

**IN THE CIRCUIT COURT OF THE  
FIFTH JUDICIAL CIRCUIT, IN  
AND FOR LAKE COUNTY, FLORIDA**

**CASE NOS. 87-1347CF  
88-0262CF**

**STATE OF FLORIDA,  
Plaintiff,**

v.

**JAMES AREN DUCKETT,  
Defendant.**

\_\_\_\_\_ /

**DEFENDANT'S SUCCESSIVE MOTION TO VACATE  
JUDGMENTS OF CONVICTION AND SENTENCE  
WITH SPECIAL REQUEST FOR EVIDENTIARY HEARING  
AND LEAVE TO AMEND**

**JAMES AREN DUCKETT**, Defendant, submits this motion pursuant to his Fla. R. Crim. P. 3.851 and respectfully moves this court for an order vacating and setting aside his sentence of death imposed upon him by this court and alternatively an order pursuant to Florida Rule of Criminal Procedure 3.800(a) correcting his illegal sentence of death. Mr. Duckett’s Rule 3.851 motion presents substantial claims challenging the validity of his death sentence. As will be demonstrated below, Mr. Duckett is entitled to the relief he seeks.

**PROCEDURAL HISTORY**

James Duckett was convicted of one count of first degree murder and one count of sexual battery in the Lake County Circuit Court on May 10, 1988 (R. 2010).<sup>1</sup> The entire penalty phase

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<sup>1</sup> Citations to the record will be as follows:  
Record on Appeal from Trial = “R. \_\_\_\_\_”  
Record from Initial Rule 3.850 Proceedings = “PC-R. \_\_\_\_\_”  
Record to Exhibits Introduced in Initial Rule 3.850 Proceedings = “PC-R. D. Exh. \_\_\_\_\_”  
Record on Appeal from DNA relinquishment proceedings - “PC-R-rel. \_\_\_\_\_”  
Record from 2d Rule 3.851 Proceedings = “PC-R2. \_\_\_\_\_”

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took place on the same date and the jury returned a vote of eight to four recommending death (R. 2442). The trial court imposed a sentence of death with a consecutive 25 year minimum mandatory sentence for the sexual battery (R. 2552). The court found two aggravating factors - in the course of a felony and heinous, atrocious and cruel, one statutory mitigating factors – no prior criminal history, and two non-statutory mitigating factors – defendant’s family background and education efforts (R. 2557).

Mr. Duckett’s direct appeal, filed on February 1, 1989, and supplemented on April 27, 1989, raised four issues: 1) the circuit court erred in denying defendant’s motion for a judgment of acquittal as the evidence was not sufficient to support the verdict; 2) the circuit court incorrectly interpreted the *Williams* rule in permitting the testimony of three witnesses; 3) the circuit court erred when it qualified FBI agent Michael Malone as an expert as Mr. Malone committed perjury when he lied about his qualifications; and, 4) the circuit court erred in imposing the death penalty when it failed to remove the arbitrariness from the proceedings and when the trial judge failed to consider that the jury may have been influenced by improper considerations and when the judge placed undue emphasis on improper factors.<sup>2</sup> The Florida Supreme Court affirmed Mr. Duckett’s convictions and sentences. *Duckett v. State*, 568 So. 2d 891 (Fla. 1990).<sup>3</sup>

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All other citations will be self explanatory.

<sup>2</sup> Counsel raised the issue of the failure of the circuit court to properly weigh all aggravators and mitigators in the conclusion of the brief, but the claim was not addressed by the court.

<sup>3</sup> With respect to the second issue, the Court found that the testimony of one of the three *Williams* rule witnesses should properly have been excluded, but found this error harmless in light of other evidence presented at trial.

Mr. Duckett filed his initial Motion to Vacate Convictions and Sentences Pursuant to Rule 3.850 on May 1, 1992 (PC-R. 1859-1870). A consolidated amendment to the petition was filed on November 14, 1994 (PC-R. 337-470).<sup>4</sup>

On May 23, 1995, the court ordered evidentiary hearings on claims I, II - A, C (¶22-23), D, E and F, III, V and IX (PC-R. 778). On August 13, 2001, the Court entered an order denying Mr. Duckett relief on all claims (PC-R. 1782-1819).

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<sup>4</sup> Mr. Duckett's claims in his motion to vacate included his arguments that: I) records pertaining to Mr. Duckett in the possession of the Florida Parole Commission, the Board of Executive Clemency and the State Attorney's Office were withheld in violation of Fla. Stat. § 119.01 *et. seq.*; II) Mr. Duckett was denied an adversarial testing when critical exculpatory evidence was not presented to the jury, specifically A) Gwen Gurley lied and the jury never heard critical impeachment evidence, B) the jury considered improperly admitted *Williams* rule testimony, C) newly discovered evidence concerning the jury deliberations raises substantial doubts about Mr. Duckett's convictions and sentences, D) the jury did not hear critical evidence which raised a reasonable doubt of guilt, including, but not limited to, evidence of other, more viable, suspects, E) the jury did not receive significant evidence contradicting the State's forensic evidence, including the hair evidence, the tire tracks evidence and the fingerprint evidence, and F) the jury never heard critical evidence corroborating Mr. Duckett's version of events including evidence that the victim was found wearing different clothes than she had been wearing when Mr. Duckett questioned her earlier in the night, and forensic evidence that the victim did not die from drowning as alleged by the State; III) Mr. Duckett was denied the effective assistance of counsel at penalty and sentencing phases when counsel failed to adequately investigate and refute aggravating factors and failed to establish mitigating factors; IV) the prosecutor's inflammatory and improper comments, arguments and conduct rendered Mr. Duckett's trial fundamentally unfair and unreliable; V) Mr. Duckett was denied his rights under *Ake v. Oklahoma* when counsel failed to obtain an adequate mental health evaluation and failed to provide necessary background information to a mental health consultant; VI) the sentencing jury did not receive instructions guiding and channeling its sentencing discretion by explaining the limiting constructions of the aggravating circumstances, and the aggravating circumstances were improperly argued and applied; VII) the sentencing instructions unconstitutionally diluted the jury's sense of responsibility for the sentence; VIII) the jury instructions unconstitutionally shifted the burden to Mr. Duckett to prove that death was inappropriate; IX) the trial was fraught with procedural and substantive errors; X) the evidence was insufficient to support the verdict; XI) Mr. Duckett was absent from critical stages of the proceedings; XII) Mr. Duckett's sentence of death was exacted pursuant to a pattern and practice of prosecuting authorities, courts and juries to discriminate on the basis of race; XIII) Florida's rule prohibiting the interview of capital jurors is unconstitutional; and XIV) the death penalty is cruel and unusual punishment in that it is applied in an arbitrary and capricious fashion in Florida.

On May 31, 2002, Mr. Duckett filed an appeal to the Florida Supreme Court from the denial of his Rule 3.850 motion and on June 4, 2002, he filed a Petition for Writ of Habeas Corpus with the Florida Supreme Court. The Court consolidated the two cases for oral argument, which was heard on March 6, 2003. Following oral argument, the Court remanded the case to this Court to determine whether clothing existed which could be tested for DNA, and to conduct such testing (Fla. S. Ct. SC01-2149, Order March 21, 2003). The Court proceedings on the DNA remand were concluded with the Final Order and Report to Supreme Court on DNA Testing submitted by this Court to the Florida Supreme Court on February 5, 2004.

Mr. Duckett filed a Notice of Appeal from those proceedings on February 25, 2004, and supplemental briefs were filed.

On August 10, 2004, Mr. Duckett filed a Motion to Relinquish Jurisdiction in the Florida Supreme Court based upon newly discovered evidence that Gwen Gurley had indeed lied at her trial at the behest of State agents. The Florida Supreme Court relinquished the case to this Court and this Court conducted a hearing on the grounds alleged in the Motion. This Court did not enter an order on the Motion but sent the records from the relinquishment proceedings to the Florida Supreme Court to be included with the pending appeal. The Florida Supreme Court denied Mr. Duckett's appeal and state habeas on October 5, 2005. *Duckett v. State*, 918 So. 2d 224 (Fla. 2005).

Mr. Duckett filed a Writ of Certiorari to the United States Supreme Court on May 31, 2006, which was denied on October 2, 2006. *Duckett v. Florida*, 549 U.S. 846 (2006).

On January 5, 2007, Mr. Duckett filed a Petition for Writ of Habeas Corpus in federal court, which was denied on March 25, 2010. Mr. Duckett's Application for Certificate of Appealability was denied by the district court and by the court of appeals.

Mr. Duckett filed a successive Motion to Vacate pursuant to Rule 3.851 on November 29, 2010.<sup>5</sup> The Florida Supreme Court affirmed the denial on June 26, 2014.

Mr. Duckett filed a successive Motion to Vacate Pursuant to Rule 3.851 on August 26, 2015.<sup>6</sup> This Court denied Mr. Duckett's motion on April 1, 2016, without an evidentiary hearing. A timely appeal was made to the Florida Supreme Court on May 3, 2016. That case is presently pending in the Florida Supreme Court.

### INTRODUCTION TO CLAIMS

On January 12, 2016, *Hurst v. Florida*, 136 S.Ct. 616 (2016), declared Florida's capital sentencing scheme unconstitutional. On March 7, 2016, the governor signed into law Chapter 2016-13, the legislature's effort to rewrite § 921.141 in the wake of *Hurst v. Florida* to cure the constitutional deficiencies. It was intended to apply in any trial, penalty phase, retrial or resentencing conducted in Florida, even when the homicide at issue had occurred prior to March 7, 2016. The revised sentencing statute provided that when 3 or more jurors voted in favor of a life sentence, the judge could not impose a death sentence. For a death recommendation to be returned, 10 jurors must have voted in favor of a death sentence.

On October 14, 2016, the Florida Supreme Court issued *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). There, the Florida Supreme Court construed *Hurst v. Florida*:

The Supreme Court in *Hurst v. Florida* made clear that the jury must find

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<sup>5</sup> Mr. Duckett's claims included: 1) his convictions and sentences violate the Sixth and Eighth Amendments under *Porter v. McCollum*; 2) newly discovered evidence concerning the false testimony of Gwen Gurley; 3) Mr. Duckett's due process rights were violated when he was prohibited from presenting evidence regarding Gwen Gurley at his prior evidentiary hearing; and, 4) newly discovered evidence from an independent examiner hired by the FBI reviewing the work of the state's hair expert requires that Mr. Duckett receive a new trial

<sup>6</sup> The sole claim in that motion raised the issue regarding the newly discovered evidence that the State had presented a report or testimony at Mr. Duckett's trial regarding microscopic hair comparison analysis which contained "erroneous statements", according to a review completed by the FBI.

“each fact necessary to impose a sentence of death,” 136 S.Ct. at 619, “any fact that expose[s] the defendant to a greater punishment,” *id.* at 621, “the facts necessary to sentence a defendant to death,” *id.*, “the facts behind” the punishment, *id.*, and “the **critical findings** necessary to impose the death penalty,” *id.* at 622 (emphasis added). Florida law has long required findings beyond the existence of a single aggravator before the sentence of death may be recommended or imposed. *See* § 921.141(3), Fla. Stat. (2012).

202 So. 3d at 53 n.7. “[B]ecause these findings occupy a position on par with elements of a greater offense,” *id.* at 57, the Florida Supreme Court concluded that the Florida Constitution and longstanding Florida law required these to be made by the jury unanimously. *Id.* at 59 (“we conclude that under the commandments of *Hurst v. Florida*, Florida's state constitutional right to trial by jury, and our Florida jurisprudence, the penalty phase jury must be unanimous in making the critical findings and recommendation that are necessary before a sentence of death may be considered by the judge or imposed.”). Alternatively, the Florida Supreme Court stated: “we conclude that juror unanimity in any recommended verdict resulting in a death sentence is required under the Eighth Amendment.” *Hurst v. State*, 202 So. 2d at 59.

On October 14, 2016, the Florida Supreme Court also decided *Perry v. State*, \_\_\_ So. 3d \_\_\_, 2016 WL 6036982 (Fla. October 14, 2016), and declared the 10-2 provision contained in Chapter 2016-13 to be unconstitutional under *Hurst v. State*'s holding that a jury must unanimously recommend a death sentence. *Perry*, 2016 6036982 at \*7 (“based on Florida's requirement for unanimity in jury verdicts and on the Eighth Amendment to the United States Constitution, [*Hurst v. State* held that] a jury's ultimate recommendation of the death sentence must be unanimous.”). Accordingly, a Florida jury must unanimously find that sufficient aggravators existed to justify a death sentence and that the aggravators outweighed the mitigating factors that are present. The jury must then unanimously reject mercy for the Defendant and vote in favor of a death sentence. If a unanimous death recommendation is not returned, a death

sentence cannot be imposed, and a life sentence is mandated. One or more jurors voting in favor of a life sentence precludes a death sentence. One juror's desire to be merciful precludes a death sentence even if the jury unanimously determined that sufficient aggravators existed and that they outweighed the mitigators that were present. *Perry v. State*, 2016WL 6036982 at \*8, quoting *Hurst v. State*, 202 So.3d at 59 (“the penalty phase jury must be unanimous in making the critical findings **and recommendation** that are necessary **before a sentence of death may be considered by the judge or imposed.**”) (emphasis added).

On December 22, 2016, the Florida Supreme Court held that *Hurst v. Florida* was a change in law to be applied retroactively. *Mosley v. State*, \_ So. 3d \_, 2016 WL 7406506 (Fla. Dec. 22, 2016).<sup>7</sup>

On the basis of the new Florida law arising from *Hurst v. Florida*, the enactment of Chapter 2016-13, *Perry v. State*, *Hurst v. State*, and *Mosley v. State*, Mr. Duckett files this motion to vacate and presents his claims for relief arising from the change in Florida law that followed in the wake of *Hurst v. Florida*. See Rule 3.851(d)(2)(B).

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<sup>7</sup> In *Mosley v. State*, the Florida Supreme Court held: “we conclude that *Hurst* should apply retroactively to *Mosley*.” 2016 WL 7406506 at \*18. See *Id.* at \*25 (“The purpose of the holdings in *Hurst v. Florida* and *Hurst* is to prevent a violation of the fundamental and critically important right to a trial by jury.”). This means that Rule 3.851(d)(2)(B) has been satisfied and motions to vacate may be “considered” that rely on the constitutional right recognized in *Hurst v. Florida* which “has been held to apply retroactively.” The Florida Supreme Court also found that *Mosley* satisfied the alternative retroactivity path because he demonstrated that failing to apply *Hurst v. Florida* to his case violated fundamental fairness. *Id.* at 18 (“This Court has previously held that fundamental fairness alone may require the retroactive application of certain decisions involving the death penalty after the United States Supreme Court decides a case that changes our jurisprudence.”).

## CLAIM I

### **MR. DUCKETT'S DEATH SENTENCE VIOLATES THE SIXTH AMENDMENT UNDER *HURST V. FLORIDA***

This claim is evidenced by the following:

1. All other factual allegations in this motion and in Mr. Duckett's previous motion to vacate, and all evidence presented by him during his trial and previous postconviction proceedings, are incorporated herein by specific reference.

2. This motion is filed with one year of the issuance of *Hurst v. Florida*, the enactment of Chapter 2016-13, the issuance of *Perry v. State*, 2016 WL 6036982 (Fla. Oct. 14, 2016) the issuance of *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), and the issuance of *Mosley v. State*, 2016 WL 7406506 (Fla. Dec. 22, 2016),<sup>8</sup> all of which constitute a change in Florida law. The claims presented herein could not have been presented before the change in Florida law that these cases and statutory amendment brought about. The claims were simply not ripe before because the basis for the Defendant's claims did not exist before the change in Florida law resulting from *Hurst v. Florida*, the enactment of Chapter 2016-13, the issuance of *Perry v. State*, the issuance of *Hurst v. State* and the issuance of *Mosley v. State*. Accordingly, this motion is timely.

3. In *Mosley v. State*, the Florida Supreme Court discussed *Hurst v. Florida*:

In *Hurst v. Florida*, the United States Supreme Court declared our capital sentencing scheme, codified at section 921.141(3)(a)-(b), Florida Statutes (2015), unconstitutional because the "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." 136 S.Ct. at 619.

2016 WL 7406506 at \*17. In *Hurst v. State*, the Florida Supreme Court explained the change in

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<sup>8</sup> *Mosley v. State* is not yet final. Mr. Duckett requests the opportunity to amend his claim once *Mosley* becomes final.

law that resulted from *Hurst v. Florida*:

In so holding, the Supreme Court overruled its decisions in *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), and *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989), to the extent they approved Florida's sentencing scheme in which the judge, independent of a jury's factfinding, finds the facts necessary for imposition of the death penalty. See *Hurst v. Florida*, 136 S.Ct. at 624. The Supreme Court's ruling in *Hurst v. Florida* also abrogated this Court's decisions in *Tedder v. State*, 322 So.2d 908 (Fla.1975), *Bottoson v. Moore*, 833 So.2d 693 (Fla.2002), *Blackwelder v. State*, 851 So.2d 650 (Fla.2003), and *State v. Steele*, 921 So.2d 538 (Fla.2005), precedent upon which this Court has also relied in the past to uphold Florida's capital sentencing statute.

