APPENDIX A

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC17-

JASON DIRK WALTON.,

Petitioner,

v.

JULIE L. JONES,

Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

On March 13, 2017, Chapter 2017-1 became law. It revised Florida's capital sentencing statute, § 921.141, Fla. Stat. As revised, § 921.141 now provides that a defendant convicted of first degree murder cannot receive a death sentence unless the State convinces a jury to return a unanimous death recommendation. Before it can return a unanimous death recommendation, the jury must first "identify[] each aggravating factor" that it has unanimously found proven beyond a reasonable doubt. *See* § 921.141(2)(b). Next, the jury must unanimously find that the aggravating factors that it unanimously found to exist are sufficient to justify a sentence of death. Then, the jury must unanimously find that "aggravating factors exist which outweigh the mitigating circumstances found to exist." *See* § 921.141(2)(b)(2). Finally, having made these unanimous findings, the jurors must then unanimously vote in favor of recommending a death sentence. Only if the jury has returned a unanimous death recommendation, is a judge authorized under § 921.141 to impose a death sentence.

Due to legislative intent, the substantive right that a defendant convicted of first degree murder receives under Chapter 2017-1 will apply retrospectively, i.e. to first degree murder prosecutions in which the homicide at issue occurred before the March 13, 2017 enactment of Chapter 2017-1. This means that defendants

convicted of first degree murder before the enactment of Chapter 2017-1 who now receive a resentencing will have the right to a life sentence unless the jury unanimously recommends a death sentence even if the first degree murder convictions were final in 1982, 1984, or 1985.

A resentencing has been order for William White whose first degree murder conviction became final in 1982, and has remained intact ever since. *White v. State*, 415 So. 2d 719 (Fla. 1982), *cert denied*, 459 U.S. 1155 (1982). The resentencing was recently ordered by a circuit court. Though the State filed a notice of appeal, it has since filed a notice of voluntary dismissal of its appeal. *See White v. State*, Case No. SC17-995. A resentencing has also been ordered for James Card whose first degree murder conviction became final in 1984, and has remained intact ever since. This Court recently vacated his death sentence and ordered the resentencing. *Card . Jones*, _ So. 3d _, 2017 WL 1743835 (Fla. May 4, 2017). And, a resentencing has been ordered for J.B. Parker whose first degree murder conviction became final in 1985. *Parker v. State,* 476 So. 2d 134 (Fla. 1985). The resentencing was recently ordered by a circuit court. While the State did file an appeal, it later filed a notice of voluntary dismissal of its appeal. *See Parker v. State,* Case No. SC17-794. At the resentencings for White, Card and Parker, the issue will be what sentence to impose on their first degree murder

convictions that were final in the early 1980's. Because Chapter 2017-1 will apply retrospectively at the resentencings, White, Card and Parker will have the substantive right to life sentences unless their resentencing juries return unanimous death recommendations. This substantive right will operate much like the right to a presumption of innocence that attaches to a criminal defendant who is charged with a criminal offense, except here it attaches to defendants at the time a first degree murder conviction is entered.

As it appears now, the substantive right to a presumption of a life sentence unless a jury unanimously returns a death recommendation will attach to all first degree murder convictions regardless of the date of conviction, so long as any death sentence previously imposed was not final prior to June 24, 2002. Even then if for any reason the previously imposed death sentence is vacated and a resentencing order, the convicted defendant will be able to exercise his substantive right to life sentence unless the State convinces a jury to return a unanimous death recommendation.

In operation, this means similarly situated defendants will be treated differently. When William White is sentenced on his 1982 first degree murder conviction, he will have a presumption of life unless the jury unanimously returns a death recommendation. When James Card is sentenced on his 1984 first degree

murder conviction, he will have a presumption of life unless the jury unanimously returns a death recommendation. When J.B. Parker is sentenced on his 1985 first degree murder conviction, he will have a presumption of life unless the jury returns a unanimous death recommendation. But as to Mr. Walton's 1986 first degree murder conviction, he will only receive a presumption of life if his previously imposed death sentence is vacated and a resentencing is ordered.

Mr. Walton's first degree murder convictions became final in February of 1986 when this Court denied rehearing after it had affirmed his first degree murder convictions, while vacating his death sentences and ordering a new penalty phase. *Walton v. State*, 481 So. 2d 1197 (Fla. 1985). Mr. Walton's first degree murder convictions were final 27 months after White's first degree murder conviction was final, 15 months after Card's first degree murder conviction was final, and 4 months after Parker's first degree murder conviction was final. Thus, Mr. Walton, William White, James Card and J.B. Parker were all convicted of the same criminal offense, first degree murder. Their convictions have been final since the early and mid 1980's, with the finality date of Mr. Walton's conviction being the most recent. Despite having been convicted of first degree murder before Mr. Walton was, White, Card and Parker are now to be given a right to a life sentence unless a jury unanimously recommends death, while the right is not extended to

Mr. Walton on his later on his later in time convictions.

At issue here is whether it is constitutional for the State of Florida to extend to White, Card and Parker the substantive right to a life sentence unless a jury unanimously recommends a death sentence, and not extend the same substantive right to Mr. Walton when all four men were convicted of the same offense.

Florida statutory law now precludes the imposition of a death sentence unless a jury unanimously returned a death recommendation. The change from an advisory recommendation by a majority vote to a unanimity requirement before a death sentence is authorized reflects a decision to increase the reliability of resulting death sentences. In Mr. Walton's case, his resentencing jury did not return unanimous death recommendations. Instead, the jury returned three 9-3 death recommendations. That means that his death sentences are less reliable and do not meet the reliability standard under today's retrospective substantive law. As a result, Mr. Walton's death sentences can no longer be allowed to stand.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). *See* Art. 1, Sec. 13, Fla. Const. The petition presents issues which concern the continued viability and constitutionality of Walton's death sentences. The Florida Constitution guarantees

that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Art. I, § 13, Fla. Const. Pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, § 3(b)(9), Fla. Const., this Court has original jurisdiction.

