IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC17-790

HAROLD LEE HARVEY JR.,

Appellant

vs.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT IN AND FOR OKEECHOBEE COUNTY, FLORIDA (CRIMINAL DIVISION)

ANSWER BRIEF OF APPELLEE

PAMELA JO BONDI
Attorney General
Tallahassee, Florida

DONNA M. PERRY
Assistant Attorney General
Florida Bar No. 64038
1515 North Flagler Drive
Suite 900
West Palm Beach, Florida 33401
Telephone: (561) 837-5000
Counsel for Appellee

TABLE OF CONTENTS

TABLE OF CITATIONS ii

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF THE ARGUMENT.....4

STANDARD OF REVIEW 5

ARGUMENT I 5

THE LOWER COURT PROPERLY DETERMINED THAT HARVEY WAS NOT ENTITLED TO RELIEF NOR TO AN EVIDENTIARY HEARING PURSUANT TO *HALL*, AS HARVEY'S MOTION IS UNTIMELY, PROCEDURALLY BARRED, AND THE CLAIM OF INTELLECTUAL DISABILITY IS CONCLUSIVELY REFUTED BY THE RECORD.

ARGUMENT II 14

THE LOWER COURT PROPERLY DETERMINED THAT HARVEY'S DEATH SENTENCE DOES NOT VIOLATE THE EIGHTH AMENDMENT; FURTHER ANY ERROR IS HARMLESS.

