IN THE SUPREME COURT OF FLORIDA

NORBERTO PIETRI,

Appellant,

Case No.: SC17-1281

v.

STATE OF FLORIDA,

Appellee.

_____/

RESPONSE TO ORDER TO SHOW CAUSE

The Appellant, NORBERTO PIETRI, by and through undersigned counsel, hereby responds to this Court's Order to Show Cause why the trial court's order should not be affirmed in light of this Court's decision in *Hitchcock v. State*, SC17-445. In support thereof, Mr. Pietri states:

INTRODUCTION

Mr. Pietri is under a sentence of death. In the above-entitled matter, he is appealing the circuit court's summary denial of his successive Rule 3.851 motion challenging the constitutionality of his death sentence in light of *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).

First, Mr. Pietri submits that his appeal is not one subject to this Court's discretionary jurisdiction. *See* Fla. R. App. Pro. 9.030 (a) (2). Mr. Pietri is exercising a substantive right to appeal the denial of his successive Rule 3.851 motion. *See* Fla. Stat. § 924.066 (2016); Fla. R. App. Pro. 9.140(b)(1)(D). Because he has been

provided this substantive right, Mr. Pietri's right to appeal is protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Evitts v. Lucy*, 469 U.S. 387, 393 (1985) ("if a State has created appellate courts as "an integral part of the …system for finally adjudicating the guilt or innocence of a defendant," *Griffin v. Illinois*, 351 U.S. at 18, 76 S.Ct., at 590, the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution."). This principle applies to collateral appeals as well as direct appeals. *Lane v. Brown*, 372 U.S. 477, 484-85 (1963) ("the *Griffin* principle also applies to state collateral proceedings, and *Burns* leaves no doubt that the principle applies even though the State has already provided one review on the merits.").

The process by which the Court has directed Mr. Pietri to proceed indicates that it unreasonably intends to bind Mr. Pietri to the outcome rendered in *Hitchcock*'s appeal, regardless of the fact the record on appeal in each case is distinct and separate from one another. Because Mr. Hitchcock lost his appeal, this Court's order to show cause severely curtails the appellate process in Mr. Pietri's appeal of right.[1] This result implicates Mr. Pietri's right to due process and equal protection, particularly

[1] Fla. R. App. Pro. 9.140(i) provides that this Court "**shall** review all rulings and orders appearing in the record necessary to pass upon the grounds of an appeal." Yet this Court has *sua sponte* decided that Mr. Pietri is only entitled to the standard appellate process, which includes the right to file an Initial Brief of 75 pages in length, if he can first satisfy some unknown "cause" standard.

given that the constitutional arguments Mr. Pietri raised in his 3.851 proceedings are different from those set out in Mr. Hitchcock's briefing. A denial of Mr. Hitchcock's appeal should not govern the issues presented in Mr. Pietri's appeal.[2]

Individualized appellate review of all capital appeals is necessary. *See Lockett v. Ohio*, 438 U.S. 586, 605 (1978) ("we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases."). The individualized appellate review is necessary to insure Florida's capital sentencing scheme complies with the Eighth Amendment. *See Proffitt v. Florida*, 428 U.S. 242, 258 (1976) ("The Supreme Court of Florida reviews each death sentence to ensure that similar results are reached in similar cases."). Mr. Pietri deserves an individualized appellate process particularly because the procedure that this Court unveiled for use in Mr. Pietri's case was not employed in *Hitchcock v. State*. There was no requirement there that Mr. Hitchcock show "cause"; indeed his appeal proceeded under the standard Florida Rules of Appellate Procedure. Mr. Hitchcock was permitted to have counsel brief his issues. And after the decision in Hitchcock issued, Mr. Hitchcock had the right to have his counsel file a motion for rehearing on which the Florida Rules of

[2] A petition for a writ of certiorari is currently pending in *Hitchcock v. Florida* (No. 17-6180) and is scheduled for conference on November 13, 2017. The pending petition for certiorari demonstrates that the issues in *Hitchcock* are unresolved.

Appellate Procedure place no page limits. There is no doubt that undersigned counsel on behalf of Mr. Pietri would have taken advantage of the right to file a motion for rehearing to explain that this Court's ruling in *Hitchcock* raised more questions than it answered with regard to the constitutionality of Florida's capital sentencing scheme under the Eighth and Fourteenth Amendments.

