

**IN THE SUPREME COURT OF FLORIDA  
CASE NO. SC16-183**

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**WILLIAM ARTHUR GREGORY,**

**Petitioner,**

**v.**

**JULIE L. JONES,  
ETC.**

**Respondents.**

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**RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS**

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**RESPONSE TO PETITION FOR  
WRIT OF HABEAS CORPUS**

COME NOW the Respondents, by and through undersigned counsel, and respond as follows to Gregory's petition for a writ of habeas corpus which was filed on February 1, 2016. For the reasons set out below, Respondents move this Honorable Court to deny the petition.

**INTRODUCTION**

The petitioner in this case seeks a writ of habeas corpus. Contemporaneous with his petition, Gregory appeals the denial of his motion for post-conviction relief under *Florida Rule of Criminal Procedure* 3.851 (hereinafter “Rule 3.851” or “3.851”) from the Circuit Court in Flagler where he was convicted of First-Degree Murder and sentenced to death. This is Gregory’s first petition to this Court for a writ of habeas corpus. In his petition, Gregory claims that his convictions and death sentences—and their affirmation by this Court—were obtained in violation of the Constitutions of the United States and the State of Florida.

**RESPONSE TO PRELIMINARY STATEMENT**

The "Preliminary Statement" found on page 1 of the petition correctly refers to 29 volumes and 4 supplemental volumes comprising the record on direct appeal in this case. The citation form and abbreviations used in the petition are accurately

described.

### **RESPONSE TO REQUEST FOR ORAL ARGUMENT**

Respondents defer to the Court's judgment as to whether oral argument is necessary or justified in this case.

### **RESPONSE TO JURISDICTION**

Petitioner raises a claim challenging the constitutionality of his convictions and sentences and the judgment of this Court. Under Article V, Section 3(b)(9) of the Florida Constitution, this Court has jurisdiction. *See also Fla. R. App. P. 9.030(a)(3), Fla. R. App. P. 9.100(a)*. The petition pleads claims involving fundamental constitutional error. These claims are denied. Gregory is not entitled to habeas relief.

### **RESPONSE TO STATEMENT OF THE CASE AND FACTS**

Petitioner's facts are incomplete and denied. Respondents rely on this Court's summary of the facts as detailed in its 2013 direct appeal decision affirming Gregory's conviction and death sentence:

#### **The Guilt Phase**

William A. Gregory, who was twenty-four years old when the murders were committed, was for a time involved in a romantic relationship with Skyler Dawn Meekins, who was seventeen at the time she was murdered. Skyler and Gregory had a child together, although their romantic relationship ended in June 2007. Skyler and Gregory both continued, however, to participate in raising their child. Around the time their relationship ended, Gregory was in jail and would often call Skyler's house. On several occasions, he spoke with

Skyler's brother, and the two would discuss Skyler's whereabouts and activities. During one call, Gregory said he was “stressing about Skyler” and asked for information regarding any other men who might be calling for Skyler. Gregory stated that he knew Skyler was “trying to ... get with dudes” and indicated that he would have to “kind of try to get over Skyler or something.”

During another call, Gregory asked Skyler's brother to check Skyler's e-mail account and online profile for other men with whom she might be communicating. Gregory told Skyler's brother that he had previously accessed Skyler's e-mail account and “erased ... all the dudes she had on there.” Gregory also directed Skyler's brother to delete a message Skyler had posted on her online profile about being newly single. According to an individual who was incarcerated with Gregory during the period in which these calls were made, Gregory was jealous of Skyler, did not like the people she was spending time with, and stated that if he ever caught Skyler “cheating” on him, “he was going to blow her ... head off.”

Skyler began dating a new boyfriend, Daniel Arthur Dyer, on July 4, 2007. Gregory was aware of Skyler's new relationship with Daniel, but Gregory would continue to call for Skyler and, after his release from jail, would visit Skyler's house several times per week. According to Skyler's brother, Gregory would call and stop by to see Skyler “[a]t least three times a week ... [u]sually not invited.” Gregory and Skyler did, however, agree to go shopping together for their child's birthday party, and, while he was still in jail, Gregory would discuss the child on the phone calls he placed.

