IN THE SUPREME COURT OF FLORIDA
Case No. SC17-1083

JASON DIRK WALTON,

Petitioner,

v.

JULIE JONES, Secretary,
Fla. Dep't of Corr.,

Respondent.
_____/

AMENDED RESPONSE TO ORDER TO SHOW CAUSE AND MOTION FOR GUIDANCE AS TO THE STANDARD FOR DETERMINING WHAT CONSTITUTES CAUSE

COMES NOW the Petitioner, **JASON DIRK WALTON,** in the above-entitled matter and respectfully responds to this Court's October 18 Order to Show Cause and requests that the Court provide guidance as to what constitutes cause and permit further briefing on this issue after such guidance has been provided.[1] For his reasons, Mr. Walton states:

1. Mr. Walton is under a death sentence. Besides this habeas proceeding, Mr. Walton also has an appeal from the denial of Rule 3.851 relief pending before this Court. *Walton v. State*, SC16-448.[2] The state habeas petition raised one claim: Whether the Eighth and Fourteenth Amendments to the United States Constitution, and the Florida Constitution require Mr. Walton to receive the retroactive application of the substantive benefit established by Chapter 2017-1 in order to apply Chapter 2017-1's substantive benefit evenhandedly.

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[1]On October 18, 2017, this Court granted Mr. Walton's request for an extension of time in part, ordering his response to the show cause order to be filed on October 24, 2017.

[2]The claims presented in that appeal are not at issue here.

2. Chapter 2017-1 was enacted on March 13, 2017. Mr. Walton's habeas petition was filed in this Court on June 8, 2017. Then on September 15, 2017, this Court issued an order in the above-entitled matter stating: "This petition is stayed pending disposition of *Hitchcock v. State*, SC17-445."[3] On September 27, 2017, this Court ordered Mr. Walton to "show cause on or before Tuesday, October 17, 2017, why the petition for a writ of habeas corpus should not be denied in light of this Court's decision *Hitchcock v. State*, SC17-445." Subsequently, Mr. Walton's motion to extend the time to file this response to the show cause order was granted in part and the time extended until October 24, 2017.

A. MR. WALTON'S RIGHT TO APPEAL THE DENIAL OF HIS RULE 3.851 MOTION AND THE UNDEFINED "CAUSE" STANDARD.

3. As an initial matter, Mr. Walton submits that his right to seek habeas relief does not involve discretionary jurisdiction. *See* Fla. R. App. Pro. 9.030(a)(2). Rather, the Florida Constitution guarantees Mr. Walton's right to petition for a writ of habeas corpus:

> The writ of habeas corpus **shall** be grantable of right, freely and without cost. It shall be returnable without delay, **and shall never be suspended** unless, in case of rebellion or invasion, suspension is essential to the public safety.

Fla. Const. Art. I Sec. 13 (emphasis added). Requiring Mr. Walton to show "cause" before he can seek a writ of habeas corpus,

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[3]This was more than a month after the decision in *Hitchcock v. State*, SC17-445 had issued. *Hitchcock v. State*, _ So. 3d _, 2017 WL 3431500 (August 10, 2017). The stay order was entered three days before this Court denied rehearing. *See Hitchcock v. State*, 2017 WL 4118830 (Fla. September 18, 2017).

converts his right to seek habeas relief under the Florida Constitution into one that is discretionary.

4. Mr. Walton has a substantive right to pursue habeas relief. As such, that substantive right is protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Evitts v. Lucey*, 469 U.S. 387, 393 (1985)("if a State has created appellate courts as "an integral part of the ... system for finally adjudicating the guilt or innocence of a defendant," *Griffin v. Illinois*, 351 U.S., at 18, the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution."). This principle applies to collateral appeals as well as direct appeals. *Lane v. Brown*, 372 U.S. 477, 484-85 (1963)("the *Griffin* principle also applies to state collateral proceedings, and *Burns* leaves no doubt that the principle applies even though the State has already provided one review on the merits.").[4]

