IN THE SUPREME COURT OF FLORIDA

CASE NO. SC16-448

JASON DIRK WALTON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of a successive motion to vacate that had been filed in 2015. After Mr. Walton filed a notice of appeal, at his request, this Court relinquished jurisdiction to allow the circuit court to consider another successive motion to vacate filed in the wake of *Hurst v. Florida*, 136 S. Ct. 616 (2016).

Citations to Walton's record on appeal in his 1st direct appeal will be designated as "R1 --";

Citations to Walton's record on appeal in his 2nd direct appeal will be designated as "R2 --";

Citations to the record on appeal from the denial of post conviction relief in 1991 will be as "PCR --";

Citations to the record on appeal following a relinquishment of jurisdiction and another denial of post conviction relief in 2001 will be as "PCR2 --";

Citations to the record on appeal from the 2007 denial of a successive motion to vacate will be as "PCR3 --";

Citations to the record on appeal from the 2015 denial of the 2015 successive motion to vacate will be as "PCR4 --";

Citations to the supplemental record on appeal of the 2017 denial of the 2016 successive motion will be as "PCR5 --."

REQUEST FOR ORAL ARGUMENT

Mr. Walton has been sentenced to death. The validity of the death sentences is at issue in this appeal. Mr. Walton's life is at stake in this appeal. This Court has allowed oral argument in other capital cases in a similar procedural posture.

Beyond the effect of this appeal on Mr. Walton, the appeal presents important and unresolved issues that this Court has yet to address regarding the effect of Chapter 2017-1, *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), and Chapter 2016-13 on the analysis of a newly discovered evidence claim when qualifying newly discovered has been found to exist. There is a need for a fair airing of the implications of this case, one of first impression. Accordingly, oral argument is warranted, given the seriousness of the claims involved and the stakes at issue. Mr. Walton, through counsel, accordingly urges that the Court accord him the opportunity to have his counsel oral argument before this Court.

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INTRODUCTION

In *Johnson v. Mississippi*, 486 U.S. 578 (1988), the US Supreme Court discussed the Eighth Amendment's requirement that death sentences be reliable and free from arbitrary factors:

> The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to **a special "'need for reliability in the determination that death is the appropriate punishment'" in any capital case**. *See Gardner v. Florida,* 430 U.S. 349, 363–364, 97 S.Ct. 1197, 1207–1208, 51 L.Ed.2d 393 (1977) (WHITE, J., concurring in judgment)(quoting *Woodson v. North Carolina,* 428 U.S. 280, 305, 96 S.Ct. 2978, 2991–92, 49 L.Ed.2d 944 (1976)). Although we have acknowledged that "there can be 'no perfect procedure for deciding in which cases governmental authority should be used to impose death,'" we have also made it clear that such decisions cannot be predicated on mere "caprice" **or on "factors that are constitutionally impermissible or totally irrelevant to the sentencing process**." *Zant v. Stephens,* 462 U.S. 862, 884–885, 887, n. 24, 103 S.Ct. 2733, 2747, 2748, n. 24, 77 L.Ed.2d 235 (1983).

Johnson v. Mississippi, 486 U.S. at 584-85 (emphasis added).[1]

The first motion to vacate at issue in Mr. Walton's appeal was filed to present newly discovered evidence claims arising from the 2014 resentencing of his co-defendant, Richard Cooper.

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[1]In *Johnson v. Mississippi*, the US Supreme Court unanimously vacated a death sentence imposed by a unanimous jury because a prior conviction of the defendant that had been introduced into evidence to prove an aggravating circumstance, was subsequently vacated and found to be invalid. The Supreme Court found that the death sentence violated the Eighth Amendment because "the jury was allowed to consider evidence that has been revealed to be materially inaccurate." *Johnson v. Mississippi*, 486 U.S. at 590. Thus new evidence not available at the time of trial carries Eighth Amendment implications when it undercuts the reliability of a decision to impose a death sentence.

That resentencing had been conducted after the Eleventh Circuit granted Cooper habeas relief and vacated his death sentences. *Cooper v. Sec'y Dep't of Corr.*, 646 F.3d 1328 (11th Cir. 2011). Cooper's jury returned 6-6 life recommendations (PCR5 3067). As a result, Cooper, who was a triggerman while Mr. Walton was not, received three life sentences.[2] Besides Cooper's life sentences, Mr. Walton's newly discovered claim relied upon testimony and information contained in the record from Cooper's resentencing which was not previously known or available. At the time of Mr. Walton's 1986 resentencing and continuously thereafter until the Eleventh Circuit's 2011 decision, Cooper was under three death sentences. And, it was not until 2014 that Cooper was given three life sentences in lieu of the three death sentences.

When denying Mr. Walton's newly discovered evidence claim, the circuit court found that the claim was presented timely (PCR4 1274) and that Cooper's life sentences did qualify as newly discovered evidence (PCR4 1275).[3] However, the circuit court concluded that Mr. Walton had failed to establish a new penalty

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[2]Because Cooper's resentencing was conducted in 2014, had he not received life sentences and been sentence to death, he would have been entitled to the retroactive benefit of *Hurst v. Florida*, 136 S. Ct. 616 (2016).

[3]These were factual determinations that Mr. Walton's newly discovered evidence claims were not time barred or procedurally barred; they were before the circuit court on the merits. Accordingly, Mr. Walton's newly discovered evidence claim is before this Court on the merits, and current Florida law governs as to whether Mr. Walton is entitled to a resentencing.

phase would probably result in life sentences. "Defendant has not shown that the outcome of a new penalty phase would probably be different." (PCR4 1280). This conclusion was reached after the circuit court stated it was not proper to include in the analysis evidence that had been presented in prior collateral proceedings even if that evidence would be admissible at a resentencing. (PCR4 1280) ("But the Court is not required to consider evidence presented at previous postconviction hearings that is not newly discovered or is unrelated to the newly discovered evidence."); *Id.* ("Nor must the Court consider evidence presented in support of a claim of ineffective assistance of counsel where counsel was not found deficient"). The circuit court acknowledged that this limitation on what he considered in his newly discovered evidence analysis "might appear inconsistent" with language in *Hildwin v. State*, 141 So. 3d 1178, 1184 (Fla. 2014); *Swafford v. State*, 125 So. 3d 760, 775-76 (Fla. 2013). (PCR4 1278). The circuit court then indicated that in an abundance of caution it did nonetheless consider "all of this evidence and **the changes in the law** set out in Defendant's motion" before concluding that it could not "find that [the qualifying newly discovered evidence] would probably result in a life sentence."[4] (PCR4 1279-80).

[4]The changes in law referenced in the December 28, 2015 order as included within the second prong analysis of the newly discovered claim were decisions issued after Mr. Walton's convictions and death sentences were final that indicated the jury instructions in his case were unconstitutional. *E.g.*,

Since the order denying the newly discovered evidence claim was filed on December 31, 2015, the law that would govern a resentencing has under gone a transformation. Most recently, Chapter 2017-1 was enacted on March 13, 2017. It rewrote Fla. Stat. § 921.141, which now provides a defendant convicted of first degree murder with a right to a life sentence unless a jury unanimously recommends a death sentence. The rewritten § 921.141 applies retrospectively to any capital trial, re-trial or re-sentencing regardless of the date of the underlying homicide. It applies in homicide prosecutions in which the homicide was committed before Chapter 2017-1 was enacted. Thus if a resentencing were ordered in Mr. Walton's case, he would receive three life sentences unless the jury unanimously were to return death recommendations.

In Mr. Walton's case this Court must confront the impact of the enactment of Chapter 2017-1 on Mr. Walton's newly discovered evidence claim given the determination that he had qualifying newly discovered evidence. Under *Hildwin v. State* and *Swafford v. State,* a resentencing is required on Mr. Walton's claim if he

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Espinosa v. Florida, 505 U.S. 1079 (1992); *Jackson v. State*, 648 So. 2d 85 (Fla. 1994). These decisions, though not retroactive, were part of the circuit court's analysis because they would govern at a resentencing. The State had made no argument that these decisions were not properly part of the analysis of Mr. Walton's newly discovered evidence claim (PCR4 1261-62) ("The State agrees that the Florida Supreme Court found that the HAC jury instruction used in Walton's 1986 re-sentencing was an incorrect statement of the law").

shows he would probably receive life sentences at a resentencing. *Hildwin v. State*, 141 So. 3d at 1184. The "standard focuses on the likely result that would occur during a new trial with all admissible evidence at the new trial being relevant to that analysis." *Swafford v. State*, 125 So. 3d at 775-76. At issue is what will happen at the future proceeding that the movant seeks, in Mr. Walton's case that would be a resentencing. The law that will govern at such a resentencing is Florida's current law, i.e. the law set forth in Chapter 2017-1.

Given that in 1986 Mr. Walton's jury returned three 9-3 death recommendations, a repeat with 9-3 recommendations under the rewritten § 921.141 would now require the imposition of life sentences. At a resentencing now, Mr. Walton has more, much more mitigating evidence to present than was presented in 1986, including life sentences for the two triggermen. The jury will also receive instructions narrowing the aggravating circumstances that were not given in 1986. So, it is probable that there will be jurors voting for the imposition of life sentences, and under Chapter 2017-1 that will require the imposition of life sentences.

In light of the qualifying newly discovered evidence, in light of Chapter 2017-1, as well as other new Florida law, and in light of the special need for reliability when a death sentence is imposed as explained in *Johnson v. Mississippi*, Mr. Walton's

death sentences can no longer stand.

STATEMENT OF THE CASE AND FACTS

On March 2, 1983, Mr. Walton and his co-defendants were indicted in Pinellas County on three counts of first degree murder. The charges arose from the shooting deaths of three men whose bodies had been discovered in a Highpoint residence on June 18, 1982. Police officers found the young son of one of the victims unharmed in a bathroom.

After receiving a tip months later, police arrested Terry Van Royal on January 19, 1983, and charged him with the three murders. Thereafter, Richard Cooper, Jeffrey McCoy, and Jason Walton were also arrested and also charged with the murders.

Cooper went to trial first. His trial began in January of 1984. A statement that Cooper gave to the police was introduced at his trial. In the statement, Cooper admitted that he and Van Royal had shot and killed the victims. Cooper was convicted on all three murder charges. At his penalty phase, evidence was presented that the four co-defendants had gone to the residence where the victims were ultimately killed because the victims had stolen cocaine and money from Mr. Walton. (Initial Brief, *Cooper v. State*, Case No. SC60,65133, at 6). The evidence presented was that after the stolen cocaine was not found, Van Royal fired first and then Cooper. (*Id.* at 7). The jury returned death recommendations as to each murder. Thereafter, Cooper received

three death sentences. On direct appeal, this Court affirmed Cooper's conviction and sentence. *Cooper v. State*, 492 So. 2d 1059 (Fla. 1986) ("We are left with five valid aggravating factors and no mitigating factors.").

Mr. Walton's case went to trial next. It began in February of 1984. Mr. Walton's statement to the police was introduced. In it, Mr. Walton said he and his co-defendants went to the house where the murders occurred. After the house was ransacked and no money and no cocaine was found, Mr. Walton said he had returned to the living room. Van Royal and Cooper were pointing shotguns at the victims who were lying face down on the floor. Mr. Walton said "let's get out of here." As he left the residence, he heard several gunshots. The jury returned guilty verdicts on the three murder charges.

In the penalty phase, the State introduced statements made by Cooper and McCoy. "Cooper's former cellmate . . . testified that Cooper told him [that Mr. Walton] was the 'ringleader' and that [he had] informed Cooper prior to their arrival at the victims' house that they were going to 'eliminate them.'" *Walton v. State*, 481 So. 2d 1197, 1198-99 (Fla. 1985). The jury returned a death recommendation on each murder count. Thereafter, the judge imposed three death sentences. "In imposing the death sentences, the trial judge found six aggravating and no mitigating circumstances." *Walton*, 481 So. 2d at 1199.

In December of 1985, this Court affirmed the convictions, but vacated Mr. Walton's death sentences. A new penalty phase was ordered because the admission of out-of-court statements by Cooper and McCoy violated Mr. Walton's constitutional right of confrontation. *Walton*, 481 So. 2d at 1200 ("the confessions of codefendants Cooper and McCoy were presented to the jury and considered by the judge in imposing sentence, without Cooper and McCoy being available for cross-examination.").

Meanwhile McCoy, Mr. Walton's younger brother, had pled "guilty to three counts of first-degree murder and agreed to testify against the others in exchange for life imprisonment with a mandatory minimum twenty-five year sentence." *Walton v. State*, 547 So. 2d 622, 623 (Fla. 1989).

Van Royal, who had been identified as a triggerman along with Cooper, was tried in August of 1984. McCoy testified at Van Royal's trial. Guilty verdicts were returned on all three counts of first-degree murder. At the penalty phase, the jury returned three life recommendations. The judge overrode the life recommendations and imposed three death sentences. *Van Royal v. State*, 497 So. 2d 625 (Fla. 1986).

In Van Royal's direct appeal, this Court found that the judge failed to enter written findings in support of the death sentences as required by the statute. As a result, Van Royal's death sentences were vacated, and this Court ordered life

sentences to be imposed. *Van Royal v. State*, 497 So. 2d at 628.

This Court's opinion vacating Mr. Walton's death sentences had issued on December 19, 1985. Rehearing was denied on February 19, 1986. At that time, the direct appeals of Cooper and Van Royal were still pending before this Court.

On remand, the State chose to again seek death sentences for Mr. Walton. Shortly before the start of Mr. Walton's second penalty phase, this Court issued its opinion affirming Cooper's convictions and death sentences on July 17, 1986. *Cooper v. State*, 492 So. 2d at 1063. Just over three weeks later, Mr. Walton's resentencing began on August 12, 1986.

Evidence was presented that Mr. Walton and the others went to the victim's residence because they understood that one of the victims had money and cocaine stashed in the house. (R575). McCoy testified to his understanding that the victims had a lot of money and cocaine. McCoy was not in the house when he heard shots fired. He had gone to the car and had started it. After he heard the shots, the other three got in the car and they all left.

The State called a psychiatrist to testify that the mental condition of the victim's eight-year-old son who was in the house at the time of the murders. He had been found in a bathroom, not physically harmed.

The State also advised the presiding judge of its desire to present Bruce Jenkins's testimony. However because it had not

been able to locate Jenkins, the State asked for Jenkins's 1984 testimony to be read to the resentencing jury (R2 635-47).[5] The State's request was granted, and Jenkins's 1984 testimony was read to the jury in 1986. In this testimony, Jenkins said that about two weeks prior to the homicides, he spoke with Mr. Walton. (R 2192). At that time, Mr. Walton had said he was worried that his girlfriend, Robin Fridella, was going to break up with him and get back with her ex-husband, Steven Fridella, who was one of the murder victims (R 2193). Jenkins testified that Mr. Walton then said that the "only way he could get [Steven Fridella] off his back was to waste him." (R 2196).

In his closing, the prosecutor told the jury that Jenkins "didn't want to testify in 1984 and didn't want to testify so bad in 1986 that he could not be found,"[6] and rhetorically asked the jury if Jenkins' testimony "was unimpeached and uncontradicted?" Jenkins's testimony was the basis for the prosecutor's argument that the CCP aggravator had been established.[7] (R2 799-800).

The jury was instructed that it "must consider" six

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[5]The State called Scott Hopkins, a state attorney investigator, to testify as to his efforts to find Jenkins and secure his availability to testify at the resentence. Hopkins testified that he could not locate Jenkins (R2 636). Based on this testimony, the judge granted the State's request.

[6]No evidence of why Jenkins was not found was presented. The prosecutor's argument on this point was without a basis.

