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

REPLY 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 Mr. Zack's Successive Motion to Vacate Death Sentence, and Alternatively Motion to Correct Illegal Sentence, based on *Hurst v. Florida*, 136 S. Ct. 616 (2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). Appellee has filed its answer to Zack's initial brief, and this reply follows. This reply will address only the most salient points argued by Appellee. Mr. Zack relies upon his initial brief in reply to any argument or authority argued by Appellee that is not specifically addressed in this reply.

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 Mr. Zack's first rule 3.851 motion; "PC-R2" refers to the record on appeal from the denial of Mr. Zack's second rule 3.851 motion; "PC-R3" refers to the record on appeal from the denial of Mr. Zack's third rule 3.851 motion; "PC-R4" refers to the record on appeal from the denial of Mr. Zack's fourth rule 3.851 motion. References to Appellant's Initial Brief are made with the letters IB, followed by the page number(s). References to Appellee's Answer Brief are made with the letters AB, followed by the page number(s). All other references will be self-explanatory.

REPLY

I. Appellee is incorrect that the law-of-the-case doctrine applies because this Court has never addressed, in Zack's case or any other case, whether its post-*Ring* retroactivity rule violates the federal Constitution.

Appellee is incorrect in arguing that the law-of-the-case doctrine requires this Court to uphold its unconstitutional post-*Ring* retroactivity rule for *Hurst* claims. Although this Court previously declined to grant Zack *Hurst* relief in its June 2017 habeas corpus decision, the Court did not address any of Zack's federal constitutional arguments regarding the arbitrariness of the post-*Ring* retroactivity rule for *Hurst* claims. The Court relied exclusively on state precedent establishing the retroactivity rule and did not meaningfully address Zack's arguments under the Eighth Amendment's prohibition against arbitrariness and capriciousness, the Fourteenth Amendment's Equal Protection and Due Process Clauses, and the requirement under *Montgomery v. Louisiana* that state courts are required by the Supremacy Clause of the Constitution to apply substantive decisions retroactively. *See Zack v. Jones*, 228 So. 3d 41 (Fla. 2017) (SC16-1090). The precedent cited in the State's own response shows that the law-of-the-case doctrine does not prevent this Court from reaching federal constitutional arguments that have never been addressed in Zack's case or any other case. AB at 16 (citing *Fla. Dept. of Transp. v. Juliano*, 801 So. 2d 101, 105 (Fla. 2001) ("Under the law-of-the-case doctrine, all

questions of law decided on appeal govern the case through all subsequent states of the proceedings.")

II. Appellee is incorrect that *Hitchcock* and *Asay* preclude Zack from *Hurst* relief under *Apprendi v. New Jersey*

Appellee's cursory argument that under *Asay* and *Hitchcock* Zack does not get retroactive *Hurst* relief does not address Zack's arguments regarding the federal constitutionality of drawing a *Hurst* retroactivity cutoff at *Ring*, given that *Apprendi v. New Jersey* is the constitutional basis for both *Ring* and *Hurst*. *See* IB at 23-26; AB at 17. Appellee's failure to address Appellant's *Apprendi* argument is telling. There are only 22 prisoners in Florida in a non-waiver, non-unanimous jury, post-*Apprendi* posture. In light of *Apprendi*'s fundamental importance to *Ring* and *Hurst*, it would violate the federal constitutional prohibition against arbitrary and capricious death sentencing, and guarantees of equal protection and due process, to extend *Hurst* retroactivity to 14 years of post-*Ring* death sentences while denying retroactivity to the small number of non-unanimous-recommendation sentences, like Zack's, that were finalized in the two years between *Apprendi* and *Ring*.

Respondent is incorrect in suggesting that *Hitchcock v. State*, 226 So. 3d 217 (Fla. 2017), and prior cases addressed whether federal constitutional law requires *Hurst* to be applied retroactively to the small number of Florida

death sentences, including Zack's, that became "final" on direct appeal during the two-year period between the decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002). In fact, *Hitchcock* did not specifically address the "*Apprendi* gap" or any of Zack's federal retroactivity arguments at all.

