RECEIVED 02/15/2016 FLORIDA SUPREME COURT

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC16-223

LOWER TRIBUNAL No. CR 87-8676-CFA

MARK JAMES ASAY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT

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REQUEST FOR ORAL ARGUMENT

Asay is presently under a death warrant with an execution scheduled for March 17, 2016. This Court has not hesitated to allow oral argument in other warrant cases in a similar procedural posture. 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, as well as Asay's pending execution date. Asay, through counsel, urges that the Court permit oral argument.

INTRODUCTION[1]

Asay was convicted of two homicides - the shooting death of Robert Booker, a black male, and the shooting death of Robert McDowell, a white male. Both Booker and McDowell were found dead on the morning of Saturday, July 18, 1987. Law enforcement did not connect the two homicides until 3PM on July 29, 1987, when FDLE Agent Warniment, claimed that the bullet found in Booker and the four bullets removed from McDowell "matched ballistically," meaning that he had concluded with certainty that they were fired from the same gun, though the gun was not located. Until Warniment's claimed match, the two homicides had been investigated separately.

In the Booker homicide, the police had a suspect named Roland Pough. The police had located a witness, Selwyn Hall, to whom Pough had confessed that he had shot a black man on the night of July 17, 1987. On July 23, 1987, Selwyn Hall signed a sworn handwritten statement that provided:

> On 23 July 87 at approx 1:25 p.m. I Selwyn A. Hall advised Det. Housend the following information . . .
>
> An acquaintance of mine "Roland" said that last Friday night he had shot a black male during what he said was a robbery attempt at 1418 N. Market St. in his side yard. "Roland" said he was shot in the right arm, and that he (Roland) shot at the B/M four or five times. Roland said he knew for sure he hit the B/M once. The

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[1]References to the record on appeal are designated as "R. ____." References to the initial postconviction record on appeal are designated as "PC-R. ____." References to the transcribed postconviction proceedings are designated as "PC-T. ____." References to the successive postconviction record on appeal are designated as "PC-R2. ____." All other references are self-explanatory or otherwise explained herewith.

> B/M then ran away. Roland has a .25 cal auto pistol crome plated with brown handle. I Selwyn A. Hall have seen Roland carry this pistol many times. I Selwyn A. Hall don't think Roland ever goes without it. Three weeks ago, Roland asked me to buy some bullets for him, and I couldn't find any. Roland got some from his brother. I Selwyn A. Hall have bought crack cocaine from Roland on several occasions. I Selwyn A. Hall know for a fact that approx thirty or more people buy their crack from Roland. This is a true and accurate statement.

(PC-R2 at 792, 1161). The statement was witnessed by Detective Housend and signed by Selwyn A. Hall.

After learning that Pough admitted shooting a black male at 1418 N. Market Street who was hit once and ran off (a little over three blocks away from where his body was discovered), the police developed a plan to arrest Pough during a drug transaction at around 4PM on July 23, 1987 (PC-R2 766, 1135)("Pough was suspected of having a gun in his possession that was involved in a homicide"). *See also* (PC-R2 770, 1139) (Roland was a suspect in the Booker homicide). When an unarmed Pough tried to flee, the police shot him (PC-R2 768, 1137). Pough was then transported to University Hospital (PC-R2 783, 1152). On July 27, 1987, the police were still trying to determine how to locate Pough's pistol; however, because Pough was "still at hospital" and "will be there for awhile" the recommendation was to suspend further investigation into the Booker homicide until "new info or leads develop" (PC-R2 1112).

After Warniment claimed that the bullets from the two homicides were fired from the same gun, the police stopped its investigation of Pough's admission that on the night of July 17th he shot a black man who ran off about three blocks from where

Booker, a black male, was found dead under a house twelve hours later.[2] In the homicide continuation report regarding the investigation in the Booker homicide, the specifics regarding the information received from Selwyn Hall were omitted. All of the important information regarding what Hall said in his sworn statement regarding Pough was omitted from continuation report which was prepared after FDLE Agent Warniment announced at 3PM on July 29th that he had matched bullet in Booker (B/M) homicide to the bullets in the McDowell (W/M) homicide. The continuation report merely referenced Hall as saying Pough had said he shot someone who ran off; the date, time and location of the shooting was omitted. Even the race of the victim was not included. And Housend in a deposition referred to Hall as having provided a dead lead.

Selwyn Hall's sworn statement remained undisclosed until the evening of January 27, 2016, when the handwritten statement was provided to Asay's current counsel. Hall's previously undisclosed sworn statement takes on even more significance in light of the fact that new evidence demonstrates that Warniment's testimony that he had determined to a one hundred percent certainty that the bullet removed from Booker and the bullets removed from McDowell were all fired from the same gun.[3]

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[2]Apparently to this day, there has been no further investigation into Pough's admission that he shot a black man on Friday, July 17, 1987, at 1418 N. Market Street.

[3]At the February 1, 2016, case management hearing, the State conceded that new scientific evidence showed that Warniment's claim of one hundred percent certainty is not now sustainable (PC-R2 983) ("the strength of the match goes down").

In denying Asay's consolidated motion without an evidentiary hearing the circuit court reviewed documents sent by the State Attorney's Office to undersigned counsel without notice to undersigned counsel. The documents that the circuit court reviewed were not in the record and had not been introduced into evidence. The circuit court erroneously concluded that Asay's claim regarding Hall was premised solely on the information contained in the continuation report. The circuit court's actions violated due process. This matter must be reversed and remanded for an evidentiary hearing on Asay's claim before a new judge.

STATEMENT OF THE CASE

Mark James Asay was indicted on two counts of first degree premeditated murder on August 20, 1987, in Duval County, Florida (R. 11). Trial commenced September 26, 1988 and Asay was convicted as charged on September 29, 1988 (R. 182-1081). The jury recommended death by votes of 9-3 on both counts (R. 143-44), and the trial court imposed sentences of death (R. 156-59). Asay appealed his convictions and sentences, which were affirmed. *Asay v. State*, 580 So. 2d 610 (Fla. 1991). The U.S. Supreme Court denied Asay's petition for writ of certiorari. *Asay v. Florida*, 502 U.S. 895 (1991).

On March 16, 1993, Asay filed a 3.850 motion in the circuit court. The motion was amended on November 24, 1993. On February 12, 1996, the circuit court held a *Huff* hearing, and on March 19, 1996, the circuit court entered an order denying relief on some claims and granting an evidentiary hearing on other claims. The evidentiary hearing was conducted on March 25-27, 1996. On April

23, 1997, an order was entered denying relief. This Court affirmed the denial of Rule 3.850 relief. *Asay v. State*, 769 So. 2d 974 (Fla. 2000). Rehearing was denied on October 26, 2000.

On October 25, 2001, Asay filed a petition for writ of habeas corpus in this Court. Subsequent to briefing and oral argument, this Court denied Asay's petition on June 13, 2002. *Asay v. Moore*, 828 So. 2d 985 (Fla. 2002). Rehearing was denied on October 4, 2002.

On October 17, 2002, Asay filed a successive postconviction motion in which he contended that Florida's capital sentencing scheme stood in violation of *Ring v. Arizona*, 536 U.S. 584 (2002). The motion was denied on February 23, 2004. This Court affirmed the denial of relief. *Asay v. State*, 892 So. 2d 1011 (Fla. 2004).

On May 11, 2005, Dale Westling, Asay's state court registry counsel, was permitted to withdraw from the case. Asay was not provided with new registry counsel.

On August 15, 2005, Asay filed a federal habeas petition in the Middle District of Florida. Asay's petition was ultimately denied on April 14, 2014. Asay subsequently moved to withdraw his notice of appeal, which the Eleventh Circuit Court of Appeals granted on July 8, 2014.

On January 8, 2016, Governor Rick Scott signed a death warrant scheduling Asay's execution for March 17, 2016. Asay filed a consolidated 3.851/3.800(a) motion on January 27, 2016. An amendment was filed on January 31, 2016. The circuit court denied relief on February 3, 2016. This appeal follows.

STATEMENT OF THE FACTS

A. THE TRIAL

On Friday evening, July 17, 1987, Mark Asay went to the Doghouse bar with his brother, Robbie Asay, James "Bubba" O'Quinn and his girlfriend (R. 491). Except for an hour when Asay drove his girlfriend home, the three were at the bar until midnight (R. 492, 555-6). Bubba testified that he smoked a joint and drank 4-5 beers while at the bar and Asay drank a few less (R. 492-3).

After leaving the bar, the trio went to Brinkman's - another bar - where they continued to drink beer, having 5-6, or 6-8 beers before the bar closed at 2AM (R. 493, 495, 555). Though they were not falling down drunk, they were "buzzed" (R. 495, 590). Upon leaving Brinkman's, Bubba suggested that they drive downtown to find a prostitute, and he would pay for oral sex for all of them (R. 497). However, the three separated because Robbie wanted to pick up a girl from the bar (R. 496). Consequently, Robbie drove off separately. Asay and Bubba drove downtown in Asay's pick-up truck with Bubba driving (R. 496).

Upon arriving downtown, Bubba and Asay saw Robbie in his truck near 6th and Laura (R. 497). Robbie was talking to a black male (R. 498), about "picking up some hookers" (R. 556). He had contact with the man for two minutes (R. 573). Asay got out of his truck and confronted the black male (R. 498-9). Asay and the man argued and Asay pointed his finger in the man's face (R. 499). According to Bubba, Asay stated: "Fuck you, nigger", pulled a gun from his back pocket and shot the man (R. 499). The black man ran away (R. 561). Robbie recalled that shooting occurred at

approximately 2:30 a.m. (R. 552). Robbie also unequivocally told the State and Asay's trial counsel, pre-trial, and the jury that the man he spoke to in the early morning hours on July 18th was not the man who was found beneath the house on Laura Street and was identified as Robert Booker (R. 591-2). Robbie specifically remembered that there was a difference in the man's hair; he had been face-to-face with him during their conversation(R. 593).

Robbie immediately drove away after the shot was fired, went to his mother's house and passed out in his truck (R. 500, 562-3). Bubba and Asay drove away and, at Bubba's suggestion, continued to look for a prostitute (R. 502-3). The two drove to a gas station where Bubba saw a prostitute, "Renee", that he knew (R. 503). Renee was Robert McDowell. After negotiating with McDowell for oral sex, Bubba drove behind a building and McDowell walked over (R. 505-7). Asay exited the truck while Bubba and Renee continued to talk (R. 508). However, according to Bubba, a minute of so later, Asay came back, grabbed McDowell's arm and started shooting him (R. 509). Asay then entered the truck and directed Bubba back to their neighborhood (R. 511-2).

At trial, during opening statement, the State told the jury that the Booker and McDowell homicides were related because the bullet from Booker and the bullet from McDowell "matched" and that "[t]hey all came from the same gun" (R. 400).

Indeed, at Asay's trial, the State presented the testimony of David Warniment, a firearms examiner from the Florida Department of Law Enforcement (FDLE). Warniment explained that he compared the four bullets obtained from McDowell with the single

bullet obtained from Booker (R. 724). Warniment testified:

> A: ...What I look for is a pattern of microscopic marks which appear on the surface of the bullets which are caused by the passages of a bullet through a barrel. These microscopic marks form a pattern which repeat from shot to shot when fired from the same barrel, and by recognizing that pattern I can form an opinion as to whether or not they were fired by the same weapon.
>
> Q: So every gun has got like a distinguishing mark that it leaves on a certain bullet?
>
> A: Not necessarily a single distinguishing mark, but each barrel – the surface of each barrel is unique, and it leaves a unique pattern of microscopic patterns on the surface of the bullets.
>
> Q: And can you exclude the fact that some bullets are not fired from the same gun, in other words?
>
> A: Sometimes. It is easier to identify a bullet, because you are finding a correspondence of this pattern rather than eliminating a firearm, because some bullets change from shot to shot, and so in elimination you have to look at other characteristics because of the amount – you look at the amount of differences noted.

(R. 724-5).

Warniment testified that the four bullets from McDowell "came from the same firearm" (R. 725). Further, the single bullet from Booker "was fired from the same weapon as the four bullets" (R. 726). However, the firearm that was submitted for testing was eliminated as the source of the bullets (R. 730). Critically, Warniment testified that he was "100 percent positive that [all of the bullets] were fired from the same weapon" (R. 732).[4]

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[4]The State conceded at the case management hearing that the new scientific evidence meant that Warniment "certainty would go down" (PC-R2 983). In other words, new scientific evidence demonstrates that Warniment's testimony was misleading and overstated the significance of his claim that there was a match.

Warniment went on to testify about the types of firearms that could have discharged the bullets, or what was the "likely weapon" (R. 726-7). Warniment testified that he made a list of the possible weapons, but only mentioned the Raven semi-automatic .25 (R. 727). Warniment described the characteristics of the Raven semiautomatic (R. 727-8).

In addition to Warniment's analysis of the bullets, the State also presented evidence that Asay's girlfriend had purchased a .25 caliber semiautomatic Raven revolver on June 12, 1987 (R. 473, 482).

Furthermore, as to the Booker homicide, the State presented the testimony of Alexander Pace and Clifford Patterson who were in the Springfield area in the early morning hours of July 18th. Both Pace and Patterson testified that a black male ran by them saying that he had been shot, about 2 AM to 2:30 AM (R. 600, 608-9). Pace could not identify the man (R. 605), but Patterson believed that the man that ran past was Booker (R. 610).

The medical examiner testified that the condition of body at the autopsy was consistent with Booker being shot at 2 AM (R. 426). Also, Booker was shot in the right abdomen with the bullet traveling downward (R. 400). The medical examiner explained that the bullet traveled at a 45 degree angle downward (R. 439).[5] Booker had cocaine in his system (R. 442)

The State also presented the testimony of Charles "Danny"

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[5]During his closing argument, trial counsel argued that the wound to Booker was not consistent with the description of the shooting of the black male talking to Robbie (R. 843)("Where does this angle come from?").

Moore and Charles "Charlie" Moore as to the circumstances surrounding the McDowell homicide. Danny testified that he overheard Asay tell Charlie that he had shot McDowell because McDowell had previously beat him out of a $10.00 bag of marijuana (R. 650-1). Danny also testified that Asay had kissed McDowell before killing him and realized that he was not female, so he shot him (R. 651). According to Danny, Asay used the victim's real name - Robert McDowell - when describing what had happened, so Danny was able to put the homicide together with what he had seen on a Crime Watch segment (R. 652). Hoping to receive a reward[6], Danny called Crime Watch, but when that did not work as planned, he contacted Detective Spaulding, whom he had known previously (R. 652-3). On cross, Danny conceded that he had previously testified that Asay's alleged statement occurred on Sunday, July 19th or Monday, July 20th (R. 857).[7] However, the Crime Watch segment did not air until July 29th.

Charlie Moore recalled that Asay called him at 2 AM one Saturday morning requesting help with his truck (R. 681).[8] It was the same day that Charlie saw the Crime Watch segment on McDowell

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[6]Danny believed that it was "a quick way to make a thousand bucks." (R. 659).

[7]Later, he said that he believed the alleged statement happened on a Sunday (R. 662). However, Charlie Moore testified that the alleged statements were made on a Thursday (R. 691).

[8]Charlie later explained that he had been out of town one of the two weekends between the homicide and his statement to law enforcement on July 31st and by process of elimination, the phone call had to have been in th early morning hours of July 18th (R. 692-3), - the same day as the homicide, but 11 days before the Crime Watch segment aired.

(R. 681). Charlie asked why Asay needed to put a bumper on his truck so urgently and Asay confided that he was involved in a shooting and his truck was identified, so he wanted to change the appearance of the truck (R. 682). That same night Charlie called Crime Watch to report what he knew (R. 685). And, according to Charlie, a few days later, Asay made additional statements to him while driving together, indicating that shooting McDowell did not bother him and pointing out where it occurred (R. 687-9).

When asked when Danny overheard the alleged conversation between he and Asay, contrary to Danny's testimony, Charlie testified that Danny overheard the statement outside of Asay's house, before anyone got in the car (R. 701).

Finally, the State presented the testimony of Thomas Gross, a jailhouse informant. Gross candidly admitted that initially he contacted law enforcement so that he could bargain for a better sentence on his charges of 2 armed robberies and an attempted armed robbery, for which he was facing a 25 year sentence (R. 725, 764). Also, the reason he was testifying against Asay was to avoid a perjury charge and that he expected the State to write letters on his behalf assisting with his placement in the Department of Corrections, assisting with his obtaining a reduction in his sentence with the Department of Corrections and to the parole board in Illinois who had to determine whether Gross would continue to be permitted parole (R. 747-8).

After explaining his motivation for testifying, Gross told the jury that, while only being in the same cell as Asay for 2 or 3 days, Asay had shown him some newspaper articles and confided

to him that he had "shot them niggers" (R. 751, 765).[9] More specifically, Asay allegedly told him that while driving his truck around, he would call black people over and shoot them (R. 766).[10] Asay then showed Gross his tattoos that signified "white pride" (R. 752). Asay told him that he was prejudiced against blacks (R. 760).

During closing argument, the State argued, as to Booker:

> Now, the defense is going to argue, Well, you know, Mark Asay killed somebody that night, that first guy, or shot somebody, but it's not this guy, this guy just happened to be found right around the corner from where this guy was shot around the same time of the shooting.
>
> There happened to be two other people who saw a man run. In fact, one man said, "this is the same man I saw," but it was just a coincidence. And the clincher is it was the same type of bullet, same type, no doubt about it, they both came from the same gun, but he said he didn't kill the man, it was the wrong guy. See, because this little thing right here, that's what did it. This little tiny thing, that's what killed him. And four of those killed Mr. McDowell, those little tiny things.

(R. 872-3).

B. THE INITIAL POSTCONVICTION PROCEEDINGS

During his initial 3.850 proceedings, Asay contended that

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[9]Further attempting to perpetuate the notion that Asay had shot Booker and McDowell based on racial animus, Housend testified that there were "two dead black males" in the case (R. 463). However, Danny Moore, who knew McDowell, and identified his body, testified that he was white (R. 670-1; *see also* R. 696 (testimony of Charlie Moore)). In fact, the homicide continuation report regarding McDowell specifically identified him as a white male (PC-R2 1078).

[10]Of course the fact that McDowell was identified in the continuation report as a white male made it all the more important to tie Asay to the Booker homicide in order provide some basis for Gross' otherwise ridiculous claim that Asay said he shot a white guy because of prejudice against blacks.

his trial counsel was ineffective in numerous ways: trial counsel failed to recuse Judge Haddock when the judge's comments constituted legally sufficient grounds for recusal. The failure to so move was prejudicial because it left Asay's trial and sentencing in the hands of a judge who on the record intimated he had already decided to impose a death sentence decision.

Furthermore, trial counsel failed to effectively impeach and demonstrate the flaws in the State witnesses' testimony. For example, Bubba claimed to have been present at both shootings, and was the only person that testified that he witnessed Asay commit the murders. Trial counsel failed to impeach Bubba's testimony of how he and Asay arrived at the second shooting and to show that Bubba's account of the events leading up to the shootings was inaccurate (PC-T. 598-99). Trial counsel admitted that there were inconsistencies between Bubba's statements and that they could have been of value to Asay's defense, (PC-T. 599). However, he did not explore them. *See* Def. Exhibit G.

Likewise, there were several inconsistencies in the Moore cousins' testimony that trial counsel did not explore (PC-T. 608-14). *See* Def. Exhibit H.

Trial counsel also failed to effectively assert a defense of voluntary intoxication. Numerous witnesses testified that Asay was under the influence of alcohol the night of the murders. Indeed, trial counsel did attempt to utilize this defense in the penalty phase when he asked his mental health expert about the effects of alcohol on a normal person, yet, he failed to present this evidence to the jury at the guilt phase.

Trial counsel was also deficient in his handling of the racial issues he was confronted with in Asay's trial. According to trial counsel, race was an "inescapable issue" during the trial and the state focused on the fact that the two victims were black (PC-T. 506). The racial motive advanced by the prosecution developed mainly through an alleged jailhouse confession to Thomas Gross (PC-T. 507). Asay was denied a full and fair hearing on this issue in prior 3.850 proceedings because the circuit court would not allow Gross to testify that his testimony was not true, but was tailored to fit the needs and demands of the prosecutor in order to gain benefit for himself.[11] Gross' proffered testimony would have established that state interference rendered trial counsel ineffective in rebutting the State's theory regarding motive for the homicides.

And, during the initial postconviction proceedings, Asay presented evidence that countered and explained the prosecutor's racial arguments. Johnny Sharp, an African-American inmate, testified that he had a sexual relationship with Asay and that Asay was not a racist. Two other inmates testified that Asay received his tattoos for protection because he was being beaten by black inmates. A psychologist from the prison in Texas where Asay served a sentence corroborated that black inmates gave Asay trouble.

Asay also alleged that the State knowingly presented false

[11]This is particularly true since the homicide continuation report listed McDowell as a white male (PC-R2 1078). Showing that Gross' testimony was not true and that McDowell was white would have removed the State's argued racial animus from the case.

evidence. Gross was a critical witness in the guilt phase of Asay's trial. In his 3.850 motion Asay alleged that at trial the State "called one witness whose only purpose was to portray Mr. Asay as a racist and whose testimony the State knew to be wholly false, misleading, and in exchange for undisclosed benefit". Asay proffered the testimony of Gross. Gross would have testified that Asay never confessed to him while they were in jail together (PC-T. 1057). Asay showed Gross newspaper articles and told Gross what the police were saying he did (PC-T. 1057). Gross saw this as an opportunity to benefit himself, because he was facing charges. He had his attorney contact the state attorney and relay that he had information regarding Asay's case (PC-T. 1057).

Gross met with the prosecutor, Bernie de la Rionda, and told him what he had read in the articles and what information the police had relayed to Asay (PC-T. 1958). The prosecutor then showed Gross pictures of Asay's tattoos, specifically the white pride and swastika (PC-T. 1058). Gross and Asay previously discussed Asay's tattoos, however, they never talked about the tattoos that de la Rionda pointed out to Gross (PC-T. 1058).

Gross would have testified that de la Rionda helped him fabricate his testimony (PC-T. 1058). de la Rionda would smile and wink at Gross while asking him "Mark Asay told you that he shot some niggers, didn't he" and "[n]ow, you're sure that Asay related to you that he is prejudiced, didn't he?" Mr. de la Rionda emphasized the words "didn't he" and Gross followed his lead and replied yes (PC-T. 1058-59). Gross rehearsed his testimony with the prosecutor who would reword his answers so

they were more inflammatory and damaging to Asay (PC-T. 1059-60). For example, de la Rionda told Gross to look directly at the jury and say "Mark Asay said I shot them niggers" (PC-T. 1059-60).

According to Gross, Asay never confessed to Gross (PC-T. 1060). Asay never even uttered a racial comment in his presence (PC-T. 1060). However, Gross was facing charges and the state attorney promised him that he could get his sentence reduced (PC-T. 1060). Therefore, Gross took advantage of Asay and formed a partnership with the state attorney; the goal being to convict Asay of first degree murder (PC-T. 1060).

Gross gave a sworn statement in October of 1987 (PC-T. 1060). After giving the sworn statement Gross decided not to testify against Asay, because he knew that his statement was a lie, and refused to give a deposition (PC-T. 1060). Mr. de la Rionda then told Gross that if he did not testify willingly he would force him to get on the stand and if he changed his testimony he would be prosecuted for perjury (PC-T. 1061). Gross felt threatened by de la Rionda so he agreed to testify falsely against Asay (PC-T. 1061).

