

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR PINELLAS COUNTY

RICHARD WALLACE J RHODES

APPELLANT

VS.

STATE OF FLORIDA

APPELLEE

LOWER CASE NUMBER: 84-03982-CFANO

APPEAL CASE NUMBER: NOT YET ASSIGNED

RECORD ON APPEAL

FLORIDA SUPREME COURT

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**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR PINELLAS COUNTY**

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**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

v.

Case No. 84-CF-3982

RICHARD W. RHODES, JR.,

Defendant.

_____/

**DEFENDANT’S MOTION FOR POST-CONVICTION RELIEF
IN LIGHT OF *HURST v. FLORIDA*¹**

Defendant Richard W. Rhodes, Jr., through counsel, moves for post-conviction relief under Fla. R. Crim. P. 3.851, seeking relief under *Hurst v. Florida*, 136 S. Ct. 616 (2016) (“*Hurst*”), and *Hurst v. State*, SC12-1947, 2016 WL 6036978 (Fla. Oct. 14, 2016) (“*Hurst v. State*”).

Facts and Procedural History

1. In 1985, Defendant was convicted of first-degree murder in the Sixth Judicial Circuit, in and for Pinellas County. *See Rhodes v. State*, 547 So. 2d 1201, 1203 (Fla. 1989).

¹ In compliance with Florida Rule of Criminal Procedure 3.851(e)(2), this motion is limited to 25 pages and therefore should not be considered a complete briefing of the issues presented herein. Counsel urges that the Court permit Defendant the opportunity to further brief this case as may be necessary in light of developments in the application of the decisions in *Hurst v. Florida* and *Hurst v. State*.

2. Following the presentation of penalty-phase evidence, the jury was instructed to make an advisory sentencing recommendation, and the “advisory” jury—through a 7-5 vote—recommended a death sentence. *See id.* at 1206. The jury vote was not unanimous.

3. On direct appeal, the Florida Supreme Court affirmed Defendant’s conviction but vacated the sentence because “only one of the three aggravating circumstances upon which the trial court relied is valid” and “there was substantial psychiatric testimony in mitigation.” *Id.* at 1208. The court remanded the case to the trial court for a new sentencing proceeding. *See id.*

4. At resentencing, the jury was again instructed to make an advisory sentencing recommendation, and the “advisory” jury—through a 10-2 vote—recommended a death sentence. *See Rhodes v. State*, 638 So. 2d 920, 923 (Fla. 1994). Again, the jury vote at resentencing was not unanimous.

5. At resentencing, the judge made factual findings as to the following aggravating circumstances: (1) Defendant committed the murder while on parole; (2) Defendant was previously convicted of a violent felony; and (3) the murder was committed while Defendant was engaged in the commission of a sexual battery. *See id.*

6. In mitigation, the judge found the following statutory mitigating circumstances: (1) Defendant’s age of 30 at the time of the offense; and (2)

Defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. *See id.* The judge found the following non-statutory mitigating circumstances: (1) Defendant was abandoned by his parents when he was a child; and (2) Defendant never experienced a normal family life because his social environments did not address his needs and he spent most of his life in state hospitals and prisons. *See id.*

7. The judge, not the jury, made findings of fact regarding the applicable aggravating circumstances, and found as fact that the aggravating circumstances were sufficient to impose the death penalty and were not outweighed by any mitigating circumstances. The court sentenced Defendant to death. *See id.*

8. On direct appeal of the resentencing, the Florida Supreme Court affirmed Defendant's sentence. *See id.* at 927. The United States Supreme Court denied Defendant's petition for a writ of certiorari. *Rhodes v. Florida*, 115 S. Ct. 642 (1994).

9. In 1996, Defendant filed a Rule 3.851 motion to vacate his conviction and death sentence. The trial court denied his motion in 2003. The Florida Supreme Court affirmed the trial court's denial of postconviction relief. *Rhodes v. State*, 986 So. 2d 501, 514 (Fla. 2008).

10. In 2009, Defendant filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Florida. The district court

denied his petition. *Rhodes v. Sec., Dep't. of Corrs.*, No. 8:09-cv-1350-T-17TBM, 2010 WL 3819358 (M.D. Fla. Sept. 30 2010).

11. Defendant now moves in this Court for post-conviction relief under *Hurst v. Florida* and *Hurst v. State*.

12. Defendant respectfully requests a status conference.

GROUND FOR RELIEF (Claim 1): Defendant's death sentence is unconstitutional under *Hurst v. Florida* and *Hurst v. State* and should be vacated

1. Timeliness

As a threshold matter, this motion is timely. Although “[a]ny motion to vacate a judgment of conviction and sentence of death shall be filed by the defendant within 1 year after the judgment and sentence become final,” Fla. R. Crim. P. 3.851(d)(1), such a motion may be filed after the one-year limitation period if “the fundamental constitutional right asserted was not established within [the one-year limitation period] and has been held to apply retroactively.” Fla. R. Crim. P. 3.851(d)(2)(B); *see also Walton v. State*, 77 So. 3d 639 (Fla. 2011).

The federal constitutional right announced this year in *Hurst*—that *Ring* applies to Florida and that the Sixth Amendment forbids a capital-sentencing scheme that requires judges, as opposed to juries, to conduct the fact finding that subjects a defendant to a death sentence—was not established within one year after Defendant's conviction became final.

The more robust Florida constitutional decision in *Hurst v. State*—which

echoed the federal constitutional *Hurst* decision, and additionally held that (1) the evolving standards of decency require unanimous jury fact-finding as to the applicable aggravating factors, the sufficiency of those aggravating factors to impose the death penalty, and the insufficiency of the mitigating factors to outweigh the aggravating factors, and (2) individualized harmless error analysis applies to *Hurst* claims in the Florida courts, and such analysis places the burden on the State to prove beyond a reasonable doubt, not based on pure speculation, that the *Hurst* error did not affect the jury's recommendation—was also not established within one year after Defendant's conviction became final.

Defendant is entitled to assert a claim under *Hurst* and *Hurst v. State* as long as those decisions meet the Florida retroactivity test set forth in *Witt v. State*, 387 So. 2d 922 (Fla. 1980). The rules in *Hurst* and *Hurst v. State* both meet the *Witt* retroactivity test, and this motion should therefore be deemed timely filed for purposes of Rule 3.851.

2. *Hurst* held Florida's capital sentencing scheme unconstitutional, and *Hurst v. State* announced more robust protections under state law

In *Hurst*, the United States Supreme Court held that “Florida’s capital sentencing scheme violates the Sixth Amendment” The Court invalidated as unconstitutional Fla. Stat. §§ 921.141(2) and (3), which provided that a defendant who has been convicted of a capital felony may be sentenced to death only after (1)

a penalty phase jury renders an advisory verdict, without specifying the factual basis for its recommendation, and (2) notwithstanding the recommendation of a majority of the jury, the court decides whether sufficient aggravating circumstances exist and that they are not outweighed by the mitigating circumstances. 136 S. Ct. at 620-21. In *Hurst*, the Supreme Court held that Florida's death sentencing scheme was constitutionally problematic because "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. The Court ruled that Florida's capital-sentencing scheme thus violated the Sixth Amendment. *Id.*

In *Hurst v. State*, the Florida Supreme Court announced that, in addition to the federal constitutional requirements set forth in *Hurst*, the state constitution required that capital defendants be afforded additional protections. First, the Florida Supreme Court ruled that the Eighth Amendment's evolving standards of decency require unanimous jury fact-finding as to each aggravating factor, that those aggravating factors are sufficient to impose the death penalty, that those aggravating factors outweigh the mitigating factors, and that those findings for fact must be made by all the jurors beyond a reasonable doubt. *Hurst v. State*, 2016 WL 6036978, at *10-14.

Second, the Florida Supreme Court ruled that claims by Florida prisoners under *Hurst* must be subjected to individualized harmless error review, and that

such review places the burden on the state to prove beyond a reasonable doubt, and not based on pure speculation, that the *Hurst* error did not affect the jury's recommendation. *Id.* at *23. In *Hurst v. State*, the Florida Supreme Court found the *Hurst* error was not harmless, explaining that "after a detailed review of the evidence presented as proof of the aggravating factors and evidence of substantial mitigation, we are not so sanguine as to conclude that Hurst's jury would without a doubt have found both aggravating factors—and, as importantly, that the jury would have found the aggravators sufficient to impose death and that the aggravating factors outweighed the mitigation." The Florida Supreme Court, articulating principles similar to those embodied in the United States Supreme Court's decision in *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985), emphasized that "we cannot determine what aggravators, if any, the jury unanimously found proven beyond a reasonable doubt," that "[w]e cannot determine how many jurors have found the aggravation sufficient for death," and that "[w]e cannot determine if the jury unanimously concluded that there were sufficient aggravating factors to outweigh the mitigating circumstances." *Hurst v. State*, 2016 WL 6036978, at *24. The Court "decline[d] to speculate as to why seven jurors in [*Hurst*] recommended death and why five jurors were persuaded that death was not the appropriate penalty." *Id.* at *25.

The Florida Supreme Court further emphasized that even if the jury does

unanimously find each element required for a capital sentence, there is no impact from the decision in *Hurst v. State* on “the right of the trial court, even upon receiving a unanimous recommendation for death, to impose a sentence of life.” *Id.* at *13.

In expanding the protections set forth by the United States Supreme Court in *Hurst*, the Florida Supreme Court in *Hurst v. State* noted that “this Court, in interpreting the Florida Constitution and the rights afforded to persons within this State, may require more protection be afforded to criminal defendants than that mandated by the federal Constitution.” *Id.*

3. The *Hurst* decisions are retroactive

The *Hurst* decisions of the United States Supreme Court and the Florida Supreme Court are retroactive under the Florida retroactivity test articulated in *Witt v. State*, 387 So. 2d 922 (Fla. 1980), and *Hurst* is also retroactive under the federal retroactivity test established in *Teague v. Lane*, 489 U.S. 288 (1989).

A. The *Hurst* decisions are retroactive under Florida’s *Witt* test

The *Hurst* decisions are retroactive under Florida’s long-established retroactivity test. The Florida Supreme Court recently reaffirmed the continuing validity of Florida’s retroactivity test, established in *Witt*, for determining whether new decisions of the United States Supreme Court that are favorable to criminal defendants are to be applied to cases on collateral review in Florida’s state courts.

See Falcon v. State, 162 So. 3d 954, 960 (Fla. 2015) (holding that *Miller v. Alabama*, 132 S. Ct. 2455 (2012) is retroactive). Under *Witt*, Florida courts apply holdings favorable to criminal defendants retroactively provided that the decisions (1) emanate from the United States Supreme Court, (2) are constitutional in nature, and (3) constitute “a development of fundamental significance.” *Id.*

Florida’s *Witt* test is distinct from the federal retroactivity test established in *Teague*. *See Falcon*, 162 So. 3d at 955-56 (determining retroactivity under *Witt* and *Teague* requires separate inquiries); *see also Witt*, 387 So. 2d at 928 (“We start by noting that we are not obligated to construe our rule concerning post-conviction relief in the same manner as its federal counterpart” The federal retroactivity test was designed with “[c]omity interests and respect for state autonomy” in mind, *Schriro v. Summerlin*, 542 U.S. 348, 364 (2004), and a state may grant broader retrospective relief when reviewing its own state convictions. *See Danforth v. Minnesota*, 552 U.S. 264, 280-81 (2008).

The *Hurst* decisions satisfy the first two *Witt* retroactivity factors. They also satisfy the third *Witt* factor because they constitute “a development of fundamental significance,” *i.e.*, a change in the law that is “of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of the United States Supreme Court’s decisions in *Stovall v. Denno*, 388 U.S. 293 (1967), and *Linkletter v. Walker*, 381 U.S. 618 (1965).” *Falcon*, 162 So. 3d at 961 (quoting *Witt*, 387 So.

2d at 929) (internal brackets omitted).

Hurst's purpose is advanced by retroactive application. Retroactivity would ensure that *all* defendants' Sixth Amendment rights are protected, and is in conformity with the Court's understanding that "[c]onsiderations of fairness and uniformity make it very difficult to justify depriving a person of his liberty or his life under a process no longer considered acceptable and no longer applied to indistinguishable cases." *Falcon*, 162 So. 3d at 962 (internal quote omitted).

Retroactive application of *Hurst* would not have a substantially injurious effect on the administration of justice, as the number of potential *Hurst* claimants is both finite and manageable. As of October 2016, Florida's total death row population was less than 400. *See Death Row Roster*, Florida Department of Corrections, *available* <http://www.dc.state.fl.us/activeinmates/deathrowroster.asp> (last visited Oct. 24, 2016). Retroactive application of new rules affecting much larger populations have been approved; in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), the Supreme Court approved of retroactive application of a new rule prohibiting mandatory life sentences for juveniles, which one study estimated could impact as many as 2,300 cases nationwide. *See* John R. Mills, Anna M. Dorn, and Amelia C. Hritz, *No Hope: Re-Examining Lifetime Sentences for Juvenile Offenders*, The Phillips Black Project, *available* <http://www.phillipsblack.org/s/JLWOP-2.pdf> (last visited Oct. 24, 2016).

B. There is no “partial retroactivity” under *Witt*; the *Hurst* decisions must apply to all death row inmates

Hurst’s retroactivity should not be truncated, *i.e.*, limited to a subset of death sentences, such as those “finalized” after *Ring*, or after *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In *Falcon*, which applied *Witt* and ruled retroactive the decision in *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (holding that mandatory life sentences for juveniles are unconstitutional), the Florida Supreme Court announced that “*any* affected juvenile offender shall have two years from the time the mandate issues in this case to file a motion for post-conviction relief in the trial court seeking to correct his or her sentence pursuant to *Miller*.” *Falcon*, 162 So. 3d at 954 (emphasis added).²

The Court did not limit *Miller* retroactivity to only *some* prisoners. Especially here,

² In the context of capital punishment, the Florida Supreme Court applied the decision in *Hitchcock v. Dugger*, 481 U.S. 393 (1987), which held that trial courts in capital cases are prohibited from instructing juries to consider only statutorily enumerated mitigating circumstances, retroactively. *See, e.g., Thompson v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987); *Downs v. Dugger*, 514 So. 2d 1069 (Fla. 1987); *Riley v. Wainwright*, 517 So. 2d 656, 660 (1987). The Court permitted all impacted individuals to seek *Hitchcock* relief pursuant to Florida Rule of Criminal Procedure 3.850, or if Rule 3.850 relief was unavailable, through a petition in the Florida Supreme Court for a writ of habeas corpus. *See Hall v. State*, 541 So. 2d 1125 (Fla. 1989) (holding that *Hitchcock* claims should be raised in Rule 3.850 motions); *Meeks v. Dugger*, 576 So. 2d 713 n.1 (Fla. 1991) (“Because this petition was filed prior to our disposition of *Hall* . . . we will allow the instant claim to be raised in a petition for a writ of habeas corpus.”). And so, in circumstances analogous to the current post-*Hurst* landscape, when the Supreme Court in *Hitchcock* rejected the Florida Supreme Court’s interpretation of *Lockett*, as the Supreme Court has now rejected the Florida Supreme Court’s interpretation of *Ring*, the Court found *Hitchcock* retroactive.

“[c]onsiderations of fairness and uniformity make it very ‘difficult to justify depriving a person of his liberty *or his life under a process no longer considered acceptable and no longer applied to indistinguishable cases.*’” *Falcon*, 162 So. 3d at 962 (quoting *Witt*, 387 So. 2d at 929) (emphasis added).

Arbitrarily denying relief to some defendants sentenced to death but not others would be particularly egregious. 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” *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977). The question should not be how many executions based upon unconstitutional death sentences Florida will tolerate before *Hurst* is given effect. The Florida Supreme Court’s history of adherence to principles of fundamental fairness opposes such a miserly approach.

C. *Hurst* is also retroactive under federal law

The decision in *Schriro v. Summerlin*, 542 U.S. 348 (2004) (holding that *Ring* is not retroactive under *Teague* in federal habeas proceedings), should have no effect on this Court’s retroactivity analysis. As noted above, Florida courts follow *Witt*, not the federal approach of *Teague v. Lane*, 489 U.S. 288 (1989), which was developed with “[c]omity interests and respect for state autonomy” in mind. *Summerlin*, 542 U.S. at 364.

However, even if *Teague* applies because of the special nature of the unconstitutionality of Defendant's death sentence and the watershed nature of the United States Supreme Court's ruling, *Hurst* should be retroactively applied under the federal approach. See *Montgomery v. Louisiana*, 136 S. Ct. 718, 728 (2016) (*Teague* "requires the retroactive application of new substantive and watershed procedural rules in federal habeas proceedings." (emphasis added)). *Hurst* is retroactive under *Teague* notwithstanding *Summerlin*, 542 U.S. at 364, which held *Ring* not retroactive in an Arizona case evaluated under *Teague*. Although *Hurst* was based on the reasoning of *Ring*, the two cases are not interchangeable because of the differences between the Arizona capital sentencing scheme at issue in *Ring* and the Florida death penalty statute invalidated by *Hurst*. For instance, unlike Arizona's law, Florida's now-defunct death penalty law required not only that aggravating factors be found to impose a death sentence, but also required factual determinations that "*sufficient* aggravating circumstances exist" to impose a death sentence, and that "there are *insufficient* mitigating circumstance to outweigh the aggravating circumstances." Fla. Stat. § 921.141(3) (emphasis added). That distinction is why, unlike the harmless-error review that occurs under *Ring* with respect to the finding of aggravating circumstances like a prior or contemporaneous felony conviction, such review is different in the *Hurst* context because it is not easy to determine whether and how the jury's "sufficiency" fact-finding was affected.

In *Hurst* cases, individualized state-court harmless error inquiries must take place.

Further, *Hurst* was grounded on the standard of proof beyond a reasonable doubt, whereas *Ring* was not, and the standard of proof beyond a reasonable doubt has always been understood to have retroactive application. As District Judge Hinkle of the United States District Court for the Northern District of Florida noted in a recent order, that although *Summerlin* held *Ring* to be non-retroactive under *Teague*, the same cannot be automatically assumed for *Hurst* because *Summerlin* “did not address the requirement for [the jury to find aggravating circumstances based on] proof beyond a reasonable doubt.” *Guardado v. Jones*, N.D. Fla. 4:15-cv-256, ECF No. 20 (Order) at 3–4.

Put simply, *Hurst* is more robust than *Ring*, and *Summerlin*’s retroactivity ruling cannot be assumed to automatically apply to *Hurst* because the Arizona law at issue in *Ring* and the Florida law at issue in *Hurst* are fundamentally different. In *Hurst* itself, the Supreme Court overruled its prior cases that formed the basis for the Florida Supreme Court’s ruling—in cases such as the instant—that *Ring* was non-retroactive. *See Hurst*, 136 S. Ct. at 616 (overruling *Hildwin* and *Spaziano*). It should also be noted that the United States Supreme Court’s early reticence to hold *Ring* retroactive under *Teague* may be eroding, as highlighted by the recent decision in *Montgomery*. And most recently, in *Johnson v. Alabama*, the Supreme Court granted a *Hurst*-based petition for rehearing, in a case where the certiorari petition

had not made a *Hurst* or *Ring* argument, vacated the state court’s judgment, and remanded to the state court for further consideration in light of *Hurst*. See No. 15-7091, 2016 WL 1723290, at *1 (May 2, 2016). The Court thereafter followed that approach in three other cases. See *Wimbley v. Alabama*, No. 15-7939, 2016 WL 410937, at *1 (May 31, 2016); *Kirksey v. Alabama*, No. 15-7923, 2016 WL 378578, at *1 (June 6, 2016); *Russell v. Alabama*, No. 15-9918, 2016 WL 3486659 (October 3, 2016). Given such indications about the state of federal retroactivity law, *Hurst* should be deemed retroactive under *Teague* and federal law.

The United States Supreme Court’s decision in *Hurst*, and the FSC decisions in *Hurst v. State*, and *Perry v. State*, SC16-547, 2016 WL 6036982 (Fla. Oct. 14, 2016), also highlight that the constitutional protections now afforded capital prisoners in Florida have Eighth Amendment implications, as they are required by evolving standards of decency.

D. A *Hurst* claim is not procedurally barred

Defendant’s *Hurst* claim is not procedurally barred. The Florida Supreme Court has permitted litigation on the merits based on recently-issued Supreme Court decisions to first occur in the trial court and later to be appealed. See, e.g., *Hall v. State*, 941 So. 2d 1125, 1128 (1989) (explaining that because “[a]ppellate courts are reviewing, not fact-finding courts,” claims under the Supreme Court’s recent decision in *Hitchcock v. Dugger*, 481 U.S. 393 (1987), “should be presented to the

trial court in a rule 3.850 motion for postconviction relief”); *Meeks v. Dugger*, 576 So. 2d 713 (Fla. 1991); *Falcon v. State*, 162 So. 3d 954 (Fla. 2015) (permitting life-sentenced juvenile offenders two years to petition the trial court for relief under the Supreme Court’s recent decision in *Miller v. Alabama*, 132 S. Ct. 2455 (2012)). Defendant’s claim, based upon the new decision in *Hurst*, is not barred.

4. The *Hurst* error is not harmless

The *Hurst* error in this case is not harmless, for reasons that include: a reasonable jury could have voted to impose a life sentence; there are not “automatic” aggravating circumstances in Florida because of the “sufficiency” clause; the jury was misled as to its role; evolving standards of decency require unanimous jury findings of each aggravator and have led to a national consensus that death sentences should only be imposed after a penalty-phase jury votes unanimously to impose death; and counsel would have tried the case differently had the jury been required to make the “sufficiency” and “insufficiency” findings of fact.

A. A reasonable jury could have voted to impose a life sentence

A reasonable jury could have voted to impose a sentence of life on Defendant, rather than a death sentence. A jury properly instructed that it, not the judge, was to make the ultimate sentencing decision could find that any one of the aggravating circumstances in Defendant’s case was *not*, in fact, sufficient to justify a death

sentence. *See* § 921.141(c)(2). There is absolutely no way to reasonably conclude that every juror found a specific aggravator sufficient for death. Jurors could have found, and relied upon, different aggravators. No single aggravator here can be held to have been found beyond a reasonable doubt by a unanimous jury.

Further, the judge found two statutory mitigating factors and two nonstatutory mitigating circumstances, *see supra* at 2-3 (listing the mitigating circumstances found by the court). Had Defendant's counsel's thinking not been influenced by the statutory framework struck down by *Hurst*, Defendant and counsel would have pursued a different approach than the one taken with the advisory jury and judge-sentencing, including broader challenges to aggravation and a broader presentation of mitigation. There is no way to conclude that the jury unanimously found any specific aggravator in this case before making an advisory death recommendation. *Cf. Mills v. Maryland*, 486 U.S. 367, 375-84 (1988); *McKoy v. North Carolina*, 494 U.S. 433, 444 (1990) (both holding, in the mitigation context, that the Eighth Amendment is violated when there is uncertainty about the jury's vote).

B. There are no “automatic” aggravating circumstances in Florida because of the “sufficiency” and “insufficiency” fact-finding requirements

Defendant should be granted relief under *Hurst* notwithstanding that the aggravating factors found by his trial judge included a contemporaneous violent felony conviction and a prior violent felony. Although *Ring* referred to an exception

allowing Arizona judges to find the fact of a prior conviction, the Florida death penalty law under which Defendant was sentenced, unlike the Arizona law at issue in *Ring*, required not only that one or more aggravating factors be found to impose a death sentence, but also required factual determinations that “*sufficient* aggravating circumstances exist” to impose a death sentence, and that “there are *insufficient* mitigating circumstances to outweigh the aggravating circumstances.” Fla. Stat. § 921.141(3) (emphasis added). As far back as four decades ago, the Florida Supreme Court made clear that the “sufficiency” fact determination “is not a mere counting process of X number of aggravating circumstances and number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.” *State v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973). The Florida system under which Defendant was sentenced is qualitatively different than the Arizona system at issue in *Ring*, so that, constitutionally, Defendant’s sentence does not stand after *Hurst*.

C. The jury was misled as to its role

The jury’s consideration of the evidence in Defendant’s case may well have been different if the jury had been required to conduct the fact finding, instead of making only an “advisory” recommendation for a sentence of death or life imprisonment. See *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985)

(recognizing the significant impact of a jury’s belief that the ultimate responsibility for determining whether a defendant will be sentenced to death lies elsewhere). Indeed, the Supreme Court “has always premised its capital punishment decision on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its truly awesome responsibility.” *Id.* at 341 (internal quotation marks omitted). This too highlights that relief is appropriate post-*Hurst*.

D. Evolving standards of decency require unanimous jury findings of each aggravator and have led to a national consensus that death sentences should only be imposed after a penalty-phase jury votes unanimously to impose death

This case implicates Eighth Amendment considerations of the “evolving standards of decency that mark the progress of a maturing society.” *Atkins v. Virginia*, 536 U.S. 304, 312 (2002).

Furthermore, evolving standards of decency have led to a national consensus that death sentences should only be imposed after a penalty-phase jury votes unanimously to impose death. The United States 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 jury unanimity should be required to impose a death sentence.

Florida has moved in line with the national consensus. The Florida Supreme

Court recently found the death-penalty statute signed into law by the Governor of Florida on March 7, 2016—which amended Florida’s death penalty scheme from requiring a 7-5 vote (the standard in place at the time of Defendant’s penalty phase) to requiring a 10-2 jury vote in favor of a death sentence, before imposing a sentence of death—to be unconstitutional because it does not require a *unanimous* death recommendation. *Hurst v. State*, 2016 WL 6036978 at *24 and *Perry v. State*, 2016 WL 6036982 at *7. *At Defendant’s first penalty phase, the advisory jury vote for death was 7-5, and at his second penalty phase, the advisory jury vote for death was 10-2.*

“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). The overwhelming number of states—including Florida—have concluded that a person is ineligible to be sentenced to death where any juror has voted for life imprisonment. Under our society’s current standards of decency and the Florida Supreme Court’s most recent opinions, Defendant’s death sentence, with an advisory jury vote of 10-2, is no longer tolerable under the Eighth Amendment. And even if such a sentence is permissible, the fact that jurors voted in Defendant’s favor demonstrates that the error may not be deemed harmless. *See Hurst v. State*, 2016 WL 6036978 at *25 (“We decline to speculate as to why seven

jurors in this case recommended death and why five jurors were persuaded that death was not the appropriate penalty. To do so would be contrary to our clear precedent governing harmless error review. Thus, the error. . .has not been shown to be harmless beyond a reasonable doubt.”)

E. Counsel and Defendant would have proceeded differently in this case post-*Hurst*

Harmless error review is rendered even more problematic by the fact that capital penalty phase proceedings do not occur in a vacuum. For instance, a defense counsel’s entire approach to the presentation of evidence would have been different had the jury, as opposed to the judge, been required to make the “sufficiency” and “insufficiency” findings. Counsel would have given different advice to the Defendant, and the decision-making in this case would have been different. This is especially true in light of the fact that the jury’s consideration of the evidence is different if the jury is required to make the sentencing findings, instead of making only an “advisory” recommendation for a sentence of death or life imprisonment. *See Caldwell*, 472 U.S. at 328-29 (recognizing significant impact of a jury’s belief that the ultimate responsibility for determining whether a defendant will be sentenced to death lies elsewhere). A hearing is appropriate to evaluate the effect of the statute invalidated by *Hurst* on counsel’s development of challenges to aggravation, mitigation, and defense penalty-phase theories at the sentencing and

resentencing; counsel's advice to the client; and the decisions of counsel and the client.

F. The Florida Supreme Court's interpretation of *Hurst*

The Florida Supreme Court's decisions in *Hurst v. State* and *Perry v. State*, confirm that a death-sentencing jury must be unanimous, the Eighth Amendment informs the unanimity requirement, the jury was misled as to its role, evolving standards of decency preclude a death sentence in a case such as this, *and* that the harmless-error analysis is not a simple hurdle for the State to overcome. *Hurst v. State* and *Perry v. State* confirm the analysis set forth herein.

The Florida Supreme Court confirmed that the right to a jury trial requires that the jury must *unanimously* find, as fact: 1) the existence of any aggravating factor; 2) that the aggravating factors are sufficient for the imposition of death; and 3) that the aggravating factors outweigh the mitigating circumstances. *Hurst v. State*, 2016 WL 6036978, at *10; *see also Perry*, 2016 WL 6036982, at *7. "The jury's recommendation for death must be unanimous." *Hurst v. State*, 2016 WL 6036978, at *10; *see also Perry*, 2016 WL 6036982, at *8. These unanimity requirements are compelled by the Eighth Amendment because had the jurors been properly instructed that they must unanimously find each fact necessary to impose death and unanimously determine that death is the appropriate punishment, the jury's consideration of the evidence in Defendant's case may well have been different. *See*

Caldwell, 472 U.S. at 328-29. And the fact findings must be made beyond a reasonable doubt.

In *Hurst v. State*, the Florida Supreme Court gave guidance in applying harmless error review: a sentencing error “is harmless only if there is no reasonable possibility that the error contributed to the sentence.” *Hurst v. State*, 2016 WL 6036978, at *23. “[T]he harmless error test is to be rigorously applied, and the State bears an extremely heavy burden in cases involving constitutional error.” *Id.* (internal citations and quotation marks omitted). Therefore, in the case of *Hurst* error, “the burden is on the State, as beneficiary of the error, to prove *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 [the Petitioner]’s death sentence in this case.” *Id.* (emphasis added). The Court further explained that a reviewing court should not speculate as to why some jurors might have found death an appropriate penalty. *Id.* at *25. All this supports the granting of relief herein.

Conclusion

Based on the foregoing, Defendant moves to vacate the sentence of death imposed in this case. Counsel for Defendant respectfully request that the State be ordered to respond and that a status conference be conducted as soon as practicable. Further, counsel requests the opportunity to brief the issues raised herein, especially in light of the on-going post-*Hurst* litigation in Florida’s state and federal courts; and

the opportunity to address, through a reply or other memorandum, any arguments or defenses the State might raise with respect to this motion.

Respectfully submitted,

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CERTIFICATION OF COUNSEL

Pursuant to Fla. R. Crim. P. 3.851(e)(1)(f), counsel certify that the motion for post-conviction relief, filed pursuant to *Hurst v. Florida*, has been discussed with Defendant and that counsel have complied with Rule 4-1.4 of the Rules of Professional Conduct, and counsel certify that the motion for post-conviction relief is filed in good faith.

/s/ Sarah S. Butters

CERTIFICATE OF SERVICE

I, HEREBY CERTIFY that on this 8th day of November, 2016, a true and correct copy of the foregoing has been served via e-file on the following:

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

STATE OF FLORIDA,

Plaintiff,

v.

Case No. CRC84-03982CFANO
Death Penalty Case

RICHARD W. RHODES, JR.,

Defendant.

_____ /

**STATE'S ANSWER TO DEFENDANT'S SUCCESSIVE
MOTION FOR POSTCONVICTION RELIEF**

The State of Florida, by and through the undersigned counsel, hereby responds to Defendant's Motion for 3.851 Postconviction Relief. On November 8, 2016, Rhodes filed his motion raising one claim for relief. For the reasons set out below, the motion should be summarily denied.

