IN THE SUPREME COURT OF FLORIDA

MARBEL MENDOZA,

Appellant,

Case No.: SC17-1324

v.

State of Florida,

Appellee.

_____/

RESPONSE TO SHOW CAUSE ORDER

Appellant, MARBEL MENDOZA, 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. Mr. Mendoza states:

INTRODUCTION

This Court stated:

> Individualized sentencing implements the required narrowing function that also ensures that the death penalty is reserved for the most culpable of murderers and for the most aggravated of murders… We cannot avoid the conclusion that **an individualized decision is essential in capital cases.**

Hurst v. State, 202 So. 3d 40, 56-57 (Fla. 2016) (emphasis added). Yet, this Court's show cause procedure sends a different signal.

This procedure intrudes upon Mr. Mendoza's Eighth Amendment right to have a "fair opportunity to show that the Constitution prohibits" his execution. *See*

Hall v. Florida, 134 S. Ct. 1986, 2001 (2014).

This procedure also intrudes upon his due process right to be meaningfully heard by this Court. For instance, Mr. Mendoza has raised claims that went unraised by *Hitchcock* and the *Asay* decisions, and he has to show this in order to be entitled to a full briefing even though the Florida Constitution already affords Mr. Mendoza that right. In addition, the *Asay V* decision contained erroneous reasoning when it concluded that certain issues were controlled by other case law, yet Mr. Mendoza has to dedicate space in this Response to explain that erroneous reasoning when he should be spending this time to show how his individual facts relate to this specific claims.

Worse yet, the standard of review for a show cause order is discretionary in itself. Thus, this procedure indicates this Court's abdication to create or apply a standard that has any objectivity and therefore is an arbitrary process. *See Proffitt v. Florida*, 428 U.S. 242 (1976) (explaining that not having a rigid standard does not necessarily amount to an arbitrary process but also indicating that lack of any standard would be one). This procedure, coupled with the fact that members of the US Supreme Court stated in dissent that this Court is not addressing the claims and nuisances of the claims before it, reveals that this procedure lacks the minimal level of objectivity that the Eighth Amendment demands. *Truehill v. Florida*, Case No. 16-9488 Slip. Op. at 2 (dissenting, J., Sotomayor joined by J., Breyer and J.,

Ginsburg).

Further exacerbating Mr. Mendoza's entitlement to full appellate review under the Florida Constitution, this Court seems to be circumventing what made Florida's statute adequate when the US Supreme Court decided *Proffitt* v. Florida. Specifically, requiring Mr. Mendoza to undergo this show cause order procedure converts his right to mandatory review of capital challenges under the Florida Constitution into one that is discretionary. It also conflicts with this Court's role as the primary protector of constitutional rights.

Finally, members of the US Supreme Court have already indicated that this Court, in rejecting claims that relate to *Hurst* error and its effects on other case law, has misunderstood the import of *Hurst v. Florida*. Indeed, members of the US Supreme Court criticized this Court for not addressing the Eighth Amendment challenge related to *Hurst*'s impact on a *Caldwell* claim. *Truehill v. Florida*, Case No. 16-9488 Slip. Op. at 2 (dissenting, J., Sotomayor joined by J., Breyer and J., Ginsburg). This should indicate to this Court that it is failing to provide a "fair opportunity" to show that one's execution is unconstitutional, *see Hall* v. Florida, by claiming a case controls when the issue has not even been addressed by this Court. *Caldwell* claims, as they relate to *Hurst v. Florida* and/or *Hurt v. State*, are not the only claims that have not been fully or adequately addressed by this Court.

Put bluntly, a fair opportunity under the Eighth and Fourteenth Amendments

is not afforded when a court expedites proceedings in such a hurried fashion that it does not afford adequate time to understand the factual basis of an individual's claim, and it certainly is not a fair opportunity when a court asserts that a case controls when the claims raised by that so-called controlling case were not at issue. *See Parker v. Dugger*, 498 U.S. 308, 318 (1991) ("The Florida Supreme Court erred in its characterization of the trial judge's findings"); *id.* at 321 ("the Florida Supreme Court affirmed Parker's death sentence neither based on a review of the individual record in this case nor in reliance on the trial judge's findings based on that record, **but in reliance on some other nonexistent findings.**") (emphasis added).

