IN THE SUPREME COURT OF FLORIDA
CASE NO. SC17-950

MELVIN TROTTER
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT IN AND FOR MANATEE COUNTY, FL
Lower Tribunal No. 411986CF001225CFAXMA

RESPONSE TO ORDER TO SHOW CAUSE

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RESPONSE TO ORDER TO SHOW CAUSE

COMES NOW, Melvin Trotter, by and through undersigned counsel, and files this Response to this Court's Order to Show Cause dated September 25, 2017. Mr. Trotter, respectfully requests this Court reverse the circuit court's denial of his successive 3.851 Motion as being untimely, which motion was filed pursuant to *Hurst I*,[1] *Hurst II*[2] and *Perry v. State*, 210 So.3d 630 (Fla. 2016), and as grounds states:

REQUEST FOR ORAL ARGUMENT AND FULL BRIEFING

This appeal presents an important issue of first impression: whether federal law requires this Court to extend *Hurst* retroactivity to death sentences that became final before *Ring*,[3] rather than cabining *Hurst* relief to only post-*Ring* death sentences. Appellant respectfully requests oral argument on this and related issues pursuant to Fla. R. App. P. 9.320. Appellant also requests that the Court permit full briefing in this case in accord with the normal, untruncated rules of appellate practice.

Depriving Appellant the opportunity for full briefing in this case would constitute an arbitrary deprivation of the vested state right to a mandatory plenary

[1] *Hurst v. Florida*, 136 S. Ct. 616 (2016).
[2] *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).
[3] *Ring v. Arizona*, 536 U.S. 584 (2002).

appeal in capital cases. *See Doty v. State*, 170 So. 3d 731, 733 (Fla. 2015) ("[T]his Court has a mandatory obligation to review all death penalty cases to ensure that the death sentence is imposed in accordance with constitutional and statutory directives."); *See also Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Hicks v. Oklahoma*, 447 U.S. 343 (1980).

PRELIMINARY STATEMENT ABOUT THE RECORD

References to the resentencing record on direct appeal are designated "R" followed by the page number. References to the successive postconviction record are designated "SPCR" followed by the page number. All references to volumes are designated as "V" followed by the volume number.

STATEMENT OF RELEVANT PROCEDURAL HISTORY AND FACTS

On June 20, 1986, Melvin Trotter was charged by way of Indictment with First Degree Murder. The indictment did not include aggravators the State intended to prove at sentencing in seeking the death penalty. Mr. Trotter filed a pre-trial motion challenging Sixth Amendment issues that mirrored *Ring* claims. V16/R2671-2673 and SPCR107-110 The lower court denied this motion. It was likely anticipated that this motion would be denied, pursuant to this Court's rulings at that time. Nevertheless, these motions were filed to preserve the issues therein.

Mr. Trotter was tried by jury and was found guilty as charged. The advisory panel recommended a death sentence by a vote of nine to three. Their

recommendation contained no verdict or fact-finding. The judge imposed a death sentence on May 18, 1987. As the sole fact-finder, the Court found aggravating and mitigating factors and weighed them without the benefit of individual factual determination by a jury. On appeal, this Court affirmed the judgment, but ordered a new penalty phase. *Trotter v. State*, 576 So. 2d 691 (Fla. 1990).

On April 21, 1993, the second advisory panel returned its recommendation for death by a vote of eleven to one. On July 23, 1993, the trial court imposed a sentenced of death, finding the same aggravators and mitigators found in the first trial and two additional mitigators. This Court affirmed the sentence. *Trotter v. State*, 690 So.2d 1235 (Fla. 1997).

On January 5, 2017, Mr. Trotter filed Successive Motion to Vacate Death Sentence, seeking relief pursuant to *Hurst I*, *Hurst II*, and their progeny, which the trial court denied on March 10, 2017 as untimely, never reaching the merits of his motion. The court's Order is the subject of this appeal.

