

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC17-1693

BOBBY RALEIGH,

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, **BOBBY RALEIGH**, and respectfully responds to this Court's Order to Show Cause and requests that the Court define "cause" and/or find that cause exists and issue a briefing schedule allowing the appeal to proceed to briefing.

After pleading guilty to two counts of first degree murder, Mr. Raleigh received two death sentences. On direct appeal, this Court affirmed. *Raleigh v. State*, 702 So. 2d 1324 (Fla. 1997), cert denied 525 U.S. 841 (1998).¹ On December 11, 2016, Mr.

¹This Court denied a challenge to the in the course of a burglary aggravator saying "the jury could [have] conclude[d] that Eberlin withdrew whatever consent he may have given for Raleigh to remain when Raleigh shot him several times and beat him so viciously that his gun was left bent, broken, and bloody." *Raleigh*, 705 So. 2d at 1329. Because Mr. Raleigh pled guilty, this Court's reference was to the penalty phase jury. In *Delgado v. State*, 776 So. 2d 233 (Fla. 2000), this Court rejected the reading of the burglary statute it had used in *Raleigh* and held "burglary was intended to criminalize the conduct of a suspect who terrorizes, shocks, or surprises the unknowing occupant." *Delgado*, 776 So. 2d at 240. In *Delgado*, the conduct at issue had occurred in 1990. *Id.* at 239-40 ("The question before this Court is whether the Legislature intended to criminalize the particular

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Raleigh filed the successive Rule 3.851 motion at issue in this appeal. Initially, he raised 3 claims. Claim I rested on the Sixth Amendment ruling in *Hurst v. Florida*, 136 S. Ct. 616 (2016). Claim II rested on the Florida Constitution and the Eighth Amendment ruling in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). Claim III argued that the prejudice prong analyses of Mr. Raleigh's previously heard collateral claims had to be revisited in light of the recognition in *Hurst v. State* that a jury's death recommendation could only be returned unanimously, otherwise a life sentence was required.² Within all 3 claims, Mr. Raleigh

conduct in this case as burglary when it added the phrase "remaining in" to the burglary statute."). *Delgado* held that a consensual entry into a residence was not meant to be criminalized under the burglary statute in effect in 1990. *Id.* at 241 ("appellant's actions are not the type of conduct which the crime of burglary was intended to punish") ("appellant's conduct does not amount to burglary"). In Mr. Raleigh's case, the conduct at issue occurred in 1994, four years after those at issue in *Delgado*. Both cases involved the same burglary statute. In *Delgado*, this Court said it was receding from *Raleigh* because it was incorrect as to what conduct the statute had criminalized. *Delgado*, 776 So. 2d at 241 (the holding in *Raleigh* "leads to an absurd result"). See *Fitzpatrick v. State*, 859 So. 2d 486, 490 (Fla. 2003) (applying *Delgado* to 1980 homicide in which trial occurred in 2000 and concluding a new trial was required because the burglary, basis for felony/murder, because Fitzpatrick "a consensual invitee into [victim]'s home").

²Besides a *Delgado* claim, many of Mr. Raleigh's previously presented claims arose from evidence of a statement by the co-defendant, Figueroa, that he killed one of the victims. This admission by co-defendant was not heard by Mr. Raleigh's jury who only heard a contrary statement from co-defendant blaming Mr. Raleigh for both homicides. Mr. Raleigh's previously presented claims also included the fact that at Figueroa's subsequent penalty phase the State presented evidence and argued that Figueroa was the dominant player who killed one victim and

argued that because his jury was told its recommendation was “advisory” in nature and the sentencing decision rested with the judge, the unanimous death recommendations reflected the bias in favor of death when the jury’s sense of responsibility is diminished. See *Caldwell v. Mississippi*, 472 U.S. 320 (1985). As a result, *Caldwell* error taints the recommendations in Mr. Raleigh’s case and they can not be used to find any error under *Hurst v. Florida* or *Hurst v. State* harmless.

On January 11, 2017, Mr. Raleigh moved to amend the 3.851 motion in light of *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), and *Asay v. State*, 210 So. 3d 1 (Fla. 2016). The motion was granted. On February 16, 2017, Mr. Raleigh filed his amended 3.851 motion. He added a fourth claim - that the apparent partial retroactivity employed by this Court violated the principles of *Furman v. Georgia*, 408 U.S. 238 (1972), as well as the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

Mr. Raleigh’s claims were orally argued at a case management conference, and Chapter 2017-1 was discussed and argued. The circuit court denied relief. A timely notice of appeal was filed.

