IN THE SUPREME COURT OF FLORIDA
Case No. SC17-1306

MICHAEL ALLEN GRIFFIN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

RESPONSE TO ORDER TO SHOW CAUSE AND MOTION FOR GUIDANCE AS TO THE STANDARD FOR DETERMINING WHAT CONSTITUTES CAUSE

COMES NOW the Appellant, **MICHAEL ALLEN GRIFFIN**, and respectfully responds to this Court's Order to Show Cause and requests that the Court provide guidance as to what constitutes cause and/or find that cause exists and issue a briefing schedule allowing Mr. Griffin's appeal to proceed to briefing. In support of his position, Mr. Griffin states:

1. Mr. Griffin is under a sentence of death which was affirmed by this Court in 1994. *Griffin v. State*, 639 So. 2d 966 (Fla. 1994), *cert denied* 514 U.S. 1005 (1995). He filed the successive Rule 3.851 motion that is the subject of this appeal on January 12, 2017. In that motion, Mr. Griffin raised four claims challenging the constitutionality of his death sentence. Claim I rested on the Sixth Amendment and the decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016). Claim II rested on the Eighth

Amendment, the Florida Constitution, and the ruling in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). Claim III was premised on *Furman v. Georgia*, 408 U.S. 238 (1972) and the arbitrary distinction this Court made in *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016) and *Asay v. State*, 210 So. 3d 1 (Fla. 2016) between death sentences final before June 24, 2002 and those final after June 24, 2002. Claim IV asserted that the denial of Mr. Griffin's previously heard collateral claims could not stand in light of the recognition in *Hurst v. State* that death sentences imposed without a jury's unanimous consent were not sufficiently reliable under the Eighth Amendment.

2. On April 10, 2017, Mr. Griffin filed a motion to amend the 3.851 motion to include a fifth claim arising from the March 13, 2017, enactment of Chapter 2017-1 which revised Florida's capital sentencing statute, § 921.141, Fla. Stat. At the April 28, 2017, case management hearing, the circuit court granted Mr. Griffin's motion to amend to include this claim and indicated that Mr. Griffin did not need to file a pleading further identifying his fifth claim (PC-R4 277). Mr. Griffin's five separate claims were orally argued at the April 28 case management hearing. But, the circuit court cut short Mr. Griffin's oral reply to the State's arguments due to the court's busy docket. As a result on May 5, 2017, Mr. Griffin filed a

notice of proffer submitting in written form his arguments in reply to the State's arguments. In his proffer, Mr. Griffin also sought to elaborate on his fifth claim arising from the enactment of Chapter 2017-1 and the revised § 921.141.

3. The circuit court denied Mr. Griffin's 3.851 claims in an order dated May 17, 2017. Mr. Griffin's timely motion for rehearing was denied on June 6, 2017. A notice of appeal was filed on July 6, 2017.

4. On July 17, 2017, this Court stayed proceedings pending a decision in *Hitchcock v. State*, Case No. 445. On September 25, 2017, this Court issued an order directing Mr. Griffin to show cause "why the trial court's order should not be affirmed in light of this Court's decision *Hitchcock v. State*, SC17-445." Mr. Griffin's motion for an extension of time to file a response was granted given that the record on appeal had not yet been filed with this Court. Mr. Griffin was given until 7 days after the record was filed to submit his response to the show cause order. The record was filed on November 9, 2017.

A. MR. GRIFFIN'S RIGHT TO APPEAL THE DENIAL OF HIS RULE 3.851 MOTION AND THE UNDEFINED "CAUSE" STANDARD.

Mr. Griffin submits that his appeal is not one subject to this Court's discretionary jurisdiction. *See* Fla. R. App. Pro. 9.030(a)(2). Mr. Griffin has a substantive right to appeal the

denial of his successive Rule 3.851 motion. *See* Fla. Const. Art. V, Sec. 3(b)(1); Fla. Stat. § 924.066 (2016); Fla. R. App. Pro 9.140(b)(1)(D). This Court "**shall review all rulings and orders appearing in the record necessary to pass upon the grounds of an appeal**." Fla. R. App. Pro. 9.140(i)(emphasis added).[1] Requiring a showing of "cause" before an appeal is heard, renders the appeal, not one of right in violation of the Florida Constitution, but merely one that is discretionary.

