No. _____

IN THE

Supreme Court of the United States

PRESSLEY BERNARD ALSTON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

PETITIONER'S APPENDIX

THIS IS A CAPITAL CASE

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EXHIBIT 1

Supreme Court of Florida

No. SC17-499

PRESSLEY BERNARD ALSTON,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

No. SC17-983

PRESSLEY BERNARD ALSTON,
Petitioner,

vs.

JULIE L. JONES, etc.,
Respondent.

[May 17, 2018]

PER CURIAM.

We have for review Pressley Bernard Alston's appeal of the circuit court's order denying Alston's motion filed pursuant to Florida Rule of Criminal Procedure 3.851 and Alston's petition for a writ of habeas corpus. We have

jurisdiction. *See* art. V, § 3(b)(1), (9) Fla. Const. We withdraw the opinion issued on January 22, 2018, and substitute this opinion in its place.

Alston seeks relief pursuant to the United States Supreme Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and our decision on remand in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017). This Court stayed Alston's appeal and consideration of his habeas petition pending the disposition of *Hitchcock v. State*, 226 So. 3d 216 (Fla.), *cert. denied*, 138 S. Ct. 513 (2017). After this Court decided *Hitchcock*, Alston responded to this Court's order to show cause arguing why *Hitchcock* should not be dispositive in both cases. Then, after this Court decided *State v. Silvia*, 239 So. 3d 349 (Fla. 2018), Alston responded to this Court's order to show cause why *Silvia* should not be dispositive in both cases.

After reviewing Alston's responses to the orders to show cause, as well as the State's arguments in reply, we conclude that Alston's valid waiver of postconviction proceedings and counsel in 2003 precludes him from claiming a right to relief under *Hurst*. *See Silvia*, 239 So. 3d 349; *Alston v. State*, 894 So. 2d 46 (Fla. 2004). Moreover, Alston's sentence of death became final in 1999. *Alston v. State*, 723 So. 2d 148 (Fla. 1998). Thus, even if Alston's postconviction waiver did not preclude him from raising a *Hurst* claim, *Hurst* would not apply retroactively to Alston's sentence of death. *See Hitchcock*, 226 So. 3d at 217.

Accordingly, we affirm the circuit court's denial of relief and deny Alston's habeas petition.

It is so ordered.

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

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

CANADY, J., concurring in result.

I would base the denial of relief to Alston on my view that *Hurst* should not be given retroactive application. *See Mosley v. State*, 209 So. 3d 1248, 1285-91 (Fla. 2016) (Canady, J., concurring in part and dissenting in part).

An Appeal from the Circuit Court in and for Duval County,
Russell Healey, Judge - Case No. 161995CF005326AXXXMA
And an Original Proceeding – Habeas Corpus

Robert A. Norgard of Norgard, Norgard, & Chastang, Bartow, Florida, and Billy H. Nolas, Chief, Capital Habeas Unit, Northern District of Florida, Tallahassee, Florida,

for Appellant/Petitioner

Pamela Jo Bondi, Attorney General, and Jennifer L. Keegan, Assistant Attorney General, Tallahassee, Florida,

for Appellee/Respondent

EXHIBIT 2

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO.: 16-1995-CF-05326-AXXX

DIVISION: CR-A

STATE OF FLORIDA

v.

PRESSLEY B. ALSTON,
Defendant.
_____/

ORDER DENYING DEFENDANT'S SUCCESSIVE POSTCONVICTION MOTION TO VACATE SENTENCE OF DEATH

This cause comes before this Court on Defendant's "Successive Postconviction Motion," filed through counsel on January 3, 2017, pursuant to Florida Rule of Criminal Procedure 3.851. On January 23, 2017, the State filed its Answer to Defendant's Successive Postconviction Motion.

A jury found Defendant guilty of First-Degree Murder, Armed Robbery, and Armed Kidnapping. Alston v. State, 723 So. 2d 148, 150 (Fla. 1998). This Court sentenced Defendant to death as to the First-Degree Murder charge and two consecutive terms of life in prison for the Armed Robbery and Armed Kidnapping charges. Id. On September 10, 1998, the Florida Supreme Court issued an opinion affirming Defendant's convictions and sentence of death. See id. Defendant did not file a petition for writ of certiorari on direct appeal with the United States Supreme Court. Alston v. State, 894 So. 2d 46, 47 (Fla. 2004). In 1999, Capital Collateral Regional Counsel was appointed as Defendant's postconviction counsel and, five months later, filed a "shell" motion for postconviction relief. Id. In 2003, this Court granted Defendant's

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request to discharge postconviction counsel and ordered all of Defendant's petitions and motions for postconviction relief be denied with prejudice. Id.

A rule 3.851 motion must be filed within one year of the conviction and sentence of death becoming final. Fla. R. Crim. P. 3.851(d)(1). A rule 3.851 motion may be considered beyond the one-year time-bar, however, if it alleges "the fundamental constitutional right asserted was not established within the [one-year] period provided for in subsection (d)(1) and has been held to apply retroactively." Fla. R. Crim. P. 3.851(d)(2)(B).

Even if timely, a successive rule 3.851 motion may be denied without an evidentiary hearing if the record conclusively shows the defendant is not entitled to relief. Gaskin v. State, SC15-1884, 2017 WL 224772, at *1 (Fla. Jan. 19, 2017) (citing Reed v. State, 116 So. 3d 260, 264 (Fla. 2013)). "Under rule 3.851, 'postconviction claims may be summarily denied when they are legally insufficient, should have been brought on direct appeal, or are positively refuted by the record.'" Carroll v. State, 114 So. 3d 883, 885-86 (Fla. 2013) (quoting Marek v. State, 8 So. 3d 1123, 1127 (Fla. 2009)).

Defendant's convictions and sentence of death became final on December 9, 1998, when the time to file a petition for writ of certiorari on direct appeal with the United States Supreme Court expired. See Fla. R. Crim. P. 3.851(d)(1)(A) (stating, for rule 3.851, "a judgment is final . . . on the expiration of the time permitted to file in the United States Supreme Court a petition for writ of certiorari seeking review of the Supreme Court of Florida decision affirming a judgment and sentence of death (90 days after the opinion becomes final)"); Alston, 894 So. 2d at 47 (stating Defendant did not file a petition for writ of certiorari after his convictions and sentence of death were affirmed on direct appeal by the Florida Supreme Court on September 10, 1998). Thus, any postconviction claim asserted more than a year after Defendant's convictions and

sentence of death became final must be denied unless the claim falls within the newly-recognized retroactive constitutional right exception in subsection (d)(2)(B). Carroll, 114 So. 3d at 886 ("Rule 3.851 requires . . . that motions for postconviction relief must be filed within one year from when the conviction and sentence become final unless the claim is based on . . . a newly recognized fundamental constitutional right that has been held to apply retroactively.").

Defendant contends he was sentenced to death unconstitutionally and his sentence of death must be vacated pursuant to Hurst v. Florida, 136 S. Ct. 616 (2016), which held Florida's capital sentencing scheme unconstitutional in light of Ring v. Arizona, 536 U.S. 584 (2002), because "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death."[1] Hurst v. Florida, 136 S. Ct. at 619. Defendant alleges he is entitled to retroactive relief under Hurst v. Florida because Defendant properly asserted, presented, and preserved challenges to the lack of jury fact findings and unanimity.

The United States Supreme Court, in Hurst v. Florida, held the Sixth Amendment mandates that each fact necessary to impose a punishment greater than authorized by the jury's guilty verdict, such as a sentence of death, must be found by the jury. Id. at 621-22. On remand, the Florida Supreme Court concluded "Hurst v. Florida requires that all the critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury" and that "the jury's recommended sentence of death must be

[1] Defendant also asserts his sentence of death was unconstitutionally imposed and must be vacated for the following reasons: (1) the retroactive application of Hurst v. Florida in Asay violates the requirement of fairness and uniformity; (2) failure to apply Hurst retroactively deprives Defendant of a mercy vote from the jury; (3) failure to apply Hurst retroactively violates the dictates of Caldwell v. Mississippi, 472 U.S. 320 (1985); (4) the sentencing jury must be provided with constitutionally sound instructions regarding aggravating factors and mitigating circumstances; (5) Defendant must be sentenced to life in prison because Florida's death penalty scheme was found unconstitutional; and (6) Defendant is entitled to a new guilt phase. Defendant, however, has not alleged that the fundamental constitutional rights asserted in the above-listed claims "w[ere] not established within the [one-year time] period provided for in subdivision (d)(1)" or "ha[ve] been held to apply retroactively." Fla. R. Crim. P. 3.851(d)(2)(B). Accordingly, this Court denies these new claims without consideration, as they are procedurally barred by the one-year time limit prescribed in rule 3.851(d)(2)(B).

unanimous." Hurst v. State ("Hurst"), 202 So. 3d 40, 44 (Fla. 2016). It further clarified the meaning of Hurst v. Florida by proclaiming: "[I]n addition to unanimously finding the *existence* of any aggravating factor, the jury must also unanimously find that the aggravating factors are *sufficient* for the imposition of death and unanimously find that the aggravating factors *outweigh* the mitigation before a sentence of death may be considered by the judge." Id. at 54.

In Asay v. State, No. SC16-223, 2016 WL 7406538 (Fla. Dec. 22, 2016), the Florida Supreme Court addressed whether Hurst v. Florida and Hurst should apply retroactively. The majority employed the traditional Witt[2] retroactivity framework to conclude that Hurst v. Florida and Hurst do not apply retroactively to capital cases that became final prior to June 24, 2002, the date on which Ring was decided. Id. at *13.

The Florida Supreme Court considered whether Hurst v. Florida and Hurst should apply retroactively to post-Ring capital cases in Mosley v. State, No. SC14-436, 2016 WL 7406506 (Fla. Dec. 22, 2016). In Mosley, the Court employed the Witt retroactivity framework as well as the fundamental fairness retroactivity analysis set forth in James v. State, 615 So. 2d 688 (Fla. 1993). Id. at *18-19. The Court held that, "because [the defendant] raised a Ring claim at his first opportunity and was then rejected at every turn, . . . fundamental fairness requires the retroactive application of Hurst, which defined the effect of Hurst v. Florida, to [the defendant]." Id. at *19. The Court further found the Witt framework also supported the retroactive application of Hurst v. Florida and Hurst to post-Ring cases. See id. at *19-25.

In Gaskin v. State, SC15-1884, 2017 WL 224772 (Fla. Jan. 19, 2017), the Florida Supreme Court made clear that the fundamental fairness retroactivity analysis is only applicable to post-Ring cases. In that case, the defendant had argued, both at trial and on direct appeal, that Florida's capital sentencing scheme was facially unconstitutional "for the reasons espoused by

[2] Witt v. State, 387 So. 2d 922 (Fla. 1980).

the United States Supreme Court in Ring and Hurst v. Florida . . . ." Id. at *3 (Pariente, J., concurring in part and dissenting in part) (footnote omitted). In spite of the defendant's repeated constitutional assaults on Florida's capital sentencing scheme based on the reasoning subsequently established in Ring, the defendant was not entitled to retroactive relief under Hurst v. Florida and Hurst because the defendant's sentence of death became final pre-Ring. Id. at *2 (citing Asay, 2016 WL 7406538 at *13).

Taken together, the Asay/Mosley/Gaskin triad creates a categorical bar against the retroactive application of Hurst v. Florida and Hurst to capital cases that became final before Ring was decided. Therefore, Defendant's belated Hurst claims do not fall within the newly-established retroactive constitutional right exception in subdivision (d)(2)(B) because the right has not been held to apply retroactively to capital cases that became final before Ring was issued. Accordingly, Defendant's claim is denied.

Accordingly, it is **ORDERED AND ADJUDGED** that Defendant's "Successive Postconviction Motion," filed through counsel on January 3, 2017, is **DENIED**. This is a final order, and Defendant shall have thirty (30) days from the date this Order is filed to take an appeal by filing a Notice of Appeal with the Clerk of the Court.

DONE AND ORDERED in Jacksonville, Duval County, Florida on February 14, 2017.

RUSSELL HEALEY
Circuit Judge
Administrative Felony Judge

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Pressley B. Alston
DOC No.: 709795
Union Correctional Institution
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CERTIFICATE OF SERVICE

I do certify that a copy hereof has been furnished to the above-listed parties by United States mail on February 21, 2017.

Deputy Clerk

Case No.: 16-1995-CF-05326-AXXX
/tbc

EXHIBIT 3

Filing # 62042847 E-Filed 09/27/2017 09:16:52 AM

Supreme Court of Florida

WEDNESDAY, SEPTEMBER 27, 2017

CASE NOS.: SC17-499 & SC17-983
Lower Tribunal No(s).:
161995CF005326AXXXMA

PRESSLEY BERNARD ALSTON	vs.	STATE OF FLORIDA
PRESSLEY BERNARD ALSTON	vs.	JULIE L. JONES, ETC.
Appellant/Petitioner		Appellee/Respondent

Appellant/Petitioner shall show cause on or before Tuesday, October 17, 2017, why the trial court's order should not be affirmed and the petition for a writ of habeas corpus should not be denied in light of this Court's decision Hitchcock v. State, SC17-445. The response shall be limited to no more than 20 pages. Appellee/Respondent may file a reply on or before Wednesday, November 1, 2017, limited to no more than 15 pages. Appellant/Petitioner may file a reply to the Appellee/Respondent's reply on or before Monday, November 13, 2017, limited to no more than 10 pages.

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

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

jat
Served:

ROBERT ANTHONY NORGARD
JENNIFER L. KEEGAN
BILLY H. NOLAS

EXHIBIT 4

Supreme Court of Florida

MONDAY, FEBRUARY 12, 2018

CASE NO.: SC17-499
Lower Tribunal No(s).:
161995CF005326AXXXMA

PRESSLEY BERNARD ALSTON vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

The mandate issued on Wednesday, February 7, 2018, is hereby recalled.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

tw
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ROBERT ANTHONY NORGARD
BILLY H. NOLAS
JENNIFER L. KEEGAN
PRESSLEY BERNARD ALSTON
MEREDITH CHARBULA
HON. RONNIE FUSSELL, CLERK
HON. MARK H. MAHON, CHIEF JUDGE
HON. RUSSELL L. HEALEY, JUDGE

Filing # 67813710 E-Filed 02/12/2018 11:04:22 AM

Supreme Court of Florida

MONDAY, FEBRUARY 12, 2018

CASE NOS.: SC17-499 & SC17-983
Lower Tribunal No(s).:
161995CF005326AXXXMA

PRESSLEY BERNARD ALSTON	vs.	STATE OF FLORIDA
PRESSLEY BERNARD ALSTON	vs.	JULIE L. JONES, ETC.
Appellant/Petitioner		Appellee/Respondent

In light of this Court's decision in *State v. Silvia*, SC17-337 (Fla. Feb. 1, 2018), Appellant/Petitioner shall show cause on or before February 27, 2018, why this Court's opinion in this case should not be vacated and why Appellant's/Petitioner's postconviction waiver does not preclude him from claiming a right to relief under *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017). The response shall be limited to no more than 20 pages. Appellee/Respondent may file a reply on or before March 9, 2018, limited to no more than 15 pages.

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

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Test:

John A. Tomasino
Clerk, Supreme Court

jat
Served:

ROBERT ANTHONY NORGARD
BILLY H. NOLAS
JENNIFER L. KEEGAN

EXHIBIT 5

Nos. SC17-499 & SC17-983

IN THE

Supreme Court of Florida

PRESSLEY BERNARD ALSTON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

PRESSLEY BERNARD ALSTON,

Petitioner,

v.

JULIE L. JONES, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

APPELLANT/PETITIONER'S RESPONSE TO SEPTEMBER 27, 2017 ORDER TO SHOW CAUSE

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Counsel for Mr. Alston

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INTRODUCTION

Appellant/Petitioner Pressley Alston's death sentence was imposed pursuant to a capital sentencing scheme that was ruled unconstitutional by the United States Supreme Court in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and this Court in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). The issue in this case is whether this Court will continue to apply its unconstitutional "retroactivity cutoff" to deny Mr. Alston *Hurst* relief on the ground that his sentence did not become final at least one day after the 2002 decision in *Ring v. Arizona*, 536 U.S. 584 (2002).

