IN THE SUPREME COURT OF FLORIDA

CASE NO.

DANIEL PETERKA,

Petitioner,

v.

JULIE L. JONES,
Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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JURISDICTION

A writ of habeas corpus is an original proceeding in this Court governed by Fla. R. App. P. 9.100. This Court has original jurisdiction under Fla. R. App. P. 9.030(a)(3) and Article V, § 3(b)(9), Fla. Const. The Constitution of the State of Florida guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Art. I, § 13, Fla. Const.

REQUEST FOR ORAL ARGUMENT

Mr. Peterka requests oral argument on this petition.

ARGUMENT I

THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION REQUIRES THE RETROACTIVE APPLICATION OF THE SUBSTANTIVE RULE ESTABLISHED BY CHAPTER 2017-1, WHICH PRECLUDES THE IMPOSITION OF A DEATH SENTENCE UNLESS A JURY UNANIMOUSLY RETURNS A DEATH RECOMMENDATION.

A. Introduction.

Chapter 2017-1 creates a substantive right which is an extension of the substantive right first set forth in Chapter 2016-13. When a State creates a right that carries a liberty or life interest with it, the right is protected by the Due Process Clause of the Fourteenth Amendment. The US Supreme Court has recognized that States "may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment." *Vitek v. Jones*, 445 U.S. 480, 488 (1980). "Once a State has granted prisoners 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.'" *Id.* at 488-89. *See 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.").

Herein, Mr. Peterka argues that pursuant to the Due Process Clause of the Fourteenth Amendment the substantive right set forth in Chapter 2017-1 which has been extended retrospectively to others must also be extended to him.

B. Creation Of Substantive Right.

With the March 7, 2016, enactment of Chapter 2016-13, a substantive right was statutorily created - a capital defendant in Florida for the first time had a right to a life sentence unless 10 of 12 jurors voted to recommend a death sentence. *See Perry v. State*, 210 So. 3d at 638 ("The changes further mandate that a life sentence be imposed unless ten or more jurors vote for death."). Chapter 2016-13 rewrote § 921.141, and provided that without 10 or more jurors voting in favor of a death sentence, the defendant would not be eligible for a death sentence, i.e. he or she would be acquitted of capital first degree murder. Under § 921.141 as rewritten by Chapter 2016-13, capital first degree murder was first degree murder plus the additional statutorily defined facts necessary to authorize a

judge to impose a death sentence as reflected in a jury's death recommendation. The additional facts could be found by as few as ten of the twelve jurors.

Certainly, the legislature could have provided that the right to a life sentence unless at least 10 jurors voted to recommend a death sentence only applied in homicide cases in which the homicide was committed after the right was enacted on March 7, 2016. But, that was not the legislative intent. Instead, the legislature intended this right to a life sentence unless 10 jurors voted to recommend a death sentence to be extended retrospectively to any defendant charged with a capital homicide that had occurred prior to March 7, 2016, with a prosecution pending after the effective date of Chapter 2016-13.

Seven months later on October 14, 2016, this Court issued *Hurst v. State*. There, it found that the Florida Constitution guarantee to a right to trial by jury in criminal cases meant that to return a guilty verdict the jury had to unanimously find the elements of the criminal offense were proven. As a result, this Court concluded that a jury in a capital case had to unanimously find all of the statutorily defined facts that were necessary to authorize the imposition of a death sentence. *Hurst v. State*, 202 So. 3d at 44 ("We reach this holding based on the mandate of *Hurst v. Florida* and on Florida's constitutional right to jury trial, considered in conjunction with our precedent

concerning the requirement of jury unanimity as to the elements of a criminal offense.").

At the same time that *Hurst v. State* issued, this Court issued *Perry v. State*. On the basis of *Hurst v. State*, this Court in *Perry v. State* found the 10-2 provision in Chapter 2016-13 unconstitutional under the Florida Constitution. In order to be constitutional, the jury findings required in Chapter 2016-13 had to be found unanimously by the jury. Findings made by ten of twelve jurors did not comport with the Florida Constitution.

