IN THE SUPREME COURT OF FLORIDA
CASE NO. SC19-841

ROBIN LEE ARCHER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR ESCAMBIA COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is an appeal from the circuit court's order summarily denying a successive 3.851 motion.

Citations to Archer's record on direct appeal will appear as "AR __";

Citations to Archer's resentencing record in his 2nd direct appeal will appear as "Arr __";

Citations to the record in direct appeal by the codefendant, Patrick Bonifay, will appear as "BR __";

Citations to Bonifay's resentencing record in Bonifay's 2nd direct appeal will appear as "Brr __";

Citations to the record in Archer's appeal of the denial of his first 3.851 motion will appear as "APC __";

Citations to the record in Archer's appeal of the denial of his second 3.851 motion will appear as "2PC-R __";

Citations to the record in Archer's appeal of the denial of his third 3.851 motion will appear as "3PC-R __";

Citations to the record in Archer's current appeal from the denial of his fourth 3.851 motion will appear as "4PC-R __".

REQUEST FOR ORAL ARGUMENT

Mr. Archer has been sentenced to death. The resolution of the issues involved in this action are thus a matter of life and death. A full opportunity to air the issues through oral argument is warranted, given the seriousness of the claims involved and

the stakes at issue. Mr. Archer, through counsel, urges this Court to permit oral argument.

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INTRODUCTION

On the night of January 26, 1991, Patrick Bonifay (age 17), Clifford Barth (age 17), and Eddie Fordham (age 18) went to Trout Auto Parts in Pensacola. Fordham drove. Trout had a take-out window. Fordham parked his car near the take-out window.

Bonifay got out of the car. He was armed with a .32 caliber Colt. He walked to the take-out window. While the store clerk was talking on the phone, Bonifay pointed the gun at him. Meanwhile, Barth had grabbed bolt cutters and a book bag, gotten out of the car, and run to the take-out window. When he arrived, Barth grabbed Bonifay and told him to hurry up. This caused Bonifay to fire the gun. According to Bonifay, Barth then grabbed the gun and stuck his arm through the take-out window and fired the gun (AR 131). They then both climbed through the take-out window. Inside, Barth cut the padlock off the safe while Bonifay held the gun. Barth stuffed the contents of the safe into the book bag. Because the clerk was begging for his life, Barth told Bonifay to kill the clerk (AR 132). Bonifay put the gun to the clerk's head and pulled the trigger twice (AR 133).[1] Bonifay and Barth then left the store with the contents of the safe in the book bag.

[1] Barth denied grabbing Bonifay and causing the gun to fire. He also denied ever firing the gun. Barth testified that Bonifay was the only one to fire the gun and kill the clerk (AR 211).

When they got into Fordham's car, Bonifay told Fordham that they needed to go.

Later when the police arrested Bonifay, he claimed that the robbery was all his cousin's idea. Bonifay's cousin was Robin Archer. He had worked at Trout. However, he had been fired some nine months before the robbery. As a result of Bonifay's claim, Archer was charged with first degree murder along with Bonifay, Barth and Fordham.

Of the four co-defendants, currently only Archer is a sentence of death.[2] Bonifay did have a death sentence, but it was reduced to a life sentence in the wake of *Roper v. Simmons*, 543

[2] Bonifay and Archer were scheduled to be tried first. Their juries were picked on the same day. Bonifay's guilt phase was conducted. When the jury returned its verdict, it was sealed. Then Archer's jury returned, and his guilt phase was conducted. Bonifay's lawyer knew that Bonifay's trial had not gone well and Bonifay was going to be found guilty and probably end up with a death sentence. The lawyer advised Bonifay that his best hope for avoiding a death sentence was to volunteer to testify against Archer. The lawyer indicated that if Bonifay helped the State convict Archer, maybe he would not end up with a death sentence. As a result, Bonifay testified for the State at Archer's trial. In his testimony, Bonifay claimed that Archer had shown him a suit case full of money which he would give him if he would go kill the night clerk at Trout. Barth was also called by the State at Archer's trial. Barth testified that he had understood that when they went to Trout, they were going to do a robbery. Solely on the basis of Bonifay's testimony, the sentencing judge found the cold, calculated and premeditated aggravator. It was the reason that this Court upheld the imposition of a death sentence on a defendant who not only was not the triggerman, he was not even at the crime scene.

U.S. 551 (2005). Fordham and Barth received life sentences. Barth's life sentence was reduced in 2017, and he was released from prison.

This appeal arises from the summary denial of Archer's successive 3.851 motion as amended on October 31, 2018. In Claim II of his amended 3.851 motion,[3] Archer asserted that the portion of this Court's ruling in *Hurst v. State*, 202 So.3d 40 (Fla. 2016) that construed § 921.141, Fla. Stat., was substantive criminal law which should govern in his case. He maintained that the retroactivity analysis set out in *Witt v. State*, 387 So.2d 922 (Fla. 1980), only applied to constitutional decisions announcing a new procedural rule. As a result, *Witt* could not be used to preclude him from receiving the benefit of the statutory construction set forth in *Hurst v. State*.

The circuit court rejected Archer's claim by relying on decisions of this Court such as *Lambrix v. State*, 227 So.3d 112, 113 (Fla. 2017), and *Asay v. State*, 224 So.3d 695, 703 (Fla.

[3] Archer's amended 3.851 motion contained three claims. The first claim was premised upon the constitutional ruling in *Hurst v. Florida*, 136 S.Ct. 616 (2016), and the portion of *Hurst v. State*, 202 So.3d 40 (Fla. 2016), that was a constitutional ruling. The third claim argued that a co-defendant's recent release from prison constituted newly discovered evidence which when viewed cumulatively with the other evidence that had been unavailable at the time of trial but had since been developed in collateral proceedings, would probably result in a less severe sentence at a resentencing.

2017). The decisions that the circuit court relied to deny Archer's claim all rested on this Court's *Witt* analysis in *Asay v. State*, 210 So.3d 1 (Fla. 2016).

On June 4, 2019, the State filed its reply to the response to an order to show cause in *Reed v. State*, Case No. SC19-714, an appeal currently pending before this Court. In its June 4th reply in *Reed v. State*, the State conceded that the *Witt* retroactivity analysis was inapplicable to a judicial decision adopting a new or unexpected construction of a criminal statute:

> Indeed, *Witt* limits retroactivity analysis to decisions that are "constitutional in nature," thereby excluding statutory interpretation decisions from its ambit.

(*Reed v. State*, Case No. 19-714, State's Reply to Response, at 6). In its reply in *Reed v. State,* the State then explained why it was inappropriate to use the Witt analysis when considering a statutory construction decision:

> It is statutory construction cases that raise the specter of legal innocence as well as ex post facto and notice concerns. *Bousley v. United States*, 523 U.S. 614, 620 (1998) (applying a decision involving statutory construction of the federal use-of-a-firearm statute retroactively and explaining that decisions involving substantive federal criminal statutes necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal); *Bouie v. City of Columbia*, 378 U.S. 347 (1964) (due process concerns raised by statutory construction of a trespass statute); *cf. Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994) (noting the due process notice concerns of statutory retroactivity). It was the use of the Witt test for retroactivity that

> raised such concerns in the United States Supreme Court in *Bunkley v. Florida*, 538 U.S. 835 (2003), which was a statutory interpretation case.

(*Reed v. State*, Case No. SC19-714, State's Reply to Response, at 6).

The State's concession in *Reed v. State*, Case No. SC19-714, is equally applicable as to Claim II of Archer's amended 3.851 motion. The *Witt* retroactivity analysis cannot be used to hold that the construction of § 921.141 set out in *Hurst v. State* was not the proper construction of § 921.141 on January 26, 1991, the date of the homicide for which Archer was convicted.

Besides the State's concession in *Reed v. State*, there is Justice Alito's recent dissent in *Rehaif v. United States*, 139 S.Ct. 2191, 2213 (2019). There, the Court's majority construed a federal criminal statute enacted in 1986 to include an element that courts had not anticipated. In his dissent, Justice Alito expressed his concern that the statutory construction adopted in *Rehaif* meant that those who were convicted under the statute and were still imprisoned would now be able challenge their convictions, even if the conviction is final and the challenge had to be presented in habeas petition:

> Those for whom direct review has not ended will likely be entitled to a new trial. Others may move to have their convictions vacated under 28 U.S.C. § 2255, and those within the statute of limitations will be entitled to relief if they can show that they are

> actually innocent of violating § 922(g), which will be the case if they did not know that they fell into one of the categories of persons to whom the offense applies. *Bousley v. United States*, 523 U.S. 614, 618–619, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998). If a prisoner asserts that he lacked that knowledge and therefore was actually innocent, the district courts, in a great many cases, may be required to hold a hearing, order that the prisoner be brought to court from a distant place of confinement, and make a credibility determination as to the prisoner's subjective mental state at the time of the crime, which may have occurred years in the past.

Rehaif v. United States, 139 S.Ct. at 2213 (Alito, J., dissenting). Justice Alito citation to *Bousley* tells us that he sees the ruling in *Rehaif* as substantive criminal law dating back to the 1986 enactment of the statute at issue.

Similarly, the Eleventh Circuit recently issued its ruling in *In re Hammoud*, _ F.3d _, 2019 WL 3296800 (11th Cir. July 23, 2019). There, the Eleventh Circuit held that the recent decision in *United States v. Davis*, 139 S.Ct. 2319 (2019), was a substantive ruling in that it narrowed the scope of a criminal statute by declaring a portion of the statute unconstitutional. Because the ruling altered the substantive law, *Davis* was found to apply retroactively. As a result, the Eleventh Circuit authorized the filing of a successive collateral motion raising a claim based on *Davis*.

The construction of § 921.141 set out in *Hurst v. State* must be found to have been the substantive law of Florida on January

26, 1991. *Hurst v. State* construed § 921.141 to require the finding of facts beyond the finding of one aggravating circumstance before death was an authorized sentence. The construction of § 921.141 announced in *Hurst v. State* narrowed the circumstances in which a death sentence was permissible. Accordingly, *Hurst v. State* must apply retroactively to the date that the statute was enacted. It must at least be recognized as the governing substantive law on January 26, 1991. As a result, Archer's death sentence cannot stand.

STATEMENT OF THE CASE AND FACTS

A. Procedural History

An indictment filed in the circuit court for Escambia County on February 26, 1991 charged Archer, Fordham, Barth and Bonifay with one count of first-degree murder, one count of armed robbery, and one count of grand theft (R. 1-2).

Archer was tried in Escambia County, Florida. On July 18, 1991, a jury found Archer guilty of first-degree murder, armed robbery, and grand theft. On July 19, 1991, the same jury returned a death recommendation by a vote of 7-5. On September 20, 1991, a death sentence was imposed. On direct appeal, this Court affirmed Archer's convictions, but remanded for a new penalty phase. *Archer v. State*, 613 So.2d 446 (Fla. 1993).

At the subsequent resentencing, another 7-5 death

recommendation was returned on October 27, 1993.[4] Archer was again sentenced to death on January 19, 1994. The sentencing judge found two aggravators: 1) the homicide occurred while the defendant was engaged in or an accomplice in a robbery; and 2) the homicide was committed in a cold, calculated and premeditated manner. *See Archer v. State*, 934 So. 2d 1187, 1192 n.1 (Fla. 2006). The sentencing judge also found two mitigators: 1) Archer had no significant history of prior criminal activity; and 2) Archer "was a good family member to his grandmother." *Id*. at 1192 n.2.[5]

In his second direct appeal to this Court, Archer argued: (1) the trial court's instruction to the jury on the cold, calculated, and premeditated aggravator was unconstitutionally vague; (2) the trial court erred in failing to provide the jury with a definition of reasonable doubt; (3) the trial court erred

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[4] At Archer's resentencing, Bonifay refused to testify despite having testified at the guilt phase portion of the Archer's 1991 trial. Because of Bonifay's refusal, the State was permitted to have his 1991 testimony read to the resentencing jury (Arr. 329).

[5] Thus, Archer's sentence of death rested upon the finding of heightened premeditated, a necessary element of the cold, calculated and premeditated aggravator because this Court had held that the in the course of a felony aggravator was not a sufficient basis for a death sentence on its own. *Rembert v. State*, 445 So. 2d 337, 340 (Fla. 1984) (overturning death sentence when the only aggravator was that the homicide occurred in course of a felony); *Proffitt v. State*, 510 So. 2d 896, 898 (Fla. 1987) (death sentence vacated where only aggravator was that the homicide occurred in the course of a burglary).

in failing to give the jury any of the general and various instructions on principals; (4) the trial court erred in admitting victim-impact evidence; (5) the trial court erred in refusing to instruct the jury that its sentencing recommendation was entitled to great weight; (6) the trial court erred in failing to instruct the jury that it could consider Archer's age of 26 as a mitigating factor; and (7) the trial court erred in granting several of the State's cause challenges of jurors who could not recommend death if Archer was not the triggerman. Though this Court affirmed Archer's sentence of death, it was sharply divided. *Archer v. State*, 673 So. 2d 17 (Fla. 1996).