Mr. Mendoza's death sentence is predicated upon a theory of felony-murder. Five jurors voted to spare Mr. Mendoza's life, meaning a bare majority established the presumption for death, i.e. 7-5 jury recommendation. Mr. Mendoza's codefendants were brothers. Both are free. Each served five and ten years, respectively. Numerous issues of unreliability exist in Mr. Mendoza's case. Due to this procedure and Mr. Mendoza's efforts to stay as close as possible within the page limitations, Mr. Mendoza cannot adequately discuss those facts herein.

REQUEST FOR FULL BRIEFING FOLLOWED BY ORAL ARGUMENT

This is a case of first impression though others in Florida are raising issues raised herein. Several issues remain undecided despite this Court's rulings in *Asay V, Asay VI,* and *Hitchcock*. Mr. Mendoza respectfully requests oral argument on

the issues raised herein pursuant to Fla. R. App. P. 9.320.

Mr. Mendoza also requests a full review in order to adequately raise the issues that are ordinarily heard pursuant to this Court's untruncated habeas briefing rules. By substantially altering the manner in which this Court reviews issues, Mr. Mendoza's substantive right to habeas corpus review, under Article I, § 13, and Article V § 3(b)(9) of the Florida Constitution has been deprived. *See Hall v. Florida*, 134 S. Ct. at 2001 (stating that individuals are entitled to a "fair opportunity" to show their execution is unconstitutional under the Eighth Amendment); *Vitek v. Jones*, 445 U.S. 480, 488 (1980) ("Once a State has granted prisoners a liberty interest, [this Court has] held that due process protections are necessary to insure that the state-created right is not arbitrarily abrogated."); *State v. Robinson*, 873 So. 2d 1205, 1209 (Fla. 2004) ("It is the due process Clause that protects the individual against the arbitrary and unreasonable exercise of governmental power."). In addition, this show cause procedure converts this Court's mandatory review into one that is discretionary, which indicates that it is contravening what made Florida's statute constitutionally adequate when *Proffitt* was decided. Finally, because a show cause order is an order typical in civil proceedings and is a discretionary standard, this procedure violates the Eighth Amendment, Due Process, and Equal Protection as an abdication of the minimal level of objectivity that the Eighth Amendment demands. A full review is

constitutionally warranted.

ARGUMENT

Cause I

A. Due Process, Equal Protection, and the Eighth Amendment do not permit Mr. Mendoza's claim predicated on the new statute to be foreclosed by the decision rendered in *Hitchcock*, *Asay V*, or *Asay VI*.

Hitchcock did not raise a claim based on, nor did he address, Chapter 2017-1's enactment and how its application has Fourteenth and Eighth Amendment implications. A cursory review of the table of authorities, as well as the headings of each argument, reveals this fact. Thus, because Hitchcock never referenced Chapter 2017-1's enactment as a fact, he could not argue that Chapter 2017-1's application resulted in Eighth and Fourteenth Amendment violations. Thus, *Hitchcock* does not control this claim.

For that reason, although Mr. Asay raised a similar claim by relying upon Chapter 2017-1's unequal application in Case No. SC17-1429 ("*Asay VI*"), *Asay VI* does not foreclose the question of whether the new statute's application violates the Eighth and Fourteenth Amendments. Indeed, this is because, in *Asay VI*, this Court erroneously reasoned that *Asay V* controlled. But, *Asay V*—a case involving arguments premised upon Chapter 2016-13, i.e. the 10-2 statute—made a misstep in reasoning. Specifically, the claim relying on Chapter 2016-13 in *Asay V* was on three erroneous grounds.

