No. _____

OCTOBER TERM 2017

IN THE SUPREME COURT OF THE UNITED STATES

MATTHEW MARSHALL,

Petitioner,

v.

STATE OF FLORIDA,

and

JULIE JONES, Secretary,
Florida Department of Corrections,

Respondents.

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

APPENDIX
TO PETITION FOR WRIT OF CERTIORARI

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ATTACHMENT A

226 So.3d 211 (Mem)
Supreme Court of Florida.

Matthew MARSHALL, Petitioner,
v.
Julie L. JONES, etc., Respondent.

No. SC16–779
|
[May 4, 2017]

Original Proceeding—Habeas Corpus

Attorneys and Law Firms

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Pamela Jo Bondi, Attorney General, Tallahassee, Florida; and Lisa–Marie Lerner, Assistant Attorney General, West Palm Beach, Florida, for Respondent

Opinion

PER CURIAM.

Petitioner **Matthew Marshall** has filed a petition for writ of habeas corpus, challenging the constitutionality of his death sentence, which was based upon a judicial override. See **Marshall** v. State, 604 So.2d 799, 802 (Fla. 1992). We have jurisdiction. See art. V, § 3(b)(9), Fla. Const. Because **Marshall's** sentence became final before Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), was decided, he is not entitled to relief. See Asay v. State, 210 So.3d 1 (Fla. 2016). Accordingly, we deny the petition.

It is so ordered.

LEWIS, QUINCE, POLSTON, and LAWSON, JJ., concur.

CANADY, J., concurs in result.

LABARGA, C.J., dissents with an opinion, in which PARIENTE, J., concurs.

LABARGA, C.J., dissenting.

I dissent from the decision of the majority to deny **Matthew Marshall** habeas corpus relief. Although his sentence admittedly became final prior to the issuance of Ring, this Court has "the power to reconsider and correct erroneous rulings in exceptional circumstances and where reliance on the previous decision would result in manifest injustice, notwithstanding that such rulings have become the law of the case." State v. Owen, 696 So.2d 715, 720 (Fla. 1997). **Marshall's** death sentence, which was based upon a judicial override, constitutes an injustice that should be remedied.

The standard for review of a judicial override was articulated in Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), abrogated by Hurst v. State, 202 So.3d 40 (Fla. 2016):

> A jury recommendation under our ... death penalty statute should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.

This elevated standard "honors the underlying principle that [the] jury's advisory sentence reflected the 'conscience of the community' at the time of ... trial." Keen v. State, 775 So.2d 263, 283 (Fla. 2000). The key focus under Tedder is whether there exists a "reasonable basis in the record to support the jury's recommendation of life." San Martin v. State, 717 So.2d 462, 471 (Fla. 1998). This is distinctly different from the weighing process that a trial court performs after a jury issues a recommendation of death. The recommendation of life "changes the analytical dynamic and magnifies the ultimate effect of mitigation on the defendant's sentence." ***212** Keen, 775 So.2d at 285. For example, with respect to the life recommendation in Keen, this Court noted that "[w]hile any of us might or might not have come to the same conclusion ... had we been jurors, that is not the legal standard by which we must evaluate the override of the jury's recommendation." Id. at 286 (emphasis added).

Marshall killed fellow inmate Jeffrey Henry at a correctional facility in Martin County. **Marshall**, 604 So.2d at 802. Although the jury recommended life imprisonment, the trial court overrode that recommendation and imposed a sentence of death. Id. The court found four aggravating circumstances: (1) **Marshall** was under a sentence of imprisonment; (2) prior violent felony;[1] (3) the murder occurred while **Marshall** was engaged in the commission of, or an attempt to commit, a burglary;[2] and (4) the murder was especially heinous, atrocious, or cruel. Id. at 802. In mitigation, the trial court found that **Marshall** behaved acceptably during trial, and he entered prison at a young age. Id. The court rejected as mitigation that **Marshall's** older brother led him astray to "run the streets" and engage in illegal conduct, and his mother caused him to believe that there would be no negative consequences for his behavior. Id. In overriding the jury recommendation, the trial court cursorily stated:

> Sufficient aggravating circumstances exist as enumerated in section 921.141(5), and there are insufficient mitigating circumstances to outweigh the aggravating circumstances. The facts supporting this conclusion are so clear and convincing that no reasonable person could differ.

1 **Marshall** had a "record of violent felonies consisting of kidnapping, sexual battery, and seven armed robberies." Id. at 806.

2 According to the decision on direct appeal:

> **Marshall** claimed that Henry was a "muscle man" for several inmates who operated a football pool. When **Marshall** tried to collect his winnings from the inmates, they told him to get the money from Henry. **Marshall** claims he entered Henry's cell only to collect his winnings but that Henry refused to pay, and that Henry then attacked him, so he fought back.

Id. at 802. The Court later stated:

> [W]e find the circumstance of murder committed during the course of a burglary to have been proven beyond a reasonable doubt. Even if **Marshall** initially entered Henry's cell with consent for the purpose of collecting a gambling debt, the only reasonable inference apparent from **Marshall's** reentering the cell was that he intended to resume his attack on the victim.

Id. at 805.

On direct appeal, this Court affirmed **Marshall's** death sentence by a bare majority vote. Id. at 806. Chief Justice Barkett, in a concurring in part and dissenting in part opinion that was joined by Justices Shaw and Kogan, concluded that a reasonable basis for the jury's recommendation of life existed, and the trial court abused its discretion when it overrode that recommendation:

> In addition to considering the stipulated testimony of **Marshall's** father, the jury could have reasonably viewed the evidence of the murder in a light more favorable to **Marshall**. In his closing argument to the jury, defense counsel conceded that the aggravating circumstances of murder committed while under a sentence of imprisonment and previous conviction of a violent felony were established, but strongly argued against the existence of the other aggravators presented by the State. He argued that the death penalty should be reserved only for the worst murderers and worst aggravation. He pointed out ***213** that the evidence showed that **Marshall** and Henry had no prior problems with each other and had socialized together at the prison. Defense counsel emphasized that the circumstances of the crime indicate no prior plot or plan to kill since **Marshall** entered the cell unarmed and the murder was committed with a battery pack belonging to and found within the cell of the victim. He argued that offensive wounds on Henry's hands showed that the murder occurred during the course of a fight and that Henry was a violent person. He also noted that Henry's skull was not fractured and his facial bones weren't broken, indicating that **Marshall** did not intend to torture the victim or inflict additional injuries once he was rendered unconscious. Defense counsel also pointed out that the murder was not committed for financial gain. Finally, defense counsel argued that **Marshall's** age and background mitigate the offense as well. He pointed out that a life sentence of 25 years on top of the sentence of 46 years that **Marshall** was already serving would keep **Marshall** in prison for a substantial period of time.
>
> ...
>
> While the jury may not have believed that **Marshall** acted in self defense to excuse the killing, it could have reasonably inferred from the evidence that a fight

> erupted between **Marshall** and Henry and that **Marshall** killed Henry in a fit of rage. It is also likely that the jury rejected some of the aggravators found by the judge or assigned them minimal weight. Additionally, the jury could have reasonably found mitigation in **Marshall's** family background and determined, based on the nature of the crime and the circumstances surrounding it, that the death penalty was not the appropriate penalty in this case.

Id. at 806–07 (citations omitted) (Barkett, C.J., concurring in part and dissenting in part).

I agree with Chief Justice Barkett's well-reasoned conclusion that under Tedder, it was an abuse of discretion for the trial court to override the jury recommendation. It cannot be said the facts of this case so clearly suggest a sentence of death "that virtually no reasonable person could differ." Tedder, 322 So.2d at 910. The fact that three members of this Court dissented to the affirmance of the override demonstrates just the opposite is true.

I do not dispute that this was a violent murder. **Matthew Marshall** may be a violent person who deserves to be in prison for the rest of his life. However, in my opinion, the trial court failed to conduct the proper analysis under Tedder, and this Court failed to honor the "conscience of the community" when it affirmed the override in this case. Keen, 775 So.2d at 283. The time has come to correct that erroneous ruling and afford **Marshall** what he is entitled to under the law—the sentence recommended by the jury who heard, considered, and carefully weighed the evidence presented.

Therefore, I dissent.

PARIENTE, J., concurs.

All Citations

226 So.3d 211 (Mem), 42 Fla. L. Weekly S533

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ATTACHMENT B

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IN THE SUPREME COURT OF FLORIDA

MATTHEW MARSHALL,

Petitioner,

v.

CASE NO. SC16-779

JULIE L. JONES,

Appellee.

______________________________/

PETITIONER'S MOTION FOR REHEARING AND FOR ORAL ARGUMENT

COMES NOW THE PETITIONER, MATTHEW MARSHALL, by and through his undersigned counsel, and herein moves the Court for rehearing and/or reconsideration of its decision issued May 4, 2017, denying his Amended Petition for Writ of Habeas Corpus. In support of his motion, Mr. Marshall states as follows:

I. Introduction.

On May 4, 2017, this Court issued its decision in *Marshall v. Jones*, 2017 WL 1739246 (Fla. May 4, 2017), in which the Court denied Mr. Marshall's amended petition for a writ of habeas corpus. In that petition, Mr. Marshall raised a number of constitutional challenges to his death sentence, a sentence imposed by the trial court over the recommendation of life returned by his capital jury at the penalty phase. This Motion for Rehearing is timely filed pursuant to Florida Rule of Appellate Procedure 9.330(a).[1]

In denying his amended habeas corpus petition, Mr. Marshall submits that the Court overlooked points of law and/or facts and therefore rehearing is warranted. Indeed, as explained in this motion, **the Court did not even address most of the issues raised by Mr. Marshall.** The Court's 4-sentence majority opinion denying relief[2] unquestionably failed to address the actual arguments raised in Mr. Marshall's petition. *See Parker v. Dugger*, 498 U.S. 308, 320 (1991) ("The Florida Supreme Court did not conduct an independent review here. In fact, there is a sense in which the court did not review Parker's sentence at all").

Mr. Marshall stands as one of only two Florida prisoners whose death sentence remains valid notwithstanding that the jury in his case recommended a life sentence in 1989. William White, whose conviction became final in 1982, was

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[1] Mr. Marshall had previously sought an extension of time in which to file the instant motion. The Court granted the motion, permitting Mr. Marshall to file a rehearing motion by June 22, 2017.

[2] In actuality, the Court's opinion addressing the petition was limited to one sentence followed by a citation: "Because Marshall's sentence became final before *Ring v. Arizona*, 536 U.S. 584 (2002), was decided, he is not entitled to relief. *See Asay v. State*, 210 So.3d 1 (Fla. 2016)." *Marshall*, 2017 WL 1739246 at *1. As
In actuality, the Court's opinion addressing the petition was limited to one sentence followed by a citation: "Because Marshall's sentence became final before *Ring v. Arizona*, 536 U.S. 584 (2002), was decided, he is not entitled to relief. *See Asay v. State*, 210 So.3d 1 (Fla. 2016)." *Marshall*, 2017 WL 1739246 at *1. As
detailed in this motion, the Court did not even acknowledge, much less address, the other claims raised by Mr. Marshall.

granted a resentencing at which he will be entitled to a unanimous jury determination and will not face a death sentence if the jury recommends life. *See White v. State*, Case No. SC17-995 (State dismissing appeal of grant of 3.851 relief based on *Hurst v. Florida*). A resentencing has also been ordered for James Card, whose first-degree murder conviction became final in 1984, and has remained intact ever since. This Court recently vacated his death sentence and ordered a resentencing in light of *Hurst v. Florida. Card v. Jones,* 2017 WL 1743835 (Fla. May 4, 2017). Mr. Card, too, will be entitled to a unanimous jury at his penalty phase and will not face a death sentence imposed by a judge should the jury not return a unanimous recommendation. J.B. Parker, whose first-degree murder conviction became final in 1985, was recently granted a resentencing pursuant to *Hurst v. Florida, see Parker v. State*, Case No. SC17-794 (State dismissing appeal of grant of 3.851 relief based on *Hurst v. Florida*), and will also be entitled to a unanimous jury determination of the facts necessary to impose a sentence of death, and will be sentenced to life should the jury fail to return a unanimous verdict.

Mr. White, Mr. Card, and Mr. Parker will have the substantive right to life sentences unless their juries return unanimous death recommendations.

But Mr. Marshall, whose conviction for first-degree murder post-dated those of Mr. White, Mr. Card, will not. Mr. Marshall still has a valid death sentence despite the fact that his jury recommended a life sentence in 1989. They were all convicted of the same offense; the only difference is that Mr. Marshall's death sentence had not been previously vacated and he was not resentenced subsequent to June 24, 2002. This is arbitrary, unfair, shocking to the conscious, and unconstitutional. This Court wrongly denied Mr. Marshall's habeas corpus petition. The Court wrongly overlooked and failed to address the arguments Mr. Marshall actually raised. Rehearing and oral argument are warranted.

A. Mr. Marshall's Amended Petition: the Issues Raised.

Mr. Marshall's Amended Habeas Corpus Petition raised a number of claims related to the present constitutionality and validity of his override death sentence. ***There were three separately delineated claims raised in Mr. Marshall's amended habeas petition***:

1. Claim I.

Claim I containing two interrelated—but separate—claims based on *Hurst v. Florida*, 136 S.Ct. 616 (2016), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016), *cert. denied sub nom Florida v. Hurst*, 2017 WL 635999 (U.S. May 22, 2017). **Claim I raised both a Sixth and an Eighth Amendment challenge to Mr. Marshall's override death sentence**.

The Sixth Amendment argument contained in Claim I was premised on *Hurst v. Florida* and *Hurst v. State*, particularly the latter case that abrogated the decades-old *Tedder* case[3] and cemented once and for all the demise of the judicial override in the State of Florida. The Eighth Amendment argument contained in Claim I was premised on this Court's decision in *Hurst v. State* and its **Eighth Amendment holding** that the "evolving standards of decency" warranted a conclusion that capital jurors must render a unanimous verdict. *Hurst,* 202 So.3d at 60 ("The "evolving standards" test considers whether punishments that were within the power of the state to impose at the time, but have since come to be viewed as unconstitutional, should be prohibited on constitutional grounds") (citing *Montgomery v. Louisiana,* 136 S.Ct. 718, 742 (2016)). In light of the Eighth Amendment holding by the Court in *Hurst v. State*, Mr. Marshall's petition argued that "a death sentence resulting from a judicial override of a jury's recommended sentence of life imprisonment is no longer tolerable under ***either the Sixth or the Eighth Amendments*** and thus has 'since become to be viewed as unconstitutional.'" (Amended Habeas Petition at 28) (emphasis added). The Court's Eighth Amendment holding in *Hurst v. State* has nothing to do with *Ring v. Arizona*, 536 U.S. 584 (2002), *Apprendi v. New Jersey*, 530 U.S. 466 (2000), or the retroactivity of *Hurst v. Florida*. Rather, as Mr. Marshall argued, the Eighth Amendment holding in *Hurst v. State* is a matter of substantive law that is retroactive and that the Sixth Amendment further required relief in the context of a

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[3] *Tedder v. State*, 322 So.2d 908 (Fla. 1975).

judicial override.

2. <u>Claim II.</u>

Claim II of Mr. Marshall's amended petition alleged that, pursuant to the then-extant §921.141, Fla. Stat. (2016), and the Eighth and Fourteenth Amendments, his override death sentence should be converted to a life sentence because "[u]nder the new statute, Mr. Marshall's death sentence must be vacated in favor of the life sentence recommended by his jury whether or not this Court determines that *Hurst v. Florida* is retroactive[] because the new statute conclusively establishes that a death sentence premised on a jury's vote for life violates the Eighth Amendment's evolving standards of decency and constitutes cruel and unusual punishment" (Amended Habeas Petition at 36). In other words, **Claim II had nothing to do with either *Hurst v. Florida* or *Hurst v. State* or the retroactivity of either ruling. Rather, it was based on the newly enacted Florida capital sentencing statute.**

3. <u>Claim III.</u>

Claim III of Mr. Marshall's amended habeas petition argued that his death sentence was due to be vacated and a life sentence should be imposed pursuant to §775.082(2), Fla. Stat. (Amended Habeas Petition at 39). Mr. Marshall contended that that his case was distinguishable from those cases where the Court had determined that §775.082(2) was inapplicable because, unlike in cases where a death sentence was imposed by a judge following a jury recommendation of *death*, a death sentence imposed by a judge following a jury recommendation of *life* **was outlawed** as a matter of constitutional law in the wake of *Hurst v. Florida* and *Hurst v. State*, particularly given the abrogation of *Tedder*. In other words, as Mr. Marshall argued, "[t]here is no more death penalty available when the jury has returned a life recommendation" (Amended Habeas Petition at 42). **Claim III had nothing to do with either *Hurst v. Florida* or *Hurst v. State* or the retroactivity of either ruling.**

B. The Court Failed to Address Mr. Marshall's Claims.

In rejecting Mr. Marshall's petition, the Court only addressed one aspect of one part of Claim I, that being the Sixth Amendment argument based on *Hurst v. Florida*. It did not decide Mr. Marshall's Eighth Amendment claim. Mr. Marshall knows this because the Court cited to *Asay v. State*, which is a case that decided *only* the retroactivity of *Hurst v. Florida*. *Marshall*, 2017 WL 1739246 at *1 ("Because Marshall's sentence became final before *Ring v. Arizona*, 536 U.S. 584 (2002), was decided, he is not entitled to relief. *See Asay v. State*, 210 So.3d 1 (Fla. 2016).").[4] *See also Gaskin v. State*, 2017 WL 224772 at *2 (Fla. Jan. 19,

[4] Justice Lewis joined the Court's per curiam majority opinion denying Mr. Marshall's petition. But, in *Asay*, Justice Lewis, in a concurring opinion, wrote that the retroactivity holding announced by the *Asay* majority should not apply to those defendants who previously raised *Hurst*-like challenges to their death

2017) (Because Gaskin's sentence became final in 1993, Gaskin is not entitled to

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sentences on direct appeal and that defendants like Mr. Marshall (who did raise such challenges) would be "wrongly executed":

> [I]n 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. . . . **[T]hose defendants who challenged Florida's unconstitutional sentencing scheme based on the substantive matters addressed in *Hurst* are entitled to consideration of that constitutional challenge.**

Asay, 210 So.3d at 30 (Lewis, J., concurring in result) (emphasis added) (citing *James v. State*, 615 So.2d 668, 669 (Fla. 1993). *See also Mosley v. State*, 209 So.3d 1248 (Fla. 2016). Justice Lewis also dissented in *Gaskin v. State*, 2017 WL 224772 (Fla. Jan. 19, 2017), where the majority again rejected a pre-*Ring* challenge in light of *Asay*. Mr. Marshall unquestionably raised challenges both at trial and on appeal to "the substantive matters addressed in *Hurst*." He even argued on direct appeal that aggravating circumstances were elements of the crime and that Florida's capital sentencing statute violated the Sixth and Eighth Amendments, noting the contra authority of the then-recent decision in *Hildwin v. Florida*, 109 S.Ct. 2055 (1989). *Hildwin* was, of course, overruled in *Hurst v. Florida*.

Additionally, Justice Quince joined in the per curiam majority opinion denying Mr. Marshall's petition. Justice Quince did not write a separate opinion in *Asay* but in her concurring opinion in *Bottoson v. Moore*, 833 So.2d 93, 709 (Fla. 2002), a case that did not involve an override, she wrote: "Whether we may fundamentally agree that jury overrides may not be allowed under a full *Ring* analysis is not the issue here." Justice Quince, however, has clearly expressed the view that there can be no harmless *Hurst* error when there are aggravating circumstances that require factual determinations based on evidence presented to a jury but made by the judge *Hall v. State*, 212 So.3d 1001, 1036 (Fla. 2017) (Quince, J., concurring in part and dissenting in part). Of course, in Mr. Marshall's case, nothing was found by the jury because the jury recommended a life sentence.

relief under Hurst v. Florida. See Asay v. State, ––So.3d ––, ––, 2016 WL 7406538 at *13 (Fla. 2016) (holding that Hurst is not retroactive to cases that became final before the United States Supreme Court decided Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)). Indeed, the Respondent in this case agreed that *Asay* only decided the retroactivity of *Hurst v. Florida*. *See* Response to Amended Petition at 15 ("This Court just determined that Hurst v. Florida is not retroactive on cases which were final before Ring"). Of course, *Hurst v. Florida* did not implicate the Eighth Amendment at all; its holding was limited to the Sixth Amendment.

The Court in Mr. Marshall's case wholly failed to address the Eighth Amendment aspect of Claim I and the entirety of Claims II and III. And, to the extent that the Court rejected the Sixth Amendment prong of Claim I, the Court overlooked Mr. Marshall's actual legal arguments in favor of what is tantamount to a per curiam affirmance with a citation to a case (*Asay*) that is inapposite to Mr. Marshall's situation.

II. Rehearing and Oral Argument on Mr. Marshall's Petition Are Warranted.

1. Improper Reliance on *Asay* for Evaluating Retroactivity of *Hurst v. Florida* and *Hurst v. State* to Override Cases.

As noted above, Mr. Marshall, as one aspect of Claim I of his amended habeas petition, contended he was entitled to relief in light of *Hurst v. Florida* ***and***

Hurst v. State. His petition contained an extensive and detailed legal analysis as to why judicial overrides did not survive either *Hurst v. Florida* or *Hurst v. State*, including the fact that the Supreme Court in *Hurst v. Florida* overruled *Spaziano v. Florida*, 468 U.S 447 (1984), and this Court in *Hurst v. State* overruled *Tedder* (Amended Habeas Petition at 14 *et seq.*). His petition also argued that any retroactivity analysis of both *Hurst v. Florida* and *Hurst v. State* required the Court to revisit its decision in *Marshall v. Crosby*, 911 So.2d 1129 (Fla. 2005), where the Court conducted a *Witt*[5] retroactivity analysis with respect to a *Ring/Apprendi* challenge to Florida's judicial override. *Id.* at 1133-1135. Given that the Court in *Marshall v. Crosby* conducted a *Witt* analysis **specifically in the context of judicial overrides** and the Court's subsequent statement in *Asay* that a different retroactivity analysis would be appropriate in other contexts,[6] Mr. Marshall presumed that the Court would engage with Mr. Marshall's arguments and provide a detailed retroactivity analysis of *Hurst v. Florida* **and** *Hurst v. State* in the context of a judicial override. But the Court ignored the issue, avoided addressing

[5] *Witt v. State*, 387 So.2d 922 (Fla. 1980).

[6] *Asay*, 210 So.3d at 22. The Court in *Asay* also determined that the *Witt* retroactivity analysis set forth in *Johnson v. State*, 904 So.2d 400 (Fla. 2005), had to be revisited in light of *Hurst v. Florida* because, in part, its analysis in *Johnson* was infused with a misunderstanding of the underlying decision whose retroactivity it was evaluating (*Ring* v. *Arizona*). However, there has been no analysis of *Hurst v. Florida*'s impact on judicial overrides despite the fact that *Marshall v. Crosby* was also infused with the Court's misunderstanding of both *Ring* and *Apprendi*.

Mr. Marshall's arguments, and instead relied on the analysis conducted in *Asay*. The Court's failure to address the retroactivity of the Sixth Amendment holding in *Hurst v. Florida* and the federal and Florida constitutional holdings of *Hurst v. State* in Mr. Marshall's case is an abrogation of its obligation to ensure that the death penalty is imposed fairly with a "commitment to dignity" consistent with "its duty to teach human decency as the mark of a civilized world." *Hall v. Florida,* 134 S.Ct. 1986, 2001 (2014).

Hurst v. Florida and *Hurst v. State* have now overruled the cases that have propped up the Florida override procedure for years—*Spaziano v. Florida* and *Tedder v. State*. This Court has a duty to evaluate the effect of the overruling of these cases in Mr. Marshall's case, where he preserved, at trial and on appeal, challenges to the very practice that has now been uniformly condemned as unconstitutional. Mr. Marshall stands as one of two prisoners on death row despite a jury recommendation of life. This violates human decency, due process, and the Sixth and Eighth Amendments. The failure by the majority in this case to even address Mr. Marshall's arguments in any fashion—much less in any meaningful fashion—only exacerbates the miscarriage of justice in this case. *See Marshall,* 2017 WL 1739246 at *1 (Labarga, C.J., dissenting) ("Marshall's death sentence, which was based upon a judicial override, constitutes an injustice that should be remedied").

2. The Court's Failure to Address Mr. Marshall's Claims Results in a Due Process Violation and also Violates the Eighth Amendment's Requirement for Heightened Reliability in Capital Cases.

As noted above, the Court failed to actually address many of the claims raised by Mr. Marshall. This is not merely a situation where Mr. Marshall is expressing disagreement with some the Court's rulings; the Court made no rulings on most of Mr. Marshall's claims. Presumably the Court would not deliberately ignore these arguments, thereby depriving Mr. Marshall of his right to be meaningfully heard, because that would violate due process. The touchstone of due process is notice and reasonable opportunity to be heard. *See Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985). *See also Scull v. State*, 569 So.2d 1251, 1252 (Fla. 1990) ("The essence of due process if that fair notice and a reasonable opportunity to be heard must be given to interested parties before judgment is rendered"); *Huff v. State*, 622 So.2d 982, 983 (Fla. 1993) ("Because of the severity of punishment at issue in a death penalty postconviction case, we have determined that henceforth the judge must allow the attorneys the opportunity to appear before the court and be heard on an initial 3.850 motion").

In a capital case in which a death sentence has been imposed, courts are required to go further when considering challenges to the death sentence. The Eighth Amendment requires more due to a special need for reliability. *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988) ("The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case"). The arguments that this Court did not mention in the opinion denying Mr. Marshall's habeas petition must have been overlooked inadvertently. However, due to the Eighth Amendment, due process, and the need for reliability in capital cases, this Court needs to actually consider and address Mr. Marshall's arguments.

In its brief opinion denying Mr. Marshall's petition, all that is addressed is the date of finality of his conviction, which was prior to 2002, the date that *Ring v. Arizona* issued, and a citation to *Asay*. However, as noted above and in his petition and the reply to the Respondent's response, Mr. Marshall presented arguments that were not made in *Asay* and thus not before the Court in *Asay*; he also presented additional claims unique to override cases that certainly were not before the Court in *Asay*. Simply relying on *Asay* and not addressing Mr. Marshall's arguments that were not made in *Asay* means that Mr. Marshall's right to be meaningfully heard has not been honored. That alone warrants a rehearing and an oral argument to fully air the issues presented in this important matter, one literally of life and death.

The Florida Constitution provides for separation of powers into three branches. Establishing law without regard to a specific individual or his right to be heard is a legislative function. To the extent that the Court appears to have decided that in *Asay* it drew a line at June 24, 2002 (a line which neither party in *Asay* asked for or wanted), and appears to be mechanically using the arbitrarily-drawn line to decide which condemned defendants get a chance to be spared from the gurney and which ones will not be given that opportunity, it is acting as a legislative body. The function of the judicial branch is to hear cases and settle disputes between parties. *Martin v. Hunter's Lessee*, 14 U.S. 304, 314 (1816) ("the judicial power 'shall extend to all cases in law or equity'"). In not addressing the arguments made by Mr. Marshall and merely applying a line drawn in *Asay* that neither party in that proceeding advocated, and on which Mr. Marshall was not given any opportunity to be heard,[7] this Court has not only deprived Mr. Marshall of due process, but it has also ceased exercising its judicial power to hear individual cases by the individual parties to those cases. Creating and applying arbitrary lines in a cold mechanical fashion for the good of the people, as a whole, is the definition of legislation. "By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons." *Roper v. Simmons*, 543 U.S. 551, 572 (2005). Surely this

[7] Mr. Marshall initiated this proceeding by filing a habeas petition on May 5, 2016, shortly after the issuance of *Hurst v. Florida* and over 8 months before *Asay* issued. However, the Court did not issue a show cause order for the State to respond and, on November 4, 2016, granted Mr. Marshall's request to amend his petition in light of the issuance of *Hurst v. State*. Mr. Marshall filed his amended petition, and only after that (on December 5, 2016), did the Court order the State to respond. By the time that the State filed its response, the Court had decided *Asay*.

means that this Court is required to treat Mr. Marshall as an individual and consider and address his arguments, rather than treating him as an object to be sorted by predetermined and arbitrary lines he had no say in creating.

WHEREFORE, based on the foregoing reasons, Mr. Marshall respectfully moves the Court for rehearing in the above-captioned case and for oral argument on the arguments presented in his amended petition for habeas corpus.

Respectfully submitted,

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CERTIFICATES OF SERVICE AND FONT

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed on this 22nd day of June, 2017, and opposing counsel will be served on this date. Counsel further certifies that this brief is typed in Times New Roman 14-point font.

/s/Todd G. Scher
TODD G. SCHER
Assistant CCRC-South
Florida Bar No. 899641

ATTACHMENT C

Supreme Court of Florida

WEDNESDAY, SEPTEMBER 20, 2017

CASE NO.: SC16-779
Lower Tribunal No(s).:
431989CF000174CFAXMX

MATTHEW MARSHALL	vs.	JULIE L. JONES, ETC.
Petitioner(s)		Respondent(s)

Petitioner's Motion for Rehearing is hereby denied.

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

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

cd
Served:

JESSICA LEIGH HOUSTON
LISA-MARIE LERNER
TODD G. SCHER
HON. CAROLYN TIMMANN, CLERK

ATTACHMENT D

KeyCite Yellow Flag - Negative Treatment
Distinguished by Estevez v. State, Fla.App. 4 Dist., May 11, 2005

604 So.2d 799
Supreme Court of Florida.

Matthew MARSHALL, Appellant,
v.
STATE of Florida, Appellee.

No. 75406.
|
July 16, 1992.
|
Rehearing Denied Sept. 28, 1992.

Synopsis

Defendant was convicted in the Circuit Court, Martin County, Dwight L. Geiger, J., of first-degree murder and sentenced to death. Defendant appealed. The Supreme Court held that: (1) standard jury instruction on manslaughter required instructing on various means by which death was caused that might lead to manslaughter conviction in alternative, but failure to instruct in the alternative on culpably negligent act and act of defendant as causing death was harmless error; (2) any error in refusing to poll prospective jurors to determine whether they had read article about murder that appeared in morning paper on second day of jury selection in murder trial was harmless in view of procedures and care taken by court to ensure that no seated jurors were exposed to the article; and (3) trial court did not abuse its discretion by sentencing defendant convicted of murder to death although jury had recommended life imprisonment.

Affirmed.

Barkett, C.J., filed opinion concurring in part and dissenting in part in which Shaw and Kogan, JJ., concurred.

Attorneys and Law Firms

***801** Richard L. Jordanby, Public Defender and Louis G. Carres, Asst. Public Defender, Fifteenth Judicial Circuit, West Palm Beach, for appellant.

Robert A. Butterworth, Atty. Gen. and Douglas J. Glaid, Asst. Atty. Gen., West Palm Beach, for appellee.

Opinion

PER CURIAM.

Matthew Marshall appeals his conviction for first-degree murder and imposition of the death sentence.[1] We affirm the conviction and the sentence of death.

1 We have jurisdiction. Art. V, § 3(b)(1), Fla. Const.

***802** Marshall and the victim, Jeffrey Henry, were both incarcerated at the Martin Correction Institute on November 1, 1988, when witnesses heard muffled screams and moans emanating from Henry's cell and observed Marshall exiting the cell with what appeared to be blood on his chest and arms. Within a few minutes, Marshall reentered the cell, and similar noises were heard. After the cell became quiet, Marshall again emerged with blood on his person. Henry was found dead, lying in his cell facedown with his hands bound behind his back and his sweat pants pulled down around his ankles to restrain his legs. Death was caused by blows to the back of his head.

Marshall was charged with first-degree murder. His defense at trial was that he killed Henry in self-defense. Marshall claimed that Henry was a "muscle man" for several inmates who operated a football pool. When Marshall tried to collect his winnings from the inmates, they told him to get the money from Henry. Marshall claims he entered Henry's cell only to collect his winnings but that Henry refused to pay, and that Henry then attacked him, so he fought back.

The jury found Marshall guilty of first-degree murder and recommended a sentence of life imprisonment. The judge rejected the jury's recommendation and imposed a sentence of death, finding in aggravation: (1) that the murder was committed by a person under sentence of imprisonment; (2) that the defendant was previously convicted of violent felonies; (3) that the murder was committed while the defendant was engaged in the commission of or an attempt to commit a burglary; and (4) that the murder was especially heinous, atrocious, and cruel. The judge found in mitigation that the defendant's behavior at trial was acceptable and that the defendant entered prison at a young age. The judge specifically rejected as mitigation that the defendant's older brother influenced him and led him astray to run the streets and break the law, and that his mother caused him to believe he would suffer no negative consequences for his bad behavior. The judge concluded that facts supporting a conclusion that the mitigating circumstances did not outweigh the aggravating circumstances were "so clear and convincing that no reasonable person could differ."

Guilt Phase

[1] **[2]** Marshall raises numerous issues on appeal, some of which, while not warranting reversal, do merit discussion.[2] Marshall first claims that the court erred in permitting an inmate to testify identified only by number, not by name. The court instituted this procedure in an effort to protect the identity of the witness, who feared reprisals from the inmate population for becoming a "snitch" by testifying for the State.[3] Marshall argues that his right to cross-examination was infringed and that the jury was allowed to infer that he personally posed a threat to the witness because the jury was never apprised of the reason for the witness's anonymity. The record reveals that the court stated that it would not offer a curative instruction on its own initiative but that it would entertain a request by the defense; defense counsel declined. Because the defense was affirmatively presented with the opportunity to ***803** request a curative instruction and chose not to do so, Marshall cannot now complain that the jury was never informed of the reason for the number procedure.

2 We reject without discussion the following claims alleging reversible error: (1) that Marshall was prevented from cross-examining witness Number 29 regarding bias; (2) that Marshall was prevented from eliciting from a prison official that inmates were allowed to visit each other's cells; (3) that the trial court abused its discretion in denying Marshall's pretrial motion for appointment of private counsel; (4) that the trial court erred in failing to bring in additional jurors for the venire when the only potential black juror was struck for cause; (5) that the trial court erred in striking for cause a juror who was opposed to the death penalty; (6) that the trial court erred in admitting hearsay evidence; and (7) that the trial court should have granted Marshall's motion for particulars.

3 Other inmate witnesses who were assigned numbers were never called to testify. One inmate, Michael Lane, Henry's cellmate, testified under his own name, but merely identified objects belonging to Henry and stated that he woke Henry up before leaving for breakfast on the morning of the murder. A former inmate, Frank Calabria, also testified under his own name, but mentioned that he was no longer incarcerated.

Furthermore, the defense always knew the true name and identity of this witness, and therefore the fact that the witness testified as "Number 29" did not hamper cross-examination or the defense's ability to investigate the background of the witness. *Cf. Smith v. Illinois,* 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956 (1968) (right to cross-examination significantly infringed where defense was not provided name or address of witness). Contrary to Marshall's assertions, we do not find the jury was led to believe that a threat of reprisal from Marshall was the reason for the witness testifying anonymously. *Cf. Ponticelli v. State,* 593 So.2d 483 (Fla.1991) (fear of reprisal from general inmate population unlikely to imply witness feared reprisal from defendant). We therefore find Marshall is not entitled to relief on this issue.

[3] **[4]** Marshall next argues that the trial court erred in instructing the jury on manslaughter. The relevant part of the instruction reads as follows:

> Before you can find the defendant guilty of manslaughter, the State must prove the following elements beyond a reasonable doubt:
>
> 1. (Victim) is dead.
>
> 2. The death was caused by the
>
> (a) act of (defendant).
>
> (b) procurement of (defendant).
>
> (c) culpable negligence of (defendant).

Fla.Std.Jury Inst. (Crim.) F.S. 782.07. The instructions inform the judge to "[g]ive 2(a), (b), or (c) depending upon allegations and proof." *Id.* In this case, the parties agreed that 2(b) did not apply to the facts here. After much discussion on the remaining sections, the judge settled on a hybrid:

> Okay. I will give paragraph two then of the manslaughter as follows. "The death was caused by the culpably negli—culpably negligent act of Matthew Marshall." And not give in the alternative. That actually, if anything, is in favor of the Defendant

> because it—it raises the burden of proof that the State must shoulder in order to convict. Okay. Others?

While we agree that the instruction calls for the giving of the sections in the alternative, we find any error harmless because, as the trial judge noted, requiring the State to prove "the culpably negligent act" as opposed to simply "the act" inures to the benefit of the defendant.

[5] Marshall's next claim is that the trial court erred in instructing the jury that self-defense was unavailable to felony murder and third-degree murder where the underlying felonies were respectively burglary and aggravated battery. We find no error. Under section 776.041(1), Florida Statutes (1987), self defense is legally unavailable to a person who "[i]s attempting to commit, committing, or escaping from the commission of, a forcible felony." Section 776.08 specifically defines "forcible felony" to include both burglary and aggravated battery. The meaning of the plain words is clear, and the trial court correctly refused the instruction. *Cf. Perkins v. State,* 576 So.2d 1310 (Fla.1991) (holding drug trafficking was not a forcible felony within the meaning of section 776.041(1) where it was not included in statutory definition or otherwise included use or threat of force as an element of the offense).

In his next claim, Marshall argues that the trial court erred in denying Marshall an instruction on aggravated assault in connection with the self-defense instruction. In light of the evidence in this case, we do not find the trial court abused its discretion in declining to give the instruction. *See Robinson v. State,* 574 So.2d 108, 111 (Fla.1991), *cert. denied,* 502 U.S. 841, 112 S.Ct. 131, 116 L.Ed.2d 99 (1991).

[6] Marshall next alleges the trial court erred in not declaring a mistrial after the prosecution conceded that it had failed to link evidence of the alleged motive. The State's theory of the murder included the assertion that Marshall's motive in killing Henry was to vindicate animosity between Henry and another inmate, David Ingles. ***804** During trial, the State presented testimony about the illicit activities of Ingles and a fight between Ingles and Henry that occurred several weeks prior to the murder. The defense objected to this evidence as being irrelevant, but the court admitted it following the State's assurances that relevance would be shown. However, at the close of its case, the State conceded that this evidence had to be stricken because it had failed to link the evidence to Marshall or to the murder. The trial court denied Marshall's motion for a mistrial but instructed the jury to disregard all that evidence. Marshall argues that the court should have granted a mistrial because the curative instruction was inadequate to overcome the prejudicial effects of this irrelevant evidence. The record reveals, however, that references to Ingles and his animosity toward Henry were minimal,[4] and that the prosecutor never argued to the jury its theory that Marshall killed Henry on behalf of Ingles. We therefore find the court's instruction to disregard the evidence of Ingles sufficient to cure any prejudice.

4 The evidence relating to Ingles occurred during the testimony of: (1) Inspector Riggins, who related Ingles's cell assignment on May 9, 10, 11, 1989, and stated that Ingles had told him that Henry set him up for administrative confinement by putting marijuana in his cell; (2) Inmate 29, who testified that Ingles sold drugs in the prison, and that conflict existed between Henry and Ingles stemming from an incident where Henry had taken drugs from Ingles without paying him; (3) Captain John Wilds, who testified regarding a fight between Ingles and Henry; and (4) Frank Calabria, a former inmate who stated in response to a defense question that Ingles and Marshall did not associate in the prison.

[7] **[8]** We next reject Marshall's claim that the trial court abused its discretion in admitting a photograph taken of the victim's head during the autopsy. Such photographs were admissible to assist the medical examiner in explaining the nature of the wounds and the manner in which they were inflicted. *See, e.g., Bush v. State,* 461 So.2d 936, 939 (Fla.1984), *cert. denied,* 475 U.S. 1031, 106 S.Ct. 1237, 89 L.Ed.2d 345 (1986). During his testimony, the medical examiner used the photo at issue to "illustrate the rather prominent area of contusion discoloration underneath the forehead." While we do not find the small polaroid photo unduly prejudicial in this case, *see id.; Jennings v. State,* 512 So.2d 169 (Fla.1987), *cert. denied,* 484 U.S. 1079, 108 S.Ct. 1061, 98 L.Ed.2d 1023 (1988), we caution trial judges to scrutinize such evidence carefully for prejudicial effect, particularly when less graphic photos are available to illustrate the same point.

[9] **[10]** We agree with Marshall's claim that the trial court erred in admitting evidence of gambling slips found in Marshall's cell six months after the murder and evidence that Marshall's nickname in prison was "Uzi." Such items bore no relevance to the murder in this case. However, we find that on this record the admission of this evidence was harmless beyond a reasonable doubt. *See State v. DiGuilio,* 491 So.2d 1129 (Fla.1986).

[11] **[12]** Marshall next asserts that the trial court erred in refusing to poll prospective jurors to determine whether they had read an article about the murder appearing in the *Palm Beach Post.* On the second day of jury selection, the article in question appeared in the morning paper. Defense counsel requested the court to poll the venire to determine whether anyone had read the article. The judge declined to poll the prospective jurors, choosing instead to follow his regular routine:

> THE COURT: So I'm not going to do that. However, I'm going to continue to ask the same questions of additional jurors that I've asked in the past. That is, do you know anything about this case from any source? Have you read any newspaper articles, come in contact with any TV coverage and the like—questions similar in nature to that. Uh, and if a juror responds yes, I'll ask when and where.

In addition, the trial judge instructed the venire on several occasions to avoid any contact with news media coverage or other discussion of Marshall's case. Later during the trial, the court did inquire of the jury as to whether it had any contact with ***805** two articles appearing in the *Palm Beach Post* and received a negative response. Although we agree with Marshall that trial courts should poll juries whenever they may have been exposed to prejudicial news coverage, we find any error in this case harmless in view of the procedures and care taken by the court to ensure that no seated jurors were exposed. *See Derrick v. State,* 581 So.2d 31, 35 (Fla.1991).

We reject Marshall's claim that the trial court erred in denying his motion for judgment of acquittal. A motion for judgment of acquittal should only be granted when "the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law." *Lynch v. State,* 293 So.2d 44, 45 (Fla.1974). The record in this case reveals sufficient evidence of either felony murder or premeditated murder from which the jury reasonably could have found Marshall guilty.

[13] Finally, we reject Marshall's claim that the prosecutor made comments vouching for the credibility of state witnesses during his opening statement that were so prejudicial as to require a new trial. These comments included the State's assertion that the State had overcome great obstacles in getting inmates to "truthfully tell what has occurred," and that inmates operate under a "code of silence" but that they have "a residual core of humanity." The record shows that the defense neither objected nor requested a curative instruction nor moved for mistrial. Because these remarks do not constitute fundamental error, this issue is not cognizable in this appeal. *E.g., Carter v. State,* 560 So.2d 1166, 1168 (Fla.1990); *Bassett v. State,* 449 So.2d 803, 807 (Fla.1984).

PENALTY PHASE

[14] **[15]** **[16]** Turning to the penalty phase, Marshall first alleges numerous errors in the judge's sentencing order require a new penalty phase. [5] We agree that the trial court erred in its consideration of a prior conviction for escape. Defense counsel had expressly waived the mitigating circumstance of no significant prior criminal history, and a conviction for escape does not qualify as a statutory aggravating factor of "another capital felony or of a felony involving the use or threat of violence" under section 921.141(5)(b), Florida Statutes (1987). *Lewis v. State,* 398 So.2d 432, 438 (Fla.1981). However, in light of Marshall's other nine prior violent felony convictions, we find the error harmless beyond a reasonable doubt. *See DiGuilio.*

5 We reject Marshall's claims that the death penalty statute and the aggravating circumstances are unconstitutional. Nor do we find that the trial court abused its discretion in refusing to admit evidence of prior violent acts of the victim.

[17] Marshall next argues that the trial court erred in finding the murder to be heinous, atrocious, or cruel. The record shows that Marshall attacked the victim twice, and that the victim was at least partially conscious during the second attack. He was struck six times on the back of the head, and witnesses heard him plead for mercy. We find this circumstance supported by the evidence beyond a reasonable doubt.

[18] Likewise, we find the circumstance of murder committed during the course of a burglary to have been proven beyond a reasonable doubt. Even if Marshall initially entered Henry's cell with consent for the purpose of collecting a gambling debt, the only reasonable inference apparent from Marshall's reentering the cell was that he intended to resume his attack on the victim.

[19] **[20]** **[21]** Marshall next alleges that the trial court abused its discretion in sentencing Marshall to death where the jury had made a recommendation of life imprisonment. It is well settled in Florida that a judge imposing sentence in a capital case must accord the jury recommendation great weight. *E.g., Tedder v. State,* 322 So.2d 908, 910 (Fla.1975). Where a jury has recommended a life sentence, the court must follow that recommendation unless "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." *Id.* Where the record contains no evidence supporting ***806** a life recommendation, the trial court does not err in declining to follow that recommendation.

In this case, the record contains insufficient evidence to reasonably support the jury's recommendation of life. Marshall's father was unable to attend the trial, but the defense and prosecution stipulated that he would have testified that Marshall did well in school until his early teens when his older brother influenced him to run the streets and break the law; that Marshall's mother did not discipline Marshall and allowed him to believe there would be no consequences for his behavior; and that Marshall's father loved him and requested a life sentence for his son. The trial court determined these facts were not mitigating, but did find Marshall's behavior at trial as well as his entering prison at a young age to be mitigating. We find no error in the court's assessment of this mitigation and conclude that it does not provide a reasonable basis for the jury's recommendation of life in this case. Even viewing this mitigation in the light most favorable to Marshall, it pales in significance when weighed against the four statutory aggravating circumstances, including Marshall's record of violent felonies consisting of kidnapping, sexual battery, and seven armed robberies.