This Court unanimously found that the instruction given Archer's jury on the cold, calculated and premeditated aggravator (CCP) was constitutionally inadequate:

> First, we address Archer's claim that the trial court erred in its instruction to the jury on the cold, calculated, and premeditated aggravating factor. The trial court gave the standard jury instruction on this aggravator, which we found to be unconstitutionally vague in *Jackson v. State*, 648 So.2d 85 (Fla.1994). Claims that the instruction on the cold, calculated, and premeditated aggravator is unconstitutionally vague are procedurally barred unless the defendant both makes a specific objection or proposes an alternative instruction at trial and raises the issue on appeal. *Walls v. State*, 641 So.2d 381, 387 (Fla.1994), *cert. denied*, 513 U.S. 1130, 115 S.Ct. 943, 130 L.Ed.2d 887 (1995). At trial, defense counsel objected to the standard instruction and requested an expanded instruction. Because Archer raises the constitutionality of the instruction on appeal, we are

able to address the merits of this claim.

Archer v. State, 673 So. 2d at 19.

Having found constitutional error, this Court then split 4-3 on whether the error was harmless. The majority concluded that the error was harmless:

> While we agree that the trial court erred in giving this instruction, we conclude that this error was harmless. *See State v. DiGuilio*, 491 So.2d 1129 (Fla.1986). Harmlessness exists if the record supports a finding that, beyond a reasonable doubt, the murder could only have been cold, calculated, and premeditated without any pretense of moral or legal justification even if the proper instruction had been given. *See Walls*, 641 So.2d at 387. The record in this case reveals that all four of these elements would exist under any definition of the terms.

Archer v. State, 673 So. 2d at 19.

This Court's majority opinion reasoned that there was evidence to support the four elements of CCP:

> Archer not only hired Patrick Bonifay, his cousin, to commit the murder but also wanted Bonifay to disguise the murder as a robbery. To this end, Archer provided Bonifay with a plan which included a description of the store's security system and the location of the store's cash box and emergency exit. Archer not only detailed what Bonifay should say to the clerk and when to shoot him, but Archer secured the gun and delivered it to Bonifay. Moreover, when Bonifay returned after killing the wrong clerk, Archer refused to pay him on the agreement. Under these facts, we find that the murder resulted from a careful plan or prearranged design beyond a reasonable doubt.

Archer v. State, 673 So. 2d at 19.[6]

On September 1, 1997, Archer filed a 3.851 motion to vacate. After the motion was amended, an evidentiary hearing was conducted in 2002 on Archer's ineffective assistance claims, on his *Brady/Giglio* claims, and on his newly discovered evidence

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[6] In his dissent, Justice Anstead, joined by Justices Shaw and Kogan, disagreed with the harmlessness finding. Justice Anstead explained:

> The majority concludes that there is no reasonable possibility that the jury would not have found the cold, calculated, and premeditated aggravator because the evidence was undisputed that the aggravator existed. However, the record does not support this conclusion. Indeed, there is some evidence that would support the defendant's position that, at most, he urged the actual gunman to commit a robbery, but not a murder.

Archer v. State, 673 So. 2d at 22. Bonifay was the only source of information that he had been hired by Archer to kill the night clerk at Trout. Barth testified that he understood at the time that they were going to Trout to do a robbery. This Court did recognize in 2006 that the State had failed to disclose police reports regarding a burglary of the All Pro Sound store that Bonifay and Barth committed about one month prior to the Trout robbery. Archer was not alleged to be involved in the All Pro Sound burglary. *Archer v. State,* 934 So.2d 1187, 1203-04 (Fla. 2006). Most importantly, Barth disputed Bonifay's testimony that Barth had jostled Bonifay and caused him to pull the trigger, and he disputed Bonifay's addition claim that Barth had at one point grabbed the gun and fired the gun at the clerk. Barth's testimony conflicted with Bonifay's testimony. According to Bonifay, Barth was not only a triggerman, but had used Bonifay's name in front of the victim when telling Bonifay to kill the victim (AR 132-33). Bonifay put the gun the victim's head and fired because the victim had seen Bonifay's face and had heard Barth say Bonifay's name.

claim arising from Bonifay's testimony in his own collateral proceedings.[7] After the trial court denied the amended 3.851 motion, Archer appealed. While denying Archer's appeal, this Court addressed Archer's claim alleging that the failure to disclose police reports regarding a burglary of All Pro Sound that Bonifay and Barth had committed in December 1991 violated *Brady v. Maryland*, 373 U.S. 83 (1963). This Court concluded that Archer had not shown "that not turning over the police reports suppressed information which could reasonably taken to put the whole case in such a different light as to undermine confidence in the verdict." *Archer v. State*, 934 So. 2d at 1204.

Archer was unsuccessful in seeking habeas relief in the federal courts.

On November 29, 2010, Archer returned to state court and filed a 3.851 motion premised upon the US Supreme Court's decision in *Porter v. McCollum*, 558 U.S. 30 (2009). After a case management hearing was held, the Rule 3.851 motion was denied on October 7, 2011 (2PC-R 726). Archer appealed (2PC-R 736). On March 7, 2013, this Court affirmed the denial of the 3.851 motion in an unpublished order. *See Archer v. State*, Case No. SC11-2234.

[7] Bonifay, at his own post-conviction proceedings, stated that 1) there had never been an arrangement to kill the intended victim and 2) he had fabricated the story to avoid being sentenced to death and to shift blame to Archer.

On June 6, 2013, Archer filed another 3.851 motion. This one was based upon information contained in a then newly published book, *Trout – A True Story of Murder, Teens, and the Death Penalty*, by Jeff Kunerth (3PC-R 1). The author had conducted numerous interviews of Archer's co-defendants and of witnesses in the case. The lead detective was interviewed, as was the prosecuting attorney as well as Bonifay's counsel. The information obtained through the numerous interviews was contained in the book. Some of this information was not only new to Archer, but also favorable. This favorable information, which had been previously unknown to Archer, would have been useful at both the guilt and penalty phases. A copy of the book was attached as an appendix to the motion (3PC-R 28).

On June 17, 2013, the State filed a motion to strike the 3.851 motion (3PC-R 132). On June 25, 2013, the circuit court denied the State's motion (3PC-R 146), but in a separate order it struck the 3.851 motion for failing to adequately plead his claim (3PC-R 149). Archer was given "30 days from the date of the order to file an amended motion" (3PC-R 149).

On July 25, 2013, Archer filed an amended 3.851 (3PC-R 151). On August 7, 2013, the State filed its answer and asked that the 3.851 motion be summarily denied (3PC-R 281-87).

On August 27, 2013, the 3.851 motion was summarily denied

(3PC-R 301).

On September 24, 2013, Archer appealed (3PC-R 309). In an unpublished order, this Court affirmed. *Archer v. State*, 151 So.3d 1223, 2014 WL 2926502 (Fla. 2014).

On November 22, 2016, Archer filed a habeas petition in this Court. He asserted that his death sentence stood in violation of the Sixth and Eighth Amendments in light of *Hurst v. Florida*, 136 S.Ct. 616 (2016), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016). He argued that both decisions were constitutional rulings that should be found to be retroactive under *Witt v. State*, 387 So.2d 922 (Fla. 1980).

Following the issuance of this Court's decisions in *Asay v. State*, 210 So.3d 1 (Fla. 2016), and *Mosley v. State*, 209 So.3d 1248 (Fla. 2016), Archer filed a successive 3.851 motion in the circuit court. It, too, challenged his death sentence on the basis of *Hurst v. Florida* and *Hurst v. State*. It also argued that the partial retroactivity result in *Asay v. State* and *Mosley v. State* violated the Fourteenth Amendment.

On March 17, 2017, this Court in an unpublished order denied Archer's habeas petition and stated:

> We hereby deny Archer's petition pursuant to our holding in *Asay v. State*, 41 Fla. L. Weekly S646 (Fla. Dec. 22, 2016), that *Hurst v. Florida* and *Hurst v. State* do not apply retroactively to capital defendants whose death sentences were final when *Ring v. Arizona*,

536 U.S. 584 (2002), was decided.

Archer v. Jones, 2017 WL 1034409 (Fla. 2017).

Archer filed a motion for rehearing. On June 29, 2017, this Court entered an order in *Archer v. Jones* and stayed further proceedings pending the disposition of *Hitchcock v. State*, Case No. SC17-445.

Meanwhile, the circuit court had stayed proceedings on Archer's successive 3.851 motion pending the outcome in *Archer v. Jones*.

On September 27, 2017, this Court entered an order directing Archer to show cause why his rehearing motion should not be denied in light of this Court's decision in *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017).

After Archer filed his response to the show cause order, this Court denied his motion for rehearing on January 22, 2018.

Thereafter, Archer asked the circuit court for the opportunity to amend his successive 3.851 motion. Archer's request was granted, and he filed an amended 3.851 motion on October 31, 2018. The State filed its answer on November 7, 2018. Archer filed a reply on November 24, 2018. The circuit court conducted a case management hearing on November 26, 2018.

On February 13, 2019, the circuit court entered its order summarily denying the amended 3.851 motion. Because Archer's

undersigned designated counsel for unknown reasons did not receive a copy of the order and did not learn of existence until April 9, 2019, counsel on Archer's behalf and the State filed a joint petition for a belated appeal on April 12, 2019.

This Court granted the petition and this is Archer's appeal of the circuit court's order summarily denying the amended 3.851 motion.

B. Relevant Facts

Archer and his three co-defendants, Bonifay, Barth and Fordham, were all charged with capital murder. The State maintained that late on January 26, 1991, Bonifay, Barth and Fordham went to Trout Auto Parts. While Fordham remained in the car, Bonifay and Barth entered the store armed with a gun. After shooting and killing Billy Coker, a store employee, Bonifay and Barth return to the car and left with Fordham driving. When the police later arrested Bonifay, he claimed Archer put him up to do the crime. Not charged in the case was David Kelly Bland who had provided the gun that was used to shoot the victim and who had provided the bolt cutters used in the robbery to gain access to the padlocked safe. Bland was Barth's cousin. He was also Bonifay's close friend (BR 266; AR 280, 295).[8]

[8] Bland testified in Bonifay's trial that Bonifay had asked for a gun. Bland testified that he gave the gun to Archer to give to

Jury selection for Bonifay's and Archer's trials occurred on July 15, 1991.[9] Bonifay's trial then proceeded first. The State called 9 witnesses including Bland and Barth.[10] The defense rested

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Bonifay (BR 208). Bland admitted in his testimony at Bonifay's trial that he had originally told the police that he gave the gun to Bonifay directly (BR 220). Bland also admitted giving Bonifay the bolt cutters that were used in the crime (BR 214). After the murder, Bonifay returned the gun, bullets and bolt cutters to Bland and told him to get rid of them (BR 213). After telling him about the homicide, Bonifay also asked Bland to "go in and threaten [Eddie Fordham's] life and all, just scare him bad" (BR 217). Bonifay was afraid that Fordham was talking about the murder and that it was going to get them in trouble. However, it was Bland's girlfriend, Jennifer Tatum, who went to the police and told them that Bonifay had confessed the homicide to her and indicated that Barth and Fordham were with him at the time (BR 202, 205). Bland testified that the police came to his house after Tatum told the police about Bonifay's confession (BR 219). Initially, Bland told to the police that he had thrown the gun off a bridge (BR 222). Eventually, he turned the gun over to the police (BR 217). Despite his involvement in the crime both before and after its commission, Bland was not charged (BR 220). Though both testified at Bonifay's trial, neither Bland nor Tatum were called to testify either in Archer's trial or his resentencing. At Bonifay's resentencing, Tatum testified that Bonifay had told her that the reason he shot the victim was "[b]ecause he saw his face" (Brr 224).

[9] After Bonifay's jury had been selected and after Archer's jury had been selected on July 15, 1991, the judge announced that "the cases of Fordham and Barth will be continued" for one week until July 22, 1991 (AR 66).

[10] After Barth's first degree murder trial was continued, he was called by the State to testify against Bonifay on July 16, 1991 (BR 265). Barth testified that he was facing "[l]ife sentence or the death penalty" (BR 280), and that no one had told him "that [he was] going to get anything other than life in prison or the death penalty" (BR 280). He was asked: "Are you getting anything in return for your testimony here today?" And he answered: "Huh-uh" (BR 280). In his testimony against Bonifay, Barth said that Bonifay shot and killed the victim inside the store while he, Barth, was still in the car. Bonifay motioned for Barth to join

without calling any witnesses. Bonifay did not testify (BR 309). The jury retired to deliberate at 10:04 AM on July 17, 1991 (BR 368). It returned its verdict at 11:45 AM (BR 373). The verdict was sealed at that time and remained so until July 19, 1991, after the completion of Archer's trial (BR 375).