[7]Jenkins's testimony was the basis of the judge's finding in his written findings that the CCP aggravator had been shown.

aggravating circumstances. (R2 852-53). The jury was not advised that Florida law required two of the six aggravators to merge and only be considered as one aggravating circumstance. As to the cold, calculated and premeditated aggravator, the jury was not instructed that the State had to prove heightened premeditation, a pre-existing plan to kill, beyond a reasonable doubt in order to establish the CCP aggravator. As to the heinous, atrocious or cruel, the jury was not instructed on a narrowing construction. The instruction given was the same one found unconstitutionally vague in *Espinosa v. Florida*, 505 U.S. 1079 (1992).[8] The jurors were instructed that in their advisory role they were to decide:

> whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

(R852). After being so instructed, the jury on August 14, 1986 returned advisory death recommendations by a vote of 9 to 3. Three of Mr. Walton's resentencing jurors voted in favor of life sentences on all three murder counts. These three jurors did not find that "sufficient aggravating circumstances exist[ed]" and/or

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[8]This Court has previously noted that the instructions given to Mr. Walton's jury violated his Eighth Amendment rights under *Espinosa v. Florida* and *Jackson v. State*, 648 So. 2d 85 (Fla. 1994). The HAC and CCP instructions failed to advised the jury of narrowing principles that limited the scope of those aggravators. *Walton v. State*, 847 So. 2d 438, 445 (Fla. 2003) ("the instructions were clearly insufficient under the United States Supreme Court's, as well as this Court's, jurisprudence governing instructions designed to narrow the class of defendants constitutionally eligible for the death penalty").

that insufficient "mitigating circumstances existed to outweigh any aggravating circumstances found to exist."

On August 29, 1986, the presiding judge followed the jury's 9-3 death recommendation and imposed three death sentences. Florida law at the time provided that before a death sentence was authorized, the judge had to enter written findings of fact as to the aggravating and mitigating factors. In complying with that law, the judge in his written findings of fact identified five aggravating factors as having been established. The judge found that no mitigating factors were present. The judge then found that sufficient aggravators existed to justify death sentences and that no mitigators existed that outweighed the aggravators. These findings of fact under Florida law then authorized the judge to impose the death sentences that he did impose.

At the time that Mr. Walton's death sentences were imposed in 1986, both triggermen in the case had received death sentences. Cooper's death sentences had just been affirmed by this Court on appeal. Van Royal's direct appeal of his death sentences was still pending. The other co-defendant, McCoy, was not a triggerman; he had received life sentences pursuant to a deal with the State.

It was on September 18, 1986, that this Court issued its opinion vacating Van Royal's death sentences. It ordered the imposition of life sentences on the three first degree murder

convictions because the judge had failed to enter written findings as statutorily required before the death sentences were authorized. *Van Royal v. State*, 497 So. 2d at 628.

Mr. Walton's second direct appeal followed. Among the issues he raised was an argument that the State had improperly presented a psychiatrist's testimony about the mental condition of the victim's son who had been in the house when the murders occurred. This Court found that the psychiatrist's testimony as to the mental condition of the victim's son "was erroneously admitted." *Walton v. State*, 547 So. 2d 622, 625 (Fla. 1989). However, this Court said the error was harmless.[9]

Mr. Walton also argued that the prosecutor's closing argument was improper. As to this claim of error, this Court wrote "we do not condone the prosecutor's conduct and this conduct could be reversible error under different circumstances." *Id.* at 625.

Despite finding that the State had been allowed to "erroneously admit" evidence and had made improper prosecutorial argument, this Court affirmed Mr. Walton's death sentences.

Mr. Walton filed a Rule 3.850 motion in 1990 challenging his convictions and death sentences. The circuit court granted an evidentiary hearing which was conducted in February of 1991. When

[9]At a resentencing, the State would not be permitted to present this testimony.

the circuit court denied postconviction relief, Mr. Walton appealed. This Court found that the circuit court had erred in ruling that Mr. Walton could not challenge the State's refusal to provide him access to public records in a Rule 3.850 motion. This Court relinquished jurisdiction so that the circuit court could consider whether the State had not complied with public records law. This Court reserved ruling on Mr. Walton's other claims, holding them in abeyance. *Walton v. Dugger*, 634 So. 2d 1059, 1062 (Fla. 1993).

On remand, the public records claim was heard. Ultimately, public records not previously provided to Mr. Walton were turned over to his collateral counsel. Mr. Walton was allowed to amend the previously filed 3.850 motion in light of the newly released public records. The circuit court held another evidentiary hearing on claims in the amended motion to vacate. On January 11, 2001, an order was entered denying any postconviction relief. (PCR2. 2477-2478).

In the ensuing unsuccessful appeal, this Court did address a number of Mr. Walton's collateral claims of particular pertinence to Mr. Walton's current appeal.

In the 2003 opinion affirming the denial of relief, this Court noted that the jury instructions given at Mr. Walton's 1986 resentencing were unconstitutional under *Espinosa v. Florida*:

> The instructions given the jury in the instant case violated the precepts of the United States Supreme

> Court's *Espinosa v. Florida*, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), decision. In *Espinosa*, the Supreme Court held that "an aggravating circumstance is invalid ... if its description is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor." 505 U.S. at 1081, 112 S.Ct. 2926. The Court then proceeded to declare the precise "especially wicked, evil, atrocious, or cruel" instruction given Walton's jury in the instant case invalid under the Eighth Amendment to the U.S. Constitution. *See id.* at 1082, 112 S.Ct. 2926.
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> Further, our decisions certainly require much more extensive instruction than was given in the instant case for application of the CCP aggravator. *See, e.g., Jackson v. State*, 648 So.2d 85, 89 (Fla.1994) (holding that proper application of the CCP aggravator requires proof "that the killing was the product of cool and calm reflection and not an act prompted by an emotional frenzy, panic, or a fit of rage (cold); and that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated); and that the defendant exhibited heightened premeditation (premeditated); and that the defendant had no pretense of moral or legal justification.") (citations omitted).

Walton v. State, 847 So. 2d 438, 444-45 (Fla. 2003). Though Mr. Walton's resentencing jury received constitutionally defective instructions, this Court affirmed the denial of postconviction relief because Mr. Walton's trial counsel had not objected to the HAC and CCP instructions.[10]

In the 2003 opinion, this Court also addressed a *Brady* claim that Mr. Walton had presented. This Court explained:

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[10]The defect in the instructions rendered the aggravators overbroad and invalid. The instructions did not give the jurors sufficient guidance as to what was required to be proven by the State to establish the HAC and CCP aggravators. At a resentencing, proper narrow instructions will be required.

> Walton contends that the State wrongfully suppressed handwritten police notes and a domestic disturbance report which show the tumultuous relationship and hatred between Robin Fridella and Stephen Fridella. The handwritten notes created by an unidentified police officer indicate initial uncertainty in the murder investigation regarding Robin Fridella's veracity and possible involvement in the murders. Additionally, Walton argues that the State should have turned over a polygraph report indicating the possibility that Robin was not being entirely frank with the police investigating this crime. This evidence, Walton contends, could have been used by the defense to craft a different theory of defense-in particular, it would have enabled Walton to assert that Robin was the mastermind who dominated him and encouraged the murders so that she could have sole custody of her child.

Walton v. State, 847 So. 2d at 452. This Court affirmed the denial of relief on the *Brady* claim because it did not find that this undisclosed information by itself undermined confidence in the jury's sentencing recommendation. *Id.* at 454.[11]

This Court in its 2003 opinion addressed a newly discovered evidence claim that rested upon the testimony of Ken Driggs and Elizabeth Wells. They had "interviewed codefendant Van Royal subsequent to the resentencing trial of Walton. They testified that Van Royal told them that Walton was not the leader of the group which killed the victims in the instant case, and that the murders were entirely unexpected." *Walton*, 847 So. 2d at 454.

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[11]At a resentencing, the defense will be able to use the information in the police reports which had not been disclosed at the time of the 1986 resentencing. *See Hildwin v. State*, 141 So. 3d at 1184 (the postconviction court must consider the effect of the newly discovered evidence, in addition to all of the evidence that could be introduced at a new trial.)"

This Court affirmed the circuit court's finding that Mr. Walton had not shown that Van Royal's statements to Driggs and Wells would probably have resulted in a different outcome, i.e. life sentences.[12]

In the 2003 opinion, this Court also addressed Mr. Walton's claims under *Strickland v. Washington*, 466 U.S. 668 (1984). One of the *Strickland* claims was ineffectiveness because trial counsel failed to use the evidence the prosecutor presented during Cooper's trial that prosecutor relied upon to argue that Cooper was not under Walton's direction or controlled by him:

> Walton identifies certain statements made by the State's attorney during codefendant Cooper's trial in which the State argued that Cooper was not under the direction of Walton. In particular, Walton cites two statements during the prosecution's closing argument in which the State asserted that it was "absolutely ludicrous" to say that Walton was at fault for Cooper's actions, and there was no evidence to support the "incredible proposition" that Walton dominated Cooper during the crime.

Walton v. State, 847 So. 2d at 456. After recognizing that this evidence had existed and was available, this Court found that the failure to present this evidence by itself did not undermine confidence in the reliability of outcome. *Id.*[13]

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[12]At a resentencing, Van Royal's statements to Driggs and Wells will be admissible. *See Hildwin v. State*, 141 So. 3d at 1184 (the postconviction court must consider the effect of the newly discovered evidence, in addition to all of the evidence that could be introduced at a new trial.)"

[13]Of course at a resentencing, this evidence will be admissible. *See Hildwin v. State*, 141 So. 3d at 1184 (the

In the 2003 opinion, this Court also addressed a separate *Strickland* claim raised by Mr. Walton which concerned available mitigating evidence that trial counsel did not present. Though it rejected the *Strickland* claim for a failure to establish deficient performance, this Court did note that the available and unpresented mitigation was significant. *Walton v. State*, 847 So. 2d at 458 ("**it is clear that the evidence in mitigation illuminated during the postconviction proceedings below could have aided Walton's case before his resentencing jury**") (emphasis added). This Court outlined the available and unpresented mitigation as follows:

> Walton introduced evidence through the testimony of his mother and sister that his home life as a child was awful-he grew up in a single parent home, his mother engaged in promiscuous behavior in front of Walton and his siblings, his alcoholic stepfather often encouraged Walton to abuse drugs, and his stepfather subsequently choked to death in front of Walton when he was an adolescent. Evidence was also introduced which revealed that Walton had abused drugs as an adolescent and teenager, and had been enrolled in a radical therapy program which likely left him severely emotionally scarred, but which had not halted his continued abuse of illegal drugs.
>
> Walton also introduced evidence during his postconviction hearings which raised questions regarding whether Robin Fridella, Walton's girlfriend and the wife of one of the victims at the time of the murders, may have played some role in the planning of the robbery and murders. Finally, Walton introduced the testimony of Bruce Jenkins, a friend of Walton's who

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postconviction court must consider the effect of the newly discovered evidence, in addition to all of the evidence that could be introduced at a new trial.)"

> explained that Walton's statement prior to the murder that he might be required to "waste" victim Stephen Fridella did not necessarily mean that he would kill him.

Walton v. State, 847 So. 2d at 458.[14]

After this Court's affirmance of the denial of his Rule 3.850 motion, Mr. Walton filed a habeas petition with this Court relying upon the decision in *Ring v. Arizona*, 536 U.S. 584 (2002). This Court summarily denied the petition saying it was "successive." *Walton v. Crosby*, 859 So. 2d 516 (Fla. 2003).

On February 10, 2006, Mr. Walton filed a rule 3.851 motion raising a claim based on *Bradshaw v. Stumpf*, 545 U.S. 175 (2005), and also a newly discovered evidence claim concerning a jailhouse informant. The newly discovered evidence claim relied on three affidavits that the jailhouse informant who aided the State in prosecuting Mr. Walton and his co-defendants had been a state agent. When the motion was summarily denied, Mr. Walton appealed. In 2009, this Court denied Mr. Walton's appeal. In addressing the newly discovered evidence claim, this Court noted: "the affidavits suggest that the jailhouse informant told some police officers that he was assisting the State and that he was housed in the section of the jail that included informants." *Walton v.*

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[14]All of this evidence can be presented and will be admissible at a resentencing. *See Swafford v. State*, 125 So. 3d at 775-76 (the newly discovered evidence "standard focuses on the likely result that would occur during a new trial with all admissible evidence at the new trial being relevant to that analysis.").

State, 3 So. 3d 1000, 1008 (Fla. 2009). This Court affirmed the denial of the newly discovered evidence claim because "Walton has failed to establish that these affidavits constitute newly discovered evidence that would probably produce a different outcome." *Id*. at 1009.

On October 12, 2010, Mr. Walton filed a successive rule 3.851 motion based on *Porter v. McCollum*, 558 U.S. 30 (2009). The motion was denied, and Mr. Walton appealed. This Court affirmed after concluding that *Porter* did not result in a "constitutional change[ ] that [was] equivalent to a jurisprudential upheaval in criminal law warrant[ing] retroactive application." *Walton v. State*, 77 So. 3d 639, 643 (Fla. 2011).

In 2011, the Eleventh Circuit addressed the federal habeas petition filed by Mr. Walton's co-defendant, Richard Cooper. The Eleventh Circuit held Cooper's trial counsel had been ineffective at Cooper's penalty phase. It found that habeas relief should issue, effectively vacating Cooper's death sentences and requiring a resentencing to be conducted. *Cooper v. Sec'y, Dep't of Corr.*, 646 F. 3d 1328 (11th Cir. 2011).

Cooper's resentencing began in February and March of 2014 with a penalty phase before a jury. A statement made by Cooper during a 1987 clemency hearing on whether he should be granted clemency was introduced by the State. Cooper's clemency statement had not ever previously been provided to Mr. Walton who only

learned of it because of its use in open court in 2014. In his 1987 statement to the clemency board, Cooper said that Mr. Walton's gun did not actually "misfire," as had been the State's theory. Cooper revealed that Mr. Walton's weapon was not loaded and that he, Cooper, knew it was not loaded. Cooper's statement shows that Mr. Walton never attempted to shoot one of the victims - there was no effort to shoot a victim that was thwarted when his gun misfired. Cooper's statement negated the State's argument that Walton had tried to shoot one of the victims, and thus had the necessary mental state of mind for the CCP aggravator. *See Cooper v. State*, 492 So. 2d 1059, 1060 (1986) ("One of the victims recognized Walton, who told his co-perpetrators they therefore would have to kill the adults. Walton's own gun misfired, and he ordered the others to shoot.").

During Cooper's 2014 resentencing, the State argued that his extreme moral culpability should lead the jury to return death recommendations: "**There is no reason for those three people to die but for the fact that Mr. Cooper took it upon himself that my freedom is far more important than those people's lives.**" (PCR4 552) (emphasis added). "**Each of the three victims were shot with the Savage shotgun which Mr. Cooper admitted carrying and using.**" (PCR4 555) (emphasis added). At the conclusion of Cooper's 2014 penalty phase trial, the jury returned life recommendations on all three murder counts when it deadlocked 6-6 (PCR5 3067). On

May 9, 2014, Cooper, an acknowledged triggerman, was resentenced to life for all three murders.

On May 7, 2015, Mr. Walton filed the first successive motion to vacate at issue here. Mr. Walton asserted that Cooper's life sentences, Cooper's clemency statement and the prosecutor's statements at the resentencing, constituted newly discovered evidence. He argued that because he would probably receive life sentences at a resentencing, under standard governing newly discovered evidence claims, he was entitled to postconviction relief under *Swafford v. State*, 125 So. 3d 760 (Fla. 2013), and *Hildwin v. State*, 141 So. 3d 1178 (Fla. 2014). Mr. Walton also argued that Cooper's life sentences, along with McCoy and Van Royal's life sentences, rendered Mr. Walton's disproportionate under *Scott v. Dugger*, 604 So. 2d 465 (Fla. 1992).

After conducting an evidentiary hearing, the circuit court determined that Cooper's life sentences did in fact qualify as newly discovered evidence and was timely presented. However, relief was denied on the newly discovered evidence claim because the circuit court concluded that a different outcome at a future resentencing was not more likely than not.

As to the newly discovered claim asserting that Cooper's life sentences (along with the life sentences that McCoy and Van Royal received), rendered Mr. Walton's death sentences disproportionate, the circuit court held that the sentences for

McCoy and Van Royal were irrelevant.(PCR4 1277).[15] As to Cooper's life sentences, the circuit court asserted that "Cooper's life sentence was based on finding [Mr. Walton] more culpable." (PCR4 1278). But, Cooper's life sentences resulted from a jury's 6-6 recommendation, which under Florida law in 2014 was treated as a life recommendation. The six jurors voting for death may have found the State's argument at Cooper's resentencing convincing. ("**There is no reason for those three people to die but for the fact that Mr. Cooper took it upon himself that my freedom is far more important than those people's lives.**" (PCR4 552) (emphasis added). "**Each of the three victims were shot with the Savage shotgun which Mr. Cooper admitted carrying and using.**" (PCR4 555) (emphasis added). The 6-6 life recommendations for Cooper do not reflect a finding that Mr. Walton was more culpable than Cooper.

