RECEIVED 02/19/2016 5:05 pm FLORIDA SUPREME COURT

In the Supreme Court of Florida

MARK JAMES ASAY,

Appellant,

v.

CASE NO. SC16-223
DEATH WARRANT SIGNED
EXECUTION SCHEDULED
FOR MARCH 17, 2016

STATE OF FLORIDA,

Appellee.
______________________/

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

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

PAGE(S)

TABLE OF CONTENTS.. i

TABLE OF CITATIONS. ii

PRELIMINARY STATEMENT.. 2

STATEMENT OF THE CASE AND FACTS.. 3

SUMMARY OF ARGUMENT.. 12

ARGUMENT. 16

ISSUE I

WHETHER THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR AND VIOLATED DUE PROCESS? (Restated). 16

ISSUE II

WHETHER THE TRIAL COURT PROPERLY SUMMARILY DENIED THE CLAIM OF NEWLY DISCOVERED EVIDENCE BASED ON TWO COMMITTEE REPORTS THAT THE BALLISTIC EXPERT TESTIMONY WAS EXAGGERATED? (Restated).. 26

ISSUE III

WHETHER THE TRIAL COURT PROPERLY SUMMARILY DENIED THE DUE PROCESS AND EQUAL PROTECTION CLAIM BASED ON THE LACK OF STATE POSTCONVICTION COUNSEL AT THE TIME THE WARRANT WAS SIGNED? (Restated) 49

ISSUE IV

WHETHER THE TRIAL COURT PROPERLY SUMMARILY DENIED THE SIXTH AMENDMENT RIGHT-TO-A-JURY-TRIAL CLAIM BASED ON *HURST V. FLORIDA*, 136 S.Ct. 616 (2016)? (Restated).. 56

CONCLUSION. 91

CERTIFICATE OF SERVICE. 91

CERTIFICATE OF FONT AND TYPE SIZE.. 91

TABLE OF CITATIONS

CASES PAGE(S)

Aguirre-Jarquin v. State,
9 So. 3d 593 (Fla. 2009). 63

Ake v. Oklahoma,
470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985).. 6

Alleyne v. United States,
- *U.S.* -, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013). . 60, 61, 63, 83

Almendarez-Torres v. United States,
523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998).14, 56, 83, 85

Apprendi v. New Jersey,
530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). . . . passim

Asay v. Florida,
502 U.S. 895, 112 S.Ct. 265, 116 L.Ed.2d 218 (1991).. . . . 6, 66

Asay v. Moore,
828 So.2d 985 (Fla. 2002).. 8

Asay v. State,
580 So.2d 610 (Fla.1991). 4, 5, 6, 8, 34, 36, 77

Atlantic Coast Line R. Company v. Powe,
283 U.S. 401, 51 S.Ct. 498, 75 L.Ed. 1142 (1931). 83

Ault v. State,
53 So. 3d 175 (Fla. 2010).. . . . . 21, 62

Barclay v. Florida,
463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983). 74

Barnes v. State,
124 So.3d 904 (Fla. 2013).. 44

Barwick v. State,
660 So.2d 685 (Fla.1995). 22

Bottoson v. Moore,
833 So.2d 693 (Fla. 2002).. . . . . 73, 74, 75

Bousley v. United States,
523 U.S. 614, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998). 68

Brady v. Maryland,
373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).. . . . . passim

Bravo v. United States,
532 F.3d 1154 (11th Cir. 2008). 72

Bunkley v. State,
882 So. 2d 890 (Fla. 2004). 71

Buzia v. State,
82 So.3d 784 (Fla. 2011). 41

Caldwell v. Mississippi,
472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).. . . . . 89, 90

Chamberlain v. State,
881 So.2d 1087 (Fla. 2004). 22

Chambers v. Maroney,
399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970).. . . . . . 52, 53

Crawford v. Washington,
541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).. . 66, 73, 74

United States v. Cronic,
466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).. 50

Croom v. State,
36 So.3d 707 (Fla. 1st DCA 2010). 20

Crosby v. United States,
506 U.S. 255, 113 S.Ct. 748, 122 L.Ed.2d 25 (1993). 23

Davis v. Singletary,
119 F.3d 1471 (11th Cir. 1997). 90

Davis v. State,
26 So.3d 519 (Fla. 2009). 40

DeStefano v. Woods,
392 U.S. 631, 88 S.Ct. 2093, 20 L.Ed.2d 1308 (1968).. . . . . 67, 68

Deparvine v. State,
146 So. 3d 1071 (Fla. 2014).. 85

Diaz v. State,
132 So. 3d 93 (Fla. 2013).. 63

Duckett v. State,
148 So. 3d 1163 (Fla. 2014).. . . . . 30, 44, 50

Duncan v. Louisiana,
391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). 67

Elliot v. State,
49 So.3d 269 (Fla. 1st DCA 2010). 20

Evans v. Sec'y, Florida Dept. of Corr.,
699 F.3d 1249 (11th Cir. 2012). 81

Fiore v. White,
531 U.S. 225, 121 S.Ct. 712, 148 L.Ed.2d 629 (2001).. . . . . 70, 71

Fletcher v. Florida,
168 So. 3d 186 (Fla. 2015), cert. denied, (Jan. 25, 2016).. 83, 84

Foster v. State,
132 So.3d 40 (Fla. 2013). 29, 32, 33, 44

Franqui v. State,
59 So.3d 82 (Fla. 2011).. 44

Galindez v. State,
955 So.2d 517 (Fla. 2007).. . . . . 86, 87

Geralds v. State,
111 So. 3d 778 (Fla. 2010). 41

Giarratano v. Murray,
847 F.2d 1118 (4th Cir. 1988).. 55

Gideon v. Wainwright,
372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). 70

Giglio v. United States,
405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).. 10

Gilliam v. State,
582 So.2d 610 (Fla.1991). 23

Goodwin v. State,
751 So. 2d 537 (Fla. 1999). 88

Gore v. State,
91 So.3d 769 (Fla. 2012). 51

Graham v. Collins,
506 U.S. 461, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993).. 70

Griffith v. Kentucky,
479 U.S. 413, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987). 76

Haliym v. Mitchell,
492 F.3d 680 (6th Cir. 2007). 34, 83

Hanover Fire Insurance Company v. Carr,
272 U.S. 494, 47 S.Ct. 179, 71 L.Ed. 372 (1926). 71

Henry v. State,
125 So.3d 745 (Fla. 2013). 32

Herring v. State,
2013 WL 6436348 (Fla. Dec. 9, 2013). 32

Hildwin v. Florida,
490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989). . . 59,73,74

Hildwin v. State,
141 So. 3d 1178 (Fla. 2014). 38,74

Hitchcock v. Sec'y, Fla. Dep't. of Corr.,
745 F.3d 476 (11th Cir. 2014). 72

Hodges v. State,
55 So. 3d 515 (Fla. 2010). 82

Holland v. Florida,
- *U.S.* -, 130 S.Ct. 2549, 177 L.Ed.2d 130 (2010). 9

Howell v. State,
145 So.3d 774 (Fla. 2013). 29, 32

Hughes v. State,
901 So. 2d 837 (Fla. 2005). 67

Hunter v. State,
29 So.3d 256 (Fla. 2008). 30

Hurst v. Florida,
136 S.Ct. 616 (2016). . . . . passim

Galindez v. State,
955 So. 2d 517 (Fla. 2007). 86

In re Anderson,
396 F.3d 1336 (11th Cir. 2005). 67

Illinois v. Allen,
397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). 23

Jackson v. State,
599 So.2d 103 (Fla.1992). 22

Jeanty v. Warden, FCI-Miami,
757 F.3d 1283 (11th Cir. 2014). 67

Johnson v. State,
904 So. 2d 400 (Fla. 2005). 66,71,72,73,76,77

Johnston v. State,
27 So.3d 11 (Fla. 2010).. 32

Jones v. State,
709 So.2d 512 (Fla. 1998).. 31,54

Kansas v. Carr,
136 S.Ct. 633 (2016). 64,65

King v. Moore,
831 So.2d 143 (Fla. 2002).. 74

Knight v. State, 746 So. 2d 423 (Fla. 1998).. 24

Lambrix v. State,
124 So. 3d 890 (Fla. 2013). 22,31,72,73

Lightbourne v. State,
742 So.2d 238 (Fla. 1999).. 38

Lockett v. Ohio,
438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). 6

Marshall v. Crosby,
911 So. 2d 1129 (Fla. 2005).. 74

Mann v. State,
112 So.3d 1158 (Fla. 2013). 45

Mansfield v. State,
758 So.2d 636 (Fla. 2000).. 63

Marshall v. State,
604 So.2d 799 (Fla. 1992).. 80

Massachusetts v. United States,
333 U.S. 611, 68 S.Ct. 747 (1948).. 71

McCoy v. United States,
266 F.3d 1245 (11th Cir. 2001). 67

McLellan v. Miss. Power and Light Company,
545 F.2d 919. 72

McNeil v. Asay,
558 U.S. 1007 (2009). 9

Miller v. Alabama,
567 U.S. –, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). 69

Montgomery v. Louisiana,
136 S.Ct. 718 (2016). 68, 69, 70

Neder v. United States,
527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999).. . . . . . . 86, 87

Nelson v. State,
274 So.2d 256 (Fla. 4th DCA 1973).. 9

Nixon v. State,
932 So.2d 1009 (Fla. 2006). 44

Occhicone v. State,
768 So.2d 1037 (Fla. 2000). 42

Parker v. State,
633 So.2d 72 (Fla. 1st DCA 1994). 20, 22, 63

Plott v. State,
148 So. 3d 90 (Fla. 2014).. 57

Power v. State,
992 So.2d 218 (Fla.2008). 32

Proffitt v. Florida,
428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). 74

Reed v. State,
116 So. 3d 260 (Fla. 2013). 31, 41

Ring v. Arizona,
536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). . . . . passim

Rivera v. State,
717 So.2d 477 (Fla. 1998).. 22

Robertson v. State,
143 So.3d 907 (Fla. 2014).. 72

Robinson v. State,
793 So.2d 891 (Fla.2001). 65

Rodriguez de Quijas v. Shearson/Am. Exp., Inc.,
490 U.S. 477, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989). 74

Romano v. Oklahoma,
512 U.S. 1, 114 S.Ct. 2004, 129 L.Ed.2d 1 (1994). 90

Rolling v. State,
944 So.2d 176 (Fla. 2006).. 32

Rose v. State,

985 So. 2d 500 (Fla. 2008). 72

Ross v. Moffitt,
417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974). 51

Rutherford v. State,
926 So.2d 1100 (Fla.2006).. 32

Saffle v. Parks,
494 U.S. 484, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990). 70

San Martin v. State,
705 So.2d 1337 (Fla. 1997). 24

Sattazahn v. Pennsylvania,
537 U.S. 101, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003).. 90

Schriro v. Summerlin,
542 U.S. 348, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004). . . . passim

Schwab v. Crosby,
451 F.3d 1308 (11th Cir. 2006). 72

Schwab v. State,
969 So.2d 318 (Fla. 2007).. 32

Smith v. Florida,
170 So. 3d 745 (Fla. 2015). 83, 84

Spalding v. Dugger,
526 So.2d 71 (Fla. 1988). 54, 55

Spaziano v. Florida,
468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984).. . 59, 73, 74

State v. Dixon,
283 So.2d 1 (Fla. 1973).. 62

State v. Towery,
64 P.3d 828.. 68

State v. Langlois,
2 N.E.3d 936, 945-46 (Ohio Ct. App. 2013).. 33

Stein v. State,
995 So. 2d 329 (Fla. 2008). 20

Stovall v. Denno,
388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967).. 67

Swafford v. State,
125 So.3d 760 (Fla. 2013).. 38

Tafero v. State,
403 So.2d 355 (Fla. 1981).. 23

Teague v. Lane,
489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). 67, 73

Thompson v. Dugger,
515 So.2d 173 (1987). 80

Tompkins v. State,
994 So.2d 1072 (Fla. 2008). 31, 32

Tuilaepa v. California,
512 U.S. 967, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994). 62

Turner v. Crosby,
339 F.3d 1247 (11th Cir. 2003). 66

Valentine v. State,
98 So.3d 44 (Fla. 2012).. 44

United States v. King,
751 F.3d 1268 (11th Cir. 2014). 74, 75, 83

United States v. O'Brien,
560 U.S. 218, 130 S.Ct. 2169, 176 L.Ed.2d 979 (2010). 61, 63

United States v. Otero,
849 F. Supp. 2d 425 (D.N.J. 2012).. 33

United States v. Nagy,
760 F.3d 485 (6th Cir. 2014). 82

United States v. Shelton,
400 F.3d 1325 (11th Cir. 2005). 83

United States v. Shunk,
113 F.3d 31 (5th Cir. 1997).. 70

United States v. Watts,
519 U.S. 148, 117 S.Ct. 633, 136 L.Ed.2d 554 (1997).. 86

Walton v. State,
3 So.3d 1000 (Fla. 2009). 30, 50

Washington v. Recuenco,
548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006). 85, 87

Whorton v. Bockting,
549 U.S. 406, 127 S.Ct. 1173, 167 L.Ed.2d 1 (2007). . . 66, 69, 73

Williams v. State,
37 So. 3d 187 (Fla. 2010). 63

Witt v. State,
387 So.2d 922 (Fla.1980). 67, 69, 72, 75

Wright v. State,
995 So.2d 324 (Fla. 2008). 38

Wyatt v. State,
71 So.3d 86 (Fla. 2011). 37

Zack v. State,
911 So. 2d 1190 (Fla. 2005). 51

Zakrzewski v. State,
717 So. 2d 488 (Fla. 1998). 80, 81

Zeigler v. State,
580 So.2d 127 (Fla. 1991). 80, 81

Zommer v. State,
31 So.3d 733 (Fla. 2010). 62

PRELIMINARY STATEMENT

Appellant, MARK JAMES ASAY, the defendant in the trial court, will be referred to as appellant, the defendant or by his proper name. Appellee, the State of Florida, will be referred to as the State. Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. The symbol "IB" will refer to appellant's initial brief and will be followed by any appropriate page number. All double underlined emphasis is supplied.

<u>STATEMENT OF THE CASE AND FACTS</u>

This is an appeal from a summary denial of a successive postconviction motion in a death warrant capital case.

Facts of the crime and procedural history

The facts of the crime are recited in the Florida Supreme Court's direct appeal opinion:

> Asay, Asay's brother, Robbie, and Robbie's friend, "Bubba" McQuinn, on July 17, 1987, the three met at a local bar where they drank beer and shot pool. They left the bar around 12:00 a.m. and went to a second bar where they stayed until closing at 2:00 a.m. Although Asay drank a number of beers, both Bubba and Robbie testified that Asay did not appear drunk or otherwise impaired.
>
> After the bar closed, Robbie said he wanted to try to "pick up a girl" he had seen at the bar, so Bubba and Asay drove around the corner in Asay's truck. They returned to discover that Robbie had been unsuccessful with the girl he had seen, so Bubba suggested that they go downtown to find some prostitutes and he would pay for oral sex for them all. Asay and Bubba left in Asay's truck and Robbie left in his. Once downtown, Asay and Bubba soon spotted Robbie who was inside his truck talking to a black man, Robert Lee Booker. Robbie was telling Booker who was standing at the driver's side window of Robbie's truck that he and his friends were looking for prostitutes.
>
> After spotting Booker standing by Robbie's truck, Asay told Bubba to pull up next to the truck. Asay immediately got out of his truck, proceeded to Robbie's truck, and told Robbie "You know you ain't got to take no s-t from these f---ing niggers." Although Robbie told Asay that "everything is cool," Asay began to point his finger in Booker's face and verbally attack him. When Booker told him "Don't put your finger in my face," Asay responded by saying "F-k you, nigger" and pulling his gun from his back pocket, shooting Booker once in the abdomen. Booker grabbed his side and ran. According to the medical examiner, the bullet perforated the intestines and an artery causing internal hemorrhaging. Booker's body was later found under the edge of a nearby house.
>
> Robbie drove away immediately after the shooting. Asay jumped into the back of his truck, as Bubba drove off. When Asay got into the cab of the truck, Bubba asked him why he shot Booker. Asay responded, "Because you got to show a nigger who is boss." When asked if he thought he killed Booker, Asay replied, "No, I just scared the s-t out of him."

Bubba testified that after the shooting, Asay and Bubba continued to look for prostitutes. According to Bubba, he saw "Renee" who he knew would give them oral sex. It appears that at the time neither Bubba nor Asay was aware that "Renee" was actually Robert McDowell, a black man dressed as a woman. According to Bubba, he negotiated a deal for oral sex for them both. Bubba drove the truck into a nearby alley. McDowell followed. Bubba testified that McDowell refused to get into the truck with them both, so Asay left the truck and walked away to act as a lookout while Bubba and McDowell had sex. As McDowell started to get into the truck with Bubba, Asay returned, grabbed McDowell's arm, pulled him from the truck and began shooting him. McDowell was shot six times while he was backing up and attempting to get away. Asay jumped back in his truck and told Bubba to drive away. When asked why he shot McDowell, Asay told Bubba that he did it because "the bitch had beat him out of ten dollars" on a "blow job." McDowell's body was found on the ground in the alley soon after the shots were heard. According to the medical examiner, any of three wounds to the chest cavity would have been fatal.

