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IN THE SUPREME COURT OF FLORIDA
CASE NO. SC16-729

EDWARD J. ZAKRZEWSKI.,

Petitioner,

v.

JULIE L. JONES,

Secretary, Florida Department of Corrections,

Respondent.

PETITIONER'S REPLY TO STATE'S RESPONSE TO AMENDED PETITION FOR WRIT OF HABEAS CORPUS

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JURISDICTION TO CONSIDER PETITION

On April 21, 2017, Respondent submitted her response to a habeas petition filed in this Court by Noel Doorbal. *See Doorbal v. Jones*, Case No. SC17-349. In *Doorbal v. Jones*, Respondent took a position not taken in her response to Mr. Zakrzewski's habeas petition, a response filed on March 21, 2017. Because the assertions made by Respondent in *Doorbal v. Jones* apply equally to Mr. Zakrzewski and raise the question regarding this Court's jurisdiction over Mr. Zakrzewski's habeas petition given the assertion it is not authorized and the claim presented is not cognizable in a habeas proceeding, Mr. Zakrzewski believes he is obligated to raise the matter.[1]

Doorbal filed a habeas petition on March 2, 2017, arguing that he was entitled to the retroactive benefit of *Hurst v. Florida*, 136 S. Ct. 616 (2016), and that as a result his death sentences which were final on June 27, 2003, could not stand. *See Doorbal v. State*, 837 So. 2d 940 (Fla. 2003), *cert denied*, 539 U.S. 962

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[1] *Edwards v. State*, 128 So. 3d 134, 136 (Fla. 1st DCA 2013) ("Normally, a claim that the trial court lacked subject matter jurisdiction can be raised at any time."); *Young v. State*, 439 So. 2d 306, 308 (Fla. 5th DCA 1983) ("When a court lacks subject matter jurisdiction it has no power to decide the case and any judgment entered is absolutely null and void, can be set aside and stricken from the record on motion at any time and may be collaterally attacked. *Malone v. Meres*, 91 Fla. 709, 109 So. 677 (1926)."). *See Waggy v. State*, 935 So. 2d 571, 573 (Fla. 1st DCA 2006).

(2003). In her *Doorbal* response, Respondent asserted that this Court did not have jurisdiction to entertain the habeas petition because it was not authorized:

> The plain language of Rules 3.851 requires the dismissal of Petitioner's successive habeas petition. Rule 3.851(d)(3) requires that *all* petitions for writ of habeas corpus be filed simultaneously with the initial brief on appeal from the circuit court's order on the Petitioner's *initial* motion for postconviction relief. The rule makes no provision for successive habeas corpus petitions filed long after the appeal on a Petitioner's initial motion for postconviction relief, and Petitioner's successive habeas petition must be dismissed as untimely and unauthorized. *Mann v. Moore*, 794 So. 2d 595, 598 (Fla. 2001), *cert. denied*, 536 U.S. 962 (2002).

Doorbal v. Jones, Case No. SC17-349, Response at 11. While Respondent does call the *Doorbal* habeas petition "untimely and unauthorized," in context it is clear that Respondent's position there is that a habeas petition cannot be filed after the initial brief in a 3.851 appeal has been filed. After the initial brief in the 3.851 appeal has been filed, Respondent's position in *Doorbal* is that a habeas petition is not authorized and cannot be entertained.

Respondent then asserts that not only can a habeas petition not be filed after the time for the initial brief in a 3.851 appeal has been filed, but also claims that can be raised on direct appeal or in a Rule 3.851 motion are not cognizable in a habeas petition in any event:

> In addition, as this Court has recognized, claims that are cognizable on direct appeal or in a motion for postconviction relief are not

> cognizable in habeas petitions. *See Smith v. State*, 126 So. 3d 1038, 1053 (Fla. 2013); *Wright v. State*, 857 So. 2d 861, 874 (Fla. 2003). As a result, this Court has held that claims regarding the constitutionality of Florida's capital sentencing scheme are not cognizable in habeas petitions. *Smith*, 126 So. 3d at 1053. Moreover, this Court has stated that claims seeking retroactive application of a change in constitutional law should be raised in postconviction motions. *See Hall v. State*, 541 So. 2d 1125, 1128 (Fla. 1989). The right to habeas relief, "like any other constitutional right, is subject to certain reasonable limitations consistent with the full and fair exercise of the right." *Haag v. State*, 591 So. 2d 614, 616 (Fla. 1992). Habeas corpus is not a substitute for an appropriate motion for postconviction relief in the trial court, and is not "a means to circumvent the limitations provided in the rule for seeking collateral postconviction relief" in the original trial court. *Baker v. State*, 878 So. 2d 1236 (Fla. 2004).

Doorbal v. Jones, Case No. SC17-349, Response at 12. The *Doorbal* response then observes that Doorbal is not without a means for seeking judicial relief because Rule 3.851(d)(2), Fla.R.Crim.P., allows a successive 3.851 motion based on newly discovered evidence or on a fundamental constitutional right held to apply retroactively. *Doorbal v. Jones*, Case No. SC17-349, Response at 13.