In its jurisdiction to issue writs of habeas corpus, this Court has an obligation to protect Walton's rights under the Florida Constitution to be free from cruel or unusual punishment and it has the power to enter orders assuring that those rights are protected. *Allen v. State*, 636 So. 2d 494, 497 (Fla. 1994); *Shue v. State*, 397 So. 2d 910 (Fla. 1981); *Makemson v. Martin County*, 491 So. 2d 1109 (1986). This Court must protect Walton's Sixth, Eighth and Fourteenth Amendment rights under the United States Constitution. Where state or federal constitutional rights are concerned, this Court may not abdicate its responsibility in deference to the legislative or executive branches of government. *Rose v. Palm Beach City*, 361 So. 2d 135, 137 n.7 (1978). This Court is required to exercise its independent power of judicial review. *Ford v. Wainwright*, 477 U.S. 399 (1986). This Court has recently exercised its habeas jurisdiction to vacate death sentences that no longer comported with either the United States Constitution or the Florida Constitution. *Hertz v. Jones*, _ So. 3d _, 2017 WL 2210402 (Fla. May 18, 2017); *Hernandez v. Jones*, _ So. 3d _, 2017 WL 1954985 (Fla. May 11, 2017); *Card . Jones*, _ So. 3d _, 2017 WL 1743835 (Fla. May 4, 2017); *Brooks v. Jones*, 2017

WL 944235 (Fla. March 10, 2017).

PROCEDURAL HISTORY

On March 2, 1983, Mr. Walton and three co-defendants were indicted in Pinellas County on three counts of first degree murder arising from the shooting deaths of three men whose bodies had been discovered in a Highpoint residence on June 18, 1982. Mr. Walton was tried in February of 1984. He was found guilty as charged on all three first degree murder counts. The jury returned advisory death recommendation, and the judge imposed three death sentences.

On December 19, 1985, this Court affirmed Mr. Walton's convictions, but vacated his death sentences. A new penalty phase was ordered because the admission of out-of-court statements by Cooper and McCoy violated Mr. Walton's constitutional right of confrontation. *Walton*, 481 So. 2d at 1200. Rehearing was denied on February 19, 1986.

On remand, the State chose to again seek death sentences for Mr. Walton. On August 14, 1986, the resentencing jury returned advisory death recommendations by a vote of 9 to 3. Three of Mr. Walton's resentencing jurors voted in favor of life sentences on all three murder counts. On August 29, 1986, the presiding judge followed the jury's 9-3 death recommendation and imposed three death sentences.

Mr. Walton's second direct appeal followed. Though error was found in the resentencing proceedings, this Court ruled the error was harmless and affirmed the imposition of three death sentences. *Walton v. State*, 547 So. 2d 622, 625 (Fla. 1989).

In the collateral proceedings that followed, additional errors and defects in the resentencing proceedings were acknowledged, but found either insufficiently prejudicial or procedurally barred. Accordingly, no collateral relief was forthcoming despite the recognized errors. *See Walton v. State*, 847 So. 2d 438 (Fla. 2003); *Walton v. Crosby*, 859 So. 2d 516 (Fla. 2003); *Walton v. State*, 3 So. 3d 1000, 1008 (Fla. 2009); *Walton v. State*, 77 So. 3d 639, 643 (Fla. 2011).

In May of 2015, Mr. Walton filed a successive Rule 3.851 motion on the basis of the life sentences that his co-defendant, Richard Cooper, received in May of 2014. After the circuit court found that the newly discovered evidence met the first prong of the *Jones v. State* standard for reviewing such claims, it denied relief finding that the second prong was not satisfied. Mr. Walton's appeal of that order is pending before this Court and more fully discussed in the Amended Initial Brief filed in *Walton v. State*, Case No. SC16-448, on June 2, 2017.[1]

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[1]The Initial Brief that Mr. Walton filed in that case on May 15, 2017 was struck because it exceeded 75 pages. In that Initial Brief, Mr. Walton had included the claim that is being presented in this petition as an argument. After the brief

BASIS FOR HABEAS CORPUS RELIEF

CLAIM

THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND THE FLORIDA CONSTITUTION, REQUIRE MR. WALTON RECEIVETHE RETROACTIVE APPLICATION OF THE SUBSTANTIVE RIGHT ESTABLISHED BY CHAPTER 2017-1, WHICH PRECLUDES THE IMPOSITION OF A DEATH SENTENCE UNLESS A JURY UNANIMOUSLY RETURNS A DEATH RECOMMENDATION AND ENHANCES RELIABILITY.

A. The road to Chapter 2017-1.

With the March 7, 2016, enactment of Chapter 2016-13, a substantive right was statutorily created - a capital defendant in Florida for the first time was given the right to a life sentence unless 10 of 12 jurors voted to recommend a death sentence.[2] *See Perry v. State*, 210 So. 3d 630, 638 (Fla. 2016) ("The changes

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was struck, Mr. Walton realized that because the claim herein concerning the March 13, 2017 enactment of Chapter 2017-1 had not been before the circuit court in the Rule 3.851 proceedings, it could, and perhaps should, be presented to this Court in a petition for a writ of habeas corpus. This Court's recent rulings in *Hertz v. Jones*, *Hernandez v. Jones*, *Card v. Jones*, and *Brooks v. Jones* clearly show that a habeas petition is viable way to present the claim. When Mr. Walton filed his Amended Initial Brief in Case No. SC16-488, he omitted the argument that is now presented in this petition.

[2]Previously, the statute provided that a jury would return an advisory sentencing recommendation. For the jury's verdict to constitute a death recommendation, seven of the twelve jurors had to vote in favor of the death recommendation. Because the jury's recommendation was advisory, it was not binding on the judge. Just because a jury returned a life recommendation did not

further mandate that a life sentence be imposed unless ten or more jurors vote for death."). Chapter 2016-13 rewrote § 921.141, and eliminated a judge's ability to override a jury's life recommendation. This meant a defendant was entitled to a life sentence unless ten or more jurors voted to return a death recommendation. Stated another way, the statute created a presumption in favor of a life sentence that could only be overcome if ten or more jurors voted to recommend a death sentence. Prior to the enactment of Chapter 2016-13, a defendant did not have a right to a life sentence even if the jury returned a life recommendation. There was no presumption in favor of a life sentence that the State was required to overcome when seeking the imposition of a death sentence.

On October 14, 2016, this Court issued *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). There, this Court found that the Florida Constitution guarantee to trial by jury in criminal cases included a right to a unanimous verdict. A defendant was and is presumed innocent until a unanimous jury returns a guilty verdict unanimously finding the elements of the criminal offense were proven. Based upon this right under the Florida Constitution, this Court concluded that a jury in the penalty phase of a capital case had to unanimously find all of the statutorily

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mean that the defendant was entitled to a life sentence on his first degree murder conviction. *See Marshall v. State*, 604 So. 2d 799 (Fla. 1992).

defined facts that were necessary to authorize the imposition of a death sentence. *Hurst v. State*, 202 So. 3d at 44 ("We reach this holding based on the mandate of *Hurst v. Florida* and on Florida's constitutional right to jury trial, considered in conjunction with our precedent concerning the requirement of jury unanimity as to the elements of a criminal offense.").

