IN THE SUPREME COURT OF FLORIDA
CASE NOs. SC17-593 & SC17-1003

DANIEL JON PETERKA,

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, **DANIEL JON PETERKA,** in the above-entitled matter and respectfully responds to this Court's September 27th 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. Peterka states:

1. Mr. Peterka is under a sentence of death. He appealed the denial of his successive Rule 3.851 motion on March 23, 2017. And, Mr. Peterka filed his Initial Brief on May 30, 2017. Simultaneously, 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. On June 8, 2017, this Court *sua sponte* entered an order staying Mr. Peterka's case. Then on September 27, 2017, this Court directed Mr. Peterka to show cause "why the trial court's order should not be affirmed and the petition for writ of habeas corpus should not be denied in light

of this Court's decision in Hitchcock v. State, SC17-445.

2. Initially, Mr. Peterka submits that a review of his Initial Brief and Petition for Writ of Habeas Corpus demonstrate the stark distinctions between the issues and arguments that he and Mr. Hitchcock presented.

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

3. First, Mr. Peterka submits that his appeal is not one within this Court's discretionary jurisdiction. *See* Fla. R. App. Pro. 9.030(a)(2). Mr. Peterka 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).

4. Because Mr. Peterka has been given the substantive right to appeal the denial of his successive Rule 3.851 motion, that substantive right is protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Evitts v. Lucey*, 469 U.S. 387, 393 (1985)("if a State has created appellate courts as "an integral part of the ... system for finally adjudicating the guilt or innocence of a defendant," *Griffin v. Illinois*, 351 U.S., at 18, 76 S.Ct., at 590, the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution."). This principle

applies to collateral appeals as well as direct appeals. *Lane v. Brown*, 372 U.S. 477, 484-85 (1963)("the *Griffin* principle also applies to state collateral proceedings, and *Burns* leaves no doubt that the principle applies even though the State has already provided one review on the merits.").[1]

5. In addition, this Court's June 8, 2017, *sua sponte* order stayed proceedings on Mr. Peterka's appeal pending the disposition of *Hitchcock v. State*, Case No. SC17-445. Linking Mr. Peterka's appeal to the outcome of Mr. Hitchcock's appeal appears to be an effort to bind Mr. Peterka 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. Peterka's right to appeal and have his arguments hears has been severely curtailed. This result implicates Mr. Peterka's right to due process and equal protection, particularly given that the constitutional arguments Mr. Peterka raised in his Initial Brief and Petition for Writ of Habeas Corpus 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. Peterka's brief and petition.

6. Importantly, should Mr. Peterka be permitted to continue the briefing in his case, he intends to address this

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

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. Peterka's sentence of death is unconstitutional. Mr. Peterka submits that he must be allowed to continue briefing the matters before this Court in accordance with the rules of appellate procedure.

7. 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. Peterka is not entitled to the standard appellate process. It is clear that this Court will not even allow Mr. Peterka to continue the briefing in his appeal and on his petition for writ of habeas corpus before deciding whether he has shown "cause" within the meaning of the September 27th order which only affords Mr. Peterka twenty pages to show "cause." This Court offers no justification in its September 27th 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.

8. This Court's issuance of 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).

9. Previously, the filing of a notice of appeal was sufficient "cause" for an appeal to proceed under the Florida Rules of Appellate Procedure. Likewise, the filing of a petition for writ of habeas corpus was permitted to proceed, pursuant to the rules. But without any notice beyond the directive set forth in the September 27th show cause order and without guidance as to what constitutes "cause" sufficient to allow an appeal or original action to proceed under the Florida Rules of Appellate Procedure, this Court has decided to ignore the issues actually raised by Mr. Peterka and wed him to briefing and arguments that are distinctly different than his own.

10. On May 30, 2017, Mr. Peterka filed an Initial Brief which contained facts and argument on the following issues:

> ARGUMENT I
> GIVEN THAT FOUR JURORS VOTED IN FAVOR OF A LIFE SENTENCE, MR. PETERKA'S DEATH SENTENCE STANDS IN VIOLATION OF THE EIGHTH AMENDMENT AND MUST BE VACATED

ARGUMENT II
MR. PETERKA'S DEATH SENTENCE VIOLATES THE FLORIDA CONSTITUTION UNDER *HURST V. STATE* AND, THEREFORE, SHOULD BE VACATED

