IN THE SUPREME COURT OF FLORIDA
CASE NO. SC17-

MARK JAMES ASAY,
Petitioner,

v.

JULIE L. JONES,
Secretary, Florida Department of Corrections,
Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

On December 22, 2016, this Court issued its decision in *Asay v. State*, 210 So. 3d 1 (Fla. 2016). This Court refused to grant relief on Mr. Asay's Sixth Amendment claim that his "death sentence [wa]s unconstitutional under *Hurst v. Florida*[, 136 S. Ct. 616 (2016)] because a judge, rather than a jury, made certain findings to make Asay eligible for a sentence of death*." Asay v. State*, 210 So. 3d at 10.[1] Because his execution had been set when a warrant was signed on January 8, 2016, Mr. Asay filed the Sixth Amendment claim in a successive motion to vacate just over two weeks after *Hurst v. Florida* issued. Given that *Hurst v. Florida* rested on the Sixth Amendment, the claim that Mr. Asay presented was grounded on the Sixth Amendment.

In its decision in *Asay v. State*, this Court ruled that Mr. Asay was not entitled to the retroactive benefit of the Sixth Amendment holding in *Hurst v.*

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[1]As this Court's statement of the claim that Mr. Asay had presented makes clear, the issue raised was about the judge making certain findings of fact instead of the jury. This demonstrates that the claim that this Court addressed in *Asay v. State* was a Sixth Amendment claim arguing it was error for the judge to make the requisite findings of fact instead of the jury. This is an entirely different claim than the one arising from *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). The claim that arises under *Hurst v. State* is whether a jury's non-unanimous death recommendation is an insufficient basis for a death sentence to be imposed, i.e., is a non-unanimous death recommendation lacking the reliability necessary under the Eighth Amendment and under the Florida Constitution for a resulting death sentence to be actually carried out?

Florida. This Court explained "that *Hurst v. Florida* should not apply retroactively to cases that were final when *Ring [v. Arizona]* was decided." *Asay v. State*, 210 So. 3d at 11.[2] *Ring v. Arizona*, 536 U.S. 584 (2002), was a ruling that a judge's finding of facts necessary to authorize a death sentence ran afoul of the Sixth Amendment and the right to have a jury decide whether those facts had been proven by the State. Linking the retroactive benefit of *Hurst v. Florida* to the issuance of *Ring* underscores that the issue decided in *Asay v. State* concerned the Sixth Amendment.[3]

Besides recognizing what was raised and before this Court to be decided in *Asay v. State*, it is important to acknowledge what was not within the scope of the

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[2]Throughout *Asay v. State* reference was made to the fact that Mr. Asay's argument concerned the meaning of *Hurst v. Florida* and whether it should apply retroactively to his death sentences. *See Asay v. State*, 210 So. 3d at 10 (in his 3.851 motion, Mr. Asay asserted that he was "entitled to relief under *Hurst v. Florida*, —— U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), and that *Hurst v. Florida* applies retroactively"); *Id*. at 14 ("Asay and the State fundamentally disagree as to the meaning of *Hurst v. Florida*."); *Id*. at 15 ("we next consider whether *Hurst v. Florida* applies retroactively to Asay."); *Id*. at 18 ("the purpose of the new rule weighs in favor of applying *Hurst v. Florida* retroactively to Asay."); *Id.* at 20 (reliance on the old rule "factor weighs heavily against retroactive application of *Hurst v. Florida* to this pre-*Ring* case."); *Id*. at 22 (the effect on the administration of justice "factor also weighs heavily against applying *Hurst v. Florida* retroactively to Asay.").

[3]The same day that this Court issued *Asay v. State*, it also issued *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), and held that *Hurst v. Florida* was retroactive to June 24, 2002, the day that *Ring v. Arizona*, 536 U.S. 584 (2002), was released.

Hurst v. Florida claim that Mr. Asay had raised. The Sixth Amendment claim did not argue that *Hurst v. Florida* found it unconstitutional for a jury to be able to return a death recommendation by a majority vote. Indeed, in *Hurst v. State*, 202 So. 3d 40, 57 (Fla. 2016), this Court acknowledged that the Sixth Amendment had not been found to require juror unanimity.

All of the pleadings and all the briefs filed by Mr. Asay in the 2016 proceedings were filed in February and March of 2016, six months or more before *Hurst v. State* issued.[4] Oral argument was on March 2, 2016. *Hurst v. State* did not issue until October 14, 2016. Mr. Asay did not and could not have pled a claim

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[4]On April 13, 2016, Mr. Asay's counsel filed a habeas petition in this Court that was based upon the March 7, 2016 enactment of Chapter 2016-13. *Asay v. Jones*, Case No. SC16-628. This legislation was enacted primarily to fix the constitutional deficiencies of Florida's capital sentencing scheme that set out in *Hurst v. Florida*. But unrelated to anything said in *Hurst v. Florida*, Chapter 2016-13 made it necessary for ten jurors to vote in favor of a death recommendation before the verdict qualified as a death recommendation. Chapter 2016-13 also made a jury's life recommendation (when 3 or more jurors voted in favor of a life sentence) binding in that a judge lacked the authority to impose a death sentence. In the April 13, 2016, petition, Mr. Asay's counsel argued that under Chapter 2016-13, Mr. Asay's death sentences violated the Eighth and Fourteenth Amendments because three jurors had voted to recommend life sentences. The State never filed a responsive pleading. In *Asay v. State*, this Court summarily denied the habeas petition, saying: "based on our decision in *Perry v. State*, 41 Fla. L. Weekly S449, ——So.3d ——, 2016 WL 6036982 (Fla. Oct. 14, 2016), that chapter 2016–13, Laws of Florida, is unconstitutional." *Asay v. State*, 210 So. 3d at 11. Thus, this Court did not address the merits of Mr. Asay's claims because it had ruled that Chapter 2016-13 was unconstitutional.

based upon a decision that had not yet been rendered. Chapter 2017-1, which also requires a jury to unanimously return a death recommendation before a judge can impose a death sentence, was not enacted until March 13, 2017. Neither *Hurst v. State* nor Chapter 2017-1 were presented by Mr. Asay as a basis for his challenge to his death sentences. Thus, they were not addressed in the *Asay* opinion.

However, *Hurst v. State* and Chapter 2017-1 do now give rise to challenges to Mr. Asay's death sentences because the jury's death recommendations at his penalty phase were not unanimous. Three of his jurors voted in favor of returning life recommendations on both counts of first degree murder. In *Hurst v. State*, this Court held that a unanimous death recommendation is necessary before a death sentence can be imposed. Under Chapter 2017-1, which was enacted on March 13, 2017, a jury's unanimous death recommendation is necessary to permit the imposition of a death sentence. As a result , it is beyond dispute that under Florida's governing law now in August of 2017, a death sentence is not permitted if, as in Mr. Asay's case, one or more jurors vote in favor of a life recommendation and against a death sentence. *See Falcon v. State*, 162 So. 3d at 954 (Fla. 2015).

