IN THE SUPREME COURT OF FLORIDA

WILLIAM REAVES,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC18-57

DEATH PENALTY CASE

STATE'S REPLY TO FEBRUARY 5, 2018 ORDER TO SHOW CAUSE

COMES NOW, APPELLEE, the State of Florida, by and through the undersigned counsel, and files its reply to Appellant's Response to the February 5, 2018 Order to Show Cause and asserts that this Court should affirm the denial of Appellant's successive postconviction motion in accordance with *Asay v. State*, 210 So.3d 1 (Fla. 2016) and *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017); *Asay v. State, 224 So.3d 695 (Fla. 2017)*; *Lambrix v. State*, 227 So.3d 112 (Fla.), *cert. denied*, 138 S.Ct. 312 (2017) and therefore states:

STATEMENT OF THE CASE AND FACTS

This is an appeal from the denial of a successive postconviction motion. *See Reaves v. State,* 639 So.2d 1 (Fla.), *cert. denied*, 513 U.S. 990 (1994); *Reaves v. State*, 826 So.2d 932 (Fla. 2002); *Reaves v. State*, 942 So.2d 874 (Fla. 2006); *Reaves v. State*, 27 So.3d 661 (Fla. 2009); *Reaves v. State*, 91 So.3d 782 (Fla. 2012).

On October 8, 1986, Reaves was indicted for the first-degree murder of Sheriff's Deputy Richard Raczkoski, possession of a firearm by a convicted felon, and trafficking in cocaine. Reaves was tried on the murder charge and is currently incarcerated pursuant to a valid judgment of guilt entered on February 25, 1992, and death sentence imposed on March 31, 1992. *See Reaves v. State*, 639 So.2d 1 (Fla. 1994)[1] (ROA.16 2329, 2332).[2] On November 7, 1994, the Supreme Court denied certiorari. *Reaves v. Florida*, 513 U.S. 990 (1994). During his 2006 postconviction review, this Court provided the following:

> Reaves was convicted and sentenced to death for the murder of Deputy Richard Raczkowski of the Indian River Sheriff's Department. On direct appeal we summarized the facts of the case as follows:
>
> In the early morning hours of September 23,

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[1] Reaves' initial conviction and sentence were overturned upon a finding by this Court that Reaves had been represented by Bruce Colton prior to Mr. Colton being elected and prosecuting Reaves for the 1986 murder. *See Reaves v. State*, 574 So.2d 105 (Fla. 1991).

[2] The appellate records of the trial and postconviction litigation will be identified as follows:

Florida Supreme Court case number 79575 *Reaves v. State*, 639 So.2d 1 (Fla. 1994) ("ROA" followed by page number); **Original Postconviction Appeal Florida Supreme Court case number SC00-840** *Reaves v. State*, 826 So.2d 932 (Fla. 2002) ("PCR-1"); **Posconviction appeal** following evidentiary hearing Florida Supreme Court case number SC04-891 *Reaves v. State*, 942 So.2d 874 (Fla. 2006) ("PCR-2"); **Successive Postconviction Appeal** Florida Supreme Court case number SC08-1985 *Reaves v. State*, 27 So.3d 661 (Fla. 2009) ("PCR-3"); **Second Successive Postconviciton Appeal** Florida Supreme Court case number SC11-512 *Reaves v. State*, 91 So.3d 782 (Fla. 2012) ("PCR-4"); **Instant Appeals - Third Successive Postconviciton Appeal** (*Hurst* claim) ("PCR-5").