5. This Court's *sua sponte* order staying proceedings on Mr. Walton's habeas petition pending a decision in *Hitchcock v. State* appears to have been an effort to bind Mr. Walton to the outcome in *Hitchcock v. State*, a prejudgment of sorts. While this practice is common in discretionary appeals, it is an anathema to individualized capital proceedings that must comport with the Eighth Amendment. Because Mr. Hitchcock lost his appeal, this Court's order to show cause severely curtails Mr. Walton's right

[4]In *Lane v. Brown*, the issue arose when an appeal was not allowed due a public defender's "stated belief that an appeal would be unsuccessful." *Id.*, 372 U.S. at 481-82.

to seek habeas relief. This means that this Court regards Mr. Walton's habeas petition as one that it has discretion to refuse to hear. This does not comport with Art. I Sec. 13, Fla. Const., and the Court's action is tantamount to a *sua sponte* constitutional amendment suspending the writ without notice of an opportunity to be heard. It violates Mr. Walton's right to due process and equal protection under the Fourteenth Amendment.[5]

6. What constitutes "cause" is unknown. Yet, Mr. Walton, who is constitutionally entitled to an objective standard under the Eighth Amendment and fair notice under the Fourteenth Amendment, is required to proceed forward on this plank, blindly. *See, e.g.*, *Scull v. State*, 569 So. 2d 1251, 1252 (Fla. 1990) (explaining that due process is fair notice and a fair opportunity to be heard); *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988) (discussing the special need for reliability in capital cases). Should Mr. Walton presume that *de novo* review applies? After all, this is an original jurisdiction state habeas petition with a pure question of law, meaning de novo review seems to apply. Or, is "cause" entirely discretionary? Mr. Walton should be informed what standard of review applies, as standards of review matter. *State v. J.P.*, 907 So. 2d 1101, 1120 (Fla. 2004) (Cantero, J., dissenting) ("Not only is the applicable standard the threshold determination in any constitutional

[5] This Court has *sua sponte* decided that Mr. Walton is not entitled to the standard of review applicable to habeas review unless he first shows "cause," whatever that means. It is not defined. There are no standards. The September 27 order only affords Mr. Walton 20 pages to show this standardless "cause."

analysis; it is often the most crucial. In this case, it has made all the difference."). Because this Court ordered Mr. Walton to proceed under an undefined standard of review, he objects and moves this Court to proceed under the well-established standard of review governing original habeas actions.

7. Individualized review of all death sentences by this Court in direct appeals, collateral appeals, and original habeas proceedings, is required by the Florida Constitution. That individualized review under well-established standards is necessary to insure Florida's capital sentencing scheme complies with the Eighth Amendment. *See Proffitt v. Florida*, 428 U.S. 242, 258 (1976) ("The Supreme Court of Florida reviews each death sentence to ensure that similar results are reached in similar cases."). Individualized consideration of each death sentence is as necessary as individualized sentencing in capital cases. *See Mosley v. State*, 209 So. 3d 1248, 1282 (Fla. 2016) ("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.") (emphasis added); *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."). *See* also Parker v. Dugger, *498 U.S. 308 (1991) (showing that this*

Court relied upon "nonexistent" findings).[6]

8. In addition, for the adversarial process to properly function, it is axiomatic that courts must only decide issues that were briefed. This way, adversaries have the opportunity to explain to the court the positive and negative impact that would occur should their respective position prevail. As explained by the United States Supreme Court:

> The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them. In this case, petitioners did not ask us to hold that there is no constitutional right to informational privacy, and respondents and their amici thus understandably refrained from addressing that issue in detail. It is undesirable for us to decide a matter of this importance in a case in which we do not have the benefit of briefing by the parties and in which potential amici had little notice that the matter might be decided.

Nat'l Aeronautics and Space Admin. V. Nelson, 532 U.S. 134, 147 n.10 (2011) (internal citations omitted). Because undersigned counsel was not counsel for Mr. Hitchcock, and Mr. Walton was not a party to that proceeding, this provides an additional reason why Mr. Walton's habeas claim is not controlled by *Hitchcock*.

