IN THE SUPREME COURT OF FLORIDA

Case No. SC18-243

Lower Court Case No. 1996-CF-002514

MICHAEL DUANE ZACK, III,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

ROBERT S. FRIEDMAN
CAPITAL COLLATERAL
REGIONAL COUNSEL - NORTH
1004 DESOTO PARK TRAIL
Tallahassee, FL 32301
(850) 487-0922

DAWN B. MACREADY
Assistant CCRC-North
Florida Bar No. 0542611

STACY BIGGART
Assistant CCRC-North
Florida Bar No. 0089388

COUNSEL FOR APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's summary denial of Zack's Successive Motion to Vacate Death Sentence, and Alternatively Motion to Correct Illegal Sentence, filed pursuant to Rule 3.851 of the Florida Rules of Criminal Procedure. This motion was based on *Hurst v. Florida*, 136 S. Ct. 616 (2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).

CITATIONS TO THE RECORD

The following symbols will be used to designate references to the record: "T" refers to the transcript of trial proceedings; "R" refers to the record on direct appeal to this Court; "PC-R" refers to the record on appeal from the denial of Zack's first rule 3.851 motion; "PC-R2" refers to the record on appeal from the denial of Zack's second rule 3.851 motion; "PC-R3" refers to the record on appeal from the denial of Zack's third rule 3.851 motion; "PC-R4" refers to the record on appeal from the denial of Zack's fourth rule 3.851 motion. All other references will be self-explanatory.

STANDARD OF REVIEW

Zack sought an evidentiary hearing pursuant to Fla. R. Crim. P. 3.851 for all claims requiring a factual determination. "A postconviction court's decision regarding whether to grant a rule 3.851 evidentiary hearing depends on the written materials before the court; therefore, for all intents and purposes, its ruling

constitutes a pure question of law and is subject to de novo review." *Tompkins v. State*, 994 So.2d 1072, 1081 (Fla. 2008); *See also State v. Coney*, 845 So.2d 120, 137 (Fla. 2003). "In reviewing a trial court's summary denial of postconviction relief, this Court must accept the defendant's allegations as true to the extent that they are not conclusively refuted by the record." *Id.*; *See also Rolling v. State*, 944 So.2d 176, 179 (Fla. 2006).

REQUEST FOR ORAL ARGUMENT

Zack has been sentenced to death. The resolution of the issues in this action will determine whether Zack lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Zack, through counsel, urges that the Court permit oral argument.

STATEMENT OF THE CASE AND FACTS

Zack was indicted on June 25, 1996, on one count of first-degree murder for the death of Ravonne Kennedy Smith, one count of robbery and one count of sexual battery. (R.1-3). Zack pled not guilty to the charges.

Zack's capital jury trial commenced on September 8, 1997. The jury returned guilty verdicts on all of the charges on September 15, 1997. (T.1521-2; R.419-20). The penalty phase began on October 14, 1997. By a vote of 11-1, the jury

recommended that Zack be sentenced to death. (T.2117; R.792). A sentencing hearing was held on November 10, 1997, and two weeks later, Zack was sentenced to death for the one count of first-degree murder. (R.852-8; 859-875).

On direct appeal, this Court affirmed Zack's convictions and sentences. *Zack v. State*, 753 So. 2d 9 (Fla. 2000). The United States Supreme Court thereafter denied certiorari. *Zack v. Florida*, 531 U.S. 858 (2000).

On July 6, 2001, Glenn Arnold was appointed to represent Zack as registry counsel. Mr. Arnold filed a motion to extend the time for filing Zack's initial Rule 3.850 motion. This motion to extend was granted. Zack's Motion to Vacate, Set Aside or Correct Judgement and Sentence pursuant to Rule 3.850 and Rule 3.851 was filed on May 10, 2002.

On October 21, 2002, postconviction counsel filed an amended Rule 3.850 motion, which abandoned several of the previously pled claims and added new claims, including a claim that the death penalty is an excessive punishment due to Zack's brain dysfunction, and a *Ring v. Arizona* claim.

A *Huff* hearing was held on January 27, 2003, and on March 20, 2003, the lower court entered an order granting a limited evidentiary hearing on claims 1, 3 and 5, while taking claims 2, 4 and 6 under advisement and permitting counsel to submit written arguments on all claims. Zack was not granted an evidentiary hearing on his claim regarding the death penalty as an excessive punishment due to brain

dysfunction or pursuant to *Atkins*.

An evidentiary hearing commenced on May 14, 2003. Following the hearing, the trial court entered an order denying relief on July 15, 2003. Because Zack's claim regarding brain dysfunction was framed in terms of the proportionality of his death sentence, which had already been litigated on direct appeal, he was precluded from relitigating the issue in postconviction. With regard to Zack's Eighth Amendment argument under *Atkins*, the court held that Zack was not intellectually disabled since his full-scale IQ score was slightly higher than 70, the threshold required for establishing intellectual disability in Florida.

In November 2003, Linda McDermott was retained to represent Zack in his appeal to this Court. Mr. Arnold was subsequently permitted by the court to withdraw as counsel of record. (Case No. SC03-1274). Zack filed an appeal of the denial of his postconviction motion to this Court on February 12, 2004. (Case No. SC03-1374). In his appeal, Zack argued that there was a plethora of evidence presented at both the guilt and penalty phases of Zack's trial from which to conclude that he was deserving of the legal protections afforded the intellectually disabled due to his brain damage, as well as his other mental and emotional impairments. He also challenged the trial court's denial of his *Ring* claim. On February 12, 2004, Zack also filed a Petition for Writ of Habeas Corpus to this Court. (SC04-201).

On November 30, 2004, while these appeals were still pending before this

Court, Zack filed a Motion to Relinquish Jurisdiction in order to pursue his claim of intellectual disability in the circuit court, pursuant to the newly promulgated Rule 3.203, which sets forth a bar to the imposition of the death penalty for those defendants who are found to be intellectually disabled.

Simultaneously, Zack filed with the circuit court, a successive Rule 3.850 motion to vacate, based upon Rule 3.203. In this motion, Zack claimed that he is an intellectually disabled and/or brain injured man who has significant limitations in adaptive skills such as communication, self-care, and self-direction.

The circuit court dismissed with prejudice Zack's successive motion to vacate on January 13, 2005, holding it was without jurisdiction to entertain the motion because this Court had not relinquished jurisdiction over the case. The circuit court further held that even if it did have jurisdiction to hear the motion, it would be denied because it is successive, which was not provided for in Rule 3.203, and because the claims were conclusively refuted by the record, as Zack's IQ has not met the "threshold" requirement of 70 or below, to establish intellectual disability.

On March 9, 2005, this Court denied Zack's motion to relinquish jurisdiction to the circuit court to make a determination of intellectual disability, but allowed him to re-file his motion in the circuit court once his appeal became final. However, since the circuit court had already dismissed the motion with prejudice, he was unable to do so. Zack filed a motion for clarification with this Court on March 23, 2005, in

order to address this procedural dilemma. This motion was denied on June 29, 2005, and Zack was foreclosed from obtaining any relief on his intellectual disability claim. (Case No. SC03-1374; SC04-201).

On March 4, 2005, Zack filed a second Petition for Writ of Habeas Corpus based upon the United States Supreme Court decision in *Crawford v. Washington*, 124 So. Ct. 1354 (2004). (Case No. SC05-378). This petition was denied on October 6, 2005. *Zack v. Crosby*, 918 So. 2d 240 (Fla. 2004).

On July 7, 2005, this Court ruled on Zack's initial appeals, affirming the lower court's order denying postconviction relief and denying relief on Zack's petition for writ of habeas corpus. *Zack v. State*, 911 So. 2d 1190 (Fla. 2005). In its decision, this Court noted that "evidence in this case shows Zack's lowest IQ score to be 79" and "[u]nder Florida law, one of the criteria to determine if a person is intellectually disabled is that he or she has an IQ of 70 or below." *Zack*, 911 So. 2d at 1201 *citing* §916.106(12), Fla. Stat. (2003). This Court further noted that the proper procedure for claiming intellectual disability as a bar to execution is through Florida Rule of Criminal Procedure 3.203, and such a claim should be addressed pursuant to that rule. *Id*. at 1202.