> 1986, Deputy Richard Raczkowski of the Indian River Sheriff's Department was dispatched by the 911 operator to a convenience store in response to a call from the store's pay telephone. According to Reaves' confession, when the deputy arrived at the store he spoke to Reaves who explained he had made the 911 call because he had no money to call a taxi cab. The deputy then called the 911 operator and requested a cab be sent to the store.
>
> In his confession Reaves stated that while he and the deputy awaited the cab, a gun fell from the shorts Reaves was wearing. When Reaves tried to pick up the gun, the deputy prevented him from doing so by stepping on his hand. Reaves pushed the deputy's knee and then grabbed him by the throat. Reaves eventually got the gun and declared he would not give it to the deputy. The deputy backed away before turning to run. Reaves then shot the deputy in the back four times, claiming he was frightened because he had been using cocaine and because the deputy had reached for his own gun. It was later determined that the deputy's gun in fact had been fired three times.
>
> After the shooting Reaves went to the home of a friend named Hinton. According to Hinton, Reaves said he was able to retrieve the gun after pushing the deputy in the throat. Reaves pointed the gun in the deputy's face as the deputy attempted to draw his own weapon and stated, “I wouldn't do that if I were you.” The deputy began backing away, turned, and ran. Reaves then shot him as he ran away.

Reaves v. State, 574 So.2d 105, 106 (Fla. 1991).

This Court reversed the judgment and sentence and remanded the case for a new trial. . . .

On direct appeal after the retrial in 1992, this Court summarized the following additional facts:

> Witness Whitaker, who discovered the deputy, testified he saw a black man wearing red shorts

> and a white T-shirt running from the scene in a manner similar to men in Vietnam under fire. (William Reaves served in Vietnam.) Witness Hinton .... [testified that he] had no trouble understanding Reaves; his speech was not slurred and he appeared to be in full control of his faculties.

Reaves v. State, 639 So.2d 1, 3 (Fla. 1994). The jury convicted Reaves of premeditated first-degree murder and recommended death by a vote of ten to two. The trial court found three aggravating circumstances (prior violent felony conviction, avoid arrest, and murder was especially heinous, atrocious, or cruel). Although no statutory mitigating circumstances were found, the trial court found three nonstatutory mitigating circumstances (honorable military discharge, good reputation in the community up to the age of sixteen, and he was a good family member). *Id*. at 3 & nn. 2-3.

. . .

Reaves filed a petition for writ of certiorari to the United States Supreme Court which was denied. *See Reaves v. Florida*, 513 U.S. 990, 115 S.Ct. 488, 130 L.Ed.2d 400 (1994). Reaves filed an initial motion to vacate judgment and sentence pursuant to Florida Rule of Criminal Procedure 3.851 in February 1995. . . . the trial court entered an order on February 9, 2000, summarily denying the motion for postconviction relief without an evidentiary hearing. Reaves' motion for rehearing was denied on March 14, 2000.

Reaves appealed to this Court and . . . we concluded that the trial court erred in summarily denying Reaves' claim of ineffectiveness of trial counsel, Jay Kirschner. *See Reaves v. State*, 826 So.2d 932, 936 (Fla. 2002).[3] The case was remanded to the trial court for an evidentiary hearing on the claims relating to whether counsel was ineffective for failing to raise a voluntary intoxication defense and

[3] This Court also denied Reaves' state habeas corpus petition. *Reaves v. Crosby*, 837 So.2d 396, 397-98 (Fla. 2003).

> related subclaims. *See id*. at 944.
>
> An evidentiary hearing was held on March 4-6, 2003. While awaiting the trial court's decision on the pending motion, **Reaves filed a successive 3.851 motion based on *Ring* on June 24, 2003**. Reaves also supplemented his 3.851 motion on December 10, 2003, by notifying the court of his eligibility to receive veteran's benefits based on a finding of 100% disability due to Post-Traumatic Stress Disorder (PTSD). On March 10, 2004, the trial court denied both the amended motion for postconviction relief and the successive motion for postconviction relief. After denying the motion for rehearing, the trial court signed final orders denying both motions on April 20, 2004.

Reaves v. State, 942 So.2d 874, 877-78 (Fla. 2006) (emphasis supplied, footnotes omitted). ***Of import here, Reaves did not raise his Ring v. Arizona, 536 U.S. 584 (2002) claim in the subsequent appeal. Reaves, 942 So.2d at 877.*** This Court affirmed the denial of postconviction relief. *Id*., at 880-81.