202 So. 3d at 44. The Sixth Amendment right enunciated and applied in *Hurst v. Florida* gives defendants the right to a jury determination of the facts that are statutorily necessary to authorize a judge to impose a death sentence. *Hurst v. Florida* invalidated Fla. Stat. §§ 921.141(2) and (3) as unconstitutional. Under those provisions, a defendant who had been convicted of a capital felony could be sentenced to death only after the sentencing judge entered written fact findings that: 1) sufficient aggravating circumstances existed that justify the imposition a death sentence, and 2) insufficient mitigating circumstances existed to outweigh the aggravating circumstances. *Hurst*, 136 S. Ct. at 620-21. *Hurst v. Florida* found this scheme unconstitutional. “Florida does not require the jury to make critical findings necessary to impose the death penalty,” but rather, “requires a judge to find these facts.” *Id.* at 622. On remand, the Florida Supreme Court held in *Hurst v. State* that as a result of *Hurst v. Florida*, “**before** the trial judge may consider imposing a sentence of death, **the jury** in a capital case **must unanimously and expressly find** all the aggravating factors that were proven beyond a reasonable doubt, 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.

4. *Hurst v. Florida* changed Florida law and established that capital defendants had a

constitutional right to a jury find the facts necessary to authorize a judge to impose a death sentence. *See* Rule 3.851(d)(2)(B) (“the fundamental constitutional right asserted ... has been held to apply retroactively”). In *Mosley*, the Florida Supreme Court held: “we conclude that *Hurst* should apply retroactively to *Mosley*.” 2016 WL 7406506 at \*18. This means that Rule 3.851(d)(2)(B) has been satisfied and motions to vacate may be “considered” that rely on the constitutional right recognized in *Hurst v. Florida* which “has been held to apply retroactively.” *Mosley* does indicate that whether a specific defendant receives the benefit of *Hurst v. Florida* requires a case-by-case and/or category-by-category analysis.

5. In *Mosley v. State*<sup>9</sup>, the Florida Supreme Court determined that *Hurst v. Florida*, 136 S. Ct. 616 (2016) constituted a change in Florida law that was to be applied retroactively to *Mosley* and required the Court to grant postconviction relief, vacate *Mosley*’s death sentence and remand for a resentencing.<sup>9</sup> As the Court in *Mosley* observed: “it is undeniable that *Hurst v. Florida* changed the calculus of the constitutionality of capital sentencing in this State.” 2016 WL 7406506 at \*23.

6. In *Mosley*, the Florida Supreme Court held that under Florida law, there are two separate and distinct approaches for conducting retroactivity analysis. 2016 WL 7406506 at \*20 n.13.<sup>10</sup> The first approach to retroactivity discussed in *Mosley* was explained as follows:

**This Court has previously held that fundamental fairness alone may require the retroactive application of certain decisions involving the death penalty after the United States Supreme Court decides a case that changes our**

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<sup>9</sup> The homicide at issue in *Mosley* occurred in 2004. Thereafter, *Mosley* was tried, convicted and sentenced to death. The judgment and sentence were affirmed on direct appeal. *Mosley v. State*, 46 So. 3d 510 (Fla. 2009), *cert denied* 562 U.S. 887 (2010).

<sup>10</sup> The State has already filed a motion for rehearing in *Mosley* complaining that by providing for a case-by-case analysis “this Court has created confusion and caused an unnecessary unsettling of the law.” (Motion for Rehearing at 2, *Mosley v. State*, Case No. SC14-2108).

**jurisprudence.** For example, in *James*, this Court reviewed whether the United States Supreme Court's decision in *Espinosa v. Florida*, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), should apply retroactively. *James*, 615 So.2d at 669. Although pre-*Espinosa* this Court had rejected claims that our jury instruction on the extremely heinous, atrocious or cruel (HAC) aggravator was unconstitutionally vague, the United States Supreme Court disagreed and held in *Espinosa* that our instruction was, indeed, unconstitutionally vague. 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854. This Court then held that defendants who had raised a claim at trial or on direct appeal that the jury instruction pertaining to the HAC aggravating factor was unconstitutionally vague were entitled to retroactive application of *Espinosa*. *James*, 615 So.2d at 669. While this Court did not employ a standard retroactivity analysis in *James*, the basis for granting relief was that of fundamental fairness. *Id.* This Court reasoned that, because *James* had raised the exact claim that was validated by the United States Supreme Court in *Espinosa*, “it would not be fair to deprive him of the *Espinosa* ruling.” *Id.*

*Mosley*, 2016 WL 7406506 at \* 19 (emphasis added). Clearly, *James* is cited just as an example of the fundamental fairness approach to determining when a particular defendant is entitled to the retroactive application of a change in law mandated by a decision from the US Supreme Court. It is also clear that the fundamental fairness approach requires a case-by-case determination of which collateral litigants get the benefit of the change in law retroactively.

7. The second approach to retroactivity discussed in *Mosley* is the analysis set forth in *Witt v. State*, 387 So. 2d 922 (Fla. 1980). Employing *Witt*, the Court in *Mosley* concluded: “Because Florida's capital sentencing statute has essentially been unconstitutional since *Ring* in 2002, fairness strongly favors applying *Hurst*, retroactively to that time.” 2016 WL 7406506 at \*23.<sup>11</sup> Further, the Court in *Mosley* explained that:

holding *Hurst* retroactive would only affect the sentences of capital defendants. Further, in addition to the fact that convictions will not be disturbed, not every defendant to whom *Hurst* applies will ultimately receive relief. As we determined in *Hurst*, each error should be reviewed under a harmless error analysis to individually determine whether each defendant will receive a new penalty phase. *Hurst*, 202 So.3d at 67–68; *James*, 615 So.2d at 669.

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<sup>11</sup> The use of the word “fairness” in the context of the *Witt* analysis would suggest that fairness, indeed fundamental fairness, is the Florida Supreme Court’s central concern in determining which defendants should retroactively receive benefit of *Hurst v. Florida*.

Additionally, we have declined to find *Hurst* applicable to those cases where the defendant waived his/her right to trial by jury. See *Mullens v. State*, 197 So.3d 16 (Fla.), *pet. for cert. filed*, No. 16–6773 (Nov. 4, 2016).

Finally, we again emphasize that this decision will only impact the sentence of death, not the conviction. The difference is not guilt or innocence but, instead, life or death.

2016 WL 7406506 at \*24-25. Here, the retroactive application of *Hurst* to Mr. Duckett’s death sentence “will only impact the sentence of death, not the conviction.”

8. In *Mosley*, the Florida Supreme Court concluded that under either the fundamental fairness approach to retroactivity or under the *Witt* analysis, *Hurst v. Florida* was a change in law that was to be retroactively applied:

Applying *Hurst* retroactively to *Mosley*, in light of the rights guaranteed by the United States and Florida Constitutions, supports basic tenets of fundamental fairness. And it is fundamental fairness that underlies the reasons for retroactivity of certain constitutionally important decisions, especially those involving the death penalty. Indeed, as we stated in *Witt*:

[S]ociety recognizes that a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice. Considerations of fairness and uniformity make it very “difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases.”

387 So.2d at 925 (citations omitted) (emphasis added).

2016 WL 7406506 at \*25.<sup>12</sup>

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<sup>12</sup> In *Asay v. State*, the Florida Supreme Court ruled that *Hurst v. Florida* was not to be applied retroactively to *Asay*’s case. *Asay v. State*, 2015 WL 7406538 at \*13 (“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*.”). Despite this statement, two justices indicated that *Hurst v. Florida* would be applied to judicial override cases that were “final before the issuance of *Ring*” and possible other cases “final before the issuance of *Ring*.” See *Id.* at \*20 (Labarga, C.J., concurring) (“The impact of *Hurst v. Florida* and *Hurst* upon their death sentences is an issue for another day.”); *Id.* at \*25 (Pariante, J., dissenting) (“Even under the majority’s holding today, relief should be granted to two Florida death row inmates whose sentences were a result of a judicial override”). Two other justices indicated that pre-*Ring* defendants may be able to have

9. Turning to Mr. Duckett’s death sentence, fundamental fairness demands that *Hurst v. Florida* be applied retroactively to his case. In his habeas petition filed with the Florida Supreme Court on June 4, 2002, Mr. Duckett argued in Claim IV that Florida law deprived him of his Sixth Amendment right to have all elements of his crime determined by a jury, relying on the principles set forth in *Apprendi v. New Jersey*, 530 U.S. 466 (2000).<sup>13</sup> Mr. Duckett also filed an appeal of the denial of his Motion to Vacate Convictions and Sentences on

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*Hurst v. Florida* apply retroactively to their cases. *Id.* at \*21 (Lewis, J., concurring in result) (Pre-*Ring* “defendants who challenged Florida’s unconstitutional sentencing scheme based on the substantive matters addressed in *Hurst* are entitled to consideration of that constitutional challenge.”); *Id.* at 27 (Perry, J., dissenting) (“I would find that *Hurst v. Florida* applies retroactively, period.”).

In *Mosley v. State*, a majority of the Florida Supreme Court embraced Justice Lewis’ position in his concurrence in *Asay*, that pre-*Ring* defendants were entitled to the retroactive application of *Hurst v. Florida* in their cases if fundamental fairness warranted it. *Mosley*, 2016 WL 7406506 at \*19 (“fundamental fairness alone may require the retroactive application” of *Hurst v. Florida*).

<sup>13</sup> The Supreme Court held in *Apprendi* that under the Sixth Amendment, “any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” 530 U.S. at 490. *Apprendi* indicated that this had been the holding in *Jones v. United States*, 526 U.S. 227 (1999):

we endorse the statement of the rule set forth in the concurring opinions in that case: “[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.” 526 U.S., at 252-253, 119 S.Ct. 1215 (opinion of STEVENS, J.); *see also id.*, at 253, 119 S.Ct. 1215 (opinion of SCALIA, J.).

*Apprendi*, 530 U.S. at 490. In *Jones*, Justice Stevens explained that this rule was derived from a line of cases decided in the 1970's:

That is the essence of the Court's holdings in *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), and *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977).

*Jones*, 526 U.S. at 253 (Stevens, J., concurring). The majority opinion in *Jones* did cite and rely on these three decisions as well. *Id.* at 540-41.

May 31, 2002, in which he raised a claim pursuant to *Caldwell v. Mississippi*, 472 U.S. 325 (2005), that the instructions and argument at his trial unconstitutionally diluted the jurors sense of responsibility. Subsequent to the filing of these two pleadings, the US Supreme Court decided *Ring v. Arizona*, 536 U.S. 584 (2002), in which the court held that *Apprendi* applied to capital sentencing and overruled *Walton v. Arizona*, 497 U.S. 639 (1990). In his reply briefs for both his habeas petition and his 3.850 appeal, Mr. Duckett urged the Court to apply *Ring* to find that his death sentence violated the Sixth Amendment because the elements of the capital murder were not determined by a jury.

10. The State argued that *Ring v. Arizona* did not apply in Florida and that the claims were procedurally defaulted, and as such, the claims should be denied.

11. When the Florida Supreme Court denied Mr. Duckett's appeal and petition in a consolidated order, it did so on the merits stating: "Finally, Duckett's habeas claim that his sentence violates the principles recognized in *Apprendi* and *Ring* is without merit. *See Johnson v. State*, 904 So.2d 400, 412 (Fla.2005) (holding that *Ring* does not apply retroactively)." *Duckett v. State*, 918 So. 2d 224, 239 (Fla. 2005). The court did not separately address Mr. Duckett's claims in his appeal of his 3.850 motion regarding *Ring v. Arizona*.

12. As to the question of whether Mr. Duckett should receive the benefit of the change in law that *Hurst v. Florida* has brought, he first addresses the fundamental fairness approach to retroactive application of a change in law set forth in *Mosley v. State*. *See Moreland v. State*, 582 So. 2d 618, 619 (Fla. 1991); *Fannin v. State* 751 So. 2d 158, 161 (Fla. 2<sup>nd</sup> DCA 2000); *Benedict v. State*, 610 So. 2d 699 (Fla. 3<sup>rd</sup> DCA 1992); *Wright v. State*, 604 So. 2d 1248, 1249 (Fla. 4<sup>th</sup> DCA 1992). Of course, fundamental fairness is an equitable concept. *See Treadwell v. Town of Oak Hill*, 175 So. 2d 777, 779 (Fla. 1965) ("courts of equity do have power

in proper cases to require that to be done which in law should be done”); *Degge v. First State Bank of Eutis*, 199 So. 564, 441 (Fla. 1941) (“Equity came into existence as a means of granting justice in cases wherein the law by its rigid principles was deficient. It has been truly called a court of conscience. It should not be shackled by rigid rules of procedure and thereby preclude justice being administered according to good conscience.”).

13. The United States Supreme court recently addressed a court’s inherent equitable powers to permit equitable tolling:

But we have also made clear that often the “exercise of a court's equity powers ... must be made on a case-by-case basis.” *Baggett v. Bullitt*, 377 U.S. 360, 375, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964). In emphasizing the need for “flexibility,” for avoiding “mechanical rules,” *Holmberg v. Armbrecht*, 327 U.S. 392, 396, 66 S.Ct. 582, 90 L.Ed. 743 (1946), we have followed a tradition in which courts of equity have sought to “relieve hardships which, from time to time, arise from a hard and fast adherence” to more absolute legal rules, which, if strictly applied, threaten the “evils of archaic rigidity,” *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248, 64 S.Ct. 997, 88 L.Ed. 1250 (1944). The “flexibility” inherent in “equitable procedure” enables courts “to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct ... particular injustices.” *Ibid.* (permitting postdeadline filing of bill of review). Taken together, these cases recognize that courts of equity can and do draw upon decisions made in other similar cases for guidance. Such courts exercise judgment in light of prior precedent, but with awareness of the fact that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case.

*Holland v. Florida*, 560 U.S. 631, 649-50 (2010). See *Martel v. Clair*, 132 S. Ct. 1276, 1285 (2012) (purpose of providing counsel to federal habeas petitioners “to foster ‘fundamental fairness in the imposition of the death penalty.’” ); *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988) (Fed. R. Civ. P. 60(b) “provides courts with authority ‘adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.’”).

14. There are a number of ways that the fundamental unfairness of refusing *apply Hurst v. Florida* can be seen in Mr. Duckett’s case. In both his 2002 state habeas petition and his 2002 appeal of the denial of his 3.850 motion, Mr. Duckett argued that under *Apprendi* and *Ring*,

his death sentence stood in violation of the Sixth Amendment. *Hurst v. Florida* has vindicated Mr. Duckett’s arguments in his appeal and habeas: 1) *Ring* and *Apprendi* were applicable in Florida; 2) *Mills v. Moore* had been wrongly decided; 3) *Hildwin v. Florida* was just as irreconcilable with *Apprendi* as *Walton v. Arizona* was; 4) the Sixth Amendment right to jury attached to the factual findings that a sentencing judge was required to make under 921.141(3) before a death sentence could be imposed, including the sufficiency of the aggravating factors; 5) these facts necessary to authorize the imposition of a death sentence were the equivalent of elements of the crime that had been decided considered at the guilt phase and had to be determine by a unanimous jury; and 6) the advisory verdict could not be treated as having made the necessary findings in compliance with the Sixth Amendment. *See Hurst v. Florida*, 136 S. Ct. at 622 (“ The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires.”).

15. In *Hurst v. State*, 202 So. 3d at 53, the Florida Supreme Court concluded:

Upon review of the decision in *Hurst v. Florida*, as well as the decisions in *Apprendi* and *Ring*, we conclude that the Sixth Amendment right to a trial by jury mandates that under Florida's capital sentencing scheme, the jury—not the judge—must be the finder of every fact, and thus every element, necessary for the imposition of the death penalty.

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just as elements of a crime must be found unanimously by a Florida jury, all these findings necessary for the jury to essentially convict a defendant of capital murder—thus allowing imposition of the death penalty— are also elements that must be found unanimously by the jury.

202 So. 3d at 53-54.

16. The Florida Supreme Court ‘s merits denial of Mr. Duckett’s claims was in keeping with the merits denials that had occurred after the first merits denial of a *Ring* claim in *Bottoson v. Moore*, 833 So. 2d 693, 695 (Fla. 2002) (“Bottoson contends that he is entitled to relief under *Ring*, we decline to so hold.”). Bottoson death sentence was final in 1984 when

certiorari review was denied by the US Supreme Court following the direct appeal. *Bottoson v. State*, 443 So.2d 962, 963-64 (Fla.1983), *cert. denied*, 469 U.S. 873 (1984). Bottoson had presented an *Apprendi* claim in a successive habeas petition filed in the Florida Supreme Court in January of 2002, more than five months before *Ring v. Arizona* was decided. The Florida Supreme Court denied the *Apprendi* claim in a successive habeas petition on the merits:

We have consistently rejected similar claims and have decided this issue adversely to Bottoson's position. *See King v. State*, 808 So.2d 1237 (Fla.2002), *stay granted*, 534 U.S. 1118, 122 S.Ct. 932, 151 L.Ed.2d 894 (2002); *Mills v. Moore*, 786 So.2d 532, 536-537 (Fla.2001), *cert. denied*, 532 U.S. 1015, 121 S.Ct. 1752, 149 L.Ed.2d 673 (2001); see also *Brown v. Moore*, 800 So.2d 223 (Fla.2001) (rejecting claims that aggravating circumstances are required to be charged in indictment, submitted to jury during guilt phase, and found by unanimous jury verdict); *Mann v. Moore*, 794 So.2d 595, 599 (Fla.2001). Thus, we conclude that Bottoson is not entitled to relief on this claim.

