IN THE SUPREME COURT OF FLORIDA

CASE NO. SC16-223

LOWER TRIBUNAL No. CR 87-8676-CFA

MARK JAMES ASAY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

REPLY BRIEF OF APPELLANT

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INTRODUCTION

As reflected in the Table of Contents and at the beginning of each Argument set forth in the Answer Brief, the State chooses not to address Mr. Asay's actual arguments, but instead sets forth "restated" versions that it addresses instead. In the course of "restat[ing]' Mr. Asay's argument, the State omits the meat of Mr. Asay's arguments in an effort to conceal the plain truth that it cannot refute.

REPLY TO STATEMENT OF THE CASE AND FACTS

The State relies upon a passage from this Court's direct appeal as establishing the facts of the crime. Of course, the two page block quote from the direct appeal opinion was written based solely on the trial transcripts that were viewed in the light most favorable to the State. Since then, there has been additional evidence presented during the course of proceedings on Asay's previous motion to vacate.

For example in his 1993 motion to vacate, Asay proffered the testimony of Thomas Gross, a state witness whose testimony was featured prominently in the passage of this Court's direct appeal opinion that the State quoted in its Answer Brief. While affirming the denial of the 1993 motion to vacate, this Court did indicate that Asay's allegations as to what Gross would have said had the 3.850 judge permitted Gross to be called as witness, "[t]aking Asay's allegations as true, Gross testified falsely that Asay had confessed to him and that Asay had shown him tattoos of a swastika, 'white pride,' and 'SWP.'". *Asay v. State*,

769 So. 2d 974, 982-83 (Fla. 2000).[1]

This Court devoted a full paragraph in its direct appeal opinion to Gross' testimony and the racial animus that Gross claimed that Asay expressed. As to that there are two significant points. First, Asay sought to present Gross' testimony in his prior motion to vacate that his testimony was false. Second, the relevance of Gross' claim that Asay expressed racial animus was dependent upon the State's evidence that Asay had shot and killed Robert Booker, a black man.[2]

The passage from this Court's direct appeal relied upon by the State as reciting the facts of the crime did not include reference to Selwyn Hall's sworn statement that Roland Pough had confessed to shooting a black man late on July 17, 1987, who ran off a little over three blocks from where Booker's body was found a few hours later:

> An acquaintance of mine "Roland" said that last Friday night he had shot a black male during what he said was a robbery attempt at 1418 N. Market St. in his side

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[1]In fact, Gross would have testified that Asay never confessed to him while they were in jail together (PC-T. 1057). Asay showed Gross newspaper articles and told Gross what the police were saying he did (PC-T. 1057). Gross saw this as an opportunity to benefit himself, because he was facing charges. He had his attorney contact the state attorney and relay that he had information regarding Asay's case (PC-T. 1057). Gross met with the prosecutor, Bernie de la Rionda, and told him what he had read in the articles and what information the police had relayed to Asay (PC-T. 1958). The prosecutor then showed Gross pictures of Asay's tattoos, specifically the white pride and swastika (PC-T. 1058). Gross and Asay previously discussed Asay's tattoos, however, they never talked about the tattoos that de la Rionda pointed out to Gross (PC-T. 1058).

[2]The other victim, Robert McDowell, was a white man according to the homicide continuation report.

> yard. "Roland" said he was shot in the right arm, and that he (Roland) shot at the B/M four or five times. Roland said he knew for sure he hit the B/M once. The B/M then ran away. Roland has a .25 cal auto pistol crome plated with brown handle. I Selwyn A. Hall have seen Roland carry this pistol many times.

(PC-R2 at 792, 1161). The statement was witnessed by Detective Housend and signed by Selwyn A. Hall on July 23, 1987.

The passage from this Court's direct appeal relied upon by the State as reciting the facts of the crime did not include the fact Danny and Charlie Moore wanted to receive money from the television show, Crime Watch, for their testimony. Danny testified that it was "a quick way to make a thousand bucks." (R. 659). Also, this Court made no reference to the fact that the testimony of Danny and Charlie Moore was not consistent as to when and where Asay's inculpatory statements were allegedly made.

And of course, this Court's direct appeal opinion made no reference to the fact that FDLE Agent Warniment testified that to a one hundred percent certainty the bullet removed from Booker and the bullets removed from McDowell were fired by the same gun. But, this testimony was the clincher, according to the prosecutor in his closing argument:

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

> killed him. And four of those killed Mr. McDowell, those little tiny things.

(R. 872-3) (emphasis added).

But we now know, that Warniment's testimony was purely subjective opinion that lacked a scientific foundation.

The State's reliance upon a passage from this Court's direct appeal opinion for a definitive recitation of the facts of the crime is clearly misplaced.

REPLY TO ARGUMENTS

ARGUMENT I: THE CIRCUIT COURT VIOLATED ASAY'S RIGHT TO DUE PROCESS.

Contrary to this Court's jurisprudence, the State argues that it was entirely proper for the circuit court to consider non-record material in ruling on Asay's *Brady*/ineffective assistance of counsel claim (AB 16). *See Peede v. State*, 748 So. 2d 253 (Fla. 1999); *Card v. State*, 652 So. 2d 344, 346 (Fla. 1995); *Lightbourne v. Dugger*, 549 So. 2d 1364 (Fla. 1989).[3]

The State posits that the records were not "extra-record

[3]The State cites to *Parker v. State*, 633 So. 2d 72, 73 (Fla. 1st DCA 1994), to suggest that review of non-record information is appropriate in some circumstances. *Parker* concerned a trial court's stacking of minimum mandatory sentences, where Parker claimed error due to the fact that the offenses arose from a single criminal episode. *Id.* However, the First District made clear that the arrest report upon which the trial court relied was a part of the record: "The **record contains only an arrest report** from which to glean the details of events on August 14, 1992. That report sets out in sordid detail the extent of the heinous crimes committed against the victim, and **since no one has challenged its accuracy either below or on appeal**, we rely on it in resolving the issue." *Id.* Thus, in *Parker*, the arrest report was part of the record and Parker had an opportunity to challenge it - that is not the case here. The State's reliance upon *Parker* is misplaced.

material in the traditional sense" (AB 20), because Asay was aware that the judge was copied with the records (AB 16, 21). However, Asay's knowledge that the records had been sent to the circuit court does not excuse the due process violation. Here, it was Asay's understanding that the State copied the circuit court with the e-mail so that the court was aware of the progress of the disclosure of public records, not that the court would rummage through the records without providing Asay an opportunity to counter any of the information contained in them. Indeed, "[j]udges are required to follow the law and apply it fairly and objectively to all who appear before them." *In re Inquiry Concerning a Judge, J.Q.C. No.* 77-*16*, 357 So. 2d 172, 179 (Fla. 1978). Asay had no notice or reasonable expectation that the circuit court would violate his rights and this Court's case law.

The State has also attempted to factually mislead this Court, stating: "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**" (AB 21)(emphasis added). However, what Judge Salvador actually said near the ending of the hearing as the transcript shows was: "I have not been able to go through **the record** to see if there were things that had been provided that included Selwyn Hall as a witness or Selwyn Hall, whatever information he had to provide."

(PC-R2 1032)(emphasis added).[4] Asay was not on notice that the judge would violate his right to due process and review materials that were not included in the record.

The circuit court's actions deprived Asay of his right to due process as he was provided no notice that the court would review non-record materials and no opportunity to be meaningfully heard as to the non-record material that Judge Salvador reviewed.

Had Asay known that Judge Salvador intended to review non-record materials, he would have explained as he does within this brief and the initial brief that the documents that Judge Salvador reviewed did not contain the *Brady* material on which his claim was based. Because Judge Salvador reviewed non-record material without notice and in violation of well-established law, Asay was deprived of the opportunity to explain.

After the judge entered her order and revealed that she had gone outside the record, Asay would have moved to disqualify her if this Court's scheduling order had not indicated that the proceedings in the circuit court were to end at 5PM on February 3. The State argues that Asay's claim that Judge Salvador should have been disqualified from presiding over his case is not preserved (AB 21). The State faults Asay for failing to file a

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[4]The State's misrepresentation is just ethically wrong. The State has access to the ROA and the transcript of the case management hearing. The State did not include a record citation. But when the transcript is combed through, the false representation is revealed. The State changed the words "the record" that appear in the transcript into the words "the public records material" in order to completely change what was said. It is hard to imagine that the factually erroneous statement was made accidently or without an intent to deceive.

motion to disqualify **after** he learned that Judge Salvador had reviewed the non-record material, and instead of filing the February 4th proffer. However, the circuit court based upon this Court's scheduling order had made clear that under no circumstances would the court enter a stay or entertain additional matters due to this Court's scheduling order (PC-R2 1034)("I have postponed and delayed as much as I possibly could for each of you to file your respective pleadings, but **after today I don't see where or how we would be able to do any further reconvening given this timeline** that I'm under and the Florida Supreme Court's not having granted your petition to extend the deadlines.")(emphasis added).