Asay later told Charlie Moore in the presence of Moore's cousin, Danny, that he shot McDowell because McDowell had cheated him out of ten dollars on a drug deal and that he had told McDowell, "if he ever got him that he would get even." Asay told Moore that he was out looking for "whores," when he came across McDowell. According to Moore's cousin, Danny, Asay also told Moore that his plan was to have Bubba get McDowell in the truck and they "would take her off and screw her and kill her." Moore testified that Asay told him that when Bubba "didn't have [McDowell] in the truck so they could go beat him up," Asay "grabbed [McDowell] by the arm and stuck the gun in his chest and shot him four times, and that when he hit the ground, he finished him off." As a result of tips received from Moore and his cousin after McDowell's murder was featured on a television Crime Watch segment, Asay was arrested and charged by indictment with two counts of first-degree murder.

The state also presented testimony of Thomas Gross, who was Asay's cellmate while he was awaiting trial. Gross testified that when the black prisoners, who were also housed in their cell, were out in the recreation area, Asay told him he was awaiting trial for a couple of murders. According to Gross, Asay then showed him some newspaper articles and told him, "I shot them niggers." While they were discussing the murders, Asay showed Gross his tattoos, which included a swastika, the words "White Pride," and the initials "SWP" which Gross said stand for supreme white power.

Asay v. State, 580 So.2d 610, 610-612 (Fla.1991).

Asay was found guilty of both murders. In accordance with the jury's recommendations, the trial court imposed a sentence of death for each conviction. The following two aggravating factors were found in connection with both murders: 1) the

> murder was committed by a person under sentence of imprisonment because Asay was on parole; and 2) Asay had been previously convicted of a capital felony based on the contemporaneous murder conviction. § 921.141(5)(a), (b), Fla.Stat. (1987). In connection with the McDowell murder, the court found a third aggravating factor, that the murder was committed in a cold, calculated, and premeditated manner, without any pretense of any moral or legal justification. § 921.141(5)(i), Fla.Stat. (1987). Asay's age of twenty-three at the time of the offenses was found in mitigation as to both murders. § 921.141(6)(g), Fla.Stat. (1987).

Asay, 580 So.2d at 612.

The jury recommended a death sentence of 9 to 3 for both victims.

On direct appeal to the Florida Supreme Court, Asay raised seven issues: 1) the trial court erred by allowing racial prejudice to be injected into the trial; 2) the trial court erred in failing to advise Asay of his right to represent himself and to conduct an inquiry when Asay asked to discharge court-appointed counsel; 3) the trial court erred in denying Asay's pro se motion for a continuance of the penalty phase of the trial to enable him to secure additional mitigation witnesses; 4) the prosecution improperly diminished the jury's role in sentencing; 5) the trial judge erred by failing to grant his motion for judgment of acquittal on count I of the indictment charging him with the first-degree premeditated murder of Robert Lee Booker; 6) the trial court erred in finding the McDowell murder was committed in a cold, calculated, and premeditated manner; and 7) death is not proportionate for these murders because they were "spontaneous, impulsive killings during stressful circumstances" *Asay v. State*, 580 So.2d 610, 612, n.1 (Fla.1991)(listing four of the seven issues raised in the direct appeal). The Florida Supreme Court found that issues 1-4 did not merit discussion. *Asay*, 580 So.2d at 612 (stating only three of the

seven issues raised merit discussion). The Florida Supreme Court affirmed the two convictions for first-degree murder and the death sentences.

Asay filed a petition for writ of certiorari in the United States Supreme Court which was denied on October 7, 1991. *Asay v. Florida*, 502 U.S. 895, 112 S.Ct. 265, 116 L.Ed.2d 218 (1991).

On March 16, 1993, Asay filed an initial 3.850 postconviction motion in state court raising twenty claims. *Asay v. State*, 769 So.2d 974, 978, n.5 (Fla. 2000)(listing the twenty claims in the amended initial postconviction motion).[1] In March 25-27, 1996, an

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[1] Asay's claims were: (I) state agencies withheld public records; (II) the judge presiding over the trial was biased and trial counsel was ineffective for failing to recuse him; (III) the original trial judge should have recused himself from presiding over the postconviction proceedings because he is biased; (IV) trial counsel was ineffective during the guilt phase; (V) the jury instructions for the CCP aggravator failed to limit the jury's consideration and it was not supported by the evidence; (VI) the CCP jury instruction was unconstitutional and counsel was ineffective for failing to object; (VII) Florida's sentencing scheme is unconstitutional; (VIII) aggravating circumstances were overbroadly argued by the State; (IX) the trial judge erred in failing to find mitigation present in the record; (X) the penalty phase jury instructions shifted the burden of proof to the defendant; (XI) the prosecutor's inflammatory comments rendered Asay's trial fundamentally unfair; (XII) Asay was denied his right to an adequate mental health evaluation under *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985); (XIII) ineffective assistance in the penalty phase; (XIV) the denial of Asay's motion for a continuance before the penalty phase to secure additional mitigation witnesses denied him due process and rendered counsel ineffective; (XV) the trial court prevented Asay from presenting mitigation evidence in violation of *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); (XVI) Asay's guilt phase counsel was ineffective for failing to present a voluntary intoxication defense; (XVII) the prosecutor improperly stated that sympathy could not be considered by the jury; (XVIII) the jury instructions unconstitutionally diluted the jury's sense of sentencing responsibility and counsel was ineffective for failing to ensure that the jury received adequate instructions; (XIX)

evidentiary hearing was held on various claims of ineffectiveness. On April 23, 1997, the trial court denied the post-conviction motion.

Asay appealed to the Florida Supreme Court. Asay raised the following claims in his state posconviction appeal: 1) judicial bias during the trial and postconviction proceedings resulted in a denial of "a fair and impartial tribunal throughout his proceedings in violation of his due process rights;" 2) the trial court improperly limited the scope of the evidentiary hearing by (a) limiting the testimony of some of Asay's siblings concerning mitigating evidence not presented during the sentencing phase; (b) limiting the scope of Asay's examination of his trial counsel regarding his knowledge of prior inconsistent statements of key witnesses; and (c) refusing to hear the testimony of Thomas Gross recanting his trial testimony; 3) ineffectiveness of counsel during the guilt phase for (a) failing to adequately impeach the State's key witnesses, (b) for failing to present a voluntary intoxication defense, and (c) for failing to rebut the State's arguments that he committed the crime due to his racial animus; 4) ineffectiveness of counsel during the penalty phase for (a) failing to investigate and present statutory mitigating evidence that he was acting under extreme emotional distress and his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, and (b) failing to present nonstatutory

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prosecutorial misconduct rendered Asay's conviction unreliable; and (XX) Asay's trial court proceedings were fraught with errors that cannot be considered harmless when considered as a whole.

mitigating evidence of physical and emotional abuse and poverty during his childhood, alcohol abuse and his history of "huffing" inhalants; 5) the trial court improperly summarily denied several claims; and 6) cumulative error. *Asay v. Moore*, 828 So.2d 985, 989, n.7 (Fla. 2002)(listing the issues raised in the postconviction appeal in a footnote). Following an oral argument, the Florida Supreme Court affirmed the trial court's denial of the postconviction motion. *Asay v. State*, 769 So.2d 974 (Fla. 2000).

On October 25, 2001, Asay filed a state habeas petition in the Florida Supreme Court. The Florida Supreme Court concluded that: 1) attorney's failure to confer with petitioner before the final acceptance of the jury panel did not violate due process right to be present during critical stages; 2) trial court's misstatement during voir dire concerning mitigating factors was not fundamental error; 3) appellate counsel did not render ineffective assistance; 4) trial court did not commit fundamental error by failing to refer to additional mitigating evidence; and 5) the instruction on the aggravating factor of a cold, calculated, and premeditated (CCP) murder was correct. The Florida Supreme Court denied the petition. *Asay v. Moore*, 828 So.2d 985 (Fla. 2002).

On October 17, 2002, Asay filed a successive 3.851 postconviction motion in state trial court raising a *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) claim. On December 20, 2004, the Florida Supreme Court rejected the *Ring* claim in an unpublished opinion, which states in its entirety:

> "Mark James Asay appeals the circuit court's order summarily denying his successive motion to vacate judgment and sentence wherein he challenges the validity of his death sentences

under *Ring v. Arizona*, 536 U.S. 584 (2002). The circuit court's order is hereby affirmed."*Asay v. State*, 892 So.2d 1011 (Fla. 2004).

Asay then filed a petition for writ of certiorari in the United States Supreme Court, which the Court denied on November 2, 2009. *McNeil v. Asay*, 558 U.S. 1007 (2009).

On August 15, 2005, original federal habeas counsels, Dale Westling and Mary Catherine Bonner, filed a federal habeas petition. (Doc. #8). The original habeas petition was untimely. Previously, before the habeas petition was filed by counsel, on February 11, 2005, Asay had filed a letter with the federal district court complaining that his habeas petition would be untimely. (Doc. # 1).

The federal district court ordered several rounds of briefing and conducted two oral arguments on the issue of the timeliness of the petition. The district also conducted an evidentiary hearing on the issue of equitable tolling. Following the evidentiary hearing on equitable tolling, Respondents, in light of *Holland v. Florida*, - U.S. -, 130 S.Ct. 2549, 177 L.Ed.2d 130 (2010), without waiving the timeliness argument, agreed to proceed to the merits of the habeas petition.

On March 11, 2011, newly appointed habeas counsel, Thomas Fallis, filed a motion to adopt the original habeas petition. (Doc. #135). The original habeas petition raised eleven grounds for habeas relief: 1) the trial court's failure to provided substitute trial counsel under *Nelson v. State*, 274 So.2d 256 (Fla. 4th DCA 1973), and to advise Petitioner that he had the right to proceed *pro se*; 2) ineffective assistance of his trial counsel, Raymond A. David, for delegating the investigation to an investigator; 3) ineffectiveness

for failing to meet with him in jail and for failing to cross-examine the State's witnesses, "Bubba" O'Quinn, Danny Moore, Charlie Moore, and Dr. Floro, regarding inconsistencies in their testimony; 4) ineffectiveness for not more vigorously pursuing the reasonable doubt trial strategy, such as failing to object to admission of evidence which tied Petitioner to the type of gun used in the murders and failing to present a voluntary intoxication defense; 5) failing to present his abusive childhood and mental mitigation during penalty phase; 6) denial of a fair trial due to the prosecution introducing evidence that the murders were racially motivated and that counsel was ineffective for failing to keep race out of the trial; 7) Thomas Gross's trial testimony was a violation of *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), and *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); 8) ineffective assistance of counsel for advising him not to testify in his own behalf; 9) ineffectiveness during guilt phase closing argument for acknowledging that Asay shot someone in the dark; 10) a claim that Florida's death penalty statute violates *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); and 11) ineffectiveness for failing to convey a plea offer from the trial court. (Doc. # 152 at 1-3)(listing issues raised but noting "the caption of the ground often does not encompass or even pertain to many of the actual issues raised" (Doc. # 152 at n.2)

On August 15, 2011, Respondents filed an answer on the merits to the habeas petition. (Doc. #143). Asay filed a reply abandoning grounds one, seven, nine and eleven. (Doc.# 147; Doc. #152 at 3).

So, only grounds two, three, four, five, six, eight, and ten remained. Thus, there ultimately were seven grounds raised in the federal habeas litigation.

On April 14, 2014, the federal district court denied the federal habeas petition on the merits but granted a COA on the issue of whether "Petitioner received ineffective assistance of counsel at the penalty phase of trial because counsel failed to investigate, obtain and present additional mitigating evidence." (Doc. # 152 at 51).

Asay, again represented by Tom Fallis, filed a notice of appeal to the Eleventh Circuit. On June 13, 2014, counsel Fallis filed a motion to withdrawal the appeal stating that Asay directed him to dismiss the appeal. The Eleventh Circuit voluntarily dismissed the appeal with prejudice.

SUMMARY OF ARGUMENT

ISSUE I

Asay asserts a claim of fundamental error and a due process violation because the trial court relied on the public records to reject one of the claims. There was no due process violation. Rather, the trial court properly considered the public records and then properly denied the claim as conclusively rebutted by the record. There is no basis to disqualify the judge. No motion to disqualify was filed in the trial court. Moreover, even if viewed as error for the judge to consider the public records, legal error is not judicial bias. Nor was the hearing on the State's motion to prohibit the proffer an "*ex parte*" hearing. An attorney may not refuse to attend a hearing and then claim that the hearing was held *ex parte*.

ISSUE II

Asay asserts a claim of newly discovered evidence, based on two new reports which discuss the proper scope of a firearm expert's testimony. He claims the State's ballistic expert's testimony at trial that the one bullet from the body of first victim matching the four bullets from the body of the second victim was exaggerated. Asay, relying on a 2008 National Research Counsel report on bullet matching analysis and a 2009 report issued by the National Academy of Sciences Committee on *Identifying the Needs of the Forensic Sciences Community titled Strengthening Forensic Science in the United States*: *A Path Forward*, argues that the ballistic expert's testimony was improper and inadmissible. But generalized reports

are not newly discovered evidence. Alternatively, regardless of the bullet testimony, the State proved the first victim was, in fact, Robert Lee Booker. Cliff Patterson testified that he heard one or two gunshots and then he saw Booker, who he knew from meeting on prior occasions, running past him and saying that he had been shot, while clutching his side. Patterson identified the person in a photograph as Booker at trial. This is highly-reliable acquaintance identification testimony. Additionally, the actual shooting, the encounter with both Patterson and Pace, and the finding of the dead body all occurred on the same street. The location of the incidents, as well as the nature of the wounds on the body, also establish that the victim was Booker. A jury, based on this evidence would convict Asay of the murder of Booker, regardless of the ballistic testimony. Moreover, ballistic testimony is still admissible in the wake of the two reports. Thus, the trial court properly summarily denied the newly discovered evidence claim.

ISSUE III

Asay asserts that his due process and equal protection rights were violated by having newly-appointed state postconviction counsel who is unfamiliar with his case handle the warrant litigation and by the loss of many of the records collected in the initial postconviction proceedings. But there is no federal or state constitutional right to postconviction counsel. The Sixth Amendment right to an attorney does not apply to collateral proceedings, much less to successive collateral proceedings. Moreover, Asay had counsel at every stage of his proceedings. He had counsel during

trial; during the direct appeal; during the initial state postconviction proceedings; during the successive state postconviction proceedings; and during the federal habeas corpus proceedings. And he has counsel during the current warrant litigation. Asay now has, not one but three, experienced capital litigators as state postconviction counsel. He also has federal habeas counsel on his defense team who has been his attorney for years and is familiar with his case. Furthermore, as many as possible of the postconviction records were recreated in the trial court during the recent warrant litigation. Thus, the trial court properly summarily denied the due process and equal protection claim.

ISSUE IV

Asay asserts that his death sentences violates the United States Supreme Court's recent decision in *Hurst v. Florida*, 136 S.Ct. 616 (Jan. 12, 2016). *Hurst*, however, is not retroactive. Both the United States Supreme Court and this Court have held that *Ring*, the precusor to *Hurst*, was not retroactive because it was a new procedural rule that did not seriously increase accuracy. Moreover, the United States Supreme Court has held the first case applying the Sixth Amendment right-to-a-jury-trial provision to the states was not retroactive. If the seminal case is not retroactive, then its progeny is not either. Moreover, *Hurst* does not apply at all because there is a recidivist aggravator in this case. Under the *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), exception, the right to a jury finding does

not apply to recidivist aggravators. Even if *Hurst* applied, the jury necessarily and explicitly found one of the aggravators in the guilt phase by convicting Asay of both murders. And even if *Hurst* applied and had been violated, any error was harmless. Thus, the trial court properly summarily denied the *Hurst* claim.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR AND VIOLATED DUE PROCESS? (Restated)

Asay asserts a claim of fundamental error and a due process violation because the trial court relied on the public records to reject one of the claims. There was no due process violation. Rather, the trial court properly considered the public records and then properly denied the claim as conclusively rebutted by the record. There is no basis to disqualify the judge. No motion to disqualify was filed in the trial court. Moreover, even if viewed as error for the judge to consider the public records, legal error is not judicial bias. Nor was the hearing on the State's motion to prohibit the proffer an "*ex parte*" hearing. An attorney may not refuse to attend a hearing and then claim that the hearing was held *ex parte*.

Facts

This was a pre-repository case in which most of the prior public records from the initial postconviction proceedings in 1993 had been destroyed or lost. During the warrant litigation, the agencies recreated their original disclosures of public records. The agencies, including the Jacksonville Sheriff's Office and the State Attorney's Office, provided the replacement public records material to opposing counsel, as well as to the judge. Opposing counsel was aware that the judge was receiving the public records material.

During the *Huff* hearing, the State read from the deposition of Detective Housend without objection from opposing counsel in support of its position that there was no suppression of Roland Pough as a possible suspect in the Booker murder. (PC 2016 Vol. 7 at 1028-1030). The deposition of Detective Housend refers to Roland Pough several times as a potential suspect and the State argued it conclusively rebutted the *Brady* claim that Roland Poland was not disclosed. The deposition was part of the State Attorney Office's public records disclosure.

During the *Huff* hearing, opposing counsel repeatedly referred to the continuation report from the Jacksonville Sheriff's Office public records materials. (PC 2016 Vol. 7 at 1023-1025). Counsel clarified that the *Brady* claim was based on the July 23 statement of Hall. (PC 2016 Vol. 7 at 1023, 1027).

