IN THE SUPREME COURT OF FLORIDA

CASE NO.SC20-243

NORMMAN BLAKE MCKENZIE

Appellant

v.

STATE OF FLORIDA

Appellee.

ANSWER BRIEF OF APPELLEE

ON APPEAL FROM THE SEVENTH JUDICIAL CIRCUIT IN AND FOR ST. JOHNS, FLORIDA

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PRELIMINARY STATEMENT

This is an appeal in a capital case from the resentencing of Appellant after postconviction relief was granted. Appellee, the State, was the prosecution and will be referred to as "the State." Appellant, Norman Blake McKenzie, was the defendant and will be referred to by proper name, e.g., "McKenzie" or "Appellant."

References to Appellant's Record on Appeal will be referred to as (R- "page") and cites to the trial transcript will be referred to as (T- "page"), and to Appellant's initial brief will be by the symbol "IB".

RESPONSE TO REQUEST FOR ORAL ARGUMENT

The State defers to this Court's judgment as to whether or not oral argument is necessary in this case.

STATEMENT OF THE CASE AND FACTS

Norman Blake McKenzie was convicted of the first-degree murders of Randy Peacock and Charles Johnston. *McKenzie v. State*, 29 So.3d 272, 277 (Fla. 2010). The following facts were established during the guilt phase:

> The evidence presented at trial established that on October 5, 2006, two Flagler Hospital employees became concerned when Randy Peacock, a respiratory therapist at the hospital, did not report to work. The two employees drove to the home that Peacock shared with Charles Johnston. Upon their arrival, they noticed that Peacock's vehicle, a green convertible, was not there. When the employees entered the residence, they found Peacock lying face down on the kitchen floor in a pool of blood. When deputies from the St. Johns County Sheriff's Office (SJSO) arrived, they secured the scene and subsequently located the body of Charles Johnston in a shed that was also located on the property. While processing the crime scene, law enforcement officers

located a hatchet inside the shed that appeared to have blood on its blade and handle. A butcher knife was found in the kitchen sink. Deputies observed a gold sport utility vehicle (SUV) in the driveway and determined that it was registered to Norman Blake McKenzie.

The deputies subsequently spoke with a neighbor of the victims. The neighbor stated that on October 4, 2006, he went to the victims' home to assist Johnston with repairs on his vehicle. When the neighbor first arrived, Johnston was not there but Peacock was present and was speaking with a man whom the neighbor later identified in a photo lineup as McKenzie. The neighbor confirmed that he saw Peacock speaking with McKenzie between 4:30 and 7 p.m., and that he also observed a gold SUV in the driveway. The neighbor departed the victims' residence before dark.

McKenzie subsequently had an encounter with a Citrus County sheriff's deputy during which Randy Peacock's wallet was recovered from one of McKenzie's pockets. Further, Charles Johnston's wallet was located in a vehicle that McKenzie had recently operated. McKenzie agreed to speak with SJSO deputies on two separate occasions during which he confessed to the murders of Peacock and Johnston.

McKenzie explained that he went to the victims' residence on October 4, 2006, to borrow money from Johnston because of his drug addiction. When he first arrived, only Peacock and the neighbor were present; however, Johnston returned home around dusk. The neighbor left after briefly speaking with Johnston, and at some point, Peacock went inside the residence. McKenzie then asked Johnston for a hammer and a piece of wood so that he could knock some “dings” out of the door of his SUV. Johnston could not locate a hammer and gave McKenzie a hatchet. While walking into the shed to locate a piece of wood, McKenzie struck Johnston in the head with the blade side of the hatchet. Johnston fell to the floor and McKenzie struck him again. McKenzie then entered the home, approached Peacock, who was cooking in the kitchen, and struck him with the hammer side of the hatchet approximately two times.

McKenzie returned to the shed, and when he observed that Johnston was still alive, he struck Johnston one or more times with the hatchet. McKenzie removed Johnston's wallet from his pocket, placed the

> hatchet on top of a bucket inside the shed, and re-entered the residence. McKenzie observed that Peacock was struggling to stand up, so he grabbed a knife and stabbed Peacock multiple times. McKenzie then placed the knife in the sink, took Peacock's wallet and car keys, and departed in Peacock's vehicle.

Id. at 275-6.

The jury recommended the death penalty for each murder by a vote of ten to two. *Id*. at 277. The trial court followed the jury's recommendation and sentenced the Defendant to death for both murders. The trial court found that four aggravating circumstances had been proven beyond a reasonable doubt – 1) McKenzie had previously been convicted of another capital felony or of a felony involving the use or threat of violence to the person, (eight prior convictions and the contemporaneous murder of the other victim); (2) the murders were committed while McKenzie was engaged in the commission of a robbery; (3) the murders were committed for pecuniary gain (merged with robbery aggravator); and (4) the murders were cold, calculated, and premeditated (CCP). *Id*. at 277-8.

The trial court concluded that McKenzie had failed to prove the existence of the statutory mitigating circumstance that he was under the influence of an extreme emotional or mental disturbance at the time of the murders. *Id*. at 278. The trial court, who ordered the preparation of a presentence investigation report, found a total of seven non-statutory mitigating factors: (1) McKenzie suffered from a cocaine addiction; (2) McKenzie was the victim of child abuse; (3) McKenzie exhibited good

behavior during court proceedings; (4) McKenzie expressed remorse; (5) McKenzie cooperated with police; (6) McKenzie possesses a GED and certificates in architectural design; and (7) McKenzie is currently serving a life sentence for armed carjacking, and the minimum mandatory sentence for the murders is life without the possible of parole. *Id*. at 277-8.

On appeal, this Court affirmed the death sentence. *Id*. at 288. Certiorari review was denied by the United States Supreme Court. *McKenzie v. Florida*, 562 U.S. 854 (2010).

McKenzie sought postconviction relief, in which he raised four claims. *McKenzie v. State/Sec'y*, 153 So.3d 867, 873 (Fla. 2014). The first claim alleged that due to State action, McKenzie was denied a full and fair capital sentencing phase, and the postconviction court should now consider McKenzie's mitigation evidence to determine whether his death sentences are constitutional. *Id*. In his second claim, McKenzie reiterated that his counsel was ineffective, which led McKenzie to choose to represent himself. *Id*. at 874. McKenzie's third claim challenged the constitutionality of Florida's lethal injection procedure and statute. His final claim challenged the constitutionality of Florida's death penalty statute in light of the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2002). *McKenzie*, 153 So.3d at 874. The postconviction court held a hearing pursuant to *Huff v. State*, 622 So. 2d 982 (Fla. 1993) and on March 8, 2012, the trial court

summarily denied McKenzie's motion without an evidentiary hearing. *McKenzie*, 153 So.3d at 874.This Court affirmed the denial of postconviction relief. *Id*. at 885. McKenzie also filed a petition for a writ of habeas corpus in which he raised one claim, which was also denied. *Id*.

On January 9, 2017, Appellant filed his First Successive Motion for Post-Conviction Relief based in part that he was entitled to have his death sentences vacated pursuant to *Hurst v. Florida*, 136 S. Ct 616 (2016). On June 19, 2017, the trial court entered its order vacating Appellant's death sentences and returned the matter to the trial docket for a new penalty phase proceeding.

The new penalty phase commenced on August 26, 2019. During the recent penalty phase, the jury considered physical evidence introduced by the defense and heard testimony from Tammy Kimbell, a former friend of the Defendant; Dr. Stephen Bloomfield, a psychologist; and Dr. Susan Skolly-Danzinger, an expert in toxicology and pharmacology. (TT807-843, 857-916). In rebuttal, the State presented the testimony of Dr. William Meadows, a psychologist. (TT1007-1070). On August 29, 2019, the jury returned its penalty phase verdicts unanimously finding the Appellant should be sentenced to death for the First-Degree Murders of Randy Peacock and Charles Johnston. (TT1192-1198).

A *Spencer*[1] hearing took place on November 22, 2019. (R1063-1157). On

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

January 23, 2020, following the *Spencer* hearing and shortly before the imposition of Appellant's sentencing, this Court released its decision in *State v. Poole*, 297 So.3d 487, 507 (Fla. 2020), receding from *Hurst v. State*, 202 So.3d 40 (Fla. 2016) except to the extent that it held that a jury must unanimously find the existence of a statutory aggravating circumstance beyond a reasonable doubt. The Sentencing Hearing was conducted on February 14, 2020 (R969-982). The Trial Court's Sentencing Order followed the jury's recommendation and sentenced Appellant to death (R887-942).