The circuit court's denial of Mr. Walton's newly discovered evidence claims was filed on December 31, 2015. Twelve days later, the decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016) issued. In a motion for rehearing, Mr. Walton's argued that in light of the decision in *Hurst v. Florida*, a rehearing was warranted so that the impact of *Hurst v. Florida* could be

[15]This conclusion was reached because Van Royal's life sentences resulted "solely on a legal error by the trial judge," and McCoy's life sentences were pursuant to a negotiated plea (PCR4 1277). This reasoning is contrary to *McCloud v. State*, 208 So. 3d 668, 687-88 (Fla. 2016).

assessed. On February 8, 2016, the motion for rehearing was denied "without prejudice to any right Defendant may have to file a separate motion based on *Hurst*." (PCR4 1312).

After filing an appeal, Mr. Walton asked this Court to relinquish jurisdiction to the circuit court so that it could consider the Rule 3.851 motion that Mr. Walton had prepared on the basis of *Hurst v. Florida*. In his motion to vacate, he also relied on the March 7, 2016 enactment of Chapter 2016-13, which had substantially revised § 921.141.

On September 13, 2016, this Court granted the relinquishment giving the circuit court the authority to hear and consider Mr. Walton's motion to vacate.

Mr. Walton's motion to vacate presented three claims. First, he argued that because the revised § 921.141 would govern at a resentencing, the changes made by the enactment of Chapter 2016-13 had to be included within the second prong analysis of Mr. Walton's newly discovered evidence claim as to whether at a resentencing Mr. Walton would probably receive a more favorable outcome, i.e. life sentences. His second claim asserted that the enactment of Chapter 2016-13 reflected a consensus that it was cruel and unusual to impose a death sentence on a defendant when three or more of his jurors had voted in favor of a life sentence. Mr. Walton's third claim argued that in light of *Hurst v. Florida*, his death sentences were unconstitutional because his

jury had not returned a verdict making the factual findings statutorily necessary to authorize the imposition of a death sentence as required by the Sixth Amendment.

On October 3, 2016, Mr. Walton filed a motion asking for leave to amend the motion to vacate (PCR5 2449). The motion was based on the discovery of documents that Mr. Walton's newly assigned counsel[16] recognized as significant. The documents were in a copy of the public records provided by the State Attorney's Office. The documents were known as "green sheets" and they summarized the testimony of witnesses giving sworn testimony during a state attorney investigation.[17] The specific documents counsel discovered summarized sworn testimony given by Bruce Jenkins, Det. Halladay, and Paul Skalnik.

The summarization of Jenkins's sworn testimony before the state attorney differed from the 1983 trial testimony that was read to the jury at Mr. Walton's 1986 resentencing. Jenkins's sworn testimony before the state attorney was summarized as: "Jenkins states that shortly before the death occurred that week between the wedding and the deaths, **J.D. WALTON made a statement**

[16]Undersigned counsel had been assigned to assume collateral representation of Mr. Walton in early January of 2016. He filed his notice of appearance on January 11, 2016 (PCR4 1287).

[17]As he explained in the motion to amend, undersigned counsel had learned of "green sheets" and what type of information they contained during evidentiary hearings in other Pinellas County cases in 2002 and 2003 (PCR5 2452-55).

that he was going to be 'burning' somebody. 'Burning' meaning rip them off." (PCR5 2458)(Bold typeface in original).[18]

As to Det. Halladay, the green sheet summarized his testimony before the state attorney as to his interviews of Van Royal and McCoy and what they told him.

The circuit granted Mr. Walton's motion for leave to amend. On October 20, 2016, Mr. Walton filed his amended Rule 3.851 motion and added a fourth claim to the motion. The fourth claim alleged a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), on the basis of the undisclosed sworn statements. Given that Jenkins's trial testimony which was read to the resentencing jury was the basis for the State to argue and for the sentencing judge to find the CCP aggravator, the undisclosed sworn statement is particularly significant. It would have been used to impeach Jenkins trial testimony.[19]

On November 21, 2016, the circuit court conducted a case management. At its conclusion, Mr. Walton's motion to vacate was taken under advisement.

On December 22, 2016, the circuit court issued an order *sua sponte* directing Mr. Walton to file a "brief addressing the

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[18]In arguing that at a resentencing a jury correctly instructed on the CCP aggravator would still find it present, the State relied upon Jenkins's reread trial testimony that Mr. Walton said "he needed to 'waste' Stephen Fridella" (PCR4 1263).

[19]Jenkins's sworn statement to the state attorney will be quite useful at a resentencing.

impact of *Asay* and *Mosley* on ground three of his motion for postconviction relief by December 30, 2016." (PCR5 2922). This Court had issued the decisions in *Asay v. State*, 210 So. 3d 1 (Fla. 2016), and *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), earlier in the day on December 22.

On December 30, 2016, Mr. Walton filed a "Brief Addressing *Asay v. State* and *Mosley v. State*." (PCR5 2926). Mr. Walton also filed a second motion to amend his motion to vacate (PCR5 2923). He sought leave to amend in light of this Court's decisions in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), and *Perry v. State*, 210 So. 3d 630 (Fla. 2016). In *Hurst v. State*, this Court held that for a death sentence to be authorized, a jury had to return a unanimous death recommendation. In *Perry v. State*, this Court held that in light of *Hurst v. State*, Chapter 2016-13 was unconstitutional because it provided that a death sentence was authorized when 10 jurors or more voted in favor of the imposition of a death sentence. Given these decisions, Mr. Walton sought the opportunity to amend his motion to vacate in light rapidly changing legal landscape.

On January 6, 2017, the circuit court issued an order granting Mr. Walton's motion to amend. The text of the order indicated that the motion was granted "on the condition that Defendant obtains an extension of time from the Florida Supreme Court." (PCR5 2941).

On January 6, 2017, the State filed its "Response to This Court's Order of 12/22/16." (PCR5 2943).

On January 9, 2017, Mr. Walton filed a motion with this Court seeking an extension of the relinquishment of this Court's jurisdiction in order to allow Mr. Walton amend his motion to vacate and to give the circuit court jurisdiction to consider the amended motion.

This Court did not rule on the January 9th motion, and thus the relinquishment period ended on January 13, 2017. Given that this Court had not granted an extension of the relinquishment period, the circuit court entered an order denying the successive Rule 3.851 motion at 4:37 PM on January 13th right before the relinquishment period ended. (PCR5 2953).

On January 31, 2017, Mr. Walton filed another motion to relinquish jurisdiction in this Court. This motion requested the relinquishment so that the circuit court would be able to consider and address Mr. Walton's motion for rehearing which was an appendix to the motion for relinquishment. The motion for rehearing sought to have the circuit court rehear or reconsider its January 13th order denying the motion to vacate.

On February 10, 2017, this Court granted the motion to relinquish. Jurisdiction was relinquished to the circuit court for a period of thirty days.

On February 19, 2017, Mr. Walton filed a Notice of Filing in

the circuit court. Attached to this notice as a proffer was the Second Amended Motion to Vacate Judgments of Conviction and Sentences and Alternatively Motion to Correct Illegal Sentence. Mr. Walton proffered this second amended motion in order to show what he "would have endeavored to file had the Florida Supreme Court granted his January 9, 2017 motion to extend the relinquishment period" (PCR5 3145).

On February 22, 2017, the State filed a motion to dismiss the second amended motion asserting that the circuit court lacked jurisdiction to consider it.

On February 28, 2017, the circuit court entered an order granting the State's motion to dismiss the second amended motion, which had been filed as a proffer.

The circuit court entered a separate order on February 28, 2017 denying Mr. Walton's motion for rehearing.

STANDARD OF REVIEW

As to Mr. Walton's newly discovered evidence claim, the State has not appealed the circuit court's finding that he timely presented qualifying newly discovered evidence to establish his claim and established the first prong of the analysis under *Jones v. State*, 709 So. 2d 512 (Fla. 1998). *See Waterhouse v. State*, 82 So.3d 84, 104 (Fla. 2012). As to the second prong, this Court recently explained in some detail the legal standard to be used on appeal when determining whether a new trial is warranted:

> The *Jones* standard requires that, in considering the effect of the newly discovered evidence, we consider all of the admissible evidence that could be introduced at a new trial. *Jones* II, 709 So.2d at 521. 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." *Lightbourne v. State*, 742 So.2d 238, 247 (Fla.1999) (quoting *Armstrong v. State,* 642 So.2d 730, 735 (Fla.1994)). As this Court held in *Lightbourne*, a trial court must even consider testimony that was previously excluded as procedurally barred or presented in another proceeding in determining if there is a probability of an acquittal. *Id.*; 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 must review that new evidence as well as *Brady* claims 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).

Swafford v. State, 125 So.3d 760, 775-76 (Fla. 2013). Where an evidentiary hearing was held, the circuit court rulings of law are reviewed *de novo* while deference to the trial court is given as to findings of fact.

As to Mr. Walton's constitutional claims, the circuit court's legal rulings are reviewed de novo.

SUMMARY OF THE ARGUMENTS

1. The circuit court failed to employ the proper standard as to the second prong of the test established in *Jones v. State* for determining whether a new trial or resentencing is warranted in light of newly discovered evidence. As explained in *Swafford*

v. State when the first prong of *Jones v. State* had been established as it was here, all of the favorable or exculpatory evidence presented during all collateral proceedings that would be admissible at a new proceeding (a retrial or a resentencing) must be considered cumulative with the qualifying newly discovered evidence under *Jones* to determine whether the defendant has shown that the result of the new proceeding would probably be different. Here, the new proceeding that Mr. Walton seeks is a new penalty phase proceeding at which the revised capital sentencing statute contained in Chapter 2017-1 would govern. Accordingly, the new law requiring a jury to unanimously vote for a death sentence before a judge has the authority to impose a death sentence would govern. Mr. Walton satisfies the second prong of the newly discovered evidence standard because it is probable that a resentencing jury will not unanimously return a death recommendation, and life sentences will be imposed.

2. Chapter 2017-1 sets forth a substantive right. It provides a defendant convicted of first degree murder with a substantive right to a life sentence unless a jury unanimously returns a death recommendation. When this substantive right is extended retrospectively, the Due Process Clause of the Fourteenth Amendment, as well as the Eighth Amendment require that the substantive right be extended uniformly to all defendants who have been convicted of first degree murder, not

just to those who have the good fortune to have a resentencing ordered.

3. Because three jurors at Mr. Walton's 1986 resentencing voted in favor of a life recommendations, his death sentences violate the Eighth Amendment because society's evolving standards of decency no longer allow death sentences to be impose when one or more jurors vote to recommend life sentences.

4. Mr. Walton's death sentences violate the Florida Constitution because the jury did not unanimously find the elements necessary to authorize the imposition of a death sentence, and the failure to apply the ruling in *Hurst v. State* retroactively in Mr. Walton's case violates the Eighth Amendment because of the acknowledged unacceptable risk that the prior decisions to impose the death sentences were unreliable.

5. The partial retroactivity that resulted from the decisions in *Asay v. State* and *Mosley v. State* created lines that arbitrarily separated those who will receive the retroactive benefit of *Hurst v. State* and *Hurst v. Florida* from those who won't on the basis of totally irrelevant factors such as luck and good fortune, thus depriving death sentences such as Mr. Walton's of the level of reliability that the Eighth Amendment demands.

ARGUMENT

ARGUMENT I

WHEN THE PROPER CUMULATIVE ANALYSIS OF MR. WALTON'S

NEWLY DISCOVERED EVIDENCE CLAIM IS CONDUCTED UNDER *SWAFFORD V. STATE* AND *HILDWIN V. STATE*, IT IS CLEAR THAT THERE IS A PROBABILITY THAT A RESENTENCING WILL RESULT IN A DIFFERENT OUTCOME - THE IMPOSITION OF LIFE SENTENCES. THUS, RULE 3.851 RELIEF IS WARRANTED.

A. Introduction.

In his successive Rule 3.851 motion filed on May 7, 2015, Mr. Walton presented newly discovered evidence claims based upon the three life sentences that were imposed upon his co-defendant, Richard Cooper, on May 9, 2014, and on information that surfaced in the course of Cooper's 2014 resentencing proceedings that Mr. Walton had not previously known.

In *Jones v. State*, 591 So. 2d 911, 915-16 (Fla. 1991), this Court held that to establish a newly discovered evidence claim, a movant must show: 1) that the new evidence had been unknown at the time of trial and could not have been discovered through the use of due diligence, and 2) "the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial."

Here, the circuit court found that the first prong of the analysis of newly discovered evidence claims was satisfied in Mr. Walton's case. While Mr. Walton filed a notice of appeal from the decision to deny Rule 3.851 relief, the State did not file a notice of cross-appeal announcing an intention to challenge the circuit court's ruling on the first prong of *Jones v. State*. In *Waterhouse v. State*, 82 So.3d 84, 96 (Fla. 2011), "the State

filed a notice of cross-appeal, challenging the postconviction court's determination that Waterhouse's second claim was timely filed pursuant to rule 3.851(d)(2)(A)." The State's failure to cross-appeal here constitutes a waiver of the issue.

Because the circuit court found qualifying newly discovered evidence was presented and the first prong of the standard was satisfied, the issue before this Court in this appeal relates solely to the second prong of the applicable analysis of newly discovered evidence claims.

B. The Second Prong of the Applicable Analysis of Newly Discovered Evidence Claims.

Unlike the prejudice analyses of claims under *Brady v. Maryland* and *Strickland v. Washington* (both of which focus on the reliability of the outcome at the trial or the penalty phase), the second prong of a newly discovered evidence claim looks forward to what will more likely than not occur a new trial or resentencing. In *Swafford v. State*, 125 So. 3d 760, 776 (Fla. 2013), this Court explained that the second prong of the newly discovered evidence "standard focuses on **the likely result that would occur during a new trial** with all admissible evidence at the new trial being relevant to that analysis." (emphasis added).

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

referenced the analysis as about what would happen at a retrial:

> In light of the evidence presented at trial, and considering the cumulative effect of all evidence that has been developed through Hildwin's postconviction proceedings, we conclude that the totality of the evidence is of "such nature that it would probably produce **an acquittal on retrial**" because the newly discovered DNA evidence "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(emphasis added).

When a newly discovered evidence claim seeks a resentencing in a capital case, the second prong of the analysis looks to

whether it is probable that a resentencing would yield a less severe sentence, i.e. a life sentence. *Johnston v. State*, 27 So. 3d 11, 18-19 (Fla. 2010). *See Bolin v. State*, 184 So. 3d 492, 498 (Fla. 2015) ("If, as here, the defendant is seeking to vacate his sentence, the second prong requires that the evidence would probably produce a less severe sentence on retrial."); *Melton v. State*, 193 So. 3d at 886 ("it is improbable that Melton would receive a life sentence"). In circumstances like those presented here when qualifying newly discovered evidence is found, the reviewing court must consider the qualifying newly discovered evidence along with all of the other favorable evidence presented in prior postconviction proceedings that would be admissible at a resentencing, and determine whether a resentencing would probably result in the imposition of a life sentence.

The issue raised by a newly discovered evidence claim is whether a new trial or a resentencing is warranted. In deciding whether a new trial should be ordered, the reviewing court must look to whether a new trial would probably produce a different outcome. *Armstrong v. State*, 642 So. 2d at 735 ("Only when it appears that, on a new trial, the witness's testimony will change to such an extent as to render probable a different verdict will a new trial be granted."). When a resentencing is sought on the basis of newly discovered evidence, the reviewing court must look to see whether it is probable that the outcome of a resentencing

would produce an outcome more favorable to the defendant, i.e. a life sentence.[20]

The standard for the second prong of a newly discovered evidence claim was adopted by this Court in *Jones v. State*, 591 So. 2d 911, 915 (Fla. 1991), when this Court receded from an earlier stricter standard:

> Upon consideration, however, we have now concluded that the *Hallman* standard is simply too strict. The standard is almost impossible to meet and **runs the risk of thwarting justice in a given case**. Thus, we hold that henceforth, in order to provide relief, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. The **same standard would be applicable if the issue were whether a life or a death sentence** should have been imposed.

