

IN THE SUPREME COURT OF FLORIDA

Case No.: SC19-2123

Lower Court Case No.: 1983-000376CF

**JOEL DALE WRIGHT,
Appellant,**

v.

**STATE OF FLORIDA,
Appellee.**

**ON APPEAL FROM THE CIRCUIT COURT OF
THE SEVENTH JUDICIAL CIRCUIT, IN AND
FOR PUTNAM COUNTY, STATE OF FLORIDA**

INITIAL BRIEF OF APPELLANT

**MARTIN J. MCCLAIN
Special Assistant CCRC-South
Florida Bar No.: 0754773**

**VINCENT M. D'AGOSTINO, ESQ.
Staff Attorney CCRC-South
Florida Bar No.: 109424**

**OFFICE OF THE CAPITAL
COLLATERAL REGIONAL
COUNSEL – SOUTH
110 SE 6th St., Suite 107
Fort Lauderdale, Florida 33301
Tel.: (954) 713-1284**

COUNSEL FOR APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court’s denial of Joel Dale Wright’s second amended successive motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.851, the supplement to the motion, and the motion for rehearing.

The following symbols will be used to designate references to the records of appeal to this Court:

“(R.__)” – record on direct appeal (64,391);

“(PCR-1.__)” – postconviction record on appeal (3.850 Motion);

“(PCR-2.__)” – postconviction record on appeal of the remand and amendment to the initial 3.850 motion (SC00-1119);

“(PCR-3.__)” – successive postconviction record on appeal (SC06-2353); and

“(PCR-4.__)” – second successive postconviction record on appeal (SC19-2123).

Additional citations will be self-explanatory.

REQUEST FOR ORAL ARGUMENT AND FULL BRIEFING

Mr. Wright has been sentenced to death. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Wright, through undersigned counsel, urges that this Court permit oral argument.

Mr. Wright’s right to appeal the denial of postconviction relief and to be meaningfully heard implicates his right to due process and equal protection. Individualized appellate review of all capital appeals, whether in the course of direct or collateral proceedings, is required by the Florida Constitution and is as necessary as individualized sentencing in a capital case. *See Proffitt v. Florida*, 428 U.S. 242, 258 (1976) (“The Supreme Court of Florida reviews each death sentence to ensure that similar results are reached in similar cases.”). “The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution.” *Hall v. Florida*, 572 U.S. 701, 724 (2014). Denying Mr. Wright the opportunity to fully present and argue his claims does not comport with due process.

Mr. Wright respectfully requests that this Court permit full briefing in this case in accord with the rules of appellate practice and Article I, Section 21, which provides access to courts, and Article V, Section 3(b)(1), which mandates this Court’s jurisdiction to hear death penalty appeals, of the Florida Constitution,. Art. I, § 21, Fla. Const.; *see also* Art. V, § 3(b)(1), Fla. Const.

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INTRODUCTION

This case at its core factually hinges upon one man's word against another. Charles Westberry, the State's main witness, gave three different versions of events of what transpired on the night of Ms. Smith's murder.

On February 8, 1983 (two days after the murder), Mr. Westberry initially told the police that Mr. Wright had arrived at his trailer around 1:30 a.m. on February 6 (Sunday morning) and spent the rest of the night on the living room couch. (R. 2156, 2168). Denise Easter (Mr. Westberry's girlfriend) was sharing a bedroom with Mr. Westberry, and they both lived with Mr. Westberry's brother, Allen Westberry. (R. 1914). Ms. Easter testified at trial that she and Mr. Westberry had gone to bed around 1:00 a.m., and when she woke up the next morning, Mr. Wright was asleep on the couch; she further testified that she did not see any blood on his clothes. (R. 1924, 1927). Mr. Westberry's brother, Allen, testified that he saw Mr. Wright on the couch at 7:00 a.m. and also did not see any blood on him. (R. 1944-46). Beverly Westberry (Allen's wife), who also lived at the trailer, saw Mr. Wright on the couch when she got up at 6:30 a.m. (R. 1953-54). In fact, it was Allen and Beverly Westberry's son (Travis Westberry) who woke Mr. Wright up that morning while he was sleeping on the couch. (R. 1955).

Two plus months later on April 15, 1983, Mr. Westberry changed his story the first time when he relayed a different account to his estranged wife, Paige

Westberry. (R. 2132, 2168, 2170). He told Paige that Mr. Wright was making trouble for him and that Mr. Wright had confessed to the murder. (R. 2172, 2175, 2473). According to Paige, Mr. Westberry told her that Mr. Wright arrived at the trailer, covered in blood, between 7:00 and 7:30 a.m. that Sunday morning and confessed that he had used a kitchen knife to cut Ms. Smith's throat. (PCR-1. 41-42).¹ According to Paige, Mr. Westberry told her that Mr. Wright showed him \$243.00 in small bills. (PCR-1. 41-42). However, Mr. Westberry testified at trial that the amount was in fact \$290.00, not 243 dollars. (R. 2137-38). Paige relayed this story to a police officer whom she was dating. (PCR-1. 677). And then three days later on April 18, 1983, Detective Taylor Douglas arrested Mr. Westberry. (R. 2159-60). After Mr. Westberry was arrested and charged as an accessory to murder, he agreed to testify against Mr. Wright in return for immunity. (PCR-2. 2415-17). Mr. Westberry shared a cell with Ronald Thomas, who attested that a detective had asked him to find out what Mr. Westberry did with the bloody clothes from the night of the murder; however, Mr. Westberry did not want to talk about the bloody clothes or what transpired the night of the murder. (Supp. PCR-3. 16-17). And then later at trial, Mr. Westberry changed his story a second time, and this different version of events involved considerably less blood on Mr. Wright. (R. 2168, 2175).

¹ But Ms. Smith had been stabbed with a pocket knife, not a kitchen knife. (R. 1822).

Even those Mr. Westberry had three different versions of events, this case isn't just about Mr. Westberry's flip-flopping storytelling; it's also about Henry Jackson and Clayton Strickland.² Mr. Wright's jury did not hear about Mr. Jackson and Mr. Strickland or any of the evidence implicating them in the murder of Ms. Smith.³ At the time of the murder, Mr. Jackson and Mr. Strickland were roommates and lived "about a block away" from Ms. Smith's house. (PCR-1. 965). Mr. Jackson had a burglary conviction for burglarizing Earl Smith's (Ms. Smith's brother) home,⁴ which was located across the street from Ms. Smith's house. (PCR-2. 2432, 2434-35). According to Mr. Jackson's statement to Detective Douglas on February 10, 1983, he and Mr. Strickland went to bed early on Saturday, February 5. (PCR-1. 378). And according to Mr. Strickland's statement to Detective Douglas on February 10, 1983, he and Mr. Jackson drank a lot on Saturday, were pretty high, and both went to bed around 8:00 p.m. (PCR-1. 379).

On Friday, February 4, 1983 (two days before Ms. Smith was found dead), Mr. Strickland approached Charlene Luce and told her that even though Mr. Jackson

² Henry Jackson and Clayton Strickland are deceased.

³ Howard Pearl (trial counsel) testified at the 1997 evidentiary hearing that he was never provided the statements of Charlene Luce, Wanda Brown, and Kim Holt implicating Mr. Jackson and Mr. Strickland. (PCR-2. 2421, 2426-28).

⁴ Mr. Pearl also testified at the 1997 evidentiary hearing that he did not know that Mr. Jackson had previously burglarized Earl Smith's home. (PCR-2. 2434-35).

might kill him, he was not scared of him. (PCR-2. 445). Mr. Jackson had been previously convicted of murdering his brother-in-law.⁵ (PCR-2. 2616). Ms. Luce also observed Mr. Jackson come outside into the yard brandishing a pocketknife in his right hand and said that Mr. Strickland had his money. (PCR-2. 445). Notably, the stab wounds on Ms. Smith were consistent with a pocketknife. (R. 1822). On Sunday, February 6, 1983 (the day Ms. Smith was found dead), Mr. Strickland sold Mr. Smith a pocket knife for \$5.00 between 2:00 and 3:00 pm. (R. 1598).

On Saturday, February 5, 1983 (the day before Ms. Smith was found dead), Wanda Brown, a mail carrier, observed Ms. Smith outside her residence arguing with Mr. Strickland and Mr. Jackson. (PCR-2. 447). However, according to Mr. Strickland's statement to Detective Douglas on February 10, 1983, he had last seen Ms. Smith on "Tuesday or Wednesday" of the previous week. (PCR-1. 379). Mr. Strickland, who was intoxicated, then walked up to the door of Ms. Brown's vehicle and demanded to know if she had his social security check. (PCR-2. 447). Ms. Brown told Mr. Strickland that she did not have any mail for him. (*Id.*). Then, Mr. Strickland asked Ms. Brown to give him some money, but she became scared and drove off. (*Id.*).

On Saturday night, February 5, 1983 (the day before Ms. Smith was found

⁵ Mr. Pearl testified at the 1997 evidentiary hearing that he was unaware that James Dunning (trial prosecutor) represented Mr. Jackson for that murder charge. (PCR-2. 2432).

dead), Idus Hughes drove by Ms. Smith's house and saw Mr. Jackson and two other men (one of them was known as "Water Tank") across the street from her residence. (Supp. PCR-3. 13-15). Also on the same night, William Bartley saw Mr. Jackson and Mr. Strickland drinking and standing in the vacant lot next to Ms. Smith's house.⁶ (PCR-1. 1006-08).

On Sunday, February 6, 1983 (the day Ms. Smith was found dead), Kim Holt, a supermarket cashier at Miller's, saw Mr. Jackson in her checkout line with fresh scratches and blood on his face. (PCR-2. 444, 2583). Ms. Holt was familiar with how Mr. Jackson usually paid with food stamps or bottles. (PCR-2. 444). But on that day, Mr. Jackson paid with a \$100 bill. (PCR-2. 444, 2583). Mr. Dunning (trial prosecutor) testified at the 1988 evidentiary hearing that the money Mr. Jackson had on him at the supermarket was from his social security check (which according to Ms. Brown did not come in the mail on Saturday) and the substance that appeared to be blood on him was actually paint. (PCR-1. 721). However, Mr. Jackson's statement to Detective Douglas on February 10, 1983 indicated that the substance on him was blood from a scratch he sustained in a fight on Sunday night. (PCR-1. 378, 389). But Mr. Jackson was seen by Ms. Holt with the scratches and blood on his face Sunday afternoon, not Sunday night. And Detective Douglas

⁶ Mr. Pearl testified at the 1997 evidentiary hearing that he was unaware of what Mr. Bartley had seen on the night of the murder. (PCR-2. 2431-32)

testified at the 1988 evidentiary hearing that the Sheriff's Office felt confident the scratches were from the tree trimming work he had done. (PCR-1. 956). Captain Clifford Miller testified at the 1988 evidentiary hearing that Detective Douglas had found someone who corroborated that Mr. Jackson had sustained those scratches from the tree-trimming job. (PCR-1. 1060).

Interestingly, when Mr. Jackson was at the grocery store that Sunday afternoon, he asked Ms. Holt if she knew that Ms. Smith had been killed. (PCR-2. 444, 2583). As he was leaving, Ms. Holt noticed that it was 4:30 p.m. (PCR-2. 444). But Ms. Smith had only been found dead by her brother around 4:00 p.m. that day. (R. 1599-1601).

Between 4:30 and 5:00 p.m. on Sunday, February 6, 1983 (the day Ms. Smith was found dead), Mr. Jackson called Ms. Luce over to the fence and informed her that Ms. Smith had been killed. (PCR-2. 445, 2621). When Ms. Luce asked, "why her," he said that "Miss Smith told [me] that she didn't kept [sic] money at home." (PCR-2. 446). Mr. Jackson then told a story about how Ms. Smith once gave him a box of chocolates. (PCR-2. 445-46). Notably, Ms. Smith was found dead with a Hershey chocolate bar on her exposed abdomen. (R. 1717). And when Ms. Luce asked Mr. Jackson if he had killed Ms. Smith, he turned red in the face, looked at her "funny, and then walked away." (PCR-2. 445, 2622).

Dr. William Latimer (the medical examiner) initially placed the time of Ms.

Smith's death between 5:00 p.m. on Saturday night (February 5, 1983), when she was last seen alive by her brother, and 9:00 p.m. on Saturday night (February 5, 1983). (R. 1853). However, on May 17, 1983, Dr. Latimer amended his report and expanded the time range to include Sunday morning. (R. 1843). The medical examiner expanded that time range a month after Mr. Westberry changed his story, implicating Mr. Wright. But Dr. Latimer did concede at trial that Ms. Smith probably died between 5:00 p.m. and 9:00 p.m. on Saturday night (February 5, 1983) because there was no food in her stomach which indicated to him that she had not eaten her dinner yet, because she was not in sleeping clothes which indicated to him that she had not changed her attire for bed yet, and because he had not received any additional information on her normal eating and sleeping habits. (R. 1826, 1849, 1853).

Detective Douglas testified at the 1988 evidentiary hearing that Mr. Jackson and Mr. Strickland's passed their polygraphs and were thus eliminated as suspects. (PCR-1. 964). However, at the 1997 evidentiary hearing, Detective Douglas testified that only Jody, Mr. House, Mr. Westberry, and Ms. Easter were polygraphed. (PCR-2. 2520). Thus, the sole basis for excluding Mr. Jackson and Mr. Strickland as suspects was revealed to be nonexistent. And no hair was ever obtained from either Mr. Jackson or Mr. Strickland for forensic comparisons to the hair found on Ms. Smith's body. (PCR-1. 1003). And no fingerprint comparisons were ever conducted

between Mr. Jackson's and Mr. Strickland's known prints and the unidentified prints found at the crime scene. (PCR-1. 1003; R. 2051).

STATEMENT OF THE CASE AND FACTS

For 36 years, Joel Dale Wright a/k/a Jody Wright, a father of three, has been wrongfully sitting on Florida's death row. That breaks down to: 436 months or 13,000 days. He was 26 years old when he was sentenced to death; he is now 62 years old.



1983



2020

Statement of the Case

This is an appeal from a final circuit court order denying a successive postconviction motion, a supplement, and a motion for rehearing in Putnam County, Florida. The order is appealable because it is an order denying relief under Florida Rule of Criminal Procedure 3.851. Fla. R. App. P. 9.140(a)(1)(D). Mr. Wright, a

death row inmate, is appealing the lower court's denial of relief because he was wrongfully sentenced to death for first degree murder back in 1983.