*Bottoson v. State*, 813 So. 2d 31, 36 (Fla. 2002).<sup>114</sup>

17. After *Ring v. Arizona* issued, Bottoson filed another successive habeas petition in the Florida Supreme Court on July 5, 2002. The Florida Supreme Court's denial of this petition on October 24, 2002, was the Florida Supreme Court's opinion or order addressing a *Ring* claim, which it denied on the merits even though it was presented in a successive habeas petition. That October 24, 2002, ruling was specifically found in *Hurst v. State* as one that had been abrogated by *Hurst v. Florida*. The merits decision in *Bottoson* is no longer good law. Had the Florida Supreme Court properly applied the Sixth Amendment principle set forth in *Apprendi* and in

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<sup>14</sup> The decision in *Mills v. Moore* was in the context of a successive habeas petition file in the Florida Supreme Court raising an *Apprendi* challenge to a death sentence that became final in 1985. *Mills v. State*, 476 So.2d 172, 174-75 (Fla.1985). *Mills v. Moore* rejected the *Apprendi* claim on the merits finding that death was authorized as a sentence upon the conviction of first degree murder and that the *Apprendi* challenge had been rejected in *Walton v. Arizona* which had not been overturned. *Mills v. Moore*, 786 So. 2d at 538. The ruling in *Mills* was clearly abrogated by *Hurst v. Florida*.

The denial of a successive habeas petition in *Mills v. Moore* was treated as the Florida Supreme Court's definitive rejection of challenges to Florida's capital sentencing scheme on the basis of *Apprendi*. *See Hurst v. State*, 819 So. 2d 689, 703 (Fla. 2002) ("this Court finds no reason to revisit the Mills decision.").

*Ring*, it would have found Bottoson’s claim meritorious, and he would not have been executed.<sup>15</sup>

18. Given that Mr. Duckett’s habeas petition and 3.850 appeal were denied on the merits on the basis of the line of cases that began with the wrongly decided *Bottoson v. Moore*, it is fundamental unfair to not apply *Hurst v. Florida* to his case and consider whether under *Hurst v. Florida* he prevails on his 2002 habeas petition.

19. But the concept of fundamental fairness has another way of applying and requiring that Mr. Duckett receive the benefit of *Hurst*. In *Mosley*, the Florida Supreme Court referenced as significant “the unique jurisprudential conundrum caused by the United States Supreme Court’s delay in reviewing the constitutionality of Florida’s capital sentencing scheme in light of *Ring*.” *Mosley*, 2016 WL 7406506 at \*18. While this observation seems to place the blame the passage of considerable time between *Ring* and *Hurst*, it is also true that the Florida Supreme Court first in *Mills v. Moore* and then in *Bottoson v. Moore* failed to recognize the obvious, *i.e.* that the rule of law set forth in *Spaziano v. Florida* and *Hildwin v. Florida* “was wrong, and irreconcilable with *Apprendi*.”<sup>16</sup> *Hurst v. Florida*, 136 S. Ct. at 623. In 2001, this

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<sup>15</sup> Following the issuance of *Hitchcock v. Dugger*, the Florida Supreme Court indicated that if *Hitchcock* was a retroactive change in Florida law, it “a sufficient change in the law that potentially affects a class of petitioners, including Thompson, to defeat the claim of a procedural default.” *Thompson v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987) See *Mikenas v. Dugger*, 519 So. 2d 601, 602 (Fla. 1988) (“Mikenas is not barred from raising this claim since *Hitchcock* represented a sufficient change in the law to defeat the application of procedural default.”); *Combs v. State*, 525 So. 2d 853, 855 (Fla. 1988) (“the United States Supreme Court’s consideration of Florida’s capital sentencing statute in *Hitchcock* represents a sufficient change in the law to defeat the argument that Combs should be denied relief on the basis of a procedural default.”). Thus if the Florida Supreme Court in *Bottoson* had concluded that *Ring* applied in Florida and changed Florida law, the decisions in *Thompson*, *Mikenas*, and *Combs* show that *Ring* would have applied retroactively in the same fashion that *Hitchcock* did. See *Johnson v. State*, 904 So. 2d 400, 416 (Fla. 2005) (Lewis, J., concurring in result only) (“Based on language in both *Apprendi* and *Ring*, these decisions initially appeared to implicate constitutional interests of the highest order and seemed to go to the very heart of the Sixth Amendment. And yet, two years after *Ring* was decided, the Supreme Court appears to have somewhat altered the foundation.”).

<sup>16</sup> The decision by the Florida Supreme Court in *Johnson v. State*, 904 So. 2d at 412, cannot be blamed on the US Supreme Court. There while recognizing that a majority of the

very point was made by the petitioner in *Mills v. Moore*, but was rejected by the Florida Supreme Court relying on US Supreme Court's failure to specifically overturn *Walton v. Arizona*. Then the US Supreme Court did overrule *Walton v. Arizona* in *Ring v. Arizona*. See *Hurst v. Florida*, 136 S. Ct. at 623 ("In *Ring*, we held that another pre-*Apprendi* decision—*Walton*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511—could not 'survive the reasoning of *Apprendi*.' 536 U.S., at 603, 122 S.Ct. 2428. *Walton*, for its part, was a mere application of *Hildwin*'s holding to Arizona's capital sentencing scheme."). With the basis of the Florida Supreme Court's reasoning in *Mills v. Moore* blown up, Bottoson argued to that court that it needed to recognize that *Hildwin* could not and did not survive the reasoning of *Apprendi* and *Ring*.<sup>17</sup> But still the Florida Supreme Court failed to acknowledge that when *Walton* was overruled, *Spaziano* and *Hildwin* were "irreconcilable with *Apprendi*." As a result, the unconstitutionality of Florida's capital sentencing scheme was allowed to fester.<sup>18</sup> While the Florida Supreme Court defends itself by

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Florida Supreme Court had relied on the prior decisions by the US Supreme Court upholding Florida's capital sentencing statute as constitutional to reject *Ring* challenges, *Johnson* addressed *Ring*'s retroactivity without the understanding of *Ring* that *Hurst v. Florida* provided. *Johnson*, 904 So. 2d at 406 ("We could easily dispose of Johnson's *Ring* claim in the same way because his death sentence was supported by an aggravating factor found by a jury beyond a reasonable doubt—namely, his prior convictions of two violent felonies."). *Johnson*'s retroactivity analysis of *Ring* was, as the opinion itself acknowledged, unnecessary. Worse, as recognized in *Asay v. State* and *Mosley v. State*, the analysis was erroneous because it was based upon a misreading of *Apprendi* and *Ring*. *Asay*, 2016WL 7406538 at \*8 ("because we were still bound by *Hildwin*, we did not properly analyze the purpose of the new rule in *Ring*, which was to protect the fundamental right to a jury in determining each element of an offense"); *Mosley*, 2016 WL offline7406506 at \*20 (quoting *Asay*'s statements regarding *Johnson*). The decision in *Johnson* has now been shown to have rested on a misreading of *Apprendi* and *Ring*.

<sup>17</sup> Justice Pariente did write that "in the United States Supreme Court's opinion in *Ring*, the Court clearly and unequivocally held that *Apprendi* did apply to capital cases, thus proving our opinion in *Mills* wrong." *Bottoson v. State*, 824 So. 2d 115, 118 (Fla. 2002) (Pariente, J., concurring in order granting a stay of execution).

<sup>18</sup> The Florida Supreme Court in *Hurst v. State* referenced this festering: "Since the issuance of *Ring* almost fifteen years ago, many death row inmates have raised *Ring* claims in this Court and have been repeatedly rebuffed based on pre-*Ring* precedent that held the jury was not required to make the critical findings necessary for imposition of the death penalty." *Hurst v. State*, 202 So. 3d at 62. What the court overlooked is the fact that *Bottoson* and *King* were wrongly decided. Not only were those individuals executed because the Florida Supreme Court

faulting the US Supreme Court, it is clear that the US Supreme Court in *Hurst v. Florida* implies that the constitutional problem was obvious. The resulting situation is akin to that in *Harris v. Dugger*, 874 F.2d 756, 763 (11<sup>th</sup> Cir. 1989). There, constitutionally ineffective assistance was found because: “counsel's failure to present or investigate mitigation evidence resulted not from an informed judgment, but from neglect. Each lawyer testified that he believed that the other was responsible for preparing the penalty phase of this case.” While the courts can dispute whose job it was to recognize the infirmity in the Florida’s statute and fix it, the one thing that is clear that Mr. Duckett did what he could, he filed a habeas petition even though this Court had rejected the *Apprendi* claim as meritless in *Mills v. Moore* and the *Ring* claim as meritless in *Bottoson v. Moore* and countless others.<sup>19</sup> Fundamental fairness warrants the application of *Hurst v. Florida* to Mr. Duckett’s 2002 habeas petition.

20. Fundamental fairness also requires Mr. Duckett to get the benefit of *Hurst v. Florida* in light of the decision in *Mosley v. State*: “Because Florida's capital sentencing statute has essentially been unconstitutional since *Ring* in 2002, fairness strongly favors applying *Hurst*, retroactively to that time.” *Mosley*, 2016 WL 7406506 at \*23. Apparently under *Mosley*, the decision in *Hurst v. Florida* should be treated as the governing law as of the issuance of *Ring v. Arizona* on June 24, 2002. *Mosley* noted that “in holding our statute unconstitutional, the United States Supreme Court [in *Hurst v. Florida*] applied the exact reasoning of *Ring* to Florida's death penalty sentencing scheme.” 2016 WL 7406506 at \*17. “Holding *Hurst* retroactive to when the

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rejected their successive habeas petitions raising *Apprendi* and *Ring* claims as meritless, other collateral challenges based on *Ring* made by other death row inmates were denied on the basis of *Bottoson* and *King*. The Florida Supreme Court did not just reject direct appeals on the basis of its holding in *Bottoson*, it erroneously rejected collateral challenges as well.

<sup>19</sup> At the time of his 1998 trial, Mr. Duckett had been told that *Hildwin v. Florida* was the law and that he was not entitled to a unanimous jury to determine all the facts necessary to impose a death sentence, a unanimous jury that was instructed that each individual juror had the power to preclude a death sentence by deciding to extend mercy and thus each individual juror bore responsibility should a death sentence be imposed.

United States Supreme Court decided *Ring* would not destroy the stability of the law, nor would it render punishments uncertain and ineffectual.” 2016 WL 7406506 at \*23.<sup>20</sup> But if *Hurst v. Florida* is to be treated as the law effective June 24, 2002, it must apply across the board to direct appeal and collateral rulings alike. Mr. Duckett’s 2002 habeas petition and his 2002 appeal and the *Ring* claims pled therein were denied on the merits on October 6, 2005. Since *Mosley* concludes that *Hurst v. Florida* applies as governing Florida law beginning June 24, 2002, fundamental fairness requires it to be applied to Mr. Duckett’s habeas petition.

21. Another aspect of fundamental fairness analysis requires the retroactive application of *Hurst v. Florida* to Mr. Duckett because the enactment of Chapter 2016-13 and the decision in *Perry v. State* demonstrate that capital defendants charged with murders that were committed long before *Hurst v. Florida* issued or Chapter 2016-13 was enacted will have *Hurst v. Florida* govern the capital sentencing procedures applicable at a retrial or resentencing occurring in the future, as well as those that have already occurred if a resulting death sentence

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<sup>20</sup> In *Asay v. State*, 2016 WL 7406538 at \*22, Justice Lewis wrote:

As Justice Perry noted in his dissent, there is no salient difference between June 23 and June 24, 2002—the days before and after the case name *Ring* arrived. See Perry, J., dissenting op. at ——. However, that is where the majority opinion draws its determinative, albeit arbitrary, line. As a result, Florida will treat similarly situated defendants differently—here, the difference between life and death—for potentially the simple reason of one defendant's docket delay. Vindication of these constitutional rights cannot be reduced to either fatal or fortuitous accidents of timing.

Justice Perry in his dissent in *Asay* wrote:

I would find that *Hurst v. Florida* applies retroactively, period. I therefore would not limit its application to cases final after June 24, 2002, when the United States Supreme Court issued its decision in *Ring*. I can find no support in the jurisprudence of this Court where we have previously determined that a case is only retroactive to a date certain in time. Indeed, retroactivity is a binary—either something is retroactive, has effect on the past, or it is not.

2016 WL 7406538 at \*27 (Perry, J., dissenting).

was not final when *Hurst v. Florida* issued on January 12, 2016. For example, Douglas Ray Meeks will receive the benefit of *Hurst v. Florida* and the new Florida law when he is sentenced on two first degree murder convictions for two 1974 homicides. Meeks had separate trials on each homicide and was convicted at both trials of first degree murder. He received two death sentences. Both were affirmed in his direct appeals. *Meeks v. State*, 336 So. 2d 1142 (Fla. 1976); *Meeks v. State*, 339 So. 2d 186 (Fla. 1976). However, after *Hitchcock v. Dugger*, 481 U.S. 393 (1987), issued, the Florida Supreme Court ordered an evidentiary hearing on Meeks' claims that *Hitchcock* error infected both death sentences. *Meeks v. Dugger*, 576 So. 2d 713 (Fla. 1991). Subsequently, the State stipulated that Meeks was entitled to new penalty phases due to the *Hitchcock* error. *Meeks v. Moore*, 216 F.3d 951, 959 (11<sup>th</sup> Cir. 2000) ("In its order, the [district] court observed that 'the State of Florida stipulated that Meeks would be provided with a new penalty phase in both cases.'"). Because those new penalty phases have yet to occur, *Hurst v. Florida* and the new Florida law will govern the sentencing procedure in both cases. Even though Meeks was convicted of homicides that were committed in 1974, he can only get death sentences now if his juries unanimously make the requisite findings of fact and unanimously recommend a death sentence.

22. As another example, Jacob Dougan was convicted of a 1974 homicide and was then sentenced to death. His conviction and death sentence were affirmed in his first direct appeal which was a joint appeal with his co-defendant (Barclay) and was reported in the name of the co-defendant. *Barclay v. State*, 343 So. 2d 1266 (Fla. 1977). Subsequently, the Florida Supreme Court vacated the death sentence because of error under *Gardner v. Florida*, 430 U.S. 349 (1977), and remanded Barclay's and Dougan's cases for judge resentencing. *Barclay v. State*, 362 So. 2d 657 (1978). After a death sentence was again imposed, it was affirmed in Dougan's second direct appeal. *Dougan v. State*, 398 So. 2d 439 (Fla. 1981). Later on the basis

of appellate counsel's ineffective assistance in that direct appeal, the Florida Supreme Court granted Dougan habeas relief and ordered a third direct appeal. *Dougan v. Wainwright*, 448 So. 2d 1005 (Fla. 1984). In the third direct appeal, Dougan's conviction was affirmed, but his death sentence was vacated and a jury resentencing was ordered. *Dougan v. State*, 470 So. 2d 697 (Fla. 1985). After another death sentence was imposed, the death sentence was affirmed in Dougan's fourth direct appeal. *Dougan v. State*, 595 So. 2d 1 (Fla. 1992). Thereafter, Dougan filed a 3.850 motion in the circuit court where it remained pending for some time. In 2013 after an evidentiary hearing was conducted, the trial court vacated Dougan's conviction and ordered a new trial. In *State v. Dougan*, \_\_\_ So. 3d \_\_\_, 2016 WL 6137285 (Fla. Oct. 20, 2016), the Florida Supreme Court affirmed the order granting Dougan a new trial. *Hurst v. Florida* will govern at the retrial and as to the sentencing procedure if a first degree murder conviction is returned. As with Meeks, Dougan will be eligible for a death sentence for the 1974 murder only if a unanimous jury makes the necessary findings of fact and unanimously recommends a death sentence.

23. Another example is John Hardwick who was charged with a 1984 homicide. He was convicted and sentenced to death. His conviction and death sentence were affirmed in his direct appeal. *Hardwick v. State*, 521 So. 2d 1071 (Fla. 1988). Later, the Florida Supreme Court affirmed the denial of Hardwick's 3.850 motion, while also denying Hardwick's habeas petition. *Hardwick v. Dugger*, 648 So. 2d 100 (Fla. 1994). Hardwick then filed for habeas relief in federal court. After the district court granted habeas relief and ordered the death sentence vacated and a new penalty phase to be conducted due to trial counsel's ineffective assistance, the Eleventh Circuit affirmed the grant of habeas relief. *Hardwick v. Sec'y Fla. Dep't of Corr.*, 803 F.3d 541 (11<sup>th</sup> Cir. 2015). Currently, Hardwick's case is pending in the trial court for a resentencing. As a result, *Hurst v. Florida* and the new Florida law will govern the sentencing procedure and the question of whether Hardwick can receive a death sentence for a 1984 murder. As with Meeks

and Dougan, Hardwick will be eligible for a death sentence only if his jury unanimously makes the requisite findings of fact and unanimously recommends a death sentence.

