No. _____

OCTOBER TERM 2018

IN THE SUPREME COURT OF THE UNITED STATES

VICTOR TONY JONES,

Petitioner

v.

STATE OF FLORIDA,

Respondent

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

APPENDIX

CAPITAL CASE

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INDEX OF APPENDICIES

APPENDIX A

241 So.3d 65
Supreme Court of Florida.

Victor Tony JONES, Appellant,
v.
STATE of Florida, Appellee.

No. SC18–285
[May 2, 2018]

Synopsis

Background: Following affirmance of convictions of first-degree murder and sentence of death, 652 So.2d 346, petitioner sought collateral relief. The Circuit Court, Miami–Dade County, No. 131990CF0501430001XX, Dennis James Murphy, J., denied motion. Petitioner appealed.

[Holding:] The Supreme Court held that decision of Florida Supreme Court in *Hurst v. State*, 202 So.3d 40, in which Court ruled that jurors must unanimously find aggravating factors in support of sentence of death, 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

Decision of Florida Supreme Court in *Hurst v. State*, 202 So.3d 40, in which Court ruled that jurors must unanimously find aggravating factors in support of sentence of death, did not apply retroactively to defendant whose sentences of death became final prior to Court's decision.

Cases that cite this headnote

An Appeal from the Circuit Court in and for Miami–Dade County, Dennis James Murphy, Judge—Case No. 131990CF0501430001XX

Attorneys and Law Firms

Neal A. Dupree, Capital Collateral Regional Counsel, William M. Hennis, III, Litigation Director, and Nicole M. Noël, Assistant Capital Collateral Regional Counsel, Southern Region, Fort Lauderdale, Florida, for Appellant

Pamela Jo Bondi, Attorney General, Tallahassee, Florida, and Melissa R. Shaw, Assistant Attorney General, Miami, Florida, for Appellee

Opinion

PER CURIAM.

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

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

After reviewing Jones' response to the order to show cause, as well as the State's arguments in reply, we conclude that Jones is not entitled to relief. A jury convicted Jones of two counts of first-degree ***66** murder and recommended a sentence of death for each count, one by a vote of ten to two and the other by a vote of twelve to zero. *Jones v. State*, 652 So.2d 346, 348 (Fla. 1995). Following the jury's recommendations, the trial court sentenced Jones to death on both counts. *Id.* Jones' sentences of death became final in 1995. *Jones v. Florida*, 516 U.S. 875, 116 S.Ct.

202, 133 L.Ed.2d 136 (1995). Thus, *Hurst* does not apply retroactively to Jones' sentences of death. *See Hitchcock*, 226 So.3d at 217. Accordingly, we affirm the denial of Jones' motion.

The Court having carefully considered all arguments raised by Jones, 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

241 So.3d 65, 43 Fla. L. Weekly S199

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APPENDIX B

Filing # 68692693 E-Filed 03/02/2018 09:14:08 AM

Supreme Court of Florida

FRIDAY, MARCH 2, 2018

CASE NO.: SC18-285
Lower Tribunal No(s).:
131990CF0501430001XX

VICTOR TONY JONES vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

Appellant shall show cause on or before Thursday, March 22, 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 Friday, April 6, 2018, limited to no more than 15 pages. Appellant may file a reply to the Appellee's reply on or before Monday, April 16, 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:

NICOLE M. NOËL
WILLIAM M. HENNIS III
MELISSA J. ROCA

APPENDIX C

Filing # 69676478 E-Filed 03/22/2018 02:53:39 PM

IN THE SUPREME COURT OF FLORIDA
Case No. SC18-285

VICTOR TONY JONES,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

RESPONSE TO ORDER TO SHOW CAUSE

The Appellant, Victor Tony Jones, by and through undersigned counsel, hereby responds to this Court's order to show cause issued in light of this Court's holding in *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), *cert. denied*, 138 S. Ct. 513 (2017).

INTRODUCTION

Mr. Jones's death sentences were imposed pursuant to an unconstitutional sentencing scheme. Mr. Jones's sentences became "final" in 1995, prior to the issuance of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002). *See Jones v. State*, 652 So. 2d 346 (Fla. 1995).

During the pendency of Mr. Jones's previous appeal to this Court, *Jones v. State*, Case. No. SC15-1549, the U.S. Supreme Court issued *Hurst v. Florida*, 136 S. Ct. 616 (2016). This Court granted Mr. Jones the opportunity to file supplemental

briefs addressing the impact of *Hurst v. Florida* on his case. The supplemental briefing was completed on March 21, 2016. On January 25, 2017, Mr. Jones filed a motion asking this Court to relinquish jurisdiction to the circuit court so that he could file a Rule 3.851 motion based on *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) and the enactment of Chapter 2016-13, which this Court denied. On September 28, 2017, this Court affirmed the denial of Mr. Jones's ID claim and also held that Mr. Jones was not entitled to relief under *Hurst v. Florida*. *Jones v. State*, 231 So. 3d 374, 376 (Fla. 2017).

On October 13, 2017, Jones filed the Rule 3.851 motion that is the subject of this appeal. Claim I (which was mistakenly not numbered in the 3.851 motion) asserted that the Eighth and Fourteenth Amendments require retroactive application of Chapter 2017-1. Claim II was based on the Eighth Amendment, *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), and *Caldwell v. Mississippi*, 472 U.S. 320 (1985). The circuit court held the motion in abeyance until January 9, 2018, when it summarily denied the motion based on this Court's September 28 opinion.[1] However, in that opinion, this Court had affirmed the denial of relief based solely on *Hurst v. Florida*, because that was the only issue before this Court in that appeal.

