IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Appellee,

v.

CASE NO. SC18-1435
Lower Court Case No. 76-3350B

WILLIAM LEE THOMPSON,
Appellant.
_____/

RESPONSE TO ORDER TO SHOW CAUSE

The Appellant, WILLIAM LEE THOMPSON, by and through undersigned counsel, hereby responds to this Court's November 6, 2018 Order directing him to show cause "why the trial court's order should not be affirmed in light of this Court's holding in *Hitchcock v. State*, 226 So. 3d 216 (Fla.), *cert. denied*, 138 S. Ct. 513 (2017)." In support of this position, Mr. Thompson states:

Mr. Thompson's death sentence was imposed pursuant to a capital sentencing scheme that was ruled unconstitutional in *Hurst v. Florida*, 136 S. Ct. 616 (2016) and *Hurst v State*, 202 So. 3d 40 (Fla. 2016), because a judge, not a jury, made factual findings and imposed a death sentence after a jury, which was repeatedly instructed that the ultimate responsibility for the punishment was solely that of the judge, returned a non-unanimous recommendation of 7-5 for death. This Court affirmed in 1993. *Thompson v. State*, 619 So. 2d 261 (Fla. 1993).

The instant appeal concerns the circuit court's summary denial of Mr.

Thompson's amended successive Rule 3.851 motion.[1] Mr. Thompson raised three claims challenging the constitutionality of his death sentence. Claim I rested on the Sixth Amendment and the decisions in *Hurst v. Florida* and *Hurst v. State*. Claim II rested on the Eighth Amendment, the Florida Constitution, and the ruling in *Hurst v. State*. Claim III arose from the March 13, 2017 enactment of Chapter 2017-1 which revised Florida's capital sentencing statute, § 921-141, Fla. Stat. Relying on this Court's decision in *Hannon v. State*, 228 So. 3d 505, 512-513 (Fla. 2017), the lower court denied Mr. Thompson's claims. (ROA 18-1435[2] at 780).

Mr. Thompson's right to appeal and be meaningfully heard implicates his right to due process and equal protection, particularly given that the constitutional claims Mr. Thompson raised in his Rule 3.851 motion are different from those raised by Hitchcock and those addressed by this Court in its opinion. Thus, Hitchcock's appeal should not govern the issues presented in Mr. Thompson's appeal.

REQUEST FOR ORAL ARGUMENT AND FULL BRIEFING

Mr. Thompson respectfully requests oral argument pursuant to Fla. R. App.

[1] Mr. Thompson timely filed his successive Rule 3.851 on January 10, 2017, and amended with permission of the lower court.

[2] The record on appeal in the instant matter will be designated as: (ROA 18-1435 at __). The designation (R3 __) refers to the record of the direct appeal from the 1989 penalty phase. Mr. Thompson is incorporating all of the facts, allegations, and legal arguments made below to the circuit court. Mr. Thompson neither waives nor abandons any fact, allegation, or legal argument made below that is not explicitly addressed in this pleading given the truncated nature of this proceeding.

P. 9.320. Mr. Thompson also requests that the Court permit full briefing in this case in accord with the normal, untruncated rules of appellate practice.

ARGUMENT

I. Due Process does not permit Mr. Thompson to be foreclosed by the decisions rendered in *Hitchcock*.

Mr. Thompson submits that this appeal is not one subject to this court's discretionary jurisdiction. Fla. R. App. Pro. 9.030(a)(2). He has a substantive right to appeal the denial of a successive 3.851 motion. See Fla. Const. Art. V. § 3(b)(1); Fla. Stat. § 924.066 (2016). This Court "shall review all rulings and orders appearing in the record necessary to pass upon the grounds of an appeal." Fla. R. App. Pro. 9.140(i). To require a showing of "cause" before an appeal proceeds the appeal is not one of right as the Florida Constitution requires.[3]

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

[3] Mr. Thompson's right to appeal is protected by the Fourteenth Amendment. *Evitts v. Lucey*, 469 U.S. 387, 393 (1985) ("if a State has created appellate courts as 'an integral part of the ... system for finally adjudicating the guilt or innocence of a defendant,' *Griffin v. Illinois*, 351 U.S., at 18, the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution.").