As to the remainder of Chapter 2016-13, this Court found it to be constitutionally valid. This Court specifically recognized that Chapter 2016-13 was intended to be applied retrospectively to all pending homicide prosecutions including those in which the homicide had occurred prior to March 7, 2016, the date Chapter 2016-13 was enacted. This Court observed that such retrospective application was proper. *Id.* at 635 ("we conclude that ... most of the provisions of the Act can be construed constitutionally and could otherwise be validly applied to pending prosecutions"). *See Evans v. State*, _ So. 3d _, 2017 WL 664191 (Fla. Feb. 20, 2017). Chapter 2016-13 was clearly intended to govern at resentencings ordered on the basis of *Hurst v. Florida* error or any other kind of error regardless of the date that the homicide was committed.

However, this Court in *Perry v. State* held that the 10-2 provision was not severable. Under separation of powers as

provided by the Florida Constitution, this Court left to the Florida Legislature rewrite the statute in a constitutional fashion.

On March 13, 2017, Chapter 2017-1 was enacted. It was meant to statutorily fix the defect identified in *Perry v. State*. The only change made to the revised § 921.141 was to replace the 10-2 provision with one requiring the jury to unanimously return a death recommendation before a judge was authorized to impose a death sentence. No change was made to the statute evincing an intent to retreat from the retrospective application of the rewritten § 921.141.

While *Hurst v. State* and *Perry v. State* were premised upon the Florida Constitution, Chapter 2016-13 and Chapter 2017-1 were both crafted by the Florida Legislature and signed into law by the Governor. This Court has said: "Generally, the Legislature has the power to enact substantive law, while the Court has the power to enact procedural law." *Allen v. Butterworth*, 756 So. 2d 52, 59 (Fla. 2000). This Court has also written: "Substantive law has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer." *State v. Garcia*, 229 So. 2d 236, 238 (Fla. 1969). This Court has explained:

> Substantive law has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer. *State v. Garcia*, 229 So.2d 236 (Fla.1969).

> It includes those rules and principles which fix and declare the primary rights of individuals with respect towards their persons and property. *Adams v. Wright*, 403 So.2d 391 (Fla.1981).

Haven Federal Savings & Loan Ass'n v. Kirian, 579 So. 2d 730, 732 (Fla. 1991). In *Benyard v. Wainwright*, 322 So. 2d 473, 475 (Fla. 1975), this Court reiterated:

> Substantive law prescribes the duties and rights under our system of government. The responsibility to make substantive law is in the legislature within the limits of the state and federal constitutions.

Pursuant to separation of powers, procedural matters are a judicial function, not a legislative function. *See State v. Raymond*, 906 So. 2d 1045, 1049 (Fla. 2005) ("where there is no substantive right conveyed by the statute, the procedural aspects are not incidental; accordingly, such a statute is unconstitutional."); *Massey v. David*, 979 So. 2d 931, 937 (Fla. 2008) ("We have held that where a statute contains some procedural aspects, but those provisions are so intimately intertwined with the substantive rights created by the statute, that statute will not impermissibly intrude on the practice and procedure of the courts in a constitutional sense, causing a constitutional challenge to fail.").

If Chapter 2016-13 had been purely procedural, it would have violated the separation of powers doctrine enshrined in the Florida Constitution. Moreover when this Court determined that the 10-2 provision was unconstitutional, it could have fixed the

defect and rewritten the governing law if the provision was one of procedure. This Court did not do that because it recognized that what was at issue was substantive law, i.e. "that part of the law which creates, defines, and regulates rights." *Garcia v. State*, 229 So. 2d at 238.

