*In the Supreme Court of Florida*

**MICHAEL DUANE ZACK**,

*Appellant*,

v. CASE NO. SC18-243

STATE OF FLORIDA,

*Appellee*.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR ESCAMBIA COUNTY, FLORIDA

# ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

PAGE(S)

TABLE OF CITATIONS

FLORIDA CONSTITUTIONAL PROVISIONS AND STATUTES



OTHER AUTHORITIES

## PRELIMINARY STATEMENT

Appellant, MICHAEL DUANE ZACK, the defendant in the trial court, will be referred to as appellant or by his proper name. Appellee, the State of Florida, will be referred to as the State. The symbol "IB" will refer to appellant's initial brief and will be followed by any appropriate page number. All bold and italicized emphasis is supplied.

## STATEMENT OF THE CASE AND FACTS

### Facts of the crime

The Florida Supreme Court described the facts of the murder in its direct appeal opinion:

> Although the murder of Smith took place on June 13, 1996, the chain of events which culminated in this murder began on June 4, 1996, when Edith Pope (Pope), a bartender in Tallahassee, lent her car to Zack. In the weeks prior, Zack had come to Pope's bar on a regular basis. He generally nursed one or two beers and talked with Pope; she never saw him intoxicated. He told her that he had witnessed his sister murder his mother with an axe. As a result, Pope felt sorry for Zack, and she began to give him odd jobs around the bar. When Zack's girlfriend called the bar on June 4 to advise him that he was being evicted from her apartment, Pope lent Zack her red Honda automobile to pick up his belongings. Zack never returned.
>
> From Tallahassee, Zack drove to Panama City where he met Bobby Chandler (Chandler) at a local pub. Over the next several days, Zack frequented the pub daily and befriended Chandler. Chandler, who owned a construction subcontracting business, hired Zack to work in his construction business. When Chandler discovered that Zack was living out of a car (the red Honda), he invited Zack to live with him temporarily. On the second night at Chandler's, Zack woke up screaming following a nightmare. Chandler heard Zack groan words which sounded like “stop” or “don't.” Although Chandler questioned him, Zack would not discuss the nightmare. Two nights later, on June 11, 1996, Zack left Chandler's during the night, stealing a rifle, a handgun, and forty-two dollars from Chandler's wallet. Zack drove to Niceville, and on the morning of June 12, 1996, pawned the guns for $225.
>
> From Niceville, Zack traveled to Okaloosa County and stopped at yet another bar. At this bar, Zack was sitting alone drinking a beer when he was approached by Laura Rosillo (Rosillo). The two left the bar in the red Honda and drove to the beach, reportedly to use drugs Zack said he possessed. Once on the beach, Zack attacked Rosillo and beat her while they were still in the Honda. He then pulled Rosillo from the car and beat her head against one of the tires. Rosillo's tube top was torn and hanging off her hips. Her spandex pants were pulled down around her right ankle. The evidence suggests she was sexually assaulted; however, the sperm found in Rosillo's body could not be matched to Zack. He then strangled her, dragged her body behind a sand dune, kicked dirt over her face, and departed.
>
> Zack's next stop on this crime-riddled journey was Dirty Joe's bar located near the beach in Pensacola. He arrived there on the afternoon of June 13, 1996, and met the decedent, Ravonne Smith. Throughout the afternoon, Smith, a bar employee, and Zack sat together in the bar talking and playing pool or darts. The bar was not very busy, so Smith spent most of her time with Zack. Both bar employees and patrons testified that Zack did

not ingest any significant amount of alcohol and that he did not appear to be intoxicated. In the late afternoon, Smith contacted her friend Russell Williams (Williams) and invited him to the bar because she was lonely. Williams arrived at the bar around 5:30 p.m. Prior to leaving the bar around 7 p.m., Smith called her live-in boyfriend, Danny Schaffer, and told him she was working late. Smith, Williams, and Zack then left the bar and drove to the beach where they shared a marijuana cigarette supplied by Zack. Afterwards, they returned to the bar and Williams departed. Zack and Smith left the bar together sometime around 8 p.m. and eventually arrived at the house Smith shared with her boyfriend.

Forensic evidence indicates that immediately upon entering the house Zack hit Smith with a beer bottle causing shards of glass and blood to spray onto the living room love seat and two drops of blood to spray onto the interior doorframe. Zack pursued Smith down the hall to the master bedroom leaving a trail of blood. Once in the bedroom Zack sexually assaulted Smith as she lay bleeding on the bed. Following the attack Smith managed to escape to the empty guest bedroom across the hall. Zack pursued her and beat her head against the bedroom's wooden floor. Once he incapacitated Smith, Zack went to the kitchen where he got an oyster knife. He returned to the guest bedroom where Smith lay and stabbed her in the chest four times with the knife. The four wounds were close together in the center of Smith's chest. Zack went back to the kitchen, cleaned the knife, put it away, and washed the blood from his hands. He then went back to the master bedroom, placed Smith's bloody shirt and shorts in her dresser drawer, stole a television, a VCR, and Smith's purse, and placed the stolen items in Smith's car.

During the night, Zack drove Smith's car to the area where the red Honda was parked. He removed the license plate and several personal items from the Honda then moved it to a nearby lot. Zack returned to Panama City in Smith's car and attempted to pawn the television and VCR. Suspecting the merchandise was stolen, the shop owners asked for identification and told Zack they had to check on the merchandise. Zack fled the store and abandoned Smith's car behind a local restaurant. Zack was apprehended after he had spent several days hiding in an empty house.

After he was arrested, Zack ***confessed*** to the Smith murder and to the Pope and Chandler thefts. Zack claimed he and Smith had consensual sex and that she thereafter made a comment regarding his mother's murder. The comment enraged him, and he attacked her. Zack contended the fight began in the hallway, not immediately upon entering the house. He said he grabbed a knife in self-defense, believing Smith left the master bedroom to get a gun from the guest bedroom.

*Zack v. State*, 753 So.2d 9, 13-14 (Fla. 2000) (emphasis added).

Procedural history

On September 15, 1997, a jury convicted Zack of the first-degree murder of Smith; robbery with a firearm; and sexual battery. After the penalty phase hearing, the jury recommended a sentence of death by a vote of eleven to one. *Zack v. State*, 228 So.3d 41, 44 (Fla. 2017).

On November 14, 1997, the trial court sentenced Zack to death. *Zack*, 228 So.3d at 44. The trial court found six aggravating circumstances: 1) the defendant was convicted of a capital felony while under a sentence of felony probation; 2) the crime was committed in conjunction with a robbery, sexual battery, or burglary; 3) the defendant committed the crime to avoid lawful arrest; 4) the defendant committed the crime for financial gain; 5) the crime was especially heinous, atrocious, and cruel; and 6) the crime was committed in a cold, calculated, and premeditated manner.[1] The trial court found four mitigating circumstances which were entitled to little weight: 1) the defendant committed the crime while under an extreme mental or emotional disturbance; 2) the defendant was acting under extreme duress; 3) the defendant lacked the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law; and 4) nonstatutory mitigating factors of remorse, voluntary confession, and good conduct while incarcerated. Zack's age of 27 years old was not considered a mitigating factor. *Zack*, 753 So.2d at 12-13.

On direct appeal to the Florida Supreme Court, Zack raised twelve issues. *Zack*, 753 So.2d at 16, n.5 (listing the issues in a footnote); *see also Zack*, 228

[1] The Florida Supreme Court struck both the under a sentence of felony probation aggravator and the avoid arrest aggravator on appeal. So, four aggravating circumstances remain: 1) the crime was committed in conjunction with a robbery, sexual battery, or burglary; 2) the defendant committed the crime for financial gain; 3) the crime was especially heinous, atrocious, and cruel; and 4) the crime was committed in a cold, calculated, and premeditated manner.

So.3d at 44-45 (listing the issues in a footnote).[2] The Florida Supreme Court affirmed the three convictions and the death sentence. *Zack v. State*, 753 So.2d 9, 26 (Fla. 2000).

Zack filed a petition for writ of certiorari arguing that the admission of victim impact evidence violated the Eighth Amendment and due process. On October 2, 2000, the United States Supreme Court denied certiorari review. *Zack v. Florida*, 531 U.S. 858 (2000).

On December 26, 2001, Zack filed a motion for postconviction relief in the state trial court. *Zack v. Tucker*, 704 F.3d 917, 918 (11th Cir. 2013) (en banc). On October 18, 2002, Zack filed an amended 3.851 postconviction motion in the trial court raising six claims. *Zack*, 228 So.3d at 45. While Zack's initial postconviction motion was pending in the state trial court, the United States Supreme Court decided *Atkins v. Virginia*, 536 U.S. 304 (2002), which held that the execution of an intellectually disabled person is cruel and unusual punishment in violation of the Eighth Amendment. On July 14, 2003, the state trial court denied the initial rule 3.851 postconviction. *Id.* at 45.