During the *Huff* hearing, the trial court asked opposing counsel if his *Brady* claim was based on the fact, that at no point that counsel was aware of, Selwyn Hall was disclosed as a witness and that Hall's statement was never disclosed to the defense. (PC 2016 Vol. 7 at 1032). Opposing counsel responded: "correct." (PC 2016 Vol. 7 at 1032). The trial court then asked the State about whether Hall's name and statement was disclosed and the judge stated: "since I just got this motion this morning I have not been able to go through the record" to see if Hall's name and statement were disclosed. (PC 2016 Vol. 7 at 1032). The state responded that the answer focused on Poland Pough being disclosed as possible suspect, not Hall, because that was the core of the *Brady* claim and the State had not had time to go through the public records for Hall's name

either. (PC 2016 Vol. 7 at 1032-1033).[2] The State explained that the deposition established that the defense knew about Pough before trial and chose not to use Pough as a defense at trial. (PC 2016 Vol. 7 at 1033).

The trial court, in her order denying the *Brady* claim raised in the amended successive motion, noted that she had "received and reviewed" the public records provided as part of the warrant litigation and that Hall's statement was disclosed by the detective's "homicide supplemental report of July 31, 1987 which provides the name and address of the alleged undisclosed witness Selwyn Hall on page 2 of 14."

On February 4, 2016, opposing counsel emailed the prosecutor and the public records person for the Jacksonville Sheriff's Office at 12:44 p.m., writing that he intended to file a proffer including unredacted materials given to him on an emergency basis on the condition, which he agreed to on-the-record, that none of the unredacted material would be made public. The Office of the Attorney General emailed back at 12:58 p.m. that the State objected to any proffer because any proffer after the trial court had already ruled was improper. Mr. McClain then emailed the Attorney General's

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[2] The amendment to the successive raising the *Brady* claim was filed on Sunday, January 31, 2016 at 1:06 p.m. which was the day before the *Huff* hearing. The State filed an answer to the amendment the same day, on Sunday, January 31, 2016, at 9:57 p.m. The State's answer focused mainly on Roland Pough himself and the fact the deposition of Detective Housend established that Pough as a possible suspect was disclosed. The *Huff* hearing was conducted on Monday, February 1, 2016, at 1:00 pm, so that morning undersigned counsel was driving over to Jacksonville from Tallahassee.

Office that he intended to file the proffer regardless of its impropriety.

At 2:31 p.m., the State filed a motion to prohibit the proffer in the trial court. The trial court's judicial assistant attempted to arrange a hearing on the State's motion but Mr. McClain emailed her back: "I am sorry I am not available at all." At 3:02 p.m., the State emailed Mr. McClain a notice of hearing via the e-portal.

At 3:14 p.m., the Judge herself emailed Mr. McClain informing him that if he "was unable to appear at 3:15pm, please let me know (via email copied to all), and I can move the hearing to 3:30pm, 3:45pm, etc. But want it heard before 5:00pm today." Mr. McClain did not respond to the email.

The trial court held a hearing on the State's motion at about 3:30 pm without Mr. McClain because Mr. McClain did not answer the phone when he was called. After the hearing, at 4:06 p.m., Mr. McClain emailed the judge that he did not "have time this afternoon for a hearing that has been set on inadequate notice. Due process demands both notice and a reasonable opportunity to be meaningful heard." At the hearing, the judge ordered the record on appeal sealed.

<u>The trial court's ruling</u>

There is no ruling from the trial court on the due process issue regarding the use of the public records to reject the *Brady* claim because no objection or rehearing was filed in the trial court asserting that the homicide supplemental report was not properly part of the record. There is also no ruling from the trial court

regarding the disqualification of the judge because no motion to disqualify the judge was filed.

Standard of review

The standard of review is *de novo*. Obviously, there is no ruling from the trial court on the matter. A claim of fundamental error is reviewed *de novo*. *Croom v. State*, 36 So.3d 707, 709 (Fla. 1st DCA 2010)(stating that the *de novo* standard of review applies to claims of fundamental error); *Elliot v. State*, 49 So.3d 269, 270 (Fla. 1st DCA 2010)(same). The standard of review of a trial judge's determination on a motion to disqualify is also *de novo*. *Stein v. State*, 995 So. 2d 329, 334 (Fla. 2008).

Merits

Asay asserts the trial court's reference to the homicide supplemental report of July 31, 1987 in denying the *Brady* claim was improper use of extra-record material. The materials are not extra-record material in the traditional sense. The trial court had obtained material, because the agencies involved, including the State Attorney's Office, provided copies of the public records to the trial court, as well as opposing counsel, during the recent warrant litigation. Thus, the material was before the trial court. It was proper for the trial court to consider the material from the State Attorney's Office and the Jacksonville Sheriff's Office as part of the record of the current warrant litigation. *Parker v. State*, 633 So.2d 72, 73 (Fla. 1st DCA 1994)(holding police report was contained in the court file could properly be relied on by this

Court to determine the facts of the case, regardless of the report not being introduced into evidence during the plea colloquy).

As to the crucible of adversarial testing, opposing counsel was in receipt of the same material as the trial court. And counsel had knowledge that the judge was receiving that material from the emails and from the judge's own statement at the *Huff* hearing that she had not had time yet to go looking for Hall's name in the public records materials. There was no due process violation.

Disqualification of judge

Asay asserts the case should be remanded and the current postconviction judge should be disqualified. First, the issue is not preserved. Asay never filed a motion to disqualify the judge in the trial court and any motion filed now would be untimely. *Ault v. State*, 53 So. 3d 175, 204 (Fla. 2010)(finding a claim of judicial bias unpreserved because the defendant never filed a motion to disqualify the judge on the same ground he raised on appeal); rule 2.330(e), Fla. R. Jud. Admin. (governing the disqualification of trial judges and providing: "A motion to disqualify shall be filed within a reasonable time not to exceed 10 days after discovery of the facts constituting the grounds for the motion and shall be promptly presented to the court for an immediate ruling). A reasonable time in the warrant context is immediately. Instead of filing an improper proffer after the ruling, opposing counsel should have filed a motion for rehearing explaining his position that the

public records should not be used by the judge as well as any motion to disqualify.[3]

As this Court explained in *Parker v. State*, 3 So.3d. 974, 982 (Fla. 2009), a motion to disqualify is governed substantively by section 38.10, Florida Statutes, and procedurally by Florida Rule of Judicial Administration 2.330. The standard for viewing the legal sufficiency of a motion to disqualify the judge is whether the facts alleged, which must be assumed to be true, would cause the movant to have a well-founded fear that he or she will not receive a fair trial at the hands of that judge. Moreover, the "fear of judicial bias must be objectively reasonable." *Parker*, 3 So.3d. at 982.

Any motion to disqualify the judge would be legally insufficient because adverse rulings are not a valid basis to disqualification. *Lambrix v. State*, 124 So. 3d 890, 903 (Fla. 2013)("As this Court has repeatedly held, the fact that a judge has previously made adverse rulings is not an adequate ground for recusal."); *Chamberlain v. State*, 881 So.2d 1087 (Fla. 2004)(noting the fact that the judge has made adverse rulings in the past against the defendant . . . is generally considered a legally insufficient reason to warrant the judge's disqualification citing *Rivera v. State*, 717 So.2d 477, 481 (Fla. 1998)(quoting *Jackson v. State*, 599 So.2d 103, 107 (Fla.1992)); *Barwick v. State*, 660 So.2d 685, 691-692 (Fla.1995)(concluding that the motion to disqualify the trial court

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[3] This would be a second motion to disqualify the postconviction court filed in this case. Previously, on March 30, 1993, Asay filed a motion to disqualify the state postconviction judge, the Honorable Lawrence Page Haddock, III, from presiding over the 3.850 proceedings, based on comments the judge made during Petitioner's trial which was denied.

was not legally sufficient because the primary basis for disqualification was Barwick's disagreement with the trial judge's rulings and explaining: "[t]he fact that a trial judge makes an adverse ruling is not a sufficient basis for establishing prejudice" citing *Jackson v. State*, 599 So.2d 103, 107 (Fla.1992); *Gilliam v. State*, 582 So.2d 610, 611 (Fla.1991); and *Tafero v. State*, 403 So.2d 355, 361 (Fla. 1981)). Adverse legal rulings from the postconviction judge are not a valid basis for disqualification of that judge.

Even if viewed as legal error to rely on the public records, it is not a basis for disqualification of the judge. Legal error is legal error, not judicial bias. To allow legal error to serve as a basis for disqualification of the judge would mean every case reversed for a new trial or a new penalty phase on appeal based on trial court error would have to be retried in front of a new judge. Disqualification of the judge is not warranted.

Hearing without counsel

While opposing counsel insists on referring to the hearing held regarding the State motion to prohibit the proffer as an *ex parte* hearing, it was really a hearing opposing counsel refused to attend. Despite being given notice of the hearing and permission to appear by phone, counsel informed the court he was not available "at all." Just as it is not considered a trial in absentia if the defendant voluntarily refuses to attend the trial, it is not an *ex parte* hearing, if counsel refuses to attend the hearing. *Crosby v. United States*, 506 U.S. 255, 113 S.Ct. 748, 122 L.Ed.2d 25 (1993)(noting

that "midtrial flight" is treated as a knowing and voluntary waiver of the right to be present); *Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970)(holding removing a defendant from the courtroom during his trial due to his conduct did not violate the Sixth Amendment and finding the defendant was "properly banished from the court" because "our courts" cannot be treated "disrespectfully with impunity."); *Knight v. State*, 746 So. 2d 423, 431-32 (Fla. 1998)(affirming the trial court removing the defendant from the courtroom on a daily basis in a capital case due to the defendant's refusal to remain silent). A hearing that counsel refuses to attend is not an *ex parte* hearing.

Counsel had actual personal knowledge that the judge wished to hold a hearing on the State's motion that afternoon and refused to be available at any time. Counsel had eportal notification of the hearing and email notification from the judge herself of the hearing. Moreover, the judge agreed to conduct the hearing at a later time in her email, if necessary, but received no answer. And counsel refused to answer the phone when called at the start of the hearing. Furthermore, if counsel truly could not have appeared, he could have had his law partner Linda McDermott or John Abatecola attend the hearing in his place. Counsel cannot turn his own misconduct and disrespect towards the court and refusal to attend into an *ex parte* hearing.

Even if viewed as error to conduct the hearing without counsel present, the error was invited by counsel's refusal to attend or arrange for one of his law partners to attend the hearing in his place. *Knight v. State*, 746 So. 2d 423, 432 (Fla. 1998)(finding a

defendant who refused to behave leaving the court no other option but to remove him from the courtroom to be bordering "on invited error" citing *San Martin v. State*, 705 So.2d 1337, 1347 (Fla. 1997) (prohibiting party from inviting error and then complaining about it on appeal)). Counsel did not want to be heard on the State's motion to prohibit the proffer. Indeed, he wrote to the judge that he had not even read the State's motion. Counsel insists that he had to go to the bank instead of attending a court-ordered hearing which was his personal choice. But his willful absence from the hearing does not make the hearing an *ex parte* hearing that violates the due process right to be heard.

Furthermore, the only action the trial court took following the hearing was to seal the record on appeal. The trial court did not grant the State's motion to prohibit the proffer. The trial court did not rule on the motion. It is hard to see how the defendant was harmed by the hearing. Thus, the trial court did not violate due process by conducting a hearing without counsel when counsel refused to attend.

ISSUE II

WHETHER THE TRIAL COURT PROPERLY SUMMARILY DENIED THE CLAIM OF NEWLY DISCOVERED EVIDENCE BASED ON TWO COMMITTEE REPORTS THAT THE BALLISTIC EXPERT TESTIMONY WAS EXAGGERATED? (Restated)

Asay asserts a claim of newly discovered evidence, based on two new reports which discuss the proper scope of a firearm expert's testimony. He claims the State's ballistic expert's testimony at trial that the one bullet from the body of first victim matching the four bullets from the body of the second victim was exaggerated. Asay, relying on a 2008 National Research Counsel report on bullet matching analysis and a 2009 report issued by the National Academy of Sciences Committee on *Identifying the Needs of the Forensic Sciences Community titled Strengthening Forensic Science in the United States*: *A Path Forward*, argues that the ballistic expert's testimony was improper and inadmissible. But generalized reports are not newly discovered evidence. Alternatively, regardless of the bullet testimony, the State proved the first victim was, in fact, Robert Lee Booker. Cliff Patterson testified that he heard one or two gunshots and then he saw Booker, who he knew from meeting on prior occasions, running past him and saying that he had been shot, while clutching his side. Patterson identified the person in a photograph as Booker at trial. This is highly-reliable acquaintance identification testimony. Additionally, the actual shooting, the encounter with both Patterson and Pace, and the finding of the dead body all occurred on the same street. The location of the incidents, as well as the nature of the wounds on the body, also establish that the victim was Booker. A jury, based on this evidence would convict Asay of the murder of Booker, regardless of

the ballistic testimony. Moreover, ballistic testimony is still admissible in the wake of the two reports. Thus, the trial court properly summarily denied the newly discovered evidence claim.

Testimony at trial

During the trial, the medical examiner, Dr. Bonofacio Floro, testified that the victim, Robert Lee Booker, had a single gunshot wound to his left abdomen, which perforated his ileac artery. (T. 420, 439-440). The medical examiner testified that the victim likely died about 2:00 a.m. in the morning. (T. 426, 459-460). The medical examiner also testified that he recovered one .25 caliber bullet from Booker's body and four .25 caliber bullets from McDowell's body. (T. 419,425).

At trial, FDLE ballistic expert Warniment testified. (T. 717). He compared the bullets from the two victims using a comparison microscope and concluded that they were all were fired from the same firearm. (T. 718, 724-726). On cross, the ballistic expert testified that he was "100% percent" positive that they were fired from the same weapon. (T. 732).[4]

Asay's brother, Robbie, and Robbie's friend, "Bubba" O'Quinn, both witnessed the first shooting but could not identify the victim as Robert Booker. (T. II 488-536, 499-500, 519, 530; T. Vol. II 550-580, T. Vol. III 588-595, 559-560, 571). "Bubba" O'Quinn, a friend

[4] This not a case where the firearm expert testified the bullet recovered from the victims matched the defendant's gun. The murder weapon was never recovered. Rather, the firearm expert testified that the bullet recovered from the first victim was fired from the same gun as the bullets recovered from the second victim.

of Asay's brother, testified that Asay shot the black male once. (T. 489-500;520-521; 530). Bubba testified that he saw Asay pull a firearm out of his back pocket and then shoot the black man. (T. 519, 530). Bubba testified that the black male then grabbed his side and ran toward Laura Street. (T. 501, 520).

At trial, Clifford Patterson testified that, on July 18, 1987, in the early morning, he was visiting a friend's house and his parked car was involved in an accident on Laura Street. (T. Vol. III 606-613; 607-608). The accident was basically a fender bender; it was "no big deal" and "wasn't really serious." (T. Vol. III 612, 613). While Patterson was discussing the accident and exchanging information with the driver of the mail truck, Mr. Pace, who had hit his car, Patterson heard one or two gunshots. (T. Vol. III 608). Right afterwards, Patterson saw a guy run right behind the two of them "holding his side saying that he was shot." (T. Vol. III 608). They were all on Laura Street at the time and the guy came up from 6th Street. (T. Vol. III 609). This occurred between 2:00 and 2:30 a.m. (T. Vol. III 609). Prosecutor Grimm showed Patterson State's exhibit 10, which was a photograph of a person, and Patterson identified the person in the photograph as the person who ran by him that night saying he had been shot. (T. Vol. III 609-610). During cross-examination, Patterson explained, that he had met Booker "more than once" before that night. (T. Vol. III 610). Patterson thinks he met Booker at either the Silver Dollar bar or the Idle Hour. (T. Vol. III 609).

Mr. Alexander Pace also testified. (T. Vol. III 596-606). He was the driver of the mail truck that hit Patterson's parked car. While

he could not identify Booker, Mr. Pace corroborated Mr. Patterson's testimony that a black man ran past them saying that he had been shot.

Patrol Officer David Smith testified he discovered a dead body on July 18, 1987, around 7:30 a.m. underneath the rear of a house located at 1622 North Laura Street which is near the corner of 7th Street and Laura Street. (T. 614-617). The body was that of a black male with a bullet wound to the abdomen. (T. 615-617). Officer Smith testified that he showed a photograph of the body to Mr. Patterson who knew the victim and identified the victim as Robert Booker. (T. 609-610).

<u>The trial court's ruling</u>

The trial court summarily denied the newly discovered evidence claim reasoning that new studies are not recognized as newly discovered evidence. The trial court noted that the 2009 report was not newly discovered evidence citing *Foster v. State*, 132 So.3d 40, 71-72 (Fla. 2013). The trial court also noted that obtaining a new expert is not a basis for a newly discovered evidence claim citing *Howell v. State*, 145 So.3d 774, 775 (Fla. 2013). The trial court found ballistic testimony to be "well-documented and accepted science" citing *Foster*, 132 So.3d at 69. The trial court also found the claim to be time barred because the reports were issued in 2008, 2009, and 2013 but the claim was not raised until 2016. Alternatively, considering the expert and reports as newly discovered evidence, the trial court concluded the claim failed because it was not likely to produce an acquittal at retrial. The

trial court noted the other evidence besides the ballistic testimony that the first victim was in fact, Robert Booker, including the medical examiner, Dr. Floro, testimony about the bullet wound on the lower abdomen of the body; James "Bubba" O'Quinn's testimony that Asay shot a black male who then grabbed his side and ran down Laura Street; the testimony of Clifford Patterson and Alexander Pace that they saw a black male running down Laura Street saying that he had been shot, while grabbing his side, and who Patterson identified as Booker; and the officer testimony about finding the body on Laura Street. The trial court also noted that the expert's testimony based on the reports would be "purely impeachment evidence." The trial court noted at any retrial, the FDLE expert Warniment's testimony regarding ballistics would still be admissible. The trial court concluded that the State fully established that the black male was Robert Booker. The trial court concluded that the new evidence "if offered during a retrial, would not result in an acquittal."

