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IN THE SUPREME COURT OF FLORIDA
CASE NO. SC17-1141

KEVIN DON FOSTER,
Appellant,

v.

STATE OF FLORIDA,
Appellee.
_________________________________/

RESPONSE TO ORDER TO SHOW CAUSE

The Appellant, KEVIN DON FOSTER, 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 25, 2017. In support thereof, Mr. Foster states:

INTRODUCTION

Mr. Foster 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. Foster's right to appeal and be meaningfully heard implicate his right to due process and equal protection, particularly given that the constitutional claims Mr. Foster 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. Foster's appeal.[1]

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[1] In addition to the arguments presented in his successive Rule 3.851 motion,

Mr. Foster 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. Foster's right to appeal is protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Evitts v. Lucy*, 469 U.S. 387, 393 (1985) ("if a State has created appellate courts as "an integral part of the … system for finally adjudicating the guilt or innocence of a defendant," *Griffin v. Illinois*, 351 U.S. at 18, 76 S.Ct., at 590, the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution.").

The United States Supreme Court has explained the bedrock nature of the right to due process:

> The words of Webster, so often quoted, that by 'the law of the land' is intended 'a law which hears before it condemns,' have been repeated in varying forms of expression in a multitude of decisions. In *Holden v. Hardy*, 169 U.S. 366, 389, 18 S. Ct. 383, 387, 42 L. Ed. 780 , the necessity of due notice and an opportunity of being heard is described as among the 'immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.' And Mr. Justice Field, in an earlier case, *Galpin v. Page*, 18 Wall. 350, 368, 369, 21 L. Ed. 959 , said that the rule that no one shall be

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Mr. Foster intends to timely file a successive Rule 3.851 motion alleging that the enactment of 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. Foster when he filed the immediate 3.851 motion, prior to the enactment of the statute.

> personally bound until he has had his day in court was as old as the law, and it meant that he must be cited to appear and afforded an opportunity to be heard. 'Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered.'

Powell v. Alabama, 287 U.S. 45, 68 (1932) (emphasis added). 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. Foster to proceed in his appeal, indicates its intention on binding Mr. Foster 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. Foster deserves an individualized appellate process, particularly because *Hitchcock* did not raise the same issues at stake here.[2]

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[2] On July 10th, 2017 Foster filed a Motion to Lift Stay of Appellate Proceedings. Two

Mr. Foster's motion for postconviction relief, the denial of which is the subject of this appeal, raised four 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.* and *Hitchcock*. 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*. In claim III, Mr. Foster argued that partial retroactivity injects arbitrariness into Florida's capital sentencing scheme in violation of the Eighth Amendment and the principles of *Furman v. Georgia*. This claim was raised in *Hitchcock* but the court did not rule on it. In claim IV, Mr. Foster alleged that his prior postconviction ineffective assistance of counsel claims, *Brady* claims, and *Giglio* claims must be reheard in light of *Hurst*. This claim was raised in *Hitchcock*, but the Court did not rule on it.

"The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution." *Hall v. Florida*, 134 S. Ct. at 2001. Denying Mr. Foster the opportunity to fully present and argue his claims, which are different

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days later, in a one line order, this Court denied the motion, further evidencing the truncated process discussed in the instant motion.

than Mr. Hitchcock's and were not decided by this Court in *Hitchcock v. State*, does not comport with due process or *Hall v. Florida*.

ARGUMENT

As to Claim II, Mr. Foster 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. Foster 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. *Id*., 209 So. 3d at 1278. *Hurst v. State* recognized that the non-unanimous recommendation demonstrates that Mr. Foster’s death sentence lacks the heightened reliability demanded by the Eighth Amendment. *See Hurst v. State*, 202 So. 3d at 59.

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 the jury’s 9-3 death recommendation at Mr. Foster’s penalty phase do 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*

v. State, 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 v. State, 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. Foster'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*, 561 U.S. 460 (2012); *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 v. State* 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, Slip Op. at *9 (Pariente, J. dissenting).

In Claim III of Mr. Foster's 3.851 motion he also challenged the 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 ensure 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 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

[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. 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. Foster'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.

