IN THE SUPREME COURT OF FLORIDA
CASE NO. SC17-807

GREGORY ALAN KOKAL,

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, **GREGORY ALAN KOKAL,** in the above-entitled matter and respectfully responds to this Court's September 22nd 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. Kokal states:

1. Mr. Kokal 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 22, 2017, before Mr. Kokal 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. KOKAL'S RIGHT TO APPEAL THE DENIAL OF HIS RULE 3.851 MOTION AND THE UNDEFINED "CAUSE" STANDARD.

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

Pro. 9.030(a)(2). Mr. Kokal 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. Kokal 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]

4. In addition, this Court's June 5, 2017, *sua sponte* order stayed proceedings on Mr. Kokal's appeal pending the disposition of *Hitchcock v. State*, Case No. SC17-445. Linking Mr.

[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.

Kokal's appeal to the outcome of Mr. Hitchcock's appeal appears to be an effort to bind Mr. Kokal 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. Kokal's right to appeal has been severely curtailed. This result implicates Mr. Kokal's right to due process and equal protection, particularly given that the procedural issues arising in the circuit court and the constitutional claims Mr. Kokal 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. Kokal's appeal.

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

has shown "cause" within the meaning of the September 22nd order which only affords Mr. Kokal 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 22nd order for this deviation from standard appellate procedure, and gives no guidance as to what is 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 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 22nd show cause order and without guidance as to what constitutes "cause" sufficient to allow an appeal to proceed under the Florida Rules of Appellate Procedure, this Court before Mr. Kokal 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 *ad hoc* basis throws the rule book out and gives Mr. Kokal 20 pages and 27[2] days to demonstrate some undefined "cause."

9. On December 15, 2016, undersigned counsel filed a Rule 3.851 motion on behalf of Mr. Kokal. The motion presented three claims on Mr. Kokal's behalf: 1) Mr. Kokal's sentence of death violated the Sixth Amendment, pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016); 2) Under *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), Mr. Kokal's death sentence violates the Eighth Amendment. Mr. Kokal's argument focused extensively on the fact that his jury did not appreciate the significance of its recommendation. *See Caldwell v. Mississippi*, 472 U.S. 320 (1985). *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. Thus, under *Hurst v. State*, the unanimous advisory recommendation simply "does not meet the standard of reliability that the Eighth Amendment requires." *Id*. at 341; and 3) 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. Kokal's newly discovered evidence and ineffective assistance of counsel claims.

10. Additionally, specific circumstances and procedural

[2]Mr. Kokal was given 20 days but requested a 7 day extension to file his response.

issues were raised before the circuit court. An example of a factual issue was the fact that in postconviction, Mr. Kokal learned that his co-defendant, William O'Kelly, who had pled guilty to second degree murder and received a 14 year sentence, had made statements during his pre-trial and post-trial incarceration to an individual named Gary Hutto. Hutto was O'Kelly's cellmate at the Duval County Jail and later encountered O'Kelly at Polk C.I. While incarcerated together at the Duval County Jail O'Kelly and Hutto discussed their cases with one another. At an evidentiary hearing in 2000, Hutto testified that O'Kelly implicated himself as the sole instigator and participant in the Russell murder:

> Q: (by Mr. Thomas) Okay. And did he explain to you what happened the night that he and Mr. Kokal were involved with the death of the sailor named Jeffrey Russell?
> A: Yes.
> Q: And what did he tell you?
> A: He said that he had robbed the guy and that they had only got a dollar. And that he had beat the guy in the head with a pool stick. He said that so and so co-defendant of his, he called him names. I would prefer not to use that language.
> Q: Well -
> A: But he didn't do nothing and he was just a sorry piece of junk.
> MR. THOMAS: With the court's indulgence, I would like to know exactly what you remember about what Mr. O'Kelly said about Greg Kokal. If the court will allow it, Your Honor?
> THE COURT: Sure.
> Q: (By Mr. Thomas) Go ahead.
> A: Well, he said that p***y m****r f****r Greg, he was too drunk to do anything. He was too sorry. He was too scared. He didn't want to do anything. He stayed up by the truck. He made me take this guy and, you know -- he didn't want nothing to do with it. He wouldn't have nothing to do with anything. He kept saying let's go, let's go. And, you know, he said I took this guy down the beach and I beat him in the head, you know. And he said he wouldn't shut up. And he said I shot him, you know in the head with a .357. And he said then, he said, the punk only had a dollar.

Q: Okay. Did he tell you whose idea it was to rob Mr. Russell?

A: Well, he said that it was his. Because he said that he thought that the guy had just got off -- he said he had just got off a boat. You know, he's a sailor at Mayport and he had just got paid and he had just got liberty, all he's got is this big wad. And he said he wanted it. And it turned out to be a dollar.

Q: Did Mr. O'Kelly tell you how it came to be that he and Mr. Kokal and Mr. Russell were together that night?