At the same time that *Hurst v. State* issued, this Court issued *Perry v. State*. On the basis of *Hurst v. State*, this Court in *Perry v. State* found the 10-2 provision in Chapter 2016-13 unconstitutional under the Florida Constitution. In order to be constitutional, the jury findings required in Chapter 2016-13 had to be found unanimously. Findings made by ten of twelve jurors did not comport with the Florida Constitution.

As to the remainder of Chapter 2016-13, this Court found it to be constitutionally valid. This Court specifically recognized that Chapter 2016-13 **was intended to be applied retrospectively** to all pending homicide prosecutions including those in which the homicide had occurred prior to March 7, 2016, the date Chapter 2016-13 was enacted. This Court observed that such retrospective application was proper. *Id.* at 635 ("we conclude that ... most of the provisions of the Act can be construed constitutionally and could otherwise be validly applied to pending prosecutions"). *See Evans v. State*, 213 So. 3d 856 (Fla. 2017).

In *Perry v. State*, this Court held that the 10-2 provision was not severable. Under separation of powers as provided by the Florida Constitution, this Court left it to the Florida Legislature to rewrite the statute in a constitutional fashion.

On March 13, 2017, Chapter 2017-1 was enacted. It was meant to statutorily fix the defect identified in *Perry v. State*. The only change made to the revised § 921.141 was to replace the 10-2 provision with one requiring the jury to unanimously return a death recommendation before a judge was authorized to impose a death sentence. No change was made to the statute evincing an intent to retreat from the retrospective application of the rewritten § 921.141.

As a result, § 921.141 now provides that a defendant convicted of first degree murder is entitled to a life sentence unless a jury returns a unanimous death recommendation. Just as a criminal defendants who is charged with a crime is entitled to a presumption of innocence until a jury returns a unanimous guilty verdict, a defendant convicted of first degree murder is entitled to a presumption of a life sentence until a jury returns a unanimous death recommendation.

B. Retrospective or prospective only - how is it determined?

This Court has explained that the standard for determining whether a decision by this Court or the US Supreme Court is to be applied retroactively does not apply when the issue concerns the retrospective application of a statutory

change in law. Thus, *Witt v. State*, 387 So. 2d 922 (Fla. 1980), has no application to the question of whether Mr. Walton should receive the benefit of Chapter 2017-1. *Thompson v. State*, 887 So. 2d 1260, 1263-64 (Fla. 2004) ("**the question of retroactivity under *Witt* is not applicable to this case because we are examining a change in the statutory law of this state not a change in decisional law emanating from this Court or the United States Supreme Court.**") (emphasis added).

When there is a change in statutory law, there is a presumption that any substantive change only applies prospectively. "[I]n the absence of clear legislative intent to the contrary, a law affecting substantive rights is presumed to apply prospectively." *Arrow Air, Inc. v. Walsh*, 645 So. 2d 422, 424 (Fla. 1994). "The general rule is that in the absence of clear legislative intent to the contrary, a law affecting substantive rights, liabilities and duties is presumed to apply prospectively." *Metropolitan Dade County v. Chase Federal Housing Corp.*, 737 So. 2d 494, 499 (Fla.1999).

On the other hand remedial statutes may be applied retrospectively. A remedial statute is a statute designed to fix a statutory defect. However, a statute that remedies the statutory defect by establishing a substantive right or imposes new legal burden is not considered remedial in determining whether to apply it

retrospectively. *Arrow Air, Inc. v. Walsh*, 645 So. 2d at 424 ("we have never classified a statute that accomplishes a remedial purpose by creating substantive new rights or imposing new legal burdens as the type of 'remedial' legislation that should be presumptively applied in pending cases.").

Chapter 2017-1 in conjunction with Chapter 2016-13 clearly do impose a new legal burden on the State when granting a defendant convicted of first degree murder the right to a life sentence unless the State convinces a jury to unanimously recommend a death sentence. The changes made by Chapter 2017-1 and Chapter 2016-13 are clearly substantive in nature. Substantive changes are presumed not to apply retrospectively unless the legislature intended the newly imposed legal burden to be extended retrospectively. And here, the legislative intent was clear. The changes made in Chapter 2017-1 and Chapter 2016-13 were meant to apply retrospectively, as this Court held in *Perry v. State* and *Evans v. State*.

Certainly, the legislature could have provided that the right to a life sentence unless the jury unanimously voted to recommend a death sentence only applied in homicide cases in which the homicide was committed after the right was enacted. But, that was not the legislative intent. Instead, the legislature intended this right to a life sentence unless the jury unanimously voted to recommend a death sentence to be extended retrospectively to any defendant

charged with a capital homicide that had occurred prior to the enactment of the right. The legislative intent is clear.

C. Substantive rights are a legislative function.

While *Hurst v. State* and *Perry v. State* were premised upon the Florida Constitution, Chapter 2016-13 and Chapter 2017-1 were both crafted by the Florida Legislature and signed into law by the Governor. This Court has said: "Generally, the Legislature has the power to enact substantive law, while the Court has the power to enact procedural law." *Allen v. Butterworth*, 756 So. 2d 52, 59 (Fla. 2000). This Court has explained:

> Substantive law has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer. *State v. Garcia*, 229 So.2d 236 (Fla.1969). It includes those rules and principles which fix and declare the primary rights of individuals with respect towards their persons and property. *Adams v. Wright*, 403 So.2d 391 (Fla.1981).

Haven Federal Savings & Loan Ass'n v. Kirian, 579 So. 2d 730, 732 (Fla. 1991). In *Benyard v. Wainwright*, 322 So. 2d 473, 475 (Fla. 1975), this Court reiterated:

> Substantive law prescribes the duties and rights under our system of government. The responsibility to make substantive law is in the legislature within the limits of the state and federal constitutions.

Pursuant to separation of powers, procedure matters are a judicial function, not a legislative function. *See State v. Raymond*, 906 So. 2d 1045, 1049 (Fla. 2005) ("where there is no substantive right conveyed by the statute, the procedural

aspects are not incidental; accordingly, such a statute is unconstitutional."); *Massey v. David*, 979 So. 2d 931, 937 (Fla. 2008) ("We have held that where a statute contains some procedural aspects, but those provisions are so intimately intertwined with the substantive rights created by the statute, that statute will not impermissibly intrude on the practice and procedure of the courts in a constitutional sense, causing a constitutional challenge to fail.").