This Court's refusal to give Mr. Asay the benefit of *Hurst v. Florida* retroactively in *Asay v. State* is generally being treated as a determination that the benefit of *Hurst v. Florida* will not be extended retroactively beyond June 24,

2002. The State has sought to extend this to claims that were not at issue in *Asay v. State*. The State has responded to claims pled by defendants with pre-*Ring* death sentences that *Asay v. State* controls even when the claims pled are premised upon the unanimity requirements of *Hurst v. State* and/or Chapter 2017-1. The State has consistently argued that *Asay v. State* precludes any defendant with a death sentence final before June 24, 2002, from benefitting in any way from either *Hurst v. State* or Chapter 2017-1.

Recent action taken by this Court belies the State's reliance on *Asay v. State* as precluding pre-*Ring* defendants from making challenges death sentences resting on a jury's non-unanimous death recommendation under *Hurst v. State*. This Court has been issuing stays of appellate proceedings in cases with death sentences that were final before June 24, 2002, and in which *Hurst v. State* and/or Chapter 2017-1 have been asserted as requiring a resentencing. On June 5, 2017, this Court began issuing the stays of appellate and/or habeas proceedings pending before this Court. The language of these stays has indicated that the proceedings are stayed pending the disposition of *Hitchcock v. State*, Case No. SC17-445.

By Mr. Asay's count, this Court has stayed appellate proceedings and/or habeas proceedings in cases involving 77 different death sentenced individuals. All 77 of these individuals who received stays from this Court have death

sentences that became final before the issuance of *Ring v. Arizona*, 536 U.S. 584 (2002). These 77 individuals are in the same category in which Mr. Asay finds himself, i.e., they all have pre-*Ring* death sentences. What is clear is that proceedings before this Court regarding challenges to 77 pre-*Ring* death sentences have been stayed pending the disposition of an appeal in yet another pre-*Ring* death sentence imposed on James Hitchcock. This leads to the *Hitchcock* briefing.

The briefing in *Hitchcock v. State* shows that *Hurst v. State* and its retroactivity are at issue in that appeal. Argument IV of the initial brief in *Hitchcock v. State* argues that *Hurst v. State* must be applied retroactively to Mr. Hitchcock's pre-*Ring* death sentence (IB at 46-50, *Hitchcock v. State*, Case No. SC17-445). Argument VI of the initial brief in *Hitchcock*, argues that under *Hurst v. State*, Mr. Hitchcock's pre-*Ring* death sentence violates the Florida Constitution (IB at 52-56, *Hitchcock v. State*, Case No. SC17-445).[5] It is clear that the breadth and importance of the unanimity requirement set out in *Hurst v. State* is at issue in *Hitchcock* because the scope of the unanimity requirement involves the Eighth Amendment and the Florida Constitution which require a different retroactivity analysis than the one conducted in *Asay v. State* which concerned the narrower

[5]Argument VI of the initial brief in *Hitchcock* also relies upon *Perry v. State*, 210 So. 3d 630 (Fla. 2016), a decision that issued the same day that *Hurst v. State* issued. In *Perry*, this Court held Chapter 2016-13 to be unconstitutional.

Sixth Amendment ruling in *Hurst v. Florida* and which did not necessarily implicate the reliability of the decision to impose a death sentence.[6]

Obviously, this Court has not undertaken to issue 77 stays of appellate and/or habeas proceedings for no reason. The stays must mean that this Court has decided that *Asay v. State* did not foreclose the issue presented in the briefing *Hitchcock v. State* as to whether *Hurst v. State* should apply retroactively to some or all pre-*Ring* death sentences. The 77 stays demonstrate that the disposition Mr. Hitchcock's *Hurst v. State* argument will be important, if not controlling, when this Court ultimately addresses the issues presented in the 77 stayed cases.[7]

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[6]The reply brief in *Hitchcock* states: "*Hurst v. State* placed it beyond the State's power to punish those who did not have a jury that unanimously found all of the facts necessary for a death sentence. *See Id. See also Falcon v. State*, 162 So.3d 954, 961-63 (Fla. 2015). Mr. Hitchcock did not just raise the violation of his Sixth Amendment right to counsel under *Hurst v. Florida* and *Ring v. Arizona*. He also raised the violations of his State and Federal constitutional rights under *Hurst v. State*. " (RB at 3, *Hitchcock v. State*, Case No. SC17-445). The reply brief also states: "The State's argument that Mr. Hitchcock 'cannot establish that his sentencing procedure was less accurate than future sentencing procedures employing the new standards announced in Hurst v. State' (AB 28) fails to consider that if Mr. Hitchcock's advisory panel were an actual jury, a 10-2 verdict would have led to a life sentence under *Hurst v. State*. If the State wants to rely on the advisory panel's recommendation in Mr. Hitchcock's case, Mr. Hitchcock should be sentenced to life." (RB at 6-7, *Hitchcock v. State*, Case No. SC17-445) .

[7]Mr. Asay's counsel is aware of the issues in cases stayed by this Court on which he is counsel. In those cases, *Hurst v. State* and its applicability to pre-*Ring* death sentences are very much at issue. *See Reed v. State*, Case No. SC17-896 (stayed June 6, 2017); *Jennings v. State*, Case No. SC17-500 (stayed June 6,

In *Hurst v. State*, which issued on October 14, 2016, this Court recognized the right to a life sentence unless a jury unanimously returned a recommendation of death. This right was found to be embedded in the Florida Constitution. This Court alternatively found the right came from the Eighth Amendment and its evolving standards of decency. This Court also held that the right to a life sentence unless the jury unanimously recommended death would insure a more reliable capital sentencing scheme. This Court specifically noted that the right to a unanimous death recommendation was not required by *Hurst v. Florida* nor by the Sixth Amendment.

The right identified in *Hurst v. State* was not asserted nor addressed in any pleading in the proceedings that resulted in the ruling in *Asay v. State*.[8] Further,

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2017); *Ford v. State*, Case No. SC17-859 & *Ford v. Jones*, Case No. SC16-706 (stayed June 8, 2017); *Archer v. Jones*, Case No. SC16-2111 (stayed June 29, 2017); *Griffin v. State*, Case No. SC17-1306 (stayed July 17, 2017).

[8]The reality is that the impact of *Hurst v. State* is even broader than *Hurst v. Florida*. Since *Hurst v. State* issued on October 14, 2016, resentencings have been ordered in at least 101 cases. This Court has ordered resentencings in 54 cases. Circuit courts have ordered resentencings in 47 cases. Of those 47 cases, there are two of those cases in which the State has a pending appeal before this Court. The opinions usually make it clear that the error at issue (often labeled as error under *Hurst v. Florida* and *Hurst v. State*) is not harmless beyond a reasonable doubt because the death recommendation was not unanimous. Unanimity was not required by *Hurst v. Florida*, only by *Hurst v. State*. Thus, it is the *Hurst v. State* error that is dispositive and the resentencings have been ordered. It is the unanimity requirement of *Hurst v. State* that has greatly expanded the number of

Mr. Asay did not file anything after *Hurst v. State* issued and argue that under it Mr. Asay was entitled to relief. Nor was Mr. Asay required to immediately file a claim based upon the newly issued *Hurst v. State* when the United States Supreme Court had not considered the State's challenge to the ruling that the State had revealed would be filed. There were just seventy days between the issuance of *Hurst v. State* and the opinion in *Asay v. State*.