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 instance, James Card was convicted of a 1981 homicide and a death sentence was imposed. His conviction and death sentence became final in 1984. *Card v. State*, 453 So. 2d 17 (Fla. 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, 2017 WL 1743835 (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.[4]

With Card and Parker entitled to the benefit of *Hurst v. Florida* and the resulting new Florida law for murders committed in 1981 and 1982 respectively, 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

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[4] Additional examples of murder cases receiving *Hurst* relief that are older than Mr. Foster's case include: *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) (1981 murders); *Hardwick v. Sec'y Fla. Dep't of Corr*., 803 F.3d 541 (11th Cir. 2015) (1984 murder); *Hildwin v. State*, 141 So. 3d 1178 (Fla. 2014) (1985 murder); and *Cardona v. State*, 185 So. 3d 514 (Fla. 2016) (1990 murder).

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 of the death sentences that juries unanimously authorize.

To deny Mr. Foster 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. Foster'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. And while arbitrary line drawing is violative of the Eighth Amendment and due process in any context, the denial of Mr. Foster's claims would be particularly egregious given that the United States Supreme Court issued its opinion in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) ten months before Mr. Foster's conviction and sentence became final. In rendering its decision in *Hurst v. Florida*, the Supreme Court noted that *Apprendi* was the basis for its decision in *Ring*. In doing so, the Supreme Court wrote, "[t]he analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's." 136 S. Ct. at 621-22. "Because Florida's capital sentencing statute has essentially been unconstitutional since [*Apprendi* in 2000], fairness strongly favors applying *Hurst*, retroactively to that time." *Mosley v. State*, 209 So. 3d 1248, 1280 (Fla. 2016). Neither *Mosley v.*

State nor *Asay v. State*, 210 So. 3d 1 (Fla. 2016), addressed the fact that *Apprendi*, not *Ring*, was the foundation of *Hurst v. Florida*.

Mr. Foster'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. Foster'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. Foster receive the benefit of *Hurst v. Florida* and *Hurst v. State*. Under both "fundamental fairness" and "manifest injustice," 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. Foster detailed his case-specific reasons why he should receive collateral relief in light of *Hurst v. Florida* and/or *Hurst v. Stat*e. In *James v. State*, 615 So. 2d 668 (Fla. 1993), this Court cited "fundamental fairness" when it granted a resentencing. It found a case-specific demonstration of fundamental unfairness entitled Mr. James to collateral relief due to the decision in *Espinosa v. Florida*, 505 U.S. 1079 (1992). Because of Mr. James' efforts to challenge the jury instruction on heinous, atrocious or cruel in anticipation of *Espinosa*, this Court held that "it would not be fair to

deprive him of the Espinosa ruling" even though Mr. James' death sentence was final years before *Espinosa* was issued by the United States Supreme Court. *James v. State*, 615 So. 2d at 669. Other collateral appellants appearing before this Court with death sentences that were final before *Espinosa* issued were generally unable to make the showing of unfairness that Mr. James made. Very few of those with death sentences final before the issuance of *Espinosa* received collateral relief on the basis of *Espinosa*. The ruling in *Espinosa* was not found retroactive under *Witt v. State*. The collateral benefit was extended only on a case by case basis to those like Mr. James who showed their case-specific entitlement to the retroactive benefit of *Espinosa* using fundamental fairness as the yardstick. Just as Mr. James made a successful case-specific showing of fundamental unfairness while others did not, Mr. Foster 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 and motion for rehearing, Mr. Foster identified issues he had raised 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*. In his initial 3.850 motion filed September 26, 2001, Mr. Foster raised a challenge to Florida's capital sentencing

scheme. Specifically, Mr. Foster raised a claim that his sentence was unconstitutional under *Caldwell v. Mississippi*, 472 U.S. 3209 (1985) where his jury was instructed that its role was merely advisory. Mr. Foster's jury was repeatedly instructed that its penalty phase verdict was merely advisory and to be returned by a majority vote. After brief deliberations, the jury returned 9-to-3 death recommendations.

Additionally, Mr. Foster also raised a claim arguing that Florida's capital sentencing scheme was unconstitutional in the manner in which it failed to provide the jury with adequate instruction regarding their determinations as to the sufficiency of aggravating circumstances and weighing of aggravators and mitigators. Despite not having the benefit of the *Ring* decision at the time of filing, Mr. Foster nevertheless still raised "*Ring*-like" challenges to his sentence.