This Court has already applied *Hurst* retroactively as a matter of state law in dozens of collateral-review cases where the defendant's sentence became final after *Ring*. But the Court has also created a state-law cutoff at the date *Ring* was decided—June 24, 2002—to deny relief in dozens of other collateral-review cases. The *Ring*-based cutoff is unconstitutional and should not be applied to Mr. Alston. Denying Mr. Alston *Hurst* relief because his sentence became final in 1999, rather than some date between 2002 and 2016, would violate the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Mr. Alston is entitled to *Hurst* retroactivity as a matter of federal law.[1]

[1] Relief should not be denied here in light of *Hitchcock v. State*, No. SC17-445, 2017 WL 3431500 (Fla. Aug. 10, 2017). Mr. Alston notes that there is a petition for a writ of certiorari pending in *Hitchcock* (No. 17-6180).

REQUEST FOR ORAL ARGUMENT AND FULL BRIEFING

This appeal presents an important issue of first impression: whether federal law requires this Court to extend *Hurst* retroactivity to death sentences that became final before *Ring*, rather than confining *Hurst* relief to post-*Ring* death sentences. Mr. Alston respectfully requests oral argument on this and related issues pursuant to Fla. R. App. P. 9.320. Mr. Alston also requests that the Court permit full briefing in this case in accord with the normal, untruncated rules of appellate practice.

Depriving Mr. Alston the opportunity for full briefing in this case would constitute an arbitrary deprivation of the vested state right to a mandatory plenary appeal in capital cases. *See Doty v. State*, 170 So. 3d 731, 733 (Fla. 2015) ("[T]his Court has a mandatory obligation to review all death penalty cases to ensure that the death sentence is imposed in accordance with constitutional and statutory directives."); *see also Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Hicks v. Oklahoma,* 447 U.S. 343 (1980).

ARGUMENT

I. Mr. Alston's sentence violates *Hurst* and the error is not "harmless"

Mr. Alston was sentenced to death pursuant to an unconstitutional Florida capital sentencing scheme. In *Hurst v. Florida*, the United States Supreme Court held that Florida's scheme violated the Sixth Amendment because it required the judge, not the jury, to make the findings of fact required to impose the death penalty

under Florida law. 136 S. Ct. at 620-22. Those findings included: (1) the aggravating factors that were proven beyond a reasonable doubt; (2) whether those aggravators were "sufficient" to justify the death penalty; and (3) whether those aggravators outweighed the mitigation. Under Florida's unconstitutional scheme, an "advisory" jury rendered a generalized recommendation for life or death by a majority vote, without specifying the factual basis for the recommendation, and then the sentencing judge alone, notwithstanding the jury's recommendation, conducted the fact-finding. *Id.* at 622. In striking down that scheme, the Court held that the jury, not the judge, must make the findings of fact required to impose death. *Id.*

On remand, this Court applied the holding of *Hurst v. Florida*, and further held that the Eighth Amendment requires *unanimous* jury fact-finding as to each of the required elements, and also a unanimous recommendation by the jury to impose the death penalty. *Hurst v. State*, 202 So. 3d at 53-59. The Court also noted that, even if the jury unanimously finds that each of the required elements is satisfied, the jury is not required to recommend the death penalty, and the judge is not required to sentence the defendant to death. *Id.* at 57-58.

Mr. Alston's jury was never asked to make unanimous findings of fact as to any of the required elements. Instead, after being instructed that its decision was advisory, and that the ultimate responsibility for imposing a death sentence rested with the judge, the jury rendered a non-unanimous, generalized recommendation

that the judge sentence Mr. Alston to death. The record does not reveal whether Mr. Alston's jurors unanimously agreed that any particular aggravating factor had been proven beyond a reasonable doubt, or unanimously agreed that the aggravators were sufficient for death, or unanimously agreed that the aggravators outweighed the mitigation. But the record *is* clear that Mr. Alston's jurors were not unanimous as to whether the death penalty should even be recommended to the court.

Mr. Alston's pre-*Hurst* jury recommended the death penalty by a vote of 9-3. This Court's precedent makes clear that *Hurst* errors are not harmless where the defendant's pre-*Hurst* jury recommended death by a non-unanimous vote. *Dubose v. State*, 210 So. 3d 641, 657 (Fla. 2017) ("[I]n cases where the jury makes a non-unanimous recommendation of death, the *Hurst* error is not harmless."). This Court has declined to apply the harmless error doctrine in every case where the pre-*Hurst* jury's recommendation was not unanimous.[2]

To the extent any of the aggravators applied to Mr. Alston were based on prior convictions, the judge's finding of such aggravators does not render the *Hurst* error harmless. Even if the jury would have found the same aggravators, Florida law does not authorize death sentences based on the mere existence of an aggravator. As

[2] *See, e.g.*, *Bailey v. Jones*, No. SC17-433, 2017 WL 2874121, at *1 (Fla. July 6, 2017) (11-1 jury vote); *Hertz v. Jones*, 218 So. 3d 428, 431-32 (Fla. 2017) (10-2 jury vote); *Hernandez v. Jones*, 217 So. 3d 1032, 1033 (Fla. 2017) (11-1 jury vote); *Card v. Jones*, 219 So. 3d 47, 48 (Fla. 2017) (11-1 jury vote); *McMillian v. State*, 214 So. 3d 1274, 1289 (Fla. 2017) (10-2 jury vote).

noted above, Florida law requires fact-finding as to both the existence of aggravators *and* the "sufficiency" of the particular aggravators to warrant imposition of the death penalty. There is no way to conclude whether the jury would have made the same sufficiency determination as the judge. That is why this Court has consistently rejected the idea that a judge's finding of prior-conviction aggravators is relevant in the harmless-error analysis of *Hurst* claims, and has granted *Hurst* relief despite the presence of such aggravators. *See, e.g.*, *Franklin v. State*, 209 So. 3d 1241, 1248 (Fla. 2016) (rejecting "the State's contention that Franklin's prior convictions for other violent felonies insulate Franklin's death sentence from *Ring* and *Hurst*").[3]

II. This Court's "retroactivity cutoff" at *Ring* is unconstitutional and should not be applied to Mr. Alston

Beginning with *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), this Court has applied *Hurst* retroactively as a matter of state law and granted relief in dozens of collateral-review cases where the defendant's sentence became final after *Ring*. But the Court has created a state-law cutoff at the date *Ring* was decided—June 24,

[3] Moreover, although this Court's state-law precedent is sufficient to resolve any harmless-error inquiry in this case, the United States Constitution would not permit a denial of relief based on the harmless error doctrine because any attempt to discern what a jury in a constitutional proceeding would have decided would be impermissibly speculative. *See, e.g., Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985) (explaining that a jury's belief about its role in death sentencing can materially affect its decision-making); *Sullivan v. Louisiana*, 508 U.S. 275, 279-80 (1993) (foreclosing application of the harmless-error doctrine to deny relief based on jury decisions not comporting with Sixth Amendment requirements).

2002—to deny relief in dozens of other collateral-review cases. The Court recently reaffirmed its retroactivity cutoff in *Hitchcock v. State*, No. SC17-445, 2017 WL 3431500 (Fla. Aug. 10, 2017). The Court has not addressed in any case whether this retroactivity cutoff at *Ring* is constitutional as a matter of federal law.

The *Ring*-based retroactivity cutoff violates the United States Constitution and should not be applied to deny Mr. Alston the same *Hurst* relief being granted in scores of materially indistinguishable collateral cases. Denying Mr. Alston *Hurst* retroactivity because his death sentence became final in 1999, while affording retroactivity to similarly-situated defendants who were sentenced (or resentenced) between 2002 and 2016, would violate the Eighth and Fourteenth Amendments' prohibition against arbitrary and capricious imposition of the death penalty, as well as the Fourteenth Amendment's guarantee of equal protection and due process.

A. This Court's retroactivity cutoff violates the Eighth and Fourteenth Amendments' prohibition against arbitrary and capricious imposition of the death penalty

This Court's retroactivity cutoff violates the Eighth and Fourteenth Amendments' prohibition against arbitrary and capricious imposition of the death penalty. The *Hurst* decisions guarantee substantive rights that must be protected through sentencing procedures, and the United States Supreme Court has explained that the death penalty cannot "be imposed under sentencing procedures that create[] a substantial risk that it would be inflicted in an arbitrary or capricious manner."

Gregg v. Georgia, 428 U.S. 153, 188 (1976); *see also Furman v. Georgia*, 408 U.S. 238, 310 (1972) ("[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.") (Stewart, J., concurring). In other words, the death penalty cannot be imposed in certain cases in a way that is comparable to being "struck by lightning." *Furman*, 408 U.S. at 308.

Experience has already shown the arbitrary results inherent in this Court's application of the *Ring*-based retroactivity cutoff. The date of a particular death sentence's finality on direct appeal in relation to the June 24, 2002 decision in *Ring*—and thus whether this Court has held *Hurst* retroactive based on its bright-line cutoff—has at times depended on whether there were delays in transmitting the record on appeal to this Court for the direct appeal; whether direct appeal counsel sought extensions of time to file a brief; whether a case overlapped with this Court's summer recess; how long the assigned Justice of this Court took to submit the opinion for release; whether an extension was sought for a rehearing motion and whether such a motion was filed; whether there was a scrivener's error necessitating issuance of a corrected opinion; whether counsel chose to file a petition for a writ of certiorari in the United States Supreme Court or sought an extension to file such a petition; and how long a certiorari petition remained pending in the Supreme Court.

In one striking example, this Court affirmed Gary Bowles's and James Card's unrelated death sentences in separate opinions that were issued on the same day, October 11, 2001. *Bowles v. State*, 804 So. 2d 1173 (Fla. 2001); *Card v. State*, 803 So. 2d 613 (Fla. 2001). Both inmates petitioned for a writ of certiorari in the United States Supreme Court. Mr. Card's sentence became final four (4) days after *Ring* was decided—on June 28, 2002—when his certiorari petition was denied. *Card v. Florida*, 536 U.S. 963 (2002). Mr. Bowles's sentence, however, became final seven (7) days before *Ring* was decided—on June 17, 2002—when his certiorari petition was denied. *Bowles v. Florida*, 536 U.S. 930 (2002). This Court recently granted *Hurst* relief to Mr. Card, ruling that *Hurst* was retroactive because his sentence became final after the *Ring* cutoff. *See Card*, 219 So. 3d at 47. Mr. Bowles, on the other hand, whose case was decided on direct appeal on *the same day* as Mr. Card's, and who filed his certiorari petition in the Supreme Court *after* Mr. Card, now finds himself on the pre-*Ring* side of this Court's current retroactivity cutoff.

Other arbitrary factors affecting whether a defendant receives *Hurst* relief under this Court's date-of-*Ring*-based retroactivity approach include whether a resentencing was granted. Under the Court's current approach, "older" cases dating back to the 1980s with a post-*Ring* resentencing are subject to *Hurst*, while other less "old" cases are not. *See, e.g.*, *Johnson v. State*, 205 So. 3d 1285, 1285 (Fla. 2016) (granting *Hurst* relief to a defendant whose crime occurred in 1981 but was

granted relief on a third successive post-conviction motion in 2010, years after the *Ring* decision); *Card*, 219 So. 3d at 47 (granting *Hurst* relief to a defendant whose crime occurred in 1981 but was afforded relief on a second successive post-conviction motion in 2002—just four days after *Ring* was decided); *cf. Calloway v. State*, 210 So. 3d 1160 (Fla. 2017) (granting *Hurst* relief in a case where the crime occurred in the late 1990s, but interlocutory appeals resulted in a ten-year delay before the trial). Under this Court's approach, a defendant who was originally sentenced to death before Mr. Alston, but who was later resentenced to death after *Ring*, would receive *Hurst* relief and Mr. Alston would not.

Moreover, under the Court's current rule, some litigants whose *Ring* claims were wrongly rejected on the merits during the 2002-2016 period will be denied the benefit of *Hurst* because the Court addressed the issue in a post-conviction rather than a direct appeal posture. *See. e.g.*, *Miller v. State*, 926 So. 2d 1243, 1259 (Fla. 2006); *Nixon v. State*, 932 So. 2d 1009, 1024 (Fla. 2006); *Bates v. State*, 3 So. 3d 1091, 1106 n.14 (Fla. 2009); *Bradley v. State*, 33 So. 3d 664, 670 n.6 (Fla. 2010).[4]

[4] Even if this Court were to maintain its unconstitutional retroactivity "cutoff" at *Ring*, individuals who preserved the substance of the *Hurst* decisions before *Hurst*, such as Mr. Alston, should receive the retroactive benefit of *Hurst* under this Court's "fundamental fairness" doctrine, which the Court has previously applied in other contexts, *see, e.g.*, *James v. State*, 615 So. 2d 668, 669 (Fla. 1993), and which the Court has applied once in the *Hurst* context, *see Mosley*, 209 So. 3d at 1274, but inexplicably never addressed since. Justice Lewis recently endorsed this "preservation" approach in *Hitchcock*. *See* 2017 WL 3431500, at *2 (Lewis, J., concurring) (stating that the Court should "simply entertain *Hurst* claims for those

Making *Hurst* retroactive to only post-*Ring* sentences also unfairly denies *Hurst* access to defendants who were sentenced between *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring*. The fundamental unfairness of that result is stark given that the Supreme Court made clear in *Ring* that its decision flowed directly from *Apprendi*. *See Ring*, 536 U.S. at 588-89. And in *Hurst*, the Court repeatedly stated that Florida's scheme was incompatible with "*Apprendi*'s rule," of which *Ring* was an application. 136 S. Ct. at 621. This Court itself has acknowledged that *Ring* was an application of *Apprendi*. *See Mosley*, 209 So. 3d at 1279-80. This Court's drawing of its retroactivity cutoff at *Ring* instead of *Apprendi* represents the sort of capriciousness that is inconsistent with the Eighth Amendment.

B. This Court's retroactivity cutoff violates the Fourteenth Amendment's guarantee of equal protection and due process

This Court's retroactivity cutoff violates the Fourteenth Amendment's guarantee of equal protection and due process. As an equal protection matter, the cutoff treats death-sentenced prisoners in the same posture—on collateral review—differently without "some ground of difference that rationally explains the different treatment." *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972). When two classes are created to receive different treatment by a state actor like this Court, the question is

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defendants who properly presented and preserved the substance of the issue, even before *Ring* arrived."). Mr. Alston urges that the Court allow him to brief this aspect of his case in an untruncated fashion.

whether there is a rational basis for the different treatment. *Id.*; *see also McLaughlin v. Florida*, 379 U.S. 184, 191 (1964). The Fourteenth Amendment requires that distinctions in state criminal laws that impinge upon fundamental rights be strictly scrutinized. *See, e.g., Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). Capital defendants have a fundamental right to a reliable determination of their sentences. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978). When a state draws a line between defendants who will receive the benefit of the rules designed to enhance the quality of decision-making by a penalty-phase jury and those who will not, the state's justification for that line must satisfy strict scrutiny. Far from meeting strict scrutiny, this Court's *Hurst* retroactivity cutoff lacks even a rational connection to any legitimate state interest. *See Dep't of Agric. v. Moreno*, 413 U.S. 528, 533 (1973).

As a due process matter, denying *Hurst* retroactivity to "pre-*Ring*" defendants like Mr. Alston violates the Fourteenth Amendment because once a state requires certain sentencing procedures to implement substantive rights like those guaranteed by the *Hurst* decisions, it creates Fourteenth Amendment life and liberty interests in those procedures. *See, e.g.*, *Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (due process interest in state-created right to direct appeal); *Hicks*, 447 U.S. at 346 (liberty interest in state-created sentencing procedures); *Ford v. Wainwright*, 477 U.S. 399, 427-31 (1986) (O'Connor, J., concurring) (liberty interest in meaningful state competency proceedings); *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 288-89 (1998)

(O'Connor, J., with Souter, Ginsburg, & Breyer, JJ., concurring) (life interest in state-created right to capital clemency proceedings).

