IN THE SUPREME COURT OF FLORIDA
CASE NO. SC17-1259

MARK ALLEN DAVIS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

RESPONSE TO ORDER TO SHOW CAUSE AND MOTION FOR GUIDANCE AS TO THE STANDARD FOR DETERMINING WHAT CONSTITUTES CAUSE

COMES NOW the Appellant, **MARK ALLEN DAVIS**, in the above-entitled matter and respectfully responds to this Court's September 25th Order to Show Cause and requests that the Court provide guidance as to what constitutes cause and permit further briefing on this issue after such guidance has been provided. For his reasons, Mr. Davis states:

1. Mr. Davis is under a sentence of death. His appeal of the denial of Rule 3.851 relief is before the Court in the above-entitled case. On September 25, 2017, before Mr. Davis had submitted anything to this Court regarding his appeal, this Court issued an order that provided:

> Appellant shall show cause on or before Monday, October 16, 2017, why the trial court's order should not be affirmed in light of this Court's decision in Hitchcock v. State, SC17-445. The response shall be limited to no more than 20 pages. Appellee may file a reply on or before Thursday, October 26, 2017, limited to no more than 15 pages. Appellant may file a reply to the Respondent's reply on or before Monday, November 6, 2017, limited to no more than 10 pages.

A. MR. DAVIS' RIGHT TO APPEAL THE DENIAL OF HIS RULE 3.851 MOTION AND THE UNDEFINED "CAUSE" STANDARD.

2. First, Mr. Davis submits that his appeal is not one within this Court's discretionary jurisdiction. *See* Fla. R. App.

Pro. 9.030(a)(2). Mr. Davis 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).

3. Because Mr. Davis 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 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.").[1]

4. In addition, this Court's July 10, 2017, *sua sponte* order stayed proceedings on Mr. Davis' appeal pending the disposition of *Hitchcock v. State*, Case No. SC17-445. Linking Mr.

[1]In *Lane v. Brown*, the issue arose when the public defender refused to perfect an appeal from a lower court's denial of collateral review because "of the Public Defender's stated belief that an appeal would be unsuccessful." *Id.*, 372 U.S. at 481-82.

Davis' appeal to the outcome of Hitchcock's appeal appears to be an effort to bind Mr. Davis to the outcome of Hitchcock's appeal. Thus, because Hitchcock lost his appeal, this Court's order to show cause makes clear that Mr. Davis' right to appeal has been severely curtailed. This result implicates Mr. Davis' right to due process and equal protection, particularly given that the procedural issues arising in the circuit court and the constitutional claims Mr. Davis raised in his 3.851 motion are different from those set out in Hitchcock's briefing. A denial of Hitchcock's appeal should not govern the issues that are present in Mr. Davis' appeal.

5. Importantly, should Mr. Davis 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), and that Mr. Davis' sentence of death is unconstitutional. Mr. Davis submits that he must be allowed to file his briefs in accordance with the rules of appellate procedure.

6. Indeed, under the Florida Rules of Appellate Procedure, appellants are normally permitted to file an initial and reply brief in conformity with those rules explaining why the trial court should not be affirmed. It would appear that this Court has *sua sponte* decided that Mr. Davis is not entitled to the standard appellate process. It is clear that this Court will not even allow Mr. Davis to file his briefing before deciding whether he

has shown "cause" within the meaning of the September 25th order which only affords Mr. Davis 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 justification in its September 25th 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.

7. 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 is notice and reasonable opportunity to be heard. The right to 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).

8. 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 25th 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. Davis 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 an *ad hoc* basis throws the rule book out and gives Mr. Davis 20 pages and 20 days to demonstrate some undefined "cause."

9. On January 2, 2017, undersigned counsel filed a Rule 3.851 motion on behalf of Mr. Davis. The motion presented four claims on Mr. Davis' behalf: 1) Mr. Davis' sentence of death violated the Sixth Amendment, pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016). Mr. Davis' claim argued for the retroactivity of *Hurst* under both *Witt v. State*, 387 So. 2d 922 (Fla. 1980), and fundamental fairness; 2) This Court's application of retroactivity to capital defendants whose death sentences became final after June 24, 2002, violates the Eighth Amendment; 3) Under *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), Mr. Davis' death sentence violates the Eighth Amendment because, despite the fact his jury was not properly instructed, a non-unanimous recommendation for death was returned; and 4) The requirement that a jury unanimously find that a capital defendant was eligible for a sentence of death changes the analysis of claims like Mr. Davis' *Brady*, newly discovered evidence and ineffective assistance of counsel claims.

