IN THE SUPREME COURT OF THE STATE OF FLORIDA

STEVEN MAURICE EVANS,

Appellant, **CASE NO. SC17-869**

LOWER CASE NO. : 481996CF005639000AOX

v.

STATE OF FLORIDA,

Appellee.
_____/

RESPONSE TO THIS COURT'S ORDER TO SHOW CAUSE

COMES NOW, Appellant, Steven Maurice Evans, by and through the undersigned counsel, and responds to this Court's Order dated September 27, 2017 "to 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" as follows:

To deny Steven Maurice Evans retroactive relief under *Hurst v. Florida*, 136 S. Ct. 616 (2016), on the ground that his death sentence became final before June 24, 2002 under the decisions in *Asay v. State*, 210 So.3d 1 (Fla. 2016), while granting retroactive *Hurst* relief to inmates whose death sentences had not become final on June 24, 2002 under the decision in *Mosley v. State*, 209 So.3d 1248 (Fla. 2016), violates Mr. Evans's right to Equal Protection of the Laws under the Fourteenth

Amendment to the Constitution of the United States (e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942)) and his right against arbitrary infliction of the punishment of death under the Eighth Amendment to the Constitution of the United States (e.g., *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Espinosa v. Florida*, 505 U.S. 1079 (1992) (per curiam)).

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fourteenth Amendment, Equal Protection Clause (1868).

The lower court ignored the Equal Protection Clause of the Fourteenth Amendment by strictly adhering to the arbitrary and capricious cutoff date announced by this Court in *Asay v. State*, 210 So. 3d 1 (Fla. 2016). By failing to grant at least an evidentiary hearing, failing to consider Mr. Evans' individual circumstances, and by failing to grant Mr. Evans *Hurst* relief, this Court enforced a law that denied Mr. Evans due process of law. At the urging of the State, this Court denied Mr. Evans equal protection of the laws. All inmates similarly situated on Florida's death row were all tried and sentenced to death under basically the same unconstitutional capital punishment system. To grant some 200 inmates *Hurst* relief, yet deny the other approximately 200 inmates *Hurst* relief who were sentenced to

death earlier in time under the same unconstitutional system is to violate equal protection laws.

Because "Death is Different," this Court should not continue to endorse a strict June 24, 2002 cutoff date and deny Mr. Evans *Hurst* relief. *See, e.g.*, *Furman v. Georgia*, 408 U.S. 238, 286–89 (1972) (Brennan, J., concurring) ("[d]eath is a unique punishment"; "[d]eath . . . is in a class by itself"); *id*. at 306 (Stewart, J., concurring) ("penalty of death differs from all other forms of criminal punishment, not in degree but in kind"); *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) ("penalty of death is different in kind from any other punishment" and emphasizing its "uniqueness"); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) ("penalty of death is qualitatively different from a sentence of imprisonment, however long"); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) ("qualitatively different"); *Spaziano v. Florida*, 468 U.S. 447, 459 (1984) (citing Court's prior recognition of the "qualitative difference of the death penalty"); *id*. at 468 (Stevens, J., concurring in part and dissenting in part) ("death penalty is qualitatively different . . . and hence must be accompanied by unique safeguards"); *Wainwright v. Witt*, 469 U.S. 412, 463 (1985) (Brennan, J., dissenting) (citing "previously unquestioned principle" that unique safeguards necessary because death penalty is "qualitatively different"); *McCleskey v. Kemp*, 481 U.S. 279, 340 (1987) (Brennan, J., dissenting)

("hardly needs reiteration that this Court has consistently acknowledged the uniqueness of the punishment of death"); *Atkins v. Virginia*, 536 U.S. 304, 337 (2002) (Scalia, J., dissenting) (majority opinion holding it cruel and unusual to punish retarded persons with death is "pinnacle of . . . death-is-different jurisprudence"); *Ring v. Arizona*, 536 U.S. 584, 605–06 (2002) ("no doubt that '[d]eath is different'") (citation omitted); *id*. at 614 (Breyer, J., concurring in the judgment) ("Eighth Amendment requires States to apply special procedural safeguards when they seek the death penalty.").