First, this Court addressed an entirely different issue in its opinion than that

raised by Mr. Asay. He argued in *Asay V* that "granting other similarly situated individuals the benefit of [Chapter 2016-13] while depriving Mr. Asay [Chapter 2016-13's] benefit would leave his death sentences…in violation of Eighth Amendment principles, as well as the Due Process and Equal Protection principles." Petition for Writ of Habeas Corpus, *Asay v. Jones*, Case No. SC16-628, at 9-10 (April 13, 2016). But in this Court's opinion denying relief on this claim, this Court stated:

> Additionally, Asay filed a petition for a writ of habeas corpus **alleging that he is entitled to relief pursuant to [C]hapter 2016-13, Laws of Florida**, which requires that at least ten jurors agree with the recommendation of death before a sentence of death can be imposed. We deny Asay's petition **based on our decision in *Perry v. State*, [210 So. 3d 630 (Fla. 2016)], that chapter 2016-13, Laws of Florida, is unconstitutional and** based on our decision today **that *Hurst* cannot be applied retroactively** to Asay.

Asay v. State, 210 So. 3d 1, 9-10 (Fla. 2016) ("*Asay V*") (emphasis added). Thus, this Court addressed a different issue than that raised by Mr. Asay. Indeed, Mr. Asay **did not argue for relief pursuant to Chapter 2016-13**. He argued that the Eighth and Fourteenth Amendments entitled him to relief. *See* Petition for Writ of Habeas Corpus, *Asay v. Jones*, Case No. SC16-628, at 9-10 (April 13, 2016). His references to Chapter 2016-13 were made because its unequal application to similarly situated individuals created the factual predicate for the constitutional violations in his case. Thus, this Court disposed of Mr. Asay's claim by what appears to be a conflation of what he actually argued.

Second, this Court's reliance on its own holding that *Hurst* does not apply retroactively, *see Asay V*, 210 So. 3d at 9-10, does not alter what the Legislature intended when it enacted substantive law that applies retrospectively. This is because this Court's *Witt* analysis as *to Hurst v. Florida*'s retroactivity has no application whatsoever to the question of whether statutory law applies retroactively. *See, e.g.*, *Thompson v. State*, 887 So. 2d 1260, 1263-64 (Fla. 2004) ("the question of retroactivity under ***Witt* is not applicable** to this case because **we are examining a change in the statutory law of this state not a change in decisional law** emanating from the Florida Supreme Court or the United States Supreme Court.") (emphasis added). Consequently, as to the issue of whether the application of the new sentencing statute violated Eighth Amendment principles, Due Process principles, and Equal Protection principles, this Court's reliance upon its holding that *Hurst v. Florida* is not retroactive was a non sequitur.

Finally, this Court's reliance upon *Perry v. State*, 210 So. 3d 630 (Fla. 2016) was substantially misplaced. *Perry*'s jurisdictional grounds and the issues presented were not the same as those raised in *Asay V* or *Asay VI*. Perry arrived to this Court on the certified questions of (1) whether Fla. Stat. § 775.082(2), which applies only when the death penalty itself has been declared unconstitutional, was triggered by the decision in *Hurst v. Florida* and (2) whether Chapter 2016-13 could be applied to pending prosecutions. This case, as well as *Asay V* and *Asay VI*, do not involve

Fla. Stat. § 775.082(2) nor do they involve a pending prosecution. Consequently, *Perry* cannot control whether Chapter 2017-1's unequal application violates Equal Protection, Due Process, and the Eighth Amendment. Had this Court decided that issue in *Perry*, it would have amounted to an unauthorized advisory opinion. Accordingly, because *Perry* did not address this issue, *Perry* never controlled *Asay V*, which means *Asay V* never controlled *Asay VI*.[1]

In short, whether Chapter 2017-1's application violates the Eighth and Fourteenth Amendments has yet to be fully addressed by this Court. It is inaccurate to conclude that there is a controlling case.

Mr. Mendoza's right to habeas corpus review would be denied in violation of the Fourteenth Amendment and in violation of the Eighth Amendment if this Court precludes the individualized appellate review that the Florida Constitution affords to persons like Mr. Mendoza. Compounding the situation, it would also be in violation of the Eighth and Fourteenth Amendments if this Court were to conclude that the decisional law referenced earlier controlled this claim when the issues were never addressed by this Court and/or raised by the petitioner. *See, 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 briefed issue was not specifically

[1] *Lambrix v. State*, -- So. 3d – 2017 WL 4320637 at *2 (Fla. Sep. 29, 2017) relied upon this same misstep in reasoning.

decided by an earlier case); *Kimmelman v. Morrison*, 477 U.S. 365, 374-75 (1986) (showing petitioner's cannot rely upon a different constitutional ground than earlier relied upon); *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."). A full briefing is warranted.

