DOCKET NO. ____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

THOMAS DEWEY POPE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA APPENDIX

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APPENDIX INDEX

APPENDIX A

237 So.3d 926
Supreme Court of Florida.

Thomas Dewey POPE, Appellant,
v.
STATE of Florida, Appellee.

No. SC17–1812
|
[February 28, 2018]

Synopsis
Background: Defendant filed motion for collateral relief, after his conviction and death sentence were affirmed on appeal, 441 So.2d 1073. The Circuit Court, Broward County, No. 061981CF003047A88810, Michael I. Rothschild, J., denied the motion. Defendant appealed.

[Holding:] The Supreme Court held that requirement that jury recommend death sentence by unanimous vote did not apply retroactively.

Affirmed.

Pariente, J., concurred in result and filed opinion.

Lewis and Canady, JJ., concurred in result.

West Headnotes (1)

[1] Courts
In general;retroactive or prospective operation
Criminal Law
Change in the law
Requirement that jury recommend death sentence by unanimous vote did not apply retroactively, and therefore defendant was not entitled to collateral relief from death sentence, even though jury recommended death sentences by vote of nine to three. Fla. R. Crim. P. 3.851.
Cases that cite this headnote

An Appeal from the Circuit Court in and for Broward County, Michael I. Rothschild, Judge—Case No. 061981CF003047A88810

Attorneys and Law Firms

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Opinion

PER CURIAM.

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

Pope's motion sought relief pursuant to the United States Supreme Court's decision in *Hurst v. Florida*, —— U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), and our decision on remand in *Hurst v. State* (*Hurst*), 202 So.3d 40 (Fla. 2016), *cert. denied*, —— U.S. ——, 137 S.Ct. 2161, 198 L.Ed.2d 246 (2017). After this Court decided *Hitchcock v. State*, 226 So.3d 216 (Fla.), *cert. denied*, —— U.S. ——, 138 S.Ct. 513, 199 L.Ed.2d 396 (2017), Pope responded to this Court's order to show cause arguing why *Hitchcock* should not be dispositive in this case.

After reviewing Pope's response to the order to show cause, as well as the State's arguments in reply, we conclude that Pope is not entitled to relief. Pope was sentenced to death following a jury's recommendation for death by a vote of nine to ***927** three, and his sentence of death became final in 1984. *Pope v. State*, 441 So.2d 1073, 1075 (Fla. 1983); *Pope v. Sec'y for Dep't of Corrs.*, 680 F.3d 1271, 1278 (11th Cir. 2012). Thus, *Hurst* does not apply retroactively to Pope's sentence of death. *See*

Hitchcock, 226 So.3d at 217. Accordingly, we affirm the denial of Pope's motion.

The Court having carefully considered all arguments raised by Pope, 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*, —— U.S. ——, 138 S.Ct. 513, 199 L.Ed.2d 396 (2017), is now final. However, I continue to adhere to the views expressed in my dissenting opinion in *Hitchcock*.

All Citations

237 So.3d 926, 43 Fla. L. Weekly S114

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APPENDIX B

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

vs.

THOMAS DEWEY POPE
Defendant.
_____/

CASE NO. 81-3047-CF10A

JUDGE: ROTHSCHILD

ORDER DENYING DEFENDANT'S SUPPLEMENTAL MOTION UNDER FLORIDA RULE 3.851

On May 31, 2017 the Court granted Defendant's Motion For Leave to Amend Successive Post-Conviction Motion and adopted the additional grounds raised. The State was given the opportunity to file a response, which was submitted on June 28, 2017. The Court then held a Huff hearing on the additional ground on August 28, 2017. After considering the additional grounds, reviewing the State's response, considering legal authority, and having heard argument at hearing, it is;

ORDERED AND ADJUDGED that Defendant's additional claim is DENIED.

Defendant raises as his additional ground whether the death penalty as codified in Florida Chapter 2017-1 creates a new substantive right for those sentenced under the previously unconstitutional statute whereby a life sentence must be imposed even where the conviction and sentence became final following the Ring decision.

Though the Defendant acknowledges that precedent indicates that such relief is not retroactive from the standpoint of constitutional interpretation, as indicated in Asay v. State, 210 So. 3d 1 (Fla. 2016), Defendant argues that the statute itself creates such a right to retroactivity. The Court disagrees.

If Defendant's argument is to be accepted then the change in the law is a substantive change. Though the Court disagrees that this change in the statute is substantive, even if so it is barred from retroactive application by Article X, Section 9 of the Florida Constitution. See, Smiley v. State, 966 So. 2d 330 (Fla. 2007).

The Court accepts the State's responsive argument that the change is a procedural change. The Florida Supreme Court has already recognized that a change in the number of jurors it takes for the imposition of the death penalty to be procedural. Jackson v. State, 213 So. 3d 754 (Fla. 2017). Furthermore, the retroactivity of such a procedural change has been well litigated and ruled upon in Asay v. State, 210 So. 3d 1 (Fla. 2016) and, more recently, Hitchcock v. State, 2017 WL 3431500 (Fla. 2017).

Since Defendant's conviction and sentence were final prior to Ring, and the recent statute is a procedural change codifying the need for a unanimous verdict any right created by the passage of Florida Chapter 2017-1 is not retroactively applied. Defendant is not entitled to relief.

DONE AND ORDERED at Fort Lauderdale, Broward County, Florida on September 6, 2017.

HON. MICHAEL I. ROTHSCHILD
CIRCUIT COURT JUDGE

Copies furnished to:

Rachel Day, Esq. and William Hennis, Esq., Attorneys for Defendant
Steven Klinger, Esq. Assistant State Attorney
Donna Perry, Esq. and Leslie Campbell, Esq., Assistant Attorney Generals

APPENDIX C

Supreme Court of Florida

THURSDAY, JANUARY 4, 2018

CASE NO.: SC17-1812
Lower Tribunal No(s).:
061981CF003047A88810

THOMAS DEWEY POPE vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

Appellant shall show cause on or before Wednesday, January 24, 2018, why the trial court's order should not be affirmed in light of this Court's decision in 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, February 8, 2018, limited to no more than 15 pages. Appellant may file a reply to the Appellee's reply on or before Monday, February 19, 2018, 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

cd
Served:

LESLIE T. CAMPBELL
RACHEL DAY

APPENDIX D

IN THE SUPREME COURT OF FLORIDA
Case NO. SC17-1812

THOMAS DEWEY POPE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

RESPONSE TO ORDER TO SHOW CAUSE

The Appellant, Thomas Dewey Pope, 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 holding in *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), *cert. denied*, 138 S. Ct. 513 (2017). In support thereof, Mr. Pope states:

INTRODUCTION

Mr. Pope's death sentence was imposed pursuant to a capital sentencing scheme that was ruled unconstitutional by the United States Supreme Court in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and by this Court in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). Mr. Pope's sentence became "final" in 1984, prior to the United States Supreme Court decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002). The issue in this case is whether this Court's

approach to limited retroactivity to deny Mr. Pope *Hurst* relief on the ground that his sentence did not become final at least one day after the 2002 decision in *Ring* is constitutional in light of *Hurst v. State*, *Hurst v. Florida*, and the enactment of Chapter 2017-1.

This Court has already applied *Hurst* retroactively as a matter of state law in dozens of collateral-review cases where the defendant's sentence became final after *Ring*. Denying Mr. Pope *Hurst* relief because his sentence became final in 1984, rather than some date between 2002 and 2016, would violate the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Mr. Pope is entitled to *Hurst* retroactivity as a matter of federal law.

Relief should not be denied here in light of *Hitchcock*. Moreover, the issues raised in Mr. Pope's appeal are not those raised by Mr. Hitchcock, nor were they addressed in this Court's decision in *Hitchcock v. State*.