Mental Incompetency and Attorney Inaction Led to this Case Being Final Prior to June 24,2002

Mr. Evans is seriously, profoundly, and severely mentally ill. He was twice adjudged mentally incompetent to stand trial due to his mental illness. *Evans v. State*, 800 So. 2d 182, 188 (Fla. 2001)("in fact the court on two prior occasions concluded that Evans was not competent to proceed with trial and had him hospitalized."). Contrary to reports from the state hospitals discharging Mr. Evans from their custody and care prior to 2002, Mr. Evans' competency was never really restored. Mr. Evans is incompetent because he suffers from schizophrenia. Mr. Evans suffered from this disease at the time of this crime, he suffered from this disease at the time of trial, and he continues to presently labor under this severe mental illness. Mr. Evans was sick at the time of the filing of the cert petition in 2002, he was sick when his attorney chose not to refile the cert petition and include the necessary paperwork on June 21,

2002, and he is still sick now. A sampling of Mr. Evans' relatively recent strange pro se filings, including a Valentine's Day card addressed to the "Chief Judge in Charge," can be seen in this case at 2017 ROA 70-83.

Throughout the progression of this case, in addition to filing strange pro se paperwork, Mr. Evans has exhibited a pattern of refusing to sign paperwork from his attorneys to assist in his defense. The pinnacle, or the absolute abyss, of the results of Mr. Evans' inability to assist his attorneys in the preparation of his defense came when his appointed appellate public defender on direct appeal lacked the necessary *in forma pauperis* paperwork (or notarized declaration of indigency) from Mr. Evans, then he apparently abandoned the cert petition he originally filed for Mr. Evans on March 11, 2002. On April 22, 2002, via letter (see 2017 ROA 347-48), the United States Supreme Court gave attorney George Burden the opportunity to gather the necessary paperwork and refile the Evans' cert petition (*in forma pauperis* paperwork and a copy of the denial of the motion for rehearing in the Florida Supreme Court was required to establish that the petition was filed timely). The United States Supreme Court allowing Mr. Burden 60 days to refile, the cert petition could have been refiled with the necessary paperwork by Friday June 21, 2002. This Court announced a cutoff of Tuesday June 24, 2002 in *Asay v. State*, 210 So. 3d 1 (Fla. 2016). Obviously, if the direct appeal attorney would have simply just refiled

the cert petition back in 2002, Mr. Evans would have received *Hurst* relief and would not have to be submitting this response to this Order.

At the very least, the lower court should have permitted a limited evidentiary hearing to decipher why direct appeal attorney George Burden made the decision not to refile the cert petition. (*See* cert petition notes reflecting the following: "Pet. not docketed 5-1-02 GB says – not re-filing." 2017 ROA 336). Had the direct appeal attorney simply refiled the cert petition up to the due date for the refile, Friday, June 21, 2002, Mr. Evans' case would have been a post-*Ring* case, and he would have been entitled to *Hurst* relief. Certainly Mr. Evans' cert petition would have been denied *after* Tuesday, June 24, 2002 had the petition been refiled on the refiling deadline: Friday June 21, 2002. Consequently, this case is an illustratively extreme example of arbitrariness and capriciousness in capital sentencing in this state following this Court's partial retroactivity ruling.

This wasn't just a situation where the attorney decided he had no viable cert issues to present. Mr. Evans had at least two (2) viable issues: a *Ring* issue (he even cited to the cert grant in *Ring* in the petition filed March 11, 2002, and issues regarding competency). Steven Evans argued the following in the heading of the cert petition filed March 11, 2002:

> **FLORIDA'S CAPITAL SENTENCING SCHEME VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 9, 16, 17 AND 22 OF THE FLORIDA CONSTITUTION BECAUSE**

IT DOES NOT REQUIRE AGGRAVATING CIRCUMSTANCES TO BE CHARGED IN THE INDICTMENT, DOES NOT REQUIRE SPECIFIC, UNANIMOUS JURY FINDINGS OF AGGRAVTING CIRCUMSTANCES AND DOES NOT REQUIRE A UNANIMOUS VERDICT TO RETURN A RECOMMENDATION OF DEATH.