<u>Standard of review</u>

The standard of review is *de novo*. When a trial court summarily denies a claim raised in a postconviction motion the standard of review for the appellate court is *de novo*. *Duckett v. State*, 148 So. 3d 1163, 1168 (Fla. 2014)("This Court reviews the circuit court's decision to summarily deny a successive rule 3.851 motion *de novo* . . ." quoting *Walton v. State*, 3 So.3d 1000, 1005 (Fla. 2009)). "Because a court's decision whether to grant an evidentiary hearing on a rule 3.851 motion is ultimately based on written materials

before the court, its ruling is tantamount to a pure question of law, subject to *de novo* review." *Hunter v. State*, 29 So.3d 256, 261 (Fla. 2008).

Merits

Asay presents a claim of newly discovered evidence arguing the ballistic testimony at the original trial was misleading but, at its core, this is really a claim that the State did not prove that the first victim was, in fact, Robert Lee Booker.

I. Newly discovered evidence

To obtain a new trial based on newly discovered evidence, a defendant must establish two requirements: 1) the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence; and 2) the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. *Jones v. State*, 709 So.2d 512, 521 (Fla. 1998)(*Jones II*). "Newly discovered evidence satisfies the second prong of the *Jones II* test if it weakens the case against the defendant so as to give rise to a reasonable doubt as to his culpability." *Reed v. State*, 116 So. 3d 260, 264 (Fla. 2013)(quoting Jones II, 709 So.2d at 526). "In determining whether the evidence compels a new trial, the trial court must consider all newly discovered evidence which would be admissible and must evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial." *Lambrix v. State*, 39

So.3d 260, 272 (Fla. 2010)(quoting *Tompkins v. State*, 994 So.2d 1072, 1086 (Fla. 2008)).

Reports and studies are not evidence

New reports and studies are not newly discovered evidence. There is controlling Florida Supreme Court precedent rejecting claims of newly discovered evidence based on new studies.[5] Indeed, one of the two reports opposing counsel relied on in his original successive postconviction motion has been directly held by the Florida Supreme Court not to constitute newly discovered evidence. *Foster v. State*, 132 So. 3d 40, 72 (Fla. 2013)(holding 2009 report issued by the National Academy of Sciences Committee on *Identifying the Needs of the Forensic Sciences Community titled Strengthening Forensic*

[5] *Henry v. State*, 125 So.3d 745, 750 (Fla. 2013)(rejecting a claim that the American Society of Addiction Medicine (ASAM) 2011 Public Policy Statement defining addiction as a brain disorder was newly discovered evidence); *Herring v. State*, 2013 WL 6436348 (Fla. Dec. 9, 2013)(unpublished)(unanimously affirming a trial court's summary denial of a successive postconviction motion rejecting a claim of newly discovered evidence premised on the release of a newer version of an I.Q. test, the WAIS-IV); *Howell v. State*, 2013 WL 673241, 1 (Fla. Feb. 25, 2013)(unpublished)(rejecting a claim of newly discovered evidence based on new studies); *Schwab v. State*, 969 So.2d 318, 325 (Fla. 2007)(stating that "this Court has not recognized 'new opinions' or 'new research studies' as newly discovered evidence"); *Rutherford v. State*, 926 So.2d 1100, 1113 (Fla.2006)(holding that a study published in the British medical journal, *The Lancet*, was not new scientific evidence and affirming a summary denial of a successive motion); *Tompkins v. State*, 994 So.2d 1072, 1082-83 (Fla. 2008)(holding an ABA report, *Evaluating Fairness and Accuracy in the State Death Penalty System: The Florida Death Penalty Assessment Report* is not newly discovered evidence citing *Power v. State*, 992 So.2d 218, 222-23 (Fla.2008)); *Rolling v. State*, 944 So.2d 176, 181 (Fla. 2006)(same citing *Rutherford v. State*, 940 So.2d 1112, 1117-1118 (Fla. 2006)).

Science in the United States: A *Path Forward* was not recognized as newly discovered evidence citing *Johnston v. State*, 27 So.3d 11, 21 (Fla. 2010)).

Newly discovered evidence must be case-specific, not merely new generalized reports or studies. Neither the National Research Council 2008 Ballistic Imaging committee report nor the 2009 report is specific to Asay's case.

Admissibility of expert ballistic testimony

Ballistic testimony is still admissible in the wake of the two reports. *United States v. Otero*, 849 F. Supp. 2d 425, 430 (D.N.J. 2012)(holding firearms identification opinion was admissible under *Daubert* despite the 2009 National Research Council's report and its 2008 Ballistics Imaging Report), affirmed, *United States v. Otero*, 557 Fed. Appx. 146 (3d Cir. 2014); *State v. Langlois*, 2 N.E.3d 936, 945-46 (Ohio Ct. App. 2013)(holding firearms identification opinion was admissible despite the 2008 NRC Ballistics Imaging Report because the purpose of the report was not "to opine on the long-established admissibility of tool mark and firearms testimony in criminal prosecutions, and indeed the NRC authors made no recommendations in that regard," rather, the report called for more research which "hardly makes what firearms examiners do junk science."). In *Foster v. State*, 132 So. 3d 40, 69 (Fla. 2013), this Court noted that ballistic testimony was admissible in Florida since at least 1937 and was not new or novel. *Foster v. State*, 132 So. 3d 40, 69 (Fla. 2013).

Opposing counsel alleges that the ballistics testimony is "inadmissible and unreliable" without any citation to any authority from any jurisdiction. Ballistic testimony is still admissible in the wake of the reports.

Not likely to produce an acquittal at any retrial

Even if the National Research Council 2008 Ballistic Imaging committee report and the 2009 National Academy of Sciences report was considered as newly discovered evidence, Asay does not meet the second prong of the *Jones II* test. The change in the level of the bullet match testimony would not result in an acquittal of the Booker murder at a new trial. Indeed, the Florida Supreme Court did not even mention the ballistics testimony in their recitation of the facts in the direct appeal opinion. *Asay v. State*, 580 So. 2d 610, 610-612 (Fla. 1991).

Asay is really asserting that the State did not prove the first victim Asay shot was, in fact, Robert Booker because the only evidence proving the person Asay shot was Booker was exaggerated bullet matching testimony. This is not accurate. There were two eyewitnesses to the first shooting. Asay's brother, Robbie, and Robbie's friend, "Bubba" O'Quinn, both witnessed the first shooting but could not identify the victim as Robert Booker. (T. II 488-536, 499-500, 519, 530; T. Vol. II 550-580, T. Vol. III 588-595, 559-560, 571). But Cliff Patterson could identify the victim as Robert Booker. Patterson identified Booker as the person who ran past him saying he had been shot and holding his side from a photograph. Patterson explained to the jury that he knew Booker from meeting him

on prior occasions. While Patterson did not see the actual shooting, he heard gunshots and then saw Booker run past him saying he had been shot and holding his side.

The State has acquaintance eyewitness testimony that the man who was shot, was, in fact, Booker. *Haliym v. Mitchell*, 492 F.3d 680, 706 (6th Cir. 2007)(contrasting the reliability of stranger identification with acquaintance identification and explaining when the witness already knows the person from previous encounters it "substantially increases" the reliability of the identification). Patterson knew Booker. Patterson's testimony was not stranger identification; it was acquaintance identification. Such testimony is highly reliable.

Moreover, Patterson was an unbiased third party witness who was on Laura street in the early morning due to the happenstance of having had a car in an accident. And Mr. Pace testified in corroboration of Patterson's testimony about a man running past them.

The jury would have concluded that the first victim was Booker based solely on Patterson's testimony, regardless of the firearm expert's testimony about the bullets. Opposing counsel totally ignores Patterson's testimony in his arguments. Succ. Motion at 8 (mentioning Joseph Knight). He asserts that "only direct evidence" linking Asay to the Booker murder was the bullet matching testimony. Succ. Motion at 21. But that is not accurate. Patterson's testimony is direct eyewitness testimony that the man who was shot was Booker. In light of Patterson's testimony there is no reasonable doubt as to Asay's culpability of the murder of Booker.

Furthermore, ballistic testimony regarding the similarities between the bullets taken from the first victim, Booker, and the bullets from the second victim, McDonnell, is still valid and would be admissible at any retrial. The NCR committee did not take the position that bullet matching testimony was scientifically invalid and totally unreliable. Rather, the committee took the position that firearm expert's testimony should not be stated in bold absolutes that imply an error rate of zero. While the nature of the firearm expert's testimony would be less definitive than at the first trial, a firearm expert could still properly testify that there were numerous similarities among the five bullets. Indeed, a firearm expert could still testify that within a reasonable degree of certainty, it was his opinion, that all five bullets were from the same weapon. Similar ballistic testimony would be presented by the prosecution at any new trial.

Moreover, as opposing counsel acknowledges, Robert Booker's dead body, was found seven hours later near Laura Street with a single bullet in his abdomen. According to the medical examiner, the bullet perforated the intestines and an artery causing internal hemorrhaging to Booker. *Asay*, 769 So. 2d at 976. And Laura Street is the same street Patterson and Pace testified that they were located when they saw the guy running while holding his side and saying he had been shot. Booker's body was then discovered several blocks down Laura street from their encounter with him. Both Robbie Asay and Bubba O'Quinn testified that Asay shot the first victim, a black male, while they were parked near Laura Street and 6th Street. (T. Vol. II 496-497; T. Vol. III 556-557). And Patterson testified

Booker came running down Laura Street from the direction of 6th Street. The actual shooting, the encounter with Patterson and Pace, and the finding of the dead body all occurred on the same street. The location of the incidents, as well as the nature of the wounds on the body, also establish that the victim was Booker. There is no reasonable doubt as to Asay's culpability of the murder of Booker.

The more limited firearm expert testimony would not result in an acquittal at retrial. In light of Patterson's testimony and the fact that a firearm expert could properly testify that, while he could not be absolutely certain that the same weapon fired all five bullets, there were similarities among all five bullets, as well as the location of the body on Laura Street and nature of the wounds on the body, the jury would still readily conclude the first victim was Booker.

Opposing counsel reliance on *Wyatt v. State*, 71 So.3d 86 (Fla. 2011), is misplaced. IB at 57-58. Wyatt involved comparative bullet lead analysis (CBLA), not ballistics match testimony which is still reliable and admissible after these reports.

Opposing counsel's reliance on *Manning v. State*, is equally misplaced. IB at 57, n.40. The Mississippi Supreme Court ultimately denied relief on the claim. *Manning v. State*, No. 2013-DR-00491-SCT (Miss. order July 25, 2013).

Asay does not meet the test for newly discovered established in *Jones II.*

Cumulative analysis

Opposing counsel improperly resurrects previous legal claims as part of his cumulative analysis including the disqualification of the trial judge; numerous claims of ineffective assistance of trial counsel; and the prior alleged recantation of Thomas Gross. None of that material should be considered by this Court in its analysis of this newly discovered evidence claim. Filing a successive postconviction motion does not resurrect previously rejected legal claims. Rather, a proper cumulative analysis is limited to evidence, not legal arguments. This Court considers all the ***evidence*** at trial together with the ***evidence*** at prior postconviction proceedings with this new ***evidence*** to determine if there is a probability of an acquittal. *Hildwin v. State*, 141 So. 3d 1178, 1184 (Fla. 2014)(citing *Swafford v. State*, 125 So.3d 760, 775–76 (Fla. 2013) and *Lightbourne v. State*, 742 So.2d 238, 247 (Fla. 1999). In determining the impact of the newly discovered evidence, the court conducts "a cumulative analysis of all the evidence so that there is a 'total picture' of the case and all the circumstances of the case." *Hildwin*, 141 So. 3d at 1184. A claim of newly discovered evidence is not a Pandora's box of previous rejected legal arguments, as opposing counsel would have it. Moreover, any claim of newly discovered evidence should be analyzed cumulatively with prior newly discovered evidence, that cumulative analysis must take into consideration new evidence of guilt as well. *Cf. Wright v. State*, 995 So.2d 324, 328-28 (Fla. 2008)(considering new DNA results, that were not presented at the original trial, in denying the newly discovered evidence claim). Claims of newly discovered evidence sound in equity. But, because claims of newly discovered

evidence are based on equitable concerns about guilt and innocence, any additional evidence of guilt developed during the postconviction proceeding should also be considered by the court in determining whether to grant relief on the claim. During the initial postconviction proceedings, defense counsel testified that Asay admitted his guilt of both murders to investigator Monchief. While the State could not use this testimony at any retrial, this Court certainly should consider Asay's admission of guilt in refusing to grant the relief of a new trial.

A proper cumulative analysis is limited to the strength of the state case on the disputed point, which in this case is the strength of the State's case proving that the man Asay shot was, in fact, Booker. In light of Patterson's testimony and the fact that a firearm expert could properly testify that, while he could not be absolutely certain that the same weapon fired all five bullets, there were similarities among all five bullets, as well as the location of the body on Laura Street and nature of the wounds on the body, the jury would still readily conclude the first victim was Booker.

Thus, the trial court properly summarily denied the newly discovered evidence claim.

II. *Brady* claim

Asay asserts, based on Jacksonville Sheriff's Office records (JSO), that Yankee's and Hall's statements that Roland Pough may have shot Mr. Booker were never disclosed before trial in violation

of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). IB at 50. Specifically, Asay alleges that a statement of Selwyn Hall that Roland Pough shot Booker contained in a July 1987 homicide supplemental report and in handwritten notes was not disclosed. There was no suppression of this information as required to establish a *Brady* violation. The information that Roland Pough was a possible suspect was disclosed. The deposition of Detective Housend refers to Roland Pough several times as a potential suspect. The record conclusively rebuts the *Brady* claim. Thus, the trial court properly summarily denied the *Brady* claim.

The trial court's ruling

The trial court summarily denied the *Brady* claim. The trial court noted that there is no *Brady* violation where the information is equally accessible to the defense. The trial court found that "defendant's trial counsel had knowledge of all the information or should have been aware of it." The trial court noted that it had received and reviewed the public records provided as part of the warrant litigation and that Hall's statement was disclosed by the detective's "homicide supplemental report of July 31, 1987 which provides the name and address of the alleged undisclosed witness Selwyn Hall on page 2 of 14." That report conclusively rebutted the *Brady* claim. The trial court found that information fails to constitute *Brady* material because Asay "failed to meet his burden of showing JSO suppressed the statement in question and failed to provide it to trial counsel." The trial court cited *Davis v. State*, 26 So.3d 519, 531 (Fla. 2009)(stating that the defendant bears the

burden of establishing a *Brady* violation). The trial court found all information "was equally accessible" by both parties. The trial court noted that Detective Housend testified "extensively" about Roland Pough during his deposition.

The trial court also concluded that the information about Pough was not material. Hall's statement about Roland Pough was cumulative to Yankee's statement about Roland Pough. The trial court concluded that there was no reasonable probability of a different verdict.

<u>Merits</u>

Asay asserts a violation of *Brady* based on handwritten notes regarding Hall's statement that Roland Pough shot Booker given on July 23, 1987, was not disclosed. In his handwritten statement, Hall stated that Roland told him that he had shot a black male last Friday night during a robbery attempt in his side yard at his home at 1418 N. Market Street during a robbery attempt. IB at 52 n.37. Hall stated that he bought crack cocaine from Hall on several occasions. IB at n.37.

Brady

To establish a *Brady* violation, a defendant must show: (1) that favorable exculpatory or impeaching evidence (2) was suppressed by the State, either willfully or inadvertently, and (3) that the evidence was material. Evidence is material or prejudicial if there is a reasonable probability that had the evidence been disclosed, the result of the proceeding would have been different. That is, the

undisclosed favorable evidence, reasonably "considered in the context of the entire record," must undermine confidence in the verdict. *Reed v. State*, 116 So. 3d 260, 265-66 (Fla. 2013)(quoting *Buzia v. State*, 82 So.3d 784, 797 (Fla. 2011)).

No suppression

"A *Brady* claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot then be found to have been withheld from the defendant." *Geralds v. State*, 111 So. 3d 778, 787 (Fla. 2010)(citing *Occhicone v. State*, 768 So.2d 1037, 1042 (Fla. 2000)). The information regarding Roland Pough being a suspect in the shooting of Robert Booker was not suppressed.

The deposition of Detective Housend refers to Roland Pough several times as a potential suspect. Original defense counsel Lewis Buzzell deposed the homicide detective, C. R. Housend of the Jacksonville Sheriff's Office on November 23, 1987, prior to the trial in 1988. During that deposition, Detective Housend testified that a Marine Patrol Officer named Touchton told him that a white male named Yankee had information that Roland, a black male, had possibly been in a shoot-out with a black male that may have been Booker that night. The detective considered that lead to be a "dead end" based on the bullet comparison but also based in the eyewitnesses description, the detective was looking for two white males with a red pick-up truck, not a black male. The detective gave Roland Pough's address at 1418 N. Market Street to defense counsel during the deposition. Detective Moneyhun informed the

detective, a few days after the tip from the Marine Patrol Officer, on July 30th, of a suspect named Mark James Asay, who was a suspect in another murder downtown that night.