24. Yet another example is Paul Hildwin who was charged and convicted of a 1985 homicide. After a death sentence was imposed, his conviction and death sentence were affirmed in his first direct appeal. *Hildwin v. State*, 531 So. 2d 124 (Fla. 1988). See *Hildwin v. Florida*, 490 U.S. 638 (1989). In collateral proceedings, a resentencing was ordered. *Hildwin v. Dugger*, 654 So. 2d 107 (Fla. 1995). After the imposition of another death sentence, a second direct appeal resulted in another affirmance. *Hildwin v. State*, 727 So. 2d 193 (Fla. 1998). In the course of new collateral proceedings, Hildwin's conviction was vacated by the Florida Supreme Court and a new trial ordered. *Hildwin v. State*, 141 So. 3d 1178 (Fla. 2014). Currently, Hildwin is awaiting his new trial. At that trial on a first degree murder charge for a 1985 homicide, *Hurst v. Florida* and the resulting new Florida law will govern at the retrial and as to the sentencing procedure if a first degree murder conviction is returned on the 1985 homicide. As with Meeks, Dougan, and Hardwick, he will be eligible for a death sentence only if his jury unanimously makes the requisite findings of fact and unanimously recommends a death sentence.

25. Still another example is Ana Cardona who was charged with a 1990 homicide. After she received a death sentence, her conviction and death sentence were affirmed on direct appeal. *Cardona v. State*, 641 So. 2d 361 (Fla. 1994), *cert denied* 513 U.S. 1160 (1995). Later, her conviction was vacated and a new trial ordered by the Florida Supreme Court during her appeal from the denial of 3.851 relief. *Cardona v. State*, 826 So. 2d 968 (Fla. 2002). After she was again convicted and again sentenced to death, the conviction and death sentence were again vacated and another new trial ordered by the Florida Supreme Court in Cardona's second direct appeal. *Cardona v. State*, 185 So. 3d 514 (Fla. 2016). Currently, Cardona's case is pending in the circuit court as she awaits her new trial. At that trial on a first degree murder charge for a 1985

homicide, *Hurst v. Florida* and the resulting new Florida law will govern at the retrial and as to the sentencing procedure if a first degree murder conviction is returned on the 1985 homicide. As with Meeks, Dougan, Hardwick, and Hildwin, Cardona will be eligible for a death sentence only if her jury unanimously makes the requisite findings of fact and unanimously recommends a death sentence.

26. There are also cases in which a capital defendant has had a death sentence vacated in collateral proceedings, a resentencing ordered, and another death sentence imposed which was pending on a direct appeal when *Hurst v. Florida* issued. In those circumstances, the capital defendant will receive the benefit of *Hurst v. Florida* because a final death sentence was not in place when *Hurst* issued. For example, Paul Beasley Johnson was convicted of first degree murder for three 1981 homicides and sentenced to death. His convictions and death sentences were affirmed on direct appeal. *Johnson v. State*, 483 So. 2d 774 (Fla. 1983). However, habeas relief was granted on an appellate counsel ineffectiveness claim, and a new trial was ordered. *Johnson v. Wainwright*, 498 So. 2d 938 (Fla. 1986). His subsequent convictions and death sentences were affirmed in his second direct appeal. *Johnson v. State*, 608 So. 2d 4 (Fla. 1992). Later, the denial of 3.850 relief was affirmed. *Johnson v. State*, 769 So. 2d 990 (Fla. 2000). Then, habeas relief was denied. *Johnson v. Moore*, 837 So. 2d 343 (Fla. 2002). Next, the denial of a successive 3.851 motion was affirmed. *Johnson v. State*, 933 So. 2d 1153 (Fla. 2006). But then in 2010, the denial of yet another successive 3.851 motion was reversed, Johnson's death sentences were vacated, and a resentencing was ordered. *Johnson v. State*, 44 So. 3d 51 (Fla. 2010). Though Johnson again received death sentences, his third direct appeal was pending before the Florida Supreme Court when *Hurst v. Florida* issued on January 12, 2016. This means that Johnson will receive the benefit of *Hurst* and the resulting new Florida law even though the 1981 murders that he was convicted of were committed 35 years before the decision in *Hurst*

was rendered.

27. With Meeks, Dougan, Hardwick, Hildwin, Cardona and Johnson all entitled to the benefit of *Hurst v. Florida* and the resulting new Florida law for murders committed as early as 1974, ensuring uniformity and fundamental fairness in circumstances in Florida's application of the death penalty requires the retroactive application of *Hurst* and the resulting new Florida law. Indeed, the logic of *Griffith v. Kentucky*, 479 U.S. 314, 327-28 (1987), is applicable:

Justice POWELL has pointed out that it “hardly comports with the ideal of ‘administration of justice with an even hand,’ ” when “one chance beneficiary—the lucky individual whose case was chosen as the occasion for announcing the new principle—enjoys retroactive application, while others similarly situated have their claims adjudicated under the old doctrine.” *Hankerson v. North Carolina*, 432 U.S. 233, 247, 97 S.Ct. 2339, 2347, 53 L.Ed.2d 306 (1977) (opinion concurring in judgment), quoting *Desist v. United States*, 394 U.S., at 255, 89 S.Ct., at 1037 (Douglas, J., dissenting). See also *Michigan v. Payne*, 412 U.S. 47, 60, 93 S.Ct. 1966, 1973, 36 L.Ed.2d 736 (1973) (MARSHALL, J., dissenting) (“Different treatment of two cases is justified under our Constitution only when the cases differ in some respect relevant to the different treatment”). **The fact that the new rule may constitute a clear break with the past has no bearing on the “actual inequity that results” when only one of many similarly situated defendants receives the benefit of the new rule.** *United States v. Johnson*, 457 U.S., at 556, n. 16, 102 S.Ct., at 2590, n. 16 (emphasis omitted).

We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a “clear break” with the past.

(Emphasis added).<sup>25</sup> “[S]elective application of new rules violates the principle of treating

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<sup>25</sup>Justice Harlan in his dissent in *Desist v. United States* wrote:

We do not release a criminal from jail because we like to do so, or because we think it wise to do so, but only because the government has offended constitutional principle in the conduct of his case. And when another similarly situated defendant comes before us, we must grant the same relief or give a principled reason for acting differently. We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a ‘new’ rule of constitutional law.

394 U.S. at 258-59.

similarly situated defendants the same.” *Id.* at 323. While Mr. Duckett’s death sentence was final when *Hurst v. Florida* issued, numerous other capital defendant’s death sentences had been final, including Hurst’s, when good fortune and good timing meant that at the moment that *Hurst v. Florida* those defendants were free of the shackles of finality.<sup>21</sup> Fundamental fairness requires that Mr. Duckett receive the benefit of the change in law. *See Desist v. United States*, 394 U.S., at 258-259 (Harlan, J., dissenting) (“[W]hen another similarly situated defendant comes before us, we must grant the same relief or give a principled reason for acting differently. We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a ‘new’ rule of constitutional law.”).

28. Moreover, in *Hurst v. State*, the Florida Supreme Court noted that “[i]n requiring jury unanimity in [the statutorily required fact] findings and in [the jury’s] final recommendation if death is to be imposed, we are cognizant of significant benefits that will further the administration of justice.” 202 So. 3d at 58. The Florida Supreme Court specifically noted that “the requirement of unanimity in capital jury findings will help to ensure the heightened level of protection necessary for a defendant who stands to lose his life as a penalty.” *Id.* at 59. Thus, the new Florida law will enhance the reliability of the death sentences that juries unanimously authorize. Clearly, uniformity and fairness require that Mr. Duckett be given the benefit of *Hurst v. Florida* and the resulting new Florida law. After all, “death is a different kind of punishment from any other that may be imposed in this country,” and “[i]t is of vital importance . . . that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice . . .

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<sup>21</sup> In *Witt v. State*, 387 So. 2d 922, 926 (Fla. 1980), the Florida Supreme Court noted the Eighth Amendment required extra weight to be given to “individual fairness because of the possible imposition of a penalty as unredeeming as death.” In a footnote, the Florida Supreme Court wrote: “It bears mention that the constitutionality of Florida’s capital sentencing procedures, §921.141, Florida Statutes (1979), is contingent upon this Court’s role of reviewing

. .” *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977).

29. The procedure employed when Mr. Duckett received a death sentence deprived him of his Sixth Amendment rights under *Hurst v. Florida* and the resulting new Florida law requiring the jury’s verdict authorizing a death sentence to be unanimous. In the wake of *Hurst v. Florida*, the Florida Supreme Court has held that each juror is free to vote for a life sentence even if the requisite facts have been found by the jury unanimously. *Hurst v. State*, 202 So. 3d at 58, 62, n. 18. Individual jurors may decide to exercise “mercy” and vote for a life sentence and in so doing preclude the imposition of a death sentence. *Perry v. State*, 2016 WL 6036982 at \*8.

30. Fundamental fairness also requires that Mr. Duckett receive the benefit of the change in law because of the unanimity requirement that the Florida Supreme Court found was necessitated by the interaction of *Hurst v. Florida* and Florida law requiring unanimity on the elements of a crime.

We also conclude that, just as elements of a crime must be found unanimously by a Florida jury, all these findings necessary for the jury to essentially convict a defendant of capital murder—thus allowing imposition of the death penalty—are also elements that must be found unanimously by the jury. Thus, **we hold that in addition to unanimously finding the existence of any aggravating factor, the jury must also unanimously find that the aggravating factors are sufficient for the imposition of death and unanimously find that the aggravating factors outweigh the mitigation before a sentence of death may be considered by the judge.** This holding is founded upon the Florida Constitution and Florida’s long history of requiring jury unanimity in finding all the elements of the offense to be proven; and it gives effect to our precedent that the “final decision in the weighing process must be supported by ‘sufficient competent evidence in the record.’ ” [Citation] As we explain, we also find that **in order for a death sentence to be imposed, the jury’s recommendation for death must be unanimous.** This recommendation is tantamount to the jury’s verdict in the sentencing phase of trial; and historically, and under explicit Florida law, jury verdicts are required to be unanimous.

*Hurst v. State*, 202 So. 3d at 53-54. The Florida Supreme Court explained that this unanimity

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each case to ensure uniformity in the imposition of the death penalty.” *Id.* at 926 n.7.

requirement will enhance the reliability of any death sentence that results:

In requiring jury unanimity in these findings and in its final recommendation if death is to be imposed, we are cognizant of significant benefits that will further the administration of justice. Supreme Court Justice Anthony Kennedy, while a judge on the Ninth Circuit Court of Appeals, noted the salutary benefits of the unanimity requirement on jury deliberations as follows:

The dynamics of the jury process are such that often only one or two members express doubt as to [the] view held by a majority at the outset of deliberations. A rule which insists on unanimity furthers the deliberative process by requiring the minority view to be examined and, if possible, accepted or rejected by the entire jury. The requirement of jury unanimity thus has a precise effect on the fact-finding process, one which gives particular significance and conclusiveness to the jury's verdict.

*United States v. Lopez*, 581 F.2d 1338, 1341 (9th Cir.1978). That court further noted that “[b]oth the defendant and society can place special confidence in a unanimous verdict.” *Id.* Comparing the unanimous jury requirement to the requirement for proof beyond a reasonable doubt, the Fifth Circuit Court of Appeals stated, “the unanimous jury requirement ‘impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.’” *United States v. Gipson*, 553 F.2d 453, 457 (5th Cir.1977).

*Hurst v. State*, 202 So. 3d at 58.

We also note that the requirement of unanimity in capital jury findings will help to ensure the heightened level of protection necessary for a defendant who stands to lose his life as a penalty.

*Id.* at 59.<sup>22</sup> Fundamental fairness requires Mr. Duckett to receive the benefit of a change in law

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<sup>22</sup> The unanimity requirement set forth in *Hurst v. State* significantly distinguishes the change in Florida law brought by *Hurst v. Florida* from the change in Arizona law that accompanied *Ring v. Arizona*. The change in Arizona was simply going from judge sentencing to jury sentencing. *Schriro v. Summerlin*, 542 U.S. 348, 356 (2004) (“When so many presumably reasonable minds continue to disagree over whether juries are better factfinders at all, we cannot confidently say that judicial factfinding seriously diminishes accuracy.”). The Florida Supreme Court specifically found that going from a majority jury recommendation that was merely advisory to requiring a unanimous jury death recommendation to even authorize a judge to consider the imposition of a death sentence, enhanced reliability. *Hurst v. State*, 202 So. 3d at 63 (“In a capital case, the gravity of the proceeding and the concomitant juror responsibility weigh even more heavily, and it can be presumed that the penalty phase jurors will take special care to understand and follow the law.”). See *Caldwell v. Mississippi*, 472 U.S. at 341 (“This Court has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its “truly

when the purpose of the change is to meet the heightened level of reliability constitutionally required. *See Teague v. Lane*, 489 U.S. 288, 312 (1989) (“In *Desist*, Justice Harlan had reasoned that one of the two principal functions of habeas corpus was “to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted,” and concluded “from this that **all ‘new’ constitutional rules which significantly improve the pre-existing fact-finding procedures are to be retroactively applied on habeas.**” 394 U.S., at 262, 89 S.Ct., at 1041.”) (emphasis added).

31. Mr. Duckett is also entitled to the benefit of the change in law resulting from *Hurst v. Florida* when the *Witt v. State* balancing is applied to his case individually. The finality of the denial of his habeas petition based on *Ring* was after the issuance of *Ring*. The denial of his direct appeal was final closer in time to *Ring*, thus granting him the benefit would have less impact. The finality date was also closer to the dates that *Apprendi v. New Jersey* and *Jones v. United States* issued. The unique circumstances of Mr. Duckett’s death sentence tip the *Witt* the balance of the *Witt* factors in his favor, particularly given the prosecutor’s and judge’s repeated admonitions to the jury that they were only responsible for recommending death to the judge and that the judge was the actual sentencer. These statements relieved the jury (already told that its role was just an advisory one) of any sense of responsibility for the imposition of a death sentence and stripped the individual jurors of their right to vote to be merciful and in favor of a life sentence.

32. Applying *Hurst v. Florida* to Mr. Duckett’s case and his 2002 3.850 appeal and habeas petition shows that his death sentence cannot stand. In *Hurst v. State*, the Florida Supreme Court held that Sixth Amendment error under *Hurst v. Florida* would be subject to a

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awesome responsibility.” In this case, the State sought to minimize the jury's sense of

strict harmless error test in which “the State bears an extremely heavy burden” of proving beyond a reasonable doubt that “the jury’s failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to Hurst’s death sentence in this case.” 202 So. 3d at 68. *See Mosley v. State*, 2016 WL 7406506 at \*25-26 (applying the *Hurst v. State* harmless error analysis when *Hurst v. Florida* is retroactively applied in collateral proceedings); *Johnson v. State*, 44 So. 3d 51, 69 (Fla. 2010) (as to constitutional error established in a successive 3.851 motion, death sentence was vacated because “the State has not met its burden of showing that Smith’s testimony was harmless beyond a reasonable doubt.”); *James v. State*, 615 So. 2d 668, 669 (Fla. 1993) (in collateral appeal, the Florida Supreme Court held “[w]e cannot say beyond a reasonable doubt, however, that the invalid instruction did not affect the jury’s consideration or that its recommendation would have been the same if the requested expanded instruction had been given.”); *Way v. Dugger*, 568 So. 2d 1263, 1266 (Fla. 1990) (in collateral appeal, the Florida Supreme Court held: “we are not convinced that the error was harmless beyond a reasonable doubt.”); *Hall v. State*, 541 So. 2d 1125, 1128 (Fla. 1989) (*Hitchcock* error presented in collateral proceedings was subject to the harmless beyond a reasonable doubt standard); *Mikenas v. Dugger*, 519 So. 2d 601, 602 (Fla. 1988) (in a collateral appeal, the court held: “we cannot say beyond a reasonable doubt that had the jury known that nonstatutory mitigating evidence could be considered, it would not have recommended life rather than death.”). In other words, the State must prove beyond a reasonable doubt that the jury’s failure to unanimously find not only the existence of each aggravating factor, that the aggravating factors are sufficient, and that the aggravating factors outweigh the mitigating circumstances had no effect on the death recommendations. The State must also show beyond a reasonable doubt that no properly

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responsibility for determining the appropriateness of death.”).

instructed juror would have dispensed mercy to Mr. Duckett by voting for a life sentence. In light of the fact that four jurors in Mr. Duckett's case did vote for a life sentence, the State cannot make this showing. All of these considerations must be factored into any evaluation of the reliability of Mr. Duckett's death sentence and the likely outcome if a resentencing were conducted in conformity with Florida's new capital sentencing procedure.

