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IN THE SUPREME COURT OF FLORIDA

CHARLES W. FINNEY,
Appellant,

v. **Case No.: SC17-985**

STATE OF FLORIDA,
Appellee.
______________________________/

RESPONSE TO ORDER TO SHOW CAUSE

Appellant Charles W. Finney, by and through undersigned counsel, responds to this Court's order of September 25, 2017 directing Finney to show cause why the trial court's order denying his Rule 3.851 motion should not be affirmed in light of this Court's holding in *Hitchcock v. State*, 2017 WL 3431500 (Fla. Aug. 10, 2017).

Finney is under a sentence of death, and he has the right to appeal and be meaningfully heard. *See* Fla. Stat. § 924.066 (2016); Fla. R. App. P. 9.140 (b)(1)(D). Finney'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 Court's denial of full briefing and review violates

Finney's rights under the Fourteenth Amendment.

This Court's denial of full appellate review also violates the Eighth Amendment under *Furman v. Georgia*, 408 U.S. 238 (1972). This Court's jurisdiction is mandatory in capital cases for a reason. *See* Fla. R. App. P. 9.030(a)(1)(A)(i). The U.S. Supreme Court counts on this Court's capital appeals process to ensure that the death penalty "will not be imposed in an arbitrary or capricious manner," and "to the extent that any risk to the contrary exists, it is minimized by Florida's appellate review system. . . ." *See Proffitt v. Florida*, 428 U.S. 242, 252-53 (1976).

"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. Denying Finney a fair opportunity to fully present and argue his claims does not comport with due process or *Hall v. Florida*.

REQUEST FOR ORAL ARGUMENT AND FULL BRIEFING

Finney requests oral argument under Fla. R. App. P. 9.320. Finney also asks the Court to allow full briefing. Depriving Finney of the opportunity for full merits review would violate his right to habeas corpus under Article I, § 13 of the Florida Constitution, and the Eighth and Fourteenth Amendments to the U.S. Constitution.

ARGUMENT

In *Hitchcock*, the majority wrote:

> 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. But, as Justice Pariente pointed out in her dissent, "[t]his Court did not in *Asay*, however, discuss the new right announced by this Court in *Hurst* to a unanimous recommendation for death under the Eighth Amendment. . . . Therefore, *Asay* does not foreclose relief in this case, as the majority opinion assumes without explanation." *Id*., at *4 (Pariente, J., dissenting).

In *Asay v. State*, 210 So. 3d 1, 14 (Fla. 2016), this Court acknowledged that the U.S. Supreme Court in *Hurst v. Florida* **did not address** "whether Florida's sentencing scheme violated the Eighth Amendment." The entirety of the Court's analysis in *Asay* hinged on whether *Hurst v. Florida*, 136 S. Ct. 616 (2016) should apply retroactively to Asay. *See id*. at 15. *Hurst v. Florida* is a Sixth Amendment case. The Sixth Amendment rights addressed in *Hurst v. Florida* have nothing to do with the substantive Eighth Amendment rights addressed in *Hurst v. State*.

The *Asay* majority acknowledged that "*Hurst v. Florida* derives from *Ring[v. Arizona*, 536 U.S. 584 (2002)]," *Asay*, 210 So. 3d at 15, and ultimately

concluded that *Hurst v. Florida* should not apply retroactively under *Witt v. State*, 387 So. 2d 922 (Fla. 1980) to people whose convictions were final before *Ring*.[1] But as this Court also recognized in *Asay*, *Hurst v. Florida* **did not address** the question of whether Florida's scheme violated the Eighth Amendment. *Id*. at 14 (emphasis added). Thus, although this Court decided in *Asay* that *Hurst v. Florida* should not apply to pre-*Ring* individuals, *Asay* did not foreclose Eighth Amendment relief under *Hurst v. State*. In *Hitchcock*, the Court declined to analyze the other "various constitutional provisions" cited by Hitchcock, and those issues were not decided in *Hitchcock*. *Hitchcock*, 2017 WL 3431500, at *2. Therefore, Hitchcock has no precedential value and does not foreclose relief.

