IN THE SUPREME COURT OF FLORIDA

BRYAN FREDRICK JENNINGS,

Appellant,

v.

Case No. SC17-500
DEATH PENALTY CASE

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT,
IN AND FOR BREVARD COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

PAMELA JO BONDI
ATTORNEY GENERAL

DORIS MEACHAM
Assistant Attorney General
Florida Bar No. 63265
444 Seabreeze Blvd., 5th floor
Daytona Beach, FL 32118
capapp@myfloridalegal.com [and]
doris.meacham@myfloridalegal.com
Telephone:(386) 238-4990
FAX:(386) 226-0457

COUNSEL FOR APPELLEE

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STATEMENT OF THE CASE AND FACTS

The Appellee will rely upon its prior statement of the facts and procedural history set forth in its initial response to this Court's show cause order filed on November 1, 2017. On January 25, 2018, this Court issued a supplemental order for briefing on "the non-*Hurst*" [note omitted] related issues in this case." This brief follows the supplemental brief filed by the Appellant on April 5, 2018.

SUMMARY OF THE ARGUMENT

Appellant's right to due process was not violated. Appellant was given notice and a meaningful opportunity to be heard. Appellant filed a successive motion to vacate his death sentence and case management conference was heard, which allowed Appellant to further argue the issues raised in his motion. He also filed a lengthy and detailed motion for rehearing.

Appellant's convictions and sentences were unquestionably final prior to the issuance of *Ring v. Arizona*, 536 U.S. 684 (2002). Pursuant to Rule 3.851 (d), of the *Florida Rules of Criminal Procedure*, a motion to vacate judgement of conviction and sentence of death must be filed within the one year of the judgment and sentence becoming final unless the fundamental constitutional right asserted was not established within the period provided …and has been held to apply retroactively. Furthermore, the fundamental fairness doctrine is extremely limited in scope and does not replace a traditional *Witt* analysis. In fact, this Court discussed the

application of the fundamental fairness doctrine in the context of cases where a defendant's death sentence became final after the United States Supreme Court decision in *Ring* and the Appellant raised a *Ring* claim pretrial. *See Mosley v. State*, 209 So. 3d 1248, 1275 (Fla. 2016). Ultimately, though, the determining factor for purposes of retroactive application of *Hurst* is whether the Appellant's sentence was final before the United States Supreme Court issued its opinion in *Ring*. *See Asay v. State*, 210 So. 3d 1, 21-22 (Fla. 2016). This is so because the reliance on the old rule and the effect on the administration of justice weighs against retroactive application of *Hurst* to pre-*Ring* cases.

Additionally, Appellant fails to provide a basis for re-opening a proceeding which was already finalized. Nothing Appellant has presented is novel or distinct from former motions and there is legal precedent in opposition of Appellant's claims. Appellant's motion raised issues that have already been raised and rejected in prior postconviction proceedings. "Claims raised and rejected in prior postconviction proceedings are procedurally barred from being relitigated in a successive motion." *Hendrix v. State,* 136 So. 3d 1122, 1125 (Fla. 2014). "A claim raised in a successive motion shall be dismissed if the trial court finds that it fails to allege new or different grounds for relief and the prior determination was on the merits." *Fla. R. Crim. P.* 3.851(e)(2). Here, both the postconviction court and this Court have already addressed the issues raised, and both have found that Appellant

is not entitled to relief. Appellant's instant successive motion fails to allege any new or different grounds that would entitle him to relief. Appellants arguments that his death sentence violates the Eighth Amendment were raised and rejected by this Court in *Hitchcock v. State,* 226 So. 3d 216 (Fla. 2017).

ARGUMENT

ARGUMENT I

APPELLANT'S RIGHT TO DUE PROCESS WAS NOT VIOLATED AS HE WAS NOT DENIED AN OPPORTUNITY TO HAVE HIS POSTCONVICTION CLAIMS ADDRESSED

Appellant contends that he was denied his due process rights. The record below reflects quite the opposite. After filing his successive motion to vacate his death sentence on October 20, 2016, Appellant was given the opportunity to have his claims heard and addressed at a case management hearing on December 5, 2016, with Judge Maxwell. The postconviction court entered its order denying Appellant's motion on January 3, 2017. Thereafter, Appellant filed a motion for rehearing, and did in fact file a 21-page Motion on January 18, 2017. (Attachment A). This motion provided an in-depth briefing regarding the history of the case and Appellant's claims for relief. Successor Judge Mahl entered an order denying Appellant's motion for rehearing on February 14, 2017.

Appellant argues he was not given an opportunity to submit supplemental briefing regarding the history of his case's claims for relief, specifically written for

a judge who was new to the case. Appellant does not indicate what would have been written differently had he known a different judge would read it. The information contained in the motion afforded the reader a detailed account of the claims issued, procedural history, and case law. He also argues that he was not able to ensure that the judge had been provided the full record. Appellant's claim is pure speculation and is contradicted by the postconviction court's order which states:

> The Court has reviewed the Defendant's Successive Motion to Vacate Death Sentence; the State's Response to Defendant's Successive Motion to Vacate Death Sentence, the transcript from the Case Management Conference held on December 5, 2016; the Order Denying Defendant's Successive Motion to Vacate Death Sentence; the Defendant's Motion for Rehearing; the State's Response to Defendant's Motion for Rehearing; and the Official Court file.

(PC-R6 531-32).

Appellant argues he was not given an opportunity to determine if he had a basis to disqualify the new judge. Florida Code of Judicial Conduct, Commentary to Canon 3E(1) states: A judge should disclose on the record any information that he or she believes the parties or their attorneys might consider relevant to disqualification, even if the judge believes there is no real basis for disqualification. A motion to disqualify a judge "must be well-founded and contain facts germane to the judge's undue bias, prejudice, or sympathy." *Rivera v. State*, 717 So. 2d 477, 480–81 (Fla. 1998) (quoting *Jackson v. State*, 599 So.2d 103, 107 (Fla. 1992)). The judge should grant a motion to disqualify if **"it shows that the party making the motion has a well-grounded fear that he or she will not receive a fair trial from**

the presiding judge." *Barwick v. State*, 660 So.2d 685, 691 (Fla. 1995). However, the fact that a judge has ruled adversely to the party in the past does not constitute a legally sufficient ground for a motion to disqualify. Appellant has failed to identify anything in the record to indicate there was a basis for disqualification.

Appellant also argues he was not given an opportunity to ascertain if the judicial assignment comported with Florida Rule of Judicial Administration 2.215(b) (10).[1] The rule requires the chief judge of the circuit to make sure the death penalty judges meet qualifications. Only the chief justice can waive the requirements. Again, Appellant's claim is pure speculation that the chief judge did not follow the rules. Appellant has failed to identify anything in the record to indicate the new judge was unqualified to hear the matter. The cases Appellant relies on in support of his claim are dissimilar to the circumstances in the instant case. *Corbett*

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[1] *Florida Rule of Judicial Administration* 2.215 (b) (10) (A) states:

The chief judge shall not assign a judge to preside over a capital case in which the state is seeking the death penalty, or collateral proceedings brought by a death row inmate, until that judge has become qualified to do so by:

> (i) presiding a minimum of 6 months in a felony criminal division or in a division that includes felony criminal cases, and
>
> (ii) successfully attending the "Handling Capital Cases" course offered through the Florida Court Education Council. A judge whose caseload includes felony criminal cases must attend the "Handling Capital Cases" course as soon as practicable, or upon the direction of the chief judge.

v. State, 602 So. 2d 1240 (Fla 1992), concerned the sentencing of a defendant by a newly assigned judge who did not preside over the penalty phase. *Craig v. State*, 620 So. 2d 174 (Fla. 1993) dealt with a resentencing of a defendant by a substitute judge. These examples involve judges who essentially stepped into the middle of the case at one of the most critical stages.

