IN THE SUPREME COURT OF FLORIDA
CASE NO. SC17-1429

MARK JAMES ASAY,
Petitioner,

v.

JULIE L. JONES,
Secretary, Florida Department of Corrections,
Respondent.

REPLY TO RESPONDENT'S ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS

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BASIS FOR HABEAS CORPUS RELIEF

CLAIM I[1]

On August 4, 2017, the State filed its "Answer To Successive Petition For Writ Of Habeas Corpus."[2] At the outset of the Answer, the State writes:

> Asay asserts that this Court should recede from its prior decision in *Asay v. State*, 210 So.3d 1 (Fla. 2016), holding that *Hurst II* is not retroactive as to any case that was final before *Ring v. Arizona*, 536 U.S. 584 (2002), was decided.

(Answer at 1).[3] Replying to this statement and the misrepresentations it contains is

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[1]The Answer does not separately address the four distinct claims set forth in the Petition. However because the separately pled claims are in fact different claims with different factual bases involving the application of different legal authority, Asay addresses them separately in this Reply.

[2]Because the Respondent to a habeas petition is usually identified as the Secretary of the Department of Corrections, it is not counsel's normal practice to refer to the Respondent as "the State." But of course, the assigned Assistant Attorney General who represents the State in Asay's pending appellate proceeding also represents the Respondent in this habeas action. In the Answer filed on August 4, the pleading is identified as "the State's response to the successive petition." (Answer at 1). So herein, counsel refers to Respondent as "the State."

[3]The State indicates that its use of *Hurst II* refers to *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). However, much confusion has resulted from shorthand references to *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). Those decisions are distinctly different. *Hurst v. Florida* is a decision concerning the Sixth Amendment right to trial by jury. *Hurst v. Florida* held that Florida had violated that provision by having a judge make the findings of fact that the Sixth Amendment reserved for the jury to determine. On the other hand, *Hurst v. State* is a decision concerning the Florida Constitution and the Eighth Amendment to the US Constitution. *Hurst v. State* held that under the

maddeningly frustrating. This error-filled sentence, just the second sentence of the Answer, is the quintessential straw man fallacy. The State has covertly replaced Asay's argument in Claim I of his petition with an entirely different argument - one that Asay did not make. And the replacement argument (or straw man) is premised upon a misrepresentation of this Court's opinion in *Asay v. State*, 210 So. 3d 1 (Fla. 2016).

In fact, the entire Answer is an exercise in building straw men in order to avoid addressing Asay's arguments while at the same time trying not appear evasive. Undersigned has struggled with how best to reply. Asay's actual arguments in Claim I are not addressed by the State in its Answer. Unnecessarily repeating Asay's arguments besides being redundant, might be annoying or worse appear defensive. Yet, just asserting that Asay relies on the unrefuted arguments in Claim I of the Petition requires confidence that the arguments were adequately written and trust that the reader will understand the arguments, even though the Answer suggests that counsel for the State did not understand the arguments. But of course, addressing the State's straw men might give them undeserved credit.

Florida Constitution and the Eighth Amendment, a jury had to unanimously return a death recommendation before a judge was authorized to impose a death sentence. Herein, when referring to either of those decisions, Asay will use either *Hurst v. Florida* or *Hurst v. State* to identify which of the two distinctly different opinions he is referencing.

In seeking a solution for his dilemma, counsel found a suggestion at a web site while doing research on arguments using the straw man fallacy: "When your opponent sets up a straw man, set it on fire and kick the cinders around the stage. Don't worry about losing the Strawperson-American community vote." While enjoying the suggestion, it actually caused counsel to conclude that he wanted to avoid anything so extreme.

It would burden this Court unduly to repeat the points documented in detail in Claim I and ignored by the State in its Answer that: 1) the rights conferred on capital defendants by *Hurst v. State* are distinct from those conferred by *Hurst v. Florida*; and 2) only the Sixth Amendment right at issue in *Hurst v. Florida* was the subject of this Court's analysis and holding in *Asay v. State*.

Beyond that, there are just a few specific points to make regarding Claim I. To be clear, Asay has not asked this Court to recede from *Asay v. State*. His argument is that *Asay v. State* did not address the right to a unanimous death recommendation conferred by *Hurst v. State* or the retroactivity of *Hurst v. State* under *Witt v. State*, 387 So. 2d 922 (Fal. 1980). *See* Petition at 30 ("***Asay v. State* conducted no retroactivity analysis under *Witt* regarding the substantive right identified in *Hurst v. State*** as an examination of the decision in *Asay v. State*, 210 So. 3d at 20-23 shows.") (emphasis in original).