After the record was filed with this Court, it issued an order on November 15, 2017 directing Mr. Raleigh to show cause

ordered Mr. Raleigh, described as a “drunken boob” to kill the other one. This conflicted with the evidence and argument presented at Mr. Raleigh’s penalty phase, and it conflicted with the judge’s written findings when imposing a death sentence.

"why the trial court's order should not be affirmed in light of this Court's decision in *Hitchcock v. State*, SC17-445."³

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

Mr. Raleigh submits that his appeal is not one subject to this Court's discretionary jurisdiction. See Fla. R. App. Pro. 9.030(a)(2). He has a substantive right to appeal the denial of a successive Rule 3.851 motion. See Fla. Const. Art. V, § 3(b)(1); Fla. Stat. § 924.066 (2016). 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).⁴ A showing of "cause" to permit an appeal means the appeal is not of right as the Florida Constitution requires.⁵

³This Court has extended the time for filing the response until December 29, 2017. Mr. Raleigh is filing a motion to accept this response as timely filed.

⁴In 2006, this Court denied Mr. Raleigh's appeal from the denial of a 3.850 motion and his habeas petition. In its opinion, it stated: "Raleigh now appeals an order of the circuit court denying his motion for postconviction relief filed under Florida Rule of Criminal Procedure 3.851. He also petitions the Court for a writ of habeas corpus. We have jurisdiction. See art. V, § 3(b)(1), Fla. Const." *Raleigh v. State*, 932 So. 2d 1054, 1056 (Fla. 2006). Art. V, § 3(b)(1), provides: "The supreme court: (1) **Shall** hear appeals from final judgments of trial courts imposing the death penalty...." (emphasis added).

⁵Mr. Raleigh's substantive right to appeal the denial of his Rule 3.851 motion is protected by the Due Process and Equal Protection Clauses. *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, the procedures

This Court's *sua sponte* issued an order to show cause based only upon a copy of the circuit court's order denying the 3.851 motion. This reflects a prejudgment by this Court. Such prejudgment violates due process. Mr. Hitchcock was not required to show cause for his appeal to be proceed. The show cause order violates Mr. Raleigh's due process and equal protection rights.⁶ "Cause" has not been explained; there are no standards.

Individualized appellate review in each capital appeal, whether in the course of direct or collateral proceedings, is mandated by the Florida Constitution. That individualized review is necessary to insure Florida's capital sentencing scheme complies with the Eighth Amendment. See *Proffitt v. Florida*, 428 U.S. 242, 258 (1976) ("The Supreme Court of Florida reviews each death sentence to ensure that similar results are reached in similar cases.").⁷

used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution."); *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.").

⁶This Court *sua sponte* decided that Mr. Raleigh was not entitled to the normal appellate review unless he first shows "cause," whatever that means. The order afforded Mr. Raleigh 20 pages to show an undefined "cause." The normal procedure grants the appellant right to file an Initial Brief of 75 pages.

⁷In a capital case, individualized appellate review is as essential as an individualized sentencing. See *Mosley v. State*, 209 So. 3d 1248, 1282 (Fla. 2016) ("In this case, where the rule announced is of such fundamental importance, the interests of

On the basis of the Florida Constitution, Mr. Raleigh objects to the requirement that he show cause before his appeal of right can proceed. He objects on the basis of the Equal Protection and Due Process Clauses of the Fourteenth Amendment,⁸ and on the basis of the Eighth Amendment.

B. MR. RALEIGH SEEKS TO SHOW "CAUSE", WHATEVER THAT IS.⁹

Despite the absence of guidance as to what constitutes "cause" which allows a capital appellant's appeal of right to proceed, Mr. Raleigh seeks to comply with this Court's directive by suggesting the following as cause:

Cause 1

A judicial ruling rejecting one constitutional challenge to a death sentence does not mean that the death sentence has been

fairness and 'cur[ing] individual injustice' compel retroactive application of *Hurst* despite the impact it will have on the administration of justice."); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) ("we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases."). See *Parker v. Dugger*, 498 U.S. 308 (1991).

⁸Mr. Hitchcock did not have to show "cause" for his appeal. Mr. Hitchcock was able to file initial and reply briefs.