Although the right to the particular procedure necessary to implement a substantive guarantee is established by state law, the violation of the life and liberty interest it creates is governed by *federal* constitutional law. *See Hicks*, 447 U.S. at 347; *Ford*, 477 U.S. at 399, 428-29; *Evitts*, 469 U.S. at 393 (state procedures employed "as 'an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant'" must comport with due process). Defendants have "a substantial and legitimate expectation that [they] will be deprived of [their] liberty only to the extent determined by the jury in the exercise of its discretion . . . and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State." *Hicks*, 447 U.S. at 346. Courts have found in a variety of contexts that state-created death penalty procedures vest in a capital defendant life and liberty interests that are protected by due process. *See. e.g.*, *Ohio Adult Parole Auth.*, 523 U.S. at 272; *Ford*, 477 U.S. at 427-31. In *Hicks*, the Supreme Court held that the trial court's failure to instruct the jury that it had the option to impose an alternative sentence violated the state-created liberty interest (and federal due process) in having the jury select his sentence from the full range of alternatives available under state law. 447 U.S. at 343.

III. Because the *Hurst* decisions announced substantive constitutional rules, the Supremacy Clause of the United States Constitution requires state courts to apply those rules retroactively to all cases on collateral review

A. The Supremacy Clause requires state courts to apply substantive constitutional rules retroactively to all cases on collateral review

In *Montgomery v. Louisiana*, 136 S. Ct. 718, 731-32 (2016), the United States Supreme Court held that the Supremacy Clause of the Constitution requires state courts to apply "substantive" constitutional rules retroactively as a matter of federal constitutional law, notwithstanding any separate state-law retroactivity analysis. In *Montgomery*, a Louisiana state prisoner filed a claim in state court seeking retroactive application of the rule announced in *Miller v. Alabama*, 567 U.S. 460 (2012) (holding that imposition of mandatory sentences of life without parole on juveniles violates the Eighth Amendment). The state court denied the prisoner's claim on the ground that *Miller* was not retroactive as a matter of state retroactivity law. *Montgomery*, 136 S. Ct. at 727. The United States Supreme Court reversed, holding that because the *Miller* rule was substantive as a matter of federal law, the state court was obligated to apply it retroactively. *See id.* at 732-34.

Montgomery clarified that the Supremacy Clause requires state courts to apply substantive rules retroactively, notwithstanding state-law analysis. *Montgomery*, 136 S. Ct. at 728-29 ("[W]hen a new substantive rule of constitutional law controls the outcome of a case, *the Constitution* requires state collateral review courts to give retroactive effect to that rule.") (emphasis added). Thus, *Montgomery* held, "[w]here

state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge." *Id.* at 731-32.

Importantly for purposes of *Hurst* retroactivity analysis, the Supreme Court found the *Miller* rule substantive in *Montgomery* even though the rule had "a procedural component." *Id.* at 734. *Miller* did "not categorically bar a penalty for a class of offenders or type of crime—as, for example, [the Court] did in *Roper* or *Graham*." *Miller*, 567 U.S. at 483. Instead, "it mandate[d] only that a sentence follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Id.* Despite *Miller*'s procedural mandates, the Court in *Montgomery* warned against "conflat[ing] a procedural requirement necessary to implement a substantive guarantee with a rule that 'regulate[s] only the *manner of determining* the defendant's culpability.'" *Montgomery*, 136 S. Ct. at 734 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)). Instead, the Court explained, "[t]here are instances in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within a category of persons whom the law may no longer punish," *id.* at 735, and that the necessary procedures do not "transform substantive rules into procedural ones," *id.* *Miller* "bar[red] life without parole . . . . For that reason, *Miller* is no less substantive than are *Roper* and *Graham*." *Id.* at 734.

B. The *Hurst* decisions announced substantive rules that must be applied retroactively to Mr. Alston under the Supremacy Clause

The *Hurst* decisions announced substantive rules that this Court must apply retroactively to Mr. Alston under the Supremacy Clause. At least two substantive rules were established by *Hurst v. Florida* and *Hurst v. State*. First, a Sixth Amendment rule was established requiring that a jury find as fact beyond a reasonable doubt: (1) each aggravating circumstance; (2) that those particular aggravating circumstances together are "sufficient" to justify imposition of the death penalty; and (3) that those particular aggravating circumstances together outweigh the mitigation in the case. *Hurst v. State*, 202 So. 3d at 53-59. Such findings are manifestly substantive. *See Montgomery*, 136 S. Ct. at 734 (holding that the decision whether a juvenile is a person "whose crimes reflect the transient immaturity of youth" is a substantive, not procedural, rule). As in *Montgomery*, these requirements amounted to an "instance[] in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within a category of persons whom the law may no longer punish." *Id.* at 735.

Second, an Eighth Amendment rule was established that requires those three beyond-a-reasonable-doubt findings to be made unanimously by the jury. The substantive nature of the unanimity rule is apparent from this Court's explanation in *Hurst v. State* that unanimity (1) is necessary to ensure compliance with the constitutional requirement that the death penalty be applied narrowly to the worst

offenders, and (2) ensures that the sentencing determination "expresses the values of the community as they currently relate to the imposition of the death penalty." 202 So. 3d at 60-61. The function of the unanimity rule is to ensure that Florida's death-sentencing scheme complies with the Eighth Amendment and to "achieve the important goal of bringing [Florida's] capital sentencing laws into harmony with the direction of the society reflected in [the majority of death penalty] states and with federal law." *Id.* As a matter of federal retroactivity law, the rule is therefore substantive. *See Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) ("[T]his Court has determined whether a new rule is substantive or procedural by considering the function of the rule"). This is true even though the rule's subject concerns the method by which a jury makes its decision. *See Montgomery*, 136 S. Ct. at 735 (noting that state's ability to determine method of enforcing constitutional rule does not convert rule from substantive to procedural).

The United States Supreme Court's decision in *Welch* is illustrative of the substantive nature of *Hurst*. In *Welch*, the Court addressed the retroactivity of the constitutional rule articulated in *Johnson v. United States*, 135 S. Ct. 2551, 2560 (2015). In *Johnson*, the Court held that a federal statute that allowed sentencing enhancement was unconstitutional. *Id.* at 2556. *Welch* held that *Johnson*'s ruling was substantive because it "affected the reach of the underlying statute rather than the judicial procedures by which the statute is applied"—therefore it must be applied

retroactively. *Welch*, 136 S. Ct. at 1265. The Court emphasized that its determination whether a constitutional rule is substantive or procedural "does not depend on whether the underlying constitutional guarantee is characterized as procedural or substantive," but rather whether "the new rule itself has a procedural function or a substantive function," i.e., whether the new rule alters only the procedures used to obtain the conviction, or alters instead the class of persons the law punishes. *Id.* at 1266. In *Welch*, the Court pointed out that, "[a]fter *Johnson*, the same person engaging in the same conduct is no longer subject to the Act and faces at most 10 years in prison. The residual clause is invalid under *Johnson*, so it can no longer mandate or authorize any sentence." *Id.* Thus, "*Johnson* establishes, in other words, that even the use of impeccable factfinding procedures could not legitimate a sentence based on that clause." *Id.* "It follows," the Court held, "that *Johnson* is a substantive decision." *Id.* (internal quotation omitted).

The same reasoning applies in the *Hurst* context. The Sixth Amendment requirement that each element of a Florida death sentence must be found beyond a reasonable doubt, and the Eighth Amendment requirement of jury unanimity in fact-finding, are substantive constitutional rules as a matter of federal law because they place certain murders "beyond the State's power to punish," *Welch*, 136 S. Ct. at 1265, with a sentence of death. Following the *Hurst* decisions, "[e]ven the use of impeccable factfinding procedures could not legitimate a sentence based on" the

judge-sentencing scheme. *Id.* And in the context of a *Welch* analysis, the "unanimous finding of aggravating factors and [of] the facts that are sufficient to impose death, as well as the unanimous finding that they outweigh the mitigating circumstances, all serve to help *narrow the class of murderers subject to capital punishment*," *Hurst*, 202 So. 3d at 60 (emphasis added), i.e., the new law by necessity places certain individuals beyond the state's power to impose a death sentence. The decision in *Welch* makes clear that a substantive rule, rather than a procedural rule, resulted from the *Hurst* decisions. *See Welch*, 136 S. Ct. at 1264-65 (a substantive rule "alters . . . the class of persons that the law punishes.").

Hurst retroactivity is not undermined by *Summerlin*, 542 U.S. at 364, where the United States Supreme Court held that *Ring* was not retroactive in a federal habeas case. In *Ring*, the Arizona statute permitted a death sentence to be imposed on a finding of fact that at least one aggravating factor existed. *Summerlin* did not review a statute, like Florida's, that required the jury not only to conduct the fact-finding regarding the aggravators, but also as to whether the aggravators were *sufficient* to impose death and whether the death penalty was an appropriate sentence. *Summerlin* acknowledged that if the Court itself "[made] a certain fact essential to the death penalty . . . [the change] would be substantive." 542 U.S. at 354. Such a change occurred in *Hurst* where, for the first time, the Court found it unconstitutional for a judge alone to find that "sufficient aggravating factors exist

and [t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." 136 S. Ct. at 622 (internal citation omitted).

Moreover, *Hurst*, unlike *Ring*, addressed the proof-beyond-a-reasonable-doubt standard in addition to the jury trial right, and the United States Supreme Court has always regarded proof-beyond-a-reasonable-doubt decisions as substantive. *See, e.g.*, *Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972) (explaining that "the major purpose of the constitutional standard of proof beyond a reasonable doubt announced in [*In re Winship*, 397 U.S. 358 (1970)] was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function, and *Winship* is thus to be given complete retroactive effect."); *Powell v. Delaware*, 153 A.3d 69 (Del. 2016) (holding *Hurst* retroactive under Delaware's state *Teague*-like retroactivity doctrine and distinguishing *Summerlin* on the ground that *Summerlin* "only addressed the misallocation of fact-finding responsibility (judge versus jury) and not . . . the applicable burden of proof.").[5]

[5] The recent ruling of an Eleventh Circuit panel in *Lambrix v. Sec'y*, No. 17-14413, 2017 WL 4416205 (11th Cir. Oct. 5, 2017), does not negate Mr. Alston's arguments. First, *Lambrix* was decided in the context of the current federal habeas statute, which dramatically curtails review: "A state court's decision rises to the level of an unreasonable application of federal law only where the ruling is objectively unreasonable, not merely wrong; even clear error will not suffice." *Id.* at *8 (internal quotation marks omitted). In contrast, this Court's application of federal constitutional protections is not circumscribed, as this Court noted in the *Hurst* context in *Hurst v. State*, 202 So. 3d 40, 44 (Fla. 2016) ("[W]e hold that the Supreme Court's decision in *Hurst v. Florida* requires that all critical findings necessary before the trial court may consider imposing a sentence of death must be found

C. This Court has an obligation to address Mr. Alston's federal retroactivity arguments

Because this Court is bound by the federal constitution, it has the obligation to address Mr. Alston's federal retroactivity arguments. *See Testa v. Katt*, 330 U.S. 386, 392-93 (1947) (state courts must entertain federal claims in the absence of a "valid excuse"); *Martin v. Hunter's Lessee*, 14 U.S. 304, 340-42 (1816).

Addressing those claims meaningfully in the present context requires full briefing and oral argument. The federal constitutional issues were raised to this Court in *Hitchcock*, but this Court ignored them. Dismissing this appeal on the basis of *Hitchcock* would compound that error.

CONCLUSION

This Court should hold that federal law requires the *Hurst* decisions to be applied retroactively to Mr. Alston, vacate Mr. Alston's death sentence, and remand to the circuit court for a new penalty phase or imposition of a life sentence.

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unanimously by the jury . . . . We also hold . . . under the Eighth Amendment to the United States Constitution, that in order for the trial court to impose a sentence of death, the jury's recommended sentence must be unanimous"). Second, *Lambrix* dealt with an idiosyncratic issue—the "retroactivity" of Florida's new capital sentencing statute. Lambrix did not argue, as Mr. Alston does here, for the retroactivity of the constitutional rules arising from the *Hurst* decisions. Third, the Eleventh Circuit did not address the specific arguments about federal retroactivity that are raised here. Fourth, almost needless to say, an Eleventh Circuit panel decision has no precedential value in this forum.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2017, the foregoing was electronically served via the e-portal to Assistant Attorney General Jennifer L. Keegan at jennifer.keegan@myfloridalegal.com and capapp@myfloridalegal.com.

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EXHIBIT 6

Filing # 68525947 E-Filed 02/27/2018 02:04:39 PM

No. SC17-499 and SC17-983

IN THE

Supreme Court of Florida

PRESSLEY BERNARD ALSTON,

Appellant/Petitioner,

v.

STATE OF FLORIDA &
JULIE JONES

Appellee/Respondent.

APPELLANT'S RESPONSE TO FEBRUARY 12, 2018 ORDER TO SHOW CAUSE

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INTRODUCTION

Mr. Alston's death sentence was imposed pursuant to a capital sentencing scheme that was ruled unconstitutional in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). Mr. Alston challenged his death sentence in the trial court based on *Hurst*, through a successive postconviction motion and then to this Court on appeal. This Court issued an opinion in this case denying Mr. Alston's challenge to the death sentence based on *Hurst* premised on this Court's decision in *Hitchcock v. State*. The mandate was issued on February 7, 2018. On February 12, 2018, this Court issued two orders: the first recalled the February 7 mandate. The second order was an order to show cause directing Mr. Alston to respond as to why this Court's recent decision in *State v. Silvia*, SC17-337 (Fla. Feb. 1, 2018) should not apply to his case.

This response is limited to addressing the Court's order. So as to avoid having the response stricken, Mr. Alston does not include argument beyond the issue identified by the Court's order.

RESPONSE

1. Mr. Alston's case is factually distinguishable from *State v. Silvia*.

In *State v. Silvia*, SC17-337 (Fla. Feb. 1, 2018), this Court carved out yet another exception to deny *Hurst* relief to death sentenced inmates. This Court held that because the defendant had waived collateral proceedings after *Ring*, but before

the *Hurst* decisions, he was precluded from obtaining *Hurst* relief. The facts adduced from the opinion of this Court are that Silvia's death sentence became final on June 6, 2011. The jury recommended death with an 11-1 vote. Silvia had challenged the constitutionality of Florida's death penalty sentencing scheme based on *Ring* in the trial court and on direct appeal but was unsuccessful because of this Court's previous rulings related to *Ring* challenges.

In 2012, Silvia waived his right to collateral proceedings and to collateral counsel. This waiver was upheld by this Court in 2013. According to the opinion Silvia's waiver was made with the following understanding:

> In addition, Silvia indicated that he understood that by waiving post-conviction proceedings early in the process-before a motion was filed –he was losing permanently his right to take advantage of any changes that may occur in the law, that he was waiving his right to federal review, and that because his attorneys had not yet completed their discovery, it was unknown what issues could be raised.

State v. Silvia, SC17-337- at page -4-[emphasis added in opinion], *quoting, Silvia*, 2013 WL5035694 at*2.

Based on the breadth and scope of the uncontested waiver and because Silvia knew about the *Ring* issue by virtue of having raised it in the trial court and on direct appeal, this Court held the valid, uncontested waiver of postconviction precluded him from claiming a right to relief under *Hurst*.

Mr. Alston's case is factually distinguishable from *Silvia*. The lengthy and convoluted process that ultimately resulted in Mr. Alston's waiver of

postconviction rights was far different than that of the defendant in *Silvia* and is set forth in *Alston v. State*, 894 So.2d 641 (Fla. 2004). Mr. Alston's case became final in 1999. Mr. Alston was represented by CCRC-M by June 1999 and a shell motion was filed five months later.

From August 1999 until July 2000, Mr. Alston filed numerous pleadings in the trial court and this Court, mostly in the form of extraordinary writs, seeking to end his state court collateral proceedings. Most of these efforts were premised on his mistaken belief that somehow his state collateral rights had either ended or that because of various issues, he was facing a procedural bar to challenging his convictions in federal court if his state court collateral proceedings were to continue.[See, Repository Records: Case No. SC00-225 Mandamus Petition, unnumbered *pro se* pleadings filed by Alston and Repository Records: Case No. SC 02-1904 and *Appendix to Amended Initial Brief of Petitioner's Former Counsel to Petitioner's Pro-Se Petition for Writ of Habeas Corpus* in *Alston v. State*, SC02-1904] During this time period *Ring* had not issued.