9. Mr. Walton maintains that requiring him to show "cause" before his habeas petition will be heard violates the Florida

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[6]As three justice of the United States Supreme Court noted, this Court's review of appeals related to *Hurst v. Florida* and the issues arising in its wake have been woefully deficient. *See Truehill v. Florida*, _ U.S. _, 2017 WL 2463876 (October 16, 2017) (Sotomayor, J., dissenting, joined by Breyer and Ginsburg, JJ.)("capital defendants in Florida have raised an important Eighth Amendment challenge to their death sentences that the Florida Supreme Court has failed to address.").

Constitution, the Equal Protection and Due Process Clauses of the Fourteenth Amendment,[7] and the Eighth Amendment.

B. MR. WALTON'S EFFORT TO SHOW "CAUSE," WHATEVER THAT IS.

While what constitutes "cause" when it must be shown by a capital habeas petitioner in order to exercise his constitutional right to seek habeas relief has not been defined, Mr. Walton, in accordance with this Court's directive, blindly suggests the following:

Cause

Mr. Walton's claim is that Florida's capital sentencing scheme as revised by Chapter 2017-1 rendered his death sentence unconstitutional under the Eighth and Fourteenth Amendment. The claim raised by Mr. Walton was not raised by Mr. Hitchcock in Case No. SC17-445. Yet, Mr. Walton is being asked to show why *Hitchcock* does not control constitutional claims not raised by Mr. Hitchcock. A cursory review of Mr. Hitchcock's briefs and the table of authorities contained therein, as well as the headings of each argument, shows that Mr. Hitchcock did not argue that Chapter 2017-1's enactment had Eighth and Fourteenth Amendment implications. The claim raised by Mr. Walton was not before this Court in *Hitchcock v. State*. Consequently, *Hitchcock* could not have decided something that had not been presented to this Court, and thus does not control as to the constitutional claims Mr.

[7]There was no requirement imposed upon Mr. Hitchcock to show "cause" before his claims were heard. There, Mr. Hitchcock was permitted to have counsel brief his issues. Mr. Walton requests that he be provided with a similar opportunity.

Walton set forth in his habeas petition.

For a similar reason, the decision in *Asay v. State*, 224 So.3d 695 (Fla. 2017), does not foreclose the question of whether the new revised statute's retrospective application violates Mr. Walton's rights under the Eighth and Fourteenth Amendments. There, this Court erroneously reasoned that *Hitchcock v. State* controlled and had decided a matter which in fact had not been presented. *Asay v. State*, 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.").[8] Mr. Hitchcock

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[8]In *Asay*, this Court had described Mr. Asay's claims as:

> in essence, an Eighth Amendment attack on his sentences based on the nonunanimous verdicts using this Court's decision in *Hurst v. State*, 202 So.3d 40 (Fla. 2016), cert. denied, --- U.S. ----, 137 S.Ct. 2161, 198 L.Ed.2d 246 (2017) and the Legislature's revision of section 921.121, Florida Statutes, in response to this Court's decision in *Perry v. State*, 210 So.3d 630 (Fla. 2016). In other words, Asay asserts that his death sentences cannot withstand Eighth Amendment scrutiny because this Court's refusal to grant him relief is arbitrary and capricious.

Asay v. State, 224 So. 3d at 702-03. However, that description shows that this Court did not address the constitutional claims based on Chapter 2017-1 that Mr. Walton raises. His argument is that the Legislature's intent was that the revised capital sentencing statute redefining the elements of first degree murder and the next higher degree of murder would apply to homicides committed before the revisions were enacted. The Legislature intended the substantive law defining first degree murder and the next higher degree of murder to apply retrospectively. Mr. Walton's constitutional claims concern whether the statutory change in substantive law can be constitutionally be made to govern homicides committed in 1978, 1981, and 1982, and/or first

did not present constitutional claims based upon Chapter 2017-1. The statement in *Asay* that *Hitchcock* had addressed a claim based upon Chapter 2017-1 is just erroneous.[9]