While coaching Gross' testimony, the state attorney showed him a picture of one of the victims in Asay's case and told Gross that one of the victims was shot in the chest with a .25 caliber gun and that the bullets partially caved in the man's chest (PC-T. 1061-62). Gross was also shown a crime scene photo from another homicide case de la Rionda was prosecuting and was told that the state might need a confession in that case (PC-T.

1062).[12] Mr. de la Rionda told Gross that he would try and place Gross in a cell with the defendant from the other homicide case and that Gross should come forward, like he did in Asay's case, and announce the defendant confessed to the crime (PC-T. 1062).

As to his penalty phase ineffective assistance of counsel claim, Asay previously established the following: At Asay's penalty phase, trial counsel presented the testimony of two witnesses, Dr. Earnest Miller, a psychiatrist who never examined him, but who testified regarding the effect alcohol has on a normal person (R. 1014-18); and Asay's mother who testified that he was a decent person[13] (R. 1023-31).

At the time of Asay's penalty phase, the only information trial counsel knew regarding Asay's childhood was that it "had not been a great one," and that there were problems with Asay's mother leaving the children alone for lengths of time (PC-T. 525-26). Had trial counsel contacted Asay's siblings or done a competent investigation he would have uncovered a wealth of mitigation: Asay was an unwanted child who was brutally physically abused as a child. Asay's parents never showed any affection to him and were emotionally abusive. His stepfather chained the refrigerator and would beat him if he ate a piece of bread. As a young boy Asay was used by older men who would get him drunk in exchange for sexual favors. Asay had an extensive

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[12]The proffer of Gross' testimony described the crime scene in detail (PC-T. 1063). Asay's counsel proffered a drawing, done by Gross, of the crime scene (PC-T. 1064; Defense Exhibit J).

[13]Trial counsel also introduced letters, that Asay had drawn roses on, to the jury (R. 1028).

history of alcoholism and regularly "huffed" inhalants while in prison. Asay was born to a father who suffered mental illness.

The initial Rule 3.850 court described the Asay family as one "at war with itself, committing domestic violence and inflicting permanent damage to one another at an early age." (PC-R. 273).

Additionally, trial counsel failed to present compelling mental health testimony. Dr. Faye Sultan, an expert in clinical psychology specializing in the assessment and treatment of victims and perpetrators of physical and sexual abuse, (PC-T. 783) examined Asay to determine whether there were psychological factors present in 1986 and 1987 that would have influenced his behavior at that time (PC-T. 785-786). Among the abuse survivors that Sultan has evaluated, Asay's abuse ranked among the most severe (PC-T. 821).[14]

Sultan testified that her evaluation of Asay revealed long-standing mental health impairments that, to a reasonable degree of psychological certainty, existed at the time of the offense in 1987 (PC-T. 817). Sultan explained that at the time of the offense Asay suffered "from both organic and psychological disturbance that was significant and debilitating" (PC-T. 818). Sultan also believed that "for psychological and for organic reason [Mark] was unable to conform his conduct to the standards

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[14]Sultan also stated: "Asay was exposed to witnessing the abuse of his siblings and his mother and was himself the victim of abuse for the entire duration of his life. The longevity of his abuse from birth until the time he was incarcerated is as severe as it gets" (PC-T. 821).

of the law" (PC-T. 818).[15]

Dr. Barry Crown's evaluation consisted of the administration of a battery of neuropsychological tests and a clinical interview (PC-T. 706). Crown determined that Asay met the criteria for two statutory mitigating factors: extreme mental and emotional duress and inability to conform conduct to the requirements of the law (PC-T. 712).

C. THE SUCCESSIVE POSTCONVICTION PROCEEDINGS

Having not had state court counsel representing him from May of 2005 until January 2016, the circuit court appointed the undersigned after Asay's warrant was signed and his execution set. After reviewing the transcripts, the undersigned retained William A. Tobin, a former forensic metallurgist/materials scientist with the Federal Bureau of Investigation (FBI) to review the documents and testimony surrounding the State's firearms identification examiner's opinion in Asay's case. *See* Affidavit of William A. Tobin, ¶2-3 (PC-R2 580).

Tobin is an experienced metallurgist whose expertise encompasses the production and functioning of the entire spectrum of metal and non-metal products and components, including firearms, bullets, and cartridge cases." (PC-R2 581).

After reviewing the documents and testimony from FDLE Analyst Warniment, Tobin concluded that the jury in Asay's case

[15]Sultan also established the following non-statutory mitigating factors: "Asay was the victim of severe childhood emotional, physical and sexual abuse. Mr. Asay has an extensive history of alcoholism. Mr. Asay suffers from organic damage, brain damage that may significantly influence his capacity for judgement [sic] and for reasoning" (PC-T. 819).

heard inadmissible and highly unreliable and misleading testimony (PC-R2 627-28). First, it simply cannot be said that bullets from a particular firearm display unique characteristics, or that there is "individualization" (PC-R2 594, 611). Second, the certainty with which Warniment expressed his opinion, i.e., "100 percent" was pure speculation with absolutely no basis in research or experience (PC-R2 620-24). Third, Asay's case presents particular problems because it falls into a category commonly referred to as a "no gun recovery case." Without the firearm from which the bullets were fired, Warniment could not have had any knowledge concerning how the firearm was manufactured or what population of firearms existed in the area with which a comparison could have been made (PC-R2 618).

Furthermore, Warniment made no mention that he had made any effort to eliminate "subclass carryover" which is an important and necessary consideration in the analysis of firearms identification. And, finally, it was highly misleading to identify a specific firearm as firing the bullets, when numerous types of firearms could have been used.

In his affidavit, Tobin further explained:

> 11. The domain of metallurgists and materials scientists includes material behavior in virtually every phase in the life of a metal, regardless of form, from its extraction as an ore to the use and functioning of a finished product. Each stage of product development, including for consumer tools, involves important metallurgical considerations, from material selection and process design to bulk metal forming, shaping, heat treatment, finishing, and related production processes. In <u>scientifically</u> evaluating the characteristics (striations and impressions) used by toolmarks examiners in 'toolmark identification' practice as it is called, it is

imperative that the underlying scientific phenomena affecting material behavior and tribological interactions with, for example, forming tools and dies, in various conditions and environments of both production and consumer use, are understood. The need to understand the scientific principles governing material behavior and their interactions extends beyond production processes. Clearly, interactions of both the product with its environment, and of the product components with each other in service (ultimate consumer use) such as occur in the cycling of a firearm, are important metallurgical design considerations. Knowledge of the material behavior resulting from the effects of an applied system(s) of stresses (primarily compressive, tensile, and shear) and of friction, lubrication, and wear, is fundamentally important to evaluating the significance of manifestations of tribological interaction (striations and impressions, used by toolmarks identification examiners for their pattern-matching practice), for efficacy of product function, and for failure analysis both in production and in user service. It is particularly important in evaluating the scientific foundations, *vel non*, underlying the pattern-matching practice of toolmarks examiners in their forensic comparisons.

12. The heart of virtually every metal forming/shaping operation for all firearm components is the tool(s)/die(s) responsible for changing the shape of the metal work piece under pressure (forced contact). This is true regardless of the actual product produced, such as firearms, bullets, ammunition cartridge cases, screwdrivers, aerospace components, wire, tubing, *etc.*, or of the function that the product is intended to serve in the consumer market.

13. A critical aspect of production continuity, and a seminal issue for forensic toolmarks comparisons, is the material response (behavior) of both the metal product/component to the tool(s)/die(s) during metal-to-metal contact under pressure during production. Material responses to applied stresses during fabrication frequently result in formation of striations and/or impressions on the work piece component surface from forced contact with the forming tool (die). **These features are called "subclass characteristics" within the domain of firearms identification and are features often incorrectly characterized by forensic examiners as "individual" or "unique", such as Mr. Warniment has assumed during the course of his examinations. They are assumed, particularly in a 'no-gun-recovered' case such as the case at bar, to be purportedly "individual" or "unique" characteristics and are used by practitioners**

> **(examiners) as the basis for firearm identification comparisons.** The formation of these striations and impressions during production depends on numerous parameters including, but not limited to, manner of fabrication, lubrication regime of tribological interaction, cleanliness of lubrication system operative, component (work piece) alloy, mechanical properties (*e.g.*, tensile and yield strengths, ductility, toughness, *etc.*), temper, speed of processing, temperature of process, *inter alia*. Surprisingly, even seemingly unrelated influential factors, such as macroeconomic conditions in the U.S. and global economies (which affects what are known as "feeds and speeds") can affect formation of striations and impressions on a metal work piece (product or component) during fabrication *that can appear, unknown to the forensic examiner, on all components in a given production lot of unknown (to the forensic examiner) size.* **It is for this reason that some crime labs do not allow firearms identification examiners to opine an individualization (specific source attribution) as "same gun" for cartridge cases without recovery of a firearm suspected as having been the firing platform, because the suspect firearm is not available for examination to ostensibly eliminate the possibility of "subclass carryover" where the striations and impressions acquired during manufacture are exhibited by firearms in the entire production lot or even larger possible sample pool.**

(PC-R2 585-87)(footnote omitted)(emphasis added). Tobin also explained that:

> Subclass characteristics are fortuitously produced during the manufacturing process by a tool that can leave *virtually identical markings on an unknown (to the forensic examiner) number of products produced, including firearms, during the tool's useful life in which it typically produces lots (production lots, groups or "batches") over many hours, days, weeks, and even months, depending on the process and product*. The number of products bearing subclass characteristics can be very large and can exist across many production lots spanning months, resulting in huge quantities of marketable product ...

(PC-R2 599)(italics in original).

Tobin's case specific opinions are supported by the National

Research Council (NRC),[16] which, in 2008, at the behest of the Department of Justice, issued a report on bullet pattern-matching analysis, Ballistic Imaging.[17] Although the NRC Committee's charge was to assess the feasibility and utility of establishing "a national reference ballistic image database ... that would house images from firings of all newly manufactured or imported firearms," it recognized that the "[u]nderlying ... question" is "whether firearms-related toolmarks are unique: that is, whether a particular set of toolmarks can be shown to come from one weapon to the exclusion of all others." *Ballistic Imaging*, supra note 2, at 1, 3. The NRC Committee determined that there was no data-based foundation to declare, with any certainty, individualization based on toolmark pattern matching.

Specifically, the NRC Committee made a "finding" that as of 2008 the "validity of the fundamental assumptions of uniqueness and reproducibility of firearms-related toolmarks has not yet been fully demonstrated." *Ballistic Imaging*, supra note 2, at 3, 81. The NRC Committee noted that "derivation of an objective,

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[16]The NRC is a component of the National Academy of Sciences, which was created by congressional charter in 1863 to "investigate, examine, experiment, and report upon any subject of science." Act to Incorporate the National Academy of Sciences, sec. 3, 12 Stat. 806 (1863), http://www.nasonline.org/aboutnas/leadership/governing-documents/act-of-incorporation.html. The NRC was established in 1916 "to associate the broad community of science and technology with the Academy's purposes of furthering knowledge and advising the federal government." NATIONAL RESEARCH COUNCIL, COMMITTEE TO ASSESS THE FEASIBILITY, ACCURACY, AND TECHNICAL CAPABILITY OF A NATIONAL BALLISTICS DATABASE, BALLISTIC IMAGING iii (2008).

[17]*Ballistic Imaging*, supra note 2. Specifically, the project was sponsored by the National Institute of Justice (NIJ), Office of Justice Programs, U.S. Department of Justice. Id. at xi.

statistical basis for rendering decisions [about matches] is hampered by the fundamentally random nature of parts of the firing process. The exact same conditions—of ammunition, of wear and cleanliness of firearms parts, of burning of propellant particles and the resulting gas pressure, and so forth—do not necessarily apply for every shot from the same gun." *Id.* at 55. The Committee concluded that "[a] significant amount of research would be needed to scientifically determine the degree to which firearms-related toolmarks are unique or even to quantitatively characterize the probability of uniqueness." *Id.* at 3, 82.

The NRC Committee further noted that, notwithstanding the absence of data and the corresponding statistical unknowns, firearms and toolmark examiners "tend to cast their assessments in bold absolutes, commonly asserting that a match can be made 'to the exclusion of all other firearms in the world.'" *Ballistic Imaging*, supra note 2, at 82. The Committee denounced this sort of testimony, stating that "**[s]uch comments cloak an inherently subjective assessment of a match with an extreme probability statement that has no firm grounding and unrealistically implies an error rate of zero**." *Id.* (emphasis added). "[S]topping short of commenting on whether firearms toolmark evidence should be admissible" in court, the NRC Committee determined that "**[c]onclusions drawn in firearms identification should not be made to imply the presence of a firm statistical basis when none has been demonstrated**." *Id.* (emphasis in original).

In a subsequent report commissioned by Congress and issued in 2009, Strengthening Forensic Science in the United States: A

Path Forward,[18] another NRC Committee published similar words of warning regarding firearms and toolmark evidence.[19] This Committee explained that "[i]ndividual patterns from manufacture or from wear might, in some cases, be distinctive enough to *suggest* one particular source." *Id.* at 154 (emphasis added). But "[b]ecause not enough is known about the variabilities among individual tools and guns," the Committee was "not able to specify how many points of similarity are necessary for a given level of confidence in the result."[20] In other words, there is currently no statistical basis to declare with any degree of certainty that toolmarks on a bullet connect that bullet to a

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[18]NATIONAL RESEARCH COUNCIL, COMMITTEE ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIENCES COMMUNITY, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD xix (2009) [hereinafter Strengthening Forensic Science].

[19]The report comprehensively reviewed a range of forensic analyses, including toolmark and firearms identification, and made a number of recommendations "to improve the forensic science disciplines and to allow the forensic science community to serve society more effectively." *Id.* at xix, 1-2.

[20]More generally, the NRC Committee observed that "[w]ith the exception of nuclear DNA analysis ... no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source." *Id.* at 7. With respect to these other forensic analyses, the NRC Committee stated that "[a] body of research ... to establish the limits and measures of performance and to address the impact of sources of variability and potential bias ... is sorely needed, but it seems to be lacking in most of the forensic disciplines that rely on subjective assessments of matching characteristics." *Id.* at 8. The NRC Committee called for the development of "rigorous protocols to guide these subjective interpretations and pursue equally rigorous research and evaluation programs." *Id.* The NRC Committee particularly recommended that "[f]orensic reports, and any courtroom testimony stemming from them, must include clear characterizations of the limitations of the analyses, including measures of uncertainty in reported results and associated estimated probabilities where possible." *Id.* at 21-22.

particular gun or "match" the markings on other bullets fired from that gun.

In addition to Tobin's opinion, Asay also discovered that JSO records, many of which were disclosed for the first time, contained much more about the shooting of Booker than was ever revealed previously: Originally, the identity of the victim was not known and the records received from JSO demonstrate that just months before Asay's trial, Booker's identity was uncertain.

When the body was found on July 18th the name Thomas John Henningan and date of birth of January 6, 1956, was supplied to law enforcement, though there is no explanation as to why Hennigan was thought to be the victim. Shortly thereafter, Booker's niece identified the victim as Robert Lee Booker. Robert Lee Booker was also known as James Johnson.

However, on May 25, 1988, law enforcement sought to photograph a vehicle allegedly belonging to "James Johnson"[21] A few days later, on May 27th, law enforcement continued to refer to the victim as "James Johnson". Whether the State ever determined the true identity of the victim is unclear.

More importantly, as the police pieced together information about "Robert Lee Booker", Willie Mae Gardner told them that he had been "cut up" on Beaver and Davis. Law enforcement's notes do not indicate when Booker had been "cut up" or why, but this information was never disclosed to Asay.

Further, just a few days after Booker was shot, police

[21]The suspect of the homicide of "James Johnson" was listed as Robert Lee Booker.

learned that an individual with the street name "Yankee" had information relating to the crime. Specifically, Yankee knew that Booker had been shot during a drug deal.[22] "Yankee" identified Roland Pough as having shot Booker. And, Pough was known to carry a .25 caliber automatic firearm. According to law enforcement, though not revealed to Asay, the CI that provided the information about Pough was characterized as "reliable" (PC-R2 766). "Yankee" identified Roland Pough as having shot Booker. And, he was known to carry a .25 caliber automatic firearm (PC-R2 766, 797-98).

Indeed, the CI told law enforcement that a drug deal was set-up for July 23, 1987 and Pough was expected to have his firearm. Law enforcement went to the scene where the drug deal was going to occur and attempted to arrest Pough (PC-R2 766, 773 783). Pough physically resisted arrest and ran from the scene. During the chase that ensued, Pough was shot (PC-R2 768). He was apprehended and taken to the hospital. Law enforcement did not locate a firearm (PC-R2 783). In the subsequent investigation, it was determined that the shooting of Pough was unjustified.

Selwyn Hall corroborated the CI's information, as to Pough being a drug dealer and involved in a shooting, in a sworn statement on July 23, 1987. Hall specifically told Housend that Pough had told him that he had shot a black male during what he described as a "robbery attempt" as 1418 N. Market St., about three blocks from where Booker's body was found. Pough had shot at the victim multiple times, but knew that he had hit him once.

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[22]The toxicology analysis of Booker's blood reflected that he had cocaine in his system at the time of his death (R. 442).

Hall also confirmed that Pough was known to carry a .25 caliber firearm (PC-R2 792).

And, law enforcement was given additional information that an individual named "'O.J.' also knows Roland shot "Booker." (PC-R2 799). Ollie Thomas indicated that he heard shots at 11PM to midnight on the night of July 17th (PC-R2 795).

Prior to receiving the JSO records on Pough, the State had provided a misleading, to say the least, account about the evidence incriminating Pough in the Booker homicide. Indeed, during Housend's pre-trial deposition he indicated that the lead relating to Pough turned out to be a "dead-end", relying solely on Warniment's claimed match to eliminate Pough as a suspect. *See* PC-R2 681-2 ("So by the bullet comparison, by them matching, we knew the same one that shot and killed McDowell at 16th and Main was actually the one that shot and killed Booker."); PC-R2 682 ("The main reason we ruled him out was because, you know he – because of the bullet comparison."). Housend also explained: "Because at the time I run this down, we got the comparisons back on the bullets. And from the eyewitnesses of the suspect at 16th and Main, we know that it couldn't have been this guy, Roland[23]." *See* PC-R2 682.

The results from the firearms identification analysis were not returned until July 29th and Housend did not learn of the results until July 30th. *See* Moneyhun Depo, p. 38. And, rather, according to the JSO records, the pursuit of Pough was suspended

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[23]"Roland" is Roland Pough.

due to his injury. In fact, Pough had been hospitalized after being shot by an officer in which the officer "improperly discharged" his weapon.

Asay also introduced information related to the timeline of the events that occurred in the Springfield area late on July 17th through the early morning hours of July 18th. According to Joseph Knight, the individual who found Booker's body, he heard a gun shot between 12 and 2 AM. Shortly thereafter, Booker ran by and said he had been shot. Knight and another individual walked behind the house where the victim had ran, but could not locate him due to the darkness. During his initial interview Knight made clear that it was between 12 and 2 AM. Knight's earlier time of 12 AM was consistent with Ollie Thomas' statement that the shot occurred between 11 PM and 12 AM However, during Housend's deposition, he testified that Knight saw Booker run by at approximately 2 AM, leaving out the earlier time. Neither Knight nor Thomas testified at Asay's trial.[24]

Indeed, according to Robbie and Bubba, the three did not leave Brinkman's until closing at 2 AM. They then drove downtown and to the Springfield area which would have made it impossible for Asay to have shot Booker.

It is also worth noting, that the JSO records reflect that Willie Joe Bradshaw owned a Raven automatic firearm.

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[24]At Asay's trial, Pace and Patterson testified and created a more favorable timeline for the State – hearing the shooting and seeing Booker run by at approximately 2 AM – closer in time to Robbie and Bubba's time line of when Asay argued with a black male at 6th and Laura (R. 466)

SUMMARY OF ARGUMENTS

1. The circuit court erroneously reviewed extra record material opening attachments to emails sent to Asay's counsel, relied on those extra record material without notice to Asay or affording Asay an opportunity to address and/or rebut the extra record material and/or the conclusions that the circuit court drew from the extra record material, made factual determinations based on the extra record material, failed to accept as true Asay's factual allegations in support of his claims for relief, and conducted an ex parte hearing after being advised that Asay's counsel was not available at which substantive matters were discussed and court exhibits were marked and introduced without notice to Asay or his counsel. Because of these errors, the summary denial of Asay's consolidated motion should be remanded for an evidentiary hearing and the Court should disqualify Judge Salvador from presiding on remand.

2. The circuit court erroneously failed to accept Asay's factual allegations as true and grant an evidentiary hearing on Claim I (a newly discovered evidence claim under *Jones v. State)* and Claim IV (a *Brady* - *Strickland* claim) of Asay's consolidated motion. On the basis of extra record material, the circuit court failed to accept Asay's factual allegation as true, even as to Asay's allegations of diligence and erred in applying erroneous legal standards and in summarily denying relief. This Court should order an evidentiary hearing on Asay's newly discovered evidence and *Brady-Strickland* claims.

3. Asay was deprived of his right to state court

collateral representation when he was left without registry counsel for over ten years. He was also denied his rights to due process and equal protection when he was left without registry counsel. Asay has been prejudiced by the circuit court's finding that during that ten year period that he was without registry counsel, he was not diligent in investigating and discovering the basis for his newly discovered evidence claim from his cell on death row. Moreover, Asay submits that a stay is warranted so that he may adequately reconstruct the files and records in his case, conduct the investigation into the facts and circumstances of his convictions that was not conducted for a ten year period of time, and litigate the claims that full investigation uncovers without the exigencies of a pending death warrant. In other words, Asay should be put in the position that he would have been in had he not be deprived of his statutory right to state court registry counsel.

4. Asay's death sentence is unconstitutional under *Hurst v. Florida* because a judge, rather than a jury, made the findings that sufficient aggravating circumstances existed and that they were not outweighed by mitigating circumstances, which were required to be found by a jury in order to convict Asay of capital first degree murder and render him death eligible.

STANDARD OF REVIEW

The lower court summarily denied Asay's motion without conducting an evidentiary hearing. Asay's factual allegations presented in his consolidated motion and in this appeal must be taken as true and the circuit court's decision must be reviewed

de novo by this Court. *Peede v. State*, 748 So. 2d 253, 257 (Fla. 1999); *Gaskin v. State*, 737 So. 2d 509, 516 (Fla. 1999).

ARGUMENT I

ASAY WAS DENIED DUE PROCESS WHEN THE CIRCUIT COURT CONSIDERED WITHOUT NOTICE TO ASAY EXTRA RECORD MATERIAL WHICH WAS USED TO ERRONEOUSLY REJECT ASAY'S FACTUAL ALLEGATIONS AND WHEN THE CIRCUIT COURT CONDUCTED AN EX PARTE HEARING WITH THE STATE. THE PROCEEDINGS BELOW WERE NEITHER FULL NOR FAIR. JUDICIAL DISQUALIFICATION ON REMAND IS WARRANTED.