Furthermore, defense counsel's argument composed largely of a negative characterization of the victim does not provide a reasonable basis for the jury's life recommendation. Moreover, contrary to Marshall's assertion, the facts surrounding the murder do not suggest that the murder was committed in self defense or in a fit of rage. The witnesses heard muffled screams and moans emanating from the victim's cell and observed Marshall leaving the cell with what appeared to be blood on his chest and arms. Within a few minutes, Marshall *reentered* the cell and similar noises were again heard. The victim was found lying face down with his hands bound behind his back and his ankles were restrained. The victim received no less than twenty-five separate wounds and blood was sprayed and splattered about the cell. Death was caused by blows to the *back* of his head. Nothing in these facts supports the notion that Marshall acted in self defense or that he simply killed the victim in the heat of a fight. We thus conclude that the trial court did not abuse its discretion in finding the facts supporting the death sentence to be "so clear and convincing that no reasonable person could differ." *See Tedder,* 322 So.2d at 910.

Finally, we do not find the death sentence disproportionate in this case. The facts of this case, including the four strong aggravating circumstances compared to the weak mitigation, render the death sentence appropriate and proportional when compared to other cases. *See, e.g., Freeman v. State,* 563 So.2d 73 (Fla.1990); *Lusk v. State,* 446 So.2d 1038 (Fla.1984).

Accordingly, we affirm Marshall's conviction for first-degree murder and the resulting death sentence.

It is so ordered.

OVERTON, McDONALD, GRIMES and HARDING, JJ., concur.

BARKETT, C.J., concurs in part and dissents in part with an opinion, in which SHAW and KOGAN, JJ., concur.

BARKETT, Chief Justice, concurring in part and dissenting in part.

I concur in the affirmance of guilt but dissent from the affirmance of the death sentence because I believe a reasonable basis for the jury's recommendation of life exists and that the trial court therefore abused its discretion in rejecting that recommendation.

As the majority correctly notes, the jury's recommendation carries great weight and should be followed unless "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." *Tedder v. State,* 322 So.2d 908, 910 (Fla.1975). In this case reasonable people could differ as to the appropriateness of the death penalty, and the court's override was therefore improper. *See Ferry v. State,* 507 So.2d 1373, 1376–77 (Fla.1987).

In addition to considering the stipulated testimony of Marshall's father, the jury ***807** could have reasonably viewed the evidence of the murder in a light more favorable to Marshall. In his closing argument to the jury, defense counsel conceded that the aggravating circumstances of murder committed while under a sentence of imprisonment and previous conviction of a violent felony were established, but strongly argued against the existence of the other aggravators presented by the State. He argued that the death penalty should be reserved only for the worst murderers and worst aggravation. He pointed out that the evidence showed that Marshall and Henry had no prior problems with each other and had socialized together at the prison. Defense counsel emphasized that the circumstances of the crime indicate no prior plot or plan to kill since Marshall entered the cell unarmed and the murder was committed with a battery pack belonging to and found within the cell of the victim. He argued that offensive wounds on Henry's hands showed that the murder occurred during the course of a fight and that Henry was a violent person. He also noted that Henry's skull was not fractured and his facial bones weren't broken, indicating that Marshall did not intend to torture the victim or inflict additional injuries once he was rendered unconscious. Defense counsel also pointed out that the murder was not committed for financial gain. Finally, defense counsel argued that Marshall's age and background mitigate the offense as well. He pointed out that a life sentence of 25 years on top of the sentence of 46 years that Marshall was already serving would keep Marshall in prison for a substantial period of time.

I believe this view of the evidence provided a reasonable basis upon which the jury could recommend a life sentence. While the jury may not have believed that Marshall acted in self defense to excuse the killing, it could have reasonably inferred from the evidence that a fight erupted between Marshall and Henry and that Marshall killed Henry in a fit of rage. It is also likely that the jury rejected some of the aggravators found by the judge or assigned them minimal weight. *See Hallman v. State,* 560 So.2d 223 (Fla.1990). Additionally, the jury could have reasonably found mitigation in Marshall's family background, *see, e.g., McCampbell v. State,* 421 So.2d 1072 (Fla.1982), and determined, based on the nature of the crime and the circumstances surrounding it, that the death penalty was not the appropriate penalty in this case. *See Hallman,* 560 So.2d at 226–27. As this Court has stated in the past, "[t]he death penalty, unique in its finality and total rejection of the possibility of rehabilitation, was intended by the legislature to be applied 'to only the most aggravated and unmitigated of most serious crimes.' " *Holsworth v. State,* 522 So.2d 348, 354–55 (Fla.1988) (quoting *State v. Dixon,* 283 So.2d 1, 7 (Fla.1973), *cert. denied,* 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974)). We have emphasized that the jury's recommendation "is entitled to great weight, reflecting as it does the conscience of the community." *Id.* 522 So.2d at 354. Although some may not view the mitigation as compelling in this case, I cannot say that no reasonable person could have recommended a life sentence for Matthew Marshall. *See, e.g., Hallman,* 560 So.2d at 226–27; *Tedder.*

Accordingly, I dissent.

SHAW and KOGAN, JJ., concur.

All Citations

604 So.2d 799, 17 Fla. L. Weekly S459

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ATTACHMENT E

854 So.2d 1235
Supreme Court of Florida.

Matthew MARSHALL, Appellant,
v.
STATE of Florida, Appellee.

No. SC00-1186.
|
June 12, 2003.
|
Rehearing Denied Sept. 8, 2003.

Synopsis

Following appellate affirmance of his conviction of murder and sentence of death, 604 So.2d 799, petitioner sought post-conviction relief. The Circuit Court, Martin County, Dwight L. Geiger, J., denied petition after evidentiary hearing, and petitioner appealed. The Supreme Court held that: (1) alleged juror misconduct set forth in post-conviction affidavit did not inhere in verdict; (2) defense counsel's investigation of petitioner's background was reasonable; (3) defense counsel's performance in connection with mental health evaluations of petitioner was not deficient; (4) any withholding of evidence by state was harmless; and (5) state did not knowingly present false testimony of inmate witness.

Affirmed in part and remanded in part.

Lewis, J., concurred in result only.

Wells, J., concurred in part and dissented in part with opinion in which Quince, J., joined.

Attorneys and Law Firms

***1237** Melissa Minsk Donoho, Special Assistant CCRC-South, and Leor Veleanu, Staff Attorney, CCRC-South, Office of the Capital Collateral Regional Counsel-South, Fort Lauderdale, FL, for Appellant.

Charles J. Crist, Jr., Attorney General, and Debra Rescigno, Assistant Attorney General, West Palm Beach, FL, for Appellee.

Opinion

PER CURIAM.

Matthew Marshall, a prisoner under sentence of death, appeals the trial court's denial of his motion for postconviction relief pursuant to 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 remand for an evidentiary hearing on one issue, but affirm the trial court's order denying Marshall postconviction relief on all the other issues raised herein.

BACKGROUND

Matthew Marshall was convicted and sentenced to death for the 1988 murder of Jeffrey Henry. This Court previously summarized the facts in this case as follows:

> Marshall and the victim, Jeffrey Henry, were both incarcerated at the Martin Correction Institute on November 1, 1988, when witnesses heard muffled screams and moans emanating from Henry's cell and observed Marshall exiting the cell with what appeared to be blood on his chest and arms. Within a few minutes, Marshall reentered the cell, and similar noises were heard. After the cell became quiet, Marshall again emerged with blood on his person. Henry was found dead, lying in his cell facedown with his hands bound behind his back and his sweat pants pulled down around his ankles to restrain his legs. Death was caused by blows to the back of his head.
>
> Marshall was charged with first-degree murder. His defense at trial was that he killed Henry in self-defense. Marshall claimed that Henry was a ***1238** "muscle man" for several inmates who operated a football pool. When Marshall tried to collect his winnings from the inmates, they told him to get the money from Henry. Marshall claims he entered Henry's cell only to collect his winnings but that Henry refused to pay, and that Henry then attacked him, so he fought back.

See Marshall v. State, 604 So.2d 799, 802 (Fla.1992). The jury found Marshall guilty of first-degree murder and recommended a sentence of life imprisonment. The trial court, however, rejected the jury's recommendation and imposed a sentence of death. In so doing, the trial court concluded that facts supporting a conclusion that the mitigating circumstances did not outweigh the aggravating circumstances were "so clear and convincing that no reasonable person could differ." [1] This Court, in a four-to-three opinion, affirmed the jury override on appeal. *See id.* at 805-06. The United States Supreme Court denied Marshall's petition for writ of certiorari on May 17, 1993. *See Marshall v. Florida,* 508 U.S. 915, 113 S.Ct. 2355, 124 L.Ed.2d 263 (1993).

1 The trial court found the following four aggravating circumstances: (1) the murder was committed by a person under sentence of imprisonment; (2) the defendant was previously convicted of violent felonies; (3) the murder was committed while the defendant was engaged in the commission of or an attempt to commit a burglary; and (4) the murder was especially heinous, atrocious, or cruel. In mitigation, the trial court found that the defendant's behavior at trial was acceptable and that the defendant entered prison at a young age. The trial court, however, specifically rejected as mitigation that the defendant's older brother influenced him and led him astray to run the streets and break the law, and that his mother caused him to believe he would suffer no negative consequences for his bad behavior. *See id.*

Marshall filed his initial 3.850 motion in August of 1994. On January 29, 1999, Marshall filed his final amended 3.850 motion, raising twenty-seven claims. [2] Following ***1239** a *Huff*[3] hearing, the trial court entered an order granting an evidentiary hearing on claims (3), (11), (17), and (23) of Marshall's amended motion, and summarily denying Marshall's remaining claims. The trial court held an evidentiary hearing on August 23-26, 1999. Thereafter, the trial court entered an order denying all relief. This appeal follows.

2 These claims included: (1) public records are being withheld in violation of chapter 119, Florida Statutes; (2) the trial transcript is unreliable and incomplete; (3) ineffective assistance of counsel during the penalty phase; (4) Marshall was allowed to waive his right to present penalty phase evidence without an adequate record inquiry to determine whether the waiver was voluntary and intelligent; (5) the Florida Bar rules' prohibition against interviewing jurors is unconstitutional; (6) the trial court erred in permitting a state prison inmate to testify before the jury as an anonymous state witness; (7) the prosecutor prejudicially vouched for the credibility of state witnesses; (8) Marshall's death sentence rests upon an unconstitutional automatic aggravating circumstance; (9) Marshall was deprived of his right to a fair and impartial trial by jury; (10) the trial court improperly considered nonstatutory aggravation; (11) the State withheld exculpatory evidence or presented misleading evidence or both; (12) the trial court and Florida Supreme Court improperly failed to evaluate mitigating circumstances; (13) ineffective assistance of counsel during the penalty phase; (14) the jury instructions improperly shifted the burden to Marshall to prove that a life sentence was appropriate; (15) the jury override resulted in an arbitrary, capricious, and unreliable death sentence; (16) trial counsel was rendered ineffective during voir dire by the trial court's action when it refused to permit more people to participate in the venire; (17) trial counsel failed to obtain a competent mental health expert; (18) Marshall is innocent of first-degree murder; (19) Marshall's sentence was based upon unconstitutionally obtained prior convictions; (20) Florida's capital sentencing scheme is unconstitutional; (21) the trial court's failure to grant a change of venue deprived Marshall of a fair trial; (22) Marshall was improperly shackled during his trial and penalty phase; (23) Marshall's trial was fraught with procedural and substantive errors which cannot be harmless; (24) charging Marshall with both premeditated and felony murder violated the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; (25) Marshall is insane to be executed; (26) Marshall is being denied his right to effective postconviction counsel due to a lack of funding; (27) newly discovered evidence establishes that execution by electrocution is cruel or unusual punishment.

3 *Huff v. State,* 622 So.2d 982 (Fla.1993).

ANALYSIS

Marshall raises five issues on appeal: (1) whether the trial court erred in denying an evidentiary hearing on Marshall's claim of juror misconduct; (2) whether the trial court erred in denying Marshall's claim alleging ineffective assistance of counsel; (3) whether the trial court erred in denying Marshall's claim that the State withheld exculpatory information; (4) whether the trial court failed to conduct an adequate cumulative error analysis; (5) whether the trial court erred by summarily denying meritorious claims. We will discuss them in turn.

Juror Misconduct

First, Marshall argues that the trial court erred in denying an evidentiary hearing on his claim of juror misconduct. In his postconviction motion, Marshall alleged that racial remarks and jokes and the jury's consideration of non-record materials deprived him of a fair and impartial jury. To support his claim, Marshall attached three sworn affidavits to his postconviction motion. Two of the affidavits were from jurors in Marshall's trial, and the other affidavit was from an attorney, Ronald Smith. The trial court summarily denied this claim without conducting an evidentiary hearing.

According to Mr. Smith's affidavit, he received a telephone call from a woman who claimed that she had served on the jury in Marshall's case.[4] During the phone conversation with Mr. Smith, the woman purportedly indicated that (1) some jurors decided Marshall was guilty before the trial was over; (2) some jurors told racial jokes about Marshall; (3) some jurors announced during the guilt phase that they were going to vote for a guilty verdict and life sentence because they wanted Marshall to return to prison to kill more black inmates; and (4) some jurors, despite the trial judge's orders forbidding it, read and discussed articles concerning the trial. Mr. Smith, however, was unable to recall the name of the woman who called his office.

4 The woman purportedly called Mr. Smith in reference to one of his clients, to whom she was related.

By contrast, the two juror affidavits discussed matters pertaining to the jury's deliberations. In her affidavit, juror Bachmann indicated that during the course of the guilt phase deliberations there were some jurors who did not want to vote for first-degree murder, and there was a concern that there might be a hung jury. She noted that a verdict finding Marshall guilty of first-degree murder was reached once there was an understanding that the jury would vote unanimously for a life sentence, although some jurors apparently felt Marshall should be sentenced to death. Juror Cunningham stated in her affidavit that during the course of the guilt phase deliberations she informed the other jurors that she did not believe the State had satisfied its burden of proof for first-degree murder, and she was not sure Marshall was guilty as charged. She noted that she compromised her true feelings regarding the case because other jurors ***1240** did not want a hung jury. She indicated that she voted for guilty of first-degree murder once it was agreed that the jury would recommend a life sentence.

[1] It is a well-settled rule that a verdict cannot be subsequently impeached by conduct which inheres in the verdict. *See, e.g., McAllister Hotel, Inc. v. Porte,* 123 So.2d 339, 344 (Fla.1959); *Russ v. State,* 95 So.2d 594, 600 (Fla.1957). In *Marks v. State Road Department,* 69 So.2d 771 (Fla.1954), this Court established guidelines with respect to the propriety of inquiry into matters occurring in the jury room. In particular, this Court explained

> [t]hat affidavits of jurors may be received for the purpose of avoiding a verdict, to show any matter occurring during the trial or in the jury room, which does not essentially inhere in the verdict itself, as that a juror was improperly approached by a party, his agent, or attorney; that witnesses or others conversed as to the facts or merits of the cause, out of court and in the presence of jurors; that the verdict was determined by aggregation and average or by lot, or game of chance or other artifice or improper manner; but that such affidavit to avoid the verdict may not be received to show any matter which does essentially inhere in the verdict itself, as that the juror did not assent to the verdict; that he misunderstood the instructions of the Court; the statements of the witnesses or the pleadings in the case; that he was unduly influenced by the statements or otherwise of his fellow-jurors, or mistaken in his calculations or judgment, or other matter resting alone in the juror's breast.

Id. at 774-75 (quoting *Wright v. Illinois & Mississippi Telegraph Co.,* 20 Iowa 195, 210 (1866)) (emphasis omitted); *see also Devoney v. State,* 717 So.2d 501, 502 (Fla.1998); *McAllister Hotel, Inc.,* 123 So.2d at 344.

[2] [3] [4] In considering claims of juror misconduct, a court must initially determine whether the facts alleged are matters that inhere in the verdict and are subjective in nature, or are extrinsic to the verdict and objective. *See Devoney,* 717 So.2d at 502. A juror is not competent to testify about matters inhering in the verdict, such as jurors' emotions, mental processes, or mistaken beliefs. *See Baptist Hosp. v. Maler,* 579 So.2d 97, 99 (Fla.1991); *State v. Hamilton,* 574 So.2d 124, 128 (Fla.1991); *see also* § 90.607(2)(b), Fla. Stat. (1999).[5] However, jurors may testify as to "overt acts which might have prejudicially affected the jury in reaching their own verdict." *Hamilton,* 574 So.2d at 128; *see also Powell v. Allstate Ins. Co.,* 652 So.2d 354, 356 (Fla.1995) (holding that racial statements alleged to have been made during deliberations by some members of an all-white jury about black plaintiffs constituted sufficient overt acts which might have prejudicially affected jury in reaching its verdict).

5 Section 90.607(2)(b) provides:

> (b) Upon an inquiry into the validity of a verdict or indictment, a juror is not competent to testify as to any matter which essentially inheres in the verdict or indictment.

[5] As noted above, Mr. Smith's affidavit states that the woman who called his office indicated among other things that some jurors told racial jokes about Marshall and that some jurors announced during the guilt phase that they were going to vote for a guilty verdict and life sentence because they wanted Marshall to return to prison to kill more black inmates. The alleged juror misconduct set forth in Mr. Smith's affidavit does not appear to inhere in the verdict.

***1241** In *Powell v. Allstate Insurance Co.,* 652 So.2d 354 (Fla.1995), this Court also addressed a claim of racial or ethnic bias as allegedly reflected in statements made by jurors concerning the litigants involved in a case, and whether those statements constituted overt juror misconduct which could be the subject of inquiry after a verdict is returned, or whether such conduct "inhered in the verdict."[6] In holding that such comments constituted overt acts of misconduct, this Court explained:

6 Following a jury trial, one of the jurors in *Powell* contacted the plaintiffs' attorney and the trial judge to inform them that other members of the jury had made numerous racial jokes and statements about the plaintiffs throughout the trial proceedings and jury deliberations. *See id.* at 355. Based upon this disclosure, the plaintiffs requested a new trial or, alternatively, an interview of the entire jury panel. The trial court held an in-court interview of the juror, during which the juror testified that various jurors made racial remarks and jokes and she believed the verdict was the result of racial bias. The trial court denied both motions. On appeal, the Fifth District initially reversed and directed that further juror interviews be conducted, and if the trial court concluded that racial statements were made that a new trial be ordered. On rehearing, however, the Fifth District reversed itself. *See id.*

> In the instant case, we find the alleged racial statements made by some of the jurors to constitute sufficient "overt acts" to permit trial court inquiry and action. Under *Maler* and *Hamilton,* it would be improper, after a verdict is rendered, to individually inquire into the thought processes of a juror to seek to discover some bias in the juror's mind, like the racial bias involved here, as a possible motivation for that particular juror to as act as she did. Those innermost thoughts, good and bad, truly inhere in the verdict.
>
> *But when appeals to racial bias are made openly among the jurors, they constitute overt acts of misconduct.* This is one way that we attempt to draw a bright line. This line may not keep improper bias from being a silent factor with a particular juror, but, hopefully, it will act as a check on such bias and prevent the bias from being expressed so as to overtly influence others.

Id. at 357-58 (emphasis added).[7] This Court emphasized that "[t]he issue of racial, ethnic, and religious bias in the courts is not simply a matter of 'political correctness' to be brushed aside by a thick-skinned judiciary." *Id.* at 358. Accordingly, the Court remanded the case with instructions for the trial court to conduct an appropriate hearing to ascertain whether racial statements were made as asserted. *See id.; see also Wright v. CTL Distribution, Inc.,* 650 So.2d 641, 643 (Fla. 2d DCA 1995) (stating that appellants, at the very least, must have an opportunity to determine the truth or falsity of juror's allegation in affidavit that racial slurs and comments were made during deliberations).

7 This Court also found the alleged conduct, if established, to be violative of the guarantees of both the federal and state constitutions which ensure all

> litigants a fair and impartial jury and equal protection of the law. *See id.* at 358.

According to Mr. Smith's affidavit, the woman who contacted him also indicated that some jurors, despite the trial judge's orders, read and discussed outside articles concerning the trial. In *Sentinel Communications Co. v. Watson,* 615 So.2d 768 (Fla. 5th DCA 1993), the court recognized that an allegation that jurors read newspapers contrary to court orders did not inhere in the verdict. *See id.* at 772. Indeed, this Court has stated that any receipt by jurors of prejudicial nonrecord information constitutes an overt act subject ***1242** to judicial inquiry. *See Baptist Hospital,* 579 So.2d at 100-01.

Thus, it would appear that the trial court erred in concluding that Marshall's allegations of juror misconduct inhered in the verdict. *See Roland v. State,* 584 So.2d 68, 70 (Fla. 1st DCA 1991) (finding that motion supported by sworn affidavit of third party indicating that alternate juror had a predisposition to find defendant guilty for matters unrelated to trial warranted juror interviews). *Cf. Preast v. Amica Mutual Ins. Co.,* 483 So.2d 83, 85 (Fla. 2d DCA 1986) (stating that although appellees supported their motion by a hearsay affidavit of a third party, i.e., a juror's sister, they had satisfied the threshold requirement of Florida Rule of Civil Procedure 1.431(g)), *disapproved of on other grounds by Baptist Hosp. of Miami, Inc. v. Maler,* 579 So.2d 97, 101 n. 2 (Fla.1991). Mr. Smith did recall speaking with the woman alleged to have served on Marshall's jury and he indicated that she was related to one of his clients. Moreover, Mr. Smith indicated that the person who contacted his office was female, and there were only six women on Marshall's jury. Thus, it appears that evidence could be submitted that could identify the purported juror who contacted Mr. Smith to ascertain whether such misconduct took place.

[6] This Court has previously permitted juror interviews during a postconviction proceeding in a capital case based on allegations of juror misconduct discovered years after the trial and direct appeal. In *Kelley v. State,* 569 So.2d 754 (Fla.1990), the defendant filed a motion to interview the jurors who sat on his original trial while the order denying postconviction relief was on appeal. In the motion, the defendant asserted that two attorneys had recently reported that one of the jurors informed them of certain misconduct on the part of another juror during trial. This Court relinquished jurisdiction to permit the trial judge to interview the jurors. *See id.* at 762. Notably, the trial judge conducted a hearing in which he interviewed all twelve jurors and the two attorneys who reported the incident, and concluded that misconduct had not been proven. *See id.* In light of the conflicting evidence at the hearing, we sustained the trial court's finding of no juror misconduct.

Other Jurisdictions

Other jurisdictions, like Florida, are hesitant to interfere with the sanctity of juror deliberations years after trial. However, in cases like the instant case, where the alleged juror misconduct is discovered subsequent to direct appeal, courts have been more willing to inquire if the alleged misconduct, if true, would warrant a new trial. *See, e.g., United States v. Jackson,* 209 F.3d 1103 (9th Cir.2000) (noting that defendant did not learn of factual predicate for juror misconduct claim until three years after trial).

Many of the cases have remanded the case for an evidentiary hearing to consider the alleged juror misconduct. *See, e.g., Fullwood v. Lee,* 290 F.3d 663, 680-82 (4th Cir.2002) (remanding for evidentiary hearing on whether contact between juror and her husband throughout trial deprived defendant of a fair trial and had substantial and injurious effect on the verdict); *Simmons v. Blodgett,* 910 F.Supp. 1519 (W.D.Wash.1996) (noting that state trial court held evidentiary hearing on juror misconduct claim based upon statement of juror made eight years after trial indicating that she read numerous newspaper articles about the case during trial), *aff'd,* 110 F.3d 39 (1997); *People v. Hobley,* 182 Ill.2d 404, 231 Ill.Dec. 321, 696 N.E.2d 313, 339-41 (1998) (holding capital defendant was entitled to an evidentiary hearing on ***1243** his claim supported by four juror affidavits alleging jurors were intimidated by nonjurors at the hotel where they were sequestered); *Campbell v. State,* 130 Idaho 546, 944 P.2d 143, 144, 146 (Idaho Ct.App.1997) (noting that trial court held postconviction evidentiary hearing on juror misconduct claim based upon information defendant obtained three years after he began to serve his sentence); *State v. Williams,* 253 Neb. 111, 568 N.W.2d 246, 251 (1997) (noting that court previously withdrew execution warrant for trial court to hold an evidentiary hearing on petition for postconviction relief alleging juror misconduct, and that eleven of twelve jurors testified at evidentiary hearing).

Some courts have permitted deposition testimony by the jurors to be introduced at the evidentiary hearing. For example, in *Massey v. State,* 541 A.2d 1254 (Del.1988), the defendant tried to impeach a jury verdict for alleged juror misconduct more than nine years after the verdict was rendered. After several postconviction relief motions and appeals, the trial court held an evidentiary hearing on the defendant's juror misconduct claim. At the evidentiary hearing, the complaining juror testified and the trial court admitted the deposition testimony of nine jurors. *See id.* at 1255.[8] *Cf. Ex parte Greenville News,* 326 S.C. 1, 482 S.E.2d 556, 557 (1997) (noting that trial court permitted depositions of jurors relating to juror misconduct claim raised three years after conviction and death sentence were affirmed, founded on information received in anonymous phone call to defense counsel).

8 At a previous evidentiary hearing, the trial court apparently permitted the jurors to be deposed by written interrogatories. *See id.*

Although a direct appeal case, *State v. Santiago,* 245 Conn. 301, 715 A.2d 1 (1998), is worth noting since it also involved a juror misconduct claimed premised on racial slurs being made by a juror. In *Santiago,* the Connecticut Supreme Court concluded that in all future cases in which a defendant alleges that a juror has made racial epithets, the trial court should conduct, at a minimum, "an extensive inquiry of the person reporting the conduct, to include the context of the remarks, an interview with any persons likely to have been a witness to the alleged conduct, and the juror alleged to have made the remarks." *Id.* at 22. In a separate opinion, Chief Justice Callahan expressed the following concerns:

> Postconviction allegations of juror misconduct require the court to strike a delicate balance between the competing interests of the state and the defendant. Obviously, allegations of juror misconduct must be taken seriously at any stage of the proceedings and inquiry is always warranted. [*State v. Brown,* 235 Conn. 502, 668 A.2d 1288, 1305 (1995)]. "[A]fter a jury verdict has been accepted, [however] other state interests emerge that favor proceedings limited in form and scope." *Id.* Specifically, we have identified those compelling state interests to include preserving the "finality of judgments ... and in protecting the privacy and integrity of jury deliberations, preventing juror harassment and maintaining public confidence in the jury system." (Citations omitted.) *Id.* Certainly, there are circumstances in which these state interests must give way to the countervailing interest of the defendant. A defendant's right to a fair trial, an interest shared by the state, is one such interest. Our rule set forth in *Brown,* however, adequately addressed this concern. In *Brown,* we concluded that "[t]he more ***1244** obviously serious and credible the allegations, the more extensive an inquiry is required; frivolous or incredible allegations may be disposed of summarily." *Id.* An allegation of racial bias is perhaps the most serious of juror misconduct allegations. Pursuant to the rule adopted in *Brown,* the trial court always will be obliged to conduct an inquiry. Moreover, in light of the seriousness of the allegation, the court must err on the side of caution in the thoroughness of the inquiry. Once the allegation is found to be frivolous or incredible, however, there is no compelling reason to engage in a full evidentiary hearing.
>
> In many cases alleging juror misconduct based on racial bias, it would be reasonable to conclude that the trial court abused its discretion if it failed to inquire of the accused juror or others who might have heard the alleged racist remarks. Every case is unique, however, and must be viewed individually. It is for this reason that, in *Brown,* we left the form and scope of the inquiry to the discretion of the trial court. In light of all of the evidence presented in this case, the trial court's inquiry was adequate because the court found the source of the allegations unbelievable and thus did not abuse its discretion in halting the inquiry when it did. The majority opinion discounts any consideration of factors that weigh in favor of the state, and instead tips the balance wholly in favor of the defendant, irrespective of the unbelievability of the allegations or the harm that might result from an unnecessary recall of the jurors.
>
> There is no doubt that when racism rears its ugly head, it must be dealt with swiftly and surely to avoid its invidious effect. It is equally true, however, that when allegations of racism are found to be false and unfounded after an inquiry, the trial court should deal with them forthwith, lest they dilute the significance of legitimate allegations. Moreover, the finality of judgments and the legitimate expectation of jurors that their deliberations will be private and that they will not unjustly be made to defend against baseless charges or have their integrity impugned, weigh in favor of not continuing the investigation when the source of the allegation is completely discredited by the trier

> of fact. To give credence to [the juror's] meritless allegations in this case by establishing a per se rule that arbitrarily mandates a full evidentiary inquiry into the most baseless of assertions demeans, rather than enhances, our notions of justice.

Id. at 26-27 (Callahan, C.J., concurring in part and dissenting in part) (some alterations in original). Further, as noted by the Appellate Court of Illinois:

> While we are aware of the difficulties the jurors may face in attempting to recall events which occurred years ago, and while we are reluctant to again interrupt the jurors' lives and involve them in additional court proceedings, those considerations do not outweigh the need to insure that the parties received a trial untainted by bias or extraneous information.

Taylor v. R.D. Morgan & Associates, Ltd., 205 Ill.App.3d 682, 151 Ill.Dec. 80, 563 N.E.2d 1186, 1194 (1990).

Based upon the analysis set out above, we conclude that the trial court erred in summarily denying Marshall's juror misconduct claim.

Ineffective Assistance of Counsel

[7] Marshall next argues that the trial court erred in denying his claim that trial counsel was ineffective for failing to adequately investigate, develop, and present available mitigating evidence regarding his family background and abusive childhood. ***1245** Marshall contends that had such evidence been presented, there would have been a sufficient basis to support the jury's recommendation of life imprisonment.

[8] In order to prove an ineffective assistance of counsel claim, a defendant must establish two elements:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *see also Rutherford v. State,* 727 So.2d 216, 219-20 (Fla.1998). "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Strickland,* 466 U.S. at 693, 104 S.Ct. 2052. However, a defendant need not show that counsel's deficient performance "more likely than not altered the outcome in the case." *Id.* Rather, to establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052. Ineffective assistance of counsel claims present a mixed question of law and fact subject to plenary review based on the *Strickland* test. *See Stephens v. State,* 748 So.2d 1028, 1033 (Fla.1999) (citing *Rose v. State,* 675 So.2d 567, 571 (Fla.1996)). This requires an independent review of the trial court's legal conclusions, while giving deference to the trial court's factual findings. *See id.*

At the postconviction evidentiary hearing, Marshall called three of his brothers to testify, Brindley Marshall, Percival Marshall, Jr., and Marvin Marshall. Each of Marshall's brothers testified that their father was extremely abusive while they were growing up. In particular, Marshall's brothers testified that their father would beat them with extension cords, tree branches, and electrical wire.[9] Sometimes the beatings would last upward of thirty to forty-five minutes. In addition, Brindley and Percival each testified that their father would bind their hands and feet with duct tape, take off all of their clothes, and beat them. Brindley and Percival also testified that they, along with Marshall, would sometimes sleep in the toolshed in the backyard, on the roof of the health clinic behind their house, or at their aunt's house to avoid the abuse. They also indicated that their father abused alcohol. Marshall's brothers further testified that their father abused their mother, and allegedly stabbed her on one occasion. However, the brothers acknowledged that they did not call the police to report the abuse. All three brothers testified that they were not contacted by trial counsel. Brindley and Marvin were in prison at the time of trial.

9 Marvin Marshall did not testify that he was beaten, although he stated that his father abused his brothers.

Marshall also presented testimony from five of his cousins at the evidentiary hearing, ***1246** Medwer Moultrie, Samuel Whymns, Lisa Laing Forbes, Jacqueline Laing, and Philencia Dames. Samuel Whymns, Lisa Laing Forbes, Jacqueline Laing, and Philencia Dames lived in the Bahamas, but testified that they visited and stayed at Marshall's home for varying amounts of time while growing up. Medwer Moultrie, on the other hand, testified that he lived with Marshall's family for two years at the request of his mother, who asked him to keep an eye on his aunt (Marshall's mother) because his uncle (Marshall's father) was being abusive. Marshall's cousins each testified in varying degrees as to the physical abuse Marshall and his mother suffered. All of Marshall's five cousins indicated that they were not contacted by trial counsel. Marshall's four cousins who lived in the Bahamas at the time of the trial also indicated that their relatives in Miami knew how to contact them.

This Court has held that "[a]n attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence." *Rose,* 675 So.2d at 571; *see also State v. Riechmann,* 777 So.2d 342, 350 (Fla.2000). This Court has also recognized that "[t]he failure to investigate and present available mitigating evidence is a relevant concern along with the reasons for not doing so." *Rose,* 675 So.2d at 571.

At the evidentiary hearing, trial counsel testified that he conducted a thorough interview with Marshall prior to trial during which he tried to obtain a life history. Trial counsel acknowledged that his notes from this interview indicated that Marshall did not want to involve his brothers and sisters, although trial counsel said he would have disregarded this request due to his duty to investigate. During this interview, Marshall told trial counsel that he completed tenth grade and started eleventh, that he was very fortunate to have two parents who motivated and encouraged him to succeed, and that there was "so much love" in his family. Marshall also denied being neglected or abused. Marshall described discipline at home as 75% verbal and 25% physical, although he did not characterize the physical discipline as abusive. Marshall did not relate any physical or mental health problems to trial counsel, and denied having suffered any serious head injuries. Defense counsel also indicated that he reviewed Marshall's school, prison, and mental health records.

In addition to speaking with Marshall, trial counsel indicated that he made efforts to speak with family members. Marshall provided trial counsel with his aunt's name, and trial counsel indicated that he wrote two letters to her requesting that she contact him because Marshall had indicated that she could put him in touch with Marshall's father and other relatives. Marshall's aunt never responded to trial counsel's inquiries. Trial counsel, however, did eventually speak with Marshall's father. According to trial counsel, Marshall's father indicated that Marshall had a good upbringing, although he and his brothers were always getting into trouble. Although trial counsel acknowledged that Marshall's father's comments about him having good grades were at odds with Marshall's school records, he indicated that he would not have made a different proffer by editing what the father would have said had he testified. Marshall's father also provided trial counsel with the names and ages of Marshall's brothers, but claimed not to know where they were living because he had disowned them due to their behavior. Trial counsel conceded during the evidentiary hearing that he did not file a motion for an investigator, nor did he request the assistance of either of the investigators working with the public defender's office at the time. Trial counsel ***1247** explained that he would not have sent a female investigator into urban Dade County looking for witnesses because it would not have been safe. He also indicated that he would not have sent the other investigator, an elderly man, into Dade County either. Although trial counsel stated that he thought about driving into Liberty City himself, he chose not to do so. Trial counsel further explained that he had no information leading him to Liberty City. Trial counsel also testified that he would not have called Marshall's brother Brindley as a witness no matter what he had to offer, because he had previously tried to help Marshall escape. Trial counsel also noted that Marshall's father led him to believe that he was going to bring as many family members as possible with him to the penalty phase. Trial counsel acknowledged that had he possessed information concerning child abuse, he would have presented it at the penalty phase. However, trial counsel testified the problem in this case was that the information Marshall relayed to him coincided with what his father had said.

Under *Strickland,* "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland,* 466 U.S. at 691, 104 S.Ct. 2052. However, "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Id.* While trial counsel has a duty to investigate, "when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." *Id.; see also Rose v. State,* 617 So.2d 291, 294-95 (Fla.1993) (trial counsel was not ineffective for failing to call family members where defendant told counsel that he had not had contact with his family for a number of years and that his family's testimony would not be helpful).

In *Stewart v. State,* 801 So.2d 59 (Fla.2001), this Court rejected a claim that trial counsel was deficient for failing to investigate and present evidence of the defendant's alleged childhood abuse by his stepfather. As in this case, Stewart generally described a happy childhood and never informed defense counsel, or the defense psychiatrist, about any abuse he suffered. Further, trial counsel indicated that he personally interviewed Stewart's stepsisters, but neither mentioned that Stewart was abused. Similarly, Stewart's stepfather never led trial counsel to believe anything other than that he was a loving and caring father to Stewart. Accordingly, this Court concluded, "by failing to communicate to defense counsel (or the defense psychiatrist) regarding any instances of childhood abuse, [the appellant] may not now complain that trial counsel's failure to pursue such mitigation was unreasonable." *Id.* at 67 (citing *Cherry v. State,* 781 So.2d 1040, 1050 (Fla.2000)). *Stewart* would appear to dictate the same result in this case.

[9] Marshall bears the burden of proving that trial counsel's representation was unreasonable under prevailing professional norms. *See Cherry,* 781 So.2d at 1048. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland,* 466 U.S. at 689, 104 S.Ct. 2052. Moreover, "[t]here is 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' " *Asay v. State,* 769 So.2d 974, 984 (Fla.2000) (quoting ***1248** *Strickland,* 466 U.S. at 689, 104 S.Ct. 2052). As indicated above, trial counsel conducted a thorough pretrial interview of Marshall, who advised him that he was not abused as a child. Similarly, Marshall denied being abused when examined by Dr. Joel Klass, as well as when he was examined by one of the postconviction mental health experts (Dr. Woods). Marshall's version of his childhood was corroborated by his father, and trial counsel indicated that nothing in Marshall's prison or school records indicated abuse. Thus, it does not appear that the trial court erred in concluding that trial counsel conducted a reasonable investigation.

Ake Claim

[10] Within his claim for ineffective assistance of counsel, Marshall also alleges that he was deprived of his right to an evaluation by a competent mental health expert pursuant to *Ake v. Oklahoma,* 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). This claim is procedurally barred because it could have been raised on direct appeal. *See Cherry v. State,* 781 So.2d 1040, 1047 (Fla.2000) ("[T]he claim of incompetent mental health evaluation is procedurally barred for failure to raise it on direct appeal.").

[11] Moreover, Marshall contends that trial counsel was ineffective for failing to ensure a competent evaluation. The trial record reflects that trial counsel requested that a mental health expert be appointed to examine Marshall for competency and sanity, as well as for the existence of possible mitigating circumstances. The trial court granted this request and appointed Dr. Klass to conduct an examination of Marshall. Following Dr. Klass's examination, however, trial counsel filed a motion for the appointment of an additional mental health expert. Trial counsel's motion indicated that Dr. Klass apparently spent no more than one hour with Marshall and that, aside from two short letters, he had failed to communicate with trial counsel or inform counsel what tests, if any, were administered and what evidence might be gathered in mitigation. The trial court denied trial counsel's motion for an additional mental health expert, although it ordered Dr. Klass to comply with the court's original order of appointment and submit a written report to defense counsel.

Although there is no mention of whether trial counsel was able to secure Dr. Klass's compliance, we are not prepared to call trial counsel's performance deficient under the first prong of *Strickland. Strickland,* 466 U.S. at 687, 104 S.Ct. 2052 (stating that to prove counsel's performance was deficient defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment"). After determining that Dr. Klass's evaluation was cursory, trial counsel filed a motion for an additional expert, which was denied by the trial court. Trial counsel cannot be deemed ineffective simply because he was unsuccessful in getting the trial court to appoint an additional expert. Moreover, trial counsel testified at the evidentiary hearing that he did not call Dr. Klass because "he would have been blown out of the water" when the jury learned that he only spent a short time with Marshall. This issue was adequately documented in the record and could have been raised on appeal.

Brady Claim

Marshall also argues that the trial court erred in denying his claim that the State withheld exculpatory evidence in violation of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and that the State presented false testimony in violation of *Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). In particular, Marshall alleges that the ***1249** State withheld evidence that inmates George Mendoza and David Marshall were promised to be housed together in the prison system in exchange for their testimony against Marshall. [10] Marshall contends that had the jury learned of this promise the credibility of Mendoza's testimony at trial would have been severely undermined. As such, Marshall argues that there is a reasonable probability that the jury would have found him not guilty, or guilty of a lesser offense than first-degree murder.

10 David Marshall did not testify at Marshall's trial.

To support this claim, Marshall called as witnesses at the postconviction evidentiary hearing inmates George Mendoza and David Marshall. [11] Mendoza and David Marshall both testified that they were promised by Inspectors Sobach and Riggins and Assistant State Attorney Spiller that they would be housed together in the prison system at an institution closer to home for their safety and protection in exchange for their testimony. According to Mendoza and David Marshall, the initial promise was made by investigator Riggins and later reiterated at a meeting following their grand jury testimony where Sobach, Riggins, and Spiller were present. Mendoza noted that they were informed their protection and safety were the reasons that they would continue to be housed together. Mendoza also indicated that Assistant State Attorney Spiller advised him that it was normal procedure in the courtroom to state that he was promised nothing in exchange for his testimony if asked by defense counsel. On cross-examination, however, both Mendoza and David Marshall acknowledged writing letters to Assistant State Attorney Spiller wherein they indicated that they understood no promises could be made. Mendoza and David Marshall also reiterated on cross-examination that their prior statements and testimony in the case were truthful.

11 Marshall also attached to his postconviction motion a copy of a civil rights action Mendoza filed against numerous correctional officials, in which Mendoza reiterated that an "oral contract/agreement" was made to house him and David Marshall together for their protection at an institution close to home for being State witnesses in Matthew Marshall's case.

Marshall also called Kerry Flack, formerly with the Department of Corrections, as a witness at the postconviction evidentiary hearing. [12] Flack testified that she became involved when inspector Sobach requested that she review files concerning Mendoza and David Marshall. According to Flack, Sobach indicated that Mendoza and David Marshall had been transferred to different institutions and he did not know whether or not they should have been permitted to remain at the same location. After reviewing the files and speaking with the classifications office and Inspector Sobach, Flack testified that she decided that "they had agreed that the inmates could move together in order to watch out for each other." Accordingly, she stated that she requested a transfer back to the same institution for Mendoza and David Marshall. Ms. Flack acknowledged at the evidentiary hearing upon viewing a print-out of the prison housing history for Mendoza and David Marshall that it was unusual for inmates to be ***1250** transferred twice to the same location at the same time.

12 Prior to being the director of information, communications and legislative planning for the Department of Corrections, Flack was the assistant to the secretary. She indicated that her job entailed primarily dealing with complaints registered by inmates and inmates' families, and legislative inquiries from the media, the public, and other state agencies.

In rebuttal, the State called Inspectors Sobach and Riggins and Assistant State Attorney Spiller as witnesses during the postconviction evidentiary hearing. Sobach, Riggins, and Spiller each denied making or having any knowledge of any promises being made to Mendoza and David Marshall in exchange for their testimony. Sobach indicated that initial transfers of inmate witnesses are for their protection, but noted that any kind of commitment to keep two individuals together forever is "totally impracticable." He also indicated that he would not have the authority to keep Mendoza and David Marshall housed together. Inspector Riggins similarly testified that he did not have transfer authority. On cross-examination, Inspector Sobach acknowledged that it was kind of unique that Mendoza and David Marshall were able to stay together. However, he denied telling Kerry Flack that Mendoza and David Marshall were promised to be kept together. Rather, he testified that he contacted Flack because he was concerned as to whether or not the special review against Mendoza and David Marshall, causing their separation, was appropriate or whether it may have been retaliation of some sort.

Assistant State Attorney Spiller similarly testified that no promises were made to Mendoza and David Marshall in exchange for their testimony, although he and Inspector Riggins both acknowledged that Mendoza and David Marshall were reassured that everything possible would be done to protect them from retribution. Spiller stated that Mendoza and David Marshall on two occasions prior to trial requested that they be assured that they would be housed together. However, Spiller testified that he informed them on both occasions that he had no authority over housing and would not make any promises that could jeopardize the case. Although Spiller admitted writing a letter to the Department of Corrections denoting Mendoza's and David Marshall's cooperation in the case, he denied ever requesting that the department house the two inmates together. Lastly, Assistant State Attorney Spiller denied instructing Mendoza that it is normal procedure for witnesses to deny that promises were made in exchange for their testimony when asked at trial.

The trial court denied Marshall's claim, concluding that Marshall had failed to prove either a *Brady* or a *Giglio* violation. In so doing, the trial court noted that there was no knowing presentation of false testimony by the State since Mendoza himself acknowledged that he understood that the State could make no promises and had made no promises to induce his testimony. For the following reasons, it does not appear that the trial court erred in denying Marshall's *Brady*/*Giglio* claim.

[12] The United States Supreme Court has recently provided the following three-prong analysis to be used when determining the merits of a *Brady* violation claim:

> [1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued.

Strickler v. Greene, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). With regard to the third prong, the Court emphasized that prejudice is measured by determining "whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.' " *Id.* at 290, 119 S.Ct. 1936 (quoting ***1251** *Kyles v. Whitley,* 514 U.S. 419, 435, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)). In applying these elements, the evidence must be considered in the context of the entire record. *See State v. Riechmann,* 777 So.2d 342, 362 (Fla.2000); *Sireci v. State,* 773 So.2d 34 (Fla.2000); *Haliburton v. Singletary,* 691 So.2d 466, 470 (Fla.1997).

In the instant case, it is questionable whether the State made a promise to house Mendoza and David Marshall together in exchange for their testimony. As noted above, Inspectors Sobach and Riggins, and Assistant State Attorney Spiller each denied making or having any knowledge of such a promise. Further, there is nothing in the record documenting the existence of any such promise. To the contrary, both Mendoza and David Marshall acknowledged at the postconviction evidentiary hearing that they wrote letters to Assistant State Attorney Spiller wherein they indicated that they understood no promises could be made. However, in light of the unique prison housing history of both inmates, it is conceivable that some sort of understanding may have been reached.