Further, any suggestion that a retroactivity decision concerning *Hurst v. Florida* foreclosed a claim arising from the enactment of a retrospective revision of the capital sentencing scheme ignores the difference between a court's procedural ruling and legislatively enacted substantive law. This was explained in *Thompson v. State*, 887 So. 2d 1260, 1263-64 (Fla. 2004): "*Witt* is not applicable to this case because we are examining a change in the statutory law of this state, not a change in the decisional law emanating from the Florida Supreme Court or the United States Supreme Court." Accordingly, as to the issue of whether the application of the new sentence statute violated Eighth Amendment principles, Due Process principles, and Equal Protection principles, this Court's reliance upon its holding that *Hurst v. Florida* is not retroactive was a non sequitur.

Finally, this Court's reliance upon *Perry v. State*, 210 So. 3d 630 (Fla. 2016) was also substantially misplaced. The issues there are not the same as those raised by Mr. Walton. There, the issue concerned Chapter 2016-13 and its application at Mr.

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degree murder convictions that were final in 1982, 1984, and 1985, but not to Mr. Walton whose convictions were final in 1990 for the 1982 homicides.

[9]Lambrix v. State, – So. 3d – 2017 WL 4320637 at *2 (Fla. Sep. 29, 2017) relied upon the same misstep in reasoning.

Perry's future trial. Mr. Walton's claim concerns Chapter 2017-1 and its retrospective application to homicides committed in 1978, 1981, and 1982. As a result, *Perry* cannot control whether Chapter 2017-1's unequal application violates Equal Protection, Due Process, and the Eighth Amendment. *Cf. e.g.*, *Lockyer v. Andrade*, 538 U.S. 63, 69, 72-73 (2003) (indicating that cases might be instructive to some extent but not necessarily controlling when the issue presented was not specifically decided or briefed by the allegedly controlling case); *Picard v. Connor*, 404 U.S. 270, 276-77 (1971) (demonstrating that claims on different constitutional amendments carry "separate identities and reflect different constitutional values."); *Rodriguez v. State*, 219 So. 3d 751, 757 (Fla. 2017) (reasoning because the same identical error did not occur in defendant's case compared to the decision he relied upon, the earlier decision was not controlling). To treat *Perry v. State*, *Hitchcock v. State*, or *Asay v. State* as controlling as to Mr. Walton's claim would also contravene the basic principle that courts only address the issues that come before them. *See generally*, *Nat'l Aeronautics and Space Admin. V. Nelson*, 532 U.S. 134, 147 n.10 (2011).

Because Mr. Walton's actual claims were not fully considered and addressed by this Court, "cause" should be found as to why *Hitchcock v. State* does not govern and require the trial court's ruling to be affirmed. Full briefing is required.

Chapter 2017-1's is substantive law

On March 13, 2017, the Governor signed Chapter 2017-1 into law. It provides that "If a unanimous jury does not determine that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of life imprisonment without the possibility of parole." The statute also provides that judges cannot override a jury's vote for life. *See* Fla. Stat. § 921.141(2)(c). Thus, it is statutorily unlawful to impose death on an individual without a unanimous jury vote for death in Florida.

Before such a vote can be reached, juries, not judges, must identify each aggravating factor that it unanimously found. *See* Fla. Stat.§ 921.141(2)(b). Afterwards, the jury must unanimously find that the state proved beyond a reasonable doubt that the unanimously found aggravating factors are sufficient to warrant a death sentence. Then, the jury must unanimously determine whether the "aggravating factors [that] exist [] outweigh the mitigating circumstances found to exist." Finally, jury members may extend mercy and vote for a life sentence despite unanimously agreeing on all other findings that would be necessary to impose a death sentence.

Put simply, to sentence someone to death, a jury must convict on first degree murder at the guilt phase and escalate that conviction to a higher degree of murder to increase the sentencing range to include death. Therefore, Chapter 2017-1 altered the elements of a criminal offense, i.e. capital first

degree murder, as opposed to first degree murder.

