IN THE SUPREME COURT OF FLORIDA
Case No. SC18-57

WILLIAM REAVES,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

RESPONSE TO ORDER TO SHOW CAUSE

The Appellant, William Reaves, by and through undersigned counsel, hereby responds to this Court's Order to Show Cause issued in light of this Court's holding in *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), *cert. denied*, 138 S. Ct. 513 (2017). In support thereof, Mr. Reaves states:

INTRODUCTION

Mr. Reaves' death sentence was imposed pursuant to a capital sentencing scheme that was ruled unconstitutional by the United States Supreme Court in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and by this Court in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). Mr. Reaves' sentence became "final" in 1994, prior to the United States Supreme Court decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002). The issue in this case is whether this Court's approach to limited retroactivity to deny Mr. Reaves *Hurst* relief on the ground that

his sentence did not become final at least one day after the 2002 decision in *Ring* is constitutional.

This Court has already applied *Hurst* retroactively as a matter of state law in dozens of collateral-review cases where the defendant's sentence became final after *Ring*. Denying Mr. Reaves *Hurst* relief because his sentence became final in 1994, rather than some date between 2002 and 2016, would violate the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Mr. Reaves is entitled to *Hurst* retroactivity as a matter of federal law.

Mr. Reaves' successive 3.851 motion to vacate, the denial of which is the subject of this appeal, raised as Claim I a challenge to his death sentence as unconstitutional based on the Sixth Amendment, the Eighth Amendment, the Florida Constitution, the decision in *Hurst v. Florida*, and this Court's ruling in *Hurst v. State*. It included subclaims concerning the unanimity requirement recognized in *Hurst v. State* and the additional protections provided under the Eighth Amendment and the Florida Constitution not addressed in *Asay* or *Hitchcock*. Another subclaim argued that *Hurst* should be applied retroactively to Mr. Reaves under an individualized retroactivity analysis and under fundamental fairness, issues this Court inadequately addressed in *Asay* and *Hitchcock*. Finally, Mr. Reaves argued that the *Hurst* error in his case was harmful in light of the non-unanimous jury verdict and this Court's arbitrary application of limited retroactivity. Claim II argued that

Florida's revised death penalty statute was a substantive change in the law that requires retroactive application to Mr. Reaves.

ARGUMENT

I. Due Process does not permit Mr. Reaves to be foreclosed by the decision rendered in *Hitchcock v. State*

Mr. Reaves 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. Reaves' 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.").

In a capital case in which a death sentence has been imposed, courts are required to go further when considering challenges to the death sentence. The Eighth Amendment requires more due to a special need for reliability. *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988) ("The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case."). The process by which the Court

has directed Mr. Reaves to proceed in his appeal, indicates its intention on binding Mr. Reaves 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. The fact that this Court has *sua sponte* issued identical orders, in numerous other cases, employing the same truncated procedure it does here, reflects baseless prejudgment of the appeals and their scope. Mr. Reaves deserves an individualized appellate process, particularly because *Hitchcock* did not raise the same issues at stake here.

"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. 1986, 2001 (2014). Mr. Reaves is being denied that opportunity by this Court's attempt to confine him to the outcome in *Hitchcock* without first providing a fair opportunity of his own to demonstrate how the record and facts in his particular case prohibit his execution. Moreover, in denying relief in *Hitchcock*, this Court relied upon *Asay v. State* for the determination that *Hurst* was not retroactive to cases final before *Ring v. Arizona*. See *Hitchcock v. State*, 226 So. 3d at 217. This Court did so despite the fact that the opinion in *Asay* was not premised upon, nor did it even address, the holding in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).

It is in that regard that this Court must acknowledge that the holding in *Asay*, and this Court's reliance upon that holding in *Hitchcock*, does not foreclose the

availability of *Hurst* relief to Mr. Reaves. *Hurst v. Florida* was a momentous shift in United States Supreme Court's jurisprudence. It 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, its most important role was to serve as the catalyst for this Court's decision in *Hurst v. State*.

II. Mr. Reaves is entitled to the Retroactive Application of *Hurst v. Florida* and *Hurst v. State* under the Eighth Amendment and the Florida Constitution.

Mr. Reaves challenged 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 by Mr. Hitchcock, and establishes that Mr. Reaves should get the retroactive benefit of *Hurst v. State*.