If Mr. Zakrzewski's habeas petition is unauthorized and the *Hurst v. Florida* claim presented in it is not cognizable in a habeas proceeding before this Court, it certainly sounds like that means that this Court lacks subject matter jurisdiction. If that is true, Mr. Zakrzewski needs to know.[2] Mr. Zakrzewski did file a Rule 3.851

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[2]It is a mystery why Respondent would assert this in *Doorbal v. Jones*, but not in response to Mr. Zakrzewski's habeas petition. But to further confuse the issue, on March 22, 2017, the State filed the State's Motion To Dismiss For Lack

motion on January 12, 2017. In that motion, Mr. Zakrzewski did present a claim premised upon *Hurst v. Florida* and this Court's decisions in *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), and *Asay v. State*, 210 So. 3d 1 (Fla. 2016). The latter decisions issued after Mr. Zakrzewski had originally initiated this habeas proceeding. In the Rule 3.851 motion, Mr. Zakrzewski also presented a claim based upon the right to a unanimous death recommendation under the Florida Constitution which was recognized in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), and alternatively an Eighth Amendment right to a unanimous death recommendation. He also presented a claim under *Furman v. Georgia* that to the extent that *Mosley* and *Asay* drew an arbitrary line as to the retroactivity of *Hurst v. Florida*, it has left his death sentences standing in violation of the Eighth Amendment. Mr. Zakrzewski has also sought to amend the Rule 3.851 motion on the basis of the enactment of Chapter 2017-1.

Because Mr. Zakrzewski wants to present evidence regarding the impact of

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Of Jurisdiction in the circuit court. The motion argued that the circuit court lacked jurisdiction to entertain Mr. Zakrzewski's Rule 3.851 motion because, according to the State, Mr. Zakrzewski's petition for a writ of habeas corpus now pending before this Court divests the circuit court of jurisdiction over a Rule 3.851 motion. The State's motion to dismiss cited no authority for its argument that the pendency of habeas petition in this Court deprived a circuit court of jurisdiction to hear a Rule 3.851 motion. Of course, the State's motion to dismiss Mr. Zakrzewski's Rule 3.851 motion in circuit court is entirely inconsistent with the response that Respondent filed in *Doorbal v. Jones*.

these various changes in Florida law would have on the manner defense counsel would investigate and present the defense at the penalty phase, he concluded that he was required to plead the claims in a Rule 3.851 motion on the basis of this Court's decision in *Hall v. State*, 541 So. 2d 1125 (Fla. 1989).[3] Since Mr. Zakrzewski does wish to be able to present extra-record evidence as needed on his claims, he has asked this Court to hold his habeas petition in abeyance while his Rule 3.851 motion is heard in circuit court. However, this Court has denied his request. And instead, the circuit court on April 21, 2017, issued an order denying the State's motion to dismiss for lack of jurisdiction, but otherwise holding the Rule 3.851 proceedings in abeyance while this Court considers the narrow single *Hurst v. Florida* issue Mr. Zakrzewski has pled in his amended habeas petition. *See* Attachment.

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[3]The ruling in *Hall v. State* is explained by the circumstances. Freddie Hall first presented his *Hitchcock v. Dugger* claim in a habeas petition. This Court ruled that the *Hitchcock* error was harmless. *Hall v. Dugger*, 531 So. 2d 76 (Fla. 1988). Later, Hall re-presented his *Hitchcock* claim in a Rule 3.850 motion and argued that the unconstitutional law's chilling effect on his trial counsel's investigation and presentation of mitigating evidence demonstrated that the *Hitchcock* error was in fact not harmless. On the basis of the additional extra-record evidence of the prejudice to Hall, this Court vacated his death sentence and ordered a new penalty phase. *Hall v. State*, 541 So. 2d at 1126 ("This case involves significant additional non-record facts which were not considered in *Hall VI* because that was a habeas corpus proceeding with no further development of evidence beyond the record. In this case, however, we are aided by the trial court's findings of fact at the rule 3.850 hearing.").

While Mr. Zakrzewski does not agree with Respondent's arguments in *Doorbal v. Jones*, he did feel obligated to alert this Court to Respondent's position, particularly since it seems to assert that this Court lacks subject matter jurisdiction. Certainly, this Court did grant habeas relief on a *Hurst v. Florida* claim in *Brooks v. Jones*, 2017 WL 944235 (Fla. March 10, 2017).

Mr. Zakrzewski does still believe that judicial economy would best be served by holding the habeas proceeding in abeyance while the Rule 3.851 motion is heard first by the circuit court. *See Scott v. Dugger*, 604 So. 2d 465, 467 (Fla. 1992) ("The circuit court granted a stay of execution, and this Court granted Scott's motion to hold the habeas proceedings in abeyance during the pendency of the 3.850 proceedings in circuit court.").

