No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

IN RE JAMES E. HITCHCOCK, *PETITIONER,*

ON PETITION FOR AN EXTRAORDINARY WRIT OF HABEAS CORPUS

---

*JAMES L. DRISCOLL, JR.
Assistant CCRC
Fla. Bar No. 0078840
Office of the Capital Collateral
Regional Counsel-Middle
12973 N. Telecom Parkway
Temple Terrace, FL 33637
driscoll@ccmr.state.fl.us
(813) 5581600
* Counsel of Record

CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the federal courts' refusal to hear Mr. Hitchcock's meritorious federal claims after he received a new judgment and sentence amounted to a suspension of the writ?

2. Whether the federal courts' refusal to hear Mr. Hitchcock's federal claims denied him due process because it created a real risk of the execution of an actually innocent person?

LIST OF PARTIES

JAMES E. HITCHCOCK, the Petitioner listed above

RICKY D. DIXON,
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

DAVID ALLEN,
WARDEN, UNION CORRECTIONAL INSTITION

ASHLEY B. MOODY,
ATTORNEY GENERAL OF THE STATE OF FLORIDA

NOTICE OF RELATED CASES

Per Supreme Court Rule 14.1(b)(iii), these are the related cases:

Trial:
Circuit Court of Orange County, Florida
Docket Number 76-1942 DIV. D
State of Florida v. James Ernest Hitchcock
Judgment Entered: Conviction January 21, 1977; Death Sentence February 11, 1977.

Direct Appeal:
Supreme Court of Florida
Docket Number: SC60-51108
James Ernest Hitchcock vs. State of Florida
Judgment Entered: February 24, 1982; Mandate November 18, 1982.

Cert. Petition
United States Supreme Court
Docket Number: No. 82-5305
James Ernest Hitchcock v. Florida
Judgment Entered October 18, 1982.

First Postconviction Proceedings:
Circuit Court of Orange County, Florida
Docket Number 76-1942 DIV. D
State of Florida v. James Ernest Hitchcock
Judgment Entered: May 10, 1983.

Supreme Court of Florida
Docket Number: SC60-63667
James Ernest Hitchcock vs. State of Florida
Judgment Entered: May 17, 1983.

Federal Habeas
United States District Court, Middle District of Florida, Orlando Division
Docket Number 83-357-CIV-Orl-11
James Hitchcock v. Secretary, Department of Corrections, et al.
Judgment Entered: September 22, 1983.

Federal Habeas Appeal
United States Court of Appeal, Eleventh Circuit
Docket No. 83-3578
Hitchcock v. Wainwright
Judgment Entered: October 18, 1984; Rehearing En Banc August 28,1985;

Rehearing November 19, 1985; On Remand October. 26, 1987.

Cert. Petition
United States Supreme Court
Docket Number: No. 85-6756;
Hitchcock v. Wainwright and *Hitchcock v. Dugger*
Judgement Entered: Cert. Granted in Part: June 9, 1986; Reversed April 22, 1987.

Retrial on Penalty
Circuit Court of Orange County, Florida
Docket Number 76-1942 DIV. D
State of Florida v. James Ernest Hitchcock
Judgment Entered: Conviction January 21, 1977; Death Sentence March 17, 1988.

Direct Appeal:
Supreme Court of Florida
Docket Number: SC60-72200
James Ernest Hitchcock vs. State of Florida
Judgment Entered: December 20, 1990; Rehearing Denied May 16, 1991; On Remand March 22, 1993.

Cert. Petition
United States Supreme Court
Docket Number: 91-5450
James Ernest Hitchcock v. Florida
Judgment Entered: Denied October 15, 1991; Rehearing granted June 29, 1992; Rehearing Denied September 4, 1992.

Retrial on Penalty
Circuit Court of Orange County, Florida
Docket Number 76-1942 DIV. D
State of Florida v. James Ernest Hitchcock
Judgment Entered: Conviction January 21, 1977; Death Sentence August 30, 1993.

Direct Appeal:
Supreme Court of Florida
Docket Number: SC60-82350
James Ernest Hitchcock vs. State of Florida
Judgment Entered: March 21, 1996. Rehearing Denied May 15, 1996.

Retrial on Penalty
Circuit Court of Orange County, Florida
Docket Number 76-1942 DIV. D
State of Florida v. James Ernest Hitchcock

Judgment Entered: Conviction January 21, 1977; Death Sentence October 10, 1996; Order Denying Relief on Newly Discovered Evidence March 18, 1998D

Direct Appeal:
Supreme Court of Florida
Docket Number: SC60-92717
James Ernest Hitchcock vs. State of Florida
Judgment Entered: March 23, 2000. Rehearing Denied May 3, 2000.

Cert. Petition
United States Supreme Court
Docket Number: 00-6447
James Ernest Hitchcock v. Florida
Judgment Entered December 4, 2000.

DNA Motion
Circuit Court of Orange County, Florida (DNA Motion)
Docket Number 76-1942 DIV. D
State of Florida v. James Ernest Hitchcock
Judgment Entered: June 24, 2002.

Appeal
Supreme Court of Florida
Docket Number: SC02-2037.
James Hitchcock vs. State of Florida
Judgment Entered: January 15, 2004.

Second Postconviction Proceedings
Circuit Court of Orange County, Florida
Docket Number 76-1942 DIV. D
State of Florida v. James Ernest Hitchcock
Judgment Entered: October 27, 2003; Order Following Remand March 29, 2006.

Appeal
Supreme Court of Florida
Docket Number: SC03-2203
James Hitchcock vs. State of Florida
Judgment Entered: May 22, 2008; Rehearing Denied September 17, 2008.

State Habeas Corpus
Supreme Court of Florida
Docket Number: SC03-2203
James E. Hitchcock vs. Walter A. McNeil, Etc.
Judgment Entered: May 22, 2008; Rehearing Denied September 17, 2008.

Rule 9 Petition
United States Court of Appeal, Eleventh Circuit
Docket No. 08-15867
In Re James E. Hitchcock
Judgment Entered: November 5, 2008; Rehearing Denied December 15, 2008.

Federal Habeas Petition
United States District Court, Middle District of Florida
Docket Number: No. 6:08–cv–1719–Orl–31KRS
James Hitchcock v. Secretary, Department of Corrections, et al.
Judgment Entered: September 20, 2012; Rehearing Denied October 31, 2012.

Federal Appeal
United States Court of Appeal, Eleventh Circuit
Docket No. 12-16158-P
James Hitchcock, Petitioner, v. Secretary, Florida Department of Corrections, et al
Judgment Entered: March 12, 2014; Rehearing Denied May 5, 2014.

Cert Petition
United States Supreme Court
Docket Number: 14–5645
James Hitchcock v. Crews
Judgment Entered; October 14, 2014; Rehearing Denied December 8, 2014.

Successive Postconviction Motion
Circuit Court of Orange County, Florida (DNA Motion)
Docket Number 76-1942 DIV. D
State of Florida v. James Ernest Hitchcock
Judgment Entered: February 17, 2017.

Appeal Successive Postconviction Motion
Supreme Court of Florida
Docket Number: SC17-445
James Ernest Hitchcock vs. State of Florida
Judgment Entered: August 10, 2017; Rehearing denied September 18, 2017.

Cert Petition
United States Supreme Court
Docket Number: 17-6180
James Ernest Hitchcock v. Florida
Judgment Entered: December 4, 2017.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED……i

LIST OF PARTIES……ii

NOTICE OF RELATED CASES……iii

TABLE OF CONTENTS……vii

INDEX TO APPENDICES……ix

TABLE OF AUTHORITIES CITED……x

OPINIONS BELOW……1

STATEMENT OF JURISDICTION……1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED……2

STATEMENT OF THE CASE……3

1. Course of Proceedings in the Courts Below……3
2. Habeas Petitions in Federal Court……6

REASONS FOR GRANTING THE WRIT……9

I. CONSTITUTIONAL CLAIMS THAT WERE DENIED FEDERAL REVIEW THAT THIS COURT SHOULD ALLOW TO BE HEARD……9

Ground I……9
Ground II……10
Ground III……12
Ground IV……17

II. MR. HITCHCOCK HAD A RIGHT TO FEDERAL REVIEW OF HIS MERITORIOUS FEDERAL CLAIMS AND SHOULD BE HEARD NOW……19

A. Mr. Hitchcock was not required to obtain permission to proceed on his guilt phase issues but nonetheless filed an application for a successive petition in an abundance of caution……19
B. Mr. Hitchcock should have been allowed to proceed on his guilt phase claims without permission for a second or successive petition……20

C. Mr. Hitchcock is actually innocent……30
D. The factual predicates for most of Mr. Hitchcock's claims could not have been discovered earlier through due diligence……..33
E. Mr. Hitchcock could not collaterally challenge his conviction because he was in limbo between the operation of federal and state law that was occasioned by the unconstitutional acts of the State……35
F. The Circuit Court's Denial of Permission was Unreasonable and Not Based on Fact……36
G. This Court should exercise its original jurisdiction to prevent a miscarriage of justice……37

CONCLUSION……38

REASONS FOR NOT MAKING APPLICATION IN THE DISTRICT COURT AND EXHAUSTION COMPLIANCE WITH 28 U.S CODE §2241 AND §2242……38

VERIFICATION……39

INDEX TO APPENDICES

Appendix A: Opinion of the United States Court of Appeals for the Eleventh Circuit. Reported at *Hitchcock v. Sec'y, Fla. Dep't of Corr.*, 745 F.3d 476 (11th Cir. 2014)

Appendix B: Order of the United States Court of Appeals for the Eleventh Circuit, denying Application for Leave to File a Second or Successive Habeas Corpus Petition 28 U.S.C. § 2244(b) by a Prisoner in State Custody.