Accordingly, Mr. Pietri objects to the requirement that he show "cause" before his appeal of right can proceed on the basis of the Florida Constitution, on the basis of the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and on the basis of the Eighth Amendment. "The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution." *Hall v. Florida*, 134 S. Ct. at 2001. Mr. Pietri respectfully moves the Court for full briefing and oral argument in accordance with the standard rules of appellate procedure.

ARGUMENT

A. Mr. Pietri's Rule 3.851.

Mr. Pietri filed a successive motion for postconviction relief on January 10, 2017, alleging that his death sentence violates the Sixth Amendment pursuant to *Hurst v. Florida* as well as the Eighth Amendment and Florida Constitution under *Hurst v. State*. Mr. Pietri argued both *Hurst* decisions should apply retroactively under *Witt v. State*, 387 So. 2d 922 (Fla. 1980), the equitable fundamental fairness

doctrine, and as a matter of federal law. Mr. Pietri also argued this Court's application of "limited retroactivity" to capital defendants whose death sentences became final after June 24, 2002, violates the Eighth Amendment. Lastly, following the enactment of Chapter 2017-1, Mr. Pietri filed a motion to amend his successive Rule 3.851 to include a claim premised on Chapter 2017-1.[3]

This Court's holding in *Asay* and this Court's reliance upon that holding in *Hitchcock*, does not foreclose the availability of *Hurst* relief to Mr. Pietri. *Hurst v. Florida* was a momentous shift in the United States Supreme Court's jurisprudence which recognized that Florida's capital sentencing scheme violated the Sixth Amendment where it did not require the jury to make the requisite findings of fact necessary to impose a sentence of death. However, it's most important role was to serve as the catalyst for this Court's decision in *Hurst v. State*.

B. Mr. Pietri's death sentence violates *Hurst* and he is entitled to retroactive application.

Mr. Pietri challenges his death sentence on the basis of the conclusion in *Hurst v. State* that a death sentence flowing from a non-unanimous death recommendation lacks reliability. This argument is different than the argument presented in *Hitchcock*

[3] Mr. Pietri sought to include a claim premised on the statutorily created substantive right to a life sentence unless a jury returns a unanimous death recommendation pursuant to Chapter 2017-1. Such a claim was not available to Mr. Pietri when he filed his 3.851 motion, prior to the enactment of the statute. Nevertheless, the circuit court denied Mr. Pietri the opportunity to brief the issue.

and establishes that Mr. Pietri should get *Hurst* relief.

In *Hitchcock*, the majority wrote:

> Although Hitchcock references various constitutional provisions as a basis for arguments that *Hurst v. State* should entitle him to a new sentencing proceeding, these are nothing more than arguments that *Hurst v. State* should be applied retroactively to his sentence, which became final prior to *Ring*. As such, these arguments were rejected when we decided *Asay*.

Hitchcock, 2017 WL 3431500, at *2. But, as Justice Pariente pointed out in her dissent, "[t]his Court did not in *Asay*, however, discuss the new right announced by this Court in *Hurst* to a unanimous recommendation for death under the Eighth Amendment. . . . Therefore, *Asay* does not foreclose relief in this case, as the majority opinion assumes without explanation." *Id*., at *4 (Pariente, J., dissenting).

In *Asay v. State*, 210 So. 3d 1, 14 (Fla. 2016), this Court acknowledged that the U.S. Supreme Court in *Hurst v. Florida* did not address "whether Florida's sentencing scheme violated the Eighth Amendment." The entirety of the Court's analysis in *Asay* hinged on whether *Hurst v. Florida*, 136 S. Ct. 616 (2016) should apply retroactively to Asay. *See id*. at 15. *Hurst v. Florida* is a Sixth Amendment case. The Sixth Amendment right addressed in *Hurst v. Florida* has nothing to do with the constitutional right to a life sentence unless a jury returns a unanimous death recommendation which was recognized in *Hurst v. State* on the basis of the Eighth Amendment and the Florida Constitution. Thus, this Court's premise: that

Hitchcock's issues were decided by *Asay* is erroneous. It was simply not raised or at issue in *Asay*.[4] And in *Hitchcock*, this Court declined to analyze the other "various constitutional provisions" cited by Hitchcock. *Hitchcock*, 2017 WL 3431500, at *2. Therefore, *Hitchcock* has no precedential value and does not foreclose relief.

