

IN THE SUPREME COURT OF FLORIDA  
CASE NO. SC17-587

RONALD WAYNE CLARK,

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, RONALD WAYNE CLARK, in the above-entitled matter and respectfully responds to this Court's September 27<sup>th</sup> 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. Clark states:

1. Mr. Clark 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 27, 2017, before Mr. Clark had submitted anything to this Court regarding his appeal, this Court issued an order that provided:

Appellant shall show cause on or before Tuesday, October 17, 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 Wednesday, November 1, 2017, limited to no more than 15 pages. Appellant may file a reply to Appellee's reply on or before Monday, November 13, 2017, limited to no more than 10 pages.

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

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

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Pro. 9.030(a)(2). Mr. Clark 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. Clark 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.").<sup>1</sup>

4. In addition, this Court's June 6, 2017, *sua sponte* order stayed proceedings on Mr. Clark's appeal pending the disposition of *Hitchcock v. State*, Case No. SC17-445. Linking Mr.

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<sup>1</sup>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.

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

5. Importantly, should Mr. Clark 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. Clark's sentence of death is unconstitutional. Mr. Clark 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. Clark is not entitled to the standard appellate process. It is clear that this Court will not even allow Mr. Clark to file his briefing before deciding whether he

has shown "cause" within the meaning of the September 27<sup>th</sup> order which only affords Mr. Clark 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 27<sup>th</sup> 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 the 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 27<sup>th</sup> show cause order and without guidance as to what constitutes "cause" sufficient to allow an appeal to proceed, this Court before Mr. Clark 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. Clark 20 pages and 27<sup>2</sup> days to demonstrate some undefined "cause."

9. On December 10, 2016, Mr. Clark filed a Rule 3.851. On February 27, 2017, Mr. Clark amended his motion. The amended motion presented four claims: 1) Mr. Clark's sentences of death violated the Sixth Amendment, pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016). Mr. Clark's claim argued for the retroactivity of *Hurst* under both *Witt v. State*, 387 So. 2d 922 (Fla. 1980), and fundamental fairness; 2) Under *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), Mr. Clark's death sentence violates the Eighth Amendment because, despite the fact his jury was not properly instructed, a non-unanimous recommendation for death was returned as to both victims; 3) This Court's application of retroactivity to capital defendants whose death sentences became final after June 24, 2002, violates the Eighth Amendment; 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. Clark's ineffective assistance of counsel claims.

10. Additionally, specific circumstances and procedural issues were raised before the circuit court. For example, as to issues that arose during the litigation before the circuit court, the same day that Mr. Clark filed his amended Rule 3.851 motion,

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<sup>2</sup>Mr. Clark was given 20 days but requested a 10 day extension to file his response. This Court granted the extension, in part, allowing an additional 7 days for Mr. Clark to file his response.

the circuit court denied it. Thus, the State did not file a response and Mr. Clark was not provided an opportunity, at a case management conference to present argument on his claims or any other issue. See Fla. R. Crim. P. 3.851(f)(5)(B). These issues were neither raised nor decided in *Hitchcock v. State*.

11. Furthermore, at the time of Mr. Clark's 1991 trial, what the jury was told about its role may have been consistent with the procedure set forth in Florida law at that time. See *Combs v. State*, 525 So. 2d 853 (Fla. 1988). But now under the Sixth Amendment, it has been recognized that the procedure was unconstitutional. See *Hurst v. Florida*, 136 S. Ct. at 622 ("The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that Ring requires."). This is because it was recognized in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), that diminishing an individual juror's sense of responsibility for the imposition of a death sentence creates a bias in favor of a juror voting for death. *Caldwell*, 472 U.S. at 330 ("In the capital sentencing context there are specific reasons to fear substantial unreliability as well as **bias in favor of death sentences** when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court.") (emphasis added).