In July 2000, CCRC-M moved for a competency determination of Mr. Alston, leading to the trial court finding him to be incompetent in October 2001. Despite the finding of incompetency and his purported desire to waive postconviction, Mr. Alston showered this court, the trial court, and the federal court with *pro se* petitions, most of which alleged bizarre acts committed by the

prosecutor, prison guards, and others that were used to incarcerate him for a crime he had not committed.

From July through November 2002, Mr. Alston was evaluated by numerous doctors and DOC, ultimately leading to an evidentiary hearing in March 2003 on the question of Mr. Alston's competency. Despite a split amongst the experts, the trial court found Mr. Alston to be competent. The decision on whether Mr. Alston would be permitted waive postconviction proceedings was scheduled for a later date. Despite Mr. Alston's request during the competency hearing to waive postconviction proceedings, between March and the June *Durocher* hearing, Mr. Alston continued to filed *pro se* pleadings attacking his conviction, albeit with increasingly bizarre allegations.[Attachment A: Copy of *Durocher* hearing conducted June 6, 2003, p.23;26-7]

In compliance with orders from this Court, on June 6, 2003, the trial court held a *Durocher* hearing to determine whether or not Mr. Alston would be permitted to waive postconviction proceedings. [Attachment A: Copy of *Durocher* hearing conducted on June 6, 2003]. At the time of the hearing CCRC-M had already filed a shell motion, unlike the situation in *Silvia*, where no motion had been filed at all.

During the hearing the trial court advised Mr. Alston that waiving his postconviction proceedings would result in a dismissal with prejudice of any

pending motions. The trial court told Mr. Alston that "Now, with prejudice means that you can never refile those matters, that once they are dismissed, they're over and all of your collateral remedies are foreclosed. Then it is logical to assume if you do that, that ultimately the judgment of the law will be carried out. [Attachment A, p.7 (emphasis added)] The trial court's explanation was directed at the already filed shell motion- not at any prospective motions.

When questioning Mr. Alston, the Assistant Attorney General engaged in this exchange with Mr. Alston:

> AAG: Mr. Alston, you understand that if the court finds that you knowingly, intelligently, and voluntarily waive your right to postconviction proceedings, that in the future if you should change your mind and attempt to re-invoke those proceedings, that the State will oppose any such motion?
>
> A: I understand Ms. Dolgin.

[Attachment A, p.36]

Immediately after this exchange the trial court advised Mr. Alston,

> And that just follows up on what I said to you when I said it would be with prejudice, which is a legal term that means that it could not be brought again ***absent extraordinary circumstances, which I frankly can't foresee***.

[Attachment A, p. 36-37 (emphasis added)]

The trial court then immediately proceeded to rule that Mr. Alston's waiver was knowing, intelligent, and voluntary. This Court upheld the waiver in *Alston v. State*, 894 So.2d 641 (Fla. 2004).

Since 2004 Mr. Alston has not ceased in his *pro se* filings to this Court, the trial court, and the federal courts, which attack and challenge his conviction and sentence.

The decision in *Silvia* that a waiver of postconviction rights precludes a claim of *Hurst* relief should not be applied in a general manner, but should be applied under the narrow factual circumstances present in *Silvia*. The *Silvia* waiver exception should be just that- the exception only applicable under the same factual circumstances. In *Silvia* the significant facts are (1) a waiver occurring prior to the filing of any motion, which necessarily contemplates the waiver of future claims; (2) a waiver where at the time of the waiver the defendant knew about *Ring*, and (3) a record which unequivocally demonstrates the defendant is waiving all future rights with no exceptions. In this case the trial court's warnings to Mr. Alston about the consequences of any waiver differ significantly from those in *Silvia* and these differences compel a different result in this case than that in *Silvia*.

First, the trial court's initial warning and explanation to Mr. Alston about the prejudice that would result if he waived postconviction was clearly directed at the already-filed shell motion. The plain language used by the trial court was that the already filed motion would be dismissed and the issues in that motion could not be brought before the courts again. Conspicuously absent from the trial court's

statements are any warnings that future motions could not be brought if they relied on different grounds other than those already present in the shell motion.

Second, unlike *Silvia,* at the time of the filing of the shell motion and throughout the period Mr. Alston was incompetent *Ring* had not issued. Unlike the defendant in *Silvia,* Mr. Alston did not have any knowledge of *Ring* at the time these proceedings had occurred. Mr. Alston did not have the benefit of having had counsel explain, pursue, or otherwise advocate *Ring* claims on his behalf as had Silvia at the time of his waiver.

Third, the trial court and the Assistant Attorney General did not clearly communicate to Mr. Alston that this waiver would be an absolute bar to any future collateral efforts. Neither the trial court nor the AAG's statements advised Mr. Alston that, as in *Silvia*, he was "losing permanently his right to take advantage of any changes that may occur in the law." *State v. Silvia*, 2013 WL 5035694 at *2. The AAG did not tell Mr. Alston he could never pursue collateral relief again- she told Mr. Alston if he filed something in the future the State would oppose it. The trial court told Mr. Alston "with prejudice" was a legal term that "means it could not be brought again absent extraordinary circumstances, which I frankly cannot foresee." This was the last statement made to Mr. Alston before the trial court announced his ruling that Mr. Alston could waive the current shell motion. The waiver made by Mr. Alston was not the type of waiver made by the defendant in

Silvia. The waiver in this case was not as broad and it cannot be considered a waiver of any changes in the law. The trial court told Mr. Alston prejudice would not bar him from reasserting his rights under extraordinary circumstances. The *Hurst* decisions represent just the extraordinary circumstances that even the trial court did not foresee in 2004.

The factual basis to apply *Silvia* to this case is missing. *Silvia* cannot be used as a basis to deny Mr. Alston from claiming a right to relief under *Hurst*. In this case, if this Court finds that *Silvia* applies to Mr. Alston, he will have been deemed to have waived a right he was unaware of at the time of the filing of his postconviction motion and at the time of his waiver. See, *Halbert v. Michigan*, 545 U.S. 605 (2005) (a litigant cannot waive rights he does not yet have). Mr. Alston continues to assert that the *Hurst* decision apply retroactively to him for the reasons set forth in the initial pleadings in this case.

2. *Class*, an opinion of the United States Supreme Court issued February 21, 2018, supports Mr. Alston and was not considered by this Court in *Silvia*.

In *Class*, the United States Supreme Court held that a guilty plea and related "waivers" do not, by themselves, bar a criminal defendant "from challenging the constitutionality of the statute of conviction on direct appeal." *Clas*s, 2018 WL 987347, at *4. Relevant here, the Court in *Class* rejected the argument that the defendant had "expressly waived" his right to appeal "constitutional" issues

because the judge informed the defendant that he "was giving up his right to appeal his conviction." *Id*. at *7 (internal brackets and quotation marks omitted). The Supreme Court rejected this argument, noting that the plea did "not expressly refer to a waiver of the appeal right here at issue." *Id*. Rather, absent an express waiver of prospective constitutional challenges, the defendant cannot be said to have waived those rights. *Id*. at *4 (internal quotation mark omitted).

Mr. Alston's waiver, like Class's plea, prohibited him from raising only certain claims in future proceedings. Mr. Alston's waiver, however, does not prohibit his claims under the *Hurst* opinions because his prior waiver did not include a waiver of his rights under *Hurst.* In fact, *Hurst* rights did not even exist at the time he entered his prior "waiver." Also, as in *Class,* Mr. Alston's waiver did not expressly prohibit him from challenging the constitutionality of the underlying statute, which was found unconstitutional by the *Hurst* decisions.

3. A finding that Mr. Alston's "waiver" precludes *Hurst* relief is contrary to *Halbert,* holding that litigant cannot waive rights he does not yet have

Any finding that Mr. Alston's waiver, entered into before *Ring*, is contrary to *Halbert v. Michigan*, 545 U.S. 605 (2005). Mr. Alston could not have waived his rights to jury fact-finding and juror unanimity because those rights were not recognized by Florida courts at the time he entered his waivers. This is the established United States Supreme Court precedent applicable here.

In *Silvia*, the Court cited to *Mullens v. State*, 197 So. 3d 16, 40 (Fla. 2016), as authority for denial of *Hurst* relief for defendants who waive a penalty phase jury. The litigants in *Mullens*, however, did not direct this Court's attention to the United States Supreme Court's holding in *Halbert*, finding that a litigant cannot waive rights that he does not have. *See also Class*, 2018 WL 987347, at *5 (a guilty plea waives only arguments that "the defendant could have availed himself by any other plea or motion." (internal quotation marks omitted)). The Court, therefore, has yet to consider *Halbert*'s controlling precedent that is contrary to *Silvia*'s and *Mullens*' reasoning. And, in most of the cases considered in *Mullens*, the defendants, unlike Mr. Alston, already had state statutory rights to jury fact-finding at sentencing that they had explicitly waived.

4. The decision in *Silvia* is incorrect and violates state and federal constitutional guarantees of equal protection, due process, constitutes cruel and unusual punishment, and results in the arbitrary and capricious operation of the death penalty.

Mr. Alston further adopts, in its entirety, the dissent authored by Justice Lewis in *Silvia*. Mr. Alston did not change his mind about pursuing collateral relief, as was the case in *Trease v. State*, 41 So.3d 119, 126 (Fla. 2010) or in *James v. State*, 974 So.2d 365, 368 (Fla. 2008). Mr. Alston has chosen to pursue collateral relief based on extraordinary circumstances- exactly as he was told he could do by the trial court in 2003. As the dissent noted, the constitutional rights

established by the *Hurst* decisions, is a new right Mr. Alston is seeking to avail himself of- exactly the kind of right even the trial court did not foresee in 2003.

Mr. Alston is not precluded from pursuing *Hurst* relief under Florida law, as the dissent asserts. To do so would deprive him of equal protection and due process as guaranteed by the Fourteenth Amendment and Article I, Section 2 of the Florida Constitution.

Mr. Alston further adopts the dissent's position that to deny him *Hurst* relief premised on the waiver of the 1999 shell motion is a violation of the Fourteenth Amendment right to due process and Article I, Section 9 of the Florida Constitution. It is fundamentally unfair to deny Mr. Alston the right to claim *Hurst* relief under *Witt v. State*, 387 So.2d 922 (Fla. 1980) and *Gore v. State*, 710 So.2d 1197, 1203 (Fla. 1998).

Mr. Alston also adopts the dissent's determination that to deny him the right to claim *Hurst* relief violates his right to jury trial under the Sixth Amendment and Article 1, Section 17 of the Florida Constitution because the decision to forgo collateral proceedings is wholly separate from the Sixth and Eighth Amendment rights at stake in *Hurst*.

The decision in *Silvia* would deny Mr. Alston his right to habeas corpus relief under Article I, Section 13 of the Florida Constitution, as well as under Article I, Section 9 of the United States Constitution.

CONCLUSION

Mr. Alston would request full briefing on these matters, but even if there is not full briefing, this Court should hold that Mr. Alston's waiver of claims in a previously filed postconviction motion do not preclude him claiming relief under *Hurst* where he did not knowingly, intelligently, and voluntarily waive his right to pursue claims based on the circumstances created by *Hurst*. Further, this Court should reconsider its ruling on *Silvia* and follow the position of the dissent in *Silvia*.

Respectfully submitted,

/s/Robert A. Norgard
ROBERT A. NORGARD

CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2018, the foregoing was electronically served via the e-portal to Assistant Attorney General Jennifer Keegan at jennifer.keegan@myfloridalegal.com and to capapp@myfloridalegal.com.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY the size and style font used in the preparation of this Response is New Time Roman 14 in compliance with Fla. R. App. P. 9.210.

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IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 95-5326-CFA.

DIVISION: CR-A.

FILED
THOMAS D. HALL
2003 JUN 13 P 3:35
CLERK, SUPREME COURT
BY

STATE OF FLORIDA

VS.

PRESSLEY ALSTON

Proceedings before the Honorable Aaron K. Bowden, at 1:40 p.m., on Friday, June 6, 2003, at the Duval County Courthouse, 330 East Bay Street, Courtroom 7, before Karen F. Howard, Registered Professional Reporter and Notary Public in and for the State of Florida at Large.

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EXHIBIT "A"

APPEARANCES

ANGELA COREY, Esquire, Assistant State Attorney, Appearing for the State of Florida.

CASSANDRA DOLGIN, Esquire, Assistant Attorney General, Appearing for the State of Florida.

ROBERT STRAIN, Esquire, and F. LESTER ADAMS, Esquire, Capital Collateral Regional Counsel's Office, Appearing on behalf of the defendant.

PROCEEDINGS

- - -

THE COURT: Hello. How is everybody today?

MR. STRAIN: Fine.

THE COURT: Let's start first -- let's go around the table and have everybody identify themselves for the record and we'll go from there.

MS. DOLGIN: Cassandra Dolgin with the Attorney General's Office on behalf of the State of Florida.

MS. COREY: Angela Corey, assistant state attorney, Fourth Judicial Circuit, trial counsel for the state.

THE COURT: Ms. Corey, forgive me. On that last order I did, we misspelled your last name, and I just caught it. I hope you didn't even catch it.

MS. COREY: I didn't catch it and I don't mind, Your Honor.

THE COURT: All right. Okay.

MR. STRAIN: Robert Strain, Judge, for Mr. Alston from Capital Collateral Regional Counsel's Office in Tampa.

THE COURT: Okay. And Mr. Alston is here I see.

THE DEFENDANT: That's true.

MR. ADAMS: Frank Lester with Capital Collateral in Tampa.

THE COURT: Okay. Mr. Alston has been urging the court to hold a hearing where he could consider waiving counsel and consider waiving his post-conviction proceedings.

The court has not been able to accommodate him prior to this because he was declared incompetent and that slowed things down for a while. However, at the last evidentiary hearing he was declared by the court to be competent. An order has been entered to that effect.

I will welcome suggestions of counsel on how we should proceed today, but I intend to ask some questions of Mr. Alston and see exactly what his desires are. Counsel is welcome to ask questions as counsel may deem appropriate. If counsel believes that the court is going down the wrong path, feel free to suggest that.

Obviously we all have the same interest

here, and that is to assure ourselves, and in particular the court, that whatever it is that Mr. Alston decides is a free and voluntary act on his part and something that he deems to be in his best interest.

We all know by dictate of the Florida Supreme Court that a death sentence prisoner has every right to reject counsel and proceed either pro se or waive post-conviction proceedings and request that the judgment of the law be carried out. That is the law of the State of Florida.

So the first exercise I see is for Mr. Alston to determine whether he wishes to discharge counsel, and then we will go from there.

Mr. Alston, to the best that you can, raise your right hand, please. I know you're shackled.

Do you swear or affirm that the answers you'll give to the questions put to you by the court and counsel will be true and that any other testimony you give will be true?

THE DEFENDANT: I affirm, Judge.

THE COURT: All right, sir. You may feel

free to remain seated. I know it's uncomfortable with you being in the shackles.

I see, Mr. Alston, that you have three options. Your first option would be -- is to stay where you are legally; that is, let CCR counsel prosecute your post-conviction matters that are now pending and just let things take ordinary course. That's your one option.

The second option is for you to discharge CCR, proceed on your own without benefit of counsel, with the caveat that if CCR counsel is discharged another lawyer will not be appointed for you, you would be on your own.

The third alternative, as I see it, is to discharge CCR, waive post-conviction proceedings. Of course, you can waive CCR and prosecute your post-conviction proceedings on your own, of course, without assistance of counsel.

THE DEFENDANT: Yes, sir.

THE COURT: But if you waive your post-conviction proceedings, the court will not only discharge counsel, but will also enter an order dismissing with prejudice any motions that you have under rule 3.851 or any

other post-conviction rules.