CONCLUSION..... 20

CERTIFICATE OF SERVICE.....21

CERTIFICATE OF TYPE SIZE.....21

TABLE OF AUTHORITIES

Cases

Asay v. State,
210 So. 3d 1 (Fla. 2016) 16, 19

Atkins v. Virginia,
536 U.S. 304 (2002) ..... 6 through 12

Cherry v. State,
959 So. 2d 702 (Fla. 2007) 8

Florida v. Nixon,
543 U.S. 175 (2004) 17

Hall v. Florida,
134 S. Ct. 1986 (Fla. 2014 ..... 6 through 13

Hampton v. State,
219 So. 3d 760 (Fla. 2017) 13

Harvey v. Dugger,
656 So. 2d 1253 (Fla. 1995) 2

Harvey v. Florida,
489 U.S. 1040 (1989) 2, 17, 18

Harvey v. Florida,
136 S. Ct. 616 (2016) 3, 4

Harvey v. State,
529 So. 2d 1083 (Fla. 1988) 1, 2, 14, 19

Harvey v. State,
No. SC95075, 2003 Fla. LEXIS 1140 (Fla. July 3, 2003) 2, 17

Harvey v. State,
946 So. 2d 937 (Fla. 2006) 3, 10, 18

Harvey v. Warden, Union Correctional Institution,
629 F. 3d 1228 (2011) 3, 12

Henry v. State,
134 So. 3d 938 (Fla. 2014) 15

Hitchcock v. State,
226 So. 3d 216 (2017) 4, 16, 17, 18

Hurst v. Florida,
136 S. Ct. 616 (2016) 3, 14, 15, 16, 19

Hurst v. State,
202 So. 3d 40 (Fla. 2016) 3, 4, 16, 19

Hurst v. State,
147 So. 3d 435 (Fla. 2014) 6

Johnson v. Singletary,
647 So. 2d 106 (Fla. 1994) 9

Lambrix v. State,
227 So. 3d 112 (Fla. 2017) 17

Moore v. Texas,
137 S. Ct. 1039 (2017) 13

Nixon v. Singletary,
758 So. 2d 618 (Fla. 2000) 2, 3, 6, 17

Perry v. State,
210 So. 3d 630 (Fla. 2016) 3

Proffitt v. Florida,
428 U.S. 242 (1976) 14

Quince v. State,
SC17-127, 2018 WL 1755470 (Fla. April 12, 2018) 13, 16

Ring v. Arizona,
536 U.S. 584 (2002) 16, 17, 18

Rodriguez v. State,
2016 WL 4194776 (Fla. 2016) 7, 8, 10, 11, 12

Spaziano v. Florida,
468 U.S. 447 (1984) 14, 15

Walton v. State,
3 So. 3d 1000 (Fla. 2009) 5

Walls v. State,
213 So. 3d 340 (Fla. 2016) 11, 12

Witt v. State,
387 So. 2d 922 (Fla. 1980) 16

Zack v. State,
228 So. 3d 41 (Fla. 2017) 13

STATEMENT OF THE CASE AND FACTS

Appellant is in custody and under a sentence of death. He is subject to the lawful custody of the State of Florida pursuant to a valid judgment of guilt entered on June 18, 1986 for two counts of First-Degree Murder.

> On February 23, 1985, Harold Lee Harvey met with Scott Stiteler, his codefendant at trial, and drove to the home of William and Ruby Boyd, intending to rob them…Stiteler knocked on the front door. In the meantime, Harvey grabbed Mrs. Boyd as she was walking around from the side of the house and took her into the house where Mr. Boyd was located…Harvey and Stiteler told the Boyds they needed money…After getting the money from the Boyds, Harvey and Stiteler discussed what they were going to do with the victims and decided they would have to kill them…the Boyds tried to run, but Harvey fired his gun, striking them both. Mr. Boyd apparently died instantly. Harvey left the Boyds' home but reentered to retrieve the gun shells. Upon hearing Mrs. Boyd moaning in pain, he shot her in the head at point blank range. Harvey and Stiteler then left and threw their weapons away along the roadway.

Harvey v. State, 529 So. 2d 1083 (Fla. 1988).

After an eleven to one jury recommendation of death, the trial court found four aggravating factors: (1) during the course of a felony (robbery/burglary); (2) avoid arrest; (3) cold, calculated, premeditated manner; and (4) heinous, atrocious and cruel manner. *Harvey v. State*, 529 So. 2d at N4, 1087. The trial court found only one mitigating factor which was the non-statutory catchall "any other aspect of the Defendant's character or record", specifically Appellant's low IQ (86), poor

education and social skills, and inability to reason abstractly combined with low self-confidence and feelings of inadequacy. Appellant was sentenced to death on both counts. *Id.* On June 16, 1988, the Florida Supreme Court affirmed. *Harvey v. State*, 529 So. 2d at 1088. On February 21, 1989, Appellant's case became final with the United States Supreme Court denying certiorari. *Harvey v. Florida*, 489 U.S. 1040 (1989).

On August 27, 1990, Appellant filed a postconviction motion seeking relief under Florida Rule of Criminal Procedure 3.850. The trial court dismissed all but one claim as facially insufficient. After an evidentiary hearing, relief was denied.

On February 23, 1995, the Florida Supreme Court affirmed the trial court's denial of most of Appellant's claims, but remanded for an evidentiary hearing on four claims. *Harvey v. Dugger*, 656 So. 2d 1253 (Fla. 1995). After the evidentiary hearing, the trial court issued an order in January 1999 denying each of the four claims. Appellant appealed to the Florida Supreme Court.[1]

---

[1]On July 3, 2003, the Florida Supreme Court, relying on *Nixon v. Singletary*, 758 So. 2d 618 (Fla. 2000), which held that concessions without defendant's consent were *per se* ineffective assistance of counsel, reversed the denial of Defendant's 3.850 motion on whether Defendant's counsel rendered ineffective assistance by conceding Defendant's guilt during opening statement, and vacated Defendant's convictions. The case was remanded for a new trial. *Harvey v. State*, No. SC95075, 2003 Fla. LEXIS 1140 (Fla. July 3, 2003). The State petitioned the

On June 15, 2006, the Florida Supreme Court rejected Appellant's ineffective assistance claims. *Harvey v. State*, 946 So. 2d 937, 940 (Fla. 2006). In part, the court found that Appellant had not shown prejudice by counsel's concessions as the jury received evidence of Appellant's confession which contained the same information as counsel's concession.

