No.

IN THE
Supreme Court of the United States

HAROLD LEE HARVEY, JR.,
Petitioner,

v.

FLORIDA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

PETITION FOR A WRIT OF CERTIORARI

Ross B. Bricker
Counsel of Record
Alexis E. Bates
Joshua M. Levin
Garrett J. Salzman
JENNER & BLOCK LLP
353 North Clark St.
Chicago, IL 60654
(312) 222-9350
rbricker@jenner.com

James T. Dawson
JENNER & BLOCK LLP
1099 New York Ave. NW
Washington, DC 20001
(202) 639-6000

CAPITAL CASE

QUESTION PRESENTED

This Court held in *Hurst v. Florida* ("*Hurst I*") that Florida's sentencing system in capital cases violated the Sixth Amendment because it required a judge, rather than a jury, "to find each fact necessary to impose a sentence of death." 136 S. Ct. 616, 619 (2016). On remand, the Florida Supreme Court held in *Hurst v. State* ("*Hurst II*") that the death penalty may be imposed only when the jury *unanimously* decides on that sentence. 202 So. 3d 40, 57 (Fla. 2016). The Florida Supreme Court later held that both *Hurst I* and *Hurst II* apply retroactively, but only to prisoners whose death sentences became final after *Ring v. Arizona*, 536 U.S. 584 (2002). *See Asay v. State*, 210 So. 3d 1 (Fla. 2016); *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016).

The Question Presented is:

Does the Florida Supreme Court's decision denying retroactive application of the *Hurst* decisions to Mr. Harvey violate the Eighth or Fourteenth Amendments because it uses an arbitrary cut-off point and other arbitrary factors—such as the timing of judicial decisions—to determine whether similarly situated death row prisoners will receive retroactive application of constitutional rights?

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PETITION FOR A WRIT OF CERTIORARI

Harold Lee Harvey, Jr. respectfully petitions for a writ of certiorari to review the judgment of the Florida Supreme Court.

OPINION BELOW

The opinion of the Florida Supreme Court is reported at 260 So. 3d 906 (Fla. 2018). Pet. App. 1a–6a. The Order of the Florida Supreme Court denying rehearing is not reported. Pet. App. 11a–12a. The decision of the Circuit Court of the Nineteenth Judicial District in and for Okeechobee County, Florida is also unreported. Pet. App. 8a–10a.

JURISDICTION

The judgment of the Florida Supreme Court was issued on November 15, 2018. Mr. Harvey filed a motion for rehearing or reconsideration on December 10, 2018, after the Florida Supreme Court granted him an extension of time for that motion to be filed. The Florida Supreme Court denied Mr. Harvey's motion for rehearing or reconsideration on December 20, 2018. Pet. App. 11a–12a. On March 8, 2019, Justice Thomas granted an extension of time in which to file a petition for a writ of certiorari to May 19, 2019. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1257(a) and 2101(d).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment provides in relevant part that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

INTRODUCTION

In 2016, the Florida Supreme Court recognized that Florida's prior system of capital sentencing violated the Constitution by depriving defendants of two rights: (1) the right to have a jury rather than a judge find each fact necessary to impose a death sentence; and (2) the right not to be subjected to capital punishment except upon the unanimous decision of the jury. *See Hurst v. Florida* ("*Hurst I*"), 136 S. Ct. 616, 619 (2016); *Hurst v. State* ("*Hurst II*"), 202 So. 3d 40, 57 (Fla. 2016). But when called upon to decide whether those two rights applied retroactively to prisoners whose cases were pending on collateral review, the Florida Supreme Court reached a novel conclusion: It split the difference, holding that those two rights did apply retroactively, but only to prisoners whose sentences became final after this Court's 2002 decision in *Ring v. Arizona*, 536 U.S. 584 (2002). *See Asay v. State*, 210 So. 3d 1 (Fla. 2016); *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016) (the "partial retroactivity rule" or the "*Asay/Mosley* rule").

Mr. Harvey recognizes that this Court has oft and recently denied certiorari in cases where death row inmates have argued that Florida's *Asay/Mosley* rule treats two classes of similarly situated individuals disparately without any rational basis, thus violating the Eighth Amendment's prohibition on arbitrary enforcement of the death penalty and the Fourteenth

Amendment's equal-protection guarantee. But this case is different.

Beyond the arguments raised by prior petitioners in support of the position that Florida's *Asay/Mosley* rule is unconstitutional, the particular timing of the Florida Supreme Court's prior decisions in Mr. Harvey's case makes clear that the application of the *Asay/Mosley* rule here is unconstitutionally arbitrary. In 2003—a year ***after Ring***—the Florida Supreme Court ordered Mr. Harvey's convictions to be vacated on collateral review. *Harvey v. State*, No. SC95075 (Fla. July 3, 2003) ("*Harvey I*") (Pet. App. 13a–27a).[1] Had that been the end of the story, Mr. Harvey would have proceeded to retrial. There he would have been acquitted, convicted and sentenced to incarceration, or convicted and sentenced to death. Even in the latter case, Mr. Harvey's death sentence would necessarily have become final after *Ring*, and he would thus be entitled to retroactive application of the *Hurst* decisions under the current *Asay/Mosley* rule.

But the Florida Supreme Court's 2003 opinion was not the last word. Following the court's decision—which was deemed non-final until the disposition of any motions for rehearing or reconsideration—Florida filed a pro forma, routine motion for rehearing in which it suggested only that the court had misapprehended existing precedent. That motion did not include any new facts or raise any new law. For reasons that are not clear from the record, the Florida Supreme Court inexplicably kept the motion for rehearing on ice for a year and a half.

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[1] This opinion is no longer available on Westlaw; for the Court's convenience, it is included in Petitioner's Appendix at 13a–27a.

Contra Fla. Code of Judicial Conduct, Canon 3B(8) (amended 2018) ("A judge shall dispose of all judicial matters promptly, efficiently, and fairly."). Then, in December 2004, the Florida Supreme Court issued an order to show cause why it should not defer its decision on the State's rehearing motion pending the outcome of *Florida v. Nixon*, 543 U.S. 175 (2004), which was by then before this Court. A year and a half later (in June 2006), the Florida Supreme Court issued an opinion in which it vacated and replaced its prior 2003 opinion in *Harvey I*, crediting a motion for rehearing that had been pending at that point for nearly three years. *See Harvey v. State*, 946 So. 2d 937, 940–41 (Fla. 2006) ("*Harvey II*").

As a result of *Harvey II*, the "finality" date for Mr. Harvey's death sentence remained the same as it had been prior to *Harvey I*—1989. And in the opinion now on review, the Florida Supreme Court mechanically applied its novel partial retroactivity rule to conclude that Mr. Harvey was not entitled to retroactive application of the *Hurst* decisions because his 1989 "finality" date preceded this Court's decision in *Ring*.

It is difficult to imagine a more arbitrary result. Had the Florida Supreme Court simply denied the State's generic rehearing motion in *Harvey I* in the weeks or months after it was filed—as state courts of last resort typically do as a matter of routine—then Mr. Harvey would not be on death row today. His 1989 convictions would have been vacated, and any new death sentence following retrial would necessarily have become final after *Ring*, thus entitling him to resentencing under the current *Asay*/*Mosley* rule. But based solely on the mere happenstance of the unusually long time the Florida

Supreme Court took to resolve the State's routine motion for rehearing, Mr. Harvey may be executed under an unconstitutional sentence.

The Constitution does not permit the death penalty "to be so wantonly and so freakishly imposed." *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (Stewart, J., concurring). Indeed, there is an ever-growing consensus that the Florida Supreme Court's partial retroactivity rule is unlawful, unfair, and unworkable. That view has recently been expressed in the federal courts of appeals,[2] by prominent law professors,[3] by the American Bar Association,[4] in popular publications,[5] and by a group of retired Florida Supreme Court justices and other

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[2] *See, e.g.*, *Hannon v. Sec'y, Fla. Dep't of Corr.*, 716 F. App'x 843, 846 (11th Cir. 2017) (Martin, J., concurring) ("[I]t is arbitrary in the extreme to make this distinction between people on death row based on nothing other than the date when the constitutional defect in their sentence occurred. Indeed I can't imagine what one could say to [the petitioner's] loved ones to justify why it is acceptable that he falls on the wrong side of this double set of rules.").