B. Chapter 2017-1's is substantive law

On March 13, 2017, the Governor signed Chapter 2017-1 into law. It provides that "If a unanimous jury does not determine that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of life imprisonment without the possibility of parole." The statute also provides that judges cannot override a jury's vote for life. *See* Fla. Stat. § 921.141(2)(c). Thus, it is statutorily unlawful to impose death on an individual without a unanimous jury vote for death in Florida.

Before such a vote can be reached, juries, not judges, must identify each aggravating factor that it unanimously found. *See* Fla. Stat.§ 921.141(2)(b). Afterwards, the jury must unanimously find that the state proved beyond a reasonable doubt that the unanimously found aggravating factors are sufficient to warrant a death sentence. Then, the jury must unanimously determine whether the "aggravating factors [that] exist [] outweigh the mitigating circumstances found to exist." Finally, jury members may extend mercy and vote for a life sentence despite unanimously agreeing on all other findings that would be necessary to impose a

death sentence.

Put simply, to sentence someone to death, a jury must convict on first degree murder at the guilt phase and escalate that conviction to a capital offense by making certain statutory findings at the penalty phase. Therefore, Chapter 2017-1 defined the elements of capital first degree murder, as opposed to first degree murder.

The US Supreme Court recognized that substantive criminal law is generally a legislative function. *Bousley v. United States*, 523 U.S. 614 (1998). In Florida, the legislature is tasked with that function exclusively. Any law "that modifies the elements of an offense is normally substantive rather than procedural." *Schiro v. Summerlin*, 542 U.S. 348, 354 (2004). For example, where a statute "alter[s] the range of conduct" necessary to punish an individual, meaning "formerly unlawful conduct [is now] lawful or vice versa," the law is substantive in nature. *Id.* As the unanimous findings must be reached by employing a beyond a reasonable doubt standard to be convicted of capital first degree murder and thus convert a conviction of first degree murder to capital first degree murder this is akin to changing the State's burden of proof from a preponderance of the evidence standard to a beyond a reasonable doubt standard. *See Addington v. Texas*, 441 U.S. 418, 423 (1979).

In fact, the State has demonstrated that the statute defines new elements for what is necessary for capital first degree murder when it acknowledged that the new death-eligibility findings at the sentencing phase, which must be made unanimously

and found beyond a reasonable doubt, were not requisite facts under the old statute. *See* Florida's Petition for a Writ of Certiorari, *Florida v. Hurst*, US Supreme Court Case No. 16-998. By going from a majority jury to one that necessitates a unanimous jury's verdict to impose death, this is tantamount to the guilt phase presumption of innocence that can only be overcome by a unanimous jury's verdict finding the State carried its burden of proof beyond a reasonable doubt. This change exhibits the Legislature and the Governor's decision that death sentences should be reliable, as the higher burden of proof reflects the degree of confidence Floridians should have in the decision to impose death. *See Addington*, 441 U.S. at 423. *See also In re Winship*, 397 U.S. 358, 371-72 (1970).

The substantive nature of Chapter 2017-1, and the right to a life sentence unless a jury returns a unanimous death sentence that it enacted, is self-evident in light of *State v. Steele*, 921 So. 2d 538 (Fla. 2005). There, this Court demonstrated that it viewed the issue as one that was substantive, not procedural. *Id.* at 548 ("the Legislature should revisit the statute to require some unanimity in the jury's recommendations."). A similar sentiment was expressed in *Hurst v. State*, 202 So. 3d 40, 62 (2016) ("Once the Supreme Court made clear in *Hurst v. Florida* that these findings are the sole province of the jury and that *Ring* applies to Florida's capital sentencing laws, **the Florida Legislature was required to immediately attempt to craft a new sentencing law** in accord with *Hurst v. Florida*.") (emphasis added).

Thus, *State v. Steele* and *Hurst v. State* show that this Court surely would have changed the rules of procedure to require unanimity at capital sentencing phases if unanimity was viewed as a procedural matter. In short, the benefit enshrined in Chapter 2017-1 has been treated as one that is substantive for quite some time. Specifically, that substantive benefit is the benefit to a life sentence unless a jury unanimously votes for death.