On October 27, 2006, Zack filed an appeal of his successive motion to vacate, arguing that Rule 3.203 does apply to him, that he has produced evidence to support his claim of intellectual disability, and that the circuit court should have held his

successive motion in abeyance until his appeals were final, rather than dismissing the motion with prejudice. (Case No. SC05-963).

In an amended order, this Court, citing *Cherry v. State*, 959 So. 2d 702, 712-714 (Fla. 2007) (reiterating that the cutoff score for the first prong of the intellectual disability standard of an IQ of 70 or below), held that "[b]ecause Zack does not meet the threshold requirement of an IQ of 70 or below, we find no useful purpose would be served in remanding this case to the trial court for another proceeding …". *See* Amended Order of September 20, 2007 (Case No. SC05-963). Rehearing was denied on May 5, 2008.

On September 28, 2005, Zack filed a Petition for Writ of Habeas Corpus By A Person In State Custody in the United States District Court for the Northern District of Florida. (Case No. 3:05-cv-000369-RH). These proceedings were stayed by the federal district court, pending resolution of the pending appeals in state court. Thereafter, Zack filed an Amended Petition for Writ of Habeas Corpus on March 20, 2008. All claims not based on *Atkins v. Virginia* were dismissed with prejudice as untimely by the district court on November 17, 2008. *Zack v. Crosby*, 607 F. Supp. 2d 1291 (N.D. Fla. 2008). Zack's *Atkins* claim was denied with prejudice on the merits on March 26, 2009. In an en banc opinion, the Eleventh Circuit affirmed the dismissal of Zack's non-*Atkins* claims as untimely. *Zack v. Tucker*, 704 F. 3d 917 (11th Cir. 2013). The United States Supreme Court denied certiorari review of the

federal habeas corpus petition on October 7, 2013. *Zack v. Crews*, 134 S. Ct. 156 (2013). On August 25, 2014, Zack filed a motion to amend his petition. This was denied on September 4, 2014. On September 30, 2014, Zack moved to alter or amend that ruling. That motion was denied on October 4, 2014. Subsequently, on October 30, 2014, Zack filed a motion for certificate of appealability, and on October 31, 2014, he filed a notice of appeal. The district court denied his motion for certificate of appealability on November 17, 2014. Thereafter, on January 8, 2016, the Eleventh Circuit Court of Appeals granted Zack's motion for certificate of appealability. Finally, on January 12, 2018, the Court of Appeals affirmed the district court's ruling and concluded that the court did not abuse its discretion in denying Zack's Rule 60(b)(6) motion. The mandate issued on April 4, 2018.

Meanwhile, in state court, on January 27, 2015, the trial court granted Linda McDermott's motion to withdraw as Zack's state registry counsel, and appointed the Office of the Capital Collateral Regional Counsel – Northern Region to represent Zack in his state postconviction proceedings.

On May 26, 2015, Zack filed a successive motion to vacate judgment and sentence based on *Hall v. Florida*, 134 S. Ct. 1986 (2014). This motion was denied on July 8, 2015. An appeal of that denial was filed and denied by this Court. *Zack v. State*, 228 So. 3d 41 (Fla. 2017). This opinion also included a denial of Zack's Petition for Writ of Habeas Corpus filed following the United States Supreme

Court's decision in *Hurst v. Florida*, 136 S. Ct 616 (2016). Zack filed a motion for rehearing on June 30, 2017. This motion was denied on October 12, 2017. The mandate was issued on October 30, 2017, and on November 6, 2017, Zack filed a Motion to Recall the Mandate based on recent United States Supreme Court decision rejecting this Court's holding in *Wright v. State*. This Court denied Zack's motion on January 23, 2018. On March 12, 2018, Zack filed a Petition for a Writ of Certiorari with the United States Supreme Court, which is currently pending.

On January 27, 2015, the trial court granted Linda McDermott's motion to withdraw as Zack's state registry counsel, and appointed the Office of the Capital Collateral Regional Counsel – Northern Region to represent Zack in his state postconviction proceedings.

On May 26, 2015, Zack filed a successive motion to vacate judgment and sentence based on *Hall v. Florida*, 134 S. Ct. 1986 (2014). This motion was denied on July 8, 2015. An appeal of that denial was filed and denied by this Court. *Zack v. State*, 228 So. 3d 41 (Fla. 2017). This opinion also included a denial of Zack's Petition for Writ of Habeas Corpus filed following the United States Supreme Court's decision in *Hurst v. Florida*, 136 S. Ct 616 (2016). Zack filed a motion for rehearing on June 30, 2017. This motion was denied on October 12, 2017. The mandate was issued on October 30, 2017, and on November 6, 2017, Zack filed a Motion to Recall the Mandate based on recent United States Supreme Court decision

rejecting this Court's holding in *Wright v. State*. This Court denied Zack's motion on January 23, 2018.

On January 11, 2017, while the above-referenced appeal was pending, Zack filed a Successive Motion to Vacate Death Sentence, and Alternatively Motion to Correct Illegal Sentence based on *Hurst v. Florida* and *Hurst v. State*. (SPCR. 23-83). On January 25, 2017, Zack filed a Motion to Hold Successive Postconviction Motion in Abeyance pending this Court's decisions in the above-referenced appeal and Petition for Writ of Habeas Corpus. (SPCR. 88-95). On February 13, 2017, the trial court issued an Order Holding "Successive Motion to Vacate Death Sentence, and Alternatively Motion to Correct Illegal Sentence" in Abeyance. (SPCR. 122-124).

On October 12, 2017, the State filed a Motion to Lift Stay and Notice to the Court of this Court's Denial of Motion for Rehearing. (SPCR. 133-137). Zack filed a response on October 14, 2017. (SPCR. 138-142). The trial court held a case management conference on November 14, 2017, and summarily denied Zack's successive 3.851 motion by written order dated January 16, 2018. (SPCR. 228-232). On February 7, 2018, Zack timely filed this appeal. (SPCR. 233).

SUMMARY OF THE ARGUMENT

I. Zack's death sentence violates the Sixth Amendment under *Hurst v. Florida*, and he is entitled to the retroactive application of *Hurst v. Florida* under Florida's

Witt test and fundamental fairness doctrine. He is also entitled to *Hurst* relief under *Apprendi v. New Jersey*, because *Apprendi*-not *Ring*-is the foundation of *Hurst v. Florida*. The *Hurst* error in Zack's case is not harmless because his death sentence was not recommended by a unanimous jury.

II. Zack's death sentence violates the Eighth Amendment because the Court is treating Zack differently than Mosley and depriving him of the benefit of *Hurst v. Florida*, based solely on when his conviction and sentence became final.

III. Zack's death sentence violates the Eighth Amendment under *Hurst v. State* because one juror at Zack's penalty phase formally voted against the imposition of a death sentence.

IV. Because the new Florida capital sentencing statute will apply at a retrial or re-sentencing, it constitutes new law within the meaning of Rule 3.851 because it extends a new right to capital defendants, i.e., the right to a life sentence if one juror votes in favor of a life sentence. Zack's previously presented *Strickland* claims must be revisited to determine whether under the requisite analysis set forth in *Hildwin* and *Swafford*, confidence in the reliability of the outcome of his trial is undermined.

V. The principles set forth by the United States Supreme Court in *Hurst v. Florida* and by this Court in *Hurst v. State* require that Zack's intellectual disability determination is subject to his Sixth Amendment right to a jury trial.

ISSUE I

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING ZACK'S CLAIM THAT HIS DEATH SENTENCE VIOLATES THE SIXTH AMENDMENT UNDER *HURST V. FLORIDA*.

