IN THE SUPREME COURT OF FLORIDA
CASE NOS. SC17-859 & SC16-706

JAMES D. FORD,

Appellant/Petitioner,

v.

STATE OF FLORIDA,

and

JULIE L. JONES, etc.,

Appellee/Respondent,
_____/

RESPONSE TO ORDER TO SHOW CAUSE AND MOTION FOR GUIDANCE AS TO THE STANDARD FOR DETERMINING WHAT CONSTITUTES CAUSE

COMES NOW the Appellant/Petitioner, **JAMES D. FORD**, 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/or find cause exists and issue a briefing schedule allowing Mr. Ford's appeal to proceed.[1] In support of his position, Mr. Ford states:

1. Mr. Ford has three death sentences. The petition for a writ of habeas corpus at issue in these proceedings raised one claim which was based on *Hurst v. Florida*.[2] The successive Rule 3.851 motion that is the subject of this appeal,[3] raised four separate claims challenging his death sentence.[4] At the same that

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[1]On October 17, 2017, this Court granted Mr. Ford's request for an extension of time in part, ordering his response to the show cause order to be filed on October 24, 2017. Later, it was then extended to October 27, 2017.

[2]The habeas petition was filed on April 26, 2016.

[3]The motion to vacate was filed on January 12, 2017.

[4]Claim I rested on the Sixth Amendment and the decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016). Claim II rested on the

the 3.851 motion was filed, Mr. Ford asked this Court to hold the habeas petition in abeyance. The motion noted that the 3.851 motion had largely superceded the habeas petition as it included the *Hurst v. Florida* claim that had been presented in the habeas petition.[5] On January 17, 2017, this Court granted the motion and ordered the habeas petition in abeyance.

2. The circuit court denied 3.851 relief on March 9, 2017, and denied Mr. Ford's motion for rehearing on April 5, 2017. A notice of appeal was filed on April 17, 2017. The record was filed on May 9, 2017. A briefing schedule issued on May 11, 2017, making the initial brief due on June 19, 2017. As counsel was preparing Mr. Ford's initial brief and an amended habeas petition, the Court *sua sponte* issued its June 8, 2017, order staying the 3.851 appeal and the habeas proceeding pending the disposition of *Hitchcock v. State*, Case No. SC17-445, and

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Eighth Amendment, the Florida Constitution, and this Court's ruling in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), that before a death sentence could be imposed a jury must have returned a unanimous death recommendation. Claim III was premised upon the arbitrariness of the distinction this Court made in *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), and *Asay v. State*, 210 So. 3d 1 (Fla. 2016), between death sentence final before June 24, 2002, and those final after June 24, 2002. The arbitrariness of the distinction meant that Mr. Ford's death sentence violates *Furman v. Georgia*, 408 U.S. 238 (1972). Claim IV asserted that the rejection of Mr. Ford's previously presented newly discovered evidence, *Brady/Giglio* and *Strickland* claims was rendered constitutionally unreliable because *Hurst v. State* and *Perry v. State* together gave him a retrospective right to a life sentence unless a jury returns a unanimous death recommendation.

[5]Because the claim presented in the habeas petition was also set out in the 3.851 motion, Mr. Ford treats the habeas claim as having merged into his appeal from the denial of the 3.851 motion. Herein, he treats the claim in the context of his appeal.

"supersed[ing]" the previously entered briefing schedule.

3. On July 2, 2017, Mr. Ford filed a motion objecting to the stay of his appellate and habeas proceedings. On July 6, 2017, this Court denied the motion to vacate the stay.

4. On September 27, 2017, this Court denied the motion to supplemental record. That same day, this Court issued an order that provided:

> Appellant shall cause on or before Tuesday, October 17, 2017, why the trial court's order should not be affirmed and the petition for a writ of habeas corpus should not be denied in light of this Court's decision in *Hitchcock v. State*, SC17-445. The response shall be limited to no more than 20 pages.