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[2] The twelve issues were: 1) the court erred in admitting *Williams v. State*, 110 So.2d 654 (Fla. 1959), rule evidence; 2) the court erred in denying a motion for judgment of acquittal on the sexual battery charge; 3) the trial court erred in denying the motion for judgment of acquittal on the robbery charge; 4) the trial court erred in instructing the jury on felony murder based upon a burglary; 5) the sentencing order failed to consider all of the mitigating evidence presented; 6) the trial court erred in finding that the murder was committed to avoid or prevent a lawful arrest; 7) the trial court erred in finding that the murder was committed in a cold, calculated, and premeditated manner; 8) the trial court erred in using victim impact evidence; 9) the trial court erred in admitting the rebuttal evidence from Candice Fletcher; 10) the trial court erred by failing to give Zack's proposed instruction on the role of sympathy; 11) the trial court erred in retroactively applying the aggravating factor of a murder committed while on felony probation; and 12) the trial court erred in refusing to admit a family photo during the penalty phase.

Zack appealed the denial of postconviction motion to the Florida Supreme Court. *Zack v. State*, 911 So.2d 1190 (Fla. 2005). Zack raised six issues in his postconviction appeal. *Zack*, 911 So.2d at 1197.[3] The Florida Supreme Court affirmed the denial of postconviction relief.

Zack also filed a state habeas petition in the Florida Supreme Court. *Zack v. State*, 911 So.2d 1190, 1203 (Fla. 2005). Zack raised six claims in his state habeas petition.[4] The Florida Supreme Court denied the state habeas petition.

On December 1, 2004, Zack filed a successive postconviction motion in state court raising an intellectual disability claim based on *Atkins*. *Zack*, 228 So.3d at 45. The state trial court summarily denied the motion finding, after a review of the expert trial testimony, that Zack's I.Q. was not near the required statutory figure of 70 in order to establish intellectual disability. The Florida Supreme Court affirmed the trial court's denial by order. In its order, the Florida Supreme Court relied on *Cherry v. State*, 781 So.2d 1040 (Fla. 2000), and held that "Zack has not

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[3] The six issue were: 1) trial counsel was ineffective for failing to challenge the DNA testimony presented by the State; 2) that counsel was ineffective because he failed to prepare Zack to testify at trial; 3) that counsel was ineffective because he made prejudicial remarks to the jury in the opening statement and closing argument; 4) that the trial court erred in summarily denying claims raised in his motion for postconviction relief involving Zack's right to a *Frye* hearing and the constitutionality of the death sentence under *Atkins*; 6) that Florida's capital sentencing scheme is unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002); and 7) that collateral counsel was ineffective. *Zack*, 911 So.2d at 1197.

[4] The six issues were: 1) appellate counsel was ineffective for failing to raise a claim regarding the State's racially motivated peremptory challenge during jury selection; 2) appellate counsel should have argued that the prosecutor made impermissible argument to the jury; 3) that the State introduced nonstatutory aggravating factors; 4) that appellate counsel was ineffective for failing to raise a claim on appeal regarding prejudicial and gruesome crime scene photos; 5) that the trial court erred in admitting evidence of other crimes; and 6) that appellate counsel was ineffective in failing to raise on appeal the claim that the trial court erroneously admitted irrelevant and prejudicial evidence.

provided any new evidence of [intellectual disability] and previous evidence demonstrates that his I.Q. was well above the statutory figure of 70 or below." *Id.* at 45-46.[5]

On March 4, 2005, Zack filed a successive habeas petition in the Florida Supreme Court raising a claim based on *Crawford v. Washington*, 541 U.S. 36 (2004). On October 6, 2005, the Florida Supreme Court denied the petition. *Zack v. Crosby*, 918 So.2d 240 (Fla. 2005).

On September 28, 2005, Zack filed his federal habeas petition which included a claim of intellectual disability under *Atkins*. *See Zack v. Crosby*, 607 F.Supp.2d 1291 (N.D. Fla. 2008); (Doc. #1 in case no. 3:05-cv-369-RH). On November 17, 2008, the federal district court dismissed all but one claim in the federal habeas petition as untimely. On March 26, 2009, the federal district court denied the *Atkins* claims on the merits. *Zack v. Tucker*, 704 F.3d 917, 919 (11th Cir. 2013) (en banc); *see also Zack*, 228 So.3d at 45.

The Eleventh Circuit, in an en banc opinion, affirmed the dismissal of the remaining claims in federal habeas petition as untimely. *Zack v. Tucker*, 704 F.3d 917 (11th Cir. 2013).[6]

On October 7, 2013, the United States Supreme Court denied certiorari review of the Eleventh Circuit's en banc decision. *Zack v. Crews*, 571 U.S. 863 (2013).

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[5] The Florida Supreme Court's order is also available online at: http://www.floridasupremecourt.org/clerk/disposition/2007/9/05-963.pdf

[6] Glenn Arnold was state postconviction counsel when the federal deadline was missed. On November 2003, Linda McDermott was retained as state postconviction counsel to replace Mr. Arnold in the Florida Supreme Court for the postconviction appeal and she handled the case in state and federal courts until January 27, 2015, when the trial court granted her motion to withdraw and then appointed Capital Collateral Regional Counsel - North (CCRC-N) as state postconviction counsel.

On August 25, 2014, Zack filed a rule 60(b)(6) motion to reopen his closed federal habeas case based on *Holland v. Florida*, 560 U.S. 631 (2010). On September 4, 2014, the district court denied the motion to reopen. On January 12, 2018, the Eleventh Circuit affirmed the district court's denial of the 60(b)(6) motion. *Zack v. Sec'y, Fla. Dept. of Corr.*, 2018 WL 388240 (11th Cir. Jan. 12, 2018) (No. 14-14998-P).

On May 26, 2015, Zack filed a second successive postconviction motion in state trial court raising a claim of intellectual disability based on *Hall v. Florida*, 134 S.Ct. 1986 (2014). *See Zack*, 228 So.3d at 46. On July 8, 2015, the trial court summarily denied the *Hall* claim.

Zack appealed the summary denial of his *Hall* claim to the Florida Supreme Court. Zack argued that the court erred in 1) summarily denying the claim without an evidentiary hearing on his intellectual disability claim; and 2) denying the claim on the basis that Zack's I.Q. was too high for an *Atkins* claim. *Zack*, 228 So.3d at 46 (SC15-1756). The Florida Supreme Court affirmed the denial of the *Hall* claim.

On June 21, 2016, Zack filed a petition for writ of habeas corpus in the Florida Supreme Court raising a claim based on *Hurst v. Florida*, 136 S.Ct. 616 (2016) (*Hurst v. Florida*). On June 15, 2017, the Florida Supreme Court denied the habeas petition. *Zack v. Jones*, 228 So.3d 41 (Fla. 2017) (SC16-1090). The Florida Supreme Court concluded that Zack was not entitled to any *Hurst* relief "because *Hurst* does not apply retroactively to cases that were final before *Ring* was decided" citing *Asay v. State*, 210 So.3d 1, 22 (Fla. 2016). *See Zack*, 228 So.3d at 47-48. On June 30, 2017, Zack filed a motion for rehearing. On October 12, 2017, the Florida Supreme Court denied the rehearing.

Zack then filed a petition for writ of certiorari in the United States Supreme Court regarding the denial of his *Hall* claim in the trial court and the denial of his

*Hurst* claim in the state habeas petition. The petition is currently pending in the United States Supreme Court. *Zack v. State*, No. 17-8134.

On January 11, 2017, Zack, represented by CCRC-N, filed a successive 3.851 motion in the trial court raising five claims based on *Hurst v. Florida*, 136 S.Ct. 616 (2016) (*Hurst v. Florida*), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (*Hurst v. State*). On February 3, 2017, the State filed an answer to the successive postconviction motion in the trial court. On February 13, 2017, the trial court stayed the successive proceedings awaiting resolution of the ruling of the Florida Supreme Court on the *Hurst* claim in the successive habeas petition. On June 15, 2017, the State filed a notice to the trial court that the Florida Supreme Court had denied the pending habeas petition raising a *Hurst* claim. On October 12, 2017, the State filed a notice to the trial court that the Florida Supreme Court had denied the rehearing and a motion to lift the stay. On November 14, 2017, the trial court held a case management conference, commonly referred to as a *Huff* hearing. On January 16, 2018, the trial court summarily denied the successive postconviction motion.

Procedural history of the *Hurst* litigation

On June 21, 2016, Zack, represented by Dawn Macready of CCRC-N, filed a petition for writ of habeas corpus in this Court raising a claim based on *Hurst v. Florida*, 136 S.Ct. 616 (2016) (*Hurst v. Florida*). On June 15, 2017, this Court denied the habeas petition. *Zack v. Jones*, 228 So.3d 41 (Fla. 2017) (SC16-1090). This Court concluded that Zack was not entitled to any *Hurst* relief "because *Hurst* does not apply retroactively to cases that were final before *Ring* was decided" citing *Asay v. State*, 210 So.3d 1, 22 (Fla. 2016). *See Zack*, 228 So.3d at 47-48.