Appellant's case had been heard and decided upon by Judge Maxwell after a case management hearing. Subsequently, Judge Mahl considered Appellant's motion for a rehearing, which included all of the relevant case law including the newly-issued opinions in *Asay v. State*, 210 So. 3d 1 (Fla. 2016) and *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016). After reviewing the motion, transcripts and Judge Maxwell's previous order, Judge Mahl entered an order denying that motion based on the record he reviewed. The motion for rehearing was denied because neither *Asay* or *Mosley* impacted Judge Maxwell's prior ruling.

ARGUMENT II

A. Introduction

Appellant argues that "fundamental fairness" requires retroactive relief in his case. Appellant relies on *James v. State*, 615 So. 2d 668 (Fla. 1993) in support of his argument that he is similarly situated. The opinion in *James* was based on "fundamental fairness" rather than a *Witt*[2] retroactivity analysis. *See Id*. at 669.

[2] *Witt v. State*, 387 So. 2d 922 (Fla. 1980).

In *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), this Court found that Florida's death penalty statute was rendered unconstitutional in 2002 by *Ring*, and therefore defendants sentenced after *Ring*, "should not be penalized for the United States Supreme Court's delay in explicitly making this determination." *Mosley*, 209 So. 3d at 1283. The *Mosley* Court concluded that because Mosley raised a *Ring* claim at his first opportunity and was "rejected at every turn," consideration of fundamental fairness warranted retroactive application **in addition** to a *Witt* analysis. See *Mosley*, 209 So. 3d at 1275. (*emphasis added*). Appellant argues that he is similarly situated because of his repeated efforts to present the Sixth Amendment challenges to his death sentence "at virtually every turn." (*IB* at 12). Appellant ignores the fact that the *Mosley* Court foreclosed retroactive relief to capital defendants whose sentences were final before *Ring*. *Id*. at 1276.

In *Witt v. State*, this Court considered the circumstances under which a change of law should be given retroactive effect in proceedings for postconviction relief. *Witt v. State* 387 So. 2d 922, 929 (Fla. 1980). However, case specific determination under the *Witt* test requires an analysis of *Hurst v. Florida*, not all capital cases as Appellant argues. The test requires analyzing *Hurst v. Florida* in the context of the purpose of the new rule, reliance on the old rule, and the effect on the administration of justice. *Id.* at 926, 929-30.

This Court performed this analysis in both *Mosley*, a post-*Ring* case, and *Asay*, a pre-*Ring* case, and determined that the reliance on the old rule and the effect on administration of justice weighed in favor of nonretroactivity in pre-*Ring* cases. *Mosley*, 209 So. 3d at 1273-84; *Asay*, 210 So. 3d at 15-17. The purpose of performing this analysis in both *Mosley* and *Asay* was to determine whether *Hurst v. Florida* applied retroactively in a pre-*Ring* scenario and whether *Hurst v. Florida* applied retroactively in a post-*Ring* scenario. The purpose was not to perform a case-by-case analysis of the retroactivity in every capital case. Even if this Court did such analysis in every capital case, the result would be the same, that *Hurst v. Florida* applies retroactively to post-*Ring* cases only.

Although Appellant relies on *Thompson v. State*, 208 So. 3d 49 (Fla. 2016), in furtherance of his argument of manifest injustice, the opinion in *Thompson* is premised on the *Witt* factors as well. *Thompson*, 208 So. 3d at 50 (concluding that *Hall* is retroactive utilizing a *Witt* analysis). Also, *Hall* is distinguishable because it deals with an entire class of persons who cannot be executed. The due process and fundamental fairness issues are very different in such a case. The rejection of the strict IQ score cutoff increases the number of potential cases in which the State cannot impose the death penalty, while requiring a more holistic review means more defendants may be eligible for relief. Accordingly, the *Hall* decision removes from

the state's authority to impose death sentences more than just those cases in which the defendant has an IQ score of 70 or below.

B. Applicable analysis of newly discovered evidence claims

Appellant suggests that under the *Swafford v. State*, 125 So. 3d 760 (Fla. 2013) and *Hildwin v. State,* 141 So. 3d 1178 (Fla. 2014) analysis, this Court should reconsider all of his prior post-conviction claims under *Brady v. Maryland,* 373 U.S. 83 (1963) and *Strickland v. Washington*, 466 U.S. 668 (1984) because the Court's previous analysis failed to consider prejudice in the context of the new death penalty law requiring a unanimous jury verdict to impose death. Essentially, Appellant is asking this Court to revisit the newly discovered evidence claim because "the analysis of the claim was premised upon the erroneous understanding that at a new trial or penalty phase in the future the vote of six jurors in favor of life would be necessary to constitute a life sentence." (*IB* at16). Both cases require a cumulative analysis of all the evidence when a valid newly discovered evidence claim is being raised, but a *Hurst* claim is not a newly discovered evidence claim. Likewise, *Hurst* retroactivity has no bearing on previously-rejected newly discovered evidence claims. Neither *Hildwin* or *Swafford* can be read as resurrecting previously denied legal claims.

In *Jones v. State*, 591 So. 2d 911 (Fla. 1991), this Court stated: "The *Hallman* definition of newly discovered evidence remains intact. That is, the asserted facts

'must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence.'" *Jones v. State*, 591 So. 2d at 916, citing *Hallman v. State*, 371 So. 2d 482, 485 (Fla. 1979). Unlike the defendant in *Jones*, Appellant has not offered any additional evidence that has not been previously determined not to meet the *Hallman* standard.

On October 23, 1989, Appellant moved for postconviction relief in state court. The motion included a *Brady* claim premised on an undisclosed taped statement by Judy Slocum further describing Appellant's intoxication on the night of the murder. *Jennings v. State*, 583 So. 2d 316, 318 (Fla. 1991) (*per curiam*) ("*Jennings IV*"). The court rejected this claim because there was not a reasonable probability that the tape would have caused a different outcome at the trial, and this Court affirmed *Id*. at 319. Appellant raised a second *Brady* claim based on a letter Clarence Muszynski wrote to the prosecutor requesting the appointment of an attorney. *Id*. at 322. Appellant's Rule 3.850 motion also asserted an ineffective assistance claim for his trial counsel's failure to investigate and present additional evidence of his intoxication from Annis Music, Patrick Clawson and Floyd Canada. The court rejected Appellant's *Brady* and ineffective assistance claims finding that the existence of another theory of defense, which may be inconsistent with the chosen theory of defense, does not mean that counsel was ineffective. This Court affirmed.