On February 21, 2018, Mr. Jones filed a notice of appeal of the circuit court's

[1] The lower court also failed to schedule a case management conference pursuant to Fla. R. Crim. P. 3.851 (f)(5)(B).

denial of his October 13, 2017 Rule 3.851 motion, and on March 2, 2017, this Court issued an order directing Mr. Jones to show cause why the trial court's order should not be affirmed in light of *Hitchcock v. State*, SC17-445.

ARGUMENT

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

Mr. Jones has 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. Jones'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 capital cases in which a death sentence has been imposed, the Eighth Amendment requires more scrutiny 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.").

This show cause proceeding indicates that this Court intends to bind Jones to the outcome rendered in Hitchcock's appeal, regardless of the fact that the issues raised in each case are separate and distinct. The fact that this Court has 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. Jones 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). This Court's attempt to confine Mr. Jones to the outcome in *Hitchcock* without first providing him a fair opportunity to demonstrate how the record and facts in his particular case prohibit his execution violates his right to due process. 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*.

II. Mr. Jones is entitled to the retroactive application of *Hurst v. State* under the Eighth Amendment and the Florida Constitution.

Mr. Jones challenged his death sentences 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. Jones 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 reliability 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 Jones'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. Jones's amounts to a denial of due process and a fair opportunity to challenge his sentence of death.

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 of June 24, 2002 as the date at which the State's interest in finality trumped the interests of fairness and curing individual injustice. This 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."). The unreliability of the proceedings giving rise to Jones's death sentences 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. Jones also raised a claim that he is entitled to retroactive application of *Hurst* on the basis of fundamental fairness. Specifically, Mr. Jones 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. Jones's case under the fundamental fairness approach. Prior to trial, Mr. Jones filed a motion requesting a special verdict regarding the theory of guilt because "the life-or-death consequences of the jury's determination of the theory of guilt require special verdicts," and the failure to provide guidance "does not provide the sentencing judge with sufficient information about the jury's finding to provide a proper premise for the decision whether or not to impose the death penalty" (R. 223-25). Mr. Jones further argued that failure to provide the jury with a special verdict violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution as well as Article I, Sections 2, 9, 16, and 17 of the Florida Constitution (R. 224). The trial court denied the motion.

Trial counsel also filed a motion to prohibit the State from minimizing the jury's role in sentencing under *Caldwell v. Mississippi*, 472 U.S. 320 (1985), arguing that to instruct the jury that "their sentencing recommendation is not the final

decision, that their sentencing recommendation is not reviewable, that their recommendation is merely advisory" violates the Eighth and Fourteenth Amendments of the U.S. Constitution as well as Article I, Section 17 of the Florida Constitution (R. 114-15). In addition to the motion, counsel requested a jury instruction with the first sentence of the standard instruction deleted, which provides that "[f]inal decision as to what punishment shall be imposed rests solely with the judge of this court" (R. 355). The request was denied, because the judge found that "[t]he jury is entitled to know that the [sentencing] decision is mine" (R. 2459). Counsel requested an additional instruction that "[t]he fact that your recommendation is advisory does not relieve you of a solemn responsibility, for the court is required to and will give great weight and serious consideration to your recommendation in imposing sentence. It is only under rare circumstances that the court could impose a sentence other than that which the jury recommends" (R. 369), which was denied (R. 2473-74). Defense counsel also challenged the jury instructions regarding the burden of proof for aggravating factors and mitigating factors and the sufficiency finding required by Fla. Stat. 921.141, all of which were denied (R. 355-95, 2454-73).

Additionally, defense counsel filed a *Motion for Order Finding Florida Statue [sic] 921.141(5)(d) Unconstitutional*, in which they challenged Florida's unconstitutional death penalty statute on grounds that the aggravating circumstance

that the defendant was committing a felony at the time of the murder duplicates the elements of first degree felony murder and thus "does not sufficiently narrow the population of death eligible felony-murder Defendants" (R. 260-61). The trial court denied the motion.

During voir dire, the trial court repeatedly instructed the jury that their role was merely advisory, and that they would only be giving a "recommendation" as to the sentences. The jury was told that "the jury's deliberations as to the penalty would be what they call an advisory opinion," and that "[i]n some other states the jury actually determines the penalty but in the State of Florida the jury gives what they call an advisory opinion" (R. 472-73).

Before the penalty phase began, the judge reiterated to the jury that "[f]inal decision as to what punishment shall be imposed rests solely 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" (R. 2511, 2766).The judge also instructed the jury that "it is not necessary that the advisory sentence of the jury be unanimous" (R. 2769). The judge instructed the jury that it could consider and weigh four aggravators: (1) under sentence of imprisonment; (2) prior violent felony; (3) felony murder (robbery); and (4) pecuniary gain (R. 2767-68).

The jury retired to deliberate at 6:38 p.m. on a Friday evening, and returned a recommendation that same evening (the time was not recorded) (R. 2773-74). The

jury "advise[d] and recommend[ed]" sentences of death by a vote of 10 to 2 for the murder of Matilda Nestor and 12 to 0 for Jacob Nestor (R. 353-54). The jury made no factual findings and did not have special verdict forms.

At the *Spencer*[2] hearing and at a competency hearing, defense counsel presented the testimony of Dr. Hyman Eisenstein, who testified that Jones had suffered frontal lobe and organic brain damage and was incompetent to stand trial (R. 2339-89, 2791-2827, 2386). He also testified that Jones was within the mildly intellectually disabled range (R. 2350). This valuable mitigation evidence was never presented to the jury.

Mr. Jones is entitled to an individualized retroactivity analysis of his *Hurst* arguments in these circumstances. An individualized assessment is necessary to determine that he is entitled to retroactivity of the *Hurst* decisions under the fundamental fairness doctrine by virtue of his repeated attempts at trial to challenge Florida's unconstitutional capital sentencing scheme, all of which were thwarted by Florida's pre-*Hurst* law.