The Court's opinion in *Hitchcock* did not even state that Mr. Hitchcock's death sentence became final between *Apprendi* and *Ring*, let alone specifically address the current federal constitutional arguments. *Hitchcock* did not address whether the federal Constitution permits a retroactivity "cutoff" that affords *Hurst* relief to defendants sentenced after the 2002 decision in *Ring* while denying *Hurst* relief to defendants sentenced before *Ring* but after the 2000 decision in *Apprendi*. Instead, *Hitchcock* relied exclusively on the Court's state-law reasoning in *Asay v. State*, 210 So. 3d 1 (Fla. 2016), which did not involve a post-*Apprendi* sentence. The reasoning in *Asay* rested entirely on the state retroactivity law first articulated in *Witt v. State*, 387 So. 2d 922 (Fla. 1980). *Asay*'s exclusive reliance on state law is evident from the *Asay* opinion itself. *See* 210 So. 3d at 16 ("To apply a newly announced rule of law to a case that is already final at the time of the announcement, this Court must conduct a retroactivity analysis pursuant to the dictates of *Witt*.").

Asay did not address whether federal law required the *Hurst* decisions to be applied retroactively in post-*Apprendi* death sentences like Zack's and did not address the federal retroactivity arguments raised in Zack's Initial Brief. Namely, *Asay* did not address whether it would violate the Eighth and Fourteenth Amendments to draw a *Hurst* retroactivity "cutoff" at *Ring*, rather than *Apprendi*, in light of the fact that *Apprendi* was the constitutional basis for both *Ring* and *Hurst*. Neither did *Asay* address more generally whether a retroactivity cutoff drawn at *Ring* violates the Eighth Amendment's prohibition against arbitrary and capricious imposition of the death penalty, or the Fourteenth Amendment's Equal Protection and Due Process Clauses. Nor did *Asay* address whether the *Hurst* decisions are "substantive" within the meaning of federal law, such that the Supremacy Clause of the Constitution requires state courts to apply the decisions retroactively under *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

Hitchcock, in relying totally on *Asay*, also did not address Zack's "post-*Apprendi*" and other federal retroactivity arguments. *See Hitchcock*, 226 So. 3d at 217 ("We affirm because we agree with the circuit court that our decision in *Asay* forecloses relief."); *Id.* ("Accordingly, we affirm the circuit court's order summarily denying Hitchcock's successive postconviction motion pursuant to *Asay*."). *Asay* was premised entirely on state retroactivity law.

During the nearly eight months between this Court's decisions in *Asay* and *Hitchcock*, numerous *Hurst* defendants, including those sentenced between *Apprendi* and *Ring*, raised federal retroactivity arguments in this Court and the circuit courts, explaining that *Asay* had not resolved those federal matters in its exclusively-state-law analysis, and imploring the courts to explicitly address federal law. Those defendants, as Zack did here, made federal arguments under the Eighth and Fourteenth Amendments and *Montgomery*. If this Court had intended to put those arguments to rest in *Hitchcock*—including whether a retroactivity cutoff at *Ring* is unconstitutional as applied to post-*Apprendi* defendants—it could have done so, but the *Hitchcock* Court declined to do so. *Hitchcock* does not even mention the small number of death sentences that became final between *Apprendi* and *Ring*, the Eighth Amendment's prohibition against arbitrariness and capriciousness, or the Fourteenth Amendment's Equal Protection and Due Process Clauses. Nor does *Hitchcock* cite *Montgomery* or address whether the *Hurst* rules are "substantive."