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). Under the Florida Constitution, the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and the Eighth Amendment, Mr. Thompson objects to having to show cause before his appeal of right will be heard.

This Court's Order suggests that it unreasonably intends to bind Mr. Thompson 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. The fact that this Court has sua sponte issued identical orders, in numerous other cases, employing the same truncated procedure it does here reflects baseless prejudgment of the appeals and their scope. Mr. Thompson deserves an individualized appellate process, particularly because Hitchcock did not raise the same issues at stake here. "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. 1986, 2001 (2014). Yet, Mr. Thompson is being denied that opportunity by this Court's attempt to confine him to the outcome in *Hitchcock* without first providing a fair opportunity of his own to demonstrate how the record and facts in his particular case prohibit his execution.

II. Mr. Thompson must not be legally or factually bound by this Court's decisions in Hitchcock.

The specific constitutional arguments Mr. Thompson asserts were not raised by Hitchcock nor addressed by this Court, therefore *Hitchcock v. State* is not controlling. Without full briefing, Mr. Thompson will be precluded from adequately addressing these arguments and presenting his appeal to this Court.

Although Hitchcock asserted an Eighth Amendment jury unanimity claim pursuant to *Hurst v. State*, this Court summarily denied the claim solely on its analysis in *Asay v. State*, 210 So. 3d 1 (Fla. 2016).

> 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).

Hitchcock, 226 So. 3d at 217. However, the entirety of this Court's analysis in *Asay* hinged on whether *Hurst v. Florida*, 136 S. Ct. 616 (2016)—a Sixth Amendment case—should apply retroactively to *Asay*. *See Asay*, 210 So. 3d at 15 (emphasis added). Moreover, the Sixth Amendment rights addressed in *Hurst v. Florida* have nothing to do with the substantive Eighth and Fourteenth Amendment rights addressed in *Hurst v. State* and were not raised or argued by Asay. This Court cannot reject claims based on arguments never made, and it cannot conflate separate and distinct constitutional challenges.

a. Despite the Court's Lack of Guidance as to What Constitutes "Cause," Mr. Thompson Can Establish That his Death Sentence Stands in Violation of Due Process, the Right to Equal Protection, and the Sixth Amendment of the U.S. Constitution Because a His Jury Did Not Make Any of the Findings of Fact Required to Impose a Death Sentence.

In Claim I, a Sixth Amendment claim based upon *Hurst v. Florida*, Mr. Thompson seeks to argue in his appeal that the is entitled to the retroactive application of *Hurst* pursuant to State and Federal Law and the U.S. and Florida Constitutions. In *Hurst v. Florida*, the United States Supreme Court held that Florida's scheme violated the Sixth Amendment because it required the judge, not the jury, to make the findings of fact required to impose the death penalty under Florida law. 136 S. Ct. at 620-22. Under Florida's unconstitutional scheme, an "advisory" jury rendered a generalized recommendation for life or death by a majority vote, without specifying the factual basis for the recommendation, and then the sentencing judge alone, notwithstanding the jury's recommendation, conducted the fact-finding. *Id.* at 622. On remand, this Court in *Hurst v. State* expanded the protections created in *Hurst v. Florida* and further held that the Florida Constitution *and* the Eighth Amendment require unanimous jury fact-finding *as to each of the required elements*. 202 So. 3d at 53-59.

The record here is clear—Mr. Thompson's jury was never asked to make unanimous findings of fact as to any of the required elements, and was expressly told that they were not ultimately responsible for their decision. In accord with what

is now clearly recognized as an unconstitutional practice, and after being unconstitutionally advised, the jury rendered a generalized recommendation for death by a mere 7-5 bare majority.

Mr. Thompson's case is the textbook definition of *Hurst* error; however, this Court's creation of an arbitrary retroactivity cut-off date unconstitutionally forecloses Mr. Thompson's right to relief. This Court's rulings in *Asay* and *Mosley*, granting retroactive *Hurst* relief only to inmates whose death sentences became final after June 24, 2002, violates Mr. Thompson's right to Equal Protection of the Laws under the Fourteenth Amendment and his right against arbitrary infliction of the death penalty under the Eighth Amendment of the U.S. Constitution. Mr. Thompson's appeal cannot be denied in light of *Hitchcock* because this Court did not address this issue, nor did Hitchcock challenge the bright line cutoff as a violation of the Eighth Amendment or Federal law.