33. The Sixth Amendment error under *Hurst v. Florida* cannot be proven by the State to be harmless beyond a reasonable doubt in Mr. Duckett's case. A harmless error analysis must be performed on a case-by-case basis, and there is no one-size fits all analysis; rather, there must be a "detailed explanation based on the record" supporting a finding of harmless error. *See Clemons v. Mississippi*, 494 U.S. 738, 753 (1990). *Accord Sochor v. Florida*, 504 U.S. 527, 540 (1992).

34. Mr. Duckett's penalty phase jury returned a 8-4 death recommendation that did not make any findings of fact. The only documents returned by the jury were the completed verdict forms showing the recommendation by a vote of 8 to 4 that death sentence be imposed. In imposing death, the judge found two aggravating factors, one statutory mitigating circumstance and non-statutory mitigation regarding Mr. Duckett's family and education.

35. In the wake of *Hurst v. Florida* and the resulting new Florida law, a Florida jury's unanimous death recommendation is necessary in order to authorize the imposition of a death sentence. After *Hurst v. Florida*, the jury's penalty phase verdict is not advisory. The jury does bear responsibility for a resulting death sentence. Each juror has the power to exercise mercy and require the imposition of a life sentence. Accordingly, the jury must be correctly instructed as to its sentencing responsibility under *Caldwell v. Mississippi*, 472 U.S. 320 (1985). In *Hurst v. Florida*, the Court wrote that "[t]he State cannot now treat the advisory

recommendation by the jury as a necessary factual finding that *Ring* requires.” 136 S. Ct. at 622. This means that post-*Hurst* the individual jurors must know that they each will bear the responsibility for a death sentence resulting in a defendant’s execution since each juror possesses the power to require the imposition of a life sentence simply by voting against a death recommendation.

36. Previous to *Hurst v. Florida* and previous to Mr. Duckett’s trial, the Florida Supreme Court had held that it was proper to inform a penalty phase jury that its role was advisory and that it bore no responsibility for the sentencing decision. In *Aldrich v. State*, 503 So. 2d 1257, 1259 (Fla. 1987), the Florida Supreme Court found that it was proper to instruct a jury that the “[f]inal decision as to what punishment shall be imposed rests solely and only with the Judge of this Court. However, the law requires that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed upon the defendant.” In *Combs v. State*, 525 So. 2d 853, 857 (Fla. 1988), the Florida Supreme Court found that it did not violate *Caldwell v. Mississippi* to advise the jury that its role was advisory and that sentencing responsibility rested with the judge because “under our process, the court is the final decision-maker and the sentencer-not the jury.”<sup>23</sup> See *Grossman v. State*, 525 So. 2d 833, 839 (Fla. 1988) (“ in Florida: the judge is the sentencing authority and the jury's role is merely advisory. Thus, *Caldwell*, which addressed the denigration of the jury acting as a sentencer is clearly distinguishable”); *Sochor v. State*, 619 So. 2d 285, 291-92 9 (Fla. 1993) (Florida’s standard jury instructions were

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<sup>23</sup> Justice Shaw in a special concurring opinion in *Combs* wrote: “[t]he question which concerns me is whether the *Tedder* rule is still viable in view ... *Caldwell*.” *Combs*, 525 So. 2d at 859 (Shaw, J., specially concurring) (footnote omitted). Justice Shaw explained: “The question raised by *Caldwell* as it applies to Florida's system is not whether the jury role is denigrated by telling it of its advisory role; the question we should be asking is whether *Tedder* denigrates the role of the actual sentencer, the judge. The *Tedder* rule raises doubt as to whether the jury or judge is the de facto sentencer.” *Id.* at 859-60.

compliant with *Caldwell v. Mississippi* as explained in *Combs* and *Grossman*).

37. In 1992 in *Espinosa v. Florida*, 505 U.S. 1079 (1992), the US Supreme Court examined Florida’s capital sentencing scheme in the course of considering whether the jury instruction on HAC was Eighth Amendment compliant. The State argued that “there was no need to instruct the jury with the specificity our cases have required where the jury was the final sentencing authority, because, in the Florida scheme, the jury is not ‘the sentencer’ for Eighth Amendment purposes.” *Id.* at 1081. The Supreme Court rejected the State’s argument and concluded that the jury instruction on HAC had to be Eighth Amendment compliant because “Florida has essentially split the weighing process in two.” *Id.* at 1082. Yet Florida’s standard jury instructions did not adjust.

38. The jury was told twice by the Court in penalty phase: “**Final decision as to what the punishment shall be rests solely with the Judge of this Court**; however, the law requires that you, the Jury, render to the Court an **advisory** sentence as to what punishment should be imposed upon the Defendant.” (R. 2062, 2028)(emphasis added). Additionally, the court and prosecutor in Mr. Duckett’s frequently made statements throughout the proceedings about the difference between the jurors' responsibility at the guilt-innocence phase of the trial and their non-responsibility at the sentencing phase, minimizing the role the jury played in the sentencing (R. 75, 90, 92, 94, 95, 100, 117, 127, 132, 134, 201, 202, 206, 211, 212, 245, 247, 264, 265-66, 268-69, 335, 360, 361, 363, 365, 377, 399, 432, 441, 442, 443, 460).<sup>24</sup>

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<sup>24</sup> For example, during voir dire the prosecutor explained to one juror:

[D]o you understand when I am talking about the penalty phase and your recommendation to the Judge, it is just that, a recommendation. You understand that Judge Lockett is the one that does the sentencing and *you are not responsible for that.*

39. As was explained in *Caldwell*, jurors must feel the weight of their sentencing responsibility if the defendant is ultimately executed after no juror exercised his or her power to preclude the a death sentence. Indeed because the jury’s sense of responsibility was inaccurately diminished in *Caldwell*, the Supreme Court held that the jury’s **unanimous** verdict imposing a death sentence in that case violated the Eighth Amendment and required the resulted death sentence to be vacated even though the jury’s verdict there was unanimous. *Caldwell*, 472 U.S. at 341 (“Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires.”).

40. The repeated comments by the prosecutor that the jurors role in sentencing was just advisory abdicated any responsibility they had for the death sentence. The State cannot prove beyond a reasonable doubt that no juror would have voted for a life sentence at a resentencing conducted with proper *Caldwell* instructions and proper instructions regarding each jurors power to vote for mercy. The likelihood of one or more jurors voting for a life sentence increases when a jury is told a death sentence could only be authorized if the jury returned a unanimous death recommendation and that each juror had the ability to preclude a death sentence simply by refusing to agree to a death recommendation. *Caldwell*, 472 U.S. at 330 (“**In the capital sentencing context there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences** when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court.”) (emphasis added).

41. The Florida Supreme Court has addressed whether or not error under *Hurst v. Florida* is harmless in several recent cases. In *Hurst v. State*, the Court concluded that although

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T. 268 (emphasis added). This theme was followed by the prosecutor throughout the voir dire.

“[t]he evidence of the circumstances surrounding this murder can be considered overwhelming and essentially uncontroverted,” “the harmless error test is not limited to consideration of only the evidence of aggravation, and it is not an ‘overwhelming evidence’ test.” 202 So. 3d at 69. The Court found that “the evidence of mitigation was extensive and compelling” but, absent an interrogatory verdict, it could not “say with any certainty how the jury viewed that mitigation.” *Id.* However, in light of the mitigation and the jury’s 7 to 5 death recommendation, the Court could not “find beyond a reasonable doubt that no rational jury, as the trier of fact, would determine that the mitigation was ‘sufficiently substantial’ to call for a life sentence.” *Id.* (quoting *State v. Ring*, 65 P.3d 915, 946 (Ariz. 2003)).

42. In *Davis v. State*, \_\_\_ So. 3d \_\_\_, 2016 WL 6649941 at \*29 (Fla. Nov. 10, 2016), where the jury recommended two death sentences by 12 to 0 votes, the Florida Supreme Court found *Hurst* error harmless because the unanimous jury recommendations “allow us to conclude beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors.” The Court based this conclusion in part on the jury instructions, including an instruction saying, “Regardless of your findings in this respect, however, you are neither compelled nor required to recommend a sentence of death.” *Id.* The Court also relied upon “the egregious facts of this case” in which “Davis set two women on fire, one of who was pregnant, during an armed robbery, and shot in the face a Good Samaritan who was responding to the scene.” *Id.* Thus, the Court concluded, “[t]he evidence in support of the *six* aggravating circumstances found as to both victims was significant and essentially uncontroverted.” *Id.* Earlier in the opinion in a discussion of proportionality, the Court found, “This case is truly among the most aggravated and least mitigated.” *Id.* at \*27.

43. In *Franklin v. State*, \_\_\_ So. 3d \_\_\_, 2016 WL 6901498 at \*6 (Fla. Nov. 23,

2016), the Florida Supreme Court noted that “the jury that recommended death did not find the facts necessary to sentence him to death” because the jury returned a non-unanimous recommendation. The Court rejected “the State’s contention that Franklin’s prior convictions for other violent felonies insulate Franklin’s death sentence from *Ring* and *Hurst v. Florida*.” *Id.*

44. In *Johnson v. State*, \_\_\_ So. 3d \_\_\_, 2016 WL 7013856 at \*3 (Fla. Dec. 1, 2016), the jury recommended three death sentences by votes of 11 to 1. There were three victims in *Johnson*, as opposed to one here. The trial court found three aggravating factors in the deaths of victims Evans and Beasley, including the cold, calculated and premeditated aggravator, and two aggravating factors in the death of victim Burnham. *Id.* at \*3 & n.1. The trial court also found three statutory and ten nonstatutory mitigating circumstances. *Id.* at 3 & nn.2,3. The trial court gave most of the mitigating factors slight or very slight weight. *Id.* In addressing whether the *Hurst* error was harmless, the Florida Supreme Court first rejected “the State’s contention that Johnson’s contemporaneous convictions for other violent felonies insulate Johnson’s death sentences from *Ring* and *Hurst v. Florida*.” *Id.* at \*3. The Court found the case “obviously include[s] substantial aggravation”:

Johnson set out on a drug-fueled hunt for money to purchase more drugs, so determined to succeed that “if he would have to shoot someone, he would have to shoot someone.” Johnson murdered a taxi driver who had been dispatched to pick up a fare, a Good Samaritan who Johnson tricked into believing that his car was broken down, and a deputy sheriff who had stopped Johnson as part of the manhunt for the perpetrator of Johnson’s two earlier murders.

*Id.* at \*4. However, the Court also found that “the evidence of mitigation was extensive and compelling.” *Id.* Based on “a nonunanimous jury recommendation and a substantial volume of mitigation evidence,” the Court could not conclude “beyond a reasonable doubt, that no rational trier of fact would determine that the mitigating circumstances were sufficiently substantial to call for leniency.” *Id.* (quoting *State v. Ring*, 65 P.3d 915, 946 (Ariz. 2003)).

45. Under these cases, the State cannot show beyond a reasonable doubt that the *Hurst* error in Mr. Duckett's case was harmless. First, as the court held in *Johnson*, Mr. Duckett's contemporaneous conviction does not render the error harmless. Second, as in *Hurst v. State* and *Johnson*, and as described above, Mr. Duckett's case involved substantial and compelling mitigation. Third, unlike in *Davis*, Mr. Duckett's jury was not instructed that they were not compelled to vote for death if the aggravators outweighed the mitigators.

46. Mr. Duckett's death sentence stands in violation of the Sixth Amendment, *Hurst v. Florida*, Chapter 2016-13, *Perry v. State*, and *Hurst v. State*. His jury did not return a verdict making any findings of fact, his jury was not instructed that its death recommendation had to be unanimous, the jury's death recommendation was tainted by *Caldwell* issues that preclude it from serving as a basis for the State to argue harmless error, the jury was not told that each individual juror carried responsibility for whether a death sentence was authorized or a life sentence was mandated, and the jurors did not know that they each were authorized to preclude a death sentence simply to be merciful.

47. The *Hurst* error in Mr. Duckett's case warrants relief. The State simply cannot show the error to be harmless beyond a reasonable doubt that no properly instructed juror would have refused to vote in favor of a death recommendation, particularly given the fact that four jurors did refuse to vote in favor of death. Unless it is proven beyond a reasonable doubt that no juror would have voted for a life sentence and through such a vote mandated that Mr. Duckett receive a life sentence, Mr. Duckett's death sentence must be vacated and a resentencing ordered. Because the State cannot meet its burden here, Rule 3.851 relief is required.

## CLAIM II

### MR. DUCKETT'S DEATH SENTENCE VIOLATES *HURST v. STATE*, *PERRY v. STATE* AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

This claim is evidenced by the following:

1. All other factual allegations in this motion and in Mr. Duckett's previous motions to vacate, and all evidence presented by him during his trial and previous postconviction proceedings, are incorporated herein by specific reference.

2. In *Mosley v. State*, before turning to the issue of retroactivity, the Florida Supreme Court noted that in its decision in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), "this Court interpreted the United States Supreme Court's holding in *Hurst v. Florida*." 2016 WL 7406506 at \*18. *Mosley* then noted that in *Hurst v. State*: "**we held, based on Florida's independent constitutional right to trial by jury that, in order for the trial court to impose a sentence of death, the jury's recommendation for a sentence of death must be unanimous.**" *Id.*

(emphasis added).<sup>25</sup> *Hurst v. State* did broaden the scope of *Hurst v. Florida* because as the opinion itself explained, the ruling in *Hurst v. Florida* meant the statutory facts necessary to authorize a death sentence were elements of capital murder:

We also conclude that, just as elements of a crime must be found unanimously by a Florida jury, all these findings necessary for the jury to essentially convict a defendant of capital murder—thus allowing imposition of the death penalty— are also elements that must be found unanimously by the jury. Thus, we hold that in addition to unanimously finding the existence of any aggravating factor, the jury must also unanimously find that the aggravating factors are sufficient for the imposition of death and unanimously find that the aggravating factors outweigh

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<sup>25</sup> The requirement that the jury's death recommendation had to be unanimous in order for it to authorize a death sentence was not contained in *Hurst v. Florida*. AS the Florida Supreme Court explained in *Hurst v. State*, the unanimity requirement arose when the mandate of *Hurst v. Florida* intersected with Florida law: "We reach this holding based on the mandate of *Hurst v. Florida* and on Florida's constitutional right to jury trial, considered in conjunction with our precedent concerning the requirement of jury unanimity as to the elements of a criminal offense." 202 So. 3d at 44.

the mitigation before a sentence of death may be considered by the judge.

*Id.* at \*53-54. The Florida Supreme Court acknowledged that the unanimity requirement had not been found by US Supreme Court to be mandated by the Sixth Amendment:

We are mindful that a plurality of the United States Supreme Court, in a non-capital case, decided that unanimous jury verdicts are not required in all cases under the Sixth Amendment to the United States Constitution. *See Apodaca v. Oregon*, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972) (plurality opinion). **However, this Court, in interpreting the Florida Constitution and the rights afforded to persons within this State, may require more protection be afforded criminal defendants than that mandated by the federal Constitution.** This is especially true, we believe, in cases where, as here, Florida has a longstanding history requiring unanimous jury verdicts as to the elements of a crime.

202 So. 3d at 57 (emphasis added) (footnote omitted). The Florida Supreme Court then explained the benefit to the administration of justice that its holding would provide:

In requiring jury unanimity in these findings and in its final recommendation if death is to be imposed, we are cognizant of significant benefits that will further the administration of justice. Supreme Court Justice Anthony Kennedy, while a judge on the Ninth Circuit Court of Appeals, noted the salutary benefits of the unanimity requirement on jury deliberations as follows:

The dynamics of the jury process are such that often only one or two members express doubt as to [the] view held by a majority at the outset of deliberations. A rule which insists on unanimity furthers the deliberative process by requiring the minority view to be examined and, if possible, accepted or rejected by the entire jury. The requirement of jury unanimity thus has a precise effect on the fact-finding process, one which gives particular significance and conclusiveness to the jury's verdict.

*United States v. Lopez*, 581 F.2d 1338, 1341 (9th Cir.1978). That court further noted that “[b]oth the defendant and society can place special confidence in a unanimous verdict.” *Id.* Comparing the unanimous jury requirement to the requirement for proof beyond a reasonable doubt, the Fifth Circuit Court of Appeals stated, “the unanimous jury requirement ‘impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.’” *United States v. Gipson*, 553 F.2d 453, 457 (5th Cir.1977).

202 So. 3d at 58 (emphasis added). Thus, the ruling that the Florida Constitution required juror

unanimity when returning a death recommendation was bottomed on enhanced reliability and confidence in the result. *Id.* at 59 (juror unanimity “will help to ensure the heightened level of protection necessary for a defendant who stands to lose his life as a penalty”).<sup>26</sup> *See Desist v. United States*, 394 U.S. at 262 (Harlan, J., dissenting) (“constitutional rules which significantly improve the pre-existing fact-finding procedures are to be retroactively applied”).<sup>27</sup>

3. The Florida Supreme Court in *Hurst v. State* then alternatively found that a unanimous jury’s death recommendation was also required under the Eighth Amendment.

In addition to the requirements of unanimity that flow from the Sixth Amendment and from Florida’s right to trial by jury, we conclude that juror unanimity in any recommended verdict resulting in a death sentence is required under the Eighth Amendment.

