IN THE SUPREME COURT OF FLORIDA

BRUCE DOUGLAS PACE,
Appellant,

CASE NO. SC17-1021

v.

Lower Tribunal No. 1988-CF689

STATE OF FLORIDA,
Appellee.
_____/

RESPONSE TO ORDER TO SHOW CAUSE

The Appellant, BRUCE DOUGLAS PACE, by and through undersigned counsel, hereby responds to this Court's Order to Show Cause why the trial court's order should not be affirmed in light of this Court's decision in *Hitchcock v. State*, SC17-445 issued on September 27, 2017. In support thereof, Mr. Pace states:

INTRODUCTION

Mr. Pace is under a sentence of death. In the above-entitled matter, he is appealing the circuit court's summary denial of his successive Rule 3.851 motion. Mr. Pace's right to appeal and be meaningfully heard implicate his right to due process and equal protection, particularly given that the constitutional claims Mr. Pace raised in his 3.851 proceedings are different from those raised by Mr. Hitchcock in his appeal and those addressed by the Court in its opinion. Mr. Hitchcock's appeal does not govern the issues presented in Mr. Pace's appeal.[1]

[1] In addition to the arguments presented in his successive Rule 3.851 motion, Mr. Pace intends to timely file a successive Rule 3.851 motion alleging that the

Mr. Pace's motion for postconviction relief, the denial of which is the subject of this appeal, raised two separate claims challenging his death sentence. Claim I rested on the Sixth Amendment and the decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), which this Court addressed in *Asay v. State*, 210 So. 3d 1 (Fla. 2016)("*Asay V*") and *Hitchcock v. State*, 42 Fla. L. Weekly S753, 2017 WL 3431500 (Fla. 2017). Claim II rested on the Eighth Amendment and the Florida Constitution, which were the basis for this Court's ruling in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) that, before a death sentence could be authorized, the jury must first return a unanimous death recommendation. This issue was not addressed in *Asay V* or *Hitchcock*.

Individualized appellate review of all capital appeals, whether in the course of direct or collateral proceedings, is required by the Florida Constitution. *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."). Individualized appellate review is as necessary as individualized sentencing in a capital case. *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

---

enactment Florida's revised death penalty statute, Chapter 2017-1, constitutes a substantive change in law requiring retrospective application. Such a claim was not available to Mr. Pace when he filed the immediate 3.851 motion, prior to the enactment of the statute.

the impact it 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.") "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). Denying Mr. Pace the opportunity to fully present and argue his claims, which are different that Mr. Hitchcock's and were not decided by this Court in *Hitchcock v. State*, does not comport with due process.

PROCEDURAL HISTORY

On December 14, 1988, Mr. Pace was indicted for the first degree murder and armed robbery. Mr. Pace pleaded not guilty, was tried by jury and convicted on all counts. At the penalty phase, the trial judge instructed the jury on six aggravating factors.[2] By a bare majority vote of 7-to-5, the jury recommend a sentence of death.

[2] The aggravating factors on which the jury was instructed were: 1) the crime was committed while the defendant was under a sentence of imprisonment; 2) the defendant had a previous conviction for a violent felony (a robbery); 3) the homicide was committed during the course of a robbery; 4) the crime was committed for the purpose of avoiding arrest; 5) the crime was committed for financial gain; 6) the crime was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

In support of the death sentence, the court found three aggravating circumstances: (1) Mr. Pace had a previous conviction for a violent felony (a robbery in 1982); (2) Mr. Pace was on parole at the time of the homicide; and (3) the homicide was committed during the course of a robbery. The court found no mitigating circumstances.

This Court affirmed Mr. Pace's conviction and the death sentence on direct appeal. *Pace v. State*, 596 So. 2d 1034, 1036 (Fla. 1992); *cert denied*, *Pace v. Florida*, 113 S. Ct. 244 (1992). Justices Overton, Barkett, and Kogan concurred with the conviction but dissented, without an opinion, as to the death sentence. *Id*.