Id. at 318-20. Appellant filed his third successive 3.851 motion on June 25, 2012. In a lengthy order after an evidentiary hearing, the trial court denied relief, finding that Muszynski's recantation testimony was "inherently incredible." *Jennings v. State*, 192 So. 3d 38 (Fla. 2015). This Court affirmed the trial court's Order on August 28, 2015 (and denied rehearing on January 14, 2016).

Attempts to relitigate claims that have previously been raised and rejected are procedurally barred. *See Wright v. State,* 857 So. 2d 861, 868 (Fla. 2003). Appellant has had his day in court, multiple times. Since Appellant's *Strickland* claims and *Brady* claims have already been litigated, the doctrines of law-of-the-case and collateral estoppel further preclude re-litigation of this issue. *See State v. McBride*, 848 So. 2d 287, 289 (Fla. 2003) (quoting *Florida Dept. of Transp. v. Juliano,* 801 So. 2d 101, 105 (Fla. 2001)) (explaining that under the law-of-the-case doctrine, "questions of law actually decided on appeal must govern the case in the same court and the trial court, through all subsequent stages of the proceedings."); and *McBride,* 848 So. 2d at 290-91 (explaining that collateral estoppel applies in the postconviction context to prevent parties from rearguing the same issues that have been decided between them); *see also Kelly v. State*, 739 So. 2d 1164, 1164 (Fla. 5th DCA 1999) (holding that ''[s]uccessive 3.800(a) motions re-addressing issues previously considered and rejected on the merits and reviewed on appeal are barred by the doctrine of law of the case'').

It is improper for Appellant to re-raise claims that have already been resolved by the lower court and affirmed by this Court. Retroactivity has no bearing on re-evaluating a procedurally barred claim. The rules do not authorize this Court to revisit an identical factual claim merely because of a subsequent, non-retroactive change in the law, or to contemplate a resentencing when Appellant's conviction and sentence were finalized eighteen years prior to *Ring*. Accordingly, as this Court has held that *Hurst* does not apply to defendants like Appellant, whose sentence was final before the *Ring* decision was rendered, that is the end of the matter, and Appellant is not entitled to relief as a matter of law. For all these reasons, Appellant's arguments are without merit and must be denied.

C. Appellant is not entitled to a new penalty phase

Appellant provides no legal support for his proposition that the postconviction claims he has previously litigated and appealed to finality are entitled to a rehearing and/or reconsideration in light of the *Hurst* decisions. The only authority for such a proposition would be a change in law that would impact upon one of his previously litigated postconviction claims which is found by this Court or the United States Supreme Court to be retroactively applicable to cases on collateral review. As previously argued, such is not the case and Appellant fails to present any other authority that would support his request to reconsider his previously litigated claims.

D. Conclusion

There is no legal basis for the Court to reconsider Appellant's previous postconviction claims. *Hurst* does not serve to resurrect Appellant's untimely and procedurally barred claims. The legal issue is whether Appellant can establish a new constitutional right that is retroactively applicable to him. The circuit court properly found that Appellant was not entitled to relief based on this Court's precedent, and Appellant has failed to show why the lower court's ruling should not be affirmed.

ARGUMENT III

APPELLANT'S DEATH SENTENCE DOES NOT VIOLATE THE EIGHTH AMENDMENT

Appellants arguments that his death sentence violates the Eighth Amendment were raised and rejected by this Court in *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017). Appellant's jury was properly instructed on its role **based upon the law existing at the time of his trial.** Thus, characterizing the jury as "advisory" and the trial court as the final sentencer, was an accurate description of the role assigned to the jury by Florida law.

Moreover, Appellant's sentence was pre-*Ring*. In addressing retroactivity, this Court stated "as a practical matter, a *Hurst*-induced *Caldwell* claim cannot be more retroactive than *Hurst* because the rights announced in *Hurst* serve as the basis for this type of *Caldwell* claim—the two are inextricably intertwined for the purposes of this challenge. If rights are not retroactive prior to *Ring*, then any pre-*Ring* claim based on those rights plainly cannot stand." *Reynolds v. State*, 2018 WL 1633075,

at *10. (Fla. Apr. 5, 2018). This Court's rulings in *Asay* and *Hitchcock* apply to Appellant. He has demonstrated no cause for this Court to recede from its lengthy case precedent.

CONCLUSION

WHEREFORE, the Appellee, State of Florida, respectfully requests that this Honorable Court affirm the Order denying postconviction relief entered below.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 24, 2018, a true and correct copy of the foregoing was filed via e-Portal to: Martin McClain, Attorney for Appellant, 141 N.E. 30th Street, Wilton Manors, FL, 33334, martymcclain@comcast.net.

Respectfully submitted,

ATTORNEY GENERAL
PAMELA JO BONDI

s/DORIS MEACHAM
DORIS MEACHAM
ASSISTANT ATTORNEY GENERAL
Florida Bar # 63265
444 Seabreeze Blvd., 5th Floor
Daytona Beach, FL 32118
(386) 238-4990
FAX-(386) 226-0457
capapp@myfloridalegal.com [and]
doris.meacham@myfloridalegal.com

COUNSEL FOR APPELLEE

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Times New Roman, in compliance with *Fla. R. App. P*. 9.210 (a) (2).

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

s/ DORIS MEACHAM
COUNSEL FOR APPELLEE

EXHIBIT A

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR BREVARD COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v. **CASE NO. 05-1979-CF-773-AXXX-XX**

BRYAN FREDRICK JENNINGS,

Defendant.
_____/

MOTION FOR REHEARING

COMES NOW, **BRYAN FREDRICK JENNINGS**, by and through undersigned counsel and respectfully moves this Court to rehear and/or reconsider its order denying Mr. Jennings' Rule 3.851 motion. Mr. Jennings respectfully submits that this Court has overlooked and/or misapprehended points of law and fact in the order denying postconviction relief. In support of this notice/motion, Mr. Jennings states:

1. Undersigned counsel has received a copy of the "Order Denying Defendant's Successive Motion to Vacate Death Sentence." The copy of the order reflects that it was filed with the clerk of court on January 3, 2017, at 4:44 PM. The certificate of service attached to the order attested that the order was placed in the mail on January 4, 2017.

2. Rule 3.851 provides that a motion for rehearing is to be filed within fifteen (15) days of the rendition of the trial court's order. The rule does not include a precise definition of "rendition," but surely rendition cannot occur until the order is filed with the clerk's office and served by the clerk on the parties by either hand delivering or placing a copy in the mail, as required by Fla. R. Crim. Pro. 3.851(f)(5)(D) . In any event, this motion is timely filed.

3. The successive motion to vacate at issue was filed by Mr. Jennings on October 20, 2016. Three separate claims were pled in the motion. Claim I asserted that Mr. Jennings' death sentence stood in violation of the Sixth Amendment under *Hurst v. Florida*, 136 S. Ct. 616 (2016), a decision that had issued on January 12, 2016. Within this claim, Mr. Jennings relied upon the decision in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), a decision that had issued on October 14, 2016, and had construed the meaning of *Hurst v. Florida*. Claim II asserted that Mr. Jennings' death sentence stood in violation of the Eighth Amendment under *Hurst v. State* and should be vacated. Within this claim, Mr. Jennings relied upon the decision in *Hurst v. State*, which had issued on October 14, 2016 and had held that under the Florida Constitution and under the Eighth Amendment, the penalty phase jury had to return a unanimous death recommendation before a sentencing judge was authorized to impose a death sentence. Claim III asserted that new law, under *Hurst v. State* and *Perry v. State*, 2016 WL 6036982 (Fla. Oct. 14, 2016), would govern at any resentencing ordered in Mr. Jennings' case and that the analysis of Mr. Jennings' previously presented newly discovered evidence claim had to be revisited given that the required analysis mandated consideration of the likely outcome at a future resentencing. As to Claim III, the previously presented newly discovered evidence claim had not been finally denied until ninety days after January 14, 2016, the date on which the Florida Supreme Court denied Mr. Jennings' motion for rehearing. *See* Attachment. By the time that the decision denying relief on the newly discovered evidence claim was final, *Hurst v. Florida* had issued and the Florida Legislature had revised Florida's capital sentencing scheme.