10. Additionally, specific circumstances exist in Mr. Davis' case that are distinct from those in *Hitchcock*. For instance, Mr. Davis' jury was given the heinous, atrocious, or cruel (HAC) instruction found to be impermissibly vague in *Espinosa v. Florida,* 112 S. Ct. 2926 (1992). Indeed, the United States Supreme Court granted certiorari in Mr. Davis' case,

vacated judgement, and remanded to this Court for reconsideration in light of *Espinosa*. *Davis v. Florida*, 112 S.Ct. 3021 (1992).[2]

11. Moreover, the jury in Mr. Davis' case heard virtually no mitigating evidence, as trial counsel remarked:

> Juries may decide guilt and recommend punishment but sentencings are done before judges, **there's no sense in putting on "the dog and pony show."**

(Def. Ex. 35)(emphasis added).[3] As a result of trial counsel's deficient performance, the jury never heard the agonizing story of Mr. Davis' life, which included an impoverished background, physical and emotional abuse, drug and alcohol abuse, depression and suicide attempts. Further, the jury was deprived of knowing about Mr. Davis' mental state at the time of the crime or the fact that two statutory mitigating circumstances existed.

12. The jury also never heard significant information that was not disclosed by the State or was newly discovered evidence. This information would have established Mr. Davis' mental state and intoxication at the time of the offense. And it would have rebutted the cold, calculated and premeditated aggravating circumstance presented to the jury and found by the court.

13. Counsel further notes that the procedure that this

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[2]This Court, however, found the issue to be procedurally barred and/or the error to be harmless. *Davis v. State*, 620 So. 2d 152 (1993).

[3]Despite counsel's statement, no additional evidence was presented to the sentencing judge on behalf of Mr. Davis. Predictably, in sentencing Mr. Davis to death, the trial court found no mitigation (PC-R. 2900).

Court has unveiled for use in Mr. Davis' case was not employed in *Hitchcock v. State*. There was no requirement that Mr. Hitchcock show "cause" because his appeal would proceed under the Florida Rules of Appellate Procedure. Mr. Hitchcock was permitted to have counsel brief his issues.[4] And certainly after the decision in *Hitchcock* issued, he had the right to have 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. Davis would have taken advantage of the right to file a motion for rehearing to explain that this Court's ruling created a huge problem with the constitutionality of Florida's capital sentencing scheme under the Eighth and Fourteenth Amendments.

14. In *Hitchcock v. State*, _ So. 3d _, 2017 WL 3431500 (Fla. August 10, 2017), 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

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[4]It is unclear why this Court chose Mr. Hitchcock's case to use as a vehicle to address some of the numerous issues relating to the cataclysmic shift in Florida and Eighth Amendment law that have followed since the United States Supreme Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016). Indeed, undersigned had filed the Initial Brief on behalf of Daniel Peterka eight days after Mr. Hitchcock's Initial Brief was filed. This Court did not enter an order staying Peterka's case until June 8, 2017. *See Peterka v. State*, Case No. SC17-593. And, Peterka filed a petition for writ of habeas corpus relating to the Florida Legislature's promulgation of 2017-1 which requires a unanimous jury verdict before a defendant is eligible for a sentence of death. And though Peterka filed his Initial Brief which demonstrates the stark distinctions between the issues and arguments that he and Hitchcock presented, he, too, has now received an order to show cause.

> decided *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

2017 WL 3431500 at *1. This Court then addressed Hitchcock's arguments stating:

> 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 erroneous. Perhaps most significantly, it is simply 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 v. State*, 210 So. 3d 1 (Fla. 2016). It simply was not raised nor at issue there.

15. *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.

16. *Hurst v. State* issued on October 14, 2016. Asay filed nothing after the issuance of *Hurst v. State* before the Florida Supreme 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*.

17. 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).

18. Because undersigned was not counsel for Hitchcock, she could not present this argument, nor any others in a motion for rehearing. And, due to the unusual procedure that this Court has directed, Mr. Davis is precluded from being heard and fully presenting his arguments.

19. Mr. Davis submits that this procedure along with the unknown standard of what constitutes cause violates due process and equal protection. Mr. Davis requests that this Court permit him to fully brief his claims under the known standards that govern an appeal from the denial of a Rule 3.851 motion.