A: Yeah. They were out hitchhiking. The sailor dude was out hitchhiking. They were riding around getting drunk, you know, having a good time, smoking some good stuff and drinking, from what I understand, some real good liquor, and that they had some better dope.

* * * *

Q: Do you know what the sequence of events was from the time that they arrived at the beach area or anything?

A: All I know is that he said that he beat him in the head with the pool stick, and that he just kept beating him, and then he said all of a sudden he hit him in the head with the gun, or -- he hit him in the head with the gun.

* * * *

Q: Did he at any time indicate anything that would lead you to believe that Mr. Kokal was involved with or consenting to the beating and homicide of Mr. Russell?

A: No. I believe that it was just the opposite, that he didn't know nothing about it. He was too messed up, you know, on drugs and alcohol to really be -- tangled up with him in the first place.

11. Mr. Kokal's jury did not have an opportunity to consider O'Kelly's inculpatory statements about the culpability of he and Mr. Kokal and/or determine whether, in light of the statements, O'Kelly's minimal sentence constituted disparate treatment. Certainly, pursuant to *Hurst v. Florida*, these issues must be determined by the jury. The issue of disparate treatment of codefendants and the significance of *Hurst v. Florida* and *Hurst v. State* on this issue, was neither raised nor decided in *Hitchcock v. State*.

12. Furthermore, as to issues that arose during the litigation before the circuit court, Mr. Kokal argued that the

circuit court denied him due process because the circuit court failed to permit him to present argument on his motion as required by Florida Rule of Criminal Procedure 3.851(f)(5)(B). Under the Rule, "Within 30 days after the state files its answer to a successive motion for postconviction relief, the trial court **shall** hold a case management conference . . . ". Fla. R. Crim. P. 3.851(f)(5)(B). The Rule also makes clear that the purpose of the conference is to allow the trial court to hear argument on any purely legal claims or to determine if an evidentiary hearing is necessary. *Id*.

13. Most recently, in *Hall v. State*, 134 S. Ct. 1986, 2001 (2014), the United States Supreme Court held: "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." Mr. Kokal was one of hundreds of capital defendants who was not provided an opportunity to arue his claims - an argument that this Court's rules of procedure guarantees. The procedure was arbitrary and violated Mr. Kokal's right to due process. This issue was neither raised nor decided in *Hitchcock v. State*.

14. Counsel can and does note that the procedure that this Court has unveiled for use in Mr. Kokal'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.[3] 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. Kokal 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 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

---

[3]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, received an order to show cause.

> 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. Kokal is precluded from being heard and fully presenting his arguments.

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

21. As to the claims in Mr. Kokal's Rule 3.851 motion, Mr. Kokal 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 claims, although there is some overlap with Mr. Hitchcock's arguments, each one of Mr. Kokal's claims can only be resolved by an analysis of matters specific to his case.[4]

22. As to Claim I in his Rule 3.851 motion and motion for rehearing, Mr. Kokal argued a Sixth Amendment claim based upon *Hurst v. Florida*, Mr. Kokal 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 *Witt v. State* means that each defendant with a 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

---

[4]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. Mr. Kokal argued the appropriateness of vacating his death sentence based upon fundamental fairness in his motion for rehearing.

[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.*

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. And, this Court did not address those issues in its opinion denying Mr. Hitchcock relief.

23. As to Claim II, under *Caldwell v. Mississippi*, 472 U.S.

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. Kokal 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. Kokal 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. Kokal is entitled to raise in this, his appeal 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*.

320 (1985), a unanimous jury verdict in favor of a death sentence violates the Eighth Amendment if 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.

24. In *Caldwell*, the prosecutor responding to defense counsel's argument stated in his argument before the jury: "Now, they would have you believe that you're going to kill this man and they know—they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable." *Id*. at 325. Because the jury's sense of responsibility was improperly diminished by this argument, the United States Supreme Court held that **the jury's unanimous verdict** imposing a death sentence in that case violated the Eighth Amendment and required the death sentence to be vacated. *Caldwell*, 472 U.S. at 341 ("Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires."). *Caldwell* explained: "Even when a sentencing jury is unconvinced that death is the appropriate punishment, it might nevertheless wish to 'send a message' of extreme disapproval for the defendant's acts.

This desire might make the jury very receptive to the prosecutor's assurance that it can more freely 'err because the error may be corrected on appeal.'" *Id.* at 331.[6]

25. Jurors must feel the weight of their sentencing responsibility and know about 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 not explained or is diminished, a jury's unanimous verdict in favor of a death sentence violates the Eighth Amendment and the death sentence cannot stand. *Caldwell*, 472 U.S. at 341 ("Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires.").

26. The United States Supreme Court in *Caldwell* found that diminishing an individual juror's sense of responsibility for the imposition of a death sentence creates a bias in favor of a juror

[6]This would certainly apply to the circumstances in Kokal's case when the jury was repeatedly reminded its penalty phase verdict was merely an advisory recommendation.