⁹Is "cause" the same as de novo review, which would govern this Court's review of questions of law? Or, does "cause" only look to if competent, substantial evidence supports the trial court's order? Standards of review matter. See *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.").

upheld against any and all constitutional challenges when the separate challenges rest on distinctly different legal arguments and/or constitutional amendments or provisions. We know this because the US Supreme Court has shown us. Each of the various amendments to the US Constitution embody distinct values and were designed to address different perceived dangers. In *McGautha v. California*, 402 U.S. 183 (1971), the US Supreme Court upheld the death sentences against a challenge made under the Due Process Clause of the Fourteenth Amendment.¹⁰ The claim was that death sentences imposed under statutes that accorded juries total sentencing discretion in determining whether to impose a death sentence violated due process. *Id.* at 196 (“petitioners contend that to leave the jury completely at large to impose or withhold the death penalty as it see fit is fundamentally lawless and therefore violates the basic command of the Fourteenth Amendment that no State shall deprive a person of his life without due process of law.”). This Due Process Clause claim failed.

One year later, the US Supreme Court heard an Eighth Amendment claim that the then existing death penalty statutes gave the capital sentencer, either a judge or a jury, absolute sentencing discretion, and that death sentences imposed under

¹⁰See *McGautha v. California*, 402 U. S. at 186 (“We granted certiorari in the McGautha case limited to the question whether petitioner's constitutional rights were infringed by permitting the jury to impose the death penalty without any governing standards.”).

such a scheme were cruel and unusual because they were arbitrarily imposed. *Furman v. Georgia*, 408 U.S. 238, 240 (1972) (Eighth Amendment challenge to scheme providing "whether the penalty should be death or a lighter punishment was left by the State to the discretion of the judge or of the jury."). Under the Eighth Amendment, the statutes were held to be unconstitutional because they permitted arbitrary imposition of death penalty. *Id.* at 310 (Stewart, J., concurring) ("the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."); *Id.* at 313 (White, J., concurring) ("there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."). The Eighth Amendment challenge succeeded, even though Due Process Clause challenged had failed.

Without the right to be meaningfully heard on their Eighth Amendment challenge, the petitioners in *Furman* would have been left with unreliable death sentences in place and no means to challenge the standardless sentencing discretion given to the juries that had imposed the death sentences:

Failure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy. Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the

individual and delimits the powers which the state may exercise.

In re Gault, 387 U.S. 1, 19-20 (1967). The due process right to be meaningfully heard is particularly acute when an inmate under sentence of death is challenging his death sentence.¹¹

The fact that Mr. Raleigh's arguments are different than the ones presented in *Hitchcock v. State*, in that they rely upon different legal arguments or different constitutional amendments, matters. Mr. Raleigh's arguments must be fully considered, just as Furman's challenge was heard despite the ruling in *McGautha*. Mr. Raleigh's arguments do not rest on the same legal principles and/or constitutional provisions on which Hitchcock relied. Moreover, Hitchcock did not rely on the *McGautha/Furman* situation as showing that *Asay v. State* was limited to the Sixth Amendment aspect of *Hurst v. Florida*. Because *McGautha/Furman* was not raised by Hitchcock, cause exists which warrants full briefing.

Cause 2

In *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), this Court addressed the old version of § 921.141 and concluded:

Thus, before a sentence of death may be considered by the trial court in Florida, the jury must find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating

¹¹See *Hall v. Florida*, 134 S.Ct. at 2001 ("The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution.").

factors outweigh the mitigating circumstances. *Hurst v. State*, 202 So. 3d at 53.¹² Because these were the statutorily defined facts necessary to increase the range of punishment to include death, proving them was necessary **"to essentially convict a defendant of capital murder."** These facts were thus elements of capital murder.¹³ *Id.* at 53-54.

In *Hurst v. State*, this Court said:

[A]ll the findings necessary for imposition of a death sentence are "elements" that must be found by a jury, and Florida law has long required that jury verdicts must be unanimous. Accordingly, we reiterate our holding that before the trial judge may consider imposing a sentence of death, the jury in a capital case must **unanimously and expressly find all the aggravating factors** that were proven beyond a reasonable doubt, **unanimously find that the aggravating factors are sufficient** to impose death, **unanimously**

¹²This Court explained that the presence of these specific facts was longstanding:

the imposition of a death sentence in Florida has in the past required, and continues to require, additional factfinding that now must be conducted by the jury. As the Supreme Court long ago recognized in *Parker v. Dugger*, 498 U.S. 308 (1991), under Florida law, "The death penalty may be imposed only where sufficient aggravating circumstances exist that outweigh mitigating circumstances." *Id.* at 313 (emphasis added) (quoting § 921.141(3), Fla. Stat. (1985)).