FACTS AND PROCEDURAL HISTORY

Rhodes was convicted of the first-degree murder of Karen Nieradka, whose decomposing body was found in construction debris in Saint Petersburg, Florida, on March 24, 1984. Following a penalty phase and sentencing hearing, Rhodes was sentenced to death. Rhodes v. State, 547 So. 2d 1201, 1202-03 (Fla. 1989). Upon remand for resentencing, Rhodes was again sentenced to death. The jury recommended death by a vote of ten

to two, and the trial court imposed a sentence of death relying on three aggravators: (1) Rhodes committed the murder while on parole; (2) Rhodes was previously convicted of a violent felony; and (3) the murder was committed while Rhodes was engaged in the commission of an attempted sexual battery. The trial court found two statutory mitigating factors: (1) Rhodes' age of thirty at the time of the offense; and (2) Rhodes' capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. In addition, the trial court found, as non-statutory mitigation, that: (1) as a child, Rhodes was abandoned by his parents; and (2) Rhodes never experienced a normal family life because as a child he was never placed in an environment that could address his needs and he spent most of his life in state hospitals and prisons. The Florida Supreme Court affirmed the death sentence imposed on resentencing. Rhodes v. State, 638 So. 2d 920, 923 (Fla. 1994). The United States Supreme Court denied Rhodes' petition for writ of certiorari on December 5, 1994. Rhodes v. Florida, 513 U.S. 1046 (1994).

On April 12, 1996, Rhodes filed a motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.851 in which he raised thirty-six claims and subclaims, including a claim that the jury was misled and its role

improperly diminished by the prosecutor and through jury instructions, contrary to Caldwell v. Mississippi, 472 U.S. 320 (1985). The State filed a response to Rhodes' 3.851 motion on August 23, 1999, and a Supplemental Response on September 8, 1999. On March 13, 2000, the trial court entered an order denying Rhodes' motion in part and granting an evidentiary hearing on two claims. Following evidentiary hearings, the trial court entered a final order denying Rhodes' Rule 3.851 motion. Thereafter, the court denied Rhodes' motion for rehearing. The Florida Supreme Court affirmed the denial of post-conviction relief in its modified opinion dated July 3, 2008. Rhodes v. State, 986 So. 2d 501 (Fla. 2008).

Rhodes' federal petition for writ of habeas corpus was denied on September 30, 2010. Rhodes v. Secretary, Dept. of Corr., 2010 WL 3819358 (M.D. Fla. Sept. 30, 2010).

Rhodes now raises a claim for relief pursuant to Hurst v. Florida, 136 S. Ct. 616 (2016), and Hurst v. State, ____ So. 3d ____, 2016 WL 6036978 (Fla. Oct. 14, 2016).

ARGUMENT

A Rule 3.851 motion for post-conviction relief must be filed within one year after the judgment and sentence are finalized. Fla. R. Crim. P. 3.851(d). If this time period expires, a motion filed thereafter is procedurally barred unless

it alleges:

(A) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, or

(B) the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively, or

(C) postconviction counsel, through neglect, failed to file the motion.

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

Additionally, a "motion filed under this rule is successive if a state court has previously ruled on a postconviction motion challenging the same judgment and sentence." Fla. R. Crim. P. 3.851(e)(2). A successive Rule 3.851 motion may be summarily denied on the merits "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief." Fla. R. Crim. P. 3.851(f)(5)(B).

Here, Rhodes filed the Rule 3.851 motion after his previous motion for post-conviction relief had been denied. This successive Rule 3.851 motion was filed on November 8, 2016, which is well beyond the one-year time limitation after the judgment and sentence were finalized on December 5, 1994, when the United States Supreme Court denied certiorari review of Rhodes' resentencing appeal. Rhodes v. Florida, 513 U.S. 1046 (1994);

Fla. R. Crim. P. 3.851(d)(1)(B) (judgment becomes final "on the disposition of the petition for writ of certiorari by the United States Supreme Court"). Thus, to be reviewed on the merits, Rhodes' claim must be either based on (A) new evidence that would have been unknowable through the exercise of due diligence, or (B) a fundamental constitutional right that has been held to apply retroactively and was not established before December 5, 1994. Fla. R. Crim. P. 3.851(d)(2)(A)-(B). Rhodes cannot meet these requirements.

CLAIM 1: RHODES IS NOT ENTITLED TO RELIEF FROM THIS COURT UNDER HURST V. FLORIDA AND HURST V. STATE.

Rhodes asserts he is entitled to relief under Hurst v. Florida and Hurst v. State; however, this claim is untimely, procedurally barred from review, and should not be applied retroactively. Rule 3.851(d)(2)(B) provides that a motion for post-conviction relief may be filed out of time only where "the fundamental constitutional right was not established within the time period provided for in subdivision (d)(1) and has been held to apply retroactively." Hurst v. Florida did not create or recognize any new constitutional right, and it has not been held to apply retroactively.

When a constitutional rule is announced, its requirements apply to defendants whose convictions or sentences are pending on

direct review or not otherwise final. Griffith v. Kentucky, 479 U.S. 314, 323 (1987). In Hurst v. Florida, the United States Supreme Court extended its holding in Ring v. Arizona, 536 U.S. 584 (2002), to Florida's death penalty procedures, holding that the Sixth Amendment right to jury trial rendered those procedures unconstitutional because they allowed a judge to make the necessary findings to render a death penalty. Rhodes' conviction and sentence were final in 1994, long before even Ring was decided. Since Ring itself is not retroactive, a decision expanding Ring to hold Florida's statute unconstitutional should not satisfy the stringent requirements needed to disrupt finality.

In Schriro v. Summerlin, 542 U.S. 348 (2004), the Supreme Court directly addressed whether its decision in Ring was retroactive. Summerlin, 542 U.S. at 349. The Court held the decision in Ring was **procedural** and not retroactive under Teague v. Lane, 489 U.S. 288 (1989). Id. at 353. This was because Ring only "altered the range of permissible methods for determining whether a defendant's conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment." Id. The Court concluded its opinion stating: "The right to jury trial is fundamental to our system of criminal procedure, and States are bound to enforce the Sixth Amendment's

guarantees as we interpret them. But it does not follow that, when a criminal defendant has had a full trial and one round of appeals in which the State faithfully applied the Constitution as we understood it at the time, he may nevertheless continue to litigate his claims indefinitely in hopes that we will one day have a change of heart. Ring announced a new procedural rule that does not apply retroactively to cases already final on direct review.” Summerlin 542 U.S. at 358. See also Whorton v. Bockting, 549 U.S. 406, 416 (2007) (holding Crawford v. Washington, 541 U.S. 36 (2004), was not retroactive under Teague, and relying extensively on the analysis of Summerlin).

Ring did not create a new constitutional right. That right was created by the Sixth Amendment guaranteeing the right to a jury trial. If Ring was not retroactive, then Hurst v. Florida cannot be retroactive as Hurst v. Florida is merely an application of Ring to Florida’s death penalty procedure. In fact, the decision in Hurst v. Florida is based on an entire line of jurisprudence which courts have almost universally held to not have retroactive application. See Destefano v. Woods, 392 U.S. 631 (1968) (*per curiam*) (holding the Court’s decision in Duncan v. Louisiana, 391 U.S. 145 (1968), which extended the right to a jury trial to the States was not retroactive); McCoy v. United States, 266 F.3d 1245, 1255, 1259 (11th Cir. 2001) (holding

Apprendi v. New Jersey, 530 U.S. 466 (2000), not retroactive under Teague, and acknowledging that every federal circuit to consider the issue reached the same conclusion); Varela v. United States, 400 F.3d 864, 866-67 (11th Cir. 2005) (explaining that Supreme Court decisions, such as Ring, Blakely v. Washington, 542 U.S. 296 (2004), and United States v. Booker, 543 U.S. 220 (2005), applying Apprendi's "prototypical procedural rule" in various contexts, are not retroactive); Crayton v. United States, 799 F.3d 623, 624-25 (7th Cir.), cert. denied, 136 S. Ct. 424 (2015) (holding that Alleyne v. United States, ___ U.S. ___, 133 S. Ct. 2151, 2156 (2013), which extended Apprendi from maximum to minimum sentences, like Apprendi or Ring, did not apply retroactively); State v. Johnson, 122 So. 3d 856, 865-66 (Fla. 2013) (holding Blakely not retroactive in Florida).

Moreover, the Florida Supreme Court has decided that Ring does not apply retroactively in Florida. In Johnson v. State, 904 So. 2d 400, 412 (Fla. 2005), the court comprehensively applied the factors in Witt v. State, 387 So. 2d 922 (Fla. 1980), to determine that Ring was not subject to retroactive application. The court concluded:

We conclude that the three Witt factors, separately and together, weigh against the retroactive application of Ring in Florida. To apply Ring retroactively, "would, we are convinced, destroy the stability of the law, render punishments uncertain and therefore ineffectual,

and burden the judicial machinery of our state . . . beyond any tolerable limit.” Witt, 387 So. 2d at 929-30. Our analysis reveals that Ring, although an important development in criminal procedure, is not a “jurisprudential upheaval” of “sufficient magnitude to necessitate retroactive application.” Id. at 929. We therefore hold that Ring does not apply retroactively in Florida and affirm the denial of Johnson’s request for collateral relief under Ring.

Johnson, 904 So. 2d at 412.

On October 14, 2016, the Florida Supreme Court released opinions in Hurst v. State and Perry v. State, ___ So. 3d ___, 2016 WL 6036982 (Fla. Oct. 14, 2016). Neither opinion resolved the issue of the retroactivity of Hurst v. Florida regarding cases in state post-conviction in a posture similar to Rhodes’ case.¹ Nevertheless, the Florida Supreme Court in Hurst v. State characterized the holding in Hurst v. Florida as a procedural rule. In rejecting Hurst’s argument that, in light of Hurst v. Florida, § 775.082(2), Florida Statutes, required the imposition of a life sentence, the court noted:

The Supreme Court in Hurst v. Florida focused its decision on that portion of the capital sentencing **process** requiring a judge rather than a jury to make all the findings critical to the imposition of the death penalty. The Court did not declare the death penalty unconstitutional. Accordingly, we hold that section 775.082(2) does not require commutation to life under the holding of Hurst v. Florida, which did

¹ The State notes that the issue of retroactivity of Hurst v. Florida is pending before the Florida Supreme Court in several cases, including Lambrix v. State. No. SC16-8, and Asay v. State, No. SC16-223.

not invalidate death as a penalty, but invalidated only that portion of the process which had allowed the necessary factfinding to be made by the judge rather than the jury in order to impose a sentence of death.

Hurst v. State, 2016 WL 6036978 at *21 (emphasis added). The court's characterization of the holding in Hurst v. Florida as a procedural rule indicates that established precedent on the non-retroactivity of the Apprendi/Ring line of cases has not been disturbed.

Rhodes' reliance on Falcon v. State, 162 So. 3d 954 (Fla. 2015), is misplaced. In Falcon, the Florida Supreme Court determined that the United States Supreme Court's decision in Miller v. Alabama, ____ U.S. ____, 132 S. Ct. 2455 (2012), which precluded mandatory life sentences for juvenile murderers, was a change in law that "place[d] beyond the authority of the state the power to regulate certain conduct or impose certain penalties." In other words, the holding in Miller invalidated mandatory life sentences for an entire class of defendants: juveniles. Because life without parole was the only available sentence and was mandatory for 20 years prior to the Miller decision, "considerations of fairness and uniformity" required retroactive application to these "indistinguishable cases." Falcon, 162 So. 3d at 962. By contrast, the death penalty is not the only available sentence for adult murderers; therefore,

Hurst v. Florida and Hurst v. State did not invalidate the only sentence available for an entire class of defendants.

Furthermore, the court in Falcon held the appropriate remedy for Miller violations was individualized sentencing where statutorily-enumerated and other pertinent factors should be considered. Falcon, 162 So. 3d at 963. This is something adult capital murderers have already received. Individualized sentencing proceedings render death penalty cases distinguishable from one another; therefore, "considerations of fairness and uniformity" do not require retroactive application of Hurst.

Because Rhodes' conviction and sentence were final prior to the issuance of Hurst v. Florida, and because Hurst is not retroactive, Rhodes is not entitled to relief as a matter of law.

Even if Hurst were to apply retroactively, Rhodes would not be entitled to relief. In Hurst v. State, the Florida Supreme Court noted that the constitutional error found in Hurst v. Florida was capable of harmless error review under Florida law. Hurst v. State, 2016 WL 6036978 at *23. "Where the error concerns sentencing, the error is harmless only if there is no reasonable possibility that the error contributed to the sentence." Id. Quoting State v. DiGuilio, 491 So. 2d 1129, 1138

(Fla. 1986), the court reiterated that the focus of the harmless error test "is on the effect of the error on the trier-of-fact." Id.

In Hurst, the Florida Supreme Court found that the defendant's death sentence was not harmless error under the circumstances of that case. Hurst is readily distinguishable from the instant matter. In aggravation, the trial court in Hurst found that "the murder was committed while Hurst was engaged in the commission of a robbery, although he was not charged with robbery and the judge found that the murder was especially heinous, atrocious, or cruel." Id. at *4. However, the Florida Supreme Court emphasized that the "mitigation was extensive and compelling." Id. at 24. The court noted:

Hurst was slow mentally while growing up and did poorly in school. He had difficulty caring for himself and performing normal daily activities. Experts presented evidence of brain abnormalities in multiple areas of his brain. Hurst's IQ testing showed scores dipping into the intellectually disabled range, although he had scored higher on occasion. Because we do not have an interrogatory verdict commemorating the findings of the jury, we cannot say with any certainty how the jury viewed that mitigation, although we do know that the jury recommended death by only a bare majority. The trial judge found that Hurst's young chronological age of 19, and his even younger mental age, at the time of the murder was mitigating. The judge also found that Hurst had significant mitigation including low IQ and likely brain abnormalities due to fetal alcohol syndrome.

Id. at *24-25.

By contrast, the aggravators in Rhodes' case were (1) Rhodes committed the murder while on parole; (2) Rhodes was previously convicted of a violent felony; and (3) the murder was committed while Rhodes was engaged in the commission of an attempted sexual battery (although he was not convicted of the attempted sexual battery). Thus, unlike the situation in Hurst, two of the aggravating circumstances in this case arose from a unanimous jury verdict.

Furthermore, unlike the situation in Hurst, in this case, the mitigation was not "extensive and compelling." Here, the mitigating circumstances included: (1) Rhodes' age of thirty at the time of the offense (as compared to Hurst's age of nineteen with an "even younger mental age"); (2) Rhodes' capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired; (3) as a child, Rhodes was abandoned by his parents; and 4) Rhodes never experienced a normal family life because as a child he was never placed in a social environment that could address his needs and he spent most of his life in state hospitals and prisons. Rhodes, 638 So. 2d at 923. Under the circumstances of this case, had the jury been instructed under the law as interpreted by the Florida Supreme Court in Hurst v. State, there is no doubt the jury would have unanimously found

the aggravating factors outweighed the mitigating circumstances and rendered a unanimous recommendation for death.

Rhodes' assertion that he is entitled to relief under the Eighth Amendment is also time-barred and does not fall within the rule's time limitations exception. The Florida Supreme Court's expansion of the issue on remand in Hurst v. State to include an Eighth Amendment analysis has not been held to be retroactive.

Rhodes' contention that the jury was misled concerning its role in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985), is procedurally barred. The principle is well-settled that "[c]laims raised and rejected in prior postconviction proceedings are procedurally barred from being relitigated in a successive motion." Hendrix v. State, 136 So. 3d 1122, 1125 (Fla. 2014) (citation omitted). Rhodes raised this claim in his prior postconviction proceeding, and the Florida Supreme Court affirmed the postconviction court's rejection of the claim. Rhodes, 638 So. 2d at 926 ("Rhodes' Caldwell claim that the jury's role in the sentencing process was improperly diminished by the prosecutor during voir dire and by the court in its instructions was not preserved by contemporaneous objection. Moreover, Rhodes' jury was instructed that its recommendation

would be given great weight.") (internal citations and footnote omitted).

Moreover, Rhodes' Caldwell claim is without merit as it is based on nothing but pure speculation. There is nothing in the record to support the proposition that the jury's responsibility in rendering an advisory verdict was assailed or diminished. The jury knew and understood their great responsibility in reviewing the evidence and determining whether to recommend death. Other than in cases where a defendant is within a class of people for whom the death penalty is not an option—juveniles, intellectually disabled, those who commit crimes short of murder—the only limit the Eighth Amendment places on the imposition of the death penalty is that the penalty cannot be imposed in an arbitrary or capricious manner. It is reserved for the most aggravated and least mitigated of crimes.

Rhodes' claim that counsel would have proceeded differently in his case had the Hurst cases been decided at the time of his trial is unavailing and based on nothing but pure speculation and should not be entertained by this Court. "Postconviction relief cannot be based on speculative assertions." Jones v. State, 845 So. 2d 55, 64 (Fla. 2003).

In sum, Rhodes' conviction and sentence were long final prior to the decision in Hurst v. Florida, and because Hurst has

not been held to be retroactive, Rhodes is not entitled to relief as a matter of law. Furthermore, even if Hurst were to apply retroactively, Rhodes would not be entitled to relief under the harmless error rule. Accordingly, this claim should be summarily denied.

CONCLUSION

In conclusion, Rhodes' successive post-conviction claim is without merit and therefore summary denial is appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of November, 2016, I filed the foregoing with the Clerk of the Court by using the E-Portal Filing System which will send a notice of electronic filing to the following: the Honorable Joseph A. Bulone, Circuit Court Judge, Pinellas County Justice Center, 14250 49th Street, Clearwater, Florida 33756, **ghahl@jud6.org**; Jim Hellickson, Assistant State Attorney, Sixth Judicial Circuit, P.O. Box 5028, Clearwater, Florida 33758, **SA6Appealservice@co.pinellas.fl.us**; Bjorn Erik Brunvand, Esq., Brunvand Wise, P.A., 615 Turner Street, Clearwater, Florida 33756, **bjorn@acquitter.com**; Sarah S. Butters, Esq., Holland & Knight LLP, Post Office Drawer 810, Tallahassee, Florida 32302, **sarah.butters@hklaw.com**.

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

STATE OF FLORIDA,

Plaintiff,

v.

Case No. CRC84-03982CFANO
Death Penalty Case

RICHARD W. RHODES, JR.,

Defendant.

_____ /

STATE'S NOTICE OF SUPPLEMENTAL AUTHORITY

COMES NOW, the State of Florida, by and through undersigned counsel, and files this notice of the following supplemental authority:

A) Asay v. State, ____ So. 3d ____, 2016 WL 7406538 (Fla. Dec. 22, 2016). Florida Supreme Court's affirmance of denial of postconviction relief and denial of petitions for a writ of habeas corpus.

This supplemental authority is pertinent to Rhodes' Claim I that his sentence of death is unconstitutional under Hurst v. Florida, 136 S. Ct. 616 (2016).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of December, 2016, I filed the foregoing with the Clerk of the Court by using the E-Portal Filing System which will send a notice of electronic filing to the following: the Honorable Joseph A. Bulone, Circuit Court Judge, Pinellas County Justice Center, 14250 49th Street, Clearwater, Florida 33756, **ghahl@jud6.org**; Jim Hellickson, Assistant State Attorney, Sixth Judicial Circuit, P.O. Box 5028, Clearwater, Florida 33758, **SA6Appealservice@co.pinellas.fl.us**; Bjorn Erik Brunvand, Esq., Brunvand Wise, P.A., 615 Turner Street, Clearwater, Florida 33756, **bjorn@acquitter.com**; Sarah S. Butters, Esq., Holland & Knight LLP, Post Office Drawer 810, Tallahassee, Florida 32302, **sarah.butters@hklaw.com**.

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2016 WL 7406538

Only the Westlaw citation is currently available.

NOTICE: THIS OPINION HAS NOT BEEN
RELEASED FOR PUBLICATION IN THE
PERMANENT LAW REPORTS. UNTIL RELEASED,
IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Supreme Court of Florida.

Mark James Asay, Appellant,

v.

State of Florida, Appellee.

Mark James Asay, Petitioner,

v.

Julie L. Jones, Etc., Respondent.

Mark James Asay, Petitioner,

v.

Julie L. Jones, etc., Respondent.

No. SC16-223

|

No. SC16-102

|

No. SC16-628

|

[December 22, 2016]

An Appeal from the Circuit Court in and for Duval
County, Tatiana Radi Salvador, Judge—Case No.
161987CF006876AXXMA And Original Proceedings—
Habeas Corpus

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Opinion

PER CURIAM.

*1 Mark James Asay, a prisoner under sentence of death
for whom a warrant has been signed,¹ appeals from the
summary denial of his second successive postconviction
motion. Asay has also filed two petitions for a writ of
habeas corpus. We have jurisdiction. See art. V, § 3(b)(1),
(9), Fla. Const. For the reasons that follow, we affirm the
circuit court's denial of postconviction relief. We also deny
the petitions for a writ of habeas corpus.

FACTS AND PROCEDURAL HISTORY

The facts of this case are set forth in Asay's direct appeal:

According to testimony of Asay's brother, Robbie, and
Robbie's friend, "Bubba" McQuinn, on July 17, 1987,
the three met at a local bar where they drank beer and
shot pool. They left the bar around 12:00 a.m. and went
to a second bar where they stayed until closing at 2:00
a.m. Although Asay drank a number of beers, both
Bubba and Robbie testified that Asay did not appear
drunk or otherwise impaired.

After the bar closed, Robbie said he wanted to try to
"pick up a girl" he had seen at the bar, so Bubba and
Asay drove around the corner in Asay's truck. They
returned to discover that Robbie had been unsuccessful
with the girl he had seen, so Bubba suggested that they
go downtown to find some prostitutes and he would pay
for oral sex for them all. Asay and Bubba left in Asay's
truck and Robbie left in his. Once downtown, Asay and
Bubba soon spotted Robbie who was inside his truck
talking to a black man, Robert Lee Booker. Robbie
was telling Booker who was standing at the driver's side
window of Robbie's truck that he and his friends were
looking for prostitutes.

After spotting Booker standing by Robbie's truck,
Asay told Bubba to pull up next to the truck. Asay
immediately got out of his truck, proceeded to Robbie's
truck, and told Robbie "You know you ain't got to take
no s--t from these f---ing niggers." Although Robbie
told Asay that "everything is cool," Asay began to point
his finger in Booker's face and verbally attack him.
When Booker told him "Don't put your finger in my

face," Asay responded by saying "F--k you, nigger" and pulling his gun from his back pocket, shooting Booker once in the abdomen. Booker grabbed his side and ran. According to the medical examiner, the bullet perforated the intestines and an artery causing internal hemorrhaging. Booker's body was later found under the edge of a nearby house.

Robbie drove away immediately after the shooting. Asay jumped into the back of his truck, as Bubba drove off. When Asay got into the cab of the truck, Bubba asked him why he shot Booker. Asay responded, "Because you got to show a nigger who is boss." When asked if he thought he killed Booker, Asay replied, "No, I just scared the s--t out of him."

Bubba testified that after the shooting, Asay and Bubba continued to look for prostitutes. According to Bubba, he saw "Renee" who he knew would give them oral sex. It appears that at the time neither Bubba nor Asay was aware that "Renee" was actually Robert McDowell, a black man dressed as a woman. According to Bubba, he negotiated a deal for oral sex for them both. Bubba drove the truck into a nearby alley. McDowell followed. Bubba testified that McDowell refused to get into the truck with them both, so Asay left the truck and walked away to act as a lookout while Bubba and McDowell had sex. As McDowell started to get into the truck with Bubba, Asay returned, grabbed McDowell's arm, pulled him from the truck and began shooting him. McDowell was shot six times while he was backing up and attempting to get away. Asay jumped back in his truck and told Bubba to drive away. When asked why he shot McDowell, Asay told Bubba that he did it because "the bitch had beat him out of ten dollars" on a "blow job." McDowell's body was found on the ground in the alley soon after the shots were heard. According to the medical examiner, any of three wounds to the chest cavity would have been fatal.

*2 Asay later told Charlie Moore in the presence of Moore's cousin, Danny, that he shot McDowell because McDowell had cheated him out of ten dollars on a drug deal and that he had told McDowell, "if he ever got him that he would get even." Asay told Moore that he was out looking for "whores," when he came across McDowell. According to Moore's cousin, Danny, Asay also told Moore that his plan was to have Bubba get McDowell in the truck and they "would take her off and screw her and kill her." Moore testified that Asay

told him that when Bubba "didn't have [McDowell] in the truck so they could go beat him up," Asay "grabbed [McDowell] by the arm and stuck the gun in his chest and shot him four times, and that when he hit the ground, he finished him off." As a result of tips received from Moore and his cousin after McDowell's murder was featured on a television Crime Watch segment, Asay was arrested and charged by indictment with two counts of first-degree murder.

The state also presented testimony of Thomas Gross, who was Asay's cellmate while he was awaiting trial. Gross testified that when the black prisoners, who were also housed in their cell, were out in the recreation area, Asay told him he was awaiting trial for a couple of murders. According to Gross, Asay then showed him some newspaper articles and told him, "I shot them niggers." While they were discussing the murders, Asay showed Gross his tattoos, which included a swastika, the words "White Pride," and the initials "SWP" which Gross said stand for supreme white power.

Asay v. State (Asay I), 580 So.2d 610, 610–12 (Fla. 1991).

The jury found Asay guilty of both murders and recommended a death sentence by a vote of nine to three. The trial court followed the recommendation and imposed a sentence of death for each conviction. Id. at 612. The court found two aggravating factors established in connection with both murders: that Asay was under sentence of imprisonment at the time of the murders and had been previously convicted of a capital felony (based on the contemporaneous murder conviction). Id. In addition, the trial court found a third aggravator as to the McDowell murder only: that the murder was committed in a cold, calculated, premeditated manner (CCP). Id. As to both murders, the trial court found Asay's age of twenty-three at the time of the murders to be the only mitigation for his offenses. Id.

On direct appeal, Asay raised seven issues.² This Court summarily denied the first four claims and also found, after some discussion, that no relief was warranted as to the remaining three claims. Id. at 612 n.1, 613–14. On June 21, 1991, this Court denied Asay's motion for rehearing, and the United States Supreme Court denied certiorari on October 7, 1991. Asay v. Florida, 502 U.S. 895, 112 S.Ct. 265, 116 L.Ed.2d 218 (1991).

In 1993, Asay filed a motion for postconviction relief³ pursuant to Florida Rule of Criminal Procedure 3.850 and an amended motion, raising twenty claims. Asay v. State (Asay II), 769 So.2d 974, 977–78 & n.5 (Fla. 2000).⁴ He also filed a motion to disqualify the trial judge from presiding over the postconviction proceedings, primarily based on comments the judge made during Asay's 1988 trial. Asay II, 769 So.2d at 978. The trial judge denied the motion to disqualify and, after holding a Huff⁵ hearing, summarily denied most of Asay's claims, granting an evidentiary hearing on only the ineffective assistance of trial counsel claims. Id. Following the evidentiary hearing, the trial court denied relief on those claims as well. Id.⁶ Asay appealed the denial of relief, raising six issues.⁷ We denied the appeal, affirming the trial court's denial of postconviction relief. Id. at 989. We denied Asay's motion for rehearing on October 26, 2000. Asay then filed a petition for writ of habeas corpus in this Court on October 25, 2001, raising five claims.⁸ Asay v. Moore (Asay III), 828 So.2d 985, 989 n.8 (Fla. 2002). We denied relief on June 13, 2002, and denied Asay's motion for rehearing on October 4, 2002. Id. at 993.

*3 On October 17, 2002, Asay filed his first successive postconviction motion, in which he contended Florida's capital sentencing procedure was unconstitutional pursuant to Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). The circuit court denied the motion on February 23, 2004. Asay appealed, and on December 20, 2004, this Court affirmed the circuit court's order. Asay v. State (Asay IV), 892 So.2d 1011 (Fla. 2004) (table). Asay filed a petition for writ of certiorari, which the Supreme Court denied on November 2, 2009. McNeil v. Asay, 558 U.S. 1007, 130 S.Ct. 495, 175 L.Ed.2d 377 (2009).

On February 11, 2005, Asay filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Florida, raising eleven claims.⁹ Asay v. Sec'y. Fla. Dep't of Corr. (Asay V), No. 3:05-cv-147-J-32PDB, 2014 WL 1463990, *6 (M.D. Fla. April 14, 2014). On April 14, 2014, the federal district court found that Asay was not entitled to relief and denied the petition. Id. at *28. A certificate of appealability was entered as to whether Asay received ineffective assistance during the penalty phase because his counsel failed to investigate, obtain, and present additional mitigating evidence. Id. On

April 28, 2014, Asay filed an appeal in the Eleventh Circuit Court of Appeals, but on July 8, 2014, the appeal was voluntarily dismissed.

On January 8, 2016, Governor Rick Scott signed a death warrant setting Asay's execution for Thursday, March 17, 2016, at 6:00 p.m. Asay filed his second successive postconviction motion on January 27, 2016, asserting four grounds for relief: (1) newly discovered evidence exists that diminishes the reliability of firearms identification evidence presented at trial; (2) Asay's due process and equal protection rights were violated because he did not have state counsel at the time the Governor signed his death warrant and for the previous 10 years; (3) Asay is entitled to relief under Hurst v. Florida, — U.S. —, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), and that Hurst v. Florida applies retroactively so that the execution should be stayed; and (4) the State violated Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), by suppressing numerous documents Asay recently received. The circuit court summarily denied all four claims and Asay's motion for a stay of execution. Asay now appeals the denial to this Court.

ANALYSIS

*4 Asay raises four claims in this appeal: (1) Asay's death sentence is unconstitutional under Hurst v. Florida because a judge, rather than a jury, made certain findings to make Asay eligible for a sentence of death; (2) the circuit court erred in denying an evidentiary hearing as to Asay's newly discovered evidence, Brady,¹⁰ and Strickland¹¹ claims; (3) Asay was denied due process when the circuit court considered extra record material and conducted an ex parte hearing with the State; and (4) Asay was denied due process, equal protection, and his right to effective collateral representation under Spalding v. Dugger, 526 So.2d 71 (Fla. 1988), when his death warrant was signed while no registry counsel was in place and had not been in place for over a decade. Asay also filed a habeas petition before this Court, raising the same issue as in claim three above; thus, the habeas petition will be addressed in our discussion of Asay's third postconviction claim. Additionally, Asay filed a petition for a writ of habeas corpus alleging that he is entitled to relief pursuant to chapter 2016–13, Laws of Florida, which requires that at least ten jurors agree with the recommendation of death before a sentence of death can be imposed. We deny Asay's

petition based on our decision in Perry v. State, 41 Fla. L. Weekly S449, --- So.3d ---, 2016 WL 6036982 (Fla. Oct. 14, 2016), that chapter 2016-13, Laws of Florida, is unconstitutional and based on our decision today that Hurst cannot be applied retroactively to Asay.