Now, with prejudice means that you can never refile those matters, that once they are dismissed, they're over and all of your collateral remedies are foreclosed. Then it is logical to assume that if you do that, that ultimately the judgment of the law will be carried out and you will be put to death as ordered by this court.

So are you now prepared to say what you want to do?

THE DEFENDANT: Yes, sir.

THE COURT: All right. How old are you today?

THE DEFENDANT: 32, sir.

THE COURT: How long have you been in either jail or prison, approximately?

THE DEFENDANT: Since 1996, March, I've been on Florida's death row at Florida State Prison, and I was transported and transferred over to Union Correctional Institution; that is, Union C.I., abbreviated U.C.I.

THE COURT: And how far did you go in school? I forget.

THE DEFENDANT: 12th grade education,

sir.

THE COURT: So you have a high school diploma, do you?

THE DEFENDANT: Yes, sir.

THE COURT: Or equivalency diploma?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. I know that you read and write the English language because you send me many messages, correct?

THE DEFENDANT: Yes, sir.

THE COURT: You're comfortable in the English language?

THE DEFENDANT: Yes, sir.

THE COURT: Are you comfortable here today; that is, physically are you in good health?

THE DEFENDANT: Yes, sir.

THE COURT: Are you under any medication?

THE DEFENDANT: No, sir.

THE COURT: None whatsoever?

THE DEFENDANT: No, sir, not at all.

THE COURT: So you have a clear head?

THE DEFENDANT: Yes, sir.

THE COURT: You know why we're here?

THE DEFENDANT: Yes, sir.

THE COURT: You know that it's at your request?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. What do you wish to do?

THE DEFENDANT: As you ordered and declared that I am competent to proceed, today I would like to -- as you say, a third option is by representing myself pro se. I would like to waive all collateral proceedings and post-conviction proceedings and have the judgment of the law carried out, meaning on January 11th, 1996, this court imposed the sentence of death for State of Florida versus Pressley Alston, and that is what I'm here for today seeking, to have the court --

THE COURT: Okay.

THE DEFENDANT: -- abide by the -- you know, stay with this judgment that was entered on January 11th, 1996.

THE COURT: Very well.

Well, I know you've been fussing for a long time, and I don't mean that in a disparaging manner, but you have fussed a little bit about some of the things that have

been done on your behalf. You have expressed some displeasure with counsel. We've resolved some personality conflicts that you've had with counsel before.

You know that these two lawyers sitting with you are available to assist you in any way that you deem appropriate? You know that, don't you?

THE DEFENDANT: Yes, sir.

THE COURT: You know that they have a repository or a reservoir of research and case law that could assist you in your post-conviction proceedings?

THE DEFENDANT: Yes, sir.

THE COURT: Will you concede that they are better equipped to deal with post-conviction proceedings than you are?

THE DEFENDANT: No, sir, because I desire to waive all remaining post-conviction proceedings, appeals, and everything as a collateral attack. The only thing I wanted to refer to was what you ruled March 20th, 2003. You said here in court on the record that I would be able to address the things that you said that I've been filing and --

THE COURT: I'm going to let you do that, but I've got to do what I've got to do first, okay?

THE DEFENDANT: Okay. Yes, sir.

THE COURT: All right. But I've also cautioned you I'm not going to let you use the courtroom as a forum just to give a speech --

THE DEFENDANT: Yes, sir.

THE COURT: -- because this is serious business.

THE DEFENDANT: Yes, sir.

THE COURT: All right?

And you know that this transcript of what we do or whatever comes out of this will probably be reviewed by the Supreme Court to be sure that everything is done properly?

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And once that's taken place, it is likely that the governor will issue a warrant calling for your death.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Now, Mr. Strain has been with him for a while. You get along with

him, don't you?

THE DEFENDANT: No, sir. Yesterday I shook his hand and as we ended up interview session, I apologized to him because we had irreconcilable conflict. And at times -- and he admitted yesterday we had some arguments. And I told him yesterday that I apologize and I was sorry because I felt as though I had disrespected him.

But I think that when you look at since 1996 and when you look at 1998 after the Supreme Court affirmed the sentence of death, that's what I've been doing, is seeking this court to waive all --

THE COURT: Okay.

THE DEFENDANT: -- no further --

THE COURT: You are very impressive in your desire to treat your case in the manner that you have outlined.

THE DEFENDANT: Thank you, sir.

THE COURT: You've done some legal research on your own. I know that.

THE DEFENDANT: Yes, sir.

THE COURT: You've done a lot of reading since you've been in prison, haven't you?

THE DEFENDANT: I try to, sir.

THE COURT: What other things do you read other than law books?

THE DEFENDANT: Just the Holy Scriptures as written in the Bible, that's it, and any other religious material or the newspaper, sometimes magazines.

THE COURT: Okay. What kind of law literature do you read?

THE DEFENDANT: Everything that is accessible and available in the written room library at Union C.I.

THE COURT: Why are you reading these law books if you want to waive all of your rights?

THE DEFENDANT: I thought that when you have a -- I thought that I was supposed to have attorney-client privilege, and that never happened since I've been on appeal.

When the case was appealed to the Florida Supreme Court -- as I filed to this court when I had attorney Teresa J. Sopp, I only saw her one time for about eight minutes. I never took part in the appellate process.

And then I had conflict with C.C.R.C.. there were things I filed against them here in

this court wherein I thought they falsified the signature on some of the paperwork that I received.

THE COURT: All right. So you were trying to see what to do about those things?

THE DEFENDANT: Yes, sir.

THE COURT: That's why you were reading the law books, right?

THE DEFENDANT: Yes, sir, to have knowledge of the court process while on appeal.

THE COURT: Okay. Lawyers, do you have any questions you wish to address to Mr. Alston concerning counsel?

Mr. Strain?

MR. STRAIN: Judge, if the court please. Judge, I do -- we recognize that case law in reality brings a presumption of competency to Mr. Alston today based on the court's ruling in March, but, Judge, I'd just like the court to know -- as you mentioned a few moments ago, I've been representing Mr. Alston since December of 1999 and probably first met him January of 2000 or so.

But since the court's hearing on March 20

of this year, Ms. Mercer visited Mr. Alston for varying lengths of time on March 31, April 9, May 7, and with Mr. Adams and myself yesterday at U.C.I., Judge.

Judge, just as a preliminary thing before I request permission under Durocher to ask some questions of Mr. Alston myself, I'd just like to again give you introductory.

The rules under Durocher -- well, Durocher tells the court, as you've already done, to conduct a Faretta-type inquiry. There are a few more questions suggested in rule 3.111 that I plan to ask Mr. Alston.

And I do appreciate the court asking not just leading questions, as the rule 3.111 seems to require only yes and no questions, so I commend the court for getting Mr. Alston to talk more.

But, Judge, since the March 20 hearing, Mr. Alston has continued to file, as far as we know by copies, of one document, and I presume that's -- it's our understanding that the court got it, and it's dated April 2, 2003, entitled plaintiff's request to waive all remaining post-conviction proceedings,

collateral counsel, and to have this court to rule for a sentence to be carried out by law and to grant his in-open-court voluntary dismissal.

Judge, a letter that Mr. Alston wrote to trial counsel Allen Chipperfield that was passed on to me after the March hearing, as well as another communication, makes me question very sincerely and in good faith whether the court can find that Mr. Alston is making a knowing and intelligent waiver, number one, and I agree with the court's sequence that first is to take care of whether he's going to dismiss my office as his counsel.

But, again, the Faretta requires -- or the rule 3.111 requires an unequivocal request. And the court may recall even back January/February of 2000 the court referred to Mr. Alston at that time waiving on his waivers request.

So he's changed his mind so many times, and I feel that the contents of much of his communications either before March or since March indicates a contradiction in whether he

understands that he will not be able to proceed with challenges, conviction, or any other matters.

THE COURT: Well, that's why we're here today. Today is the day of reckoning.

MR. STRAIN: With that, Judge, if I may, let me ask a few questions. I refer the court to page twelve forty-four and forty-five, if anybody else has the rule book. These are the Faretta questions.

THE COURT: Is that 111?

MR. STRAIN: This is the 2003 volume.

THE COURT: But it's rule --

MR. STRAIN: Yeah, 3.111, yes, Your Honor, the small print questions that follow that rule.

THE COURT: Okay. Good.

EXAMINATION

BY MR. STRAIN:

Q Mr. Alston, if I may ask you, how would you explain to the court what the consequences of dismissing my office are as far as any post-conviction proceedings?

A The consequences is the death sentence that this court imposed, as I said earlier, on January 11th, 1996, the consequences of waiving all collateral

proceedings, CCR, Capital Collateral Regional Counsel Middle Region today would be that I would not have an attorney -- I would not have the attorney's services or any representatives of C.C.R.C. middle region to help me or assist me in anything that I try to file to this court as a collateral attack or post-conviction relief.

And that is not what -- that's not what I'm going to do. I will not have any assistance or help from C.C.R.C. at all. That is my understanding.

Q Mr. Alston, are you under any drugs or medication at the present time?

A No, sir.

Q Have you been taking any drugs or medication in the last two weeks?

A No, sir, not at all.

Q Mr. Alston, have you -- have you ever been diagnosed and treated for mental illness?

A No, sir. Only thing, I went through the competency evaluations, but I never been treated for any mental illnesses at all.

Q Do you remember any of the specific diagnoses that some of the witnesses testified to before?

A No, sir. As you have a letter there where you said that there was a paradox because of what I filed and what I wrote to C.C.R.C. after March 20th of 2003,

the only reason I wrote the letter and the only reason I filed the motion -- I wrote the letter because I felt as though some of the things that the experts and the people that testified on March 20th, 2003, Judge Bowden, I felt as though it was smear campaign or some type of character attack by them in front of Ms. Sharon Coon.

And the only thing I wanted to do was after this court said that I was competent to proceed, declared it and ordered it, I felt as though it would be fair to me that I could stand and cross-examine them in front of her, because when they began to speak about and testify about my conduct at Union C.I., and in front of her, I felt as though that took away from any rehabilitation, reform, or reeducation that I've been through since I've been in the Florida Department of Corrections at F.S.P. or Union C.I., and that is the only reason I wrote C.C.R.C. after March 20th, 2003.

I don't think it was a paradox. I think it was concern for Ms. Sharon Coon and myself and the court because some of the experts, some of the doctors that testified, it seemed as though they were saying something bad or negative about me.

And then there were prison officials that testified here wherein my rebuttal to what they testified in their testimony would be what if there was

some procedural deviation or some rule violation by them wherein I got a disciplinary report to be on disciplinary confinement as they testified here in court.

That's the only thing I wanted to do to end and conclude that court hearing, because it was a two-day evidentiary hearing, we had one, and when you said in your ruling that I'm competent to proceed and that I would be able to address the court, I thought it was a good idea, it would be nice, to file a motion and dismiss the appeals, dismiss everything as I was seeking in the motion, though at the same time be allowed to cross-examine some of the witnesses that testified because Ms. Sharon Coon was here present in court.

Q Mr. Alston, assuming the judge finds today that you are making a knowing and voluntary and intelligent waiver of counsel, do you understand that it's a whole -- as the judge explained earlier -- that it's a whole second step whether or not you're going to waive any post-conviction proceedings?

A Yes, sir, there is -- I believe that -- I believe that there is no second step after I knowingly and intelligently and voluntary waive all further appeals and collateral proceedings and post-conviction proceedings in this case.

Q Mr. Alston, can you tell the court in connection with that answer that you will cease as of today from ever filing any more pro se pleadings post-conviction?

A Yes, sir, because Judge Bowden said earlier that the Supreme Court of Florida will review the transcripts of the record here in these proceedings for these proceedings; there is no need.

Q Do you understand by not filing any more pro se pleadings that any complaints against prosecutor Angela Corey will have to stop?

A Yes, sir. I think that only complaint that I can make against her would be to a law enforcement agency, but to the court, I can never file anything to the court again.

Q What about Daniel Lugo, who's a fellow inmate on death row at U.C.I., do you intend to file any lawsuits in connection with him?

A No, sir, because of the criminal investigation that was in nexus with this case that I believe that Ms. Angela Corey administered or worked in as an agent, I thought that -- this person housed next to me at Union Correctional Institution by the name Daniel L. Lugo, I thought this person was investigator or agent working with her investigating a totally different crime,

meaning the murder of Jacksonville police detective.

So I was living on death row for years by this person thinking, assuming, under the impression that he was working for her. The whole time, Judge, when I was filing and writing letters to you -- if you were to review your file, you would see that I made complaints and reported this to you. Also I asked you did you ever administer any oaths for any agents or investigators.

And at the same time anything that I sent out through the routine mail, this same person, he ends up with it or he has other people that works with him that bother whatever -- if I sent out routine mail or mail that's being sent to me, he was bothering with me as a law enforcement officer.

And I thought that because this case was in connection with that criminal investigation that this was something that Angela Corey, him, or any other law enforcement officer had done. I thought that this was what they were engaged in.

Q Mr. Alston, it's my understanding that perhaps currently before the Florida Supreme Court and possibly with the U.S. District Court of the Northern District of Florida you have pending motions which challenge the legality of your conviction on the case that we're before Judge Bowden today.

A Yes, sir.

Q Is that correct?

A Yes, sir.

Q Is it not correct that you filed some of those pleadings, whether they were termed habeas petitions or mandamus petitions, after the fact that you had recently communicated with Judge Bowden about a desire to waive counsel and waive post-conviction proceedings?

A Yes, sir. Judge Bowden -- and Robert Strain, excuse me -- the only reason I did that, because I feel as though that all state remedies and release has been exhausted in this case, and all state remedies and relief has been exhausted in this case and for this case since 1998, September 10th, and the statute of limitations for me to file any 3.850 motion, 3.851 motion as a collateral attack has run out.

That was another reason for my letters to you, because I was trying to alert the court that because the statute of limitations had run out for me to file anything because of the irreconcilable conflict and the many other court dates that we have had here with C.C.R.C. and Mr. Strain and other members of his staff, I thought that you would respond and inform all of us that the statute of limitations had run out in this case, there's no more, that the appeals -- and it would

be no more appellate process because the statute of limitations had run out.

Q Mr. Alston, in connection with my visit with you yesterday at U.C.I., do you recall how that exact issue about the fact that you do not have a fully pled 3.850 or 3.851 motion filed with this court -- do you remember what my explanation was to you then?

A No, sir. I don't understand your question. You'll have to repeat it.

Q Did we yesterday discuss the fact that no verified 3.850 or 3.851 motion has been filed through my office with your signature on it?

A Yes, sir, I responded and --

Q And what did I explain to you yesterday about that issue, about the fact that since the time that the middle region started representing you that no fully pled or verified 3.850 has been filed yet? How did I explain that to you yesterday?

A The only explanation I received was I believe something that pertains to this court hearing today that we were so busy involved in and at conflict with one another that we could never sit down to discuss the case.

Q Do you remember me yesterday suggesting that in my legal opinion we would have a very strong argument

to file a late 3.850 due to the court's incompetency order that he entered in, I believe, the fall of -- is that 2001, Judge? -- about October 2001, I believe?

Do you remember me telling you that yesterday?

A No, sir. It was my understanding yesterday that we concluded our attorney-client interview with -- that today I would come forth and waive --

Q Well, if I -- sorry to interrupt.

If I advised you today, Mr. Alston, that it's my strong legal opinion that we would have a very good argument to file a fully pled and investigated 3.850 today despite the fact that it was not filed within the one-year period of your initial appeal, would that make a difference in any waiver that you intend to tell the judge you want to go with?

A No. My intentions are still the same.

Q Mr. Alston, do you understand that if the Robert Trease death warrant case is any precedent, that any time after today, assuming the judge dismisses my office, that if you change your mind and request counsel, even up to the day before any execution is carried out, you would still be able to communicate and ask to be -- have counsel reappointed for you?

A You informed me about that case yesterday. I can't really remember. I just remember the name.

Q Do you understand that fact today, that if you change your mind again, that you can request counsel and it'd be up to the court then to decide how that would fit in at a later time?

A I understand that, but I will not change my mind.

MR. STRAIN: May I have a minute with co-counsel, Judge?

THE COURT: Yes, sir.

(Brief pause while counsel confer.)