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616 (2016) (*Hurst v. Florida*), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (*Hurst v. State*). On February 3, 2017, the State filed an answer to the successive postconviction motion in the trial court. On February 13, 2017, the trial court stayed the successive 3.851 proceedings awaiting resolution of the successive *Hurst* habeas petition pending in this Court. On January 16, 2018, the trial court summarily denied the successive motion. The trial court explained, that the Florida Supreme Court has repeatedly held that *Hurst* did not apply retroactively to cases that were final before *Ring*, citing *Asay v. State*, 210 So.3d 1 (Fla. 2016), *Hannon v. State*, 228 So.3d 505, 513 (Fla. 2017), and *Archer v. Jones*, 2017 WL 1034409 (Fla. Mar. 17, 2017) (SC16-2111). The trial court noted that it was "uncontested that Defendant's sentence was final before *Ring* was decided." The trial court concluded that the "Defendant is not entitled to relief as to any of his present claims as each depends on a retroactive application of the *Hurst* decisions."

This appeal follows.

## SUMMARY OF ARGUMENT

ISSUE I

Zack asserts that his death sentence violates the Sixth Amendment right-to-a-jury-trial provision under *Hurst v. Florida*, 136 S.Ct. 616 (2016) (*Hurst v. Florida*). Zack asserts that this Court's decision in *Asay v. State*, 210 So.3d 1 (Fla. 2016), is incorrectly decided and, as a matter of fundamental fairness, he is entitled to retroactive benefit of *Hurst v. Florida*. This claim is procedurally barred under the law-of-the-case doctrine because it was already ruled on by this Court in the state habeas petition. Zack also asserts that Florida's standard jury instructions in the penalty phase violate *Caldwell v. Mississippi*, 472 U.S. 320 (1985). But, for a *Caldwell* violation to occur, the jury instructions or comments must be a misrepresentation of the jury's role in capital sentencing. There is no *Caldwell* violation because the standard jury instructions accurately characterize the jury's recommendation as advisory. In Florida, a jury's recommendation of death was advisory, and, under the new death penalty, the recommendation remains advisory. If anything, the standard jury instructions inflate the jury's role in sentencing because they tell a jury that the judge will give their recommendation great weight when, in fact, a trial court may ignore a recommendation of death and impose a life sentence. The trial court properly summarily denied this claim.

ISSUE II

Zack asserts that this Court's partial retroactivity analysis violates the Eighth Amendment. Zack claims that this Court's refusal to apply *Hurst v. Florida*, 136 S.Ct. 616 (2016) (*Hurst v. Florida*), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (*Hurst v. State*), retroactively to all capital cases is arbitrary in violation of the Eighth Amendment. This claim is procedurally barred under the law-of-the-case doctrine because it was already ruled on by this Court in the state habeas

petition. Furthermore, the United States Supreme Court has definitively held that States are free to have their own retroactivity tests. The Eighth Amendment simply has nothing to say regarding partial retroactivity. The trial court properly summarily denied this claim.

ISSUE III

Zack asserts that this Court's partial retroactivity analysis violates equal protection. Zack also seems to be asserting that the Eighth Amendment requires jury unanimity. This claim is procedurally barred under the law-of-the-case doctrine because it was already ruled on by this Court in the state habeas petition. The Equal Protection Clause simply has nothing to say regarding retroactivity. And retroactivity analysis often depends on dates and often creates two classes of defendants based on a date. Furthermore, the United States Supreme Court has never addressed the issue of whether jury unanimity is required in capital cases. But the High Court has held that nonunanimious verdicts in non-capital cases do not violate the Eighth Amendment. The trial court properly summarily denied the claim.

ISSUE IV

Zack asserts that due process and *Hurst* require his previously denied claims of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), must be relitigated. Zack also claims that the new death penalty statute, Chapter 2017-1, Laws of Florida, created a substantive right that must be retroactively applied. The due process claim is barred by the law-of-the-case doctrine. Alternatively, this claims makes little sense. *Hurst*, which involves the denial of the right to a jury trial, if it applies retroactively, entitles a defendant to a new penalty phase, not a new postconviction appeal. Zack may not relitigate his

postconviction claims based on *Hurst*. Regarding the claim that the new death penalty statute, Chapter 2017-1, Laws of Florida, created a substantive right that must be retroactively applied, this Court has rejected that claim repeatedly. Generally, statutes are applied prospectively only. Nothing in the text or legislative history of the new death penalty statute indicates a legislative intent that the statute be applied retroactively. The trial court properly summarily denied this claim.

ISSUE V

Zack asserts that the Sixth Amendment right-to-a-jury-trial provision requires that a jury instead of a judge make the intellectual disability determinations. Both the applicable statute and the applicable rule of court provide that a judge rather than a jury make the determination of intellectual disability. It is only facts that increase or aggravate a sentence that must be found by the jury under the Sixth Amendment. But intellectual disability is a mitigator and mitigators are not required to be determined by a jury under the Sixth Amendment. This Court has held, in the wake of *Hurst*, that a judge may make intellectual disability determinations in *Oats v. Jones*, 220 So. 3d 1127, 1129-30 (Fla. 2017). The trial court properly relied on this Court's precedent in rejecting this claim and properly summarily denied the claim.

## ARGUMENT

## ISSUE I

WHETHER THE TRIAL COURT PROPERLY SUMMARILY DENIED THE CLAIM THAT THE DEATH SENTENCE VIOLATES THE SIXTH AMENDMENT UNDER *HURST V. FLORIDA*, 136 S.Ct. 616 (2016)? (Restated)

Zack asserts that his death sentence violates the Sixth Amendment right-to-a-jury-trial provision under *Hurst v. Florida*, 136 S.Ct. 616 (2016) (*Hurst v. Florida*). Zack asserts that this Court's decision in *Asay v. State*, 210 So.3d 1 (Fla. 2016), is incorrectly decided and, as a matter of fundamental fairness, he is entitled to retroactive benefit of *Hurst v. Florida*. This claim is procedurally barred under the law-of-the-case doctrine because it was already ruled on by this Court in the state habeas petition. Zack also asserts that Florida's standard jury instructions in the penalty phase violate *Caldwell v. Mississippi*, 472 U.S. 320 (1985). But, for a *Caldwell* violation to occur, the jury instructions or comments must be a misrepresentation of the jury's role in capital sentencing. There is no *Caldwell* violation because the standard jury instructions accurately characterize the jury's recommendation as advisory. In Florida, a jury's recommendation of death was advisory, and, under the new death penalty, the recommendation remains advisory. If anything, the standard jury instructions inflate the jury's role in sentencing because they tell a jury that the judge will give their recommendation great weight when, in fact, a trial court may ignore a recommendation of death and impose a life sentence. The trial court properly summarily denied this claim.

### Summary denials as a matter of law

While trial courts must accept the factual allegations in postconviction motion as true, trial courts are entitled to summarily deny a claim as meritless as a matter of law, as well as when the claim is conclusively rebutted by the record.

*Mann v. State*, 112 So.3d 1158, 1162 (Fla. 2013) (stating "because Mann raised purely legal claims that have been previously rejected by this Court, the circuit court properly summarily denied relief"). This Court affirms summary denials when there is controlling precedent from this Court in the area. *McLean v. State*, 147 So.3d 504, 513 (Fla. 2014) (affirming a summary denial of a lethal injection claim). Where there is controlling precedent from this Court regarding a particular claim, a trial court can, and should, summarily deny the claim.[7]

Standard of review

The standard of review for a summary denial of a postconviction motion is *de novo*. Because a trial court's decision to summarily deny a postconviction motion is "ultimately based on written materials before the court, its ruling is tantamount to a pure question of law, subject to *de novo* review." *Barnes v. State*, 124 So.3d 904, 911 (Fla. 2013) (citing *Seibert v. State*, 64 So.3d 67, 75 (Fla. 2010)). Because a trial court ruling on a postconviction motion is required to accept all factual assertions as true, there are no factual findings from the trial court for an appellate court to defer to. *Barnes*, 124 So.3d at 911 (noting that courts accept the movant's factual allegations as true). The standard of review, therefore, necessarily is *de novo*.

The postconviction court's ruling

The trial court summarily denied this claim. The trial court explained that the Florida Supreme Court has repeatedly held that *Hurst* did not apply retroactively

[7] In the interest of brevity, the State will not repeat the law regarding summary denial of postconviction claims for each of the five issues raised on appeal but all of the claims raised on appeal were summarily denied by the trial court.

to cases that were final before *Ring*, citing *Asay v. State*, 210 So.3d 1 (Fla. 2016), *Hannon v. State*, 228 So.3d 505, 513 (Fla. 2017), and *Archer v. Jones*, 2017 WL 1034409 (Fla. Mar. 17, 2017) (SC16-2111). The trial court noted that it was "uncontested that Defendant's sentence was final before *Ring* was decided." The trial court concluded that the "Defendant is not entitled to relief as to any of his present claims as each depends on a retroactive application of the *Hurst* decisions."