Mr. Griffin has a substantive right to appeal the denial of a successive Rule 3.851 motion. It is protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Evitts v. Lucey*, 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, the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution."). This applies

[1]In 2003, this Court denied Mr. Griffin's appeal from the denial of a 3.850 motion and stated: "Michael Allen Griffin appeals an order of the circuit court denying his motion for postconviction relief under Florida Rule of Criminal Procedure 3.850. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const." *Griffin v. State*, 866 So. 2d 1, 4 (Fla. 2003). Art. V, § 3(b)(1), provides: "The supreme court: (1) **Shall** hear appeals from final judgments of trial courts imposing the death penalty...." (emphasis added).

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.").[2]

This Court's *sua sponte* stay of Mr. Griffin's appeal pending a decision in *Hitchcock v. State* appears to have been a prejudgment of Mr. Griffin's appeal and an effort to bind him to the outcome in *Hitchcock v. State*. While such show cause orders are common in discretionary appeals, it is an anathema to individualized capital appeals. This Court's show cause order guts the appellate process in Mr. Griffin's appeal of right. It appears that the use of a procedure from discretionary appeals means that this Court regards Mr. Griffin's appeal as one within its discretion to hear or not hear. This does not comport with this Court's construction of Art V, Sec. 3(b)(1), Fla. Const. It reflects this Court's abandonment of its long held construction of the Florida Constitution, and a tacit constitutional amendment without notice or opportunity to be heard.[3] It violates Mr.

---

[2]In *Lane v. Brown*, the issue arose when an appeal was not allowed due to a public defender's "stated belief that an appeal would be unsuccessful." *Id.*, 372 U.S. at 481-82.

[3]This Court's order was entered before the record on appeal had been filed with this Court. The order reflects a pre-judgment without a review of the record and without

Griffin's right to due process and equal protection under the Fourteenth Amendment.[4] What constitutes "cause" has not been explained; there are no standards.

Individualized appellate review in each capital appeal, whether in the course of direct or collateral proceedings, is mandated by the Florida Constitution. That individualized 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."). In a capital case, individualized appellate review is as essential as an individualized sentencing. *See Mosley v. State*, 209 So. 3d 1248, 1282 (Fla. 2016) ("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 *Hurst* despite the impact it

---

affording Mr. Griffin a right to be heard. Mr. Griffin was stripped of his right to file initial and reply briefs. It was and is an unconstitutional denial of due process.

[4]This Court *sua sponte* decided that Mr. Griffin was not entitled to the normal capital appellate review process unless he first shows "cause," whatever that means. It is undefined. The show cause order only affords Mr. Griffin 20 pages to show a standardless "cause." The rules of appellate procedure would grant him the right to file an Initial Brief of 75 pages in length in his appeal of right.

will have on the administration of justice."); *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."). *See also Parker v. Dugger*, 498 U.S. 308 (1991).[5]

On the basis of the Florida Constitution, Mr. Griffin objects to the requirement that he show cause before his appeal of right can proceed. He objects on the basis of the Equal Protection and Due Process Clauses of the Fourteenth Amendment,[6] and on the basis of the Eighth Amendment.

B. MR. GRIFFIN SEEKS TO SHOW "CAUSE", WHATEVER THAT IS.[7]

---

[5]As three Supreme Court justices recently noted, this Court's review of *Hurst*-related appeals has been incomplete. *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.").

[6]Mr. Hitchcock did not have to show "cause" for his appeal to proceed. Mr. Hitchcock's counsel was permitted to file initial and reply briefs.

[7]Is "cause" the same as de novo review, which would govern this Court's review of questions of law? Or, does "cause" contemplate merely a review of whether competent, substantial evidence supports the trial court's order? Standards of review matter. *See State v. J.P.* 907 So.2d 1101, 1120 (Fla. 2004) (Cantero, J., dissenting) ("Not only is the applicable standard the threshold determination in

Despite the absence of guidance as to what constitutes "cause" which allows a capital appellant's appeal of right to proceed, Mr. Griffin seeks to comply with this Court's directive by suggesting the following as cause:

Cause 1

On March 13, 2017, Chapter 2017-1 became law. It revised Florida's capital sentencing statute, § 921.141. As revised, § 921.141 now provides that a defendant convicted of first degree murder cannot receive a death sentence unless the State convinces a jury to unanimously return a "death recommendation." Before the jury can return a unanimous death recommendation, the jury must first "identify[] each aggravating factor" that it has unanimously found proven beyond a reasonable doubt. *See* § 921.141(2)(b). Next, the jury must unanimously find beyond a reasonable doubt that the aggravators, it unanimously found, are sufficient to justify a death sentence. Then, the jury must unanimously find beyond a reasonable doubt that "aggravating factors exist which outweigh the mitigating circumstances found to exist." *See* Fla. Stat. § 921.141(2)(b)(2). Finally, the jurors must then unanimously vote to recommend a death sentence. Only if a unanimous death recommendation is returned is a judge

---

any constitutional analysis; it is often the most crucial. In this case, it has made all the difference.").

authorized to impose a death sentence.

Under the revised § 921.141, a defendant convicted of first degree murder cannot receive a death sentence unless and until a jury returns a unanimous verdict that makes the findings necessary to authorize a judge to consider a death sentence. The findings to be made by a unanimous jury are what separate first degree murder from the next higher degree of murder for which death is a permissible penalty. While the statute calls the jury's unanimous verdict a "death recommendation," it is functionally a verdict finding a defendant guilty of the highest degree of murder, what can be called capital first degree murder.

In *Ring v. Arizona*, 536 U.S. 584, 604-05 (2002), the US Supreme Court explained:

> *Apprendi* repeatedly instructs in that context that the characterization of a fact or circumstance as an "element" or a "sentencing factor" is not determinative of the question "who decides," judge or jury. *See, e.g.*, 530 U.S., at 492, 120 S.Ct. 2348 (noting New Jersey's contention that "[t]he required finding of biased purpose is not an 'element' of a distinct hate crime offense, but rather the traditional 'sentencing factor' of motive," and calling this argument "nothing more than a disagreement with the rule we apply today"); *id.*, at 494, n. 19, 120 S.Ct. 2348 ("[W]hen the term 'sentence enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict."); *id.*, at 495, 120 S.Ct. 2348 ("[M]erely because the state legislature placed its hate crime sentence enhancer within the sentencing provisions of the criminal code does not mean that the

> finding of a biased purpose to intimidate is not an essential element of the offense." (internal quotation marks omitted)); *see also id.*, at 501, 120 S.Ct. 2348 (THOMAS, J., concurring) ("[I]f the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact[,] ... the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime.").

In his concurrence, Justice Scalia explained that it did not matter how the legislature labeled findings that were necessary to increase the range of punishment, what mattered was what was necessary under the statute to authorize an increase in the range of punishment:

> I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt.

Ring v. Arizona, 534 U.S. at 610 (Scalia, J., concurring).

The revised § 921.141 identifies those findings that a jury must unanimously make to increase a first degree murder conviction (for which the death penalty is not authorized) to a capital first degree murder conviction (for which a judge may impose a death sentence). In *Alleyne v. United States*, 570 U.S. 99 (2013), the US Supreme Court explained:

> When a finding of fact alters the legally prescribed

> punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury. It is no answer to say that the defendant could have received the same sentence with or without that fact. It is obvious, for example, that a defendant could not be convicted and sentenced for assault, if the jury only finds the facts for larceny, even if the punishments prescribed for each crime are identical. One reason is that each crime has different elements and a defendant can be convicted only if the jury has found each element of the crime of conviction.

Alleyne, 570 U.S. at _, 133 S. Ct. at 2162. Under the revised § 921.141, first degree murder plus the additional elements set forth in the statute constitute a different crime, a higher degree of murder for which a death sentence is authorized. *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004) ("In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings."). Under the revised § 921.141, the maximum punishment for first degree murder is life imprisonment. For a death sentence to be authorized, the defendant must be found guilty of the next higher degree of murder, in essence capital first degree murder.

The additional elements identified in the revised § 921.141 that are necessary for a capital first degree murder conviction go beyond requiring a finding of one aggravator, which the State of Florida maintained was all that was necessary to render a conviction of first degree murder subject to the death penalty

before the statutory revision. In *Griffin v. State*, 866 So. 2d 1, 7-8 (Fla. 2003), this Court held:

> Griffin also includes an assertion that he is innocent of and ineligible for the death penalty. In order to prevail on such a claim, a defendant "would have to show constitutional error invalidating all of the aggravating circumstances upon which the sentence was based." *In re Medina*, 109 F.3d 1556, 1566 (11th Cir.1997). In Griffin's case, the trial court found four aggravating circumstances: CCP, previous conviction of a violent felony (based on the attempted murder of Officer Crespo), that the murder was committed during the course of a burglary, and that the murder was committed to avoid arrest. Griffin has not shown constitutional error that would invalidate all of these aggravating circumstances.