The jury selected on July 15th to hear Archer's case then returned on July 17th and his trial resumed.[11] After presenting brief testimony from its first 3 witness, the State called Bonifay as its 4th witness. Bonifay's testimony began shortly after 2 PM on July 17th, and a little over 2 hours after the sealed verdict had been returned in his case. Bonifay testified that he was charged with 1st degree murder and was facing "[t]he death penalty" (AR 125). When asked if anyone has "told you that you

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him, and then "he shot the man again" (BR 274). It was only then that Bonifay and Barth entered the store (BR 274-75). Barth testified that Bonifay had told him that he had gotten information about the store lay out from Archer because Archer used to work there. Barth specifically swore: "[Bonifay] told me that [Archer] told him where everything was. He didn't say that he set it up or nothing" (BR 285).

[11] In his opening statement, the prosecutor told Archer's jury: "The evidence will be Robin Archer did not kill Billy Coker. No question about that. Robin Archer was not there" (AR 82). The prosecutor also told the jury: "the State will not try and demonstrate that Robin Archer received any money from this robbery. He did not" (AR 82). The prosecutor told the jury that he expected the evidence to show that Archer came up with a plan to get Bonifay to rob Trout Auto Parts, where Archer used to work, and shoot the man working behind the counter for purposes of revenge (AR 83-84, 86). The prosecutor said that the State's evidence would show that "Patrick Bonifay was going to do a murder for Robin Archer, and get rich in the process" (AR 87).

would not receive the death penalty, in any way receive consideration for your testimony," Bonifay answer "No, Sir" (AR 125). Bonifay then testified that he had "participate[d] in the robbery and the murder of Billy Coker" (AR 125-26). Bonifay testified that Archer[12] came to his house and "showed [Bonifay] a briefcase full of money and [Archer] told [Bonifay] he wanted me to do a job. And I asked him what was he talking about. And he said I want you to murder someone. And so he explained everything to me and left from there" (AR 126).[13]

Bonifay explained that Archer wanted the man killed because "[t]he man had got him fired" (AR 129). Bonifay claimed that when he could not go through with the murder on January 25th, he told Archer he "wasn't going to kill somebody for money. And he said oh, you're not. He said you like your mom and Rae" (AR 130). Bonifay said that he took it as a threat that Archer would hurt Bonifay's mother and his girlfriend if he did not go through with the murder (AR 130). Bonifay testified, he went with Barth and Fordham that night, January 26th, back to Trout's Auto Parts. Bonifay testified that both Barth and Fordham knew what was going

[12] Bonifay testified that Archer was "my cousin, second cousin" (AR 125).
[13] During the cross, Bonifay said he did not know how much money was in the briefcase, but that Archer told him it $500,000 (AR 139).

to happen (AR 131). When they got there, Bonifay went to the service window. When the teller wasn't looking, he pulled out his gun and pointed at the teller. Barth came running up and "said hurry up" (AR 131). Barth grabbed Bonifay "and the gun went off" (AR 131). Barth then grabbed the gun from Bonifay and walked up to the window and "stuck his arm in the window and shot the gun again" (AR 132).[14] Both Barth and Bonifay climbed through the service window to rob the place. The victim was stilling alive. Barth then saying Bonifay's name told him to kill the victim (AR 132). Because the victim had seen Bonifay's face and because Barth had said his name, Bonifay "put the gun to his head and turned the other way and I pulled the trigger twice" (AR 133).[15]

On cross, Bonifay admitted that when they were leaving the

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[14] During cross, Bonifay acknowledged that "under oath [he was] saying that Cliff Barth shot [the victim] the second time" (AR 143) This was after Barth hit Bonifay's shoulder, the gun went off firing the first shot.

[15] On cross, Bonifay testified that the reason that the victim was killed was because Barth said Bonifay's name in front of the victim (AR 146). Later, he testified that he killed him because he was afraid of Archer (AR 148-49). During the cross, he also denied telling Tatum that the victim was begging for his life when he fired the final shots (AR 147). Bonifay disputed Tatum's claim that he had confessed to her. Bonifay testified that such a confession never happened (AR 162). Interestingly, the prosecutor called Tatum to testify at Bonifay's trial, but chose not to call her at Archer's trial where her testimony would contradict Bonifay's testimony. However, it was Tatum's statement to the police that Bonifay had confessed the murder to her that resulted in Bonifay's arrest.

scene in the Fordham's car, he had pointed the gun at Barth and threatened because he was mad at him for saying his name in front of the victim (AR 153).

On cross, Bonifay also testified that Bland was his best friend (AR 156). Bonifay said that he got the gun he used from Bland (AR 156).[16] He then changed it and said he got it from Archer (AR 156).[17] Bonifay elaborated that he had gotten the gun from Archer on Friday night when nothing happened. He gave it back to Bland on Saturday (AR 159).[18] Bonifay then had to go back to Bland later that Saturday to get the gun again before returning to Trout Auto Parts that night (AR 159). Bonifay testified that he got the bolt cutters used in the crime from Bland (AR 157). Bonifay said in cross that he had told Bland what

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[16] In his opening statement, Archer's counsel told the jury: "I expect that you'll also hear from a man by the name of Kelly Bland. Expect that Kelly Bland, he was questioned just prior or just after the charges, told investigators that he gave the gun to Bonifay,that he gave it to Bonifay. Then he changed his mind and said that he gave it to Robin Archer. Contradicting what he said in the first statement to the police" (AR 101). Though Bland had been called by the State to testify at Bonifay's trial, after hearing the defense's opening and after suddenly having Bonifay for reasons not explained at the time suddenly wanting to testify for the State, the prosecutor surprised defense counsel and did not call Bland to testify at Archer's trial.

[17] Later in the cross, Bonifay testified that the gun "belong to [Bland's] aunt" (AR 157). Bonifay knew that Bland "took it out of [his aunt's] house" (AR 157).

[18] On cross, Bonifay admitted that in his statement to the police, he had not indicated that Archer had handed him the gun on Friday (AR 160).

he needed the gun for when he got it back from him on Saturday (AR 159, 163). Bonifay said that he told Bland he "had a job to do" and that Bland knew what that job was (AR 159-60).[19] Bonifay testified that when he returned the gun to Bland, he told him that the gun had been used in a murder (AR 161).[20] Bonifay also testified that he had told Fordham, Barth and Bland that Archer had wanted Bonifay to kill the man working at the counter at Trout Auto Parts (AR 163). Bonifay testified in redirect that, while he wasn't afraid of Archer physically, he was afraid of "[h]is gun, his associates" (AR 163).[21]

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[19] When the State called Bland as a witness at Bonifay's trial, he testified that when Bonifay asked about getting a gun, he had said that it was "to go shoot it, target practice" (BR 210). On cross, Bland specifically denied knowing the gun was for anything but target practice (BR 221). Despite having presented Bland as a truthful witness at Bonifay's trial, the State did not tell the jury that Bland had testified and contradicted Bonifay's testimony on this point.

[20] At Bonifay's trial, Bland testified that when Bonifay returned the gun, he told Bland to "get rid of it" (BR 213). Bland also stated that Bonifay told him about the murder, and how he, Bonifay, did it. Bland reported that Bonifay said that the victim "was pleading for his life. He said he had a wife and two kids, not to kill me and all, and [Bonifay] said F your wife and kids and shot him anyway" (BR 216).

[21] Bonifay was not asked about Bland's testimony at Bonifay's trial. No mention was made of Bland's testimony regarding Bonifay's request that Bland "go in and threaten [Eddie Fordham's] life and all, just scare him bad" (BR 217). Bland testified that he then went with Fordham to a Taco Bell, went inside and sat down with Fordham. Bland testified that he "asked Eddie if he had been talking about it, and he said no, and I told him if he had, you know, that I would hurt him" (BR 217).

On redirect, the prosecutor asked Bonifay about George Wynn (AR 167).[22] Bonifay testified that he thought he had told Wynn about how "Archer was helping plan this" (AR 168). This was because Wynn "was supposed to be involved in it" (AR 168).

Wynn was the State's 7th witness (AR 191).[23] Wynn testified that Bonifay asked him one Friday night in January of 1991 to drive him over to Trout Auto Parts (AR 191-92). Wynn said that Bonifay "said they were going to rob Trout and it might involve killing somebody" (AR 192). According to Wynn, Bonifay had said that Archer had "asked him to do that and he wanted one person killed" (AR 192).[24] In the cross, Wynn acknowledge that he was related to Bonifay and that they were "pretty good friends" (AR

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[22] The transcript from Archer's trial misspelled the name. The correct spelling is George Wynne. It appears in Wynne's criminal case which was pending at the time, but which was not disclosed to Archer or his counsel, nor mentioned in the testimony presented by the State. *State v. George Herbert Wynne*, Case No. 1991-CF-001300A. Burglary and grand theft charges had been filed on March 25, 1991. The charges arose from the burglary of All Pro Sound on December 22, 1990. The trial was initially set for July 1, 1991, but was continued until after the trials of Bonifay, Archer and Fordham had concluded. On November 8, 1991, a deferred prosecution agreement was filed in Wynne's criminal case. On October 23, 1992, the State filed a nolle prosequi and the case was closed. Under *Davis v. Alaska*, 415 U.S. 308 (1974), Wynne had reason to curry favor with the State. Neither the guilt phase jury nor the resentencing jury were advised of the charges pending against Wynne.

[23] The State did not call Wynne to testify at Bonifay's trial.

[24] Archer's counsel failed to make a hearsay objection to Wynn's testimony about what Bonifay had told him that Archer had said.

194). Wynn further testified that the day after the murder Bonifay called and told him that he (Bonifay) had shot the victim in the head (AR 195).[25] Wynn then admitted that even though Bonifay went into detail about how he committed the murder, he did not call the police and report Bonifay's confession (AR 195). Wynn testified that the reason for that was the fact that he "was scared" (AR 195).

As its 8th witness, the State called Barth. He testified that Bonifay had asked if he would help him rob Trout (AR 202). Barth indicated that Bonifay had told him that Archer used to work there and had told him about it (AR 203). Barth said he agreed to be part of the robbery. On Friday, Bonifay and Fordham picked him up, and they went to see Wynn. Bonifay tried to talk Wynn into joining them, but he declined (AR 203-04). Then Fordham drove Bonifay and Barth to Trout. Bonifay went to the service window, but soon returned to the car and said that "the guy heard him cock the gun" (AR 205). The trio then left Trout. The next day, Bonifay decided to try again. Barth claimed that Bonifay had "said [Archer] said that would be a good night to do it" (AR 206). When they got back to the store, Bonifay went back to the

[25] For unknown reasons, the State did not call Wynn at Bonifay's trial to present Wynn's testimony recounting Bonifay's confession that he shot and killed the victim.

service window. Barth testified that Bonifay fired his gun at the clerk, and then signaled for Barth to go to the window (AR 206). Barth testified that as he was getting out of the car, Bonifay was already going through the service window into the store. By the time, Barth followed and got inside the store, Bonifay had "shot the man two more times" (AR 206).

On the cross, Barth emphatically denied Bonifay's claim that Barth had grabbed Bonifay and caused the gun to discharge (AR 208). Barth also testified that Bonifay had not at any time said that he wanted to go to Trout in order to shoot and kill the night clerk (AR. 211). At no time during his testimony did Barth tell the jury that he had criminal charges pending against him and/or that if convicted he could receive a death sentence.[26]

After the State rested, Archer took the stand and testified on his own behalf. He affirmatively asserted that he had not planned the robbery/murder with Bonifay. The case came down to whom to believe: Bonifay or Archer.

In his closing argument, the prosecutor called the crime a

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[26] In his testimony, Barth did not mention that he had been meeting with Archer's prosecutor frequently going over "all the evidence that Patterson had collected and needed Cliff to corroborate." *Trout - A True Story of Murder, Teens, and the Death Penalty* at 88. Barth did not reveal his understanding that if he cooperated with the Archer's prosecutor, the prosecutor "would not seek the death penalty." *Trout - A True Story of Murder, Teens, and the Death Penalty*, at 87.

"[c]lassic inside job" (AR 369). He said that "two 17 year olds committed this crime, killed Mr. Coker" (AR 369). He argued that "both 17 year olds at the time they are arrested said well, yeah, the information came from Robin Archer. That's how we did it" (AR 369).[27] The prosecutor then vouched for Barth's credibility:

> You saw Clifford Barth testify. He's 17 years old. He is in a situation where he has ruined his life and he knows it. And he told yes, I know what I'm facing, and I'm telling you no promise, no benefit, I don't care, I'm telling you that the gun came from Robin Archer.

(AR 371).[28] The prosecutor argued that "Robin Archer made sure that they had a gun" (AR 370).[29]

In his rebuttal, the prosecutor disputed the defense's claim that the case was centered on Bonifay and his credibility: "The defense says that the case centers on Patrick Bonifay, that that's it, that's the whole case. That's not a whole truth.

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[27] The prosecutor did not tell the jury that Barth testified at Bonifay's trial and swore that "[Bonifay] told me that [Archer] told him where everything was. He didn't say that he set it up or nothing" (BR 285). Barth did not know what Archer did or did not do. Barth only knew what Bonifay told him.

[28] Contrary to the prosecutor's closing, Barth did not testify to what he was facing. Until the prosecutor told Archer's jury that Barth's life was ruined and that no promises had been made nor benefit given to Barth, there had not been testimony on the matter.