Thereafter, Mr. Foster was granted leave to amend his motion for postconviction relief upon completion of public records and full investigation of all grounds for supporting his claims for relief. That amendment was on May 21, 2010, nearly nine years after the filing of his initial motion. In the intervening time period, however, litigation of *Ring*-based claims had been deemed a resolved matter by this Court. It was not until the United States Supreme Court decision in *Hurst v. Florida* that the error in Florida's capital sentencing scheme and the decade-long misconception that *Ring* did not apply in Florida was recognized and the Florida

Supreme Court forced to acknowledge its error. *See Asay*, 210 So. 3d at 14; *Mosley*, 209 So. 3d at 1283. Given the state of the *Ring* litigation at the time of the filing of his amended motion for postconviction relief, Mr. Foster did not include a claim pursuant to *Ring* as it would have been futile.

Mr. Foster's case is uniquely emblematic of the inequity which results from a partial retroactivity approach in applying *Hurst* to capital defendants. Mr. Foster is in the unfortunate position of being a defendant who did not have the benefit of *Ring* at the time of trial or on direct appeal, as it had not yet been decided, and despite having raised "*Ring*-like" challenges in his initial Rule 3.850 motion, did not advance any challenge pursuant to *Ring* because of the state of the law at the time he ultimately filed his amended Rule 3.850 in 2010.

Under these circumstances, excluding him from the availability of *Hurst* relief based on the timing of judicial decisions and circumstances over which he had no control is both arbitrary and capricious. It certainly runs afoul of the Eighth Amendment requirement of culpability-related decision making in capital cases and the Fourteenth Amendment requirement that distinctions in state criminal laws that impinge upon fundamental rights must be strictly scrutinized. *See, e.g. Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964); *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972). Furthermore, it also ignores

entirely the fact that the United States Supreme Court made clear in *Ring* that its decision flowed directly from *Apprendi*, *see Ring*, 536 U.S. at 588-89. That reliance upon *Apprendi* as the foundation for its Sixth Amendment analysis was then further established in *Hurst v. Florida* where the Court repeatedly stated that Florida's scheme was incompatible with "*Apprendi's* rule," of which *Ring* was an application. 136 S. Ct. at 621.

Thereafter, the Florida Supreme Court then embraced that framework in *Mosley* when it also acknowledged that *Ring* was an application of *Apprendi*. *See Mosley v. State*, 209 So. 3d 1248, 1279-80 (Fla. 2016). Given that framework, relying upon *Apprendi* as the bedrock for purposes of Sixth Amendment analysis, any attempt to deny retroactive application of *Hurst* to those defendants whose cases fall within the post-*Apprendi* pre-*Ring* class of defendants such as Mr. Foster, is entirely arbitrary and constitutionally impermissible.

In Claim IV, Mr. Foster alleged that his prior postconviction claims must be re-heard under a constitutional framework. Claim IV did not involve the retroactivity of *Hurst v. Florida* and *Hurst v. State*. Instead, the claim arose from the fact that at a resentencing, if one were to be ordered, Mr. Foster would have a right to a life sentence unless the jury returns a unanimous death recommendation. The claim asks how this affects the validity of this Court's rejection of Mr. Foster's *Strickland*,

Brady, and *Giglio* claims in his initial motion to vacate. Mr. Foster's challenge is to this Court's affirmance of the denial of his prior Rule 3.851 motion.

This Court's recent decision in *Bevel v. State*, 221 So. 3d 1168 (2017), supports the validity of this claim:

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

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

In postconviction proceedings, Mr. Foster raised *Strickland*, *Brady*, and *Giglio* claims. It is true that this Court addressed all of the issues raised by Mr. Foster in his direct appeal and subsequent collateral proceedings and found the individual errors were harmless beyond a reasonable doubt or as to *Brady* and *Strickland* claims, this Court's confidence in the reliability of the outcome was not undermined. But this review was always conducted with the understanding that the jury's advisory death recommendation would not have changed unless three additional jurors would have been convinced to vote in favor of a life recommendation. Thus, the need for three jurors to switch their votes in a 9-3 case became part of the yardstick for measuring the prejudice Mr. Foster suffered as a result of counsel's

deficiency or the harm suffered from errors such as *Brady* or *Giglio* violations.[5]