2017 ROA 321. *See* the cert. petition in its entirety at 2017 ROA 301-335.

In the apparently technically deficient cert. petition filed March 11, 2002, Mr. Evans through counsel continued to argue the following in support of cert: "The United States Supreme Court recently agreed in Ring v. Arizona, 122 S. Ct. 865 (2002), to decide whether Apprendi overrules Walton. The validity of this Court's holding in Mills is therefore dependent on the outcome of Ring." 2017 ROA 321. The attorney drafted and filed the cert petition and it actually reached the United States Supreme Court on March 20, 2002. Had the attorney simply accepted the United States Supreme Court's invitation to just refile it by Friday June 21, 2002 with the necessary paperwork, this Court would be vacating Mr. Evans' death sentence based on *Hurst* rather than denying the successor motion based on the Tuesday, June 24, 2002 cutoff date. The lower court should have at least permitted a limited evidentiary hearing to hear from the direct appeal attorney in this case regarding the circumstances regarding the filing of the cert petition in this case, and the failure to refile the cert petition by June 21, 2002.

Ring v. Arizona 536 U.S. 584 (2002) was decided June 24, 2002. Presumably, this Court identified that date as a date that our State should have recognized the

constitutional infirmities of our death penalty system, and identified this as the cutoff date for *Hurst* relief. Interestingly, Justice Lewis, concurring, but writing separately in *Asay*, stated the following:

> As Justice Perry noted in his dissent, there is no salient difference between June 23 and June 24, 2002—the days before and after the case name Ring arrived. See Perry, J., dissenting op. at 38. However, that is where the majority opinion draws its determinative, albeit arbitrary, line. As a result, Florida will treat similarly situated defendants differently—here, the difference between life and death—for potentially the simple reason of one defendant's docket delay. Vindication of these constitutional rights cannot be reduced to either fatal or fortuitous accidents of timing.

Asay v. State, 210 So. 3d 1 (Fla. 2016) (J. Lewis concurring).

The Steven Evans case is precisely a case wherein vindication of his constitutional rights was denied due to a fatal accident of timing. Sadly, simple docket delay and an arbitrary date line will result in the execution of an incompetent, blind, paranoid schizophrenic, sarcoidosis-afflicted prisoner. (*See* postconviction counsel's "Motion to Determine Competency" filed October 2, 2002 at 2017 ROA 337-344). This Court should not be so rigid given the unique circumstances of this case. In fairness, this Court should grant *Hurst* relief based on the unique circumstances of this case. The docket entry "5-1-02 GB says not re-filing [the cert petition]" ominously appearing in this case at 2017 ROA 336 should not be, as Justice Lewis forecasted, "the difference between life and death." Because "Death is Different," this Court should not draw such arbitrary and capricious lines.

Additional Reasons for Granting Relief (Numerous Caldwell Errors)

Besides the arbitrariness of all this, as well as equal protection problems, this Court has failed to squarely address another major problem in this State that has been ongoing since June 11, 1985. In a case much closer to Florida, and many years predating *Ring v. Arizona*, the United States Supreme Court released *Caldwell v. Mississippi*, 472 U.S. 320 (1985). In *Caldwell*, the United States Supreme Court identified and rectified a problem that occurred during closing arguments in a capital case out of Mississippi. In *Caldwell*, the jury was informed that their decision in the case would be reviewed by a higher court.