(emphasis added). This Court's formulation of the second prong standard was prompted by concerns that the older stricter standard risked thwarting justice. Clearly, the second prong of the newly discovered evidence standard was designed to facilitate the interests of justice and insure that criminal proceedings produce reliable outcomes. This is in keeping with *Johnson v. Mississippi*, 486 U.S. at 586-87 ("A rule that regularly gives a defendant the benefit of such postconviction relief is not even arguably arbitrary or capricious. [Citations] To the contrary,

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[20]In *Scott v. Dugger*, 604 So. 2d 465 (Fla. 1992), this Court found a co-defendant's life sentence was newly discovered evidence that required Scott's death sentence to be vacated and a life sentence imposed because the outcome of a direct appeal following a resentencing would result in a sentence reduction and the imposition of a life sentence.

especially in the context of capital sentencing, it reduces the risk that such a sentence will be imposed arbitrarily."). Under *Johnson*, the Eighth Amendment requires consideration be given to new evidence showing a risk that the capital sentencing decision was influenced by an arbitrary factor.[21]

In capital cases in which a death sentence has been imposed, there is heightened need for a reliable determination to impose death as a penalty.[22] *Johnson v. Mississippi*, 486 U.S. at 584

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[21]Cases in which there are co-defendants in which some co-defendants receive death sentences while others do not carry a great risk of arbitrariness under the Eighth Amendment and courts must endeavor to insure death sentences in such circumstances are sufficiently reliable. In *Slater v. State*, 316 So. 2d 539, 542 (Fla. 1975), this Court wrote:

> **We pride ourselves in a system of justice that requires equality before the law.** Defendants should not be treated differently upon the same or similar facts. When the facts are the same, the law should be the same. The imposition of the death sentence in this case is clearly not equal justice under the law. Ironically, the trial judge stated in his reasons, 'I don't feel you can treat Darius (the appellant, Darius Slater) and Charles Ware (the 'triggerman') separately in that fashion,' and then went ahead and did so. We recognize the validity of the Florida death penalty statute as expressed in *State v. Dixon*, 283 So.2d 1 (Fla.1973), but **it is our opinion that the imposition of the death penalty under the facts of this case would be an unconstitutional application under *Furman v. Georgia*,** 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

(emphasis added).

[22]In *Ray v. State*, 755 So. 2d 604 (Fla. 2000), this Court vacated a death sentence because the judge may have imposed the death sentence due to a misapprehension as to whether he was obligated to follow the jury's recommendation. *Id.* at 612 ("It seems clear that the judge would have imposed equal sentences but

("The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case."). In fact, this heightened need for reliability when a death sentence is imposed has led this Court to recognize a special category of newly discovered evidence claims.

In *Armstrong v. State*, 862 So. 2d 705, 717-18 (Fla. 2003), a Rule 3.851 motion included a claim that was premised upon new evidence that had not been available at the time of the 1991 trial. The new evidence revealed that the prior felony conviction introduced at Armstrong's penalty phase to establish the prior violent felony aggravator, had been vacated in 1999 when the conviction was determined to be constitutionally invalid by a court of competent jurisdiction.

There was no question that at the time of Armstrong's penalty phase proceeding, the prior felony conviction from the State of Massachusetts was valid and admissible as evidence offered by the State to prove an aggravating factor. It was not until eight years later that a Massachusetts court invalidated

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for his belief that a failure to abide by the jury's recommendation would result in a reversal on appeal. Under these circumstances, the trial court's entry of disparate sentences was error."). Obviously, a death sentence imposed due to a misunderstanding of the law would suggest arbitrariness had infected the decision to impose a death sentence.

the conviction. The ruling invalidating the prior conviction did not exist at the time of Armstrong's 1991 penalty phase. It was found to be new evidence that could not have been discovered.[23]

This new evidence did not show that the 1985 Massachusetts conviction had been erroneously or unlawfully introduced at Armstrong's 1991 penalty phase. *Armstrong v. State*, 862 So. 2d at 721 (Wells, J., concurring) ("I write only to point out that I believe that the use of term 'error' in the admission of the prior conviction is not accurate in the sense that it connotes error by the trial judge in admitting the prior conviction and testimony in respect to it at the time that it was admitted. The trial judge did not err in that admission."). Instead the new evidence, the invalidation of the prior conviction, destroyed the

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[23]In *Scott v. Dugger*, 604 So. 2d 465 (Fla. 1992), a newly discovered evidence claim was presented on the basis of a co-defendant's life sentence which had been imposed Scott's death sentence had been affirmed on direct appeal in 1986. The co-defendant, Robinson, had originally been given a death sentence. But after a resentencing was ordered by this Court in 1986. At his subsequent resentencing, a life sentence was imposed. This Court concluded that the newly discovered evidence claim was meritorious:

> Based upon this record, this Court probably would have found Scott's death sentence inappropriate had Robinson's life sentence been factored into our review on direct appeal.

Scott v. Dugger, 604 so. 2d at 469. This Court vacated Scott's death sentence and ordered the imposition of a life sentence. *Id.* at 470 ("Based upon this record, this Court probably would have found Scott's death sentence inappropriate had Robinson's life sentence been factored into our review on direct appeal.").

basis for the finding of one of the three aggravating factors on which Armstrong's death sentence rested.[24] As this Court explained: "the jury considered, in support of an aggravating factor, evidence of a conviction that has since been revealed to be materially inaccurate as that conviction has been vacated." *Armstrong v. State*, 862 So. 2d at 718. On the basis of *Johnson v. Mississippi* and its finding that the Eighth Amendment required a heightened need for reliability when a death sentence was imposed, this Court vacated Armstrong's death sentence and ordered a resentencing. *Armstrong v. State*, 862 So. 2d at 718 ("we cannot say that the consideration of Armstrong's prior felony conviction of indecent assault and battery on a child of the age of fourteen constituted harmless error beyond a reasonable doubt.").[25]

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[24]This Court had found in Armstrong's direct appeal that the death sentence rested on "three valid aggravating circumstances and the negligible mitigating evidence." *Armstrong v. State*, 642 So. 2d at 739.

[25]In vacating Armstrong's death sentence, this Court rejected the circuit court's finding that any error was harmless "in light of an armed robbery conviction obtained against Armstrong after his penalty phase" which could serve as a basis for the prior conviction aggravator at a resentencing. *Armstrong v. State*, 862 So. 2d at 717. In Justice Wells's concurrence which was joined by Justices Bell and Cantero, he explained that in his view the reliability of the death sentence had been so undermined by the new evidence that a resentencing was required. *Id.* at 721 (Wells, J., concurring) ("the vacation of the prior conviction has now caused us to conclude that our confidence in the death sentence in this case has been sufficiently undermined that a new penalty phase is required as a matter of law.").

The new evidence in *Armstrong v. State* was a Massachusetts court's ruling that the prior conviction was constitutionally invalid. The ruling issued in 1999 and invalidated the 1985 prior conviction introduced at the 1991 penalty phase.[26] The new evidence there conclusively demonstrated materially inaccurate evidence served as a basis for the death sentence. Otherwise, the analysis would have been focused upon the probability of a different outcome at a resentencing at which the invalid prior conviction would not be admissible.

In evaluating the second prong of the *Jones* standard in a case in which the defendant seeks relief from a death sentence, a reviewing court in deciding whether to grant a resentencing must assess the probable outcome of a resentencing. If it is more likely than not that the resentencing would result in a less severe sentence, a resentencing should be granted one. The heighten need for reliability in the decision to impose a death sentence must necessarily be part of the second prong analysis in order to insure that a death sentence is not "predicated on mere

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[26]In *Johnson v. Mississippi*, the US Supreme Court held that the invalidation of a prior conviction introduced into evidence in a penalty phase of a capital case meant "the jury was allowed to consider evidence that has been revealed to be materially inaccurate." *Johnson v. Mississippi*, 486 U.S. at 590. Because new evidence showed the use of "materially inaccurate" evidence, the resulting death sentence no longer met the heightened reliability required by the Eighth Amendment of a decision to impose a death sentence. *Id.* Thus, the analysis under *Johnson v. Mississippi* was backward looking when the newly discovered evidence specifically demonstrated the jury considered materially inaccurate evidence.

'caprice' or on 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process.'" *Johnson v. Mississippi*, 486 U.S. at 585.

C. Florida Law Governing Capital Resentencings.

Before addressing whether the second prong analysis includes consideration of the new law that will govern at a resentencing if one is ordered, Mr. Walton first looks at how Florida law has recently been transformed. Florida's capital sentencing scheme had remained virtually unchanged since its adoption in the 1973, following the decision in *Furman v. Georgia*. For that reason, the significance of changes in Florida's capital sentencing scheme as to the prejudice prong of the *Jones* standard have seldom been at issue. The law governing resentencings has generally been the same as the law that governed the penalty phase when the defendant was first tried. There have been few exceptions.

One exception resulted from the rulings in *Espinosa v. Florida*, 505 U.S. 1079 (1992), and *Jackson v. State*, 648 So. 2d 85 (Fla. 1994). Neither of these decisions were ever found to be retroactive under *Witt v. State*, 387 So. 2d 922 (Fla. 1980). Because Mr. Walton's 1986 resentencing pre-dated both *Espinosa and Jackson*, the jury instructions regarding the HAC and CCP aggravators that were given in 1986 were defective as this Court noted in *Walton v. State*, 847 So. 2d 444-45. At a resentencing ordered in Mr. Walton's case, jury instructions compliant with

Espinosa and *Jackson* would be required.

When Mr. Walton filed his newly discovered evidence claims in May of 2015, he addressed this. He argued that when considering the qualifying newly discovered evidence along with all of the other admissible evidence presented in prior collateral proceedings, the effect of the rulings in *Espinosa* and *Jackson v. State* had to be part of the analysis. In fact, the State in its written closing filed on November 30, 2015, noted that the decisions in *Espinosa* and *Jackson v. State* would require a resentencing jury in Mr Walton's case to be given different instructions on HAC and CCP than were given in 1986 (PCR4 1261).[27] The State argued that a properly instructed jury would nonetheless be able to find both the HAC and the CCP aggravators established (PCR4 1262-63). Alternatively, the State argued that even if one or both of those aggravators were not found by the jury, "the remaining aggravators found applicable by the Florida

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[27]It is worth emphasizing that neither *Espinosa v. Florida* nor *Jackson v. State* were held to be retroactive changes in the law under *Witt v. State*. The retroactive benefit of *Espinosa* was given to only those who had objected to the jury instruction on HAC as inadequate and raised it on appeal, only to lose before *Espinosa* issued. Because *Espinosa* showed this Court erred, relief issued under what was in essence the manifest injustice exception to the law of the case doctrine. *See James v. State*, 615 So. 2d 668 (Fla. 2003); *Marshall v. Jones*, _ So. 3d _, 2017 WL 1739246 *1 (Fla. May 4, 2017) (Labarga, C.J., dissenting) ("this Court has 'the power to reconsider and correct erroneous rulings in exceptional circumstances and where reliance on the previous decision would result in manifest injustice, notwithstanding that such rulings have become the law of the case.'").

Supreme Court would remain" (PCR4 1264).[28] As a result, the State concluded that "Walton failed to show that a more favorable outcome is reasonably possible." (PCR4 1266).

Implicit in the State's arguments in its written closing was an awareness of the operational effect of Florida's capital sentencing scheme, i.e that for a resentencing to result in a less severe sentence, six of the jurors would have to vote to recommend a life sentence. This meant that a showing had to be made that it was more likely than not that six jurors at a resentencing would vote to recommend life sentences, three more than had voted in favor of life recommendations in 1986.

The circuit court's denial of Mr. Walton's newly discovered evidence claims was entered on December 31, 2015. At that time, Florida law required six penalty phase jurors to vote in favor of a life recommendation before the jury's advisory verdict was a life recommendation entitled to great weight. On the other hand seven jurors voting in favor of a death recommendation meant that the jury's advisory verdict was a death recommendation.

Historically when reviewing penalty phase error in Florida capital cases in which a death sentence was imposed, reviewing courts have looked to the margin by which the jury had voted to return a death recommendation. For example, the Eleventh Circuit

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[28]The State made no argument that this Court's failure to find *Espinosa* and/or *Jackson* retroactive under *Witt v. State* preclude those decisions from applying at a resentencing.

Court of Appeal considered the operational effect of Florida law when evaluating whether constitutional error may have influenced a Florida jury's death recommendation in *Duest v. Singletary*, 997 F.2d 1336 (11th Cir. 1993). The Eleventh Circuit found the margin by which the jury returned a death recommendation to be significant in evaluating the impact of the constitutional error on the outcome:

> Initially, we note that Duest's sentencing jury recommended death by the slim margin of 7-5. Under Florida law, a 6-6 split is deemed a recommendation against the death penalty. *E.g., Harich v. State*, 437 So.2d 1082, 1086 (Fla.1983), *cert. denied*, 465 U.S. 1051, 104 S.Ct. 1329, 79 L.Ed.2d 724 (1984). The sentencing judge may override the jury's recommendation of life only if no person reasonably could conclude that life imprisonment is an appropriate punishment for this defendant. *Hall v. State*, 541 So.2d 1125, 1128 (Fla.1989); *Tedder v. State*, 322 So.2d 908, 910 (Fla.1975). Given the State's concession that "plenty" of nonstatutory mitigating evidence was present in this case, see State Postconviction Tr. at 121, an override would not have been proper had the jury recommended life. Thus, habeas relief is warranted in this case if we believe even one of the jurors who voted in favor of the death penalty likely was substantially influenced by the evidence of Duest's prior conviction.

Duest v. Singletary, 997 F.2d 1336, 1339 (11th Cir. 1993).

This Court too has looked to the margin by which a jury recommended a death sentence in evaluating prejudice flowing from any error identified as occurring before the jury. *Preston v. State*, 564 So. 2d 120, 123 (Fla. 1990) ("Finally, the jury only recommended death by a one-vote margin. Had the jury returned a recommendation of life imprisonment, we cannot be certain whether

Preston's ultimate sentence would have been the same."); *Harich v. State*, 437 So. 2d 1082, 1086 (Fla. 1983) ("The jury returned a death recommendation by a nine-to-three vote, and there is nothing in this record to show that the jury was confused by the instruction. In view of the jury's vote, we find no prejudice.").

Under Florida's capital sentencing scheme in effect on December 31, 2015, the fact that Mr. Walton's 1986 jury had returned a 9-3 death recommendation meant that Mr. Walton had a steeper climb under the second prong of the *Jones* standard, than someone who had a 7-5 death recommendation. For Mr. Walton, he would need to gain the support of three additional jurors at a resentencing, while a defendant who had a 7-5 death recommendation would only need one additional juror to reach a 6-6 result. With that law in place, the circuit court concluded that Mr. Walton had not shown it was more likely than not that a resentencing would lead to a less severe sentence, i.e. that six or more jurors would vote for a life sentence.

Twelve days after the circuit court denied Mr. Walton's newly discovered evidence claim, *Hurst v. Florida* issued. *Hurst v. Florida* declared Florida's capital sentencing scheme was unconstitutional. The release of *Hurst v. Florida* was just the start of a process that played out over a fourteen month period and completely transformed Florida's capital sentencing scheme.

The next step in the transformation came when Chapter 2016-

13 was enacted on March 7, 2016. It was the legislature's effort to fix the constitutional defect identified in *Hurst v. Florida*. While Chapter 2016-13 was meant to fix the constitutional defect identified in *Hurst v. Florida*, it rewrote § 921.141. It eliminated the judicial override. *See Perry v. State*, 210 So. 3d at 638 ("the law expressly eliminates the ability of the court to override a jury's recommendation for a life sentence with the imposition of a sentence of death"). It also increased the number of jurors who had to vote in favor of a death sentence for a death recommendation to be returned. Under Chapter 2016-13, it became necessary for ten of the twelve jurors to vote to recommend a death sentence before a judge was authorized to impose a death sentence. *See Perry v. State*, 210 So. 3d at 638 ("The changes further mandate that a life sentence be imposed unless ten or more jurors vote for death."). *Hurst v. Florida* had not mandated these changes.[29] The changes were a result of legislative decisions that a jury's life recommendation should preclude the imposition of a death sentence, and that when three or more jurors favored the imposition of a life sentence, a judge should not be authorized to impose a death sentence. This reflected Florida's evolving standards of decency. The

[29]It is significant to note that *Hurst v. Florida* did not address a judge's ability to override a jury's life recommendation nor a requirement that a jury could make findings of fact by a majority vote. The legislative changes in Chapter 2016-13 went well beyond the limited scope of *Hurst v. Florida*.

legislative changes raised the bar for a death sentence to be authorized, and in so doing reduced the number of capital defendants who could be sentenced to death.