Mr. Pace sought postconviction relief under Florida Rule of Criminal Procedure 3.850. After conducting a limited evidentiary hearing, the circuit court denied relief. Mr. Pace appealed the denial of relief and filed a petition for a writ of state habeas corpus, raising several claims including that Florida's sentencing statute and his sentence of death are unconstitutional in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and the United States Supreme Court's granting of certiorari to review *Arizona v. Ring*, 25 P.3d 1139 (Ariz. 2001), *cert. granted*, *Ring v. Arizona*, 122 S.Ct. 865 (2001). This Court affirmed the denial of postconviction relief and denied the habeas corpus petition. *Pace v. State*, 854 So. 2d 167 (Fla. 2003); *cert denied*, *Pace v. Florida*, 124 S. Ct. 1155 (2004).

Mr. Pace timely sought a Writ of Habeas Corpus in the United States District

Court for the Northern District of Florida which was denied. Mr. Pace timely appealed to the Eleventh Circuit Court of Appeals which affirmed. *Pace v. McNeil*, 556 F.3d 1211 (2009); *cert. denied*, 558 U.S. 870 (2009).

On November 26, 2011, Mr. Pace filed a successive rule 3.851 motion to vacate premised on the United States Supreme Court's decision in *Porter v. McCollum*, 130 S. Ct. 447 (2009)(PCR2. 1-37). The circuit court denied the successive motion. Mr. Pace timely appealed to this Court which affirmed. *Pace v. State*, 91 So. 3d 783 (Fla. 2012).

On January 12, 2017, Mr. Pace filed a successive motion for postconviction relief premised on the Supreme Court's decision *Hurst v. Florida*, 136 S. Ct. 616 (2016) and this Court's decisions in *Perry v. State*, 210 So. 3d 630 (Fla. Oct. 14, 2016), *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *Mosley v. State*, 209 So. 3d 1248 (Fla. Dec. 22, 2016), and *Asay v. State*, 210 So. 3d 1 (Fla. Dec. 22, 2016). After conducting a case management conference, the circuit court denied relief, which is the basis of this appeal.

ARGUMENT

As to Claim I, Mr. Pace challenges his death sentence on the basis of the conclusion in *Hurst v. State* that a death sentence flowing from a non-unanimous death recommendation lacks reliability. This argument is different than the argument presented by Mr. Hitchcock, and establishes that Mr. Pace should get the retroactive

benefit of *Hurst v. State*.

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, from *Hurst v. Florida*, or from *Ring v. Arizona*. Rather, it is a right emanating from the Florida Constitution and the Eighth Amendment.

The requirement that the jury unanimously vote in favor of a death recommendation before a death sentence is authorized was embraced as a way to enhance the reliability of death sentences. *Hurst v. State*, 202 So. 3d at 59 ("We also note that the requirement of unanimity in capital jury findings will help to ensure the heightened level of protection necessary for a defendant who stands to lose his life as a penalty.). *See Johnson v. Mississippi*, 486 U.S. 578, 584 (1988)("The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case."). In *Mosley v. State*, this Court noted that the unanimity requirement in *Hurst v. State* carried with it "heightened protection" for a capital defendant. 209 So. 3d at 1278. This Court stated in *Mosley* that *Hurst v. State* had "emphasized the critical importance of a unanimous verdict." *Id*. This Court added:

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

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

In holding that requiring unanimity would produce more reliable death sentences, this Court acknowledged that death sentences imposed without the unanimous support of a jury lacked the reliability the Eighth Amendment requires. "**A reliable penalty phase proceeding requires** that 'the penalty phase jury must be unanimous in making the critical findings and recommendation that are necessary before a sentence of death may be considered by the judge or imposed." Hurst v. State, 202 So. 3d at 59. This Court's recognition that "a reliable penalty phase requires" a unanimous jury death recommendation means that Mr. Pace's penalty phase, where the jury recommended death by the barest majority vote of 7-to-5, does not qualify as reliable.

The importance of the heightened reliability demanded by the Eighth

Amendment is of such fundamental importance that this Court abandoned the binary approach to retroactivity under *Witt v. State*, 387 So. 2d 922 (Fla. 1980). In *Mosley*, when considering whether *Hurst v. State* is retroactive under *Witt* to death sentences imposed after *Ring*, this Court wrote:

> **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, 209 So. 3d at 1282 (emphasis added). As indicated in *Mosley*, the *Witt* analysis in the context of *Hurst v. State* requires considering the need to cure "individual injustice." Under a case by case *Witt* analysis, which *Mosley* said is required, the layers of unreliability and identified errors in his penalty phase show "individual injustice" in need of a cure. In light of the "individual injustice" in Mr. Pace's case, the scales are tipped and the interests of fairness exceed the State's interest in finality.