In denying this claim, the circuit court cited to this Court's opinion in *Asay v. State*, and precluded any relief because Zack's death sentence was final prior to the issuance of the United States Supreme Court's June 24, 2002, opinion of *Ring v. Arizona*, 536 U.S. 584 (2002). *See Asay v. State*, 210 So. 3d 1 (Fla. 2016). While recognizing this Court's precedent, Zack submits that *Asay* was wrongly decided and that he is entitled to relief.

Hurst v. Florida, 136 S. Ct. 616, 617 (2016) held, "Florida's capital sentencing scheme violates the Sixth Amendment …" On remand, this Court held in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), that *Hurst v. Florida* means:

> that before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death.

Hurst v. State, So. 3d at 57. The Sixth Amendment right enunciated in *Hurst v. Florida* and found applicable to Florida's capital sentencing scheme guarantees that all facts that are statutorily necessary before a judge is

authorized to impose death are to be found by a jury, pursuant to the capital defendant's constitutional right to a jury trial.

I. Zack is entitled to the retroactive application of *Hurst v. Florida.*

Hurst v. Florida was a decision of fundamental significance that has resulted in substantive and substantial upheaval in Florida's capital sentencing jurisprudence. In *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), this Court determined that *Hurst v. Florida* constituted a change in Florida law that was to be applied retroactively to Mosley and required the Court to grant postconviction relief, vacate Mosley's death sentence and remand for a re-sentencing. In *Mosley*, this Court held that under Florida law, there are two separate and distinct approaches for conducting retroactivity analysis. *Id*. at 1274.

A. Retroactivity under Fundamental Fairness

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

> This court has previously held that **fundamental fairness alone may require the retroactive application of certain decisions involving the death penalty after the United States Supreme Court decides a case that changes our jurisprudence**. For example, in *James*, this Court reviewed whether the United States Supreme Court's decision in *Espinosa v. Florida*, 505 U.S. 1079 (1992), should apply retroactively. *James*, 615 So.2d at 669. Although pre-*Espinosa* this Court had rejected claims that our jury instruction on the extremely heinous, atrocious, or cruel (HAC) aggravator was unconstitutionally vague, the United States Supreme Court disagreed and held in *Espinosa* that our

> instruction was, indeed, unconstitutionally vague. 505 U.S. 1079. This Court then held that defendants who had raised a claim at trial or on direct appeal that the jury instruction pertaining to the HAC aggravating factor was unconstitutionally vague were entitled to retroactive application of *Espinosa*. *James*, 615 So.2d at 669. While this Court did not employ a standard retroactivity analysis in *James*, the basis for granting relief was that of fundamental fairness. *Id*. This Court reasoned that, because James had raised the exact claim that was validated by the United States Supreme Court in *Espinosa*, "it would not be fair to deprive him of the *Espinosa* ruling." *Id*.

Id. at 1275. Clearly, *James* is cited as an example of the fundamental fairness approach to determining when a particular defendant is entitled to the retroactive application of a change in law mandated by a decision from the United States Supreme Court. It is also clear that the fundamental fairness approach requires a case-by-case determination of which collateral litigants get the benefit of the change in law retroactively.

B. Retroactivity under *Witt v. State*

The second approach to retroactivity discussed in *Mosley* is the analysis set forth in *Witt v. State*, 387 So.2d 922 (Fla. 1980). Employing *Witt*, this Court concluded: "Because Florida's capital sentencing statute has essentially been unconstitutional since *Ring* in 2002, fairness strongly favors applying *Hurst*, retroactively to that time." *Id*. at 1280.[1] Further, this Court explained that:

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

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

Id. at 1282-83. In Zack's case, the difference is between life and death. It is only Zack's sentence that will be impacted by the retroactive application of *Hurst v. Florida*.

This Court concluded that under either the fundamental fairness approach to retroactivity or under the *Witt* analysis, *Hurst v. Florida* was a change in law that was to be applied retroactively under *Mosley*:

> Applying *Hurst* retroactively to Mosley, in light of the rights guaranteed by the United States and Florida Constitutions, supports basic tenets of fundamental fairness. And it is fundamental fairness that underlies the reasons for retroactivity of certain constitutionally important decisions, especially those involving the death penalty. Indeed, as we stated in *Witt*:
>
> [S]ociety recognizes that a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice. Considerations of fairness and uniformity make it very "difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases."

387 So.2d at 925 (citations omitted)(emphasis added).

Id. at 1283.[2]

C. Zack gets *Hurst* relief under a fundamental fairness analysis.

Here, fundamental fairness demands that *Hurst v. Florida* be applied retroactively in his case. At his trial, Zack raised the very challenge to Florida's capital sentencing scheme that has now been held to be the law, i.e., that the jury did not unanimously determine the findings that were necessary for a death sentence.

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[2] In *Asay v. State*, this Court ruled that *Hurst v. Florida* was not to be applied retroactively to Asay's case. *Asay v. State*, 210 So. 3d 1, 22 (Fla. 2016) ("we conclude that *Hurst* should not be applied retroactively to Asay's case, in which the death sentence became final before the issuance of *Ring*."). Despite this statement, two justices indicated that *Hurst v. Florida* would be applied to judicial override cases that were "final before the issuance of *Ring*" and possible other cases "final before the issuance of *Ring*." *See Id*. at 29 (Labarga, C.J., concurring) ("The impact of *Hurst v. Florida* and *Hurst* upon their death sentences is an issue for another day."); *Id*. at 35 and fn. 32 (Pariente, J., dissenting) ("Even under the majority's holding today, relief should be granted to two Florida death row inmates whose sentences were a result of a judicial override."). Two other justices indicated that pre-*Ring* defendants may be able to have *Hurst v. Florida* apply retroactively to their cases. *Id*. at 31. (Lewis, J., concurring in result) (Pre-*Ring* "defendants who challenged Florida's unconstitutional sentencing scheme based on the substantive matters addressed in *Hurst* are entitled to consideration of that constitutional challenge."); *Id*. at 37 (Perry, J., dissenting) ("I would find that *Hurst v. Florida* applies retroactively, period.").

In *Mosley v. State*, a majority of this Court embraced Justice Lewis' position in his concurrence in *Asay*, that pre-*Ring* defendants were entitled to the retroactive application of *Hurst v. Florida* in their cases if fundamental fairness warranted it. *Mosley*, 209 So. 3d 1248 at 1274 ("fundamental fairness alone may require the retroactive application" of *Hurst v. Florida*).

See R. 48-49. Zack also raised a *Ring* claim, within one year of the United States Supreme Court's decision, in his first amended postconviction motion. That claim was also denied.

Moreover, fundamental fairness requires the retroactive application to Zack because the decision in *Perry v. State*, 210 So. 3d 630 (Fla. 2016) that capital defendants charged with murders that were committed long before *Hurst v. Florida* issued will have *Hurst v. Florida* govern the capital sentencing procedures applicable at a retrial or re-sentencing occurring in the future, as well as those that have already occurred if a resulting death sentence was not final when *Hurst v. Florida* issued on January 12, 2016. For example, Douglas Ray Meeks will receive the benefit of *Hurst v. Florida* and the new Florida law when he is sentenced on two first degree murder convictions for two 1974 homicides. Meeks had separate trials on each homicide and was convicted at both trials of first degree murder. He received two death sentences. Both were affirmed in his direct appeals. *Meeks v. State*, 336 So.2d 1142 (Fla. 1976); *Meeks v. State*, 339 So.2d 186 (Fla. 1976), However, after *Hitchcock v. Dugger*, 481 U.S. 393 (1987), issued, this Court ordered an evidentiary hearing on Meeks' claims that *Hitchcock* error infected both death sentences. *Meeks v. Dugger*, 576 So.2d 713 (Fla. 1991). Subsequently, the State stipulated that Meeks was entitled to new penalty phases due to the *Hitchcock* error. *Meeks v. Moore*, 216 F.3d 951, 959 (11th Cir. 2000) ("In its order, the [district] court observed that 'the

State of Florida stipulated that Meeks would be provided with a new penalty phase in both cases.'"). Because those new penalty phases have yet to occur, *Hurst v. Florida* and the new Florida law will govern the sentencing procedure in both cases. Even though Meeks was convicted of homicides that were committed in 1974, he can only get death sentences now if his juries unanimously make the requisite findings of fact and unanimously recommend a death sentence.

