# IN THE
# SUPREME COURT OF FLORIDA
**TALLAHASSEE, FLORIDA**

CASE NO. 16-1985-CF-012620-AXXX-MA
DIVISION CR-C

APPEAL NO. SC17-703

ETHERIA VERDEL JACKSON Appellant___,
VS
STATE OF FLORIDA Appellee___,

RONNIE FUSSELL,
CLERK
OF THE CIRCUIT AND
COUNTY COURTS

## RECORD ON APPEAL

VOLUME 1

Appeal from the Circuit Court

Duval County, Florida

BEFORE THE HONORABLE JUDGE ANGELA COX

Julissa Rosalyn Fontan
FOR APPELLANT

ATTORNEY GENERAL
FOR APPELLEE

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

ETHERIA VERDEL JACKSON
APPELLANT

CASE NO: 16-1985-CF-012620-AXXX-MA
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STATE OF FLORIDA
APPELLEE

APPEAL NO: SC17-703

**VOLUME 1**

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IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

ETHERIA VERDEL JACKSON
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**CERTIFICATE OF CLERK**

**STATE OF Florida,**
**COUNTY OF DUVAL**

**16-1985-CF-012620-AXXX-MA**
**SC17-703**

**I, RONNIE FUSSELL, Clerk of the Circuit and County Courts for the County of Duval, State of Florida, do hereby certify that the foregoing pages 01 to 096 inclusive contain a correct transcript of the record of the judgment in the case of STATE OF FLORIDA vs. ETHERIA VERDEL JACKSON and a true and correct recital and copy of all such papers and proceedings in said cause as appears from records and files of my office and that have been directed to be included in said record by the directions furnished to me.**

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**Inclusive embrace the transcribed notes of the reporter as made at the trial and certified by him to me.**

**In Witness Whereof, I have set my hand and affixed the Seal of said Court this 25th day of May, A.D. 2017.**

**RONNIE FUSSELL,**
**CLERK OF THE CIRCUIT AND**
**COUNTY COURTS OF DUVAL**
**COUNTY**

*/S/ Ashley Samford*
**BY ASHLEY L SAMFORD**
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CLERK OF THE CIRCUIT COURT
SUUM CUIQUE
DUVAL COUNTY, FLORIDA

**IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA**

**STATE OF FLORIDA,**

**Plaintiff,**

**v.** **Case No. 85-12620 CF**

**ETHERIA VERDELL JACKSON,**

**Defendant.**
_____/

**SUCCESSIVE MOTION TO VACATE DEATH SENTENCE**

Defendant Etheria Verdell Jackson, through undersigned counsel, files this successive motion to vacate under Fla. R. Crim. P. 3.851. This motion is filed in light of a change in Florida law following the decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), the enactment of Chapter 2016-13 on March 7, 2016, the decisions of *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *Perry v. State*, --- So.3d --- 2016 WL 6036982 (Fla. October 14, 2016), *Mosley v. State*, ---So.3d --- 2016 WL7406506 (Fla. December 22, 2016) and *Asay v. State*, ---So.3d --- 2016 WL7406538 (Fla. December 22, 2016).

**1. The judgment and sentence under attack and the name of the court that rendered the same.**

Mr. Jackson was tried by a jury and found guilty on June 20, 1986 of first degree murder in the Fourth Judicial Circuit in and for Duval County. The jury recommended a sentence of death for the first degree murder conviction on July 8, 1986 by a vote of seven to five, a bare majority. The trial court sentenced Mr. Jackson to death on August 8, 1986, finding five aggravating factors and no mitigating factors. The Florida Supreme Court affirmed the conviction and sentence on direct appeal, even though the Court found that one of the aggravating factors had been improperly considered by the trial court. *Jackson v. State,* 530 So.2d 269 (Fla. 1988). Certiorari to the United States Supreme Court was denied on January 23, 1989. *Jackson v. Florida*, 109 S. Ct. 882 (1989).

Mr. Jackson filed a motion for post-conviction relief, under Fl. R. Crim. P. 3.850[1]. The trial court

[1] Governor Martinez included Mr. Jackson's death warrant among five signed on March 29, 1990, a year when at least 38 warrants were signed. The Capital Collateral Representative was responsible for most of the cases in which

summarily denied Mr. Jackson's 3.850 motion for post-conviction relief on March 25, 1991 without requiring a response by the State and without holding a hearing. An appeal of the denial of post-conviction relief was filed and state habeas on September 9, 1993. The Florida Supreme Court affirmed the denial of post-conviction relief, as well as denying Mr. Jackson's state habeas. *Jackson v. State*, 633 So. 2d 1051 (1993).

Mr. Jackson filed a petition for federal habeas relief for which nine of Mr. Jackson's claims were procedurally barred and the remainder were denied on December 15, 2003. Post-conviction counsel filed a Motion to Alter or Amend pursuant to Fed. R. Civ. P. 59(e) on January 5, 2004, but due to an error in calculating the due date and relying upon advice from a court clerk regarding days for mailing, the motion was untimely. *Jackson v. Crosby*, 375 F.3d 1291, 1292 (11th Cir. 2004). However, during the pendency of Mr. Jackson's federal habeas, *Apprendi v. New Jersey*[2] was decided and raised immediately in a supplemental brief[3]. See *Jackson v. Moore*, 3:94-CV-492-J-20. Jackson also filed a subsequent motion to amend adding *Ring v. Arizona*[4], on July 8, 2003. The district court denied the Motion on January 29, 2004 in a single paragraph, stating only that the Motion was denied. The denial was upheld by the Eleventh Circuit Court of Appeals. *Jackson v. Crosby*, 375 F.3d 1291 (11th Cir. 2004). The United States Supreme Court denied certiorari and the merits of Mr. Jackson's appeal were never heard.

Mr. Jackson also filed a successive 3.851 regarding lethal injection. That was also subsequently denied. Mr. Jackson also filed a 3.853 motion for DNA testing. That was also denied. Mr. Jackson has *never* had a postconviction evidentiary hearing.

**2. Issues raised on appeal and disposition thereof.**

*The following issues were raised in Mr. Jackson's direct appeal*:

1. Limiting Mr. Jackson's cross-examination of Linda Riley concerning her present dating relationships (denied).

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warrants were signed, and was overwhelmed. Due to the untenable case load imposed by the Governor's actions, counsel responsible for Mr. Jackson's post-conviction pleadings at that time overlooked claims of ineffective assistance of trial and appellate counsel.

[2] *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000).

[3] This was the first opportunity to do so.

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

2. Allowing the state to introduce evidence that Jackson has been in prison prior to the offense (denied)
3. Admitting the statements Jackson made to a detective during the examination of his arm cast. (denied)
4. Trial court erred in permitting the state to introduce evidence of Jackson's conviction for escape, because the evidence was unnecessary to prove the aggravating circumstance that appellant was in prison at the time of the offense (denied)
5. Trial court erred in allowing the state to cross-examine appellant regarding prior convictions (denied)
6. The trial court erred in refusing to give the jury specific instructions as to the nonstatutory mitigating circumstances it could consider (denied)
7. The trial court improperly doubled up the aggravating circumstances of heinous, atrocious, and cruel, and cold, calculated and premeditated (the Florida Supreme Court found "that the application of cold, calculated and premeditated as an aggravating circumstance was error,"however the elimination of that aggravator would not result in a life sentence for Mr. Jackson, thus denied)[5].
8. The failure to allow evidence that the parole commission does not consider for parole inmates serving life sentences without eligibility for parole for 25 years as a mitigating circumstance (denied).

**3. Disposition of all previous claims raised in post-conviction proceedings and the reasons the claims raised in the present motion were not raised in the former motions[6].**

*Motion to Vacate Judgments and Sentences[7] and Appeal*:

1. Trial counsel was ineffective due to a conflict of interest with the public defender's office and thus prevented an attorney-client relationship from forming (denied)
2. Mr. Jackson was denied his right to a trial by jury that presumed he was innocent when the state repeatedly referred to his having been in prison the year before the offense (denied)
3. Mr. Jackson's rights to present a defense and to confront witnesses against him were denied when the court prohibited cross-examination of Linda Riley about her relationship with another man (denied)
4. The trial court and jury considered and relied on the victim's personal characteristics and the impact of the offense on the victim's family (denied)
5. The jury was erroneously instructed that a verdict of life must be made by a majority of the jury and the jury was materially misled as to its role in sentencing (denied)
6. Mr. Jackson's death sentence violates the 5th, 6th 8th and 14th Amendments because the penalty phase jury instructions shifted the burden to Mr. Jackson to prove death was inappropriate and because the sentencing judge himself employed the improper sentencing standard[8] (denied).
7. The sentencing court's failure to find mitigating circumstances violated the 8th and 14th Amendments (denied).
8. Mr. Jackson's sentencing jury was repeatedly misled by the instructions and arguments which unconstitutionally and inaccurately diluted the jury's sense of responsibility for sentencing and counsel was ineffective for failing to zealously advocate and litigate the issue (denied)[9].
9. Mr. Jackson's sentence was based upon an unconstitutionally obtained prior conviction (denied).

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[5] All the aggravators were found by the trial court, not the jury.
[6] All issues raised in state court were also raised in Mr. Jackson's petition for writ of habeas corpus to the federal district court.
[7] All claims were summarily denied without requesting an answer from the State and without providing a hearing for argument on the motion. *Jackson v. State*, 633 So.2d 1051, 1053 (Fla. 1993).
[8] This claim addressed *Ring*-like claims regarding the weighing of the aggravators and the mitigators.
[9] Argument was based on *Caldwell v. Mississippi*, 472 U.S. 320 (1985), but also made arguments that the jury were supposed to be tasked with fact-finding, but were merely told to recommend a sentence. There were *Ring*-like and *Hurst*-like arguments made in this claim.

10. The cold, calculated, and premeditated aggravating circumstance was applied in violation of the 8th and 14th Amendments (denied).
11. Mr. Jackson's sentencing jury was improperly instructed on the "especially heinous, atrocious, or cruel" aggravating circumstance and the aggravator was improperly argued and imposed (denied).
12. The Florida Supreme Court's failure to remand for resentencing after striking an aggravating circumstance on direct appeal denied Mr. Jackson the protections afforded under Florida's capital sentencing statute (denied).
13. The introduction of non-statutory aggravating factors so perverted the sentencing phase that it resulted in an arbitrary and capricious imposition of the death penalty (denied).
14. Counsel was ineffective at both the guilt and sentencing phases of Mr. Jackson's trial (denied).
15. Counsel was ineffective because due to inadequate pretrial investigation and evaluations, Mr. Jackson was unable to establish available intoxication and diminished capacity defenses, counsel failed to properly challenge the aggravating factors and failed to establish statutory and non-statutory mitigating circumstances (denied).

*State Petition for Habeas Corpus*:

1. The penalty phase instructions urged the jury to presume death appropriate, shifted the burden to petitioner to prove that death was not appropriate, and limited full consideration of mitigating circumstances to those which outweighed aggravating circumstances, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments and *Hitchcock v. Duggar*, 107 S.Ct. 1821 (1987). (Denied)

C. *Claims not Raised in Previous Motions*:

On January 12, 2016, *Hurst v. Florida*, 136 S. Ct. 616 (2016), issued. It declared Florida's capital sentencing scheme unconstitutional. On March 7, 2016, Chapter 2016-13 was enacted. It was the legislature's effort to rewrite § 921.141 in the wake of *Hurst* to cure the constitutional deficiencies.

On October 14, 2016, the Florida Supreme Court issued its decision in *Perry v. State*, --- So. 3d---, 2016 WL 6036982 (Fla. October 14, 2016), and declared the 10-2 provision contained in Chapter 2016-13 to be unconstitutional under *Hurst v. Florida.* In *Perry*, the Florida Supreme Court concluded that the Sixth and the Eighth Amendment required a unanimous jury verdict recommending a death sentence before one could be imposed. As the Florida Supreme Court explained in *Hurst*, "Not only does jury unanimity further the goal that a defendant will receive a fair trial and help to guard against arbitrariness in the ultimate decision of whether a defendant lives or dies, jury unanimity in the jury's final recommendation of death also ensures that Florida conforms to 'the evolving standards of decency that mark the progress of a maturing society,' which inform Eighth Amendment analyses." *Hurst v. State*, 202 So.3d 40, 72 (Fla. 2016) (internal citations omitted). Accordingly, the jury must unanimously find that sufficient aggravators existed

to justify a death sentence and that the aggravators outweighed the mitigating factors that were present in the case. Finally, if a unanimous death recommendation is not returned, a death sentence cannot be imposed. Thus, a life sentence is mandated if one or more jurors vote in favor of a life sentence due to a desire to be merciful even if the jury unanimously determined that sufficient aggravators existed and that they outweighed the mitigators that were present. *Perry v. State*, ---So. 3d ---, 2016WL 6036982 *8, quoting *Hurst v. State*, 202 So. 3d 40, 59 (Fla. 2016) ("'the penalty phase jury must be unanimous in making the critical findings and recommendation that are necessary before a sentence of death may be considered by the judge or imposed.'") *See also Hurst v. State*, 202 So.3d at 62, n. 18.

On December 22, 2016, the Florida Supreme Court explicitly decided that, as a matter of state law, there are two classes of defendants who are entitled to the retroactive application of *Hurst*:

1) Those whose sentences became final after the Supreme Court issued its decision in *Ring*. Such defendants are entitled to retroactive application as a group, regardless of preservation. See *Mosley v. State*, ---So.3d --- 2016 WL7406506 (Fla., Dec. 22, 2016) at **56-75. Because his direct appeal proceedings concluded in 1989, see *Jackson v. Florida*, 109 S. Ct. 882 (1989)(denying certiorari), Mr. Jackson is outside this group.

2) Those who specifically preserved the *Ring* issue. See *Mosley* at *53-56 & n.13 (citing *James v. State,* 615 So. 2d 668 (Fla. 1993). Considerations of fundamental fairness dictate the application of the requirements contained in *Hurst v. Florida* to this class of defendants. Mr. Jackson is within this class. Mr. Jackson's trial attorney filed a Motion to Vacate Death Penalty arguing *Ring*-like claims regarding the unconstitutionality of the sentencing statute based on the fact the recommendation was not a binding verdict and unanimity under the Eighth Amendment. See attached Exhibit A and ROA Vol. 1:59-66. Because Mr. Jackson "raised a *Ring* claim at his first opportunity and was then rejected at every turn ... fundamental fairness requires the retroactive application of *Hurst*, which defined the effect of *Hurst v. Florida*," to him. *Mosley* at *56.

On the basis of the new Florida law arising from *Hurst v. Florida*, the enactment of Chapter 2016-13, *Perry v. State*, *Hurst v. State*, *Mosley v. State*, and *Asay v. State*, Mr. Jackson files this motion to vacate and

presents his claims for relief arising from the resulting new Florida law, which was previously unavailable when Mr. Jackson filed his prior motions.

**4. The nature of the relief sought.**

Mr. Jackson seeks to set aside his death sentence and receive a new penalty phase, or, in the alternative, a life sentence.

**5. Claims for which an evidentiary hearing is sought.**

**CLAIM 1**

**Jackson's death sentence stands in violation of the Sixth Amendment under *Hurst v. Florida* and *Hurst v. State* and should be vacated.**

This claim is evidence by the following:

All factual allegations contained elsewhere within this motion and set forth in the Defendant's previous motions to vacate, and all evidence presented by him in previous motions to vacate[10] are incorporated herein by specific reference.

This motion is filed with one year of the issuance of *Hurst v. Florida*, the enactment of Chapter 2016-13, the issuance of *Perry v. State*, *Hurst v. State*, *Mosley v. State*, and *Asay v. State*, all of which established new Florida law. The claims presented herein could not have been presented before the change in Florida law that these cases and statutory amendment brought about. The claims were simply not ripe before because the basis for the Defendant's claims did not exist before the change in Florida law resulting from *Hurst v. Florida*. Accordingly, this motion is timely.