On August 20, the day before the murders, Gregory, who was out of jail and on probation, spent the day with his brother and a few friends. While at one friend's house, he test-fired a pistol that someone was trying to sell, possibly leaving gunshot residue on his hands, and while riding around with his brother and another friend, he used marijuana and crack cocaine and took pills. Sometime that afternoon, Gregory called Daniel's cell phone, asking to speak to Skyler, who spent the day with Daniel and Daniel's friend at Daniel's house.

Starting at 10:19 p.m. that night, Gregory began making a number of outgoing phone calls, including several to Skyler's house. At 10:26 p.m., an incoming call was made from Skyler's house to Gregory's house number, and there were then six additional outgoing calls from Gregory to Skyler's house after the incoming call to Gregory went unanswered. At 11:31 and 11:32 p.m., Gregory called the number for a taxicab company that was no longer in business.

Gregory's brother recalled seeing Gregory in their shared bedroom at approximately 3:00 or 3:30 a.m. in the early morning hours of August 21. Gregory was wet and mumbling about being down by the beach. Gregory later told his brother that he passed out at the beach and awoke with a wave washing up on him, that his shoes and wallet “got all soaked,” and that he then dove in the pool at a nearby condominium complex because he was “all ... sandy.”

At 4:17 a.m., Gregory called 911 to report himself for a probation violation as a result of his earlier drug use. A law enforcement officer informed Gregory that Gregory would have to take the matter up with his probation officer. Gregory's brother and a friend said that they had used drugs with Gregory in the past and had never known him to self-report a probation violation.

Around 6 a.m. that morning, Skyler's grandparents, who had been sleeping in the home during the murders, awoke to find Skyler and her boyfriend Daniel dead in Skyler's bed. Skyler and Daniel had each suffered heavy head trauma caused by the firing of a shotgun at close range while they slept. Skyler's father, who lived next door, called the authorities, and sheriff's deputies were dispatched to the home. On arrival, the deputies observed Skyler's and Daniel's bodies in a back bedroom, along with a shotgun and two shotgun shells lying on the floor in front of the bed. Skyler's grandfather kept a shotgun and rifles, along with ammunition, in a house closet, which was usually left unlocked.

Gregory had previously lived with Skyler in that house, and the guns were kept in the same location during that time. A firearms analyst concluded that an individual would have to have been familiar with the particular shotgun used as the murder weapon in this case in order

to load it because it was not a popular shotgun and was “quite different” in how it would be loaded. Gregory's fingerprints were found on this shotgun.

After police had arrived at the home, Skyler's brother called and left a message for Gregory at 7:26 a.m., stating, “You better run.” Gregory placed a 911 call at 8:24 a.m. to report this message to law enforcement and was taken by law enforcement to the Flagler County Sheriff's Office as a result of calling in the threat. Gregory was then arrested for a violation of probation based on his earlier admissions of using a controlled substance.

While at the sheriff's office, Gregory was tested for gunshot residue. The results were negative, although Gregory apparently thought that he had tested positive based on test-firing a pistol the prior day. Gregory subsequently placed a call to a friend from jail, telling her not to incriminate herself because the calls were recorded, and then explaining that law enforcement had taken magnet samples on his skin and reminding her that he “was popping off that pistol in the backyard” the previous day.

In subsequent phone calls, Gregory spoke to his mother and brother about the answers they were giving to law enforcement regarding his whereabouts at the time of the murders. In particular, Gregory questioned his mother about why she told investigators that she did not see him on the morning of August 21, and told her, “nobody's helping me out.”