Hurst v. State, 202 so. 3d at 53.

¹³While this Court referred to the higher degree of murder as "capital murder," Mr. Raleigh herein refers to the higher degree of murder as capital first degree murder. While, the labeling is not constitutionally significant, what is significant is this Court's recognition that the elements set forth in the statute when combined with the elements of first degree murder are constituent parts of a new offense, a higher degree of murder.

find that the aggravating factors outweigh the mitigating circumstances, and **unanimously recommend a sentence of death.** We equally emphasize that by so holding, we do not intend to diminish or impair the jury's right to recommend a sentence of life even if it finds aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating circumstances. See *Brooks v. State*, 762 So.2d 879, 902 (Fla.2000). As the relevant jury instruction states: "Regardless of your findings ... you are neither compelled nor required to recommend a sentence of death." Fla. Std. Jury Instr. (Crim.) 7.11 Penalty Proceedings—Capital Cases. Once these critical findings are made unanimously by the jury, each juror may then "exercis[e] reasoned judgment" in his or her vote as to a recommended sentence. See *Henyard v. State*, 689 So.2d 239, 249 (Fla.1996) (quoting *Alvord v. State*, 322 So.2d 533, 540 (Fla.1975)).

Id. at 57-58. This was the holding of *Hurst v. State*. These elements were not articulated in *Hurst v. Florida* nor was jury unanimity at issue or discussed in *Hurst v. Florida*.

Hurst v. State identified the Eighth Amendment demand for heightened reliability in capital cases as reason why it was necessary for a unanimous jury to find the statutory elements to have been proven beyond a reasonable doubt:

* * * If death is to be imposed, unanimous jury sentencing recommendations, when made in conjunction with the other critical findings unanimously found by the jury, provide the highest degree of reliability in meeting these constitutional requirements in the capital sentencing process.

Hurst v. State, 202 So. 3d at 60. The holding in *Hurst v. State*, while resting on the Eighth Amendment, also implicated the US Supreme Court's holding that elements must be proven "beyond a reasonable doubt" which was set forth in *In re Winship*, 397 U.S.

358 (1970):

Winship presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.

Jackson v. Virginia, 443 U.S. 307, 316 (1979).

Fiore v. White, 531 U.S. 225, 226 (2001), addressed import of the Due Process Clause in this context:

We granted certiorari in part to decide when, or whether, the Federal Due Process Clause requires a State to apply a new interpretation of a state criminal statute retroactively to cases on collateral review.

But before resolving the issue, the Supreme Court asked the Pennsylvania Supreme Court to explain the basis for one of its decisions regarding the elements of the statutorily defined criminal offense for which Fiore had been convicted.¹⁴ Was the decision construing the criminal statute a new interpretation or

¹⁴Fiore was convicted of operating a hazardous waste facility without a permit. While Fiore had a permit, the State had “argued that Fiore had deviated so dramatically from the permit’s terms that he nonetheless had violated the statute.” 531 U.S. at 227. On the State’s theory, Mr. Fiore was convicted. After Fiore’s unsuccessful appeals had concluded, the Pennsylvania Supreme Court in a different case held: “[t]he statute made it unlawful to operate a facility without a permit; one who deviated from his permit’s terms was not a person without a permit; hence, a person who deviated from his permit’s terms did not violate the statute.” *Id.* at 227. After Fiore unsuccessfully challenged his conviction in state court collateral proceedings based on the Due Process Clause, he sought federal habeas relief. “The Court of Appeals believed that the Pennsylvania Supreme Court, in Scarpone’s case, had announced a new rule of law and thus was inapplicable to Fiore’s already final conviction.” *Id.*, at 227.

was it a straightforward reading of the statute? *Fiore v. White*, 531 U.S. at 226. The Pennsylvania Supreme Court explained that its earlier "ruling merely clarified the plain language of the statute." *Id.* at 228. This meant that the ruling dated back to the statute's enactment. The US Supreme Court explained:

the question is simply whether Pennsylvania can, consistently with the Federal Due Process Clause, convict Fiore for conduct that its criminal statute, as properly interpreted, does not prohibit.