ARGUMENT – TIMELINESS AND RETROACTIVITY

To deny Mr. Trotter retroactive relief under *Hurst I* and *II*, 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) and *Hitchcock v. State,* SC17-445, 2017 WL 3431500 (Fla. Aug. 10, 2017), 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. Trotter's right to Equal Protection of the Laws under 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)).

In *Hitchcock*, this Court denied relief relying on *Asay*, a case that did not fully plead all applicable claims that have arisen since *Hurst v. Florida*. Asay's appeal was filed before Florida Chapter 2017-1, *Hurst v. State* and its progeny, law and opinions that continued to develop in the wake of *Hurst v. Florida*. Nevertheless, this Court seems to have cut off any further argument as to any additional grounds for relief, though these grounds have never been addressed by this Court directly. As Justice Pariente found in her dissenting opinion, "Rather than analyze Hitchcock's constitutional arguments, the majority dismisses them without explaining why *Asay*, in fact, forecloses relief." *Hitchcock*, Op. at *3. Mr. Trotter prays this Court will consider and address his arguments below.

I. Unanimity

In *Hurst v. State*, this Court found more than just a violation of the Sixth Amendment to the United States Constitution. This Court found that *Hurst v.*

Florida, the ruling by the United States Supreme Court finding Florida's capital sentencing scheme unconstitutional, also involves a violation of the Eighth Amendment, as well as the Florida Constitution. This Court reasoned that death is different and the law must perform a narrowing function so death is not arbitrarily imposed, thereby violating the Eighth Amendment. A unanimous jury recommendation, when made with other critical findings unanimously found by a jury, creates this degree of a high reliability. *See, Hurst v. State*, at 59.

The precepts against cruel and unusual punishment under the Eighth Amendment also turn on evolving standards of decency. It is the near uniform judgement of our nation that the death penalty is only imposed by a unanimous jury vote. However, the jury in Mr. Trotter's case recommended death by a vote of only eleven to one. Therefore, in light of this Court's reasoning in *Hurst II*, finding that the Eighth Amendment is violated where Florida's death sentencing scheme allows non-unanimous death recommendations from a jury, Mr. Trotter's sentence lacks reliability and would be an arbitrary and unconstitutional imposition of death.

Nevertheless, this Court will compound the arbitrariness of sentencing someone to death whose advisory panel recommended death by only an eight to four vote by employing a cut-off date, so that only some inmates affected by Florida's unconstitutional death sentencing scheme will be entitled to relief. In *Asay*, this

Court denied relief to a defendant who did not have a unanimous jury recommendation, not based on issues of culpability or severity of the offense, but because his appeal was final before *Ring*. *Asay*, at 22. In so finding, this Court appears to have created a second Eighth Amendment violation.

II. Partial Retroactivity

Mr. Trotter remains sentenced to death not because of where his case falls on the aggravation and mitigation continuum, but because of where his case falls on the calendar. The concept of partial retroactivity has no basis in Florida Supreme Court or United States Supreme Court precedent and leads to a bizarre and unfair result that would violate both the Eighth, as well as the Fourteenth Amendment's guarantee of equal protection and due process. When two classes of similarly situation individuals are treated differently by a state actor, the question becomes "whether there is some ground of difference that rationally explains the different treatment . . ." *Eisenstadt v. Baird*, 405 U.S. 43. The *Ring* cutoff treats death-sentenced prisoners in the same posture—on collateral review— differently without "sound ground of difference that rationally explains the different treatment." *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964).

Once this Court determined in *Mosley* that the *Hurst* decisions were retroactive to some cases on collateral review, it became prohibited under the United States and Florida Constitutions from arbitrarily limiting that retroactivity.