On January 18, 2008, Appellant petitioned the United States District Court for the Southern District of Florida for a writ of habeas corpus. The district court denied his petition, but granted a certificate of appealability ("COA"). On January 6, 2011, the United States Court of Appeals for the Eleventh Circuit affirmed the denial of habeas relief. *Harvey v. Warden, Union Correctional Institution*, 629 F. 3d 1228 (2011).

On January 12, 2016, the United States Supreme Court issued its decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016). Two related decisions were issued by the Florida Supreme Court on October 14, 2016, *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), and *Perry v. State*, 210 So. 3d 630 (Fla. 2016).

On December 20, 2016, Appellant filed a Successive Motion to Vacate Death Sentence claiming he should be entitled to

---

Florida Supreme Court for rehearing and while the petition was pending, the United States Supreme Court reversed the Florida Supreme Court's *per se* rule in *Florida v. Nixon, 543 U.S. 175, 187 (2004)*. The Florida Supreme Court then vacated the 2003 opinion. *Harvey v. State*, 946 So. 2d 937, 940 (Fla. 2006).

relief due to *Hurst v. Florida*, 136 S. Ct 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), and claiming Appellant's death sentence violates the Eighth Amendment as it was not unanimous and because he is Intellectually Disabled. The State filed its response on February 1, 2017. On March 29, 2017, the lower court summarily denied Appellant's motion.

Appellant then appealed and on September 22, 2017, this Court issued an order directing Appellant to show cause why the lower court's order should not be affirmed in light of *Hitchcock v. State,* 226 So. 3d 216 (2017). Appellant filed his show cause brief on October 12, 2017. On October 20, 2017, the State filed its response. Appellant filed a reply to the State's response on November 1, 2017.

On January 25, 2018, this Court issued an order directing the parties to file briefs addressing the non-*Hurst* related issues in the case. Appellant filed his brief on April 27, 2018. This response follows.

SUMMARY OF THE ARGUMENT

Argument I- The lower court properly summarily denied Harvey's successive motion for postconviction relief. Harvey is not entitled to relief nor to an evidentiary hearing pursuant to *Hall* as his motion is untimely, procedurally barred, and the claim that he is intellectually disabled is conclusively refuted by the record. This Court should affirm the lower court's order

denying postconviction relief.

Argument II- The lower court properly summarily denied Harvey's successive motion for postconviction relief as his death sentence does not violate the Eighth Amendment. This argument is nothing more than an argument that *Hurst* should be applied retroactively to Appellant's Pre-*Ring* sentence, and as such, said argument was already rejected by this Court in *Asay.* This Court should affirm the lower court's order denying postconviction relief.

STANDARD OF REVIEW

The trial court's summary denial of Harvey's successive motion for postconviction relief is reviewed by this Court *de novo*, accepting the Appellant's factual allegations as true to the extent they are not refuted by the record, and affirming the ruling if the record conclusively establishes that the Appellant is entitled to no relief. *Walton v. State*, 3 So. 3d 1000, 1005 (Fla. 2009).

ARGUMENT
ISSUE I

THE LOWER COURT PROPERLY DETERMINED HARVEY WAS NOT ENTITLED TO RELIEF NOR TO AN EVIDENTIARY HEARING PURSUANT TO *HALL* AS HARVEY'S MOTION IS UNTIMELY, PROCEDURALLY BARRED, AND THE CLAIM OF INTELLECTUAL DISABILITY IS CONCLUSIVELY REFUTED BY THE RECORD.

Appellant's successive motion for post-conviction relief was filed December 20, 2016, well beyond the one-year time limit

after his judgment and sentence became final. *See* Fla. R. Crim. P. 3.851(d)(1). As a result, the motion is untimely unless he is able to show he meets one of two exceptions. Rule 3.851(d)(2)(B) provides that a motion may be filed out of time where "the fundamental constitutional right asserted was not established within the time period provided for in subdivision (d)(1) and has been held to apply retroactively."