The Sixth Amendment right enunciated in *Hurst v. Florida*, and found applicable to Florida's capital sentencing scheme, guarantees that all facts that are statutorily necessary before a judge is authorized to impose a death sentence are to be found by a jury, pursuant to the capital defendant's constitutional right to a jury trial. *Hurst v. Florida* held that "Florida's capital sentencing scheme violates the Sixth Amendment . . . ." It invalidated Fla. Stat. §§ 921.141(2) and (3) as unconstitutional. Under those provisions, a defendant who had been convicted of a capital felony could be sentenced to death only after the sentencing

[10] Mr. Jackson never received an evidentiary hearing for any of his postconviction claims.

judge entered written fact findings that: 1) sufficient aggravating circumstances existed that justify the imposition a death sentence, and 2) insufficient mitigating circumstances existed to outweigh the aggravating circumstances. *Hurst*, 136 S. Ct. at 620-21. *Hurst v. Florida* found Florida's sentencing scheme 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. On remand, the Florida Supreme Court held in *Hurst v. State* that *Hurst v. Florida* means "that before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death." *Hurst v. State*, 202 So.3d 40, 57-58 (Fla. 2016).

**A. Mr. Jackson is entitled to retroactive application of both *Hurst* decisions under the *Witt* test.**

1. *Hurst v. Florida* was a decision of fundamental significance that has resulted in substantive and substantial upheaval in Florida's capital sentencing jurisprudence. The fundamental change in Florida law that has resulted means that under Florida's retroactivity test set forth in *Witt v. State*, 387 So. 2d 922 (Fla. 1980), the decision in *Hurst v. Florida* must be given retroactive effect[11]. Under *Witt*, Florida courts apply holdings favorable to criminal defendants retroactively provided that the decisions (1) emanate from the United States Supreme Court or the Florida Supreme Court, (2) are constitutional in nature, and (3) constitute "a development of fundamental significance." *Id. Hurst v. Florida* and the change in Florida law made in its wake satisfy the first two *Witt* retroactivity factors—(1) *Hurst v. Florida* is a decision by the US Supreme Court, and (2) its holding is constitutional in nature: the Sixth Amendment forbids a capital

[11] Mr. Jackson recognizes that *Asay v. State*, ---So.3d --- 2016 WL7406538 (Fla. December 22, 2016) suggests that cases that were final when *Ring* was decided are not entitled to the retroactive effect of *Hurst* under a *Witt* analysis, but that case left open the possibility for retroactivity under fundamental fairness. Rehearing has been filed and the case is not final. In addition, Mr. Jackson's case should be decided on an individual basis. Moreover, the United States and Florida Constitutions cannot tolerate the concept of "partial retroactivity," where similarly situated defendants are granted or denied the benefit of seeking *Hurst* relief in collateral proceedings based on when their sentences were finalized. To deny Mr. Jackson the retroactive effect of *Hurst* deprives him of due process and equal protection under the federal constitution and the corresponding provisions of the Florida Constitution.

sentencing scheme that provides for judges, not juries, make the factual findings that are statutorily required to authorize the imposition of a death sentence.

2. The third factor under *Witt* is also met because *Hurst v. Florida* "constitutes a development of fundamental significance," i.e., it is a change in the law which is "of sufficient magnitude to necessitate retroactive application as ascertained by ... 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). What must be considered are whether "[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). Accordingly, "[t]he doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications." *Witt*, 387 So. 2d at 925.

3. *Hurst v. State* also acknowledged the added reliability resulting from requiring unanimous jury fact finding and unanimity in the jury's death recommendation, as well as "significant benefits that will further the administration of justice." 202 So.3d at 58. These are also factors that favor full retroactivity of *Hurst v. Florida.*

4. As applied to Mr. Jackson, the first *Stovall/Linkletter* factor – the purpose to be served by the new rule – weighs heavily in favor of retroactivity. 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").

5. The second *Stovall/Linkletter* factor – extent of reliance on the old rule – also weighs in favor of applying those decisions retroactively. This factor requires examination of the "extent to which a condemned practice infect(ed) the integrity of the truth-determining process at trial." *Stovall v. Denno*, 388 U.S. 293, 297 (1967). Florida's unconstitutional sentencing scheme has always been unconstitutional and systemically infected the truth-determining process at penalty-phase proceedings since the statute was

enacted – including Mr. Jackson's trial. Accordingly, the second factor weighs in favor of retroactivity.

6. Finally, the third *Stovall/Linkletter* factor – effect on administration of justice – also weighs in favor of retroactivity. This factor does not weigh against retroactivity unless it will "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." *Witt v. State*, 387 So. 2d 922, 929–30 (Fla. 1980). There can be no serious rationale for a prediction that categorically permitting the retroactive application of the *Hurst* decisions to all pre-*Ring* defendants will "destroy" the judiciary.

7. Undoubtedly, retroactive application will have slightly more of an impact on the administration of justice but that is not the test. Retroactive application of new rules affecting much larger populations have been approved. *See e.g. Montgomery v. Louisiana*, 136 S.Ct. 718 (2016).

8. As a result, retroactivity would also ensure that all defendants' Sixth and Eighth Amendment rights are protected. "Considerations 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).

9. Anything less than full retroactivity leads to disparate treatment among Florida capital defendants. See *Meeks v. Moore*, 216 F.3d 951, 959 (11th Cir. 2000) (new penalty phases on 1974 murders); *State v. Dougan*, 202 So.3d 363 (Fla. 2016)(granting a new trial in a 1974 homicide); *Hildwin v. State*, 141 So.3d 1178 (Fla. 2014)(granting a new trial in a 1985 homicide); *Cardona v. State*, 185 So.3d 514 (Fla. 2016)(granting a new trial in a 1990 homicide), and *Johnson v. State*, ---So.3d --- 2016 WL 7013856 (Fla. December 1, 2016)(on a direct appeal from a resentencing, the Court remand for a new penalty phase because of *Hurst* error in a 1981 triple homicide).

10. Ensuring uniformity and fairness in circumstances in Florida's application of the death penalty requires the retroactive application of *Hurst* and the resulting new Florida law. After all, "death is a different kind of punishment from any other that may be imposed in this country," and "[i]t is of vital importance . . . that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice . . . ." *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977).

**B. Mr. Jackson is entitled to retroactive application of both *Hurst* decisions under the fundamental fairness doctrine**

11. The *Hurst* decisions apply retroactively to Mr. Jackson under the equitable "fundamental fairness" retroactivity doctrine, which the Florida Supreme Court ("Court") has applied in cases such as *Mosley* and *James v. State*, 615 So. 2d 668 (Fla. 1993). 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. 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 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 fundamentally unfair to bar Mosley from seeking *Hurst* relief on retroactivity grounds, regardless of when his sentence became final, by virtue of the fact that Mosley had previously attempted to challenge Florida's unconstitutional capital sentencing scheme and was "rejected at every turn" under this Court's flawed pre-*Hurst* law. *Mosley*, 2016 WL 7406506, at *19.

12. Although *Mosley* was a post-*Ring* case, the Court's fundamental fairness approach applies to pre-*Ring* defendants, who may also obtain retroactive *Hurst* relief on fundamental fairness grounds. *See id.* at *19 n. 13. 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, as measured by this Court on a case-by-case basis.

13. In assessing fundamental fairness in the retroactivity context, 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.

14. As noted above, like Mosley, Mr. Jackson raised a *Ring*-like claims at his first opportunity during his pre-trial proceedings (see Exhibit A), direct appeal and later in his post-conviction motion, even though at the time of his direct appeal and motions for post-conviction relief, *Ring* and *Apprendi* did not exist. Mr. Jackson raised these *Ring*-like claims in his federal petition for habeas corpus as well, and then cited and briefed *Ring* and *Apprendi* in his federal habeas pleadings when they issued.

15. In this case, the interests of finality must yield to fundamental fairness. Mr. Jackson, who anticipated the defects in Florida's capital sentencing scheme that were later articulated in *Hurst v. Florida* and *Hurst v. State*, should not be denied the chance to now seek relief under the *Hurst* decisions. Applying the *Hurst* decisions retroactively to Mr. Jackson "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. Accordingly, this Court should hold that fundamental fairness requires retroactively applying the *Hurst* decisions in this case.

16. Ensuring uniformity and fairness in circumstances in Florida's application of the death penalty requires the full retroactive application of *Hurst* and the resulting new Florida law. After all, "death is a different kind of punishment from any other that may be imposed in this country," and "[i]t is of vital importance . . . that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice . . . ." *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977).

**C. Mr. Jackson has a federal right to retroactive application of the *Hurst* decisions**

17. Mr. Jackson is also entitled to the retroactive effect of *Hurst* under federal law. 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 v. Louisiana*, 136 S. Ct. 718, 731-32 (2016)

("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.").

18. That case arose when Montgomery launched state post-conviction proceedings seeking the benefit of *Miller v. Alabama* and the Louisiana Supreme Court (in contrast to the Florida Supreme Court in *Falcon*) determined that *Miller* was not retroactive under its state retroactivity doctrines. The United States Supreme Court held that determination made no difference to Montgomery's entitlement to the benefits of *Miller*. Because the rule of *Miller* was substantive, Louisiana was required to apply it on state post-conviction review.

19. In *Hurst v. State*, the Florida Supreme Court announced not one, but two substantive constitutional rules. First, the Florida Supreme Court held that the Sixth Amendment requires that a jury decide whether those aggravating factors that have been proven beyond a reasonable doubt are sufficient in themselves to warrant the death penalty and, if so, whether those factors outweigh the mitigating circumstances. Second, the Florida Supreme Court determined that the Eighth Amendment required that a jury a determination that the evidence presented at the penalty phase warrants a death sentence must be unanimous.

20. *Hurst v. State* held that the "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." Such findings are manifestly substantive.[12] See *Montgomery v. Louisiana*, 136 S.Ct. at 734 (holding that

[12] In contrast, in *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004), the Supreme Court (applying *Teague v. Lane*, 489 U.S. 288 (1989)) found that *Ring v. Arizona*, 489 U.S. 288 (1989)—the basis of *Hurst v. Florida*—was not retroactive on federal collateral review. The rationale of *Summerlin* was that the requirement that a jury rather than a judge make findings on such factual matters as to whether the defendant had previously been convicted of a crime of violence was procedural rather than substantive.

Support for this distinction comes from recent actions of the United States Supreme Court during the past year in cases from Alabama, whose capital system is being challenged on the grounds that the ultimate power to impose a death sentence rests with judges rather than juries. In *Johnson v. Alabama*—a case where the certiorari petition had not made a *Hurst* or *Ring* argument—the Supreme Court granted a *Hurst*-based petition for rehearing, 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 (U.S. May 2, 2016). The Supreme Court then followed this approach in three additional cases. *See Wimbley v. Alabama*, No. 15-7939, 2016 WL 410937 (U.S. May 31, 2016); *Kirksey v. Alabama*, No. 15-7923, 2016 WL 378578 (U.S. June 6, 2016); *Russell v. Alabama*, No. 15-9918, 2016 WL 3486659 (U.S. Oct. 3, 2016).

the decision whether a particular juvenile is or is not a person "whose crimes reflect the transient immaturity of youth" is substantive, not procedural).

21. Because the Sixth and Eighth Amendment rules announced in *Hurst v. State* are substantive, Mr. Jackson is, as *Montgomery v. Louisiana* held, entitled under the United States Constitution to benefit from them in this state post-conviction proceeding.

**D. The State cannot establish that the *Hurst* error in Mr. Jackson's sentencing was harmless beyond a reasonable doubt**

22. The procedure employed when Mr. Jackson received a death sentence at his sentencing deprived him of his Sixth Amendment rights under *Hurst v. Florida* and the resulting new Florida law requiring the jury's verdict authorizing a death sentence to be unanimous or else a life sentence is required, rather than a judge imposed sentence. In the wake of *Hurst v. Florida*, the Florida Supreme Court has held that each *juror* is free to vote for a life sentence even if the requisite facts have been found by the jury unanimously. *Hurst v. State*, 202 So. 3d 40, 58 (Fla. 2016). Individual jurors may decide to exercise "mercy" and vote for a life sentence and in so doing preclude the imposition of a death sentence. *Perry v. State*, 2016 WL 6036982 at*8.

23. The Sixth Amendment error under *Hurst v. Florida* cannot be proven by the State to be harmless beyond a reasonable doubt in Mr. Jackson's case. In *Hurst v. State*, the Florida Supreme Court stated that error under *Hurst v. Florida* "is harmless only if there is no reasonable possibility that the error contributed to the sentence." *Hurst* at 68. "[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). The State must show beyond a reasonable doubt that the jury's failure to unanimously find not only the existence of each aggravating factor, that the aggravating factors are sufficient, and that the

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Last month, in *Powell v. Delaware*, the Delaware Supreme Court held that its recent decision in *Rauf v. State*, 145 A.3d 430 (Del. 2016), which invalidated Delaware's death penalty scheme under *Hurst*, applied retroactively under that state's retroactivity doctrine. *See* --- A.3d ----, 2016 WL 7243546 (Del. Dec. 15, 2016). As the *Powell* Court noted, *Schriro* "only addressed the misallocation of fact-finding responsibility (judge versus jury) and not, like *Rauf* the applicable burden of proof." 2016 WL 7243546, at *3.

aggravating factors outweigh the mitigating circumstances had no effect on the death recommendations. The State must also show beyond a reasonable doubt that no properly instructed juror would have dispensed mercy to Mr. Jackson by voting for a life sentence. The State cannot establish beyond a reasonable doubt that the *Hurst v. Florida* error was harmless in Mr. Jackson's case. A harmless error analysis must be performed on a case-by-case basis, and there is no one-size fits all analysis; rather there must be a "detailed explanation based on the record" supporting a finding of harmless error. *See Clemons v. Mississippi*, 494 U.S. 738, 753 (1990). *Accord Sochor v. Florida*, 504 U.S. 527, 540 (1992). See *Johnson v. State*, ---So.3d---, 2016WL 7013856 (Fla. December 1, 2016)(*Hurst* error not harmless in a case with 11-1 votes for each of the three murder convictions); *Simmons v. State*, --- So.3d ---, 2016 WL 7406514(Fla. December 22, 2016)(*Hurst* error not harmless where the jury vote was 8-4, and where the jury completed a special verdict form indicating unanimous votes for three aggravating circumstances); and *Franklin v. State*, --- So.3d ---, 2016 WL 6901498 (Fla. November 23, 2016)(*Hurst* error not harmless in the murder of a prison guard where the defendant had previously been serving a life sentence and the jury vote was 9-3).

24. Per *Hurst*, "[t]he 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. 616, 619 (2016) (emphasis added). "The Supreme Court made clear, as it had in *Apprendi*, that the Sixth Amendment, in conjunction with the Due Process clause, 'requires that each element of a crime be proved to a jury beyond a reasonable doubt.' The Court reiterated, as it had in *Apprendi*, '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 [the] jury." *Hurst v. State,* 202 So. 3d 40, 51 (Fla. 2016). As the Florida Supreme Court pointed out in *Hurst v. State*, "[b]ecause 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." 202 So. 3d at 69. This Court cannot rely upon a legally meaningless recommendation by an advisory jury, *Hurst v. Florida*, 136 S.Ct. at 622 (Sixth Amendment cannot be satisfied by merely treating "an advisory recommendation by the jury as

the necessary factfinding"), as making findings the Sixth Amendment requires a jury to make. Furthermore, the recommendation for death was made by a bare majority vote, like in Mr. Hurst's case.

25. Finally, Mr. Jackson's jury was repeatedly told its recommendation was advisory only. In order to treat a jury's advisory recommendation, the jury must be correctly instructed as to its sentencing responsibility under *Caldwell v. Mississippi*, 472 U.S. 320 (1985). This means that post-*Hurst* the individual jurors must know that the each will bear the responsibility for a death sentence resulting in a defendant's execution since each juror possesses the power to require the imposition of a life sentence simply by voting against a death recommendation. See *Perry v. State*. Mr. Jackson's jurors were instructed that it was their "duty to advise the court as to what punishment should be imposed." ROA Vol. IV:704. Post-*Hurst*, the individual jurors must know that each will bear the responsibility for a death sentence resulting in a defendant's execution since each juror possesses the power to require the imposition of a life sentence simply by voting against a death recommendation. *See Perry v. State*. Indeed, because the jury's sense of responsibility was inaccurately diminished in *Caldwell*, the Supreme Court held that the jury's unanimous verdict imposing a death sentence in that case violated the Eighth Amendment and required the resulting death sentenced to be vacated. *Caldwell*, 472 U.S. at 341. Mr. Jackson's death sentence likewise violates the Eighth Amendment under *Caldwell*.