12. Indeed in *Caldwell v. Mississippi*, a unanimous jury verdict in favor of a death sentence was vacated because the jury was not correctly instructed as to its sentencing responsibility. *Caldwell* held: "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has

been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* 328-29. Jurors must feel the weight of their sentencing responsibility; they must know that if the defendant is ultimately executed it will be because no juror exercised her power to preclude a death sentence. Part of feeling the weight of a juror's sentencing responsibility is dependent upon knowing of their individual authority to preclude a death sentence. See *Blackwell v. State*, 79So. 731, 736 (Fla. 1918) (prejudicial error found in "the remark of the assistant state attorney as to the existence of a Supreme Court to correct any error that might be made in the trial of the cause, in effect told the jury that it was proper matter for them to consider when they retired to make up their verdict. Calling this vividly to the attention of the jury tended to lessen their estimate of the weight of their responsibility, and cause them to shift it from their consciences to the Supreme Court."). Where the jurors' sense of responsibility for a death sentence is either not explained or is in fact diminished, a jury's unanimous verdict in favor of a death sentence violates the Eighth Amendment and the resulting death sentence cannot stand. *Caldwell*, 472 U.S. at 341.

13. Certainly a review of whether the *Caldwell* violations were so egregious that fundamental fairness and the Eighth Amendment require Mr. Clark's death sentence to be vacated is a factual issue that neither could be raised or addressed in *Hitchcock v. State*.

14. Counsel can and does note that the procedure that this Court has unveiled for use in Mr. Clark's case was not employed in *Hitchcock v. State*. There was no requirement there that Mr. Hitchcock show "cause" because his appeal would proceed under the Florida Rules of Appellate Procedure. There Mr. Hitchcock was permitted to have counsel brief his issues.<sup>3</sup> 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. Clark 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.

15. Indeed, 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

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<sup>3</sup>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 cataclysmic shift in Florida and Eighth Amendment law that have followed 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 Mr. Peterka's case until June 8, 2017. See *Peterka v. State*, Case No. SC17-593. And, Mr. 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 Mr. Peterka filed his Initial Brief which demonstrates the stark distinctions between the issues and arguments that he and Mr. Hitchcock presented, he, too, has now received an order to show cause.



interpreted in *Hurst v. State* to defendants whose death sentences were final when the Supreme Court decided *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

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

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 or at issue there.

16. *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.

17. *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*.

18. And, 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).

19. Because, undersigned was not counsel for Mr. Hitchcock, she could not present this argument, or any others in a motion for rehearing. And, due to the unusual procedure that this Court has directed, Mr. Clark is precluded from being heard and fully presenting his arguments.

20. Mr. Clark submits that this procedure along with the unknown standard of what constitutes cause violates due process and equal protection. Mr. Clark 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. CLARK'S SUCCESSIVE RULE 3.851 MOTION**

21. As to the claims in Mr. Clark's Rule 3.851 motion, Mr. Clark raised at least one claim that does not appear to have been raised in Mr. Hitchcock's 3.851 motion because there is nothing in the initial brief addressing it and this Court's opinion does not address it. As to the other three claims, although there is some overlap with Mr. Hitchcock's arguments, each one of Mr. Clark's claims can only be resolved by an analysis of matters specific to his case.<sup>4</sup>

22. In his Rule 3.851 motion, Mr. Clark discussed the decisions in *Mosley v. State* and *Asay v. State* as they related to Claim I, Claim II, and Claim III.<sup>5</sup> As to Claim I, a Sixth Amendment claim based upon *Hurst v. Florida*, Mr. Clark 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

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<sup>4</sup>For example, the question of whether "fundamental fairness" or "manifest injustice" warrant a particular result in a capital defendant's case requires a case by case analysis. The concept 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* are no different. Both require a case by case determination of their applicability.

<sup>5</sup>Claim III was in fact premised upon the line seemingly drawn in *Mosley* and *Asay*. He argued that the arbitrariness of that line violated the Eighth Amendment under *Furman v. Georgia*.

*Witt v. State* means that each defendant with a pre-*Ring* death sentence is entitled to receive what Mr. Asay received, a case specific balancing of the *Witt* factors.<sup>6</sup> In his briefing, Mr.

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<sup>6</sup>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 Mr. Asay should not receive the retroactive benefit of the Sixth Amendment ruling in *Hurst v. Florida* because his conviction and death sentence were final in 1991. This Court observed that *Hurst v. Florida* found merit in a claim that Mr. Hurst had raised based upon the Sixth Amendment ruling in *Ring v. Arizona*, 536 U.S. 584 (2002). Without hearing what additional arguments a litigant with a death sentence that became final after Mr. Asay's 1991 finality date and before the issuance of *Ring* on June 24, 2002, might have under *Witt*, this Court in *Asay* referenced June 24, 2002, as a potential dividing line. 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 Mr. Hitchcock and Mr. Clark 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. Clark 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. Clark is entitled to raise in this, his appeal

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

23. Claim II of Mr. Clark's 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

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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*.