[3] Pet. for Cert., *Kelley v. Florida* (No. 17-1603), 2018 WL 2412330 (U.S. May 25, 2018) (petition authored by Prof. Laurence H. Tribe).

[4] *Florida Supreme Court Reaffirms Decision to Deny Relief for Unconstitutional Sentences Issued Prior to 2002*, Am. Bar Ass'n (Oct. 11, 2017), https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2017/yearend/florida-supreme-court-reaffirms-decision-to-deny-relief-for-unco/ ("The decision in *Asay* created a life-or-death distinction between functionally identical cases, relief being available in some instances only because of the random chance of a slow moving case docket.").

[5] Nathalie Baptiste, *Here's Another Example of Why the "Death Penalty System In Florida Is in Absolute Chaos,"* Mother Jones (Aug. 23, 2017), https://www.motherjones.com/crime-justice/2017/08/florida-death-penalty-unanimous-jury-mark-asay/.

Florida jurists.[6] Even *current* Justices on the Florida Supreme Court have recognized that the novel partial retroactivity rule has sent the Florida courts "tumbl[ing] down the dizzying rabbit hole of untenable line drawing." *Hitchcock v. State*, 226 So. 3d 216, 218 (Fla. 2017) (Lewis, J., concurring in result).

The Florida Supreme Court has explained that its *Asay*/*Mosley* rule stems from the fact that "Florida's capital sentencing statute has essentially been unconstitutional since *Ring* in 2002," and thus that it would have been unreasonable for Florida courts to continue believing after *Ring* that there had been no "change[in] the calculus of the constitutionality of Florida's death penalty scheme." *Mosley*, 209 So. 3d at 1280. But the Florida Supreme Court had the chance to apply that reasoning when it issued decisions in Mr. Harvey's case in both 2003 and 2006—both of which were after *Ring*—and yet declined to do so. Despite charging lower courts with knowledge that Florida's capital sentencing scheme was unlawful from the moment *Ring* was decided and onwards, the Florida Supreme Court has chosen to apply a different rule to itself—one in which it is permissible to ignore the myriad constitutional infirmities of a Florida death sentence even in opinions that were issued after *Ring*.

This case, unlike others that have recently appeared on this Court's docket, demonstrates with remarkable clarity the arbitrariness and unconstitutionality of Florida's partial retroactivity rule. The petition for a

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[6] *See* Brief of Amici Curiae Retired Florida Judges and Jurists as Amici Curiae in Support of Petitioner, *Branch v. Jones* (No. 17-7758), 2018 WL 949750 (U.S. Feb. 15, 2018).

writ of certiorari should be granted, and the opinion below should be vacated.

STATEMENT OF THE CASE

A. Legal Framework And Relevant Case Law

In *Ring v. Arizona* (June 2002), this Court invalidated an Arizona sentencing scheme that allowed trial judges, rather than juries, to determine whether the aggravating factors necessary to impose capital punishment were present. 536 U.S. at 588–89, 609. The *Ring* majority did not comment on Florida's similar system for capital sentencing, and in the years that followed, this Court denied numerous petitions for writs of certiorari that presented the question whether Florida's sentencing scheme was also unconstitutional.

In *Hurst I* (January 2016), this Court declared Florida's capital sentencing scheme unconstitutional because it required judges and not juries to "find each fact necessary to impose a sentence of death." 136 S. Ct. at 619; *see id.* ("A jury's mere recommendation is not enough."). Citing *Ring*, the *Hurst I* Court concluded that Florida's sentencing system violated the Sixth Amendment right to a jury. *Id.* at 621–22.

On remand in *Hurst II* (October 2016), the Florida Supreme Court interpreted *Hurst I* to require that juries find the existence of aggravating factors sufficient to impose the death penalty under Florida law. 202 So. 3d at 44. *Hurst II* also held that the Eighth Amendment requires that the facts necessary to support the death penalty must be found by a *unanimous* jury before capital punishment may be imposed. *Id.*

In *Asay* and *Mosley* (December 2016), the Florida Supreme Court considered whether the constitutional rights recognized in *Hurst I* and *Hurst II* should apply retroactively. Under a normal retroactivity analysis, those decisions would apply retroactively either to all prisoners with final death sentences or to none of those prisoners.[7] But the Florida Supreme Court departed markedly from that norm. The Court instead concluded that for prisoners such as Mr. Mosley, whose sentences became final after *Ring*, both *Hurst* decisions would apply retroactively. *Mosley*, 209 So. 3d at 1283. But for prisoners such as Mr. Asay, whose sentences became final before *Ring*, neither *Hurst* decision would apply retroactively. *Asay*, 210 So. 3d at 21–22. As a result of this partial retroactivity rule, Mark Asay was executed, while John Mosley is entitled to resentencing.

The Florida Supreme Court's *Asay/Mosley* rule is premised on the notion that *Ring* "actually rendered unconstitutional" Florida's sentencing scheme in 2002, making *Ring* an appropriate cut-off for retroactive application of the *Hurst* decisions. *Mosley*, 209 So. 3d at 1283. The Court concluded that prisoners whose sentences became final after *Ring* "should not be penalized for the United States Supreme Court's delay in explicitly" invalidating Florida's sentencing system. *Id.* But nowhere did the Court reckon with the fact that

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[7] *See, e.g.*, *State v. Lotter*, 917 N.W.2d 850, 864 (Neb. 2018) (finding *Hurst I* not to apply retroactively to *any* cases on collateral review); *Powell v. Delaware*, 153 A.3d 69, 70 (Del. 2016) (per curiam) (finding *Hurst I* retroactive to all cases on collateral review). *See also Welch v. United States*, 136 S. Ct. 1257, 1264 (2016) ("'New *substantive* rules generally apply retroactively.'" (citation and alteration omitted)).

all prisoners whose death sentences predated the *Hurst* cases were sentenced under an unconstitutional scheme, no matter whether those sentences became final before or after *Ring*.

Two Justices dissented from the *Asay* decision, emphasizing that the rule it crafted was arbitrary. Justice James E. C. Perry wrote that "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." 210 So. 2d at 37 (Perry, J., dissenting). Justice Barbara J. Pariente wrote that the *Asay*/*Mosley* rule "results in an unintended arbitrariness" and undermines principles of "uniformity and fundamental fairness." *Id.* at 36 (Pariente, J., concurring in part and dissenting in part). *See also Evans v. State*, No. SC17-869, 2018 WL 3617642, at *1 (Fla. Apr. 26, 2018) (Pariente, J. concurring in result denying rehearing) (noting that the *Asay*/*Mosley* rule worked an "unconstitutional arbitrariness" under which "a fatal accident of timing" would decide whether prisoners would be subjected to the death penalty).

In *Hitchcock v. State* (August 2017), the Florida Supreme Court reaffirmed the *Asay*/*Mosley* rule, again over Justice Pariente's dissent. 226 So. 3d at 217. *But see id.* at 220 (Pariente, J., dissenting). Shortly thereafter, the Florida Supreme Court—recognizing that its *Asay*/*Mosley* rule would deny relief to more than 150 Florida prisoners who were then on death row—issued stays in over 100 capital cases, followed by orders to show cause why those cases should not be dismissed in light of *Hitchcock*.

Mr. Harvey—who received a stay and order to show cause after *Hitchcock*—joined many others in arguing that the A*say*/*Mosley* rule violated the U.S. Constitution. The Florida Supreme Court nonetheless denied relief in these cases *en masse* in a series of cursory opinions that cited *Hitchcock* and provided little further reasoning. To date, the Florida Supreme Court has applied the *Asay*/*Mosley* rule in about 100 cases. Many of those cases have been or will be appealed to this Court, and will likely then be followed by federal habeas proceedings that will clog the federal courts for years to come.

Most troubling, the Florida Supreme Court's partial retroactivity rule has enabled the execution of three prisoners whose death sentences violated constitutional rights that the Florida Supreme Court has itself recognized, merely because those three prisoners—like Mr. Harvey—happened to have sentences that were final before *Ring*. *See Asay v. State*, 210 So. 3d 1, 22 (Fla. 2016) (Mark Asay executed in August 2007); *Lambrix v. State*, 227 So. 3d 112, 113 (Fla. 2017) (Cary Lambrix executed in October 2017); *Hannon v. State*, 228 So. 3d 505, 513 (Fla. 2017) (Patrick Hannon executed in November 2017). A fourth such execution is scheduled for next week. *See Long v. State*, 235 So. 3d 293, 294 (Fla. 2018) (execution of Robert Long scheduled for May 23, 2019). Meanwhile, dozens of other prisoners whose cases are materially indistinguishable from those of the three recently executed prisoners have been granted

resentencing merely because their sentences became final after *Ring*.