[13] Nonetheless, even assuming the State withheld evidence of the alleged promise, Marshall does not appear to have satisfied the prejudice prong of the three-part test for a *Brady* violation. First, evidence of the alleged promise would have had limited impeachment value in this case. At trial, defense counsel thoroughly cross-examined Mendoza and, in doing so, elicited testimony concerning Mendoza's desire to remained housed with David Marshall and a letter Mendoza had written to inspector Riggins thanking him for stopping a transfer. The record reveals the following:

> [Q]: Okay. You wrote Inspector Riggins a letter one time and asked or thanked him for stopping a transfer between you and your roommate?
>
> [A]: No, for stopping a transfer for me going to Avon Park Correctional Institution.
>
> [Q]: You didn't-you and-you and your number twenty-eight [David Marshall] didn't want to be separated, did you?
>
> [A]: I didn't want to leave the institution?
>
> [Q]: You all were good friends, weren't you?
>
> [A]: Yes sir.

More importantly, Mendoza was not the sole witness to testify at trial that he observed Marshall leaving the victim's cell, nor the only witness to describe the sounds heard coming from the victim's cell. To the contrary, former inmate Frank Calabria also testified in detail as to events he observed on the morning of the murder. In addition to describing the sounds he heard emanating from the victim's cell, Calabria testified that he observed Marshall exiting from the victim's cell with blood on his chest, arms, and hands. Furthermore, Calabria's testimony established that Marshall entered the victim's cell a second time, during which Calabria again heard moaning noises coming from the victim's cell. Thus, it does not appear that evidence of the alleged "promise" would have "put the whole case in such a different light as to undermine confidence in the verdict." *Strickler,* 527 U.S. at 290, 119 S.Ct. 1936. *See Rose v. State,* 774 So.2d 629, 635 (Fla.2000) (finding no *Brady* violation due to limited impeachment value of any alleged deal given witnesses in exchange for their testimony and the fact that additional independent witnesses identified defendant as the perpetrator).

[14] **[15]** **[16]** For similar reasons, it does not appear that the trial court erred in denying Marshall's *Giglio* claim. In order to establish a *Giglio* violation, a defendant must show that (1) the prosecutor or witness ***1252** gave false testimony; (2) the prosecutor knew the testimony was false; and (3) the statement was material. *See Rose,* 774 So.2d at 635; *Robinson v. State,* 707 So.2d 688, 693 (Fla.1998); *Routly v. State,* 590 So.2d 397, 400 (Fla.1991). False testimony is material if there is a reasonable likelihood that it could have affected the jury's verdict. *See Ventura v. State,* 794 So.2d 553, 563 (Fla.2001); *Rose,* 774 So.2d at 635; *Routly,* 590 So.2d at 400. This Court has recognized that "[t]he thrust of *Giglio* and its progeny has been to ensure that the jury know the facts that might motivate a witness in giving testimony, and that the prosecutor not fraudulently conceal such facts from the jury." *Routly,* 590 So.2d at 400 (quoting *Smith v. Kemp,* 715 F.2d 1459, 1467 (11th Cir.1983)).

In the instant case, it is worth noting that Mendoza never expressly testified during Marshall's trial that no promises were made in exchange for his testimony. The trial transcript reveals the following:

> [Q]: Okay. And you're just-you just got involved in this case because-why because you're looking for some favors like most snitches?
>
> [A]: No sir, I got a life of a quarter mandatory. I can't get no favors as far as from that point. I just felt I was doing the right thing in coming forward and testifying to what I saw that morning.
>
> ....
>
> [Q]: You're not looking for any reward you just-just a peaceful person.
>
> [A]: Yes sir.

[Q]: That's why you were-that's why you got involved in this.

[A]: Yes sir.

Moreover, even assuming that the alleged promise was made, Marshall appears to have failed to satisfy the materiality prong of the three-part inquiry. As noted above, defense counsel impeached Mendoza during cross-examination regarding his desire to be housed with David Marshall and his letter thanking Inspector Riggins for stopping a transfer of him to another facility. Nor was Mendoza the sole witness to testify in regard to the events surrounding the murder. Thus, it appears that Marshall has failed to demonstrate a reasonable likelihood that the alleged false testimony could have affected the jury's verdict. *See Ventura,* 794 So.2d at 565 (holding evidence of deal immaterial under *Giglio* based on ample impeachment and corroboration).

Cumulative Error

Marshall argues that the trial court failed to conduct an adequate cumulative error analysis. As part of this claim, he alleges that "significant claims for which Mr. Marshall was denied an opportunity to present evidence" entitle him to relief. However, as explained in this opinion, we have rejected Marshall's claims of error on all issues but one, and have remanded for an evidentiary hearing on that claim. Hence, the claim of cumulative error has been rendered moot.

Summary Denial of Additional Issues

[17] [18] [19] Finally, Marshall argues that the trial court erred in summarily denying twenty-two claims in his 3.850 motion without an evidentiary hearing. Except for claims (4), (15), and (25), Marshall presents no definitive argument on appeal, other than simply listing the issue raised below. Thus, these claims are insufficiently presented for review. *See Shere v. State,* 742 So.2d 215, 218 n. 6 (Fla.1999) (noting that issues raised in appellate brief that contain no argument are deemed abandoned). As to the three claims where Marshall does present arguments, they are either procedurally barred, [13] or they are not yet ripe ***1253** for review. [14]

13 Marshall's claim that he was allowed to waive his right to present penalty phase evidence without an adequate record inquiry to determine whether the waiver was voluntary and intelligent is procedurally barred because it could have been raised on direct appeal. Marshall's claim that the jury override resulted in an arbitrary, capricious, and unreliable death sentence was addressed on direct appeal. *Marshall v. State,* 604 So.2d 799 (Fla.1992).

14 Marshall concedes that the issue of his sanity to be executed is not ripe for consideration. *See* Fla. R.Crim. P. 3.811.

CONCLUSION

In accord with the above, we affirm the trial court's order denying postconviction relief, with the exception of the claims of juror misconduct. We remand for an evidentiary hearing on that claim. The scope of the hearing on remand is limited to attempting to obtain the identity of the female juror who spoke to Mr. Smith, to interview that juror, and then to conduct further interviews only if the court determines that there is a reasonable probability of juror misconduct. Moreover, the trial court may wish to conduct most or all of the questioning of the jurors, thereby ensuring that unnecessarily intrusive questions will not be asked of the jurors and to prevent questioning on matters that inhere in the verdict. *Cf. People v. Hedgecock,* 51 Cal.3d 395, 272 Cal.Rptr. 803, 795 P.2d 1260, 1274 (1990) (discussing steps trial court can take to avoid a chilling effect on jury deliberations when holding evidentiary hearing on juror misconduct claim).

It is so ordered.

ANSTEAD, C.J., and PARIENTE, J., and SHAW, Senior Justice, concur.

LEWIS, J., concurs in result only.

WELLS, J., concurs in part and dissents in part with an opinion, in which QUINCE, J., concurs.

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

I concur with the majority opinion in respect to its denial of relief on issues two, three, four and five. I likewise concur that the affidavits of juror Pamela H. Bachman and Judy Cunningham set forth matters which inhere in the verdict and cannot be used to impeach the verdict.

However, I dissent from the decision of the majority to reverse the trial court and remand for an evidentiary hearing on the claim of alleged juror misconduct and for juror interviews based upon the affidavit of Ronald B. Smith. I believe the majority's decision and opinion on this issue seriously undermine the sanctity and security of the jury system. I do not believe that jurors who decided a case in 1989 should be subject to a 2003 interrogation based upon a 1996 affidavit which contains conclusory hearsay statements attributed to an anonymous caller.

The jury returned its verdict in this case in December 1989. Ronald Smith swore to his affidavit six and a half years later, on June 16, 1996. In his affidavit, Ronald Smith says in paragraph 1:

> 1. After the trial of Matthew Marshall, I received a telephone call from a woman who was calling in reference to a client of mine to whom she was related.

The affidavit does not (a) state when this call was made to Ronald Smith, and (b) does not identify the woman making the call.

In paragraph 2, the affidavit says:

> She said some jurors told jokes about Matthew Marshall. She said the joking was racial.

The affidavit does not state what remarks "she said" were made. Obviously, what ***1254** we have in this statement is conclusory hearsay within hearsay.

In paragraph 4, the affidavit says:

> Then she said that some jurors did read articles about the trial and talked with each other about the articles they had read.

The affidavit does not state what was claimed to have been said in respect to any articles. Again, this statement is conclusory hearsay within hearsay.

Finally, the affidavit concludes that Ronald Smith cannot remember who the anonymous woman was.

Our jury system depends on citizens who serve on juries believing that their service will be secure and protected. This means that once that service is ended, the jurors will not be subject to unending interrogation about the decision made as jurors. I recognize that there must be room for exceptions when there is a substantial reason to believe that a jury has been the subject of an improper extraneous influence. But the standard for this exception must necessarily be high. Ronald Smith's affidavit does not even approach meeting that standard.

This is what this Court held in *Baptist Hospital of Miami v. Maler,* 579 So.2d 97 (Fla.1991), in determining that the affidavits in that case failed to state a legally sufficient reason to interview jurors:

> We now clarify the meaning of [*State v. Hamilton,* 574 So.2d 124 (Fla.1991),] in light of the strong public policy against allowing litigants either to harass jurors or to upset a verdict by attempting to ascertain some improper motive underlying it. We hold that an inquiry is never permissible unless the moving party has made sworn factual allegations that, if true, would require a trial court to order a new trial using the standard adopted in *Hamilton.*

Id. at 100. In this case there are no sworn statements other than conclusory hearsay within hearsay.

In *Devoney v. State,* 717 So.2d 501, 504 (Fla.1998), this Court agreed with Justice O'Connor's observation in *Tanner v. United States,* 483 U.S. 107, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987):

> Writing for a majority, Justice O'Connor observed the reality of the jury system when she commented:
>
> > There is little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could

> survive such efforts to perfect it. Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time ... after the verdict, seriously disrupt the finality of the process. Moreover, full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror misconduct.

> *Tanner,* 483 U.S. at 120-21, 107 S.Ct. 2739 (citation omitted). We agree with Justice O'Connor's comments.

This Court then concluded in *Devoney:*

> Imperfect as it may be, in a free country such as ours, the jury system continues to be the finest method ever devised for the resolution of disputes. To permit jury verdicts to be impugned in the manner advocated by Devoney would sow the seeds for the destruction of that system.

Id. at 505. What we held in *Baptist Hospital* and *Devoney* controls here, and this ***1255** jury should not be impugned on the basis of such an affidavit as was here presented.

QUINCE, J., concurs.

All Citations

854 So.2d 1235, 28 Fla. L. Weekly S461

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ATTACHMENT F

911 So.2d 1129
Supreme Court of Florida.

Matthew MARSHALL, Petitioner,
v.
James V. CROSBY, Jr., etc., Respondent.

No. SC02–420.
|
May 26, 2005.
|
Rehearing Denied Sept. 15, 2005.

Synopsis

Background: Petitioner was convicted in the Circuit Court, Martin County, Dwight L. Geiger, J., of first-degree murder and sentenced to death despite jury recommendation of life imprisonment. Petitioner appealed. The Supreme Court, 604 So.2d 799, affirmed. Petitioner sought writ of habeas corpus.

Holdings: The Supreme Court held that:

[1] difficulties with appointed mental health expert did not entitle petitioner to appointment of additional mental health expert;

[2] nine prior violent felonies were an aggravating circumstance that took judge's death sentence outside the scope of *Ring's* requirements of jury determination; and

[3] claim of arbitrary application of *Tedder* standard for judge's decision to override recommendation of life imprisonment did not entitle petitioner to relief.

Petition denied.

Cantero, J., concurred and filed opinion in which Wells and Bell, JJ., concurred.

Lewis, J., concurred in result and filed opinion.

Pariente, C.J., and Anstead, J., dissented and filed opinion.

Attorneys and Law Firms

***1130** Neal A. Dupree, Capital Collateral Regional Counsel—South, Melissa Minsk Donoho, Special Assistant CCRC–South, and Leor Veleanu, Assistant CCRC–South, Fort Lauderdale, FL, for Petitioner.

Charles J. Crist, Jr., Attorney General, Tallahassee, FL, and Debra Rescigno, Assistant Attorney General, West Palm Beach, FL, for Respondent.

Opinion

PER CURIAM.

Matthew Marshall, a prisoner under sentence of death, petitions this Court for a writ of habeas corpus. We have jurisdiction. *See* Art. V, § 3(b)(9), Fla. Const. For the reasons set forth below, we deny Marshall's petition for habeas relief.

BACKGROUND

Matthew Marshall was convicted and sentenced to death for the 1988 murder of Jeffrey Henry. This Court previously summarized the facts surrounding this case on direct appeal. *See Marshall v. State,* 604 So.2d 799 (Fla.1992). The jury found Marshall guilty of first-degree murder and recommended a sentence of life imprisonment. The trial court, however, rejected the jury's recommendation and imposed a sentence of death. In so doing, the trial court "concluded that facts supporting a conclusion that the mitigating circumstances did not outweigh the aggravating circumstances were 'so clear and convincing that no reasonable person could differ.' " *Id.* at 802.[1] This Court affirmed ***1131** the jury override on appeal. *See id.* at 805–06. The United States Supreme Court denied Marshall's petition for writ of certiorari on May 17, 1993. *See Marshall v. Florida,* 508 U.S. 915, 113 S.Ct. 2355, 124 L.Ed.2d 263 (1993). Subsequently, Marshall filed a motion for postconviction relief under Florida Rule of Criminal Procedure 3.850, which the trial court denied. *See Marshall v. State,* 854 So.2d 1235, 1237 (Fla.2003). On appeal, this Court affirmed the denial of the motion, but remanded Marshall's claim on potential juror misconduct for an evidentiary hearing. *Id.* at 1253.

1 The trial court found the following four aggravating circumstances: (1) the murder was committed by a person under sentence of imprisonment; (2) the defendant was previously convicted of violent felonies; (3) the murder was committed while the defendant was engaged in the commission of or an attempt to commit a burglary; and (4) the murder was especially heinous, atrocious, or cruel (HAC). In mitigation, the trial court found that the defendant's behavior at trial was acceptable and that the defendant entered prison at a young age. The trial court, however, specifically rejected as mitigation that the defendant's older brother influenced him and led him astray to run the streets and break the law, and that his mother caused him to believe he would suffer no negative consequences for his bad behavior. *See id.*

ANALYSIS

In his present habeas corpus petition, Marshall raises three claims: (1) appellate counsel was ineffective for failing to raise on direct appeal the trial court's denial of trial counsel's motion for the appointment of an additional mental health expert, (2) the trial judge's override of the jury's recommendation in favor of life violates the Constitution pursuant to the United States Supreme Court's opinions in *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and (3) the standard for jury override cases announced in *Tedder v. State,* 322 So.2d 908 (Fla.1975), was arbitrarily applied in Marshall's case. We address each of these claims in turn.

Additional Mental Health Expert

In his first claim, Marshall argues that appellate counsel was ineffective for failing to raise as error on direct appeal the trial court's denial of his motion for appointment of an additional mental health expert. [2] Marshall alleges that as a result of the trial court's ruling, he was deprived of his right to a competent mental health expert pursuant to *Ake v. Oklahoma,* 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). *Ake* requires that a defendant be afforded access to a "competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Id.* at 83, 105 S.Ct. 1087.

2 In our previous opinion, we rejected a similar claim of ineffective assistance of trial counsel, noting that trial counsel's performance was not deficient pursuant to the test in *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See Marshall v. State,* 854 So.2d 1235, 1248 (Fla.2003).

[1] **[2]** **[3]** The issue of appellate counsel's ineffectiveness is appropriately raised in a petition for writ of habeas corpus. *See Freeman v. State,* 761 So.2d 1055, 1069 (Fla.2000). However, in order to grant habeas relief on the basis of ineffectiveness of appellate counsel, this Court must determine

> whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.

***1132** *Pope v. Wainwright,* 496 So.2d 798, 800 (Fla.1986); *see also Freeman,* 761 So.2d at 1069. "The defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based." *Freeman,* 761 So.2d at 1069.

[4] Prior to trial, defense counsel requested that a mental health expert be appointed to examine Marshall for competency and sanity, as well as for the existence of possible mitigating circumstances. Defense counsel specifically requested that Dr. Joel Klass, with whom the public defender's office had previously worked, be appointed. The trial court granted the motion and appointed Dr. Klass to examine Marshall. Subsequent to Dr. Klass' s examination, however, defense counsel filed a motion for an additional mental health expert, expressing counsel's dissatisfaction with both Dr. Klass's examination of Marshall and his correspondence with defense counsel. Accordingly, in the motion defense counsel requested that an additional mental health expert be appointed to evaluate Marshall.

The trial court held a hearing on Marshall's motion, during which defense counsel reiterated claims from the motion for an additional mental health expert, including a claim that Dr. Klass apparently spent no more than one hour with Marshall, and that aside from two short letters, he had failed to communicate with defense counsel or inform counsel of what tests, if any, were administered and what evidence might be gathered in mitigation. The State opposed Marshall's motion, arguing that (1) it would be a waste of the trial court's time and the county's money to appoint an additional expert, since Dr. Klass had completed an evaluation and simply needed to communicate with defense counsel in accordance with the trial court's order, and (2) the additional expert specifically requested, a Dr. Robert Berland, was not qualified to perform the desired work. The State suggested that the trial court order Dr. Klass to comply with its previous order appointing him. Thereafter, the trial court orally denied Marshall's motion for an additional mental health expert. In so doing, the trial court noted that based upon its prior experience with Dr. Klass, it did not believe he was incompetent, nor had defense counsel shown Dr. Klass was incompetent. However, the trial court indicated that it would order Dr. Klass to comply with its previous order and to conduct another interview of Marshall if necessary. The trial court subsequently entered a written order denying Marshall's motion and requiring Dr. Klass to comply with its previous order and submit a written report to defense counsel in addition to communicating with defense counsel by telephone.

[5] **[6]** As noted above, Marshall contends appellate counsel was ineffective for failing to challenge the trial court's denial of his motion for an additional mental health expert on direct appeal. In our most recent opinion concerning Marshall, we indicated that trial counsel was not ineffective for failing to get the trial court to appoint an additional expert and that the issue regarding the appointment of an additional expert was "adequately documented in the record and could have been raised on appeal." *Marshall,* 854 So.2d at 1248. To be effective, however, appellate counsel is not required to raise every conceivable issue on appeal. *See Atkins v. Dugger,* 541 So.2d 1165, 1167 (Fla.1989). Moreover, appellate counsel cannot be ineffective for not raising on appeal an issue with little or no merit. *See Rutherford v. Moore,* 774 So.2d 637, 643 (Fla.2000) ("If a legal issue 'would in all probability have been found to be without merit' had counsel raised the issue on direct appeal, the ***1133** failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective.").

[7] **[8]** A trial court's ruling on a motion for appointment of experts will be affirmed on appeal in the absence of an abuse of discretion. *See San Martin v. State,* 705 So.2d 1337, 1347 (Fla.1997); *Sliney v. State,* 699 So.2d 662, 671 (Fla.1997); *Martin v. State,* 455 So.2d 370, 371–72 (Fla.1984). In *San Martin,* this Court explained the applicable standard when a defendant alleges error in the trial court's decision to not appoint an expert:

> In evaluating whether there was an abuse of discretion, courts have applied a two-part test: (1) whether the defendant made a particularized showing of need; and (2) whether the defendant was prejudiced by the court's denial of the motion requesting the expert assistance.

San Martin, 705 So.2d at 1347 (citing *Dingle v. State,* 654 So.2d 164, 166 (Fla. 3d DCA 1995)).

In the instant case, the trial court's order denying Marshall's request for an additional mental health expert specifically ordered Dr. Klass to comply with the court's previous order, submit a written report to defense counsel on the issues specified in that order, and communicate with defense counsel for the purposes of pretrial preparation. Although the trial court declined to appoint an additional mental health expert, it sought to remedy the specific difficulties defense counsel was reportedly experiencing with Dr. Klass by ordering Dr. Klass to comply with the court's initial order of appointment, as well as communicate with defense counsel. Notably, defense counsel made no subsequent representations to the trial court that he continued to experience difficulties with Dr. Klass or that Dr. Klass had failed to comply with the trial court's order. Nor did trial counsel contest the trial court's refusal to appoint an additional mental health expert in Marshall's motion for a new trial. Under these circumstances and in light of the trial court's order directing Dr. Klass to comply with its initial order of appointment, we conclude that Marshall has failed to demonstrate that the trial court abused its discretion in denying his motion for appointment of an additional mental health expert.[3] Accordingly, appellate counsel was not ineffective for failing to raise this claim on direct appeal.

3 *See Bates v. State,* 750 So.2d 6, 15–17 (Fla.1999) (holding trial court did not violate *Ake* by refusing to appoint additional experts to evaluate MRI results where court-appointed expert opined defendant suffered from organic brain damage, defense counsel claimed MRI would not show this functional brain damage, and MRI results revealed no presence of organic brain damage); *see also Rose v. State,* 506 So.2d 467, 471 (Fla. 1st DCA 1987) (concluding trial court did not abuse its discretion in refusing to appoint additional experts where several experts had been previously appointed); *cf. Morgan v. State,* 639 So.2d 6, 11–12 (Fla.1994) (concluding that denial of defendant's request for additional experts on grounds that experts were biased was error, but harmless given that at least five experts had been previously retained to aid in defense); *but see Cade v. State,* 658 So.2d 550, 555 (Fla. 5th DCA 1995) (holding trial court abused its discretion in denying defendant's motion for appointment of DNA expert given the central importance of DNA evidence to the State's case); *Dingle v. State,* 654 So.2d 164, 167 (Fla. 3d DCA 1995) (concluding trial court abused its discretion in denying defendant's motion for additional experts which were sought to rebut the State's evidence concerning the timing of the victim infant's injuries).

Apprendi and Ring Claim

Marshall's next claim is that the trial judge's decision to override the jury's recommendation in favor of life violates the ***1134** principles set out in the Supreme Court's decisions in *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).[4] In over fifty cases since *Ring's* release, we have rejected *Ring* claims.[5]

4 In his original habeas petition, Marshall argued that the death penalty is unconstitutional as applied to him in light of the United States Supreme Court's decision in *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). After Marshall's petition was filed, the United States Supreme Court issued its opinion in *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), which applied the *Apprendi* decision to death penalty cases. Subsequently, in the plurality decisions in *Bottoson v. Moore,* 833 So.2d 693, 695 (Fla.2002), and *King v. Moore,* 831 So.2d 143 (Fla.2002), this Court addressed the application of *Ring* in Florida, and while there was no single majority view expressed in either case, this Court denied relief. After the release of *Bottoson* and *King,* we allowed supplemental filings by Marshall and the State on this issue.

5 *See, e.g., Robinson v. State,* 865 So.2d 1259 (Fla.2004); *Smith v. State,* 866 So.2d 51 (Fla.2004); *Parker v. State,* 873 So.2d 270 (Fla.2004); *Guzman v. State,* 868 So.2d 498 (Fla.2003); *Davis v. State,* 875 So.2d 359 (Fla.2003); *Zakrzewski v. State,* 866 So.2d 688 (Fla.2003); *Henry v. State,* 862 So.2d 679, 681 (Fla.2003); *Owen v. State,* 862 So.2d 687, 704 (Fla.2003); *Johnston v. State,* 863 So.2d 271, 286 (Fla.2003), *cert. denied,* 541 U.S. 946, 124 S.Ct. 1676, 158 L.Ed.2d 372 (2004); *Cummings–El v. State,* 863 So.2d 246, 253 (Fla.2003); *Anderson v. State,* 863 So.2d 169, 189 (Fla.2003), *cert. denied,* 541 U.S. 940, 124 S.Ct. 1662, 158 L.Ed.2d 363 (2004); *Jones v. State,* 855 So.2d 611, 619 (Fla.2003); *Rivera v. State,* 859 So.2d 495, 508 (Fla.2003); *Davis v. State,* 859 So.2d 465, 480 (Fla.2003); *Stewart v. State,* 872 So.2d 226 (Fla.2003); *Conde v. State,* 860 So.2d 930, 959 (Fla.2003), *cert. denied,* 541 U.S. 977, 124 S.Ct. 1885, 158 L.Ed.2d 475 (2004); *McCoy v. State,* 853 So.2d 396, 409 (Fla.2003); *Owen v. Crosby,* 854 So.2d 182, 193 (Fla.2003); *Fennie v. State,* 855 So.2d 597, 611 (Fla.2003), *cert. denied,* 541 U.S. 975, 124 S.Ct. 1877, 158 L.Ed.2d 471 (2004); *Caballero v. State,* 851 So.2d 655, 664 (Fla.2003); *Nelson v. State,* 850 So.2d 514, 533 (Fla.2003), *cert. denied,* 540 U.S. 1091, 124 S.Ct. 961, 157 L.Ed.2d 797 (2003); *Belcher v. State,* 851 So.2d 678, 685 (Fla. July 10, 2003); *Allen v. State,* 854 So.2d 1255, 1262 (Fla.2003); *Wright v. State,* 857 So.2d 861, 878 (Fla.2003), 541 U.S. 961, 124 S.Ct. 1715, 158 L.Ed.2d 402 (2004); *Blackwelder v. State,* 851 So.2d 650, 653 (Fla.2003); *Duest v. State,* 855 So.2d 33, 49 (Fla.2003); *Cooper v. State,* 856 So.2d 969, 977 (Fla.2003), *cert. denied,* 540 U.S. 1222, 124 S.Ct. 1512, 158 L.Ed.2d 159 (2004); *Pace v. State,* 854 So.2d 167, 172 (Fla.2003), *cert. denied,* 540 U.S. 1153, 124 S.Ct. 1155, 157 L.Ed.2d 1049 (2004); *Butler v. State,* 842 So.2d 817, 834 (Fla.2003); *Harris v. State,* 843 So.2d 856, 870 (Fla.2003); *Lawrence v. State,* 846 So.2d 440, 456 (Fla.2003); *Banks v. State,* 842 So.2d 788, 793 (Fla.2003); *Grim v. State,* 841 So.2d 455, 465 (Fla.2003); *Lugo v. State,* 845 So.2d 74, 119 (Fla.2003); *Jones v. State,* 845 So.2d 55, 74 (Fla.2003); *Kormondy v. State,* 845 So.2d 41, 54 (Fla.2003); *Doorbal v. State,* 837 So.2d 940, 963 (Fla.2003); *Anderson v. State,* 841 So.2d 390, 408 (Fla.2003); *Cole v. State,* 841 So.2d 409, 431 (Fla.2003); *Conahan v. State,* 844 So.2d 629, 642 (Fla.2003); *Spencer v.*

State, 842 So.2d 52, 72 (Fla.2003); *Porter v. Crosby,* 840 So.2d 981, 987 (Fla.2003); *Lynch v. State,* 841 So.2d 362, 366 (Fla.2003); *Lucas v. State,* 841 So.2d 380, 389 (Fla.2003); *Fotopoulos v. State,* 838 So.2d 1122, 1136 (Fla.2002); *Israel v. State,* 837 So.2d 381, 394 (Fla.2002); *Bruno v. Moore,* 838 So.2d 485, 492 (Fla.2002); *Marquard v. State,* 850 So.2d 417, 431 (Fla.2002); *Chavez v. State,* 832 So.2d 730, 767 (Fla. Nov.21, 2002); *Washington v. State,* 835 So.2d 1083, 1091 (Fla.2002); *Bottoson v. Moore,* 833 So.2d 693, 694 (Fla.2002); *King v. Moore,* 831 So.2d 143, 144 (Fla.2002).

[9] Although we have not addressed *Ring's* application in the context of a jury override verdict, our previous conclusions with regard to *Ring* claims preclude Marshall from being granted relief on his claim. First, as our plurality opinion noted in *Bottoson,* "the United States Supreme Court repeatedly has reviewed and upheld Florida's capital sentencing statute over the past quarter of a century." *Bottoson,* 833 So.2d at 695 & n. 4 (Fla.2002) ***1135** (listing as examples *Hildwin v. Florida,* 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989), *Spaziano v. Florida,* 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), *Barclay v. Florida,* 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983), and *Proffitt v. Florida,* 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976)). In fact, the United States Supreme Court expressly upheld the jury override aspect of Florida's sentencing scheme. *See Spaziano,* 468 U.S. at 466, 104 S.Ct. 3154 ("We see nothing that suggests that the application of the jury-override procedure has resulted in arbitrary or discriminatory application of the death penalty, either in general or in this particular case."). *Spaziano* remains good law, and as was noted in the *Bottoson* plurality opinion, despite any tension between *Spaziano* and *Ring,* this Court relies on the United States Supreme Court's admonition that lower courts should "follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Bottoson,* 833 So.2d at 695 (quoting *Rodriguez de Quijas v. Shearson/American Express,* 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989)).

[10] Second, *Ring* did not alter the express exemption in *Apprendi* that prior convictions are exempt from the Sixth Amendment requirements announced in the two cases. *See Apprendi v. New Jersey,* 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). We have repeatedly relied on the presence of the prior violent felony aggravating circumstance when denying *Ring* claims.[6] In the instant case, one of Marshall's aggravating circumstances was that he had been previously convicted of nine violent felonies. Therefore, even if *Ring* were to call Florida's jury override procedures into question, Marshall's nine prior violent felonies are an aggravating circumstance that takes his sentence outside the scope of *Ring's* requirements.

6 *See, e.g., Smith v. State,* 866 So.2d 51, 68 (Fla.2004) (denying relief on *Ring* claim and "specifically not[ing] that one of the aggravating factors present in this matter is a prior violent felony conviction"); *Davis v. State,* 875 So.2d 359, 374 (Fla.2003) (stating that "[w]e have denied relief in direct appeals where there has been a prior violent felony aggravator"); *Johnston v. State,* 863 So.2d 271, 286 (Fla.2003) (stating that the existence of a "prior violent felony conviction alone satisfies constitutional mandates because the conviction was heard by a jury and determined beyond a reasonable doubt"), *cert. denied,* 541 U.S. 946, 124 S.Ct. 1676, 158 L.Ed.2d 372 (2004); *Henry v. State,* 862 So.2d 679, 687 (Fla.2003) (stating in postconviction case that this Court has previously rejected *Ring* claims "in cases involving the aggravating factor of a previous violent felony conviction"); *see also Rivera v. State,* 859 So.2d 495, 508 (Fla.2003); *Jones v. State,* 855 So.2d 611, 619 (Fla.2003); *Conde v. State,* 860 So.2d 930, 959 (Fla.2003), *cert. denied,* 541 U.S. 977, 124 S.Ct. 1885, 158 L.Ed.2d 475 (2004); *Belcher v. State,* 851 So.2d 678, 685 (Fla.2003), *cert. denied,* 540 U.S. 1054, 124 S.Ct. 816, 157 L.Ed.2d 706 (2003); *Blackwelder v. State,* 851 So.2d 650, 654 (Fla.2003); *Duest v. State,* 855 So.2d 33, 49 (Fla.2003), *cert. denied,* 541 U.S. 993, 124 S.Ct. 2023, 158 L.Ed.2d 500 (2004); *Grim v. State,* 841 So.2d 455, 465 (Fla.2003); *Jones v. State,* 845 So.2d 55, 74 (Fla.2003); *Lugo v. State,* 845 So.2d 74, 119 n. 79 (Fla.2003); *Doorbal v. State,* 837 So.2d 940, 963 (Fla.2003).

Finally, we have recently held in *Johnson v. State,* 904 So.2d 400 (Fla. 2005) that we will not apply *Ring* retroactively in postconviction cases even assuming it affected Florida law.

Application of Tedder Standard

[11] In the final claim of his habeas petition, Marshall alleges that *Tedder v. State,* 322 So.2d 908 (Fla.1975), which allows the trial judge to override a jury recommendation in capital cases, was arbitrarily applied in this case based on language found in *Keen v. State,* 775 So.2d 263 (Fla.2000). In *Tedder,* this Court held ***1136**

that "[i]n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." *Tedder,* 322 So.2d at 910. More recently, this Court in *Keen* reiterated the proper analysis for a *Tedder* inquiry: "The singular focus of a *Tedder* inquiry is whether there is 'a reasonable basis in the record to support the jury's recommendation of life,' rather than the weighing process which a judge conducts after a death recommendation." *Keen,* 775 So.2d at 283–84 (citation omitted). The Court further explained that "the jury's life recommendation changes the analytical dynamic and magnifies the ultimate effect of mitigation on the defendant's sentence." *Id.* at 285.

In *Mills v. Moore,* 786 So.2d 532 (Fla.2001), this Court rejected an argument similar to the one currently raised by Marshall. In so doing, this Court stated:

> While conceding that *Keen* is not new law, Mills nonetheless argues that *Keen's* application of *Tedder* constitutes a new standard by which jury override cases are reviewed. *Keen* is not a major constitutional change or jurisprudential upheaval of the law as it was espoused in *Tedder. Keen* offers no new or different standard for considering jury overrides on appeal. Thus, we disagree with Mills' contention that *Keen* offers a new standard of law and we reject the contention that *Keen* was anything more than an application of our long-standing *Tedder* analysis.
>
> *Tedder* is the seminal case in Florida on jury overrides and remains so after *Keen. Tedder* was applied to this case. *Keen* provides no basis for our reconsideration of this issue.

Id. at 539–40.

In the instant case, we reviewed the propriety of the trial court's override on direct appeal under the standard set forth in *Tedder.* In particular, this Court explained:

> Marshall next alleges that the trial court abused its discretion in sentencing Marshall to death where the jury had made a recommendation of life imprisonment. It is well settled in Florida that a judge imposing sentence in a capital case must accord the jury recommendation great weight. *E.g., Tedder v. State,* 322 So.2d 908, 910 (Fla.1975). Where a jury has recommended a life sentence, the court must follow that recommendation unless "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." *Id.* Where the record contains no evidence supporting a life recommendation, the trial court does not err in declining to follow that recommendation.
>
> In this case, the record contains insufficient evidence to reasonably support the jury's recommendation of life. Marshall's father was unable to attend the trial, but the defense and prosecution stipulated that he would have testified that Marshall did well in school until his early teens when his older brother influenced him to run the streets and break the law; that Marshall's mother did not discipline Marshall and allowed him to believe there would be no consequences for his behavior; and that Marshall's father loved him and requested a life sentence for his son. The trial court determined these facts were not mitigating, but did find Marshall's behavior at trial as well as his entering prison at a young age to be mitigating. We find no error in the court's assessment of this mitigation and conclude that it does not provide a reasonable basis for the jury's recommendation of life in this case. Even viewing this mitigation in the light ***1137** most favorable to Marshall, it pales in significance when weighed against the four statutory aggravating circumstances, including Marshall's record of violent felonies consisting of kidnapping, sexual battery, and seven armed robberies.
>
> Furthermore, defense counsel's argument composed largely of a negative characterization of the victim does not provide a reasonable basis for the jury's life recommendation. Moreover, contrary to Marshall's assertion, the facts surrounding the murder do not suggest that the murder was committed in self defense or in a fit of rage. The witnesses heard muffled screams and moans emanating from the victim's cell and observed Marshall leaving the cell with what appeared to be blood on his chest and arms. Within a few minutes, Marshall *reentered* the cell and similar noises were again heard. The victim was found lying face down with his hands bound behind his back and his ankles were restrained. The victim received no less than twenty-five separate wounds and blood was sprayed and splattered about the cell. Death was caused by blows to the back of his head. Nothing in these facts supports the notion that Marshall acted in self defense or that he simply killed

> the victim in the heat of a fight. We thus conclude that the trial court did not abuse its discretion in finding the facts supporting the death sentence to be "so clear and convincing that no reasonable person could differ." *See Tedder,* 322 So.2d at 910.

Marshall, 604 So.2d at 805–06. Accordingly, as in *Mills,* this claim provides no basis for relief.

CONCLUSION

For the reasons set forth above, we deny Marshall's petition for writ of habeas corpus.

It is so ordered.

WELLS, QUINCE, CANTERO, and BELL, JJ., concur.

CANTERO, J., concurs with an opinion, in which WELLS and BELL, JJ., concur.

LEWIS, J., concurs in result only with an opinion.

PARIENTE, C.J., dissents with an opinion.

ANSTEAD, J., dissents with an opinion.

CANTERO, J., concurring.

I concur in the majority opinion. I write only to respond to Chief Justice Pariente's dissent, which addresses Marshall's jury override claim. We considered and denied that claim in Marshall's direct appeal. *See Marshall v. State,* 604 So.2d 799, 805–06 (Fla.1992). Therefore, the claim is procedurally barred. *See, e.g., Parker v. Dugger,* 550 So.2d 459, 460 (Fla.1989) (holding that habeas is improper to relitigate issues that either were or could have been raised on direct appeal). We need say no more.

Justice Pariente would nevertheless disregard the procedural bar in these circumstances. I know of no case among the nearly 30–year–old jurisprudence of this Court considering collateral relief in death penalty cases, and the hundreds of such cases we have decided during that period, allowing an exception to the proposition that issues raised on direct appeal from a sentence of death will not be considered on review from denial of postconviction relief. To do so now would require us to recede from a legal proposition so ingrained in our death penalty jurisprudence that it has become black-letter law. Even if we limited the exception to jury overrides, tomorrow we would be inundated with requests ***1138** to create exceptions in a myriad of other circumstances. I would not open that door.

WELLS and BELL, JJ., concur.

LEWIS, J., concurring in result only.

I reiterate my concern that a trial judge's override of a jury's life recommendation stands in apparent "irreconcilable conflict" with the holding of *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002):

> If *Apprendi* [7] and *Ring* support the proposition that it is unconstitutional for a trial judge to independently find fact with regard to aggravators and impose a sentence of death without jury involvement, surely the Supreme Court's *Spaziano* [8] decision authorizing a trial judge's complete disregard for a sentencing jury's recommendation based upon jury findings of aggravating factors cannot now stand. I cannot avoid the conclusion that if *Ring* mandates penalty phase jury findings for the imposition of capital sentences, a trial judge may not simply dismiss the jury's recommendation based upon these findings and do precisely what *Ring* prohibits. A trial court simply cannot sentence a defendant to death through findings of fact rendered completely without, and in the case of a jury override, directly contrary to, a jury's advice and input. As has been noted by this Court in the past, a "jury's life recommendation changes the analytical dynamic," and under *Ring,* this life recommendation must be respected. Thus, this is not only an asserted irreconcilable conflict, in my view it is a conflict we should acknowledge.

7 *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

8 *Spaziano v. Florida,* 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984).

Bottoson v. Moore, 833 So.2d 693, 727–28 (Fla.2002) (Lewis, J., concurring in result only) (citation omitted). Nevertheless, in the present case, I agree that *Ring* is inapplicable, as explained below.

The United States Supreme Court in *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), was confronted with the issue of whether a judge, sitting without a jury, could conduct the fact-finding necessary to enhance a defendant's sentence by two years under a "hate-crimes" statute. In conducting its analysis, the Supreme Court first acknowledged the importance of the interests that were at stake, *see id.* at 476, 120 S.Ct. 2348 ("At stake in this case are constitutional protections of surpassing importance."), and the Court then announced a bright-line rule of law that would protect those interests appropriately: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490, 120 S.Ct. 2348.

Two years later, the United States Supreme Court in *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), applied *Apprendi's* bright-line rule to capital cases, holding as follows: "Because ... aggravating factors operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury." *Ring,* 536 U.S. at 609, 122 S.Ct. 2428 (citation omitted). The Court explained further:

> The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's ***1139** sentence by two years, but not the factfinding necessary to put him to death.

Id. Based on language in both *Apprendi* and *Ring,* the holding of *Ring* appeared to implicate constitutional interests of the highest order and seemed to go to the very heart of the Sixth Amendment. And yet, two years after *Ring* was decided, the Supreme Court appears to have somewhat altered the foundation.

When asked to decide the retroactivity of *Ring,* the United States Supreme Court in *Schriro v. Summerlin,* 542 U.S. 348, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004), first explained that "[t]his holding [in *Ring*] did not alter the range of conduct Arizona law subjected to the death penalty" and that *Ring* therefore was procedural rather than substantive. *Summerlin,* 124 S.Ct. at 2523. And second, the Court relied upon its own prior decision in *DeStefano v. Woods,* 392 U.S. 631, 88 S.Ct. 2093, 20 L.Ed.2d 1308 (1968) (declining to give retroactive application to a 1968 decision that extended the jury-trial guarantee to the states), and concluded that *Ring* did not establish a "watershed rule of criminal procedure":

> If under *DeStefano* a trial held entirely without a jury was not impermissibly inaccurate, it is hard to see how a trial in which a judge finds only aggravating factors could be.

Summerlin, 124 S.Ct. at 2526. The Court then held: "*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review." *Summerlin,* 124 S.Ct. at 2526.

Based on *Summerlin*—as surprising as that decision may be [9] in light of the Supreme Court's own prior language in *Apprendi* and *Ring*—I can only conclude that *Ring* cannot be applied retroactively in Florida even upon application of our *Witt* [10] analysis. The United States Supreme Court is the ultimate arbiter of the federal constitution, and the decision in *Ring* is that Court's own Sixth Amendment interpretation and application. If the United States Supreme Court has held and stated that *Ring* is not a "watershed rule of criminal procedure" but merely a "new procedural rule that does not apply retroactively," then I am precluded from determining that *Ring* is of fundamental significance, significant magnitude or constitutes a "jurisprudential upheaval" under Florida law, even though if writing upon a clean slate I would certainly do so. Further, the purpose served by a new rule of law is a key factor in determining retroactivity in Florida, [11] and the United States Supreme Court in *DeStefano* held that the purpose served by the jury-trial guarantee ("to prevent arbitrariness and repression") "favor[s] only prospective application" of that guarantee to the states. [12] Therefore, I cannot logically say that the purpose served by the jury fact-finding requirement ***1140** of *Ring* favors a different treatment in this regard.

9 *Cf. Apprendi,* 530 U.S. at 538, 120 S.Ct. 2348 (O'Connor, J., dissenting) (terming the majority's reasoning in *Apprendi* "baffling, to say the least").

10 *Witt v. State,* 387 So.2d 922 (Fla.1980).

11 *See id.* at 926 (holding that the retroactivity of a new rule of law may be determined by assessing (a) the *purpose* served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of retroactive application of the new rule).

12 *See DeStefano,* 392 U.S. at 633, 88 S.Ct. 2093 (explaining that the "purpose" served by a new rule of law is one of three factors for determining retroactivity under *Stovall v. Denno,* 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967), and then holding that "[a]ll three factors favor only prospective application" of the jury-trial guarantee to the states).

Based on the foregoing, I must agree that *Ring* is inapplicable in this post-conviction case.

PARIENTE, C.J., dissenting.

I agree that Marshall is not entitled to relief under *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). We have held that *Ring* does not apply retroactively to death sentences that have been affirmed on direct appeal and are thus considered final. *See Johnson v. State,* 904 So.2d 400 (Fla. 2005). Consequently, any other basis for denying *Ring* relief is superfluous.

However, I dissent from the denial of habeas relief because I conclude that when this Court upheld the trial court's override of the jury's recommendation of life imprisonment in Marshall's direct appeal, we failed to follow our own precedent in *Tedder v. State,* 322 So.2d 908 (Fla.1975). As *Tedder* mandates, the jury's recommendation carries great weight and should be followed unless "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." *Id.* at 910. The test is whether there is a reasonable basis in the record upon which the jury could have recommended life. *See Keen v. State,* 775 So.2d 263, 283 (Fla.2000).

As explained by Chief Justice Barkett in the direct appeal as to why the jury's recommendation of life imprisonment should be honored,

> in this case reasonable people could differ as to the appropriateness of the death penalty, and the court's override was therefore improper.
>
> In addition to considering the stipulated testimony of Marshall's father, the jury could have reasonably viewed the evidence of the murder in a light more favorable to Marshall. In his closing argument to the jury, defense counsel conceded that the aggravating circumstances of murder committed while under a sentence of imprisonment and previous conviction of a violent felony were established, but strongly argued against the existence of the other aggravators presented by the State. He argued that the death penalty should be reserved only for the worst murderers and worst aggravation. He pointed out that the evidence showed that Marshall and Henry had no prior problems with each other and had socialized together at the prison. Defense counsel emphasized that the circumstances of the crime indicate no prior plot or plan to kill since Marshall entered the cell unarmed and the murder was committed with a battery pack belonging to and found within the cell of the victim. He argued that offensive wounds on Henry's hands showed that the murder occurred during the course of a fight and that Henry was a violent person. He also noted that Henry's skull was not fractured and his facial bones weren't broken, indicating that Marshall did not intend to torture the victim or inflict additional injuries once he was rendered unconscious. Defense counsel also pointed out that the murder was not committed for financial gain. Finally, defense counsel argued that Marshall's age and background mitigate the offense as well. He pointed out that a life sentence of 25 years on top of the sentence of 46 years that Marshall was already serving would keep Marshall in prison for a substantial period of time.
>
> I believe this view of the evidence provided a reasonable basis upon which the jury could recommend a life sentence. While the jury may not have believed that Marshall acted in self defense ***1141** to excuse the killing, it could have reasonably inferred from the evidence that a fight erupted between Marshall and Henry and that Marshall killed Henry in a fit of rage. It is also likely that the jury rejected some of the aggravators found by the judge or assigned them minimal weight. Additionally, the jury could have reasonably found mitigation in Marshall's family background, and determined, based on the nature of the crime and the circumstances surrounding it, that the death penalty was not the appropriate penalty in this case.... Although some may not view the mitigation as compelling in this case, I cannot say that no reasonable

person could have recommended a life sentence for Matthew Marshall.

