IN THE SUPREME COURT OF FLORIDA

WILLIAM HAROLD KELLEY,

Appellant,

CASE NO.: SC17-830
Lower Case No.:
281981CF000535CFAXMX

v.

THE STATE OF FLORIDA,

Appellee.

APPELLANT'S BRIEF IN RESPONSE TO SHOW CAUSE ORDER

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October 2, 2017.

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INTRODUCTION

This appeal asks this Court to review the circuit court's denial of relief under *Hurst v. Florida*, 136 S. Ct. 616 (2016) (*Hurst I*), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) (*Hurst II*), in which the court determined that those decisions did not apply retroactively to Appellant William Kelley. As a federal constitutional matter, those decisions must be applied retroactively to Kelley. These are legal issues that deserve an explicit decision by this Court.

REQUEST FOR BRIEFING AND ORAL ARGUMENT

Appellant requests the opportunity for his counsel to submit full briefing and to present oral argument pursuant to Florida Rule of Appellate Procedure 9.320.

BACKGROUND

Kelley, who has at all times maintained his actual innocence, timely filed a successive motion for relief pursuant to Florida Rule of Criminal Procedure 3.851(e)(2) in November 2016. In that motion, he asserted both state and federal constitutional grounds for his request that the court set aside his death sentence in view of the *Hurst* decisions.

Kelley was sentenced to death by the trial judge in 1984, after an initial jury was unable to reach a verdict and after a second, non-unanimous advisory jury recommended death by an 8-3 vote. That jury was not instructed to and did not make any individualized factual findings as to whether (1) any particular

aggravating factor was proven beyond a reasonable doubt, (2) the aggravators were sufficient to impose the death penalty, or (3) the aggravators outweighed the mitigation.

In 2002, the United States Supreme Court decided *Ring v. Arizona*, 536 U.S. 584 (2002), holding that, under the Sixth Amendment, a defendant has the right to have a jury determine the existence of aggravating factors necessary for the imposition of the death penalty. *Id*. at 609. Within one year, Kelley filed a successive habeas petition in this Court challenging his death sentence under *Ring*. (R. 71-91). Kelley argued that the Florida statute under which he was sentenced to death violated his Sixth Amendment right to a jury trial because it required the judge to make the factual findings upon which his death sentence was based. (R. 79). He also argued that his non-unanimous jury recommendation was unconstitutional. (R. 79-80).

This Court denied the petition, without an opinion, on May 4, 2004. *See Kelley v. Crosby*, 874 So. 2d 1192 (Fla. 2004). At the time, *Hildwin v. Florida*, 490 U.S. 638 (1989) and *Spaziano v. Florida*, 468 U.S. 447 (1984), which had upheld Florida's death sentencing scheme from constitutional attack, were still good law. *Hildwin* and *Spaziano* were overturned, however, in *Hurst I*. *See Hurst I*, 136 S. Ct. at 623 ("Their conclusion was wrong, and irreconcilable with *Apprendi*.").

On November 21, 2016, Kelley filed a successive Rule 3.851 motion asserting that his death sentence must be vacated under the *Hurst* decisions because the trial judge, rather than the jury, made the factual findings required to impose a sentence of death, and, in addition, the jury's advisory recommendation of death was not unanimous. (R. 9-28). He asserted those decisions should be applied retroactively to him under both Florida's *Witt* test and fundamental fairness doctrine, as well as the federal test in *Teague v. Lane*, 489 U.S. 288 (1989). (R. 17-22).

Kelley also invoked his rights under the Sixth and Eighth Amendments, arguing among other things that a rule of partial retroactivity – i.e., limiting relief under the *Hurst* decisions to only defendants whose convictions were final after *Ring* – would violate the federal due process guarantee against the arbitrary application of the law, as well as the federal guarantee of equal protection of the law. (*See, e.g.,* R. 19-21, 202-04, 158-60).

On March 15, 2017, the trial judge held a status conference, at which he heard a brief argument on the motion. (R. 187-212). When Kelley's counsel explained the arbitrariness of drawing a bright line at the date of *Ring*, the State described this as merely "the luck of the draw." (R. 209).