A. IN DENYING ASAY'S SUCCESSIVE RULE 3.851 MOTION, THE CIRCUIT COURT WITHOUT NOTICE TO ASAY CONSIDERED AND RELIEF UPON DOCUMENTS NOT INCLUDED IN THE RECORD BEFORE THE COURT AND NOT PRESENTED IN AN ADVERSARIAL PROCEEDING

Throughout the proceedings below, Asay made clear that he did not have the public records that had previously been disclosed due to prior counsel's loss or destruction of the records. On January 20, 2016, the Office of the State Attorney sent Asay's counsel eight emails, each having an attachment containing a portion of the records that Mr. de la Rionda indicated had been previously provided. The email attaching a portion of the records was copied to the circuit court judge. Although, other records, including JSO's records were put on a CD and sent via overnight or same day courier, due to the size. In fact, the records sent by JSO via a same day courier reached undersigned counsel's offices a little after 8PM on January 26th.

Unbeknownst to Asay or his counsel, the circuit court reviewed some portion of the files and records that were attached to eight emails sent to undersigned counsel: "SAO indicated it provided collateral counsel with all of the public records it provided to Defendant's collateral counsel in 1993, prior to the

evidentiary hearing addressing Defendants Initial Rule 3.850 Motion. This Court also received and reviewed such records ...” (PC-R2. 561). Based solely on the State’s representation in an email that the records had been previously disclosed and her review of some unknown portion of the attachments to the eight emails, the circuit court found that the State had not withheld information concerning an alternative suspect - Roland Pough (PC-R2. 561). However, Asay was given no notice that: 1) the circuit court intended to consider Mr. de la Rionda’s representations as true, without allowing Asay an opportunity to cross examine or present conflicting evidence, 2) the circuit court reviewed extra records that were not before the court to decide Asay’s claims, and 3) the circuit court would ignore the fact that Asay’s amended Claim I and his Claim IV (*Brady-Strickland)* claims were premised upon a handwritten sworn statement and other handwritten notes and reports that were not in the attachments to emails that Mr. De la Rionda sent undersigned counsel.

The circuit court’s actions in reviewing extra record documents violated Florida law and Asay’s due process rights. *See McClain v. State*, 629 So.2d 320, 321 (Fla. 1st DCA 1993)(“We consider the state’s admitted inability to refute the facially sufficient allegations of ineffective assistance of counsel without recourse to matters outside the record, warrants reversal”). This Court has held that the facts alleged in a 3.851 motion must be taken as true. *See Peede v. State*, 748 So. 2d 253 (Fla. 1999)(“we must accept the factual allegations made by the defendant to the extent that they are not refuted by the

record.”). Clearly, attachments to emails sent to Asay’s counsel by the State are not part of the record, i.e. contained in the records introduced into evidence and filed with the clerk of court. Here the circuit court strayed from the record before her and relied on documents attached to emails sent to Asay’s counsel without submitting those document to the crucible of an adversarial testing. This was reversible error in and of itself.

But over and above the requirements of Rule 3.851, the circuit court’s action violated Asay’s basic bedrock due process rights to notice and meaningful opportunity to be heard. The circuit court without notice to Asay considered attachment to emails sent to his counsel the contents of which Asay was not on notice to address and thus not in a position to counter and refuted the erroneous conclusions the circuit court drew from reviewing some unknown number of attachments to eight emails.[25] Had Asay known that the circuit court was considering extra record information, he could have readily demonstrated that the newly disclosed documents on which his amended Claim I and Claim IV of his consolidated motion were premised were not in the files that Mr. de la Rionda had sent to his current counsel.

The right to due process entails “‘notice and opportunity for hearing appropriate to the nature of the case.’” *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985), quoting

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[25]The circuit court has never disclosed specifically what email attachments it opened and reviewed. Asay only learned of the circuit court’s review of extra record material from the February 3 order summarily denying relief, when he had no means of responding except through the Notice of Proffer that he filed on February 5.

Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306, 313 (1950).

> In *Holden v. Hardy*, 169 U.S. 366, 389, 18 S.Ct. 383, 387, 42 L.Ed. 780, the necessity of due notice and an opportunity of being heard is described as among the 'immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.' And Mr. Justice Field, in an earlier case, *Galpin v. Page*, 18 Wall. 350, 368, 369, 21 L.Ed. 959, said that the rule that no one shall be personally bound until he has had his day in court was as old as the law, and it meant that he must be cited to appear and afforded an opportunity to be heard. 'Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered.'

Powell v. Alabama, 287 U.S. 45, 68 (1932).

This Court has held "a sentencing judge who intends to use any information not presented in open court as a factual basis for a sentence must advise the defendant of what the information is and afford the defendant an opportunity to rebut it." *Vining v. State*, 827 So. 201, 209 (Fla. 2002). In *Vining*, the error was found to be harmless because "Vining was advised by the trial judge of his consideration of extra-record information and afforded an opportunity to rebut or impeach the information." *Id*. at 210. However, Asay was not afforded such an opportunity here. *See Krawczuk v. State*, 92 So. 3d 195, 202-03 (Fla. 2012) (judges considering Rule 3.851 motions are not permitted to conduct extra record investigation).

Had Asay know that the circuit court had reviewed extra record materials and engaged in its own extra judicial investigation into his claims, he would have moved to disqualify her. And, Asay could have demonstrated that the portion of

records reviewed by the circuit court was simply did not in fact contain the documents on which his Claim IV was based, contrary to the circuit court's find of fact made without the benefit of an adversarial process.[26]

The prejudice to Asay is apparent – his claims were decided by a court that conducted its own extra record investigation, in violation of Rule 3.851, and without notice to Asay, which denied him the ability to address extra record material and counter that material with the specific unredacted documents that counsel had received from JSO on January 27, 2016, on which his amendment to Claim I and Claim IV were based. Asay clearly disputed the facts that the circuit court found without notice to him on the basis of extra record material. The circuit court's summary denial of his claims must be reversed and the matter remanded to be heard by a new judge who has not conducted an extra record

[26]The records request at issue in 1993 were made by Asay's collateral counsel who at that time was Stephen Kissinger and who Asay was prepared to call to show that the specific records at issue, i.e. Selwyn Hall's sworn statement and other handwritten records, were not included in the records provided in 1993. Without hearing from Kissinger, the circuit court "conclude[d] trial counsel ultimately received the records requested" based upon her undisclosed review of records that were being sent to undersigned counsel, but that were not in the record and that were not introduced into evidence (PC-R2 560). When addressing Asay's *Brady* claims, the circuit court did not accept the factual allegations as true, but instead said that the Defendant has failed to meet his burden," even though Asay was never given the opportunity to meet his burden to prove the *Brady* violations occurred (PC-R2 562). Without ever affording Asay the opportunity to present any evidence that Hall's handwritten sworn statement was disclosed prior to January 26, 2016, the circuit court wrote: "this Court finds *all* the evidence at issue was equally accessible by both parties, could have been found with due diligence, *or* the Defense had knowledge of the evidence before, during, or at the time of trial." (PC-R2 562).

investigation.

B. THE CIRCUIT COURT HELD AN *EX PARTE* HEARING AFTER BEING ADVISED THAT ASAY'S COUNSEL WAS UNAVAILABLE

On February 4, 2016, Asay notified opposing counsel that he intended to file some of the JSO records as a proffer, which he had received less than 24 hours before the deadline for filing his Rule 3.851 motion (PC-R2 738). He copied opposing counsel with his email to JSO asking if it could review the documents for redactions because the records had been provided to him without any review for any redactions of confidential information with the understanding that he would not file without affording JSO an opportunity to review for necessary redactions (PC-R2 738).

Upon sending the email with the records that intended to proffer, AAG Charmaine Millsaps responded informing undersigned that she opposed him proffering records (PC-R2 736). Undersigned informed Millsaps that she could file any pleading she chose, but that he intended to file the proffer later that day (PC-R2 736).

At around 2:31 PM, Millsaps filed a motion to prohibit the prospective proffer.[27] When the court's judicial assistant

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[27]At 2:38 PM on February 4, undersigned counsel's computer received an email entitled: Service of Court Document. Because counsel was busy, he did not open it at that time. Then at 2:47 PM, an email arrived from Judge Salvador's judicial assistant inquiring: "Is everyone available at 3:15 p.m. for an emergency hearing on the Motion to Prohibit Proffer." (PC-R2 823). At that point counsel had still not read the State's motion. With his pre-approved and pre-arranged legal phone call with Asay set to begin at 3PM, his need to attend to a banking matter by 5PM, and the need to finish the Notice of Proffer and the Notice of Appeal by 5PM, undersigned counsel responded to the judicial assistant's inquiry saying, "I am sorry I am not available at all." (PC-R2 823). Shortly before 3PM counsel jumped in his car, headed to the bank, and waited for his law partner to patch him into the legal phone call with Asay. In his haste, he left his computer on, and

contacted him at 2:47 PM. inquiring as to his available for a 3:15 hearing, he replied that he was not available at all the rest of the afternoon. His computer shows that at 3:02 PM, Millsaps filed a notice of hearing for 3:15 PM. - 13 minutes of notice. Counsel did not learn of this email until much later. At 3:14 PM. counsel's computer shows that the judge emailed the parties indicating that a court reporter had been secured for 3:15 PM. (one minute after the e-mail was sent). The judge indicated she wanted the matter was to be heard before 5PM. Counsel did not discover this email until after 4PM. The hearing occurred without any representative of Asay's and according to the transcript, lasted nearly 40 minutes. Upon discovering the judge's 3:14 PM. email after 4PM, at 4:06 PM, counsel responded to the judge's email, and not knowing that an *ex parte* hearing had been held, again reiterated that he was not available for a hearing that afternoon.

Despite knowing that Asay's counsel had indicated that he was unavailable, the circuit convened an *ex parte* hearing with the State and addressed substantive matters. Without Asay's knowledge, court exhibits were marked and introduced. The circuit court's actions were improper. Canon 3B(7) of Florida's Code of Judicial Conduct states:

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while he was gone, email was downloaded on his computer and not on his phone. The phone call with Asay lasted from 3:00 until 3:30 PM. For the last half of the call, counsel was sitting in the bank parking lot. Once it was concluded, counsel took care of his banking business, and then drove back to his office. He got there at about 4PM and soon discovered the email from Judge Salvador that reflected that it had been sent at 3:14 PM. It advised counsel that she was holding a hearing at 3:15 PM.

> A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:
>
> (a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized, provided:
>
> (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communications, and
>
> (ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communications and allows an opportunity to respond.

Judge Salvador's conduct was improper, violated the Code of Judicial Conduct and demonstrates her bias against Asay and/or his counsel and a disregard for the duty of the court to avoid the appearance of impropriety. Her actions in convening an *ex parte* hearing must also be viewed in conjunction with her investigation into and consideration of extra record material without notice to Asay which then used to justify her summary denial of Asay's consolidated motion.

The *ex parte* communication and demonstration of bias is violative of Asay's right to due process and the right to be represented by counsel provided by the constitutions of the State of Florida and the United States. The *ex parte* hearing on February 4th have caused "a shadow [to be] cast upon judicial neutrality so that disqualification is required." *Chastine v. Broome*, 629 So. 2d 293, 295 (Fla. 4th DCA 1993).

This Court explained in *In re Inquiry Concerning a Judge: Clayton*, 504 So. 2d 394 (Fla. 1987), that the intent of Canon 3

was to exclude all *ex parte* communications except those authorized by statute or rules. It "implements a fundamental requirement for all judicial proceedings under our form of government. Except under limited circumstances, no party should be allowed the advantage of presenting matters to or having matters decided by the judge without notice to all interest parties". *Id.*, at 395. In *In re Inquiry Concerning a Judge: Robert R. Perry*, 586 So. 2nd 1054 (Fla. 1991), this Court found that improper *ex parte* conduct by a judge was grounds for discipline.

Here, when notified sometime after 2:47 PM about his availability for a hearing, undersigned responded and advised the circuit court and parties that he was not available for the remaining two hours and 13 minutes of the work day. Indeed, undersigned had a conference call scheduled with his client to discuss the circuit court's order denying relief at 3PM.[28] He also had to address a pressing, personal banking matter, after he spoke to his client. As he informed the circuit court, he had not had time to review the State's motion or to prepare to address it before the end of the business day.

An *ex parte* communication is prejudicial per se. It is "[t]he essence of due process is that fair notice and reasonable opportunity to be heard must be given to interested parties before judgment is rendered." *Huff v. State*, 622 So. 2d 982 (Fla.

[28]At the time the State emailed the notice of hearing and the judge emailed that she was holding a hearing at 3:15 p.m., undersigned was speaking to Asay – a phone conference that had been arranged with the prison several days previously.

1993), *quoting Scull v. State*, 568 So. 2d 1251, 1252 (Fla. 1990). As this Court has observed:

> No matter how pure the intent of the party who engages in such contacts, without the benefit of a reply, a judge is placed in the position of possibly receiving inaccurate information or being unduly swayed by unrebutted remarks about the other side's case. The other party should not have to bear the risk of factual oversights or inadvertent negative impressions that might easily be corrected by the chance to present counter arguments.

Rose v. State, 601 So. 2d 1181, 1183 (Fla. 1992).

Asay requests that this Court reverse and remand so that he can he can obtain full and fair Rule 3.851 proceedings, *see Holland v. State*, 503 So. 2d 1250 (Fla. 1987), including the fair determination of the issues by a neutral, detached judge. The aforementioned circumstances of this case are of such a nature that they are "sufficient to warrant fear on [Asay's] part that he would not receive a fair hearing by the assigned judge." *Suarez v. Dugger*, 527 So. 2d 191, 192 (Fla. 1988).

ARGUMENT II

THE CIRCUIT COURT ERRED IN DENYING ASAY AN EVIDENTIARY HEARING AS TO HIS NEWLY DISCOVERED EVIDENCE CLAIM, HIS *BRADY* CLAIM, AND HIS *STRICKLAND* CLAIM. ASAY IS ENTITLED TO RELIEF ON HIS NEWLY DISCOVERED EVIDENCE CLAIM UNDER *HILDWIN V. STATE*, AND HE IS ENTITLED TO RELIEF ON HIS *BRADY* CLAIM AND *STRICKLAND* CLAIM UNDER THE CUMULATIVE ANALYSIS REQUIRED BY *KYLES V. WHITLEY*.

A. INTRODUCTION

In his consolidated 3.851/3.800(a) motion as amended, Asay presented a newly discovered evidence claim under *Jones v. State*, 591 So. 2d 911 (Fla. 1991), as Claim I, and *Brady v. Maryland*, 373 U.S. 83 (1963) and/or *Strickland v. Washington*, 466 U.S. 668 (1984) claims as Claim IV. Asay sought an evidentiary hearing on

these claims, but the circuit court summarily denied both Claim I and Claim IV without permitting Asay to present the evidence on which these claims were premised.

Because this Court's jurisprudence requires cumulative consideration of newly discovered evidence claims premised upon *Jones v. State* with *Brady* and *Strickland* claim, Asay has in this appeal presented his arguments as to Claim I and Claim IV of his consolidated motion within this one argument. *Hildwin v. State*, 141 So. 3d 1178 (Fla. 2014).[29]

Under rule 3.851, a postconviction defendant is entitled to an evidentiary hearing unless the motion and record conclusively show that the defendant is entitled to no relief. *See* Fla. R. Crim. P. 3.851(f)(5)(B); *Peede v. State*, 748 So. 2d 253, 257 (Fla. 1999); *Gaskin v. State*, 737 So. 2d 509, 516 (Fla. 1999). This means that the facts alleged by Asay must be accepted as true in determining whether the he is entitled to an opportunity to present evidence in support of his factual allegations. *Lightbourne v. Dugger*, 549 So. 2d 1364 (Fla. 1989). Factual allegations in support of a claims for relief as well as on the issue of diligence must be accepted as true. An evidentiary hearing is required if the claims involve "disputed issues of fact." *Maharaj v. State*, 684 So. 2d 726, 728 (Fla. 1996). As to a successive postconviction motion, allegations of previous unavailability of new the facts, as well as of movant's diligence, are to be accepted as true and require evidentiary

[29]This Court has required *Brady* and *Strickland* claims to be evaluated cumulative. *Parker v. State*, 89 So. 3d 844 (Fla. 2011).

development so long as not conclusively refuted by the record. *Card v. State*, 652 So. 2d 344, 346 (Fla. 1995).

Within this argument, Asay first identifies the factual allegations on which his *Jones v. State*, *Brady* and *Strickland* claims were premised as well as the factual allegations as to his diligence. He then argues present his arguments that when the proper standard is applied to his claims, it is apparent that the circuit court erred in denying these claims without conducting an evidentiary hearing.

B. NEWLY DISCOVERED EVIDENCE ESTABLISHES THE JURY HEARD UNRELIABLE AND MISLEADING TESTIMONY THAT BULLETS REMOVED FROM MCDOWELL MATCHED THE BULLET REMOVED FROM BOOKER AND THAT TO A ONE HUNDRED PERCENT CERTAINTY THEY WERE FIRED BY THE SAME GUN

Within 14 days of counsel's appointment in Asay's case, Asay presented the circuit court with newly discovered scientific evidence that demonstrates that Warniment's testimony that he could state with one hundred percent certainty the same gun was used to shot and kill both McDowell and Booker was unreliable. During the ten year period that Asay was denied his statutory right to state court registry counsel, scientific developments undercut Warniment's testimony and any scientific basis for what is now known as subjective junk science. From his cell on death row, Asay did not have the means or wherewithal to develop a newly discovered evidence claim based on new scientific information.[30] Once counsel was appointed, Tobin was contacted.

[30]In the circuit court's order summarily denying the newly discovered evidence claim, Judge Salvador ruled that Asay sitting in his death row cell without state court counsel was not diligent in learning of the scientific advancements in the area

Tobin reviewed the testimony and evidence in Asay's case and advised counsel that Warniment's testimony was scientifically unsound and was merely unproven subjective opinion.

First, what was not known at the time of Asay's trial in 1988, was that firearms identification lacked scientific reliability and validity. Warniment testified with unqualified certainty that the bullet recovered from Booker and the bullets recovered from McDowell were fired from a specific gun to the exclusion of all others; he said there were "unique patterns" to the bullets that could only originate from a single source. However, due to new scientific information that was not available at the time of trial we now know that in his testimony, Warniment overstated the significance of the similarities between the bullets, based his conclusion on subjective scientifically unproven opinion and in so doing, mislead the jury. Further, it is now clear that such purely subjective testimony does not even meet the standards for admissibility. *See Ramirez v. State*, 810 So. 2d 836 (Fla. 2001); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).[31]

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and presenting his challenge to Warniment's testimony sooner. Judge Salvador did not explain what a death row inmate can do to investigate scientific advancements from a cell on death row. Her conclusion flies in the face of this Court's opinion in *Waterhouse v. State*, 82 So. 3d 84 (Fla. 2012).

[31]In *Daubert*, the US Supreme Court explained the standard that it was adopting:

> Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or

Warniment's announcement that he found a match was the basis that the McDowell and Booker homicides were linked in the first place. Until Warniment said there was a match, the two homicides were viewed by the police as unrelated.

> determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue. We are confident that federal judges possess the capacity to undertake this review. Many factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test. But some general observations are appropriate.
>
> Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested. "Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry." Green 645. *See also* C. Hempel, Philosophy of Natural Science 49 (1966)("[T]he statements constituting a scientific explanation must be capable of empirical test"); K. Popper, Conjectures and Refutations: The Growth of Scientific Knowledge 37 (5th ed. 1989) ("[T]he criterion of the scientific status of a theory is its falsifiability, or refutability, or testability")(emphasis deleted).
>
> Another pertinent consideration is whether the theory or technique has been subjected to peer review and publication. * * *
>
> Additionally, in the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error, see, e.g., *United States v. Smith*, 869 F.2d 348, 353–354 (CA7 1989) (surveying studies of the error rate of spectrographic voice identification technique), and the existence and maintenance of standards controlling the technique's operation, *see United States v. Williams*, 583 F.2d 1194, 1198 (CA2 1978)(noting professional organization's standard governing spectrographic analysis), cert. denied, 439 U.S. 1117, 99 S.Ct. 1025, 59 L.Ed.2d 77 (1979).

Daubert, 509 U.S. at 592-94.

Similarly at trial, Warniment's testimony was the lynchpin linking the two cases. At Asay's trial, his brother, Robbie testified that he had driven to 6th and Laura when a black male approached his vehicle (R. 558). As they were discussing the possibility that the black male could arrange for three prostitutes, his brother and Bubba arrived (R. 573).[32] Asay got out of his vehicle and he and the black male argued. Robbie heard a shot **though he did not see Asay shoot the black male** (R. 575) (emphasis added). Just as significant was Robbie's further testifimony that Booker was not the black man "that came up to [his] truck" (R. 591), and; that Booker was not the man that he had spoken with and that Asay was speaking to at 6th and Laura when a shot was fired (R. 592). Robbie was certain because he recalled that the man with whom he spoke had a full head of hair, unlike Booker (R. 592). While Asay's other brother, Bubba, described the shooting in his testimony, he did not identify the victim of the shooting as Booker (*see* R. 488-550).

Despite Robbie's unequivocal testimony that Booker was not the individual with whom Asay had been speaking with when the shot was fired, the State presented the testimony of Warniment. Warniment's purpose was to link the shooting of Booker to the shooting of McDowell, because there was no direct evidence that Booker was in fact the victim of the shooting observed by Robbie and Bubba. Warniment testified that he compared the four (4) bullets obtained from McDowell with the single bullet obtained

[32]During the investigation, law enforcement found no evidence that Booker was a pimp.

from Booker (R. 724). Warniment testified:

> A: ...What I look for is a pattern of microscopic marks which appear on the surface of the bullets which are caused by the passages of a bullet through a barrel. These microscopic marks form a pattern which repeat from shot to shot when fired from the same barrel, and by recognizing that pattern I can form an opinion as to whether or not they were fired by the same weapon.
>
> Q: So every gun has got like a distinguishing mark that it leaves on a certain bullet?
>
> A: Not necessarily a single distinguishing mark, but each barrel – the surface of each barrel is unique, and it leaves a unique pattern of microscopic patterns on the surface of the bullets.
>
> Q: And can you exclude the fact that some bullets are not fired from the same gun, in other words?
>
> A: Sometimes. It is easier to identify a bullet, because you are finding a correspondence of this pattern rather than eliminating a firearm, because some bullets change from shot to shot, and so in elimination you have to look at other characteristics because of the amount – you look at the amount of differences noted.

(R. 724-25).

Warniment testified that the four bullets from McDowell "came from the same firearm" (T. 725). Further, the single bullet from Booker "was fired from the same weapon as the four bullets" (T. 726). Critically, Warniment testified that he was **"100 percent positive that [all of the bullets] were fired from the same weapon."**[33] (R. 732) (emphasis added).

Warniment then testified about the types of firearms that

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[33]The State conceded at the February 1st, case management hearing that the new scientific evidence meant that Warniment "certainty would go down" (PC-R2 983). In other words, the State concedes that new scientific evidence demonstrates that Warniment's testimony was misleading and overstated the significance of his claim that there was a match.

could have discharged the bullets, or what was the “likely weapon” (R. 726-7). Warniment testified that he made a list of the possible weapons, but conveniently for the State only mentioned in his testimony the Raven semi-automatic .25 (R. 727). Warniment said that the Raven was semiautomatic (R. 727-8). In conjunction with Warniment’s testimony, the State presented evidence that Asay’s girlfriend had recently purchased a .25 caliber semiautomatic Raven revolver (R. 473). Though the girlfriend did not provide a statement and the gun was never located, the State argued that from Warniment’s testimony that it should be inferred that Asay took possession of the weapon.