If Chapter 2017-1 and Chapter 2016-13 had been purely procedural, they would have violated the separation of powers doctrine enshrined in the Florida Constitution. Moreover when this Court determined that the 10-2 provision was unconstitutional, it could have fixed the defect and rewritten the governing law if the provision and/or the fix were simply a procedural matter. This Court did not do that because it recognized that what was at issue was substantive law, i.e. "that part of the law which creates, defines, and regulates rights." *Garcia v. State*, 229 So. 2d at 238. [3]

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[3]The procedural rule/substantive right dichotomy is important when analyzing Chapter 2017-1 and Chapter 2016-13. Procedural rules attach to a proceeding. For example, this Court could announce effective July 1, 2017, appellants in capital appeals will have thirty days from the date the record on appeal is filed to submit the initial brief. Another example would be when this Court amends Rule 3.851 effective on a particular date to change what a motion to vacate must contain or how many pages in length is permitted. Procedural rules are promulgated by this Court. They attach to a proceeding, i.e. an appeal, Rule 3.851 proceedings, etc. On the other hand, substantive rights are extended to

After Chapter 2017-1, a life sentence results unless the jury unanimously finds all facts necessary to authorize a judge to impose a death sentence, sets forth its unanimous findings in a special verdict, and recommends a death sentence. The jury, aware that each juror has the power to preclude a death sentence by voting to recommend a life sentence, must unanimously vote in favor of a death sentence before a judge has the power to impose a death sentence.

This change is not like a procedural rule altering the page limitation on an initial brief, or changing the time allotted for the submission of an appellate brief. Nor is it like a pleading requirement that Rule 3.851 motions must identify all the issues raised on direct appeal. Nor is it like a rule establishing when a case management hearing on a Rule 3.851 motion must be held.

It is also not like a ruling that substitutes one factfinder for another,

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people. Substantive law governs what the State must prove to convict a criminal defendant of the crime with which he or she has been charged. Substantive law define the crime of first degree murder established the elements of first degree murder that the State must prove. A substantive right, for example the right to counsel, attaches to a person charged with a crime. The presumption of innocence is a substantive right that is extended to a defendant and can only be overcome if the State proves guilt beyond a reasonable doubt. The Eighth Amendment right to present mitigating evidence attaches to a person convicted of first degree murder when the State seeks to impose a death sentence. Similarly, the right to require the State to prove aggravating factors beyond a reasonable doubt is also a right that is extended to a defendant convicted of first degree murder.

transferring factfinding duties from a judge to a jury.[4] What is provided for here is as substantive as the presumption of innocence or the right to only be convicted upon proof of guilt beyond a reasonable doubt.

Chapter 2017-1 changes a co-sentencer's role from rendering an advisory recommendation by a majority vote to one that imposes upon each individual juror responsibility for whether it is permissible for the defendant to given a death sentence. Each juror will know that he or she can preclude a death sentence by not agreeing to a unanimous death recommendation. The change in the jury's role and the necessity of unanimity means that its verdict will be more reliable and more meaningful in exactly the same way that requiring proof beyond a reasonable doubt instead of by a preponderance of the evidence makes a criminal defendant's

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[4]Unlike the circumstances in *Schriro v. Summerlin,* 542 U.S. 348 (2004), the change here is going from an advisory jury recommendation requiring seven of twelve jurors to vote in favor of an advisory death recommendation, to requiring a jury to return a unanimous death recommendation before a judge has the power to impose a death sentence. In *Schriro v. Summerlin*, 542 U.S. at 355-56, the US Supreme Court noted that a substantive right that seriously improved accuracy and reliability would apply retroactively. Going from a majority vote to a unanimous verdict is akin to go from a proof by a preponderance of the evidence to proof beyond a reasonable doubt. It is change that is designed to make a decision to impose a death sentence more reliable. *See Addington v. Texas*, 441 U.S. 418, 423 (1979) *("*"The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'"*)*

Sixth Amendment rights stronger and more meaningful. As Justice Harlan once observed, in an ordinary civil suit a preponderance standard "seems peculiarly appropriate" because "we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor," while in the criminal context requiring proof beyond a reasonable doubt is proper because the "social disutility" of convicting an innocent person is greater than that of acquitting a guilty person. *In re Winship*, 397 U.S. 358, 371–72 (1970).

If Chapter 2017-1 were merely procedural (besides being enacted in violation of the separation of powers doctrine), it would be proper for it to attach to any capital sentencing proceeding conducted after its effective date because it only sets out the manner by which the parties should seek to litigate. *State v. Raymond*, 906 So. 2d at 1048 ("practice and procedure is the method of conducting litigation involving rights and corresponding defenses.").

However, Chapter 2017-1 does more than that. It imposes an obligation on the State to convince the jury to make unanimous findings of fact and return a unanimous death recommendation. It gives a defendant convicted of first degree murder something that he or she did not have before: a right to a life sentence unless the jury returns a unanimous death recommendation. Quite clearly, Chapter

2017-1 precludes the imposition of a death sentence unless the State bears its burden and convinces the jury to return a unanimous death recommendation.

Chapter 2017-1 sets forth a substantive right that is personal in that it belongs to someone. For example, the Sixth Amendment right to representation by counsel attaches to a defendant who is criminal charged. A substantive right is person, it attaches to a person. Clearly, the right to a life sentence unless the jury unanimously returns a death recommendation is given to a defendant who is convicted of first degree murder. It arises from the conviction for first degree murder. It is a presumption of a life sentence, and it is very much akin to the presumption of innocence because it reflects the State's legal burden in the criminal process.

The change in law that Chapter 2017-1, and its predecessor Chapter 2016-13, brought about can best be understood by looking at what was replaced. Before March 7, 2016, Florida's capital sentencing scheme provided for a jury to return an advisory verdict by a majority vote, and then for the judge to consider the advisory verdict and impose a sentence. Under the Eighth Amendment, the jury and the judge were co-sentencers. *Espinosa v. Florida*, 505 U.S. at 1083 ("We merely hold that, if a weighing State decides to place capital sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid

aggravating circumstances."); *Lambrix v. Singletary*, 520 U.S. 518, 528 (1997) ("In *Espinosa*, we determined that the Florida capital jury is, in an important respect, a cosentencer with the judge."). For its part, the jury did not identify what if any facts had been found, let alone explain how many jurors found any particular fact. If six jurors voted to recommend a life sentence that constituted a life recommendation that a judge could override to impose a death sentence if the life recommendation was unreasonable.