In *Atkins v. Virginia,* 536 U.S. 304 (2002), the United States Supreme Court determined that the execution of intellectually disabled persons was unconstitutional. In 2014, the Florida Supreme Court, in *Hall v. Florida*, 134 S.Ct. 1986 (Fla. 2014), determined that Florida's interpretation of its statute defining intellectual disability ("ID") was unconstitutional and might result in a violation of *Atkins* where the Standard Error Measurement ("SEM") is not taken into consideration for IQ scores-most commonly from the Wechsler Adult Intelligence Scale ("WAIS"). As a result, a defendant with a full scale score between 71 and 75 must be permitted the opportunity to present and have considered evidence concerning the second two factors in the ID analysis, namely, concurrent deficiency in adaptive behavior and manifestation of the condition before age eighteen. *See, Hurst v. State*, 147 So.3d at 441; *Nixon*, 2 So.3d at 142; §921.137, Fla. Stat. (2012).

It is Appellant's position that Florida law precluded him from raising an ID claim until *Hall* was decided. He argues that *Hall* provides a newly established constitutional right requiring evidentiary consideration of an ID claim where a full scale IQ score is above 70, and therefore, provides him with an opportunity to litigate his ID claim. The State disagrees.

Hall did not create a new constitutional right. *Atkins* created the constitutional right. The court in *Hall* merely held that Florida should not have precluded Hall from presenting evidence of his ID based solely on a full scale score of 71. Appellant here was never precluded from offering evidence as to his alleged ID. Instead, he failed to seek review by the state courts within the year following *Atkins*. It was not until December 20, 2016 that he raised, for the first time, his IQ as a bar to execution.

On August 9, 2016, the Florida Supreme Court decided *Rodriguez v. State*, 2016 WL 4194776 (Fla. 2016), which addressed a capital defendant's successive postconviction relief motion based on *Hall*. The court affirmed the summary denial of postconviction relief agreeing that the capital defendant was time-barred from raising a *Hall* claim as he had not raised a timely claim under *Atkins*. Further, the capital defendant could

not rely on *Cherry v. State*, 959 So. 2d 702 (Fla. 2007), to excuse that time bar.

In Appellant's motion, he pointed to *Atkins* and *Hall* and asserted he was Intellectually Disabled and therefore should be ineligible for the death penalty. However, Appellant, like *Rodriguez*, failed to file a claim under *Atkins* in a timely manner. *Cherry v. State*, 959 So. 2d 702 (Fla. 2007), provides no basis for excusing the untimeliness of the motion.

In *Rodriguez*, the Florida Supreme Court pointed to rule 3.851 and the 2004 promulgation of Rule 3.203, Fla.R.Crim.P., and concluded that a capital defendant is time-barred from raising an ID claim under *Hall* where he failed to raise a timely claim under *Atkins*.

Here, Appellant's case became final in 1989 when certiorari was denied following affirmance of his sentencing. Between 1989 and 2008, Appellant continued to litigate various postconviction motions. *Atkins* was decided on June 20, 2002 while Appellant's appeal of the trial court's denial of his 3.850 motion was still pending. No ruling was made on this motion until July 3, 2003, more than a year after the *Atkins* decision.

A postconviction claim cannot be raised in a successive Rule 3.851 motion where the basis for raising the claim was available at the time an earlier motion for postconviction

relief was pending. *See Johnson v. Singletary*, 647 So. 2d 106 (Fla. 1994). As a result of *Atkins*, the Florida Supreme Court promulgated Rule 3.203 in *Amendments to Florida Rules of Criminal Procedure and Florida Rules of Appellate Procedure*, 875 So. 2d 563 (Fla. 2004). Rule 3.203(d)(4)(E)-(F), as originally adopted, specifically provided that prisoners whose cases were in various postconviction procedural postures could file a successive motion for collateral relief in state court to assert an *Atkins* claim stating as follows:

> (E) If a death sentenced prisoner has filed a motion for postconviction relief and that motion has been ruled on by the circuit court and an appeal is pending on or before October 1, 2004, the prisoner may file a motion in the supreme court to relinquish jurisdiction to the circuit court for a determination of mental retardation within 60 days from October 1, 2004. The motion to relinquish jurisdiction shall contain a copy of the motion to establish mental retardation as a bar to execution, which shall be raised as a successive rule 3.851 motion, and shall contain a certificate by appellate counsel that the motion is made in good faith and on reasonable grounds to believe that the defendant is mentally retarded.
>
> (F) If a death sentenced prisoner has filed a motion for postconviction relief, the motion has been ruled on by the circuit court, and that ruling is final on or before October 1, 2004, the prisoner may raise a claim under this rule in a successive rule 3.851 motion filed within 60 days after October 1, 2004. The circuit court may reduce this time period and expedite the proceedings if the circuit court determines that such action is necessary.

ID. at 571. Fatal to Appellant's instant successive motion, he did not avail himself of Rule 3.203.

Critical to this Court's *Rodriguez* decision was the fact that the capital defendant's postconviction litigation was pending when Rule 3.203 was promulgated, yet he, like Appellant whose postconviction appeal was pending in the Florida Supreme Court, did not file an *Atkins* claim. It was not until after *Hall* was decided that Rodriguez, like Appellant, filed a successive motion. This Court affirmed the summary denial of relief in *Rodriguez* stating as follows:

> Rodriguez, who has never before raised an intellectual disability claim, asserted that there was "good cause" pursuant to Rule 3.203(f) for his failure to assert a previous claim of intellectual disability and only after the United States Supreme Court decided *Hall v. Florida*, 134 So. Ct. 1986 (2014), did he have the basis for asserting an intellectual disability claim. The trial court rejected the motion as time barred, concluding there was no reason that Rodriguez could not have previously raised a claim of intellectual disability based on *Atkins v. Virginia*, 536 U.S. 304 (2002). The trial court further concluded that Rodriguez could not have relied on *Cherry v. State*, 959 So. 2d 702 (Fla. 2007), which established the bright-line cut-off of 70 for IQ scores disapproved of in *Hall*, because he never raised an intellectual disability claim after *Atkins* as required by rule 3.203.
>
> We have considered the issues raised, and affirm the trial court's denial of Rodriguez's motion as time-barred for the reasons stated by the trial court.

Rodriguez, 2016 WL 4194776 (Fla. 2016).

As noted above, Appellant's postconviction litigation was pending before this Court from January 1999 through June 15, 2006. See *Harvey v. State*, 946 So. 2d 937, 940 (Fla. 2006)

(vacating the 2003 opinion and rejecting Appellant's ineffective assistance of counsel claims). Hence, Appellant's postconviction litigation was pending on October 1, 2004 when Rule 3.203 went into effect. As a result, Appellant had until, at the latest, November 30, 2004 to file the necessary pleadings to raise an ID claim under *Atkins* and Rule 3.203, however, he did not file a claim at that time. Instead, Appellant ignored Rule 3.203, waiting more than twelve years before he filed an ID claim in December 2016. Under *Rodriguez*, Appellant is time-barred and he has no excuse under the law to lift the time bar.

The State would also point out that while Appellant may point to Rule 3.851(d)(2)(B) and *Hall* to provide a basis for the continued validity of his ID claim, *Rodriguez* has foreclosed that option. In deciding *Rodriguez*, this Court rejected the suggestion that *Hall* was an avenue to raise an *Atkins* claim or a stand-alone claim.

It should be noted that Appellant's claim for relief is in no way supported by *Walls v. State*, 213 So. 3d 240 (Fla. 2016), which is made perfectly clear in Justice Pariente's concurrence distinguishing *Walls* and *Rodriguez* where she stated:

> As this Court determined in an unpublished Order in the case of *Rodriguez v. State*, those defendants who do not timely raise a claim under *Atkins v. Virginia*, 536 U.S. 304 (2002), and pursuant to Florida Rule of Criminal Procedure 3.203, should not be entitled to relief under *Hall*.