4. On December 5, 2016, this Court conducted a case management hearing. At that time, Mr. Jennings' counsel informed this Court that, as to Claim I and Claim II, numerous

collateral appeals were pending in the Florida Supreme Court regarding *Hurst v. Florida* and *Hurst v. State* and whether those decisions were to subject to retroactive application. As to Claim III, Mr. Jennings' counsel argued that the retroactive application of those decisions were not at issue because the claim was premised upon the prospective application of those decisions and the fact that those decisions would govern at a resentencing.

5. As to the State's argument that under Rule 3.851(f)(5)(B), Mr. Jennings' motion was untimely and unauthorized even though it was filed within a year of *Hurst v. Florida*, *Hurst v. State*, and *Perry v. State*, Mr. Jennings asserted that the State had misconstrued the rule. Because the motion was filed within one year of the new case law, the motion was timely. Whether the new case law was retroactively available to Mr. Jennings was a question properly before this Court to consider when evaluating Mr. Jennings' claim. Counsel pointed out that in the case of Mark Asay, a successive motion to vacate under Rule 3.851 had been filed premised upon *Hurst v. Florida* and when Mr. Asay appealed the denial of the motion, the Florida Supreme Court stayed his execution in order to consider Mr. Asay's claim. The Florida Supreme Court did not reject Mr. Asay's 3.851 appeal as arising from an untimely and unauthorized motion. The fact that on March 2, 2016 Florida Supreme Court stayed Mr. Asay's execution and was still considering his appeal and his *Hurst* claim on December 5, 2016 (some nine months later), clearly demonstrated that the State's construction of Rule 3.851(f)(5)(B), was wrong.

6. Besides pointing out the Florida Supreme Court's action in Mr. Asay's case, Mr. Jennings also addressed the Florida Supreme Court's decision to relinquish jurisdiction in *Walton v. State*, Case No. SC16-448. There while Mr. Walton's appeal of the denial of a Rule 3.851 motion was pending in the Florida Supreme Court, Mr. Walton filed another successive

motion to vacate that was largely premised upon *Hurst v. Florida*. The motion to vacate also included a claim virtually identical to Claim III in Mr. Jennings' motion to vacate asserting that new law governing at a future resentencing required revisiting Mr. Walton's previously denied newly discovered evidence claim. Mr. Walton's death sentences were final in 1989. When Mr. Walton filed his Rule 3.851 motion, he also filed a motion in the Florida Supreme Court asking that jurisdiction be relinquished to the circuit court so that the successive motion to vacate could be heard. On September 13, 2016, the Florida Supreme Court granted the motion to relinquish so that the successive 3.851 motion could be heard and considered by the circuit court. Again, Mr. Jennings argued that this clearly demonstrated that the State's reading of Rule 3.851(f)(5)(B) was erroneous because the Florida Supreme Court would not have relinquished jurisdiction to the circuit court to hear and consider an untimely and unauthorized motion.

7. Moreover, the State's construction of Rule 3.851(f)(5)(B) is contrary to a decision on which it relies, *Johnson v. State*, 904 So. 2d 400 (Fla. 2005). There, Mr. Johnson presented a claim based upon *Ring v. Arizona*, 536 U.S. 584 (2002), immediately after *Ring* issued. The *Ring* claim was presented in a successive Rule 3.851 motion filed in 2002. Mr. Johnson's death sentence was final in 1984. The successive motion was not found to be untimely and unauthorized. Instead, Mr. Johnson's motion was considered and his arguments that he was entitled to the retroactive benefit of *Ring* were entertained, considered and rejected.

8. The State's construction of Rule 3.851(f)(5)(B) would also mean that when a decision like *Hurst v. Florida* issues, capital defendants whose sentencing proceedings were unconstitutional under the new decision, but whose death sentences were final more than one year before the new decision issued, would be denied access to the courts in order to obtain a

determination of whether the new decision was retroactively applicable to their case. Further, if a one year clock runs from the date of the decision, as opposed to from the date it is found to be retroactive, the one year clock would like expire before any retroactive determination could be obtained.

9. After the case management hearing, Mr. Jennings filed a motion to stay proceedings on his Rule 3.851 motion pending a decision from the Florida Supreme Court addressing the retroactivity of *Hurst v. Florida*. Within this motion, Mr. Jennings identified other cases with pending successive 3.851 motions with claims based upon *Hurst v. Florida* in which the circuit court had not accepted the State's position that the 3.851 motions were unauthorized, but instead determined that the best course of action was stay proceedings on the 3.851 motions until the Florida Supreme Court addressed the appropriate retroactive analysis applicable to claims premised upon *Hurst v. Florida*:

> 3. Other capital collateral defendants have presented virtually identical Rule 3.851 claims arguing for retroactive application of *Hurst v. Florida* under *Witt v. State*. A number of circuit courts have stayed proceedings on the pending Rule 3.851 motions. Proceedings have been stayed until a determination is made by the Florida Supreme Court as to the retroactivity of *Hurst v. Florida. See* Attachment A - Order dated 12-5-16, *State v. Haliburton v. State*, Case No. 81-5015 (15th Jud. Cir., Palm Beach Cty.); Attachment B - Order dated 12-7-16, *State v. Bates*, Case No. 82-0661-C (14th Jud. Cir., Bay Cty.). A stay was orally granted in *State v. Byrd* , Case No. 81-10517 (13th Jud. Cir., Hillsborough Cty.), during a case management hearing on December 6, 2016. Instead of issuing a stay order, other circuit courts have simply scheduled and then continued case management hearings on the 3.851 motions every sixty days or so. In *State v. Pittman*, Case No. 90-2242A1-XX (10th Jud. Cir., Polk Cty.), the circuit court continued the December 8, 2016, case management hearing until February 9, 2017, because the *Hurst* retroactivity ruling had not yet been announced by the Florida Supreme Court. This was the third time that a case management hearing on Mr. Pittman's *Hurst* claims had been continued due to the pendency of the retroactivity issue in the Florida Supreme Court. Similar continuances have been granted in *State v. Phillips*, Case No. 83-435 (11th Jud. Cir., Miami-Dade Cty.),

and *State v. Wilcox*, Case No. 08-3736 (17th Jud. Cir., Broward Cty.).

> 4. As explained in the order staying proceedings in *State v. Bates*, it is generally deemed "prudent to stay the current proceedings until a determination is made as to whether *Hurst v. State* should be retroactively applied." *See* Attachment B.

Motion for an Order Staying Proceedings at 1-2, filed 12-9-16.