I. CONSTITUTIONALITY UNDER HURST v. FLORIDA

Asay argues that his death sentence is unconstitutional under the United States Supreme Court's decision in Hurst v. Florida. In that case, the Supreme Court reversed our decision in Hurst v. State, 147 So.3d 435 (Fla. 2014), which denied a Ring claim based on prior Supreme Court precedent that upheld Florida's capital sentencing scheme, and held that Florida's "capital sentencing scheme [is] unconstitutional [because the] Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." Hurst v. Florida, 136 S.Ct. at 619.¹² On remand from the United States Supreme Court, we held "that the Supreme Court's decision in Hurst v. Florida requires that all the critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury." Hurst v. State, 202 So.3d 40, 44 (Fla. 2016). We also held "that in order for the trial court to impose a sentence of death, the jury's recommended sentence of death must be unanimous." Id. Asay contends that he is entitled to retroactive application of Hurst v. Florida, and thus, his death sentences must be vacated. For the reasons explained below, we conclude that Hurst v. Florida should not apply retroactively to cases that were final when Ring was decided.

A. Ring and Hurst v. State

In Ring, the United States Supreme Court held the Arizona capital sentencing statute unconstitutional "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." Id. at 609, 122 S.Ct. 2428. The Court endorsed the holding of Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and overruled in relevant part Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), explaining that "[c]apital defendants, no less than non-capital defendants, ... are entitled to a jury determination

of any fact on which the legislature conditions an increase in their maximum punishment." Ring, 536 U.S. at 590, 122 S.Ct. 2428. In reaching this result, the Supreme Court discussed both Arizona law and Florida law, noting that Arizona law did not permit a defendant to be sentenced to death until the judge presided over a separate sentencing hearing and made factual findings on its own that aggravators existed, while under Florida law, "the jury recommends a sentence but makes no explicit findings on aggravating circumstances." Id. at 598, 122 S.Ct. 2428.

When discussing its prior holdings pertaining to Florida and Arizona, the Supreme Court cited both Walton, 497 U.S. at 649, 110 S.Ct. 3047, and Hildwin v. Florida, 490 U.S. 638, 640-41, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989), for its prior holding that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." Ring, 536 U.S. at 598, 122 S.Ct. 2428. However, despite recognizing that the Arizona court "was bound by the Supremacy Clause to apply Walton," the Supreme Court overruled only Walton—not Hildwin. Ring, 536 U.S. at 596, 122 S.Ct. 2428.

*5 In determining that Arizona's capital sentencing scheme violated the Sixth Amendment, the Supreme Court rejected Arizona's claim that because the capital sentencing statute prescribed "death or life imprisonment" for first-degree murder, Ring had been sentenced to no more than the maximum punishment authorized by the jury verdict. Id. at 604, 122 S.Ct. 2428. The Court instead found that "the required finding of an aggravated circumstance exposed Ring to a greater punishment than that authorized by the guilty verdict." Id. at 586, 122 S.Ct. 2428 (citations and brackets omitted). The Supreme Court noted that if this argument prevailed, "Apprendi would be reduced to a 'meaningless and formalistic' rule of statutory drafting." Id. In addition, the Court rejected a distinction between elements of an offense and sentencing factors. Id. In a dissent by Justice O'Connor, in which Chief Justice Rehnquist joined, Justice O'Connor stated her concern that prisoners in states like Florida would seize on the Ring holding to challenge their sentences, despite the fact that those sentences involve a hybrid sentencing scheme. Id. at 621, 122 S.Ct. 2428 (O'Connor, J., dissenting).

Once Ring was issued, this Court was required to determine its application to Florida since, at the time,

the Supreme Court had initially stayed the execution of two Florida inmates and then lifted the stays after Ring was decided without mentioning that case. In a sharply divided opinion issued in Bottoson v. Moore, 833 So.2d 693 (Fla. 2002), this Court declined to apply the principles espoused in Ring to an ongoing death warrant—in which the conviction and sentence were affirmed in 1983.¹³ Bottoson, 833 So.2d at 694, abrogated by Hurst v. Florida, 136 S.Ct. 616. In reaching that result, the plurality decision relied on the fact that in Hildwin—a decision that was mentioned in Ring but not overruled like Walton—the United States Supreme Court expressly held the Florida death penalty scheme did not violate the Sixth Amendment. See Bottoson, 833 So.2d at 695, n.4. Further, this Court emphasized that the Supreme Court summarily denied Bottoson's petition for certiorari and lifted his stay. Id. By doing so, the Supreme Court did not provide this Court with an opportunity to reconsider our earlier decision in Bottoson in light of Ring, thus leading to this Court's conclusion that Ring did not impact Florida because Florida has a hybrid capital sentencing scheme, in contrast with Arizona's law in which the jury is not involved. However, this Court was deeply divided regarding the impact of Ring in Florida; each Justice wrote a special opinion setting forth his or her reasoning. The Court reached a similar decision in King v. Moore, 831 So.2d 143 (Fla. 2002).

On direct appeal in Hurst v. State, this Court addressed a resentencing in which a jury recommended death but made no explicit findings as to whether the defendant qualified for a death sentence, and then the judge, in a separate hearing, followed the recommendation, concluding that sufficient aggravators were present and were not outweighed by the mitigation. Hurst v. State, 147 So.3d at 452. The defendant raised a Ring claim, asserting that “capital defendants are entitled to a jury determination of any fact on which the legislature conditions an increase in the maximum punishment.” Id. at 445. In a 4–3 decision, this Court rejected Hurst's argument, relying on Bottoson and King and emphasizing that in Hildwin, the United States Supreme Court stated, “[T]he Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.” Hurst v. State, 147 So.3d at 446 (quoting Hildwin, 490 U.S. at 640–41, 109 S.Ct. 2055). Justice Pariente, joined by Justices Labarga and Perry, dissented in part as to the Ring analysis and stated that “Florida's death penalty statute, as applied

in circumstances like those presented in this case where there is no unanimous jury finding as to any of the aggravating circumstances, is unconstitutional.” Id. at 449–50 (Pariente, J., concurring in part and dissenting in part).

*6 The United States Supreme Court granted certiorari and reversed this Court's decision, holding that Florida's sentencing scheme in death penalty cases is unconstitutional because “[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.” Hurst v. Florida, 136 S.Ct. at 619. The Supreme Court described Florida's capital procedure:

First-degree murder is a capital felony in Florida. See Fla. Stat. § 782.04(1)(a) (2010). Under state law, the maximum sentence a capital felon may receive on the basis of the conviction alone is life imprisonment. § 775.082(1). “A person who has been convicted of a capital felony shall be punished by death” only if an additional sentencing proceeding “results in findings by the court that such person shall be punished by death.” Ibid. “[O]therwise such person shall be punished by life imprisonment and shall be ineligible for parole.” Ibid.

The additional sentencing proceeding Florida employs is a “hybrid” proceeding “in which [a] jury renders an advisory verdict but the judge makes the ultimate sentencing determinations.” Ring v. Arizona, 536 U.S. 584, 608, n.6, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). First, the sentencing judge conducts an evidentiary hearing before a jury. Fla. Stat. § 921.141(1) (2010). Next, the jury renders an “advisory sentence” of life or death without specifying the factual basis of its recommendation. § 921.141(2). “Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death.” § 921.141(3). If the court imposes death, it must “set forth in writing its findings upon which the sentence of death is based.” Ibid. Although the judge must give the jury recommendation “great weight,” Tedder v. State, 322 So.2d 908, 910 (Fla. 1975) (per curiam), the sentencing order must “reflect the trial judge's independent judgment about the existence of aggravating and mitigating factors,” Blackwelder v. State, 851 So.2d 650, 653 (Fla. 2003) (per curiam).

Id. at 620.

The Supreme Court recognized that this Court rejected the defendant's Sixth Amendment argument on the basis that Ring was inapplicable in light of the Supreme Court's "repeated support of Florida's capital sentencing scheme in pre-Ring cases," including Hildwin, which held that the Sixth Amendment "does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." Id. at 620–21 (quoting Hildwin, 490 U.S. at 640–641, 109 S.Ct. 2055). However, the Supreme Court also noted that since its decision in Apprendi, it has consistently held that "any fact that 'expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict' is an 'element' that must be submitted to a jury." Id. at 621 (quoting Apprendi, 530 U.S. at 494, 120 S.Ct. 2348). The Court then held that the analysis in Ring applied equally to Florida's statutory scheme:

The analysis the Ring Court applied to Arizona's sentencing scheme applies equally to Florida's. Like Arizona at the time of Ring, Florida does not require the jury to make the critical findings necessary to impose the death penalty. Rather, Florida requires a judge to find these facts. Fla. Stat. § 921.141(3). Although Florida incorporates an advisory jury verdict that Arizona lacked, we have previously made clear that this distinction is immaterial: "It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." Walton v. Arizona, 497 U.S. 639, 648, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990); accord, State v. Steele, 921 So.2d 538, 546 (Fla. 2005) ("[T]he trial court alone must make detailed findings about the existence and weight of aggravating circumstances; it has no jury findings on which to rely").

*7 As with Timothy Ring, the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole. As with Ring, a judge increased Hurst's authorized punishment based on her own factfinding. In light of Ring, we hold that Hurst's sentence violates the Sixth Amendment.

Id. at 621–22 (emphasis added).

In explicitly rejecting the argument that the jury's death recommendation "necessarily included a finding of an aggravating circumstance," the Supreme Court turned to Florida's sentencing statute, which "does not make a defendant eligible for death until 'findings by the court that such person shall be punished by death'" and requires that "the trial court alone must find 'the facts ... [t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'" Id. at 621–22 (quoting § 921.141(3), Fla. Stat.) (last emphasis added). Accordingly, the High Court concluded that in Florida, the advisory recommendation by the jury could not be considered the necessary factual finding that Ring requires. Id.

The Supreme Court further rejected the claim that stare decisis required Florida's capital sentencing scheme to be upheld. Id. at 623. Instead, the Court expressly overruled its prior decisions in Hildwin and Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), as irreconcilable with Apprendi. The Court did not address whether Florida's sentencing scheme violated the Eighth Amendment. The Supreme Court also left to this Court the decision of whether and how to apply Hurst v. Florida and whether any Hurst v. Florida error can be harmless.

B. Meaning of Hurst v. Florida

Asay and the State fundamentally disagree as to the meaning of Hurst v. Florida. The State asserts that only one aggravator must be found by the jury to satisfy Hurst v. Florida, pointing to language in the Hurst v. Florida opinion that supports this interpretation. Asay, on the other hand, asserts that under section 921.141, Florida Statutes the jury must find both that "sufficient aggravators" exist and that there are insufficient mitigating factors because those are the "facts" required to be found before the death penalty can be imposed. As we have explained fully in Hurst, "Hurst v. Florida requires that all the critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury." Hurst, 202 So.3d at 44. Also, "based on Florida's requirement for unanimity in jury verdicts, and under the Eighth Amendment to the United States

Constitution, ... the jury's recommended sentence of death must be unanimous." *Id.* Accordingly, we next consider whether *Hurst v. Florida* applies retroactively to Asay.

C. Retroactivity

Now that the United States Supreme Court has overruled *Hildwin* and held that Florida's hybrid sentencing scheme violates the Sixth Amendment right to trial by jury, Asay contends that this Court should apply *Hurst v. Florida* retroactively. In order to answer this question, we must first look to our decision in *Johnson v. State*, 904 So.2d 400, 409 (Fla. 2005), which held that *Ring* does not apply retroactively. While that decision would seem to answer the question presented here—since *Hurst v. Florida* derives from *Ring*—a retroactivity analysis hinges on an accurate understanding of the underlying decision, and in *Johnson*, this Court did not fully apply the holding of *Ring* because we were attempting to reconcile the United States Supreme Court's holdings in *Ring* and *Hildwin*.

*8 In addressing whether *Ring* should apply retroactively, this Court announced in *Johnson* that despite the federal courts' use of *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), to determine retroactivity, this Court would "continue to apply our longstanding *Witt*¹⁴ analysis, which provides more expansive retroactivity standards than those adopted in *Teague*." *Johnson*, 904 So.2d at 409 (emphasis added).¹⁵ However, our application of *Witt v. State*, 387 So.2d 922 (Fla. 1980), was significantly impacted by our attempt to reconcile the holding of *Ring* with the holding of *Hildwin*. First, we relied on the Supreme Court's *Teague* analysis in *Schriro v. Summerlin*, 542 U.S. 348, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004), finding that the decision in *Ring* "was not a substantive change to the law, but rather a 'prototypical procedural rule[]' in that it regulates the manner in which culpability is determined but does not alter the range of conduct or class of persons that the law punishes. *Johnson*, 904 So.2d at 409 (quoting *Summerlin*, 542 U.S. at 353, 124 S.Ct. 2519). However, such analysis derives from the much narrower *Teague* test, which utilizes completely different factors from Florida's *Witt* test.

In addition, our retroactivity analysis in *Johnson* hinged upon our understanding of *Ring*'s application to Florida's

capital sentencing scheme at that time. Thus, we did not treat the aggravators, the sufficiency of the aggravating circumstances, or the weighing of the aggravating circumstances against the mitigating circumstances as elements of the crime that needed to be found by a jury to the same extent as other elements of the crime. Specifically, 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. With the issuance of *Hurst v. Florida*, in which the United States Supreme Court overruled its decision in *Hildwin*, we conclude that this Court must now reconsider its prior decision in *Johnson*. Accordingly, we now turn to a retroactivity analysis in this case.

Applying cases retroactively is a "thorny" issue, "requiring that [this Court] resolve a conflict between two important goals of the criminal justice system ensuring finality of decisions on the one hand, and ensuring fairness and uniformity in individual cases on the other within the context of post-conviction relief from a sentence of death." *Witt*, 387 So.2d at 924–25. On the one hand, this Court has recognized the vast importance of finality in the justice system:

It has long been recognized that, for several reasons, litigation must, at some point, come to an end. In terms of the availability of judicial resources, cases must eventually become final simply to allow effective appellate review of other cases. There is no evidence that subsequent collateral review is generally better than contemporaneous appellate review for ensuring that a conviction or sentence is just. Moreover, an absence of finality casts a cloud of tentativeness over the criminal justice system, benefiting neither the person convicted nor society as a whole.

Id. at 925. Yet, on the other hand, ensuring fairness and uniformity is an underpinning of the same justice system:

[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.

*9 *Id.* In any retroactivity analysis, this Court must determine where finality yields to fairness based on a change in the law. To apply a newly announced rule of law to a case that is already final at the time of the announcement, this Court must conduct a retroactivity analysis pursuant to the dictates of *Witt*.

Under *Witt*, a change in the law does not apply retroactively “unless the change: (a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance.” *Id.* at 931. To be a “development of fundamental significance,” the change in law must “place beyond the authority of the state the power to regulate certain conduct or impose certain penalties,” or, alternatively, be “of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of *Stovall*¹⁶ and *Linkletter*.”¹⁷ *Id.* at 929. The *Stovall/Linkletter* test requires courts to analyze three factors: (a) the purpose to be served by the rule, (b) the extent of reliance on the prior rule, and (c) the effect that retroactive application of the new rule would have on the administration of justice. *Id.* at 926; *Johnson*, 904 So.2d at 408.

As with *Ring*, it is not in dispute that *Hurst v. Florida* satisfies the first two prongs of *Witt* because it emanates from the Supreme Court and is constitutional in nature. However, the third prong turns entirely on whether the decision represents a “development of fundamental significance” or is “of sufficient magnitude.” Again, like *Ring*, this last prong turns on the *Stovall/Linkletter* test, which we address below.

1. Purpose of the New Rule

The first factor under the *Stovall/Linkletter* test is the purpose to be served by the new rule. *Witt*, 387 So.2d at 926. In this case, the purpose of the new rule is to ensure that a criminal defendant's right to a jury is not eroded and encroached upon by sentencing schemes that permit a higher penalty to be imposed based on findings of fact that were not made by the jury. See *Hurst*, No. SC12-1947, slip op. at 21-23 (discussing the necessity of a unanimous jury decision regarding the finding of aggravators and whether those aggravators outweigh any mitigation).

The importance of the right to a jury trial has been recognized since this country's inception and is the only right to appear in both the body of the Constitution and the Bill of Rights. Art. III, § 2, U.S. Const.; U.S. Const. amend. VI. In fact, in the very line of cases at issue here, the United States Supreme Court has recognized that the right to a jury's determination of all the elements of an offense is of utmost importance, thereby changing its previous position that “sentencing considerations” were an exception to the rule. See *Apprendi*, 530 U.S. at 476, 120 S.Ct. 2348 (“At stake in this case are constitutional protections of surpassing importance.”); see also *Ring*, 536 U.S. at 609, 122 S.Ct. 2428 (“Because ... aggravating factors operate as ‘the functional equivalent of an element of a greater offense,’ the Sixth Amendment requires that they be found by a jury.” (citation omitted) (emphasis added)).

Likewise, in Florida, this Court has “always considered the right to jury trial an indispensable component of our system of justice.” *Blair v. State*, 698 So.2d 1210, 1213 (Fla. 1997). In fact, Florida's first Constitution declared, “That the great and essential principles of liberty and free government, may be recognized and established, we declare: ... That the right of trial by jury, shall for ever remain inviolate.” Art. I, § 6, Fla. Const. (1838). This Court has consistently recognized the importance of a defendant's right to a jury trial, calling it “indisputably one of the most basic rights guaranteed by our constitution.” *State v. Griffith*, 561 So.2d 528, 530 (Fla. 1990).

*10 The underpinnings of *Hurst v. Florida*, requiring that the jury make all the factual findings necessary to impose a death sentence, are based on the critical right to a jury trial: one of the guarantees set forth in the Bill

of Rights since our country's—and this State's—inception. The right to a jury trial not only ensures a defendant's guilt is accurately determined, but also that any decision on the matter is made by a group of the defendant's peers—as opposed to a member of the government. Our citizens place their trust in our criminal justice system in large part because the citizens themselves are the crucial element in determining a defendant's guilt or innocence.

Further, as is apparent, the ultimate decision of whether a defendant lives or dies rests on these factual findings, only strengthening the purpose of the new rule. Both this Court and the Supreme Court have recognized that “death is different.” See, e.g., Yacob v. State, 136 So.3d 539, 546 (Fla. 2014) (quoting Fitzpatrick v. State, 527 So.2d 809, 811 (Fla. 1988)); Ring, 536 U.S. at 605, 122 S.Ct. 2428. Thus, in death cases, this Court has taken care to ensure all necessary constitutional protections are in place before one forfeits his or her life, and the purpose of the new rule weighs in favor of applying Hurst v. Florida retroactively to Asay.

2. Reliance on the Old Rule

The next and most important factor is the extent of reliance on the old rule—in this case, the principle that the judge could make the factual determinations necessary to impose death and that a jury determination of those facts was not required. Florida was the first state to revise its death penalty statute in 1972 after the death penalty was declared unconstitutional in all states as violative of the Eighth Amendment in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). In keeping with the holding of Furman, which was to substantially narrow the class of murders eligible for the sentence of death, Florida's statute included specified aggravators, which were intended to be specific and unambiguous. A challenge immediately arose, and in a 5–2 decision, this Court upheld the death penalty in State v. Dixon, 283 So.2d 1 (Fla. 1973). There, the Court focused on whether the new statute adequately curbed the discretion of judges to impose the ultimate punishment to avoid violating the Eighth Amendment:

Death is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation. It is proper, therefore, that the

Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes. In so doing, the Legislature has also recognized the inability of man to predict the myriad tortuous paths which criminality can choose to follow. If such a prediction could be made, the Legislature could have merely programmed a judicial computer with all of the possible aggravating factors and all of the possible mitigating factors included—with ranges of possible impact of each—and provided for the imposition of death under certain circumstances, and for the imposition of a life sentence under other circumstances. However, such a computer could never be fully programmed for every possible situation, and computer justice is, therefore, an impossibility. The Legislature has, instead, provided a system whereby the possible aggravating and mitigating circumstances are defined, but where the weighing process is left to the carefully scrutinized judgment of jurors and judges.

Id. at 7. In discussing the role of the jury as one of the five steps in Florida's death penalty scheme, this Court in Dixon elaborated:

The second step of the sentencing procedure is that the jury—the trial jury if there was one, or a specially called jury if jury trial was waived—must hear the new evidence presented at the post-conviction hearing and make a recommendation as to penalty, that is, life or death. With the issue of guilt or innocence disposed of, the jury can then view the question of penalty as a separate and distinct issue. The fact that the defendant has committed the crime no longer determines automatically

that he must die in the absence of a mercy recommendation. They must consider from the facts presented to them—facts in addition to those necessary to prove the commission of the crime—whether the crime was accompanied by aggravating circumstances sufficient to require death, or whether there were mitigating circumstances which require a lesser penalty.

*11 *Id.* at 8. Ultimately, the Court upheld Florida's revised capital sentencing statute as constitutional under the Eighth Amendment.

Rather than viewing aggravators as part of the jury's ultimate determination—such as guilt or innocence, which has always been recognized as within the Sixth Amendment right to trial by jury—states treated aggravators as “sentencing factors” and gave the trial judge, with mandatory review by this Court, the ultimate responsibility for finding them. Our sentencing scheme was challenged and upheld by the United States Supreme Court in *Hildwin* and *Walton*, where the Supreme Court specifically rejected broad challenges to Florida's and Arizona's sentencing schemes under the Sixth Amendment, and later in *Spaziano*, where Florida's statute was also upheld against an Eighth Amendment challenge.

Over time, however, various legislatures extended a trial court's authority to make factual determinations in a way that exposed defendants to higher sentences than authorized by a jury's verdict alone, amending criminal statutes in noncapital cases to include “sentencing factors” where the judge found specified facts after the jury's verdict to increase the sentence. *See, e.g., Apprendi*, 530 U.S. at 476–87, 120 S.Ct. 2348 (setting forth the history of legislatures providing trial judges with the authority to make factual findings on matters classified as “sentencing factors”). Thus, in cases where a defendant was brandishing a firearm or committed a crime based on hate, a higher sentence was authorized if the trial judge made certain factual findings. In *Apprendi*, the United States Supreme Court held for the first time that a state law was unconstitutional when it permitted the judge—rather than the jury—to make a factual finding as to whether a defendant committed a crime to intimidate the victim based on a particular characteristic the victim

possessed and thus impose a greater punishment based on this finding. *Id.* at 496, 120 S.Ct. 2348. However, in reaching this decision, the Supreme Court distinguished capital cases from its holding in *Apprendi* to the extent that capital cases permitted a judge to find specific aggravating factors before imposing a sentence of death. *Id.* at 497, 120 S.Ct. 2348.

This Court relied upon that precedent, which had categorically rejected Sixth Amendment challenges to the capital sentencing statute and held Florida's capital sentencing scheme to be constitutional. *See Hildwin*, 490 U.S. 638, 109 S.Ct. 2055. Further, while the reasoning of *Apprendi* appeared to challenge the underlying prior reasoning of *Walton* and similar cases, the United States Supreme Court expressly excluded death penalty cases from its holding. *Apprendi*, 530 U.S. at 496, 120 S.Ct. 2348 (“[T]his Court has previously considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death.”). Based on the whole of the jurisprudence at the time Asay's conviction and sentence were affirmed on direct appeal, this Court and the State of Florida had every reason to believe that its capital sentencing scheme was constitutionally sound.¹⁸

*12 This prong does not only focus on whether this Court's reliance on the old rule was in good faith, but also requires us to consider the breadth of our prior reliance. In this context, this Court's reliance on the old rule has spanned decades' worth of capital cases, with 386 inmates currently residing on death row and 92 executions carried out since 1976. *See Fla. Dep't of Corrections, Death Row Fact Sheet*, available at <http://www.dc.state.fl.us/oth/deathrow/index.html> (under “Death Row” heading, click on link to “Death Row List” and “Execution List”) (last visited October 13, 2016). As this Court stated in *Johnson*, “That Florida has reasonably relied on its longstanding capital sentencing scheme is an important factor weighing against the retroactive application of *Ring*.” *Johnson*, 904 So.2d at 411; *see also Williams v. State*, 421 So.2d 512, 515 (Fla. 1982) (“It was reasonable ... to rely upon [the old] law. That significant reliance has been placed on the old rule is an important factor supporting prospective application of the new rule.”).

Thus, when considering this prong in the context of Asay's sentence, which was final before Ring, we determine that this Court, the State of Florida in prosecuting these crimes, and the families of the victims, had extensively relied on the constitutionality of Florida's death penalty scheme based on the decisions of the United States Supreme Court. This factor weighs heavily against retroactive application of Hurst v. Florida to this pre-Ring case.

3. Effect on the Administration of Justice

The last prong of the Stovall/Linkletter test analyzes the effect of applying the new rule on the administration of justice. As the Court stated in Ferguson v. State, 789 So.2d 306 (Fla. 2001), "This final consideration in the retroactivity equation requires a balancing of the justice system's goals of fairness and finality." Id. at 312. As a part of this analysis, this Court must review the risk of whether applying the new rule retroactively could "destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit." Id. (quoting Witt, 387 So.2d at 929–30).

As this Court recognized in Johnson, this factor weighs heavily against retroactive application. At the time Johnson was decided, approximately 367 defendants were on Florida's Death Row, and at the present time, there are 386 defendants on death row. See Fla. Dep't of Corrections, Death Row Fact Sheet, available at <http://www.dc.state.fl.us/oth/deathrow/index.html> (under "Death Row" heading, click on link to "Death Row List") (last visited October 13, 2016). Of those defendants currently on death row, approximately 45 percent have sentences that were final before the Supreme Court issued Ring. In addition to the fact that there are a substantial number of death sentences the finality of which would be upended, nearly half of those defendants committed their crimes and had their sentences upheld decades ago. As this Court explained in Johnson:

The retroactive application of Ring in Florida would require reconsideration of hundreds of cases to determine whether a new penalty phase is warranted. This reconsideration alone would be a major undertaking. Even though we have rejected numerous Ring claims in postconviction proceedings on grounds

other than non-retroactivity, such as existence of a prior violent felony conviction aggravator or a unanimous death recommendation, the United States Supreme Court has not addressed whether these distinctions comport with the Sixth Amendment. One member of this Court, relying on the decision of the Arizona Supreme Court on remand in Ring, has dissented from our conclusion that a single Ring-exempt aggravator permits reliance on other aggravators found solely by the trial judge. See Duest v. State, 855 So.2d 33, 56 (Fla. 2003) (Anstead, C.J., concurring in part and dissenting in part). Thus, if Ring were made retroactive its impact on Florida's death-row population would remain unclear.

*13 Resentencing hearings necessitated by retroactive application of Ring would be problematic. For prosecutors and defense attorneys to reassemble witnesses and evidence literally decades after an earlier conviction would be extremely difficult. We fear that any new penalty phase proceedings would actually be less complete and therefore less (not more) accurate than the proceedings they would replace. As we explained in State v. Glenn, 558 So.2d 4 (Fla. 1990), where we declined to apply retroactively the double jeopardy ruling of Carawan v. State, 515 So.2d 161 (Fla. 1987):

Granting collateral relief ... would have a strong impact upon the administration of justice. Courts would be forced to reexamine previously final and fully adjudicated cases. Moreover, courts would be faced in many cases with the problem of making difficult and time-consuming factual determinations based on stale records. We believe that a court's time and energy would be better spent in handling its current caseload....

Glenn, 558 So.2d at 8; see also Reed v. State, 837 So.2d 366, 370 (Fla. 2002) (refusing to apply a new rule retroactively to child abuse cases because it "would require courts to revisit numerous final convictions and to extensively review stale records"); Williams, 421 So.2d at 515 (refusing to apply a new rule retroactively because it would entail hearings with "evidence possibly long since destroyed, misplaced, or deteriorated" and witnesses who "may not be available or [whose] memory might be dimmed"); [State v. Towery, 204 Ariz. 386, 64 P.3d 828, 835 (Ariz. 2003)] (recognizing that "[c]onducting new sentencing hearings [for Arizona's

90 death row prisoners], many requiring witnesses no longer available, would impose a substantial and unjustified burden on Arizona's administration of justice").

904 So.2d at 411–12. Thus, we concluded that "[t]o apply Ring retroactively in Florida would ... 'consume immense judicial resources without any corresponding benefit to the accuracy or reliability of penalty phase proceedings.' " Id. at 412.

Although we recognize that Johnson's analysis of the first prong of Witt was impacted by an incorrect understanding of the Sixth Amendment claim, the analysis as to the impact on the administration of justice holds the same force. Penalty phase resentencing is a time-intensive proceeding that requires significant preparation and discovery, death-qualifying a jury, and generally, a multi-day trial. Further, penalty phase proceedings require juries to have a full understanding of the crime committed, so the State would be required to present evidence from the guilt phase as well. While some of the prior witnesses' statements could be admitted based on the transcripts from the prior sentencing, the jury's ability to weigh the strength of those witnesses would clearly be impacted. Finally, there is an important consideration regarding the impact a new sentencing proceeding would have on the victims' families and their need for finality. Thus, we conclude that this factor also weighs heavily against applying Hurst v. Florida retroactively to Asay.

4. Conclusion of Retroactivity Analysis

After weighing all three of the above factors, we conclude that Hurst should not be applied retroactively to Asay's case, in which the death sentence became final before the issuance of Ring. We limit our holding to this context because the balance of factors may change significantly for cases decided after the United States Supreme Court decided Ring. When considering the three factors of the Stovall/Linkletter test together, we conclude that they weigh against applying Hurst retroactively to all death case litigation in Florida. Accordingly, we deny Asay relief.

II. DENIAL OF EVIDENTIARY HEARING ON ASAY'S CLAIMS

*14 Asay argues that the circuit court erred in summarily denying his newly discovered evidence and Brady/Strickland claims. Because a circuit court's decision to grant an evidentiary hearing on a rule 3.851 motion is ultimately based on written materials before the court, its ruling is tantamount to a pure question of law, subject to de novo review. Long v. State, 183 So.3d 342, 344 (Fla. 2016). Accordingly, when reviewing a court's summary denial of a successive rule 3.851 motion, this Court accepts the movant's factual allegations as true to the extent they are not refuted by the record and will affirm the ruling if the record conclusively shows that the movant is entitled to no relief. See Van Poyck v. State, 116 So.3d 347, 354 (Fla. 2013); Jones v. State, 998 So.2d 573, 587 (Fla. 2008); McLin v. State, 827 So.2d 948, 954 (Fla. 2002); see generally Fla. R. Crim. P. 3.851(f)(5)(B) ("If the motion, files, and records in the case conclusively show that the movant is entitled to no relief, the motion may be denied without an evidentiary hearing.").

A. Newly Discovered Evidence

Asay raises his newly discovered evidence claim based on the sworn affidavit of ballistics expert William A. Tobin, Ph.D. The summary denial of a newly discovered evidence claim will be upheld if the motion is legally insufficient or its allegations are conclusively refuted by the record. McLin, 827 So.2d at 954. To prevail on a claim of newly discovered evidence, a defendant must show:

- (1) the asserted facts "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by the use of due diligence"; and
- (2) the newly discovered evidence "must be of such nature that it would probably produce an acquittal on retrial."

Lambrix v. State, 124 So.3d 890, 896 (Fla. 2013). The newly discovered evidence will probably produce an acquittal on retrial if it "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability." Hildwin v. State, 141 So.3d 1178, 1181 (Fla.

2014) (quoting Jones v. State, 709 So.2d 512, 526 (Fla. 1998)).

Applying the standard to this case, we agree with the circuit court's conclusion that Tobin's affidavit does not qualify as newly discovered evidence. New opinions or new research studies have routinely been rejected as newly discovered evidence. See Henry v. State, 125 So.3d 745, 750-51 (Fla. 2013). Merely obtaining a new expert to review the same records does not create newly discovered evidence. See Howell v. State, 145 So.3d 774, 775 (Fla. 2013).