B. Proceedings In Mr. Harvey's Case

A jury found Mr. Harvey guilty of two counts of first-degree murder on June 18, 1986. He was sentenced to death on June 20, 1986, after a non-unanimous, "advisory" jury recommended death by an 11-to-1 vote.

On February 27, 1985, Mr. Harvey was arrested for the murders of William and Ruby Boyd. A codefendant, Scott Stiteler, was also charged with murdering the Boyds. Mr. Harvey was brought back to the Sheriff's Department, where he was interrogated at length. *Harvey v. State*, 529 So. 2d 1083, 1084 (Fla. 1988). While at the Sheriff's Department, a public defender requested and was denied access to Mr. Harvey, but was allowed to speak to Mr. Stiteler and others held at the facility. *Id.* at 1085. During his interrogation, Mr. Harvey gave a recorded statement without counsel present admitting to his involvement in the murders. *Id.* at 1984. Mr. Harvey first spoke with counsel more than three hours after beginning his recorded statement. *Id.* at 1085.

Mr. Harvey pled not guilty to the murders. His codefendant, Mr. Stiteler, accepted a plea deal in which he admitted his guilt in exchange for a sentence of life imprisonment. Mr. Harvey's case proceeded to trial.

The guilt phase of Mr. Harvey's murder trial concluded on June 18, 1986, when the jury returned guilty verdicts against him on both first-degree murder counts. *Harvey II*, 946 So. 2d at 941. At the time of Mr. Harvey's trial, Florida's capital-sentencing scheme required the jury to provide the trial court with an

advisory sentencing decision. *See Hurst I*, 136 S. Ct. at 620. The trial court would then conduct a sentencing hearing, weighing the aggravating and mitigating factors to determine whether sufficient aggravating factors existed to justify a death sentence. *Id.* As discussed above, this scheme was ruled unconstitutional by this Court in *Hurst I*. *Id.* at 624. As for Mr. Harvey's sentence, the jury's sentencing recommendation was non-unanimous on both murder charges against Mr. Harvey. *Harvey II*, 946 So. 2d at 941. The jury did not make any written factual findings regarding aggravating or mitigating circumstances.

On June 20, 1986, the trial judge made written findings of fact concerning the propriety of the death penalty. The judge found four aggravating factors, specifically that the murders: (1) were committed during a robbery; (2) were committed for the purpose of avoiding lawful arrest; (3) were heinous, atrocious, and cruel; and (4) were committed in a cold and premeditated manner. *Harvey v. State*, 529 So. 2d at 1087, 1087 n.4 (Fla. 1998). The judge found as a mitigating circumstance Mr. Harvey's low IQ, in combination with his poor educational and social skills. *Id.* at 1088 n.5. The judge noted Mr. Harvey's inability to reason abstractly and his introversion, lack of self-confidence, and feelings of inadequacy.

The judge found that the four aggravating factors were sufficient to impose the death penalty, and that insufficient mitigating circumstances existed to outweigh the aggravating circumstances. The judge imposed a sentence of death on June 20, 1986.

Mr. Harvey appealed his conviction, and the Florida Supreme Court affirmed on June 16, 1988. *Harvey v. State*, 529 So. 2d 1083, 1088 (Fla. 1988). This Court denied certiorari on February 21, 1989. *Harvey v. Florida*, 489 U.S. 1040 (1989).

On August 27, 1990, Mr. Harvey filed a motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850. The trial court ultimately denied all of his claims, and Mr. Harvey appealed to the Florida Supreme Court. On February 23, 1995, that Court remanded the case to the trial court for an evidentiary hearing on Mr. Harvey's ineffective assistance of counsel claims. *Harvey v. Dugger*, 656 So. 2d 1253, 1258 (Fla. 1995). The trial court again found against Mr. Harvey, and he again appealed to the Florida Supreme Court.

On July 3, 2003, the Florida Supreme Court reversed the trial court, finding that the performance of Mr. Harvey's trial counsel was *per se* ineffective due in part to his concession of Mr. Harvey's guilt as to all elements of first-degree murder at trial. *Harvey v. State*, No. SC95075 (July 3, 2003) (Pet. App. 13a–24a), *withdrawn and superseded on reh'g*, 946 So. 2d 937 (Fla. 2006). The Florida Supreme Court relied on its application in *Nixon v. Singletary*, 758 So. 2d 618 (Fla. 2000), of this Court's decision in *United States v. Cronic*, 466 U.S. 648 (1984), to hold that Mr. Harvey need not demonstrate prejudice to obtain relief for his counsel's ineffective performance. Pet. App. 22a–24a. It remanded the case with instructions to vacate Mr. Harvey's convictions and grant him a new trial. *Id.* at 24a.

The State then filed a routine motion for rehearing on July 18, 2003, and Mr. Harvey filed his response on August 5, 2003. For reasons that are not clear, the Florida Supreme Court did not dispose of the State's motion for rehearing in the usual course. Rather, the motion sat pending for well over a year without any activity. Meanwhile, this Court granted certiorari to review the Florida Supreme Court's decision in *Nixon v. State*, 857 So. 2d 172 (Fla. 2003), *rev'd and remanded sub nom Florida v. Nixon*, 543 U.S. 175 (2004). On December 6, 2004, nearly a year and a half after the State filed its motion for rehearing, the Florida Supreme Court issued an order in Mr. Harvey's case, directing the State to show cause why the Court should not defer ruling on the State's rehearing motion until after this Court announced its decision in *Nixon*.

On December 13, 2004, this Court decided *Nixon*. Reversing the Florida Supreme Court, this Court held that ineffective assistance of counsel claims where counsel concedes the defendant's guilt should not be evaluated under *Cronic*'s presumed prejudice analysis. 543 U.S. at 189–90. Instead, defendants must demonstrate prejudice under the two-pronged ineffective assistance of counsel test announced in *Strickland v. Washington*, 466 U.S. 668 (1984). 543 U.S. at 189–90.

Based on this Court's decision in *Nixon*, on June 15, 2006—nearly three years after the State filed its motion for rehearing—the Florida Supreme Court withdrew its 2003 decision vacating Mr. Harvey's convictions and allowed his death sentence to stand. *Harvey II*, 946 So. 2d 937 (Fla. 2006).

On January 18, 2008, Mr. Harvey petitioned the United States District Court for the Southern District of Florida for a writ of habeas corpus. The district court denied his petition and the Eleventh Circuit affirmed. *See Harvey v. Warden, Union Corr. Inst.*, 629 F.3d 1228, 1236, 1237 (11th Cir. 2011).

On December 20, 2016—following the *Hurst* decisions—Mr. Harvey filed a successive motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.851. His motion asserted that his death sentence should be vacated because the judge, not the jury, made the factual findings to impose a death sentence and because the sentence was not the result of a unanimous jury verdict. Mr. Harvey also asked that *Hurst I* and *II* be applied retroactively to him.

Mr. Harvey argued that using the date of the *Ring* decision as a cut-off for retroactive application of the *Hurst* decisions was arbitrary, cruel, and unusual in violation of the Eighth Amendment. While other prisoners—who were sentenced under the same pre-*Hurst*, unconstitutional sentencing system as Mr. Harvey—have had their sentences vacated, Mr. Harvey's "bad timing" foreclosed his ability to obtain relief for the same undisputed constitutional defects in his death sentence.

On March 29, 2017, the trial court summarily denied Mr. Harvey's motion by incorporating into its order the State's answer and hearing argument, and adopting the State's reasoning. On November 15, 2018, the Florida Supreme Court issued an opinion affirming the trial court's denial of relief. *Harvey v. State*, 260 So. 3d 906, 907 (Fla. 2018). Pet. App. 1a–6a.

REASONS FOR GRANTING THE WRIT

This Court held in *Godfrey v. Georgia* that the Eighth and Fourteenth Amendments to the United States Constitution mandate that "if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." 446 U.S. 420, 428. (1980). The *Asay/Mosley* rule violates that command by drawing distinctions between life and death based on nothing more than the random timing of court decisions. As Mr. Harvey's case shows, whether a prisoner falls on the side of the *Asay/Mosley* cut-off that entitles him to retroactive application of the *Hurst* decisions turns on sheer happenstance. The *Asay/Mosley* rule thus cannot be squared with the anti-arbitrariness requirement of the Eighth Amendment and the Fourteenth Amendment.