As another example, Jacob Dougan was convicted of a 1974 homicide and was then sentenced to death. His conviction and death sentence were affirmed in his first direct appeal which was a joint appeal with his co-defendant (Barclay) and was reported in the name of the co-defendant. *Barclay v. State*, 343 So.2d 1266 (Fla. 1977). Subsequently, this Court vacated the death sentence because of error under *Gardner v. Florida*, 430 U.S. 349 (1977), and remanded Barclay's and Dougan's cases for judge re-sentencing. *Barclay v. State*, 362 So.2d 657 (1978). After a death sentence was again imposed, it was affirmed in Dougan's second direct appeal. *Dougan v. State*, 398 So.2d 439 (Fla. 1981). Later on the basis of appellate counsel's ineffective assistance in that direct appeal, this Court granted Dougan habeas relief and ordered a third direct appeal. *Dougan v. Wainwright*, 448 So.2d 1005 (Fla. 1984). In the third direct appeal, Dougan's conviction was affirmed, but his death sentence was vacated and a jury re-sentencing was ordered. *Dougan v. State*, 470 So.2d 697 (Fla. 1985). After another death sentence was imposed, the death sentence

was affirmed in Dougan's fourth direct appeal. *Dougan v. State*, 595 So.2d 1 (Fla. 1992). Thereafter, Dougan filed a 3.850 motion in the circuit court where it remained pending for some time. In 2013 after an evidentiary hearing was conducted, the trial court vacated Dougan's conviction and ordered a new trial. In *State v. Dougan*, 202 So.3d 363 (Fla. 2016), this Court affirmed the order granting Dougan a new trial. *Hurst v. Florida* will govern at the retrial and as to the sentencing procedure if a first-degree murder conviction is returned. As with Meeks, Dougan will be eligible for a death sentence for the 1974 murder only if the jury unanimously makes the necessary findings of fact and unanimously recommends a death sentence.

Another example is John Hardwick who was charged with a 1984 homicide. He was convicted and sentenced to death. His conviction and death sentence were affirmed in his direct appeal. *Hardwick v. State*, 521 So.2d 1071 (Fla. 1988). Later, this Court affirmed the denial of Hardwick's 3.850 motion, while also denying Hardwick's habeas petition. *Hardwick v. Dugger*, 648 So.2d 100 (Fla. 1994). Hardwick then filed for habeas relief in federal court. After the district court granted habeas relief and ordered the death sentence vacated and a new penalty phase to be conducted due to trial counsel's ineffective assistance, the Eleventh Circuit affirmed the grant of habeas relief. *Hardwick v. Sec'y Fla. Dep't of Corr.*, 803 F.3d 541 (11th Cir. 2015). Currently, Hardwick's case is pending in the trial court for a re-sentencing. As a result, *Hurst v. Florida* and the new Florida law will govern the

sentencing procedure and the question of whether Hardwick can receive a death sentence for a 1984 murder. As with Meeks and Dougan, Hardwick will be eligible for a death sentence only if his jury unanimously makes the requisite findings of fact and unanimously recommends a death sentence.

Yet another example is Paul Hildwin who was charged and convicted of a 1985 homicide. After a death sentence was imposed, his conviction and death sentence were affirmed in his first direct appeal. *Hildwin v. State*, 531 So.2d 124 (Fla. 1988). *See Hildwin v. Florida*, 490 U.S. 638 (1989). In collateral proceedings, a re-sentencing was ordered. *Hildwin v. Dugger*, 654 So.2d 107 (Fla. 1995). After the imposition of another death sentence, a second direct appeal resulted in another affirmance. *Hildwin v. State*, 727 So.2d 193 (Fla. 1998). In the course of new collateral proceedings, Hildwin's conviction was vacated by this Court and a new trial ordered. *Hildwin v. State*, 141 So.3d 1178 (Fla. 2014). Currently, Hildwin is awaiting his new trial. At that trial on a first-degree murder charge for a 1985 homicide, *Hurst v. Florida* and the resulting new Florida law will govern at the retrial and as to the sentencing procedure if a first degree murder conviction is returned on the 1985 homicide. As with Meeks, Dougan, and Hardwick, he will be eligible for a death sentence only if his jury unanimously makes the requisite findings of fact and unanimously recommends a death sentence.

Still another example is Ana Cardona who was charged with a 1990 homicide. After she received a death sentence, her conviction and death sentence were affirmed on direct appeal. *Cardona v. State*, 641 So.2d 361 (Fla. 1994), *cert denied* 513 U.S. 1160 (1995). Later, her conviction was vacated and a new trial ordered by this Court during her appeal from the denial of 3.851 relief. *Cardona v. State*, 826 So.2d 968 (Fla. 2002). After she was again convicted and again sentenced to death, the conviction and death sentence were again vacated and another new trial ordered by this Court in Cardona's second direct appeal. *Cardona v. State*, 185 So.3d 514 (Fla. 2016). Currently, Cardona's case is pending in the circuit court as she awaits her new trial. At that trial on a first-degree murder charge for a 1985 homicide, *Hurst v. Florida* and the resulting new Florida law will govern at the retrial and as to the sentencing procedure if a first-degree murder conviction is returned on the 1985 homicide. As with Meeks, Dougan, Hardwick, and Hildwin, Cardona will be eligible for a death sentence only if her jury unanimously makes the requisite findings of fact and unanimously recommends a death sentence.

There are also cases in which a capital defendant has had a death sentence vacated in collateral proceedings, a re-sentencing ordered, and another death sentence imposed which was pending on a direct appeal when *Hurst v. Florida* issued. In those circumstances, the capital defendant will receive the benefit of *Hurst v. Florida* because a final death sentence was not in place when *Hurst* issued. For

example, Paul Beasley Johnson was convicted of first degree murder for three 1981 homicides and sentenced to death. His convictions and death sentences were affirmed on direct appeal. *Johnson v. State*, 483 So.2d 774 (Fla. 1983). However, habeas relief was granted on an appellate counsel ineffectiveness claim, and a new trial was ordered. *Johnson v. Wainwright*, 498 So.2d 938 (Fla. 1986). His subsequent convictions and death sentences were affirmed in his second direct appeal. *Johnson v. State*, 608 So.2d 4 (Fla. 1992). Later, the denial of 3.850 relief was affirmed. *Johnson v. State*, 769 So.2d 990 (Fla. 2000). Then habeas relief was denied. *Johnson v. Moore*, 837 So.2d 343 (Fla. 2002). Next, the denial of a successive 3.851 motion was affirmed. *Johnson v. State*, 933 So.2d 1153 (Fla. 2006). But then in 2010, the denial of yet another successive 3.851 motion was reversed, Johnson's death sentences were vacated, and a re-sentencing was ordered. *Johnson v. State*, 44 So.3d 51 (Fla. 2010). Though Johnson again received death sentences, his third direct appeal was pending before this Court when *Hurst v. Florida* issued on January 12, 2016. This means that Johnson will receive the benefit of *Hurst* and the resulting new Florida law even though the 1981 murders that he was convicted of were committed 35 years before the decision in *Hurst* was rendered.

With Meeks, Dougan, Hardwick, Hildwin, Cardona, and Johnson all entitled to the benefit of *Hurst v. Florida* and the resulting new Florida law for murders committed as early as 1974, ensuring uniformity and fundamental fairness in

circumstances in Florida's application of the death penalty requires the retroactive application of *Hurst* and the resulting new Florida law. Moreover, in *Hurst v. State*, this Court noted that "[i]n requiring jury unanimity in [the statutorily required fact] findings and in [the jury's] final recommendation if death is to be imposed, we are cognizant of significant benefits that will further the administration of justice." 202 So.3d at 58. This Court specifically noted that "the requirement of unanimity in capital jury findings will help to ensure the heightened level of protection necessary for a defendant who stands to lose his life as a penalty." *Id*. at 59. Thus, the new Florida law will enhance the reliability of the death sentences that juries unanimously authorize. Clearly, uniformity and fairness require that Zack be given the benefit of *Hurst v. Florida* and the resulting new Florida law. After all, "death is a different kind of punishment from any other that may be imposed in this country," and "[i]t is of vital importance …that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice …" *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977).