REPLY TO RESPONSE

CLAIM I

ZAKRZEWSKI'S DEATH SENTENCES VIOLATE THE SIXTH AMENDMENT UNDER *HURST V. FLORIDA*.

A. Facts and Procedural History.

Respondent includes a section in her Response that is captioned: "Facts and Procedural History." Almost the entirety of this section of the Response is block quotes from this Court's 2003 opinion denying Mr. Zakrzewski's collateral appeal.

Respondent introduces a block quote from this Court's 2003 opinion by stating: "This Court also denied petitioner's *Ring* claim, added to his *Apprendi* claim in his appeal." Response at 5. Thereupon, Respondent includes this block quote from the 2003 opinion denying Mr. Zakrzewski's *Ring* claim on the merits:

> In his last issue on appeal, Zakrzewski argues that Florida's death penalty statute, section 921.141, Florida Statutes (2002), is unconstitutional pursuant to *Apprendi v. New Jersey* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). In *Bottoson v. Moore*, 833 So.2d 693 (Fla.), *cert. denied*, 537 U.S. 1070, 123 S.Ct. 662, 154 L.Ed.2d 564 (2002), and *King v. Moore*, 831 So.2d 143 (Fla.), *cert. denied*, 537 U.S. 1067, 123 S.Ct. 657, 154 L.Ed.2d 556 (2002), this Court denied relief under *Ring*. Subsequently, this Court has rejected postconviction challenges to section 921.141 based on *Apprendi* and *Ring*. *See, e.g., Wright v. State*, 857 So.2d 861, 867 (Fla. 2003); *Jones v. State*, 855 So.2d 611, 616 (Fla.2003); *Chandler v. State*, 848 So.2d 1031, 1034 n. 4 (Fla.2003).
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> In addition, Zakrzewski's guilty pleas in this case are equivalent to convictions on three counts of first-degree murder. *See Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) ("A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment."). **Thus, the prior violent felony or capital felony conviction aggravator exempts this case from the requirement of jury findings on any fact necessary to render a defendant eligible for the death penalty. *See Duest v. State*, 855 So.2d 33, 52 (Fla.2003); *see also Doorbal v. State*, 837 So.2d 940, 963 (Fla.)** (stating that prior violent felony aggravator based on contemporaneous crimes charged by indictment and on which defendant was found guilty by unanimous jury "clearly satisfies the mandates of the United States and Florida Constitutions"), *cert denied*, 539 U.S. 962, 123 S.Ct. 2647, 156

L.Ed.2d 663 (2003).

Zakrzewski v. State, 866 So. 2d 688, 696-97 (Fla. 2003) (emphasis added).

This passage from this Court's 2003 opinion denying Mr. Zakrzewski's collateral appeal which was quoted by Respondent clearly demonstrates that this Court denied Mr. Zakrzewski's claim on the merits on November 13, 2003, well after *Ring v. Arizona* issued on June 24, 2002. This Court specifically relied upon its denial of post-*Ring* direct appeals in *Duest v. State*, 855 So. 2d 33 (Fla. 2003), and *Doorbal v. State*, 837 So. 2d 940 (Fla. 2003).

While quoting this Court's 2003 denial of Mr. Zakrzewski's *Ring* claim on the merits, Respondent ignores the fact that this Court in *Hurst v. State*, 202 So. 3d at 62, stated:

> When the Supreme Court decided *Hurst v. Florida* and finally applied *Ring* to capital sentencing in Florida, it invalidated a portion of Florida's capital sentencing scheme. Since the issuance of *Ring* almost fifteen years ago, **many death row inmates have raised *Ring* claims in this Court and have been repeatedly rebuffed** based on pre-*Ring* precedent that held the jury was not required to make the critical findings necessary for imposition of the death penalty.

(Emphasis added). Mr. Zakrzewski was one of those individuals who raised a *Ring* claim and lost on the merits.

In *Mosley v. State*, 209 So. 3d at 1280, this Court stated: "Because Florida's capital sentencing statute has essentially been unconstitutional since *Ring* in 2002,

fairness strongly favors applying *Hurst*, retroactively to that time." Later in that opinion, this Court wrote: "Holding *Hurst* retroactive to when the United States Supreme Court decided *Ring* would not destroy the stability of the law, nor would it render punishments uncertain and ineffectual." *Mosley v. State*, 209 So. 3d at 1281.

Thus, this Court in *Mosley* decided to treat *Hurst v. Florida* as the law in Florida at least back to June 24, 2002. Therefore, this Court's direct appeal decisions in *Duest* and *Doorbal* were wrong decided. Indeed, the decision in *Anderson v. State*, 841 So. 2d 390, 409 (Fla. 2003), which issued January 16, 2003, has been recognized as wrongly decided. *See Anderson v. State*, _So. 3d _, 2017 WL 930924 (Fla. March 9, 2017). This Court's denial of Mr. Zakrzewski's *Ring* claim on the merits issued November 13, 2003, ten months after *Anderson v. State* issued, nine and a half months after *Doorbal v. State* issued, and five months after *Duest v. State* issued. If *Hurst v. Florida* is being treated as the law at the time those decisions issued rejecting the *Ring* claims raised in those appeals on the merits, and *Duest* and *Doorbal* were cited as authority for the denial of Mr. Zakrzewski's *Ring* claim, the denial of Mr. Zakrzewski's *Ring* claim cannot stand.