In the Answer, the State says: "On April 13, 2016, as part of the first warrant litigation, Asay also filed a habeas petition in this Court arguing the retroactivity of *Hurst II. Asay v. Jones*, SC16-628." (Answer at 2).[4] The State indicates that when it cites to *Hurst II*, it is referring to *Hurst v. State*, a decision that this Court issued on October 14, 2016. The docket for *Asay v. Jones*, Case No. SC16-628, does show Asay's habeas petition was filed on April 13, 2016, six months before *Hurst v. State* issued. It also shows that after April 13th nothing else was filed until the December 22, 2016 opinion, i.e. *Asay v. State*. Asay did not present a unanimous death recommendation claim based on *Hurst v. State* in his petition filed six months before *Hurst v. State* was issued by this Court. The State's contrary assertion is not just false, but a factual impossibility.

The State also erroneously claims that this Court in *Zack v. State*, _ So.3d _, 2017 WL 2590703 (Fla. June 15, 2017), denied a capital petitioner *Hurst II* relief based solely on non-retroactivity grounds citing *Asay*. At issue in *Zack* was a habeas petition filed on June 21, 2016, months before *Hurst v. State* issued. The petition raised a *Hurst v. Florida* claim. The petition did not include a unanimous

[4]When the habeas petition was filed on April 13, 2016, Asay's execution had already been stayed by this Court on March 2, 2016. The petition was not filed as part of under warrant litigation.

death recommendation claim based on *Hurst v. State*.[5] So, the petition was about the retroactivity of *Hurst v. Florida*, not *Hurst v. State*.

In the Answer, the State raises the "law-of-the-case" doctrine, a matter not addressed by Asay in his Petition. The State describes the doctrine's operation as follows: "The law-of-the-case doctrine bars consideration of those legal issues that were **actually considered and decided** in a former appeal." (Answer at 4) (emphasis added). Ignoring the bolded words in its description of the doctrine, the State says: "The successive habeas petition and the accompanying amicus brief are raising a claim that is barred by the law-of-the-case doctrine." (Answer at 4).

The issue that is left out of the State's discussion of the "law-of-the-case" doctrine is whether this Court in *Asay v. State* was presented with Asay's claim based on *Hurst v. State*, considered that claim, and decided that Asay was not entitled to relief on the basis of *Hurst v. State*. This Court's recent decision in *Delta Property Management v. Profile Investments, Inc.*, 87 So. 3d 765 (Fla. 2012), explained what is necessary for law of the case to apply:

> In addition, this Court expressly addressed the misconception that the law-of-the-case doctrine could bar consideration of a legal question that was not previously raised and decided on appeal but, given the facts of the case, could have been raised in a prior appeal. We followed our decision in *U.S. Concrete Pipe Co. v. Bould*, 437 So.2d

[5]A motion for rehearing filed by Zack is currently pending before this Court.

> 1061, 1063 (Fla.1983), which determined that **the doctrine of the law of the case is limited to rulings on questions of law actually presented and considered on a former appeal**, and emphasized that "[a] corollary of the law of the case doctrine is that a lower court is not precluded from passing on issues that 'have not necessarily been determined and become law of the case.' " *Juliano*, 801 So.2d at 106 (quoting *Greene v. Massey*, 384 So.2d 24, 27 (Fla.1980)). We also **expressly receded** from *Airvac, Inc. v. Ranger Insurance Co.*, 330 So.2d 467 (Fla.1976), **to the extent that decision implied that the law-of-the-case doctrine could be applied to an issue not previously decided on appeal**. *See Juliano*, 801 So.2d at 107.

Delta Property Management v. Profile Investments, Inc., 87 So. 3d at 770 (emphasis added).

So under *Delta Property* in order for the *Hurst v. State* claim to be barred by the law of the case doctrine, Asay had to have previously presented a unanimous death recommendation claim based on *Hurst v. State* and this Court had to have considered and rejected it in *Asay v. State*. As was explained in some detail in the Petition, Asay did not raise a unanimous death recommendation claim based on *Hurst v. State* in any pleading filed in this Court in any of the proceedings addressed in *Asay v. State*.[6] The *Hurst v. State* claim was not before this Court and not decided by this Court in *Asay v. State* (Petition at 2 n.2, 3, 4, 5, 7, 8, 10, 28 n.18, 30, 31). Accordingly, the law of the case doctrine is inapplicable.

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[6]As noted in the Petition, *Hurst v. State* issued on October 14, 2016, more than seven months after the March 2, 2016 oral argument in *Asay v. State*.