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

First, Mr. Ford submits that his appeal is not one subject to this Court's discretionary jurisdiction. *See* Fla. R. App. Pro. 9.030(a)(2). Mr. Ford has a substantive right to appeal the denial of his successive Rule 3.851 motion. *See* Fla. Const. Art. V, Sec. 3(b)(1); Fla. Stat. § 924.066 (2016); Fla. R. App. Pro 9.140(b)(1)(D). 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).[6] Requiring a showing of "cause" before an appeal is heard, makes the appeal, not one of right under the Florida Constitution, but one that is

[6]In 2013, this Court denied Mr. Ford's previous appeal of a denial of a 3.851 motion, noting it had jurisdiction to hear the appeal under Art. V, § 3(b)(1), which provides in part: "The supreme court: (1) **Shall** hear appeals from final judgments of trial courts imposing the death penalty...." *See Ford v. State*, 2015 WL 1741803 (Fla. 2015).

discretionary in nature.

Mr. Ford has a substantive right to appeal the denial of his successive Rule 3.851 motion. It 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, the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution."). This 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.").[7]

This Court's *sua sponte* order staying Mr. Ford's appeal pending a decision in *Hitchcock v. State* appears to have tried to bind Mr. Ford to the outcome in *Hitchcock v. State*. While this practice is common in discretionary appeals, it is an anathema to individualized capital appeals. his Court's order to show cause severely curtails the appellate process in Mr. Ford's appeal of right. It appears that the use of a procedure from discretionary appeals means that this Court regards Mr. Ford's appeal as one within its discretion to hear or not hear. Not only does this not

[7]In *Lane v. Brown*, the issue arose when an appeal was not allowed due a public defender's "stated belief that an appeal would be unsuccessful." *Id.*, 372 U.S. at 481-82.

comport with this Court's construction of Art V, Sec. 3(b)(1), Fla. Const., the Court's abandonment of its long held construction of the Florida Constitution is tantamount to a *sua sponte* constitutional amendment without notice of opportunity to be heard.[8] It violates Mr. Ford's right to due process and equal protection under the Fourteenth Amendment.[9] What constitutes "cause" has not been explained.

Individualized appellate review in each capital appeal, whether in the course of direct or collateral proceedings, is required by the Florida Constitution. That individualized review is necessary to insure Florida's capital sentencing scheme is Eighth Amendment compliant. *See Proffitt v. Florida*, 428 U.S. 242, 258 (1976) ("The Supreme Court of Florida reviews each death sentence to ensure that similar results are reached in similar cases."). Individualized appellate review is as necessary as individualized sentencing in a capital case. *See Mosley v. State*, 209 So. 3d 1248, 1282 (Fla. 2016) ("In this case, where the rule

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[8]The record was filed on May 11, 2017, prior to the entry of the stay order. If this Court reviewed the record before issuing the stay order, that would reflect a prejudgment of Mr. Ford's arguments before he was allowed to make them. Whether the stay order was based upon nothing or a review of the record without affording Mr. Ford a right to be heard, the stay order stripped Mr. Ford of the right to file an initial brief and a reply brief. It was and is an unconstitutional denial of due process.

[9]This Court *sua sponte* decided that Mr. Ford was not entitled to the normal capital appellate review process unless he first shows "cause," whatever that means. It is undefined. There are no standards. The September 27th order only affords Mr. Ford 20 pages to show this standardless "cause." The rules of appellate procedure would grant him the right to file an Initial Brief of 75 pages in length in his appeal of right.

announced is of such fundamental importance, the interests of fairness and 'cur[ing] individual injustice' compel retroactive application of *Hurst* despite the impact it will have on the administration of justice."); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) ("we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases."). *See Parker v. Dugger*, 498 U.S. 308 (1991).[10]

On the basis of the Florida Constitution, Mr. Ford objects to the requirement that he show cause before his appeal of right can proceed. He also objects on the basis of the Equal Protection and Due Process Clauses of the Fourteenth Amendment,[11] and on the basis of the Eighth Amendment.

B. MR. FORD'S EFFORT TO SHOW "CAUSE", WHATEVER THAT IS.[12]

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[10]As three Supreme Court justices recently noted, this Court's review of *Hurst* related appeals has been deficient. *See Truehill v. Florida*, _ U.S. _, 2017 WL 2463876 (October 16, 2017) (Sotomayor, J., dissenting, joined by Breyer and Ginsburg, JJ.)("capital defendants in Florida have raised an important Eighth Amendment challenge to their death sentences that the Florida Supreme Court has failed to address.").