The substantive nature of the changes made by Chapter 2017-1 and Chapter 2016-13 was recognized in *State v. Steele*, 921 So. 2d 538 (Fla. 2005). There, this Court asked the legislature to review whether jury unanimity should be required for death recommendations. This Court clearly viewed the issue as a substantive one, not a procedural one. *Id.* at 548 ("Finally, we express our considered view, as the court of last resort charged with implementing Florida's capital sentencing scheme, that in light of developments in other states and at the federal level, the Legislature should revisit the statute to require some unanimity in the jury's recommendations."). Because the issue was substantive and not procedural, this Court was not free to rewrite the statute.

Chapter 2016-13 initially established a retrospective substantive right that a capital defendant had a right to a life sentence if three or more jurors voted in

favor of a life sentence. *See Perry v. State*, 210 So. 3d at 638 ("The changes further mandate that a life sentence be imposed unless ten or more jurors vote for death."). Then this Court in *Hurst v. State* determined the facts statutorily necessary to authorize a death sentence were in essence elements of an offense and under the Florida Constitution had to be found by a unanimous jury. On the basis of the ruling in *Hurst v. State*, the 10-2 provision of Chapter 2016-13 was declared unconstitutional. In Chapter 2017-1 the Florida Legislature rewrote the statute to provide that a defendant convicted of first degree murder was to receive a life sentence unless a jury returned a unanimous death recommendation. The substantive right created in Chapter 2016-13 was expanded. One juror voting for a life recommendation precluded the imposition of a death sentence. The right was extended to defendants in all homicide prosecutions regardless of the date of the underlying homicide, and regardless of the date that the conviction became final.

D. The substantive right to juror unanimity is meant to enhance reliability.

Chapter 2016-13 first eliminated the judicial override and established that a defendant convicted of first degree murder was entitled to a life sentence unless and until at least 10 jurors voted to recommend a death sentence. Subsequently, this Court in *Hurst v. State* concluded that the jury had to be unanimous when

making the findings of fact necessary for the imposition of a death sentence.[5] In reaching this result, the unanimity requirement was recognized as a major step forward in enhancing the reliability of any decision to impose death. *Hurst v. State*, 202 So. 3d at 58 ("In requiring jury unanimity in these findings and in its final recommendation if death is to be imposed, we are cognizant of significant benefits that will further the administration of justice."); *Id.* ("it has been found based on data that 'behavior in juries asked to reach a unanimous verdict is more thorough and grave than in majority-rule juries, and that the former were more likely than the latter jurors to agree on the issues underlying their verdict. Majority jurors had a relatively negative view of their fellow jurors' openmindedness and persuasiveness.'"); *Id.* at 59 ("We also note that the requirement of unanimity in

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[5]The Florida Legislature in Chapter 2016-13 first recognized that a defendant convicted of first degree murder had a substantive right to be sentenced to life imprisonment unless the State convinced ten of twelve jurors to vote in favor of a death recommendation. This substantive right was new. Previously, six jurors voting for a life sentence constituted a life recommendation that the judge could override and impose a death sentence if the life recommendation was found not to be supported by a reasonable basis. When Chapter 2016-13 eliminated the judicial override of a life recommendation and reduced the number of jurors necessary for the jury's verdict to constitute a life recommendation from six to three, a substantive right to a life sentence was established when three jurors voted for a life sentence. Chapter 2016-13 did include a fix for the constitutional defect in § 921.141 identified in *Hurst v. Florida*. But, neither the elimination of the judicial override nor the requirement that ten jurors must vote in favor of a death sentence instead of seven jurors was a change mandated by *Hurst v. Florida*. Instead, these changes reflected Florida's evolving standards of decency.

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."); *Id.* at 60 ("If death is to be imposed, unanimous jury sentencing recommendations, when made in conjunction with the other critical findings unanimously found by the jury, provide the highest degree of reliability in meeting these constitutional requirements in the capital sentencing process."); *Id.* (unanimous recommendation "expresses the values of the community as they currently relate to imposition of death as a penalty."); *Id.* ("Requiring unanimous jury recommendations of death before the ultimate penalty may be imposed will ensure that in the view of the jury—a veritable microcosm of the community—the defendant committed the worst of murders with the least amount of mitigation.").

Implicit in the recognition that requiring juror unanimity will enhance the reliability of a decision to impose death sentences is an acknowledgment that a death sentence imposed without such a requirement is less reliable. The 9-3 advisory death recommendations in Mr. Walton's case mean his death sentences resulted from a less reliable capital sentencing process than is now required.

There is empirical evidence to support the conclusion, that without requiring a unanimous death recommendation, Florida's old capital sentencing scheme produced unreliable death sentences. Between 1972 and 2006, twenty-two

(22) people who had been sentenced to death in Florida were subsequently exonerated and another individual was exonerated posthumously, while sixty-one (61) people have been executed. *Evaluating Fairness and Accuracy in the State Death Penalty System: The Florida Death Penalty Assessment Report*, America Bar Association (2006) at iv, 8 ("[T]he proportion exonerated exceeds thirty percent of the number executed."). "Since the reinstatement of the death penalty in 1972, Florida has led the nation in death row exonerations." *Id.* at 45.[6] The number of men freed from Florida's death row with a restored presumption of innocence is indicative of a system infected with unreliability and in violation of *Furman v. Georgia*.[7] With a jury returning only an advisory recommendation by a majority vote while also being precluded from considering any lingering doubt of

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[6]One exoneree (Juan Melendez) was all the way through a first round and second round of state postconviction proceedings before prevailing in a third motion for postconviction relief and being released from death row after 17 years. Surely what happened to Mr. Melendez was "cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Furman* 408 U.S. at 309 (Stewart, J., concurring). And his exoneration was a second lightning strike. This means that undoubtedly there are other innocent individuals on Florida's death row.

[7]Mr. Melendez served 17 years on death row, Rudolph Holton served 16 years before his release, and Frank Lee Smith served 15 years before dying of cancer a few months before DNA evidence cleared of murder.

the defendant's guilt, unreliability abounded.[8] We know numerous men who were subsequently exonerated ended up on Florida's death row. We do not know how many remain there.

The unanimity requirement as explained in *Hurst v. State* is meant to improve the reliability of death sentences imposed in Florida. It operates in a fashion akin to a burden of proof. Going from an advisory death recommendation by a majority vote of the jury to a requirement that a jury unanimously recommend death before a death sentence is authorized is analogous to going from requiring proof by a preponderance of the evidence to requiring proof beyond a reasonable doubt.[9] As to the requirement that in criminal cases guilt must be proven beyond a

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[8]With this Court recognizing *Hurst v. State* and *Perry v. State*, that jurors will be able to vote to exercise mercy, a vehicle for consideration of lingering doubt will exist. Defendants who did not commit the murder that they were convicted of are less able to mitigate a crime they did not commit, and thus have a greater exposure to a death sentence when convicted of first degree murder.