Two days later, this Court rendered its decision in *Archer v. Jones*, No. SC16-2111, 2017 WL 1034409, at *1 (Fla. Mar. 17, 2017), explicitly holding that

Hurst II would be applied in only a partially retroactive manner, with *Ring* being the dividing line. Kelley acknowledged *Archer* was binding upon the trial judge with respect to Florida law, but continued to press his federal constitutional arguments. (*See, e.g.*, R. 151-62). The trial judge denied Kelley's motion on March 28, 2017. (R. 163-67). This timely appeal followed, but was stayed prior to briefing, pending the Court's decision in *Hitchcock v. State*, Case No. SC17-445.

ARGUMENT

I. The *Hurst* Decisions Must Be Applied Retroactively to Kelley Under the Federal Constitution.

Federal constitutional requirements set a retroactivity "floor," under which the *Hurst* decisions must be applied retroactively to Kelley.

This Court has not explicitly addressed the specific federal constitutional challenges that Kelley advances in this case to the Court's bright-line rule of partial retroactivity. Those challenges are not barred and are ripe for decision herein. In all events, by this brief, Kelley expressly preserves all of these issues for further review by the United States Supreme Court.

A. The Constitutional Requirements Imposed by the *Hurst* Decisions Promote a Substantive Function, Requiring Retroactive Application.

In *Montgomery v. Louisiana*, 136 S. Ct. 718, 731-32 (2016), the United States Supreme Court held that "[w]here state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to

give retroactive effect to a substantive constitutional right that determines the outcome of that challenge." This federal constitutional requirement applies even where a state supreme court applies its state's own retroactivity doctrine. *See id.*

That was the exact issue in *Montgomery*, where the defendant in a state post-conviction proceeding requested retroactive application of *Miller v. Alabama*, 132 S. Ct. 2455 (2012). *Miller* held that imposition of mandatory sentences of life without parole on juveniles convicted of murder posed "too great a risk of disproportionate punishment" and therefore violated the Eighth Amendment. *Montgomery*, 136 S. Ct. at 733 (quoting *Miller*, 132 S. Ct. at 2469). The Louisiana Supreme Court denied the defendant relief under *Miller* on state retroactivity grounds. *Montgomery*, 136 S. Ct. at 727.

The United States Supreme Court reversed, holding the *Miller* constitutional rule was substantive and had to be applied retroactively. *See id.* at 732-34. The Court stated that cases where it will be appropriate to sentence minors to life without parole will be "'uncommon.'" *Id.* at 733-34 (quoting *Miller*). Accordingly, *Miller* was retroactive because a mandatory life sentence "necessarily carr[ies] a significant risk that a defendant' – here, the vast majority of juvenile offenders – 'faces a punishment that the law cannot impose on him.'" *Id.* at 734.

Florida courts accordingly must apply the *Hurst* decisions retroactively to all who were sentenced to death under Florida's unconstitutional scheme. This is

required because, like *Miller*, those decisions announced substantive rules within the meaning of controlling federal law.

First, in *Hurst I*, the United States Supreme Court held the Sixth Amendment requires findings by the jury, as fact, beyond a reasonable doubt, on various issues regarding aggravating circumstances and mitigation. *Hurst I* at 53-59. Rules requiring proof-beyond-a-reasonable doubt are substantive, not procedural. *See, e.g., V. v. City of New York*, 407 U.S. 203, 205 (1972). This point has been specifically recognized with respect to *Hurst I*. *See, e.g., Guardado v. Jones*, No. 4:15-cv-256-RH, 2016 WL 3039840, at *2 (N.D. Fla. May 27, 2016).

Second, in *Hurst II*, this Court announced the Florida constitutional requirement of *unanimous* jury fact-finding as to all three of the aggravators–mitigators issues. The substantive nature of this unanimity rule is made clear by this Court's explanation that unanimity is required to ensure that the sentencing determination "expresses the values of the community as they currently relate to the imposition of the death penalty," as well as to ensure compliance with the constitutional requirement that the death penalty be applied narrowly and only to the worst offenders. *Hurst II* at 60-61. That is the function served by the rule of unanimity.

This is critical because "whether a new rule is substantive or procedural" is determined "by considering the function of the rule." *Welch v. United States*, 136

S. Ct. 1257, 1265 (2016). This is true even where the rule's subject matter concerns the method by which a jury makes decisions. *See Montgomery*, 136 S. Ct at 735 (noting state's ability to determine method of enforcing constitutional rule does not convert rule from substantive to procedural). Application of this test establishes the substantive nature of the unanimity rule at issue here.