It is axiomatic that "[t]o be of value as a precedent, the questions raised by the pleadings and adjudicated in the case cited as a precedent must be in point with those presented in the case at bar." *Twyman v. Roell*, 166 So. 215, 217 (Fla. 1936). In other words, "no decision is authority on any question not raised and considered, although it may be involved in the facts of the case." *State v. Du Bose*, 128 So. 4, 6 (Fla. 1930). Florida courts have held that where an "issue was not presented to the

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[1] Finney agrees with the dissents in *Asay* that *Hurst v. Florida* should be retroactively applied to everyone sentenced under the prior unconstitutional scheme. *See Asay,* 210 So. 3d at 36 (Pariente, J., dissenting) (*Hurst* should apply to all defendants who were sentenced to death under Florida's prior, unconstitutional scheme"); *id*. at 37 (Perry, J., dissenting) ("I would find that *Hurst v. Florida* applies retroactively, period.").

court, and . . . was not decided by the court," then the decision issued by that court is not binding on lower courts on that issue. *Speedway SuperAmerica, LLC v. Tropic Enters., Inc.*, 966 So. 2d 1, 3 (Fla. 2d DCA 2007); *see also Benson v. Norwegian Cruise Line Ltd.*, 859 So. 2d 1213, 1218 (Fla. 3d DCA 2003) (rejecting argument that two cases were binding precedent and must be followed because "neither of these cases decided the point now before us"). Because *Asay* is silent on the issue of whether Florida's scheme violates the Eighth Amendment under *Hurst v. State*, and *Hitchcock* merely cites to *Asay*, *stare decisis* does not apply and *Hitchcock* is not binding precedent on issues not raised or decided in *Asay*.

Furthermore, this Court has recognized that *stare decisis* is not immutable, and may yield if there has been an error in legal analysis.

> In Florida, the presumption in favor of stare decisis is strong, but not unwavering. *Brown v. Nagelhout*, 84 So.3d 304, 309 (Fla.2012). The doctrine of stare decisis may bend "where there has been an error in legal analysis." *Id.* (*quoting Puryear v. State*, 810 So.2d 901, 905 (Fla.2002)). We have recognized that "[s]tare decisis does not yield based on a conclusion that a precedent is merely erroneous" but that an error is of sufficient gravity to justify departing from precedent where the prior decision is "unsound in principle" or "unworkable in practice." *Id.* (*quoting Allied–Signal, Inc. v. Dir., Div. of Taxation*, 504 U.S. 768, 783, 112 S.Ct. 2251, 119 L.Ed.2d 533 (1992)).

Roughton v. State, 185 So. 3d 1207, 1210–11 (Fla. 2016).

Hitchcock is both unsound in principle and unworkable in practice. *Hitchcock* is unsound in principle because it cites to *Asay* for the proposition that

neither *Hurst* decision should apply to Hitchcock retroactively, when *Asay* only addressed the Sixth Amendment implications of *Hurst v. Florida*. And it is unworkable in practice because each appeal raises unique issues, and due process requires a full consideration of those issues in each individual appeal. This Court has created an unworkable practice—and an avalanche of due process violations—by attempting to dispose of dozens of cases under *Hitchcock* without further analysis.

Finney's 3.851 motion raised four claims challenging his death sentence.[2] Claim I rested on the Sixth Amendment and *Hurst v. Florida*, 136 S. Ct. 616 (2016). Although this Court held in *Asay* that *Hurst v. Florida* should not apply retroactively under *Witt* to pre-*Ring* individuals, the Court did not address the issue of whether fundamental fairness requires retroactive application. Claim II asserted that under *Hurst v. State*, the Eighth Amendment and the Florida Constitution require that before a death sentence can be authorized, a jury must first return a unanimous death recommendation. This issue was not addressed in *Asay* or *Hitchcock*. Although Hitchcock raised a similar claim, this Court did not rule on it.

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[2] In addition to the arguments presented in this Rule 3.851 motion, Finney intends to timely file a successive Rule 3.851 motion asserting that the enactment of Florida's revised death penalty statute, Chapter 2017-1, constitutes a substantive change in law requiring retrospective application. The new statute had not yet been passed when Finney filed the instant 3.851 motion.