Thus, the revised § 921.141 changed the elements that had to be proven beyond a reasonable and that the jury had to unanimously find in order for there to be a conviction of capital first degree murder which authorizes the imposition of a death sentence. A conviction of capital first degree murder is necessary for a judge to have the authority to impose death as a sentence. The additional elements, over and above those required for first degree murder, that are necessary to authorize a death sentence must be proven beyond a reasonable doubt to the satisfaction of all twelve jurors.

The legislature intended the substantive elements of capital first degree murder to govern in all homicide cases, even those

homicides committed before the revisions were enacted.[8] The revised § 921.141 was intended to apply retrospectively, i.e. to first degree murder prosecutions in which the homicide at issue occurred before the enactment of Chapter 2017-1. Because a defendant convicted of first degree murder, as opposed to capital first degree murder, cannot receive a death sentence, a "resentencing" is functionally a guilt phase trial of the elements necessary for a conviction of capital first degree murder. Only upon such a conviction is a judge authorized to impose a death sentence. *See Blakely v. Washington*, 542 U.S. at 304 ("When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' *Bishop*, *supra*, § 87, at 55, and the judge exceeds his proper authority.").

Defendants who were convicted of first degree murder before the enactment of Chapter 2017-1 that are receiving a "resentencing" cannot again receive a death sentence on the basis

[8]At a case management hearing on November 9, 2017, in *State v. Pittman*, a Polk County case in which the defendant is under a death sentence for 1990 homicides, the State acknowledged that if Mr. Pittman's death sentences were vacated for any reason and a "resentencing" ordered, the revised § 921.141 would govern, and before Mr. Pittman could be again sentenced to death, the jury would have to unanimously make all the findings necessary to authorize the presiding judge to consider imposing a death sentence.

of the first degree murder conviction previously returned in light of the revised § 921.141. A jury must return a verdict which is functionally a finding of guilt of the next highest degree of murder, capital first degree murder, and which authorizes a judge to impose a death sentence. Absent a unanimous jury making the requisite findings, and in essence convicting the defendant of capital first degree murder, the only possible sentence is a life sentence. It does not matter if a first degree murder conviction had been previously been returned and had been final since 1982, 1984, or 1985.

A "resentencing" has been ordered for William White whose first degree murder conviction became final on November 29, 1982, and has remained intact ever since. *White v. State*, 415 So. 2d 719 (Fla. 1982), *cert denied*, 459 U.S. 1155 (1982). The "resentencing" was recently ordered by a circuit court. Though the State filed a notice of appeal, it has since filed a notice of voluntary dismissal of its appeal. *See White v. State*, Case No. SC17-995. Before Mr. White can receive a death sentence, the jury will have to convict him of capital first degree murder. The "resentencing" will actually be a trial on whether to convict Mr. White of the next higher degree of murder.

A "resentencing" has also been ordered for James Card whose first degree murder conviction became final on November 5, 1984,

and it has remained intact ever since. The Florida Supreme Court recently vacated his death sentence and ordered a "resentencing." *Card v. Jones*, 219 So. 3d 47 (Fla. 2017). Under the revised § 921.141, the "resentencing" will actually be a trial on whether to convict Mr. Card of the next higher degree of murder.

A "resentencing" has been ordered for J.B. Parker whose first degree murder conviction became final on January 26, 1986. *Parker v. State*, 476 So. 2d 134 (Fla. 1985). The "resentencing" was recently ordered by a circuit court. While the State did file an appeal, it later filed a notice of voluntary dismissal of its appeal. *See Parker v. State*, Case No. SC17-794. Under the revised § 921.141, the "resentencing" will actually be a trial on whether to convict Mr. Parker of the next higher degree of murder.