However, this Court has found that a case-specific letter from the FBI based on a 2004 report by the National Research Council is newly discovered evidence. Wyatt v. State, 71 So.3d 86, 100 (Fla. 2011). The 2004 report discredited the science supporting the trial testimony of the FBI's own agent on comparative bullet lead analysis, and the letter provided a case-specific assessment from the FBI on how the report's findings could affect Wyatt's case. Id. at 95, 99. We found the letter to be newly discovered evidence because "[a]lthough the FBI did not actually write the letter until August 2008, more than fifteen years after Wyatt's trial, the flaws inherent in CBLA science were unknown or not publicly acknowledged at the time of trial." Id. at 100.

Here, Tobin's affidavit asserts that National Research Council reports from 2008 and 2009 show ballistic testimony in Asay's case was misleading. However, that affidavit cannot be considered newly discovered evidence in the same way as the case-specific letter from the FBI in Wyatt. Tobin is not a law enforcement agent seeking to correct his agency's prior testimony. See id. at 101; Smith v. State, 75 So.3d 205, 206 (Fla. 2011). Further, one of the reports on which Tobin bases his affidavit was already itself rejected as newly discovered evidence in Johnston v. State, 27 So.3d 11 (Fla. 2010), because the report cited to existing publications published years before Johnston raised his claim. Id. at 20-21. Obtaining an expert to review that same report does not convert it or the expert's report into newly discovered evidence. See generally, Howell, 145 So.3d at 775. Thus, Asay has not provided any newly discovered evidence on which to base his claim. Because the record conclusively shows that he is not entitled to relief on his newly discovered evidence claim, the circuit court did not err in denying

an evidentiary hearing. Therefore, we deny relief on this claim.

B. Strickland Claims

*15 In the alternative to his Brady claims, discussed below, Asay alleges generally that if the evidence was not suppressed in violation of Brady, trial counsel was ineffective under Strickland for failing to adequately investigate or introduce the evidence at trial. The Brady/Strickland evidence concerns three circumstances that Asay alleges affect the facts of his case as presented at trial: initial police investigation into another suspect for the Booker murder, a witness's ownership of a gun fitting the profile of the murder weapon, and information impeaching Charlie Moore's testimony that Asay confessed to the McDowell murder.

The summary denial of an ineffective assistance of counsel claim will be upheld where the motion is legally insufficient or where the record conclusively refutes the allegations. See Jones, 998 So.2d at 587. To succeed on a claim of ineffective assistance of trial counsel, a movant must show that trial counsel's performance fell "outside the broad range of reasonably competent performance under prevailing professional standards," and that this deficiency affected the proceeding so as to undermine confidence in the outcome at trial such that the defendant was prejudiced by the deficiency. Maxwell v. Wainwright, 490 So.2d 927, 932 (Fla. 1986).

The impeachment evidence of Charlie Moore may not be considered for the purposes of this claim because it was previously raised as part of an ineffective assistance of counsel claim within Asay's initial postconviction motion. See Asay II, 769 So.2d at 978 n.5. Asay's initial postconviction claim was based on an inconsistency about which trial counsel failed to question state witness Charlie Moore—specifically that Moore's testimony was presented at trial as a single conversation with law enforcement when, in fact, Moore did not tell police that Asay confessed to the McDowell murder until after he learned that his cousin Danny had done so in response to a television show, *Crime Watch*. This is the exact piece of impeachment evidence which Asay offers in this proceeding. Having reviewed the initial postconviction record, we find that as to this piece of evidence, the claim "fails to allege new or different grounds for relief and the

prior determination was on the merits.” Fla. R. Crim. P. 3.851(e)(2). Therefore, Asay’s claim as to this evidence is procedurally barred.

As to the remaining evidence underlying Asay’s Strickland claims, Asay did not plead his Strickland claim separately from his Brady claim before the circuit court, except to allege generally that “[t]o the extent that counsel was or should have been aware of this [Brady] information, counsel was ineffective in failing to discover it and utilizing [sic] it.” In addition, for the instant appeal, the Brady/Strickland claims were grouped with the newly discovered evidence claim, and Asay argued that this Court must find a Strickland violation if the evidence was not suppressed under Brady because Brady and Strickland are “two sides of the same coin.”

We find that these conclusory allegations fail to demonstrate that trial counsel’s performance was deficient or prejudiced Asay. See Jones, 998 So.2d at 587; Connor v. State, 979 So.2d 852, 862 (Fla. 2007). Asay does not demonstrate how trial counsel was deficient or that counsel’s performance fell outside of reasonable professional standards. As to prejudice, Asay alleges that the evidence would have allowed counsel to convey a narrative that, if believed by the jury, would probably undermine confidence in his conviction or sentence. However, whether the jury would believe this narrative is “mere speculation that fails to rise to the level of prejudice needed to establish an ineffective assistance of trial counsel claim.” Nelson v. State, 73 So.3d 77, 85 (Fla. 2011) (citing Johnson v. State, 921 So.2d 490, 503–04 (Fla. 2005)). Because Asay has not demonstrated deficiency or prejudice, his Strickland claim is legally insufficient and the circuit court properly denied an evidentiary hearing. Jones, 998 So.2d at 587. We deny relief on this claim.

C. Brady Claims

*16 The summary denial of a Brady claim is upheld if the motion is legally insufficient or its allegations are conclusively refuted by the record. See id. This Court discussed the elements of this claim in Franqui v. State, 59 So.3d 82 (Fla. 2011):

To demonstrate a Brady violation, the defendant has the burden to show (1) that favorable evidence,

either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced. To meet the materiality prong of Brady, the defendant must demonstrate a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.... [M]ateriality under Brady requires a probability sufficient to undermine confidence in the outcome. [For t]he materiality inquiry ... the question is whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. It is the net effect of the evidence that must be assessed.

Id. at 101–02 (internal citations omitted).

As noted above, Asay previously raised a Strickland claim based on the Charlie Moore impeachment evidence. See Asay II, 769 So.2d at 978 n.5. Because Asay has previously argued before this Court that trial counsel had this evidence and was deficient in failing to use it, he cannot now argue that the State suppressed the information for the purposes of a Brady claim. Therefore, the record conclusively shows he is not entitled to relief based on that evidence. See Jones, 998 So.2d at 587.

As to the other Brady/Strickland evidence, Asay contends that the existence of another initial suspect and a witness’s ownership of a gun fitting the profile of the murder weapon support speculation that Asay did not shoot Booker. Asay pleads generally that it is exculpatory, was suppressed by the State, and is material, such that he was prejudiced. However, the record conclusively shows that the alleged evidence is not material such that its alleged suppression prejudiced him. Franqui, 59 So.3d at 102. The existence of another initial suspect and the fact that a witness owned a gun similar to the murder weapon cannot “reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” Id. Nor does that evidence create any dispute with the evidence the jury heard at trial. It does not refute medical examiner and witness testimony which link Asay to both

murders. Because the record conclusively refutes Asay's Brady claim as to this remaining evidence, the circuit court properly denied an evidentiary hearing. See Jones, 998 So.2d at 587. We affirm the denial.

D. Cumulative Prejudice

Asay contends that his newly discovered evidence, when considered cumulatively with his Brady/Strickland evidence, undermines confidence in the results of his proceeding. See Swafford v. State, 125 So.3d 760, 775 (Fla. 2013); Parker v. State, 89 So.3d 844, 867 (Fla. 2011); Suggs v. State, 923 So.2d 419, 441 (Fla. 2005); Jones, 709 So.2d at 526. However, in this case, the record conclusively shows that Asay's alleged newly discovered evidence does not constitute newly discovered evidence. The Brady/Strickland evidence with potential impeachment value against Charlie Moore is procedurally barred. Asay's Strickland claim is insufficient for failing to demonstrate deficiency or prejudice. Therefore, the only alleged error this Court could review for cumulative prejudice is Asay's Brady claim based on the evidence showing another initial suspect and a witness's ownership of a gun similar to the murder weapon. As noted in the Brady discussion above, the record conclusively shows that this evidence is not material such that it prejudiced Asay. As such, we find no cumulative prejudice.

III. EXTRA RECORD MATERIAL AND EX PARTE HEARING

*17 Asay next argues the circuit court violated his right to due process when it considered extra record material and conducted an ex parte hearing with the State. According to Asay, this demonstrates bias on behalf of the trial judge and requires her removal from the case. Each of these claims will be addressed in turn.

A. Extra Record Material

Asay argues the circuit court considered extra record material in deciding his Brady claim. During the warrant litigation, the State Attorney's Office and the Jacksonville Sheriff's Office recreated their original disclosures of public records. The State attached these public records to an e-mail, sent them to Asay's counsel, and copied

the e-mail to the circuit court. The attachments were not introduced into evidence. At the Huff hearing, the State read from the deposition of Detective Housend in support of its position that it did not suppress information regarding Roland Pough as a possible suspect. The State also repeatedly referred to a homicide continuation report from the public records provided by the Jacksonville Sheriff's Office. The circuit court relied on these records to deny Asay's Brady claim that Detective Housend failed to provide trial counsel with information about Roland Pough as a suspect in Booker's shooting. Both documents were part of the public records sent to Asay's counsel and the circuit court via e-mail, and defense counsel made no objection to the use of the records during the hearing.

Generally, to raise an error on appeal, a contemporaneous objection must be made at the trial level when the alleged error occurs. J.B. v. State, 705 So.2d 1376, 1378 (Fla. 1998). Only when an error is fundamental can it be raised on appeal in the absence of a contemporaneous objection. Crump v. State, 622 So.2d 963, 972 (Fla. 1993). An error is fundamental when it goes to the foundation of the case or the merits of the cause of action and is equivalent to a denial of due process. State v. Johnson, 616 So.2d 1, 3 (Fla. 1993). Further, it is " '[t]he essence of due process ... that fair notice and reasonable opportunity to be heard must be given to interested parties before judgment is rendered.' " Huff v. State, 622 So.2d 982, 983 (Fla. 1993) (quoting Scull v. State, 569 So.2d 1251, 1252 (Fla. 1990)).

Here, Asay failed to object to the circuit court's receipt of the public records via e-mail. He also failed to object when the State read from the public records during the Huff hearing. If Asay had objected at either time, he would have had the opportunity to be heard. Consequently, Asay fails to establish a lack of notice and opportunity to be heard as to the circuit court's receipt of the public records. Because there was no violation of due process, the circuit court's reliance on the public records in its final order does not amount to fundamental error, and Asay is barred from raising this issue on appeal.

B. Ex Parte Hearing

Asay also contends that the circuit court conducted an ex parte hearing with the State. On February 4, 2016, at approximately 12:45 p.m., Asay's counsel emailed the State, writing that he intended to file a proffer containing

unredacted materials. The Office of the Attorney General e-mailed back at 12:58 p.m. that the State objected because any proffer after the circuit court's ruling was improper. Asay's counsel responded that he still intended to file the proffer. At 2:31 p.m., the State filed a motion to prohibit the proffer. The trial judge's judicial assistant attempted to arrange a hearing on the State's motion; however, Asay's counsel responded that he would not be available at all that day.

*18 At 3:02 p.m., the State e-mailed Asay's counsel a notice of hearing via the e-portal. At 3:14 p.m., the judge e-mailed Asay's counsel that the hearing could be moved to a later time but needed to be held before 5 p.m. that day. At 3:15 p.m., the trial court held a hearing on the State's motion without opposing counsel present. During the hearing, the circuit court noted that it received e-mails from Asay's counsel that he intended to file unredacted police reports along with a Notice of Proffer. The circuit court also noted, however, that all proceedings were to be completed by February 3 according to this Court's Scheduling Order. Thus, the circuit court stated that it had not reviewed and would not review the e-mails, and then sealed, filed, and labeled the e-mails as exhibits Two and Three to be submitted to this Court to preserve the matter. After the hearing, at 4:06 p.m., Asay's counsel e-mailed the judge that he was not available and had not been given adequate notice.

Generally, a judge should not engage in ex parte communications with any party. See Smith v. State, 708 So.2d 253, 255 (Fla. 1998). The hearing at issue here was an ex parte communication, a fact the State conceded during the hearing. However, Asay was not prejudiced by this non-substantive hearing. The circuit court only went on record to acknowledge it received the e-mails and the State's motion and to explain that review of the proffered material would not be possible in order to adhere to this Court's Scheduling Order. While due process requires notice and opportunity to be heard before judgment is rendered, no judgment was rendered at the hearing. The court did not review the e-mails or rule on the State's motion. Instead, the court sealed the e-mails to preserve the issue for this Court. Consequently, Asay fails to establish how he was adversely affected by the hearing or how the proceedings establish bias on the part of the circuit court judge.

Although the circuit court reviewed extra record material and conducted an ex parte hearing with the State, Asay is not entitled to relief as to either claim. Moreover, because Asay fails to establish prejudice, his claim that the circuit court judge was biased is meritless. Additionally, Asay did not file a motion to disqualify the judge. Therefore, the claim of bias is also procedurally barred. Asay is not entitled to relief as to this second issue.

IV. DUE PROCESS, EQUAL PROTECTION, AND SPALDING V. DUGGER CLAIMS

Next, Asay argues he was denied due process, equal protection, and the right to effective collateral representation under Spalding, 526 So.2d at 72, when his death warrant was signed while no registry counsel was in place and had not been in place for over a decade. In 2005, Asay's postconviction counsel, Dale Westling, withdrew from the case when it moved into federal court. Asay was not represented by registry counsel again until his death warrant was signed in January 2016. Following that appointment, it was discovered that many of Asay's records were lost or damaged.

Asay contends that the lack of counsel for ten years violated his right to due process and equal protection. Moreover, Asay argues that the court's late appointment of counsel and the lack of records rendered his counsel's performance ineffective. In response, the State argues that defendants have no constitutional right to postconviction counsel, Asay was represented by counsel at every stage of his proceedings, and neither late appointment of registry counsel nor lost records violate due process. The standard of review is de novo.

A. Due Process

Due process requires that a defendant be given notice and an opportunity to be heard on a matter before it is decided. Huff, 622 So.2d at 983. While Asay argues that his lack of registry counsel violated his right to due process, he fails to state when he was denied notice or opportunity to be heard at any stage of his postconviction proceedings. Asay appears to suggest that postconviction counsel was required to actively investigate his case for the preceding ten years and continuously bring forth new arguments. However, this is not mandated by section 27.710, Florida

Statutes. Instead, counsel is only required to represent the defendant “until the sentence is reversed, reduced, or carried out or until released by order of the trial court.” § 27.710(4), Fla. Stat.

*19 Here, Asay was represented by counsel at every stage of his postconviction proceedings. Steve Kissinger represented Asay during the initial postconviction proceedings, and Dale Westling represented Asay during the successive postconviction proceedings. In 2005, Mr. Westling filed a motion to withdraw when the case moved from state court to federal court. The trial court granted the motion. In federal court, at least two attorneys represented Asay at various stages of the proceedings. When the death warrant was signed in January of 2016, the trial court appointed new registry counsel. At no point was Asay not represented by counsel. Furthermore, Asay had notice of each postconviction proceeding and the opportunity to have counsel argue his claims before the court. Thus, his due process argument fails.

B. Equal Protection

Asay's equal protection argument also fails. Disparate treatment of similarly situated defendants is a violation of equal protection. See Duncan v. Moore, 754 So.2d 708, 712 (Fla. 2000). However, Asay does not demonstrate how he was treated differently from similarly situated defendants. As previously explained, Asay has been represented by counsel at every stage of his proceedings as required by statute. While he contends that counsel's withdrawal resulted in disparate treatment, the statute allows counsel to withdraw from the case with permission of the trial court. Here, Asay does not show how withdrawal of counsel resulted in disparate treatment when any defendant's postconviction counsel can withdraw with permission from the trial court. Thus, we find that Asay is not entitled to relief on this claim.

C. Ineffective Assistance of Counsel

Finally, Asay argues that the late appointment of registry counsel and the lack of records rendered counsel's assistance ineffective and violated his right to due process. Asay cites Spalding in support of his claim. However, Spalding only requires that a defendant be represented by an attorney during postconviction proceedings. Id. at 72.

Therefore, Spalding does not entitle Asay to the relief he requests. To the extent that Asay is instead attempting to argue ineffective assistance of counsel, this Court has repeatedly held that defendants are not entitled to effective assistance of collateral counsel. See Gore v. State, 91 So.3d 769, 778 (Fla. 2012) (explaining that there is no independent cause of action for ineffective assistance of collateral counsel in Florida); Zack v. State, 911 So.2d 1190, 1203 (Fla. 2005) (“Under Florida and federal law, a defendant has no constitutional right to effective collateral counsel.”).

Furthermore, the lack of records does not amount to a due process violation. This is a pre-repository case, so the documents from the initial postconviction proceedings in state court were not archived. However, the Office of the Attorney General copied the entire appellate record in state court including the direct appeal, the initial postconviction proceedings, and the successive postconviction proceedings. The Department of Corrections provided counsel with Asay's entire medical record, as well as the entire inmate file. The State Attorney's Office provided counsel with its entire file, which included many of the original public records requests made during the initial postconviction proceedings. Additionally, the Florida Department of Law Enforcement and the Jacksonville Sheriff's Office provided counsel with all the materials they had. Every state agency involved attempted to recreate the records.

However, even if some records have been permanently lost or destroyed, the loss or destruction of files does not necessarily amount to a due process violation. See, e.g., Jones v. State, 928 So.2d 1178, 1192 (Fla. 2006) (rejecting a due process challenge to the capital collateral proceedings where trial counsel's files were destroyed in a fire). Additionally, Asay's counsel does not identify what records were not available, or what particular argument he is prevented from making due to a lack of records. Consequently, we deny relief as to this issue.

CONCLUSION

*20 Because Asay has failed to demonstrate that he is entitled to relief as to any of his claims, we affirm the circuit court's summary denial of his motion for postconviction relief and deny his petition to this Court

for a writ of habeas corpus. Additionally, we lift the stay entered on March 2, 2016.

It is so ordered.

LABARGA, C.J., and QUINCE, and POLSTON, JJ., concur.

LABARGA, C.J., concurs with an opinion.

POLSTON, J., concurs with an opinion.

LEWIS, J., concurs in result with an opinion.

CANADY, J., concurs in result only.

PARIENTE, J., concurs in part and dissents in part with an opinion.

PERRY, J., dissents with an opinion.

LABARGA, C.J., concurring.

I concur in the conclusion of the majority that Hurst v. Florida and Hurst do not apply retroactively to those defendants whose death sentences became final prior to the issuance of Ring. However, 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. There are only two death row defendants who satisfy this criteria—Matthew Marshall and William Zeigler, Jr.¹⁹ The impact of Hurst v. Florida and Hurst upon their death sentences is an issue for another day.

POLSTON, J., concurring.

I agree with the majority that Hurst v. Florida, --- U.S. ---, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), does not apply retroactively to cases that were final when Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), was decided. To be clear, this decision does not address whether Hurst v. Florida applies retroactively to those cases that were not final when Ring was decided but were final when Hurst v. Florida was decided.

However, while I agree with the majority that Hurst v. Florida is not retroactive to pre-Ring cases under Witt v. State, 387 So.2d 922 (Fla. 1980), I believe that the

retroactivity analysis the United States Supreme Court announced in Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), is the proper and applicable test. See Johnson v. State, 904 So.2d 400, 413 (Fla. 2005) (Cantero, J., concurring). I also continue to dissent to the majority's expansion of the meaning of Hurst v. Florida as well as the majority's holding that chapter 2016-13, Laws of Florida, is unconstitutional. See Hurst v. State, 202 So.3d 40, 77-83 (Fla. 2016) (Canady, J., dissenting); Perry v. State, 41 Fla. L. Weekly S449, ---So.3d---, 2016 WL 6036982 (Fla. Oct. 14, 2016) (Canady, J., concurring in part and dissenting in part).

LEWIS, J., concurring in result.

I agree with most of the conclusions set forth in the majority opinion. However, 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. In this case, Asay did not raise a Sixth Amendment challenge prior to the case named Ring arriving. See majority op. at --- n.12. Therefore, I agree that he is not entitled to relief, and I concur in result. However, I write separately to explain my disagreement with the Hurst retroactivity issue as adopted by this Court.

*21 Many courts struggle with the “staggeringly intricate body of law governing the question whether new constitutional doctrines should be ‘retroactively’ or ‘prospectively’ applied.” Witt v. State, 387 So.2d 922, 925 (Fla. 1980) (quoting Paul M. Bator et al., Hart & Wechsler's The Federal Court and the Federal System 1477 (2d ed. 1973)). This Court need not tumble down the dizzying rabbit hole of untenable line drawing; instead, the Court could simply entertain Hurst claims for those defendants who properly presented and preserved the substance of the issue, even before Ring arrived. This is consistent with the precedent of this Court. In James v. State, 615 So.2d 668, 669 (Fla. 1993), we granted relief to a defendant who had asserted at trial and on direct appeal that the jury instruction pertaining to the heinous, atrocious, or cruel aggravating circumstance was unconstitutionally vague before the United States Supreme Court ultimately reached that same conclusion in Espinosa v. Florida, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992). We concluded that—despite his

case becoming final before the principle of law had a case name—it would be unjust to deprive James of the benefit of the Supreme Court's holding in Espinosa after he had properly presented and preserved such a claim. James, 615 So.2d at 669. Similarly, I believe that defendants who properly preserved the substance of a Ring challenge at trial and on direct appeal prior to that decision should also be entitled to have their constitutional challenges heard.

Preservation of the issue is perhaps the most basic tenet of appellate review, see Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982); and this Court should be particularly cognizant of preservation issues for capital defendants. Accordingly, the fact that some defendants specifically cited the name Ring while others did not is not dispositive. Rather, the proper inquiry centers on whether a defendant preserved his or her substantive constitutional claim to which and for which Hurst applies.²⁰ This preservation approach—enshrined in James—ameliorates some of the majority's concern with the effect on the administration of justice. Defendants, like Asay, who did not properly preserve their constitutional challenges, forfeited them just as any other defendant who fails to raise and preserve a claim. However, those defendants who challenged Florida's unconstitutional sentencing scheme based on the substantive matters addressed in Hurst are entitled to consideration of that constitutional challenge.

Jurists have echoed this type of approach as a remedy to the more exacting federal Teague standard.²¹ Federal courts have employed a similar preservation approach, and it is “one of the dominant means by which federal courts limit the disruptive effects of legal change in the context of direct review of federal criminal convictions.”²² Regardless of the limited federal approach, scholars urge state courts to pull retroactivity off Teague's constitutional floor,²³ which the Supreme Court expressly permitted in Danforth v. Minnesota, 552 U.S. 264, 280, 128 S.Ct. 1029, 169 L.Ed.2d 859 (2008).

This Court's adoption of the Stovall/Linkletter standard was intended to provide “more expansive retroactivity standards” than those of Teague. Johnson v. State, 904 So.2d 400, 409 (Fla. 2005). However, the Court's retroactivity decision today eschews that intention. Further, it illuminates Justice Harlan's famous critique of Linkletter:

Simply fishing one case from the stream of appellate review ... and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule constitute[s] an indefensible departure from this model of judicial review.

*22 Williams v. United States, 401 U.S. 667, 679, 91 S.Ct. 1171, 28 L.Ed.2d 404 (1971) (Harlan, J., concurring in part and dissenting in part). 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.²⁴

Every pre-Ring defendant has been found by a jury to have wrongfully murdered his or her victim. With full knowledge that some defendants properly preserved challenges to their unconstitutional sentences, this Court now limits the application of Hurst, resulting in the State wrongfully executing those defendants. It seems axiomatic that “two wrongs don't make a right”; yet, this Court essentially condones that outcome with its very limited interpretation of Hurst's retroactivity and application.

PARIENTE, J., concurring in part and dissenting in part. Our recent decision in Hurst²⁵ is undoubtedly a decision of fundamental constitutional significance based not only on the United States Supreme Court's decision in Hurst v. Florida,²⁶ but also on Florida's separate constitutional right to trial by jury under article I, section 22, of the Florida Constitution. Not only did the United States Supreme Court hold that Florida's capital sentencing scheme was unconstitutional based on the Sixth Amendment to the United States Constitution, but this Court also held in Hurst that capital defendants are entitled to unanimous jury findings of each aggravating factor, that the aggravating factors are sufficient to impose death, and that the aggravating factors

outweigh the mitigating circumstances and a unanimous jury recommendation of death as part of Florida's constitutional right to a trial by jury under article I, section 22, of the Florida Constitution. Hurst, 202 So.3d at 44.

Applying decisions of fundamental constitutional significance retroactively to defendants in similar circumstances is essential to "ensuring fairness and uniformity in individual adjudications." Witt v. State, 387 So.2d 922, 925 (Fla. 1980).²⁷ This Court has always recognized that "death is different," so we must be extraordinarily vigilant in ensuring that the death penalty is not arbitrarily imposed.²⁸ Therefore, I dissent from the majority's holding not to apply Hurst retroactively to all death sentences that were imposed under Florida's unconstitutional capital sentencing scheme.²⁹

*23 In Hurst, we emphasized the importance of unanimity in jury decisions, stating: "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. In fact, the majority acknowledges the importance of our holding in Hurst:

[T]he ultimate decision of whether a defendant lives or dies rests on these factual findings, only strengthening the purpose of the new rule. Both this Court and the Supreme Court have recognized that "death is different." See, e.g., Yacob v. State, 136 So.3d 539, 546 (Fla. 2014) (quoting Fitzpatrick v. State, 527 So.2d 809, 811 (Fla. 1988)); Ring, 536 U.S. at 605, 122 S.Ct. 2428. Thus, in death cases, this Court has taken care to ensure all necessary constitutional protections are in place before one forfeits his or her life, and the purpose of the new rule weighs in favor of applying Hurst v. Florida retroactively to Asay.

Majority op. at -----.

The majority's decision will have an immediate effect on Asay, who is the subject of a pending death warrant. Majority op. at -----. In my view, by limiting the retroactivity of the rights explained in Hurst v. Florida and Hurst, the majority discounts the significance of the unanimity requirement imposed by this Court's holding in Hurst and applied in our holding in Perry v. State, 41 Fla. L. Weekly S449, --- So.3d ---, 2016 WL 6036982 (Fla. Oct. 14, 2016), invalidating Florida's revised 2016 death penalty sentencing statute for its failure to require unanimity in the jury's final recommendation of death. While I cannot agree with Justice Perry's interpretation and application of section 775.082(2), Florida Statutes, which would reduce every final death sentence to life after Hurst v. Florida, I agree that a faithful application of the Witt test for retroactivity compels full retroactivity of Hurst. A faithful Witt analysis includes consideration of the uniqueness and finality of the death penalty, together with the fundamental constitutional rights at stake when the State sentences someone to death—namely the right to trial by jury and sentencing by a unanimous jury as guaranteed by both the Sixth Amendment to the United States Constitution and article I, section 22, of the Florida Constitution.

Ultimately, when applying the retroactivity equation of balancing "the justice system's goals of fairness and finality" in this circumstance, fairness must prevail over finality. Ferguson v. State, 789 So.2d 306, 312 (Fla. 2001). I recognize, as does the majority, the victims and their families' "need for finality" but stress, as does Justice Perry in his dissent, that no conviction shall be disturbed. Majority op. at -----; see Asay, No. SC16-223, slip op. at ----- (Perry, J., dissenting). The question is not of guilt or innocence but, rather, of life or death.

A retroactivity analysis under Witt consists of three prongs. Witt, 387 So.2d at 931. The majority opinion explains how the Hurst v. Florida decision meets the first two prongs of a Witt retroactivity analysis; it undoubtedly emanates from the United States Supreme Court and is clearly constitutional in nature. Majority op. at -----; see Witt, 387 So.2d at 931. Likewise, our opinion in Hurst interpreted the United States Supreme Court's opinion in Hurst v. Florida and Florida's own constitutional right to jury trial. See art. I, § 22, Fla. Const. As to the third prong of the Witt analysis, I conclude, as I explain below, that the requirement of jury unanimity in the ultimate decision as to whether a defendant is sentenced to death is

of such fundamental significance that fairness requires us to also apply Hurst retroactively to all capital defendants in Florida. This third prong, which asks whether the decision is of sufficient magnitude to require retroactive application, is reviewed under the three factors of the Stovall³⁰/Linkletter³¹ test: examining the purpose of the rule, the extent of reliance on the prior rule, and the effect of retroactive application of the new rule on the administration of justice. Witt, 387 So.2d at 926 (citations omitted).

*24 As to the importance of the right to trial by jury, the majority appropriately explains that the purpose to be served by the rule weighs in favor of applying Hurst retroactively:

The importance of the right to a jury trial has been recognized since this country's inception and is the only right to appear in both the body of the Constitution and the Bill of Rights. Art. III, § 2, U.S. Const.; U.S. Const. amend. VI. In fact, in the very line of cases at issue here, the United States Supreme Court has recognized that the right to a jury's determination of all the elements of an offense is of utmost importance, thereby changing its previous position that "sentencing considerations" were an exception to the rule. See Apprendi, 530 U.S. at 476, 120 S.Ct. 2348 ("At stake in this case are constitutional protections of surpassing importance."); see also Ring, 536 U.S. at 609, 122 S.Ct. 2428 ("Because ... aggravating factors operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury." (citation omitted) (emphasis added)).

Likewise, in Florida, this Court has "always considered the right to jury trial an indispensable component of our system of justice." Blair v. State, 698 So.2d 1210, 1213 (Fla. 1997). In fact, Florida's first Constitution declared, "That the great and essential principles of liberty and free government, may be recognized and established, we declare: ... That the right of trial by jury, shall for ever remain inviolate." Art. I, § 6, Fla. Const. (1838). This Court has consistently recognized the importance of a defendant's right to a jury trial, calling it "indisputably one of the most basic rights guaranteed by our constitution." State v. Griffith, 561 So.2d 528, 530 (Fla. 1990).

The underpinnings of Hurst v. Florida, requiring that the jury make all the factual findings necessary to

impose a death sentence, are based on the critical right to a jury trial: one of the guarantees set forth in the Bill of Rights since our country's—and this State's—inception. The right to a jury trial not only ensures a defendant's guilt is accurately determined, but also that any decision on the matter is made by a group of the defendant's peers—as opposed to a member of the government. Our citizens place their trust in our criminal justice system in large part because the citizens themselves are the crucial element in determining a defendant's guilt or innocence.

Majority op. at ———. In light of our recent holding in Hurst, emphasizing the fundamental constitutional significance of the right to trial by jury under both the United States and Florida Constitutions and the role unanimity plays in ensuring fairness and reliability in the imposition of death, I agree with the majority that the purpose of the new rule weighs in favor of retroactive application.