To the extent that the 2003 denial of Mr. Zakrzewski's *Ring* claim is law of the case, it should be set aside as this Court recently explained when addressing

the retroactivity of *Hall v. Florida* in *Thompson v. State*, 208 So. 3d 49 (Fla. 2016). There, this Court noted a manifest injustice exception to the law of the case doctrine:

> Not only have we determined that *Hall* is retroactive utilizing a *Witt* analysis, *Walls v. State*, 2016 WL 6137287 (Fla. Oct. 20, 2016), but to fail to give Thompson the benefit of *Hall*, which disapproved of *Cherry*, would result in a manifest injustice, which is an exception to the law of the case doctrine. *See State v. Owen*, 696 So.2d 715, 720 (Fla.1997) ("[t]his 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" and that "[a]n intervening decision by a higher court is one of the exceptional situations that this Court will consider when entertaining a request to modify the law of the case").

2016 WL 6649950 at *1. *Thompson* thus stands for the proposition that retroactive application of a new decision may be warranted when necessary to avoid "manifest injustice." For this Court to acknowledge that *Anderson*, *Doorbal* and *Duest* erroneously rebuffed *Ring* claims on the merits and apply *Hurst v. Florida* as the governing Florida law back to June 24, 2002, but refuse to acknowledge that the November 13, 2003 rejection of Mr. Zakrzewski's *Ring* claim was also erroneous is manifestly unjust. Given Respondent's recognition that Mr. Zakrzewski's *Ring* claim was denied on the merits, under the manifest injustice exception to the law of the case doctrine set forth in *Thompson v. State*, this

Court's erroneous ruling denying Mr. Zakrzewski's *Ring* claim should be corrected. Habeas relief should issue.

B. Respondent's Arguments in Opposition.

Citing *Asay v. State*, Respondent asserts that "[t]his Court subsequently held that any case in which the death sentence was final before *Ring* was decided would not receive relief based on *Hurst*." Response at 7. Actually, this Court did not actually state that in *Asay v. State*. Certainly, Chief Justice Labarga's concurrence suggested there may be exceptions as did Justice Lewis's concurrence. And this Court's decision in *Mosley v. State* also indicated that there may be exceptions when fundamental fairness warranted.[4]

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[4]Respondent cites *Gaskin v. State*, _ So. 3d _, 2017 WL 224772 (Fla. Jan. 19, 2017), as establishing that no pre-*Ring* case was entitled to *Hurst v. Florida* relief. However, this Court held in *Gaskin* that Gaskin was not entitled to *Hurst v. Florida* relief. As this Court's docket shows, Gaskin made no arguments to this Court after *Hurst v. Florida* issued as to why he was entitled to the retroactive benefit of *Hurst v. Florida*. He did not make a fundamental fairness argument under *Mosley v. State* as to why he should he get the benefit of *Hurst v. Florida*. The law is pretty clear that issues that are not raised by a party in a case and subjected to the adversarial process are not before a court to decide. *State v. Simpson*, 554 So. 2d 506, 510 n.5 (Fla. 1989) ("After the relevant events of this case occurred, the legislature has changed the standard of proof from clear and convincing to a preponderance of the evidence. Ch. 87-110, Laws of Florida. The parties have not briefed this issue and we thus do not address any matter associated with the enactment of chapter 87-110."); *Arab Termite and Pest Control of Florida, Inc. V. Jenkins*, 409 So. 2d 1039, 1043 (Fla. 1982) ("The parties have not briefed [whether the trial court's decision was affirmatively supported by the record or by the findings in the judge's order]. We therefore

Zakrzewski's death sentences are undoubtedly unconstitutional under *Hurst v. Florida*, 136 S. Ct. 616 (2016). His jury voted 7 to 5 for two death recommendations and 6 to 6 for one life recommendation. "Because the jury recommended the death penalty by a vote of ten to two, we conclude that McMillian's death sentence violates *Hurst* [*v. Florida*]." *McMillian v. State*, ___ So. 3d ___, slip op. at 23 (Fla. April 13, 2017). "Because Kopsho was condemned to death by a vote of ten to two, we find that Kopsho's sentence is the result of a *Hurst v. Florida* error." *Kopsho v. State*, 209 So. 3d 568, 570 (Fla. 2017).