202 So. 3d at 59. The Florida Supreme Court in *Hurst v. State* explained:

If death is to be imposed, unanimous jury sentencing recommendations, when made in conjunction with the other critical findings unanimously found by the jury, provide the highest degree of reliability in meeting these constitutional requirements in the capital sentencing process.

*Id.* at 60. In *Hurst v. State*, the Florida Supreme Court ruled that on the basis of the Eighth Amendment and on the basis of the Florida Constitution, the evolving standards of decency now requires jury “unanimity in a recommendation of death in order for death to be considered and

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<sup>26</sup> In *Hurst v. State*, the Florida Supreme Court relied upon studies comparing majority rule juries to those require to return a unanimous verdict. 202 So. 2d at 58 (“ it has been found based on data that ‘behavior in juries asked to reach a unanimous verdict **is more thorough** and grave than in majority-rule juries, and that the former were more likely than the latter jurors to agree on the issues underlying their verdict. Majority jurors had a relatively negative view of their fellow jurors’ openmindedness and persuasiveness.”) (emphasis added); *Id.* (“juries not required to reach unanimity **tend to take less time deliberating and cease deliberating** when the required majority vote is achieved rather than attempting to obtain full consensus; and jurors operating under majority rule **express less confidence in the justness of their decisions.**”) (emphasis added).

<sup>27</sup> Replacing a majority vote verdict with a requirement that the jury must be unanimous when returning a death recommendation is markedly different that switching from a judge to jury as the finder of fact. *See Schriro v. Summerlin*, 542 U.S. 348, 356 (2004) (“When so many presumably reasonable minds continue to disagree over whether juries are better factfinders at all, we cannot confidently say that judicial factfinding seriously diminishes accuracy.”).

imposed”. 202 So. 3d at 61. Quoting the United States Supreme Court, *Hurst v. State* noted, “the ‘clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.’” *Id.* Then, from a review of the capital sentencing laws throughout the United States, *Hurst v. State* found that a national consensus reflecting society’s evolving standards of decency was apparent:

The vast majority of capital sentencing laws enacted in this country provide the clearest and most reliable evidence that contemporary values demand a defendant not be put to death except upon the unanimous consent of the jurors who have deliberated upon all the evidence of aggravating factors and mitigating circumstances.

*Id.* Accordingly, the Court in *Hurst v. State* concluded:

the United States and Florida Constitutions, as well as the administration of justice, are implemented by requiring unanimity in jury verdicts recommending death as a penalty before such a penalty may be imposed.

*Id.* at 63. The Eighth Amendment holding in *Hurst v. State* turned upon both 1) a finding of a consensus reflecting the evolving standards of decency that now precluded the execution of a defendant without a jury’s unanimous death recommendation, and 2) the enhanced reliability that would result from no longer allowing a jury’s death recommendation to be returned without juror unanimity.

4. What constitutes cruel and unusual punishment under the Eighth Amendment turns upon considerations of the “evolving standards of decency that mark the progress of a maturing society.” *Atkins v. Virginia*, 536 U.S. 304, 312 (2002).<sup>28</sup> “This is because ‘[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.’ *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C. J.,

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<sup>28</sup> “The basic concept underlying the Eighth Amendment is nothing less than the dignity of man . . . . The Amendment must draw its meaning from the evolving standards that mark the progress of a maturing society.” *Atkins*, 536 U.S. at 311-12 (internal quotation marks omitted).

dissenting).” *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008). According to *Hurst v. State*, the evolving standards of decency are reflected in a national consensus that a defendant can only be given a death sentence when a penalty phase jury has voted unanimously in favor of the imposition of death. The US Supreme Court has explained that the “near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not.” *Burch v. Louisiana*, 441 U.S. 130, 138 (1979). The near-uniform judgment of the states is that only a defendant who has received a unanimous jury verdict finding the facts necessary to authorize the imposition of a death sentence and a unanimous jury vote against extending mercy and recommending the imposition of death sentence.<sup>29</sup>

5. Under *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), and under *Witt v. State*, the Florida Supreme Court’s ruling in *Hurst v. State* must be applied retroactively. When a juror in a capital proceedings has voted against recommending death, the defendant is within a class that society’s evolving standards of decency has concluded to be ineligible for a death sentence. In *Walls v. State*, 2016 WL 6137287 at \*6, the Florida Supreme Court found retroactivity must be accorded to an Eighth Amendment decision when it “places beyond the State of Florida the power to impose a certain sentence” against a category or subgroup of people. Here, the State of

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<sup>29</sup> Former Florida Supreme Court Justice Raoul G. Cantero has written, “the national consensus demonstrates an overwhelming preference for requiring unanimity.” Raul G. Cantero & Robert M. Kline, *Death is Different: The Need for Jury Unanimity in Death Penalty Cases*, 22 St. Thomas L. Rev. 4, 11 (2009). Only three states—Alabama, Delaware, and Florida—permitted the imposition of a death sentence by a non-unanimous jury before the issuance of *Hurst v. Florida*. Justice Cantero explained the logical basis of the consensus: “If jury unanimity is required to convict a defendant of stealing a car, all the more should it be required to sentence a defendant to death.” *Id.* Also indicative of the nation’s current standard of decency, the American Bar Association recently adopted Resolution 108A, which urges all jurisdictions to require that “[b]efore a court can impose a sentence of death, a jury must unanimously recommend or vote to impose that sentence.” ABA Resolution 108A, *available at* [http://americanbar.org/content/dam/aba/images/abanews/2015mm\\_hodres/108a.pdf](http://americanbar.org/content/dam/aba/images/abanews/2015mm_hodres/108a.pdf) (last visited Oct. 17, 2016).

Florida under *Hurst v. State* cannot carry out a death sentence on capital defendants who had one or more of their jurors at their capital trial vote in favor of a life sentence and against recommending a death sentence. Moreover the purpose of the ruling in *Hurst v. State* is to enhance the reliability of a death recommendation. Enhancement of reliability also warrants retroactive application of *Hurst v. State* and *Perry v. State* to Mr. Duckett. See *Desist v. United States*, 394 U.S. at 262 (Harlan, J., dissenting) (“The greatly expanded writ of habeas corpus seems at the present time to serve two principal functions. [Citations] First, it seeks to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted. **It follows from this that all ‘new’ constitutional rules which significantly improve the pre-existing fact-finding procedures are to be retroactively applied on habeas.**”) (emphasis added).<sup>30</sup>

6. But of course, the Eighth Amendment requires that a capital jury must know and appreciate the significance of its verdict:

In a capital case, the gravity of the proceeding and the concomitant juror responsibility weigh even more heavily, and it can be presumed that the penalty phase jurors will take special care to understand and follow the law.

*Id.* at 63. Indeed, under *Caldwell v. Mississippi*, 472 U.S. 320 (1985), a unanimous jury verdict in favor of a death sentence violates the Eighth Amendment because the jury was not correctly informed as to its sentencing responsibility. *Caldwell* held: “it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.”

*Id.* 328-29. Jurors must feel the weight of their sentencing responsibility; they must know that if

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<sup>30</sup> See *United States v. Johnson*, 457 U.S. 537, 548 (1982) (“We now agree with Justice Harlan that “ ‘[r]etroactivity’ must be rethought,” *Desist v. United States*, 394 U.S., at 258, 89 S.Ct., at 1038 (dissenting opinion). We therefore examine the circumstances of this case to determine whether it presents a retroactivity question clearly controlled by past precedents, and if not, whether application of the Harlan approach would resolve the retroactivity issue presented in a principled and equitable manner.”).

the defendant is ultimately executed it will be because no juror exercised her power to preclude a death sentence.

7. In *Caldwell*, the prosecutor responding to defense counsel’s argument stated in his argument before the jury: “Now, they would have you believe that you're going to kill this man and they know—they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable.” *Id.* at 325.<sup>31</sup> Because the jury’s sense of responsibility was improperly diminished by this argument, the Supreme Court held that **the jury’s unanimous verdict** imposing a death sentence in that case violated the Eighth Amendment and required the death sentence to be vacated. *Caldwell*, 472 U.S. at 341 (“Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires.”). *Caldwell* explained: “Even when a sentencing jury is unconvinced that death is the appropriate punishment, it might nevertheless wish to ‘send a message’ of extreme disapproval for the defendant's acts. This desire might make the jury very receptive to the prosecutor's assurance that it can more freely ‘err because the error may be corrected on appeal.’” *Id.* at 331.<sup>32</sup>

8. Jurors must feel the weight of their sentencing responsibility and know about their individual authority to preclude a death sentence. *See Blackwell v. State*, 79So. 731, 736 (Fla. 1918) (prejudicial error found in “the remark of the assistant state attorney as to the existence of a Supreme Court to correct any error that might be made in the trial of the cause, in effect told the jury that it was proper matter for them to consider when they retired to make up their verdict.

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<sup>31</sup> In her concurrence, Justice O’Connor wrote: “In telling the jurors, ‘your decision is not the final decision ... [y]our job is reviewable,’ the prosecutor sought to minimize the sentencing jury's role, by creating the mistaken impression that automatic appellate review of the jury's sentence would provide the authoritative determination of whether death was appropriate.” *Caldwell*, 472 U.S. at 342-43.

<sup>32</sup> This would certainly apply to the circumstances in Mr. Duckett’s case when the jury was repeatedly reminded its penalty phase verdict was merely an advisory recommendation.

Calling this vividly to the attention of the jury tended to lessen their estimate of the weight of their responsibility, and cause them to shift it from their consciences to the Supreme Court.”). Where the jurors’ sense of responsibility for a death sentence is not explained or is diminished, a jury’s unanimous verdict in favor of a death sentence violates the Eighth Amendment and the death sentence cannot stand. *Caldwell*, 472 U.S. at 341 (“Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires.”).

9. The US Supreme Court in *Caldwell* found that diminishing an individual juror’s sense of responsibility for the imposition of a death sentence creates a bias in favor of a juror voting for death. *Caldwell*, 472 U.S. at 330 (“In the capital sentencing context there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court.”).

10. If a bias in favor a death recommendation increases when the jury’s sense of responsibility is diminished, removing the basis for that bias increases the likelihood that one or more jurors will vote for a life sentence. The likelihood increases even more when the jury receives accurate instruction as to each juror’s power and authority to dispense mercy and preclude a death sentence. In this regard, the context of the prosecutor’s improper argument in *Caldwell* is important. The prosecutor was responding to and trying to blunt defense counsel’s assertion that the sentencing decision rested with the jury and that it could chose mercy:

I implore you to exercise your prerogative to spare the life of Bobby Caldwell.... I'm sure [the prosecutor is] going to say to you that Bobby Caldwell is not a merciful person, but I say unto you he is a human being. That he has a life that rests in your hands. You can give him life or you can give him death. It's going to be your decision. I don't know what else I can say to you but we live in a society where we are taught that an eye for an eye is not the solution.... You are the judges and you will have to decide his fate. It is an awesome responsibility, I know—an awesome responsibility.

*Caldwell*, 472 U.S. at 324.

11. Mr. Duckett’s jury was not advised that each juror had the authority to dispense mercy as the Florida Supreme Court held that they possessed in *Hurst v. State* and *Perry v. State*.

12. The circumstances under which Mr. Duckett’s recommendations of 8-4 shows that it cannot now be viewed as a valid unanimous verdict or that the *Hurst* error was harmless without violating the Eighth Amendment. “Even when a sentencing jury is unconvinced that death is the appropriate punishment, it might nevertheless wish to ‘send a message’ of extreme disapproval for the defendant’s acts. This desire might make the jury very receptive to the prosecutor’s assurance that it can more freely ‘err because the error may be corrected on appeal.’” *Caldwell*, 472 U.S. at 331. The advisory recommendation simply “does not meet the standard of reliability that the Eighth Amendment requires.” *Id.* at 341.

13. In *Mosley*, this Court bases for the decision in *Hurst v. State* to require juror unanimity when returning a death recommendation:

Under Florida’s independent constitutional right to a trial by jury, this Court concluded: “If death is to be imposed, unanimous jury sentencing recommendations, when made in conjunction with the other critical findings unanimously found by the jury, **provide the highest degree of reliability** in meeting these constitutional requirements in the capital sentencing process.” [202 So. 3d] at 60.

2016 WL 7406506 at \*21.

14. This Court cannot rely on the jury’s 8-4 death recommendation in Mr. Duckett’s case as showing either that he was not deprived of his Eighth Amendment right to require a unanimous jury’s death recommendation or that the violation of the right was harmless. To do so would violate the Eighth Amendment because the advisory verdict was not returned in proceedings compliant with the Eighth Amendment. *Caldwell*, 472 U.S. at 332 (“The death

sentence that would emerge from such a sentencing proceeding would simply not represent a decision that the State had demonstrated the appropriateness of the defendant's death.”).

15. In *Hurst v. Florida*, the US Supreme Court expressly warned against using what was an advisory verdict to conclude that the findings necessary to authorize the imposition a death sentence had been made by the jury:

“[T]he jury's function under the Florida death penalty statute is advisory only.” *Spaziano v. State*, 433 So.2d 508, 512 (Fla.1983). The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires.

*Hurst v. Florida*, 136 S. Ct. at 622.

16. Under *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), the Florida Supreme Court's Eighth Amendment ruling in *Hurst v. State* must be applied retroactively. Under *Witt v. State*, the Florida Supreme Court's decision in *Hurst v. State* must also be applied retroactively because the proper *Witt* analysis of the retroactivity of *Hurst v. State* was not conducted in *Asay v. State*. When the purpose of the unanimity requirement is considered the balance under *Witt* shifts, as the *Witt* analysis in *Mosley* shows. It is not constitutionally permissible to execute a person whose death sentence was imposed under an unconstitutional scheme and where it is like that one or more jurors in Mr. Duckett's case would have voted in favor of a life recommendation had they known that the role was not merely advisory and that the law did not required them to vote to recommend a death sentence as the prosecutor argued.

17. The Florida Supreme Court's recent decision in *Walls v. State*, 2016 WL 6137287 (Fla. Oct. 20, 2016), also indicates that *Hurst v. State* must be applied retroactively. Although *Walls* addressed the retroactivity of another Supreme Court decision involving an Eighth Amendment violation under *Hall v. Florida*, 134 S. Ct. 1986 (2014), it is instructive here. There, the Court concluded that the Eighth Amendment decision in *Hall* “removes from the State [the] authority to impose death sentences” in a category of cases. *Walls*, 2016 WL 6137287 at \*5.

“[Mr.Duckett’s] eligibility or ineligibility for execution must be determined in accordance with the correct United States Supreme Court jurisprudence.” *Id.* at \*8 (Pariente, J., concurring).

“More than fundamental fairness and a clear manifest injustice, **the risk of executing a person who is not constitutionally able to be executed**, trumps any other considerations that this Court looks to when determining if a subsequent decision of the United States Supreme Court should be applied.” *Id.* (emphasis added).

18. Under the fundamental fairness approach to retroactivity set forth in *Mosley*, Mr. Duckett is entitled to the retroactive application of *Hurst v. State* to his case. It would be fundamental unfair to deprive Mr. Duckett of the benefits of *Hurst v. State* while other similarly situated individuals received its benefit. These individuals were all convicted and sentenced to death long before Mr. Duckett’s trial started. Because retrials and/or resentencings have been ordered in their cases, each will be receiving the benefit of *Hurst v. State* and *Perry v. State*. In these circumstances, it would be fundamental unfair to deprive Mr. Duckett of the same benefit, application of the new rule of law set forth in *Hurst v. State* and *Perry v. State*. Indeed, the logic of *Griffith v. Kentucky*, 479 U.S. 314, 327-28 (1987), is applicable:

Justice POWELL has pointed out that it “hardly comports with the ideal of ‘administration of justice with an even hand,’ ” when “one chance beneficiary-the lucky individual whose case was chosen as the occasion for announcing the new principle-enjoys retroactive application, while others similarly situated have their claims adjudicated under the old doctrine.” *Hankerson v. North Carolina*, 432 U.S. 233, 247, 97 S.Ct. 2339, 2347, 53 L.Ed.2d 306 (1977) (opinion concurring in judgment), quoting *Desist v. United States*, 394 U.S., at 255, 89 S.Ct., at 1037 (Douglas, J., dissenting). See also *Michigan v. Payne*, 412 U.S. 47, 60, 93 S.Ct. 1966, 1973, 36 L.Ed.2d 736 (1973) (MARSHALL, J., dissenting) (“Different treatment of two cases is justified under our Constitution only when the cases differ in some respect relevant to the different treatment”). **The fact that the new rule may constitute a clear break with the past has no bearing on the “actual inequity that results” when only one of many similarly situated defendants receives the benefit of the new rule.** *United States v. Johnson*, 457 U.S., at 556, n. 16, 102 S.Ct., at 2590, n. 16 (emphasis omitted).

We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not

yet final, with no exception for cases in which the new rule constitutes a “clear break” with the past.