Like sentencing minors to life without parole, the death penalty is supposed to be uncommon. The unanimity requirement is supposed to ensure this. Indeed, that is the stated "narrowing" function of *Hurst II*: the "unanimous finding of aggravating factors and the facts that are sufficient to impose death, as well as the unanimous finding that they outweigh the mitigating circumstances, all serve to help *narrow the class of murderers subject to capital punishment*." 202 So. 3d at 60. And, just as in *Montgomery*, the fact that *Hurst II* involves, as a component, a guarantee for a substantive right that could be considered "procedural" does not make the holding itself "procedural" for retroactivity purposes.

Notably as well, in *Hurst II*, this Court acknowledged that the unanimity rule "achieve[s] the important goal of bringing [Florida's] capital sentencing laws into harmony with the direction of the society reflected in [the majority of death penalty] states and with federal law." *Id*. at 60. This Court cited *Montgomery*, tying its analysis to the "evolving standards of decency" test, which looks at whether a punishment is no longer "within the power of the state to impose . . . ." *Id.*

Simply put, "the 'evolving standards' test considers whether punishments that were within the power of the state to impose at the time, but have since come to be viewed as unconstitutional, should be prohibited on constitutional grounds." *Id*. at 60. Consequently, the Eighth Amendment ruling in *Hurst II* addresses a substantive question – whether a death sentence upon a non-unanimous, advisory jury recommendation is within the power of the State to impose.

By the same token, then, it must be applied retroactively under *Montgomery*, 136 S. Ct. at 733-35, which applied a decision based on the Eighth Amendment retroactively, even though it involved a procedural component. Just as here, that procedural aspect was necessary to safeguard a substantive right.

The federal law requirement that the *Hurst* decisions be applied retroactively is not undermined by *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004). The *Montgomery* Court specifically addressed *Summerlin* in holding *Miller* to be retroactive. So too here, *Summerlin* does not alter the requirement that the *Hurst* decisions be applied retroactively.

To begin with, in *Summerlin*, *Ring* was held not retroactive in the federal habeas context under the test articulated in *Teague*. Although the *Hurst* decisions are based in part on the reasoning of *Ring*, the decisions are not interchangeable. The Arizona statute at issue in *Ring* required the judge to conduct a sentencing proceeding and, ultimately, to determine whether there was at least one

aggravating factor sufficient to impose death. *See Ring*, 536 U.S. at 588, 592-93. Florida's unconstitutional death penalty scheme did not merely require the judge to make the findings necessary for death. Rather, it allowed the decision maker on the issue of death versus life to avoid taking full responsibility for that decision.

For years, Florida told the advisory sentencing panel, incorrectly called a jury, that its work was mainly advisory and that the responsibility was for the trial judge, even though the judge was in fact sorely constrained by a non-unanimous "advisory" recommendation of death. Thus, the sentencing scheme was set up to prevent either the judge or the jury from feeling fully accountable for this life-or-death decision. That advisory scheme is the worst of all possible worlds from a judicial perspective of assuring that a sentence of death is imposed on only the most culpable of defendants.

Further still, and again unlike *Ring*, Florida's statute required the judge to find not only the existence of aggravating factors required to impose a death sentence, but also that "*sufficient* aggravating circumstances exist[ed]" and that "there [were] *insufficient* mitigating circumstances to outweigh the aggravating circumstances." § 921.141(3), Fla. Stat. That is, *Ring* involved the narrow holding that because the existence of at least one aggravating factor was required to impose a death sentence, this made such a finding an "element" that must be found by a jury rather than a judge. *Ring*, 536 U.S. at 608. *Summerlin* was not considering

the retroactivity of a decision involving a statute, like Florida's, that required the jury not only to conduct the fact-finding regarding the aggravators, but also the fact-finding as to whether the aggravators were *sufficient* to impose death and the ultimate decision whether a defendant should receive a life or death sentence.

The *Summerlin* Court acknowledged that if the Court itself "[made] a certain fact essential to the death penalty . . . [the change] would be substantive." 542 U.S. at 354. Such a change occurred in *Hurst* where, for the first time, the Court found it unconstitutional for a judge alone to find that "sufficient aggravating factors exist and [t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." 136 S. Ct. at 622 (internal citation omitted).

Moreover, this is entirely unlike the harmless-error review at issue under *Ring*, which may involve only a judge's finding that a defendant had a prior or contemporaneous felony conviction.