This appeal followed.

SUMMARY OF THE ARGUMENT

ISSUE I: The jury must find the existence of the *fact* that an aggravating factor existed. Under *State v. Poole*, 297 So.3d 487 (Fla. 2020) because a unanimous jury finding in Appellant's case establishes the existence of at least one statutory aggravating circumstance beyond a reasonable doubt, there is no *Hurst* error.

ISSUE II: The trial court did not err in permitting the state's amended notice of intent to seek the death penalty to stand. The rule of court that existed in 2007 at the time of the arraignment governs this case, not the statute or rule as amended years later in 2016.

ISSUE III: Victim impact testimony is allowed by law and statute.

ISSUE IV: The only finding a capital sentencing jury must make beyond a

reasonable doubt is whether a given aggravator is proven.

ISSUE V: Florida's death penalty statute, Fla. Stat. § 921.141 (2017), was amended after, and in comport with, the decisions in *Hurst v. Florida*, 136 S. Ct. 616 (2016) and *Hurst v. State*, 202 So.3d 40 (Fla. 2016). Neither *Hurst* nor the new statute create a new crime with new elements.

ISSUE VI: The trial court correctly and constitutionally applied section 921.141(6)(b) to Appellant. This Court has rejected this argument for over twenty years and Appellant provides no new legal authority that would require this Court to reanalyze the constitutionality of the statute.

Appellee is requesting that this Court affirm the death sentence imposed at the new penalty phase.

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR INTERROGATORY PENALTY PHASE VERDICT IN VIOLATION OF THE FOURTH, FIFTH, SIXTH, AND FOURTEENTH CONSTITUTIONAL AMENDMENTS.

In his first claim, Appellant argues that the jury was required to specifically state in their verdict what facts they were relying upon beyond a reasonable doubt in order to find that an aggravator exists. (IB31). On October 18, 2018, Appellant filed

a Motion for Interrogatory Penalty Phase Verdict[2]. (R334-337). In pertinent part, Appellant stated:

> *7. The above-named Defendant moves this Honorable Court to provide to the jury a verdict form, as part of the recording process to be used to document the finding of the existence of statutory aggravating facts that includes:*
>
> *A separate provision requiring the jury to state the facts upon which the factor is found allows the trial court and the appellate court to determine whether the jury's recommendation conforms with applicable law. Thus, the verdict form should contain an inquiry asking, for each aggravating circumstance found, the factual basis for that finding, so that the inquiry would read substantially as follows:*
>
> > ***"Our finding that the homicide was committed in an especially heinous, atrocious or cruel manner" is based on the following facts: {specify) –***
>
> *B: A provision outlining each mitigating circumstance defined by statute, a statement of the applicable quantum of proof, a statement of the jury's vote upon said circumstance and a section allowing the jury room to write in those non-statutory mitigating circumstances they find to be applicable. For example:*
>
> > ***We, the jury, by a vote of_ to_, are reasonably convinced that the defendant has no significant history of prior criminal activity, based upon the following:***
>
> *C: A provision that the jury finds that the statutory aggravating factors so outweigh the mitigating circumstances that the death penalty is justified beyond a reasonable doubt.*

(R335-337).

[2] Appellant also filed Motion for Special Verdict Form Containing Findings of Fact by The Jury, which was also denied. (R475-477)

The trial court denied the Motion stating:

> *THE COURT: The Florida Supreme Court in May set forth – May of this year -- set forth a new verdict form in death penalty cases. That is what will be used. I am not going to deviate from that which the Florida Supreme Court says shall be used unless there is a compelling reason to do so. And I don't see a compelling reason here.*

(R1013).

The trial judge must fully instruct a death penalty jury on all applicable jury instructions set forth in Florida Standard Jury Instructions unless legal justification exists to modify an instruction. *Guzman v. State*, 644 So. 2d 996 (1994). Appellant's entire argument is predicated on an erroneous interpretation of the Sixth Amendment's requirements. The jury must find the existence of the *fact* that at least one an aggravating factor existed; however, nothing in the applicable statute, the standard jury instructions, or the standard verdict form requires the jury to write out word for word the facts or reasoning for which they relied upon in finding that an aggravator was found beyond a reasonable doubt. Under *State v. Poole*, 297 So.3d 487 (Fla. 2020) because a unanimous jury finding in Appellant's case establishes the existence of at least one statutory aggravating circumstance beyond a reasonable doubt, there is no *Hurst* error. The trial court, therefore, did not err in denying the motion.

As the Supreme Court itself noted in *Hurst v. Florida*, section 775.082(1), Florida Statutes, states that the punishment for a capital felony is life imprisonment

unless "the procedure set forth in section 921.141 results in findings by the court that such person shall be punished by death." The required trial court findings are set forth in section 921.141(3), Florida Statutes, which is titled "Findings in Support of Sentence of Death." When the Supreme Court referred to "the critical findings necessary to impose the death penalty," it referred to those findings as "facts" and cited section 921.141(3). *Hurst v. Florida*, 136 S. Ct. at 622. For purposes of complying with section 921.141(3)(a), "sufficient aggravating circumstances" means "one or more." *See Miller v. State*, 42 So.3d 204, 219 (Fla. 2010) ("sufficient aggravating circumstances" means "one or more such circumstances").

Once the state establishes the existence of an aggravating circumstance, the defendant becomes eligible for an enhanced sentence of death and the jury need not make any additional "factual" findings. *See Sattazahn v. Pennsylvania,* 537 U.S. 101, 111 (2003) ("That is to say, for purposes of the Sixth Amendment's jury-trial guarantee, the underlying offense of 'murder' is a distinct, lesser included offense of 'murder plus one or more aggravating circumstances': Whereas the former exposes a defendant to a maximum penalty of life imprisonment, the latter increases the maximum permissible sentence to death. Accordingly, a jury must find the existence of an aggravating factor, *Hurst*, 136 S. Ct. at 623–24, but a judge may determine that "the mitigating circumstances were insufficient to outweigh such aggravating circumstances," and that "a sentence of death should be imposed,"

Spaziano v. Florida, 468 U.S. 447, 451–52 (1984).

At the recent penalty phase, the State relied on five aggravating factors, for which it had given the defense notice. Pursuant to the directives of Fla. Stat. §921.141(2),[3] the jury was instructed that in order to find the existence of an aggravating factor it must unanimously determine the aggravating factor has been proven beyond a reasonable doubt. The instructions given were taken from the Florida Standard Jury Instructions in Criminal cases and conform to the requirements of Fla. Stat. §921.141 (2) on this issue. (R770-780).

After the standard instruction gives a full explanation of how to make findings in mitigation, the instruction continues on to explain the weighing process the jurors must conduct. The instructions explain that weighing is not a mechanical process and "the law contemplates that different factors or circumstances may be given different weight or values by different jurors." Fla. Std. Jury Instr. (Crim.) 7.11.

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[3] **(2) Findings and recommended sentence by the jury.--**This subsection applies only if the defendant has not waived his or her right to a sentencing proceeding by a jury.
(a) After hearing all of the evidence presented regarding aggravating factors and mitigating circumstances, the jury shall deliberate and determine if the state has proven, beyond a reasonable doubt, the existence of at least one aggravating factor set forth in subsection (6).
(b) The jury shall return findings identifying each aggravating factor found to exist. A finding that an aggravating factor exists must be unanimous.

Fla. Stat. Ann. § 921.141 (West)

These instructions fully illuminate the issue and demonstrate that the only determination a jury must make for the defendant to be eligible for the death penalty is whether a qualifying aggravator has been proven. All other determinations that the jury makes are steps in the process for determining whether the death penalty is appropriate. Additionally, the verdict forms followed the language of the standard jury instructions and **included what the jury must find** before going to the next step, as required by law. (R784-790).

The aggravating-factor determination (the so-called "eligibility phase"), is a purely factual determination. In answer to Appellant's question as to what does "specific finding" mean, specific factual findings required to be found by the jury refer to the *existence* of aggravating circumstances. The aggravating factors are clearly defined by statute, the jury instructions, and case law. The facts justifying death set forth in the statute either did or did not exist and all that is required is the finding that they did exist to be made beyond a reasonable doubt. Appellant was previously convicted of a capital felony or a felony involving the use or threat of violence to a person, or he wasn't.[4] The First-Degree Murder was committed while

[4] **COUNT I - FIRST DEGREE MURDER OF RANDY PEACOCK**
The aggravating factors alleged by the State as to Court I are:

1. NORMAN BLAKE McKENZIE was previously convicted of another capital felony or a felony involving the use or threat of violence to another person.
a. The crime of First Degree Murder is a capital felony.