As it appears now, the substantive right to a life sentence unless a jury unanimously convicted of the next higher degree of murder will attach to all first degree murder convictions regardless of the date of conviction, so long as any death sentence previously imposed was not final prior to June 24, 2002. Even then, if for any reason the previously imposed death sentence is vacated and a "resentencing" ordered, the convicted defendant will receive a life sentence unless the State convinces a jury to return a unanimous verdict making the necessary

findings to convict of the next higher degree of murder.

At issue here is whether the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the Eighth Amendment, and/or the Florida Constitution are violated when the State of Florida changes the elements of the highest degree of murder, which is punishable by death, and applies those changes in substantive law retrospectively to White, Card, and Parker, but not to Mr. Griffin. *See Blakely v. Washington*, 542 U.S. at 304 ("When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' *Bishop, supra*, § 87, at 55, and the judge exceeds his proper authority.").

This issue was not presented to this Court in *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), and it was not addressed by this Court in that decision. This must constitute cause as to why *Hitchcock* does not govern and does not require this Court to affirm the trial court's order. Full briefing should be ordered.

Cause 2

In *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), this Court said:

> We have consistently applied our decision in *Asay*, denying the retroactive application of *Hurst v. Florida* as interpreted in *Hurst v. State* to defendants whose death sentences were final when the Supreme Court decided *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556

(2002).

226 So. 3d at 218. Mr. Hitchcock's arguments were denied:

> 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***.

Id. (emphasis added). That is the extent of the analysis of the arguments in *Hitchcock v. State*. But, the Court's premise that Mr. Hitchcock's issues were decided by *Asay* is belied by facts. Perhaps most significantly, it is not possible that the retroactivity of the constitutional right to a life sentence absent a jury's unanimous death recommendation, a right recognized in *Hurst v. State* on the basis of the Eighth Amendment and the Florida Constitution, was a matter that was decided in *Asay v. State*, 210 So. 3d 1 (Fla. 2016). It simply was not raised or at issue there.[9]

Hurst v. Florida issued on January 12, 2016. Asay relied upon *Hurst v. Florida*. Asay argued that under *Witt v. State*, 387 So. 2d 922 (Fla. 1980), *Hurst v. Florida* should be held to be retroactive. Briefing was completed in *Asay*, Case No. SC16-223, on February 23, 2016. Oral argument was held on March 2, 2016. A

[9]It is not possible nor permissible for this Court to reject arguments in appeal when the arguments were not made.

motion for supplemental briefing was filed, but denied March 29, 2016. Other than two pro se pleadings filed in May of 2016, nothing further was filed by Asay.

Hurst v. State issued on October 14, 2016. Nothing after the issuance of *Hurst v. State* was filed by Asay, and the decision in *Asay v. State* issued on December 22, 2016. Asay did not present an argument that his death sentences violated the Eighth Amendment or the Florida Constitution on the basis of the ruling in *Hurst v. State*.

For the adversarial process to properly function, the issue must be raised and briefed by the parties.

> The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (opinion for the court by Scalia, J.). In this case, petitioners did not ask us to hold that there is no constitutional right to informational privacy, and respondents and their amici thus understandably refrained from addressing that issue in detail. It is undesirable for us to decide a matter of this importance in a case in which we do not have the benefit of briefing by the parties and in which potential amici had little notice that the matter might be decided.

Nat'l Aeronautics and Space Admin. v. Nelson, 562 U.S. 134, 147 n.10 (2011).

In *Wilson v. Wainwright*, 474 So. 2d 1162, 1164-65 (Fla. 1985), this Court wrote:

> The role of an advocate in appellate procedures should not be denigrated. Counsel for the state asserted at oral argument on this petition that any deficiency of appellate counsel was cured by our own independent review of the record. She went on to argue that our disapproval of two of the aggravating factors and the eloquent dissents of two justices proved that all meritorious issues had been considered by this Court. It is true that we have imposed upon ourselves the duty to independently examine each death penalty case. However, we will be the first to agree that our judicially neutral review of so many death cases, many with records running to the thousands of pages, **is no substitute for the careful, partisan scrutiny of a zealous advocate**. It is the unique **role of that advocate to discover and highlight possible error and to present it to the court**, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process. Advocacy is an art, not a science.

(emphasis added). Mr. Griffin seeks to present arguments that were not presented by Hitchcock or Asay, and were not before this Court. Surely that is "cause" as to why Mr. Griffin's appeal as a matter of right should be heard by this Court.