Procedurally barred under the law-of-the-case doctrine

Under the law-of-the-case doctrine, all questions of law decided on appeal govern the case through all subsequent stages of the proceedings. *Fla. Dept. of Transp. v. Juliano*, 801 So.2d 101, 105 (Fla. 2001). This Court previously denied this claim in a state habeas petition. Zack filed a petition for writ of habeas corpus in this Court raising a claim based on *Hurst v. Florida*, 136 S.Ct. 616 (2016) (*Hurst v. Florida*). On June 15, 2017, this Court denied the habeas petition. *Zack v. Jones*, 228 So.3d 41 (Fla. 2017) (SC16-1090). This Court concluded that Zack was not entitled to any *Hurst* relief "because *Hurst* does not apply retroactively to cases that were final before *Ring* was decided" citing *Asay v. State*, 210 So.3d 1, 22 (Fla. 2016). *See Zack*, 228 So.3d at 47-48.

This Court should not permit capital defendants to file the same claim in this Court in a habeas petition and then file the same claim in a successive 3.851 motion in the trial court. It is a waste of the trial court's time and this Court's time as well. This claim is barred by law-of-the-case doctrine.

Merits

This Court has repeatedly held that *Hurst* is not retroactive to cases that were final before *Ring v. Arizona*, 536 U.S. 584 (2002), was decided in 2002. *Asay v. State*, 210 So.3d 1 (Fla. 2016), *cert. denied*, *Asay v. Florida*, 138 S. Ct. 41 (2017); *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017), *cert. denied, Hitchcock v. Florida*, 138 S.Ct. 513 (2017). This Court has followed *Asay* and *Hitchcock* in dozens of capital cases, such as in *Reaves v. State*, 2018 WL 2041459 (Fla. May 2, 2018). This Court has rejected similar fundamental fairness arguments to those opposing counsel is making in dozens of cases. Indeed, this Court recently denied *Hurst* relief in a case where the retroactivity depended on a "mere three months or three days." *Evans v. State*, 2018 WL 1959622 (Fla. Apr. 26, 2018) (SC17-869) (Pariente, J., concurring) (commenting on the arbitrariness created by the *Ring* cutoff in a case where counsel did not file a corrected petition for certiorari).

Zack's death sentence became final on October 2, 2000, when the Supreme Court denied certiorari review in the direct appeal. *Zack v. Florida*, 531 U.S. 858 (2000). Under *Asay* and *Hitchcock*, *Hurst* does not apply retroactively to him. Zack is not entitled to a new penalty phase. The trial court properly ruled, following this Court's precedent, that Zack was not entitled to retroactive benefit of *Hurst*.

***Caldwell v. Mississippi***

There was no violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985). To establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law. *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994); *see also Dugger v. Adams*, 489 U.S. 401 (1989).

Even today, under Florida's new death penalty statute, the judge remains the final sentencer in Florida and a jury recommendation of death in Florida is just that — a recommendation. The Florida's new death penalty statute refers to the jury's vote as a "recommendation." Ch. 2017-1, § 1, Laws of Fla. ("If a unanimous jury determines that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of death."); *see also In re Standard Criminal Jury Instructions in Capital Cases*, 214 So.3d 1236, 1238, n.4 (Fla. 2017) (Lawson, J., concurring) (stating: "the jury's verdict is only a recommendation"). A Florida trial court, while bound by the jury's findings of no aggravation, is still free to reject the jury's death recommendation of death and impose a life sentence. And such a decision is not even appealable under double jeopardy. *Williams v. State*, 595 So.2d 936 (Fla. 1992) (holding that the Double Jeopardy Clause prohibits a new penalty phase where the judge had imposed a life sentence at the first penalty phase citing *Brown v. State*, 521 So.2d 110 (Fla. 1988)); *State v. Ballard*, 956 So.2d 470, 475 (Fla. 2d DCA 2007) (Villanti, J., concurring) (noting a judge's decision to override a jury's recommendation of death is not appealable). Unless this Court is going to recede from *Williams* and *Brown* and hold that a judge must impose a death sentence if the jury recommends a death sentence and may not impose a life sentence instead, then characterizing the jury's recommendation as advisory is accurate.[8] The jury's recommendation in Florida was, and remains, "advisory."

This Court has explicitly rejected *Caldwell* attacks on Florida's standard penalty phase jury instructions in two recent cases. *Reynolds v. State*, __ So.3d __, 2018 WL 1633075 (Fla. Apr. 5, 2018) (SC17-793); *see also Johnston v. State*,

[8] Actually, receding from *Williams* and *Brown* may not be sufficient under *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003).

2018 WL 1633043 (Fla. Apr. 5, 2018) (SC17-1678) (rejecting a *Caldwell* claim citing *Reynolds*). The *Reynolds* decision contains an extensive discussion of the *Caldwell* issue. Only Justice Pariente dissented in *Reynolds* regarding the *Caldwell* claim. *Reynolds*, 2018 WL 1633075 at *15-*17 (Pariente, J., dissenting). Justice Pariente believes that the use of the word "advisory" creates a possible *Caldwell* problem but, as explained above, it does not. Only Justice Quince dissented in *Johnson* and she did so regarding harmless error, not *Caldwell*.

Two United States Supreme Court Justices have expressed the view that *Caldwell* is an issue in Florida in non-final capital cases.[9] *Truehill v. Florida*, 138 S.Ct. 3 (Oct. 16, 2017) (Sotomayor, J., dissenting from the denial of certiorari) (advocating that the Florida Supreme Court revisit its precedent rejecting *Caldwell* challenges to the use of the term "advisory" to describe the jury's recommendation in the wake of *Hurst*); *Middleton v. Florida*, 138 S.Ct. 829 (Feb. 26, 2018) (Sotomayor, J., dissenting from the denial of certiorari) (expressing the view that describing a juror's role in sentencing as "merely advisory" is a *Caldwell* concern and because the Florida Supreme Court's reasoning that "unanimity ensured that jurors had made the necessary findings of fact" under *Hurst* "effectively" transforms "the pre-*Hurst* jury recommendations into ***binding*** findings of fact") (emphasis added). Justice Sotomayor repeated her concerns alone recently in *Guardado v. Jones*, 138 S.Ct. 1131 (April 2, 2018) (Sotomayor, J., dissenting from the denial of certiorari).[10]

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[9] Justice Breyer's separate opinion was based mainly on his view that the Eighth Amendment requires jury sentencing in capital cases — a view no other Justice has taken. While he purports to join the dissenters, he does so on separate grounds. He cannot be said to agree with Justice Sotomayor that there is a *Caldwell* problem with the Florida Supreme Court's harmless error analysis.

[10] Neither Justice Breyer nor Justice Ginsburg joined Justice Sotomayor in *Guardado*, as they had previously done.

But *Caldwell* requires that the prosecutor, judge, or jury instructions misrepresent the jury's role in sentencing. *Darden v. Wainwright*, 477 U.S. 168, 183, n.15 (1986) (rejecting a *Caldwell* attack, explaining that "*Caldwell* is relevant only to certain types of comment — those that ***mislead*** the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision") (emphasis added). But the new death penalty statute refers to the jury's decision as a "recommendation." Ch. 2017-1, § 1, Laws of Fla. There is no misrepresentation of the jury's role under local law from use of the word "advisory." Under *Romano*, that statutory language, in and of itself, ends any *Caldwell* claim.

Furthermore, it is difficult to see a *Caldwell* problem with the standard jury instructions given in capital cases. See Standard Jury Instruction 7.11 (Penalty Proceedings — Capital Cases). The standard penalty phase jury instructions inform the jury: "Before you ballot you should carefully weigh, sift, and consider the evidence, and all of it, realizing that ***human life is at stake***." *The Florida Bar re: Standard Jury Instructions Criminal Cases*, 477 So. 2d 985, 988 (Fla. 1985); *In re Standard Jury Instructions in Criminal Cases-Report No. 2005-2*, 22 So.3d 17, 36 (Fla. 2009) (emphasis added). The standard penalty phase instructions also inform the jury: "Although the recommendation of the jury as to the penalty is advisory in nature and is not binding, the jury recommendation must be given ***great weight*** and deference by the Court in determining which punishment to impose." *In re Standard Jury Instructions in Criminal Cases - Report No. 2005-2*, 22 So.3d at 28-29 (emphasis added). The jury instructions provide: "All of us are depending upon you to make a wise and legal decision in this matter." *Id.* at 30. At the end of the instructions, the jury is told that "Regardless of your findings in this respect, however, you are neither compelled nor required to recommend a sentence of death." *Id.* at 35. "You should take sufficient time to fairly discuss the

evidence and arrive at a well reasoned recommendation." *Id.* at 36. It is difficult to see how a jury would underestimate its importance in capital sentencing given such instructions.