[9]This Court recognized the a unanimity requirement was comparable to the requirement that the State prove the elements of the offense beyond a reasonable doubt in *Hurst v. State*, 202 So. 3d at 58 when it wrote:

> Comparing the unanimous jury requirement to the requirement for proof beyond a reasonable doubt, the Fifth Circuit Court of Appeals stated, "the unanimous jury requirement 'impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.' " *United States v. Gipson*, 553 F.2d 453, 457 (5th Cir.1977).

The purpose of both are the same, the importance of certitude in the jury's findings

reasonable doubt, the US Supreme Court held:

> The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.' *Coffin v. United States, supra*, 156 U.S., at 453, 15 S.Ct., at 403.

In re Winship, 397 U.S. 358, 363 (1970).[10]

In *Addington v. Texas*, 441 U.S. 418, 42324 (1979), the US Supreme Court explained:

> The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *In re Winship*, 397 U.S. 358, 370, 90 S.Ct. 1068, 1076, 25 L.Ed.2d 368 (1970) (Harlan, J., concurring). The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.
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and ultimate verdict.

[10]In *Jackson v. Virginia*, 443 U.S. 307, 316 (1979), the US Supreme Court discussed *Winship* and observed:

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

> In a criminal case, on the other hand, the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment. In the administration of criminal justice, our society imposes almost the entire risk of error upon itself. This is accomplished by requiring under the Due Process Clause that the state prove the guilt of an accused beyond a reasonable doubt. *In re Winship*, *supra.*

(Footnote omitted). The burden of proof imposed in a particular type of case (civil, civil commitment, juvenile, criminal) reflects the value that society places on the liberty or life interest that is at stake. *Id.* at 425.[11]

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[11]In *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958), the US Supreme Court observed:

> Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof in the first instance, and of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt.

Of course where a party's life is at stake, the Eighth Amendment requires more:

> 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.

Johnson v. Mississippi, 486 U.S. 578, 584 (1988).

Florida's move from a jury returning an advisory, non-binding life or death recommendation by a majority vote to the necessity of a jury unanimously vote for death reflects a fundamental and substantive determination of the value of life interest at stake. *See In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) ("I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."). The change was meant to reflect the values of the people of Florida and a desire to enhance the reliability of the decision to impose a death sentence.

E. Those receiving the retrospective benefit of the substantive right set forth in Chapter 2017-1 and the enhanced reliability it brings.

This Court recently ordered a resentencing in James Card's case. *Card v. Jones*, _ So. 3d _, 2017 WL 1743835 (Fla. May 4, 2017). Card was convicted of a 1981 homicide. His conviction became final in 1984. *Card v. State*, 453 So. 2d 17 (Fla. 1984). His 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, postconviction relief issued and a resentencing was conducted in 1999. An 11-1 death recommendation led to another death sentence that was affirmed, and then became final 4 days after the issuance of *Ring v. Arizona*, 536 U.S. 584 (2002). *Card v. State*, 803 So. 2d 613

(Fla. 2001), *cert denied* 536 U.S. 963 (2002). Because his petition for certiorari review was denied four days after *Ring* issued, this Court has now ordered a resentencing at which Card will have the substantive right to a life sentence unless the jury unanimously returns a death recommendation.

A circuit court recently granted J.B. Parker a resentencing on the basis of *Hurst v. State*. Though the State filed a notice of appeal, it has now filed a notice of voluntary dismissal of its appeal after the US Supreme Court denied certiorari review of *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *cert denied*, 137 S. Ct. _, 2017 WL 635999 (May 22, 2017). 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 though the conviction remained intact and final. *State v. Parker*, 721 So. 2d 1147 (Fla. 1998). Parker received another death sentence after the jury returned an 11-1 death recommendation. This Court affirmed on appeal. *Parker v. State*, 873 So. 2d 270 (Fla. 2004). Now because the death sentence became final after *Ring v. Arizona* issued, there will be another resentencing on Parker's first degree murder conviction that was final in 1985. At the resentencing, Parker will have the substantive right to a life sentence unless the jury unanimously returns a death recommendation.

A circuit court recently vacated William White's death sentence and ordered a resentencing. The State filed a notice of appeal, but after the denial certiorari review in *Florida v. Hurst*, the State has filed a notice of voluntary dismissal. White was convicted of a 1978 homicide and, after a jury unanimously returned a death recommendation, a death sentence was imposed. The conviction and death sentence became final in 1982 after they were affirmed on direct appeal. *White v. State*, 415 So. 2d 719 (Fla. 1982), *cert denied*, 459 U.S. 1155 (1982). In 1999, White's death sentence was vacated though the conviction remained intact and final. This Court found error under *Hitchcock v. Dugger*, 481 U.S. 393 (1987) required a resentencing. *White v. State*, 729 So. 2d 909 (Fla. 1999).[12] At the resentencing, the jury returned a 10-2 death recommendation. The judge imposed a death sentence. On appeal, this Court affirmed on April 4, 2002. *White v. State*, 817 So. 2d 799 (Fla. 2002), *cert denied*, 537 U.S. 1091.[13] Now, because the death sentence became final after *Ring v. Arizona* issued, the circuit court has ordered another resentencing. At a resentencing on his first degree murder conviction final

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[12]When the *Hitchcock* error was presented to this Court in 1988 in a habeas petition, it had found the error "clearly harmless." *White v. Dugger*, 523 So. 2d 140, 141 (Fla. 1988).

[13]The US Supreme Court denied White's petition for certiorari review on December 16, 2002.

in 1982, White will have the substantive right to a life sentence unless the jury unanimously returns a death recommendation.

The legislature could have provided that the right in Chapter 2017-1 only attached to defendants convicted of first degree murder after Chapter 2017-1 became effective, i.e. March 13, 2017. The legislature chose not to do it that way. Chapter 2017-1 was meant to apply retrospectively. The legislature meant to extend the right to a presumption of a life sentence to William White, James Card and J.B. Parker when they are sentenced for the crime of first degree murder, the crime for which they were convicted and there convictions became final in 1982, 1984 and 1985, respectively.

Using just these three examples,[14] the substantive right set forth in Chapter 2017-1 was attached to first degree murder convictions that became final before Mr. Walton's first degree murder conviction became final. William White, James Card, J.B. Parker and Jason Walton are four similarly-situated men. They were each convicted of first degree murder in the early and mid 1980's. Three of the four will receive the substantive right to a life sentence requiring the State to carry the burden of convincing the juries to unanimously return death recommendations.

