**IN THE SUPREME COURT OF FLORIDA**
**CASE NO. SC17-1142**

**ATNON KRAWCZUK,**
**Appellant,**

**v.**

**STATE OF FLORIDA,**
**Appellee,**
_____/



**CONSOLIDATED RESPONSE TO SHOW CAUSE ORDER, MOTION FOR CLARIFICATION AS TO THE DEFINITION OF "CAUSE," MOTION FOR FULL BRIEFING AND ORAL ARGUMENT**

COMES NOW the Appellant, ANTON KRAWCZUK, by and through undersigned counsel, and submits his Response to the Court's Order dated September 25, 2017, ordering Mr. Krawczuk to "show cause why the trial court's order should not be affirmed in light of this Court's decision in *Hitchcock v. State*."[1] Along with his response, Mr. Krawczuk is seeking clarification of the definition of the concept of "cause," a standard of review that the Court appears to have decided governs the instant appeal. Mr. Krawczuk is also moving for full briefing and oral argument in what should be a plenary capital appeal over which this Court has exclusive jurisdiction.

**A. Introduction**.

Mr. Krawczuk is under a sentence of death and is appealing the circuit court's

[1] *See Hitchcock v. State*, 2017 WL 3431500 (Fla. Aug. 10, 2017). There is a petition for a writ of certiorari pending in the United States Supreme Court regarding this

summary denial of his successive Rule 3.851 motion (2PCR-196-203).[2] This appeal is not one within this Court's discretionary jurisdiction. *See* Fla. R. App. Pro. 9.030(a)(2). Rather, **Mr. Krawczuk 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). In his appeal, this Court "**shall review** all rulings and orders appearing in the record **necessary to pass upon the grounds of an appeal**." Fla. R. App. Pro. 9.140(i) (emphasis added).

Because Mr. Krawczuk has been given the substantive right to appeal the denial of his successive Rule 3.851 motion, that substantive right is protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Evitts v. Lucey*, 469 U.S. 387, 393 (1985) ("if a State has created appellate courts as "an integral part of the ... system for finally adjudicating the guilt or innocence of a defendant," *Griffin v. Illinois*, 351 U.S., at 18, 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."). This principle applies to collateral appeals

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Court's *Hitchcock* decision.

[2] The record on appeal in this case is designated by 2PCR followed by the relevant page number. In this pleading, Mr. Krawczuk is incorporating all of the facts, allegations, and legal arguments made below in his written submissions to the trial court and during the case management hearing (2PCR-146-195). Mr. Krawczuk neither waives nor abandons any fact, allegation, or legal argument made below that is not explicitly addressed in this pleading given the truncated nature of this proceeding.

as well as direct appeals. *Lane v. Brown*, 372 U.S. 477, 484-85 (1963) ("the *Griffin* principle also applies to state collateral proceedings, and *Burns* leaves no doubt that the principle applies even though the State has already provided one review on the merits.").

This Court previously stayed these appellate proceedings, over Mr. Krawczuk's objection,[3] pending the disposition of *Hitchcock.* Linking Mr. Krawczuk's appeal to the outcome of Mr. Hitchcock's was an effort to bind Mr. Krawczuk to the outcome of Mr. Hitchcock's appeal. Because Mr. Hitchcock has now lost his appeal, this Court's show cause order implies that Mr. Krawczuk's right to appeal will be eliminated or severely curtailed. This threat to Mr. Krawczuk's right to appeal and be meaningfully heard implicates his right to due process and equal protection, particularly given that the constitutional claims Mr. Krawczuk raised in his 3.851 proceedings are in many ways different from those raised by Mr. Hitchcock. A denial of Mr. Hitchcock's appeal should not govern the issues presented in Mr. Krawczuk's appeal. *Cf. e.g.*, *Lockyer v. Andrade*, 538 U.S. 63, 69, 72-73 (2003) (indicating that cases might be instructive to some extent but not necessarily controlling when the issue presented was not specifically decided or briefed by the allegedly controlling case); *Picard v. Connor*, 404 U.S. 270, 276-77

[3] Mr. Krawczuk filed a motion in this Court to vacate the stay and to proceed with briefing, but his request was denied within a day of the filing of the motion.