26. The error in Mr. Jackson's case warrants relief. The State simply cannot show the error to be harmless beyond a reasonable doubt that no properly instructed juror would have refused to vote in favor of a death recommendation. In fact, five jurors did so even without hearing Mr. Jackson's significant mental health mitigation. There was no testimony about Mr. Jackson's extensive substance abuse history, nor his history of mental illness including a previous diagnosis of schizophrenia and depression at the age of 19. Unless it is proven beyond a reasonable doubt that no juror would have voted for a life sentence and through such a vote mandated that Mr. Jackson receive a life sentence. Mr. Jackson's death sentence must be vacated and a resentencing ordered.

**CLAIM 2**

**Jackson's death sentence stands in violation of the Eighth Amendment under *Hurst v. State* and**

**should be vacated.**

This claim is evidenced by the following:

1. All factual allegations contained elsewhere within this motion and set forth in the Defendant's previous motion to vacate are incorporated herein by specific reference.

2. In *Hurst v. State*, 202 So.3d 40 (Fla. 2016), the Florida Supreme Court explained that, in accordance with Florida's capital sentencing scheme, the jury has a "right to recommend a sentence of life even if it finds aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating circumstances." *Hurst*, 202 So. 3d at 58, citing *Brooks v. State*, 762 So.2d 879, 902 (Fla. 2000). In other words, before a judge can impose the death penalty, the jury must be told it has the right to recommend a life sentence, even if the precedent factual findings are all made unanimously. This safeguard is to allow jurors in capital cases to "exercise reasoned judgment in his or her vote as to a recommended sentence." *Hurst*, 202 So. 3d at 58. Accord *Perry*, 2016 WL 6036982 at *7-8 ("It has long been true that a juror is not required to recommend the death sentence even if the jury concludes that the aggravating factors outweigh the mitigating circumstances"). See also *Hurst*, 202 So.3d at 58 ("Regardless of your findings . . . you are neither compelled nor required to recommend a sentence of death").

3. In *Hurst v. State*, the Florida Supreme Court ruled that on the basis of the Eighth Amendment and on the basis of the Florida Constitution, the evolving standards of decency now requires jury "unanimity in a recommendation of death in order for death to be considered and imposed." *Hurst v. State*, 202 So.3d 40, 61 (Fla. 2016). Quoting the United States Supreme Court, the Court in *Hurst* noted "that the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" *Id.* Then from a review of the capital sentencing laws throughout the United States, the Court in *Hurst v. State* found that a national consensus reflecting society's evolving standards of decency was apparent:

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

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

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

*Id.* at 63.

4. But of course, the jury must know and appreciate the significance of its verdict:

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

*Id.* at 63. Indeed, under *Caldwell v. Mississippi*, 472 U.S. 320 (1985), a unanimous jury verdict in favor of a death sentence violates the Eighth Amendment if the jury was not correctly instructed as to its sentencing responsibility. *Caldwell* held: "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* 328-29. Jurors must feel the weight of their sentencing responsibility; they must know that if the defendant is ultimately executed it will be because no juror exercised her power to preclude a death sentence.

5. As was explained in *Caldwell*, jurors must feel the weight of their sentencing responsibility if the defendant is ultimately executed after no juror exercised his or her power to preclude a death sentence. Indeed, because the jury's sense of responsibility was inaccurately diminished in *Caldwell*, the Supreme Court held that the jury's unanimous verdict imposing a death sentence in that case violated the Eighth Amendment and required the resulting death sentence to be vacated. *Caldwell*, 472 U.S. at 341 ("Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires."). Mr. Jackson's death sentence likewise violates the Eighth Amendment under *Caldwell*. The chances that at least one juror would not join a death recommendation if a resentencing were now conducted are likely given that proper *Caldwell* instructions would be required. The likelihood of one or more jurors voting for a life sentence increases when a jury is told a death sentence could only be authorized if the jury returned a unanimous death recommendation and

that each juror had the ability to preclude a death sentence simply by refusing to agree to a death recommendation. *Caldwell*, 472 U.S. at 330 ("In the capital sentencing context there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court."). In Mr. Jackson's case, the State cannot prove beyond a reasonable doubt that not a single juror would have voted for life given proper *Caldwell*-compliant instructions, especially since five jurors voted originally for life.

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

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

*Hurst v. Florida*, 136 S. Ct. at 622. An advisory verdict (premised upon inaccurate information regarding the binding nature of a life recommendation, the juror's inability to be merciful based upon sympathy, and what aggravating factors could be found and weighed in the sentencing calculus) cannot be used as a substitute for a unanimous verdict from a properly instructed jury. *California v. Ramos*, 463 U.S. 992, 1004 (1983) ("Because of the potential that the sentencer might have rested its decision in part on erroneous or inaccurate information that the defendant had no opportunity to explain or deny, the need for reliability in capital sentencing dictated that the death penalty be reversed.").

7. Under *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), the Florida Supreme Court's Eighth Amendment ruling in *Hurst v. State* must be applied retroactively. Under *Witt v. State* and the fundamental fairness doctrine, the Florida Supreme Court's decision in *Hurst v. State* must be applied retroactively. It is not constitutionally permissible to execute a person whose death sentence was imposed under an unconstitutional scheme[13].

[13] "[R]etroactivity is binary – either something is retroactive, has effect on the past, or it is not." *Asay*, 2016 WL 7406538, at *27 (Perry, J., dissenting). This legal reality is highlighted by the United States Supreme Court's decision in *Montgomery*, the Delaware Supreme Court's recent decision in *Powell v. Delaware*, 2016 WL 7243546 (Del. Dec.

8. In Mr. Jackson's case in particular, it would be unjust and fundamentally unfair for *Hurst* to not apply to him, especially in light of the fact that during the pendency of his trial, appeal and post-conviction proceedings and his federal habeas corpus proceedings, Mr. Jackson raised a *Ring*-like claim that his non-unanimous death sentence violated the Sixth, Eighth and Fourteenth Amendments. Prior to trial, Mr. Jackson challenged the constitutionality of Florida's death sentencing statute "because the jury recommendation need not be unanimous thereby depriving the defendant of the right to due process and to a unanimous verdict." ROA Vol. 1:63, see also Exhibit A. Jackson further argued that for the jury to recommend death, the jury should be instructed that it must be "convinced beyond every reasonable doubt that the aggravating circumstances outweigh any mitigating circumstances." *Id.* at p. 64, see also Exhibit A. Finally, Jackson argued in that same motion that the statute was unconstitutional because "it permits the trial judge when imposing the sentence to consider and find aggravating circumstances that the jury did not." *Id.* at p. 65, see also Exhibit A. At the time this pre-trial motion was filed, *Apprendi* and *Ring* had not yet been decided. Mr. Jackson was denied relief at that time. He has been denied relief ever since[14]. Together, these efforts constitute a pre-*Ring* effort to raise a *Ring*-like claim. To deny Mr. Jackson the application of *Hurst* now, would result in an arbitrary and capricious result that violates the Eighth Amendment. Furthermore, Mr. Jackson was sentenced to death on the barest of majorities, seven to five, which, pursuant to *Hurst* is both a violation of the Eighth Amendment and the Florida Constitution.

9. What constitutes cruel and unusual punishment under the Eighth Amendment turns upon considerations of the "evolving standards of decency that mark the progress of a maturing society." *Atkins v. Virginia*, 536 U.S. 304, 312 (2002)[15]. According to *Hurst v. State*, the evolving standards of decency are reflected in a national consensus that a defendant can only be given a death sentence when a penalty-phase

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15, 2016)(holding *Hurst* retroactive to all prisoners), and the Florida Supreme Court's decision in *Falcon*. If "partial retroactivity" ultimately occurs, Florida will again be the outlier, subjecting its citizens to disparate treatment under the law, in violation of the state and federal constitutions.

[14] Not only denied relief, but never afforded the opportunity to actually have a hearing on his claims in postconviction.

[15] "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).

jury has voted unanimously in favor of the imposition of 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 only a defendant who a jury unanimously concluded should be sentenced to death, can receive a death sentence[16]. As a result, those defendants who have had one or more jurors vote in favor of a life sentence are not eligible to receive a death sentence. This class of defendants, those who have had jurors formally vote in favor a life sentence, cannot be executed under the Eighth Amendment.

10. Mr. Jackson is within this protected class. At his sentencing, the jury recommended death by a simple majority of 7 to 5. Mr. Jackson has been raising *Ring*-like claims since his trial and beyond. Under the Eighth Amendment, his execution would thus constitute cruel and unusual punishment and would be manifestly unjust. His death sentence must accordingly be vacated.

11. Because jurors at Mr. Jackson's trial formally voted with a bare majority for the imposition of a death sentence, his sentence of death stands in violation of the Eighth Amendment and the Florida Constitution. *Hurst v. State*, 202 So.3d 40 (Fla. 2016). Failing to apply *Hurst* retroactively to Mr. Jackson, especially where he raised a *Ring*-like claim at his first opportunity, at the trial level, would be a violation of his due process and equal protection rights under the federal constitution and would result in a death sentence that is arbitrary and capricious in violation of the Eighth Amendment of the United States Constitution and the corresponding provision of the Florida Constitution.

12. Finally, Mr. Jackson's death sentence should be vacated because it was obtained in violation of

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

the Florida Constitution. On remand in *Hurst v. State*, the Florida Supreme Court found that the right to a jury trial found in the United States Constitution required that all factual findings be made by the jury unanimously under the Florida Constitution. In addition to Florida's jury trial right, the Florida Supreme Court found that the Eighth Amendment's evolving standards of decency and the bar on the arbitrary and capricious imposition of the death penalty require a unanimous jury fact-finding. *Hurst v. State*, 202 So. 3d at 59–60. Mr. Jackson should benefit, as he raised this argument prior to his trial.

13. The increase in penalty imposed on Mr. Jackson was without any jury at all. No unanimous jury found "all aggravating factors to be considered," "sufficient aggravating factors exist[ed] for the imposition of the death penalty," or that "the aggravating factors outweigh the mitigating circumstances." Lastly, there was no "unanimity in the final jury recommendation for death." This was a further violation of Florida Constitution.

14. Mr. Jackson had a number of other rights under the Florida Constitution that are at least coterminous with the United States Constitution, and possibly more extensive. This Court should also vacate Mr. Jackson's death sentences based on the Florida Constitution. Article I, Section 15(a) provides:

> (a) No person shall be tried for capital crime without presentment or indictment by a grand jury, or for other felony without such presentment or indictment or an information under oath filed by the prosecuting officer of the court, except persons on active duty in the militia when tried by courts martial.

Article I, Section 16(a) provides in relevant part:

> (a) In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation, and shall be furnished a copy of the charges . . .

15. Prior to *Apprendi*, *Ring*, and *Hurst*, the United States Supreme Court addressed a similar question in a federal prosecution and held that: "elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt." *Jones v. United States*, 526 U.S. 227, 232, 119 S. Ct. 1215, 1219 (1999). Because the State proceeded against Mr. Jackson under an unconstitutional system, the State never presented the aggravating factors, like robbery, as elements for the Grand Jury to consider in determining whether to indict Mr. Jackson. A proper indictment would require that the Grand Jury find

that there were sufficient aggravating factors to go forward with a capital prosecution. Mr. Jackson was denied his right to a proper Grand Jury Indictment. Additionally, because the State was proceeding under an unconstitutional death penalty scheme, Mr. Jackson was never formally informed of the full "nature and cause of the accusation" because the aggravating factors were not found by the Grand Jury and contained in the indictment.

16. Mr. Jackson's death sentence must be vacated and a life sentence substituted, or in the alternative he should receive a new penalty phase.

**CLAIM 3**

**This Court's denial of Mr. Jackson's prior postconviction claims must be reheard and determined under a constitutional framework.**

This claim is evidence by the following:

1. All other factual allegations contained in this motion and set forth in the Defendant's previous motions to vacate are incorporated herein by specific reference.

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

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

In *Swafford*, the Florida Supreme Court indicated the evidence to be considered in evaluating whether a different outcome was probable, included "evidence that [had been] previously excluded as procedurally barred or presented in another proceeding." *Swafford v. State*, 125 So. 3d at 775-76. The "standard focuses on the likely result that would occur during a new trial with all admissible evidence at the new trial being relevant to that analysis." *Id.* Put simply, the analysis requires envisioning how a new trial or resentencing would look with all of the evidence that would be available. Obviously, the law that would govern at a new trial or resentencing must be part of the analysis. Here, the revised capital sentencing statute would

apply at a resentencing and would require that the jury unanimously determine that sufficient aggravating factors existed to justify a death sentence and unanimously determine that the aggravators outweigh the mitigating factors. It would also require the jury to unanimously recommend a death sentence before the sentencing judge would be authorized to impose a death sentence. One single juror voting in favor of a life sentence would required the imposition of a life sentence.

3. This is new Florida law that did not exist when Mr. Jackson previously presented his original 3.850/3.851 *Strickland* claims. Accordingly, before the issuance of *Perry v. State* and *Hurst v. State* on October 14, 2016, Mr. Jackson could not present his claim as set forth herein because the new law that would govern any resentencing ordered in Mr. Jackson's case was previously unavailable. Accordingly, Mr. Jackson's previously presented claims must be reevaluated in light of the new Florida law. The Florida Supreme Court explained in *Hurst v. State* that "the requirement of unanimity in capital jury findings will help to ensure the heightened level of protection necessary for a defendant who stands to lose his life as a penalty." 202 So.3d 40, 59. *See State v. Steele*, 921 So. 2d 538, 549 (Fla. 2005), quoting *State v. Daniels*, 542 A.2d 306, 315 (Conn. 1988) ("[W]e perceive a special need for jury unanimity in capital sentencing. Under ordinary circumstances, the requirement of unanimity induces a jury to deliberate thoroughly and helps to assure the reliability of the ultimate verdict."). Thus, reliability of Florida death sentences is the touchstone of the new Florida law requiring a unanimous jury to make the factual determinations necessary for the imposition of a death sentence and requiring the jury to unanimously return a death recommendation before a death sentence is authorized as a sentencing option. Implicit in the justification for the new Florida law is an acknowledgment that death sentences imposed under the old capital sentencing scheme were (or are) less reliable.

4. Before executions are carried out in cases in which the reliability of a death sentence is subpar, a re-evaluation of such a death sentence in light of the changes made by Chapter 2016-13, *Hurst v. State*, and *Perry v. State* is warranted. A previous rejection of a death sentenced defendant's *Strickland* claims, *Brady* claims, and/or newly discovered evidence claims should be re-evaluated in light of the new requirement that juries must unanimously make the necessary findings of fact and return a unanimous

death recommendation before a death sentence is even a sentencing option. Further, the *Strickland* prejudice analysis requires a determination of whether confidence in the reliability of the outcome - the imposition of a death sentence - is undermined by the evidence the jury did not hear due to the *Strickland* violations. The new Florida law should be part of the evaluation of whether confidence in the reliability of the outcome is undermined, particularly since the touchstone of the new Florida law is the likely enhancement of the reliability of any resulting death sentence.

5. The Florida Supreme Court explained in *Hurst v. State* that "the requirement of unanimity in capital jury findings will help to ensure the heightened level of protection necessary for a defendant who stands to lose his life as a penalty." *Hurst v. State*, 202 So. 3d 40, 59 (Fla. 2016). *See State v. Steele*, 921 So. 2d 538, 549 (Fla. 2005), quoting *State v. Daniels*, 542 A.2d 306, 315 (Conn. 1988) ("[W]e perceive a special need for jury unanimity in capital sentencing. Under ordinary circumstances, the requirement of unanimity induces a jury to deliberate thoroughly and helps to assure the reliability of the ultimate verdict."). The Florida Supreme Court in *Hurst v. State* also held:

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

*Hurst v. State*, 202 So. 3d 40, 60 (Fla. 2016).

6. This is particularly important in Mr. Jackson's case, since his original 3.850 motion was summarily denied without any hearing at all. None of his claims were ever substantively addressed or evaluated by a court of law in Florida. This Court must re-visit and re-evaluate the rejection of Mr. Jackson's previously presented *Strickland, Brady*, DNA motion and newly discovered evidence claims in light of the new Florida law which would govern at a resentencing. When such a re-evaluation is conducted, it is apparent that the outcome would probably be different and that Mr. Jackson would likely receive a binding life recommendation from the jury.