ARGUMENT III
THE RETROACTIVITY RULINGS IN *ASAY v. STATE* AND *MOSLEY v. STATE* THAT SEEMINGLY PERMIT PARTIAL RETROACTIVITY AND/OR CASE BY CASE RETROACTIVITY OF NEW LAW IN DEATH PENALTY PROCEEDINGS INJECTS ARBITRARINESS INTO FLORIDA'S CAPITAL SENTENCING SCHEME THAT VIOLATES THE EIGHTH AMENDMENT PRINCIPLES OF *FURMAN v. GEORGIA*

ARGUMENT IV
THE DECISIONS IN *HURST v. STATE* AND *PERRY v. STATE* ALONG WITH THE RECENT ENACTMENT OF A REVISED SENTENCING STATUTE, ALL OF WHICH ARE NEW LAW THAT WOULD GOVERN AT A RESENTENCING AND REQUIRE THE JURY TO UNANIMOUSLY FIND THE STATUTORILY REQUIRED FACTS NECESSARY TO AUTHORIZE A DEATH SENTENCE AND ALSO REQUIRE THE JURY TO UNANIMOUSLY RECOMMEND A DEATH SENTENCE BEFORE THE JUDGE WOULD BE AUTHORIZED TO IMPOSE A DEATH SENTENCE, MUST BE PART OF THE SECOND PRONG ANALYSIS OF MR. PETERKA'S PREVIOUSLY PRESENTED *STRICKLAND* CLAIMS. THE NEW LAW, DUE PROCESS PRINCIPLES, AND THE EIGHTH AMENDMENT ALL REQUIRE THIS COURT TO REVISIT MR. PETERKA'S PREVIOUSLY PRESENTED CLAIMS AND DETERMINE WHETHER THE EVIDENCE PRESENTED TO SUPPORT EACH CLAIM AND ALL THE OTHER ADMISSIBLE EVIDENCE AT A FUTURE RESENTENCING WOULD PROBABLY RESULT IN A LIFE SENTENCE IN LIGHT OF THE NEW LAW THAT WOULD GOVERN AT A RESENTENCING

ARGUMENT V
MR. PETERKA'S DEATH SENTENCE VIOLATES THE SIXTH AMENDMENT UNDER *HURST v. FLORIDA*

See Peterka v. State, Case No. SC17-593, Initial Brief p. iii-iv.

11. And, in his Petition for Writ of Habeas Corpus Mr. Peterka addressed the following issue:

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.

See Peterka v. Jones, Case No. SC17-1003, Petition p. 1.

12. In contrast Mr. Hitchcock raised the following issues in his appeal:

> ARGUMENT I
> THE ERROR IN MR. HITCHCOCK'S CASE WAS NOT HARMLESS.
>
> ARGUMENT II
> TO THE EXTENT THAT RETROACTIVE APPLICATION IS NECESSARY, THIS COURT SHOULD FIND THAT *HURST V. FLORIDA* AND *HURST V. STATE* ARE RETROACTIVE TO ALL OF MR. HITCHCOCK'S CLAIMS BECAUSE DENYING MR. HITCHCOCK RELIEF BASED ON NONRETROACTIVITY VIOLATES MR. HITCHCOCK'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.
>
> ARGUMENT III
> MR. HITCHCOCK'S DEATH SENTENCE SHOULD BE VACATED BECAUSE IT IS UNCONSTITUTIONAL BASED ON *HURST*, PRIOR PRECEDENT AND SUBSEQUENT DEVELOPMENTS BECAUSE MR. HITCHCOCK WAS DENIED HIS RIGHT TO A JURY TRIAL ON THE FACTS THAT LED TO HIS DEATH SENTENCE.
>
> ARGUMENT IV
> THIS COURT SHOULD VACATE MR. HITCHCOCK'S DEATH SENTENCE BECAUSE, IN LIGHT OF *HURST* AND SUBSEQUENT CASES, MR. HITCHCOCK'S DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT BECAUSE HIS DEATH SENTENCE WAS CONTRARY TO EVOLVING STANDARDS OF DECENCY AND IS ARBITRARY AND CAPRICIOUS.
>
> ARGUMENT V
> THIS COURT SHOULD VACATE MR. HITCHCOCK'S DEATH SENTENCE BECAUSE THE FACT-FINDING THAT SUBJECTED MR. HITCHCOCK TO THE DEATH WAS NOT PROVEN BEYOND A REASONABLE DOUBT.
>
> ARGUMENT VI
> IN LIGHT OF *HURST*, MR. HITCHCOCK'S DEATH SENTENCE SHOULD BE VACATED BECAUSE IT WAS OBTAINED IN VIOLATION OF THE FLORIDA CONSTITUTION.
>
> ARGUMENT VII
> THIS COURT'S DENIAL OF MR. HITCHCOCK'S POSTCONVICTION CLAIMS MUST BE REHEARD AND DETERMINED UNDER A CONSTITUTIONAL FRAMEWORK.