[11]There was no demand for Mr. Hitchcock show "cause" for his appeal to proceed under the Florida Rules of Appellate Procedure. Mr. Hitchcock's counsel was allowed to fully brief the issues.

[12]Is "cause" the same as de novo review, which would govern this Court's review of questions of pure law? Or does "cause" contemplate merely a review of whether the lower court's ruling is supported by competent, substantial evidence? Standards of review matter. *See State v. J.P.* 907 So.2d 1101, 1120 (Fla. 2004) (Cantero, J., dissenting) ("Not only is the applicable standard the threshold determination in any constitutional analysis; it is often the most crucial. In this case, it has made

Despite the absence of guidance as to what constitutes "cause" that allows a capital appellant's appeal of right to proceed, Mr. Ford in accordance with this Court's directive blindly suggests the following as cause:

Cause 1

In *Hitchcock v. State*, _ So. 3d _, 2017 WL 3431500 (Fla. August 10, 2017), this Court said:

> 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. As to Mr. Hitchcock's arguments, it said:

> 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 (emphasis added). That is the extent of this Court's analysis of the arguments made by Mr. Hitchcock. While this Court described Mr. Hitchcock's arguments as nothing more than that *Hurst v. State* should be applied retroactively to his sentence, Mr. Ford does not believe that his arguments can be fairly described in that fashion. But perhaps more importantly, the Court's premise that the retroactivity of *Hurst v. State* was decided in *Asay* is belied by facts. It is not possible that the retroactivity of the constitutional right to a life sentence unless a jury returned a unanimous death recommendation which was

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all the difference.").

recognized in *Hurst v. State* on the basis of the Eighth Amendment and the Florida Constitution to have been decided in *Asay v. State*, 210 So. 3d 1 (Fla. 2016). It simply was not raised or at issue there.[13]

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.

Hurst v. State issued on October 14, 2016. Nothing after the issuance of *Hurst v. State* was filed by Asay before the 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*.

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[13]It is simply not possible nor permissible for this Court to reject arguments that were not made. Courts can only decide issues that are actually presented and subjected to the adversarial process. *See also Hall v. State*, 134 S. Ct. 1986, 2001 (2014) ("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.").

For the adversarial process to properly function, the issue must be raised and briefed by the parties.

> 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).

While Hitchcock did not argue that Asay had not raise any claims based on *Hurst v. State*, and that this Court could not have decided issues and arguments that were not presented, Mr. Ford does so argue. In *Wilson v. Wainwright*, 474 So. 2d 1162, 1164-65 (Fla. 1985), this Court wrote:

> The role of an advocate in appellate procedures should not be denigrated. Counsel for the state asserted at oral argument on this petition that any deficiency of appellate counsel was cured by our own independent review of the record. She went on to argue that our disapproval of two of the aggravating factors and the eloquent dissents of two justices proved that all meritorious issues had been considered by this Court. It is true that we have imposed upon ourselves the duty to independently examine each death penalty case. However, we will be the first to agree that our judicially neutral review of so many death cases, many with records running to the thousands of pages, **is no substitute for the careful, partisan scrutiny of a zealous advocate.** It is the unique **role of that advocate to discover and highlight possible error and to present it to the court,** both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process. Advocacy is an art, not a science.

(Emphasis added).

Moreover, Asay's death sentence did not become final after the issuance of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Asay could not have argued that *Hurst v. Florida* and *Hurst v. State* must at a minimum be retroactive to June 26, 2000, the day *Apprendi* issued. In *Asay*, this Court did not have before it an individual with a death sentence that become final after *Apprendi* issued on June 26, 2000. This Court was not called upon to and did not conduct an analysis of post-*Apprendi* death sentences to determine whether *Hurst v. Florida* should apply to them pursuant to *Witt v. State*, 387 So. 2d 922 (Fla. 1980). Since Asay could not have presented the argument which did not apply to him, this Court's decision in *Asay* could not have determined whether *Hurst v. State* should apply retroactively to death sentences that became final post-*Apprendi*. The Eighth Amendment requires this Court to give Mr. Ford a fair opportunity to present his argument as to why his execution is precluded by the constitution. *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014).

