IN THE SUPREME COURT OF FLORIDA

HARRY FRANKLIN PHILLIPS,

Appellant,

Case No.: SC17-984

v.

STATE OF FLORIDA,

Appellee.

_____/

RESPONSE TO ORDER TO SHOW CAUSE

The Appellant, **HARRY FRANKLIN PHILLIPS**, by and through undersigned counsel, hereby responds to this Court's September 27th Order to Show Cause why the trial court's order should not be affirmed in light of this Court's decision in *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017). In support thereof, Mr. Phillips states:

A. Introduction.

Mr. Phillips is under a sentence of death and is appealing the circuit court's summary denial of his successive Rule 3.851 motion. As an initial matter, Mr. Phillips submits that his appeal is not one subject to this Court's discretionary jurisdiction. *See* Fla. R. App. Pro. 9.030 (a) (2). Mr. Phillips is exercising a substantive right to appeal the denial of his successive Rule 3.851 motion. *See* Fla. Stat. § 924.066 (2016); Fla. R. App. Pro. 9.140(b)(1)(D). Because he has been provided this substantive right, Mr. Phillips's right to appeal is protected by the Due

Process and Equal Protection Clauses of the Fourteenth Amendment. *Evitts v. Lucy*, 469 U.S. 387, 393 (1985) ("if a State has created appellate courts as "an integral part of the …system for finally adjudicating the guilt or innocence of a defendant," *Griffin v. Illinois*, 351 U.S. at 18, 76 S.Ct., at 590, the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution."). This principle applies to collateral appeals as well as direct appeals. *Lane v. Brown*, 372 U.S. 477, 484-85 (1963) ("the *Griffin* principle also applies to state collateral proceedings, and *Burns* leaves no doubt that the principle applies even though the State has already provided one review on the merits.").

This Court's *sua sponte* order staying these proceedings pending the disposition of *Hitchcock* indicates this Court intends to bind Mr. Phillips to the outcome rendered in *Hitchcock*'s appeal, regardless of the fact the record on appeal in each case is distinct and separate from one another. While this practice is common in discretionary appeals, it is an anathema to individualized capital proceedings that must comport with the Eighth Amendment. *See 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."). The individualized appellate review is necessary to insure

Florida's capital sentencing scheme complies with the Eighth Amendment. *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.").

Because Mr. Hitchcock has now lost his appeal, this Court's order to show cause severely curtails the appellate process in Mr. Phillips's appeal of right.[1] This threat to Mr. Phillips's right to appeal and be meaningfully heard implicates his right to due process and equal protection, particularly given that the constitutional arguments Mr. Phillips raised in his 3.851 proceedings are different from those set out in Mr. Hitchcock's briefing. A denial of Mr. Hitchcock's appeal should not govern the issues that are present in Mr. Phillips's appeal.[2]

Importantly, the procedure that this Court unveiled for use in Mr. Phillips's case was not employed in *Hitchcock v. State*. There was no requirement there that Mr. Hitchcock show "cause"; indeed, his appeal proceeded under the standard Florida Rules of Appellate Procedure. Mr. Hitchcock was permitted to have counsel brief

[1] Fla. R. App. Pro. 9.140(i) provides that this Court "**shall** review all rulings and orders appearing in the record necessary to pass upon the grounds of an appeal." Yet this Court has *sua sponte* decided that Mr. Phillips is only entitled to the standard appellate process, which includes the right to file an Initial Brief of 75 pages in length, if he can first satisfy some unknown "cause" standard.

[2] A petition for a writ of certiorari is currently pending in *Hitchcock v. Florida* (No. 17-6180) and is scheduled for conference on December 1, 2017. The pending petition for certiorari demonstrates that the issues in *Hitchcock* are unresolved.

his issues. And after the decision in *Hitchcock* issued, Mr. Hitchcock had the right to have his counsel file a motion for rehearing on which the Florida Rules of Appellate Procedure place no page limits. There is no doubt that undersigned counsel on behalf of Mr. Phillips would have taken advantage of the right to file a motion for rehearing to explain that this Court's ruling in *Hitchcock* raised more questions than it answered with regard to the constitutionality of Florida's capital sentencing scheme under the Eighth and Fourteenth Amendments.

Accordingly, Mr. Phillips objects to the requirement that he show "cause" before his appeal of right can proceed on the basis of the Florida Constitution, on the basis of the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and on the basis of the Eighth Amendment. "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." *Hall v. Florida*, 134 S. Ct. at 2001. Mr. Phillips respectfully moves the Court for full briefing and oral argument in accordance with the standard rules of appellate procedure.