As one Florida Supreme Court justice has noted, the precedential value of *Hurst v. State* grew when the United States Supreme Court denied certiorari review of the decision on May 22, 2017. *See Florida v. Hurst*, 137 S. Ct. 2161 (2017). In his concurring opinion in *Okafor v. State*, _ So. 3d _, 2017 WL 2481266 (Fla. June 8, 2017), Justice Lawson noted the denial of certiorari review by the US Supreme Court had upped the precedential value of *Hurst v. State*: "the Supreme Court's denial of certiorari renders *Hurst* final, solidifying it as this Court's precedent." *Okafor v. State*, 2017 WL 2481266 at *6 (Lawson, J., concurring specially). As a result of the denial of certiorari review in *Florida v. Hurst*, Justice Lawson in *Okafor* voted to "concur in the decision to grant *Hurst* relief because that is what a faithful application of now-settled Florida law requires in this case." *Okafor*, 2017 WL 2481266 at *6 (Lawson, J., concurring

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resentencings being ordered, and more are likely to issue.

specially).[9] Of course when *Asay v. State* issued on December 22, 2016, the denial of certiorari review in *Florida v. Hurst* was not known and would not be known for five more months.

Asay did not present any arguments or constitutional claims based on *Hurst v. State*. Asay did not present an argument that his death sentences violated the Florida Constitution on the basis of the ruling in *Hurst v. State*. Asay made no arguments regarding the retroactivity of *Hurst v. State*. **The retroactivity of *Hurst v. State* was not raised by the parties in *Asay v. State*; it was not briefed by the parties in *Asay v. State*; it was not issue in *Asay v. State*.**[10]

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[9]Up until his opinion concurring specially in *Okafor*, Justice Lawson had repeatedly expressed his disagreement with *Hurst v. State* and dissented from decisions granting relief on the basis of *Hurst v. State*. Though he indicated in *Okafor* that he still did not agree with the decision, the denial of certiorari review in *Florida v. Hurst* caused him to concur with the majority that *Hurst v. State* required a resentencing to be ordered in *Okafor*. In the capital decisions that followed, Justice Lawson continued to concur when resentencings were ordered on the basis of *Hurst v. State*. In two instances, Justice Lawson's vote to grant a resentencing on the basis of *Hurst v. State* created a four person majority with three justices dissenting. *See Bailey v. Jones*, _ So. 3d _, 2017 WL 2874121 (Fla. July 6, 2017); *Dennis v. State*, 2017 WL 2888700 (Fla. July 7, 2017) (unpublished order granting resentencing). Moreover, Justice Lawson was not a member of this Court when *Asay v. State* issued.

[10]In *Archer v. Jones*, 2017 WL 1034409 (Fla. March 17, 2017) (unpublished order denying habeas relief), this Court said: "We hereby deny Archer's petition pursuant to our holding in *Asay v. State*, 41 Fla. L. Weekly S646 (Fla. Dec. 22, 2016), that *Hurst v. Florida* and *Hurst v. State* do not apply retroactively to capital defendants whose death sentences were final when *Ring v. Arizona*, 536 U.S. 584

In addition to the decision in *Hurst v. State*, the March 13, 2017, enactment of Chapter 2017-1 has also now ratified that a unanimous death recommendation is necessary before a judge is authorized to impose a death sentence. Chapter 2017-1 revised Florida's capital sentencing statute, § 921.141, Fla. Stat. It now provides that a defendant convicted of first degree murder is entitled to a life sentence unless the State convinces a jury to unanimously return a death recommendation. A death sentence cannot be imposed if even one juror votes in favor of a life recommendation. The legislative intent is that the substantive right extended to a defendant convicted of first degree murder under Chapter 2017-1 applies retrospectively, i.e., to all first degree murder prosecutions regardless of the date of the underlying homicide.

In this petition, Mr. Asay presents challenges to his death sentences that have arisen on the basis of *Hurst v. State* and Chapter 2017-1, and were not before this Court when it issued its opinion in *Asay v. State* on December 22, 2016.

(2002), was decided." Mr. Archer filed a motion for rehearing pointing out that *Asay v. State* did not address the retroactivity of *Hurst v. State*. While Mr. Archer's rehearing motion remained pending, this Court on June 29th issued an order stating, "[t]his case is stayed pending disposition of *Hitchcock v. State*, SC17-445."

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). *See* Art. 1, Sec. 13, Fla. Const. The petition presents issues which concern the continued viability and constitutionality of Mr. Asay's death sentences. The Florida Constitution guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Art. I, § 13, Fla. Const. Pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, § 3(b)(9), Fla. Const., this Court has original jurisdiction.

In its jurisdiction to issue writs of habeas corpus, this Court is obligated to protect Mr. Asay's rights under the Florida Constitution to be free from cruel or unusual punishment and it has the power to enter orders assuring that those rights are protected. *Allen v. State*, 636 So. 2d 494, 497 (Fla. 1994); *Shue v. State*, 397 So. 2d 910 (Fla. 1981); *Makemson v. Martin County*, 491 So. 2d 1109 (1986). Where state or federal constitutional rights are concerned, this Court may not abdicate its responsibility in deference to the legislative or executive branches of government. *Rose v. Palm Beach City*, 361 So. 2d 135, 137 n.7 (1978). This Court must exercise its independent power of judicial review. *Ford v. Wainwright*, 477 U.S. 399 (1986). This Court has used its habeas jurisdiction to vacate death sentences that no longer comported with either the US Constitution or the Florida

Constitution. *Hertz v. Jones*, 218 So. 3d 428 (Fla. 2017); *Hernandez v. Jones*, 217 So. 3d 1032 (Fla. 2017); *Card . Jones*, 219 So. 3d 47 (Fla. 2017); *Brooks v. Jones*, 2017 WL 944235 (Fla. March 10, 2017).

PROCEDURAL HISTORY

Mark James Asay was indicted on two counts of first degree murder on August 20, 1987, in Duval County, Florida. Trial began on September 26, 1988. Mr. Asay was convicted as charged. The jury recommended death by votes of 9-3 on both counts. The trial court imposed two death sentences. This Court affirmed. *Asay v. State*, 580 So. 2d 610 (Fla. 1991). Mr. Asay's petition for writ of certiorari was denied on October 7, 1991. *Asay v. Florida*, 502 U.S. 895 (1991).

On March 16, 1993, Mr. Asay filed a Rule 3.850 motion. The motion was amended on November 24, 1993. Then on March 19, 1996, an order was entered denying relief on some claims and ordering an evidentiary hearing on others. The evidentiary hearing was conducted on March 25-27, 1996. On April 23, 1997, relief was denied. On appeal, this Court affirmed the denial of Rule 3.850 relief. *Asay v. State*, 769 So. 2d 974 (Fla. 2000).