The question here, then, is whether Zakrzewski is entitled to the retroactive benefit of *Hurst v. Florida*. Respondent says no, contending that this Court's plurality opinion in *Asay v. State*, 210 So. 3d 1 (Fla. 2016), categorically bars Zakrzewski from obtaining the retroactive benefit of *Hurst v. Florida* because his convictions and sentences were final before the decision in *Ring v. Arizona*, 536 U.S. 583 (2002) (Response at 7, 11-12). Respondent then argues that the fundamental fairness retroactivity doctrine also provides Zakrzewski no relief, and, although Zakrzewski stands to lose his life, ultimately insists that

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remand the case to the district court to prove the appropriate appellate review."); *Ervin v. Taylor*, 66 So. 2d 816, 817 (Fla. 1953) ("We do not sanction the procedure recognized by the chancellor. The complaint was a mere petition to the court to pass upon the validity of an act of the legislature. There were no adversaries, and being none, there was no actual controversy.").

Zakrzewski's "fairness argument pales against the interests of the State" (Response at 11).

Fairness is the linchpin of any retroactivity analysis, as this Court explained in *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016):

> Applying *Hurst* retroactively to Mosley, in light of the rights guaranteed by the United States and Florida Constitutions, supports basic tenets of fundamental fairness. And it is fundamental fairness that underlies the reasons for retroactivity of certain constitutionally important decisions, especially those involving the death penalty.

Id. at 1283. However, "fairness" does not describe this Court's decisions in *Asay* and *Mosley*, where the Court arbitrarily drew a line between those death cases were final before and after *Ring*. Nothing distinguishes these two groups from one another except this arbitrary line. Certainly, Asay was not representative of all those with final death sentences before *Ring* issued. Members of both groups were sentenced to death under the same unconstitutional sentencing statute, and this Court affirmed their death sentences on direct appeal.

In *Griffith v. Kentucky*, 479 U.S. 314 (1987), the United States Supreme Court explained how fairness applies when considering the retroactivity of a decision. While *Griffith* specifically concluded all cases pending on direct appeal should receive the benefit of new law issued while the direct appeal was pending, the overriding principle of the opinion was an all or nothing approach to

retroactivity to insure that justice would be administered with an even hand:

> James Kirkland Batson, the petitioner in Batson v. Kentucky, and Randall Lamont Griffith, the petitioner in the present Kentucky case, were tried in Jefferson Circuit Court approximately three months apart. The same prosecutor exercised peremptory challenges at the trials. It was solely the fortuities of the judicial process that determined the case this Court chose initially to hear on plenary review. Justice POWELL has pointed out that it "hardly comports with the ideal of 'administration of justice with an even hand,' " when "one chance beneficiary-the lucky individual whose case was chosen as the occasion for announcing the new principle-enjoys retroactive application, while others similarly situated have their claims adjudicated under the old doctrine." Hankerson v. North Carolina, 432 U.S. 233, 247, 97 S.Ct. 2339, 2347, 53 L.Ed.2d 306 (1977) (opinion concurring in judgment), quoting Desist v. United States, 394 U.S., at 255, 89 S.Ct., at 1037 (Douglas, J., dissenting). See also Michigan v. Payne, 412 U.S. 47, 60, 93 S.Ct. 1966, 1973, 36 L.Ed.2d 736 (1973) (MARSHALL, J., dissenting) ("Different treatment of two cases is justified under our Constitution only when the cases differ in some respect relevant to the different treatment"). The fact that the new rule may constitute a clear break with the past has no bearing on the "actual inequity that results" when only one of many similarly situated defendants receives the benefit of the new rule. United States v. Johnson, 457 U.S., at 556, n. 16, 102 S.Ct., at 2590, n. 16 (emphasis omitted).
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> We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a "clear break" with the past.

Griffith, 479 U.S. at 327-28 (emphasis added). "[S]elective application of new rules violates the principle of treating similarly situated defendants the same." *Id.* at 323.

In *Witt v. State*, 387 So. 2d 922 (Fla. 1980), this Court adopted the retroactivity analysis set forth in *Stoval v. Denno*, 388 U.S. 293 (1967), and *Linkletter v. Walker*, 381 U.S. 618 (1965). The binary nature of the *Stoval/ Linkletter* analysis is clear on the face of those opinions.[5] This Court's abandonment of the binary foundation of *Witt v. State* violated the due process basis of *Griffith v. Kentucky*. This Court's action has been made all the more problematic by its failure to actually address whether it is constitutionally permissible to drop this aspect of *Witt v. State*, and *Stoval/ Linkletter*. This Court has failed to provide a principled basis for this change in the manner in which the *Witt* analysis is conducted.

Griffith shows that drawing a line such as the one this Court drew in *Asay*

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[5]*Stoval*, 388 U.S. at 294 ("This case therefore provides a vehicle for deciding the extent to which the rules announced in *Wade* and *Gilbert*—requiring the exclusion of identification evidence which is tainted by exhibiting the accused to identifying witnesses before trial in the absence of his counsel—are to be applied retroactively."); *Linkletter*, 381 U.S. at 622 ("we are concerned only with whether the exclusionary principle enunciated in *Mapp* applies to state court convictions which had become final before rendition of our opinion."). *See Johnson v. New Jersey*, 384 U.S. 719, 728 (1966) ("**the retroactivity or nonretroactivity** of a rule is not automatically determined by the provision of the Constitution on which the dictate is based.") (emphasis added); *Tehan v. U.S. ex rel. Shott*, 382 U.S. 406, 409 (1966) ("The *Linkletter* opinion reviewed in some detail the competing conceptual and jurisprudential theories bearing on the problem of **whether a judicial decision that overturns previously established law is to be given retroactive or only prospective application**.") (emphasis added).