On August 25, Gregory was moved to a different housing facility. During this time, he was in the same cell block as an inmate who had been certified as a paralegal, and Gregory discussed his situation with this inmate. Gregory believed he had tested positive for gunshot residue and seemed very surprised about this because he said that was one of the reasons he had jumped in a pool after the incident. Gregory told the inmate that he used a shotgun instead of a pistol, thinking there would be less gunshot residue, and figured he must have tested positive because of firing the pistol the day before the murders.

According to this inmate, Gregory knew Daniel and Skyler were together in Skyler's house on August 21 because Gregory "said he was outside the house, like watching the house." Gregory told the inmate that he "just couldn't stand to see" Skyler with her new boyfriend and that the "worst part about it all was watching [Skyler] die." Gregory also stated to the inmate that he was "frustrated because he couldn't talk to his family on the phone because he knew that it was being recorded" and stated that his family members "were going to be his alibi."

Gregory later spoke to a different inmate about his case. Gregory told this individual that it was "a joke" that the State was concerned about Gregory having walked to Skyler's house on the night of the murders because it was "impossible for that to have happened." Gregory stated that he had a ride that night and that he "did what he had to do."

Gregory was subsequently indicted and tried for the murders of Skyler and Daniel. The jury found Gregory guilty of two counts of first-degree murder, one count of burglary, and one count of possession of a firearm by a convicted felon.

### **The Penalty Phase**

During the penalty phase of Gregory's trial, the State presented testimony from Gregory's probation officer that Gregory was on felony probation at the time of the murders. Gregory called his sister and mother to testify. Gregory's sister testified about Gregory's history of drug use, lack of a relationship with his father, and his witnessing an incident during which she was raped when he was eight years old. Gregory's mother testified about two head injuries Gregory suffered as a child and about the effect her abusive relationships with men and the rape incident involving Gregory's sister had on Gregory.

By a vote of seven to five, the jury recommended that Gregory be sentenced to death for the murders of Skyler Dawn Meekins and Daniel Arthur Dyer. A *Spencer* hearing was held thereafter, where the State presented victim impact testimony and Gregory's sister briefly testified on his behalf.

In sentencing Gregory to death for both murders, the trial court found the following aggravating circumstances as to both victims: (1) the murders were committed by a person previously convicted of a felony who was on felony probation (moderate weight); (2) Gregory was previously convicted of a prior violent felony (very substantial weight); (3) the murders were committed during the course of a burglary (moderate weight); and (4) the murders were committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification (CCP) (great weight). The trial court found one statutory mitigating circumstance—the murders were committed while Gregory was under the influence of extreme mental or emotional disturbance (slight weight)—and six nonstatutory mitigating circumstances. Finding that the aggravating circumstances far outweighed the mitigating circumstances, the trial court sentenced Gregory to death for both murders.

*Gregory v. State*, 118 So. 3d 770, 775-78 (Fla. 2013), *as corrected* (Sept. 12, 2013) (footnotes omitted).

Gregory, through appellate counsel, raised five (5) issues on appeal, three of which were related to evidentiary rulings made by the trial judge during the guilt phase. *Id.* In addition to the issues specifically raised by Gregory, this Court considered whether the evidence was sufficient to support Gregory's convictions and whether the death sentences were proportionate. *Id.* at 778. This Court denied relief on all of Gregory's direct appeal claims and affirmed the convictions and sentence of death. *Id.* at 787.

Gregory filed a Motion to Vacate Judgment of Conviction and Sentence pursuant to *Florida Rule of Criminal Procedure* 3.851 on September 12, 2014. An evidentiary hearing was held and Gregory's motion was subsequently denied on

July 6, 2015. Gregory filed his *Initial Brief* appealing the post-conviction court's denial of his motion to vacate along with a petition for writ of habeas corpus. The State's *Answer Brief* on appeal from the denial of post-conviction relief in Case No. SC15-1663 contains a detailed summary of facts and procedural history and is being submitted along with the instant response.