7. Mr. Jackson's death sentence must be vacated and a life sentence substituted, or in the alternative he should receive a new penalty phase.

## CONCLUSION

Based on the foregoing, Mr. Jackson prays for the following relief, based on his prima facie allegations showing violation of his constitutional rights: 1) a "fair opportunity" to demonstrate that his death sentence stands in violation of the Sixth and Eighth Amendments and *Hurst v. Florida, Perry v. State* and *Hurst v. State*; 2) an opportunity for further evidentiary development to the extent necessary; and, 3) on the basis of the reasons presented herein, Rule 3.851 relief vacating his death sentence of death and granting a new penalty phase, or, in the alternative, the imposition of a life sentence.

### CERTIFICATION PURSUANT TO FLA. R. CRIM. P. 3.851(e)

Pursuant to Fla. R. Crim P. 3.851(e)(2)(A) and (e)(1)(F), undersigned counsel hereby certifies that discussions with Mr. Jackson of this motion and its contents has occurred over a period time as relevant new Florida has unfolded during the past year. Counsel has endeavored to fully discuss and explain the contents of this motion with Mr. Jackson, and that counsel to the best of their ability has complied with Rule 4-1.4 of the Rules of Professional Conduct, and that this motion is filed in good faith.

Respectfully submitted,


/s/ Julissa R. Fontán
Julissa R. Fontán
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/s/ Maria E. DeLiberato
Maria E. DeLiberato
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/s/Chelsea Shirley
Chelsea Shirley
Florida Bar No. 112901


### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Successive Motion to Vacate Death Sentence has been filed with Clerk for the 4th Judicial Circuit, Duval County served upon Hon. Linda F. McCallum, Circuit Court Judge, JennetteM@coj.net, Assistant Attorney General Charmaine Millsaps, Charmaine.millsaps@myfloridalegal.com, cappapp@myfloridalegal.com and Assistant State Attorney Meredith Charbula, mcharbula@coj.net on this 10th day of January, 2017.


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/s/ Maria E. DeLiberato
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Counsel for Mr. Jackson

# Exhibit A

State Attorney Number: 85-56357

NCA: 5-5-86

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

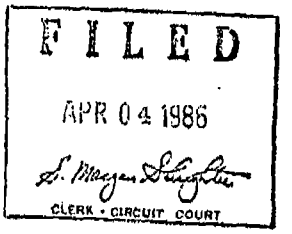
CASE NO.: 85-12620 CF

DIVISION: Q

STATE OF FLORIDA

VS.

ETHERIA JACKSON




MOTION TO VACATE DEATH PENALTY

Defendant, ETHERIA JACKSON, by and through the undersigned attorney, the Public Defender for the Fourth Judicial Circuit of Florida, respectfully moves this Honorable Court to vacate the death penalty as a possible sentence in this cause, or, in the alternative, to declare Section 921.141, Florida Statutes (1983), unconstitutional as it applies to Defendant in this cause. Defendant asserts the following grounds in support of this motion:

1. Section 921.141, Florida Statutes (1983), is unconstitutional on its face because the death penalty per se is cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 17 of the Florida Constitution. See Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960 (1976), dissenting opinions of Justices Brennan and Marshall at 2971.

2. Section 921.141, Florida Statutes (1983), is unconstitutional on its face as it allows for excessive and disproportionate penalties to be imposed upon persons who have not deliberately taken the life of another, in violation of the Eighth and Fourteenth Amendments to the United States Constitution. See Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, concurring opinion of Justice White at 2981, (1978); Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, at 2932 (1976); Coker v. Georgia, 438 U.S. 584, 97 S.Ct. 2861 (1977); Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

3. The Florida death penalty statute is unconstitutional on its face because it creates a presumption in favor of death for those convicted under the felony-murder rule. Under Section 921.141(5)(d), Florida Statutes (1983), the perpetration of a homicide during the commission of a designed felony constitutes an aggravating circumstance. When one or more statutory aggravating circumstances are proved beyond a reasonable doubt, a presumption arises that death is the appropriate penalty by operation of a law. State v. Dixon, 283 So.2d 1, at 9, (Fla. 1973). Therefore, anyone convicted of first degree murder under the felony-murder doctrine is presumptively destined for death, regardless of his limited participation in the felony and lack of participation in the homicide. There is no such aggravating circumstance applicable in the case of every premeditated murder, since Section 921.141(5)(i), Florida Statutes (1983), utilizes qualifying language to make only certain premeditated acts an aggravating circumstance. The statute, therefore, makes possible a disproportionately higher frequency of death sentences for those convicted of felony murder than those convicted of premeditated murder. There is no rational basis for this disproportionately in sentencing, since in felony-murder the liability can be for aiding and abetting a felony that resulted in death, while in a premeditated murder the defendant can be the actual perpetrator who intended death to result. The Florida death penalty statute therefore violates the defendant's right to equal protection and due process of law, and the right to be free from an arbitrary and capricious sentencing process, as guaranteed by Article I, Sections 2, 9, 16, and 17 of the Florida Constitution and the Fifth, Eighth and Fourteenth Amendments to the United States Constitution. Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

4. The presumption in favor of death created by the establishment of only one single aggravating circumstance has the

result of imposing upon the defendant the burden of establishing why he should live. This impermissible shift in the burden of proof and persuasion contravenes every fundamental principle underlying our system of criminal justice, in violation of Article I, Sections 9, 16, and 17, of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. See Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881 (1974); Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450 (1979).

5. Liability for first degree murder in Florida arises from evidence of a killing during the commission of an enumerated felony, or from evidence of a killing from a premeditated design. Section 921.141(5)(d), Florida Statutes (1983), permits the fact that the murder occurred during the commission of the same enumerated felonies to be used as an aggravating circumstance in the penalty phase of the trial. This practice has the effect of twice penalizing the defendant for the same aspect of the crime, and at the penalty phase shifts the burden of proof to the defendant because the existence of an aggravating circumstance is automatic upon conviction. To punish a defendant in the penalty phase for the same element of the crime which was necessary to prove a conviction in the guilt phase is to violate the double jeopardy and collateral estoppel concepts of Article I, Section 9 of the Florida Constitution and the Sixth and Fourteenth Amendments to the United States Constitution. See State v. Hegstrom, 401 So.2d 1343 (Fla. 1981); Provence v. State, 337 So.2d 783 (Fla. 1976); State v. Cherry, 298 N.C. 86, 257 S.E. 2d 551 (1979).

6. Section 921.141, Florida Statutes (1983), is unconstitutional on its face because a jury recommendation of life imprisonment need not be followed by the trial court judge. The standard to be applied by the judge in overruling a life recommendation is that "facts suggesting a sentence of death" are

"so clear and convincing that no reasonable person could differ." Tedder v. State, 332 So.2d 908, at 910 (Fla. 1975). To sustain a death sentence in the face of a jury life recommendation necessarily requires a determination that the jury's recommendation is unreasonable. This standard is impossible to implement. As the Fifth Circuit Court of Appeals has said, "reasonable persons can differ over the fate of every criminal defendant in every death penalty case." Spinkellink v. Wainwright, 578 F.2d 582, at 605 (5th Cir. 1978). Because reasonable persons can and virtually always do disagree over whether a particular defendant should be sentenced to death, the Tedder standard is not susceptible of rational application, and fosters the arbitrary, unreliable, and capricious imposition of capital punishment, in violation of Article I, Section 9, 16, and 17 of the Florida Constitution and the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

7. Section 921.141, Florida Statutes (1983), is unconstitutional because it permits the trial judge to overrule a jury life recommendation, contrary to the clear expression of the conscience of the community. "Juries are the conscience of our communities." McCaskill v. State, 344 So.2d 1276, at 1280 (Fla. 1977). In determining whether punishment comports with the Eighth Amendment's ban against cruel and unusual punishments, an assessment of contemporary values or "evolving standards of decency" is required. Trop v. Dulles, 356 U.S. 86, 78 S.Ct. 590 (1958); Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909 (1976). A jury life recommendation reflects a determination that, in an individual case, imposition of the death penalty does not accord with contemporary values. To discard such a determination is to ignore the vital source from which the "cruel and unusual punishment" clause derives its meaning, in violation of Article I, Section 17 of the Florida Constitution and the Eighth and Fourteenth Amendments to the United States Constitution.

8. Since Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726 (1972), a majority of American jurisdictions have enacted capital punishment statutes that permit jury participation in sentencing. A majority of these jurisdictions have made a jury life verdict binding. A majority of these states having death penalty statutes make a life sentence automatic if even one juror refuses to vote for death. However, Section 921.141, Florida Statutes (1983), only requires a majority recommendation from the jury and permits the judge to overrule it. The infliction of the death penalty contrary to a jury's verdict of life is repugnant to the representative scheme of checks and balances basis to our government system. As Justice Powell has observed:

> One of the criticisms leveled against our system is the absence of a remedy for an unjustified acquittal by a jury...The founding fathers, in light of history, decided that the balance here should be struck in favor of the individual. To reverse this today would negate the key role of the jury as a popular check on government. It might even unbalance our entire system of constitutional checks and balances. Powell, "Jury Trial of Crimes," 23 Wash. & Lee L. Rev. 1, at 7-8, (1966).

The overruling of a jury life verdict therefore violates the concept of limited and representative government as embodied in the Ninth and Fourteenth Amendments to the United States Constitution.

9. Section 921.141, Florida Statutes (1983), is unconstitutional on its face because the jury recommendation need not be unanimous, thereby depriving the defendant of the rights to due process and to a unanimous jury verdict, in violation of Article I, Sections 9, 16, and 22 of the Florida Constitution, and the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

10. Section 921.141, Florida Statutes 91983), is unconstitutional in its face because the State is not required to specifically allege in any pleading the aggravating circumstances it intends to prove in order to justify the imposition of the

death penalty, nor is the State required to give the defense any notice of what aggravating circumstances it intends to rely upon to justify the death penalty. To force defense counsel to proceed into the penalty phase of the trial without formal notice of what specific aggravating circumstances the State intends to rely upon is to deny the defendant due process, the effective assistance of counsel and serves to foster unreliable and disproportionate imposition of the death penalty, in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 and 17 of the Florida Supreme Court that uphold the constitutionality of the application of the death penalty in this state. Sullivan v. State, 441 So.2d 609 (Fla. 1983); Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981); State v. Dixon, 283 So.2d 1 (Fla.1973).

11. The death penalty in Florida is unconstitutional because neither the Florida Statutes, the Florida Rules of Criminal Procedure nor the Florida Standard Jury Instructions requires the Court to instruct the jury that, in order to return a recommendation of death, the jury must be convinced beyond every reasonable doubt that the aggravating circumstances outweigh any mitigating circumstances. The failure to require such an instruction serves to foster unreliable and arbitrary imposition of the death penalty, in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 and 17 of the Florida Constitution. Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983).

12. The death penalty in Florida is unconstitutional because upon conviction of the defendant the jury is not required to list the specific aggravating circumstances they have found beyond a reasonable doubt when they recommend the death penalty. in that situation the trial judge is deprived of the opportunity to know what aggravating circumstances the jury found and what aggravating circumstances the jury did not find. This permits the

trial judge when imposing sentence to consider and find aggravating circumstances that the jury did not. This results in disproportionate and unreliable imposition of the death penalty, in violation of Article I, Sections 9 and 17 of the Florida Constitution, Section 921.141, Florida Statutes (1983), and holdings of the Florida Supreme Court that uphold the constitutionality of the application of the death penalty in this state. Sullivan v. State, 441 So.2d 609 (Fla. 1983); Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981); State v. Dixon, 283 So.2d 1 (Fla 1973). It also prevents the Florida Supreme Court from conducting a meaningful review of a particular case relative to other cases in which the death penalty has been imposed. See Dixon and Sullivan, supra.

13. Section 921.141, Florida Statutes (1983), is unconstitutional because it permits the trial judge to consider aggravating circumstances in imposing the death sentence that the advisory jury may not have considered, or that the jury may have decided did not exist. Furthermore, Section 921.141, Florida Statutes (1983), permits the trial judge to find that aggravating circumstances outweigh any mitigating circumstances despite a jury recommendation of life imprisonment. A jury recommendation of life instead of death necessarily involves a finding that (a) no aggravating circumstances exist, or (b) the aggravating circumstances do not outweigh any mitigating circumstances. The collateral estoppel concept of the prohibition against double jeopardy prevents the trial judge from reconsidering the issues of whether certain aggravating circumstances exist, or whether the aggravating circumstances outweigh any mitigating circumstances. Since Section 921.141, Florida Statutes (1983), permits such factual findings to be twice litigated and twice decided, it violates the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 9 of the Florida Constitution.

14. The enumerated aggravating and mitigating circumstances are unconstitutionally vague and overbroad, in violation of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 17 of the Florida Constitution.

15. Section 921.141, Florida Statutes (1983), is unconstitutional because the qualifying language describing the statutory mitigating circumstances places an unnecessary limitation on the reception and finding of such evidence by the jury and court. It thus violates the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 17 of the Florida Constitution. Examples of such language include "extreme mental or emotional disturbance", Section 921.141(6)(b), Florida Statutes (1983) (emphasis supplied); "substantially impaired", Section 921.141(6)(f), Florida Statutes (1983) (emphasis supplied); and "extreme duress", Section 921.141(6)(e), Florida Statutes (1983) (emphasis supplied). See Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954 (1978); State v. Stokes, 304 S.E.2d 184 (N.C. 1983).

WHEREFORE, Defendant prays this Honorable Court to grant this motion and vacate the death penalty as a possible sentence in this cause.

Respectfully submitted,

LOUIS O. FROST, JR.
PUBLIC DEFENDER

BY: Alan Chipperfield
Alan Chipperfield
Assistant Public Defender

I HEREBY CERTIFY that a copy of the above and foregoing Motion to Vacate Death Penalty has been furnished to the Office of the State Attorney, by hand, this 4th day of April, 1986.

/gew

Alan Chyzinfield

6175 1145

OFFICIAL RECORDS 1

☐ PROBATION VIOLATOR
*(Check if Applicable)*

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

DIVISION O

STATE OF FLORIDA

CASE NUMBER 85-12620-CF

—vs—

ETHERIA VERDEL JACKSON
Defendant

FILED
AUG - 8 1986
S. Morgan Slaughter
CLERK - CIRCUIT COURT

# JUDGMENT

The Defendant, ETHERIA VERDEL JACKSON, being personally before this Court represented by PUB. DEF. ALAN CHIPPERFIELD, his attorney of record, and having:

*(Check Applicable Provision)*
- ☒ Been tried and found guilty of the following crime(s)
- ☐ Entered a plea of guilty to the following crime(s)
- ☐ Entered a plea of nolo contendere to the following crime(s)

| COUNT | CRIME | OFFENSE STATUTE NUMBER(S) | DEGREE OF CRIME | CASE NUMBER |
|---|---|---|---|---|
| | MURDER IN THE FIRST DEGREE | 782.04 | CAPITAL | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |

and no cause having been shown why the Defendant should not be adjudicated guilty, IT IS ORDERED THAT the Defendant is hereby ADJUDICATED GUILTY of the crime(s).

The Defendant is hereby ordered to pay the sum of ten dollars ($10.00) pursuant to F.S. 960.20 (Crimes Compensation Trust Fund). The Defendant is further ordered to pay the sum of two dollars ($2.00) as a court cost pursuant to F.S. 943.35(4).

☐ The Defendant is ordered to pay an additional sum of two dollars ($2.00) pursuant to F.S. 943.25(8).
(This provision is optional; not applicable unless checked).

*(Check if Applicable)* ☐ The Defendant is further ordered to pay a fine in the sum of $ _____ pursuant to F.S. 775.0835.
(This provision refers to the optional fine for the Crimes Compensation Trust Fund, and is not applicable unless checked and completed. Fines imposed as part of a sentence pursuant to F.S. 775.083 are to be recorded on the Sentence page(s)).

☐ The Court hereby imposes additional court costs in the sum of $ _____.

S. MORGAN SLAUGHTER
Clerk of the Circuit Court

Defendant ~~ETHERIA VERDEL JACKSON~~

Case Number 85-12620-CF

Imposition of Sentence Stayed and Withheld (Check if Applicable) ☐ The Court hereby stays and withholds the imposition of sentence as to count(s) _____ and places the Defendant on probation for a period of _____ under the supervision of the Department of Corrections (conditions of probation set forth in separate order.)