Mr. Pope's successive 3.851 motion to vacate, the denial of which is the subject of this appeal, raised a claim challenging his death sentence as unconstitutional based on the Sixth Amendment, the Eighth Amendment, the Florida Constitution, the decision in *Hurst v. Florida*, and this Court's ruling in *Hurst v. State*. Within this one claim were numerous subclaims. Subclaim 3B addressed the unanimity requirement recognized in *Hurst v. State* and the additional protections it provides Mr. Pope under the Eighth Amendment and the Florida Constitution. This

issue was not addressed in *Asay* or *Hitchcock*. Subclaim 3C argued that *Hurst* should be applied retroactively to Mr. Pope under an individualized retroactivity analysis and under fundamental fairness, issues this Court inadequately addressed in *Asay* and *Hitchcock*. Subclaim D argued that the *Hurst* error in Mr. Pope's case was harmful in light of the non-unanimous jury verdict.

A subsequent amendment to the motion was filed on May 17th, 2017. Claim II argued that Florida's revised death penalty statute was a substantive change in the law that requires retroactive application to Mr. Pope.

ARGUMENT

I. Due Process does not permit Mr. Pope to be foreclosed by the decision rendered in *Hitchcock v. State*

Mr. Pope 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. Pope'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.").

In a capital case in which a death sentence has been imposed, courts are

required to go further when considering challenges to the death sentence. The Eighth Amendment requires more due to a special need for reliability. *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."). The process by which the Court has directed Mr. Pope to proceed in his appeal, indicates its intention on binding Mr. Pope 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. Pope 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. Pope 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. Moreover, in denying relief in *Hitchcock,* this Court relied upon *Asay v.*

State for the determination that *Hurst* was not retroactive to cases final before *Ring v. Arizona*. See *Hitchcock v. State*, 226 So. 3d at 217. This Court did so despite the fact that the opinion in *Asay* was not premised upon, nor did it even address, the holding in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).

It is in that regard that this Court must acknowledge that the holding in *Asay,* and this Court's reliance upon that holding in *Hitchcock,* does not foreclose the availability of *Hurst* relief to Mr. Pope. *Hurst v. Florida* was a momentous shift in United States Supreme Court's jurisprudence when it 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, its most important role was to serve as the catalyst for this Court's decision in *Hurst v. State.*

II. Mr. Pope is entitled to the Retroactive Application of *Hurst v. Florida* under the Eighth Amendment and the Florida Constitution.

Mr. Pope challenged 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 by Mr. Hitchcock, and establishes that Mr. Pope should get the retroactive benefit of *Hurst v. State.*

Hurst v. State was premised upon this Court's interpretation of what the Florida Constitution and the national consensus required under the Eighth

Amendment to ensure reliability of death sentences. In *Hurst v. State* this Court held that it is reliability that is the touchstone of the Eighth Amendment in capital cases. And it is the need for reliability that led to this Court's decision in *Hurst v. State*, requiring unanimity under the Eighth Amendment and the Florida Constitution. That decision by necessity inherently implied that this Court acknowledged the constitutional requirement for reliability in a death sentence and recognized the need for enhancing reliability in Florida under its capital sentencing statute. This Court's opinion in its simplest terms is the acknowledgement that cases in which unanimity was not required are inherently less reliable and carry with that lack of reliability the impermissible likelihood that the decision to impose death was made arbitrarily and wantonly in violation of the Eighth Amendment. *See Furman v. Georgia;* 408 U.S. 238 (1972); *Gregg v. Georgia, 428 U.S. 153 (1976)*. Thus, it is within that context that the proper basis for Mr. Pope's argument against this Court's approach to limited retroactive application of *Hurst* in both *Asay* and *Hitchcock* is properly understood. This Court's continued reliance on *Asay* to repeatedly reject *Hurst* claims similar to Mr. Pope's will amount to the denial of due process and a fair opportunity to challenge his sentences of death.

Mr. Pope has a much different and stronger argument in support of retroactivity under *Hurst v. State* than the one made by Mr. Hitchcock. The Eighth Amendment requires that a death sentence carry extra reliability in order to ensure

that it was not imposed arbitrarily. Heightened reliability in capital cases is a core value of the Eighth Amendment and *Furman v. Georgia*.

In *Hurst v. State*, this Court held that enhanced reliability warranted the requirement that a death recommendation be returned by a unanimous jury. In doing so, the Court effectively recognized that a death sentence without the unanimous consent of the jury was lacking in reliability and thus did not carry the heightened reliability required by the Eighth Amendment. In that context, this Court's decisions in *Mosley* and *Asay* established a bright line cutoff as to the date at which the State's interest in finality trumped the interests of fairness and curing individual injustice. Such a bright line cutoff violated the Eighth Amendment principle set forth in *Hall v. Florida*. 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, nor has this Court addressed this issue.

While this Court in *Hurst v. State* found non-unanimous death recommendations were lacking in reliability, the level of unreliability is obviously compounded in some cases by matters and issues that increase the unreliability of a particular death sentence. Just as there were death sentenced individuals on the wrong side of the 70 IQ score cutoff who were likely intellectually disabled and erroneously under sentence of death as discussed in *Hall*, there are individuals with pre-*Ring* death sentences that are founded upon proceedings layered in error to the

extent that the cumulative unreliability overcomes any interests the State may have in finality.

Thus, death sentences imposed after a jury did not return unanimous findings on all facts necessary to impose a sentence of death before June 24, 2002, are just as unreliable as similar death sentences imposed after June 24, 2002. Drawing a line at June 24, 2002 is just as arbitrary and imprecise as the bright line cutoff at issue in *Hall v. Florida*, 134 S. Ct. at 2001 ("A State that ignores the inherent imprecision of these tests risks executing a person who suffers from intellectual disability."). When the United States 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. The unreliability of the proceedings giving rise to Mr. Pope's death sentence compounds the unreliability of his death recommendation. A recommendation that was returned by a jury unaware of its sentencing responsibility, as recognized in *Hurst v. State*, to such an extent that the interests of fairness outweigh the State's interest in finality in his case.

In addition to arguing entitlement to relief under *Hurst v. State* and the requirement of unanimity, Mr. Pope also raised a claim that he is entitled to retroactive application of *Hurst* on the basis of fundamental fairness. Specifically, Mr. Pope argued that he is entitled to relief under this Court's holding in *Mosley v.*

State, which embraced fundamental fairness as an alternative a means of receiving collateral relief under *Hurst v. Florida* and/or *Hurst v. State* where a defendant had attempted to raise *Ring* "at his first opportunity." *Mosley*, 209 So. 3d at 1275. In doing so, this Court determined it would be fundamentally unfair to prohibit the defendant who had anticipated the defects in Florida's capital sentencing scheme before they were recognized in *Hurst* but had been denied relief. This Court determined that in such instances the interests of fundamental fairness outweighed any interest the State may have in finality.

The *Hurst* decisions apply retroactively to Mr. Pope's case under the fundamental fairness approach. Mr. Pope raised a challenge to Florida's capital sentencing scheme in his state habeas corpus petition based on *Caldwell v. Mississippi*, 472 U.S. 320 (1985), even though he did not have the benefit of the United States Supreme Court's decisions in *Ring* or *Hurst v. Florida*, nor the benefit of the Court's decision in *Hurst v. State*.[1]

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[1] "[P]etitioner argues that appellate counsel was ineffective for failing to argue that the trial judge and prosecutor so trivialized the jury's advisory role in sentencing as to mandate vacation of his death sentence and remand for a new sentencing hearing before a jury." *Pope v. Wainwright*, 496 So.2d 798, 804 (Fla.,1986). This Court denied the claim, stating: "We perceive no eighth amendment requirement that a jury whose role is to advise the trial court on the appropriate sentence should be made to feel it bears the same degree of responsibility as that borne by a "true sentencing jury." Informing a jury of its advisory function does not unreasonably diminish the jury's sense of responsibility." *Pope v. Wainwright*, 496 So.2d at 805.