Warniment’s testimony was highly speculative, misleading unreliable, and should now be recognized as inadmissible. According to Tobin, an experienced metallurgist, the testimony provided by Warniment was “objectionable as unfounded” as well as “misleading, speculative and exaggerated” (PC-R2 627-28). Tobin maintains that the premise of “uniqueness” necessary for firearms identification, which was subscribed to by Warniment in his testimony, has never been established to exist (PC-R2 591-93). Warniment expressed complete certainty in his opinion, i.e., he was “100 percent” certain that the bullets originated from the same firearm. But we now know that his opinion was pure speculation with absolutely no basis in research or experience.

Tobin reports that the process or method used by firearms experts to compare bullets to firearms and bullets to bullets is completely speculative. Specifically, he describes the “pattern-matching process” which requires an examiner to distinguish

between class, subclass and individual characteristics (PC-R2 596-98). However, while examiners are certainly able to distinguish class characteristics, caliber, the number and direction of lands and groves on a bullet, the distinction between subclass and individual or "unique" characteristics are indistinguishable (PC-R2 598-99). This fact makes it impossible to match or conclude that particular bullets originated from the same firearm or "single source" and means Warniment's testimony was subjective junk science. *Ramirez v. State*.

Further complicating matters in Asay's case, is the fact that no weapon had been recovered. In what is characterized as a "no gun recovery" case, the individual or "unique" characteristics to which an examiner testifies are based entirely on the assumption that they are individual and not subclass characteristics (PC-R2 585-86). As Asay pled in his consolidated motion: "Without the firearm from which the bullets were fired, Warniment could not have had any knowledge concerning how the firearm was manufactured or what population of firearms existed in the area with which a comparison could have been made." (PC-R2 133). Tobin reports that Warniment's identification of a specific firearm as firing the bullets, when numerous types of firearms could have been used was highly misleading.

Thus, on the basis of the information provided by Tobin and his conclusion after reviewing Warniment's testimony, Asay pled a newly discovered evidence claim under *Jones v. State*, 591 So. 2d 911 (Fla. 1991), that newly discovered scientific evidence now demonstrates that Warniment's testimony was not scientifically

sound and was not admissible under the proper standards for the admissibility of expert testimony.

C. THE STATE FAILED TO DISCLOSE, OR TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PRESENT, EXCULPATORY EVIDENCE RELATING TO AN ALTERNATIVE SUSPECT AND OTHER CIRCUMSTANCES SURROUNDING THE CRIMES

Asay also pled a *Brady-Strickland* claim in Claim IV of his amended consolidated motion. This was pled after Asay received on January 26, 2016, at approximately 8PM, hundreds of pages of records from JSO. Within those records were pages of handwritten notes and information concerning leads and alternative suspects in the investigation. Many of the notes and materials relate to the investigation of Pough and contain information favorable to Asay. When counsel reviewed and investigated these pages of handwritten notes, it became apparent that these materials had not been provided to Asay before. They were not in the files and records that Asay received in January of 2016 from the State Attorney's Office.

When counsel spoke with prior collateral counsel, Stephen Kissinger, he indicated that he could state with confidence that he had not been previously provided with handwritten notes and records concerning JSO's investigation of Roland Pough (PC-R2 530-31). The handwritten notes contain qualitatively different information regarding Pough that appeared in the homicide continuation report dated July 31, 1987.

The handwritten notes show that a few days after Booker was shot, law enforcement learned that an individual with the street name "Yankee" had information relating to the crime. Yankee said

he knew that Booker had been shot during a drug deal.[34] "Yankee" identified Roland Pough as having shot Booker (PC-R2 1166). And, Pough was known to carry a .25 caliber automatic firearm. A CI advised the police on July 23 that "Rowland" shot Booker during a drug deal. The CI also advised that a drug deal involving "Rowland" was going down at 4PM that on the 23rd (PC-R2 770, 773, 1111, 1132). According to police notes, the CI that provided the information about Pough was characterized as "reliable" (PC-R2 1124).[35] Pough was considered a suspect in the murder of Booker.

Indeed, the CI told law enforcement that a drug deal was set-up for July 23, 1987, near Pough's residence[36], and Pough was expected to have his firearm, which was characterized as "a possible murder weapon". Law enforcement went to the scene where the drug deal was going to occur and attempted to arrest Pough. Pough physically resisted arrest and ran from the scene. During the chase that ensued, law enforcement officers believed that a shot had been fired. Ultimately, Pough was shot, apprehended and taken to the hospital. Law enforcement did not locate a firearm. During the subsequent investigation, it was determined that the shooting was unjustified.

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[34]The toxicology analysis of Booker's blood reflected that he had cocaine in his system at the time of his death.

[35]In fact, Housend had previously relied upon the CI in other investigations. And, the CI had "given accurate and truthful testimony in sworn court appearances on numerous occasions" (PC-R2 1124).

[36]According to the CI, Booker's shooting also took place outside of Pough's residence which was a little over three blocks from where Booker's body was found.

Selwyn Hall gave a sworn handwritten statement on July 23, 1987, in which he swore that Pough had told him that on Friday night, July 17th, that he, Pough, shot a black man who ran away afterwards. The shooting occurred about three blocks from where Booker's body was found.[37]

Handwritten notes also indicate that the police were also provided information that an individual named "O.J." knew that Pough shot Booker.

The victim's sister and brother also provided pertinent information. Shortly after the victim's body was discovered, his sister, Willie Mae Gardner, told law enforcement that he had been "cut up" on Beaver and Davis. Law enforcement's notes do not indicate when Booker had been "cut up" or why. And, on July 28, 2016, Frank Booker, the victim's brother, informed Housend that

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[37]Hall's sworn handwritten statement that provided:

> On 23 July 87 at approx 1:25 p.m. I Selwyn A. Hall advised Det. Housend the following information . . .
>
> An acquaintance of mine "Roland" said that last Friday night he had shot a black male during what he said was a robbery attempt at 1418 N. Market St. in his side yard. "Roland" said he was shot in the right arm, and that he (Roland) shot at the B/M four or five times. Roland said he knew for sure he hit the B/M once. The B/M then ran away. Roland has a .25 cal auto pistol crome plated with brown handle. I Selwyn A. Hall have seen Roland carry this pistol many times. I Selwyn A. Hall don't think Roland ever goes without it. Three weeks ago, Roland asked me to buy some bullets for him, and I couldn't find any. Roland got some from his brother. I Selwyn A. Hall have bought crack cocaine from Roland on several occasions. I Selwyn A. Hall know for a fact that approx thirty or more people buy their crack from Roland. This is a true and accurate statement.

(PC-R2 at 792, 1161).

the victim had been robbed a week before being killed and that when the victim retaliated, he was killed. This information was consistent with what had been learned during the investigation of Pough.

The investigation of Pough was initially suspended because he was hospitalized after being shot by the police. But after Warniment claimed that the bullets matched, the investigation into Pough's claim that he shot a black male on Friday, July 17th, was dropped.

The evidence against Pough was certainly substantial enough (even before Hall's sworn statement), to attempt to arrest Pough and question him about the Booker homicide. However following Warniment's claimed match, the official continuation report omitted any details of Hall's sworn statement or the other evidence implicating Pough in Booker's homicide. At Housend's deposition, he indicated that the lead turned out to be a "dead-end". *See* PC-R2 681-2 ("So by the bullet comparison, by them matching, we knew the same one that shot and killed McDowell at 16th and Main was actually the one that shot and killed Booke."); PC-R2 682 ("The main reason we ruled him out was because, you know he – because of the bullet comparison.").

But, of course, it is now clear that the testimony concerning the firearms identification and "match" of the bullets is misleading, scientifically unreliable and inadmissible. Thus, the value of the Pough information to Asay's defense has been greatly enhanced.

Indeed, this information combined with the timeline provided

by the State's evidence substantiates the notion that Booker was shot before Asay arrived in the Springfield area. According to Joseph Knight, the individual who found Booker's body, he heard a gun shot between 12 and 2AM. Shortly thereafter, Booker ran by and said he had been shot. Knight and another individual walked behind the house where the victim had ran, but could not locate him due to the darkness. During his initial interview Knight made clear that it was between 12 and 2AM Knight's earlier time of 12AM. was consistent with Ollie Thomas' statement that the shot occurred between 11PM and 12AM. However, at Housend's deposition, he testified that Knight saw Booker run by at approximately 2AM, leaving out the earlier time. Neither Knight nor Thomas testified at Asay's trial. Housend's testimony was misleading.

And, according to Robbie and Bubba, the two of them and Asay did not leave Brinkman's until closing at 2AM. They then drove downtown and to the Springfield area which would have making it impossible for Asay to have shot Booker by 2AM.

In addition to the investigation of Pough, there was much more about the shooting of Booker than was ever revealed to Asay: Originally, the identity of the victim was not known and the records received from JSO demonstrate that just months before trial, Booker's identity was uncertain.

When the body was found on July 18th the name Thomas John Henningan and date of birth of January 6, 1956, was supplied to law enforcement, though there is no explanation as to why Hennigan was thought to be the victim. Shortly thereafter, Booker's niece identified the victim as Robert Lee Booker.

Robert Lee Booker.

On May 25, 1988, police sought to photograph a vehicle allegedly belonging to "James Johnson".[38] A few days later, on May 27th, police continued to refer to the victim as "James Johnson". Whether the State ever determined the true identity of the victim is uncertain.[39]

D. THE CIRCUIT COURT ERRONEOUSLY DENIED ASAY'S CLAIMS

1. The Circuit Court ignored the Standard for an Evidentiary Hearing

The circuit court did not mention the standard required for an evidentiary hearing in either the order from the case management conference or the order denying Asay's motion (PC-R2 519, 525-67). Rather, the circuit court imposed a more demanding standard, suggesting that Asay was required to prove his claims before even presenting evidence. For example, the circuit court indicated that Asay's claims were speculative (PC-R2 542), and ignored the fact that newly discovered evidence relating to the firearms identification totally undermined the evidence heard by the jury. That fact is not speculative. Particularly when considered cumulatively with the other favorable evidence that

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[38]The suspect of the homicide of "James Johnson" was listed as Robert Lee Booker.

[39]And, it is worth noting, particularly in light of Asay's newly discovered evidence claim, that the JSO records reflect that Willie Joe Bradshaw owned a Raven automatic firearm. The significance of this fact is that it undermines the evidence that the State presented concerning Asay's alleged possession of a Raven firearm, which was purchased by his girlfriend. Clearly, multiple people involved in the investigations owned firearms that could have discharged the bullets obtained from the crime scenes.

would be admissible at a new trial as is required under the proper analysis mandated by this Court in *Swafford v. State*, 125 So. 3d 760 (Fla. 2013).

The evidence relating to suspect Pough which must be evaluated with Tobin's affidavit under *Swafford* is not speculative. Pough was a suspect in Booker's homicide. Police characterized him as such and believed that the firearm Pough was known to carry was the murder weapon. It is also not speculative that Housend provided an explanation during his deposition as to the information about Pough being a "dead-end" that is not supported by the JSO records.

Likewise, also in conjunction, the firearms identification information and information relating to Pough's suspected involvement in Booker's homicide, along with all of the other information contained in Asay's successive 3.851 motion, provide more than a sufficient basis for an evidentiary hearing.

Asay met the pleading requirements; the motion and record DO NOT conclusively show that Asay is entitled to no relief.

2. Tobin's Conclusions Constitute Newly Discovered Evidence

a. case-specific acknowledgments of unreliable or unscientific evidence constitutes

Within days of being appointed to Asay's case and learning of the flawed ballistics testimony that was presented to Asay's jury, Tobin, an experienced metallurgist with extensive knowledge in firearms identification, was asked to review the testimony of Warniment and records relating to his analysis of the bullets recovered from the victims. After the review, Tobin concluded

that Asay's jury heard highly misleading and unreliable testimony, which, in fact, should now be found inadmissible under *Ramirez*. Tobin provided specific information about the flaws in the analysis and conclusions made by Warniment.

In *Wyatt v. State*, 71 So. 3d 86, 99 (Fla. 2011), this Court held that the trigger date for a newly discovered evidence claim relating to unreliable forensic evidence was the date from which a "case-specific" letter discrediting the forensic evidence was provided to the defendant. In *Wyatt*, the forensic area concerned comparative bullet lead analysis (CBLA), and the case-specific letter originated from the FBI due to the Department of Justice's (DOJ), review of prior FBI case work and testimony in cases throughout the country. *Id*. In Asay's case, because, the FDLE conducted the firearms identification analysis and not the FBI, his case was only subject to review when he submitted the information to a qualified expert, like Tobin, and obtained a case-specific opinion.[40] Therefore, Tobin's opinion constitutes

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[40]The DOJ has sought to notify defendants of flawed firearms identification evidence. On May 6, 2013, on the eve of the execution of Willie Manning in Mississippi, DOJ acknowledged the serious, long standing flaws of firearms examinations and identification when it issued a letter identifying an error in Manning's conviction:

> The science regarding firearms examinations does not permit examiner testimony that a specific gun fires a specific bullet to the exclusion of all other guns in the world. The examiner could testify to that information to a reasonable degree of scientific certainty, but not absolutely. Any individual association or identification conclusion effected through this examination process is based not on absolute certainty but rather a reasonable degree of scientific certainty. As with any process involving human judgement, claims of infallibility or

qualifying newly discovered newly discovered evidence under *Jones v. State* which must be evaluated in conformity with *Swafford v. State* and *Hildwin v. State* with all the other favorable evidence now known which would could be presented, either as substantive evidence or as impeachment, at a new trial.

In holding to the contrary, the circuit court largely relies on *Foster v. State*, 132 So. 2d 40 (2013). However, *Foster* reinforces the holding in *Wyatt* – that the NAS reports of 2008 and 2009 do not constitute newly discovered evidence because they do not provide information holding that "forensic techniques used in this case unreliable." *Foster v. State*, 132 So. 2d at 72. Thus, it is incumbent on the defendant to obtain "case-specific" information showing that the analysis and testimony in his case is unreliable – which is exactly what Asay did once he had state court registry counsel in place, but which he could not do in the ten year period he was left without state court registry counsel.

Further, this Court rejected Foster's ineffective assistance of counsel claim as to the failure to challenge the admissibility of the firearms identification evidence because "Foster's claim is conclusory and unspecific, and fails to allege any fact that support his allegation that the tool mark and firearms testimony by Hornsby was unreliable" *Id*. at 69. However, Asay cited specific facts establishing that the testimony by Warniment was unreliable, as well as providing a plethora of information as to why the firearms identification methodology is deeply flawed.

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impossibility of error are not supported by scientific standards.

In addition, Tobin is not merely a more favorable expert, but rather is the expert who has taken the advancements and acknowledgments that have occurred in the scientific community regarding firearms identification and linked those new developments specifically to Asay's case. Tobin's scientific opinion constitutes qualifying new evidence.

The circuit court also sought to distinguish this Court's decision *Ramirez v. State*, where this Court held:

> In each of the three successive murder trials in the present case, police crime technician Robert Hart made the extraordinary claim that his newly formulated knife mark identification procedure was infallible. He contended that he could identify the murder weapon to the exclusion of every other knife in the world-even if there had been two million consecutively produced knives of the same type-based on a striation "signature" arising from microscopic imperfections in the steel of the blade. The trial court in all three trials admitted expert testimony based on Hart's testimony, and Ramirez each time was convicted of first-degree murder and sentenced to death.
>
> Our review of the record convinces us that under the general acceptance test of Frye, the State has failed to prove that the testing procedure used to apply the underlying scientific principle to the facts has gained general acceptance in the field in which it belongs.
>
> In sum, Hart's knife mark identification procedure-at this point in time-cannot be said to carry the imprimatur of science. The procedure is a classic example of the kind of novel "scientific" evidence that Frye was intended to banish-i.e., a subjective, untested, unverifiable identification procedure that purports to be infallible. The potential for error or fabrication in this procedure is inestimable. In order to preserve the integrity of the criminal justice system in Florida, particularly in the face of rising nationwide criticism of forensic evidence in general, state courts-both trial and appellate-must apply the Frye test in a prudent manner to cull scientific fiction and junk science from fact. Any doubt as to admissibility under Frye should be resolved in a manner that minimizes the chance of a wrongful conviction, especially in a capital case.

Ramirez, 810 So. 2d at 853. The circuit court, without conducting an evidentiary hearing, said that this Court determined that evidence in *Ramirez* was inadmissible in light of the expressed infallibility of the tool mark examiner (PC-R2 542), seemingly ignoring the fact that Warniment also testified to the same "infallibility" in the firearms identification in Asay's case, i.e. he was "100 percent positive that [all of the bullets] were fired from the same weapon." (R. 732). The circuit court's analysis failure to get that Warniment's testimony here is subject to exactly the same analysis that this Court used in *Ramirez*. As further explained by Tobin, the same rationale that this Court employed for finding the tool mark identification testimony in *Ramirez*, is present in Asay's case. The circuit court's analysis is erroneous. At a minimum, an evidentiary hearing should have been ordered.

b. diligence

In addition, while finding that the 2008 and 2009 NAS reports, and the DOJ's 2013 letter in the Manning case do not constitute newly discovered evidence, which was not and is not Asay's argument, the circuit court makes an illogical shift and concludes that Asay was not diligent in filing his claim because of the existence of the 2008 and 2009 NAS reports and the DOJ's 2013 letter (PC-R2 541)("Defendant seeks to circumvent the one-year time bar for the instant claim by arguing the newly-discovered evidence is the testimony from Mr. Tobin, not the new opinions or research studies upon which the opinion is premised."). Thus, it was not until the information contained in

the reports were linked to Asay's case that the information rose to the level of newly discovered.

And, as the circuit court recognized, Asay was unrepresented in the state courts from May 9, 2005 until January 13, 2016. Thus, during the decade when the NAS, DOJ and the scientific community at large determined that firearms identification analysis and conclusions drawn therefrom was seriously flawed and had significant limitations, Asay was unrepresented and had no opportunity to obtain the information and link it to his case in order to meet the "case-specific" requirement set forth in *Wyatt*.

Moreover, the circuit court's finding that Asay had no right to be represented by state court counsel until 2014, when this Court promulgated Rule 3.851(b)(6), is erroneous as a matter of law.[41] In 1985, the Florida Legislature created the Capital Collateral Representative (CCR), in order to provide representation to indigent death-sentenced inmates whose direct appeal proceedings have terminated. A few years later, and 25 years before Rule 3.851(b)(5), in *Spalding v. Dugger*, 526 So. 2d 71, 72 (Fla. 1988), this Court recognized that under the statute "each defendant under a sentence of death is entitled, as

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[41]**It is absolutely shocking to undersigned counsel for a circuit court judge in this State to be unaware that a right to state provided collateral counsel was established thirty-one years ago after the executions of James Agan and Robert Waterhouse were stayed because they were unrepresented by counsel and the Office of the Capital Collateral Representative was created to insure that every death row inmate has collateral representation at all times.** Yet, that was the ruling by Judge Salvador in her February 1, 2016 order, i.e. it was this Court that first created the right in 2014 when Rule 3.851(b)(6) was promulgated.

statutory right to effective legal representation by the capital collateral representative in all collateral relief proceedings." *See also State v. Kilgore*, 976 So. 2d 1066, 1068 (Fla. 2007) ("Florida has an explicit statutory scheme in place to provide postconviction counsel to all capital defendants ..."). This Court also stated:

> The legislature established the statutory right not only in recognition of the appropriateness for all death-sentenced prisoners to have counsel in collateral relief proceeding, but also to avoid the attendant problems of determining the need to appoint counsel and the utilization of volunteer counsel, including the resulting delays in the process.

Spalding v. Dugger, 526 So. 2d at 72.

Likewise, in 1999, the Florida Legislature enacted legislation to provide supplemental private counsel for capital collateral defendants and specifically mandated that courts "shall monitor the performance of assigned counsel to ensure that the capital defendant is receiving quality representation." *See* Fla. Stat. 27.711(12).

Asay was originally represented by CCR and its successor counsel the Capital Collateral Counsel for the Northern Region (CCC-NR). When the Legislature defunded CCC-NR, effective July 1, 2003, Asay was provided registry counsel, pursuant to Fla. Stat. §§ 27.710 and 27.711. Pursuant to § 27.711(8), registry counsel agreed to represent Asay "until the capital defendant's sentence [was] reversed reduced, or carried out". Also, § 27.711(8) makes clear that successor counsel must be appointed and "shall" obtain the files and records from prior counsel.

Furthermore, the notion that federal court counsel (Mary

Catherine Bonner, John Mills[42] and Thomas Fallis[43]), were representing Asay for purposes of anything but litigation on his federal habeas petition is equally factually and legally erroneous. Indeed, as recently litigated before this Court in *Merck v. State*, Florida Supreme Court Case No. SC15-1439, the State has taken the position that federal court counsel is not authorized to represent capital defendants in state court, unless appointed to so. In *Merck*, federal court counsel, who was authorized by the federal district court to exhaust a claim on behalf of her client, filed a successive Rule 3.851 motion on his behalf. The State convinced the circuit court to strike the motion.[44] This Court then dismissed an appeal without prejudice for federal CJA counsel to seek substitution of counsel in the circuit court, pursuant to *Suggs v. State*, 152 So. 3d 471 (Fla. 2014). *See Merck v. State*, Case No. SC15-1439, Order dated Jan. 28, 2016.

Clearly, Asay was entitled to state court counsel long before 2014; federal court counsel did not suffice to fulfill Asay's statutory right. The denial of counsel violated Asay's right to due process and certainly caused him prejudice because until January 13, 2016, Asay did not have counsel to investigate

[42]Mills represented Asay only as to the issue of equitable tolling. When contacted, Mills had no files or records concerning Asay's case and had limited knowledge of the substantive issues.

[43]Fallis was appointed July 14, 2010, as CJA Counsel to litigate the petition for writ of habeas corpus. Fallis had no intention, and no authority to represent Asay in state courts.