B. Mr. Phillips's Rule 3.851 Motion.

Mr. Phillips is appealing the circuit court's summary denial of his successive Rule 3.851 motion. On March 7, 2017, Mr. Phillips's filed an amended motion for

postconviction relief, raising four separate claims.[3] Claim I rested on the Sixth Amendment and the decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016). Claim II rested on the 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 authorized the jury must first return 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 sentences final before June 24, 2002, and those that became final after June 24, 2002. The arbitrariness of the distinction meant that his death sentence stood in violation of *Furman v. Georgia*, 408 U.S. 238 (1972). Claim IV asserted that the rejection of Mr. Phillips's previously presented *Brady*/*Giglio*, *Strickland*, and *Atkins*/*Hall* claims could not stand because *Hurst v. State* and *Perry v. State* gave him a retrospective right to a life sentence unless a jury returns a unanimous death recommendation.[4]

C. Mr. Phillips should not be factually or legally bound by *Hitchcock*.

[3] Mr. Phillips filed a Rule 3.851 motion on February 23, 2016 following *Hurst v. Florida*. The motion was amended March 7, 2017, and March 31, 2017 to include briefing on subsequent developments in the law.

[4] In addition, on March 31, 2017, Mr. Phillips filed an amendment premised upon the substantive change in law resulting from the enactment of Chapter 2017-1 by the Florida Legislature. *See* instant Record at 198-207. Subsequently, after allowing the amendment during the case management conference, the circuit court summarily denied it. *See* instant Record at 296, 312.

Mr. Phillips challenges his death sentence on the basis of the conclusion in *Hurst v. State* that a death sentence flowing from a non-unanimous death recommendation lacks reliability. This argument is different than the argument presented in *Hitchcock* and establishes that Mr. Phillips should get *Hurst* relief.

In *Hitchcock v. State*, this Court wrote:

> We have consistently applied our decision in *Asay*, denying the retroactive application of *Hurst v. Florida* as interpreted in *Hurst v. State* to defendants whose death sentences were final when the Supreme Court decided *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

2017 WL 3431500 at *1. Purporting to address Hitchcock's arguments, the Court concluded as follows:

> 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*.**

Hitchcock, 2017 WL 3431500, at *2. (emphasis added). That is the extent of this Court's decision in *Hitchcock v. State*. Yet, this Court's premise that Mr. Hitchcock's issues were decided by *Asay* is belied by facts. Most significantly, it is impossible that the retroactivity of the constitutional right to a life sentence unless a jury returned a unanimous death recommendation which was recognized in *Hurst v.*

State on the basis of the Eighth Amendment and the Florida Constitution could have been decided in *Asay*: the issue was not raised or at issue there.[5]

For the adversarial process to properly function, it is axiomatic that courts must only decide issues that were briefed. This way, adversaries have the opportunity to explain to the court the positive and negative impact that would occur should their respective position prevail. As explained by the United State Supreme Court:

> The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them. 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, 532 U.S. 134, 147 n.10 (2011) (internal citations omitted). Because undersigned counsel were not counsel for Mr. Hitchcock and because this Court declined to analyze the other "various

[5] After the October 14, 2016 issuance of *Hurst v. State* and before the December 22, 2016 decision in *Asay v. State*, Mr. Asay did not present any arguments on the basis of *Hurst v. State*, the Eighth Amendment, or the Florida Constitution. In addition, Mr. Asay made no arguments regarding the retroactivity of *Hurst v. State.*

constitutional provisions" cited by *Hitchcock*, *Hitchcock* does not foreclose relief. *Hitchcock*, 2017 WL 3431500, at *2.

In Claim I, a Sixth Amendment claim based upon *Hurst v. Florida*, Mr. Phillips seeks to argue that this Court's rulings in *Asay* and *Mosley* abandoning the binary nature of the balancing test set forth in *Witt v. State*[6] means that each defendant with a pre-*Ring* death sentence is entitled to receive what Mr. Asay received—a case specific balancing of the *Witt* factors. Mr. Phillips has strong case specific reasons why the *Witt* balancing test tips in his favor, which he intends to articulate if granted full briefing.[7]

Claim II of Mr. Phillip's Rule 3.851 is based upon the right to a life sentence unless a properly-instructed jury unanimously recommends a death sentence recognized in *Hurst v. State*. It establishes a presumption of a life sentence that is the equivalent of the guilt phase presumption of innocence. This Court recognized that the requirement that the jury must unanimously recommend death before this

[6] 387 So. 2d 922 (Fla. 1980).