Of course, the Court's reasoning in denying Mr. Pope's claim has now since been overturned following the *Hurst* decisions. This means that when Mr. Pope first raised his *Ring*-based claims and was denied by this Court, that ruling was based upon a fundamental misunderstanding of the Eighth Amendment which has since been overturned following *Hurst v. State* and *Hurst v. Florida*. Given that Mr. Pope raised the issue at the first opportunity, the record reflects that there is a sufficient basis to apply the *Hurst* decisions retroactively to Mr. Pope regardless of the fact that his sentence became final before the issuance of *Ring* in 2002. Thus, this Court's holding in *Mosley* establishes that fundamental fairness requires retroactive application of the *Hurst* decisions to Mr. Pope's case.

III. The enactment of Florida's revised death penalty statute, Chapter 2017-1, constitutes a substantive change in law requiring retrospective application

On March 13, 2017, Chapter 2017-1 was enacted by Florida's legislature and signed by Governor Scott. It revised Florida's capital sentencing statute. It constitutes substantive law and provides that unless the jury returns a death recommendation, the judge "shall impose the recommended sentence [of life]." Thus, now in Florida, unless the jury returns a death recommendation by a unanimous vote, the revised statute sets the limit for the punishment of first-degree

murder at life imprisonment. See § 921.141(3)(a)(1). Without additional unanimous jury findings, a death sentence is not a sentencing option for first-degree murder in Florida. Put simply, the jury's vote in Florida now must be unanimous before first-degree murder becomes punishable by death, i.e. capital first degree murder.

Before the jury can return a death recommendation, the statute as revised by Chapter 2017-1 requires the jury to: 1) identify each aggravating factor that it unanimously finds to exist, 2) unanimously find that sufficient aggravating factors exist to justify a death sentence, 3) unanimously find that the aggravating factors outweigh the mitigating circumstances found to exist, and 4) unanimously find there is no basis for the imposition of a life sentence. *See* § 921.141(2)(b). Normally, legislative substantive criminal law does not apply retrospectively. Absent legislative intent for retrospective application, legislative enactments apply prospectively from the statute's effective date. But as to Chapter 2017-1, the legislative intent was for the revised § 921.141 to govern in any criminal prosecution for first-degree murder regardless of when the murder was committed.

As a result of the recently enacted Chapter 2017-1, its substantive benefit of requiring unanimity is without regard to the date of the crime or to the date the conviction became final. However, because of decisions by this Court, Chapter 2017-1's benefit currently embraces only those whose sentence was final on or after June 24, 2002. The goal in drawing this cut-off is to delineate cases that are deemed

too old to deserve relief. But the rule establishing this cut-off, which thereby created this disparity between individuals that receive Chapter 2017-1's benefit and those that do not, does not reasonably further the purpose of having the rule in the first place. This is because the goal of ensuring only relatively new cases receive Chapter 2017-1's benefit is not accomplished by setting a cut-off date that attaches to the sentence's finality date. Some of Florida's oldest capital cases will receive Chapter 2017-1's benefit too.

For instance, James Card was convicted of a June 3, 1981 homicide and a death sentence was imposed. His conviction and death sentence became final on November 5, 1984. *Card v. State*, 453 So. 2d 17 (Fla. 1984), *cert. denied*, 105 S. Ct. 396 (1984). Card's original death sentence was vacated in collateral proceedings because the judge had the State write his sentencing findings on an ex parte basis. When this was discovered nearly ten years later, a resentencing was ordered. The resentencing was held in 1999. The jury returned an 11-1 death recommendation. Another death sentence was imposed and affirmed on appeal. *Card v. State*, 803 So. 2d 613 (Fla. 2001), *cert denied* 536 U.S. 963 (2002). Because his petition for certiorari review was denied on June 28, 2002 (four days after Florida's June 24, 2002 cut-off date), his death sentence was vacated. *Card v. Jones*, 219 So. 3d 47 (Fla. 2017). Unless the resentencing jury unanimously returns a death recommendation, Card will receive a life sentence on his conviction final in 1984 of

a homicide committed in 1981.

Another example, J.B. Parker was convicted of a 1982 homicide and sentenced to death. The conviction and death sentence became final in 1985. *Parker v. State*, 476 So. 2d 134 (Fla. 1985). In 1998, Parker's death sentence was vacated, but his conviction remained intact due to a Brady violation discovered in the course of a co-defendant's resentencing. *State v. Parker*, 721 So. 2d 1147 (Fla. 1998). Parker then received another death sentence after his resentencing jury returned an 11-1 death recommendation. The Florida Supreme Court affirmed on appeal. *Parker v. State*, 873 So. 2d 270 (Fla. 2004). Because the death sentence became final after June 24, 2002, his sentence was vacated. At his resentencing, Parker will be entitled to a life sentence on his conviction which was final in 1985 for a murder committed in 1982.

Mr. Pope has not been as lucky. Card and Parker are each receiving the retrospective substantive benefit of Chapter 2017-1 because they had resentencing proceedings in the late 1990s or 2000s. Mr. Pope has been denied the statute's benefit. The murder for which Mr. Pope was convicted and sentenced to death took place on or about January 22, 1981, several months before both the June 3, 1981 murder for which Card was convicted and Parker's 1982 crime. There are numerous other examples of murder cases receiving relief for murders that are older or

contemporaneous with Mr. Pope's case.[2] Mr. Pope was convicted on February 25, 1982 and sentenced to death on April 7, 1982, after a non-unanimous jury recommendation of 9 to 3. (R. 1278). Mr. Pope's sentence of death remains intact simply because his death sentence was final in April 1984. The only distinction between Mr. Pope's case and those of cases like Card and Parker is that, as a matter of good fortune and timing, they received resentencings for murders committed around the same time as the one Mr. Pope was convicted of having committed. That distinction rests entirely on arbitrary factors like luck and happenstance. These are factors unconnected to the crime or the defendant's character.

Mr. Pope's claim, previously raised in the amendment to his successive Rule 3.851 motion, is premised upon the fact that the revised statute is meant to apply in all homicide prosecutions regardless of the date of the homicide and regardless of the date of conviction. In other words, it applies to resentencings ordered on first-degree murder convictions. Specifically it will apply at the resentencings ordered for James Card and J.B. Parker who were convicted of first-degree murder and sentenced to death at about the same time as Mr. Pope. Their convictions of first-degree murder were final in November 1984 and 1985 respectively, while Mr. Pope's finality was in April 1984. The resentencings ordered for Mr. Card and Mr.

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[2] *See*: *State v. Dougan*, 202 So.3d 363 (Fla. 2016) (1974 murder); *Meeks v. Moore*, 216 F.3d 951, 959 (11th Cir. 2000) (1974 murders); *Johnson v. State,* 44 So. 3d 51 (Fla. 2010) (January 8-9, 1981 murders).

Parker means that their criminal prosecutions are again active and within the scope of the revised statute. The legislative intent clearly was that the revised statute govern those prosecutions. As a result, the crime for which they were convicted, first-degree murder, no longer renders them death eligible.

The revised statute has effectively established the elements of the greater offense necessary to render Card and Parker eligible for death sentences. Under the revised statute the burden to prove these elements beyond a reasonable doubt rests with the State. That change in the elements and the additional burden of proof imposed upon the State is a change in substantive criminal law. Having the revised statute govern the prosecutions of Card and Parker means that the revised statute is being applied retrospectively to homicides committed in 1981 and 1982, and as a result extends to those individuals the substantive right to a life sentence unless the State proves the new elements beyond a reasonable doubt to the satisfaction of a unanimous jury as demonstrated when the unanimous jury returns a death recommendation.