Moreover, the constitutional protections afforded capital prisoners in Florida now have Eighth Amendment implications, as they are required by evolving standards of decency. Such Eighth Amendment protections are generally understood to be retroactive. *See, e.g.*, *Miller v. Alabama*, 132 S. Ct. 2455; *Atkins v. Virginia*, 536 U.S. 304 (2002). This issue – whether retroactive application of the right to a unanimous jury recommendation for death announced in *Hurst* under the Eighth

Amendment to the United States Constitution – was not specifically addressed in this Court's opinion in *Asay*, on which *Hitchcock* relies. *See Hitchcock v. State*, 2017 WL 3431500, at *3 (Fla. 2017)(Pariente, J. dissenting).

Mr. Pace's 3.851 motion also challenged the arbitrary bright line of June 24, 2002, as set in *Mosley* and *Asay*, as arbitrary in violation the Eighth Amendment principles enunciated in *Furman v. Georgia*. Like the unanimity argument, this argument is premised upon the requirement under the Eighth Amendment that a death sentence carry extra reliability in order to insure that it was not imposed arbitrarily. Heightened reliability in capital cases is a core value of the Eighth Amendment and *Furman v. Georgia*. 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.[3] As a result of this

[3] In separating those who are to receive the retroactive benefit of *Hurst v. Florida* and/or *Hurst v. State* from those who will not, the line drawn operates much the same as the IQ score of 70 cutoff at issue in *Hall v. Florida*. 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. 1986 (2014)("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. Pace's death sentence compounds the unreliability of his non-unanimous death recommendation, 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.

Court's rulings, capital defendants charged with murders that were committed long before *Hurst v. Florida* issued will have *Hurst v. Florida* govern the capital sentencing procedures applicable at a retrial or resentencing occurring in the future, as well as those that have already occurred if a resulting death sentence was not final when *Hurst v. Florida* issued on January 12, 2016.

For example, Douglas Ray Meeks will receive the benefit of *Hurst v. Florida* and the new Florida law when he is sentenced on two first degree murder convictions for two 1974 homicides. Meeks had separate trials on each homicide and was convicted at both trials of first degree murder. He received two death sentences. Both were affirmed in his direct appeals. *Meeks v. State*, 336 So. 2d 1142 (Fla. 1976); *Meeks v. State*, 339 So. 2d 186 (Fla. 1976). However after *Hitchcock v. Dugger*, 481 U.S. 393 (1987) issued, this Court ordered an evidentiary hearing on Meeks' claims that *Hitchcock* error infected both death sentences. *Meeks v. Dugger*, 576 So. 2d 713 (Fla. 1991). Subsequently, the State stipulated that Meeks was entitled to new penalty phases due to the *Hitchcock* error. *Meeks v. Moore*, 216 F.3d 951, 959 (11th Cir. 2000)("In its order, the [district] court observed that 'the State of Florida stipulated that Meeks would be provided with a new penalty phase in both cases.'"). Because those new penalty phases have yet to occur, *Hurst v. Florida* and the new Florida law will govern the sentencing procedure in both cases. Even though Meeks was convicted of homicides that were committed in 1974, he can only get death

sentences now if his juries unanimously make the requisite findings of fact and unanimously recommend a death sentence.

Another example, Jacob Dougan was charged with and convicted of a 1974 homicide. He was then sentenced to death. His conviction and death sentence were affirmed in his first direct appeal which was a joint appeal with his co-defendant (Barclay) and was reported in the name of the co-defendant. *Barclay v. State*, 343 So. 2d 1266 (Fla. 1977). Subsequently, this Court vacated the death sentence because of error under *Gardner v. Florida*, 430 U.S. 349 (1977), and remanded Barclay's and Dougan's cases for judge resentencing. *Barclay v. State*, 362 So. 2d 657 (Fla. 1978). After a death sentence was again imposed, it was affirmed in Dougan's second direct appeal. *Dougan v. State*, 398 So. 2d 439 (Fla. 1981). Later on the basis of appellate counsel's ineffective assistance in that direct appeal, this Court granted Dougan habeas relief and ordered a third direct appeal. *Dougan v. Wainwright*, 448 So. 2d 1005 (Fla. 1984). In the third direct appeal, Dougan's conviction was affirmed, but his death sentence was vacated and a jury resentencing was ordered. *Dougan v. State*, 470 So. 2d 697 (Fla. 1985). After another death sentence was imposed, the death sentence was affirmed in Dougan's fourth direct appeal. *Dougan v. State*, 595 So. 2d 1 (Fla. 1992). Thereafter, Dougan filed a 3.850 motion in circuit court where it remained pending for some time. In 2013 after an evidentiary hearing was conducted, the trial court vacated Dougan's conviction and ordered a new trial.