[7] While both Mr. Hitchcock and Mr. Phillips have raised issues as to the *Witt* analysis that was conducted in *Asay v. State* regarding *Hurst v. Florida*, the argument made in the initial brief in *Hitchcock v. State* quickly diverges from the claims that Mr. Phillips asserted in his 3.851 motion. Put simply, the *Hitchcock* brief does not seem to view *Hurst v. Florida* and *Hurst v. State* as involving distinctly different constitutional claims. To preclude Mr. Phillips from making his arguments in an initial brief in compliance with the standard rules governing appellate procedures when Mr. Hitchcock has been afforded the very opportunity that is being denied to Mr. Phillips violates equal protection.

presumption of a life sentence can be overcome does *not* arise from the Sixth Amendment, from *Hurst v. Florida*, or from *Ring v. Arizona*. Rather, it is a right emanating from the Florida Constitution and the Eighth Amendment.

The requirement that the jury unanimously vote in favor of a death recommendation before a death sentence is authorized was embraced as a way to enhance the reliability of death sentences. *Hurst v. State*, 202 So. 3d at 59 ("We also note that the requirement of unanimity in capital jury findings will help to ensure the heightened level of protection necessary for a defendant who stands to lose his life as a penalty.). *See Johnson v. Mississippi*, 486 U.S. 578, 584 (1988) ("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 holding that requiring unanimity would produce more reliable death sentences, this Court has acknowledged that death sentences imposed without the unanimous support of a jury lacked the requisite reliability:

> After our more recent decision in *Hurst*, 202 So. 3d 40, where we determined 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," 202 So. 3d at 59, we must consider whether the unpresented mitigation evidence would have swayed one juror to make "a critical difference." *Phillips*, 608 So. 2d at 783.

Bevel v. State, 221 So. 3d 1168, 1182 (Fla. 2017). This Court's recognition that "a reliable penalty phase requires" a unanimous jury death recommendation by a properly-instructed jury means that the death recommendation provided by Mr. Phillips's jury does not qualify as reliable. In *Mosley v. State*, this Court noted that the unanimity requirement in *Hurst v. State* carried with it "heightened protection" for a capital defendant. *Id*., 209 So. 3d at 1278. This Court stated in *Mosley* that *Hurst v. State* had "emphasized the critical importance of a unanimous verdict." *Id*. This Court added:

> In this case, where the rule announced is of such fundamental importance, the interests of fairness and "cur[ing] **individual injustice**" compel retroactive application of *Hurs*t despite the impact it will have on the administration of justice. *State v. Glenn*, 558 So.2d 4, 8 (Fla. 1990).

Mosley v. State, 209 So. 3d at 1282 (emphasis added). *Hurst v. State* recognized that the non-unanimous recommendation demonstrates that Mr. Phillips's death sentence lacks the heightened reliability demanded by the Eighth Amendment. *Hurst v. State*, 202 So. 3d at 59 ("the requirement of unanimity in capital jury findings will help to ensure the heightened level of protection necessary for a defendant who stands to lose his life as a penalty.").

An examination of Mr. Hitchcock's initial brief shows that the focus of his arguments is actually on *Hurst v. Florida* and the Sixth Amendment right to a jury verdict as to the imposition of a death sentence. His Summary of the Argument

focuses only on *Hurst v. Florida*; it does not mention *Hurst v. State*. Argument IV of Mr. Hitchcock's initial brief does raise an Eighth Amendment argument arising from *Hurst v. State*, but focuses on the evolving standards of decency. In *Hurst v. State*, this Court found that there existed a national consensus that death sentences should only result when a jury unanimously consented to its imposition. *Id*., 202 So. 3d at 61. While there is a basis for Mr. Hitchcock's argument within *Hurst v. State*, it is not the Eighth Amendment argument and Florida Constitution argument that Mr. Phillips will be making.

Although there is some overlap with Mr. Hitchcock's arguments, the indicia of unreliability present here was not present or addressed in *Hitchcock v. State*. Indeed, all of Mr. Phillips's arguments are underscored by the numerous errors that occurred at his capital penalty phase which, in light of the cataclysmic shift in the law, establish that his death sentence is incurably unreliable. For instance, Mr. Phillips's jury was exposed to incurably prejudicial information that was not at issue in *Hitchcock v. State*.[8] At Mr. Phillips's resentencing,[9] the trial court informed the jury:

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[8] It should be noted that in *Hitchcock v. State*, 673 So. 2d 859, 863 (Fla. 1996), this Court remanded for a new penalty phase because the trial court's improper comments to the jury at resentencing "could have [had] the effect of preconditioning the present jury to a death a sentence."