### **RESPONSE TO STANDARD OF REVIEW**

The Respondents agree that ineffective assistance of appellate counsel claims are reviewed under *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

### **RESPONSE TO GROUNDS FOR HABEAS CORPUS RELIEF**

The Respondents deny the allegation that Gregory was afforded constitutionally ineffective appellate counsel and assert that Gregory is entitled to no relief.

### **ARGUMENT**

#### **LEGAL STANDARD FOR STATE HABEAS PETITIONS**

In raising a state habeas claim, “[t]he defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based.” *Freeman v. State*, 761 So. 2d 1055, 1069 (Fla. 2000) (citing *Knight v. State*, 394 So. 2d 997, 1001 (Fla. 1981)).

Habeas petitions are the proper vehicle to advance claims of ineffective assistance of appellate counsel. *See Thompson v. State*, 759 So. 2d 650, 660 (Fla. 2000); *Teffeteller v. Dugger*, 734 So. 2d

1009, 1026 (Fla. 1999).

When analyzing the merits of the claim, "[t]he criteria for proving ineffective assistance of appellate counsel parallel the *Strickland* standard for ineffective trial counsel." *Wilson v. Wainwright*, 474 So. 2d 1162, 1163 (Fla. 1985). Thus, this Court's ability to grant habeas relief on the basis of appellate counsel's ineffectiveness is limited to those situations where the petitioner establishes first, that appellate counsel's performance was *deficient* because "the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance" and second, that the petitioner was *prejudiced* because appellate counsel's deficiency "compromised the appellate process to such a degree as to undermine confidence in the correctness of the result." *Thompson*, 759 So. 2d at 660 (emphasis supplied) (quoting *Groover v. Singletary*, 656 So. 2d 424, 425 (Fla. 1995)); see, e.g., *Teffeteller*, 734 So. 2d at 1027. If a legal issue "would in all probability have been found to be without merit" had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective. *Williamson v. Dugger*, 651 So. 2d 84, 86 (Fla. 1994); see, e.g., *Kokal v. Dugger*, 718 So. 2d 138, 142 (Fla. 1998); *Groover*, 656 So. 2d at 425. This is generally true as to issues that would have been found to be procedurally barred had they been raised on direct appeal. See, e.g., *Groover*, 656 So. 2d at 425; *Medina v. Dugger*, 586 So. 2d 317, 318 (Fla. 1991).

*Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000). Stated differently:

In order to grant habeas relief on the basis of ineffective assistance of appellate counsel, this Court must determine "first, whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result." *Groover v. Singletary*, 656 So. 2d 424, 425 (Fla. 1995) (quoting *Pope*

*v. Wainwright*, 496 So. 2d 798, 800 (Fla. 1986)); *see, e.g., Teffeteller v. Dugger*, 734 So. 2d 1009, 1027 (Fla. 1999).

*Thompson v. State*, 759 So. 2d 650, 660 (Fla. 2000).

Appellate counsel need not raise every conceivable claim on appeal to be effective. *Freeman*, 761 So. 2d at 1070; *Provenzano v. Dugger*, 561 So. 2d 541 (Fla. 1990).

Habeas relief based on appellate counsel's ineffectiveness "is limited to those situations where the petitioner establishes first, that appellate counsel's performance was deficient and second, that the petitioner was prejudiced because appellate counsel's deficiency compromised the appellate process to such a degree as to undermine confidence in the correctness of the result." *Davis v. State/Crosby*, 928 So. 2d 1089, 1126 (Fla. 2006). "The defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based." *Freeman*, 761 So. 2d at 1069.

A person convicted of a crime, whose conviction has been affirmed on appeal and who seeks relief from the conviction or sentence on the ground of ineffectiveness of counsel on appeal must show, first, that there were specific errors or omissions of such magnitude that it can be said that they deviated from the norm or fell outside the range of professionally acceptable performance; and second, that the failure or deficiency caused prejudicial impact on the appellant by compromising the appellate process to such a degree as to undermine confidence in the fairness and correctness of the outcome under the governing standards of decision. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Smith v. State*, 457 So. 2d 1380 (Fla. 1984).

