CAPITAL CASE

DOCKET NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

PERRY ALEXANDER TAYLOR,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

David D. Hendry
Florida Bar Number 0160016
Law Office of the Capital Collateral Regional Counsel – Middle Region
12973 N. Telecom Parkway
Temple Terrace, Florida 33637
Phone No. (813) 558-1600 ext. 624
Fax No. (813) 558-1601
hendry@ccmr.state.fl.us
Attorney of Record for Petitioner

CAPITAL CASE

QUESTION PRESENTED

Perry Alexander Taylor was denied relief under *Hurst v. Florida*, 136 S. Ct. 616 (2016) in the State of Florida because his case was one of many that became final before June 24, 2002. The advisory panel who recommended death for Mr. Taylor did so by a non-unanimous vote of 8-4. There is no question that the *Hurst* errors were harmful in this case. Even the courts of the State of Florida agree that the errors were presumptively harmful based on the non-unanimous advisory panel recommendations. This case presents a question of partial and fractured retroactivity in death penalty cases, and whether the remaining decisions denying *Hurst* relief violate the Eighth Amendment and Equal Protection laws.

Following this Court's decision in *Hurst*, Florida has given relief to virtually all post-*Ring* cases with non-unanimous death recommendations. But Florida courts have denied relief in all cases like this one that became final before June 24, 2002. This is unfair. In *all* of these cases, the defendants were denied the right to a trial by jury on the elements which would support the imposition of a death sentence. It's not as if the capital system in the State of Florida gave more protections to defendants prior to June 24, 2002. As a matter of fact, defendants had less protections in the older cases. Evolving advancements in capital trial practices and industry standards in capital representation are such that the representation was better in the newer cases rather than the older cases. Florida has unconstitutionally left intact the oldest of the oldest death sentences, not the worst of the worst offenders. Cases in Florida

are now judged simply by their old age rather than by their weighty aggravation. This has led to very arbitrary and capricious results in Florida's post-*Hurst* landscape.

There is yet another reason why a death sentence is inappropriate and unconstitutional in this case. This case also presents a question regarding the reliability of the conviction for first degree murder in light of the flawed scientific testimony from a medical examiner regarding the likelihood that a sexual battery occurred in this case. Based on a relatively recent affidavit from the medical examiner in this case clarifying some statistics and probabilities of what likely occurred or did not occur during this murder, the sexual battery component of this case is called into question. As such, this case can be more correctly described as a rage murder (heat of passion type-murder) rather than a rape murder. Therefore life is the highest legally justifiable sentence remaining for this offense, not death. The advisory panel who recommended death by 8-4 did so without hearing the medical examiner correct his flawed testimony regarding the cause of the vaginal injuries in this case.

Mr. Taylor requests that certiorari be granted to address the following three substantial questions:

1. Consistent with Equal Protection and the Eighth Amendment, can the State of Florida deny *Hurst* relief and execute a prisoner because his case became before June 24, 2002?

2. Should *Hurst* be applied retroactively in the State of Florida at least to this Court's decision in *Caldwell v. Mississippi*, 472 U.S. 320 (1985) in light of the evolving standards of decency, Equal Protection, and the Eighth Amendment's prohibition of cruel and unusual punishment where the advisory panel at the penalty phase was repeatedly instructed in violation of *Caldwell*?

3. Whether the State of Florida execute a prisoner after the state's medical examiner corrected his flawed trial testimony via sworn affidavit, thus creating reasonable doubt for first degree murder?

LIST OF PARTIES

All parties appear in the caption on the cover page.

TABLE OF CONTENTS

INDEX OF APPENDICES

TABLE OF AUTHORITIES

CASES **Page(s)**

LAW REVIEW ARTICLES

MISCELLANEOUS

PETITION FOR WRIT OF CERTIORARI

Perry Alexander Taylor respectfully petitions for a writ of certiorari to review a judgment of the Supreme Court of Florida.

OPINIONS AND ORDERS BELOW

This proceeding was instituted as a successive motion for postconviction relief under Florida Rule Crim. Proc. 3.851. The 2016 opinion of the Circuit Court in and for Hillsborough County denying claims I-III of the motion (the claims related to the medical examiner Dr. Miller's testimony) is unreported. It is reproduced at Appendix A. The 2017 opinion of the Circuit Court in and for Hillsborough County denying amended claim IV (the *Hurst* claim) is unreported. It is reproduced at Appendix B. The Florida Supreme Court affirmed the denial of relief on May 3, 2018. That opinion is reported and is reproduced at Appendix C. A Motion for Rehearing was filed. It is reproduced at Appendix E. The Florida Supreme Court denied rehearing on July 5, 2018, by an order reproduced at Appendix D. Earlier opinions in the case are set out in Appendix F, G, and H.

JURISDICTION

The Florida Supreme Court's final judgment was entered on July 5, 2018. A sixty (60) day filing extension was requested and granted by Justice Thomas (Application (18A238)) on September 7, 2018 extending the time to file until December 2, 2018. This Court has jurisdiction to review it under 28 U.S.C. § 1257 (a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides in relevant part: "No person shall be . . .

deprived of life, liberty, or property without due process of law."

The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."

The Eighth Amendment provides in relevant part: "[C]ruel and unusual punishments [shall not be] inflicted."

The Fourteenth Amendment provides in relevant part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Perry Alexander Taylor was convicted of murder and sexual battery, and was initially sentenced to death following a unanimous advisory panel recommendation. The convictions were affirmed but the case was remanded for a new resentencing because of prosecutorial misconduct. *Taylor v. State*, 583 So. 2d 323, 330 (Fla. 1991). At resentencing, a new advisory panel recommended death by the non-unanimous vote of eight to four, and the trial court imposed a death sentence again. The first issue raised and denied on this appeal was that "the jury should not have been allowed to consider sexual battery as an aggravating circumstance because it unconstitutionally repeats an element of first degree murder." *Taylor v. State*, 638 So. 2d 30, 32 (Fla. 1994). As will be discussed in this petition further, this case legally involves only an aggravated battery, not a sexual battery.

Certiorari should be granted in this case for three primary reasons: i) as this Court stated in *Hurst*, Florida's death penalty scheme is unconstitutional; therefore the death penalty imposed in this case is unconstitutional, and should be vacated; ii)

Florida's partial and fractured retroactivity results in violations of equal protection laws illustrated by the following: approximately half of the similarly-situated inmates on Florida's death row have received *Hurst* relief; Mr. Taylor and others who have been on death row for relatively longer time periods have not received the benefit of *Hurst* relief; iii) this should not have been a death penalty case because it is clearly a rage murder, not a rape murder, as exhibited by the medical examiner's sworn recantation. The death sentence in this case should be vacated.

Following the denial of direct appeal in 1994, Mr. Taylor filed a petition for writ of certiorari in the United States Supreme Court, which was denied on November 14, 1994. *Taylor v. Florida*, 513 U.S. 1003 (1994).

Mr. Taylor filed his 3.850 motion in 1996. After evidentiary hearings were held in 2003, 2004, and 2005, the circuit judge denied all relief. The Florida Supreme Court affirmed. *Taylor v. State*, 3 So. 3d 986 (Fla. 2009). The Federal District Court for the Middle District of Florida and the Eleventh Circuit denied federal relief. This Court denied certiorari in 2015. *Taylor v. Jones*, 135 S. Ct. 2323 (2015).

Relevant to this petition, well before *Ring v. Arizona,* 536 U.S. 584 (2002) was even issued, Mr. Taylor raised *Ring*-like claims in the Florida Supreme Court. *See Taylor v. State*, 638 So. 2d 30, 33 fn. 4 (Fla. 1994)("Taylor also makes the following claims (1) that the Florida death penalty statute which allows a bare majority death recommendation violates the Constitution; (2) that the death penalty statute conflicts with the Florida Rules of Criminal Procedure."). All of those claims were denied.

Mr. Taylor filed his first successive motion for postconviction relief on July 14,

2016. In the motion he raised three separate claims generally related to the trial testimony of medical examiner Dr. Miller. He also raised a fourth claim citing the United States Supreme Court decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016).

On January 24, 2017, Mr. Taylor filed a Motion to Amend First Successive Motion for Postconviction Relief in the lower state court, including in that motion an expanded claim IV based on *Hurst v. Florida* and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). 2017 ROA Vol. II 301-325. The lower court granted the motion to amend February 8, 2017. 2017 ROA Vol. II 326-327. On March 22, 2017, Mr. Taylor filed his witness and exhibit list in preparation for evidentiary hearing in the lower state court, which included references to his *Ring*-like claims previously raised decades prior, as well as a new report from applied sociologist Harvey A. Moore, Ph. D. who identified approximately 140 *Caldwell*-type errors from trial. Dr. Moore ultimately concluded in his report the following:

> [A] jury which is told its work will not determine the outcome of sentencing necessarily is less likely to take its role as seriously as would be the case if it actually bore more direct responsibility for execution of sentence. . . .Based on the socio-legal standard established in *Caldwell v. Mississippi*, 472 U.S. 320 (1985) we may we may conclude to a reasonable degree of sociological certainly the jury which recommended a sentence of death for Mr. Taylor [] was persuaded against the requisite level of attention to its responsibility through comments made by the court and the prosecutor, and repeated by fellow members of the venire.

Dr. Moore's Report at 2017 ROA Supp. 811.