MR. STRAIN: Thank you, Judge, just one last question.

BY MR. STRAIN:

Q Mr. Alston, if assuming you can't control yourself -- and I say that in a jocular sense knowing your prolific history of pro se filings. The judge may be aware once before we made reference that there have been at least two, if not three, federal habeas pleadings filed with the district court, multiple pleadings with the Florida Supreme Court that we don't all get copied on.

Mr. Alston, if you file a pleading again with any of the court's available to you, would you be able to tell the judge straightforwardly that that means that you're not intending to do anything post-conviction?

In other words, it's what we've talked about for a number of years and a number of weeks and including yesterday. I find -- my own belief is I will be very, very surprised if you quit filing pro se pleadings, and to me that would be a contradiction if you file anything pro se after today, if the court rules so today, saying that, number one, you don't want to do anything post-conviction or, number two, that you don't want our office as your counsel.

A Straightforwardly, Mr. Strain, I think that the misunderstanding and harmful error was that the case was exhausted. I allowed -- or when the case became exhausted and I didn't even see to file a writ of certiorari, I began filing to the federal court because everything in this court as the state remedy and relief had exhausted, so I began filing motions to the Federal District Court, the United States District Court around the corner, because it's a higher court.

And because of the ongoing irreconcilable and the many conflicts that we even had in this courtroom, I began filing motions or petitions for the intervention and interference of the federal court. That is the only reason, because everything was exhausted.

And I mailed the letters here, copies of the letters to Judge Bowden. I filed them in motions that

clearly showing in black and white from the appeal attorney that I had that the case and all appeals had exhausted and that the statute of limitations had run out.

So I began filing motions and petitions to the federal court. That is why, because whenever I filed some here to the court, Your Honor, C.C.R.C. middle region, meaning Mr. Strain or his investigators, they would come and get copies, and then they would call here or have some ex-parte communications with you and say, "Well, he's filing this and we need the court hearing to discuss this, Judge. We need you to rule or we need your discretion or judgment in this matter because Pressley is acting up again."

Or I would file motions to you and I would say they are acting up again. That is why I was filing motions and petitions to the federal court, because everything here had exhausted. There was no way I could even get into a clerk's office here without them taking the motion and prohibiting me from doing anything.

I think that if I was not prohibited and if I had filed here pro se and if my motions had been received and accepted by the court without hindrance, then maybe something would have been done in 1998, '99, or 2000 or 2001, but that did not take place.

MR. STRAIN: Judge, I apologize, I do have one last question.

THE COURT: That's fine.

BY MR. STRAIN:

Q Mr. Alston, if you will explain to me and the court in very clear terms what it means when the court's sentence of execution is going to be carried out, if those are your desires by waiving counsel and waiving post-conviction proceedings?

A That is my desire, to have the court's sentence and judgment carried out by law.

Q And what's going to happen when that is carried out?

A I believe that after today and Judge Bowden's court orders and ruling, as he said, that he will send down to the Supreme Court and the Supreme Court will review it and send it to the governor's office and subsequently a death warrant will be signed.

Q Okay. But what happens when U.C.I. personnel take you over to F.S.P. to the death chamber, as it's often called in the newspapers? What happens when the execution is carried out, Mr. Alston?

A Death; I will be dead.

MR. STRAIN: Nothing further, Judge.

THE COURT: Counsel for the state wish to

inquire?

MS. DOLGIN: Your Honor, just a few questions.

THE COURT: All right.

BY MS. DOLGIN:

Q Mr. Alston, you understand that you have the right to counsel to file an amended post-conviction motion?

A Yes, ma'am.

Q And you understand that if you retain counsel, Mr. Strain, that he could request an evidentiary hearing on your claims that your conviction was either unconstitutional or your sentence is unconstitutional?

A I understand that.

Q Are you telling this court that you do not want counsel to file an amended motion?

A Yes, ma'am.

Q And are you telling the court that you don't want counsel to request an evidentiary hearing?

A Yes, ma'am.

Q You also understand, Mr. Alston, that you would -- if he filed an amended post-conviction motion, that you have the right to have counsel call witnesses at an evidentiary hearing?

A Yes, ma'am.

Q Are you telling this court that you do not want counsel to request a hearing so that you can put on witnesses?

A Yes, ma'am.

Q You had mentioned, Mr. Alston, that you had a conflict with counsel. Is that based upon your desire to waive your right to a post-conviction motion?

A That in the case itself, Ms. Dolgin, because, as I said, in January 11th, 1996, this court imposed a death sentence. At that time I did not know it, but I have records in reviewing the transcript of the records, the case had a Florida Supreme Court case number on January 17th, 1996. I don't know how that happened, how I could get a Supreme Court of Florida case number at that time.

At the same time what the Jacksonville Sheriff's Office did in their detectives or agents for them -- and, like I said, again, I'm thinking Ms. Corey-Lee was involved. They used the case while it was on track, meaning that as far as the case having case number and coming back and forth to this court, they used it for a criminal investigation.

And everything that I did in prison, wherever I walked, wherever I talked, either they had an agent or law enforcement agent working around me undercover, some

prison officials were working undercover as undercover agents. There wasn't anything I was doing. I was living in fear of my life.

So whenever I sent something out in the mail to -- whether it be the governor's office to get help, whether to Judge Aaron K. Bowden here, whether to the clerk's office here, if I wrote the State Attorney's Office, if I wrote C.C.R.C. middle or northern region, these undercover agents and law enforcement agents would bother it, and they would always say that this is undercover action, meaning that whatever I filed, instead of everything being straightforward, it would be undercover action.

So with that and using that criminal investigation against me, then at the same time polygraphing me and I passed it, then they lied to other judges saying that I did not pass it.

And I was living -- I was like living in danger, not because of State of Florida versus Pressley Alston, the case that we're here for now, I'm basically living in danger and in prison walking around them because they are so-called investigating the murder of a police detective.

And then when I have these conflicts going on with Robert Strain and any other personnel from

C.C.R.C., it's disrespectful, it's time-consuming, it's a waste of time, and since September 10th, 1998, whatever I filed here coming back before this court or even standing in this court saying, "Judge Bowden, can I speak to Ms. Sharon Coon? Can I say anything to her?" it's just been a waste of time.

It's been a waste of time because only thing the police did -- or police officer, police detective of the Jacksonville Sheriff's Office, they just took the case from the beginning in 1995 and they just made out a criminal investigation.

So anything I do in the case, nothing has happened. They just using me as a stool pigeon. So today it is my desire, because of everything that has been going on, some foolishness -- and I think when you really weigh it out, it hasn't been foolishness on my part. Everything, whether it was personal letters to Judge Bowden or to attorney general or even Governor Lawton Chiles' office and Ms. Corey-Lee herself, it's just been a waste of time.

And we just coming back and forth, and every time we come back and forth, it's a waste of time. It's something that goes on wherein a 30-day period go by, a 60-day period go by, sometimes a four- or five-month period go by, nothing is happening. So we're at this

point here today, still nothing, when the case was affirmed on September 10th, 1998, and we are here today June 6th, 2003.

Q So when you say nothing is happening, you're saying your death sentence has not been carried out?

A I'm saying that the death sentence has not been carried out. Nothing as far as post-conviction relief hasn't even taken place.

Q Well, you understand, though, that you do have the right to proceed with the post-conviction if you wish?

A I do not wish that.

MS. DOLGIN: No questions.

THE COURT: All right. Thank you.

MR. STRAIN: Judge, if the questioning is done, I'd just like to add one more thing.

THE COURT: Sure.

MR. STRAIN: Judge, my relationship with Mr. Alston and matters of our special visits and other visits, if you will, I want to put on record that I have serious -- despite the court's competency finding from March, I question whether the -- Mr. Alston's mental condition has -- has -- let me phrase it this way.

I believe his mental illness that some of the experts testified to has been communicated involving some delusional materials, many, many pro se pleadings filing attacking the credibility of his death sentence, and I believe -- I just question myself whether the competency ruling that the court made in March would be the same as a -- being competent today to make a full understanding of a knowing, intelligent, and voluntary waiver of counsel.

THE COURT: Mr. Strain, you are a worthy advocate. I certainly appreciate your professional concern about Mr. Alston, but ultimately the burden is on the court, as you know, to make that determination.

The court finds that Pressley Alston has knowingly, intelligently, and voluntarily waived his right to counsel. Capital collateral counsel is discharged as the attorney for Mr. Alston and is relieved of any further professional responsibility in this matter.

The court will, of course, enter a written order to that effect.

We will now go -- and I think we've covered it, but let's go to the second part, and I don't know that we need to explore it too much further, that Mr. Alston desires to waive further post-conviction proceedings. It sort of dove-tailed into the first.

Does counsel for the state think it needs to be explored any further?

MS. DOLGIN: Well, Your Honor, if I could just ask one question of Mr. Alston.

THE COURT: Yes.

BY MS. DOLGIN:

Q Mr. Alston, you understand that if the court finds that you knowingly, intelligently, and voluntarily waive your right to post-conviction proceedings, that in the future if you should change your mind and attempt to re-invoke those proceedings, that the state will oppose any such motion?

A I understand, Ms. Dolgin.

MS. DOLGIN: No further questions.

THE COURT: And that just follows up on what I said to you when I said it would be with prejudice, which is a legal term that means that it could not be brought again absent extraordinary circumstances, which I

frankly can't foresee.

Very well. Mr. Alston has again knowingly, intelligently, and voluntarily indicated his desire to waive further post-conviction proceedings. He has knowingly, intelligently, and voluntarily requested that the judgment of the court be carried out. He realizes the ultimate penalty will be exacted if his wish is followed, and the court will enter an order to that effect.

I'm not quite sure procedurally what I should do with that order, but my thought, lawyers, is that I would send the order to the Supreme Court perhaps with a transcript of the hearing.

Does someone want to suggest something to me? Mr. Strain, as a friend of the court?

MR. STRAIN: Judge, that's exactly what Judge Eaton did down in Seminole County about two months ago on a case on my team.

We made inquiry afterwards with the Florida Supreme Court clerk's office about if we were missing some type of administrative rule from the Florida Supreme Court. We figured he was doing it, but we didn't know

the authority, and the clerk's office informed us that the customary practice because of the eventuality of the next stage moving to when a death warrant is signed by the governor and that eliminates a gap in time, essentially.

So, again, it's something -- my understanding there's certainly no criminal rule and no administrative rule from the Supreme Court that most circuits around the state who have been through the same situation follow that exact --

THE COURT: Well, that was the impression that I got. I just wanted to be sure I didn't run afoul here anything. Thank you for that information.

Is that consistent with the attorney general's or the state attorney's belief?

MS. COREY: It is, Your Honor.

THE COURT: Okay. Very well.

Now, Mr. Alston, I promised you that I would give you an opportunity to address the court. I do not want you addressing Mrs. Coon directly.

THE DEFENDANT: Yes, sir.

THE COURT: I will not subject her to

that type of emotional trauma.

THE DEFENDANT: Yes, sir.

THE COURT: But I caution you that I'm not going to sit here and listen to you -- one of your little rambling lectures now, but if you have something meaningful to say to me I will hear it.

THE DEFENDANT: Yes, sir. I think that it is meaningful in reference to your question to Mr. Strain. You asked him about your court orders being sent to the Florida Supreme Court.

The only thing I wanted to say, Judge, if I can have the court's respect to speak in that regard, that because of my waiver -- because the defendant's waiver request and inquest that will be followed by the Florida Supreme Court, the governor's office, and subsequently because of a death warrant, I'm asking that this court will perform an act of grace such as in its administration it would send all those -- send all of these court -- send the court's records to the clerk's office and desk of the Florida Supreme Court.

I thought that the Florida Supreme Court

or the governor's office, as you said, will review it. I don't know if it's being reviewed on a federal level.

And I spoke earlier, as you know, about oaths, that I thought that Angela Corey was under oath working as an agent for a different criminal investigation that they had appeared that involved this case.

I'm throwing myself on the breast of this court right now addressing the court pro se. I don't know if you will allow me to call Angelo Corey to the witness stand, and the reason why I said that and -- my reason for saying that is because, as I said, she was working as an agent and investigator. And I'm not trying to be disrespectful here today. I'm not trying to be disrespectful to any court body here today.

She was working as an agent, and I believe that my bare essentials, meaning my body -- Angela Corey, she saw my body at times bare while I was in prison. She did that because she was investigating the murder of Jacksonville police detective Lonnie Miller. She did that without any formality.

Also she has said that she wanted to marry me. She has made statements I believe to Chief Frank J. Mackesy, Michael Foxworth of the Jacksonville Sheriff's Office that one of the reasons I was put on death row was because she wanted to marry me and if she couldn't have me no one else could.

But my speaking here now is that I'm asking that you will bold-face print a Manila envelope and send it to the Florida Supreme Court and to the governor's office bold-face printed as does not involve a principal agents, undercover agents, investigators, or binders, and now open for a federal review or review by the feds or whoever handles that down there, because it would take away harassment and me bother after this court hearing by them or by the police or these investigators, meaning that none of my mail that the Florida Supreme Court sends to me acknowledging that they have received your court orders will be bothered by them. I would not be bothered by them or any prison officials because I don't know if they solved this murder.

But I've been going through some things in prison, Your Honor, as a result of it, it is ridiculous, and I feel as though that if Angela Corey did make this case -- this whole big case out of criminal investigation, then she should say so on the stand.

If she did say she put me on Florida's death row because she wanted to marry me, then she should testify to that, because everything here will be transcribed and sent to the Florida Supreme Court, and they should be allowed to review that as well.

And that is not my way of trying to get out of anything or to fall back on anything. I'm still going with -- can that happen for me? Will you do that?

THE COURT: No, I will not permit you to call Ms. Corey as a witness. And I do assure you, however, that I will enter a written order as soon as practicable, if not this afternoon, by no later than a week from today, and I will forward that immediately to the Florida Supreme Court.

I don't think protocol calls for the court to send anything to the governor. I

think that's for the attorney general to initiate. So I would not be so presumptive as to communicate directly with the governor's office.

Anything else you wish to say?

THE DEFENDANT: No, sir. If this court -- in its order of the things that you send to the Florida Supreme Court, will your orders acknowledge any letters that I have sent to you wherein --

THE COURT: They will have the whole file.

THE DEFENDANT: Okay.

THE COURT: It's all here, everything you have done. I have never discarded any communication you sent to me. I always noted it. I can't tell you that I read every bit of it, but I looked at it enough to see what the contents were, and I put it in the court file, and here they are all over here. Everything you've done has been preserved.

THE DEFENDANT: Okay. Because my -- the only other thing is that I don't know if you have seen it or if you seen it on the local TV news stations here -- I don't how it happened,

but -- I don't know if -- and I don't know if you administered any oaths for any agents or investigators, but I was reported as being judicially nominated, and I wanted to know apart from anything that deals with any pleadings here, any motions here, can I still send anything out as far as legal mail in that regard?

THE COURT: Well, I don't want to give you any advice on what you should or should not do. You're a prisoner and you're under the custody of the Department of Corrections and you're subject to their regulations and I just don't want to get into that area.

But I do want to say to you in conclusion of this hearing that I commend you. I commend you for being realistic about your case. I commend you for accepting the judgment of the court.

Have a good day. We're in recess.

(Proceedings adjourned at 2:32 p.m.)

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CERTIFICATE

STATE OF FLORIDA)
COUNTY OF DUVAL)

I, Karen F. Howard, Registered Professional Reporter, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

DATED this 10th day of June, 2003.

Karen F. Howard
Registered Professional Reporter

EXHIBIT 7

IN THE SUPREME COURT OF FLORIDA

PRESSLEY BERNARD ALSTON,

Appellant,

CASE NO. SC17-499

v.

STATE OF FLORIDA,

Appellee.

PRESSLEY BERNARD ALSTON,

Petitioner,

CASE NO. SC17-983

v.

JULIE L. JONES, ET AL.,

Respondents.