[9] This Court vacated Mr. Phillips's first death sentence and remanded for a new penalty phase due to ineffective assistance of counsel at the sentencing phase of trial. *Phillips v. State*, 608 So. 2d 778 (Fla. 1992).

> This is a little unusual case in that we are on the penalty phase of a First Degree Murder case, that means that the defendant has already been found guilty of First Degree Murder by a different jury and **for legal technicalities we have to retry the penalty phase.** (R. 82-83) (emphasis added).

The mishandling of the jury, however, did not stop there, the trial judge also instructed:

> "**[i]t's not your duty** to advise the court as to what punishment should be imposed upon the defendant for his crime of first degree murder. As you were told **I will decide what punishment shall be imposed**. It's the responsibility of the Judge" (R. 787) (emphasis added).[10]

In *Caldwell v. Mississippi*, the United States Supreme Court held it is constitutionally impermissible to rest a death sentence on a determination made by a jury that was "led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U.S. at 328-29.[11] Here, not only did the court diminish the jury's role by explicitly informing the jury

[10] In addition, the trial court explicitly instructed the jury that "[f]eelings of prejudice, bias or mere sympathy are not legally reasonable doubts and they should not be discussed by any of you in any way" (R. 795).

[11] While this Court has previously rejected *Caldwell* challenges (including Mr. Phillips's) in the context of the prior sentencing scheme, three justices of the United States Supreme Court recently dissented from a denial of certiorari because of this Court's appellate review of issues arising in the wake of *Hurst v. Florida*. *See Truehill v. Florida*, 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.").

that the final decision rested solely with the judge, but the deliberative process was further undermined by the judge's improper commentary. After retiring to deliberate, the jury returned with several questions, and the court agreed that the instructions had been confusing and improper, and reinstructed the jury about voting procedures (R. 803). The jury once again retired to deliberate and returned without reaching a decision. The following day, the jury returned to deliberate and sent a note to the judge indicating that two jurors were declining to vote, i.e., that a verdict could not be reached (R. 810). The judge brought the jury in and told them to take a vote, even if from only ten of the jurors, and to "[p]ut on the vote as it stands" (R. 811). **Six minutes later**, the jury returned with a recommendation, by a vote of 7 to 5, to impose death (R. 812).

The unreliability of the proceedings giving rise to Mr. Phillips's death sentence is clear on the face of the record. At the *Spencer*[12] hearing, the judge showed up with a sentencing order prepared in hand. *See* R. 826-46. The order indicated the trial court found the four aggravating[13] factors that the jury was instructed on but found neither of the two statutory mitigators applied. On direct

[12] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

[13]The court acknowledged that although "[t]his Court previously found [the disrupt/hinder] factor inapplicable because the court believed that the homicide was committed for revenge. However, the Court submits that although revenge may have been one motive, it was part of the overall motive of killing a parole officer… Mr. Svenson's only connection with the defendant was as parole officer and parolee" (R. 831). However, Mr. Svenson was not Phillips's parole officer.

appeal, this Court found the *Spencer* claim procedurally barred because of trial counsel's failure to properly object at trial[14], but nonetheless this Court acknowledged the trial judge's error in "adopt[ing] almost verbatim the State's earlier-filed sentencing memorandum as his sentencing order." *Phillips v. State*, 705 So. 2d 1320 (Fla. 1997) (Anstead, J. concurring). Given this Court's acknowledgment of error and the fact that the jury did not return any written findings, it cannot be said that the sentencing order reflects the jury's fact-finding.[15] As the United States Supreme Court explained in *Caldwell*, "there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court." *Id.* at 330. Here, the trial court's failure to follow sentencing procedures, coupled with its improper commentary, further compounds the prejudice to Mr. Phillips and demonstrates specific reasons why the jury's 7-5 recommendation for death is incurably unreliable.

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[14] While this Court found Mr. Phillips's claim procedurally barred because of trial counsel's failure to object and preserve the issue, this Court did not attribute any error to trial counsel.