Appendix C: Order denying Motion to Withdraw Mandate and/or Vacate, Modify and/or Clarify Order Denying Application for Leave to File a Second or Successive Habeas Corpus Petition, 28 U.S.C. § 2244(b), and for Rehearing in Part of Argument that this Section is Inapplicable to Mr. Hitchcock's Unique Procedural Posture, and Suggestion for Rehearing and Rehearing En Banc.

Appendix D: Denial of Application for a Certificate of Appealability filed in the United States District Court, Middle District of Florida (expanded).

Appendix E: Denial, in part, and grant, in part, Application for a Certificate of Appealability filed in the United States Court of Appeals for the Eleventh Circuit (expanded).

Appendix F: Transcript of State Evidentiary Hearing April 8, 2003 Volume VI.

Appendix G: Order of the Supreme Court of Florida's Order dated May 3, 2005.

Appendix H: Opinion of the Supreme Court of Florida *Hitchcock v. State*, 991 So. 2d 337 (Fla. 2008).

TABLE OF AUTHORITIES CITED

CASES **PAGE**

Baker v. State,
878 So. 2d 1236 (Fla. 2004)....36
Banks v. Dretke,
540 U.S. 668 (2004)....31
Berman v. United States,
302 U.S. 211 (1937)....21
Brady v. Maryland,
373 U.S. 83 (1963)....18
Dretke v. Haley,
541 U.S. 386 (2004)....31
Giglio v. U.S.,
405 U.S. 150 (1972)....18
Herrera v. Collins,
506 U.S. 390 (1990)....16, 29
Hill v. United States ex rel. Wampler,
298 U.S. 460 (1936)....21
Hitchcock v. Crews,
574 U.S. 939 (2014)....8
Hitchcock v. Dugger,
481 U.S. 393 (1987)....4, 6, 35
Hitchcock v. Florida,
138 S. Ct. 513 (2017)....6
Hitchcock v. Florida,
459 U.S. 960 (1982)....3
Hitchcock v. Florida,
502 U.S. 912 (1991)....4
Hitchcock v. Florida,
505 U.S. 1215 (1992)....4
Hitchcock v. Florida,
531 U.S. 1040 (2000)....4
Hitchcock v. Sec'y, Fla. Dep't of Corr.,
745 F.3d 476 (11th Cir. 2014)....8
Hitchcock v. State,
226 So. 3d 216 (Fla. 2017)....6
Hitchcock v. State,
413 So. 2d 741 (Fla.1982)....3
Hitchcock v. State,
432 So. 2d 42 (Fla. 1983)....3
Hitchcock v. State,
578 So. 2d 685 (Fla. 1990). 4
Hitchcock v. State,

614 So. 2d 483 (Fla. 1993) 4
Hitchcock v. State,
755 So. 2d 638 (Fla. 2000) 4, 12
Hitchcock v. State,
866 So. 2d 23 (Fla. 2004) 4, 11
Hitchcock v. State,
991 So. 2d 337 (Fla. 2008). 5
Hitchcock v. Wainright,
476 U.S.1168 (1986) 4, 6
Hitchcock v. Wainwright,
745 F.2d 1332 (11th Cir. 1984) 3, 6
Hitchcock v. Wainwright,
770 F.2d 1514 (11th Cir. 1985) 3, 6
Hitchcock v. Wainwright,
777 F.2d 628 (11th Cir. 1985) 4, 6
Hurst v. Florida,
577 U.S. 92 (2016) 6
In re Rule 3.850 of the Florida Rules of Criminal Procedure,
481 So. 2d 480 (Fla. 1985) 36
Insignares v. Sec'y, Dep't of Corr.,
755 F.3d 1273 (11th Cir. 2014). .....*passim*
Insignares v. State,
957 So. 2d 680 (Fla. 3d DCA 2007). 22
Jackson v. Virginia,
443 U.S. 307 (1979) 32
Magwood v. Culliver,
555 F.3d 968 (11th Cir. 2009) 26
Magwood v. Patterson,
561 U.S. 320 (2010) 20, 23, 24
Miller v. Aderhold,
288 U.S. 206 (1933) 21
Murray v. Carrier,
477 U.S. 478 (1986). 32
Napue v. Illinois,
360 U.S. 264 (1959). 18
Peek v. State,
488 So. 2d 52 (Fla. 1986). 17
Sawyer v. Whitley,
505 U.S. 333 (1992). 2
Schlup v. Delo,
513 U.S. 298 (1995). 31, 32

STATUTES AND RULES

28 U.S.C.§2254.....1

28 U.S.C. §1651.....1,2

28 U.S.C. § 2241.....1

28 U.S.C. § 2244.....1,2

IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF HABEAS CORPUS AND/OR EXTRAORDINARY RELIEF

Petitioner respectfully prays that a writ of habeas corpus issue and/or extraordinary relief be granted and that this Court transfer the present application "for hearing and determination" to the United States District Court for the Middle District of Florida in accordance with its authority under 28 U.S.C. §2241(b), so that the District Court may, consistent with the practices set forth by this Court in *In re Davis*, 557 U.S. 952 (2009), make findings of fact and conclusions of law with respect to the claims that the Petitioner previously raised in his Petition for Writ of Habeas Corpus.

OPINIONS BELOW

While this is an original action, at issue are the Order of the United States Court of Appeals for the Eleventh Circuit denying Application for Leave to File a Second or Successive Habeas Corpus Petition 28 U.S.C. §2244(b) by a Prisoner in State Custody, the district court's dismissal of Mr. Hitchcock's guilt phase claims and the Eleventh Circuit's order denying an expanded Certificate of Appealability. (Appendix B, D, and E).

STATEMENT OF JURISDICTION

This Court's original habeas jurisdiction is invoked under 28 U.S.C. §2241, §2254(a), §1651(a), Article I, Section 9, Clause 2, and Article III of the U.S. Constitution. It has the authority to transfer the case to the district court for merits adjudication under §2241(b). This Court, and indeed all federal courts, "may issue all

writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. §1651(a).

This Petition is premised on this Court's equitable power to issue a writ of habeas corpus. As such, the timeliness limitations present in 28 U.S.C. §2244(d)(1) simply do not apply. Moreover, as discussed below, this petition is also based on Mr. Hitchcock's innocence, which is itself a sound basis for permitting an otherwise time-barred habeas petition. *See generally Sawyer v. Whitley*, 505 U.S. 333 (1992). Timeliness concerns should not bar this Court's review.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Article I, Section 9, clause 2 and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Article I, Section 9, Clause 2 (The Suspension Clause) provides:

> The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

The Fifth Amendment provides in relevant part:

> No person . . . shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section I of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

1. Course of Proceedings in the Courts Below.

In 1976 Mr. Hitchcock was arrested and indicted for first-degree murder. Mr. Hitchcock was not charged with any other offense in the indictment. Mr. Hitchcock was tried, convicted, and sentenced to death in 1977. The Florida Supreme Court affirmed. *Hitchcock v. State*, 413 So. 2d 741 (Fla.1982), *cert. denied*, *Hitchcock v. Florida*, 459 U.S. 960 (1982).

During the pendency of a death warrant, Mr. Hitchcock sought state postconviction relief. The postconviction court denied relief. The Florida Supreme Court affirmed the denial. *Hitchcock v. State*, 432 So. 2d 42 (Fla. 1983). Mr. Hitchcock sought a writ of certiorari in this Court which was denied.

Mr. Hitchcock sought federal habeas relief in United States District Court, Middle District of Florida. The court dismissed the Petition. Mr. Hitchcock appealed the denial of federal habeas corpus relief. The Circuit Court affirmed the District Court decision and denied relief *en banc* and on rehearing. *Hitchcock v. Wainwright*, 745 F.2d 1332 (11th Cir. 1984); *Hitchcock v. Wainwright*, 770 F.2d 1514 (11th Cir.

1985); *Hitchcock v. Wainwright*, 777 F.2d 628 (11th Cir. 1985). This Court granted *certiorari* and reversed on penalty phase. *Hitchcock v. Wainright*, 476 U.S.1168 (1986); *Hitchcock v. Dugger*, 481 U.S. 393 (1987).

After resentencing proceedings, Mr. Hitchcock was again sentenced to death. The Florida Supreme Court affirmed the trial court. *Hitchcock v. State*, 578 So. 2d 685 (Fla. 1990). This Court denied certiorari. *Hitchcock v. Florida*, 502 U.S. 912 (1991), but this Court later granted rehearing and granted penalty phase relief. *Hitchcock v. Florida*, 505 U.S. 1215 (1992).