On March 22, 2017, hours after Mr. Taylor filed his witness and exhibit list, the state filed a motion to strike Dr. Moore as a witness and moved to strike his report. 2017 ROA Vol. II 347-350. On May 2, 2017, Mr. Taylor filed a Second Motion

to Amend First Successive Motion for Postconviction Relief, attaching a claim related to a new law now requiring unanimous jury verdicts for death in Florida. 2017 ROA Vol. II 351-373. On May 3, 2017, Mr. Taylor responded to the state's Motion to Strike the witness and exhibit list. 2017 ROA Vol. II 374-385.

On May 15, 2017, the lower court denied Mr. Taylor's Second Motion to Amend First Successive Motion for Postconviction Relief. 2017 ROA Vol. III 423-425. A hearing was held on the state's motion to strike Dr. Moore and his report on May 18, 2017. The lower court heard extensive qualifying testimony from Dr. Moore on May 18, 2017, then issued an order granting the state's motion to strike on June 12, 2017. 2017 ROA Supp. 850-936. Also on June 12, 2017, the lower court denied the Amended Claim Four of the Defendant's First Successive Motion for Postconviction Relief. 2017 ROA Vol. III 568-577. Mr. Taylor filed Motions for Rehearing on the striking of Dr. Moore (2017 ROA Vol. III 578-583) and on the denial of Amended Claim Four (2017 ROA Vol. III 584-586). On June 29, 2017 Mr. Taylor filed a Supplement to the Motion for Rehearing on the striking of Dr. Moore including an amended report from Dr. Moore addressing some of the issues raised by the lower court in the previous order striking the report (2017 ROA Vol. III 587-627; (*See also* Appendix I, the revised 6/28/17 report). On July 13, 2017 the lower court entered orders denying rehearing on Claim Four and on the Dr. Moore issue (2017 ROA Vol. III 628-629, 630-31). This appeal of those adverse decisions follows.

REASONS FOR GRANTING THE WRIT

To deny Mr. Taylor retroactive relief under *Hurst v. Florida*, 136 S. Ct. 616

(2016), on the ground that his death sentence became final before June 24, 2002 under the decisions in *Asay v. State*, 210 So. 3d 1 (Fla. 2016), while granting retroactive *Hurst* relief to inmates whose death sentences had not become final after June 24, 2002 under the decision in *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), violates Mr. Taylor's right to Equal Protection of the Laws under the Fourteenth Amendment to the Constitution of the United States (e.g. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942)) and his right against arbitrary infliction of the punishment of death under the Eighth Amendment to the Constitution of the United States (e.g., *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Espinoza v. Florida*, 505 U.S. 1079 (1992)(per curiam)).

The Equal Protection violation here is especially egregious because the crime should not have even been eligible for the death penalty. This was a rage murder, not a rape murder. Even with the advisory panel being misled by the prosecution to believe that this murder occurred during the course of a sexual battery, the recommendation still was only 8-4 in favor of the death penalty. This crime was not the worst of the worst. His death sentence remains simply because his case became final before the arbitrary date line set by the State of Florida. Mr. Taylor should not be denied *Hurst* relief just because his case was final prior to June 24, 2002.

EQUAL PROTECTION CONSIDERATIONS

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State 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.

Fourteenth Amendment, Equal Protection Clause (1868).

The Florida courts have overlooked the Equal Protection Clause of the Fourteenth Amendment by strictly adhering to an arbitrary and capricious cutoff date announced in *Asay v. State*, 210 So. 3d 1 (Fla. 2016). By failing to consider Mr. Taylor's individual circumstances, and by failing to grant Mr. Taylor *Hurst* relief, the Florida courts enforced a law that denied Mr. Taylor due process of law. At the urging of the state, the Florida courts denied Mr. Taylor equal protection of the law. All inmates similarly situated on Florida's death row were all tried and sentenced to death under an unconstitutional capital punishment system. To grant some 200 inmates *Hurst* relief, yet deny the other approximately 200 inmates *Hurst* relief who were sentenced to death earlier in time under the same unconstitutional system is to violate Equal Protection laws.

Because Death is Different, this Court should not accept a strict June 24, 2002 cutoff date and permit the State of Florida to deny Mr. Taylor *Hurst* relief. *See, e.g.*, *Furman v. Georgia*, 408 U.S. 238, 286–89 (1972) (Brennan, J., concurring) ("[d]eath is a unique punishment"; "[d]eath . . . is in a class by itself"); *id.* at 306 (Stewart, J., concurring) ("penalty of death differs from all other forms of criminal punishment, not in degree but in kind"); *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) ("penalty of death is different in kind from any other punishment" and emphasizing its "uniqueness"); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) ("penalty of death is qualitatively different from a sentence of imprisonment, however long");

Lockett v. Ohio, 438 U.S. 586, 604 (1978) ("qualitatively different"); *Spaziano v. Florida*, 468 U.S. 447, 459 (1984) (citing Court's prior recognition of the "qualitative difference of the death penalty"); *id.* at 468 (Stevens, J., concurring in part and dissenting in part) ("death penalty is qualitatively different . . . and hence must be accompanied by unique safeguards"); *Wainwright v. Witt*, 469 U.S. 412, 463 (1985) (Brennan, J., dissenting) (citing "previously unquestioned principle" that unique safeguards necessary because death penalty is "qualitatively different"); *McCleskey v. Kemp*, 481 U.S. 279, 340 (1987) (Brennan, J., dissenting) ("hardly needs reiteration that this Court has consistently acknowledged the uniqueness of the punishment of death"); *Atkins v. Virginia*, 536 U.S. 304, 337 (2002) (Scalia, J., dissenting) (majority opinion holding it cruel and unusual to punish retarded persons with death is "pinnacle of . . . death-is-different jurisprudence"); *Ring v. Arizona*, 536 U.S. 584, 605–06 (2002) ("no doubt that '[d]eath is different'") (citation omitted); *id.* at 614 (Breyer, J., concurring in the judgment) ("Eighth Amendment requires States to apply special procedural safeguards when they seek the death penalty.").

Death is different, and this case is different from the other nearly 200 Florida cases who had the misfortune of falling on the wrong side of June 24, 2002. Aside from the unique circumstances in Mr. Taylor's case revealing that the jury was misled as to the facts of this case and the degree of this murder, it is quite remarkable that nearly half of the Justices of the Florida Supreme Court (three out of seven Justices) felt that the June 24, 2002 cutoff was arbitrary and capricious, and therefore violated principles of Equal Protection. *See Asay v. State*, 210 So. 3d 1 (Fla. 2016).

PERRY, J., dissenting.

I cannot agree with the majority's decision to limit the retroactive application of *Hurst v. Florida* to those cases that were not final when the United States Supreme Court decided *Ring*. In my opinion, the line drawn by the majority is arbitrary and cannot withstand scrutiny under the Eighth Amendment because it creates an arbitrary application of law to two groups of similarly situated persons. Coupled with Florida's troubled history in applying the death penalty in a discriminatory manner (footnote omitted). I believe that such an application is unconstitutional. I therefore dissent.

…

Indeed, as my retirement approaches, I feel compelled to follow other justices who, in the twilight of their judicial careers, determined to no longer "tinker with the machinery of death." *See, e.g.*, *Callins v. Collins*, 510 U.S. 1141 [] (1994)(Blackmun, J., dissenting). The majority's decision today leads me to declare that I no longer believe that there is a method of which the State can avail itself to impose the death penalty in a constitutional manner. Because the majority of this Court has already determined that Asay will be executed for his crimes, I limit the remainder of my discussion to the application of *Hurst v. Florida* to this case.

I would find that *Hurst v. Florida* applies retroactively, period. I therefore would not limit its application to cases final after June 24, 2002, when the United States Supreme Court issued its decision in *Ring*. I can find no support in the jurisprudence of this Court where we have previously determined that a case is only retroactive to a date certain in time. Indeed, retroactivity is a binary-—either something is retroactive, has effect on the past, or it is not.

The majority's opinion is inconsistent with our analysis of principles of fairness in our recent decision *Falcon v. State*, 162 So. 3d 954 (Fla. 2015). In *Falcon*, this Court stated that the principles of fairness underlying the *Witt* analysis "make it very difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases." *Falcon*, 162 So. 3d at 962. In *Falcon,* we found that applying a constitutional rule to some juvenile offenders but not to other similarly situated juvenile offenders simply because of the date their sentences became final would result in unjust disparate treatment of similarly situated persons. *Id.*; see also *Thompson v. Dugger*, 515 So. 2d 173 (Fla. 1987)(concluding that all death sentenced individuals, regardless of when their sentences became final, were entitled to seek relief in light of *Hitchcock v. Dugger*, 481 U.S. 393 [] (1987). Accordingly, we concluded that "[t]he patent unfairness of

depriving indistinguishable juvenile offenders of their liberty for the rest of their lives, based solely on when their cases were decided, weighs heavily in favor of [retroactivity]." *Falcon*, 162 So. 3d at 962.