Marshall v. State, 604 So.2d 799, 806–07 (Fla.1992) (Barkett, C.J., concurring in part and dissenting in part) (citations omitted).

Although the Court's rejection of Marshall's claim that the override could not be sustained under *Tedder* is law of the case that we normally would not revisit, the law of the case doctrine is not immutable. As I previously stated in another override case,

> [t]he doctrine is not an absolute mandate, but rather a self-imposed restraint that courts abide by to promote finality and efficiency in the judicial process and prevent relitigation of the same issue in a case. This Court has the power to reconsider and correct erroneous rulings in exceptional circumstances and where reliance on the previous decision would result in manifest injustice, notwithstanding that such rulings have become law of the case.

Mills v. Moore, 786 So.2d 532, 545 (Fla.2001) (Pariente, J., dissenting) (quoting *State v. Owen,* 696 So.2d 715, 720 (Fla.1997)).

In *Mills,* I concluded that the law of the case doctrine should not preclude us from determining that a death sentence had been erroneously affirmed under the *Tedder* standard:

> The undeniable fact is that a proper and consistent application of *Tedder* ... would result in this Court honoring the jury's recommendation of life and therefore requires that we revisit our prior ruling in this case. The issue in this case is whether the doctrine of the law of the case precludes our revisiting the jury override issue. I conclude that it does not because it would be a manifest injustice for Mills to be executed when, under identical circumstances, he would not be executed if this Court had reviewed his sentence at any time after 1985. Contrary to Justice Harding's assertion in his concurrence, a proper and consistent application of *Tedder* does not result in our making "new law on a case-by-case basis in order to reach a desired result." Rather, a proper and consistent application of our longstanding *Tedder* analysis mandates that we reduce Mills' sentence to life in order to fulfill "our responsibility to apply the law uniformly in all cases, regardless of the status of the players or the stakes of the game." It is precisely because this Court has openly acknowledged in *Cochran v. State,* 547 So.2d 928, 933 (Fla.1989), that it did not properly and "uniformly" apply *Tedder* to Mills and other defendants, that we are urged to correct our mistake now before a life is taken based on that mistake.

Mills, 786 So.2d at 545 (Pariente, J., dissenting) (citations omitted). Consistent with my views in *Mills,* I believe that adherence to the *Tedder* standard for review of the judicial override of a life recommendation takes precedence over the ***1142** doctrine of law of the case and requires that we reduce Marshall's sentence to life.

ANSTEAD, J., dissenting.

Today, we approve a practice that has now been outlawed in the United States by this nation's highest court, the imposition of the death penalty by a single judge in the face of a jury finding that the circumstances of the case do not support a sentence of death and require a life sentence. Because this outcome essentially allows a trial judge to ignore a jury's actions and direct a verdict and judgment for death in favor of the State, it is patently offensive to our constitutional notions of due process and the right to a jury trial.[13]

13 I acknowledge that this Court has now ruled that *Ring* will not be applied retroactively in Florida. *See Johnson v. State,* 904 So.2d 400 (Fla. 2005).

In *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), the Supreme Court explained that although entrusting a judge to find facts necessary to support a death sentence might be an efficient scheme for a society that is prepared to leave criminal justice to the State, "[t]he founders of the American Republic were not prepared to leave it to the State, which is why the jury trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free." *Id.* at 607, 122 S.Ct. 2428 (quoting *Apprendi v. New Jersey,* 530 U.S. 466, 498, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (Scalia, J., concurring)). In his opinion in *Ring,* Justice Scalia specifically warned that despite the Sixth Amendment's vital importance to the founders of this country:

> [O]ur people's traditional belief in the right of trial by jury is in perilous decline. That decline is bound to be confirmed, and indeed accelerated, by the repeated spectacle of a man's going to his death because *a judge* found that an aggravating factor existed. We cannot preserve our veneration for the protection of the jury in criminal cases if we render ourselves callous to the need for that protection by regularly imposing the death penalty without it.

Id. at 612, 122 S.Ct. 2428 (Scalia, J., concurring). Today, the right to a jury trial guaranteed by our founding fathers has suffered a drastic setback in Florida. [14]

14 It is truly tragic to see how far respect has diminished for one of the two most important and fundamental rights vouchsafed for us by our founding fathers, the first being the right to vote, the second being the right to trial by jury. The importance of this right was described by the U.S. Supreme Court in *Jones v. United States,* 526 U.S. 227, 246, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), where the Court said:

> Identifying trial by jury as "the grand bulwark" of English liberties, Blackstone contended that other liberties would remain secure only "so long as this *palladium* remains sacred and inviolate, not only from all open attacks, (which none will be so hardy as to make) but also from all secret machinations, which may sap and undermine it; by introducing new and arbitrary methods of trial, by justices of the peace, commissioners of the revenue, and courts of conscience. And however *convenient* these may appear at first (as doubtless all arbitrary powers, well executed, are the most *convenient*), yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters." [4 William Blackstone, Commentaries] at 342–344.

Jones v. United States, 526 U.S. 227, 246, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999).

I am gravely concerned that the majority's opinion in the instant case hastens the erosion of our traditional veneration for the right to trial by jury in Florida. In short, the majority's decision eviscerates the Sixth Amendment by allowing the death sentence to be imposed based solely on a judge's findings, even though a jury ***1143** has clearly found that the defendant should live. For the reasons set forth below, I conclude that Florida's death sentencing scheme, and especially its provision for a judge override of a jury finding, violates the Sixth Amendment and is unconstitutional as applied in this case.

RING and *FURMAN*

As I have previously stated, I believe that the United States Supreme Court's decision in *Ring* is clearly the most significant death penalty decision since the Court's seminal decision in *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). *See Bottoson v. Moore,* 833 So.2d 693, 703 (Fla.2002) (Anstead, C.J., concurring in result only). In fact, the Supreme Court's decision in *Ring* represents the convergence of two separate lines of cases involving important constitutional safeguards in death penalty jurisprudence. [15]

15 *Furman,* of course, was applied universally and retroactively to all state death penalty schemes in the United States, even though the case was decided by a plurality decision. *See, e.g., Gregg v. Georgia,* 428 U.S. 153, 179–180, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (noting that thirty-five states had enacted new death penalty statutes in response to the Court's decision in *Furman*); *Schick v. Reed,* 419 U.S. 256, 270, 95 S.Ct. 379, 42 L.Ed.2d 430 (1974) (Marshall, J., dissenting) (stating that *Furman's* retroactivity is "unclouded" and noting that the Court had not hesitated in giving "full retroactive effect to the *Furman* decision"); *Robinson v. Neil,* 409 U.S. 505, 508, 93 S.Ct. 876, 35 L.Ed.2d 29 (1973) (recognizing that the Court had not hesitated in applying *Furman* retroactively); *Summerlin v. Stewart,* 341 F.3d 1082, 1103 (9th Cir.2003) (stating that "[t]here was no doubt, importantly, that *Furman* had retroactive effect"); *Joubert v. Hopkins,* 75 F.3d 1232, 1242 (8th Cir.1996) (noting that *Furman* invalidated all death penalty procedures that were in place at the time it was decided).

The first set of safeguards sprang from the Supreme Court's *Furman* decision and subsequent cases which held that the Eighth Amendment requires states to adopt safeguards protecting against arbitrary and capricious impositions of the death sentence. *See, e.g., Loving v. United States,* 517 U.S. 748, 755, 116 S.Ct. 1737, 135 L.Ed.2d 36 (1996); *Gregg v. Georgia,* 428 U.S. 153, 176–78, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Proffitt v. Florida,* 428 U.S. 242, 252–53, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). As a result of *Furman* and its progeny, states began "adopt[ing] various narrowing factors that limit the class of offenders upon which the sentencer is authorized to impose the death penalty." *Sawyer v. Whitley,* 505 U.S. 333, 341–42, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992).[16] These narrowing factors are usually set out in a list of aggravating factors that might be utilized in sentencing in cases where the death penalty is authorized as a permissible and possible sanction.

16 In *Loving,* the Court further explained this Eighth Amendment narrowing requirement:

> The Eighth Amendment requires, among other things, that "a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.' " *Lowenfield v. Phelps,* 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988) (quoting *Zant v. Stephens,* 462 U.S. 862, 877, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983)). Some schemes accomplish that narrowing by requiring that the sentencer find at least one aggravating circumstance. 484 U.S., at 244, 108 S.Ct., at 554. The narrowing may also be achieved, however, in the definition of the capital offense, in which circumstance the requirement that the sentencer "find the existence of an aggravating circumstance in addition is no part of the constitutionally required narrowing process." *Id.*, at 246, 108 S.Ct. 546.

517 U.S. at 755, 116 S.Ct. 1737.

The second line of cases is based on the Sixth Amendment right to a trial by jury ***1144** and the extent to which the Sixth Amendment requires a jury, and not a judge, to determine the existence of any facts necessary to sentence an individual for an enhanced crime. *See Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *Jones v. United States,* 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999). In rejecting Arizona's argument that judges could determine the existence of the facts necessary to permit a sentence of death, the U.S. Supreme Court in *Ring* commented on how the Eighth and Sixth Amendment lines of cases complement one another, first by reiterating the states' responses to *Furman:*

> States have constructed elaborate sentencing procedures in death cases, Arizona emphasizes, because of constraints we have said the Eighth Amendment places on capital sentencing. Brief for Respondent 21–25 (citing *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (per curiam)); *see also Maynard v. Cartwright,* 486 U.S. 356, 362, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988) ("Since *Furman,* our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action."); *Apprendi,* 530 U.S., at 522–23, 120 S.Ct. 2348 (Thomas, J., concurring) ("[I]n the area of capital punishment, unlike any other area, we have imposed special constraints on a legislature's ability to determine what facts shall lead to what punishment—we have restricted the legislature's ability to define crimes.").

Ring, 536 U.S. at 606, 122 S.Ct. 2428. The Court then went on to expressly reject "[t]he notion 'that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence.' " *Id.* (quoting *Apprendi,* 530 U.S. at 539, 120 S.Ct. 2348 (O'Connor, J., dissenting)). The Court noted that in various settings it had "interpreted the Constitution to require the addition of an element or elements to the definition of a criminal offense in order to narrow its scope." *Id.* The Court concluded that "[i]f a legislature ... add[ed an] element we held constitutionally required, surely the Sixth Amendment guarantee would apply to that element. We see no reason to differentiate capital crimes from all others in this regard." *Id.* at 607, 122 S.Ct. 2428.

Under Florida's death penalty scheme, the aggravating factors or elements necessary to impose the death penalty are found at the penalty phase of the trial, after a jury has determined general guilt of the underlying offense. *See* §§ 775.082, 782.084, 921.141(3), Fla. Stat. (1989). Hence, the narrowing functions required by the Eighth Amendment occur during the penalty phase, which under Florida's statutory scheme expressly directs that a judge rather than the jury determine the existence of aggravating factors necessary for a death sentence to be imposed. Because of the way Florida's statutory death sentencing scheme is written and operates to vest this authority in a judge rather than a jury, it directly conflicts with these two lines of Supreme Court cases, especially to the extent that it allows a judge to override a jury's recommendation in favor of life.

INVALIDITY OF OVERRIDE UNDER *RING*

While I have consistently disagreed with this Court's refusal to apply the Sixth ***1145** Amendment requirements laid out in *Apprendi* and *Ring*, and have previously written to voice my disagreement with the Court's failure to make an honest assessment of how *Apprendi* and *Ring* impact Florida's death penalty jurisprudential landscape,[17] it is inescapable that *Ring* precludes the decision that the majority reaches today. As Justice Lewis has eloquently declared:

17 *See, e.g., Conde v. State,* 860 So.2d 930, 959–960 (Fla.2003) (Anstead, C.J., concurring in part and dissenting in part); *Caballero v. State,* 851 So.2d 655, 664–65 (Fla.2003) (Anstead, C.J., concurring in part and dissenting in part); *Fennie v. State,* 855 So.2d 597, 611 (Fla.2003) (Anstead, C.J., concurring in part and dissenting in part); *Nelson v. State,* 850 So.2d 514, 535 (Fla.2003) (Anstead, C.J., concurring in part and dissenting in part); *Duest v. State,* 855 So.2d 33, 52–57 (Fla.2003) (Anstead, C.J., concurring in part and dissenting in part); *Bottoson v. Moore,* 833 So.2d 693, 703–10 (Fla.2002) (Anstead, C.J., concurring in result only).

> Based upon the foregoing, although I concur in the result, I cannot concur in the silent reasoning provided by the majority as a basis for its conclusions. As detailed above, I am gravely concerned regarding the constitutionality of jury overrides under *Ring* and I cannot silently afford blind adherence to authorities which are now in apparent irreconcilable conflict with *Ring*. Additionally, I also conclude that Florida's standard jury instructions need immediate attention. In my view, there are more than mere contentions of conflict, which the majority is willing to acknowledge, there are facially irreconcilable conflicts which the majority does not acknowledge.
>
> *Bottoson v. Moore,* 833 So.2d 693, 734 (Fla.2002) (Lewis, J., concurring in result only). Today, Justice Lewis's concerns have come true in an actual case where a jury's finding has been voided by a judge and the majority has approved that override.

Rather than determine what role the jury should be playing in Florida in order to comply with *Ring* and the Sixth Amendment, the majority essentially eviscerates the role of a jury in identifying the facts necessary to sentence an individual to death.[18] The majority ignores the fact that the Eighth Amendment procedural protections built into Florida's sentencing scheme occur at the penalty phase of the trial. Instead of considering what happened at the penalty phase of the trial, and the inconvenient fact that the jury found that Marshall should be given a life sentence, the majority erroneously equates the existence of Marshall's prior violent felonies with a finding of the facts necessary to impose the death sentence.

18 As demonstrated by the number of cases cited by the majority, the Court has consistently relied upon such exceptions or loopholes to avoid the ambit of *Ring's* requirements in virtually all of the cases we have reviewed since *Ring's* release. *See supra* note 5.

A JUDGE'S OVERRIDE

Regardless of whether a majority of this Court has concluded that *Ring* does not apply in Florida, we cannot simply ignore the constitutional legal principles discussed in the *Ring* opinion and our obligation to determine whether any of those constitutional principles impact Florida's death penalty scheme. Perhaps the most visible flaw in Florida's sentencing scheme is its provision allowing a judge to override a jury's finding that sufficient circumstances do not exist to justify imposition of a sentence of death. As noted above, authorizing such an override is tantamount to authorizing a judge to set aside a jury's verdict of not guilty and the imposition of a directed verdict and judgment of death in favor of the State by the judge. Ironically, ***1146** the State has frequently asserted in this Court that it is the jury's action in recommending death that "saves" Florida's death scheme under the constitutional analysis in *Ring*. In other words, the State has asserted that the jury's recommendation of death is tantamount to a finding by the jury of sufficient aggravation to authorize death. However, that argument (even accepting its validity for purposes of further analysis), is completely undermined when a judge is allowed to trump a jury's recommendation of life since in such instance there can be no implication that the jury found aggravating circumstances at all.

A recitation of the circumstances and history of the instant case vividly illustrates how Florida's death sentencing scheme violates the Sixth Amendment. Marshall was charged in an indictment which stated that he unlawfully killed the victim in this case "with premeditated design and/or while engaged in the perpetration of a felony [burglary]." [19] Upon conviction, the jury's general verdict form simply stated that the jury found Marshall guilty of first-degree murder. There is no indication as to whether this conviction was for premeditated murder under section 782.04(1)(a)(1), or felony murder under section 782.04(1)(a)(2), or both. Thus, the jury's guilt phase verdict provides no guidance whatsoever as to whether the facts necessary to sentence Marshall to death were present, let alone proven beyond a reasonable doubt.

19 The indictment also listed the crimes charged as violations of sections 782.04(1)(a)(1) "and/or" 782.04(1)(a)(2), Florida Statutes (1987). Section 782.04(1)(a)(1) prohibits premeditated murder and section 782.04(1)(a)(2) deals with murders committed during the perpetration of enumerated felonies.

More importantly, at this stage of the proceedings no aggravating circumstances or elements necessary to impose the death sentence had been found beyond a reasonable doubt, and thus no narrowing under the Eighth Amendment had occurred. Stated differently, at this stage of the proceedings, without a finding of any aggravating circumstances necessary to impose the death sentence, Marshall stood in the same position as all other defendants convicted of first-degree murder, including those individuals whose crimes did not warrant the death penalty. *See generally* §§ 775.082, 782.084(1)(b), Fla. Stat. (1987) (indicating that upon conviction of first-degree murder, the procedures in section 921.141, Florida Statutes must be followed in order to determine sentence of death or life imprisonment).

Following the penalty phase proceedings, the jury gave its advisory recommendation pursuant to section 921.141(2), Florida Statutes (1989), that Marshall should be given a sentence of life in prison. Given the recommendation in favor of life, the jury obviously found that the evidence was insufficient to demonstrate the presence of aggravating circumstances that outweighed the mitigating circumstances, [20] if we are to assume, as we must, that the jury followed the standard instructions given in accord with Florida's death penalty scheme. However, after receipt of the jury's recommendation, the trial judge, pursuant to section 921.141(3), Florida Statutes (1989), went on to make his own findings in support of the death sentence and he imposed a sentence of death contrary to the jury's findings and recommendation. ***1147** [21] Hence the override of the jury's contrary determinations as to aggravation and mitigation.

20 The U.S. Supreme Court has recognized that Florida's death penalty scheme prevents one from knowing what aggravating circumstances the jury has found. *See Sochor v. Florida,* 504 U.S. 527, 538, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992) (recognizing that "the jury in Florida does not reveal the aggravating factors on which it relies.").

21 It is worthy to note that Marshall was not charged with the underlying burglary and he was not convicted of burglary by the jury. Therefore, it was necessary for the trial judge to find that the elements of the burglary had been proven as well.

In short, to the extent that the jury participated in the process by which Marshall was sentenced to death, it rendered an advisory recommendation in favor of life. The judge acting as the sole fact-finder of the aggravating circumstances then rejected the jury's findings and sentenced Marshall to death. This is simply the way in which Florida's death sentencing scheme is written in the statutes and the way it operates. However, under *Ring,* this type of judicial fact-finding is unconstitutional.

SPAZIANO, RODRIGUEZ DE QUIJAS, and "EXEMPT" AGGRAVATING CIRCUMSTANCES

To date, this Court has consistently avoided directly confronting the question of *Ring's* application. The Court has consistently relied on the plurality opinions in *Bottoson v. Moore,* 833 So.2d 693 (Fla.2002), and *King v. Moore,* 831 So.2d 143 (2002), even though neither plurality opinion resolved any of the questions about how *Ring* should apply or analyzed the potential problems with Florida's statute in any detail. [22] As Justice Lewis has noted, the majority in those cases relied on "silent reasoning." *Bottoson v. Moore,* 833 So.2d 693, 734 (Fla.2002) (Lewis, J., concurring in result only). In addition to this repeated unelaborated reference to those plurality opinions, the majority today relies on two other grounds for denying relief, as well as its recent decision in *Johnson* on retroactivity.

22 As I have previously pointed out, the opinions in *Bottoson v. Moore,* 833 So.2d 693 (Fla.2002), and *King v. Moore,* 831 So.2d 143 (2002), where we first addressed *Ring,* were "only plurality opinions and a majority of justices (four), wrote separate opinions acknowledging that *Ring* impacted Florida's death penalty scheme in a variety of ways." *Duest v. State,* 855 So.2d 33, 57 n. 25 (Fla.2003) (Anstead, C.J., concurring in part and dissenting in part); *see also Bottoson v. Moore,* 833 So.2d 693, 703–10 (Fla.2002) (Anstead, C.J., concurring in result only).

First, the majority relies on the existence of the prior violent felony aggravating circumstance. I have written extensively on this matter in previous opinions,[23] and will not repeat my views at length here. Nevertheless, I would reiterate that the death sentence in this case was based solely on the judge's override of the jury's findings that insufficient circumstances existed to impose a death penalty. In other words, the death sentence here is expressly predicated upon practice expressly outlawed in *Ring:* one judge's findings contrary to the findings of a jury.

23 *See supra* note 17.

The majority also relies on the Supreme Court's comment in *Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989), that courts faced with conflicting Supreme Court decisions should "follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Id.* at 484, 109 S.Ct. 1917. Of course, as everyone must acknowledge, and as I have noted before, the U.S. Supreme Court has not yet directly answered the question of whether Florida's death sentencing scheme violates the Sixth Amendment pursuant to the reasoning in *Ring* and *Apprendi. See Duest,* 855 So.2d at 57 (Anstead, C.J., concurring in part and dissenting in part). However, the majority alleges that we are precluded from ***1148** applying *Ring* under the *Rodriguez de Quijas* reasoning because the Supreme Court has previously upheld Florida's death sentencing scheme against a Sixth Amendment challenge in *Spaziano v. Florida,* 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). I do not believe that the majority's reliance on *Spaziano* is well placed. The Supreme Court has specifically stated that the decision in *Spaziano* did not involve the type of Sixth Amendment challenge brought in *Ring* and *Apprendi. See Jones v. United States,* 526 U.S. 227, 250, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999) (explaining, in a case that was the precursor to *Apprendi* and *Ring,* that *Spaziano* "contains no discussion of the sort of fact-finding before us in this case. It addressed the argument that capital sentencing must be a jury task and rejected that position on the ground that capital sentencing is like sentencing in other cases, being a choice of the appropriate disposition, as against an alternative or a range of alternatives"); *see also King v. Moore,* 831 So.2d 143, 152 (Fla.2002) (explaining that "the defendant in *Spaziano* never based his Sixth Amendment argument on the premise that aggravating factors must be found by a jury beyond a reasonable doubt") (Pariente, J., concurring in result only).

Nevertheless, even if we construe *Spaziano* as precluding our ability to give relief based on *Ring,* we should at least be clear as to the tension between the two opinions. Although the basis for the *Rodriguez de Quijas* admonition was rooted in the important and long-standing concept of stare decisis and the supremacy clause of the constitution, we are not required to blind ourselves to Supreme Court decisions that do not directly speak to our Court or to sit silent in the face of changes in the law. When we are faced with the tension between whether we should be faithful to what may be doubtful precedent in an old line of cases or whether we should follow the law as developed in newer and more recent cases, at the very least we should set out the tension that exists.

At a minimum, for example, the majority should not ignore Justice Lewis's good-sense observations in *Bottoson:*

> [W]e should acknowledge that although decisions such as *Spaziano v. Florida,* 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), have not been expressly overruled, at least that portion of *Spaziano* which would allow trial judges to override jury recommendations of life imprisonment in the face of Sixth Amendment challenges must certainly now be of questionable continuing vitality. *Spaziano* viewed jury participation through the prism of sentencing, a framework now removed from the analysis adopted in *Ring.* ...
>
> ... While I certainly understand and respect the principle that the United States Supreme Court has reserved for

itself "the prerogative of overruling its own decisions," *Agostini v. Felton*, 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989)), I conclude that a logical reading and comparison of the texts of the *Spaziano* and *Ring* opinions produces an inescapable conflict. Thus, just as "*Walton* and *Apprendi* are irreconcilable," *Ring*, 536 U.S. at 609, 122 S.Ct. at 2443, the portions of *Spaziano* which conflict with the explicit conclusions of *Ring* are, at best, of dubious continuing vitality.

Bottoson, 833 So.2d at 725–26 (Lewis, J., concurring in result only). Indeed, given the acknowledged correctness of the principles set out in *Ring*, this Court has an independent obligation to apply those principles ***1149** in Florida. Justice Lewis has already provided us with an appropriate framework for doing so in his opinion in *Bottoson*.

Moreover, I do not believe that the Supreme Court implied that its *Ring* decision should be construed so narrowly that it only applies to Arizona. In addition to Arizona, the *Ring* decision listed a number of states where capital sentencing fact-finding was performed solely by judges, as well as so-called "hybrid" states like Florida. *See Ring*, 536 U.S. at 608 n. 6, 122 S.Ct. 2428. (listing Colorado, Idaho, Montana and Nebraska as having schemes similar to Arizona, and Alabama, Delaware, Florida and Indiana as "hybrid" systems). [24] Except for Florida and Alabama, all of the states identified in *Ring* as having sentencing schemes that potentially violate the Sixth Amendment have openly confronted the unconstitutional portions of their state's death sentencing schemes in case law or legislation. [25]

24 Justice O'Connor also elaborated that *Ring's* impact was not limited to Arizona. *See Ring*, 536 U.S. at 620–21, 122 S.Ct. 2428 (noting that the *Ring* majority "effectively declares five States' capital sentencing schemes unconstitutional" and also creates questions about the sentencing schemes in four other states, including Florida, that would lead to claims filed by prisoners on death row) (O'Connor, J., dissenting).

25 *See Woldt v. People*, 64 P.3d 256, 259 (Colo.2003) (holding that Colorado's death penalty statute violated the Sixth Amendment and was unconstitutional under *Ring*); *State v. Gales*, 265 Neb. 598, 658 N.W.2d 604, 624 (2003) (holding that jury's failure to explicitly find aggravating circumstance violated *Ring* and remanding for new sentencing procedure); *State v. Fetterly*, 137 Idaho 729, 52 P.3d 874, 875 (2002) (concluding that *Ring* applied to Idaho's death sentencing scheme and it appeared to render Idaho's death sentencing scheme unconstitutional); *Brice v. State*, 815 A.2d 314, 320 (Del.2003) (explaining that Delaware's General Assembly had revised Delaware's death sentencing scheme in response to *Ring* and "transformed the jury's role, at the so-called narrowing phase, from one that was advisory under the [pre-*Ring* version of the statute] into one that is now determinative as to the existence of any statutory aggravating circumstances"); *see also* Mont.Code Ann. § 46–1–401(1)(a)–(b) (2003) (indicating that sentence enhancing facts must be charged in the indictment and a judge is prohibited from enhancing a sentence unless "the jury unanimously found in a separate finding that the enhancing act, omission, or fact occurred beyond a reasonable doubt"); Ind.Code Ann. § 35–50–2–9(e)(2) (2004) (indicating that if the jury reaches a sentencing recommendation, the judge must sentence the defendant accordingly).

Prior Case Law

Perhaps most importantly, the majority's position also directly conflicts with our own previous precedent, since we have never used the comment from *Rodriguez de Quijas* to justify disregarding important decisions from the U.S. Supreme Court. In fact, we have consistently acted to the contrary, and always attempted to apply such decisions to Florida, even when these decisions involved the U.S. Supreme Court's review of death sentencing procedures from other states. [26] In other words, the majority has no legitimate cover to ***1150** support its refusal to acknowledge the legal principles established in *Ring*. The lesson to be garnered from our precedent is that we have never allowed the fact that an important Supreme Court decision did not directly address Florida's death penalty scheme to relieve us of the obligation to apply its holding in Florida. [27]

26 For example, in *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), the United States Supreme Court upheld Florida's death sentencing statute against an Eighth and Fourteenth Amendment challenge. Since it was decided, *Proffitt*

has remained good law. Nevertheless, we have on numerous occasions applied or relied on decisions from the United States Supreme Court that announced new doctrinal developments in death penalty law based on the Eighth Amendment, despite the fact that these decisions addressed other state's death penalty schemes and did not expressly overrule *Proffitt. See, e.g., Allen v. State,* 636 So.2d 494, 498 n. 7 (Fla.1994) (noting that Supreme Court's decision in *Thompson v. Oklahoma,* 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988) provided support for our conclusion that the Florida Constitution prohibited a death sentence for individuals who were younger than sixteen at the time of their crime); *Jackson v. Dugger,* 547 So.2d 1197, 1198–99 (Fla.1989) (applying decision in *Booth v. Maryland,* 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987) to Florida law); *Harvard v. State,* 486 So.2d 537 (Fla.1986) (applying decisions in *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) and *Eddings v. Oklahoma,* 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) to Florida law).

27 Even if the Court chooses to err on the side of assuming that we are prevented from granting relief in this case until the Supreme Court overrules *Spaziano,* we should acknowledge, as has Justice Lewis, that *Spaziano* and *Ring* are irreconcilable. This is what the Arizona Supreme Court did when faced with the tension between *Walton v. Arizona,* 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), and *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). *See State v. Ring,* 200 Ariz. 267, 25 P.3d 1139, 1150–52 (2001). However, our Court is in a more tenuous position than the Arizona Supreme Court was when it made its decision. In its opinion, the Arizona Supreme Court explained that it was bound to follow the Supreme Court's previous decision upholding Arizona's death sentencing scheme in *Walton v. Arizona,* 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), because, even though there were questions about *Walton's* continued viability, the *Apprendi* majority had expressly endorsed *Walton* and rejected *Apprendi's* application to capital sentencing schemes. *Id.* Following the Supreme Court's decision in *Ring,* we now know that the reasoning in *Apprendi does* apply to capital sentencing schemes. Moreover, unlike *Apprendi,* which tacitly endorsed the continued viability of *Walton,* there is no such endorsement of the previous decisions upholding Florida's sentencing scheme in *Ring.*

RETROACTIVITY

Having concluded that Florida's jury override scheme is impermissible under *Ring,* I would also affirmatively state that *Ring* should be retroactively applied in this case. To a large extent, I addressed my views on the question of *Ring's* retroactivity in my dissenting opinions in *Hughes v. State,* 901 So.2d 837 (Fla. 2005), and *Johnson v. State* where I concluded that *Ring* and *Apprendi* should be applied retroactively, since we have applied numerous other Supreme Court death penalty decisions retroactively.[28] Nevertheless, as I stated in *Hughes,* by our consistency in addressing the merits of *Apprendi* and *Ring* claims in postconviction cases, the Court has implicitly held that *Ring* has retroactive effect. *See Hughes v. State,* 901 So.2d at 855–56 and note 21 (Anstead, J., dissenting).

28 *See supra* note 26. *See also James v. State,* 615 So.2d 668, 669 (Fla.1993) (applying retroactively *Espinosa v. Florida,* 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), wherein Florida's jury instruction on the "heinous, atrocious, or cruel" aggravating circumstance was held to be impermissibly vague under the Eighth Amendment); *Thompson v. Dugger,* 515 So.2d 173, 175 (Fla.1987) (concluding that *Hitchcock v. Dugger,* 481 U.S. 393, 398–99, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), which held that instruction to advisory jury to not consider nonstatutory mitigation and trial judge's refusal to consider nonstatutory mitigation were improper, should be applied collaterally); *State v. White,* 470 So.2d 1377, 1379 (Fla.1985) (concluding that *Enmund v. Florida,* 458 U.S. 782, 797, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), which held that it was improper to impose the death penalty on a defendant "who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed," should be applied collaterally); *Tafero v. State,* 459 So.2d 1034, 1035 (Fla.1984) (determining, under *Witt,* that *Enmund* is "such a change in the law as to be cognizable in post-conviction proceedings").

***1151** To determine whether *Ring* should have retroactive effect, it is necessary for the Court to apply the test this Court long ago established for determining retroactivity in *Witt v. State,* 387 So.2d 922 (Fla.1980). The *Witt* test is comprised of three elements: (1) a change of law that emanates either from this Court or the United States Supreme Court; (2) is constitutional in nature; and (3) has fundamental significance. *See Witt,* 387 So.2d at 931. Under the third prong of the *Witt* test, the Court will consider a decision of fundamental significance if it places beyond the authority of the state the power to regulate certain conduct or impose certain penalties or if it meets the three so-called *Stovall/Linkletter* factors.[29] *Witt,* 387 So.2d at 926. Those factors are: "(a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule." *Id.* at 926.[30] Clearly, *Ring* satisfies the first two prongs of the *Witt* test as it emanated from the United States Supreme Court and it dealt with the constitutional protections in the Sixth Amendment. Therefore, the case would turn on the third prong of the *Witt* test.

29 *Stovall v. Denno,* 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967); *Linkletter v. Walker,* 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965).

30 Justice Shaw has already done a retroactivity analysis under *Witt* to *Ring* and found *Ring* should be applied retroactively:

> First, *Ring* falls within the ambit of *Witt,* for it emanated from the United States Supreme Court. Second, *Ring* is constitutional in nature, for its holding goes to the very heart of the constitutional right to trial by jury. And third, *Ring* is of "fundamental significance," for its purpose is to safeguard the basic protections guaranteed by the right to trial by jury. This Court in the past has applied retroactively other significant decisions of the United States Supreme Court in the capital sentencing area.

Bottoson v. Moore, 833 So.2d 693, 717 (Fla.2002) (Shaw, J., concurring in result only) (footnote omitted).

Arguably, *Ring* is a decision of fundamental significance because it prevents states from exercising the death penalty where the facts necessary to impose the penalty were found by a judge alone. The Court clearly viewed the *Ring* decision as one of fundamental significance. In going through the history leading up to the decision that *Apprendi* and *Walton* were irreconcilable and overruling *Walton,* the Court quoted at length from Justice Stevens' dissent in *Walton,* wherein he explained the historical significance of the Sixth Amendment requirement that juries find the facts necessary to impose the death sentence:

> In dissent in *Walton,* Justice Stevens urged that the Sixth Amendment requires "a jury determination of facts that must be established before the death penalty may be imposed." [*Walton,* 497 U.S.], at 709, 110 S.Ct. 3047. Aggravators "operate as statutory 'elements' of capital murder under Arizona law," he reasoned, "because in their absence, [the death] sentence is unavailable." *Id.,* at 709, n. 1, 110 S.Ct. 3047 "If th[e] question had been posed in 1791, when the Sixth Amendment became law," Justice Stevens said, "the answer would have been clear," for [b]y that time,
>
> > "the English jury's role in determining critical facts in homicide cases was entrenched. As fact-finder, the jury had the power to determine not only whether the defendant was guilty of homicide but also the degree of the offense. Moreover, *the jury's role in finding facts that would determine a homicide defendant's eligibility for capital punishment was particularly well established.* Throughout its history, ***1152** the jury determined which homicide defendants would be subject to capital punishment by making factual determinations, many of which related to difficult assessments of the defendant's state of mind. By the time the Bill of Rights was adopted, the jury's right to make these determinations was unquestioned."
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> *Id.,* at 710–11, 110 S.Ct. 3047(quoting White, Fact–Finding and the Death Penalty: The Scope of a Capital Defendant's Right to Jury Trial, 65 Notre Dame L.Rev. 1, 10–11 (1989)).

Ring, 536 U.S. at 599, 122 S.Ct. 2428. Additionally, in explaining that the Sixth Amendment requires the jury to find aggravating circumstances when they operate as the functional equivalent of a greater offense, the Supreme Court specifically declared: "The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death." *Ring,* 536 U.S. at 609, 122 S.Ct. 2428. Therefore, the Supreme Court was undeniably aware of the fundamental significance of its decision in *Ring.*

Ring should also be treated retroactively when the three *Stovall/ Linkletter* factors are considered, i.e., (a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule.[31] First, as illustrated by the quotations above, the purpose of the rule in *Ring* is of paramount importance—the rule is meant to safeguard an individual's Sixth Amendment rights. Second, to the extent that the prior rule at issue in this case was utilized, it was only applied to those individuals who were sentenced to death by a judge's factual findings after a jury had recommended a life sentence.[32] And third, the impact on administration of justice would be minimal. The number of individuals currently on death row because a judge chose to override the jury's recommendation in favor of life is minimal. Moreover, because of well-established double jeopardy precepts, these individuals would not need additional sentencing proceedings because their death sentences would be commuted to life. *Cf. Wright v. State,* 586 So.2d 1024, 1032 (Fla.1991) (stating that "when it is determined on appeal that the trial court should have accepted a jury's recommendation of life imprisonment pursuant to *Tedder[v. State,* 322 So.2d 908 (Fla.1975)], the defendant must be deemed acquitted of the death penalty for double jeopardy purposes").

31 I would note that the only state court that has examined *Ring* under a retroactivity test similar to Florida's has found that *Ring* should be applied retroactively. *See State v. Whitfield,* 107 S.W.3d 253, 268 (Mo.2003) (concluding that *Ring* should apply retroactively under the *Stovall/Linkletter* test).

32 Some published accounts have indicated that there are only a small number of individuals in this position. *See* Brad Smith, *A Say in Matters of Life And Death,* Tampa Tribune, Dec. 29, 2002, at 1 (stating that "[o]nly 10 of Florida's 366 death row convicts ... were condemned by a judge after a jury recommended life in prison, the state's attorney general's office says").

More importantly, I find it untenable that collateral claimants would not be entitled to make any claim based on *Ring's* holding on procedural retroactivity grounds. The idea that individuals with cases decided after *Ring* are entitled to their Sixth Amendment rights, but those who were sentenced before *Ring* are not, is troubling. Of course, I realize the value of finality and do not believe that every decision warrants retroactive relief. However, ***1153** as noted in *Witt,* the doctrine of finality is not inviolable:

> The doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications. Thus, 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. *Considerations of fairness and uniformity make it very "difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases."*

Witt, 387 So.2d at 925 (emphasis added). In stark contrast to our charge in *Witt,* the majority today is ignoring fairness and uniformity and committing an obvious injustice by depriving Marshall of his life under a process that is not acceptable and that will no longer be applied in the future. As Justice Stewart noted in his oft-quoted opinion in *Furman:*

> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

Furman v. Georgia, 408 U.S. at 306, 92 S.Ct. 2726 (Stewart, J., concurring). The need for finality of the case must be weighed against the finality of the punishment to be meted out. As Justice Scalia stated in *Ring*, our traditional belief in the right to trial by jury is undermined by "the repeated spectacle of a man's going to his death because a judge found that an aggravating factor existed." *Ring v. Arizona*, 536 U.S. at 612, 122 S.Ct. 2428 (Scalia, J., concurring).

CONCLUSION

Clearly, *Ring* was a decision meant to increase the consistency and accuracy of identifying those cases where the death penalty is warranted by requiring the facts necessary to impose the death sentence to be found by the jury. The Court's decision today flies directly in the face of the Sixth Amendment and the Supreme Court's decision in *Ring*. Rather than embrace the Sixth Amendment's protections and look for ways in which the role of the jury could be modified to bring Florida into line with the Supreme Court's prevailing constitutional law, the majority has effectively removed the jury from the death penalty equation.[33] This is a sad day for constitutional law and justice in the State of Florida.

33 In addition to my concerns with Marshall's *Ring* claim, I am troubled by the outcome of his mental health claim as well. In effect, Marshall was never evaluated by a mental health expert as he is entitled to under *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). Although Marshall was evaluated briefly by Dr. Klass, in this Court's previous opinion we determined that trial counsel was not ineffective for failing to secure an additional expert, despite any shortcomings in Dr. Klass's evaluation, and noted that the issue could have been brought on appeal. *See Marshall v. State*, 854 So.2d 1235, 1248 (Fla.2003). Even if appellate counsel was not ineffective for failing to raise a claim on appeal, the end result is that Marshall was never closely evaluated. *See id.* (noting that Marshall's trial counsel did not want to call Dr. Klass to testify "because 'he would have been blown out of the water' when the jury learned that he only spent a short time with Marshall").

All Citations

911 So.2d 1129, 30 Fla. L. Weekly S399

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ATTACHMENT G

976 So.2d 1071
Supreme Court of Florida.

Matthew MARSHALL, Appellant,
v.
STATE of Florida, Appellee.

No. SC05–2379.
|
Dec. 6, 2007.
|
Rehearing Denied Feb. 29, 2008.

Synopsis

Background: Following appellate affirmance of his conviction of murder and sentence of death, 604 So.2d 799, petitioner sought post-conviction relief. The Circuit Court, Martin County, Dwight Luther Geiger, J., denied petition after evidentiary hearing, and petitioner appealed. The Supreme Court, 854 So.2d 1235, affirmed in part and remanded in part. On remand, the Circuit Court, Dwight Luther Geiger, Senior Judge, denied relief after evidentiary hearing. Petitioner appealed.

Holdings: The Supreme Court held that:

[1] postconviction trial court did not abuse its discretion, by denying defendant's request to expand, based on allegations in affidavit of ex-wife of former juror regarding juror misconduct, the scope of inquiry of former jurors, on remand from postconviction appellate court, beyond postconviction appellate court's instruction, and

[2] postconviction trial court's denial of defendant's request to allow his counsel to conduct an informal interview of former juror, before postconviction trial court, itself, conducted a formal interview of the former juror, was not an abuse of discretion.

Affirmed.

Attorneys and Law Firms

***1073** Neal A. Dupree, Capital Collateral Regional Counsel, and Melissa Minsk Donoho, Special Assistant CCR Counsel, Southern Region, Fort Lauderdale, FL, for Appellant.

Bill McCollum, Attorney General, Tallahassee, Florida, and Lisa–Marie Lerner, Assistant Attorney General, West Palm Beach, FL, for Appellee.

Opinion

PER CURIAM.

Matthew Marshall, a prisoner under sentence of death, appeals the trial court's denial of his motion for postconviction relief filed pursuant to 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 affirm the trial court's denial of postconviction relief.

PROCEEDINGS TO DATE

Marshall was convicted and sentenced to death for the 1988 murder of Jeffrey Henry. *Marshall v. State,* 604 So.2d 799, 801–02 (Fla.1992) (*Marshall I*). After the penalty-phase proceedings were concluded, the jury recommended that Marshall receive a life sentence. *Id.* at 802. However, the trial judge imposed a sentence of death. *Id.* The facts of the case are set forth in our opinion in Marshall's direct appeal of his conviction and sentence. *See id.* On direct appeal, we affirmed the first-degree murder conviction and the death sentence imposed by the trial judge over the jury's recommendation. *Id.* at 801.

Subsequently, Marshall filed a postconviction motion raising twenty-seven claims. *See Marshall v. State,* 854 So.2d 1235, 1238 & n. 2 (Fla.2003) (*Marshall II*). The trial court held an evidentiary hearing on four of the claims but summarily denied others. *Id.* at 1239. On appeal, we affirmed the trial court's denial of postconviction relief on all but one issue: Marshall's claim of juror misconduct. *Id.* at 1253. In this claim, Marshall alleged that racial remarks and jokes as well as the jury's consideration of nonrecord materials deprived him of a fair and impartial trial. *Id.* at 1239. He attached three sworn affidavits to his postconviction motion in support of his claim. *Id.* Two of the affidavits were from jurors in his trial, and the other was from an attorney, Ronald Smith. *Id.* We concluded that the juror affidavits “discussed matters pertaining to the jury's deliberations.” *Id.* More specifically, however, Smith's affidavit stated that he received a telephone call from a woman who claimed that she had served on the jury in Marshall's case in which she told him:

> (1) some jurors decided Marshall was guilty before the trial was over; (2) some jurors told racial jokes about Marshall; (3) some jurors announced during the guilt phase that they were going to vote for a guilty verdict and life sentence because they wanted Marshall to return to prison to kill more black inmates; and (4) some jurors, despite the trial judge's orders forbidding it, read and discussed articles concerning the trial.

***1074** *Id.* Smith was unable to recall the name of or otherwise identify the woman who called his office. *Id.* [1]

1 She purportedly called Smith in reference to one of his clients, to whom she was related. *Id.* at 1239 n. 4. On remand, the record contains no additional evidence as to Smith's ability to identify the caller.

[1] **[2]** **[3]** On appeal, we held that the trial court erred in summarily denying Marshall's juror misconduct claim. *Id.* at 1244. We found that the alleged juror misconduct discussed in Smith's affidavit required further proceedings. *See id.* [2] We further observed that "it appears that evidence could be submitted that could identify the purported juror who contacted Mr. Smith to ascertain whether such misconduct took place." *Id.* at 1242. We remanded for an evidentiary hearing on the claim, but with limiting instructions:

2 As recognized by this Court in *Marshall II,* a verdict cannot be impeached by conduct which inheres in the verdict. 854 So.2d at 1240; *see, e.g., McAllister Hotel, Inc. v. Porte,* 123 So.2d 339, 344 (Fla.1959); *Russ v. State,* 95 So.2d 594, 600 (Fla.1957). Moreover, a juror is not competent to testify about matters which inhere in the verdict. § 90.607(2)(b), Fla. Stat. (1999). Judicial inquiry into jurors' emotions, mental processes, or mistaken beliefs is forbidden. *State v. Hamilton,* 574 So.2d 124, 128 (Fla.1991).

> The scope of the hearing on remand is limited to attempting to obtain the identity of the female juror who spoke to Mr. Smith, to interview that juror, and then to conduct further interviews only if the court determines that there is a reasonable probability of juror misconduct. Moreover, the trial court may wish to conduct most or all of the questioning of the jurors, thereby ensuring that unnecessarily intrusive questions will not be asked of the jurors and to prevent questioning on matters that inhere in the verdict. *Cf. People v. Hedgecock,* 51 Cal.3d 395, 272 Cal.Rptr. 803, 795 P.2d 1260, 1274 (1990) (discussing steps trial court can take to avoid a chilling effect on jury deliberations when holding evidentiary hearing on juror misconduct claim).
>
> *Marshall II,* 854 So.2d at 1253.

