DOCKET NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

NORBERTO PIETRI,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI APPENDIX

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Filing # 67424433 E-Filed 02/02/2018 10:46:50 AM

Supreme Court of Florida

No. SC17-1281

NORBERTO PIETRI,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[February 2, 2018]

PER CURIAM.

We have for review Norberto Pietri's appeal of the circuit court's order denying Pietri's motion filed pursuant to Florida Rule of Criminal Procedure 3.851. This Court has jurisdiction. See art. V, § 3(b)(1), Fla. Const.

Pietri's motion sought relief pursuant to the United States Supreme Court's decision in Hurst v. Florida, 136 S. Ct. 616 (2016), and our decision on remand in Hurst v. State (Hurst), 202 So. 3d 40 (Fla. 2016), cert. denied, 137 S. Ct. 2161 (2017). This Court stayed Pietri's appeal pending the disposition of Hitchcock v. State, 226 So. 3d 216 (Fla. 2017), cert. denied, 138 S. Ct. 513 (2017). After this

Court decided Hitchcock, Pietri responded to this Court's order to show cause arguing why Hitchcock should not be dispositive in this case.

After reviewing Pietri's response to the order to show cause, as well as the State's arguments in reply, we conclude that Pietri is not entitled to relief. Pietri was sentenced to death following a jury's recommendation for death by a vote of eight to four. Pietri v. State, 644 So. 2d 1347, 1349 (Fla. 1994). Pietri's sentence of death became final in 1995. Pietri v. Florida, 515 U.S. 1147 (1995). Thus, Hurst does not apply retroactively to Pietri's sentence of death. See Hitchcock, 226 So. 3d at 217. Accordingly, we affirm the denial of Pietri's motion.

The Court having carefully considered all arguments raised by Pietri, we caution that any rehearing motion containing reargument will be stricken. It is so ordered.

LABARGA, C.J., and QUINCE, POLSTON, and LAWSON, JJ., concur.
PARIENTE, J., concurs in result with an opinion.
LEWIS and CANADY, JJ., concur in result.

PARIENTE, J., concurring in result.

I concur in result because I recognize that this Court's opinion in Hitchcock v. State, 226 So. 3d 216 (Fla. 2017), cert. denied, 138 S. Ct. 513 (2017), is now final. However, I continue to adhere to the views expressed in my dissenting opinion in Hitchcock.

An Appeal from the Circuit Court in and for Palm Beach County,
John S. Kastrenakes, Judge - Case No. 501988CF011366AXXXMB

Neal Dupree, Capital Collateral Regional Counsel, William M. Hennis, III, Litigation Director, and Marta Jaszczolt, Staff Attorney, Capital Collateral Regional Counsel, Southern Region, Fort Lauderdale, Florida,

for Appellant

Pamela Jo Bondi, Attorney General, Tallahassee, Florida, and Leslie T. Campbell, Senior Assistant Attorney General, West Palm Beach, Florida,

for Appellee

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IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA
CRIMINAL DIVISION DIV: "V"

CASE NO.: 1988CF011366AXX

STATE OF FLORIDA,
Plaintiff,

vs.

NORBERTO PIETRI,
Defendant.
_____/

ORDER DENYING DEFENDANT PIETRI'S SUCCESSIVE MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE PURSUANT TO RULE 3.851

THIS CAUSE having come before the Court on Defendant Norberto Pietri's ("defendant") Successive Motion to Vacate Judgment of Conviction and Sentence (DE #207), filed January 10, 2017, pursuant to Fla. R. Crim. P. 3.851, and the Court having carefully examined and considered Defendant's Motion, the State of Florida's Response (DE #212), filed February 22, 2017, having heard extensive argument of counsel at the March 30, 2017 Case Management Conference, having considered the applicable case law, having reviewed the court file and record, and being otherwise fully advised in the premises, the Court finds the following:

Defendant, Norberto Pietri, seeks to have his death sentence vacated pursuant to *Hurst v. Florida*, --- U.S. ---, ---, 136 S. Ct. 616 (2016) and *Hurst v. State*, 202 So.3d 40 (Fla. 2016). Defendant's conviction and sentence were affirmed on appeal by the Florida Supreme Court, *Pietri v. State*, 644 So.2d 1347 (Fla. 1994) and became final on June 19, 1995 with the denial of *certiorari*. *Pietri v. Florida*, 515 U.S. 1147 (1995). *Ring v. Arizona*, 536 U.S. 583 (2002) was decided by the United States Supreme Court on June 24, 2002, some seven (7) years after Pietri's convictions became final.

Pursuant to *Asay v. State*, No. SC16-102, 2016 WL 7406538, *13 (Fla. Dec. 22, 2016) and *Mosley v. State*, No. SC14-2108, 2016 WL 7406506, *18 (Fla. Dec. 22, 2016)(stating "we have now held in *Asay v. State* that *Hurst* does not apply retroactively to capital defendants whose sentences were final before...*Ring*"), Defendant is not entitled to post conviction relief and is not deserving of an evidentiary hearing as his conviction and sentence were final well before *Ring* was issued. *See Suggs v. Jones*, SC16-1066, 2017 WL 1033680, at *1 (Fla. Mar. 17, 2017) (reiterating that "*Hurst v. Florida* does not apply retroactively to capital defendants whose sentences were final when *Ring v. Arizona*, 536 U.S. 584 (2002), was decided."); *Archer v. Jones*, SC16-2111, 2017 WL 1034409, at *1 (Fla. Mar. 17, 2017) (same); *Lukehart v. Jones*, SC16-1225, 2017 WL 1033691 (Fla. Mar. 17, 2017) (same); *Cherry v. Jones*, SC16-694, 2017 WL 1033693 (Fla. Mar. 17, 2017)(same). As *Hurst v. Florida* and *Hurst v. State* do not apply retroactively to Defendant's case, all issues raised by Defendant in his successive post conviction motion are denied.

Although not necessary for resolution of Defendant's motion, this Court finds that even under a harmless error analysis, Defendant would not be entitled to relief. Each aggravating circumstance found by the sentencing judge and affirmed by the Florida Supreme Court on direct appeal in *Pietri*, 644 So.2d at 1349, 1353-54 was confirmed independently by a unanimous jury verdict in this case. The aggravating factors found by the trial judge in this case were: (1) murder committed by person under sentence of imprisonment; (2) murder committed while fleeing from a burglary; and (3) murder committed to avoid arrest or escape which merged with murder committed in order to disrupt/hinder lawful enforcement of laws and the victim was a law enforcement officer performing official duties. *Id.*

The jury found Pietri guilty of escape which is a sentence of imprisonment and established the aggravator of "murder committed by person under sentence of imprisonment." Also, Defendant's jury unanimously convicted him of burglary and it was during Defendant's escape from that burglary that he killed Officer Chappell, thus establishing the aggravator of murder during the course of, or while escaping from, a burglary. The third aggravating circumstance was established unanimously by the jury when it convicted Pietri of murdering Officer Chappell who had stopped Defendant for a traffic violation as Defendant was escaping from a burglary. Such conviction established the aggravator of "avoid arrest or escape merged with disrupt/hinder lawful enforcement of laws and victim law enforcement officer performing official duties."

Each of the jury's unanimous findings of guilt established the aggravating circumstances and formed the bedrock of the death penalty decision of the sentencing trial judge, former Circuit Judge Marvin Mounts. It is this Court's finding that all those factors, even under a harmless error analysis, would conclusively demonstrate that it was not harmful error that a jury did not render a unanimous sentencing recommendation in this case. One does not have to go much further with a fundamental fairness analysis to conclude that the Defendant received a fair trial. Further, the death penalty was appropriate upon careful consideration of all the facts of this case, including the jury's eight to four death recommendation, and Judge Mounts' sentencing decision.