Death penalty cases should be treated as a "class apart" from non-death penalty cases. *Furman* [at] 285-87 (citation omitted). We have consistently noted that "death is different" and as such, required careful consideration by the judiciary. *Robertson v. State*, 143 So. 3d 907, 912 (Fla. 2014) (Florida jurisprudence "begins with the premise that death is different."); (other Florida case citations omitted) [] ("[T]his Court's automatic, mandatory, and statutorily required review of death penalty cases 'must begin with the premise that death is different.' "); [] ("This Court has long adhered to the idea that [i]n the field of criminal law, there is no doubt that 'death is different.' "); [] ("[O]ur jurisprudence also embraces the concept that 'death is different' and affords a correspondingly greater degree of scrutiny to capital proceedings."). In its decision today, this Court chooses not to minimize the risk of wholly arbitrary and capricious implantation of the death penalty.

In the present case, the majority strays from its reasoning in *Falcon* and decides that in capital cases where the Sixth Amendment rights of hundreds of persons were violated, it is appropriate to arbitrarily draw a line between June 23 and June 24, 2002—the day before and the day after *Ring* was decided. The majority does not offer a convincing rationale as to why 173 death sentenced persons should be treated differently than those whose sentences became final post- *Ring*, while overestimating the burden that these 173 capital cases will place on the judiciary. Because "death is different," retroactive application of *Hurst v. Florida* to all death sentenced persons cannot be justified by the mere fact that it will be harder to grant a new penalty phase or other relief to 173 additional persons.

…

I submit that there is a more logical way to provide finality to the victims' families without violating the Eighth Amendment. First, the majority has overstated the effect of retroactivity on the administration of justice: the effect would not be substantial.

…

Moreover, because the majority opines that a new penalty phase is required in these cases, the burden on state attorneys, defense counsel, and the judiciary is not as great as if the convictions were vacated. However, even this burden could be eliminated if the Court were to abide by the Legislature's directive in [§]775.082(2), Florida Statutes. In so

doing, these capital defendants would receive life sentences, new penalty phase proceedings would be unnecessary, and the burden on the administration of justice would be nil. In other words, this Court has rejected an available remedy that creates no burden but then pronounces that the burden is far too great to provide equal application to similarly situated defendants. In short, there will be situations where persons who committed equally violent felonies and whose death sentences became final days apart will be treated differently without justification from this Court.

For example, Asay committed two murders on the night of July 17, 1987. His sentence became final on October 7, 1991, when the United States Supreme Court denied certiorari. *See Asay v. Florida*, 502 U.S. 895 [] (1991). Asay's nine-to-three jury recommendation that resulted in a death sentence would not be constitutional if *Hurst v. Florida* applied to him, but the majority holds that he is not entitled to the Sixth Amendment protections articulated in *Hurst v. Florida* (footnote omitted). Yet, under the present majority's decision, another defendant who committed his offense on an earlier date but had his sentence vacated and was later resentenced after *Ring*, cannot receive the death penalty without the protections articulated in *Hurst* (footnote omitted). Timothy Hurst committed his crimes on May 2, 1990, and was originally sentenced on April 26, 2000, which was final October 21, 2002, a few short months after the decision in *Ring*. The majority's application of *Hurst v. Florida* makes constitutional protection depend on little more than a roll of the dice. This cannot be tolerated.

In light of the relatively few number of capital cases in proportion to the judiciary's entire caseload and the fact that *Hurst v. Florida* requires either only new penalty proceedings or no new proceedings at all, the administration of justice would not be over-burdened by the retroactive application of *Hurst v. Florida*. The United States Supreme Court has previously applied new constitutional rules retroactively despite significantly greater burdens on judicial administration. For instance, when the United States Supreme Court made retroactive its holding that no juvenile may be sentenced to life in prison without some opportunity for release, it entitled some 2295 prisoners nationwide to resentencing proceedings or parole hearings. *See Montgomery v. Louisiana*, --U.S.--, 136 S. Ct. 718 [] (2016); John R. Mills, et al., *Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway*, 65 Am. U. L. R. 535, 570 n.215 (2016). Following the United States Supreme Court's decision to require states to provide counsel to indigent defendants even in noncapital cases, this Court noted that the decision could require not just new sentencing proceedings but entirely

new trials for 4542 prisoners, *representing over half of Florida's entire prison population*. *Roy v. Wainright*, 151 So. 2d 825, 827 (Fla. 1963)("The Division of Corrections reports that as of June 30, 1962, there were approximately 8,000 State prisoners in custody. Of this group 4,065 entered pleas of guilty without the benefit of counsel. Four hundred, seventy-seven (477) entered pleas of not guilty but were convicted without benefit of counsel."). The impact of *Hurst v. Florida* to the administration of justice pales in comparison.

Because I would find that Asay is entitled to the constitutional protections articulated in *Hurst v. Florida*, I turn now to what I would find to be the appropriate remedy. As I explained fully in *Hurst v. State,* 202 So. 3d 40, 75-76 (Fla. 2016) there is no compelling reason that the plain language of section 775.082(2), Florida Statutes, does not apply to this case. Because his death sentence is unconstitutional, Asay is entitled to the remedy that the Legislature has specified: the sentencing court must vacate his death sentence and sentence him to life in prison. *See* § 775.082(2), Fla. Stat. (2015)("In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1).").

The plain language of the statute does not rely on a specific amendment to the United States Constitution, nor does it refer to a specific decision by this Court or the United States Supreme Court. Further, it does not contemplate that all forms of the death penalty in all cases must be found unconstitutional. [T]he statute uses singular articles to describe the circumstances by which the statute is to be triggered. Indeed, the statute repeatedly references a singular defendant being brought before a court for sentencing to life imprisonment. *Hurst v. State,* 202 So. 3d at 75-76 (Fla. 2016)(Perry, J., concurring in part and dissenting in part).

The sentencing court unconstitutionally imposed the death penalty on Asay. Accordingly, "the death penalty in [Asay's] capital felony [has been] held to be unconstitutional," and accordingly, "the court having jurisdiction over [Asay who was] previously sentenced to death for a capital felony shall cause [him] to be brought before the court, and the court shall sentence [him] to life imprisonment." *Id.* We need conduct no further legal gymnastics to carry out the will of the Legislature. *See, e.g.*, *English v. State*, 191 So. 3d 448, 450 (Fla. 2016)("When the statutory language is clear or unambiguous, this Court need not look

behind the statute's plain language or employ principles of statutory construction to determine legislative intent."). The sentencing court must impose a life sentence pursuant to [§] 775.082(2), Florida Statutes.

Asay v. State, 210 So. 3d at 37-41 (Fla. 2016).

LEWIS, J., concurring in result.

I agree with most of the conclusions set forth in the majority opinion. However, in my view, the majority opinion has incorrectly limited the retroactive application of *Hurst* by barring relief to even those defendants who, prior to *Ring*, had properly asserted, presented, and preserved challenges to the lack of jury factfinding and unanimity in Florida's capital sentencing procedure at the trial level and on direct appeal, the underlying gravamen of this entire issue. In this case, Asay did not raise a Sixth Amendment challenge prior to the case named *Ring* arriving. *See* majority op. at 11 n.12. Therefore, I agree that he is not entitled to relief, and I concur in result. However, I write separately to explain my disagreement with the *Hurst* retroactivity issue as adopted by this Court.

Many courts struggle with the "staggeringly intricate body of law governing the question whether new constitutional doctrines should be 'retroactively' or 'prospectively' applied." Witt v. State, 387 So. 2d 922, 925 (Fla. 1980) (quoting Paul M. Bator et al., *Hart & Wechsler's The Federal Court and the Federal System,* 1477 (2d ed. 1973)). This Court need not tumble down the dizzying rabbit hole of untenable line drawing; instead, the Court could simply entertain *Hurst* claims for those defendants who properly presented and preserved the substance of the issue, even before *Ring* arrived. This is consistent with the precedent of this Court. In *James v. State*, 615 So. 2d 668, 669 (Fla. 1993), we granted relief to a defendant who had asserted at trial and on direct appeal that the jury instruction pertaining to the heinous, atrocious, or cruel aggravating circumstance was unconstitutionally vague *before* the United States Supreme Court ultimately reached that same conclusion in *Espinoza v. Florida*, 505 U.S. 1079 [] (1992). We concluded that—despite his case becoming final before the principle of law had a case name—it would be unjust to deprive James of the benefit of the Supreme Court's holding in *Espinoza* after he had properly presented and preserved such a claim. *James*, 615 So. 2d at 669. Similarly, I believe that defendants who properly preserved the substance of a *Ring* challenge at trial and on direct appeal prior to that decision should also be entitled to have their constitutional challenges heard.

> …
> As Justice Perry noted in his dissent, there is no salient difference between June 23 and June 24, 2002—the days before and after the case name *Ring* arrived. *See* Perry, J., dissenting op. at 38. However, that is where the majority opinion draws its determinative, albeit arbitrary, line. As a result, Florida will treat similarly situated defendants differently—here, the difference between life and death—for potentially the simple reason of one defendant's docket delay. Vindication of these constitutional rights cannot be reduced to either fatal or fortuitous accidents of timing (footnote omitted).
>
> Every pre-*Ring* defendant has been found by a jury to have wrongfully murdered his or her victim. With full knowledge that some defendants properly preserved challenges to their unconstitutional sentences, this Court now limits the application of *Hurst*, resulting in the State wrongfully executing those defendants. It seems axiomatic that "two wrongs don't make a right"; yet, this Court essentially condones that outcome with its very limited interpretation of *Hurst*'s retroactivity and application.

Asay v. State, 210 So. 3d at 30-31.

PARIENTE, J., concurring in part and dissenting in part.