Further emphasizing the importance of the right to trial by jury, Justice Anstead explained in his concurring in part and dissenting in part opinion in Johnson v. State, 904 So.2d 400 (Fla. 2005), why Ring should not only apply in Florida but should apply retroactively:

The right to a jury trial is not only recognized as the most important right involving our justice system set out in our constitution, its roots rest in the most revered legal document of our Anglo-American legal tradition, the Magna Carta. Countless thousands of English and American patriots have recognized and defended the right of jury trial as the very foundation of our justice system. In 1762, David Hume, the English philosopher, wrote that "trial by jury is the best institution calculated for the preservation of liberty and the administration of justice that was ever devised by the wit of man." Similarly, Thomas Jefferson declared in 1788, "I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution." See J. Kendall Few, In Defense of Trial by Jury 214, 311, American Jury Trial Foundation (1993)... Indeed, this Court's first chief justice, Chief Justice Douglas, eloquently assessed the importance of this right in 1848 when he spoke for a unanimous Court in declaring:

*25 When however it is remembered with what jealous and scrupulous regard "the right of trial by

jury” has ever been cherished and preserved by our Anglo Saxon ancestors, and by the Fathers of the revolution of 1776, a regard transmitted to us their descendants not only with unabated attachment, but if possible with increased interest and regard—a Magna Charta shielding every one in the enjoyment of life liberty and property: When these things are borne in mind and a Legislative act in its terms abridges this hallowed right, or its provisions are subversive of the principles of natural justice and against common reason and common right, the duty of the court, though unpleasant and even painful, is too obvious to be doubted or denied.

Flint River Steam Boat Co. v. Roberts, Allen & Co., 2 Fla. 102, 115 (1848).

Johnson, 904 So.2d at 427–28.

Turning to the extent of reliance on the old rule, which the majority states is the “most important factor” when determining whether the new rule constitutes a development of fundamental significance, the majority determines that this factor militates against a finding of retroactivity due to the number of defendants currently on Florida’s death row and the number of executions in this State since 1976. Majority op. at ———, ———. Presumably, then, under that same reasoning, if there were fewer defendants currently on death row and fewer executions in this State since 1976, this Court might have held Hurst to be fully retroactive. But, in fact, Witt does not elevate this factor above the others when conducting a retroactivity analysis because the three prongs are intertwined to assist the Court in determining when fairness must yield to finality.

I would conclude that Hurst creates the rare situation in which finality yields to fundamental fairness in order to ensure that the constitutional rights of all capital defendants in Florida are upheld.³² Witt, 387 So.2d at 925; Ferguson, 789 So.2d at 312. As Chief Justice Strine of the Supreme Court of Delaware stated in his recent concurrence in Rauf v. Delaware, a decision that invalidated Delaware’s capital sentencing scheme in light of the United States Supreme Court’s decision in Hurst, and which the Delaware Supreme Court recently held applies retroactively under the more restrictive Teague³³ test:³⁴

If U.S. Supreme Court jurisprudence has and therefore can turn on a determination that death is different, it is certainly appropriate to recognize that the decision to give death or life is the most important one that can be made in any criminal trial, and that the Sixth Amendment right was understood as of its adoption and for much of our history as allocating that authority to the jury.

Rauf v. Delaware, 145 A.3d 430, 473 (Del. 2016) (Strine, C.J., concurring) (footnotes omitted).

Maintaining the focus on fairness, I turn to the third prong of the Stovall/Linkletter test: the effect on the administration of justice. As this Court stated in Witt, “society 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.” 387 So.2d at 925. When determining whether someone lives or dies, requiring that a jury determine unanimously that the death penalty be imposed—after carefully determining which aggravators exist, weighing the sufficiency of the aggravators, determining that the aggravating factors outweigh the mitigating circumstances—“promotes a thorough and reasoned resolution,” thereby stabilizing capital sentencing by ensuring that sentences of death are constitutional.³⁵ Undoubtedly, the justice system would be affected if this Court applied Hurst retroactively to all defendants on death row in Florida, but I conclude that this impact does not justify the injustice that results from not granting relief to all eligible capital defendants presently on Florida’s death row.

*26 For these reasons, I conclude that Hurst should apply to all defendants who were sentenced to death under Florida’s prior, unconstitutional capital sentencing scheme. 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. For example, many defendants whose crimes were committed before 2002 will receive the benefit of Hurst because they were previously granted a resentencing on other grounds and their newest death

sentence was not final when Ring was decided.³⁶ To avoid such arbitrariness and to ensure uniformity and fundamental fairness in Florida's capital sentencing, our opinion in Hurst should be applied retroactively to all death sentences. Thus, I would apply Hurst retroactively to Asay.

Because I would apply Hurst to Asay's case, I now turn to whether the Hurst error in Asay's penalty phase was harmless beyond a reasonable doubt. On remand from the United States Supreme Court, this Court determined that such error is capable of harmless error review and set forth the test for such review. Hurst, 202 So.3d at 66–68. In Asay's case, the penalty phase jury recommended death by a vote of nine to three. Because there was no special verdict, we do not know why the three dissenting jurors did not vote to recommend death—whether they did not find that sufficient aggravating factors existed or did not find that sufficient aggravating factors outweighed the mitigating circumstances, or whether three jurors otherwise determined that death for this twenty-three-year-old was not the appropriate punishment. Thus, it cannot be said that the lack of unanimity was harmless beyond a reasonable doubt, and I would therefore conclude that Asay is entitled to a new penalty phase.

PERRY, J., dissenting.

I cannot agree with the majority's decision to limit the retroactive application of Hurst v. Florida to those cases that were not final when the United States Supreme Court decided Ring. 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. Coupled with Florida's troubled history in applying the death penalty in a discriminatory manner,³⁷ I believe that such an application is unconstitutional. I therefore dissent.

Asay will be the first white person executed for the murder of a black person in this State. See Frank R. Baumgartner, *The Impact of Race, Gender, and Geography on Florida Executions*, <http://www.unc.edu/~fbaum/articles/Baumgartner-Florida-executions-Jan2016.pdf> (January 14, 2016); (“No White person has been executed in Florida for a homicide involving a Black victim. In contrast, 71 percent of the executions carried out against Black

inmates were for homicides involving White victims.”); see also Michael Radelet, Glenn L. Pierce, Choosing Those Who Will Die: Race and the Death Penalty in Florida, 43 Fla. L. Rev. 1 (1991). This sad statistic is a reflection of the bitter reality that the death penalty is applied in a biased and discriminatory fashion, even today. Indeed, as my retirement approaches, I feel compelled to follow other justices who, in the twilight of their judicial careers, determined to no longer “tinker with the machinery of death.” See, e.g., Callins v. Collins, 510 U.S. 1141, 1145, 114 S.Ct. 1127, 127 L.Ed.2d 435 (1994) (Blackmun, J., dissenting). The majority's decision today leads me to declare that I no longer believe that there is a method of which the State can avail itself to impose the death penalty in a constitutional manner. Because the majority of this Court has already determined that Asay will be executed for his crimes, I limit the remainder of my discussion to the application of Hurst v. Florida to this case.

*27 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.

The majority's opinion is inconsistent with our analysis of principles of fairness in our recent decision Falcon v. State, 162 So.3d 954 (Fla. 2015). In Falcon, this Court stated that the principles of fairness underlying the Witt analysis “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.” Falcon, 162 So.3d at 962. In Falcon, we found that applying a constitutional rule to some juvenile offenders but not to other similarly situated juvenile offenders simply because of the date their sentences became final would result in unjust disparate treatment of similarly situated persons. Id.; see also Thompson v. Dugger, 515 So.2d 173 (Fla. 1987) (concluding that all death sentenced individuals, regardless of when their sentences became final, were entitled to seek relief in light of Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987)). Accordingly, we concluded that “[t]he patent unfairness of depriving indistinguishable juvenile offenders of their liberty for the rest of their lives,

based solely on when their cases were decided, weighs heavily in favor of [retroactivity].” Falcon, 162 So.3d at 962.

Death penalty cases should be treated as a “class apart” from non-death penalty cases. Furman v. Georgia, 408 U.S. 238, 285–87, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). We have consistently noted that “death is different” and as such, required careful consideration by the judiciary. Robertson v. State, 143 So.3d 907, 912 (Fla. 2014) (Florida jurisprudence “begins with the premise that death is different.”); Yacob v. State, 136 So.3d 539, 546 (Fla. 2014) (“[T]his Court’s automatic, mandatory, and statutorily required review of death penalty cases ‘must begin with the premise that death is different.’ ”); Ocha v. State, 826 So.2d 956, 964 (Fla. 2002) (“This Court has long adhered to the idea that [i]n the field of criminal law, there is no doubt that ‘death is different.’ ”); Swafford v. State, 679 So.2d 736, 740 (Fla. 1996) (“[O]ur jurisprudence also embraces the concept that ‘death is different’ and affords a correspondingly greater degree of scrutiny to capital proceedings.”). In its decision today, this Court chooses not to minimize the risk of wholly arbitrary and capricious implantation of the death penalty.

In the present case, the majority strays from its reasoning in Falcon and decides that in capital cases where the Sixth Amendment rights of hundreds of persons were violated, it is appropriate to arbitrarily draw a line between June 23 and June 24, 2002—the day before and the day after Ring was decided. The majority does not offer a convincing rationale as to why 173 death sentenced persons should be treated differently than those whose sentences became final post-Ring, while overestimating the burden that these 173 capital cases will place on the judiciary. Because “death is different,” retroactive application of Hurst v. Florida to all death sentenced persons cannot be justified by the mere fact that it will be harder to grant a new penalty phase or other relief to 173 additional persons.

*28 One of the reasons given for this arbitrary line in the sand is the administration of justice.³⁸ The majority opines that penalty phase proceedings are time intensive endeavors that require the State to present evidence from the guilt phase in addition to penalty-phase-specific evidence and that the jurors’ ability to weigh the testimony of witnesses who may no longer be available will be impacted. Indeed, the majority claims that the greater the time since the crime, the more difficult a new penalty

phase will be. Undoubtedly, there will be situations where persons who committed equally violent felonies and whose death sentences became final days apart will be treated differently without justification from this Court. However, because death row defendants have succeeded in having convictions and sentences vacated for crimes that were committed long before Ring was decided and now have new sentences that became final after Ring was decided, the majority’s conclusion is undermined and the application is arbitrary.

I submit that there is a more logical way to provide finality to the victims’ families without violating the Eighth Amendment. First, the majority has overstated the effect of retroactivity on the administration of justice: the effect would not be substantial. The retroactive application of Hurst v. Florida would affect only capital cases. Although they are generally more complex and require more judicial resources than other types of cases, capital cases make up only a small percentage (0.09 percent) of the 171,414 criminal cases filed in circuit court during the fiscal year 2014–15, and an even smaller percentage (0.02 percent) of the 753,011 total cases filed in circuit court. See Office of the State Courts Admin’r, Florida’s Trial Courts Statistical Reference Guide: FY 2014–15, ch. 2, at 4 (2015), http://flcourts.org/core/fileparse.php/541/urlt/20150901-Chapter-2-Overall-Statistics_accessible.pdf. In light of this Court’s mandatory jurisdiction over capital cases and the statutory requirement that capital cases be prosecuted in circuit court, the new rule would have no effect on either the district courts or county courts.

Moreover, because the majority opines that a new penalty phase is required in these cases, the burden on state attorneys, defense counsel, and the judiciary is not as great as if the convictions were vacated. However, even this burden could be eliminated if the Court were to abide by the Legislature’s directive in section 775.082(2), Florida Statutes. In so doing, these capital defendants would receive life sentences, new penalty phase proceedings would be unnecessary, and the burden on the administration of justice would be nil. In other words, this Court has rejected an available remedy that creates no burden but then pronounces that the burden is far too great to provide equal application to similarly situated defendants. In short, there will be situations where persons who committed equally violent felonies and

whose death sentences became final days apart will be treated differently without justification from this Court.

For example, Asay committed two murders on the night of July 17, 1987. His sentence became final on October 7, 1991, when the United States Supreme Court denied certiorari. See Asay v. Florida, 502 U.S. 895, 112 S.Ct. 265, 116 L.Ed.2d 218 (1991). Asay's nine-to-three jury recommendation that resulted in a death sentence would not be constitutional if Hurst v. Florida applied to him, but the majority holds that he is not entitled to the Sixth Amendment protections articulated in Hurst v. Florida.³⁹ Yet, under the present majority's decision, another defendant who committed his offense on an earlier date but had his sentence vacated and was later resentenced after Ring, cannot receive the death penalty without the protections articulated in Hurst.⁴⁰ Timothy Hurst committed his crimes on May 2, 1990, and was originally sentenced on April 26, 2000, which was final October 21, 2002, a few short months after the decision in Ring.⁴¹ The majority's application of Hurst v. Florida makes constitutional protection depend on little more than a roll of the dice. This cannot be tolerated.

*29 In light of the relatively few number of capital cases in proportion to the judiciary's entire caseload and the fact that Hurst v. Florida requires either only new penalty proceedings or no new proceedings at all, the administration of justice would not be overburdened by the retroactive application of Hurst v. Florida. The United States Supreme Court has previously applied new constitutional rules retroactively despite significantly greater burdens on judicial administration. For instance, when the United States Supreme Court made retroactive its holding that no juvenile may be sentenced to life in prison without some opportunity for release, it entitled some 2295 prisoners nationwide to resentencing proceedings or parole hearings. See Montgomery v. Louisiana, — U.S. —, 136 S.Ct. 718, 736, 193 L.Ed.2d 599 (2016); John R. Mills, et al., Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway, 65 Am. U. L. Rev. 535, 570 n.215 (2016). Following the United States Supreme Court's decision to require states to provide counsel to indigent defendants even in noncapital cases, this Court noted that the decision could require not just new sentencing proceedings but entirely new trials for 4542 prisoners, representing over half of Florida's entire

prison population. Roy v. Wainwright, 151 So.2d 825, 827 (Fla. 1963) ("The Division of Corrections reports that as of June 30, 1962, there were approximately 8,000 State prisoners in custody. Of this group 4,065 entered pleas of guilty without the benefit of counsel. Four hundred, seventy-seven (477) entered pleas of not guilty but were convicted without benefit of counsel."). The impact of Hurst v. Florida to the administration of justice pales in comparison.

Because I would find that Asay is entitled to the constitutional protections articulated in Hurst v. Florida, I turn now to what I would find to be the appropriate remedy. As I explained fully in Hurst v. State, 202 So.3d 40, 75–76 (Fla. 2016), there is no compelling reason that the plain language of section 775.082(2), Florida Statutes, does not apply to this case. Because his death sentence is unconstitutional, Asay is entitled to the remedy that the Legislature has specified: the sentencing court must vacate his death sentence and sentence him to life in prison. See § 775.082(2), Fla. Stat. (2015) ("In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1).").

The plain language of the statute does not rely on a specific amendment to the United States Constitution, nor does it refer to a specific decision by this Court or the United States Supreme Court. Further, it does not contemplate that all forms of the death penalty in all cases must be found unconstitutional. Instead, the statute uses singular articles to describe the circumstances by which the statute is to be triggered. Indeed, the statute repeatedly references a singular defendant being brought before a court for sentencing to life imprisonment.

Hurst v. State, 202 So.3d at 75–76 (Perry, J., concurring in part and dissenting in part).

The sentencing court unconstitutionally imposed the death penalty on Asay. Accordingly, “the death penalty in [Asay’s] capital felony [has been] held to be unconstitutional,” and accordingly, “the court having jurisdiction over [Asay who was] previously sentenced to death for a capital felony shall cause [him] to be brought before the court, and the court shall sentence [him] to life imprisonment.” *Id.* We need conduct no further legal gymnastics to carry out the will of the Legislature. *See, e.g., English v. State*, 191 So.3d 448, 450 (Fla. 2016)

(“When the statutory language is clear or unambiguous, this Court need not look behind the statute’s plain language or employ principles of statutory construction to determine legislative intent.”). The sentencing court must impose a life sentence pursuant to section 775.082(2), Florida Statutes.

All Citations

--- So.3d ----, 2016 WL 7406538

Footnotes

- 1 The execution was originally scheduled for March 17, 2016, but was stayed indefinitely by this Court on March 2, 2016.
- 2 The issues raised on appeal were (1) the trial court erred by allowing racial prejudice to be injected into the trial; (2) the trial court erred in failing to advise Asay of his right to represent himself and to conduct an inquiry when Asay asked to discharge court-appointed counsel; (3) the trial court erred in denying Asay’s pro se motion for continuance of the penalty phase of the trial to enable him to secure additional mitigation witnesses; (4) the prosecution improperly diminished the jury’s role in sentencing; (5) the trial court judge erred by failing to grant his motion for judgment of acquittal on count I of the indictment charging him with the first-degree premeditated murder of Robert Lee Booker; (6) the trial court erred in finding CCP established as to the McDowell murder; and (7) Asay’s death sentence was disproportionate. *Id.* at 612 n.1, 613–14.
- 3 While his postconviction motion was pending, Asay—along with other capital defendants—appealed the Florida Board of Executive Clemency’s denial of Asay’s public records requests, but this Court held that the obligation of the State to disclose exculpatory material under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), does not apply to clemency records. *See Asay v. Fla. Parole Comm’n*, 649 So.2d 859, 860 (Fla. 1994), *cert. denied*, 516 U.S. 1017, 116 S.Ct. 591, 133 L.Ed.2d 505 (1995).
- 4 These claims were (1) state agencies withheld public records; (2) the trial judge was biased and trial counsel should have sought to have him disqualified; (3) the original trial judge was biased and should have recused himself from presiding over the postconviction proceedings; (4) trial counsel was ineffective during the guilt phase; (5) the jury instructions for the CCP aggravator did not limit the jury’s consideration and was not supported by the evidence; (6) the CCP jury instruction was unconstitutional and counsel’s failure to object rendered his performance ineffective; (7) Florida’s sentencing scheme is unconstitutional; (8) the State’s aggravating circumstances argument was overbroad; (9) the trial judge erred in failing to find mitigation present in the record; (10) the penalty phase jury instructions shifted the burden of proof to the defendant; (11) Asay’s trial was fundamentally unfair due to the prosecutor’s inflammatory comments; (12) Asay did not receive an adequate mental health evaluation as required by *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985); (13) Asay’s counsel was ineffective during the penalty phase; (14) Asay’s due process rights were violated and his counsel’s performance was rendered ineffective when his motion for a continuance before the penalty phase to secure additional mitigation witnesses was denied; (15) the trial court prevented Asay from presenting mitigation evidence in violation of *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); (16) Asay’s guilt phase counsel was ineffective for not presenting a voluntary intoxication defense; (17) the prosecutor’s statement that sympathy could not be considered by the jury was improper; (18) the jury instructions unconstitutionally diluted the jury’s sense of sentencing responsibility and counsel was ineffective for not ensuring that the jury received adequate instructions; (19) prosecutorial misconduct rendered Asay’s conviction unreliable; and (20) Asay’s trial court proceedings, when considered as a whole, were fraught with errors that could not be considered harmless. *Id.* at 978 n.5.
- 5 *Huff v. State*, 622 So.2d 982 (Fla. 1993).
- 6 During the pendency of Asay’s appeal from the denial of his postconviction motion, Asay also joined a mandamus class action suit to stay application of the Florida Death Penalty Reform Act of 2000, of which this Court found certain sections to be unconstitutional. *Allen v. Butterworth*, 756 So.2d 52, 67 (Fla. 2000).
- 7 These issues were (1) judicial bias during the trial and postconviction proceedings denied Asay “a fair and impartial tribunal throughout his proceedings in violation of his due process rights,” (2) the trial court improperly limited the scope of the evidentiary hearing by limiting the testimony of some of Asay’s siblings concerning mitigating evidence not presented

during the sentencing phase, limiting the scope of Asay's examination of his trial counsel regarding his knowledge of prior inconsistent statements of key witnesses, and refusing to hear the testimony of Thomas Gross recanting his trial testimony; (3) Asay's guilt phase counsel was ineffective for failing to adequately impeach the State's key witnesses, present a voluntary intoxication defense, and rebut the State's arguments that he committed the crime due to his racial animus; (4) penalty phase counsel was ineffective for failing to investigate and present statutory mitigating evidence that Asay was acting under extreme emotional distress and his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, and failing to present nonstatutory mitigating evidence of physical and emotional abuse and poverty during his childhood, alcohol abuse, and his history of "huffing" inhalants; (5) the trial court's summary denial of several claims was improper; and (6) cumulative error. *Id.* at 978–89.

8 The claims raised were (1) appellate counsel was ineffective in failing to argue that Asay was absent during critical stages of the proceedings; (2) Asay's death sentences are unconstitutional because Asay was impermissibly prevented from presenting mitigation, the trial court failed to consider or weigh mitigation, and the prosecutor made impermissible arguments regarding aggravation; (3) appellate counsel was ineffective for failing to raise the trial court's failure to give the requested instruction on CCP; (4) appellate counsel was ineffective for failing to argue that the penalty phase instructions improperly shifted the burden of proof regarding the appropriateness of a life sentence; and (5) Florida's capital sentencing statute and jury instructions are unconstitutional. *Id.*

9 Asay raised the following claims: (1) Asay's Sixth Amendment rights were violated when, during the trial, Asay informed the trial court that he wanted to terminate the services of defense counsel, yet the trial court neither provided substitute counsel nor advised Asay that he had the right to proceed pro se; (2) Asay's counsel was ineffective for delegating the investigation of Asay's case to an investigator and failing to supervise or follow up on that investigator's work product; (3) Asay's counsel was ineffective for failing to meaningfully consult with Asay, failing to obtain and use relevant information about Asay and dropping all defense preparation when he was informed that Asay had confessed to the defense investigator; (4) Asay's counsel was ineffective for failing to meaningfully prepare for trial; (5) Asay's counsel was ineffective for believing that a first degree murder conviction in Asay's case was impossible and therefore failing to prepare for the trial and penalty phase, and laboring under the misconception that there could be no defense if Asay confessed; (6) racial evidence and argument tainted the trial process and denied Asay his right to a fair trial; (7) a State witness, Thomas Gross, admitted after trial that his testimony that Asay was a racist was a lie, that his testimony was coached, and the prosecutor suborned this conduct; (8) Asay's counsel was ineffective for advising Asay not to testify at trial and at the *Spencer* hearing; (9) Asay's counsel was ineffective for conceding Asay's guilt during closing argument; (10) Florida's capital sentencing scheme is unconstitutional under *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); and (11) defense counsel failed to convey an offer of a plea to second degree murder. *Id.* at *1.

10 *Brady*, 373 U.S. 83, 83 S.Ct. 1194.

11 *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

12 Asay raised *Ring* claims in both his first successive motion for postconviction relief and his subsequent habeas petition before the U.S. District Court for the Middle District of Florida. He did not raise a Sixth Amendment challenge to his death sentence at any time prior to *Ring*.

13 See *Bottoson v. State*, 443 So.2d 962, 963 (Fla. 1983) (affirming conviction and sentence).

14 *Witt v. State*, 387 So.2d 922 (Fla. 1980).

15 The Supreme Court has also acknowledged that a *Teague* analysis is very narrow, particularly if a court considers the new rule to be procedural. See *Montgomery v. Louisiana*, — U.S. —, 136 S.Ct. 718, 728, 193 L.Ed.2d 599 (2016) ("*Teague* requires the retroactive application of new substantive and watershed procedural rules in federal habeas proceedings."); *Schiro v. Summerlin*, 542 U.S. 348, 352, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004).

16 *Stovall v. Denno*, 388 U.S. 293, 297, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967).

17 *Linkletter v. Walker*, 381 U.S. 618, 636, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965).

18 In fact, our reliance on the old rule was well-placed up until the decision in *Ring*, after which point this Court struggled with how *Ring* should be properly interpreted in Florida, since the Supreme Court deliberately did not make broad pronouncements and chose to overrule only its decision in *Walton*. This meant that the Supreme Court left intact its prior pronouncements in *Hildwin* and *Spaziano*, which had previously held Florida's statutory scheme to be constitutional. Thus, this Court was faced with competing holdings in *Hildwin* and *Ring*—a difference that could be explained by the difference in the two state statutes at issue. Based on the uncertainty, however, we urged the Legislature to amend the capital sentencing scheme in order to ensure any possible constitutional infirmities could be avoided. In other words, only after the issuance of *Ring* was the law on this point no longer clear.

- 19 There is a third defendant who has a death sentence as a result of an override—Edward J. Zakrzewski, II. However, Zakrzewski received two additional death sentences for murders for which a jury issued recommendations of death. See Zakrzewski v. State, 717 So.2d 488, 491 (Fla. 1998). Therefore, Zakrzewski is not subject to execution purely by virtue of the actions of a judge.
- 20 See L. Anita Richardson & Leonard B. Mandell, Fairness Over Fortuity: Retroactivity Revisited and Revised, 1989 Utah L. Rev. 11, 56–57 (1989).
- 21 Tung Yin, A Better Mousetrap: Procedural Default as a Retroactivity Alternative to Teague v. Lane and the Antiterrorism and Effective Death Penalty Act of 1996, 25 Am. J. Crim. L. 203, 232 (1998).
- 22 Toby J. Heytens, Managing Transitional Moments in Criminal Cases, 115 Yale L.J. 922, 942 (2006).
- 23 Christopher N. Lasch, The Future of Teague Retroactivity, or “Redressability,” After Danforth v. Minnesota: Why Lower Courts Should Give Retroactive Effect to New Constitutional Rules of Criminal Procedure in Postconviction Proceedings, 46 Am. Crim. L. Rev. 1, 51–54 (2009).
- 24 See generally, Christopher M. Smith, Schriro v. Summerlin: A Fatal Accident of Timing, 54 DePaul L. Rev. 1325 (2005).
- 25 Hurst v. State (Hurst), 202 So.3d 40 (Fla. 2016).
- 26 Hurst v. Florida (Hurst v. Florida), — U.S. —, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016).
- 27 See Witt, 387 So.2d at 925 (“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.”).
- 28 See, e.g., Johnson v. State, 904 So.2d 400, n.14 (Fla. 2005) (Anstead, J., concurring in part and dissenting in part) (explaining other contexts in which this Court has granted retroactive application of new precedent).
- 29 I agree with the majority’s denial of relief on Asay’s second, third, and fourth claims respectively, and thus would not overturn Asay’s conviction. Majority op. at ————, ————.
- 30 Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967).
- 31 Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965).
- 32 Even under the majority’s holding today, relief should be granted to the two Florida death row inmates whose sentences were a result of a judicial override because the jurisprudence on the acceptability of judicial overrides has so dramatically changed since their sentences were finalized. Marshall v. State, 604 So.2d 799 (Fla. 1992); Marshall v. State, No. SC16–779 (pending); Zeigler v. State, 402 So.2d 365 (Fla. 1981); see Zeigler v. State, No. SC16–1498 (pending); see also Hurst v. Florida, 136 S.Ct. at 626 (Alito, J., dissenting) (“No Florida trial court has overruled a jury’s recommendation of a life sentence for more than 15 years.”); see also Asay, slip op. at ———— (Labarga, C.J., concurring).
- 33 Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989); see Asay, slip op. at ———— (Polston, J., concurring).
- 34 See Powell v. Delaware, No. 310, 2016, — A.3d —, 2016 WL 7243546 (Del. Dec. 15, 2016).
- 35 Am. Bar Ass’n Death Penalty Due Process Rev. Project Sec. of Individual Rights & Resps., Report to the House of Delegates (Feb. 2015), http://www.americanbar.org/content/dam/aba/un categorized/Death_Penalty_Representation/2015_my_108a.authcheckdam.pdf, at 3–4; accord Ferguson, 789 So.2d at 312.
- 36 See, e.g., Johnson v. State, 44 So.3d 51 (Fla. 2010) (vacating the sentences of death and remanding for a new penalty phase hearing on a conviction from a murder in 1981). Johnson currently has an appeal pending before this Court where he claims entitlement to relief based on Hurst. See case No. SC14–1175.
- 37 I am aware of the irony of this statement in this particular case. It does not escape me that Mark Asay is a terrible bigot whose hate crimes are some of the most deplorable this State has seen in recent history. However, it is my sworn duty to uphold the constitution of this state and of these United States and not to ensure retribution against those whose crimes I find personally offensive.
- 38 I agree with the majority that Witt is the appropriate test to determine retroactivity.
- 39 Furthermore, in today’s decision, the Court declines to extend relief to Asay despite the fact that his nine-to-three jury recommendation violates our decision in Hurst v. State, which interpreted Hurst v. Florida and state law to require both unanimous jury findings and a unanimous jury verdict to impose the death penalty. See Hurst v. State, 202 So.3d 40, 44 (Fla. 2016) (“In capital cases in Florida, these specific findings required to be made by the jury include the existence of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances. We also hold, based on Florida’s requirement for unanimity in jury verdicts, and under the Eighth Amendment to the United States Constitution, that in order for the trial court to impose a sentence of death, the jury’s recommended sentence of death must be unanimous.”); see also id. at 57 (“[B]efore 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 a death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death.”)

40 See, e.g., *Johnson v. State*, No. SC14–1175, ---So.3d ---, ---, 2016 WL 7013856, op. at 1 (Fla. Dec. 1, 2016) (Johnson was convicted for multiple murders occurring on January 8 and 9, 1981, and his sentences became final on February 21, 1984. Subsequently, this Court vacated Johnson’s sentences and remanded for a new penalty phase. This Court vacated Johnson’s death sentence “[b]ecause the jury that recommended Johnson’s death sentences did not find the facts necessary to sentence him to death”

41 Hurst’s sentence was later vacated in 2009.

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IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY
CRIMINAL DIVISION

STATE OF FLORIDA,

CASE NO.: CRC84-03982CFANO-D
UCN: 521984CF003982XXXXNO

v.

RICHARD W. RHODES,
Person ID: 322043, Defendant. /

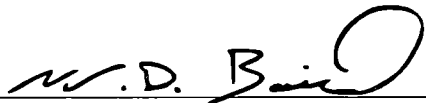
ORDER DIRECTING SUPPLEMENTAL BRIEFING

THIS CAUSE came before the Court on the Court's own initiative. On December 22, 2016, the Florida Supreme Court issued decisions in Asay v. State, SC16-223, and Mosley v. State, SC14-436, regarding the retroactive application of Hurst v. Florida, 136 S. Ct. 616 (2016). The parties are directed to file supplemental briefs addressing what effect, if any, these cases have on the Defendant's "Motion for Post-Conviction Relief in Light of Hurst v. Florida." The Defendant shall file a brief by Friday, January 13, 2017. The State shall file a response by Friday, January 20, 2017.

Accordingly it is,

ORDERED AND ADJUDGED that the Defendant **SHALL FILE** a brief addressing the impact of Asay and Mosley on his motion for postconviction relief by January 13, 2017, and the State **SHALL FILE** a response thereto by January 20, 2017.

DONE AND ORDERED in Clearwater, Pinellas County, Florida, this 4th day of January, 2017. A true and correct copy of this order has been furnished to the parties listed below.


W. Douglas Baird, Senior Circuit Judge

cc: Office of the State Attorney
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CLERK OF CIRCUIT COURT
PINELLAS COUNTY

State v. Rhodes, CRC84-03982CFANO

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**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

v.

Case No. 84-CF-3982

RICHARD W. RHODES, JR.,

Defendant.

_____/

**MEMORANDUM OF LAW PURSUANT TO
*ASAY v. STATE AND MOSLEY v. STATE***

In accordance with this Court’s Order dated January 4, 2017, Defendant, through counsel, files this memorandum of law addressing the impact of *Asay v. State*, Nos. SC16-223, SC16-102, SC16-628, 2016 WL 7406538 (Fla. Dec. 22, 2016), and *Mosley v. State*, Nos. SC14-436 and SC14-2108, 2016 WL 7406506 (Fla. Dec. 22, 2016) on Defendant’s “Motion for Postconviction Relief in Light of *Hurst v. Florida*.”