C. Chapter 2017-1 applies retrospectively regardless of the date of the homicide or conviction's finality date

When there is a change in statutory law, Florida law presumes substantive changes are prospective, meaning from the date of enactment forward. *Arrow Air, Inc. v. Walsh*, 645 So. 2d 422, 424 (Fla. 1994). Remedial statutes may be applied retrospectively, however. These statutes are identified by whether they fix a statutory defect. But if a statute remedies a defect by establishing a substantive right or imposing a new legal burden, it is not a remedial statute. *Id.*

Chapter 2017-1 imposes a new legal burden on the State by according a defendant convicted of first degree murder a presumption to a life sentence unless the State convinces a jury to unanimously vote for death. The statutory benefit applies to direct appeals and pending prosecutions. But, **the statutory benefit also extends to all resentences or retrials** that were not final on June 24, 2002. The date of the homicide is irrelevant. The date that the defendant was indicted is irrelevant. The date that the conviction became final is irrelevant. The only thing that is relevant

under Chapter 2017-1 is whether a defendant's sentence was final after June 24, 2002.

The Legislature could have provided that the statutory benefit applied only to homicides that were committed after the right was enacted, but it did not. In addition, to infer that the Legislature merely acted as this Court instructed would denigrate the Legislature's substantive rulemaking authority and indicate that this Court could have resolved this problem sooner under its procedural rulemaking authority, which conflicts with this Court's acknowledgments in *State v. Steele* and *Hurst v. State* that the Legislature was responsible for the fix. Therefore, Chapter 2017-1 applies retrospective from the date of enactment. But, it does not apply retrospectively to all. The effect of not applying the substantive benefit enacted by the Legislature evenly is what gives rise to the Due Process, Equal Protection, and Eighth Amendment claims.[2] This is the very issue this Court has not addressed.

D. The Uneven Application of Chapter 2017-1's Application Establishes the Constitutional Violations

The homicide at issue in this case occurred on March 17, 1992. The capital conviction was final on October 5, 1998—the date that Mr. Mendoza's direct appeal

[2] In contrast to Florida's approach, when Alabama recently changed its law to eliminate a judge's power to override a life recommendation, Alabama made its effective date applicable to any defendants who were "**charged** with capital murder **after the effective date**." Alabama Laws Act 2017-131, sec. 2, enacted April 11, 2017 (emphasis added). Surely, Florida's Legislature could have done something similar when it codified a substantive rule that unanimity was necessary to overcome a defendant's presumption for a life sentence.

Petition for Writ of Certiorari was denied. Though these events occurred before June 24, 2002, the critical procedural events in Mr. Mendoza's case also occurred after the homicides at issue in cases that will receive the benefit of the new statute. Individuals whose convictions were final long before June 24, 2002, and whose convictions were final before Mr. Mendoza's conviction was final will receive the benefit of the new statute.

For instance, James Card will receive the benefit of the new statute. He was convicted of a 1981 homicide. His conviction was final in 1984. *Card v. State*, 453 So. 2d 17 (Fla. 1984). Due to collateral proceedings, he received a resentencing procedure that returned an 11-1 jury recommendation. The later-imposed death sentence became **final four days after the issuance of *Ring v. Arizona*, 536 U.S. 584 (2002)**. *Card v. State*, 803 So. 2d 613 (Fla. 2001), *cert. denied* 536 U.S. 963 (2002). Under the new statute's terms, he will receive a statutorily created substantive benefit to a life sentence unless a jury unanimously agrees to a death sentence.