> Our recent decision in *Hurst [v. State]* (footnote omitted) is undoubtedly a decision of fundamental constitutional significance based not only on the United States Supreme Court's decision in *Hurst v. Florida* (footnote omitted), but also on Florida's separate constitutional right to trial by jury under article I, section 22, of the Florida Constitution. Not only did the United States Supreme Court hold that Florida's capital sentencing scheme was unconstitutional based on the Sixth Amendment to the United States Constitution, but this Court also held in *Hurst* that capital defendants are entitled to unanimous jury findings of each aggravating factor, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances and a unanimous jury recommendation of death as part of Florida's constitutional right to a trial by jury under article I, section 22, of the Florida Constitution. *Hurst* 202 So. 3d at 44.
>
> Applying decisions of fundamental constitutional significance retroactively to defendants in similar circumstances is essential to "ensuring fairness and uniformity in individual adjudications." *Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980)(footnote omitted). This Court has always recognized that "death is different," so we must be

extraordinarily vigilant in ensuring that the death penalty is not arbitrarily imposed (footnote omitted). Therefore, I dissent from the majority's holding not to apply *Hurst* retroactively to all death sentences that were imposed under Florida's unconstitutional capital sentencing scheme (footnote omitted).

In *Hurst,* we emphasized the importance of unanimity in jury decisions, stating: "If death is to be imposed, unanimous jury sentencing recommendations, when made in conjunction with the other critical findings unanimously found by the jury, provide the highest degree of reliability in meeting these constitutional requirements in the capital sentencing process." 202 So. 3d at 60. In fact, the majority acknowledges the importance of our holding in *Hurst:*

> [T]he ultimate decision of whether a defendant lives or dies rests on these factual findings, only strengthening the purpose of the new rule. Both this Court and the Supreme Court have recognized that "death is different." *See, e.g.*, *Yacob v. State*, 136 So. 3d 539, 546 (Fla. 2014) (quoting *Fitzpatrick v. State*, 527 So. 2d 809, 811 (Fla. 1988)); *Ring,* 536 U.S. at 605; 122 S. Ct. 2428. Thus, in death cases, this Court has taken care to ensure all necessary constitutional protections are in place before one forfeits his or her life, and the purpose of the new rule weighs in favor of applying *Hurst v. Florida* retroactively to *Asay*.

Majority op. at 17–18.

The majority's decision will have an immediate effect on Asay, who is the subject of a pending death warrant. Majority op. at 5–6. In my view, by limiting the retroactivity of the rights explained in *Hurst v. Florida* and *Hurst*, the majority discounts the significance of the unanimity requirement imposed by this Court's holding in *Hurst* and applied in our holding in *Perry v. State*, 41 Fla. Law Weekly S449, --So. 3d --, 2016 WL 6036982 (Fla. Oct. 14, 2016), invalidating Florida's revised 2016 death penalty sentencing statute for its failure to require unanimity in the jury's final recommendation of death.

While I cannot agree with Justice Perry's interpretation and application of section 775.082(2), Florida Statutes, which would reduce every final death sentence to life after *Hurst v. Florida,* I agree that a faithful application of the *Witt* test for retroactivity compels full retroactivity of *Hurst.* A faithful *Witt* analysis includes consideration of the uniqueness and finality of the death penalty, together with the fundamental constitutional rights at stake when the State sentences

someone to death—namely the right to trial by jury and sentencing by a unanimous jury as guaranteed by both the Sixth Amendment to the United States Constitution and article I, section 22, of the Florida Constitution.

Ultimately, when applying the retroactivity equation of balancing "the justice system's goals of fairness and finality" in this circumstance, fairness must prevail over finality. *Ferguson v. State*, 789 So. 2d 306 (Fla. 2001). I recognize, as does the majority, the victims and their families' "need for finality" but stress, as does Justice Perry in his dissent, that no conviction shall be disturbed. Majority op. at 22; *see Asay*, No. SC16–223, op. at 39 (Perry, J., dissenting). The question is not of guilt or innocence but, rather, of life or death.

…

I would conclude that *Hurst* creates the rare situation in which finality yields to fundamental fairness in order to ensure that the constitutional rights of all capital defendants in Florida are upheld (footnote omitted). *Witt,* 387 So. 2d at 925*; Ferguson*, 789 So. 2d at 312. As Chief Justice Strine of the Supreme Court of Delaware stated in his recent concurrence in *Rauf v. Delaware*, a decision that invalidated Delaware's capital sentencing scheme in light of the United States Supreme Court's decision in *Hurst,* and which the Delaware Supreme Court recently held applies retroactively under the more restrictive *Teague* test (footnotes omitted):

> If U.S. Supreme Court jurisprudence has and therefore can turn on a determination that death is different, it is certainly appropriate to recognize that the decision to give death or life is the most important one that can be made in any criminal trial, and that the Sixth Amendment right was understood as of its adoption and for much of our history as allocating that authority to the jury.

Rauf v. Delaware, 145 A. 3d 430, 473 (Del. 2016) (Strine, C.J., concurring) (footnotes omitted).

Maintaining the focus on fairness, I turn to the third prong of the *Stovall/Linkletter* test: the effect on the administration of justice. As this Court stated in *Witt*, "society recognizes that a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice." 387 So. 2d at 925. When determining whether someone lives or dies, requiring that a jury determine unanimously that the death penalty be imposed—after carefully determining which aggravators exist, weighing

> the sufficiency of the aggravators, determining that the aggravating factors outweigh the mitigating circumstances—"promotes a thorough and reasoned resolution," thereby stabilizing capital sentencing by ensuring that sentences of death are constitutional (footnote omitted). Undoubtedly, the justice system would be affected if this Court applied *Hurst r*etroactively to all defendants on death row in Florida, but I conclude that this impact does not justify the injustice that results from not granting relief to all eligible capital defendants presently on Florida's death row.
>
> For these reasons, I conclude that *Hurst* should apply to all defendants who were sentenced to death under Florida's prior, unconstitutional capital sentencing scheme. The majority's conclusion results in an unintended arbitrariness as to who receives relief depending on when the defendant was sentenced or, in some cases, resentenced. For example, many defendants whose crimes were committed before 2002 will receive the benefit of *Hurst* because they were previously granted a resentencing on other grounds and their newest death sentence was not final when *Ring* was decided (footnote omitted). To avoid such arbitrariness and to ensure uniformity and fundamental fairness in Florida's capital sentencing, our opinion in *Hurst* should be applied retroactively to all death sentences. Thus, I would apply *Hurst* retroactively to Asay.
>
> Because I would apply *Hurst* to Asay's case, I now turn to whether the *Hurst* error in Asay's penalty phase was harmless beyond a reasonable doubt. On remand from the United States Supreme Court, this Court determined that such error is capable of harmless error review and set forth the test for such review. *Hurst*, 202 So. 3d at 66-68. In Asay's case, the penalty phase jury recommended death by a vote of nine to three. Because there was no special verdict, we do not know why the three dissenting jurors did not vote to recommend death—whether they did not find that sufficient aggravating factors existed or did not find that sufficient aggravating factors outweighed the mitigating circumstances, or whether three jurors otherwise determined that death for this twenty-three-year-old was not the appropriate punishment. Thus, it cannot be said that the lack of unanimity was harmless beyond a reasonable doubt, and I would therefore conclude that Asay is entitled to a new penalty phase.

Asay v. State, 210 So. 3d at 32-37.

As Justice Pariente mentions in her dissent, it is quite remarkable that the Supreme Court of Delaware extended *Hurst v. Florida* relief to Delaware's entire

death row population based on the denial of the condemned prisoners' Sixth Amendment rights to a trial by jury. *Powell v. Delaware*, 153 A. 3d 69 (Del. 2016). Yet, in the State of Florida, where *Hurst* originated, *Hurst* relief was only extended to about half of Florida's death row population.

FOLLOWING *HURST*, IT IS CLEAR THAT THE STATE OF FLORIDA HAS VIOLATED, AND CONTINUES TO VIOLATE *CALDWELL* FOR OVER 33 YEARS

Evolving standards of decency should prohibit the State of Florida from continuing to execute inmates whose Sixth and Eighth Amendment rights have clearly been violated. Especially inmates like Mr. Taylor whose advisory panel was misled to believe that he committed rape and premeditated murder, and whose advisory panel still did not find that he should be put to death unanimously.

Numerous *Caldwell* Errors

Ring v. Arizona 536 U.S. 584 (2002) was decided June 24, 2002. Presumably, the Florida Supreme Court identified that date as a date that Florida should have recognized the constitutional infirmities of our death penalty system; therefore this became the cutoff date for *Hurst* relief. Justice Lewis, concurring, but writing separately in *Asay* disagreed with the June 24, 2002 cutoff, reasoning: "Vindication of these constitutional rights cannot be reduced to either fatal or fortuitous accidents of timing." *Id.* at 31. The case at bar is precisely a case wherein vindication of constitutional rights was denied due to a fatal accident of timing.

Besides Equal Protection problems, the Florida Supreme Court has failed to squarely address another major problem in this State that has knowingly been

ongoing since June 11, 1985. In a case closer to Florida, many years predating *Ring v. Arizona*, this Court issued *Caldwell v. Mississippi*, 472 U.S. 320 (1985). In *Caldwell*, this Court identified and rectified a problem that occurred during closing arguments in a capital case out of Mississippi.