D. Zack gets *Hurst* relief under *Apprendi v. New Jersey*

In addition, Zack's death sentence became final after the issuance of *Apprendi v. New Jersey*, 530 U.S. 466 (2000).[3] In *Apprendi*, the Supreme Court "held that any

[3] In *Hurst v. Florida*, 136 S. Ct. at 621, the Supreme Court explained:

fact that 'expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict' is an 'element' that must be submitted to a jury." *Hurst v. Florida*, 136 S. Ct. 616, 621 (2016) (quoting *Apprendi*, 530 U.S. at 494). In *Ring v. Arizona*, 536 U.S. 584 (2002), the Supreme Court "concluded that Arizona's capital sentencing scheme violated *Apprendi*'s rule because the State allowed a judge to find the facts necessary to sentence a defendant to death." *Hurst v. Florida*, 136 S. Ct. at 621 (citing *Ring*, 536 U.S. at 591-93, 597). In *Hurst v. Florida*, the Supreme Court held, "The analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's." 136 S. Ct. at 621-22.

In *Hurst v. Florida*, 136 S. Ct. 616 (2016), the Supreme Court relied upon *Apprendi* as the basis for ruling that *Spaziano v. Florida*, 468 U.S. 447 (1984) and *Hildwin v. Florida*, 490 U.S. 638 (1989) were "wrong, and irreconcilable with *Apprendi*." 136 S. Ct. at 623. The Supreme Court specifically held: "And in the *Apprendi* context, we have found that 'stare decisis does not compel adherence to a decision whose "underpinnings" have been "eroded" by subsequent developments of constitutional law.'" *Id*. at 623-24. It was on the basis of *Apprendi* that the

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> In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court held that any fact that "expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict" is an "element" that must be submitted to a jury.

The result in *Hurst v. Florida* was premised upon *Apprendi*; it was an application of *Apprendi* to Florida's capital sentencing statute.

Supreme Court concluded that the legal principle employed in *Spaziano* and *Hildwin* "was wrong." *Hurst*, 136 S. Ct. at 623. The Supreme Court specifically employed the past tense – "was wrong". The Supreme Court did not say *Spaziano* and *Hildwin* are wrong. Those decisions were wrong because they were "irreconcilable with *Apprendi*."[4] Thus, in either the fundamental fairness approach, or the *Witt* retroactivity analysis, Zack must be provided the benefit of *Hurst v. Florida* and *Hurst v. State*.

Zack's death sentence became final on October 2, 2000, when the Supreme Court denied certiorari review. *Zack v. Florida*, 531 U.S. 858 (2000). This was after the Supreme Court decided *Apprendi*, the decision upon which both *Ring* and *Hurst v. Florida* are based. "Because Florida's capital sentencing statute has essentially been unconstitutional since [*Apprendi* in 2000], fairness strongly favors applying *Hurst*, retroactively to that time." *Mosley v. State*, 209 So. 3d 1248, 1280 (Fla. 2016). Neither *Mosley v. State* nor *Asay v. State*, 210 So. 3d 1 (Fla. 2016), addresses

[4] In *Hurst v. State*, this Court recognized that *Apprendi* was at least as much of the basis for the result in *Hurst v. Florida* as was *Ring*. *Id*. at 53. ("Upon review of the decision in *Hurst v. Florida*, as well as the decisions in *Apprendi* and *Ring*, we conclude that the Sixth Amendment right to a trial by jury mandates that under Florida's capital sentencing scheme, the jury-not the judge-must be the finder of every fact, and thus every element, necessary for the imposition of the death penalty.").

the fact that *Apprendi*, not *Ring*, is the foundation of *Hurst v. Florida*. Zack should be afforded relief under *Apprendi*.

E. Zack gets *Hurst* relief under the *Witt* Test.

Finally, as to this Court's *Witt* analysis in *Asay* and *Mosley*, the Court has repudiated the binary approach to retroactivity. And, as to the *Stovall/Linkletter*[5] analysis, the opinions reached entirely inconsistent conclusions on two components of the analysis. Specifically, the third prong of *Witt* requires an analysis of the second *Stovall/Linkletter* factor – extent of reliance on pre-*Hurst* law. In *Asay* this Court found that the extent of reliance on Florida's unconstitutional death penalty scheme weighed "heavily against" retroactive application to Asay, while in *Mosley*, the Court reached the opposite conclusion, holding that the extent of reliance on *the same pre-Hurst law* weighed "in favor" of retroactive application to Mosley. *See Asay*, 210 So. 3d at 20; *Mosley*, 209 So. 3d at 1281.

The *Asay* and *Mosley* decisions also differed as to the third *Stovall/Linkletter* retroactivity factor – the effect on the administration of justice – finding that it weighed "heavily against" retroactive application to Asay, but in favor or retroactive application to Mosley. *See Asay*, 210 Sol 3d at 20; *Mosley*, 209 So. 3d at 1283.

When this Court determined that *Hitchcock v. Dugger*, 481 U.S. 393 (1987), was a retroactive change in the law, everyone got the benefit, even pre-*Lockett*

[5] *Stovall v. Denno*, 388 U.S. 293 (1967); *Linkletter v. Walker*, 381 U.S. 618 (1965).

defendants. *Lockett v. Ohio*, 438 U.S. 586 (1978), had held that a state could not limit the mitigation considered by the sentence to a statutory list. However, before *Lockett* issued, Florida limited the presentation of mitigation evidence to a statutory list of acceptable mitigating factors. *Hitchcock* held that Florida juries had to be advised that they were to consider any nonstatutory mitigating factors found to be present and weigh those factors in the sentencing calculus.

In *Meeks v. Dugger*, 576 So.2d 713 (Fla. 1991), this Court was presented with a *Hitchcock/Lockett* claim in a case in which the death penalty sentence became final in 1976, two years before *Lockett* issued. Even though Meeks' death sentence was final two years before *Lockett*, the Court gave Meeks the benefit of *Hitchcock* because *Hitchcock* was a retroactive change in the law:

> We have previously recognized that the recent *Hitchcock* decision represents a sufficient change in the law to defeat a claim that the issue is procedurally barred. *See, e.g.*, *Thompson v. Dugger*, 515 So.2d 173 (Fla. 1987), *cert. denied*, 485 U.S. 960 (1988); *Demps v. Dugger*, 514 So.2d 1092 (Fla. 1987); *Delap v. Dugger*, 513 So.2d 659 (Fla. 1987).

Meeks, 576 So.2d at 715. Even though the US Supreme Court precedent at the time of Meeks' trial had approved Florida's statute limiting the mitigating circumstances to those listed at the time of Meeks' sentencing, he got the benefit of *Hitchcock* and with it, *Lockett*. Thus, under a proper *Witt* analysis, Zack must receive the benefit of *Hurst v. Florida* and *Hurst v. State*.

II. The *Hurst* error in Zack's case is not harmless.

In *Hurst v. State*, this Court held that Sixth Amendment error under *Hurst v. Florida* would be subject to a strict harmless error test in which "the State bears an extremely heavy burden" of proving beyond a reasonable doubt that "they jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to Hurst's death sentence in this case." 202 So.3d at 68. In other words, the State must prove beyond a reasonable doubt that the jury's failure to unanimously find not only the existence of each aggravating factor, that the aggravating factors are sufficient, and that the aggravating factors outweigh the mitigating circumstances had no effect on the death recommendations. The State must also show beyond a reasonable doubt that no properly instructed juror would have dispensed mercy to Zack by voting for a life sentence. All of these considerations must be factored into any evaluation of the reliability of Zack's death sentence and the likely outcome if a re-sentencing were conducted in conformity with Florida's new capital sentencing procedure.