The second successive 3.851 motion at issue herein was first filed on January 12, 2017. It was amended on May 16, 2017. A case management hearing was conducted on August 24, 2017. After the matter was reassigned to another judge, Mr. Wright was permitted to file a supplement to the amended second successive 3.851 motion on March 1, 2019. On July 12, 2019, a second case management hearing was conducted before the replacement judge.

Mr. Wright's successive 3.851 motion as amended and supplemented challenged his death sentence by arguing that: i) his death sentence violates the Sixth⁷ and Eighth Amendment⁸ to the U.S. Constitution under *Hurst v. Florida*,⁹ 136

⁷ The Sixth Amendment states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." U.S. Const. amend. VI.

⁸ The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

⁹ The U.S. Supreme Court in *Hurst I* held that Florida's capital sentencing scheme, which consisted of a jury making an advisory recommendation to a judge and the judge making the critical findings needed to impose a death sentence, is unconstitutional and that "the Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." *Hurst I*, 136 S. Ct. at 619. *Hurst I* overruled *Spaziano v. Florida*, 468 U.S. 447 (1984) and *Hildwin v. Florida*, 490 U.S. 638 (1989) in that those cases concluded that the Sixth Amendment did not

S. Ct. 616 (2015) (hereinafter *Hurst I*) and *Hurst v. State*,¹⁰ 202 So. 3d 40 (Fla. 2016) (per curiam) (receded from by *State v. Poole*, __ So. 3d __, 2020 WL 370302 (Fla. Jan. 23, 2020) except to the extent that the jury must still unanimously find a statutory aggravator beyond a reasonable doubt) (hereinafter *Hurst II*); ii) the current retroactivity analysis violates the Eighth Amendment under *Furman v. Georgia*,¹¹ 408 U.S. 238 (1972) (per curiam); iii) a future resentencing would probably result in a life sentence; iv) newly discovered evidence shows that Jody’s conviction and death sentence is in violation of the Fourteenth Amendment¹² to the U.S.

require a jury to make the specific fact findings to authorize the imposition of a death sentence. *Hurst I*, 136 S. Ct. at 623.

¹⁰ This Court in *Hurst II* held that “*Hurst v. Florida* mandates that all 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 . . . before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death. *Hurst II*, 202 So. 3d at 57.

¹¹ The U.S. Supreme Court in *Furman* held that that the death penalty “constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments” where one defendant in Georgia was sentenced to death for murder, another defendant in the same state of Georgia was sentenced to death for rape, and a defendant in Texas was sentenced to death for rape. *Furman*, 408 U.S. at 239-40.

¹² The Fourteenth Amendment states in pertinent part: “nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protections of the laws.” U.S. Const. amend. XIV.

Constitution pursuant to *Brady v. Maryland*,¹³ 373 U.S. 83 (1963) and *Giglio v. U.S.*,¹⁴ 405 U.S. 150 (1972); v) Florida’s new sentencing scheme is substantive law that requires retroactive application under the Fourteenth Amendment. The lower court denied the amended second successive 3.851 motion and the supplement.

On October 25, 2019, Mr. Wright filed a motion for rehearing. It was denied on November 8, 2019. Mr. Wright’s notice of appeal was filed on December 4, 2019.

Statement of the Facts

Thirty-six years ago, Ms. Smith was found dead in her home, amid debris piling four-feet high, on Sunday (February 6, 1983) around 4:00 p.m. by her brother Earl Smith. (R. 1599-1601l; PCR-4. 790). The last time Ms. Smith was seen alive was by her brother the day before, Saturday (February 5, 1983) around 5:00 p.m. (R. 1603).

¹³ The U.S. Supreme Court in *Brady* held that “suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Brady*, 373 U.S. at 87. The U.S. Supreme Court set the standard for “materiality” in *U.S. v. Bagley*, 473 U.S. 667 (1985) when it held that evidence is material “only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.” *Bagley*, 473 U.S. at 682.

¹⁴ The U.S. Supreme Court in *Giglio* held that the deliberate or unintentional presentation of false evidence, including testimony, that goes uncorrected requires a new trial if it in any reasonable likelihood affected the judgment of the jury and would have changed the verdict. *Giglio*, 405 U.S. at 153-54.

Two and a half months later, Mr. Wright was arrested for Ms. Smith's murder on April 18, 1983. (PCR-1. 66). Four days later, Mr. Wright was indicted for first-degree murder on April 22, 1983.¹⁵ (R. 5). Mr. Wright pled not guilty. (R. 37).

Mr. Wright lived with his parents who were Ms. Smith's next-door neighbors. (R. 2132-2133). He testified at trial that on the night of her murder, he had been out late playing poker and had won about \$30. (R. 1874). When he got home after midnight, he found himself locked out and proceeded to walk across town to Charles Westberry's trailer at Kelly's Trailer Park where he spent the rest of the night. (R. 2128, 2532-36).

Trial

On the eve of trial (36 years ago), Mr. Wright attempted suicide, and this incident was never brought to the trial court's attention. (PCR-2. 2535-36).

Trial began on August 22, 1983 before Judge Robert Perry. (R. 707). The evidence at trial showed that Ms. Smith was in all likelihood stabbed to death by a right-handed person. (R. 1834). However, Mr. Wright is left-handed (R. 2478). The principle evidence against Mr. Wright consisted of trial testimony of Charles Westberry and a lone fingerprint on a kerosene two-burner stove in Ms. Smith's bedroom that matched the left ring finger of Jody. (R. 2127; 1767; 1686, 2039).

¹⁵ Mr. Wright was also indicted for sexual battery, burglary, and grand theft.

A witness, Kathy Waters, came forward after the close of the evidence who would have provided corroboration of Mr. Wright's testimony and who would have also testified that she saw three individuals walking in front of Ms. Smith's house; however, the trial judge refused to allow her to testify before the jury because she was a spectator at trial. (R. 700, 706). In his dissent from the denial of certiorari review, Justice Blackmun wrote: "Since Wright's fingerprint could have been left during the alleged earlier break-in, this case comes down to Wright's word against Westberry's. Waters' testimony obviously would not have proved Wright innocent, but it would have provided some corroboration for Wright's story." *Wright v. Florida*, 474 U.S. 1094, 1096 (1986) (Blackmun, J., dissenting, joined by Brennan and Marshall, JJ.).

On September 1, 1983, the jury returned guilty verdicts on each count. (R. 688). The following day, the penalty phase proceeding began, and the jury recommended death by a vote of 9 to 3 (R. 689, 695). On September 23, 1983, Judge Perry imposed a death sentence¹⁶ after finding four aggravating circumstances.¹⁷ (R.

¹⁶ Mr. Wright was also sentenced 99 years for the sexual battery count, 15 years for the burglary count, and five years for the grand theft count.

¹⁷ Those aggravators were as follows: i) the homicide occurred in the course of a felony; ii) the homicide was committed to avoid arrest; iii) the homicide was especially heinous, atrocious, and cruel; and iv) the homicide was committed in a cold, calculated and premeditated manner without any pretense of moral justification. (R. 713).

710, 713).

Direct Appeal

In 1984 (35 years ago), Larry Henderson represented Mr. Wright in his direct appeal. *Wright v. State*, 473 So. 2d 1277 (Fla. 1985) (per curiam). On direct appeal, Mr. Henderson made ten arguments in the Initial Brief that was filed on May 3, 1984:

- (i) The trial court committed reversible error and violated the Sixth and Fourteenth Amendments and Article I, Section 16(a)¹⁸ of the Florida Constitution by restricting Jody's right of cross-examination;¹⁹
- (ii) The trial court committed reversible error and violated the Sixth and Fourteenth Amendments and Article I, Section 16(a) of the Florida Constitution by refusing to allow Mr. Wright to reopen his case in order to present newly discovered exculpatory evidence, which evidence was discovered after the "technical" close of all the evidence but prior to any argument or instruction

¹⁸ Article I, Section 16(a) of the Florida Constitution states in pertinent part that: "In all criminal prosecutions, the accused shall . . . have the right to have compulsory process for witnesses, to confront at trial adverse witnesses. . . ." Art. I, § 16(a), Fla. Const.

¹⁹ This argument concerned various rulings by Judge Perry (trial judge) limiting Mr. Pearl's (trial counsel) cross-examination of four State witnesses: i) the medical examiner (the court would not permit trial counsel to inquire into the sources of information used to determine the new time of death unless the questions were predicated upon prior testimony at trial); ii) Kenneth Goodson (the court would not permit trial counsel to inquire into how well Mr. Goodson knew Mr. Wright by asking about an incident that occurred in March); iii) Deputy Walter Perkins inquired into Deputy Perkins' memory as to the content of the unrecorded interrogation of Mr. Wright; and iv) Charles Westberry (trial counsel inquired into whether Mr. Westberry was advised that he was given immunity for Ms. Smith's murder).

- of law being given to the jury;²⁰
- (iii) The trial court deprived Mr. Wright of a fair trial by an impartial jury guaranteed by the Sixth and Fourteenth Amendments and Article I, Section 16(a) of the Florida Constitution by instructing the jury, over objection, that evidence of a prior crime committed by Mr. Wright “will be considered by you for the limited purposes of proving . . . identity . . . on the part of the defendant.”;²¹
 - (iv) The trial court violated the Fourth,²² Fifth,²³ Sixth, and Fourteenth Amendments by permitting a police officer, over objection, to comment upon Jody’s exercise of his right to remain silent;²⁴
 - (v) The conviction for grand theft second degree must be reversed

²⁰ This argument challenged Judge Perry’s decision that Mr. Pearl could not call Kathy Waters as a defense witness because she had been a spectator in the courtroom.

²¹ This argument challenged Judge Perry’s instruction regarding admitted *Williams*’ Rule evidence that consisted of Paul House and Mr. Wright entering the victim’s house during the day through a rear window a month prior to the murder. The *Williams*’ Rule is codified in Florida Rule of Evidence 90.404(2)(a) which states that evidence of other crimes, wrongs, or acts of the accused is admissible if relevant to a material fact other than bad character or propensity such as motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. Fla. R. Evid. 90.404(2)(a); *see also Williams v. State*, 110 So. 2d 654 (Fla. 1959).

²² The Fourth Amendment states that: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. Const. amend. IV.

²³ The Fifth Amendment states in pertinent part that: “No person . . . shall be compelled in any criminal case to be a witness against himself. . . .” U.S. Const. amend. V.

²⁴ This argument challenged the admission into evidence of Detective Perkins’ testimony regarding Mr. Wright’s statement “If I confess to this, I’ll die in the electric chair. If I don’t talk, I stand some chance of living.”

where the *corpus delecti*²⁵ of the crime was not established other than by the confession of Mr. Wright;

- (vi) The trial court committed reversible error by restricting the final argument of the defense counsel concerning the law governing circumstantial evidence, and/or by then refusing to instruct the jury, upon timely request, as to the law governing circumstantial evidence;
- (vii) The trial court erroneously found that the murder was committed for the purpose of preventing a lawful arrest or effecting an escape from custody;
- (viii) The trial court erroneously found the aggravating circumstance of cold, calculated, and premeditated murder, in that said finding was unsupported by the evidence and the finding constituted a doubling-up of the aggravating circumstance of especially heinous, atrocious or cruel murder; and
- (ix) As applied, Section 921.141, Florida Statutes (1983), violated the Sixth and Fourteenth Amendments by denying Jody due process of law, in that the existence of aggravating and/or mitigating circumstances, as questions of fact, are found by the trial judge as opposed to a jury of Mr. Wright's peers; and
- (x) Florida's capital sentencing statute, Section 921.141, *Florida Statutes* (1983), is unconstitutional on its face and as applied.

Init. Brief of App., May 3, 1984.

On June 21, 1984, Mr. Wright filed a motion seeking relinquishment of jurisdiction with this Court in order to permit evidentiary development regarding a statement made by juror Sandra Wilkinson²⁶ during trial; that motion was denied on

²⁵ Corpus delecti is defined as "the fact of a transgression." Black's Law Dictionary (11th ed. 2019).

²⁶ Ms. Wilkinson had discussed with a deputy clerk how another juror kept falling asleep during trial and how the defense failed to prove that Mr. Wright was innocent. Mot. to Permit Relinq. Jdx. at ¶ 3. Jun. 21, 1984.

June 28, 1984.²⁷ On September 4, 1984, after all briefing had been completed, Mr. Wright filed a second motion for relinquishment with this Court regarding whether he was present when an inquiry was conducted concerning the bias of another juror; that motion was granted.²⁸ A hearing was then held in circuit court, and the record on appeal was supplemented. (R. 3078-3186). Mr. Wright was then permitted to file a supplement to the Initial Brief wherein he raised an 11th argument that his absence during the inquiry violated his constitutional right to be present at all stages of his capital trial.²⁹

On July 3, 1985, this Court affirmed Mr. Wright's convictions and sentences, including his death sentence.³⁰ *Wright*, 473 So. 2d at 1279-81. However, this Court

²⁷ This motion and order are not part of the record on appeal of the direct appeal (64,391). Mot. to Permit Relinq. Jdx., Jun. 21, 1984; *see also* Order Den. Mot. to Permit Relinq. Jdx., Jun. 28, 1984.

²⁸ This motion and order are not part of the record on appeal of the direct appeal (64,391). Mot. to Permit Relinq. Jdx., Sept. 4, 1984; *see also* Order Grant. Mot. to Permit Relinq. Jdx., Kenneth Shwing, a spectator at the trial, overheard a woman in the gallery during trial say that a friend of hers who is sitting on the jury "had already made up her mind that [Mr. Wright] was guilty, and it wouldn't take her at least five minutes when they got to the back room to decide the case, that she would find him guilty." (R. 2842).

²⁹ This supplemental brief is not part of the record on appeal of the direct appeal (64,391).

³⁰ This Court found that the exclusion of Ms. Waters' testimony was a harmless error, and this Court also struck the "cold, calculated and premeditated aggravator. *Wright*, 473 So. 2d at 1279-82. But this Court did not conduct a proper harmless error analysis with respect to the "cold, calculated and premeditated aggravator. *Id.* at

did not address the 11th argument in its opinion. *Id.*

Mr. Wright filed a Petition for Writ of Certiorari, and the U.S. Supreme Court denied his petition on January 21, 1986. *Wright v. Florida*, 474 U.S. 1094. Mr. Wright's death sentence became final on January 21, 1986.