Experience has already shown the arbitrary results inherent in this Court's application of the *Ring*-based retroactivity cutoff. 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 scheduling, delays in receiving documents, [4] or whether

[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 resulting in the direct appeal being decided post-*Ring*). *Compare Booker v. State*, 773 So. 2d 1079 (Fla. 2000) (opinion issued within one year after briefing completed, before *Ring*), *with Hall v. State*, 201 So.

counsel requested extensions of time.[5]

Moreover, the *Hitchcock* opinion fails to discuss Mr. Thompson's arguments 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. Thompson receive the benefit of *Hurst v. Florida* and *Hurst v. State*. In his 3.851 motion, Mr. Thompson identified issues he had raised at his trial, on direct appeal, and in collateral proceedings which he had pursued in an effort to present the Sixth, Eighth, and Fourteenth Amendment challenges to his death sentence found meritorious in *Hurst v. Florida* and *Hurst v. State*. The record is clear, Mr. Thompson challenged the constitutionality of Florida's sentencing statute in several pre-trial motions dating back prior to his resentencing in 1989. In his "Motion to Declare Statute 921.141

3d 628 (Fla. 2016) (opinion issued twenty-three months after the last brief was submitted).

[5] 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 certiorari petition was denied on June 28, 2002, making his sentence became final four (4) days after *Ring* was decided. *Card v. Florida*, 536 U.S. 963 (2002). However, Mr. Bowles's petition was denied on June 17, 2002, making his sentence final seven (7) days before *Ring*. *Bowles v. Florida*, 536 U.S. 930 (2002). Mr. Card received the benefit of *Hurst*, however, Mr. Bowles, whose case was decided on direct appeal on *the same day* as Mr. Card's, and who filed his certiorari petition in the Supreme Court *after* Mr. Card, now finds himself on the other side of this Court's current retroactivity cutoff. Mr. Card now faces execution based on a freakish and wanton stroke of ill-fortune.

Unconstitutional," Mr. Thompson argued that Florida's sentencing statute was unconstitutional under the Sixth, Eighth and Fourteenth Amendments because it failed to "offer sufficient guidance to the jury in determining whether to impose the death penalty and, therefore, permits arbitrary and capricious decision making." Following the issuance of *Ring*, Mr. Thompson raised a claim at his first opportunity.

Mr. Thompson's penalty phase jury was repeatedly instructed that its verdict was merely advisory and could be returned by a mere majority vote. The court told the jury that "the final decision as to what punishment to impose rests solely with the judge of this Court," and that " . . . the Court does not have to accept the advisory opinion, or sentence of the jury." (R3. 1071). Even after several jurors expressed difficulty in considering the death penalty, the State reassured jurors that the ultimate decision was not theirs, "And even when you make that recommendation, it's not binding on this judge. He'll still make the final, ultimate decision. It's just recommending that you as the jurors feel would be the appropriate sentence in this case." (R3. 1189). At the close of the penalty phase, before deliberations, the judge noted again "as you have been told, the final decision as to what punishment shall be imposed is a responsibility of the judge" (R3. 3115). After brief deliberations, Mr. Thompson's advisory jury returned a death sentence by a non-unanimous, bare majority vote of 7-to-5, notwithstanding the fact that the lower court instructed on aggravators that did not apply.

As the United States Supreme Court explained in *Caldwell v. Mississippi*, 472 U.S. 320, 330 (1985), "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." In *Caldwell*, the prosecutor's comments in closing arguments that the jury's decision would be subject to appellate review, so as to minimize their responsibility, did not meet the reliability requirements of the Eighth Amendment, it's baffling that this Court has since held that a jury out-right instructed that their recommendation is only advisory can stand. Whether "fundamental fairness" and "manifest injustice" warrants collateral relief can only be resolved after a full review of the record in Mr. Thompson's case, not a review of the record in Hitchcock's case.

b. Mr. Thompson's Death Sentence Stands in Violation of the Eighth Amendment to the United States Constitution Because the Lower Court Imposed a Death Sentence After the Jury Returned a Non-Unanimous, Bare Majority Verdict of 7-5.