After a third resentencing, Mr. Hitchcock was again sentenced to death. The Florida Supreme Court, however, reversed the trial court and remanded the case for a new sentencing. *Hitchcock v. State*, 614 So. 2d 483 (Fla. 1993). After a fourth sentencing, Mr. Hitchcock was again sentenced to death, which the Florida Supreme Court affirmed. *Hitchcock v. State*, 755 So. 2d 638 (Fla. 2000), *cert. denied*, *Hitchcock v. Florida*, 531 U.S. 1040 (2000).

With a conviction *and* sentence that were final, Mr. Hitchcock sought postconviction relief in state court. Mr. Hitchcock's initial Motion to Vacate Judgment of Conviction and Sentence with Special Request for Leave to Amend was dismissed by the postconviction court as was an amended motion. Mr. Hitchcock also filed a Motion for DNA Testing which was denied.[1]

Mr. Hitchcock filed his Second Amended Motion to Vacate Judgment of

[1] Mr. Hitchcock filed a Motion for DNA testing under Florida Rule of Criminal Procedure 3.853 which was denied on June 25, 2002. The Florida Supreme Court affirmed on appeal. *Hitchcock v. State*, 866 So. 2d 23 (Fla. 2004).

Conviction and Sentence with Special Request for Leave to Amend on November 30, 2001. On December 13, 2002, the postconviction court granted Mr. Hitchcock's Motion to Amend Section D and his Motion to Amend Section E.

The postconviction court granted a hearing on all claims for which Mr. Hitchcock requested a hearing. The postconviction court held an evidentiary hearing which began on April 7, 2003 and was continued for further testimony to May 8, 2003. The State and Mr. Hitchcock filed written closing arguments. The postconviction court entered a written order on October 27, 2003, denying each claim of the Second Motion to Vacate Judgment of Conviction and Sentence with Special Request for Leave to Amend.

After the postconviction court denied relief on Mr. Hitchcock's Second Motion to Vacate Judgment of Conviction and Sentence with Special Request for Leave to Amend, he appealed to the Florida Supreme Court. With his initial brief, Mr. Hitchcock filed a Petition for Writ of Habeas Corpus invoking the Florida Supreme Court's original jurisdiction. On May 3, 2005, the Florida Supreme Court relinquished jurisdiction to the postconviction court for a decision on the merits of Mr. Hitchcock's guilt phase postconviction claims, which the postconviction court had denied as procedurally barred. The postconviction court held an additional evidentiary hearing on these claims. Following the hearing, the postconviction court denied relief and Mr. Hitchcock appealed the denial to the Florida Supreme Court. Following supplemental briefing and oral argument, the Florida Supreme Court denied the habeas petition and affirmed the postconviction court's denial of relief. *Hitchcock v. State*, 991 So. 2d 337 (Fla. 2008). Mr. Hitchcock filed a motion for

rehearing which the Florida Supreme Court denied on September 17, 2008. The court then issued the mandate on October 3, 2008.

Mr. Hitchcock filed a successive postconviction motion in State court following this Court's decision in *Hurst v. Florida*, 577 U.S. 92 (2016). After the trial court denied relief, the Florida Supreme Court affirmed the denial. *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), *cert denied Hitchcock v. Florida,* 138 S. Ct. 513 (2017).

Despite litigation in the courts of the State of Florida and the United States, Mr. Hitchcock has never received a permanent and complete remedy to the deprivation of his constitutional rights that justice and the promise of our Nation demand. Accordingly, he seeks now, through the federal courts, what should always have been his rights.

2. Habeas Petitions in Federal Court

After Mr. Hitchcock's first death sentence and state postconviction proceedings, Mr. Hitchcock sought federal habeas relief in United States District Court, Middle District of Florida. The court dismissed the Petition. Mr. Hitchcock appealed the denial of federal habeas corpus relief. The Circuit Court affirmed the District Court decision and denied relief *en banc* and on rehearing. *Hitchcock v. Wainwright*, 745 F.2d 1332 (11th Cir. 1984); *Hitchcock v. Wainwright*, 770 F.2d 1514 (11th Cir. 1985); *Hitchcock v. Wainwright*, 777 F.2d 628 (11th Cir. 1985). This Court granted *certiorari* and reversed on penalty phase. *Hitchcock v. Wainright*, 476 U.S.1168 (1986); *Hitchcock v. Dugger*, 481 U.S. 393 (1987).

On October 6, 2008, Mr. Hitchcock filed a Petition for Writ of Habeas Corpus in the District Court. This Petition raised both guilt phase claims concerning Mr.

Hitchcock's 1977 conviction and penalty phase claims concerning his 1996 death sentence.

On this same date, Mr. Hitchcock filed an Application for Leave to File a Second or Successive Habeas Corpus Petition in the Eleventh Circuit. This Application sought permission to be heard on the guilt phase claims contained in Mr. Hitchcock's Petition for Writ of Habeas Corpus.

On November 5, 2008, the Eleventh Circuit denied Mr. Hitchcock permission to proceed on his guilt phase claims. (Appendix B). Mr. Hitchcock filed a Motion to Withdraw Mandate and/or Vacate, Modify and/or Clarify Order Denying Application for Leave to File a Second or Successive Habeas Corpus Petition, 28 U.S.C. §2244(b), and for Rehearing in Part of Argument that this Section is Inapplicable to Mr. Hitchcock's Unique Procedural Posture, and Suggestion for Rehearing and Rehearing En Banc. On December 15, 2008, the Eleventh Circuit denied this Motion. (Appendix C).

On February 3, 2009, the District Court issued an Order dismissing Mr. Hitchcock's Habeas Petition without prejudice. The Order was based on the fact that Mr. Hitchcock had previously filed a habeas petition in Case Number 6:83-cv-357-Orl-11. The District Court's order found that "the present habeas petition is a second or successive application." The District Court then "dismissed [this case] without prejudice to allow Petitioner the opportunity to seek authorization from the Eleventh Circuit Court of Appeals."

Mr. Hitchcock filed a Motion to Alter or Amend Judgment, as rendered in the District Court's order. The District Court granted the Motion Alter or Amend to the

extent that Mr. Hitchcock could proceed on his 1996 penalty phase claims. The District Court ordered Mr. Hitchcock to file an amended petition omitting the guilt phase issues.

Mr. Hitchcock filed an Amended Petition for Writ of Habeas Corpus. On September 20, 2012, the District Court denied Mr. Hitchcock's Amended Petition for a Writ of Habeas Corpus. Mr. Hitchcock filed a Motion to Alter or Amend Judgment and Included Memorandum of Law. On October 31, 2012, the District Court denied the motion but granted a limited COA on a penalty phase claim. On November 29, 2012, Mr. Hitchcock filed a Notice of Appeal and an Application for a Certificate of Appealability (expanded). On December 3, 2012, the District Court denied the Application for a Certificate of Appealability. (Appendix D).

In the United States Court of Appeals for the Eleventh Circuit, Mr. Hitchcock renewed his application for an expanded Certificate of Appealability (COA) for the grounds which the District Court denied a COA. On August 6, 2013, the Eleventh Circuit granted expansion, in part, and denied expansion, in part. In doing so, the court allowed an additional penalty phase issue to be heard but denied a COA on issue presented in the instant petition. (Appendix E).

On March 12, 2014, the United States Circuit Court for the Eleventh Circuit affirmed the District Court's denial of habeas corpus relief. *Hitchcock v. Sec'y, Fla. Dep't of Corr.*, 745 F.3d 476 (11th Cir. 2014) (Appendix A). A properly filed, timely Motion for Rehearing and Rehearing En Banc was filed on March 31, 2014, which was denied on May 5, 2014. This Court denied certiorari. *Hitchcock v. Crews*, 574 U.S. 939 (2014).

REASONS FOR GRANTING THE WRIT

This case presents the extraordinary and rare situation satisfying the criteria set forth in this Court's Rule 20 for the Court's exercise of its original habeas jurisdiction, "that the writ will be in aide of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court." Mr. Hitchcock prays that this Court will grant review so that his substantial claims of unconstitutionality and injustice may be heard.

I. CONSTITUTIONAL CLAIMS THAT WERE DENIED FEDERAL REVIEW THAT THIS COURT SHOULD ALLOW TO BE HEARD.

A brief summary of the guilt phase claims contained in the Petition is as follows:

Ground I

Guilt phase trial counsel was ineffective during the guilt phase thus violating Mr. Hitchcock's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The state court decisions on these matters were contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding or both.

Trial counsel was ineffective for failing to adequately investigate, prepare and question witnesses prior to and during the 1977 guilt phase. Counsel called defense witnesses and inexplicably opened the door to very damaging rebuttal testimony by

State witnesses. Counsel failed to respond effectively once the door to the admission of this evidence was opened. Counsel went on to further prejudice Mr. Hitchcock by asking questions that elicited prejudicial answers. Counsel failed to consult with Mr. Hitchcock in an effective manner in order to obtain Mr. Hitchcock's input in formulating a coherent defense.