B. MR. DAVIS' SUCCESSIVE RULE 3.851 MOTION

20. As to the claims in Mr. Davis' Rule 3.851 motion, he raised at least one claim that does not appear to have been raised in Hitchcock's 3.851 motion. As to the other three claims, although there is some overlap with Hitchcock's arguments, each one of Mr. Davis' claims can only be resolved by an analysis of matters specific to his case.[5]

21. In his Rule 3.851 motion, Mr. Davis discussed the decisions in *Mosley v. State* and *Asay v. State* as they related to Claim I, Claim II, and Claim III.[6] As to Claim I, a Sixth Amendment claim based upon *Hurst v. Florida*, Mr. Davis 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* means that each defendant with a pre-*Ring* death sentence is entitled to receive a case specific balancing of the

[5]For example, the question of "fundamental fairness" as discussed and embraced in *Mosley v. State* and the "manifest injustice" exception to the law of the case doctrine employed in *Thompson v. State* requires a case by case determination of their applicability.

[6]Claim II was in fact premised upon the line seemingly drawn in *Mosley* and *Asay*. Mr. Davis argued that the arbitrariness of that line violated the Eighth Amendment under *Furman v. Georgia*.

Witt factors.[7] In his briefing, Hitchcock does not argue that in

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[7]In *Asay v. State*, this Court conducted an analysis of *Hurst v. Florida* pursuant to *Witt v. State*, 387 So. 2d 922 (Fla. 1980), 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 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 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. 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.

Within the *Asay* decision, there is no indication that a retroactivity analysis under *Witt* was conducted as to this Court's decision in *Hurst v. State*, which was a ruling based upon the Florida Constitution and the Eighth Amendment. *Hurst v. State* specifically acknowledged the unanimity requirement it set forth was not based upon the Sixth Amendment and thus was not required by *Ring*. However, in *Mosley v. State*, this Court addressed the retroactivity of *Hurst v. State* under *Witt* and concluded that post-*Ring* death sentences were entitled to the retroactive benefit of its unanimity requirement. In subsequent rulings, there have been representations that *Asay* determined that *Hurst v. State* did not apply retroactively under *Witt* to cases final before *Ring* issued. *See Archer v. Jones*, 2017 WL 1034409 (Fla. March 17, 2017); *Zack v. State*, _ So. 3d _, 2017 WL 2590703 *5 (Fla. June 15, 2017)(Pariente, J., concurring in result).

While both Hitchcock and Mr. Davis have raised issues as to the *Witt* analysis that was conducted in *Asay v. State* regarding *Hurst v. Florida*, the argument made in the *Hitchcock v. State* briefing quickly diverges from the claims that Mr. Davis asserted in his Rule 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* briefing does not address the arguments that Mr. Davis is entitled to raise in his appeal of right from the denial of a successive Rule 3.851 motion, as to his distinctly different rights under *Hurst v. Florida* and *Hurst v. State*. And, this issue was not decided in *Hitchcock v. State*.

light of *Asay* and *Mosley*, the *Witt* balancing test for determining whether *Hurst v. Florida* applies retroactively must be conducted case by case. Nor does Hitchcock assert the case specific reasons that Mr. Davis pled in his motion to vacate. And, certainly, this Court did not address those issues in its opinion denying Hitchcock relief.

22. Claim II of Mr. Davis' 3.851 motion challenges the seemingly bright line, as in time line, that resulted from *Mosley* and *Asay*. Here, Mr. Davis 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*.

23. Claim II 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. Davis will argue in his appeal of the denial of Claim II of his 3.851 motion

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] 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 Hitchcock relief.

24. While this Court in *Hurst v. State* found non-unanimous death recommendations were lacking in reliability, the level of unreliability is obviously compounded in some cases by matters and issues that increase the unreliability of a particular death sentence. Just as there were death sentenced individuals on the wrong side of the 70 IQ score cutoff who were likely intellectually disabled and erroneously under sentence of death, there are individuals with pre-Ring death sentences that rest on proceedings layered in error and/or outdated science and/or discredited forensic evidence such that the cumulative unreliability rises up to trump the State's interest in finality.

25. Indeed, the specific issues of Mr. Davis' improper HAC instruction as well as the extensive amount of evidence which the

[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.

jury did not hear, are issues that were neither raised nor addressed in *Hitchcock v. State*. Yet, it is undeniable that these issues bear upon the reliability of Mr. Davis' death sentence.