The petition for certiorari should be granted.

I. THE FLORIDA SUPREME COURT'S *ASAY/MOSLEY* RULE CREATES AN ARBITRARY PARTIAL RETROACTIVITY SCHEME THAT VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

The Florida Supreme Court's decisions in *Asay* and *Mosley* create a partial retroactivity scheme under which similarly situated prisoners are treated differently based on whether their sentences became final before or after *Ring*. The Florida Supreme Court has not denied the benefits of retroactivity to *all* prisoners whose sentences predate the new decision; rather, it has recognized that the rights at issue merit retroactivity for one class of such prisoners, but has

denied the benefits of retroactivity to another, materially indistinguishable class of prisoners.

This method of partitioning death-row inmates violates the Eighth Amendment because it works an "arbitrary or irrational imposition of the death penalty." *Parker v. Dugger*, 498 U.S. 308, 321 (1991). When, as here, a state has decided that the death penalty is appropriate for a certain class of crimes, the Eighth Amendment requires the state to "administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." *Spaziano v. Florida*, 468 U.S. 447, 460 (1984), *overruled on other grounds*, *Hurst v. Florida*, 136 S. Ct. 616 (2016). *See also Gregg v. Georgia*, 428 U.S. 153, 195 (1976) (noting this Court's consistent concern "that the penalty of death not be imposed in an arbitrary or capricious manner"); *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) (noting that "capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all").

The cut-off date the Florida Supreme Court chose for the retroactive application of the *Hurst* decisions—the date *Ring* was decided—is arbitrary. According to the Florida Supreme Court, *Ring* was the appropriate dividing line because that decision set forth an analysis that rendered Florida's capital sentencing scheme "essentially [] unconstitutional." *Mosley*, 209 So. 3d at 1280. The problem with this rationale, however, is that it contradicts the very concept of retroactivity. When a right is deemed retroactively applicable, it is based on the logic that the right should be treated as if it has *always* been in effect. *See Teague v. Lane*, 489 U.S. 288,

300–01 (1989). Thus, the very premise of the *Asay/Mosley* rule—that a right does not apply retroactively before the case clarifying that right (here, *Ring*)—would undo the doctrine of retroactivity itself. Indeed, *Ring* relied on *Apprendi v. Arizona*, 530 U.S. 466 (2000), which could support retroactivity backwards to yet another arbitrary date—*i.e.*, 2000—under the same reasoning. Regardless of whether a defendant's conviction became final before or after *Ring*, all Florida prisoners sentenced before *Hurst I* were sentenced under an equally unconstitutional sentencing process.

For the same reasons, the *Asay/Mosley* rule also violates the Fourteenth Amendment guarantee of equal protection of the law. As this Court has explained, equal protection is denied "[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense" and subjects "one and not the other" to a more severe sanction. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). Apart from the Florida Supreme Court's *Asay/Mosley* cases, we are not aware of any court that has ever found both: (1) that a constitutional rule is of "fundamental importance" and thus must be applied to already-final sentences, *see Mosley*, 209 So. 3d at 1282, ***and*** (2) that the same rule should *not* apply to a certain subset of already-final sentences, even though that subset of sentences implicates the same constitutional rule, *see Asay*, 210 So. 3d at 22. The *Asay/Mosley* rule uses *Ring* to draw an arbitrary dividing line between death-sentenced individuals who *all* have equally final death sentences under an equally unconstitutional sentencing scheme.

Even if it were constitutionally permissible to use *Ring* as the cut-off date for retroactive application of *Hurst I*, the Florida Supreme Court's decision to use the same cut-off date for retroactive application of *Hurst II* makes no sense. The Florida Supreme Court's rationale for tying *Hurst I*'s retroactivity to *Ring* is that *Ring* prefigured this Court's ruling in *Hurst I*. But *Ring* in no way prefigured the Florida Supreme Court's unanimity holding in *Hurst II*. *Ring* was a ***Sixth*** Amendment case that made no mention of jury unanimity; in contrast, *Hurst II*'s requirement of jury unanimity in capital sentencing was based on the ***Eighth*** Amendment, and did not draw at all on *Ring* or any Sixth Amendment principles. The Florida Supreme Court has never explained its rationale for using *Ring* as the cut-off for the Eighth Amendment right to jury unanimity announced in *Hurst II*. No rational basis exists for creating a partial retroactivity rule for the Eighth Amendment right at issue in *Hurst II* based on the date of the Sixth Amendment decision of *Ring*, given that *Ring* had nothing to say about the Eighth Amendment or jury unanimity.

Moreover, staking the decision between life and death on the date that a sentence became final is inherently arbitrary due to the many random administrative and procedural variables that affect the date of finality in each case, such as how long a judge took to write an opinion or how long a motion for rehearing was pending.

Mr. Harvey's case is a stark example of this species of arbitrariness. If the Florida Supreme Court in *Harvey I* had denied the State's routine motion for

rehearing in the weeks or months after it was filed, the vacatur of Mr. Harvey's convictions would have become final. Any new death sentence imposed after retrial would thus have become final after *Ring*. But for reasons unknown, the Florida Supreme Court took no action on the State's rehearing motion for more than a year—an uncommonly long time.

As time passed, a decision from this Court (*Nixon*) gave the State new ground to challenge the *Harvey I* decision vacating Mr. Harvey's convictions. 543 U.S. 175 (2004). That challenge proved successful and led the Florida Supreme Court to reinstate Mr. Harvey's pre-*Ring* sentence in its *Harvey II* decision. Under the *Asay/Mosley* rule, Mr. Harvey is now barred from obtaining a remedy for his unconstitutional sentence, no matter that his convictions were ordered vacated after *Ring*, and reinstated after *Ring*. But for the Florida Supreme Court's inexplicable delay in resolving the motion for rehearing in *Harvey I*, his sentence would have become final after *Ring*. This is precisely the type of arbitrariness that the Eighth and Fourteenth Amendments prohibit in the application of the death penalty.

The Florida Supreme Court explained that the *Hurst* decisions should apply retroactively back to 2002 because, after *Ring*, the Florida courts were essentially on notice that there was a significant "change[in] the calculus of the constitutionality of Florida's death penalty scheme." *Mosley*, 209 So. 3d at 1280. But, inexplicably, the Florida Supreme Court then declined to charge *itself* with the same notice when it allowed Mr. Harvey's death sentences to stand in two opinions that

were both released after *Ring*. *Contra* Fla. Code of Judicial Conduct, Canon 3B(2) (amended 2018) ("A judge shall be faithful to the law and maintain professional competence in it."). Again, this is the height of arbitrariness. Mr. Harvey should not subjected to execution because the Florida Supreme Court has opted to exclude itself from the application of a rule it has imposed on lower Florida courts.

A second example further illustrates this point. On October 11, 2001, the Florida Supreme Court affirmed two death sentences in related cases—those of Gary Bowles and James Card. *See Bowles v. State*, 804 So. 2d 1173, 1184 (Fla. 2001); *Card v. State*, 803 So. 2d 613, 617 (Fla. 2001). Both Bowles and Card petitioned for certiorari, and this Court denied both petitions—Bowles's on June 17, 2002, and Card's on June 28, 2002. *Bowles v. Florida*, 536 U.S. 930 (2002); *Card v. Florida*, 536 U.S. 963 (2002). In the days between those denials—on June 24, 2002—this Court decided *Ring*. Applying its *Asay/Mosley* rule, the Florida Supreme Court granted *Hurst* relief to Card while denying the same relief to Bowles, ***despite the fact that the Florida Supreme Court had affirmed their death sentences on the same day***. *See Bowles v. State*, 235 So. 3d 292, 292 (Fla. 2018); *Card v. Jones*, 219 So. 3d 47, 47 (Fla. 2017). *Cf.* Pet. for Cert. at 30, *Puiatti v. Florida* (No. 17-1706), 2018 WL 3141454 (U.S. June 22, 2018).

The Constitution does not permit the death penalty to be applied in so arbitrary a fashion. *Parker*, 498 U.S. at 321. Because Florida's *Asay/Mosley* rule violates the Eighth and Fourteenth Amendments, this Court should grant certiorari and vacate the judgment below.