This Court in *Bevel* recognized the effect that the defendant's right to a life sentence unless a jury unanimously returns a death recommendation has on this Court's standard of review in capital cases. In *Bevel*, this Court found that the decision in *Hurst v. State* mandating a unanimous death recommendation before the presumption of a life sentence is overcome altered the prejudice analysis of *Brady/Giglio* claims and *Strickland* claims. Under *Bevel*, this Court's standard of review for harmless error and prejudice must also change.

It no longer takes six jurors voting for a life recommendation for an advisory life recommendation to result. Now, one juror voting for life means a life sentence is the only sentence to be imposed for a first-degree murder conviction. This means that, due to the arbitrary line this Court has drawn in the course of deciding *Mosley* and *Asay*, Mr. Foster's death sentence is inherently *more* unreliable. As this Court explained in *Bevel*, his penalty phase proceeding was not a reliable one because the

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[5] This Court's harmless error test and its evaluation of the prejudice arising from *Strickland* errors have in the past implicitly accepted a death sentence imposed after an advisory jury's majority vote in favor of a death recommendation was sufficiently reliable for Eighth Amendment purposes. However, the recognition in *Bevel v. State* that a penalty phase without a unanimous jury's death recommendation is not a reliable penalty phase means the unreliability of a non-unanimous death recommendation infects the appellate and collateral review with the same unreliability. This spreads the underlying unreliability to appellate harmless error analysis and to the prejudice prong of *Strickland* claims.

death recommendation was not unanimous. In turn, that unreliability grew when this Court's standard of review on appeal was tolerant of the unreliability that accompanied an advisory jury's death recommendation returned by a majority vote.

The decisions in *Bevel v. State* and *Hurst v. State* acknowledged that when a judge follows a jury's non-unanimous death recommendation and imposes a death sentence, that sentence is inherently unreliable. Death sentences imposed after a jury returned a non- unanimous death recommendations before June 24, 2002, are just as unreliable as death sentences imposed after June 24, 2002, following a non-unanimous death recommendation. In fact, the older the death sentence, the more unreliable the death sentence due to the less reliable scientific methodology the further back in time the death sentence was imposed.

The result of *Mosley v. State* and *Asay v. State* seems to be a bright line cutoff as to who gets the retroactive benefit of *Hurst v. State*. Those with death sentences that became final prior to June 24, 2002, seemingly do not automatically get the benefit of *Hurst v. Florida* and *Hurst v. State*, which is automatically extended to individuals on the lucky side of the June 24, 2002 line. Employing a bright line cutoff on June 24, 2002, the day *Ring* was decided, is arbitrary. *Ring* did not address the need for juror unanimity, and *Ring* was decided on the basis of the Sixth Amendment, not the Eighth Amendment. As this Court noted in *Hurst v. State*, the Sixth Amendment has never been found to require a unanimous jury. There is no

logic to linking *Hurst v. State* to June 24, 2002. Separate and apart from *Ring*, there is nothing about June 24, 2002, that otherwise reflects on the reliability of death sentences in Florida or a shift in the State's interest in finality somehow being greater before that date. The bright line cutoff violates the Eighth Amendment and/or pre-*Ring* death sentences must undergo a case-specific *Witt* analysis. In the former case, the harmless error analysis must be conducted case by case. Either way, Claim IV requires a case-specific analysis to determine whether Mr. Foster was prejudiced by trial counsel's failures at guilt and penalty phase and/or the numerous other errors raised in postconviction.

As to this claim, the Court's decision in *Hitchcock v. State* does not matter. The specific claim raised by Mr. Foster was simply not raised by Mr. Hitchcock or disposed of by this Court. In any event, this is a case-specific claim requiring a case by case analysis.

CONCLUSION

Mr. Foster respectfully submits that this Court should allow full briefing on the issues resulting from the trial court's summary denial. In the alternative, Mr. Foster 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,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 16, 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, Stephen Ake, Assistant Attorney General, at *capapp@myfloridalegal.com* and/or *stephen.ake@myfloridalegal.com*.

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