The US Supreme Court recognized that substantive criminal law is generally a legislative function. *Bousley v. United States*, 523 U.S. 614 (1998). In Florida, the legislature is tasked with that function exclusively. Any law "that modifies the elements of an offense is normally substantive rather than procedural." *Schiro v. Summerlin*, 542 U.S. 348, 354 (2004). For example, where a statute "alter[s] the range of conduct" necessary to punish an individual, meaning "formerly unlawful conduct [is now] lawful or vice versa," the law is substantive in nature. *Id.* As the unanimous findings must be reached by employing a beyond a reasonable doubt standard to be convicted of capital first degree murder and thus convert a conviction of first degree murder to capital first degree murder, this is akin to changing the State's burden of proof from a preponderance of the evidence standard to a beyond a reasonable doubt standard. *See Addington v. Texas*, 441 U.S. 418, 423 (1979).

In fact, the State has demonstrated that the statute defines new elements for what is necessary for capital first degree murder when it acknowledged that the new death-eligibility findings at the sentencing phase, which must be made unanimously and found beyond a reasonable doubt, were not requisite facts under the old statute. *See* Florida's Petition for a Writ of Certiorari, *Florida v. Hurst*, US Supreme Court Case No. 16-998. By going from a majority jury to one that necessitates a

unanimous jury's verdict to impose death, this is tantamount to the guilt phase presumption of innocence that can only be overcome by a unanimous jury's verdict finding the State carried its burden of proof beyond a reasonable doubt. This change exhibits the Legislature and the Governor's decision that death sentences should be reliable, as the higher burden of proof reflects the degree of confidence Floridians should have in the decision to impose death. *See Addington*, 441 U.S. at 423. *See also In re Winship*, 397 U.S. 358, 371-72 (1970).

The substantive nature of Chapter 2017-1, and the right to a life sentence unless a jury returns a unanimous death sentence that it enacted, is self-evident in light of *State v. Steele*, 921 So. 2d 538 (Fla. 2005). There, this Court showed that it viewed the issue as one that was substantive, not procedural. *Id.* at 548 ("the Legislature should revisit the statute to require some unanimity in the jury's recommendations."). A similar sentiment was expressed in *Hurst v. State*, 202 So. 3d 40, 62 (2016) ("Once the Supreme Court made clear in *Hurst v. Florida* that these findings are the sole province of the jury and that *Ring* applies to Florida's capital sentencing laws, **the Florida Legislature was required to immediately attempt to craft a new sentencing law** in accord with *Hurst v. Florida*.") (emphasis added). Thus, *State v. Steele* and *Hurst v. State* show that this Court surely would have changed the rules of procedure to require unanimity at capital sentencing phases if unanimity was viewed as a procedural matter.

For quite some time, the benefit enshrined in Chapter 2017-1 has been treated as one that is substantive.

Chapter 2017-1 applies retrospectively regardless of the date of the homicide or conviction's finality date

When there is a change in statutory law, Florida law presumes substantive changes are prospective, meaning from the date of enactment forward. *Arrow Air, Inc. v. Walsh*, 645 So. 2d 422, 424 (Fla. 1994). Remedial statutes may be applied retrospectively, however. These statutes are identified by whether they fix a statutory defect. But if a statute remedies a defect by establishing a substantive right or imposing a new legal burden, it is not a remedial statute. *Id.*

Chapter 2017-1 imposes a new legal burden on the State by according a defendant convicted of first degree murder a presumption to a life sentence unless the State convinces a jury to unanimously vote for death. The statutory benefit applies to direct appeals and pending prosecutions. But, the statutory benefit also extends to all resentencings or retrials that were not final on June 24, 2002. The date of the homicide is irrelevant. The date that the defendant was indicted is irrelevant. The date that the conviction became final is irrelevant. The only thing that is relevant under Chapter 2017-1 is whether a defendant's sentence was final after June 24, 2002.