Id. at 228. Because the answer to this question was "no," the US Supreme Court held the Due Process Clause was violated:

This Court's precedents make clear that Fiore's conviction and continued incarceration on this charge violate due process. We have held that **the Due Process Clause of the Fourteenth Amendment forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt.**

Id. at 228-29. Because he had not been found guilty of an essential element, his conviction was not constitutionally valid.

Just as the Pennsylvania Supreme Court had done, this Court in *Hurst v. State* read the plain language in the statute and saw the statutorily necessary facts to convict of capital first degree murder. The statutorily necessary facts were elements:

We also conclude that, just as elements of a crime must be found unanimously by a Florida jury, all these **findings necessary for the jury to essentially convict a defendant of capital murder**—thus allowing imposition of the death penalty—are also **elements** that must be found unanimously by the jury.

Hurst v. State, 202 So. 3d at 53-54 (emphasis added). These

"elements" came from the statute and had always been there.¹⁵ In the *Scarpone* decision discussed in *Fiore*, the Pennsylvania Supreme Court used the plain meaning of the statute. Thus, the decision had not established a new rule; it merely identified the substantive law in the statute. This is exactly what *Hurst v. State* did. The result must be the same as in *Fiore*. Without a jury finding each element of capital first degree murder proven beyond a reasonable doubt, collateral relief is required. This was not at issue in *Hurst v. Florida*.

The error that this Court assessed in *Hurst v. State* when it addressed harmless error was the failure to instruct the jury that it had to unanimously find that the State had proven all of the necessary elements beyond a reasonable doubt:

the burden is on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to Hurst's death sentence in this case.

Hurst v. State, 202 So. 3d at 68. This is different from the Sixth Amendment error identified within *Hurst v. Florida*.

In *Apprendi v. New Jersey*, 530 U.S. 466, 469 (2000), the issue before the US Supreme Court was:

whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination

¹⁵In Mr. Raleigh' case, three of the elements identified in *Hurst v. State* were not found proven beyond a reasonable doubt and thus he could not have been convicted of capital first degree murder under the Due Process Clause as explained in *Fiore*.

authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt.

As it began its analysis, the Supreme Court explained:

At stake in this case are constitutional protections of surpassing importance: **the proscription of any deprivation of liberty without "due process of law," Amdt. 14**, and the guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury," Amdt. 6. Taken together, these rights indisputably entitle a criminal defendant to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *United States v. Gaudin*, 515 U.S. 506, 510 (1995); see also *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993); *Winship*, 397 U.S., at 364 ("**[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged**").

Apprendi, 530 U.S. at 476-77 (emphasis added).¹⁶ *Apprendi* noted the historical basis for the due process right:

Equally well founded is the companion right to have the jury verdict based on proof beyond a reasonable doubt. "The 'demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, [though] its crystallization into the formula "beyond a reasonable doubt" seems to have occurred as late as 1798. It is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt.' C. McCormick, *Evidence* § 321, pp. 681-682 (1954); see also 9 J. Wigmore, *Evidence* § 2497 (3d ed.1940)." *Winship*, 397 U.S., at

¹⁶The decision in *Apprendi* was primarily about the Sixth Amendment right to trial by jury. Its focus was actually on the Due Process Clause and its requirement that the elements of a charged criminal offense must be proven beyond a reasonable doubt for a conviction to be valid. The decision in *Ring v. Arizona*, 536 U.S. 584, 588 (2002) ("This case concerns the Sixth Amendment right to a jury trial in capital prosecutions.").

361. We went on to explain that the reliance on the "reasonable doubt" standard among common-law jurisdictions "reflect[s] a profound judgment about the way in which law should be enforced and justice administered." *Id.*, at 361-362 (quoting *Duncan*, 391 U.S., at 155).

Apprendi, 530 U.S. at 478. The Supreme Court observed that the "reasonable doubt" standard demanded by due process protects against erroneous convictions and government overreach:

As we made clear in *Winship*, the "reasonable doubt" requirement "has [a] vital role in our criminal procedure for cogent reasons." 397 U.S., at 363, 90 S.Ct. 1068. Prosecution subjects the criminal defendant both to "the possibility that he may lose his liberty upon conviction and ... the certainty that he would be stigmatized by the conviction." *Ibid.* We thus require this, among other, procedural protections in order to "provid[e] concrete substance for the presumption of innocence," and **to reduce the risk of imposing such deprivations erroneously.** *Ibid.*

Apprendi, 530 U.S. at 484 (emphasis added).