On December 26, 2006, Reaves filed a second successive postconviction motion seeking public record documents and challenging Florida's lethal injection statute as unconstitutional. The public records request was denied under *Kearse v. State*, 969 So.2d 976, 988-89 (Fla. 2007) and the statute was found constitutional. Reaves appealed and by order dated February 4, 2010 in case number SC08-1985, this Court affirmed the denial of postconviction relief. *See Reaves v. State*, 27 So3d 661 (Fla. 2009) (Unpublished). On November 24, 2010, Reaves filed a third successive Rule 3.851 motion premised

on *Porter v. McCollum*, 130 S.Ct. 447 (2009). The denial of relief was affirmed. *Reaves v. State*, 91 So.3d 782 (Fla. 2012).[4]

On January 12, 2016, the United States Supreme Court issued *Hurst v. Florida*, 136 S.Ct. 616 (2016) finding Florida's capital sentencing unconstitutional to the extent it did not require unanimous jury findings necessary to render the defendant death eligible. In response, on February 22, 2016, Reaves filed a successive postconviction motion challenging his sentence. The postconviction court dismissed the motion without prejudice "to timely refile" should *Hurst v. Florida* be held retroactive. Reaves appealed (SC16-1460), but this Court dismissed for lack of jurisdiction. (PCR-5 1).

Following this Court's determination that *Hurst v. Florida* and *Hurst v. State*, 202 So.3d 40 (Fla. 2016) do not apply retroactively to cases like Reaves' which was final before the issuance of *Ring v. Arizona*, 536 U.S. 584 (2002), on October 13, 2017, Reaves refiled his motion seeking Hurst relief. (PCR-5 30-111). That motion exceeded the page limit and was stricken without prejudice. (PCR-5 159-60). On November 6, 2017, Reaves refiled his motion within the proper page-limits. (PCR-5 161-248). On December 13, 2017, postconviction relief was denied

[4] Reaves, on February 16, 2010, filed his §28 U.S.C. §2254 petition. The Eleventh Circuit Court of Appeals denied federal habeas relief. *See Reaves v. Sec'y, Florida Dept. of Corrections*, 717 F.3d 886, 900 (11th Cir. 2013); Reaves v. Sec'y Florida Dept. of Corrections, 872 F.3d 1137 (11th Cir. 2017).

summarily and Reaves appealed. (PCR-5 275-78. (PCR-5 277-78). On February 5, 2018, this Court ordered a response as to "why the trial court's order should not be affirmed in light of this Court's decision in *Hitchcock v. State*, SC17-445."

ARGUMENT

I, II, AND IV – *HITCHCOCK* IS DIRECTLY ON POINT AND SUPPORTS THE DENIAL OF RELIEF AS *HURST* IS NOT RETROACTIVE (restated)

Appellant suggests he cannot be bound by *Hitchcock* on due process and equal protection grounds. Further, he argues that he challenges his death sentence on Eighth Amendment grounds. Contrary to his suggestion, the settled precedent of *Hitchcock*; *Lambrix*, 227 So.3d 116-17; *Asay*, 210 So.3d at 22 and their progeny address the constitutional challenges Reaves raises here and support the denial of relief.

Reaves alleges he has a substantive right to an individualized appellate process and asserts this Court's referencing *Hitchcock* "reflects baseless prejudgment of the appeals and their scope." (R at 4). He maintains the defendant in *Hitchcock* did not raise the same claims Reaves presents and Asay, 210 So.3d at 1 did not address *Hurst v. State* retroactivity, thus, *Hitchcock* is not binding.