On October 25, 2001, Mr. Asay filed a habeas petition in this Court. The petition was denied on June 13, 2002. *Asay v. Moore*, 828 So. 2d 985 (Fla. 2002).

On October 17, 2002, Mr. Asay filed a successive Rule 3.851 motion

arguing that Florida's capital sentencing scheme was unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002). The motion was denied on February 23, 2004. On appeal, this Court affirmed. *Asay v. State*, 892 So. 2d 1011 (Fla. 2004).

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

On January 8, 2016, a death warrant was signed scheduling Mr. Asay's execution for March 17, 2016. A 3.851 motion was filed. It was denied, and Mr. Asay appealed. Mr. Asay also filed a petition for a writ of habeas corpus with this Court. Briefing followed, and this Court heard oral argument on March 2, 2016. Later that same day, this Court entered a stay of Mr. Asay's execution. Another habeas petition was filed in April 2016. This Court denied relief in *Asay v. State*, 210 So. 3d 1 (Fla. 2016).

BASIS FOR HABEAS CORPUS RELIEF

CLAIM I

CONTRARY TO THE EIGHTH AMENDMENT, MR. ASAY'S DEATH SENTENCES DO NOT REST ON A JURY'S UNANIMOUS DEATH RECOMMENDATION AS *HURST V. STATE* FOUND TO BE NECESSARY TO INSURE A RELIABLE DECISION TO IMPOSE A DEATH SENTENCE, .

THE EIGHTH AMENDMENT DOES NOT ALLOW FLORIDA TO LEAVE INTACT DEATH SENTENCES PREMISED UPON A JURY'S NON-UNANIMOUS DEATH RECOMMENDATIONS WHICH CARRY A LESSER LEVEL OF RELIABILITY.

A. Introduction - *Hurst v. State*[11]

In *Hurst v. State*, this Court held that before a death sentence is a permissible sentencing option upon a conviction of first degree murder, the jury must return a unanimous death recommendation:

> We also conclude that, just as elements of a crime must be found unanimously by a Florida jury, all these findings necessary for the jury to essentially convict a defendant of capital murder—thus allowing imposition of the death penalty— are also elements that must be found unanimously by the jury. Thus, we hold 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.

Hurst v. State, 202 So. 3d at 53-54. The requirement that a penalty phase jury unanimously vote in favor of a death recommendation before a death sentence could be authorized was found to be a way to enhance the reliability of death sentences. *Hurst v. State*, 202 So. 3d at 59 ("We also note that the requirement of

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[11]This claim is filed within one year of the release of *Hurst v. State*, and thus is timely filed. It is filed with three months of the US Supreme Court's denial certiorari review.

unanimity in capital jury findings will help to ensure the heightened level of protection necessary for a defendant who stands to lose his life as a penalty.").

This Court has subsequently explained in *King v. State*, 211 So. 3d 866, 889 (Fla. 2017), that in *Hurst v. State*:

> we held that "before a sentence of death may be considered by the trial court in Florida, the jury must find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances."

In *Bevel v. State*, _ So. 3d _, 2017 WL 2590702 (Fla. June 15, 2017), this Court explained that in *Hurst v. State*:

> we determined that **a reliable penalty phase** proceeding **requires** that "the penalty phase **jury must be unanimous in making the critical findings and recommendation** that are necessary before a sentence of death may be considered by the judge or imposed," 202 So.3d at 59.

Id. *10 (emphasis added).[12]

Mr. Asay's jury made no findings unanimously. On each homicide count, it

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[12]While there may some debate as to whether judge sentencing results in more reliable sentences than jury sentencing, the ruling in *Hurst v. State* means going from an advisory recommendation that is rendered by majority vote to no death sentence unless the jury returns a unanimous death recommendation. This distinguishes the ruling in *Hurst v. State* from the one in *Ring v. Arizona* which the Court in *Schriro v. Summerlin*, 542 U.S. 348 (2004), concluded did not necessarily enhancing the reliability of a resulting death sentence. A death recommendation unanimously returned by a jury will be more reliable than one based on a majority vote. *Hurst v. State*, 202 So. 3d at 59; *Bevel v. State*, 2017 WL 2590702 *10.

returned non-unanimous death recommendations - the jury vote in favor of the death recommendations was 9-3. Under *Hurst v. State* as this Court explained in *Bevel v. State*, a non-unanimous death recommendation with three jurors voting to recommend a life sentence does not reflect a reliable penalty phase proceeding.

B. Reliability - an Eighth Amendment Command

The United States Supreme Court has explained: "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." *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988) . *See Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) ("Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) ("We are satisfied that this qualitative difference between death and other penalties calls for 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"); *Furman v. Georgia*, 408 U.S. at 238, 286 (1972)

(Brennan, J., concurring) ("Death is a unique punishment in the United States.").

Under the Eighth Amendment, there is a greater "need for reliability in the determination that death is the appropriate punishment in a specific case." *Gardner v. Florida*, 430 U.S. 349, 363 (1977) (White, J., concurring). Florida's death penalty statute was approved in *Proffitt v. Florida*, 428 U.S. 242, 252-53 (1976), because "[t]he Florida capital-sentencing procedures thus seek to assure that the death penalty will not be imposed in an arbitrary or capricious manner." This Court's appellate review must be meaningful and must insure death sentences are reliable and free of arbitrary distinctions. *Parker v. Dugger*, 498 U.S. 308, 321 (1991) ("We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally."). The Eighth Amendment demands "that capital punishment be imposed fairly, and **with reasonable consistency**, **or not at all**." *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) (emphasis added).

In *Hall v. Florida*, 134 S. Ct. 1986 (2014), the US Supreme Court struck down Florida's strict 70 IQ score cutoff for intellectual disability on Eighth Amendment grounds. The US Supreme Court noted: "A State that ignores the inherent imprecision of these tests risks executing a person who suffers from intellectual disability." *Id.* at 2001. Florida's rigid adherence to the cutoff meant

that the death sentence at issue lacked reliability under the Eighth Amendment. *Id*. ("Freddie Lee Hall may or may not be intellectually disabled").

This Court has itself referenced the Eighth Amendment demand that Florida insure that the decision to impose death as a punishment is reliable. In *Arbelaez v. Butterworth*, 738 So. 2d 326, 326-27 (Fla. 1999), this Court wrote:

> 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). *Allen v. Butterworth*, 756 So. 2d 52, 67 (Fla. 2000), explained that competent representation was needed insure reliability in capital cases:

> **A reliable system** of justice depends on adequate funding at all levels. Obviously, this means adequate funding for **competent counsel** during trial, appellate, and **postconviction proceedings** for both the State and the defense, including access to thorough investigators and expert witnesses.

(Emphasis added) (footnotes omitted). In *Fla. Dep't of Financial Services v. Freeman*, 921 So. 2d 598 (Fla. 2006), this Court observed that adequate compensation of counsel was necessary to insure a reliable death penalty scheme:

> Inadequate compensation could create an economic disincentive for appointed counsel to spend more than a minimum amount of time on the case and discourage competent attorneys from agreeing to represent indigent capital defendants.