Appellant was engaged in the commission of a Robbery, or he wasn't. The answers to those interrogatories are inherent in the verdict that the jury either unanimously recommended the death penalty or did not. This is just like the verdict form for any crime that a defendant is convicted of.

At the conclusion of McKenzie's penalty phase, the jury returned interrogatory verdict forms for both the murder of Randy Peacock and the murder of Charles Johnston, indicating that the jury unanimously found the existence of the *fact* that each of the five proposed aggravating factors existed. The jury also unanimously returned a recommendation for a death sentence. (R784-790). In its sentencing order, the trial court found the same five aggravating factors, followed the jury's recommendation and imposed a death sentence.[5] (R887-942).

Furthermore, there is no doubt the jury found two of the aggravators in this case based upon McKenzie's contemporaneous convictions and prior violent

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b. The crimes of Robbery, Carjacking, and Kidnapping are all felonies involving the use or threat of violence to another person.

[5] **(3) Imposition of sentence of life imprisonment or death.--**
(a) If the jury has recommended a sentence of:
1. Life imprisonment without the possibility of parole, the court shall impose the recommended sentence.
2. Death, the court, after considering each aggravating factor found by the jury and all mitigating circumstances, may impose a sentence of life imprisonment without the possibility of parole or a sentence of death. ***The court may consider only an aggravating factor that was unanimously found to exist by the jury.***

Fla. Stat. Ann. § 921.141 (West) (emphasis added).

felonies. These aggravators are necessarily supported by a unanimous jury verdict, and, under this Court's previous understanding of *Ring* and *Apprendi*, rendered McKenzie eligible for a death sentence in this case. *See Miller v. State*, 42 So.3d 204, 218–19 (Fla. 2010) (*Ring* is not violated where Miller's aggravating factors were established by prior violent felonies and contemporaneous felonies).

This claim should be denied.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO STRIKE STATE'S AMENDED NOTICE OF AGGRAVATING CIRCUMSTANCES IN VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

It is Appellant's position that the State's January 23, 2019 amended notice of intent to seek the death penalty failed to show good cause for the amendment as required by Rule 782.04(1)(b), Fla. Stat. (2016). Appellant's argument that the notices were late, and the aggravators contained in the November 2017 amended notice should have been stricken is based on the faulty premise that Fla. Stat. §782.04(l)(b) (2016) applies to his case.

On October 17, 2006, the Appellant was indicted on two counts of First-Degree Murder and was arraigned on that Indictment on February 15, 2007. On March 2, 2007, the State filed a Notice of Intent to Seek Death Penalty. That notice did not contain a list of aggravating factors the State intended to rely upon, since

there was no such requirement at that time.[6] On August 21, 2007, the Defendant was found guilty of the two First Degree Murder charges. At the penalty phase that followed, the State elicited evidence to establish four aggravating factors: (1) McKenzie had previously been convicted of another capital felony or of a felony involving the use or threat of violence to the person, *see* § 921.141(5)(b), Fla. Stat. (2006) (eight prior convictions and the contemporaneous murder of the other victim) (great weight); (2) the murders were committed while McKenzie was engaged in the commission of a robbery, *see* § 921.141(5)(d) (significant weight); (3) the murders were committed for pecuniary gain, *see* § 921.141(5)(f) (merged with robbery aggravator-no additional weight given); and (4) the murders were cold, calculated, and premeditated (CCP), *see* § 921.141(5)(i) (great weight). *McKenzie v. State*, 29 So.3d 272, 278 (Fla. 2010)

On August 28, 2017, in preparation for a new penalty phase trial, the State filed a Renewed Notice of Intent to Seek the Death Penalty and List of Aggravating Factors. The aggravating factors listed by the State in the Renewed Notice restated those relied upon during the 2007 trial. (R252-53).

On January 23, 2019, the State filed a Motion to Amend Notice of Aggravating Factors, seeking to add the "heinous, atrocious, and cruel" aggravating

[6] The State was not required to file a Notice at all. The filing of the Notice merely allowed the State to interview certain witnesses.

factor to those listed previously. (R542-43).

On February 20, 2019, the defendant filed a Motion to Strike State's Amended Notice of Aggravating Factors as Untimely on the basis that the State did not have good cause to do so. (555-56). On March 13, 2019, the State filed its Memorandum of Law in Opposition to Defendant's Motion to Strike State's Amended Notice of Aggravating Factors. (R567-575). On March 21, 2019, relying on *Jackson v. State,* 256 So.3d 975 (Fla. 1st DCA 2018) and *Varnadore v. State,* 282 So.3d. 886 (Mem) (Fla. 1st DCA 2019), the trial court denied the Appellant's Motion based upon the determination that neither Fla. Stat. §782.04(l)(b) (2016), nor Fla. R. Crim. P. 3.181 are retroactive. (R590-598).

The rule of court that existed in 2011 at the time of the arraignment governs this case, not the statute or rule as amended years later in 2016. *Landgraf v. USI Film Products*, 511 U.S. 244, 275, n.29 (1994) (it is the procedural law that exist at the time of that stage of the trial that governs how that stage is conducted).

In 1995, this Court enacted Florida Rule of Criminal Procedure 3.202(a), which stated:

> (a) Notice of Intent to Seek Death Penalty. The provisions of this rule apply only in those capital cases in which the state gives written notice of its intent to seek the death penalty within 45 days from the date of arraignment. Failure to give timely written notice under this subdivision does not preclude the state from seeking the death penalty.

Amendments to Florida Rule of Criminal Procedure 3.220 Discovery, 674 So. 2d

83, 84 (Fla. 1995). This rule remained in place until 2016 when the Supreme Court of the United States found Florida's "sentencing scheme" unconstitutional. *Hurst v. Florida*, 136 S. Ct. 616, 624 (2016).

As a result of *Hurst*, the legislature amended Florida's capital punishment statute. The legislature codified a requirement that the State file a notice of intent to seek the death penalty:

> (b) In all cases under this section, the procedure set forth in s. 921.141 shall be followed in order to determine sentence of death or life imprisonment. If the prosecutor intends to seek the death penalty, the prosecutor must give notice to the defendant and file the notice with the court within 45 days after arraignment. The notice must contain a list of the aggravating factors the state intends to prove and has reason to believe it can prove beyond a reasonable doubt. The court may allow the prosecutor to amend the notice upon a showing of good cause.

Ch. 2016-13, § 2, Laws of Fla. (enacting § 782.04(1)(b), Fla. Stat. (2016)).

The statute provides that a notice of intent to seek the death penalty must be filed within forty-five days after arraignment. This amendment to the murder statute was enacted in 2016. *See* Chapter 2016-13, Laws of Fla. The effective date of the new provision was March 7, 2016.

The rule of criminal procedure governing "Notice to Seek Death Penalty," rule 3.181, provides:

> In a prosecution for a capital offense, if the prosecutor intends to seek the death penalty, the prosecutor must give notice to the defendant of the state's intent to seek the death penalty. The notice must be filed with the court within 45 days of arraignment. The notice must contain a list of the aggravating factors the state intends to prove and has reason

> to believe it can prove beyond a reasonable doubt. The court may allow the prosecutor to amend the notice upon a showing of good cause.

(emphasis added). The rule was adopted by the Florida Supreme Court in response to the new statute and became effective on September 15, 2016. *See In re* Amendments to Florida Rules of Criminal Procedure, 200 So.3d 758 (Fla. 2016) (SC16-1453). Under the rules of statutory construction, neither the new amendment nor the new rule applies to this case.

One of the rules of statutory construction is that statutes are generally applied prospectively only. A statute is applied retrospectively only if there is "clear evidence of legislative intent to apply the statute retrospectively." *Fla. Ins. Guar. Ass'n, Inc. v. Devon Neighborhood Ass'n, Inc*., 67 So.3d 187, 194 (Fla. 2011) (*citing In Old Port Cove Holdings, Inc. v. Old Port Cove Condo. Ass'n One, Inc*., 986 So. 2d 1279 (Fla. 2008)). If there is no such clear intent, the statute is not applied retrospectively.