Initial 3.850 Motion

On February 22, 1988 (31 years ago), Mr. Wright filed his Initial 3.850³¹ Motion.³² Init. 3.850 Mot. To Vacate J., Feb. 22, 1988. And on July 19, 1988, Mr. Wright filed an Amended Initial 3.850 Motion, which contained 18 claims:

- (i) The State's intentional withholding of material and exculpatory

1282. The Court did hold that: "Because the court properly found there were no mitigating and three aggravating circumstances, we conclude the imposition of the death penalty was correct and find it unnecessary to remand for a new sentencing hearing." *Id.* However, mitigation was presented and argued by Mr. Pearl and even conceded to by Mr. Dunning (trial prosecutor). Mr. Dunning had conceded in proceedings before the jury to the presence of at least one mitigating factor: his young age. (R. 2981-82). And testimony was presented from Susan Wright (Mr. Wright's wife of five years) who was the mother of his three young children. (R. 2948). She expressed her love for Mr. Wright and described him as "a good father." (*Id.*). Diane Hughes (Mr. Wright's sister) testified to her love for Mr. Wright. (R. 2952). Debbie June (Mr. Wright's other sister) testified that he was a "[v]ery gentle person. I mean, he's watched my kids many of times." (R. 2959). Mr. Wright's mother died shortly before his trial began.

³¹ In 1993, this Court adopted a new Florida Rule of Criminal Procedure 3.851 to solely address death penalty postconviction proceedings. *In re Rule of Criminal Procedure 3.851 (Collateral Relief After Death Sentence Has Been Imposed) and Rule 3.850 (Motion to Vacate, Set Aside, or Correct Sentence)*, 626 So. 2d 198, 198 (Fla. 1993) (per curiam).

³² The Initial 3.850 Motion is not part of the record on appeal for the appeal of the circuit court's denial of said motion (3.850 Motion).

- evidence violated the constitutional rights of Mr. Wright under the Fifth, Sixth, Eighth, and Fourteenth Amendments;
- (ii) Mr. Wright was denied the effective assistance of counsel at both the guilt/innocence and sentencing phases of his trial, in violation of the Sixth, Eighth, and Fourteenth Amendments:
 - (a) Trial counsel's ineffective cross-examination and impeachment of witnesses and his failure to present evidence of Mr. Wright's credibility was so deficient as to render the conviction totally unreliable;
 - (b) Trial counsel failed to present favorable and exculpatory evidence to the jury;
 - (c) During the penalty phase of the trial, trial counsel argued against his client's interest and presented in mitigation evidence which was in fact aggravating; and
 - (d) Trial counsel was also ineffective at sentencing for his failure to present evidence that Mr. Wright passed at least two polygraph examinations which demonstrated that he was being truthful when he said he did not the crime;
 - (iii) Trial counsel rendered ineffective assistance of counsel at sentencing by unreasonably failing to produce reliable and available evidence that Mr. Wright was not anti-social, was not violent, was not sociopathic, and did not have the mental makeup to have committed this offense, and counsel failed to ensure that Mr. Wright received meaningful, reliable, and individualized sentencing, in violation of the Sixth, Eighth, and Fourteenth Amendments;
 - (iv) Mr. Wright was denied his right to a trial by a fair and impartial jury, in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights, by trial counsel's failure to request a change of venue and by the trial court's failure adequately to inquire into and ensure that a fair and impartial jury was provided to Jody;
 - (v) Mr. Wright was denied his right to a trial by a fair and impartial jury in violation of his Fifth, Sixth, and Fourteenth Amendment rights, by improper juror conduct, and by the trial court's failure to adequately inquire into and ensure that a fair and impartial jury was guaranteed;
 - (vi) Mr. Wright's conviction and sentence of death are invalid since the state's use of Jody's comments on silence violated his Fifth Amendment right to silence;
 - (vii) Mr. Wright was denied his fundamental right to confront a

witness through cross-examination in violation of the Sixth and Fourteenth Amendments;

- (viii) The trial court's refusal to permit the defense to reopen its case to present newly discovered evidence after the close of all evidence but prior to closing arguments violated Mr. Wright's Sixth, Eighth, and Fourteenth Amendment rights and Article I, Section 16(a) of the Florida Constitution, and trial counsel ineffectively presented the issue;
- (ix) Mr. Wright was denied his Sixth Amendment right to present a defense when his counsel was not permitted to present exculpatory evidence that Ms. Smith's house had been regularly burglarized;
- (x) The prosecutor's closing argument in the guilt phase denied Mr. Wright a fair trial as guaranteed him by the Sixth, Eighth, and Fourteenth Amendments;
- (xi) Trial counsel unreasonably failed to request, and the court erred by not giving a jury instruction regarding voluntary intoxication and specific intent, in violation of Jody's Sixth, Eighth, and Fourteenth Amendment rights;
- (xii) Mr. Wright was absent from the courtroom while the court communicated with jurors during guilty/innocence deliberations, in violation of the Sixth, Eighth, and Fourteenth Amendments;
- (xiii) The trial court's unconstitutional shifting of the burden of proof in its instructions at sentencing deprived Mr. Wright of his rights to due process and equal protection of law, as well as his rights under the Eighth and Fourteenth Amendments;
- (xiv) Mr. Wright's sentencing jury was repeatedly misinformed and misled by instructions and arguments which unconstitutionally and inaccurately diluted their sense of responsibility for sentencing, contrary to *Caldwell v. Mississippi*,³³ 472 U.S. 320 (1985), *Adams v. Dugger*,³⁴ 816 F. 2d 1493 (11th Cir. 1987) (per

³³ The U.S. Supreme Court in *Caldwell* held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibilities for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell*, 472 U.S. at 328-29.

³⁴ The 11th Circuit Court of Appeals held that the judge's statements to the jury violated defendant's *Caldwell* right because they created an "impermissible danger that the jury's recommended sentence was unreliable" and "consequently, that

- curiam), and *Mann v. Dugger*,³⁵ 844 F. 2d 1446 (11th Cir. 1988) and in violation of the Eighth and Fourteenth Amendments;
- (xv) The jury was misled and incorrectly informed about its function at capital sentencing, in violation of the Eighth and Fourteenth Amendments;
 - (xvi) The statutory aggravating circumstance heinous, atrocious, or cruel was applied in violation of the Eighth and Fourteenth Amendments;
 - (xvii) The introduction of non-statutory aggravating factors so perverted the sentencing phase of Mr. Wright's trial that it resulted in the totally arbitrary and capricious imposition of the death penalty in violation of the Eighth and Fourteenth Amendments; and
 - (xviii) Mr. Wright was denied his Eighth and Fourteenth Amendment rights by the instructions to the penalty phase jury that incorrectly set out the law as to what aggravating circumstances could be.

(PCR-1. 1).

1988 Evidentiary Hearing

An evidentiary hearing on the Amended Initial 3.850 Motion was held before Judge Perry (the trial judge) on October 3 and 4, 1988. (PCR-1. 461). Mr. Pearl (trial counsel) testified about the glass decanter/jar/vase (hereinafter decanter). (PCR-1. 919-20). Mr. Pearl stated that he failed to call Mr. Wright's aunt (Ms. Wiggs) to testify as to the identity and ownership of the decanter and its matching glasses despite traveling from South Carolina; her testimony would have showed that the set

Adams' death sentence was unreliable." *Adams*, 816 F. 2d at 1500-01 (judgment reversed by *Dugger v. Adams*, 489 U.S. 401 (1989)).

³⁵ The 11th Circuit Court of Appeals in *Mann* held that the defendant was entitled to relief on his *Caldwell* claim. *Mann*, 844 F. 2d at 1447 (overruled by *Davis v. Singletary*, 119 F. 3d 1471 (11th Cir. 1997)).

was given to Mr. Wright's mother by her and not stolen from Ms. Smith's house which was testified to by Mr. Westberry at trial. (PCR-1. 919-20; R. 2135-36). Mr. Pearl also testified that the State had failed to provide him with the exculpatory evidence that implicated Mr. Jackson and Mr. Strickland. (PCR-1. 792-814). Mr. Pearl further testified that he had not been fully advised of the consideration that Mr. Westberry was given in exchange for his testimony against Mr. Wright. (PCR-1. 791).

On June 9, 1989, Judge Perry entered an order denying postconviction relief. (PCR-1. 1084). While the order denying postconviction relief was pending, Mr. Wright learned that Mr. Pearl had been a special deputy sheriff while representing him. (PCR-1. 1168). Mr. Wright then filed a motion for rehearing and amended motion to vacate which included a conflict claim based on the new information. (PCR-1. 1167). But Judge Perry summarily denied the conflict claim and the motion for rehearing. (PCR-1. 1272).

Mr. Wright appealed to this Court. (R. 1387). On February 13, 1990, Mr. Wright filed his Initial Brief with this Court; it contained 21 arguments:

- (i) Mr. Wright was deprived of a constitutionally adequate adversarial testing because either the state failed to disclose or the defense unreasonably failed to discover exculpatory evidence regarding other suspects:
 - (a) The prosecutor violated his duty to disclose exculpatory evidence and
 - (b) Trial counsel failed to insure adversarial testing;
- (ii) Mr. Wright was deprived of a constitutionally adequate

adversarial testing because either the state failed to disclose or the defense unreasonably failed to discover exculpatory evidence impeaching Mr. Westberry, including the details of the limited grant of immunity extended to Mr. Westberry:

- (a) The prosecutor had knowledge of the illegal scrap metal business and accorded Mr. Westberry immunity for charges in exchange for testimony against Jody;
- (b) The prosecutor reduced to writing Mr. Westberry's statements to him during their interviews;
- (c) Trial counsel did not receive a copy of Mr. Westberry's statement to Mr. Dunning (trial prosecutor) nor did know of the "limited grant of immunity" as to the illegal scrap metal business; and
- (d) Trial counsel failed to insure adversarial testing;
- (iii) Mr. Wright was deprived of the effective assistance of counsel at the guilt phase of his trial;³⁶
- (iv) Mr. Wright was deprived of his Fifth and Sixth Amendment privilege when trial counsel forced him to testify;
- (v) Mr. Wright was deprived of effective representation at the penalty phase of his capital trial;
- (vi) Mr. Wright was deprived of a fair trial due to juror misconduct;
- (vii) The State improperly used his invocation of his right to silence as evidence of his guilt;
- (viii) Mr. Wright was deprived of his right of confrontation;
- (ix) Mr. Wright was deprived of his right to present favorable evidence when the trial court refused to permit the presentation of evidence discovered after the defense rested, but before closing argument;
- (x) Mr. Wright was deprived of a fair trial by virtue of the prosecutor's closing argument;
- (xi) Mr. Wright was denied his right to present favorable evidence that the victim's home had frequently been burglarized in the weeks prior to her homicide;
- (xii) Mr. Wright was deprived of a fair trial due to the denial of his request for a change of venue;
- (xiii) Mr. Wright was deprived of his right to be present in enduring all critical stages of his trial;

³⁶ This argument involved the evidence of ownership of the decanter and the impeachment of Mr. Westberry and corroboration of Mr. Wright.

- (xiv) Mr. Wright was deprived of his right to an instruction on voluntary intoxication;
- (xv) The penalty phase instructions improperly shifted the burden of proof;
- (xvi) The penalty phase jury was misled as to its sentencing responsibility;
- (xvii) The jury instruction on the heinous, atrocious, or cruel aggravating circumstances was constitutionally overbroad;
- (xviii) The penalty phase jury instructions incorrectly set forth the aggravating circumstances to be considered by the jury;
- (xix) Non-statutory aggravating circumstances were improperly presented to the penalty phase jury;
- (xx) The jury was improperly instructed as to the need for a majority to return a life recommendation; and
- (xxi) Trial counsel's undisclosed conflict of interest in violation of the laws and constitution of the state of Florida denied Mr. Wright the effective assistance of counsel guaranteed under the Sixth, Eighth, and Fourteenth Amendments.

Init. Brief of App., Feb. 13, 1990.

On May 9, 1991, this Court affirmed the denial of relief except for as to the conflict claim which was remanded for an evidentiary hearing. *Wright v. State*, 581 So. 2d 882, 887 (Fla. 1991) (per curiam). On the same day, this Court authorized the circuit court to consolidate other cases with the similar conflict claims. *Id.* at 886. Meanwhile, Mr. Wright had discovered that he had not been previously provided with all the requested public records regarding Mr. Jackson. Therefore, he filed an amended initial 3.850 motion³⁷ on December 11, 1991, which contained the

³⁷ Despite Mr. Wright titling this pleading “Amendment to Supplemental 3.850 Motion. . .”, this pleading is technically another amendment to the Initial 3.850 Motion.

following three claims:

- (i) Access to the files and records pertaining to Mr. Wright in the possession of certain state agencies have been withheld in violation of Chapter 119,³⁸ *Florida Statutes*, the Due Process Clause and Equal Protection Clauses of the Fourteenth Amendment and the Eighth Amendment and the corresponding provisions of the Florida Constitution. Mr. Wright cannot prepare an adequate 3.850 motion until he has received full Chapter 119 disclosure and been afforded due time to review the disclosures and amend;³⁹
- (ii) The State's withholding of material and exculpatory evidence violated the constitutional rights of Mr. Wright under the Fifth, Sixth, Eighth, and Fourteenth Amendments and the discovery provisions of the Florida Rules of Criminal Procedure. Moreover, because the jury did not know of this important evidence contained in the state's possession an adversarial testing did not occur. As a result, confidence is undermined in the outcome, and 3.850 relief must be granted; and
- (iii) Newly discovered evidence establishes that Mr. Wright is innocent of the offense for which he was convicted and sentenced to death, and this, his conviction and death sentence violates the Eighth and Fourteenth Amendments.

(PCR-2. 115).

On December 15, 17, and 18, 1992, a consolidated evidentiary hearing was held before Judge Driver regarding the issue of Mr. Pearl's special bonded deputy sheriff status. (PCR-2. 1306, 1460, 1623, 1879).

On February 22, 1993, Mr. Wright amended his initial 3.850 motion a second

³⁸ Chapter 119, *Florida Statutes*, governs the public records law in Florida. See generally Chapter 119, *Fla. Stat.*

³⁹ These files and records were the police records of Mr. Jackson, which indicated an increase in violence. (PCR-2. 115).

time to add the following three claims:

- (i) Mr. Wright was deprived of his due process rights when the presiding judge at trial and postconviction proceedings was a special deputy sheriff and thus, the recipient of “quaint political patronage.” The process accorded to Mr. Wright at trial and in postconviction was not full and fair in violation of the Sixth, Eighth, and Fourteenth Amendments;
- (ii) Florida’s statute setting forth the aggravating circumstances to be considered in a capital case is facially vague and overbroad in violation of the Eighth and Fourteenth Amendments. The facial invalidity of the statute was not cured in Mr. Wright’s case where the jury did not receive adequate narrowing instructions. As a result, Mr. Wright’s sentence of death is premised upon fundamental error which must be corrected now in light of new Florida law, *Espinosa v. Florida*,⁴⁰ 505 U.S. 1079 (1992) (per curiam); and
- (iii) The jury’s death recommendation which was accorded great weight by the trial court was tainted by consideration of invalid aggravating circumstances (i.e., “cold, calculated and premeditated”, “pecuniary gain”, and “heinous, atrocious or cruel”) in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

(PCR-2. 480).