Furthermore, the statement Selwyn Hall gave on July 23, 1987, that Roland Pough shot Booker, was contained in a homicide supplemental report that was disclosed. Even if the trial court should not have referred to the supplemental report, the critical underlying fact that Roland Pough was a suspect was disclosed as the deposition clearly establishes. Detective Housend's deposition refers to Roland Pough several times as a potential suspect. That Roland Pough was a suspect in the murder of Robert Booker was disclosed to defense counsel. Hall's statement about Roland Pough was cumulative to Yankee's statement about Roland Pough in the sense that they both pointed to the alternative suspect of Pough. Regardless of the source, Hall or Yankee, defense counsel had the information that Pough was considered a suspect by the JSO early in the investigation and defense counsel choose not use it at trial.

Regardless of whether the information was conveyed via handwritten notes or via the homicide supplemental report, the point is that the information was disclosed. *Brady* may be fulfilled by handwritten notes or typed reports or even email, provided the information is disclosed, *Brady* is satisfied. *Brady* does not require a particular format. Roland Pough was disclosed and

therefore, the *Brady* claim is meritless. Because there was no suppression, there was no *Brady* violation.[6]

Record conclusively rebuts the claim

A "defendant may not simply file a motion for postconviction relief containing conclusory allegations ... and then expect to receive an evidentiary hearing." *Foster v. State*, 132 So.3d 40, 71 (Fla. 2013). Rather, a defendant must allege specific facts that **are not conclusively rebutted by the record**... *Foster*, 132 So.3d at 71 (citing cases and concluding, because the claim was conclusively rebutted by the record and procedurally barred, the postconviction court correctly summarily denied the claim).

The record conclusively refutes this allegation. Detective Housend's deposition refers to Roland Pough several times as a

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[6] Regarding the favorable evidence prong of *Brady*, while opposing counsel refers to the information as "compelling evidence of an alternative suspect," the only information he provides is that someone with a street name of "Yankee" said Roland Pough shot Booker during a drug deal. That is less than compelling. Alternatively, the impeachment value of Roland Pough is marginal at best. If defense counsel had attempted to cross-examine Detective Housend regarding Roland Pough, the detective would have just explained why he ruled Pough out as the perpetrator and considered him a "dead end," which would hardly helped the defense case.

The CI seems to have provided information on how Pough could be located and on that score, the CI was indeed highly reliable. Pough was located at the time and place where the CI told law enforcement he could be located.

Regarding the original interview notes of Charles Moore, while the notes contained the statement that Asay admitted "We shot somebody," the notes did not include the fact that Asay and Moore were driving around at the time of the confession or other details of the confession. *Brady* does not require notes contain certain information. Provided the interview notes were disclosed in some form, that the notes lacked certain details is not a *Brady* violation.

potential suspect. Detective Housend's deposition rebuts this claim. The record, as it exists, conclusively rebuts the *Brady* claim.[7]

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[7] A trial court may deny a claim in a postconviction motion without conducting an evidentiary hearing. An evidentiary hearing must be held on an initial 3.851 motion only when the movant makes a facially sufficient claim that requires factual determination. *Barnes v. State*, 124 So.3d 904, 911 (Fla. 2013).

First, a successive rule 3.851 motion may be denied without an evidentiary hearing if the records of the case conclusively show that the movant is entitled to no relief. See Fla. R.Crim. P. 3.851(f)(5)(B). For example, the record conclusively rebuts the *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) claim because the lead detective's deposition established the fact that the information that Roland Pough was a suspect early in the investigation was disclosed to the defense because defense counsel asked the detective about Pough during the deposition. The deposition of Detective Housend refers to Roland Pough several times as a potential suspect. The record conclusively rebuts the *Brady* claim.

Second, a trial court may deny a claim as legally insufficient. *Valentine v. State*, 98 So.3d 44, 54 (Fla. 2012)(quoting *Franqui v. State*, 59 So.3d 82, 95 (Fla. 2011)). The burden is on the defendant to establish a legally sufficient claim. *Duckett v. State*, 148 So. 3d 1163, 1168 (Fla. 2014)(citing *Nixon v. State*, 932 So.2d 1009, 1018 (Fla. 2006)). Some of the claims were summarily denied because the claims were legally insufficient. Opposing counsel did not fully plead the claims in his postconviction motion. Instead, opposing counsel proffered evidence to support his claims after the trial court ruled. For example, the affidavit of original state postconviction counsel Kissinger was not attached to the motion. Indeed, the affidavit is dated the day after the order was entered. Nor was Kissinger's potential testimony proffered during the *Huff* hearing. The trial court properly observed that several of the claims were legally insufficient.

Third, a trial court may deny a claim as meritless as a matter of law. When there is controlling Florida Supreme Court precedent disposing of the claim, it is proper for the trial court to summarily deny the post-conviction motion. In *Mann v. State*, 112 So.3d 1158, 1162 (Fla. 2013), this Court rejected a claim that the trial court was required to conduct an evidentiary hearing regarding a claim raised in a fifth successive postconviction motion that was controlled by existing precedent. This Court explained, that "[b]ecause Mann raised purely legal claims that have been previously rejected by this Court, the circuit court properly summarily denied relief." Summary denials are proper when there is existing precedent from the Florida Supreme Court and the

Materiality prong

Alternatively, even if Roland Pough as a possible suspect had not been disclosed (which it was), Hall's statement was not material. Regarding the materiality prong of *Brady*, there is no reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different.

While opposing counsel refers to the State's case as resting on Charles Moore, Danny Moore, James O'Quinn and Thomas Gross, opposing counsel omits Robbie Asay, the defendant's brother. Both O'Quinn and Robbie Asay were eyewitnesses to the murders. Even if Hall's statement was never disclosed (which never occurred because it was disclosed), it is hard to see any prejudice from the failure to disclose Pough as an early possible suspect in a case with actual eyewitnesses to the murder.

Thus, the trial court properly summarily denied the *Brady* claim.

III. Ineffectiveness

Asay asserts a claim of ineffectiveness of trial counsel, Raymond David, for not presenting Roland Pough as the actual shooter as a defense at trial to the murder of Booker. He frames this claim as an alternative to his *Brady* claim. But, because the name Roland Pough as an early potential suspect was clearly disclosed, the only

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claim is a pure questions of law. For example, the *Hurst* claim is meritless as a matter of law. The controlling precedent from this Court is that *Ring* and therefore, *Hurst*, is not retroactive. Many of the claims presented in Asay's successive motion were meritless as a matter of law and therefore, the trial court properly summarily denied those claims.

possible valid claim was a claim of ineffectiveness of trial counsel for not pointing the finger at Roland Pough as the actual shooter as a defense to the Booker murder. But any such claim of ineffectiveness should have raised in the initial postconviction proceedings. Current postconviction counsel may not belatedly raise such a claim during this warrant litigation. The signing of a warrant is not carte blanche to resurrect every issue that should have been previously raised.

<u>The trial court's ruling</u>

The trial court found the claim of ineffectiveness to be procedurally barred citing 3.851(d)(2). The trial court also noted that numerous claims of ineffectiveness were explored at the evidentiary hearing held during the original postconviction proceedings.

Untimely

Any claim of ineffectiveness of trial counsel, Raymond David, for not presenting Roland Pough being the actual shooter instead of Asay as a defense at trial to the murder of Booker is untimely. Any such claim of ineffectiveness should have been raised in the initial postconviction proceedings. Fla. R. Crim. P. Rule 3.851(d)(2)(A)(providing: "No motion shall be filed or considered pursuant to this rule if filed beyond the time limitation provided in subdivision (d)(1) unless it alleges: (A) the facts on which the claim is predicated were unknown to the movant or the movant's

attorney and could not have been ascertained by the exercise of due diligence). The facts were known to initial postconviction counsel Stephen Kissinger. That Roland Pough was an early suspect in the investigation of the murder of Robert Booker was known to initial postconviction counsel via Detective Housend's deposition (from the deposition it was obvious known to trial counsel who asked repeated questions regarding Pouvh of the detective). Initial postconviction counsel chose not to raise such a claim of ineffectiveness during the initial state postconviction proceedings in 1993, which ends the matter. Successive postconviction counsel McClain may not raise a claim of ineffectiveness of trial counsel at this late date. The claim of ineffectiveness is untimely under the rule.

Merits

Furthermore, there is little merit to such a claim of ineffectiveness of trial counsel. There was no deficient performance. Pointing the finger at Roland Pough is dangerous strategy. The problem with an alternative suspect defense is that often the state can account for alternative suspect's whereabout at the time of the murder and then the defense just looks like liars to the jury. Morever, such a defense does nothing to undermine Bubba's or Robbie's testimony that Asay shot a black man before shooting McDowell.

There was no prejudice either. The jury would have convicted Asay and recommended death if Pough had been presented as a defense. Given the evidence, including the eyewitness testimony that Asay

shot a person and Patterson’s testimony that Booker was the man that was shot, the jury would have concluded Asay shot Booker.

Thus, the trial court properly summarily denied the newly discovered evidence claim; the *Brady* claim; and the ineffectiveness claim.

ISSUE III

WHETHER THE TRIAL COURT PROPERLY SUMMARILY DENIED THE DUE PROCESS AND EQUAL PROTECTION CLAIM BASED ON THE LACK OF STATE POSTCONVICTION COUNSEL AT THE TIME THE WARRANT WAS SIGNED? (Restated)

Asay asserts that his due process and equal protection rights were violated by having newly-appointed state postconviction counsel who is unfamiliar with his case handle the warrant litigation and by the loss of many of the records collected in the initial postconviction proceedings. But there is no federal or state constitutional right to postconviction counsel. The Sixth Amendment right to an attorney does not apply to collateral proceedings, much less to successive collateral proceedings. Moreover, Asay had counsel at every stage of his proceedings. He had counsel during trial; during the direct appeal; during the initial state postconviction proceedings; during the successive state postconviction proceedings; and during the federal habeas corpus proceedings. And he has counsel during the current warrant litigation. Asay now has, not one but three, experienced capital litigators as state postconviction counsel. He also has federal habeas counsel on his defense team who has been his attorney for years and is familiar with his case. Furthermore, as many as possible of the postconviction records were recreated in the trial court during the recent warrant litigation. Thus, the trial court properly summarily denied the due process and equal protection claim.

The trial court's ruling

The trial court rejected the due process claim premised on the lack of state postconviction counsel. The trial court noted that Asay was represented by federal habeas counsel while in federal court. The trial court noted that there is no constitutional right to effective assistance of collateral counsel. The trial court rejected any analogy to *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), because, unlike the inexperienced attorney at issue in *Cronic*, collateral counsel "has decades of experience representing death row and death warrant inmates." The trial court, while acknowledging that the time frames were short, noted the numerous steps collateral counsel had taken on behalf of his client. The trial court declined to find that collateral counsel was rendering deficient performance. The trial court also denied the stay of execution.

Standard of review

The standard of review is *de novo*. When a trial court summarily denies a claim raised in postconviction motion the standard of review for the appellate court is *de novo*. *Duckett v. State*, 148 So. 3d 1163, 1168 (Fla. 2014)("This Court reviews the circuit court's decision to summarily deny a successive rule 3.851 motion *de novo* . . ." quoting *Walton v. State*, 3 So.3d 1000, 1005 (Fla. 2009)).

Merits

There is no constitutional right to state postconviction counsel, much less a constitutional right to have state postconviction

counsel while the case is pending in federal court. *Ross v. Moffitt*, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974)(holding there is no due process or equal protection constitutional right to counsel in collateral proceedings); *Zack v. State*, 911 So. 2d 1190, 1203 (Fla. 2005)("Under Florida and federal law, a defendant has no constitutional right to effective collateral counsel."); *Gore v. State*, 91 So.3d 769, 778 (Fla. 2012)(explaining that there is no independent cause of action for ineffective assistance of collateral counsel in "our state courts system."). And wrapping the claim in a due process cloth does not change the law that there is no constitutional right to counsel, under either the Sixth Amendment or the due process clause.

Asay was continuously represented in both state and federal court. Asay was represented Steve Kissinger of CCR-North during the initial postconviction proceedings in state court and then he was represented by registry counsel Dale Westling during the successive postconviction proceedings in state court. State successive postconviction counsel Westling did not withdraw until the case moved into federal court. Asay was originally represented by Mary Bonner in federal court, then he was represented by two attorneys, John Mills and Thomas Fallis, who replaced Mary Bonner. At each and every stage of the litigation and in every court, Asay had representation.

Prior state postconviction counsel, Dale Westling, filed a motion to withdraw when the case moved from state court into federal district court with Mary Katherine Bonner representing Asay at that

point in federal court. The state trial court granted that motion to withdraw in May of 2005.

Furthermore, the problem of lack of state postconviction counsel was remedied in the trial court by the appointment of new registry counsel. Asay now has state postconviction counsel. Indeed, Asay now has three experienced capital litigators as registry counsel. He also has federal habeas counsel on his defense team who has been his attorney for years and is familiar with his case. Opposing counsel ignores that he is part of a larger defense team which includes three highly-experienced capital litigators - Marty McClain, Linda McDermott, and John Abatecola. And that team also includes federal habeas counsel Thomas Fallis who handled merits briefing in the federal district court and is familiar with this case. Fallis was appointed as counsel by the federal court in August of 2010 for the purpose of merits briefing. Fallis has been Asay's lawyer for years. Asay's defense team includes an attorney who is familiar with both him and this case.[8]

Even where the constitutional right to counsel and the right to a fair trial applies, such as at the trial stage, the late appointment of counsel is not cause to reverse the conviction.

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[8] On January 15, 2016, Asay filed a *pro se* motion in federal district court for substitution of counsel. *Asay v. Jones*, No. 3:16-cv-00043 (M.D. Fla). Asay seeks to replace his current habeas counsel Thomas Fallis with new habeas counsel such as the Capital Habeas Unit (CHU) of the federal Public Defender's Office. The State filed a response asserting the motion was untimely because the habeas proceedings are complete and therefore, the motion should be denied. On February 16, 2016, state postconviction counsel McClain filed a reply. (Doc. #6). The *pro se* motion is currently pending in the Middle District. But, until the motion is ruled upon, Fallis remains counsel of record in federal court.

Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 1982, 26 L.Ed.2d 419 (1970). The Supreme Court observed, while unquestionably, "the courts should make every effort to effect early appointments of counsel in all cases," but the court refused "to fashion a per se rule requiring reversal of every conviction following tardy appointment of counsel." *Chambers*, 399 U.S. at 54, 90 S.Ct. at 1982-1983.

There was no need for an evidentiary hearing. There is no dispute regarding the facts surrounding this claim. Prior state postconviction counsel Dale Westling was permitted to withdraw as state successive postconviction counsel in May of 2005 when the case moved into federal court. Courts do not conduct evidentiary hearings for their amusement; they conduct evidentiary hearings to resolve factual disputes and there is no factual dispute regarding this claim. Because there is no factual dispute, this claim become solely a matter of law and therefore, it was properly resolved without any evidentiary hearing.

There was no due process violation from not having state postconviction counsel while the case was in federal court.

Loss of records

There is no due process violation from the loss of some of the records. Most of the records were recreated in the trial court as part of the warrant litigation. This is a pre-repository case, so the documents from the initial postconviction proceedings in state court, such as the original public records demands, were not archived. The Office of the Attorney General, however, copied the

entire appellate record in state court including the direct appeal; the initial postconviction proceedings, as well as the second successive postconviction proceedings. The Department of Corrections provided counsel with Asay's entire medical records, as well as his entire inmate file. The State Attorney's Office provided opposing counsel with its entire file which included many of the original public records requests made during the initial state postconviction proceedings. Both the Florida Department of Law Enforcement (FDLE) and the Jacksonville Sheriff's Office (JSO) provided opposing counsel with all the materials they had. Opposing counsel does not identify any agency that was unwilling to recreate the previous public records disclosures. Every state agency involved did what it could to recreate the records. Actually, there may be no lost records at all.

Furthermore, the recreation of the prior record does not entitled counsel to raise new claims now in the warrant litigation that should have been raised during the initial postconviction proceedings. Prior state postconviction Kissinger had those records and choose to raise the claims that he raised in the initial postconviction motion filed in 1993, which ends the matter.

But even if some of the records were lost, this Court had held the loss or destruction of files does not amount to a due process violation. *Jones v. State*, 928 So. 2d 1178, 1192 (Fla. 2006)(rejecting a due process challenge to the capital collateral proceedings where trial counsel's files were destroyed in a fire). Moreover, counsel does not identify any particular argument he is

being prevented from raising by the loss of those records, if any.

Opposing counsel's reliance on *Spalding v. Dugger*, 526 So.2d 71 (Fla. 1988), is misplaced. The *Spalding* Court did not create a state constitutional right to collateral counsel. Indeed, the *Spalding* Court denied the petition writ of mandamus.[9]

There is no due process or equal protection violation from Asay not having state postconviction counsel during the years his case was pending in federal habeas court where he had federal habeas counsel. Thus, the trial court properly summarily denied the due process and equal protection claim.

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[9] As an aside, the *Spalding* Court observed that "recently one federal circuit court of appeals has held that states are absolutely obligated to provide counsel for death-sentenced defendants in collateral relief matters" citing Giarratano v. Murray, 847 F.2d 1118 (4th Cir. 1988). The Fourth Circuit was then reversed by the United States Supreme Court in *Murray v. Giarratano*, 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989), which held neither Eighth Amendment nor due process clause requires states to appoint counsel for death row inmates seeking state postconviction relief.