Moreover, once Asay learned of the circuit court's actions, he could not "unring the bell" because the court had already summarily denied his motion. And, Asay is not asserting that the judge should be disqualified bec*aus*e her rulings were adverse. *See* AB 22. Here, the circuit court violated Asay's right to due process and this Court's pronouncements as to the proper analysis of factual claims raised in motions to vacate. Such conduct constitutes both legal error and judicial bias. It requires that Asay be provided an evidentiary hearing and that Judge Salvador be disqualified from those proceedings.

Finally, the State addresses the *ex parte* hearing that was held on February 4. Unsurprisingly, the State seeks to blame undersigned counsel for the improper *ex parte* hearing

misrepresenting the facts as to what occurred.[5] *See* AB 19. For example, in describing what occurred on February 4th in relation to the proffer, the State represents that undersigned "emailed the Attorney General's Office that [I] intend[] to file the proffer regardless of its impropriety." (AB 18-9). The State seems to suggest that undersigned, believing that the proffer was improper, decided to file it regardless of any rule, law or ethical prohibition to it. Nothing could be further from the truth. On February 4th and ever since, undersigned believed and continues to believe that the proffer was completely appropriate, particularly in light of the circuit court's order relying on non-record materials.

The State also submits that reasonable notice and opportunity to be heard at the *ex parte* hearing were provided (AB 19), but fails to identify when such notice was sent. The notice of hearing that appears in the file was stamped as filed by the clerk at 4:51 P.M. on February 4 (PC-R2 574). The email that Judge Salvador sent notifying counsel of the 3:15 P.M. hearing shows that the email was sent at 3:15 P.M. Judge Salvador marked this email as Court Exhibit 1 during the ex parte hearing that commenced at 3:15 P.M. (PC-R2 737). At best, the notice that

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[5]The State likens undersigned's exclusion for the February 4th hearing to an unruly client's removal from the courtroom (AB 23-4). While the State's analogy is completely illogical and factually baseless, it must also be noted that when an unruly client is removed from a hearing, he still has an attorney present as his representative. During the February 4th hearing, Asay was unrepresented, and Judge Salvador and the State both knew that Asay was unrepresented as they had been advised that counsel was not available.

undersigned counsel received of the 3:15 P.M. hearing was at 3:15 P.M.[6] That is not reasonable notice.

However, what the State refuses to acknowledge is that counsel for the State and Judge Salvador all had notice before the *ex parte* hearing began at 3:15 P.M. that undersigned counsel was not available. Judge Salvador and the State had notice when the hearing began, that undersigned counsel was not available. Indeed, Judge Salvador marked undersigned counsel's 2:48 P.M. email indicating that he was "not available at all" as a court exhibit and introduced it (PC-R2 823). The State and the judge knew that counsel was unavailable and they chose to conduct an *ex parte* hearing in violation of the Code of Judicial Conduct.

The State argues that undersigned refused to attend the hearing that he was unaware had been scheduled and had begun while he was communicating with his client (AB 23, 25). All that counsel knew was that the judge's judicial assistant had inquired of his availability for a 3:15 P.M. hearing. No notice was received that despite his unavailability, a hearing was nonetheless scheduled because counsel was on a conference call with Asay from 3:00 until 3:30 P.M.

The State's molestation of the facts is clearly an ad hoc rationalization for participating in a clearly improper *ex parte* hearing. When the judge's email was sent at 3:15 P.M., advising

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[6]However, undersigned counsel was on a conference call with Asay from 3:00 until 3:30 P.M. As he indicated in his Initial Brief, he did not discover that email until after 4PM when he returned to his office.

that a court reporter had been arranged for 3:15 P.M., undersigned was speaking to his client. Thus, there was no "willful absence" (AB 25), but rather a complete lack of knowledge, and an *ex parte* hearing conducted by the judge and the State with full knowledge of counsel's unavailability in violation of the Code of Judicial Conduct.

The State and Judge Salvador's actions were improper and should not be countenanced. Judicial disqualification is required.

ARGUMENT II: ASAY'S NEWLY DISCOVERED EVIDENCE, *BRADY* AND *STRICKLAND* CLAIMS.[7]

A. NEWLY DISCOVERED EVIDENCE CLAIM

The State fails to address the actual newly discovered evidence claim that Asay presented. Rather, in a transparent attempt to avoid defending the circuit court's erroneous analysis of the claim, the State omits any reference to the newly discovered evidence on which Asay's claim was actually premised, William Tobin's proffered testimony, which was specific to Asay's case and the testimony given by FDLE Agent Warniment. Instead, the State pretends that the newly discovered evidence on which the claim was based were "two committee reports" that are not

[7]In the State's "restated" version of Asay's Argument II, references to his *Brady* and *Strickland* claims are omitted and the basis of the newly discovered evidence claim is misrepresented. The newly discovered evidence claim is based upon the scientific analysis of Warniment's testimony by William Tobin who concludes that Warniment's testimony was scientifically erroneous and unreliable. And despite leaving out reference to Asay's *Brady* and *Strickland* claims in the "restated" argument caption, the State does include sections in the argument addressing the *Brady* and *Strickland* claims.

specific to Asay's case (AB 26). Only by asserting that the newly discovered evidence claim is premised on "two committee reports" (when as a matter of fact it is not premised upon "two committee reports") is the State able to insert the otherwise irrelevant assertion that: "But generalized reports are not newly discovered evidence." (AB 26).

In the Answer Brief, the State never mentions Asay's highly qualified firearms expert, William Tobin, who was identified in January 27, 2016, motion to vacate by name. Asay wrote that after Tobin reviewed Warniment's testimony and the FDLE file:

> Tobin has concluded that the jury in Mr. Asay's case heard highly unreliable and misleading testimony. First, as has been acknowledged by DOJ, it simply cannot be said that bullets from a particular firearm display unique characteristics, or that there is "individualization". Second, the certainty with which Warniment expressed his opinion, i.e., "100 percent" was pure speculation with absolutely no basis in research or experience. Third, Mr. Asay's case presents particular problems because it falls into a category commonly referred to as a "no gun recovery case." Without the firearm from which the bullets were fired, Warniment could not have had any knowledge concerning how the firearm was manufactured or what population of firearms existed in the area with which a comparison could have been made. Furthermore, Warniment made no mention that he had made any effort to eliminate "subclass carryover" which is an important and necessary consideration in the analysis of firearms identification. And, finally, it was highly misleading to identify a specific firearm as firing the bullets, when numerous types of firearms could have been used.

(PC-R2 132-33).[8]

Instead, the State asserts that Asay's newly discovered evidence is based upon the 2008 and 2009 NAS reports which do not

[8]Asay proffered a 49-page affidavit from Tobin setting forth and detailing his findings (PC-R2 580-628).

constitute newly discovered evidence (AB 26, 32). However, as stated in Asay's January 27th motion, at the February 1st *Huff* hearing, in his Notice of Proffer, and in his Initial Brief, Asay has obtained "case-specific" evidence that demonstrates that the jury in Asay's case heard highly unreliable and misleading testimony.[9] At this juncture, Asay's factual allegations must be accepted as true. *Lightbourne v. Dugger*, 549 So. 2d 1364, 1365 (Fla. 1989). As Asay has alleged, Tobin will testify that it simply cannot be said that bullets from a particular firearm display unique characteristics, or that there is "individualization". Tobin will testify the certainty with which Warniment expressed his opinion, i.e., "100 percent" was pure speculation with absolutely no basis in research or experience. Tobin will testify that Asay's case presents particular problems because it falls into a category commonly referred to as a "no

[9]The State attempts to distinguish *Wyatt v. State*, 71 So. 3d 86 (Fla 2011), because *Wyatt* "involved comparative bullet lead analysis (CBLA), not ballistics match testimony which is still reliable and admissible after these reports" (AB 37). Not a single citation is offered in support of this non-record assertion of fact that contradicts Asay's factual allegations which under this Court's jurisprudence must be accepted as true at this juncture. *Lightbourne v. Dugger*, 549 So. 2d 1364, 1365 (Fla. 1989). Further, the condemnation of CBLA is nearly identical to the uncertainty and subjectivity present in firearm identification analysis. The principle announced in *Wyatt* - requiring "case-specific" information to support a claim of newly discovered evidence was applied in *Foster v. State*, 132 So. 2d 40, 72 (2013)("new research studies are not recognized as newly discovered evidence. *** Foster 'has not identified how the article would demonstrate, in any specific way, that the testing methods or opinions in his case were deficient.' *Johnston*, 27 So.3d at 21–22"). Asay's proffer of Tobin's testimony does what was not done in *Foster* (PC-R2 580-628).

gun recovery case." Tobin will testify that without the firearm from which the bullets were fired, Warniment could not have had any knowledge concerning how the firearm was manufactured or what population of firearms existed in the area with which a comparison could have been made. Tobin will also testify that Warniment made no mention that he had made any effort to eliminate "subclass carryover" which is an important and necessary consideration in the analysis of firearms identification. Finally, Tobin will testify it was highly misleading to identify a specific firearm as firing the bullets, when numerous types of firearms could have been used.