The Defendant shot Officer Brian Chappell, a West Palm Beach police officer conducting a traffic stop of Pietri, who, unbeknownst to him, had: escaped recently from a state prison facility; burglarized a home; stolen guns; and stolen a truck. Officer Chappell was shot by Pietri as Chappell approached the vehicle Defendant was driving. Officer Chappell did not even have his gun out when he was the shot in the chest by Defendant who fled the scene. Pietri

subsequently terrorized other people after the killing, which included kidnapping innocent people, threatening others, burglarizing other homes, and finally, leading the police on a 100 mile per hour chase before he was eventually captured, indicted, and successfully prosecuted. Based on these facts, the Court finds that the death penalty was absolutely appropriate in this case. **WHEREFORE**, it is hereby

ORDERED and ADJUDGED that Defendant Norberto Pietri's Successive Motion to Vacate Judgment of Conviction and Sentence is **DENIED WITHOUT FURTHER HEARING.** It is further

ORDERED and ADJUDGED that the Defendant has thirty (30) days in which to Appeal this Order.

DONE and ORDERED in Chambers at West Palm Beach, Palm Beach County, Florida, this 17 day of May, 2017.

JOHN S. KASTRENAKES
Circuit Judge

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Supreme Court of Florida

MONDAY, SEPTEMBER 25, 2017

CASE NO.: SC17-1281
Lower Tribunal No(s).:
501988CF011366AXXXMB

NORBERTO PIETRI vs. STATE OF FLORIDA

Appellant Appellee

Appellant shall show cause on or before Monday, October 16, 2017, why the trial court's order should not be affirmed in light of this Court's decision Hitchcock v. State, SC17-445. The response shall be limited to no more than 20 pages. Appellee may file a reply on or before Thursday, October 26, 2017, limited to no more than 15 pages. Appellant may file a reply to the Respondent's reply on or before Monday, November 6, 2017, limited to no more than 10 pages.

Motions for extensions of time will not be considered unless due to a medical emergency.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

ks
Served:

MARTA JASZCZOLT
WILLIAM M. HENNIS III
LESLIE T. CAMPBELL

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IN THE SUPREME COURT OF FLORIDA

NORBERTO PIETRI,

Appellant,

Case No.: SC17-1281

v.

STATE OF FLORIDA,

Appellee.

_____/

RESPONSE TO ORDER TO SHOW CAUSE

The Appellant, NORBERTO PIETRI, by and through undersigned counsel, hereby responds to this Court's 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*, SC17-445. In support thereof, Mr. Pietri states:

INTRODUCTION

Mr. Pietri is under a sentence of death. In the above-entitled matter, he is appealing the circuit court's summary denial of his successive Rule 3.851 motion challenging the constitutionality of his death sentence in light of *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).

First, Mr. Pietri submits that his appeal is not one subject to this Court's discretionary jurisdiction. *See* Fla. R. App. Pro. 9.030 (a) (2). Mr. Pietri 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. Pietri'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.").

The process by which the Court has directed Mr. Pietri to proceed indicates that it unreasonably intends to bind Mr. Pietri 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. Because Mr. Hitchcock lost his appeal, this Court's order to show cause severely curtails the appellate process in Mr. Pietri's appeal of right.[1] This result implicates Mr. Pietri's right to due process and equal protection, particularly

[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. Pietri 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.

given that the constitutional arguments Mr. Pietri 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 presented in Mr. Pietri's appeal.[2]

Individualized appellate review of all capital appeals is necessary. *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."). Mr. Pietri deserves an individualized appellate process particularly because the procedure that this Court unveiled for use in Mr. Pietri'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 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

[2] A petition for a writ of certiorari is currently pending in *Hitchcock v. Florida* (No. 17-6180) and is scheduled for conference on November 13, 2017. The pending petition for certiorari demonstrates that the issues in *Hitchcock* are unresolved.

Appellate Procedure place no page limits. There is no doubt that undersigned counsel on behalf of Mr. Pietri 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. Pietri 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. Pietri respectfully moves the Court for full briefing and oral argument in accordance with the standard rules of appellate procedure.

ARGUMENT

A. Mr. Pietri's Rule 3.851.

Mr. Pietri filed a successive motion for postconviction relief on January 10, 2017, alleging that his death sentence violates the Sixth Amendment pursuant to *Hurst v. Florida* as well as the Eighth Amendment and Florida Constitution under *Hurst v. State*. Mr. Pietri argued both *Hurst* decisions should apply retroactively under *Witt v. State*, 387 So. 2d 922 (Fla. 1980), the equitable fundamental fairness

doctrine, and as a matter of federal law. Mr. Pietri also argued this Court's application of "limited retroactivity" to capital defendants whose death sentences became final after June 24, 2002, violates the Eighth Amendment. Lastly, following the enactment of Chapter 2017-1, Mr. Pietri filed a motion to amend his successive Rule 3.851 to include a claim premised on Chapter 2017-1.[3]

This Court's holding in *Asay* and this Court's reliance upon that holding in *Hitchcock*, does not foreclose the availability of *Hurst* relief to Mr. Pietri. *Hurst v. Florida* was a momentous shift in the United States Supreme Court's jurisprudence which recognized that Florida's capital sentencing scheme violated the Sixth Amendment where it did not require the jury to make the requisite findings of fact necessary to impose a sentence of death. However, it's most important role was to serve as the catalyst for this Court's decision in *Hurst v. State*.

B. Mr. Pietri's death sentence violates *Hurst* and he is entitled to retroactive application.

Mr. Pietri 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*

[3] Mr. Pietri sought to include a claim premised on the statutorily created substantive right to a life sentence unless a jury returns a unanimous death recommendation pursuant to Chapter 2017-1. Such a claim was not available to Mr. Pietri when he filed his 3.851 motion, prior to the enactment of the statute. Nevertheless, the circuit court denied Mr. Pietri the opportunity to brief the issue.

and establishes that Mr. Pietri should get *Hurst* relief.

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 right addressed in *Hurst v. Florida* has nothing to do with the constitutional right to a life sentence unless a jury returns a unanimous death recommendation which was recognized in *Hurst v. State* on the basis of the Eighth Amendment and the Florida Constitution. Thus, this Court's premise: that

Hitchcock's issues were decided by *Asay* is erroneous. It was simply not raised or at issue in *Asay*.[4] And in *Hitchcock*, this Court declined to analyze the other "various constitutional provisions" cited by Hitchcock. *Hitchcock*, 2017 WL 3431500, at *2. Therefore, *Hitchcock* has no precedential value and does not foreclose relief.

Mr. Pietri's 3.851 motion is based upon the right to a life sentence unless a properly-instructed jury unanimously recommends a death sentence as 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 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

[4] After the October 14, 2016 issuance of *Hurst v. State* and before the December 22, 2016 decision in *Asay v. State*, Asay did not present any arguments on the basis of *Hurst v. State*. Asay did not present any argument that his death sentences violated the Eighth Amendment or the Florida Constitution. Asay also did not make any arguments regarding the retroactivity of *Hurst v. State.*

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 8 to 4 death recommendation provided by Mr. Pietri'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. Pietri'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. Pietri will be making.