Importantly, Mr. Ford's argument that post-*Apprendi* death sentences should be subject to the ruling in *Hurst v. State* is compelling. This Court in *Asay* attributed the ruling in *Hurst v. Florida* to *Ring v. Arizona* failing to note that both *Hurst v. Florida* and *Ring* were in fact based upon *Apprendi*.

in *Apprendi v. New Jersey*, the Supreme Court "held that any fact that 'expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict' is an 'element' that must be submitted to a jury." *Hurst v. Florida*, 136 S.Ct.

616, 621 (2016) (quoting *Apprendi*, 530 U.S. at 494). In *Ring v. Arizona*, 536 U.S. 584 (2002), the Supreme Court "concluded that Arizona's capital sentencing scheme violated *Apprendi*'s rule because the State allowed a judge to find the facts necessary to sentence a defendant to death." *Hurst v. Florida*, 136 S.Ct. at 621 (citing *Ring*, 536 U.S. at 591-93, 597). In *Hurst v. Florida*, the Supreme Court noted that *Apprendi* was the basis for its decision in *Ring*. It then wrote, "The analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's." 136 S.Ct. at 621-22. *Hurst v. Florida* overruled the Supreme Court's prior decisions in *Spaziano v. Florida*, 468 U.S. 447 (1984), and *Hildwin v. Florida*, 490 U.S. 638 (1989), as "irreconcilable **with *Apprendi***" (emphasis added), explaining:

> *Spaziano* and *Hildwin* summarized earlier precedent to conclude that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Hildwin*, 490 U.S., at 640-41, 109 S.Ct. 2055. **Their conclusion was wrong, and irreconcilable with *Apprendi***. Indeed, today is not the first time we have recognized as much. In *Ring*, we held that another pre-*Apprendi* decision-*Walton [v. Arizona]*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 [(1990)]-could not "survive the reasoning of *Apprendi*." 536 U.S., at 603, 122 S.Ct. 2428. *Walton*, for its part, was a mere application of *Hildwin*'s holding to Arizona's capital sentencing scheme. 497 U.S., at 648, 110 S.Ct. 3047.

Hurst v. Florida, 136 S.Ct. at 623 (emphasis added). It was on the basis of *Apprendi* that the Arizona statutory scheme was declared unconstitutional in *Ring* and that the Florida capital sentencing scheme was held unconstitutional in *Hurst v. Florida*.

In fact shortly after *Apprendi* issued, this Court was presented with a challenge to Florida's death penalty statute in

Mills v. Moore, 786 So. 2d 532 (Fla. 2001). The *Apprendi* argument was also presented in *Bottoson v. Moore,* 833 So. 2d 693 (Fla. 2002). In those cases, this Court failed to see the obvious, i.e. that the rule of law set forth in *Spaziano v. Florida* and *Hildwin v. Florida* "was wrong, and irreconcilable with *Apprendi.*" *Hurst v. Florida*, 136 S. Ct. at 623.

In *Mills v. Moore*, this Court rejecting the *Apprendi* challenge relying on the US Supreme Court's failure to expressly overrule *Walton v. Arizona*. Then, the US Supreme Court held that *Walton v. Arizona* could not survive the logic of *Apprendi* when it issued *Ring v. Arizona*. *See Hurst v. Florida*, 136 S. Ct. at 623 ("In *Ring*, we held that another pre-*Apprendi* decision— *Walton*, 497 U.S. 639—could not 'survive the reasoning of *Apprendi*.' 536 U.S., at 603. *Walton*, for its part, was a mere application of *Hildwin*'s holding to Arizona's capital sentencing scheme."). After *Ring* issued and the basis of the reasoning in *Mills v. Moore* shredded, this Court avoided the obvious by citing *Hildwin v. Florida,* in lieu of *Walton v. Arizona*.[14]

However, the US Supreme Court in *Hurst v. Florida* specifically cited and relied upon *Apprendi* in expressly overruling *Hildwin* and *Spaziano* because those decisions were

[14]This Court simply ignored the unconstitutionality of Florida's capital sentencing scheme under *Apprendi* and waited for the US Supreme Court to correct the error. While this Court defensively faulted the US Supreme Court for taking so long, it is clear from the reference in *Hurst v. Florida* to *Spaziano* and *Hildwin* as "irreconcilable with *Apprendi*" which Mills and Bottoson told this Court in 2001 and 2002 respectively that from the time *Apprendi* issued, the constitutional defect was obvious.