In Claim III, Finney asserted that his prior postconviction ineffective assistance of counsel and *Brady* claims must be reevaluated in light of *Hurst*. And in Claim IV, he argued that this Court's limited retroactivity rulings inject arbitrariness into Florida's capital sentencing scheme in violation of the Eighth Amendment. This Court did not decide these issues in *Hitchcock*.

Claim I: Finney's death sentence stands in violation of the Sixth Amendment under *Hurst v. Florida* and fundamental fairness demands that it be vacated.

Although *Asay* determined that *Hurst v. Florida* should not be retroactively applied under *Witt*, *Hitchcock* did not address Finney's argument that fundamental fairness requires that he receive the benefit of *Hurst v. Florida* and *Hurst v. State*. In *Mosley*, this Court explained that the critical inquiry is whether the defendant unsuccessfully attempted to raise a challenge to Florida capital sentencing scheme "at his first opportunity," before *Hurst v. Florida* and *Hurst v. State* issued. *Mosley*, 209 So. 3d at 1275. In such circumstances, it would be fundamentally unfair to deny relief to someone who anticipated the fatal defects in Florida's capital sentencing scheme before they were recognized in the *Hurst* decisions. *See id.*

Finney detailed his case-specific reasons why the fundamental fairness doctrine this Court embraced and employed in *Mosley* meant that he should receive the benefit of the *Hurst* decisions (PCR 97-99). Neither *Hitchcock* nor *Asay* discussed fundamental fairness at all, although Justice Lewis reiterated his view 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." *Asay*, 210 So. 3d at 30 (Lewis, J., concurring in result).

In *James v. State*, 615 So. 2d 668 (Fla. 1993), this Court ruled that fundamental unfairness entitled James to collateral relief under *Espinosa v. Florida*, 505 U.S. 1079 (1992). Because James had made efforts to challenge the jury instruction on the HAC aggravator in anticipation of *Espinosa*, this Court held that "it would not be fair to deprive him of the *Espinosa* ruling" even though James's death sentence was final years before *Espinosa* was issued. *James*, 615 So. 2d at 669. And the *Mosley* majority held that "[t]he situation presented by . . . *Hurst v. Florida* is not only analogous to the situation presented in *James*, but also concerns a decision of greater fundamental importance than was at issue in *James*." *Mosley*, 209 So. 3d at 1275. The *James* Court did not find *Espinosa* retroactive under *Witt*, and only applied it to the few who were able to show their case-specific entitlement to relief. Finney likewise made a case-specific showing of fundamental unfairness which requires relief.

In his 3.851 motion, Finney identified several issues he had raised at trial, on direct appeal, and in collateral proceedings in an effort to present the Sixth Amendment and Eighth Amendment challenges to his death sentence that were found meritorious in the *Hurst* decisions. Most relevantly, Finney filed a federal

habeas petition after *Ring* was issued, which was denied. The federal district court explained that "[b]ecause at the time *Ring* was announced, Finney's case was final, he is entitled to no *Ring* relief." *Finney v. McDonough*, 2006 WL 2024456, at *38 (M.D. Fla. July 17, 2006). Finney raised a *Ring* claim "at his first opportunity and was then rejected at every turn." *Mosley*, 209 So. 3d at 1275. For that reason alone, "fundamental fairness requires the retroactive application of *Hurst*, which defined the effect of *Hurst v. Florida*," to Finney. *See id.*

Claim II: Finney's death sentence stands in violation of the Eighth Amendment under *Hurst v. State* and must be vacated.

In Claim II, Finney challenged his death sentence under *Hurst v. State*'s holding that a death sentence flowing from a non-unanimous death recommendation lacks reliability and violates the Eighth Amendment. *Hurst v. State* established a presumption of a life sentence that is the equivalent of the guilt phase presumption of innocence, which cannot be overcome unless the jury unanimously makes the requisite findings beyond a reasonable doubt and unanimously recommends a death sentence. This Court recognized that the requirement that the jury must unanimously recommend death before the presumption of a life sentence can be overcome does **not** arise from the Sixth Amendment, or from *Hurst v. Florida*, or from *Ring*. This right emanates from the Florida Constitution and the Eighth Amendment.