While 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. Pietri'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, on direct appeal, this Court found that it was error to instruct the jury on the aggravating circumstance of cold, calculated and premeditated (CCP), but found the error to be harmless. *Pietri v. State*, 644 So. 2d 1347 (Fla. 1994). *cert. denied*, *Pietri v. Florida*, 515 U.S. 1147 (1995). However, after *Hurst*, this Court must consider the impact the stricken aggravator had on the jury's ultimate verdict, particularly in light of the fact that CCP "is among the most serious aggravators set out in the statutory sentencing scheme." *Wood v. State*, 209 So. 3d 1217, 1228 (Fla. 2017) (internal citations omitted).[5]

In addition, Mr. Pietri's jury was not instructed to avoid improperly doubling the three aggravating circumstances of: 1) avoid arrest; 2) disrupt/hinder law enforcement; and 3) victim was law enforcement .While the sentencing order reflects the judge correctly merged the aggravating circumstances, the record clearly demonstrates Mr. Pietri's jury was improperly instructed as to the law as well as to

[5] This Court did not strike any of Mr. Hitchcock's aggravating factors on direct appeal, therefore this issue was not raised and the disposition of Mr. Hitchcock's appeal does not foreclose relief on this issue.

their role. *See Caldwell v. Mississippi*, 472 U.S. 320 (1985) (holding jury's verdict imposing a death sentence is invalid if imposed by a jury that believed ultimate responsibility rested elsewhere).[6]

Mr. Pietri's jury was repeatedly instructed that its role was merely advisory and that the judge would ultimately decide the sentence. After brief deliberations, the jury returned an 8-4 death recommendation without specifying the factual basis for the recommendation. (R. 3099-3102; 3680). There is no way for this Court to determine if individual jurors, or a sub-group of jurors, based their overall recommendation for death on a different underlying calculus. As noted above, this Court certainly did not agree with the lower court's sentencing calculus when it struck CCP on direct appeal. *Pietri v. State*, 644 So. 2d 1347 (Fla. 1994). 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.

[6] While this Court has previously rejected *Caldwell* challenges 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.").

Here, the stricken aggravator, improper jury instructions, and generalized non-unanimous verdict demonstrate specific reasons why Mr. Pietri's death sentence is fundamentally unfair and unreliable.

Again, Mr. Pietri's 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 lacks the requisite heightened reliability. This is a different argument than the one presented by Mr. Hitchcock, and it provides a much different and stronger argument that Mr. Pietri 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. Pietri will argue that under the case by case *Witt* analysis which *Mosley* said was required, the layers of unreliability and identified errors in Mr. Pietri's penalty phase show "individual injustice" in need of a cure. [7]

[7] While both Mr. Hitchcock and Mr. Pietri 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 that claims that Mr. Pietri asserted in his 3.851 motion. Mr. Hitchcock did not argue that in light of *Asay* and *Mosely*, the *Witt* balancing test for determining whether *Hurst v. Florida* applies retroactively must be conducted case by case. To preclude Mr. Pietri from making his arguments in an initial brief filed in compliance with the standard rules of

Indeed, not only was Mr. Pietri's jury never asked to make unanimous findings of fact as to any of the required elements, and was expressly told mercy could play no role in their recommendation, but as noted above, the jury was also never instructed to avoid the doubling of aggravators and was instructed on the invalid CCP aggravator that this Court later struck on direct appeal.[8] In light of the "individual injustice" in Mr. Pietri's case, the scales are tipped and the interests of fairness exceed the State's interest in finality. It is undeniable that these issues support Mr. Pietri's contention that his 8-4 death recommendation possesses substandard reliability. The disposition of Mr. Hitchcock's appeal and arguments made therein did not address the "individual injustice" present in Mr. Pietri's case. Thus, the disposition of Mr. Hitchcock's appeal cannot govern or control the outcome on the issue being raised in Mr. Pietri's appeal.

In addition to addressing *Hurst v. Florida* and *Hurst v. State* under *Witt*, Mr. Mr. Pietri 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

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appellate procedure when Mr. Hitchcock has been afforded the very opportunity that is being denied Mr. Pietri violates equal protection.

[8] Mr. Pietri's jury was instructed to consider six aggravating factors even though the State conceded that the three aggravating factors of: 1) avoid arrest; 2) disrupt/hinder law enforcement; and 3) victim was law enforcement, could only be considered as a single aggravating factor.

Mr. Pietri 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. Pietri 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. Pietri'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. Pietri's case can only be resolved after a full review of the record in Mr. Pietri's case, not a review of the record in Mr. Hitchcock's case.

When discussing the concept of fundamental fairness in his 3.851 motion, Mr. Pietri 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 Amendment and Eighth Amendment challenges to his death sentence found meritorious in *Hurst v. Florida* and *Hurst v. State*. At trial, Mr. Pietri filed a motion seeking to declare Florida's capital sentencing scheme, § Fla. Stat. 921.141, unconstitutional generally and specifically noting the lack of adequate appellate review. The motion alleged, "until the court requires a special verdict form wherein the jury states the circumstances it relied upon to render its advisory opinion and until trial judges are require to meticulously detail the mitigation that was considered, there can only be arbitrary sentences of death in Florida" (R. 3431). Moreover, "[t]here can be no doubt the trial court engages in a guessing game when it attempts to determine the

basis for the jury's verdict" (R. 3431). Counsel also filed a motion requesting the trial court to instruct the jury that it could "always grant mercy" and recommend life despite the existence of aggravating circumstances (R. 3633).

Prior to sentencing, counsel also filed a "Motion to Declare Unconstitutional the Treatment of an 8-4 Verdict as a Death Recommendation" (R. 3700-03). The motion alleged: (1) the jury was misled and may have been swayed by the inflated number of aggravating circumstances; and (2) the Sixth and Eighth Amendment are violated because a non-unanimous recommendation diminishes the reliability of the jury's verdict. All motions were denied.

On direct appeal, Mr. Pietri again challenged the trial court's denial of his motions and the constitutionality of Florida's capital sentencing scheme. This Court affirmed the convictions and sentences, but struck the aggravating circumstance of cold, calculated and premeditated, holding the error to be harmless. *Pietri v. State*, 644 So. 2d 1347 (Fla. 1994). *cert. denied*, *Pietri v. Florida*, 515 U.S. 1147 (1995).

During postconviction Mr. Pietri first filed a Fla. R. Crim. P. 3.851 successive motion predicated on *Ring. v. Arizona* on October 10, 2002, and, in addition, later filed a state habeas petition in this Court within a year after *Ring* was issued. This Court denied the *Ring* claim on the basis of *Bottoson v. Moore*, 831 So. 2d 693 (Fla. 2002) and *King v. Moore*, 831 So. 2d 143 (Fla. 2002), cases which this Court has now recognized were wrongly decided, and also referred to Mr. Pietri's prior violent

felonies as disqualifying. *Pietri v. State*, 885 So. 2d. 245, 276 (Fla. 2004). Thus, Mr. Pietri 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 Mr Pietri. *See id.*

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

Mr. Pietri's 3.851 motion also challenged the Court's arbitrary bright line cutoff that resulted from *Mosley* and *Asay*. Mr. Pietri 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.

The resulting June 24, 2002, cutoff based on the date of a particular death sentence's finality is inherently arbitrary. Finality can depend on whether there were delays in transmitting the record on appeal;[9] whether direct appeal counsel sought extensions of time to file a brief; whether a case overlapped with the Court's summer

[9] *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*).

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.

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.[10] There can be no other word to describe these disparate outcomes but arbitrary.

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). Drawing a line at June 24, 2002, is just as arbitrary and imprecise as the bright line cutoff at issue in *Hall*. 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. Mr. Pietri is similarly entitled to an individual review of his inherently unreliable death sentence.[11]

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[10] *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).

[11] The decisions in *Bevel v. State* and *Hurst v. State* acknowledged that when a judge follows a jury's non-unanimous death recommendation and imposes a death sentence, that sentence is inherently unreliable. A death sentence imposed after a jury returned a non-unanimous death recommendations before June 24, 2002, is just as, if not more, unreliable than a death sentence imposed after June 24, 2002, following a non-unanimous death recommendation.