Claim II of Mr. Thompson's motion to vacate 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 a properly-instructed jury must unanimously recommend death before this presumption of a life sentence can be overcome does not arise from the Sixth Amendment or from *Hurst v. Florida* or from *Ring v.*

Arizona, 536 U.S. 584 (2002). It is a right emanating from the Florida Constitution and alternatively 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. 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 Hurst 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).

Mr. Thompson's claim is that *Hurst v. State* recognized that the non-unanimous recommendation as to all facts necessary to impose a sentence of death demonstrates the unreliability of his death sentence under 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."). This argument is different than the argument presented by Hitchcock, and establishes that Mr. Thompson should get the retroactive benefit of *Hurst v. State*.

An examination of Hitchcock's initial brief shows that the focus of his arguments is actually on *Hurst v. Florida*. Argument IV of 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 Hitchcock's argument within *Hurst v. State*, it is not the Eighth Amendment argument and Florida Constitution argument that Mr. Thompson will be making. Thus, Mr. Thompson cannot and should not be bound by the Court's disposition of Hitchcock's appeal.

Moreover, the constitutional protections afforded capital prisoners in Florida now have Eighth Amendment implications, as they are required by evolving standards of decency. Such Eighth Amendment protections are generally understood to be retroactive. *See, e.g.*, *Miller v. Alabama*, 132 S. Ct. 2455; *Atkins v. Virginia*, 536 U.S. 304 (2002). This issue – whether retroactive application of the right to a unanimous jury recommendation for death announced in *Hurst* under the Eighth Amendment – was not specifically addressed in this Court's opinion in *Asay*, on which *Hitchcock* relies. *See Hitchcock*, 226 So. 3d at 216 (Pariente, J. dissenting).

Mr. Thompson contends that this bright line cut-off resulting from *Mosley* and *Asay*, set at June 24, 2002, is so arbitrary as to violate the Eighth Amendment principles enunciated in *Furman v. Georgia*. 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).[6] Not only did Hitchcock not challenge the arbitrary bright line cutoff as a violation of the Eighth Amendment, this Court did not address this issue in its opinion denying him relief.

[6] The individuals with pre-*Ring* death sentences that rest on proceedings layered in error are no different than the death sentenced individuals on the wrong side of the 70 IQ score cutoff who were likely intellectually disabled and erroneously under sentence of death. Choosing June 24, 2002 is just as arbitrary and imprecise as the bright line cutoff at issue in *Hall*. When the Supreme Court struck the ID cut off, those death-sentenced individuals were found to be entitled to a case by case determination of whether the Eighth Amendment precludes their execution.

Mr. Thompson respectfully requests that this Court squarely address his Eighth Amendment claim and asserts that notions of Due Process and fundamental fairness require this Court to address his claim. Failure to do so by this Court, whether in an attempt to evade U.S. Supreme Court review or through negligence, renders the appellate process fundamentally unfair.

c. Mr. Thompson's Death Sentence Stands in Violation of the Due Process Clause and the Eighth and Fourteenth Amendments to the United States Constitution Because Under the Revised Fla. Stat. § 921.141, Death is Only Authorized if a Jury Finds the Necessary Elements Required to Convict of the Greater Offense of Capital First Degree Murder.

On March 13, 2017, the Legislature enacted Chapter 2017-1, revising Florida's Capital sentencing statute § 921.141. Codifying the dictates of *Hurst v. State*, Chapter 2017-1 confirmed that a death sentence is not authorized for a defendant convicted of first degree murder unless and until a jury returns a unanimous verdict finding that the State has proven beyond a reasonable doubt: that the aggravators that are unanimously found to exist beyond a reasonable doubt are sufficient to justify death, and that the aggravators outweigh the mitigators. The findings to be made by a unanimous jury are what separate first degree murder from the next higher degree of murder for which death is a permissible penalty. And while the statute calls the jury's unanimous verdict a "death recommendation," functionally what the jury returns is a guilty verdict finding the defendant guilty of the greater offense of capital first degree murder.