[44]Co-counsel in Asay's case, Linda McDermott, is federal court counsel for Merck.

and present any claim arising in the wake of the 2008 or 2009 NAS reports if interpreted to trigger some obligation on Asay's part to raise the claim concerning the unreliability of firearms identification. Under the circumstances, Asay must be found to have been diligent.

c. the impact of the firearms identification evidence

The circuit court also finds that Asay has not met his burden of showing that the evidence probably would produce an acquittal on retrial, or as this Court has explained that the evidence "weakens the case against [the defendant] so as to give rise to a reasonable doubt" as to guilt or as to moral culpability." *Jones v. State*, 709 So. 2d 512, 526 (Fla. 1998). In so finding, the circuit court points to several other pieces of evidence from the trial, and ignores all of the evidence presented at Asay's initial postconviction hearing and the facts included in his successive motion to vacate as it was legally required. *See Hildwin v. State*, 141 So. 3d 1178 (Fla. 2014); *Swafford v. State*, 120 So. 3d 760 (Fla. 2013). The qualifying newly discovered evidence must be evaluated cumulatively with all favorable evidence, even favorable evidence that has previously been procedurally barred, to determine whether a retrial and/or resentencing a different outcome is likely.[45]

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[45]The facts surrounding Gross' statements made to postconviction counsel were barred due to prior postconviction counsel's (Kissinger) failure to adequately present the claim to the state courts. *See Asay v. State*, 769 So. 2d 974, 982 (Fla. 2000). Now, that information must be considered in conjunction with all of the admissible evidence in Asay's case. *Id.* at 983 ("Taking Asay's allegations as true, Gross testified falsely that Asay had confessed to him and that Asay had shown him tattoos of

In its order, the circuit court says that Warniment was extensively cross-examined (PC-R2. 544). However, a review of the record makes clear that Warniment maintained his "infallibility" on cross and was never asked about individualization or subclass characteristics. He was never asked about production rates, the other brands of firearms that could have been used to fire the bullets (despite the fact that records reflect several possible brands), false positives, proficiency testing or the subjectivity of his analysis. He was never confronted with Tobin's information which establishes that the analysis and testimony presented to the jury was scientifically unsound. His hundred percent certainty was left as fact and argued by the State as conclusive.

The circuit court also relies on the medical examiner's testimony that the same caliber of bullets was used to shoot Booker as McDowell, Booker's injuries were corroborated by Robbie and Bubba's accounts of what occurred and that the time of death was around 2AM (PC-R2 545). Of course, as to the similarity of the caliber of bullet, no evidence is before the circuit court as to the commonality of .25 caliber bullets in the Jacksonville area in July, 1987. Much like the firearms identification testimony, the similarity is meaningless.[46]

And, Floro also testified about the 45 degree angle that the

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a swastika, 'white pride,' and 'SWP.'").

[46]Moreover, according to reports, Pough was known to carry a .25 caliber firearm and asked Hall to obtain bullets for him. And, Willie Joe Bradshaw, one of the individuals who described the pick-up truck last seen with McDowell owned a Raven automatic firearm. Clearly, firearms that used .25 caliber bullets were not uncommon in the Springfield area.

bullet traveled and indicated that there were many possibilities as to how the angle occurred. Indeed, in closing arguments Asay's trial counsel argued that such an angle was impossible if Bubba's description of the shooting was credible; trial counsel told the jury that the angle was more consistent with the victim being in a lower position than the person who shot him, like Bubba shooting from the pick-up truck.

Floro also indicated that Booker's wound would have bled a lot (R. 424), but according to Housend, there was no blood or anything in the area where Booker was found (PC-R2 669).

As to the time of death of "around 2:00 a.m.", Floro originally opined that the time of death was 4AM. The circuit court ignores this inconsistency, though Asay relied on it in his motion for relief. Further, Knight believed that the shot he heard and the victim he saw occurred between 12 and 2AM, which if true, would make it impossible for Asay to have shot Booker, since by all accounts he did not leave Brinkman's until closing at 2AM, and still had to travel to the Spingfield area. Knight's timeline was not accurately presented during Housend's deposition when he testified that Knight said that the shot occurred around 2AM, only.

The circuit court references that Robbie Asay purchased a .25 caliber pistol on June 12, 1987, but never indicates the relevance of this fact (PC-R2 545). Robbie never testified or indicated that Asay took possession of his firearm on July 18, 1987. And, though Bubba said he saw Asay shoot a black male near 6th and Laura Street, he could not identify Booker as the man.

Though Pace and Patterson saw a man run by them at about 2AM, neither one saw what had happened to the man, i.e., if he was shot and by whom, or where he ended up. And, the timeline they provided conflicts with that of Robbie and Bubba.

The circuit court also briefly references Charlie Moore, Danny Moore and Thomas Gross – all of the individuals who testified that Asay made statements to them about the shootings on July 18th (PC-R2 547). Beyond the impeachment from trial and presented at the initial postconviction evidentiary hearing, the obvious flaw in the circuit court's reliance on this testimony is that none of the individuals could identify Booker as being the individual that was shot near 6th and Laura Street when Robbie was speaking to a black male, that he categorically claimed was not Booker.

None of the evidence that the circuit court cites establishes that Asay shot Booker. Thus, any evidence that casts a reasonable doubt on the assumption that Asay shot Booker simply cannot fairly be characterized as inconsequential (PC-R2 548-49). Indeed, Tobin's information does not simply "impeach" Warniment (PC-R2 550), it completely refutes it. And, contrary to the circuit court's order, Warniment's testimony would not be admissible in a re-trial under *Ramirez v. State*, or under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

Likewise, the circuit court erroneously dismissed the evidence concerning Pough as "inadmissible hearsay" (PC-R2 549). Hall's sworn handwritten statement was under oath and recounted Pough's statement to him which was against penal interest. *See*

Fla. Evid. Code 90.803(18)(a). Hall's sworn statement that Pough told him that he shot a black man would be admissible at a new trial. The circuit court's ruling to the contrary is wrong. And, information concerning the abrupt suspension of the Pough investigation due to his injury caused by law enforcement would be available as impeachment of law enforcement's inadequate and incomplete investigation. *See Kyles v. Whitley*, 514 U.S. 419, 445-46 (1995)("Beanie's various statements would have raised opportunities to attack not only the probative value of crucial physical evidence and the circumstances in which it was found, but the thoroughness and even the good faith of the investigation, as well.").

3. The Notes and Reports Disclosed by JSO Demonstrate that Asay's Rights to Due Process Were Violated

On January 26th, at approximately 8PM, Asay received records from JSO. The JSO records were replete with handwritten notes containing information that was not previously disclosed. In addition, several reports and notes concerned the investigation of Pough. While Pough had been mentioned in the homicide continuation report and in Housend's depo, there was much more information contained in the various reports and statements made concerning Pough.

As to the Pough investigation, the circuit court says that Selwyn Hall's name was revealed in the homicide continuation report, which the circuit court accessed by opening attachments to an email to Asay's counsel; the report was extra record and not properly before the circuit court (PC-R2. 560-61). Based on

this incomplete reference to Hall that omitted all the details contained in his sworn handwritten statement and the fact that Asay was previously provided the homicide continuation report, the circuit court says that the evidence was not suppressed and "*all* of the evidence at issue was equally accessible to both parties."[47]

In *Waterhouse v. State*, 82 So. 3d 84 (Fla. 2012), in the context of a newly discovered evidence claim premised upon a witness' statement made over 20 years after the homicide when the witness' name was contained in a police report, but the substance of what she had to say was not, this Court wrote:

> In *Mungin*, we did not state that defense counsel, or collateral counsel, upon receiving a police report, must presume that the report is false and thereafter independently verify every detail of the report or every statement made by a witness to the police. To place the onus of verifying every aspect of an unambiguous police report on defense or collateral counsel would not only create a substantial amount of work in a capital case, but also could be viewed as downplaying the seriousness of allegedly false police reports. Moreover, to hold that collateral counsel must investigate every aspect of a police report—even where it appears that such investigation would be fruitless—is inconsistent with a prior case where we held, in the context of an alleged *Brady* violation, that due diligence by trial counsel was satisfied even though the witness who provided the impeaching evidence had been named in a police document that was provided to defense counsel.

Waterhouse, 82 So. 3d at 103.

The circuit court's ruling here is clearly contrary to

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[47]Of course as set forth in Argument I, the fact that the circuit court went beyond the record and reviewed public records in order to deny Asay's claim was improper. *See McClain v. State*, 629 So.2d 320, 321 (Fla. 1st DCA 1993)(holding that trial court erred in summarily denying claim for relief by relying on non-record information).

Waterhouse. The fact that Hall's name was listed in a police report does not mean that a *Brady* violation did not occur. Here, Hall's sworn statement and the contents of that statement, the details that Hall provided regarding Pough's statement against penal interest, were not disclosed.

The circuit court failed to consider the fact that during his deposition Housend provided clearly misleading testimony in light of the information contained in the JSO records. During his deposition, Housend testified that the investigation of Pough turned out to be a "dead-end". Housend indicated that the firearm identification evidence caused him to abandon Pough as a suspect. (PC-R2 681-82)("So by the bullet comparison, by them matching, we knew the same one that shot and killed McDowell at 16th and Main was actually the one that shot and killed Booker."). What Housend did not reveal was that the investigation was simply suspended due to Pough's injury – an injury that was inflicted by a police officer who improperly discharged his weapon. What Housend did not reveal was that Hall had given a sworn handwritten statement detailing Pough's admission to him that he had shot a black man who ran off on the night of Friday, July 17. Despite having a sworn account of Pough's statement against penal interest, it was not revealed in any form that the investigation of Pough was just dropped solely on the basis of Warniment's claimed match. It was not simply enough that the State provided Hall's name in a report. *See Hoffman v. State*, 800 So. 2d 174, 179 (Fla. 2001)(holding that *Strickler* and *Kyles* "squarely place the burden on the State to disclose to the defendant all information in its

possession that is exculpatory.”).

Indeed, the circuit court’s determination that the Pough, Bradshaw and Charlie Moore information was equally accessible is not supported by the facts or the law (PC-R2 559, 563). The U.S. Supreme Court has made it clear that the State has an absolute obligation to provide exculpatory evidence to the defense. A rule “declaring ‘prosecutor may hide, defendant must seek,’ is not tenable in a system constitutionally bound to accord defendants due process.” *Banks v. Dretke*, 540 U.S. 668, 696 (2004).

The circuit court also concluded that Asay could not prove that a suppression of the evidence occurred due to the fact that prior postconviction counsel had obtained records from JSO (PC-R2 561-62). However, the prior postconviction record makes clear that Asay did not receive all of the JSO records. Even after the evidentiary hearing, he filed a motion to compel JSO to disclose its complete file. After prior collateral counsel had an opportunity to review the JSO records, he provided an affidavit indicating that he was confident that he had not been provided the handwritten notes, or the information relating to the investigation and arrest of Pough, other than the brief mention of Pough in the homicide investigation report (PC-R2 630-31).

Finally, as in *Rivera v. State*, 995 So. 2d 915 (Fla. 2003), “the record does not conclusively refute [Asay]’s allegations about his diligence in pursuing these claims. ... the records of the prior proceedings do not clearly establish or identify what materials were turned over to [Asay].” And, “the State has not sufficiently demonstrated that these claims are procedurally

barred as successive." *Id*. It is clear that Asay has been deprived of fully investigating and presenting his claim in a Rule 3.851 motion.[48]

The circuit court also found that Asay had not shown, at the pleading stage that the evidence relating to Pough was exculpatory (PC-R2 562). The circuit court also suggests that the witnesses who saw Booker running from 6th and Laura to 7th and Laura refute the Pough information (PC-R2. 562). As Asay has presented, no witness can testify that Asay shot Booker. In fact, Robbie, the individual who was speaking directly to the black man near his pick-up, vehemently denies that the man was Booker.

Moreover, in determining whether the evidence is material and exculpatory "courts should consider not only how the State's suppression of favorable information deprived the defendant of direct relevant evidence but also how it handicapped the defendant's ability to investigate or present other aspects of the case." *Rogers v. State*, 782 So. 2d 373, 385 (Fla. 2001). This includes impeachment presentable through cross challenging the "thoroughness and even good faith of the [police] investigation." *Kyles*, 514 U.S. at 446. And, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 446.

[48]This Court has held that evidentiary development of diligence is appropriate. *See Davis v. State*, 26 So. 3d 519, 528-9 (Fla. 2010); *Swafford v. State*, 679 So. 2d 736, 739 (Fla. 1996).

The evidence identified from the JSO records concerning Pough, Bradshaw and Charlie Moore was not disclosed to Asay. It was exculpatory as it provided the defense with information bearing on the credibility of the State's witnesses and law enforcement's investigation.

Finally, *Brady v. Maryland*, 373 U.S. 83 (1963), and *Strickland v. Washington*, 466 U.S. 668 (1984), are two sides of the same coin. On one side of the coin, *Brady* holds that the State is responsible for disclosing known exculpatory evidence, and on the flip side, *Strickland* holds that trial counsel is constitutionally ineffective for failing to investigate and utilize readily available exculpatory evidence. *See Williams v. Taylor*, 529 U.S. 362, 397-98 (2000)(holding that a court must consider "the totality of evidence, both that adduced at trial, and the evidence adduced in the habeas proceeding""); *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999), (providing the three components necessary to finding a violation of *Brady*). Where exculpatory evidence existed but was not utilized to ensure a fair trial for a criminal defendant, one of the two claims for relief must apply. Thus, the circuit court cannot simultaneously find the absence of a *Brady* violation for failure of due diligence on the part of defense counsel and then also find no *Strickland* violation. *See Rompilla v. Beard*, 545 U.S. 374, 382-83 (2005)(finding trial counsel ineffective for utilizing available records to investigate leads to assist their client).

4. The Circuit Court Failed to Conduct a Proper Cumulative Analysis of the Evidence

The circuit court refused to consider the evidence presented at Asay’s initial postconviction proceedings, holding that the claims were procedurally barred (PC-R2 551). However, this Court has repeatedly found that, when presented with newly discovered evidence claims in a successive Rule 3.851 motion, the proper standard required cumulative consideration of all of the favorable evidence presented in the collateral proceedings and, also the use of the constitutional mandated yardstick as to the constitutional claims that had been presented in collateral proceedings to determine whether Rule 3.851 relief was warranted. *See Hildwin v. State*, 141 So. 3d 1178 (Fla. 2014); *Swafford v. State*, 120 So. 3d 760 (Fla. 2013); *Smith v. State*, 75 So. 3d 2005 (Fla. 2011); *Johnson v. State*, 44 So. 3d 51 (Fla. 2010); *Rivera v. State*, 995 So. 2d 191 (Fla. 2008); *Lightbourne v. State*, 742 So. 2d 238 (Fla. 1999).

At trial, the jury was told that the firearms identification linked the homicide of Booker and McDowell with 100 percent certainty. And, though there was testimony from Bubba that Asay shot McDowell and alleged statements of various witnesses that Asay admitted to the shooting of McDowell, the evidence was inconsistent in that the alleged statements did not match and the witnesses had financial and other motivations, including benefits provided by the State.[49] Considering the testimony and errors that occurred at trial, the case against Asay has been placed in

[49]The State used the Booker homicide and its claim that Asay committed the Booker homicide to argue that McDowell homicide was premeditated.

a whole new light. Relief is warranted.

ARGUMENT III

ASAY'S DEATH WARRANT WAS SIGNED WHEN NO REGISTRY COUNSEL WAS IN PLACE TO REPRESENT HIM AND HAD NOT BEEN IN PLACE FOR OVER A DECADE. ASAY HAS BEING DENIED DUE PROCESS AND EQUAL PROTECTION UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND HIS RIGHT TO EFFECTIVE COLLATERAL REPRESENTATION UNDER *SPALDING V. DUGGER*.

A. ASAY'S CLAIM

Asay's right to the effective assistance of counsel, as well as his rights to due process and equal protection, have been denied since even before his death warrant was signed. Indeed, prior to undersigned counsel being appointed by the circuit court on January 13, 2016, Asay had been without registry counsel for the past ten years.[50]

Following undersigned counsel's appointment, it was soon learned that the thirty-three boxes of files and records that had been assembled on Asay's behalf over the course of many years were nowhere to be found.[51] Dale Westling, Asay's former registry counsel, stated that he had no records. Mary Bonner, who was appointed as CJA Counsel to represent Asay before the federal district court as to the issue of the timeliness of his § 2254 petition, stated that she provided some files to subsequent CJA

[50]Asay's prior registry counsel, Dale Westling, was permitted to withdraw from his case on May 11, 2005.

[51]Asay was represented by the Capital Collateral Counsel-North Region (CCC-NR), prior to it being abolished in 2003. The Capital Collateral Counsel-Middle Region (CCC-MR), which oversaw the closing of CCC-NR, maintained a log of the case files. James Viggiano, the current CCC-MR, who is in possession of the log, has confirmed that thirty-three boxes of files and records relating to Asay's case were provided to Westling.

counsel, Thomas Fallis, who was appointed as to the merits of Asay's § 2254 petition. Fallis stated that while he had obtained a number of boxes from Bonner, they were ultimately destroyed because of the poor condition they had been stored in.[52]

Asay's current legal team searched the index of public records maintained by the records repository, pursuant to Rule 3.852. However, none of Asay's records were ever delivered to the repository due to the fact that he had already had his evidentiary hearing when Rule 3.852 was promulgated.[53]

Counsel frantically attempted to reconstruct his files and records. Asay's records on appeal were obtained from the Department of State, Archives and Records Management Division of Library and Information Services, on January 20, 2016. Records from the Attorney General's Office and the State Attorney's Office began arriving on January 19, 2016. Records from the Department of Correction were obtained on January 19 and January 23, 2016. Ms. Bonner was able to locate some of Asay's previous

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[52]Fallis explained that he had obtained boxes of files from Bonner after he was appointed by the federal court in August, 2010. He drove to Bonner's home in south Florida. She kept Asay's files in an outdoor storage shed. He described the shed as hot and infested with snakes, rats and insects, including roaches. The files were in horrible condition. Nonetheless, Fallis said that he took approximately ten boxes of files from Bonner.

After reviewing the files more carefully, Fallis believed that they were worthless due to the condition in which they were stored. He did his best to make use of what he could. Ultimately, Fallis destroyed all of the files and records he received from Bonner in addition to the file he maintained while representing Asay.

[53]Unlike other capital postconviction defendants, Asay did not have the "back-up" of having records in the repository to replace lost or destroyed records.

records and approximately four badly damaged, mold and insect infested boxes were delivered to counsel on January 25, 2016.[54]

In his attempt to continue to reconstruct the litigation files and public records, Asay filed three demands for additional public records on January 22, 2016. A demand to the Office of the State Attorney (SAO), for additional public records concerning three prosecution witnesses; a demand to the Florida Department of Law Enforcement (FDLE), for public records concerning FDLE's investigation of Booker and McDowell's homicides; and a demand to the Jacksonville Sheriff's Office (JSO), concerning JSO's investigation of Booker and McDowell's homicides.[55]

A case management hearing was held in the circuit court on January 25, 2016. At that time, Asay's counsel was advised that pursuant to his Rule 3.852 requests of January 22nd, additional records would be forthcoming. FDLE indicated that it would honor the 3.852 request and during the course of the telephonic hearing emailed Asay's counsel with records. Records were delivered by the JSO at approximately 8PM on January 26th. The SAO emailed some records to Asay's counsel on the evening of January 26th. However, due to the size of some of the files, the SAO indicated that it would send the remaining files on CD via

[54]After the consolidated motion was file on January 27, 2016, Bonner delivered some boxes which had been left out in the rain during two days of tropical rain. The boxes were literally collapsing; they were useless contaminated with mold and dead insects. As Fallis found in 2010, the contents of the boxes appear to be worthless.

[55]The demands were prepared after reviewing the records received from the State Attorney and determining what other agencies and records were necessary to obtain on behalf of Asay.

Fed EX for delivery on January 27, 2016.

Due to the pending death warrant, Asay's counsel was required to file all of Asay's motions and potential claims by 5PM on January 27th which was a total of eight days from the date that counsel first received any of the documents, files or records concerning Asay and his case. While counsel complied with the circuit court's directive, the time parameters made it impossible for counsel to do more than scratch the surface. It is simply not possible for Asay's counsel to render the effective representation required by *Spalding v. Dugger*, 526 So. 2d 71 (Fla. 1988), under the circumstances that have been thrust upon him. While counsel will have received thousands and thousands of pages of documents, records, and files, not enough time has been allotted for counsel to review all of them and to draft necessary pleadings.

The right to due process entails "'notice and opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985), quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306, 313 (1950).

> In *Holden v. Hardy*, 169 U.S. 366, 389, 18 S.Ct. 383, 387, 42 L.Ed. 780, the necessity of due notice and an opportunity of being heard is described as among the 'immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.' And Mr. Justice Field, in an earlier case, *Galpin v. Page*, 18 Wall. 350, 368, 369, 21 L.Ed. 959, said that the rule that no one shall be personally bound until he has had his day in court was as old as the law, and it meant that he must be cited to appear and afforded an opportunity to be heard. 'Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is

> judicial usurpation and oppression, and never can be upheld where justice is justly administered.'

Powell v. Alabama, 287 U.S. 45, 68 (1932).

In Asay's collateral proceedings, the court-appointed counsel is statutorily required to represent his capital client "until the sentence is reversed, reduced, or carried out, or until released by order of the trial court." Section 27,710(4), Fla. Stat. The appointed counsel was required under statute and by virtue of a signed contract with the Florida Department of Financial Services to represent Asay in both state and federal courts while pursuing his collateral remedies.

Asay did not received that to which he was entitled, and that which other capital postconviction defendants have received. The treatment of similarly situated defendants is a violation of equal protection. *See e.g., City of Cleburne, Texas, et al.v. Cleburne Living Center, Inc., et al.*, 473 U.S. 432, 439 (1985), citing to *Plyler v. Doe*, 457 U.S. 202, 216 (1982)("The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike.").

Not only has Asay been without registry counsel for the past ten years, he has also been forced to litigate his present death warrant under patently unjust circumstances. Asay's counsel needs adequate time to review the files and records in order to provide effective representation. At the very least, the unfairness to Asay should be remedied in the interests of justice. *See e.g.,*

Scott v. Dugger, 634 So. 2d 1062, 1064 (Fla. 1993)(stay granted where new collateral counsel was required to take the case after signing of death warrant); *Hildwin v. Dugger*, Case No. 76,145 (Fla. June 21, 1990)(stay granted to permit CCR to enter an appearance and file 3.850 motion within 60 days). Asay's execution should be stayed and his recentlyappointed counsel be afforded a reasonable time under which to investigate and present Asay's claims.

B. THE CIRCUIT COURT'S ORDER

The circuit court rejected Asay's request for a stay and an opportunity to reconstruct the files and records in his case and fully investigate matters free of the time constraints of a death warrant. The circuit court's reasoning was two-fold: first, the circuit court held that Asay had not been entitled to state court counsel until 2014, and the circuit court held, that due to counsel's experience, Asay was receiving effective represenation (PC-R2 552-54).

As stated previously, the circuit court's finding that Asay had no right to be represented by state court counsel until 2014, when this Court promulgated Rule. 3.851(b)(6), is simply erroneous as a matter of law, and shocking as a matter of fact. The circuit court ignored history and the 1985 creation of CCR, an office charged with providing collateral representation to all capital inmates whose death sentences had been affirmed on direct appeal. As a result, this Court determined that there was a statutory the right to effective representation in all capital collateral proceedings, a right that would have attached to

Asay’s death sentence when it was affirmed on direct appeal in 1991. *See Spalding v. Dugger*, 526 So. 2d at 72.[56]

Clearly, Asay was entitled to state court counsel long before 2014. The failure to honor Asay’s right to collateral representation by leaving him without court-appointed registry counsel for over ten years violated Asay’s right to due process and certainly caused him prejudice should this Court affirm that Asay was not diligent in presenting his claims. *See* Argument II.