Hurst v. State was premised upon this Court's interpretation of what the Florida Constitution and the national consensus required under the Eighth Amendment to ensure reliability of death sentences. In *Hurst v. State* this Court held that it is reliability that is the touchstone of the Eighth Amendment in capital cases. And it is the need for reliability that led to this Court's decision in *Hurst v. State*, requiring unanimity under the Eighth Amendment and the Florida Constitution. That decision by necessity inherently implied that this Court acknowledged the

constitutional requirement for reliability in a death sentence and recognized the need for enhancing reliability in Florida under its capital sentencing statute. This Court's opinion in its simplest terms is the acknowledgement that cases in which unanimity was not required are inherently less reliable and carry with that lack of reliability the impermissible likelihood that the decision to impose death was made arbitrarily and wantonly in violation of the Eighth Amendment. *See Furman v. Georgia;* 408 U.S. 238 (1972); *Gregg v. Georgia, 428 U.S. 153 (1976)*. Thus, it is within that context that the proper basis for Mr. Reaves' argument against this Court's approach to limited retroactive application of *Hurst* in both *Asay* and *Hitchcock* is properly understood. This Court's continued reliance on *Asay* to repeatedly reject *Hurst* claims similar to Mr. Reaves' amounts to a denial of due process and a fair opportunity to challenge his sentence of death.

Mr. Reaves has a much different and stronger argument in support of retroactivity under *Hurst v. State* than the one made by Mr. Hitchcock. The Eighth Amendment requires that a death sentence carry extra reliability in order to ensure that it was not imposed arbitrarily. Heightened reliability in capital cases is a core value of the Eighth Amendment and *Furman v. Georgia*.

In *Hurst v. State*, this Court held that enhanced reliability warranted the requirement that a death recommendation be returned by a unanimous jury. In doing so, the Court effectively recognized that a death sentence without the unanimous

consent of the jury was lacking in reliability and thus did not carry the heightened reliability required by the Eighth Amendment. In that context, this Court's decisions in *Mosley* and *Asay* established a bright line cutoff as to the date at which the State's interest in finality trumped the interests of fairness and curing individual injustice. Such a bright line cutoff violated the Eighth Amendment principle set forth in *Hall v. Florida*. 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, nor has this Court addressed this issue.

While this Court in *Hurst v. State* found non-unanimous death recommendations were lacking in reliability, the level of unreliability is obviously compounded in some cases by matters and issues that increase the unreliability of a particular death sentence. Just as there were death sentenced individuals on the wrong side of the 70 IQ score cutoff who were likely intellectually disabled and erroneously under sentence of death as discussed in *Hall*, there are individuals with pre-*Ring* death sentences that are founded upon proceedings layered in error to the extent that the cumulative unreliability overcomes any interests the State may have in finality.

Thus, death sentences imposed after a jury did not return unanimous findings on all facts necessary to impose a sentence of death before June 24, 2002, are just as unreliable as similar death sentences imposed after June 24, 2002. Drawing a line at

June 24, 2002 is just as arbitrary and imprecise as the bright line cutoff at issue in *Hall v. Florida*, 134 S. Ct. at 2001 ("A State that ignores the inherent imprecision of these tests risks executing a person who suffers from intellectual disability."). When the United States 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. The unreliability of the proceedings giving rise to Mr. Reaves' death sentence compounds the unreliability of his death recommendation. A recommendation that was returned by a jury unaware of its sentencing responsibility, as recognized in *Hurst v. State*, to such an extent that the interests of fairness outweigh the State's interest in finality in his case.

In addition to arguing entitlement to relief under *Hurst v. State* and the requirement of unanimity, Mr. Reaves also raised a claim that he is entitled to retroactive application of *Hurst* on the basis of fundamental fairness. Specifically, Mr. Reaves argued that he is entitled to relief under this Court's holding in *Mosley v. State*, which embraced fundamental fairness as an alternative a means of receiving collateral relief under *Hurst v. Florida* and/or *Hurst v. State* where a defendant had attempted to raise *Ring* "at his first opportunity." *Mosley*, 209 So. 3d at 1275. In doing so, this Court determined it would be fundamentally unfair to prohibit the defendant who had anticipated the defects in Florida's capital sentencing scheme

before they were recognized in *Hurst* but had been denied relief. This Court determined that in such instances the interests of fundamental fairness outweighed any interest the State may have in finality.

The *Hurst* decisions apply retroactively to Mr. Reaves' case under the fundamental fairness approach. Mr. Reaves raised a challenge to Florida's capital sentencing scheme on direct appeal. During jury selection in Mr. Reaves' trial there were repeated references by the trial court and the state to the venire about the "advisory recommendation" by the jury (R. 301, 338, 340). During closing arguments at the penalty phase by the state there were additional comments about the advisory function (R. 2272, 2273). And during the jury instructions the trial court referred to the jury's "duty to advise the court" and to render an advisory sentence (R. 2312, 2313, 2317, 2318) and continued to do so after deliberations were completed and during the polling of the jury (R. 2319, 2320, 2321, 2322, 2323).