On April 2, 1993, the circuit court entered an order denying Mr. Wright’s 3.850 claims respective to the Mr. Pearl issue.⁴¹ (PCR-2. 513). However, the circuit

⁴⁰ The U.S. Supreme Court in *Espinosa* held that “the weighing of an invalid aggravating circumstance violates the Eighth Amendment” and that “an aggravating circumstance is invalid . . . if its description is vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor.” *Espinosa*, 505 U.S. at 1081.

⁴¹ This order is not in the record of appeal for the remand and amendment to the supplemental motion. Order Den. 3.850 Mot., Apr. 2, 1993.

court did not rule on Mr. Wright's other claims.

In 1996, this Court issued *Teffeteller v. Dugger*, 676 So. 2d 369 (Fla. 1996) (per curiam) and ruled that the consolidation of the Pearl cases had violated the Due Process Clause. *Id.* With the other claims still pending in the circuit court, the circuit court concluded on the basis of *Teffeteller* that Mr. Wright was entitled to another evidentiary hearing on the conflict claim. (PCR-2. 703).

On October 8, 1997, Jody amended his pending initial 3.850 motion again to add two additional claims:

- (i) The State's withholding of material and exculpatory evidence⁴²

⁴² The evidence included but was not limited to the following:

- i) a voluntary statement from Bobby Hackney taken by Detective Douglas regarding sexual battery charges against him by his 14-year-old sister and arrest reports charging Mr. Hackney with burglaries;
- ii) deposition testimony from Jerry Vaughn that Mr. Hackney was involved in the illegal scrap metal business;
- iii) deposition testimony from Derry Dedmon that he destroyed all polygraph records through 1984 at the direction of the new sheriff;
- iv) deposition testimony from John Robinson that he had no record of a crime scene video to which former Sheriff Walter Pellicer testified that existed;
- v) deposition testimony from Detective Douglas that he did not know who wrote two anonymous letters asking the Putnam County Sheriff's Office to question Mr. Wright about the murder (these two letters appear to have been sent by the same person and were received on February 8, 1983);
- vi) arrest records of Clayton Hughes for aggravated assault with a knife and for burglary, including a burglary at Walt's Bar-B-Que, which was owned by the former Sheriff Pellicer;
- vii) deposition testimony from Captain Miller that Detective Douglas told him that Mr. Wright's two polygraph tests were inconclusive and that Mr. Jackson had a reputation of being a drinker and a fighter;
- viii) Sam Hogg's diagram of the west rear side of Ms. Smith's home where the

violated constitutional rights of Mr. Wright under the Fifth, Sixth, Eighth, and Fourteenth Amendments and the discovery provisions of the Florida Rules of Criminal Procedure. Moreover, because the jury did not know of this important evidence contained in the state's possession, an adversarial testing did not occur. Either the prosecutor violated *Brady* or defense counsel was ineffective. As a result, confidence is undermined in the outcome and 3.850 relief must be granted; and

- (ii) Newly discovered evidence shows Mr. Wright's capital conviction and sentence are constitutionally unreliable in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments where Mr. Wright's trial court proceedings were fraught with procedural and substantive errors which cannot be harmless when viewed as a whole since the combination of errors including *Brady* violations and ineffective assistance of counsel deprived him of the fundamentally fair trial guaranteed under the Sixth, Eighth, and Fourteenth Amendment, and the

pocket knife was found and his report of a fight between Mr. Jackson and Anthony White;

- ix) records indicating that Mr. Jackson violated his parole for a burglary and that his brother, Harold Jackson, was charged with aggravated child abuse on a child of six years;
- x) John Griffin's police report that Mr. Jackson was prowling in a neighborhood late at night;
- xi) deposition testimony from former Sheriff Pellicer that Mr. Jackson was arrested several times for drunkenness and fighting, that Freddie Williams (Mr. Pearl's investigator) was a bonded special deputy, and that Mr. Jackson, Mr. Strickland, Mr. Westberry, and Mr. Jackson's brother, Harold, were all suspects;
- xii) a report by Nolan Richard that indicated an elderly female victim was robbed possibly by Mr. Jackson;
- xiii) deposition testimony from Derrick Smith that he investigated Mr. Jackson's death in 1985; and
- xiv) Mr. Westberry's estranged wife (Paige) was reportedly dating Deputy Perkins at the time of Ms. Smith's death. (PCR-2. 914).

cumulative effect test articulated in *Kyles v. Whitley*,⁴³ 514 U.S. 419 (1995) and *State v. Gunsby*,⁴⁴ 670 So. 2d 920 (Fla. 1996) (per curiam).

(PCR-2. 906).

1997 Evidentiary Hearing

On March 3 and 7, 1997 and December 8, 1997, an evidentiary hearing on the third amended initial 3.850 motion was held before Judge A. W. Nichols. (PCR-2. 2202, 2364, 2496).

At the 1997 evidentiary hearing, Mr. Wright's postconviction investigator Jeff Walsh testified that Captain Miller turned over a packet of documents in 1991 that Mr. Wright had not previously received. (PCR-2. 2600-01). Subsequently, additional more documents were received that had not been previously turned over. (PCR-2. 2604).

Mr. Wright's sister (Bobbi Mixon) testified that during the winter months following Ms. Smith's death, Deputy Perkins became angry with Mr. Wright's mother and threatened her over one of the Wright brothers seeing one of his

⁴³ The U.S. Supreme Court in *Kyles* held that in determining if an undisclosed item of evidence is material, i.e., a *Brady* violation, the cumulative effect of all suppressed evidence favorable to a defendant is considered, not each item of evidence individually. *Kyles*, 514 U.S. at 437.

⁴⁴ This Court in *Gunsby* held that the effect of *Brady* violations and the ineffective assistance of defendant's trial counsel in failing to discover exculpatory evidence, when considered cumulatively, created a reasonable probability of a different outcome and required a vacated conviction. *Gunsby*, 670 So. 2d at 925.

stepsisters; Deputy Perkins told Ms. Wright that both brothers “would go down” and that he was going to make her “sorry [she] ever had them two boys.” (PCR-2. 2587-88).

Tammy Logan Marjenhoff and her sister, Glenna Cheryl Fox, testified about the police report of Mr. Jackson attempting to unlawfully enter her residence on multiple occasions. (PCR-2. 2540, 2543, 2547-2554). Leon Wells and Ella Hill also testified about Mr. Jackson’s violent behavior. (PCR-2. 2571-78, 2629-38).

Sheriff Walter Pellicer’s deposition dated September 5, 1997⁴⁵ indicated that Judge Perry (trial judge), Freddie Williams (Mr. Pearl’s investigator), and Mr. Dunning (trial prosecutor) were all special bonded deputy sheriffs.⁴⁶ (PCR-2. 2500; Pellicer Dep. 19-20). Captain Miller’s deposition was introduced as an exhibit to show that former Sheriff Pellicer provided special deputy appointments to any person who was a “political ally.” (PCR-2. 2519; Miller Dep. 7-8).

Mr. Pearl (trial counsel) testified at the evidentiary hearing about how he was a special deputy sheriff in Marion County when he represented Jody at trial. (PCR-

⁴⁵ The deposition is erroneously dated September 5, 1998; it should have been dated September 5, 1997.

⁴⁶ Former Sheriff Pellicer explained in his deposition that special bonded deputy sheriffs were also known as “pistol-toting deputies” which was a “black person’s slang for part-time deputies.” Pellicer Dep. 16. The special bonded deputy sheriffs were unpaid and had a special assignment of duties, which consisted of back up and patrolling town. *Id.* at 18.

2. 2407). Mr. Wright was unaware of Mr. Pearl's, Mr. Williams', Mr. Dunnings' and Judge Perry's special deputy appointments at trial. (PCR-2. 2640-41).

The circuit court denied all of Mr. Wright's pending claims on June 5, 2000.⁴⁷ (PCR-2. 1135).

Mr. Wright appealed to this Court. (*Id.*). On May 24, 2001, Jody filed his Initial Brief with this Court, which contained the following six arguments:

- (i) Mr. Wright was deprived of his rights to due process under the Fourteenth Amendment as well as his rights under the Fifth, Sixth, and Eighth Amendments because either the state failed to disclose evidence which was material and exculpatory in nature and/or presented misleading evidence and/or defense counsel unreasonably failed to discover and present exculpatory evidence;⁴⁸

⁴⁷ This order is not in the record of appeal for the remand and amendment to the supplemental motion.

⁴⁸ This argument was comprised of the following sub-arguments:

- i) Judge Perry's (trial judge) determination at the 1988 evidentiary hearing that Mr. Williams was aware of the statements by Wanda Brown, Charlene Luce and Kim Holt prior to trial was incorrect because he had not seen the statements until five years after the trial;
- ii) Judge Perry's reliance on testimony from Detective Douglas and Captain Miller at the 1988 evidentiary hearing that Mr. Jackson and Mr. Strickland were excluded as suspects when they passed their polygraph examinations was mistaken because Detective Douglas in 1997 acknowledged that Mr. Jackson and Mr. Strickland did not take polygraphs;
- iii) Mr. Wright was not provided with public records that contained exculpatory evidence:
 - a) the aforementioned statements;
 - b) Mr. Jackson's criminal history;
 - c) police reports concerning Leon Wells' call and Ella Hill's phone calls concerning Mr. Jackson's violent behavior;

- (ii) Mr. Pearl's status as a special deputy sheriff, in conjunction with former Sheriff Pellicer's testimony that Freddie Williams (Mr. Pearl's investigator) was a bonded deputy sheriff in Putnam County, affected the defense team's performance and interfered with its ability to provide effective representation;
- (iii) Mr. Wright was deprived of his right to a fair and impartial judge when Judge Perry presided over his trial in 1983 and over his postconviction evidentiary hearing in 1988 in violation of the Sixth, Eighth, and Fourteenth Amendments;⁴⁹
- (iv) Mr. Wright was sentenced to death by a judge whose standard practice was to have the state draft the findings in support of a sentence of death. This erroneous procedure violated due process and Florida law;
- (v) The procedure following postconviction has violated Mr. Wright's due process rights under *Jones v. State*,⁵⁰ 740 So. 2d

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- d) a letter from Johnny McClendon regarding his efforts to get Connie Ray Israel, who had a history of raping and robbing elderly woman in Palatka, to confess to the crime;
 - e) a police report concerning Dell Gillman's allegation that Deputy Perkins had previously falsified a police report;
 - f) the fact that there was no police documentation checking out Mr. Jackson's story of how he obtained the money, scratches, and what appeared to be blood as observed by Kim Holt;
 - g) the fact that Mr. Jackson's and/or Mr. Strickland's fingerprints were never compared to the prints lifted from the crime scene; and
 - h) the fact that hair was never obtained from either Mr. Jackson or Mr. Strickland and compared to the unidentified hair found on Ms. Smith's body. Init. Brief of App., May 24, 2001.

⁴⁹ This argument involved how former Sheriff Pellicer testified in a deposition that Judge Perry had been a special deputy sheriff in Putnam County at the time of Mr. Wright's trial.

⁵⁰ The Florida Supreme Court in *Jones* held that a failure to timely act on a Supreme Court order for an evidentiary hearing deprives defendants of due process. *Jones*, 740 So. 2d at 525.

- 520 (Fla. 1999) (per curiam) and a new trial is warranted;⁵¹ and
- (vi) This Court failed to comply with the requirements of *Sochor v. Florida*,⁵² 504 U.S. 527 (1992) when it affirmed Mr. Wright's sentence of death on direct appeal⁵³.

Init. Brief of App., May 24, 2001.

On December 31, 2001, Mr. Wright filed a Petition for Writ of State Habeas with this Court, which contained four claims:

- (i) The State failed to disclose pertinent facts which were necessary to this court's consideration of the issues raised by Mr. Wright, and as a result, the direct appeal did not comport with the Sixth, Eighth, and Fourteenth Amendments;
- (ii) Mr. Wright's appellate counsel rendered ineffective assistance in failing to raise on appeal numerous meritorious issues which warrant reversal of his conviction and sentence of death;
- (iii) Mr. Wright was deprived of his right to have a jury determination of the facts necessary to render him death eligible in light of *Apprendi v. New Jersey*,⁵⁴ 530 U.S. 466 (2000); and
- (iv) This Court failed to comply with the requirements of the harmless error analysis under *Sochor* when it struck an aggravated circumstance and affirmed Mr. Wright's sentence of death on direct appeal.

⁵¹ This argument involved Judge Nichols' refusal to timely rule on Mr. Wright's motion to depose Judge Perry.

⁵² The U.S. Supreme Court in *Sochor* held that an Eighth Amendment error occurs when a state court does not explain or declare the error "“was harmless beyond a reasonable doubt” in that ‘it did not contribute to the [sentence] obtained.’” *Sochor*, 504 U.S. at 540.

⁵³ This argument involved the harmless error analysis.

⁵⁴ The U.S. Supreme Court in *Apprendi* stands for the proposition that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury and proven beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490.

Pet. for Writ of HC, Dec. 31, 2001.

On July 3, 2003, this Court affirmed the circuit court's denial of relief and denied Mr. Wright's petition for writ of habeas corpus. *Wright v. State*, 857 So. 2d 861 (Fla. 2003) (per curiam). In 2004, the U.S. Supreme Court denied Mr. Wright's petition for a writ of certiorari. *Wright v. Crosby*, 541 U.S. 961 (2004).

3.853 Motion

On August 6, 2003 (16 years ago), Mr. Wright filed a motion seeking DNA testing pursuant to Rule 3.853 in the circuit court. (PCR-3. 1). The motion requested mitochondrial DNA testing of a pubic hair contained in a rape kit, which had been introduced into evidence at trial. (*Id.*). Mr. Wright's motion also requested mitochondrial DNA testing of head hairs which were introduced at trial. (*Id.*).

The State argued that the rape kit contained a semen sample. (PCR-3. 160-161). Mr. Wright's counsel responded that the semen sample had been tested in 1993 or 1994, that counsel understood that the sample had been destroyed in that testing, and that the results of the semen sample testing back then were inconclusive. (PCR-3. 161-62, 166, 169-70). He also objected to FDLE examining the rape kit for semen because FDLE was involved in this case pre-trial and during the trial as witnesses. (PCR-3. 227-228).