The amended murder statute is silent on the question of retroactivity. There is no textual support in the language of the amendment for applying the statute retrospectively to cases where the arraignment has already occurred. Accordingly, in the absence of evidence to the contrary, it applies only to cases where a defendant's arraignment will occur after the enactment of the statute.[7] The critical

[7] While Mckenzie cites to *State v. Chantiloupe*, 248 So.3d 1191 (Fla. 4th DCA 2018) as controlling authority, *Chantiloupe* is not a resentencing case, but a case that

event in the new notice statute is the arraignment. Specifically, the revised statute only applies to capital cases where the arraignment is held after March 7, 2016, and the new rule only applies to capital cases where the arraignment is held after September 15, 2016.[8]

Neither the statute nor rule apply retroactively to cases where the arraignment occurred years ago, such as this case. *See Jackson v. State,* 256 So.3d 975, 976 (Fla. Dist. Ct. App. 2018), *reh'g denied* (Nov. 15, 2018*)* (holding that "the 2016 amendment to section 782.04(1), Fla. Stat., requiring that the State provide notice of aggravating factors within 45 days of arraignment (in addition to its notice of intent to seek the death penalty) does not apply retroactively to an arraignment that occurred in 2007."); *See Varnadore v. State*, 282 So.3d 886, 887 (Fla. Dist. Ct. App. 2019), *citing Jackson, supra.,* for the proposition "that the 2016 amendment to section 782.04(1), Florida Statutes, does not apply when the arraignment occurred prior to the date of the statutory amendment."

In Appellant's case, the trial court agreed that "timing of the arraignment is

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addresses the State's failure to actually file within 45 days of an arraignment for an offense that occurred after the statute changed.

[8] Previously, Criminal Rule 3.202(a) provided that the state had to make a timely written notice of its intent to seek the death penalty within 45 days of arraignment in order to be able to obtain a mental examination of the defendant. The rule explicitly provided that failure to do so "does not preclude the state from seeking the death penalty."

critical to determination of the applicability of §782.04l(l)(b) and Rule 3.181." (R597). The judge pointed to the fact that the Defendant in the instant case was arraigned on the Indictment on February 15, 2007, over nine years prior to the enactment of Fla. Stat. §782.04(l)(b) and Rule 3.181. That Indictment was never amended and the Defendant's conviction for two counts of First-Degree Murder was based on that Indictment. Since the arraignment occurred prior to the enactment of Fla. Stat. §782.04(1)(b) and Rule 3.181, the State was not required to provide notice of its aggravating factors within 45 days of that Indictment and need not show good cause in order to amend its list of aggravating factors. (R597).

As noted above, the statute is devoid of language making it or the rule made retroactive. The fact that neither the legislature nor this Court adopted a rule/statute requiring application of the notice requirement to cases initiated before the enactment of the statute/promulgation of the rule precluded the trial court from imposing such a rule on the State. On its face, the rule does not apply given the procedural posture of Appellant's case. Appellant's case was initiated in 2006 and his arraignment took place years before the statue and rule went into effect. No court has held to the contrary. The mere fact that the State gave notice of aggravation does not render it bound by the new statute or rule.

Although the rule is inapplicable here, out of courtesy and possible due process concerns, the State set out the aggravations it intended to prove. Given *Hurst*

v. Florida and the Legislature's intent to put the defendant on notice and allow him to prepare for trial, the newly required notice is akin to a statement of particulars. The state is permitted to amend a statement of particulars before and during trial. During trial, amendments are allowed unless the defendant is prejudiced. *Hoffman v. State*, 397 So. 2d 288, 289 (Fla. 1981). In *Hoffman*, the Court stated that trial courts should inquire into the surrounding circumstances to determine whether the amendment would result in harm or prejudice to the defendant during trial. By analogy, the standard used to analyze amendments to statements of particulars is a good fit for notices of aggravating factors. The Appellant was on notice of the aggravation available in his case since indictment and even acknowledges such stating, "The reason given in the state's motion does not establish good cause as the information that the state relied on was in the state's possession since 2007 when the defendant was arrested and interviewed by law enforcement several times. The information was also available during the trial of defendant and was made a part of the trial through the testimony of detective Timothy Burres". (IB 35). Again, there was no ambush and no prejudice in permitting the State to go forward with the aggravators identified in its renewed and amended notices.

The trial court properly denied the request as Appellant's arraignment predated the statute and rule, neither of which were made retroactive to pending cases. Appellant was already on notice that the State intended to seek the death

penalty in his case, and already had notice of the specific aggravating factors the State intended to prove during the penalty phase before the statute was amended to include this requirement. Appellant's strict construction argument is also without merit, as the State cannot be held accountable for failing to comply with the procedures of the statute which was not even in effect during the relevant timeframe. As such, the statute and rule did not apply retroactively, and it was a courtesy for the State to give the notice it did. This Court should affirm.

ISSUE III

WHETHER THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO ALLOW VICTIM IMPACT EVIDENCE BEFORE THE JUDGE ALONE IN VIOLATION OF APPELLANT'S FOURTH, FIFTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS TO THE UNITED STATES CONSTITUTION.

On October 18, 2018, the Appellant filed his Motion to Exclude Victim Impact Evidence and Motion to Allow Victim Impact to be put before the Judge alone (if the Court denies the Defendant's previous motion to exclude said evidence). (R368-374). The Trial Court, conducted a hearing on November 28, 2018:

> *THE COURT: Let me tell you what I'm going to do on victim impact evidence.*
>
> *MR. BARRETT: Okay.*
>
> *THE COURT: And I'll make this real clear. And this is going to solve a lot of these. The person who's going to -- who's going to provide the victim impact testimony will do a written victim impact statement. They'll provide it to the Defense a day or two, however many -- couple*

of days prior to the trial.

MR. BARRETT: Okay.

THE COURT: You'll have an opportunity to go through it, identify those items that you believe to be objectionable --

MR. BARRETT: Sure.

THE COURT: -- outside the presence of the jury. Prior to that person taking the witness stand, we can address that. If it's objectionable, it will be redacted out. They will read their victim impact statement. And I will instruct the jury in advance of the reading of victim impact statements that it doesn't – the jury shall not consider it as an aggravating circumstance. I'll give them the standard instruction on victim impact. I'll do that during the closing instructions as well. That's my position on victim impact. So it answers most of your questions on your motions. So your first one to exclude victim impact evidence, the Legislature has spoken. The United States Supreme Court has spoken on this issue. So I'm going to overrule that motion -- or deny that motion. Motion To Allow The Evidence Before The Judge Alone. That also is contrary to that which the Florida Legislature and the United States Supreme Court has said. So I will deny that motion.

(R1009-1010). [9]

Victim impact evidence is, as a general matter, permitted by both the United States and Florida Constitutions. Florida Statutes section 921.141(1) sets forth the following standard for the admission of evidence in the penalty phase:

> In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5)

[9] The Trial Court denied the motion on December 6, 2018, (R528), not December 6, 2019 as stated in Appellant's IB. (IB at 39).

> and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida.

This section has been interpreted consistently by this Court to allow the jury to hear evidence "which will aid it in understanding the facts of the case in order that it may render an appropriate advisory sentence," *Teffeteller v. State*, 495 So. 2d 744 (Fla. 1986), or which will allow the sentencer "to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case." *Elledge v. State*, 346 So. 2d 998, 1001 (Fla. 1977). Thus, for example, in *Teffeteller*, the State introduced into evidence a crime scene photograph of the victim, although the photograph was not specifically relevant to any of the aggravating circumstances. This Court observed that it could not "expect jurors impaneled for capital sentencing proceedings to make wise and reasonable decisions in a vacuum." 495 So. 2d at 744.

In 1984, the legislature amended § 921.143 to allow the victim or next of kin to appear before the sentencing court to provide a statement concerning "the extent of any harm, including social, psychological, or physical harm, financial losses, and loss of earnings directly or indirectly resulting from the crime for which the defendant is being sentenced." A constitutional amendment in 1988 further

strengthened victim's rights by providing that "victims of crime or their lawful representatives, including the next of kin of homicide victims, are entitled to the right . . . to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused." Art. I, § 16(b), Fla. Const.

At approximately the same time as Florida's amendment, however, the United States Supreme Court rendered *Booth v. Maryland*, 482 U.S. 496 (1987), which held that the Eighth Amendment prohibited use of victim impact statements or evidence regarding the personal qualities of the victim at the sentencing phase of a capital trial, unless such evidence related directly to the circumstances of the crime. Following the dictates of *Booth*, this Court held that, in spite of § 921.143, the legislature could not permit victim impact evidence in a capital sentencing proceeding. *Grossman v. State*, 525 So. 2d 833, 842-843 (Fla. 1988).