This Court's *Ring*-based retroactivity cutoff is simply not reasonable as applied to Zack's death sentence, which became final after *Apprendi*, because the rule announced in *Apprendi* was the constitutional basis for both *Ring* and *Hurst*. It was *Apprendi*, not *Ring*, which first articulated the principle that the

Sixth Amendment requires any finding that increases a defendant's maximum sentence to be understood as an element of the offense that must be found by a jury beyond a reasonable doubt. *See Apprendi*, 530 U.S. at 490. In the *Hurst* decision itself, the United States Supreme Court explained that *Ring* applied *Apprendi*'s analysis in finding Arizona's capital sentencing scheme unconstitutional. *See Hurst*, 136 S. Ct. at 621. The foundation of *Ring* is *Apprendi*, and if there is to be a bright line for retroactivity in these cases, the line should be drawn at *Apprendi*, not at *Ring*. To draw a line at *Ring* instead of *Apprendi*, is to fundamentally misunderstand the relationship between the two cases.

In fact, this Court previously recognized that the "jury sentencing" idea originated with *Apprendi*. In those days, the Court denied relief to petitioners relying on *Apprendi* because the United States Supreme Court had not held that *Apprendi* applied to capital sentencing schemes such as Florida's. *See, e.g., Mills v. Moore*, 786 So. 2d 532, 537 (Fla. 2001) ("No court has extended *Apprendi* to capital sentencing schemes . . . "). In the current era, this Court has not addressed the argument that post-*Apprendi* cases are in a different posture than other pre-*Ring* cases. These matters all remain open questions that this Court should address. There are real, unresolved issues here and Zack urges this Court to address them.

III. Appellee incorrectly diminishes the impact of *Caldwell* error on Zack's jury.

Appellee attempts to diminish the *Caldwell* error in Zack's case by arguing that the jury's recommendation of death in a capital case is always advisory and the trial judge is always free to reject the jury's death recommendation and sentence the defendant to life. AB at 18. In *Caldwell v. Mississippi*, 472 U.S. 320 (1985), the Supreme Court held that a capital sentence is invalid if it was imposed by a jury that believed that the ultimate responsibility for determining the appropriateness of a death sentence rested elsewhere and not with the jury. *Id.* at 328-29. The Court explained that it "has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its truly awesome responsibility." *Id.* at 341 (internal quotation omitted). The jurors in *Caldwell* were informed of their diminished sentencing responsibility by the prosecutor, who assured them during his summation that their decision would be automatically reviewed by an appellate court. The Court held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death sentence lies elsewhere." *Id.* at 328-29.

Despite Appellee's attempts to diminish the *Caldwell* error in Zack's case, the juror confusion generated by Florida's unconstitutional statute is well-documented. This Court itself recognized, shortly after Petitioner was sentenced, that "research establishes that many Florida capital jurors do not understand their role and responsibilities when deciding whether to impose a death sentence." *In re Standard Jury Instructions*, 22 So. 3d at 19 (citing ABA, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Florida Death Penalty Assessment Report* (2006)). Justice Pariente noted that "[t]he role of the jury during the penalty phase under the Florida death penalty scheme has always been confusing," and, "absent a recommendation for life, the jury recommendation is essentially meaningless to the trial judge." *Id.* at 26 (Pariente, J., concurring) (internal quotations omitted). The Eleventh Circuit has also recognized that "the concerns voiced in *Caldwell* are triggered when a Florida sentencing jury is misled into believing that its role is unimportant," and that "[u]nder such circumstances, a real danger exists that a resulting death sentence will be based at least in part on the determination of a decision maker that has been misled as to the nature of its responsibility." *Mann v. Dugger*, 844 F.2d 1446, 1454-55 (11th Cir. 1988).

Here, Zack's jury was led to believe that its role in sentencing was diminished when the trial court instructed its penalty phase verdict was merely a "recommendation" or an "advisory verdict" to be returned by majority vote, and that

the "final decision as to what punishment shall be imposed is the responsibility of the judge." (T.1591, 2107). It was with those instructions in mind, which informed Zack's jury "that the responsibility for determining the appropriateness of the defendant's death sentence lies elsewhere," *id.* at 328-29, that the jury returned a recommendation for a death sentence on a form titled "Advisory Sentence" which stated: "A majority of the jury, by a vote of 11 to 1, advise and recommend to the court that it impose the death penalty upon Michael Duane Zack, III." (R.792).