Here, Mr. Reaves is entitled to an individualized retroactivity analysis of his *Hurst* arguments in these circumstances. An individualized assessment is necessary to determine that he is entitled to retroactivity of the *Hurst* decisions under the fundamental fairness doctrine by virtue of his repeated attempts at trial to challenge Florida's unconstitutional capital sentencing scheme, all of which were thwarted by Florida's pre-*Hurst* law.

Mr. Reaves trial counsel also filed pre-trial motions that included the

following arguments: "[T]he appellate court is in no position to know what aggravating and mitigating circumstances the jury found…it insures uncertainty in the fact finding process in violation of the eighth amendment. Our law in affect makes the aggravating circumstances into elements of the crime so as to make the defendant death eligible. Hence the lack of a unanimous verdict as to any aggravating circumstance violates Article 1, sections 9, 16, and 17 of the State constituition and the 5th, 6th, 8th and 14th amendments to the federal constitution." (R. 2673-75). "Standard Jury Instructions on capital cases merely state that the penalty verdict be made by a majority vote with a tie vote resulting in a life verdict, but makes no provision as to how individual circumstances are to be determined by the jury. This absence of guidance renders section 921.141 unconstitutional…[t]he Eighth amendment requires a higher standard of definiteness than does the due process clause with respect to jury instructions in capital cases." (R. 2700-01); In a Motion to Declare Section 921.142 Unconstitutional, trial counsel argued that."instead of heightened reliability, Florida's statutory scheme invites error by using the constitutionally inadequate fact finding procedure of a bare majority [penalty] verdict." (R. 2710-12).

Both the jury unanimity issue and a *Caldwell v. Mississippi* claim were preserved and briefed without success on direct appeal. See I.B. at 86-87. The direct appeal opinion makes no reference to either issue. *See Reaves v. State*, 639 So. 2d 1

(Fla. 1994).

Mr. Reaves' individualized retroactivity assessment must, unlike in *Asay*, consider his claims under both *Hurst v. Florida* and *Hurst v. State*. Here, Mr. Reaves' claims are being raised after the decision in *Hurst v. State*, and Mr. Reaves is affirmatively raising both Sixth Amendment claims under *Hurst v. Florida* and Eighth Amendment claims under *Hurst v. State*. Thus, this Court's holding in *Mosley* establishes that fundamental fairness requires retroactive application of the *Hurst* decisions to Mr. Reaves' case.

III. The enactment of Florida's revised death penalty statute, Chapter 2017-1, constitutes a substantive change in law requiring retrospective application

Claim II below concerned the enactment on March 13, 2017, of Chapter 2017-1 by Florida's legislature. It revised Florida's capital sentencing statute. It constitutes substantive law and provides that unless the jury returns a death recommendation, the judge "shall impose the recommended sentence [of life]." Thus, now in Florida, unless the jury returns a death recommendation by a unanimous vote, the revised statute sets the limit for the punishment of first-degree murder at life imprisonment. See § 921.141(3)(a)(1). Without additional unanimous jury findings, a death sentence is not a sentencing option for first-degree murder in Florida. Put simply, the jury's vote in Florida now must be unanimous before first-degree murder becomes punishable by death, i.e. capital first degree murder.

Before the jury can return a death recommendation, the statute as revised by Chapter 2017-1 requires the jury to: 1) identify each aggravating factor that it unanimously finds to exist, 2) unanimously find that sufficient aggravating factors exist to justify a death sentence, 3) unanimously find that the aggravating factors outweigh the mitigating circumstances found to exist, and 4) unanimously find there is no basis for the imposition of a life sentence. *See* § 921.141(2)(b). Normally, legislative substantive criminal law does not apply retrospectively. Absent legislative intent for retrospective application, legislative enactments apply prospectively from the statute's effective date. But as to Chapter 2017-1, the legislative intent was for the revised § 921.141 to govern in any criminal prosecution for first-degree murder regardless of when the murder was committed.

As a result of the recently enacted Chapter 2017-1, its substantive benefit of requiring unanimity is without regard to the date of the crime or to the date the conviction became final. However, because of decisions by this Court, Chapter 2017-1's benefit currently embraces only those whose sentence was final on or after June 24, 2002. The goal in drawing this cut-off is to delineate cases that are deemed too old to deserve relief. But the rule establishing this cut-off, which thereby created this disparity between individuals that receive Chapter 2017-1's benefit and those that do not, does not reasonably further the purpose of having the rule in the first place. This is because the goal of ensuring only relatively new cases receive Chapter

2017-1's benefit is not accomplished by setting a cut-off date that attaches to the sentence's finality date. Some of Florida's oldest capital cases will receive the benefit of Chapter 2017-1.