Based on isolated comments to the jury, this Court vacated the death sentence in *Caldwell*, holding in part:

> It is unconstitutionally impermissible to rest a death sentence on a determination made by a sentence who has been led to believe that responsibility for determining the appropriateness of defendant's death rests elsewhere. . . .There are specific reasons to fear substantial unreliability as well as bias in favor of death sentences where there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court.

Id. at 328, 330.

With its fractured retroactivity division, the State of Florida continues to have a major problem now, especially when viewed through the lens of the *Hurst v. Florida*, 136 S. Ct. 616 (2016) decision. *Hurst* reminded us of a basic fundamental Sixth Amendment right: capital defendants facing the ultimate penalty of death have the right to a trial by jury. These capital defendants should also have ***the right to a properly instructed jury***. Without proper jury instructions, and without full retroactivity, the Sixth and Eighth Amendments, *Hurst*, *Ring*, and *Caldwell,* all have no teeth in the State of Florida.

As illustrated in the numerous examples cited in Dr. Moore's report (*See* Appendix I) from the Perry Taylor trial transcripts, the case at bar clearly does not meet Eighth Amendment scrutiny. *Caldwell* reversed a death sentence based on a

prosecutor's isolated comments during closing arguments. The United States Supreme Court concluded in *Caldwell*:

> This Court 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." In this case, the State sought to minimize the jury's sense of responsibility for determining the appropriateness of death. Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires. The sentence of death must therefore be vacated. Accordingly, the judgment is reversed to the extent that it sustains the imposition of the death penalty, and the case is remanded for further proceedings.

Id. at 341. By affording only partial retroactivity back to *Ring* (2002), and ignoring the established Eighth Amendment mandates of *Caldwell* (1985), the Florida Supreme Court, and this Court, leaves clearly established Eight Amendment violations unrectified.

Caldwell / Eighth Amendment Violations at the Taylor Trial

The case at bar is distinguishable from *Caldwell* because *Caldwell* only presented **one** instance of the jury's role being diminished. **This case presents one hundred and thirty four (134) instances of the jury's role being diminished**.

If just one instance of the jury's role being diminished in a capital case warrants that a death sentence be vacated under *Caldwell, Id.*, surely 134 instances of the advisory panel's role being diminished should warrant that the death sentence be vacated. *Hurst* reaffirmed the principle that a capital defendant facing the death penalty has a right for a jury to make factual findings, and to decide his fate, not a judge. *Caldwell* reminds us that the jury must also be properly instructed. All

inmates similarly situated and currently housed on Florida's death row arrived there following trials with defective and unconstitutional instructions. If *Caldwell* was applied properly prospectively, Florida would have had to drastically change its capital sentencing scheme after 1985. *See Taking Caldwell v. Mississippi Seriously: The Unconstitutionality of Capital Sentencing Statutes That Divide Responsibility Between Judge and Jury*, Michael Mello, 30 Boston College Law Review 283 (1989).

The Florida Supreme Court's Past Treatment of the *Caldwell* Issue

Indeed, there is a long line of cases from the Florida Supreme Court denying *Caldwell* relief. But, most of those decisions were made operating under the flawed premise that Florida's death penalty system was constitutional. This is not the case anymore. The constitutional landscape in the State of Florida has changed dramatically since those prior *Caldwell* issues were decided. Florida's death penalty has now been declared unconstitutional by this Court in *Hurst*. The Florida Supreme Court has ruled that its pre-*Hurst* death penalty system violates both the Sixth Amendment and the Eighth Amendment. *Hurst v. State*, 202 So. 3d 40, 59 (Fla. 2016)("we conclude that juror unanimity in any recommended verdict resulting in a death sentence is required under the Eighth Amendment."). *Hurst* has changed everything.

The Florida Supreme Court's Recent Treatment of *Caldwell*

On March 8, 2018, the Florida Supreme Court was again confronted with post-*Hurst Caldwell* issues. Even though this Court held in *Caldwell* that such errors are presumptively harmful, the Florida Supreme Court ruled as follows:

> Further, we have considered and rejected Guardado's claim that *Caldwell v. Mississippi*, 472 U.S. 320 (1985), and *Sullivan v. Louisiana*, 508 U.S. 275 (1993), affect this Court's harmless error analysis in *Hurst*. See *Franklin v. State*, 43 Fla. L. Weekly S86 (Fla. Feb. 15, 2018); *Truehill v. State*, 211 So. 3d 930 (Fla. 2017); *Hitchcock v. State*, 226 So. 3d 216 (Fla. [2017]), cert. denied 138 S. Ct. 513 (2017). Because Guardado's claims have been previously rejected, we affirm the circuit court's summary denial of Guardado's successive motion for postconviction relief.

Guardado v. State, 238 So. 3d 162, 163-164 (Fla. March 8, 2018).

The Florida Supreme Court finally substantively addressed post-*Hurst Caldwell* arguments in *Reynolds v. State*, 251 So. 3d 811 (Fla. 2018), but wrongly decided the issue, focusing primarily on the fact that the jury was instructed appropriately according to unconstitutional Florida law that existed at that time. Regarding *Caldwell* issues in the State of Florida following fractured application of *Hurst* relief, partial retroactivity, and routine unreasonable denials in cases with unanimous death recommendations, three Justices from this Court dissented from the denial of certiorari in *Truehill v. Florida*, 138 S. Ct. 1 (2017), reasoning as follows:

> Justice BREYER, dissenting from denial of certiorari.
>
> In part for the reasons set forth in my opinion in *Hurst v. Florida*, 577 U.S. – [] (2016) (concurring opinion in judgment), I would vacate and remand for the Florida Supreme Court to address the Eighth Amendment issue in these cases. I therefore join the dissenting opinion of Justice SOTOMAYOR in full.
>
> Justice SOTOMAYOR, with whom Justice GINSBERG and Justice BREYER join, dissenting from the denial of certiorari.
>
> At least twice now, capital defendants in Florida have raised an important Eighth Amendment challenge to their death sentences that the Florida Supreme Court has failed to address. Specifically, those capital defendants, petitioners here, argue that the jury instructions in their cases impermissibly diminished the jurors' sense of responsibility

> as to the ultimate determination of death by repeatedly emphasizing that their verdict was merely advisory. "This Court has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task," and we have thus found unconstitutional under the Eighth Amendment comments that "minimize the jury's sense of responsibility for determining the appropriateness of death." *Caldwell v. Mississippi*, 472 U.S. 320, 341 [] (1985).
>
> Although the Florida Supreme Court has rejected a *Caldwell* challenge to its jury instructions in capital cases in the past, it did so in the context of its prior sentencing scheme, where "the court [was] the final decision-maker and the sentencer—not the jury." *Combs v. State*, 525 So. 2d 853, 857 (1988). In *Hurst v. Florida*, 577 U.S. – [] (2016), however, we held that process, "which required the judge alone to find the existence of an aggravating circumstance," to be unconstitutional. With the rationale underlying its previous rejection of the *Caldwell* challenge now undermined by this Court in *Hurst*, petitioners ask that the Florida Supreme Court revisit the question. The Florida Supreme Court, however, did not address that Eighth Amendment challenge.
>
> This Court has not in the past hesitated to vacate and remand a case when a court has failed to address an important question that was raised below. See, *e.g., Beer v. United States*, 564 U.S. 1050 [] (2011) (remanding for consideration of unaddressed preclusion claim); *Younblood v. West Virginia*, 547 U.S. 867 [] (2006) (*per curiam*) (remanding for consideration of unaddressed claim under *Brady v. Maryland*, 373 U.S. 83 (1963)). Because petitioners here raised a potentially meritorious Eighth Amendment challenge to their death sentences, and because the stakes in capital cases are too high to ignore such constitutional challenges, I dissent from the Court's refusal to correct that error.

Truehill v. Florida, 138 S. Ct. at 3 (2017). Other *Caldwell*-based dissents have come from this Court since *Truehill*. Given that the standard jury instructions in the State of Florida violate *Caldwell*, the State of Florida was unreasonably wrong to hold *Hurst* retroactive only back to *Ring* (2002) and not to *Caldwell* (1985). Such decisions have led to Equal Protection violations. Some 200 death sentences were vacated in the State of Florida after *Hurst*. The approximate 200 leftover death sentences that

remain in place are clearly based on arbitrary and capricious reasoning. All of the inmates were tried under the same unconstitutional system, yet only half of the inmates have had their death sentences vacated. All of these unconstitutional death sentences should be vacated because they clearly violate *Caldwell* and the Eighth Amendment. Remarkably, a nearly unanimous Florida Senate felt *Hurst* should legislatively be fully retroactive (*see* SB 870 -- 33 YEAHS to 3 NAYS, March 9, 2018). *See* Appendix J.

Justice Pariente agreed recently in another dissent that *Hurst* relief should be afforded to all Florida death row inmates based on *Caldwell*.