10. Overlooking the case law on which Mr. Jennings relied and disregarding the fact that the Florida Supreme Court stayed Mr. Asay's execution on the basis of a Rule 3.851 motion raising a claim based upon *Hurst v. Florida* as new law, this Court entered the January 3, 2017, order and stated: "The Court finds the present motion is procedurally barred and unauthorized under Rule 3.851, Florida Rule of Criminal Procedure." Order Denying 3.851 Motion at 10.

11. Also overlooked by this Court was the fact that on December 22, 2016, the Florida Supreme Court issued its decision in *Mosley v. State*, _ So. 3d _, 2016 WL 7406506 (Fla. Dec. 22, 2016). There, the Florida Supreme Court determined that *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) constituted changes in Florida law that were to be applied retroactively in *Mosley*. After *Mosley*, it is undeniable that *Hurst v. Florida* and *Hurst v. State* "ha[ve] been held to apply retroactively." Thus after *Mosley*, even under the State's reading of Rule 3.851(d)(2)(B), which this Court embraced, Mr. Jennings' 3.851 motion is timely and authorized. This Court's ruling otherwise must be withdrawn and consideration given to Mr. Jennings' arguments that he can demonstrate that *Hurst v. Florida* and *Hurst v. State* should be retroactively applied to his death sentence and evaluate whether it must be vacated.

12. In *Mosley*, the Florida Supreme Court recognized that in determining which

collateral defendants were to actually receive the benefit of *Hurst v. Florida* and *Hurst v. State*, there are two separate and distinct approaches for conducting retroactivity analysis. 2016 WL 7406506 at *20 n.13.[1] One approach requires a case-by-case determination; the other approach requires a category-by-category approach.

13. The first approach to retroactivity discussed in *Mosley* was explained as follows:

> This Court has previously held that **fundamental fairness alone may require the retroactive application of certain decisions involving the death penalty after the United States Supreme Court decides a case that changes our jurisprudence**. For example, in *James*, this Court reviewed whether the United States Supreme Court's decision in *Espinosa v. Florida*, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), should apply retroactively. *James*, 615 So.2d at 669. Although pre-*Espinosa* this Court had rejected claims that our jury instruction on the extremely heinous, atrocious or cruel (HAC) aggravator was unconstitutionally vague, the United States Supreme Court disagreed and held in *Espinosa* that our instruction was, indeed, unconstitutionally vague. 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854. This Court then held that defendants who had raised a claim at trial or on direct appeal that the jury instruction pertaining to the HAC aggravating factor was unconstitutionally vague were entitled to retroactive application of *Espinosa*. *James*, 615 So.2d at 669. While this Court did

[1]It is worth mentioning that the decision in *Mosley v. State* is not final. In fact, the State has filed a motion for rehearing and asserted that by providing for a case-by-case analysis "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). In fact, the State's rehearing motion argues that the "**substantive analyses set forth in [*Mosley*] violate fundamental principles found in existing precedent**." (Motion for Rehearing at 2, *Mosley v. State*, Case No. SC14-2108). Justice Canady in his separate opinion in *Mosley* agreed that the Court's new approach to retroactivity had completely upended Florida law. *Mosley*, 2016 WL 7406506 at *32 (Canady, J., concurring in part, dissenting in part) ("the supposed rule of 'fundamental unfairness' articulated in *James* is deeply problematic—if not entirely incoherent—when judged by its own terms. If counsel accepted our decisions at face value and relied on the United States Supreme Court's repeated rejection of *Ring* claims, the client loses under *James*. But if counsel raised claims that had been consistently rejected, the client wins. **This hardly comports with the notion of fundamental fairness**.") (emphasis added); *Id*. at *32 (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.").

> not employ a standard retroactivity analysis in *James*, the basis for granting relief was that of fundamental fairness. *Id*. This Court reasoned that, because James had raised the exact claim that was validated by the United States Supreme Court in *Espinosa*, "it would not be fair to deprive him of the *Espinosa* ruling." *Id*.

Mosley, 2016 WL 7406506 at * 19 (emphasis added). Clearly, *James* is cited as an example of the fundamental fairness approach to determining when a particular defendant is entitled to the retroactive application of a change in law mandated by a decision from the US Supreme Court. It is also clear that the fundamental fairness approach requires a case-by-case determination of which collateral litigants get the benefit of the change in law retroactively.

15. The two alternative retroactivity analyses set forth in *Mosley* were foreshadowed in *Thompson v. State*, _ So. 3d _, 2016 WL 6649950 *1 (Fla. Nov. 10, 2016). At issue there was the retroactivity of *Hall v. Florida*, 134 S. Ct. 1986 (2014). In *Thompson*, the Court acknowledged the more traditional *Witt* had already been applied to *Hall v. Florida*. But, the Court that noted an alternative basis for giving Thompson the benefit of *Hall*:" 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)"). In *State v. Owen*, 696 So. 2d 715 (Fla. 1997), the Florida Supreme Court had previously ruled that statements obtained from Duane Owen were inadmissible as they had been obtained in violation of Owens' rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). *See Owen v. State*, 560 So. 2d 207(Fla. 1990), *cert denied*, *Florida v. Owen*, 498 U.S. 855.[2] Prior to Owens' retrial, the United States Supreme Court rendered a decision in *Davis v. United States*,

[2]The United States Supreme Court denied Florida's petition for a writ of certiorari on October 1, 1990, meaning that the ruling in *Owen v. State* was final as of that date.

512 U.S. 452 (1994).[3] On the basis of *Davis*, the State argued that Owens' statements should be held to be admissible at Owens' retrial. "[T]he trial court held the confession inadmissible. The State next filed a petition for a writ of certiorari in the district court of appeal." *State v. Owen*, 696 So. 2d at 717. "Because the suppression of Owen's confession was the law of the case, the [district] court denied the petition but certified [a] question" to the Florida Supreme Court. *Id.* The Florida Supreme Court then set aside the law of the case because of the intervening decision from the US Supreme Court:

> Generally, under the doctrine of the law of the case, "all questions of law which have been decided by the highest appellate court become the law of the case which must be followed in subsequent proceedings, both in the lower and appellate courts." *Brunner Enters., Inc. v. Department of Revenue*, 452 So.2d 550, 552 (Fla.1984). However, **the doctrine is not an absolute mandate, but rather a self-imposed restraint** that courts abide by **to promote finality and efficiency** in the judicial process and prevent relitigation of the same issue in a case. *See Strazzulla v. Hendrick*, 177 So.2d 1, 3 (Fla.1965) (explaining underlying policy). **This Court has the power to reconsider and correct erroneous rulings** in exceptional circumstances and where reliance on the previous decision would result in manifest injustice, notwithstanding that such rulings have become the law of the case.

State v. Owen, 696 So. 2d 715, 720 (Fla. 1997) (emphasis added).

16. In *Strazzulla v. Hendrick*, 177 So.2d 1, 4 (Fla. 1965), the Florida Supreme Court held that an appellate court was not "wholly without authority to reconsider and reverse a previous ruling that is 'the law of the case.'" *Strazzulla* then explained:

> We think it should be made clear, however, that an appellate court should reconsider a point of law previously decided on a former appeal only **as a matter of grace**, and not as a matter of right; and that an exception to the general rule binding the parties to 'the law of the case' at the retrial and at all subsequent proceedings should not be made **except in unusual circumstances** and **for the**

[3]The decision in *Davis* issued on June 24, 1994, over four years after *Owen v. State* had issued, and three years and eight months after *Owen v. State* was final.