Chapter 2016-13 initially established a retrospective substantive right that a capital defendant had a right to a life sentence if three or more jurors voted in favor of a life sentence. *See Perry v. State*, 210 So. 3d at 638 ("The changes further mandate that a life sentence be imposed unless ten or more jurors vote for death."). Then, this Court in *Hurst v. State* determined the facts statutorily necessary to authorize a death sentence were in essence elements of an offense and under the Florida Constitution had to be found by a unanimous jury. On the basis of the ruling in *Hurst v. State*, the 10-2 provision of Chapter 2016-13 was declared unconstitutional. In Chapter 2017-1 the Florida Legislature rewrote the statute to provide that a defendant convicted of first degree murder was to receive a life sentence unless a jury returned a unanimous death recommendation. The substantive right recognized in Chapter 2016-13 was expanded.[1] The right was extended to the defendants in all

[1]Three weeks before Chapter 2017-1 was enacted, this Court issued *Evans v. State*, 2017 WL 664191 at *3 and concluded that the 10-2 provision of Chapter 2016-13 could be applied to pending prosecutions as long as a death sentence was only imposed if the jury returned a unanimous death recommendation. This decision

homicide prosecutions regardless of the date of the underlying homicide, and regardless of the date that a homicide conviction became final.

C. The Substantive Right Cannot Be Extended Arbitrarily In The Hit Or Miss Fashion That Is Occurring So Far.

In *Evitts v. Lucey*, 469 U.S. 387, 400 (1985), the US Supreme Court recognized that "a State need not provide a system of appellate review as of right at all." States have the option to not provide appellate review of criminal convictions. *See McKane v. Durston*, 153 U.S. 684 (1894). But "when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution-and, in particular, in accord with the Due Process Clause." *Evitts v. Lucey*, 469 U.S. at 401. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983) ("There is, of course, no constitutional right to an appeal, but in *Griffin v. Illinois*, 351 U.S. 12, 18, (1955), and *Douglas v. California*, 372 U.S. 353 (1963), the Court held that if an appeal is open to those who can pay for it, an appeal must be provided for an indigent."). "Once a State has granted prisoners a liberty interest, [the US Supreme Court has]

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made it clear that capital prosecutions could proceed and that a legislative rewrite of the statute was not required. Despite this, the legislature nonetheless revised § 921.141 to require a unanimous death recommendation be returned before a death sentence was authorized. Thus, the unanimity requirement was fully and voluntarily embraced by the legislature and the governor when Chapter 2017-1 was enacted on March 13, 2017.

held that due process protections are necessary 'to insure that the state-created right is not arbitrarily abrogated.'" *Vitek v. Jones*, 445 U.S. at 488-89. Who gets the benefit of a substantive right and who does not must not offend the Due Process Clause. *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.").

The Eighth Amendment is implicated if substantive rights are doled out arbitrarily in capital cases. In *Johnson v. Mississippi*, 486 U.S. 578 (1988), the US Supreme Court discussed the Eighth Amendment's requirement that death sentences be reliable and free from arbitrary factors:

> The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special " 'need for reliability in the determination that death is the appropriate punishment' " in any capital case. See *Gardner v. Florida,* 430 U.S. 349, 363–364, 97 S.Ct. 1197, 1207–1208, 51 L.Ed.2d 393 (1977) (WHITE, J., concurring in judgment)(quoting *Woodson v. North Carolina,* 428 U.S. 280, 305, 96 S.Ct. 2978, 2991–92, 49 L.Ed.2d 944 (1976)). Although we have acknowledged that "there can be 'no perfect procedure for deciding in which cases governmental authority should be used to impose death,' "**we have also made it clear that such decisions cannot be predicated on** mere "caprice" or on "**factors that are constitutionally impermissible or totally irrelevant to the sentencing process**." *Zant v. Stephens,* 462 U.S. 862, 884–885, 887, n. 24, 103 S.Ct. 2733, 2747, 2748, n. 24, 77 L.Ed.2d 235 (1983).

Johnson v. Mississippi, 486 U.S. 584-85 (emphasis added).

The right to a life sentence unless a jury unanimously

recommends a death sentence under revised § 921.141 is being extended to any capital defendant who has received a resentencing that is now currently pending. This is due to the fact that Chapter 2016-13 and Chapter 2017-1 were both intended to apply retrospectively to all pending capital prosecutions regardless of the date of the homicide or the date that a first degree murder conviction became final.