Sentence Deferred Until Later Date *(Check if Applicable)* ☐ The Court hereby defers imposition of sentence until _____ (date).

The Defendant in Open Court was advised of his right to appeal from this Judgment by filing notice of appeal with the Clerk of Court within thirty days following the date sentence is imposed or probation is ordered pursuant to this adjudication. The Defendant was also advised of his right to the assistance of counsel in taking said appeal at the expense of the State upon showing of indigency.

FINGERPRINTS OF DEFENDANT

| 1. R. Thumb | 2. R. Index | 3. R. Middle | 4. R. Ring | 5. R. Little |
|---|---|---|---|---|
|  |  |  |  |  |
| **6. L. Thumb** | **7. L. Index** | **8. L. Middle** | **9. L. Ring** | **10. L. Little** |
|  |  |  |  |  |

Fingerprints taken by:

William R. Morris 9571

Name and Title

DONE AND ORDERED in Open Court at Jacksonville, Duval County, Florida, this 8th day of AUGUST A.D., 1988. I HEREBY CERTIFY that the above and foregoing fingerprints are the fingerprints of the Defendant, ETHERIA VERDEL JACKSON and that they were placed thereon by said Defendant in my presence in Open Court this date.

L O Hadlock

JUDGE

S. MORGAN SLAUGHTER
Clerk of the Circuit Court

Defendant ETHERIA VERDEL JACKSON

Case Number 85-12620-CF

# SENTENCE

(As to Count _____ )

The Defendant, being personally before this Court, accompanied by his attorney, P.D.ALAN CHIPPERFIELD, and having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he should not be sentenced as provided by law, and no cause being shown,

*(Check either provision if applicable*

☐ and the Court having on _____ (date) deferred imposition of until this date.

☐ and the Court having placed the Defendant on probation and having subsequently revoked the Defendant's probation by separate order entered herein,

☐ The Defendant pay a fine of $ _____, plus $ _____ as the 5% surcharge required by F.S. 960.25.
☒ The Defendant is hereby committed to the custody of the Department of Corrections
☐ The Defendant is hereby committed to the custody of the Sheriff of Duval County, Florida

To be imprisoned (check one; unmarked sections are inapplicable)

☐ For a term of Natural Life.
☒ For a term of DEATH BY ELECTROCUTION.
☐ For an indeterminate period of 6 months to _____ years.

*If "split" sentence complete either of these two paragraphs*

☐ Followed by a period of _____ on probation under the supervision of the Department of Corrections according to the terms and conditions of probation set in a separate order entered herein.

☐ However, after serving a period of _____ imprisonment in _____ the balance of such sentence shall be suspended and the Defendant shall be placed on probation for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of probation set forth in a separate order entered herein.

## SPECIAL PROVISIONS

By appropriate notation, the following provisions apply to the sentence imposed in this section:

*Firearm — 3 year mandatory minimum*

☐ It is further ordered that the 3 year minimum provisions of F.S. 775.087(2) are hereby imposed for the sentence specified in this count, as the Defendant possessed a firearm.

*Drug Trafficking — mandatory minimum*

☐ It is further ordered that the _____ year minimum provisions of F.S. 893.135 (1)( )( ) are hereby imposed for the sentence specified in this count.

*Rentention of Jurisdiction*

☐ The Court pursuant to F.S. 947.16(3) retains jurisdiction over the defendant for review of any Parole Commission release order for the period of _____. The requisite findings by the court are set forth in a separate order or stated on the record in open court.

*Habitual Offender*

☐ The Defendant is adjudged a habitual offender and has been sentenced to an extended term in this sentence in accordance with the provisions of F.S. 775.084(4)(a). The requisite findings by the court are set forth in a separate order or stated on the record in open court.

*Jail Credit*

☒ It is further ordered that the Defendant shall be allowed a total of 242 credit for such time as he has been incarcerated prior to imposition of this sentence. Such credit reflects the following periods of incareration (optional):

*Consecutive/Concurrent*

It is further ordered that the sentence imposed for this count shall run ☐ consecutive to ☐ concurrent with (check one) the sentence set forth in count _____ above.

S. MORGAN SLAUGHTER
Clerk of the Circuit Court

OFFICIAL RECORDS

Defendant ETHERIA VERDEL JACKSON

Case Number 85-12620-CF

*Consecutive/Concurrent (As to other convictions)* It is further ordered that the composite term of all sentences imposed for the counts specified in this order shall run ☐ consecutive to ☐ concurrent with (check one) the following:

☐ An active sentence being served.

☐ Specific sentences: _____

In the event the above sentence is to the Department of Corrections, the Sheriff of Duval County, Florida is hereby ordered and directed to deliver the Defendant to the Department of Corrections together with a copy of this Judgment and Sentence.

The Defendant in Open Court was advised of his right to appeal from this Sentence by filing notice of appeal within thirty days from this date with the Clerk of this Court, and the Defendant's right to the assistance of counsel in taking said appeal at the expense of the State upon showing of indigency.

In imposing the above sentence, the Court further recommends _____

DONE AND ORDERED in Open Court at DUVAL County, Florida, this 8th day of AUGUST A.D., 1986.

L O Valdes
JUDGE

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OFFICIAL RECORDS

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO: 85-12620-CF

DIVISION: Q

FILED
AUG 8 1986
CLERK CIRCUIT COURT

STATE OF FLORIDA

VS

ETHERIA VERDEL JACKSON

FINDINGS OF FACT REQUIRING IMPOSITION OF THE DEATH PENALTY

The Court, upon consideration of the record of trial and the sentencing proceedings previously held herein, finds that the following aggravating circumstances, as enumerated in F.S.921.141 (5), exist:

1. This murder was committed while the Defendant was under sentence of imprisonment. (The Defendant was on parole at the time of the killing. A person on parole is still under sentence ).

2. The Defendant was previously convicted of a felony involving the use or threat of violence to some person, (armed robbery).

3. The murder was committed for financial gain. The Defendant killed his victim in the process of stealing several thousand dollars from him.

4. The murder was especially wicked, evil, atrocious, or cruel. The victim, who was an elderly man, begged the Defendant to spare his life. He freely gave up his money to the Defendant, offered to get him more money or furniture from his brother's furniture store if he would just not kill him. The victim told the Defendant he had emphesema and could not breathe when lying on his stomach. Nonetheless, the Defendant tied victim's hands behind his back and forced him to lie on his stomach in a position which caused him to gasp and wheeze, trying to get enough air in his lungs to

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737

survive. All of his efforts were for naught, however as the Defendant, after taking all of his victim's money, then began to brutally beat him, using a plaster cast on his arm and his fist as weapons. He then choked him until he thought he was strangled. When the victim began to writhe in pain and recover consciousness, the Defendant got a kitchen knife and knelt over Mr. Moody, plunging and twisting the knife again and again into his chest, until at last Mr. Moody's agonies were over, because Etheria Jackson had achieved his goal, and Mr. Moody was dead.

5. The murder was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification. Etheria Jackson's inhuman and autonomic drive to take Mr. Moody's life was so unrelenting that, when the knife broke under his onslaught, he obtained a second kitchen knife and renewed his butchery.

The Defendant's cold, ruthless, and calculating attitude is best evidenced by his behavior immediately after the killing. Immediately after having disposed of Mr. Moody's body, he went in search of drugs. He celebrated his success by getting high, and he bragged to his friends "I just hit me a sweet lick."

The Court further finds that no statutory or non-statutory mitigating circumstances exist.

DONE AND ORDERED in open court, Jacksonville, Duval County, Florida this 8th day of August, 1986.

L O Hadlock

CIRCUIT JUDGE

6 of 7

738

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OFFICIAL RECORDS

IN THE CIRCUIT COURT,
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA.

CASE NO. 85-12620 CF A

DIV. Q

FILED
AUG 8 1986
S. Morgan Slaughter
CLERK - CIRCUIT COURT

STATE OF FLORIDA,

vs

ETHERIA VERDEL JACKSON

C E R T I F I C A T E

This is to certify that the above named defendant

[ ] Has paid all fines and court costs imposed by the Court.

[ ] Has been declared indigent - Community Service.

[X] The Court has waived court costs and community service.

DATED this 8TH day of AUGUST, 1986.

S. MORGAN SLAUGHTER, CLERK

By M. Hager
Deputy Clerk

747

STATE OF FLORIDA
UNIFORM COMMITMENT TO CUSTODY
DEPARTMENT OF CORRECTIONS
FOURTH JUDICIAL CIRCUIT COURT
DUVAL COUNTY

SPRING Term, 19 86

Conviction for MURDER IN THE FIRST DEGREE
(Offense)

Date of conviction AUGUST 8, 1986

Date of sentence imposed AUGUST 8, 1986

Term of sentence DEATH BY ELECTROCUTION, WITH CREDIT FOR 242 DAYS JAIL TIME

STATE OF FLORIDA,

Plaintiff,

vs.

CASE NO. 85-12620 CF DIV Q

ETHERIA VERDELL JACKSON,

OFFENDER NO. 85-35224-7

Defender.

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA, TO THE SHERIFF OF SAID COUNTY AND THE DEPARTMENT OF CORRECTIONS OF SAID STATE, GREETING:

The above named defendant having been duly charged with the above named offense in the above styled Court, and he having been duly convicted and adjudged guilty of and sentenced for said offense by said Court, as appears from the attached certified copies of

INDICTMENT
(Indictment) (Information)

judgment and sentence, which are hereby made parts hereof;

Now, therefore, this is to command you, the said Sheriff, to take and keep and, within a reasonable time after receiving this commitment, safely deliver the said defendant into the custody of the Department of Corrections of the State of Florida; and this is to command you, the said Department of Corrections, by and through your director, superintendents, wardens, and other officials, to keep and safely imprison the said defendant for the term of said sentence in the institution in the state correctional system to which you, the said Department of Corrections, may cause the said defendant to be conveyed or thereafter transferred. And these presents shall be your authority for the same. Herein fail not.

WITNESS the Honorable L. PAGE HADDOCK

Judge of said Court, as also S. MORGAN SLAUGHTER,

Clerk, and the Seal thereof, this the 8TH day of AUGUST, 19 86.

S. MORGAN SLAUGHTER, CLERK

BY: M. Hager
Deputy Clerk

(to be used in committing defendants under indeterminate sentences as well as under sentences of imprisonment for definite periods.)

740

PS 1185

**IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA**

**CASE NO. 85-12620-CF**

**STATE OF FLORIDA,**

**Plaintiff,**

**v.**

**ETHERIA JACKSON,**

**Defendant.**

_____/

**NOTICE OF APPEARANCE**

Please take notice that Julissa Fontán, Maria DeLiberato and Chelsea Shirley, hereby enter their appearance as co-counsel in the above-captioned action. The current status of counsel in the instant case should reflect the following:

James V. Viggiano
Capital Collateral Regional Counsel - Middle

Julissa Fontán
Assistant CCRC

Maria E. DeLiberato
Assistant CCRC

Chelsea Rae Shirley
Assistant CCRC

Counsel currently represent Mr. Jackson in his postconviction action for first degree murder in Case No. 1985-CF-12620.

## CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing Notice of Appearance has been electronically filed with the Clerk of the Circuit Court; the Honorable Linda F. McCallum, Circuit Court Judge (JennetteM@coj.net); Assistant Attorney General Charmaine Millsaps (Charmaine.millsaps@myfloridalegal.com and cappapp@myfloridalegal.com) and Assistant State Attorney Meredith Charbula (mcharbula@coj.net) on this 10th day of January, 2017.

Respectfully submitted,

**/s/ Julissa R. Fontán**
Julissa R. Fontán
Florida Bar. No. 0032744
Assistant Capital Collateral Counsel
Fontan@ccmr.state.fl.us

**/s/ Maria E. DeLiberato**
Maria E. DeLiberato
Florida Bar No. 664251
Assistant CCRC - Middle Region
deliberato@ccmr.state.fl.us

**/s/ Chelsea R. Shirley**
Chelsea R. Shirley
Florida Bar. No. 112901
Assistant CCRC - Middle Region
Shirley@ccmr.state.fl.us
12973 N. Telecom Parkway
Temple Terrace, FL 33637
813-558-1600

Counsel for Mr. Jackson

**IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA**

**CASE NO. 85-12620-CF**

**STATE OF FLORIDA,**

**Plaintiff,**

**v.**

**ETHERIA JACKSON,**

**Defendant.**

_____/

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Counsel currently represent Mr. Jackson in his postconviction action for first degree murder in Case No. 1985-CF-12620.

## CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing Notice of Appearance has been electronically filed with the Clerk of the Circuit Court; the Honorable Linda F. McCallum, Circuit Court Judge (JennetteM@coj.net); Assistant Attorney General Charmaine Millsaps (Charmaine.millsaps@myfloridalegal.com and cappapp@myfloridalegal.com) and Assistant State Attorney Meredith Charbula (mcharbula@coj.net) on this 10th day of January, 2017.

Respectfully submitted,

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Counsel for Mr. Jackson

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO.: 16-1985-CF-12620-AXXX

DIVISION: CR-C

STATE OF FLORIDA

v.

ETHERIA VERDELL JACKSON,
Defendant.
_____/

**ORDER DENYING DEFENDANT'S SUCCESSIVE POSTCONVICTION MOTION TO VACATE SENTENCE OF DEATH**

This cause comes before this Court on Defendant's "Successive Motion to Vacate Death Sentence," filed through counsel on January 10, 2017, pursuant to Florida Rule of Criminal Procedure 3.851.

A jury convicted Defendant of first-degree murder and, by a vote of 7 to 5, voted for the death sentence, which the Court imposed. Jackson v. State, 530 So. 2d 269, 271 (Fla. 1988). The Florida Supreme Court affirmed the judgment and sentence of death in a Mandate issued on September 1, 1988. Id. On September 5, 1990, Defendant filed a Florida Rule of Criminal Procedure 3.850 motion, which the Court denied on the merits. Jackson v. Dugger, 633 So. 2d 1051, 1053 (Fla. 1993). In a Mandate issued on January 13, 1994, the Florida Supreme Court affirmed the Court's denial of Defendant's rule 3.850 motion. Id.

A rule 3.851 motion must be filed within one year of the conviction and sentence of death becoming final. Fla. R. Crim. P. 3.851(d)(1). A rule 3.851 motion may be considered beyond the one-year time-bar, however, if it alleges that "the fundamental constitutional right asserted

was not established within the [one-year] period provided for in subsection (d)(1) and has been held to apply retroactively." Fla. R. Crim. P. 3.851(d)(2)(B).

Even if found to be timely, a successive rule 3.851 motion may be denied without an evidentiary hearing if the record conclusively shows the defendant is not entitled to relief. Gaskin v. State, SC15-1884, 2017 WL 224772, at *1 (Fla. Jan. 19, 2017) (citing Reed v. State, 116 So. 3d 260, 264 (Fla. 2013)). "Under rule 3.851, 'postconviction claims may be summarily denied when they are legally insufficient, should have been brought on direct appeal, or are positively refuted by the record.'" Carroll v. State, 114 So. 3d 883, 885-86 (Fla. 2013) (quoting Marek v. State, 8 So. 3d 1123, 1127 (Fla. 2009)).

Defendant's convictions and sentence of death became final on January 23, 1989, when the United States Supreme Court denied Defendant's petition for writ of certiorari on direct appeal. See Fla. R. Crim. P. 3.851(d)(1)(B) (stating, for purposes of rule 3.851, that a sentence of death becomes final under subsection (d)(1)(B) "on the disposition of the petition for writ of certiorari by the United States Supreme Court, if filed."); Jackson v. Florida, 488 U.S. 1050 (1989). Thus, any postconviction claim asserted more than a year after Defendant's convictions and sentence of death became final must be denied unless the claim falls within the newly-recognized retroactive constitutional right exception in subsection (d)(2)(B). Carroll, 114 So. 3d at 886 ("Rule 3.851 requires . . . that motions for postconviction relief must be filed within one year from when the conviction and sentence become final unless the claim is based on . . . a newly recognized fundamental constitutional right that has been held to apply retroactively.").