Four years after *Booth*, however, the United States Supreme Court rendered *Payne v. Tennessee*, 501 U.S. 808 (1991) and expressly overruled *Booth*. The United States Supreme Court held in *Payne v. Tennessee,* 501 U.S. 808, 827, 111 S. Ct. 2597, 115 L.Ed.2d 720 (1991):

> [I]f the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed.

The Florida legislature then enacted § 921.141(7), which authorized the admission of victim impact evidence, while at the same time giving substance to § 921.143(2) and Article I, § 16 of the Florida Constitution. [10] Section 921.141(7), states:

> **Victim impact evidence.--**Once the prosecution has provided evidence of the existence of one or more aggravating factors as described in subsection (6), the prosecution may introduce, and subsequently argue, victim impact evidence **to the jury**[11]. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

Additionally, the Florida Supreme Court has held that victim impact testimony is permitted during the penalty phase of a capital trial. For example, in *Stein v. State*, 632 So. 2d 1361 (Fla. 1994), this Court cited *Payne* for the proposition that the prosecutor's "brief humanizing remarks" about the victim were not improper.

The relevance of victim impact evidence is independent of any aggravating

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[10] The Florida Constitution contains a victims' rights provision that entitles the victims of crimes, including the next of kin of homicide victims, to be informed, to be present, and to be heard when relevant, at all critical stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused. Art. I, § 16, Fla. Const.

[11] Appellant incorrectly cited the statute and argued that the statute does not say whether this evidence is to be introduced to the judge or the jury. (IB 39).

circumstance and is an adjunct to the facts of the case. The evidence at issue here is simply another method of informing the sentencing authority as to the specific harm caused by the crime in question. As noted in *Payne,* it has always been proper for a sentencing court *and jury* to consider the harm done by the defendant in imposing sentence, and victim impact evidence is illustrative of the harm caused by the murders. *Payne* at 825. (emphasis added). Florida courts have expressly followed *Payne* in authorizing the limited use of victim impact evidence in a sentencing proceeding. While it is clear that such evidence may not be used as an aggravator, it is nonetheless admissible, and the sentencing authority is permitted to consider it. *State v. Maxwell*, 647 So. 2d 871, 872 (Fla. 4th DCA 1994) ("[victim impact evidence] is neither aggravating nor mitigating evidence. Rather, it is *other* evidence, which is not required to be weighed against, or offset by, statutory factors."). *See also Franklin v. State,* 965 So. 2d 79 (Fla. 2007) (family members and coworker who testified that the victim's death "devastated" the family was proper and within the bounds of evidence permitted by section 921.141(7) and *Payne*).

Victim impact evidence must be limited to that which is relevant as specified in section 921.141(8)." *Windom v. State,* 656 So. 2d 432, 438 (Fla.1995). Victim impact evidence is relevant because it places the defendant's crime and the victim's death in proper context. Thus, the introduction of victim impact evidence at the sentencing phase that informs the jury about the specific harm caused by the crime

in question is relevant and authorized. *Burns v. State*, 699 So. 2d 646 (Fla. 1997). It is for this same reason that the facts underlying a capital conviction are made known to a jury where resentencing is ordered. *See, e.g., Chandler v. State*, 534 So. 2d 701 (Fla. 1988); *King v. State*, 514 So. 2d 354 (Fla. 1987). These facts assist the sentencing jury in becoming familiar with the facts of the underlying conviction.

Furthermore, the statutory procedure for addressing victim impact evidence in a capital murder prosecution does not impermissibly interfere with the weighing of aggravating and mitigating factors or otherwise interfere with the defendant's constitutional rights. Victim impact evidence may not be considered as establishing either an aggravating circumstance or rebuttal of a mitigating circumstance; but the jury may still consider the victim's impact evidence in making its decision. *Snelgrove v. State*, 107 So.3d 242 (Fla. 2012), as revised on denial of reh'g, (Jan. 31, 2013). Accordingly, a court properly instructs the jury that it cannot consider victim impact evidence as an aggravating circumstance but that the jury can consider such evidence in making its decision. *Alston v. State*, 723 So. 2d 148 (Fla. 1998).[12]

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[12] The trial court judge read the victim-impact instruction to the jury before each witness testified:

> *Folks, this is what's known as victim-impact evidence. You're about to hear evidence about the impact of this murder on the family, friends, and community of Randy Peacock. This evidence is presented to show the victim's uniqueness as an individual and the resultant loss by Randy Peacock's death. However, you may not consider this evidence as an aggravating factor.* (R774, 781).

In *Payne v. Tennessee,* 501 U.S. 808, 823, 111 S. Ct. 2597, 115 L.Ed.2d 720 (1991), the United States Supreme Court expressly rejected the argument that admitting such evidence violates equal protection, finding that victim impact evidence is not offered to encourage a comparison of victims but to "show instead *each* victim's 'uniqueness as an individual human being,' whatever the jury might think the loss to the community resulting from his death might be." *Kormondy v. State,* 845 So. 2d 41, 53 (Fla. 2003). In addition, the admission of victim impact evidence does not violate the prohibition against ex post facto laws and does not violate equal protection. *Burns v. State,* 699 So. 2d 646 (Fla. 1997).

Victim impact evidence "relating to the victim's personal characteristics and the emotional impact of the murder on the victim's family" is entirely proper. *Id. Payne* does not preclude the State from depicting to the jury the "life" of the human being murdered by the defendant. *Id.* at 822. As the Court stated in *Payne*, "[t]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentence, that just as the murderer

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> *Folks, I'm going to read that same instruction to you. You're about to hear evidence about the impact of this murder on the family, friends, and community of Charles Johnston. This evidence was presented to show -- or is being presented to show the victim's uniqueness as an individual and the resultant loss by Charles Johnston's death. However, you must not consider this evidence as an aggravating factor.* (R787-88),

should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." *Payne*, 501 U.S. at 825 (*quoting Booth v. Maryland*, 482 U.S. 496 (1987)).

In the instant case, the trial court acted within its discretion in allowing Charles' daughter,[13] and Randy's two sisters[14] to testify regarding the resultant loss their murder had on those that knew them. (R777-791). *See Huggins v. State*, 889 So. 2d 743, 765 (Fla. 2004) (upholding the trial court's admission of victim impact evidence presented during the penalty phase from three witnesses -- the victim's husband, mother, and best friend -- regarding their relationship with the victim and the loss they suffered due to her murder). The evidence presented in this case was limited to the type of evidence specified in section 921.141(7), Florida Statutes. Here, the proper balance was struck between the victim's family members' right to be heard and to assist the jury in understanding the loss of Randy Peacock and Charles Johnson, and Appellant's right to a fair trial.

This Court spells out the purpose of victim impact statements in *Deparvine v. State*, 995 So. 2d 351, 378 (Fla. 2008), stating, "[v]ictim impact evidence is designed

[13] Julianne Schneider, victim advocate from the State Attorney's Office, read the victim-impact statement from Cheryl Johnston, who is the daughter of Charlie Johnston. (R788-791).

[14] Kathy Whitman testified at the hearing. Janet Luke's letter was read by her brother David Brooks, having passed away in 2009. (R782-787).

to show 'each victim's uniqueness as an individual human being, whatever the jury might think the loss to the community resulting from his death might be,'" quoting *Payne v. Tennessee*, 501 U.S. 808 (1991). The victim impact evidence presented in this case was not unnecessarily emotional or inflammatory. None of the three statements asked for a specific sentence or punishment. None made mention of revenge or retribution. None of the statements discussed the crime. Each statement merely sought to express the specific loss that individual felt.

Appellant's claim of error in this regard must therefore be rejected.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE AGGRAVATING FACTORS WERE SUFFICIENT TO SUPPORT THE DEATH PENALTY WHEN THE JURY DID NOT FIND THE AGGRAVATORS WERE SUFFICIENT BEYOND A REASONABLE DOUBT, AND THE JURY WAS NOT INSTRUCTED ON WHAT CONSTITUTES SUFFICIENT IN ORDER TO SUPPORT THE DEATH PENALTY IN VIOLATION OF MCKENZIE'S FOURTH, FIFTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

Appellant asserts that the trial court's failure to provide a definition for "sufficient" before considering a death sentence reduced the burden of proof on the State and thus denied McKenzie due process of law, creating fundamental error. (IB at 47). But there was no error at all, much less fundamental error, because the additional determinations of "sufficiency" and "weighing" are not elements. The additional determinations are not elements under the text of the death penalty statute

or under the constitutional definition of an element, as well as not being elements under this Court's recent precedent. Rather, when one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided in Fla. Stat. § 921.141(7). *State v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973).