II. THIS CASE PRESENTS A RECURRING, IMPORTANT ISSUE THAT WARRANTS THIS COURT'S REVIEW.

Because the *Asay/Mosley* rule injects complete arbitrariness into a State's determination of who shall live and who shall die, the issue presented here is of the utmost possible importance. This issue touches the fate of approximately 160 death row prisoners in Florida whose sentences, like Mr. Harvey's, became final before *Ring* and who have therefore been denied (or will be denied) any remedy for their unconstitutional sentences.

In the years since the *Asay/Mosley* rule was announced, Florida has already executed three prisoners whose sentences became final prior to *Ring* and who presented the argument that the *Asay/Mosley* rule was unconstitutional. If this question is not reviewed now, the Florida Supreme Court's arbitrary and irrational rule likely will result in the execution of many more Florida prisoners sentenced under an unconstitutional sentencing scheme, while other prisoners—whose sentences are not distinguishable on any relevant basis—will avoid execution.

Since the Florida Supreme Court denied relief in more than 100 cases that were stayed in light of *Hitchcock*, dozens of prisoners whose sentences became final before *Ring* have filed petitions for certiorari. These petitions will continue to be filed and, if denied, those cases will likely proceed to federal habeas review. By granting certiorari in this case, the Court can resolve this critical question of constitutional law. A decision from this Court would provide the lower federal courts with much-needed clarity concerning the legality of the

Asay/Mosley rule as they confront, with increasing frequency, the task of addressing this issue on federal collateral review.

Mr. Harvey appreciates that there is no conflict between the *Asay/Mosley* rule and any other decisions of the federal Courts of Appeals or state courts of last resort. One typical ground for granting certiorari is therefore not present in this case. However, the reason there is no conflict here is precisely because the partial retroactivity rule the Florida Supreme Court invented in *Asay* and *Mosley* is utterly novel and unprecedented. This *supports* the case for granting review here. *See Graham v. Florida*, 560 U.S. 48, 67 (2010), *as modified* (July 6, 2010) (holding Florida "sentencing practice" unconstitutional under the Eighth Amendment where, among other things, it was "exceedingly rare").

III. THIS CASE PRESENTS AN IDEAL VEHICLE FOR RESOLVING THE QUESTION PRESENTED.

Certiorari is also appropriate here because Mr. Harvey's case is an excellent vehicle for addressing whether the Florida Supreme Court's *Asay/Mosley* rule violates the Eighth or Fourteenth Amendments. Because the Florida Supreme Court determined that Mr. Harvey's death sentence became final before *Ring*, he falls into the class of individuals who are not entitled to retroactive application of the *Hurst* decisions. Unlike the petitions for certiorari that have been filed by other Florida death row prisoners in the pre-*Ring* class, the procedural history of Mr. Harvey's case uniquely demonstrates the unconstitutional arbitrariness of meting out death sentences based only on the timing of

judicial decisions. This case squarely presents the random, "freakish[]" factors that determine finality for purposes of the *Asay/Mosley* rule. *See Furman*, 408 U.S. at 310 (Stewart, J., concurring). As a result, this case provides the Court with an opportunity to address not only the arbitrariness of using *Ring* as a cut-off for retroactive application of the *Hurst* decisions, but also the arbitrariness involved in deciding on which side of that cut-off a particular case falls.

Further, because Mr. Harvey's advisory jury was not unanimous in its recommendation of a death sentence, this case squarely presents both aspects of the *Asay/Mosley* question: (1) whether the *Ring* cut-off can constitutionally be used to limit the retroactivity of *Hurst I*, ***and*** (2) whether the *Ring* cut-off can constitutionally be used to limit retroactivity as to the distinct Eighth Amendment unanimity requirement announced in *Hurst II*.

The constitutionality of the Florida Supreme Court's partial retroactivity scheme is presented clearly and cleanly in Mr. Harvey's case. The Court need not address any jurisdictional, procedural, or collateral issues before reaching the question raised.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Ross B. Bricker
Counsel of Record
Alexis E. Bates
Joshua M. Levin
Garrett J. Salzman
JENNER & BLOCK LLP
353 North Clark St.
Chicago, IL 60654
(312) 222-9350
rbricker@jenner.com

James T. Dawson
JENNER & BLOCK LLP
1099 New York Ave. NW
Washington, DC 20001
(202) 639-6000

May 17, 2019

APPENDIX

Appendix A

Supreme Court of Florida

No. SC17-790

HAROLD LEE HARVEY, Jr.,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

November 15, 2018

PER CURIAM.

Harold Lee Harvey, Jr., appeals the summary denial of his successive postconviction motion to vacate his sentences of death under Florida Rule of Criminal Procedure 3.851. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const. Because we find that the record conclusively demonstrates that Harvey is not entitled to relief, we find that the postconviction court properly summarily denied Harvey's motion.

Harvey was convicted in 1986 for the murders of Ruby and William Boyd. His crimes are detailed in *Harvey v. State*, 529 So. 2d 1083 (Fla. 1988). We affirmed Harvey's convictions and sentences. *Id.* His death

sentences became final on February 21, 1989, when the United States Supreme Court denied certiorari review. *See Harvey v. Florida*, 489 U.S. 1040 (1989). We denied habeas relief in *Harvey v. Dugger*, 656 So. 2d 1253 (Fla. 1995), and affirmed the denial of Harvey's initial postconviction motion in *Harvey v. State*, 946 So. 2d 937, 940 (Fla. 2006). In the instant appeal, Harvey argues that the postconviction court erred in denying his intellectual disability claim without an evidentiary hearing and in denying his claim for relief under *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).

A postconviction court's decision on whether to grant an evidentiary hearing on a postconviction motion is a pure question of law, reviewed de novo. *Mann v. State*, 112 So. 3d 1158, 1162 (Fla. 2013). "If the motion, files and records in the case conclusively show that the movant is entitled to no relief, the motion may be denied without an evidentiary hearing." Fla. R. Crim. P. 3.851(f)(5)(B).

Harvey's motion was filed December 20, 2016. Harvey, who had never before raised an intellectual disability claim, argues that his claim was timely because he filed two months after this Court decided *Walls v. State*, 213 So. 3d 340 (Fla. 2016). We have previously held that a similarly situated defendant's claim was untimely because he failed to raise a timely intellectual disability claim under *Atkins v. Virginia*, 536 U.S. 304 (2002). *See Rodriguez v. State*, 250 So. 3d 616 (Fla. 2016). Accordingly, the record conclusively shows that Harvey's claim is untimely, and he is not entitled to relief.

Harvey also contends that he is eligible for *Hurst* relief. This Court has repeatedly held that *Hurst* relief does not extend to cases final before the United States Supreme Court decided *Ring v. Arizona*, 536 U.S. 584 (2002). *See, e.g.*, *Hitchcock v. State*, 226 So. 3d 216, 217 (Fla. 2017), *cert. denied*, 138 S. Ct. 513 (2017). Harvey's case became final when the United States Supreme Court denied certiorari review of our opinion on direct appeal on February 21, 1989. *See Harvey v. Florida*, 489 U.S. 1040 (1989).[1] *See Harvey v. Florida*, 489 U.S. 1040 (1989). Accordingly, the record conclusively demonstrates that he is not entitled to relief on this claim.

Based on the foregoing, we affirm the postconviction court's summary denial of Harvey's motion.

It is so ordered.

LEWIS, QUINCE, POLSTON, LABARGA, and LAWSON, JJ., concur.
CANADY, C.J., concurs in result.
PARIENTE, J., concurs in result with an opinion.
ANY MOTION FOR REHEARING OR CLARIFICATION MUST BE FILED WITHIN

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[1] This is true despite the fact that, in an opinion that never became final, we briefly vacated Harvey's convictions and remanded for a new trial in *Harvey v. State*, 28 Fla. L. Weekly S513, S513-15 (Fla. July 3, 2003) (citing *Nixon v. Singletary*, 758 So. 2d 618 (Fla. 1995)). In light of the United States Supreme Court's decision in *Florida v. Nixon*, 543 U.S. 175, 187 (2004), we withdrew that opinion on rehearing, rejected Harvey's ineffective assistance claim, and affirmed his death sentence. *See Harvey v. State*, 946 So. 2d 937, 940 (Fla. 2006).