Page limitations do not violate due process. *Henry v. State*, 937 So.2d 563, 575-76 (Fla. 2006) (concluding courts may impose reasonable page limits on petitions for extraordinary

writs *quoting Basse v. State*, 740 So.2d 518, 519 (Fla. 1999), and *citing Johnson v. Singletary*, 695 So.2d 263, 266 (Fla. 1996), as well as noting that the federal courts impose page limitations in capital cases *quoting United States v. Battle*, 163 F.3d 1, 1 (11th Cir. 1998)). Likewise, this Court's long-standing tag procedure does not violate either due process or equal protection. Indeed, the United States Supreme Court employs a somewhat similar procedure when dealing with numerous cases involving the same issue. It decides the lead case, and then it vacates and remands the other cases to the lower courts in light of the new decision in the lead case. This procedure is referred to as "grant, vacate, and remand" or "GVR" for short. *Lawrence v. Chater,* 516 U.S. 163, 166 (1996) (noting "the ['grant, vacate, and remand'] order has, over the past 50 years, become an integral part of this Court's practice, accepted and employed by all sitting and recent Justices"); *Wellons v. Hall*, 558 U.S. 220, 225 (2010). There is no basis for this Court to amend its procedure here. Moreover, reliance on precedent is the backbone of jurisprudence.

This Court has determined *Hurst v. Florida* and *Hurst* are not retroactive to cases in a similar posture to the instant case. On December 22, 2016, this Court issued *Asay*, 210 So.3d at 22 and *Mosley v. State*, 209 So. 3d 1248, 1274 (Fla. 2016). In *Mosley*, this Court stated: "we have now held in *Asay v.*

State, [210 So.3d 1, (Fla. 2016)], that *Hurst [v. State*, 202 So.3d 40 (Fla. 2016)} does not apply retroactively to capital defendants whose sentences were final before the United States Supreme Court issued its opinion in *Ring*." As such, Reaves' argument that *Asay* did not settle the retroactivity question for cases final before *Ring* is not supported by this Court's precedent. Hence, *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017) and *Lambrix v. State*, 227 So.3d 112 (Fla. 2017) foreclose Reaves' challenges raised here as his case was final in 1994 with the denial of certiorari. *Reaves*, 513 U.S. at 990. *See Asay*, 210 So.3d at 22;[5] *Hitchcock*, 226 So.3d at 217 (stating "[w]e have consistently applied our decision in *Asay V*, [210 So.3d at 22], 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*") *Asay, 224 So.3d at 703 (rejecting claim that Hurst and Chapter 2017-1, Laws of Florida should be applied retroactively to defendant whose case became final before June 24, 2002)*; and

[5] Also, in Asay, 210 So.3d at 15-16 this Court discussed the appropriate test for determining retroactivity of Hurst and applied the *Witt v. State*, 387 So.2d 922 (Fla. 1980) analysis "which provides more expansive retroactivity standards than those adopted in *Teague [v. Lane*], 489 U.S. 288 (1989)," which enumerates the federal retroactivity standards. Id. (emphasis in original), *quoting Johnson v. State*, 904 So.2d 400, 409 (Fla. 2005). *See also Danforth v. Minnesota*, 522 U.S. 264, 280-81 (2008) (allowing states to adopt a retroactivity test that is broader that *Teague*). As recognized in *Hitchcock*, after *Asay*, 210 So.3d at 1, this Court has adhered staunchly to its ruling.

Lambrix v. State, 227 So.3d 112 (Fla. 2017), *cert. denied*, 17-6222, 2017 WL 4409398 (U.S. Oct. 5, 2017).

The *Ring*[6] decision date 1s the bright-line cutoff point for retroactivity of a *Hurst* claim. Thus far, this Court has refused to extend *Hurst v. Florida* and *Hurst* to defendants, including Asay, based solely on the fact that their judgments were final prior to the decision in Ring.[7] [8]

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[6] *Ring* is not retroactive under *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004), thus, further undercutting Appellant's claim. There the Supreme Court determined *Ring* was a procedural rule and did not create a substantive constitutional change in the law as it 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." *Schriro*, 542 U.S. at 353. *Ring* did not alter the "range of conduct or the class of persons that the law punishes." *Id*. *Ring* "announced a new procedural rule that does not apply retroactively to cases already final on direct review." *Id*. at 358. Because *Hurst* is an expansion of *Ring* to Florida, *Hurst* like *Ring* did not create a substantive rule and is not retroactive under federal law.