Beginning with that holding, it has always been understood that, for purposes of complying with section 921.141(3)(a), "sufficient aggravating circumstances" means "one or more." *See Miller v. State*, 42 So.3d 204, 219 (Fla. 2010) ("sufficient aggravating circumstances" means "one or more such circumstances"); *Zommer v. State*, 31 So.3d 733, 754 (Fla. 2010) (same); *see also Douglas v. State*, 878 So. 2d 1246, 1265 (Fla. 2004) (Pariente, J., concurring as to conviction and concurring in result only as to sentence) ("A defendant convicted of first-degree murder cannot qualify for a death sentence unless at least one statutory aggravating factor is found to exist.").

Contrary to Appellant's suggestion, a defendant in Florida is eligible to receive a death sentence if the jury finds that the State proved at least one aggravator beyond a reasonable doubt. *See State v. Poole,* 297 So.3d 487, 503 (Fla. 2020), ("Under longstanding Florida law, there is only one eligibility finding required: the existence of one or more statutory aggravating circumstances."); *accord McKinney v. Arizona*, 140 S. Ct. 702, 705 (2020) ("Under [the United States Supreme] Court's

precedents, a defendant convicted of murder is eligible for a death sentence if at least one aggravating circumstance is found."). Appellant's suggestion that "sufficient" implies a qualitative assessment of the aggravator, as opposed simply to finding that an aggravator exists, is mistaken. Here, the trial court did not err when it sentenced Appellant to death, much less commit fundamental error.

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury…." The United States Supreme Court has interpreted the right to an impartial jury, in conjunction with the Fourteenth Amendment's right to due process, to "entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'" *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (quoting *United States v. Gaudin*, 515 U.S. 506, 510 (1995)). Stated another way, in a criminal case the Sixth Amendment requires a jury, or a trial court if the defendant elects for a bench trial, to find all of the facts necessary to constitute a statutory offence and those facts must be proven beyond a reasonable doubt. *Id.* at 483-84; *see also Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993); *In re Winship*, 397 U.S. 358, 364 (1970) ("[T]he 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.").

The United States Supreme Court has applied this framework to death penalty cases and concluded the Sixth Amendment requires a jury to find the existence of aggravating factors beyond a reasonable doubt before a trial court may sentence a defendant to death. *Ring v. Arizona*, 536 U.S. 584, 609 (2002) ("Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' *Apprendi,* 530 U.S., at 494, n. 19, the Sixth Amendment requires that they be found by a jury."). Importantly though, the Sixth Amendment's requirements are limited to facts that must be found by a jury in order to impose the death penalty. *Id.* at 612-13 (Scalia, J., concurring) ("What today's decision says is that the jury must find the existence of the *fact* that an aggravating factor existed. Those States that leave the ultimate life-or-death decision to the judge may continue to do so—by requiring a prior jury finding of aggravating factor in the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase."). The United States Supreme Court further articulated this in *Hurst v. Florida,* 136 S. Ct. 616 (2016), when the Court found that a defendant's death sentence violated the Sixth Amendment because Florida law required a trial court, rather than a jury, to find the *fact* that an aggravating factor existed before the court could sentence the defendant to death.

The United States Supreme Court has never held that the sufficiency of the aggravating factors, the weighing of the aggravating factors and mitigating

circumstances, or the jury recommendation are elements that must be proven beyond a reasonable doubt under the Sixth Amendment before a trial court may impose the death penalty on a criminal defendant. In fact, the Court has expressly rejected such contentions:

> Under *Ring* and *Hurst*, a jury must find the aggravating circumstance that makes the defendant death eligible. But importantly, in a capital sentencing proceeding just as in an ordinary sentencing proceeding, a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range. In *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000), this Court carefully avoided any suggestion that "it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute." *Id.*, at 481, 120 S. Ct. 2348. And in the death penalty context, as Justice Scalia, joined by Justice Thomas, explained in his concurrence in *Ring*, the decision in *Ring* "has nothing to do with jury sentencing. What today's decision says is that the jury must find the existence of the *fact* that an aggravating factor existed." 536 U.S. at 612, 122 S. Ct. 2428; see also *Kansas v. Carr*, 577 U.S. —, — - —, 136 S.Ct. 633, 193 L.Ed.2d 535 (2016) (slip op., at 9-11). Therefore, as Justice Scalia explained, the "States that leave the ultimate life-or-death decision to the judge may continue to do so." *Ring*, 536 U.S. at 612, 122 S.Ct. 2428.
>
> In short, *Ring* and *Hurst* did not require jury weighing of aggravating and mitigating circumstances, and *Ring* and *Hurst* did not overrule *Clemons* so as to prohibit appellate reweighing of aggravating and mitigating circumstances.

McKinney v. Arizona, 140 S. Ct. 702, 707-08 (2020).

Accordingly, Appellant's entire argument is predicated on an erroneous interpretation of the Sixth Amendment's requirements. The Sixth Amendment only

requires that the *facts* which make a criminal defendant eligible for the death penalty be found beyond a reasonable doubt. Neither the sufficiency of the aggravating factors, nor the weighing of the aggravating factors and mitigating circumstances are facts, as explained by the United States Supreme Court. *McKinney*, 140 S. Ct. at 707-08.

Florida's new death penalty statute sets out specific steps the jury must take before recommending a death sentence for a criminal defendant. If the jury:

> 2. Unanimously finds at least one aggravating factor, the defendant is eligible for a sentence of death and the jury shall make a recommendation to the court as to whether the defendant shall be sentenced to life imprisonment without the possibility of parole or to death. The recommendation shall be based on a weighing of all of the following:
>
> a. Whether sufficient aggravating factors exist.
>
> b. Whether aggravating factors exist which outweigh the mitigating circumstances found to exist.
>
> c. Based on the considerations in sub-subparagraphs a. and b., whether the defendant should be sentenced to life imprisonment without the possibility of parole or to death.

§ 921.141(2)(b), Fla. Stat. (2019).

The statute's requirements thus differ from the Sixth Amendment's requirements because the statute requires the jury to make non-factual selection findings before recommending a death sentence. The statute's text reflects this as it identifies the unanimous finding of at least one aggravating factor as the eligibility

requirement for the imposition of the death penalty. Put another way, the statute identifies the existence of an aggravating factor as a fact that must be unanimously found by the jury before the death penalty may be imposed. The additional statutory requirements, sufficiency and weighing, are selection findings that pertain to the jury recommendation, not the Sixth Amendment.

Appellant's argument conflates the selection findings under section 921.141 with the factual findings required by the Sixth Amendment in an effort to convince this Court to adopt a position expressly rejected by the United States Supreme Court in *McKinney*, 140 S. Ct. at 707-08. As such, Appellant's argument is clearly without any legal merit.

In this case, the trial court's sentencing order found that the State had proven the existence of five aggravating circumstances beyond a reasonable doubt. (R. 887-942). Under a correct Sixth Amendment analysis, such as the one this Court adopted in *State v. Poole*, 297 So.3d 487 (Fla. 2020), the trial court's sentencing order is devoid of error. Furthermore, this Court has explicitly, and correctly, rejected Appellant's argument that the sufficiency and weight of the aggravating factors are determinations that must be made beyond a reasonable doubt. *Santiago-Gonzalez v. State*, 301 So.3d 157 (Fla. 2020) (*quoting Rogers v. State*, 285 So.3d 872, 885-86 (Fla. 2019)).

Accordingly, because the trial court here found that the State had proven five

statutory aggravators beyond a reasonable doubt, the aggravating factors were sufficient to impose the death penalty, and the aggravating factors outweighed the mitigating circumstances, Appellant's death sentence is not constitutionally deficient and Appellant is not entitled to relief.

ISSUE V

WHETHER THE STATUTORY CONSTRUCTION IN *HURST II* CONSTITUTES SUBSTANTIVE LAW, AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT LAW, REQUIRES THAT THIS SUBSTANTIVE LAW GOVERN THE LAW THAT EXISTED AT THE TIME OF MCKENZIE'S NEW PENALTY PHASE TRIAL.