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

Claim I below concerned the enactment on March 13, 2017, of Chapter 2017-1 by Florida's legislature. It revised Florida's capital sentencing statute. It constitutes

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

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). And without additional unanimous jury findings, a death sentence is not even a sentencing option for first-degree murder in Florida. The statute as revised by Chapter 2017-1 now requires for a finding of capital first degree murder that the jury must: 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 the benefit of Chapter 2017-1.

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. Jones 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. Jones has been denied the statute's benefit. The murders for which Mr. Jones was convicted and sentenced to death took place on December 19, 1990, years after both the June 3, 1981 murder for which Card was convicted and Parker's 1982 crime. There are many other examples of

murder cases receiving relief for murders that are contemporaneous or far older than Mr. Jones's case.[3] Mr. Jones was originally sentenced to death on March 1, 1993. His two death sentences of death remain intact simply because they became final in 1995. *Jones v. State*, 52 So. 2d 346 (Fla. 1995), *cert. denied, Jones v. Florida*, 116 S. Ct. 202 (1995).

The only distinction between Mr. Jones'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 years before the ones Mr. Jones was convicted of. That distinction rests entirely on arbitrary factors like luck and happenstance. These are factors unconnected to the crime or the defendant's character.

Mr. Jones's claim 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 for crimes committed years before Mr. Jones's 1990 offenses. Their convictions of first-degree murder were final in November 1984 and 1985 respectively, while Mr. Jones's 1993 convictions and sentences of

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[3] *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).

death were affirmed on direct appeal in 1995.

The resentencings ordered for Mr. Card and Mr. Parker mean 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. Jones. Similar to Card and Parker, due process requires that Mr. Jones be afforded the benefit of the new sentencing statute and the substantive changes in law and the elements of the offense of capital first degree

murder that it establishes.[4] Mr. Jones 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. Jones's death sentences violate *Hurst*, and the error is not harmless.

At the outset, a unanimous jury verdict is not merely the ultimate 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 now required by the jury as well. Jones's penalty phase jury in 1993 did not return a verdict making any findings of fact. The

[4] The United States Supreme Court has held "that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). Mr. Jones's death sentences are illegal because they exceed the maximum sentence that is permitted upon a conviction of first degree murder. As this Court recently held: "Florida's new capital sentencing scheme, which requires the jury to unanimously and expressly find all the aggravating facts that were proven beyond a reasonable doubt, unanimously find that sufficient aggravating factors exist to impose death, unanimously find that the aggravating factors outweigh the mitigating factors, and unanimously recommend a sentence of death before the trial judge may consider imposing a sentence of death." *Victorino v. State*, __ So. 3d __, 2018 WL 1193382 at *2. (Fla. March 8, 2018). This simply did not happen here.

only document returned by the jury was an advisory recommendation that a death sentence be imposed in both cases. Mr. Jones'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 recommendation vote was 10 to 2 in Mrs. Nestor's death and 12 to 0 in Mr. Nestor's death.

This Court's recognition that "a reliable penalty phase requires" both unanimous jury findings and a unanimous recommendation of death means that the jury's death recommendations at Mr. Jones'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. 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.").[5]

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 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.

CONCLUSION

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

[5] *See Truehill v. Florida*, 138 S. Ct. 3, 4 (2017) (dissenting, J., Sotomayor joined by J., Breyer and J., Ginsburg).

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 Melissa J. Roca, Assistant Attorney General at cappapp@myfloridalegal.com via the Florida Court e-filing portal on March 22, 2018.

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APPENDIX D

IN THE SUPREME COURT OF THE STATE OF FLORIDA

VICTOR TONY JONES,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

Case No. SC18-285
Lower Ct. No.: 90-50143
Death Penalty Case

STATE'S REPLY TO APPELLANT'S MOTION TO SHOW CAUSE

COMES NOW, APPELLEE, the State of Florida, by and through the undersigned counsel, and submits this reply to APPELLANT Jones' Response to this Court's March 2, 2018, Order to Show Cause and submits that this Court should affirm the circuit court's order denying Jones' post-conviction relief in accordance with this Court's precedent in Asay v. State, 210 So. 3d 1 (Fla. 2016), and Hitchcock v. State, 226 So. 3d 216 (Fla. 2017).

RELEVANT FACTS AND PROCEDURAL HISTORY

Appellant, VICTOR TONY JONES, was convicted of the first-degree murder and armed robbery of Matilda Nestor and Jacob Nestor, and was sentenced to death in 1993. Jones v. State, 652 So. 2d 346 (Fla. 1995). The jury unanimously voted in favor of death for the murder of Mr. Nestor and voted 10-2 in favor of death for the murder of Mrs. Nestor. Id. at 348. The judgment and sentence became final upon

denial of certiorari by the United States Supreme Court on October 2, 1995. Jones v. Florida, 516 U.S. 875 (1995); Fla. R. Crim. P. 3.851(d)(1)(B) (A judgment and sentence become final "on the disposition of the petition for writ of certiorari by the United States Supreme Court, if filed.").

On October 13, 2017, Jones filed his amended successive motion for postconviction relief arguing that he was entitled to relief following this Court's decision in Hurst v. State, 202 So. 3d 40 (Fla. 2016). On January 9, 2018, the postconviction court denied Jones' motion for postconviction relief holding that because his sentence was finalized prior to Ring v. Arizona, 536 U.S. 584 (2002), the postconviction court was bound by this Court's decision in Asay. On February 7, 2018, Jones appealed the postconviction court's decision to this Court. On March 2, 2018, this Court ordered Jones to show cause as to why he should be entitled to relief following this Court's decision in Hitchcock and Asay. Jones filed his response on March 22, 2018. This reply follows.