The Legislature could have provided that the statutory benefit applied only to homicides that were committed after the

right was enacted, but it did not. In addition, to infer that the Legislature merely acted as this Court instructed would denigrate the Legislature's substantive rulemaking authority and indicate that this Court could have resolved this problem sooner under its procedural rulemaking authority, which conflicts with this Court's acknowledgments in *State v. Steele* and *Hurst v. State* that the Legislature was responsible for the fix. Therefore, Chapter 2017-1 applies retrospective from the date of enactment. But, it does not apply retrospectively to all. The effect of not applying the substantive benefit enacted by the Legislature evenly is what gives rise to the Due Process, Equal Protection, and Eighth Amendment claims.[10] This is the very issue this Court has not addressed.

D. The Uneven Application of Chapter 2017-1's Application Establishes the Constitutional Violations

The homicide at issue in this case occurred on June 18 1982. The capital conviction was final on November 8, 1990—the date that Mr. Walton's direct appeal Petition for Writ of Certiorari was denied. Though these events occurred before June 24, 2002, the critical procedural events in Mr. Walton's case also occurred after the homicides at issue in cases that will receive the benefit of the new statute. Individuals whose convictions were

[10]In contrast to Florida's approach, when Alabama changed its law to eliminate a judge's power to override a life recommendation, Alabama made its effective date applicable to any defendants who were "**charged** with capital murder **after** the effective date." Alabama Laws Act 2017-131, sec. 2, enacted April 11, 2017 (emphasis added).

final long before June 24, 2002, and whose convictions were final before Mr. Walton's convictions were final will receive the benefit of the new statute.

For instance, James Card will receive the benefit of the new statute. He was convicted of a 1981 homicide. His conviction was final in 1984. *Card v. State*, 453 So. 2d 17 (Fla. 1984). Due to collateral proceedings, he received a resentencing procedure that returned an 11-1 jury recommendation. The later-imposed death sentence became **final four 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). Under the new statute's terms, he will receive a statutorily created substantive benefit to a life sentence unless a jury unanimously agrees to a death sentence.

Examples like that of James Card reveal the absurdity and unconstitutionality of applying this statute retrospective to its enactment date, but not retrospective to all. If the new statute's goal is to enhance reliability of death sentences in Florida, it does not eliminate the fact that Mr. Walton's still lacks the right to that sort of reliability. If the new statute's goal is to ensure that only the most culpable receive death, that goal is not achieved either, as Card's death recommendation for premeditated murder was 11-1 compared to Mr. Walton's 9-3 recommendations. And, if the new statute's goal is to draw a line in the sand somewhere at the expense of sacrificing the older

cases, that goal is not accomplished either, as Card's case is older than Mr. Walton's. Whatever the intent, it is certainly not being accomplished adequately or in a rationale way.

Similar circumstances to Card's case exist in J.B. Parker's case, who will receive the benefit of the new statute for a 1982 homicide in which the conviction became final in 1985. *State v. Parker*, 873 So. 2d 270 (Fla. 2004). Plenty of individuals, whose convictions were final before Mr. Walton's and homicides occurred before the ones at issue in this case, will receive the substantive benefit of the new state. *See, e.g., Johnson v. State*, 205 So. 3d 1285 (Fla. 2016) (1981 homicide and conviction final in 1995).; *Meeks v. Moore*, 216 F. 3d 951, 959 (1974 homicide with 1977 conviction finality date will receive benefit of statutory change and decisional law).

In addition, by Chapter 2017-1 drawing a line based on the finality of the sentencing date, as opposed to the date of the homicide or finality of the conviction, the Legislature has created other problems indicative of an arbitrary application and unjust deprivation of a liberty interest. For instance, it fails to take into consideration that the substantive benefit will be awarded to defendants that were recalcitrant clients during or at trial.[11] It also will be extended to those where attorneys caused

[11] Take for example, Harrell Braddy. Although he was convicted by a jury in 2007 for his capital offense, which involved feeding a child to an alligator, his homicide occurred in 1998–almost a decade earlier from the jury's verdict. *Braddy v. State,* 111 So. 3d 810 (2012). The State has indicated that

unnecessary delays. *See, e.g.*, *Lugo v. State*, 845 So. 2d 74 (Fla. 2003) (showing a two-year delay in preparing the record on appeal which likely impacted the post *Ring* status).