In *Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993), the Supreme Court addressed the Due Process Clause requirement:

What the factfinder must determine to return a verdict of guilty is prescribed by the Due Process Clause. The prosecution bears the burden of proving all elements of the offense charged, see, e.g., *Patterson v. New York*, 432 U.S. 197, 210 (1977); *Leland v. Oregon*, 343 U.S. 790, 795 (1952), and must persuade the factfinder "beyond a reasonable doubt" of the facts necessary to establish each of those elements, see, e.g., *In re Winship*, 397 U.S. 358, 364 (1970); *Cool v. United States*, 409 U.S. 100, 104 (1972) (per curiam).

In *Sullivan*, the failure to instruct a jury on the "beyond a

reasonable doubt" standard was held to be structural error.¹⁷

In *Alleyne v. United States*, 133 S. Ct. 2151, 2160 (2013), the Supreme Court noted: "*Apprendi* concluded that any 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed' are elements of the crime." *Alleyne* said:

When a finding of fact alters the legally prescribed punishment so as to aggravate it, **the fact necessarily forms a constituent part of a new offense and must be submitted to the jury.** It is no answer to say that the defendant could have received the same sentence with or without that fact. It is obvious, for example, that a defendant could not be convicted and sentenced for assault, if the jury only finds the facts for larceny, even if the punishments prescribed for each crime are identical. One reason is that each crime has different elements and a defendant can be convicted only if the jury has found each element of the crime of conviction.

Alleyne, 133 S. Ct. at 2162 (emphasis added). The identification of the facts necessary to increase the authorized punishment was noted to be a matter of substantive law. *Id.* at 2161 ("Defining facts that increase a mandatory statutory minimum to be part of the substantive offense enables the defendant to predict the legally applicable penalty from the face of the indictment.").

¹⁷Mr. Raleigh's jury was not instructed that the sufficiency of the aggravators and whether they outweighed the mitigating factors were matters to be proved by the State beyond a reasonable doubt. Under *Sullivan*, this was structural error. See *Patterson v. New York*, 432 U.S. 197, 215 (1977) ("a State must prove every ingredient of an offense beyond a reasonable doubt, and [] it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense"); *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979) (since jury may have read instruction as relieving State of proving an element beyond a reasonable doubt, defendant was denied "his right to the due process of law").

The error actually analyzed for harmlessness in *Hurst v. State* was not the narrow Sixth Amendment error identified in *Hurst v. Florida*.¹⁸ Instead, it has been the failure to instruct the jury of the elements of capital first degree murder and the necessity of a unanimous verdict finding that the State met its burden to prove each element beyond a reasonable doubt.

In Mr. Raleigh's case the jury was not instructed on the need to find three of the four elements of capital first degree murder beyond a reasonable doubt, i.e. 1) the aggravators were sufficient, 2) the aggravators outweighed the mitigators, and 3) there was no basis for a single juror to be merciful and vote to impose a life sentence. The failure to instruct on the need to find all elements of a criminal offense beyond a reasonable doubt violates the Due Process Clause and under *Fiore* must be applied to the date of the statute that plainly identifies the elements. The retroactivity of a new rule is not an issue because case law recognizing elements set out in the plain language of the substantive law must date to the statute's enactment and warrants

¹⁸Since jury unanimity was not at issue in *Hurst v. Florida*, this Court's consideration of whether the death recommendation was unanimous in the harmlessness assessment shows that the error evaluated was not the *Hurst v. Florida* error. Instead, it was the error in not requiring a unanimous death recommendation that was evaluated. What was left out of the analysis was the judge's findings of fact. That shows that as a result of *Hurst v. State*, the error in Florida was not judge fact finding in lieu of jury fact finding. The error being measured in the harmless error analysis is the error in permitting advisory recommendations on the basis of a majority vote, instead of juror unanimity.

collateral relief when the jury was not instructed it must find the element was proven beyond a reasonable doubt.

This argument was not presented to this Court in the briefing in *Hitchcock v. State*. The decision in *Hitchcock* did not address or decide the Due Process Clause claim arising from *Hurst v. State* in light of *Fiore v. White*. Full briefing is warranted.

Cause 3

Because the aggravating factors are element of capital first degree murder, they must be found to have existed at the time of the homicide. Mr. Raleigh's jury was instructed that it could consider each contemporaneous homicide as an aggravator as to the other homicide. However, the homicide convictions occurred one year after the homicides when Mr. Raleigh pled guilty. Thus, Mr. Raleigh had not previously been convicted of a violent felony at the time of the murders. Submission and consideration of the previous conviction aggravator violated the Due Process Clause. This issue was neither raised nor considered in *Hitchcock v. State*, nor in *Asay v. State*. Full briefing is warranted.