But Justice Sotomayor shows an even deeper misunderstanding of the logic of *Caldwell*. *Caldwell* requires both that there be a misrepresentation of the jury's role and that the jury hear that misrepresentation. The jury must hear misrepresentation for their sense of responsibility to be diminished, which is the core of *Caldwell*. The jury, obviously, never heard the Florida Supreme Court's opinion. This Court made its observations and statements that concern Justice Sotomayor as part of its harmless error analysis of the *Hurst* error in *Truehill* and *Middleton*. She believes that this Court turned the recommendation into a binding one by its harmless error analysis. But an appellate court's harmless error analysis occurs long after the jury has been dismissed. Also, harmless error is an appellate concept which occurs in a different forum — trial court versus appellate court. One simply cannot premise a *Caldwell* violation on something the jury never heard. The jury never heard anything written by this Court. No one read the Florida Supreme Court's opinion (that had not been written yet) to the jury. There simply is no way the jury's sense of responsibility was diminished by statements made in an appellate opinion they never read. It is the standard jury instruction that the jury hears, not the opinion from this Court. *Caldwell* violations cannot be premised on appellate opinions.

Additionally, the misrepresentation must ***decrease*** the jury's sense of responsibility for sentencing to be a *Caldwell* violation. A misrepresentation of their role that ***increases*** their sense of responsibility is not a *Caldwell* problem. The juries in Florida are told in the standard penalty phase jury instructions that the judge would give their recommendation great weight including their recommendation of death. While the instructions tell the jury that any type of

recommendation they make will be given great weight, in fact, the judge does not have to give a jury's death recommendation any weight and a judge totally ignoring the jury recommendation is not even appealable regardless of how unjustified his reasons for doing so are. If anything, Florida's standard penalty phase jury instructions increase the jury's sense of responsibility which simply is not a *Caldwell* violation.

Furthermore, Justice Sotomayor is mistaken in believing that a jury's death recommendation is "binding" on a trial court in Florida. It is not. Under both the old death penalty statute and the new death penalty statute, a judge may still sentence a defendant to life, if the jury recommends death. Unanimous jury recommendations of death are not binding on the trial court. While a jury's finding of no aggravating factors is now binding under the new statute, a jury's finding of no aggravating factors was nearly binding under the caselaw interpreting the old statute. *Evans v. Sec'y, Fla. Dept. of Corr.*, 699 F.3d 1249, 1256 (11th Cir. 2012) (noting the Florida Supreme Court's "stringent application" of the *Tedder v. State*, 322 So.2d 908 (Fla. 1975), standard under which the last override affirmed on appeal was over twenty years ago in 1994). But a jury's recommendation of death is ***not*** binding in any manner under either the old statute or the new statute. And therefore, it is perfectly accurate to refer to the jury's recommendation of death as either a recommendation or as advisory, because that is exactly what it is. There is both no misrepresentation and no jury knowledge of the statement and therefore, no possible *Caldwell* problem. The entire premise of the dissent is based on the statement that "If those then-advisory jury findings are now binding" there is a *Caldwell* problem because the jury instructions "repeatedly emphasized the nonbinding, advisory nature of the jurors' role." *Middleton*, 138 S.Ct. at 830. But that premise is faulty. Harmless error analysis by an appellate court cannot create "binding" findings in

the trial court in the face of both the statute and long-existing precedent that the trial court may ignore a jury's death recommendation and impose a life sentence.

Accordingly, the trial court properly summarily denied this claim.

## ISSUE II

WHETHER THE TRIAL COURT PROPERLY SUMMARILY DENIED THE CLAIM THAT THIS COURT'S PARTIAL RETROACTIVITY VIOLATES THE EIGHTH AMENDMENT? (Restated)

Zack asserts that this Court's partial retroactivity analysis violates the Eighth Amendment. Zack claims that this Court's refusal to apply *Hurst v. Florida*, 136 S.Ct. 616 (2016) (*Hurst v. Florida*), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (*Hurst v. State*), retroactively to all capital cases is arbitrary in violation of the Eighth Amendment. This claim is procedurally barred under the law-of-the-case doctrine because it was already ruled on by this Court in the state habeas petition. Furthermore, the United States Supreme Court has definitively held that States are free to have their own retroactivity tests. The Eighth Amendment simply has nothing to say regarding partial retroactivity. The trial court properly summarily denied this claim.

### Standard of review

The standard of review for a summary denial of a postconviction motion is *de novo*. Because a trial court's decision to summarily deny a postconviction motion is "ultimately based on written materials before the court, its ruling is tantamount to a pure question of law, subject to *de novo* review." *Barnes v. State*, 124 So.3d 904, 911 (Fla. 2013) (citing *Seibert v. State*, 64 So.3d 67, 75 (Fla. 2010)). Because a trial court ruling on a postconviction motion is required to accept all factual assertions as true, there are no factual findings from the trial court for an appellate court to defer to. *Barnes*, 124 So.3d at 911 (noting that courts accept the movant's factual allegations as true). The standard of review, therefore, necessarily is *de novo*.

The postconviction court's ruling

The trial court summarily denied this claim. The trial court explained, that the Florida Supreme Court has repeatedly held that *Hurst* did not apply retroactively to cases that were final before *Ring*, citing *Asay v. State*, 210 So.3d 1 (Fla. 2016), *Hannon v. State*, 228 So.3d 505, 513 (Fla. 2017), and *Archer v. Jones*, 2017 WL 1034409 (Fla. Mar. 17, 2017) (SC16-2111). The trial court noted that it was "uncontested that Defendant's sentence was final before *Ring* was decided." The trial court concluded that the "Defendant is not entitled to relief as to any of his present claims as each depends on a retroactive application of the *Hurst* decisions."

Procedurally barred under the law-of-the-case doctrine

This Court previously denied this claim in a state habeas petition. Zack filed a petition for writ of habeas corpus in this Court raising a claim based on *Hurst v. Florida*, 136 S.Ct. 616 (2016) (*Hurst v. Florida*). On June 15, 2017, this Court denied the habeas petition. *Zack v. Jones*, 228 So.3d 41 (Fla. 2017) (SC16-1090). This Court concluded that Zack was not entitled to any *Hurst* relief "because *Hurst* does not apply retroactively to cases that were final before *Ring* was decided" citing *Asay v. State*, 210 So.3d 1, 22 (Fla. 2016). *See Zack*, 228 So.3d at 47-48.

This Court should not permit capital defendants to file the same claim in this Court in a habeas petition and then file the same claim in a successive 3.851 motion in the trial court. It is a waste of the trial court's time and this Court's time as well. This claim is barred by law-of-the-case doctrine.

Merits

The United States Supreme Court has definitively held that states are free to have their own retroactivity tests, provided that the state's test is broader than the

federal test for retroactivity. In *Danforth v. Minnesota*, 552 U.S. 264 (2008), the United States Supreme Court held that states are free to have different retroactivity tests than the federal test for retroactivity established in *Teague v. Lane*, 489 U.S. 288 (1989). The *Danforth* Court held that states are not required to adopt *Teague*. *Id.* at 266. The High Court noted that the Oregon Supreme Court correctly stated that states "are free to choose the ***degree*** of retroactivity . . . so long as the state gives federal constitutional rights at least as broad a scope as the United States Supreme Court requires." *Id.* at 276 (emphasis added). The High Court concluded that "the remedy a state court chooses to provide its citizens for violations of the Federal Constitution is primarily ***a question of state law***." *Id.* at 288 (emphasis added).

Under *Danforth*, states are free to have a broader retroactivity test; they just may not have a narrower test. *Montgomery v. Louisiana*, 136 S.Ct. 718, 729 (2016) (explaining that the federal constitution requires state courts to give retroactive effect to new substantive rules). Florida's test for retroactivity is broader than the federal test. *Asay*, 210 So.3d at 15 (citing *Johnson v. State*, 904 So.2d 400, 409 (Fla. 2005)); *Johnson v. State*, 904 So.2d 400, 409 (Fla. 2005) (rejecting the use of the federal test of *Teague* to determine retroactivity, and continuing to apply "our longstanding *Witt* analysis, which provides more expansive retroactivity standards than those adopted in *Teague*"). Because Florida's state test for retroactivity is broader and provides more relief than *Teague*, the retroactivity of the Florida Supreme Court's decisions is solely a matter of state law. When the *Danforth* Court spoke of state courts being free to choose the "degree of retroactivity" that includes partial retroactivity. A state court is welcome to employ a partial retroactivity approach without violating the federal constitution under *Danforth*. Florida is entitled to adopt a partial retroactivity analysis in cases where there would be no retroactivity under the federal test of *Teague*.

Furthermore, it is difficult to see the complaint. Zack would not be granted relief under the federal test of *Teague*. *Hurst v. Florida* is not retroactive under both the United States Supreme Court and Eleventh Circuit precedent. *Schriro v. Summerlin*, 542 U.S. 348 (2004) (holding *Ring* was not retroactive); *Turner v. Crosby*, 339 F.3d 1247, 1282-86 (11th Cir. 2003) (same). *Hurst v. Florida* was merely an application of *Ring* to Florida. If the seminal case is not retroactive, then neither is its progeny. *Jeanty v. Warden, FCI–Miami*, 757 F.3d 1283, 1285 (11th Cir. 2014) (observing "if *Apprendi*'s rule is not retroactive on collateral review, then neither is a decision applying its rule"). Because *Ring* is not retroactive, neither is *Hurst v. Florida*. Zack would not be granted *Hurst* relief in federal court either.