This Court recently held in *Williams v. State*, 242 So. 3d 280 (Fla. 2018): "any fact that increases the statutory maximum sentence is an 'element' of the offense to be found by a jury." *Id.* at 286 (*emphasis added*). This Court relied on the U.S. Supreme Court decision in *Alleyne v. United States*, 570 U.S. 99 (2013), which explained, "When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury. It is no answer to say that the defendant could have received the same sentence with or without that fact." *Alleyne*, 570 U.S. at 114-115. Thus, under *Alleyne* and now *Williams*, the facts identified by this Court in *Hurst v. State* and confirmed by the legislature in the revised § 921.141 as necessary to increase the authorized punishment to include death are elements which constitute a new or separate offense, i.e. capital first degree murder.

A court decision identifying the elements of a statutorily defined criminal offense constitutes substantive law that dates back to the enactment of the statute. *Bousley v. United States*, 523 U.S. 614, 625 (1998) (Stevens, J., concurring in part and dissenting in part) ("This case does not raise any question concerning the possible retroactive application of a new rule of law, cf. *Teague v. Lane*, 489 U.S. 288 (1989), because our decision in *Bailey v. United States*, 516 U.S. 137 (1995), did not change the law. It merely explained what § 924(c) had meant ever since the statute was enacted. The fact that a number of Courts of Appeals had construed the

statute differently is of no greater legal significance than the fact that 42 U.S.C. § 1981 had been consistently misconstrued prior to our decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).") (emphasis added). "A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers v. Roadway Exp., Inc*., 511 U.S. 298, 312-13 (1994) (emphasis added).

Indeed, this Court said that proof of the identified facts was a longstanding requirement under the statute:

> [T]he imposition of a death sentence in Florida has in the past required, and continues to require, additional factfinding that now must be conducted by the jury. As the Supreme Court long ago recognized in *Parker v. Dugger*, 498 U.S. 308 (1991), under Florida law, "The death penalty may be imposed only where sufficient aggravating circumstances exist that outweigh mitigating circumstances." Id. at 313 (emphasis added) (quoting § 921.141(3), Fla. Stat. (**1985**)).

Hurst v. State, 202 so. 3d at 53 (emphasis added).

The fact that the elements have been present since the enactment of § 921.141 is further supported by the constitutional prohibition against ex post facto laws. Article I, § 10 of the U.S. Constitution provides: "No State shall … pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts … ." Under the Ex Post Facto Clause, the substantive criminal law setting forth the elements of a criminal offense must have been in effect at the time the alleged criminal offense occurred. Applying a criminal law enacted after a crime was

committed to make facts not previously elements of criminal offense a basis for finding a higher degree of murder or increasing the punishment is expressly prohibited by the Ex Post Facto Clause. *See Marks v. United States*, 430 U.S. 188, 191-92 (1977) (extending the protections of the Ex Post Facto Clause to the judiciary).

This Court's holding in *Victorino v. State*, 241 So. 3d at 50 (Fla. 2018) supports Mr. Thompson's claim that the substantive elements now required for capital murder have been present since the enactment of the statute in 1972. In *Victorino*, this Court rejected an ex post facto challenge to the application of Chapter 2017-1 to homicide prosecutions involving murders committed before the enactment of Chapter 2017-1 finding that "For a criminal law to be ex post facto it must be retrospective, that is, it must apply to events that occurred before its enactment; and it must alter the definition of criminal conduct or increase the penalty by which a crime is punishable." *Id*. (quoting *Lynce v. Mathis*, 519 U.S. 433, (1997). The substantive criminal law identifying the elements necessary to convict a defendant of capital first degree murder and authorize the imposition of a death sentence must have been in place at the time of Mr. Thompson's crime.

Since this new offense is a higher degree of murder for which a death sentence is authorized, due process requires all its elements to be proven beyond a reasonable doubt. As explained in *In re Winship*, 397 U.S. 358 (1970), the Due Process clause

requires the State to prove the elements of capital murder "beyond a reasonable doubt":

> *Winship* presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.

Jackson v. Virginia, 443 U.S. 307, 316 (1979). The U.S. Supreme Court applied *Winship*'s holding in *Fiore v. White*, 531 U.S. 225, 226 (2001), holding that Due Process required "a State to apply a new interpretation of a state criminal statute retroactively to cases on collateral review."[7] *Fiore v. White*, 531 U.S. at 226.