ARGUMENT

Jones raises four interrelated arguments where he argues that he is entitled to Hurst relief, none of which are unfamiliar to this Court or based on new grounds. First, Jones argues that this show cause order unlawfully denies him his right to a full briefing of his case. Second, Jones argues that he should not be bound by this

Court's Hitchcock and Asay decisions and that Caldwell v. Mississippi[1] applies to his case because his jury was not properly instructed. Third, Jones argues that Chapter 2017-1 is retroactive to his case. Fourth, Jones claims that his sentences violate Hurst and the error is not harmless. As will be shown below, each of these arguments must be denied.

I. This Court Does Not Violate Jones' Due Process Rights Where It Requires Jones To Respond To A Show Cause Order.

Jones first objects to being bound by the briefing in Asay and Hitchcock on due process grounds. Contrary to Jones' assertion, the order to show cause still provides for Jones' case to be analyzed on an individualized determination, and his right to appeal is not unfairly curtailed by the outcome of Hitchcock or any other capital case.[2] The Order to Show Cause is Jones' opportunity to inform this Court why his case is distinguishable from Asay and Hitchcock.

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

[2] This Court's long-standing tag procedure does not violate due process. 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) ("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 "a 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 Justices have criticized the GVR practice, those criticisms are on case

As Jones has pointed to no specific fact that distinguishes his case from Asay or Hitchcock, this precedent applies to Jones. Similar to Jones' arguments, Hitchcock also raised claims based on Chapter 2017-1 and Caldwell insisting retroactivity was required. See Asay, 224 So. 3d at 703 ("Asay's claims applying the retroactive application of Hurst v. State, and Chapter 2017–1, Laws of Florida, are controlled by this Court's decision in Hitchcock v. State, No. SC17–445. Hitchcock, SC17–445, —— So.3d at ——, 2017 WL 3431500, at *1 ("We have consistently applied our decision in Asay V, 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).")). Moreover, Jones argues that the truncated briefing order interferes with his ability to raise arguments that have already been litigated under Strickland v. Washington, 466 U.S. 668 (1984). Hurst does not provide this mechanism; thus, this Court must deny Jones' first argument.

II. Jones' sentence of death does not violate Hurst and his Caldwell claim is meritless.

Jones next asserts that his sentence of death is unconstitutionally and fundamentally unfair based on Florida's prior sentencing scheme. Jones' argument

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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.

fails because as this Court has previously held: (1) Hurst is not retroactive to defendants whose sentences of death were finalized prior to Ring; and (2) Hurst does not breathe new life into Jones' previously litigated and meritless Caldwell claim.

(1) Hurst is not retroactive to Jones' Case.

Jones contends that the Ring-based cutoff date that determines whether a defendant receives Hurst relief unconstitutionally violates Jones' Eighth Amendment rights. This argument is meritless. See Hannon v. State, 228 So. 3d 505, 513 (Fla. 2017) (finding that "Hannon chooses to ignore our precedent because he disagrees with the retroactivity cutoff that we set in Asay V, however that decision is final....").

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 v. Kentucky, 479 U.S. 314, 328 (1987), 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."

Under this "pipeline" concept, only those cases 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 in Ring instead of the decision date in Hurst,

benefits more capital defendants. Thus, the retroactivity cutoff does not violate the Fourteenth Amendment's guarantee of equal protection and due process.

Jones further argues that this Court's decisions to allow partial retroactivity of Hurst v. Florida and Hurst v. State give rise to a violation of Equal Protection Clause and the Eighth Amendment. This claim is also without merit. See Hannon, 228 So. 3d at *513 (finding the retroactivity cutoff date "has been impliedly approved by the United States Supreme Court, which denied certiorari review in Asay v. Florida, No. 16-9033, 2017 WL 1807588 (U.S. Aug. 24, 2017)."). Despite Jones' claims that the result is not fair, this Court has continuously followed its precedent in Asay. Fairness does not require that Hurst v. State be applied to all cases. Inherent in the concept of non-retroactivity is that some defendants will receive the benefit of a new legal development, while others will not.[3] Drawing a line between newer cases that will receive the benefit of a new development in the law and finalized cases that will not receive such benefit is part of the retroactivity

[3] Florida is an outlier for giving **any** retroactive effect to an Apprendi/Ring based error. Moreover, the Supreme Court has not made other rules based on Apprendi retroactive to cases on collateral review. See Schriro v. Summerlin, 542 U.S. 348 at 349, 358 (2004) (determining the extension of Apprendi to judicial factfinding in Ring v. Arizona did not apply retroactively). Apprendi's rule "recharacterizing certain facts as offense elements that were previously thought to be sentencing factors" does not lay "anywhere near that central core of fundamental rules that are absolutely necessary to insure a fair trial." Walker v. United States, 810 F.3d 568, 575 (8th Cir. 2016). "If Apprendi ... does not apply retroactively, then a case extending Apprendi should not apply retroactively." Hughes v. United States, 770 F.3d 814, 818 (9th Cir. 2014)

analysis. See, e.g., Griffith, 479 U.S. at 328 (1987) (all new developments in criminal law must be applied retrospectively to all cases, state or federal, that are pending on direct review); Smith v. State, 598 So. 2d 1063, 1065 (Fla. 1992).

Moreover, while Jones claims the Eighth Amendment is violated by partial retroactivity, the United States Supreme Court has acknowledged that the issue of post-conviction retroactivity, even for federal constitutional violations, is primarily a matter of state law. Danforth v. Minnesota, 552 U.S. 264, 288 (2008). There is no United States Supreme Court Eighth Amendment decision which supports Jones' claim.