This Court recently ordered a resentencing in Lancelot Armstrong's case. *Armstrong v. State*, 211 So. 3d 864 (Fla. 2017). The homicide at issue there occurred in early 1990. Armstrong's conviction and death sentence were affirmed on direct appeal. *Armstrong v. State*, 642 So. 2d 730 (Fla. 1994), *cert denied* 514 U.S. 1085 (1995). In collateral proceedings, a resentencing was ordered. *Armstrong v. State*, 862 So. 2d 705 (Fla. 2003). However, the first degree murder conviction that became final in April of 1995 has remained final. At the upcoming resentencing for a first degree murder conviction that has been final since 1995 that was a 1990 homicide, Armstrong will have the substantive right to a life sentence for that conviction final in 1995 unless a jury returns a unanimous death recommendation.

This Court recently granted a resentencing in Paul Johnson's case. *Johnson v. State*, 205 So. 3d 1285 (Fla. 2016). He had been convicted of three 1981 homicides. The convictions were final in 1993. *Johnson v. State*, 608 So. 2d 4 (Fla. 1992), *cert denied*,

508 U.S. 919 (1993). His death sentences were vacated in collateral proceedings in 2010. *Johnson v. State*, 44 So. 3d 51 (Fla. 2010). After again receiving death sentences, this Court in his recent appeal ordered another resentencing. At the upcoming resentencing on those three convictions final in 1993 as to homicides committed in 1981, Johnson will have substantive right to life sentences unless a jury returns a unanimous death recommendations.

The Eleventh Circuit recently granted a resentencing in John Hardwick's case. *Hardwick v. Sec'y Fla. Dep't of Corr.*, 803 F.3d 541 (11th Cir. 2015). Hardwick was convicted of a 1984 homicide. His conviction became final in 1988. *Hardwick v. State*, 521 So. 2d 1071 (Fla. 1988). That conviction is still intact. At the upcoming resentencing, Hardwick will have the substantive right to life sentences unless a jury returns a unanimous death recommendations.

This Court recently ordered a resentencing in James Card's case. Card was convicted of a 1981 homicide. His conviction became final in 1984. *Card v. State*, 453 So. 2d 17 (Fla. 1984). His death sentence was vacated in collateral proceedings because the judge had the State write his sentencing findings on an ex parte basis. When this was discovered nearly ten years later, postconviction relief issued and a resentencing was conducted in 1999. An 11-1 death recommendation led to another death sentence

that was affirmed, and then became final 4 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). Because his petition for certiorari review was denied four days after *Ring* issued, this Court has ordered a resentencing at which Card will have the substantive right to a life sentence unless the jury unanimously returns a death recommendation.

A circuit court has recently granted J.B. Parker a resentencing on the basis of *Hurst v. State*. Though the State will likely appeal, under the governing law this Court is likely to affirm the grant of a resentencing. Parker was convicted of a 1982 homicide and sentenced to death. The conviction and death sentence became final in 1985. *Parker v. State*, 476 So. 2d 134 (Fla. 1985). In 1998, Parker's death sentence was vacated though the conviction remained intact and final. *State v. Parker*, 721 So. 2d 1147 (Fla. 1998). Parker received another death sentence after the jury returned an 11-1 death recommendation. This Court affirmed on appeal. *Parker v. State*, 873 So. 2d 270 (Fla. 2004). Now because the death sentence became final after *Ring v. Arizona* issued, the circuit court has ordered another resentencing. At a resentencing on his first degree murder conviction final in 1985, Parker will have the substantive right to a life sentence unless the jury unanimously returns a death recommendation.

Chapter 2017-1 now provides that a defendant convicted of

first degree murder has a right to be sentenced to life imprisonment unless the State convinces a jury to unanimously return a death recommendation.[2] This right surely is a substantive right. It is not merely a procedural rule. If it were, it would violate the separation of powers doctrine for it to be enacted by the legislature.