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.").

27. If a bias in favor a death recommendation increases when the jury's sense of responsibility is diminished, removing the basis for that bias increases the likelihood that one or more jurors will vote for a life sentence. The likelihood increases even more when the jury receives accurate instruction as to each juror's power and authority to dispense mercy and preclude a death sentence. In this regard, the context of the prosecutor's improper argument in *Caldwell* is important. The prosecutor was responding to and trying to blunt defense counsel's assertion that the sentencing decision rested with the jury and that it could chose mercy:

> I implore you to exercise your prerogative to spare the life of Bobby Caldwell.... I'm sure [the prosecutor is] going to say to you that Bobby Caldwell is not a merciful person, but I say unto you he is a human being. That he has a life that rests in your hands. You can give him life or you can give him death. It's going to be your decision. I don't know what else I can say to you but we live in a society where we are taught that an eye for an eye is not the solution.... You are the judges and you will have to decide his fate. It is an awesome responsibility, I know—an awesome responsibility.

Caldwell, 472 U.S. at 324.

28. Mr. Kokal's jury was not advised of each jurors' authority to dispense mercy. Indeed, the instructions suggested otherwise.

29. The circumstances under which Kokal's jury returned its

12-0 death recommendation shows that it cannot now be viewed as a valid unanimous verdict or that the *Hurst* error was harmless without violating the Eighth Amendment. "Even when a sentencing jury is unconvinced that death is the appropriate punishment, it might nevertheless wish to 'send a message' of extreme disapproval for the defendant's acts. This desire might make the jury very receptive to the prosecutor's assurance that it can more freely 'err because the error may be corrected on appeal.'" *Caldwell*, 472 U.S. at 331. The advisory recommendation simply "does not meet the standard of reliability that the Eighth Amendment requires." *Id.* at 341.

30. If permitted to brief his claims, Mr. Kokal intends to argue that this Court cannot rely on the jury's death recommendation in his case as showing either that he was not deprived of his Eighth Amendment right to require a unanimous jury's death recommendations or that the violation of the right was harmless. To do so would violate the Eighth Amendment because the advisory verdict was not returned in proceedings compliant with the Eighth Amendment. *Caldwell*, 472 U.S. at 332 ("The death sentence that would emerge from such a sentencing proceeding would simply not represent a decision that the State had demonstrated the appropriateness of the defendant's death.").

31. In fact, in *Hurst v. Florida*, the United States Supreme Court warned against using what was an advisory verdict to conclude that the findings necessary to authorize the imposition a death sentence had been made by the jury:

"[T]he jury's function under the Florida death penalty

> statute is advisory only." *Spaziano v. State*, 433 So.2d 508, 512 (Fla.1983). The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires.

Hurst v. Florida, 136 S. Ct. at 622. An advisory verdict (premised upon inaccurate information regarding the binding nature of a life recommendation and the juror's inability to be merciful based upon sympathy) cannot be used as a substitute for a unanimous verdict from a properly instructed jury. *California v. Ramos*, 463 U.S. 992, 1004 (1983)("Because of the potential that the sentencer might have rested its decision in part on erroneous or inaccurate information that the defendant had no opportunity to explain or deny, the need for reliability in capital sentencing dictated that the death penalty be reversed.").

32. Mr. Kokal's *Caldwell* issue and the issue of Mr. Kokal's culpability and disparate treatment are factual in nature and thus, the facts specific to the unreliability of Mr. Kokal's penalty proceedings was neither raised nor addressed in *Hitchcock v. State*.

33. As to Claim III of Mr. Kokal'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. Kokal 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. Kokal's newly discovered evidence, and *Strickland* claims in his previous successive motion to

vacate. Mr. Kokal's challenge is to this Court's affirmance of the denial of his prior Rule 3.851 motions.

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

35. In his initial briefing, Mr. Hitchcock does not the same claim that Mr. Kokal presented. And, this Court did not address that issues 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)("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 has raised, it is not the same as Claim III of Mr. Kokal's Rule 3.851 motion, nor the way Mr. Kokal will brief his claims before this Court.

37. Mr. Kokal 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. Kokal will be entitled at a resentencing to a less severe sentence unless the jury unanimously returns a death recommendation. Undoubtedly, in light of the new evidence and all the evidence developed in collateral proceeding that will be admissible, Mr. Kokal will receive a sentence of less than death.

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

WHEREFORE, Mr. Kokal 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 19th day of October, 2017.

/s/. Linda McDermott
LINDA McDERMOTT
Florida Bar No. 0102857
McCLAIN & McDERMOTT, P.A.
Attorneys at Law
20301 Grande Oak Blvd.
Suite 118 - 61
Estero, FL 33928
(850) 322-2172
lindammcdermott@msn.com

Counsel for Mr. Kokal