> **most cogent reasons-and** always, of course, only **where 'manifest injustice' will result from a strict and rigid adherence to the rule.**

Id. (emphasis added). One example cited as an exception to the law of the case doctrine arose when warranted by "considerations of public policy in order to give effect to the law of a sister state and judicial orders regularly entered pursuant to such law." *Id*. The Court then noted:

> Another clear example of a case in which **an exception** to the general rule **should be made** results from **an intervening decision** by a higher court contrary to the decision reached on the former appeal, the correction of the error making unnecessary an appeal to the higher court.

Id. (emphasis added). To make clear that it was not limiting the exceptions to the law of the case doctrine, this Court observed: "Other examples which have appealed to courts of other jurisdictions as proper exceptions to the general rule are set out in the annotation in 87 A.L.R.2d, at pp. 299 et seq." Thus, *Strazzula* stands for the proposition that "the court has the power to reconsider and correct an erroneous ruling that has become 'the law of the case.'" *Strazzula*, 177 So. 2d at 5.

17. This line of cases is very much in keeping with the fundamental fairness approach set forth in *Mosley v. State*. As noted there, the fundamental fairness approach to retroactive application of a change in law is part of Florida's jurisprudence. *See Moreland v. State*, 582 So. 2d 618, 619 (Fla. 1991); *Fannin v. State* 751 So. 2d 158, 161 (Fla. 2nd DCA 2000); *Benedit v. State*, 610 So. 2d 699 (Fla. 3rd DCA 1992); *Wright v. State*, 604 So. 2d 1248, 1249 (Fla. 4th DCA 1992). Of course, fundamental fairness is an equitable concept. *See Treadwell v. Town of Oak Hill*, 175 So. 2d 777, 779 (Fla. 1965) ("courts of equity do have power in proper cases to require that to be done which in law should be done"); *Degge v. First State Bank of Eutis*, 199 So. 564, 441 (Fla. 1941) ("Equity came into existence as a means of granting justice in cases wherein the

law by its rigid principles was deficient. It has been truly called a court of conscience. It should not be shackled by rigid rules of procedure and thereby preclude justice being administered according to good conscience."). The United States Supreme Court recently addressed a court's inherent equitable powers to permit equitable tolling:

> But we have also made clear that often the "exercise of a court's equity powers ... must be made on a case-by-case basis." *Baggett v. Bullitt*, 377 U.S. 360, 375, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964). In emphasizing the need for "flexibility," for avoiding "mechanical rules," *Holmberg v. Armbrecht*, 327 U.S. 392, 396, 66 S.Ct. 582, 90 L.Ed. 743 (1946), we have followed a tradition in which courts of equity have sought to "relieve hardships which, from time to time, arise from a hard and fast adherence" to more absolute legal rules, which, if strictly applied, threaten the "evils of archaic rigidity," *Hazel–Atlas Glass Co. v. Hartford–Empire Co.*, 322 U.S. 238, 248, 64 S.Ct. 997, 88 L.Ed. 1250 (1944). The "flexibility" inherent in "equitable procedure" enables courts "to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct ... particular injustices." *Ibid*. (permitting postdeadline filing of bill of review). Taken together, these cases recognize that courts of equity can and do draw upon decisions made in other similar cases for guidance. Such courts exercise judgment in light of prior precedent, but with awareness of the fact that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case.

Holland v. Florida, 560 U.S. 631, 649-50 (2010). *See Martel v. Clair*, 132 S. Ct. 1276, 1285 (2012) (purpose of providing counsel to federal habeas petitioners "to foster 'fundamental fairness in the imposition of the death penalty.'"); *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988) (Fed. R. Civ. P. 60(b) "provides courts with authority 'adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.'"). As an equitable concept and like exception to the law of the case doctrine, fundamental fairness must be addressed on a case-by-case.

18. The second approach to retroactivity discussed in *Mosley v. State* is the analysis set forth in *Witt v. State*, 387 So. 2d 922 (Fla. 1980). However, the Florida Supreme Court

abandoned the binary approach to retroactivity that had previously been aspect of *Witt*.[4] Employing *Witt*, the Court in *Mosley* concluded: "Because Florida's capital sentencing statute has essentially been unconstitutional since *Ring* in 2002, fairness strongly favors applying *Hurst*, retroactively to that time." 2016 WL 7406506 at *23.[5] Further, the Court in *Mosley* explained that:

> holding *Hurst* retroactive would only affect the sentences of capital defendants. Further, in addition to the fact that convictions will not be disturbed, not every defendant to whom *Hurst* applies will ultimately receive relief. As we determined in *Hurst*, each error should be reviewed under a harmless error analysis to individually determine whether each defendant will receive a new penalty phase. *Hurst*, 202 So.3d at 67–68; *James*, 615 So.2d at 669. Additionally, we have declined to find *Hurst* applicable to those cases where the defendant waived his/her right to trial by jury. *See Mullens v. State*, 197 So.3d 16 (Fla.), *pet. for cert. filed*, No. 16–6773 (Nov. 4, 2016).
>
> Finally, we again emphasize that this decision will only impact the sentence of death, not the conviction. The difference is not guilt or innocence but, instead, life or death.

2016 WL 7406506 at *24-25. Thus, the *Witt* analysis is now conducted category-by-category. This means that it is up to collateral movants to make arguments as to a particular category in which they fit and why that category of collateral movants can show retroactive application to that category is warranted under the traditional *Witt* analysis.

19. In th wake of *Mosley*, Mr. Jennings can readily demonstrate that under the

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[4]It is this abandonment of the binary approach that led to Justice Canady's statement that in his separate opinion in *Mosley*, that the majority's "retroactivity analysis [left] the *Witt* framework in tatters." *Mosley v. State*, 2016 WL 7406506 at 32 (Canady, J., concurring in part, dissenting in part).

[5]The use of the word "fairness" in the context of the *Witt* analysis would suggest that fairness, indeed fundamental fairness, is the Florida Supreme Court's central concern in determining which defendants should retroactively receive the benefit of *Hurst v. Florida*.

fundamental approach and the miscarriage of justice exception to the law of the case doctrine, he should receive the benefit of *Hurst v. Florida* and *Hurst v. State* as to Claim I and Claims II of his successive motion to vacate.[6]

20. Even though his direct appeal occurred well before *Hurst v. Florida*, *Ring v. Arizona*, and even *Apprendi v. New Jersey*, Mr. Jennings raised arguments in his direct appeal that he had been denied his right to an impartial jury's resolution of the determination facts at issue in the penalty phase - he even argued that "[t]he Florida capital sentencing statute does not require a sentencing recommendation by a unanimous jury or substantial majority of the jury." (IB at 99, *Jennings v. State*, Case No. SC 68,835). Mr. Jennings argued in Point IX of his Initial Brief that he was deprived of his Sixth Amendment right to a jury trial when the State's motion to excuse a juror who had sat through the guilt phase was granted at the commencement of the penalty phase. The State's challenge to the juror was based upon statements she made in open court before the start of guilt phase regarding her concerns about the death penalty. In Point XI of his Initial Brief, Mr. Jennings was deprived of his Sixth Amendment right to a jury trial when the judge denied his motion for mistrial when it was discovered at the beginning of the penalty phase that several jurors had obtained extrajudicial information regarding prior trial of Mr. Jennings and heard others during conversation about his case express views regarding the trial as a waste of money. During the deliberations, the jury sent the judge a written question seeking more information of prior trials reflecting discussions among the jurors about the extrajudicial information several jurors had obtained. Mr. Jennings specifically argued that the trial judge's

[6]Claim III does not involve retroactive application of *Hurst v. Florida*. The denial of Mr. Jennings' prior 3.851 motion and the newly discovered evidence claim contained therein was not final when *Hurst v. Florida* issued.

refusal to grant a mistrial "that he was denied his constitutional rights to due process of law and to a fair trial." (IB at 60, Case No. SC 68,835).