Accordingly, the trial court properly summarily denied this claim.

## ISSUE III

WHETHER THE TRIAL COURT PROPERLY SUMMARILY DENIED THE CLAIM THAT THIS COURT'S PARTIAL RETROACTIVITY ANALYSIS VIOLATES EQUAL PROTECTION? (Restated)

Zack asserts that this Court's partial retroactivity analysis violates equal protection. Zack also seems to be asserting that the Eighth Amendment requires jury unanimity. This claim is procedurally barred under the law-of-the-case doctrine because it was already ruled on by this Court in the state habeas petition. The Equal Protection Clause simply has nothing to say regarding retroactivity. And retroactivity analysis often depends on dates and often creates two classes of defendants based on a date. Furthermore, the United States Supreme Court has never addressed the issue of whether jury unanimity is required in capital cases. But the High Court has held that nonunanimious verdicts in non-capital cases do not violate the Eighth Amendment. The trial court properly summarily denied the claim.

### Standard of review

The standard of review for a summary denial of a postconviction motion is *de novo*. Because a trial court's decision to summarily deny a postconviction motion is "ultimately based on written materials before the court, its ruling is tantamount to a pure question of law, subject to *de novo* review." *Barnes v. State*, 124 So.3d 904, 911 (Fla. 2013) (citing *Seibert v. State*, 64 So.3d 67, 75 (Fla. 2010)). Because a trial court ruling on a postconviction motion is required to accept all factual assertions as true, there are no factual findings from the trial court for an appellate court to defer to. *Barnes*, 124 So.3d at 911 (noting that courts accept the movant's factual allegations as true). The standard of review, therefore, necessarily is *de novo*.

The postconviction court's ruling

The trial court summarily denied this claim. The trial court explained that the Florida Supreme Court has repeatedly held that *Hurst* did not apply retroactively to cases that were final before *Ring*, citing *Asay v. State*, 210 So.3d 1 (Fla. 2016), *Hannon v. State*, 228 So.3d 505, 513 (Fla. 2017), and *Archer v. Jones*, 2017 WL 1034409 (Fla. Mar. 17, 2017) (SC16-2111). The trial court noted that it was "uncontested that Defendant's sentence was final before *Ring* was decided." The trial court concluded that the "Defendant is not entitled to relief as to any of his present claims as each depends on a retroactive application of the *Hurst* decisions."

Procedurally barred under the law-of-the-case doctrine

This Court previously denied this claim in a state habeas petition. Zack filed a petition for writ of habeas corpus in this Court raising a claim based on *Hurst v. Florida*, 136 S.Ct. 616 (2016) (*Hurst v. Florida*). On June 15, 2017, this Court denied the habeas petition. *Zack v. Jones*, 228 So.3d 41 (Fla. 2017) (SC16-1090). This Court concluded that Zack was not entitled to any *Hurst* relief "because *Hurst* does not apply retroactively to cases that were final before *Ring* was decided" citing *Asay v. State*, 210 So.3d 1, 22 (Fla. 2016). *See Zack*, 228 So.3d at 47-48.

This Court should not permit capital defendants to file the same claim in this Court in a habeas petition and then file the same claim in a successive 3.851 motion in the trial court. It is a waste of the trial court's time and this Court's time as well. This claim is barred by law-of-the-case doctrine.

Merits

Zack asserts that this Court's partial retroactivity analysis violates equal protection. Zack also seems to be asserting that the Eighth Amendment requires jury unanimity.

**Equal Protection and retroactivity analysis**

The Equal Protection Clause simply has nothing to say regarding retroactivity. And retroactivity analysis often depends on dates and often creates two classes of defendants based on a date. For example, a cut-off date is part of the pipeline doctrine first established in *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). The *Griffith* Court created the pipeline concept by holding that all new developments in the criminal law must be applied retrospectively to all cases, state or federal, that are pending on direct review. *Griffith* depends on the date of finality of the direct appeal. The current federal test for retroactivity in the postconviction context, *Teague*, also depends on a date. If a case is final on direct review, the defendant will not receive benefit of the new rule unless one of the exceptions to *Teague* applies.

Inherent in the concept of non-retroactivity is that some cases will get the benefit of a new development in the law, while other cases will not. Drawing a line between newer cases that will receive benefit of a new development in the law and older final cases that will not receive benefit of the new development is part of the landscape of retroactivity analysis. It is simply part of the retroactivity paradigm that some cases will be treated differently than other cases based on the age of the case. In other words, non-uniformity is part and parcel of any retroactivity determination.

Opposing counsel is really asserting that all major cases should automatically be retroactive but no court has ever held that. Both federal and state courts have

retroactivity doctrines. Indeed, courts do the exact opposite of what opposing counsel is asserting fairness and uniformity demand they do.

If opposing counsel's view was adopted by courts, with every new development in the law, a capital defendant would get a new trial or a new penalty phase *ad infinitum*. Given that the litigation in capital cases span decades, there would never be any finality in capital cases if such a position was adopted. And, as the United States Supreme Court has explained, finality is the overriding concern in any retroactivity analysis including in capital cases. *Penry v. Lynaugh*, 492 U.S. 302, 312 (1989). Finality trumps both fairness and uniformity in the retroactivity realm.

**Eighth Amendment and unanimity**

Florida has a conformity clause in its state constitution that requires the state courts to interpret Florida's prohibition on cruel and unusual punishments 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). The United States Supreme Court has never addressed the issue of whether jury unanimity is required in capital cases. But the High Court has held that non-unanimious verdicts in non-capital cases do not violate either the Sixth Amendment or the Due Process Clause. *Apodaca v. Oregon*, 406 U.S. 404 (1972) (holding that the Sixth Amendment does not require unanimous jury verdicts in state criminal trials); *Johnson v. Louisiana*, 406 U.S. 356 (1972) (holding that the Due Process Clause does not require unanimous jury verdicts in state criminal trials). There is no United States Supreme Court case

holding that the Eighth Amendment requires the jury's final recommendation in a capital case be unanimous.

## ISSUE IV

WHETHER THE TRIAL COURT PROPERLY SUMMARILY DENIED THE CLAIM THAT DUE PROCESS AND THE NEW DEATH PENALTY STATUTE REQUIRE RECONSIDERATION OF THE PREVIOUSLY DENIED POSTCONVICTION CLAIMS? (Restated)

Zack asserts that due process and *Hurst* require his previously denied claims of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), must be relitigated. Zack also claims that the new death penalty statute, Chapter 2017-1, Laws of Florida, created a substantive right that must be retroactively applied. The due process claim is barred by the law-of-the-case doctrine. Alternatively, this claims makes little sense. *Hurst*, which involves the denial of the right to a jury trial, if it applies retroactively, entitles a defendant to a new penalty phase, not a new postconviction appeal. Zack may not relitigate his postconviction claims based on *Hurst*. Regarding the claim that the new death penalty statute, Chapter 2017-1, Laws of Florida, created a substantive right that must be retroactively applied, this Court has rejected that claim repeatedly. Generally, statutes are applied prospectively only. Nothing in the text or legislative history of the new death penalty statute indicates a legislative intent that the statute be applied retroactively. The trial court properly summarily denied this claim.

### Standard of review

The standard of review for a summary denial of a postconviction motion is *de novo*. Because a trial court's decision to summarily deny a postconviction motion is "ultimately based on written materials before the court, its ruling is tantamount to a pure question of law, subject to *de novo* review." *Barnes v. State*, 124 So.3d 904, 911 (Fla. 2013) (citing *Seibert v. State*, 64 So.3d 67, 75 (Fla. 2010)). Because a trial court ruling on a postconviction motion is required to accept all factual

assertions as true, there are no factual findings from the trial court for an appellate court to defer to. *Barnes*, 124 So.3d at 911 (noting that courts accept the movant's factual allegations as true). The standard of review, therefore, necessarily is *de novo*.

Furthermore, whether a statute applies retroactively or applies prospectively only is a question of law reviewed *de novo*. *Staples v. State*, 202 So.3d 28, 32 (Fla. 2016) (explaining that "where the issue presented is a question of law, the standard of review is *de novo*"). The standard of review is *de novo*.

The postconviction court's ruling

The trial court summarily denied this claim. The trial court explained, that the Florida Supreme Court has repeatedly held that *Hurst* did not apply retroactively to cases that were final before *Ring*, citing *Asay v. State*, 210 So.3d 1 (Fla. 2016), *Hannon v. State*, 228 So.3d 505, 513 (Fla. 2017), and *Archer v. Jones*, 2017 WL 1034409 (Fla. Mar. 17, 2017) (SC16-2111). The trial court noted that it was "uncontested that Defendant's sentence was final before *Ring* was decided." The trial court concluded that the "Defendant is not entitled to relief as to any of his present claims as each depends on a retroactive application of the *Hurst* decisions."