Furthermore, regardless of undersigned’s experience or zealous advocacy on behalf of Asay, this Court has held that:

> Four components are essential to a balanced capital postconviction system. First, a capital defendant facing execution must be promptly provided competent postconviction counsel charged with the responsibility of investigating the facts and circumstances of the case and researching the applicable law in order to present all postconviction claims in a timely manner. Second, in order for postconviction counsel to effectively carry out this responsibility, counsel must be given reasonable time and adequate resources. Third, postconviction counsel must have timely access to all information concerning the defendant’s case, especially public records from investigating and prosecuting agencies. Fourth, there must be active and reasonable judicial oversight of the postconviction process to ensure that the defendant’s claims are timely investigated and fairly and efficiently processed once presented. Pursuant to the changes we adopt today, in addition to the continued support of the above components, the Court is confident that we can obtain the goal of achieving a prompt, fair, and efficient resolution of capital postconviction proceedings.

AMENDMENTS TO FLORIDA RULES OF CRIMINAL PROCEDURE 3.851, 3.852,

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[56]In 1999, the Florida Legislature enacted legislation to provide supplemental private counsel for capital collateral defendants and specifically mandated that courts “shall monitor the performance of assigned counsel to ensure that the capital defendant is receiving quality representation.” *See* Fla. Stat. 27.711(12).

and 3.993 and Florida Rule of Judicial Administration 2.050, 797 So. 2d 1213, 1215 (Fla. 2001).

Clearly, none of the components to ensure the fair resolution of Asay's case have been provided to him. Asay seeks what he was promised and requests that this Court enter a stay so that he may adequately reconstruct the files and records in his case, completely investigate the facts and circumstances of his convictions and prepare and litigate an adequate motion for postconviction relief with the effective assistance of counsel.

ARGUMENT IV

ASAY'S DEATH SENTENCE IS UNCONSTITUTIONAL UNDER *HURST V. FLORIDA* BECAUSE A JUDGE, RATHER THAN A JURY, MADE THE FINDINGS THAT SUFFICIENT AGGRAVATING CIRCUMSTANCES EXISTED AND THAT THEY WERE NOT OUTWEIGHED BY MITIGATING CIRCUMSTANCES, WHICH WERE REQUIRED TO BE FOUND BY A JURY IN ORDER TO CONVICT ASAY OF CAPITAL FIRST DEGREE MURDER AND RENDER HIM DEATH ELIGIBLE.

A. INTRODUCTION

This argument is premised on *Hurst v. Florida*, 136 S. Ct. 616 (2016), and was presented to the circuit court in Claim III of Asay's consolidated motion. At the outset, Asay notes that the circuit court in addressing Claim III abstained from making any substantive ruling, instead finding that such a decision rests exclusively with this Court (PC-R2 556)("While this court acknowledges that the Florida Supreme Court granted a stay of execution in the matter of *Lambrix v. State* on February 2, 2016 (presumably to determine the very issue of the retroactivity of *Hurst* as applicable to Lambrix), the Florida Supreme Court has not yet ruled one way or the other on that issue as of the date of this Order. This trial court refuses to speculate on the

decision of the higher court, and its resultant implications for Mr. Asay.”). *See also* (PC-R2 557)(“However, despite the Defendant’s request that this Court also make a determination on the retroactivity of the *Hurst* decision, this Court has found no caselaw precedent allowing or authorizing a trial court judge to determine the retroactive application of a United States Supreme Court decision. That determination should be made, and indeed will be made, by the highest court in this State.”).

As will be discussed herein, Asay submits that this Court should find that his death sentence is unconstitutional under *Hurst v. Florida*.

B. THE DECISION IN *HURST V. FLORIDA*

On January 12, 2016, the U.S. Supreme Court rendered its decision in *Hurst v. Florida*, 136 S.Ct. 616 (2016), and found that Florida’s capital sentencing statute is unconstitutional: “We hold this sentencing scheme unconstitutional.” *Id.* at 619. The Court ruled that “[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury’s mere recommendation is not enough.” *Id.* The *Hurst* opinion identified the statutorily defined facts that must be found under Florida law before a death sentence may be imposed:

> The State fails to appreciate the central and singular role the judge plays under Florida law. As described above and by the Florida Supreme Court, **the 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). “[T]he jury’s function

> under the Florida death penalty statute is advisory only." The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires.

Id. at 622 (emphasis added) (citations omitted). Under Florida's statute, a death sentence is not authorized unless a finding of these statutorily defined facts after a unanimous verdict finding the defendant guilty of first degree murder has been returned. The additional statutorily defined facts required to authorize the imposition of a death sentence are 1) the existence of "sufficient aggravating circumstances" and 2) the absence of "sufficient mitigating circumstances to outweigh the aggravating circumstances." *See* § 921.141(3); *Hurst*, 136 S.Ct. at 622.[57]

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[57]This Court in *Randolph v. State*, 463 So. 2d 186, 193 (Fla. 1984), recognized that the sufficiency of the aggravating circumstances under the statute was a question of fact for the sentencing judge. After striking one aggravating circumstance and merging two other aggravating circumstances, this Court vacated the death sentence and remanded to the sentencing judge for reconsideration. This Court explained:

> We conclude that Randolph is entitled to a reconsideration of his sentence in light of our determination that only one valid aggravating circumstance was present in this case rather than the aggravating circumstances found by the trial judge. **One valid aggravating circumstance may be sufficient to support a death sentence** in the absence of at least one overriding mitigating circumstance. *State v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973) . . . , however, went on to stress that the capital sentencing procedure is not a mere counting process of X number of aggravating circumstances and number of mitigating circumstances, but **rather a reasoned judgment as to what factual situations require the imposition of death** and which can be satisfied by life imprisonment in light of the totality of the circumstances present.

Id. at 10 (emphasis added). The dissent in *Randolph* objected to the remand, asserting that "[t]he majority seems to hold that persons should not be sentenced to death upon one aggravating circumstance." *Randolph*, 463 So. 2d at 195 (Adkins, J.,

For Sixth Amendment purposes, the statutorily defined facts that must be found before a death sentence may be imposed operate as elements of an offense that are a step above mere first degree murder, and should arguably be called capital first degree murder. Those statutorily defined facts separate first degree murder from capital first degree murder under Florida law, and like all other elements of a statutorily defined crime must be found to be present beyond a reasonable doubt by a jury under the Sixth Amendment. The statutorily defined facts along with the statutorily defined elements of first degree murder thus join together to define the crime of capital murder in Florida. *See Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000) (applying the ruling of *Jones v. United States*, 526 U.S. 227 (1999) that "**any fact . . . that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt**" to state sentencing schemes under the Fourteenth Amendment) (emphasis added).

Hurst recognized that the logic of its earlier decision in *Ring v. Arizona*, 536 U.S. 584 (2002), also applied in Florida. In *Ring*, the U.S. Supreme Court held the *Apprendi* rule applied to Arizona's capital sentencing scheme. As a result, the Court in *Ring* found Arizona's capital scheme which left the decision to impose a death sentence entirely to a judge violated the jury

dissenting).

trial right set forth in *Apprendi* and the Sixth Amendment.[58]

In *Hurst,* the Supreme Court held that when this Court in *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002), considered the potential impact of *Ring v. Arizona*, 536 U.S. 584 (2002) on Florida's capital sentencing scheme, it erroneously failed to recognize that the decisions in *Ring* and *Apprendi* meant that Florida's capital sentencing statute was also unconstitutional. The basis for this Court's erroneous conclusion that *Ring* and *Apprendi* were inapplicable in Florida was its belief that *Hildwin v. Florida*, 490 U.S. 638, 640-41 (1989), remained intact. However, the U.S. Supreme Court in *Hurst* concluded that the logic of *Hildwin* did not survive *Apprendi* and *Ring*:

> *Spaziano* and *Hildwin* summarized earlier precedent to

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[58]As the Arizona Supreme Court explained in *Ring v. State*, 25 P.3d 1139, 1151 (Ariz. 2001), the factual determination required by Arizona law before a death sentence was authorized was the presence of at least one aggravating factor:

> And even then [after a sentencing hearing before the trial judge] a death sentence may not legally be imposed by the trial judge unless at least one aggravating factor is found to exist beyond a reasonable doubt. *State v. Gretzler*, 135 Ariz. 42, 54, 659 P.2d 1, 13 (1983); *see also* A.R.S. § 13-703.E ("the court . . . **shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated**"). Thus, when the state seeks the death penalty, a separate evidentiary hearing, without a jury, must be held; the death sentence becomes possible only after the trial judge makes **a factual finding that at least one aggravating factor is present.**

(emphasis added) (alteration in original). Unlike the Arizona law at issue in *Ring*, Florida law only permits the imposition of a death sentence upon a factual determination that **"sufficient aggravating circumstances exist" and that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances.**" § 921.141(3) (emphasis added).

> conclude that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Hildwin*, 490 U.S., at 640–641. **Their conclusion was wrong, and irreconcilable with *Apprendi*.** Indeed, today is not the first time we have recognized as much. In *Ring*, we held that another pre *Apprendi* decision—*Walton*, 497 U.S. 639, 110 S. Ct. 3047, 111 L.Ed.2d 511—could not "survive the reasoning of *Apprendi*." 536 U.S., at 603. *Walton*, for its part, was a mere application of *Hildwin's* holding to Arizona's capital sentencing scheme. 497 U.S., at 648.

Hurst, 136 S.Ct. at 623 (emphasis added).[59]

The 8-1 decision in *Hurst v. Florida* must be recognized as a tectonic shift in Florida capital law.[60] *Hurst* requires a

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[59]It follows that this Court's decision in *Mills v. Moore*, 786 So. 2d 532 (Fla. 2001) was also wrong when it concluded that Florida's capital sentencing scheme did not violate *Apprendi*. In *Mills*, the jury had recommended a life sentence, but the judge overrode the recommendation, throwing out whatever implicit factfinding might have been said to accompany the recommendation, and imposed a death sentence instead. This Court rejected Mills' claim that his death sentence stood in violation of *Apprendi*:

> Mills argues that *Apprendi* overruled *Walton* and relies upon the five to four split in the Court. Four justices stated in dissent that *Apprendi* effectively overruled *Walton*, and another justice in his concurring opinion stated that reconsideration of *Walton* was left for another day. With the majority of the justices refusing to disturb the rule of law announced in *Walton*, it is still the law and it is not within this Court's authority to overrule *Walton* in anticipation of any future Supreme Court action. The Supreme Court has specifically directed lower courts to "leav[e] to this Court the prerogative of overruling its own decisions." The majority opinion in *Apprendi* forecloses Mills' claim because *Apprendi* preserves the constitutionality of capital sentencing schemes like Florida's. Therefore, on its face, *Apprendi* is inapplicable to this case.

Mills, 786 So. 2d at 537 (citations omitted).

[60]Not only was this Court's decision in *Bottoson v. Moore* expressly overturned, the U.S. Supreme Court expressly held that its decisions in *Hildwin v. Florida* and *Spaziano v. Florida* had not survived *Apprendi v. New Jersey* and *Ring v. Arizona*. *Hurst v.*

complete overhaul of Florida capital law. *Hurst* establishes that our most basic assumptions about the constitutional integrity of Florida's scheme were wrong. It necessarily opens up new approaches to understanding what is, and is not, unconstitutional and what must change. The declaration that Florida's capital sentencing statute is unconstitutional can only be described as a development of fundamental significance and jurisprudential upheaval. *See Hughes v. State*, 901 So. 2d 837, 848 (Fla. 2005) (Lewis, J., concurring in result only) (describing his initial impression of *Apprendi* and *Ring* as being that they "implicate constitutional interests of the highest order and seem[] to go to the very heart of the Sixth Amendment.").

In Asay's case, the jury was repeatedly told that their recommendation was not final (R. 223, 1007, 1036, 1042, 1051, 1052, 1064). During voir dire, in the presence of all the jurors who ultimately served on the jury, the prosecutor and the judge made numerous comments that diminished the jurors' sense of responsibility (R. 223, 270). These instructions clearly made the jurors much more comfortable with the idea of voting for a death sentence, as illustrated by the following exchange between a juror and the state attorney:

Florida implicitly overturned *Mills v. Moore* and every subsequent Florida Supreme Court decision relying upon either *Mills v. Moore* or *Bottoson v. Moore*. It also overturned every Florida Supreme Court decision resting upon *Spaziano v. Florida* and/or *Hildwin v. Florida*. The tectonic shift in Florida capital law engendered by *Hurst v. Florida* is comparable only to that which was created by *Furman v. Georgia*, 408 U.S. 238 (1972). Indeed, not since *Furman* has the Florida capital sentencing scheme been declared unconstitutional.

> [A VENIREMAN]: . . . I have to be honest and say that I would really be relieved not to have to be the person to pull the switch, so I don't know how I feel. I guess I haven't figured that out. I don't know how I feel.
>
> [STATE]: Do you understand that if you are picked as a juror, and the evidence is overwhelming, or whatever, and you decide that your recommendation would be death, do you understand you don't pull the switch? Do you understand?
>
> [VENIREMAN]: I know – I know I could vote a guilty or not guilty verdict based on the evidence presented**, but it was my understanding that the Judge is the one that imposes the actual sentence.**
>
> [STATE]: **That's correct.**
>
> [VENIREMAN] : I would have no problem with that

(R. 266) (emphasis added).

The judge's initial instruction at the penalty phase was:

> The final decision as to what punishment shall be imposed **rests solely with the Judge of this Court**, however, the law requires that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed upon the defendant.

(R. 1007) (emphasis added). This error was exacerbated by the prosecutor's improper argument throughout his closing in penalty phase:

> I'd like now to cover what I believe the defense will argue in terms of mitigation, why you shouldn't sentence -- or why you shouldn't recommend -- **but you really don't sentence him, the Judge does. So don't get confused about this, don't go in there and worry, I'm the person that does this. No.**

(R. 1042) (emphasis added). The prosecutor repeated this fallacy later in the same argument to the jury:

> But the bottom line is, **you are making a recommendation, I can't stress that enough, to Judge Haddock, he's the one that imposes the sentence.**

(R. 1051) (emphasis added). And just in case there was any chance

that the jury did not understand that their vote meant nothing, the prosecutor once again explained that the decision of life and death was for the judge to make:

> **The question that you have before you today is what to do with this, and it is, of course, the Judge's decision.** You have a recommendation to make, but the law requires that the Judge give great weight to your recommendation.

(R. 1052) (emphasis added).

This error was not corrected by the judge who repeated the erroneous jury instruction immediately prior to the jury's retiring to consider Asay's fate:

> **As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge**, however, the law requires me to give great weight to your recommendation.

(R. 1064) (emphasis added).

The jury was also instructed by the judge in conformity with Florida statutory law that the first fact question to be considered during the penalty phase deliberations was whether sufficient aggravating circumstances existed to justify the imposition of the death penalty:

> The State and the defendant may now present evidence relative to the nature of the crime and the character of the defendant. You are instructed that this evidence, when considered with the evidence you have already heard, is presented in order that you might determine, first, **whether sufficient aggravating circumstances exist that would justify the imposition of the death penalty, and, second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances.**

(R. 1007-08) (emphasis added). Asay's jury was also told that its advisory verdict did not need to be unanimous, and that only a majority vote was required for a death recommendation (R. 1069-

70). After deliberations were completed, the jury foreman announced death recommendations by a vote of 9-3 (R. 143-44).

Thereafter, the trial judge did an independent sentencing as required by the Florida statute and imposed sentences of death. In doing so, the judge—and the judge alone—made the findings of fact required under Florida law that authorized the imposition of death sentences. The proceedings that resulted in Asay's death sentences were pursuant to a capital sentencing scheme that violates the Sixth Amendment and because of the Sixth Amendment violation, would also violate the Eighth Amendment if the jury's advisory recommendation were treated were to be used to try to cure the Sixth Amendment violation. *Hurst v. Florida*. In violation of the Sixth Amendment, Asay's jury did not return a verdict finding the factual element or elements necessary to render Asay guilty of capital first degree murder and thus death eligible, and a jury's verdict that resulted after repeated instruction that the verdict was advisory only cannot now be treated as returning binding findings of the statutorily define facts necessary to authorize the imposition of a death sentence.

C. THE SCOPE AND NATURE OF THE UNCONSTITUTIONALITY OF FLORIDA'S DEATH PENALTY SCHEME IN THE WAKE OF *HURST V. FLORIDA*

1. Sufficient aggravating circumstances must exist, and not be outweighed by mitigating circumstances

Under Florida law, "the maximum sentence a capital felon may receive on the basis of the conviction alone is life imprisonment." *Id.* (citing Florida Statutes § 775.082(1)). Additional findings of fact must be made before death is available as a maximum sentence. *See* § 775.082(1). The Florida

Legislature stated what those findings of fact are quite plainly in Florida Statutes § 921.141.

The language in § 921.141(2) is clear on its face. It requires the penalty phase jury to "deliberate and render an advisory verdict" as to "whether sufficient aggravating circumstances exist," and then as to whether the aggravating circumstances are outweighed by mitigating circumstances. Similarly, § 921.141(3), relevantly entitled "[f]indings in support of sentence of death," clearly provides that the judge, before imposing a death sentence, must first find that "sufficient aggravating circumstances exist," and then find that there are "insufficient mitigating circumstances to outweigh the aggravating circumstances." After the issuance of *Ring*, the State has argued for years that the advisory Subsection (2) jury finding made by a simple majority vote was the operable finding which satisfied the Sixth Amendment principle set forth in *Apprendi*. In *Hurst*, the U.S. Supreme Court ruled otherwise, citing to § 921.141(3), and stating that "Florida does not require the jury to make the critical findings necessary to impose the death penalty" but "requires a judge to find these facts." *Hurst*, 136 S.Ct. at 622. Thus for Sixth Amendment purposes, the Subsection (3) findings of fact are the operable statutorily defined facts that must be found by a jury because the presence of those facts are necessary to authorize the imposition of a death sentence.

The holding of *Hurst* is that Florida's sentencing scheme is unconstitutional because its juries are not required to return

binding verdicts finding the existence of sufficient aggravating circumstances and the absence of sufficient mitigating circumstances that outweigh the aggravating circumstances. Because Florida statutory law leaves it for sentencing judges to make those necessary findings of statutorily defined facts that authorize a death sentence, *Hurst* declared the statute unconstitutional.

There is language in *Ring* that superficially suggests that the finding of a single aggravator renders a capital defendant eligible for a death sentence and thus satisfies the Sixth Amendment. However, this language in *Ring* is there because Arizona statutory law is markedly different than Florida law in what facts are required to render a capital defendant death eligible. The oft-cited quote from *Ring* is as follows:

> Accordingly, we overrule *Walton* to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. *See* 497 U.S., at 647–649, 110 S. Ct. 3047. Because Arizona's enumerated aggravating factors operate as "the functional equivalent of an element of a greater offense," *Apprendi*, 530 U.S., at 494, n. 19, 120 S. Ct. 2348, the Sixth Amendment requires that they be found by a jury.

Ring, 536 U.S. at 609. The important aspect of the second sentence is its recognition that Arizona's aggravators operate as "the functional equivalent of an element of a greater offense." This language recalls that earlier in the *Ring* opinion the Supreme Court explained that the determination of what is the functional equivalent of an element of a greater offense requires reference to—and an examination of—Arizona law: "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." *Id.* at 602. As the Supreme Court explained in *Ring*, Arizona law provided 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 (citing the Arizona law).

Florida's statute is different. It does not permit the imposition of a death sentence upon the finding of just one aggravating circumstances. Instead, it requires that before a death sentence can be imposed there must be a finding by the judge that "sufficient aggravating circumstances exist" and that sufficient mitigating circumstances that outweigh the aggravating circumstances do not exist before a death sentence can be returned. Fla. Stat. § 921.141(3)(a). This feature of Florida's scheme was specifically cited to and relied upon in the 8-1 *Hurst* opinion.

The *sufficiency* of the aggravating circumstances is what Florida juries are instructed to consider when returning an advisory recommendation by a majority vote. The *sufficiency* of the aggravating circumstances is what judges are required to independently find before a death sentence can be imposed. The existence of *sufficiency* aggravators is the required fact for the imposition of a death sentence. The *sufficiency* of the aggravators is a necessary element of capital first degree murder under Florida's capital sentencing scheme. *See Swan v. State*, 322 So. 2d 485, 489 (Fla. 1975) ("Having considered the total record, we are of the opinion that there were insufficient aggravating

circumstances to justify the imposition of the death penalty.”).

The fact that sufficient aggravating circumstances must be found under Florida law to render a capital defendant death eligible is unlike the Arizona law which was at issue in *Ring*, and has at least two important consequences in assessing *Hurst’s* scope and impact in Florida: (1) the finding of a prior violent felony does not cure *Hurst* error, and (2) a finding of the felony murder aggravator does not cure *Hurst* error. Before a death sentence can be imposed there must be a finding that those aggravating circumstances if present are sufficient in a given case to justify a death sentence. Not all prior violent felonies are equal. The sufficiency finding required by the statute means that there must be a case specific assessment of the facts of the prior crime of violence and a determination as to whether the facts of the prior crime of violence in conjunction with the factual basis for any other aggravating circumstance present in the case are sufficient to justify the imposition of a death sentence.

Because *Hurst* has redefined the elements of the statutorily defined crime which renders a defendant eligible to be sentenced to death, the decision in *Hurst* is substantive. It is about the substantive definition of capital first degree murder and what facts must be proven to convict a defendant of capital first degree murder.

2. Unanimous findings as to the elements of capital murder identified in *Hurst*

At issue in *Apprendi* was a sentencing statute in which the

New Jersey Legislature "decided to make the hate crime enhancement a 'sentencing factor,' rather than an element of an underlying offense," so that it would be found by a judge, rather than a jury. *Apprendi*, 530 U.S. at 471. This violated the Sixth Amendment and the right to a jury trial embodied therein, as the U.S. Supreme Court explained in *Apprendi*:

> "[T]o guard against a spirit of oppression and tyranny on the part of rulers," and "as the great bulwark of [our] civil and political liberties," 2 J. Story, Commentaries on the Constitution of the United States 540-541 (4th ed. 1873), trial by jury has been understood to require that "*the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours . . . ." 4 W. Blackstone, Commentaries on the Laws of England 343 (1769) (hereinafter Blackstone) (emphasis added). *See also Duncan v. Louisiana*, 391 U.S. 145, 151-154, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968).

Apprendi, 530 U.S. at 477 (alterations and emphasis in original). The foundation of *Apprendi* was built firmly on the inviolable right to the unanimous suffrage of twelve jurors.

Observing that "[a]ny possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding," *id*. at 478 (footnote omitted), the *Apprendi* Court ruled that any finding of fact which "expose[s a defendant] to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone," **is an element**, and thus must be found by a jury. *Ring*, 536 U.S. at 586 (citing *Apprendi*). The Court stated that

"[d]espite what appears to us the clear 'elemental' nature of the factor here, the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Apprendi*, 530 U.S. at 494.

Because in Florida "the maximum sentence a capital felon may receive on the basis of the conviction alone is life imprisonment," *Hurst*, 136 S. Ct. at 619 (citing Fla. Stat. § 775.082(1)), and a factual finding must be made that sufficient aggravating circumstances exist before a Florida capital defendant can be sentenced to death, *see id.*, that critical fact, under *Apprendi*, is an element of the offense of capital murder. This is the logical result of the ruling in *Hurst* that applied *Apprendi* to Florida's death penalty scheme and finding it unconstitutional. The finding that sufficient aggravating circumstances exist to justify the imposition of a death sentence is an element of the offense of capital first degree murder: the crime of first degree murder plus the element rendering the defendant eligible for a sentence of death. Pursuant to longstanding Florida law, all of the elements of capital first degree murder, including the determination that sufficient aggravating circumstances exist, must be found unanimously by a jury.