21. In Argument XIII of his Initial Brief, Mr. Jennings argued:

> Due process of law applies "with no less force at the penalty phase of a trial in a capital case" than at the guilt determining phase of any criminal trial. *Presnell v. Georgia*, 439 U.S. 14, 16-17 (1978). Amend. V, U.S. Const. The need for adequate instructions to be given to a jury to guide its recommendation in capital cases was expressly noted by the Court in *Gregg v. Georgia*, 428 U.S. 153, 192-193 (1976):
>
> > The idea that a jury should be given guidance in its decision making is also hardly a novel proposition. Juries are invariably given careful instructions on the law and how to apply it before they are authorized to decide the merits of a lawsuit. It would be virtually unthinkable to follow any other course in a legal system that has traditionally operated by following prior precedents and fixed rules of law. *See Gasoline Products Co. v. Camplin Refining Co.*, 283 U.S. 494, 498, 75 L.Ed. 1188, 51 S.Ct. 513 (1931); Fed. Rul.Civ.Proc. 51. When erroneous instructions are given, retrial is often required. It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations.
>
> The information received by Appellant's jury in the form of instructions on the law to be followed in making a penalty recommendation was far from adequate to avoid the infirmities in this death sentence that inhered in death sentences imposed under the pre-*Furman* statute.

(IB at 67-68, Case No. SC68,835). After noting that two of the proffered instructions that the trial judge rejected concerned the aggravating circumstances at issue before the jury, Mr Jennings argued:

> Thus errors of such magnitude as the failure to define the aggravating circumstances and the weighing process of aggravating against mitigating in the instructions to the jury at the penalty phase of Appellant's trial requires either reduction of the sentence to life imprisonment or no less than that a new penalty recommendation be obtained. In *Messer v. State*, 330 So.2d 137, 142 (Fla. 1976), the Court stated:
>
> > It is clear that the Legislature in the enactment of Section 921.141, Florida

> Statutes, sought to devise a scheme of checks and balances in which the input of the jury serves as an integral part. The validity of the jury's recommendation is directly related to the information it receives to form a foundation for such recommendation.
>
> Accordingly, this Court should reduce the sentence or remand to the trial court with instructions that a new penalty recommendation be obtained. The trial court's error violated a Appellant's constitutional rights. Amend. V, VI, VIII and XIV, U.S. Const.; Art. I, Sec. 9, Fla. Const.

(IB at 69-70, Case No. 68,835).

22. In its Answer Brief, the State captioned its answer to Point Thirteen: "NO PREJUDICE RESULTED TO APPELLANT FROM THE JURY INSTRUCTIONS GIVEN BY THE TRIAL COURT DURING THE PENALTY PHASE." (AB at 38, Case No. SC 68,835). The State conceded that Mr. Jennings had objected to the inadequate instructions during the trial and had proffered proposed instructions which the trial judge rejected and refused to give. Instead, the State's response to Mr. Jennings' argument was to assert that Mr. Jennings' was not entitled to have the jury provided adequate instructions because the jury's role was not significant. Under Florida law, the judge was the finder of fact and the sentencer:

> In Florida, the trial judge imposes the death sentence. Therefore, even if the jury instructions are later found to be inadequate, the death sentence should be affirmed, because the trial judge, utilizing the guidelines designed by the legislature, must still determine whether the ultimate penalty is warranted. This is a valid measure to assure that the Florida death penalty is applied in a manner that avoids arbitrary and capricious infliction of the death penalty. *Proffitt v. Florida*, a 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

(AB at 39-40, Case No. SC 68,835).

23. In Point XIV of his Initial Brief, Mr. Jennings argued that the cold, calculated and premeditated aggravating circumstance had not been found at his previous trial despite the State's effort to establish it. Mr. Jennings asserted that the State's presentation of the CCP

aggravator at Mr. Jennings' third trial violated his right against double jeopardy:

> This Court has declared that the aggravating circumstances set forth in the statute "actually define those crimes" punishable by death, and thus "must be proved beyond a reasonable doubt." *State v. Dixon*, 283 So.2d 1, 9 (Fla. 1973). In this respect, aggravating circumstances under Florida's death penalty system are analogous to individual offenses. By failing to find the circumstance at the first trial, Appellant was acquitted of that particular factor. To allow the trial judge at the second trial and at the instant trial to use this factor in support of a death penalty would violate the dictates of *North Carolina v. Pearce*, 395 U.S. 711 (1969). *Bullington v. Missouri*, 451 U.S. 430 (1981), also supports Appellant's contention. *Bullington* barred the imposition of a death sentence following a retrial after a defendant's appeal where the jury's verdict at the first trial fixed the punishment as life. The Court pointed out that double jeopardy applied, since the sentencing portion of the trial was like the trial on the question of guilty or innocence. In *Bullington* the court stated that it did not matter whether the state would seek to rely on the same or additional evidence holding that "[hlaving received one fair opportunity to offer whatever proof it could assemble, *Burks v. United States*, 437 U.S., 1, 16, (1977), the State is not entitled to another." *Bullington v. Missouri, supra* at 446. An acquittal, regardless of how obtained, constitutes an absolute bar to relitigation. *Sambria v. United States*, 437 U.S. 54 (1978).

(IB at 83, Case No. SC 68,835).

24. Alternatively to the double jeopardy argument regarding CCP, Mr. Jennings also argued that its application in his case violated the Ex Post Facto Clause:

> Additionally, application of this aggravating circumstance to this particular defendant is violative of his constitutional protections against - ex post facto, since the crime was committed in May of 1979 and, while the statute was amended in July of 1979. Amend V, VIII, and XIV, U.S. Const.; Art. I, 59 and Art. X, 59, Fla. Const.

(IB at 85, Case No. SC 68,835).