26. Claim III of Mr. Davis' Rule 3.851 motion is based upon the right to a life sentence unless a 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 the jury must unanimously recommend death before this presumption of a life sentence can be overcome does not arise from the Sixth Amendment or from *Hurst v. Florida* or from *Ring v. Arizona*. It is a right emanating from the Florida Constitution and alternatively the Eighth Amendment. The requirement that the jury unanimously vote in favor of a death recommendation before a death sentence is authorized was embraced as a way to enhance the reliability of death sentences. *Hurst v. State*, 202 So. 3d at 59 ("We also note that the requirement of unanimity in capital jury findings will help to ensure the heightened level of protection necessary for a defendant who stands to lose his life as a penalty.). *See Johnson v. Mississippi*, 486 U.S. 578, 584 (1988)("The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case.").

27. 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 requisite reliability. This was explained in *Bevel v. State*:

> 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).

28. This Court's recognition that "a reliable penalty phase requires" a unanimous jury death recommendation means that the jury's 8-4 death recommendation at Mr. Davis' penalty phase 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 then 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). Mr. Davis' claim is that *Hurst v. State* recognized that the non-unanimous recommendation shows that Mr. Davis' death sentence possesses substandard reliability. Mr. Davis' 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.").

29. An examination of Hitchcock's briefing 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 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 Hitchcock's argument within *Hurst v. State*, it is not the Eighth Amendment argument and Florida Constitution argument that Mr. Davis will be making or that this Court decided in its opinion in *Hitchcock v. State*.

30. Again, Mr. Davis seeks to challenge 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 is a different argument than the one presented by Hitchcock, and it provides a much different and stronger argument that Mr. Davis should get the retroactive benefit of *Hurst v. State*. In *Mosley*, when evaluating *Hurst v. State* using the *Witt* analysis, 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. 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 the need to cure "individual injustice." Accordingly, Mr. Davis 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. Davis' case, the scales are tipped and the interests of fairness exceed the State's interest in finality. The disposition of Hitchcock's appeal and arguments made therein requiring a case by case evaluation does not address the "individual injustice" present in Mr. Davis' case.

31. In addition to addressing *Hurst v. Florida* and *Hurst v. State* under *Witt*, Mr. Davis will be arguing 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 Mr. Davis to receive the benefit of *Hurst v. Florida* and *Hurst v. State*. Under both "fundamental fairness" and "manifest injustice," Mr. Davis asserted in his Rule 3.851 motion that collateral relief was warranted under *Hurst v. Florida* and/or *Hurst v. State*.

32. And, while Hitchcock's briefing references both

"fundamental fairness" and "manifest injustice" as reasons he should get collateral relief in light of *Hurst v. Florida* and *Hurst v. State*, it is clear from *James v. State* that both "fundamental fairness" and "manifest injustice" require case specific analyses when raised. Resolution of either or both of these equitable concepts in Hitchcock's case does not govern the result in Mr. Davis' case.

33. As to Claim IV of Mr. Davis' Rule 3.851 motion, it 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 is ordered, Mr. Davis will 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. Davis' newly discovered evidence, *Brady* and *Strickland* claims in his previous motions to vacate. Mr. Davis' challenge is to this Court's affirmance of the denial of his prior Rule 3.851 motions.[9]

34. Mr. Davis presented a newly discovered evidence claim in his prior collateral proceeding. This Court's jurisprudence indicates these claims must be evaluated cumulatively with *Brady* and *Strickland* claims. This Court has also held that a resentencing is required on a newly discovered evidence claim if it is probable that at a resentencing the defendant will get a less severe sentence. This analysis is forward looking. And

[9]This Court's recent decision in *Bevel v. State*, 221 So. 3d 1168 (Fla. 2017), supports the validity of Claim IV of Mr. Davis' Rule 3.851 motion.

looking forward, Mr. Davis will be entitled at a resentencing to a less severe sentence unless the jury unanimously returns a death recommendation. Given that Mr. Davis' previous jury did not return a unanimous death recommendation, it is probable that in light of the new evidence and all the evidence developed in collateral proceeding that will be admissible, Mr. Davis will receive a sentence of less than death.

35. The specific claim raised by Mr. Davis was simply not raised by Hitchcock or addressed by this Court. Claim IV is a case specific claim requiring a case by case analysis.

WHEREFORE, Mr. Davis requests that this Court permit him to submit briefing on the issues that he raised in his Rule 3.851 motion and that arose during the proceedings before the circuit court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing response has been furnished by electronic service to Candance Sabella, Chief Assistant Attorney General, Office of the Attorney General, 3507 E. Frontage Rd., Suite 200, Tampa, FL 33607-7013, on this 23rd day of October, 2017.

/s/. Linda McDermott
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