(1971) (demonstrating that claims on different constitutional amendments carry "separate identities and reflect different constitutional values."); *Rodriguez v. State*, 219 So. 3d 751, 757 (Fla. 2017) (reasoning because the same identical error did not occur in defendant's case compared to the decision he relied upon, the earlier decision was not controlling).

Importantly, should Mr. Krawczuk be permitted to submit briefing, he intends to address this Court's decision in *Hitchcock v. State* and explain how this Court's ruling there creates claims under the Due Process and the Equal Protection Clauses of the Fourteenth Amendment, as well as the Eighth Amendment in light of *Furman v. Georgia*, 408 U.S. 238 (1972). Mr. Krawczuk submits that he must be allowed to file his briefs in accordance with the rules of appellate procedure.

Indeed, under the Florida Rules of Appellate Procedure, appellants are normally permitted to file an initial and reply brief in conformity with those rules and to explain, under the appropriate standard of review, why the trial court's rulings should not be affirmed. But it appears that this Court has *sua sponte* decided that Mr. Krawczuk is not entitled to the standard appellate process. It appears evident that this Court will not even allow Mr. Krawczuk to file his briefing before deciding whether he has shown "cause" within the meaning of the September 25 order which only affords Mr. Krawczuk twenty pages to show "cause." However, if he briefed his case, he would be allowed an Initial Brief of 75 pages in length and

a Reply Brief of 25 pages in length. This Court offers no explanation in its September 25 order for this deviation from standard appellate procedure, and gives no guidance as to what constitutes "cause." This Court's action is contrary to the Due Process and Equal Protection Clause of the Fourteenth Amendment.

This Court's issuance of a show cause order has occurred without any notice of the standard by which the "cause" is to be measured. This is in violation of due process. The touchstone of due process entails "'notice and opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985), quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)). "[F]undamental fairness is the hallmark of the procedural protections afforded by the Due Process Clause." *Ford v. Wainwright*, 477 U.S. 399, 424 (1986) (Powell, J., concurring).

Previously, the filing of a notice of appeal was sufficient "cause" for an appeal to proceed under the Florida Rules of Appellate Procedure. But without any notice beyond the directive set forth in the September 25 show cause order and without guidance as to what constitutes "cause" sufficient to allow an appeal to proceed under the Florida Rules of Appellate Procedure, this Court—before Mr. Krawczuk has filed a single sentence relating to his appeal explaining why the circuit court's rulings in his case should not be affirmed—*sua sponte* and on *ad hoc* basis appears to have disregarded the traditional rules governing plenary appeals and provides Mr.

Krawczuk 20 pages and less than 30 days to demonstrate some undefined "cause."

Moreover, the procedure that this Court unveiled for use in Mr. Krawczuk's case was not employed in *Hitchcock v. State*. There was no requirement there that Mr. Hitchcock show "cause"; indeed, his appeal proceeded under the Florida Rules of Appellate Procedure. Mr. Hitchcock was permitted to have counsel brief his issues. And after the decision in *Hitchcock* issued, Mr. Hitchcock had the right to have his counsel file a motion for rehearing on which the Florida Rules of Appellate Procedure place no page limits. There is no doubt that undersigned counsel on behalf of Mr. Krawczuk would have taken advantage of the right to file a motion for rehearing to explain that this Court's ruling in *Hitchcock* raised more questions than it answered with regard to the constitutionality of Florida's capital sentencing scheme under the Eighth and Fourteenth Amendments.

Accordingly, in addition to responding to the Court's Order, Mr. Krawczuk moves the Court for some clarification as to what "cause" means and how it is to be applied to Mr. Krawczuk's case. Is "cause" the same as *de novo* review, which would govern this Court's review of questions of pure law? Or does "cause" contemplate merely a review of whether the lower court's ruling is supported by competent, substantial evidence? Standards of review matter. *State v. J.P.* 907 So.2d 1101, 1120 (Fla. 2004) (Cantero, J., dissenting) ("Not only is the applicable standard the threshold determination in any constitutional analysis; it is often the

most crucial. In this case, it has made all the difference."). Yet this proceeding is being governed by an undefined standard of review. Once "cause" is defined and is aware of the appropriate standard of review applicable to this proceeding, Mr. Krawczuk respectfully moves the Court for full briefing and oral argument.