Examples like that of James Card reveal the absurdity and unconstitutionality of applying this statute retrospective to its enactment date, but not retrospective to all. If the new statute's goal is to enhance reliability of death sentences in Florida, it does not eliminate the fact that Mr. Mendoza's still lacks the right to that sort of reliability. If the new statute's goal is to ensure that only the most culpable receive

death, that goal is not achieved either, as Card's death recommendation for premeditated murder was 11-1 compared to Mr. Mendoza's 7-5 for felony-murder. And, if the new statute's goal is to draw a line in the sand somewhere at the expense of sacrificing the older cases, that goal is not accomplished either, as Card's case is a decade older than Mr. Mendoza's. Whatever the goal of this statute is, it is certainly not being accomplished adequately or in a rationale way.[3]

In addition, by Chapter 2017-1 drawing a line based on the finality of the sentencing date, as opposed to the date of the homicide or finality of the conviction, it has created other problems indicative of an arbitrary application and unjust deprivation of a liberty interest. For instance, it fails to take into consideration that Chapter 2017-1's substantive benefit will be awarded to defendants that were recalcitrant clients during or at trial.[4] Chapter 2017-1's benefit will also be extended

[3] Similar circumstances have resulted in cases like J.B. Parker's case, who will receive the benefit of the new statute for a 1982 homicide in which the conviction became final in 1985. *State v. Parker*, 873 So. 2d 270 (Fla. 2004). *See also Johnson v. State*, 205 So. 3d 1285 (Fla. 2016) (1981 homicide and conviction final in 1995); *Meeks v. Moore*, 216 F. 3d 951, 959 (1974 homicide with 1977 conviction finality date will receive benefit of statutory change and decisional law).

[4] Take for example, Harrell Braddy. Although he was convicted by a jury in 2007 for his capital offense, which involved feeding a child to an alligator, his homicide occurred in 1998—almost a decade earlier from the jury's verdict. *Braddy v. State*, 111 So. 3d 810 (2012). The State has indicated that Braddy was the type of defendant that fired "numerous attorneys when they refused to follow his wishes." Answer Brief on Merits, *Braddy v. State*, Case No. SC15-404, at 29. Indeed, "[Mr. Braddy] managed to get rid of some of the best-known attorneys in Miami-Dade County for one reason or another [at trial] by filing motions to proceed without counsel as well as bar complaints." Initial Brief on Merits, *Braddy v. State*, Case No.

to individuals whose attorneys caused delays.[5]

Therefore, as cases that are older and newer than Mr. Mendoza's case will receive Chapter 2017-1's benefit, Mr. Mendoza is being deprived of equal application of the law. *See Griffith v. Kentucky*, 479 U.S. 314, 323 (1987) ("[S]elective application of new rules violates the principle of treating similarly situated defendants the same."); *Smith v. State*, 598 So. 2d 1063, 1066 (Fla. 1992) ("[a]ny rule of law that substantially affects the life liberty or property of criminal defendants must be applied in a fair and evenhanded manner."). *See also Desist v. United States*, 394 U.S. 244, 258-59 (1969) (Harlan, J., dissenting) (discussing departures from the judicial tradition when similarly situated defendants are treated differently). Florida's Legislature was bound by the Equal Protection Clause when it defined the class that would receive Chapter 2017-1's benefit. Because the reasoning for the classification cannot reasonably be accomplished, the Florida Legislature ignored the principle that "[a] classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstances

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SC15-404, at 50. Surely, this sort of recalcitrance delayed the proceedings enough to allow his sentence to become final after June 24, 2002. Had Mr. Mendoza been as recalcitrant as Mr. Braddy, a jury would not have convicted him for the 1992 homicide until 2001, and his sentence would have been final after June 24, 2002.

[5] *See, e.g.*, *Lugo v. State*, 845 So. 2d 74 (Fla. 2003) (showing a two-year delay in preparing the record on appeal which likely impacted the post-*Ring* status).

shall be treated alike." *Reed v. Reed*, 404 U.S. 71, 76 (1971).

With regard to the Due Process Clause, it was "intended to secure the individual from the arbitrary exercise of the powers of government." *Hurtado v. California*, 110 U.S. 516, 527 (1884). Though Chapter 2017-1 created a substantive liberty interest, the Florida Legislature has extended that benefit to persons similarly situated to Mr. Mendoza, while creating a rule that denies it to Mr. Mendoza. But, "[o]nce a State has granted a liberty interest, [the US Supreme Court has] held that due process protections are necessary to insure that the state-created right is not arbitrarily abrogated." *Vitek v. Jones*, 445 U.S. 480, 488-89 (1980). Granting Mr. Card, Mr. Parker, Mr. Braddy, and others identified throughout this Response Chapter 2017-1's benefit, while denying that liberty interest to Mr. Mendoza, violates due process.