> ASSISTANT DISTRICT ATTORNEY: Ladies and gentlemen, I intend to be brief. I'm in complete disagreement with the approach the defense has taken. I don't think it's fair. I think it's unfair. I think the lawyers know better. 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. They know it. Yet they …
>
> COUNSEL FOR DEFENDANT: Your Honor, I'm going to object to this statement. It's out of order.
>
> ASSISTANT DISTRICT ATTORNEY: Your Honor, throughout their argument, they said this panel was going to kill this man. I think that's terribly unfair.
>
> THE COURT: Alright, go on and make the full expression so the Jury will not be confused. I think it proper that the jury realizes that it is reviewable automatically as the death penalty commands. I think that information is now needed by the Jury so they will not be confused.
>
> ASSISTANT DISTRICT ATTORNEY: Throughout their remarks, they attempted to give you the opposite, sparing the truth. They said 'Thou shalt not kill.' If that applies to him, it applies to you, insinuating

> that your decision is the final decision and that they're gonna take Bobby Caldwell out in the front of this Courthouse in moments and string him up and that is terribly, terribly unfair. For they know, as I know, and as Judge Baker has told you, that the decision you render is automatically reviewable by the Supreme Court. Automatically, and I think it's unfair and I don't mind telling them so. *Id.*, at 21–22.

Caldwell, Id. at 325-26.

Based on the above comments to the jury, the United States Supreme Court vacated the death sentence in *Caldwell*, holding in part:

> It is unconstitutionally impermissible to rest a death sentence on a determination made by a sentence who has been led to believe that responsibility for determining the appropriateness of defendant's death rests elsewhere. . . .There are specific reasons to fear substantial unreliability as well as bias in favor of death sentences where there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court.

Caldwell, Id. at 328, 330.

The State of Florida continues to have a major problem in this regard now, especially when viewed through the lens of the *Hurst v. Florida*, 136 S. Ct. 616 (2016) decision. *Hurst* reminded us of a basic fundamental Sixth Amendment right: capital defendants facing the ultimate penalty of death have the right to a trial by jury. These capital defendants obviously also have ***the right to a properly instructed jury***. Without proper jury instructions, and without full retroactivity, the Sixth, Eighth, and Fourteenth Amendments, *Hurst*, *Ring*, and *Caldwell*, all will have no meaning in this state.

As will be illustrated in numerous examples below from the Steven Evans trial transcripts, the case at bar clearly does not pass Eighth Amendment scrutiny. *Caldwell* reversed a death sentence based on a prosecutor's isolated comment during closing arguments about the jury's decision being reviewed. The United States Supreme Court concluded in *Caldwell*:

> This Court has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its "truly awesome responsibility." In this case, the State sought to minimize the jury's sense of responsibility for determining the appropriateness of death. 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. The sentence of death must therefore be vacated. Accordingly, the judgment is reversed to the extent that it sustains the imposition of the death penalty, and the case is remanded for further proceedings.

Caldwell, Id. at 341. By affording only partial retroactivity back to *Ring* (2002), and ignoring the established Eighth Amendment mandates of *Caldwell* (1985), this Court leaves clearly established Eight Amendment violations unrectified.

Caldwell / Eighth Amendment Violations at the Steven Evans Trial

The case at bar is remarkably distinguishable from *Caldwell* because *Caldwell* only presented **one** instance of the jury's role being diminished. This case **presents over one hundred instances of the jury's role being diminished**. For example, early in the jury instructions and continuing through *voir dire,* Steven Evans' jury

was informed:

> "THE COURT: Should the accused be found guilty of the capital felony described in the charges, a second phase will then address what type of penalty ***the jury will recommend*** to the Court . . . Your ***advisory sentence*** as to what sentence should be imposed on this defendant is entitled by law and it will be ***given great weight by this Court in determining what sentence to impose*** in this case. It is only under rare circumstances that this court could impose a sentence other than that which ***you recommend***. Because your verdict ***could lead*** to the imposition of the death penalty. . . .abide by your oath as a juror and [] ***follow the law as I give it to you***. . . .whether you are in a position to ***follow the law as I give it to you***. . . .***follow the law***. . . ***render a verdict that may lead to imposition of the death penalty***." (R. 69-71)(emphasis added).
>
> "[THE COURT]: The ***advisory verdict***. The ***advisory verdict need not be unanimous. The recommendation*** for the imposition of the death penalty ***must be by a majority of the jury. A recommendation of incarceration for life*** with no eligibility for parole may be ***made either by majority of you or by an even division of the jury. That is a tie vote of six to six.*** When deliberating upon ***the nature of the advisory verdict***. . . .the penalty ***jury will make its recommendation*** to the Court. . . . still ***decline to join in a recommendation*** for the death penalty to be imposed... ***serve conscientiously as a juror***."(R. 72-74)(emphasis added).
>
> "[THE STATE TO THE PROSPECTIVE JURORS]: You then are asked to consider mitigating circumstances and to weigh one against the other and through that process ***come to a recommendation***. . . .***follow the process and come to a lawful recommendation***." (R. 136)(emphasis added).

Not every instance during *voir dire* of the jury's diminished role will be listed in this response, but, for several volumes of transcript the following type of discussions occurred:

> "[THE DEFENSE ATTORNEY TO A PROSPECTIVE JUROR]:

Well, you will be asked to ***make a recommendation to the court*** and, again, ***as the judge told you, it will be given great weight.***" (R. 206)(emphasis added).

"[THE DEFENSE ATTORNEY TO A PROSPECTIVE JUROR]: ***Could you vote to recommend death*** if you were convinced that was the case?" (R. 419) (emphasis added).

After closing arguments from the attorneys, the advisory panel was instructed in the following manner:

"THE COURT: Ladies and gentlemen of the jury: It's ***now your duty to advise the Court*** as to what punishment should be imposed. . . .***As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge***; however, ***it is your duty to follow the law*** that will now be given to you by the court ***and render an advisory sentence***. . . .***Your advisory sentence should be based upon the evidence***." (R. 2047)(emphasis added).

"[THE COURT:] If you find that the aggravating circumstances do not justify the death sentence, ***your advisory sentence should be one of life imprisonment*** without the possibility of parole." (R. 2050)(emphasis added).

"[THE COURT:] The ***sentence that you recommend to the Court*** must be based on the facts. . . .***your advisory sentence*** must be based on these considerations. In determining ***whether to recommend life imprisonment or death***, ***the procedure is not a mere counting process***. . . .In these proceedings ***it is not necessary that the advisory sentence of the jury be unanimous***. The fact that ***the determination of whether you recommend a sentence of death or a sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings***. . . .human life is at stake, [] ***bring to bear your best judgment in reaching your advisory sentence***. . . .***If a majority of the jury determine*** that Steven Evans should be sentenced to death, ***your advisory sentence will be***: [] ***by a vote of, and then you would insert the vote, advise and recommend to the Court that it impose the death penalty***. . . .On the other hand, ***if by six or more votes the jury determines*** that Steven Evans should not be sentenced to death, ***your***

> ***advisory sentence*** will be: ***The jury advises and recommends to the Court that it impose a sentence of life imprisonment***. . . .You will now retire to ***consider your recommendation***. When ***you reach an advisory sentence in conformity with these instructions, that form of recommendation should be signed by your foreperson and returned to the court***." (R. 2053-55)(emphasis added).
>
> "[THE COURT:] Ladies and Gentlemen: ***have you rendered a recommendation to the court***? . . .Madame Clerk ***would you publish the recommendation***? (R. 2060)(emphasis added).

At that point, the verdict form is published, reading "Jury Recommendation" at the top. (R. 2060). The language of the form includes the language "[the advisory panel by vote of] 11 to 1 advises and recommends to the court that it imposes the death penalty." (R. 2061). The defense requests that the advisory panel be polled, and each of the 12 members of the panel confirms that the "advisory sentence" read in court is their recommendation, and is correct (R. 2061-2064).