To deny Mr. Pietri 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 Mr. Pietri'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. Mr. Hitchcock did not make this argument as to the retroactive benefit 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. Thus, Mr. Pietri should not be bound by the disposition of Mr. Hitchcock's appeal.

CONCLUSION

The specific issues raised by Mr. Pietri were not decided by this Court in *Hitchcock*, or in *Asay*. Due process requires that Mr. Pietri have the opportunity for full briefing and an individualized analysis of his claims. Mr. Pietri 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. Pietri 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 Leslie T. Campbell, Assistant Attorney General, on October 31, 2017.

/s/ William M. Hennis III
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Florida Bar No. 0066850
Litigation Director

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IN THE SUPREME COURT OF FLORIDA

NORBERTO PIETRI,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC17-1281

DEATH PENALTY CASE

STATE'S REPLY TO SEPTEMBER 25, 2017 ORDER TO SHOW CAUSE

COMES NOW, APPELLEE, the State of Florida, by and through the undersigned counsel, and files its reply to Appellant's Response to the September 25, 2017, Order to Show Cause and asserts that this Court should affirm the denial of Appellant's successive postconviction motion in accordance with *Asay v. State*, 210 So.3d 1 (Fla. 2016) and *Hitchcock v. State*, --- So.3d ---; 2017 WL 3431500 (Fla. Aug. 10, 2017); *Asay v. State, 224 So.3d 695 (Fla. 2017)*; *Lambrix v. State*, SC17-1687, 2017 WL 4320637 (Fla. Sept. 29, 2017), *cert. denied*, 17-6222, 2017 WL 4409398 (U.S. Oct. 5, 2017) and therefore states:

STATEMENT OF THE CASE AND FACTS

This is an appeal from the denial of a successive postconviction motion. *See Pietri v. State*, 644 So.2d 1347 (Fla. 1994); *Pietri v. State*, 885 So.2d 245, 276 (Fla. 2004); *Pietri v. State*, 94 So.3d 501 (Fla. 2012) (successive postconviction litigation based on *Porter v. McCollum*, 558 U.S. 30 (2009)).

On September 22, 1988, Appellant was indicted for crimes committed between August 18, 1988 and August 24, 1988 (ROA.21 3177-82)[1] and following a jury trial, on February 7, 1990, Appellant was convicted of First Degree Murder of Police Officer Brian Chappell and fourteen other crimes.[2] After the penalty phase yielded an eight to four death recommendation, on March 15, 1990, the trial court sentenced Appellant to death upon finding no mitigation and aggravation of: (1) under sentence of imprisonment; (2) during the course of a felony (burglary); and (3) avoid arrest merged with victim was law enforcement officer. (ROA.23 3680, 3708-09).[3] This Court affirmed the convictions and death sentence, but vacated the non-capital counts for re-sentencing once a Pre-Sentencing Investigation report was completed. *Pietri*, 644 So.2d at 1355. **Appellant's case became final on June 19, 1995 with the denial of certiorari. *Pietri v. Florida*, 515 U.S. 1147 (1995).**[4]

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[1] Referencing direct appeal case SC60-75844 record.

[2](1) escape; (2) burglary of an automobile; (3) grand theft of automobile; (4) burglary of dwelling while armed; (5) grand theft of property including revolver; (6) possession of firearm by felon; (8) possession of firearm during felony (9) burglary; (10) grand theft of Aaron Saylor's automobile; (11) robbery of Tami Nelson's automobile; (12) grand theft of Tami and Keith Nelson's motor vehicle; (13) attempted kidnapping; (14) false imprisonment; and (15) possession of cocaine. (ROA.23 3603-05).

[3] The trial court had found "cold calculated and premeditated," however, this Court struck it. *Pietri*, 644 So.2d at 1353-54.

[4] A judgment and sentence become final "on the disposition of the petition for writ of certiorari by the United States Supreme Court, if filed." Rule 3.851(d)(1)(B), Fla. R. Crim. P. 3.851.

Later, Appellant moved for postconviction relief and after an evidentiary hearing, the trial court denied relief. Appellant appealed and filed a state habeas corpus petition. This Court affirmed the trial court and denied the petition. *Pietri*, 885 So.2d at 276. Next, Appellant pursued federal habeas relief to no avail. *Pietri v. Florida Dept. of Corr.*, 641 F.3d 1276, 1279 (11th Cir. 2011). That was followed by a successive postconviction relief claim. Again, the denial of relief was affirmed. *Pietri*, 94 So.3d at 501.

On January 18, 2017, Appellant filed a successive Rule 3.851 motion seeking relief pursuant to *Hurst v. Florida*, 136 S.Ct. 616 (2016) and *Hurst v. State*, 202 So.3d 40 (Fla. 2016). On May 17, 2017, relief was denied (PCR-3 116-17). This Court, on September 25, 2017, ordered limited briefing.

ARGUMENT

Initially, Appellant urges this Court to allow the usual brief page-limitations to apply and complains about being bound by the briefing conducted by the defendant in *Hitchcock* and *Asay* on due process and equal protection grounds. However, page limitations do not violate due process. *Henry v. State*, 937 So.2d 563, 575-76 (Fla. 2006) (concluding courts may impose reasonable page limits on petitions for extraordinary writs *quoting Basse v. State*, 740 So.2d 518, 519 (Fla. 1999), and *citing Johnson v. Singletary*, 695 So.2d 263, 266 (Fla. 1996), as

well as noting that the federal courts impose page limitations in capital cases *quoting United States v. Battle*, 163 F.3d 1, 1 (11th Cir. 1998)). Appellant's argument also overlooks the fact the State was limited to 15 pages in its reply while Appellant was granted double the pages compared to the State.

This Court's long-standing tag procedure does not violate either due process or equal protection. Indeed, the United States Supreme Court employs a somewhat similar procedure when dealing with numerous cases involving the same issue. It decides the lead case, and then it vacates and remands the other cases to the lower courts in light of the new decision in the lead case. This procedure is referred to as "grant, vacate, and remand" or "GVR" for short. *Lawrence v. Chater,* 516 U.S. 163, 166 (1996) (noting "the GVR order has, over the past 50 years, become an integral part of this Court's practice, accepted and employed by all sitting and recent Justices"); *Wellons v. Hall*, 558 U.S. 220, 225 (2010) (observing that "GVR order conserves the scarce resources of this Court"). The parties in the other cases do not get to brief the issue in the High Court. In contrast, this Court allows the parties in the tag cases to brief the issue after the lead case is decided in a response to an order to show cause. While some United States Supreme Court Justices have criticized the GVR practice, those criticisms are on case specific grounds, not on due process grounds. Opposing

counsel cites no case from any appellate court holding that the court's procedures for dealing with a mass of cases involving the same issue, such as tagging or GVR, violates due process. There is no basis for this Court to amend its procedure here.