[7] This Court has reaffirmed *Hurst* is not retroactive to cases final before June 24, 2002 and affirmed the denial of the *Hurst* claim on that basis. *See Stein v. State,* SC17-1547, 2018 WL 636066, at *1 (Fla. Jan. 31, 2018); *Gordon v. State*, SC17-1133, 2018 WL 636418, at *1 (Fla. Jan. 31, 2018); *Whitton v. State*, SC17-1118, 2018 WL 635982, at *1 (Fla. Jan. 31, 2018); *Krawczuk v. State*, SC17-1142, 2018 WL 635983, at *1 (Fla. Jan. 31, 2018); *Sireci v. State*, SC17-1143, 2018 WL 635985, at *1 (Fla. Jan. 31, 2018); *Rodriguez v. State*, SC17-1268, 2018 WL 635986, at *1 (Fla. Jan. 31, 2018); *Consalvo v. State*, SC17-1309, 2018 WL 635988, at *1 (Fla. Jan. 31, 2018); *Sliney v. State*, SC17-1074, 2018 WL 636103, at *1 (Fla. Jan. 31, 2018); *Miller v. Jones*, SC17-1211, 2018 WL 636104, at *1 (Fla. Jan. 31, 2018); *Lamarca v. State*, SC17-1179, 2018 WL 618728, at *1 (Fla. Jan. 30, 2018); *Whitfield v. State*, SC17-1399, 2018 WL 615022, at *1 (Fla. Jan. 30, 2018); *Mendoza v. State*, SC17-1324, 2018 WL 618592, at *1 (Fla. Jan. 30, 2018); *Gudinas v. State*, SC17-919, 2018 WL 618595, at *1 (Fla. Jan. 30, 2018); *Sochor v. State*, SC17-1343,

On August 10, 2017, this Court reiterated:

> 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

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2018 WL 618698, at *1 (Fla. Jan. 30, 2018); *Fotopoulos v. State*, SC17-971, 2018 WL 579814, at *1 (Fla. Jan. 29, 2018); *Marquard v. State*, SC17-862, 2018 WL 524794, at *1 (Fla. Jan. 24, 2018). *See also Asay*, 210 So.3d at 8, 22(sentence final in 1991); *Hitchcock*, 226 So.3d at 216; *Lambrix v. State*, 217 So.3d 977, 989 (Mar. 2017)(sentence final in 1986).

[8] Even if *Hurst* were applied to Reaves, any error is harmless beyond a reasonable doubt as Reaves has a prior violent felony conviction. Reaves was death eligible based on a recidivist aggravator, his prior violent felony convictions of two armed robberies and a battery on a corrections officer. While this Court has not reembraced *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) fully, *see King v. State*, 211 So.3d 866, 891 (Fla. 2017), the United States Supreme Court recognized the critical distinction of an enhanced sentence supported by a prior conviction in *Almendarez-Torres*, 523 U.S. 224; *Ring*, 536 U.S. at 598 n.4; *Alleyne v. United States*, 133 S. Ct. 2151, 2160 n.1 (2013). *Hurst v. Florida* did not disturb this precedent. Also, while this Court declined to model its harmless error analysis after *Jenkins v. Hutton*, 137 S. Ct. 1769 (2017) for a post-*Ring* case, *Pagan v. State*, 2018 WL 654450 (Fla. Feb. 1, 2018), the United States Supreme Court has confirmed the constitutionality of an Ohio death sentence based on a jury's guilt-phase determination of facts. In *Jenkins*, the lower court ordered a new sentencing trial because, in that court's view, the penalty phase jury failed to make the necessary factual findings to support a death sentence. However, because the necessary aggravating factors were established beyond a reasonable doubt by the jury during the guilt phase, the Supreme Court reversed and reinstated the death sentence. *See also Waldrop v. Comm'r, Alabama Dep't of Corr.*, 15-10881, 2017 WL 4271115, at *20 (11th Cir. Sept. 26, 2017) (explaining its rejection of a *Hurst* claim, Circuit Court of Appeals stated: "Alabama requires the existence of only one aggravating circumstance in order for a defendant to be death-eligible, and in Mr. Waldrop's case the jury found the existence of a qualifying aggravator beyond a reasonable doubt when it returned its guilty verdict. See §13A-5-45(e).").