3. Separation of powers principles prevent any remedial statutory construction in an attempt to cure *Hurst* error, which is structural in nature and not subject to harmless error

After declaring Florida's capital sentencing scheme

unconstitutional, the *Hurst* decision reversed the judgment of this Court and remanded for further proceedings not inconsistent with the *Hurst* opinion. The U.S. Supreme Court specifically, and as a matter of course, left it for this Court to consider on remand "the State's assertion that any error was harmless. *Hurst*, 136 S. Ct. at 624 (citing *Neder v. United States, 527* U.S. 1, 18–19 (1999) for holding that "the failure to submit an uncontested element of an offense to a jury may be harmless"). The U.S. Supreme Court stated, "[t]his Court normally leaves it to state courts to consider whether an error is harmless, and we see no reason to depart from that pattern here." *Id.* What is important to note about this language in *Hurst* is that nothing was resolved. The State's argument that "any error was harmless" was left to be addressed by this Court, consistent with the U.S. Supreme Court's usual practice. The citation to *Neder* merely noted that therein the U.S. Supreme Court had concluded that the failure to submit an uncontested element of an offense to a jury *may be* harmless. But because the U.S. Supreme Court expressed no opinion on the State's argument in *Hurst*, there was no resolution of whether the error identified in *Hurst* can properly be described as simply a "failure to submit an uncontested element of an offense to a jury."

Indeed, as explained herein, the determination in *Hurst* that Florida's capital sentencing scheme is unconstitutional does not equate to a simple failure to submit an uncontested element to a jury. The unconstitutional sentencing scheme in Florida: 1) erroneously left it for the judge to determine whether sufficient

aggravating circumstances existed to justify a death sentence; 2) erroneously informed the jury and defense counsel that the jury's penalty phase verdict was merely advisory; 3) erroneously informed the jury and defense counsel that the jury could render its advisory sentencing recommendation by a majority vote; and 4) failed to notify defense counsel that a single juror with reasonable doubt as to whether sufficient aggravating circumstances existed to justify a death sentence could preclude the imposition of a sentence. Thus, the error arising from Florida's employment of its unconstitutional sentencing scheme involved much, much more than a simple failure to submit an uncontested element to a penalty phase jury. Indeed, using the unconstitutional capital sentencing scheme at issue in *Hurst* to impose a death sentence constitutes structural error that can never be harmless.

Hurst found Florida's capital sentencing scheme unconstitutional. It is the first case to do so since *Furman v. Georgia*. Conceptually then, evaluating the impact of the constitutional error under *Hurst* on any one particular death sentence is most akin to evaluating the impact of the *Furman* constitutional error on any one particular death sentence. After *Furman*, no one was successful in asserting that *Furman* error was or could be harmless. This suggests that constitutional defects identified in *Furman* were structural in nature. *Furman* was not just about error within a capital penalty phase. It was not just concerned with the improper admission of evidence, the improper exclusion of evidence, or erroneous or misleading jury

instructions. Thus, *Furman* was not simply "trial error which occur[s] during the presentation of the case to the jury;" *Furman* identified "structural defects in the constitution of the trial mechanism." *Arizona v. Fulminante*, 499 U.S. 279, 291, 308-09 (1991). *Furman* was a determination that the manner in which Florida's capital sentencing scheme functioned as a whole was unconstitutional. As a result, it was also beyond the power of the judicial branch to provide a fix.

Because *Hurst* declared Florida's capital sentencing scheme unconstitutional, it too extends beyond "trial error which occur[s] during the presentation of the case to the jury." While certainly one can identify specific trial errors that infect any one defendant's penalty phase in light of *Hurst*, the specific trial errors identified were a product of the "structural defects in the constitution of the trial mechanism." For example, Asay's penalty phase jury was repeatedly told throughout the trial (in voir dire, in counsel's arguments, and in the court's instructions), that its verdict was advisory, merely a sentencing recommendation. Under *Hurst*, the jury's determination of death eligibility cannot just be advisory, but must be binding under the Sixth Amendment. This means that the jury verdict that was returned in Asay's case cannot now be converted into some sort of binding determination that sufficient aggravating circumstances existed to justify death because to do so would create error under *Caldwell v. Mississippi*, 472 U.S. 320 (1985), i.e. the jury would have been provided misinformation regarding the binding nature of its verdict which diminished its sense of

responsibility for the outcome.

As another example, Asay's penalty phase jury was told that its penalty phase verdict did not need to be unanimous. However, under *Hurst*, the fact necessary to render a defendant death eligible is an element of the criminal offense. Under Florida law, jury unanimity is required as to all elements of a criminal offense. While it should be obvious that a non-unanimous verdict cannot in retrospect become a unanimous verdict, the error is but a manifestation of the "structural defects in the constitution of the trial mechanism." But looking only to the record of the penalty phase proceeding fails to capture how counsel's trial preparation and penalty phase strategies were impacted by the capital sentencing scheme then in place, which has now been identified as unconstitutional. Imagine how differently counsel might approach a guilt phase in which the jury is instructed that its verdict would be an advisory recommendation that was to be rendered by majority vote. Counsel would undoubtedly make different choices in how he or she investigated a case and in the type of defense that was presented. It would seem less likely that counsel would employ the defense now commonly used that focuses on making the State prove the elements beyond a reasonable doubt to all trial jurors. Voir dire would be conducted differently. Counsel would less likely look for jurors who counsel believes would have the strength to be a holdout, jurors who would stand up to peer pressure and be capable of being a persuasive voice during deliberations. Peremptory challenges would be exercised differently. As to the presentation

of evidence before a jury who would decide guilt by a majority vote, counsel would likely have to focus more on presenting evidence for the defense and less on attacking the State's case in order to raise reasonable doubt. This would likely result in a shift in how investigative resources are deployed, what cross is conducted, and what evidence is presented by the defense.

However, the biggest difference in the conduct of the proceeding would occur behind a closed door during the jury's deliberations. Requiring juries to return unanimously a verdict they know is binding means jurors will actually deliberate, discuss, ponder, analyze, and think about what is the right verdict to return. It encapsulates the bedrock of the American criminal justice system: that the best and most reliable decisions are made through the crucible of an adversarial testing. For the process to reliably function, the decision maker must know the importance of her decision so that she can actually deliberate as to the proper result. An advisory verdict by a majority vote amounts to little more than a straw poll. When jurors know that their verdict is advisory in nature and unanimity is not required, of course the deliberative functioning evaporates.

But an analysis of the full impact of *Hurst* cannot be conducted in any meaningful way until a constitutional sentencing scheme is in place. At this point, no one knows what the new sentencing scheme will look like. Until the legislative fix (assuming there is one) is known, the full impact of the shift from an unconstitutional sentencing scheme to a new (and

hopefully) constitutional sentencing scheme cannot be determined.

The alternative to new legislative action is reliance on old legislative action. Florida Statute Section 775.082(2) was adopted in anticipation of the decision in *Furman v. Georgia* to make a remedy available on the day that Florida's capital sentencing scheme was found unconstitutional. Section 775.082(2) provides: "In the event the death penalty in a capital felony is held to be unconstitutional by this Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1)." *See Donaldson v. Sack*, 265 So. 2d 499, 505 (Fla. 1972) ("We have given general consideration to any effect upon the current legislative enactment to commute present death sentences to become effective October 1, 1972. The statute was conditioned upon the very holding which has now come to pass by the US Supreme Court in invalidating the death penalty as now legislated. It is worded to apply to those persons already convicted without recommendation of mercy and under sentence of death."). Sec. 775.082(2), which applied when *Furman v. Georgia* issued, appears on its face to apply now given the determination in *Hurst* invalidating Florida's capital sentencing scheme.

4. The only possible punishment authorized by the guilty verdicts alone was life imprisonment

On January 22, 2106, in the case of *State v. Dykes*, Case No. 15-1972 CFANO (6th Jud. Cir. Pinellas County), Judge Andrews

entered an order stating "that pursuant to *Hurst v. Florida*, – S.Ct. –, No. 14-7505, 2016 WL 112683 (Jan. 12, 2016) this court concludes that there currently exists no death penalty in the State of Florida in that there is no procedure in place." Accordingly, Judge Andrews ruled in a case set for trial that there would be no attempt to death qualify a jury and that the State's notice of intent to seek a death sentence was struck.

Asay stands convicted of first degree murder. Following the decision in *Hurst v. Florida*, a defendant convicted of first degree murder alone is not eligible for a sentence of death. The death penalty for the capital felony defined under Florida law as first degree murder has been rendered unconstitutional by virtue of the decision in *Hurst*. In order to be eligible for a death sentence, a defendant must be found guilty of the elements of first degree murder plus an additional element or elements statutorily defined as the presence of those facts necessary for the imposition of a death sentence.

Upon the conviction of first degree murder alone, the only sentence permitted by virtue of the decision in *Hurst v. Florida* was or is life imprisonment. All that Asay stands convicted of is two counts of first degree murder. He was not convicted of first degree murder along with a finding of the additional element or elements by a unanimous jury informed that its finding of the additional element or elements specifically identified in *Hurst* was binding on the court.

Asay's circumstances are best illustrated by a hypothetical. Assume that he had been convicted of manslaughter because the

jury had not only been instructed on the crime of manslaughter and had not instructed as to the elements for a first degree murder. Assume that the sentencing judge then imposed a life sentence on Asay saying that he found that Asay had a premeditated intent to kill and did kill the victim. *See State v. Montgomery*, 39 So. 3d 252 (Fla. 2010). Because the sentencing judge had concluded that the facts necessary for first degree murder were present, he announced that the sentence for first degree murder should be imposed, i.e. life imprisonment without the possibility of parole. Accordingly in this hypothetical, the sentencing judge imposed a life sentence without the possibility of parole. For whatever reason, Asay did not appeal. Then twenty years later, he realized that his sentence was illegal and filed a Rule 3.800 motion which can be filed at any time to correct an illegal sentence. *See Carter v. State*, 786 So. 2d 1173, 1178 (Fla. 2001). If at the Rule 3.800 proceeding, the State conceded that the sentence was illegal would the State then be able to argue that the error was harmless because it had evidence that demonstrated that the murder was committed with premeditated intent, and that the life without parole sentence should be undisturbed. According to *Hopping v. State*, 708 So. 2d 263, 265 (Fla. 1998), the answer to the question would seem to be no as it would violate double jeopardy.[61]

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[61]In *Hopping*, this Court adopted the reasoning of the dissenting judge from the First DCA decision under review:

> Thus, **as Judge Benton concisely reasoned**, the sentence should not be unreachable under a rule expressly intended to correct illegal sentences:

In Asay's case, the only possible punishment authorized by the guilty verdicts alone was life imprisonment without the possibility of parole for twenty-five (25) years.[62] There is no doubt as to this conclusion because in this case, the indictment charged only first-degree murder, and Asay was convicted of only first-degree murder. As of the time that the jury returned unanimous verdicts of guilt for first-degree murder, there were no actual factual findings as to whether sufficient aggravating circumstances existed to justify the imposition of a death sentence. Under these circumstances and pursuant to the statutory scheme in place at the time, Asay was required to be sentenced to life unless and until there was a determination by the sentencing judge that sufficient aggravating circumstances existed which

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> > The court today decides that appellant's claim that his sentence was unconstitutionally lengthened, after he had begun serving it cannot be considered under a rule that provides: "A court may at any time correct an illegal sentence imposed by it...." The opinion in *Davis v. State*, 661 So.2d 1193 (Fla.1995), should not, in my opinion, be read so narrowly. **A sentence that has been unconstitutionally enhanced is "an illegal sentence ... [in] that [it] exceeds the maximum period set forth by law for a particular offense without regard to the guidelines.**"
>
> *Hopping v. State*, 674 So.2d 905, 906 (Fla. 1st DCA 1996)(Benton, J., dissenting) (citations omitted). **We agree with Judge Benton's reasoning** and conclude that our holding today does no violence to the rationale of Davis.

Hopping, 708 So. 2d at 265 (emphasis added).

[62]As *Hurst* now makes clear *any* fact, no matter how it is labeled it, which increases the punishment authorized by a guilty verdict, constitutes an element of the death eligible offense, i.e. capital first degree murder, and must be found by a jury beyond a reasonable doubt.

justified a death sentence.

After *Hurst*, we now know that the elements of capital first degree murder under Florida include those facts set forth in the statute that must be found before the judge may impose a sentence of death. Defining crimes and their elements is a matter of substantive law that under separation of power principles is a legislative function. *Hurst* has illuminated the fact that under Florida's substantive law, Asay was not and is not death eligible on the basis of the jury's verdict finding him guilty of first degree murder. Under *Fiore v. White*, 531 U.S. 225 (2001), *Hurst*'s mere clarification of the plain language of the statute dates back to statute's enactment:

> "Because we were uncertain whether the Pennsylvania Supreme Court's decision ... represented a change in the law," we certified a question to the Pennsylvania Supreme Court. *Id.*, at 228, 121 S.Ct. 712. This question asked whether the Pennsylvania Supreme Court's interpretation of the statute " 'state[d] the correct interpretation of the law of Pennsylvania at the date Fiore's conviction became final.' " *Ibid.*
>
> When the Pennsylvania Supreme Court replied that the ruling " 'merely clarified the plain language of the statute,' " *ibid.*, the question on which we originally granted certiorari disappeared. Pennsylvania's answer revealed the "simple, inevitable conclusion" that Fiore's conviction violated due process. *Id.*, at 229, 121 S.Ct. 712. It has long been established by this Court that "the Due Process Clause ... forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt." *Id.*, at 228-229, 121 S.Ct. 712.

Bunkley v. Florida, 538 U.S. 835, 839-40 (2003).

D. HURST IS RETROACTIVE UNDER FLORIDA LAW

This Court has stated that "[c]onsiderations of fairness and uniformity make it very **difficult to justify depriving a person**

of his liberty or **his life, under process no longer considered acceptable and no longer applied to indistinguishable cases.**" *Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980)(emphasis added) (quotations omitted). *Hurst* rejects as constitutionally infirm the process under which Florida defendants are sentenced to death.

There is no dispute that every death sentenced individual whose case is still pending in circuit court or is on direct appeal in this Court will receive the benefit of the *Hurst* decision.[63] There are also strong and compelling reasons for this

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[63]Absent full retroactivity, there is no question but that indistinguishable cases will receive the benefit of *Hurst* simply because those cases are pending on direct appeal or are pending for a retrial or a resentencing. Whether relief is granted to those individuals or not, they will receive the benefit of the decision simply because of when *Hurst* issued. But those receiving the benefit of *Hurst* also include capital defendants who received death sentences long ago, but who have received collateral relief and are awaiting a new trial or a resentencing.

For example, Rickey Roberts who was convicted of a crime committed in 1984. His death sentence was affirmed in *Roberts v. State,* 510 So. 2d 885 (Fla. 1987). His death sentence was vacated in collateral proceedings in *Roberts v. State*, 840 So. 2d 962 (Fla. 2002). He is still in a Miami-Dade County jail awaiting his resentencing. Indeed, the presiding judge in anticipation of *Hurst* stayed the resentencing. Roberts convicted of a 1984 homicide will receive the benefit of the decision in *Hurst.* Similarly, Paul Hildwin was convicted of a crime committed in 1985. His death sentence was affirmed by this Court in *Hildwin v. State*, 531 So. 2d 124 (Fla. 1988), and by the United States Supreme Court in *Hildwin v. Florida*, 490 U.S. 638 (1989). Hildwin conviction and sentence of death were vacated in collateral proceedings in *Hildwin v. State*, 141 So. 3d 1178 (Fla. 2014). Hildwin is awaiting his new trial. Hildwin who was convicted of a 1985 homicide will receive the benefit of *Hurst* if he is convicted again.

Another example of someone who will receive the benefit of *Hurst* is Paul Beasley Johnson who was convicted of a crime committed in 1981. His death sentence was affirmed in *Johnson v. State*, 438 So. 2d 774 (Fla. 1983). Johnson first received

Court to conclude that *Hurst* must be found retroactive to the June 24, 2002, the date that *Ring v. Arizona* issued. Indeed, this Court in *Witt v. State* wrote:

> The doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring **fairness and uniformity in individual adjudications.** Thus, society recognizes that a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief **is necessary** to **avoid individual instances of obvious injustice. Considerations of fairness and uniformity** make it very "difficult to justify depriving a person of his liberty or his life, **under process no longer considered acceptable** and **no longer applied to indistinguishable cases.**"

Witt, 387 So. 2d at 925 (emphasis added). Thus, the *Witt* standard for retroactive application is a yardstick for determining when "[c]onsiderations of fairness and uniformity" trumps "[t]he doctrine of finality." *See Thompson v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987) ("We find that the United States Supreme Court's consideration of Florida's capital sentencing statute in its *Hitchcock* opinion represents a sufficient change in the law that potentially affects a class of petitioners, including Thompson, to defeat the claim of a procedural default.").[64]

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collateral relief in *Johnson v. Wainwright*, 498 So. 2d 938 (Fla. 1986), when a new trial was ordered. Subsequently, Johnson was again convicted and sentenced to death. His death sentence was again affirmed in *Johnson v. State*, 608 So. 2d 4 (Fla. 1992). Johnson's death sentence was later vacated in collateral proceedings. *Johnson v. State*, 44 So. 3d 51 (Fla. 2010). At a resentencing, Johnson was again sentenced to death. Currently, Johnson's sentence of death is pending on direct appeal in this Court. *Johnson v. State*, Case No. SC14-1175. Oral argument in the direct appeal is scheduled for March 8, 2016. Unquestionably, Johnson will receive the benefit of *Hurst*.

[64]In *Thompson*, this Court noted that

The U.S. Supreme Court issued *Ring v. Arizona* on June 24, 2002. After certiorari review had been accepted in *Ring*, but before the decision issued, the U.S. Supreme Court stayed Amos King's execution due to the pendency of *Ring* on January 18, 2002. *See King v. State* & *King v. Moore*, Case Nos. SC02-01 & SC-2-01.[65]

> Thompson's sentencing occurred in September of 1978. The United States Supreme Court, in June of 1978, had released *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), which held unconstitutional Ohio's capital sentencing statute limiting mitigating circumstances to those enumerated in the statute itself. In December of that year, three months after Thompson's sentencing, this Court directly addressed the issue in *Songer v. State*, 365 So.2d 696 (Fla.1978), cert. denied, 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979), construing our statute as allowing nonstatutory mitigating circumstances to be considered by both the jury and the judge in the sentencing proceeding.

Thompson v. Dugger, 515 So. 2d at 175. This Court then concluded: "we have no alternative but to conclude Thompson's death sentence was imposed in violation of *Lockett*, and in violation of the United States Supreme Court's *Hitchcock* decision." *Id. Accord Downs v. Dugger*, 514 So. 2d 1069 (Fla. 1987) (*Hitchcock* rejected this Court's misreading of *Lockett*, and thus *Downs'* penalty phase was conducted in violation of *Lockett*); *Delap v. Dugger*, 513 So. 2d 659, 660 (Fla. 1987) ("Because *Hitchcock* represents a substantial change in the law occurring since we first affirmed Delap's sentence, we are constrained to readdress his *Lockett* claim on its merits.").

[65]This Court's opinion in *King v. State*, 808 So. 2d 1237, 145-46 (Fla. 2002), *cert denied*, 536 U.S. 962 (June 28, 2002), addressed King's *Apprendi v. New Jersey*, 530 U.S. 466 (2000), issue on the merits and provided:

> King's sixth contention, that *Apprendi* applies to Florida's capital sentencing statute and the maximum sentence under the statute is death, has been decided adversely to King's position. *See Mills v. Moore*, 786 So.2d 532, 537-38 (Fla.2001), *cert. denied*, 532 U.S. 1015, 121 S.Ct. 1752, 149 L.Ed.2d 673 (2001); see also *Brown v. Moore*, 800 So.2d 223 (Fla.2001) (rejecting claims that aggravating circumstances are required to be charged in indictment, submitted to jury during guilt phase, and found by unanimous jury verdict); *Mann*

The U.S. Supreme Court also stayed Linroy Bottoson's execution due to the pendency of *Ring* on February 4, 2002. *See Bottoson v. State* & *Bottoson v. Moore*, Case Nos. SC02-58 & SC02-128.[66] After the decision in *Ring v. Arizona* issued, the U.S. Supreme Court denied both King and Bottoson's certiorari petitions on June 28, 2002. Both King and Bottoson then filed habeas petitions with

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> *v. Moore*, 794 So.2d 595, 599 (Fla.2001) (same). We are aware that the United States Supreme Court very recently granted certiorari in *State v. Ring*, 200 Ariz. 267, 25 P.3d 1139 (2001), *cert. granted*, 534 U.S. 1103, 122 S.Ct. 865, 151 L.Ed.2d 738 (2002); however, we decline to grant a stay of execution following our precedent on this issue, on which the Supreme Court has denied certiorari. Thus, King is not entitled to relief on this issue.

[66]This Court's opinion in *Bottoson v. State*, 813 So. 2d 31 (Fla. 2002), *cert. denied,* 536 U.S. 962 (June 28, 2002), addressed the *Apprendi v. New Jersey* issue on the merits and provided:

> In Bottoson's third and final habeas claim, he alleges that the U.S. Supreme Court's holding in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), applies to Florida's capital sentencing statute. We have consistently rejected similar claims and have decided this issue adversely to Bottoson's position. *See King v. State*, 808 So.2d 1237 (Fla. 2002), stay granted, 534 U.S. 1118, 122 S.Ct. 932, 151 L.Ed.2d 894 (2002); *Mills v. Moore*, 786 So.2d 532, 536-537 (Fla. 2001), *cert. denied*, 532 U.S. 1015, 121 S.Ct. 1752, 149 L.Ed.2d 673 (2001); see also *Brown v. Moore*, 800 So.2d 223 (Fla. 2001) (rejecting claims that aggravating circumstances are required to be charged in indictment, submitted to jury during guilt phase, and found by unanimous jury verdict); *Mann v. Moore*, 794 So.2d 595, 599 (Fla .2001). Thus, we conclude that Bottoson is not entitled to relief on this claim.
>
> Although we recognize that the United States Supreme Court recently granted certiorari review in *State v. Ring*, 200 Ariz. 267, 25 P.3d 1139 (2001), *cert. granted*, 534 U.S. 1103, 122 S.Ct. 865, 151 L.Ed.2d 738 (2002), we decline to grant a stay of execution or other relief, in accordance with our precedent on this issue in *King*.

this Court and requested stays of execution on July 5, 2002. In light of *Ring v. Arizona*, this Court issued published orders granting stays of execution on July 8, 2002, and set a briefing and oral argument schedule. *Bottoson v. Moore*, 824 So. 2d 115 (Fla. 2002); *King v. Moore*, 824 So. 2d 127 (Fla. 2002).[67]

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[67]Justice Wells dissented from the stay order asserting that the U.S. Supreme Court's denial of certiorari review on June 28, 2002, in both *Bottoson* and *King* and the lifting of the stays of execution granted during the pendency of *Ring* meant: "The termination of the stays of execution by the Supreme Court can only mean that *Ring* does not apply to the Florida capital sentencing statute." *Bottoson*, 824 So. 2d at 124. Justice Wells continued, "The Supreme Court in *Ring* overruled neither *Hildwin [v. Florida*, 490 U.S. 638 (1989),] nor multiple decisions in which the Supreme Court rejected the very same constitutional challenges to Florida's capital sentencing statute made now by Bottoson." *Bottoson*, 824 So. 2d at 124. Justice Wells noted: "there has been no receding from or rejection by the Supreme Court of its decisions in *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984) (rejecting Fifth, Sixth, Eighth, and Fourteenth Amendment challenges)". *Bottoson*, 824 So. 2d at 125. Justice Wells concluded with the following:

> There is simply no reason for this Court to stay this execution in order to study or further consider *Ring*. These cases of the Supreme Court of the United States, dealing directly with the Florida capital sentencing statute-not *Ring*, which deals with the Arizona capital sentencing statute-continue to be what this Court and lower Florida courts are to follow.
>
> I am very concerned about the confusion which will certainly result for Florida's trial judges from this Court's stay of execution. These trial judges have to try cases and adjudicate postconviction motions this week. This Court's entering of this stay of execution will clearly leave the impression that *Ring* has an effect at present on Florida's capital sentencing statute. Because the Supreme Court has repeatedly upheld Florida's statute and because Ring did not overrule any of these decisions, that impression is clearly incorrect. There are twenty-five years of precedent from the Supreme Court repeatedly upholding the constitutionality of Florida's capital sentencing statute, and nothing in *Ring* affected those decisions.