*Johnson v. Wainwright*, 463 So. 2d 207, 209 (Fla. 1985). Further, in order to grant habeas relief on the basis of ineffectiveness of appellate counsel, this Court must determine whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. *Simmons v. State*, 105 So. 3d 475, 512 (Fla. 2012) (citing *Pope v. Wainwright*, 496 So.2d 798, 800 (Fla.1986)).

**GROUND I: GREGORY WAS ACCORDED EFFECTIVE APPELLATE COUNSEL WHO DID NOT ABANDON MERITORIOUS CLAIMS. (PETITION 11-24, RESTATED).**

In his first ground for relief, Gregory argues that he is entitled to a new direct appeal because his appellate counsel “abandoned” meritorious claims, and the failure to raise these claims constitutes serious and substantial deficiencies such that the confidence in this Court’s affirmation of Gregory’s conviction and sentence of death is undermined. (*Petition* at 12). Petitioner asserts that Gregory “received no assistance at all,” and would have been better served by an *Anders* brief. (*Petition* at 13).

***Jail Calls***

In the first sub-part of this claim, Petitioner argues that appellate counsel

should have raised a claim in direct appeal challenging the trial court's denial of defense's motion *in limine* regarding Gregory's jail calls. Petitioner asserts that Gregory's jail calls should have been excluded because they constituted "victim impact evidence" during the guilt phase, and because under *Fla. Stat.* § 90.403, the prejudicial effect of these calls outweighed their probative value because, in part, they showed that Gregory was in custody. Petitioner attempts to polarize his claim, asserting he is entitled to relief under a theory of either ineffective assistance of trial counsel or appellate counsel, stating:

It can't be both: either Mr. Gregory received ineffective assistance of trial counsel for failing to present available beneficial evidence to the jury when he needed to do so, a claim argued in the pending 3.851 appeal, or Mr. Gregory received ineffective assistance of appellate counsel for failing to argue that the court erred by admitting, over defense objection, the phone calls that were introduced by the State.

(*Petition* at 21). Petitioner is incorrect on both fronts.

With respect to the trial counsel component of this claim, Florida law is settled that claims that are properly presented in a *Florida Rule of Criminal Procedure* 3.851 motion are not cognizable in a petition for writ of habeas corpus. Florida law is long-settled that "habeas corpus petitions are not to be used for additional appeals on questions which could have been, should have been, or were raised on appeal or in a rule 3.850 motion, or on matters that were not objected to at trial." *Parker v. Dugger*, 550 So. 2d 459, 460 (Fla. 1989)." *Hardwick v. Dugger*,

648 So. 2d 100, 105 (Fla. 1994). To the extent that Gregory is claiming ineffective assistance of trial counsel as a basis for habeas relief, that claim is not properly presented here and should be stricken.

To the extent that Gregory alleges ineffectiveness on the part of his direct appeal counsel, that claim has no legal or factual basis. Appellate counsel is not required to argue every preserved issue on appeal, particularly when that issue is meritless. In *Simmons v. State*, 105 So. 3d 475, 512 (Fla. 2012) (citing *Davis v. State*, 928 So. 2d 1089, 1126–27 (Fla. 2005)), this Court recognized that appellate counsel cannot present every conceivable claim on direct appeal. Merely because the issue of the jail calls was preserved does not mean it was a meritorious claim for appeal, and certainly does not follow that appellate counsel was ineffective for raising other claims instead. Appellate counsel challenged Gregory’s death sentence as set out *supra*, at page 8. This Court recognized that a defendant is better served by an appellate advocate advancing only the strongest issues, stating, “[m]oreover, appellate counsel is not required to present every conceivable claim. *See Atkins v. Dugger*, 541 So. 2d 1165, 1167 (Fla. 1989) (“Most successful appellate counsel agree that from a tactical standpoint it is more advantageous to raise only the strongest points on appeal and that the assertion of every conceivable argument often has the effect of diluting the impact of the stronger points.”)