The Sixth Amendment error under *Hurst v. Florida* cannot be proven by the State to be harmless beyond a reasonable doubt in Zack's case. A harmless error analysis much be performed on a case-by-case basis, and there is no one-size fits all analysis; rather, there must be a "detailed explanation based on the record"

supporting a finding of harmless error. *See Clemons v. Mississippi*, 494 U.S. 738, 753 (1990). *Accord Sochor v. Florida*, 504 U.S. 527, 540 (1992).

Zack's penalty phase jury was not unanimous. One juror voted to recommend life. One juror voting for a life sentence is all it takes, as explained in *Hurst v. State*, for a binding life recommendation mandating the imposition of a life sentence. The fact that one juror here recommended life in and of itself shows that there must be doubt that a properly instructed jury would have unanimously returned a death recommendation. Where "the recommendation of death . . . was not unanimous, [the court] cannot find beyond a reasonable doubt that the error did not contribute to [the] sentence." *Dubose v. State*, 210 So. 3d 641, 657 (Fla. 2017). This Court has not found harmless error in many cases where, like this one, the jury vote was not unanimous.

Moreover, in *Hurst v. Florida* and the resulting new Florida law, the jury must be correctly instructed as to its sentencing responsibility under *Caldwell v. Mississippi*, 472 U.S. 320 (1985). In *Hurst v. Florida*, the Court wrote that "[t]he State cannot now treat the advisory recommendation by the jury as a necessary factual finding that *Ring* requires." 136 S. Ct. at 622. This means that post-*Hurst* the individual jurors must know that they each will bear the responsibility for a death sentence resulting in a defendant's execution since each juror possesses the power to require the imposition of a life sentence simply by voting against a death

recommendation. Zack's jury was told the exact opposite – that Zack could be sentenced to death regardless of the jury's recommendation. As was explained in *Caldwell*, jurors must feel the weight of their sentencing responsibility if the defendant is ultimately executed after no juror exercised his or her power to preclude a death sentence. Indeed, because the jury's sense of responsibility was inaccurately diminished in *Caldwell*, the Supreme Court held that the jury's unanimous verdict imposing a death sentence in that case violated the Eighth Amendment and required the resulted death sentence to be vacated even though the jury's verdict there was unanimous. *Caldwell*, 472 U.S. at 341 ("Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires."). In Zack's case, one juror voted for a life sentence. In this circumstance, the chances that at least one juror would not join a death recommendation if a re-sentencing were conducted are likely given that proper *Caldwell* instructions would be required. The likelihood of one of more jurors voting for a life sentence increases when a jury is told a death sentence could only be authorized if the jury returned a unanimous death recommendation and that each juror had the ability to preclude a death sentence simply by refusing to agree to a death recommendation. *Caldwell*, 472 U.S. at 330 ("In the capital sentencing context there are specific reasons to fear substantial unreliability as well as bias in favor of

death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court.").

The State cannot show beyond a reasonable doubt that the *Hurst* error in Zack's case was harmless. The jury did not unanimously find "all facts necessary to impose death and that death was the appropriate sentence," as Zack's jury recommendation was less than unanimous. *See Mosley v. State*, 209 So. 3d at 1284.

Zack's death sentence stands in violation of the Sixth Amendment. His jury did not return a verdict making any findings of fact, his jury was not instructed that its death recommendation had to be unanimous, the jury's death recommendation was not unanimous, the jury was not told that each individual juror carried responsibility for whether a death sentence was authorized or a life sentence was mandated, and the jurors did not know that they each were authorized to preclude a death sentence simply to be merciful.

The *Hurst* error in Zack's case warrants relief. The State simply cannot show the error to be harmless beyond a reasonable doubt that no properly instructed juror would have refused to vote in favor of a death recommendation. Unless it is proven beyond a reasonable doubt that no juror would have voted for a life sentence and through such a vote mandated that Zack receive a life sentence, Zack's death sentence must be vacated and a re-sentencing ordered.

ISSUE II

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING ZACK'S CLAIM THAT FAILING TO APPLY *HURST V. FLORIDA* TO HIS DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT

In denying this claim, the circuit court again concluded that Zack was not entitled to relief based upon this Court's holding in *Asay* because it is uncontested that his sentence was final before Ring was decided. Recognizing this precedent, Zack contends that *Asay* was wrongly decided, and that failing to apply *Hurst v. Florida* to his death sentence violates the Eighth Amendment.

In *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), this Court determined that *Hurst v. Florida*, 136 S. Ct. 616 (2016) constituted a change in Florida law that was to be applied retroactively to *Mosley* and required this Court to grant postconviction relief, vacate Mosley's death sentence, and remand for a re-sentencing. As this Court in *Mosley* observed: "it is undeniable that *Hurst v. Florida* changed the calculus of the constitutionality of capital sentencing in this State." *Id*. at 1281.

However, in *Asay v. State*, this Court ruled that *Hurst v. Florida* was not to be applied retroactively to Asay's case. *Asay v. State*, 210 So. 3d 1, 22 (Fla. 2016) ("we conclude that *Hurst* should not be applied retroactively to Asay's case, in which the death sentence became final before the issuance of *Ring*.").

Should this Court determine that Zack is not entitled to the retroactivity of *Hurst v. Florida*, his death sentence violates the Eighth Amendment. Put simply, as

several members of this Court determined, failing to apply retroactivity uniformly to those whose cases became final both before and after *Ring v. Arizona* cannot withstand constitutional scrutiny. *See Asay* at 31 (Lewis, J., concurring in result) ("As Justice Perry noted in his dissent, there is no salient difference between June 23 and June 24, 2002 – the days before and after the case named *Ring* arrived … However, that is where the majority opinion draws its determinative, albeit arbitrary line. As a result, Florida will treat similarly situated defendants differently – here, the difference between life and death – for potentially the simple reason of one's docket delay. Vindication of these constitutional rights cannot be reduced to either fatal or fortuitous accidents of timing."); *Id*. at 32 (Pariente, J., concurring in part and dissenting in part) ("For these reasons, I conclude that *Hurst* should apply to all defendants who were sentenced to death under Florida's prior, unconstitutional capital sentencing scheme. The majority's conclusion results in an unintended arbitrariness as to who receives relief depending on when the defendant was sentenced or, in some cases, resentenced."); *Id*. at 37 (Perry, J., dissenting) ("In my opinion, the line drawn by the majority is arbitrary and cannot withstand scrutiny under the Eighth Amendment because it creates an arbitrary application of law to two groups of similarly situated persons.").

Thus, as recognized by three justices of this Court, treating Zack differently than Mosley and depriving him of the benefit of *Hurst v. Florida*, based solely on when his conviction and sentence became final violates the Eighth Amendment.

ISSUE III

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING ZACK'S CLAIM THAT HIS DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT UNDER *HURST V. STATE* AND SHOULD BE VACATED

In denying this claim, the circuit court relied upon this Court's decision in *Asay v. State*, 210 So. 3d 1 (Fla. 2016), that *Hurst v. Florida* and *Hurst v. State* do not apply retroactively to any death sentence that became final prior to *Ring v. Arizona*, 536 U.S. 584 (2002). Zack submits that *Asay* was wrongly decided and that his death sentence violates the Eighth Amendment under *Hurst v. State*.

In *Hurst v. State*, this Court ruled that on the basis of the Eighth Amendment and on the basis of the Florida Constitution, the evolving standards of decency now requires jury "unanimity in a recommendation of death in order for death to be considered and imposed." 202 So.3d at 61. Quoting the United States Supreme Court, *Hurst v. State* noted, "the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" *Id.* Then, from a review of the capital sentencing laws throughout the United States, *Hurst v. State* found that a national consensus reflecting society's evolving standards of decency was apparent:

> The vast majority of capital sentencing laws enacted in this country provide the clearest and most reliable evidence that contemporary values demand a defendant not be put to death except upon the unanimous consent of the jurors who have deliberated upon all the evidence of aggravating factors and mitigating circumstances.

Id. Accordingly, the Court in *Hurst v. State* concluded:

> the United States and Florida Constitutions, as well as the administration of justice, are implemented by requiring unanimity in jury verdicts recommending death as a penalty before such a penalty may be imposed.