Then on October 14, 2016, Florida capital sentencing law underwent further transformation when this Court issued opinions in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), and *Perry v. State*, 210 So. 3d 630 (Fla. 2016). *Hurst v. State* held that under the Florida Constitution, a capital defendant convicted of first degree murder had a constitutional right to a life sentence on that conviction unless the jury returned a unanimous death recommendation.[30] In *Perry v. State*, this Court relied on *Hurst v. State* to find that the rewritten § 921.141 (Chapter 2016-13) violated the Florida Constitution because it authorized a judge to impose a death sentence when a jury returned a less than unanimous death recommendation. Chapter 2016-13 had provided that it took ten of the twelve jurors to authorize a death sentence. *Perry v. State* held this 10-2 provision to be unconstitutional. Because the unconstitutional provision was not severable, this Court concluded the entire statute was unconstitutional and that

[30]The result in *Hurst v. State* incorporated the holding in *Hurst v. Florida* that a defendant's right to a jury trial meant that the finding of the statutorily defined facts necessary to authorize the imposition of a death sentence had to be made by a jury, not by a judge as Florida law had previously provided. But in holding that the Florida Constitution required the jury to return a unanimous death recommendation before a judge was authorized to impose a death sentence, the scope and effect of *Hurst v. State* was much broader than *Hurst v. Florida*.

it was for the legislature to enact a fix. The upshot of *Hurst v. State* and *Perry v. State* was the recognition that under the Florida Constitution a defendant convicted of first degree murder could not be given a death sentence unless the jury unanimously returned a death recommendation, i.e. the defendant convicted of first degree murder had a right to a life sentence unless his jury returned a unanimous death recommendation.[31]

On March 13, 2017, Chapter 2017-1 was enacted, and the transformation of Florida's capital sentencing scheme was complete. Chapter 2017-1 provided the legislative fix for the constitutional defect identified in *Perry v. State*. The 10-2 provision set forth in Chapter 2016-13 was replaced with a provision that required a jury's unanimous death recommendation before a judge could impose a death sentence.

While the transformation of Florida's capital sentencing scheme was occurring over a fourteen month period, Mr. Walton tried to incorporate the changes into his newly discovered evidence claims as they occurred. However, the March 13, 2017 enactment of Chapter 2017-1 was after jurisdiction had transferred back to this Court.

Given that the rejection of Mr. Walton's newly discovered

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[31]In *Hurst v. State*, this Court noted: "historically, it was the finding by the jury of all the elements necessary for conviction of murder that subjected the defendant to the ultimate penalty, unless mercy was expressed in the verdict of the jury as allowed by law." *Hurst v. State*, 202 So. 3d at 56.

evidence claim is now back before this Court, Mr. Walton relies on Chapter 2017-1 to argue to this Court that the new Florida law must be part of the second prong analysis of his newly discovered evidence claim since it now governs any resentencing ordered a capital cases regardless of the date of the underlying homicide.

Within his newly discovered evidence claim, Mr. Walton is arguing that the law that will govern at a resentencing conducted in the future must be part of the second prong analysis of his newly discovered evidence claim. As it appears that Chapter 2017-1 will govern all future resentencings and Mr. Walton seeks a resentencing on the basis of qualifying newly discovered evidence, the effect of Chapter 2017-1 must be assessed.

D. Consideration of the Law Governing A Resentencing Is Required When Determining Whether A Less Severe Sentence Is The Probable Outcome Of A Resentencing.

Following this Court's relinquishment of jurisdiction on September 13, 2016, the circuit court was presented with Mr. Walton's argument that the changes in Florida's capital sentencing occasioned by *Hurst v. Florida*, Chapter 2016-13, *Hurst v. State*, and *Perry v. State* would govern at a resentencing, and therefore, must be part of the second prong analysis of his newly discovered evidence claims. In its January 13, 2017 order, **the circuit court held that "changes in the law are not part of the cumulative review of newly discovered evidence.**" (PCR5 2956). The circuit court asserted that case law:

> require[s] courts to "conduct a cumulative analysis of all of the evidence," *Swafford*, 125 So. 3d at 776, not a cumulative analysis of any factor that might conceivably affect the outcome of a new trial.

(PCR5 2956). Thus, **the circuit court in its second prong analysis refused to consider the Florida law that will now govern at a resentencing in Mr. Walton's case.**

The circuit court's conclusion that changes in Florida's capital sentencing law "are not part of the cumulative review of newly discovered evidence" was a ruling of law that is subject to de novo review by this Court. When review de novo, it is clear the circuit court's ruling of law was erroneous. It failed to recognize that the second prong of the newly discovered evidence analysis is forward looking. The second prong is concerned with the likelihood that a less severe sentence will result if a resentencing is ordered.

In the second prong analysis of a newly discovered evidence claim, the Eighth Amendment applies. "[A]ny factor" that increases the risk that a death sentence is arbitrarily imposed and/or arbitrarily left standing must be recognized and excluded while those factors **decreasing** such risks are to be welcomed. *See Johnson v. Mississippi*, 486 U.S. at 587.

In determining whether to grant a resentencing on the basis of newly discovered evidence, a reviewing court is required to considered the likely outcome of the resentencing if it is

granted. The logic behind this is obvious. If a less severe sentence is not likely, it would be an act of futility to grant the resentencing - a waste of judicial resources. On the other hand if a different outcome is more likely than not, the death sentence at issue lacks the reliability that the Eighth Amendment requires in capital cases. Given that the second prong of the newly discovered evidence standard requires consideration of the likely result of a future resentencing, the law that will govern at the future resentencing is an essential part of determining the likelihood that a less severe sentence will result. *See Bolin v. State*, 184 So. 3d 492, 498 (Fla. 2015) ("If, as here, the defendant is seeking to vacate his sentence, the second prong requires that the evidence would probably produce a less severe sentence on retrial."). The governing law at a resentencing will impact whether a less severe sentence is likely.

Chapter 2016-13 was enacted on March 7, 2016, less than sixty days after *Hurst v. Florida* declared Florida's capital sentencing scheme unconstitutional. This Court in *Perry v. State* found that Chapter 2016-13 was intended to be applied retrospectively to pending homicide prosecutions in which the crime occurred prior to the enactment of Chapter 2016-13. *Id.* at 635 ("we conclude that ... most of the provisions of the Act can be construed constitutionally and could otherwise be validly applied to pending prosecutions"). It was intended to govern at

resentencings ordered on the basis of *Hurst v. Florida* error or any other kind of error regardless of the date that the homicide was committed. *See Evans v. State*, _ So. 3d _, 2017 WL 664191 *3 (Fla. Feb. 20, 2017) ("Accordingly, pursuant to our holding in *Perry*, the revised statutory scheme in chapter 2016-13, Laws of Florida, can be applied to pending prosecutions because "most of the provisions of the Act can be construed constitutionally and [can] otherwise be validly applied to pending prosecutions." *Id.* at 635. ").

Chapter 2017-1 was enacted on March 13, 2017 to fix the constitutional defect in Chapter 2016-13 that was identified in *Perry v. State*.[32] It did so by simply omitting the 10-2 language and replaced with language requiring the jury to unanimously vote to recommend a death sentence. In an opinion issued on April 13, 2017, this Court addressed the enactment of Chapter 2017-1 and stated:

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[32]The preamble described Chapter 2017-1 as "[a]n act relating to sentencing for capital felonies; amending ss. 921.141 and 921.142, F.S.; requiring jury unanimity rather than a certain number of jurors for a sentencing recommendation of death." Chapter 2017-1 amended § 921.141(2)(c) to provide: "If a unanimous jury does not determine that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of life imprisonment without the possibility of parole." Section 921.141(3)(a) provides that "[i]f the jury has recommended a sentence of ...[l]ife without the possibility of parole, the court shall impose the recommended sentence." As a result, Florida's capital sentencing statute now precludes the imposition of a death sentence unless a jury returns a unanimous death recommendation.

> the Florida Legislature enacted chapter 2017-1, Laws of Florida, effective March 13, 2017. This legislation requires a jury to unanimously determine that a defendant should be sentenced to death before a trial court may impose the death penalty.

In re: Standard Criminal Jury Instructions in Capital Cases, _ So. 3d _, Case No. SC17-583, Slip Op. at 2 (Fla. April 13, 2017). This Court noted that Chapter 2017-1 was enacted in response to its holding in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016):

> we held that "in addition to unanimously finding the existence of any aggravating factor, the jury must also unanimously find that the aggravating factors are sufficient for the imposition of death and unanimously find that the aggravating factors outweigh the mitigation before a sentence of death may be considered by the judge." *Id.* at 54. We further held that a unanimous jury recommendation for death is required before a trial court may impose a sentence of death. *Id.*

In re: Standard Criminal Jury Instructions in Capital Cases, Case No. SC17-583, Slip Op. at 2.

The changes contained in Chapter 2016-13 were meant to govern any resentencing ordered in a capital case regardless of the date of the homicide. That aspect of Chapter 2016-13 was not changed by the enactment of Chapter 2017-1. Thus, the revised version of § 921.141 that was set forth in Chapter 2017-1 will govern a resentencing in Mr. Walton's case if one is ordered.

Under the revised version of § 921.141 at a resentencing Mr. Walton will have the right to a life sentence unless the jury returns a unanimous death recommendation. Before it can return a unanimous death recommendation, the jury must first "identify[]

each aggravating factor found to exist," and the finding that an aggravating factor was proven to exist beyond a reasonable doubt "must be unanimous." § 921.141(2)(b). Next, the jury will have to unanimously find that sufficient aggravating factors exist as to justify a death sentence. Then, the jury will have to unanimously find that "aggravating factors exist which outweigh the mitigating circumstances found to exist." § 921.141(2)(b)(2). If all of these unanimous findings have been made, jurors will be free to be merciful and vote in favor of recommending a life sentence. Only if the jury returns a unanimous death recommendation will the judge be authorized to impose a death sentence.

E. At A Resentencing A Less Severe Sentence Is Likely.

In 1986 three members of Mr. Walton's jury vote in favor of life sentences as to all three first degree murder convictions. If even one juror votes for a life sentences at a resentencing, the judge will not be authorized to impose death sentences. Mr. Walton's resentencing will result in a less severe sentence. However at a resentencing, Mr. Walton has much more mitigating evidence to present than was presented in 1986, while some aggravating evidence and argument presented in 1986 has been found by this Court to have been improper.

At the time of the 1986 proceeding, both triggermen, Cooper and Van Royal, were under three death sentences. There was

nothing mitigating or helpful for Mr. Walton to present regarding their sentences in 1986. At a resentencing now, Mr. Walton will be able to present the life sentences that Cooper and Van Royal, the triggermen, have received.[33]

In addition, Mr. Walton now has admissible evidence to challenge any assertion by the State that he was the leader or that he planned the murders in advance. At the resentencing, he can introduce Van Royal's statements that Mr. "Walton was not the leader of the group which killed the victims in the instant case, and that the murders were entirely unexpected." *Walton*, 847 So. 2d at 454.

Mr. Walton will also be able to introduce the evidence from Cooper's 2014 resentencing that the State relied upon to argue that Cooper bore the moral responsibility for the three homicides: "**There is no reason for those three people to die but for the fact that Mr. Cooper took it upon himself that my freedom is far more important than those people's lives.**" (PCR4 552) (emphasis added). "**Each of the three victims were shot with the**

[33]The circuit court found Van Royal's life sentence was "irrelevant" because his life sentence was "based solely on a legal error by the trial judge." (PCR4 1277). However as this Court recently held that does not make Van Royal's life sentences irrelevant. *See McCloud v. State*, 208 So. 3d 668, 688 (Fla. 2016)("We reject any principle of law that hamstrings this Court's ability to conduct a full proportionality review, including a relative culpability analysis, simply because the State allowed a codefendant to enter a plea to murder that resulted in a life sentence.").

Savage shotgun which Mr. Cooper admitted carrying and using." (PCR4 555) (emphasis added). The evidence from Cooper's resentencing included Cooper's 1987 statement to the clemency board in which he said that Mr. Walton's gun did not actually "misfire," as had been the State's theory.[34] Cooper said that Mr. Walton's weapon was not loaded and that he, Cooper, knew it was not loaded. Cooper's statement shows that Mr. Walton never attempted to shoot one of the victims - there was no effort to shoot a victim that was thwarted when his gun misfired.

At a resentencing, the State will not be able to call a psychiatrist to testify about the mental condition of the victim's eight-year-old son since this Court found the admission of such testimony in the 1986 proceeding to be error. Similarly, the prosecutor at a resentencing will have to refrain from the conduct which led this Court to write: "we do not condone the prosecutor's conduct and this conduct could be reversible error under different circumstances." *Walton v. State*, 547 So. 2d at

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[34]Cooper's 1987 clemency was introduced into evidence at Cooper's 2014 resentencing. Until then, Mr. Walton was unaware of its existence. The State has argued that Cooper's clemency statement would not be admissible at Mr. Walton's resentencing. However, that just is not true. Mr. Walton's right to present a defense in the form of mitigating evidence trumps the State's claim of privilege. *Green v. Georgia*, 442 U.S. 95(1979). *See Holmes v. South Carolina*, 547 U.S. 319 (2006); *Rock v. Arkansas*, 483 U.S. 44 (1987); *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987); *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Washington v. Texas*, 388 U.S. 14 (1967); *Mordenti v. State*, 982 So. 2d 710, 712-13 (Fla. 2nd DCA 2008).

625.

At a resentencing, the jury instructions regarding the HAC and CCP aggravators will have to include the proper narrowing constructions that were not provided in 1986. Jurors advised of the limiting constructions of these aggravators and the evidence now available which was not presented in 1986 may conclude one or both the HAC and CCP aggravators do not apply.

Bruce Jenkins's trial testimony which was read to the resentencing jury in 1986 was used by the sentencing judge to find the CCP aggravator. However, there is now the summary of Jenkins's sworn statement to the state attorney in which Jenkins said that Mr. Walton had used a word reflecting an intent to rip off, not an intent to kill. The prosecutor's closing which asserted that Jenkins was hiding in 1986 because he did not want to testify can now be shown to be false. Jenkins testified in prior collateral proceedings that he was not hiding and would have willingly testified had he been contacted. Jenkins also testified that he did not understand Mr. Walton to mean that he intended to kill anyone. This is consistent with what statements from both Cooper and Van Royal, and negates the CCP aggravator.

There is also a wealth of mitigating evidence presented in prior collateral proceedings which was not presented in 1986, but which would be admissible at a resentencing. When considering it in a previous collateral appeal, this Court did note that this

mitigation was significant. *Walton v. State*, 847 So. 2d at 458 ("**it is clear that the evidence in mitigation illuminated during the postconviction proceedings below could have aided Walton's case before his resentencing jury**") (emphasis added).

When the qualifying newly discovered evidence is considered cumulatively with the other favorable evidence presented in prior collateral proceedings that will be admissible at a resentencing, it is clear that aggravating evidence giving weight to the aggravating factors on the death side of the scale **will be removed or lessened**, while a considerable amount of mitigating evidence not presented in 1986 will put weight on the life side of the scale. It is probably that more than three jurors will be voting for life sentences at a resentencing, and certain that at least one juror will vote to recommend life sentences

It is clearly likely that at a resentencing Mr. Walton will receive a less severe sentence. Under the applicable second prong standard, that means that Rule 3.851 relief must issue, and that this Court must order a resentencing.

ARGUMENT II

THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION REQUIRE THE RETROACTIVE APPLICATION OF THE SUBSTANTIVE RULE ESTABLISHED BY CHAPTER 2017-1, WHICH PRECLUDES THE IMPOSITION OF A DEATH SENTENCE UNLESS A JURY UNANIMOUSLY RETURNS A DEATH RECOMMENDATION.

A. Introduction.

Argument I addressed Chapter 2017-1 in the context of a newly discovered evidence claim. Accordingly at issue in Argument I was the applicability of Chapter 2017-1 at resentencing to be conducted in the future.