Therefore, as cases that are older and newer than Mr. Walton's case will receive Chapter 2017-1's benefit, Mr. Walton is being deprived of equal application of the law. *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."). *See also Desist v. United States*, 394 U.S. 244, 258-59 (1969) (Harlan, J., dissenting) (discussing departures from the judicial tradition when similarly situated defendants are treated differently). Florida's Legislature was bound by the Equal Protection Clause when it defined the class that would receive Chapter 2017-1's benefit. Because the reasoning for the classification cannot reasonably be accomplished, the Florida Legislature ignored the principle that "[a] classification 'must be reasonable, not

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Braddy was the type of defendant that fired "numerous attorneys when they refused to follow his wishes." Answer Brief on Merits, *Braddy v. State*, Case No. SC15-404, at 29. Indeed, "[Mr. Braddy] managed to get rid of some of the best-known attorneys in Miami-Dade County for one reason or another [at trial] by filing motions to proceed without counsel as well as bar complaints." Initial Brief, *Braddy v. State*, Case No. SC15-404, at 50. Surely, this sort of recalcitrance delayed the proceedings enough to allow Braddy's sentence to become final after June 24, 2002.

arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstances shall be treated alike." *Reed v. Reed*, 404 U.S. 71, 76 (1971).

The Due Process Clause was "intended to secure the individual from the arbitrary exercise of the powers of government." *Hurtado v. California*, 110 U.S. 516, 527 (1884). Though Chapter 2017-1 created a substantive liberty interest, the Florida Legislature has extended that benefit to persons similarly situated to Mr. Walton, while creating a rule that denies it to Mr. Walton. But, "[o]nce a State has granted 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. 480, 488-89 (1980). Granting Mr. Card, Mr. Parker, Mr. Braddy, and others identified throughout this Response Chapter 2017-1's benefit, while denying that liberty interest to Mr. Walton, violates due process.

This Court already acknowledged that unanimity at the sentencing phase is necessary to insure reliability. *See Bevel v. State*, 221 So. 3d at 1179 ("a reliable penalty phase proceeding requires that 'the penalty phase jury must be unanimous in making the critical findings and recommendation that are necessary before a sentence of death may be considered by the judge or imposed.'"). Implicit in that acknowledgment is an admission that

death sentences that were reached without unanimity at the sentencing phase are less than reliable. When a death sentence is to be imposed, there is a special need for enhanced reliability in order to adhere to this country's and the Eighth Amendment's "fundamental respect for humanity." *See Johnson v. Mississippi*, 486 U.S. 578, 584 (1988). The statutory change towards unanimity, and to apply that change regardless of the date of the homicide, reflects the Legislature's intent to achieve reliability.

Mr. Walton will not receive the benefit of unanimity even though three jurors voted to spare his life for the homicide at issue in which all of his codefendants received life. Under *Bevel v. State*, he did not receive a reliable penalty phase. Death sentences are no longer permissible without a unanimous jury findings at the sentencing phase in Florida, yet Mr. Walton is still subject to a death sentence while similarly situated persons will not be subject to the death sentences previously imposed. *Cf. Lecroy v. State*, Case No. SC05-136 (showing this Court ordered Lecroy's death sentence to be vacated because his death sentence was legal when imposed but could not be imposed now because the State lacks the authority to execute him). Surely, this is "cause." A full briefing is warranted and relief should be granted.

WHEREFORE, Mr. Walton requests briefing on his claim pursuant to this Court's traditional appellate rules of procedure and to Art I, sec. 13 of the Florida Constitution.

CERTIFICATE OF SERVICE AND FONT

I HEREBY CERTIFY that a true copy of the foregoing response has been furnished by electronic service to Timothy Freeland, Assistant Attorney General, Office of the Attorney General, 3507 East Frontage Road, Tampa FL 33607 on thus 30th day of October, 2017. I further certify that I have complied with all font requirements.

Respectfully Submitted,

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