Mr. Pietri's 3.851 motion is based upon the right to a life sentence unless a properly-instructed jury unanimously recommends a death sentence as recognized in *Hurst v. State*. It establishes a presumption of a life sentence that is the equivalent of the guilt phase presumption of innocence. This Court recognized that the requirement that the jury must unanimously recommend death before this presumption of a life sentence can be overcome does *not* arise from the Sixth Amendment, from *Hurst v. Florida*, or from *Ring v. Arizona*. Rather, it is a right emanating from the Florida Constitution and the Eighth Amendment.

The requirement that the jury unanimously vote in favor of a death recommendation before a death sentence is authorized was embraced as a way to enhance the reliability of death sentences. *Hurst v. State*, 202 So. 3d at 59 ("We also note that the requirement of unanimity in capital jury findings will help to ensure the heightened level of protection necessary for a defendant who stands to lose his life

[4] After the October 14, 2016 issuance of *Hurst v. State* and before the December 22, 2016 decision in *Asay v. State*, Asay did not present any arguments on the basis of *Hurst v. State*. Asay did not present any argument that his death sentences violated the Eighth Amendment or the Florida Constitution. Asay also did not make any arguments regarding the retroactivity of *Hurst v. State.*

as a penalty.). *See 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.").

In holding that requiring unanimity would produce more reliable death sentences, this Court has acknowledged that death sentences imposed without the unanimous support of a jury lacked the requisite reliability:

> After our more recent decision in *Hurst*, 202 So. 3d 40, where we determined that a reliable penalty phase proceeding requires that "the penalty phase jury must be unanimous in making the critical findings and recommendation that are necessary before a sentence of death may be considered by the judge or imposed," 202 So. 3d at 59, we must consider whether the unpresented mitigation evidence would have swayed one juror to make "a critical difference." *Phillips*, 608 So. 2d at 783.

Bevel v. State, 221 So. 3d 1168, 1182 (Fla. 2017).

This Court's recognition that "a reliable penalty phase requires" a unanimous jury death recommendation by a properly-instructed jury means that the 8 to 4 death recommendation provided by Mr. Pietri's jury does not qualify as reliable. In *Mosley v. State*, this Court noted that the unanimity requirement in *Hurst v. State* carried with it "heightened protection" for a capital defendant. *Id*., 209 So. 3d at 1278. This Court stated in *Mosley* that *Hurst v. State* had "emphasized the critical importance of a unanimous verdict." *Id*. This Court added:

> In this case, where the rule announced is of such fundamental importance, the interests of fairness and "cur[ing] **individual injustice**" compel retroactive application of *Hurs*t despite the impact it will have on the administration of justice. *State v. Glenn*, 558 So.2d 4, 8 (Fla. 1990).

Mosley v. State, 209 So. 3d at 1282 (emphasis added). *Hurst v. State* recognized that the non-unanimous recommendation demonstrates that Mr. Pietri's death sentence lacks the heightened reliability demanded by the Eighth Amendment. *Hurst v. State*, 202 So. 3d at 59 ("the requirement of unanimity in capital jury findings will help to ensure the heightened level of protection necessary for a defendant who stands to lose his life as a penalty.").

An examination of Mr. Hitchcock's initial brief shows that the focus of his arguments is actually on *Hurst v. Florida* and the Sixth Amendment right to a jury verdict as to the imposition of a death sentence. His Summary of the Argument focuses only on *Hurst v. Florida*; it does not mention *Hurst v. State*. Argument IV of Mr. Hitchcock's initial brief does raise an Eighth amendment argument arising from *Hurst v. State*, but focuses on the evolving standards of decency. In *Hurst v. State*, this Court found that there existed a national consensus that death sentences should only result when a jury unanimously consented to its imposition. *Id*., 202 So. 3d at 61. While there is a basis for Mr. Hitchcock's argument within *Hurst v. State*, it is not the Eighth Amendment argument and Florida Constitution argument that Mr. Pietri will be making.