[15] Judge Snyder's commentary prior to reading the sentencing order provides further support for this contention. *See* R. 825 ("It's interesting in this case that the jury verdict was 7-5 in both cases … I don't know that I would even accept the jury verdict of 12 nothing for life imprisonment. I really don't. I had a fellow by the name of famous Stacy Weinstein case. Bosco. Jury voted 12 nothing give him life imprisonment, and I gave him the death penalty. It was reversed. Not on the case, but that he was given life. There are certain crimes that you must send a message to the community").

Again, Mr. Phillips seeks to challenge his death sentence on the basis of *Hurst v. State*—that a death sentence flowing from a death recommendation in which the jury was not required to return a unanimous verdict on all findings of fact lacks reliability. This is a different argument than the one presented by Mr. Hitchcock, and it provides a much different and stronger argument that Mr. Phillips should get the retroactive benefit of *Hurst v. State*. The importance of the heightened reliability demanded by the Eighth Amendment was found in *Mosley* to be of such fundamental importance that this Court abandoned the binary approach to *Witt*. As indicated in *Mosley*, the *Witt* analysis in the context of *Hurst v. State* requires consideration of the need to cure "individual injustice." Unlike Mr. Hitchcock, Mr. Phillips will argue that under the case by case *Witt* analysis which *Mosley* said was required, the layers of unreliability and identified errors in Mr. Phillip's penalty phase show "individual injustice" in need of a cure. The disposition of Mr. Hitchcock's appeal and arguments therein did not address the "individual injustice" present in Mr. Phillips's case. Thus, *Hitchcock* cannot govern or control the outcome on the issue being raised in Mr. Phillips's appeal.

In addition to addressing *Hurst v. Florida* and *Hurst v. State* under *Witt*, Mr. Phillips intends to argue that fundamental fairness (as identified and discussed in *Mosley v. State*) and the manifest injustice exception to the law of the case doctrine set forth in *Thompson v. State*, 208 So. 3d 49, 50 (Fla. 2016), apply and require that

Mr. Phillips receive the benefit of *Hurst v. Florida* and *Hurst v. State*. Under both "fundamental fairness" and "manifest injustice," collateral relief is warranted.

Specifically, as to the fundamental fairness concept set forth in *Mosley*, Mr. Phillips detailed his case specific reasons why the "fundamental fairness" concept, which this Court embraced and employed in *Mosley*, meant that he should receive collateral relief in light of *Hurst v. Florida* and/or *Hurst v. State*. In *James v. State*, 615 So. 2d 668 (Fla. 1993), this Court cited "fundamental fairness" when it granted a resentencing. It found a case specific demonstration of fundamental unfairness entitled Mr. James to collateral relief due to the decision in *Espinosa v. Florida*, 505 U.S. 1079 (1992). Because of Mr. James' efforts to challenge the jury instruction on heinous, atrocious or cruel in anticipation of *Espinosa*, this Court held that "it would not be fair to deprive him of the Espinosa ruling" even though Mr. James' death sentence was final years before *Espinosa* was issued by the United States Supreme Court. *James v. State*, 615 So. 2d at 669.

Other collateral appellants appearing before this Court with death sentences that were final before *Espinosa* issued were generally unable to make the showing of unfairness that Mr. James made. Very few of those with death sentences final before the issuance of *Espinosa* received collateral relief on the basis of *Espinosa*. The ruling in *Espinosa* was not found retroactive under *Witt v. State*. The collateral benefit was extended only on a case by case basis to those like Mr. James who

showed their case specific entitlement to the retroactive benefit of *Espinosa* using fundamental fairness as the yardstick. Just as Mr. James made a successful case specific showing of fundamental unfairness while others did not, Mr. Phillips's case specific showing of fundamental unfairness cannot be controlled by the *Hitchcock* decision as it was not an issue raised in Mr. Hitchcock's case. Whether "fundamental fairness" warrants collateral relief in Mr. Phillips's case can only be resolved after a full review of the record in Mr. Phillips's case, not a review of the record in Mr. Hitchcock's case.