"irreconcilable with *Apprendi*." 136 S. Ct. at 623.

Mr. Ford will make arguments and claims that were not presented by Hitchcock or Asay, and thus were not before this Court. Surely that constitutes "cause" as to why Mr. Ford's appeal as a matter of right should be heard by this Court.

Cause 2

In *Hitchcock v. State*, 2017 WL 3431500, Hitchcock did raise arguments that his death sentence was unconstitutional based upon *Caldwell v. Florida*, 472 U.S. 320 (1985), which this Court did not address when denying his appeal. Three justice of the US Supreme Court have noted this Court's has failed revisited *Caldwell* in the wake of *Hurst v. Florida* and *Hurst v. State*. *See Truehill v. Florida*, _ U.S. _, 2017 WL 2463876 (October 16, 2017) (Sotomayor, J., dissenting, joined by Breyer and Ginsburg, JJ.)("capital defendants in Florida have raised an important Eighth Amendment challenge to their death sentences that the Florida Supreme Court has failed to address."). Mr Ford will present the *Caldwell* based arguments that so far this Court has failed to address. *Caldwell*, a 1985 decision, issued well before Mr. Ford's conviction was final. Surely, the unresolved *Caldwell* issue constitutes "cause" as to why Mr. Ford's appeal as a matter of right should be heard by this Court.

Cause 3

On April 15, 2015, this Court affirmed the denial of Mr. Ford's prior successive 3.851 motion and stated:

> Ford's third claim, challenging this Court's general jurisprudence that nonunanimous jury recommendations of the death sentence are constitutional, has also been

> repeatedly rejected by this Court. *See McLean v. State*, 147 So.3d 504, 514 (Fla.2014); *Kimbrough v. State*, 125 So.3d 752, 754 (Fla.2013); *Mann v. State*, 112 So.3d 1158, 1162 (Fla.2013). Ford was convicted of sexual battery with a firearm, child abuse, and two counts of first-degree murder following a jury trial for the murders of Greg and Kimberly Malnory in the presence of their daughter, Maranda Malnory. *Ford*, 802 So.2d at 1125–26. In the penalty phase, the jury recommended the death penalty by a vote of eleven to one for each murder. *Id*. at 1126. Ford received a sentence of 19.79 years imprisonment for the sexual battery conviction, five years for the child abuse conviction, and the death sentence for each murder. Id. at 1125. Thus, at the guilt phase the jury unanimously found that Ford committed another capital felony, the contemporaneous murder, and the fact that both murders were committed during the commission of a sexual battery, satisfying the constitutional requirements. *See Parker v. State*, 904 So.2d 370, 383 (Fla.2005); *Doorbal v. State*, 837 So.2d 940, 963 (Fla.2003).

Ford v. State, 2015 WL 1741803 (Fla. 2015). Thus nine months before *Hurst v. Florida* issued, this Court rejected Mr. Ford's argument that the imposition of a death sentence without a jury's unanimous death recommendation violated the Eighth Amendment. This Court rejected Mr. Ford's claim on the merits.

In *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), this Court held that the imposition of a death sentence without the jury's unanimous consent violated both the Florida Constitution and the Eighth Amendment. The decision in *Hurst v. State* issued 18 months after this Court had rejected Mr. Ford's Eighth Amendment challenge to his death sentences which were imposed without a jury's unanimous death recommendation. *Hurst v. State* clearly overrules the decision in *Ford v. State* that "nonunanimous jury recommendations of the death sentence are constitutional."

In *State v. Owen*, 696 So. 2d 715, 720 (Fla. 1997), this Court indicated that it had the equitable power to reconsider and

correct an erroneous ruling:

> This Court has the power to reconsider and correct erroneous rulings in exceptional circumstances and where reliance on the previous decision would result in manifest injustice, notwithstanding that such rulings have become the law of the case.

