Appendix A

IN THE SUPREME COURT OF FLORIDA

JAMES MILTON DAILEY,

Appellant,

v. **CASE NO. SC17-1073**
DEATH PENALTY CASE

STATE OF FLORIDA,

Appellee.
_____/

STATE'S REPLY TO ORDER TO SHOW CAUSE

Appellee, the State of Florida, by and through the undersigned counsel, hereby submits this reply to Appellant's response and to this Court's order entered April 13, 2018, and respectfully requests that this Court affirm the lower court's order denying Appellant's second successive motion for postconviction relief in light of *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), as well as *Hamilton v. State*, 236 So. 3d 276 (Fla. 2018).

STATEMENT OF THE CASE AND FACTS

Appellant, James Milton Dailey, was convicted of first-degree murder of fourteen-year-old victim, S.B. *Dailey v. State*, 594 So. 2d 254, 255 (Fla. 1991). Dailey and codefendant, Jack Pearcy, picked up S.B. and her twin sister when they were hitchhiking, and Dailey and Pearcy took them to a bar. *Id.* The group later returned to Pearcy's house. *Id.* S.B.'s sister stayed

behind while S.B., Pearcy, and Dailey went to another bar. *Id.* The two men returned several hours later without S.B. *Id.* Dailey was wearing only a pair of wet pants, and he was carrying something bundled in his arms. *Id.* The next morning, Dailey and Pearcy visited a self-service laundry and made plans to leave town. *Id.* at 256. That same morning, S.B.'s body was found floating in the water near Indian Rocks Beach. She had been stabbed, strangled, and drowned. *Id.*

The jury found Dailey guilty of first-degree murder and unanimously recommended death. *Dailey*, 594 So. 2d at 256. The court found the following circumstances in aggravation: previous conviction of a violent felony; commission during a sexual battery; commission to avoid arrest; the murder was especially heinous, atrocious, or cruel ("HAC"); and the murder was committed in a cold, calculated, and premeditated manner ("CCP"). Dailey requested the death penalty at sentencing. *Dailey*, 594 So. 2d at 255. The court ultimately followed the recommendation of the unanimous jury along with Dailey's preference for death and sentenced Dailey to death. *Id.*

Dailey appealed his conviction and sentence, and this Court found error in the trial court's finding of the CCP aggravator, as well as the lower court's failure to consider mitigating circumstances even though it recognized the presence of numerous mitigating circumstances. *Dailey v. State*, 594 So. 2d 254, 259

(Fla. 1991). The trial court had presided over codefendant Pearcy's trial as well, and the court improperly considered evidence from his trial that was not introduced during the guilt phase of Dailey's trial. *Id.* As a result, this Court affirmed the conviction, but reversed the sentence and remanded the case for resentencing before the trial judge. *Id.* at 259.

Upon the case being remanded, Dailey was resentenced before the trial judge. *Dailey v. State*, 659 So. 2d 246, 247 (Fla. 1995). The judge found three aggravating circumstances: (1) prior violent felony conviction; (2) murder during the course of a sexual battery; and (3) HAC. The court found numerous mitigating circumstances.

Dailey again appealed his sentence challenging various issues related to his resentencing without an entirely new penalty-phase jury. *Id.* This Court found no error in Dailey's resentencing procedures, and it affirmed his sentence of death. *Id.* at 248. The mandate was issued May 25, 1995. Dailey filed a petition for writ of certiorari, which was denied January 22, 1996. *Dailey v. Florida*, 516 U.S. 1095 (1996).

Dailey subsequently filed a motion for postconviction relief, which was denied. *Dailey v. State*, 965 So. 2d 38 (Fla. 2007). He appealed to this Court and also filed a petition for writ of habeas corpus. Dailey's petition for writ of habeas corpus was based on the *Ring v. Arizona*, 536 U.S. 584 (2002)

decision. Dailey argued that Florida's murder statute was unconstitutional under *Ring*, to the extent that it permits the state to indict a defendant for first-degree murder without specifying whether it intends to prosecute under the theory of premeditated or felony murder. *Dailey*, 965 So. 2d at 47. He also argued that his appellate counsel was ineffective for failing to raise that claim. *Id.* This Court deemed the claim meritless. This Court further noted that "Dailey's conviction became final before the Supreme Court's decision in *Ring*. We have held that *Ring* does not apply retroactively[.]" *Id.* Ultimately, this Court affirmed the trial court's denial of Dailey's postconviction claims and denied his petition for writ of habeas corpus. *Id*. at 48. Rehearing was denied May 31, 2007.