Procedurally barred under the law-of-the-case doctrine

Opposing counsel asserts that *Hurst* somehow resurrects Zack's previously denied postconviction claims. But, under the law-of-the-case doctrine, all questions of law decided on appeal govern the case through all subsequent stages of the proceedings. *Fla. Dept. of Transp. v. Juliano*, 801 So.2d 101, 105 (Fla. 2001). The ineffectiveness claims are procedurally barred by the law-of-the-case doctrine.

Opposing counsel, relying on a brew of *James v. State*, 615 So.2d 668 (Fla. 1993), and the manifest injustice exception to the doctrine, asserts that this Court should revisit the postconviction claims. But opposing counsel is really asserting that this Court should recede from *Asay v. State*, 210 So.3d 1 (Fla. 2016), and *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017), and rely on *James* instead. She is asserting that this Court should adopt Justice Lewis' dissenting opinion regarding the retroactivity of *Hurst*. *Asay*, 210 So.3d at 30 (Lewis, J., concurring) (relying on the logic of *James*). But, if a case is not retroactive, then the defendant is entitled to NO relief, which includes no new postconviction proceedings. Non-retroactivity is not an exception to the law-of-the-case doctrine.

*Hurst v. State*, which is a right-to-a-jury-trial and an Eighth Amendment unanimity case, does not operate to breathe new life into previously denied *Strickland v. Washington*, 466 U.S. 668 (1984), claims. *Hurst* is not a right to counsel case, as is *Strickland*. *Hurst* is a right to a jury trial case. *Hurst* involves an entirely different constitutional right than *Strickland* does. There has not even been a change in the law regarding *Strickland*. *Hurst* entitles a defendant to litigate a *Hurst* claim, not other types of claims. Zack may not relitigate his postconviction claims based on *Hurst*.

Furthermore, the remedy for a violation of the right to a jury trial is a new trial, not a new postconviction appeal. There is no connection between the purported error and the proposed remedy.

The previously litigated ineffectiveness claims are procedurally barred by the law-of-the-case doctrine and this Court should not revisit them.

Merits

Zack claims that the new death penalty statute, Chapter 2017-1, Laws of Florida, created a substantive right that must be retroactively applied. Generally,

statutes are prospective only. A statute is applied retrospectively only if there is "clear evidence of legislative intent to apply the statute retrospectively." *Fla. Ins. Guar. Ass'n, Inc. v. Devon Neighborhood Ass'n, Inc.*, 67 So.3d 187, 194 (Fla. 2011) (citing *In Old Port Cove Holdings, Inc. v. Old Port Cove Condo. Ass'n One, Inc.*, 986 So.2d 1279 (Fla. 2008)). If there is no such clear intent, the statute is not applied retrospectively.

There is no clear legislative intent that Chapter 2017-1 be applied retroactively. The new death penalty statute certainly does not explicitly state that it is to be applied retroactively. Opposing counsel points to no language in the text of the statute that supports an argument that the legislature intended to grant all capital defendants new penalty phases. There is no textual support for a claim that the new death penalty statute applies retroactively.

And there is no support in the legislative history of this Chapter for a claim that the legislature intended the new law to apply retroactively and require that all capital defendants on death row be given a new penalty phase either. The legislative history discussed the expense of new penalty phases granted in some cases by the Florida Supreme Court's decision in *Mosley v. State*, 209 So.3d 1248 (Fla. 2016). *See Senate Staff Analysis* dated Feb. 21, 2017, at 6-7. Given that the Legislature was concerned about the expense of the Florida Supreme Court's partial retroactivity in *Mosley*, it certainly would not have enacted a statute designed to grant greater relief by giving all death row inmates a new penalty phase. Nothing in the text or legislative history of the new death penalty statute indicates a legislative intent that the statute be applied retroactively.

And the proposed bills that advocated extending *Hurst v. State* to all death row inmates were not enacted.

**Constitutional retroactivity**

Opposing counsel asserts that the constitution requires that the new death penalty statute be retroactively applied. There is no such thing as constitutional retroactivity of a statute. There is no constitutional requirement that new substantive criminal law statutes must be applied retroactively. Opposing counsel imports the distinction between substantive and procedural drawn in *Teague v. Lane*, 489 U.S. 288 (1989), for purposes of retroactivity analysis of judicial decisions into her argument. But *Teague* does not apply to statutes.

But, even assuming that the legal standards for the retroactivity of judicial decisions can be applied to statutory changes, opposing counsel is confused regarding what is substantive for purposes of retroactivity. *Schriro v. Summerlin*, 542 U.S. 348, 354 (2004) (explaining that a decision that modifies the elements of an offense is normally substantive rather than procedural). None of the changes in the new death penalty statute modified an element of the offense of capital murder and therefore, there were are no substantive changes.

There are three major changes in the new death penalty statute, Chapter 2017-1, Laws of Florida. First, the new statute requires a unanimous jury vote for a recommendation of death compared to the older version of the statute that only required a 7 to 5 vote for a recommendation of death. Second, the new statute also requires specific findings from the jury regarding aggravating circumstances and weighing. Third, the new statute does not permit judicial overrides unlike the older version of the statute.

But the aggravating circumstances in the new death penalty statute were not changed. The aggravating circumstances are exactly the same in the new statute as in the older version of the statute. No aggravator was added to the new statute. No definition of any of the existing aggravators was changed in any manner. Not a single aggravating circumstance was changed in any manner in the new death

penalty statute. The only substantive elements in a death penalty statute are the aggravating circumstances. It is the aggravating circumstances that are the functional equivalents of elements. *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (holding that because "Arizona's enumerated aggravating factors operate as the functional equivalent of an element," "the Sixth Amendment requires that they be found by a jury"); *Schriro v. Summerlin*, 542 U.S. 348, 354 (2004) (explaining that the aggravators in Arizona's death penalty statute effectively were elements for federal constitutional purposes but holding that *Ring* was not retroactive regardless); *Hurst v. Florida*, 136 S.Ct. 616, 621 (2016) (noting that it was the required finding of an aggravated circumstance that exposed *Ring* to the death penalty). Because there were no changes in the aggravating circumstances, there were no substantive changes in the new death penalty statute.

The changes in the new statute are all procedural changes. None of the changes in the new death penalty statute are substantive. Even applying a substantive/procedural distinction, the new statute is not constitutionally required to be applied retroactively.

**Florida Supreme Court and Eleventh Circuit precedent**

Furthermore, this Court has repeatedly rejected the claim that the new statute created a substantive right that must be applied retrospectively. *Asay v. State*, 224 So.3d 695, 703 (Fla. 2017) (rejecting a claim that Chapter 2017-1, Laws of Florida, creates a substantive right to a life sentence unless a jury unanimously recommends death); *Lambrix v. State*, 227 So.3d 112, 113 (Fla. 2017) (rejecting a claim of a substantive right based on the legislative passage of Chapter 2017-1, Laws of Florida, which "prospectively" requires unanimous verdicts), *cert. denied, Lambrix v. Florida*, 138 S.Ct. 312 (2017); *Hannon v. State*, 228 So.3d 505, 513 (Fla. 2017) (rejecting a claim based on Chapter 2017-1, Laws of Florida citing prior

cases), *cert. denied, Hannon v. Florida*, 138 S.Ct. 441 (2017); *Taylor v. State*, 2018 WL 2057452, *8 (Fla. May 3, 2018) (SC17-1501) (rejecting as "without merit," a claim that Chapter 2017-1, Laws of Florida, created a substantive right that must be retroactively applied).

The Eleventh Circuit agrees. The Eleventh Circuit noted that "the Florida legislature passed Chapter 2017-1, amending Florida's death penalty statute to require a unanimous jury finding of at least one aggravating factor and a unanimous jury recommendation of death before a defendant convicted of first-degree murder may be sentenced to death" but the "amended statute contains no provision regarding its retroactive application." *Lambrix v. Sec'y, Fla. Dept. of Corr.*, 872 F.3d 1170, 1175 (11th Cir. 2017). The Eleventh Circuit then rejected a claim that the Eighth and Fourteenth Amendments of the U.S. Constitution, as well as the Florida Constitution, required the retroactive application of the substantive right established by Chapter 2017-1. *Lambrix*, 872 F.3d at 1176. The Eleventh Circuit also rejected the claim that the Florida legislature intended Chapter 2017-1 to apply retroactively. *Id.* Lambrix further contended that Florida courts had ordered resentencing under the new statute in some cases and that he would be treated differently if his sentences were not also vacated. But, the Eleventh Circuit concluded that, contrary to Lambrix's assertions, "nothing in the legislative history indicated that the legislature intended Chapter 2017-1 to apply retroactively, nor did Lambrix cite any legal authority applying Chapter 2017-1 to cases that were final before the statute was amended." *Id.* at 1176. Indeed, the Eleventh Circuit observed that there was "even one Supreme Court decision inconsistent with Lambrix's Equal Protection claim." *Id.* at 1183 (citing *Dobbert v. Florida*, 432 U.S. 282, 301 (1977)); *see also Hannon v. Sec'y, Fla. Dept. of Corr.*, 2017 WL 5177614 (11th Cir. Nov. 8, 2017) (denying a certificate of appealability regarding a claim that not applying Chapter

2017-1 retroactively violates the Equal Protection Clause, the Due Process Clause, or the Eighth Amendment because such a claim "is foreclosed by our decision in *Lambrix*").