This manifest injustice exception to the law of the case doctrine is a matter to be evaluated case by case. *See Brunner Enterprises, Inc. v. Dep't of Revenue*, 452 So.2d 550, 553 (Fla. 1984) ("n intervening decision by a higher court is one of the exceptional situations in which a court will entertain a request to modify the law of the case."). The manifest injustice exception to the law of the case doctrine was most recently embraced and employed by this Court in *Thompson v. State*, 208 So. 3d 49, 50 (Fla. 2016) ("to fail to give Thompson the benefit of Hall, which disapproved of *Cherry*, would result in a manifest injustice, which is an exception to the law of the case doctrine.").

This Court has now held "that a reliable penalty phase proceeding requires that 'the penalty phase jury must be unanimous in making the critical findings and recommendation that are necessary before a sentence of death may be considered by the judge or imposed,' [*Hurst v. State*,]202 So.3d at 59." *Bevel v. State*, 221 So. 3d 1168, 1182 (Fla. 2017).

There was additional indicia of unreliability in Mr. Ford's case. The only documents returned by the jury were the completed verdict forms showing 11-1 death recommendations. In imposing death, the judge found four aggravating factors, two statutory mitigating circumstances and six nonstatutory mitigating

circumstances. Ford had presented evidence on and argued 17 nonstatutory mitigating circumstances. The judge rejected 5 of these circumstances, erroneously concluding they were not "valid" mitigation. *Ford v. State*, 802 So. 3d at 1135-36. The judge found 2 other non-statutory mitigators proven but gave them no weight.

During voir dire, the jurors were repeatedly told that their sentencing decision was a recommendation and merely advisory and that the judge would make the final decision regarding sentencing. These statements were repeated in the final penalty phase jury instructions. *Caldwell v. Mississippi* recognized that suggesting to jurors that the sentencing responsibility in a capital case rests elsewhere diminishes the jurors' own sense of responsibility and creates a bias in favor of a death verdict.

Further at the penalty phase charge conference, the defense unsuccessfully proposed an instruction saying, ""Where the aggravating factors outweigh the mitigating circumstances, the jury may exercise reasoning and judgment and proceed in such a case in rendering an advisory sentence of life" (R50. 4554). In support of this instruction, counsel cited *Henyard v. State*, 689 So. 2d 239 (Fla. 1996), for the proposition that a jury may constitutionally dispense mercy in a case deserving of the death penalty and is neither compelled nor required to recommend death where aggravating factors outweigh mitigation.[15] The refusal to

[15]In *Hurst v. State*, this Court cited *Henyard* in holding a capital penalty phase jury had the "right to recommend a sentence of life even if it finds aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating circumstances. . . . Once these critical findings are made

give the proposed instruction further increases the risk of unreliable death sentences under *Hurst v. State.*

The analysis must include the fact that there is a special need for reliability in a capital cases. *Johnson v. Mississippi*, 486 U.S. at 584 ("The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case."). In *Arbelaez v. Butterworth*, 738 So. 2d 326, 326-27 (Fla. 1999), this Court held:

> We acknowledge **we have a constitutional responsibility to ensure the death penalty is administered in a fair, consistent and reliable manner**, as well as having an administrative responsibility to work to minimize the delays inherent in the postconviction process.

(Emphasis added).

In the circumstances of his case, Mr. Ford argues in his appeal that the manifest injustice exception must apply. Not only is there indicia of the unreliability of his death sentences, this Court denied Mr. Ford's Eighth Amendment challenge on the merits 9 months before *Hurst v. Florida* issued and 18 months before *Hurst v. State* issued and found the argument was in fact meritorious. *Hitchcock v. State* did not address the circumstances of Mr. Ford's case which demonstrate the manifest injustice exception applies to Mr. Fordy. Under *Hall v. Florida*, Mr. Ford must be afford a fair opportunity to demonstrate why his

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unanimously by the jury, each juror may then 'exercis[e] reasoned judgment' in his or her vote as to a recommended sentence. *See Henyard v. State*, 689 So. 2d 239, 249 (Fla. 1996)." *Hurst v. State*, 202 So. 3d at 67-68.

execution is prohibited by the constitution. This surely constitutes "cause" as to why Mr. Ford's appeal as a matter of right should be heard by this Court.