As to the issue of "individualization" or "uniqueness," Tobin will testify that it has not been established that examiners, like Warniment, are able to differentiate between class, subclass and individual characteristics. Because of this, contrary to the State's assertion that firearm identification evidence is admissible (AB 27), Tobin will testify that it is not scientifically sound and is virtually entirely subjective.[10] Thus accepting Asay's factual allegations as true, i.e. accepting

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[10]The State argues that firearm identification evidence is still admissible and therefore, not significant to the analysis here (AB 33-4, 36). However, Tobin would testify that firearm identification is generally unreliable. In addition, Tobin would testify specifically that because this was a "no gun recovery case" there is simply no way to distinguish between subclass and "unique" characteristics. Some law enforcement agencies prohibit testimony about examinations under these circumstances. Tobin would also testify about other specific facts relating to Asay's case, i.e., that the jury was misled by the testimony that the bullets matched with 100% certainty and that there is no way to link a particular type of weapon to the bullets, as occurred in Asay's case. *See* R. 473, 482, 727.

Tobin's proffer as fact, Warniment's testimony was not only scientifically unreliable, it does not qualify as admissible expert testimony under the governing standards. *Ramirez v. State*, 810 So. 2d 836 (Fla. 2001).

No where in its analysis of the newly discovered evidence does the State address the previously undisclosed statement of Selwyn Hall, which indicates that Roland Pough shot Booker who then ran off a few hours before his body was found his body was found a little over three blocks away:

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

(PC-R2 at 792, 1161). On the basis of Hall's sworn statement, Pough was named as the main suspect in Booker's death. He was eliminated as a suspect solely on the basis of Warniment's ballistics match, which we now know is scientifically unreliable. Hall's sworn statement in conjunction with Tobin's proffered testimony provide compelling evidence that Booker died after he was shot by Pough and ran off.

Besides ignoring Hall's sworn statement, the State also misrepresents the evidence that was presented at Asay's trial when it argues that it proved that Asay's victim was Robert Booker. Notably, the State disingenuously argues that Robbie Asay and Bubba O'Quinn merely "could not identify the victim as Robert Booker" (AB 27, 34). However from the beginning of the investigation through trial, Robbie stated that the man he spoke to in the early morning hours on July 18th was not the man who was found beneath the house on Laura Street and was identified as Robert Booker (R. 591-92).[11]

Moreover, the State's reliance on Clifford Patterson as conclusive evidence Booker was shot by Asay and not by Pough is equally misplaced (AB 26). Patterson did not witness a shooting or identify Robbie, Bubba or Asay or their vehicles as being near the crime scene at the time he saw Booker run by stating that he had been shot. Patterson did not know who had shot Booker. Indeed, it may very well have been Pough who had shot Booker when, according to Pough's statement to Hall, Booker ran off. Booker did not indicate to Patterson in any way who had shot him.

The police were aware of Patterson's observations when Hall gave his July 23 sworn statement implicating Pough (PC-R2 1060). If Booker ran off after Pough shot him, he needed to just go a block to 6th Street and take a left. Patterson claimed to have seen Booker running down 6th Street and turn the corner onto

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[11]Throughout the police investigation, no evidence suggested that Booker was a pimp. Yet, the black male, with whom Robbie spoke, had wanted to arrange three prostitutes for Robbie.

Laura Street (PC-R2 1060). Joseph Knight who was with Patterson at the time said that "between 12 midnight and 2:00 A.M. he saw the victim run by" (PC-R2 1058). Hall's statement that Pough shot a black male at 1418 N. Market Street was clearly consistent with Patterson and Knight's observation of Booker running down 6th Street and turning right onto Laura Street.[12]

The police learned of multiple gunshots in the Springfield area of Jacksonville late on July 17th and/or early on July 18th. As Hall swore, Pough described several shots fired at Booker, just a few blocks from the abandoned house where Booker was found[13]; Ollie Thomas reported hearing shots fired between 11PM and 12AM; Joseph Knight heard shots between 12 and 2AM[14]; and an unidentified black female witnessed a shooting in front of the Idle Hour bar; however, the police discounted the witness "as a very talkative black female seeking attention" (PC-R2 1060). Patterson did not see who shot Booker. His testimony is limited. Hall's undisclosed sworn statement and Tobin's proffered testimony is no way is refuted by Patterson's observations.

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[12]In the Answer Brief, the State erroneously asserts: "Booker's body was then discovered several blocks down Laura street from [Patterson's] encounter with him" (AB 36). However, the corner of 6th St. and Laura St. begins the 1600 hundred block of Laura St. Booker's body was found underneath a house at 1622 N. Laura St (PC-R2 1055).

[13]The State attempts to argue that the proximity of the alleged shooting involving Asay and the abandoned house where Booker's body was found at 9:40AM provides proof that Asay shot Booker (AB 37). However, the proximity between the Pough shooting and the house was also within a few blocks.

[14]Robbie, Bubba and Asay did not leave Brinkman's until it closed at 2AM.

As to the medical examiner's testimony about Booker's wound, the State cannot account for the angle of the bullet because it is not consistent with how the State alleged that Asay shot Booker.

The "case-specific" firearm identification evidence provided by Tobin constitutes newly discovered evidence. The import of the evidence when evaluated cumulatively with the other new evidence that is admissible at a retrial demonstrates that Asay is entitled to relief. The jury heard misleading and scientifically unreliable testimony which was the only direct evidence linking Asay to the Booker homicide as the State noted in its closing argument.

The State's argument in its Answer Brief is premised upon a fundamental misunderstanding of this Court's governing jurisprudence. This Court has held:

> Based on the standard set forth in *Jones II*, the postconviction court must consider the effect of the newly discovered evidence, in addition to all of the admissible evidence that could be introduced at a new trial. *Swafford v. State*, 125 So.3d 760, 775–76 (Fla.2013). In determining the impact of the newly discovered evidence, the court must conduct a cumulative analysis of all the evidence so that there is a "total picture" of the case and "all the circumstances of the case." *Id.* at 776 (*quoting Lightbourne v. State*, 742 So.2d 238, 247 (Fla.1999)). This determination includes
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> > whether the evidence goes to the merits of the case or whether it constitutes impeachment evidence. The trial court should also determine whether the evidence is cumulative to other evidence in the case. The trial court should further consider the materiality and relevance of the evidence and any inconsistencies in the newly discovered evidence.
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> *Jones II*, 709 So.2d at 521 (citations omitted). As this

> Court held in *Lightbourne*, and more recently in *Swafford*, **a postconviction court must even consider testimony that was previously excluded as procedurally barred or presented in another postconviction proceeding in determining if there is a probability of an acquittal**. *Swafford*, 125 So.3d at 775–76; *Lightbourne*, 742 So.2d at 247; *see also Roberts v. State*, 840 So.2d 962, 972 (Fla.2002) (holding that upon remand, if the trial court determined that the testimony in a newly discovered evidence claim was reliable, the trial court was required to review that new evidence, as well as claims under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), that were previously rejected in a prior postconviction motion, because the evidence was equally accessible to the defense and there was no reasonable probability that the result of the trial would have been different had the evidence been disclosed).

Hildwin v. State, 141 So. 3d 1178, 1184 (Fla. 2014) (emphasis added). The State's characterization that Asay is attempting to "resurrect previous claims" (AB 38), misunderstands the requirement that this Court consider all of the previous evidence relating to the statements made by Gross that he provided false testimony and was directed to provide damning information about Asay's motives for the crimes; the impeachment of Bubba O'Quinn, Charlie Moore and Danny Moore as to the inconsistencies with their testimony and all of the other evidence; and the previously undisclosed Selwyn Hall sworn statement about Pough's admission to him; along with Tobin's proffered testimony regarding Warniment's misleading and scientifically unreliable testimony. All of this would be admissible at a new trial and all of it must considered in evaluating a newly discovered evidence claim under *Hildwin v. State*.[15] At a minimum, an evidentiary hearing is

[15]The State concedes that Asay's alleged "confession" to a defense investigator would not be admissible at a re-trial; but,

required. *Smith v. State*, 75 So. 3d 2005 (Fla. 2011).

B. *BRADY* CLAIM

As to Asay's *Brady* claim, the State argues that because Selwyn Hall's name was disclosed in the homicide continuation report and Housend's deposition, his undisclosed sworn statement does not constitute a *Brady* violation (AB 39). Specifically, the State argues: 1) Housend discussed Pough in his depo; and 2) that Selwyn Hall's statement was revealed in the homicide continuation report (AB 42-3). According to the State, that was all that was required under *Brady* (AB 43). The State is wrong as to both the facts and the law; the exculpatory information contained in Hall's sworn statement was not in fact disclosed.

The State falsely asserts: "the statement Selwyn Hall gave on July 23, 1987, that Roland Pough shot Booker, was contained in a homicide supplemental report that was disclosed." (AB 43).[16] The July 31, 1987, homicide supplemental report that Judge Salvador found in an attachment to an email sent to Asay's

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then argues without any citation of authority that this Court can use it to deny Asay a retrial (AB 39) ("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."). The State is wrong. Asay did not confess to the defense investigator, who made the claim up in response to an ineffectiveness allegation. The investigator's testimony is and was not true. Moreover, any statement to the investigator is privileged and inadmissible. The alleged statement cannot be considered in assessing whether Asay is entitled to an evidentiary hearing on his claims.