"[R]etroactivity is a binary—either something is retroactive, has effect on the past, or it is not." *See, Asay*, at 37 (Perry, J., dissenting). This legal reality is highlighted by the United States Supreme Court's decision in *Montgomery v. Louisiana*,[4] the Delaware Supreme Court's recent decision in *Powell v. Delaware*[5] and the Florida Supreme Court's decision in *Falcon*. If the Court decides to endorse "partial retroactivity," it will be the outlier, *see Powell*, (holding *Hurst v. Florida* retroactive to *all* prisoners), and constitutional challenges in the United States Supreme Court will likely follow. In *Asay*, Justice Pariente warned this Court that the result of using *Ring* as a cut-off date would be "an unintended arbitrariness." Id., at 36. Justice Perry added in his dissent, at 37-38:

> …the line drawn by the *Ring* opinion date cannot withstand scrutiny under the Eighth Amendment, because it creates an arbitrary application of law to two groups of similar situated persons.
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> Undoubtedly there will be situations where persons who commit equally violent felonies whose death sentences become final days apart will be treated differently without justification from this Court.

As an example of how this prediction is coming true we can look to *Johnson v. State*, 205 So.3d 1285 (Fla. 2016). In *Johnson*, the murder was committed in

[4] *Montgomery v. Louisiana*, 136 S. Ct. 718, 731-32 (2016).
[5] *Powell v. Delaware*, 2016 WL 7243546 (Del. Dec. 15, 2016).

1981, before the crime for which Mr. Trotter is being sentenced was committed, but Mr. Johnson received relief because his direct appeal was final after *Ring*.[6]

It should also be noted that the date of a particular death sentence's finality on direct appeal, in relation to the June 24, 2002 decision in *Ring*, has at times depended on whether there were delays in transmitting the record on appeal to this Court for the direct appeal;[7] whether direct appeal counsel sought extensions of time to file a brief; whether a case overlapped with this Court's summer recess; how long the assigned Justice of this Court took to submit the opinion for release;[8] whether an extension was sought for a rehearing motion and whether such a motion was filed; whether there was a scrivener's error necessitating issuance of a corrected opinion; whether counsel chose to file a petition for a writ of certiorari in the United States Supreme Court or sought an extension to file such a petition; and how long a certiorari petition remained pending in the Supreme Court. The result of this cut-off

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[6] *See also, Parker v. State*, 873 So.2d 270 (Fla. 2004); *Card. v. Julie L. Jones, etc*, 219 So.3d 47 (Fla. 2017); These cases demonstrate the illogical result that defendants who committed a murder before Trotter committed his crime will be entitled to relief and their *Hurst* motions will not be untimely.

[7] *See, e.g.*, *Lugo v. State*, 845 So. 2d 74 (Fla. 2003) (two-year delay between the time defense counsel filed a notice of appeal and the record on appeal being transmitted to this Court, almost certainly resulting in the direct appeal being decided post-*Ring*).

[8] *Compare Booker v. State*, 773 So. 2d 1079 (Fla. 2017) (this Court's opinion issued within one year after all briefs had been submitted, before *Ring*), *with Hall v. State*, 201 So. 3d 628 (Fla. 2016) (opinion issued twenty-three months after the last brief was submitted). If this Court had taken the same amount of time to decide *Booker* as it did *Hall*, Mr. Booker's death sentence would have become final after *Ring*.

date is that a death sentence may be dependent upon administrative delays, rather than the severity of the offense.[9]

Additionally, the State cannot show that Appellant's case is more aggravated and less mitigated than any post-*Ring* capital case. Thus far, this Court has **reversed every non-unanimous, post-*Ring* death sentence**, and at least twelve death sentences where the defendants also had jury recommendation(s) of 11-1.[10] Of those twelve reversals, five defendants had multiple first degree murder convictions while