On August 17, 2004, the circuit court issued an order permitting mitochondrial DNA testing of the pubic hair and head hairs and also ordered that FDLE test the

semen sample in the rape kit if it was suitable for testing. (PCR-3. 234-35). Mitotyping Technologies' report dated March 1, 2005 concluded that Mr. Wright, Ms. Smith, and their maternal relatives were not the contributors of the two tested hairs and that the two tested hairs were different and contributed by two different people. (PCR-3. 283-285). FDLE's report dated April 18, 2005 stated that the FDLE had extracted samples from the vagina, anus, mouth, and head of Ms. Smith and that FDLE collected mouth swabs from Mr. Wright. (PCR-3. 292). The DNA profile from two of the samples matched the DNA profile of Mr. Wright. (PCR-3. 293). However, there has never been an evidentiary hearing on the issues surrounding the chain of custody and possible contamination of the tested samples. (PCR-4. 792).

On June 7, 2005, Mr. Wright filed a motion for additional DNA testing. (PCR-3. 304-05). The motion asked that the materials tested by FDLE be sent to Forensic Science Associates (FSA) for additional DNA testing. (*Id.*). This motion was denied. (PCR-3. 404).

Successive 3.851 Motion

On August 5, 2004 (15 years ago), Mr. Wright filed a Successive 3.851 Motion on the basis of newly discovered evidence under *Jones v. State*, 591 So. 2d 911 (Fla. 1991) (per curiam) (hereinafter *Jones I*). (Supp. PCR-3. 4). The Successive 3.851 Motion contained two claims:

- (i) Mr. Wright was deprived of his rights to due process under the Fourteenth Amendment as well as his rights under the Fifth,

Sixth, and Eighth Amendments because either the state failed to disclose evidence which was material and exculpatory in nature and/or presented misleading evidence and/or defense counsel unreasonably failed to discover and present exculpatory evidence and/or the prosecutor violated *Giglio* and/or new evidence establishes manifest injustice;⁵⁵ and

- (ii) Due to recent technological improvements in DNA testing, newly discovered evidence is available which proves that Mr. Wright is innocent to the extent that the state has destroyed biological evidence, Mr. Wright's due process rights have been violated.

(*Id.*).

On March 23, 2006, the circuit court summarily denied the motion.⁵⁶ Order Den. Mot. To Vacate J.

Mr. Wright appealed to this Court. On April 30, 2007, Mr. Wright filed his Initial Brief with this Court which contained the following four arguments:

- (i) The circuit court erred as a matter of law in denying Mr. Wright's Rule 3.850 motion without an evidentiary hearing;
- (ii) Mr. Wright was deprived of his rights to due process under the Fourteenth Amendment as well as his rights under the Fifth, Sixth, and Eighth Amendments because either the state failed to disclose evidence which was material and exculpatory in nature and/or presented misleading evidence and/or defense counsel unreasonably failed to discover and present exculpatory evidence, and/or the prosecutor violated *Giglio* and/or new evidence establishes manifest injustice;
- (iii) The trial court erred in relying upon the results of DNA testing to deny Mr. Wright's claims when the FDLE report was not in

⁵⁵ The new evidence consisted of affidavits from Idus Hughes and Ronald Thomas.

⁵⁶ This order is not in the supplemental record on appeal for the successive postconviction motion (SC06-2353).

evidence and had never been the subject of an adversarial proceeding and when Mr. Wright was denied the opportunity to have an expert conduct independent testing and to review FDLE's testing, contrary to due process and the Eighth Amendment; and

- (iv) The results of DNA testing establish Mr. Wright's entitlement to a new trial.

Init. Brief of App., Apr. 30, 2007.

On September 25, 2008, this Court affirmed the circuit court's denial of relief. *Wright v. State*, 995 So. 2d 324 (Fla. 2008) (per curiam).

On July 9, 2012, Jody filed a Petition for Writ of Habeas Corpus with this Court claiming that this Court's prior resolution of Jody's claim premised upon *Jones I* and *Gunsby* was erroneous and resulted in manifest injustice. Pet. For HC., Jul. 9, 2012. On October 3, 2013, this Court denied state habeas relief. *Wright v. Tucker*, 126 So. 3d 1060 (Fla. 2013). In 2015, the US. Supreme Court denied Mr. Wright's petition for a writ of certiorari. *Wright v. Jones*, 135 S. Ct. 2380 (2015).

Second Successive 3.851 Motion

On January 12, 2017 (33 years after being sentenced to death), Mr. Wright filed his Second Successive 3.851 Motion, which is at issue in this appeal. (PCR-4. 42). On March 3, 2017, the State filed its response to the motion. (PCR-4. 127). On May 16, 2017, Mr. Wright filed his Amended Second Successive 3.850 Motion, which contained the following six claims:

- (i) Mr. Wright's death sentence violates the Sixth Amendment under *Hurst I* and therefore should be vacated;

- (ii) Mr. Wright's death sentence violates the Eighth Amendment under *Hurst II* and therefore should be vacated:
 - (a) Jury Unanimity as to the Elements of Criminal Offense Are Mandated by the Florida Constitution; and
 - (b) The Eighth Amendment Requires A Unanimous Death Recommendation.
- (iii) The retroactivity rulings in *Asay v. State*,⁵⁷ 210 So. 3d 1 (Fla. 2016) (per curiam) and *Mosley v. State*,⁵⁸ 209 So. 3d 1248 (Fla.

⁵⁷ This Court in *Asay* held that the U.S. Supreme Court decision *Hurst I* would not apply retroactively to a defendant whose death sentence was final at the time of the U.S. Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), which was issued on June 24, 2002. *Asay*, 210 So. 3d at 22 (The three-fold *Stovall/Linkletter* test under the umbrella of the analysis set forth in *Witt v. State*, 387 So. 2d 922 (1980) (per curiam) test was applied to reach that decision); *see also Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017) (per curiam). The U.S. Supreme Court in *Ring* overruled *Walton v. Arizona*, 497 U.S. 639 (1990) because *Apprendi* and *Walton* were irreconcilable and capital defendants "are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Ring*, 210 So. 3d at 589. *Walton* had held that capital defendants were not entitled to a jury determination because the additional facts found by the judge qualified as sentencing consideration not as elements of capital murder. *Id.* at 588. *Ring* held that the Arizona statute where a trial judge determines the presence or absence of any aggravating factors required to impose the death penalty, following a jury's adjudication of guilty in a first-degree murder trial, violates the Sixth Amendment right to a jury trial. *Ring*, 210 So. 3d at 609.

⁵⁸ This Court in *Mosley* held that the U.S. Supreme Court decision in *Hurst I* and the Florida Supreme Court decision in *Hurst II* applied retroactively to a defendant whose death sentence became final after *Ring*. *Mosley*, 209 So. 3d at 1274. The Court independently looked to the fundamental fairness doctrine under *James v. State*, 615 So. 2d 668 (Fla. 1993) and then independently looked to the factors in *Witt* before reaching its decision. *Mosley*, 209 So. 3d at 1274-83. This Court in *James* held that it would not be fair to deprive a defendant the benefit of the U.S. Supreme Court decision in *Espinosa v. Florida*, 505 U.S. 1079 (1992), which held that Florida's jury instruction on the heinous, atrocious, or cruel (HAC) aggravator was unconstitutionally vague, when he had first raised that issue at trial and on direct appeal. *James*, 615 So. 2d 668. This Court in *Witt* held that a change of law will not be considered in a capital case unless the change: i) emanated from this Court or the U.S. Supreme Court; ii) is constitutional in nature; and iii) constitutes a development

2016) that seemingly permit partial retroactivity and/or category by category and/or case by case retroactivity of new law in death penalty proceedings injects arbitrariness into the Florida's capital sentencing scheme that violates the Eighth Amendment principles of *Furman*;

(iv) The decisions in *Hurst II* and *Perry v. State*,⁵⁹ 210 So. 3d 630

of fundamental significance, i.e. “major constitutional changes of law” which are tantamount to “jurisprudential upheavals”, not “evolutionary refinements in criminal law, affording new or different standards for admissibility of evidence, for procedural fairness, for proportionality review of capital cases, and for other like matters.” *Witt*, 387 So. 2d at 929-31 (Fla. 1980). *Witt* involved the denial of a postconviction relief motion. *Id.* at 924. This Court explained that “[m]ost law changes of ‘fundamental significance’ will fall within the two broad categories . . .”. *Id.* at 931. Those two categories are: a) those “which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties” or b) those “which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test” of *Stovall/Linkletter*. *Id.* at 929. This Court gave *Coker v. Georgia*, 433 U.S. 584 (1977), where the U.S. Supreme Court held that the death penalty for the crime of rape is in violation of the Eighth Amendment, as an example of the first category. *Witt*, 387 So. 2d at 929. This Court gave *Gideon v. Wainwright*, 372 U.S. 335 (1963), where the U.S. Supreme Court held that the Sixth Amendment guarantees the right to counsel in criminal prosecutions, as an example of the second category. *Witt*, 387 So. 2d at 929. The three-fold test of *Stovall/Linkletter* is comprised of: 1) “the purpose to be served by the new rule”; 2) “the extent of reliance on the old rule”; and 3) “the effect on the administration of justice of a retroactive application of the new rule.” *Id.* at 926; see also *Linkletter v. Walker*, 381 U.S. 618 (1965) and *Stovall v. Denno*, 388 U.S. 293 (1967).

⁵⁹ When this Court issued *Hurst II* on October 14, 2016, it simultaneously issued *Perry*. Compare *Hurst II*, 202 So. 3d 40 and *Perry*, 210 So. 3d 630. This Court in *Perry* held that Section 921.141(2)(c), *Florida Statutes* (2016), which requires a 10-2 jury recommendation for a death sentence, violated the State's constitutional right to trial by jury guaranteed under Article I, Section 22 of the Florida State Constitution. *Perry*, 210 So. 3d at 640 (receded from by *Rogers v. State*, 2019 WL 4197021 (Fla. 2019) (per curiam) on another ground); see also Art. I, § 22, Fla. Const. This Court in *Rogers* held that the jury did not have to find beyond a reasonable doubt that aggravating factors were sufficient to justify the death penalty and that aggravating factors outweighed mitigating circumstances. *Rogers*, 2019 WL 4197021.

(Fla. 2016) (per curiam) along with the recent enactment of a revised sentencing statute, all of which govern at a resentencing and require the jury to unanimously find the statutorily required facts necessary to authorize a death sentence and the jury to unanimously recommend a death sentence before the judge would be authorized to impose a death sentence, must be part of the second prong analysis of Mr. Wright's previously presented newly discovered evidence claim, *Brady* claims, and *Strickland*⁶⁰ claims. Due process principles and the Eighth Amendment require this court to revisit Mr. Wright's previously presented claims and determine whether the evidence presented to support each claim and all the other admissible evidence at a future resentencing would probably result in a life sentence in a light of the law that now would govern at a resentencing, and when the proper analysis is conducted, it is clear that it is likely that a different outcome would result, and rule 3.851 relief is requested;

- (v) In light of recently discovered evidence that could not have been discovered even with due diligence, Mr. Wright's conviction and death sentence violate the Fourteenth Amendment pursuant to *Brady* and *Giglio*; and
- (vi) The Fourteenth Amendment Requires a Retroactive Application of the Substantive Rule Established by Chapter 2017-1,⁶¹ *Florida*

⁶⁰ The U.S. Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984) held that the proper standard for an ineffective assistance of counsel claim under the Sixth Amendment consists of two prongs: i) counsel's representation fell below an objective standard of reasonableness; and ii) there is a reasonable probability that but for the counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 686-95.

⁶¹ On March 13, 2017, Chapter 2017-1, *Florida Statutes*, was enacted to statutorily fix the defect identified in *Perry* by deleting the 10-2 jury recommendation for a death sentence and replacing it with a unanimous jury recommendation for a death sentence. (PCR-4. 245, 256). Chapter 2017-1, *Florida Statutes*, states that a defendant has right to a life sentence absent a unanimous decision, and this substantive right to a life sentence was first set forth in Chapter 2016-13, *Florida Statutes*, which rewrote Section 921.141, *Florida Statutes*; Chapter 2016-13, *Florida Statutes*, statutorily created for the first time a capital defendant's right to a life

*Statutes, Which Precludes the Imposition of a Death Sentence
Unless a Jury Unanimously Returns a Death Recommendation.*

(PCR-4. 162).

In the first claim, Mr. Wright argued that his death sentence violated the Sixth Amendment under *Hurst I* because a judge, not the jury, made the necessary fact-findings to impose his death sentence. (PCR-4. 170). Mr. Wright cited to *Mosley* to explain that there are two separate and distinct approaches for conducting a retroactivity analysis. (PCR-4. 173). In *Mosley*, this Court concluded that under either approach, *Hurst I* was a change in law that was to be retroactively applied. (PCR-4. 174-75). The first approach, fundamental fairness, may require retroactive application of certain U.S. Supreme Court decisions where defendants previously raised the issue addressed by those decisions. (PCR-4. 173). Mr. Wright argued that he is entitled to retroactivity under the fundamental fairness doctrine because at trial, his counsel objected to the instructions advising the jury that the judge would be the one to decide the sentence, and this issue was raised at trial, on direct appeal, and at collateral proceedings. (PCR-4. 178). The second approach entailed the *Witt* analysis. (PCR-4. 174). And Mr. Wright argued that he is also entitled to retroactivity under *Witt* when the factors are balanced to his case individually. (PCR-

sentence unless 10 of 12 jurors voted to recommend a death sentence (if three or more jurors voted in favor of a life sentence like they did in Mr. Wright's case, then the defendant must be given a life sentence). (PCR-4. 242-43, 247).

4. 196). He also argued that this Sixth Amendment error was not harmless.⁶² (PCR-4. 202).