_____/

APPELLEE/RESPONDENTS' REPLY TO APPELLANT/PETITIONER'S RESPONSE TO SEPTEMBER 27, 2017, ORDER TO SHOW CAUSE

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STATEMENT OF THE CASE AND FACTS

Pressley Alston was convicted of first-degree murder in the Fourth Judicial Circuit Court in Florida. Alston v. State, 723 So. 2d 148 (Fla. 1998). In the penalty phase, the jury recommended a death sentence by a vote of nine to three. The trial court found the following aggravating factors ("aggravators"): (1) Alston was convicted of three prior violent felonies; (2) the murder was committed during a robbery/kidnapping and for pecuniary gain; (3) the murder was committed to avoid a lawful arrest; (4) the murder was especially heinous, atrocious, or cruel (HAC); and (5) the murder was cold, calculated, and premeditated (CCP). Id. The trial court did not find any statutory mitigating circumstances ("mitigators") and found four nonstatutory mitigators. Id. The Florida Supreme Court affirmed petitioner's conviction and death sentence on direct appeal on September 10, 1998. Id. (rehearing denied December 17, 1998). His conviction and sentence became final when the time for filing a writ of certiorari in the United States Supreme Court elapsed on March 17, 1999.

On July 1, 2002, Alston filed a pro se petition in this Court asking to waive further postconviction appeals. Alston v. State, 894 So. 2d 46 (Fla. 2004). This Court ordered the Fourth Judicial Circuit Court of Florida to hold hearings to determine competency and waiver, if necessary. Id. The trial court conducted an inquiry and determined that Alston did want to waive further postconviction appeals. The trial

court had Drs. Umesh M. Mhatre, Wade Cooper Myers, and Robert M. Berland evaluate Alston and held an evidentiary hearing on the question of Alston's competency pursuant to Faretta v. California, 422 U.S. 806 (1975). The court determined that Alston was competent to waive further appeals, and that his waiver was knowing, voluntary, and intelligent. The trial court discharged Alston's postconviction counsel and dismissed all motions or petitions on postconviction relief with prejudice pursuant to Durocher v. Singletary, 623 So. 2d 482 (Fla.1993). Alston, 894 So. 2d at 58. In an opinion released October 14, 2004, following an extensive review of the trial court proceedings, the Florida Supreme Court found

> that evidence in the form of Dr. Mhatre's reports and testimony, the DOC reports, and the testimony by DOC personnel support the circuit court's conclusion that Alston is competent to proceed. … Given the evidence at hand and the applicable standard of review, we conclude that a sufficient basis exists to support the circuit court's resolution of the conflicting evidence and that the circuit court did not abuse its discretion in finding Alston competent to proceed.

Id., at 56-59. This Court also upheld the trial court's Durocher proceeding and the trial court's finding that "Alston had knowingly, intelligently, and voluntarily waived his rights to postconviction counsel and relief." Id. at 47. In October 2004, counsel was appointed to represent Alston in any state clemency proceedings.

On January 3, 2017, Alston filed his Successive Postconviction Motion ("Successive Motion") in the trial court seeking relief under Hurst v. Florida, 136 S. Ct. 616 (2016), and Hurst v. State, 202 So. 3d 40 (Fla. 2016). On February 16, 2017, the trial court denied the Successive Motion, holding that Asay v. State (Asay V), 210 So. 3d 1 (Fla. 2016), Mosley v. State, 209 So. 3d 1248 (Fla. 2016), and Gaskin v. State, 218 So. 3d 399 (Fla. 2017), barred retroactive application of Hurst to Alston's case, and as such, the Successive Motion was untimely under Rule 3.851(d), Florida Rules of Criminal Procedure.[1] On March 9, 2017, Alston filed a notice of appeal. While Alston's appeal was pending before this Court, he filed a Petition for Writ of Habeas Corpus ("Habeas Petition") in this Court seeking relief under Hurst v. Florida and Hurst v. State.

On June 8, 2017, this Court stayed Alston's appeal and Petition pending the disposition of Hitchcock v. State, No. SC17-445, 2017 WL 3431500 (Fla. Aug. 10, 2017). On August 10, 2017, this Court affirmed the conviction and sentence in Hitchcock in accordance with this Court's decision in Asay V, 210 So. 3d at 1. On September 27, 2017, this Court issued an order for Alston to show cause as to "why

[1] Notably, numerous procedural bars apply to the Hurst claim Alston raised below. Alston's January 3, 2017 Successive Motion well exceeded the one year time limitation after his judgement and sentence became final. See Fla. R. Crim. P. 3.851 (d)(1). As his claim did not fall into one of the enumerated exceptions to the one year limitation, his petition was untimely. See Fla. R. Crim. P. 3.851(d)(2). Further, Alston entered a valid Durocher waiver and the trial court's acceptance of that waiver was affirmed by this Court. Alston cannot now assert postconviction claims simply because he has changed his mind. See Trease v. State, 41 So. 3d 119 (Fla. 2010).

the trial court's order should not be affirmed and the petition for a writ of habeas corpus should not be denied in light of this Court's decision in Hitchcock v. State, SC17-445." On October 13, 2017, Alston filed his "Appellant/Petitioner's Response to September 27, 2017 Order to Show Cause" ("Response"). This is the Appellee/Respondents' reply to Alston's Response.

SUMMARY OF THE ARGUMENT

Alston has failed to show cause as to why his case should be excluded from this Court's precedent in Asay V as reaffirmed by Hitchcock. Because Alston's case was final before Ring, Hurst is not retroactive under federal law, and his claim for relief is procedurally barred, this Court should deny Alston's pending appeal from the denial of his Successive Motion and his pending Habeas Petition.

ARGUMENT

Alston argues that various constitutional rules mandate the retroactive application of Hurst v. Florida and Hurst v. State to his case. The circuit court properly found that Alston was not entitled to relief based on this Court's precedent, and he has failed to show cause as to why the court's ruling should not be affirmed and why his Habeas Petition should not be denied.

In Asay v. State (Asay V), 210 So. 3d 1, 22 (Fla. 2016), this Court held that Hurst v. State, 202 So. 3d 40 (Fla. 2016), is not retroactive to any case in which the death sentence was final prior to the June 24, 2002, decision in Ring v. Arizona, 536

U.S. 584 (2002). This Court performed a retroactivity analysis under state law using the standard set forth in Witt v. State, 387 So. 2d 922 (Fla. 1980), which provides "*more expansive retroactivity standards* than those adopted in Teague,[2]" which enumerates the federal retroactivity standards. Asay V, 210 So. 3d at 15-16 (emphasis in original) (quoting Johnson v. State, 904 So. 2d 400, 409 (Fla. 2005)); see also Danforth v. Minnesota, 522 U.S. 264, 280-81 (2008) (allowing states to adopt a retroactivity test that is broader that Teague).

A. The June 24, 2002, Cutoff for Hurst Retroactivity is Not Unconstitutional

Alston alleges that the retroactivity cutoff for Hurst relief established by Asay V, 210 So. 3d at 1, violates various constitutional principles, including the Due Process Clause, the Equal Protection Clause, fundamental fairness, and the Eighth Amendment protection against arbitrary and capricious punishment. To support his point, Alston notes various facts in other cases, such as how long this Court took to issue its opinion in a case. He asserts that the differing circumstances of a case will affect when the case was final and thereby affect whether a given defendant is entitled to a review of Hurst error in his case. Alston appears to conclude that it is unconstitutional to extend Hurst relief to some defendants and not others based on when their convictions and sentences became final.

[2] Teague v. Lane, 489 U.S. 288 (1989).

While every case is different, and these differences may impact when a conviction and sentence becomes final, these differing outcomes arise in every circumstance where a new constitutional rule is not applied retroactively to cases on collateral review. If Alston's complaints were valid, they would compel retroactive application to every case every time a change in the law occurred. Such a result would be untenable and would upend any semblance of finality in the criminal justice system.

Finality is a significant consideration when determining whether to apply new rules to existing cases. Penry v. Lynaugh, 492 U.S. 302, 314 (1989) (holding finality concerns in retroactivity are applicable in the capital context) (abrogated on other grounds by Atkins v. Virginia, 536 U.S. 304 (2002)). In Griffith v. Kentucky, 479 U.S. 314, 328 (1987), the Supreme Court held "that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." See also Smith v. State, 598 So. 2d 1063, 1065 (Fla. 1992). Under this "pipeline" concept, only those still pending direct review would receive the benefit of relief from Hurst error. The fact that this Court has drawn the line at the decision date in Ring instead of the decision date in Hurst, benefits more appellants instead of less.

While Alston alleges that the June 24, 2002, Hurst retroactivity cutoff violates the Due Process Clause, the Equal Protection Clause, and the Eighth Amendment's prohibition of arbitrary and capricious punishments, these claims have been specifically rejected by this Court's opinion in Lambrix v. State, No. SC17-1687, 2017 WL 4320637, *1 (Fla. Sep. 29, 2017). In its Lambrix opinion, this Court made clear that its opinions in Hitchcock, 2017 WL 3431500 at *1, and Asay v. State (Asay VI), 224 So. 3d 695 (Fla. 2017), contemplated and rejected such constitutional arguments.[3] Lambrix, at *1-2.

Further, Alston asserts briefly that this Court must extend Hurst retroactively to his case under the fundamental fairness doctrine. (Response at 9, fn. 3). Alston misinterprets the Mosley v. State, 209 So. 3d 1248 (Fla. 2016), holding to extend Hurst relief to pre-Ring cases through the fundamental fairness doctrine when an Apprendi or Ring claim was previously raised. The Mosley fundamental fairness discussion concerned the impact this Court's reliance on pre-Hurst precedent had on Mosley's *post*-Ring case. Specifically, the Court noted that Mosley had previously sought Ring relief and was denied on bases this Court now considers incorrect. Mosley, 209 So. 3d at 1275. Mosley's fundamental fairness discussion was never

[3] Alston's argument that it is unfair to extend Hurst retroactivity to the Ring decision date but not to the June 26, 2000, decision date in Apprendi v. New Jersey, 530 U.S. 466 (2000), is meritless. Unlike Ring, the Apprendi opinion clearly states it does not apply to capital cases, and thus the decision date should not serve as an end for Hurst retroactivity. Apprendi, 530 U.S. at 496-97. Further, this Court has declined to extend Hurst relief in Lukehart v. Jones, No. SC16-1255, 2017 WL 1033691, *1 (Fla. Mar. 17, 2017), in which the conviction and sentence became final after Apprendi, but before June 24, 2002.

intended to create an exception to the June 24, 2002, Hurst retroactivity cutoff, and this Court has confirmed this by rejecting the same argument in Gaskin v. State, 218 So. 3d 399 (Fla. 2017). Even if such an exception was intended by Mosley, it would be inapplicable to Alston because he failed to raise the substance of a Ring-type claim on direct appeal. Initial Brief of Appellant, Alston v. State, 723 So. 2d at 148.

This Court has consistently adhered to using June 24, 2002, as the cutoff point for retroactivity.[4] (Response at 1). This Court's Hitchcock opinion reaffirmed the decision in Asay V and rejected Hitchcock's various constitutional arguments. This Court noted that Hitchcock's constitutional arguments against the Ring retroactivity cutoff had been considered and rejected in the Asay V opinion. Hitchcock, 2017 WL 3431500 at *2; see also Asay VI, 224 So. 3d at 703 (rejecting the claim that Chapter 2017-1, Laws of Florida, "creates a substantive right to a life sentence unless a jury unanimously recommends otherwise"); Lambrix, 2017 WL 4320637 at *1

[4] See Asay, 210 So. 3d at 8, 22; Jones v. State, No. SC15-1549, 2017 WL 4296370, *2 (Fla. Sept. 28, 2017); Hitchcock, 2017 WL 3431500; Zack v. State, Nos. SC15-1756, SC16-1090, 2017 WL 2590703, *5 (Fla. June 15, 2017); Zakrzewski v. Jones, 221 So. 3d 1159 (Fla. 2017); Oats v. Jones, 220 So. 3d 1127 (Fla. 2017); Marshall v. Jones, No. SC16-779, 2017 WL 1739246 (Fla. May 4, 2017); Rodriguez v. State, 219 So. 3d 751 (Fla. 2017); Willacy v. Jones, No. SC16-497, 2017 WL 1033679 (Fla. Mar. 17, 2017); Suggs v. Jones, No. SC16-1066, 2017 WL 1033680, *1 (Fla. Mar. 17, 2017); Lukehart, No. SC16-1225, 2017 WL 1033691, *1; Cherry v. Jones, No. SC16-694, 2017 WL 1033693, *1 (Fla. Mar. 17, 2017); Archer v. Jones, No. SC16-2111, 2017 WL 1034409, *1 (Fla. Mar. 17, 2017); Jones v. Jones, No. SC16-607, 2017 WL 1034410 (Mar. 17, 2017); Hartley v. Jones, No. SC16-1359, 2017 WL 944232, *1 (Mar. 10, 2017); Geralds v. Jones, No. SC16-659, 2017 WL 944236, *1 (Fla. Mar. 10, 2017); Lambrix v. State, 217 So. 3d 977 (Fla. 2017); Stein v. Jones, No. SC16-621, 2017 WL 836806 (Fla. Mar. 3, 2017); Hamilton v. Jones, No. SC16-984, 2017 WL 836807 (Fla. Mar. 3, 2017); Davis v. State, No. SC16-264, 2017 WL 656307 (Fla. Feb. 17, 2017); Bogle v. State, 213 So. 3d 833 (Fla. 2017); Wainwright v. State, No. SC15-2280, 2017 WL 394509 (Fla. Jan. 30, 2017); Gaskin, 218 So. 3d at 399.

(rejecting arguments based on the Eighth Amendment, denial of due process and equal protection, and a substantive right based on new legislation).

B. Hurst Does Not Establish a New Substantive Constitutional Rule

Alston alleges that Hurst is retroactive under the United States Supreme Court's retroactivity test put forth in Teague v. Lane, 489 U.S. 288 (1989), because Hurst constitutes a substantive change. (Response at 15). Alston relies upon Ivan V. v. City of New York, 407 U.S. 203, 205 (1972), and Powell v. Delaware, 153 A. 3d 69 (Del. 2016), to support his argument. (Response at 19). He claims that Hurst is a substantive change because it "addressed the proof-beyond-a-reasonable-doubt standard." (Response at 19). However, the standard of proof for proving aggravating factors in Florida has been beyond a reasonable doubt long before Hurst was decided. See Floyd v. State, 497 So. 2d 1211, 1214-15 (Fla. 1986); Zeigler v. State, 580 So. 2d 127, 129 (Fla. 1991). Alston's reliance on Powell is misplaced because the Delaware Supreme Court in Powell agreed that Ring and Hurst did not change the burden of proof that was used in those cases. Powell, 153 A. 3d at 74 ("neither Ring nor Hurst involved a Due Process Clause violation caused by the unconstitutional use of a lower burden of proof"). Powell, 153 A. 3d at 74. Furthermore, Powell addressed the retroactivity of Rauf v. State, 145 A. 3d 430 (Del. 2016), the Delaware Court's initial case interpreting Hurst v. Florida. The Delaware Court distinguished Rauf from Hurst and Ring because Rauf addressed burden-of-

proof issues that existed under Delaware state law. Rauf, at 74. Because the Delaware Court held Rauf retroactive based on issues specific to Delaware state law, the Powell case is easily distinguishable from Hurst and fails to support Alston's claim.

Importantly, the United States Supreme Court addressed the retroactivity of Ring, and found that it was a procedural rule that did not justify retroactive application. In Schriro v. Summerlin, 542 U.S. 348 (2004), the Supreme Court determined that Ring was a procedural rule and did not establish substantive constitutional change in the law because it only "altered the range of permissible methods for determining whether a defendant's conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment." Id., at 353. Ring did not alter the type of conduct that is punishable nor the group or class of people that can be punished under the law. Id. Thus, the new rule established by Ring was procedural in nature and not retroactive to convictions and sentences that were already final. Id. at 358. Since the Supreme Court held that Ring did not create a substantive constitutional rule, and Hurst is simply an extension of Ring to Florida's sentencing scheme, Hurst is likewise procedural in nature and is not retroactive to convictions and sentences that are already final.