Argument II now focuses on the substantive right set forth in Chapter 2017-1, which is an extension of the substantive right first set forth in Chapter 2016-13. When a State creates a right that carries a liberty or life interest with it, the right is protected by the Due Process Clause of the Fourteenth Amendment. The US Supreme Court has recognized that States "may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment." *Vitek v. Jones*, 445 U.S. 480, 488 (1980). "Once a State has granted prisoners a liberty interest, [the US Supreme Court has] held that due process protections are necessary 'to insure that the state-created right is not arbitrarily abrogated.'" *Id.* at 488-89. *See State v. Robinson*, 873 So. 2d 1205, 1209 (Fla. 2004) ("It is the Due Process Clause that protects the individual against the arbitrary and unreasonable exercise of governmental power.").

Herein, Mr. Walton argues that pursuant to the Due Process Clause of the Fourteenth Amendment the substantive right set forth in Chapter 2017-1 which has been extended retrospectively to others must also be extended to him.

B. Creation Of Substantive Right.

With the March 7, 2016, enactment of Chapter 2016-13, a substantive right was statutorily created - a capital defendant in Florida for the first time had a right to a life sentence unless 10 of 12 jurors voted to recommend a death sentence. *See Perry v. State*, 210 So. 3d at 638 ("The changes further mandate that a life sentence be imposed unless ten or more jurors vote for death."). Chapter 2016-13 rewrote § 921.141, and provided that without 10 or more jurors voting in favor of a death sentence, the defendant would not be eligible for a death sentence, i.e. he or she would be acquitted of capital first degree murder. Under § 921.141 as rewritten by Chapter 2016-13, capital first degree murder was first degree murder plus the additional statutorily defined facts necessary to authorize a judge to impose a death sentence as reflected in a jury's death recommendation. The additional facts could be found be as few as ten of the twelve jurors.

Certainly, the legislature could have provided that the right to a life sentence unless at least 10 jurors voted to recommend a death sentence only applied in homicide cases in which the homicide was committed after the right was enacted on March 7, 2016. But, that was not the legislative intent. Instead, the legislature intended this right to a life sentence unless 10 jurors voted to recommend a death sentence to be extended retrospectively to any defendant charged with a capital homicide

that had occurred prior to March 7, 2016, with a prosecution pending after the effective date of Chapter 2016-13.

Seven months later on October 14, 2016, this Court issued *Hurst v. State*. There, it found that the Florida Constitution guarantee to a right to trial by jury in criminal cases meant that to return a guilty verdict the jury had to unanimously find the elements of the criminal offense were proven. As a result, this Court concluded that a jury in a capital case had to unanimously find all of the statutorily defined facts that were necessary to authorize the imposition of a death sentence. *Hurst v. State*, 202 So. 3d at 44 ("We reach this holding based on the mandate of *Hurst v. Florida* and on Florida's constitutional right to jury trial, considered in conjunction with our precedent concerning the requirement of jury unanimity as to the elements of a criminal offense.").

At the same time that *Hurst v. State* issued, this Court issued *Perry v. State*. On the basis of *Hurst v. State*, this Court in *Perry v. State* found the 10-2 provision in Chapter 2016-13 unconstitutional under the Florida Constitution. In order to be constitutional, the jury findings required in Chapter 2016-13 had to be found unanimously by the jury. Findings made by ten of twelve jurors did not comport with the Florida Constitution.

As to the remainder of Chapter 2016-13, this Court found it to be constitutionally valid. This Court specifically recognized

that Chapter 2016-13 was intended to be applied retrospectively to all pending homicide prosecutions including those in which the homicide had occurred prior to March 7, 2016, the date Chapter 2016-13 was enacted. This Court observed that such retrospective application was proper. *Id.* at 635 ("we conclude that ... most of the provisions of the Act can be construed constitutionally and could otherwise be validly applied to pending prosecutions"). *See Evans v. State*, _ So. 3d _, 2017 WL 664191 (Fla. Feb. 20, 2017). Chapter 2016-13 was clearly intended to govern at resentencings ordered on the basis of *Hurst v. Florida* error or any other kind of error regardless of the date that the homicide was committed.

However, this Court in *Perry v. State* held that the 10-2 provision was not severable. Under separation of powers as provided by the Florida Constitution, this Court left it to the Florida Legislature to rewrite the statute in a constitutional fashion.

On March 13, 2017, Chapter 2017-1 was enacted. It was meant to statutorily fix the defect identified in *Perry v. State*. The only change made to the revised § 921.141 was to replace the 10-2 provision with one requiring the jury to unanimously return a death recommendation before a judge was authorized to impose a death sentence. No change was made to the statute evincing an intent to retreat from the retrospective application of the rewritten § 921.141.

While *Hurst v. State* and *Perry v. State* were premised upon the Florida Constitution, Chapter 2016-13 and Chapter 2017-1 were both crafted by the Florida Legislature and signed into law by the Governor. This Court has said: "Generally, the Legislature has the power to enact substantive law, while the Court has the power to enact procedural law." *Allen v. Butterworth*, 756 So. 2d 52, 59 (Fla. 2000). This Court has also written: "Substantive law has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer." *State v. Garcia*, 229 So. 2d 236, 238 (Fla. 1969). This Court has explained:

> Substantive law has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer. *State v. Garcia*, 229 So.2d 236 (Fla.1969). It includes those rules and principles which fix and declare the primary rights of individuals with respect towards their persons and property. *Adams v. Wright*, 403 So.2d 391 (Fla.1981).

Haven Federal Savings & Loan Ass'n v. Kirian, 579 So. 2d 730, 732 (Fla. 1991). In *Benyard v. Wainwright*, 322 So. 2d 473, 475 (Fla. 1975), this Court reiterated:

> Substantive law prescribes the duties and rights under our system of government. The responsibility to make substantive law is in the legislature within the limits of the state and federal constitutions.

Pursuant to separation of powers, procedure matters are a judicial function, not a legislative function. *See State v. Raymond*, 906 So. 2d 1045, 1049 (Fla. 2005) ("where there is no

substantive right conveyed by the statute, the procedural aspects are not incidental; accordingly, such a statute is unconstitutional."); *Massey v. David*, 979 So. 2d 931, 937 (Fla. 2008) ("We have held that where a statute contains some procedural aspects, but those provisions are so intimately intertwined with the substantive rights created by the statute, that statute will not impermissibly intrude on the practice and procedure of the courts in a constitutional sense, causing a constitutional challenge to fail.").

If Chapter 2016-13 had been purely procedural, it would have violated the separation of powers doctrine enshrined in the Florida Constitution. Moreover when this Court determined that the 10-2 provision was unconstitutional, it could have fixed the defect and rewritten the governing law if the provision was one of procedure. This Court did not do that because it recognized that what was at issue was substantive law, i.e. "that part of the law which creates, defines, and regulates rights." *Garcia v. State*, 229 So. 2d at 238.

Chapter 2016-13 initially established a retrospective substantive right that a capital defendant had a right to a life sentence if three or more jurors voted in favor of a life sentence. *See Perry v. State*, 210 So. 3d at 638 ("The changes further mandate that a life sentence be imposed unless ten or more jurors vote for death."). Then, this Court in *Hurst v. State*

determined the facts statutorily necessary to authorize a death sentence were in essence elements of an offense and under the Florida Constitution had to be found by a unanimous jury. On the basis of the ruling in *Hurst v. State*, the 10-2 provision of Chapter 2016-13 was declared unconstitutional. In Chapter 2017-1 the Florida Legislature rewrote the statute to provide that a defendant convicted of first degree murder was to receive a life sentence unless a jury returned a unanimous death recommendation. The substantive right created in Chapter 2016-13 was expanded.[35] The right was extended to defendants in all homicide prosecutions regardless of the date of the underlying homicide, and regardless of the date that a homicide conviction became final.

C. The Substantive Right Cannot Be Extended Arbitrarily In The Hit Or Miss Fashion That Is Occurring So Far.

In *Evitts v. Lucey*, 469 U.S. 387, 400 (1985), the US Supreme Court recognized that "a State need not provide a system of appellate review as of right at all." States have the option to not provide appellate review of criminal convictions. *See McKane*

[35]Three weeks before Chapter 2017-1 was enacted, this Court issued *Evans v. State*, 2017 WL 664191 at *3 and concluded that the 10-2 provision of Chapter 2016-13 could be applied to pending prosecutions as long as a death sentence was only imposed if the jury returned a unanimous death recommendation. This decision made it clear that capital prosecutions could proceed and that a legislative rewrite of the statute was not required. Despite this, the legislature nonetheless revised § 921.141 to require a unanimous death recommendation be returned before a death sentence was authorized. Thus, the unanimity requirement was fully and voluntarily embraced by the legislature and the governor when Chapter 2017-1 was enacted on March 13, 2017.

v. Durston, 153 U.S. 684 (1894). But "when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution-and, in particular, in accord with the Due Process Clause." *Evitts v. Lucey*, 469 U.S. at 401. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983) ("There is, of course, no constitutional right to an appeal, but in *Griffin v. Illinois*, 351 U.S. 12, 18 (1955), and *Douglas v. California*, 372 U.S. 353 (1963), the Court held that if an appeal is open to those who can pay for it, an appeal must be provided for an indigent."). "Once a State has granted prisoners a liberty interest, [the US Supreme Court has] held that due process protections are necessary 'to insure that the state-created right is not arbitrarily abrogated.'" *Vitek v. Jones*, 445 U.S. at 488-89. Who gets the benefit of a substantive right and who does not must not offend the Due Process Clause. *State v. Robinson*, 873 So. 2d 1205, 1209 (Fla. 2004) ("It is the Due Process Clause that protects the individual against the arbitrary and unreasonable exercise of governmental power.").

The Eighth Amendment is implicated if substantive rights are doled out arbitrarily in capital cases. In *Johnson v. Mississippi*, 486 U.S. 578 (1988), the US Supreme Court discussed the Eighth Amendment's requirement that death sentences be reliable and free from arbitrary factors:

> The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and

> unusual punishment gives rise to a special " 'need for reliability in the determination that death is the appropriate punishment' " in any capital case. See *Gardner v. Florida,* 430 U.S. 349, 363–364, 97 S.Ct. 1197, 1207–1208, 51 L.Ed.2d 393 (1977) (WHITE, J., concurring in judgment)(quoting *Woodson v. North Carolina,* 428 U.S. 280, 305, 96 S.Ct. 2978, 2991–92, 49 L.Ed.2d 944 (1976)). Although we have acknowledged that "there can be 'no perfect procedure for deciding in which cases governmental authority should be used to impose death,' " **we have also made it clear that such decisions cannot be predicated on** mere "caprice" or on "**factors that are constitutionally impermissible or totally irrelevant to the sentencing process.**" *Zant v. Stephens,* 462 U.S. 862, 884–885, 887, n. 24, 103 S.Ct. 2733, 2747, 2748, n. 24, 77 L.Ed.2d 235 (1983).

Johnson v. Mississippi, 486 U.S. 584-85 (emphasis added).

The right to a life sentence unless a jury unanimously recommends a death sentence under revised § 921.141 is being extended to any capital defendant who has received a resentencing that is now currently pending. This is due to the fact that Chapter 2016-13 and Chapter 2017-1 were both intended to apply retrospectively to all pending capital prosecutions regardless of the date of the homicide or the date that a first degree murder conviction became final.

This Court recently ordered a resentencing in Lancelot Armstrong's case. *Armstrong v. State*, 211 So. 3d 864 (Fla. 2017). The homicide at issue there occurred in early 1990. Armstrong's conviction and death sentence were affirmed on direct appeal. *Armstrong v. State*, 642 So. 2d 730 (Fla. 1994), *cert denied* 514 U.S. 1085 (1995). In collateral proceedings, a resentencing was

ordered. *Armstrong v. State*, 862 So. 2d 705 (Fla. 2003). However, the first degree murder conviction that became final in April of 1995 has remained final. At the upcoming resentencing for a first degree murder conviction that has been final since 1995 that was a 1990 homicide, Armstrong will have the substantive right to a life sentence for that conviction final in 1995 unless a jury returns a unanimous death recommendation.

This Court recently granted a resentencing in Paul Johnson's case. *Johnson v. State*, 205 So. 3d 1285 (Fla. 2016). He had been convicted of three 1981 homicides. The convictions were final in 1993. *Johnson v. State*, 608 So. 2d 4 (Fla. 1992), *cert denied*, 508 U.S. 919 (1993). His death sentences were vacated in collateral proceedings in 2010. *Johnson v. State*, 44 So. 3d 51 (Fla. 2010). After again receiving death sentences, this Court in his recent appeal ordered another resentencing. At the upcoming resentencing on those three convictions final in 1993 as to homicides committed in 1981, Johnson will have substantive right to life sentences unless a jury returns a unanimous death recommendations.

The Eleventh Circuit recently granted a resentencing in John Hardwick's case. *Hardwick v. Sec'y Fla. Dep't of Corr.*, 803 F.3d 541 (11th Cir. 2015). Hardwick was convicted of a 1984 homicide. His conviction became final in 1988. *Hardwick v. State*, 521 So. 2d 1071 (Fla. 1988). That conviction is still intact. At the

upcoming resentencing, Hardwick will have the substantive right to life sentences unless a jury returns a unanimous death recommendations.

This Court recently ordered a resentencing in James Card's case. *Card v. Jones*, _ So. 3d _, 2017 WL 1743835 (Fla. May 4, 2017). Card was convicted of a 1981 homicide. His conviction became final in 1984. *Card v. State*, 453 So. 2d 17 (Fla. 1984). His death sentence was vacated in collateral proceedings because the judge had the State write his sentencing findings on an ex parte basis. When this was discovered nearly ten years later, postconviction relief issued and a resentencing was conducted in 1999. An 11-1 death recommendation led to another death sentence that was affirmed, and then became final 4 days after the issuance of *Ring v. Arizona*, 536 U.S. 584 (2002). *Card v. State*, 803 So. 2d 613 (Fla. 2001), *cert denied* 536 U.S. 963 (2002). Because his petition for certiorari review was denied four days after *Ring* issued, this Court has now ordered a resentencing at which Card will have the substantive right to a life sentence unless the jury unanimously returns a death recommendation.

A circuit court has recently granted J.B. Parker a resentencing on the basis of *Hurst v. State*. Though the State will likely appeal, under the governing law this Court is likely to affirm the grant of a resentencing. Parker was convicted of a 1982 homicide and sentenced to death. The conviction and death

sentence became final in 1985. *Parker v. State*, 476 So. 2d 134 (Fla. 1985). In 1998, Parker's death sentence was vacated though the conviction remained intact and final. *State v. Parker*, 721 So. 2d 1147 (Fla. 1998). Parker received another death sentence after the jury returned an 11-1 death recommendation. This Court affirmed on appeal. *Parker v. State*, 873 So. 2d 270 (Fla. 2004). Now because the death sentence became final after *Ring v. Arizona* issued, the circuit court has ordered another resentencing. At a resentencing on his first degree murder conviction final in 1985, Parker will have the substantive right to a life sentence unless the jury unanimously returns a death recommendation.

Chapter 2017-1 now provides that a defendant convicted of first degree murder has a right to be sentenced to life imprisonment unless the State convinces a jury to unanimously return a death recommendation.[36] This right surely is a

[36]The Florida Legislature in Chapter 2016-13 first recognized that a defendant convicted of first degree murder had a substantive right to be sentenced to life imprisonment unless the State convinced ten of twelve jurors to vote in favor of a death recommendation. This substantive right was new. Previously, six jurors voting for a life sentence constituted a life recommendation that the judge could override and impose a death sentence if the life recommendation was not supported by a reasonable basis. When Chapter 2016-13 eliminated the judicial override of a life recommendation and reduced the number of jurors necessary for the jury's verdict to constitute a life recommendation from six to three, a substantive right to a life sentence was established when three jurors voted for a life sentence. Chapter 2016-13 did include a fix for the constitutional defect in § 921.141 identified in *Hurst v. Florida*. But, neither the elimination of the judicial override nor the requirement that ten jurors must vote in favor of a death

substantive right. It is not merely a procedural rule. If it were, it would violate the separation of powers doctrine for it to be enacted by the legislature.