This Court affirmed. *State v. Dougan*, 202 So. 3d 363 (Fla. 2016). If Dougan is again found guilty, *Hurst v. Florida* will govern at his penalty phase. As with Meeks, Dougan will be eligible for a death sentence for the 1974 homicide only if the jury unanimously makes the requisite findings of fact and unanimously recommends a death sentence.

Another example is John Hardwick who was charged with a 1984 homicide. He was convicted and sentenced to death. His conviction and death sentence were affirmed in his direct appeal. *Hardwick v. State*, 521 So. 2d 1071 (Fla. 1988). Later, this Court affirmed the denial of Hardwick's 3850 motion, while also denying Hardwick's habeas petition. *Hardwick v. Dugger*, 648 So. 2d 100 (Fla. 1994). Hardwick then filed for habeas relief in federal court. After the district court granted habeas relief and ordered the death sentence vacated and a new penalty phase to be conducted due trial counsel's ineffective assistance, the Eleventh Circuit affirmed the grant of habeas relief. *Hardwick v. Sec'y Fla. Dep't of Corr*., 803 F.3d 541 (11th Cir. 2015). Currently, Hardwick's case is pending in the trial court for a resentencing. As a result, *Hurst v. Florida* and the new Florida law will govern the sentencing procedure and the question of whether Hardwick can receive a death sentence for a 1984 murder. As with Meeks and Dougan, Hardwick will be eligible for a death sentence only if his jury unanimously makes the requisite findings of fact and unanimously recommends a death sentence.

Still another example is Paul Hildwin who was charged and convicted of a 1985 homicide. After a death sentence was imposed, his conviction and death sentence were affirmed in his first direct appeal. *Hildwin v. State*, 531 So. 2d 124 (Fla. 1988). *See Hildwin v. Florida*, 490 U.S. 638 (1989). In collateral proceedings, a resentencing was ordered by This Court. *Hildwin v. Dugger*, 654 So. 2d 107 (Fla. 1995). After the imposition of another death sentence, a second direct appeal resulted in another affirmance. *Hildwin v. State*, 727 So. 2d 193 (Fla. 1998). In the course of new collateral proceedings, Hildwin's conviction was vacated by this Court and a new trial ordered. *Hildwin v. State*, 141 So. 3d 1178 (Fla. 2014). Currently, Hildwin is awaiting his new trial. At that trial on a of first degree murder charge for a 1985 homicide, *Hurst v. Florida* and the resulting new Florida law will govern at the retrial and as to the sentencing procedure if a first degree murder conviction is returned on the 1985 homicide. As with Meeks, Dougan, and Hardwick, he will be eligible for a death sentence only if his jury unanimously makes the requisite findings of fact and unanimously recommends a death sentence.

Still another example is Ana Cardona who was charged with a 1990 homicide. After she received a death sentence, her conviction and death sentence were affirmed on direct appeal. *Cardona v. State*, 641 So. 2d 361 (Fla. 1994), *cert denied* 513 U.S. 1160 (1995). Later, her conviction was vacated and a new trial ordered by this Court during her appeal from the denial of 3.851 relief. *Cardona v. State*, 826 So. 2d 968

(Fla. 2002). After she was again convicted and again sentenced to death, the conviction and death sentence were again vacated and another new trial ordered by this Court in Cardona's second direct appeal. *Cardona v. State*, 185 So. 3d 514 (Fla. 2016). Currently, Cardona's case is pending in the circuit court as she awaits her new trial. At that trial on a of first degree murder charge for a 1990 homicide, *Hurst v. Florida* and the resulting new Florida law will govern at the retrial and as to the sentencing procedure if a first degree murder conviction is returned on the 1990 homicide. As with Meeks, Dougan, Hardwick, and Hildwin, Cardona will be eligible for a death sentence only if her jury unanimously makes the requisite findings of fact and unanimously recommends a death sentence.