**B. Mr. Krawczuk's Rule 3.851 Motion.**

Mr. Krawczuk filed a successive motion for postconviction relief on January 11, 2017, alleging that his death sentence was unconstitutional in light of the Supreme Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) (2PCR at 47-109). Mr. Krawczuk raised four separate claims challenging his death sentence. Claim I rested on the Sixth Amendment and the decision in *Hurst v. Florida* (2PCR 56-73). Claim II rested on the Eighth Amendment and the Florida Constitution, which were the basis for this Court's ruling in *Hurst v. State* (2PCR 73-88). Claim III asserted that the arbitrariness of the outcomes and findings in the *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016) and *Asay v. State,* 210 So. 3d 1 (Fla. 2016), cases in which a death sentence was final before June 24, 2002 and in which a death sentence was final after that same date (2PCR 89-99). In this claim, Mr. Krawczuk argued the arbitrariness of this Court's distinction in the two cases meant that his death sentence stood in violation of *Furman v. Georgia*, 408 U.S. 238 (1972). Lastly, Claim IV argued that the rejection of Mr. Krawczuk's previously presented ineffective assistance of counsel claims

were rendered constitutionally unreliable because *Hurst v. State* gave him a retrospective right to a life sentence that can only be overcome if a jury returns a unanimous death recommendation. Claim IV also argued that the enactment of Chapter 2016-13 and the new law governing at any resentencing must be part of the prejudice analysis when the court was to review Mr. Krawczuk's previously denied claims pursuant to *Strickland v. Washington*, 668 U.S. 448 (1984).

**1. Mr. Krawczuk should not be factually or legally bound by *Hitchcock*.**

In *Hitchcock v. State*, this Court wrote:

> We have consistently applied our decision in *Asay,* denying the retroactive application of *Hurst v. Florida* as interpreted in *Hurst v. State* to defendants whose death sentences were final when the Supreme Court decided *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

2017 WL 3431500 at *1. Purporting to address Hitchcock's arguments, the Court concluded as follows:

> Although Hitchcock references various constitutional provisions as a basis for arguments that *Hurst v. State* should entitle him to a new sentencing proceeding, these are nothing more than arguments that *Hurst v. State* should be applied retroactively to his sentence, which became final prior to *Ring*. As such, these arguments were rejected when we decided *Asay*.

2017 WL 3431500 at *2. That is the extent of this Court's decision in *Hitchcock v. State*. Yet, this Court's premise—that Hitchcock's issues were decided by *Asay*--is factually and unreasonably erroneous. Perhaps most significantly, it is impossible that the retroactivity of the constitutional right to a life sentence unless a jury returned a unanimous death recommendation which was recognized in *Hurst v. State* on the basis of the Eighth Amendment and the Florida Constitution could have been

decided in *Asay*: **the issue was not raised or at issue there**, as explained below.

*Hurst v. Florida* issued on January 12, 2016. In challenging his death sentence in his 3.851 motion filed in late January of 2016, Asay relied upon *Hurst v. Florida*. Asay argued that under *Witt v. State*, 387 So.2d 922 (Fla. 1980), *Hurst v. Florida* should be held to be retroactive. Briefing was completed in *Asay*, Case No. SC16-223, on February 23, 2016. Oral argument was held on March 2, 2016. A motion for supplemental briefing was filed, but denied March 29, 2016. Other than two *pro se* pleadings filed in May of 2016, nothing further was filed by Asay.

*Hurst v. State* issued on October 14, 2016. Asay filed nothing after the issuance of *Hurst v. State* before this Court's decision in *Asay v. State* issued on December 22, 2016. Asay did not present any arguments or constitutional claims based on *Hurst v. State*. Asay did not present an argument that his death sentences violated the Eighth Amendment or the Florida Constitution on the basis of the ruling in *Hurst v. State*. Asay made no arguments regarding the retroactivity of *Hurst v. State*.