## ANALYSIS OF *HURST* CLAIM

Defendant contends he was sentenced to death unconstitutionally, and that his sentence of death must be vacated, pursuant to Hurst v. Florida, 136 S. Ct. 616 (2016), which held Florida's

capital sentencing scheme unconstitutional in light of Ring v. Arizona, 536 U.S. 584 (2002), because "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death."[1] Hurst v. Florida, 136 S. Ct. at 619. Defendant alleges he is entitled to retroactive relief under Hurst v. Florida because Defendant properly asserted, presented, and preserved challenges to the lack of jury fact finding and unanimity.

The United States Supreme Court, in Hurst v. Florida, held the Sixth Amendment mandates that each fact necessary to impose a greater punishment than authorized by the jury's guilty verdict, such as a sentence of death, must be submitted to and found by the jury. Id. at 621-22. On remand, the Florida Supreme Court concluded "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" and that "the jury's recommended sentence of death must be unanimous." Hurst v. State ("Hurst"), 202 So. 3d 40, 44 (Fla. 2016). It further clarified the meaning of Hurst v. Florida by proclaiming: "[I]n addition to unanimously finding the *existence* of any aggravating factor, the jury must also unanimously find that the aggravating factors are *sufficient* for the imposition of death and unanimously find that the aggravating factors *outweigh* the mitigation before a sentence of death may be considered by the judge." Id. at 54.

In Asay v. State, No. SC16-223, 2016 WL 7406538 (Fla. Dec. 22, 2016), the Florida Supreme Court addressed whether Hurst v. Florida and Hurst should apply retroactively. The majority employed the traditional Witt[2] retroactivity framework to conclude that Hurst v. Florida

[1] Defendant also asserts that all of his previous postconviction claims must be reheard and determined under the new constitutional framework provided in the Hurst decisions. Such a rehearing is not authorized by rule or law. See Fla. R. Crim. P. 3.851(d)(2)(B); Taylor v. State, 62 So. 3d 1101, 1111 (Fla. 2011) (citing Nelms v. State, 596 So. 2d 441, 442 (Fla. 1992)) (holding that "trial counsel 'cannot be held ineffective for failing to anticipate the change in the law.'"). To the extent Defendant argues the Hurst opinions constitute newly discovered evidence, newly discovered evidence means facts, not law. See Fla. R. Crim. P. 3.851(d)(2)(A)&(B).

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

and Hurst do not apply retroactively to capital cases that became final prior to June 24, 2002, the date on which Ring was decided. Id. at *13.

The Florida Supreme Court considered whether Hurst v. Florida and Hurst should apply retroactively to post-Ring capital cases in Mosley v. State, No. SC14-436, 2016 WL 7406506 (Fla. Dec. 22, 2016). In Mosley, the Court employed the Witt retroactivity framework as well as the fundamental fairness retroactivity analysis set forth in James v. State, 615 So. 2d 688 (Fla. 1993). Id. at *18-19. The Court held that, "because [the defendant] raised a Ring claim at his first opportunity and was then rejected at every turn, . . . fundamental fairness requires the retroactive application of Hurst, which defined the effect of Hurst v. Florida, to [the defendant]." Id. at *19. The Court further found the Witt framework also supported the retroactive application of Hurst v. Florida and Hurst to post-Ring cases. See id. at *19-25.

In Gaskin v. State, SC15-1884, 2017 WL 224772 (Fla. Jan. 19, 2017), the Florida Supreme Court made clear that the fundamental fairness retroactivity analysis only applies to post-Ring cases. In that case, the defendant had argued, both at trial and on direct appeal, that Florida's capital sentencing scheme was facially unconstitutional "for the reasons espoused by the United States Supreme Court in Ring and Hurst v. Florida . . . ." Id. at *3 (Pariente, J., concurring in part and dissenting in part) (footnote omitted). In spite of the defendant's repeated constitutional assaults on Florida's capital sentencing scheme based on the reasoning subsequently established in Ring, the defendant was not entitled to retroactive relief under Hurst v. Florida because the defendant's sentence of death became final pre-Ring. Id. at *2 (citing Asay, 2016 WL 7406538 at *13).

Taken together, the Asay/Mosley/Gaskin triad creates a categorical bar against the retroactive application of Hurst v. Florida and Hurst to capital cases that became final before

Ring was decided. Therefore, Defendant's belated Hurst claims do not fall within the newly-established retroactive constitutional right exception in subdivision (d)(2)(B) because the right has not been held to apply retroactively to capital cases that became final before Ring was issued. Accordingly, Defendant's claim is denied.

Accordingly, it is **ORDERED AND ADJUDGED** that Defendant's "Successive Motion to Vacate Death Sentence," filed through counsel on January 10, 2017, is **DENIED.** This is a final order, and Defendant shall have thirty (30) days from the date this Order is filed to take an appeal by filing a Notice of Appeal with the Clerk of the Court.

**DONE AND ORDERED** in Jacksonville, Duval County, Florida on February 14, 2017.

**RUSSELL HEALEY**
**Circuit Judge**

Copies to:

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Etheria Verdel Jackson
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Raiford, FL 32026-4000

## CERTIFICATE OF SERVICE

I do certify that a copy hereof has been furnished to the above-listed parties by United States mail on FEBRUARY 14TH, 2017.

Deputy Clerk

Case No.: 16-1985-CF-12620-AXXX
/act

**IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA**

**STATE OF FLORIDA,**

**Plaintiff,**

**v.** **Case No. 85-12620 CF**

**ETHERIA VERDELL JACKSON,**

**Defendant.**
_____/

**MOTION FOR REHEARING**

Defendant Etheria Verdell Jackson, through undersigned counsel, files this motion for rehearing pursuant to Fl. R. Crim. Proc. 3.851(f)(7) and in support states as follows:

1. Mr. Jackson is a prisoner under sentence of death.

2. On January 10, 2017, Mr. Jackson filed a Successive Motion to Vacate Death Sentence pursuant to Fl. R. Crim. Proc. 3.851(e)(2). Fl. R. Crim. Proc. 3.851(f)(3)(B) requires that the State respond within 20 days of the filing of the successive motion. The State's response was due on January 30, 2017. To date, the State has never filed a response.

3. On February 14, 2017, this Court entered an order summarily denying the successive motion without requiring a response by the State and without holding a case management conference on the matter.

4. Fl. R. Crim. Proc. 3.851(f)(3)(B) requires the following: "Within 20 days of the filing of a successive motion, the state ***shall*** file its answer." (Emphasis added).

5. Similarly, Fl. R. Crim. Proc. 3.851(f)(5)(B) requires, "the trial court ***shall*** hold a case management conference" (emphasis added) within 30 days after the State has filed a response.

6. These rules are not ambiguous or discretionary.

7. The proper procedure as outlined in Fl. R. Crim. Proc. 3.851 was not followed by either the State or this Court. As noted above, the State must respond to the successive motion within 20 days of the filing of the successive motion. Furthermore, pursuant to Fl. R. Crim. Proc. 3.851, Mr. Jackson is entitled to a case management conference where he can present legal argument in support of his claims and address the need for an evidentiary hearing.

8. Requiring the State to answer and the court to conduct a case management conference provides a litigant with notice of the process and the manner in which he can be meaningfully heard on his claim. The touchstone of due process is "'notice and opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. Of Ed. V. Loudermill*, 470 U.S. 532, 542 (1985), quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Rule 3.851's requirement that the State respond and that this Court conduct a case management conference assures Mr. Jackson a fundamentally fair proceeding, where he will be put on notice as to any arguments by the State and is given an opportunity to respond and set forth his position and legal argument. See *Huff v. State*, 622 So.2d 982 (Fla. 1993) (the failure to conduct a hearing "leaves the impression that Huff's arguments were not considered.").

9. The actions in this case are troublingly consistent with the history of this case in postconviction, where Mr. Jackson has been consistently denied, since the inception of his postconviction proceedings, an opportunity to make arguments, present evidence at a hearing or, as the rules require, receive a case management conference.

10. In September of 1990, Mr. Jackson filed a motion for post-conviction relief, under Fl. R. Crim. P. 3.850. The trial court summarily denied Mr. Jackson's 3.850 motion for post-conviction relief, without requiring a response by the State and without holding a hearing. The troubling pattern of summary denials violates Mr. Jackson's due process rights under the Fifth,

Sixth, Eighth and Fourteenth Amendments of the United States Constitution and the corresponding provisions of the Florida Constitution. Furthermore, these repeated violation of due process offends notions of fundamental fairness. What this pattern patently demonstrates is that this case is one of the cases which "40 years of experience make... increasingly clear that the death penalty is imposed arbitrarily, i.e., without the 'reasonable consistency' legally necessary to reconcile its use with the Constitution's commands." *Glossip v. Gross*, 135 S.Ct. 2726, 2760 (2015) (Breyer, J., dissenting), quoting *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982). The finality of death creates a "qualitative difference" between a sentence of death and any other punishment, including life in prison. That finality creates a "need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion).

11. Furthermore, in its Order summarily denying the *Hurst* successive, this Court assumes that the issue of retroactivity related to *Hurst* has been settled and decided. That is error. On February 13, 2017, the State filed a petition for writ of certiorari to the United States Supreme Court in *Hurst v. State*, 202 So.3d 40 (Fla. 2016). Furthermore, it is counsel's understanding that a petition for writ of certiorari is going to be filed in *Asay v. State*, ---So.3d --- 2016 WL7406538 (Fla. December 22, 2016) case, specifically addressing the issue of retroactivity. The State has also filed for an extension of time to file a petition for writ of certiorari on *Johnson v. State*, 205 So.3d 1285 (Fla. 2016), to challenge the retroactive effect of *Hurst* to post-*Ring* cases. Finally, the Florida Supreme Court has not issued a decision yet in *Lambrix v. State*, SC 16-8 and SC 16-56, a case whose situation could impact a determination of retroactivity in Mr. Jackson's case. Mr. Lambrix, like Mr. Jackson, raised a Sixth Amendment challenge to Florida's death penalty scheme at trial and has argued that fundamental fairness necessitates retroactivity. The landscape of the

law in this issue is far from settled and Mr. Jackson is entitled to make those and other arguments at a case management conference.

12. Finally, there are many cases across the state that in a similar posture as Mr. Jackson that have received case management conferences, as required by law. See, *Walls v. State*, 87-CF-00856, case management conference (CMC) held on February 13, 2017; *Morton v. State*, 1992-CF-308-CFAXWS (CMC set for 2/28/17); *Anderson v. State*, 1987-CF-008047 (CMC set for 2/23/17) ; *Marquard v. State*, 91002418CFMA (CMC held on 2/20/17), *Lucas v. State*, 76-588 CF (CMC held on 2/10/17), *Rogers v. State*, 95-15314 CF (CMC to be reset), *Cole v. State*, 94-498-CF-A-X (CMC set for 2/21/17), *Morris v. State*, CF 94-3961A1-XX (CMC held on 2/13/17), *Windom v. State*, 1992-CF-001305-A-O (CMC held on 2/20/17), *Dailey v. State*, 1985-CF-007084-D (CMC held on 2/20/17) and *Trotter v. State*, 86-1225-F (CMC held on 2/16/17). Respectfully, Mr. Jackson is entitled to equal treatment under the law and an opportunity to be heard. This Court's summary denial was a clear violation of the Rules of Criminal Procedure.

WHEREFORE, Mr. Jackson respectfully requests that this Court withdraw its Order, direct the State to respond to the successive motion, and schedule the required case management conference on the issues raised in his successive postconviction motion.

Respectfully submitted,

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Counsel for Mr. Jackson

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing Motion for Rehearing has been filed with Clerk for the 4th Judicial Circuit, Duval County served upon Hon. Russell L. Healey, Circuit Court Judge, rlhealey@coj.net, Assistant Attorney General Charmaine Millsaps, Charmaine.millsaps@myfloridalegal.com, cappapp@myfloridalegal.com and Assistant State Attorney Meredith Charbula, mcharbula@coj.net on this 22nd day of February, 2017.

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Counsel for Mr. Jackson

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 1985-CF-12620

STATE OF FLORIDA

V.

ETHERIA JACKSON

Defendant

_____/

**STATE'S RESPONSE TO JACKSON'S MOTION FOR REHEARING**

COMES NOW, the State, by and through the undersigned Assistant State Attorney, and files this response to Jackson's motion for rehearing as follows:

(1) On February 14, 2017, this Court denied Jackson's successive motion for post-conviction relief.

(2) On February 22, 2017, Jackson filed a timely motion for rehearing.

(3) In his motion, Jackson claims this Court erred in failing to require the State to file a response to Jackson's Hurst motion and to hold a case management conference (Huff hearing) as required by Rule 3.851(f)(5)(B) Florida Rules of Criminal Procedure.

(4) This Court should deny Jackson's motion for rehearing on these grounds.

(5) First, while it is true that Rule 3.851 (f)(5)(B) calls for this court to hold a Huff hearing after a successive motion has been filed, any failure to do so may be deemed harmless error when the defendant is not entitled to relief as a matter of law. Marek v. State, 14 So.3d 985 (Fla. 2009)(finding failure to hold a case management conference harmless when Marek's successive motion was legally insufficient and without merit). *See also* Sochor v. State, 22 So.3d 68 (Fla. 2009)(unpublished disposition).[1]

(6) Second, this court should deny the motion because Jackson's motion was properly denied in any event. [2]

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[1] The rule also requires the State to file an answer. However, logically, the State's failure to file an answer can also be deemed harmless. If the State would have filed a response, the State would have made the same arguments set forth here in this response to Jackson's motion for rehearing. When a Huff hearing is not held, a defendant certainly cannot show prejudice from the State's failure to file a response.

[2] Of course, the better practice is to follow the rules of criminal procedure. But in his case, no matter how compellingly Jackson might plead his cause at a Huff hearing, this Court would be obligated to summarily deny his motion. This is true because this Court is bound by Florida Supreme Court's decisions that make clear Jackson is not entitled to relief. Asay v. State, No. SC16-102, 2016 WL 7406538, *13 (Fla. Dec. 22, 2016). *See also* Gaskin v. State, ___ So.3d ___, 2017 WL 224772 (Fla. January 19, 2017) (Hurst not retroactive to cases final before Ring was decided). Withdrawing its order to allow the State to respond and Jackson to plead his case at a Huff hearing is just an unnecessary drain on this Court's scarce judicial resources.

(7) Jackson's successive motion was clearly time barred.

(8) A capital defendant has one year from the time his conviction and sentence to death becomes final to raise a claim under Rule 3.851, Florida Rules of Criminal Procedure. See *Fla. R. Crim. P. 3.851(d)(1)*.

(9) Jackson's conviction because final on January 23, 1989 when the United States Supreme Court denied certiorari review of his direct appeal proceedings. Jackson v. Florida, 109 S.Ct. 882 (1989). Accordingly, on its face, Jackson's successive motion was filed more than two *decades* beyond the one year time limitation.

(10) There are a few narrow exceptions to this one year limitation rule. One such exception arises when a new fundamental constitutional right is established and that new constitutional right has been held to apply retroactively. *See Fla. R. Crim. 3.851(d)(2)*(B). This exception allows a successive motion to be filed when a new case of significant and sweeping constitutional import is decided by either the Florida Supreme Court or the United States Supreme Court.[3]

(11) In addition to requiring that a new fundamental constitutional right be established, this new right has to have

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[3] This exception is logical since one cannot bring a claim based on a new case until it is decided.

already been held to apply retroactively to cases in the same procedural posture as the movant's case.[4] *Fla. R. Crim. 3.851(d)(2)*(B).

(12) In this case, Jackson cannot meet the second prerequisite to filing an out of time motion pursuant to Rule 3.851(d)(2)(B). Indeed, the Florida Supreme Court has held the opposite to be true in cases like Jackson's whose convictions and sentence were already final at the time the United States Supreme Court decided the case of Ring v. Arizona, 536 U.S. 583 (2002) on June 24, 2002.

(13) On December 22, 2016, the Florida Supreme Court issued an opinion, in a Duval County case, in which the Court held Hurst did not apply retroactively to cases that were final before June 24, 2002 when Ring was decided. Asay v. State, No. SC16-102, 2016 WL 7406538, *13 (Fla. Dec. 22, 2016). The court reiterated the same principle less than a month later in Gaskin v. State, ___ So.3d ___, 2017 WL 224772 (Fla. January 19, 2017) (Hurst not retroactive to cases final before Ring was decided).