If one instance of the jury's role being diminished in a capital case warrants that the death sentence be vacated under *Caldwell*, *Id.*, surely upwards of 100 instances of the jury's role being diminished should warrant that the death sentence be vacated, as in the instant case. *Hurst* reaffirmed the principle that a capital defendant facing the death penalty has a right for a jury to make factual findings, and to decide his fate. Not a judge. *Caldwell* reminds us that the jury must also be properly instructed. All inmates similarly situated and currently housed on Florida's death row were judged by juries who received defective and unconstitutional instructions.

The Florida Supreme Court's Past Treatment of the Caldwell Issue

Indeed, there is a long line of cases from the Florida Supreme Court denying *Caldwell* relief. But, those cases were operating under the premise that Florida's death penalty system was constitutional. That is not the case anymore. *Hildwin v. Florida* has been specifically overturned by *Hurst v. Florida*. The constitutional landscape in this State has changed dramatically since those prior *Caldwell* cases were decided. Florida's death penalty has now been declared unconstitutional by the United States Supreme Court. This Court has ruled in *Hurst v. State* that our system violates both the Sixth Amendment and the Eighth Amendment. *Hurst* has changed everything. This Court has now addressed and cured most *Caldwell* errors prospectively issuing *IN RE: STANDARD JURY INSTRUCTIONS IN CAPITAL CASES*, 214 So. 3d 1236 (Fla. 2017). But the time has come to retroactively cure these errors.

The Florida Supreme Court's Recent Treatment of the Caldwell Issue

In November of 2016 this Court was given an opportunity in a case to address and rectify a handful of cited *Caldwell* violations, but declined to address the issues because the Court reversed Robert McCloud's death sentence on other grounds.

> McCloud claims that the trial court erred by "advis[ing] the jury on five or six occasions that the ultimate decision to impose the death penalty rested with the court," in violation of the United States Supreme Court's holding in *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985)("[I]t

> 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."). We decline to address this argument in light of our decision to vacate McCloud's death sentences on other grounds.

McCloud v. State, 208 So. 3d 668, 681-82 (Fla. 2016).

This Court should address and rectify these issues rather than strictly adhering to the arbitrary June 24, 2002 cutoff date. Mr. Evans' egregious Sixth and Eighth Amendment violations should not remain time barred.

James Remains Good Law, This Court Has the Authority to Grant Relief Under James

James v. State, 615 So. 2d 668 (Fla. 1993) remains good law. This Court has the authority and the duty to follow its precedent and vacate Mr. Evans' death sentence based on *James*. Faced with a similar-type situation, Davidson James' death sentence was vacated by this Court. James was afforded retroactive relief because this Court reasoned that "it would not be fair to deprive him" the benefit of a new ruling in death penalty jurisprudence. *James*, *Id.* at 669. This lower court in the case at bar, and the Florida Supreme Court recently in *Asay*, failed to consider the Eighth Amendment concerns triggered by adhering to a June 24, 2002 cutoff date, and failed to consider the mandates of the Florida Constitution that require a unanimous jury verdict. A split verdict is not enough to sustain a death sentence. Mr. Evans raised these issues throughout all the court proceedings, including trial and