(Emphasis added).<sup>33</sup> “[S]elective application of new rules violates the principle of treating similarly situated defendants the same.” *Id.* at 323. While Mr. Duckett’s death sentence was final when *Hurst v. Florida* issued, numerous other capital defendant’s death sentences had been final, including Hurst’s, when good fortune and good timing meant that at the moment that *Hurst v. Florida* those defendants were free of the shackles of finality.<sup>34</sup> Fundamental fairness requires that Mr. Duckett receive the benefit of the change in law. *See Desist v. United States*, 394 U.S., at 258-259 (Harlan, J., dissenting) (“[W]hen another similarly situated defendant comes before us, we must grant the same relief or give a principled reason for acting differently. We depart from this basic judicial tradition when we simply pick and choose from among similarly situated

19. Under *Hurst v. State* and *Perry v. State*, Mr. Duckett’s death sentence stands in violation of the Eighth Amendment and the Florida Constitution. Rule 3.851 relief must issue and his death sentence must be vacated.

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<sup>33</sup> Justice Harlan in his dissent in *Desist v. United States* wrote:

We do not release a criminal from jail because we like to do so, or because we think it wise to do so, but only because the government has offended constitutional principle in the conduct of his case. And when another similarly situated defendant comes before us, we must grant the same relief or give a principled reason for acting differently. We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a ‘new’ rule of constitutional law.

394 U.S. at 258-59.

<sup>34</sup> In *Witt v. State*, 387 So. 2d 922, 926 (Fla. 1980), the Florida Supreme Court noted the Eighth Amendment required extra to be given to “individual fairness because of the possible imposition of a penalty as unredeeming as death.” In a footnote, the Court wrote: “It bears mention that the constitutionality of Florida’s capital sentence procedures, §921.141, Florida Statutes (1979), is contingent upon this Court’s role of reviewing each case to ensure uniformity in the imposition of a death penalty.” *Id.* at 926 n. 7.

### CLAIM III

**THE RETROACTIVITY RULINGS IN *ASAY v. STATE* AND *MOSLEY v. STATE* THAT SEEMINGLY PERMIT PARTIAL RETROACTIVITY AND/OR CATEGORY BY CATEGORY AND/OR CASE BY CASE RETROACTIVITY OF NEW LAW IN DEATH PENALTY PROCEEDINGS INJECTS ARBITRARINESS INTO THE FLORIDA'S CAPITAL SENTENCE SCHEME THAT VIOLATES THE EIGHTH AMENDMENT PRINCIPLES OF *FURMAN V. GEORGIA*.**

This claim is evidenced by the following:

1. All other factual allegations in this motion and in Mr. Duckett's previous motions to vacate, and all evidence presented by him during his trial and previous postconviction proceedings, are incorporated herein by specific reference.

2. In *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972), the U.S. Supreme Court found that the death penalty "could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976); *see also Furman*, 408 U.S. at 239-40. Because of the recognition that "the penalty of death is qualitatively different from a sentence of imprisonment, however long \* \* \* there is a corresponding difference in the need for reliability" in capital cases. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (finding there is a "qualitative difference" between death and other penalties requiring "a greater degree of reliability when the death sentence is imposed"); *Gregg v. Georgia*, 428 U.S. 153, 187-88 (1976) (stating that "death is different in kind" and as a punishment is "unique in its severity and irrevocability"); *Furman v. Georgia*, 408 U.S. at 238, 286 (1972) (Brennan, J., concurring) ("Death is a unique punishment in the United States.").

3. In *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014), the US Supreme Court find that Florida's procedure for determining intellectual disability was inadequate to reliable to insure that an intellectually disabled defendant was not executed. "A State that ignores the inherent

imprecision of these tests risks executing a person who suffers from intellectual disability.” *Id.* at 2001. Because Florida ignored that inherent imprecision, the Supreme Court found that “Florida’s rule is invalid under the Constitution’s Cruel and Unusual Punishments Clause.” *Id.* The Supreme Court explained: “The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution. Florida’s law contravenes our Nation’s commitment to dignity and its duty to teach human decency as the mark of a civilized world.”

4. The heightened need for reliability in the capital sentencing process was recognized by the Florida Supreme when in 1999 it adopted minimum standards for attorneys in capital cases. *See Fla. R. Crim. P. 3.112*. When issuing Rule 3.112, this Court explained that the minimum standards were: “an important step in ensuring the integrity of the judicial process in capital cases by adopting a rule of criminal procedure to help **ensure that competent representation will be provided to indigent capital defendants in all cases.**” *In re Amendment to Fla. Rules of Crim. Pro.*, 759 So. 2d 610, 611 (Fla. 1999) (emphasis added). It further noted: “This Court has a continuing obligation to ensure the integrity of the judicial process in all cases. **Our overview is especially important in death penalty cases.**” *Id.* at 612.

5. In *Arbelaez v. Butterworth*, 738 So. 2d 326, 326-27 (Fla. 1999), the Florida Supreme Court acknowledged its Eighth Amendment obligation in insuring fair capital process that operated in a reliable manner:

We acknowledge we have a constitutional responsibility to ensure **the death penalty is administered in a fair, consistent and reliable manner**, as well as having an administrative responsibility to work to minimize the delays inherent in the postconviction process.

(Emphasis added) .

6. In *Allen v. Butterworth*, 756 So. 2d 52, 67 (Fla. 2000), the Florida Supreme Court explained that competent representation by collateral counsel was critical and necessary in order

to insure reliability in capital cases:

**A reliable system of justice** depends on adequate funding at all levels. Obviously, this means adequate funding for competent counsel during trial, appellate, and postconviction proceedings for both the State and the defense, including access to thorough investigators and expert witnesses. It is critical that this state provides for adequately funded and trained public defenders, conflict counsel, and CCR and registry counsel, **as these are vital to the reliability** and efficiency of the trial, appellate, and postconviction process.

(Emphasis added) (footnotes omitted).

7. In *Fla. Dep't of Financial Services v. Freeman*, 921 So. 2d 598 (Fla. 2006), Justice Pariente wrote a specially concurring opinion and observed: “**the credibility of our death penalty** system depends in large part on **the quality of the attorneys** who undertake the representation.” *Id.* at 921 So. 2d at 604 (emphasis added). Justices Anstead and Cantero concurred in her opinion.

8. On the same day that this Court issued *Asay v. State*, 2016 WL 7406538, it also issued *Mosley v. State*, 2016 WL 7406506. Both *Asay* and *Mosley* had also challenged their death sentences in light of *Hurst v. Florida*. *Asay's* death sentences and *Mosley's* death sentence were final before the decision in *Hurst v. Florida* issued. Both cases presented the question of the retroactivity of *Hurst v. Florida*. However, the Florida Supreme Court broke from its own jurisprudence and held *Hurst v. Florida* to be retroactive in *Mosley's* death sentence under its *Witt* analysis, while in *Asay* its *Witt* analysis found *Hurst v. Florida* was not retroactive to *Asay's* case. The result of *Asay* and *Mosley* was the repudiation of a binary approach to retroactivity under *Witt*. In *Asay*, the Florida Supreme Court superficially at least seemed to suggest that there were just two categories of collateral cases at issue in a *Witt* analysis of *Hurst v. Florida* - those cases final after the issuance of *Ring v. Arizona*, 536 U.S. 584 (2002), and those final before it *Ring* issued.<sup>35</sup> Full analysis of the various concurring and dissenting opinions in *Asay* and

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<sup>35</sup>Of course, there other categories that were not before this Court in either *Asay* or

*Mosley* suggests that there are likely more categories of cases that warrant specific consideration under *Witt* than merely the two referenced in *Asay*.

9. In *Asay v. State*, Chief Justice Labarga was one of three justices who concurred in the lead opinion that announced the result. But, he wrote a concurring opinion stating: “I write separately to express my view that our decision today does not apply to those defendants whose death sentences were imposed based upon, and who are facing execution solely as a result of, a judicial override.” *Asay v. State*, 2016 WL 7406538 at \*20. That is a pretty explicit recognition that there are pre-*Ring* people who may get the benefit of *Hurst*. If two pre-*Ring* defendants who

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*Mosley*. This Court did not consider those death sentences that became final after the issuance of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), but before the issuance of *Ring*. In *Hurst v. Florida*, 136 S. Ct. 616 (2016), the US Supreme Court relied upon *Apprendi* as the basis for ruling that *Spaziano v. Florida*, 468 U.S. 447 (1984) and *Hildwin v. Florida*, 490 U.S. 638 (1989) were “wrong, and irreconcilable with *Apprendi*.” 136 S. Ct. at 623. The Supreme Court specifically held: “And in the *Apprendi* context, we have found that ‘stare decisis does not compel adherence to a decision whose “underpinnings” have been “eroded” by subsequent developments of constitutional law.’” *Id.* at 623-24. It was on the basis of *Apprendi* that the Supreme Court concluded that the legal principal employed in *Spaziano* and *Hildwin* “was wrong.” *Hurst*, 136 S. Ct. at 623. In neither *Asay* nor *Mosley* did this Court conduct a *Witt* analysis of the post-*Apprendi* cases.

But in *Apprendi* the US Supreme Court indicated that its ruling there:

was foreshadowed by our opinion in *Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), construing a federal statute. We there noted that “under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, **any fact** (other than prior conviction) **that increases the maximum penalty** for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.” *Id.*, at 243, n. 6, 119 S.Ct. 1215. The Fourteenth Amendment commands the same answer in this case involving a state statute.

*Apprendi*, 530 U.S. at 476 (emphasis added). If *Apprendi* was foreshadowed by *Jones*, what about post-*Jones* cases?. And in *Jones*, Justice Stevens in a concurrence wrote that the result in *Jones* was premised upon *In re Winship*, 397 U.S. 358 (1970), *Mullaney v. Wilbur*, 421 U.S. 684 (1975), and *Patterson v. New York*, 432 U.S. 197 (1977). *Jones*, 526 U.S. at 253 (Stevens, J., concurring). The majority opinion in *Jones*, not only rely upon *Mullaney*, it called into question the decisions in *Spaziano v. Florida*, 468 U.S. 447 (1984), *Hildwin v. Florida*, 490 U.S. 638 (1989), and *Walton v. Arizona*, 497 U.S. 639 (1990). *Jones*, 526 U.S. at 251-52.

were sentenced to death pursuant to a judicial override of a life recommendation qualify to get the benefit of *Ring* because their jury voted 6-6, and thus returned a life recommendation, the distinction between a 6-6 life recommendation and a 7-5 death recommendation could hardly justify granting the benefit of *Hurst v. Florida* to the defendant with the jury voting 6-6 while denying it to the defendant whose jury returned a 7-5 death recommendation, particularly with the bias created in favor of death noted in *Caldwell v. Mississippi* when jurors are told responsibility for a death sentence rests elsewhere.

10. Justice Lewis, who provided the fifth vote in favor of denying Mr. Asay the benefit of *Hurst*, wrote:

in my view, the majority opinion has incorrectly limited the retroactive application of *Hurst* by barring relief to even those defendants who, prior to *Ring*, had properly asserted, presented, and preserved challenges to the lack of jury factfinding and unanimity in Florida's capital sentencing procedure at the trial level and on direct appeal, the underlying gravamen of this entire issue.

*Asay*, 2016 WL 7406538 at \*20. Thus, Justice Lewis suggests that pre-*Ring* should be able to get the benefit of *Hurst v. Florida* on a case-by-case basis.

11. When the opinions of Chief Justice Labarga and Justice Lewis are considered with the two dissenting opinions, a majority of the Court is open to granting the benefit of *Hurst* to pre-*Ring* people.

12. Then in *Mosley*, Justice Quince joins the majority opinion recognizing that pre-*Ring* defendants may be entitled to the benefit of *Hurst* if they can show on a case-by-case basis that depriving them of the benefit of *Hurst v. Florida* would be fundamentally unfair. This means five justices of the Florida Supreme Court have concluded that the benefit of *Hurst v. Florida* may be extended to pre-*Ring* cases either on a category by category approach or a case by case approach.

13. The State has filed a motion for rehearing in *Mosley* complaining that the Florida Supreme Court “has created confusion and caused an unnecessary unsettling of the law.” (Motion for Rehearing at 2, *Mosley v. State*, Case No. SC14-2108). The State noted that only “on rare and limited occasion, [had the] Court [] permitted retroactive application of new law out of a concern for fairness without performing the three-part analysis from *Witt*.” (Motion for Rehearing at 3, *Mosley v. State*, Case No. 14-2108). This was a round about way of agreeing that the *Witt* analysis has until December 22, 2016, always been binary. The two cases that the State cites as the occasions that this Court has permitted a retroactive application as the State notes did not involve or include the *Witt* analysis, but instead turned on fundamental fairness. So, it appears that the State agrees that a partial retroactivity result under *Witt* is unprecedented. In fact, the State argues the **substantive analyses set forth in [Mosley] violate fundamental principles found in existing precedent.**” (Motion for Rehearing at 2, *Mosley v. State*, Case No. SC14-2108). This would arbitrary to be another way of saying the retroactivity analyses employed were arbitrary and ad hoc.

14. The State is not alone in that view. A majority of the Florida Supreme Court in separate opinions in the two decisions complained that the Court through the two rulings had injected unacceptable arbitrariness into Florida’s capital sentencing process. As a result, the distinction between who gets the benefit of *Hurst v. Florida* and 3.851 relief and who doesn’t and gets executed will be an arbitrary one. *See Asay*, 2016 WL 7406538 at \*22 (Lewis, J., concurring in result) (“As Justice Perry noted in his dissent, there is no salient difference between June 23 and June 24, 2002—the days before and after the case name *Ring* arrived. *See Perry, J., dissenting op.* at ——. However, that is where the majority opinion **draws its determinative, albeit arbitrary, line.** As a result, Florida will treat similarly situated defendants differently—here, the difference between life and death—for potentially the simple reason of one

defendant's docket delay.”) (emphasis added); *Id.* at \*26 (Pariante, J., concurring in part, dissenting in part) (“The majority's conclusion results in an unintended **arbitrariness** as to who receives relief depending on when the defendant was sentenced or, in some cases, resentenced.”) (emphasis added); *Id.* at 26 (Perry, J., dissenting) (“In my opinion, the line drawn by the majority is **arbitrary and cannot withstand scrutiny under the Eighth Amendment** because it creates an arbitrary application of law to two groups of similarly situated persons.”) (emphasis added); *Mosley*, 2016 WL 7406506 at \*32 (Canady, J., concurring in part, dissenting in part) (“the supposed rule of ‘fundamental unfairness’ articulated in *James* is deeply problematic—if not entirely incoherent—when judged by its own terms. If counsel accepted our decisions at face value and relied on the United States Supreme Court's repeated rejection of *Ring* claims, the client loses under *James*. But if counsel raised claims that had been consistently rejected, the client wins. **This hardly comports with the notion of fundamental fairness.**”) (emphasis added); *Id.* at \*32 (Canady, J., concurring in part, dissenting in part) (“ Based on an indefensible misreading of *Hurst v. Florida* and **a retroactivity analysis that leaves the *Witt* framework in tatters**, the majority **unjustifiably plunges the administration of the death penalty in Florida into turmoil that will undoubtedly extend for years**. I strongly dissent from this badly flawed decision.”).<sup>36</sup>

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<sup>36</sup> It would appear that Justice Canady also disagrees with the Court’s action in abandoning the binary as of the *Witt* analysis. It thus appears that four of the seven Florida Supreme Court do not support discarding the either-it-is-or-isn’t-retroactive *Witt* analysis. Once the binary approach is abandoned and the issue is no longer between just a prospective (nonretroactive) application of *Hurst v. Florida* and a retroactive application to cases final when *Hurst v. Florida* issued, necessarily the retroactive application of the law can be given to some and not to others. However, there are no governable standards. This is particularly true when employing the same *Witt* test to *Asay* and *Mosley* the majority reached different conclusions on the issue. For example, on the third prong of *Witt* requires an analysis of the extent of reliance factor on pre-*Hurst* law. In *Asay* the Court found that the extent of reliance on Florida’s unconstitutional death penalty scheme weighed “heavily against” retroactive application to *Asay*, while in *Mosley*, the Court reached the opposite conclusion, holding that the extent of reliance on *the same pre-Hurst law* weighed “in favor” of retroactive application to *Mosley*. See *Asay*, 2016

15. Completely ignored in *Asay* and *Mosley* is the logic of *Griffith v. Kentucky*, 479 U.S. 314, 327-28 (1987), that justice should be administered with an even hand:

Justice POWELL has pointed out that it “**hardly comports with the ideal of ‘administration of justice with an even hand,’**” when “**one chance beneficiary—the lucky individual whose case was chosen as the occasion for announcing the new principle—enjoys retroactive application, while others similarly situated have their claims adjudicated under the old doctrine.**” *Hankerson v. North Carolina*, 432 U.S. 233, 247, 97 S.Ct. 2339, 2347, 53 L.Ed.2d 306 (1977) (opinion concurring in judgment), quoting *Desist v. United States*, 394 U.S., at 255, 89 S.Ct., at 1037 (Douglas, J., dissenting). See also *Michigan v. Payne*, 412 U.S. 47, 60, 93 S.Ct. 1966, 1973, 36 L.Ed.2d 736 (1973) (MARSHALL, J., dissenting) (“**Different treatment of two cases is justified under our Constitution only when the cases differ in some respect relevant to the different treatment**”). The fact that the new rule may constitute a clear break with the past has no bearing on the “actual inequity that results” when only one of many similarly situated defendants receives the benefit of the new rule. *United States v. Johnson*, 457 U.S., at 556, n. 16, 102 S.Ct., at 2590, n. 16 (emphasis omitted).