Cause 4

The judge in his findings concluded that the as a matter of law that the State had failed to prove the pecuniary gain aggravator. Despite this and over Mr. Raleigh's objection, the jury was instructed on the pecuniary gain aggravator. As a result, the jury was encouraged to find an aggravator that did

not exist as a matter of law and to weigh it against the mitigators when deciding whether the State had proven the aggravators outweighed the mitigators beyond a reasonable doubt. In the wake of *Hurst v. State* and under *Fiore v. White*, this violated the Due Process Clause and the Eighth Amendment. The circumstances here were not present or presented to this Court in *Hitchcock v. State* or *Asay v. State*. "Cause" exists and full briefing is required in to comply with the Eighth Amendment and the Fourteenth Amendment.

Cause 5

The judge refused to instruct the jury on the no significant history of criminal activity statutory mitigator. This amounts to a directed verdict removing a mitigator from the jury's consideration of whether the aggravators outweighed the mitigators beyond a reasonable doubt. See *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572 (1977) ("For this reason, a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict, see *Sparf & Hansen v. United States*, 156 U.S. 51, 105 (1895); *Carpenters v. United States*, 330 U.S. 395, 408 (1947), regardless of how overwhelmingly the evidence may point in that direction").

In light of the ruling in *Hurst v. State*, the judge erroneously directed a verdict removing the jury's consideration of the no significant history statutory mitigator when it

analyzed whether the aggravators outweighed the mitigators beyond a reasonable doubt. This issue was not presented or considered in *Hitchcock v. State* or *Asay v. State*. Full briefing is required.

Cause 6

Whether a unanimous jury's death recommendation renders all *Hurst v. Florida* error harmless when the previously convicted of a violent felony aggravator was erroneously presented to the jury as supported by the contemporaneous homicide convictions, when the pecuniary gain aggravator was provided to the jury even though the judge determined as a matter of law there was no evidence to support it, when the jury considered the in the course of a burglary aggravator even a consensual entry was not intended to be a criminal act, and when the jury was not instructed on the no significant history of criminal activity statutory mitigator. This unconstitutional rulings regarding elements of the offense of capital first degree murder effectively tip the scales of justice in favor of the State in violation of the Due Process Clause and the Eighth Amendment.

These circumstances and Mr. Raleigh's arguments in the wake of *Hurst v. State* were not presented, considered or decided in *Hitchcock v. State* and/or *Asay v. State*. "Cause" exists which requires Mr. Raleigh be permitted to be fully heard through full briefing of these unresolved constitutional issues.

Cause 7

In *Hitchcock v. State*, Hitchcock raised arguments that his death sentence was unconstitutional under *Caldwell v. Florida*, 472 U.S. 320 (1985). But, this Court did not address that when denying Hitchcock's appeal. Three justices of the US Supreme Court have noted this Court has failed at revisiting *Caldwell* in the wake of *Hurst v. Florida* and *Hurst v. State*. See *Truehill v. Florida*, 138 S. Ct. 3 (2017) (Sotomayor, J., dissenting, joined by Breyer and Ginsburg, JJ.) ("capital defendants in Florida have raised an important Eighth Amendment challenge to their death sentences that the Florida Supreme Court has failed to address."). *Caldwell* issued long before Mr. Raleigh's conviction. The unresolved *Caldwell* issue is "cause" demanding full briefing.

Cause 8

On March 13, 2017, Chapter 2017-1, Laws of Florida became law and revised Florida's capital sentencing statute, § 921.141, Fla. Stat., to expressly provide that a defendant convicted of first degree murder cannot receive a death sentence unless the State convinces a unanimous jury to return a "recommendation" of death. Before it can return a unanimous death "recommendation" and authorize a death sentence, the jury must first "identify[] each aggravating factor" that it has unanimously found proven beyond a reasonable doubt. See § 921.141(2)(b). Next, the jury must unanimously find beyond a reasonable doubt that the aggravators that found to exist are sufficient to justify a death

sentence. Then, the jury must unanimously find beyond a reasonable doubt that the aggravators outweigh the mitigators. See § 921.141(2)(b)(2). Having made these unanimous findings, the jurors must then unanimously reject mercy in favor of a death sentence. Only if the jury returns a unanimous death verdict, can a judge under the revised § 921.141 impose a death sentence.