After remand for an evidentiary hearing, the circuit court directed counsel to investigate the whereabouts of the jurors. The court further decided to question all of the jurors who could be located and not just the female ones. It was discovered that two of the jurors were deceased, leaving ten jurors to be questioned. Subsequently, at an initial hearing on March 24, 2004, the circuit court first questioned six of the surviving jurors who were subpoenaed to appear. The court advised each of the jurors that neither the individual juror nor any of the other jurors was in trouble. The court then asked each juror if he or she was a juror in Marshall's case. Each of the six jurors responded affirmatively. The court then asked each juror:

> Are you the juror who phoned attorney Ronald B. Smith, who is a lawyer in Stuart, and said basically two things. First, that you were related to one of Mr. Smith's clients and also that you were a juror in the case and that you observed other jurors doing things that were improper including making racial jokes and also failing to follow the judge's instructions that the jurors should not come into any contact with news media coverage during the trial?

Each of the six jurors responded in the negative. The court also asked each juror if he or she knew who the person was that called Smith. Each again responded in the negative. After all six of the jurors were questioned individually, the court dismissed the jurors with agreement by the State and Marshall.

Subsequently, and before the next scheduled hearing on the issue, Marshall ***1075** filed an emergency motion seeking to add a witness to the list of those to be questioned at the hearing. The motion alleged that during the attempt to locate the remaining witnesses, an investigator found the ex-wife of one of the surviving jurors, and requested that the court permit the ex-wife to testify. Attached to the motion was a sworn affidavit from Debra Thomason stating that her former husband, juror Coy Thomason, had discussed the case with her and others, even though he knew he was not supposed to talk about the case; he followed the case in the newspapers and carried newspaper articles about the case in his briefcase; and he "made it clear" to Debra Thomason and others that he thought that Marshall was "guilty from the getgo," because of Marshall's status as a prison inmate. The affidavit also alleged that Debra Thomason had read an article in the newspaper about the possibility of jurors going back to court regarding the issue of juror misconduct in the case and that the reference to "[t]he racial jokes and the sharing of information from newspaper articles brought my ex husband's face immediately to mind."

On May 19, 2004, the circuit court held a hearing to interview the remaining jurors from the case. The court again advised each juror that the juror was not in trouble. The court also asked each the three questions previously asked the other jurors in the March hearing. Each of the jurors affirmed participation as a juror in Marshall's case but responded negatively to the other two questions, as had been the case with the other jurors questioned in the earlier proceedings. Neither Marshall nor the State offered any additional questions. After the court excused the jurors, counsel and the court addressed Marshall's emergency motion to add a witness. After discussion, the court denied the motion but suggested that Marshall might be able to file an additional postconviction motion, saying, "I really hesitate to go outside of the—if you will, the traditional procedure," apparently alluding to this Court's instructions on remand.

On June 2, 2004, Marshall filed a motion to interview juror Thomason, based upon the affidavit of Debra Thomason. The motion alleged that "Mr. Marshall has demonstrated good cause for being granted permission to interview juror Coy Lee Thomason. Fla. R. Civ. Pro. 1.431(h)." Marshall also filed a successive and amended motion to vacate the judgment of conviction and sentence based upon juror Thomason's alleged misconduct. The postconviction motion further alleged that Debra Thomason had died on June 4, 2004.

At a June 30, 2004, hearing on the pending motions, the State suggested that the court question juror Coy Thomason as it had the other jurors. Marshall's counsel requested that she be allowed to interview Coy Thomason before the court questioned him. The court declined that request, explaining:

> I don't want to restrict a complete examination of Mr. Thomason, but I—I really feel that the procedure that the Supreme Court mandated—or I guess suggested strongly, as to the earlier interviews—although the issue was different, I think the idea is the same. So I'm going to follow that procedure.

The court then issued an order granting the motion to interview Coy Thomason in part, stating that pursuant to the terms of Florida Rule of Civil Procedure 1.431(h), the court would conduct the initial questioning of the juror and would allow subsequent questioning by counsel as it deemed appropriate.

On June 10, 2005, the court held a hearing during which the court and the parties agreed to conduct a two-part interview of juror Thomason, one part devoted to the issues on remand from this Court and one part devoted to the newly alleged juror ***1076** misconduct issue raised in the successive motion for postconviction relief. The court first questioned juror Thomason and advised him that he was not in trouble. The court then asked the three questions that had been asked of all of the other jurors who had been interviewed. Thomason responded that he was a juror in Marshall's case but that he was not the juror who called Smith and that he did not know who that person was and "didn't even know it happened." In response to Thomason's answer to the third question, the court asked, "Did you know anything about this before I just started talking about it?" Thomason said he did not. The court then asked Thomason two additional questions. The court first asked, "While you were a juror trying the Matthew Marshall case, did you ever discuss the case with your ex-wife Debra Thomason or any people at your place of work?" Thomason said that he did not. Next, the court asked, "Did you ever read any newspaper articles regarding the Matthew Marshall case while you were a juror on the case?" Thomason replied that he did not. The court then had Thomason step outside the courtroom.

With Thomason absent, Marshall's counsel proposed five additional questions for the court to ask Thomason. The State did not object to the first question proposed but objected to the remaining questions. In response, Marshall's counsel withdrew one of the questions, the trial court agreed to rephrase one of the questions, and the court sustained the State's objection to the other two questions. The court then interviewed Thomason again and asked, "First ... did you at anytime carry a briefcase with you containing articles of the Matthew Marshall case?" Thomason replied that he did not. Next, the court asked, "Did anyone tell you or have you read any newspaper articles or heard anything on radio or television about why you were being called here today?" Again Thomason responded in the negative. Thomason was then excused.

On September 28, 2005, the trial court entered a final order denying relief on all of the claims of juror misconduct in the pending motions for postconviction relief. In its order, the court concluded: (1) the female juror who called Smith cannot be identified; (2) no further juror interviews are necessary; (3) no proof exists that juror Thomason violated the court's instructions and engaged in jury misconduct; and (4) "[n]o reasonable probability exists that any of the acts charged of juror misconduct occurred." This appeal followed.

APPEAL

Marshall raises three issues on appeal: (1) whether the trial court erred by failing to adequately question former jurors about alleged jury misconduct and by restricting the scope of its inquiry; (2) whether the trial court erred by refusing to take Debra Thomason's testimony and requiring Marshall to file a successive motion for postconviction relief and by failing to expand the scope of the inquiry of the former jurors; and (3) whether the trial court erred by not allowing counsel to informally interview former juror Coy Thomason and by limiting the manner and scope of the questioning of Thomason.

Questioning of Former Jurors

Marshall first argues that the trial court erred by failing to adequately question former jurors about alleged jury misconduct and by restricting the scope of its inquiry.

[4] Florida appellate courts have uniformly held that a court's decision on whether to allow an interview of jurors after trial is subject to review for an abuse of discretion. *See, e.g., Boyd v. State,* 910 So.2d 167, 178 (Fla.2005) (concluding that the trial court did not abuse its discretion ***1077** by refusing to question the jury about allegations made by a friend of the defendant that she had overheard jurors discussing extrajudicial information during the guilt phase of a capital trial); *Baptist Hosp. of Miami, Inc. v. Maler,* 579 So.2d 97, 101 (Fla.1991) (holding that a trial court abused its discretion in authorizing an inquiry of jurors based on matters that inhered in the verdict); *Shere v. State,* 579 So.2d 86, 94–95 (Fla.1991) (finding that a trial court did not abuse its discretion in refusing to grant a capital defendant's motion to interview the jury, which was based on allegations contained in an anonymously written letter to a newspaper); *Melrose Nursery, Inc. v. Collinsworth, Alter, Nielson, Fowler & Dowling, Inc.,* 832 So.2d 891, 892 (Fla. 3d DCA 2002) (recognizing that trial courts have broad discretion to grant or deny a motion to interview jurors); *Roland v. State,* 584 So.2d 68, 70 (Fla. 1st DCA 1991) (stating that the appropriate standard of review for a trial court's ruling on a motion to interview jurors is abuse of discretion); *Schofield v. Carnival Cruise Lines, Inc.,* 461 So.2d 152, 155 (Fla. 3d DCA 1984) (explaining that the standard of review for an appellate court is whether the trial court abused its broad discretion to permit or disallow jury interviews). In the instant case, the trial court's discretion was specifically limited by the express directions on remand issued by this Court when it determined that while further proceedings should be conducted on Marshall's claim of juror misconduct, those proceedings should be limited and sharply focused on the matters set out in the Smith affidavit.

In our opinion, we specifically instructed the trial court about the appropriate scope of the hearing on remand by directing that "[t]he scope of the hearing on remand is limited to attempting to obtain the identity of the female juror who spoke to Mr. Smith, to interview that juror, and then to conduct further interviews only if the court determines that there is a reasonable probability of juror misconduct." *Marshall II,* 854 So.2d at 1253. In remanding for an evidentiary hearing on the claim of juror misconduct, we further directed that "the trial court may wish to conduct most or all of the questioning of the jurors, thereby ensuring that unnecessarily intrusive questions will not be asked of the jurors and to prevent questioning on matters that inhere in the verdict." *Id.* A review of the record below reveals that the trial court conducted further proceedings and interviewed the jurors in strict accordance with our instructions.

The trial court interviewed all of the surviving ten jurors from Marshall's trial. Further, even though the trial court did not have an opportunity to interview juror Cunningham, who was deceased, this juror had previously supplied an affidavit alleging possible juror misconduct, but that affidavit contained no reference to the type of misconduct alleged in the Smith affidavit. *See id.* at 1239–40 (discussing juror Cunningham's allegations). Moreover, as this Court directed, the court's questioning of each juror focused on attempting to discover the identity of the person who spoke to attorney Ronald Smith. While Marshall argues that the trial court should have directly asked the former jurors about the allegations of juror misconduct based on the allegations of the unidentified caller in Smith's affidavit, such an inquiry would have contravened our specific instructions that the trial court first attempt to find and interview the unidentified juror who had called Smith before proceeding further. *See id.* at 1253. In addition, the trial court questioned all of the surviving jurors, rather than limiting the questioning to the female jurors, one of whom had allegedly called Smith.

As we noted in our prior *Marshall II* opinion, there is a very fine line that the ***1078** courts must walk in investigating claims of juror misconduct without invading the confidentiality of juror deliberations. We attempted to maintain that line in our prior decision to allow further proceedings in this case while cautioning the trial court to exercise care in conducting those proceedings. We can hardly fault the trial court here for adhering to our instructions. Accordingly, we find that the trial court did not abuse its discretion in interviewing the former jurors in compliance with our mandate.

Thomason Affidavit

Marshall next argues that the trial court erred by refusing to take Debra Thomason's testimony, requiring Marshall to file a successive motion for postconviction relief, and failing to expand the scope of the inquiry of the former jurors.

[5] **[6]** **[7]** Just as the trial court's conduct of juror interviews is subject to an abuse of discretion standard of review, the trial court's denial of Marshall's emergency motion to add Debra Thomason as a witness is subject to an abuse of discretion standard of review. *See, e.g., Boyd,* 910 So.2d at 178; *Maler,* 579 So.2d at 101; *Shere,* 579 So.2d at 94–95; *cf. Way v. State,* 760 So.2d 903, 916 (Fla.2000) (finding that the trial court did not abuse its discretion in concluding that the testimony of witnesses was beyond the scope of the remand). Likewise, the trial court's failure to expand the scope of the inquiry of the remaining jurors based on the allegations in Debra Thomason's affidavit is also subject to an abuse of discretion standard of review, as is the trial court's determination that Marshall should file a successive motion for postconviction relief. *Cf. Arbelaez v. State,* 898 So.2d 25, 42–43 (Fla.2005) (reviewing for an abuse of discretion a trial court's rejection of a supplemental motion filed after an evidentiary hearing held on remand but before a ruling, because the motion raised arguments beyond the scope of this Court's remand); *Huff v. State,* 762 So.2d 476, 481 (Fla.2000) (stating that the standard of review for a trial court's determination regarding a motion to amend a postconviction motion is whether there was an abuse of discretion).

[8] We conclude that the trial court's refusal to take Debra Thomason's testimony at the May 19, 2004, hearing was not an abuse of discretion. The scope of the hearing was not just limited by the type of misconduct alleged in the Smith affidavit, it was also expressly limited by this Court's cautionary directions in *Marshall II.* As discussed above, we explicitly instructed the trial court that "[t]he scope of the hearing on remand is limited to attempting to obtain the identity of the female juror who spoke to Mr. Smith, to interview that juror, and then to conduct further interviews only if the court determines that there is a reasonable probability of juror misconduct." *Marshall II,* 854 So.2d at 1253. The Thomason affidavit did not relate to the identity of the juror who contacted Ronald Smith but rather raised a separate issue of possible juror misconduct. In denying Marshall's motion, the trial court expressed concern about adhering to this Court's instructions about the scope of the hearing on remand. In light of our explicit instructions, we conclude the trial court's decision to restrict the hearing to finding that juror was not an abuse of discretion.

[9] Similarly, given this Court's explicit limitation about the scope of the hearing on remand, we conclude the trial court's attempt to adhere to our mandate by requiring Marshall to file a successive motion raising a new and separate issue of alleged juror misconduct was not an abuse of discretion. *See Arbelaez,* 898 So.2d at 42–43. We note the trial court did conduct a hearing on the new claim and questioned juror Thomason about the allegations in ***1079** Debra Thomason's affidavit. Further, we find no error in the trial court's resolution of this claim given juror Thomason's responses to the court's questions and the absence of any other evidence to sustain the claim. Of course, the trial court could not have reasonably anticipated that Debra Thomason would die before a hearing on the successive motion could be held.

Finally, we conclude the trial court's failure to expand the scope of the inquiry of the other former jurors to include the Thomason claim was not an abuse of discretion. Marshall argues that the court should have expanded the scope of the inquiry of the former jurors based on the allegations in Debra Thomason's affidavit. Significantly, Marshall did not seek to interview jurors, other than Coy Thomason, about the allegations contained in Debra Thomason's affidavit. Moreover, the Thomason affidavit did not explicitly allege that Coy Thomason spoke with other jurors about the media reports, prematurely deliberated Marshall's guilt with other jurors, brought articles into the jury room, or discussed any racial matters with other jurors. Finally, as we have repeatedly noted, the trial court's actions were specifically limited by this Court's directions on remand.

Accordingly, we hold that the trial court did not abuse its discretion by refusing to take Debra Thomason's testimony, in requiring Marshall to file a successive motion for postconviction relief, and in not expanding the scope of the inquiry of the former jurors.

Examination of Coy Thomason

Marshall next argues that the trial court erred by not allowing counsel to question former juror Coy Thomason before the hearing and by thereafter limiting the manner and scope of the questioning of Thomason.

[10] As discussed above, a trial court's decision whether to allow an interview of jurors after trial is subject to review for an abuse of discretion. *See, e.g., Boyd,* 910 So.2d at 178; *Maler,* 579 So.2d at 101; *Shere,* 579 So.2d at 94–95. Moreover, a trial court's decision regarding the manner and scope of questioning of jurors also is subject to review for an abuse of discretion. *See, e.g., Melrose Nursery, Inc.,* 832 So.2d at 892–93; *Sconyers v. State,* 513 So.2d 1113, 1117 (Fla. 2d DCA 1987) ("If the trial court finds that a further interview of a juror or jurors is warranted, then it should conduct such interview(s), in its discretion, as would be necessary to determine the merits of appellant's allegations.").

[11] Marshall asserts that the trial court abused its discretion because parties may engage in prehearing discovery relating to a postconviction motion. In support of this argument, Marshall cites our decision in *State v. Lewis,* 656 So.2d 1248, 1249–50 (Fla.1994). Contrary to Marshall's implication, *Lewis* does not suggest that parties have an unqualified entitlement to engage in prehearing discovery relating to a postconviction motion. Rather, the availability of discovery in a postconviction case is a matter firmly within the trial court's discretion. *See id.* at 1250.

[12] **[13]** Marshall also suggests that because different rules govern informal juror interviews by counsel [3] and formal juror interviews by a court, [4] the trial court abused its discretion by not allowing counsel to informally interview Coy Thomason. However, Marshall did not file a notice of intent to interview juror Coy Thomason; ***1080** Marshall filed a motion to interview Thomason and cited to Florida Rule of Civil Procedure 1.431(h) in support of the motion. [5] Importantly, the trial court's order granting the motion in part clearly states that the interview would be conducted by the court pursuant to rule 1.431(h). Rule 1.431(h) provides that "[i]f the interview is permitted, the court may prescribe the place, manner, conditions, and scope of the interview." Fla. R. Civ. P. 1.431(h). Furthermore, this Court and other courts have found it to be within a court's discretion to conduct the interview itself. *See Kelley v. State,* 569 So.2d 754, 762 (Fla.1990) (explaining that the Court had previously relinquished jurisdiction to permit the judge to interview the jurors); *Sconyers,* 513 So.2d at 1117 (remanding for the trial court to conduct juror interviews). We directed in *Marshall II* that "the trial court may wish to conduct most or all of the questioning of the jurors, thereby ensuring that unnecessarily intrusive questions will not be asked of the jurors and to prevent questioning on matters that inhere in the verdict." 854 So.2d at 1253. The trial court expressed a desire to adhere to this suggestion when it denied Marshall's request to informally interview Coy Thomason. For all these reasons, we conclude the trial court's decision to deny Marshall an informal interview of Thomason was not an abuse of discretion.

3 *See* R. Regulating Fla. Bar 4–3.5(d)(4).

4 *See* Fla. R. Civ. P. 1.431(h).

5 Florida Rule of Criminal Procedure 3.575, which now governs motions to interview jurors in criminal cases, was not in existence when the motion to interview juror Coy Thomason was filed. We adopted that rule in 2004. *Amendments to the Fla. Rules of Criminal Procedure,* 886 So.2d 197, 197 (Fla.2004). It became effective on January 1, 2005. *Id.* at 200.

Marshall also contends that the trial court abused its discretion by limiting the scope of the questioning of Thomason. In an attempt to restrict the scope of the hearing on remand but allow for a more thorough examination of Coy Thomason based on the allegations in Debra Thomason's affidavit, the trial court conducted a multipart interview of Thomason. In light of the rather delicate nature of juror interviews in general (in order to avoid matters that inhere in the verdict) and in light of this Court's cautionary language about the narrow scope of the hearing on remand in this specific case, we conclude the trial court's decision was not an abuse of discretion. In addition to asking the questions posed to the other jurors, the trial court asked Thomason two questions apparently proposed by the State. The court first asked, "While you were a juror trying the Matthew Marshall case, did you ever discuss the case with your ex-wife Debra Thomason or any people at your place of work?" Next, the court asked, "Did you ever read any newspaper articles regarding the Matthew Marshall case while you were a juror on the case?" Thomason replied in the negative to both questions. Both questions focused on the specific allegations in Debra Thomason's affidavit. Marshall's counsel proposed five additional questions for the court to ask Coy Thomason. The State did not object to the first question, so the court asked Thomason, "First ... did you at anytime carry a briefcase with you containing articles of the Matthew Marshall case?" Thomason replied that he did not. Like the earlier question asked by the court to Thomason, this question focused on a specific allegation in Debra Thomason's affidavit. The court also asked Thomason a question which was a rephrased version of a question originally proposed by Marshall: "Did anyone tell you or have you read any newspaper articles or heard anything on radio or television about why you were being called here today?" Thomason responded in the negative. Although this ***1081** question did not focus on the allegations in the Debra Thomason's affidavit, it did concern Thomason's awareness of the ongoing inquiry into the allegations of juror misconduct.

The court also sustained objections to other questions proposed by Marshall. While the questions may not have improperly inquired into matters which inhere in the verdict, they related to matters not specifically alleged in Debra Thomason's affidavit. Therefore, the trial court did not abuse its discretion in ruling that the questions raised issues that were not presented.

In sum, we find that the trial court did not abuse its discretion by not allowing counsel to informally interview former juror Coy Thomason or by limiting the manner and scope of the questioning of Thomason.

CONCLUSION

Based on the foregoing reasons, we affirm the trial court's denial of postconviction relief.

It is so ordered.

LEWIS, C.J., and WELLS, ANSTEAD, PARIENTE, QUINCE, CANTERO, and BELL, JJ., concur.

All Citations

976 So.2d 1071, 32 Fla. L. Weekly S797

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ATTACHMENT H

610 F.3d 576
United States Court of Appeals,
Eleventh Circuit.

Matthew MARSHALL, Petitioner-Appellant,
v.
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, Walter A. McNeil, Respondent-Appellee.

No. 09-15419.
|
June 28, 2010.

Synopsis
Background: Following affirmance of state first-degree murder conviction and sentence of death, 604 So.2d 799, petition for writ of habeas corpus was filed. The United States District Court for the Southern District of Florida, No. 09-14065-CV-CMA, Cecilia M. Altonaga, J., denied the petition. Petitioner appealed.

[Holding:] The Court of Appeals, Hull, Circuit Judge, held that state court's entry of death sentence, overriding jury recommendation of life imprisonment, was not imposed in an arbitrary or discriminatory fashion.

Affirmed.

Attorneys and Law Firms

***577** Melissa Minsk Donoho (Court-Appointed), Law Office of Melissa M. Donoho, William Hennis, III (Court-Appointed), Capital Collateral Regional Counsel, Ft. Lauderdale, FL, for Petitioner-Appellant.

Lisa-Marie Lerner, West Palm Beach, FL, for Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before DUBINA, Chief Judge, and HULL and MARCUS, Circuit Judges.

Opinion

HULL, Circuit Judge:

Death-sentenced Florida prisoner Matthew Marshall appeals the district court's denial of his 28 U.S.C. § 2254 petition for a writ of habeas corpus. After review and oral argument, we affirm.

I. BACKGROUND

A. Crime, Conviction, and Sentence
On November 1, 1988, Marshall, then an inmate at Martin Correction Institute in Florida with nine prior violent felony convictions,[1] murdered fellow inmate Jeffrey Henry. As described by the Florida Supreme Court:

1 Marshall was convicted of kidnaping, sexual battery, and seven armed robberies. At the time of the murder, Marshall was 24 years old and serving a 46-year sentence.

> [W]itnesses heard muffled screams and moans emanating from Henry's cell and observed Marshall exiting the cell with what appeared to be blood on his chest and arms. Within a few minutes, Marshall reentered the cell, and similar noises were heard. After the cell became quiet, Marshall again emerged with blood on his person. Henry was found dead, lying in his cell facedown with his hands bound behind his back and his sweat pants pulled down around his ankles to restrain his legs. Death was caused by blows to the back of his head.
> *Marshall v. State,* 604 So.2d 799, 802 (Fla.1992) ("*Marshall I*"). Henry "received no less than twenty-five separate wounds," including six blows to the back of his head, and "was at least partially conscious during the second attack." *Id.* at 805-06. Witnesses heard Henry plead for mercy. *Id.* at 805.

Marshall was charged with first-degree murder. At trial, Marshall claimed he killed Henry in self-defense. The jury found Marshall guilty.

At the penalty phase, the State admitted copies of Marshall's prior violent felony convictions. Marshall expressly waived the right to present evidence of, or obtain ***578** a jury instruction on, statutory mitigating circumstances. Marshall relied solely on non-statutory mitigation.

Marshall intended to call his father, Perciful Marshall, to testify. However, Perciful Marshall did not show up for the penalty phase. Consequently, Marshall and the State entered into a stipulation, which was read to the jury, as to what Perciful Marshall's testimony would have been. The parties stipulated that Perciful Marshall would have testified:

> That he is Matthew Marshall's father. That Matthew was born on July 23rd, 1964.... That Matthew was his second born child. Matthew was born and raised in Miami, his father's present home. Matthew has one older brother and three younger brothers. Mr. Perciful Marshall worked hard all his life at one job at Modernage Furniture, and provided the best he could for his children and his wife. Matthew was the smartest of the children and made quote, "beautiful" unquote grades until he was in his early teens. Matthew was influenced by his older brother, Brendly ..., who encouraged him to run the streets and break the law. Matthew's mother did not discipline the boys in Perciful's absence and led them to believe that there would ... not be any consequences for their behavior. Matthew's mother allowed her lack of discipline to affect their marriage, as well as their children, to the extent that she and the boys were on one side and Perciful was on the other side. Mr. Perciful Marshall expressed that despite the bad things that Matthew has done and his problems earlier with him he loves him very much. Mr. Perciful Marshall expressed that he would tell the jury of his love for Matthew and his request that they recommend to the Judge a life sentence rather than death. Mr. Perciful Marshall promised to be here but was unable to be here.

Other than this stipulation, Marshall presented no other evidence in the penalty phase.

In his closing argument, Marshall's counsel admitted that two statutory aggravating circumstances existed (the murder was committed while Marshall was under a sentence of imprisonment, and Marshall previously was convicted of violent felonies). But Marshall's counsel argued that the three other statutory aggravating circumstances that the State contended existed-the murder was committed during a burglary; was especially heinous, atrocious, or cruel; and was cold, calculated, and premeditated-were not present.

As non-statutory mitigation, Marshall's counsel argued that a death sentence was not appropriate, pointing out that: (1) Marshall and Henry had socialized with each other in the prison and there were no prior problems between them; (2) there was no evidence Marshall had any plan to kill Henry when he first entered Henry's cell; (3) Henry was a violent person and had offensive wounds on his hands, indicating the murder occurred during the course of a fight; (4) Marshall and Henry were of equal size and physical strength; (5) Marshall entered Henry's cell unarmed and bludgeoned Henry using a battery pack he found in Henry's cell; (6) Marshall did not inflict further wounds after Henry was unconscious and did not steal Henry's gold chain, indicating the murder was not committed for financial gain and that Marshall had no intent to torture Henry; (7) Marshall's age at the time of the crime (24 years old) and his background (including the young age at which Marshall went to prison) were mitigating; and (8) Marshall was already serving a 46-year sentence, and an additional life sentence, even with ***579** the possibility of parole, would keep Marshall in prison for a long time. [2]

2 In the course of his argument, Marshall's counsel stated that: (1) Henry was a drug dealer and on the morning of his murder was believed by one witness to be "committing a homosexual rape on a boy or ... having homosexual sex with him"; and (2) Henry "was not in an innocent position," as are victims in other murder cases, such as children, the elderly, women, police officers, politicians, judges, or the

> victims of contract killings or killings for insurance proceeds.

The jury recommended a sentence of life without parole.[3] The state trial court, however, overrode the jury's recommendation and sentenced Marshall to death. The state trial court found four statutory aggravating circumstances: (1) Marshall committed the murder while under a sentence of imprisonment; (2) Marshall was convicted of nine prior felonies involving the use or threat of violence; (3) Marshall committed the murder while he was engaged in or attempting to commit a burglary;[4] and (4) the murder was especially heinous, atrocious, and cruel. In support of its finding that the murder was especially heinous, atrocious, and cruel, the state trial court found:

3 The state trial court polled the jurors as to whether the advisory sentence was the verdict of a majority of the jurors. Each juror agreed it was.

4 For offenses committed on or before July 1, 2001, Florida law defines burglary as "entering or remaining in a dwelling, a structure, or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain." Fla. Stat. § 810.02(1)(a).

> The victim was attacked twice and remained at least partially conscious until the second attack. During the first attack he cried for mercy and was aware of the gravity of the situation. He was beaten and struck six times on the back of the head with two D-cell batteries and suffered for a period of several minutes until he finally lost consciousness and died. The attacks resulted in blood being sprayed and spattered about the room and the victim receiving some twenty-five separate wounds. The murder of this victim was extremely wicked and shockingly evil, with utter indifference to, or even enjoyment of the suffering of the victim. The murder was both conscienceless and pitiless.

While, as noted earlier, Marshall did not claim any statutory mitigating circumstances existed, the state trial court found two non-statutory mitigating circumstances: Marshall entered prison at a young age, and he behaved acceptably at trial. The state trial court expressly rejected as mitigating circumstances that Marshall's "older brother influenced him and led him astray to run the streets and break the law[,] [and Marshall's] mother failed to discipline him and caused him to believe there were no negative consequences for his bad behavior." In support of its decision to override the jury's recommendation and impose a death sentence, the state trial court stated, "Sufficient aggravating circumstances exist as enumerated in [Fla. Stat.] section 921.141(5), and there are insufficient mitigating circumstances to outweigh the aggravating circumstances. The facts supporting this conclusion are so clear and convincing that no reasonable person could differ."

B. Direct Appeal

Marshall appealed. The Florida Supreme Court affirmed Marshall's first-degree murder conviction and death sentence. *Marshall I*, 604 So.2d 799. As to the death sentence, the Florida Supreme Court concluded that the state trial court did not abuse its discretion in imposing a ***580** death sentence over the jury's recommendation of life imprisonment because there was "insufficient evidence to reasonably support the jury's recommendation of life":

> Marshall ... alleges that the trial court abused its discretion in sentencing Marshall to death where the jury had made a recommendation of life imprisonment. It is well settled in Florida that a judge imposing sentence in a capital case must accord the jury recommendation great weight. *E.g., Tedder v. State*, 322 So.2d 908, 910 (Fla.1975). Where a jury has recommended a life sentence, the court must follow that recommendation unless "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." *Id.* Where the record contains no evidence supporting a life recommendation, the trial court does not err in declining to follow that recommendation.
>
> In this case, the record contains insufficient evidence to reasonably support the jury's recommendation of life. Marshall's father was unable to attend the trial, but the defense and prosecution stipulated that he would have testified that Marshall did well in school until his early teens when his older brother influenced him to run the streets and break the law; that Marshall's mother did not discipline Marshall and allowed him to believe there would be no consequences for his behavior; and that Marshall's father loved him and requested a life sentence for his son. The trial court determined these facts were not mitigating, but did find Marshall's behavior at trial as well as his entering

prison at a young age to be mitigating. We find no error in the court's assessment of this mitigation and conclude that it does not provide a reasonable basis for the jury's recommendation of life in this case. Even viewing this mitigation in the light most favorable to Marshall, it pales in significance when weighed against the four statutory aggravating circumstances, including Marshall's record of violent felonies consisting of kidnapping, sexual battery, and seven armed robberies.

Furthermore, defense counsel's argument composed largely of a negative characterization of the victim does not provide a reasonable basis for the jury's life recommendation. Moreover, contrary to Marshall's assertion, the facts surrounding the murder do not suggest that the murder was committed in self defense or in a fit of rage. The witnesses heard muffled screams and moans emanating from the victim's cell and observed Marshall leaving the cell with what appeared to be blood on his chest and arms. Within a few minutes, *Marshall reentered the cell and similar noises were again heard. The victim was found lying face down with his hands bound behind his back and his ankles were restrained. The victim received no less than twenty-five separate wounds and blood was sprayed and splattered about the cell. Death was caused by blows to the back of his head.* Nothing in these facts supports the notion that Marshall acted in self defense or that he simply killed the victim in the heat of a fight. We thus conclude that the trial court did not abuse its discretion in finding the facts supporting the death sentence to be "so clear and convincing that no reasonable person could differ." *See Tedder*, 322 So.2d at 910.

Id. at 805-06 (emphasis added). The United States Supreme Court denied Marshall's petition for certiorari. *Marshall v. Florida,* 508 U.S. 915, 113 S.Ct. 2355, 124 L.Ed.2d 263 (1993).

***581** *C. State Collateral Proceedings*

Marshall filed two state collateral proceedings. First, Marshall filed a Florida Rule of Criminal Procedure 3.850 motion to set aside his death sentence that raised 27 claims. The state 3.850 court (the same trial judge who imposed his sentence) granted an evidentiary hearing on four claims and later denied relief on all claims. The Florida Supreme Court affirmed on all but one claim, a jury misconduct claim which it remanded for an evidentiary hearing. *Marshall v. State,* 854 So.2d 1235 (Fla.2003) ("*Marshall II*"). After that evidentiary hearing, the state 3.850 court again denied the jury misconduct claim. The Florida Supreme Court affirmed. *Marshall v. State,* 976 So.2d 1071 (Fla.2007) ("*Marshall IV*"). The 3.850 proceedings did not involve Marshall's jury-override claim.

Rather, Marshall raised his jury-override claim in his petition for a writ of habeas corpus filed directly in the Florida Supreme Court.[5] Marshall's habeas petition claimed, *inter alia,* that his constitutional rights were violated because the state trial court arbitrarily applied Florida's legal standard for jury overrides set forth in *Tedder v. State,* 322 So.2d 908 (Fla.1975). The Florida Supreme Court denied Marshall's habeas petition, specifically rejecting Marshall's claim that the jury override was arbitrarily applied. *Marshall v. Crosby,* 911 So.2d 1129, 1135-37 (Fla.2005) ("*Marshall III*"). The Florida Supreme Court pointed out that it had already "reviewed the propriety of the trial court's override on direct appeal." *Id.* at 1136. It quoted at length from its analysis in its prior decision on direct appeal, which had explained why no facts supported the jury's recommendation of life, why all facts supported the death sentence, and thus why no reasonable persons could differ. *Id.* at 1136-37 (quoting *Marshall I,* 604 So.2d at 805-06). The Florida Supreme Court again concluded that the jury-override standard in *Tedder* had not been arbitrarily applied by the state trial judge. *Id.* at 1137.

5 *See* Fla. R.Crim. P. 3.851(d)(3) (stating that, in capital cases, "[a]ll petitions for extraordinary relief in which the Supreme Court of Florida has original jurisdiction, including petitions for writs of habeas corpus, shall be filed simultaneously with the initial brief filed on behalf of the death-sentenced prisoner in the appeal of the circuit court's order on the initial motion for postconviction relief").

Before leaving Marshall's state habeas petition, we note another important part of the Florida Supreme Court's decision in Marshall's habeas case. The Florida Supreme Court also rejected Marshall's habeas claim that it had made a "major constitutional change" in the *Tedder* standard in its subsequent decision in *Keen v. State,* 775 So.2d 263 (Fla.2000). *Marshall III,* 911 So.2d at 1136. The Florida Supreme Court expressly stated that "*Keen* is not new law" and "*Tedder* is the seminal case in Florida on jury overrides and remains so after *Keen,*" stating:

Marshall alleges that *Tedder v. State,* 322 So.2d 908 (Fla.1975), which allows the trial judge to override a jury recommendation in capital cases, was arbitrarily applied in this case based on language found in *Keen v. State,* 775 So.2d 263 (Fla.2000). In *Tedder,* this Court held that "[i]n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." *Tedder,* 322 So.2d at 910. More recently, this Court in *Keen* reiterated the proper analysis for a *Tedder* inquiry: "The singular focus of a *Tedder* inquiry is whether ***582** there is 'a reasonable basis in the record to support the jury's recommendation of life,' rather than the weighing process which a judge conducts after a death recommendation." *Keen,* 775 So.2d at 283-84 (citation omitted). The Court further explained that "the jury's life recommendation changes the analytical dynamic and magnifies the ultimate effect of mitigation on the defendant's sentence." *Id.* at 285.

In *Mills v. Moore,* 786 So.2d 532 (Fla.2001), this Court rejected an argument similar to the one currently raised by Marshall. In so doing, this Court stated:

> While conceding that *Keen* is not new law, Mills nonetheless argues that *Keen*'s application of *Tedder* constitutes a new standard by which jury override cases are reviewed. *Keen* is not a major constitutional change or jurisprudential upheaval of the law as it was espoused in *Tedder. Keen* offers no new or different standard for considering jury overrides on appeal. Thus, we disagree with Mills' contention that *Keen* offers a new standard of law and we reject the contention that *Keen* was anything more than an application of our long-standing *Tedder* analysis.
>
> *Tedder* is the seminal case in Florida on jury overrides and remains so after *Keen. Tedder* was applied to this case. *Keen* provides no basis for our reconsideration of this issue.

Id. at 539-40.

Marshall III, 911 So.2d at 1135-36.[6]

6 Marshall's state habeas petition also claimed that the state trial court's jury override violated the constitutional principles set forth by the United States Supreme Court in *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). The Florida Supreme Court denied this claim as well, stating that (1) the Florida Supreme Court had rejected *Ring* claims in more than 50 death penalty cases tried before *Ring,* and its conclusions in those cases precluded Marshall from succeeding on his claim; (2) the United States Supreme Court upheld the jury-override feature of Florida's capital sentencing scheme in the pre-*Apprendi,* pre-*Ring* case of *Spaziano v. Florida,* 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), and had not overruled *Spaziano;* (3) *Apprendi* expressly exempted prior convictions from its proof requirements and *Ring* did not change that exemption, so Marshall's nine prior violent felony convictions would "take[ ] [Marshall's] sentence outside the scope of *Ring*'s requirements"; and (4) in any event, even if *Ring* affected Florida law, the Florida Supreme Court already had held that *Ring* does not apply retroactively in postconviction cases. *Marshall III,* 911 So.2d at 1133-35.

After the Florida Supreme Court denied Marshall's state habeas petition, the United States Supreme Court denied Marshall's certiorari petition. *Marshall v. McDonough,* 547 U.S. 1143, 126 S.Ct. 2059, 164 L.Ed.2d 807 (2006).

D. Federal § 2254 Proceedings

In February 2009, Marshall filed the instant § 2254 petition. Marshall's § 2254 petition raised fifteen claims, including that the state trial court's jury override was contrary to the *Tedder* standard for overrides and thereby resulted in an arbitrary, capricious, and unreliable death sentence in violation of the Eighth and Fourteenth Amendments to the United States Constitution.[7] The district court denied Marshall's petition.

7 Marshall's § 2254 petition also claimed, as had his state habeas petition, that the jury override violated *Apprendi* and *Ring.*

As to Marshall's claim that the *Tedder* jury override and resulting death sentence were arbitrarily imposed, the district court concluded that (1) the Florida courts considered ***583** Marshall's mitigating evidence and found there was no reasonable basis for the jury's recommendation of life imprisonment, and (2) the district court had no authority to re-weigh the evidence or second-guess the state courts' decisions.

The district court granted a certificate of appealability on one issue: "whether Petitioner's [death] sentence violates the Eighth and Fourteenth Amendments based on a jury override which was arbitrary and capricious in light of *Tedder.*"

II. STANDARD OF REVIEW

[1] We review the district court's legal conclusions *de novo. Cummings v. Sec'y for the Dep't of Corr.,* 588 F.3d 1331, 1355 (11th Cir.2009), *petition for cert. filed,* (U.S. Jun. 7, 2010) (No. 09-11289). Marshall's petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. No. 104-132, 110 Stat. 1214 (1996), which provides for deferential federal-court review of § 2254 claims already decided by state courts. *Rhode v. Hall,* 582 F.3d 1273, 1279 (11th Cir.2009), *cert. denied,* 78 U.S.L.W. 3714, --- U.S. ----, 130 S.Ct. 3399, 177 L.Ed.2d 313 (U.S. Jun. 7, 2010) (No. 09-10597); *see* 28 U.S.C. § 2254(d). Section 2254(d), as amended by AEDPA, states that federal habeas relief shall not be granted as to any claims decided on the merits in state court unless the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2).

[2] **[3]** "A legal principle is 'clearly established' within the meaning of this provision only when it is embodied in a holding of [the United States Supreme] Court." *Thaler v. Haynes,* --- U.S. ----, 130 S.Ct. 1171, 1173, ---L.Ed.2d ---- (2010); *see also Berghuis v. Smith,* --- U.S. ----, 130 S.Ct. 1382, 1392-96, 176 L.Ed.2d 249 (2010) (reversing Court of Appeals' grant of habeas relief to state prisoner on Sixth Amendment jury-pool claim because the Supreme Court's precedent "hardly establishes-no less 'clearly' so-that [petitioner] was denied his Sixth Amendment right to an impartial jury drawn from a fair cross section of the community"). It must be United States Supreme Court precedent, not state-law precedent, that is contravened or unreasonably applied because "federal courts do not sit to revisit a state supreme court's judgment as to whether the trial court complied with state law." *Bolender v. Singletary,* 16 F.3d 1547, 1570 (11th Cir.1994).

III. DISCUSSION

Florida's statutory capital sentencing scheme was substantially the same at the time of Marshall's trial as it is today. *See* Fla. Stat. § 921.141 (1989); Fla. Stat. § 921.141 (2010). After a defendant is convicted of a capital felony, the state trial judge conducts a separate sentencing proceeding before the trial jury, at which the parties may present evidence "relevant to the nature of the crime and the character of the defendant," including "matters relating to any of the aggravating or mitigating circumstances" enumerated by statute, and arguments for or against imposition of the death penalty. Fla. Stat. § 921.141(1) (1989). After hearing the evidence and arguments, the jury renders *an advisory sentence* to the state trial judge, based upon (1) whether there are sufficient statutory aggravating circumstances, (2) whether there are mitigating circumstances that outweigh the aggravating circumstances, and (3) consequently, whether the defendant should receive a sentence of life imprisonment ***584** or death. *Id.* § 921.141(2). However, "[n]otwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death." *Id.* § 921.141(3). [8]

8 If the state trial court sentences the defendant to death, it must set forth in writing the findings upon which its sentence rests, specifically the statutory aggravating circumstances that it finds to exist and that there are insufficient mitigating circumstances to outweigh the statutory aggravating circumstances. Fla. Stat. § 921.141(3). The conviction and death sentence are subject to automatic review by the Florida Supreme Court. *Id.* § 921.141(4).

Although the jury's advisory sentence "should be given great weight," the state trial judge in Florida is permitted to override it. *Tedder,* 322 So.2d at 910. But, as the Florida Supreme Court held in *Tedder,* "[i]n order to sustain a sentence of death following a jury recommendation of life, *the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.*" *Id.* (emphasis added).

The United States Supreme Court has upheld the constitutionality of Florida's statutory capital sentencing scheme, including its jury-override feature. *See Spaziano v. Florida,* 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d

340 (1984); *Proffitt v. Florida,* 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). In *Spaziano,* a jury-override case, the Supreme Court found "there is no constitutional imperative that a jury have the responsibility of deciding whether the death penalty should be imposed." *Spaziano,* 468 U.S. at 465, 104 S.Ct. at 3165. The Supreme Court addressed Spaziano's claim that the state courts misapplied the *Tedder* standard for jury overrides in Florida. The Supreme Court stated that although the *Tedder* standard represented a "significant safeguard" for Florida capital defendants, the Supreme Court's role was not to second-guess the application of the *Tedder* standard by the state courts, but rather simply to ensure that the result was not arbitrary or discriminatory:

> Petitioner's final challenge is to the application of the standard the Florida Supreme Court has announced for allowing a trial court to override a jury's recommendation of life. This Court already has recognized the significant safeguard the *Tedder* standard affords a capital defendant in Florida. We are satisfied that the Florida Supreme Court takes that standard seriously and has not hesitated to reverse a trial court if it derogates the jury's role. Our responsibility, however, is not to second-guess the deference accorded the jury's recommendation in a particular case, but to ensure that the result of the process is not arbitrary or discriminatory.

Id. (citations omitted). In *Spaziano,* the Supreme Court concluded that the jury override did not produce an arbitrary or discriminatory result. *Id.* at 466, 104 S.Ct. at 3165. In doing so, the Supreme Court reaffirmed that its federal role was not to decide whether it agreed with the state trial judge's or the Florida Supreme Court's override decision but to determine only whether the state courts' application of the jury-override procedure in a particular case was arbitrary or discriminatory, stating:

> We see nothing that suggests that the application of the jury-override procedure has resulted in arbitrary or discriminatory application of the death penalty, either in general or in this particular case. Regardless of the jury's recommendation, the trial judge is required to conduct an independent review of the evidence and to make his own ***585** findings regarding aggravating and mitigating circumstances.... The Florida Supreme Court must review every capital sentence to ensure that the penalty has not been imposed arbitrarily or capriciously ... [, and] there is no evidence that the Florida Supreme Court has failed in its responsibility to perform meaningful appellate review of each death sentence, either in cases in which both the jury and the trial court have concluded that death is the appropriate penalty or in cases when the jury has recommended life and the trial court has overridden the jury's recommendation and sentenced the defendant to death.
>
> In this case, the trial judge based his decision on the presence of two statutory aggravating circumstances.... The trial judge found no mitigating circumstances. [9]
>
> 9 The two statutory aggravating circumstances found by the state trial court were that Spaziano had prior violent felony convictions (rape and aggravated battery) and the murder was especially heinous, atrocious, and cruel (Spaziano told a witness he tortured the victim before he killed her, and the victim's body had cuts on the breasts, stomach, and chest). *Spaziano,* 468 U.S. at 466-67, 104 S.Ct. at 3165-66.
>
> The Florida Supreme Court reviewed petitioner's sentence and concluded that the death penalty was properly imposed under state law. [10] *It is not our function to decide whether we agree with the majority of the advisory jury or with the trial judge and the Florida Supreme Court. Whether or not "reasonable people" could differ over the result here, we see nothing irrational or arbitrary about the imposition of the death penalty in this case.*
>
> 10 A majority of the Florida Supreme Court concluded that the state trial court's jury override satisfied the *Tedder* standard, but one justice dissented on this point. *See Spaziano v. State,* 433 So.2d 508, 511 (Fla.1983) (majority opinion); *id.* at 512 (McDonald, J., dissenting).

Id. at 466-67, 104 S.Ct. at 3165-66 (citations omitted; emphasis added).