We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a “clear break” with the past.

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WL 7406538, at \*12; *Mosley*, 2016 WL 7406506, at \*23. The distinction is simply arbitrary. Similarly, *Asay* and *Mosley* also reach opposite results as to the third *Stovall/Linkletter* retroactivity factor — the effect on the administration of justice—finding that it weighed “heavily against” retroactive application as to *Asay*, but in favor of retroactive application as to *Mosley*. See *Asay*, 2016 WL 7406538, at \*13; *Mosley*, 2016 WL 7406506, at \*24.

(Emphasis added).<sup>37</sup> “[S]elective application of new rules violates the principle of treating similarly situated defendants the same.” *Id.* at 323.

16. While Mr. Duckett’s death sentence was final when *Hurst v. Florida* issued, numerous other capital defendant’s death sentences had been final, including Hurst’s, when good fortune and good timing meant that at the moment that *Hurst v. Florida* those defendants were free of the shackles of finality. The decisions in *Asay* and *Mosley* have opened the door to arbitrariness infecting Florida’s death penalty system in violation of the Eighth Amendment. *See Desist v. United States*, 394 U.S., at 258-259 (Harlan, J., dissenting) (“[W]hen another similarly situated defendant comes before us, we must grant the same relief or give a principled reason for acting differently. We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a ‘new’ rule of constitutional law.”). Because Florida ignored the inherent imprecision in testing for intellectual disability, the Supreme Court found that “Florida’s rule is invalid under the Constitution’s Cruel and Unusual Punishments Clause.” *Hall v. Florida*, 134 S. Ct. at 2001. In abandoning the binary approach to retroactivity, has embraced imprecision as sifts through death

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<sup>37</sup> Justice Harlan in his dissent in *Desist v. United States* wrote:

We do not release a criminal from jail because we like to do so, or because we think it wise to do so, but only because the government has offended constitutional principle in the conduct of his case. And when another similarly situated defendant comes before us, we must grant the same relief or give a principled reason for acting differently. We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a ‘new’ rule of constitutional law.

394 U.S. at 258-59.

penalty cases in collateral review on a case by case ad hoc approach.<sup>38</sup> As four justices of the Florida Supreme Court recognized, as the State in its motion for rehearing in *Mosley* recognized, the new approach to retroactivity insures an unreliable and arbitrary death penalty system will govern collateral review in Florida.

17. In paragraphs 25-31 of Claim I of this motion, Mr. Duckett identified individuals who were convicted of murder and sentenced to death for homicides long before the one he was convicted and who will receive the benefit of *Hurst* and the entitlement to a life sentence if a jury does not return a unanimous death recommendation. As a result, the integrity of Florida's death penalty system has been shredded; it has been infected with arbitrariness that violates the Eighth Amendment. Accordingly, Mr. Duckett's death sentence cannot stand and he is entitled to Rule 3.851 relief.

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<sup>38</sup> The lengthy time consuming costly case-by-case analysis that the Florida Supreme Court has mandated in its *Asay* and *Mosley* opinion was not factored into the effect on the administration of justice analysis when the Court denied *Asay* the benefit of *Hurst v. Florida*.

#### CLAIM IV

**THE DECISIONS IN *HURST V. STATE* AND *PERRY V. STATE* ALONG WITH THE RECENT ENACTMENT OF A REVISED SENTENCING STATUTE, ALL OF WHICH ARE NEW LAW THAT WOULD GOVERN AT A RESENTENCING AND REQUIRE THE JURY TO UNANIMOUSLY FIND THE STATUTORILY REQUIRED FACTS NECESSARY TO AUTHORIZE A DEATH SENTENCE AND ALSO REQUIRE THE JURY TO UNANIMOUSLY RECOMMEND A DEATH SENTENCE BEFORE THE JUDGE WOULD BE AUTHORIZED TO IMPOSE A DEATH SENTENCE, MUST BE PART OF THE SECOND PRONG ANALYSIS OF MR. DUCKETT'S PREVIOUSLY PRESENTED NEWLY DISCOVERED EVIDENCE CLAIMS, HIS PREVIOUSLY PRESENTED *BRADY* CLAIMS AND HIS PREVIOUSLY PRESENTED *STRICKLAND* CLAIMS. THE NEW LAW, DUE PROCESS PRINCIPLES, AND THE EIGHTH AMENDMENT ALL REQUIRE THIS COURT TO REVISIT MR. DUCKETT'S PREVIOUSLY PRESENTED CLAIMS AND DETERMINE WHETHER THE EVIDENCE PRESENTED TO SUPPORT EACH CLAIM AND ALL THE OTHER ADMISSIBLE EVIDENCE AT A FUTURE RESENTENCING WOULD PROBABLY RESULT IN A LIFE SENTENCE IN LIGHT OF THE NEW LAW THAT WOULD GOVERN AT A RESENTENCING, AND WHEN THE PROPER ANALYSIS IS CONDUCTED IT IS CLEAR THAT IT IS LIKELY THAT A DIFFERENT OUTCOME WOULD RESULT, RULE 3.851 RELIEF IS REQUIRED.**

This claim is evidenced by the following:

1. All other factual allegations in this motion and in Mr. Duckett's previous motions to vacate and all evidence presented by him during his trial and previous postconviction proceedings are incorporated herein by specific reference.
2. On March 7, 2016, Chapter 2016-13 was signed into law. It substantially revised Florida's capital sentencing statute and constitutes new law cognizable in Rule 3.851 proceedings. As the Staff Analysis of the Criminal Justice Subcommittee accompanying HB 7101 (Chapter 2016-13) makes clear, its adoption was intended to cure the constitutional defect in Florida's capital sentencing scheme identified in *Hurst v. Florida*, 136 S. Ct. 616 (2016).
3. In *Perry v. State*, the Florida Supreme Court addressed the newly revised statute. While generally approving all other aspects of the newly revised statute, it held that the provision

making a 10-2 vote by the jury a necessary predicate for a death sentence was unconstitutional under *Hurst v. Florida* because it did not require unanimity. *Perry* held:

to increase the penalty from a life sentence to a sentence of death, the jury must unanimously find the existence of any aggravating factor, that the aggravating factors are sufficient to warrant a sentence of death, that the aggravating factors outweigh the mitigating circumstances, and must unanimously recommend a sentence of death.

2016 WL 6036982 at 8. In deciding whether to recommend a death sentence, jurors may choose to vote in favor of a life sentence to be merciful. *Id.* (“This final jury recommendation, apart from the findings that sufficient aggravating factors exist and that the aggravating factors outweigh the mitigating circumstances, has sometimes been referred to as the ‘mercy’ recommendation.”).<sup>39</sup>

4. This is the law that now governs when a death sentence is vacated and a resentencing ordered in a capital case. In *Hurst v. State*, the Florida Supreme Court explained:

Requiring a unanimous jury recommendation before death may be imposed, in accord with precepts of the Eighth Amendment and Florida’s right to trial by jury, is a critical step toward ensuring that Florida will continue to have a constitutional and viable death penalty law, which is surely the intent of the Legislature. The requirement will dispel most, if not all, doubts about the future validity and long-term viability of the death penalty in Florida.

2016 WL 6036978 at \*17.

5. In *Hildwin v. State*, 141 So.3d 1178, 1184 (Fla.2014), the Florida Supreme Court explained that when presented with qualifying newly discovered evidence:

the postconviction court must consider the effect of the newly discovered evidence, in addition to all of the evidence that could be introduced at a new trial. *Swafford v. State*, 125 So.3d 760, 775-76 (Fla. 2013). In determining the impact of the newly discovered evidence, the court must conduct a cumulative analysis of all the evidence so that there is a ‘total picture’ of the case.

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<sup>39</sup> Residual doubt could lead one of more jurors to chose mercy and vote in favor of a life sentence.

In *Swafford*, the Florida Supreme Court indicated the evidence to be considered in evaluating whether a different outcome was probable included “evidence that [had been] previously excluded as procedurally barred or presented in another proceeding.” *Swafford v. State*, 125 So.3d at 775-76. The “standard focuses on the likely result that would occur during a new trial with all admissible evidence at the new trial being relevant to that analysis.” *Id.* Put simply, the analysis requires envisioning how a new trial or resentencing would look with all of the evidence that would be available. Obviously, the law that would govern at a new trial must be part of the analysis. Here, the revised capital sentencing statute would apply at a resentencing and would require the jury to determine unanimously that sufficient aggravators exist and that they outweigh the mitigators. It would also require the jury to unanimously recommend a death sentence before the sentencing judge would be authorized to impose a death sentence. One single juror voting in favor of a life sentence would require the imposition of a life sentence.

6. This is new Florida law that did not exist when Mr. Duckett previously presented his newly discovered evidence, *Brady* and *Strickland* claims. Accordingly, before the enactment of Chapter 2016-13 on March 7, 2016, and before the issuance of *Perry v. State* and *Hurst v. State* on October 14, 2016, Mr. Duckett could not present his claims as set forth herein because the new law that would govern any resentencing ordered in Mr. Duckett’s was previously unavailable. Mr. Duckett’s previously presented claims must be re-evaluated in light of the new Florida law.

7. The Florida Supreme Court explained in *Hurst v. State* that “the requirement of unanimity in capital jury findings will help to ensure the heightened level of protection necessary for a defendant who stands to lose his life as a penalty.” 2016 WL 6036978 at \*14. *See State v. Steele*, 921 So. 2d 538, 549 (Fla. 2005), quoting *State v. Daniels*, 542 A.2d 306, 315 (Conn.

1988) (“[W]e perceive a special need for jury unanimity in capital sentencing. Under ordinary circumstances, the requirement of unanimity induces a jury to deliberate thoroughly and helps to assure the reliability of the ultimate verdict.”). The Court in *Hurst v. State* also held:

If death is to be imposed, unanimous jury sentencing recommendations, when made in conjunction with the other critical findings unanimously found by the jury, provide the highest degree of reliability in meeting these constitutional requirements in the capital sentencing process.

2016 WL 6036978 at \*15. Thus, reliability of Florida death sentences is the touchstone of the new Florida law requiring a unanimous jury to make the factual determinations necessary for the imposition of a death sentence and requiring the jury to unanimously return a death recommendation before a death sentence is authorized as a sentencing option. Implicit in the justification for the new Florida law is an acknowledgment that death sentences imposed under the old capital sentencing scheme were (or are) less reliable. Before executions are carried out in a case in which the reliability of a death sentence is subpar, a re-evaluation of such a death sentence in light of the changes made by Chapter 2016-13, *Hurst v. State*, and *Perry v. State* is warranted. A previous rejection of a death sentenced defendant’s *Strickland* claims, *Brady* claims, and/or newly discovered evidence claims should be re-evaluated in light of the new requirement that juries must unanimously make the necessary findings of fact and return a unanimous death recommendation before a death sentence is even a sentencing option. Certainly the previous rejection of a newly discovered evidence claim on the basis of a defendant’s failure to show that the new evidence would have likely led six jurors to vote for a life sentence no longer comports with the law since Florida law now provides that if one juror votes for a life sentence, a life sentence must be imposed. It is likely a properly instructed jury knowing that the jurors individually are responsible for a death sentence because they each have the power to preclude it, and knowing that they are not required by law to ever vote in favor of a death

sentence, that the outcome at a resentencing would probably be different and/or confidence is undermined in the reliability of the death sentence currently imposed in Mr. Duckett's case. The *Strickland* and *Brady* prejudice analysis requires a determination of whether confidence in the reliability of the outcome - the imposition of a death sentence - is undermined by the evidence the jury did not hear due to the *Strickland* and/or *Brady* violations. The new Florida law should be part of the evaluation of whether confidence in the reliability of the outcome is undermined, particularly since the touchstone of the new Florida law is the likely enhancement of the reliability of any resulting death sentence.

8. The newly discovered evidence presented in Mr. Duckett's previous Rule 3.851 motions must be evaluated under the standard set forth in *Swafford* and *Hildwin* and that means all of the evidence that would be admissible at a resentencing which includes the mitigating evidence presented to meet the prejudice prong of the *Strickland* standard governing ineffectiveness claims and the undisclosed exculpatory evidence presented to show that the State failed to meet its *Brady* obligation. With all the new evidence that would be admissible at a resentencing, the State cannot demonstrate beyond a reasonable doubt that not a single juror would have voted in favor of a life sentence. A single juror voting for a life sentence under *Hurst v. State* and *Perry v. State* would mean that a life sentence would be the only sentencing option. Thus, when the proper *Swafford/Hildwin* analysis is conducted with proper consideration given to the new Florida law arising from Chapter 2016-13, *Hurst v. State* and *Perry v. State*, it is in fact more likely than not that, armed with the previously undisclosed and newly discovered evidence described above, and with *Caldwell* compliant instructions regarding each juror's sentencing responsibility, Mr. Duckett would be able to persuade at least one juror to vote for a

life sentence.<sup>40</sup>This is particularly true in Mr. Duckett's case given that the original jury authorized death only by a vote of 8-4 and this was without hearing the newly discovered evidence. That means it is more likely than not that a life sentence would be required and that the outcome of a resentencing would be different. Similarly, one juror's vote in favor of a life sentence is much more likely to undermine confidence in the reliability of the decision to impose death in light of the new unanimity requirement when a court is considering the prejudice arising from *Strickland* and/or *Brady* claims.

9. This Court must re-evaluate Mr. Duckett's newly discovered evidence, *Brady* and *Strickland* claims in light of the new Florida law which would govern at resentencing. In *Walton v. State*, where a Rule 3.851 appeal is pending in the Florida Supreme Court, the court recently granted a motion to relinquish jurisdiction raising this identical argument. *Walton v. State*, Case No. SC16-448 (Fla. Sept. 13, 2016). When the re-evaluation of all of the admissible evidence is conducted, it is apparent that the outcome would probably be different and that Mr. Duckett would receive a binding life recommendation from the jury - one juror voting in favor of a life sentence now mandates the imposition of a life sentence. *Perry v. State*; *Hurst v. State*.

10. Because the new Florida law will apply at a retrial or resentencing, it constitutes new law within the meaning of Rule 3.851 because it extends a new right to capital defendants, *i.e.* the right to a life sentence if one juror votes in favor of a life sentence. This new law and the new right it extends requires this Court to revisit Mr. Duckett's previously presented newly discovered evidence claims and determine whether under the requisite analysis set forth in *Hildwin* and *Swafford*, a different result, *i.e.*, a life sentence, is more likely than not. Mr. Duckett

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<sup>40</sup> Moreover, consideration must be given to the fact that the original jury was permitted to consider the testimony of a *Williams* rule witness, Kimberly Fowler, that the Florida Supreme Court subsequently said was error. Even with this inadmissible evidence, four jurors voted for a

can meet the *Hildwin/Swafford* test. He could also demonstrate that confidence in the reliability of the outcome is undermined on the basis of the *Strickland* and/or *Brady* claims. Accordingly, he is entitled to Rule 3.851 relief on his newly discovered evidence, *Strickland* and/or *Brady* claims on the basis of new Florida law set forth in *Perry v. State* and *Hurst v. State*.

11. Rule 3.851 relief is warranted. Mr. Ducktt's death sentence must be vacated and a new penalty phase ordered.

### **CONCLUSION AND RELIEF SOUGHT**

Mr. Duckett prays for the following relief, based on his prima facie allegations showing violation of his constitutional rights: 1) a “fair opportunity” to demonstrate that his death sentence stands in violation of the Sixth and Eighth Amendments and *Hurst v. Florida*, *Perry v. State* and *Hurst v. State*; 2) a re-evaluation of his previously presented *Strickland*, *Brady*, and newly discover evidence claims in light of the new Florida law that would govern at a resentencing in order to enhance the reliability of any resulting death sentence; 3) an opportunity for further evidentiary development to the extent necessary; 4) authorization to proceed *in forma pauperis*; 5) leave to supplement this motion should new claims, facts, or legal precedent become available to counsel; and, 6) on the basis of the reasons presented herein, Rule 3.851 relief vacating his death sentence and ordering a new penalty phase proceeding.

### **CERTIFICATION OF ATTORNEY**

I HEREBY CERTIFY that I have discussed the contents of this motion with my client, that I have complied with Rule 4-1.4 of the Rules of Professional Conduct, and that the motion is filed in good faith.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing Motion to Vacate Judgment and Sentence, and Request for Leave to Amend has been furnished to counsel for the State through the Florida Courts efileing portal.

This the 12<sup>th</sup> day of January 2017.

MARY ELIZABETH WELLS  
Florida Bar No. 0866067  
623 Grant Street, SE  
Atlanta, Georgia 30312  
(404) 408-2180  
mewells27@comcast.net

By:     /s/ Mary E. Wells      
Counsel for James A. Duckett