In his second claim, Mr. Wright argued that his death sentence violated the Eighth Amendment under *Hurst II*. (*Id.*). He argued that the Florida Constitution and the Eighth Amendment requires jury unanimity. (PCR-4. 203, 214). He also argued that jury unanimity is a substantive right under Article I, Section 6 of the Florida Constitution which in relevant part states: “the right of trial by jury, shall for ever remain inviolate.” (PCR-4. 204); *see also* Art. I, § 6, Fla. Const. And that the U.S. Supreme Court in *Apprendi* reviewed a sentencing statute and ruled that any finding of fact which increases the penalty is an element that must be found by a jury. (PCR-4. 205). Then, Mr. Wright cited *Hurst II* to support his contention that in order for a death sentence to be authorized under Florida law, each finding of fact constitutes an element that must be unanimously proven beyond a reasonable doubt. (PCR-4. 205-06). He further argued how the Eighth Amendment holding in *Hurst II*

⁶² This Court in both *Asay* and *Mosley* employed the harmless error analysis once it determined whether *Hurst I* and *Hurst II* applied retroactively. *See Asay*, 210 So. 3d at 36 and *Mosley*, 209 So. 3d at 1283-84. The U.S. Supreme Court left it to the state courts to determine if any *Hurst I* error was harmless. *Asay*, 210 So. 3d at 14; *see also Hurst v. Florida*, 139 S. Ct. at 624. The harmless error analysis consists of examining whether a *Hurst I* or *Hurst II*-error was harmless beyond a reasonable doubt; “an error is harmless only if there is no reasonable possibility that the error contributed to the sentence.” *Mosley*, 209 So. 3d at 1283. In the context of a *Hurst II*-error, the State bears the burden, “as the beneficiary of the error, to prove beyond a reasonable doubt that the jury’s failure to unanimously find all the facts necessary for the imposition of the death penalty did not contribute” to the death sentence. *Id.*

turned on both the finding of a consensus reflecting the evolving standards of decency, which determines cruel and unusual punishments, and the enhanced reliability, which naturally flows from no longer allowing no unanimity. (PCR-4. 215-16). He contended that he is within a protected class of defendants because his jury was not unanimous; in fact, three of his jurors voted in favor of a life sentence. (PCR-4. 217). Mr. Wright finally posited that *Hurst II* should be applied retroactively to him under both the fundamental fairness doctrine and the *Witt* analysis set forth in *Mosley*. (PCR-4. 219, 221).

In his third claim, Mr. Wright argued that the retroactivity rulings in *Asay* and *Mosley* seemingly permit partial retroactivity and violate the Eighth Amendment principles of *Furman* because they inject arbitrariness into Florida's death penalty scheme. (PCR-4. 223). Mr. Wright pointed out that *Asay* and *Mosley* were decided on the same day by this Court (December 22, 2016), and the result was a repudiation of the binary approach to retroactivity under *Witt* where retroactivity was all or nothing. (PCR-4. 225-26). In *Asay* and *Mosley*, this Court created two categories of collateral cases: 1) those who receive the retroactive benefit of both a *Hurst I*-error or a *Hurst II*-error if their case was final on or after *Ring* was issued; and 2) those who don't receive the retroactive benefit of either decision if their case was final

before *Ring* was issued.⁶³ (PCR-4. 226). Mr. Wright argued that because some individuals who are similarly situated with death sentences pre-dating *Ring* (June 24, 2002), like himself, but whose date of finality falls on said date or beyond due to good fortune or good timing, unlike himself, will receive the benefit of a *Hurst I*-error or a *Hurst II*-error due to the rules announced in *Asay* and the additional rule announced in *Mosley*, his death sentence arbitrarily stands in violation of the Eighth Amendment. (PCR-4. 232-33).

In his fourth claim, Mr. Wright asserted that because *Hurst II* and *Perry* did not exist when he previously presented his newly discovered evidence, those claims had to be re-evaluated in light of the new Florida law. (PCR-4. 233). When viewed under the standards set forth in *Swafford*, 125 So. 3d 760 (Fla. 2013) (per curiam)⁶⁴

⁶³ This Court’s decision in *Asay* to use the date *Ring* was decided (June 24, 2002) as the cutoff date for retroactivity, and it turned on the last prong of the *Stovall/Linkletter* three-prong test under the *Witt* analysis, and this Court determined it weighed heavily against retroactive application. *Asay*, 210 So. 3d at 20. *Asay* did not receive the benefit of a *Hurst I*-error because his death sentence was final before *Ring*; however, *Mosley* did receive the benefit of both a *Hurst I*-error and a *Hurst II*-error because his death sentence was final after *Ring* was issued. Compare *Asay*, 210 So. 3d 1 with *Mosley*, 209 So. 3d 1248.

⁶⁴ This Court in *Swafford* indicated that based on *Jones v. State*, 709 So. 2d 512 (Fla. 1998) (per curiam) aka *Jones II*, all of the admissible evidence that could be introduced at trial must be considered cumulatively so that there is a “total picture of the case and all of the circumstances of the case” to assist in the determining if there is a probability of an acquittal when considering the effect of newly discovered evidence. *Swafford*, 125 So. 3d 760.

and *Hildwin*, 141 So. 3d 1178 (Fla. 2014),⁶⁵ Mr. Wright elucidated out how a new trial or resentencing with all this new evidence might result in a different outcome considering that now it only takes one juror to vote for a life sentence to stop a death sentence, and he had three jurors who voted for life at his penalty phase back in 1983. (PCR-4. 235).

In his fifth claim, Mr. Wright argued that his conviction and death sentence violated the Fourteenth Amendment pursuant to *Brady* and *Giglio* because the evidence showing the violations could not have been discovered sooner despite his diligence. (PCR-4. 239). Robert McLeod, a former state attorney from Putnam County, Charlotte Martinez, and Mr. Westberry had only just disclosed the *Brady* and *Giglio* evidence. Mr. Wright pled that Mr. McLeod remembered that Deputy Perkins was the kind of person who “lived in the grey area” and that it was odd for him to be so heavily involved in Mr. Wright’s case because he was not a homicide

⁶⁵ This Court in *Hildwin* reiterated the holding in *Swafford*. *Hildwin*, 141 So. 3d at 1184. The two-prong newly discovered evidence from *Swafford* consists of: i) the newly discovered evidence “must not have been known” by the trial court, the defendant, or defense counsel at trial and it “must appear” that the defendant or defense counsel “could not have known of it by the use of diligence” and ii) the evidence “must be of such nature that would probably produce an acquittal on retrial.” *Swafford*, 125 So. 3d at 767. (citing *Jones II*, 709 2d at 521). Newly discovered evidence satisfies the second prong if it raises reasonable doubt as to culpability. *Swafford*, 125 So. 3d at 767 (citing *Jones v. State*, 678 So. 2d 309, 315 (Fla. 1996)). However, “[i]f the defendant is seeking to vacate a sentence, the second prong requires that the newly discovered evidence would probably yield a less severe sentence.” *Swafford*, 125 So. 3d at 767 (citing *Jones I*)).

investigator. (PCR-4. 240). Mr. McLeod recalled the way that Mr. Dunning (trial prosecutor) obtained a piece of evidence during the middle of Mr. Wright's trial. (*Id.*). That evidence was a decanter, which according to Mr. Westberry, Mr. Wright had stolen from Ms. Smith's house the night of the murder. (PCR-4. 402-03). Charlotte Martinez indicated that she had heard trial testimony regarding this decanter and realized that she was in possession of it. (PCR-4. 782). She thought if she turned the decanter over to the authorities, it would prove that Mr. Wright did not commit the murder because it did not come from Ms. Smith's house. (PCR-4. 782). Ms. Martinez had told her sister Cynthia about the decanter, and Cynthia told Mr. Dunning, with whom she was having an affair. (*Id.*). Mr. Dunning, who was a married man, had his paramour, Cynthia, pressure her sister, Ms. Martinez, into handing over the decanter. (PCR. 4. 405). Ms. Martinez was even threatened with an obstruction charge if she didn't hand over the decanter. (PCR-4. 782). According to Ms. Martinez, Mr. Dunning and an unidentified man, Deputy Perkins, met with her and her sister Cynthia behind a Baptist church to obtain the decanter; this secret meeting was arranged so that no one would learn of Mr. Dunning's extra-marital affair with Cynthia. (PCR-4. 240-41). Ultimately, the decanter was introduced into evidence, but Mr. Pearl (trial counsel) failed to present evidence that this item was a Wright family heirloom. (PCR-4. 403). Mr. McLeod also recalled that a tape recording was made of the conversation between Mr. Dunning and Cynthia

regarding the decanter in which a reference was made to their affair; however, Mr. McLeod was unsure but believed the tape was destroyed so that the circumstances of how the decanter surfaced, including the affair, would not be fully revealed. (PCR-4. 240-41, 404). Mr. Wright also pled that Mr. Westberry had advised in 2016 that he often wondered whether Jody's brother (Roddy Wright), who had committed suicide after Jody was sentenced to death, was the actual murderer. (PCR-4. 241, 783).

In his sixth claim, Jody argued that the Due Process Clause of the Fourteenth Amendment required retroactive application of Chapter 2017-1, *Florida Statutes*, because that new law established a substantive rule⁶⁶ that has been extended to others but not him.⁶⁷ (PCR-4. 242, 249). He argued that due process required that he be

⁶⁶ Mr. Wright cited to *Allen v. Butterworth*, 756 So. 2d 52, 59 (Fla. 2000) to support his contention that the state legislature generally enacts substantive law while the Court enacts procedural law pursuant to the separation of powers found in Article II, Section 3 of the Florida Constitution. (PCR-4. 246). Article II, Section 3 states: "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." Art. II, § 3, Fla. Const. Mr. Wright argued that when this Court determined *Perry*, it could have fixed the defect in Chapter 2016-13, *Florida Statutes*, and rewritten the law but it recognized that the law was substantive, not just procedural, because it created, defined, and regulated rights as seen in *State v. Garcia*, 229 So. 2d 236, 238 (Fla. 1969). (PCR-4. 247).

⁶⁷ Mr. Wright listed Lancelot Armstrong, Paul Johnson, John Hardwick, James Card, and J.B Parker as examples where their death sentence was final prior to the *Ring* decision but due to resentencing on other grounds post-*Ring*, they inured the benefit of a *Hurst II*-error. (PCR-4. 249-51).

given the same substantive right in Chapter 2017-1 that was being afforded to others whose convictions were final prior to the *Ring* cutoff date. (PCR-4. 257). Mr. Wright also argued that depriving him of the benefit of Chapter 2017-1 violated the Eighth Amendment.

On June 2, 2017, the State filed its response to Jody's Amended Second Successive 3.851 Motion. (PCR-4. 267).

On August 24, 2017, a Case Management Conference was held before Judge Clyde E. Wolfe. (PCR-4. 464). As to Claim I, Mr. Wright argued that he was entitled to the benefit of the *Hurst I*-error under the fundamental fairness doctrine in *Mosley*. (PCR-4. 375-376, 379). As to Claim II, he argued that he was entitled to the benefit of the *Hurst II*-error and noted that *Mosley* addressed the retroactivity of both *Hurst I* and *Hurst II*, not *Asay* as it only addressed the retroactivity of *Hurst I*. (PCR-4. 385, 387-388). As to Claim III, he argued that there was a due process violation in the way that the retroactivity analysis under *Witt* was applied in *Asay*. (PCR-4. 391-92). As to Claim IV, he argued that given all the new evidence, a different outcome would have result due to the jury unanimity requirement. (PCR-4. 398-400). As to Claim V, he argued that all the newly discovered evidence had to be considered cumulative in light of *Hurst II*. (PCR-4. 405-06). As to Claim VI, he argued that Chapter 2017-1, *Florida Statutes*, recognized that Florida's substantive criminal law

required factual findings that sufficient aggravating factors existed and that they outweighed the mitigating factors to justify a death sentence. (PCR-4. 394-96).

On December 18, 2018, Chief Judge Raul A. Zambrano reassigned this case to himself due to the passing of Judge Wolfe. (PCR-4. 356). On December 26, 2018, Mr. Wright sought leave to file a supplement to the pending successive 3.851 motion as amended. (PCR-4. 358). On December 28, 2019, a status hearing was held. (PCR-4. 732-734). On January 2, 2019, Judge Zambrano filed a disclosure stating that even though he was a member of the State Attorney's Office in the Seventh Circuit⁶⁸ from 1990 to 2005 and was assigned to capital cases from 1995 to 2005, he was not familiar with Mr. Wright's case and had not participated in any postconviction proceedings as an attorney in this case. (PCR-4. 366). On January 25, 2019, a status hearing was held, and Judge Zambrano granted Mr. Wright request for leave to file a supplement to his pending successive 3.851 motion. (PCR-4. 741).

The supplement was filed on March 1, 2019. (PCR-4. 558). Mr. Wright supplemented Claim I by citing *Robinson v. State*, 260 So. 3d 1011, 1015 (Fla. 2018) wherein this Court denied *Hurst II* relief to Mr. Robinson on the basis of fundamental fairness because he did not raise a *Ring*-like claim at trial. (PCR-4. 562). Unlike Mr. Robinson, Mr. Wright did in fact raise such a claim at trial and on direct appeal. Mr.

⁶⁸ The Seventh Circuit is comprised of the following counties: Flagler, Putnam (the county where Mr. Wright's death sentence originated), St. Johns, and Volusia.

Wright supplemented Claims II, III, IV, and V noting that despite adverse rulings from this Court, he was not abandoning his constitutional arguments. (PCR-4. 563-65). Mr. Wright supplemented Claim VI and invoked the Equal Protection Clause of the Fourteenth Amendment. (*Id.*). Jody cited to *Alleyne v. U.S.*,⁶⁹ 570 U.S. 99 (2013) to support the contention that the identification of facts or elements necessary to increase the authorized punishment is a matter of substantive law. (PCR-4. 567). Mr. Wright cited to *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004) for its recognition that new substantive rules generally apply retroactively. (PCR-4. 568). Mr. Wright argued that the new penalty phase ordered under *Hurst II* and conducted under Chapter 2017-1, *Florida Statutes*, would be a proceeding to determine if the State could prove the facts or elements of a higher degree of murder, i.e., capital first-degree murder, beyond a reasonable doubt in order to impose the death penalty. (*Id.*). Mr. Wright also relied upon *In re Winship*, 397 U.S. 358 (1970), and *Fiore v. White*, 531 U.S. 225 (2001), to argue that the Due Process Clause requires the State to prove all the elements of a criminal offense beyond a reasonable doubt. (PCR-4. 569-70).

⁶⁹ The U.S. Supreme Court in *Alleyne* held that: “[w]hen a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury.” *Alleyne*, 570 U.S. at 111.

On March 20, 2019, the State filed its response to the Supplement. (PCR-4. 578).

On July 12, 2019, a second Case Management Conference was held before Chief Judge Zambrano. (PCR-4. 759). Mr. Wright relied on what was previously argued at the last case management conference with respect to Claims I, II, III, and IV. (PCR-4. 778). But with respect to Claim V, involving some of the newly discovered evidence from Mr. McLeod, Judge Zambrano noted that he was familiar with Mr. McLeod and referred to him as “Mac.” (PCR-4. 778-82). And as for the lone fingerprint on the portable stove, Mr. Wright stated that he was Ms. Smith’s neighbor and had helped her move that stove. (PCR-4. 789). Mr. Wright reminded the lower court that a wallet belonging to Asrial Lewis was found in Ms. Smith’s home, and even though Mr. Lewis testified at trial that he did not kill Ms. Smith, he could not explain how his wallet ended up in her home. (PCR-4. 790). And as for Claim VI, Mr. Wright argued that there is no case from this Court that specifically states the *Witt* analysis is the appropriate analysis to use when it comes to determining retroactivity of a case involving statutory construction. (PCR-4. 772). Mr. Wright informed the lower court that the State conceded in its Reply to a Response to Order to Show Cause dated June 4, 2019 in *Reed v. State of Florida*, SC19-714, which was then pending before this Court, that the *Witt* analysis was not

the proper analysis for retroactivity concerning a judicial decision construing a statute.