These same protections and opportunity to be sentenced under the new statute should be provided to Mr. Pope. Similar to Card and Parker, due process requires that Mr. Pope be afforded the benefit of the new sentencing statute and the substantive changes in law that it establishes. Mr. Pope is entitled to retrospective application of Chapter 2017-1 and the enhanced protections it provides with respect

to the elements necessary to impose a sentence of death and the additional burden of proof imposed upon the State.

IV. Mr. Pope's death sentence violates *Hurst*, and the error is not "harmless"

At the outset, a unanimous jury verdict is not merely the recommendation. In *Hurst v. State*, this Court noted that "[i]n requiring jury unanimity in [the statutorily required fact] findings and in [the jury's] final recommendation if death is to be imposed, we are cognizant of significant benefits that will further the administration of justice." 202 So. 3d at 58. Thus, it is not only a unanimous recommendation that the Court recognized provided heightened reliability, but also the unanimous findings required by the jury as well. Mr. Pope's penalty phase jury in 1982 did not return a verdict making any findings of fact. The only document returned by the jury was an advisory recommendation that a death sentence be imposed. Mr. Pope's jury made no findings at all regarding the elements necessary to allow for the imposition of a death sentence. The jury did not find unanimously and expressly all the aggravating factors were proven beyond a reasonable doubt, unanimously find that the aggravators were sufficient to impose death, or unanimously find that the aggravators outweighed the mitigators. Finally, the jury vote was 9 to 3 on the ultimate question of whether Mr. Pope was deserving of death.

This Court's recognition that "a reliable penalty phase requires" unanimous jury findings and a unanimous recommendation means that the jury's death

recommendations at Mr. Pope's penalty phase do 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 *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).

The right to a life sentence unless a jury unanimously recommends a death sentence recognized in *Hurst v. State* 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 or from *Hurst v. Florida* or from *Ring v. Arizona*. 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.").

Jurors are required to feel the weight of their sentencing responsibility and they must know that they have the power to exercise mercy to preclude a death sentence. Further, 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." The Court in *Caldwell* found that diminishing an individual juror's sense of responsibility for the imposition of a death sentence creates a bias in favor of a juror voting for death. *Id.* at 330 ("In the capital sentencing context 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.").[3]

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[3] On October 16, 2017 three Justices of the US Supreme Court, specifically referencing *Caldwell*, commented in a dissent from a denial of certiorari that "[a]t least twice now, capital defendants in Florida have raised an important Eighth Amendment challenge to their death sentences that the Florida Supreme Court has failed to address," specifically, "that the jury instructions in their cases

If a bias in favor of a death recommendation increases when the jury's sense of responsibility is diminished, removing the basis for that bias increases the likelihood that one or more jurors will vote for a life sentence.

Here, the record in Mr. Pope's case supports that presumption where his jury received inaccurate instructions as to their ultimate responsibility during sentencing and as to their power to dispense mercy and preclude a death sentence. This Court held in *Hurst v. State* that a jury must return a unanimous death recommendation before a judge is authorized to impose a death sentence on a defendant convicted of first-degree murder. This Court made it clear that jurors could vote against a death recommendation for any reason as an act of mercy. This means that although this Court has previously ruled that lingering doubt as to guilt is not a mitigating circumstance under Florida law, it is now something jurors can consider and can constitute the basis for a juror to vote in favor of a life sentence.

CONCLUSION

The resolution of *Hitchcock v. State* by this Court does not impact the resolution of Mr. Pope's successive 3.851 motion. The specific claims raised by Mr. Pope were not raised by Mr. Hitchcock. Mr. Pope is entitled to an individualized

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impermissibly diminished the jurors' sense of responsibility as to the ultimate determination of death by repeatedly emphasizing that the verdict was merely advisory." *Truehill v. Florida*, 138 S. Ct. 3, 4 (2017) (dissenting, J., Sotomayor joined by J., Breyer and J., Ginsburg).

assessment of his claims.

Respectfully submitted,

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I HEREBY CERTIFY that a true copy of the foregoing has been provided by electronic service to Leslie Campbell, Assistant Attorney General, Office of the Attorney General, 1515 N. Flagler Drive, Suite 900, West Palm Beach, Florida 33401 at leslie.campbell @myfloridalegal.com via the Florida Court e-filing portal on the 24th day of January, 2018.

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APPENDIX E

IN THE SUPREME COURT OF FLORIDA

THOMAS DEWEY POPE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC17-1812

DEATH PENALTY CASE

STATE'S REPLY TO JANUARY 4, 2018 ORDER TO SHOW CAUSE

COMES NOW, APPELLEE, State of Florida, by and through the undersigned counsel, and files its reply to Appellant's Response to Order to Show Cause filed on January 24, 2018 pursuant to this Court's Order dated January 4, 2018 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); *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017); *Asay v. State, 224 So.3d 695 (Fla. 2017); Lambrix v. State*, 227 So.3d 112 (Fla. 2017) and therefore states:

STATEMENT OF THE CASE AND FACTS

A grand jury indicted Thomas Dewey Pope ("Pope") for the first-degree murders of Al Doranz ("Doranz"), Caesar DiRusso ("DiRusso"), and Kristine Walters ("Walters"). The jury found Pope guilty as charged and recommended life for the murders of Doranz and DiRusso, and death for Walters' murder. (ROA-R.7

1265-67)[1] *Pope v. State*, 441 So.2d 1073 (Fla. 1983). On October 27, 1983, this Court affirmed finding:

> On January 19, 1981, the bodies of Al Doranz and Caesar Di Russo were discovered in an apartment rented to Kristine Walters. Both had been dead several days but Di Russo's body was in a more advanced state of decomposition than Doranz's. Both victims had been shot, Doranz three times and Di Russo five times. A spent .22 caliber shell casing was found under Di Russo's body. Three days later, the body of Kristine Walters was found floating in a canal. She had been shot six times with exploding ammunition, her skull was fractured and she had been thrown into the canal while still breathing.
>
> All three victims had been shot with exploding ammunition, so ballistics comparison was impossible. However, parts of an AR-7 rifle were found in the canal near Walters's body and the spent shell casing under Di Russo's body had been fired from an AR-7 weapon.
>
> Investigation led to appellant's girlfriend, Susan Eckard, and ultimately police were able to show that Doranz purchased an AR-7 rifle for Pope shortly before the murder. Eckard and Pope admitted being with Doranz and Walters at Walters's apartment on Friday night, the night Doranz and Di Russo were killed. Eckard later testified that Pope had arranged a drug deal with Doranz and Di Russo. She stated that she and Pope left Walters's apartment to visit Clarence "Buddy" Lagle and to pick up some hamburgers. They then returned to the apartment where Pope and Doranz convinced Walters to go with Eckard to the apartment where Pope had been staying.
>
> Later that same night, Pope arrived at his apartment and told the women there had been trouble and that Doranz had been injured but that it was best for Walters to stay away from him for a while. Eckard said she knew that Di Russo and Doranz were dead, and that she had known Pope intended to kill them at this

[1] Identifying the direct appeal record; "2017PCR" references the instant record.