and *Mosley* produces an intolerable inequity which is unfair and therefore untenable. All capital defendants sentenced to death before *Hurst v. Florida* are similarly situated. In fact, this Court has attached the Sixth Amendment right announced in *Hurst v. Florida* to convictions that were final many years before *Ring v. Arizona* issued. *See, e.g., Johnson v. State*, ___ So. 3d ___, 2016 WL 7013856 (Fla. Dec. 1, 2016) (murder convictions final in 1993); *Armstrong v. State*, ___ So. 3d ___, 2017 WL 224428 *1 (Fla. Jan. 19, 2017) (murder conviction final in 1995). Granting an individual with a conviction final in 1993 the benefit of *Hurst v. Florida* because a direct appeal from a resentencing was pending in 2016 when *Hurst v. Florida* was decided is attaching the constitutional right to a first degree murder conviction final in 1993.

When this Court issued *Asay v. State* on December 22, 2016, the Court also issued its decision in *Mosley v. State*. Without either decision deciding that partial retroactivity was permissible under *Witt v. State* or the *Stoval/Linkletter* analysis *Witt* was derived from, this Court by the separate results in *Asay* and *Mosley* made *Hurst v. Florida* partially retroactive. None of the parties to *Asay* and *Mosley* advocated for partial retroactivity. Because this Court did not address partial retroactivity head on in either *Asay* or *Mosley*, it is clear that partial retroactivity resulted not from any overriding judicial principle, but instead from the ad hoc

decisions in those two cases.

A review of the various concurring and dissenting opinions in *Asay* and *Mosley* show that a clear majority of this Court did not view partial retroactivity as legitimate under *Witt*. When both *Asay* and *Mosley* are analyzed together, five justices of this Court complained that the Court through the two ad hoc rulings had injected unacceptable arbitrariness into Florida's capital sentencing process and/or destroyed the basic character of *Witt*. This means that who gets the benefit of *Hurst v. Florida* and 3.851 relief and who does not and gets executed is the product of ad hoc rulings in *Asay* and *Mosley* which were not based upon an overriding judicial principle and not consistent with the view of a majority of this Court that *Witt* does not provide for partial retroactivity. It was, and at least had been, binary in nature. The ad hoc results in *Asay* and *Mosley* were reached when two justices, Chief Justice Labarga and Justice Quince, joined the plurality opinion in *Asay* denying retroactivity under *Witt* as to Asay, and then joined the per curium opinion in *Mosley* finding *Hurst v. Florida* retroactive under *Witt* as to Mosley.

The ad hoc line drawing that resulted must of course be arbitrary, as ad hoc rulings are by definition, and do not comport with *Witt*. *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 33 (Pariente, J., concurring in part, dissenting in part) ("a faithful application of the *Witt* test for retroactivity compels full retroactivity of *Hurst*."); *Id*. at 37 (Perry, J., dissenting) ("I can find no support in the jurisprudence of this Court where we have previously determined that a case is only retroactive to a date certain in time. Indeed, retroactivity is a binary—either something is retroactive, has effect on the past, or it is not."); *Mosley*, 209 So. 3d at 1291 (Canady, J., concurring in part, dissenting in part) ("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. I strongly dissent from this badly flawed decision."). Justice Polston concurred in Justice Canady's dissent in *Mosley*.

Thus, five of the Court's seven justices expressed the view that the well established judicial principles did not provide for the partial retroactivity that resulted when two justices of the Court rejected the all-or-nothing approach to

retroactivity that had previously been the law, and voted on an ad hoc basis in the two cases.

Once the binary approach is abandoned and the issue is no longer between just a prospective (nonretroactive) application of *Hurst v. Florida* and a retroactive application to all cases final when *Hurst v. Florida* issued, the line drawing becomes ad hoc. This is apparent from the *Asay* and *Mosley* opinions that in the two cases reached different conclusions on the same prongs of *Witt*. For example, the third prong of *Witt* requires an analysis of the extent of reliance factor on pre-*Hurst* law. In *Asay* the Court found that the extent of reliance on Florida's unconstitutional death penalty scheme weighed "heavily against" retroactive application to Asay, while in *Mosley*, the Court reached the opposite conclusion, holding that the extent of reliance on the same pre-*Hurst* law weighed "in favor" of retroactive application. See *Asay*, 210 So. 3d at 20; *Mosley*, 209 So. 3d at 1281.[6] The distinction is simply arbitrary. *Asay* and *Mosley* also differed as to the third

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[6]The State filed a motion for rehearing in *Mosley* asserting that this Court "has created confusion and caused an unnecessary unsettling of the law." (Motion for Rehearing at 2, *Mosley v. State*, Case No. SC14-2108). The State noted that only "on rare and limited occasion, [had the] Court [] permitted retroactive application of new law out of a concern for fairness without performing the three-part analysis from *Witt*." (*Id*. at 3). The State expressed its disagreement with partial retroactivity when it embraced Justice Canady's dissent and his assertion that the Court had left "the *Witt* framework in tatters."