[4] Because the way Rule 3.851(d)(2) is structured, a defendant's one year time limit to file a motion based on a new constitutional right does not begin to run until the new right is determined to apply retroactively to cases in the same procedural posture as the movant's case. Accordingly, a defendant need not be concerned that his one year limitation period begins to run when a new case of constitutional significant is issued.

(14) Jackson's death sentence was final on January 23, 1989, when the United States Supreme Court denied certiorari review of his direct appeal proceedings. Jackson v. Florida, 109 S.Ct. 882 (1989). Pursuant to Asay and Gaskin, Hurst has been declared not to be retroactive to cases in the same procedural posture as Jackson's. Accordingly, Jackson's successive motion did not fall within the exception set forth in Rule 3.852(d)(2)(B) and his successive motion was clearly time barred.

(15) Even if this were not the case, Jackson's motion was properly denied because the Florida Supreme Court's decision in Asay and Gaskin make clear that Jackson is not entitled to relief.

(16) In both of those cases, the Court determined that defendants whose conviction and sentence were final before Ring was decided are not entitled to Hurst relief. Asay, No. SC16-102, 2016 WL 7406538 at *13. [5] As Jackson's conviction was final well before Ring was decided, Jackson is not entitled to Hurst relief. *See* Gaskin v. State, ___ So.3d ___, 2017 WL 224772 (Fla. January 19, 2017)(affirming the denial of post-conviction relief because Gaskin's sentence became final in 1993 and, as such Gaskin is not entitled to relief under Hurst v. Florida.

[5] The State recognizes the time bar issue is interrelated to the issue of retroactivity and the decisions in Asay and Gaskin..

(17) Although tacitly acknowledging that the Florida Supreme Court's decision in Asay v. State controls in this case, Jackson argues for rehearing on the grounds that the issue of retroactivity set forth in Asay is not yet settled or decided. Jackson is mistaken. [6]

(18) On February 1, 2017, the Florida Supreme Court denied rehearing in Asay. Mandate issued on February 17, 2017. Accordingly, this case is clearly final for the purposes of binding this Court. Trial courts are bound by final decisions of the Florida Supreme Court. State v. Lott, 286 So. 2d 565, 566 (Fla. 1973)(the trial court is bound by the decisions of the Florida Supreme Court just as the District Courts of Appeal follow controlling precedents set by the Florida Supreme Court).

(19) In this case, because Jackson's successive Hurst motion is both time barred and without merit, any error in ruling on the motion without the benefit of a State response or a case management conference is harmless.

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[6] Jackson claims that the Court's summary denial of his Hurst motion is especially disturbing since Jackson has been "repeated[ly]" deprived of due process. Jackson points to the summary denial of his 1990 motion as an example of his deprivations. But Jackson has always had the opportunity to challenge any alleged deprivation of due process before the Florida Supreme Court. Notably, the Florida Supreme Court rejected any notion that Jackson was deprived of his due process rights in his 1990 post-conviction proceedings. Jackson v. Dugger, 633 So.2d 1051 (Fla. 1993)(rejecting Jackson's claim that the trial judge erred in summarily denying his 1990 post-conviction motion without holding a Huff hearing or an evidentiary hearing)

**BASED ON THE FOREGOING,** this Court should deny Jackson's motion for rehearing.

Respectfully submitted,

MELISSA W. NELSON
STATE ATTORNEY

/s/ Meredith Charbula

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been served by electronic filing to counsel for Mr. Jackson this 23d day of February 2017.

/s/ Meredith Charbula

Meredith Charbula

**IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA**

**STATE OF FLORIDA,**

**Plaintiff,**

**v.** **Case No. 85-12620 CF**

**ETHERIA VERDELL JACKSON,**

**Defendant.**
_____/

**NOTICE OF FILING**

COMES NOW Etheria Verdell Jackson, by and through the undersigned counsel, and hereby files in the court file of this case the following:

Affidavit of Alan Chipperfield

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing Notice of Filing has been filed with Clerk for the 4th Judicial Circuit, Duval County served upon Hon. Russell L. Healey, Circuit Court Judge, rlhealey@coj.net, Assistant Attorney General Charmaine Millsaps, Charmaine.millsaps@myfloridalegal.com, cappapp@myfloridalegal.com and Assistant State Attorney Meredith Charbula, mcharbula@coj.net on this 23rd day of February, 2017.

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Counsel for Mr. Jackson

**IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA**

**STATE OF FLORIDA,**

**Plaintiff,**

**v.** **Case No. 85-12620 CF**

**ETHERIA VERDELL JACKSON,**

**Defendant.**
_____/

STATE OF FLORIDA )

) ss

COUNTY OF DUVAL )

**Affidavit of Alan Chipperfield**

I, Alan Chipperfield, under penalty of perjury, declare on this 22nd day of February 2017, and pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct:

1. My name is Alan Chipperfield, and I am licensed to practice law in the State of Florida. I represented Mr. Etheria Jackson at his 1986 trial.

2. At the 1986 trial, the "advisory" Duval County penalty-phase jury recommended death by a vote of 7-5, the bare minimum required under Florida law at that time.

3. In January 2016, in *Hurst v. Florida*, the United States Supreme Court declared Florida's death-sentencing statute—the statute under which Mr. Jackson was sentenced to death—unconstitutional. The Court held that the jury must find all facts necessary for imposition of a death sentence. In October 2016, in *Hurst v. State*, the Florida Supreme Court further held that the jury must unanimously make the findings of fact required to impose a death sentence. These post-*Hurst* concepts would have changed the manner in which my co-counsel

and I proceeded in Mr. Jackson's case.

4. Our trial preparation and advice to Mr. Jackson was based on Florida's standard jury instructions and the death-sentencing statute and scheme in place in 1986. Our strategy—including the approach to the investigation, the development of evidence, the selection of the jury, and the presentation at trial—relied on Florida's pre-*Hurst* law in effect at that time. Had this trial taken place under a sentencing scheme as required by *Hurst v. Florida* and *Hurst v. State*, I would have taken a different approach.

5. I can say unequivocally that my approach to this case was greatly shaped by the pre-*Hurst* sentencing scheme in which the jury's role was merely advisory, in which a majority vote was sufficient to recommend death, and in which the judge made the ultimate fact-finding required to impose the death. The ways our overall thinking, specific strategy and advice to our client, would have been different under a post-*Hurst* sentencing scheme—where the jury is the finder of fact and is required to be unanimous in finding all facts necessary to impose a death sentence, including that the jurors unanimously agree on all the aggravators, that the jurors unanimously agree that the aggravation outweighs the mitigation, and finally, that the jury unanimously finds the aggravators "sufficient" to impose a death sentence—could have been numerous and profound. Our selection and presentation of evidence would have been guided by this thought: is it possible that a single juror would find this mitigating enough to vote for life, even if other jurors might find it more aggravating than mitigating? It seems likely to me that this would have changed at least parts of our presentation.

6. If this case was tried in the post-*Hurst* landscape, our jury selection process would also have been markedly different. Under the current case law, we would be able to use the Colorado Method of jury selection, knowing that we needed only to seat one juror out of 12 who would

vote to impose life.

7. I am available to testify at an evidentiary hearing and, if I am called to do so, I would testify consistently with this affidavit.

Alan Chipperfield

Alan Chipperfield

FURTHER AFFIANT SAYETH NAUGHT.

Before me personally appeared Alan Chipperfield, known to me, who swore that the above statements are true and signed in my presence.

Notary Public, State of Florida

My Commission expires: 11/19/2019

KRISTA K. PETERSON GILLESPIE
MY COMMISSION # FF937852
EXPIRES: November 19, 2019

IN THE CIRCUIT COURT
OF THE FOURTH JUDICIAL
CIRCUIT, IN AND FOR DUVAL
COUNTY, FLORIDA

STATE OF FLORIDA,

*Plaintiff,*

v.

CASE NO. 85-12620-CF
CAPITAL CASE

ETHERIA VERDELL JACKSON,

*Defendant.*

_____/

STATE'S ANSWER TO SUCCESSIVE RULE 3.851 MOTION FOR POSTCONVICTION RELIEF

On January 10, 2017, Jackson, represented by Capital Collateral Regional Counsel - Middle, filed a successive 3.851 motion for postconviction relief in this capital case raising three claims based on *Hurst v. Florida*, 136 S.Ct. 616 (2016) (*Hurst v. Florida*), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (*Hurst II*). This Court should summarily deny the motion because *Hurst II* is not retroactively applicable to Jackson under controlling Florida Supreme Court precedent.

Claim I – *Hurst II*

Jackson asserts that his death sentence violates the Sixth Amendment right to a jury trial under *Hurst v. Florida*, 136 S.Ct. 616 (2016) (*Hurst v. Florida*), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (*Hurst II*). Succ. Motion at 6. But *Hurst II* does not retroactively apply to this case. This Court should summarily deny this claim.

**Retroactivity**

Under the Florida Supreme Court controlling precedent of *Asay v. State*, SC16-102, 2016 WL 7406538 (Fla. Dec. 22, 2016), *Hurst II* is not retroactive as to Jackson. In *Asay*, the Florida Supreme Court recently held that any case in which the death sentence was final before *Ring v. Arizona*, 536 U.S. 584 (2002), was decided on June 24, 2002, would not receive *Hurst II* relief.

Recently, the Florida Supreme Court, in a decision issued after *Asay*, rejected a *Hurst* claim based on non-retroactivity using the cut-off date of June 24, 2002, as the sole criteria. *Gaskin v. State*, 2017 WL 224772, No. SC15-1884 (Fla. Jan. 19, 2017). The majority in *Gaskin* denied the *Hurst* claim "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 7406538 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*, No. SC15-1884, slip op. at 5. The *Gaskin* majority described its

holding in *Asay* as being that of a single cut-off date. *Hurst* is not retroactive to any case where the sentence was final before 2002.

Jackson's death sentence was final before 2002 when *Ring* was decided. His death sentence became final on January 23, 1989, when the United States Supreme Court denied the petition from the direct appeal. *Jackson v. Florida*, 488 U.S. 1050 (1989) (No. 88-5801). Therefore, *Hurst II* is not retroactive in his case. Under controlling Florida Supreme Court precedent, Jackson is not entitled to any *Hurst* relief.

Jackson acknowledges in passing the Florida Supreme Court's holding in *Asay*, but asserts that fairness and uniformity require that *Hurst II* be retroactively applied to all cases. Succ. Motion at 7, n.11. Inherent in the concept of non-retroactivity is that some cases will get the benefit of a new development, while other cases will not. Drawing a line between newer cases that will receive benefit of a new development in the law and older final cases that will not receive benefit of the new development is part of the landscape of retroactivity analysis. It is simply part of the retroactivity paradigm that some cases will be treated differently than other cases based on the age of the case. In other words, non-uniformity is part and parcel of any retroactivity determination.

Opposing counsel is really asserting that all major cases should automatically be retroactive but no court has ever held that. Both federal and state courts have retroactivity doctrines. Indeed, courts do the exact opposite of what opposing counsel is asserting fairness and uniformity demand they do. If

opposing counsel's view was adopted by courts, with every new development in the law, a capital defendant would get a new trial or a new penalty phase *ad infinitum.* Given that the litigation in capital cases span decades, there would never be any finality in capital cases if such a position was adopted. And, as the United States Supreme Court has explained, finality is the overriding concern in any retroactivity analysis including in capital cases. *Penry v. Lynaugh*, 492 U.S. 302, 312 (1989). Finality trumps both fairness and uniformity in the retroactivity realm.

Contrary to opposing counsel's position, there are not two different tests for determining the retroactivity of *Hurst II.* Succ. Motion at 10. There is only one test for retroactivity of *Hurst II* and that test depends solely on the date of finality of the death sentence, as can be seen from the Florida Supreme Court's recent holding in *Gaskin.* There is no fundamental fairness test under *James v. State*, 615 So.2d 668 (Fla. 1993).

Opposing counsel relies on language from *Mosley v. State*, _ So.3d _, SC14-436, 2016 WL 7406506 (Fla. Dec. 22, 2016). But that argument totally ignores the Florida Supreme Court's holding in *Gaskin* and *Gaskin* was decided after *Mosley.* While the dissent in *Gaskin* agreed with opposing counsel, the majority in *Gaskin* did not. There is no *James* exception to *Asay.* The sole test for retroactivity depends on a date, not on preservation. And under that sole test, *Hurst II* is not retroactive as to Jackson.

Contrary to opposing counsel's argument, while *Hurst* is retroactive under

state law, it is not under federal law. Succ. Motion at 11. The United States Supreme Court has directly held that *Ring* itself is not retroactive. *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004). *Ring* was the basis for the United States Supreme Court's holding in *Hurst v. Florida*. *Ring* was discussed for paragraph after paragraph by the United States Supreme Court in *Hurst v. Florida*. If *Ring* itself was not retroactive there is no reason for *Hurst v. Florida* to be either. If the seminal case is not retroactive, then its progeny is not retroactive either. *Jeanty v. Warden, FCI–Miami*, 757 F.3d 1283, February 24, 20171285 (11th Cir. 2014) (observing "if *Apprendi's* rule is not retroactive on collateral review, then neither is a decision applying its rule").

Opposing counsel's argument is based on *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016). But *Montgomery* did not overrule *Summerlin*. Indeed, the *Montgomery* Court relied upon *Summerlin* at a couple of points in their discussion, making it clear the High Court considers this type of error to be procedural, not substantive. *Montgomery*, 136 S.Ct. at 723, 728. *Hurst II* is only retroactive under state law.

*Hurst II* is not retroactively applicable to this case. Accordingly, the claim should be summarily denied.

Claim II – *Eighth Amendment and unanimity*

Jackson also asserts that any jury recommendation of death that is not unanimous violates the Eighth Amendment prohibition on cruel or unusual punishment. Succ. Motion at 16. The Eighth Amendment does not require that the jury make a final recommendation at all, much less that it be unanimous. This claim should be summarily denied.

Florida has a conformity clause in its state constitution that requires the state courts to interpret Florida's prohibition on cruel and unusual punishments in conformity with the United States Supreme Court's Eighth Amendment jurisprudence. Art. I, § 17, Fla. Const.; *Henry v. State*, 134 So.3d 938, 947 (Fla. 2014) (noting that, under Article I, section 17 of the Florida Constitution, Florida courts are "bound by the precedent of the United States Supreme Court" regarding Eighth Amendment claims). The United States Supreme Court does not require unanimous verdicts in state non-capital criminal cases as either a matter of the Sixth Amendment or the due process clause. *Apodaca v. Oregon*, 406 U.S. 404 (1972) (holding that the Sixth Amendment does not require unanimous jury verdicts in state criminal trials); *Johnson v. Louisiana*, 406 U.S. 356 (1972) (holding that the Due Process Clause does not require unanimous jury verdicts in state criminal trials). There is no United States Supreme Court case holding that the Eighth Amendment requires the jury's final recommendation be unanimous.

The United States Supreme Court's decision in *Hurst v. Florida* did not

address the claim that the Eighth Amendment requires the aggravating circumstances be found unanimously by the jury, much less a claim that the Eighth Amendment requires the final recommendation be unanimous. And, while there can be a debate about whether the finding of an aggravating circumstance, in a capital case, should be required to be unanimous under the Eighth Amendment's heightened reliability requirement, there can be no such debate regarding the jury's final death recommendation. The federal constitution does not require the jury to even make a final recommendation. The jury is only required to find the aggravating circumstances because only the aggravating circumstances increase the penalty.

This is really a claim that jury sentencing is constitutionally required. But only one justice of the United States Supreme Court is of the view that the Eighth Amendment requires jury sentencing. *Hurst v. Florida*, 136 S.Ct. at 624 (Breyer. J., concurring) ("the Eighth Amendment requires that a jury, not a judge, make the decision to sentence a defendant to death"). Because there is no constitutional requirement that the jury even make a final recommendation at all, the final recommendation is not required to be unanimous.[1]

Nor did *Hurst* create a protected class. Succ. Motion at 20. Jackson is not in any Eighth Amendment protected class based on *Hurst v. Florida* or *Hurst II.*

---

[1] The State of Florida filed a petition of writ of certiorari in the United States Supreme Court, on February 13, 2017, which raises the issue of whether the jury's final recommendation must be unanimous. *Hurst v. Florida II*, No. 16-998.