Alston further relies on Welch v. U.S., 136 S. Ct. 1257 (2016), to assert that Hurst "place[s] certain murders 'beyond the State's power to punish,'" and is thereby substantive in nature. Contrary to Alston's assertion, Hurst does not change the definition of first-degree murder, nor exclude a class of persons from being subject to the death penalty. Rather, Hurst modifies the procedural steps required to impose the death penalty. The very case Alston relies on aptly illustrates the State's point. In Welch, the United States Supreme Court held that striking the definition of "prior violent felony" in the Armed Career Criminal Act was a substantive change that must be applied retroactively. 136 S. Ct. at 1259. The United States Supreme Court explained that by striking the definition of a prior violent felony, "the same person engaging in the same conduct is no longer subject to the Act." Id. at 1265. In contrast to Welch, Hurst did not change the definition of first-degree murder, but rather, changed the procedural requirements for determining the penalty for first-degree murder. As such, Hurst is plainly procedural in nature.

Alston acknowledges that the Eleventh Circuit has declined to extend Hurst retroactively in Lambrix v. Florida, 872 F. 3d 1170 (11th Cir. 2017), but he attempts to explain this ruling away as a product of a narrow standard of review. However, the Eleventh Circuit's ruling reached the merits of the retroactivity issue and clearly held that Hurst is not retroactive under federal law. The opinion explained that

denying Hurst retroactivity was in full accord with Ring and Schriro, 542 U.S. at 348. Lambrix, 872 F. 3d at 1182-83.

Here, just as in Hitchcock, Alston raises various constitutional provisions to argue that Hurst v. State should be retroactively applied to him. However, just as in Asay, as reaffirmed by Hitchcock, Hurst v. State does not apply retroactively to Alston. This case became final on November 11, 2000, which is prior to the June 24, 2002, decision in Ring. As such, Hurst v. State is not retroactive to this case. Thus, the Habeas Petition should be denied and the trial court's denial of Hurst relief should be affirmed.

This Court's rulings in Asay and Hitchcock apply to Alston, and he has demonstrated no cause for this Court to recede from its lengthy case precedent. Because Alston's judgment and sentence were final prior to the decision in Ring, Hurst is not retroactive to him.

CONCLUSION

WHEREFORE, Appellee/Respondents pray this Court deny Alston's Habeas Petition and affirm the circuit court's denial of Hurst relief in his case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing State's Answer to Defendant's Successive Postconviction Motion has been furnished via the eportal to Robert A. Norgard, Esq., norgardlaw@verizon.net; Billy H. Nolas, Esq., billy_nolas@fd.org, Attorneys for Appellant/Petitioner; this 1st day of November, 2017.

CERTIFICATE OF FONT COMPLIANCE

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

/s/ Jennifer L Keegan
Counsel for Appellee/Respondents

EXHIBIT 8

Filing # 63843017 E-Filed 11/07/2017 08:40:55 AM

Nos. SC17-499 & SC17-983

IN THE

Supreme Court of Florida

PRESSLEY BERNARD ALSTON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

PRESSLEY BERNARD ALSTON,

Petitioner,

v.

JULIE L. JONES, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

APPELLANT/PETITIONER'S REPLY IN SUPPORT OF RESPONSE TO ORDER TO SHOW CAUSE

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RENEWED REQUESTS FOR BRIEFING AND ORAL ARGUMENT

Mr. Alston renews his requests that the Court permit untruncated briefing.

ARGUMENT

I. The State's cursory response to Mr. Alston's arguments that partial retroactivity is unconstitutional should be rejected

The State fails to substantively engage most of Mr. Alston's constitutional arguments regarding the *Ring* cutoff. Although the State mentions the Eighth Amendment argument, the State does not address Mr. Alston's specific argument that a retroactivity cutoff at *Ring* violates the Eighth Amendment's prohibition against arbitrary and capricious imposition of the death penalty. *See* State's Resp. at 5-19.

The State offers only a cursory response to Mr. Alston's arguments under the Fourteenth Amendment. According to the State, a *Ring*-based cutoff does not violate the Equal Protection and Due Process Clauses any more than a traditional rule that provides for only prospective application of new constitutional rules. *See id.* at 6. The State assumes that "partial" retroactivity is constitutional because it "benefits more appellants," no matter where the line is drawn. *Id.* at 6. Notably, however, the State fails to provide an example of any previous constitutional ruling that has been given only "partial" retroactive effect, and does not engage in any specific due process or equal protection analysis.

The State's failure to address Mr. Alston's Eighth Amendment arguments and cursory treatment of his Fourteenth Amendment arguments is telling. A *Ring* cutoff injects into Florida's death penalty jurisprudence a level of arbitrariness and capriciousness, as well as a denial of equal protection and due process, that is not present in typical circumstances where retroactivity is withheld based on the pragmatic necessity to evolve constitutional protections prospectively without undue cost to the finality of preexisting judgments. A retroactivity cutoff at *Ring* inaugurates a kind and degree of capriciousness that far exceeds the level justified by normal non-retroactivity jurisprudence. Indeed, a *Ring*-based cutoff precludes relief in precisely the class of cases in which relief makes the most sense.

For instance, inmates whose death sentences became final before *Ring* have been on death row longer than their post-*Ring* counterparts. They have demonstrated over a longer time that they are capable of adjusting to that environment and continuing to live without endangering any valid interest of the State. Pre-*Ring* inmates are more likely to have been given death sentences under standards that would not produce a capital sentence—or even a capital prosecution—under the conventions of decency prevailing today. In the generation since *Ring* was decided, prosecutors and juries have been increasingly unlikely to seek and impose death sentences. And pre-*Ring* inmates are more likely to have received death sentences in trials involving problematic factfinding. The past two decades have witnessed a

broad recognition of the unreliability of numerous kinds of evidence—flawed forensic-science theories and practices, hazardous eyewitness identification testimony, and so forth—that was accepted without question in pre-*Ring* capital trials. Doubts that would cause today's prosecutors, juries, and judges to hesitate to seek or impose death were unrecognized in the pre-*Ring* era. Taken together, these considerations highlight that a *Ring*-based retroactivity cutoff involves a level of caprice that runs beyond that tolerated by typical retroactivity rules.

Taken together, these considerations highlight that a *Ring*-based retroactivity cutoff involves a level of caprice that exceeds that tolerated by standard-fare retroactivity rules. A *Ring* cutoff's denial of relief in precisely the class of cases in which relief makes the most sense is irremediably perverse and inconsistent with the Eighth and Fourteenth Amendments.

II. The State's cursory response to Mr. Alston's federal retroactivity arguments is unpersuasive

The State's federal retroactivity arguments can be dispensed with briefly. The State cites *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004), for the proposition that the Supreme Court's ruling that *Ring* is not retroactive in a federal habeas proceeding means that *Hurst* is not retroactive in any proceeding. *See* State's Resp. at 10. But as Mr. Alston explained in his earlier response, *see* Alston's Resp. at 19-20, the Arizona statute at issue in *Ring v. Arizona*, 536 U.S. 584 (2002), and *Summerlin* did not require, as Florida's statute did, factfinding regarding both the aggravators *and*

their "sufficiency" for the death penalty. The State acknowledges as much by addressing only Florida's burden of proof for aggravators. *See* State's Resp. at 9. *Summerlin* acknowledged that if the Court itself "[made] a certain fact essential to the death penalty . . . [the change] would be substantive." 542 U.S. at 354. Such a change occurred with the *Hurst* decisions. They recognized for the first time that it is unconstitutional for a judge alone to make a finding of fact concerning the "sufficiency" of the aggravation.

Moreover, unlike *Ring*, *Hurst* was grounded on the beyond-a-reasonable-doubt standard. The State unpersuasively attempts to distinguish *Ivan V. v. City of New York*, 407 U.S. 203 (1972). *See* State's Resp. at 9. Even assuming, as the State suggests, that Florida's scheme formerly incorporated the beyond-a-reasonable-doubt standard, the standard was misapplied to factfinding by the trial judge, not findings made by the jury. The *Hurst* decisions held that *the jury* must make the beyond-a-reasonable-doubt findings that subject a defendant to a death sentence. Indeed, a federal judge in Florida, citing *Ivan*, has already observed the distinction between *Summerlin* and *Hurst* because of the beyond-a-reasonable-doubt standard. *See Guardado v. Jones*, No. 4:15-cv-256 (N.D. Fla. May 27, 2016) (contrasting *Hurst* to *Ring* and *Summerlin* because the latter decisions "did not address the requirement for proof beyond a reasonable doubt," and "[t]he Supreme Court has held a proof-beyond-a-reasonable-doubt decision retroactive").

The State's citation to *Powell v. Delaware, see* State's Resp. at 9, is particularly odd considering that the Delaware Supreme Court in *Powell* applied a retroactivity test that mirrors the federal retroactivity test articulated in *Teague v. Lane*, 489 U.S. 288 (1989), and held that *Hurst* should be applied retroactively in Delaware. *See Powell v. Delaware*, 153 A.3d 69, 75-76 (Del. 2016). If anything, *Powell* supports Mr. Alston's arguments.

The State's fundamental misunderstanding of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), is on display in its attempt to distinguish *Welch v. United States*, 136 S. Ct. 1247 (2016). *See* State's Resp. at 11. The State argues that, unlike *Welch*, *Hurst* is not substantive because it "did not change the definition of first-degree murder, but rather, changed the procedural requirements for determining the penalty for first-degree murder." State's Resp. at 11. This argument, however, is the exact argument that *Apprendi* rejected when it made clear that any factfinding that increases the penalty to which a defendant is exposed is an element of an offense, not merely a sentencing factor. *See Apprendi*, 530 U.S. at 485 (a state cannot "circumvent the protections of [*In re*] *Winship*[, 397 U.S. 358 (2000),] merely by redefining the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment" (internal quotation marks omitted)). *Hurst*, therefore, did not merely change a procedure, it explained that the

factfinding that determines whether a defendant may be exposed to death is *an element of the offense*.

Finally, it is telling that the State failed to even engage Mr. Alston's *Montgomery* arguments, a case in which the Supreme Court explained that substantive rules will contain procedural components. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016) (warning against "conflating a procedural requirement necessary to implement a substantive guarantee with a rule that regulates only the *manner of determining* the defendant's culpability" (internal brackets and quotation marks omitted))

III. The State is incorrect in asserting that *Hitchcock* addressed Mr. Alston's constitutional arguments

This Court's opinion in *Hitchcock v. State*, No. SC17-445, 2017 WL 3431500 (Fla. Aug. 10, 2017), relied exclusively on the reasoning in *Asay v. State*, 210 So. 3d 1 (Fla. 2016). As the State acknowledges, the Court's decision in *Asay* rested entirely on state retroactivity law articulated in *Witt v. State*, 387 So. 2d 922 (Fla. 1980). *See* State's Resp. at 4-5 ("In *Asay* . . . . [t]his Court performed a retroactivity analysis under state law using the standard set forth in *Witt*"); *see also Asay*, 210 So. 3d at 16 ("To apply a newly announced rule of law to a case that is already final at the time of the announcement, this Court must conduct a retroactivity analysis

pursuant to the dictates of *Witt*.").[1] *Asay* did not address whether federal law required the *Hurst* decisions to be applied retroactively, and certainly did not address the federal retroactivity arguments raised in Mr. Alston's response to the order to show cause in this proceeding. Namely, *Asay* did not address whether a retroactivity "cutoff" drawn at *Ring* violates the Eighth Amendment's prohibition against arbitrary and capricious imposition of the death penalty or the Fourteenth Amendment's Equal Protection and Due Process Clauses. Nor did *Asay* address whether the *Hurst* decisions are "substantive" within the meaning of federal law, such that the Supremacy Clause of the Constitution requires state courts to apply the decisions retroactively in light of *Montgomery*.

Hitchcock, in relying totally on *Asay*, also did not explicitly address or reject Mr. Alston's federal retroactivity arguments. *See Hitchcock*, 2017 WL 3431500, at *1 ("We affirm because we agree with the circuit court that our decision in *Asay* forecloses relief."); *id.* at *2 ("Accordingly, we affirm the circuit court's order summarily denying Hitchcock's successive postconviction motion pursuant to *Asay*."). The State's response here attempts to highlight the conclusory sentence in *Hitchcock* that reads: "Although Hitchcock references various *constitutional provisions* as a basis for arguments that *Hurst v. State* should entitle him to a new

[1] As this Court has repeatedly emphasized, *Witt* addresses retroactivity as a matter of state law, which is separate and distinct from federal retroactivity analysis. *See, e.g.*, *Falcon v. State*, 162 So. 3d 954, 955-56 (Fla. 2015).

sentencing proceeding, these are nothing more than arguments that *Hurst v. State* should be applied retroactively to his sentence, which became final prior to *Ring*." State's Resp. at 4 (citing *Hitchcock*, 2017 WL 3431500, at *2) (emphasis added). But the *Hitchcock* Court's reference to "constitutional provisions" cannot be reasonably read to address Mr. Alston's federal retroactivity arguments, as the very next sentence in *Hitchcock* reads: "As such, these arguments were rejected when we decided *Asay*."). *Hitchcock*, 2017 WL 3431500, at *2. As explained above, *Asay* rested its analysis entirely on state retroactivity law and the Florida Constitution.

During the nearly eight months between this Court's decisions in *Asay* and *Hitchcock*, many *Hurst* defendants have raised federal retroactivity arguments in this Court and the circuit courts, explaining that *Asay* did not resolve those matters in its exclusively state-law analysis and imploring that federal law be addressed. Those defendants, appellants, and petitioners, as Mr. Alston does here, advanced federal retroactivity arguments under the Eighth and Fourteenth Amendments, as well as the Supremacy Clause and *Montgomery*. If this Court had intended to put those arguments to rest in *Hitchcock*, it could have done so. But any fair reading of *Hitchcock* leads to the conclusion that those issues remain unresolved in light of the Court's wholesale reliance on *Asay*. Indeed, *Hitchcock* neither mentions the Eighth Amendment's prohibition against arbitrary and capricious imposition of the death penalty, nor the Fourteenth Amendment's Equal Protection and Due Process

Clauses. Nor does *Hitchcock* cite *Montgomery* or otherwise explain why the Supremacy Clause does not require the substantive rules announced in the *Hurst* decisions to be retroactively applied by state courts. The State's response to the order to show cause in this case does not contend otherwise.

To the extent the State suggests that Mr. Alston's federal arguments have been addressed in other cases, those decisions are not applicable here. As Mr. Alston noted in his initial response to the order to show cause, the Eleventh Circuit's decision in *Lambrix v. Sec'y*, No. 17-14413, 2017 WL 4416205 (11th Cir. Oct. 5, 2017), is not precedential in this Court and was decided in the context of the current federal habeas statute, which dramatically restricts federal review of state-court decisions. This Court's application of federal constitutional protections, on the other hand, is not circumscribed. More importantly, *Lambrix* dealt with an idiosyncratic issue—the "retroactivity" of Florida's new capital sentencing statute—and did not squarely address the retroactivity of the constitutional rules arising from the *Hurst* decisions. Similar idiosyncratic presentations also render inapplicable to Mr. Alston this Court's recent active-death-warrant decisions in *Asay v. State*, 224 So. 3d 695 (Fla. 2017), *Lambrix v. State*, No. SC17-1687, 2017 WL 4320637 (Fla. Sep. 29, 2017), and *Hannon v. State*, No. SC17-1837, 2017 WL 4944899 (Fla. Nov. 1, 2017).

IV. The State abandons any "harmless error" arguments

The State abandons any argument that the *Hurst* error in Mr. Alston's case was harmless by failing to even reference the harmless error doctrine in its response. *See Hoskins*, 75 So. 3d at 257 ("An issue not raised in an initial brief is deemed abandoned.") (citing *Hall*, 823 So. 2d at 763 (Fla. 2002)) (quotation cleaned up). As Mr. Alston argued in his initial filing, the *Hurst* error is not harmless under this Court's precedent in light of the advisory jury's non-unanimous recommendation.

CONCLUSION

For the reasons above and in Mr. Alston's initial response to the Court's order to show cause, this Court should hold that federal law requires the *Hurst* decisions to be applied retroactively and vacate Mr. Alston's death sentence.

Respectfully submitted,

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