This Court cited the relevant authority in its opinion on Gregory's direct appeal on similar evidentiary issue when it stated:

This Court reviews evidentiary rulings for abuse of discretion. A judge's discretion is limited by the rules of evidence and by the principles of stare decisis." *Johnson v. State*, 969 So. 2d 938, 949 (Fla. 2007) (citation omitted). "Relevant evidence is evidence tending to prove or disprove a material fact." § 90.401, Fla. Stat. (2011). "All relevant evidence is admissible, except as provided by law." § 90.402, Fla. Stat. (2011).

Relevant evidence "is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." § 90.403, Fla. Stat. (2011). "The trial court is obligated to exclude evidence in which unfair prejudice outweighs the probative value in order to avoid the danger that a jury will convict a defendant based upon reasons other than evidence establishing his guilt." *McDuffie v. State*, 970 So. 2d 312, 327 (Fla. 2007).

*Gregory v. State*, 118 So. 3d at 780. Thus, any claim of error as to the trial court's admission of the jail calls would have been reviewed similarly, and relief only granted by this Court if it found the trial court had abused its discretion in admitting the jail calls, and that error was not harmless – that Gregory would not have been convicted and sentenced to death but for that erroneous admission. This Court held on direct appeal that Gregory's statement that he would kill Meekins which occurred 8 months prior to the murder was not so remote in time as to have minimal probative value. *Id.*, at 781. It therefore stands to reason that this Court would have similarly held that the jail call conversations which occurred even

more recent in time would not be so remote as to have minimal probative value. Because the conversations on the jail calls were relevant to material facts at issue, and not more prejudicial than probative, they were correctly admitted and any claim to the contrary would have been meritless.

The trial court properly applied the relevant analysis in its order admitting the jail calls:

The State MAY offer as evidence relevant recorded telephone conversations between the Defendant and certain witnesses while the Defendant was incarcerated in the Flagler and St. Johns County Jails. These calls include, but are not limited to, the following:

- a. Conversations between the Defendant and Skyler Meekins' brother, Colton Meekins, prior to the murders concerning Skyler Meekins' whereabouts, activities and communications as they related to other guys. These conversations include, but are not limited to requests by the Defendant for Colton Meekins to access Skyler Meekins' home computer, review her personal e-mails and MySpace account, and delete photographs of and communications between other guys. Such conversations are relevant to the issue of motive and are, accordingly, admissible at trial.
- b. Conversations between the Defendant and Skyler Meekins, Kory Gregory and/or Linda Probert prior to the murders concerning the relationship between the Defendant and Skyler Meekins, Skyler Meekins' conduct, and/or the Defendant's plans when he was released from jail. These-conversations provide the context and background of the relationship and are relevant to the issue of motive.
- c. Conversations between the Defendant and Kory Gregory and Linda Probert after the murders pertaining to his association to

the murders, or the lack thereof, Such statements are clearly relevant to the issues of this case.

d. Conversations between the Defendant and Amber Curnutt after the murders in which the Defendant discusses shooting a gun the day before the murders and her relaying that information to law enforcement. As stated previously, these statements are relevant to the issue of the Defendant's consciousness of guilt.

These calls, collectively, are quite lengthy and include a number of conversations that are not relevant to any issue in the case. These irrelevant conversations must be redacted prior to their publication of them at trial. Counsels for the State and the Defendant have agreed to collaborate and attempt to agree on the necessary redactions. To the extent that the parties are not able to agree, then they will submit to the court those conversations that remain in dispute, at which time the court will resolve the matter.

(SR, V1, R6-7). The jail calls were properly admitted by the trial court. The jail calls evidence Gregory's motive and intent in murdering his former girlfriend and her new boyfriend. They are direct evidence of the relationship between Gregory and Meekins, and the lengths he went to control her relationships with others. They evidence his jealousy and obsession. Thus, any claim that appellate counsel could raise that the trial court abused its discretion in allowing the redacted jail calls into evidence would not have been meritorious. Appellate counsel cannot be ineffective for failing to raise a meritless claim. *Simmons v. State*, 105 So. 3d at 512.