The State also argues: "The successive habeas petition is really an untimely second motion for rehearing." (Answer at 5). However, Fla. R. App. Pro. 9.330 provides that a motion for rehearing "shall not present issues not previously raised in the proceeding." Since Asay had not at any time in the proceeding presented a unanimous death recommendation claim based on *Hurst v. State*, he was precluded from raising a claim based on *Hurst v. State* in a motion for rehearing.

Turning to retroactivity, the State argues: "There are no limits to opposing counsel's arguments regarding fairness and uniformity and adopting such a view would have the effect of undermining any finality in capital cases." (Answer at 6).[7] Again, the State is wrong.[8] Asay's argument is that according to this Court in *Hurst v. State*, the holding there that a death sentence could not be imposed without a jury's unanimous death recommendation would enhance the reliability of death sentences and further the administration of justice. Asay's retroactivity argument is based on the reasoning and justification for the holding in *Hurst v.*

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[7]The State makes no mention of the fact that this Court ruled that *Hurst v. State* is retroactive, at least to June 24, 2002. *King v. State*, 211 So. 3d 866, 889 (Fla. 2017).

[8]The State also says: "Opposing counsel is really asserting that fairness and uniformity demand that all major cases should automatically be retroactive but no court has ever held that." (Answer at 8). Asay did not and does not argue "that all major cases should automatically be retroactive." The State's claim is simply a fabrication.

State that this Court set out in its opinion. Counsel knows of no other capital decision issued by this Court in the past 40 years that was as significant as *Hurst v. State* and that wrought a change that this Court extolled as enhancing the reliability of death sentences and further the administration of justice.

As to Claim I of the Petition, the State's Answer can be stripped down to fundamental refusal to recognize that *Hurst v. State* invalidates death sentences premised upon an advisory death recommendation returned by a majority vote. *Hurst v. State* holds that a jury must return a unanimous death recommendation before a death sentence can be imposed. Instead of addressing the actual holding of *Hurst v. State*, the State argues it is not retroactive because:

> Furthermore, a death sentence imposed by a judge is at least as accurate and reliable as a death sentence based on jury findings. **Because the accuracy of the sentence is not at issue**, *Hurst II* **should not be applied retroactively**.

(Answer at 6) (emphasis added).[9] *Hurst v. State* is not about going from findings by a judge to findings by a jury. *Hurst v. State* is about going from a an advisory 9-3 death recommendation to the necessity of a jury returning a unanimous death recommendation. The difference between a 9-3 death recommendation and a

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[9]This mantra is repeated later in the Answer: "The error was a judge rather than a jury made the factual findings regarding the death penalty. But the accuracy of a death sentence is not at issue in such a situation because judicial factfinding is not less reliable than jury factfinding." (Answer 9).

unanimous death recommendation is simple. The latter will result in a more reliable death sentence, as this Court stated in *Hurst v. State*. "[T]he accuracy of the [death] sentence" is the issue. And because it is at issue in *Hurst v. State*, that decision should be retroactive, as the State seems to implicitly acknowledge by arguing against retroactivity on the basis it does.

CLAIM II

As to Chapter 2017-1, the State does not seem to understand what is at issue when a statute is retrospective, nor that statutes cannot be applied in an unconstitutional fashion.

First, the State acknowledges that whether a statute is retrospective is a question of legislative intent. Asay agrees.

Due to the constitutionally mandated separation of power, substantive law is the domain of the legislature, while procedural matters belong to the judiciary. "Substantive law has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer." *State v. Garcia*, 229 So. 2d 236, 238 (Fla. 1969).

Chapter 2017-1 is substantive law. It was enacted by the legislature. Under Chapter 2017-1, a defendant convicted of first degree murder has a right to a life sentence unless the State convinces a jury to unanimously return a death

recommendation. That is not a procedural right concerning when a witness list is to be disclosed, the availability of discovery depositions, or similar procedural matter. *See Allen v. Butterworth*, 756 So. 2d 52, 59 (Fla. 2000) ("Generally, the Legislature has the power to enact substantive law, while the Court has the power to enact procedural law.").

This Court has held that the elimination of a convicted defendant's eligibility for parole after serving 25 years on first degree murder conviction was a matter of substantive law. The change was not intended to apply retrospectively, i.e. to homicides committed before its 1994 effective date. *See Craig v. State*, 685 So. 2d 1224, 1230 n.12 (Fla. 1996) ("Because Craig committed his crime on July 21, 1981, he is not eligible to receive a life sentence without the possibility of parole."). In *Bates v. State*, 750 So. 2d 6, 10 (Fla. 1999), this Court indicated that even though Bates was resentenced after the 1994 effective date for a crime committed in 1982, his substantive right to parole eligibility remained intact at his resentencing. The 1994 elimination of parole eligibility after the convicted defendant had served 25 years was not intended to apply retrospectively. As a result, the statutory change was not applied to defendants convicted of homicides committed before the statutes effective date. *Bates v. State*, 750 So. 2d at 10 ("We have previously held that this statute was not applicable to crimes committed

before its effective date.").