In Asay, this Court held that Hurst v. State is not retroactive to any case in which the death sentence was final prior to the June 24, 2002, decision in Ring. Asay v. State, 210 So. 3d 1, 22 (Fla. 2016). This Court established a definitive guideline based on three factors to determine whether a case receives retroactive Hurst relief: 1) the purpose of the new rule; 2) reliance on the old rule; and 3) the effect on the administration of justice. Id. at 17-22. Applying the Witt test, this Court determined that based on the rule of law prior to Ring and the effect on the administration of justice, defendants whose sentences were finalized prior to Ring would not receive Hurst relief. Id. at 17-22. Thus, rather than creating an arbitrary system in deciding which defendants receive Hurst relief, the date of finality of a defendant's sentence dictated whether he or she receives Hurst relief. Id. at 22.

Accordingly, as the judgment in Asay became final on October 7, 1991, Asay was not eligible for any relief under Hurst. Asay, 210 So. 3d at 8. After Asay, this Court has continuously adhered to using the Ring decision date as the cutoff point for retroactivity. Thus far, this Court has failed to extend Hurst v. State and Hitchcock v. State to numerous cases, including Asay, based solely on the fact that the judgments were finalized prior to the decision in Ring.[4]

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[4] Gonzalez v. State, No. SC17-1499, 2018 WL 1443861, *1 (Fla. Mar. 23, 2018); Martin v. State, 43 Fla. L. Weekly S115 (Fla. Feb. 28, 2018); Raleigh v. State, 43 Fla. L. Weekly S114 (Fla. Feb. 28, 2018) (unanimous vote for death); Pope v. State, 43 Fla. L. Weekly S114 (Fla. Feb. 28, 2018); Heath v. State, 43 Fla. L. Weekly S113 (Fla. Feb. 28, 2018); Geralds v. State, 43 Fla. L. Weekly S113 (Fla. Feb. 28, 2018) (unanimous vote for death); Gaskin v. State, 43 Fla. L. Weekly S114 (Fla. Feb. 28, 2018); Byrd v. State, 43 Fla. L. Weekly S115 (Fla. Feb. 28, 2018); Brown v. State, 43 Fla. L. Weekly S113 (Fla. Feb. 28, 2018) (unanimous vote for death); Barwick v. State, 43 Fla. L. Weekly S113 (Fla. Feb. 28, 2018) (unanimous vote for death); Pietri v. State, 44 Fla. L. Weekly S76 (Fla. Feb. 2, 2018); Overton v. State, 44 Fla. L. Weekly S78 (Fla. Feb. 2, 2018); Morton v. State, 44 Fla. L. Weekly S78 (Fla. Feb. 2, 2018); Melton v. State, 44 Fla. L. Weekly S77 (Fla. Feb. 2, 2018); Lawrence v. State, 44 Fla. L. Weekly S76 (Fla. Feb. 2, 2018); Johnson v. State, 43 Fla. L. Weekly S75 (Fla. Feb. 2, 2018); Hodges v. State, 44 Fla. L. Weekly S77 (Fla. Feb. 2, 2018); Griffin v. State, 44 Fla. L. Weekly S77 (Fla. Feb. 2, 2018); Derrick v. State, 44 Fla. L. Weekly S75 (Fla. Feb. 2, 2018); Damren v. State, 44 Fla. L. Weekly S76 (Fla. Feb. 2, 2018); Whitton v. State, 43 Fla. L. Weekly S55 (Fla. Jan. 31, 2018) (unanimous vote for death); Stein v. State, 43 Fla. L. Weekly S56 (Fla. Jan. 31, 2018); Sliney v. State, 235 So. 3d 310 (Fla. 2018); Sireci v. State, 43 Fla. L. Weekly S54 (Fla. Jan. 31, 2018); Rodriguez v. State, 43 Fla. L. Weekly S53 (Fla. Jan. 31, 2018) (unanimous vote for death); Nelson v. State, 235 So. 3d 308 (Fla. 2018) (unanimous vote for death); Miller v. Jones, 43 Fla. L. Weekly S53 (Fla. Jan. 31, 2018); Krawczuk v. State, 43 Fla. L. Weekly S54 (Fla. Jan. 31, 2018); Gordon v. State, 235 So. 3d 311 (Fla. 2018); Consalvo v. State, 235 So. 3d 307 (Fla. 2018); Whitfield v. State, 235 So. 3d 297 (Fla. 2018); Sochor v. State, 235 So. 3d 304 (Fla. 2018); Rogers v. State, 235 So. 3d 306 (Fla. 2018) (unanimous vote for death); Pace v. State, 43 Fla. L. Weekly S50 (Fla. Jan. 30, 2018); Occhicone v. State, 235 So. 3d

On August 10, 2017, in Hitchcock, this Court reaffirmed its Asay decision:

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299 (Fla. 2018); Mendoza v. State, 235 So. 3d 302 (Fla. 2018); Lamarca v. State, 43 Fla. L. Weekly S52 (Fla. Jan. 30, 2018); Gudinas v. State, 235 So. 3d 503 (Fla. 2018); Davis v. Jones, 235 So. 3d 301 (Fla. 2018); Booker v. State, 235 So. 3d 298 (Fla. 2018); Bell v. State, 235 So. 3d 287 (Fla. 2018) (unanimous vote for death); Bowles v. State, 235 So. 3d 292 (Fla. 2018) (unanimous vote for death); Brown v. State, 235 So. 3d 289 (Fla. 2018); Davis v. State, 235 So. 3d 295 (Fla. 2018); Foster v. State, 235 So. 3d 290 (Fla. 2018); Foster v. State, 235 So. 3d 294 (Fla. 2018); Fotopoulos v. State, 43 Fla. L. Weekly S47 (Fla. Jan. 29, 2018); Gamble v. State, 235 So. 3d 288 (Fla. 2018); Jennings v. State, 43 Fla. L. Weekly S46 (Fla. Jan. 29, 2018); Long v. State, 235 So. 3d 293 (Fla. 2018) (unanimous vote for death); Trotter v. State, 235 So. 3d 284 (Fla. 2018); Trepal v. State, 235 So. 3d 281 (Fla. 2018); Stewart v. State, 235 So. 3d 798 (Fla. 2018); Morris v. State, 43 Fla. L. Weekly S45 (Fla. Jan. 26, 2018); Lightbourne v. State, 235 So. 3d 285 (Fla. 2018); Kelley v. State, 235 So. 3d 280 (Fla. 2018); Jeffries v. State, 235 So. 3d 283 (Fla. 2018); Hartley v. State, 43 Fla. L. Weekly S43 (Fla. Jan. 26, 2018); Finney v. State, 235 So. 3d 279 (Fla. 2018); Anderson v. State, 235 So. 3d 277 (Fla. 2018); Dillbeck v. State, 234 So. 3d 558 (Fla. 2018); Steven Maurice Evans, 43 Fla. L. Weekly S29 (Fla. Jan. 24, 2018); Jackson v. State, 43 Fla. L. Weekly S30 (Fla. Jan. 24, 2018); Kokal v. State, 43 Fla. L. Weekly S28 (Fla. Jan. 24, 2018); Lucas v. State, 234 So. 3d 647 (Fla. 2018); Marquard v. State, 234 So. 3d 560 (Fla. 2018); Sweet v. State, 234 So. 3d 646 (Fla. 2018); Taylor v. State, 234 So. 3d 649 (Fla. 2018); Thomas v. State, 234 So. 3d 559 (Fla. 2018); Trease v. State, 43 Fla. L. Weekly S28 (Fla. Jan. 24, 2018); Atwater v. State, 234 So. 3d 550 (Fla. 2018); Beasley v. State, 234 So. 3d 553 (Fla. 2018); Burns v. State, 234 So. 3d 555 (Fla. 2018) (unanimous vote for death); Clark v. State, 43 Fla. L. Weekly S25 (Fla. Jan. 23, 2018); Cole v. State, 234 So. 3d 644 (Fla. 2018) (unanimous vote for death); Ford v. State, 43 Fla. L. Weekly S26 (Fla. Jan. 23, 2018); Puiatti v. State, 234 So. 3d 551 (Fla. 2018); Rhodes v. State, 234 So. 3d 554 (Fla. 2018); Willacy v. State, 43 Fla. L. Weekly S24 (Fla. Jan. 23, 2018); Windom v. State, 234 So. 3d 556 (Fla. 2018); Alston v. State, 43 Fla. L. Weekly S23 (Fla. Jan. 22, 2018); Bates v. State, 43 Fla. L. Weekly S22 (Fla. Jan. 22, 2018); Bradley v. Jones, 43 Fla. L. Weekly S24 (Fla. Jan. 22, 2018); Branch v. State, 234 So. 3d 548 (Fla. 2018); Jones v. State, 234 So. 3d 545 (Fla. 2018); Peterka v. State, 43 Fla. L. Weekly S21 (Fla. Jan. 22, 2018); Phillips v. State, 234 So. 3d 547 (Fla. 2018); Stephens v. State, 43 Fla. L. Weekly S21 (Fla. Jan. 22, 2018); Suggs v. State, 234 So. 3d 546 (Fla. 2018); Walls v. State, 43 Fla. L. Weekly S23 (Fla. Jan. 22, 2018) (unanimous vote for death).

> 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 216, 217 (Fla. 2017); see also Asay v. State, 224 So. 3d 695, 704 (Fla. 2017) (rejecting the claim that chapter 2017-1, Laws of Florida, "creates a substantive right to a life sentence unless a jury unanimously recommends otherwise"); Lambrix v. State, 227 So. 3d 112, 113 (Fla. 2017) (rejecting arguments based on the Eighth Amendment, denial of due process and equal protection, and a substantive right based on new legislation).

In this case, Jones' sentence became final on October 2, 1995, which is prior to the June 24, 2002 decision in Ring. As such, Hurst v. State is not retroactive to this case. Like Hitchcock, Jones further raises various constitutional provisions, including a fundamental fairness claim, to argue that Hurst v. State should be retroactively applied to him. However, just as in Asay, as reaffirmed by Hitchcock, Hurst v. State does not apply retroactively. Therefore, the claim must be denied.

(2) Even if Hurst applied, Jones' jury unanimously voted in favor of the death penalty during the sentencing phase and was properly instructed.

Jones attempts to persuade this Court, that even though Jones received a unanimous sentence of death for the murder of Mr. Nestor, that this sentence should be vacated because the sentencing jury was improperly instructed in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985), which he argues requires Hurst relief.

Not only has this argument been previously litigated in Jones' case,[5] but this Court has denied this identical claim. In Hall v. State, this Court addressed a Caldwell claim in the context of Hurst relief and found that, "challenges to 'the standard jury instructions that refer to the jury as advisory and that refer to the jury's verdict as a recommendation violate **Caldwell v. Mississippi . . . are without merit**. Hall v. State, 212 So. 3d 1001, 1032-33 (Fla. 2017) (citing Dufour v. State, 905 So. 2d 42, 67 (Fla. 2005)) (emphasis added).

More recently, this Court addressed a Caldwell claim in Hannon, where this Court found the Caldwell claim to be meritless and procedurally barred. See Hannon, 228 So. 3d at 513 (finding Hannon's Caldwell claim to be procedurally barred, and noting, "Hannon's Eighth Amendment claim is essentially a challenge to the

[5] Jones v. State, 855 So. 2d 611, 619 no. 5 (Fla. 2003).

arbitrariness of our retroactivity decision in Asay V."). As Jones alleges the same issue, his claim is meritless and procedurally barred.[6]

More importantly, the accuracy of Jones' death sentence is not at issue here. In fact, the United States Supreme Court in Schriro v. Summerlin, has already dictated that "for every argument why juries are more accurate factfinders, there is another why they are less accurate." Schriro v. Summerlin, 524 U.S. 348, 356 (2004). As a result, Jones' argument that his previously denied claim merits a new review because the jury was not properly instructed is meritless and his claim must be denied.