King v. State, 824 So. 2d at 132 (footnotes omitted).

Subsequently on October 24, 2002, this Court issued its opinions re-addressing the merits of both Bottoson and King's *Apprendi* claims in light of *Ring v. Arizona*. *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002); *King v. Moore*, 831 So. 2d 143 (Fla. 2002). This Court again denied the *Apprendi* claims (re-raised on the basis of *Ring v. Arizona*) on the merits stating in the identically worded language appearing the majority opinion in both cases:

> Significantly, the United States Supreme Court has repeatedly reviewed and upheld Florida's capital sentencing statute over the past quarter of a century and although King contends that there now are areas of "irreconcilable conflict" in that precedent, the Court in *Ring* did not address this issue.

King v. Moore, 831 So. 2d at 144 (footnote omitted); *Bottoson v. Moore*, 833 So. 2d at 695 (footnote omitted).[68] In the omitted footnote, this Court relied upon *Hildwin v. Florida* and *Spaziano v. Florida*.

In *Hurst v. Florida*, the U.S. Supreme Court specifically addressed this Court's opinion in *Bottoson v. Moore* and concluded that this Court's reliance on *Hildwin* and *Spaziano* to conclude that *Ring* and *Apprendi* had no application to Florida's capital sentencing scheme was error:

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[68]In neither *Bottoson v. Moore* nor *King v. Moore* did this Court refuse to address the merits of the claims premised on *Ring v. Arizona* on the basis that the claims were procedurally barred or on the basis that *Ring* was not retroactive. Bottoson was convicted of a 1979 homicide. His death sentence was affirmed on direct appeal in 1983. *Bottoson v. State*, 443 So. 2d 962 (Fla. 1983). King was convicted of a 1976 homicide. His conviction and sentence of death were affirmed in 1980. *King v. State*, 390 So. 2d 315 (Fla. 1980). Subsequently, a resentencing was ordered. He was again sentenced to death, and this Court affirmed in 1987. *King v. State*, 514 So. 2d 354 (Fla. 1987).

> *Spaziano* and *Hildwin* summarized earlier precedent to conclude that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Hildwin*, 490 U.S., at 640–641, 109 S.Ct. 2055. **Their conclusion was wrong, and irreconcilable with Apprendi**. Indeed, today is not the first time we have recognized as much. In *Ring*, we held that another pre-*Apprendi* decision—*Walton*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511—could not "survive the reasoning of *Apprendi*." 536 U.S., at 603, 122 S.Ct. 2428. *Walton*, for its part, was a mere application of *Hildwin*'s holding to Arizona's capital sentencing scheme. 497 U.S., at 648, 110 S.Ct. 3047.
>
> * * *
>
> **Time and subsequent cases have washed away the logic of *Spaziano* and *Hildwin***. The decisions are overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty.

Hurst, 136 S.Ct. at 623-24 (emphasis added).

Since the U.S. Supreme Court specifically addressed and disapproved of this Court's decision in *Bottoson v. Moore* and its conclusion that *Ring* did not have any applicability to Florida's capital sentence scheme, the fairness principles of *Witt v. State* warrant treating *Hurst v. Florida* retroactive to the issuance of *Ring*. Had *Bottoson* and *King* been properly decided and recognized that *Ring* had rendered Florida's capital sentencing scheme unconstitutional, certainly every capital defendant whose death sentence was not final on June 24, 2002, would have undoubtedly received the benefit of *Ring*. Simple fairness, the overriding principle of *Witt*, demands that those who should have received the benefit of *Ring* must receive the benefit of *Hurst*.[69] *See*

[69] *Hurst* held that the logic of *Hildwin* and *Spaziano* had been washed away by the time of this Court's decisions in *Bottoson* and

Thompson v. Dugger; *Downs v. Dugger*; *Delap v. Dugger*.

However, limiting the benefit of *Hurst* only to those whose death sentences became final after *Ring* issued ignores the fact that *Hurst* held that *Hildwin* and *Spaziano* were "irreconcilable with *Apprendi*." *Hurst v. Florida*, 136 S. Ct. at 623. *Apprendi v. New Jersey* issued on June 26, 2000. Indeed, Bottoson and King both presented this Court with challenges to their death sentences on the basis of *Apprendi*. In January of 2002, this Court denied their *Apprendi* claims on the merits. *See King v. State*, 808 So. 2d 1237, 145-46 (Fla. 2002), *cert denied*, 536 U.S. 962 (2002)*; Bottoson v. State*, 813 So. 2d 31 (Fla. 2002), *cert. denied,* 536 U.S. 962 (2002). This Court gave merits review to Bottoson's *Apprendi* challenge to his death sentence that was final in 1983. This Court gave merits review to King's *Apprendi* challenge to his death sentence that was final in 1987. This Court did not apply any procedural bars to the *Apprendi* challenges, nor did this Court find that it was precluded from considering the *Apprendi* challenges to death sentences under *Witt v. State*. In both cases, this Court relied upon its decision in

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King. In those two case, this Court relied upon the US Supreme Court's failure to state in *Ring v. Arizona* that not only was *Walton v. Arizona* overruled, but so too were *Hildwin v. Florida* and *Spaziano v. Florida*. Neither this Court's failure to recognize that logic of *Hildwin* and *Spaziano* had been washed away nor the US Supreme Court's failure in *Ring* to expressly state that *Hildwin* and *Spaziano* were overruled can properly be attributed to any capital defendant. It would simply be unfair within the meaning of *Witt* to deprive capital defendants whose death sentences became final after Ring issued on June 24, 2002, the benefit of *Hurst v. Florida*.

Mills v. Moore, 786 So. 2d 532 (Fla. 2001).[70]

In *Mills v. Moore*, this Court considered an *Apprendi* challenge to a death sentence that resulted from a judicial override of a jury's life recommendation. The crime had occurred in 1979. The conviction was returned in late 1979, and then the jury recommended a sentence of life imprisonment. The judge overrode the life recommendation and imposed a death sentence in early 1980. *Mills v. State*, 476 So. 2d 172 (Fla. 1985). In early 2001, Mills filed a habeas petition in this Court in which he argued that "Florida's death penalty override scheme, under which [he] was sentenced to death, violates the principle espoused in the recent decision by the United States Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)." *Mills v. Moore*, 786 So. 2d at 536. This Court noted that "Mills argues that [775.082(1), Fla. Stat.] makes life imprisonment the maximum penalty available. Mills argues that the statute allowing the judge to override the jury's recommendation makes it clear that the maximum possible penalty is life imprisonment unless and until the judge holds a separate hearing

[70]The decision in *Mills v. Moore* was a 4-3 decision affirming the death sentence. However as to the *Apprendi* claim, the dissenters joined the majority opinion. *Mills v. Moore*, 786 So. 2d at 545 (Pariente, J., dissenting) ("I agree with the majority, however, that the United States Supreme Court majority opinion in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 2366, 147 L.Ed.2d 435 (2000), by its express terms did not apply to capital sentencing and thus does not provide a basis for granting Mills relief. **Nonetheless, I point out that a jury recommendation of life might, under a logical extension of the reasoning in *Apprendi*, preclude a trial court from overriding a jury's life recommendation.**") (emphasis added).

and finds that the defendant is death eligible."[71] This Court rejected Mills' *Apprendi* claim on the merits, saying:

> Mills is actually attacking the validity of the bifurcated guilt and sentencing phases of a capital trial. That issue was litigated and decided in *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), and *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990). The *Apprendi* majority clearly did not revisit these rulings.

Mills, 786 So. 2d at 538.[72]

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[71]As this Court noted, the statute at the time of the capital offense at issue in *Mills* provided:

> A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than 25 years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in finding by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.

Mills, 786 So. 2d at 538.

[72]In its opinion, this Court noted: "Mills argues that *Apprendi* overruled *Walton [v. Arizona]* and relies upon the five-to-four split in the Court." This Court in rejecting Mills' *Apprendi* claim specifically relied upon the continued vitality of *Walton*. But then in *Ring v. Arizona*, *Walton* was specifically overruled. In the wake of *Ring*, Justice Pariente noted in her concurrence in the stay of execution issued to Bottoson on July 8, 2002, that *Ring* had explicitly overruled *Walton*. Justice Pariente then wrote:

> However, I cannot accept the dissent's view that "[t]he termination of the stays of execution by the Supreme Court can only mean that *Ring* does not apply to the Florida capital sentencing statute." Dissenting op. at 124. That is what we thought after *Apprendi* when in case after case, the United States Supreme Court denied petitions for certiorari in cases that had stated that *Apprendi* did not apply to capital sentencing. *See Mills,* 786 So.2d at 537 ("The Supreme Court's denial of certiorari indicates that the Court meantwhat it said when it held that *Apprendi* was not intended to affect capital sentencing schemes."). **Clearly, we were wrong in *Mills*** that the multiple instances where the United States Supreme Court denied certiorari after

Mills was not the only capital defendant to raise an *Apprendi* challenge before this Court. In *Mann v. Moore*, 794 So. 2d 595, 599 (Fla. 2001), this Court citing to *Mills v. Moore* also rejected Mann's *Apprendi* claim on the merits: "Thus, Mann's Apprendi arguments are without merit." In *Brown v. Moore*, 800 So. 2d 223, 225 (Fla. 2001), when faced with another *Apprendi* challenge to Florida's capital sentencing scheme, this Court wrote:

> We have previously rejected identical arguments. See *Mills v. Moore*, 786 So.2d 532, 536-38 (Fla.), *cert. denied*, 532 U.S. 1015, 121 S.Ct. 1752, 149 L.Ed.2d 673 (2001); *Mann*, 794 So.2d at 600. For the same reasons explained in those opinions, we reject Brown's arguments.

As it did in *Mills*, this Court reviewed the *Apprendi* challenges on the merits without referencing *Witt v. State* while considering the validity of Mann's death sentence (which was final in 1992) and Brown's death sentence (which was final in 1990).[73]

> *Apprendi* meant that the Supreme Court did not intend *Apprendi* to apply to capital sentencing.

Bottoson v. Moore, 824 So. 2d at 118 (Pariente, J., concurring).

[73] In this Court's 2002 opinion denying Hurst's first direct appeal, this Court while rejecting Hurst's *Apprendi* claim wrote:

> Subsequent to the filing of Hurst's initial brief, this Court decided this issue and has rejected the argument that the *Apprendi* case applies to Florida's capital sentencing scheme. *See Mills v. Moore*, 786 So.2d 532 (Fla.), *cert. denied*, 532 U.S. 1015, 121 S.Ct. 1752, 149 L.Ed.2d 673 (2001); *Mann v. Moore*, 794 So.2d 595 (Fla.2001). In his reply brief, Hurst requests that this Court revisit the *Mills* decision and find that *Apprendi* does apply to capital sentencing schemes. Having considered the cases Hurst cited and his additional arguments, this Court finds no reason to revisit the *Mills* decision, and thus we reject Hurst's final claim.

The U.S. Supreme Court in *Hurst* specifically concluded that *Spaziano v. Florida* and *Hildwin v. Florida* were irreconcilable with *Apprendi*:

> *Spaziano* and *Hildwin* summarized earlier precedent to conclude that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Hildwin*, 490 U.S., at 640–641, 109 S.Ct. 2055. **Their conclusion was wrong, and irreconcilable with *Apprendi*.**

136 S.Ct. at 623 (emphasis added). Thus, this Court's rejection of *Apprendi* claims on the merits in *Mills*, *Mann* and *Brown* was error under the principles enunciated in *Apprendi,* a decision that issued on June 26, 2002. Indeed, this Court rested its decision rejecting Mills' *Apprendi* challenge to his death sentence, which resulted from an override, on *Walton v. Arizona*, a decision that was expressly found to be contrary to *Apprendi* in *Ring v. Arizona*.

Since the U.S. Supreme Court specifically found that *Hildwin* and *Spaziano* were irreconcilable with *Apprendi* and yet this Court rejected *Apprendi* claims on the merits in *Mills*, *Mann* and *Brown,* the fairness principles of *Witt v. State* warrant treating *Hurst v. Florida* retroactive to the issuance of *Apprendi*. Had *Mills*, *Mann* and *Brown* been properly decided and recognized that *Apprendi* had rendered Florida's capital sentencing scheme unconstitutional, certainly every capital defendant whose death sentence was not final on June 26, 2000, would have undoubtedly received the benefit of *Ring*. Simple fairness, the overriding principle of *Witt*, demands that those who should have received

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Hurst v. State, 819 So. 2d 689, 703 (Fla. 2002).

the benefit of *Apprendi* must receive the benefit of *Hurst*. *See Thompson v. Dugger*; *Downs v. Dugger*; *Delap v. Dugger*.

Witt v. State is not just premised upon principles of fairness; it also rests on the concept of uniformity. "**Considerations of fairness and uniformity** make it very 'difficult to justify depriving a person of his liberty or his life, **under process no longer considered acceptable** and **no longer applied to indistinguishable cases**.'" *Witt v. State*, 387 So. 2d at 925 (emphasis added).

In *Meeks v. Dugger*, 576 So. 2d 713 (Fla. 1991), this Court was presented with a *Hitchcock/Lockett* claim in a case in which the death sentence became final in 1976, two years before *Lockett* issued. Even though Meeks' death sentence was final two years before *Lockett* issued, this Court gave Meeks the benefit of *Hitchcock*:

> We have previously recognized that the recent Hitchcock decision represents a sufficient change in the law to defeat a claim that the issue is procedurally barred. *See, e.g., Thompson v. Dugger*, 515 So.2d 173 (Fla. 1987), *cert. denied*, 485 U.S. 960, 108 S.Ct. 1224, 99 L.Ed.2d 424 (1988); *Demps v. Dugger*, 514 So.2d 1092 (Fla. 1987); *Delap v. Dugger*, 513 So.2d 659 (Fla. 1987).

Meeks, 576 So. 2d at 715. In a special concurrence, Justice Kogan wrote: "I believe that both this Court and the trial court must directly confront the root cause of the problem we face today: This Court's own inconsistent pronouncements on the admissibility of mitigating evidence during trials conducted in the 1970s." *Meeks*, 576 So 2d at 717. He then explained:

> In the 1970s, because of our own erroneous interpretation of federal case law, this Court directly

> barred capital defendants from presenting any mitigating evidence other than that described in the narrow list contained at that time in section 921.141(7), Florida Statutes (1975). *E.g., Cooper v. State*, 336 So.2d 1133, 1139 & 1139 n. 7 (Fla. 1976), *cert. denied*, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977).
>
> In 1978, the United States Supreme Court declared such a practice invalid in *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Only weeks later, this Court disingenuously stated that *Cooper* and other cases never had restricted defendants solely to the statutory list. In *Songer v. State*, 365 So.2d 696, 700 (Fla. 1978) (on rehearing), *cert. denied*, 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979), we retroactively amended Cooper with a few sentences arguing that our precedents "indicate unequivocally that the list of mitigating factors is not exhaustive." *Id*.

Meeks, 576 So.2d at 717.[74] Within this context, Justice Kogan concluded that the underlying principles of *Witt*'s retroactivity analysis warranted giving Meeks the benefit of *Hitchcock*: "Cooper and *Songer*, read together with an honest and objective mind, reveal a serious injustice that now must be corrected." *Meeks*, 576 So.2d at 718.

Accepting that the *Witt* fairness principles require *Hurst* to relate back to the issuance of *Ring v. Arizona* and/or *Apprendi v. New Jersey*, this Court must confront whether "[c]onsiderations of fairness and uniformity" can justify denying the benefit of *Hurst*

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[74]Justice Kogan continued: "Only two years later, in *Songer*, we did exactly what we said we could not do: We judicially expanded the list to conform to *Lockett*." *Meeks*, 576 So.2d at 717. "This act alone was highly suspect. As we frequently have stated, **a statute cannot be rendered constitutional if this can be accomplished only 'by a bald judicial amendment similar to a legislative enactment.'** *Brown v. State*, 358 So.2d 16, 20 (Fla. 1978) (quoting *State v. Mayhew*, 288 So.2d 243, 252 (Fla. 1973) (Ervin, J., dissenting). A bald judicial amendment is precisely what *Songer* achieved." *Meeks*, 576 So.2d at 717 n.5 (Kogan, J., specially concurring) (emphasis added).

to those whose death sentences were final before June 24, 2002, or June 26, 2000. For example, what about Matthew Marshall.

Marshall is an individual on Florida's death row solely on the basis of a judicial override of a jury's life recommendation. In *Marshall v. State*, 604 So. 2d 799 (Fla. 1992), this Court affirmed the death sentence by a 4-3 margin. The majority wrote:

> The jury found Marshall guilty of first-degree murder and recommended a sentence of life imprisonment. The judge rejected the jury's recommendation and imposed a sentence of death, finding in aggravation: (1) that the murder was committed by a person under sentence of imprisonment; (2) that the defendant was previously convicted of violent felonies; (3) that the murder was committed while the defendant was engaged in the commission of or an attempt to commit a burglary; and (4) that the murder was especially heinous, atrocious, and cruel.

Marshall, 604 So. 2d at 802. Subsequently, this Court affirmed the denial of Marshall's Rule 3.851 claim based on *Ring* and *Apprendi* in *Marshall v. State*, 911 So. 2d 1129, 1134 (Fla. 2005) ("Although we have not addressed *Ring's* application in the context of a jury override verdict, our previous conclusions with regard to *Ring* claims preclude Marshall from being granted relief on his claim.").[75] How can "[c]onsiderations of fairness and uniformity" justify denying Marshall the benefit of *Hurst* simply because the judicial override of the jury's life recommendation

[75]Justice Lewis wrote in his concurrence: "I reiterate my concern that a trial judge's override of a jury's life recommendation stands in apparent "irreconcilable conflict" with the holding of *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)." *Marshall v. Crosby,* 911 So. 2d at 1138. However, Justice Lewis concluded that because in the years following *Ring*'s issuance, *Spaziano* had been left intact: "I must agree that *Ring* is inapplicable in this post-conviction case." *Marshall*, 911 So. 2d at 1140.

in his case was affirmed by this Court on July 16, 1992? Can this Court leave Marshall's death sentence intact after the decision in *Hurst v. Florida*?

What about Edward Zakrzewski? After he pled guilty to killing his wife and two children, his penalty phase jury returned one 6-6 life recommendation, and two 7-5 death recommendations. His sentencing judge overrode the life recommendation and imposed three death sentences that this Court affirmed on direct appeal by a narrow margin. *Zakrzewski v. State*, 717 So. 2d 488 (Fla. 1998). Subsequently, this Court rejected Zakrzewski's *Apprendi/Ring* challenge to his three death sentences on the merits. *Zakrzewski v. State*, 866 So. 2d 688, 697 (Fla. 2003) ("Thus, the prior violent felony or capital felony conviction aggravator exempts this case from the requirement of jury findings on any fact necessary to render a defendant eligible for the death penalty."). The basis of this Court's rejection of Zakrzewski's *Apprendi/Ring* is premised upon this Court's misunderstanding of what facts *Apprendi* and *Ring* require the jury to find in order for a death sentence to be imposed. How can "[c]onsiderations of fairness and uniformity" justify denying Zakrzewski the benefit of *Hurst* simply because the judicial override of the jury's life recommendation in his case was affirmed by this Court on June 11, 1998. Can this Court leave Zakrzewski's death sentence intact after the decision in *Hurst v. Florida*? Is there some guiding principle that can justify denying Zakrzewski the benefit of *Hurst* when this Court denied his *Apprendi/Ring* claim that cannot withstand scrutiny under *Hurst*?

If not, then this Court is arbitrarily drawing lines that violated the bedrock principles of *Furman v. Georgia*, 408 U.S. 238 (1972).

Indeed, there is no principled way to grant partial retroactivity under *Witt v. State*. "Considerations of fairness and uniformity" require that *Hurst v. Florida* be fully retroactive, and that Asay receive the benefit of that decision. According to this Court's law, to arbitrarily deprive Asay of the benefit of *Hurst's* determination that the capital sentencing scheme under which he received a sentence of death is unconstitutional cannot be justified.[76] Certainly, that would

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[76] *Hurst* is undoubtedly a "development of fundamental significance" within the meaning of *Witt v. State*, 387 So. 2d 922, 931 (Fla. 1980), and thus principals of fairness dictate that *Hurst* be given retroactive effect. These principles of fairness were recently explained by this Court in *Falcon v. State*. There, this Court wrote:

> As this Court stated in *Witt*, "**[c]onsiderations of fairness and uniformity make it very 'difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases.**'" Here, if *Miller* is not applied retroactively, it is beyond dispute that some juvenile offenders will spend their entire lives in prison while others with "indistinguishable cases" will serve lesser sentences merely because their convictions and sentences were not final when the *Miller* decision was issued. The patent unfairness of depriving indistinguishable juvenile offenders of their liberty for the rest of their lives, based solely on when their cases were decided, weighs heavily in favor of applying the Supreme Court's decision in *Miller* retroactively.

162 So. 3d 954, 962 (Fla. 2015) (citations omitted) (emphasis added). If the unfairness resulting from loss of liberty demands retroactive application then so too does loss of life. If the unfairness to juveniles in indistinguishable cases receiving different non-capital sentences is too great then so too is the unfairness of executing Asay while defendants with

violate the Eighth Amendment.

Based on the facts and circumstances asserted herein, Asay submits that relief is warranted.

CONCLUSION

Asay submits that relief is warranted in the form of a new trial, the imposition of a life sentence, a new sentencing proceeding, or any other relief that this Court deems proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing initial brief has been furnished by electronic mail to Charmaine Millsaps, Assistant Attorney General, on this 15th day of February, 2016.

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indistinguishable cases will receive the benefit of *Hurst* (and not be put to death under an unconstitutional death penalty scheme).

CERTIFICATE OF FONT

This is to certify that this Initial Brief has been produced in a 12 point Courier type, a font that is not proportionately spaced.

/s/ Martin J. McClain
MARTIN J. MCCLAIN