See Hitchcock v. State, Case No. SC17-445, Initial Brief p. 11, 16, 38, 41, 50, 52 and 56.

13. Most obviously, Mr. Peterka's issues present extensive argument as to this Court and the Florida Legislature's determinations that a non-unanimous death recommendation, or verdict is not sufficiently reliable in violation of the Eighth Amendment, and Florida Consitution. Mr. Hitchcock, on the other hand presents issues which more concern the Sixth Amendment right to a jury verdict as to the imposition of a death sentence. Further, Mr. Hitchcock raised no argument about Florida Statute 2017-1 and the fact that it is substantive law which will apply retroactively to those capital defendants who were pending capital trials and re-sentencings at the time it was enacted. And, while there is some overlap with Mr. Hitchcock's arguments, each one of Mr. Peterka's arguments can only be resolved by an analysis of matters specific to his case.

14. Additionally, specific circumstances were raised before the circuit court. Indeed, all of Mr. Peterka's arguments are underscored by the numerous errors that occurred at his capital penalty phase which, in light of the cataclysmic shift in the law, establishes that his death sentence is incurably unreliable. On direct appeal, this Court found that numerous errors that occurred at the penalty phase of Mr. Peterka's capital trial. This Court found that it was error for the State to introduce testimony about Mr. Peterka's prior juvenile convictions, because defense counsel did not open the door to offer this evidence. *Peterka v. State*, 640 So. 2d 59, 70 (Fla. 1994).

15. This Court also found that the trial court had improperly doubled the aggravating circumstances of avoiding a lawful arrest and hindering the lawful exercise of a governmental function or enforcement of the laws. *Id.* at 71. This Court also found that "the trial court improperly considered the pecuniary gain aggravating circumstance." *Id.* At the time of his direct appeal This Court found the errors that occurred at the penalty phase to be harmless. *Id.* at 71-2.

16. In addition, Mr. Peterka's jury was improperly instructed. *See Caldwell v. Mississippi*, 472 U.S. 320 (1985). Yet, despite the multitude of errors, the jury narrowly recommended death by a vote of 8-4.

17. These errors combined with the clear dictate of this Court that: 1) a jury must be properly instructed as to its role in sentencing; 2) the jury must unanimously decide all of the facts necessary for a capital defendant to be sentenced to death. Those facts include each aggravating circumstance; that the aggravating factors are sufficient to warrant a death sentence; that the aggravating factors outweighed the mitigating factors; and that the jury does not chose to exercise mercy. A review of the errors identified by this Court in direct appeal shows that Mr. Peterka's death sentence is fundamentally unfair and unreliable.

18. Moreover, counsel can and does note that the procedure that this Court has unveiled for use in Mr. Peterka'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.[2] 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. Peterka 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.

19. 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 interpreted in *Hurst v. State* to defendants whose death sentences were final when the Supreme Court decided *Ring v.*

[2]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. Because of the posture of Mr. Peterka's appeal, he urges this Court to allow him to brief his issues in accordance with the Florida Rules of Appellate Procedure.

> *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.

20. *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.

21. *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*.

22. 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).

23. 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. Peterka is precluded from being heard and fully presenting his arguments.

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

B. MR. PETERKA'S RULE 3.851 APPEAL AND PETITION FOR WRIT OF HABEAS CORPUS

25. As to the arguments in Mr. Peterka's Initial Brief and Petition for Writ of Habeas Corpus, Mr. Peterka raised at least two arguments that do 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 four arguments, although there is some overlap with Mr. Hitchcock's arguments, each one of Mr. Peterka's arguments can only be resolved by an analysis of matters specific to his case.[3]

26. Perhaps most notably, Mr. Hitchcock raised no issue related to Chapter 2017-1, which Mr. Peterka raised in his

[3]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.

petition for writ of habeas corpus. Chapter 2017-1 amended §921.141(2)(c) to provide: "If a unanimous jury does not determine that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of life imprisonment without the possibility of parole." Section 921.141(3)(a) provides that "[i]f the jury has recommended a sentence of ...[l]ife without the possibility of parole, the court shall impose the recommended sentence." As a result, Florida's capital sentencing statute now precludes the imposition of a death sentence unless a properly instructed jury returns a unanimous death recommendation.