"Reliability is the linchpin of Eighth Amendment jurisprudence, and a death

sentence imposed without a unanimous jury verdict for death is inherently unreliable." *Hitchcock*, 2017 WL 3431500, at *3 (Pariente, J., dissenting). 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. "A reliable penalty phase proceeding requires that 'the penalty phase jury must be unanimous in making the critical findings and recommendation that are necessary before a sentence of death may be considered by the judge or imposed." *Hurst v. State*, 202 So. 3d at 59. The Court also recognized the need for heightened reliability in capital cases. *Id.* ("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 *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), this Court noted that the unanimity requirement in *Hurst v. State* carried with it the "heightened protection" necessary 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*. In *Mosley,* when considering whether *Hurst v. State* is retroactive

under *Witt* to death sentences imposed after *Ring*, this Court wrote:

> 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, 209 So. 3d at 1282 (emphasis added). The importance of the heightened reliability demanded by the Eighth Amendment is of such fundamental importance that this Court abandoned *Witt*'s binary approach to retroactivity in favor of correcting the injustice.

Hurst v. State and *Mosley* demonstrate that Finney's death sentence lacks the heightened reliability demanded by the Eighth Amendment. His jury's vote was 9-3, which was returned the same day the penalty phase began. As this Court recognized, "juries not required to reach unanimity tend to take less time deliberating and cease deliberating when the required majority vote is achieved rather than attempting to obtain full consensus. . . ." *Hurst v. State*, 202 So. 3d at 58. A 9-3 advisory recommendation after a one-day penalty phase cannot possibly be considered reliable. As indicated in *Mosley*, the *Witt* analysis in the context of *Hurst v. State* requires courts to consider the need to cure "individual injustice." Under a case by case *Witt* analysis, which is required under *Mosley*, the layers of unreliability and errors in Finney's penalty phase demonstrate an individual injustice in need of a cure.

Moreover, *Hurst v. State* recognized that evolving standards of decency require unanimous recommendations.

> Requiring unanimous jury recommendations of death before the ultimate penalty may be imposed will ensure that in the view of the jury—a veritable microcosm of the community—the defendant committed the worst of murders with the least amount of mitigation. This is in accord with the goal that capital sentencing laws keep pace with "evolving standards of decency." *Trop v. Dulles*, 356 U.S. 86, 101, 78 S. Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion) (holding that the Eighth Amendment must "draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

Hurst v. State, 202 So. 3d at 60. Such Eighth Amendment protections are generally understood to be retroactive. *See, e.g., Miller v. Alabama*, 132 S. Ct. 2455 (2012) (holding retroactive a case which held that mandatory sentences of life without parole for juveniles are unconstitutional); *Atkins v. Virginia*, 536 U.S. 304 (2002).

Additionally, the jury was repeatedly instructed that its penalty phase verdict was merely advisory and only needed to be returned by a majority vote. However, the Eighth Amendment requires that jurors must feel the weight of their sentencing responsibility. As the U.S. Supreme Court explained in *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985), "it is not 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." *See also Blackwell v. State*, 79 So. 731, 736 (Fla. 1918).[3] Diminishing an individual juror's sense of responsibility for the imposition of a death sentence creates a "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." *Caldwell*, 472 U.S. at 330.

Finney's jurors were not told that their vote had to be unanimous, and that their decision was binding on the sentencing judge. The jurors were not advised of each juror's authority to dispense mercy. The jury was never instructed that it could still recommend life as an expression of mercy, or that they were "neither compelled nor required" to vote for death even if it determined that there were sufficient aggravating circumstances that outweighed the mitigating circumstances. Finney's jury's non-unanimous 9-3 advisory recommendation simply "does not meet the standard of reliability that the Eighth Amendment requires." *Id*. at 341.

The issue of whether *Hurst v. State*'s right to a unanimous jury recommendation should be retroactively applied was never addressed in *Hitchcock* or *Asay*. *See Hitchcock*, 2017 WL 3431500, at * 4 (Pariente, J. dissenting) ("This

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[3] This Court has previously rejected *Caldwell* challenges in the context of the prior sentencing scheme, where the judge was the final decision-maker, not the jury. But three Justices of the U.S. Supreme Court today dissented from the denial of certiorari in two capital cases because this Court's rationale for denying *Caldwell* claims has been undermined by *Hurst v. Florida*, and would grant cert to address this "potentially meritorious Eighth Amendment challenge." *Truehill v. Florida*, 2017 WL 2463876, at *1 (Oct. 16, 2017) (Sotomayor, J., dissenting).