I. Background

In 1985, Defendant was convicted of first-degree murder in the Sixth Judicial Circuit, in and for Pinellas County. *See Rhodes v. State*, 547 So. 2d 1201, 1203 (Fla. 1989). Following the presentation of penalty-phase evidence, the jury was instructed to make an advisory sentencing recommendation, and the “advisory” jury—through a 7-5 vote—recommended a death sentence. *See id.* at 1206. The jury vote was not unanimous.

On direct appeal, the Florida Supreme Court affirmed Defendant’s conviction but vacated the sentence because “only one of the three aggravating circumstances upon which the trial court

relied is valid” and “there was substantial psychiatric testimony in mitigation.” *Id.* at 1208. The court remanded the case to the trial court for a new sentencing proceeding. *See id.*

At resentencing, the jury was again instructed to make an advisory sentencing recommendation, and the “advisory” jury—through a 10-2 vote—recommended a death sentence. *See Rhodes v. State*, 638 So. 2d 920, 923 (Fla. 1994). The jury vote at resentencing was not unanimous.

At resentencing, the judge made factual findings as to the following aggravating circumstances: (1) Defendant committed the murder while on parole; (2) Defendant was previously convicted of a violent felony; and (3) the murder was committed while Defendant was engaged in the commission of a sexual battery. *See id.*

In mitigation, the judge found the following statutory mitigating circumstances: (1) Defendant’s age of 30 at the time of the offense; and (2) Defendant’s capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. *See id.* The judge found the following non-statutory mitigating circumstances: (1) Defendant was abandoned by his parents when he was a child; and (2) Defendant never experienced a normal family life because his social environments did not address his needs and he spent most of his life in state hospitals and prisons. *See id.*

The judge, not the jury, made findings of fact regarding the applicable aggravating circumstances, and found as fact that the aggravating circumstances were sufficient to impose the death penalty and were not outweighed by any mitigating circumstances. The court sentenced Defendant to death. *See id.*

On direct appeal of the resentencing, Defendant raised a claim under *Caldwell v. Mississippi*, 472 U.S. 320 (1985) arguing that the jury’s role was improperly diminished by the

prosecutor during voir dire and in the court's instructions. *Rhodes v. State*, 638 So. 2d 920, 926 (Fla. 1994). The court denied the claim arguing it "was not preserved by contemporaneous objection." *Id.* The Florida Supreme Court affirmed Defendant's sentence. *Id.* at 927. The United States Supreme Court denied Defendant's petition for a writ of certiorari. *Rhodes v. Florida*, 115 S. Ct. 642 (1994).

In 1996, Defendant filed a motion to vacate his conviction and death sentence. Among other claims, Defendant argued that counsel was ineffective for failing to raise *Caldwell* objections at trial. The trial court denied his motion in 2003. Defendant appealed, again raising the argument that counsel was ineffective for failing to raise *Caldwell* objections at trial. Without addressing the merits of the *Caldwell* claim, the Florida Supreme Court noted that the *Caldwell* claim had been rejected in other death penalty cases. *Rhodes v. State*, 986 So. 2d 501, 514 n.8 (Fla. 2008). The court affirmed the trial court's denial of post-conviction relief. *Id.* at 514.

In 2003, Defendant filed a motion to vacate his conviction and death sentence raising a claim under *Ring v. Arizona*, 536 U.S. 584 (2002). In particular, Defendant argued that "Florida's capital sentencing scheme violates the jury trial guarantee of the Sixth and Fourteenth Amendments" because "it exposes capital defendants to a penalty *exceeding* the maximum they would receive if punished according to the facts reflected in the jury verdict alone." Def's Br. at 8 (Jun. 24, 2003) (internal brackets and quotation marks omitted). The trial court denied relief after concluding that *Ring* did not apply retroactively to Defendant and Defendant's aggravators included a prior violent felony. Order at 1-2 (Dec. 11, 2003).

In 2009, Defendant filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Florida. In Ground Thirteen, he argued that he was denied a reliable trial in violation of the Eighth and Fourteenth Amendments because the jury's role was

diminished in violation of *Caldwell*. See *Rhodes v. Sec., Dep't. of Corrs.*, No. 8:09-cv-1350-T-17TBM, ECF 1, at 84. In particular, he asserted that “[i]n light of *Ring v. Arizona*, 536 U.S. 584 (2002), Florida’s standard penalty phase jury instructions are no longer valid under the United States Supreme Court’s holding in *Caldwell* [.]” *Id.* at 94. The district court denied his petition. *Rhodes v. Sec., Dep't. of Corrs.*, No. 8:09-cv-1350-T-17TBM, 2010 WL 3819358 (M.D. Fla. Sept. 30, 2010).

On November 8, 2016, Defendant filed in this Court for post-conviction relief under *Hurst v. Florida* and *Hurst v. State*. On January 4, 2017, this Court entered an order directing Defendant to file a supplemental brief addressing the impact of *Asay* and *Mosley* on his motion for post-conviction relief.

II. Impact of *Asay* and *Mosley*

Defendant’s death sentence is unconstitutional under the Sixth and Eighth Amendments in light of *Hurst v. Florida* and *Hurst v. State*. Both *Hurst* decisions apply retroactively to Defendant’s case under the Florida Supreme Court’s decisions in *Asay v. State*, Nos. SC16-223, SC16-102, SC16-628, 2016 WL 7406538 (Fla. Dec. 22, 2016), and *Mosley v. State*, Nos. SC14-436 & SC14-2108, 2016 WL 7406506 (Fla. Dec. 22, 2016). The State cannot meet its burden of proving beyond a reasonable doubt that the *Hurst* errors were harmless. Accordingly, for the reasons explained below, Defendant respectfully requests that this Court vacate his death sentence.

A. Defendant’s sentence is unconstitutional under *Hurst v. Florida* and *Hurst v. State*

In *Hurst v. Florida*, the United States Supreme Court invalidated Florida’s capital sentencing statute, which allowed for imposition of a death sentence only after (1) a penalty phase jury rendered an advisory verdict, without specifying the factual basis for its recommendation, and (2) notwithstanding the recommendation of a majority of the jury, the trial court found as fact that

aggravating circumstances were proven beyond a reasonable doubt, the aggravators were sufficient to impose the death penalty, and the aggravators were not outweighed by the mitigating circumstances. 136 S. Ct. at 620-21. The Supreme Court held that Florida’s capital sentencing scheme was unconstitutional because “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.

In *Hurst v. State*, the Florida Supreme Court ruled that, in addition to the federal constitutional requirements set forth in *Hurst v. Florida*, the state constitution required that capital defendants be afforded additional protections. First, the Florida Supreme Court ruled that, in addition to the Sixth Amendment, the Eighth Amendment’s requires *unanimous* jury fact-finding that specific aggravating circumstances were proven, that the aggravating circumstances are sufficient to impose the death penalty, and that the aggravating circumstances outweigh the mitigating circumstances. Each of those findings of fact, the Florida Supreme Court held, must be made by all of the jurors beyond a reasonable doubt. *Hurst v. State*, 202 So. 3d at 53-59.

Second, the Florida Supreme Court ruled that claims by Florida prisoners under *Hurst* must be subjected to individualized harmless error review, and that such review places the burden on the state to prove beyond a reasonable doubt that the *Hurst* error did not affect the jury’s recommendation. *Id.* at 67-68. Ruling in *Hurst*’s favor, the Florida Supreme Court wrote: “after a detailed review of the evidence presented as proof of the aggravating factors and evidence of substantial mitigation, we are not so sanguine as to conclude that *Hurst*’s jury would without a doubt have found both aggravating factors—and, as importantly, that the jury would have found the aggravators sufficient to impose death and that the aggravating factors outweighed the mitigation.” *Id.* at 68. Articulating principles similar to those in *Caldwell*, the Court emphasized that “we cannot determine what aggravators, if any, the jury unanimously found proven beyond a

reasonable doubt,” that “[w]e cannot determine how many jurors have found the aggravation sufficient for death,” and that “[w]e cannot determine if the jury unanimously concluded that there were sufficient aggravating factors to outweigh the mitigating circumstances.” *Id.* The Florida Supreme Court “decline[d] to speculate as to why seven jurors in [*Hurst*] recommended death and why five jurors were persuaded that death was not the appropriate penalty.” *Id.*

In expanding the protections set forth by the United States Supreme Court in *Hurst v. Florida*, the Florida Supreme Court noted that “this Court, in interpreting the Florida Constitution and the rights afforded to persons within this State, may require more protection be afforded to criminal defendants than that mandated by the federal Constitution.” *Id.* at 57.

Here, Defendant’s death sentence violates both the Sixth and Eighth Amendments in light of *Hurst v. Florida* and *Hurst v. State*. Defendant’s death sentence violates the Sixth Amendment because the trial judge, not the jury, made the findings of fact necessary for imposition of a death sentence (a sentence that was not authorized by Defendant’s murder conviction alone). After the jury made a general recommendation to impose the death penalty without specifying the basis for its recommendation, the trial judge found as fact that (1) specific aggravating circumstances had been proven beyond a reasonable doubt, (2) those particular aggravating circumstances were sufficient in the context of Defendant’s case to impose the death penalty, and (3) the aggravating circumstances were not outweighed by the mitigating circumstances. Defendant’s death sentence also violates the Eighth Amendment in light of both *Hurst v. State*’s clear edict that a jury must vote unanimously for the death penalty (Defendant’s jury voted by a bare majority of 7-5), and the “evolving standards of decency,” see *Atkins v. Virginia*, 536 U.S. 304, 312 (2002), that have led to a national consensus that death sentences should only be imposed after unanimous jury verdicts.

B. Both *Hurst v. Florida* and *Hurst v. State* apply retroactively to Defendant’s case

Retroactivity principles do not bar Defendant—whose jury recommended the death penalty by a 10-2 majority—from seeking the relief now available to dozens of similarly-situated death row prisoners who were sentenced in violation of the United States and Florida Constitutions.

As explained below, the Florida Supreme Court’s decisions in *Asay* and *Mosley* rejected traditional notions of retroactivity as a binary concept and endorsed an individualized, case-specific retroactivity approach to *Hurst* claims. Under such an individualized assessment, Defendant should be afforded retroactive application of both *Hurst* decisions on three independent grounds: (1) under the fundamental fairness doctrine, which the Florida Supreme Court has applied in cases including *Mosley* and *James v. State*, 615 So. 2d 668 (Fla. 1993); (2) under the traditional Florida retroactivity analysis established in *Witt v. State*, 387 So. 2d 922 (1980); and (3) as a matter of federal law in light of the United States Supreme Court’s decision in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). In conducting any of those analyses, this Court should reject the notion of “partial retroactivity,” which violates both the United States and Florida Constitutions.

1. *Asay* and *Mosley* require individualized retroactivity analysis for *Hurst* claims

Contrary to traditional notions of retroactivity as a binary concept—*i.e.*, a new constitutional rule is either retroactive to all cases or to none—*Asay* and *Mosley* establish that determining retroactivity in *Hurst* cases requires individualized assessments much in the same way that harmless error must be assessed on a case-by-case basis. *Cf. Mosley*, 2016 WL 7406506, at *24 (“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.”). Individualized retroactivity analysis is necessitated in part by the fact that in *Mosley*, the Court held that the *Hurst* decisions may be found retroactive *either* by virtue of Florida’s traditional *Witt*

test, *or* under the separate fundamental fairness doctrine. In order to assess retroactivity under the fundamental fairness approach, courts must review and assess *all of* the facts of each case.

In *Asay* and *Mosley*, the Florida Supreme Court suggested that courts must first conduct an individualized assessment in order to decide which *Hurst* decision or decisions to analyze for retroactivity, and then to decide whether to apply the *Witt* test, the fundamental fairness approach, or both. For example, the Court assessed retroactivity in *Asay* only as to *Hurst v. Florida*, while in *Mosley*, the Court also addressed *Hurst v. State*. In *Mosley*, the Court then applied two independent retroactivity analyses—*Witt* and fundamental fairness—and reached separate conclusions under each approach. *Mosley*, 2016 WL 7406506, at *18-19. In *Asay*, the Court applied *Witt* but not fundamental fairness, suggesting a case-specific reason for the omission.

Even in applying a traditional *Witt* analysis, the Florida Supreme Court reached individualized conclusions in *Asay* and *Mosley* as to the dispositive third *Witt* prong, which requires examination of three factors borrowed from *Stovall v. Denno*, 388 U.S. 293 (1967), and *Linkletter v. Walker*, 381 U.S. 618 (1965). In *Asay*, the Florida Supreme Court ruled that the first *Stovall/Linkletter* factor—the purpose of *Hurst*—weighed “in favor” of retroactive application, while in *Mosley*, the Court ruled that the purpose of the *same Hurst decisions* weighed “heavily in favor of retroactivity.” *See Asay*, 2016 WL 7406538, at *10; *Mosley*, 2016 WL 7406506, at *21 (emphasis added). In analyzing the second *Stovall/Linkletter* factor—extent of reliance on pre-*Hurst* law—the Florida Supreme Court found in *Asay* 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 WL 7406538, at *12; *Mosley*, 2016 WL 7406506, at *23. *Asay* and *Mosley* also differed as to the

third *Stovall/Linkletter* factor—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.

2. Under *Asay* and *Mosley*, Defendant is entitled to an individualized retroactivity analysis

An individualized assessment is necessary to determine that Defendant is entitled to retroactivity of the *Hurst* decisions under the fundamental fairness doctrine due to his repeated attempts to challenge Florida’s unconstitutional capital sentencing scheme, all of which were thwarted by the Florida Supreme Court’s pre-*Hurst* law. An individualized assessment is also necessary to determine that Defendant is separately entitled to retroactivity of the *Hurst* decisions under Florida’s *Witt* test, given that the *Stovall/Linkletter* factors *as applied in his case* align with the Florida Supreme Court’s analysis in *Mosley*, where, unlike in *Asay*, retroactivity was found.

Defendant’s individualized retroactivity assessment must, unlike in *Asay*, consider his claims under both *Hurst v. Florida* and *Hurst v. State*. In *Asay*, the Florida Supreme Court limited its retroactivity analysis to the United States Supreme Court’s decision in *Hurst v. Florida* and did not consider the retroactivity of *Hurst v. State*. Here, there is no justification for cabining the retroactivity analysis to *Hurst v. Florida*. Unlike in *Asay*, Defendant’s claims are being filed in this Court after the decision in *Hurst v. State*, and Defendant affirmatively raises both Sixth Amendment claims under *Hurst v. Florida* and Eighth Amendment claims under *Hurst v. State*. Whatever the *Asay* Court’s reasoning for remaining silent on *Hurst v. State* retroactivity, Defendant should receive an individualized retroactivity analysis of both of the *Hurst* decisions.

As discussed below, the absence of any holding on the retroactivity of *Hurst v. State* in *Asay* also means that *Asay*’s retroactivity ruling is applicable to *Hurst v. Florida* claims. Thus, to the extent *Asay* suggests that certain *categories* of defendants might be ineligible for retroactive

application of *Hurst v. Florida*, that holding does not apply to any claims that defendants may raise under *Hurst v. State*. Here, Defendant has raised claims under both *Hurst* decisions.

3. Pursuant to an individualized retroactivity analysis, Defendant is entitled to retroactivity of both *Hurst* decisions under the fundamental fairness doctrine

The *Hurst* decisions apply retroactively to Defendant under the equitable “fundamental fairness” retroactivity doctrine, which the Florida Supreme Court has applied in cases such as *Mosley*. In *Mosley*, the Court explained that although *Witt* is the “standard” retroactivity test in Florida, defendants may also be entitled to retroactive application of the *Hurst* decisions by virtue of the fundamental fairness doctrine, which had been applied in cases like *James*. See *Mosley*, 2016 WL 7406506, at *19 (“This Court has previously held that fundamental fairness alone may require the retroactive application of certain decisions involving the death penalty”). Unlike the *Mosley* Court’s *Witt* analysis, which considered whether Mosley’s sentence became final after the *Ring* decision as a factor in assessing *Hurst* retroactivity, the Florida Supreme Court’s fundamental fairness analysis made no distinction between pre-*Ring* and post-*Ring* sentences. *Id.* at *18-19. Rather, the *Mosley* Court’s separate fundamental fairness analysis focused on whether it would be unfair to bar Mosley from seeking *Hurst* relief, regardless of when his sentence became final; the Court noted that Mosley had previously attempted to challenge Florida’s unconstitutional capital sentencing scheme but was unsuccessful. *Mosley*, 2016 WL 7406506, at *19.¹

Although *Mosley* was a post-*Ring* case, the Florida Supreme Court’s fundamental fairness approach applies to pre-*Ring* defendants, who may also obtain retroactive *Hurst* relief on

¹ As explained in Section II(B)(6), *infra*, to the extent that certain statements in other sections of the *Mosley* or *Asay* opinions imply that *no* pre-*Ring* defendants can seek *Hurst* relief, whether under the fundamental fairness doctrine or *Witt*, any such interpretation would lead to unconstitutional results. The United States and Florida Constitutions cannot tolerate the problematic concept of “partial retroactivity,” whereby similarly-situated defendants are arbitrarily granted or denied the ability to seek *Hurst* relief based on when their sentences were finalized.

fundamental fairness grounds. *See id.* at *19 n. 13 (“The difference between a retroactivity approach under *James* and a retroactivity approach under a standard *Witt* analysis is that under *James*, a defendant or his lawyer would have had to timely raise a constitutional argument, in this case a Sixth Amendment argument, before this Court would grant relief. However, using a *Witt* analysis, any defendant who falls within the ambit of the retroactivity period would be entitled to relief regardless of whether the defendant or his or her lawyer had raised the Sixth Amendment argument.”). In other words, to the extent *Mosley* stands for the proposition that defendants sentenced after *Ring* are categorically entitled to *Hurst* relief under *Witt*, it also stands for the proposition that any defendant, regardless of when they were sentenced, can receive the same retroactive application of the *Hurst* decisions as a matter of fundamental fairness.

In assessing fundamental fairness, the *Mosley* Court explained that an important inquiry is whether the defendant unsuccessfully attempted to raise a challenge to Florida’s capital sentencing scheme before *Hurst v. Florida* and *Hurst v. State* were decided. *See id.* at *19. In *Mosley*’s case, the Court looked to whether he raised a challenge under *Ring* “at his first opportunity.” *See id.* If *Mosley* had raised such a challenge, the Court reasoned, it would be fundamentally unfair to prohibit him from seeking post-conviction relief under *Hurst*, given that he had accurately anticipated the fatal defects in Florida’s capital sentence scheme even before they were recognized in the *Hurst* decisions. *See id.* The *Mosley* Court emphasized that ensuring fundamental fairness in assessing retroactivity outweighed the State’s interests in the finality of death sentences. *Id.* (“In this instance . . . the interests of finality must yield to fundamental fairness.”).

To illustrate why the *Hurst* decisions should apply to *Mosley* as a matter of fundamental fairness, the Florida Supreme Court drew a historical analogy to *James*’s retroactive application of the United States Supreme Court’s decision in *Espinosa*. *Id.* In *James*, the Court concluded

“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 the retroactive application of *Espinosa*.” *Id.* The *Mosley* Court held that “[t]he situation presented by the United States Supreme Court’s holding in *Hurst* is not only analogous to the situation presented by *James*, but also concerns a decision of greater fundamental importance than was at issue in *James*.” *Id.* The Court was correct because, under *Hurst v. Florida* and *Hurst v. State*, “the fundamental right to a trial by jury under both the United States and Florida Constitutions is implicated, and Florida’s death penalty sentencing procedure has been held unconstitutional, thereby making the machinery of post-conviction relief . . . necessary to avoid individual instances of obvious injustice.” *Id.* (internal quotation omitted). The application of the fundamental fairness retroactivity doctrine thus makes as much sense for *Hurst* claims as *Espinosa* claims.

In Defendant’s case, as in *Mosley*, the *Hurst* decisions should apply retroactively under the fundamental fairness doctrine. Although Defendant’s direct appeal was pre-*Ring*, he filed a successive post-conviction motion in the circuit court raising a *Ring* claim at the first opportunity, within one year after *Ring* was decided. In denying relief, the circuit court explained, using an analysis no longer valid after *Hurst v. Florida* and *Hurst v. State* that *Ring* is not retroactive and that Defendant is not entitled to relief because of his prior violent felony aggravator: the Court noted that “the Florida Supreme Court has also denied relief to postconviction defendants raising this issue.” Order at 2 (Dec. 11, 2003). Defendant therefore preserved his challenge to Florida’s unconstitutional statute at least to the same extent as *Mosley*, and he is thus entitled to the same fundamental-fairness retroactivity as *Mosley*.²

² Although Defendant did not include his *Ring* claim in his appeal of the circuit court’s denial to the Florida Supreme Court, that Court has made clear that it would have been futile for him to do so. *Mosley*, 2016 WL 7406506, at *22 (explaining that *Ring* claims were uniformly rejected in

Arguably, Defendant is even more entitled to fundamental-fairness retroactivity than Mosley, who had the benefit of the *Ring* decision when he first challenged Florida's unconstitutional statute. As noted in Section I, *supra*, Defendant raised a challenge to Florida's capital sentencing scheme during his direct appeal and in his post-conviction motion, even though he did not have the benefit of the United States Supreme Court's decisions in *Ring* or *Hurst v. Florida*, nor the benefit of this Court's decision in *Hurst v. State*. Still, in his initial brief on direct appeal and in his post-conviction motion, Defendant challenged Florida's advisory-jury system as contrary to *Caldwell*. Those efforts constituted a pre-*Ring* effort to raise *Ring*-like challenges.

In addition, it should be considered in the fundamental fairness context that two different juries have returned non-unanimous death recommendations in Defendant's—at his first sentencing the jury voted for death by a 7-5 margin, and his second sentencing the jury voted for death by a 10-2 margin. Both of these votes indicate that Defendant presented substantial mitigation to the jury. Indeed, the Judge found the following mitigating circumstances: (1) Defendant's age of 30 at the time of the offense; (2) Defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; (3) Defendant was abandoned by his parents when he was a child; and (4) Defendant never experienced a normal family life because his social environments did not address his needs and he spent most of his life in state hospitals and prisons. *See Rhodes*, 638 So. 2d at 923.

Under *Mosley*, these circumstances provide a sufficient basis to apply the *Hurst* decisions retroactively to Defendant, regardless of the fact that his sentence became final before the issuance of *Ring*. *See Mosley*, 2016 WL 7406506, at *19 n.13. Indeed, Defendant was diligent in

the Florida Supreme Court between 2002 and 2016). It would be fundamentally unfair to deny *Hurst* retroactivity to Defendant due to counsel's decision not to pursue a futile *Ring* appeal.

challenging the constitutionality of Florida's death-sentencing scheme by raising his pre-*Ring* claims in Florida courts, and he should not be penalized for not bringing a separate *Ring* claim in a Florida court. The Florida Supreme Court has made clear that it was widely known that *Ring* or *Ring*-like claims were futile in this state, given the Court's mistaken belief that *Ring* did not apply in Florida. *See id.* at *22. It would be fundamentally unfair to reward defendants who raised futile *Ring* claims while blocking *Hurst* relief for defendants who were prescient enough to challenge Florida's sentencing scheme before *Ring* and discerning enough not to pursue a clearly futile *Ring* appeal in the Florida Supreme Court. In any event, Defendant raised pre-*Ring* claims, and that is enough.

Here, as the Florida Supreme Court found in *Mosley*, the interests of finality must yield to fundamental fairness. Defendant, who anticipated the defects in Florida's statute that were later articulated in *Hurst v. Florida* and *Hurst v. State*, and who raised a *Ring* claim at the earliest opportunity in federal court, should not be denied the chance to now seek relief under the *Hurst* decisions. Applying the *Hurst* decisions retroactively to Defendant "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 constitutional decisions, especially those involving the death penalty." *Mosley*, 2016 WL 7406506, at *25.

4. Defendant is also entitled to retroactive application of both *Hurst* decisions under the traditional *Witt* test, pursuant to an individualized analysis

In addition to the fundamental fairness doctrine, the *Hurst* decisions are separately retroactive to Defendant under a traditional *Witt* analysis. As explained above, *Asay* and *Mosley* show that the importance and weight of each of the *Witt* factors depend on the circumstances of the particular case. *Compare Asay*, 2016 WL 7406538, at *10–13 (concluding as to the third *Witt*

prong that the first *Stovall/Linkletter* factor weighed “in favor” of retroactivity, the second *Stovall/Linkletter* factor weighed “heavily against” retroactivity, and the third *Stovall/Linkletter* factor weighed “heavily against” retroactivity), *with Mosley*, 2016 WL 7406506, at *21-24 (concluding as to the same third *Witt* prong that the first *Stovall/Linkletter* factor weighed “heavily in favor” of retroactivity, the second *Stovall/Linkletter* factor weighed “in favor” of retroactivity, and the third *Stovall/Linkletter* factor weighed in favor of retroactivity). Here, considering the circumstances of this case, Defendant’s *Hurst* claims satisfy *Witt* retroactivity.

There is no dispute that Defendant’s *Hurst* claims satisfy the first two *Witt* prongs because they (1) arise from decisions of the United States Supreme Court and this Court, and (2) are constitutional in nature. The only question is whether the third *Witt* prong is satisfied—*i.e.*, whether the *Hurst* decisions are of “fundamental significance” as measured by the *Stovall/Linkletter* factors. As applied here, the *Stovall/Linkletter* factors favor retroactivity.

a. Purpose of new rule

As applied to Defendant, the first *Stovall/Linkletter* factor—the purpose of the *Hurst* decisions—weighs in favor of retroactivity. In *Asay*, which analyzed only *Hurst v. Florida*, the Florida Supreme Court stated that the purpose of the decision “is to ensure that a criminal defendant’s right to a jury is not eroded and encroached upon by sentencing schemes that permit a higher penalty to be imposed based on findings of fact that were not made by the jury.” *Asay*, 2016 WL 7406538, at *9. In *Mosley*, where the Court considered both *Hurst v. Florida* and the more expansive decision in *Hurst v. State*, the Court added that the purpose of *Hurst v. State* was to enshrine Florida’s “longstanding history requiring unanimous jury verdicts as to the elements of a crime” into the state’s capital sentencing scheme. *Mosley*, 2016 WL 7406506, at *21. In *Asay*, the Court concluded that the purpose of *Hurst v. Florida* weighs “in favor” of retroactive

application. *Asay*, 2016 WL 7406538, at *10. In *Mosley*, given the circumstances, the Court concluded that the combined purpose of the decisions in *Hurst v. Florida* and *Hurst v. State* weighed “heavily in favor” of retroactive application. *Mosley*, 2016 WL 7406506, at *21.

Here, Defendant has raised claims under both *Hurst v. Florida* and *Hurst v. State*. Under the decisions in *Asay* and *Mosley*, the purpose of those decisions together weighs “heavily” in favor of retroactive application to Defendant. As the Florida Supreme Court emphasized, the right to a trial by jury is a fundamental feature of the United States and Florida Constitutions and its protection must be among the highest priorities of the courts, particularly in capital cases. *See Asay*, 2016 WL 7406538, at *10 (“[I]n death cases, this Court has taken care to ensure all necessary constitutional protections are in place before one forfeits his or her life”).

b. Extent of reliance on old rule

As applied to Defendant, the second *Stovall/Linkletter* factor—extent of reliance on Florida’s unconstitutional pre-*Hurst* scheme—also weighs in favor of applying those decisions retroactively. The decisions in *Asay* and *Mosley* offer confused conceptions of the familiar “extent of reliance” factor. As noted above, in an ordinary retroactivity analysis—whether under *Witt* or any other mechanism that considers reliance—the extent of reliance on the law prior to the creation of the new rule would be the same, given that the body of law that developed and was applied before the new rule does not change no matter the particular case in which retroactivity is analyzed. But in *Asay* and *Mosley*, the Florida Supreme Court drew different conclusions regarding the extent of reliance on pre-*Hurst* law depending on the date the defendant’s sentence became final.³ In

³ Such a segmented “extent of reliance” analysis has no basis in *Witt* itself and, as explained in Section II(B)(6), *infra*, leads to arbitrary “partial retroactivity” results that run afoul of both the United States and Florida Constitutions.

addition, *Asay* and *Mosley* split with each other regarding whether “good faith” should be considered in analyzing the second *Stovall/Linkletter* factor, which further confused the matter.

In *Asay*, which considered only the decision in *Hurst v. Florida*, the Court said that the extent of reliance on pre-*Hurst* law as applied to *Asay*’s pre-*Ring* sentence weighed heavily against retroactivity because, before the issuance of *Ring* in 2002, the Florida courts and the State of Florida had relied in good faith on Florida’s unconstitutional death penalty law, in light of the United States Supreme Court’s failure to inform them otherwise until *Hurst v. Florida*. *See id.* at *11 n.18 (“In fact, our reliance on the old rule was well-placed up until the decision in *Ring*, after which point this Court struggled with how *Ring* should be properly interpreted in Florida, since the Supreme Court deliberately did not make broad pronouncements . . .”). In light of that good faith, the *Asay* Court held, the extent of reliance factor weighed “heavily against” retroactive application of *Hurst v. Florida* to pre-*Ring* sentences.⁴

In *Mosley*, the Court held that “[t]he ‘extent of reliance’ prong is *not* a question of whether this Court properly or in good faith relied on United States Supreme Court precedent, but how the precedent changed the calculus of the constitutionality of Florida’s death penalty scheme.” *Mosley*, 2016 WL 7406506, at *23 (emphasis added). Examining the extent of reliance on pre-*Hurst* law without considering “good faith,” the *Mosley* Court concluded that the second *Stovall/Linkletter* factor weighed “in favor” of applying the *Hurst* decisions retroactively to all post-*Ring* defendants. *Id.* The Court limited its analysis to the extent of reliance after *Ring* in light of the fact that *Mosley* was a post-*Ring* case.

⁴ As discussed previously, this analysis in *Asay* was limited to *Witt* and does not have any impact on retroactive application of the *Hurst* decisions to pre-*Ring* defendants under the fundamental fairness doctrine, which was not referenced in *Asay*.

Here, this Court should consider exactly what the second *Stovall/Linkletter* factor requires: the extent of reliance on Florida’s capital sentencing scheme before the *Hurst* decisions, *i.e.*, “[t]he extent to which a condemned practice infect[ed] the integrity of the truth-determining process at trial.” *Stovall*, 388 U.S. at 297. Florida’s unconstitutional sentencing scheme has not just been unconstitutional since *Ring* was decided in 2002, it has always been unconstitutional, and it has consistently and systematically infected the truth-determining process at penalty-phase proceedings since the statute was enacted following *Furman v. Georgia*, 408 U.S. 238 (1972), including during Defendant’s trial. Accordingly, as *Mosley* concluded, the second *Stovall/Linkletter* factor weighs in favor of applying the *Hurst* decisions retroactively in this case.

c. Effect on administration of justice

As applied to Defendant, the third *Stovall/Linkletter* factor—the effect on the administration of justice—also weighs in favor of applying the *Hurst* decisions retroactively. As recognized in *Asay*, this factor does not weigh against retroactivity unless applying the *Hurst* decisions retroactively could “destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit.” *Asay*, 2016 WL 7406538, at *11 (quoting *Witt*, 387 So.2d at 929–30). In *Mosley*, the Court held that categorically applying the *Hurst* decisions retroactively to all post-*Ring* defendants, of which there are approximately 175, would not grind this state’s judiciary to a halt. *See Mosley*, 2016 WL 7406506, at *23-25. In light of that conclusion, there can be no serious rationale for a prediction that categorically permitting the retroactive application of the *Hurst* decisions to all pre-*Ring* defendants, like Defendant, of which there are also only approximately 175, would tip the balance so far in the other direction as to “destroy” the judiciary.