While there is some overlap with Mr. Hitchcock's arguments, the indicia of unreliability present here was not present or addressed in *Hitchcock v. State*. Indeed, all of Mr. Pietri's arguments are underscored by the numerous errors that occurred at his capital penalty phase which, in light of the cataclysmic shift in the law, establish that his death sentence is incurably unreliable. For instance, on direct appeal, this Court found that it was error to instruct the jury on the aggravating circumstance of cold, calculated and premeditated (CCP), but found the error to be harmless. *Pietri v. State*, 644 So. 2d 1347 (Fla. 1994). *cert. denied*, *Pietri v. Florida*, 515 U.S. 1147 (1995). However, after *Hurst*, this Court must consider the impact the stricken aggravator had on the jury's ultimate verdict, particularly in light of the fact that CCP "is among the most serious aggravators set out in the statutory sentencing scheme." *Wood v. State*, 209 So. 3d 1217, 1228 (Fla. 2017) (internal citations omitted).[5]

In addition, Mr. Pietri's jury was not instructed to avoid improperly doubling the three aggravating circumstances of: 1) avoid arrest; 2) disrupt/hinder law enforcement; and 3) victim was law enforcement .While the sentencing order reflects the judge correctly merged the aggravating circumstances, the record clearly demonstrates Mr. Pietri's jury was improperly instructed as to the law as well as to

[5] This Court did not strike any of Mr. Hitchcock's aggravating factors on direct appeal, therefore this issue was not raised and the disposition of Mr. Hitchcock's appeal does not foreclose relief on this issue.

their role. *See Caldwell v. Mississippi*, 472 U.S. 320 (1985) (holding jury's verdict imposing a death sentence is invalid if imposed by a jury that believed ultimate responsibility rested elsewhere).[6]

Mr. Pietri's jury was repeatedly instructed that its role was merely advisory and that the judge would ultimately decide the sentence. After brief deliberations, the jury returned an 8-4 death recommendation without specifying the factual basis for the recommendation. (R. 3099-3102; 3680). There is no way for this Court to determine if individual jurors, or a sub-group of jurors, based their overall recommendation for death on a different underlying calculus. As noted above, this Court certainly did not agree with the lower court's sentencing calculus when it struck CCP on direct appeal. *Pietri v. State*, 644 So. 2d 1347 (Fla. 1994). As the United States Supreme Court explained in *Caldwell*, "there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court." *Id*. at 330.

[6] While this Court has previously rejected *Caldwell* challenges in the context of the prior sentencing scheme, three justices of the United States Supreme Court recently dissented from a denial of certiorari because of this Court's appellate review of issues arising in the wake of *Hurst v. Florida*. *See Truehill v. Florida*, 2017 WL 2463876 (October 16, 2017) (Sotomayor, J., dissenting, joined by Breyer and Ginsburg, JJ.) ("capital defendants in Florida have raised an important Eighth Amendment challenge to their death sentences that the Florida Supreme Court has failed to address.").

Here, the stricken aggravator, improper jury instructions, and generalized non-unanimous verdict demonstrate specific reasons why Mr. Pietri's death sentence is fundamentally unfair and unreliable.

Again, Mr. Pietri's seeks to challenge his death sentence on the basis of *Hurst v. State*—that a death sentence flowing from a death recommendation in which the jury was not required to return a unanimous verdict lacks the requisite heightened reliability. This is a different argument than the one presented by Mr. Hitchcock, and it provides a much different and stronger argument that Mr. Pietri should get the retroactive benefit of *Hurst v. State*. The importance of the heightened reliability demanded by the Eighth Amendment was found in *Mosley* to be of such fundamental importance that this Court abandoned the binary approach to *Witt*. As indicated in *Mosley*, the *Witt* analysis in the context of *Hurst v. State* requires consideration of the need to cure "individual injustice." Unlike Mr. Hitchcock, Mr. Pietri will argue that under the case by case *Witt* analysis which *Mosley* said was required, the layers of unreliability and identified errors in Mr. Pietri's penalty phase show "individual injustice" in need of a cure. [7]