This Court also has considered jury-override challenges under Florida law. In *Lusk v. Dugger,* 890 F.2d 332 (11th Cir.1989), the death-sentenced petitioner claimed the Florida trial court and the Florida Supreme Court misapplied the *Tedder* jury-override standard. *Id.* at 340. The district court granted relief, but this Court reversed, concluding the district court improperly re-weighed the penalty-phase evidence and the state court proceedings did not produce an arbitrary or discriminatory result:

> The district court, we find, improperly engaged in reweighing the evidence after the Florida courts determined that the override was constitutional and proper because there was no reasonable basis to support the recommendation....
>
> ....
>
> The state trial court acknowledged that it considered the mitigating evidence offered by Lusk in his trial, as did the Supreme Court of Florida. This court may examine the application of Florida's jury override scheme, but we may not second-guess the state courts regarding whether the trial court "complied with the mandates of *Tedder.*" *It is not our function to decide whether we agree with the advisory jury or with the trial judge and the Supreme Court of Florida. Our review, rather, is limited to ascertaining whether the result of the override scheme is arbitrary or discriminatory.* ***586** *Spaziano v. Florida,* 468 U.S. 447, 465, 104 S.Ct. 3154, 3165, 82 L.Ed.2d 340 (1984). Lusk contends that we should grant only limited deference to state override proceedings. On the contrary, *to the extent that those proceedings do not produce an arbitrary or discriminatory result, the Constitution is not violated, and we will not second-guess the state courts on a matter of state law.* The state courts concluded that there were no reasonable bases for the jury's recommendation despite the fact that both the jury as advisor and the judge as sentencer were made aware of mitigating factors. On the facts of this case, we do not find that the result of the application of *Tedder* was arbitrary or irrational.

Id. at 341-42 (citations omitted; emphasis added).

Similarly, in *Francis v. Dugger,* 908 F.2d 696, 704 (11th Cir.1990), this Court rejected the death-sentenced petitioner's argument that the jury override in his Florida case violated the Eighth and Fourteenth Amendments because certain mitigating circumstances in the record furnished a reasonable basis for the jury's advisory sentence of life imprisonment. We reiterated that a federal court may not second-guess whether the state courts complied with the mandate of *Tedder* and concluded that the jury override in petitioner Francis's case was not arbitrary or discriminatory. *Id.* We noted that, under Florida law, "the mere presence of mitigating evidence does not automatically provide a reasonable basis for the jury's recommendation." *Id.* (citing *Pentecost v. State,* 545 So.2d 861, 863 n. 3 (Fla.1989)); *accord Mills v. Singletary,* 161 F.3d 1273, 1283 (11th Cir.1998).

[4] Here, Marshall's death sentence was not imposed in an arbitrary or discriminatory fashion. "Florida's override scheme has been upheld as constitutional precisely because the capital sentencing scheme 'has struck a reasonable balance between sensitivity to the individual and his circumstances and ensuring that the penalty is not imposed arbitrarily or discriminatorily,' " *Bolender,* 16 F.3d at 1571 (quoting *Spaziano,* 468 U.S. at 464, 104 S.Ct. at 3164), and the Florida courts followed that scheme in Marshall's case. After the jury issued its advisory sentence, the state trial court conducted an independent review of the facts relating to Marshall's character and the nature of his crime and concluded that there were "insufficient mitigating circumstances to outweigh the aggravating circumstances" and that "[t]he facts supporting this conclusion are so clear and convincing that no reasonable person could differ." The Florida Supreme Court reviewed the state trial court's jury override and concluded that the override procedure was properly followed and was not arbitrarily applied. *Marshall I,* 604 So.2d at 805-06. As the Florida Supreme Court pointed out, Marshall at age 24 was already a nine-times-convicted violent felon under a sentence of 46 years' imprisonment. Although under a very long sentence, Marshall viciously beat a man to death while he was restrained and pleading for mercy. The victim was found lying face-down with his hands bound behind his back and his ankles were restrained. The victim received no fewer than 25 blows, and death was caused by 6 blows to the back of his head. Nothing supported that Marshall acted in self-defense or killed the victim in the heat of the fight. Marshall presented little, if anything, in the way of mitigation.

Marshall argues that the state courts arbitrarily applied the *Tedder* standard for overriding the jury's advisory verdict of life imprisonment because the facts suggesting a death sentence for Marshall were not so clear and convincing that no ***587** reasonable person could differ. Marshall contends that this *Tedder* misapplication was a *federal constitutional* violation because *Spaziano* made the Eighth Amendment validity of a death sentence arising from a jury override dependent on a proper application of "the significant safeguard the *Tedder* standard affords a capital defendant in Florida." *Spaziano,* 468 U.S. at 465, 104 S.Ct. at 3165. Therefore, Marshall argues, when the state trial court overrode the jury's recommendation and the Florida Supreme Court affirmed his death sentence, their decisions not only misapplied *Tedder* but also violated clearly established federal law as enunciated in *Spaziano.*

Marshall's arguments rest upon a fundamental misreading of *Spaziano.* Despite what Marshall contends, *Spaziano* did not make proper application of the *Tedder* standard a federal constitutional requirement. Not only does the language in *Spaziano* make this clear, but also the Supreme Court, in fact, has expressly said so. In *Harris v. Alabama,* 513 U.S. 504, 115 S.Ct. 1031, 130 L.Ed.2d 1004 (1995), the Supreme Court upheld Alabama's capital sentencing scheme, which like Florida's required jury participation in sentencing but gave ultimate sentencing authority to the trial judge, but which unlike Florida's *Tedder* standard required only that the trial judge "consider" the jury's recommendation. *Id.* at 508-15, 115 S.Ct. at 1034-37. In doing so, the Supreme Court explained that its approval of Florida's *Tedder* standard did not make that standard an Eighth Amendment requirement:

> In various opinions on the Florida statute we have spoken favorably of the deference that a judge must accord the jury verdict under Florida law. While rejecting an *ex post facto* challenge in *Dobbert v. Florida,* 432 U.S. 282, 294, 97 S.Ct. 2290, 2298, 53 L.Ed.2d 344 (1977), we noted the "crucial protection" provided by the standard of *Tedder v. State.* In the same fashion, in dismissing Spaziano's argument that the *Tedder* standard was wrongly applied by the lower courts in his case, we stated:
>
> > "This Court already has recognized the significant safeguard the *Tedder* standard affords a capital defendant in Florida. We are satisfied that the Florida Supreme Court takes that standard seriously and has not hesitated to reverse a trial court if it derogates the jury's role."
>
> *These statements of approbation, however, do not mean that the Tedder standard is constitutionally required.* As we stated in *Spaziano* immediately following the passage quoted above: "*Our responsibility, however, is not to second-guess the deference accorded the jury's recommendation in a particular case, but to ensure that the result of the process is not arbitrary or discriminatory.*" 468 U.S., at 465, 104 S.Ct., at 3165. We thus made clear that, our praise for *Tedder* notwithstanding, *the hallmark of the analysis is not the particular weight a State chooses to place upon the jury's advice, but whether the scheme adequately channels the sentencer's discretion so as to prevent arbitrary results.*

Id. at 511, 115 S.Ct. at 1035 (citations omitted; emphasis added).[11]

11 The Supreme Court concluded that "[t]he Constitution permits the trial judge, acting alone, to impose a capital sentence [and it] is thus not offended when a State further requires the sentencing judge to consider a jury's recommendation and trusts the judge to give it the proper weight." *Harris,* 513 U.S. at 515, 115 S.Ct. at 1037.

Simply put, the Supreme Court has told us twice that a federal court on § 2254 habeas review may not "second-guess" a Florida state court's application of the ***588** *Tedder* standard in a jury-override case. *Id.; Spaziano,* 468 U.S. at 465, 104 S.Ct. at 3165. Rather, the federal constitutional question is only whether the Florida state courts' application of the *Tedder* standard was arbitrary or discriminatory or, stated another way, whether it produced an arbitrary or discriminatory result. *Harris,* 513 U.S. at 511, 115 S.Ct. at 1035; *Spaziano,* 468 U.S. at 465, 104 S.Ct. at 3165. Moreover, AEDPA adds an additional layer of deference to our review because we examine only whether the Florida Supreme Court's decision-that the state trial judge did not arbitrarily apply the *Tedder* standard-was contrary to, or an unreasonable application of, clearly established federal law evidenced in a holding of the United States Supreme Court. *See* 28 U.S.C. § 2254(d)(1); *see also Smith,* 130 S.Ct. at 1392; *Haynes,* 130 S.Ct. at 1173.

In this case, nothing in the record suggests the state courts' application of the jury-override procedure was arbitrary or discriminatory or that such application produced an arbitrary or discriminatory death sentence. Under

AEDPA, and indeed even under *de novo* review, Marshall has not shown he is entitled to federal habeas relief.

IV. CONCLUSION

We affirm the district court's denial of Marshall's § 2254 petition.

AFFIRMED.

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ATTACHMENT I

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IN THE SUPREME COURT OF FLORIDA

Case No. SC16-779

MATTHEW MARSHALL,

Petitioner,

v.

JULIE L. JONES,

Secretary, Florida Dep't. of Corrections,
Respondent.

AMENDED PETITION FOR HABEAS CORPUS IN CAPITAL CASE WHERE DEATH SENTENCE IMPOSED OVER JURY RECOMMENDATION OF LIFE IMPRISONMENT

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INTRODUCTION

> But Your Honor, under our current statute, *Hurst,* we need a specific jury finding that is binding. That is the *Hurst* Court's two problems. That it [the jury's findings] wasn't specific enough and it wasn't binding. That finding, for example, of non-aggravation needs to be binding. ***In other words, no overrides***. That's . . . *Hurst* is saying two things. We want it specific, not implied. We want to know which aggravator the jury found. Then we want that finding, for example, of non-aggravation to be binding. ***They didn't like the override*** . . . that is the two parts of the Constitution, of our statute. ***The override provision, and the not specific that the Hurst Court said no, we're not doing that. That's the part that is unconstitutional.***

See Transcript of Oral Argument, *Asay v. Jones*, Nos. SC16,102 & 16,223 (Oral Argument of Assistant Attorney General Charmaine M. Millsaps) (emphasis added). Mr. Marshall agrees with the State's representation to this Court. The override provision of Florida's former capital sentencing statute *is* unconstitutional and so is Mr. Marshall's death sentence. ***In 1989***, Matthew Marshall's jury recommended that he be sentenced to life imprisonment rather than the death penalty. Now, ***almost 30 years later***, it is time to honor and impose that life sentence.

The propriety of Mr. Marshall's death sentence has been litigated in this Court ever since his trial. His challenges have been rejected although usually by a divided Court. *See Marshall v. State*, 604 So. 2d 799 (Fla. 1992) (on direct appeal, upholding override death sentence by a 4-3 decision);[1] *Marshall v. Crosby,* 911 So. 2d 1129 (Fla. 2005) (on state habeas, upholding override death sentence in a 5-2 decision).[2]

Mr. Marshall now brings this action[3] in light of the Supreme Court's decision in *Hurst v. Florida,* 136 S.Ct. 616 (2016); moreover, several subsequent cases decided by this Court provide further support for his entitlement to relief. *See Hurst v. State*, 2016 WL 6036978 (Fla. Oct. 14, 2016); *Perry v. State*, 2016 WL 6036982 (Fla. Oct. 14, 2016); *Walls v. State*, 2016 WL 6137287 (Fla. Oct. 20, 2016); *Atwell v. State*, 197 So. 3d 1040 (Fla. 2016). Notably, this Court in *Hurst v. State* also noted the abrogation of *Tedder v. State*, 322 So. 2d 908 (Fla. 1975), the seminal case whereby this Court authorized the continued use of judge overrides of life sentences returned by a jury. *Hurst,* 2016 WL 6036978 at *1.

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[1] The three dissenting justices concluded that a reasonable basis existed for the jury's life recommendation and that therefore the override was improper under *Tedder v. State*, 322 So. 2d 908 (Fla. 1975). *Marshall*, 604 So. 2d at 806-07 (Barkett, C.J., concurring in part and dissenting in part). Among the reasons for upholding the jury's life recommendation, the dissent noted that it was likely that "the jury rejected some of the aggravators found by the judge or assigned them minimal weight." *Id.* at 608. Notably, this Court in *Hurst v. State* recognized the abrogation of *Tedder* in light of *Hurst v. Florida. Hurst,* 2016 WL 6036978 at *1.

[2] The state habeas presented several claims, one of which was a challenge to Mr. Marshall's death sentence in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002).

[3] Mr. Marshall filed this petition on May 6, 2016. This amended petition is being filed in accordance with the Court's Order of November 4, 2016.

In its jurisdiction to issue writs of habeas corpus, this Court has an obligation to protect Mr. Marshall's right under the Florida Constitution to be free from cruel or unusual punishment and it has the power to enter orders assuring that his rights are protected. *Allen v. State*, 636 So. 2d 494, 497 (Fla. 1994) (holding that the Court was required under Article I, § 17 of the Florida Constitution to strike down the death penalty for persons under sixteen at time of crime); *Shue v. State*, 397 So. 2d 910 (Fla. 1981) (holding that this Court was required under Article I, § 17 of the Florida Constitution to invalidate the death penalty for rape); *Makemson v. Martin County*, 491 So. 2d 1109 (1986) ("[t]he courts have authority to do things that are essential to the performance of their judicial functions. The unconstitutionality of a statute may not be overlooked or excused"). This Court has explained: "It is axiomatic that the courts must be independent and must not be subject to the whim of either the executive or legislative departments. The security of human rights and the safety of free institutions require freedom of action on the part of the court." *Rose v. Palm Beach City*, 361 So. 2d 135, 137 n.7 (1978).

In light of *Hurst v. Florida,* the State's concession in the oral argument held in the *Asay* case acknowledging that *Hurst* did away with Florida's override of life sentences ("In other words, no overrides"), the abrogation of *Tedder v. State*, and the holdings and legal reasoning from the afore-mentioned decisions, Mr. Marshall seeks in this petition an order from the Court vacating his unconstitutional override death sentence.[4]

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). *See* Art. 1, § 13, Fla. Const. The petition presents issues that concern the constitutionality of Mr. Marshall's death sentence. This Court has jurisdiction to entertain a petition for a writ of habeas corpus, an original proceeding governed by Fla. R. App. P. 9.100. This Court has original jurisdiction under Fla. R. App. P. 9.030(a)(3) and Art. V, § 3(b)(9), Fla. Const. The Florida Constitution guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Art. I, § 13, Fla. Const.

This Court must protect Mr. Marshall's Sixth, Eighth and Fourteenth Amendment rights under the United States Constitution. Where constitutional rights—whether state or federal—of individuals are concerned, this Court may not abdicate its responsibility in deference to the legislative or executive branches of government. This Court is required to exercise its independent power of judicial review. *Ford v. Wainwright*, 477 U.S. 399 (1986).

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[4] At present there are three Florida defendants on death row in whose cases the jury recommended a life sentence. Mr. Marshall is one. William Zeigler is another. *See Zeigler v. State*, 580 So. 2d 127 (Fla. 1991). Edward Zakrzweski is the third, but his case involved three victims and the jury recommended death for two of the three victims. *See Zakrzweski v. State*, 717 So. 2d 488 (Fla. 1998).

Also at issue is the legality of Mr. Marshall's death sentence under newly enacted Chapter 2016-13, which prohibits the judge from overriding a jury's recommendation of life imprisonment, thus reflecting a consensus that a death sentence cannot be imposed if the jury formally votes to recommend a life sentence. This shows that Mr. Marshall's death sentence—resulting from a jury recommendation of life—now violates the evolving standards of decency of the Eighth Amendment. This Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review. *Elledge v. State*, 346 So. 2d 998, 1002 (Fla. 1977); *Wilson v. Wainwright*, 474 So. 2d 1162, 1165 (Fla. 1985). This Court has not hesitated in exercising its inherent jurisdiction to review issues arising in the course of capital postconviction proceedings, *State v. Lewis*, 656 So. 2d 1248 (Fla. 1995), and to vacate death sentences when subsequent decisions from the Supreme Court mandate that result. *LeCroy v. State*, Case No. SC05-136.[5] The reasons set forth herein show that the Court's exercise of its jurisdiction, and of its authority to grant habeas relief, is warranted in this action.

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[5] *See* Claim II, *infra*. Mr. LeCroy committed his crime prior to the age of 18, and when the Supreme Court issued its decision in *Roper v. Simmons*, 543 U.S. 551 (2005), the Court, with the agreement of the State, entered an order vacating Mr. LeCroy's death sentence and imposed a life sentence without the possibility of parole for twenty-five years.

STATEMENT OF THE CASE AND RELEVANT FACTS

Mr. Marshall was indicted for the first-degree murder of Jeffrey Henry, both of whom were incarcerated at the Martin Correctional Institution. The indictment charged Mr. Marshall with only first-degree murder; no other felony was charged. Mr. Marshall's jury convicted him of first-degree murder and, after a penalty phase, recommended that he be sentenced to life imprisonment. In a document entitled "Findings of Fact by the Court," the trial court, pursuant to Florida's statutory procedure at the time, engaged in the process required in order to find the facts necessary to impose a death sentence. First, the trial court made factual findings that four (4) statutory aggravating circumstances had been established beyond a reasonable doubt (R4084-85).[6] Next, the trial court addressed the mitigating evidence presented, finding that some nonstatutory mitigation had been established (R4085).[7] Then the trial court next made findings with respect to whether "sufficient

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[6] The court found the following aggravating circumstances: that Mr. Marshall was under a sentence of imprisonment (the murder in the instant case occurred while Mr. Marshall was serving that sentence); that Mr. Marshall had been previously convicted of nine (9) prior crimes involving the use of or threat of violence to the person (the felonies for which Mr. Marshall was sentenced and was serving prison time when the killing occurred); the capital felony was committed while Mr. Marshall was engaged in the commission of or an attempt to commit a burglary (the burglary being the entry by Mr. Marshall into the prison cell of the victim but which had not been charged in the indictment); and that the crime was especially heinous, atrocious, and cruel (R4084-85).

[7] The trial court first addressed the evidence that Mr. Marshall's older brother

aggravating circumstances" existed to justify the imposition of the death penalty, concluding that sufficient aggravating circumstances did in fact exist in Mr. Marshall's case (R4086). The trial court then found that there were "insufficient mitigating circumstances to outweigh the aggravating circumstances" (R4086), and determined that Mr. Marshall should be sentenced to death notwithstanding the recommended sentence of the jury.

On direct appeal, this Court, in a 4-3 decision, affirmed Mr. Marshall's conviction for first-degree murder and the trial court's override of the jury's life recommendation. *Marshall v. State*, 604 So. 2d 799 (Fla. 1992).[8]

Mr. Marshall then sought postconviction relief pursuant to Fla. R. Crim. P. 3.850. Following a limited evidentiary hearing, the circuit court denied relief and, on appeal, this Court affirmed on all but one claim, a jury misconduct claim that it remanded for an evidentiary hearing. *Marshall v. State*, 854 So. 2d 1235 (Fla. 2003).

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influenced him and led him astray, and that his mother also failed to adequately discipline him, finding that these facts were "not mitigating circumstances" (R4086). The court did find as mitigating that Mr. Marshall's behavior at trial was acceptable, and that Mr. Marshall entered prison at a young age (*Id.*).

[8] The majority opinion concluded that there was no reasonable basis for the jury's life recommendation. *Marshall*, 604 So. 2d at 805-06. The three dissenting justices disagreed, determining that there *was* mitigating evidence in the record that could have persuaded a reasonable juror to vote for a life sentence; moreover, the dissent concluded it was "also likely that the jury rejected some of the aggravators found by the judge or assigned them minimal weight." *Id.* at 807 (Barkett, C.J., concurring in part and dissenting in part) (citing *Hallman v. State*, 560 So. 2d 223 (Fla. 1990)).

After the evidentiary hearing, the circuit court denied relief and, on appeal, this Court affirmed. *Marshall v. State*, 976 So. 2d 1071 (Fla. 2007). Mr. Marshall also filed directly in this Court a petition for writ of habeas corpus, which addressed in part his claim under *Ring* and *Apprendi*. The Court denied habeas relief by a vote of 5-2. *Marshall v. Crosby*, 911 So. 2d 1129 (Fla. 2005).

Mr. Marshall thereupon sought relief in the federal courts. First, a petition for writ of habeas corpus was filed in the United States District Court for the Southern District of Florida. That petition was denied, and the Eleventh Circuit Court of Appeals affirmed the denial. *Marshall v. Sec'y Fla. Dep't of Corrections*, 610 F.3d 576 (11th Cir. 2010), *cert denied sub nom Marshall v. Buss*, 563 U.S. 906 (2011).

GROUNDS FOR HABEAS CORPUS RELIEF

CLAIM I

THE CAPITAL SENTENCING STATUTE UNDER WHICH MR. MARSHALL WAS SENTENCED TO DEATH IS UNCONSTITUTIONAL AND HIS OVERRIDE DEATH SENTENCE STANDS IN VIOLATION OF THE SIXTH AND EIGHTH AMENDMENTS.

> *"[C]onsiderations of fairness and uniformity make it very 'difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases.'"*[9]

A. *Hurst v. Florida* and *Hurst v. State*

On January 12, 2016, the United States Supreme Court rendered its 8-1 decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and found that Florida's capital sentencing statute is unconstitutional. The Court ruled, "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." *Id.* The *Hurst* opinion identified the statutorily defined facts that must be found under Florida law before a death sentence may be imposed:

> The State fails to appreciate the central and singular role the judge plays under Florida law. As described above and by the Florida Supreme Court, **the Florida sentencing statute does not make a defendant eligible for death until "findings by the court that such person shall**

[9] *Atwell v. State*, 197 So.3d 1040, 1050 (Fla. 2016) (quoting *Falcon v. State*, 162 So. 2d 954, 962 (Fla. 2015) (quoting *Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980)).

> **be punished by death**." Fla. Stat. § 775.082(1) (emphasis added). The trial court alone **must find "the facts . . . [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances**." § 921.141(3). "[T]he jury's function under the Florida death penalty statute is advisory only." The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires.

Id. at 622 (emphasis added) (citations omitted). *Hurst v. Florida*, however, only addressed Sixth Amendment implications to Florida's capital sentencing scheme.

On October 14, 2016, this Court issued its decision in *Hurst v. State*, 2016 WL 6036978 (Fla. Oct. 14, 2016), and addressed the Sixth **and** Eighth Amendment implications of *Hurst v. Florida* following the remand from the Supreme Court. In *Hurst v. State*, the Court examined the federal precedent leading up to the *Hurst v. Florida* decision, including *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002),[10] as well as the longstanding deeply entrenched Florida law regarding the right to unanimous jury trials in criminal cases, and held that "the jury—not the judge—must be the finder of every fact, and thus every element necessary for the imposition of the death penalty." *Hurst*, 2016 WL 6036978 at *10. These facts include "the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and

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[10] Indeed, Mr. Marshall's first state habeas was premised, in part, on his entitlement to relief under *Apprendi* and *Ring*. *See Marshall,* 911 So. 2d at 1134-35.

that the aggravating factors outweigh the mitigating circumstances." In addition, the Court acknowledged that a Florida penalty phase jury has always had—and continues to have—the right to "grant mercy in a capital cases" even if "it finds aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating circumstances." *Hurst,* 2016 WL 6036978 at *12, *13. *See also id.* at *17 n.18 ("even if the jurors unanimously find that sufficient aggravators were proven beyond a reasonable doubt, and that the aggravators outweigh the mitigating circumstances, the jurors are never required to recommend death."). Moreover, the Court held that under the Sixth Amendment, all the statutory elements "must be found unanimously by the jury." *Id.* at *10, *15. *Accord Perry v. State*, 2016 WL 6036982 (Fla. Oct. 14, 2016).

The Court in *Hurst v. State* also determined that, under the Eighth Amendment and its "evolving standards" test, juror unanimity in any recommended verdict resulting in a death sentence is required under the Eighth Amendment. *Hurst v. State*, 2016 WL 6036978 at *15. The Eighth Amendment "evolving standards" test is equally applicable to Mr. Marshall's situation. In Florida there is now a consensus against—indeed a constitutional and statutory prohibition on—juror override death sentences. The Eighth Amendment "death is different" analysis embraced by the Court in *Hurst v. State* is equally applicable to cases of judicial overrides now forbidden under the Sixth Amendment and the new Florida statute. A death sentence "may not be arbitrarily imposed, but must be reserved only for defendants convicted of the most aggravated and least mitigated of murders." *Id.* The Court acknowledged the constitutional importance of the "view of the jury" as "a veritable microcosm of the community" in determining which "defendant committed the worst of murders with the least amount of mitigation." *Id.* at *16. Here, Mr. Marshall's jury made that determination and voted for a life sentence but the judge overrode that recommendation. While it was "within the power of the state to impose" a death sentence notwithstanding a jury vote for life in 1989, such a punishment has "since come to be viewed as unconstitutional" and thus "prohibited on constitutional grounds." *Id.* at *16 (citing *Montgomery v. Louisiana*, 136 S. Ct. 718, 742 (2016). Just as Florida has been a "clear outlier" in refusing to require unanimity for the juror death recommendation, *Hurst*, 2016 WL 6036978 at *17, so too has it been a "clear outlier" until now with regard to jury overrides. But with the overruling of *Spaziano*, the abrogation of *Tedder v. State*, and this Court's ruling in *Hurst v. State*, the practice of jury overrides has finally been relegated to the dustbin of history.

Because Mr. Marshall's jury was in no manner involved in the fact-finding process required under the Sixth Amendment to make him eligible for the death penalty, his sentence violates the Sixth Amendment. Mr. Marshall was indicted for and convicted of only first-degree murder. At the time of his conviction, the maximum sentence he could receive under Florida's capital statute was life imprisonment without the possibility of parole for 25 years. At the penalty phase, the jury, making no "findings" with respect to any facts necessary to impose the death penalty, returned a recommendation of life imprisonment. It is not known what, if any, aggravating circumstances were found by the jury to have been established beyond a reasonable doubt. It is not known if or whether the jury ever reached the additional factual determination of the sufficiency of the aggravators to make Mr. Marshall eligible for the death penalty. It is also not known if or whether the jury ever reached the factual determination that requires a weighing of the aggravation and mitigation.[11] Instead, the trial court made all the factual findings necessary to impose the death sentence on Mr. Marshall, a procedure that, under *Hurst v. Florida*, violated the Sixth Amendment (as Mr. Marshall contended in his 1991 direct appeal and in his first state habeas petition). And because the override death sentence, which was in the power of the State to impose in 1989, is now unconstitutional, Mr. Marshall's execution is also prohibited by the Eighth Amendment. Indeed, this Court in *Hurst v. State* noted that its decision in *Tedder v. State* has been abrogated by the Supreme Court's ruling in *Hurst v. Florida*.

[11] It could well be that, as the dissenters on Mr. Marshall's direct appeal noted, that the jury "rejected some of the aggravators found by the judge or assigned them little weight." *Marshall*, 604 So. 2d at 608 (Barkett, C.J., concurring in part and dissenting in part). It could also well be that the jurors decided to extent mercy to Mr. Marshall, a right uniquely within its province.

B. **Overrides Do Not Survive *Hurst v. Florida* or *Hurst v. State*.**

That judge overrides of jury recommendations of life did not survive Sixth Amendment scrutiny after the Supreme Court decision in *Apprendi* and *Ring* is not an earth-shattering proposition;[12] thus override death sentences cannot survive *Hurst v. Florida*, especially given that the Supreme Court overruled *Spaziano*. *Hurst*, 136 S. Ct. at 623 ("We now overrule *Spaziano* . . . in relevant part").[13] Nor can judicial overrides survive *Hurst v. State* on both Sixth and Eighth Amendment grounds; indeed, the overruling of *Spaziano* led this Court to conclude that *Tedder* had also been abrogated. Under the Sixth Amendment, the jury in Mr. Marshall's case had no part in the factfinding necessary to impose death; indeed, the life recommendation indicates that the jury found either that the aggravators were insufficient to impose the death penalty or that the aggravators did not outweigh the mitigators. Under the Eighth Amendment, *Hurst v. State*, in conjunction with *Perry v. State*, establish an Eighth Amendment consensus that those who received a life recommendation from the jury constitute a class of offenders who cannot be executed. Thus, Mr. Marshall's

[12] Even the State acknowledged in the *Asay* oral argument that, after *Hurst v. Florida*, there are "no overrides" anymore.

[13] The "relevant part" of *Spaziano* that was overruled related to its holding allowing, under the Sixth Amendment, a sentencing judge, "independent of a jury's factfinding," to find those facts "necessary for the imposition of the death penalty." *Hurst v. Florida*, 136 S. Ct. at 624.

jury override sentence violates the Sixth and Eighth Amendments.

Members of the Court have, over the years, addressed challenges to judicial overrides[14] and expressed grave doubts about the continuing viability of the judicial override following *Ring*.[15] Those concerns should inform the Court's consideration of the constitutionality of Mr. Marshall's override death sentence in light of *Hurst.* But the central case for the Court to reconsider is its previous decision in *Marshall v. Crosby* denying Mr. Marshall relief based on his *Ring/Apprendi* challenge to his override death sentence.

Aside from *Mills v. Moore,* in 2001[16] and the brief discussion of the override

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[14] *See Mills v. Moore*, 786 So. 2d 532 (Fla. 2001) (rejecting *Apprendi*-based challenge to override death sentence because no court had extended *Apprendi* to capital sentencing schemes and determining that the maximum penalty for first-degree murder was death simply because the statute referred to a "capital" felony).

[15] *Bottoson v. Moore*, 824 So. 2d 115, 118 (Fla. 2002) (concurring in granting of a stay of execution) (*Ring* established that "we were wrong" in *Mills* and it "casts serious doubt on the constitutionality of our scheme to the extent that it permits a judge to override a jury recommendation of a life sentence"); *Bottoson v. Moore*, 833 So. 2d 693, 726 (Fla. 2002) (Lewis, J., concurring in result only) ("we should not suggest the continuing validity of the concept of trial courts overriding jury recommendations of life imprisonment in these cases" because "a logical reading and comparison of the texts of *Spaziano* and *Ring* produces an inescapable conflict"); *Id.* at 702 (Quince, J., concurring specially with an opinion) ("Whether we may fundamentally agree that jury overrides may not be allowed under a full *Ring* analysis is not the issue here"); *King v. Moore*, 831 So. 2d 152 (Fla. 2002) (Pariente, J., concurring in result only) ("the reasoning relied on by the [Supreme] Court in *Spaziano* might be suspect in light of *Ring*").

[16] *See supra* n. 14.

issue in *Bottoson* and *King* by some members of the Court in 2002,[17] the Court did not address *Apprendi* or *Ring* in the context of a judicial override of a jury's death recommendation for three years until the issue was presented in Mr. Marshall's state habeas proceeding. The state habeas presented several claims, one of which was a challenge to Mr. Marshall's death sentence in light of *Apprendi* and *Ring.* Despite acknowledging "we have not addressed *Ring*'s application in the context of an override," the majority rejected the *Apprendi/Ring* claim for three reasons. **First**, the majority noted that the Supreme Court had consistently upheld Florida's capital sentencing statute and expressly upheld the override aspect in *Spaziano v. Florida*, 468 U.S. 447 (1984).[18] Despite "any tension between *Spaziano* and *Ring*," the majority concluded that "*Spaziano* remains good law" and it was not for this Court to "overrule" the Supreme Court's jurisprudence. *Marshall*, 911 So. 2d at 1134-35. **Second**, the majority concluded that Marshall's prior violent felonies "takes his sentence outside the scope of *Ring*'s requirements." *Id.* at 1135.[19] **Third,** the

[17] *See supra* n.15.

[18] *Spaziano* has now been expressly overruled by the Supreme Court in *Hurst v. Florida* to the extent that it permitted a judge, and not a jury, to make the necessary factual findings under Florida law to impose a death sentence.

[19] This portion of the *Marshall* holding is no longer tenable in light of *Hurst v. Florida* and *Hurst v. State*.

majority, relying on *Johnson v. State*, 904 So. 2d 400 (Fla. 2005), ruled that *Ring* could not be retroactively applied to Marshall's case "even assuming it affected Florida law." *Marshall*, 911 So. 2d at 1135.

Justice Lewis concurred, writing separately to "reiterate [his] concern that a trial judge's override of a jury's life recommendation stands in apparent 'irreconcilable conflict' with" *Ring*. *Marshall*, 911 So. 2d at 1138 (Lewis, J., concurring in result only) (quoting *Bottoson v. Moore*, 833 So. 2d 693, 727-28 (Fla. 2002) (Lewis, J., concurring in result only)). However, Justice Lewis opined that *Ring* could not be applied retroactively and was "inapplicable to this post-conviction case." *Marshall*, 911 So. 2d at 1139-40 (Lewis, J., concurring in result only).

The two dissenting justices in the habeas proceeding wrote opinions. Justice Pariente concurred with the denial of the *Ring* claim due to its nonretroactivity but wrote that the Court had erroneously rejected the *Tedder* claim on direct appeal. *Marshall*, 911 So. 2d at 1140 (Pariente, J., dissenting). Justice Anstead would have granted relief based on *Ring,* writing:

> Today, we approve a practice that has now been outlawed in the United States by this nation's highest court, the imposition of the death penalty by a single judge in the face of a jury finding that the circumstances of the case do not support a sentence of death and require a life sentence. Because this outcome essentially allows a trial judge to ignore a jury's actions and direct a verdict and judgment for death in favor of the State, it is patently offensive to our constitutional notions of due process and the right to a jury trial.

Marshall, 911 So. 2d at 1142 (Anstead, J., dissenting). Justice Anstead concluded that "Florida's death penalty scheme, and especially its provision for a judge override of a jury finding, violates the Sixth Amendment and is unconstitutional as applied in this case." *Id.* at 1143.

Each of the stated reasons for rejecting Mr. Marshall's claim by this Court in state habeas is now no longer valid as a matter of law. *Spaziano* is no longer good law, having been overruled in *Hurst v. Florida*. Reliance on prior violent felonies is also no longer a valid analysis; it is the "sufficiency" of the aggravation, when weighed against the mitigation, which must be found by a jury in order to impose a sentence of death in Florida.[20] Moreover, a Florida jury has always had the right to dispense mercy to a capital defendant notwithstanding having made the other requisite findings. Finally, as explained below, the Court's reliance on *Johnson v. State* with regard to *Ring*'s non-retroactivity does not apply to *Hurst v. Florida* error.

C. Retroactivity of *Hurst v. Florida and Hurst v. State*

1. Preservation of Sixth Amendment *Hildwin*-Based Claim and Eighth Amendment Claim on Direct Appeal.

In his direct appeal Initial Brief, filed in 1991, Mr. Marshall challenged not only the propriety of his override death sentence but also raised a challenge to the

[20] In any event, the jury was presented with the prior violent felonies and still recommended a life sentence for Mr. Marshall.

constitutionality *vel non* of Florida's capital sentencing statute. For example, in Point XXIV of the Initial Brief, he argued, *inter alia*:

> That our law forbids special verdicts as to theories of homicide ***and as to aggravating and mitigating circumstances makes problematic the judge's role in deciding whether to override the penalty verdict.*** The judge has no clue of which factors the jury considered or how it applied them, and has no way of knowing whether the jury acquitted the defendant of premeditated murder (so that a sentencing order finding of cold, calculated, and premeditated murder would be improper), or whether it acquitted him of felony murder (so that a finding of killing during the course of a felony would be inappropriate). Similarly, if the jury found the defendant guilty of felony murder, and not of premeditated murder, application of the felony murder aggravating circumstance would fail to narrow the class of death eligible persons as required by the eighth amendment under, *e.g., Lowenfeld v. Phelps*, 108 S. Ct. 546 (1988).

(Initial Brief, *Marshall v. State*, Case No. 75,406, at 106-07) (footnote omitted) (emphasis added). His brief further argued:

> Our law provides for trial court review of the penalty verdict. *Yet the trial court is in no position to know what aggravating and mitigating circumstances the jury found because the law does not provide for special verdicts.* Worse yet, it does not know whether the jury acquitted the defendant of felony murder or murder by premeditated design so that a finding of the felony murder or premeditation factor would violate double jeopardy under *Delap v. Dugger*, 890 F.2d 285, 306-319 (11^{th} Cir. 1989). This necessarily leads to double jeopardy and collateral estoppel problems where the jury has rejected an aggravating factor but the trial court nonetheless finds it. *It also ensures uncertainty in the fact finding process in violation of the eighth amendment.*
>
> ***Our law in effect makes the aggravating circumstances into elements of the crime so as to make the defendant death eligible.*** *Hence, the lack of unanimous jury verdict as to any aggravating circumstance violates Article I, Section 9, 16, and 17 of the state constitution and the*

> *Fifth, Sixth, Eighth, and Fourteenth Amendments to the Federal constitutional. See Adamson v. Ricketts*, 856 F.2d 1011 (9th Cir. 1988) (en banc). ***But see Hildwin v. Florida*, 109 S.Ct. 2055 (1989) (rejecting a similar Sixth Amendment argument).**

(Initial Brief, *Marshall v. State*, Case No. 75,406, at 113-14) (emphasis added). Not only did Mr. Marshall preserve a Sixth Amendment challenge to Florida's capital sentencing statute, noting the contrary authority in the then-recent decision in *Hildwin*, he also presented an Eighth Amendment challenge to the ability of a judge to override a jury's life recommendation, contending that it is "unconstitutional to impose a death sentence after a jury has recommended life imprisonment under legal instructions" (*Id.* at 115). His brief argued that "it violates every basic precept of the concept of justice known since the Magna Charta for a statute to purport to permit a judge to overrule a jury's decision for life" and that a "sentence imposed contrary to the jury's decision for life violates the cruel or unusual clause of the Constitution" (*Id.*). And his brief urged the Court to reconsider the propriety of the jury override notwithstanding *Spaziano* (*Id.*).[21]

The State's Answer Brief addressed the merits of Mr. Marshall's arguments, noting that the Sixth Amendment challenges had "been decided adversely to" Mr. Marshall in the then-recent decision in *Hildwin* (Answer Brief, *Marshall v. State*,

[21] *Spaziano* has now been overruled, and this Court noted the abrogation of *Tedder v. State* in the wake of *Hurst v. Florida*.

Case No. 75,406, at 97),[22] and the challenge to the override had been rejected in *Spaziano*. (*Id.*). This Court rejected the merits of Mr. Marshall's claims. *Marshall*, 604 So. 2d at 805 n.5 ("We reject Marshall's claims that the death penalty statute and the aggravating circumstances are unconstitutional."). Because Mr. Marshall raised on appeal what turned out to be the very argument that prevailed in *Hurst v. Florida* and later ratified in *Hurst v. State*, he should get the benefit of *Hurst*'s holding. *See James v. State*, 615 So. 2d 668 (Fla. 1993).

2. Preservation of *Apprendi/Ring* Challenge to Override Raised in First State Habeas Petition.

In his first state habeas petition, Mr. Marshall re-raised his Sixth Amendment claim, this time armed with *Apprendi* and *Ring*. *Marshall*, 911 So. 2d at 1133-34 ("Marshall's next claim is that the trial judge's decision to override the jury's recommendation in favor of life violates the principles set out in the Supreme Court's decisions in" *Apprendi* and *Ring*.). However, this Court rejected Mr. Marshall's argument on the merits. *Id.* at 1134-35. Now, in 2016, Mr. Marshall's arguments have proven correct. And now is the time for Mr. Marshall's unconstitutional override death sentence to be vacated because, as explained below, *Marshall v. Crosby* must be overruled because its reasoning does not survive *Hurst*

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[22] This portion of *Hildwin* was also overruled by the Supreme Court in *Hurst v. Florida*.

v. Florida and *Hurst v. State*. Reliance on *Marshall v. Crosby* would result in a manifest injustice in this case.

A "manifest injustice" is an "exception to the law of the case" doctrine:

> Generally, under the doctrine of the law of the case, "all questions of law which have been decided by the highest appellate court become the law of the case which must be followed in subsequent proceedings, both in the lower and appellate courts." *Brunner Enters., Inc. v. Department of Revenue,* 452 So. 2d 550, 552 (Fla.1984). However, the doctrine is not an absolute mandate, but rather a self-imposed restraint that courts abide by to promote finality and efficiency in the judicial process and prevent relitigation of the same issue in a case. *See Strazzulla v. Hendrick,* 177 So. 2d 1, 3 (Fla.1965) (explaining underlying policy). This Court has the power to reconsider and correct erroneous rulings in exceptional circumstances and where reliance on the previous decision would result in manifest injustice, notwithstanding that such rulings have become the law of the case. *Preston v. State,* 444 So. 2d 939 (Fla.1984).

State v. Owen, 696 So. 2d 715, 720 (Fla. 1997) (cited in *Walls v. State*, 2016 WL 6137287 at *7 (Fla. Oct. 20, 2016)) (Pariente, J., concurring).

3. The *Witt* Test is Satisfied and the Sixth Amendment Holdings of *Hurst v. Florida* and *Hurst v. State* Should be Fully Retroactive.

Hurst v. Florida is undoubtedly a "development of fundamental significance" within the meaning of *Witt v. State*, 387 So. 2d 922, 931 (Fla. 1980), and fairness dictates that *Hurst v. Florida* be given full retroactive effect. *See Falcon v. State*, 162 So. 3d 954, 962 (Fla. 2015); *Walls v. State*, 2016 WL 6137287 (Fla. Oct. 20, 2016); *Atwell v. State*, 197 So. 3d 1040 (Fla. 2016). *See also James v. State*, 615 So.

2d 668 (Fla. 1993).[23] A "sweeping change of law" of "fundamental significance" constituting a "jurisprudential upheaval" will qualify under *Witt*, *see Mitchell v. Moore*, 786 So. 2d 521, 529 (Fla. 2001) (brackets omitted) (citation omitted), and *Hurst v. Florida*, perhaps more so than virtually any other case decided since *Furman v. Georgia*, 408 U.S. 238 (1972), satisfies this standard. Indeed, *Hurst v. Florida* "places beyond the State of Florida the power to impose a certain sentence[,]" *i.e.* a sentence imposed where the jury has recommended a life sentence. *Walls v. State*, 2016 WL 6137287 at *6 (Fla. Oct. 20, 2016). In such circumstances, a new case is a "development of fundamental significance" under *Witt* and thus retroactive. *Id.* Moreover, it would be a "manifest injustice" to allow Mr. Marshall's override death sentence to stand; a "manifest injustice" is an "exception to the law of the case doctrine." *Walls*, 2016 WL 6137287 at *7 (Pariente, J., concurring). The abrogation of *Tedder v. State* in the wake of *Hurst v. Florida* also more than qualifies as a "jurisprudential upheaval" with regard to cases like Mr. Marshall's where the

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[23] As noted *supra*, Mr. Marshall did preserve his Sixth Amendment challenge on appeal, even noting the contrary authority of *Hildwin*. But to be sure, Mr. Marshall's position is that *Hurst* is fully retroactive notwithstanding prior preservation of the issue on direct appeal and in his prior state habeas petition. *See Atwell v. State*, 197 So.3d 1040, 1042 (Fla. 2016) (noting "patent unfairness" of treating similar defendants differently "based solely on when their cases were decided") (citing *Falcon v. State*, 162 So.3d 954, 962 (Fla. 2015)). A declaration of retroactivity means that a defendant need not have previously raised the issue now deemed meritorious by a subsequent decision; that is the whole point of retroactivity. *See, e.g. Thompson v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987).

jury recommended life but the judge overrode that recommendation. This practice was condoned by the now-overruled decision in *Spaziano* and effectuated in Florida by the now-abrogated decision in *Tedder.*

This Court's recent decision in *Hurst v. State*[24] only reinforces the necessity of retroactive application of *Hurst v. Florida*. There is no question that *Hurst v. Florida* is a case emanating from the United States Supreme Court and its ruling was constitutional in nature. *Witt*, 387 So. 2d at 931. The only remaining question is whether *Hurst v. Florida* "constitutes a development of fundamental significance" and thus warrants retroactive application. *Id.* And *Hurst v. State* in large part answers that question.

"Developments of fundamental significance are likely to fall within one of two categories: changes of law that either 'place beyond the authority of the state the power to regulate certain conduct or impose certain penalties' or are 'of sufficient magnitude to necessitate retroactive application' under the test set forth in *Stovall v. Denno*, 388 U.S. 293, 297 (1967), and *Linkletter v. Walker,* 381 U.S. 618, 636 (1965)." *Walls*, 2016 WL 6137287 at *5. There can be no question that one effect of

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[24] *Hurst v. State* had two holdings, one under the Sixth Amendment and one under the Eighth Amendment (requiring juror unanimity in the ultimate sentencing recommendation). It is the Sixth Amendment holding that is most applicable to Mr. Marshall's case given that his jury recommended a life sentence. Mr. Marshall does have an Eighth Amendment argument but it is distinct from the juror unanimity issue presented in and decided by *Hurst v. State*. *See* Claim II, *infra.*

Hurst v. Florida is that no overrides are permitted under Florida's capital sentencing scheme presently or in the future; indeed, one effect directly addressed to Mr. Marshall's situation is the abrogation of *Tedder. See also Perry v. State*, 2016 WL 6036982 at *5 (Fla. Oct. 14, 2016) ("the [new] law expressly eliminates the ability of the court to override a jury's recommendation for a life sentence with the imposition of a sentence of death"). Thus, the *Hurst v. Florida* holding placed beyond the power of the State the ability to impose a certain penalty, in particular, a death sentence notwithstanding a jury's recommendation of life imprisonment. *See also* Claim II, *infra*. Moreover, it is certainly a case of sufficient magnitude to warrant retroactive application because it not only abrogated *Tedder* but also upended the law in existence since 1972 with regard to our understanding of the jury's role in capital sentencing in Florida: "Since 1972, until the Supreme Court's ruling in *Hurst v. Florida*, it has been the Florida judge who ultimately makes his or her own determination of the existence of the aggravating factors, the evidence of mitigation, and the weight to be given each in the sentencing decision before a sentence of death could be imposed." *Hurst v. State* at *13. In fact, the Court explained in *Hurst v. State* that *Hurst v. Florida* restored the jury's prominent and dispositive role in early capital cases in Florida to "control[] which defendants would receive death" by rendering unanimous verdicts. *Hurst*, 2106 WL 6036978 at *11, *12.