When this Court in *Perry v. State* declared the 10-2 provision in Chapter 2016-13 unconstitutional, it did not treat the matter of requiring a unanimous death recommendation as merely a matter of procedure over which this Court has exclusive authority, akin to establishing time tables for filing motions or briefs. *Allen v. Butterworth*, 756 So. 2d at 62 ("this Court the exclusive authority to set deadlines for postconviction motions."). Rather, this Court in *Perry v. State* regard the matter as substantive, i.e. a defendant's substantive right to a life sentence absent a jury's unanimous findings of the facts necessary to authorize a death sentence. *State v. Raymond*, 906 So. 2d 1045, 1048-49 (Fla. 2005) ("matters of substantive law are within the Legislature's domain. Substantive law has been defined as **that part of the law which creates, defines, and regulates rights**, or that part of the law which courts are established to administer. *State v. Garcia*, 229 So.2d 236 (Fla.1969). It includes those rules and principles which fix and declare the primary rights of individuals with respect to their persons and

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sentence instead of seven jurors before a the jury's verdict constituted a death recommendation was a change mandated by *Hurst v. Florida*. Instead, these changes reflected Florida's evolving standards of decency.

property. *Adams v. Wright*, 403 So.2d 391 (Fla.1981).") (emphasis added).

The procedural rule/substantive right dichotomy matters in analyzing Chapter 2017-1. Procedural rules attach to a proceeding. For example, this Court could announce effective July 1, 2017, appellants in capital appeals will have thirty days from the date the record on appeal is filed to submit the initial brief. Another example would be when this Court amends Rule 3.851 effective on a particular date to change what a motion to vacate must contain or how many pages in length is permitted. Procedural rules are promulgated by this Court and attach to a proceeding, i.e. an appeal, Rule 3.851 proceedings, etc.

On the other hand, substantive rights attach to people. Substantive law attaches to events. For example, the substantive law defining the crime of first degree murder can only attach to homicides committed after the substantive law established the elements of first degree murder. A substantive right, for example the right to counsel, attaches to a person charged with a crime. The Eighth Amendment right to present mitigating evidence attaches to a person convicted of first degree murder when the State seeks to impose a death sentence. Similarly, the right to require the State to prove aggravating factors beyond a reasonable doubt is a right that attaches to a defendant convicted of first degree murder.

Chapter 2017-1 provides that a defendant who has been convicted of first degree murder cannot receive a death sentence unless the jury returns a unanimous death recommendation which by definition includes unanimously finding every fact necessary to authorize a judge to impose a death sentence. This provision is not at all like a procedural rule setting forth page limitations on an initial brief. Instead, this provision is much more like the requirement that the State must prove each element beyond a reasonable doubt, and that the defendant is presumed innocent.

Perhaps this can be better seen by looking at the change in law that Chapter 2017-1, and its predecessor Chapter 2016-13, brought about. Before March 7, 2016, Florida's capital sentencing scheme provided for a jury to return an advisory verdict by a majority vote, and then for the judge to consider the advisory verdict and impose a sentence. Under the Eighth Amendment, the jury and the judge were co-sentencers. *Espinosa v. Florida*, 505 U.S. at 1083 ("We merely hold that, if a weighing State decides to place capital sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances."); *Lambrix v. Singletary*, 520 U.S. 518, 528 (1997) ("In *Espinosa*, we determined that the Florida capital jury is, in an important respect, a cosentencer with the judge."). For its part, the jury did not identify what if any facts had been found, let alone explain how many jurors found any particular fact. If

six jurors voted to recommend a life sentence that constituted a life recommendation that a judge could override to impose a death sentence if the life recommendation was unreasonable.

After Chapter 2017-1, a life sentence results unless the jury unanimously finds all facts necessary to authorize a judge to impose a death sentence, sets forth its unanimous findings in a special verdict, and recommends a death sentence. The jury, aware that each juror can preclude a death sentence by voting to recommend a life sentence, must unanimously vote in favor of a death sentence before a judge has the power to impose a death sentence.

This change is not like a procedural rule imposing a shorter page limitation on an initial brief, or reducing the time allotted for the submission of an appellate brief. It is not like a rule requiring Rule 3.851 motion to identify all the issues raised on direct appeal or establishing when a case management hearing must be held. It is not even like a rule substituting fact finding by a jury in place of fact finding by a judge.[37]

Instead, Chapter 2017-1 changes a co-sentencer's role from

[37]Unlike the circumstances in *Schriro v. Summerlin,* 542 U.S. 348 (2004), the change here is going from an advisory jury recommendation requiring seven of twelve jurors to vote in favor of an advisory death recommendation, to requiring a jury to return a unanimous death recommendation before a judge has the power to impose a death sentence. In *Schriro v. Summerlin*, 542 U.S. at 355-56, the US Supreme Court noted that a substantive right thatseriously improved accuracy and reliability would apply retroactively.

merely advisory to necessary, and requires not just the support of seven jurors, but unanimity of all twelve jurors for a death recommendation to be returned. This empowers each juror to know that he or she can preclude a death sentence. The change in the jury's role and the necessity of unanimity means that its verdict will be more reliable and more meaningful in exactly the same way that requiring proof beyond a reasonable doubt instead of by a preponderance of the evidence makes a criminal defendant's Sixth Amendment rights stronger and more meaningful.

If Chapter 2017-1 were merely procedural besides being enacted in violated of the separation of powers doctrine, it would be proper for it to attach to any capital sentencing proceeding conducted after its effective date because it only sets out the manner by which the parties should seek to litigate. *State v. Raymond*, 906 So. 2d at 1048 ("practice and procedure is the method of conducting litigation involving rights and corresponding defenses.").

However, Chapter 2017-1 is clearly substantive because it gives a defendant convicted of first degree murder something that he or she did not have before: a right to a life sentence unless the jury returns a unanimous death recommendation. Quite clearly, Chapter 2017-1 precludes the imposition of a death sentence unless the jury returns a unanimous death recommendation.

Because Chapter 2017-1 sets forth a substantive right that

is personal in that it belongs to someone. For example, the Sixth Amendment right to representation by counsel attaches to a defendant who is criminal charged. A substantive right must attach to a person, not a proceeding. Clearly, the right to a life sentence unless the jury unanimously returns a death recommendation attaches to a defendant who is convicted of first degree murder. It is a right that springs to life when the first degree murder conviction is returned. It is a presumption of a life sentence, akin to a presumption of innocence.

Certainly, the legislature could have provided that the right set forth in Chapter 2017-1 only attached to defendants convicted of first degree murder after Chapter 2017-1 became effective, i.e. March 13, 2017. The legislature chose not to do it that way. Chapter 2017-1 was meant to apply retrospectively.

This means the substantive right to a life sentence unless the jury unanimously returns a death recommendation has attached to James Card's first degree murder conviction which was final in 1984. It will attach to J.B. Parker's first degree murder conviction which was final in 1985. It has attached to John Hardwick's first degree murder conviction which was final in 1988. It has also attached to Paul Johnson's first degree murder conviction which was final in 1993. And, it has attached to Lancelot Armstrong's first degree murder conviction which was final in 1995.

In a proceeding to determine the sentence to be imposed on Card's 1984 conviction, the substantive right set forth in Chapter 2017-1 will apply. In a proceeding to determine the sentence to be imposed on Parker's 1985 conviction, the substantive right set forth in Chapter 2017-1 will apply. In a proceeding to determine the sentence to be imposed on Hardwick's 1988 conviction, the substantive right set forth in Chapter 2017-1 will apply. In a proceeding to determine the sentence to be imposed on Johnson's 1993 conviction, the substantive right set forth in Chapter 2017-1 will apply. And in a proceeding to determine the sentence to be imposed on Armstrong's 1995 conviction, the substantive right set forth in Chapter 2017-1 will apply. Due process requires that Mr. Walton be given the same substantive right as to the sentence to be imposed on his conviction which was final in early 1986. *Walton v. State*, 481 So. 2d at 1200.

A State cannot establish a substantive right that provides a life and/or liberty interest which it arbitrarily extends to some, but not others. The substantive right set forth in Chapter 2017-1 cannot be extended retrospectively across time in the manner that children play hopscotch. Granting the right to those convicted defendants who through luck and good fortune happened to get a resentencing ordered and/or when resentenced to death, the death sentence was not final when *Ring v. Arizona* issued so

that another resentencing is ordered solely on the basis of timing. The reasons that Card, Parker, Hardwick, Johnson, and Armstrong will receive the benefit of the substantive right set forth in Chapter 2017-1, has nothing to do with the circumstances of the crimes for which they were convicted, nor their character or the mitigating circumstances. To give them the benefit of Chapter 2017-1 while depriving Mr. Walton of that benefit can only be described as arbitrary and a violation of due process. *See Griffith v. Kentucky*, 479 U.S. 314, 323 (1987) ("[S]elective application of new rules violates the principle of treating similarly situated defendants the same."); *Smith v. State*, 598 So. 2d 1063, 1066 (Fla. 1992) ("[a]ny rule of law that substantially affects the life, liberty, or property of criminal defendants must be applied in a fair and evenhanded manner. Art. I, §§ 9, 16, Fla. Const.").

In addition to violating the Due Process Clause, depriving Mr. Walton of the benefit of Chapter 2017-1 violates the Eighth Amendment. In *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014), the US Supreme Court found that Florida's procedure for determining intellectual disability was inadequate to reliably insure that an intellectually disabled defendant was not executed. "A State that ignores the inherent imprecision of these tests risks executing a person who suffers from intellectual disability." *Id.* at 2001. Because Florida ignored that inherent imprecision, the

Supreme Court found that "Florida's rule is invalid under the Constitution's Cruel and Unusual Punishments Clause." *Id.* The Supreme Court explained: "The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution. Florida's law contravenes our Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world."

This Eight Amendment principle applies here where James Card was convicted of a murder that occurred a year before those for which Mr. Walton was convicted. Card's conviction was final more than a year before Mr. Walton's convictions were final. Yet, Card has the right to a life sentence as to that conviction unless a jury unanimously returns a death recommendation, while Mr. Walton is under a death sentence when three jurors voted against the imposition of a death sentence. There is only one word to describe the distinction between Card's circumstances and Mr. Walton's, and that word is "arbitrary." To allow this arbitrary distinction and leave Mr. Walton's death sentences intact while James Card and others receive the right to a life sentence unless the jury returns a unanimous death recommendation violates *Furman v. Georgia*, 408 U.S. 238 (1972).

There can be no question that with three jurors in Mr. Walton's case voting in favor of life sentences, there is a very

large risk that the death penalty was improperly imposed because he was not unanimously convicted of capital first degree murder, i.e. first degree murder plus those statutorily defined facts necessary to authorize a judge to impose a death sentence. Indeed, under Chapter 2017-1, the 9-3 death recommendation would constitute an acquittal of capital first degree murder and have precluded the imposition of a death sentence.[38]

There is no valid basis under Art. I, §§ 9, 16, Fla. Const., the Due Process Clause of the Fourteenth Amendment, and the Eighth Amendment for depriving Mr. Walton of that statutorily created substantive right given that is being extended to Card, Parker, Hardwick, Johnson and Armstrong. "Once a State has granted prisoners a liberty interest, [the US Supreme Court has] held that due process protections are necessary 'to insure that the state-created right is not arbitrarily abrogated.'" *Vitek v. Jones*, 445 U.S. at 488-89. *See State v. Robinson*, 873 So. 2d 1205, 1209 (Fla. 2004) ("It is the Due Process Clause that protects the individual against the arbitrary and unreasonable exercise of governmental power.").

Rule 3.851 relief is required. Mr. Walton's death sentences must be vacated and at a minimum, a resentencing ordered.

ARGUMENT III

[38]Even under Chapter 2016-13, the 9-3 death recommendation would constitute an acquittal of capital first degree murder and preclude the imposition of a death sentence.

GIVEN THAT THREE JURORS VOTED IN FAVOR OF LIFE SENTENCES, MR. WALTON'S DEATH SENTENCES STAND IN VIOLATION OF THE EIGHTH AMENDMENT AND MUST BE VACATED.

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." "The Eighth Amendment 'is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.' Weems v. United States, 217 U.S. 349, 378 (1910)." *Hall v. Florida*, 134 S. Ct. 1986, 1992 (2014). What constitutes cruel and unusual punishment under the Eighth Amendment turns upon considerations of the "evolving standards of decency that mark the progress of a maturing society." *Atkins v. Virginia*, 536 U.S. 304, 312 (2002). "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man . . . . The Amendment must draw its meaning from the evolving standards that mark the progress of a maturing society." *Atkins*, 536 U.S. at 311-12 (internal quotation marks omitted). "This is because '[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.' *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C. J., dissenting)." *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008).

Under the US Supreme Court's Eighth Amendment jurisprudence,

whether a particular sentence is "cruel and unusual" depends on the current and prevailing societal norms. The US Supreme Court has looked to the laws enacted by state legislatures as providing the "clearest and most reliable objective evidence of contemporary values." *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989). Of course, "in a democratic society[,] legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." *Gregg v. Georgia*, 428 U.S. 153, 175-176 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (internal quotation marks omitted).

In *Hurst v. State*, 202 So. 3d at 61, concluded that the evolving standards of decency now require jury "unanimity in a recommendation of death in order for death to be considered and imposed." Quoting the US Supreme Court, *Hurst v. State* noted, "the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" *Id.* From a review of the capital sentencing laws throughout the United States, this Court in *Hurst v. State* found that a national consensus reflecting society's evolving standards of decency was apparent:

> The vast majority of capital sentencing laws enacted in this country provide the clearest and most reliable evidence that contemporary values demand a defendant not be put to death except upon the unanimous consent of the jurors who have deliberated upon all the evidence of aggravating factors and mitigating circumstances.

Id. This Court in *Hurst v. State* concluded:

> the United States and Florida Constitutions, as well as the administration of justice, are implemented by requiring unanimity in jury verdicts recommending death as a penalty before such a penalty may be imposed.

Id. at 63. As this Court explained in *Hurst v. State*, the evolving standards of decency are reflected in a national consensus that a defendant can only be given a death sentence when a penalty phase jury has voted unanimously in favor of the imposition of death.

This Court in *Hurst v. State* noted that when it issued on October 14, 2016, Florida was "one of only three [states] that [did] not require a unanimous jury recommendation for death." *Hurst v. State*, 202 So. 3d at 61. In a footnote, this Court noted that as to one of the three states, Delaware, a recent ruling by the Delaware Supreme Court had declared its state statute unconstitutional for failing to require a jury to unanimously find the applicable aggravating circumstances. Since the decision in *Hurst v. State*, Chapter 2017-1 was enacted on March 13, 2017. Pursuant to it, § 921.141 was revised and now requires a jury to return a unanimous death recommendation before a judge is authorized to impose a death sentence.

The third state that did not require a unanimous jury recommendation for death was Alabama. However, legislation was enacted on April 11, 2017, in Alabama to eliminate a judicial override and require the imposition of a life sentence when three

or more jurors voted to favor of recommending a life sentence. Thus, Alabama now remains the only state to not require a jury to unanimously recommend a death sentence before a death sentence is authorized. But with this the recent change in Alabama law, no state permits a death sentence to be imposed when three or more jurors vote in favor of a life recommendation.

In Mr. Walton's case, three jurors voted to recommend life sentences. No state in the country permits the imposition of a death sentence in such circumstances. The imposition of a death sentence when three jurors have formally voted in favor of life sentences clearly violates the societal evolving standards of decency.

In any event, with the enactment of Chapter 2017-1 on march 13, 2017, Florida is no longer an outlier along side Alabama. Florida, like the rest of the nation, now requires the jury to return a unanimous death recommendation before a judge is authorized to impose a death sentence. The national consensus this Court recognized in *Hurst v. State*, now includes Florida. In fact, there is now a statute recognizing a consensus within Florida that when even a single juror votes in favor of a life recommendation, a death sentence cannot be imposed. Mr. Walton's death sentences stand in violation of both the national consensus and the consensus within the State of Florida. Mr. Walton's death sentences violate the evolving standards of decency and

constitute cruel and unusual punishment.

As societal's norms evolve, a sentence that was Eighth Amendment compliant when imposed, may come to constitute cruel and unusual punishment before the sentence has been completed or carried out. "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. There is no grandfather clause that permits States to enforce punishments the Constitution forbids." *Montgomery v. Louisiana*, 136 S. Ct. 718, 731 (2016).

Mr. Walton's death sentences which were imposed despite three jurors voting in favor of life recommendations. Under Chapter 2016-13 which was enacted on March 7, 2016, Florida law no longer permitted the imposition of a death sentence in such circumstances. Then in light of *Hurst v. State* and with the enactment of Chapter 2017-1, Florida law no longer permits death sentences to be imposed if a single juror voted to recommend a life sentence. Florida societal norms have evolved. To carry out an execution of individual whose death sentences were imposed in a manner no longer viewed as acceptable and no longer seen as sufficiently reliable to justify the imposition of the ultimate punishment, violates society's evolving standards of decency. As a result, the death sentences imposed on Mr. Walton violate the Eighth Amendment because they constitute cruel and unusual

punishment.