The new death penalty statute is prospective only. The new penalty statute does not apply retroactively to Zack.

Accordingly, the trial court properly summarily denied this claim.

## ISSUE V

WHETHER THE TRIAL COURT PROPERLY SUMMARILY DENIED THE CLAIM THAT THE INTELLECTUAL DISABILITY DETERMINATION MUST BE MADE BY THE JURY RATHER THAN THE JUDGE UNDER THE SIXTH AMENDMENT? (Restated)

Zack asserts that the Sixth Amendment right-to-a-jury-trial provision requires that a jury instead of a judge make the intellectual disability determinations. Both the applicable statute and the applicable rule of court provide that a judge rather than a jury make the determination of intellectual disability. It is only facts that increase or aggravate a sentence that must be found by the jury under the Sixth Amendment. But intellectual disability is a mitigator and mitigators are not required to be determined by a jury under the Sixth Amendment. This Court has held, in the wake of *Hurst*, that a judge may make intellectual disability determinations in *Oats v. Jones*, 220 So.3d 1127, 1129-30 (Fla. 2017). The trial court properly relied on this Court's precedent in rejecting this claim and properly summarily denied this claim.

### Standard of review

The standard of review for a summary denial of a postconviction motion is *de novo*. Because a trial court's decision to summarily deny a postconviction motion is "ultimately based on written materials before the court, its ruling is tantamount to a pure question of law, subject to *de novo* review." *Barnes v. State*, 124 So.3d 904, 911 (Fla. 2013) (citing *Seibert v. State*, 64 So.3d 67, 75 (Fla. 2010)). Because a trial court ruling on a postconviction motion is required to accept all factual assertions as true, there are no factual findings from the trial court for an appellate court to defer to. *Barnes*, 124 So.3d at 911 (noting that courts accept the movant's factual allegations as true). Furthermore, whether the Sixth Amendment right-to-a-jury-trial provision requires a jury determination of intellectual

disability is a question of law reviewed *de novo*. The standard of review, therefore, necessarily is *de novo*.

The postconviction court's ruling

The trial court denied this claim stating "the Florida Supreme Court has recently addressed Defendant's fifth claim as it pertains to a jury finding of intellectual disability, and found it to be without merit." In a footnote to that sentence, the trial court cited to, and quoted, *Oats v. Jones*, 220 So.3d 1127, 1129-30 (Fla. 2017).

Merits

Both the applicable statute and the applicable rule of court provide that a judge rather than a jury make the determination of intellectual disability. The "imposition of the death sentence upon an intellectually disabled defendant prohibited" statute, § 921.137(4), Florida Statutes (2018), provides:

> After a defendant who has given notice of his or her intention to raise intellectual disability as a bar to the death sentence is convicted of a capital felony and an advisory jury has returned a recommended sentence of death, the defendant may file a motion to determine whether the defendant is intellectually disabled. Upon receipt of the motion, the court shall appoint two experts in the field of intellectual disabilities who shall evaluate the defendant and report their findings to the court and all interested parties prior to the final sentencing hearing. Notwithstanding s. 921.141 or s. 921.142, the final sentencing hearing shall be held without a jury. At the final sentencing hearing, the court shall consider the findings of the court-appointed experts and consider the findings of any other expert which is offered by the state or the defense on the issue of whether the defendant has an intellectual disability. If ***the court finds***, by clear and convincing evidence, that the defendant has an intellectual disability as defined in subsection (1), the court may not impose a sentence of death and shall enter a written order that sets forth with specificity the findings in support of the determination.

(emphasis added).

Florida's rule of criminal procedure governing "defendant's intellectual disability as a bar to imposition of the death penalty," rule 3.203(e), provides:

> The ***circuit court shall conduct*** an evidentiary hearing on the motion for a determination of intellectual disability. At the hearing, the court shall consider the findings of the experts and all other evidence on the issue of whether the defendant is intellectually disabled. The court shall enter a written order prohibiting the imposition of the death penalty and setting forth the court's specific findings in support of the court's determination if the court finds that the defendant is intellectually disabled as defined in subdivision (b) of this rule. The court shall stay the proceedings for 30 days from the date of rendition of the order prohibiting the death penalty or, if a motion for rehearing is filed, for 30 days following the rendition of the order denying rehearing, to allow the state the opportunity to appeal the order. ***If the court determines*** that the defendant has not established intellectual disability, the court shall enter a written order setting forth the court's specific findings in support of the court's determination.

(emphasis added).

**The Sixth Amendment right-to-a-jury-trial provision**

Opposing counsel invokes the Sixth Amendment as a basis for this claim but the Sixth Amendment only requires aggravating factors be found by the jury. Intellectual disability is a *per se* mitigator, not an aggravating factor. Facts that ***increase*** a sentence or the minimum mandatory must be found by the jury under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its extensive progeny. *See Betterman v. Montana*, 136 S. Ct. 1609, 1613, n.2 (2016) (reserving for another day the question whether the Speedy Trial Clause applies to bifurcated sentencing proceedings at which "facts that could increase the prescribed sentencing range are determined" such as "capital cases in which eligibility for the death penalty hinges on aggravating factor findings"). But a finding of intellectual disability decreases the sentence. Any fact that ***decreases*** the sentence may be found by a judge alone. As the United States Supreme Court stated in *Alleyne v. United States*, 570 U.S. 99, 116 (2013), our "ruling today does not mean that any fact that influences judicial discretion must be found by a jury." It is only "aggravating facts" that must be "submitted to the jury and found beyond a reasonable doubt." *Alleyne*, 570 U.S. at 116. A fact that "influences judicial discretion" need not be

found by a jury. Opposing counsel's argument totally ignores the entire reasoning of *Alleyne*.

The federal circuit courts have rejected the claim that the federal constitution requires a jury determination of intellectual disability. *In re Johnson*, 334 F.3d 403, 405 (5th Cir. 2003) (rejecting a claim that *Apprendi* requires a jury determination of intellectual disability explaining that the absence of mental retardation is not the functional equivalent of an element of capital murder which the state must prove beyond a reasonable doubt); *Walker v. True*, 399 F.3d 315, 326 (4th Cir. 2005) (rejecting a claim that the Sixth Amendment requires a jury determination of intellectual disability because "an increase in a defendant's sentence is not predicated on the outcome of the mental retardation determination; only a decrease."). The Sixth Amendment does not require a jury determination of intellectual disability.

**Florida Supreme Court precedent**

This Court in *Oats v. Jones*, 220 So.3d 1127, 1129-30 (Fla. 2017), in the wake of *Hurst v. Florida*, and *Hurst v. State*, rejected a claim that intellectual determinations must be made by a jury. This Court noted that both "the statute and the court rule provide for an evidentiary hearing to determine intellectual disability to take place before the trial court." *Id.* at 1130 (citing § 921.137 and rule 3.203(e)). "It is clear that the Florida Legislature designated the trial judge, not the jury, as the factfinder for intellectual disability determinations." *Id.* This Court explained that intellectual disability is not a necessary finding to impose a death sentence but is, rather, the opposite—a fact that bars death." *Id.* (citing *Hurst*, 202 So.3d at 67). Both the concurring opinions agreed that Oats was not entitled to a jury determination of intellectual disability. *Oats*, 220 So.3d at 1131 (Pariente, J., concurring); *Oats*, 220 So.3d at 1131 (Lawson, J., concurring). Not

a single Justice of the Florida Supreme Court thought that a capital defendant is entitled to a jury determination of intellectual disability.

Opposing counsel asserts that *Oats* is incorrectly decided. But the United States Supreme Court would have to change their entire *Apprendi* line of cases, involving nearly twenty years of jurisprudence, regarding the Sixth Amendment provision to adopt the position that all factual findings must be made by the jury. The United States Supreme Court has decided case after case applying the logic of *Apprendi* to various scenarios and repeatedly emphasized in those various cases that it is only facts that increase or aggravate a sentence that must be determined by a jury, such as most recently in *Alleyne*.

Accordingly, the trial court properly summarily denied this claim and properly summarily denied the successive postconviction motion.

## CONCLUSION

The State respectfully requests that this Honorable Court affirm the trial court's summary denial of the successive 3.851 motion.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished via e-portal to DAWN B. MACREADY, Assistant Capital Collateral Regional Counsel - North, 175 Salem Court, Tallahassee, FL 32301; phone: (850) 487-0922; email: Dawn.Macready@ccrc-north.org and STACY BIGGART, Assistant Capital Collateral Regional Counsel - North, 175 Salem Court, Tallahassee, FL 32301; phone: (850) 487-0922; email: Stacy.Biggart@ccrc-north.org this 7th day of May, 2018.

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## CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Bookman Old Style 12 point font.

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