Trial counsel was also ineffective for failing to question Richard Hitchcock, the true perpetrator of the murder, in a manner that confronted Richard Hitchcock with the fact that he killed the victim. Additionally, had counsel effectively prepared this case, counsel would have developed the similar fact evidence that Richard Hitchcock was sexually possessive of his female family members and would choke them when the young girls appeared interested in males other than Richard. Had counsel acted effectively, counsel would have known this information and presented it under a proper theory of admissibility.

As pleaded in his habeas petition, Mr. Hitchcock was denied his rights under the United States Constitution. Mr. Hitchcock should be allowed to proceed in federal court on this Ground, after which, the writ should issue.

Ground II

The state courts denied Mr. Hitchcock's right to show his innocence by denying him the right to conduct DNA testing or other forensic evidence testing in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment Rights. The state court decisions on these matters were contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or resulted in a decision that was based on an unreasonable determination of

the facts in light of the evidence presented in the state court proceeding or both.

Shortly after filing his final postconviction motion in state court, Mr. Hitchcock filed a motion for DNA testing. The impetus behind the motion was information concerning the lack of skill that hair analyst Diana Bass had to perform microscopic analysis of the hair and provide scientifically accurate testimony at Mr. Hitchcock's 1977 guilt phase trial. The motion was denied. The Florida Supreme Court affirmed the denial on appeal. *Hitchcock v. State*, 866 So. 2d 23 (Fla. 2004).

Mr. Hitchcock proceeded to an evidentiary hearing on his postconviction motion while the DNA appeal was pending. In closing argument and on appeal he renewed his request for DNA testing or any sort of scientific testing. As of this date no court has allowed Mr. Hitchcock to scientifically test the evidence in this case.

Mr. Hitchcock specifically sought to test the hair evidence that was collected from near the victim's body, as well as other evidence. At trial, Diana Bass excluded Richard Hitchcock's hair from any incriminating location and supposedly found a match between the known hairs of James Hitchcock and some of the unknown hair found on or about the victim. The deficiency of Ms. Bass' skills is discussed further under Ground IV, below.

Mr. Hitchcock should have been allowed to test the evidence in his case. The state courts' denial prejudiced Mr. Hitchcock in presenting all of his postconviction claims. If he is denied the opportunity to proceed on his guilt phase claims, the state courts' denial of Mr. Hitchcock's right to seek a writ of habeas corpus and all of his other constitutional rights will be complete.

As pleaded in his habeas petition, Mr. Hitchcock was denied his rights under

the United States Constitution. Mr. Hitchcock should be allowed to proceed in federal court on this ground after which the writ should issue.

This claim relies on the breakthroughs in DNA science and technology since Mr. Hitchcock's guilt phase trial in 1977 that allows the innocent to overcome unjust convictions.

Ground III

The state courts denied Mr. Hitchcock's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments because Mr. Hitchcock is actually innocent of the death penalty and of this crime. The state court decisions on these matters were contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or, resulted in decisions that were based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings or both.

After James Hitchcock was convicted of a crime he did not commit, Richard Hitchcock incriminated himself to Rossi Meachem and Wanda Hitchcock Green that he was in fact the murderer of Cynthia Driggers. Ms. Green came forward to the media after James Hitchcock last received a death sentence. Following her disclosure, the resentencing court held a hearing on whether this constituted newly discovered evidence. The court ruled against Mr. Hitchcock. On direct appeal, Mr. Hitchcock raised three issues related to this hearing. The Florida Supreme Court found that these issues were not properly before the court because the evidence was related only to the guilt phase of Hitchcock's trial, which was not the subject of this appeal of his third resentencing. *Hitchcock v. State*, 755 So. 2d 638, 645 (Fla. 2000).

Mr. Hitchcock raised Richard's confession to Ms. Green in his state postconviction motion. This was critical evidence because Ms. Green had always supported Richard Hitchcock against her other brother James Hitchcock. After the motion was filed, Rossi Meachem came to the attention of Capital Collateral Regional Counsel – Middle Region (CCRC-M). Counsel amended Mr. Hitchcock's motion to plead a claim that Richard Hitchcock also confessed to the murder to Ms. Meachem. The postconviction court accepted the amendment and set an evidentiary hearing on all of Mr. Hitchcock's postconviction claims.

At the evidentiary hearing Ms. Green and Ms. Meachem testified to the substance and circumstances of Richard's confession. (Appendix F). In addition to the newly discovered similar fact evidence the lower court was also presented with newly discovered evidence that Richard Hitchcock confessed the murder to Wanda Hitchcock Green and Rossi Meacham. Ms. Green would have refused to talk to Mr. Hitchcock's 1977 trial counsel because she believed if the State accused somebody it meant that the accused was guilty. (VOL. PCR. VI 193-94; Appendix F).

Her reluctance disappeared after she heard Richard confess to the murder. Ms. Green sat with Richard Hitchcock at her mother's table when Richard revealed his guilt. Wanda Green stated at the 2003 hearing:

> [W]e were sitting at the kitchen table talking . . . I'd told him that it's going to be rough on my mama when they execute Erney [the defendant]. And he said they're not going to execute Erney. I said yeah, they'll execute him for the murder. And he said they're not going to execute him because he didn't do that murder.
>
> Q. Did he say anything else?
> A. Yeah, he did. He said - - I said no, they're going to execute him for the murder. And he said that they ain't going to execute him for rape.

> And in other words he told me that he was kneeling right there, that Erney only raped.
>
> Q. What did you do in response to that?
> A. I told him I was going to have to tell somebody and he informed me he knew that I was going to.
>
> Q: Do you think you were - - last time you came to court for Erney do you think that you were coming to do that when he - -
> A: That's exactly what I was coming to do. All they wanted to know was if Erney chopped cotton or picked or had a rough life.

(VOL VI PCR. 194-95; Appendix F).

Rossi Bell Meacham was an acquaintance of Richard Hitchcock and knew some of the Hitchcock family from Arkansas. (VOL. VI PCR. 160; Appendix F). Ms. Meacham was an important witness because Richard Hitchcock revealed to her the dark secret which he never revealed to the jury – that he was the victim's real killer. Ms. Meacham was discovered through the investigative work of CCRC-M and was previously unknown. Ms. Meacham met Richard in the early nineties before Richard died. (VOL. VI PCR. 160-61; Appendix F). Ms. Meacham was called to support the claim of newly discovered evidence as was pled in the amendment to Claim IX. She was also called to corroborate the other evidence of Richard's guilt in this case and Mr. Hitchcock's other witnesses' testimony.

Ms. Meacham told the truth and recounted:

> [ ]We was all sitting around the kitchen table, me and him and his mother who was in and out. It was after the yard sale. I stayed around to talk to him a few minutes and he was getting - - getting he was drinking a little. He was getting a little belligerent. He said yeah, you wouldn't know the things that I can tell you. And I said like what things. And he said I murdered that girl in Florida and blamed it on my brother Erney because he said his reason being was he was crippled and Erney was a young person. He can serve time better, but he blamed it on Erney.

(VOL. VI PCR. 162; Appendix F). (Erney was the name that James Hitchcock the petitioner was called by family in Arkansas.).

Even worse than simply recounting such evilness, Richard went so far as to brag about it to Ms. Meacham. When asked by Ms. Meacham how he could do such a thing Richard said, "I can do it and I got by with it." (VOL. VI PCR. 162; Appendix F). After that, Ms. Meacham stopped going over to Mr. Hitchcock's mother's house as much because Richard wanted her to be scared of him; indeed, she was scared of him. (VOL. VI PCR. 163; Appendix F). This did not mean that Richard was untruthful or that Ms. Meacham lied, only that contrary to the lower court's mischaracterization this was why she did not call the police.

The postconviction court denied relief based on a finding that Mr. Hitchcock was procedurally barred from raising guilt phase claims. The Florida Supreme Court found that this was incorrect and remanded the case back to the postconviction court for a determination of all of Mr. Hitchcock's guilt phase claims on the merits. (Appendix G). The postconviction court again denied relief. The Florida Supreme Court affirmed the denial of relief on this claim.

This was an arbitrary and capricious decision when the fact that the only evidence that remains after postconviction is Mr. Hitchcock's false and recanted confession. Through Florida's postconviction process, Mr. Hitchcock showed that he was actually innocent. Despite this evidence the state courts arbitrarily and capriciously denied Mr. Hitchcock relief.

Mr. Hitchcock testified in 1977 to the facts of how Richard committed this offense. Because of counsel's ineffectiveness and Richard's failing to come forward

and admit his guilt, Mr. Hitchcock was falsely and unjustly convicted. In postconviction, Mr. Hitchcock showed that not only did Richard commit the murder, but that Richard also told two people that he did so. Additionally, Mr. Hitchcock showed through all of the similar fact evidence, that Richard Hitchcock's motive and modus operandi for committing the murder was that he saw the young women in his family as his sexual property which he would choke when Richard perceived them as being interested in other males.