[7] While both Mr. Hitchcock and Mr. Pietri have raised issues as to the *Witt* analysis that was conducted in *Asay v. State* regarding *Hurst v. Florida*, the argument made in the initial brief in *Hitchcock v. State* quickly diverges from that claims that Mr. Pietri asserted in his 3.851 motion. Mr. Hitchcock did not argue that in light of *Asay* and *Mosely*, the *Witt* balancing test for determining whether *Hurst v. Florida* applies retroactively must be conducted case by case. To preclude Mr. Pietri from making his arguments in an initial brief filed in compliance with the standard rules of

Indeed, not only was Mr. Pietri's jury never asked to make unanimous findings of fact as to any of the required elements, and was expressly told mercy could play no role in their recommendation, but as noted above, the jury was also never instructed to avoid the doubling of aggravators and was instructed on the invalid CCP aggravator that this Court later struck on direct appeal.[8] In light of the "individual injustice" in Mr. Pietri's case, the scales are tipped and the interests of fairness exceed the State's interest in finality. It is undeniable that these issues support Mr. Pietri's contention that his 8-4 death recommendation possesses substandard reliability. The disposition of Mr. Hitchcock's appeal and arguments made therein did not address the "individual injustice" present in Mr. Pietri's case. Thus, the disposition of Mr. Hitchcock's appeal cannot govern or control the outcome on the issue being raised in Mr. Pietri's appeal.

In addition to addressing *Hurst v. Florida* and *Hurst v. State* under *Witt*, Mr. Mr. Pietri intends to argue that fundamental fairness (as identified and discussed in *Mosley v. State*) and the manifest injustice exception to the law of the case doctrine set forth in *Thompson v. State*, 208 So. 3d 49, 50 (Fla. 2016), apply and require that

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appellate procedure when Mr. Hitchcock has been afforded the very opportunity that is being denied Mr. Pietri violates equal protection.

[8] Mr. Pietri's jury was instructed to consider six aggravating factors even though the State conceded that the three aggravating factors of: 1) avoid arrest; 2) disrupt/hinder law enforcement; and 3) victim was law enforcement, could only be considered as a single aggravating factor.

Mr. Pietri receive the benefit of *Hurst v. Florida* and *Hurst v. State*. Under both "fundamental fairness" and "manifest injustice," collateral relief is warranted.

Specifically, as to the fundamental fairness concept set forth in *Mosley*, Mr. Pietri detailed his case specific reasons why the "fundamental fairness" concept, which this Court embraced and employed in *Mosley*, meant that he should receive collateral relief in light of *Hurst v. Florida* and/or *Hurst v. State*. In *James v. State*, 615 So. 2d 668 (Fla. 1993), this Court cited "fundamental fairness" when it granted a resentencing. It found a case specific demonstration of fundamental unfairness entitled Mr. James to collateral relief due to the decision in *Espinosa v. Florida*, 505 U.S. 1079 (1992). Because of Mr. James' efforts to challenge the jury instruction on heinous, atrocious or cruel in anticipation of *Espinosa*, this Court held that "it would not be fair to deprive him of the Espinosa ruling" even though Mr. James' death sentence was final years before *Espinosa* was issued by the United States Supreme Court. *James v. State*, 615 So. 2d at 669.

Other collateral appellants appearing before this Court with death sentences that were final before *Espinosa* issued were generally unable to make the showing of unfairness that Mr. James made. Very few of those with death sentences final before the issuance of *Espinosa* received collateral relief on the basis of *Espinosa*. The ruling in *Espinosa* was not found retroactive under *Witt v. State*. The collateral benefit was extended only on a case by case basis to those like Mr. James who

showed their case specific entitlement to the retroactive benefit of *Espinosa* using fundamental fairness as the yardstick. Just as Mr. James made a successful case specific showing of fundamental unfairness while others did not, Mr. Pietri's case specific showing of fundamental unfairness cannot be controlled by the *Hitchcock* decision as it was not an issue raised in Mr. Hitchcock's case. Whether "fundamental fairness" warrants collateral relief in Mr. Pietri's case can only be resolved after a full review of the record in Mr. Pietri's case, not a review of the record in Mr. Hitchcock's case.