When this Court in *Perry v. State* declared the 10-2 provision in Chapter 2016-13 unconstitutional, it did not treat the matter of requiring a unanimous death recommendation as merely a matter of procedure over which this Court has exclusive authority, akin to establishing time tables for filing motions or briefs. *Allen v. Butterworth*, 756 So. 2d at 62 ("this Court the exclusive authority to set deadlines for postconviction

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[2]The Florida Legislature in Chapter 2016-13 first recognized that a defendant convicted of first degree murder had a substantive right to be sentenced to life imprisonment unless the State convinced ten of twelve jurors to vote in favor of a death recommendation. This substantive right was new. Previously, six jurors voting for a life sentence constituted a life recommendation that the judge could override and impose a death sentence if the life recommendation was not supported by a reasonable basis. When Chapter 2016-13 eliminated the judicial override of a life recommendation and reduced the number of jurors necessary for the jury's verdict to constitute a life recommendation from six to three, a substantive right to a life sentence was established when three jurors voted for a life sentence. Chapter 2016-13 did include a fix for the constitutional defect in § 921.141 identified in *Hurst v. Florida*. But, neither the elimination of the judicial override nor the requirement that ten jurors must vote in favor of a death sentence instead of seven jurors before a the jury's verdict constituted a death recommendation was a change mandated by *Hurst v. Florida*. Instead, these changes reflected Florida's evolving standards of decency.

motions."). Rather, this Court in *Perry v. State* regarded the matter as substantive, i.e. a defendant's substantive right to a life sentence absent a jury's unanimous findings of the facts necessary to authorize a death sentence. *State v. Raymond*, 906 So. 2d 1045, 1048-49 (Fla. 2005) ("matters of substantive law are within the Legislature's domain. Substantive law has been defined as **that part of the law which creates, defines, and regulates rights**, or that part of the law which courts are established to administer. *State v. Garcia*, 229 So.2d 236 (Fla.1969). It includes those rules and principles which fix and declare the primary rights of individuals with respect to their persons and property. *Adams v. Wright*, 403 So.2d 391 (Fla.1981)."") (emphasis added).

The procedural rule/substantive right dichotomy matters in analyzing Chapter 2017-1. Procedural rules attach to a proceeding. For example, this Court could announce effective July 1, 2017, appellants in capital appeals will have thirty days from the date the record on appeal is filed to submit the initial brief. Another example is when this Court has amended Rule 3.851 effective on a particular date to change what a motion to vacate must contain. Procedural rules are promulgated by this Court and attach to a proceeding, i.e. an appeal, Rule 3.851 proceedings, etc.

On the other hand, substantive rights attach to people.

Substantive law attaches to events. For example, the substantive law defining the crime of first degree murder can only attach to homicides committed after the substantive law established the elements of first degree murder. A substantive right, for example the right to counsel, attaches to a person charged with a crime. The Eighth Amendment right to present mitigating evidence attaches to a person convicted of first degree murder when the State seeks to impose a death sentence. Similarly, the right to require the State to prove aggravating factors beyond a reasonable doubt is a right that attaches to a defendant convicted of first degree murder.

Chapter 2017-1 provides that a defendant who has been convicted of first degree murder cannot receive a death sentence unless the jury returns a unanimous death recommendation which by definition includes unanimously finding every fact necessary to authorize a judge to impose a death sentence. This provision is not at all like a procedural rule setting forth page limitations on an initial brief. Instead, this provision is much more like the requirement that the State must prove each element beyond a reasonable doubt.

Perhaps this can be better seen by looking at the change in law that Chapter 2017-1, and its predecessor Chapter 2016-13, brought about. Before March 7, 2016, Florida's capital sentencing scheme provided for a jury to return an advisory verdict by a

majority vote, and then for the judge to consider the advisory verdict and impose a sentence. Under the Eighth Amendment, the jury and the judge were co-sentencers. *Espinosa v. Florida*, 505 U.S. at 1083 ("We merely hold that, if a weighing State decides to place capital sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances."); *Lambrix v. Singletary*, 520 U.S. 518, 528 (1997) ("In *Espinosa*, we determined that the Florida capital jury is, in an important respect, a cosentencer with the judge."). For its part, the jury did not identify what if any facts had been found, let alone explain how many jurors found any particular fact. If six jurors voted to recommend a life sentence that constituted a life recommendation that a judge could override and impose death if the life recommendation was unreasonable.