> PARIENTE, J., dissenting.
>
> I dissent because I would grant Hamilton a new penalty phase in light of *Hurst* (footnote omitted). Also, I write to address the majority's discussion and denial of relief based on timeliness, which is both unnecessary and, more importantly, relies on reasoning that is legally unsound. In my previous dissents, I have explained why fundamental fairness dictates that all capital defendants should be provided a new penalty phase pursuant to *Hurst* where there is a nonunanimous jury recommendation for death (footnote omitted).
>
> Hamilton was sentenced to death after the jury recommended a sentence of death by a vote of ten to two (citations omitted). His sentence became final in 1998. *Id.* I would apply *Hurst* retroactively to Hamilton's sentence and, based on the jury's nonunanimous recommendation for death, would vacate the sentence of death and grant a new penalty phase. I note that this Court already denied Hamilton's prior petition for a writ of habeas corpus requesting *Hurst* relief, where I concurred in result based on this Court's precedent in *Asay V* (citations omitted). However, since *Asay V* this Court has further denied the retroactive application of *Hurst* to pre–2002 defendants without properly addressing defendants' Eighth Amendment claims and allowed three executions to proceed; I have dissented from all of those decisions (citation omitted).
>
> Over and over, the United States Supreme Court and this Court have

made clear that "the critical linchpin of the constitutionality of the death penalty is that it be imposed in a reliable and not arbitrary manner." Asay VI, 224 So. 3d 708 & n. 8 (Pariente, J., dissenting) (citing *Gregg v. Georgia* [] (1976); *Glossip v. Gross* [] (2015)(Breyer, J., dissenting); *accord Hurst*, 202 So. 3d at 59-60; *see generally* Furman v. Georgia [] (1972). As I have expressed several times, the Court's retroactivity cut-off of *Ring* [] results in unconstitutional arbitrariness in the imposition of the death penalty. Likewise, Judge Martin of the United States Court of Appeals for the Eleventh Circuit recently stated that "it is arbitrary in the extreme to [distinguish] between people on death row based on nothing other than the date when the constitutional defect in their sentence occurred." *Hannon v. Sec'y, Fla. Dept. of Corrections*, No. 17-14935, --Fed. Appx.--, -----, 2017 WL 5177614 (11th Cir. Nov. 8, 2017) (Martin, J., concurring).

Comparing Hamilton's case with death row inmate Charles Anderson's, for example, demonstrates this unconstitutional arbitrariness. The crimes for which Charles Anderson was sentenced to death occurred on January 16, 1994, three months before the crimes in Hamilton's case. *Anderson v. State*, 841 So. 2d 390 (Fla. 2003). While Hamilton's sentence became final in 1998, Anderson's sentence did not become final until 2003. Thus, Anderson received *Hurst* relief, whereas Hamilton is not even entitled to review of this claim, as the per curiam opinion concludes. *Anderson v. State,* 220 So. 3d 1133, 1150 (Fla. 2017).

Like most defendants whose death sentences have been reviewed by this Court since *Hurst v. Florida* and *Hurst*, Hamilton also raises a claim for relief pursuant to *Caldwell* [] (1985). In *Caldwell,* the United States Supreme 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 rests elsewhere." 472 U.S. at 328-29, 105 S. Ct. 2633. The Court explained:

> In evaluating the various procedures developed by States to determine the appropriateness of death, this Court's Eighth Amendment jurisprudence has taken as a given that capital sentencers would view their task as the serious one of determining whether a specific human being should die at the hands of the State. ... Belief in the truth of the assumption that sentencers treat their power to determine the appropriateness of death as an "awesome responsibility" has allowed this Court to view sentencer discretion as consistent with—and indeed as indispensable to—the Eighth Amendment's "need for reliability in the determination that

> death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, [428 U.S. 280] at 305 [96 S. Ct. 2978 [] (1976) (plurality opinion).
> ....
> In the capital sentencing context there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court.
> ....
> This Court 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." In this case, the State sought to minimize the jury's sense of responsibility for determining the appropriateness of death. *Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires.*

Id. at 329-41, 105 S. Ct. 2633 (emphasis added). Based on this lack of reliability, the Supreme Court vacated the sentence of death. *Id.* at 341, 105 S. Ct. 2633.

Florida's pre-*Hurst* jury instructions referred to the advisory nature of the jury's recommendation over a dozen times. *See* Fla. Std. Jury Instr. (Crim.) 7.11 (2016). Further, the jury was only required to make a recommendation between life or death to the trial court, which then held the ultimate responsibility of making the requisite factual findings and determining the appropriate sentence. Thus, it was made abundantly clear to the jury that they were not responsible for rendering the final sentencing decision. *Caldwell*, which was decided seventeen years before *Ring,* further supports the conclusion that defendants whose sentences were imposed after a jury nonunanimously recommended a sentence of death should be eligible for *Hurst* relief to avoid unconstitutional arbitrariness and ensure reliability in imposing the death penalty.

...

Hamilton should not be denied relief of the fundamental constitutional right announced in *Hurst v. Florida* and *Hurst* based on untimeliness. Further, to ensure reliability and protect Hamilton's fundamental constitutional rights, I would apply *Hurst* retroactively to his sentence and reverse for a new penalty phase based on the jury's nonunanimous recommendation for death. Accordingly, I dissent.

Hamilton v. State, 236 So. 3d 276, 279-282 (Fla. Feb. 8, 2018).

Just as this Court held that the dictates of *Ring* apply in Florida in *Hurst*, this Court should mandate that the dictates of *Caldwell* apply in Florida as well, and afford Mr. Taylor *Hurst* relief. Although Florida Supreme Court Justice Lewis concurred in the *Asay* decision that established the June 24, 2002 cutoff date, he recently dissented in a related case involving waiver of postconviction and alleged failure to preserve *Ring* and *Hurst* issues. Justice Lewis revisited the issue of the Florida Supreme Court's chosen June 24, 2002 cutoff date in his dissent.

> LEWIS, J., dissenting.
>
> Today this Court advances for the first time a new excuse, not a valid reason, to push Florida's death penalty jurisprudence into an unconstitutional abyss. This case is a classic example which illustrates application of this Court's retroactivity approach to *Hurst v. Florida* and *Hurst v. State*, to deny relief to defendants who have fully and completely preserved the constitutional challenges to Florida's death sentencing scheme. This new denial approach results in equal protection and due process violations, constitutes cruel and unusual punishment, and the arbitrary and capricious operation of the death penalty. The Court simply turns its eyes from the violation of the Sixth, Eighth, and Fourteenth Amendments under the United States Constitution and the corresponding provisions under our Florida Constitution.

State v. Silvia, 235 So. 3d 349, 352 (Fla. 2018).

Justice Lewis more recently stated the following in this case:

> I have repeatedly expressed my disagreement with this Court's *Hurst* retroactivity determinations. . . .Florida will treat similarly situated defendants differently-—here the difference between life and death—-for potentially the simple reason of one defendant's docket delay. Vindication of these constitutional rights cannot be reduced to either fatal or fortuitous accidents of timing. . . .I continue to respectfully dissent on the *Hurst* issue.

Taylor v. State, 246 So. 3d 231 (Fla. 2018).

Since *Hurst v. Florida* (2016), four inmates have been executed in the State of Florida who were sentenced to death under a capital sentencing scheme that this Court has unquestionably ruled to be unconstitutional, at least violating the inmates' Sixth Amendment right to jury trial. Since this Court's decision in *Ring v. Arizona* (2002), 44 inmates have been executed in the State of Florida who were also deprived of their Sixth Amendment right to jury trial. Since *Caldwell v. Mississippi* (1985), 79 inmates have been executed in the State of Florida under a capital sentencing system that routinely diminishes the jury's sense of responsibility in the Florida standard jury instructions, thus violating their Eighth Amendment rights against cruel and unusual punishment under *Caldwell*. This Court should prohibit the State of Florida from executing those who remain condemned to death under a clearly antiquated unconstitutional system, especially Mr. Taylor whose crime does not rise to the legal level of a capital offense in light of the medical examiner's recantation.

Just hours before Patrick Hannon was executed by the State of Florida on November 8, 2017, Judge Martin from the United States Eleventh Circuit Court of Appeals wrote a separate concurring opinion criticizing the June 24, 2002 cutoff date for *Hurst* relief, and commenting on Mr. Hannon's Motion for Stay of Execution.

> MARTIN, Circuit Judge, concurring:
>
> > Patrick Hannon's claim is simple. The United States Supreme Court and the Florida Supreme Court have identified a constitutional defect in the process that resulted in his death sentence. *See Hurst v. Florida,* [] 136 S. Ct. [at] 619 [] (2016)(holding Florida's former death penalty sentencing scheme unconstitutional because "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death"); *Hurst v. State*, 202 So. 3d 40, 44 (Fla. 2016) (holding that "in order for the trial court to impose a sentence of death, the jury's

recommended sentence of death must be unanimous"). Of course, this defect is quite serious because it concerns Mr. Hannon and others who will lose their lives at the hand of the State.

Indeed, it is so serious that the Florida legislature passed a new law intended to fix this problem in capital sentencing. The new Florida statute requires the jury to unanimously find at least one aggravating factor and to unanimously recommend death in order for a defendant to be sentenced to death. *See* Fla. Stat. § 921.141(2)-(3)(2017). And although the Florida Supreme Court has interpreted the law to give relief to some death row inmates who were sentenced before the effective date of this statute, Mr. Hannon is not among those who get retroactive relief. Compare *Asay* [] (holding that *Hurst v. Florida* does not apply retroactively to cases that were final before *Ring v. Arizona* [] (2002), was decided), *with* Mosley v. State, 209 So. 3d 1248, 1276 (Fla. 2016) (holding that *Hurst* applies retroactively to cases that became final after *Ring).*

The effect of the new statute, and the Florida Supreme Court's retroactivity decisions, is that going forward, people convicted in Florida of the same crime as Mr. Hannon will now have juries deciding important issues related to their sentences. No jury will decide these issues in Mr. Hannon's case, however, only because of the date his conviction and death sentence became final. And in my view, it 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 Mr. Hannon's loved ones to justify why it is acceptable that he falls on the wrong side of this double set of rules.