Court did not in *Asay*, however, discuss the new right announced by this Court in *Hurst [v. State]* to a unanimous recommendation for death under the Eighth Amendment. Indeed, although the right to a unanimous jury recommendation for death may exist under both the Sixth and Eighth Amendments, the retroactivity analysis, which is based on the purpose of the new rule and reliance on the old rule, is undoubtedly different in each context. Therefore, *Asay* does not foreclose relief in this case, as the majority opinion assumes without explanation."). These issues were not addressed or decided in *Hitchcock*, and Finney must have a fair opportunity to show that the Eighth Amendment prohibits his execution.

Claim III: Finney's previously presented *Brady/Giglio* and *Strickland* claims must be revisited in light of the new law that would govern at a resentencing, to determine the likelihood of a different outcome.

In Claim III, Finney alleged that his prior claims must be reevaluated in light of the new requirement that juries must unanimously make the necessary findings of fact and return a unanimous death recommendation. Certainly, the *Strickland* and *Brady* analyses require a new determination of whether confidence in the reliability of the outcome was undermined. Further, although residual doubt is not a mitigator, jurors would be free to conclude that the residual doubt created by the *Brady* evidence was a reason to vote for life even if the requisite findings had been made, particularly since the State's case was largely circumstantial.

Courts must be concerned with whether "the result of a particular proceeding

is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." *Strickland v. Washington*, 466 U.S. 668, 696 (1984). Similarly, with respect to *Brady* claims, reliability is the touchstone, and the question is whether the suppressed evidence "undermines confidence in the outcome of the trial." *Kyles v. Whitley*, 514 U.S. 419, 434 (1985).

In *Bevel v. State*, 221 So. 3d 1168, 1182 (2017), this Court held:

> 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.

(emphasis added). Thus, *Hurst v. State* altered the prejudice analysis of *Brady/Giglio* and *Strickland* claims. The Court must reevaluate Finney's claims to determine whether the unpresented evidence would have swayed one juror to make a critical difference.

Regarding newly discovered evidence, this Court explained in *Hildwin v. State*, 141 So. 3d 1178, 1184 (Fla. 2014) how courts must view such evidence:

> [T]he postconviction court must consider the effect of the newly discovered evidence, in addition to all of the evidence that could be introduced at a new trial." *Swafford v. State*, 125 So. 3d 760, 775-76 (Fla. 2013). In determining the impact of the newly discovered evidence, the court must conduct a cumulative analysis of all the

evidence so that there is a "total picture" of the case.

In *Swafford v. State*, 125 So. 3d 760 (Fla. 2013), this Court indicated the evidence to be considered in evaluating whether a different outcome was probable, included "evidence that [had been] previously excluded as procedurally barred or presented in another proceeding." *Id.* at 775-76. The "standard focuses on the likely result that would occur during a new trial with all admissible evidence at the new trial being relevant to that analysis." *Id*. With all of the new evidence that would be admissible at a resentencing, the State cannot demonstrate beyond a reasonable doubt that not a single juror would vote in favor of a life sentence.

Claim IV: Limited retroactivity injects arbitrariness into Florida's capital sentencing scheme, which violates the Eighth Amendment principles of *Furman v. Georgia*.

Finney's 3.851 motion also challenged the bright-line cutoff of June 24, 2002 as determined in *Mosley* and *Asay* as arbitrary and capricious, in violation of the Eighth Amendment principles enunciated in *Furman v. Georgia*. This issue was not decided in *Hitchcock* or *Asay*. 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.

Drawing a line at June 24, 2002, is just as arbitrary and imprecise as the

bright line cutoff that was at issue in *Hall v. Florida*, 134 S. Ct. at 2001 ("A State that ignores the inherent imprecision of these tests risks executing a person who suffers from intellectual disability."). When the U.S. Supreme Court declared that cutoff unconstitutional, those death sentenced individuals with IQ scores above 70 were found to be entitled to a case-by-case determination of whether the Eighth Amendment precludes their execution. Finney is similarly entitled to an individual review of his inherently unreliable death sentence.