Walls v. State, 213 So. 3d 240 (Fla. 2016).

Walls had pursued an *Atkins* claim and was denied relief on the basis of his IQ results alone, therefore, he was entitled to obtain relief following *Hall*. Here, like in *Rodriguez*, Appellant did not pursue relief under *Atkins* or Rule 3.203 in a timely manner and thus, like in *Rodriguez*, Appellant is not entitled to relief under *Hall*. *See Walls*, *ID*.

Further, the claim is conclusively refuted by the record. Though Appellant was evaluated by mental health experts during the pendency of his capital litigation, none have diagnosed him with mental retardation. In fact, Appellant has received an IQ score of 86, setting him well outside the definition of ID which requires an IQ of less than 75. ("The court found only one mitigating factor – the non-statutory catch-all, "any other aspect of the Defendant's character or record": Harvey's low IQ (86), poor education and social skills, and inability to reason abstractly, combined with low self-confidence and feelings of inadequacy." *Harvey v. Warden, Union Correctional Institution*, 629 F. 3d 1228, 1234 (11th Cir. 2011)).

This court has already determined that it is only "when a defendant's IQ score is 75 or below, that he must be given the opportunity to present evidence of intellectual disability."

Hampton v. State, 219 So. 3d 760 (Fla. 2017); *Quince v. State*, SC17-127, 2018 WL 1755470 (Fla. April 12, 2018) ("Although *Hall* requires courts to consider all three prongs of intellectual disability in tandem, we have recently reiterated that if the defendant fails to prove any one of these components, the defendant will not be found to be intellectually disabled." (Citations, quotations omitted)); *Zack v. State*, 228 So. 3d 41 (Fla. 2017) ("The trial court correctly found the significantly subaverage intellectual functioning prong dispositive of Zack's intellectual disability claim based on Zack's scores prior to age 18, which were all over 75…a defendant's score must first fall within the test's acknowledged and inherent margin of error."); *Moore v. Texas*, 137 S. Ct. 1039 (2017) ("[I]n line with *Hall*, we require that courts continue the inquiry and consider other evidence of intellectual disability where an individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual-functioning deficits.")(Citations, quotations omitted). Appellant's IQ has never been found to be below 75. Relief must be denied.

ISSUE II

THE LOWER COURT PROPERLY DETERMINED THAT HARVEY'S DEATH SENTENCE DOES NOT VIOLATE THE EIGHTH AMENDMENT; FURTHER ANY ERROR IS HARMLESS.

Appellant alleges that Defendants who did not receive unanimous jury recommendations are not eligible to receive death sentences. This claim is flawed and meritless.

The United States Supreme Court "has never suggested that jury sentencing is constitutionally required". *Proffitt v. Florida*, 428 U.S. 242, 252 (1976). To the contrary, in *Spaziano v. Florida*, 468 U.S. 447, 463-64, (1984), the United States Supreme Court held that the Eighth Amendment is not violated in a capital case when the ultimate responsibility of imposing death rests with the judge. *Spaziano v. Florida*, 468 U.S. 447, 463-64, (1984) overruled in part on sixth amendment grounds by *Hurst v. Florida*, 136 S. Ct. 616 (2016). In deciding *Hurst v. Florida*, the United States Supreme Court analyzed the case pursuant to Sixth Amendment grounds and overruled *Spaziano* to the extent that it allowed a sentencing judge to find aggravating circumstances independent of a jury's fact-finding. *Hurst v. Florida*, 136 S. Ct. at 618. (That is not an issue here, because Appellant conceded the propriety of finding the aggravating factor that the two murders were committed while he was engaged in the commission or attempted commission of a

robbery or burglary. *Harvey v. State*, 529 So. 2d 1083, N4 at 5 (Fla. 1988).) In *Hurst v. Florida*, the Court did not address the issue of a possible Eighth Amendment violation, and therefore did not overrule *Spaziano* on Eighth Amendment grounds.