> point. The next day, Walters checked into a nearby motel, where Pope supplied her with quaaludes and cocaine. On Sunday, Pope told Walters he would take her to see Doranz. Eckard testified that Pope had told her that he knew he had to get rid of Walters but that he regretted it because he had become fond of her. According to Eckard, Pope described Walters's murder when he returned and said the gun had broken when he beat Walters over the head with it. The next day Eckard went with Pope to the scene of the crime to collect fragments of the broken stock and to look for the missing trigger assembly and receiver.
>
> Buddy Lagle told the police he had made a silencer for the AR-7 rifle at Pope's request. Because Lagle planned to leave the jurisdiction to take a job on a ship in the Virgin Islands, he was deposed on videotape pursuant to an order granting the state's motion to perpetuate testimony. When the state was unable to produce him at trial, the videotape was admitted into evidence.
>
> Pope was convicted of three counts of first degree murder. The jury recommended a life sentence for the murders of Doranz and Di Russo and death for Walters's murder. The state indicated its agreement with that recommendation, and the trial court imposed sentence accordingly.

Pope, 441 So.2d at 1074-75. Rehearing was denied on January 11, 1984 and Pope did not seek certiorari review; thus, for purposes of postconviction litigation, his case became final 90-days later on April 10, 1984 under Rule 3.851, Fla. R. Crim. P.

On September 17, 1984, Pope filed a postconviction relief motion (entitled Motion for New Trial) and later amended it. Following an evidentiary hearing, the trial court denied relief and on October 11, 1990, this was affirmed by this Court. *Pope v. State*, 569 So.2d 1241 (Fla. 1990). During the pendency of

that motion, Pope filed a petition for writ of habeas corpus with this Court which denied relief. *Pope v. Wainwright*, 496 So.2d 798, 801-03 (Fla. 1986) *cert. denied*, 480 U.S. 951 (1987).

In September 1991, Pope filed a federal habeas petition,[2] however, in March 1995, Pope filed a second state postconviction relief motion. Ultimately, on May 29, 1996, the trial court summarily denied relief as procedurally barred. This Court affirmed. *Pope v. State*, 702 So.2d 221 (Fla. 1997). Also during the pendency of his federal litigation, Pope filed successive postconviction motions and appeals. *See Pope v. State*, 845 So.2d 892 (Fla. 2003); *Pope v. Crosby*, 921 So.2d 629 (Fla. 2005) (Tables); *Pope v. State*, 27 So.3d 661 (Fla. 2010).

On January 10, 2017, Pope filed his fourth successive postconviction motion in which he challenged his capital sentence based on *Hurst v. Florida*, 136 S.Ct. 616 (2016). Following his May 31, 2017 amendment, Pope relied upon *Hurst v. State*, 202 So.3d 40 (Fla. 2016). (2017PCR 3-53, 81-106). On September 6, 2017, relief was denied summarily. (2017PCR 141-44) On January 4, 2018, this Court issued an Order to Show Cause.

ARGUMENT

In spite of his conviction and sentencing becoming final

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[2] Later, Pope returned to federal court were eventually all relief was denied. *See, Pope v. Sec'y, Florida Dept. of Corr.*, 680 F.3d 1271 (11th Cir. 2012); *Pope v. Sec'y, Florida Dept. of Corr.*, 752 F.3d 1254, 1256 (11th Cir. 2014).

before June 24, 2002, the day *Ring v. Arizona*, 536 U.S. 584 (2002) was issued, *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017), *cert. denied*, 138 S.Ct. 513 (2017), does not preclude the relief Pope seeks. He challenges his death sentence as unconstitutional under the Sixth, Eighth, and Fourteenth Amendments as interpreted and applied in *Hurst v. Florida* and *Hurst*. Further, he claims that refusing to find *Hurst v. Florida* and *Hurst* retroactive to his case merely because his case was final before *Ring*, is a denial of due process. Pope suggests that *Hurst* should be retroactive under federal law. Also, he claims Chapter 2017-1, Laws of Florida is a substantive change in the law, thus entitling him to resentencing.

Contrary to Pope's suggestions otherwise, this Court applied state law correctly in finding *Hurst v. Florida* and *Hurst* not to be retroactive to cases final before June 24, 2002 and should continue to follow the precedent of *Asay v. State*, 210 So.3d 1 (Fla. 2016) and *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017), *cert. denied*, 138 S.Ct. 513 (2017); *Asay v. State, 224 So.3d 695 (Fla. 2017); Lambrix v. State*, 227 So.3d 112 (Fla. 2017), *cert. denied*, 135 S.Ct. 312 (2017) as well as *Mosley v. State*, 209 So.3d 1248 (Fla. 2016) and the cases reviewed as a result of that precedent. Pope has not offered any arguments that have not been presented to this Court previously and rejected after due consideration. He has offered nothing to

cause this Court to alter its precedent. As such *Hitchcock* and *Lambrix* foreclose Pope's challenges here. Additionally, this Court has made clear that the new statute should not be applied retroactively and that neither the Sixth nor the Eighth Amendments provide Pope with an avenue for relief. *See, Asay*, 210 So.3d at 22; *Hitchcock; Lambrix; 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)*. Pope is not entitled to relief as those cases reject each of his arguments for retroactivity to cases final before June 24, 2002.

This Court has held *Hurst v. Florida* and *Hurst* are not retroactive to cases final before June 24, 2002, the day *Ring v. Arizona*, 536 U.S. 584 (2002) issued. *See Asay*, 210 So.3d at 8, 22. *See also, Asay, 224 So.3d at 703* (reiterating *Hurst* and *Hurst v. Florida* not retroactive to cases final before *Ring*); *Hitchcock*, 226 So.3d at 217 (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 v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).")

In *Asay*, 210 So.3d at 15-16, this Court applied the *Witt v. State*, 387 So.2d 922 (Fla. 1980) analysis for determining

whether *Hurst* was retroactive 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.* (emphasis in original), *quoting Johnson v. State*, 904 So.2d 400, 409 (Fla. 2005). *See also Danforth v. Minnesota*, 522 U.S. 264, 280-81 (2008) (allowing states to adopt retroactivity test that is 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 bright-line cutoff point for retroactivity of *Hurst* claims. This Court has refused to extend *Hurst v. Florida* and *Hurst* to any defendant whose case was final before *Ring*.[3]

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[3] In just the last week, this Court has reaffirmed *Hurst* is not retroactive to cases final before June 24, 2002 and affirmed the denial of the *Hurst* claim on that basis. *See Stein v. State*, SC17-1547, 2018 WL 636066, at *1 (Fla. Jan. 31, 2018); *Gordon v. State*, SC17-1133, 2018 WL 636418, at *1 (Fla. Jan. 31, 2018); *Whitton v. State*, SC17-1118, 2018 WL 635982, at *1 (Fla. Jan. 31, 2018); *Krawczuk v. State*, SC17-1142, 2018 WL 635983, at *1 (Fla. Jan. 31, 2018); *Sireci v. State*, SC17-1143, 2018 WL 635985, at *1 (Fla. Jan. 31, 2018); *Rodriguez v. State*, SC17-1268, 2018 WL 635986, at *1 (Fla. Jan. 31, 2018); *Consalvo v. State*, SC17-1309, 2018 WL 635988, at *1 (Fla. Jan. 31, 2018); *Sliney v. State*, SC17-1074, 2018 WL 636103, at *1 (Fla. Jan. 31, 2018); *Miller v. Jones*, SC17-1211, 2018 WL 636104, at *1 (Fla. Jan. 31, 2018); *Lamarca v. State*, SC17-1179, 2018 WL 618728, at *1 (Fla. Jan. 30, 2018); *Whitfield v. State*, SC17-1399, 2018 WL 615022, at *1 (Fla. Jan. 30, 2018); *Mendoza v. State*, SC17-1324, 2018 WL 618592, at *1 (Fla. Jan. 30, 2018); *Gudinas v. State*, SC17-919, 2018 WL 618595, at *1 (Fla. Jan. 30, 2018); *Sochor v. State*, SC17-1343, 2018 WL 618698, at *1 (Fla. Jan. 30, 2018); *Fotopoulos v. State*, SC17-971, 2018 WL 579814, at *1 (Fla. Jan.