As an example of arbitrariness, Appellant points to the bright line rule and notes the defendants in *Bowles v. Florida*, 536 U.S. 930 (2002) and *Card v. Florida*, 536 U.S. 963 (2002) would obtain different results under *Hurst*. Such does not establish arbitrariness. Here the date for retroactivity was based on *Ring*.[5] The same argument could be made for any retroactivity date; even if it were January 12, 2016, the date *Hurst v. Florida* was decided. Some defendants' cases would have been final before that date and others would be considered pipeline cases and subject to the new case law. That is the nature of finality and retroactive application; it does not establish arbitrary application. With retroactivity, there is

[5] However, *Ring* is not retroactive under *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004), thus, further undercutting Appellant's argument here. There the Supreme Court determined that *Ring* was a procedural rule and did not create a substantive constitutional change in the law because it only "altered the range of permissible methods for determining whether a defendant's conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment." *Schriro*, 542 U.S. at 353. *Ring* did not alter the "range of conduct or the class of persons that the law punishes." *Id*. Thus, *Ring* "announced a new procedural rule that does not apply retroactively to cases already final on direct review." Id. at 358. Because *Hurst* is an expansion of Ring to Florida, *Hurst* like *Ring* did not create a substantive rule and is not retroactive under federal law.

usually a cutoff date to provide for finality in appellate processing. *Penry v. Lynaugh*, 492 U.S. 302, 314 (1989) (holding finality concerns in retroactivity are applicable in the capital context). In *Griffith*, the Supreme Court held "that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987); *see also Smith v. State*, 598 So.2d 1063, 1065 (Fla. 1992).

Under this "pipeline" concept, only those still pending on direct review would receive the benefit of relief from *Hurst* error. The fact that this Court has drawn the line at the decision date of *Ring* instead of the decision date in *Hurst*, benefits more defendants. Thus, this Court's retroactivity cutoff does not violate the Fourteenth Amendment's guarantee of equal protection and due process. Likewise, it does not render the process a constitutional violation, but takes into consideration the need for finality.

With respect to the balance of Appellant's argument, he focuses on *Hurst v. State* and Eighth Amendment challenges. This does not alter the analysis as this Court rejected those matters previously. In *Asay*, 210 So.3d at 11-22, this Court held that any capital defendant whose death sentence was final before *Ring*

v. Arizona, 536 U.S. 584 (2002), was decided on June 24, 2002 was not entitled to *Hurst* relief. This Court performed a full retroactivity analysis using the state test of *Witt v. State*, 387 So.2d 922 (Fla. 1980). *Asay*, 210 So.3d at 15-22. Such was reaffirmed in *Hitchcock v. State*, 42 Fla. L. Weekly S753, 2017 WL 3431500 (Fla. Aug. 10, 2017) wherein this Court rejected several constitutional challenges to its non-retroactivity rule thereby reaffirming its prior holding in *Asay*. Here, Appellant makes many of the same Eighth Amendment, equal protection, and due process arguments this Court rejected explicitly in *Hitchcock*, *Asay VI*, and *Lambrix*. *Hitchcock*, 2017 WL 3431500 at *2; *Asay v. Jones*, 2017 WL 3472836, *6 (Fla. Aug. 14, 2017) (*Asay VI*) (denying Eighth Amendment challenge to holding in *Asay*); *Lambrix v. State*, 2017 WL 4320637, *1-*2 (Fla. Sept. 29, 2017) (denying Eighth Amendment, due process, and equal protection challenges to holding in *Asay* citing *Hitchcock* and *Asay VI*).[6] The instant challenges should be rejected.[7]

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[6] This Court has determined that *Hurst v. Florida* and *Hurst* are not retroactive to cases in a similar posture to Appellant's. As such *Hitchcock*, WL 3431500 and *Lambrix*, 2017 WL 4320637 foreclose any challenge to the new statute. *See Asay*, 210 So.3d at 22; *Hitchcock*; *Asay*, 224 So.3d at 703 (rejecting claim that *Hurst* and Chapter 2017-1, Laws of Florida should be applied retroactively to defendant whose case became final before June 24, 2002); and *Lambrix* make clear Appellant is not entitled to relief as those cases reject each of his arguments for retroactivity to cases final before June 24, 2002.

[7] The Eleventh Circuit has also rejected equal protection, due process, and Eighth Amendment challenges to this Court's non-

Furthermore, in *Asay,* 224 So.3d at 703, this Court reiterated *Hurst* and *Hurst v. Florida* were not retroactive to cases final before *Ring*. *See Hitchcock*, 2017 WL 3431500, at *1 (stating "[w]e have consistently applied our decision in *Asay V*, [210 So.3d at 22], 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*.")[8] Thus far, this Court has refused to extend *Hurst* to

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retroactivity rule established in *Asay* recognizing "[t]he Supreme Court has held that *Ring* does not apply retroactively to cases on collateral review. *See Schriro v. Summerlin*, 542 U.S. 348, 358[ ] (2004) (holding *Ring* does not apply retroactively under federal law to death-penalty cases already final on direct review.)." *Lambrix v. Sec'y, Fla. Dep't of Corr.*, __ F.3d __, 2017 WL 4416205 (11th Cir. Oct. 5, 2017), *cert. denied, Lambrix v. Jones*, 2017 WL 4456332 (Oct. 5, 2017). Further, the Eleventh Circuit held that this Court's ruling, that Hurst did not apply retroactively to Lambrix, whose judgment was final in 1986, "is fully in accord with the U.S. Supreme Court's precedent in Ring and Schriro." Lambrix, 2017 WL 4416205 at *8. The Eleventh Circuit also rejected the statutory retroactivity argument stating:

> jurists of reason would not find this position debatable: the Florida court's rejection of Lambrix's constitutional-statutory claim was not contrary to, or an unreasonable application of, the holding of a Supreme Court decision.

Id. at *9; *see Dobbert v. Florida*, 432 U.S. 282, 301 (1977).

[8] In *Asay*, 210 So.3d at 15-16, this Court discussed the appropriate test for applying retroactivity to *Hurst* and applied the *Witt v. State*, 387 So.2d 922 (Fla. 1980) analysis for retroactivity under state law, "which provides more expansive retroactivity standards than those adopted in *Teague [v. Lane*], 489 U.S. 288 (1989)," which enumerates the federal retroactivity standards. *Id.*, *quoting Johnson v. State*, 904 So.2d 400, 409 (Fla. 2005). *See Danforth v. Minnesota*, 522 U.S. 264, 280-81

some 23 defendants, including Asay, based solely on the fact their judgments were final prior to the decision in *Ring*.[9]

> Recently, this Court reaffirmed the decision in *Asay*:
>
> > 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*. Accordingly, we affirm the circuit court's order summarily denying Hitchcock's successive postconviction motion pursuant to *Asay*.

Hitchcock, 2017 WL 3431500, *2; *see also Asay, 224 So.3d at 703*

(2008) (allowing states to adopt retroactivity test broader than *Teague*). As recognized in *Hitchcock*, after *Asay*, 210 So.3d at 1, this Court has adhered staunchly to using the *Ring* decision date as the cutoff point for retroactivity of a *Hurst* claim.

[9] *See Asay*, 210 So.3d at 8, 22; *Jones v. State*, No. SC15-1549, 2017 WL 4296370, *2 (Sept. 28, 2017); *Hitchcock v. State*, No. SC17-445, 2017 WL 3431500 (Fla. Aug. 10, 2017); *Zack v. State*, Nos. SC15-1756, SC16-1090, 2017 WL 2590703, *5 (Fla. June 15, 2017); *Zakrzewski v. Jones*, 221 So.3d 1159, 1159 (Fla. 2017); *Oats v. Jones*, 220 So.3d 1127, 1129 (Fla. 2017); *Marshall v. Jones*, No. SC16-779, 2017 WL 1739246 (May 4, 2017); *Rodriguez v. State*, 219 So.3d 751, 760 (Fla. 2017); *Willacy v. Jones*, No. SC16-497, 2017 WL 1033679 (Mar. 17, 2017); *Suggs v. Jones*, No. SC16-1066, 2017 WL 1033680, *1 (Mar. 17, 2017); *Lukehart v. Jones*, No. SC16-1225, 2017 WL 1033691, *1 (Mar. 17, 2017); *Cherry v. Jones*, No. SC16-694, 2017 WL 1033693, *1 (Mar. 17, 2017); *Archer v. Jones*, No. SC16-2111, 2017 WL 1034409, *1 (Mar. 17, 2017); *Jones v. Jones*, No. SC16-607, 2017 WL 1034410 (Mar. 17, 2017); *Hartley v. Jones*, No. SC16-1359, 2017 WL 944232, *1 (Mar. 10, 2017); *Geralds v. Jones*, No. SC16-659, 2017 WL 944236, *1 (Mar. 10, 2017); *Lambrix v. State*, SC17-1687, 2017 WL 4320637 (Fla. Sept. 29, 2017), *cert. denied*, 17-6222, 2017 WL 4409398 (U.S. Oct. 5, 2017); *Stein v. Jones*, No. SC16-621, 2017 WL 836806 (Mar. 3, 2017); *Hamilton v. Jones*, No. SC16-984, 2017 WL 836807 (Mar. 3, 2017); *Davis v. State*, No. SC16-264, 2017 WL 656307 (Feb. 17, 2017); *Bogle v. State*, 213 So.3d 833, 855 (Fla. 2017); *Wainwright v. State*, No. SC15-2280, 2017 WL 394509 (Jan. 30, 2017); *Gaskin v. State*, 218 So.3d 399, 400 (Jan. 19, 2017).