Indeed, as noted above, the *Hurst* decisions, unlike *Ring*, also involve the proof-beyond-a-reasonable-doubt standard. *See Powell v. Delaware*, 153 A.3d 69 (Del. 2016) (holding *Hurst* retroactive and distinguishing *Summerlin* because it "only addressed the misallocation of fact-finding responsibility (judge versus jury) and not . . . the applicable burden of proof").

As discussed more fully below, and again unlike in *Ring* or *Summerlin*, there is an Eighth Amendment unanimity rule under *Hurst II*, in addition to the Sixth

Amendment's jury-trial guarantee. Just as in *Montgomery*, the jury unanimity requirement imposed in *Hurst II* is not simply a device to promote "accuracy" in fact finding, as a procedural rule might also do. It additionally serves to promote a substantive, "narrowing" function, i.e., confining the ultimate penalty only to that limited number of criminals who, based on evolving standards, are the most culpable and deserving of death. *Hurst II* at 60.

In view of the substantive rules announced in the *Hurst* decisions, Kelley's death sentence must be reversed as a matter of federal constitutional law.

B. "Partial Retroactivity" Based On The Date Of *Ring* Draws An Unconstitutional Line.

Further still, if Kelley is denied the benefit of the *Hurst* decisions on the sole ground that they only can benefit those defendants whose convictions were not final prior to the decision in *Ring*, that is a purely arbitrary line that violates the federal due process guarantee against the arbitrary application of the law, as well as the federal guarantee of equal protection of the law. Although Florida's capital statute was always unconstitutional, *see Montgomery*, 136 S. Ct. at 731, including when Kelley was sentenced to death, this Court has now created an arbitrary line for deciding which petitioners on collateral review now get a new constitutionally-sound penalty phase, and that line is in violation of the Fourteenth Amendment. "The equal protection clause would indeed be a formula of empty words if such

conspicuously artificial lines could be drawn." *Skinner v. Oklahoma Ex rel. Williamson*, 316 U.S. 535, 542 (1942).

Where there is no retroactive application, new rules are applied only where the defendant's conviction was final prior to the decision announcing them. Here, that would mean that ***no*** defendants whose convictions were final before the *Hurst* decisions would receive the benefit of those rules. On the other hand, retroactive application would mean that ***all*** defendants, including those whose death sentences became final prior to those decisions, would receive that benefit.

Once this Court determined that the *Hurst* decisions should have retroactive effect, to then draw a line to provide that retroactive effect only to some of the defendants sentenced to die under Florida's unconstitutional statutory scheme is an unprecedented departure from long-standing notions of retroactivity analysis as binary. We have found no Florida case where retroactive relief was afforded on collateral review only to some whose constitutional rights were violated.

Doing so is unconstitutional because it is arbitrary and leads to arbitrary results: it leaves pre-*Ring* defendants unable to avail themselves of the *Hurst* decisions even though their sentence of death was imposed under the same unconstitutional sentencing scheme as those defendants who have been granted the benefit of the *Hurst* decisions invalidating that scheme. Indeed, a defendant

sentenced a day after *Ring* is afforded relief that a defendant sentenced under the exact same unconstitutional scheme a day before *Ring* does not get.

But ***all*** persons sentenced to die under that scheme – recognized under evolving standards of decency to be unconstitutional – should be given relief from their death sentences. As demonstrated above, the general rule is that new substantive rules, such as those announced in the *Hurst* decisions, apply retroactively. So too, new "'watershed rules of criminal procedure,'" which are procedural rules "implicating the fundamental fairness and accuracy of the criminal proceeding," also generally have retroactive effect. *Summerlin*, 542 U.S. at 355.

Both these guiding principles apply here. Consequently, because this Court recognized that the *Hurst* decisions must be given some retroactive effect, they must now, as a matter of controlling federal constitutional law, be given retroactive effect to ***all*** defendants sentenced to death under Florida's unconstitutional sentencing scheme. Kelley should not be denied relief from his death sentence that violates both the Sixth and the Eighth Amendments based solely on the fact that his conviction happened to become final before the *2002* decision in *Ring*.