While this Court initially included the Eighth Amendment as a reason for warranting unanimous jury recommendations in its *Hurst v. State* decision, this Court did not, and could not, overrule the United States Supreme Court's surviving precedent in *Spaziano*. In addition, Florida has a conformity clause in its state constitution that requires the state courts to interpret Florida's prohibition on cruel and unusual punishment in conformity with the United States Supreme Court's Eighth Amendment jurisprudence. Art. I, § 17, Fla. Const.; *Henry v. State*, 134 So. 3d 938, 947 (Fla. 2014) (noting that under Article I, section 17 of the Florida Constitution, Florida courts are "bound by the precedent of the United States Supreme Court" regarding Eighth Amendment claims). Given that there is no United States Supreme Court case holding that the Eighth Amendment requires the jury's sentencing recommendation be unanimous, Appellant's argument must fail.

Appellant cites a dissent to make the claim that this Court has not yet decided whether the jury unanimity requirement applies retroactively and to claim that such an analysis must be

performed pursuant to *Witt v. State*, 387 So. 2d 922 (Fla. 1980). In fact, this Court conducted a *Witt* analysis and was abundantly clear in *Asay v. State,* 210 So. 3d 1 (2016), that the requirement for juror unanimity is not retroactive to any case in which the death sentence was final prior to the June 24, 2002 decision in *Ring*. *Asay v. State*, 210 So.3d 1, 22 (Fla. 2016); *Hurst v. State*, 202 So.3d 40 (Fla. 2016); *Ring v. Arizona*, 536 U.S. 584 (2002). The judgment in *Asay* became final October 7, 1991, and thus Asay was not eligible for any relief under *Hurst*. *Asay*, 210 So.3d at 8. After *Asay*, this Court continuously adhered to using the *Ring* decision date as the cutoff point for retroactivity.

On August 10, 2017, in *Hitchcock*, this Court reaffirmed the decision in *Asay* stating as follows:

> Although Hitchcock references various constitutional provisions as a basis for arguments that *Hurst v. State* should entitle him to a new sentencing proceeding, these are nothing more than arguments that *Hurst v. State* should be applied retroactively to his sentence, which became final prior to *Ring*. As such, these arguments were rejected when we decided *Asay*. Accordingly, we affirm the circuit court's order summarily denying Hitchcock's successive postconviction motion pursuant to *Asay*.

Hitchcock, 226 So. 3d 216 (Fla. 2017); *see also Quince v. State*, 233 So. 3d 1017 (Fla. 2018) (rejecting arguments based on the Eighth Amendment, denial of due process and equal protection);

Lambrix v. State, 227 So. 3d 112, *1 (Fla. 2017) (rejecting arguments based on the Eighth Amendment, denial of due process and equal protection, and a substantive right based on new legislation).

Here, the judgment and sentence became final upon denial of certiorari by the United States Supreme Court on February 21, 1989. *Harvey v. Florida*, 489 U.S. 1040 (1989). Appellant attempts to negate this fatal fact by pointing out that on July 3, 2003, the Florida Supreme Court, relying on *Nixon v. Singletary*, 758 So. 2d 618 (Fla. 2000), which held that concessions without Appellant's consent were *per se* ineffective assistance of counsel, reversed the denial of Appellant's 3.850 motion on whether Appellant's counsel rendered ineffective assistance by conceding Appellant's guilt during opening statement, and vacated Appellant's convictions, remanding the case for a new trial. *Harvey v. State*, No. SC95075, 2003 Fla. LEXIS 1140 (Fla. July 3, 2003). However, this makes no difference to the analysis herein because the State petitioned the Florida Supreme Court for rehearing and while the petition was pending, the United States Supreme Court reversed the Florida Supreme Court's *per se* rule in *Florida v. Nixon,* 543 U.S. 175, 187 (2004), resulting in the Florida Supreme Court vacating the 2003 opinion. *Harvey v. State*, 946 So. 2d 937, 940

(Fla. 2006). As such, pursuant to Fla. R. Crim. P. 3.851(d)(1)(B) (A judgment and sentence become final "on the disposition of the petition for writ of certiorari by the United States Supreme Court, if filed."), the operative date for this analysis remains February 21, 1989, when the judgment and sentence became final upon denial of certiorari by the United States Supreme Court. *Harvey v. Florida*, 489 U.S. 1040 (1989).