[29] The prosecutor knew from Bland's testimony in Bonifay's trial that it was Bonifay who asked Bland for the gun and made sure that he, Bonifay, was armed for the robbery. Bland simply gave the gun to Archer and told him to give it to Bonifay. The gun was Bland's gun.

Clifford Barth testified. Clifford Barth looked at you. Clifford Barth looked Mr. Lang straight in the eye and said Robin Archer gave the gun to Patrick Bonifay, I saw him do it" (AR 404).[30]

After Archer's jury returned a guilty verdict, the guilty verdict in Bonifay's case was unsealed. The Bonifay's penalty phase proceedings began. In Bonifay's penalty phase, the prosecutor, who had days earlier called Bonifay to testify against Archer, asserted that Bonifay's story that Archer had hired him was fabricated. The prosecutor maintained that Bonifay was trying to escape moral responsibility for his conduct.

After Bonifay's jury returned a death recommendation, Archer's penalty phase was conducted. The jury returned a 7-5 death recommendation. Thereafter, the judge imposed a sentence of death.

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[30] Barth testified on direct that he "didn't see the gun come out" (AR 204). Barth indicated that he did not see Archer hand the gun to Bonifay. Of course, neither the defense nor the jury knew that the prosecutor had spent numerous hours over the course of many meetings with Barth prepping him and instructing him how to testify in court. Barth had been meeting with the prosecutor frequently and going over "all the evidence that Patterson had collected and needed Cliff to corroborate." *Trout - A True Story of Murder, Teens, and the Death Penalty*, at 88. "In preparing for the trials of [Bonifay], [Fordham], and [Archer], [Barth] spent many more hours with Patterson than he would not with his own attorney in preparing his own defense." *Id*. It is not at all clear that Barth understood that his cooperation would not necessarily result in benefit. *Trout - A True Story of Murder, Teens, and the Death Penalty*, at 87.

On appeal, this Court vacated the death sentence and ordered a new penalty phase. *Archer v. State*, 613 So. 2d 446 (Fla. 1993).

A new prosecutor handled Archer's resentencing. This time Bonifay "refused to testify in this matter despite being granted use immunity for his testimony" (Arr 329).[31] Thereupon, Bonifay's testimony from July 17, 1991, during Archer's guilt phase, was read to the 1993 resentencing jury, even though the original prosecutor who had elicited the testimony doubted Bonifay's truthfulness, and stated so at Bonifay's 1991 penalty phase.[32]

At the 1993 penalty phase proceeding, the State called Barth to testify. On cross, Barth admitted that after testifying against Bonifay, Archer and Fordham, he was able to enter a plea

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[31] The judge instructed the jury at Archer's resentencing that Bonifay "refused to testify in this matter despite being granted use immunity for his testimony" (Arr 329). This jury was not told that the prosecutor at Archer's guilt phase had told Bonifay's jury at his 1991 penalty phase that the story that Bonifay told when he testified at Archer's trial was not true, but an attempt by Bonifay to escape moral responsibility for his actions.

[32] The prosecutor at Archer's resentencing could not claim as the trial prosecutor claimed that he had not prepped for Bonifay's testimony and did not know what Bonifay was going to say when he put him on the witness stand. At the 2002 evidentiary hearing in Archer's case, the trial prosecutor testified that he had not had a chance to prep for Bonifay's testimony because he learned from Bonifay "literally in a hallway" right before putting Bonifay on the witness stand that Bonifay "want[ed] to testify" on behalf of the State at Archer's trial (APC 365-66). The prosecutor testified that he had not been in a position prior to hearing Bonifay's testimony when he took the witness stand "to make an evaluation of credibility of what [Bonifay] was going to say" (APC 366).

and accept a life sentence (Arr 289). Barth did not disclose in his testimony that he understood that if he cooperated with prosecutor, "Patterson would not seek the death penalty." *Trout – A True Story of Murder, Teens, and the Death Penalty* at 87. Barth also did not disclose that at the time of his July 17, 1991, testimony that a criminal case was pending against him for the burglary of All Pro Sound which had occurred on December 22, 1990. *State v. Clifford Barth*, Case No. 1991-CF-001111A. The docket in that case shows that a plea agreement was reached on June 11, 1991, but an adjudication was withheld at that time.[33] Barth's case got passed until September 17, 1991, when Barth was adjudicated guilty and his sentence was made concurrent with his sentence in Case No. 91-606, the Trout Auto Parts case.[34]

At the 1993 penalty phase proceeding, the State also called

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[33] Barth's plea was entered more than a month before Archer's trial began on July 15, 1991. Yet at Archer's trial, no mention was made of the plea agreement. In fact, the State withheld from the defense documents regarding the All Pro Audio burglary.

[34] In affirming the denial of Rule 3.851 relief in Archer's case, this Court found that the State had failed to turn over documents and materials concerning the All Pro Sound burglary. *Archer v. State*, 934 So.2d at 1203. The denial of relief was premised upon a failure by Archer to show that the failure to disclose undermined confidence in the guilty verdict or death sentence. *Archer,* 934 So. 2d at 1203-04.

George Wynne[35] to testify against Archer (Arr 358).[36] Wynne's 1993 testimony was mostly a repeat of what he had said at Archer's July 1991 trial. He again made no mention of the fact that on March 25, 1991, criminal charges had been filed against him for the December 22, 1990, burglary of All Pro Sound.[37] Wynne had

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[35] In the transcript from Archer's resentencing, Wynne's name is correctly spelled.

[36] At his resentencing, Archer was not represented by the same attorney who had represented at the trial two years earlier.

[37] Police reports were introduced into evidence at the 2002 hearing on Archer's initial 3.851 motion. They showed that the break in the All Pro Sound burglary case came on February 16, 1991, when a police officer assigned to investigate the case learned from the homicide investigator assigned to the Trout homicide that David Kelly Bland (DOB 8/20/71) had been granted immunity in connection with the homicide investigation. In return, Bland was required to tell the police about any and all crimes within the preceding year in which Bland had been a participant (APC 1168, 1316-25). Bland was first questioned by police about the Trout homicide after his girlfriend, Jennifer Tatum, went to the police on February 11, 1991. *Trout - A True Story of Murder, Teens, and the Death Penalty*, at 49. After Tatum's bombshell, the police got a hold of Bland. They were talking with Bland by 3:30 PM on February 11, 1991. *Id*. In Bland's February 11th statement he reported that had obtained a gun from Bland on Friday, January 25, and returned it on
Sunday, January 27. When he returned it, he told Bland he needed to get rid of the gun. Bland said it was a few days later that Bonifay told Bland that he shot the guy and then shot him some more when he started begging for his life. *Id*. Bland told the police that he did as Bonifay directed and got rid of the gun. *Id*. Bland also told the police that Barth and Fordham were with Bonifay when the homicide occurred. The State reward Bland for the information that he provided by giving him immunity, so long as he came clean on all the crimes that he had been involved in the preceding year. This led to Bland providing a second statement on February 15, 1991, in which he detailed the other crimes cases that he had been involved in or knew about.

first learned that he was being investigated for the All Pro Sound burglary on February 28, 1991, when the police investigator met with Wynne's wife and told her that the stereo that Wynne had given her for Christmas was stolen (APC 1317). Wynne's wife was told to tell her husband that the police were looking for him. Given this, Wynne realized that he was in legal jeopardy before speaking with the police.

After he was charged with the All Pro Sound burglary, Wynne's trial was scheduled to start on July 1, 1991. The State agreed to continue Wynne's trial until after Bonifay, Archer and Fordham had all been tried for the Trout homicide.[38] On November 8, 1991, a deferred prosecution agreement was entered in the case. On October 23, 1992, the State filed a nolle prosequi closing the case. When Wynne testified on July 17, 1991, Wynne had an undisclosed reason to curry favor with the State, his

[38] While Wynne did not testify at Bonifay's 1991 trial, he was deposed during Bonifay's trial on July 16, 1991. Present for the deposition were the prosecutor and Bonifay's lawyer, Barth's lawyer and Fordham's lawyer. Bonifay's lawyer asked Wynne whether a deal had been reached in the All Pro Sound case (APC 1674-75). Of course, Bonifay and Barth were Wynne's co-defendants in the All Pro Sound case; Archer was not. Archer's trial counsel was not present for Wynne's July 16th deposition. After Wynne's deposition, the State decided not to call Wynne at Bonifay's trial. He was called as a witness at Bonifay's 1994 resentencing by the defense in order to present mitigating evidence for Bonifay, Wynne's lifelong friend (Brr 279). Wynne was 10 years older than Bonifay (Brr 280).

pending felony case. *Davis v. Alaska*, 415 U.S. 308 (1974); *Smith v. Sec'y Dept. of Corrs.*, 572 F.3d 1327, 1342 (11th Cir. 2009).

Archer's 1993 penalty phase ended with the jury returning a 7-5 death recommendation (Arr 502). On January 19, 1994, the presiding judge imposed a death sentence finding only two aggravators. His sentencing order showed that the death sentence was rested on the veracity of Bonifay's claim that Archer hired him to kill a clerk at Trout:

> **This is the classic case of murder for hire, a contract murder, an execution.** Archer sought out Patrick Bonifay for the purpose of avenging his firing from Trout Auto Parts [sic] employment by killing the one that [sic] he felt [was] responsible. Whether payment was to be the money taken in the robbery or a satchel of money as claimed by Bonifay, the deal was struck. Archer concocted the plan to get in, the use of ski masks to thwart the video, the bolt cutters to open the concealed cash box, and the smart way to exit. He aided in securing a gun, even delivering it to Bonifay himself.
>
> This plan proceeded over a period of several days--ample time for reflection. Even after the first attempt failed, Archer directed and insisted that Bonifay try again and go through with the murder ….

(Arr. 544-45) (emphasis added).

On appeal, this Court unanimously found Eighth Amendment error, but by a 4-3 margin found the error harmless because a jury properly instructed on the elements of the CCP aggravator would have would have found it proven. *Archer v. State*, 673 So. 2d at 20.

Archer then filed a 3.851 motion in the circuit court. At a 2002 evidentiary hearing, Archer presented evidence supporting his *Giglio* claims, *Brady* claims, ineffective assistance of counsel claims, and newly discovered evidence claim based on *Jones v. State*, 591 So. 2d 911 (Fla. 1991).

The *Giglio* claim was premised upon the prosecutor's failure to correct Bonifay's false or misleading testimony as Archer's 1991 trial and at the 1993 resentencing when Bonifay's 1991 testimony was read in full to the resentencing jury.

Archer's *Brady* claims were several in number. First, he presented evidence to show that the State did not disclose to him police reports regarding the All Pro Sound burglary which had occurred on December 22, 1990. These police reports showed that Bland was granted immunity in the Trout Auto Parts homicide (APC 1168).[39] In 2002, the trial prosecutor testified that "I don't know that I knew Mr. Bland was getting immunity for any cases" (APC 1105).[40] Archer's trial counsel testified that he did not recall knowing that Bland had received immunity (APC 1035).

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[39] Deputy O'Neal testified that Bland had been given use immunity as to the Trout Auto Parts case, although to O'Neal's knowledge Bland was not given immunity in the All Pro Sound burglary (APC 1168).

[40] The trial prosecutor testified in 2002 that he did not think that he had ever contemplated bringing charges against Bland in the Trout Auto Parts case (APC 1105).

Similarly, Archer's resentencing counsel did not recall knowing that Bland had received immunity (APC 962).

The undisclosed All Pro Sound police reports revealed that while being interviewed about the Trout homicide, Bland told police that on December 22, 1990, when he was 19 years old, he went with Wynne (who was then 26 years old), Bonifay, Barth, and another person and burglarized All Pro Sound (APC 1322).

The undisclosed police reports also revealed that Bonifay was then interviewed about the All Pro Sound burglary. Bonifay said he developed a prearranged plan with each participant having assigned tasks for carrying out the burglary (APC 1316).[41] Bonifay told the police that he and the others took property worth $17,730.30 in the course of the burglary of All Pro Sounds (APC 1316).

According to the undisclosed police reports, Barth was also interviewed. During the interview, he admitted his involvement in the All Pro Sounds burglary (APC 1317-18).

The undisclosed police reports noted that some of the stolen property was found in Wynne's house (APC 1318).

[41] The undisclosed police reports indicate that Bonifay got inside information about All Pro Sound from his stepfather who had worked there (APC 1316).

The police investigation led to criminal charges being filed against Bonifay, Barth and Wynne. Those cases were ongoing at the time when Bonifay, Barth and Wynne testified at Archer's July 1991 trial.

As for Archer's newly discovered evidence claim under *Jones v. State*, he presented Bonifay's testimony at a 2002 evidentiary hearing on Bonifay's own 3.851 motion in which Bonifay testified that Archer had not hired him or asked him to kill the Trout clerk. Archer also called Bonifay as a witness at the 2002 evidentiary hearing on Archer's 3.851 motion. Bonifay swore under oath that his testimony at Archer's trial had been fabricated.