SEVEN DAYS. A RESPONSE TO THE MOTION FOR REHEARING/CLARIFICATION MAY BE FILED WITHIN FIVE DAYS AFTER THE FILING OF THE MOTION FOR REHEARING/CLARIFICATION. NOT FINAL UNTIL THIS TIME PERIOD EXPIRES TO FILE A REHEARING/CLARIFICATION MOTION AND, IF FILED, DETERMINED.

PARIENTE, J., concurring in result.

I agree that Harvey is not entitled to relief on his intellectual disability claim because he "failed to raise a timely . . . claim under *Atkins v. Virginia*, 536 U.S. 304 (2002)." Per curiam op. at 2. However, as I have explained several times, I would apply *Hurst*[2] retroactively to Harvey's case. *See Hitchcock v. State*, 226 So. 3d 216, 222-23 (Fla.) (Pariente, J., dissenting), *cert. denied*, 138 S. Ct. 513 (2017); *see also Asay v. State (Asay V)*, 210 So. 3d 1, 32-36 (Fla. 2016) (Pariente, J., concurring in part and dissenting in part), *cert. denied*, 138 S. Ct. 41 (2017).

Applying *Hurst* to Harvey's case, the jury's nonunanimous recommendations for death by votes of eleven to one indicate that the *Hurst* error is not harmless beyond a reasonable doubt. *Harvey v. State*, 946 So. 2d 937, 941 (Fla. 2006); see *Davis v. State*, 207 So. 3d 142, 175 (Fla. 2016). In addition, as Justice Anstead

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[2] *Hurst v. State (Hurst)*, 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017); *see Hurst v. Florida*, 136 S. Ct. 616 (2016).

argued and I agreed in 2006, Harvey's counsel failed to present significant evidence of mitigation:

> [D]ue to counsel's blatant neglect in heeding the psychologist's advice, *none of this powerful mitigating evidence was ever investigated, developed, or presented.* As our death penalty jurisprudence makes clear, counsel's duty is to thoroughly investigate first, and then evaluate in order to develop a sound defense strategy. We have a clear breach of counsel's duty here and substantial prejudice as a result. In the face of an almost apologetic case for mitigation, *the jury's recommendation for death was virtually a certainty*.

Harvey, 946 So. 2d at 951 (Anstead, J., concurring in part and dissenting in part, joined by Pariente, C.J.) (emphasis added). The "evidence of several important statutory mitigators and extensive nonstatutory mitigation" in Harvey's case included "numerous and serious mental problems, including organic brain damage . . . growing out of the defendant's deprived and abusive childhood, and at least two major traumatic events." *Id.* Thus, Justice Anstead concluded:

> I would hold that we cannot have confidence in the outcome of proceedings so infected by trial counsel's neglect and ineffectiveness. While counsel's neglect may ultimately have made no difference in the establishment of his guilt, the record in this case clearly establishes that the adversarial testing mandated by *Strickland* did not take place in the penalty phase proceedings of

> this case. We should remand for a new penalty phase, so that this essential adversarial testing can take place before a reasoned and informed judgment is rendered on life or death.

Id. at 952. Counsel's deficient representation, as explained by Justice Anstead, directly affected what we now know to be *Hurst*-relevant inquiries, specifically the weighing of aggravation and mitigation. *See Hurst*, 202 So. 3d at 44.

Accordingly, I would apply Hurst to Harvey's case, vacate Harvey's sentences of death, and remand for a new penalty phase.

An Appeal from the Circuit Court in and for Okeechobee County,
Robert L. Pegg, Judge -
Case No. 471985CF000075CFAXMX

Ross B. Bricker of Jenner & Block, LLP, Chicago, Illinois,

for Appellant

Pamela Jo Bondi, Attorney General, Tallahassee, Florida, Lisa-Marie Lerner and Donna M. Perry, Assistant Attorneys General, West Palm Beach, Florida,

for Appellee

Appendix B

MANDATE
SUPREME COURT OF FLORIDA

To the Honorable, the Judges of the:

Circuit Court in and for Okeechobee County, Florida

WHEREAS, in that certain cause filed in this Court styled:

HAROLD LEE HARVEY JR.
vs. STATE OF FLORIDA

Case No.: **SC17-790**

Your Case No.: **471985CF000075CFAXMX**

The attached opinion was rendered on: **11/15/2018**

YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinion, the rule of this Court and the laws of the State of Florida.

WITNESS, The Honorable CHARLES T. CANADY, Chief Justice of the Supreme Court of Florida and the Seal of said Court at Tallahassee, the Capital, on this 7th day of January 2019.

/s/ John A. Tomasino
Clerk of the Supreme Court of Florida

Appendix C

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT IN AND FOR OKEECHOBEE COUNTY, FLORIDA

STATE OF FLORIDA,	FELONY DIVISION CASE NO. 471985CF000075A

vs.

HAROLD LEE HARVEY, JR.,

Defendant.
_____ /

ORDER DENYING SUCCESSIVE MOTION TO VACATE DEATH SENTENCE

THIS CASE came before the court on the Defendant's motion filed on December 20, 2016; the State's answer filed on February 1, 2017; and the case management hearing conducted on March 28, 2017, in this capital postconviction case pursuant to Florida Rule of Criminal Procedure 3.851. The court finds and orders as follows.

The Defendant seeks to have his death sentence vacated pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). Because the Defendant's judgment and sentence became final on February 21, 1989, before the *Ring v. Arizona*, 536 U.S. 583 (2002) opinion was issued on June 24, 2002,

the Defendant is not entitled to retroactive *Hurst* relief. See *Asay v. State*, No. SC16-102, 2016 WL 7406538 at *13 (Fla. Dec. 22, 2016).

Further, the court incorporates by reference the State's answer and the State's hearing argument, and adopts the State's reasoning in finding the remaining claims/subclaims procedurally barred and/or beyond the scope of *Hurst* relief. Therefore,

The Defendant's request for evidentiary hearing and motion are denied.

DONE AND ORDERED in chambers in Vero Beach, Florida, on March 29, 2017.

/s/ Robert L. Pegg
ROBERT L. PEGG
CIRCUIT JUDGE

Copies to:

Donna M. Perry
Assistant Attorney General
donna.perry@myflorida.com

Leslie Campbell
Assistant Attorney General
leslie.campbell@myflorida.com

Ryan Butler
Assistant State Attorney
rbutler@sao19.org

Ross Bricker, Esquire
rbricker@jenner.com

Sharon L. Robson
Senior Staff Attorney
robsons@circuit19.org

John A Tomasino, Clerk
Florida Supreme Court
500 South Duval Street
Tallahassee, FL 32399-1927

Appendix D

Supreme Court of Florida

Thursday, December 20, 2018

CASE NO.: SC17-790
Lower Tribunal No(s).:
471985CF000075CFAXMX

HAROLD LEE HARVEY, Jr.,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

Appellant's Motion for Rehearing or Reconsideration is hereby denied.

CANADY, C.J., and PARIENTE, LEWIS, QUINCE, POLSTON, LABARGA, and LAWSON, JJ., concur.

A True Copy
Test:

/s/ John A. Tomasino
John A. Tomasino
Clerk, Supreme Court

cd
Served:

LISA-MARIE LERNER
ROSS BENJAMIN BRICKER
RYAN LEWIS BUTLER
HON. SHARON ROBERTSON, CLERK
HON. ELIZABETH ANN METZGER, CHIEF JUDGE
HON. ROBERT LEE PEGG, JUDGE

Appendix E

Supreme Court of Florida

No. SC95075

HAROLD LEE HARVEY,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[July 3, 2003]

PER CURIAM.

Harold Lee Harvey, a prisoner under a sentence of death, appeals an order of the trial court denying his motion for postconviction relief under Florida Rule of Criminal Procedure 3.850. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const. For the reasons set forth below, we reverse the trial court's denial of rule 3.850 relief and remand to the trial court for a new trial.

FACTS AND PROCEDURAL HISTORY

Harvey was charged with two counts of first-degree murder in the killings of William and Ruby Boyd during the course of a robbery at the Boyds' home. After obtaining money from the victims, Harvey and his codefendant discussed what they were going to do with the Boyds and decided they would have to kill them. Harvey shot both victims. *Harvey v. State*, 529 So. 2d 1083, 1084 (Fla. 1988).