Id. at 600.[13]

The Eighth Amendment demands reliability, not just when a death sentence is imposed, but also when it is carried out. *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 omitted] To the contrary, especially in the context of capital sentencing, **it reduces the risk that such a sentence will be imposed arbitrarily**.") (emphasis added).

In light of *Hurst v. State*, Mr. Asay's death sentences are lacking in reliability. A failure to afford him the benefit of *Hurst v. State* while granting it to so many others demonstrates a capital sentencing scheme lacking in "reasonable consistency." *Eddings v. Oklahoma*, 455 U.S. at 112.

C. *Hurst v. State* - the right to a life sentence unless the jury unanimously returns a death recommendation.

Following the issuance of *Hurst v. Florida*, 136 S. Ct. 616 (2016), the matter was remanded to this Court. It was left to this Court to grapple with the US Supreme Court's determination that Florida's capital sentencing scheme violated the Sixth Amendment and evaluate the ramifications of that ruling.

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[13]In her specially concurring opinion, Justice Pariente observed: "**the credibility of our death penalty** system depends in large part on **the quality of the attorneys** who undertake the representation." *Id*. at 921 So. 2d at 604 (emphasis added). Justices Anstead and Cantero concurred in her opinion.

In so doing, this Court recognized that a defendant convicted of first degree murder is to receive a life sentence unless the jury returns a unanimous death recommendation. In *Hurst v. State*, this Court explained:

> in order for a death sentence to be imposed, the jury's recommendation for death must be unanimous. This recommendation is tantamount to the jury's verdict in the sentencing phase of trial; **and historically, and under explicit Florida law, jury verdicts are required to be unanimous**.

Id. at 54 (emphasis added). This Court specifically ruled that this right to a life sentence unless a unanimous jury returned a death recommendation was **"founded upon the Florida Constitution** and Florida's long history of requiring jury unanimity in finding all the elements of the offense to be proven". *Id* (emphasis added). Florida law had long required that a jury's verdict to be unanimous:

> Almost half a century later, in *Jones v. State*, 92 So.2d 261 (Fla.1956), again acknowledging that "[i]n this state, the verdict of the jury must be unanimous," this Court held that any interference with the right to a unanimous jury verdict denies the defendant a fair trial as guaranteed by the Declaration of Rights of the Florida Constitution. *Id*. at 261 (On Rehearing Granted). Thus, Florida has always required jury verdicts to be unanimous on the elements of criminal offenses.

Id. at 55 (footnote omitted). This had historically been Florida law in death cases:

> Thus, 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.

Id. at 56. This Court also noted that a unanimous jury had not been held to be required in *Hurst v. Florida* because it was not required by the Sixth Amendment:

> 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.

Id. at 57 (footnote omitted) (emphasis added).

The Florida Constitution and Florida law were found to require the finding of those facts and the death recommendation itself to be made by a unanimous jury. *Hurst v. State*, 202 So. 3d at 57 ("before the trial judge may consider imposing a sentence of death, the jury in a capital case must **unanimously** and expressly find all the aggravating factors that were proven beyond a reasonable doubt, **unanimously** find that the aggravating factors are sufficient to impose death, **unanimously** find that the aggravating factors outweigh the mitigating circumstances, and **unanimously** recommend a sentence of death".) (emphasis added). In *Hurst v. State*, this Court held that jurors had the right to vote for a life sentence simply to be merciful. *Hurst v. State*, 202 So. 3d at 57-58 ("We equally

emphasize that by so holding, we do not intend to diminish or impair the jury's right to recommend a sentence of life even if it finds aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating circumstances.").[14]

Under *Hurst v. State*, a capital defendant convicted of first degree murder is not eligible for a death sentence unless the State convinces a jury to unanimously return a death recommendation.[15] *Id*. at 59 ("the penalty phase jury must be unanimous in making the critical findings and recommendation that are necessary before a sentence of death may be considered by the judge or imposed."). *Hurst v. State* grounded this right on the enhanced reliability that would result from requiring a jury's unanimous death recommendation before a judge was authorized to imposed a death sentence. A great benefit to the administration of justice would result from providing those convicted of first degree murder with the substantive right to a unanimous death recommendation:

> In requiring jury unanimity in these findings and in its final recommendation if death is to be imposed, we are cognizant of

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[14]Residual doubt, while not a mitigating circumstance, could lead one of more jurors to chose mercy and vote in favor of a life sentence.

[15]A presumption of a life sentence is the functional equivalent of the presumption of innocence in the guilt phase. The State has to make its case and convince the jury to return a unanimous verdict.

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).

Further, 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." *See* Elizabeth F. Loftus & Edith Greene, Twelve Angry People: The Collective Mind of the Jury, 84 Colum. L.Rev. 1425, 1428 (1984). Another study disclosed that capital jurors work especially hard to evaluate the evidence and reach a unanimous verdict where they can find agreement. *See* Scott E. Sundby, War & Peace in the Jury Room: How Capital Juries Reach Unanimity, 62 Hastings L.J. 103 (2010). Unanimous-verdict juries tend to be more evidence driven, generally delaying their first vote until the evidence has been discussed. *See* Kate Riordan, Ten Angry

> Men: Unanimous Jury Verdicts in Criminal Trials and Incorporation After McDonald, 101 J.Crim. L. & Criminology 1403, 1429 (2011). Further, 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. *See, e.g.*, Kim Taylor–Thompson, Empty Votes in Jury Deliberations, 113 Harv. L. Rev. 1261, 1272–73 (2000). All these principles would apply with even more gravity, and more significance, in capital sentencing proceedings. We also note that **the requirement of unanimity in capital jury findings will help to ensure the heightened level of protection necessary for a defendant who stands to lose his life as a penalty.**

Hurst v. State, 202 So. 3d at 58-59 (emphasis added).

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 (juror unanimity "will help to ensure the heightened level of protection necessary for a defendant who stands to lose his life as a penalty").[16] Improvement in "the administration of justice" was recognized as

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[16]In *Hurst v. State*, this Court noted 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**

a benefit flowing from the recognition of the fundamental constitutional right to a life sentence unless a jury returned a unanimous death recommendation and authorized the imposition of a death sentence.

D. Death sentences imposed without a jury's unanimous consent are lacking in reliability and violate the Eighth Amendment

As explained in *Bevel v. State*, this Court in *Hurst v. State*:

> determined that **a reliable penalty phase** proceeding **requires** that "the penalty phase **jury must be unanimous in making the critical findings and recommendation** that are necessary before a sentence of death may be considered by the judge or imposed," 202 So.3d at 59.

Bevel v. State, 2017 WL 2590702 *10 (emphasis added). Implicitly, death sentences imposed without a jury's unanimous death recommendation are lacking in reliability. Allowing death sentences to stand that are recognized to be systemically lacking in reliability would violate the Eighth Amendment demand "that capital punishment be imposed fairly, and with reasonable consistency, or not at all." *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982).