In addition, the trial prosecutor was called at the 2002 evidentiary hearing. The prosecutor testified that he had not believed much of Bonifay's testimony at Archer's trial. The prosecutor did not believe that the clerk was killed because of anything Archer did.[42] Bonifay had testified that Archer had promised him a briefcase full of money, reportedly $500,000.00, if Bonifay killed the clerk working at Trout. Bonifay had also testified that when he failed to go through with it on January

[42] The prosecutor testified that he did not believe Bonifay's testimony that Archer had threatened him was true: "it was the State's theory of the case in Mr. Bonifay's trial and in Mr. Archer's trial that the act was not committed as a result of threats. So, yes, I did not believe that that's why this crime was committed." *Archer v. State*, 934 So. 2d at 1200.

25, he interpreted Archer's reaction to the news as a threat of what would happen if he failed to kill the clerk.[43]

Archer was convicted of first-degree murder on the basis of Bonifay's testimony that he had hired and then forced Bonifay to commit the murder. But, the prosecutor did not believe that Bonifay was truthful even as he presented it. Then in 2002, there was Bonifay swearing under oath that his 1991 testimony was fabricated.

After the circuit court denied his 3.851 motion, Archer appealed. This Court denied the appeal. In rejecting the *Giglio* claim, it wrote: "we do not find a record basis to support Archer's assertion that the State presented evidence that the State knew to be false." *Archer v. State*, 934 So.2d at 1201.

In denying relief on the *Brady* claim, this Court ruled that the trial prosecutor's claim that he did not disclose the police reports because he did not possess them did not defeat the *Brady* claim. Under *Brady*, "the prosecutor is charged with possession of what the State possesses." *Archer v. State*, 934 So.2d at 1203. Thus, the "prosecutor has a duty to learn of any favorable

[43] Bonifay had also testified at Archer's trial that he put the gun up to the clerk's head and pulled the trigger because the clerk saw his face and because Barth said his name when telling Bonifay that he needed to kill the clerk.

evidence known to others acting on the government's behalf in the case and to disclose that evidence if it is material." *Id.*

However, this Court denied 3.851 relief on Archer's *Brady* claim because it concluded:

> Archer has not demonstrated that there was such favorable evidence in those police reports about which Archer was unaware that the instant case is put in such a different light as to undermine confidence in the guilty verdict or death sentence.

Archer v. State, 934 So.2d at 1203-04.

As for the newly discovered evidence claim, this Court found that Archer had failed to carry his substantial burden to overcome the circuit court's conclusion that Bonifay's 2002 testimony was not credible. *Archer v. State*, 934 So.2d at 1198. The circuit court in finding Bonifay's 2002 testimony not credible relief in large part on the fact that Bonifay was on death row in 2002 when he testified at Archer's evidentiary hearing. *Id.* at 1195. This Court found that Bonifay's presence on death row at the time of his 2002 testimony was a legitimate basis for concluding that he was not credible when he gave his testimony in 2002:

> Archer contends that Bonifay had nothing to gain by recanting and repeatedly points out that Bonifay is no longer eligible for the death penalty because he was a juvenile when he committed the crime. However, at the time of Bonifay's original recantation in February of 2001, the Supreme Court had not yet decided that juveniles could not be executed. *See Roper v. Simmons*,

> 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). Bonifay still faced the death penalty and was in the middle of his postconviction proceedings when he originally recanted. We conclude that the context of the recantation does not strongly weigh against the trial court's finding that Bonifay's recantation was not credible.

Archer v. State, 934 So. 2d at 1197. This Court also wrote:

> As previously mentioned, Bonifay was still death-eligible at the time of the recantation. We do not conclude that the postconviction court's conclusion that Bonifay's recantation may have been thought by Bonifay to potentially affect his death sentence was unreasonable.

Id. at 1198.[44] This Court concluded that Archer had failed to carry his burden and adequately corroborate Bonifay's 2002 testimony that his 1991 testimony was false.

In 2012, *Trout - A True Story of Murder, Teens, and the Death Penalty* by Jeff Kunerth was published. In 2013, Archer filed a successive 3.851 relying upon the additional evidence that the author had uncovered and detailed in his book. However, this Court affirmed the circuit court's summary denial of the 3.851 motion. *Archer v. State*, 151 So.3d 1223, 2014 WL 2926502 (Fla. 2014).

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[44] However by this time that this Court issued its opinion affirming the denial of 3.851 relief, Bonifay was no longer on death row because the US Supreme Court had ruling that the Eighth Amendment precludes the imposition of a death sentence on a defendant for acts he undertook when he was a juvenile. *Roper v. Simmons*, 543 U.S. 551 (2005).

STANDARD OF REVIEW

Because the circuit court summarily denied Archer's amended 3.851 motion, this Court must conduct de novo review of Archer's 3.851 claims. *Peede v. State*, 748 So.2d 253 (Fla. 1999); *Gaskin v. State*, 737 So.2d 509 (Fla. 1999); *Lightbourne v. Dugger*, 549 So.2d 1364 (Fla. 1989).

SUMMARY OF THE ARGUMENTS

1. In *Hurst v. State*, this Court construed § 921.141, Fla. Stat., and held that the statutorily identified facts that § 921.141 said a judge had to find present before he or she could impose a death sentence were subject to the right to trial by jury. Comparing the statutorily identified facts to elements of a criminal offense, this Court ruled that the jury had to unanimously find that the State had proven the statutorily identified facts before a death sentence was authorized. Decisions construing criminal statutes constitute substantive criminal law, just as the criminal statutes are substantive law. As such, the retroactivity analysis used to determine whether a new procedural rule of constitutional law is retroactive does not apply to statutory construction rulings. Because *Hurst v. State* simply relied on the plain language of the statute, its construction of § 921.141 dates to the statute's enactment. As a result, *Hurst v. State* must be held to have been the law on

January 26, 1991. Under the statutory construction set out in *Hurst v. State*, Archer's death sentence is invalid. The statutorily required facts were not found by a unanimous jury to have been proven beyond a reasonable doubt.

2. As for the *Hurst v. Florida* claim (Claim I of the 3.851 motion), this Court in *Archer v. Jones* found that Archer was not entitled to the retroactive benefit of the constitutional ruling in *Hurst v. Florida*. This Court relied on its decisions in *Asay v.* State, 210 So.3d 1 (Fla. 2016), and *Hitchcock v.* State, 226 So.3d 216 (Fla. 2017), in which this Court conducted the retroactivity analysis set out in *Witt v. State,* 387 So.2d 922 (Fla. 1980). The *Witt* analysis required this Court to balance the criminal justice system's need for fairness against its need for finality. Application of the balancing test result in partial retroactivity, *Hurst v. Florida* was found retroactive to death sentences that became final after June 24, 2002. However, there is evidence that this Court's view of finality has shifted since *Asay v. State* and *Hitchcock v. State* were decided. Recent action by this Court shows that finality has been devalued and is accorded less weight. This Court has shown a greater tolerance for instability in the law than it showed when conducting the *Witt* retroactivity analysis in *Asay v. State*. Given that this Court is according finality less weight these days and has

demonstrated a willingness to revisit recent rulings, it should revisit and reconsider its rulings in *Asay v. State* and *Hitchcock v. State*. With finality devalued by this Court and accorded less weight, scales used to balance fairness and finality should tip further in favor of fairness. *Hurst v.* Florida should apply retroactively at least to Archer's death sentence. Applying *Hurst v. Florida* in Archer's case requires the issuance of 3.851 relief. Archer's death sentence must be vacated and a resentencing ordered.

3. The newly discovered evidence presented in Archer's 3.851 motion must be considered cumulatively with all of the favorable evidence developed in the course of the collateral proceedings that would be admissible at a resentencing. When all of the favorable evidence developed in collateral proceedings that would be admissible at a resentencing is considered cumulatively, it is clear that at a resentencing Archer would likely receive a less severe sentence. Accordingly, a resentencing before a new penalty phase jury is warranted.

ARGUMENT

ARGUMENT I

ARCHER WAS DEPRIVED OF HIS DUE PROCESS RIGHT TO HAVE A UNANIMOUS JURY DETERMINE WHETHER THE STATE HAD PROVEN BEYOND A REASONABLE DOUBT THAT SUFFICIENT AGGRAVATORS EXISTED TO JUSTIFY A DEATH SENTENCE AND THAT THE AGGRAVATORS OUTWEIGHED THE MITIGATORS.

A. Statutory Construction Constitutes Substantive Law

What fact or facts must be found in order to increase the range of punishment to include a more severe sentence is a matter of a state's substantive criminal law. "Those facts that permit the authorization of a death sentence are a matter of state law." *Jackson v. State*, 213 So. 3d 754, 783 (Fla. 2017). Identifying the facts necessary to increase the authorized sentence is generally a legislative function. *See* § 921.002 (1), Fla. Stat. ("The provision of criminal penalties and of limitations upon the application of such penalties is a matter of predominantly substantive law and, as such, is a matter properly addressed by the Legislature.").

It is a principle of the separation of powers that "it is only Congress, and not the courts, which can make conduct criminal," *Bousley v. United States*, 523 U.S. 614, 620-21 (1998). Of course, construing the statutory language that the legislature provided is a judicial function. A judicial decision that engages in statutory construction of a criminal statute identifying the facts that are necessary to increase the range of punishment constitutes substantive criminal law. *Welch v. United States*, 136

S.Ct. 1257, 1268 (2016).[45]

B. *Hurst v. State* Was A Substantive Ruling

In *Hurst v. State*, this Court had to construe the version of § 921.141, Fla. Stat. in effect before 2016.[46] This Court proceeded to identified those facts that had to be shown in order to increase the range of punishment for first-degree murder upwards so that it included death as a sentencing option. In *Hurst v. State* this Court explained:

> [T]he imposition of a death sentence in Florida has in the past **required, and continues to require, additional factfinding** that now must be conducted by the jury. As the Supreme Court long ago recognized in *Parker v. Dugger*, 498 U.S. 308, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991), under Florida law, "**The death penalty may be imposed only where sufficient aggravating circumstances exist that outweigh mitigating circumstances**." *Id.* at 313, 111 S.Ct. 731 (emphasis added) (quoting § 921.141(3), Fla. Stat. (1985)). Thus, **before a sentence of death may be considered by the trial court in**

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[45] In *Welch*, the Supreme Court said that not only were statutory construction decisions substantive, but also decisions involving statutory invalidation when it narrowed the scope of a criminal offense. *Welch v. United States*, 136 S.Ct. at 1268.

[46] The homicide at issue in *Hurst* was committed on May 2, 1998. When *Hurst v. State* issued, Article X, section 9 of the Florida Constitution (the "Savings Clause") provided: "Repeal of criminal statutes. - Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed." This Court had held that "the purpose of the 'Savings Clause' [wa]s to require the statute in effect at the time of the crime to govern the sentence an offender receives for the commission of that crime." *Horsley v. State*, 160 So. 3d 393, 406 (Fla. 2015). Thus, the issue before this Court in *Hurst v. State* concerned what facts were required by § 921.141 to be present on May 2, 1998, before Timothy Hurst could eligible for a death sentence.

> **Florida, the jury must find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances.**

Id. at 53 (emphasis added). This Court find support for its reading of the statute's plain language from the fact that the United States Supreme Court had read the statute as requiring "additional factfinding" after a first-degree murder conviction before a death sentence could be imposed. It cited the January 22, 1991 decision in *Parker v. Dugger* for this observation.

Most significantly, this Court in *Hurst v. State* explained that because the statutorily defined facts were necessary to increase the range of punishment to include death, proof of those facts was needed "to essentially convict a defendant of capital murder." *Id.* at 53-54. These facts were essentially elements of a higher degree of murder. The existence of these facts were for the State to prove beyond a reasonable doubt:

> [A]ll the findings necessary for imposition of a death sentence are "elements" that must be found by a jury, and Florida law has long required that jury verdicts must be unanimous. Accordingly, we reiterate our holding 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. We equally emphasize that by so

> holding, we do not intend to diminish or impair the jury's 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. . . . As the relevant jury instruction states: "Regardless of your findings ... you are neither compelled nor required to recommend a sentence of death." Fla. Std. Jury Instr. (Crim.) 7.11 Penalty Proceedings—Capital Cases. Once these critical findings are made unanimously by the jury, each juror may then "exercis[e] reasoned judgment" in his or her vote as to a recommended sentence.

Id. at 57-58 (emphasis added).

The additional facts, that were statutorily required before a death sentence could be imposed on a defendant convicted of first-degree murder, were described by the majority opinion in *Hurst v. State* as essentially elements of a greater offense. *Hurst v. State*, 202 So.3d at 57.[47] The same day that *Hurst v.*

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[47] In his dissent, Justice Canady (joined by Justice Polston) objected to the majority's description of the statutorily identified facts as essentially elements:

> Contrary to the majority's view, "each fact necessary to impose a sentence of death" that must be found by a jury is not equivalent to each determination necessary to impose a death sentence. The case law makes clear beyond any doubt that when the Court refers to "facts" in this context it denotes "elements" or their functional equivalent. And the case law also makes clear beyond any doubt that in the process for imposing a sentence of death, once the jury has found the element of an aggravator, no additional "facts" need be proved by the government to the jury. After an aggravator has been found, all the determinations necessary for the imposition of a death sentence fall outside the category of such "facts."