> sentence, which became final prior to *Ring*. As such, these arguments were rejected when we decided *Asay*. Accordingly, we affirm the circuit court's order summarily denying Hitchcock's successive postconviction motion pursuant to *Asay*.

Hitchcock, 226 So.3d at 217; *see also Asay, 224 So.3d at 703* (rejecting claim chapter 2017-1, Laws of Florida, "creates a substantive right to a life sentence unless a jury unanimously recommends otherwise"); *Lambrix*, 227 So.3d at 113 (rejecting arguments based on Eighth Amendment,[9] due process, equal

[9] Also, Appellant claims his death sentence violates the Eighth Amendment and that *Hurst v. State* is retroactive must be rejected. His argument that defendants who did not receive a unanimous jury recommendation are not eligible to receive a death sentence and cannot be executed under the Eighth Amendment is flawed. In *Spaziano v. Florida*, the United States Supreme Court held that the Eighth Amendment is not violated in a capital case when the ultimate responsibility of imposing death rests with the judge. *Spaziano v. Florida*, 468 U.S. 447, 463–64, (1984) *overruled on other grounds by Hurst v. Florida*, 136 S. Ct. 616 (2016). In deciding *Hurst v. Florida*, the Supreme Court only analyzed the case on Sixth Amendment grounds. The Court did not address any possible Eighth Amendment violation. Hence, *Hurst v. Florida*, only overrules *Spaziano* to the extent it allows a sentencing judge to find an aggravator independent of a jury's fact-finding. *Hurst v. Florida*, 136 S. Ct. at 618. The Supreme Court has never held a unanimous jury recommendation is required under the Eighth Amendment.

While this Court initially included the Eighth Amendment as a reason for warranting unanimous jury recommendations in its *Hurst v. State* decision, it did not, and cannot, overrule the United State Supreme Court's surviving precedent in Spaziano. Additionally, Florida has a conformity clause in its state constitution that requires the state courts to interpret Florida's prohibition on cruel and unusual punishments in conformity with the United States Supreme Court's Eighth Amendment jurisprudence. Art. I, § 17, Fla. Const.; *Henry v. State*, 134 So.3d 938, 947 (Fla. 2014) (noting under Article I, section 17 of the Florida Constitution, Florida courts are

protection, and a substantive right based on new legislation).

Here, just as was presented in *Hitchcock*, Reaves raises various constitutional provisions to argue that *Hurst* should be applied retroactively to him. However, as determined in *Asay*, 210 So.3d at 8, 22 and reaffirmed in *Hitchcock*; *Lambrix*; and *Asay, 224 So.3d at 703*, *Hurst* does not apply retroactively[10] and this Court should affirm the denial of relief.[11]

"bound by the precedent of the United States Supreme Court" regarding Eighth Amendment claims). Given Florida's conformity clause and that there is no United States Supreme Court case holding the Eighth Amendment requires the jury's final recommendation be unanimous, Reaves' reliance on the Eighth Amendment discussed in *Hurst v. State* is misplaced and does not support his claim for relief. No Eighth Amendment right was created, thus, there is no right to be applied retroactively.