Under the revised § 921.141, the statutory maximum sentence that can be imposed on a first degree murder conviction is one of life imprisonment. For a death sentence to be permissible, the defendant must be convicted of the next higher degree of murder, i.e. capital first degree murder. The revised § 921.141 provides for proof of the **elements** necessary to raise a conviction of first degree murder up to capital first degree murder to be presented at a penalty phase proceeding. But, a unanimous jury's finding that the State has proven the necessary elements beyond a reasonable doubt is functionally a verdict finding the defendant guilty of capital first degree murder.

In cases in which new penalty phases have been ordered and are currently pending, the revised § 921.141 governs. The jury's unanimous findings that the State proved the necessary elements is functionally a guilty verdict convicting of a "new offense" - a higher degree of murder or capital first degree murder. The new penalty phases will functionally be trials as to whether the defendant is guilty of capital first degree murder. The orders

granting “new penalty phase[s]” have effectively reopened the issue of the defendant’s guilt. See *Card v. Jones*, 219 So. 3d 47, 48 (Fla. 2017);¹⁹ *Johnson v. State*, 205 So. 3d 1285 (Fla. 2016);²⁰ *Armstrong v. State*, 211 So. 3d 864, 865 (Fla. 2017);²¹ *Anderson v. State*, 220 So. 3d 1133, 1152 (Fla. 2017)²² In these cases, the jury will be deciding whether the defendant was guilty of capital first degree murder.²³

The State will be required to prove the existence of the elements beyond a reasonable doubt to the satisfaction of a unanimous jury before the judge will be authorized to impose a death sentence. The State will have to show that the elements, not of first degree murder, but of capital first degree murder were present on the date of the homicides at issue. See *Peugh v. United States*, 133 S. Ct. 2072, 2081 (2013); *Carmell v. Texas*,

¹⁹Card was convicted of first degree murder for a 1981 homicide. *Card v. State*, 453 So. 2d 17, 18 (Fla. 1984).

²⁰Johnson was convicted of 3 first degree murders committed in 1981. *Johnson v. State*, 438 So. 2d 774, 775 (Fla. 1983).

²¹Armstrong was convicted of first degree murder for a 1990 homicide. *Armstrong v. State*, 211 So. 3d at 865.

²²Anderson was convicted of a first degree murder for a 1994 homicide. *Anderson v. State*, 841 So. 2d 390, 394 (Fla. 2003).

²³Other death sentences that have recently been vacated by Florida circuit courts and new penalty phases ordered. See *State v. White*, Case No. 48-1978-CF-1840 (White had been convicted of a first degree murder committed on June 5, 1978 - *White v. State*, 415 So. 2d 719 (Fla. 1982)); *State v. Parker*, 43-1982-CF-000352-C (Parker had been convicted of a first degree murder committed in 1984. *Parker v. State*, 476 So. 2d 134, 135 (Fla. 1985)).

529 U.S. 513, 530 (2000). The State must prove beyond a reasonable doubt of the substantive elements of capital first degree murder, i.e. first degree murder plus the additional facts necessary to authorize the imposition of a death sentence. Otherwise, the only available sentence for a defendant convicted of first degree murder is life imprisonment.²⁴

To apply the revised statute as to the homicides committed by Card, Johnson, Armstrong, and Anderson, while allowing Mr. Raleigh's death sentences to stand even though he was not convicted of capital first degree murder would violated the Due Process and Equal Protection Clauses and the Eighth Amendment. This issue was not addressed in *Hitchcock* or *Asay*. "Cause" is present, and full briefing of the issued required.

WHEREFORE, Mr. Raleigh submits that this Court must grant full briefing and afford him the opportunity to be meaningfully heard as to why his execution is barred under the Due Process and Equal Protection Clauses and by the Eighth Amendment on issues he in his Rule 3.851 motion and his amendment to that motion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing

²⁴After the decision to vacating William White's death sentence and ordering a new penalty phase, the State announced that it would not seek to carry its burden of proof. Without a unanimous jury finding the facts or elements necessary for a conviction of capital first degree murder, under the revised § 921.141, a life sentence was the only option. On September 19, 2017, a life sentence was imposed on a 1978 homicide.

response with the Court's electronic filing system which will send a notice of electronic filing to opposing counsel of record, on this 1st day of January, 2018.

/s/ Martin J. McClain
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