Next, Dailey filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, in United States District Court, Middle District of Florida. *Dailey v. Sec'y*, No. 8:07-CV-1897-T-27MSS, 2008 WL 4470016, at *1 (M.D. Fla. Sept. 30, 2008). The Department of Corrections filed a motion to dismiss the petition. The court dismissed numerous grounds and gave the parties the opportunity to address the merits of other grounds. *Id*. The court ultimately denied Dailey's remaining claims. *Dailey v. Sec'y, Florida Dept. of Corr.*, No. 8:07-CV-1897-T-27MAP, 2011 WL 1230812, at *32 (M.D. Fla. Apr. 1, 2011), amended

in part, vacated in part, No. 8:07-CV-1897-T-27MAP, 2012 WL 1069224 (M.D. Fla. Mar. 29, 2012).

Dailey subsequently filed a successive motion pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), which was summarily denied as untimely and meritless. This appeal follows.

SUMMARY OF THE ARGUMENT

This Court has consistently held that *Hurst* is not retroactive to any case in which the death sentence became final prior to the issuance of the *Ring v. Arizona*, 536 U.S. 584 (2002), decision. *See Asay v. State*, 210 So. 3d 1, 22 (Fla. 2016); *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017). Dailey's death sentence became final in 1996. Therefore, *Hurst* is not retroactive to his sentence, and the lower court's order denying relief requires affirmance.

LEGAL ARGUMENT

DAILEY'S SUCCESSIVE MOTION WAS UNTIMELY, AND *HURST* DOES NOT RETROACTIVELY APPLY TO DAILEY'S SENTENCE WHEN IT BECAME FINAL IN 1996.

The lower court properly determined that Dailey's motion was untimely. Dailey claimed his successive motion was timely filed because it was filed within one year of the issuance of *Hurst v. Florida*, 136 S. Ct. 616 (2016), *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016);

and *Asay v. State*, 210 So. 3d 1 (Fla. 2016). In order for Dailey's successive motion to be considered timely filed, it had to be based on a claim asserting a fundamental constitutional right that had been held to have retroactively applied to him, and the motion had to have been filed within one year of that right becoming retroactive. Fla. R. Crim. P. 3.851(d)(2)(B).

In *Hamilton v. State*, 236 So. 3d 276, 278 (Fla. 2018), this Court explained that "[t]he relevant time in which to file a claim based on a new fundamental constitutional right is one year from the date of the decision announcing that the right applies retroactively." "But *Hurst* has never been held to be retroactive to [pre-*Ring]* defendants in Hamilton's position." *Id*. Accordingly, this Court affirmed the lower court denial of the successive motion as untimely. *Id.*

Here, Dailey's conviction and sentence became final in 1996, decades before he filed his successive motion. His *Hurst* motion was not based on any fundamental constitutional right that had been held to retroactively apply to him. Instead, it was a plea for the law to be expanded so that *Hurst* would retroactively apply to his case. Accordingly, the lower court properly determined that his successive motion was untimely, and this Court should affirm the lower court's ruling.

Furthermore, Dailey spends much of his response challenging the procedure in which he was resentenced in the early 1990s.

This is not a proper claim to raise in his successive motion, as it is untimely and procedurally barred. Dailey's specific challenge involves this Court remanding his case for a resentencing before a judge, rather than a jury, after it struck two of the aggravators. Dailey, however, has already challenged his resentencing by judge on appeal. *See Dailey v. State*, 659 So. 2d 246 (Fla. 1995) (Dailey alleged that the trial court erred in denying his motion for an entirely new penalty phase).

Given that this Court has already rejected Dailey's challenge to this resentencing procedure on appeal, the doctrines of law-of-the-case and collateral estoppel preclude re-litigation of this issue. *See State v. McBride*, 848 So. 2d 287, 289 (Fla. 2003) (quoting *Florida Dept. of Transp. v. Juliano*, 801 So. 2d 101, 105 (Fla. 2001)) (explaining that under the law-of-the-case doctrine, "questions of law actually decided on appeal must govern the case in the same court and the trial court, through all subsequent stages of the proceedings."); and *McBride*, 848 So. 2d at 290-91 (explaining that collateral estoppel applies in the postconviction context to prevent parties from rearguing the same issues that have been decided between them).

Moreover, the issuance of the *Hurst* opinion does not warrant the revival of Dailey's previously litigated claim. In *Asay v. State*, 210 So. 3d 1, 11-22 (Fla. 2016), *cert. denied*,

138 S. Ct. 41 (2017), this Court held that any capital defendant whose death sentence was final before *Ring v. Arizona*, 536 U.S. 584 (2002), was decided in 2002 was not entitled to *Hurst* relief. This Court reaffirmed its *Asay* holding in *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017). "We have consistently applied our decision in *Asay*, denying the retroactive application of *Hurst v. Florida* as interpreted in *Hurst v. State* to defendants whose death sentences were final when the Supreme Court decided *Ring v. Arizona,* 536 U.S. 584, 122 S. Ct. 2428, 153 L.Ed.2d 556 (2002)." *Hitchcock*, 226 So. 3d at 217.