Id. at 63.

What constitutes cruel and unusual punishment under the Eighth Amendment turns upon considerations of the "evolving standards of decency that mark the progress of a maturing society." *Atkins v. Virginia*, 536 U.S. 304, 312 (2002).[6] "This is because '[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.' *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C.J., dissenting)." *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008). According to *Hurst v. State*, the evolving standards of decency are reflected in a national consensus that a defendant can only be given a death sentence when a penalty phase jury has voted unanimously in favor

[6] The basic concept underlying the Eighth Amendment is nothing less than the dignity of man … The Amendment must draw its meaning from the evolving standards that mark the progress of a maturing society." *Atkins*, 536 U.S. at 311-12 (internal quotation marks omitted).

of the imposition of death. The United States Supreme Court has explained that the "near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not." *Burch v. Louisiana*, 441 U.S. 130, 138 (1979). The near-uniform judgment of the states is that only a defendant who a jury unanimously concluded should be sentenced to death can receive a death sentence. As a result, those defendants who have had one or more jurors vote in favor of a life sentence are not eligible to receive a death sentence. This class of defendants, those who have had jurors formally vote in favor of a life sentence, cannot be executed under the Eighth Amendment.

Zack is within the protected class. At his penalty phase, one juror voted in favor of the imposition of a life sentence. Under the Eighth Amendment, his execution would thus constitute cruel and unusual punishment. His death sentence must accordingly be vacated.

Under *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), and under *Witt v. State*, this Court's ruling in *Hurst v. State* must be applied retroactively. It is not constitutionally permissible to execute a defendant who is within a class that society's evolving standards of decency has concluded to be ineligible for a death sentence. In *Walls v. State*, 213 So. 3d 340, 346 (Fla. 2016), this Court found retroactivity must be accorded to an Eighth Amendment decision when it "places beyond the State of Florida the power to impose a certain sentence" against a

category or subgroup of people. Here, the *State of Florida* under *Hurst v. State* cannot carry out a death sentence on capital defendants who had one or more of their jurors at their capital trial vote in favor of a life sentence and against recommending a death sentence.

Because one juror at Zack's penalty phase formally voted against the imposition of a death sentence, Zack's sentence of death stands in violation of the Eighth Amendment and the Florida Constitution.

ISSUE IV

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING ZACK'S CLAIM THAT PREVIOUSLY RAISED *STRICKLAND* CLAIMS MUST BE REVISITED UNDER *PERRY V. STATE*, THE REVISED SENTENCING STATUTE, DUE PROCESS AND THE EIGHTH AMENDMENT.

In denying this claim, the circuit court concluded that Zack was not entitled to any relief, as this claim depends on the retroactive application of the *Hurst* decisions. Relevant to this claim, the circuit court cites to *Lambrix v. State*, 227 S. 3d 112 (Fla. 2017), which states in relevant part:

> To the extent that Lambrix now raises additional claims to relief based on the rights announced in *Hurst* and *Perry* – including arguments based on the Eighth Amendment to the United States Constitution, denial of due process and equal protection based on the arbitrariness of this Court's retroactivity decisions in *Asay V* and *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), and a substantive right based on the legislative passage of chapter 2017-1, Laws of Florida, prospectively requiring unanimous verdicts – we reject these arguments based on our recent opinions in *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), and *Asay v. State (Asay VI)*, 224 So. 3d 695 (Fla. 2017).

Lambrix, 227 So. 3d at 113.

While recognizing this Court's holding above, Zack maintains that both *Lambrix* and *Asay* were wrongly decided and that he is entitled to the retroactive application of not only *Hurst*, but also *Perry* and the revised sentencing statute.

In *Perry v. State*, this Court held that to be constitutional the findings of fact and the death recommendation necessary to authorize the imposition of a death sentence had to be reached unanimously by the jury. *Perry* held:

> to increase the penalty from a life sentence to a sentence of death, the jury must unanimously find the existence of any aggravating factor, that the aggravating factors are sufficient to warrant a sentence of death, that the aggravating factors outweigh the mitigating circumstances, and must unanimously recommend a sentence of death.

210 So. 3d 630, 640 (Fla. 2016). In deciding whether to recommend a death sentence, jurors may choose to vote in favor of a life sentence to be merciful. *Id*. ("This final jury recommendation, apart from the findings that sufficient aggravating factors exist and that the aggravating factors outweigh the mitigating circumstances, has sometimes been referred to as the 'mercy' recommendation.").[7] This is the law that now governs when a death sentence is vacated and a re-sentencing is ordered in a capital case. In *Hurst v. State*, this Court explained:

> Requiring a unanimous jury recommendation before death may be imposed, in accord with precepts of the Eighth Amendment and

[7] Residual doubt could lead one or more jurors to choose mercy and vote in favor of a life sentence.

> Florida's right to trial by jury, is a critical step toward ensuring that Florida will continue to have a constitutional and viable death penalty law, which is surely the intent of the Legislature. The requirement will dispel most, if not all, doubts about the future validity and long-term viability of the death penalty in Florida.

202 So. 3d 40, 61 (Fla. 2016).

In *Hildwin v. State*, 141 So.3d 1178, 1184 (Fla. 2014), this Court explained that when presented with qualifying newly discovered evidence:

> the postconviction court must consider the effect of newly discovered evidence, in addition to all of the evidence that could be introduced at a new trial. *Swafford v. State*, 125 So.3d 760, 775-76 (Fla. 2013). In determining the impact of the newly discovered evidence, the court must conduct a cumulative analysis of all the evidence so that there is a 'total picture' of the case.

In *Swafford*, this Court indicated the evidence to be considered in evaluating whether a different outcome was probable included "evidence that [had been] previously excluded as procedurally barred or presented in another proceeding." *Swafford v. State*, 125 So.3d at 775-76. The "standard focuses on the likely result that would occur during a new trial with all admissible evidence at the new trial being relevant to that analysis." *Id*. Put simply, the analysis requires envisioning how a new trial or re-sentencing would look with all of the evidence that would be available. Obviously, the law that would govern at a new trial must be part of the analysis. Here, under *Perry*, the law that would apply at a re-sentencing would require the jury to determine unanimously that sufficient aggravators exist and that they outweigh the mitigators. It would also require the jury to unanimously

recommend a death sentence before the sentencing judge would be authorized to impose a death sentence. One single juror voting in favor of a life sentence would require the imposition of a life sentence.

This is new Florida law that did not exist when Zack previously presented his *Strickland* claims. Accordingly, before the issuance of *Perry v. State* and *Hurst v. State* on October 14, 2016, Zack could not present his claims as set forth herein because the new law that would govern any re-sentencing ordered in Zack's case was previously unavailable. Zack's previously presented claims must be re-evaluated in light of the new Florida law.

This Court explained in *Hurst v. State* that "the requirement of unanimity in capital jury findings will help to ensure the heightened level of protection necessary for a defendant who stands to lose his life as a penalty." 202 So. 3d at 59. *See State v. Steele*, 921 So.2d 538, 549 (Fla. 2005), *quoting State v. Daniels*, 542 A.2d 306, 315 (Conn. 1988) ("[W]e perceive a special need for jury unanimity in capital sentencing. Under ordinary circumstances, the requirement of unanimity induces a jury to deliberate thoroughly and helps to assure the reliability of the ultimate verdict."). This Court in *Hurst v. State* also held:

> If death is to be imposed, unanimous jury sentencing recommendations, when made in conjunction with the other critical findings unanimously found by the jury, provide the highest degree of reliability in meeting these constitutional requirements in the capital sentencing process.