State issued, this Court issued *Perry v. State*, 210 So.3d 630 (Fla. 2016). There, this Court citing to *Hurst v. State* held that "the findings necessary to increase the penalty from a mandatory life sentence to death must be found beyond a reasonable doubt by a unanimous jury." *Id.* at 633.[48] This Court then stated:

> Those findings specifically include unanimity as to all aggravating factors to be considered, unanimity that sufficient aggravating factors exist for the imposition of the death penalty, unanimity that the aggravating factors outweigh the mitigating circumstances, and unanimity in the final jury recommendation for death.

Id.

It is worth noting that as Justice Scalia indicated, it is not a question of how the legislature labeled a statutory requirement that certain findings be made before a defendant convicted of first-degree murder can receive a death sentence. It is a question of whether a death sentence cannot be imposed

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Hurst v. State, 202 So. 3d at 77 (emphasis added). Justice Canady took issue with whether the statutorily identified findings necessary before a death sentence could be imposed were facts or subjective determinations. *Id.* at 82. Of course, the legislature's revisions to the § 921.141 which incorporate into the statute the majority's ruling in *Hurst v. State* suggests that the majority opinion correctly construed the legislative intent.

[48] When a statute uses elements to distinguish between a lower and higher degree of an offense, due process requires the elements necessary for a higher degree of the offense to be proven by the State beyond a reasonable doubt. *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975) ("The safeguards of due process are not rendered unavailing simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty.").

without the additional findings. *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring) ("all facts essential to imposition of the level of punishment that the defendant receives—**whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt.**") (emphasis added).

A recent opinion from this Court overlooked Justice Scalia's concurrence in *Ring* and engaged in a discussion about whether the additional statutorily required findings had been labeled "elements." *Foster v. State*, 258 So.3d 1248 (Fla. 2018). Without acknowledging that *Hurst v. State* had used the "elements" label over Justice Canady's dissent, *Foster* did say that *Hurst v. State* "**reflected a change in this state's decisional law.**" *Foster v. State*, 258 So.3d at 1251 (emphasis added). This Court's opinion in *Foster* then acknowledged that *Hurst v. State* required that:

> in order for a defendant to be sentenced to death, the jury must: (1) unanimously find at least one aggravating factor beyond a reasonable doubt; (2) identify all aggravating factors that it unanimously finds beyond a reasonable doubt; (3) unanimously determine whether sufficient aggravating factors exist to impose a sentence of death; (4) determine whether any mitigating circumstances exist and unanimously determine whether the aggravating factors outweigh those mitigating circumstances; and (5) unanimously determine that the defendant should be sentenced to death. See Hurst, 202 So.3d at 57; § 921.141(2), Fla. Stat. (2018); ch. 2017-1, Laws of Fla. **If the jury makes these findings**, it only does so after a jury has unanimously convicted the defendant of the capital

> crime of first-degree murder that is delineated in section 782.04, Florida Statutes (2018).

Foster v. State, 258 So.3d at 1251 (emphasis added). This Court in *Foster*, then stated:

> [T]he Hurst penalty phase findings **are not elements** of the capital felony of first-degree murder. Rather, **they are findings required of a jury: (1) before the court can impose the death penalty for first-degree murder**, and (2) only after a conviction or adjudication of guilt for first-degree murder has occurred.

Id. at 1252 (emphasis added).

Using the "findings" label in lieu of the "elements" label is as Justice Scalia explained, a distinction without meaning. What matters is that Florida's substantive criminal law requires findings to be made before "the court can impose the death penalty for first-degree murder."

C. *Hurst v. State* Changed Florida's Substantive Law

The decision in *Hurst v. State* was a change in Florida's substantive criminal law as this Court even acknowledged in *Foster v. State*. Prior to *Hurst v. State*, this Court had held in *Mills v. Moore*, 786 So. 2d 532 (Fla. 2001), that death was the maximum sentence that could be imposed on a defendant who was convicted of first-degree murder. *Mills* had argued that the maximum sentence that could be imposed on a defendant simply convicted of first-degree murder was life imprisonment. *Id.* at 537 (*Mills* "argues that the statute in effect at the time of the

initial trial made the maximum penalty for his crime life imprisonment. Only after the jury verdict and further sentencing proceedings, *Mills* argues, could death be a possible sentence."). This Court rejected Mills' argument stating: "When section 775.082(1) is read *in pari materia* with section 921.141, Florida Statutes, there can be no doubt that a person convicted of a capital felony faces a maximum possible penalty of death." *Id.* at 538.

Subsequently, this Court held that under Florida law the finding of one aggravating circumstance in addition to a first-degree murder conviction was all that was needed to authorize the imposition of a death sentence. In *State v. Steele*, 921 So. 2d 538, 545-46 (Fla. 2005), this Court explained:

> Under the law, therefore, the jury may recommend a sentence of death so long as a majority concludes that at least one aggravating circumstance exists. Nothing in the statute, the standard jury instructions, or the standard verdict form, however, requires a majority of the jury to agree on which aggravating circumstances exist. Under the current law, for example, the jury may recommend a sentence of death where four jurors believe that only the "avoiding a lawful arrest" aggravator applies, see § 921.141(5)(e), while three others believe that only the "committed for pecuniary gain" aggravator applies, see § 921.141(5)(f), because seven jurors believe that at least one aggravator applies.

See also Ault v. State, 53 So. 3d 175, 206 (Fla. 2010) ("Under Florida law, in order to return an advisory sentence in favor of death a majority of the jury must find beyond a reasonable doubt

the existence of at least one aggravating circumstance listed in the capital sentencing statute.").

However, from the time it was enacted until *Hurst v. State* issued in 2016, § 921.141 (3) had at all times provided:

> Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing **its findings** upon which the sentence of death is based **as to the facts**:
>
> (a) **That sufficient aggravating circumstances exist** as enumerated in subsection (5), and
>
> (b) **That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.**

(Emphasis added). But, prior to the decision in *Hurst v. State*, this Court had not required the State to prove the statutorily identified facts beyond a reasonable doubt. Even though the statute required factual findings that sufficient aggravators existed and that there were insufficient mitigators to outweigh the aggravators, this Court had not required the jury to be instructed that the State had to prove the factual findings beyond a reasonable doubt. It also had not required the judge to impose the beyond a reasonable doubt burden of proof.

This Court in *Hurst v. State* simply read the statute and gave effect to the plain language that required findings that

sufficient aggravators existed to justify a death sentence and that the aggravators also outweighed the mitigators. These factual findings had not previously been held by this Court to be necessary to authorize the imposition of a death sentence. The ruling in *Hurst v. State* was tantamount to a determination that the State had to prove an element that it had not been previously required to prove before a guilty verdict could be returned. This Court's decision in *Hurst v. State* was a change in Florida's substantive criminal law which was no different in effect than the change in substantive law that occurred in *Fiore v. White*, 531 U.S. 225 (2001), and in *Bailey v. United States*, 516 U.S. 137 (1995), and in *Fowler v. United States*, 563 U.S. 668 (2011), and in *Johnson v. United States*, 135 S.Ct. 2551 (2015).

D. The *Witt* Retroactivity Analysis Is Inapplicable To Decisions Changing Substantive Criminal Law

This Court has acknowledged that the retroactivity analysis set forth in *Witt v. State*, 387 So.2d 922 (Fla. 1980), is only applicable to decisions that are constitutional in nature. In *Thompson v. State*, 887 So. 2d 1260 (Fla. 2004), this Court held that *Witt v. State* is not the proper analysis for determining whether a judicial decision that makes a change in the substantive criminal by announcing a new statutory construction of a criminal statute is retroactive:

> [T]he question of retroactivity under *Witt* is not applicable to this case because we are examining a change in the statutory law of this state not a change in decisional law emanating from this Court or the United States Supreme Court.

Thompson v. State, 887 So.2d at 1263-64. Recently in *Reed v. State*, Case No. SC19-714 (an appeal currently pending before this Court), the State conceded that the *Witt* retroactivity analysis was inapplicable when a judicial decision at issue set forth a new or unexpected construction of a criminal statute:

> Indeed, *Witt* limits retroactivity analysis to decisions that are "constitutional in nature," thereby excluding statutory interpretation decisions from its ambit.

(*Reed v. State*, Case No. SC19-714, Reply to response at 6). The State's pleading in *Reed v. State* then explained why the *Witt* analysis should not apply when the issue is the retroactivity of a decision which changed the construction of a criminal statute:

> It is statutory construction cases that raise the specter of legal innocence as well as ex post facto and notice concerns. *Bousley v. United States*, 523 U.S. 614, 620 (1998) (applying a decision involving statutory construction of the federal use-of-a-firearm statute retroactively and explaining that decisions involving substantive federal criminal statutes necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal); *Bouie v. City of Columbia*, 378 U.S. 347 (1964) (due process concerns raised by statutory construction of a trespass statute); *cf. Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994) (noting the due process notice concerns of statutory retroactivity). It was the use of the *Witt* test for retroactivity that raised such concerns in the United States Supreme Court in *Bunkley v. Florida*, 538 U.S. 835 (2003), which was a

statutory interpretation case.

(Reply to response at 6).

The *Witt* retroactivity analysis used in *Asay v. State*, and *Hitchcock v. State* does not govern as to whether Archer is entitled to the benefit of the substantive law ruling in *Hurst v. State*. In *Asay* and in *Hitchcock*, this Court addressed retroactivity of the constitutional law rulings set out in *Hurst v. Florida* and in *Hurst v. State*. Based on the *Witt* retroactivity analysis, this Court in *Asay* and in *Hitchcock* held that individuals under death sentences that became final prior to June 24, 2002, were not entitled to the retroactive benefit of new constitutional rules announced in *Hurst v. Florida* and *Hurst v. State*. Because neither *Asay v. State* nor *Hitchcock v. State* used the proper analysis for determining whether the change in substantive criminal law made in *Hurst v. State* applies retroactively, they are not relevant to whether due process requires the change in Florida's substantive criminal law to be applied retroactively to Archer's case.

In *Bousley v. United States*, 523 U.S. 614 (1998), the Supreme Court found the retroactivity analysis applicable to decisions that announce a new procedural rule to be inapplicable when a judicial decision changed substantive law as a result of statutory construction. *Bousley*, 523 U.S. at 620 ("[B]ecause

Teague[v. Lane, 489 U.S. 288 (1989)] by its terms applies only to procedural rules, we think it is inapplicable to the situation in which this Court decides the meaning of a criminal statute enacted by Congress.").

Similarly, the United States Supreme Court in *Bunkley v. Florida*, 538 U.S. 835 (2003), looked at this Court's use of the *Witt* retroactivity analysis to find that a change made by this Court in Florida's substantive criminal law did not apply retroactively. The United States Supreme Court found that the retroactivity of a judicial decision changing the substantive criminal law turned on whether the failure to apply change retroactively violated the Due Process Clause. Resolving that required determining if a judicial decision's new interpretation of the substantive criminal law was "'a correct statement of the law when [Bunkley's] conviction became final.'"[49] *Bunkley v.*

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[49] While the United States Supreme Court in *Bunkley* focused on what was the state of the law on the date that Bunkley's conviction became final, Article X, Section 9 of the Florida Constitution (the Savings Clause) was in effect when *Hurst v. State* issued, and it was a legislative change to a criminal statute from "affect[ing] the prosecution or punishment of a crime committed before [the amendment] took effect." *Whatley v. State*, 35 So. 80, 81 (Fla. 1903). What mattered under the Savings Clause was the substantive criminal law that was in effect on the date of the charged criminal offense. Thus, the Savings Clause required the statutory construction appearing in *Hurst v. State* to reflect Florida's substantive law on May 2, 1998, the date of the homicide that was at issue in *Hurst*. By virtue of the Savings Clause, the construction of § 921.141 adopted in *Hurst v. State*

Florida, 538 U.S. at 840, quoting *Fiore v. White*, 531 U.S. 225, 226 (2001).

E. Decisions Changing Substantive Criminal Law Must Be Retroactive If They Add To What The State Must Prove

In *Schriro v. Summerlin*, 542 U.S. 348 (2004), the United States Supreme Court indicated that substantive rulings regarding the scope of a criminal statute are to be applied retroactively:

> New substantive rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms, *see Bousley v. United States*, 523 U.S. 614, 620-621, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998), as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish, *see Saffle v. Parks*, 494 U.S. 484, 494-495, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990); *Teague v. Lane*, 489 U.S. 288, 311, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (plurality opinion). Such rules apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal'" or faces a punishment that the law cannot impose upon him. *Bousley, supra*, at 620, 118 S.Ct. 1604 (quoting *Davis v. United States*, 417 U.S. 333, 346, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974)).

Schriro, 542 U.S. at 351-52 (emphasis added) (footnote omitted).

> A decision that modifies the elements of an offense is normally substantive rather than procedural. New elements alter the range of conduct the statute punishes, rendering some formerly unlawful conduct lawful or vice versa. *See Bousley*, 523 U.S., at 620-621, 118 S.Ct. 1604.