At trial, Harvey was convicted of the first-degree murders of the Boyds. The jury recommended death by a vote of eleven to one. The sentencing judge found four aggravating factors[1] and as a mitigating circumstance found that Harvey had a low I.Q. and poor educational and social skills. *Id.* at 1088 n.5.

On appeal we affirmed Harvey's convictions and sentences of death. *Id.* at 1088. After the governor signed a death warrant on March 29, 1990, Harvey filed a petition for writ of habeas corpus with this Court along with a request for stay of execution. We issued a stay so that Harvey could seek relief under rule 3.850. Thereafter, Harvey filed a motion for postconviction relief in the trial court. After an evidentiary hearing on one of the claims, the trial judge entered an order denying relief. Harvey appealed the denial of his

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[1] The murders were found to be: (l) especially heinous, atrocious, or cruel; (2} committed for the purpose of avoiding lawful arrest; (3) committed in a cold, calculated, and premeditated manner; and (4) committed during the commission of or the attempt to commit robbery or burglary. *Id.* at 1087 n.4.

postconviction motion, raising seventeen claims, and also filed a supplemental habeas petition raising seven issues. We denied the petition for writ of habeas corpus, but reversed the trial court's summary denial of the postconviction motion as to five issues to determine if Harvey was denied effective assistance of counsel. *Harvey v. Dugger*, 656 So. 2d 1253 (Fla. 1995).[2] After an evidentiary hearing on these five issues, the trial court denied postconviction relief in an amended order.

Harvey now appeals the denial of postconviction relief, raising the following claims for review: (1) whether trial counsel was ineffective for failing to investigate and present evidence of mental mitigation; (2) whether trial counsel was ineffective for failing to adequately investigate and present mitigating evidence; (3) whether trial counsel was ineffective for admitting Harvey's guilt during opening statement; (4) whether trial counsel was ineffective for failing to make several arguments in support of his motion to suppress Harvey's confession;[3] and (5) whether the cumulative effect of trial counsel's other errors constituted ineffective assistance of counsel. However, because we find the resolution of claim (3) to be dispositive, claims (1), (2), (4), and (5) are rendered moot in light of this

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[2] This Court denied Harvey's remaining rule 3.850 claims. *See Harvey v. Dugger*, 656 So. 2d 1253 (Fla. 1995).

[3] In *Harvey v. Dugger*, 656 So. 2d at 1256, we found the remainder of this claim to be procedurally barred with the exception of the portion of the claim relating to the booking sheet because the issue of the suppression of Harvey's confession was raised on direct appeal and rejected by this Court.

opinion. *See Clark v. State*, 690 So. 2d 1280, 1282 n.4 (Fla. 1997).

DISCUSSION

Harvey claims trial counsel was ineffective for admitting guilt without Harvey's consent during the guilt phase opening statement. Specifically, Harvey argues that trial counsel's statements to the jury were the functional equivalent of a guilty plea to both first-degree and second-degree murder, and that this concession of guilt without Harvey's consent constituted *per se* ineffective assistance of counsel.[4] The State on the other hand, argues that the trial court properly denied relief because trial counsel did not concede guilt to the crime charged.

Crucial to this issue's resolution is a determination of the appropriate standard of review. As we have discussed numerous times, the *Strickland v. Washington*, 466 U.S. 668 (1984), standard normally applies to ineffective assistance of counsel claims. Under *Strickland*, in order to establish an ineffective assistance of counsel claim, a defendant must demonstrate (1) deficient performance by counsel and (2) prejudice to the defense. *Id.* at 687. However, there are instances where the rule announced in *United States v. Cronic*, 466 U.S.

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[4] Florida Rule of Criminal Procedure 3.171(c)(1)provides:

> Defense counsel shall not conclude any plea, agreement on behalf of a defendant-client without the client's full and complete consent thereto, being certain that any decision to plead guilty or nolo contendere is made by the defendant.

648 (1984), applies to decisions of trial counsel. In *Cronic*, "the Supreme Court created an exception to the *Strickland* standard for ineffective assistance of counsel and acknowledged that certain circumstances are so egregiously prejudicial that ineffective assistance of counsel will be presumed." *Stano v. Dugger*, 921 F.2d 1125, 1152 (11th Cir. 1991) (en banc). The Supreme Court stated:

> Moreover, because we presume that the lawyer is competent to provide the guiding hand that the defendant needs, *see Michel v. Louisiana*, 350 U.S. 91, 100-101 (1955), the burden rests on the accused to demonstrate a constitutional violation. There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.
>
> Most obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. *Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.* No specific showing of prejudice was required in *Davis v. Alaska*, 415 U.S. 308 (1974), because the petitioner had been "denied the right of effective cross-examination" which "'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would

> cure it.'" *Id.* at 318 (citing *Smith v. Illinois*, 390 U.S. 129, 131 (1968), and *Brookhart v. Janis*, 384 U.S. 1, 3 (1966)).

Cronic, 466 U.S. at 658-59 (emphasis added) (footnotes omitted). Thus, "*Cronic* only applies to the narrow spectrum of cases where the defendant was completely denied effective assistance of counsel." *Nixon v. Singletary*, 758 So. 2d 618, 622 (Fla. 2000).

To determine which test applies, we must first decide whether Harvey's trial counsel "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing." *Cronic*, 466 U.S. at 659. Trial counsel began his arguments to the jury by stating:

> Harold Lee Harvey is guilty of murder. If anything is established over the next week it will be that Harold Lee Harvey is guilty of murder. I have been doing defense work for some time. I've never said that in a court of law, that my client is guilty of murder. But he is. That doesn't by any means end your consideration of his case. The physical act that he committed was that he pulled the trigger on what was an automatic military weapon firing it into a room, discharging projectiles that hit human beings and killed them.
>
> Now what events lead up to that? What events place this young man in that chair in this room before these 14 people to determine not whether or not he's a murderer but merely what type of murderer he is?

At this point, the State argues that trial counsel's strategy was obvious: trial counsel was attempting, in the face of Harvey's confession, to argue that while Harvey did commit murder, it was second-degree murder because it was done without premeditation. However, a review of trial counsel's entire opening statement tells a different story. In describing the events leading up to the murder, trial counsel stated the following:

> And then it happened just about the way that Mr. Morgan said it did. When they got there Mrs. Boyd surprised them. She was outside the house. She was on her way out to get the garbage, they didn't have time to put their masks on. Mrs. Boyd came up to them, it was, I believe, shortly before nightfall, and asked them at the front door, "What are you doing out here?" And Stiteler looked at Lee and Lee looked at Stiteler and they knew that things were starting to go wrong. And they had Mrs. Boyd walk back into the house and Mr. Boyd was in the house and they told them, "We want your money." And Stiteler ran around the house, all through the house looking for this cache of money, while Lee went into the bedroom with Mr. and Mrs. Boyd. Mr. and Mrs. Boyd then gave Lee what little bit they had, which was about $30 or $40 at the time. They didn't have any stash of money there. And Stiteler never did find the stash of money and they came down and completed the robbery. And little facts come out in cases that are always sometimes more indicative of what's really going on and is more

> indicative about the human beings involved than what the real plan was than other things. And the little fact in this case is Mr. Boyd asked for money for church, it was Saturday. And he said, "I have to go to church tomorrow, you're taking all my money." After all, he's thinking this is the neighbor kid. I know this kid, he lives over here. What's this crazy kid doing? And Lee gave him back money for church, because he didn't plan to kill him.
>
> But then they went outside. And at that time Stiteler had the imposing weapon and Lee had the handgun. And at that point they began this frenzied conversation. They were just outside the home and the door was half open. They asked Mr. and Mrs. Boyd to sit down at a card table in the room, and you'll see pictures of the room.
>
> *And they had this conversation and without question what was discussed during this conversation was whether or not to kill these two people. This is a crazy conversation for these two young men to be having but that's what it had gotten to.*

(Emphasis added.) The emphasized language above clearly demonstrates that trial counsel admitted that Harvey deliberated his plan to kill the Boyds. By stating that Harvey and Stiteler had a conversation in which they discussed the plan to commit murder, trial counsel conceded that Harvey acted with premeditation and, therefore, conceded Harvey's guilt to first-degree murder. Trial counsel's comments were the functional

equivalent of a guilty plea, and for this reason, we find that trial counsel's performance failed to subject the prosecution's case to meaningful adversarial testing under *Cronic* and therefore must be presumed ineffective. *See Atwater v. State*, 788 So. 2d 223, 231 (Fla. 2001) (explaining when the *Cronic* presumption is applicable).