Cause 3

In *Hitchcock v. State*, Mr. Hitchcock raised arguments that his death sentence was unconstitutional under *Caldwell v. Florida*, 472 U.S. 320 (1985). But, this Court did not address that when denying Hitchcock's appeal. Three justices of the US Supreme Court have noted this Court has failed at revisiting *Caldwell* in the wake of *Hurst v. Florida* and *Hurst v. State*. *See Truehill v. Florida*, _ U.S. _, 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."). Mr Griffin will present the *Caldwell* arguments that this Court has yet to address. *Caldwell*, a 1985 decision, issued before Mr. Griffin's conviction was final. Surely, the unresolved *Caldwell* issue is "cause" as to why Mr. Griffin's appeal as a matter of right should be heard by this Court. Full briefing should be ordered.

Cause 4

In *Mosley v. State*, 209 So. 3d 1248, 1274 (Fla. 2016), this Court said that "certain decisions should be given retroactive effect on the basis of fundamental fairness, such as *James v. State*, 615 So.2d 668 (Fla. 1993)." *Mosley* held:

> the fundamental right to trial by jury under both the United States and Florida Constitutions is implicated, and Florida's death penalty sentencing procedure has been held unconstitutional, thereby making "the machinery of post-conviction relief ... necessary to avoid individual instances of obvious injustice." [*James v. State*, 615 So. 2d] at 925.

Mosley, 209 So. 3d at 1275. Thus, "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." *Id.* at 1274-75.[10] This aspect of *Mosley* remains the law.

Mr. Griffin also relies on that the manifest injustice exception to the law of the case doctrine. In *State v. Owen*, 696 So. 2d 715, 720 (Fla. 1997), this Court explained:

> 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.

Use of the equitable power to reconsider and correct erroneous rulings is a matter to be evaluated case by case. The manifest injustice exception to the law of the case doctrine is the law under controlling precedent. It was not addressed in *Hitchcock v. State*. Mr. Griffin seeks to brief manifest injustice and why it warrants granting him the benefit of *Hurst v. State*.

---

[10]This aspect of *Mosley* drew a vigorous objection in Justice Canady's dissent. *Mosley*, 209 So. 3d at 1291 ("in applying *James*, the majority forsakes the 'essence' of retroactivity analysis by jettisoning any thought of the State's interest in finality—no matter how weighty that interest might be."). The State filed a motion for rehearing in *Mosley* asking this Court to eliminate its reliance on *James v. State* and its fundamental fairness approach. The State's motion was denied. Despite Justice Canady's dissent and the State's motion, the fundamental fairness analysis set forth in *James v. State* and in *Mosley v. State* remain the law. The fundamental fairness analysis of *Mosley* demands a case specific review of the individual injustice in determining whether the benefit of *Hurst v. State* should extend retroactively to a particular defendant.

Cause 5

This Court's rejection of Mr. Griffin's previously presented *Strickland* claims and other asserted errors was premised upon an understanding that at a resentencing it took 6 jurors to return an advisory life recommendation. But, any resentencing ordered in Mr. Griffin's case in collateral proceedings would be governed by the law that one juror voting for a life sentence would preclude a death sentence. *See Armstrong v. State*, 642 So. 2d at 735 ("Only when it appears that, on a new trial, the witness's testimony will change to such an extent as to render probable a different verdict will a new trial be granted."); *Bevel v. State*, 221 So. 3d 1168 (Fla. 2017) (the right to a life sentence unless a jury unanimously returns a death recommendation must alter this Court's standard of review in capital cases).

Mr. Griffin in his appeal argues that this Court must revisit the denial of Mr. Griffin's previous challenges to his death sentence. This issue was not addressed in *Hitchcock v. State*. "Cause" surely exists as to why Mr. Griffin's appeal of right should be permitted to proceed.

WHEREFORE, Mr. Griffin requests that this Court permit him to submit briefing on the issues that he raised in his Rule 3.851 motion and its amendment during the proceedings before the circuit court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing response with the Court's electronic filing system which will send a notice of electronic filing to opposing counsel of record, on this 16th day of November, 2017.

Martin J. McClain

MARTIN J. MCCLAIN
Florida Bar No. 0754773
McClain & McDermott, P.A.
Attorneys at Law
141 NE 30th Street
Wilton Manors, FL 33334
martymcclain@earthlink.net
(305) 984-8344

Counsel for Mr. Griffin