Prior to *Hurst v. State*, Florida law permitted a penalty phase jury to hear evidence and return an advisory recommendation as to the sentence by a majority vote. Only seven jurors were needed to vote in favor of a death recommendation

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their decisions.") (emphasis added).

for the advisory verdict to in fact be a death recommendation. Since the sentencing judge was to give great weight to the advisory recommendation, the jury was essentially a co-sentencer. *Espinosa v. Florida*, 505 U.S. 1079, 1082 (1992) ("the jury weighs aggravating and mitigating circumstances, and the result of that weighing process is then in turn weighed within the trial court's process of weighing aggravating and mitigating 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.").

Hurst v. State held that for a death sentence to be imposed, a unanimous death recommendation was necessary to authorize its consideration as a sentence. Finding this necessary to enhance reliability means death sentences imposed without the unanimity requirement are reliability deficient. Mr. Asay's death sentences imposed after the jury voted 9-3 in favor of a death recommendation are thus recognized to be deficient in reliability under *Hurst v. State*.

The question of the applicability of *Hurst v. State* to Mr. Asay's death sentences presents a markedly different question than that at issue in *Schriro v. Summerlin*, 542 U.S. 348, 356 (2004). There, the issue was whether requiring a jury instead of a judge to make the requisite findings of fact pursuant to the Sixth Amendment right to a jury meant the findings would be more reliable. Because the

US Supreme Court did not find the change would elevate the reliability of the findings of fact, it concluded that the change did not have to be retroactive. *See Schriro v. Summerlin*, 542 U.S. 348, 356 (2004) ("When so many presumably reasonable minds continue to disagree over whether juries are better factfinders at all, we cannot confidently say that judicial factfinding seriously diminishes accuracy."). Unlike the change at issue in *Schriro v. Summerlin,* the change resulting from *Hurst v. State* is not simply going from judge fact finding to jury fact finding. 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 unanimously return a death recommendation before a judge is authorized to impose a death sentence.[17] *Hurst v. State* justified the change on the basis of an enhancement in reliability.[18] And

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[17]This is analogous to replacing a preponderance burden of proof with a beyond a reasonable doubt burden of proof. Such a change would necessarily ensure any resulting convictions were more reliable and more accurate.

[18]This Court's ruling in *Asay v. State* only considered the retroactivity of *Hurst v. Florida* in the Sixth Amendment context in which *Schriro v. Summerlin* considered *Ring v. Arizona*, a change that was simply substituting jury findings for judicial findings:

> Thus, we concluded that "[t]o apply *Ring* retroactively in Florida would ... 'consume immense judicial resources without any corresponding benefit to the accuracy or reliability of penalty phase proceedings.'" *Id*. at 412.

logic dictates that going from a non-binding majority vote death recommendation to a unanimous death recommendation before a death sentence is authorized will absolutely mean any resulting decision to impose death will be more reliable.

E. *Hurst v. State* must be applied retroactively to Mr. Asay's death sentences

In *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), this Court observed that in *Hurst v. State*, "**we held, based on Florida's independent constitutional right to trial by jury that, in order for the trial court to impose a sentence of death, the jury's recommendation for a sentence of death must be unanimous**." *Id*. (emphasis added). This Court then proceeded to find *Hurst v. State* retroactive at least to the date *Ring v. Arizona* issued under *Witt v. State*, 387 So. 2d 922 (Fla. 1980). *Mosley v. State*, 209 So. 3d at 1276 ("our recent decision in *Hurst* is undoubtedly a decision of fundamental constitutional significance because it emanates from this Court and is based on Florida's independent constitutional right to trial by jury under article I, section 22, of the Florida Constitution.").[19] The

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Asay v. State, 210 So. 3d at 21. The issue raised here under *Hurst v. State* was not addressed in *Asay v. State*. As *Hurst v. State* noted, requiring juror unanimity will enhance the reliability of any decision to impose a death sentence. This Court in *Asay v. State* was considering a different issue than the one presented here.

[19]In *Mosley v. State*, 209 So. 3d at 1282, this Court stated: "the rule announced is of such fundamental importance, the interests of fairness and 'cur[ing] individual injustice' compel retroactive application of *Hurst*."

ruling in *Mosley* was explained in *King v. State*, 211 So. 3d at 889:

> [I]n *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).

The *Witt* analysis set forth in *Mosley* was limited to the retroactivity of *Hurst v. State* to post-*Ring* death sentences. *Mosley v. State*, 209 So. 3d at 1274. This Court cited to *Asay v. State* as the reason for limiting the *Witt* analysis in that fashion. However, ***Asay v. State* conducted no retroactivity analysis under *Witt* regarding the substantive right identified in *Hurst v. State*** as an examination of the decision in *Asay v. State*, 210 So. 3d at 20-23 shows.[20] So neither *Mosley* nor

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[20]In *Asay v. State*, this Court found that the second prong of the *Witt* analysis "weighs heavily against retroactive application of *Hurst v. Florida* to this pre-*Ring* case." *Asay*, 210 So. 3d at 20. As to the third prong, this Court stated: "this factor also weighs heavily against applying *Hurst v. Florida* retroactively to Asay." The *Witt* analysis in *Asay* even said that retroactive application would not result in any enhance reliability:

> we concluded that "[t]o apply *Ring* retroactively in Florida would ... 'consume immense judicial resources **without any corresponding benefit to the accuracy or reliability** of penalty phase proceedings.' " *Id*. at 412.

Asay v. State, 210 So. 3d at 21 (emphasis added). Clearly, the *Witt* analysis did not concern *Hurst v. State* which had emphasized the enhanced reliability that would result from a requirement that death recommendations had to be unanimous.

Asay considered the retroactivity of *Hurst v. State* as to pre-*Ring* death sentences. The *Witt* analysis this Court conducted in *Mosley v. State* applies just as much to Mr. Asay's death sentences as it does to Mr. Mosley's. To draw a distinction in the *Witt* analysis between the importance of the enhanced reliability to Mr.

Because the ruling in *Hurst v. State* was recognized as providing enhanced reliability to any decision to impose death, the Eighth Amendment requires uniform application of the ruling. So far resentencings have been ordered in at least 101 cases, and most of those resentencings have been granted in post-conviction proceedings involving death sentences that were final before *Hurst v. State* issued.[21] Of the 54 cases in which this Court has ordered a resentencing on the basis of *Hurst v. State*, it appears that 34 of the cases were in collateral review, either a 3.851 appeal or state habeas proceeding like this one Mr. Asay has filed. In all 47 cases of which Mr. Asay's counsel is aware where the circuit court ordered a resentencing, the resentencing was ordered in the course of collateral

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[21]Applying *Hurst v. State* only to death sentences that became final after June 24, 2002, but not to older death sentences final before that date, is nonsensical, without rhyme or reason. More recent death sentences are certainly not less reliable than older death sentences. Given that *Hurst v. State* is about enhanced reliability of any decision to impose a death sentence, there is no rational justification for an arbitrary line in the sand at June 24, 2002. There is no basis for concluding that reliability suddenly became more significant or more necessary on that date than it had been before, or that on date there was a sudden decrease in the reliability of capital proceedings.

proceedings.[22] Limiting the retroactive application of *Hurst v. State* to post-*Ring* death sentences precludes "reasonable consistency" and violates the Eighth Amendment. *See Eddings*, 455 U.S. at 112.