In separate opinions in *Asay* and *Mosley*, a divided Court complained that the Court had injected unacceptable arbitrariness into Florida's capital sentencing process by endorsing limited retroactivity. *See Asay*, 210 So. 3d at 31 (Lewis, J., concurring in result) ("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 named *Ring* arrived. *See* Perry, J., dissenting op. at --. 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."); *Id*. at 36 (Pariente, J., concurring in part, dissenting in part) ("The majority's conclusion results in an unintended arbitrariness as to who receives relief depending on when the defendant was

sentenced or, in some cases, resentenced."); *Id*. at 37 (Perry, J., dissenting) ("In my opinion, the line drawn by the majority is arbitrary and cannot withstand scrutiny under the Eighth Amendment because it creates an arbitrary application of law to two groups of similarly situated persons."); *Mosley,* 209 So. 3d at 1291 (Canady, J., concurring in part, dissenting in part) (" Based on an indefensible misreading of *Hurst v. Florida* and a retroactivity analysis that leaves the *Witt* framework in tatters, the majority unjustifiably plunges the administration of the death penalty in Florida into turmoil that will undoubtedly extend for years. I strongly dissent from this badly flawed decision.").

The finality of a death sentence on direct appeal is inherently arbitrary. Finality can depend on whether there were delays in transmitting the record on appeal;[4] whether direct appeal counsel sought extensions of time to file a brief; whether a case overlapped with the Court's summer recess; whether an extension was sought for rehearing and whether such a motion was filed; whether counsel chose to file a petition for writ of certiorari in the U.S. Supreme Court or sought an extension to file such a petition; and how long a certiorari petition remained pending in the Supreme Court.

[4] *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 resulted in the direct appeal being decided post-*Ring*).

This inherent arbitrariness is exemplified by two unrelated cases. This Court affirmed Gary Bowles's and James Card's 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 men petitioned for a writ of certiorari in the U.S. Supreme Court. Card's sentence became final four days after *Ring* was decided—on June 28, 2002—when his certiorari petition was denied. *Card v. Florida*, 536 U.S. 963 (2002). However, Bowles's sentence became final seven 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 Card a new sentencing proceeding, ruling that *Hurst* was retroactive because his sentence became final after the *Ring* cutoff. *See Card*, 219 So. 3d at 47. However, Bowles, whose direct appeal was decided the same day as Card's, falls on the other side of this Court's current retroactivity cutoff and will not receive the benefit of the *Hurst* decisions.

There are also cases in which a capital defendant has had a death sentence vacated in collateral proceedings, a resentencing ordered, and another death sentence imposed, which was pending on appeal when *Hurst v. Florida* issued. Those individuals will receive the benefit of the *Hurst* decisions because a final death

sentence was not in place when *Hurst* issued.[5] There can be no other word to describe these disparate outcomes but arbitrary. To deny Finney the retroactive application of the *Hurst* decisions on the ground that his death sentence became final before June 24, 2002 while granting retroactive *Hurst* relief to inmates whose death sentences were not final on June 24, 2002 violates Finney's right to equal protection under the Fourteenth Amendment and his right against arbitrary infliction of the death penalty under the Eighth Amendment.

CONCLUSION

Hitchcock is inapposite to Finney's appeal. The specific issues raised by Finney were not decided by this Court in *Hitchcock*. Due process requires that Finney have the opportunity for full briefing and an individualized analysis of his claims. Finney asks this Court to allow oral argument and full briefing on the issues resulting from the trial court's summary denial of his Rule 3.851 motion. In the alternative, Finney 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.

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[5] *See, e.g., Armstrong v. State*, 211 So. 3d 864 (Fla. 2017) (resentencing ordered where conviction was final in 1995 for a 1990 homicide); *Johnson v. State*, 205 So. 3d 1285 (Fla. 2016) (resentencing ordered where conviction was final in 1993 for three 1981 homicides); *Hardwick v. Sec'y, Fla. Dept. of Corr.*, 803 F. 3d 541 (11th Cir. 2015) (resentencing ordered where conviction was final in 1988 for a 1984 homicide).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that this response has been served via the e-filing portal to Assistant Attorney General Lisa Martin at lisa.martin@myfloridalegal.com and capapp@myfloridalegal.com on October 16, 2017.

/s/ Suzanne Keffer
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