Here, like in *Hitchcock* and *Asay*, Dailey's death sentence became final before *Ring*, and, therefore, *Hurst* is not retroactively applicable to his sentence. Since issuing its *Hitchcock* opinion, this Court has continually rejected claims for *Hurst* relief made by defendants whose death sentences were final prior to the *Ring* opinion. *See, e.g. Lambrix v. State*, 227 So. 3d 112, 113 (Fla. 2017), *cert. denied sub nom. Lambrix v. Florida*, 138 S. Ct. 312 (2017); *Hannon v. State*, 228 So. 3d 505 (Fla. 2017); Lamarca v. State, 237 So. 3d 914 (Fla. 2018); *Phillips v. State*, 234 So. 3d 547 (Fla. 2018); *Gonzalez v. State*, No. SC17-1499, 2018 WL 1443861 (Mar. 23, 2018); *Johnson v. State*, No. SC17-1480, 2018 WL 1477527 (Fla. Mar. 27, 2018); *Trease v. State*, No SC17-686, 2018 WL 1959603 (Fla. Apr. 26, 2018); Reaves v. State, No18-57, 2018 WL 2041459 (Fla. May 2,

2018); *Jones v. State*, No. SC18-285, 2018 WL 2041464 (Fla. May 2, 2018); *Taylor v. State*, SC17-1501, 2018 WL 2057452 (Fla. May 3, 2018).

Dailey also argues that his death sentence violates principles of fundamental fairness, the Eighth Amendment, and the Fourteenth Amendment. The lower court properly found that "[t]he binding majority opinion in *Asay* implicitly rejected Defendant's contention that barring relief to defendants who had the foresight to raise constitutional challenges to Florida's death penalty scheme before *Ring* is fundamentally unfair." The court further determined that "[t]here is no authority holding either *Hurst* opinion retroactive to Defendant under federal law."

While Dailey raises many different constitutional, procedural, and public policy arguments as to why he should be entitled to *Hurst* relief, as this Court acknowledged in *Hitchcock*, "these are nothing more than arguments that *Hurst v. State* should be applied retroactively to his sentence, which became final prior to *Ring*." *Hitchcock*, 226 So. 3d at 217; *see also Asay v. State*, 224 So. 3d 696 (Fla. 2017) (denying an Eighth Amendment challenge); *Lambrix v. State*, 227 So. 3d 112 (Fla. 2017) (denying Eighth Amendment, due process, and equal protection challenges to the holding in *Asay*); *Hannon v. State*, 228 So. 3d (Fla. 2017) (rejecting Hannon's *Hurst* challenges

based on due process, the Florida Constitution, and the Eighth Amendment).

Lastly, Dailey claims that the jury instructions in his case diminished the jurors' sense of responsibility and violated *Caldwell v. Mississippi*, 105 S. Ct. 2633 (1985). This Court has repeatedly rejected *Caldwell* challenges to the advisory, standard jury instructions. *Dufour v. State*, 905 So. 2d 42, 67 (Fla. 2005). In *Reynolds v. State*, No. SC17-793, 2018 WL 1633075 (Fla. Apr. 5, 2018), this Court held that there cannot be a pre-*Ring*, *Hurst*-induced *Caldwell* challenge to the standard jury instructions because the instructions clearly did not mislead jurors as to their responsibility under the law. *Id*. at *9. "The Standard Jury Instruction cannot be invalidated retroactively prior to *Ring* simply because a trial court failed to employ its divining rod successfully to guess at completely unforeseen changes in the law by later appellate courts." *Id.*

The Court further explained that a *Hurst*-induced *Caldwell* claim cannot be more retroactive than *Hurst* since the rights announced in *Hurst* serve as the basis for the *Caldwell* claim; if rights are not retroactive prior to *Ring*, a pre-*Ring* claim based on those rights simply cannot stand. *Id.* at *10. Accordingly, Dailey's *Hurst*-induced *Caldwell* challenge to the standard jury instructions used in his case also fail.

Based on the foregoing, Dailey is not entitled to *Hurst* relief. Accordingly, the lower court's order summarily denying Dailey's successive motion based on *Hurst* should be affirmed in light of *Hitchcock* as well as *Hamilton*.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this day of May 14, 2018, I electronically filed the foregoing with the Clerk of Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Chelsea Rae Shirley, Maria E. DeLiberato, Julissa R. Fontan, Assistant CCRC, Law Office of the Capital Collateral Regional Counsel-Middle, 12973 North Telecom Parkway, Temple Terrace, Florida 33637, **shirley@ccmr.state.fl.us**, and **deliberato@ccmr.state.fl.us**, **fontan@ccmr.state.fl.us**, and **support@ccmr.state.fl.us**; and to Laura Fernandez, Yale Law School, 127 Wall Street, New Haven, Connecticut 06511, **laura.fernandez@yale.edu**.

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