In *Hurst v. Florida,* 136 S. Ct. 616 (2016), the Supreme Court held that the jury must find the aggravators that make the defendant eligible for the death sentence. *Id*. at 622. The Court expressly recognized that the error in allowing a sentencing judge to find the existence of aggravating factors, independent of a jury's fact-finding, is subject to harmless error review. Holding with tradition though, the Court remanded *Hurst* back to this Court for a harmless error analysis. *Id*. at 624. The *Hurst v. Florida* decision emanated from the earlier Supreme Court decision in *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000). In *Apprendi*, the Supreme Court held that a defendant is entitled to a jury determination of any fact designed to increase the maximum punishment allowed by a statute. *Id.*

Subsequently, in *Ring v. Arizona*, the Court extended its holding in *Apprendi*

to capital cases. *Ring*, 536 U.S. at 589. "Arizona's capital sentencing scheme violated *Apprendi's* rule because the State allowed a judge to find the facts necessary to sentence a defendant to death." *Hurst v. Florida*, 136 S. Ct. at 621. "Specifically, a judge could sentence [a defendant] to death only after independently finding at least one aggravating circumstance." *Id*. Because it was the judge, and not a jury, which conducted the fact-finding to enhance the penalty, "Ring's death sentence therefore violated his right to have a jury find the facts behind his punishment." *Id*.

In *Hurst v. Florida*, the Court held that Florida's capital sentencing structure violated *Ring* because it required a judge to conduct the fact-finding necessary to enhance a defendant's sentence. *Hurst v. Florida*, 136 S. Ct. at 621-22. Also, under *Spaziano v. State*, 433 So. 2d 508, 512 (Fla. 1983), the jury's role in sentencing a defendant to capital punishment was viewed as advisory. *Spaziano*, 433 So. 2d at 512. Thus, the Supreme Court held Florida's capital sentencing structure, "which required the judge alone to find the existence of an aggravating circumstance", violated its decision in *Ring*, and overruled portions of its prior decisions of *Spaziano* and *Hildwin v. Florida*, 490 U.S. 638 (1989). *Hurst v. Florida*, 136 S. Ct. at 622-25.

When a constitutional rule is announced, its requirements apply to defendants whose convictions or sentences are pending on direct review or not otherwise final. *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987). However, once a criminal conviction has been upheld on appeal, the application of a new rule of constitutional criminal

procedure is limited. The Supreme Court has held that new rules of criminal procedure will apply retroactively only if they fit within one of two narrow exceptions. *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004).

In *Schriro v. Summerlin*, the Court directly addressed whether its decision in *Ring v. Arizona* was retroactive. *Summerlin*, 542 U.S. at 349. The Court held the decision in *Ring* was procedural and non-retroactive. *Id.* at 353. This was because *Ring* only "altered the range of permissible methods for determining whether a defendant's conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment." *Id.* The Court concluded its opinion by stating: "The right to jury trial is fundamental to our system of criminal procedure, and States are bound to enforce the Sixth Amendment's guarantees as we interpret them. But it does not follow that, when a criminal defendant has had a full trial and one round of appeals in which the State faithfully applied the Constitution as we understood it at the time, he may nevertheless continue to litigate his claims indefinitely in hopes that we will one day have a change of heart. *Summerlin*, 542 U.S. at 358.

Ring announced a new procedural rule that does not apply retroactively to cases already final on direct review." *Summerlin*, 542 U.S. at 358. *Ring* did not create a new constitutional right. That right was created by the Sixth Amendment guaranteeing the right to a jury trial. If *Ring* was not retroactive, then *Hurst v.*

Florida cannot be retroactive since that case is merely an application of *Ring* to Florida. In fact, the decision in *Hurst v. Florida* is based on an entire line of jurisprudence, none of which has ever been held to be retroactive. *See DeStefano v. Woods*, 392 U.S. 631 (1968) (per curiam) (holding the Court's decision in *Duncan v. Louisiana*, which guaranteed the right to a jury trial to the States was not retroactive); *McCoy v. United States*, 266 F.3d 1245, 1255, 1259 (11th Cir. 2001) (holding *Apprendi* not retroactive under *Teague,* and acknowledging that every federal circuit to consider the issue reached the same conclusion); *Varela v. United States*, 400 F.3d 864, 866-67 (11th Cir. 2005) (explaining that Supreme Court decisions, such as *Ring*, *Blakely*, and *Booker*, applying *Apprendi's* "prototypical procedural rule" in various contexts, are not retroactive); *Crayton v. United States*, 799 F.3d 623, 624-25 (7th Cir. 2015) *cert. denied*, 136 S. Ct. 424 (2015) (holding that *Alleyne v. United States*, 570 U.S. 99 (2013), which extended *Apprendi* from maximum to minimum sentences, did not, like *Apprendi* or *Ring*, apply retroactively). Since the Supreme Court has expressly found that *Ring* was not retroactive, *Hurst v. Florida*, which applied *Ring* to invalidate Florida's statute, is also not retroactive under federal law.

Upon remand, this Court had to interpret and apply the *Hurst v. Florida* decision to the facts in that case. However, this Court did not limit its review to the question of whether the error under the Sixth Amendment was harmless as identified

by the Supreme Court. Instead, this Court concluded that the state constitutional right to a jury trial mandates that a defendant's right to unanimous jury findings regarding the elements of a criminal offense applies not only to the existence of an aggravating factor but also to whether the aggravating factors are sufficient and are not outweighed by mitigating circumstances. Using that starting point, this Court found such a *Hurst* error was not harmless. This Court also found that the *Hurst* error was not retroactive to those defendants whose cases were final before *Ring*. *Asay v. State*, 210 So.3d 1 (Fla. 2016). The *Asay* decision is binding on lower courts and is dispositive of the *Hurst* claim.

Hurst reflected a change in this state's decisional law, and, in *Asay*, this Court concluded "that *Hurst* should not be applied retroactively to [a] case, in which the death sentence became final before the issuance of *Ring*." *Asay,* 210 So.3d at 22. Under Florida's revised capital sentencing statute, and consistent with *Hurst*, in order for a defendant to be sentenced to death, the jury must: (1) unanimously find at least one aggravating factor beyond a reasonable doubt; (2) identify all aggravating factors that it unanimously finds beyond a reasonable doubt; (3) unanimously determine whether sufficient aggravating factors exist to impose a sentence of death; (4) determine whether any mitigating circumstances exist and unanimously determine whether the aggravating factors outweigh those mitigating circumstances; and (5) unanimously determine that the defendant should be

sentenced to death. *See Hurst*, 202 So.3d at 57; § 921.141(2), Fla. Stat. (2018); ch. 2017-1, Laws of Fla. If the jury makes these findings, it only does so after a jury has unanimously convicted the defendant of the capital crime of first-degree murder that is delineated in section 782.04, Florida Statutes (2018).

Florida's new capital sentencing scheme, neither alters the definition of criminal conduct nor increases the penalty by which the crime of first-degree murder is punishable. *Victorino v. State*, 241 So.3d 48 (Fla. 2018). These changes to the sentencing procedure did not create a new offense. The class of persons who are death eligible and the range of conduct which causes those defendants to be death eligible did not change. The aggravating factors necessary to qualify a defendant as eligible for the death penalty were not changed. In fact, the specific aggravators used in Wright's case had been in place for decades. The only changes made for a death recommendation were the requirement of specific jury findings of unanimity for the existence and sufficiency of the aggravating factors and that they outweigh mitigation.

Under Florida law, there is no crime expressly termed "capital first-degree murder." Florida law prohibits first-degree murder, which is, by definition, a capital crime. Rather, in Florida, first-degree murder is, by its very definition, a capital felony. Florida's substantive statute on murder, codified at section 782.04, Florida Statutes, provides as follows:

> 782.04 Murder.—
> (1)(a) The unlawful killing of a human being:
>
> 1. When perpetrated from a premeditated design to effect the death of the person killed or any human being;
>
> 2. When committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any: [enumerated felonies a.-s.] or
>
> 3. Which resulted from the unlawful distribution by a person 18 years of age or older of any of the following substances, or mixture containing any of the following substances, when such substance or mixture is proven to be the proximate cause of the death of the user: [enumerated controlled substances a.-i.] is murder in the first degree and constitutes a capital felony, punishable as provided in s. 775.082.