In Claim III of his 3.851 motion, Mr. Phillips challenged the Court's arbitrary bright line cutoff that resulted from *Mosley* and *Asay*. Mr. Phillips contends that the cutoff set at June 24, 2002 is so arbitrary as to violate the Eighth Amendment principles enunciated in *Furman v. Georgia*. In *Furman*, the U.S. Supreme Court found that the death penalty "could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976); *see also Furman*, 408 U.S. at 239-40. In separating those who are to receive the retroactive benefit of *Hurst v. Florida* and/or *Hurst v. State* from those who will not, the line drawn operates much

the same as the IQ score of 70 cutoff at issue in *Hall v. Florida*, 134 S. Ct. 1986 (2014).[16]

Claim III is premised upon the Eighth Amendment and its requirement that a death sentence carry extra reliability in order to insure that it was not imposed arbitrarily. Heightened reliability in capital cases is a core value of the Eighth Amendment and *Furman v. Georgia*. In *Hurst v. State*, this Court held that enhanced reliability warranted the requirement that a death recommendation be returned by a unanimous jury. In doing so, the Court effectively recognized that a death sentence without the unanimous consent of the jury was lacking in reliability and thus did not carry the heightened reliability required by the Eighth Amendment. It is within that context that Mr. Phillips will argue in his appeal that if this Court's decision in *Mosley* and *Asay* established a bright line cutoff as to the date at which the State's interest in finality trumped the interests of fairness and curing individual injustice, such a bright line cutoff violated the Eighth Amendment principle set forth in *Hall v. Florida*.[17] Mr. Hitchcock did not make this argument as to the retroactive benefit

[16] Just as there were death sentenced individuals on the wrong side of the 70 IQ score cutoff who were likely intellectually disabled and erroneously under sentence of death, there are individuals with pre-*Ring* death sentences that rest on proceedings layered in error and/or outdated science and/or discredited forensic evidence such that the cumulative unreliability rises up to trump the State's interest in finality.

[17] It should be obvious that although this Court found the State's interest in finality increases the older a case is, the older case will often have greater unreliability due to advances in science and improvements in the quality of the representation in capital cases over time.

of *Hurst v. State* being arbitrarily limited by a bright line cutoff in violation of the Eighth Amendment. And, certainly, this Court did not address this issue in its opinion denying Mr. Hitchcock relief.

Finally, Claim IV is premised on the fact that if a resentencing is ordered, Mr. Phillips will have a right to a life sentence unless the jury returns a unanimous death recommendation. This Court found in *Bevel v. State*, 221 So. 3d 1168 (Fla. 2017), that *Hurst v. State* required adjustment to the prejudice analysis of *Brady*/*Giglio* claims and *Strickland* claims Accordingly, this claim asks how this affects the validity of this Court's rejection of Mr. Phillips's *Brady*/*Giglio*, *Strickland*, and *Atkins*/*Hall* claims in his previous motions to vacate.

Throughout his appellate and collateral proceedings, Mr. Phillips has pointed to numerous ways in which the State withheld evidence and used false testimony, all which have been denied on the basis that no prejudice has been shown. Mr. Phillips also alleged that trial counsel rendered ineffective assistance of counsel at the penalty phase for, among other reasons, failing to present mitigation, including evidence of intellectual disability. Certainly the previous rejection of *Strickland* claims or *Brady*/*Giglio* claims on the basis of a defendant's failure to show prejudice (i.e. a reasonable likelihood that six jurors would vote for a life sentence) no longer comports with the law since Florida law now provides that if only one juror votes for a life sentence, a life sentence must be imposed. *Strickland* and *Brady* prejudice

analysis requires a determination of whether confidence in the reliability of the outcome –the imposition of a death sentence – is undermined by the evidence the jury did not hear due to the *Strickland* and/or *Brady* violations. The new Florida law should be part of the evaluation of whether confidence in the reliability of the outcome is undermined.

Given that Mr. Phillips's previous jury did not return a unanimous death recommendation, it is probable that in light of the evidence developed in collateral proceedings that will be admissible, Mr. Phillips will receive a sentence of less than death. Due to the arbitrary line this Court has drawn in the course of deciding *Mosley* and *Asay,* Mr. Phillips's death sentence is inherently more unreliable. This specific claim raised by Mr. Phillips was simply not raised by Mr. Hitchcock or addressed by this Court. Claim IV is a case specific claim requiring a case by case analysis.

The specific issues raised by Mr. Phillips were not decided by this Court in *Hitchcock*, or in *Asay*. Due process requires that Mr. Phillips have the opportunity for full briefing and an individualized analysis of his claims. Mr. Phillips asks this Court to allow oral argument and full briefing on the issues resulting from the circuit court's summary denial of his Rule 3.851 motion. In the alternative, Mr. Phillips asks this Court to apply the *Hurst* decisions retroactively to him, vacate his death sentence, and remand to the circuit court for a new penalty phase that comports with the Sixth, Eighth and Fourteenth Amendments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been filed through the Florida State Courts e-filing portal which electronically sent a copy to Melissa Roca, Assistant Attorney General, on November 16, 2017.

/s/ William M. Hennis III
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