Schriro, 542 U.S. at 354.

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had to have been a correct statement of Florida's substantive criminal law as of May 2, 1998.

In *Richardson v. United States*, 526 U.S. 813 (1999), the United States Supreme Court was called upon to construe a criminal statute: "In this case, we must decide whether the statute's phrase 'series of violations' refers to one element, namely a 'series,' in respect to which the 'violations' constitute the underlying brute facts or means, or whether those words create several elements, namely the several 'violations,' in respect to each of which the jury must agree unanimously and separately." *Richardson*, 526 U.S. at 817-18. *Richardson*'s construction of the statute was subsequently found by the circuit courts to be a change in substantive law that applied retrospectively. "By deciding that the jury had to agree unanimously on each of the offenses comprising the 'continuing series' in a CCE count, *Richardson* interpreted a federal criminal statute and, in doing so, changed the elements of the CCE offense. In other words, it altered the meaning of the substantive criminal law. *Bousley*, 523 U.S. at 620, 118 S.Ct. 1604." *Santana-Madera v. United States*, 260 F.3d 133, 138 (2nd Cir. 2001). *See Ross v. United States*, 289 F.3d 677, 681 (11th Cir. 2002).

The Third Circuit explained this area of the law in *Bruce v. Warden Lewisburg USP*, 868 F.3d 170, 182 (3rd Cir. 2017):

"A rule is substantive rather than procedural if it

> alters the range of conduct or the class of persons that the law punishes." *Schriro*, 542 U.S. at 353, 124 S.Ct. 2519. "This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish." *Id.* at 351-52, 124 S.Ct. 2519 (citation omitted). In such circumstances, "where the conviction or sentence is not in fact authorized by substantive law, then finality interests are at their weakest." *Welch*, 136 S.Ct. at 1266. By interpreting the witness tampering murder statute, *Fowler [v. United States*, 563 U.S. 668 (2011)] narrowed its scope. *Fowler* therefore announced a new rule of substantive law that applies retroactively in cases on collateral review. ***
>
> *** Decisions of the Supreme Court "holding that a substantive federal criminal statute does not reach certain conduct ... necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal.'" *Bousley v. United States*, 523 U.S. 614, 620, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998) (quoting *Davis v. United States*, 417 U.S. 333, 346, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974)); *see also Dorsainvil*, 119 F.3d at 250-51. And because it is a first principle of the separation of powers that "it is only Congress, and not the courts, which can make conduct criminal," *Bousley*, 523 U.S. at 620-21, 118 S.Ct. 1604; *see United States v. Hudson*, 11 U.S. (7 Cranch) 32, 3 L.Ed. 259 (1812), a court is "prohibited from imposing criminal punishment beyond what Congress in fact has enacted by a valid law." *Welch*, 136 S.Ct. at 1268. It is for these reasons that "*Teague*'s conclusion establishing the retroactivity of new substantive rules is best understood as resting upon constitutional premises." *Montgomery v. Louisiana*, --- U.S. ----, 136 S.Ct. 718, 728, 193 L.Ed.2d 599 (2016).

Hurst v. State construed § 941.141(3) as precluding the imposition of a death sentence unless findings were made "as to the facts" that: 1) sufficient aggravating circumstances existed

to warrant a death sentence and 2) those existing aggravating circumstances outweighed the mitigating circumstances. Prior to issuance of *Hurst v. State* the State had not been required to prove beyond a reasonable doubt that those two statutorily defined "facts" were present. To the extent that *Hurst v. State* concluded that the legislature intended that could only be sentenced to death if those two factual findings were established, death sentences imposed without a finding that those two facts had been proven beyond a reasonable doubt are beyond what the legislature authorized. The circumstance would be no different than those in which through statutory construction an element was added after a defendant was tried and convicted without the State being held to prove the later recognized element. Instances where that has occurred have resulted in the convictions being vacated in collateral proceedings. *Fiore v. White*. *See Rehaif v. United States*, 139 S.Ct. 2191, 2213 (2019) (Alito, J., dissenting).

F. Distinguishing Between Arizona's Death Penalty Scheme At Issue In *Ring*, And Florida's Death Penalty Scheme At Issue In *Hurst*

The US Supreme Court in *Ring v. Arizona*, 536 U.S. 584 (2002), found that Arizona had deprived Ring of his Sixth Amendment right to a jury trial. In reaching that conclusion, the Supreme Court's analysis had two components. First, the US

Supreme Court had to examine Arizona's substantive criminal law in order to determine whether a death sentence could be imposed solely on the basis of a jury's verdict finding a defendant guilty of first-degree murder, and if not what additional facts had to be found before the range of punishment included a sentence of death. *Ring v. Arizona*, 538 U.S. at 596. The Arizona Supreme Court's decision in *State v. Ring*, 25 P.3d 1139, 1151 (Ariz. 2001), explained what Arizona law:

> In Arizona, a defendant cannot be put to death solely on the basis of a jury's verdict, regardless of the jury's factual findings. The range of punishment allowed by law on the basis of the verdict alone is life imprisonment with the possibility of parole or imprisonment for "natural life" without the possibility of release.

In order for a death sentence to be statutorily authorized, an aggravating circumstance had to be found to exist. *Ring v. Arizona*, 538 U.S. at 597 ("in Arizona, a 'death sentence may not legally be imposed ... unless at least one aggravating factor is found to exist beyond a reasonable doubt.'").

With the Arizona state law understood, the US Supreme Court turned to Sixth Amendment jurisprudence. Because in Arizona the judge, not the jury, was charged with determining whether the State had proven an aggravating circumstance, Ring was denied his right to have a jury decide if the State had proven the aggravating circumstance existence beyond a reasonable doubt.

Ring v. Arizona, 538 U.S. at 602 ("If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt.").[50]

Over time, some people merged the two steps of the analysis in *Ring v. Arizona* and ended up believing that *Ring* had held that it was the Sixth Amendment that required one aggravating circumstance to be present before a judge was authorized to impose a death sentence on a defendant convicted of first-degree murder. *See Hurst v. State,* 202 So.3d at 78 (Canady, C.J., dissenting) (*Ring v. Arizona* "recognized that 'a death sentence may not legally be imposed ... unless at least one aggravating factor is found to exist beyond a reasonable doubt.' *Id*. at 597, 122 S.Ct. 2428 (citation omitted).").

G. *Card v. Jones*, 219 So.3d 47 (Fla. 2017)

In *Card v. Jones,* 219 So. 3d 47 (Fla. 2017), this Court, on the basis of *Hurst v. State*, vacated Card's death sentence. This Court remanded Card's case for a determination of whether

[50] The Arizona statute at issue in *Ring* and the Florida statute at issue in *Hurst* diverged as to the facts needed to render a defendant convicted of first-degree murder subject to a death sentence. The construction of the Florida statute in *Hurst v. State* changed Florida's substantive law; while in Arizona, *Ring* did not produce a change in Arizona substantive law.

a death sentence could be re-imposed under *Hurst v. State* and Chapter 2017-1. The homicide at issue in *Card* was committed in 1981. *See Card v. State*, 453 So.2d 17 (1984) (homicide committed in June 1981, first degree murder conviction was final in November 1984). By virtue of the Savings Clause, the ruling in *Card v. Jones* means the statutory construction adopted in *Hurst v. State* was Florida's substantive criminal law at the time of the offense in *Card* (June 1981).

The Florida Constitution's Savings Clause was in effect when *Card v. Jones* issued. It was also in effect at the time that Card's conviction became final (November 1984) which is the date that *Bunkley v. Florida* said mattered.

> In 2015, this Court discussed the "Savings Clause":
>
> the purpose of the "Savings Clause" is to require **the statute in effect at the time of the crime** to **govern the sentence** an offender receives for the commission of that crime.

Horsley v. State, 160 So. 3d at 406. This Court's construction of § 921.141 which was set out in *Hurst v. State* will be governing what sentence will be imposed on Card. This Court surely complied with the Savings Clause when it treated *Hurst v. State* as governing Card's resentencing. Compliance with the Savings Clause means that the construction of § 921.141 set out in *Hurst v. State* and employed in *Card v. Jones* was the

governing law in June 1981 at the time of Card's crime.[51]

The law that is governing Card's sentence for a 1981 crime must be applied equally and govern Archer's sentence for a 1991 crime, otherwise the Due Process and Equal Protection Clauses of the Fourteenth Amendment are violated.

H. Conclusion

The change in Florida's substantive criminal law made by *Hurst v. State* simply gave meaning to the plain language of § 921.141. It requires the State to prove statutorily identified facts beyond a reasonable doubt when this was not previously required. The construction of § 921.141 set forth in *Hurst v. State* reflects the legislative intent and must govern Archer's sentence, just as it governs the sentence Card will receive. This Court must do as it did in *Card v. Jones*. It must vacate Archer's death sentence and remand for further proceedings.

ARGUMENT II

GIVEN THIS COURT'S DEVALUATION OF THE WEIGHT ACCORDED TO FINALITY, THIS COURT SHOULD REVISIT ITS *WITT V. STATE* RETROACTIVITY ANALYSIS OF *HURST V. FLORIDA* AND FIND THAT THE INTERESTS OF FAIRNESS NOW OUTWEIGH THE INTERESTS OF FINALITY, AT LEAST AS TO ARCHER'S DEATH SENTENCE. ARCHER'S DEATH SENTENCE CANNOT WITHSTAND CONSTITUTIONAL SCRUTINY IF *HURST V. FLORIDA* IS FOUND TO RETROACTIVELY APPLY IN ARCHER'S CASE. THE SIXTH AND/OR EIGHTH AMENDMENT ERROR CANNOT BE HARMLESS

[51] In *Lebron v. State*, 799 So. 2d 997, 1019-20, this Court held that in a capital case, consideration of an aggravator enacted after the murder had occurred was improper.

BEYOND A REASONABLE DOUBT IN LIGHT OF 7-5 DEATH RECOMMENDATIONS THAT ARCHER'S PRIOR JURIES RETURNED.

This Court's decision in *Hitchcock v. State*, 226 So.3d 216 (2017), rested upon its earlier decision in *Asay v. State*, 210 So.3d 1 (Fla. 2016). In *Hitchcock*, this Court stated: "We affirm because we agree with the circuit court that our decision in *Asay* forecloses relief."

At issue in *Asay* was the retroactivity of *Hurst v.* State, 202 So.3d 40 (Fla. 2016). In *Asay*, this Court explained:

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

Asay, 210 So.3d at 16. The question to be resolved was at what point does "finality yield[] to fairness based on a change in the law." *Id.* The analysis required by *Witt v. State*, 387 So.2d 922 (Fla. 1980), it is in essence a balancing test. In *Asay*, this Court looked to *Witt* and the discussion there regarding the importance of finality versus the need for fairness within the criminal justice system. This required consideration of the extent to which the new rule advanced fairness and advanced reliability. It also required this Court to look at how damaging to retroactive application of the new rule would be to the

stability of the law and how important was stability of the law to the State's judicial machinery:

> In contrast to these jurisprudential upheavals are evolutionary refinements in the criminal law, affording new or different standards for the admissibility of evidence, for procedural fairness, for proportionality review of capital cases, and for other like matters. Emergent rights in these categories, or the retraction of former rights of this genre, do not compel an abridgement of the finality of judgments. To allow them that impact would, we are convinced, **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, 387 So.2d at 929-30 (emphasis added).

Since this Court's decisions in *Asay* and *Hitchcock*, there are signs that this Court's view of finality and the need for stability of the law has shifted. Recent action by this Court shows that finality has been devalued and is accorded less weight. This Court's decision in *Atwell v. State*, 197 So.3d 1040 (Fla. 2016), was abrogated by this Court just two years later in *Franklin v. State*, 258 So.3d 1239 (Fla. 2018). This ruling reflects a greater tolerance for instability in the law than was shown in *Asay v. State*.

This Court decisions in *DeLisle v. Crane Co.*, 258 So.3d 1219 (Fla. 2018), and *In re Amendments to Florida Evidence Code*, 210 So.3d 1231 (Fla. 2017), were receded from in a very short time span with the issuance of *In re Amendments to Florida Evidence*

Code, _ So.3d _, 2019 WL 2219714 (May 23, 2019). This ruling also demonstrates a much greater tolerance for instability in the law than was shown in *Asay v. State*.

Orange County v. Singh, _ So.3d _, 2019 WL 1716301 (Fla. April 18, 2019), is a case that had become final when the mandate issued on January 7, 2019. This Court recalled the mandate and vacate the opinion previously issued. It appears that a majority of the Court no longer agreed with the decision reached just months before. Again, this Court's action demonstrates a much greater tolerance for instability in the law than was shown when in this Court's analysis in *Asay v. State*.

In *Owen v. State*, Case No. SC18-810, this Court on April 24, 2019, issued an order that directed the parties to brief:

> whether this Court should recede from the retroactivity analysis in *Asay v. State*, 210 So.3d 1 (Fla. 2016); *Mosley v. State*, 209 So.3d 1248 (Fla. 2016); and *James v. State*, 615 So.2d 668 (Fla. 1993).