We faced a similar situation in *Nixon*. In that case, the defendant argued that trial counsel was ineffective because his opening and closing arguments contained statements that were the functional equivalent of a guilty plea. 758 So. 2d at 620. We agreed, and "conclude[d] that Nixon's claim must prevail at the evidentiary hearing below if the testimony establishes that there was not an *affirmative, explicit acceptance* by Nixon of counsel's strategy." *Id.* at 624 (emphasis added). In this case, the trial court has already conducted an evidentiary hearing on this issue, and made the following findings of facts and conclusion of law:

> Because [trial counsel] felt the confession "was the case," he had discussed with Mr. Harvey during case preparation what his defense could be and that they probably would admit some degree of murder if the confession was not suppressed. They specifically discussed on more than one occasion that if the confession was ruled admissible, [trial counsel] would make an opening statement that Harvey was guilty of murder, but that it was second degree murder and not either premeditated or felony murder. Mr. Harvey said he understood this defense tactic.

> [Trial counsel] stated to the jury during his opening statement that the evidence would show a murder was caused by a frightened and confused young Mr. Harvey after he and his friend had robbed the victims. He stated that Harvey did not intend to kill.
>
> * * * *
>
> Defendant's trial counsel was not ineffective because of his opening statement to the jury. Key to whether the opening statement was ineffective is whether the strategy of conceding guilt of murder and arguing for a conviction of murder in the second degree had been discussed with Mr. Harvey. The argument for a second degree conviction is not *per se* ineffective and is a valid trial strategy, for which there was an evidentiary basis. The facts show a sufficient discussion of this strategy between counsel and defendant before the statement was made to the jury. The facts also show that the concession of guilt of murder was not of guilt of first degree murder and thus not an improper admission of guilty plea.

However, the trial court's factual findings are not supported by the record.

As outlined above, trial counsel's opening statement actually conceded first-degree murder because trial counsel stated that "without question" Harvey discussed whether to kill the Boyds before the murder. Trial counsel also indicated that Harvey and his codefendant were in the process of robbing the victims

when the murders were committed; thereby conceding Harvey's guilt to felony murder. Testimony from the evidentiary hearing demonstrates that, at best, trial counsel informed Harvey of his strategy to concede guilt to second-degree murder. Trial counsel testified that in light of Harvey's confession, "I was offering [the jury] the opportunity of convicting him of murder while saving his life and pointing out that second degree murder is murder . . . . They could convict him of murder and feel as though they had done their civic duty while still saving his life." Harvey, however, testified that he did not consent to trial counsel's statements to the jury conceding *any* degree of murder, and even so, "[s]ilent acquiescence is not enough." *Nixon*, 758 So. 2d at 624. While we would be inclined to agree with the trial court's conclusion had trial counsel conceded only second-degree murder, we cannot agree in light of trial counsel's opening remarks to the jury.

We are aware that *Nixon* did not involve a confession. However, even in cases involving a confession, the jury is free to give as much or as little weight to the confession as it wishes. As we explained in *Nixon*: "In every criminal case, a defense attorney can, at the very least, hold the State to its burden of proof by clearly articulating to the jury or fact-finder that the State must establish each element of the crime charged and that a conviction can only be based upon proof beyond a reasonable doubt." 758 So. 2d at 625. In other words, trial counsel cannot be excused for conceding guilt and, under the facts of this case, failing to subject the prosecution's case to a meaningful adversarial testing just because Harvey confessed to the

crime charged. We made it very clear in *Nixon* that a defendant must give an "affirmative, explicit acceptance" of counsel's strategy to concede guilt because conceding guilt is the functional equivalent of a guilty plea. *Id.* at 624; *see also Atwater*, 788 So. 2d at 231 ("Thus, in *Nixon* we held that unless the defendant expressly consented to this strategy, or in effect knowingly and voluntarily consented to decline meaningful adversarial testing of the prosecution's case, then prejudice to the defendant is presumed and counsel is thus per se ineffective."). Here, Harvey pled not guilty to the charges against him, including first-degree murder. Trial counsel's concessions, however, rendered that not guilty plea a nullity.

CONCLUSION

In sum, we find that trial counsel conceded Harvey's guilt to first-degree murder by stating, in his guilt phase opening statement, that Harvey acted with premeditation and that the murder was committed during the course of a robbery. Trial counsel testified at the evidentiary hearing that conceded guilt in response to the denial of the motion to suppress Harvey's confession; however, trial counsel also repeatedly testified that his strategy was to concede guilt only to second-degree murder by arguing Harvey did not intend to kill the Boyds. A close reading of trial counsel's opening statement shows that he did otherwise. Thus, we conclude that under *Nixon* and *Cronic*, trial counsel's performance in this case constituted *per se* ineffective assistance of counsel. For this reason we reverse the denial of Harvey's motion for postconviction relief and remand with directions that his convictions be vacated.

It is so ordered.

ANSTEAD, C.J., PARIENTE and QUINCE, JJ., and SHAW, Senior Justice, concur.
WELLS, J., dissents with an opinion.
LEWIS, J., dissents;

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

WELLS, J., dissenting.

For many of the same reasons that I dissented in *Nixon v. Singletary*, 758 So. 2d 618 (Fla. 2000), I dissent here. In addition, I find this decision, in its application of *United States v. Cronic*, 466 U.S. 648 (1984), to be in conflict with this Court's decision in *Atwater v. State*, 788 So. 2d 223 (Fla. 2001), and the Eleventh Circuit's decision in *McNeal v. Wainright*, 722 F.2d 674 (11th Cir 1984).

However, it is also my view that here the present majority does not follow what this Court did in remanding this case for an evidentiary hearing on this issue in 1995 in *Harvey v. Dugger*, 656 So. 2d 1253, 1256 (Fla. 1995):

> In claim 1(f), Harvey argues that he was denied effective assistance of counsel in the guilt phase of the trial when without his consent, defense counsel conceded Harvey's guilt in the opening argument. Harvey maintains that this concession nullified his fundamental right to have

> the issue of guilt or innocence presented to the jury as an adversarial issue. *Because the record before us is unclear as to whether Harvey was informed of the strategy to concede guilt and argue for second-degree murder, we remand to the trial court for an evidentiary hearing on this issue. See Nixon v. State*, 572 So. 2d 1336 (Fla. 1990), cert. denied, 502 U.S. 854 (1991).

(Emphasis added.) In that 1990 *Nixon* opinion, this Court did not make a decision that *Cronic* applied to *Nixon*. All this Court did was state that it declined to dispose of Nixon's claim on the state of the record at that time.

The point here, though is that this Court now has before it the very same opening statement by defense counsel that it did in its 1995 consideration of this case. If this Court believed that "trial counsel's comments were the functional equivalent of a guilty plea" and, based upon *Cronic*, that trial counsel's representation of Harvey was presumptively ineffective, there was no need to remand the case for an evidentiary hearing.

Yet, this Court in 1995 did not hold that *Cronic* applied based upon the opening statement and did remand for an evidentiary hearing. The trial court held an extensive, six-day evidentiary hearing and entered a thorough and detailed order. In that order, the trial judge, based upon the evidence at the evidentiary hearing which this Court had directed that the trial judge have, found:

> The argument for a second degree conviction is not per se ineffective and is a valid trial strategy, for which there was an evidentiary basis. The *facts* show a sufficient discussion of the strategy between counsel and defendant before the statement was made to the jury.

State v. Harvey, No. 86-75 CF, order at 11 (Fla. 19th Cir. Ct. order filed Jan. 26, 1999) (emphasis added). The trial court did precisely what this Court ordered eight years ago. I find no basis under the law of this case to now reverse the trial judge on the basis that the present majority of this Court comes to the conclusion that counsel's opening statement, given in 1986, was per se ineffective assistance of counsel. To the contrary, to grant a new trial to Harvey on this basis is plainly wrong.

An Appeal from the Circuit Court in and for Indian River County,

Dwight Geiger, Judge – Case No. 86-322B

Ross B. Bricker, Jeffrey A. Koppy and Ellen C. Lamond of Jenner & Block, Chicago, Illinois,

for Appellant

Charles J. Crist, Jr., Attorney General, and Celia A. Terenzio, Assistant Attorney General, West Palm Beach, Florida,

for Appellee