Cause 4

Mr. Ford filed his certiorari petition from his direct appeal on March 13, 2002. *Ford v. Florida*, No. 01-9298, USSC Docket. On March 20, 2002, another death-sentenced defendant, James Card, filed his certiorari petition from his direct appeal. *Card v. Florida*, No. 01-9152, USSC Docket. On March 20, 2002, another death-sentenced defendant, Guerry Hertz, filed his certiorari petition from his direct appeal.[16]

Mr. Ford's death sentences became final on May 28, 2002, when the US Supreme Court denied his certiorari petition. Card's death sentence became final on June 28, 2002, when the US Supreme Court denied his certiorari petition. Hertz's death sentence became final on June 28, 2002, when the US Supreme Court denied his certiorari petition.

The death sentences imposed on Mr. Ford, Mr. Card, and Mr. Hertz were all final well before *Hurst v. Florida* issued on January 12, 2016. And all of their death sentences had become final in a 31 day period of time in 2002.

In *Card v. Jones*, 219 So. 3d 47 (Fla. 2017), this Court granted Card habeas relief pursuant to *Hurst v. Florida* and ordered a resentencing. In *Hertz v. Jones*, 218 So. 3d 428 (Fla. 2017), this Court granted Hertz habeas relief under *Hurst v.*

[16]Certiorari review had been granted in *Ring v. Arizona* on January 11, 2002. *Ring v. Arizona*, 534 U.S. 1103 (Jan. 11, 2002).

Florida and ordered a resentencing. *Id.* at 432 ("In *Mosley v. State*, we held that *Hurst* applies retroactively to those postconviction defendants whose sentences became final after the US Supreme Court's June 24, 2002, decision in *Ring v. Arizona*, 536 U.S. 584 (2002). *Mosley v. State*, 209 So.3d 1248, 1283 (Fla. 2016). Hertz's conviction became final on June 28, 2002. *Hertz*, 536 U.S. 963. Thus, Hertz falls within the category of defendants to whom Hurst is applicable.").

To the extent that this Court has drawn a line at June 24, 2002, and is extending the retroactive benefit of *Hurst* to Card and Hertz, but not to Mr. Ford, the line is arbitrary and violates the Eighth Amendment. The death sentences imposed on these three individuals were all final when *Hurst* issued.

The Eighth Amendment is concerned with "the risk that [a death] sentence will be imposed arbitrarily." *Johnson v. Mississippi*, 486 U.S. at 587. Under the Eighth Amendment, there is a greater "need for reliability in the determination that death is the appropriate punishment in a specific case." *Gardner v. Florida*, 430 U.S. 349, 363 (1977) (White, J., concurring).

Mr. Ford must be afforded an opportunity to show that there is no valid basis for distinguishing between his death sentences and the death sentences imposed on Card and Hertz. *Hitchcock v. State* did not address whether the distinction between Mr. Ford and Card and Hertz justified leaving Mr. Ford's death sentences intact, while Card's and Hertz's death sentences were vacated and remanded for resentencings. This must constitute "cause" as to why Mr. Ford's appeal as a matter of right should be heard by

this Court.

Cause 5

This Court's rejection of Mr. Ford's newly discovered evidence, *Brady/Giglio* and *Strickland* claims in his previous 3.851 motions was premised upon an understanding that at a resentencing it took the vote of six jurors to return an advisory life recommendation. However, any resentencing ordered in Mr. Ford's case in the course of collateral proceedings would have be governed by the law that one juror voting for a life sentence would preclude the imposition of a death sentence. *See Armstrong v. State*, 642 So. 2d at 735 ("Only when it appears that, on a new trial, the witness's testimony will change to such an extent as to render probable a different verdict will a new trial be granted."); *Bevel v. State*, 221 So. 3d 1168 (Fla. 2017) (the right to a life sentence unless a jury unanimously returns a death recommendation must alter this Court's standard of review in capital cases).

Mr. Ford in his appeal argues that this Court must revisit the denial of Mr. Ford's collateral challenges to his death sentences. This issue was not addressed in *Hitchcock v. State*. "Cause" surely exists as to why Mr. Ford's appeal of right should be permitted to proceed. *See Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014).

WHEREFORE, Mr. Ford requests that this Court issue a briefing schedule and afford Mr. Ford an opportunity to brief the issue in his appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing response with the Court's electronic filing system which will send a notice of electronic filing to opposing counsel of record, on this 30th day of October, 2017.

/s/. Martin J. McClain
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