When discussing the concept of fundamental fairness in his 3.851 motion, Mr. Pietri identified issues he had raised at his trial, on direct appeal and in collateral proceedings which he had pursued in an effort to present the Sixth Amendment and Eighth Amendment challenges to his death sentence found meritorious in *Hurst v. Florida* and *Hurst v. State*. At trial, Mr. Pietri filed a motion seeking to declare Florida's capital sentencing scheme, § Fla. Stat. 921.141, unconstitutional generally and specifically noting the lack of adequate appellate review. The motion alleged, "until the court requires a special verdict form wherein the jury states the circumstances it relied upon to render its advisory opinion and until trial judges are require to meticulously detail the mitigation that was considered, there can only be arbitrary sentences of death in Florida" (R. 3431). Moreover, "[t]here can be no doubt the trial court engages in a guessing game when it attempts to determine the

basis for the jury's verdict" (R. 3431). Counsel also filed a motion requesting the trial court to instruct the jury that it could "always grant mercy" and recommend life despite the existence of aggravating circumstances (R. 3633).

Prior to sentencing, counsel also filed a "Motion to Declare Unconstitutional the Treatment of an 8-4 Verdict as a Death Recommendation" (R. 3700-03). The motion alleged: (1) the jury was misled and may have been swayed by the inflated number of aggravating circumstances; and (2) the Sixth and Eighth Amendment are violated because a non-unanimous recommendation diminishes the reliability of the jury's verdict. All motions were denied.

On direct appeal, Mr. Pietri again challenged the trial court's denial of his motions and the constitutionality of Florida's capital sentencing scheme. This Court affirmed the convictions and sentences, but struck the aggravating circumstance of cold, calculated and premeditated, holding the error to be harmless. *Pietri v. State*, 644 So. 2d 1347 (Fla. 1994). *cert. denied*, *Pietri v. Florida*, 515 U.S. 1147 (1995).

During postconviction Mr. Pietri first filed a Fla. R. Crim. P. 3.851 successive motion predicated on *Ring. v. Arizona* on October 10, 2002, and, in addition, later filed a state habeas petition in this Court within a year after *Ring* was issued. This Court denied the *Ring* claim on the basis of *Bottoson v. Moore*, 831 So. 2d 693 (Fla. 2002) and *King v. Moore*, 831 So. 2d 143 (Fla. 2002), cases which this Court has now recognized were wrongly decided, and also referred to Mr. Pietri's prior violent

felonies as disqualifying. *Pietri v. State*, 885 So. 2d. 245, 276 (Fla. 2004). Thus, Mr. Pietri raised a *Ring* claim "at his first opportunity and was then rejected at every turn." *Mosley*, 209 So. 3d at 1275. For that reason alone, "fundamental fairness requires the retroactive application of *Hurst*, which defined the effect of *Hurst v. Florida*," to Mr Pietri. *See id.*

C. Limited retroactivity injects arbitrariness into Florida's capital sentencing scheme, which violates the Eighth Amendment principles of *Furman v. Georgia*.

Mr. Pietri's 3.851 motion also challenged the Court's arbitrary bright line cutoff that resulted from *Mosley* and *Asay*. Mr. Pietri contends that the cutoff set at June 24, 2002 is so arbitrary as to violate the Eighth Amendment principles enunciated in *Furman v. Georgia*. In *Furman*, the U.S. Supreme Court found that the death penalty "could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976); *see also Furman*, 408 U.S. at 239-40.

The resulting June 24, 2002, cutoff based on the date of a particular death sentence's finality is inherently arbitrary. Finality can depend on whether there were delays in transmitting the record on appeal;[9] whether direct appeal counsel sought extensions of time to file a brief; whether a case overlapped with the Court's summer

[9] *See e.g., Lugo v. State*, 845 So. 2d 74 (Fla. 2003) (two-year delay between the time defense counsel filed a notice of appeal and the record on appeal being transmitted to this Court almost certainly resulted in the direct appeal being decided post-*Ring*).

recess; whether an extension was sought for rehearing and whether such a motion was filed; whether counsel chose to file a petition for writ of certiorari in the U.S. Supreme Court or sought an extension to file such a petition; and how long a certiorari petition remained pending in the Supreme Court.