For the adversarial process to properly function, a court can only decide an issue after the adversaries have briefed the court on the pros and cons of their respective positions. As explained by the United States Supreme Court:

> The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (opinion for the court by Scalia, J.). In this case, petitioners did not ask us to hold

> that there is no constitutional right to informational privacy, and respondents and their amici thus understandably refrained from addressing that issue in detail. It is undesirable for us to decide a matter of this importance in a case in which we do not have the benefit of briefing by the parties and in which potential amici had little notice that the matter might be decided.

*Nat'l Aeronautics and Space Admin. v. Nelson*, 562 U.S. 134, 147 n.10 (2011). *Cf. e.g.*, *Lockyer v. Andrade*, 538 U.S. 63, 69, 72-73 (2003) (indicating that cases might be instructive to some extent but not necessarily controlling when the issue presented was not specifically decided or briefed by the allegedly controlling case); *Picard v. Connor*, 404 U.S. 270, 276-77 (1971) (demonstrating that claims on different constitutional amendments carry "separate identities and reflect different constitutional values."); *Rodriguez v. State*, 219 So. 3d 751, 757 (Fla. 2017) (reasoning because the same identical error did not occur in defendant's case compared to the decision he relied upon, the earlier decision was not controlling).

Because the undersigned counsel were not counsel for Mr. Hitchcock, they could not present this argument, or any others, in a motion for rehearing in Mr. Hitchcock's case. This was one of the reasons why Mr. Krawczuk's counsel sought to vacate the stay entered by the Court, out of a fear that he would be somehow bound to the ruling in *Hitchcock* despite the fact that they did not participate in that case.

In his Rule 3.851 motion, the denial of which is on appeal in this proceeding, Mr. Krawczuk discussed the decisions in *Asay v. State* and *Mosley v. State*, 209 So.3d 1248 (Fla. 2016), as they related to Claim I, Claim II, and Claim III.

In Claim I, a Sixth Amendment claim based upon *Hurst v. Florida*, Mr. Krawczuk seeks to argue in his appeal that this Court's rulings in *Asay* and *Mosley* abandoning the binary nature of the balancing test set forth in *Witt v. State*[4] means that each defendant with a pre-*Ring* death sentences is entitled to receive what Mr. Asay received, a ***case specific balancing*** of the *Witt* factors.[5] In his initial brief, Mr.

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[4] 387 So.2d 922 (Fla. 1980).

[5] In *Asay v. State*, this Court conducted a *Witt* retroactivity analysis of *Hurst v. Florida* and concluded that Asay should not receive the retroactive benefit of the Sixth Amendment ruling in *Hurst v. Florida* because his conviction and death sentence were final in 1991. This Court observed that *Hurst v. Florida* found merit in a claim that Mr. Hurst had raised based upon the Sixth Amendment ruling in *Ring v. Arizona*, 536 U.S. 584 (2002). Without hearing what additional arguments a litigant with a death sentence that became final after Mr. Asay's 1991 finality date and before the issuance of *Ring* on June 24, 2002, might have under *Witt*, this Court in *Asay* referenced June 24, 2002, as a potential dividing line. While *Asay* did not specifically address post-*Ring* cases, the decision in *Mosley v. State*, which issued the same day *Asay* did, concluded that the Sixth Amendment decision in *Hurst v. Florida* should apply to post-*Ring* death sentences.

While both Mr. Hitchcock and Mr. Krawczuk have raised issues as to the *Witt* analysis that was conducted in *Asay v. State* regarding *Hurst v. Florida*, the argument made in the initial brief in *Hitchcock v. State* quickly diverges from the claims that Mr. Krawczuk asserted in his 3.851 motion. The *Hitchcock* brief does not seem to view *Hurst v. Florida* and *Hurst v. State* as involving distinctly different constitutional claims. A Sixth Amendment claim is distinctly different from an Eighth Amendment claim or a claim based upon a right set forth in the Florida Constitution that is not in the Sixth Amendment. Quite simply, the *Hitchcock* initial brief does not address the arguments that Mr. Krawczuk is entitled to raise in his appeal of right from the denial of a successive 3.851 motion. To preclude Mr. Krawczuk from making his arguments in an initial brief filed in compliance with the governing rules when Mr. Hitchcock has been afforded the very opportunity that is being denied to Mr. Krawczuk violates equal protection.