Once the false scientific evidence testified to at trial by Diana Bass is removed from the evidence against Mr. Hitchcock, all that remained was the false confession Mr. Hitchcock gave to the police after he was arrested. When the proof of Richard Hitchcock's guilt is considered, the result in this case should have been that Mr. Hitchcock received a new trial.

Mr. Hitchcock pleads his actual innocence as enabling him to have his other guilt phase claims heard and as a freestanding compelling basis to grant habeas relief. *See Herrera v. Collins,* 506 U.S. 390, 417 (1990) (assuming "that in a capital case a truly persuasive demonstration of "actual innocence" made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim."). The Florida Supreme Court correctly found that Mr. Hitchcock was not procedurally barred from having his guilt phase claims determined. While the court later erred in affirming the denial of relief, the court's earlier decision allowing Mr. Hitchcock's claims to be determined was correct. This Court should allow Mr. Hitchcock to be heard on this claim.

As pleaded in his last habeas petition, Mr. Hitchcock was denied his rights under the United States Constitution. Mr. Hitchcock should be allowed to proceed in federal court on this ground after which the writ should issue.

This claim was not raised in Mr. Hitchcock's first habeas petition.

Ground IV

Mr. Hitchcock was convicted on the basis of inaccurate and false testimony that created a false sense of scientific certainty and was inadmissible. Facts relating to this evidence were not disclosed by the State. All of this denied Mr. Hitchcock his Fifth, Sixth, Eighth, and Fourteenth Amendment rights under the United States Constitution. The state court decisions on these matters were contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding or both.

At Mr. Hitchcock's 1977 guilt phase trial the State called Diana Bass as an expert in hair analysis. Ms. Bass testified that some of the hair found at the crime scene matched the known hair of James Hitchcock but none of the hair matched Richard Hitchcock. Since the time of this trial Ms. Bass was discredited in the case of Anthony Ray Peek. *See Peek v. State*, 488 So. 2d 52 (Fla. 1986). The trial judge before this appeal granted Peek postconviction relief because, in Peek's first trial, false expert testimony was presented concerning hair identification evidence which effectively denied Peek a fair trial. *See Id*. at 53. The State's appeal of this order was dismissed by a stipulation between the State and Peek with the provision that the

State could retry Peek. *Id*.

Mr. Hitchcock alleged in state postconviction, and then in his federal habeas petition, that the testimony of Diana Bass violated the Constitution in a number of ways. First, the State, which included Diana Bass, violated *Brady v. Maryland*, 373 U.S. 83 (1963). Ms. Bass knew that she was not qualified to conduct hair analysis and at the least should have known that it was critical to maintain the integrity of minuscule evidence. Ms. Bass did not inform defense counsel or Mr. Hitchcock about her inadequacies. When the problems with Ms. Bass came to light in the above-mentioned Peek case, the State never informed Mr. Hitchcock or his attorneys about the discrediting of Diana Bass. The State then went so far as to falsely claim that Diana Bass was unavailable in 1988 so that her testimony from 1977 could be read to the resentencing jury without her being impeached. It was later shown that Diana Bass was available to testify at the resentencing, contrary to the State's assertion.

Second, the testimony of Diana Bass violated *Giglio v. U.S.*, 405 U.S. 150 (1972) and *Napue v. Illinois*, 360 U.S. 264 (1959). Ms. Bass knew that she was not capable of performing scientifically accurate hair testing because of her own lack of care and training. Nevertheless, Ms. Bass created a false sense of scientific certainty when she testified at Mr. Hitchcock's trial.

Third, the testimony of Diana Bass violated due process because hair testing as conducted by Ms. Bass had not yet obtained a level of scientific validity. Both the method and manner of hair testing employed by Ms. Bass failed in this regard. At the state evidentiary hearing, Mr. Hitchcock called Robert Kopec as a witness. Mr. Kopec was hired by the lab at which Ms. Bass worked, and Mr. Kopec became Ms. Bass'

supervisor. During that time period, Mr. Kopec proficiency tested Ms. Bass. Here, as seen through the testimony of Robert Kopec at the state evidentiary hearing, the method that Ms. Bass used was found to be scientifically inaccurate and antiquated. Mr. Kopec also found that the method Ms. Bass used to conduct hair testing during the operative period was unreliable because Ms. Bass did not follow very basic procedures to ensure the integrity of microscopic evidence. Beyond the substantive due process violation, counsel was ineffective for failing to make a proper objection to the admission of Diana Bass' testimony and move for a hearing to prevent the admission of this evidence.

As pleaded in his habeas petition, Mr. Hitchcock was denied his rights under the United States Constitution. Mr. Hitchcock should be allowed to proceed in federal court on this Ground, after which the writ should issue.

This claim was not raised in a prior federal petition, application, or motion. The claim does rely on information that the State failed to disclose.

II. MR. HITCHCOCK HAD A RIGHT TO FEDERAL REVIEW OF HIS MERITORIOUS FEDERAL CLAIMS AND SHOULD BE HEARD NOW.

A. Mr. Hitchcock was not required to obtain permission to proceed on his guilt phase issues but nonetheless filed an application for a successive petition in an abundance of caution.

Mr. Hitchcock did file an Application for Leave to File a Second or Successive Habeas Corpus Petition Under 28 U.S.C. § 2244 in the Circuit Court on the same date as he filed a Petition for a Writ of Habeas Corpus in the District Court. The Application sought permission to proceed on the guilt phase claims Mr. Hitchcock raised in the habeas petition. Mr. Hitchcock followed this course because of the time

limits under AEDPA. Mr. Hitchcock's filing predated this Court's decision on *Magwood v. Patterson*, 561 U.S. 320 (2010) and the Eleventh Circuit's decision in *Insignares v. Sec'y, Dep't of Corr.*, 755 F.3d 1273 (11th Cir. 2014). These cases were decided before Mr. Hitchcock's habeas petition was decided and before his appeal to the Eleventh Circuit.

The Circuit Court denied leave to file a second or successive petition on Mr. Hitchcock's guilt phase claims. Mr. Hitchcock filed a motion entitled "Motion to Withdraw Mandate and/or Vacate, Modify and/or Clarify Order Denying Application for Leave to File a Second or Successive Habeas Corpus Petition, 28 U.S.C. §2244(b), and for Rehearing in Part of Argument that this Section is Inapplicable to Mr. Hitchcock's Unique Procedural Posture, and Suggestion for Rehearing and Rehearing En Banc." The Circuit Court denied this on December 15, 2008. (Appendix C). The restrictions AEDPA places on second or successive petitions never applied to Mr. Hitchcock's case.

Both the District Court and the Eleventh Circuit denied Mr. Hitchcock a COA on whether his guilt phase claims should have been dismissed.

B. Mr. Hitchcock should have been allowed to proceed on his guilt phase claims without permission for a second or successive petition.

Mr. Hitchcock submits that the provisions in AEDPA requiring permission to proceed on a second or successive habeas petition did not prohibit him from proceeding on his guilt phase claims despite his having filed a previous habeas petition.

This Court has held that: "Final judgment in a criminal case means sentence.

The sentence is the judgment." *Berman v. United States*, 302 U.S. 211, 212, (1937); citing *Miller v. Aderhold*, 288 U.S. 206, 210 (1933); *Hill v. United States ex rel. Wampler*, 298 U.S. 460, 464 (1936). If this Court accepts this reasoning, then Mr. Hitchcock received a new final judgment when he was last sentenced to death. Once that occurred, Mr. Hitchcock was in the same position as any individual who received a new guilt phase in postconviction and was later found guilty again. With a new final judgment resulting from his new sentence, likewise Mr. Hitchcock is entitled to proceed on the guilt phase claims he now raises.

Until the Florida Supreme Court issued a mandate following Mr. Hitchcock's last appeal from the denial of postconviction relief, Mr. Hitchcock could not meet this most basic requirement that a claim be adjudicated. The state court's opinion was when the final decisions were made that were contrary to federal law or when the state courts finished unreasonably applying federal law. Until the mandate, the Florida courts, including the Florida Supreme Court, had not yet issued decisions that were based on unreasonable determination of facts in light of the evidence presented in state court proceedings.

Importantly, until this round of postconviction proceedings, the guilt phase claims presented here did not have decisions, adjudication, or factual development. The Florida Supreme Court found that Mr. Hitchcock's guilt phase claims were properly raised in postconviction and adjudicated those claims on the merits. (Appendix G). The state court decisions were incorrect and violated the United States Constitution. These decisions should be reviewed federally.

In *Insignares v. Sec'y, Dep't of Corr.*, 755 F.3d 1273 (11th Cir. 2014) the

Eleventh Circuit affirmed the District Court's finding that a petition was not successive "[b]ecause resentencing by the state judge resulted in a new judgment, making this the first challenge to that new judgment in a new judgment, making this the first challenge to that new judgment, we conclude Insignares's petition is not successive. *Id*. at 1275. The court recognized in *Insignares* what Mr. Hitchcock had urged all along - - when an individual receives a new sentence in state court it results in a new judgment and allows guilt and sentencing issues to be raised. Mr. Hitchcock's habeas petition likewise followed a new judgment. Accordingly, the District Court should have adjudicated the claims.