Mr. Walton's death sentences which were imposed despite three jurors voting for life recommendations can no longer stand. At a minimum, a resentencing must be ordered.

ARGUMENT IV

MR. WALTON'S DEATH SENTENCES VIOLATE THE FLORIDA CONSTITUTION UNDER *HURST V. STATE* AND, THEREFORE, SHOULD BE VACATED.

Since before Florida was admitted into the union as a state, Florida juries have been required to find elements of an offense unanimously. "[T]he requirement was an integral part of all jury trials in the Territory of Florida in 1838." *Bottoson v. Moore*, 833 So. 2d 693, 715 (Fla. 2002) (Shaw, J., concurring). Likewise, the requirement that Florida juries find elements unanimously has been an "inviolate tenet of Florida jurisprudence since the State was created." *Id.* at 714. The Florida Legislature adopted the English common law rule on November 6, 1829 with enactment of Section 775.01 of the Florida Statutes. *See id.* Florida's first Constitutional Convention adopted the right to a jury trial when it proclaimed in Article I of our Declaration of Rights that "the right of trial by jury, shall for ever remain inviolate." Fla. Const. art. I, § 6.

This Court recognized over a century- and-a-half ago that "[t]he common law wisely requires the verdict of a petit jury to be unanimous." *Motion to Call Circuit Judge to Bench*, 8 Fla. 459,

482 (1859). It has held true to that requirement over the years, stating in *Patrick v. Young*, 18 Fla. 50, 50 (Fla. 1881) that "[t]he record of a verdict implies a unanimous consent of the jury, and is conclusive evidence of that fact," and later in *Jones v. State*, 92 So. 2d 261, 261 (Fla. 1956) that "[i]n this state, the verdict of the jury must be unanimous."

The criminal defendant's right to a jury's unanimous verdict reflecting juror unanimity as to the establishment of each element of the criminal offense beyond a reasonable doubt is a substantive right under the Florida Constitution.

In *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), this Court held that in light of *Hurst v. Florida* in order for a death sentence to be authorized under Florida law, the statutorily required and identified facts were in effect elements of the criminal offense, i.e. capital first degree murder. A death sentence was not authorized until a jury returned a verdict finding the defendant guilty and each element of the offense proven by the State beyond a reasonable doubt. Based upon a Florida defendant's substantive right to be convicted of a criminal offense only upon a unanimous jury verdict, this Court held in *Hurst v. State* that the jury must return a unanimous verdict reflecting a unanimous finding of the necessary facts and a unanimous death recommendation before a death sentence was authorized. This unanimity requirement was not derived from *Hurst*

v. Florida itself nor the Sixth Amendment, but from the Florida Constitution, and alternatively from the Eighth Amendment.

As this Court explained in *Hurst v. State* the unanimity requirement arose when the mandate of *Hurst v. Florida* intersected with Florida law: "We reach this holding based on the mandate of *Hurst v. Florida* and on Florida's constitutional right to jury trial, considered in conjunction with our precedent concerning the requirement of jury unanimity as to the elements of a criminal offense." 202 So. 3d at 44. Thus, *Hurst v. State* was broader in scope than *Hurst v. Florida* because the substantive right under the Florida Constitution was found to apply. This was because *Hurst v. Florida* meant the statutory facts necessary to authorize a death sentence were elements of capital murder. The substantive right that a conviction can only be returned by a unanimous jury verdict is contained in the Florida Constitution:

> We are mindful that a plurality of the United States Supreme Court, in a non-capital case, decided that unanimous jury verdicts are not required in all cases under the Sixth Amendment to the United States Constitution. *See Apodaca v. Oregon*, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972) (plurality opinion). **However, this Court, in interpreting the Florida Constitution and the rights afforded to persons within this State, may require more protection be afforded criminal defendants than that mandated by the federal Constitution**. This is especially true, we believe, in cases where, as here, Florida has a longstanding history requiring unanimous jury verdicts as to the elements of a crime.

202 So. 3d at 57 (emphasis added) (footnote omitted).

Hurst v. State issued on October 14, 2016. It delineated a Florida capital defendant's substantive right to a unanimous jury make the statutorily required finding of facts necessary to authorize his death sentence. *See King v. State*, _ So. 3d _, 2017 WL 372081 (Fla. Jan. 26, 2017) (In *Hurst v. State*, [w]e further held that a unanimous jury recommendation is required before a trial court may impose a sentence of death.").

In *McGirth v. State*, _ So. 3d _, 2017 WL 372095 (Fla. Jan. 26, 2017), this Court applied the fundamental constitutional right to a unanimous jury verdict recommending a death sentence retroactively. A resentencing was ordered in *McGirth* "[b]ecause the jury vote was eleven to one". *Id.* The failure to return a unanimous death recommendation could not be found to be harmless beyond a reasonable doubt

In *King v. State*, 2017 WL 372081 at *17, this Court held:

> in *Mosley v. State*, Nos. SC14-436 & SC14-2108, --- So.3d ----, 2016 WL 7406506 (Fla. Dec. 22, 2016), we further held that our decision in *Hurst v. State* applies retroactively to those postconviction defendants whose sentences were final after the United States Supreme Court's 2002 decision in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

Thus, this Court recognized that *Hurst v. State* "has been held to apply retroactively." However, the *Witt* analysis set forth in *Mosley* only analyzed retroactivity in post-*Ring* cases.

In *Hurst v. State*, this Court had explained at length the considerable benefit to the administration of justice that the substantive right to a unanimous death recommendation would provide because it would result in more reliable death sentences:

> In requiring jury unanimity in these findings and in its final recommendation if death is to be imposed, we are cognizant of significant benefits that will further the administration of justice. Supreme Court Justice Anthony Kennedy, while a judge on the Ninth Circuit Court of Appeals, noted the salutary benefits of the unanimity requirement on jury deliberations as follows:
>
> > The dynamics of the jury process are such that often only one or two members express doubt as to [the] view held by a majority at the outset of deliberations. A rule which insists on unanimity furthers the deliberative process by requiring the minority view to be examined and, if possible, accepted or rejected by the entire jury. The requirement of jury unanimity thus has a precise effect on the fact-finding process, one which **gives particular significance and conclusiveness to the jury's verdict**.
>
> *United States v. Lopez*, 581 F.2d 1338, 1341 (9th Cir.1978). That court further noted that "**[b]oth the defendant and society can place special confidence in a unanimous verdict.**" *Id.* Comparing the unanimous jury requirement to the requirement for proof beyond a reasonable doubt, the Fifth Circuit Court of Appeals stated, "**the unanimous jury requirement 'impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.' **" *United States v. Gipson*, 553 F.2d 453, 457 (5th Cir.1977).

202 So. 3d at 58-59 (emphasis added). Thus, the ruling that the Florida Constitution required juror unanimity when returning a death recommendation was bottomed on enhanced reliability and confidence in the result. *Id.* at 59 (explaining juror unanimity

"will help to ensure the heightened level of protection necessary for a defendant who stands to lose his life as a penalty").[39]

The enhanced reliability afforded by the fundamental right to a unanimous death recommendation must be applied retroactively under the Eighth Amendment and its requirement that death sentences have a special need for reliability. *Johnson v. Mississippi*, 486 U.S. at 584-85. For this reason, the Eighth Amendment requires *Hurst v. State* to be applied in Mr. Walton's case. Under *Hurst v. State*, Mr. Walton's death sentence cannot stand, At a minimum, a resentencing is required.

ARGUMENT V

THE RETROACTIVITY RULINGS IN *ASAY v. STATE* AND *MOSLEY v. STATE* THAT SEEMINGLY PERMIT PARTIAL RETROACTIVITY OF NEW LAW IN DEATH PENALTY PROCEEDINGS INJECTS ARBITRARINESS INTO THE FLORIDA'S CAPITAL SENTENCING SCHEME THAT VIOLATES THE EIGHTH AMENDMENT PRINCIPLES OF *FURMAN V. GEORGIA*.

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[39]In *Hurst v. State*, the Florida Supreme Court observed that studies comparing majority rule juries to those required to return a unanimous verdict showed enhanced reliability in unanimous verdicts. 202 So. 2d at 58 (" it has been found based on data that 'behavior in juries asked to reach a unanimous verdict **is more thorough** and grave than in majority-rule juries, and that the former were more likely than the latter jurors to agree on the issues underlying their verdict. Majority jurors had a relatively negative view of their fellow jurors' openmindedness and persuasiveness.'") (emphasis added); *Id.* ("juries not required to reach unanimity **tend to take less time deliberating and cease deliberating** when the required majority vote is achieved rather than attempting to obtain full consensus; and jurors operating under majority rule **express less confidence in the justness of their decisions.**") (emphasis added).

In *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972), the US Supreme Court found that the death penalty "could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976); *see also Furman*, 408 U.S. at 239-40. Because of the recognition that "the penalty of death is qualitatively different from a sentence of imprisonment, however long * * * there is a corresponding difference in the need for reliability" in capital cases. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (finding there is a "qualitative difference" between death and other penalties requiring "a greater degree of reliability when the death sentence is imposed"); *Gregg v. Georgia*, 428 U.S. 153, 187–88 (1976) (stating that "death is different in kind" and as a punishment is "unique in its severity and irrevocability").

In *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014), the US Supreme Court found that Florida's procedure for determining intellectual disability was inadequate to reliably insure that an intellectually disabled defendant was not executed. "A State that ignores the inherent imprecision of these tests risks executing a person who suffers from intellectual disability." *Id.* at 2001. Because Florida ignored that inherent imprecision, the Supreme Court found that "Florida's rule is invalid under the

Constitution's Cruel and Unusual Punishments Clause." *Id.* The Supreme Court explained: "The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution. Florida's law contravenes our Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world."

The heightened need for reliability in capital proceedings process was recognized by this Court when in 1999 when it adopted minimum standards for attorneys in capital cases. *See* Fla. R. Crim. P. 3.112.[40] In *Arbelaez v. Butterworth*, 738 So. 2d 326, 326-27 (Fla. 1999), this Court noted the Eighth Amendment need to insure a fair capital process that operated in a reliable manner:

> We acknowledge we have a constitutional responsibility to ensure **the death penalty is administered in a fair, consistent and reliable manner**, as well as having an administrative responsibility to work to minimize the delays inherent in the postconviction process.

(emphasis added). In *Allen v. Butterworth*, 756 So. 2d 52, 67 (Fla. 2000), this Court explained that competent representation

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[40]When issuing Rule 3.112, this Court explained that the minimum standards were: "an important step in ensuring the integrity of the judicial process in capital cases by adopting a rule of criminal procedure to help **ensure that competent representation will be provided to indigent capital defendants in all cases**." *In re Amendment to Fla. Rules of Crim. Pro.*, 759 So. 2d 610, 611 (Fla. 1999) (emphasis added). It further noted: "This Court has a continuing obligation to ensure the integrity of the judicial process in all cases. **Our overview is especially important in death penalty cases**." *Id.* at 612.

by collateral counsel was critical and necessary in order to insure reliability in capital cases:

> **A reliable system of justice** depends on adequate funding at all levels. * * * It is critical that this state provides for adequately funded and trained public defenders, conflict counsel, and CCR and registry counsel, **as these are vital to the reliability** and efficiency of the trial, appellate, and postconviction process.

(emphasis added) (footnotes omitted). In *Fla. Dep't of Financial Services v. Freeman*, 921 So. 2d 598 (Fla. 2006), Justice Pariente wrote in a specially concurring opinion: "**the credibility of our death penalty** system depends in large part on **the quality of the attorneys** who undertake the representation." 921 So. 2d at 604 (emphasis added). Justices Anstead and Cantero concurred.

When *Asay v. State*, 210 So. 3d 1 (Fla. 2016), and *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), issued, this Court failed to honor the binary nature of retroactivity under *Witt v. State*, 387 So. 2d 922 (1980). The binary nature of *Witt* was not followed, and no explanation was offered in either *Asay* or *Mosley*. However, the dissenting opinions in both cases revealed five of this Court's seven justices did not agree with the resulting partial retroactivity. *See Mosley v. State*, 209 so. 3d at 1291 (Canady, J., dissenting, joined by Polston, J.) ("Based on an indefensible misreading of Hurst v. Florida and **a retroactivity analysis that leaves the *Witt* framework in tatters**, the majority unjustifiably plunges the administration of the death penalty in Florida into

turmoil that will undoubtedly extend for years.") (emphasis added); *See Asay*, 210 So. 3d at 31 (Lewis, J., concurring in result) ("As Justice Perry noted in his dissent, there is no salient difference between June 23 and June 24, 2002—the days before and after the case name *Ring* arrived. *See* Perry, J., dissenting op. at 58. However, that is where the majority opinion **draws its determinative, albeit arbitrary, line**. As a result, Florida will treat similarly situated defendants differently—here, the difference between life and death—for potentially the simple reason of one defendant's docket delay.") (emphasis added); *Id*. at 36 (Pariente, J., concurring in part, dissenting in part) ("The majority's conclusion results in an unintended **arbitrariness** as to who receives relief depending on when the defendant was sentenced or, in some cases, resentenced.") (emphasis added); *Id*. at 37 (Perry, J., dissenting) ("In my opinion, the line drawn by the majority is **arbitrary and cannot withstand scrutiny under the Eighth Amendment** because it creates an arbitrary application of law to two groups of similarly situated persons.") (emphasis added).

The repudiation of a binary approach to retroactivity set forth in *Witt* was also a repudiation of the *Stoval/Linkletter* standard that was adopted in *Witt*. It left the retroactivity standard without an objective principled basis, but instead rests

upon some variable subjective standard of two justices.[41]

The decisions in *Asay* and *Mosley* opened the door and invited arbitrariness inside to infect Florida's death penalty system and render it in violation of the Eighth Amendment.[42] *See Desist v. United States*, 394 U.S. 244, 258-259 (1969) (Harlan, J., dissenting) ("[W]hen another similarly situated defendant comes before us, we must grant the same relief or give a principled reason for acting differently. We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a 'new' rule of constitutional law."). When Florida ignored the inherent imprecision in testing for intellectual disability, the Supreme Court found that "Florida's rule is invalid under the Constitution's Cruel and Unusual Punishments Clause." *Hall v. Florida*, 134 S. Ct. at 2001. In abandoning the binary approach to retroactivity, the court has embraced similar imprecision as created mechanical rules that arbitrarily draw lines based on

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[41]An analysis of the *Asay* and *Mosley* opinions, reveals only two justices of this Court supported partial retroactivity.

[42]In *Witt v. State*, 387 So. 2d 922, 926 (Fla. 1980), this Court noted the Eighth Amendment required extra weight to be given to "individual fairness because of the possible imposition of a penalty as unredeeming as death." In a footnote, the Florida Supreme Court wrote: "It bears mention that **the constitutionality of Florida's capital sentencing procedures**, s 921.141, Florida Statutes (1979), **is contingent upon this Court's role of reviewing each case to ensure uniformity in the imposition of the death penalty**." *Id.* at 926 n.7 (emphasis added).

dates and times have nothing to do with reliability and/or fairness. As five justices of this Court recognized, the new approach to retroactivity insures an unreliable and arbitrary death penalty system, i.e. a walking violation of the Eighth Amendment. *See Johnson v. Mississippi*, 486 U.S. at 584-85 ("Although we have acknowledged that 'there can be "no perfect procedure for deciding in which cases governmental authority should be used to impose death,"' we have also made it clear that such decisions cannot be predicated on mere 'caprice' **or on 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process**.'") (emphasis added).

As a result, Mr, Walton's death sentences are infected by the arbitrary and standardless manner in which this Court backed into partial retroactivity. The Eighth Amendment requires all capital defendants to be treated the same and receive full retroactivity of *Hurst v. State* and *Hurst v. Florida*.

CONCLUSION

In light of the foregoing arguments, this Court must vacate Mr. Walton's death sentences and at a minimum order a resentencing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by email, to Timothy A Freeland, Assistant Attorney General, Office of the Attorney General, at his primary email

address: Timothy.Freeland@myfloridalegal.com on May 15, 2017.

CERTIFICATE OF COMPLIANCE

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

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