(rejecting claim chapter 2017-1, Laws of Florida, "creates a substantive right to a life sentence unless a jury unanimously recommends otherwise"); *Lambrix*, 2017 WL 4320637, *1 (rejecting arguments based on Eighth Amendment, due process, equal protection, and a substantive right based on new legislation).

Here, just as was addressed in *Hitchcock, Asay,* and *Lambrix*, Appellant raises various constitutional provisions to argue *Hurst* should be applied retroactively to him. He claims that denying him retroactive application of *Hurst* violates the Eighth Amendment of the United States Constitution as he was not provided Due Process and Equal Protection. However, as determined in *Asay*, 210 So.3d at 8, 22 and reaffirmed in *Hitchcock*, 2017 WL 3431500, *2; *Lambrix*, 2017 WL 4320637, at *1; and *Asay, 224 So.3d at 703*, *Hurst* does not apply retroactively. Here, Appellant's case became final on June 19, 1995 with the denial of certiorari. *Pietri v. Florida*, 515 U.S. 1147 (1995). As such, *Hurst* and *Hurst v. Florida* are not retroactive to this case and the trial court's order denying the successive postconviction relief motion should be affirmed.

Also, Appellant's claims that his death sentence violates the Eighth Amendment and that *Hurst v. State* is retroactive must be rejected. His argument that defendants who did not receive a unanimous jury recommendation are not eligible to receive a death sentence and cannot be executed under the Eighth Amendment

is flawed. In *Spaziano v. Florida*, 468 U.S. 447, 463–64, (1984), the United States Supreme Court held that the Eighth Amendment is not violated in a capital case when the ultimate responsibility of imposing death rests with the judge. *Spaziano v. Florida*, 468 U.S. 447, 463–64, (1984) *overruled on other grounds by Hurst v. Florida*, 136 S. Ct. 616 (2016). In deciding *Hurst v. Florida*, the United States Supreme Court only analyzed the case pursuant to Sixth Amendment grounds. The Court did not address the issue of any possible Eighth Amendment violation. Consequently, *Hurst v. Florida*, only overrules *Spaziano* to the extent it allows a sentencing judge to find an aggravator independent of a jury's fact-finding. *Hurst v. Florida*, 136 S. Ct. at 618. The court has never held that a unanimous jury recommendation is required under the Eighth Amendment.

While this Court initially included the Eighth Amendment as a reason for warranting unanimous jury recommendations in its *Hurst v. State* decision, it did not, and cannot, overrule the United State Supreme Court's surviving precedent in *Spaziano*. In addition, Florida has a conformity clause in its state constitution that requires the state courts to interpret Florida's prohibition on cruel and unusual punishments in conformity with the United States Supreme Court's Eighth Amendment jurisprudence. Art. I, § 17, Fla. Const.; *Henry v. State*, 134 So.3d 938, 947 (Fla. 2014) (noting that under Article

I, section 17 of the Florida Constitution, Florida courts are "bound by the precedent of the United States Supreme Court" regarding Eighth Amendment claims). Given Florida's conformity clause and that there is no United States Supreme Court case holding that the Eighth Amendment requires the jury's final recommendation be unanimous, Defendant's reliance on the Eighth Amendment discussed in *Hurst v. State* is misplaced and does not support his claim for relief. No Eighth Amendment right was created, thus, there is no right to be applied retroactively and Appellant's arguments must fail.

Appellant's jury was given the standard jury instructions (ROA.20 3087-93), thus, even if *Hurst* were to be applied retroactively to Appellant's case, relief would not be warranted as any error would be harmless beyond a reasonable doubt. This was a homicide of a police officer as he was conducting a traffic stop during Appellant's flight from a burglary. Appellant's jury found him guilty of all charges and recommended by a vote of eight to four that he be sentenced to death for the officer's murder. The trial court followed the jury's recommendation. There is no doubt the jury found: (1) under sentence of imprisonment; (2) in the course of a felony; and (3) avoid arrest/hinder law enforcement officer aggravators[10] as

[10] Appellant asserts his case is different from others denied relief because his CCP aggravator was stricken and the jury was

reflected by the jury's verdict convicting Appellant of: (1) escape from state facility; (2) burglary; and (3) murder of Officer Chappell during his stop of Appellant following a burglary especially in light of Appellant's testimony confessing to the burglary and shooting of Officer Chappell. *Pietri*, 644 So.2d at 1350.

A rational jury would have unanimously found the aggravating factors if it had been instructed to, and it would have unanimously found that the aggravating factors were sufficient for the imposition of death, and that they outweighed the mitigation offered especially in light of the fact the sentencing court found "no Mitigating Circumstances, statutory or otherwise."[11] (ROA.23 3709). Even if a rational jury would

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not instructed on improper doubling. Appellant is not entitled to relief as he was death eligible based on the aggravation found in the jury verdict - "during the course of a felony" and victim was a law enforcement officer regardless of whether this Court struck CCP. Also, contrary to Appellant's suggestion the jury was not instructed on doubling, the record refutes that charge. The jury was told "[i]f two or more enumerated aggravating circumstances are supplied by or come from a single aspect or part of the case, then you should consider that as supporting a single aggravating circumstance." (ROA.20 3091)

[11] Defendant's argument that *Caldwell v. Mississippi*, 472 U.S. 320 (1985) precludes a harmless error finding is without merit. Any complaint about jury instructions now is untimely and procedurally barred. *Troy v. State*, 57 So.3d 828, 838 (Fla. 2011). Also, to establish constitutional error under *Caldwell*, a defendant must show the instructions improperly described the jury's role. *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994). Here, the jury was instructed properly. It is ludicrous to suggest the jury should have been instructed in accordance with a constitutional change in the law which occurred decades after

have found mitigation, *Pietri*, 885 So.2d at 258-67, it still would have found that aggravation outweighed the mitigation given this was a murder of a police officer during the performance of his duties which involved stopping the defendant after he committed a burglary and while he was under sentence of imprisonment having escaped recently from a detention facility. No statutory mental health mitigation was established, *Pietri*, 885 So.2d at 265, and other mitigation does not outweigh this highly aggravated murder of a police officer.

While recognizing this Court's precedent to the contrary, the State maintains that there was no Sixth Amendment error here as Appellant became death eligible given his contemporaneous convictions. Without question, and as the jury found by its verdict, the murder of Officer Chappell was committed when Appellant had a prior violent felony and during the course of a felony burglary, thus rendering him death eligible. The Sixth Amendment requires nothing more than jury fact-finding sufficient to support the sentence; it does not mandate a specific jury recommendation for a given sentence.