[9] In one striking example, this Court affirmed Gary Bowles' and James Card's unrelated death sentences in separate opinions that were issued on the same day, October 11, 2001. *See Bowles v. State*, 804 So. 2d 1173 (Fla. 2001); *Card v. State*, 803 So. 2d 613, 617 (Fla. 2001). Both inmates petitioned for a writ of certiorari in the U.S. Supreme Court. Mr. Card's sentence became final four (4) days after *Ring* was decided—on June 28, 2002—when his certiorari petition was denied. *Card v. Florida*, 536 U.S. 963 (2002). However, Mr. Bowles's sentence became final seven (7) days before *Ring* was decided—on June 17, 2002—when his certiorari petition was denied. *Bowles v. Florida*, 536 U.S. 930 (2002). This Court recently granted *Hurst* relief to Mr. Card, ruling that *Hurst* was retroactive because his sentence became final after the *Ring* cutoff. *See, Card*, 219 So. 3d at 47. However, Mr. Bowles, whose case was decided on direct appeal on *the same day* as Mr. Card's, falls on the other side of this Court's current retroactivity cutoff.

[10] *Johnson v. State*, 205 So.3d 1285 (Fla. 2016); *McGirth v. State*, 209 So.3d 1146 (Fla. 2017); *Brooks v. Jones*, -- So. 3d -- 2017 WL 944235 (Fla. Mar. 10, 2017); *Jackson v. State*, 213 So.3d 754 (Fla. 2017); *Orme v. State*, 214 So.3d 1269 (Fla. 2017); *Card v. State*, 219 So.3d 47 (Fla. 2017); *Pasha v. State*, --- So.3d --- 2017 WL 1954975 (Fla. May 11, 2017); *Okafor v. State*, --- So.3d ----2017 WL 2481266 (Fla. June 8, 2017); *Hall v. State*, 219 So.3d 783 (Fla. 2017); *Braddy v. State*, 219 So.3d 803 (Fla. 2017); *Bailey v. State*, --- So.3d ----2017 WL 2874121 (Fla. July 6, 2017); and *Dennis v. State*, -- So. 3d. -- 2017 WL 2888700 (Fla. July 7, 2017).

Appellant only had one.[11]

In contrast to *Asay*, this Court reasoned in *Falcon*, in the context of retroactivity analysis, "…considerations of fairness and uniformity make it very difficult to justify depriving a person of his liberty or his life under a process no longer considered acceptable and no longer applied to indistinguishable cases."[12] Furthermore, in *Witt* this Court held, "the doctrine of finality should be abridged only when a more compelling objective appears, such as insuring fairness and uniformity in individual adjudications." *See*, *Witt v. State*, 387 So.2d 922, 925 (Fla. 1980). Finally, in *Johnson v. State*,[13] at footnote 14 of Justice Anstead's dissent, he cites a long lists of opinions where this Court has found that the new rule should be retroactive, rules that involved an outcome far less severe than death.

Clearly, *Hurst v. State* was not part of the *Witt* analysis in *Asay* as demonstrated by its reliance upon *Johnson v. State*, showing that no benefit to the administration of justice was to be gained from retroactively applying the Sixth Amendment right identified in *Apprendi* and *Ring* and set forth in *Hurst v.*

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[11] *Johnson v. State*, 205 So.3d 1285 (Fla. 2016); *Brooks v. Jones*, -- So. 3d -- 2017 WL 944235 (Fla. Mar. 10, 2017); *Pasha v. State*, --- So.3d --- 2017 WL 1954975 (Fla. May 11, 2017); *Okafor v. State*, --- So.3d ----2017 WL 2481266 (Fla. June 8, 2017); *Hall v. State*, 219 So.3d 783 (Fla. 2017); *Braddy v. State*, 219 So.3d 803 (Fla. 2017); and *Dennis v. State*, -- So. 3d. -- 2017 WL 2888700 (Fla. July 7, 2017).

[12] *Falcon v. State*, 162 So.3d 954, 962 (Fla. 2015), quoting *Witt v. State*, 387 So.2d 922, 925 (Fla. 1980).

[13] *Johnson v. State*, 904 So.2d 400, 418 (Fla. 2005).