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[14]There are numerous others who will be receiving the retrospective benefit of the substantive right set forth in Chapter 2017-1 even though their first degree murder convictions were final long before June 24, 2002.

The fourth, Mr. Walton, has seemingly been skipped over because his resentencing happened in 1986, and his death sentence became final in 1989.[15]

F. A substantive right cannot be extended arbitrarily in a hit or miss fashion, nor can acceptance of less reliable death sentences comport with the Eighth Amendment.

When a State creates a right that carries a liberty or life interest with it, the right is protected by the Due Process Clause of the Fourteenth Amendment. The US Supreme Court has recognized that States "may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment." *Vitek v. Jones*, 445 U.S. 480, 488 (1980). "Once a State has granted prisoners a liberty interest, [the US Supreme Court has] held that due process protections are necessary 'to insure that the state-created right is not arbitrarily abrogated.'" *Id.* at 488-89. *See State v. Robinson*, 873 So. 2d 1205, 1209 (Fla. 2004) ("It is the Due Process Clause that protects the individual against the arbitrary and unreasonable exercise of governmental power.").

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[15]Had this Court granted William White his resentencing when he first presented his claim under *Hitchcock v. Dugger* claim in 1988, and not when he presented it a second time in 1999, then presumably he would not be receiving the benefit of the substantive right to a presumption of a life sentence. Or, had the either the State or the judge revealed the ex parte contact that led to James Card's 1998 resentencing at an earlier point in time or had this United States Supreme Court denied his petition for a writ of certiorari one week earlier than it did, Card would not be receiving the benefit of the substantive right and the enhanced reliability it is meant to bring to any decision to impose a death sentence.

In *Evitts v. Lucey*, 469 U.S. 387, 400 (1985), the US Supreme Court recognized that "a State need not provide a system of appellate review as of right at all." States have the option to not provide appellate review of criminal convictions. *See McKane v. Durston*, 153 U.S. 684 (1894). But "when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution-and, in particular, in accord with the Due Process Clause." *Evitts v. Lucey*, 469 U.S. at 401. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983) ("There is, of course, no constitutional right to an appeal, but in *Griffin v. Illinois*, 351 U.S. 12, 18 (1955), and *Douglas v. California*, 372 U.S. 353 (1963), the Court held that if an appeal is open to those who can pay for it, an appeal must be provided for an indigent."). "Once a State has granted prisoners a liberty interest, [the US Supreme Court has] held that due process protections are necessary 'to insure that the state-created right is not arbitrarily abrogated.'" *Vitek v. Jones*, 445 U.S. at 488-89. Who gets the benefit of a substantive right and who does not must not offend the Due Process Clause. *State v. Robinson*, 873 So. 2d 1205, 1209 (Fla. 2004) ("It is the Due Process Clause that protects the individual against the arbitrary and unreasonable exercise of governmental power.").

Further, the Eighth Amendment is implicated if substantive rights are doled

out arbitrarily in capital cases, particularly where the right has implications for the reliability of the decision to impose a death sentence. In *Johnson v. Mississippi*, 486 U.S. 578 (1988), the US Supreme Court discussed the Eighth Amendment's requirement that death sentences be reliable and free from arbitrary factors:

> 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. See *Gardner v. Florida,* 430 U.S. 349, 363–364, 97 S.Ct. 1197, 1207–1208, 51 L.Ed.2d 393 (1977) (WHITE, J., concurring in judgment)(quoting *Woodson v. North Carolina,* 428 U.S. 280, 305, 96 S.Ct. 2978, 2991–92, 49 L.Ed.2d 944 (1976)). Although we have acknowledged that "there can be 'no perfect procedure for deciding in which cases governmental authority should be used to impose death,' " **we have also made it clear that such decisions cannot be predicated on** mere "caprice" or on "**factors that are constitutionally impermissible or totally irrelevant to the sentencing process.**" *Zant v. Stephens,* 462 U.S. 862, 884–885, 887, n. 24, 103 S.Ct. 2733, 2747, 2748, n. 24, 77 L.Ed.2d 235 (1983).

Johnson v. Mississippi, 486 U.S. 584-85 (emphasis added).

The right to a life sentence unless a jury unanimously recommends a death sentence under revised § 921.141 is being extended to any capital defendant under sentence of death who received after June 24, 2002 or will receive a resentencing at any point in the future. This is due to the fact that Chapter 2016-13 and Chapter 2017-1 were both intended to apply retrospectively to all pending capital prosecutions regardless of the date of the homicide or the date that a first degree

murder conviction became final. The June 24, 2002 demarcation line arises by virtue of the decision in *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), applying *Hurst v. Florida*, 136 S. Ct. 616 (2016), retroactive to that date.

In a proceeding to determine the sentence to be imposed on William White's 1982 conviction, the substantive right set forth in Chapter 2017-1 will apply. In a proceeding to determine the sentence to be imposed on James Card's 1984 conviction, the substantive right set forth in Chapter 2017-1 will apply. In a proceeding to determine the sentence to be imposed on J.B. Parker's 1985 conviction, the substantive right set forth in Chapter 2017-1 will apply. For the reasons explained in *Hurst v. State*, this will mean any death sentence that results for White, Card or Parker will be more reliable and the defendant's life interest will be better protected than is the case with Mr. Walton's death sentence imposed at his 1986 resentencing.

The retrospective application of Chapter 2017-1 to only those who were convicted of first degree murder who have for whatever reason received a resentencing after June 24, 2002, will create two categories of death sentences: 1) those that to which the defendant was not extended a presumption of life and the death sentence carries less reliability; and 2) those to which the defendant had a right to a life sentence unless the jury unanimously recommended and any decision

to impose death has greater reliability. Carrying out executions of defendants whose death sentences are recognized as less reliable because the defendant was not afforded the presumption of life will violate the Eighth and Fourteenth Amendments to the United States Constitution, as well as the Florida Constitution.

Given that White, Card and Parker are being extended a substantive right as to the sentencing to be imposed on the 1982, 1984, and 1985 first degree murder convictions, due process requires that Mr. Walton be given the same substantive right as to the sentence to be imposed on his 1986 first degree murder conviction. The State of Florida having created the right and having extended to White, Card and Parker cannot arbitrarily deny Mr. Walton of the right when he is so similarly situated. A State cannot establish a substantive right that provides a life and/or liberty interest which it arbitrarily extends to some, but not others.