[16]At this juncture, Asay's factual allegations must be accepted as true. *Lightbourne v. Dugger*, 549 So. 2d 1364, 1365 (Fla. 1989). Asay has alleged that Hall's sworn statement was not disclosed. The State refuses to accept the allegation as true.

current collateral counsel and on which she relied in denying Asay's *Brady* claim has a list of witnesses which included: "Hall, Selwiyn [sic], 116 East 7th Street, Phone, None" (PC-R2 1055). The only references to Hall in the report are as follows:

> TRUSSELL led this writer to a SELWIYN [sic] who was reported as being the black male who "Roland" had told him of the shooting.
>
> **1:25 P.M.** This writer interviewed SELWIYN [sic] HALL at the Pic N'Save store. MR. HALL stated that ROLAND told hi that this dude was trying to rob him outside his apartment and that he had shot four or five times and he knew that he struck the guy once with one of the shots and that the dude had run off. MR. HALL also stated that there was suppose to be a drug deal at ROLAND's residence on this date at 4:00 P.M. HALL stated that ROLAND was suppose to trade some crack cocaine for a blue Mustang at that time. HALL also stated that ROLAND always had in his possession a .25 caliber automatic pistol.

(PC-R2 1062). In Housend's depo, the information regarding Pough was described as a dead end because of the ballistic match.

Neither in the July 31st supplemental report nor in Housend's depo does Selwyn Hall's sworn statement appear. It contained a wealth of information that was omitted from the supplemental report and from Housend's depo:

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

> from Roland on several occasions. I Selwyn A. Hall know for a fact that approx thirty or more people buy their crack from Roland. This is a true and accurate statement.

(PC-R2 at 792, 1161) (emphasis added).[17] The date, time and location that Roland said he shot the black male appear in Hall's sworn statement, but not in the July 31 report or in Housend's depo. The description of the victim as a black male appears in Hall's sworn statement, but not in the July 31 report or in Housend's depo. A full description of Pough's gun is included as well. In addition, another previously undisclosed document describes Hall as someone who was reliable.[18]

The information obtained from Hall also accompanied information from both Booker's sister and brother about recent altercations he had with someone.[19]

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[17]Hall informed the police that Pough was a drug dealer who sold cocaine. Booker had cocaine in his system the night of his death.

[18]In a handwritten supplemental report by John McCallum regarding the July 23, 1987, arrest of Pough, appears the following: "Det. Housend informed us that he received information from a reliable informant that a subject would be exchanging a blue Ford Mustang for cocaine with a subject known as Roland Pough at 1418 N. Market St. Housend related that Pough was suspected of having a gun in his possession that was involved in a homicide." (PC-R2 766). From the "reliable informant," Selwyn Hall, the police learned that Pough was selling drugs, had at least 30 customers in the neighborhood and was known to carry a Raven .25 pistol. The police then tried to arrest Pough that afternoon in the hope of obtaining the murder weapon.

Hall provided the information about Pough's gunshot wound before he was arrested. Ultimately, Pough was treated for a gunshot wound to his arm and remained in the hospital for a week.

[19]Booker's sister told law enforcement that he had been "cut up" on Beaver and Davis. And, on July 28th, Booker's brother, informed Housend that the victim had been robbed a week before

The information contained in the Hall's undisclosed sworn statement and the other undisclosed documents concerning Pough's July 23rd arrest contain favorable information that was not set forth in the July 31 supplemental report and was not in Housend's depo. The State's whole argument is that disclosing that at one point in time, Pough had been a suspect satisfies its *Brady* obligation as to Pough's admission to Hall: "Roland Pough was disclosed and therefore, the *Brady* claim is meritless." (AB 43-44). The State's position is just contrary to the law.

The seminal case is *Brady v. Maryland*, 373 U.S. 83 (1963). The facts of *Brady* demonstrates that the State's argument is a fallacy. Brady's co-defendant was Boblit. As *Brady* indicates:

> Prior to the trial petitioner's counsel had requested the prosecution to allow him to examine Boblit's extrajudicial statements. **Several of those statements were shown to him; but one dated July 9, 1958, in which Boblit admitted the actual homicide, was withheld by the prosecution** and did not come to petitioner's notice until after he had been tried, convicted, and sentenced, and after his conviction had been affirmed.

Brady, 373 U.S. at 84 (emphasis added). Thus, Brady was aware of Boblit's name and was provided several of Boblit's statements. However, *Brady* error occurred because the State did not disclose one specific Boblit statement, the one in which he admitted the homicide.

In *Kyles v. Whitley*, 514 U.S. 419 (1995), the State had disclosed the name of individual known as Beanie. The defense was aware of who Beanie was even though he was not called as a witness by the State or by the defense at Kyles' initial trial or

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being killed and that when the victim retaliated, he was killed.

even at his retrial.[20] However, the U.S. Supreme Court held that the State's failure to disclose many of Beanie's various statements to the police and to the prosecutor violated *Brady*. *Kyles*, 514 U.S. at 430 ("Notwithstanding the many inconsistencies and variations among Beanie's statements, neither Strider's notes nor any of the other notes and transcripts were given to the defense.").

In *Hoffman v. State*, 800 So. 2d 174, 179 (Fla. 2001), this Court was presented with a *Brady* claim premised upon undisclosed "results of an exculpatory hair analysis, an analysis which excluded Hoffman, codefendant White and the male victim, Ihlenfeld, as the sources of the hairs found in the female victim's hands." Just like it has argued here, the State argued in *Hoffman* that it had "disclosed the existence of a hair analysis to defense counsel. This disclosure, the State assert[ed], should have placed Hoffman's attorney on notice of any other evidence flowing therefrom." *Id*.[21] This Court rejected the State's argument and granted a new trial. This Court held:

> The State's additional argument is that defense counsel Harris elicited information at trial from a serologist about the hairs. The information solicited, however, was merely the fact that hairs were gathered at the

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[20]At the first trial, "[t]he theory of the defense was that Kyles had been framed by Beanie, who had planted evidence in Kyles's apartment and his rubbish for the purposes of shifting suspicion away from himself, removing an impediment to romance with Pinky Burns, and obtaining reward money." *Kyles*, 514 U.S. at 429.

[21]As here, "the State essentially argue[d] that defense counsel should have inquired further once told of the existence of other hair analyses." *Id*.

> scene. The State asserts this testimony sufficiently apprised the defense of the existence of this evidence. This argument is flawed in light of *Strickler* and *Kyles*, which squarely place **the burden on the State to disclose to the defendant all information in its possession that is exculpatory**. In failing to do so, the State committed a Brady violation when it did not disclose the results of the hair analysis pertaining to the defendant.

Id. (emphasis added). *See Smith v. Sec'y Dep't of Corrs.*, 572 F.3d 1327 (11th Cir. 2009).

The State's failure to disclose Selwyn Hall's sworn statement regarding Pough's admissions against penal interest to him about shooting a black man late on July 17th a few blocks from where Booker's body was found violated *Brady*.[22] When properly evaluated with all the other exculpatory evidence including, Gross' recantation and Tobin's proffered testimony regarding Warniment's ballistics match, confidence is undermined in the outcome of Asay's trial.[23] At the very least, an

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[22]As to the Charlie Moore interview notes, the State avers: "*Brady* does not require notes contain certain information." (AB 44 n.6). The State clearly does not understand that if Moore failed to provide the police with details about Asay's alleged statement and then at trial added those details, his failure to originally provide them shows an inconsistency and is impeachment to his testimony. Without providing Asay the statement and/or information that Moore later added details to his original statement, the State violated *Brady* as explained in *Kyles*.

[23]The State argues that Hall's statement is not material because of the evidence presented against Asay (AB 46). As previously stated, there was no direct evidence linking Asay to Booker's shooting. Robbie testified that the man with whom he spoke on July 18th was not Booker. A review all of the admissible evidence, including, Tobin's testimony, Hall's testimony, the medical examiner's testimony about the angle of the bullet in relation to the Booker homicide, the impeachment of Bubba and the Moores and Gross' statements that he provided false testimony and the fact that McDowell was white, establishes that confidence in

evidentiary hearing is required on his claims.

C. *STRICKLAND V. WASHINGTON* CLAIM

To the extent that the State argues that trial counsel should have known about Selwyn Hall's sworn statement, Asay has alternatively pled its recent disclosure as an ineffectiveness claim under *Strickland*. As to this alternatively pled claim, the State argues the claim is not timely (AB 47). However, the State's argument makes absolutely no sense. Asay's prior collateral counsel was not provided the investigative file relating to Pough which contained Hall's sworn statement and all of the facts surrounding the investigation of Pough. At issue is the same undisclosed records at issue in Asay's *Brady* claim. The State properly makes no argument of a time bar as to the *Brady* claim. That is because prior collateral counsel was not provided with Hall's handwritten sworn statement and the other files regarding Pough's July 23, 1987, arrest. Without Hall's sworn statements and the files regarding Pough's July 23, 1987, arrest, prior collateral counsel was just as unable to alternatively plead Asay's *Strickland* claim as he was unable to plead Asay's *Brady* claim.[24] Accepting the factual allegations as true, an

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Asay's convictions and sentences of death has been undermined.