In *Insignares*, the petitioner was convicted following a jury trial. *Id*. at 1276. Following conviction, but before appeal, he filed a motion to correct sentence under Florida Rule of Criminal Procedure 3.800 and was resentenced. *Id*. Following direct appeal, the state appellate court reversed his criminal mischief conviction but otherwise affirmed. *Id*. at 1277.

The petitioner sought postconviction relief in state court, was denied and the denial was affirmed on appeal. *Id*.; citing *Insignares v. State*, 957 So. 2d 680 (Fla. 3d DCA 2007). The petitioner filed his first federal habeas petition under §2254 in the District Court. He filed the same issues in the first petition as he later filed in his second petition. *Id*. The District Court dismissed the petition as untimely and, without a certificate of appealability, he appealed to the Eleventh Circuit Court of Appeals. The Eleventh Circuit dismissed for failure to prosecute. *Id*.

The petitioner filed a second Florida Rule 3.800 motion to correct sentence. *Id*. The state court granted the motion and reduced his sentence on the attempted

murder charge. *Id*. The petitioner filed a second Florida Rule 3.850 motion challenging his conviction and alleging actual innocence, which was denied and affirmed without an opinion. *Id*. (Citations omitted).

The petitioner then filed the §2254 petition that was at issue in the appeal before the Eleventh Circuit. *Id*. The magistrate judge found the petition "was not 'second or successive' under *Magwood v. Patterson*, 561 U.S. 320 (2010), because it was [the petitioner's] first petition to challenge the new judgment entered after resentencing." *Id*. (Citations to magistrate's report and recommendation omitted). The magistrate recommended that the claims be rejected. The District Court adopted the recommendation and granted a COA on four issues. *Id*.

The Eleventh Circuit decided the appellate issues, but first needed to decide whether the District Court had jurisdiction to hear the petition because the petitioner never sought permission to file a second or successive petition from the appellate court. *Id*. at 1277-78. The State contended that the petition was successive because the petitioner had filed an earlier petition raising the same issues in federal court. *Id*. at 1278. The petitioner countered that the 2011 petition was not successive because it was "his first challenge to the new judgment" and "not 'second or successive.'" *Id*. The court held that the petitioner's second in-time habeas petition was not successive and accordingly, the District Court had jurisdiction to decide the claims without the appellate court's permission.

In reaching this decision, the appellate court applied this Court's reasoning in *Magwood v. Patterson*, 561 U.S. 320 (2010). In *Magwood*, the District Court "conditionally granted" relief from the death sentence. *Id*. at 326. The petitioner in

Magwood was resentenced to death and again sought federal review of the death sentence raising a new claim that he had not raised in the initial petition. *Id*. at 327.

The District Court conditionally granted relief again. *Id*. at 329. The Eleventh Circuit Court of Appeals reversed "in relevant part." This Court described the Eleventh Circuit's reasoning as follows:

> [A]ny claim that "challenge[s] the new, amended component of the sentence" should be "regarded as part of a first petition," and any claim that "challenge[s] any component of the original sentence that was not amended" should be "regarded as part of a second petition." Applying this test, the court held that because Magwood's fair-warning claim challenged the trial court's reliance on the same (allegedly improper) aggravating factor that the trial court had relied upon for Magwood's original sentence, his claim was governed by § 2244(b)'s restrictions on "second or successive" habeas applications. The Court of Appeals then dismissed the claim because Magwood did not argue that it was reviewable under one of the exceptions to § 2244(b)'s general rule requiring dismissal of claims first presented in a successive application.

Id. at 329; citations and footnote omitted.

This Court granted certiorari and addressed the issue of whether the petitioner's habeas petition following resentencing subjects the claims that could have been raised to AEDPA's restrictions on successive federal petitions. *Id*. at 330. The petitioner raised a "fair warning claim" that could have been, but was not, raised in the first petition and not simply a claim raising a deficiency that occurred during the resentencing proceedings.

This Court "granted certiorari to determine whether Magwood's application challenging his 1986 death sentence, imposed as part of resentencing in response to a conditional writ from the District Court, is subject to the restraints that §2244(b) imposes on the review of 'second or successive' habeas applications." *Id*. at 330. This

Court reversed, finding that "Magwood's first application challenging his new sentence under the 1986 judgment is not 'second or successive' under §2244(b) to bar review of the fair-warning claim Magwood presented in that application." *Id*. at 342-43.

This Court found that Magwood's case did not present a question that was of concern to the State - - whether a petitioner who receives habeas relief as to sentence "may file a subsequent application challenging not only his resulting, new sentence, but also his original *undisturbed* conviction." *Id*. at 342. The Court had "no occasion to address that question because Magwood ha[d] not attempted to challenge his underlying conviction." *Id*. The issue that was not before this Court in *Magwood* was before the Eleventh Circuit Court of Appeals in *Insignares*. As that court acknowledged:

> The wrinkle in *Magwood* is that the Court expressly reserved the question of whether a subsequent petition challenging the undisturbed conviction would be "second or successive" after the state imposes only a new sentence. *Id*. at 342, 130 S. Ct. at 2802. That is the question we must decide.

Insignares, *Id*. at 1280. The Eleventh Circuit Court of Appeals proceeded to decide that question.

The Eleventh Circuit followed this Court's reasoning in *Magwood* that "courts must look to the *judgment* challenged to determine whether a petition is second or successive. AEDPA does not define the phrase 'second or successive.'" *Id*. at 1278; citing *Magwood* at 331-32. To determine the meaning of "second or successive" the Eleventh Circuit followed this Court in looking to §2254(b)(1). *Id*. at 1279; citing *Magwood* at 332 (citation and internal quotation marks omitted).

In *Magwood*, this Court found that "[t]he limitations imposed by §2244(b) apply only to a 'habeas corpus application under §2254,' that is, an 'application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court,' §2254(b)(1)." *Id.*; citing *Magwood* at 332. As explained by the Eleventh Circuit, in *Magwood,* "in accordance with AEDPA" this Court,

> recognized a habeas application seeks invalidation "'*of the judgment* authorizing the prisoner's confinement,'" and, even if the application is successful, "'the State may seek a new judgment.'" *Id.* (quoting *Wilkinson v. Dotson*, 544 U.S. 74, 83, 125 S. Ct. 1242, 1248 (2005)). Therefore, the judgment is the center of the analysis, "both § 2254(b)'s text and the relief it provides indicate that the phrase 'second or successive' must be interpreted with respect to the judgment challenged."

Id. at 1279; citing 332-33.

The Eleventh Circuit found that this Court "also clarified that the phrase 'second or successive' applies to habeas *petitions*, not to the *claims* they raise. On appellate habeas review in *Magwood*, [the Eleventh Circuit] had 'concluded that the first step in determining whether §2244(b) applies is to "separate the new claims challenging the resentencing from the old claims that were or should have been presented in the prior application."" *Id.* at 1279; citing *Magwood* at 329 (quoting *Magwood v. Culliver*, 555 F.3d 968, 975 (11th Cir. 2009)) (Emphasis in the original).

In *Magwood*, this Court stated, "although . . . many rules under §2244(b) focus on claims, that does not entitle us to rewrite the statute to make the phrase 'second or successive' modify claims as well." *Insignares* at 1279; citing *Magwood* at 334-35. The Eleventh Circuit summarized this Court's opinion in *Magwood*:

> Based on this analysis, the Court concluded that: "AEDPA's text commands a more straight-forward rule: where . . . there is a new

judgment intervening between the two habeas petitions, an application challenging the resulting new judgment is not second or successive." *Id*. at 341-42, 130 S. Ct. at 2802 (citation and internal quotation marks omitted). Throughout its opinion, the Court emphasized the effect of a new judgment. "Because Magwood's habeas application challenge[d] a new judgment for the first time, it [was] not 'second or successive' under § 2244(b)." *Id*. at 323-24, 130 S. Ct. at 2792 (footnote omitted). The Court agreed with Magwood that § 2244(b) "appl[ies] only to a 'second or successive' application challenging the same state-court judgment." *Id*. at 331, 130 S. Ct. at 2796. Since his petition was his "first application challenging [an] intervening judgment," it was not "second or successive," regardless of whether he had raised the claims before. *Id*. at 336, 339, 130 S. Ct. at 2799, 2801. Put simply, the first application to challenge a judgment is not subject to AEDPA's restrictions on successive petitions— "the existence of a new judgment is dispositive."

Id. at 1279-80; citing *Magwood* at 338.

In deciding *Insignares*, the Eleventh Circuit went on to state:

Neither do we write on a clean slate. We have addressed the effect of resentencing on AEDPA's statute of limitations. *Ferreira v. Sec'y, Dep't of Corr.*, 494 F.3d 1286 (11th Cir. 2007). The prisoner in *Ferreira* had been resentenced by the state trial judge and sought federal review of his underlying conviction. *Id*. at 1288. The issue was whether resentencing rendered timely his otherwise untimely challenge to the conviction. *Id*. Prior to *Ferreira*, we viewed the conviction and sentence as two separate judgments, each with its own statute of limitations. Responding to the Supreme Court's decision in *Burton*, which ruled AEDPA's statute of limitations "[does] not begin until both [the] conviction and sentence 'bec[o]me final,'" *Burton*, 549 U.S. at 156, 127 S. Ct. at 799, we overruled our incorrect understanding of separate judgments of conviction and sentence. *Ferreira*, 494 F.3d at 1293.