Appellant raises the Eighth Amendment claim, just as in *Hitchcock*, to attempt to argue yet again that *Hurst v. State* should be retroactively applied to him. However, just as in *Asay*, as reaffirmed by *Hitchcock*, *Hurst v. State* does not apply retroactively to cases that were final prior to the issuance of *Ring* and repackaging the argument as an Eighth Amendment claim does not change that result. As this Court said in *Hitchcock*, such arguments are "nothing more than arguments that *Hurst v. State* should be applied retroactively to his sentence, which became final prior to *Ring*. As such, these arguments were rejected when we decided *Asay*." The same result is required here, the argument must be rejected under the precedent of *Asay*. Thus, this Petition must be denied.

Even if *Hurst* were retroactive to Appellant's case, which *Asay* clearly dictates it is not, Appellant would not be entitled to relief as any alleged error is harmless beyond a reasonable

doubt. *See Hurst v. State*, 202 So. 3d at 67 (recognizing a *Hurst* error is capable of harmless error review); and *Hurst v. Florida*, 136 S. Ct. at 624 (remanding to the state court to determine whether the error was harmless). Appellant conceded the propriety of finding the aggravating factor that the two murders were committed while he was engaged in the commission or attempted commission of a robbery or burglary. *Harvey v. State*, 529 So. 2d 1083, N4 at 5 (Fla. 1988). Therefore, the question of whether the jury unanimously found him guilty of a contemporaneous crime to support the aggravating circumstance is proven by the verdict and by concession. Also, three other aggravating factors were found in this case; that the two murders were heinous, atrocious and cruel; were committed for the purpose of avoiding lawful arrest; and were committed in a cold, calculated and premeditated manner. *Harvey v. State*, 529 So. 2d 1083 (Fla. 1988). A rational jury would have unanimously found the conceded aggravating factor as well as the other three aggravating factors and recommended death had they been instructed. Moreover, the recommendation would have been unanimous given the evidence upon which Appellant was convicted, particularly his own detailed confession outlining the purpose of his criminal acts, and his premeditation supporting aggravation. Had the jury been told that a unanimous

recommendation was required to sentence Appellant to death, the jury would have certainly done so in this case.

CONCLUSION

Appellant's argument based on *Hall* is time-barred. Appellant's argument based on the Eighth Amendment is nothing more than an argument that *Hurst* should be applied retroactively to his Pre-*Ring* sentence, and as such, said argument was already rejected by this Court in *Asay*. Each claim raised in Appellant's successive motion is similarly without merit and provides no basis for relief. In conclusion, Appellee respectfully requests that this Honorable Court affirm the lower court's order denying Appellant postconviction relief. The State objects to oral argument.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

/s/ Donna M. Perry
DONNA M. PERRY
Assistant Attorney General
Florida Bar No. 64038
Office of the Attorney General
1515 N. Flagler Drive, Suite 900
West Palm Beach, Florida 33401
Telephone: (561) 837-5000
Facsimile: (561) 837-5108
capapp@myfloridalegal.com [and]
donna.perry@myfloridalegal.com

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 10th day of May, 2018, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Ross Bricker, Esq., attorney for Appellant. A true copy was furnished by electronic mail to Ross Bricker, Esq., attorney for Appellant and Ryan Butler, Esq., Assistant State Attorney.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

/s/ Donna M. Perry
COUNSEL FOR APPELLEE