Finally, with regard to the Eighth Amendment, this Court already acknowledged that unanimity at the sentencing phase promotes reliability. *See Bevel v. State*, 221 So. 3d at 1179 ("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.'"). Implicit in that acknowledgment is an admission that death sentences that were reached without unanimity at the sentencing phase are less reliable. When a death sentence is to be imposed, there is a special need for enhanced

reliability in order to adhere to this country's and the Eighth Amendment's "fundamental respect for humanity." *See Johnson v. Mississippi*, 486 U.S. 578, 584 (1988). The statutory change towards unanimity, and to apply that change regardless of the date of the homicide, reflects the Legislature's intent to achieve reliability.

Mr. Mendoza will not receive the benefit of unanimity even though five jurors voted to spare his life for the felony-murder homicide at issue. To apply a distinction that denies Mr. Mendoza the reliability afforded by Chapter 2017-1, while individuals with homicides that occurred before and after the one at issue here, exposes the sort of arbitrariness that the Eighth Amendment prohibits. Death sentences are no longer permissible without a unanimous jury findings at the sentencing phase in Florida, yet Mr. Mendoza is still subject to a death sentence while similarly situated persons will not be subject to the death sentences previously imposed. *Cf. Lecroy v. State*, Case No. SC05-136 (showing this Court ordered Lecroy's death sentence to be vacated because his death sentence was legal when imposed but could not be imposed now because the State lacks the authority to execute him). A full briefing is warranted and relief should be granted.

Cause II

Hitchcock did not raise a claim related to *Enmund* or *Tison* and how those cases were impacted by *Hurst v. Florida* and *Hurst v. State*. As *Hitchcock* is not relevant to the show cause order, a full briefing and airing of this issue is warranted. Further, it would violate Due Process, Equal Protection, and the Eighth Amendment

to deprive Mr. Mendoza of appellate review that he is entitled to under the Florida Constitution.

On the merits, Mr. Mendoza would prevail. The culpability finding required by *Enmund*/*Tison* is a fact determining death eligibility. A bare majority was required when Mr. Mendoza was sentenced. *Hurst v. Florida* and/or *Hurst v. State* show that a bare majority was never enough, nor is a judge's finding enough. The culpability finding, like other death eligibility findings, must be found by a unanimous jury. [6] In *Mosley*, in considering whether *Hurst v. State* was 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.

Mosley v. State, 209 So. 3d at 1282 (emphasis added). As the *Witt* analysis conducted by this Court in *Asay V* did not take into consideration the limited class sentences predicated on pure felony-murder, the administration of justice analysis would be entirely different. To not consider this narrow class that Mr. Mendoza fits into also ignores this Court's statement that "individual injustice" should be cured "despite the impact it will have on the administration of justice."

[6] This Court, in collateral proceedings, deemed the identity of the shooter irrelevant because the conviction was premised upon a felony-murder theory. However, the identity of the shooter is germane to the issue of moral culpability under *Enmund*/*Tison*.

Members of the US Supreme Court criticized this Court for not addressing the Eighth Amendment challenge related to *Hurst*'s impact on a *Caldwell* claim. *Truehill v. Florida*, Case No. 16-9488 Slip. Op. at 2 (dissenting, J., Sotomayor joined by J., Breyer and J., Ginsburg). Lumping together the various constitutional issues that have resulted after *Hurst v. Florida* creates an appellate process that fails to fully address the issues before it. At least one member of this Court recognizes that this Court seems to be conflating issues. *See Hitchcock*, Slip Op. at *9 (Pariente, J. dissenting) ("The Eighth Amendment and due process arguments presented here are not addressed by the majority in Asay… **Rather than analyze Hitchcock's constitutional arguments, the majority dismisses them without explain why *Asay*, in fact, forecloses relief**.") A full briefing is warranted.

Cause III

The Rule 3.851 Motion also asserts that Mr. Mendoza is entitled to a review of this Court's 2011 decision because it assumed that a bare majority was necessary to make all death-eligibility findings when reviewing his ineffective assistance of counsel claim. This Court has already demonstrated that *Hurst v. State* and *Hurst v. Florida* have impacted this Court's analysis of ineffective assistance of trial counsel claims. See *Bevel v. State*, 221 So. 3d, at 1182.