[10] The Eleventh Circuit has also rejected equal protection, due process, and Eighth Amendment challenges to this Court's non-retroactivity rule established in *Asay* recognizing "[t]he Supreme Court has held that *Ring* does not apply retroactively to cases on collateral review. *See Schriro v. Summerlin*, 542 U.S. 348, 358[ ] (2004) (holding *Ring* does not apply retroactively under federal law to death-penalty cases already final on direct review.)." *Lambrix v. Sec'y, Fla. Dep't of Corr.*, __ F.3d __, 2017 WL 4416205 (11th Cir. Oct. 5, 2017), *cert. denied, Lambrix v. Jones*, 2017 WL 4456332 (Oct. 5, 2017). Further, the Eleventh Circuit held that this Court's ruling, that Hurst did not apply retroactively to Lambrix, whose judgment was final in 1986, "is fully in accord with the U.S. Supreme Court's precedent in Ring and Schriro." *Lambrix*, 2017 WL 4416205 at *8. The Eleventh Circuit also rejected the statutory retroactivity argument stating:

> jurists of reason would not find this position debatable: the Florida court's rejection of Lambrix's constitutional-statutory claim was not contrary to, or an unreasonable application of, the holding of a Supreme Court decision.

Id. at *9; *see Dobbert v. Florida*, 432 U.S. 282, 301 (1977).

[11] To the extent that Reaves maintains that he raised his constitutional claim previously, such does not afford him a

Reaves' reliance on *Caldwell v. Mississippi*, 472 U.S. 320 (1985) and claim there can be no harmless error as his jury was misled because its role was advisory (R at 10) is meritless. First, any complaint about jury instructions at this point is untimely and procedurally barred. *Troy v. State*, 57 So. 3d 828, 838 (Fla. 2011). Second, in order to establish constitutional error under *Caldwell*, a defendant must show the comments or jury instructions "improperly described the role assigned to the jury by local law." *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994). The jury was instructed properly on its role based upon then existing law. It is absurd to suggest the jury should have been instructed in accordance with a constitutional change in the law which occurred some 22 years after sentencing. Third, the claim is based on pure speculation. There is nothing to support the proposition that the jury's responsibility in rendering the advisory sentence was diminished. Relief must be denied.

III – CHAPTER 2017-1 DOES NOT REQUIRE REAVES BE RESENTENCED (RESTATED)

As noted above, this Court has rejected the notion that the

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basis for review now. *Hurst* is based on an expansion of Ring to Florida and while the record establishes Reaves filed a successive postconviction relief motion claiming his death sentence was unconstitutional under Ring, he abandoned that claim in the resulting appeal. *Reaves*, 942 So.2d at 877. Reaves should be found procedurally barred from raising the same issue again. *Rodriguez v. State*, 919 So.2d 1252, 1281 (Fla. 2005). Moreover, given the abandonment of the claim, any suggestion the fundamental fairness argument noted in *Mosley*, 209 So.3d at 1275 as a pathway for relief, fails.

passage of Chapter 2017-1, Laws of Florida creates a substantive right to a resentencing in a case final before June 24, 2002. The fact that the Legislature has enacted a new statute following the dictates of *Hurst*, does not give Reaves a new substantive right. *See Asay*, 210 So.3d at 8, 22; *Hitchcock*; *Lambrix*, 227 So.3d at 113 (rejecting arguments based on Eighth Amendment, due process, equal protection, and a substantive right based on new legislation); and *Asay*, 224 So.3d at 703 (rejecting claim chapter 2017-1, Laws of Florida, "creates a substantive right to a life sentence unless a jury unanimously recommends otherwise"). See also Article X, section 9 of the Florida Constitution. Furthermore, the new statute does not apply to Reaves. Reaves' case is a successive motion as "a state court has previously ruled on a postconviction motion challenging the same judgment and sentence." Florida Rule of Criminal Procedure 3.851 (e)(2).

Given the fact Appellant's case was final before *Ring* and this Court has rejected previously all of Appellant's claims, the denial of postconviction relief should be affirmed.

CONCLUSION

WHEREFORE, the Appellee, State of Florida, respectfully requests this Honorable Court to affirm the trial court's order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 13th day of March 2018, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: William M. Hennis, III, Esq., at HennisW@ccsr.state.fl.us; Rachel L. Day, Esq. at dayr@ccsr.state.fl.us at 1 East Broward Blvd, Suite 444, Fort Lauderdale, FL 33301.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of the type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

/s/ Leslie T. Campbell
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