27. Chapter 2017-1 was 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). It also has 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).

28. Chapter 2017-1 includes the right to a life sentence unless a jury returns a unanimous death recommendation which it extended retrospectively to all capital defendants in pending capital prosecutions regardless of the date of the alleged capital crime.

29. A capital defendant's right to a life sentence unless a jury returns a death recommendation is a substantive right. Whether viewed as a legislatively created right that applies retrospectively or a constitutional right identified in *Hurst v. State*, it is a substantive right, not a procedural rule. The right to a life sentence unless a properly instructed jury unanimously returns a death recommendation as noted in *Hurst v. State* did not arise from the Sixth Amendment principles of *Apprendi v. New Jersey*, *Ring v. Arizona*, or *Hurst v. Florida*. It is derived either from legislative enactments or the Florida Constitution or both. A state created right that carries a liberty or life interest with it is protected by the Due Process Clause of the Fourteenth Amendment.

30. Mr. Peterka's argument is not about retroactivity of a court ruling. It is about a statutorily created substantive right that was intended to be retrospective. 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 created substantive right. Mr. Hitchcock did not raise this issue in his briefing before this Court and this Court's opinion in *Hitchcock v. State* does not address it.

31. In his Initial Brief, Arguments I and II are 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.

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. Mr. Peterka identified numerous errors that occurred during his capital penalty phase which make clear that the jury's 8-4 recommendation for death is fundamentally unfair and that such unreliability trumps the State's interest in finality.

33. Furthermore, Mr. Peterka discussed the decisions in *Mosley v. State* and *Asay v. State* as they related to Argument III and V.[4] As to Argument V, a Sixth Amendment argument based upon *Hurst v. Florida*, Mr. Peterka argued that this Court's rulings in *Asay* and *Mosley* abandoning the binary nature of the balancing test set forth in *Witt v. State* means that each defendant with a

[4]Argument 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*.

pre-*Ring* death sentences is entitled to receive what Mr. Asay received, a case specific balancing of the *Witt* factors.[5] In his briefing, Mr. Hitchcock does not argue that in light of *Asay* and

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[5]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. Peterka argued 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 argument Mr. Peterka made. 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. Peterka made. And, this issue was not decided in *Hitchcock v. State*.

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. Peterka raised in is Initial Brief. And, certainly, this Court did not address those issues in its opinion denying Mr. Hitchcock relief.

34. Mr. Peterka's Argument III challenges the seemingly bright line, as in time line, that resulted from *Mosley* and *Asay*. Here, Mr. Peterka 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*.

35. In that context, Mr. Peterka argued 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*.[6] Mr. Hitchcock

[6]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.

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.

36. As to Argument IV, Mr. Peterka argued that if a resentencing is ordered, Mr. Peterka will have a right to a life sentence unless the jury returns a unanimous death recommendation. The argument asks how this affects the validity of this Court's rejection of Mr. Peterka's *Strickland* claim in his previous Rule 3.851 motion. Mr. Peterka's challenge is to this Court's affirmance of the denial of his prior Rule 3.851 motions. This Court's recent decision in *Bevel v. State*, 221 So. 3d 1168 (Fla. 2017), supports the validity of Argument IV.

37. In his briefing, Mr. Hitchcock does not present the same argument that Mr. Peterka presented. And, this Court did not address that issue in its opinion denying Mr. Hitchcock relief.

38. 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)("Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived."). Whatever it is that Mr. Hitchcock raised, it is not the same as Argument IV of Mr. Peterka's Initial Brief.

39. Mr. Peterka presented an ineffective assistance of counsel claim in his prior collateral proceeding. This Court's jurisprudence indicates these claims must be evaluated cumulatively with other 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. Peterka will be entitled at a resentencing to a less severe sentence unless the jury unanimously returns a death recommendation. Given that Mr. Peterka'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. Peterka will receive a sentence of less than death.

40. The specific argument raised by Mr. Peterka was simply not raised by Mr. Hitchcock or addressed by this Court. Argument IV is a case specific claim requiring a case by case analysis.

WHEREFORE, Mr. Peterka requests that this Court allow his appeal and petition to be fully briefed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing reply 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 thus 17th day of October, 2017.

/s/. Linda McDermott
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