Here, Chapter 2017-1 creates a substantive right rather than extinguishing one. And here, the State acknowledges that the statute creating a right to a life sentence unless the jury returns a unanimous death recommendation was intended to apply in cases in which the homicide was committed before the statute's effective date. But, the State contends the retrospective application was intended to only apply to homicides committed before the effective date if the previously convicted defendant is granted a new penalty phase. (Answer at 11) ("There is nothing to support a claim that the legislature intended the statute to apply to all capital cases instead of **applying only to those defendants granted new penalty phases** under the existing law.") (emphasis added).

The problem with the State's argument is it ignores the constitutional restraints on legislative enactments such as the ones identified in the Petition. Certainly, the legislature could have passed a statute providing that for homicides committed after March 13, 2017, the defendant will receive a life sentence unless a jury at the conclusion of a penalty phase returns a unanimous death recommendation. Such a statute would have shown that the legislature did not intend the substantive right to apply retrospectively. However, that is not what the legislature did.

Instead, the State argues that the legislature intended to do something that it cannot constitutionally do. The State maintains that the legislature intended for defendants convicted of a first degree murder committed before the effective date of the statute to have a right to a life sentence unless the jury unanimously returns a death recommendation, but only if a new penalty phase is ordered. But a substantive right cannot constitutionally be retrospectively applied in such a haphazard and arbitrary manner.

As noted in the Petition, a resentencing has recently been ordered in James Card's case. *Card v. Jones*, 219 So. 3d 47 (Fla. 2017). Card was convicted of a 1981 homicide. His conviction became final in 1984. *Card v. State*, 453 So. 2d 17 (Fla. 1984). When the resentencing occurs, the State has acknowledged that Chapter 2017-1 will apply because the legislature intended it to apply. This means when Card is sentenced on his 1984 conviction for a 1982 homicide, he will have an enforceable right to a life sentence unless the resentencing jury returns a unanimous death recommendation.

Asay stands convicted of two1987 homicides and his convictions were final in 1991. According to the State, Card gets the substantive right provided by Chapter 2017-1, and Asay does not. While that may have been the legislature's intention as the State argues, there are constitutional restraints on legislative

enactments which are set out in the Petition, and which were not addressed in the Answer.

Because the State does not address the constitutional limitations on the legislature's power to retrospectively apply a substantive right in a less than evenhanded fashion, Asay simply relies on his arguments in the Petition.

CLAIM III

As to Claim III, the State does not acknowledge that three of Asay's jurors voted to recommend a life sentence. Under *Hurst v. State* and under Chapter 2017-1, it is no longer permissible to impose a death sentence on a defendant in the condemned's circumstances. Under Florida law, when the State no longer has the power to impose a sentence, it no longer has the power to carry out that sentence, even if it was lawful when it was imposed. *See Falcon v. State*, 162 So. 3d 954, 961 (Fla. 2015) ("Clearly, by invalidating section 775.082(1), Florida Statutes, as applied to juveniles convicted of a capital homicide offense, *Miller* announced a prohibition on the state's power to 'impose certain penalties'—nondiscretionary sentences of life imprisonment without the possibility of parole."). "A penalty imposed pursuant to an unconstitutional law is no less void because the prisoner's sentence became final before the law was held unconstitutional. **There is no grandfather clause that permits States to enforce**

punishments the Constitution forbids. To conclude otherwise would undercut the Constitution's substantive guarantees." *Montgomery v. Louisiana*, 136 S. Ct. 718, 731 (2016) (emphasis added).

The State simply ignores this reality and refuses to explain why *Falcon v. State* and *Montgomery v. Louisiana* do not preclude Asay's execution.

CLAIM IV

The State also chose not to address Claim IV of the Petition. As to Claim IV, Asay stands by his arguments as stated in the Petition.

CONCLUSION

Habeas relief is required. Mr. Asay's death sentences must be vacated and at a minimum, a resentencing ordered.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing REPLY TO RESPONDENT'S ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS has been furnished by electronic mail to Timothy Freeland, Assistant Attorney General, on this 8th day of August, 2017.

CERTIFICATE OF FONT

This is to certify that the Petition has been reproduced in 14 point Times New Roman type, a font that is not proportionately spaced.

/s/ Martin J. McClain
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