ISSUE IV

WHETHER THE TRIAL COURT PROPERLY SUMMARILY DENIED THE SIXTH AMENDMENT RIGHT-TO-A-JURY-TRIAL CLAIM BASED ON *HURST V. FLORIDA*, 136 S.Ct. 616 (2016)? (Restated)

Asay asserts that his death sentences violates the United States Supreme Court's recent decision in *Hurst v. Florida*, 136 S.Ct. 616 (Jan. 12, 2016). *Hurst*, however, is not retroactive. Both the United States Supreme Court and this Court have held that *Ring*, the precusor to *Hurst*, was not retroactive because it was a new procedural rule that did not seriously increase accuracy. Moreover, the United States Supreme Court has held the first case applying the Sixth Amendment right-to-a-jury-trial provision to the states was not retroactive. If the seminal case is not retroactive, then its progeny is not either. Moreover, *Hurst* does not apply at all because there is a recidivist aggravator in this case. Under the *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), exception, the right to a jury finding does not apply to recidivist aggravators. Even if *Hurst* applied, the jury necessarily and explicitly found one of the aggravators in the guilt phase by convicting Asay of both murders. And even if *Hurst* applied and had been violated, any error was harmless. Thus, the trial court properly summarily denied the *Hurst* claim.

The trial court's ruling

The trial court summarily denied the *Hurst* claim. The trial court first ruled that the claim was procedurally barred under rule 3.851(d)(2)(B), because this Court has not yet held *Hurst* to be retroactive. The trial court noted that was no caselaw permitting

a trial court to make a retroactivity decision in contravention of the language of the rule. Rather, the decision on the retroactivity of *Hurst* should be made by the Florida Supreme Court. The trial court noted that it was "bound by the current state of the law." Because Asay's convictions and sentences became final 25 years before *Hurst*, he was not entitled to any relief. The trial court also denied the stay of execution premised mainly on *Hurst*.

Standard of review

The standard of review is *de novo*. This Sixth Amendment right-to-a-jury-trial claim is purely a matter of law and pure issues of law are reviewed *de novo*. *Cf. Plott v. State*, 148 So. 3d 90, 93 (Fla. 2014)(stating that because an claim of an *Apprendi/ Blakely* error "is a pure question of law," the "Court's review is *de novo*."). Furthermore, because the claim is solely a matter of law because it does not require any factual development and therefore, no evidentiary hearing was required. When a claim is purely a matter of law, the claim should be determined on summary basis. No evidentiary hearing is required to dispose of legal questions.

Merits

In *Hurst v. Florida*, 136 S.Ct. 616 (Jan. 12, 2016), the United States Supreme Court declared that certain aspects of Florida's death penalty statute, which allowed "the judge alone to find the existence of an aggravating circumstance" violate the Sixth Amendment right-to- a-jury-trial. The *Hurst* Court found Florida's death penalty statute unconstitutional because, under Florida law,

a "jury's mere recommendation is not enough." *Hurst*, 136 S. Ct. at 619. The Court noted that, under Florida law, although the judge must give the jury recommendation great weight, the sentencing order must "reflect the trial judge's independent judgment about the existence of aggravating and mitigating factors." *Id*. at 620.

The *Hurst* Court first explained that the Sixth Amendment and due process "requires that each ***element*** of a crime be proved to a jury beyond a reasonable doubt." *Hurst*, 136 S.Ct. at 621 quoting *Alleyne v. United States*, 570 U.S. –, –, 133 S.Ct. 2151, 2156, 186 L.Ed.2d 314 (2013)(emphasis added). The Court then discussed *Apprendi v. New Jersey*, 530 U.S. 466, 494, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), noting its holding "any fact that exposes the defendant to a ***greater punishment*** than that authorized by the jury's guilty verdict is an element that must be submitted to a jury." *Id*. at 621(emphasis added). The *Hurst* Court then noted its application of *Apprendi* in numerous contexts, including capital punishment with *Ring v. Arizona*, 536 U.S. 584, 608, n. 6, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). The Court noted it had concluded in *Ring* that "the required finding of an aggravated circumstance exposed Ring to a **greater punishment** than that authorized by the jury's guilty verdict." *Id*. at 621(emphasis added). Ring's death sentence therefore violated his right to have a jury find the facts behind his punishment. *Id*.

And then the Court concluded this analysis applied equally to Florida. *Id*. at 621-622. The Court observed "the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole. "As with *Ring*, a judge increased

Hurst's authorized punishment based on her own factfinding." *Id.* at 622. The problem the Court identified was the "central and singular role the judge plays under Florida law" because under Florida's statute a defendant was not "eligible for death" until there were "findings ***by the court.***" Id. at 622 (emphasis in original). The trial court ***alone*** made the factual findings. Id. at 622 (emphasis in original). The "jury's function under the Florida death penalty statute was advisory only."

The Court then overruled *Spaziano v. Florida*, 468 U.S. 447, 457–465, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), and *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989). The *Hurst* Court concluded that those cases' conclusion that the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury, "was wrong, and irreconcilable with *Apprendi*." *Id.* at 623. The Court rejected a stare decisis argument because "in the *Apprendi* context, we have found that stare decisis does not compel adherence to a decision whose underpinnings have been eroded by subsequent developments of constitutional law." *Id.* at 623-624.

The *Hurst* Court concluded the Sixth Amendment right-to-a-jury-trial required Florida to base a "death sentence on a jury's verdict, not a judge's factfinding." *Id.* at 624. "Florida's sentencing scheme, which required the judge alone to find the existence of ***an aggravating circumstance***, is therefore unconstitutional." *Hurst*, 136 S.Ct. at 624 (emphasis added).

***Apprendi, Ring, and Alleyne* and increases in the penalty**

Opposing counsel asserts that *Hurst* requires not only that all aggravating circumstances be found by the jury but mitigating circumstances be found as well and then the jury must weigh those circumstances to determine if aggravating circumstances outweigh mitigating circumstances. IB at 91. He argues that under Florida's current death penalty those are the "operable" facts that are necessary to impose a death sentence and therefore, they must all be found by the jury. Basically, opposing counsel reads *Hurst* as requiring jury sentencing. It does not.

Hurst is an extension of *Ring* to Florida and *Ring* was based on *Apprendi*. Because the *Hurst* Court's logic was based on *Apprendi*, which was repeatedly cited in the *Hurst* opinion, a discussion of *Apprendi* and its progeny is in order to understand the scope of the *Hurst* decision. The holding in *Apprendi* was that any fact, other than the fact of a prior conviction, that "increases the penalty for a crime" beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490, 120 S.Ct. at 2362-63 (emphasis added).

As the *Ring* Court itself explained, because aggravating circumstances "operate as the functional equivalent of an ***element*** of a greater offense, the Sixth Amendment requires that they be found by a jury." *Ring*, 536 U.S. at 609, 122 S.Ct. at 2443 (citation omitted). The *Hurst* court also repeatedly cited *Alleyne v. United States*, – U.S. –, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013), which held any facts that ***increase*** the mandatory minimum sentence for an

offense must be submitted to the jury and found beyond a reasonable doubt. The Court explained that "any fact that, by law, increases the penalty for a crime is an element that must be submitted to the jury and found beyond a reasonable doubt." *Alleyne*, 133 S. Ct. at 2155. "The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an 'element' or 'ingredient' of the charged offense." *Alleyne*, 133 S.Ct. at 2158 (citing *United States v. O'Brien*, 560 U.S. 218, 130 S.Ct. 2169, 176 L.Ed.2d 979 (2010)). The *Alleyne* Court explained it was not only facts that ***increase*** the ceiling, but also facts that ***increase*** the floor that "alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that ***aggravates*** the punishment" and therefore, facts that increase the mandatory minimum sentence are "elements and must be submitted to the jury and found beyond a reasonable doubt." *Id.* The *Alleyne* Court explained that juries must find any facts that increase either the statutory maximum or minimum because "the Sixth Amendment applies where a finding of fact both alters the legally prescribed range ***and*** does so in a way that aggravates the penalty." *Alleyne*, 133 S.Ct. 2151, 2161, n.2 (emphasis in original). The *Alleyne* Court further explained, "this is distinct from factfinding used to guide judicial discretion in selecting a punishment within limits fixed by law." *Id*. "While such findings of fact may lead judges to select sentences that are more severe than the ones they would have selected without those facts, the Sixth Amendment does not govern

that element of sentencing." *Alleyne*, 133 S.Ct. at 2161, n.2.[10] It is only facts that ***increase*** or ***aggravate*** the penalty that are treated as elements that must be found by the jury.

The only facts in Florida's death penalty statute that actually increase the penalty to death are aggravating circumstances. Constitutionally not every aggravating circumstance must be found by the jury, just one aggravating circumstance is required constitutionally to increase the penalty to death. *Tuilaepa v. California*, 512 U.S. 967, 971-72, 114 S.Ct. 2630, 2634, 129 L.Ed.2d 750 (1994)(explaining that to "render a defendant eligible for the death penalty ... the trier of fact must convict the defendant of murder and find one aggravating circumstance (or its equivalent) at either the guilt or penalty phase" citing cases); *Ault v. State*, 53 So.3d 175, 205 (Fla. 2010)(stating that "to return an advisory sentence in favor of death a majority of the jury must find beyond a reasonable doubt the existence of at least one aggravating circumstance listed in the capital sentencing statute."); *Zommer v. State*, 31 So.3d 733, 754 (Fla. 2010)(noting that, in *State v. Dixon*, 283 So.2d 1 (Fla. 1973), "this Court interpreted the term 'sufficient aggravating circumstances' in Florida's capital sentencing scheme to mean *one or more* such circumstances)(emphasis in original). Additional aggravating circumstances do not increase the penalty. So, it is only one aggravating circumstances that the jury must find.

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[10] These statements in part III-B of the opinion were the majority opinion. Justice Thomas wrote and was joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan.

But even assuming all aggravating circumstances must be found by the jury (except recidivist aggravators that have already been found by a prior jury), it is only aggravating circumstances, not mitigating circumstances, that must be found by the jury. Mitigating circumstances do not "increase" the punishment, in the *Apprendi* Court's words. Mitigating circumstances do not "aggravate" the penalty, in the *Alleyne* Court's words. Rather, mitigating circumstances, if found, ***decrease*** the penalty. *United States v. O'Brien*, 560 U.S. 218, 224, 130 S.Ct. 2169, 2174, 176 L.Ed.2d 979 (2010)(distinguishing elements that must be found by a jury from sentencing factors that may be found by a judge because sentencing factors guide the judge's sentencing discretion without increasing the maximum sentence). Mitigators are the opposite of elements of the crime of capital murder. Nor do mitigators have to be found beyond a reasonable doubt, unlike elements or aggravators. *Williams v. State*, 37 So. 3d 187, 194-95 (Fla. 2010)(stating that the State has the burden to prove beyond a reasonable doubt each and every aggravating circumstance); *Aguirre-Jarquin v. State*, 9 So. 3d 593, 607 (Fla. 2009)(explaining that the State must prove the existence of an aggravator beyond a reasonable doubt citing *Parker v. State*, 873 So.2d 270, 286 (Fla. 2004)); *Diaz v. State*, 132 So. 3d 93, 117 (Fla. 2013)(explaining that mitigating factors be established by the greater weight of the evidence citing *Mansfield v. State*, 758 So.2d 636, 646 (Fla. 2000)). If this Court insists on treating mitigators as though they are aggravators, then mitigators would have to be found beyond a reasonable doubt too. But even increasing the standard of proof would not work because it would still be the

wrong party proving the fact. Elements are facts the State must prove but it is the defense that proves mitigators. Mitigators simply are not elements. *Hurst* did not mandate that mitigation be found by the jury. Mitigating circumstances do not have to be submitted to the jury and proven beyond a reasonable doubt.

And weighing is not even a fact. Rather, weighing is a judgment call. *Kansas v. Carr*, 136 S.Ct. 633 (2016)(noting that aggravating factors are "purely factual determination" but, in contrast, whether mitigation exists is "largely a judgment call (or perhaps a value call)" and the ultimate question whether mitigating circumstances outweigh aggravating circumstances is "mostly a question of mercy."). Under *Apprendi* and its progeny, only facts that increase the sentence must be found by the jury, which in capital cases, are aggravating circumstances only. Under *Hurst*, only aggravators, not mitigators, and certainly not weighing, must be found by the jury.

While opposing counsel repeatedly quotes *Apprendi* and its holding that any fact that ***increases*** the maximum penalty must be charged in an indictment, submitted to a jury and **proven beyond a reasonable doubt**," he does not explain how mitigating circumstances can possibly increase the penalty. IB at 85 (bolded in original). Nor does he explain how the beyond a reasonable doubt part of *Apprendi* could possibly apply to mitigation.

While opposing counsel quotes the current death penalty statute as the basis for his claim that all facts must be determined by the jury, sentencing statutes often contain procedural requirements and additional facts that do not ***increase*** or ***aggravate*** the penalty.

Because those facts do not increase or aggravate the penalty, those facts remaining sentencing factors that may be determined by the judge. An example of that would be that statutory requirement that the judge enter a written order within 30 days of sentencing the defendant to death but no one would seriously contend that a written order is an element of capital murder. § 921.141(3), Fla. Stat. (2015)(providing: "If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.). None of the additional steps, such as the determination of mitigation, increase the penalty, so they are all sentencing factors, not elements, and they do not have to be found by the jury. *Cf. Robinson v. State*, 793 So.2d 891, 893 (Fla.2001)(holding that *Apprendi* does not require a jury to determine whether a defendant committed the crime within three years of being released from prison). Under *Hurst* and *Carr*, only aggravators must be found by the jury.

Jury sentencing and findings of mitigators and weighing

Interpreting *Hurst* to require the jury find mitigating circumstances as well as do the weighing of aggravating and mitigating circumstances amounts to a requirement of jury sentencing. Jury sentencing is not required under *Hurs*t. Indeed, only a single Justice of the Supreme Court in *Hurst* would have required jury sentencing and he would have done so as a matter of the Eighth Amendment, not the Sixth Amendment right-to-a-jury-trial guarantee. *Hurst*, 136 S.Ct. at 624 (Breyer, J. concurring)("the

Eighth Amendment requires that a jury, not a judge, make the decision to sentence a defendant to death.”).

And the majority in *Hurst* did not hold, or even imply, that jury sentencing was required. Opposing counsel is reading *Hurst* in a manner that was clearly rejected by the other Justices who refused to join Breyer’s concurrence. Requiring a jury engaging in finding mitigators and weighing is improperly requiring jury sentencing.

Retroactivity

Regardless of the scope of *Hurst*, it is not retroactive. Asay’s convictions and two death sentences became final when the United States Supreme Court denied review from the direct appeal on October 7, 1991. *Asay v. Florida*, 502 U.S. 895, 112 S.Ct. 265, 116 L.Ed.2d 218 (1991). Asay’s convictions and sentences were final decades before the decision in *Hurst* in 2016.

New rules of law, such as *Hurst*, do not normally apply to cases that are final. *Whorton v. Bockting*, 549 U.S. 406, 416, 127 S.Ct. 1173, 1180, 167 L.Ed.2d 1 (2007)(explaining the normal rule of non-retroactivity and holding the decision in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), was not retroactive). *Hurst* was based on *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), which in turn was based on *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

The United States Supreme Court; the Eleventh Circuit; and this Court have all held that *Ring* is not retroactive. *Schriro v.*

Summerlin, 542 U.S. 348, 352, 124 S.Ct. 2519, 2526, 159 L.Ed.2d 442 (2004)(holding that "*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review"); *Turner v. Crosby*, 339 F.3d 1247, 1282-1286 (11th Cir. 2003); *Johnson v. State*, 904 So. 2d 400, 405 (Fla. 2005)(applying *Witt*[11] and holding *Ring* would not be applied retroactively in Florida). Furthermore, both the Eleventh Circuit and the Florida Supreme Court have held that *Apprendi* is not retroactive either. *McCoy v. United States*, 266 F.3d 1245, 1258 (11th Cir. 2001)(holding that *Apprendi* does not apply retroactively); *Hughes v. State*, 901 So. 2d 837, 838 (Fla. 2005)(holding that *Apprendi* does not apply retroactively in Florida). Because *Apprendi* and *Ring* are not retroactive under controlling precedent, then *Hurst*, which was an extension of *Apprendi* and *Ring* to Florida, is not retroactive either and for the same reasons. *Jeanty v. Warden, FCI-Miami*, 757 F.3d 1283, 1285 (11th Cir. 2014)(observing "if *Apprendi*'s rule is not retroactive on collateral review, then neither is a decision applying its rule" citing *In re Anderson*, 396 F.3d 1336, 1340 (11th Cir. 2005)). If the seminal case is not retroactive, then none of its progeny is either.

Indeed, the United States Supreme Court has held that its decision in *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), which first extended the Sixth Amendment right-

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[11] *Witt v. State*, 387 So.2d 922 (Fla. 1980). *Witt* is based on the older federal test for retroactivity, the *Linkletter-Stovall* test. *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965); *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967)

to-a-jury trial to the states was not retroactive. *DeStefano v. Woods*, 392 U.S. 631, 88 S.Ct. 2093, 20 L.Ed.2d 1308 (1968). The *DeStefano* Court used a *Witt*-like test, not *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), to determine Duncan was not retroactive. The *Summerlin* Court relied heavily on *DeStefano*, observing "if under *DeStefano* a trial held entirely without a jury was not impermissibly inaccurate, it is hard to see how a trial in which a judge finds only aggravating factors could be." *Summerlin*, 542 U.S. at 357, 124 S.Ct. at 2526.