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[6] Jones filed his initial motion for postconviction relief under Florida Rule of Criminal Procedure 3.850 on March 24, 1997. (PCR 38-70) He amended his motion for postconviction relief on March 9, 1999 (PCR 93- 202). Jones raised a Caldwell claim in his motion for postconviction relief. (PCR 168-69) (CLAIM XIII MR. JONES'S SENTENCING JURY WAS MISLED BY COMMENTS, QUESTIONS, AND INSTRUCTIONS THAT UNCONSTITUTIONALLY AND INACCURATELY DILUTED THE JURY'S SENSE OF RESPONSIBILITY TOWARDS SENTENCING IN VIOLATION OF THE EIGTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. TRIAL COUNSEL WAS INEFFECTIVE FOR NOT PROPERLY OBJECTING.). The post-conviction court heard argument on this claim and denied the claim as he could not meet the prejudice prong under Strickland v. Washington, 466 U.S. 668 (1984), and the claim should have been raised on direct appeal, thus it was procedurally barred. See Post-conviction Court Order on Amended Motion for Post-conviction Relief, Mar. 8, 2001. Jones raised this claim on appeal before the Florida Supreme Court. See Jones v. State, 855 So. 2d 611, 619 n.5 (Fla. 2003). However, the Supreme Court affirmed the lower court's decision noting that the claim was procedurally barred without requiring further discussion. Id. at 619.

III. Chapter 2017-1, also known as section 921.141 of the Florida Statutes, is not retroactive to Jones' case.

Jones' attempt to avoid this Court's retroactivity ruling by asserting a substantive statutory right under the new statute is patently without merit. Nothing in the text of the new statute or legislative history of Chapter 2017-1, Laws of Florida, evinces a legislative intent to abrogate all prior death sentences and require a new penalty phase proceeding for every defendant on death row. Indeed, the Senate Staff Analysis of S.B. 280 refers to the Florida Supreme Court's decision in Asay. See Senate Staff Analysis dated Feb. 21, 2017, at 6. The Senate Staff Analysis states:

> It is the date of the Ring opinion (2002) that has become the Florida Supreme Court's bright line for deciding Hurst's retroactivity. If a sentence became final prior to the Ring decision, the defendant is not entitled to Hurst relief. If, however, the sentence became final on or after the date of the Ring opinion, Hurst applies.

Id. at 6-7. "For those defendants entitled to Hurst relief, if the jury did not vote unanimously for a death sentence, based on case histories since Hurst, it appears those cases will be remanded for new penalty phases." Id. at 7.

The analysis also indicated that this Court's decision on the retroactivity of Hurst will "significantly increase both the workload and associated costs of public defender offices for several years to come." Id. at 7. The Legislature certainly did not hint at any desire to increase the cost of Hurst by expanding its application to all capital cases. Additionally, Chapter 2017-1 was not meant to apply as a substantive right as it merely codified the language of Hurst. The new statute is completely

procedural and applies to any trial held after the effective date of the statute. Therefore, the new death penalty statute does not apply retrospectively to Jones.

IV. Even if this Court were to conduct a harmless error analysis, Jones would not receive Hurst relief where the jury voted unanimously for death.

Even if Jones was to receive a harmless error analysis, this Court must only determine whether the record shows beyond a reasonable doubt that the jury would have unanimously recommended death, had it been properly instructed. See Hurst v. State, 202 So. 3d at 68.

Here, Jones' claim for Hurst relief is foreclosed because the jury made one unanimous recommendations for death. This Court has repeatedly held that where a jury unanimously recommends death, even in post-Ring cases, that the defendant will not receive Hurst relief.[7] Accordingly, because the jury was instructed according to the proper law at the time as dictated in Asay, Jones' claim is meritless. Hurst does not breathe new life into claims that this Court has already decided. See Jones,

[7] See Franklin v. State, 43 Fla. L. Weekly S86 (Fla. Feb. 15, 2018); Philmore v. State, 234 So. 3d 567 (Fla. 2018); Tundidor v. State, 221 So. 3d 587 (Fla. 2017) (rehearing denied June 28, 2017); Morris v. State, 219 So. 3d 33 (Fla. 2017) (rehearing denied June 7, 2017); Oliver v. State, 214 So. 3d 606 (Fla. 2017); Middleton v. State, 220 So. 3d 1152 (Fla. 2017) (rehearing denied June 1, 2017); Jones v. State, 212 So. 3d 321 (Fla. 2017) (*cert. denied* Jones v. Florida, 138 S. Ct. 175 (mem.) (Oct. 2, 2017)); Truehill v. State, 211 So. 3d 930 (Fla. 2017) (*cert. denied* Truehill v. Florida, 138 S. Ct. 3 (mem.) (Oct. 16, 2017)); Hall v. State, 212 So. 3d 1001 (Fla. 2017) (rehearing denied, Mar. 28, 2017); Kaczmar v. State, 228 So. 3d 1 (Fla. 2017); Knight v. State, 225 So. 3d 661 (Fla. 2017) (rehearing denied, Sept. 13, 2017); Wood v. State, 209 So. 3d 1217 (Fla. 2017); King v. State, 211 So. 3d 866 (Fla. 2017) (rehearing denied, Mar. 13, 2017).