Hitchcock did not argue that in light of *Asay* and *Mosley*, the *Witt* balancing test for determining whether *Hurst v. Florida* applies retroactively must be conducted case by case. Mr. Krawczuk has strong case specific reasons why the *Witt* balancing test tips in his favor, as he would intend to articulate in briefing.

Claim II of Mr. Krawczuk's motion to vacate is based upon the right to a life sentence unless a properly-instructed jury unanimously recommends a death sentence recognized in *Hurst v. State*. It 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 a properly-instructed 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*, 536 U.S. 584 (2002). 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.").

In holding that requiring unanimity would produce more reliable death sentences, this Court has acknowledged that death sentences imposed without the unanimous support of a jury lacked the requisite reliability:

> 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).

This Court's recognition that "a reliable penalty phase requires" a unanimous jury death recommendation by a properly-instructed jury means that the death recommendation provided by Mr. Krawczuk's penalty phase jury does 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 *Hurs*t 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). Mr. Krawczuk's claim is that *Hurst v. State* recognized that the non-unanimous recommendation as to all facts necessary to impose a sentence of death demonstrates the unreliability of his death sentence under 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.").

An examination of Mr. Hitchcock's initial brief shows that the focus of his arguments is actually on *Hurst v. Florida*. His Summary of the Argument focuses only on *Hurst v. Florida*; it does not mention *Hurst v. State*. Argument IV of Mr. Hitchcock's initial brief does raise an Eighth Amendment argument arising from *Hurst v. State*, but focuses on the evolving standards of decency. In *Hurst v. State*, this Court found that there existed a national consensus that death sentences should only result when a jury unanimously consented to its imposition. *Id.*, 202 So. 3d at 61. While there is a basis for Mr. Hitchcock's argument within *Hurst v. State*, it is not the Eighth Amendment argument and Florida Constitution argument that Mr. Krawczuk will be making. Thus, Mr. Krawczuk cannot and should not be bound by the Court's disposition of Mr. Hitchcock's appeal.

Again, Mr. Krawczuk seeks to challenge his death sentence on the basis of the

conclusion in *Hurst v. State* that a death sentence flowing from a death recommendation in which the jury was not required to return a unanimous verdict on all findings of fact lacks reliability. This is a different argument than the one presented by Mr. Hitchcock, and it provides a much different and stronger argument that Mr. Krawczuk should get the retroactive benefit of *Hurst v. State*. The importance of the heightened reliability demanded by the Eighth Amendment was found in *Mosley* to be of such fundamental importance that this Court abandoned the binary approach to *Witt*. As indicated in *Mosley*, the *Witt* analysis in the context of *Hurst v. State* requires considering of the need to cure "individual injustice." Accordingly, Mr. Krawczuk will argue that under a case by case *Witt* analysis which *Mosley* said was 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. Krawczuk's case, the scales are tipped and the interests of fairness exceed the State's interest in finality. The disposition of Mr. Hitchcock's appeal and arguments made therein requiring a case by case evaluation did not address the "individual injustice" present in Mr. Krawczuk's case. Thus, the disposition of Mr. Hitchcock's appeal cannot govern or control the outcome on the issue being raised in Mr. Krawczuk's appeal.

In addition to addressing *Hurst v. Florida* and *Hurst v. State* under *Witt*, Mr. Krawczuk intends to argue in his appeal that the concept of fundamental fairness as

identified and discussed in *Mosley v. State*, as well as the manifest injustice exception to the law of the case doctrine set forth in *Thompson v. State*, 208 So. 3d 49, 50 (Fla. 2016), both apply and require that Mr. Krawczuk receive the benefit of *Hurst v. Florida* and *Hurst v. State*. Under both "fundamental fairness" and "manifest injustice," Mr. Krawczuk is entitled to relief.

Specifically, as to the fundamental fairness concept set forth in *Mosley*, Mr. Krawczuk detailed in his pleadings below 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*.[6] 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

[6] The fundamental fairness concept embraced in *Mosley* is one that requires a case by case analysis of a defendant's efforts to unsuccessfully litigate the Sixth Amendment issue that prevailed in *Hurst v. Florida* and/or the Eighth Amendment issue that prevailed in *Hurst v. State*. In his 3.851 motion and subsequent proceedings, Mr. Krawczuk traced his efforts in his case to raise Sixth and Eighth Amendment challenges to his death sentence in order to demonstrate that the fundamental fairness principle set forth in *Mosley* applied to him and his death sentence.