The State responded by citing to *Foster v. State*,⁷⁰ 258 So. 3d 1248 (Fla. 2018) wherein this Court held that there is no greater offense of capital first-degree murder. (PCR-4. 794). The State argued that *Hurst II* was a procedural change, not a substantive one, and therefore, not retroactive to Mr. Wright. (PCR-4. 794-95).

Mr. Wright responded that the findings of the statutorily required facts at issue in the penalty phase had to be determined before a death sentence can be imposed. (PCR-4. 795-96). And according to the U.S. Supreme Court, that meant that they were elements. (*Id.*).

On October 8, 2019, Judge Zambrano denied any 3.851 relief. (PCR-4. 647). The order was rendered on October 10, 2019. (*Id.*).

The lower court denied Claim I on the basis of this Court's case law denying retroactive application of *Hurst II* relief to those defendants whose death sentences became final prior to *Ring*. (PCR-4. 649-51). The court denied Claim II saying that the U.S. Supreme Court has not held the Eighth Amendment to require a unanimous jury recommendation and that *Hurst II* was decided pursuant to the Sixth

⁷⁰ This Court in *Foster* held that there is no greater offense of capital first-degree murder because a conviction for first-degree murder, which is a capital felony, consists of a jury unanimously finding the elements set forth in the substantive first-degree murder statute (Section 782.04, *Florida Statutes*) before proceeding to the penalty phase. *Foster*, 258 So. 3d at 1252.

Amendment, not the Eighth Amendment. (PCR-4. 651-52). The court denied Claim III saying that it was legally bound to follow this Court's ruling *Asay*. (PCR-4. 652-54).

The lower court denied Claim IV because it found Mr. Wright's reliance on *Hildwin* and *Swafford* misplaced in that those cases involved evidentiary issues whereas the ruling in *Hurst II* was one of law. (PCR-4. 654-55). The court relied on *Walton v. State*, 246 So. 3d 246, 250-52 (Fla. 2018) which held that a change in law regarding a jury's recommendation of a death sentence did not constitute newly-discovered evidence. (PCR-4. 655).

The lower court denied Claim V because it was legally insufficient under Florida Rule of Criminal Procedure 3.851(e)(2)(C). (*Id.*) Alternatively, the court ruled that even if the motion was legally sufficient, Mr. Wright would not have been able to satisfy the diligence prong of the test in *Jones II* due to Mr. Pearl's failure to ask Mr. Westberry during his deposition whether another person could have been responsible for the murder. (PCR-4. 656). The court also denied the claim because it found that there was sufficient evidence, i.e., a confession and fingerprints, to support the jury's verdict. (*Id.*).

The lower court denied Claim VI because *Hurst II* relief does not apply retroactively to Mr. Wright's death sentence which was final in 1986 and because *Hurst II* and Chapter 2017-1, *Florida Statutes*, concerned procedural rules, not

substantive law. (PCR-4. 657, 6-60). The lower court found that neither *Hurst II* nor Chapter 2017-1 created a new crime or recognized new elements. (*Id.*). The lower court cited to the retroactivity analysis under *Teague v. Lane*,⁷¹ 489 U.S. 288 (1989), rather than *Witt*, in holding that Chapter 2017-1 was not retroactive to Mr. Wright's case. (PCR-4. 657-58). The court also concluded that neither *Hurst I* nor *Hurst II* addressed the proof beyond a reasonable doubt standard. (PCR-4. 659). As to Mr. Wright's Eighth Amendment claim and his Due Process and Equal Protection under the Fourteenth Amendment claim, the court distinguished between James Card's death sentence which was final post-*Ring* and Mr. Wright's death sentence which

⁷¹ The U.S. Supreme Court in *Teague* held that new constitutional rules of criminal procedure will not be applied retroactively to cases on collateral review unless the new rule places “certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe” or unless the new rule is a “watershed” rule of criminal procedure. *Teague*, 489 U.S. at 311 (quoting *Mackey v. U.S.*, 401 U.S. 667, 692 (1971)). *Teague* involved the denial of a federal habeas petition. *Teague*, 489 U.S. at 293. The U.S. Supreme Court noted that a “case announces a new rule when it breaks new ground or imposes a new obligation on the States or Federal” or in other words, “if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.” *Id.* at 301. The U.S. Supreme Court abandoned the *Linkletter* approach, which resulted in disparate treatment of similarly situated defendants, in favor of Justice Harlan's view of retroactivity for cases on collateral view outlined above. *Id.* at 306, 310.

was final before *Ring*. (PCR-4. 660).⁷² Relying on *State v. Dwyer*,⁷³ 332 So. 2d 333 (Fla. 1976), the court denied Mr. Wright’s sixth claim. (PCR-4. 661).

On October 25, 2019, Mr. Wright filed a motion for rehearing. (PCR-4. 662). On November 5, 2019, Judge Zambrano denied the motion a rehearing. (PCR-4. 698). On December 4, 2019, Mr. Wright filed his notice of appeal to this Court.

STANDARD OF REVIEW

Florida Rule of Criminal Procedure 3.851(f)(5)(B) permits the denial of a successive postconviction motion without an evidentiary hearing “[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief.” A postconviction court’s decision regarding whether to grant a rule 3.851 evidentiary hearing depends upon the written materials before the court; thus, for all practical purposes, its ruling is tantamount to a pure question of law and is subject to de novo review. *See e.g. Rose v. State*, 985 So. 2d 500, 505 (Fla. 2008).

SUMMARY OF THE ARGUMENT

The Due Process Clause of the Fourteenth Amendment requires that Mr. Wright be given the benefit of *Hurst II* because it is this Court’s statutory construction set forth in *Hurst II* that governs as to what facts must be found by a

⁷² However, this was Mr. Card’s second death sentence for the same homicide; his first death sentence for the same homicide did in fact predate *Ring*.

⁷³ This Court in *Dwyer* held that where this Court decides an issue, lower courts are bound to that ruling when considering similar issues. *Dwyer*, 332 So. 2d at 335.

unanimous jury before a death sentence may be imposed on Mr. Wright. Given the statutory construction which governs Mr. Wright's case, Mr. Wright was deprived of his Sixth Amendment right to jury trial as explained in *Hurst I*.

This Court's statutory construction in *Hurst II* constitutes substantive law, and due process requires that this law govern the law that existed back in 1983 when Mr. Wright was arrested for first-degree murder. Due process also does not permit *State v. Poole* to retroactively change Florida's substantive criminal law to Mr. Wright's detriment.

Introduction

Ring v. Arizona

The U.S. Supreme Court in *Ring v. Arizona* found that Arizona had deprived Mr. Ring of his Sixth Amendment right to a jury trial. *Ring*, 536 U.S. 584 (2002). In reaching that conclusion, the Supreme Court had to examine Arizona's substantive criminal law and determine what fact or facts had to be found so that a death sentence was an authorized punishment, i.e., could a death sentence be imposed solely on the basis of a jury's verdict finding the defendant guilty of first-degree murder, and if not, what additional facts had to be found to increase the permissible range of punishment to include a sentence of death. *Id.* at 597.

The Arizona Supreme Court's decision in *State v. Ring*, 25 P. 3d 1139, 1151 (Ariz. 2001), explained what the Arizona law was:

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.

Before a death sentence could be statutorily authorized, Arizona law required that an aggravating circumstance had to be found to exist. *Ring*, 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.’”).

In *Hurst I*, the Supreme Court discussed its decision in *Ring* and the Arizona statute at issue therein:

An Arizona jury had convicted Timothy Ring of felony murder. 536 U.S., at 591, 122 S.Ct. 2428. Under state law, “Ring could not be sentenced to death, the statutory maximum penalty for first-degree murder, unless further findings were made.” *Id.*, at 592, 122 S.Ct. 2428. Specifically, a judge could sentence Ring to death **only after independently finding at least one aggravating circumstance**. *Id.*, at 592–593, 122 S.Ct. 2428. Ring's judge followed this procedure, found an aggravating circumstance, and sentenced Ring to death.

Hurst I, 136 S. Ct. at 621 (emphasis added). Under Arizona statutory law, the finding of one aggravating circumstance authorized the sentencing judge to impose a death sentence. Arizona's statute did not require a finding that sufficient aggravating circumstances existed and that they outweighed the mitigating circumstances before a judge was authorized to impose a death sentence.

Because the only fact that was necessary to authorize a death sentence in Arizona was the existence of one aggravating circumstance, the Sixth Amendment

right was only applied to that finding – the existence of one aggravating circumstance. *Ring*, 538 U.S. at 609. Mr. Ring’s death sentence was overturned because his judge, not his jury, was charged with determining whether the State had proven an aggravating circumstance beyond a reasonable doubt. *Id.* 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.”) (emphasis added).⁷⁴

Many, including this Court, misread *Ring* by ignoring that the decision was one part state substantive law and one part Sixth Amendment law. Those who failed to recognize the state law component to the decision misconstrued *Ring* as only having held that the Sixth Amendment required the existence of one aggravating circumstance before a death sentence could be imposed on a defendant convicted of first-degree murder. See *Hurst v. State*, 202 So. 3d at 78 (Canady, J., dissenting) (hereinafter *Hurst II*) (*Ring* “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).”). It is a matter of

⁷⁴ The Arizona statute at issue in *Ring* and the Florida statute at issue in *Hurst II* 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 II* changed Florida’s substantive law; while in Arizona, *Ring* did not produce a change in Arizona’s substantive law.

state law as to what facts must be found to increase the range of punishment. The Sixth Amendment's right to a jury determination attaches to the facts required by state law as necessary to increase the range of punishment to include a death sentence.

Hurst v. Florida

The U.S. Supreme Court issued *Hurst v. Florida*, 136 S. Ct. 616 (2016) (hereinafter *Hurst I*), on January 12, 2016. Therein, the Supreme Court considered whether Florida's capital sentencing scheme deprived a capital defendant of his Sixth Amendment right to have a jury "find each fact necessary to impose a sentence of death." *Id.* at 619. Its analysis began with an examination of the Florida's capital sentencing statute in order to identify what facts had to be found before a death sentence could legally be imposed. At the outset of its opinion, the Supreme Court observed: "Florida law required the judge to hold a separate hearing and **determine whether sufficient aggravating circumstances existed to justify imposing the death penalty.**" *Id.* (emphasis added). Later in its opinion, the Supreme Court further explained what facts had to be found under Florida's statutory scheme before a death sentence could be an authorized punishment:

[T]he Florida sentencing statute does not make a defendant eligible for death until "findings *by the court* that such person shall be punished by death." Fla. Stat. § 775.082(1) (emphasis added). The trial court *alone* must find "**the facts . . . [t]hat sufficient aggravating circumstances exist**" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." § 921.141(3); *see Steele*, 921

So.2d, at 546.

Id. at 622 (emphasis added). Based upon the requirement that statutorily identified facts had to be found to be present before a death sentence could be imposed, the Supreme Court concluded that the finding of the requisite facts was subject to the Sixth Amendment right to a jury. Because Florida's statute provided for a judge to find the requisite facts, it stood in violation of the Sixth Amendment under *Ring v. Arizona*, 536 U.S. 584 (2002). Relying on *Hurst I*, Mr. Wright filed his second successive 3.851 motion which is at issue in this appeal.

Hurst v. State

In *Hurst v. State* (hereinafter *Hurst II*), this Court was called on to construe Section 921.141, *Florida Statutes*, the version that was in effect before 2016. *See Hurst II*, 202 So. 3d 40 (Fla. 2016); see also § 921.141, Fla. Stat. (2012). In its decision, this Court identified those facts that had to be shown in order to increase the range of punishment available on a first degree murder conviction upwards to include death as a sentence. *See Hurst II*, 202 So. 3d at 53. 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 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 observed that it had previously required and continued to require the “additional factfinding” it held to be necessary before a death sentence could be considered as a punishment. *Id.* The citation to the 1991 decision in *Parker* shows that the additional factfinding was the law in 1991. *Id.*

Most significantly, this Court explained in *Hurst II* that because the statutorily defined facts were necessary to increase the range of punishment to include death, proof of those facts was necessary “to essentially convict a defendant of capital murder.” *Id.* at 53. Thus, these facts were in essence elements of a higher degree of murder which the State had to prove beyond a reasonable doubt:

[*Hurst I*] mandates that all 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.

Id. at 57-58.

Under well-established case law, the statutory construction set forth in *Hurst II* must be found to have been the governing law in 1983. See *Fiore v. White*, 531 U.S. 225 (2001); *Bunkley v. Florida*, 538 U.S. 835 (2003) (per curiam). Mr. Wright was denied his due process right to have elements proven beyond a reasonable doubt. See *In re Winship*, 397 U.S. 358 (1970).

What matters is the statutorily identified fact’s function. *Ring*, 536 U.S. at 610 (Scalia, J., concurring) (“the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that 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.”).

This Court’s ruling in *Hurst II* construed the capital statute that had been in effect since before 1991 and the requirement that before a death sentence could be imposed, a judge had to first find that the statutorily identified facts that had been established by the State. Under *Fiore*, the Florida Supreme Court’s statutory construction in *Hurst II* based on the plain language of the statute dates back to the enactment of the statutory language.

As opposed to Arizona’s capital sentencing statute discussed in *Ring*, Florida’s statute did not permit the imposition of a death sentence unless the sentencing judge set forth in written findings of fact that “sufficient aggravating

circumstances exist” to justify a death sentence. *See* § 921.141, Fla. Stat. (2012). The statute used the word “facts” to describe the question of the sufficiency of the aggravating circumstances and question whether the mitigating circumstances were insufficient to outweigh the aggravating circumstances. *Id.* Undoubtedly, there was reasonable basis for this Court’s construction of Section 921.141, *Florida Statutes*, in *Hurst II* and its conclusion that whether the aggravating circumstances were sufficient was a question of fact. *See Hurst II*, 202 So. 3d at 68. *See also Jackson v. State*, 213 So. 3d 754, 783 (Fla. 2017) (per curiam) (“Those facts that permit the authorization of a death sentence are a matter of state law.”)