855 So. 2d at 619 (affirming the denial of Jones' Caldwell claim where it was procedurally barred). Thus, pursuant to Hitchcock and Asay, this Court should reject Jones' claims in his response to this Court's order to show cause.

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 2nd day of April, 2018, 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**, Counsel for Appellant, CCRC-South, at hennisw@ccsr.state.fl.us AND ccrcpleadings@ccsr.state.fl.us; and **Nicole M. Noel**, Assistant Capital Collateral Counsel, at noeln@ccsr.state.fl.us.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of the type used in this brief is 14-point Times New Roman, in compliance with Fla. R. App. P. 9.210(a)(2).

/s/ Melissa R. Shaw
COUNSEL FOR APPELLEE

APPENDIX E

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IN THE SUPREME COURT OF FLORIDA
Case No. SC18-285

VICTOR TONY JONES,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

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

The Appellant, Victor Tony Jones, 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. Jones states:

I. Mr. Jones has been denied due process.

In his Response, Mr. Jones 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. Jones 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. Jones 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. Jones'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. Jones 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. Jones 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. Jones has offered nothing to cause this Court to alter its precedent and that *Hitchcock* and *Asay* foreclose Jones's challenges here. *see* Reply at 4, but this is simply wrong. Mr. Jones has raised issues not addressed in *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), as set out in his Response. The State's arguments lack merit and this Court should reject them.

Initially, it should be noted that the State's Reply purports to respond to Mr. Jones's arguments, but, for the most part, avoids and/or ignores much of Mr. Jones's argument. The State contends that Mr. Jones is disentitled to relief from his death sentence in light of *Lambrix v. State,* 227 So. 3d 112, 113 (Fla. 2017), to argue Mr. Jones's Eighth Amendment, Due Process, and Equal Protection claims have already been addressed and rejected. *See* Reply at 10. Similar idiosyncratic presentations also render inapplicable to Mr. Jones 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)

II. Other Issues

The State contends this Court has already determined that Mr. Jones's *Caldwell*[1] claim is untimely and procedurally barred. *See* Reply at 11-12. 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 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).
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> 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

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

> 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.). *See also Guardado v. Jones*; *Cozzie v. Florida*, 584 U.S. (2018) (Sotomayor, J., dissenting). Counsel acknowledges this Court's recent response to this issue and the Eighth Amendment challenges outlined based on *Caldwell* and the jury instructions regarding the jury's advisory sentencing recommendation. *See Reynolds v. State,* __ So. 3d __ (Fla. 2018), 2018 WL 1633075 (April 5, 2018).

The State also fails to acknowledge that the relevant "lead case" (*Hitchcock*) did not address the applicability of *Caldwell.* The "law at the time" of the jury instruction in Mr. Jones' case 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. The State does not address Mr. Jones's claim that

fundamental fairness requires reversal, relying only on the argument that since *Hurst v. State* is not retroactive to cases that became final prior to June 24, 2002, no further consideration need be give Mr. Jones's case. Reply at 10. If there is an "individualized determination" to be made by this Court, as the State suggests, there is, in the State's view, no avenue for such consideration. (Reply at 3).

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. Jones's jury, who heard faulty evidence and instructions, returned an advisory death recommendation in one of his two cases by a non-unanimous 10 to 2 verdict and in the other by a unanimous 10 to 0 verdict. The State's Reply amply demonstrates a misunderstanding of the preserved *Caldwell* claim as well as that Mr. Jones is not receiving the individualized appeal that the Eighth Amendment requires. Accordingly, the State's argument that Mr. Jones's *Caldwell* claim lacks merit must be denied.

Mr. Jones does not dispute that a valid pragmatic necessity exists for finality, rather Mr. Jones argues that the *Ring* cutoff injects a level of arbitrariness that far exceeds the level justified by normal retroactivity rules. 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).

The State also contends that Mr. Jones's claim concerning Chapter 2017-1 does not require Mr. Jones be resentenced. Reply at 13. As such, the State relies on *Asay* and a Senate Staff Analysis of S.B. 280 from February 21, 2017 to support its position. The State claims that "[t]he Legislature certainly did not hint at any desire to increase the cost of Hurst by expanding its application to all capital cases." Reply at 13. This position completely ignores the arguments based on the Eighth Amendment that to treat Chapter 2017-1 as anything other than retroactive creates an arbitrariness that violates the Eighth Amendment. It also ignores the Senate's 2018 vote on Senate Bill 870 before this year's session ended to make *Hurst* fully retroactive. As such, the State's argument is non responsive and must fail.

Mr. Jones argued in his Response to the Show Cause order that due process requires that Mr. Jones be afforded the benefit of the new sentencing statute and the substantive changes in law and the elements of the offense of capital first degree murder that it establishes. The United States Supreme Court has held "that the Due Process Clause protects the accused against conviction except upon proof beyond a

reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). Mr. Jones' death sentence is illegal because it exceeds the maximum sentence that is permitted upon a conviction of first degree murder. As this Court recently held: "Florida's new capital sentencing scheme, which requires the jury to unanimously and expressly find all the aggravating facts that were proven beyond a reasonable doubt, unanimously find that sufficient aggravating factors exist to impose death, unanimously find that the aggravating factors outweigh the mitigating factors, and unanimously recommend a sentence of death before the trial judge may consider imposing a sentence of death." *Victorino v. State*, ___ So. 3d ___, 2018 WL 1193382 at *2. (Fla. March 8, 2018). This simply did not happen in Mr. Jones' case.

WHEREFORE, Mr. Jones 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 Melissa Roca Shaw, Assistant Attorney General, Office of the Attorney General, 1 SE 3rd Ave., Suite 900, Miami, FL 33131 at Melissa.Shaw@myfloridalegal.com via the Florida Court e-filing portal on the 16th day of April, 2018.

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