There also cases in which a capital defendant has had a death sentence vacated in collateral proceedings, a resentencing ordered, and another death sentence imposed, which was pending on a direct appeal when *Hurst v. Florida* issued. In those circumstances, the capital defendant will receive the benefit of *Hurst v. Florida* because a final death sentence was not in place when *Hurst* issued. For example, Paul Beasley Johnson was convicted of first degree murder for three 1981 homicides and sentenced to death. His convictions and death sentences were affirmed in first direct appeal. *Johnson v. State*, 483 So. 2d 774 (Fla. 1983). However, habeas relief was granted on appellate counsel ineffectiveness claim, and a new trial was ordered. *Johnson v. Wainwright*, 498 So. 2d 938 (Fla. 1986). His

subsequent convictions and death sentences were affirmed in his second direct appeal. *Johnson v. State,* 608 So. 2d 4 (Fla. 1992). Later, the denial of 3.850 relief was affirmed. *Johnson v. State*, 769 So. 2d 990 (Fla. 2000). Then, habeas relief was denied. *Johnson v. Moore*, 837 So. 2d 343 (Fla. 2002). Next, the denial of a successive 3851 motion was affirmed. *Johnson v. State*, 933 So. 2d 1153 (Fla. 2006)(table decision). But then in 2010, the denial of yet another successive 3851 motion was reversed, and Johnson death sentences were vacated, and a resentencing was ordered. *Johnson v. State*, 44 So. 3d 51 (Fla. 2010). Though Johnson again received death sentences, his third direct appeal was pending before this Court when *Hurst v. Florida* issued on January 12, 2016. This means that Johnson will receive the benefit of *Hurst* and the resulting new Florida law even though the 1981 murders that he was convicted of were committed 35 years before the decision in *Hurst* was rendered.

With Meeks and Dougan entitled to the benefit of *Hurst v. Florida* and the resulting new Florida law for murders committed in 1974, ensuring uniformity and fairness in circumstances in Florida's application of the death penalty requires the retroactive application of *Hurst* and the resulting new Florida law. Moreover 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 40, 58 (Fla. 2016). This Court specifically noted 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." *Id*. at 59. Thus, the new Florida law will enhance the reliability the death sentences that juries unanimously authorize.

To deny Mr. Pace the retroactive application of *Hurst v. Florida* on the ground that his death sentence became final before June 24, 2002 while granting retroactive *Hurst* relief to inmates whose death sentences had not become final on June 24, 2002 violates Mr. Pace's right to Equal Protection of the Laws under the Fourteenth Amendment to the Constitution of the United States and his right against arbitrary infliction of the death penalty under the Eighth Amendment to the Constitution of the United States. Mr. Pace's appeal cannot be denied in light of *Hitchcock* because this Court did not address this issue in *Hitchcock*. Indeed, Mr. Hitchcock did not make the 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 does the *Hitchcock* opinion discuss Mr. Pace's arguments that fundamental fairness (as identified and discussed in *Mosley v. State*) and the manifest injustice exception to the law of the case doctrine set forth in *Thompson v. State*, 208 So. 3d 49, 50 (Fla. 2016), apply and require that Mr. Pace receive the benefit of *Hurst v. Florida* and *Hurst v. State*. Under both "fundamental fairness" and "manifest injustice," Mr. Pace

collateral relief is warranted under *Hurst v. Florida* and/or *Hurst v. State.*

Specifically, as to the fundamental fairness concept set forth in *Mosley*, Mr. Pace detailed his case specific reasons why the fundamental fairness concept, which this Court embraced and employed in *Mosley*, meant that he should receive collateral relief in light of *Hurst v. Florida* and/or *Hurst v. State*. In *James v. State*, 615 So. 2d 668 (Fla. 1993), this Court cited "fundamental fairness" when it granted a resentencing. It found a case specific demonstration of fundamental unfairness entitled Mr. James to collateral relief due to the decision in *Espinosa v. Florida*, 505 U.S. 1079 (1992). Because of Mr. James' efforts to challenge the jury instruction on heinous, atrocious or cruel in anticipation of *Espinosa*, this Court held that "it would not be fair to deprive him of the Espinosa ruling" even though Mr. James' death sentence was final years before *Espinosa* was issued by the United States Supreme Court. *James*, 615 So. 2d at 669. Other collateral appellants appearing before this Court with death sentences that were final before *Espinosa* issued were generally unable to make the showing of unfairness that Mr. James made. Very few of those with death sentences final before the issuance of *Espinosa* received collateral relief on the basis of *Espinosa*. The ruling in *Espinosa* was not found retroactive under *Witt v. State*. The collateral benefit was extended only on a case by case basis to those like Mr. James who showed their case specific entitlement to the retroactive benefit of *Espinosa* using fundamental fairness as the yardstick. Just as Mr. James