[24]The State's argument that it was not ineffective to fail to raise Pough as an alternative suspect because he may have had an alibi (AB 48), lacks evidentiary support and is contrary to police reports. Hall provided a statement that Pough confessed to him. The information gathered about Pough was so compelling that law enforcement arranged to arrest him in the hope of obtaining the murder weapon.

Likewise, reliance on Robbie's testimony as refuting Hall's sworn statement is misplaced (AB 48). Robbie maintained from the

evidentiary hearing is warranted.

ARGUMENT III: ASAY'S RIGHT TO EFFECTIVE COLLATERAL COUNSEL HAS BEEN VIOLATED.

The State insists that Asay has no constitutional right to postconviction counsel (AB 50). However, that is not the issue. Statutory law conclusively guarantees Asay is to be provided effective assistance of collateral counsel. Further, Asay's statutory right to effective assistance of state court counsel has never been held not to apply when pursuing relief in the federal courts. *See* AB 51-2. Indeed, the cases cited by the State in support of its proposition do not support this conclusion. *Id.* Neither *Ross v. Moffitt*, 417 U.S. 600 (1974), nor *Zack v. State*, 911 So. 2d 1190 (Fla. 2005), or *Gore v. State*, 91 So. 3d 769 (Fla. 2012), stand for the proposition that in Florida, capital collateral defendants, like Asay, are not entitled to the effective assistance of counsel in their collateral proceedings while they challenge their convictions and sentences of death in federal habeas corpus proceedings.

In 1974, the U.S. Supreme Court held in *Ross v. Moffitt*, 417 U.S. 600, 611-12 (1974), that the Due Process Equal Protection Clauses to the United States Constitution did not compel counsel be appointed for discretionary review of a criminal conviction. However, the U.S. Supreme Court also stated: "We do not mean by this opinion to in any way discourage those States which have, as a matter of legislative choice, made counsel available to

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outset that Booker was not the black male with whom he spoke on July 18th in the Springfield area.

convicted defendants at all stages of judicial review." *Id.* at 618. Indeed, the State of Florida, in 1985, determined that death sentenced individuals were entitled to state court counsel as a matter of right. A few years later, this Court made equally clear that pursuant to the statute "**each defendant under a sentence of death is entitled, as statutory right to effective legal representation by the capital collateral representative** in all collateral relief proceedings." *Spalding v. Dugger*, 526 So. 2d 71, 72 (Fla. 1988) (emphasis added).[25] Whether capital collateral defendants have a constitutional right to counsel is not the issue. But, there can be no doubt that for more than thirty years, they have enjoyed the statutory right to effective assistance of collateral counsel under § 27.701, Fla. Stat.

While Asay was without state court counsel from May, 2005, until January 13, 2016, he was deprived of his statutory right to effective collateral counsel. He was deprived of his right with the State's full knowledge; he did not have "representation at each and every stage of the litigation." (AB 52).

In *White v. Board of County Comm'rs*, 537 So. 2d 1376, 1378-1379 (Fla. 1989), this Court held: "since the state of Florida enforces the death penalty, its primary obligation is to ensure that indigents are provided competent, effective counsel in capital cases". Further, the basic requirement of due process in

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[25]The State's interpretation of *Spalding* is a clearly obtuse reading of its import. *See* AB 56 ("The *Spalding* Court did not create a state constitutional right to collateral counsel."). Asay relies upon *Spalding* for the statutory right to effective collateral counsel. *Spalding v. Dugger*, 526 So. 2d at 72.

an adversarial system is that an accused be zealously represented at "every level"; in a death penalty case such representation is the "very foundation of justice". *Wilson v. Wainwright*, 474 So. 2d 1162, 1164 (Fla. 1985).[26]

In Asay's case, he was deprived of the competent, effective lawyering for more than a decade. Having a death warrant signed and an execution date scheduled in these circumstances, in addition to the loss and destruction of all of the 33 boxes of records maintained by the Capital Collateral Counsel for the Northern Region until July 1, 2003[27], does not comport with due process and cannot be rectified by providing even the most experienced and dedicated counsel to assist Asay.

It is also important to correct the State's false statements

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[26]In 1999, this Court adopted minimum standards for certain attorneys litigating capital cases. *In Re: Amendment to Florida Rules of Criminal Procedure -- Rule 3.112 -- Minimum Standards for Attorneys in Capital Cases*, 759 So. 2d 610 (Fla. 1999). In adopting new rules, this Court acknowledged the complexities, convoluted doctrines of procedural default, and uniqueness of capital law, and stated that under our system of justice, "the quality of lawyering is critical" in capital cases. It employed its "inherent and fundamental obligation to ensure that lawyers are appointed to represent indigent capital defendants who possess the experience and training necessary to handle the complex and difficult issues inherent in death penalty cases." *Id.* at 613-614.

[27]The State submits that Asay was able to reconstruct his records after the appointment of counsel on January 13th (AB 55). Quite simply, the task of reconstructing Asay's file would take months, not days to complete. Records would be reviewed and comprehensive supplemental requests would be made. That public records collection has not occurred. Instead, undersigned has collected minimal records relating to the case. Currently, Asay's files comprise approximately 6 boxes of records which is obviously woefully incomplete in comparison to the file that had been gathered and maintained until July 1, 2003.

relating to Thomas Fallis' role in Asay's defense. The State repeatedly asserts that Fallis is a part of Asay's defense team: "He also has federal habeas counsel on his defense team who has been his attorney for years and is familiar with his case." (AB 50); *see also* AB 53 ("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 is not involved in Asay's case and has never been authorized to conduct any litigation in the state courts. The State has no evidence to support such statements and in fact, clearly knows that the opposite is true. Its deceit shows its bad faith and demonstrates why Asay went unrepresented before the state courts for over a decade; the State wanted it so. Indeed, the State has violated § 27.711(12), Fla. Stat, in failing to alert the state courts of Asay's need for state court counsel.

The prejudice that Asay has suffered includes the circuit court's finding a lack of diligence as to his newly discovered evidence claim. Asay cannot be found to have failed to exercise due diligence as to scientific studies and reports when he was left without state court collateral counsel from May of 2005 until January of 2016. Sitting in his cell on death row, Asay was deprived of the means of exercising any diligence - he was deprived of his statutory right to collateral representation.

ARGUMENT IV: ASAY'S *HURST* CLAIM.

In response to Asay's claim based on *Hurst v. Florida*, 136 S.Ct. 616 (2016), the State makes a four-pronged argument: 1) *Hurst* does not require jury sentencing; 2) *Hurst* is not

retroactive; 3) *Hurst* does not apply because there is a recidivist aggravator in this case; and 4) even if *Hurst* applied, any error was harmless (AB 57, 61).

A. REPLY TO PRONG ONE OF FOUR PRONGED *HURST* ARGUMENT

As to its first argument, the State misconstrues Asay's claim as asserting that *Hurst* requires a jury sentencing (AB 61). This erroneous reading of the Initial Brief seems to arise from the language quoted from *Hurst* that Florida sets forth statutorily defined facts that must be found before a death sentence may be authorized: "The trial court alone **must find 'the facts . . . [t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'** § 921.141(3)." *Hurst*, 136 S.Ct. at 622. Despite this language set forth in *Hurst*, the State argues that mitigating circumstances need not be found by a jury as they do not increase the punishment (AB 64). According to the State, "weighing is not even a fact." (AB 65). It "is largely a judgment call" (AB 65). Thus after setting aside the language in *Hurst* itself, the State posits that "[u]nder *Hurst*, only aggravators, not mitigators, and certainly not weighing, must be found by the jury." (AB 65).

The State's argument first fails to address what the U.S. Supreme Court said in *Hurst*, 136 S. Ct. at 619: "We hold this sentencing scheme unconstitutional. The Sixth Amendment **requires a jury**, not a judge, **to find each fact necessary to impose a sentence of death**." (Emphasis added). The Supreme Court then went on to identify the statutorily defined facts under Florida law:

"The trial court alone must find **'the facts ... [t]hat sufficient aggravating circumstances exist'** and **'[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'** § 921.141(3); *see Steele*, 921 So.2d, at 546." *Id.* at 622 (emphasis added). As was noted in *Hurst*, Florida statutes have identified "the facts" that must be found before a death sentence may be imposed and those "facts" are **"[t]hat sufficient aggravating circumstances exist"** and **"[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances."** § 921.141(3), Fla. Stat. Nowhere does the State address the statute that provides that the "facts" that must be found includes **"[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances."** (Emphasis added). In no case cited by the State other than *Hurst* has Florida law regarding its requirement that the "facts" that must be found to impose a death sentence included a finding of fact **"[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances."** (Emphasis added).