This inherent arbitrariness is exemplified by two unrelated cases. This Court affirmed Gary Bowles's and James Card's death sentences in separate opinions that were issued on the same day, October 11, 2001. *See Bowles v. State*, 804 So. 2d 1173 (Fla. 2001); *Card v. State*, 803 So. 2d 613, 617 (Fla. 2001). Both men petitioned for a writ of certiorari in the U.S. Supreme Court. Card's sentence became final four days after *Ring* was decided—on June 28, 2002—when his certiorari petition was denied. *Card v. Florida*, 536 U.S. 963 (2002). However, Bowles's sentence became final seven days **before** *Ring* was decided—on June 17, 2002—when his certiorari petition was denied. *Bowles v. Florida*, 536 U.S. 930 (2002). This Court recently granted Card a new sentencing proceeding, ruling that *Hurst* was retroactive because his sentence became final after the *Ring* cutoff. *See Card*, 219 So. 3d at 47. However, Bowles, whose direct appeal was decided the same day as Card's, falls on the other side of this Court's current retroactivity cutoff and will not receive the benefit of the *Hurst* decisions.

There are also cases in which a capital defendant has had a death sentence vacated in collateral proceedings, a resentencing ordered, and another death sentence

imposed, which was pending on appeal when *Hurst v. Florida* issued. Those individuals will receive the benefit of the *Hurst* decisions because a final death sentence was not in place when *Hurst* issued.[10] There can be no other word to describe these disparate outcomes but arbitrary.

In separating those who are to receive the retroactive benefit of *Hurst v. Florida* and/or *Hurst v. State* from those who will not, the line drawn operates much the same as the IQ score of 70 cutoff at issue in *Hall v. Florida*, 134 S. Ct. 1986 (2014). Drawing a line at June 24, 2002, is just as arbitrary and imprecise as the bright line cutoff at issue in *Hall*. When the U.S. Supreme Court declared that cutoff unconstitutional, those death sentenced individuals with IQ scores above 70 were found to be entitled to a case-by-case determination of whether the Eighth Amendment precludes their execution. Mr. Pietri is similarly entitled to an individual review of his inherently unreliable death sentence.[11]

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[10] *See, e.g.*, *Armstrong v. State*, 211 So. 3d 864 (Fla. 2017) (resentencing ordered where conviction was final in 1995 for a 1990 homicide); *Johnson v. State*, 205 So. 3d 1285 (Fla. 2016) (resentencing ordered where conviction was final in 1993 for three 1981 homicides); *Hardwick v. Sec'y, Fla. Dept. of Corr*., 803 F. 3d 541 (11th Cir. 2015) (resentencing ordered where conviction was final in 1988 for a 1984 homicide).

[11] The decisions in *Bevel v. State* and *Hurst v. State* acknowledged that when a judge follows a jury's non-unanimous death recommendation and imposes a death sentence, that sentence is inherently unreliable. A death sentence imposed after a jury returned a non-unanimous death recommendations before June 24, 2002, is just as, if not more, unreliable than a death sentence imposed after June 24, 2002, following a non-unanimous death recommendation.

To deny Mr. Pietri the retroactive application of the *Hurst* decisions on the ground that his death sentence became final before June 24, 2002 while granting retroactive *Hurst* relief to inmates whose death sentences were not final on June 24, 2002 violates Mr. Pietri's right to Equal Protection of the Laws under the Fourteenth Amendment and his right against arbitrary infliction of the death penalty under the Eighth Amendment. Mr. Hitchcock did not make this argument as to the retroactive benefit of *Hurst v. State* being arbitrarily limited by a bright line cutoff in violation of the Eighth Amendment. And, certainly, this Court did not address this issue in its opinion denying Mr. Hitchcock relief. Thus, Mr. Pietri should not be bound by the disposition of Mr. Hitchcock's appeal.

CONCLUSION

The specific issues raised by Mr. Pietri were not decided by this Court in *Hitchcock*, or in *Asay*. Due process requires that Mr. Pietri have the opportunity for full briefing and an individualized analysis of his claims. Mr. Pietri asks this Court to allow oral argument and full briefing on the issues resulting from the circuit court's summary denial of his Rule 3.851 motion. In the alternative, Mr. Pietri asks this Court to apply the *Hurst* decisions retroactively to him, vacate his death sentence, and remand to the circuit court for a new penalty phase that comports with the Sixth, Eighth and Fourteenth Amendments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been filed through the Florida State Courts e-filing portal which electronically sent a copy to Leslie T. Campbell, Assistant Attorney General, on October 31, 2017.

/s/ William M. Hennis III
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