In *Ferreira*, we explained there is one judgment, comprised of both the sentence and conviction. *Id*. at 1292 ("[T]he judgment to which AEDPA refers is the underlying conviction and most recent sentence that authorizes the petitioner's current detention."); cf. *Deal v. United States*, 508 U.S. 129, 132, 113 S. Ct. 1993, 1996 (1993) ("A judgment of conviction includes both the adjudication of guilt and the sentence."). Applying that rule, we held "that AEDPA's statute of limitations runs from the date the judgment pursuant to which the petitioner is in custody becomes final, which is the date both the conviction and sentence the petitioner is serving become final." *Ferreira*, 494 F.3d at 1288. The limitations provisions of AEDPA "are specifically focused on

> the judgment which holds the petitioner in confinement," and resentencing results in a new judgment that restarts the statute of limitations. *Id*. at 1292–93. Since there was a new judgment, we saw no reason to differentiate between a claim challenging a conviction and one challenging the sentence.
>
> Having reviewed *Magwood* and the cases of other circuits, we return to the basic proposition underlying *Burton* and *Ferreira*: there is only one judgment, and it is comprised of both the sentence and the conviction. In *Ferreira*, resentencing by the state judge resulted in a new judgment. *Magwood* explains, the "existence of a new judgment is dispositive" in determining whether a petition is successive. 561 U.S. at 338, 130 S. Ct. at 2800. Based on these cases, we conclude that when a habeas petition is the first to challenge a new judgment, it is not "second or successive," regardless of whether its claims challenge the sentence or the underlying conviction.
>
> Insignares's first federal habeas petition was decided in 2008. In 2009, the state judge granted a motion to reduce Insignares's mandatory-minimum imprisonment sentence from 20 years to 10 years but retained his 27-year imprisonment sentence. The 2009 resentencing by the state judge resulted in a new judgment, and the 2011 petition is his first federal challenge to that 2009 judgment. Therefore, Insignares's 2011 petition is not "second or successive," and the district judge had jurisdiction to decide it.

Id. at 1281.

The *Insignares* approach is both legally and practically sound in comparison to other approaches. As found in *Insignares*, successive clearly refers to petitions under AEDPA. The "courts must look to the *judgment* challenged to determine whether a petition is second or successive. AEDPA does not define the phrase 'second or successive.'" *Id.* at 1278; citing *Magwood* at 331-32. Upon resentencing the prospective habeas petitioner receives a new judgment, after which a habeas petition may be filed challenging all of the exhausted federal claims denied in state court.

In practice, some claims will involve both guilt and sentencing phase issues. Especially in a capital scheme like Florida's, but indeed in all cases, facts concerning

the offense overwhelmingly impact the sentencer's decision. To the extent that such facts come without the efficacy of fair and constitutional adversarial proceedings, the imposition of the death penalty cannot be justified. In a case like Mr. Hitchcock's, the failure to consider constitutional errors that would result in a new guilt phase trial leaves Mr. Hitchcock without recourse to avoid the fate of execution for a crime he submits he did not commit. Based on this Court's prior decisions on actual innocence, *see Herrera v. Collins*, *supra*, the raising of constitutional claims may be the only way to avoid an unjust sentence.

Mr. Hitchcock was permitted to raise federal guilt phase issues in state court. When he was denied relief in state court, he sought federal review of his federal claims in federal court. While federal habeas review under AEDPA is hardly de novo review, it does serve the function of limiting how far from the requirements of the Constitution a state court may stray.

Mr. Hitchcock repeatedly received new judgments after this Court and the Florida courts found constitutional error. Once the resentencing was final, Mr. Hitchcock received a new judgment and was free to challenge it in federal court like any other convicted and sentenced individual who had properly exhausted federal claims of constitutional violation. Mr. Hitchcock, in a case involving actual innocence, requests nothing more than to argue for the justice he has long been denied and to do so as any other petitioner denied a remedy for constitutional violations by the state courts would be able to do. Mr. Hitchcock should have received the same review that the Eleventh Circuit allowed in *Insignares*. There was no meaningful difference between the cases, and indeed, Mr. Hitchcock presents a far more compelling case for

his guilt phase claims being heard than in *Insignares*.

This Court should grant the writ and find that the District Court should determine the merits of Mr. Hitchcock's timely and exhausted federal claims.

C. Mr. Hitchcock is actually innocent.

James Hitchcock is actually innocent. His conviction and death sentence are contrary to the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. Raising claims in federal court may be the only way that Mr. Hitchcock can avoid execution for a crime he did not commit. At the core of this case are two conflicting versions of the events of July 31, 1976. The first is the version that James Hitchcock told law enforcement during custodial interrogation on August 4, 1976. After being held in custody, desperate and suicidal, James Hitchcock falsely confessed to the murder of Cynthia Driggers. James Hitchcock admitted to the crime to protect his brother Richard and to aid in his own suicide.

At trial, James Hitchcock swore an oath and told the jury exactly what happened on July 31, 1976. Mr. Hitchcock came back to the house he was staying and had consensual sexual relations with the victim. The medical examiner in this case never testified that there was anything inconsistent with consensual relations.

Mr. Hitchcock told the jury exactly how Richard murdered the victim. After the consensual sexual relations, Richard came into the room and saw James and the victim lying in bed. Richard became enraged and dragged the victim outside the house. While outside Richard Hitchcock choked the victim. James Hitchcock tried to break Richard's grip around the victim's neck, but it was too late, the victim was dead, and Richard was guilty of murder.

In state postconviction, the truth about Richard Hitchcock and his confession to the murder came to light. The State's veil of false scientific evidence was lifted and all that remains are the two conflicting statements.

Mr. Hitchcock made the substantial showing of his actual innocence in state court and likewise can and does make such a showing now. Through the state postconviction process, Mr. Hitchcock showed that it was indeed his brother Richard Hitchcock who committed the murder for which Mr. Hitchcock has been convicted and sentenced to death.

There are several exceptions to the general rule barring federal review of a procedurally defaulted claim. First, there is "a narrow exception to the general rule when the habeas applicant can demonstrate that the alleged constitutional error has resulted in the conviction of one who is actually innocent of the underlying offense or, in the capital sentencing context, of the aggravating circumstances rendering the inmate eligible for the death penalty." *Dretke v. Haley,* 541 U.S. 386, 387 (2004) (internal citations omitted); *see also Schlup v. Delo*, 513 U.S. 298 (1995).[2] Second, there is an exception in claims of *Brady* error, where the elements of the substantive claim itself mirror the cause and prejudice inquiry and proof of one is necessarily proof of the other. *Banks v. Dretke*, 540 U.S. 668 (2004).

"[W]hen a petitioner who has been sentenced to death raises a claim of actual innocence to avoid a procedural bar to the consideration of the merits of his

[2]As *Schlup* recognized, "the quintessential miscarriage of justice . . . the execution of a person who is actually innocent." *Id*. at 324.

constitutional claims," the petitioner must show "that a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Schlup*, 513 U.S. at 326-27 (1995) (citing *Murray v. Carrier*, 477 U.S. 478, 496 (1986)). Furthermore, "[t]o be credible, such a claim [of actual innocence] requires petitioner to support his allegations of constitutional error with new reliable evidence - - whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence B that was not presented at trial." *Id.* at 324.

This Court made clear in *Schlup* that to establish a gateway claim of actual innocence, a habeas petitioner need not present new facts that "unquestionably establish" his innocence; rather, the evidence need only "raise sufficient doubt" about a petitioner's guilt "to undermine confidence in the result of the trial." *Schlup* at 317. In analyzing a claim of actual innocence under *Schlup*, a habeas court is not bound by the rules of admissibility that would govern at trial. The emphasis on actual innocence allows a habeas court to also "consider the probative force of relevant evidence that was either excluded or unavailable at trial." *Id.* at 327-28. Additionally, a "petitioner's showing of innocence [under *Schlup*] is not insufficient solely because the trial record contained sufficient evidence to support the jury's verdict." *Id.* at 331. Finally, in contrast to a mere sufficiency of the evidence review under *Jackson v. Virginia*, 443 U.S. 307 (1979), a habeas court evaluating a gateway claim of actual innocence under *Schlup* "may have to make some credibility assessments," because under the *Schlup* standard, "newly presented evidence may indeed call into question the credibility of the witnesses presented at trial" to a degree sufficient to establish actual innocence. *Id.* at 513 U.S. at 330.

As is demonstrated in Ground III, *supra*, which is incorporated herein, Mr. Hitchcock is actually innocent of both the underlying crime and his death sentence. His innocence is also a gateway through which any procedural default is excused allowing for his claims to be reviewed on their merits.

D. The factual predicates for most of Mr. Hitchcock's claims could not have been discovered earlier through due diligence.