Undoubtedly, retroactive application of the *Hurst* decisions to pre-*Ring* defendants will have more impact on the administration of justice than arbitrarily limiting retroactivity to post-*Ring* defendants—but that is not the test. Without sufficient rationale for predicting that 175 retroactive *Hurst* proceedings would be manageable, but that 175 more would “destroy” the judiciary, retroactivity should not be denied to pre-*Ring* defendants like Defendant. There is no serious administrative rationale for such an arbitrary cut-off. Retroactive application of new rules affecting much larger populations have been approved. In *Montgomery*, the United States Supreme Court approved of retroactive application of a new rule prohibiting mandatory life sentences for all juveniles, which one study estimated could impact as many as 2,300 cases nationwide. See John R. Mills, Anna M. Dorn, and Amelia C. Hritz, *No Hope: Re-Examining Lifetime Sentences for Juvenile Offenders*, The Phillips Black Project, available at <http://www.phillipsblack.org/s/JLWOP-2.pdf> (last visited Jan. 10, 2017). In Florida, “capital cases make up only a small percentage (0.09 percent) of the 171,414 criminal cases filed in circuit court during the fiscal year 2014-15, and an even smaller percentage (0.02 percent) of the 753,011 total cases filed in circuit court.” *Asay*, 2016 WL 7406538, at *28 (Perry, J., dissenting).

Any argument that resentencing hearings would be problematic because the State would have to reassemble old witnesses and evidence is not a basis to deny Defendant the opportunity to be sentenced in compliance with the United States and Florida Constitutions. “*Hurst* creates the rare situation in which finality yields to fundamental fairness in order to ensure that the constitutional rights of all capital defendants in Florida are upheld.” *Asay*, 2016 WL 7406538, at *25 (Pariente, J., dissenting). Difficulty assembling witnesses or evidence in a new penalty phase proceeding, even adopting the dubious assumption that prior evidence could not be reintroduced, is not an appropriate basis to force Defendant to continue living under an unconstitutional death

sentence. Accordingly, the third *Stovall/Linkletter* factor, like the first two factors, weighs in favor of applying the *Hurst* decisions retroactively to Defendant under the *Witt* test.

5. Defendant has a federal right to retroactive application of the *Hurst* decisions as highlighted by the recent decision in *Montgomery*

In analyzing the retroactivity of the *Hurst* decisions under this state's retroactivity doctrines, this Court should recognize that Defendant has a federal right to retroactivity as highlighted by the United States Supreme Court's recent decision in *Montgomery*. Where a constitutional rule is substantive, the Supremacy Clause of the United States Constitution requires a state post-conviction court to apply it retroactively. *See Montgomery*, 136 S. Ct. at 731-32 ("Where state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge."). In *Montgomery*, the Defendant initiated a state post-conviction proceeding seeking retroactive application of *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (holding imposition of mandatory sentences of life without parole on juveniles violates Eighth Amendment). The Louisiana Supreme Court (in contrast to what this Court did in *Falcon v. State*, 162 So. 3d 954 (Fla. 2015)) held that *Miller* was not retroactive under its state retroactivity tests. The United States Supreme Court reversed, holding that Louisiana could not bar retroactivity under its state doctrines because the *Miller* rule was substantive and therefore Louisiana was obligated under the federal Constitution to apply it retroactively on state post-conviction review.

The *Hurst* decisions announced substantive rules that under the federal Constitution may not be denied to Florida defendants on state retroactivity grounds. In *Hurst v. State*, the Court announced two substantive rules. First, the Court held that the Sixth Amendment requires that a jury decide whether the aggravating factors have been proven beyond a reasonable doubt, whether they are sufficient to impose the death penalty, and whether they are outweighed by the mitigating

factors. Such findings are manifestly substantive.⁵ See *Montgomery*, 136 S. Ct. at 734 (holding that the decision whether a particular juvenile is or is not a person “whose crimes reflect the transient immaturity of youth” is substantive, not procedural). Indeed, the United States Supreme Court has consistently applied proof-beyond-a-reasonable-doubt rules retroactively to *all* defendants. *Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972); *Hankerson v. North Carolina*, 432 U.S. 233, 242 (1977).

Second, the Court held that the Eighth Amendment requires the jury’s fact-finding during the penalty phase to be unanimous. The Court explained that the unanimity rule is required to implement the constitutional mandate that the death penalty be reserved for a narrow class of the worst offenders, and assures that the determination “expresses the values of the community as they currently relate to the imposition of the death penalty.” *Hurst v. State*, 202 So. 3d at 60-61 (“By requiring unanimity in a recommendation of death in order for death to be considered and imposed, Florida will achieve the important goal of bringing its capital sentencing laws into harmony with the direction of the society reflected in [the majority of death penalty] states and with federal law.”); see also *Perry v. State*, 2016 WL 6036982, at *7 (“We also held [in *Hurst*] that, based on

⁵ The Supreme Court’s decision in *Schriro v. Summerlin*, 542 U.S. 348, 364 (2004) is distinguishable. In *Summerlin*, the Supreme Court applied the federal retroactivity test in *Teague v. Lane*, 489 U.S. 288 (1989), and determined that *Ring* was not retroactive on federal habeas review because the requirement that the jury rather than the judge make findings as to whether the defendant had a prior violent felony aggravator was procedural rather than substantive. But *Summerlin* did not review a capital sentencing statute like Florida’s that required the jury not only to make the fact-finding regarding the applicable aggravators, but also required the jury to make the finding as to whether the aggravators were *sufficient* to impose the death penalty. Moreover, *Hurst*, unlike *Ring*, addressed the proof-beyond-a-reasonable-doubt standard in addition to the jury trial right, and the Supreme Court has always regarded such decisions as substantive. See *Powell v. Delaware*, No. 310, 2016, 2016 WL 7243546, at *3 (Del. Dec. 15, 2016) (holding that *Hurst v. Florida* is retroactively applicable under the state’s *Teague*-like retroactivity doctrine and distinguishing *Summerlin* because it “only addressed the misallocation of fact-finding responsibility (judge versus jury) and not . . . the applicable burden of proof.”).

Florida’s requirement for unanimity in jury verdicts and on the Eighth Amendment to the United States Constitution, a jury’s ultimate recommendation of the death sentence must be unanimous.”). As the Court made clear, the function of the unanimity rule is to ensure that Florida’s overall capital system complies with the Eighth Amendment. *See id.* at *47-48. That makes the rule substantive, *see Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) (“[T]his Court has determined whether a new rule is substantive or procedural by considering the function of the rule”), even though its subject has to do with the method by which a jury makes decisions. *See Montgomery*, 136 S. Ct. at 735 (noting that existence of state flexibility in determining method by which to enforce constitutional rule does not convert substantive rule into procedural one).

Because the rules announced in the *Hurst* decisions are substantive within the meaning of federal law, this Court has a duty under the federal Constitution to apply them retroactively to Defendant under Florida’s retroactivity doctrines.

6. The United States and Florida Constitutions do not tolerate the problematic concept of “partial retroactivity”

As explained in Section II, *supra*, the decisions in *Asay* and *Mosley* established a general framework whereby the retroactivity of *Hurst v. Florida* and *Hurst v. State* should be analyzed—whether under the fundamental fairness or *Witt* retroactivity doctrines—on an individualized basis. For the reasons explained above, Defendant is entitled to retroactive application of the *Hurst* decisions based on such individualized review. In reviewing retroactivity as applied to Defendant, this Court should reject the problematic concept of “partial retroactivity,” whereby the *Hurst* decisions apply to only *some* cases on collateral review. The concept of partial retroactivity has no basis in the Florida Supreme Court’s or the United States Supreme Court’s precedent, will lead to arbitrary and unfair results, and is violative of the Eighth and Fourteenth Amendments. *See Asay*, 2016 WL 7406538, at *28 (Perry, J., dissenting) (“Undoubtedly, there will be situations

where persons who committed equally violent felonies and whose death sentences became final days apart will be treated differently without justification from this Court.”).

C. The State cannot establish that the *Hurst* errors in Defendant’s sentencing were harmless beyond a reasonable doubt

1. The State bears the burden of establishing harmlessness

As noted above, the Florida Supreme Court held in *Hurst v. State* that claims by Florida prisoners under *Hurst* must be subjected to individualized harmless error review, and that such review places the burden on the state to prove beyond a reasonable doubt, and not based on pure speculation, that the *Hurst* error did not affect the jury’s recommendation. *Hurst v. State*, 202 So. 3d at 67-68. The Court has reiterated that holding in numerous other cases, including *Mosley*. *Mosley*, 2016 WL 7406506, at *25-26; *see also Simmons v. State*, No. SC14-2314, 2016 WL 7406514, at *6-7 (Dec. 22, 2016); *Johnson v. State*, No. SC14-1175, 2016 WL 7013856, at *3-4 (Dec. 1, 2016) (explaining that burden is on the state to show that a *Hurst* error is harmless beyond a reasonable doubt). Here, the State cannot establish harmlessness beyond a reasonable doubt.

2. The *Hurst* errors in this case were not harmless

The jury in Defendant’s case voted by a 10-2 majority in recommending a death sentence, without specifying the factual bases for its recommendation. Under *Hurst v. State*, this Court may not speculate that, absent the *Hurst* error, the jury would have unanimously found that the aggravating factors were proven beyond a reasonable doubt, that they were sufficient to impose the death penalty under the circumstances, and that they outweighed the mitigation. The Florida Supreme Court cautioned that it would be impermissible to engage in that kind of speculation. 202 So. 3d at 69 (“We decline to speculate as to why seven jurors in this case recommended death and why five jurors were persuaded that death was not the appropriate penalty. To do so would be contrary to our clear precedent governing harmless error review.”); *see also Mosley*, 2016 WL

7406506, at *26. The reasoning the Florida Supreme Court supplied in *Hurst v. State* applies with equal force here:

The jury recommended death by only a seven to five vote, a bare majority. Because there was no interrogatory verdict, we cannot determine what aggravators, if any, the jury unanimously found proven beyond a reasonable doubt. We cannot determine how many jurors may have found the aggravation sufficient for death. We cannot determine if the jury unanimously concluded that there were sufficient aggravating factors to outweigh the mitigating circumstances. Nevertheless, the fact that only seven jurors recommended death strongly suggests to the contrary.

Hurst v. State, 202 So. 3d at 68.

Indeed, the jury's consideration of the evidence in Defendant's case may have been different if the jury had been required to conduct the fact finding, instead of making only an advisory recommendation for a sentence of death or life imprisonment. *See Caldwell*, 472 U.S. at 328-29 (1985) (recognizing the significant impact of a jury's belief that the ultimate responsibility for determining whether a defendant will be sentenced to death lies elsewhere). The Supreme Court "has always premised its capital punishment decisions on the assumption that a capital sentencing jury [should] recognize[] the gravity of its task and proceed[] with the appropriate awareness of its truly awesome responsibility." *Id.* at 341 (internal quotation marks omitted).

Substantial mitigation was presented to the jury. *See Archer*, 934 So. 2d at 1192. Among the mitigation presented was that Defendant was only 30 at the time of the offense and that Defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, which the trial court found as statutory mitigating factors. The trial court also found as non-statutory mitigating factors that Defendant was abandoned by his parents when he was a child and that Defendant never experienced a normal family life because his social environments did not address his needs and he spent most of his life in state hospitals and prisons. In *Hurst v. State*, the Court emphasized that mitigation is an

important consideration in assessing harmless error. 202 So. 3d at 68-69 (“Because we do not have an interrogatory verdict commemorating the findings of the jury, we cannot say with any certainty how the jury viewed th[e] mitigation, although we do know that the jury recommended death by only a bare majority . . . we cannot find beyond a reasonable doubt that no rational jury, as trier of fact, would determine that the mitigation was ‘sufficient substantial’ to call for a life sentence.”).

If defense counsel’s thinking had not been influenced by the statutory framework struck down by *Hurst*, he would have pursued a different approach than the one taken with the advisory jury and judge-sentencing, including broader challenges to aggravation and a broader presentation of mitigation. A jury properly instructed that it, not the judge, was to make the ultimate sentencing decision could find that any one of the aggravators in Defendant’s case was *not*, as fact, sufficient to justify a death sentence. As such, it cannot be concluded that the jury unanimously found any specific aggravator before making a recommendation. *Cf. Mills v. Maryland*, 486 U.S. 367, 375-84 (1988); *McKoy v. North Carolina*, 494 U.S. 433, 444 (1990) (both holding, in the mitigation context, that Eighth Amendment violated when there is uncertainty about the jury’s vote).

To the extent the State may argue that the *Hurst* error is rendered harmless by the fact that the aggravators applied to Defendant were based on contemporaneous and prior felony convictions, the Florida Supreme Court has rejected the idea that a judge’s finding of such aggravating factors is relevant in the harmless-error analysis of *Hurst* claims. *See Franklin v. State*, 2016 WL 6901498, at *6 (Fla. Nov. 23, 2016) (rejecting “the State’s contention that Franklin’s prior convictions for other violent felonies insulate Franklin’s death sentence from *Ring* and *Hurst v. Florida*.”). The Court found the *Hurst* error *not* harmless in *Mosley* despite the fact

that Mosley's judge had found a contemporaneous felony aggravator. *Mosley*, 2016 WL 7406506, at *3.

3. To the extent this Court needs further evidence that the *Hurst* errors in Defendant's case cannot be found harmless, a hearing is appropriate to probe the impact of the *Hurst* errors on defense counsel's strategy and presentation

For the reasons above, this Court should not rule that the *Hurst* errors in Defendant's case were harmless beyond a reasonable doubt, because any such ruling on the present record would be based on impermissible speculation. To the extent this Court needs further evidence that the errors were not harmless, a hearing is appropriate to probe the impact of the *Hurst* errors on defense counsel's strategy and presentation. This Florida Supreme Court has approved of such hearings in similar contexts. In *Meeks v. Dugger*, 576 So. 2d 713, 716 (Fla. 1991), the Court, while considering a habeas petition raising a claim under *Hitchcock v. Dugger*, 481 U.S. 393 (1987), determined that the Defendant was entitled to an evidentiary hearing on the issue of harmless error and remanded. Here, as in *Meeks*, this Court should allow a hearing so that it can make findings of fact regarding harmlessness. At a hearing on whether the *Hurst* error in his penalty phase was harmless beyond a reasonable doubt, Defendant would present evidence, among other things, that defense counsel's approach to diminishing the weight of the aggravating factors would have been different had counsel known that the jury, not the judge, would make the critical findings of fact.

For instance, a defense counsel's entire approach would have been different had the jury, as opposed to the judge, been required to make the "sufficiency" and "insufficiency" findings. Counsel would have given different advice to Defendant, and the decision-making in this case would have been different. This is especially true in light of the fact that the jury's consideration of the evidence is different if the jury is required to make the sentencing findings, instead of making only an advisory recommendation. See *Caldwell*, 472 U.S. at 328-29 (recognizing significant

impact of a jury's belief that the ultimate responsibility for determining whether a defendant will be sentenced to death lies elsewhere). A hearing is therefore appropriate to evaluate the effect of the statute invalidated by *Hurst* on counsel's development of challenges to aggravation, mitigation, and defense penalty-phase theories at the sentencing and resentencing; counsel's advice to the client; counsel's investigation; and the decisions of counsel and the client.

III. Conclusion

For the foregoing reasons, *Hurst* is retroactive to Defendant under the reasoning of *Asay* and *Mosley*. This Court, therefore, should vacate Defendant's death sentence and either impose a life sentence or conduct a new penalty phase that complies with the *Hurst* decisions. Defendant respectfully requests a status conference.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, HEREBY CERTIFY that on this 11th day of January, 2017, a true and correct copy of the foregoing has been served via e-file on the following:

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/s/ Sarah S. Butters

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

STATE OF FLORIDA,

Plaintiff,

v.

Case No. CRC84-03982CFANO
Death Penalty Case

RICHARD W. RHODES, JR.,

Defendant.

_____ /

STATE'S SUPPLEMENTAL ANSWER TO DEFENDANT'S
SUCCESSIVE MOTION FOR POSTCONVICTION RELIEF

The State of Florida, through counsel, responds to this Court's January 4, 2016, Order, directing supplemental briefing on Defendant's Motion for 3.851 Postconviction Relief. On November 8, 2016, Rhodes filed his motion raising a claim for relief based on the decisions in Hurst v. Florida, 136 S. Ct. 616 (2016) and Hurst v. State, 202 So. 3d 40 (Fla. 2016). As explained below, Rhodes' motion should be summarily denied because Hurst does not apply retroactively to capital defendants—like Rhodes—whose sentences were final before the United States Supreme Court issued its opinion in Ring v. Arizona, 536 U.S. 584 (2002). See Asay v. State, ____ So. 3d ____, 2016 WL 7406538 (Fla. Dec. 22, 2016).

Rhodes' conviction and sentence for the first-degree murder of Karen Nieradka were final on December 5, 1994, when the United States Supreme Court denied Rhodes' petition for writ of certiorari from denial of relief on Rhodes' direct appeal. Rhodes v. State, 638 So. 2d 920 (Fla. 1994), cert. denied Rhodes v. Florida, 513 U.S. 1046 (1994). On November 8, 2016, Rhodes filed a successive Rule 3.851 motion, raising a claim for relief pursuant to Hurst v. Florida, 136 S. Ct. 616 (2016), and Hurst v. State, ___ So. 3d ___, 2016 WL 6036978 (Fla. Oct. 14, 2016). The State responded, arguing that Hurst was not retroactive but noting that the Florida Supreme Court had not yet resolved the issue of retroactivity.

The Florida Supreme Court has now addressed the retroactivity of Hurst. In Asay, 2016 WL 7406538 at *7-14, the Florida Supreme Court ruled that Hurst v. Florida does not apply retroactively to cases that were final when Ring was decided. See also Mosley v. State, 2016 WL 7406506, *18 (Fla. Dec. 22, 2016) ("[W]e have now held in Asay v. State that Hurst does not apply retroactively to capital defendants whose sentences were final before the United States Supreme Court issued its opinion in Ring").

Rhodes appears to be arguing that the retroactivity of Hurst is subject to a case-by-case analysis, and that whether or not

Hurst applies to him is to be determined based on the circumstances of his particular case. Rhodes is incorrect. Neither Hurst nor Asay held that the retroactivity of Hurst is to be decided on a case-by-case basis. In spite of Rhodes' insistence to the contrary, the Florida Supreme Court has drawn a bright-line rule concerning the retroactivity of Hurst: **The Hurst decision does not apply to murderers whose death sentences were final prior to the Supreme Court's decision in Ring.** Contrary to Rhodes' argument, the Florida Supreme Court did not hold that the question of retroactivity depended on the facts of each capital case. Indeed, in Mosley, the court stated that "**Hurst does not apply retroactively to capital defendants whose sentences were final before the United States Supreme Court issued its opinion in Ring.**" See Mosley, 2016 WL 7406506 at *18 (emphasis added).

More recently, in Gaskin v. State, No. SC15-1884 (Fla. Jan. 19, 2017), the Florida Supreme Court considered the Hurst claim of a death-sentenced murderer whose sentence became final in 1993. In that case, the defendant, at trial and on direct appeal, raised a constitutional challenge to Florida's death penalty statute "for the reasons espoused by the United States Supreme Court in Ring" Id. at *6 (Pariente, J., concurring in part and dissenting in part). In affirming the summary denial of

Gaskin's successive postconviction motion, the Florida Supreme Court ruled:

Because Gaskin's sentence became final in 1993, Gaskin is not entitled to relief under Hurst v. Florida. See Asay v. State, No. SC16-223, 2016 WL 740538 at *13 (Fla. Dec. 22, 2016) (holding that Hurst is not retroactive to cases that became final before the United States Supreme Court decided Ring v. Arizona, 536 U.S. 584 (2002)).

Gaskin, SC15-1884 at *5.

Thus, it is irrelevant that a death-sentenced defendant has preserved a Ring claim. The bright-line rule drawn by the Florida Supreme Court is that Hurst relief is not available to defendants whose death sentences were final when Ring was decided. That is the end of the story. Rhodes' arguments concerning the application of the Witt¹ factors to his case are therefore unavailing. Moreover, in Asay, the Florida Supreme Court conducted its retroactivity analysis "pursuant to the dictates of Witt," and concluded that Hurst does not apply retroactively to death sentences that were final before the issuance of Ring. Asay, 2016 WL 7406538 at *9, 14.

Rhodes argues that Hurst created a new substantive rule, not a new procedural rule, or, that it implicates some new fundamental or structural error that is not subject to a harmless error analysis. However, both the United States Supreme Court and

the Florida Supreme Court have rejected these contentions. See Schriro v. Summerlin, 542 U.S. 348, 353 (2004) (holding that its decision in Ring announced a new procedural rule and was not retroactive); Hurst, 202 So. 3d at 66 (noting that the Supreme Court in Hurst v. Florida "focused its decision on that portion of the process requiring a judge rather than a jury to make all the findings critical to the imposition of the death penalty") (emphasis added).²

In the State's Answer to Defendant's Successive Motion for Postconviction Relief, the State addressed Rhodes' claim of entitlement to relief under Caldwell v. Mississippi, 472 U.S. 320 (1985). The State reiterates herein that this claim is procedurally barred because Rhodes raised this claim in his prior postconviction proceeding, and the Florida Supreme Court affirmed this Court's rejection of the claim. Rhodes, 638 So. 2d at 926.

¹ Witt v. State, 387 So. 2d 922 (1980).

² Furthermore, as explained more fully in the State's Answer to Defendant's Successive Motion for Postconviction Relief, neither the United States Supreme Court's decision in Montgomery v. Louisiana, ___ U.S. ___, 136 S. Ct. 718 (2016), nor the Florida Supreme Court's decision in Falcon v. State, 162 So. 3d 954 (Fla. 2015), provide support for retroactive application of Hurst. That is because, unlike Ring and Hurst, Miller v. Alabama, ___ U.S. ___, 132 S. Ct. 2455 (2012), placed beyond the authority of the state the power to impose a certain penalty: mandatory life sentences for juvenile offenders.

Rhodes claims that the State cannot show beyond a reasonable doubt that any Hurst error in his case was harmless; however, harmless error is not the State's burden to prove in this proceeding. First, there **is no error** because Hurst does not apply to Rhodes' case. Mosley, 2016 WL 7406506 at *18. Second, unlike a direct appeal, the State has no burden of proving harmless error in postconviction proceedings. Rather, it is the movant that must show entitlement to relief. See Freeman v. State, 761 So. 2d 1055, 1061 (Fla. 2000) (explaining that in order to obtain postconviction relief, "[t]he defendant bears the burden of establishing a prima facie case based upon a legally valid claim"). Thus, it is Rhodes' burden to meet, and he has failed to do so in this case. Beyond that, the State herein reiterates and relies on the arguments previously set forth in its Answer to Defendant's Successive Motion for Postconviction Relief on the matter of harmless error.

Rhodes is not entitled to a hearing in order to present further "evidence" on his harmless error argument. Rhodes' reliance on Meeks v. Dugger, 576 So. 2d 713 (Fla. 1991), is misplaced. The defendant in that case was entitled to relief under Hitchcock v. Dugger, 481 U.S. 393 (1987), because the Florida Supreme Court had previously ruled that Hitchcock, which held that an instruction to the jury to not consider nonstatutory

mitigation and the trial court's refusal to consider nonstatutory mitigation was improper, should be applied collaterally. Thompson v. Dugger, 515 So. 2d 173, 175 (Fla. 1987). Unlike the situation in Meeks, Rhodes is **not** entitled to relief under Hurst, because Hurst does not apply retroactively to his case. The Florida Supreme Court has determined that Hurst does not apply retroactively to cases, like Rhodes', that were final prior to the issuance of Ring in 2002. That is the end of it.

In sum, Rhodes' judgment and sentence were finalized on December 5, 1994, when the United States Supreme Court denied Rhodes' petition for writ of certiorari. See Fla. R. Crim. P. 3.851(d)(1)(B) (judgment becomes final "on the disposition of the petition for writ of certiorari by the United States Supreme Court"). Therefore, Rhodes' convictions and sentences were long final prior to the 2002 decision in Ring. In Asay, the Florida Supreme Court has ruled that Hurst does not apply retroactively to capital defendants whose sentences were final before the United States Supreme Court issued its decision in Ring. Because Hurst is not retroactive to cases that were final prior to the Ring decision, Rhodes is not entitled to relief as a matter of law. Accordingly, Rhodes' motion must be summarily denied.

CONCLUSION

In conclusion, Rhodes' successive post-conviction claim is without merit and therefore summary denial is appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of January, 2017, I filed the foregoing with the Clerk of the Court by using the E-Portal Filing System which will send a notice of electronic filing to the following: the Honorable Joseph A. Bulone, Circuit Court Judge, Pinellas County Justice Center, 14250 49th Street, Clearwater, Florida 33756, **ghahl@jud6.org**; Jim Hellickson, Assistant State Attorney, Sixth Judicial Circuit, P.O. Box 5028, Clearwater, Florida 33758, **SA6Appealservice@co.pinellas.fl.us**; Bjorn Erik Brunvand, Esq., Brunvand Wise, P.A., 615 Turner Street, Clearwater, Florida 33756, **bjorn@acquitter.com**; Sarah S. Butters, Esq., Holland & Knight LLP, Post Office Drawer 810, Tallahassee, Florida 32302, **sarah.butters@hklaw.com**.

/s/ C. Suzanne Bechard

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**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

v.

Case No. 84-CF-3982

RICHARD W. RHODES, JR.,

Defendant.

_____/

DEFENDANT’S REPLY AND MEMORANDUM

Defendant Richard W. Rhodes, Jr., through counsel, files this reply to the “State’s Supplemental Answer to Defendant’s Successive Motion for Postconviction Relief,” filed January 20, 2017.

1. Defendant is entitled to retroactive application of *Hurst v. Florida* and *Hurst v. State*

The State incorrectly asserts that *Asay* and *Gaskin* preclude Defendant from relief under *Hurst v. Florida* and *Hurst v. State*. The State, however, fails to note that neither *Asay* nor *Gaskin* sought relief under *Hurst v. State* or the fundamental fairness doctrine applied in cases like *James* and *Mosley*. Further, the State fails to acknowledge that neither *Asay* nor *Gaskin* addressed the retroactivity of *Hurst v. Florida* under the federal retroactivity test set forth in *Montgomery*.

A. Fundamental Fairness

In *Mosley*, the Florida Supreme Court used the fundamental-fairness doctrine, in addition to the *Witt* analysis, in concluding that *Mosley* was entitled to retroactive application of *Hurst v. Florida* and *Hurst v. State*. The Court explained:

The difference between a retroactivity approach under *James* and a retroactivity approach under a standard *Witt* analysis is that under *James*, a defendant or his

lawyer would have had to timely raise the constitutional argument, in this case a Sixth Amendment argument, before this Court would grant relief. However, using a *Witt* analysis, any defendant who falls within the ambit of the retroactivity period would be entitled to relief regardless of whether the defendant or his or her lawyer had raised the Sixth Amendment argument.

Mosley, 2016 WL 7406506, at *19 n.13.

The *Mosley* Court held that “[t]he situation presented by the United States Supreme Court’s holding in *Hurst* is not only analogous to the situation presented by *James*, but also concerns a decision of *greater fundamental importance* than was at issue in *James*.” *Id.* (emphasis added). The Court was correct because, under *Hurst v. Florida* and *Hurst v. State*, “the fundamental right to a trial by jury under both the United States and Florida Constitutions is implicated, and Florida’s death penalty sentencing procedure has been held unconstitutional, thereby making the machinery of post-conviction relief . . . necessary to avoid individual instances of obvious injustice.” *Id.* (internal quotation omitted).

Citing to *Asay* and *Gaskin*, the State argues that defendants whose cases are final prior to *Ring* are not entitled to relief under *Hurst v. Florida*. *Asay* and *Gaskin*, however, do not control Defendant’s fundamental-fairness claim because neither *Asay* nor *Gaskin* raised a fundamental fairness claim, and the Florida Supreme Court did not address a fundamental-fairness claim in its decisions. *Jones v. State*, 966 So. 2d 319, 330 (Fla. 2007) (It is well-established that arguments not raised in the initial brief are considered barred.). Rather, the Court relied on only the *Witt* retroactivity analysis in *Asay* and *Gaskin*. See *Asay v. State*, No. SC 16-223, 2016 WL 7406538, at *9-13 (Fla. 2016) (not mentioning the fundamental fairness doctrine); *Gaskin*,

Mosley, on the other hand, argued in his initial brief that he was entitled to retroactive application of *Hurst v. Florida* under both the fundamental fairness doctrine and *Witt*. Indeed, *Mosley* dedicated an entire section of his initial brief to his fundamental-fairness argument: “B.

Hurst [v. *Florida*] should be held to be particularly retroactive in Mosley’s case under this Court’s holding in *James v. State*, 615 So. 2d 668 (Fla. 1993).” *Mosley*, Pet. Brief at 11-13. The Florida Supreme Court, therefore, addressed this argument: “[B]ecause Mosley raised a *Ring* claim at his first opportunity and was then rejected at every turn, we conclude that fundamental fairness requires the retroactive application of *Hurst*, which defined the effect of *Hurst v. Florida*, to *Mosley*.”

The Florida Supreme Court does not afford only partial retroactivity when it applies the fundamental fairness doctrine, and in no part of *Mosley* did the Florida Supreme Court condition the applicability of the fundamental fairness doctrine on the date on which *Mosley*’s sentence became final. Rather, the Florida Supreme Court’s analysis of the fundamental fairness doctrine indicates that it applies to *all* defendants. To illustrate why the *Hurst* decisions should apply to Mosley as a matter of fundamental fairness, the Florida Supreme Court drew a historical analogy to *James*’s retroactive application of the United States Supreme Court’s decision in *Espinosa*. *Id.* *James*, therefore, provides guidance in the application of the fundamental fairness doctrine to *Hurst* claims. After *James*’s sentence was final, the United States Supreme Court declared in *Espinosa v. Florida*, 505 U.S. 1079 (1992), that Florida’s heinous, atrocious, or cruel aggravator instruction was unconstitutionally vague. *See James v. State*, 615 So. 2d 668, 669 (Fla. 1993). In post-conviction review, the Florida Supreme Court found that it “would not be fair to deprive him of the *Espinosa* ruling” even though his sentence was final *before Espinosa* because *James* had raised *Espinosa*-like arguments at trial and on direct appeal. *See id.* Accordingly, the Florida Supreme Court applies the fundamental fairness doctrine to *all* defendants regardless of when their sentence became final.