On August 10, 2017, this Court reaffirmed *Asay* stating:

> 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, 226 So.3d at 217; *see also Asay, 224 So.3d at 703* (rejecting claim chapter 2017-1, Laws of Florida, "creates a substantive right to a life sentence unless a jury unanimously recommends otherwise"); *Lambrix*, 227 So.3d at 113 (rejecting arguments based on Eighth Amendment, due process, equal protection, and a substantive right based on new legislation).

Here, just as was presented in *Hitchcock*, Pope raises various constitutional provisions to argue that *Hurst* should be applied retroactively to him. He claims that denying him retroactive application of *Hurst* violates the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution as he was not provided Due Process and Equal Protection. As determined in *Asay*, 210 So.3d at 8, 22 and reaffirmed in *Hitchcock*, 226 So.3d at 117; *Lambrix*, 227 So.3d at 113; and *Asay, 224 So.3d at 703*, *Hurst* does not apply

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29, 2018); *Marquard v. State*, SC17-862, 2018 WL 524794, at *1 (Fla. Jan. 24, 2018). *See also Asay*, 210 So.3d at 8, 22(sentence final in 1991); *Hitchcock*, 226 So.3d at 216; *Lambrix v. State*, 217 So.3d 977, 989 (Mar. 2017)(sentence final in 1986).

retroactively. Here, Appellant's case became final on April 10, 1984, 90-days after affirmance on direct appeal. See Rule 3.851(d). Hence, *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.

Furthermore, reliance on the federal retroactivity assessment identified in *Teague* or suggestion that there has been a substantive rule announced by *Hurst* do not further Appellant's position. *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004), and its determination that *Ring* was not retroactive supports the conclusion that *Hurst v. Florida*, which was an expansion of *Ring* to Florida capital cases, would likewise not be retroactive under a *Teague* analysis. Despite Pope's claim that *Hurst* created a substantive change requiring federal retroactivity, *Schriro* forecloses that assertion. 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 v. Florida* is an expansion of *Ring* to Florida, *Hurst v. Florida* and this Court's resulting Hurst decision, like *Ring* did not create a substantive rule and are not retroactive under federal law.[4]

Furthermore, with retroactivity, there is 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

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[4] The Eleventh Circuit has rejected the argument that *Hurst* is retroactive under federal law, stating: "[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 that *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.*, No. 17-14413, 2017 WL 4416205, *8 (11th Cir. Oct. 5, 2017), *cert. denied Lambrix v. Florida*, Nos. 17-6290, 17A380, 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).

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.

In *Asay*, 210 So.3d at 11-19, this Court also discussed the role the *Apprendi* opinion had in the Supreme Court's decisions in *Ring* and *Hurst*. There however, "the Supreme Court distinguished capital cases from its holding in *Apprendi*." *Asay*, 210 So.3d at 19; *citing Apprendi v. New Jersey*, 530 U.S. 466, 496-97 (2000) ("this Court has previously considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes . . ."). Because *Apprendi* does not apply to capital cases, it should not be used as the cutoff date for *Hurst* retroactivity.

Also, the fact the Legislature enacted a new statute following *Hurst*, that does not give Appellant a new substantive right. *See Asay*, 210 So.3d at 8, 22 and reaffirmed in *Hitchcock*, 226 So.3d at 217; *Lambrix*, 227 So.3d at 113; and *Asay, 224 So.3d at 703*. Furthermore, the new statute does not apply to Pope.

Yet, even if *Hurst* were to be applied retroactively, relief would not be warranted under *Caldwell v. Mississippi*,[5] or *Hurst* as any error would be harmless beyond a reasonable doubt. In this case, the jury convicted Pope of three counts of first degree murder and distinguished between the homicides committed during a drug buy and the death of Kristine Walters who was duped into going to a hotel where Pope kept her drugged while contemplating killing her because he did not want a witness to the prior murders. In discussing aggravation, this Court stated:

> …the court found four aggravating circumstances. First, the *defendant had been convicted of another capital felony, the murders of Donranz and Di Russo.* ... Second, *the capital felony was committed for the purpose of avoiding or preventing lawful arrest.* The defendant's own statements to Susan Eckard as well as the circumstances surrounding the murder show, beyond a reasonable doubt, that this was the sole motive for the murder. ... Third, the *capital felony was*

[5] First, any complaint about jury instructions at this point is untimely and procedurally barred. *Troy v. State*, 57 So. 3d 828, 838 (Fla. 2011). Second, in order to establish constitutional error under *Caldwell*, a defendant must show the instructions "improperly described the role assigned to the jury by local law." *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994). Here, the jury was instructed properly on its role based upon then existing law. It is absurd to suggest the jury should have been instructed in accordance with a constitutional change in the law which occurred some 34 years after the trial. Third, Pope's claim is based on pure speculation. There is nothing in the record to support the proposition that the jury's sentencing responsibility was diminished or rendered the recommendation unreliable. This is especially true where the jury differentiated the killing of the male victims involved in a drug trade and that of Walters who was kept secluded and sedated over the weekend before she was killed. Clearly, the jury understood its great responsibility and exercised it.

> *committed in a cold, calculated and premeditated manner.* Susan Eckard's testimony about Pope's discussions of the murder with her prior to the killing supports beyond a reasonable doubt the finding of premeditation as required by this statutory aggravating factor. ... Fourth, *the capital felony was especially heinous, atrocious or cruel.* The medical examiner's testimony at trial revealed that the pattern of gun-shot wounds on Walter's body revealed, without indicating the sequence of shots, that she had been shot from the rear, had attempted to flee the attack, and had been shot twice with the gun pressed close to her abdomen. The wounds caused by the explosion of the bullets at impact would have been extraordinarily painful without causing unconsciousness or death. When this had failed to kill her, she had been clubbed over the head with the gun barrel. When the gun barrel broke before the murderous end had been achieved, the defendant dragged his still-living victim to the canal where he threw her to drown. The evidence of conscious psychological and physical suffering is clear from the medical examiner's testimony and supports a finding that this murder was heinous, atrocious and cruel to an extent greater than that inherent in all murders. ... We find no merit to appellant's assignment of error to the finding of any of these factors.

Pope, 441 So.2d at 1076-77. The "convicted of another capital felony" was inherent in the jury's verdict and the avoid arrest, CCP, and HAC aggravators are undeniable given Pope's admissions and medical examiner's testimony.

Pope's jury was given the standard jury instructions. Further, the jury's guilt phase verdicts support the finding of aggravation making Appellant death eligible based on a unanimous jury finding, i.e., (1) previously convicted of another violent

felony, the murders of two other victims.[6] While recognizing this Court's precedent to the contrary, the State maintains there is no Sixth Amendment error here as Pope became death eligible upon conviction. Without question, and as the jury found by its guilt phase verdict, the murder of Walters was committed after Pope had killed Doranz and DiRusso, thus rendering Pope death eligible. The Sixth Amendment requires nothing more than jury fact-finding sufficient to support the resulting sentence; it does not mandate any specific jury verdict or recommendation as a pre-requisite to a given sentence.