Significantly, the recent Supreme Court decision in *Jenkins v. Hutton*, 582 U.S. ___, 137 S. Ct. 1769 (2017), confirmed the constitutionality of an Ohio death sentence based on a jury's

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trial. Appellant's claim is pure speculation and the record is devoid of evidence supporting the proposition the jury's sentencing responsibility was diminished.

guilt-phase determination of facts. In *Jenkins*, the lower court ordered a new sentencing trial because, in that court's view, the penalty phase jury failed to make the necessary factual findings to support a death sentence. However, because the necessary aggravating factors were established beyond a reasonable doubt by the jury during the guilt phase, the Supreme Court reversed and reinstated the death sentence. *See also Waldrop v. Comm'r, Alabama Dep't of Corr.*, 15-10881, 2017 WL 4271115, at *20 (11th Cir. Sept. 26, 2017) (explaining its rejection of a *Hurst* claim, Circuit Court of Appeals stated: "Alabama requires the existence of only one aggravating circumstance in order for a defendant to be death-eligible, and in Mr. Waldrop's case the jury found the existence of a qualifying aggravator beyond a reasonable doubt when it returned its guilty verdict. *See* §13A-5-45(e).").

Given the fact Appellant's case was final before *Ring* and this Court has rejected previously all of Appellant's claims, the denial of postconviction relief should be affirmed.

CONCLUSION

WHEREFORE, the Appellee, State of Florida, respectfully requests this Honorable Court to affirm the trial court's order.

Respectfully submitted,

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I HEREBY CERTIFY that, on this 7th day of November 2017, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: William M. Hennis, III, Esq., at HennisW@ccsr.state.fl.us; Marta Jaszczolt, Esq. at JaszczoltM@ccsr.state.fl.us.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of the type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

/s/ Leslie T. Campbell
COUNSEL FOR APPELLEE

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IN THE SUPREME COURT OF FLORIDA

NORBERTO PIETRI,

Appellant,

Case No.: SC17-1281

v.

STATE OF FLORIDA,

Appellee.

_____/

REPLY TO STATE'S REPLY TO ORDER TO SHOW CAUSE

The Appellant, NORBERTO PIETRI, by and through undersigned counsel, hereby replies to the State's Reply to his Response to this Court's September 27, 2017 Order to Show Cause. In support thereof, Mr. Pietri states:

I. Mr. Pietri has been denied due process.

In his Response, Mr. Pietri requested that this Court adhere to the Florida Rules of Appellate Procedure and permit him to fully brief the issues that were raised and arose in the circuit court. In other words, Mr. Pietri asked to be treated no differently than any appellant in a capital case whose appeal is decided by the Court under its mandatory jurisdiction. However, the State ignores the legal bases of Mr. Pietri's argument and instead attempts to analogize the substantive right to appeal to this Court with the discretionary procedure the United States Supreme Court follows when reviewing cases with similar legal issues. *See* Reply at 3-5.

First, as explained in Mr. Pietri's Response, this Court's jurisdiction over this capital appeal is not discretionary. It is mandatory. By enacting Fla. Stat. § 924.066 (2016), the Florida Legislature provided Mr. Pietri with a substantive right to appeal the denial of his Rule 3.851 motion, a motion which challenged the constitutionality of his death sentence. Contrary to the State's misunderstanding of the law, that right is protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *See Evitts v. Lucey*, 469 U.S. 387, 393 (1985); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956); *Lane v. Brown*, 372 U.S. 477, 484-86 (1963).[1]

Second, the State's attempt to analogize Mr. Pietri's right to appeal with the certiorari procedure employed by the United States Supreme Court is absurd. The State claims this Court's procedure is not constitutionally problematic because it is "similar" to the Supreme Court's procedure (Reply at 3-5). The State fails to acknowledge that nothing in the rules of the Supreme Court provide for bypassing those rules even if other cases present similar (or even identical) issues for potential review. There is no truncated procedure when a litigant presents a petition for writ of certiorari that raises similar—or even identical—issues for potential review. Nor is this a "GVR" situation; in all cases in which certiorari review is sought by a litigant in the Supreme Court, the litigant is entitled to the full protection of the rules of court and can file a petition addressing all issues the litigant wishes to present for potential

[1] The State refuses to acknowledge *Evitts*, *Griffin*, or *Lane*.

certiorari review. And after a "lead case" is decided, the Supreme Court may determine that another case raising the same issue should be vacated and remanded in light of the decision in the "lead case." But by this analogy, the State is really suggesting that this Court should reverse the denial of Mr. Pietri's Rule 3.851 motion and remand to the lower court for reconsideration of its decision in light of the decision in the "lead case" (*Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017)). This does not appear to really be what the State is proposing and thus this argument appears as self-defeating as it is wrong.

Mr. Pietri's claim is not merely about the number of pages or the amount of time he has been provided to appeal the denial of his successive motion, rather it is about having his appeal heard by this Court in its own right, as it should be. Individualized appellate review of each capital appeal is required by the Florida Constitution. *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."). *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"). Mr. Pietri maintains that requiring him to show "cause" before his appeal of right will be fully heard violates the Florida Constitution, the Equal Protection and Due Process

Clauses of the Fourteenth Amendment, and the Eighth Amendment. *See Doty v. State*, 170 So. 3d 731, 733 (Fla. 2015). Mr. Pietri must be given a fair opportunity to establish that his death sentence is unconstitutional. *See Hall v. Florida*, 134 S.Ct. 1986 (2014).

II. The State ignores that Mr. Pietri's individual claims were not addressed in *Asay* or *Hitchcock*.

Initially, it should be noted that the State's Reply purports to respond to Mr. Pietri's arguments, but, for the most part, avoids and/or ignores much of Mr. Pietri's argument. The State's failure to differentiate between the United States Supreme Court's opinion in *Hurst v. Florida* and this Court's opinion in *Hurst v. State* results in a confusing and misleading Reply that raises more questions than it answers, thus supporting the need for full briefing.

The State contends that Mr. Pietri is disentitled to relief from his death sentence in light of *Asay v. State*, 210 So.3d 1 (Fla. 2016), and *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017), *certiorari petition pending*, *Hitchcock v. Florida*, Case No. 17-6180. The State erroneously relies on *Asay v. State*, 210 So. 3d 1(2016), to argue *Asay* controls Mr. Pietri's claims premised upon *Hurst v. State*. However, the passage cited to in the *Asay* opinion related to this Court's analysis of the retroactivity of *Hurst v. Florida*, not *Hurst v. State*. *See* Reply at 7, *citing Asay*, 210 So. 3d at 17-22. The State's argument ignores the fact that Mr. Asay only raised a challenge based upon *Hurst v. Florida*. *Hurst v. State* had not even been decided

when Mr. Asay's briefing and argument were conducted. More importantly, *Hurst v. State* was decided on Sixth **and** Eighth Amendment grounds, in addition to Florida constitutional grounds. Therefore *Asay* cannot control Mr. Pietri's claims concerning the retroactivity of *Hurst v. State* that were raised in his Rule 3.851 motion.

Furthermore, the State erroneously relies on *Lambrix v. Sec'y, Fla. Dep't of Corr*., 2017 WL 4416205 (11th Cir. Oct. 5, 2017), to argue Mr. Pietri's Eighth Amendment, Due Process, and Equal Protection claims have already been addressed and rejected. *See* Reply at 7-8, 10. First, the 11th Circuit's opinion holds no precedential value because the issue before the 11th Circuit concerned its determination whether to grant a review on the merits as compared to a ruling on the merits. *See Buck v. Davis*, 137 S.Ct. 759, 773 (2017). More importantly, *Lambrix* dealt with an idiosyncratic issue—the "retroactivity" of Florida's new capital sentencing statute—and did not squarely address the retroactivity of the constitutional rules arising from the *Hurst* decisions.