Witt retroactivity factor (the effect on the administration of justice), finding that it weighed "heavily against" retroactive application in *Asay*, but in favor of retroactive application in *Mosley*. See *Asay*, 210 So. 3d at 22; *Mosley*, 209 So. 3d 1282-83.

A bedrock principle of the American judicial system is the doctrine of stare decisis. In *Welch v. Texas Dep't of Highways and Public Transp.*, 483 U.S. 468, 494-95 (1987), the US Supreme Court explained: "the doctrine of stare decisis is of fundamental importance to the rule of law. For this reason, 'any departure from the doctrine ... demands special justification.' *Arizona v. Rumsey*, 467 U.S., at 212, 104 S.Ct., at 2311." Yet, this Court abandoned the binary nature of *Witt v. State* and *Stoval*/*Linkletter* without even acknowledging it was doing so, let alone providing "special justification."

In *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989), the United States Supreme Court explained:

> [I]t is indisputable that stare decisis is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving **a jurisprudential system that is not based upon "an arbitrary discretion**." The Federalist, No. 78, p. 490 (H. Lodge ed. 1888) (A. Hamilton). See also *Vasquez v. Hillery*, 474 U.S. 254, 265, 106 S.Ct. 617, 624, 88 L.Ed.2d 598 (1986) (**stare decisis ensures that "the law will not merely change erratically" and "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of**

individuals”).

(emphasis added). However, here, the ad hoc rulings in *Asay* and *Mosley* that simply ignore the well-established binary foundation of *Witt v. State* are at odds with these principles.

An even more egregious example of ad hoc arbitrary line-drawing is found in Zakrzewski’s own case. In *Asay v. State*, Chief Justice Labarga concurred in the plurality opinion announcing the result and also wrote a concurring opinion expressing his view that *Asay* did not apply to defendants whose death sentences resulted from a judge’s override of a jury’s life recommendation. Chief Justice Labarga identified “only two death row defendants who satisfy this criteria–Matthew Marshall and Williams Ziegler, Jr.” *Asay v. State*, 210 So. 3d at 29 (Labarga, C.J., concurring). Chief Justice Labarga recognized that Zakrzewski had one override death sentence but excluded him from the override death sentences who might receive relief under *Hurst v. Florida* because Zakrzewski also has two death sentences for which the jury recommended death. *Id*. at 20 n.19 (emphasis added). Justice Pariente agreed that Marshall and Ziegler should get the benefit of *Hurst v. Florida*, *Asay*, 210 So. 3d at 35 n.32 (Pariente, J., concurring in part and dissenting in part), apparently also excluding Zakrzewski from that group. Neither justice provided any “special justification” for this line-drawing.

Respondent argues that Zakrzewski's override death sentence is insignificant because "this Court has already considered the judicial override in this very case when deciding *Asay*" (Response at 13). This is nonsense. Zakrzewski was not a party to *Asay*, and one justice mentioning his case in a concurring opinion is not a decision by the Court. Due process requires that Zakrzewski have an opportunity to be heard before there is a decision.

Respondent also dismisses any importance of Zakrzewski's override death sentence because, in her view, *Hurst v. Florida* "did not overrule *Spaziano[v. Florida*, 468 U.S. 447 (1984),] entirely" and the US Supreme Court had denied certiorari review of a judicial override in Alabama (Response at 13). However, the Florida Legislature abolished the override in Ch. 2016-13, Laws of Florida, and Alabama's legislature has done so as well. Zakrzewski's override death sentence remains relevant to his entitlement to retroactive application of *Hurst v. Florida*.

The override sentence is also significant and relevant in light of Zakrzewski's argument on direct appeal that the trial court violated the Eighth Amendment in imposing all three death sentences when it gave undue weight to the death recommendations and then concluded that the life recommendation was unreasonable in light of the death recommendations because it found no differences between the three murders. Rather, Zakrzewski argued, the trial court

should have performed this analysis in reverse, considering the life recommendation first and then finding the 7 to 5 death recommendations unreasonable in light of the life recommendation (*Zakrzewski v. State*, Case No. 88367, Initial Brief of Appellant at 36-39). The argument boiled down to an argument that the trial judge, as well as the jury, skewed his analysis in favor of death. Apparently responding to this argument, Justice Anstead's direct appeal dissent from the Court's affirmance of Zakrzewski's override death sentence, joined by Justices Kogan and Shaw, shows that this Eight Amendment error affects all of Zakrzewski's death sentences. Justice Anstead dissented because

> [T]he majority has ignored not only the evidence and inferences therefrom that would support the jury's recommendation, but has also ignored the fact that even the jury vote recommending death was by a slim seven to five margin, one vote away from a life recommendation for the appellant. Hence, the majority, in direct violation of the law and our decision in *Tedder* has substituted its subjective analysis of the facts for the views of the sworn and death-qualified jurors, who not only could have had reasonable but differing views as to whether death was appropriate, but *did* have those views and openly expressed them. The majority has apparently concluded that because its members would not have extended mercy, the views of the twelve citizens sitting on this jury extending mercy will be ignored.