The Eighth Amendment does not permit unreliable death sentences to be grandfathered in.[23] The Eighth Amendment requires States to act to preclude arbitrariness from infecting death sentences. It violates the Eighth Amendment for the State of Florida to ignore the systemic unreliability identified in *Hurst v. State*. Reasonable consistency as required by the Eighth Amendment does not allow some unreliable death sentences to stand when there has been a finding that the manner in which they were imposed failed to insure adequate reliability. Mr. Asay's death sentences stand in violation of the Eighth Amendment because they are infected with systemic unreliability recognized by this Court when the jury did not unanimously consent to the imposition of a death sentence.

Habeas relief is warranted.

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[22]The resentencings that have been ordered have almost invariably been due to *Hurst v. State* error, the lack of a unanimous death recommendation. *See McGirth v. State*, 209 So. 3d 1146, 1164 (Fla. 2017) (a resentencing ordered "[b]ecause the jury vote was eleven to one").

[23]Just because someone has been on death row for a long time is not a basis for saying the unreliability of his death sentence does not matter anymore. A 9-3 death recommendation returned by a jury in 1987 is just as unreliable as a 9-3 death recommendation returned by a jury in 2003.

CLAIM II

THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION REQUIRES THE RETROACTIVE APPLICATION OF THE SUBSTANTIVE RIGHT SET FORTH IN CHAPTER 2017-1, WHICH PROVIDES FOR A LIFE SENTENCE TO BE IMPOSED FOR FIRST DEGREE MURDER UNLESS A JURY UNANIMOUSLY RETURNS A DEATH RECOMMENDATION.

A. Introduction.

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.").

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.

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 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.").

Simultaneously with *Hurst v. State*, this Court issued *Perry v. State*. On the basis of *Hurst v. State*, *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. It 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. It also 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.

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 Fla. Stat. § 921.141 was the replacement of 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.

Because this claim is based upon Chapter 2017-1 which was enacted March 13, 2017, the claim is timely filed with this Court.

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). It 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). Substantive law "includes those rules and principles which fix and declare the primary rights of individuals with respect towards their persons and property."*Haven Federal Savings & Loan Ass'n v. Kirian*, 579 So. 2d 730, 732 (Fla. 1991) (citing *Adams v. Wright*, 403 So.2d 391 (Fla.1981)).

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, in *Hurst v. State*, this Court 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 recognized in Chapter 2016-13 was expanded. The right was extended to the 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 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 James Card's case. *Card v. Jones*, 219 So. 3d 47 (Fla. 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 in the mid-90's. At the 1999

resentencing, an 11-1 death recommendation led to another death sentence. This Court affirmed, and certiorari review was denied 4 days after the issuance of *Ring v. Arizona*. *Card v. State*, 803 So. 2d 613 (Fla. 2001), *cert denied* 536 U.S. 963 (2002). As a result, this Court found the lack of a unanimous death recommendation violated *Hurst v. State*. At Card's upcoming resentencing on his first degree murder conviction that has been final since 1984, he will have a right to a life sentence unless the jury unanimously recommends death under Chapter 2017-1. The presumption of a life sentence will be attached to a 1984 conviction.[24]

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. Chapter 2017-1 precludes the imposition of a death sentence unless the jury returns a

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[24]Similarly, J.B. Parker has been granted a resentencing on the basis of error under *Hurst v. State*. 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. The sentence was affirmed on appeal in 2004. *Parker v. State*, 873 So. 2d 270 (Fla. 2004). Now because the death sentence became final after *Ring v. Arizona* issued, *Hurst v. State* applied and required another resentencing to be ordered. At the resentencing on the first degree murder conviction final in 1985, Parker will have a presumption of a life sentence unless the jury unanimously returns a death recommendation.

unanimous death recommendation. This right is retroactively attaching to Mr. Card's first degree murder conviction which was final in 1984, before Mr. Asay was even charged with a homicide. This is a substantive right that is personal in that it belongs to a person convicted of first degree murder.[25] When Mr. Card is sentence for the 1981 homicide on his conviction of first degree murder that was final in 1984, he will be entitled to a life sentence unless the jury unanimously returns a death recommendation. The substantive right is being attached to a conviction final in 1984. There is no basis, no logic for Mr. Card to have the substantive right that has been extended to him when he is sentenced on the 1984 conviction, while Mr. Asay does not have the same right as to his convictions which were final in 1991.

The date of the underlying homicide does not matter under the statute. While the legislature could have provided that the right set forth in Chapter 2017-1 only attached to defendants charged with a first degree murder committed after Chapter 2017-1 became effective, i.e. March 13, 2017, the legislature chose not to

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[25]The right to representation by counsel attaches to a defendant when he or she is criminally charged. The right to the presumption of innocence attaches to the person who is formally charged with a crime. The right to a life sentence unless the jury unanimously returns a death recommendation, which is established in Chapter 2017-1, attaches to the defendant once he or she is convicted of first degree murder.

do it that way. Chapter 2017-1 was meant to apply retrospectively. It was meant to apply to Mr. Card's 1984 conviction. But in extending the right to Mr. Card, Florida must extend the right to Mr. Asay as to his 1991 convictions.

Put contextually, 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 for a 1981 homicide. The conviction was final in 1984.[26] In a proceeding to determine the sentence to be imposed on Card's 1984 conviction, Chapter 2017-1 means that Card will have a presumption of a life sentence on the conviction that was final in 1984 unless the jury returns a unanimous death recommendation. Due process, as well as the Eighth Amendment, require that Mr. Asay be given the same substantive right to a life sentence unless the jury returns a unanimous death recommendation as to his first degree murder convictions that were final on October 7, 1991. *Asay v. State*, 580 So. 2d 610 (Fla. 1991), *cert denied*., 502 U.S. 895.

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

[26]It also attached to J.B. Parker's first degree murder conviction for a 1982 homicide. The conviction was final in 1985.

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 then 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 is arbitrary. The reason that Card 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 mitigating circumstances. To give Card the benefit of Chapter 2017-1 while depriving Mr. Asay 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. Asay 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*.

Card's conviction was final seven years before Mr. Asay's convictions were final. Yet, Card gets the right to a life sentence as to his first degree murder conviction unless a jury unanimously returns a death recommendation, while Mr. Asay has two death sentences even though three jurors voted against the imposition of both death sentences.[27] The distinction can only be described as "arbitrary." To deprive Mr. Asay of the right that is being extended to Mr. Card, a right to a life sentence unless a resentencing jury unanimously recommends death violates *Furman v. Georgia*, 408 U.S. 238 (1972).