Although this Court declined to follow the State's argument in *Pagan v. State*, SC17-872, slip op. (Fla. Feb. 1, 2018)

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[6] There is no doubt the jury found the prior conviction of a capital felony given the murders of Doranz and DiRusso. Also, based on the case facts, avoid arrest and CCP were proven through Pope's admission that he had a silencer made for the murders of Doranz and DiRusso, had Walters taken from the scene and kept drugged over the weekend before announcing he regretted having to kill her to as he had become fond of her, but he could not have a witness. On the day of her death, Walters was taken to a remote location, shot, bludgeoned when the shots did not kill, then drowned when the gunstock broke. Such show heightened planning, cold execution, the intent to avoid arrest, and the HAC nature of the killing. *Pope*, 441 So.2d at 1076-77. A rational jury would have found unanimously aggravators if it had been instructed to, and would have found unanimously they were sufficient to support a death sentence, and that they outweighed the mitigation especially in light of the fact no statutory and only two non-statutory mitigators (service in Vietnam and honorable discharge) were found. Such pales in weight to the aggravation here. A rational jury, properly instructed would have found unanimously that the aggravation outweighed the mitigation given this was a CCP homicide, committed after a double homicide and to avoid arrest.

regarding *Jenkins v. Hutton*, 137 S. Ct. 1769 (2017), it bears repeating. In *Jenkins*, the Supreme Court confirmed the constitutionality of an Ohio death sentence based on a jury's guilt-phase determination of facts. In *Jenkins*, the lower court ordered a new sentencing 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 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, Appeals Court 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).").

As Pope's case was final in April 1984 and this Court has rejected all of the instant claims, the denial of relief should be affirmed. Also, given that the guilt phase verdict rendered Pope death eligible, there is no Sixth Amendment violation.

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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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 6th day of February, 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: to Rachel Day, Esq., at dayr@ccsr.state.fl.us, and William M. Hennis, III, Esq. at HennisW@ccsr.state.fl.us at Capital Collateral Regional Counsel-South, One Broward Blvd, Suite 444, Fort Lauderdale, FL 33301.

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

APPENDIX F

IN THE SUPREME COURT OF FLORIDA
Case No. SC17-1812

THOMAS DEWEY POPE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

REPLY TO STATE'S REPLY TO RESPONSE TO ORDER TO SHOW CAUSE

The Appellant, Thomas Dewey Pope, by and through undersigned counsel, hereby responds to the State's Reply to his response to this Court's Order 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. 2017), *cert. denied*, 138 S. Ct. 513 (2017). In reply thereof, Mr. Pope states:

I. Mr. Pope has been denied due process.

In his Response, Mr. Pope 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. Pope asked to be treated no differently than any appellant in a capital case whose appeal is decided by the Court under its mandatory jurisdiction.

Mr. Pope has a substantive right to appeal the denial of his Rule 3.851 motion, a motion which challenged the constitutionality of his death sentence. 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). This principle applies to collateral appeals as well as direct appeals. See *Lane v. Brown*, 372 U.S. 477, 484-85 (1963).

Mr. Pope'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. Pope 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) ("[T]his Court has a mandatory obligation to

review all death penalty cases to ensure that the death sentence is imposed in accordance with constitutional and statutory directives."). Mr. Pope must be given a fair opportunity to establish that his death sentence is unconstitutional. *See Hall v. Florida,* 134 S.Ct. 1986 (2014).

The State asserts that "[Mr. Pope] has offered nothing to cause this Court to alter its precedent. As such *Hitchcock* and *Lambrix* foreclose Pope's challenges here." *see* Reply at 5-6, but this is simply wrong. Mr. Pope has raised issues not addressed in *Hitchcock* and *Asay* as set out in his Response. The State's arguments lack merit and this Court should reject them.

II. The State ignores that Mr. Pope'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. Pope's arguments, but, for the most part, avoids and/or ignores much of Mr. Pope's argument. The State contends that Mr. Pope 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), *cert. denied*, 138 S. Ct. 312 (2017).

In doing so, the State erroneously relies on *Lambrix v. Sec'y, Fla. Dep't of Corr.*, 872 F. 3d 1170 (11th Cir. 2017), to argue Mr. Pope's Eighth Amendment, Due Process, and Equal Protection claims have already been addressed and rejected. *See* Reply at 10, fn. 4. First, the 11th Circuit's opinion holds no precedential value because the issue before the 11th Circuit in *Lambrix* concerned its determination

whether to grant an under-warrant review 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. Similar idiosyncratic presentations also render inapplicable to Mr. Pope this Court's recent active-death-warrant decisions in *Asay v. State*, 224 So. 3d 695 (Fla. 2017), *Hannon v. State*, 2017 WL 4944899 (Fla. Nov. 1, 2017), and *Branch v. State*, 2018 WL 897079 (Fla.. February 15, 2018)

The State contends this Court has already determined that Mr. Pope's *Caldwell*[1] claim is untimely and procedurally barred, and further states that "even if Hurst were to be applied retroactively, relief would not be warranted.". *See* Reply at 12. Recently, three justices of the United States Supreme Court noted that this Court's review of appeals related to *Hurst v. Florida* and the issues arising in its wake has been woefully deficient:

> At least twice now, capital defendants in Florida have raised an important Eighth Amendment challenge to their death sentences that the Florida Supreme Court has failed to address. Specifically, those capital defendants, petitioners here, argue that the jury instructions in their cases impermissibly diminished the jurors' sense of responsibility as to the ultimate determination of death by repeatedly emphasizing that their verdict was merely advisory. "This Court has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task," and we have thus

[1] *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

found unconstitutional under the Eighth Amendment comments that "minimize the jury's sense of responsibility for determining the appropriateness of death." *Caldwell v. Mississippi*, 472 U.S. 320, 341, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

Although the Florida Supreme Court has rejected a *Caldwell* challenge to its jury instructions in capital cases in the past, it did so in the context of its prior sentencing scheme, where "the court [was] the final decision-maker and the sentencer—not the jury." *Combs v. State*, 525 So.2d 853, 857 (1988). In *Hurst v. Florida*, 577 U.S. ——–, ——, 136 S.Ct. 616, 624, 193 L.Ed.2d 504 (2016), however, we held that process, "which required the judge alone to find the existence of an aggravating circumstance," to be unconstitutional.

With the rationale underlying its previous rejection of the *Caldwell* challenge now undermined by this Court in *Hurst*, petitioners ask that the Florida Supreme Court revisit the question. The Florida Supreme Court, how-ever, did not address that Eighth Amendment challenge.

This Court has not in the past hesitated to vacate and remand a case when a court has failed to address an important question that was raised below. See, *e.g., Beer v. United States*, 564 U.S. 1050, 131 S.Ct. 2865, 180 L.Ed.2d 909 (2011) (remanding for consideration of unaddressed preclusion claim); *Youngblood v. West Virginia*, 547 U.S. 867, 126 S.Ct. 2188, 165 L.Ed.2d 269 (2006) (*per curiam*) (remanding for consideration of unaddressed claim under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)). Because petitioners here raised a potentially meritorious Eighth Amendment challenge to their death sentences, and because the stakes in capital cases are too high to ignore such constitutional challenges, I dissent from the Court's refusal to correct that error.