Florida.[14] Of course, the defendant in *Asay* did not present a claim under *Hurst v. State* when filing his 3.851 motion under the exigencies of a death warrant on January 27, 2016, eight and a half months before the substantive constitutional right was recognized on October 14, 2016, in *Hurst v. State*.

Pre-*Ring* defendants do not differ from post-*Ring* defendants in that they both were sentenced under an unconstitutional scheme that allowed death sentences to be founded upon factual findings not tested by a jury trial. However, they do differ in ways that are more important than the *Ring* cut-off date used by this Court in analyzing which of these defendants should have *Hurst I* and *II* apply to them retroactively:

a) In having been sentenced longer, they have demonstrated the ability to adjust to a prison setting without continuing to endanger any valid State interest;

b) They have suffered long from the anxiety and uncertainty of having the death sentence hanging over their head for an unconscionable number of years;

c) They are less likely than their post-*Ring* counterparts to have had the

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[14] In contrast to *Asay*, the Court in *Mosley* noted the benefit to be reaped from *Hurst v. State* in the course of its *Witt* analysis when it quoted from *Hurst v. State:*

> 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." *Id*. at 60.

See, *Mosley*, 209 So. 3d at 1278.

same quality of mitigation presented on their behalf, as the law and attorney training continues to improve for defendants facing a death sentence; and

d) Over the past two decades there has been recognition of the wide ranging unreliability of many kinds of evidence, from flawed forensic-science theories and practices to hazardous eyewitness identification testimony.

These consideration have not been taken into account by this Court in performing its *Witt* analysis in *Asay*.

III. *Witt v. State*

The same conclusion as to the retroactivity of *Hurst I and II* can be arrived at by analyzing the third *Witt* factor, a change of "fundamental significance," using the First Category of cases - where the constitutional change in the law "places beyond the authority of the State the power to …impose certain penalties." *Witt*, at 929. As in *Walls*[15] and *Falcon*[16], *Hurst I* and *II* increase the number of potential cases in which the State cannot impose the death penalty. Before *Hurst*, a death recommendation was acknowledged where there was a mere majority of the jurors advising the judge to impose a death sentence. Additionally, a judge could sentence anyone to death, even if the jury recommended life. *Hurst I* overruled *Spaziano*[17] and it is no longer constitutional for a trial court to override a jury's life

[15] *Walls v. State*, 213 So.3d 340 (Fla. 2016).
[16] *Falcon v. State*, 162 So. 3d 954 (Fla. 2015).
[17] *Spaziano v. Florida*, 468 U.S. 447, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984).

recommendation. *Hurst II* held that only where a jury has unanimously found that sufficient aggravators exist to justify a death sentence and unanimously found that the aggravators outweigh the mitigating factors that were present in the case, and have unanimously recommended death can a defendant be sentenced to death – a significantly smaller class of defendants. Therefore, it is reasonable to apply a *Witt* analysis to Mr. Trotter's case, using Category 1 of the Third Prong and find that *Hurst* is fully retroactive.

IV. *James v. State*

In *Asay,* the case relied upon by this Court for the proposition that *Hurst* should not apply retroactively to pre-*Ring* cases is a case where the defendant did not *plead* the fact that the defendant raised Sixth Amendment claims in the form of pre-trial motions or on direct appeal. In *Asay,* at footnote 12, the Florida Supreme Court noted, "[Asay] did not raise a Sixth Amendment challenge to his death sentence at any time prior to *Ring.*

Mr. Trotter filed pre-trial motions challenging Sixth Amendment issues that mirrored *Ring* claims. Mr. Trotter is not asking this Court to ignore its recent opinions that deny *Hurst* relief to pre-*Ring* cases, but to take into account this Court's own language and distinction mentioned in its *majority* opinions.

In *Mosley,* at *1275,* this Court found:

> While this Court did not employ a standard retroactivity analysis in *James*[18], the basis for granting relief was that of fundamental fairness. *Id*. This Court reasoned that, because James had raised the exact claim that was validated by the United States Supreme Court in *Espinosa*, "it would not be fair to deprive him of the *Espinosa* ruling." *Id*.