The State cites *Schriro v. Summerlin*, 543 U.S. 348, 353 (2004), for the proposition that the Supreme Court's ruling that *Ring* is not retroactive in a federal habeas proceeding means that *Hurst* is not retroactive in any proceeding. *See* Reply at 7, n.7. However, *Summerlin* involved the federal retroactivity of Arizona's statute, which did not require the jury to make findings regarding sufficiency of the aggravators and the appropriateness of the death penalty, as Florida's does.

Summerlin itself acknowledged that if the Court itself "[made] a certain fact essential to the death penalty . . . [the change] would be substantive." 542 U.S. at 354. The State fails to acknowledge that such a change occurred in *Hurst v. State* when this Court explicitly made unanimity a "fact essential to the death penalty."

Moreover, unlike *Ring*, *Hurst* addressed the proof-beyond-a-reasonable-doubt standard in addition to the jury trial right, and proof-beyond-a-reasonable-doubt decisions are substantive. *See*, e.g., *Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972). Thus, the State's argument does not preclude Mr. Pietri from briefing his distinct claims before this Court.

Additionally, the State misstates Mr. Pietri's argument and misguidedly attempts to analogize a *Ring*-based retroactivity cutoff to more standard-fare rulings that provide for prospective application, but no retroactive application. *See* Reply at 6, *citing Griffith v. Kentucky*, 479 U.S. 314 (1987).[2] Mr. Pietri does not dispute that a valid pragmatic necessity exists for finality, rather Mr. Pietri argues that the *Ring* cutoff injects a level of arbitrariness that far exceeds the level justified by normal

[2] The State contends the "pipeline concept" created in *Griffith v. Kentucky*, 479 U.S. 314 (1987) supports its argument. *See* Reply at 6. While the "pipeline concept" places the dividing line between final and non-final, that is clearly not what has occurred in Florida. Indeed, many capital defendants whose convictions were final when *Hurst v. Florida* was decided have been granted the benefits of *Hurst v. Florida* and *Hurst v. State*.

retroactivity rules.[3] *See* Response 17-19. Given the Eighth Amendment's concern with "the risk that [a death] sentence will be imposed arbitrarily," this Court's line drawing contravenes the Supreme Court's mandate that States have a constitutional responsibility to tailor and apply their laws in a manner that avoids the arbitrary and capricious infliction of the death penalty. *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988); *see* also, *Furman v. Georgia*, 408 U.S. 238 (1972).

The State also refuses to acknowledge this Court's Eighth Amendment holding. *See* Reply at 11. Instead of meaningfully addressing Mr. Pietri's argument that *Hurst v. State* established a right to a life sentence unless a properly-instructed jury returns a unanimous recommendation for death, the State cites to *Spaziano v. Florida*, 468 U.S. 447 (1984).[4] The State asserts that this Court violated the Conformity Clause of the Florida Constitution by requiring unanimous jury

[3] The State's reliance on *Summerlin* is equally unpersuasive here. *See* Reply at 5, n.5. As explained above, *Summerlin*—a Sixth Amendment right-to-jury-trial issue, involving Arizona's statute, did not address any of the constitutional issues arising from *Hurst v. State*. In addition, the State fails to address the fact that the unorthodox line drawing that has occurred in Florida did not occur in Arizona as a result of *Summerlin*.

[4] Perplexingly, the State still maintains this Court cannot include the "Eighth Amendment as a reason for warranting unanimous jury recommendations" because of the "surviving precedent in *Spaziano*." However, this exact argument was raised and rejected in *Florida v. Hurst*, 137 S. Ct. 2161 (2017). Additionally, the State fails to acknowledge that the unanimity requirement also stems from the Florida Constitution. *See Hurst*, 202 So. 3d at 54 ("This holding is founded upon the Florida Constitution and Florida's long history of requiring jury unanimity in finding all the elements of the offense to be proven…").

recommendations because "there is no United States Supreme Court case holding that the Eighth Amendment requires the jury's final recommendation to be unanimous" (Reply at 12). This concrete statement shows a lack of understanding of the purpose for the Conformity Clause, which is to ensure that courts interpret Florida's laws in conformity with federal law. This Court's reason for requiring unanimity was that "Florida's extreme outlier status in not requiring unanimity in the jury's final recommendation render[ed] the . . . imposition of the death penalty in Florida cruel and unusual punishment under the Eighth Amendment to the United States Constitution." *Hurst v. State*, 202 So. 3d at 70 (Pariente, J., concurring). In other words, the unanimity requirement of *Hurst v. State* **brought Florida's capital system into conformity** with the Eighth Amendment. If anything, Florida's former statute, which required only a bare majority, arguably violated the Conformity Clause, given Florida's former outlier status and the fact that evolving standards of decency overwhelmingly favor unanimous verdicts.

The State also asserts that Mr. Pietri's issues, which have not been fully pleaded, do not merit relief. Specifically, the State avers that Mr. Pietri's contemporaneous convictions render any error harmless. *See* Reply 12-14. As explained in his Response, Mr. Pietri's argument is within the context of the Eighth Amendment and this Court's recognition that "a reliable penalty phase requires" a unanimous death recommendation by a properly-instructed jury. *See Bevel v. State*,

221 So. 3d 1168, 1182 (Fla. 2017). Thus, not only is the State's claim that "no Sixth Amendment error" occurred here irrelevant in this context, but it has also been repeatedly rejected by this Court. *See, e.g., Johnson v. State*, 205 So. 3d 1285, 1289 (Fla. 2016).

Finally, the State fails to acknowledge that the relevant "lead case" (*Hitchcock*) did not address the applicability of *Caldwell v. Mississippi*, 472 U.S. 320 (1985). To simply state that Mr. Pietri's jury was instructed according to the proper law at time, misses the point. *See* Reply at 13, n.11.

Prior to *Hurst v. Florida* and the resulting new Florida law, this Court had held that it was proper to inform a penalty phase jury that its role was advisory and that it bore no responsibility for the sentencing decision. In *Aldrich v. State*, 503 So. 2d 1257, 1259 (Fla. 1987), this Court found that it was proper to instruct a jury that the "[f]inal decision as to what punishment shall be imposed rests solely and only with the Judge of this Court. However, the law requires that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed upon the defendant." In *Combs v. State*, 525 So. 2d 853, 857 (Fla. 1988), this Court found that it did not violate *Caldwell v. Mississippi* to advise the jury that its role was advisory and that sentencing responsibility rested with the judge because "under our process, the court is the final decision-maker and the sentencer-not the jury." *See Grossman v. State*, 525 So. 2d 833, 839 (Fla. 1988) ("in Florida: the judge is the sentencing

authority and the jury's role is merely advisory. Thus, *Caldwell*, which addressed the denigration of the jury acting as a *sentencer* is clearly distinguishable"). Mr. Pietri raised his *Caldwell* claim at the first opportunity, but this Court relying on faulty jurisprudence, rejected his claim. As Justice Sotomayor pointed out, this Court's rationale for rejecting *Caldwell* challenges has been undermined by *Hurst v. Florida*, and this Court should reconsider those claims. *See Truehill v. Florida*, 2017 WL 2463876, at *1 (Oct. 16, 2017).

WHEREFORE, Mr. Pietri submits that *Hitchcock v. State* does not govern and that he should be permitted to fully brief the specific claims raised in his Rule 3.851 motion.

Respectfully submitted,

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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 Leslie T. Campbell, Assistant Attorney General, on November 17, 2017.

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