After Chapter 2017-1, the jury is required to unanimously find all facts necessary to authorize a judge to impose a death sentence and set forth its unanimous findings in a special verdict. The jury, aware that each juror can preclude a death sentence by voting to recommend a life sentence, must unanimously vote in favor of a death recommendation before a judge is authorized to impose a death sentence.

This change is not like a procedural rule imposing a shorter page limitation on an initial brief, or reducing the time allotted for the submission of an appellate brief. It is not like

a rule requiring Rule 3.851 motion identify all the issues raised on direct appeal or setting forth how soon a case management hearing must be held. It is not even like a rule substituting fact finding by a jury in place of fact finding by a judge.[3]

Instead, Chapter 2017-1 changes a co-sentencer's role from merely advisory to necessary, and requires not just the support of seven jurors, but unanimity of all twelve jurors for a death recommendation to be returned. This empowers each juror to know that he or she can preclude a death sentence. The change in the jury's role and the necessity of unanimity means that its verdict will be more reliable and more meaningful in exactly the same way that requiring proof beyond a reasonable doubt instead of by a preponderance of the evidence makes a criminal defendant's Sixth Amendment rights stronger and more meaningful.

If Chapter 2017-1 were merely procedural besides being enacted in violated of the separation of powers doctrine, it would be proper for it to attach to any capital sentencing proceeding conducted after its effective date because it only provides the manner by which the parties should seek to litigate.

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[3]Unlike the circumstances in *Schriro v. Summerlin*, 542 U.S. 348 (2004), the change here is going from an advisory jury recommendation requiring seven of twelve jurors to vote in favor of an advisory death recommendation, to requiring a unanimous death recommendation before a judge is authorized to impose a death sentence. In *Schriro v. Summerlin*, 542 U.S. at 355-56, the US Supreme Court noted that a substantive right would apply retroactively if it seriously improved accuracy and reliability.

State v. Raymond, 906 So. 2d at 1048 ("practice and procedure is the method of conducting litigation involving rights and corresponding defenses.").

However, Chapter 2017-1 is clearly substantive because it gives a defendant convicted of first degree murder something that he or she did not have before: a right to a life sentence unless the jury returns a unanimous death recommendation. Quite clearly, Chapter 2017-1 precludes the imposition of a death sentence unless the jury returns a unanimous death recommendation.

Because Chapter 2017-1 sets forth a substantive right that is personal in that it belongs to someone. For example, the Sixth Amendment right to representation by counsel attaches to a defendant who is criminally charged. A substantive right must attach to a person, not a proceeding. Clearly, the right to a life sentence unless the jury unanimously returns a death recommendation attaches to a defendant who is convicted of first degree murder. It is a right that springs to life when the first degree murder conviction is returned.

Certainly, the legislature could have provided that the right set forth in Chapter 2017-1 only attached to defendants convicted of first degree murder after Chapter 2017-1 became effective, i.e. March 13, 2017. But, the legislature chose not to do it that way. Instead, Chapter 2017-1 was meant to apply retrospectively.

This means the substantive right to a life sentence unless the jury unanimously returns a death recommendation has attached to James Card's first degree murder conviction which was final in 1984. It will attach to J.B. Parker's first degree murder conviction which was final in 1985. It has attached to John Hardwick's first degree murder conviction which was final in 1988. It has also attached to Paul Johnson's first degree murder convictions which were final in 1993. And, it has attached to Lancelot Armstrong's first degree murder conviction which was final in 1995.

In a proceeding to determine the sentence to be imposed on Card's 1984 conviction, the substantive right set forth in Chapter 2017-1 will apply. In a proceeding to determine the sentence to be imposed on Parker's 1985 conviction, the substantive right set forth in Chapter 2017-1 will apply. In a proceeding to determine the sentence to be imposed on Hardwick's 1988 conviction, the substantive right set forth in Chapter 2017-1 will apply. In a proceeding to determine the sentence to be imposed on Johnson's 1993 convictions, the substantive right set forth in Chapter 2017-1 will apply. And in a proceeding to determine the sentence to be imposed on Armstrong's 1995 conviction, the substantive right set forth in Chapter 2017-1 will apply. Due process requires that Mr. Peterka be given the same substantive right as to the sentence to be imposed on his

conviction which was final in January, 1995. *Peterka v. State*, 640 So. 2d 59 (Fla. 1994), *cert. denied Peterka v. Florida*, 513 U.S. 1129 (1995).