The *Summerlin* Court's main reasoning was that *Ring* was procedural, not substantive, and therefore, did not warrant retroactive application. Contrary to opposing counsel arguments, all of that logic applies equally to *Hurst*. IB at 95. The distinction between substantive versus procedural for purpose of retroactivity is limited to such as the correct interpretation of the underlying substantive criminal statute. *Bousley v. United States*, 523 U.S. 614, 620, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998)(explaining that retroactivity is inapplicable to the situation in which this Court decides the meaning of a criminal statute enacted by Congress); *State v. Towery*, 64 P.3d 828, * (Ariz. 2003)(explaining the difference between substantive and procedural for purposes of retroactivity analysis and using the *Linkletter* test to determine *Ring* is not retroactive because *Ring* was "not designed to improve accuracy."). The logic of the distinction is that an incorrect interpretation of the substantive criminal statute could result in a defendant being held in prison, either in whole or in

part, for conduct that is not criminal under the correct interpretation.

The other exception is a new substantive rule that places "certain criminal laws and punishments altogether beyond the State's power to impose." Such new rules decriminalize a class of conduct or prohibit the imposition of a punishment on a particular class of persons. An example of that exception is the recent case of *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), which held that *Miller v. Alabama*, 567 U.S. –, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), was retroactive because the new rule of *Miller* was substantive. The *Montgomery* Court explained the difference. Substantive rules set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose. "Procedural rules, in contrast, are designed to enhance the accuracy of a conviction or sentence by regulating the manner of determining the defendant's culpability." *Montgomery*, 136 S. Ct. at 729-30; *Cf. Witt v. State*, 387 So.2d 922, 929, 931 (Fla.1980)(explaining that most law changes of "fundamental significance" that will warrant retroactive application "will fall within the two broad categories" of 1) changes of law which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties or 2) changes of law which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of *Stovall* and *Linkletter*).

Only those types of substantive new rules are retroactive. *Hurst* not interpret a criminal statute nor did it hold murder to be legal

or that the death penalty was a forbidden punishment. Therefore, *Hurst* is not substantive for purposes of retroactivity.

Every other new rule is considered procedural for the purposes of retroactivity analysis including the relationship between the judge and jury deciding facts explored in *Ring* and *Hurst*. The only procedural rules that are retroactive are those that are a "watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Whorton v. Bockting*, 549 U.S. 406, 416, 127 S.Ct. 1173, 1180, 167 L.Ed.2d 1 (2007). Fundamental fairness is not implicated because "one can easily envision a system of 'ordered liberty' in which certain elements of a crime are proven to a judge, not to the jury. *United States v. Shunk*, 113 F.3d 31, 37 (5th Cir. 1997). An example of a new procedural rule that would be sufficiently watershed is the right to counsel established in *Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). *See Saffle v. Parks*, 494 U.S. 484, 495, 110 S.Ct. 1257, 1264, 108 L.Ed.2d 415 (1990)(giving *Gideon* as example of a watershed that would be retroactive because it seriously increases the accuracy of a conviction). The United States Supreme Court has explained that the exception to non-retroactivity for procedural rules is limited to a small core of rules which seriously enhance accuracy. *Graham v. Collins*, 506 U.S. 461, 478, 113 S.Ct. 892, 903, 122 L.Ed.2d 260 (1993)(noting it is unlikely that many such components of basic due process have yet to emerge). A trial conducted with a procedural error "may still be accurate" and for that reason, "a trial conducted under a procedure found to be unconstitutional in a later case does not, as a general

matter, have the automatic consequence of invalidating a defendant's conviction or sentence" and therefore, generally, procedural rules are not given retroactive effect. *Montgomery*, 136 S. Ct. at 730.

Opposing counsel's reliance on *Fiore v. White*, 531 U.S. 225, 121 S.Ct. 712, 148 L.Ed.2d 629 (2001), to argue that *Hurst* is retroactive back to the enactment of Florida's death penalty statute in 1973, is misplaced. IB at 107. *Hurst* is not substantive law dealing with the interpretation of a statute; it is constitutional law. *Hurst* is based on the Sixth Amendment right-to-a-jury-trial. Indeed, the United States Supreme Court does not interpret state statutes at all. *Hanover Fire Ins. Co. v. Carr*, 272 U.S. 494, 509, 47 S.Ct. 179, 183, 71 L.Ed. 372 (1926)(observing that a state supreme court's interpretation of a state statute is binding upon the United States Supreme Court as to its meaning). The United States Supreme Court's power is limited to federal constitutional matters. Additionally, "*Fiore* held that due process is violated by a conviction based on conduct that a criminal statute, as properly interpreted, does not prohibit." *Bunkley v. State*, 882 So. 2d 890, 893 (Fla. 2004). Murder was criminal in Florida in 1973 when the current death penalty statute was enacted and murder was criminal in 2016 when *Hurst* was decided. Murder was never, and is not now, innocent conduct. *Fiore* is simply inapplicable.

Hurst, like *Ring*, is procedural, not substantive and therefore, does not warrant retroactive application.

Controlling precedent on retroactivity

This Court has controlling precedent holding *Ring* is not retroactive. *Johnson v. State*, 904 So. 2d 400, 405- 412 (Fla. 2005).

The *Johnson* Court did not reach the merits of the *Ring* claim. Instead, its holding was that *Ring* was not retroactive. *Johnson*, 904 So. 2d 400, 405 (Fla. 2005)("we ***hold*** that *Ring* does not apply retroactively in Florida to defendants whose convictions already were final when that decision was rendered.")(emphasis added). Even if viewed as an alternative holding, alternative holdings are binding precedent. *Massachusetts v. United States*, 333 U.S. 611, 623, 68 S.Ct. 747, 754 (1948)(when a case is decided on two grounds, both are effective); *Hitchcock v. Sec'y, Fla. Dep't. of Corr.*, 745 F.3d 476, 484. n.3 (11th Cir. 2014)(stating that an alternative holding is not dicta but instead is binding precedent); *Bravo v. United States*, 532 F.3d 1154, 1162 (11th Cir. 2008)(explaining that "alternative holdings are not dicta, but instead are as binding as solitary holdings" citing cases); *McLellan v. Miss. Power & Light Co.*, 545 F.2d 919, 925 n. 21 (5th Cir.1977)(en banc)("It has long been settled that all alternative rationales for a given result have precedential value."). The *Johnson* Court discussed the retroactivity of *Ring* for 24 paragraphs and did a full-blown *Witt* analysis. It was not mere dicta. *Cf. Schwab v. Crosby*, 451 F.3d 1308, 1325 (11th Cir. 2006)(expressing doubt that three paragraphs in United States Supreme Court case could properly be characterized as "throw-away kind of dicta.")

Opposing counsel does not explain why he believes *Johnson* is incorrectly decided. Instead, he ignores *Johnson*. But this Court

should not. It should follow its precedent. *Robertson v. State*, 143 So.3d 907, 910 (Fla. 2014)(stating that the "presumption in favor of stare decisis is strong" and the decision to depart from the principles of stare decisis "cannot be taken lightly" and reaffirming the prior precedent).

Amicus totally ignores *Johnson* in their *Witt* analysis in their brief to this Court.[12] Regardless of amicus' assertion, *Hurst* is not of fundamental significance because it does not seriously increase accuracy as this Court recognized in *Johnson*. *See also Hughes*, 901 So.2d at 840-842(reasoning that *Apprendi* did not constitute a "development of fundamental significance."). Amicus does not grapple with this Court's repeated observations in *Johnson* that jury factfinding and new penalty phases in old cases do not increase accuracy.

Opposing counsel asserts that *Hurst* is of fundamental significance because it was a "tectonic shift" in jurisprudence that overruled *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984) and *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989), as well as this Court's decision in

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[12] Amicus improperly attached their amicus brief in *Lambrix* to the brief in this case but this Court should not allow that type of improper incorporation. *Rose v. State*, 985 So. 2d 500, 509 (Fla. 2008)(considering arguments made by incorporation in the appellate brief to be waived). Amicus does not explain why he wrote two different briefs requiring this Court and the State to read two different briefs. Indeed, it would seem to have been much easier for amicus to repeat the same argument made in *Lambrix* in his brief in his case. This type of hide-the-ball appellate practice is exactly why incorporation of arguments is not permitted. The amicus brief in *Lambrix* does contain a discussion of *Johnson*, albeit one without any focus on accuracy of factfinding by judges versus juries.

Bottoson v. Moore, 833 So.2d 693 (Fla. 2002). IB at 86. According to this logic, any case that overrules a prior case is necessarily of fundamental significance and automatically retroactive. But the *Bockting* Court held otherwise. *Whorton v. Bockting*, 549 U.S. 406, 416, 127 S.Ct. 1173, 1180, 167 L.Ed.2d 1 (2007)(holding the decision in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), was not retroactive under a *Teague* analysis relying heavily on the same analysis as in *Summerlin*). The United States Supreme Court in *Bockting* was dealing with a case that overruled prior precedent in the area of the right of confrontation, which is more likely to increase accuracy of a conviction compared to judges versus jury factfinding, but the Court still held that *Crawford* was not retroactive. Overruling prior precedent does not automatically make a case of fundamental significance.[13]

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[13] It is not even accurate to describe *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002), or *King v. Moore*, 831 So.2d 143 (Fla. 2002), as incorrectly decided. The Florida Supreme Court in *Bottoson* and *King* relied on the existing United States Supreme Court precedent upholding "Florida's capital sentencing statute over the past quarter of a century." *Bottoson*, 833 So.2d at 695, n.4 (citing *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989); *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984); *Barclay v. Florida*, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983); and *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). The United States Supreme Court in *Hurs*t had to overrule not one, but two, of those cases to arrive at its holding in *Hurst*. Hurst, 136 S.Ct. at 623 (overruling Spaziano and Hildwin "expressly"). Moreover, the United States Supreme Court has insisted on reserving to itself the task of burying its own decisions. As the United States Supreme Court has observed, if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions. *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917,

Opposing counsel speaks of fairness and uniformity but the retroactivity doctrine is really about finality, not uniformity. IB at 107-109. The very nature of the retroactivity doctrine is that cases will not be treated uniformly. If one were to value uniformity over finality, there would be no doctrine of retroactivity. All cases would receive the benefit of any new rule regardless of what stage in the process the case was in, resulting in true uniform treatment. But the problem with uniformity is that no case would ever become final, which is the problem that the retroactivity doctrine was designed specifically to address. Every case would receive the benefit of any new rule *ad infinitum* resulting in convictions and sentences that are ***never*** final. And in capital cases, which last for decades, new rules necessarily will develop during that time frame, which would mean that every capital case would have new trials and new penalty phases without ending.

1921–22, 104 L.Ed.2d 526 (1989). The *Bottoson* Court merely recognized that principle. *Bottoson*, 833 So.2d at 695 (quoting *Rodriguez de Quijas*). This Court recognized the tension between *Ring* and *Spaziano* but properly decided to allow the United States Supreme Court to resolve that tension. *Marshall v. Crosby*, 911 So. 2d 1129, 1135 (Fla. 2005)(rejecting a *Ring* claim in an override case because "despite any tension between *Spaziano* and *Ring*, this Court relies on the United States Supreme Court's admonition that lower courts should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions" quoting *Bottoson*). Because the United States Supreme Court had upheld Florida's death penalty state in the past against Sixth Amendment challenges in both *Spaziano* and *Hildwin*, only the United States Supreme Court could truly overrule those decisions. This Court in *Bottoson* and *King* merely recognized that reality and this Court's decision to do so in both cases seemed correct for over a decade. The United States Supreme Court denied certiorari petition after certiorari petition in Florida capital cases raising *Ring* issues for more than a decade. It is not that this Court got it wrong in *Bottoson* or *King*; it is that United States Supreme Court changed its mind.

It would be pure happenstance for any conviction to become final and for any executions to occur, if this Court routinely applied new rules to old cases.

Finality is the polestar of the retroactivity doctrine. As this Court stated in *Witt* and has repeated on several occasions, the "importance of finality in any justice system, including the criminal justice system, cannot be understated" and at some point, litigation must "come to an end." *Witt v. State*, 387 So.2d 922, 925 (Fla. 1980). Opposing counsel totally ignores the value of finality in his plea for "fairness." Courts simply must have retroactivity doctrines to ensure the finality of convictions and sentences.

Moreover, courts already balance the competing interests of finality and fairness by extending the benefit of the new rule to all pipeline cases rather than limiting the benefit of the new rule to cases where the trial occurs after the decision. *Griffith v. Kentucky*, 479 U.S. 413, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987). Courts permit the new rule to apply to cases where the trial occurred before the new decision establishing the new rule but the direct appeal is still pending, *i.e.*, pipeline cases. A more narrow application of retroactivity doctrine would have the new rule apply prospectively only such that the new rule would apply only to trials that occur after the date of the new decision. The non-retroactivity doctrine already extends the benefit of the new rule to a larger-than-necessary group of cases. And this is especially true in capital cases where the direct appeals often take years to be completed. Cases where the trial occurred two or three years ago but are still pending in this court or the United States Supreme

Court on direct appeal will get the benefit of *Hurst* if the Hurst claim has any merit. Including pipeline cases is the proper balance between fairness and finality.

Furthermore, "fairness" is a two way street. The retroactivity doctrine and the pipeline distinction are based on the fact that the new rule will be applied and result in a new trial, if warranted, for the newest cases. Old cases will not get the benefit of the new rule for a reason. As cases become older, retrying the case becomes more difficult. Allowing new trials based on a new rule in older cases could result in unwarranted acquittals due to lost witnesses and evidence. This Court recognized this problem in *Johnson*, observing that applying *Ring* retroactively would require prosecutors to "reassemble witnesses and evidence literally decades" later. *Johnson*, 904 So.2d at 411. Opposing counsel ignores the age of the case and the problem of retrying older cases in his plea for "fairness," but fortunately the retroactivity doctrine does not. Allowing the guilty to walk or be unjustifiably acquitted due to the age of the case is not fair to the State of Florida or the family of the victims. Furthermore, retrial upon retrial, which would be the result of not having a retroactivity doctrine undermines both the deterrence value of the law and public confidence in the judicial system.

This Court also noted that new penalty phases conducted decades after the murder were likely to be less accurate. Conducting new penalty phases decades later would consume "immense" prosecutorial and judicial resources "without any corresponding benefit to the accuracy or reliability" of the penalty phase. *Johnson*, 904 So.2d

at 412. As the United States Supreme Court observed in *Summerlin* itself, "for every argument why juries are more accurate factfinders, there is another why they are less accurate" and when "so many presumably reasonable minds continue to disagree over whether juries are better factfinders ***at all***, we cannot confidently say that judicial factfinding seriously diminishes accuracy." *Summerlin*, 542 U.S. at 356, 124 S.Ct. at 2525 (emphasis in original).

And *Summerlin* was a case from Arizona where there was no jury participation at all in the penalty phase. Here, in contrast, Asay had a jury that recommended death. *Asay* had jury some input, albeit not as much as would be currently required under *Hurst*. Asay's death sentence was more in compliance with the right to a jury trial than either Ring's or Summerlin's death sentence because, unlike both those defendants, a jury was involved in Asay's case and made a death recommendation. Applying a new rule that does not "seriously enhance accuracy" only to new cases is quite fair. *Hurst* should only apply to new cases.

Date of retroactivity

Retroactivity is determined from the date of the *Hurst* opinion on January 12, 2016, not the date of the *Ring* opinion in June 24, 2002. The test for retroactivity in the federal courts is *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).[14] Under a

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[14] The test for retroactivity in the Florida courts is *Witt v. State*, 387 So.2d 922 (Fla. 1980). *Witt* is different but somewhat similar to *Teague*. *See Johnson v. State*, 904 So. 2d 400, 410, n.4 (Fla. 2005)(noting that, while the federal and state

Teague analysis, an old rule applies both on direct and collateral review, but a new rule generally applies only to cases still on direct review. *Whorton v. Bockting*, 549 U.S. 406, 416, 127 S.Ct. 1173, 1180, 167 L.Ed.2d 1 (2007). The first step in a *Teague* analysis is to decided if the case is a "new" rule of law. If *Hurst* was an "old" rule ***dictated*** by *Ring* it would apply to all cases from the date of the *Ring* opinion in 2002. But *Hurst* is not an old rule, it is a new rule because the *Hurst* Court had to overrule two cases to create the new rule of law.

"A new rule is defined as a rule that was not *dictated* by precedent existing at the time the defendant's conviction became final." *Bockting*, 549 U.S. at 416, 127 S.Ct. at 1181. The *Bockting* Court determined that *Crawford* was clearly a new rule because far from being "dictated" by prior precedent, the *Crawford* court had overruled prior precedent to arrive at the new decision. Basically, any case which overrules prior precedent is a new rule and the proper retroactivity analysis starts from the date of that new case.

Just as in *Bockting*, it is clear that *Hurst* is a new rule not dictated by *Ring* from the language of the *Hurst* opinion. The *Hurst* Court explicitly overruled both *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), and *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989). The *Hurst* Court wrote: "We now expressly overrule *Spaziano* and *Hildwin* in relevant

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tests for retroactivity are different, but observing a discussion by the United States Supreme Court of retroactivity of the same case "is obviously worthy of our attention and deference.")

part" because both decisions were "irreconcilable" with *Apprendi*. "Time and subsequent cases have washed away the logic of *Spaziano* and *Hildwin*." *Hurst*, slip op at 9. Moreover, *Ring* itself distinguished "hybrid" capital sentencing schemes, such as Florida's, from judge only schemes such as Arizona's. *Ring*, 536 U.S. at 608 n. 6, 122 S.Ct. at 2442 n. 6 Arizona's."). *Hurst* is a new rule of law not dictated by *Ring*.

Basically, any case such as the *Hurst* case, which overrules prior precedent is a new rule and the retroactivity analysis starts from the date of that new case which in the particular situation is the date of the *Hurst* case. So, retroactivity is determined from the date of the *Hurst* opinion, not the date of the *Ring* opinion. The proper date for the retroactivity analysis is 2016, not 2002.[15]

Hurst, therefore, will ***not*** apply to any case that was final before January 12, 2016. No case in the postconviction proceedings stage as of January of 2016 should be affected by *Hurst*.