This order indicates that this Court is contemplating receding from the decision in *Asay* and the decision in *Mosley v. State*, both of which issued on December 22, 2016. Together, these two decisions made *Hurst v. Florida* and *Hurst v. State* retroactive only to death sentences not final on June 24, 2002. This partial retroactivity shows that the balancing of finality versus fairness as to *Hurst v. Florida* and *Hurst v. State* was so close

that the mid-point between finality and fairness shifted over time.

Since the *Owen* order issued, this Court has explained in an unpublished order denying a stay of execution in *Long v. State*, Case No. SC19-726 (May 10, 2019), the scope of the *Owen* order:

> Unless we recede from our current retroactivity analysis in *Owen*, the defendant in that case is entitled to the retroactive application of *Hurst v. Florida,* 136 S.Ct. 616 (2016); *Hurst v. State,* 202 So.3d 40 (Fla. 2016), because his sentence of death became final after *Ring v. Arizona*, 536 U.S. 584 (2002). In contrast, Appellant's sentence of death became final before *Ring*. Therefore, as we have previously held, Appellant is not entitled to retroactive application of the *Hurst* decisions.

While the *Long* order explains the context of the *Owen* order as concerning defendants with death sentence that became final after *Ring* issued, the order nonetheless reflects the fact that a questioning of the finality of the ruling in *Mosley v. State* which made *Hurst v. Florida* and *Hurst v. State* retroactive to Owen's death sentence. This ruling reflects a greater tolerance for instability in the law than was shown in *Asay v. State*. In fact, the order in *Owen* itself injected instability and uncertainty in capital cases throughout Florida. Calling into question this Court's decision in *Mosley v. State* is itself a statement that finality is simply not as important as was stated in *Asay v. State* when this Court refused to apply *Hurst v.*

Florida and *Hurst v. State* retroactive to individuals under sentences of death that were final prior to June 24, 2002.

While this Court has made it clear that finality in 2019 is not nearly as important as this Court thought in 2016 when it issued *Asay v. State*, the importance of fairness and reliability to the criminal justice system has surely not diminished. Since this Court has devalued the value and weight it accords finality, there is less weight on the finality side the scales used to conduct the *Witt* balancing test. This calls into question the *Witt* analysis set out in *Asay v. State*, 210 So.3d at 21. The *Owen* order is requiring the expenditure of judicial resources without any benefit to the accuracy or reliability of Owen's death sentence. Thus, the concerns that this Court cited as why the interests of finality triumphed over the interests of fairness in *Asay* appear to no longer matter to this Court or were at least overblown in *Asay.*

When the Appellant in *Reed v. State*, Case No. SC19-714, suggested that the devaluation of finality warranted revisiting this Court's decision in *Asay v. State,* the State filed a reply to Reed's response to a show cause order and asked this Court to abandon the *Witt* retroactivity analysis. The State seemingly cannot defend the result of the balancing test in *Asay* in light of this Court's recent actions devaluating finality. Instead, the

State has argued for a new retroactivity analysis. The State's position in *Reed* also demonstrates that this Court must revisit *Asay v. State* since the State would prefer abandonment of the *Witt* balancing test over defending the result of the balancing test in *Asay v. State* now that finality has been devalued.

Accordingly, Archer asks that this Court revisit and reconsider the retroactivity analysis conducted in *Asay v. State* as to whether finality should yield to fairness in the context of *Hurst v. State*. *Asay,* 210 So.3d at 16. An analysis of the records that have been filed with this Court over the years in Archer's direct and collateral appeal clearly shows that 1) if *Hurst v. Florida* and *Hurst v. State* are applied retroactively to his case, his death sentence would have to be vacated, and 2) if *Hurst v. State* governs a resentencing of Archer, it is virtually certain that no jury would return a recommendation that Archer be given a death sentence. None of the co-defendants, who actually went to Trout Auto Supply and actively carried out the armed robbery in which the clerk was shot and killed while begging for his life, are under a death sentence. One co-defendant, Barth, that another co-defendant, Bonifay, said fired one of the four shots that killed the clerk has been released from prison a free man. Moreover, Bonifay who testified at the 1991 trial that Archer, who was homeless, promised him $500,000 if he would kill the

clerk at Trout Auto Supply. This ridiculous testimony which even the prosecutor did not believe was the basis for Archer's death sentence. Bonifay refuse to appear and repeat the ridiculous testimony at Archer's resentencing in 1993. In 2001, Bonifay testified under oath that his 1991 testimony at Archer's trial was false and an effort to escape moral responsibility for what he (Bonifay) did. Bonifay testified that he gave the false testimony in 1991 in order to try to curry favor with the prosecutor in the hopes that he would abandon his efforts to have Bonifay sentenced to death. If a resentencing is conducted in Archer's case, Bonifay will testify that his claim that Archer hired to kill the clerk was a fabrication.

So, here is what it comes down to, if *Hurst v. Florida* and *Hurst v. State* apply retroactively to Archer's death sentence, it will be vacated and a resentencing ordered. If a resentencing is ordered, Archer will not be resentenced to death. And that means that Archer is under a sentence of death for no good reason unless sacrificing fairness and reliability for finality, which this Court no longer values, is considered good reason for leaving a death sentence that would not be re-imposed at a resentencing intact.

This Court should vacate Archer's death sentence and order a resentencing.

ARGUMENT III

THE NEWLY DISCOVERED EVIDENCE PRESENTED BELOW MUST CONSIDERED CUMULATIVELY WITH ALL THE OTHER FAVORABLE EVIDENCE DEVELOPED IN COLLATERAL PROCEEDINGS THAT WOULD BE ADMISSIBLE AT A RESENTENCING. WHEN PROPER CUMULATIVE CONSIDERATION IS GIVEN, IT IS CLEAR THAT IT IS LIKELY THAT AT A RESENTENCING, IT IS LIKELY THAT ARCHER WOULD RECEIVED A LESS SEVERE SENTENCE.

Archer pled that his co-defendant's release from prison constitutes newly discovered evidence that was not previously available which now must be evaluated cumulatively with all the other favorable evidence that has been developed in the course of collateral proceedings. In Swafford v. State, 125 So. 3d 760, 776 (Fla. 2013), this Court explained that the second prong of the newly discovered evidence "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." (emphasis added).

This forward looking aspect of the analysis was apparent in this Court's decision to grant a new trial in *Hildwin v. State*, 141 So. 3d 1178 (Fla. 2014). There, this Court repeatedly referenced the analysis as about what would happen at a retrial:

> In light of the evidence presented at trial, and considering the cumulative effect of all evidence that has been developed through Hildwin's postconviction proceedings, we conclude that the totality of the evidence is of "such nature that it would probably produce **an acquittal on retrial**" because the newly discovered DNA evidence "weakens the case against [the

> defendant] so as to give rise to a reasonable doubt as to his culpability."

Hildwin, 141 So. 3d at 1181, quoting *Jones v. State*, 709 So. 2d 512, 521, 526 (Fla. 1998) (emphasis added).

> Based on the standard set forth in *Jones II*, the postconviction court must consider the effect of the newly discovered evidence, in addition to all of the admissible evidence that **could be introduced at a new trial**.

Hildwin, 141 So. 3d at 1184 (emphasis added).

> In conclusion, the postconviction court erred in holding that the results from the DNA testing would be inadmissible **at a retrial**. This evidence cannot be excluded merely because the new scientific evidence is contrary to the scientific evidence that the State relied upon in order to secure a conviction at the original trial. Questions surrounding the materiality of the evidence and the weight to be given such evidence are for the jury.

Hildwin, 141 So. 3d at at 1187 (emphasis added).

> [T]he postconviction court must consider the effect of the newly discovered evidence, in addition to all of the admissible evidence that **could be introduced at a new trial**, and conduct a cumulative analysis of all the evidence so that there is a "total picture" of the case and "all the circumstances of the case."

Hildwin, 141 So. 3d at 1187-88, quoting *Swafford v. State*, 125 So. 3d at 776 (emphasis added).

> The newly discovered evidence, when considered together **with all other admissible evidence**, must be of such nature that it would probably produce an acquittal on retrial . . . .

Hildwin, 141 So. 3d at 1188 (emphasis added).

> The dissent ignores the disputed evidence, does not acknowledge the impact that erroneous scientific evidence would have on the jury, and avoids reviewing any of the evidence discovered after trial—evidence that **would be admissible at a retrial and must be considered** to obtain a full picture of the case.

Hildwin, 141 So. 3d at 1192 (emphasis added).

In *Melton v. State*, 193 So. 3d 881 (Fla. 2016), this Court affirmed the denial of a newly discovered evidence claim. In so doing, this Court again referenced the forward looking nature of the analysis:

> Having considered Melton's newly discovered evidence and **the evidence that could be introduced at a new trial**, including the evidence introduced in Melton's prior postconviction proceedings, we agree with the circuit court's conclusions that there is **no probability of an acquittal on retrial**.

Melton v. State, 193 So. 3d at 885 (emphasis added).

In *Armstrong v. State*, 642 So. 2d 730, 735 (Fla. 1994), this Court explained:

> Only when it appears that, **on a new trial**, the witness's testimony will change to such an extent as to render probable a different verdict will a new trial be granted.

(emphasis added).

When a newly discovered evidence claim seeks a resentencing in a capital case, the second prong of the analysis looks to whether it is probable that a resentencing would yield a less severe sentence, i.e. a life sentence. *Johnston v. State*, 27 So.

3d 11, 18-19 (Fla. 2010). *See Bolin v. State*, 184 So. 3d 492, 498 (Fla. 2015) ("If, as here, the defendant is seeking to vacate his sentence, the second prong requires that the evidence would probably produce a less severe sentence on retrial."); *Melton v. State*, 193 So. 3d at 886 ("it is improbable that Melton would receive a life sentence"). A reviewing court must consider the newly discovered evidence pled in the 3.851 motion, along with all of the other favorable evidence presented in prior postconviction proceedings that would be admissible at a resentencing, and determine whether a resentencing would probably result in the imposition of a life sentence.

Since all of the favorable evidence developed in collateral would be admissible at a resentencing, it must all be evaluated cumulatively. This favorable evidence was discussed in some detail the Statement of the Case. The wealth of evidence developed in collateral proceedings when considered in conjunction with the newly discovered evidence that Archer's co-defendant, Barth, has been released from prison completely creates the likelihood that if a resentencing is ordered, it is very likely that a less severe sentence would result. This development must be part of this Court's analysis.

An examination of the circuit court order reveals a problematic analysis. The circuit court without conducting an

evidentiary hearing made rulings adverse to Archer. The biggest problem with the order is the circuit court's unquestioning reliance on Bonifay's trial testimony that Archer was the mastermind. The circuit court then relied on Barth's trial testimony that he, Barth, was not a trigger man nor involved in the planning to find that the disparate roles that Archer and Barth played in the case justified their recent of disparate sentences.

The circuit court overlooked the fact that Bonifay testified that Barth was a triggerman who fired one of the four shots that hit and killed the victim. Bonifay also testified that Barth ordered him to "finish off" the victim because he had seen Bonifay's face. According to Bonifay, Barth used Bonifay's name when he told to him finish off the victim. This simply further forced Bonifay to put the gun to the victim's head and fire two more shots to ensure that he could not be identified.

If the circuit court is going to accept Bonifay's trial testimony as to Archer, then it must also accept Bonifay's testimony as to Barth. Or if the circuit court does not consider Bonifay's testimony credible as to Barth, then it should not rely on Bonifay's as to Archer.[52] But here, the circuit court tried to

[52] In reality, there is good reason to conclude that pretty much everything Bonifay said was fabricated. Bonifay was trying to

have it both ways.

Quite simply, if a resentencing were to be ordered, it is an almost absolute certainty that Archer would receive a less severe sentence in light of all of the facts set out in the Statement of the Case.

CONCLUSION

In light of the foregoing arguments, Archer is entitled to 3.851 relief or at the very least, a remand for evidentiary development on Argument III.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been electronically served on Janine Robinson, Assistant Attorney

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help himself. In his testimony, Bonifay tried to shift all moral responsibility from himself to everyone else. At one point, Bonifay claimed that Archer offered him $500,000 to kill the clerk who worked at Trout. At another point, he said that Archer became afraid that he, Bonifay, was backing out. According to Bonifay, Archer began saying things about Bonifay's family, which Bonifay took as threats. These threats, led Bonifay to go back to Trout. Then Bonifay tried to shift moral responsibility for the robbery/homicide on to Barth. Bonifay claimed that Barth hit him when he ran up to the window to tell him to hurry up. Bonifay claimed the first shot fired was due to Barth grabbing his arm which caused Bonifay to pull the trigger and fire the gun. Then, Bonifay said that an impatient Barth grabbed the gun, stuck it threw the window and fire the gun at the clerk. Then Barth said Bonifay's name in front of the victim while telling Bonifay that he need to finish the clerk. The best explanation for Bonifay's 1991 testimony is that all of it was fabricated.

General, Office of the Attorney General, at her primary email address janine.robinson@myfloridalegal.com on August 7, 2019.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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