Ignoring for the moment that Florida statutes identify **"[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances"** as a fact, the other statutory defined fact that is necessary in order for a death sentence to be authorized is a finding of fact **"[t]hat sufficient aggravating circumstances exist."** (Emphasis added). No mitigators are at issue as to this fact. There is no weighing involved. What is required is a determination of whether, as Asay's jury was instructed, sufficient aggravating circumstances exist to justify

a death sentence. Yet, the State chooses in its Answer Brief to ignore that the existence of sufficient aggravating circumstances is a statutorily defined fact that must be found before a death sentence is authorized.[28]

Florida Statute § 921.141(3), relevantly entitled "[f]indings in support of sentence of death," clearly provides that the judge, before imposing a death sentence, must first find that "sufficient aggravating circumstances exist," and then find that there are "insufficient mitigating circumstances to outweigh the aggravating circumstances." In *Hurst*, the U.S. Supreme Court, citing to § 921.141(3), stated that "Florida does not require the jury to make the critical findings necessary to impose the death penalty" but "requires a judge to find these facts." *Hurst*, 136 S.Ct. at 622. And in Hurst, the U.S. Supreme Court specifically found that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." *Id.* at 619. Thus, for Sixth Amendment purposes, the Subsection (3) findings of fact are the operable statutorily defined facts that must be found by a jury because the presence of those facts are

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[28]Without addressing this statutory requirement that as a matter of fact sufficient aggravating circumstances must be found to exist, the State throughout the remainder of its argument assumes that the presence of one aggravating circumstance authorizes a death sentence, even though there is no such provision in the Florida statutes. While there is proposed legislation currently to change this, the fact that legislation has been proposed to insert language into the statute that one aggravating circumstance authorizes the imposition of a death sentence only underscores that Florida law currently requires more - it now requires as a matter of fact that sufficient aggravating circumstances exist before a death sentence is authorized.

necessary to authorize the imposition of a death sentence.[29]

Contrary to the State's suggestion that Asay's arguments are not based on law, Asay relies on the specific language in *Hurst* quoting specific language in Florida statutes. Asay's arguments come directly from *Hurst*. Further, contrary to the State's suggestion that Asay is arguing that jury sentencing is required, he is not. Asay is arguing as *Hurst* commands: "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." *Id*. at 619. Asay is arguing as *Hurst* found the "facts" necessary under Florida to authorize a death sentence are "**[t]hat sufficient aggravating circumstances exist**" and "**[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances**." *Id*. at 622 (emphasis added).

B. REPLY TO PRONG TWO OF FOUR PRONGED *HURST* ARGUMENT

With regard to the second argument, the State pretty much ignores that Florida law regarding retroactivity of *Hurst* is set forth in *Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980), and

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[29]Failing to grasp the relevancy of the weighing process with regard to a death sentence being constitutionally imposed, the State claims that sentencing statutes often contain procedural requirements and additional facts that do not increase or aggravate the penalty (AB 65). And with regard to § 921.141(3), the State points to the fact that it contains other language that does not constitute an element needing to be found by a jury (AB 66)("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.") (AB 66). The State's argument, of course, is inapposite as there is no nexus between the sentencing order by the judge and the operable facts required to impose a death sentence.

instead focuses on federal retroactivity law. The State surmises that because *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002) are not retroactive under controlling precedent, then *Hurst*, which was an extension of *Apprendi* and *Ring* to Florida, is not retroactive either (AB 68). The State does cite as support for its argument this Court's decision in *Johnson v. State*, 904 So. 2d 400 (Fla. 2005), which did employ *Witt,* although it erroneously failed to recognize that *Ring* was applicable in Florida. But, the State focuses more on the U.S. Supreme Court's decision in *Schriro v. Summerlin*, 542 U.S. 348 (2004), employing the federal retroactivity test which differs markedly from the *Witt* standard and has been rejected by this Court (AB 67-68).[30]

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[30]The State also relies upon *Whorton v. Bockting*, 549 U.S. 406 (2007), another U.S. Supreme Court decision addressing the federal retroactivity standard. The State also references *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), which holds that changes in substantive constitutional law are required to be retroactive. But in referencing *Montgomery*, the State omits a discussion of what was at issue there, the retroactivity of the decision that juveniles cannot be sentenced to life without parole without procedural safeguards that insure that only a juvenile whose crime reflects irreparable corruption would receive such a sentence. *Id.* at 734. Thus without the procedural safeguards required by the Eighth Amendment, a juvenile could no longer be sentenced to life without parole. In *Montgomery*, this was determined to be substantive law. *Montgomery* noted, "A penalty imposed pursuant to an unconstitutional law is no less void because the prisoner's sentence became final before the law was held unconstitutional." *Id.* at 731. *Montgomery* elaborated that concern for finality "has no application in the realm of substantive rules, for no resources marshaled by a State could preserve a conviction or sentence that the Constitution deprives the State of power to impose." *Id.* 734. As an example of when a substantive ruling had to be applied retroactively, *Montgomery* set forth "when an element of a criminal offense is deemed unconstitutional, a prisoner convicted under that offense

What the State completely ignores is that there has been no decision from any court addressing the retroactivity of *Hurst v. Florida*. And most assuredly, *Hurst* is not *Ring*. A comparison of *Hurst* to *Ring* demonstrates that *Hurst* is a much broader decision. In *Ring*, the Supreme Court held: "Accordingly, we overrule Walton to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." 536 U.S. at 609. *Hurst* on the other hand held: "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." *Id*. at 619. *Hurst* then proceeded to address Florida's substantive criminal law and identified the elements or facts that were necessary to authorize a death sentence: "'the facts ... [t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.' § 921.141(3); *see Steele*, 921 So.2d, at 546." *Hurst* addressed Florida substantive criminal law identifying the facts necessary to authorize a death sentence in a way that *Ring* did not, and *Hurst* held that "a jury, not a judge [must] find each fact necessary to impose a sentence

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receives a new trial where the government must prove the prisoner's conduct still fits within the modified definition of the crime." *Id*. at 735. After referencing *Montgomery*, the State asserts: "*Hurst* [did] 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." (AB 70-71). Actually *Hurst* did interpret a criminal statute, and it did determine that a death sentence was forbidden unless "a jury, not a judge, [found] each fact necessary to impose a sentence of death." *Id*. at 619.

of death." *Id.* at 619. The scope of *Hurst* is so much greater than *Ring*. A retroactivity analysis of *Ring* simply did not capture the much greater jurisprudential upheaval engendered by *Hurst.*

The State's reliance upon this Court's conclusion that *Ring* and *Apprendi* were not retroactive is misplaced. This Court, while failing to understand that *Apprendi* and *Ring* not only applied to Florida's capital sentencing scheme, but had rendered *Spaziano v. Florida,* 468 U.S. 447 (1984) and *Hildwin v. Florida*, 490 U.S. 638 (1989) obsolete, engaged in a retroactive analysis of *Apprendi* in *Hughes v. State*, 901 So. 2d 837, 838 (Fla. 2005), and of *Ring* in *Johnson v. State*, 904 So. 2d 400 (Fla. 2005). However, the *Witt* analyses in both *Hughes* and *Johnson* were infused with this Court's failure to recognize that *Ring* did in fact apply in Florida, and under its logic, Florida's capital sentencing scheme was unconstitutional. In neither *Hughes* nor *Johnson* did this Court address the retroactivity of *Hurst*.

In both *Hughes* and *Johnson*, this Court assessed the impact of *Apprendi* and *Ring* while viewing *Hildwin* as intact law. *Hildwin* held that the Sixth Amendment "does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." 490 U.S. at 640-41. *Hurst* has specifically held that *Hildwin* is overruled. *Hurst*, 136 S.Ct. at 623 ("We now expressly overrule *Spaziano* and *Hildwin* in relevant part."). *Hurst* held that *Apprendi* and *Ring* had washed away the logic underpinning of *Hildwin* and shown that the holdings of both *Hildwin* and *Spaziano* were wrong. *Hurst*, 136 S.Ct. at 623 ("Their

conclusion was wrong, and irreconcilable with *Apprendi*.").[31]

Also ignored by the State is the fact that when this Court adopted the *Witt* standard for retroactivity it specifically ruled that it was not bound by a federal standard. *Witt v. State*, 387 So. 2d 922, 926 (Fla. 1980). Indeed, this Court found federal retroactivity law too restrictive, and crafted *Witt* specifically to provide greater, more expansive, more inclusive protection. *See Johnson*, 904 So. 2d at 409 (reaffirming commitment to "our longstanding *Witt* analysis, which provides more expansive retroactivity standards than those adopted in *Teague*"); *see also Hughes*, 901 So. 2d at 857 (Anstead, J., dissenting) (noting the federal standard is "considerably more restrictive" than *Witt*).

The decision to have a more expansive retroactivity standard was wise because the federal standard was "fashioned upon considerations wholly inapplicable to state law systems." *Id.* at 861 (Anstead, J., dissenting). *Teague* is "focus[ed] on the impropriety of disturbing a final conviction, it diverts attention from constitutional violations and prohibits relief except in the very rare case." *State v. Whitfield*, 107 S.W. 3d

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[31] *Hughes* and *Johnson*, decided on the same day, both presumed the inapplicability of *Ring* in Florida in assessing the impact of *Apprendi* and *Ring* under *Witt*. Because the *Witt* analysis depends on the impact of the change in the law, a prior finding that there is little to no change profoundly affects the *Witt* analysis. Now that it is known from *Hurst* that *Apprendi* applies to Florida's capital sentencing scheme and renders the scheme unconstitutional and caused *Hildwin* and *Spaziano* to be overruled, a new assessment must be done under *Witt*. *Hurst's* retroactivity in Florida must be assessed, not *Apprendi's*, which was not a capital case, and certainly not *Ring's*, which contemplated Arizona's sentencing scheme.