Just as the Pennsylvania Supreme Court had done in *Fiore*, this Court's decision in *Hurst v. State* looked at the plain language of Florida's death penalty statute and identified the statutorily defined facts (or elements) necessary to convict a defendant of capital first degree murder. 202 So. 3d at 53-54. Under *Fiore*, a decision that identifies the elements of criminal offense based on a statute's plain

[7] Fiore was convicted of operating a hazardous waste facility without a permit, which he had. However, the State took the position that he "deviated so dramatically from the permit's terms that he nonetheless had violated the statute." 531 U.S. at 227. On this theory, Mr. Fiore was convicted. The Pennsylvania Supreme court ruled in another case that "one who deviated from his permit's terms was not a person without a permit; hence, a person who deviated from his permit's terms did not violate the statute." *Id*. at 227. Mr. Fiore filed a federal habeas. "The Court of Appeals believed that the Pennsylvania Supreme Court, in Scarpone's case, had announced a new rule of law and thus was inapplicable to Fiore's already final conviction." *Id*., at 227.

language is "not new law" and does not present a question of retroactivity, because these "elements" came were in the statute when it was enacted in 1972. This means that *Hurst v. State* did not establish a new rule of procedure. Law governing the retroactivity of a new procedural rule does not govern as to substantive law. Accordingly, the result here must be the same as in *Fiore*. Absent a unanimous jury determination of each element of capital first degree murder beyond a reasonable doubt, collateral relief is required.

This Court has already determined that cases that have been remanded for new sentencing proceedings will be governed by § 921.141 as revised by Chapter 2017-1. This includes cases involving homicides committed as early as the 1980's.[8] At these new "penalty phases" a judge will not be authorized to impose a death sentence unless and until the State proves beyond a reasonable doubt the existence of the substantive elements of capital first degree murder. The State will have to show that the elements, not of first degree murder, but of capital first degree murder, were present on the date of the homicides at issue. *See Peugh v. United States*, 133 S. Ct.

[8] See *Card v. Jones*, 219 So. 3d 47 (Fla. 2017), this Court vacated a death sentence and ordered a new "penalty phase" in May of 2017 although underlying crime happened on June 3, 1981. *See* also, *Johnson v. State*, 205 So. 3d 1285 (Fla. 2016) (1981 conviction for three homicides); *Armstrong v. State*, 211 So. 3d 864 (Fla. 2017) (1990 homicide conviction). If the substantive criminal law set forth in *Hurst v. State* and in Ch. 2017-1 governs as to homicides committed before Mr. Thompson's, then it must apply in Mr. Thompson's case. Mr. Thompson was not convicted of capital murder, any more than Card, Johnson, and Armstrong were.

2072, 2081 (2013); *Carmell v.Texas*, 529 U.S. 513, 530 (2000). Otherwise, the only available sentence for a defendant convicted of first degree murder is life imprisonment. *See State v. White*, Case No. 1978-CF-1840 (9th Jud. Cir. Ct.).[9]

For Mr. Thompson to be convicted of capital first degree murder and subject to a death sentence, a unanimous jury has to have returned a verdict finding the elements proven beyond a reasonable doubt. Because this has not occurred, his death sentences stand in violation of the Due Process Clause and the Eighth Amendment.

CONCLUSION

Hitchcock has no bearing on this appeal, because the specific issues that Mr. Thompson raised below were not decided by this Court. Thus, the disposition of Hitchcock's appeal cannot govern or control the outcome on the issue being raised in Mr. Thompson's appeal. This Court must address his Eighth Amendment retroactivity claim. And, under the governing substantive law at the time of the homicides at issue here, Mr. Thompson was not convicted of capital first degree murder because the elements recognized in *Hurst v. State* and confirmed in Chapter 2017-1 were not found by a unanimous jury to have been proven beyond a reasonable doubt. Accordingly, "cause" is present and full briefing is warranted.

[9] After a lower court vacated William White's death sentence and ordered a new penalty phase, the State announced that it would not seek to carry its burden of proof. Without a unanimous jury finding the facts or elements necessary for a conviction of capital murder, under the revised § 921.141, a life sentence was the only option on this 1978 case.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing petition has been served using the Florida Courts e-filing portal upon Abbe Rifkin, Assistant State Attorney, and Melissa Roca Shaw, Assistant Attorney General, and by email on the Honorable Marisa Tinkler-Mendez on this 4th day of December, 2018.

s/ Brittney Nicole Lacy
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