Having determined that a finding that the aggravating circumstances were sufficient was a finding of fact necessary to render the defendant subject to a death sentence, this Court in *Hurst II* found the question of fact was subject to the Sixth Amendment right to trial by jury. *Hurst II*, 202 So. 3d at 63.

Of course, the sufficiency of the aggravating circumstances is entirely a matter for the State to prove. It does not involve consideration or weighing of the mitigating evidence presented by the defense. It is no different than having a jury determine the value of stolen property in order to decide what degree of theft was committed by the defendant.

As to the finding that the mitigating circumstances were insufficient to outweigh the aggravating circumstances, it is as much a question of fact as the issue of

heat of passion was in *Mullaney v. Wilbur*, 421 U.S. 684 (1975). In *Mullaney*, the U.S. Supreme Court noted that:

Maine law requires a defendant to establish by a preponderance of the evidence that he acted in the heat of passion on sudden provocation in order to reduce murder to manslaughter. Under this burden of proof a defendant can be given a life sentence when the evidence indicates that it is as likely as not that he deserves a significantly lesser sentence. This is an intolerable result in a society where, to paraphrase Mr. Justice Harlan, it is far worse to sentence one guilty only of manslaughter as a murderer than to sentence a murderer for the lesser crime of manslaughter.

Id. at 703-04. The purpose of the “heat of passion” defense was to reduce the defendant’s criminal culpability, i.e., to mitigate the criminal act. Despite constituting mitigation, the U.S. Supreme Court concluded that due process required the State to bear the burden of proving the absence of heat of passion beyond a reasonable doubt in order to obtain a conviction of murder under Maine law. *Id.*

ARGUMENT I

The statutory construction in *Hurst II* constitutes substantive law, and the Due Process Clause of the Fourteenth Amendment requires that this substantive law govern the law that existed at the time of Mr. Wright’s crime

A judicial decision construing substantive criminal law or identifying the elements of a criminal offense is substantive law. It is not a procedural rule. The analyses used to determine when a new procedural rule of constitutional law is to be applied retroactively do not apply to the judicial decisions construing statutes setting forth substantive criminal. *Bousley v. United States*, 523 U.S. 614, 620 (1998)

(Because *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.”).

In *Schriro v. Summerlin*, 542 U.S. 348 (2004), the U.S. 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 (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.

In *Richardson v. United States*, 526 U.S. 813 (1999), the U.S. Supreme Court was called upon to construe a criminal statute and decide “whether the statute's

phrase ‘series of violations’ refers to one element, namely a ‘series,’ . . . or whether those words create several elements, namely the several ‘violations,’ in respect to *each* of which the jury must agree unanimously and separately.” *Id.* at 817-18 (The Court held that the latter applied when attempting to convict a defendant of a continuing criminal enterprise (CCE)). *Richardson’s* construction of the statute was subsequently found by the federal circuit courts to be a change in substantive law that applied retrospectively. *See Santana-Madera v. United States*, 260 F. 3d 133, 139 (2nd Cir. 2001) (“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.”). *See Ross v. U.S.*, 289 F. 3d 677, 681 (11th Cir. 2002) (per curiam).

While members of this Court disagreed with the majority’s holding in *Hurst II*, the statutory construction contained therein constitutes Florida’s substantive criminal law. It identified what statutorily identified facts were essentially elements of the greater offense and had to be found by a jury before a death sentence could be an authorized punishment.

When a court construes a statute and identifies the elements of a statutorily defined criminal offense, the ruling constitutes substantive law and dates to the

statute's enactment. *Bousley*, 523 U.S. at 625 (Stevens, J., concurring in part and dissenting in part) ("This case does not raise any question concerning the possible retroactive application of a new rule of law, cf. *Teague* . . . because our decision in *Bailey v. United States*, 516 U.S. 137 . . . (1995), did not change the law. It merely explained what § 924(c) had meant ever since the statute was enacted."). See also *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 312-13 (1994) ("A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.")

Of course, 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. Establishing Florida's substantive criminal law is a legislative function:

"Enacting laws—and especially criminal laws—is quintessentially a legislative function." *Fla. House of Representatives v. Crist*, 999 So.2d 601, 615 (Fla.2008). "[T]he Legislature generally has broad authority to determine any requirement for intent or knowledge in the definition of a crime." *State v. Giorgetti*, 868 So.2d 512, 515 (Fla.2004). We thus have recognized that generally "[i]t is within the power of the Legislature to declare an act a crime regardless of the intent or knowledge of the violation thereof." *Coleman v. State ex rel. Jackson*, 140 Fla. 772, 193 So. 84, 86 (1939).

State v. Adkins, 96 So. 3d 412, 417 (Fla. 2012).

Identifying the facts necessary to increase an authorized sentence is likewise regarded as a legislative function. *State v. Benitez*, 395 So. 2d 514, 518 (Fla. 1981)

(“. . . the legislature, and not the judiciary, determines maximum and minimum penalties for violations of the law.”). Section 921.002(1), *Florida Statutes*, i.e., The Criminal Punishment Code states:

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. The Legislature, in the exercise of its authority and responsibility to establish sentencing criteria, to provide for the imposition of criminal penalties, and to make the best use of state prisons so that violent criminal offenders are appropriately incarcerated, has determined that it is in the best interest of the state to develop, implement, and revise a sentencing policy.

§ 921.002(1), Fla. Stat.

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. The Legislature is presumed to have agreed with this Court’s statutory construction when it does not express voiced disagreement:

The Legislature is presumed to know the judicial constructions of a law when amending that law, and the Legislature is presumed to have adopted prior judicial constructions of a law unless a contrary intention is expressed.

Florida Dep’t Of Children And Families v. F.L., 880 So. 2d 602, 609 (Fla. 2004).

When it was issued, the statutory construction aspect of *Hurst II* constituted Florida’s substantive criminal law. It construed the meaning of the statute certainly

back to at least the date of the criminal offense given the Savings Clause in the Florida Constitution which is located in Article X, Section 9 and specifically states that “[r]epeal of a criminal statute shall not affect prosecution for any crime committed before such repeal.” Art. X, § 9, Fla. Const. As substantive criminal law, *Hurst II* was not subject to the retroactivity analysis of either *Witt v. State*, 387 So. 2d 922 (Fla. 1980) or *Teague*.

After *Hurst II* was issued, the Florida Legislature did make changes to Section 921.141, *Florida Statutes*, but it did not express disagreement with the determination in *Hurst II* that the aggravating circumstances had to be found sufficient as a matter of fact before a death sentence could be authorized. This shows that the Legislature believed that this Court correctly construed the statute in *Hurst II*. See *Florida Dep’t Of Children And Families v. F.L.*, 880 So. 2d at 609.

Under the Due Process Clause of the Fourteenth Amendment, the statutory construction set forth in *Hurst II* must be found to have been the governing law at the time of Ms. Smith’s death in 1983. See *Fiore*, 531 U.S. 225; see also *Bunkley* 538 U.S. 835.

ARGUMENT II

The Due Process Clause of the Fourteenth Amendment does not permit *State v. Poole* to retroactively change Florida’s substantive law to Mr. Wright’s detriment

This Court in *State v. Poole*, __ So. 3d __, 2020 WL 370302 (Fla. Jan. 23, 2020),

receded from *Hurst II*, specifically and relevant to here, the conclusion that the sufficiency of the aggravating circumstances is a fact that had to be found before a death sentence was authorized. In *Poole*, this Court in essence adopted Justice Canady's dissent in *Hurst II*. While Mr. Wright believes that the dissent in *Hurst II* and the *Poole* decision rest on a fundamental misreading of *Ring* and *Hurst I*, what really matters is the simple fact that the Due Process Clause of the Fourteenth Amendment does not permit *Poole* to retroactively change Florida's substantive criminal law to Mr. Wright's detriment.

When this Court in *Hurst II* construed the 2012 version of Section 921.141, *Florida Statutes*, the Savings Clause of the Florida Constitution (Article X, Section 9) required the law on the date of the criminal offense to govern as to the prosecution and sentencing of a criminal defendant. Thus, the construction of Section 921.141, *Florida Statutes*, in *Hurst II* reflected the meaning of the statute on February 6, 1983, the date of the homicide at issue there.

This Court's decision on January 23, 2020, in *Poole* to recede from statutory construction set forth in *Hurst II* cannot be applied retroactively. The U.S. Supreme Court has held that:

We think it clear that the South Carolina Supreme Court, in applying its new construction of the statute to affirm these convictions, has deprived petitioners of rights guaranteed to them by the Due Process Clause. If South Carolina had applied to this case its new statute prohibiting the act of remaining on the premises of another after being asked to leave, the constitutional proscription of ex post facto laws

would clearly invalidate the convictions. The Due Process Clause compels the same result here, where the State has sought to achieve precisely the same effect by judicial construction of the statute.

Bouie v. City of Columbia, 378 U.S. 347, 362 (1964). In *Bouie*, the Court also stated:

When a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law ‘in its primary sense of an opportunity to be heard and to defend (his) substantive right.’ *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 678, 50 S.Ct. 451, 453, 74 L.Ed. 1107.

Id. at 354.

In *Brinkerhoff-Faris Trust & Sav. Co.*, 281 U.S. at 681-82 (1930), the U.S.

Supreme Court held:

Undoubtedly, the state court had the power to construe the statute dealing with the state tax commission; and to re-examine and overrule the *Laclede Case*. Neither of these matters raises a federal question; neither is subject to our review. But, while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its Legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.

Id. (Footnote omitted).

Due process prohibits the retroactive application of judicial interpretations of criminal statutes that are “‘unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.’” *Rogers v. Tennessee*, 532 U.S. 451, 461 (2001) (citing *Bouie*, 378 U.S. at 354). Certainly, *Poole* was

unexpected. It is also indefensible in that the statutory construction set forth in *Hurst II* has been applied to a number of cases where the crime was committed pre-*Ring*, its corresponding death sentence was vacated, and an unanimous jury returned a binding life recommendation. The *Hurst II* statutory construction was applied in the case of William Melvin White, whose homicide was committed in 1978, when the circuit court vacated his death sentence on the basis of *Hurst II*. *State of Florida v. William Melvin White*, 1978-CF-001840-C-O (Orange County, Fla. Sept. 19, 2017). See also *White v. State*, 817 So. 2d 799 (Fla. 2002) (per curiam); *White v. State*, 729 So. 2d 909 (Fla. 1999) (per curiam); *White v. State*, 415 So. 2d 719 (1982) (per curiam). After Mr. White's death sentence was vacated, the State did not pursue another death sentence, and as a result, a life sentence was imposed. Moreover, the U.S. Supreme Court in 1991 indicated that under Florida law a death sentence could only be imposed "where sufficient aggravating circumstances exist" as to a crime committed in 1982. *Parker*, 498 U.S. 308.

Poole is also indefensible because the Florida Legislature has demonstrated its agreement with the statutory construction set forth in *Hurst II* by revising the statute. However, the Legislature has not chosen to change the statute after *Poole* was issued and chunked the statutory construction set forth in *Hurst II*. This is in sharp contrast to the Legislature's reaction to this Court's decision in *Delgado v.*

State, 776 So. 2d 233 (Fla. 2000) (per curiam) in which this Court construed Florida’s burglary statute.

In *Delgado*, this Court “held that the phrase ‘remaining in’ found in Florida’s burglary statute, section 810.02(1), Florida Statutes (1989), applied ‘only in situations where the remaining in was done surreptitiously.’” *State v. Ruiz*, 863 So. 2d 1205, 1207 (Fla. 2003). In the next legislative session after *Delgado*, the Legislature amended the burglary statute and included language stating that *Delgado* “was decided contrary to legislative intent”. *Id.*

With *Hurst II*, the Legislature did not challenge the decision as contrary to legislative intent when the statute was amended in the 2017 legislative session. Under the separation of powers provided by the Florida Constitution, surely it is within the legislature’s realm to complain when this Court construes a statute contrary to Legislative intent. And the Legislature did not indicate that *Hurst II* had construed Section 921.141, *Florida Statutes*, in manner that was contrary to legislative intent in its 2018 or 2019 legislative session.

Instead when the makeup of this Court changed, it decided to ignore the Legislature’s reaction to *Hurst II* and instead issue a repudiation of *Hurst II* in *Poole*. This amounted to an effort to re-write the statute which under Florida’s constitution is a legislative function. It seemingly violated Florida’s separation of powers provision. But given this Court’s usurpation of the legislative power, the limit on the legislative power must still attach to the usurped power. When the Legislature passed

legislation amending the burglary statute with a repudiation in *Delgado*, this Court held that the amendment could not apply retroactively and could only be applied prospectively. *Ruiz*, 863 So. 2d at 1209-10.

Furthermore, after *Poole* was issued, the Legislature left the provisions intact that had been adopted to accommodate the Sixth Amendment ruling in *Hurst II*. It still remains that the jury must unanimously find that the aggravating circumstances are sufficient and find that the aggravating circumstances outweigh the mitigating circumstances before the judge is authorized to impose a death sentence. The Florida Legislature's reaction to *Hurst II* and *Poole* shows that this Court in *Hurst II* correctly read the statute and captured the legislative intent. Further, due process precludes *Poole* from applying to crimes committed prior to January 23, 2020.

CONCLUSION AND RELIEF SOUGHT

Mr. Wright respectfully urges this Court to allow full briefing on the issues resulting from the trial court's denial. In the alternative, Mr. Wright requests that this Court vacate his death sentence and remand to the circuit court for an imposition of a life sentence or a new jury trial and penalty phase that comports with the requirements of the Sixth, Eighth, and Fourteen Amendments to the U.S. Constitution.

Respectfully submitted,

/s/ Martin J. McClain
MARTIN J. MCCLAIN

Special Assistant CCRC-South
Fla. Bar No.: 0754773
martymcclain@comcast.net

VINCENT M. D'AGOSTINO, ESQ.
Staff Attorney CCRC-South
Fla. Bar. No.: 109424
dagostinov@ccsr.state.fl.us

CCRC-South
110 SE 6th St., Suite 701
Fort Lauderdale, FL 33301
Tel.: 954-713-1284
ccrcpleadings@ccsr.state.fl.us

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document has been furnished to counsel for Appellee, Doris Meacham, Assistant Attorney General, at *doris.meacham@myfloridalegal.com* and *capapp@myfloridalegal.com* on May 15, 2020.

/s/ Martin J. McClain
MARTIN J. MCCLAIN
Special Assistant CCRC-South

CERTIFICATE OF COMPLIANCE

I certify that the foregoing Initial Brief has been reproduced in 14 Times New Roman Type, pursuant to Florida Rule 9.100(l) of Appellate Procedure.

/s/ Martin J. McClain
MARTIN J. MCCLAIN
Special Assistant CCRC-South