The *Hurst v. State* decision also acknowledged the added reliability to the system resulting from requiring unanimous jury factfinding and unanimity in the jury's death recommendation, as well as "significant benefits that will further the administration of justice." *Id.* at *14. These are also factors that further favor full retroactivity of *Hurst v. Florida*. For example, the Court, citing to a Ninth Circuit Court of Appeals decision authored by Supreme Court Justice Kennedy while sitting as a judge on the Ninth Circuit, noted the "salutatory benefits of the unanimity requirement on jury deliberations." *Id.* (citing *United States v. Lopez*, 581 F.2d 1338, 1341 (9th Cir. 1978). The Court also found embraced the empirical research that jurors act more thoroughly and with the requisite gravity to their task when they are required to reach a unanimous verdict, thus "help[ing] to ensure the heightened level of protection necessary for a defendant who stands to lose his life as a penalty." *Hurst*, 2016 WL 6036978 at *14.

Most importantly, both *Hurst v. Florida* and *Hurst v. State* completely undermine the majority opinion in *Marshall v. Crosby* where this Court rejected Mr. Marshall's claim, then premised on *Apprendi* and *Ring*. *Spaziano* is no longer good law, and as to the Court's reliance on the *Bottoson* plurality opinion to reject Mr. Marshall's claim, the Supreme Court specifically addressed this Court's ruling in *Bottoson* and overturned both *Spaziano* and *Hildwin*, the impediments this Court noted in *Bottoson* to applying *Ring* and *Apprendi* to Florida. *Hurst*, 136 S. Ct. at 623.

Both *Hurst* decisions are intervening decisions that warrant lifting the "law of the case" from *Marshall v. Crosby;* to hold otherwise would be to result in a manifest injustice in Mr. Marshall's case.

Any continued reliance on the Court's 2005 decision in *Johnson v. State*, in which the Court determined that *Ring* would not be given retroactive effect, likewise would be misplaced and result in a grotesque result in Mr. Marshall's case given that the State has represented to this Court that the override provision of the former statute no longer remains constitutional. When this Court issued *Johnson*, it was still relying on the vitality of *Hildwin* and *Spaziano,* both of which were overruled in *Hurst v. Florida*. Further, the *Witt* analysis conducted in *Johnson* was infused with this Court's failure to recognize that *Ring* and *Apprendi* applied in Florida, a fact that has now been answered by *Hurst v. Florida*. *Johnson* also was infused with the Court's reliance on its prior decision in *Bottoson,* reliance that, based on *Hurst v. Florida*, was improper as the underpinning of *Bottoson*—that *Ring* and *Apprendi* did not apply to Florida's capital sentencing scheme—was itself erroneous. It would be a "manifest injustice" to allow Mr. Marshall's override death sentence to stand at this time. *Walls*, 2016 WL 6137287 at *7 (Pariente, J., concurring); *Marshall*, 911 So. 2d at 1153 (Anstead, J., dissenting) (noting that "[t]his is a sad day for constitutional law and justice in the State of Florida" to allow Mr. Marshall's override to stand following *Ring*).

4. The Eighth Amendment Holding in *Hurst v. State* Should be Fully Retroactive.

As noted above, *Hurst v. State* had a second constitutional component to its holding, girded to the Eighth Amendment. The Court recognized that the "evolving standards of decency" test from the Eighth Amendment "considers whether punishments that were in the power of the state to impose at the time, but have since come to be viewed as unconstitutional, should be prohibited on constitutional grounds." *Hurst*, 2016 WL 6036978 at *16 (citing *Montgomery v. Louisiana*, 136 S.Ct. 718, 742 (2016). There is no question at all that a death sentence resulting from the judicial override of a jury's recommended sentence of life imprisonment is no longer tolerable under either the Sixth or Eighth Amendments and thus has "since come to be viewed as unconstitutional." *Spaziano* and *Tedder* are no longer the law.

The Eighth Amendment's prohibition on death sentences resulting from jury overrides is a substantive rule demanding retroactive effect. "Substantive rules [] set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose." *Montgomery*, 136 S. Ct. at 729. This is why substantive changes in law demand retroactivity, because "the Constitution immunizes the defendant from the sentence imposed." *Id.* at 730. "No circumstances call more for the invocation of a rule of complete retroactivity." *Id.* (citation omitted). *See also Walls*, 2016 WL 6137287 at *6 (retroactivity of substantive change in law is required where new law "places beyond the State of Florida the power to impose a certain sentence").

Although there were not many states that allowed jury overrides at the time that Mr. Marshall's death sentence was imposed over the recommendation made by his jury for a life sentence, the practice still had the constitutional imprimatur of the Supreme Court's decision in *Spaziano* and this Court's decision in *Tedder*. However, *Spaziano* has been overruled and *Tedder* has been abrogated; and now Florida joins those few other states that have abolished override death sentences in light of *Ring* and even following *Hurst v. Florida*. *See, e.g. Rauf v. Delaware*, 145 A.3d 430 (Del. 2016). Alabama appears to be the *only* state where death sentences resulting from judge overrides are still available, although the continued viability of the Alabama scheme seems to be in doubt. *Hurst*, 2016 WL 6036978 at n.26 (noting that Supreme Court has remanded Alabama cases for reconsideration in light of *Hurst*). To allow Mr. Marshall to be executed under these circumstances, where his death sentence is unquestionably unconstitutional under the Eight Amendment evolving standards of decency, would itself violate the Eighth Amendment.

5. The Error is not Harmless.

This Court in *Hurst v. State* held that harmless error is available for the Sixth Amendment error discussed in that case and in *Hurst v. Florida*. *Hurst*, 2016 WL 6036978 at *22. However, in Mr. Marshall's case, his jury returned a life recommendation, a circumstance that all but proscribes the State from being able to meet its extremely high burden of establishing harmlessness of the error beyond a reasonable doubt. In fact it would make it impossible given that, to establish harmlessness the State has to establish beyond a reasonable doubt that "the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to [Mr. Marshall's] death sentence." *Id.* at *23. Here, the premise of the very question—the jury's failure to unanimously find all the facts—cannot even be met given that the jury did, in fact, recommend a life sentence. It could well be that, as the dissenters on Mr. Marshall's direct appeal noted, that the jury "rejected some of the aggravators found by the judge or assigned them little weight." *Marshall*, 604 So. 2d at 608 (Barkett, C.J., concurring in part and dissenting in part). It could also well be that the jurors decided to extent mercy to Mr. Marshall, a right uniquely within its province. *See Hurst,* 2016 WL 6036978 at *12, *13 (a Florida penalty phase jury has always had—and continues to have—the right to "grant mercy in a capital cases" even if "it finds aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating circumstances."); *id.* at *17 n.18 ("even if the jurors unanimously find that sufficient aggravators were proven beyond a reasonable doubt, and that the aggravators outweigh the mitigating circumstances, the jurors are never required to recommend death."). Under these circumstances, the State is unable to establish harmlessness beyond a reasonable doubt.

Moreover, on remand, Mr. Marshall is entitled to the benefit of his life recommendation from the jury and therefore his case should be remanded for the imposition of a sentence of life imprisonment without the possibility of parole for 25 years. *See Wright v. State*, 586 So. 2d 1024, 1032 (Fla. 1991) (because "the constitutional protection against double jeopardy provides that if a defendant has been in effect 'acquitted' of the death sentence," a jury's vote in favor of a life recommendation has double jeopardy protection). *See also Marshall*, 911 So. 2d at 1152 (Anstead, J., dissenting) (noting that impact on administration of justice for a finding of retroactivity of *Ring* in jury override cases would be minimal because only a few individuals are still on death row with override death sentences[25] and, due to double jeopardy principles, "these individuals would not need additional sentencing proceedings because their death sentences would be commuted to life") (citing *Wright*, 586 So. 2d at 1032). There would be no basis on which to remand for any other type of resentencing proceeding given that Mr. Marshall is entitled to his life

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[25] At present there are three Florida defendants on death row in whose cases the jury recommended a life sentence. Mr. Marshall is one. William Zeigler is another. *See Zeigler v. State*, 580 So. 2d 127 (Fla. 1991). Edward Zakrzweski is the third, but his case involved three victims and the jury recommended death for two of the three victims. *See Zakrzweski v. State*, 717 So. 2d 488 (Fla. 1998).

recommendation, *Tedder* has been abrogated, and there is no constitutional manner for him to be sentenced to death given the new statute's prohibition on jury overrides. *See Perry,* 2016 WL 6036982 at *5 (Fla. Oct. 14, 2016) ("the [new] law expressly eliminates the ability of the court to override a jury's recommendation for a life sentence with the imposition of a sentence of death").

D. Conclusion

As Justice Anstead wrote in this very case:

> Today, we approve a practice that has now been outlawed in the United States by this nation's highest court, the imposition of the death penalty by a single judge in the face of a jury finding that the circumstances of the case do not support a sentence of death and require a life sentence. Because this outcome essentially allows a trial judge to ignore a jury's actions and direct a verdict and judgment for death in favor of the State, it is patently offensive to our constitutional notions of due process and the right to a jury trial.

Marshall, 911 So. 2d at 1142 (Anstead, J., dissenting). If it was not clear when *Ring* issued that the practice of judicial overrides violated the Sixth Amendment, it is certainly clear now in light of *Hurst v. Florida* and its overruling of *Spaziano* and *Tedder*. This Court expressly relied in *Spaziano* in rejecting Mr. Marshall's state habeas claim premised on *Ring* and *Apprendi*. *Marshall*, 911 So. 2d at 1135 ("In fact, the United States Supreme Court expressly upheld the jury override aspect of Florida's sentencing scheme. . . . *Spaziano* remains good law.") (citing *Spaziano*, 468 U.S. at 466). But *Spaziano* has been overturned by the Supreme Court. It is now time for this Court to overturn Mr. Marshall's override death sentence just as it did not hesitate to acknowledge the abrogation of *Tedder.*

The trial judge, rather than the jury, made all of the factual findings necessary under the then-extant capital sentencing statute to render Mr. Marshall eligible for the death penalty. The jury was instructed, in accordance with the capital sentencing statute at the time, that its role was to consider whether sufficient aggravating circumstances existed to justify the imposition of the death penalty and whether there were insufficient mitigating circumstances to outweigh the aggravating circumstances. The jury returned with a life recommendation. "[F]rom a jury's bare advisory recommendation, it would be impossible to tell which, if any, aggravating circumstances a jury or any individual juror may have determined existed. And, of course, a 'recommendation' is hardly a finding at all." *Bottoson,* 833 So. 3d at 708 (Anstead, C.J., concurring in result only). *Accord Hurst*, 136 S. Ct. at 622 ("The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires"). *Hurst v. Florida,* like *Ring,* "counsels that this Court cannot allow a sentencing judicial officer to find aggravating factors contrary to the specific findings of a jury on aggravating factors and override jury recommendations of life imprisonment," *Bottoson*, 833 So. 2d at 726 (Lewis, J., concurring in result only).

The time has come for this Court to vacate Mr. Marshall's unconstitutional sentence of death, a sentence imposed over the recommendation of the jury's life recommendation.[26] Mr. Marshall is entitled to the benefit of the life recommendation returned by the jury. *See Wright v. State*, 586 So. 2d 1024, 1032 (Fla. 1991) (because "the constitutional protection against double jeopardy provides that if a defendant has been in effect 'acquitted' of the death sentence," a jury's vote in favor of a life recommendation has double jeopardy protection). At a minimum, this Court should hold *Hurst v. Florida* retroactive and authorize Mr. Marshall to present his *Hurst* claim in a Rule 3.851 motion.

CLAIM II

UNDER §921.141, FLA. STAT. (2016), MR. MARSHALL'S DEATH SENTENCE MUST BE CONVERTED TO A LIFE SENTENCE WITHOUT THE POSSIBILITY OF PAROLE FOR 25 YEARS; TO RULE OTHERWISE WOULD VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS.

In *Roper Simmons*, 543 U.S. 551 (2005), the Supreme Court held that the death penalty imposed on individuals under the age of 18 at the time of the commission of the crime violated the Eighth and Fourteenth Amendments. In the wake of *Roper*, there was no question that a sentenced capital defendant who committed his or her crime before the age of 18 was entitled to the benefit of *Roper*.

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[26] This Court has the authority to vacate Mr. Marshall's sentence on its own and then remand to the circuit court for the imposition of a life sentence without the possibility of parole for 25 years, as it did in the Cleo LeCroy case. *See* Claim II, *infra*.

Indeed, in Cleo LeCroy's case, the State agreed that, in light of *Roper*, Mr. LeCroy's death sentence had to be vacated in favor of a life sentence without the possibility of parole for 25 years. *See* Response to Order to Show Cause, *LeCroy v. State*, Case No. SC05-136 ("The State agrees *Roper* is applicable to LeCroy's case and has no objection to the relinquishment of jurisdiction. Further, the State will not object to the vacating of LeCroy's death sentence …).[27] Upon receipt of the State's response, this Court entered an order vacating Mr. LeCroy's death sentence and remanded the case to the trial court for the imposition of a life sentence without the possibility of parole for 25 years (Attachment A). There is no meaningful difference between Mr. LeCroy's situation and the present circumstances of Mr. Marshall's case. *Roper* outlawed Mr. LeCroy's death sentence, and *Hurst v. Florida*, 136 S. Ct. 616 (2016), *Hurst v. State*, 2016 WL 6036978 (Fla. Oct. 14, 2016), and *Perry v. State*, 2016 WL 6036982 (Fla. Oct. 14, 2016), have outlawed Mr. Marshall's override death sentence. This Court's decision in *Tedder v. State*, 322 So. 2d 908 (Fla. 1975), has also been abrogated. *Hurst v. State*, 2016 WL 6036978 at *1 (Fla. Oct. 14, 2016).

[27] The State's Response came as a result of a Show Cause Order issued by the Court following the release of *Roper*. *See* Order to Show Cause, *LeCroy v. State*, Case No. SC05-136 ("In light of the United States Supreme Court decision in *Roper v. Simmons*, 125 S. Ct. 1183 (2005), the Court hereby orders the State to show cause why the death sentence imposed in this case should not be vacated and the case remanded for the imposition of a sentence of life imprisonment without the possibility of parole for twenty-five years").

The new §921.141 now provides that when a jury returns a life recommendation, the sentencing judge "must" impose a life sentence. *See* Staff Analysis of the Criminal Justice Subcommittee accompanying HB 7101, p. 1 ("If the jury recommends life imprisonment without the possibility of parole, the judge **must** impose the recommended sentence.") (emphasis added). *Accord Perry,* 2016 WL 6036982 at *5 (Fla. Oct. 14, 2016) ("the [new] law expressly eliminates the ability of the court to override a jury's recommendation for a life sentence with the imposition of a sentence of death"). The constitutionality of this particular provision of the new statute was unchallenged by the State in *Perry* and held to be constitutional.

Under the new statute, Mr. Marshall's death sentence must be vacated in favor of the life sentence recommended by his jury whether or not this Court determines that *Hurst v. Florida* is retroactive[28] because the new statute conclusively establishes that a death sentence premised on a jury's vote for life violates the Eighth Amendment's evolving standards of decency and constitutes cruel and unusual punishment. *See Hurst,* 2016 WL 6036978 at *16 ("[t]he 'evolving standards' test considers whether punishments that were within the power of the state to impose at the time, but have since come to be viewed as unconstitutional, should be prohibited

[28] *See* Claim I, *supra.*

on constitutional grounds") (citing *Montgomery v. Louisiana*, 136 S. Ct. 718, 742 (2016)). It also shows that granting other similarly situated individuals the benefit of the new statute while depriving Mr. Marshall of its benefit would leave his death sentence dependent upon the arbitrary application of the new statute in violation of the Eighth Amendment, as well as Due Process and Equal Protection Clauses of the Fourteenth Amendment. *See Atwell v. State*, 197 So. 3d 1040, 1049 (Fla. 2016) ("'[c]onsiderations of fairness and uniformity make it very difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases'") (quoting *Falcon v. State*, 162 So. 3d 954, 962 (Fla. 2015) (quoting *Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980))). Refusal to apply the new statute to Mr. Marshall's death sentence would also result in him being one of only two individuals on Florida's death row serving a death sentence when the jury recommended a life sentence by way of an override procedure that everyone concedes is now unconstitutional and is in fact forbidden in Florida's new capital sentencing statute. This, too, would violate the Eighth Amendment.[29]

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[29] In a pre-*Hurst v. Florida* opinion respecting the denial of certiorari in an Alabama capital case, Justice Sotomayor noted the defunct nature of the override in Florida since 1999:

> Since 1972, 166 death sentences have been imposed in Florida following a jury recommendation of life imprisonment. Between 1973

The enactment of the new statute (not to mention the abrogation of *Tedder*) establishes that Mr. Marshall's death sentence constitutes cruel and unusual punishment under the Eighth Amendment, and continuation of his death sentence under a scheme conceded by all to be unconstitutional would make Florida's outlier status even more acutely apparent. The new statute demonstrates a consensus within the State of Florida and an absolute national consensus against imposing a death sentence when they jury votes for life imprisonment, thus the imposition of a death sentence in Mr. Marshall's case violates the evolving standards of decency enshrined in the Eighth Amendment. *See Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002); *Roper Simmons*, 543 U.S. 551, 561 (2005). "Whether this requirement has been fulfilled is determined not by the standards that prevailed when the Eighth Amendment was adopted in 1791 **but by the norms that 'currently prevail**.'"

> and 1989, an average of eight people was sentenced to death on an override each year. That average number dropped by 50 percent between 1990 and 1994, and by an additional 70 percent from 1995 to 1999. The practice then stopped completely. It has been more than 14 years since the last life-to-death override in Florida; the last person sentenced to death after a jury recommendation of life imprisonment was Jeffrey Weaver, sentenced in August 1999.

Woodward v. Alabama, 134 S. Ct. 405, 408 n.6) (2013). The State of Florida, in its merits brief to the Supreme Court in *Hurst v. Florida,* it likewise touted the fact that "overrides are essentially nonexistent in Florida" (Brief of Respondent, *Hurst v. Florida*, No. 14-7505, at 25 n.9).

Kennedy v. Louisiana, 554 U.S. 407, 419 (2008) (emphasis added). As Florida's new capital sentencing statue establishes, the norms that "currently prevail" do not permit the imposition of a death sentence when the jury has voted for life imprisonment. *See* Transcript of Oral Argument, *Asay v. Jones*, Nos. SC16,102 & 16,223 (Oral Argument of Assistant Attorney General Charmaine M. Millsaps) ("In other words, no overrides"). *See also Perry*, 2016 WL 6036982 at *5 (Fla. Oct. 14, 2016) ("the [new] law expressly eliminates the ability of the court to override a jury's recommendation for a life sentence with the imposition of a sentence of death").

Because the jury in Mr. Marshall's case formally voted for a life sentence, his death sentenced imposed by the judge violates the Eighth Amendment. To carrying out his death sentence in these circumstances would be just as constitutionally offensive as if Cleo LeCroy's sentence had been carried out despite the unconstitutionality of his death sentence. This Court, with the agreement of the State, properly vacated Mr. LeCroy's death sentence. It is now time to do the same thing for Mr. Marshall. "This Court has stepped up to the plate before in being certain that we apply the prevailing standards of the law to death penalty cases," *White v. State*, 664 So. 2d 242, 247 (Fla. 1995) (Anstead, J., dissenting), and must do so here by vacating Mr. Marshall's override death sentence.

CLAIM III

MR. MARSHALL IS DUE TO HAVE HIS DEATH SENTENCE VACATED AND SENTENCED TO LIFE IMPRISONMENT PURSUANT TO §775.082(2), FLA STAT.

In *Hurst v. Florida*, 136 S. Ct. 616 (2016), the Supreme Court not only invalidated the capital sentencing scheme under which Mr. Marshall was sentenced—a scheme which authorized a trial judge to override a jury recommendation of life notwithstanding that the jury has made no findings whatsoever with regard to the facts necessary for the judge to impose death—it also overruled *Spaziano v. Florida*, 468 U.S. 447 (1984), the seminal case which upheld the practice of permitting a judge to override a jury life recommendation. Specifically, the *Hurst v. Florida* Court concluded that the conclusion reached in *Spaziano* was "wrong" and that "[t]ime and subsequent cases have washed away" its logic. *Hurst*, 136 S. Ct. at 624. Hence, the Supreme Court overruled *Spaziano* to the extent that it allowed "a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for the imposition of the death penalty." *Id.* In the wake of *Hurst v. Florida* and the overruling of *Spaziano*, an occurrence which led this Court to abrogate *Tedder v. State,* 322 So. 2d 908 (Fla. 1975), the new §921.141 now provides that when a jury returns a life recommendation, the sentencing judge "must" impose a life sentence. *See* Staff Analysis of the Criminal Justice Subcommittee accompanying HB 7101, p. 1 ("If the jury recommends life imprisonment without the possibility of parole, the judge **must** impose the recommended sentence.") (emphasis added).

Mr. Marshall submits that the provision of §775.082(2), Fla. Stat.,[30] applies in his unique situation because "the death penalty" in a particularized class of cases (override cases) was "held to be unconstitutional" by the United States Supreme Court. The Supreme Court overruled *Spaziano*, the very case that had authorized an override death sentence under the Sixth Amendment, and this Court has since abrogated *Tedder*. The death penalty for cases involving jury overrides of life recommendations has been found unconstitutional, just as the death penalty for juvenile offenders under the age of 18 was found unconstitutional in *Roper v. Simmons*, 543 U.S. 551 (2005). Mr. Marshall respectfully submits that under these circumstances, §775.082(2), Fla. Stat. would apply and mandate that his override death sentence be vacated and that he be resentenced to life imprisonment without

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[30] This statutory provision provides:

> 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). No sentence of death shall be reduced as a result of a determination that a method of execution is held to be unconstitutional under the State Constitution or the Constitution of the United States.

the possibility of parole.

Moreover, not only was the death penalty outlawed in cases where the jury returned a life sentence in *Hurst v. Florida* but also, under *Hurst v. State,* 2016 WL 6036978 (Fla. Oct. 14, 2016), and *Perry v. State*, 2016 WL 6036982 (Fla. Oct. 14, 2016), death sentences imposed where the jury returned a life recommendation are outlawed as well. Mr. Marshall acknowledges that in *Hurst v. State*, the Court rejected an argument advanced by Hurst that he was entitled to a life sentence under §775.082(2), Fla. Stat., in the wake of *Hurst v. Florida*. *Hurst* at *19 - *22. Mr. Marshall maintains, however, that his unique case (an override) takes him outside of the broader holding in *Hurst v. State*. There is no more death penalty available when the jury has returned a life recommendation. And unlike the remedy available under *Hurst v. State*—a resentencing before a jury—there is no remedy for an override case but to impose a life sentence because double jeopardy attaches to that recommendation. *See Wright v. State*, 586 So. 2d 1024, 1032 (Fla. 1991) (because "the constitutional protection against double jeopardy provides that if a defendant has been in effect 'acquitted' of the death sentence," a jury's vote in favor of a life recommendation has double jeopardy protection).

CONCLUSION

For the reasons set forth here, the Petitioner, Matthew Marshall, petitions the Court to grant this petition and order that his death sentence, the result of a judicial override of the jury's life recommendation, be vacated immediately and that a sentence of life imprisonment without the possibility of parole for 25 years be entered. In the alternative, the Petitioner petitions the Court to vacate his death sentence and to remand the case to the trial court for the imposition of a life sentence without the possibility of parole for 25 years.

Respectfully submitted,

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CERTIFICATES OF SERVICE AND FONT

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed on this 21st day of November, 2016, and opposing counsel will be served on this date. Counsel further certifies that this petition is typed in Times New Roman 14-point font.

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ATTACHMENT J

Filing # 50440328 E-Filed 12/22/2016 02:42:50 PM

IN THE SUPREME COURT OF FLORIDA
Case No. SC16-779

****

MATTHEW MARSHALL,
Petitioner,

v.

JULIE L. JONES,
Secretary, Florida Dep't. Of Corrections,
Respondent.

****

RESPONSE TO AMENDED PETITION FOR HABEAS CORPUS

****

RECEIVED, 12/22/2016 02:43:30 PM, Clerk, Supreme Court

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STATEMENT OF THE CASE AND FACTS

Trial and Direct Appeal:

In December 1989, Petitioner, Matthew Marshall ("Marshall"), an inmate at the Martin Correctional Institute, in Martin County, Florida, was convicted of the first-degree murder of a fellow inmate, Jeffrey Henry. The jury recommended a sentence of life in prison. The trial court overrode the jury's recommendation and imposed a death sentence, finding it "so clear and convincing" that the mitigating circumstances did not outweigh the aggravating circumstances "that no reasonable person could differ." Marshall v. State, 604 So.2d 799, 802 (Fla. 1992). In aggravation, the trial judge found: (1) that the murder was committed by a person under sentence of imprisonment; (2) that Marshall was previously convicted of nine (9) violent felonies (kidnapping, sexual assault, and seven armed robberies with a gun); (3) that the murder was committed while Marshall was engaged in the commission of or an attempt to commit a burglary; and (4) that the murder was especially heinous, atrocious, and cruel. In mitigation, the judge found that Marshall's behavior at trial was acceptable and that he entered prison at a young age.

This Court affirmed the conviction and death sentence on direct appeal, outlining the facts of the murder as follows:

> Marshall and the victim, Jeffrey Henry, were both incarcerated at the Martin Correction Institute on November 1, 1988, when witnesses

> heard muffled screams and moans emanating from Henry's cell and observed Marshall exiting the cell with what appeared to be blood on his chest and arms. Within a few minutes, Marshall reentered the cell, and similar noises were heard. After the cell became quiet, Marshall again emerged with blood on his person. Henry was found dead, lying in his cell face down with his hands bound behind his back and his sweat pants pulled down around his ankles to restrain his legs. Death was caused by blows to the back of his head.
>
> Marshall was charged with first-degree murder. His defense at trial was that he killed Henry in self-defense. Marshall claimed that Henry was a "muscle man" for several inmates who operated a football pool. When Marshall tried to collect his winnings from the inmates, they told him to get the money from Henry. Marshall claims he entered Henry's cell only to collect his winnings but that Henry refused to pay, and that Henry then attacked him, so he fought back.

Marshall v. State, 604 So.2d at 802.

Regarding the override, this Court explained that pursuant to Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975), a trial judge must follow a jury's recommendation of death unless "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." Id. "Where the record contains no evidence supporting a life recommendation, the trial court does not err in declining to follow that recommendation." Marshall, 604 So.2d at 806. Applying the law to Marshall's case, this Court concluded that the override sentence was proper:

> In this case, the record contains insufficient evidence to reasonably support the jury's recommendation of life. Marshall's father was unable to attend the trial, but the defense and prosecution stipulated that he would have testified that Marshall did well in school until his early teens when his older brother influenced him to run the streets and break the law; that Marshall's mother did not discipline Marshall and

> allowed him to believe there would be no consequences for his behavior; and that Marshall's father loved him and requested a life sentence for his son. The trial court determined these facts were not mitigating, but did find Marshall's behavior at trial as well as his entering prison at a young age to be mitigating. We find no error in the court's assessment of this mitigation and conclude that it does not provide a reasonable basis for the jury's recommendation of life in this case. Even viewing this mitigation in the light most favorable to Marshall, it pales in significance when weighed against the four statutory aggravating circumstances, including Marshall's record of violent felonies consisting of kidnapping, sexual battery, and seven armed robberies.
>
> Furthermore, defense counsel's argument composed largely of a negative characterization of the victim does not provide a reasonable basis for the jury's life recommendation. Moreover, contrary to Marshall's assertion, the facts surrounding the murder do not suggest that the murder was committed in self defense or in a fit of rage. The witnesses heard muffled screams and moans emanating from the victim's cell and observed Marshall leaving the cell with what appeared to be blood on his chest and arms. Within a few minutes, Marshall reentered the cell and similar noises were again heard. The victim was found lying face down with his hands bound behind his back and his ankles were restrained. The victim received no less than twenty-five separate wounds and blood was sprayed and splattered about the cell. Death was caused by blows to the back of his head. Nothing in these facts supports the notion that Marshall acted in self defense or that he simply killed the victim in the heat of a fight. We thus conclude that the trial court did not abuse its discretion in finding the facts supporting the death sentence to be "so clear and convincing that no reasonable person could differ." *See Tedder*, 322 So. 2d at 910.

Id. at 806.

This Court denied rehearing on September 28, 1992 and the United States Supreme Court denied certiorari review on May 17, 1993. Marshall v. Florida, 508 U.S. 915 (1993).

Postconviction Motion, Appeal and Habeas Petition:

In August, 1994, Marshall filed an initial 3.850 motion and, thereafter, on January 29, 1999, filed an amended motion raising twenty-seven claims. Marshall v. State, 854 So.2d 1235, 1239 (Fla. 2003). The trial court granted an evidentiary hearing on four (4) issues and summarily denied the remaining claims. Among the issues summarily denied was Marshall's claim that the jury override resulted in an arbitrary, capricious, and unreliable death sentence. After a three-day evidentiary hearing, held August 23-26, 1999, the trial court denied all relief. Marshall appealed the adverse ruling to the Florida Supreme Court, raising five (5) issues on appeal.

On June 12, 2003, this Court affirmed the denial of all but one issue, the juror misconduct claim, which it remanded for a limited evidentiary hearing. Marshall, 854 So.2d at 1253.

While the appeal was pending, Marshall had also filed, on February, 22, 2002, a Petition for Writ of Habeas Corpus, raising three claims, including the trial judge's override of the jury's life recommendation violated the Constitution pursuant to the United States Supreme Court's opinions in Apprendi v. New Jersey, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000), and Ring v. Arizona, 536 U.S. 584, 153 L. Ed. 2d 556, 122 S. Ct. 2428 (2002), and the standard for jury override cases announced in Tedder, 322 So. 2d 908 was arbitrarily applied in Marshall's case.

This Court rejected Marshall's claim that Apprendi/Ring invalidated his override, stating:

> In over fifty cases since *Ring*'s release, we have rejected *Ring* claims. Although we have not addressed *Ring*'s application in the context of a jury override verdict, our previous conclusions with regard to *Ring* claims preclude Marshall from being granted relief on his claim. First, as our plurality opinion noted in *Bottoson*, "the United States Supreme Court repeatedly has reviewed and upheld Florida's capital sentencing statute over the past quarter of a century." *Bottoson*, 833 So. 2d at 695 & n.4 (Fla. 2002)(listing as examples *Hildwin v. Florida*, 490 U.S. 638, 104 L. Ed. 2d 728, 109 S. Ct. 2055 (1989), *Spaziano v. Florida*, 468 U.S. 447, 82 L. Ed. 2d 340, 104 S. Ct. 3154 (1984), *Barclay v. Florida*, 463 U.S. 939, 77 L. Ed. 2d 1134, 103 S. Ct. 3418 (1983), and *Proffitt v. Florida*, 428 U.S. 242, 49 L. Ed. 2d 913, 96 S. Ct. 2960 (1976)). In fact, the United States Supreme Court expressly upheld the jury override aspect of Florida's sentencing scheme. *See Spaziano*, 468 U.S. at 466 ("We see nothing that suggests that the application of the jury-override procedure has resulted in arbitrary or discriminatory application of the death penalty, either in general or in this particular case."). *Spaziano* remains good law, and as was noted in the *Bottoson* plurality opinion, despite any tension between *Spaziano* and *Ring*, this Court relies on the United States Supreme Court's admonition that lower courts should "follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Bottoson*, 833 So. 2d at 695 (quoting *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484, 104 L. Ed. 2d 526, 109 S. Ct. 1917 (1989)).
>
> Second, *Ring* did not alter the express exemption in *Apprendi* that prior convictions are exempt from the Sixth Amendment requirements announced in the two cases. *See Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000). We have repeatedly relied on the presence of the prior violent felony aggravating circumstance when denying Ring claims. In the instant case, one of Marshall's aggravating circumstances was that he had been previously convicted of nine violent felonies. Therefore, even if *Ring* were to call Florida's jury override procedures into question, Marshall's nine prior violent felonies are an aggravating circumstance that takes his sentence

> outside the scope of *Ring*'s requirements.
>
> Finally, we have recently held in *Johnson v. State*, 904 So. 2d 400 (Fla. 2005) that we will not apply *Ring* retroactively in post-conviction cases even assuming it affected Florida law.

Marshall v. Crosby, 911 So.2d 1129, 1134-35 (Fla. 2005).

This Court also rejected Marshall's claim that Tedder, was arbitrarily applied in this case based on language found in Keen v. State, 775 So. 2d 263 (Fla. 2000). In rejecting that argument, the court stated:

> In *Tedder*, this Court held that "in order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." *Tedder*, 322 So. 2d at 910. More recently, this Court in *Keen* reiterated the proper analysis for a *Tedder* inquiry: "The singular focus of a *Tedder* inquiry is whether there is 'a reasonable basis in the record to support the jury's recommendation of life,' rather than the weighing process which a judge conducts after a death recommendation." *Keen*, 775 So. 2d at 283-84 (citation omitted). The Court further explained that "the jury's life recommendation changes the analytical dynamic and magnifies the ultimate effect of mitigation on the defendant's sentence." *Id.* at 285.
>
> In *Mills v. Moore*, 786 So. 2d 532 (Fla. 2001), this Court rejected an argument similar to the one currently raised by Marshall. In so doing, this Court stated:
>
> > While conceding that *Keen* is not new law, Mills nonetheless argues that *Keen*'s application of *Tedder* constitutes a new standard by which jury override cases are reviewed. *Keen* is not a major constitutional change or jurisprudential upheaval of the law as it was espoused in *Tedder*. *Keen* offers no new or different standard for considering jury overrides on appeal. Thus, we disagree with Mills' contention that *Keen* offers a new standard of law and we reject the contention that *Keen* was anything more than an application of our long-standing *Tedder*

> analysis.
>
> *Tedder* is the seminal case in Florida on jury overrides and remains so after *Keen*. *Tedder* was applied to this case. *Keen* provides no basis for our reconsideration of this issue.

Marshall, 911 So.2d at 1136, citing Mills v. Moore, 786 So. 2d 532, 539-40 (Fla. 2001).

Noting that it had already reviewed the propriety of the override under the Tedder standard, on direct appeal, the Court quoted extensively from its direct appeal opinion, setting forth its analysis under the Tedder standard. Accordingly, the Court held, "as in *Mills*, this claim provides no basis for relief."

On February 9, 2006 Marshall filed a Petition for Writ of Certiorari to the United States Supreme Court, raising the three issues he had in his state habeas petition. The Court denied the petition on May 15, 2006. Marshall v. McDonough, 547 U.S. 1143, 126 S.Ct. 2059 (2006).

The trial court held a series of evidentiary hearings based on the remand order from the Florida Supreme Court. On June 30, 2004 Marshall filed a successive 3.851 alleging "newly discovered evidence" of juror misconduct on the part of juror Coy Lee Thomason and a corresponding Motion to Interview him. Again, the trial court held a hearing to interview Thomason. On September 28, 2005 the trial court entered an order denying relief, finding no evidence of juror misconduct.

Marshall then appealed that denial to this Court, which affirmed the trial court's denial of Marshall's 3.851 motions. Marshall v. State, 976 So. 2d 1071 (Fla. 2007). The Court then denied rehearing. Marshall v. State, 2008 Fla. LEXIS 381 (Fla. Feb. 29, 2008). The mandate issued on March 17, 2008.

Marshall filed a petition for writ of habeas corpus pursuant to 28 U.S.C. §2254 on February 27, 2009. The district court denied that petition on September 21, 2009. Marshall then filed a certificate of appealability ("COA"). That court granted the COA on the issue of whether Marshall's death sentence violates the Eighth and Fourteenth Amendments based on a jury override which was arbitrary and capricious in light of Tedder v. State, 322 So.2d 908 (Fla. 1975). Marshall next filed with the federal district court a Motion to Expand the Certificate of Appealability on November 16, 2009. The court denied that motion on February 5, 2010.

Marshall then appealed that denial to the Eleventh Circuit Court of Appeals. On June 28, 2010 the Eleventh Circuit affirmed the denial of the petition. Marshall v. Secretary, Florida Dept. of Corrections, 610 F.3d 576 (11th Cir. 2010).

REASONS FOR DENYING RELIEF

CLAIM I

MARSHALL IS NOT ENTITLED TO RELIEF UNDER HURST v. FLORIDA SINCE IT IS NOT RETROACTIVE AND DID NOT ADDRESS ANY EIGHTH AMENDMENT ISSUES. (Restated)

Marshall argues that he is entitled to a life sentence under Hurst v. Florida, 136

S.Ct. 616 (2016), on Sixth Amendment grounds, and under Hurst v. State, 202 So. 3d 40 (Fla. 2016), on both Sixth and Eighth Amendment grounds. Hurst v. Florida is not retroactive and, thus, can provide no avenue for relief. The United States Supreme Court did not address the Eighth Amendment in its Hurst opinion and, therefore, this Court cannot grant relief under the guise of the Eighth Amendment.

While the State agrees that a judge can no longer override the jury's recommendation, that was not the law in 1989, thirteen years before Ring was decided.

A. Hurst v. Florida is not retroactive.

Marshall's case was final on direct appeal when the Supreme Court denied certiorari in 1993. Consequently, Hurst can have no application to this case until and unless either this Court or the Supreme Court determines that it should apply retroactively. Hurst is not retroactive. Consequently, Marshall, who was tried, convicted, and sentenced in accordance with Florida and federal law at the time of his trial, is not entitled to any relief.

In Hurst v. Florida, the Court held that Florida's capital sentencing structure violated Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), because it required a judge to conduct the fact-finding necessary to enhance a defendant's sentence, i.e. to make a defendant *eligible* to be sentenced to death. Hurst, 136 S.Ct. at 621-622. In arriving at its decision, the Court looked directly to Florida's sentencing statute, finding that it does not "make a defendant eligible for death until 'findings *by the court* that such a person shall be punished by death.'" Id. at 622 (citing §Fla. Stat. § 775.082(1) (emphasis in opinion). Also, under Spaziano v. State, 433 So. 2d 508, 512 (Fla. 1983), the jury's role in sentencing a defendant to capital punishment was viewed as advisory. Spaziano, 433 So. 2d at 512. Thus, the Supreme Court held Florida's capital sentencing structure, "which required the judge alone to find the existence of an aggravating circumstance," violated its decision in Ring and overruled the prior decisions of Spaziano v. State of Florida and Hildwin v. Florida, 490 U.S. 638 (1989). Hurst, 136 S.Ct. at 622-626.

The only way in which the Supreme Court can construct a rule's retroactivity is through a holding. Tyler v. Cain, 533 U.S. 656, 663 (2001) ("We thus conclude that a new rule is not 'made retroactive to cases on collateral review' unless the Supreme Court holds it to be retroactive."). The Supreme Court made no such holding in Hurst. Further, Hurst clearly would have no application to Marshall, whose direct appeal, was completed long ago in 1993 and his collateral review in 2008.

When a constitutional rule is announced, its requirements apply to defendants whose convictions or sentences are pending on direct review or not otherwise final. Griffith v. Kentucky, 479 U.S. 314, 323 (1987). However, once a criminal conviction has been upheld on appeal, the application of a new rule of constitutional criminal procedure is limited. The Supreme Court has held that new rules of criminal procedure will apply retroactively only if they fit within one of two narrow exceptions.[2] Schriro v. Summerlin, 542 U.S. 348, 351 (2004).

Marshall argues that Hurst created a new substantive rule, not a new procedural rule, or that it created some new fundamental or structural error that is not subject to a harmless error analysis. Neither contention has any merit.

In Schriro v. Summerlin, the Supreme Court directly addressed whether its decision in Ring v. Arizona was retroactive. Summerlin, 542 U.S. at 349. The Court held the decision in Ring was **procedural** and non-retroactive. Id. at 353. This was because Ring only "altered the range of permissible methods for determining whether a defendant's conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment." Id. The Court concluded its opinion stating: "The right to jury trial is fundamental to our system of criminal procedure, and States are bound to enforce the Sixth Amendment's guarantees as we interpret

[2] Those exceptions are: (1) a substantive rule that "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe or if it prohibits a certain category of punishment for a class of defendants because of their status or offense"; and (2) a procedural rule which constitutes a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. Teague v. Lane, 498 U.S. 288, 310–13 (1989); Penry v. Lynaugh, 492 U.S. 302 (1989) (abrogated on other grounds by Atkins v. Virginia, 536 U.S. 304 (2002); Butler v. McKellar, 494 U.S. 407 (1990); Saffle v. Parks, 494 U.S. 484 (1990)).

them. But it does not follow that, when a criminal defendant has had a full trial and one round of appeals in which the State faithfully applied the Constitution as we understood it at the time, he may nevertheless continue to litigate his claims indefinitely in hopes that we will one day have a change of heart. Ring announced a new procedural rule that does not apply retroactively to cases already final on direct review." Summerlin, 542 U.S. at 358. See Whorton v. Bockting, 549 U.S. 406, 416 (2007) (holding Crawford v. Washington, 541 U.S. 36 (2004) was not retroactive under Teague and relying extensively on the analysis of Summerlin).

Ring did not create a new constitutional right. That right was created by the Sixth Amendment guaranteeing the right to a jury trial.[3] If Ring were not retroactive, then Hurstv. Florida cannot be retroactive since it is merely an application of Ring to Florida law. In fact, the decision in Hurstv. Florida is based on an entire line of jurisprudence that courts have almost universally held not to have retroactive application. See DeStefano v. Woods, 392 U.S. 631 (1968) (*per curiam*) (holding the Court's decision in Duncan v. Louisiana, which guaranteed the right to a jury trial to the States was not retroactive); McCoy v. United States, 266 F.3d 1245, 1255, 1259 (11th Cir. 2001) (holding Apprendi not retroactive under Teague, and acknowledging

[3] The right to a jury trial was extended to the States in Duncan v. Louisiana, 391 U.S. 145 (1968). But, in DeStefano v. Woods, 392 U.S. 631 (1968) (*per curiam*), the Court declined to apply the holding of Duncan retroactively. Apprendi merely extended the right to a jury trial to the sentencing phase, when the State sought to increase the maximum possible punishment. Apprendi, 530 U.S. at 494.

that every federal circuit to consider the issue reached the same conclusion); Varela v. United States, 400 F.3d 864, 866–67 (11th Cir. 2005) (explaining that Supreme Court decisions, such as Ring, Blakely, and Booker, applying Apprendi's "prototypical procedural rule" in various contexts are not retroactive); Crayton v. United States, 799 F.3d 623, 624-25 (7th Cir. 2015) {fs28 cert. denied 136 S. Ct. 424 (2015) (holding that Alleyne v. United States, 570 U.S. ___, ___, 133 S. Ct. 2151, 2156 (2013), which extended Apprendi from maximum to minimum sentences, did not, like Apprendi or Ring, apply retroactively); State v. Johnson, 122 So. 3d 856, 865-66 (Fla. 2013)(holding Blakely not retroactive in Florida).

Since the United States Supreme Court expressly found that Ring was not retroactive, Hurstv. Florida, which applied Ring to invalidate Florida's statute, is also not retroactive. Significantly, this Court has already decided that Ring does not apply retroactively in Florida. In Johnson v. State, 904 So. 2d 400 (Fla. 2005), this Court comprehensively applied the Witt v. State, 387 So.2d 922 (Fla. 1980), factors to determine that Ring was not subject to retroactive application. This Court did a full-blown Witt analysis that consisted of 24 paragraphs in Johnson and concluded then that Ring is not retroactive. This Court concluded:

> We conclude that the three *Witt* factors, separately and together, weigh against the retroactive application of *Ring* in Florida. To apply *Ring* retroactively "would, we are convinced, destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the

> judicial machinery of our state ... beyond any tolerable limit." *Witt,* 387 So. 2d at 929-30. Our analysis reveals that *Ring,* although an important development in criminal procedure, is not a "jurisprudential upheaval" of "sufficient magnitude to necessitate retroactive application." *Id.* at 929. We therefore hold that *Ring* does not apply retroactively in Florida and affirm the denial of Johnson's request for collateral relief under *Ring.*

Johnson, 904 So. 2d at 412. This Court's main reasoning in Johnson was that judge versus jury did not seriously increase accuracy so, Ring should not be applied retroactively. All of that logic applies equally to Hurst v. Florida.

If the seminal case is not retroactive, then neither is its progeny. Jeanty v. Warden, FCI–Miami, 757 F.3d 1283, 1285 (11th Cir. 2014)(observing "if Apprendi's rule is not retroactive on collateral review, then neither is a decision applying its rule"). Because Ring is not retroactive, neither is Hurst v. Florida.

The current debate in this Court is whether the Court should recede from Johnson to the extent that those defendants whose sentences were final after Ring and who raised a Ring claim in the direct appeal should receive the benefit of Hurst v. Florida under the logic of James v. State, 615 So. 2d 668, 669 (Fla. 1993). In other words, the Court may hold Hurst v. Florida is partially retroactive back to 2002 when Ring was decided.

But, even under the reasoning of James, Hurst v. Florida is not retroactive as to Marshall. Marshall's conviction and death sentence became final when the United States Supreme Court denied review from the direct appeal in 1993. Archer's death sentence was final decades before the decision in Hurst v. Florida in 2016 and years before Ring was decided in 2002. So, even under James, Marshall is not entitled to any Hurst v. Florida relief. This Court just determined that Hurst v. Florida is not retroactive on cases which were final before Ring. Asay v. State, Nos. SC16-223, SC16-102, SC16-628 (slip op. issued Fla. Dec. 22, 2016), at 35. Marshall is not entitled to relief.