A State cannot establish a substantive right that provides a life and/or liberty interest which it arbitrarily extends to some, but not others. The substantive right set forth in Chapter 2017-1 cannot be extended retrospectively across time in the manner that children play hopscotch. Granting the right to those convicted defendants who through luck and good fortune happened to get a resentencing ordered and/or then when resentenced to death, the death sentence was not final when *Ring v. Arizona* issued so that another resentencing is ordered solely on the basis of timing. The reasons that Card, Parker, Hardwick, Johnson, and Armstrong will receive the benefit of the substantive right set forth in Chapter 2017-1, has nothing to do the circumstances of the crimes for which they were convicted, nor their character or mitigating circumstances. To give them the benefit of Chapter 2017-1 while depriving Mr. Peterka of that benefit can only be described as arbitrary and a violation of due process. *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. Art. I, §§ 9, 16, Fla. Const.").

In addition to violating the Due Process Clause, depriving Mr. Peterka of the benefit of Chapter 2017-1 violates the Eighth Amendment. In *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014), the US Supreme Court found that Florida's procedure for determining intellectual disability was inadequate to reliably insure that an intellectually disabled defendant was not executed. "A State that ignores the inherent imprecision of these tests risks executing a person who suffers from intellectual disability." *Id.* at 2001. Because Florida ignored that inherent imprecision, the Supreme Court found that "Florida's rule is invalid under the Constitution's Cruel and Unusual Punishments Clause." *Id.* The Supreme Court explained: "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. Florida's law contravenes our Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world."

This Eight Amendment principle applies here where Lancelot Armstrong was convicted of a murder that occurred shortly after the one for which Mr. Peterka was convicted. Armstrong's conviction was final the same year Mr. Peterka's conviction was final. Yet, Armstrong has the right to a life sentence as to that

conviction unless a jury unanimously returns a death recommendation, while Mr. Peterka is under a death sentence when four jurors voted against the imposition of a death sentence. There is only one word to describe the distinction between Armstrong's circumstances and Mr. Peterka's, and that word is "arbitrary." To allow this arbitrary distinction and leave Mr. Peterka's death sentences intact while Lancelot Armstrong and others receive the right to a life sentence unless the jury returns a unanimous death recommendation violates *Furman v. Georgia*, 408 U.S. 238 (1972).

There can be no question that with four jurors in Mr. Peterka's case voting in favor of a life sentence, there is a very large risk that the death penalty was improperly imposed because he was not unanimously convicted of capital first degree murder, i.e. first degree murder plus those statutorily defined facts necessary to authorize a judge to impose a death sentence. Indeed, under Chapter 2017-1, the 8-4 death recommendation would constitute an acquittal of capital first degree murder and have precluded the imposition of a death sentence.[4]

There is no valid basis under Art. I, §§ 9, 16, Fla. Const., the Due Process Clause of the Fourteenth Amendment, and the Eighth Amendment for depriving Mr. Peterka of that statutorily

[4]Even under Chapter 2016-13, the 8-4 death recommendation would constitute an acquittal of capital first degree murder and preclude the imposition of a death sentence.

created substantive right given that is being extended to Card, Parker, Hardwick, Johnson and Armstrong. "Once a State has granted prisoners 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. at 488-89. *See 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.").

CONCLUSION AND RELIEF REQUESTED

Mr. Peterka, through counsel, respectfully urges that the Court issue its Writ of Habeas Corpus and vacate his unconstitutional sentence of death.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus has been furnished by electronic service to Charmaine Millsaps, Assistant Attorney General, Office of the Attorney General, The Capitol, PL-01, Tallahassee, FL 32399-1050, on May 30, 2017.

/s/ Linda McDermott
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