In the *Mosley* opinion, at 1276, footnote 13, this Court drops any distinction between *Ring* claims and refers to the type of claim which *Ring* represents, a Sixth Amendment claim.

The fairness standard under *James* is not an opinion of a lower court, another state court or a federal court that has no bearing on Florida law. *James* is a case cited by the *majority* of this Court in a landmark decision concerning the issue of retroactivity. *See, Mosley*, at 1274-1275. Like Mosley,[19] Trotter raised the same claims that were held to be valid in *Ring* and in *Hurst*, but he was incorrectly denied relief. Failure to extend *James* to Mr. Trotter's case is arbitrary, capricious and denies Mr. Trotter equal protection under the law, contrary to the Eighth and Fourteenth Amendments of the United States Constitution.

V. Federal Retroactivity for Substantive Rules

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[18] *James v. State*, 615 So.2d 668, 669 (Fla. 1993).

[19] *Mosley* noted that the Court in *Asay* had not foreclosed the retroactive application of *Hurst v. Florida* to other capital postconviction defendants. See, *Mosley*, at 1274 and *Asay*, at 22. Thus, *Mosley* is a follow-up opinion to *Asay* that makes clear that *Asay* is limited in its scope and merely concludes that Asay is not entitled to the benefit of *Hurst v. Florida*. *Asay* does not mean that *Hurst v, Florida is* not to be applied retroactively in any capital collateral case; in fact, *Mosley* holds that *Hurst v. Florida* is to be applied retroactively to at least 2002, and when fundamental fairness dictates and/or when the *Witt* balancing test warrants.

Furthermore, where a constitutional rule is substantive, the Supremacy Clause of the United States Constitution requires a state post-conviction court to apply it retroactively. In *Montgomery*, the Supreme Court held, "Where 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." *Montgomery*, at 731. In *Hurst II*, this Court announced not one, but two substantive constitutional rules. *First*, this Court held that the Sixth Amendment requires that a jury decide whether those aggravating factors that have been proven beyond a reasonable doubt are sufficient in themselves to warrant the death penalty and, if so, whether those factors outweigh the mitigating circumstances. Such findings are manifestly substantive. *Second*, this Court determined that the Eighth Amendment requires a unanimous determination that all the evidence presented to a jury at the penalty phase warrants a death sentence. Likewise, the unanimity rule is substantive. Therefore, the *Hurst* rulings should applies to this case.

Mr. Trotter raised in his successive motion that he was entitled to relief because he was denied the right to Due Process, to the State proving each element beyond a reasonable doubt, violating the Fourteenth Amendment. While this is a freestanding basis for relief, it is also definitive proof that the changes in the law in *Hurst I* and *II* were substantive. Therefore, a claim that Federal law would require that *Hurst* be applied retroactively is not undermined by *Schriro v. Summerlin*, 542 U.S. 348, 364 (2004), wherein the United States Supreme Court held that *Ring* was

not retroactive in the federal habeas context under the federal retroactivity test articulated in *Teague v. Lane*, 489 U.S. 288 (1989).

Summerlin did not review 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. Moreover, as noted above, *Hurst*, unlike *Ring*, addressed the proof-beyond-a-reasonable-doubt standard in addition to the jury trial right, and the Supreme Court has always regarded such decisions as substantive. *See Ivan V.*, 407 U.S. at 205; *see also Powell v. Delaware*, 153 A.3d 69 (Del. 2016) (holding *Hurst* retroactive under Delaware's state *Teague*-like retroactivity doctrine and distinguishing *Summerlin* on the ground that *Summerlin* "only addressed the misallocation of fact-finding responsibility (judge versus jury) and not . . . the applicable burden of proof."). And with *Hurst*, unlike in *Summerlin*, there is an Eighth Amendment unanimity rule at issue in addition to the Sixth Amendment's jury-trial guarantee. *See Summerlin*, 542 U.S. at 353.