Defendants who have their death sentence reversed for a new penalty phase are not a protected class. *United States v. Ball*, 163 U.S. 662, 672 (1896) (stating that it "is quite clear" that double jeopardy does not bar a retrial for two defendants who were convicted after a successful appeal); *Francis v. Resweber*, 329 U.S. 459, 462 (1947) (stating that "where the accused successfully seeks review of a conviction, there is no double jeopardy upon a new trial"). As the Florida Supreme Court has explained, double jeopardy does not preclude a retrial when "the former judgment was set aside at the instance of the petitioner." *Tilghman v. Mayo*, 82 So.2d 136, 137 (Fla. 1955).

The Eighth Amendment does not require unanimous jury recommendations. Accordingly, this claim should be summarily denied.

Claim III – *resurrection of previously denied claims*

Jackson asserts that *Hurst II* somehow resurrects his previously denied postconviction claims. Succ. Motion at 22. *Hurst II*, however, does not operate to breathe new life into previously denied due process claims, such as newly discovered evidence claims, or into previously denied ineffective assistance of counsel *Strickland* claims. *Strickland v. Washington*, 466 U.S. at 668 (1984). Opposing counsel is basically asserting that *Hurst II* should be retroactively applied to completed postconviction proceedings. No view of the scope of the holding of either *Hurst v. Florida* or *Hurst II* supports this claim.

New statutes enacted years after postconviction litigation was completed or new case law issued years after postconviction litigation was completed does not effect, in any manner, completed postconviction litigation. *Strickland* claims are analyzed under the law in effect at the time of trial, not at the time of the postconviction proceedings, much less years after the postconviction proceedings were affirmed on appeal. *Strickland*, 466 U.S. at 689 (stating courts are to evaluate ineffectiveness claims "from counsel's perspective at the time" of trial); *Harrington v. Richter*, 562 U.S. 86, 89 (2011) (relying on hindsight to cast doubt on a trial that took place over 15 years ago is precisely what *Strickland* seeks to prevent); *McMann v. Richardson*, 397 U.S. 759, 773 (1970) (stating that counsel "cannot be faulted" for not anticipating a change in law where the attorney advised the defendant to enter a guilty plea under the law at the time). As the Florida Supreme Court has noted, counsel cannot be deemed ineffective for not

anticipating changes in the law, such as *Hurst*. *Seibert v. State*, 64 So. 3d 67, 81 (Fla. 2010) (citing *Peede v. State*, 955 So.2d 480, 502-03 (Fla.2007)). Claims of ineffectiveness must be premised on the law at the time of trial. Both *Hurst* and the new statute are irrelevant to completed postconviction litigation.

Nor does an argument that *Hurst* somehow affected defense counsel's strategy regarding jury selection or the penalty phase make much sense. Before *Hurst v. Florida*, the jury recommended a sentence to the judge and the judge was required to give that recommendation great weight and, absent extraordinary circumstances, the trial court could not override a life recommendation. *Evans v. Sec'y, Fla. Dep't. of Corr.*, 699 F.3d 1249, 1258 (11th Cir. 2012) (noting the last time the Florida Supreme Court affirmed an override was eighteen years ago and characterizing the standard for affirming an override under *Tedder v. State*, 322 So.2d 908, 910 (Fla. 1975), as being "stringent"). Defense counsel had every incentive, prior to *Hurst*, under the *Tedder* standard, to chose jurors that would recommend life and to present those jurors with the available mitigation and to argue to those jurors for life in closing argument of the penalty phase.

Accordingly, this Court should summarily deny this claim and should summarily deny the entire successive motion.[2]

---

[2] All three claims are purely a matter of law. No evidentiary hearing is required. Because the claims are all solely questions of law that are controlled by the Florida Supreme Court's precedent that *Hurst II* is not retroactive, there was no need for a case management conference. *Huff* hearings are held to determine such claim require further factual development at the an evidentiary hearing. But none of these claim require an factual development. Regardless of any argument

Respectfully submitted,
PAMELA JO BONDI
ATTORNEY GENERAL

*/s/ Charmaine Millsaps*

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CO-COUNSEL FOR THE STATE

---

opposing counsel presented at the *Huff* hearing, a trial court cannot overrule the Florida Supreme Court. *State v. Lott*, 286 So. 2d 565, 566 (Fla. 1973) (observing that a "trial court is bound by the decisions of this Court"). A *Huff* hearing would be an empty formality in light of the controlling precedent and purely legal nature of the claims raised in the successive postconviction motion. And, even if the failure to hold a *Huff* hearing is viewed as error, it is harmless error.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing STATE'S ANSWER TO SUCCESSIVE RULE 3.851 MOTION FOR POSTCONVICTION RELIEF has been furnished via e-portal to Assistant Capital Collateral Counsel Maria E. DeLiberato; Office of Capital Collateral Regional Counsel, - Middle, 12973 N. Telecom Parkway, Temple Terrace, FL, 33637; phone: (813) 558-1600; email: Deliberato@ccmr.state.fl.us; Assistant Capital Collateral Counsel Julissa R. Fontan, Office of Capital Collateral Regional Counsel, - Middle, 12973 N. Telecom Parkway, Temple Terrace, FL, 33637; phone: (813) 558-1600; email: Fontan@ccmr.state.fl.us; Assistant Capital Collateral Counsel Chelsea Shirley; Office of Capital Collateral Regional Counsel, - Middle, 12973 N. Telecom Parkway, Temple Terrace, FL 33637; phone: (813) 558-1600; email: Shirley@ccmr.state.fl.us; this 24th day of February, 2017.

/s/ Charmaine Millsaps
Charmaine M. Millsaps
Attorney for the State of Florida

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO.: 16-1985-CF-12620-AXXX

DIVISION: CR-C

STATE OF FLORIDA

v.

ETHERIA VERDELL JACKSON,
Defendant.
_____/

**ORDER DENYING DEFENDANT'S MOTION FOR REHEARING**

This cause comes before the Court on Defendant's "Motion for Rehearing," filed pursuant to Florida Rule of Criminal Procedure 3.851(f)(7) on February 22, 2017. The instant Motion concerns the Court's February 14, 2017 Order Denying Defendant's "Successive Motion to Vacate Death Sentence," filed pursuant to Rule 3.851 on January 10, 2017.

The Court, after reviewing Defendant's Motion for Rehearing, the applicable law, and State's response, does not find any points of law or fact that were overlooked in deciding Defendant's Motion. Further, it is not the function of a motion for rehearing to give a defendant the opportunity to advise the court that the defendant disagreed with the court's conclusion, to reargue matters already discussed, or to request the court change its mind as to a matter that has already received the careful attention of the court. State v. Green, 105 So. 2d 817, 818 (Fla. 1st DCA 1958); Anderson v. State, 532 So. 2d 4, 6 (Fla. 2d DCA 1988); Whipple v. State, 431 So. 2d 1011, 1013 (Fla. 2d DCA 1983).

Accordingly, it is:

**ORDERED** that Defendant's "Motion for Rehearing," filed on February 22, 2017, is **DENIED**. This is a final order, and Defendant shall have thirty (30) days from the date this Order is filed to take an appeal by filing a Notice of Appeal with the Clerk of the Court.

**DONE** in Jacksonville, Duval County, Florida on March 16, 2017.

**RUSSELL HEALEY**
**Administrative Felony Judge**

Copies to:

Charmaine M. Millsaps, Esq.
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PL-01, The Capitol
Tallahassee, FL 32399-1050

Office of the State Attorney
Division CR-C

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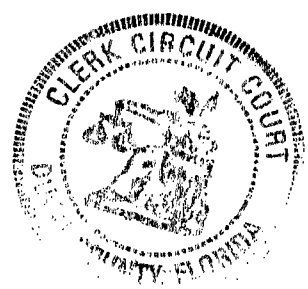
Etheria Verdel Jackson
DOC No.: 072847
Union Correctional Institution
7819 N.W. 228th Street
Raiford, FL 32026-4000

## CERTIFICATE OF SERVICE

I do certify that a copy hereof has been furnished to the above-listed parties by United States mail on March 16, 2017.

Deputy Clerk

Case No.: 16-1985-CF-12620-AXXX
/act



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**IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA**

**STATE OF FLORIDA,**

**Plaintiff,**

**v.** **Case No. 85-12620 CF**

**ETHERIA VERDELL JACKSON,**

**Defendant.**
_____/

## NOTICE OF APPEAL

COMES NOW, Etheria Verdell Jackson, by and through undersigned counsel, and takes and enters this Notice of Appeal to the Florida Supreme Court to review the final orders of the Circuit Court of the Fourth Judicial Circuit, in and for Duval County, Florida.

The nature of the orders appealed are the:

Order Denying Successive Motion to Vacate Death Sentence – Signed February 14, 2017 Docketed February 14, 2017.

Order Denying Motion for Rehearing – Signed on March 16, 2017. Docketed March 16, 2017.

All parties to said cause are called upon to take notice of the entry of this Appeal.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Notice of Appeal has been filed with Clerk for the 4th Judicial Circuit, Duval County served upon Hon. Russell L. Healey, Circuit Court Judge, rlhealey@coj.net, Assistant Attorney General Charmaine Millsaps, Charmaine.millsaps@myfloridalegal.com, cappapp@myfloridalegal.com and Assistant State Attorney Meredith Charbula, mcharbula@coj.net on this 11th day of April, 2017.

/s/ Julissa R. Fontán
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Counsel for Mr. Jackson

Filing # 55302849 E-Filed 04/19/2017 02:10:41 PM

# Supreme Court of Florida

Office of the Clerk
500 South Duval Street
Tallahassee, Florida 32399-1927

JOHN A. TOMASINO
CLERK
MARK CLAYTON
CHIEF DEPUTY CLERK
KRISTINA SAMUELS
STAFF ATTORNEY

PHONE NUMBER: (850) 488-0125
www.floridasupremecourt.org

## ACKNOWLEDGMENT OF NEW CASE

April 19, 2017

RE: ETHERIA VERDEL JACKSON vs. STATE OF FLORIDA

CASE NUMBER: SC17-703
Lower Tribunal Case Number(s): 161985CF012620AXXXMA
Lower Tribunal Filing Date: 4/11/2017

CR-D

The Florida Supreme Court has received the following documents reflecting a filing date of 4/17/2017.

Notice of Appeal

The Florida Supreme Court's case number must be utilized on all pleadings and correspondence filed in this cause.

tw
cc:
JULISSA FONTÁN
CHARMAINE M. MILLSAPS
CHELSEA RAE SHIRLEY
MARIA D. CHAMBERLIN
MEREDITH CHARBULA
HON. RUSSEL L. HEALY, JUDGE
OFFICIAL COURT REPORTERS
HON. MARK HARRISON MAHON, CHIEF JUDGE
HON. RONNIE FUSSELL, CLERK

Filing # 55302849 E-Filed 04/19/2017 02:10:41 PM

# Supreme Court of Florida

WEDNESDAY, APRIL 19, 2017

**CASE NO.: SC17-703**
Lower Tribunal No(s).:
161985CF012620AXXXMA

CK-D

ETHERIA VERDEL JACKSON vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

We have received a notice of appeal (3.851-Summary Denial) in the above-captioned case, which is an appeal from a first-degree murder conviction with a sentence of death.

Pursuant to Florida Rule of Appellate Procedure 9.142(a)(1), the Honorable Mark Harrison Mahon, Chief Judge of the Fourth Judicial Circuit Court of Florida, is hereby appointed to monitor the preparation of the complete record in the circuit court for timely filing in this Court.

The transcripts should be filed with the trial court clerk **within fifty days from the filing of the notice of appeal in this Court.** As the time for filing the transcript has already been extended, the Court does not anticipate that any further extensions of time will be necessary.

The trial court clerk shall have twenty days after the filing of the transcript(s) in which to file the record on appeal with this Court. The complete record in a death penalty appeal shall include all items required by rule 9.200 and by any order issued by the supreme court. In any appeal following the initial direct appeal, the record transmitted shall begin with the most recent mandate issued by the supreme court, or the most recent filing not already transmitted in a prior record in the event the preceding appeal was disposed of without a mandate, and shall exclude any materials already transmitted to the supreme court as the record in any prior appeal. The supreme court shall take judicial notice of the appellate records in all prior appeals and writ proceedings involving a challenge to the same judgment of conviction and sentence of death. Appellate records subject to judicial

notice under this subdivision shall not be duplicated in the record transmitted for the appeal under review.

Pursuant to Florida Rule of Judicial Administration 2.215(i), the circuit judge assigned to the case shall take such action as may be necessary to ensure that a complete record on appeal is properly prepared and filed. Judge Russel L. Healy is directed to hold a status conference **within thirty days from the date of this order** which shall be attended by the Clerk of Court (or the clerk's designee), all appropriate court reporters, counsel, and such other persons Judge Healy may deem necessary. Judge Healy may enter such orders as necessary for the timely completion and filing of the record on appeal with this Court. The time and place of the status conference shall be set by Judge Healy for the purpose of ensuring that the record on appeal is complete. Judge Healy shall file with this Court, **within twenty days from the date of the status conference**, a report detailing the current status of the record preparation. The record on appeal shall be timely filed with this Court unless there are substantial reasons requiring delay. The trial court is reminded that only this Court can extend the deadline for filing the record on appeal.

Pursuant to Florida Rule of Appellate Procedure 9.200(e), the burden to ensure that the record on appeal is prepared and transmitted in accordance with the Florida Rules of Appellate Procedure shall be on the appellant. Counsel for the appellant is hereby directed to file Status Reports with this Court **every twenty days** regarding the progress of the completion of the record on appeal.

**The failure to timely file a record on appeal substantially affects this Court's ability to timely process its death cases and will not be tolerated.**

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

tw
Served:

JULISSA FONTÁN
CHARMAINE M. MILLSAPS
CHELSEA RAE SHIRLEY
MARIA D. CHAMBERLIN
MEREDITH CHARBULA
HON. RUSSEL L. HEALY, JUDGE
OFFICIAL COURT REPORTERS
HON. MARK HARRISON MAHON, CHIEF JUDGE
HON. RONNIE FUSSELL, CLERK

**IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA**

**STATE OF FLORIDA,**

**Plaintiff,**

**v.** **Case No. 85-12620 CF**

**ETHERIA VERDELL JACKSON,**

**Defendant.**
_____/

**DIRECTIONS TO THE CLERK**

Defendant Etheria Verdell Jackson, by and through undersigned counsel, hereby directs the Clerk as specified in Florida Rule of Appellate Procedure 9.200(a)(1) to include all items filed in this post-conviction proceeding in the record on appeal, including all pleadings, original documents, transcripts of all proceedings including status hearings, and all exhibits which have been filed with the Clerk of Court, whether accepted into evidence or not.

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Counsel for Mr. Jackson

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Directions to the Clerk has been electronically filed with the Clerk for the 4th Judicial Circuit, Duval County served upon Hon. Russell L. Healey, Circuit Court Judge, rlhealey@coj.net, Assistant Attorney General Charmaine Millsaps, Charmaine.millsaps@myfloridalegal.com, cappapp@myfloridalegal.com and Assistant State Attorney Meredith Charbula, mcharbula@coj.net on this 21st day of April, 2017.

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**IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA**

**STATE OF FLORIDA,**

**Plaintiff,**

**v.** **Case No. 85-12620 CF**

**ETHERIA VERDELL JACKSON,**

**Defendant.**
_____/

## JUDICIAL ACTS TO BE REVIEWED

Petitioner, Etheria Verdell Jackson, sets out the following as Judicial Act(s) to be reviewed:

Order Denying Defendant's Successive Motion to Vacate Death Sentence filed on February 14, 2017.

Order Denying Motion for Rehearing filed on March 16, 2017.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Notice of Appeal has been filed with Clerk for the 4th Judicial Circuit, Duval County served upon Hon. Russell L. Healey, Circuit Court Judge, rlhealey@coj.net, Assistant Attorney General Charmaine Millsaps, Charmaine.millsaps@myfloridalegal.com, cappapp@myfloridalegal.com and Assistant State Attorney Meredith Charbula, mcharbula@coj.net on this 21st day of April, 2017.

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