appeal, and he is entitled to relief under *Hurst*. *See also Mosely v. State*, 209 So. 3d 1248, 1274-75 (Fla. 2016)("This Court has previously held that fundamental fairness alone may require the retroactive application of certain decisions involving the death penalty after the United States Supreme Court decides a case that changes our jurisprudence. For example, in *James*, this Court reviewed whether the United States Supreme Court's decision in *Espinoza v. Florida*, 505 U.S. 1079 [] (1992) should apply retroactively. *James*, 615 So. 2d at 669.") *See also* J. Lewis' concurrence citing *James* in *Asay v. State*, 210 So. 3d 1, 21 (Fla. 2016) ("it would be unjust to deprive James of the benefit of the Supreme Court's holding in *Espinoza* he had properly presented and preserved such a claim. *James* 615 So. 2d at 669. Similarly, I believe that defendants who properly preserved the substance of a *Ring* challenge at trial and on direct appeal prior to that decision should also be entitled to have their constitutional challenges heard"). See also J. Pariente's concurrence/dissent citing *James* in *Gaskin v. State*, 218 So. 3d 399, 403 (Fla. 2017)("Even without a finding a full retroactivity, under Justice Lewis's concurring in result opinion in *Asay*, *Hurst* would apply retroactively to Gaskin under *James v. State*, 615 So. 2d 668 (Fla. 1993), because Gaskin asserted, presented, and preserved a challenge to the lack of jury factfinding in Florida's capital sentencing procedure. *Asay* 210 So. 3d 1, 20 (Lewis, J., concurring in result).")

Short of vacating this death sentence which is certainly warranted under long-

ago established case law, this Court should at the very least remand this case for a limited evidentiary hearing so as to be fully informed on the unique circumstances that freakishly and tragically led to Mr. Evans' pre-*Ring* finality. Respectfully, in the interests of justice and fundamental fairness, this Court should not affirm the lower court's decision based on this Court's recent decision in *Hitchcock*. No prisoner should be put to death based on an arbitrary date line cutoff. This is because Death is Different. And so is Steven Maurice Evans' case.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy hereof has been furnished to opposing counsel by filing with the e-portal, which will serve a copy of this response on Tayo Popoola, Assistant Attorney General, on October 12th, 2017.

DAVID DIXON HENDRY
DAVID DIXON HENDRY
FLORIDA BAR NO. 0160016
ASSISTANT CCRC
hendry@ccmr.state.fl.us
CAPITAL COLLATERAL REGIONAL COUNSEL - MIDDLE
12973 N. Telecom Parkway
Temple Terrace, Florida 33637
(813) 558-1600

GREGORY W. BROWN
GREGORY W. BROWN
FLORIDA BAR NO. 0086437
ASSISTANT CCRC

brown@ccmr.state.fl.us
CAPITAL COLLATERAL REGIONAL COUNSEL - MIDDLE
12973 N. Telecom Parkway
Temple Terrace, Florida 33637
(813) 558-1600

JAMES L. DRISCOLL JR.
JAMES L.DRISCOLL JR.,
FLORIDA BAR NO. 0078840
ASSISTANT CCRC
driscoll@ccmr.state.fl.us
CAPITAL COLLATERAL REGIONAL COUNSEL - MIDDLE
12973 N. Telecom Parkway
Temple Terrace, Florida 33637
(813) 558-1600

CERTIFICATE OF COMPLIANCE

We hereby certify that a true copy of the foregoing was generated in a Times New Roman, 14-point font, pursuant to Fla. R. App. P. 9.210.

DAVID DIXON HENDRY
DAVID DIXON HENDRY
FLORIDA BAR NO. 0160016
ASSISTANT CCRC
hendry@ccmr.state.fl.us
CAPITAL COLLATERAL REGIONAL COUNSEL - MIDDLE
12973 N. Telecom Parkway
Temple Terrace, Florida 33637
(813) 558-1600

GREGORY W. BROWN
GREGORY W. BROWN
FLORIDA BAR NO. 0086437
ASSISTANT CCRC
brown@ccmr.state.fl.us
CAPITAL COLLATERAL REGIONAL COUNSEL - MIDDLE
12973 N. Telecom Parkway
Temple Terrace, Florida 33637
(813) 558-1600

JAMES L. DRISCOLL JR.
JAMES L.DRISCOLL JR.,
FLORIDA BAR NO. 0078840
ASSISTANT CCRC
driscoll@ccmr.state.fl.us
CAPITAL COLLATERAL REGIONAL COUNSEL - MIDDLE
12973 N. Telecom Parkway
Temple Terrace, Florida 33637
(813) 558-1600