For instance, James Card was convicted of a June 3, 1981 homicide and a death sentence was imposed. His conviction and death sentence became final on November 5, 1984. *Card v. State*, 453 So. 2d 17 (Fla. 1984), *cert. denied*, 105 S. Ct. 396 (1984). Card's original death sentence was vacated in collateral proceedings because the judge had the State write his sentencing findings on an ex parte basis. When this was discovered nearly ten years later, a resentencing was ordered. The resentencing was held in 1999. The jury returned an 11-1 death recommendation. Another death sentence was imposed and affirmed on appeal. *Card v. State*, 803 So. 2d 613 (Fla. 2001), *cert denied* 536 U.S. 963 (2002). Because his petition for certiorari review was denied on June 28, 2002 (four days after Florida's June 24, 2002 cut-off date), his death sentence was vacated. *Card v. Jones*, 219 So. 3d 47 (Fla. 2017). Unless the resentencing jury unanimously returns a death recommendation, Card will receive a life sentence on his conviction final in 1984 of a homicide committed in 1981.

Another example, J.B. Parker was convicted of a 1982 homicide and sentenced to death. The conviction and death sentence became final in 1985. *Parker v. State*, 476 So. 2d 134 (Fla. 1985). In 1998, Parker's death sentence was vacated,

but his conviction remained intact due to a Brady violation discovered in the course of a co-defendant's resentencing. *State v. Parker*, 721 So. 2d 1147 (Fla. 1998). Parker then received another death sentence after his resentencing jury returned an 11-1 death recommendation. The Florida Supreme Court affirmed on appeal. *Parker v. State*, 873 So. 2d 270 (Fla. 2004). Because the death sentence became final after June 24, 2002, his sentence was vacated. At his resentencing, Parker will be entitled to a life sentence on his conviction which was final in 1985 for a murder committed in 1982.

Mr. Reaves has not been as lucky. Card and Parker are each receiving the retrospective substantive benefit of Chapter 2017-1 because they had resentencing proceedings in the late 1990s or 2000s. Mr. Reaves has been denied the statute's benefit. The murder for which Mr. Reaves was convicted and sentenced to death took place in 1986, years after both the June 3, 1981 murder for which Card was convicted and Parker's 1982 crime. There are numerous other examples of murder cases receiving relief for murders that are contemporaneous or far older than Mr. Reaves' case.[1]

Mr. Reaves was originally convicted and sentenced to death in 1987. On retrial, he was found guilty of first degree murder on February 25, 1992 and his jury

[1] *See*: *State v. Dougan*, 202 So.3d 363 (Fla. 2016) (1974 murder); *Meeks v. Moore*, 216 F.3d 951, 959 (11th Cir. 2000) (1974 murders); *Johnson v. State*, 44 So. 3d 51 (Fla. 2010) (January 8-9, 1981 murders).

non-unanimously recommended death by a vote of ten to two on February 28, 1992. The trial court sentenced him to death on March 31, 1992. Mr. Reaves' sentence of death remains intact simply because his death sentence became final in 1994. *Reaves v. State*, 639 So. 2d 1 (Fla. 1994), *cert denied*, 115 S. Ct. 488 (1994).

The only distinction between Mr. Reaves' case and those of cases like Card and Parker is that, as a matter of good fortune and timing, they received resentencings for murders committed around the same time as the one Mr. Reaves was convicted of having committed. That distinction rests entirely on arbitrary factors like luck and happenstance. These are factors unconnected to the crime or the defendant's character.

Mr. Reaves' claim, raised in Claim II of his successive Rule 3.851 motion, is premised upon the fact that the revised statute is meant to apply in all homicide prosecutions regardless of the date of the homicide and regardless of the date of conviction. In other words, it applies to resentencings ordered on first-degree murder convictions. Specifically it will apply at the resentencings ordered for James Card and J.B. Parker who were convicted of first-degree murder and sentenced to death for crimes committed years before Mr. Reaves 1986 offense. Their convictions of first-degree murder were final in November 1984 and 1985 respectively, while Mr. Reaves' 1987 conviction and sentence of death was overturned on direct appeal. *Reaves v. State*, 574 So. 2d 105 (Fla. 1991). After his retrial finality was in 1994.