Thus, the crime of first-degree murder, of which Appellant was convicted, is defined in section 782.04 as a capital felony—this is regardless of whether the death penalty is ultimately imposed. Moreover, section 921.141(1), "Separate Proceedings on Issue of Penalty," begins as follows: "Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by section 775.082." Further, Florida Rule of Criminal Procedure 3.112(b) defines a capital trial as "any first-degree murder case in which the State has not formally waived the death penalty on the record."

These statutes and the rule of procedure illustrate that the penalty phase findings are not elements of the capital felony of first-degree murder. Rather, they are findings required of a jury: (1) before the court can impose the death penalty for

first-degree murder, and (2) only after a conviction or adjudication of guilt for first-degree murder has occurred. The conviction for first-degree murder must occur before and independently of the penalty-phase findings required by *Hurst* and its related legislative enactments.

Appellant's reliance on *Bousley v. United States*, 523 U.S. 614 (1998) in furtherance of this proposition is misplaced. There, the Supreme Court "decid[ed] the meaning of a criminal statute enacted by Congress." *Id*. at 620. Concluding that a *Teague* analysis was not necessary under that circumstance, the Court held that an individual who pled guilty to violating 18 U.S.C. § 924(c)(1), based upon the prior interpretation of "using" a firearm is entitled to have the conviction set aside if he or she was actually innocent of the crime as it was subsequently defined by this Court. *Id*. Instead, *Hurst*, like *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." *Schriro* v. *Summerlin*, 542 U.S. 348, 353 (2004). *Hurst* did not announce a substantive change in the law and is not retroactive under federal law.

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN DENYING MCKENZIE'S MOTION TO FIND SECTION 921.141, FLORIDA STATUTES, AS UNCONSTITUTIONAL BECAUSE THE "PRIOR VIOLENT FELONY" AGGRAVATOR IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

Appellant contends that section 921.141(6)(b), Florida Statutes, is unconstitutional, both facially and as applied, because it is vague and overbroad. (IB 66). Appellant's argument is wholly without merit and has been rejected by this Court as such for over twenty years.

"The constitutionality of a statute is a question of law subject to *de novo* review." *State v. Adkins*, 96 So.3d 412, 416 (Fla. 2012) (*quoting Crist v. Ervin*, 56 So.3d 745, 747 (Fla. 2011)). In order to demonstrate that a statute is facially unconstitutional, the party seeking relief must demonstrate "that no set of circumstances exists under which the statute would be valid." *Id.* at 417 (citation omitted). With respect to an as-applied challenge to the constitutionality of a statute, "this Court employs a mixed standard of review. . . . [W]e defer to factual conclusions of the circuit court, but review constitutional matters *de novo*." *Correll v. State*, 184 So.3d 478, 487 (Fla. 2015).

Appellant's facial challenge to section 921.141(6)(b) should be rejected because Appellant's argument is without merit. In order for Appellant's argument to succeed, Appellant must demonstrate "that no set of circumstances exists under which the statute would be valid." *Adkins*, 96 So.3d at 417 (citation omitted). Moreover, if Appellant cannot demonstrate that the statute was unconstitutional as applied to his case, Appellant by definition is precluded from arguing that the statute is facially unconstitutional. *Sieniarecki v. State*, 756 So. 2d 68, 74 (Fla. 2000)

(*quoting New York v. Ferber*, 458 U.S. 747, 767 (1982)); *see also Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973).

Section 921.141(6)(b), identifies one of the statutory aggravators trial courts and juries utilize when considering whether to impose the death penalty: "The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person." Appellant articulates several examples of how the statute is allegedly unconstitutional: (1) convictions that are pending on appeal satisfy the "prior violent felony" aggravator; (2) offenses contemporaneous with the capital offense may be used to satisfy the aggravator; and (3) the statute does not define the term "prior violent felony." (IB.68). The Florida Supreme Court held repeatedly that a contemporaneous murder may be used to establish a prior violent felony aggravator. *Francis v. State*, 808 So. 2d 110, 136 (Fla. 2001) (stating that "[t]his Court has repeatedly held that where a defendant is convicted of multiple murders, arising from the same criminal episode, the contemporaneous conviction as to one victim may support the finding of the prior violent felony aggravator as to the murder of another victim."); *Knight v. State,* 746 So. 2d 423, 434 (Fla. 1998) (explaining that under *Elledge v. State,* 346 So. 2d 998 (Fla. 1977), and its progeny, previous violent felony convictions suffice for purposes of the prior violent felony aggravator so long as the convictions predate the sentencing); *Lucas v. State,* 376 So. 2d 1149, 1152-1153 (Fla. 1979).

Appellant cannot demonstrate that section 921.141(6)(b) is unconstitutional because, as articulated above, his case presents a clear example of a set of circumstances under which the statute was valid. In addition to the contemporaneous murder conviction, it was also established during the recent penalty phase that the Appellant had previously been convicted of nine prior violent felonies:

> State of Florida v. Norman McKenzie, Case No.: 1984-3709CF (Broward County, Florida); November 8, 1984
> Kidnapping and Robbery
>
> State of Florida v. Norman McKenzie, Case No.: 1990-19206CF10 (Broward County, Florida); May 28, 1991
> Robbery
>
> State of Florida v. Norman McKenzie, Case No.: 01-2006-CF005259-A (Alachua County, Florida); May 10, 2007
> Attempted Robbery
>
> State of Florida v. Norman McKenzie, Case No.: 01-2006-CF-005261-A (Alachua County, Florida); May 10, 2007
> Kidnapping with a Firearm
>
> State of Florida v. Norman McKenzie, Case No.: 01-2007-CF-00532-A (Alachua County, Florida); May 10, 2007
> Robbery
>
> State of Florida v. Norman McKenzie, Case No.: 01-2007-CF-000585-A (Alachua County, Florida); May 10, 2007
> Robbery
>
> State of Florida v. Norman McKenzie, Case No.: 01-2007-CF-000586-A (Alachua County, Florida); May 10, 2007
> Robbery
>
> State of Florida v. Norman McKenzie, Case No.: 42-2006-CF-004213-A (Marion County, Florida); March 6, 2007

Carjacking while Armed

In addition to the Judgment and Sentences received into evidence from these prior violent felonies, during the recent penalty phase, testimony was received from the victims of many of these prior violent felonies, including Charles McGuire who was the victim from the 1991 Broward County robbery conviction; Clarice Polczynski, Amanda Hughes, Chantel Wilson and Marquette Frederick, who were the victims from the 2007 Alachua County robbery and attempted robbery convictions; Larry Van who was the victim from the 2007 Marion County carjacking conviction; and Ceasar Saldana who was an investigating detective from the 2007 Alachua County kidnapping conviction. (R895-896). Since the statute was constitutionally applied to him, Appellant "may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *Ferber*, 458 U.S. at 767.

The trial court correctly and constitutionally applied section 921.141(6)(b) to Appellant. Appellant's multiple prior violent felony convictions in no way implicates any of the three means by which Appellant alleges the statute is unconstitutionally vague and overbroad. Accordingly, this Court must reject Appellant's facial challenge to section 921.141(6)(b) as improper because the statute was constitutionally applied to Appellant. *Ferber*, 458 U.S. at 768 (stating that the United States Supreme Court will not review constitutional challenges to a statute if

the statute properly applies to a criminal defendant because "[t]his practice also fulfills a valuable institutional purpose: it allows state courts the opportunity to construe a law to avoid constitutional infirmities").

Finally, this Court has rejected the argument that the prior violent felony statutory aggravator is unconstitutionally vague or overbroad for over twenty years. *Gonzalez v. State*, 136 So.3d 1125, 1169 (Fla. 2014) (*citing Hudson v. State*, 708 So. 2d 256, 260 n.4 (Fla. 1998)); *Farina v. State*, 937 So. 2d 612, 618 n.5-6 (Fla. 2006). Neither this Court nor the United States Supreme Court has reevaluated any constitutional provisions which would require this Court to review Florida's prior violent felony aggravator.

Accordingly, Appellant is not entitled to relief on this ground.

CONCLUSION

Based upon the foregoing, the State respectfully requests that this Court affirm the new death sentence properly imposed under the law.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by e-portal service on November 10th, 2020 to: Michael P. Reiter, Assistant Regional Counsel, Office of the Criminal Conflict and Civil Regional Counsel, 5th Dist., 307 N.W. 3rd Street, Ocala, Florida 34475 email: rccmarion@rc5state.com, mreiter@rc5state.com.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Times New Roman 14-point font.

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