253, 268 n. 15 (Mo. 2003) (quotations omitted). "[T]he *Teague* plurality's main focus and concern in adopting a more restrictive view of retroactivity was to limit the scope of federal habeas review of state convictions." *Hughes*, 901 So. 2d at 862. Indeed, federal habeas courts, in capital cases, are directed to uphold state court decisions **that they find to be incorrect**, as long as there is some reasoning to support the incorrect ruling. *See Williams v. Taylor*, 529 U.S. 362, 410 (2000). It would thus seem that some reasoning would be required on the part of state courts, but it is not. Federal habeas courts must supply their own reasoning, asking "what arguments or theories supported or ... could have supported[] the state court's decision" *Harrington v. Richter*, 562 U.S. 86, 102 (2011), to support, and ultimately uphold **incorrect state court rulings supported by no reasoning at all**. The reason for this is that "requiring a statement of reasons [from state courts] could undercut state practices designed to preserve the integrity of the case-law tradition." *Id*. The goal is "deference and latitude" for state courts. *Id*. It is not to do justice on the facts. *Teague* arises from these same considerations and has been "universally criticized by legal commentators 'as being fundamentally unfair, internally inconsistent, and unreasonably harsh.'" *Hughes*, 901 So. 2d at 862 (Anstead, J., dissenting).

Thus, "[i]t would make little sense for state courts to adopt the *Teague* analysis when a substantial part of *Teague's* rationale is deference to a state's substantive law and review." *Hughes*, 901 So. 2d at 863 (Anstead, J., dissenting). Instead,

> [i]f anything, the more restrictive standards of federal review place **increased and heightened importance upon the quality and reliability of the state proceedings.** In other words, if the state proceedings become the only real venue for relief, as they in fact have become, it is critically important that the state courts provide that venue and "get it right" since those proceedings will usually be the final and only opportunity to litigate collateral claims. In fact, it is the presumed heightened quality of state proceedings that allows the federal courts to defer to the state proceedings as adequate safeguards to the rights of state prisoners. To then further restrict the state proceedings would undermine the entire rationale for restricting federal proceedings because of the reliability of state proceedings.

Id. at 863 (Anstead, J., dissenting). This nation's judicial system presumes that Florida courts will do justice, get it right, be hypersensitive to constitutional violations in the first instance, and require federal habeas review only in the rarest of cases. The reliability and confidence in Florida's judicial system depends on Florida courts being more protective of constitutional rights.

Florida cannot rely on federal habeas review to correct a denial of relief under *Hurst*, even if that denial is patently incorrect and has no reasoning to support it. This Court is the last true line of defense against the unconstitutional execution of Florida defendants. In habeas, constitutional error and deprivations will be permitted out of respect for this Court's judgment, fairness, and sovereignty unless the Court's decision is found to be unreasonable. In federal habeas, deference to this Court is required. It is assumed to have adequately functioned as the protector on the constitutional guarantees.

In *Cabana v. Bullock*, the U.S. Supreme Court acknowledged

the role of state judicial systems as the primary line of defense against constitutional violations:

> First, to the extent that *Enmund* recognizes that a defendant has a right not to face the death penalty absent a particular factual predicate, it also implies that the State's judicial process leading to the imposition of the death penalty must at some point provide for a finding of that factual predicate. Accordingly, Bullock "is entitled to a determination [of the issue] in the state courts in accordance with valid state procedures." *Jackson v. Denno*, 378 U.S. 368, 393 (1964). Second, the State itself has "a weighty interest in having valid federal constitutional criteria applied in the administration of its criminal law by its own courts." *Rogers v. Richmond*, 365 U.S. 534, 548 (1961). **Considerations of federalism and comity counsel respect for the ability of state courts to carry out their role as the primary protectors of the rights of criminal defendants. . . . [I]t is Mississippi, therefore, not the federal habeas corpus court, which should first provide Bullock with that which he has not yet had and to which he is constitutionally entitled—a reliable determination** as to whether he is subject to the death penalty as one who has killed, attempted to kill, or intended that a killing take place or that lethal force be used.

474 U.S. 376, 390-91 (1986) (citations partially omitted) (emphasis added). In *Younger v. Harris*, 401 U.S. 37, 43-45 (1971) (emphasis added), the U.S. Supreme Court discussed how principles of equity and comity require federal courts not to interfere with state criminal cases:

> The precise reasons for this **longstanding public policy against federal court interference with state court proceedings** have never been specifically identified but the primary sources of the policy are plain. One is the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief. The doctrine may originally have grown out of circumstances peculiar to the English judicial system and not applicable in this country, but its fundamental purpose of restraining equity jurisdiction within narrow limits is equally important under our Constitution, in order

> to prevent erosion of the role of the jury and avoid a duplication of legal proceedings and legal sanctions where a single suit would be adequate to protect the rights asserted. This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. . . . It should never be forgotten that this slogan, "Our Federalism," born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.

In *Giles v. Maryland*, the U.S. Supreme Court indicated that states must not view federal review of state decisions as either a limitation on the scope of constitutional protections they should extend to their citizens or a crutch:

> **The truism that our federal system entrusts the States with primary responsibility in the criminal area means more than merely "hands off."** The States are bound by the Constitution's relevant commands but they are not limited by them. We therefore should not operate upon the assumption—especially inappropriate in Maryland's case in light of its demonstrated concern to afford post-conviction relief paralleling that which may be afforded by federal courts in habeas corpus proceedings—that state courts would not be concerned to reconsider a case in light of evidence such as we have here, particularly where the result may avoid unnecessary constitutional adjudication and minimize federal-state tensions.

386 U.S. 66, 81-82 (1967) (emphasis added) (footnote omitted).[32]

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[32]It is hugely problematic that the *Hughes* Court "rel[ied] almost exclusively on federal decisions that evaluate retroactivity under the irrelevant and considerably more restrictive federal standard announced in the plurality opinion in *Teague* . . . ." *Hughes*, 901 So. 2d at 857 (Anstead, J., dissenting). It is hugely problematic that the *Johnson* Court "[d]eferr[ed] to the United States Supreme Court's assessment of its own decision in *Ring*," *Johnson*, 904 So. 2d at 410, where "in

In *Hughes* and *Johnson,* Justice Anstead warned that this Court in its retroactivity analysis there "simply turned a blind eye to the most important and unique feature of the American justice system upon which we have relied for centuries to ensure fairness and justice for our citizens: the right to trial by jury." *Hughes*, 901 So. 2d at 858 (Anstead, J., dissenting), lamenting that "[n]o other right in our system has been so jealously guarded, until today." *Id*. (Anstead, J., dissenting).

With that being said, the fact of the matter is that *Hughes* and *Johnson* should have no bearing on this Court's assessment of *Hurst's* retroactivity because they both assessed the impact of *Apprendi* and *Ring* while this Court assumed that *Hildwin v. Florida*, 490 U.S. 638 (1989) remained controlling law. In 1989, prior to both *Apprendi* and *Ring*, the U.S. Supreme Court held in *Hildwin* that the Sixth Amendment "does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Hildwin*, 490 U.S. at 640-41. The fact that this Court did not see in *Johnson* that *Hildwin* did not survive *Apprendi* and *Ring* demonstrates that it did not appreciate the full ramifications of those decisions and the substantial upheaval in the law that they represented. In any event, the issue now is the retroactivity of *Hurst* knowing that it concluded that *Bottoson v. Moore* was wrong and held that *Hildwin* and *Spaziano* are overruled. Under *Witt*, *Hurst* must be held to apply

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Schriro v. Summerlin, 542 U.S. 348 (2004), [it found] that *Ring* does not apply retroactively for purposes of federal law. *Id*. at 408 (citation partially omitted).

retroactively.[33]

C. REPLY TO PRONG THREE OF FOUR PRONGED *HURST* ARGUMENT

The State's third argument is premised upon the holding in *Ring* that the jury needs only to find the existence of an aggravating circumstance. However, the holding in *Hurst* is different. It "requires a jury, not a judge, to find each fact necessary to impose a sentence of death." *Id.* at 619. Ignoring the holding in *Hurst* and the statutory requirement that there must be a factual determination that "sufficient aggravating circumstances exist," the State claims that *Hurst* does not apply to *Asay* because his case involves a recidivist aggravator (AB 83). The State claims that the exception for prior convictions in *Apprendi* was based on the recidivist exception established in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (AB 83). The State argues that this Court, based on the exception, has repeatedly observed that *Ring* does not apply to cases involving

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[33]The State also argues that *Witt* is just about finality. Apparently, the State did not read *Witt*. There, this Court wrote:

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

Witt, 387 So. 2d at 925 (emphasis added).

recidivist aggravators (AB 83-84). But of course, these statements regarding *Ring* were based upon the narrow holding in *Ring* addressing Arizona's capital sentencing scheme. The holding in *Hurst* addressing Florida's statute was much more expansive. Because in Florida sufficient aggravating circumstances must be found to exist, one aggravator by itself is not necessarily enough. The jury must determine under *Hurst* if the aggravating circumstances are sufficient.[34]

The flaw in the State's argument is its failure to cite or

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[34]As support for its argument, the State relies on the fact that the U.S. Supreme Court recently denied certiorari review without dissent in two pipeline cases involving recidivist aggravators after *Hurst* (AB 85)("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." (AB 85). The State's reliance on denials of certiorari review of having precedential valute is ridiculous. After *Ring* issued, certiorari review was denied in cases involving Linroy Bottoson and Amos King. From those denials of review, this Court erroneously concluded that *Ring* and *Apprendi* had no applicaibility to Florida's capital sentencing scheme. In the 13 some years between *Ring* and *Hurst*, there were probably a hundred denials of certiorari review of Florida death sentences raising *Ring/Apprendi* challenges to Florida's capital sentencing scheme. Those denials of certiorari review meant absolutely nothing as to whether Florida's capital sentencing statute was constitutional when the U.S. Supreme Court granted review in *Hurst*.