The substantive right set forth in Chapter 2017-1 cannot be extended retrospectively in a manner that hopscotches across time. Currently, the right is granted to those convicted defendants who through luck and good fortune happened to get a resentencing ordered and/or to those previously resentenced to death so that the death sentence was not final when *Ring v. Arizona* issued. This means that the right is being doled out based on the finality date of the sentence, not the finality date of the conviction for which the sentence is being imposed. The

reasons that White, Card and Parker will receive the benefit of the substantive right set forth in Chapter 2017-1, has nothing to do with the circumstances of the crimes for which they were convicted nor their character and mitigating factors. To give them the benefit of Chapter 2017-1 and not extend it to Mr. Walton can only be described as arbitrary and a violation of due process. *See Griffith v. Kentucky*, 479 U.S. 314, 323 (1987) ("[S]elective application of new rules violates the principle of treating similarly situated defendants the same."); *Smith v. State*, 598 So. 2d 1063, 1066 (Fla. 1992) ("[a]ny rule of law that substantially affects the life, liberty, or property of criminal defendants must be applied in a fair and evenhanded manner. Art. I, §§ 9, 16, Fla. Const.").

But perhaps worse than this due process violation is the apparent willingness to leave death sentences intact that carry a greater risk of unreliability than is permissible under Chapter 2017-1. Death sentences lacking the enhanced reliability that comes with the requirement that the State convince a jury to unanimously return a death recommendation cannot consistent with the Eighth Amendment be grandfathered in and allowed to remain standing. "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference,

there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

In *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014), the US Supreme Court found that Florida's procedure for determining intellectual disability was inadequate to reliably insure that an intellectually disabled defendant was not executed. "A State that ignores the inherent imprecision of these tests risks executing a person who suffers from intellectual disability." *Id.* at 2001. Because Florida ignored that inherent imprecision, the Supreme Court found that "Florida's rule is invalid under the Constitution's Cruel and Unusual Punishments Clause." *Id.* The Supreme Court explained: "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. Florida's law contravenes our Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world."

This Eight Amendment principle applies here where James Card was convicted of a murder that occurred a year before those for which Mr. Walton was convicted. Card's conviction was final more than a year before Mr. Walton's convictions were final. Yet, Card has the right to a life sentence as to that

conviction unless a jury unanimously returns a death recommendation, while Mr. Walton is under a death sentence even though three jurors voted against a death sentence. The distinction between Card's circumstances and Mr. Walton's can only be described as "arbitrary." To allow such an arbitrary distinction and leave Mr. Walton's death sentences intact while James Card and others receive the right to a life sentence unless the jury returns a unanimous death recommendation violates *Furman v. Georgia*, 408 U.S. 238 (1972).

There can be no question that with three jurors in Mr. Walton's case voting in favor of life sentences, there is a very large risk that the death penalty was improperly imposed because he was not unanimously convicted of capital first degree murder, i.e. first degree murder plus those statutorily defined facts necessary to authorize a judge to impose a death sentence. Indeed, under Chapter 2017-1, the 9-3 death recommendation would constitute an acquittal of capital first degree murder and have precluded the imposition of a death sentence.[16]

There is no valid basis under Art. I, §§ 9, 16, Fla. Const., the Due Process Clause of the Fourteenth Amendment, and the Eighth Amendment for depriving Mr. Walton of that statutorily created substantive right given that it is being

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[16]Even under Chapter 2016-13, the 9-3 death recommendation would constitute an acquittal of capital first degree murder and preclude the imposition of a death sentence.

extended to White, Card and Parker. "Once a State has granted prisoners a liberty interest, [the US Supreme Court has] held that due process protections are necessary 'to insure that the state-created right is not arbitrarily abrogated.'" *Vitek v. Jones*, 445 U.S. at 488-89. *See State v. Robinson*, 873 So. 2d 1205, 1209 (Fla. 2004) ("It is the Due Process Clause that protects the individual against the arbitrary and unreasonable exercise of governmental power.").

Besides the lack the enhanced reliability that this Court found would accompany a unanimity requirement, this Court has in the past identified errors infecting Mr. Walton's resentencing. On direct appeal, this Court found the State erroneously introduced inflammatory testimony from a psychiatrist. *Walton v. State*, 547 So. 2d 622, 625 (Fla. 1989). This Court also observed that the State's closing argument was improper. *Id.* ("we do not condone the prosecutor's conduct and this conduct could be reversible error under different circumstances.").

In collateral proceedings, it was recognized that the jury instructions given on aggravating factors violated the Eighth Amendment, but the claim was procedurally barred. *Walton v. State*, 847 So. 2d 438, 444-45 (Fla. 2003). This Court affirmed the denial of relief on the *Brady* claim because it did not find that this undisclosed information by itself undermined confidence in the jury's sentencing recommendation. *Id.* at 454. While recognizing that trial counsel failed

to present available favorable evidence of the State's claims at a co-defendant's trial, this Court found that the failure to present this evidence by itself did not undermine confidence in the reliability of outcome. *Id.* at 456. This Court also noted that there was mitigating evidence that Mr. Walton's jury had not heard when it returned its 9-3 death recommendations. *Walton v. State*, 847 So. 2d at 458 ("it is clear that the evidence in mitigation illuminated during the postconviction proceedings below could have aided Walton's case before his resentencing jury").

Mr. Walton's resentencing was riddled with error, which in the context of the governing law at the time, this Court found either harmless or insufficient to show a probability that six jurors would have voted to recommend a life sentence. Now, to enhance the reliability of any resulting death sentence, a defendant convicted of first degree murder has a right to a life sentence unless the jury unanimously returns a death recommendation.

Quite simply, the failure to extend to Mr. Walton the substantive right contained in Chapter 2017-1, deprives Mr. Walton of his Eighth Amendment right. His death sentence is lacking in the enhanced reliability that Florida law now requires. The Eighth Amendment does permit the State of Florida to arbitrarily grandfather in old death sentences that are recognized to be of inferior reliability, just simply because the death sentence was final before June 24, 2002. The Eighth

and Fourteenth Amendment require the State to extend to Mr. Walton the same substantive right that is being extended to William White, James Card and J.B. Parker, the right to a life sentence unless the State convinces a jury to unanimously return a death recommendation.

Habeas relief is required. Mr. Walton's death sentences must be vacated and at a minimum, a resentencing ordered.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS has been furnished by electronic mail to Timothy Freeland, Assistant Attorney General, on this 8th day of June, 2017.

CERTIFICATE OF FONT

This is to certify that the Petition has been reproduced in 14 point Times New Roman type, a font that is not proportionately spaced.

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