25. In addressing Mr. Jennings' arguments regarding the CCP aggravating circumstances and that it was functionally an element of the offense and improperly considered under either the Double Jeopardy Clause or the Ex Post Facto Clause, the State wrote:

> Appellant mistakenly relies upon this court's statement in *State v. Dixon*, that the aggravating circumstances actually define those crimes punishable by death and must be proved beyond a reasonable doubt. *Id*. at 9. Appellant argues that aggravating circumstances are analogous to individual offenses, and by failing to make this finding after the first trial, that he was acquitted of that particular factor.
>
> The appellee would invite appellant to read further to the next paragraph, wherein the appellee would maintain, this court explains that the aggravating factors represent "situations" wherein the death penalty was applicable absent overriding mitigating factors. *Id*. at p. 9.
>
> The appellee would maintain that the homicide was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification, does not add an entirely new factor as an aggravating circumstance, but only relates, in part, what is already present in the elements of premeditated murder, with which appellant was charged, and which the evidence clearly supported. Therefore, the finding of this factor was proper and did not violate prohibition against ex post facto as set forth in *Weaver v. Graham*, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 7 (1981) and *State v. Williams*, 397 So. 2d 663 (Fla. 1981). *See also, Combs v. State*, 403 So.2d 418 (Fla. 1981), cert. denied, 102 S.Ct. 2258 (1982).

(AB at 53, Case No. SC 58,835).

26. In affirming Mr. Jennings' death sentence in his third direct appeal, the Florida Supreme Court rejected all of his arguments on the merits. *Jennings v. State*, 512 So. 2d 169, 173-76 (Fla. 1987).

27. The arguments briefly outlined herein were erroneously rejected as *Hurst v. Florida* and *Hurst v. State* now establish. It violates fundamental fairness to not apply *Hurst v. Florida* and *Hurst v. State* to his meritorious direct appeal arguments. The manifest injustice exception to the law of the case doctrine is equally applicable. Both fundamental fairness and manifest injustice principles warrant the retroactive application of *Hurst v. Florida* and *Hurst v. State*. Under *Hurst v. Florida* and *Hurst v. State* is clear that Mr. Jennings' death sentence cannot stand. The CCP aggravator is an element of the offense under *Hurst v. Florida* and *Hurst v.*

State, and is use to impose a death sentence violated Mr. Jennings' rights against double jeopardy and ex part facto laws. The jury was entitled to adequate instructions at the penalty phase. The failure to adequately instruct the jury violated Mr. Jennings' right to a jury trial under *Hurst v. Florida* and *Hurst v. State*. Further, Mr. Jennings was entitled to a unanimous jury recommendation before a death sentence was authorized. Given that the death recommendation was not unanimous, the error under *Hurst v. Florida* and *Hurst v. State* cannot be shown by the State to be harmless beyond a reasonable doubt.

28. Further, after *Ring v. Arizona* issued on June 24, 2002, Mr. Jennings promptly filed a habeas petition in the Florida Supreme Court on October 2, 2002, and argued that his death sentence stood in violation of *Ring v. Arizona*. He specifically argued that under *Ring* he was entitled to have the jury make the factual determination of whether sufficient aggravating circumstances existed to justify the imposition of a death sentence and whether insufficient mitigating circumstances existed to outweigh the aggravating circumstances. (Habeas Petition at 18, Case No. SC02-2143). Mr. Jennings also argued under *Ring* the jury had to make those findings unanimously. (Habeas Petition at 20, Case No. SC02-2143).

29. On June 18, 2003, the Florida Supreme Court denied Mr. Jennings' habeas petition on the merits without a written opinion.

30. Fundamental fairness and manifest injustice both require that Mr. Jennings receive the benefit of *Hurst v. Florida* and *Hurst v. State* as to the erroneous June 18, 2003 denial of his habeas petition and the *Ring* claim set forth therein.

31. Because this Court overlooked and was seemingly unaware of the Florida Supreme Court's December 22, 2016 ruling in *Mosley v. State* when it rendered its January 3,

2017, denial of the successive motion to vacate, it did not address the fundamental fairness approach to retroactivity set forth in *Mosley v. State*, nor the manifest injustice exception to the law of the case doctrine identified in *Thompson v. State*. Certainly on the basis of these principles and the finding in *Mosley* that *Hurst v. Florida* and *Hurst v. State* did apply retroactively to Mosley's death sentence, this Court should grant this motion for rehearing as to Claim I and Claim II and allow Mr. Jennings a full and fair opportunity to present the arguments that outlined herein, but which warrant full and careful consideration.

32. As to Claim III, the denial of Mr. Jennings' previous Rule 3.851 motion was not final when *Hurst v. Florida* issued on January 12, 2016. Accordingly, Mr. Jennings is entitled to the benefit of *Hurst v. Florida* and the revised sentencing statute considered and applied to the rejection of his newly discovered evidence claim.

33. In *Oats v. State*, 181 So. 3d 457 (Fla. 2015), Mr. Oats received the benefit of *Hall v. Florida* as it related to his pending intellectual disability claim in a Rule 3.851 motion, even though Mr. Oats' death sentence was final in 1985. *Hall v. Florida* issued in 2014. Without regard to retroactivity, Mr. Oats got the benefit of the new law in his then pending appeal from the denial of his 3.851 motion.

34. This Court overlooked this aspect of Claim III when it issued its January 3rd order. This Court also failed to recognize that Mr. Jennings is not seeking retroactive application of either *Hurst v. Florida* or *Hurst v. State* in Claim III. He is merely seeking to have the newly discovered evidence analysis properly consider that at a future resentencing the governing law will be that a jury must unanimously return a death recommendation before a judge will be permitted to impose a death sentence. That law that we know now will apply in the future, if a

resentencing is ordered, must be part of the analysis under *Hildwin/Swafford* in determining whether Mr. Jennings can demonstrate that he would likely receive a different sentence (i.e. a life sentence) at a resentencing.

35. In light of the significance of the decision in *Mosley v. State*, which was just released on December 22 and is not yet final, this Court should vacate its January 3 order denying the motion to vacate and order the parties to brief *Mosley*. The significance of *Mosley* and its impact was underscored when Justice Canady in his separate opinion acknowledged the upheaval in the law that the decision in *Mosley* had brought. *Mosley v. State*, 2016 WL 7406506. at *32 (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.") (emphasis added). Due process should require that Mr. Jennings be given an opportunity to full assess and address the impact of *Mosley* on his motion to vacate and his claims for relief under *Hurst v. Florida* and *Hurst v. State*. The US Supreme Court in *Hall v. Florida*, 134 S. Ct. at 2001, recently explained:

> The death penalty is the gravest sentence our society may impose. **Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution.** Florida's law contravenes our Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world. The States are laboratories for experimentation, but those experiments may not deny the basic dignity the Constitution protects.

(Emphasis added). Surely Mr. Jennings must be afforded a fair opportunity to demonstrate why after *Mosley v. State* he is entitled to Rule 3.851 relief from his unconstitutionally imposed death

sentence.

WHEREFORE, Mr. Jennings respectfully moves this Court to rehear and reconsider its January 3, 2017 order denying his Rule 3.851 motion for the rehearing and order the parties to brief *Mosley v. State*.

I HEREBY CERTIFY that a true copy of the foregoing Motion has been furnished by electronic mail to William Respess, Assistant State Attorney, at wrespess@sa18.state.fl.us; and Vivian Singleton, Assistant Attorney General, at VivianSingleton@myfloridalegal.com, on January 18, 2017.

/s/ Martin J. McClain
MARTIN J. McCLAIN
Florida Bar No. 0754773
McClain & McDermott, P.A.
Attorneys at Law
141 N.E. 30th Street
Wilton Manors, FL 33334
(305) 984-8344
martymcclain@earthlink.net

REGISTRY COUNSEL FOR MR. JENNINGS