made a successful case specific showing of fundamental unfairness while others did not, Mr. Pace's presented his own case specific showing of fundamental unfairness which cannot be controlled by the *Hitchcock* decision for the plain reason that the Court did not address it.

When discussing the concept of fundamental fairness in his 3.851 motion, Mr. Pace identified issues he had raised at his trial, on direct appeal and in collateral proceedings which he had pursued in an effort to present the Sixth Amendment and Eighth Amendment challenges to his death sentence found meritorious in *Hurst v. Florida* and *Hurst v. State*. Mr. Pace challenged the constitutionality of Florida's sentencing statute in several pre-trial motions dating back to 1989. In his "Motion to Declare Statute 921.141 Unconstitutional," Mr. Pace argued that Florida's sentencing statute was unconstitutional under the Sixth, Eighth and Fourteenth Amendments because it "fails to set forth with particularity the method and means by which the jury should reach an opinion as to the advisory sentence" (R. 1150). In his "Motion to Dismiss Indictment Or To Declare that Death Is Not A Possible Penalty," Mr. Pace argued that the aggravating circumstances enumerated in Florida Statute 921.141 are "essential facts which must re alleged in the indictment" (R. 1151-2). Mr. Pace also filed a "Motion For Statement Of Particulars Regarding Aggravating And Mitigating Circumstances" which alleged, rightfully, that "Indictment fails to sufficiently inform the Defendant of the particulars of the

offense, relevant to imposition of the death penalty under Florida Statute Section 921.141, to enable him to prepare his defense (R. 1159). Mr. Pace raised a claim pursuant to *Apprendi v. New Jersey* at his first opportunity – in his initial brief on appeal of the denial of postconviction relief – and his state petition for writ of habeas corpus in the Florida Supreme Court. The petition was filed on March 4, 2002, after the United States Supreme Court granted certiorari in *Ring* but before the *Ring* opinion was issued. In denying relief, the Court said merely, "We have denied relief for postconviction claims based upon this argument . . . We likewise deny Pace's claim." *Pace*, 854 So. 2d at 181 (internal citations omitted).

Moreover, the jury was repeatedly instructed that its penalty phase verdict was merely advisory and could be returned by a mere majority vote. After brief deliberations, Mr. Pace's advisory jury returned a death sentence by a non-unanimous, bare majority vote of 7-to-5, notwithstanding the fact that trial counsel presented minimal mitigation to the jury. 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. The 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. 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."

CONCLUSION

Mr. Pace respectfully submits that this Court should allow full briefing on the issues resulting from the trial court's summary denial. In the alternative, Mr. Pace requests that this Court hold that the *Hurst* decisions must be applied retroactively to him, vacate his death sentence, and remand to the circuit court for imposition of a life sentence or a new penalty phase that comports with the requirements of the Sixth, Eighth and Fourteenth Amendments.

Respectfully Submitted,

/s/ Paul Kalil
PAUL KALIL
Assistant CCRC-South
Florida Bar No. 174114
BRI LACY
Staff Attorney
Florida Bar No. 116001
CCRC-South
1 East Broward Boulevard, Suite 444
Fort Lauderdale, Florida 33301
(954) 713-1284 Office
(954) 713-1299 Fax
kalilp@ccsr.state.fl.us
COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 17, 2017, I electronically filed the foregoing with the Clerk of the Court by using the electronic filing portal which will send a notice of electronic filing to counsel for the Appellee, Berdene Beckles, Assistant Attorney General, at *capapp@myfloridalegal.com*.

/s/ Paul Kalil
PAUL KALIL
Florida Bar No. 0174114
Assistant CCRC-South