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. Krawczuk's appeal would present his own case specific showing of fundamental unfairness which will not be controlled by a decision in Mr. Hitchcock's case as it was not an issue raised in Mr. Hitchcock's case. Whether "fundamental fairness" warrants collateral relief in Mr. Krawczuk's case can only be resolved after a full review of the record in Mr. Krawczuk's case, not a review of the record in Mr. Hitchcock's case.

In Claim III of his 3.851 motion, Mr. Krawczuk challenged the seemingly bright line, as in time line, that resulted from *Mosley* and *Asay*. Here, Mr. Krawczuk contends that this bright line set at June 24, 2002 is so arbitrary as to violate the

Eighth Amendment principles enunciated in *Furman v. Georgia*. 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*, 134 S.Ct. 1986 (2014).[7] 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. And, certainly, this Court did not address this issue in its opinion denying Mr. Hitchcock relief. Thus, Mr. Krawczuk should not be bound by the disposition of Mr. Hitchcock's appeal.

[7] 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, there are individuals with pre-*Ring* death sentences that rest on proceedings layered in error that the cumulative unreliability rises up to trump the State's interest in finality. Drawing a line at June 24, 2002, is just as arbitrary and imprecise as the bright line cutoff at issue in *Hall.* When the 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. Mr. Krawczuk will argue in his appeal that the unreliability of the proceedings giving rise to his death sentence compounds the unreliability of his death recommendation, returned by a jury unaware of its sentencing responsibility to such an extent that the interests of fairness outweigh the State's interest in finality in his case. The jury in this case 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 a 12-0 death recommendation. As the 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."

Claim III is premised upon the Eighth Amendment and its requirement 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*. 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, Mr. Krawczuk will argue in his appeal that if 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*.[8] 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.

Finally, the last issue in Mr. Krawczuk's Rule 3.851 motion addressed the fact that, in prior postconviction proceedings, Mr. Krawczuk raised claims of ineffective

[8] It should be obvious that although this Court found the State's interest in finality increases the older a case is, the older case will often have greater unreliability due to advances in science and improvements in the quality of the representation in capital cases over time.

assistance at the guilt and penalty phases of trial. The circuit court found that trial counsel was deficient in failing to adequately investigate and present substantial mitigation evidence. Nevertheless, on appeal this Court concluded that Mr. Krawczuk had failed to establish deficient performance where it was clear that Mr. Krawczuk repeatedly insisted that counsel not pursue mitigation and not involve his family. Based on those instructions, this Court reasoned Mr. Krawczuk could not establish any prejudice. *Krawczuk v. State*, 92 So. 3d 195, 205 (Fla. 2012). This Court's finding was based on the understanding that the jury's advisory death recommendation would not have changed unless six additional jurors would have been convinced to vote in favor of a life recommendation. Thus, the need for four jurors to switch their votes in a 12-0 case became part of the yardstick for measuring the prejudice Mr. Krawczuk suffered as a result of counsel's deficiency.

But 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. Krawczuk's death sentence is inherently *more* unreliable. This specific claim raised by Mr. Krawczuk was not raised by Mr. Hitchcock. For this reason, "cause" has been shown why the trial court's order on this claim should not be affirmed.

WHEREFORE, for the reasons stated herein, Mr. Krawczuk respectfully submits this response to the Court's Order to Show Cause. Further, he moves the Court for clarification as to the definition of "cause" and for briefing and oral argument in this appeal.

Respectfully Submitted,

*/s/ Todd G. Scher*
TODD G. SCHER
Assistant CCRC-South
Florida Bar No. 0899641

*/s/ Scott Gavin*
SCOTT GAVIN
Staff Attorney
CCRC-South
Florida Bar No. 0058651

CCRC-South
1 East Broward Boulevard, Suite 444
Fort Lauderdale, Florida 33301
(954) 713-1284 Office
(954) 713-1299 Fax
COUNSEL FOR APPELLANT

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 23, 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 *steven.ake@myfloridalegal.com.*

*/s/ Todd G. Scher*
TODD G. SCHER
Florida Bar No. 0899641