The denial of a petition for writ of certiorari by the U.S. Supreme Court "**imports no expression of opinion upon the merits of the case, as the bar has been told many times.**" *United States v. Carver*, 260 U.S. 482, 490 (1923); *Atlantic Coast Line R. Co. v. Powe*, 283 U.S. 401, 403, 404 (1931); *W. P. Brown & Sons Lumber Co. v. Louisville & N. R. Co.*, 82 F.2d 94, 96 (6th Cir. 1936) (emphasis added).

reference Florida's statute, which does not authorize a death sentence based upon one aggravating circumstance.[35] Instead, the State cites several post-*Ring* decisions from this Court that bought into the State's erroneous reading of *Ring* and relied upon the erroneously decided decision in *Bottoson v. Moore*. As *Hurst* has since explained, this Court in *Bottoson* was wrong in its reading and understanding of both *Ring* and *Apprendi*. Thus, the only support for the State's argument that merely the presence of one aggravator renders a defendant death eligible are decisions where this Court misconstrued *Ring*.[36]

Apprendi, Ring, and *Hurst* hold that the fact or facts necessary to render a capital defendant death eligible must be

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[35]The State's reliance on *Almendarez-Torres*is is misplaced as that case involves a federal statute in a non-capital case.

[36]For instance, in one of the cases cited by the State, *Ault v. State*, 53 So. 3d 175, 205 (Fla. 2010)(*See* AB 63), this Court cited the language in *Ring* without reference to the fact that Florida statutes identified factual determinations necessary for death eligibility that were different from the factual determination required for death eligibility under Arizona law. As such, this Court did not address the statutory language set forth in the Florida statutes, nor the language appearing in the standard jury instructions. While seeming to adopt the *Ring* description of Arizona law as mandated by the Sixth Amendment and thus the law in Florida, this Court struck a discordant note when it relied on *Bottoson v. Moore* to maintain that Florida's statutory scheme was constitutional. *Ault*, 53 So. 3d at 206 ("Further, we note that we have repeatedly rejected constitutional challenges to Florida's death penalty under *Ring*. *See*, *e.g.*, *Jones*, 845 So. 2d at 74 (rejecting claim that Florida's death penalty is unconstitutional under *Ring*); *see also Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002) (noting that the United States Supreme Court did not direct this Court to reconsider the defendant's death sentence in light of *Ring*); *King v. Moore*, 831 So. 2d 143 (Fla. 2002) (same).").

made by a jury. "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." *Ring*, 536 U.S. at 602. Florida's statute requires a finding that sufficient aggravating circumstances exist to justify a sentence of death. The statutorily defined fact that is necessary for death eligibility is repeated to the jury in Florida's standard jury instructions as the issue to be resolved in the jury's penalty phase deliberations before returning an advisory verdict by a majority vote. The cases on which the State relies simply ignore the factual requirement set forth in Florida's statute and in Florida's standard jury instructions.

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

factual basis for any other aggravating circumstance present in the case are sufficient to justify the imposition of a death sentence. The third prong of the State's four pronged argument, i.e. that one recidivist aggravator makes a death sentence *Hurst* compliant, is simply contrary to *Hurst* and Florida statutes.

D. REPLY TO PRONG FOUR OF FOUR PRONGED *HURST* ARGUMENT

With regard to the fourth prong, the State claims that violations of the right-to-a-jury trial are subject to harmless error (AB 87). And the State rejects the notion that a harmless error analysis requires a remand to the trial courts, as it is an appellate concept (AB 89). The State also asserts that trial counsel's possible strategy is not part of a harmless error analysis (AB 89). Further, relying on a concurring opinion in *Galindez v. State*, 955 So. 2d 517 (Fla. 2007), the State claims that this Court has the inherent authority to fashion remedies for constitutional problems such as *Hurst* (AB 88, fn 18)("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*.").

The State's arguments are once again fundamentally flawed. First, ignored by the State is the fact that when *Hitchcock v. Dugger*, 481 U.S. 393 (1987), issued, this Court ultimately determined that *Hitchcock* claims required consideration of non-record evidence when evaluating the impact of *Hitchcock* on

specific penalty phase proceedings. *Hall v. State*, 541 So. 2d 1125, 1126 (Fla. 1989) (Florida's pre-*Hitchcock* law "precluded Hall's counsel from investigating, developing, and presenting possible nonstatutory mitigating circumstance"); *Meeks v. Dugger*, 576 So. 2d 713, 716 (Fla. 1991) ("according to the affidavits filed with this motion, Meeks' counsel did not seek to develop nonstatutory mitigating evidence because he was constrained by the then-prevailing statutory construction"). Accordingly, this Court concluded that *Hitchcock* claims were required to be presented in Rule 3.850 motions. *Hall*, 540 So. 2d at 1128 ("We hold, therefore, that *Hitchcock* claims should be presented to the trial court in a rule 3.850 motion for postconviction relief and that, after the filing of this opinion, such claims will not be cognizable in habeas corpus proceedings."); *Meeks*, 576 So. 2d at 716 ("*Hitchcock* claims should now be raised by motion for postconviction relief. However, Meeks' petition for habeas corpus was filed before our decision in *Hall*. Therefore, we remand this case to the trial court for an evidentiary hearing directed to the *Hitchcock* allegations of this petition as if they had been filed pursuant to Florida Rule of Criminal Procedure 3.850.").

Second, contrary to the State's assertion, this Court lacks the institutional authority to, in essence, develop a death penalty statute through interpretation, because such action would circumvent the legislative branch's lawmaking authority. *See* Fla. const. art. II, § 3; Fla. const. art. V, § 2a. Since the Framing of the Federal Constitution, the federal system of government is thought to be best secured by dividing governmental powers. *See*

United States v. Morrison, 529 U.S. 598, 617 n.7 (2000). Unlike the Federal Constitution's implicit separation of powers doctrine, Florida has an explicit Separation of Powers Clause in its Constitution. *See* Fla. const. art. II, § 3 ("The powers of the State government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided [within Florida's constitution]"). Thus, Florida employs a "strict" application of the separation of powers doctrine, demanding two fundamental prohibitions. *See Bush v. Schiavo*, 885 So. 2d 321, 329 (Fla. 2004) (quoting *State v. Cotton*, 769 So. 2d 345, 353 (Fla. 2000)). "The first is that no branch may encroach upon another's power." *Id.* "The second is that no branch may delegate to another branch its constitutionally assigned power." *Id.* (quoting *Chiles v. Children A, B, C, D, E, & F*, 589 So. 2d 260, 264 (Fla. 1991)). The doctrine of separation of powers is designed to keep each of the branches free from the *direct or indirect coercive influence* of the others. *Humphrey's Ex'r v. United States*, 295 U.S. 602, 630 (1935). Thus, just as a statute purporting to modify or create a procedural rule is constitutionally invalid, a judicial attempt at modifying, creating, or otherwise rewriting a substantive statutory right is constitutionally invalid. *See* Fla. Const. Art. II, § 3; Fla. const. art. V, § 2a. A law is substantive if it "creates, defines, and regulates rights, or that part of the law which courts are established to administer." *Haven Fed. Sav. & Loan Ass'n v. Kirian*, 579 So. 2d 730, 732 (Fla. 1991). "It

includes those rules and principles which fix and declare the primary rights of individuals with respect towards their persons and property." *Id*. "[W]here a statute has some substantive aspects, but the procedural requirements of the statute conflict with or interfere with the procedural mechanisms of the court system, those requirements are unconstitutional." *Massey v. David*, 979 So. 2d 931, 937 (Fla. 2008).

As the decision in *Hurst* has made the determination that sufficient aggravating circumstances exist a substantive element of capital murder, there can be no doubt that defining the substantive element of capital first degree murder is a matter of substantive law. Any temptation by this Court to define the elements of capital first degree murder usurps legislative power and violates the constitutionally mandated separation of powers doctrine.

Based on the facts and circumstances asserted herein in his Initial Brief, Asay submits that relief under *Hurst* is warranted.

CONCLUSION

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing initial brief has been furnished by electronic mail to Charmaine Millsaps, Assistant Attorney General, on this 22nd day of February, 2016.

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

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