Opposing counsel's reliance on *Thompson v. Dugger*, 515 So.2d 173 (1987), is misplaced. IB at 109. The Court in *Thompson* did not perform a proper *Witt* analysis but this Court in *Johnson* did. Furthermore, Johnson dealt with the Sixth Amendment right-to-a-jury trial and *Ring* itself, which was a precusor to *Hurst*, not the Eighth Amendment, as *Thompson* did. *Johnson* controls.

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[15] Even starting the retroactivity analysis from the date of the decision in *Ring* in 2002 or even *Apprendi* in 2000, which is not proper retroactivity analysis, would not benefit Asay. His case was final in 1991, years before either *Apprendi* or *Ring* was decided. Asay's convictions and sentences were final before *Apprendi*, *Ring*, or *Hurst*.

Opposing counsel's reliance on the override cases of *Marshall v. State*, 604 So.2d 799 (Fla. 1992); *Zeigler v. State*, 580 So.2d 127 (Fla. 1991); and *Zakrzewski v. State*, 717 So. 2d 488 (Fla. 1998), is misplaced because it makes the point for the State that many *Hurst* claims, in the end, are meritless, including those involving overrides. *Marshall* involved the prior violent felony aggravator, which is an exception to *Hurst*. *Marshall v. Crosby*, 911 So. 2d 1129, 1135 (Fla. 2005)(noting that one of Marshall's aggravating circumstances was that he had been previously convicted of nine violent felonies and observing that "*Ring* did not alter the express exemption in *Apprendi* that prior convictions are exempt from the Sixth Amendment requirements . . ."). *Hurst* does not apply to Marshall's case at all. Zeigler was convicted of four murders which means his jury necessarily found an aggravating circumstance unanimously in the guilt phase his case. *Zeigler v. State*, 580 So. 2d 127, 129 (Fla. 1991)(noting the judge's finding that he had previously been convicted of another capital or violent felony based on the four contemporaneous murders.). *Hurst* was satisfied in the guilt phase in *Zeigler*. And that is equally true of *Zakrzewski* who was convicted of three murders.
Zakrzewski v. State, 717 So. 2d 488, 491 (Fla. 1998)(noting one of the aggravators was that "the defendant was previously convicted of other capital offenses (the contemporaneous murders)").[16] If this

[16] *Zakrzewski* is not really an override case. *Evans v. Sec'y, Florida Dept. of Corr.*, 699 F.3d 1249, 1258, n.4 (11th Cir. 2012)(noting the difference between "pure" override cases in which the jury did not recommend a death sentence at all and multiple-victim cases in which the jury recommended a death sentence for some but not all of the murders and discussing the

Court recedes from *Johnson*, it will have hundreds of *Hurst* appeals only to discover after review that, with many of the cases, there is no real *Hurst* error. Applying *Hurst* retroactively will mainly be an "immense" waste of this Court's judicial resources.

This Court should not recede from *Johnson*. *Hurst* is not retroactive.

Recidivist aggravators

Hurst does not apply at all to this case. *Hurst* does not apply to Asay because his case involves a recidivist aggravator. Asay was on parole at the time of these murders and that was one of the aggravators found as a basis for both death sentences. The holding in *Apprendi* was that any fact, *"other than the fact of a prior conviction,"* that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490, 120 S.Ct. at 2362-63 (emphasis added). The exception for prior convictions in *Apprendi* was based on recidivist exception established in *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998).

The Florida Supreme Court, based on the exception, has repeatedly observed that *Ring* does not apply to cases involving recidivist

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Zakrzewski case). Zakrzewski's jury recommended death for two of the three murders; it was only the jury's recommendation of life for the third murder of his five-year-old daughter that was overridden. *Zakrzewski*, 717 So. 2d 488, 491 (Fla. 1998)(noting the jury recommended the death penalty for the murders of his wife and son by a vote of seven to five but recommended life imprisonment for the murder of his daughter).

aggravators, such as the prior-violent-felony aggravator or the under-sentence-of-imprisonment aggravator. *McCoy v. State*, 132 So.3d 756, 775–76 (Fla. 2013)(explaining that *Ring* is not implicated in cases involving the prior violent felony aggravator), *cert. denied*, – U.S. –, 135 S.Ct. 90, 190 L.Ed.2d 75 (2014); *Johnson v. State*, 104 So.3d 1010, 1028 (Fla. 2012)(stating that the Florida Supreme Court has repeatedly rejected *Ring* claims where the prior violent felony aggravator has been found); *Hodges v. State*, 55 So. 3d 515, 540 (Fla. 2010)("This Court has repeatedly held that *Ring* does not apply to cases where the prior violent felony, the prior capital felony, or the under-sentence-of-imprisonment aggravating factor is applicable."). That same logic, based on the exception for prior convictions, remains valid and applies in the wake of *Hurst*. *Hurst* did not involve any recidivist aggravators. And the *Hurst* Court did not overrule *Almendarez-Torres*. *Almendarez-Torres* was not cited or discussed by the *Hurst* Court. The prior conviction exception was not at issue in *Hurst*. *Almendarez-Torres* is still good law in the wake of *Apprendi* and all its progeny including *Hurst*. *United States v. Nagy*, 760 F.3d 485, 488 (6th Cir. 2014)(stating that *Alleyne* leaves "no doubt" that *Almendarez-Torres* still good law), *cert. denied*, 135 S. Ct. 1009 (2015); *United States v. King*, 751 F.3d 1268, 1280 (11th Cir. 2014)("We have explained that the Supreme Court's holding in *Almendarez-Torres* was left undisturbed by *Apprendi*, *Blakely*, and *Booker* citing *United States v. Shelton*, 400 F.3d 1325, 1329 (11th Cir. 2005)), *cert. denied*, 135 S. Ct. 389 (2014).

The United States Supreme Court recently denied certiorari review in two pipeline cases involving recidivist aggravators after *Hurst*. *Smith v. Florida*, 170 So. 3d 745 (Fla. 2015) *cert. denied*, (U.S. Jan. 25, 2016)(No. 15-6430)(prior violent felony aggravator); *Fletcher v. Florida*, 168 So. 3d 186 (Fla. 2015), *cert. denied*, (Jan. 25, 2016)(No. 15-6075)(under-sentence-of-imprisonment aggravator with an 8-4 jury recommendation).[17] The Supreme Court denied both petitions without dissent - not a single Justice was the slightest bit worried about application of *Hurst* to cases involving recidivist aggravators. Even after *Hurst*, the United States Supreme Court is allowing death sentences in Florida to remain in place if the case involves a recidivist aggravator, as Asay's case does.

The normal rule that a denial of certiorari does not imply a merits ruling does not apply to the *Smith* and *Fletcher* cases. *Atl. Coast Line R. Co. v. Powe*, 283 U.S. 401, 403-04, 51 S. Ct. 498, 499, 75 L.Ed. 1142 (1931)(stating that the "denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times citing *United States v. Carver*, 260 U. S. 482, 490, 43 S. Ct. 181, 67 L. Ed. 361 (1923)). Normally, the United States Supreme Court may think the issue has some merit but is too busy with other cases to take the case at that point in time or thinks the case is not a particularly good case to decide the issue or wants the issue to percolate in the lower courts more and so, the Court denies certiorari. But the United States

[17] Fletcher also involved the murder-while-engaged-in-a-robbery aggravator which the jury had found during guilt phase by convicting the defendant of home-invasion robbery.

Supreme Court did not have to take either *Smith* or *Fletcher* to have both cases reviewed further. The Court has a special procedure called grant, vacate, and remand for reconsideration in light of the new case that does not require any of their time (commonly referred to as GVR). If the United States Supreme Court were the slightest bit concerned with the Sixth Amendment rulings in either *Smith* or *Fletcher*, it would have simply employed the GVR procedure and remanded the case to the Florida Supreme Court to reconsider in light of *Hurst*. But the United States Supreme Court did not do that in either case. Instead, they denied the petitions in both of those Florida capital cases. That means that both cases, under their own precedent of *Summerlin*, will not get the benefit of *Hurst* review in federal habeas. All of this was well known to the United States Supreme Court when they denied those two petitions. The only possible conclusion is that the recidivist aggravator exception to *Apprendi* and *Ring*, is still alive and well in the wake of *Hurst*. *Hurst* does not apply to cases with recidivist aggravators.

Asay was eligible for the death penalty based on his status of being on parole before the trial even started based on this recidivist aggravator. Contrary to opposing counsel's argument, the fact that Florida's statute requires "sufficient" aggravating circumstances is irrelevant because the wording of the statute has nothing to do with the *Almendarez-Torres* exception. IB at 95. *Hurst* does not apply at all.

Explicit jury findings

Even if *Hurst* applied, the jury necessarily and explicitly found one of the aggravators in the guilt phase by convicting Asay of both murders. One of the aggravators that the trial court found applied to both murders was Asay had been previously convicted of a capital felony based on the contemporaneous murder conviction. But the judge, in finding that aggravator, was merely recognizing the jury's unanimous verdict in the guilt phase convicting Asay of both of these murders. In other words, *Hurst* was satisfied in the guilt phase in this particular case. *Deparvine v. State*, 146 So. 3d 1071, 1106-07 (Fla. 2014)(denying a *Ring* claim as "meritless" because one of the aggravating factors found by the trial court was the prior violent felony based on the contemporaneous murder convictions). There was no violation of *Hurst* because the jury made the explicit finding of an aggravator by unanimous verdict in the guilt phase. *Hurst* was satisfied.

Harmless error

Finally, even if *Hurst* was retroactive and applied to this case, and had been violated, any error would be harmless. Violations of the right-to-a-jury-trial are subject to harmless error. *Washington v. Recuenco*, 548 U.S. 212, 222, 126 S.Ct. 2546, 2553, 165 L.Ed.2d 466 (2006)(relying on *Neder v. United States*, 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999), and holding that the "failure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error"); *Galindez v. State*, 955 So.2d 517, 524 (Fla. 2007)(holding harmless error analysis

applies to *Apprendi* and *Blakely* error).[18] The trial court found three aggravators. The trial court found two aggravators in connection with both murders: 1) the murder was committed by a person under sentence of imprisonment because Asay was on parole; and 2) Asay had been previously convicted of a capital felony based on the contemporaneous murder conviction. In connection with the McDowell murder, the court found a third aggravator 3) the murder was committed in a cold, calculated, and premeditated manner. The jury explicitly found the previously-convicted-of-a-capital-felony-based-on-the-contemporaneous-murder-conviction aggravator by convicting Asay of both murders. The jury unanimously found that aggravator in the guilt phase. The jury also would have found the

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[18] The concurrence in *Galindez* also observed that this Court has the inherent authority to fashion remedies for constitutional problems such as *Hurst*. Galindez v. State, 955 So. 2d 517, 527 (Fla. 2007)(Cantero, J., concurring)(stating the when "confronted with new constitutional problems to which the Legislature has not yet responded, we have the inherent authority to fashion remedies." citing *In re Order on Prosecution of Criminal Appeals by Tenth Judicial Circuit Public Defender*, 561 So.2d 1130, 1133 (Fla. 1990)). While the Legislature is considering a new death penalty statute and obviously when the new statute is enacted, trial courts should follow the statute but, in the mean time, this Court should direct that jury be required to complete a special verdict form on all aggravating circumstances in all penalty phases conducted after *Hurst.* And the jury should be informed that the judge is bound by their findings regarding aggravating circumstances. If a jury finds that a particular aggravating circumstance was not proven, the prosecutor may not then attempt to prove that same aggravating circumstance to the judge at the *Spencer* hearing. *Cf. United States v. Watts*, 519 U.S. 148, 117 S.Ct. 633, 136 L.Ed.2d 554 (1997)(allowing acquitted conduct to be considered at the preponderance standard of proof) In other words, the jury's individual finding that a particular aggravator does not exist would be binding on the trial court, as well as a general finding of no aggravation, because aggravators are elements, not sentencing factors.

under-sentence-of-imprisonment aggravator because there is simple no possible dispute as to Asay's status of being on parole at the time of these two murders. And, while the jury is only required to find one aggravator to make Asay death-eligible, the jury would have found the cold, calculated, and premeditated aggravator for the second victim as well. According to the eyewitness, Asay shot the second victim, Robert McDowell, shot six times as the victim was trying to flee. The jury would have found the CCP aggravator based on this eyewitness testimony, just as the judge did. The jury would have found all three aggravators if a special verdict had been used.

Amicus argues that harmless error analysis requires a remand to the trial courts. But harmless error is an appellate concept. Trial courts do not conduct harmless error analysis, appellate courts do. *Hurst* errors are **not** structural as both the United States Supreme Court and this Court have already held in the context of *Apprendi*. Amicus ignores both the United States Supreme Court's holding to the contrary in *Washington v. Recuenco*, and the Florida Supreme Court's holding to the contrary in *Galindez* in his arguments. Amicus, while quoting from *Neder*, ignores the actual holding in *Neder*. The *Neder* Court concluded that allowing the judge rather than the jury decide the materiality element, in a tax fraud case, was not structural error. Instead, harmless error applied.

Opposing counsel and Amicus assert that harmless analysis should not be done at all in *Hurst* cases because defense counsel's approach to the case for life would have been different under the current law. IB at 102. Harmless error does not operate in that manner. Counsel's possible strategy is simply not part of the analysis. It

is the facts of the cases, not any possible change in the litigation strategy that matters to harmless error. Nor does amicus explain why defense counsel would have approached the case for life differently, given that defense counsel knew, and the jury is instructed, that the jury's recommendation would be given great weight. Trial counsel had every incentive at the original trial to pick jurors who would vote for life. And trial counsel had every incentive at the original penalty phase to present a full mitigation case to the jury.

Furthermore, Amicus' logic applies to every other type of error and would be the end of harmless error doctrine. *Goodwin v. State*, 751 So. 2d 537, 539-541 (Fla. 1999)(detailing the history of the harmless error doctrine and explaining that before the doctrine, appellate courts routinely reversed convictions for almost every error committed during trial resulting in appellate court being described as "impregnable citadels of technicality" and resulting in harmless error statutes being enacted). The harmless error doctrine, by its very nature, requires an appellate court to "guess" what the jury would have done. Roger J. Traynor, THE RIDDLE OF HARMLESS ERROR (1970). Florida has a harmless error statute that requires appellate courts to affirm, if possible. § 924.33, Fla. Stat. (2015)(providing that no judgment shall be reversed unless the appellate court is of the opinion, "that error was committed that injuriously affected the substantial rights of the appellant" and that it "shall not be presumed that error injuriously affected the substantial rights of the appellant."). Opposing counsel is really arguing for a presumption of harmfulness in violation of the

statute. This Court can, and should, conduct harmless error analysis in *Hurst* cases, as it has done for numerous other errors in the penalty phase in hundreds of capital cases, including for the improper finding of an aggravator, through out the years.

Any *Hurst* error was harmless.

Hurst* and *Caldwell

Asay asserts a violation of *Caldwell v. Mississippi*, 472 U.S. 320, 329, 105 S.Ct. 2633, 2639, 86 L.Ed.2d 231 (1985), based on the prosecutor's comment during the penalty phase. IB at 88.

First, regardless of the prosecutor's comments, the judge told the jury that the law required him to give great weight to the jury's recommendation. IB at 90 citing (T. 1064).

Second, *Hurst* did not expand *Caldwell* or apply *Caldwell* to Florida. Indeed, the *Hurst* Court did not discuss or even cite *Caldwell*. Asay is mixing apples and oranges by mixing *Hurst* and *Caldwell*. He is actually mixing new *Hurst* with old *Caldwell*. While the jury's role has been expanded by the recent decision in *Hurst*, that was not true at the time of Asay's trial.[19]

There was no *Caldwell* violation. The prosecutor's comments, by and large, were accurate statements of the jury's role at the time of the trial, prior to *Hurst*. *Romano v. Oklahoma*, 512 U.S. 1, 114 S.Ct. 2004, 129 L.Ed.2d 1 (1994)(clarifying the holding of *Caldwell* and explaining to establish a *Caldwell* violation, a defendant

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[19] While this Court should issue new standard jury instructions informing the jury that the judge is bound by their findings regarding aggravating circumstances for all future penalty phases, those new instruction would not apply to Asay's case.

necessarily must show that "the remarks to the jury improperly described the role assigned to the jury by local law."); *Belcher v. Sec'y, Dept. of Corr.*, 427 Fed. Appx. 692, 695 (11th Cir. 2011)(rejecting a Caldwell claim based on the prosecutor's comment that the jury's recommendation was "advisory" because the prosecutor did not misrepresent Florida law regarding the jury's role citing *Davis v. Singletary*, 119 F.3d 1471, 1482 (11th Cir. 1997)).[20]

Thus, the trial court properly summarily denied the *Hurst* claim

[20] Nor does double jeopardy prohibit a new penalty phase in pipeline cases with *Hurst* errors. IB at 105. Double jeopardy only prohibits a new penalty phase when a defendant was originally acquitted of death. *Sattazahn v. Pennsylvania*, 537 U.S. 101, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003). A defendant who was originally sentenced to death based on a jury recommendation of death can have no valid double jeopardy claim.

CONCLUSION

The State respectfully requests that this Honorable Court affirm the trial court's summarily denial of the successive postconviction motion

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished via the e-portal to Martin J. McClain, McClain & McDermott, 141 N.E. 30th Street, Wilton Manors, FL 33334 this 19th day of February, 2016.

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CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.