Here, like James and Mosley, Defendant has consistently raised *Ring*-like, *Ring*, and *Hurst* claims, and the courts have rejected those claims every step of the way. On direct appeal of his resentencing, Defendant raised a claim under *Caldwell v. Mississippi*, 472 U.S. 320 (1985), a *Ring*-like claim, arguing that the jury's role was improperly diminished by the prosecutor during voir dire and in the court's instructions. *Rhodes v. State*, 638 So. 2d 920, 926 (Fla. 1994). The court rejected the claim, *id.*, and the Florida Supreme Court affirmed Defendant's sentence, *id.* at 927. The United States Supreme Court denied Defendant's petition for a writ of certiorari. *Rhodes v. Florida*, 115 S. Ct. 642 (1994).

Defendant filed a motion to vacate his conviction and death sentence in 1996. Among other claims, he argued that counsel was ineffective for failing to raise *Caldwell* objections at trial. The trial court denied his motion in 2003. Defendant appealed, again raising the argument that counsel was ineffective for failing to raise *Caldwell* objections at trial. Without addressing the merits of the *Caldwell* claim, the Florida Supreme Court noted that the *Caldwell* claim had been rejected in other death penalty cases. *Rhodes v. State*, 986 So. 2d 501, 514 n.8 (Fla. 2008). The court affirmed the trial court's denial of post-conviction relief. *Id.* at 514.

Defendant also raised *Ring* and *Hurst* claims at his first opportunity. In 2003, Defendant filed a motion to vacate his conviction and death sentence raising a claim under *Ring v. Arizona*, 536 U.S. 584 (2002). In particular, Defendant argued that "Florida's capital sentencing scheme violates the jury trial guarantee of the Sixth and Fourteenth Amendments" because "it exposes capital defendants to a penalty *exceeding* the maximum they would receive if punished according to the facts reflected in the jury verdict alone." Def's Br. at 8 (Jun. 24, 2003) (internal brackets and quotation marks omitted). The trial court denied relief after concluding that *Ring* did not apply

retroactively to Defendant and Defendant's aggravators included a prior violent felony. Order at 1-2 (Dec. 11, 2003).

In 2009, Defendant filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Florida. In Ground Thirteen, he argued that he was denied a reliable trial in violation of the Eighth and Fourteenth Amendments because the jury's role was diminished in violation of *Caldwell*. See *Rhodes v. Sec., Dep't. of Corrs.*, No. 8:09-cv-1350-T-17TBM, ECF 1, at 84. In particular, he asserted that "[i]n light of *Ring v. Arizona*, 536 U.S. 584 (2002), Florida's standard penalty phase jury instructions are no longer valid under the United States Supreme Court's holding in *Caldwell* []." *Id.* at 94. The district court denied his petition. *Rhodes v. Sec., Dep't. of Corrs.*, No. 8:09-cv-1350-T-17TBM, 2010 WL 3819358 (M.D. Fla. Sept. 30, 2010).

Finally, Defendant filed a motion for post-conviction relief under *Hurst v. Florida* and *Hurst v. State*.

Like the defendants in *James* and *Mosley*, Defendant has consistently raised *Hurst*-like, *Ring*, and *Hurst* claims. Therefore, under the fundamental fairness doctrine, he is entitled to retroactive application of *Hurst v. Florida* and *Hurst v. State*.

B. *Witt* test

The State incorrectly asserts that the Florida Supreme Court does not apply the *Witt* analysis on a case-by-case basis. In *Asay* and *Mosley* the Florida Supreme Court used an individualized *Witt* analysis for each case rather than setting down a brightline rule. In particular, the Court reached individualized conclusions in *Asay* and *Mosley* as to the dispositive third *Witt* prong, which requires examination of three factors borrowed from *Stovall v. Denno*, 388 U.S. 293 (1967), and *Linkletter v. Walker*, 381 U.S. 618 (1965). In *Asay*, the Florida Supreme Court ruled

that the first *Stovall/Linkletter* factor—the purpose of *Hurst*—weighed “in favor” of retroactive application, while in *Mosley*, the Court ruled that the purpose of the *same Hurst decisions* weighed “heavily in favor of retroactivity.” See *Asay*, 2016 WL 7406538, at *10; *Mosley*, 2016 WL 7406506, at *21 (emphasis added). In analyzing the second *Stovall/Linkletter* factor—extent of reliance on pre-*Hurst* law—the Florida Supreme Court found in *Asay* 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 WL 7406538, at *12; *Mosley*, 2016 WL 7406506, at *23. *Asay* and *Mosley* also differed as to the third *Stovall/Linkletter* factor—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.

Defendant’s retroactivity assessment must, unlike in *Asay* and *Gaskin*, consider his claims under both *Hurst v. Florida* and *Hurst v. State*. In both *Asay* and *Gaskin*, the Florida Supreme Court limited its retroactivity analysis to the United States Supreme Court’s decision in *Hurst v. Florida* and did not consider the retroactivity of *Hurst v. State*. Here, there is no justification for cabining the retroactivity analysis to *Hurst v. Florida*. Unlike in *Asay* and *Gaskin*, Defendant’s claims are being filed in this Court after the decision in *Hurst v. State*, and Defendant affirmatively raises both Sixth Amendment claims under *Hurst v. Florida* and Eighth Amendment claims under *Hurst v. State*. Whatever the *Asay* Court’s reasoning for remaining silent on *Hurst v. State* retroactivity, Defendant should receive an individualized retroactivity analysis of both of the *Hurst* decisions.

The absence of any holding on the retroactivity of *Hurst v. State* in *Asay* or *Gaskin* also means that *Asay*'s and *Gaskin*'s retroactivity ruling is applicable to *Hurst v. Florida* claims. Thus, to the extent *Asay* or *Gaskin* suggests that certain *categories* of defendants might be ineligible for retroactive application of *Hurst v. Florida*, that holding does not apply to any claims that defendants may raise under *Hurst v. State*. For instance, in *Gaskin*, the Florida Supreme Court found Gaskin was not entitled to relief because his sentence became final in 1993. *Gaskin*, 2017 WL 224772, at *2. It is also important to note that *Gaskin*, unlike Defendant, did not argue retroactivity in his brief and did not raise an Eighth Amendment claim under *Hurst v. State*. The Florida Supreme Court, therefore, did not consider the retroactivity of the broader constitutional protections contained in *Hurst v. State* or engage in a rigorous case-specific *Witt* analysis. *See Jones v. State*, 966 So. 2d 319, 330 (Fla. 2007) (It is well-established that arguments not raised in the initial brief are considered barred.).

C. Federal Retroactivity under *Montgomery*

The State incorrectly asserts that *Hurst v. Florida* announced a procedural, not a substantive rule, and cites to *Schriro v. Summerlin*, 542 U.S. 348 (2004) (holding *Ring* was not retroactive) for support. State's Br. at 5. *Summerlin*, however, is distinguishable. In *Summerlin*, the Supreme Court applied the federal retroactivity test in *Teague v. Lane*, 489 U.S. 288 (1989), and determined that *Ring* was not retroactive on federal habeas review because the requirement that the jury rather than the judge make findings as to whether the defendant had a prior violent felony aggravator was procedural rather than substantive. But *Summerlin* did not review a capital sentencing statute like Florida's that required the jury not only to make the fact-finding regarding the applicable aggravators, but also required the jury to make the finding as to whether the aggravators were *sufficient* to impose the death penalty. Moreover, *Hurst*, unlike *Ring*, addressed

the proof-beyond-a-reasonable-doubt standard in addition to the jury trial right, and the Supreme Court has always regarded such decisions as substantive. *See Powell v. Delaware*, No. 310, 2016, 2016 WL 7243546, at *3 (Del. Dec. 15, 2016) (holding that *Hurst v. Florida* is retroactively applicable under the state’s *Teague*-like retroactivity doctrine and distinguishing *Summerlin* because it “only addressed the misallocation of fact-finding responsibility (judge versus jury) and not . . . the applicable burden of proof.”).

This Court should recognize that Defendant has a federal right to retroactivity as highlighted by the United States Supreme Court’s recent decision in *Montgomery*. Where a constitutional rule is substantive, the Supremacy Clause of the United States Constitution requires a state post-conviction court to apply it retroactively. *See Montgomery*, 136 S. Ct. at 731-32 (“Where state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge.”). In *Montgomery*, the Defendant initiated a state post-conviction proceeding seeking retroactive application of *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (holding imposition of mandatory sentences of life without parole on juveniles violates Eighth Amendment). The Louisiana Supreme Court (in contrast to what this Court did in *Falcon v. State*, 162 So. 3d 954 (Fla. 2015)) held that *Miller* was not retroactive under its state retroactivity tests. The United States Supreme Court reversed, holding that Louisiana could not bar retroactivity under its state doctrines because the *Miller* rule was substantive and therefore Louisiana was obligated under the federal Constitution to apply it retroactively on state post-conviction review.

The *Hurst* decisions announced substantive rules that under the federal Constitution may not be denied to Florida defendants on state retroactivity grounds. In *Hurst v. State*, the Court announced two substantive rules. First, the Court held that the Sixth Amendment requires that a

jury decide whether the aggravating factors have been proven beyond a reasonable doubt, whether they are sufficient to impose the death penalty, and whether they are outweighed by the mitigating factors. Such findings are manifestly substantive.¹ See *Montgomery*, 136 S. Ct. at 734 (holding that the decision whether a particular juvenile is or is not a person “whose crimes reflect the transient immaturity of youth” is substantive, not procedural). Indeed, the United States Supreme Court has consistently applied proof-beyond-a-reasonable-doubt rules retroactively to *all* defendants. See, e.g., *Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972) (giving retroactive application to the rule in *In re Winship* 397 U.S. 358 (1970) that juveniles must be afforded the proof-beyond-a-reasonable-doubt standard at the adjudicatory stage).

Second, the Court held that the Eighth Amendment requires the jury’s fact-finding during the penalty phase to be unanimous. The Court explained that the unanimity rule is required to implement the constitutional mandate that the death penalty be reserved for a narrow class of the worst offenders, and assures that the determination “expresses the values of the community as they currently relate to the imposition of the death penalty.” *Hurst v. State*, 202 So. 3d at 60-61 (“By requiring unanimity in a recommendation of death in order for death to be considered and imposed, Florida will achieve the important goal of bringing its capital sentencing laws into harmony with

¹ The proof-beyond-a-reasonable-doubt standard is a hallmark of our criminal justice system. Henry D. Gabriel & Katherine A. Barski, *Reasonable Doubt Jury Instructions: The Supreme Court Struggles to Live by its Principles*, 11 St. John’s Legal Comment. 73, 73 (1995) (“The ‘beyond a reasonable doubt standard plays a vital role in the American scheme of criminal procedure. A common aphorism states that it is better to have ten guilty people go free than to have one innocent person erroneously convicted. This intrinsic societal belief has been encapsulated in the requirement that a criminal defendant be found guilty beyond a reasonable doubt to be convicted.” (internal quotation marks omitted)). “The demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, though its crystallization into the formula ‘beyond a reasonable doubt seems to have occurred as late as 1798. It is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt.” *Apprendi v. New Jersey*, 530 U.S. 466, 478 (2000) (quoting C. McCormack, *Evidence* § 321, pp. 681-82 (1954)) (internal brackets and quotation marks omitted). The Supreme Court has recognized that “the reliance on the ‘reasonable doubt’ standard among common-law jurisdictions reflects a profound judgment about the way in which law should be enforced and justice administered.” *Apprendi*, 530 U.S. at 478 (internal brackets and quotation marks omitted).

the direction of the society reflected in [the majority of death penalty] states and with federal law.”); *see also Perry v. State*, No. SC16-547, 2016 WL 6036982, at *7 (Fla. Oct. 14, 2016) (“We also held [in *Hurst*] that, based on Florida’s requirement for unanimity in jury verdicts and on the Eighth Amendment to the United States Constitution, a jury’s ultimate recommendation of the death sentence must be unanimous.”). As the Florida Supreme Court made clear, the function of the unanimity rule is to ensure that Florida’s overall capital system complies with the Eighth Amendment. *See id.* at *47-48. That makes the rule substantive, *see Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) (“[T]his Court has determined whether a new rule is substantive or procedural by considering the function of the rule”), even though its subject has to do with the method by which a jury makes decisions. *See Montgomery*, 136 S. Ct. at 735 (noting that existence of state flexibility in determining method by which to enforce constitutional rule does not convert substantive rule into procedural one). Indeed, the United States Supreme Court made clear in *Montgomery* that “protection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment and goes far beyond the manner of determining a defendant’s sentence.” 136 S. Ct. at 732-33.

Because the rules announced in the *Hurst* decisions are substantive within the meaning of federal law, this Court has a duty under the federal Constitution to apply them retroactively to Defendant under Florida’s retroactivity doctrines.

2. The harmlessness burden is on the State, and the *Hurst* errors were not harmless

The Florida Supreme Court has repeatedly explained the appropriate standard for harmless-error review. In *Hurst v. Florida*, the United States Supreme Court cited to the harmless-error review standard delineated in *Neder v. United States*, 527 U.S. 1 (1999).

Drawing from *Neder*, this Court explained the harmless-error test courts should employ when reviewing *Hurst* errors:

The harmless error test . . . places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction. . . . Where the error concerns sentencing, the error is harmless only if there is no reasonable possibility that the error contributed to the sentence. Although the harmless error test applies to both constitutional errors and errors not based on constitutional grounds, the harmless error test is to be rigorously applied, and the State bears an extremely heavy burden in cases involving constitutional error. Therefore, in the context of a *Hurst v. Florida* error, the burden is on the State, as the beneficiary of the error, to prove 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.

Hurst v. State, 202 So. 3d 40, 68 (Fla. 2016) (internal citations and quotation marks omitted); *Mosley v. State*, No. SC14-2108, 2016 WL 7406506, at *25-26 (Fla. Dec. 22, 2016); *Simmons v. State*, No. SC14-2314, 2016 WL 7406514, at *6-7 (Dec. 22, 2016); *Johnson v. State*, No. SC14-1175, 2016 WL 7013856, at *3-4 (Dec. 1, 2016).

Despite these clear directives, the State contends “harmless error is not the State’s burden to prove in this proceeding...because unlike a direct appeal, the State has no burden of proving harmless error in postconviction proceedings.” State’s Br. at 6. But, in *Mosley*, an appeal from the denial of a post-conviction motion, the Court repeated the *same* harmless-error standard: “[I]n the context of *Hurst* error, the burden is on the State, as the beneficiary of the error, to prove 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 [Defendant]’s death sentence in this case.” *Mosley*, 2016 WL 7406506, at *25. It is therefore inexplicable why the state maintains it does not carry the burden is proving the *Hurst* error was harmless.

Here, the State has not met its burden in proving that the *Hurst* error in Defendant’s case was harmless beyond a reasonable doubt. Defendant’s jury recommendation for death was 10-2. The Court should not engage in speculation as to why ten jurors voted for death. *Hurst v. State*, 202 So. 3d at 69 (“We decline to speculate as to why seven jurors in this case recommended death and why five jurors were persuaded that death was not the appropriate penalty. To do so would be contrary to our clear precedent governing harmless error review.”); *Mosley*, 2016 WL 7406506, at *26. The reasoning this Court applied in *Hurst v. State* is equally applicable here:

The jury recommended death by only a seven to five vote, a bare majority. Because there was no interrogatory verdict, we cannot determine what aggravators, if any, the jury unanimously found proven beyond a reasonable doubt. We cannot determine how many jurors may have found the aggravation sufficient for death. We cannot determine if the jury unanimously concluded that there were sufficient aggravating factors to outweigh the mitigating circumstances. Nevertheless, the fact that only seven jurors recommended death strongly suggests to the contrary.

Id. at 68.

The jury’s consideration of the evidence in Defendant’s case may have been different if the jury had been required to conduct the fact finding, instead of making only an advisory recommendation for a sentence of death or life imprisonment. *See Caldwell*, 472 U.S. at 328-29 (1985) (recognizing the significant impact of a jury’s belief that the ultimate responsibility for determining whether a defendant will be sentenced to death lies elsewhere). The Supreme Court “has always premised its capital punishment decisions on the assumption that a capital sentencing

jury [should] recognize[] the gravity of its task and proceed[] with the appropriate awareness of its truly awesome responsibility.” *Id.* at 341 (internal quotation marks omitted).

Substantial mitigation was presented to the jury. *See Archer*, 934 So. 2d at 1192. Among the mitigation presented was that Defendant was only 30 at the time of the offense and that Defendant’s capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, which the trial court found as statutory mitigating factors. The trial court also found as non-statutory mitigating factors that Defendant was abandoned by his parents when he was a child and that Defendant never experienced a normal family life because his social environments did not address his needs and he spent most of his life in state hospitals and prisons. In *Hurst v. State*, the Court emphasized that mitigation is an important consideration in assessing harmless error. 202 So. 3d at 68-69 (“Because we do not have an interrogatory verdict commemorating the findings of the jury, we cannot say with any certainty how the jury viewed th[e] mitigation, although we do know that the jury recommended death by only a bare majority . . . we cannot find beyond a reasonable doubt that no rational jury, as trier of fact, would determine that the mitigation was ‘sufficiently substantial’ to call for a life sentence.”).

If defense counsel’s thinking had not been influenced by the statutory framework struck down by *Hurst*, he would have pursued a different approach than the one taken with the advisory jury and judge-sentencing, including broader challenges to aggravation and a broader presentation of mitigation. A jury properly instructed that it, not the judge, was to make the ultimate sentencing decision could find that any one of the aggravators in Defendant’s case was *not*, as fact, sufficient to justify a death sentence. As such, it cannot be concluded that the jury unanimously found any specific aggravator before making a recommendation. *Cf. Mills v. Maryland*, 486 U.S. 367, 375-

84 (1988); *McKoy v. North Carolina*, 494 U.S. 433, 444 (1990) (both holding, in the mitigation context, that Eighth Amendment violated when there is uncertainty about the jury's vote).

To the extent the State may argue that the *Hurst* error is rendered harmless by the fact that the aggravators applied to Defendant were based on contemporaneous and prior felony convictions, the Florida Supreme Court has rejected the idea that a judge's finding of such aggravating factors is relevant in the harmless-error analysis of *Hurst* claims. *See Franklin v. State*, 2016 WL 6901498, at *6 (Fla. Nov. 23, 2016) (rejecting "the State's contention that Franklin's prior convictions for other violent felonies insulate Franklin's death sentence from *Ring* and *Hurst v. Florida*."). The Court found the *Hurst* error *not* harmless in *Mosley* despite the fact that Mosley's judge had found a contemporaneous felony aggravator. *Mosley*, 2016 WL 7406506, at *3.

In sum, the State has failed to establish that the *Hurst* errors in this case were harmless beyond a reasonable doubt.

Conclusion

For the foregoing reasons, Defendant is entitled to relief under *Hurst v. Florida* and *Hurst v. State*. This Court, therefore, should vacate Defendant's death sentence and either impose a life sentence or conduct a new penalty phase that complies with the *Hurst* decisions. Defendant respectfully requests a status conference.

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CERTIFICATE OF SERVICE

I, HEREBY CERTIFY that on this 2nd day of February, 2017, a true and correct copy of the foregoing has been served via e-file on the following:

The Honorable Joseph A. Bulone, Circuit Court Judge: ghahl@jud6.org

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/s/ Sarah S. Butters

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Florida Bar No. 499021

**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF THE
STATE OF FLORIDA IN AND FOR PINELLAS COUNTY
CRIMINAL DIVISION**

STATE OF FLORIDA,

v.

RICHARD WALLACE RHODES,
Person ID: 322043, Defendant.

CASE NO.: CRC84-03982CFANO

UCN: 521984CF003982XXXNO

DIVISION: D

FILED
CRIMINAL COURT RECORD
2017 FEB -3 PM 2:57
KEN BURKE
CLERK OF CIRCUIT COURT
AND COMPTROLLER

**FINAL ORDER DENYING DEFENDANT'S MOTION FOR
POSTCONVICTION RELIEF; DIRECTIONS TO CLERK**

THIS CAUSE came before the Court on the Defendant's "Motion for Post-Conviction Relief in Light of *Hurst v. Florida*," filed through counsel on November 8, 2016, under Florida Rule of Criminal Procedure 3.851. The State of Florida filed a response to the Defendant's Rule 3.851 motion on November 28, 2016. As required by rule 3.851(f)(5)(B), the Court held a case management conference on December 13, 2016, at 8:30 a.m. to determine whether an evidentiary hearing should be held and hear argument on any purely legal claims. At the case management conference, the parties requested that the Court hold the motion in abeyance for 90 days, as the issue was currently pending before the Florida Supreme Court.

Subsequently, on December 22, 2016, the Florida Supreme Court issued decisions in Asay v. State, 41 Fla. L. Weekly S646 (Fla. Dec. 22, 2016), and Mosley v. State, 41 Fla. L. Weekly S629 (Fla. Dec. 22, 2016), regarding the retroactive application of Hurst v. Florida, 136 S. Ct. 616 (2016). This Court issued an order on January 4, 2017, requesting supplemental authority from the parties on the import of Asay and Mosley. The Defendant and the State filed their responses on January 11, 2017, and January 20, 2017, respectively.

Procedural History

On August 19, 1985, the Defendant was found guilty by a jury of one count of murder in the first degree. Following a penalty phase and sentencing hearing, Defendant was sentenced to death after the jury recommended that the death penalty be imposed by a vote of 7-5. See Rhodes v. State, 547 So. 2d 1201, 1202-03 (Fla. 1989). On direct appeal the Florida Supreme Court affirmed the Defendant's conviction, but remanded the case to the trial court for a new sentencing proceeding, finding that two of the aggravating circumstances were invalid and that there was substantial mitigation. During resentencing, the jury again recommended that a death

sentence be imposed, by a vote of 10-2. The judge found the following aggravating circumstances: 1) the Defendant committed the offense while on parole; 2) the Defendant was previously convicted of a violent felony; and 3) the offense was committed while the Defendant was engaged in the commission of a sexual battery. The trial court found two statutory mitigating factors: 1) the Defendant's age of 30 at the time of the offense; and 2) the Defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. The trial court found the following non-statutory mitigating factors: 1) the Defendant was abandoned by his parents as a child; and 2) the Defendant was never placed in an environment that could address his needs because he spent most of his life in state hospitals and prisons and never experienced a normal family life. The Florida Supreme Court affirmed the death sentence imposed on resentencing. Rhodes v. State, 638 So. 2d 920, 923 (Fla. 1994). The United States Supreme Court denied the Defendant's petition for writ of certiorari on December 5, 1994. Rhodes v. Florida, 513 U.S. 1046 (1994).

On April 12, 1996, the Defendant filed a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.851, raising 36 claims and subclaims. Following an evidentiary hearing on two of the Defendant's claims, the trial court entered a final order denying the Defendant's motion. The Defendant filed a motion for rehearing, which was also denied by the Court. The Florida Supreme Court affirmed the denial of the Defendant's motion for postconviction relief in a modified opinion dated July 3, 2008. Rhodes v. State, 986 So. 2d 501 (Fla. 2008).

The Defendant filed a federal petition for writ of habeas corpus, which was denied on September 30, 2010. Rhodes v. Secretary, Dept. of Corr., 2010 WL 3819358 (M.D. Fla. Sept. 30, 2010).

Analysis

In Hurst v. Florida, 136 S.Ct. 616 (2016) [hereinafter Hurst I], the U.S. Supreme Court held Florida's death penalty scheme unconstitutional in part, but remanded for a harmless error analysis. In Hurst v. State, 202 So.3d 40 (Fla. 2016) [hereinafter Hurst II], the Florida Supreme Court considered the scope and application of the U.S. Supreme Court's ruling in Hurst I. The Florida Supreme Court held that a jury must find 1) each aggravating factor beyond a reasonable doubt, 2) that the aggravating factors are sufficient, and 3) that the aggravating factors outweigh the mitigating circumstances. The Court further held that the Eighth Amendment of the U.S. Constitution and Article I, section 22 of the Florida Constitution require the jury's recommended

death sentence to be unanimous. The Court rejected Hurst's claim that he should be sentenced to life, but held that the sentencing error in his case was not harmless and remanded for a new penalty phase.

Subsequently, the Florida Supreme Court issued an opinion in Asay v. State, 41 Fla. L. Weekly S646 (Fla. Dec. 22, 2016), holding that Hurst I does not apply retroactively to cases that were final before the U.S. Supreme Court issued its opinion in Ring v. Arizona, 536 U.S. 584 (2002). The Court conducted a retroactivity analysis pursuant to Witt v. State, 387 So. 2d 922 (Fla. 1980), which provides that a change in the law does not apply retroactively unless the change 1) emanates from the Florida Supreme Court or U.S. Supreme Court, 2) is constitutional in nature, and 3) constitutes a development of fundamental significance. To be a development of fundamental significance, the development must either prohibit the state from imposing certain penalties or be of sufficient magnitude to necessitate retroactive application under a three prong analysis considering: 1) the purpose of the rule, 2) the extent of reliance on the prior rule, and 3) the effect retroactive application would have on the administration of justice. The Court held that Hurst I undoubtedly satisfies the first two prongs of Witt and thus turned to the third prong. The Court determined that the purpose of Hurst I weighed in favor of retroactivity, but the extent of reliance on the finality of over 300 death cases weighed heavily against retroactivity. The Court further determined that the impact on the administration of justice by re-litigating all of those cases weighed heavily against retroactivity. Thus, the Court held that, weighing all three factors, Hurst I should not apply retroactively to cases that were final when Ring was issued.

In Mosley v. State, 41 Fla. L. Weekly S629 (Fla. Dec. 22, 2016), the Florida Supreme Court held that Hurst I is retroactive to post-Ring cases. Mosley's conviction and death sentence became final in 2009. The Court held that principles of fundamental fairness alone require retroactive application of Hurst I to post-Ring cases, but still conducted a Witt analysis for retroactivity. Like in Asay, the Court held that Hurst I undoubtedly satisfies the first two prongs of Witt and thus turned to the third prong. The Court concluded that post-Ring cases fall within the category of cases that are of "sufficient magnitude to necessitate retroactive application" based on the purpose of Hurst I, the U.S. Supreme Court's delay in applying Ring to Florida, and in the interest of fairness in the administration of justice.

The Defendant argues that his sentence is unconstitutional because he was sentenced under the procedure declared unconstitutional in Hurst I. At the Defendant's penalty phase, the jury recommended the death sentence by a vote of 10 to 2, and the sentencing judge determined

that the death sentence was appropriate. Hurst I held that a jury recommendation did not satisfy the Sixth Amendment's requirement for the jury to find each fact necessary to impose a death sentence. 136 S. Ct. at 619. The Defendant argues that the decision in Hurst I should apply retroactively to him because it is fundamentally unfair not to do so in a case like his, he had preserved the argument in previously filed motions raising similar arguments pursuant to Caldwell v. Mississippi, 472 U.S. 320 (1985), had timely filed a postconviction motion asserting newly discovered evidence claims pending in the Florida Supreme Court or this Court after 2002, and because upon analysis of the Witt factors in his particular case he is entitled to retroactive application of Hurst. See Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016). He also argues that the Hurst I error was not harmless because two jurors voted in favor of a life sentence. The State argues that the Defendant's claim is without merit because Asay provides a bright line rule that Hurst I does not apply retroactively to defendants whose sentences became final before Ring was decided.

Hurst I does not apply retroactively to the Defendant. In Asay, the Florida Supreme Court held that Hurst I should not be applied retroactively to a case where the death sentence became final before Ring issued. Slip Op. at 35–6. In Mosley, the Court held that Hurst I does apply retroactively to defendants whose sentences became final after Ring. Slip Op. at 61–2. The Court found that Florida's death penalty statute was actually rendered unconstitutional in 2002 by Ring, and, based on concerns for fundamental fairness, defendants sentenced after Ring "should not be penalized for the United States Supreme Court's delay in explicitly making this determination." Slip Op. at 61. The Defendant's sentence became final in 1994, when the U.S. Supreme Court denied certiorari review of the Defendant's resentencing appeal. See Rhodes v. Florida, 513 U.S. 1046 (1994). Therefore, under Asay, the Defendant falls within the group not entitled to the retroactive application of Hurst I. The Defendant's arguments do not raise the same type of fundamental fairness concerns as those in Mosley, where Mosley's sentence was actually unconstitutional at the time it was imposed. Accordingly, as Hurst I does not apply retroactively to the Defendant, this claim is denied.

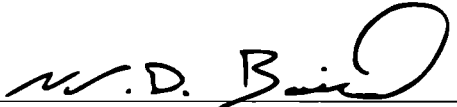
Accordingly it is,

ORDERED AND ADJUDGED that the Defendant's Motion for Postconviction Relief is hereby **DENIED**.

THE CLERK OF THE CIRCUIT COURT IS HEREBY DIRECTED to promptly serve a copy of this order, along with a certificate of service, upon the parties listed at the end of this order as required by Florida Rule of Criminal Procedure 3.851(f)(5)(F).

THE DEFENDANT IS HEREBY NOTIFIED that he has 30 days from the date of this order in which to file an appeal, should he choose to do so.

DONE AND ORDERED in Clearwater, Pinellas County, Florida, this 1st day of February, 2017. A true and correct copy of this order has been furnished to the parties listed below.



W. Douglas Baird, Senior Circuit Judge

cc: Office of the State Attorney
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**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

v.

Case No. 84-CF-3982

RICHARD W. RHODES, JR.,

Defendant.

_____ /

NOTICE OF APPEAL

Defendant, through counsel, takes and enters his appeal to the Florida Supreme Court to review the order of the Circuit Court of the Sixth Judicial Circuit, in and for Pinellas County, Florida, dated February 1, 2017, and filed with the clerk on February 3, 2017; and all other rulings, actions, or acts rendered adversely to the Defendant in support of said judgment.

The nature of the order appealed from is the denial of Defendant's Motion for Post-Conviction Relief in the above captioned case. All parties to said cause are hereby notified of the entry of this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, HEREBY CERTIFY that on this 2nd day of March, 2017, a true and correct copy of the foregoing has been served via e-file on the following: Assistant Attorney General Carla Bechard at carlasuzanne.bechard@myfloridalegal.com and Assistant State Attorney Jim Hellickson at SA6Appealservice@co.pinnellas.fl.us

/s/ Sarah S. Butters

Sarah S. Butters

Florida Bar No. 499021

STATE OF FLORIDA

COUNTY OF PINELLAS

I, KEN BURKE, Clerk of the Circuit Court and Comptroller of the Sixth Judicial Circuit in and for the County of Pinellas, State of Florida, do hereby certify that pages ONE through ONE HUNDRED AND THIRTY-SEVEN, inclusive, contain a correct **TRANSCRIPT OF RECORD**, in the case of

STATE OF FLORIDA vs. RHODES , RICHARD WALLACE J,

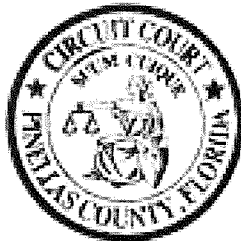
Circuit Criminal Number 8403982CFANO, and a true and correct recital and copy of all such papers and proceedings in said cause as appear from the records and files of my office that have been directed to be included in said record in accordance with:

Summary Rule 3.850

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of said Court on this the 10th day of March, 2017.

KEN BURKE

Clerk of the Circuit Court and Comptroller



By: /s/ Marlica Tomlinson
Deputy Clerk
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(727) 464-7000

Email: ClerkAppealDist@co.pinellas.fl.us

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☐ APPELLATE JUDGES
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