VI. Retroactive application of Chapter 2017-1

A significant development since Mr. Trotter filed his successive motion to vacate is the March 13, 2017 enactment of Chapter 2017-1 which amends Florida's capital sentencing statute to preclude the imposition of a death sentence unless a jury returns a unanimous death recommendation. The legislature has codified the fundamental constitutional right that this Court identified in *Hurst v. State*.

Chapter 2017-1 applies retrospectively to all homicide cases regardless of the date of the offense. It will apply to any first degree murder case that goes to

trial, as well as any murder case where a retrial or resentencing is conducted. Thus, the statute will govern at Paul Johnson's resentencing which was recently ordered even though the homicides for which he is to be sentenced occurred in 1981 and his conviction was final in 1992. *Johnson v. State*, 205 So. 3d 1285 (Fla. 2016).

This statutory right arises from a statute that creates a substantive rule, and as such must be applied retroactively. In *Montgomery v. Louisiana*, 136 S. Ct. 718, 732 (2016), the United States Supreme Court held:

> As a final point, it must be noted that the retroactive application of substantive rules does not implicate a State's weighty interests in ensuring the finality of convictions and sentences. *Teague* warned against the intrusiveness of "continually forc[ing] the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." 489 U.S., at 310, 109 S.Ct. 1060. This concern has no application in the realm of substantive rules, for no resources marshaled by a State could preserve a conviction or sentence that the Constitution deprives the State of power to impose. *See Mackey*, 401 U.S., at 693, 91 S.Ct. 1160 (opinion of Harlan, J.) ("There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose").

In *Welch v. United States*, 136 S. Ct. 1257, 1264 (2016), the Supreme Court held:

> First, "[n]ew substantive rules generally apply retroactively." *Schriro v. Summerlin*, 542 U.S. 348, 351, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004); *see Montgomery v. Louisiana*, 577 U.S. ——, ——, 136 S.Ct. 718, 728, 193 L.Ed.2d 599 (2016); *Teague, supra*, at 307, 311, 109 S.Ct. 1060. Second, new "'watershed rules of criminal procedure,' " which are procedural rules "implicating the fundamental fairness and accuracy of the criminal proceeding," will also have retroactive effect.

In *Schriro v. Summerlin*, 542 U.S. 348, 355-56 (2004), the U.S. Supreme Court explained what is necessary for a new rule to qualify as watershed:

> Rather, the question is whether judicial factfinding so "seriously diminishe[s]" accuracy that there is an " 'impermissibly large risk' " of punishing conduct the law does not reach.

In his dissenting opinion in *Schriro*, 542 U.S. at 366, Justice Breyer explained:

> As I have pointed out, the majority does not deny that *Ring*'s rule makes some contribution to greater accuracy. It simply is unable to say "confidently" that the absence of *Ring's* rule creates an " ' "impermissibly large risk" ' " that the death penalty was improperly imposed.

Chapter 2017-1 incorporates a rule that does more than just contribute to greater accuracy. Had the rule existed at the time of Mr. Trotter's penalty phase, he would have been acquitted of capital first degree, i.e. first degree murder plus a jury's unanimous death recommendation finding the facts necessary to make him eligible for a death sentence. This is because one juror voted for a life sentence. This means that there is an "impermissibly large risk" that a death sentence was imposed when the conduct did not rise to the level necessary for the imposition of a death sentence. As a result, the retrospective Chapter 2017-1 established a substantive rule that must be applied retroactively. Failure to extend the benefits of the statute to Mr. Trotter violates the Eighth and Fourteenth Amendments to the United States Constitution.