This Court specifically noted the severe and unsettling impact that retroactive application would have on our justice system [with nearly 400 death sentenced prisoners]. Johnson, 904 So. 2d at 411-12.[4] Marshall's invitation for this Court to revisit its previous decision is unpersuasive. Neither the federal nor Florida constitutions justify or authorize this Court to take such action as re-sentencing all death sentences to life. Furthermore, such a decision would ignore the considerable

[4] This Court's decision in State v. Johnson, 122 So. 3d at 865-66, similarly holding that one of Apprendi's many permutations was not retroactive, is also instructive. In finding Blakely was not retroactive, this Court stated, in part:

> Retroactive application of the rule announced in *Blakely* would require review of the records of numerous cases, first to determine whether *Blakely* error occurred, then whether such error was preserved, and finally, whether the error was harmless. In those cases where a claim for postconviction relief survives such review, juries would likely have to be empaneled to hear evidence and determine sentence enhancements. All told, this would be a time-consuming undertaking that would significantly strain our scarce court resources. Even if the retroactive application extended only to cases finalized in the interval between the issuance of Apprendi and Blakely, the disruption would be significant. Accordingly, this factor also weighs against applying Blakely retroactively.

interests of the citizens of this State and, in particular, victims' family members upon whom the emotional toll of such an action cannot be measured.

The Supreme Courts of Arizona, Nevada, and Idaho also reached the same conclusion on retroactivity as this Court in Johnson. Ring is not retroactive. See State v. Towery, 204 Ariz. 386, 393-94, 64 P.3d 828, 835-36 (2003); Rhoades v. State, 149 Idaho 130, 139-40, 233 P.3d 61, 70-71 (2010); Colwell v. State, 118 Nev. 807, 821-22, 59 P.3d 463, 473 (2002), cert. denied, 540 U.S. 981 (2003).

Marshall can offer no compelling justification for revisiting this Court's decision in Johnson. Assuming, any new Witt analysis would be appropriate, all of the same factors apply with equal force to hold that Hurst is not retroactive. Such an application would be greatly deleterious to finality and unsettle the reasonable expectations for justice by Florida's citizens and, in particular, countless numbers of victims' family members.

The Supreme Court's opinion in Hurst does not provide that the holding is to apply retroactively. Such an omission is noteworthy given the Court was cognizant of its decision in Summerlin holding that Ring was not retroactive and its stance in Teague that "'whether a decision [announcing a new rule should] be given prospective or retroactive effect should be faced at the time of [that] decision'" and a general acceptance that "...new rules generally should not be applied retroactively to cases on collateral review." Teague, 498 U.S. at 300, 305 (quoting Mishkin, foreword: the High Court, the Great Writ, and the Due Process of Time and Law, 79 Harv. L. Rev. 56, 64 (1965)).

Marshall cited to this Court's citation to the Supreme Court's decision in Montgomery v. Louisiana, 136 S. Ct. 718 (2016). The retroactivity issue in Montgomery is absent in Hurst. The Supreme Court held in Montgomery that the rule announced in Miller v. Alabama, 132 S. Ct. 2455 (2012), was a substantive rule retroactively applicable to cases on collateral review. 136 S. Ct. at 736. But unlike Miller, Hurst v. Florida presents no question as to its non-retroactivity. As noted above, this Court and the Supreme Court have both already held that Ring, the case on which Hurst is based, is not substantive. Summerlin, 542 U.S. at 353. It makes no sense for Marshall to argue that Hurst v. Florida, which merely applied Ring to Florida's capital-sentencing statutes, 136 S. Ct at 621–22, is a substantive rule where Ring is not.

In conclusion, since both the Supreme Court and this Court have held that Ring v. Arizona does not apply retroactively, Hurst should not applied retroactively in Florida. See Jeanty v. Warden, FCI–Miami, 757 F.3d 1283, 1285 (11th Cir. 2014) (observing "if Apprendi's rule is not retroactive on collateral review, then neither is a decision applying its rule")(citing In re Anderson, 396 F.3d 1336, 1340 (11th Cir. 2005)). Marshall is not entitled to relief.

B. The Eighth Amendment does not require judicial sentencing in capital cases.

Marshall also invokes the Eighth Amendment in support of his argument that the Constitution requires jury sentencing. He bases this assertion on the discussion in Hust v. State about the Eighth Amendment application of the test of evolving standards of decency in determining whether a previously constitutional punishment is now made unconstitutional. Marshall again argues that the purported Eighth Amendment ban on death sentences resulting from jury overrides is also fully retroactive to him since it is a substantive change in the law. The State contends that Hurst v. State could not announce an Eighth Amendment basis for declaring Florida's sentencing scheme unconstitutional and any dicta in that opinion regarding a such a basis is not retroactive to Marshall.

The Florida Supreme Court is bound by the Florida Constitution and does not have the power to sketch out its own determinations on what is in violation of the Eighth Amendment. The Florida Constitution states:

> The death penalty is an authorized punishment for capital crimes designated by the legislature. The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme

> Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution.

Fla. Const. art. I, § 17. The Florida Supreme Court is bound by the Conformity Clause of the Florida Constitution to construe the state prohibition against cruel and unusual punishment consistently with pronouncements by the United States Supreme Court. Correll v. State, 184 So.3d 478 (2015), certiorari denied 193 L.Ed.2d 307, 2015 WL 6111441. See also Valle v. State, 70 So.3d 530 (2011), certiorari denied 132 S.Ct. 1, 564 U.S. 1067, 180 L.Ed.2d 940 (In accordance with the Florida Constitution, the Florida Supreme Court is bound by the precedent of the United States Supreme Court regarding challenges to Florida's chosen method of execution.). The Supreme Court has held that the death penalty does not violate the Eighth Amendment. Gregg v. Georgia, 428 U.S. 153, (1976).

The Supreme Court has not issued an interpretation to the Eighth Amendment saying that a judge's override of a jury recommendation constitutes cruel and unusual punishment. Hurst v. Florida only addressed the Sixth Amendment. Hurst did not overrule Spaziano v. Florida, 468 U.S. 447, 104 S. Ct. 3154 (1984), in its entirety. Instead, the Court held: "The decisions [in Spaziano and Hildwin] are overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty." Hurst, 136 S. Ct. at 624.

Spaziano challenged Florida's capital sentencing scheme on both Sixth and Eighth Amendment grounds and the Court addressed both. Noting that since petitioner's "fundamental premise is that the capital sentencing decision is one that, in all cases, should be made by a jury," the Court went on to say:

> In light of the facts that the Sixth Amendment does not require jury sentencing, that the demands of fairness and reliability in capital cases do not require it, and that neither the nature of, nor the purpose behind, the death penalty requires jury sentencing, we cannot conclude that placing responsibility on the trial judge to impose the sentence in a capital case is unconstitutional.

Spaziano, 468 U.S. at 458, 464, 104 S. Ct. at 3164. On the Eighth Amendment challenge, the Court stated:

> The fact that a majority of jurisdictions have adopted a different practice, however, does not establish that contemporary standards of decency are offended by the jury override. The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws. "Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment" is violated by a challenged practice. *See Enmund v. Florida*, 458 U.S. 782, 797, 102 S.Ct. 3368, 3376, 73 L.Ed.2d 1140 (1982); Coker v. Georgia, 433 U.S. 584, 597, 97 S.Ct. 2861, 2868, 53 L.Ed.2d 982 (1977) (plurality opinion).

Id. No case has held that Florida's sentencing scheme violates the Eighth Amendment. The Supreme Court addressed a similar issue in Harris v. Alabama, 513

U.S. 504 (1995), and held that Alabama's capital sentencing scheme was consistent with the Eighth Amendment. The Harris Court explained that "[t]he Constitution permits the trial judge, acting alone, to impose a capital sentence." Id. at 515.

This Court should deny Marshall's request for either a new sentencing trial or for a life sentence since Hurst v. Florida is not retroactive nor did it address the constitutionality under the Eighth Amendment so the previous case law is still in effect.

CLAIM II

MARSHALL IS NOT ENTITLED TO A LIFE SENTENCE ON EIGHTH AMENDMENT GROUNDS.

Marshall's next claim is that he is entitled to a life sentence under sec. 921.141 because the Hurst decisions have outlawed a judge override of a jury recommendation for life, likening his situation to that involved in Roper v. Simmons, 543 U.S. 551 (2005) where the Supreme Court held that the death penalty could not be applied to anyone under the age of 18 since to do so would violate the Eighth and Fourteenth Amendments. The State disagrees since the Eighth Amendment was not involved in Hurst v. Florida nor is that case retroactive. The State respectfully reincorporates its arguments in Claim I on those issues here.

Further, the Eighth Amendment provides a poor vehicle through which to determine whether there is a constitutional right to jury sentencing in capital cases. In Coker v. Georgia, Roper v. Simmons, 543 U.S. 551 (2005), and similar cases, the Supreme Court found that "capital punishment - though not unconstitutional *per se* - is categorically too harsh a penalty to apply to certain types of crimes and certain classes of offenders." Graham v. Florida, 560 U.S. 48, 100 (2010) (Thomas, J., dissenting). As the Court explained in Graham, "[t]he classification" it uses under the Eighth Amendment "consists of two subsets, one considering the nature of the offense, the other considering the characteristics of the offender." Id. at 60. This framework does not fit Marshall's challenge to judicial sentencing.

Marshall does not fall within either of the subsets recognized by the Supreme Court's Eighth Amendment jurisprudence. He was convicted of capital murder, a crime for which the death penalty is constitutionally permissible. Consequently, a consideration of the nature of his offense is inapposite. And, unlike age or mental status, a jury's nonbinding recommendation is not an objective "characteristic of the offender." Rather, the jury's recommendation reflects its subjective opinion regarding the appropriate sentence based on the limited evidence available to it. Thus, Marshall's argument does not fall within the second classification of cases.

Even if the Court were to survey "societal consensus" on the issue, nothing has changed since Harris or Spaziano to call that precedent into question. Although this Court and the court in Delaware have held similar schemes unconstitutional, that says nothing about societal consensus because those decisions contravene acts of 22 state legislatures. Moreover, there has been no consistent movement in the intervening years since Harris: Indiana, which allowed judicial sentencing in 1995, amended its capital punishment procedures in 2002 to place final sentencing authority in the jury, but in 2003 Delaware amended its capital punishment procedures to allow judicial sentencing. Del. Code Ann. tit. 11, § 4209.[5] If the societal consensus is "evolving" on this issue, the direction of that evolution is not yet clear.

CLAIM III

SECTION 775.082(2) FLA. STAT. IS NOT IMPLICATED

Marshall's suggestion that section 775.082(2) requires that his sentence be commuted to life was rejected in Hurst v. State, 202 So. 3d at 66. This Court stated:

> When section 775.082(2) is viewed in the context of this State's response to the plurality opinion in *Furman*, and in light of the fact that *Furman* was based on Eighth and Fourteenth Amendment principles, we conclude that the statute does not mandate automatic commutation to

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[5] As noted above, the fact that the Delaware Supreme Court recently held that Delaware's capital sentencing scheme was unconstitutional based on that court's review of Delaware law, see Rauf v. State, 145 A.3d 430 (Del. 2016), does not change the fact that there has not been a shift in societal consensus or acts of state legislatures since Harris, particularly since the state court's decision contravened the act of a state legislature.

> life sentences after the decision in *Hurst v. Florida*. *Hurst v. Florida* was decided on Sixth Amendment grounds and nothing in that decision suggests a broad indictment of the imposition of the death penalty generally. *Ring* was also decided on Sixth Amendment grounds, and that decision did not require the state court to vacate all death sentences and enter sentences of life and did not address the range of conduct that a state may criminalize.

Id. See Franklin v. State, --- So.3d ---, 2016 WL 6901498 (Fla. 2016). There is no basis to reconsider that decision.

CONCLUSION

The State requests respectfully this Court deny relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished electronically to Todd Scher at Tscher@msn.com this 22nd day of December, 2016.

/s/ Lisa-Marie Lerner
LISA-MARIE LERNER
Assistant Attorney General

ATTACHMENT K

Filing # 50650209 E-Filed 12/30/2016 02:52:16 PM

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IN THE SUPREME COURT OF FLORIDA

Case No. SC16-779

MATTHEW MARSHALL,

Petitioner,

v.

JULIE L. JONES,

Secretary, Florida Dep't. of Corrections,
Respondent.

REPLY TO RESPONSE TO AMENDED PETITION FOR HABEAS CORPUS IN CAPITAL CASE WHERE DEATH SENTENCE IMPOSED OVER JURY RECOMMENDATION OF LIFE IMPRISONMENT

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CLAIM I

THE CAPITAL SENTENCING STATUTE UNDER WHICH MR. MARSHALL WAS SENTENCED TO DEATH IS UNCONSTITUTIONAL AND HIS OVERRIDE DEATH SENTENCE STANDS IN VIOLATION OF THE SIXTH AND EIGHTH AMENDMENTS.

A. Introduction.

Just last week, the list of this Court's justices (past and present) who have dissented about the propriety of Mr. Marshall's override death sentence grew. On Mr. Marshall's direct appeal, three justices—Chief Justice Barkett and Justices Shaw and Kogan—dissented from the affirmance of Mr. Marshall's override death sentence. *Marshall v. State*, 604 So. 2d 799, 806 (Fla. 1992). In his first state habeas corpus proceeding, two more justices—Chief Justice Pariente and Justice Anstead—dissented from Mr. Marshall's death sentence. *Marshall v. Crosby*, 911 So. 2d 1129, 1140, 1142 (Fla. 2005). Now, in the wake of *Hurst v. Florida*, 136 S. Ct. 616 (2015), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), additional voices of dissent (some explicit, others implicit) have emerged from the Court.

In *Asay v. Jones*, 2016 WL 7406583 (Fla. Dec. 22, 2016), Chief Justice Labarga noted that the propriety of Mr. Marshall's death sentence post-*Hurst* remained an "issue for another day," writing that the Court's holding in *Asay* that *Hurst v. Florida* and *Hurst v. State* were not retroactive to Mr. Asay did "not apply" to Mr. Marshall's override death sentence:

> I concur in the conclusion of the majority that *Hurst v. Florida* and *Hurst* do not apply retroactively to those defendants whose death sentences became final prior to the issuance of *Ring* [*v. Arizona*, 536 U.S. 584 (2002)]. **However, I write separately to express my view that our decision today does not apply to those defendants whose death sentences were imposed based upon, and who are facing execution solely as a result of, a judicial override**. There are only two death row defendants who satisfy this criteria—**Matthew Marshall** and William Zeigler, Jr.[] The impact of *Hurst v. Florida* and *Hurst* upon their death sentences is an issue for another day.

Asay at *20 (Fla. Dec. 22, 2016) (Labarga, C.J., concurring) (emphasis added).

Justice Pariente, in her dissenting opinion in *Asay*, also referenced Mr. Marshall's case:

> Even under the majority's holding today, **relief should be granted to two Florida death row inmates whose sentences were a result of a judicial override** because the jurisprudence on the acceptability of judicial overrides has so dramatically changed since their sentences were finalized.

Asay at *25 (Pariente, J., concurring in part and dissenting in part) (emphasis added).[1]

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[1] Justice Pariente's dissent in *Asay* was not the first time she expressed discomfort with override death sentences post-*Ring*. In *Bottoson v. Moore*, 824 So. 2d 115, 118 (Fla. 2002) (concurring in granting a stay of execution), Justice Pariente wrote that *Ring* "casts serious doubt on the constitutionality of out scheme to the extent that it permits a judge to override a jury recommendation of a life sentence." *See also King v. Moore*, 831 So. 2d 152 (Fla. 2002) (Pariente, J., concurring in result only) ("the reasoning relied on by the [Supreme] Court in *Spaziano* might be suspect in light of *Ring*"). Two years prior to *Ring*, in the wake

Justice Perry's dissenting opinion in *Asay* would by necessity encompass relief for Mr. Marshall:

> 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.

Asay at *27 (Perry, J., dissenting) (emphasis added).

Finally, in his concurring opinion in *Asay*, Justice Lewis wrote:

> [I]n 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. . . . **[T]hose defendants who challenged Florida's unconstitutional sentencing scheme based on the substantive matters addressed in *Hurst* are entitled to consideration of that constitutional challenge.**

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of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), Justice Pariente questioned the constitutional validity of the Florida judicial override procedure. *Mills v. Moore*, 786 So. 2d 532, 545 n.8 (Fla. 2001) (Pariente, J., dissenting) ("I point out that a jury recommendation of life might, under a logical extension of the reasoning in *Apprendi,* preclude a trial court from overriding a jury's life recommendation.").

Asay at *21 (Lewis, J., concurring in result) (emphasis added) (citing *James v. State*, 615 So. 2d 668, 669 (Fla. 1993).[2] *Accord Mosley v. State,* 2016 WL 7406506 at *19 (Fla. Dec. 22, 2016) (accepting fundamental fairness analysis in *James* as an acceptable and valid retroactivity approach separate from the *Witt* standard).

Thus, at this point, there are five current or former Justices on the Court who have opined that Mr. Marshall's death sentence should be vacated. For two additional Justices—Chief Justice Labarga and Justice Lewis—the issue remains open but both have written that Mr. Marshall's case is different from that addressed in *Asay* and that a distinct analysis applies to evaluate the retroactivity of *Hurst v. Florida* and *Hurst v. State* to override cases.[3] Moreover, *Asay* did not

[2] As he noted in his amended habeas petition and as he further details *infra*, Mr. Marshall did previously preserve both Sixth and Eighth Amendment challenges to Florida's capital sentencing scheme *and* the propriety of his override. Under Justice Lewis's analysis in *Asay* and the majority holding in *Mosley v. State,* 2016 WL 7406506 (Fla. Dec. 22, 2016), Mr. Marshall is entitled to the benefit of the holding in *Hurst v. Florida* and the concomitant overruling of *Spaziano v. Florida,* 468 U.S. 447 (1984), by the Supreme Court and this Court's later abrogation of *Tedder v. State*, 322 So. 2d 908 (Fla. 1975), in *Hurst v. State*. *Hurst*, 202 So. 3d at 44.

Shortly after the issuance of *Ring v. Arizona*, 536 U.S. 584 (2002), Justice Lewis expressed the view that "we should not suggest the continuing validity of the concept of trial courts overriding jury recommendations of life imprisonment in these cases" because "a logical reading and comparison of the texts of *Spaziano* and *Ring* produces an inescapable conflict." *Bottoson v. Moore*, 833 So. 2d 693, 726 (Fla. 2002) (Lewis, J., concurring in result only).

[3] Justice Quince did not write a separate opinion in *Asay*. In her concurring opinion in *Bottoson v. Moore*, 833 So. 2d 93, 709 (Fla. 2002), a case that did not

address some of the issues raised by Mr. Marshall, that is, the Eighth Amendment ramifications on his override death sentence in the wake of *Hurst v. Florida*, *Hurst v. State*, and the overruling and/or abrogation of *Spaziano v. Florida* and *Tedder v. State*. Under *Witt*[4] and/or the fundamental fairness approach to retroactivity embodied in *James*, Mr. Marshall is entitled to relief, and nothing in Respondent's response provides this Court with any meaningful reason to hold otherwise under the law.

B. <u>Respondent's Obsolete and Outdated Arguments Regarding *Hurst v. Florida* and *Hurst v. State.*</u>

The Respondent shrugs its shoulders to Mr. Marshall being only one of two defendants currently on death row where a jury recommendation of life was overridden by a judge. Conceding, as it must, that "a judge can no longer override the jury's recommendations," it nevertheless argues that Mr. Marshall is just out of luck because "that was not the law in 1989, thirteen years before *Ring* was decided" (Response at 9). However, "considerations of fairness and uniformity make it very 'difficult to justify depriving a person of his liberty or his life, ***under process no longer considered acceptable and no longer applied to indistinguishable cases***.'" *Atwell v. State*, 197 So. 3d 1040, 1050 (Fla. 2016)

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involve an override, she wrote: "Whether we may fundamentally agree that jury overrides may not be allowed under a full *Ring* analysis is not the issue here."

[4] *Witt v. State*, 387 So. 2d 922 (Fla. 1980).

(emphasis added) (quoting *Falcon v. State*, 162 So. 2d 954, 962 (Fla. 2015) (quoting *Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980)). "More than fundamental fairness and a clear manifest injustice, ***the risk of executing a person who is not constitutionally able to be executed, trumps any other considerations*** that this Court looks to when determining if a subsequent decision of the United States Supreme Court should be applied." *Walls v. State*, 2016 WL 6137287 at *8 (Fla. Oct. 20, 2016) (Pariente, J., concurring) (emphasis added).[5]

Respondent acknowledges the override process is "no longer considered acceptable" but rather than recognizing that the two remaining Florida override death sentences do not survive *Hurst v. Florida* or *Hurst v. State*, or even that the override's constitutional demise was determined once and for all by the overruling of *Spaziano* and the abrogation of *Tedder,* the Respondent buries its head in the sand. Its only reference to *Tedder* is contained in its historical discussion of Mr. Marshall's case and it merely references the fact that *Spaziano v. Florida* was overruled in *Hurst v. Florida* (Response at 10). The Respondent makes no reference to the fact that, in *Hurst v. State*, this Court abrogated *Tedder*. Nor does the Respondent address Mr. Marshall's arguments that the abrogation of *Tedder* further establishes that he is now entitled to relief.

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[5] *See also Montgomery v. Louisiana*, 136 S.Ct. 718, 729-30 (2016) ("when a State enforces a proscription or penalty barred by the Constitution, the resulting conviction or sentence is, by definition, unlawful").

Rather, the Respondent forges ahead with outdated arguments about the meaning of *Hurst v. Florida*, going to far as to rely on the viability of *Johnson v. State*, 904 So. 2d 400 (Fla. 2005), to argue that *Hurst* is not retroactive under *Witt v. State*, 387 So. 2d 922 (Fla. 1980) (Response at 13). Continued reliance on *Johnson*, however, is misplaced because *Johnson*'s analysis is obsolete. *Asay* at *8 (Fla. Dec. 22, 2016) ("With the issuance of *Hurst v. Florida*, in which the United States Supreme Court overruled its decision in *Hildwin*, we conclude that this Court must now reconsider its prior decision in *Johnson*" and perform a new retroactivity analysis as to Mr. Asay).

As explained in this Reply, none of the Respondent's arguments hold water. Under a *Witt* analysis or a *James* analysis, Mr. Marshall is entitled to the life sentence his jury recommended in 1989 because his override death sentence violates the Sixth and Eighth Amendments.

1. Fundamental fairness as noted in *Mosley v. State* requires that Mr. Marshall receive the benefit of *Hurst v. Florida* and *Hurst v. State.*

a. Prior preservation of *Hildwin/Apprendi/Ring* issues.

A large section of Mr. Marshall's amended state habeas petition was devoted to setting out the extensive preservation of both the Sixth and Eighth Amendment claims that ultimately prevailed in *Hurst v. Florida* (resulting in the abrogation of *Hildwin v. Florida* and *Spaziano v. Florida*) and in *Hurst v. State* (resulting in the abrogation of *Tedder v. State*). *See* Amended Petition at 18-22. The State does not dispute that Mr. Marshall previously preserved Sixth and Eighth Amendment challenges to Florida's capital sentencing scheme, including the override, both on his direct appeal[6] and in his prior state habeas corpus proceeding.[7] On direct appeal, this Court rejected the merits of Mr. Marshall's challenges to the constitutionality of the Florida capital sentencing statute. *Marshall v. State*, 604 So. 2d 799, 805 n.5 (Fla. 1992) ("We reject Marshall's claims that the death penalty statute and the aggravating circumstances are unconstitutional"). In the prior state habeas proceeding, this Court rejected the merits of Mr. Marshall's *Apprendi/Ring*-

[6] On direct appeal, Mr. Marshall made his Sixth Amendment argument noting the contra authority of the then-recent decision in *Hildwin v. Florida*, 490 U.S. 638 (1989). He also made an Eighth Amendment argument about the constitutionality of the override procedure and urged the Court to reconsider the propriety of the override notwithstanding *Spaziano*. In its Answer Brief on direct appeal, the State argued that Mr. Marshall's Sixth Amendment arguments had been decided adversely to him in *Hildwin*, and that his Eighth Amendment arguments was "belied by" *Spaziano* and *Tedder*. *See* Amended Habeas Petition at 19-20. Mr. Marshall also challenged at trial and on appeal the fact that the jury's role was unconstitutionally diminished in violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985), as well as the fact that jury unanimity was required. *See* Answer Brief of Appellee, *Marshall v. State*, Case No. 75,406, at 94. In a motion for new trial, Mr. Marshall also argued that the court "erred in overriding the recommendation of the jury for a sentence of life imprisonment" and that it erred in "failing to grant Defendant's pretrial motions directed to the constitutionality of the statutes and the procedures implementing those statutes relating to the death penalty" (R. 4098).

[7] In the prior state habeas proceeding, Mr. Marshall argued, *inter alia*, that his death sentence violated the Sixth Amendment and the recent decisions in *Ring* and in *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

based challenge to his override death sentence. *Marshall v. Crosby*, 911 So. 2d 1129, 1134-35 (Fla. 2005).

b. Respondent's misunderstanding of fundamental fairness analysis.

In his amended habeas petition, Mr. Marshall argued that the fundamental fairness analysis of *James v. State* applied to his case and that he was therefore entitled to the benefit of *Hurst v. Florida* and *Hurst v. State* because he had previously preserved the Sixth and Eighth Amendment issues on direct appeal and, after *Ring* and *Apprendi* issued, in a prior state habeas (Amended State Habeas at 18-22). In *Mosley v. State*, this Court noted *James* as an example of its previous determination that "***fundamental fairness alone may require the retroactive application*** of certain decisions involving the death penalty after the United States Supreme Court decides a case that changes our jurisprudence." *Mosley* at *19.

The Respondent argues that the fundamental fairness analysis set forth in *James* only applies to those cases where convictions and sentences were final *subsequent* to *Ring* where the defendant raised a *Ring* claim on direct appeal, thus excluding Mr. Marshall's sentence, which became final in 1993 (Response at 14). But this is not what this Court held in *Mosley*,[8] nor is it was this Court held in

[8] In *Mosley*, this Court clearly held that the fundamental fairness analysis exemplified by *James* was a retroactivity approach that was separate from the *Witt* analysis. *Mosley* at 19 n.13. *See also id.* at *32 (Canady, J., dissenting) ("*James* should be abrogated").

James. Rather, *James* involved a defendant who, ***prior*** to the issuance of *Espinosa v. Florida*, 505 U.S. 1079 (1992), had challenged on appeal the constitutionality of the HAC aggravating factor, "the exact same claim that was [later] validated by the United States Supreme Court in *Espinosa*. . ." *Mosley* at *19; *see also id.* (noting that, in *James*, the Court held that defendants who raised the claim at trial or on direct appeal that the HAC jury instruction was unconstitutional were entitled to retroactive application of *Espinosa*). While it is true that the fundamental fairness approach to retroactivity set forth in *Mosley* and in *James* would also apply to defendants who, post-*Ring*, filed constitutional challenges that turned out to have been validated in *Hurst v. Florida*,[9] the reach of fundamental unfairness under *Mosley* and *James* is **not** limited back to only 2002 when *Ring* issued. Like Davidson James and McArthur Breedlove,[10] for example, who challenged the HAC instruction on appeal years before *Espinosa* issued in 1992, Mr. Marshall, on direct appeal and over a decade before *Ring* issued, indisputably preserved his relevant constitutional challenges under the Sixth and Eighth Amendments to Florida's capital sentencing scheme that were later "validated by the United States Supreme Court in [*Hurst v. Florida*]." *Mosley* at *19. Under *James* and *Mosley*, Mr.

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[9] This is part of the Court's holding in *Mosley*.

[10] *See State v. Breedlove*, 655 So. 2d 74, 76 (Fla. 1995) (under *James*, extending retroactive application of *Espinosa* to defendant who challenged the constitutionality of the HAC instruction on appeal).

Marshall should receive the benefit of *Hurst v. Florida* **and** *Hurst v. State*; to hold otherwise would be fundamentally unfair.[11]

2. *Hurst v. Florida* and *Hurst v. State* are retroactive to Mr. Marshall under *Witt.*

The Respondent disputes that Mr. Marshall is entitled to the retroactive application of *Hurst v. Florida* and/or *Hurst v. State* under this Court's *Witt* test, arguing three main points. Mr. Marshall addresses each in turn.

First, the Respondent argues non-retroactivity under *Schriro v. Summerlin*, 542 U.S. 348 (2004), which held *Ring* was not retroactive under the federal standard set forth in *Teague v. Lane*, 498 U.S. 288 (1989) (Response at 11-13). Florida continues to follow the *Witt* test, *see Asay* at *8-9, and therefore the Respondent's reliance on federal *Teague* cases is misplaced.

Second, the Respondent argues that the logic of *Johnson v. State*, 904 So. 2d 400 (Fla. 2005), still applies now (Response at 13). However, as this Court recently

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[11] The Respondent's reliance on the *Witt*-based non-retroactivity holding in *Asay* is misplaced (Response at 15); Asay "did not raise a Sixth Amendment challenge to his death sentence at any time prior to *Ring*." *Asay* at *4 n.12. Thus, the Court did not perform a fundamental fairness analysis under *Mosley* and *James* in *Asay*. *Mosley* controls the *James* analysis in Mr. Marshall's case, not *Asay*. But to be sure, Justice Lewis's concurrence in *Asay* endorses *James*'s reach to Mr. Marshall's case. *Asay*, 7406538 at *21 (Lewis, J., concurring in result) (under *James*, "those defendants who challenged Florida's unconstitutional sentencing scheme based on the substantive matters addressed in *Hurst* are entitled to consideration of that constitutional challenge"). Indeed, a majority if this Court embraced Justice Lewis's view in his *Asay* concurrence and adopted it as a separately available retroactivity approach. *Mosley* at 19 n.13.

explained in *Asay*, this Court's *Johnson* analysis suffered from a number of faults: first, it "did not fully apply the holding of *Ring* because [it] was attempting to reconcile the United States Supreme Court's holdings in *Ring* and *Hildwin*." *Asay*, 2016 WL 7406538 at *7. Second, it improperly relied on *Summerlin*, which employed the "much narrower" *Teague* standard that "utilizes completely different factors from Florida's *Witt* test." *Id.* at *8. Finally, the Court acknowledged that its holding in *Johnson* was infused with a misunderstanding of *Ring*'s application to Florida's capital sentencing statute "at that time." *Id.* Thus, the Court in *Asay* recognized that *Johnson* was no longer controlling on the issue of *Hurst*'s retroactivity and concluded it "must now reconsider its prior decision in *Johnson*." *Id.* For the very same reasons, *Marshall v. Crosby*'s analysis of the impact of *Ring* on Florida's override scheme must be revisited.

Mr. Marshall acknowledges that, in *Asay*, the Court ultimately did not find *Hurst v. Florida* retroactive "to Asay's case." *Asay* at *13. But it did conclude that the first two prongs of the *Witt* test had been satisfied; it was the last prong relating to the *Stovall/Linkletter*[12] test that was the problematic aspect for the *Asay* majority. The *Asay* majority did find that "the purpose of the new rule weighs in favor of applying *Hurst v. Florida* retroactively to Asay," but that reliance on the "old rule," namely the precedent that, until 2016, had consistently found Florida's

[12] *See Stovall v. Denno*, 388 U.S. 293, 297 (1967); *Linkletter v. Walker*, 381 U.S. 618, 636 (1965).

capital sentencing scheme constitutional, weighed against a finding of retroactivity "to *this* pre-*Ring* case." *Asay*, 2016 WL 7406538 at *12 (emphasis added). Moreover, the *Asay* majority determined that the impact on the administration of justice would be too severe given the high number of cases that would be impacted were *Hurst* to be retroactive to *all* of the cases where convictions and sentences were final before 2002. *Id.* at *12-13.

The *Stovall/Linkletter* analysis performed by the *Asay* Court as to Mr. Asay's case does not answer the question of retroactivity under *Witt* as to Mr. Marshall's case because the context of the case—a judicial override—entails different factors and requires a different analysis. Just as the "balance of factors [regarding *Hurst*'s retroactivity] may change significantly for cases decided after the United States Supreme Court decided *Ring*" *Asay* at *13, so too the balance of factors are changed when it comes to evaluating a judicial override death sentence. For example, unlike the unbroken line of cases upholding Florida's death penalty statute that gave the Court and the State "every reason to believe that its capital sentencing scheme was constitutionally sound" until at least 2002 (when *Ring* was decided), *id.* at *11 & n.18, this Court's jurisprudence on *jury override cases* has been far more unsettled for many years.

While it is true that *Spaziano* was not explicitly overruled until 2016, resulting in this Court's abrogation of *Tedder* in *Hurst v. State*,[13] the jury override procedure in Florida has long been questioned by members of this Court, even in Mr. Marshall's own case.[14] Indeed, almost 30 years ago Justices Marshall and Brennan wrote "appealing a `life override' under Florida's capital sentencing scheme is akin to Russian Roulette." *Engle v. Florida*, 102 S. Ct. 1094, 1098 (1988) (Marshall and Brennan, JJ., dissenting from the denial of petition for writ of certiorari). That Florida's jury override procedure was constitutionally vulnerable

[13] *See Hurst*, 202 So. 3d at 44.

[14] *See, e.g. Asay* at *25 n.32 (Pariente, J., dissenting) (noting that "the jurisprudence on the acceptability of judicial overrides has so dramatically changed since [the override death sentences of Mr. Marshall and William Zeigler] were finalized"); *id.* at *20 & n.19 (Labarga, C.J., concurring) ("our decision today does not apply to those defendants whose death sentences were imposed based upon, and who are facing execution solely as a result of, a judicial override. There are only two death row defendants who satisfy this criteria—Matthew Marshall and William Zeigler, Jr.[] The impact of *Hurst v. Florida* and *Hurst* [*v. State*] upon their death sentences is an issue for another day"); *Hurst v. Florida*, 136 S. Ct. at 626 (Alito, J., dissenting) ("No Florida trial court has overruled a jury's recommendation of a life sentence for more than 15 years"); *Marshall v. Crosby*, 911 So. 2d at 1141 (Pariente, J., dissenting) ("I believe that adherence to the *Tedder* standard for review of the judicial override of a life recommendation takes precedence over the doctrine of the law of the case and requires that we reduce Marshall's sentence to life"); *Marshall v. Crosby*, 911 So. 2d at 1153 (Anstead, J., dissenting) ("In stark contrast to our charge in *Witt*, the majority today is ignoring fairness and uniformity and committing an obvious injustice by depriving Marshall of his life under a process that is not acceptable and that will no longer be applied in the future"); *Mills v. Moore*, 786 So. 2d 532, 545 n.8 (Fla. 2001) (Pariente, J., dissenting) ("I point out that a jury recommendation of life might, under a logical extension of the reasoning in *Apprendi,* preclude a trial court from overriding a jury's life recommendation.").

as far back as 2000 when *Apprendi* issued was apparent to members of the Court, *see e.g. Mills v. Moore*, 786 So. 2d 532, 545 n.8 (Fla. 2001) (Pariente, J., dissenting) ("I point out that a jury recommendation of life might, under a logical extension of the reasoning in *Apprendi,* preclude a trial court from overriding a jury's life recommendation.").[15] Even the State of Florida acknowledged in its Brief to the United States Supreme Court in *Hurst v. Florida* that "overrides are virtually nonexistent in Florida" and that no judge had overridden a life recommendation since 1999. *See* Brief for Respondent, *Hurst v. Florida*, No. 14-7505, at 25 n.9 And certainly after *Ring* issued, the jury override's constitutional demise was nearly a given. *See* Amended Petition at 15 n.14 (citing cases). In fact, "Florida's capital sentencing statute has essentially been unconstitutional since *Ring* in 2002." *Mosley* at *23.

With regard to the effect on the administration of justice were the Court to retroactively apply *Hurst v. Florida* and *Hurst v. State* to Mr. Marshall (and presumably to Mr. Zeigler), this Court "reviews whether retroactive application

[15] Thus, as justices of this Court pointed out even before *Ring*, *Apprendi* called the constitutionality of judicial overrides of jury life recommendations into question. But this Court rejected the *Apprendi* challenge because *Apprendi* did not overrule *Walton v. Arizona*, 497 U.S. 639 (1990). *Mills v. Moore*, 786 So. 2d 532, 537 (Fla. 2001) ("Because *Apprendi* did not overrule *Walton*, the basic scheme in Florida is not overruled either"). However, "in the United States Supreme Court's opinion in *Ring*, the Court clearly and unequivocally held that *Apprendi* did apply to capital cases, thus proving our opinion in *Mills* wrong." *Bottoson v. Moore*, 824 So. 2d 115, 118 (Fla. 2002) (Pariente, J., concurring).

would 'destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit.'" *Mosley* at *23 (quoting *Witt*, 387 So. 2d at 929-30). There is no question that this factor weighs heavily in Mr. Marshall's favor. Giving Mr. Marshall (and Mr. Zeigler) the benefit of *Hurst v. Florida* and *Hurst v. State* will hardly "destroy the stability of the law" given that the death penalty is still a constitutional punishment and Mr. Marshall is not seeking to be released from prison as a result of the vacation of his death sentence. *Mosley* at *23. Moreover, retroactive application of *Hurst v. Florida* to Mr. Marshall (and to Mr. Zeigler) would result in relief being afforded in only two cases;[16] and in both of those cases full-blown resentencing proceedings would not need to occur because both defendants are entitled to the benefit of their life recommendations. *See Wright v. State*, 586 So. 2d 1024, 1032 (Fla. 1991). Granting relief to Mr. Marshall would hardly register on the "judicial machinery" of this State, fiscally or otherwise. On the other hand, granting him relief would restore the 1989 jury vote for life.

C. The Eighth Amendment and *Hurst v. State*.

In his amended state habeas petition, Mr. Marshall also argued that the Eighth Amendment analysis undertaken by the Court in *Hurst v. State* also warrants

[16] This is according to Chief Justice Labarga's concurrence in *Asay*. *Asay* at *20.

retroactive application and relief to Mr. Marshall. As he contended, the Eighth Amendment's "evolving standards of decency" test "considers whether punishments that were in the power of the state to impose at the time, but have since come to be viewed as unconstitutional, should be prohibited on constitutional grounds." *Hurst v. State*, 202 So. 3d at 60-61. Because there is no question that a death sentence resulting from a judicial override of a life recommendation by a jury is no longer tolerable under the Sixth or Eighth Amendments, such a death sentence has "since come to be viewed as unconstitutional" and therefore prohibited under the "evolving standards of decency" analysis embodied in the Eighth Amendment. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 742 (2016).

In response to Mr. Marshall's Eighth Amendment claim, the Respondent persists in misunderstanding the issue. The issue is not "jury sentencing" (Response at 18); it is whether Mr. Marshall's death sentence imposed by a judge over a jury's recommendation of life satisfies the "evolving standards of decency" analysis of the Eighth Amendment. To this the Respondent merely argues that this Court "cannot announce an Eighth Amendment basis" for striking down Mr. Marshall's death sentence because it "does not have the power to sketch out its own determinations on what is in violation of the Eighth Amendment (Response at 18). This, of course, is a ludicrous proposition. *See Hurst*, 202 So. 3d at 71-75

(Pariente, J., concurring).[17] His claim is that his override death sentence is an "outlier" (in fact, an "extreme outlier"). *Id.* at 73. Indeed, the legislation passed by the Florida Legislature and signed into law by Governor Scott on March 7, 2016, eliminated a judge's power to override a jury's life recommendation. This reflects Florida's evolving standards of decency.

Lastly, the Respondent seems to suggest that jury overrides are *still* constitutionally permissible because *Spaziano*'s Eighth Amendment holding was not overruled in *Hurst v. Florida*. However, *Spaziano* was decided over 30 years ago. It is this Court's duty to determine whether Mr. Marshall's death sentence violates the "evolving standards of decency" embodied in the Eighth Amendment and the Florida Constitution particularly where the Respondent has conceded that, in Florida, "a judge can no longer override a jury's recommendation [of life]" (Response at 9). Mr. Marshall is one of two Florida defendants sentenced to death under a scheme that everyone, including the Respondent, concedes is no longer valid and indeed violates the United States Constitution. His execution at this time would violate the Eighth Amendment, and relief should be granted.

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[17] It also appears to be a backhanded way of arguing that this Court was wrong in *Hurst v. State* when it determined that Florida's status as an "outlier" in not requiring unanimous jury verdicts at the penalty phase violated the Eighth Amendment. But the State of Florida did not seek rehearing in *Hurst v. State*, and thus any complaints it may have about this Court's decision are waived and irrelevant at this time. *Hurst* is a final decision from this Court.

D. The Respondent has waived any argument that the error in Mr. Marshall's case is harmless.

The Respondent does not address Mr. Marshall's argument that the State cannot, under these circumstances, establish harmless error beyond a reasonable doubt. The State has thus waived any harmless error challenge in this case.

CLAIM II

UNDER §921.141, FLA. STAT. (2016), MR. MARSHALL'S DEATH SENTENCE MUST BE CONVERTED TO A LIFE SENTENCE WITHOUT THE POSSIBILITY OF PAROLE FOR 25 YEARS; TO RULE OTHERWISE WOULD VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS.

Analogizing his situation to that facing capital defendants in the wake of *Roper v. Simmons*, 543 U.S. 551 (2005), Mr. Marshall contends in this claim that his override death sentence is no longer constitutionally acceptable under the new §921.141 and *Hurst v. Florida*, 136 S. Ct. 616 (2016), *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), and *Perry v. State*, 2016 WL 6036982 (Fla. Oct. 14, 2016). Just like Cleo LeCroy, whose death sentence was vacated following *Roper* because he was a juvenile at the time of his offense, so too must Mr. Marshall's override death sentence be vacated because it would be constitutionally intolerable to execute him based on a sentence imposed under a procedure that no one disagrees is now unconstitutional. Indeed, the Respondent agrees "a judge can no longer override the jury's recommendation" (Response at 9).

The Respondent argues that Eighth Amendment was not involved in *Hurst v. Florida* "nor is that case retroactive" (Response at 21). As for *Hurst*'s retroactivity (under both *James* and *Witt*), Mr. Marshall incorporates his arguments from Claim I, *supra*. But the Respondent's response does not address the new Florida statute, nor does it address *Hurst v. State*, both of which implicate the Eighth Amendment. The Respondent's failure to address Mr. Marshall's arguments should be deemed as a waiver and an acknowledgment that the Respondent agrees with Mr. Marshall's arguments.

Lastly, the Respondent contends that "nothing has changed" in the years since *Spaziano v. Florida*, 468 U.S. 447 (1984), or *Harris v. Alabama*, 513 U.S. 504 (1995), were decided (Response at 23). It also contends that this Court's decision in *Hurst v. State* and the Delaware Supreme Court's decision in *Rauf v. State*, 145 A.3d 430 (Del. 2016), "contravene acts of 22 state legislatures" (Response at 23). Mr. Marshall admits confusion about what the Respondent is arguing; as best Mr. Marshall can discern, the Respondent is arguing that there is not a national consensus in favor of jury sentencing. But that is not Mr. Marshall's argument. His argument is that his override death sentence violates the evolving standards of decency test embodied in the Eighth Amendment. Given that the Respondent itself has acknowledged that Florida no longer constitutionally tolerates judge overrides of jury recommendations of life, the Respondent's arguments are bewildering.

CLAIM III

MR. MARSHALL IS DUE TO HAVE HIS DEATH SENTENCE VACATED AND SENTENCED TO LIFE IMPRISONMENT PURSUANT TO §775.082(2), FLA STAT.

In this claim, Mr. Marshall contended that his override death sentence should be vacated and that he should be sentenced to life imprisonment without the possibility of parole for 15 years under the authority of §775.082(2), Fla. Stat. The Respondent contends that this statutory provision is "not implicated" given the Court's holding in *Hurst v. State*, 202 So. 3d 40, 66 (Fla. 2016) However, as he explained in his amended state habeas petition, the death penalty in a particularized class of cases (override cases) has been held unconstitutional. In other words, there is no more death penalty available when the jury has returned a life recommendation. Further, there is no remedy for an override case but to impose a life sentence because double jeopardy attaches to that recommendation. *Wright v. State*, 586 So. 2d 1024, 1032 (Fla. 1991) (because "the constitutional protection against double jeopardy provides that if a defendant has been in effect 'acquitted' of the death sentence," a jury's vote in favor of a life recommendation has double jeopardy protection). Mr. Marshall maintains that this Court can and should vacate his unconstitutional death sentence and impose a sentence of life imprisonment without the possibility of parole for 25 years. *See Mosley v. State,* 2016 WL

7406506 at *32 (Fla. Dec. 22, 2016) (Perry, J., dissenting); *Asay v. State*, 2016 WL 7406538 at *28 (Fla. Dec. 22, 2016) (Perry, J., dissenting); *Hurst v. State*, 202 So. 2d 40, 75-76 (Fla. 2016) (Perry, J., dissenting).

Respectfully submitted,

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CERTIFICATES OF SERVICE AND FONT

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed on this 30th day of December, 2016, and opposing counsel will be served on this date. Counsel further certifies that this petition is typed in Times New Roman 14-point font.

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