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. Asay of the statutorily created substantive right that is being extended to James Card. "Once a State has granted prisoners a liberty interest, [the US

[27]Under Chapter 2017-1, the 9-3 death recommendations would constitute acquittals of capital first degree murder and would have precluded the imposition of death sentences.

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.").

Habeas relief is required. Mr. Asay's death sentences must be vacated, and at a minimum, a resentencing ordered.

CLAIM III

GIVEN THAT THREE JURORS VOTED IN FAVOR OF LIFE SENTENCES, MR. ASAY'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).

Florida law after *Hurst v. State* and after the enactment of Chapter 2017-1 provides that a defendant can be executed if 12 jurors unanimously consent by returning a death recommendation. While that was not the law at the time of Mr. Asay's sentencing, it is the law now. It will be the law when the State tries to execute Mr. Asay. And Florida law now says a defendant cannot executed by the State of Florida unless 12 jurors voted in favor of a death sentence. The State no longer has the power to impose a death sentence without the unanimous consent of 12 jurors. *See Falcon v. State*, 162 So. 3d 954, 961 (Fla. 2015) ("*Miller* has dramatically disturbed the power of the State of Florida to impose a nondiscretionary sentence of life without parole on a juvenile convicted of a

capital felony").

This claim is being presented within one year of the decision in *Hurst v. State* and also within one year of the enactment of Chapter 2017-1. This claim is therefore timely filed with this Court.

At the time of Mr. Asay's sentencing, the law permitted Mr. Asay to be sentenced to death after a jury returned two 9-3 death recommendations. That is not in dispute. Mr. Asay does not and cannot contest the fact that his death sentences were permitted when he was sentenced even though 3 jurors voted against recommending death sentences. But that is not the issue in 2017 when the State seeks to carry out an execution that the State no longer has the power to impose in a capital sentencing proceeding today. Currently, a death sentence cannot be imposed when three jurors vote to recommend a life sentence.

Cleo LeCroy was convicted of first degree murder for a homicide that occurred when Mr. Le Croy was 17 years old. A death sentenced was imposed and affirmed by this Court on direct appeal. *LeCroy v. State*, 533 So. 2d 750 (Fla. 1988). At the time that Mr. LeCroy was sentenced to death, the law allowed a 17-year-old to be sentenced to death. Then in 2005, the US Supreme Court held: "The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed."

Roper v. Simmons, 543 U.S. 551, 578 (2005). On August 17, 2005, this Court on the basis of *Roper* ordered Mr. LeCroy's death sentence vacated and a life sentence imposed. *LeCroy v. State*, Case No. SC05-136. The fact that Mr. LeCroy's death sentence was legal when imposed did not mean it could be carried out once there was no constitutional statutory authority for executing an individual who was a juvenile at the time of the homicide.[28]

In cases in which the defendant is intellectually disabled, there is no question that a death sentence imposed on such individual prior to the 2002 decision in *Atkins v. Virginia* was permissible and legal. A judge had the authority to impose the sentence. However after *Atkins*, the State of Florida no longer has the power to impose a death sentence on an individual who is intellectually disabled. Accordingly, the State cannot carry out an execution of an intellectually disable defendant who was sentenced to death prior to the 2002 decision in *Atkins*.

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[28]When the US Supreme Court held that juveniles could not be sentenced to life imprisonment without the possibility of parole, this Court found: "Clearly, by invalidating section 775.082(1), Florida Statutes, as applied to juveniles convicted of a capital homicide offense, *Miller* announced a prohibition on the state's power to 'impose certain penalties'—nondiscretionary sentences of life imprisonment without the possibility of parole." *Falcon v. State*, 162 So. 3d 954, 961 (Fla. 2015). As a result, this Court held that the decision in *Miller v. Alabama*, 567 U.S. 460 (2012), invalidating the statute authorizing the imposition of sentence of life without the possibility of parole had to be applied retroactively. *Falcon*, 162 So. 3d at 962 ("The state is no longer able to impose a mandatory sentence of life imprisonment without the possibility of parole on a juvenile").

See Hall v. Florida, 134 S. Ct. 1986 (2014). Under the dictates of *Montgomery v. Louisiana*, 136 S. Ct. 718, 734-36 (2016), Mr. Asay's death sentences which were imposed after 3 jurors voted to recommend a life sentence cannot be permitted to stand when the State can no longer impose a death sentence in such circumstances.

Again, the question is whether a death sentence can be carried out today when a sentencing judge no longer has the authority to impose a death sentence when three jurors voted in favor of a life sentence. Chapter 2017-1; *Hurst v. State*. In is undeniable that the law no longer permits a death sentence to be imposed when three jurors vote in favor of a life sentence. As a result, a death sentence cannot be carried out in a case in which three jurors voted in favor of a life recommendation. *Falcon v. State*, 162 So. 3d at 962; *Toye v. State*, 133 So. 3d 540, 543 (Fla. 2nd DCA 2014) ("*Miller* invalidated the only statutory means for imposing a sentence of life without the possibility of parole on juveniles convicted of a capital felony."). Accordingly, Mr. Asay's death sentences must be vacated.

CLAIM IV

TO CARRY OUT MR. ASAY'S DEATH SENTENCES VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT WHEN OTHERS HAVE BEEN EXTENDED THE RETROACTIVE BENEFIT OF THE SIXTH AMENDMENT RIGHT SET FORTH IN *HURST V. FLORIDA*. MR. ASAY'S DEATH SENTENCES MUST BE VACATED.

To deny Mr. Asay retroactive relief under *Hurst v. Florida*, 136 S. Ct. 616

(2016), on the ground that his death sentence became final before June 24, 2002 under the decisions in *Asay v. State*, 210 So.3d 1 (Fla. 2016), while granting retroactive *Hurst v. Florida* relief to inmates whose death sentences had not become final on June 24, 2002 under the decision in *Mosley v. State*, 209 So.3d 1248 (Fla. 2016), violates Mr. Assay's right to Equal Protection of the Laws under Fourteenth Amendment to the Constitution of the United States (e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942)) and his right against arbitrary infliction of the punishment of death under the Eighth Amendment to the US Constitution (e.g., *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Espinosa v. Florida*, 505 U.S. 1079 (1992) (per curiam)).

The decision in *Mosley v. State* issued on December 22, 2016. Since then this Court has given the retroactive benefit to approximately 34 capital collateral litigants. Distinguishing Mr. Asay from those individuals and denying him the benefit of *Hurst v. Florida*, a benefit they have received violates the Equal Protection Clause as well as the Eighth Amendment. The distinction this Court has drawn is completely arbitrary. It lacks reasonable consistency.

CONCLUSION

Habeas relief is required. Mr. Asay's death sentences must be vacated and at a minimum, a resentencing ordered.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS has been furnished by electronic mail to Timothy Freeland, Assistant Attorney General, on this 2nd day of August, 2017.

CERTIFICATE OF FONT

This is to certify that the Petition has been reproduced in 14 point Times New Roman type, a font that is not proportionately spaced.

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