VII. Florida Constitution

The trial court's denial of Trotter's motion failed to consider this *Perry v. State*, 210 So.3d 630 (Fla. 2016), where this Court found Florida's post-*Hurst* revision of the death penalty statute was still unconstitutional after reviewing the

statute in light of *Hurst II* and the Florida Constitution. This Court held,

> that as a result of the *longstanding adherence to unanimity* in criminal jury trials in Florida, the right to a jury trial *set forth in article I, section 22 of the Florida Constitution* requires that in cases in which the penalty phase jury is not waived, the findings necessary to increase the penalty from a mandatory life sentence to death must be found beyond a reasonable doubt by a unanimous jury. [fn4] *Hurst*, 202 So.3d at 44-45. Those findings specifically include unanimity as to all aggravating factors to be considered, unanimity that sufficient aggravating factors exist for the imposition of the death penalty, unanimity that the aggravating factors outweigh the mitigating circumstances, and unanimity in the final jury recommendation for death. *Id*, at 53-54, 59-60. (Emphasis added.)

Perry, at 633. Importantly, Footnote 4 of *Perry* states, "In *Hurst*, we also decided the requirements of unanimity under both the Sixth and Eighth Amendments to the United States Constitution, but our basic reasoning rests on Florida's independent constitutional right to trial by jury. Art. I, § 22, Fla. Const." *Id.*, at 633. Therefore, it has always been a requirement under Florida jurisprudence that juries must return unanimous verdicts. Therefore, retroactivity is not an issue for Mr. Trotter, whose case does not pre-date the Florida Constitution.

Further support for this argument can be found in the reasoning of the Supreme Court in *Stringer v. Black*, 503 U.S. 222, 228 (1992), where retroactivity would not be an issue under a federal *Teague* analysis if the new case is merely an interpretation of existing law. *See, Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). As in *Stringer v. Black*, the right to a trial by jury and a

unanimous verdict is not a new rule announced by *Hurst v. State*. In requiring a unanimous verdict for a death sentence, this Court did not break new ground, as there has been a "longstanding adherence to unanimity in criminal jury trials in Florida." *Hurst II* and *Perry v. State* clarify, for purposes of *Teague*, a right controlled by the Florida Constitution. The precedent already existed at the time of Trotter's sentencing. *See*, *Stringer*, at 229. In *Stringer*, the Supreme Court held;

> The purpose of the new rule doctrine is to validate reasonable interpretations of existing precedents. Reasonableness, in this as in many other contexts, is an objective standard, and the ultimate decision whether [a new case] was dictated by precedent is based on an objective reading of the relevant cases.

Finally, denying Mr. Trotter the same right to a unanimous jury verdict as every other citizen of the State of Florida violates his right to Equal Protection and therefore, not only violates the Florida Constitution, but also the Fourteen Amendment of the United States Constitution.

CONCLUSION

It would be a miscarriage of justice to deny Mr. Trotter retrospective application of *Hurst v. Florida*, *Hurst v. State*, *Perry v. State*, and Chapter 2017-1. A denial of the right to have a hearing on whether Mr. Trotter's non-unanimous death sentence should be vacated rises to a level of capriciousness and inequality that violates the Eight Amendment and Equal Protection respectively.

WHEREFORE, Mr. Trotter prays this Court find his claims are timely filed and remand this case to the circuit court for a ruling on the merits of his Motion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 16, 2017, I electronically filed the forgoing Response to Order to Show Cause by using Florida Courts e-portal filing system which will send a notice of electronic filing to the following: Scott A. Browne, Assistant Attorney General, , Scott.Browne@myfloridalegal.com, deborah.speer@myfloridalegal.com and CapApp@myflordialegal.com; Office of the State Attorney for the Sixth Judicial Circuit, sa6eservice@pinellascounty.org, Sara Elizabeth Macks, smacks@co.pinellas.fl.us. I further certify that I mailed the forgoing document to Melvin Trotter, DOC#573461, Union Correctional Institution, P.O. Box 1000, Raiford, FL 32083.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Response to Order to Show Cause was generated in Times New Roman 14-point font pursuant to Fla. R. App. P. 9.100.

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