Had this Court considered that a unanimous jury was required to make all findings at Mr. Mendoza's sentencing phase, it would have deemed the evidence this

Court viewed as cumulative as enough to sway one juror to vote that the aggravating circumstances were not sufficient or were not outweighed by the mitigating evidence. Because the yardstick for measuring whether relief should be afforded always considered whether a majority would vote for life, as opposed to considering whether a jury would unanimously vote for death, this claim was assessed through an inaccurate lens. This claim is individualized and tied to the facts in Mr. Mendoza's case.

Cause IV

To deny Mr. Mendoza retroactive relief under *Hurst v. Florida*, 136 S. Ct 616 (2016) and/or *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) on the basis that his death sentence became final before June 24, 2002 under the decisions in *Asay v. State*, 210 So. 3d 1 (Fla. 2016) and *Hitchcock v. State*, while granting *Hurst* relief retroactively to inmates whose death sentences had not become final on June 24, 2002, violates Equal Protection under the Fourteenth Amendment. *See e.g., Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

The classification violates the Eighth Amendment's Cruel and Unusual Punishment Clause too. *See, e.g., Godfrey v. Georgia*, 446 U.S, 420 (1980); *Espinosa v. Florida*, 505 U.S. 1079 (1992). Eighth Amendment protections are typically applied retroactively. *See, e.g.*, *Miller v. Alabama*, 132 S. Ct. 2455 (2012). This issue— namely whether retroactive application of the right to life without a unanimous jury's recommendation for death announced in *Hurst v. State*—was not

specifically addressed in this Court's opinion in *Asay*, on which *Hitchcock* relies. *See Hitchcock*, Slip Op. at *9 (Pariente, J. dissenting) ("The Eighth Amendment and due process arguments presented here are not addressed by the majority in Asay… **Rather than analyze Hitchcock's constitutional arguments, the majority dismisses them without explain why *Asay*, in fact, forecloses relief**.") (emphasis added). The bright line also ignores that older cases are more unreliable than newer cases due to the less reliable scientific methodology used further back in time when a sentence was imposed. In separating those who are to receive the retroactive benefit of *Hurst v. Florida* and/or *Hurst v. State*, the line drawn operates much the same way that the IQ score of 70 cutoff operated in *Hall v. Florida*, as both arbitrarily ignore the imprecision and unreliability of the line. *See Hall v. Florida*, 134 S. Ct. at 2001.

If afforded the Sixth or Eighth Amendment benefit recognized in *Hurst v. Florida* or *Hurst v. State*, Mr. Mendoza would prevail, as a bare majority, i.e. 7-5, is the basis for his death sentence. There is no question that persons with convictions that were final before Mr. Mendoza's conviction was final will receive the benefit of those rulings. *See infra*. Unquestionably, defendants whose homicides predate the one at issue here will receive the benefit of those rulings. Mr. Mendoza's entitlement to those rulings should be individualized to his character, the facts underlying his sentence, and to some other classification other than the finality date of the sentence

to adhere to constitutional principles. A fair opportunity to be heard as to this claim is required under Due Process principles, Equal Protection principles, and the Eighth Amendment.

CONCLUSION

Mr. Mendoza is entitled to a full briefing under the Florida Constitution. To deny him of this right, it would violate Due Process, Equal Protection, and the Eighth Amendment. This show cause order in itself violates those same provisions by creating a standard of review with zero objectivity, which may be sufficient in civil proceedings, but not when death is at stake.[7] Nevertheless, Mr. Mendoza has shown cause to proceed with a full briefing of the issues followed by oral argument. Relief is warranted.

[7] To further highlight the unconstitutionality of this show cause procedure, Mr. Mendoza notes that he was unable to adequately or fully discuss his individual facts that reveal the lack of reliability permeating in this case. Such facts are essential in order to make an individualized and reliable assessment of his claims, as required by Due Process, Equal Protection, and the Eighth Amendment of the US Constitution and as required by the Florida Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing has been provided by electronic service to all counsel of record via the Florida Court e-filing portal on the 16th day of October, 2017. I further certify that I have complied with all font requirements.

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