Zakrzewski v. State, 717 So. 2d 488, 497 (Fla. 1998) (Anstead, J., concurring in part and dissenting in part) (emphasis in original). As Zakrzewski's amended petition explains, the 7 to 5 death recommendations occurred because the jury instructions telling the jury their decision was "advisory only" and a

"recommendation" created a bias in favor of death (Amended Petition, pp. 28-31 (discussing *Caldwell v. Mississippi*, 472 U.S. 320 (1985)). Had the jury not been so instructed and had it been told it had a right to extend mercy, the 7 to 5 death recommendations would have been 6 to 6 life recommendations at the least.

Respondent lastly argues that any *Hurst v. Florida* error in Zakrzewski's case is harmless, despite her passing recognition of the fact that the jury's death recommendations were not unanimous (Response at 15). Respondent does not actually make an argument that the *Hurst v. Florida* error in this particular case was harmless but argues that "this Court should revisit the method it performs a harmless error analysis in this case and not reject a harmless error analysis because of the advisory verdict" (*Id*.). However, the Court has been consistent in ruling that when a jury's death recommendation is not unanimous, the Court cannot determine that the jury's vote was not affected by the *Hurst* error, as the Court explained in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016):

> [A]fter a detailed review of the evidence presented as proof of the aggravating factors and evidence of substantial mitigation, we are not so sanguine as to conclude that Hurst's jury would without doubt have found both aggravating factors–and, as importantly, that the jury would have found the aggravators sufficient to impose death and that the aggravating factors outweighed the mitigation. The jury recommended death by only a seven to five vote, a bare majority. Because there was no interrogatory verdict, we cannot determine what aggravators, if any, the jury unanimously found proven beyond a reasonable doubt. We cannot determine how many jurors may have

> found the aggravation sufficient for death. We cannot determine if the jury unanimously concluded that there were sufficient aggravating factors to outweigh the mitigating circumstances. Nevertheless, the fact that only seven jurors recommended death strongly suggests to the contrary.

Id. at 68.

> In Hurst's case, we cannot find beyond a reasonable doubt that no rational jury, as the trier of fact, would determine that the mitigation was "sufficiently substantial" to call for a life sentence. Nor can we say beyond a reasonable doubt there is no possibility that the *Hurst v. Florida* error in this case contributed to the sentence. We decline to speculate as to why seven jurors in this case recommended death and why five jurors were persuaded that death was not the appropriate penalty. To do so would be contrary to our clear precedent governing harmless error review. Thus, the error in Hurst's sentencing has not been shown to be harmless beyond a reasonable doubt.

Id. This Court has reaffirmed and applied this same harmless error analysis in numerous cases.[7] Respondent's suggestion that the Court reconsider its harmless error analysis is contrary to all of these cases.

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[7] *Franklin v. State*, 209 So. 3d 1241, 1248 (Fla. 2016); *Johnson v. State*, 205 So. 3d 1285, 1290-91 (Fla. 2016); *Mosley v. State*, 209 So. 3d 1248, 1283-84 (Fla. 2016); *Simmons v. State*, 207 So. 3d 860, 867 (Fla. 2016); *Kopsho v. State*, 209 So. 3d 568, 570 (Fla. 2017); *Armstrong v. State*, 211 So. 3d 864 (Fla. 2017); *Williams v. State*, 209 So. 3d 543, 566-57 (Fla. 2017); *Calloway v. State*, 210 So. 3d 1160, 1200 (Fla. 2017); *Hojan v. State*, ___ So. 3d ___, 2017 WL 4102215 at *12-*13 (Fla. Jan. 31, 2017); *Durousseau v. State*, ___ So. 3d ___, 2017 WL 411331 at *5-*6 (Fla. Jan. 31, 2017); *Ault v. State*, ___ So. 3d ___, 2017 WL 930926 at *7-*8 (Fla. Mar. 9, 2017); *Jackson v. State*, ___ So. 3d ___, 2017 WL 1090546 at *23-*25 (Fla. Mar. 23, 2017); *Deviney v. State*, ___ So. 3d ___, 2017 WL 1090560 at *5-*6 (Fla. Mar. 23, 2017); *White v. State*, ___ So. 3d ___, 2017 WL 117764 at *6-*7 (Fla. Mar. 30, 2017).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing REPLY TO RESPONSE TO AMENDED PETITION FOR WRIT OF HABEAS CORPUS has been furnished by electronic mail to Carolyn M. Snurkowski, Assistant Deputy Attorney General, on May 3, 2017.

CERTIFICATE OF FONT

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