The foregoing is true as to the Sixth Amendment rationale of *Hurst I*, but it is critical to appreciate that it is all the more true of the Eighth Amendment rationale of *Hurst II*. As shown above, the unanimity requirement in *Hurst II*

squarely implicates Eighth Amendment principles. But, *Ring* is a Sixth Amendment decision, which did not speak to a jury unanimity requirement at all. To nonetheless choose the date of *Ring* as the line of demarcation for retroactive application of the unanimity requirement based on the Eighth Amendment, a claim Kelley has timely advanced, is completely arbitrary. Even if one (wrongly) accepts that *Ring* presaged *Hurst I* such that partial retroactivity to the date of *Ring* is appropriate, that argument does not transfer to the Eighth Amendment rationale of *Hurst II*.

Indeed, as Justice Pariente emphasized in *Hurst II*, unanimity "ensures that Florida conforms to 'the evolving standards of decency that mark the progress of a maturing society' which inform Eighth Amendment analyses."). *See Hurst II*, 202 So. 3d at 72 (Pariente, J., concurring). Under the federal Constitution, death is reserved for only the most culpable, under evolving standards of decency. *See id.* at 59-60. Putting defendants to death when some members of the jury believed death was not warranted violates evolving standards of decency and such a death sentence constitutes disproportionate punishment, which is not within the power of the State to impose.

Instead, under the Eighth Amendment, capital sentencing laws must keep up with "evolving standards of decency that mark the progress of a maturing society." *See, e.g., Atkins v. Virginia*, 536 U.S. 304, 312 (2002); *see also Montgomery*, 136

S. Ct. at 742. Evolving standards of decency have led to a national consensus that death sentences should be imposed only after a penalty-phase jury votes unanimously to impose death.

Florida was "a clear outlier" in its "fail[ure] to require a unanimous recommendation for death as a predicate for possible imposition of the ultimate penalty." *See Hurst II*, 202 So. 3d at 61. The near-uniform judgment of the states is that a jury, in exercising its grave and "truly awesome responsibility," *see Caldwell v. Mississippi*, 472 U.S. 341 (1985), must *unanimously* conclude that death, the harshest of all punishments, is the appropriate sentence. *See Hurst II* at 61. As this Court explained in *Mosley*:

> Under Florida's independent constitutional right to a trial by jury, this Court concluded: "If death is to be imposed, unanimous jury sentencing recommendations, when made in conjunction with the other critical findings unanimously found by the jury, provide the highest degree of reliability in meeting these constitutional requirements in the capital sentencing process."

Mosley v. State, 209 So. 3d 1248, 1278 (Fla. 2016) (quoting *Hurst II* at 60).

The constitutional requirement of juror unanimity when returning a death recommendation is bottomed on enhanced reliability and confidence in the result. *Hurst II* at 59. Kelley's advisory jury recommendation of only eight (8) to three (3) in favor of recommending death – after the jury in his first trial could not even reach a verdict on the issue of guilt – is not tolerable under the Eighth Amendment and evolving standards of decency. Invoking the Sixth Amendment *Ring* decision

as a point of reference and dividing line for *Hurst II* Eighth Amendment claims is arbitrary and unconstitutional.

There are numerous other vagaries of the arbitrariness inherent in making the *Hurst* decisions only partially retroactive based on the date *Ring* was decided. As noted above, *Hurst* retroactivity is denied to individuals whose death sentences became final on direct appeal shortly before *Ring*, while *Hurst* retroactivity is granted to individuals whose sentence became final four days after *Ring*. *Card v. Jones*, 219 So. 3d 47, 48 (Fla. 2017); *Hertz v. Jones*, 218 So. 3d 428, 431-32 (Fla. 2017) (granting *Hurst* retroactivity to a defendant whose conviction became final four days after the *Ring* decision).

It also is granted to other individuals who arrived on death row perhaps decades earlier but were granted new penalty phases on other grounds and then resentenced to death after *Ring*. Yet all of those individuals were sentenced to death under the same unconstitutional sentencing scheme.

Similarly, this dividing line arbitrarily denies the benefit of the *Hurst* decisions to defendants who were sentenced between the decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring*. Such arbitrariness is particularly stark in view of the fact that the United States Supreme Court made clear in *Ring* that its decision there flowed directly from its earlier decision in *Apprendi*. *See Ring*, 536 U.S. at 588-89. And in *Hurst I*, the United States Supreme Court repeatedly stated

that Florida's scheme was incompatible with "*Apprendi*'s rule," of which *Ring* was merely an application. 136 S. Ct. at 621.

Nonetheless, this Court used *Ring* as a dispositive dividing line for retroactivity, not the earlier underlying decision in *Apprendi*. It is arbitrary to draw such a line. This violates the Eighth Amendment.