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.").

24. 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 unrepresented 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).

25. This Court's recognition that "a reliable penalty phase requires" a unanimous jury death recommendation means that the jury's 11-1 death recommendations at Mr. Clark's penalty phase do 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. Clark's claim is that *Hurst v. State* recognized that the non-unanimous recommendation shows that Mr. Clark's death sentence possesses substandard reliability. Mr. Clark's 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.").

26. An examination of Mr. 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 Mr. Hitchcock's initial brief does raise an Eighth Amendment argument arising from *Hurst v. State*, but focuses on the evolving standards of decency. In *Hurst v. State*, this Court found that there existed a national consensus that death sentences should only result when a jury unanimously consented to its imposition. *Id.*, 202 So. 3d at 61. While there is a basis for Mr. Hitchcock's argument within *Hurst v. State*, it is not the Eighth Amendment argument and Florida Constitution argument that Mr. Clark will be making or that this Court decided in its opinion in *Hitchcock v. State*.

27. Again, Mr. Clark 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 Mr. Hitchcock, and it provides a much different and stronger

argument that Mr. Clark 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. Clark 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. Clark's case, the scales are tipped and the interests of fairness exceed the State's interest in finality. The disposition of Mr. Hitchcock's appeal and arguments made therein requiring a case by case evaluation does not address the "individual injustice" present in Mr. Clark's case.

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

29. And, while Mr. 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 Mr. Hitchcock's case does not govern the result in Mr. Clark's case.

30. Claim III of Mr. Clark's Rule 3.851 motion, challenges the seemingly bright line, as in time line, that resulted from *Mosley* and *Asay*. Here, Mr. Clark 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*.

31. Claim III is premised upon the Eighth Amendment and its requirement that a death sentence carry extra reliability in order to insure that it was not imposed arbitrarily. Heightened reliability in capital cases is a core value of the Eighth Amendment and *Furman v. Georgia*. In *Hurst v. State*, this Court

held that enhanced reliability warranted the requirement that a death recommendation be returned by a unanimous jury. In doing so, the Court effectively recognized that a death sentence without the unanimous consent of the jury was lacking in reliability and thus did not carry the heightened reliability required by the Eighth Amendment. In that context, Mr. Clark will argue in his appeal of the denial of Claim III of his Rule 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*.<sup>7</sup> Mr. Hitchcock did not make this argument as to the retroactive benefit of *Hurst v. State* being arbitrarily limited by a bright line cutoff in violation of the Eighth Amendment. And, certainly, this Court did not address this issue in its opinion denying Mr. Hitchcock relief.

32. 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

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<sup>7</sup>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.

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.

33. As to Claim IV of Mr. Clark's 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. Clark 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. Clark's newly discovered evidence, and *Strickland* claims in his previous motion to vacate. Mr. Clark's challenge is to this Court's affirmance of the denial of his prior Rule 3.851 motion.

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

35. In his initial briefing, Mr. Hitchcock does not the same claim that Mr. Clark presented. And, this Court did not address that issue in its opinion denying Mr. Hitchcock relief.

36. In Argument VII of his briefing, Mr. Hitchcock argues that all prior postconviction rulings must be revisited in light of *Hurst v. Florida*. Beyond specifying a prior denial of a claims based on *Ring v. Arizona* and on *Caldwell v. Mississippi*, Mr. Hitchcock just seeks to incorporate his prior 3.851 motions. See (*Hitchcock v. State*, Case No. SC17-445, Initial Brief at 57).

This Court has previously held referring to and incorporating by reference arguments presented in a 3.851 motion constitutes an inadequate way to present issues. *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990). Mr. Hitchcock's claim is not the same as Claim IV of Mr. Clark's Rule 3.851 motion, nor the way Mr. Clark will brief his claims before this Court.

37. Mr. Clark 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 looking forward, Mr. Clark will be entitled at a resentencing to a less severe sentence unless the jury unanimously returns a death recommendation. Given that Mr. Clark's 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. Clark will receive a sentence of less than death.

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

WHEREFORE, Mr. Clark 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 reply has been furnished by electronic service to Jennifer Ann Donahue, Assistant Attorney General, Office of the Attorney General, The Capitol, PL-01, Tallahassee, FL 32399-1050, on thus 24<sup>th</sup> day of October, 2017.

/s/. Linda McDermott  
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