Here, in light of the impact of the "advisory" instructions to the jury, this Court cannot even be certain that the jury would have made the same unanimous *recommendation* without the *Hurst* error. Given the principles articulated in *Caldwell*, this Court also cannot be sure that the jury would have found all of the other elements for a death sentence satisfied. And, critically, the Court cannot be sure that Petitioner would have received a death sentence. *See Rose v. Clark*, 478 U.S. 570, 578 (1986) (recognizing that an "error is harmless if, beyond a reasonable doubt, it did not contribute to the verdict obtained") (emphasis in original) (internal quotation marks and citation omitted).

Without the *Hurst* error, where the jury was properly apprised of its role as fact-finder, there is a reasonable likelihood that the jury would have afforded greater weight to the mitigation in Petitioner's case. As such, it cannot be concluded that a jury would have unanimously found or rejected any specific mitigators in a

constitutional proceeding. *Cf. Mills v. Maryland*, 486 U.S. 367, 375-84 (1988); *McKoy v. North Carolina*, 494 U.S. 433, 444 (1990) (both holding in the mitigation context that the Eighth Amendment is violated when there is uncertainty about jury's vote). In *Hurst v. State*, this Court emphasized that mitigation is an important consideration in assessing harmless error. 202 So. 3d at 68-69 ("Because we do not have an interrogatory verdict commemorating the findings of the jury . . . we cannot find beyond a reasonable doubt that no rational juror, as trier of fact, would determine that the mitigation was 'sufficiently substantial' to call for a life sentence.").

In this context, proper judicial review would have measured the impact of the unconstitutional jury scheme and instructions on the jury's consideration of mitigation against the standard articulated by the in *Boyde v. California*, 494 U.S. 370 (1990). In *Boyde*, the Supreme Court explained that the proper standard is whether there is a "reasonable likelihood" that the jury was impeded from consideration of constitutionally relevant evidence. *Id.* at 380. The "reasonable likelihood" standard, the Court explained, "better accommodates the concerns of finality and accuracy than does a standard which makes the inquiry dependent on how a single hypothetical 'reasonable' juror could or would have interpreted the instruction." *Id.* After all, "[j]urors do not sit in solitary isolation booths parsing

instructions for subtle shades of meaning in the same way that lawyers might." *Id.* at 381.

The extensive mitigation in Zack's case suggests a reasonable likelihood that a jury in a constitutional proceeding, where it was properly apprised of its role as fact-finder in determining whether a death sentence would be imposed, may not have agreed that each of the elements for a death sentence was satisfied. The trial court found the following mitigation had been established: (1) Zack was under the influence of extreme or emotional disturbance; (2) Zack was under extreme duress; (3) Zack suffered from a substantial impairment; (4) Zack was remorseful; (5) Zack confessed to the crime; (6) Zack had a good jail record while awaiting trial in Okaloosa County; and (7) Zack's childhood and family background.

If the fact-finding at Zack's penalty phase had been conducted by a jury that understood its constitutional role in sentencing, the above mitigation may well have been found to be weightier than the aggravation. Because there is a reasonable likelihood that the jury's consideration of the evidence was "impermissibly inhibited" by the unconstitutional statute, *see Boyde*, 494 U.S. at 380, the *Caldwell* error in Zack's case is indeed significant.

CONCLUSION

For the reasons set forth in his Initial Brief and this Reply Brief, Appellant, Michael Duane Zack, III, requests that he be granted a new penalty phase, 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

/s/ Stacy Biggart
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 on this day May 29, 2018, via electronic service to Charmaine Millsaps, Assistant Attorney General, at charmaine.millsaps@myfloridalegal.com and capapp@myfloridalegal.com and by U.S. Mail to Appellant, Michael Duane Zack, III, DOC# 124439, Union Correctional Institution, P.O. Box 1000, Raiford, FL 32083.

CERTIFICATION OF FONT

Counsel certifies that this brief was typed in Times New Roman 14-point font.

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

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

COUNSEL FOR APPELLANT