After Mr. Hitchcock's case became final, he first sought postconviction relief in the state courts. During this period of time there was no time limit on seeking postconviction relief in state court and no time limit on petitioning the federal courts for a writ of habeas corpus. Section 2244(b)(2)(B)(i) and (ii) states in relevant part:

> 2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unlessB . . .
>
> (B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

While Mr. Hitchcock's habeas petition is not successive, if the guilt phase claims are taken as successive, they are not impermissibly so under '2244. First the Florida Supreme Court never found them to be successive or otherwise barred. As such, these claims, are now exhausted and can be raised in a habeas petition. Second, on the claims involving Diana Bass and the flawed hair analysis, the factual predicate could not have been known until after Robert Kopec discovered Ms. Bass'

inadequacies in the area of microanalytical hair analysis and evidence handling. At the 1977 trial, Ms. Bass testified at length that the hair evidence discovered on and about the victim's body provided matches with James Hitchcock and excluded Richard Hitchcock. The problem was that Ms. Bass could not make this determination.

The evidence concerning Ms. Bass could not have been discovered earlier because the State never disclosed the fact that Ms. Bass was incompetent to handle and test hair evidence. Once Robert Kopec, employed by the State, and part of the State for purposes of disclosure, discovered Ms. Bass' deficiencies, the State had a duty to disclose Mr. Kopec's findings to Mr. Hitchcock. The State never made any sort of disclosure. Worse yet, in 1988 when Mr. Hitchcock went to a resentencing, the State misrepresented Diana Bass' availability in order to enable serologist Steven Platt to read the testimony of Diana Bass into evidence. Mr. Platt testified at the 2003 evidentiary hearing regarding why he read the testimony of Diana Bass and whether Ms. Bass was available:

> Q: Did at any point you in fact tell [the] prosecutors that you had found Diana Bass?
> A: I recall probably leaving a telephone message to the effect that I thought she was in Saint Augustine, Florida at the time.
> Q: Was this before the trial?
> A: Before the hearing, yes.

(VOL. VI PCR. 247). Ms. Bass confirmed that she was living in Florida in 1988, the year that Mr. Hitchcock's penalty phase and second death sentence occurred. (VOL. VI PCR. 210). Accordingly, Ms. Bass was not unavailable as the State misled the court in 1988. Had the State not hid Ms. Bass in 1988, Mr. Hitchcock would have

been able to discover the information that Ms. Bass was incompetent to handle and test evidence at that time even if the State failed to perform its duty to disclose Mr. Kopec's findings.

Lastly, the newly discovered evidence of Richard Hitchcock's confession could not have been discovered through the exercise of due diligence because Richard Hitchcock did not begin to confess until the mid-1990's, almost 20 years after Mr. Hitchcock's 1977 guilt phase, the only trial proceeding in which Mr. Hitchcock's guilt has been at issue.

E. Mr. Hitchcock could not collaterally challenge his conviction because he was in limbo between the operation of federal and state law that was occasioned by the unconstitutional acts of the State.

Mr. Hitchcock could not have raised the guilt phase claims in his Petition earlier because of the State's ongoing violation of his rights. Moreover, Mr. Hitchcock could not have raised these claims because of the procedural posture he found himself in after he filed his initial habeas corpus petition and after this Court granted Mr. Hitchcock relief in *Hitchcock v. Dugger*, 481 U.S. 393 (1987). This certainly justifies this Court allowing Mr. Hitchcock to proceed on his guilt phase claims.

Mr. Hitchcock initially collaterally challenged his judgment of conviction and death sentence after the Governor signed a death warrant. At the time the warrant was signed, there was no established system in Florida that provided for the collateral representation of death sentenced individuals such as the modern-day Office of the Capital Collateral Regional Counsel. All the way from the filing of Mr. Hitchcock's original Rule 3.850 Motion until this Court's decision granting relief, the public defender's office which handled Mr. Hitchcock direct appeal to the Florida Supreme

Court represented him collaterally.

The attorneys representing Mr. Hitchcock had an arduous task and labored under a death warrant. Immediately, they needed to come up with a claim to save Mr. Hitchcock's life. They did. During the time that this was occurring the state rules of criminal procedure did not prohibit a second postconviction motion being filed. It was only after 1984 that there was a time limit and a definitive bar on successive motions in Florida.[3]

Once relief was granted, Mr. Hitchcock could not go back to the federal courts without going through state court because he had to exhaust the federal claims in state court. He could not file a postconviction motion in the state court because his judgment and conviction were not final. Accordingly, because Mr. Hitchcock was placed in state-federal limbo by the misconduct of the State, he should be allowed to proceed on all of his Grounds in federal court.

F. The Circuit Court's Denial of Permission was Unreasonable and Not Based on Fact.

The Circuit Court's decision denying Mr. Hitchcock permission to proceed on his guilt phase claims denied Mr. Hitchcock his right to seek relief in federal court. The court's order is based on false assumptions that denied Mr. Hitchcock the right to seek a remedy from his wrongful conviction. This Court should exercise its original

[3]By *In re Rule 3.850 of the Florida Rules of Criminal Procedure*, 481 So. 2d 480 (Fla. 1985), the Florida Supreme Court amended this Rule to read as follows: "Any person whose judgment and sentence became final prior to January 1, 1985, shall have until January 1, 1987, to file a motion in accordance with this rule."*Id.* For a complete discussion of the history of the limits Florida placed on postconviction and the dates of enactment *see Baker v. State*, 878 So. 2d 1236 (Fla. 2004).

jurisdiction and allow Mr. Hitchcock to be heard on his guilt phase claims in federal court.

G. This Court should exercise its original jurisdiction to prevent a miscarriage of justice.

This Court has original jurisdiction to prevent the miscarriage of justice that will result if Mr. Hitchcock is not allowed to be heard on his guilt phase claims. Either the bar on successive petitions was overcome by Mr. Hitchcock or it never applied to him in the first place. Any finding to the contrary amounts to a suspension of the writ. The Constitution does apply, and Mr. Hitchcock should be able to be heard on his claims that his rights were violated by the State in convicting Mr. Hitchcock.

This case presents a clear reason for this Court's exercise of original jurisdiction. First, while even if Mr. Hitchcock could not meet the standards to pass through the gateway of innocence, he presents compelling arguments that his trial was insufficient to prove his guilt to a standard that the irrevocable sentence of death can be imposed.

Second, Mr. Hitchcock presented his claims at all stages in good faith and without delay. While the standards for receiving relief in federal habeas are arduous, federal habeas provides a necessary remedy for when the State courts adjudicate federal claims contrary to the demands of the United States Constitution. This Court has recognized that the state courts are the primary forum for seeking a remedy for violations of the United States Constitution in state prosecutions. When the state courts fail, as they did in Mr. Hitchcock, it is necessary for federal review to regain the trust that this Court has placed in the state courts.

Mr. Hitchcock sought federal habeas corpus, much like the petitioner, in *Insignares* after he was resentenced and had a new judgment and sentence. There is no logical or legal basis for the disparate treatment. Indeed, treating Mr. Hitchcock's meritorious federal claims differently, despite a clear understanding by the Eleventh Circuit, amounts to a denial of due process, equal protection and is ultimately a suspension of the writ of habeas corpus. Mr. Hitchcock should receive the exact federal review anyone else in his position would receive; no more, and no less. This Court should grant relief so that Mr. Hitchcock may seek a remedy that would be available to anyone who received a new judgment and sentence.

CONCLUSION

This Court should issue a writ allowing Mr. Hitchcock to be heard by in the District Court on his guilt phase claims.

REASONS FOR NOT MAKING APPLICATION IN THE DISTRICT COURT AND EXHAUSTION COMPLIANCE WITH 28 U.S CODE §2241 AND § 2242

The reason for not making the application in the District Court is that the District Court dismissed the guilt phase claims and denied a COA. Mr. Hitchcock was denied a COA by the District Court and the Eleventh Circuit and the Eleventh Circuit also denied permission to file a successive petition. This Court denied cert. Mr. Hitchcock is entitled to federal review of his guilt phase claims. Mr. Hitchcock has meritorious guilt phase claims that were fully exhausted in state court but have not been reviewed federally

All of the claims that Mr. Hitchcock seeks to present were exhausted in state court during postconviction following Mr. Hitchcock's last death sentence.

Under 28 U.S Code §2241(c)(3) Mr. Hitchcock "is in custody in violation of the Constitution or laws or treaties of the United States…"

VERIFICATION

I, James L. Driscoll Jr, a member of the Bar of this Court, and the Petitioner's attorney, hereby verifies, under penalty of perjury, the forgoing Petition on behalf of the Petitioner, James E. Hitchcock as authorized by Rule Governing Section 2254 Cases 2(5), is true and correct.

/S/ JAMES L. DRISCOLL, JR.
JAMES L. DRISCOLL, JR.
Office of the Capital Collateral
Regional Counsel-Middle
12973 N. Telecom Parkway
Temple Terrace, Florida 33637
813-558-1600
(Facsimile) 813-558-1601
* Counsel of Record

DATE: December 5, 2022