Mr. Hannon is set to be executed tonight. No one disputes that he was sentenced to death by a process we now recognize as unconstitutional. Neither does anyone dispute that others who were sentenced to death under those same unconstitutional procedures are eligible for resentencing under Florida's new law. The Florida Supreme Court's retroactivity analysis therefore leaves the difference between life and death to turn on "either fatal or fortuitous accidents of timing." *Asay*, 210 So. 3d at 31 (Lewis, J., concurring in result); *see id.* at 40 (Perry, J., dissenting) ("The majority's application of *Hurst v. Florida* makes constitutional protection depend on little more than a roll of the dice.").

I agree with the majority of this panel that this Court's decision in *Lambrix v. Sec'y, DOC*, 872 F. 3d 1170 (11th Cir. 2017)(per curiam) forecloses Mr. Hannon's ability to get a Certificate of Appealability on this issue. Nevertheless, his impending execution is a stark illustration

> of the problems with Florida's retroactivity rule. In particular, I cannot fathom why the need to "cur[e] individual injustice" compels retroactive application of *Hurst* to cases that became final after, but not before, *Ring*. *Mosley*, 209 So. 3d at 1282 (quotation omitted). To the contrary, I say finality should yield to fairness, particularly when the State is taking the life of this man based on a death sentence that was unconstitutionally imposed.

Hannon v. Sec'y, Fla. Dept. of Corrections, 716 F. App'x. 843, 847-847 (11th Cir. 2017) (Martin, J., concurring).

On April 26, 2018, Justice Pariente from the Florida Supreme Court Supreme Court concurred as follows on a denial of rehearing on a case that missed the *Hurst* cutoff date by one business day:

> [This] case rises and falls on a 'fatal accident of timing' that demonstrates the unconstitutional arbitrariness created by this Court's *Ring* cutoff []. Two days after the Supreme Court's sixty-day deadline in Evans' case, on June 24, 2002, the Supreme Court decided *Ring*. Had Evans or Mr. Burden sought certiorari in March or corrected the petition by the June 22, 2002 deadline, the date of the United States Supreme Court's subsequent decision, assuming it was a denial of certiorari, would have served as the date Evans' conviction and sentence been final. Presumably, under either of those circumstances, Evans would have fallen on the other side of this Court's *Ring* cutoff and would, therefore, be entitled to the retroactive application of *Hurst*. Thus, Evans' case shows how this Court's *Ring* cutoff for Hurst retroactivity creates arbitrariness that has no proper place in death penalty jurisprudence.

Evans v. State, --So. 3d--, 2018 WL 3617642, 1-2 (Fla. 2018).

CONCLUSION AS TO QUESTIONS NUMBER ONE AND TWO

Mr. Taylor should not be denied *Hurst* relief just because his case happened to fall on the wrong side of the calendar. In fairness, and in accordance with and evolving standards of decency and Equal Protection, *Hurst* should be retroactive at least back to *Caldwell* (1985), not just to *Ring* (2002).

THE ISSUE OF DR. MILLER'S SWORN RECANTATION

The Florida Supreme Court erroneously found that "the capital felony occurred during the commission of a sexual battery" to support the death sentence in this case. *Taylor v. State*, 638 So. 2d 30 (Fla. 1994). This finding was based in large part on the testimony of medical examiner Dr. Lee Robert Miller. Mr. Taylor was charged with the sexual battery and murder of a woman who voluntarily accompanied him to a baseball field dugout for sex in the middle of the night. Mr. Taylor admitted flying into a rage and kicking the woman to death when she bit him during consensual oral sex. The sexual battery charge was grounded on injuries to the victim which the medical examiner testified suggested a large object had been inserted in her vagina. Under Florida law, if the injury were caused by a kick rather than the deliberate insertion of an object, a sexual battery did not occur. If no sexual battery occurred, the conviction for sexual battery is invalid, the basis for finding felony murder is invalid, and the aggravating factor that the murder occurred during a sexual battery is invalid. At most, the homicide is second degree murder.

The only evidence that the injury was caused by something other than a kick was the testimony of the State's medical examiner, Dr. Miller, at the guilt trial. On a penalty phase retrial, Dr. Miller began to express doubts that a kick could not have caused the injury. At the postconviction hearing, Dr. Miller fully conceded that a kick was the possible, if not probable, cause of the injuries supporting the sexual battery conviction. 2007 ROA Vol. XII 1949-51. However, because of an off-hand remark by Dr. Miller at the conclusion of his testimony about the kick, that the injury from the kick was a one-in-a-million shot, the state courts refused to recognize that Dr. Miller's

opinion had changed (and therefore raised a reasonable doubt about the sexual battery). The federal district court endorsed the state courts' refusals to recognize the shift in opinion.

In the district court's order denying the habeas petition, the judge wrote that Dr. Miller testified in the postconviction hearing that "the 'injuries could have been [caused by] a hard blow from a shoe going directly in [to the vagina]. That didn't come up [at trial] and it certainly seems a reasonable possibility, maybe even a probability []." *Taylor v. Secretary, Dept. of Corr.*, --F. Supp. 2d--, 2011 WL 2160341 at 27 (M.D. Fla. 2011). But the court then agreed with the state courts that Dr. Miller's postconviction testimony that a kick was a reasonable possibility "is not inconsistent with his trial testimony that within a reasonable degree of medical probability the interior injuries were caused by something inserted into the vagina, and that those injuries were not consistent with having been inflicted by someone kicking the victim in that area." *Id.* at 27.

The district court also adopted the bad faith reading the state courts gave to Dr. Miller's testimony that the kick which caused the injury was one in a million. The interpretation the state courts made of the one-in-a-million statement nullified Dr. Miller's testimony that a kick was not only possible, it was probable. There is no evidence Dr. Miller intended to nullify, and every indication he was simply expanding on his opinion that a kick caused the injuries.

Dr. Miller testified in the postconviction hearing that he agreed with the defendant's postconviction expert medical examiner, Dr. Wright, that the injuries

could well have been caused by a kick. In doing so, he attempted to blame trial counsel for a lack of diligence:

> [T]here was something that wasn't brought up by any of the attorneys in any of those [pre-trial] depositions you referred to and **perhaps I should have brought it up myself. It was brought up by a subsequent witness [for the postconviction hearing, Dr. Wright] whose deposition I read.**
>
> **. . . .**
>
> Dr. Wright said the injuries to the inside of the vagina were . . . probably sustained by a kick or a blow. Whereas I said they were sustained by a stretch injury. . . . **I agree that if a blow had been struck where the toe of the shoe actually went, went into the vagina stretching the vagina it would have introduced the injuries that I've described.**
>
> . . . [T]he attorneys didn't bring it out that it could have been a hard blow from a shoe going directly in. That didn't come up and **it certainly seems a reasonable possibility, maybe even a probability**, in reading Dr. Wright's [deposition].
>
> . . . .
>
> **I'm saying that [the ten internal radial lacerations] could have been the result of a kick.** One of many scenarios where something went in there that was wider than the vagina and stretched it. We talked about kicks and blows earlier on. But the subject of the shoe or the foot actually entering the vaginal canal didn't come up. That was - **it's a one-in-a-million shot.**
>
> **Q What do you mean a one-in-a-million shot?**
>
> **A Well, it's you can kick somebody an awful lot in that area and not have your toe actually go up into that narrow vaginal canal.**

2007 ROA Vol. XII at 1949-51 (emphasis added).

An after-the-fact probability explaining the occurrence of an unlikely event which actually occurred has an entirely different connotation than an estimate made before an occurrence.

Dr. Miller has now made clear that he considers the victim's genital injuries were possibly, perhaps probably, caused by a kick, an act which negates the sexual

battery in this case. He says, in his affidavit (2017 ROA Vol. I 87-88; APPENDIX K) that the "one-in-a-million" statement was an unfortunate misstatement, and that he in no way intended to back away from his full testimony at the postconviction hearing which was that the kick, not a sexual battery by insertion of object, was "a very reasonable possibility."

When analyzing the cause of an injury after it has occurred, any estimate of the likelihood of the injury before it occurs, the "ex ante" likelihood of the injury, becomes irrelevant. The Seventh Circuit Court of Appeals explains:

> Life is full of surprises. [The defendant's] story is not impossible, just improbable. And it is only a confusion between ex ante and ex post probabilities that might make one think that the government could never prove a person guilty beyond a reasonable doubt of an improbable crime. The probability that X could shoot Y between the eyes from a thousand paces might be one in a million before X pulled the trigger, but once Y shows up with a bullet hole between the eyes the probability that X is the author of this improbable wound shoots up, and that is the probability that is relevant to the issue of guilt.

United States v. Morales, 902 F.2d 604, 607 (7th Cir. 1990). If the State were trying to prove that Mr. Taylor injured the area in question with a kick, there is no doubt the State would acknowledge the wisdom of the *Morales* analysis.