202 So. 3d at 60. Thus, reliability of Florida death sentences is the touchstone of the new Florida law requiring a unanimous jury to make the factual determinations necessary for the imposition of a death sentence and requiring the jury to unanimously return a death recommendation before a death sentence is authorized as a sentencing option. Implicit in the justification for the new Florida law is an acknowledgment that death sentences imposed under the old capital sentencing scheme were (or are) less reliable. Before executions are carried out in a case in which the reliability of a death sentence is subpar, a re-evaluation of such a death sentence in light of the changes made by *Hurst v. State*, and *Perry v. State* is warranted. A previous rejection of a death sentenced defendant's *Strickland* claims should be re-evaluated in light of the new requirement that juries must unanimously make the necessary findings of fact and return a unanimous death recommendation before a death sentence is even a sentencing option. Certainly the *Strickland* prejudice analysis requires a determination of whether confidence in the reliability of the outcome – the imposition of a death sentence – is undermined by the evidence the jury did not hear due to the *Strickland* violations. The new Florida law should be part of the evaluation of whether confidence in the reliability of the outcome is undermined, particularly since the touchstone of the new Florida law is the likely enhancement of the reliability of any resulting death sentence.

At Zack's penalty phase proceeding, one juror voted in favor of a life sentence. This was after the jury had been instructed that the sentencing recommendation was to be based on "whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist." The newly discovered evidence presented in Zack's previous Rule 3.851 motion must be evaluated under the standard set forth in *Swafford* and *Hildwin* and that means all of the evidence that would be admissible at a re-sentencing. With all the new evidence that would be admissible at a re-sentencing, the State cannot demonstrate beyond a reasonable doubt that not a single juror would have voted in favor of a life sentence. One juror's vote in favor of a life sentence is much more likely to undermine confidence in reliability of the decision to impose death in light of the new unanimity requirement when a court is considering the prejudice arising from *Strickland* claims.

Because the new Florida law will apply at a retrial or re-sentencing, it constitutes new law within the meaning of Rule 3.851 because it extends a new right to capital defendants, i.e., the right to a life sentence if one juror votes in favor of a life sentence. This new law and the new right it extends requires this Court to revisit Zack's previously presented claims to determine whether under the requisite analysis

set forth in *Hildwin* and *Swafford*, confidence in the reliability of the outcome is undermined on the basis of the *Strickland* claims.

ISSUE V

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING ZACK'S CLAIM THAT HIS INTELLECTUAL DISABILITY DETERMINATION IS SUBJECT TO HIS SIXTH AMENDMENT RIGHT TO A JURY TRIAL PURSUANT TO *HURST V. FLORIDA* AND *HURST V. STATE*.

In denying Zack's claim that his intellectual disability determination is subject to his Sixth Amendment right to a jury trial pursuant to *Hurst v. Florida* and *Hurst v. State*, the circuit court relied upon this Court's decision in *Oats v. Jones*, 220 So. 3d 1127 (Fla. 2017).

In *Oats*, this Court held: "Although *Atkins* held that the imposition of the death penalty against intellectually disabled individuals is unconstitutional, the United States Supreme Court left for the states 'the task of developing appropriate ways to enforce the constitutional restriction' established in *Atkins*. *Oats v. Jones*, 220 So. 3d at 1129, *citing Atkins v. Virginia*, 536 U.S. 304, 317 (2002). As a result, the Florida Legislature enacted section 921.137, Florida Statutes, barring the execution of intellectually disabled defendants, and this Court adopted Florida Rule of Criminal Procedure 3.202 to provide a procedure for implementing *Atkins*. See §921.137(2), Fla. Stat. (2001).

However, the Florida Legislature's designation of the trial judge, rather than the jury, as the factfinder for intellectual disability determinations cannot trump an individual's Sixth Amendment right to a jury trial. Zack submits that *Oats* was wrongly decided in much the same way that *Bottoson v. Moore* was wrongly decided. *See Bottoson v. Moore*, 833 So. 2d 693 (2002), abrogated by *Hurst v. Florida*, 136 S. Ct. 616 (2016). In *Bottoson*, this Court declined to grant relief under *Ring v. Arizona*, 536 U.S. 584 (2002), because "the United States Supreme Court repeatedly has reviewed and upheld Florida's capital sentencing statute over the past quarter of a century…" *Bottoson*, 833 So. 2d at 695. Fourteen years later the United States Supreme Court abrogated this decision in *Hurst v. Florida*, holding Florida's capital sentencing scheme unconstitutional, as violative of the Sixth Amendment right to a jury trial. Simply because the United States Supreme Court left it up to the states to implement a capital sentencing scheme, does not guarantee that it will be constitutionally sound. Nor does it give the states the power to trample on an individual's right to a jury trial as guaranteed by the Sixth Amendment.

Under §921.137(2), Florida Statutes, "[a] sentence of death may not be imposed upon a defendant convicted of a capital felony if it is determined . . . that the defendant is intellectually disabled." Section 921.137(4) provides that when a defendant raises intellectual disability as a bar to a death sentence and the judge finds 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 that determination." Thus, Florida law provides that an intellectually disabled defendant is not eligible for a death sentence.

Hurst v. Florida, 136 S. Ct. at 622, held that the Sixth Amendment guarantees that all facts that are statutorily necessary before a judge is authorized to impose death are subject to the capital defendant's constitutional right to a jury trial. As a result, the Florida Supreme Court in *Hurst v. State*, 202 So. 3d at 53, held that "the jury—not the judge—must be the finder of every fact, and thus every element necessary for the imposition of the death penalty." The Court further concluded that in Florida, "the penalty phase jury must be unanimous in making the critical findings and recommendation that are necessary before a sentence of death may be considered by the judge or imposed." *Perry v. State*, 210 So. 3d 630, 634 (Fla. 2016) (*quoting Hurst v. State*, 202 So. 3d at 59).

Whether a defendant is intellectually disabled is a question of fact as the Florida Supreme Court's decision in *Oats v. State*, 181 So. 3d 457 (Fla. 2015), made clear. There, the Court explained:

> In reviewing the circuit court's determination that Oats is not intellectually disabled, "this Court examines the record for whether competent, substantial evidence supports the determination of the trial court." *State v. Herring*, 76 So. 3d 891, 895 (Fla. 2011). We "do [ ] not reweigh the evidence or second-guess the circuit court's findings as to

> the credibility of witnesses." Brown v. State, 959 So. 2d 146, 149 (Fla. 2007).

Oats v. State, 181 So. 3d at 456-66.

Hurst v. State applies to the determination of fact, i.e. the defendant's intellectual disability, which must be addressed and resolved before a death sentence can be imposed when properly raised by the defense under §921.137. Therefore, the principles set forth by the United States Supreme Court in *Hurst v. Florida* and by this Court in *Hurst v. State* require that Zack's intellectual disability determination is subject to his Sixth Amendment right to a jury trial.

CONCLUSION

For the reasons set forth in this Initial Brief, Appellant, Michael Duane Zack, III, requests that he be granted an evidentiary hearing on his claims, and any other relief deemed appropriate by this Court.

Respectfully submitted,
ROBERT S. FRIEDMAN
Capital Collateral Regional Counsel-North

/s/ Dawn B. Macready
DAWN B. MACREADY
Assistant CCRC-North
Florida Bar No. 0542611
175 Salem Court
Tallahassee, FL 32301
(850) 487-0922
Dawn.Macready@ccrc-north.org

STACY BIGGART
Assistant CCRC-North
Florida Bar No. 0089388
Stacy.Biggart@ccrc-north.org

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished via electronic service to all counsel of record on this day, April 16, 2018.

CERTIFICATION OF FONT

This is to certify that the foregoing Initial Brief of Appellant has been reproduced in Times New Roman 14-point font, pursuant to Rule 9.100 (l), Florida Rules of Appellate Procedure.

ROBERT S. FRIEDMAN
Capital Collateral Regional Counsel-North

/s/ Dawn B. Macready
DAWN B. MACREADY
Assistant CCRC-North
Florida Bar No. 0542611
1004 DeSoto Park Drive
Tallahassee, FL 32301
(850) 487-0922
Dawn.Macready@ccrc-north.org

/s/ Stacy Biggart
STACY BIGGART
Assistant CCRC-North
Florida Bar No. 0089388
Stacy.Biggart@ccrc-north.org

COUNSEL FOR APPELLANT