Truehill v. Fla., 138 S.Ct. 3, 4 (Mem) (U.S. 2017) (Sotomayor, J., dissenting, joined by Breyer and Ginsburg, JJ.). The State also fails to acknowledge that the relevant "lead case" (*Hitchcock*) did not address the applicability of *Caldwell.* Rather, the State simply asserts that "[I]t is absurd to suggest the jury should have been instructed in accordance with a constitutional change in the law which occurred

some 34 years after the trial." Response at 12, fn. 5. But that is precisely the point. The "law at the time" has now been held to be unconstitutional. And more importantly, in the wake of *Hurst v. Florida* and the resulting new Florida law, a jury's **unanimous** death recommendation is necessary in order to authorize the imposition of a death sentence. Mr. Pope preserved his *Caldwell* claim at the first opportunity afforded him in state habeas and this Court's rationale for denying the claim is in conflict with *Hurst v. Florida* and *Hurst v. State* and the new statute:

> As his final point, petitioner argues that appellate counsel was ineffective for failing to argue that the trial judge and prosecutor so trivialized the jury's advisory role in sentencing as to mandate vacation of his death sentence and remand for a new sentencing hearing before a jury. For this argument, Pope relies on a recent decision of the United States Supreme Court, *Caldwell v. Mississippi,* 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), in which the Court held that a death sentence is invalid when it rests on a determination made by a *sentencing jury* which was improperly led to believe that the responsibility for determining the appropriateness of the death sentence rests elsewhere. *Id.* at 2639. In *Caldwell* the prosecutor impermissibly minimized the importance of the jury's role as sentencer, emphasizing to the jury that they should not feel ultimate responsibility for the defendant's death because imposition of the death penalty was "automatically reviewable" by the state supreme court. The *Caldwell* Court found this argument contrary to the defendant's eighth amendment right to a reliable determination of the appropriateness of his death. *Id.* at 2640. The Court reasoned: "In the capital sentencing context there are specific reasons to fear substantial unreliability as well as bias in favor of the death sentence when there are state-induced suggestions that the *sentencing jury* may shift its sense of responsibility to an appellate court." *Id.* (emphasis added). One of the Court's main concerns was that this "delegation of sentencing responsibility" to the appellate court would deprive the defendant of his right to a fair determination of the appropriateness of the death sentence because an appellate court is "wholly ill-suited" to

make that initial determination. *Id.* As Justice O'Connor points out in her concurring opinion, the prosecutor's "misleading emphasis on appellate review misinformed the jury concerning the finality of its decision," thereby creating an unacceptable risk that the death penalty may have been imposed arbitrarily or capriciously. *Id.* at 2647 (O'Connor, J., concurring).

Under Mississippi law it is the jury who makes the ultimate decision as to the appropriateness of the defendant's death. *See*Miss.Code Ann. § 99-19-101 (Supp.1985). Whereas, in Florida it is the trial judge who is the ultimate "sentencer." *See Thompson v. State,*456 So.2d 444 (Fla.1984). **The jury's recommendation, although an integral part of Florida's capital sentencing scheme, is merely advisory**. *See* § 921.141(2), Fla.Stat. (1985). This scheme has been upheld against constitutional challenge. *See Proffitt v. Florida,* 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

In the instant case, petitioner argues that repeated reference by the trial judge and prosecutor to the advisory nature of the jury's recommendation overly trivialized the jury's role and encouraged them to recommend death. We cannot agree. We find nothing erroneous about informing the jury of the limits of its sentencing responsibility, as long as the significance of its recommendation is adequately stressed. **It would be unreasonable to prohibit the trial court or the state from attempting to relieve some of the anxiety felt by jurors impaneled in a first-degree murder trial. We perceive no eighth amendment requirement that a jury whose role is to advise the trial court on the appropriate sentence should be made to feel it bears the same degree of responsibility as that borne by a "true sentencing jury." Informing a jury of its advisory function does not unreasonably diminish the jury's sense of responsibility.** Certainly the reliability of the jury's recommendation is in no way undermined by such non-misleading and accurate information. *See Caldwell,* 105 S.Ct. 2646 (O'Connor, J., concurring). Further, if such information should lead the jury to "shift its sense of responsibility" to the trial court, the trial court, unlike an appellate court, is well-suited to make the initial determination on the appropriateness of the death sentence.

Although the jury in this case was told a number of times throughout the trial that its role was only advisory and the trial judge had ultimate responsibility for the sentence imposed, the jury's role was adequately portrayed and they were in no way misled as to the

> importance of their role. In his final instructions to the jury, the trial judge stressed the significance of the jury's recommendation and the seriousness of the decision they were being asked to make. Therefore, the comments complained of did not deprive the petitioner of a fair determination of the appropriateness of his death. Since there is no merit to Pope's argument that the death sentence was imposed in a fundamentally unfair manner, appellate counsel was not ineffective for failing to raise this point on appeal. *See Middleton v. State,* 465 So.2d 1218, 1226 (Fla.1985) (statements by trial court and prosecutor that jury's role in sentencing was advisory only with final decision resting with court are factually and legally correct; even if such comments were improper they must be objected to at trial as they are not so improper as to constitute fundamental error).
>
> In conclusion, after a careful review of the record in light of each point raised in the petition for writ of habeas corpus, we conclude that the errors complained of, considered individually or collectively, were not fundamental in nature; and therefore, appellate counsel was not seriously deficient for failing to raise issues which he was otherwise procedurally barred from raising. Accordingly, since the petitioner has failed to demonstrate his entitlement to relief, the petition for writ of habeas corpus is denied.

Pope *v. Wainwright,* 496 So.2d 798, 804 (Fla.,1986) (emphasis added). After *Hurst v. Florida*, the jury's penalty phase verdict is no longer advisory and the jury bears the responsibility for a resulting death sentence. Additionally, the individual jurors must know that each has the power to exercise mercy by simply voting against a death recommendation. The State's blanket statement ignores the fact that Mr. Pope's jury, who heard faulty evidence and instructions, returned an advisory death recommendation by a non-unanimous 9 to 3 verdict. The State's Reply amply demonstrates a misunderstanding of the preserved *Caldwell* claim presented on state habeas after the case issued as well as that Mr. Pope is not receiving the

individualized appeal that the Eighth Amendment requires. Accordingly, the State's argument that Mr. Pope's *Caldwell* claim lacks merit must be denied.

Mr. Pope does not dispute that a valid pragmatic necessity exists for finality, rather Mr. Pope argues that the *Ring* cutoff injects a level of arbitrariness that far exceeds the level justified by normal retroactivity rules.[2] Given the Eighth Amendment's concern with "the risk that [a death] sentence will be imposed arbitrarily," this Court's line-drawing contravenes the United States 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).

Additionally, the State's reliance on *Danforth v. Minnesota*, 552 U.S. 264 (2008) to support its claim that limited retroactivity does not violate the Eighth Amendment, perverts the meaning of *Danforth*. *Danforth* stands for the proposition that states may choose to provide **more** protection than federal law requires.

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[2] The State's reliance on *Schriro v. Summerlin*, 542 U.S. 348 (2004) is equally unpersuasive here. *See* Reply at 9. *Summerlin*—a Sixth Amendment right-to-jury-trial issue, involving Arizona's statute, did not address any of the constitutional issues arising under *Hurst v. State*, the Eighth Amendment or the Florida Constitution. In addition, *Summerlin* itself acknowledged that if the Court "[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."

However, *Danforth* does not permit states to create state law that contravenes federal law, as the State suggests. *See* Reply at 7.

Finally, the State fails to explain how *Hitchcock v. State* governs Mr. Pope's claim. The State's position appears to be that Mr. Pope's jury was irrational because it returned a non-unanimous death recommendation given the aggravating factors found by the sentencing court. At the same time the State says, "Clearly, the jury understood its great responsibility and exercised it." Reply at 12. As Mr. Pope explained, after *Hurst v. State*, prejudice and materiality analyses must now contemplate whether a single juror would be persuaded to vote for a life sentence, as that would change the outcome and mandate a life sentence. In light of Mr. Pope's 9-3 death recommendation, if a resentencing were granted, the unpresented evidence could certainly "sway[] one juror to make a critical difference." *See Bevel v. State*, 221 So. 3d 1168, 1182 (2017). The State's harmless error analysis and "rational jury" argument do not defeat the argument for relief. Reply at 12-15.

WHEREFORE, Mr. Pope 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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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been provided by electronic service to Leslie Campbell, Assistant Attorney General, Office of the Attorney General, 1515 N. Flagler Drive, Suite 900, West Palm Beach, Florida 33401 at leslie.campbell @myfloridalegal.com via the Florida Court e-filing portal on the 19th day of February, 2018.

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