The jury in the guilt phase trial heard Dr. Miller's testimony that there were no injuries in the genital area caused by kicking, 1989 ROA Vol. I at 87, leaving the only other option to be penetration of a large object for sexual gratification, a conclusion that supported conviction for sexual battery. *Id*. at 82-83. Had the jury known that one or more kicks were administered in the genital area causing the injuries, it would be as if victim Y in the *Morales* case not only had a bullet wound

between the eyes, but also one an inch lower, inflicted by a bullet from the same gun. Actually, the analogy is better made if Y's body is considered to have been found full of bullet holes. The victim in this case suffered multiple kicking blows suggesting that the kick to the genitals was only one of many hits such that the "one in a million" shot landed only as a coincidental result of the rage-induced kicking, not the result of preternatural forces.

Dr. Miller acknowledged that Dr. Wright's analysis of the genital injuries was the correct one, and contrary to his own testimony at the trials: "Dr. Wright said the injuries to the inside of the vagina were . . . probably sustained by a kick or a blow. Whereas I said they were sustained by a stretch injury."

The Petitioner's forensic pathology expert at the postconviction hearing, Dr. Ronald Wright, was board certified in anatomic, clinical and forensic pathology and a Diplomate of the National Board of Medical Examiners, and a medical examiner since 1972. 2007 ROA Vol. X at 1526-29. Dr. Wright testified that the genital injuries were caused by kicking: "She was kicked." *Id.* at 1537. The victim did not suffer a sexual battery by intrusion of an object penetrating the vagina. She was kicked. *Id.* at 1545. The defendant's tennis shoes could have caused the injuries. *Id.* at 1538.

Dr. Wright testified that the genital injuries occurred after the victim died, to a reasonable degree of medical probability. *Id.* at 1531. The pattern of kicking injuries in this case is always associated with someone who is in a rage. The injuries were consistent with Mr. Taylor being in a rage. *Id.* at 1581.

The State's rebuttal witness, Dr. Lynch, was the only witness who concluded that the injuries were not the result of a kick. Her testimony contradicted both Dr. Wright and Dr. Miller. Dr. Miller is the only witness to have personally viewed the injuries at issue. Dr. Lynch was a practicing ob/gyn doctor in a local hospital, not a forensic pathologist, nor did she have any training or skills in forensic medicine. *Id.* at 1617. She had only treated six to eight sexual battery victims, all of whom were alive, in her entire career, *id.* at 1596. Her practice consisted of treating live patients for the usual conditions attended to by an ob/gyn doctor. Over the continuing objection of the defense to her lack of qualifications, *id.* at 1605, 1610, 1615, the ob/gyn doctor said it was impossible for a kick to cause the vaginal injuries unless the foot was able to fit into the vagina. *Id.* at 1630.

Contrary to the testimony of both Dr. Wright and Dr. Miller, forensic pathology experts, she claimed the defendant's shoes could not have penetrated a couple of centimeters to cause the injuries. *Id.* at 1631. However, her testimony that the shoes could not fit was immediately vitiated by her follow up testimony that a baby's head is larger than the opening she claimed could not accommodate the toe of a sneaker, a fact she actually was qualified to testify about. *Id.* at 1631. Her testimony that the injuries could only be caused by a kick if the shoe could fit into the vagina, when taken with her testimony that a baby's head would fit, fully supports the testimony of the two experts, highly trained forensic pathologists. The state courts' acceptance of the testimony of a witness not qualified as a forensic expert, and incompetent therefore to render an opinion as to causation, is an unjustified application of the

rules of evidence such that "the application of these evidentiary rules rendered his trial fundamentally unfair and deprived him of due process of law." *Chambers v. Mississippi*, 410 U.S. 284, 289-90 (1973).

Given the testimony establishing the fact that, at the very least, there was a reasonable doubt whether the injury was caused during the commission of a sexual battery (a kick is not for sexual gratification, any penetration occurred after death), the state courts' persistence in sustaining a conviction for sexual battery required an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. Compare the evidence outlined in the record and here with the unsupported conclusions of the Florida Supreme Court:

> In essence, the postconviction court concluded that, at trial, Dr. Miller testified that the lacerations were not, within reasonable medical probability, caused by a kick. Similarly, at the evidentiary hearing, Dr. Miller testified that it was his opinion that there was only a one-in-a-million chance that the lacerations could have been caused by a kick. Hence, **because the record refutes Taylor's contrary interpretation of the testimony,** Taylor fails to show that Miller's postconviction testimony qualifies as newly discovered evidence. **While it is true that Miller's trial testimony did not admit to this one-in-a-million possibility, we find this omission insufficient to overturn the trial court's conclusion that sufficient "new evidence" had not been established.**

Taylor v. State, 3 So. 3d 986, 993 (Fla. 2009)(emphasis added).

The Florida Supreme Court's conclusion that there was no contradiction between the trial testimony that the injuries were not caused by a kick and the postconviction recantation that the injuries were, indeed, caused by a kick to "a reasonable possibility, maybe even a probability," is a clearly unreasonable determination of the facts in light of the evidence presented in the state court.

The state courts should not accept the testimony of a witness unqualified to testify about causation over the testimony of two highly qualified experts, one of whom was the eyewitness at autopsy to the injury. Reliance on an unqualified, incompetent, witness also is contrary to or involved an unreasonable application of clearly established federal law, i.e. *Chambers v. Mississippi,* 410 U.S. 284 (1973).

The jury in the guilt phase trial was told that only the insertion of a large object, i.e. sexual battery, could have caused all of the injuries to the genital area. Had they known that a kick had been delivered to the genital area (the state would not have called an unqualified witness such as Dr. Lynch to impeach their own medical examiner), they would have had the opportunity to attribute the injuries to a kick. This would have especially been so had Dr. Miller disclosed his opinion that a kick reasonably, maybe probably, caused the injury.

Courts have ignored the additional claim of prejudice arising from the wrongful conviction for sexual battery. Murder during commission of a sexual battery was found to be an aggravating factor. Yet the sexual battery aggravator was not proven at trial. If there is no sexual battery, there is no felony murder. If there is no felony murder, there is nothing here in the facts of this case to support the death sentence.

The newly discovered evidence (rejected as newly discovered in the postconviction hearings because of the interpretation of "one-in-a-million" to mean there was virtually no possibility the injuries were not the result of sexual battery) of Dr. Miller's position that the courts have misinterpreted his "one-in-a-million" remark to negate his belief that the kick was the possible, if not probable, cause of

the injury, requires a new trial. The trial juries never heard that there was a "very reasonable possibility" that the evidence negated sexual battery.

Being told that the victim suffered the sexual battery, which is the only evidence contradicting Mr. Taylor's confession to second degree murder at worst, undermined the jury's confidence in believing Mr. Taylor's testimony. Had they known the actual facts, they would have acquitted on the sexual battery charge, the felony murder charge, and the premeditated murder charge which could only have been sustained in reliance on the unsupported evidence presented by the state. Had the jury known the evidence supported Mr. Taylor's confession contrary to the erroneous testimony of Dr. Miller, they would have believed the facts justified only conviction for a lesser charge. The outcome of the trial would have been conviction for a lesser offense, and the death penalty would have been taken off the table.

Dr. Miller's evidence was not previously available because he was not aware of the incorrect interpretation of his testimony and therefore was unaware of the need to come forward to correct the errors. Good-faith efforts by the defense to contact him were unsuccessful until June 2015.

Newly discovered evidence establishes that Mr. Taylor is innocent of the rape conviction which was used to support conviction on a theory of felony murder, and as an aggravating factor supporting a death sentence. Dr. Miller's affidavit establishes that his off-hand remark that the kick was "one in a million" was misconstrued by the trial court and subsequent reviewing courts. The correct testimony at trial would have resulted in conviction for a lesser offense.

Dr. Miller testified in postconviction proceedings that the only reason he did not testify at trial that the kick was a likely cause of the injuries in question was because he was not asked the right questions. Assuming that he had always been prepared to testify to a kick as causation (possibly in conflict with his postconviction testimony that he concluded it was a kick based on reviewing Dr. Wright's report and testimony) at trial, trial counsel was ineffective for failing to ask the questions. Trial counsel was also ineffective for failing to retain a forensic pathologist who could make the correct determination of causation sufficient to guide trial counsel in his questioning of Dr. Miller, and who could have testified to the jury that the causation was a kick, not sexual battery. The correct testimony at trial would have resulted in conviction for a lesser offense. The lower court erred in summarily denying the claims related to the medical examiner's misleading trial testimony.

CONCLUSION AS TO QUESTIONS NUMBER ONE, TWO, AND THREE

Florida's death penalty system has been unconstitutional since the death penalty was reenacted after *Furman v. Georgia*. *Hurst v. Florida* and *Hurst v. State* have corrected some of the unconstitutionality but, based on the fracturing of retroactivity, the cases that remain are even further removed from rights guaranteed by the United States Constitution and the Florida Constitution. Mr. Taylor's death sentence was unconstitutional when he received it and even more so if this Court allows it to stand. He was unconstitutionally convicted of sexual battery and felony murder based on the misleading testimony of the medical examiner. This Court should grant certiorari.

Respectfully submitted,

/s/ David D. Hendry
David D. Hendry
Florida Bar Number 0160016
Office of the Capital Collateral Regional Counsel – Middle Region
12973 N. Telecom Parkway
Temple Terrace, Florida 33637
Phone No. (813) 558-1600 ext. 624
Fax No. (813) 558-1601
hendry@ccmr.state.fl.us
Attorney of Record for Petitioner