The resentencings ordered for Mr. Card and Mr. Parker means that their criminal prosecutions are again active and within the scope of the revised statute. The legislative intent clearly was that the revised statute govern those prosecutions. As a result, the crime for which they were convicted, first-degree murder, no longer renders them death eligible. The revised statute has effectively established the elements of the greater offense necessary to render Card and Parker eligible for death sentences. Under the revised statute the burden to prove these elements beyond a reasonable doubt rests with the State. That change in the elements and the additional burden of proof imposed upon the State is a change in substantive criminal law. Having the revised statute govern the prosecutions of Card and Parker means that the revised statute is being applied retrospectively to homicides committed in 1981 and 1982, and as a result extends to those individuals the substantive right to a life sentence unless the State proves the new elements beyond a reasonable doubt to the satisfaction of a unanimous jury as demonstrated when the unanimous jury returns a death recommendation.

These same protections and opportunity to be sentenced under the new statute should be provided to Mr. Reaves. Similar to Card and Parker, due process requires that Mr. Reaves be afforded the benefit of the new sentencing statute and the substantive changes in law and the elements of the offense of capital first degree murder that it establishes. Mr. Reaves is entitled to retrospective application of

Chapter 2017-1 and the enhanced protections it provides with respect to the elements necessary to impose a sentence of death and the additional burden of proof imposed upon the State.

IV. Mr. Reaves' death sentence violates *Hurst*, and the error is not "harmless"

At the outset, a unanimous jury verdict is not merely the recommendation. In *Hurst v. State*, this Court noted that "[i]n requiring jury unanimity in [the statutorily required fact] findings and in [the jury's] final recommendation if death is to be imposed, we are cognizant of significant benefits that will further the administration of justice." 202 So. 3d at 58. Thus, it is not only a unanimous recommendation that the Court recognized provided heightened reliability, but also the unanimous findings required by the jury as well. Mr. Reaves' penalty phase jury in 1992 did not return a verdict making any findings of fact. The only document returned by the jury was an advisory recommendation that a death sentence be imposed. Mr. Reaves' jury made no findings at all regarding the elements necessary to allow for the imposition of a death sentence. The jury did not find unanimously and expressly all the aggravating factors were proven beyond a reasonable doubt, unanimously find that the aggravators were sufficient to impose death, or unanimously find that the aggravators outweighed the mitigators. Finally, the jury vote was 10 to 2 on the ultimate question of whether Mr. Reaves was deserving of death.

This Court's recognition that "a reliable penalty phase requires" unanimous

jury findings and a unanimous recommendation means that the jury's death recommendations at Mr. Reaves' penalty phase do 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 *Hurst* 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). The right to a life sentence unless a jury unanimously recommends a death sentence recognized in *Hurst v. State* 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 or from *Hurst v. Florida* or from *Ring v. Arizona*. It is a right emanating from the Florida Constitution and alternatively 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 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.").

Jurors are required to feel the weight of their sentencing responsibility and they must know that they have the power to exercise mercy to preclude a death sentence. Further, as the United States Supreme Court explained in *Caldwell v. Mississippi*, 472 U.S. 320, 330 (1985), "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." The Court in *Caldwell* found that diminishing an individual juror's sense of responsibility for the imposition of a death sentence creates a bias in favor of a juror voting for death. *Id.* at 330 ("In the capital sentencing context there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court.").[2]

[2] *See Truehill v. Florida*, 138 S. Ct. 3, 4 (2017) (dissenting, J., Sotomayor joined by J., Breyer and J., Ginsburg).

If a bias in favor of a death recommendation increases when the jury's sense of responsibility is diminished, removing the basis for that bias increases the likelihood that one or more jurors will vote for a life sentence.

Here, the record in Mr. Reaves' case supports that presumption where his jury received inaccurate instructions as to their ultimate responsibility during sentencing and as to their power to dispense mercy and preclude a death sentence. This Court held in *Hurst v. State* that a jury must return a unanimous death recommendation before a judge is authorized to impose a death sentence on a defendant convicted of first-degree murder. This Court made it clear that jurors could vote against a death recommendation for any reason as an act of mercy. This means that although this Court has previously ruled that lingering doubt as to guilt is not a mitigating circumstance under Florida law, it is now something jurors can consider and can constitute the basis for a juror to vote in favor of a life sentence.

CONCLUSION

The resolution of *Hitchcock v. State* by this Court does not impact the resolution of Mr. Reaves' successive 3.851 motion. The specific claims raised by Mr. Reaves were not raised by Mr. Hitchcock. Mr. Reaves is entitled to an individualized assessment of his claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been provided by electronic service to Leslie Campbell, Assistant Attorney General, Office of the Attorney General, 1515 N. Flagler Drive, Suite 900, West Palm Beach, Florida 33401 at leslie.campbell @myfloridalegal.com via the Florida Court e-filing portal on the 26th day of February, 2018.

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