In *Furman v. Georgia*, 408 U.S. 238 (1972), the United States Supreme Court held that the death penalty "could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976). Significantly, *Furman*, which was grounded on the Eighth Amendment, not the Sixth Amendment like *Ring*, was given retroactive effect. *See Walker v. Georgia*, 408 U.S. 936 (1972); *Moore v. Illinois*, 408 U.S. 786, 800 (1972); *United States v. Johnson*, 457 U.S. 537, 550 (1982). Denying Kelley relief on his Eighth Amendment claim is arbitrary and violates his right to retroactivity of the *Hurst* decisions under federal law.

It has long been recognized that because "the penalty of death is qualitatively different from a sentence of imprisonment, however long . . . there is a corresponding difference in the need for reliability" in capital cases. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). The United States cannot tolerate this result, whereby similarly-situated defendants – i.e., those whose convictions and

sentencing under Florida's unconstitutional sentencing scheme were final prior to the *Hurst* decisions – can obtain relief based entirely on whether their convictions and sentences also were final at least one day after the date of an entirely different decision that did not address the Eighth Amendment constitutional issues presented here.

Finally, this Court's holding in *Hitchcock v. State*, No. SC17-445, 2017 WL 3431500 (Fla. Aug. 10, 2017), and *Asay v. State*, Nos. SC17-1400 & SC17-1429, 2017 WL 3472836 (Fla. Aug. 14, 2017), do not undermine Kelley's right to retroactivity under federal law. *Asay* and *Hitchcock* do not apply to Kelley's arguments because neither case resolved his arguments.

Asay raised four claims: (1) the failure to require a unanimous jury decision violated the Eight Amendment's requirement for reliability in capital sentencing; (2) Florida's statutory amendment requiring unanimity is a substantive right that applies retroactively under the Fourteenth Amendment; (3) the lack of unanimity in Kelley's sentencing hearing violated the Eighth Amendment; and (4) that the failure to extend the same Sixth Amendment right announced by *Hurst I* that has been extended to other death row prisoners violates Fourteenth Amendment equal protection. *See Asay v. Jones*, Petition for Writ of Habeas Corpus, No. SC17-1429, 2017 WL 3472836 (Fla. Aug. 2, 2017).

Asay focused on federal constitutional law as it pertains to jury unanimity and the arbitrariness of this Court's application of the new jury unanimity statute. *Asay* did not resolve any arguments that the *Hurst* decisions announced new substantive rules that must apply retroactively under federal law or that the failure to apply them retroactively violated due process rights or the ban against arbitrary capital sentencing.

Hitchcock also is distinguishable. First, the procedural posture of *Hitchcock* precluded this Court from fully addressing federal retroactivity because Hitchcock had failed to preserve the federal retroactivity issue for appeal. *See Hitchcock v. State*, State's Answer Brief, No. SC17-445, 2017 WL 3431500 at 8 n.2 (Fla. June 12, 2017). While this Court did not specifically address this default, its opinion relied on the original *Asay* opinion, which did not resolve any arguments pertaining to federal retroactivity law: *See Asay v. State*, 210 So. 3d 1 (Fla. 2016). Indeed, the whole purpose for the August 2017 *Asay* appeal of his successive 3.851 petition is that *Asay* had not previously raised retroactivity under federal law and that he had addressed *Hurst I* but not *Hurst II*.

It is clear from this Court's complete silence on Hitchcock's federal retroactivity arguments that such arguments were not available for review in that case. The Court's reliance on the first *Asay* opinion in *Hitchcock*, which in turn provided the basis of its decision in the second *Asay* opinion, prevented this Court

from addressing the question of retroactivity under federal constitutional law. Because the decisions in *Asay* and *Hitchcock* were based almost entirely on state law arguments, and to the extent that any federal arguments were made they are distinguishable from Kelley's arguments, *Hitchcock* and *Asay* do not control this case.

CONCLUSION

The trial court's order should be reversed and Kelley's death sentence should be vacated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this response to the order to show cause was furnished by electronic mail to the following persons this 2nd day of October, 2017.

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CERTIFICATE OF COMPLIANCE

I HEREBY FURTHER CERTIFY that the type size and style used throughout this response to order to show cause is 14-point Times New Roman, and that this brief fully complies with the requirements of Florida Rules of Appellate Procedure 9.142 and 9.210.

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