Moreover, whether a claim may or may not have been meritorious on appeal is not the issue, as stated in *Johnson*, the issue before this Court on a habeas

petition is, “first, whether the decision not to make the argument or the simple omission to do so constitutes a serious error or substantial deficiency and, second, whether the failure of counsel undermines confidence in the correctness of the outcome . . . the merits of that legal point is not before us” and “[t]he question of the merits of the legal point petitioner says should have been argued on appeal is a mere abstraction here, the only concrete issues before us being those pertaining directly to the claim of ineffectiveness of counsel.” *Johnson v. Wainwright*, 463 So. 2d at 209-10.

In his petition, Gregory makes extensive reference to testimony and evidence from the Rule 3.851 evidentiary hearing. That testimony and evidence has nothing to do with whether or not appellate counsel was constitutionally ineffective on direct appeal. Petitioner attempts to magnify the importance of this claim by asserting that trial counsel “staked his entire defense on this issue [the admissibility of the jail calls] on the direct appeal.” (*Petition* at 21). In addition to being unsupported and incorrect, it is nonsensical to suggest that appellate counsel was ineffective for not relying on testimony regarding trial counsel’s trial strategy that was not given until years after the direct appeal was over and evidence that was not yet part of the record on appeal.

The jail calls do not constitute improper victim impact evidence. In *Davis v. State*, 928 So. 2d 1089, 1134 (Fla. 2005), the petitioner raised a claim that his

appellate counsel was ineffective for failing to raise a claim that the State had admitted “victim impact evidence” during the guilt phase through the testimony of a witness. In *Davis*, this Court found that the petitioner was not entitled to habeas relief because the witness’s testimony did not rise to fundamental error. Here, the issue was preserved, but this Court should likewise deny the claim because even if counsel had raised the claim that the trial court had improperly admitted the jail calls on direct appeal because they constituted improper victim impact evidence, this argument “would in all probability have been found to be without merit” and “the failure of appellate counsel to present the meritless issue will not render appellate counsel's performance ineffective.” *Rutherford*, 774 So.2d at 643 (quoting *Williamson v. Dugger*, 651 So. 2d 84, 86 (Fla. 1994)).

Petitioner’s reliance on *United States v. Cronin*, 466 U.S. 648, 654 (1984) is misplaced. In *Cronin*, a mail fraud case, the Supreme Court held that particular factors could not establish a basis for ineffective assistance of counsel without a showing of **actual** ineffectiveness. *Id.* This Court’s analyses in *Belcher v. State*, 961 So. 2d 239, 257 (Fla. 2007) (holding appellate counsel was not ineffective for forgoing a claim disputing the admission of victim impact evidence because it had no merit); *Walls v. State*, 926 So. 2d 1156, 1179 (Fla. 2006) (holding that letters from the victims' family constituted improper victim impact statements, but appellate counsel was not ineffective for failing to raise a claim because the jury

never saw the letters and thus the claim was without merit); and *Jackson v. State*, 127 So. 3d 447, 461 (Fla. 2013) (holding that appellate counsel did not provide deficient representation for failing to raise a claim regarding suppression or redaction of his profane language on a jailhouse call) are much more instructive regarding this claim.

Gregory has failed to show that appellate counsel seriously erred in declining to raise a direct appeal claim as to the jail calls; and, to the extent that counsel could or should have raised a jail calls claim, such would be unavailing because the jail calls were properly admitted as relevant evidence. Appellate counsel was not ineffective, and Petitioner has proven neither deficiency nor prejudice as required under *Strickland* to be entitled to habeas relief. This Court should deny all relief on Claim I.

### ***Ring/Apprendi /Hurst Claim***

In the second sub-part to his first claim, Petitioner attempts to circumvent the procedural bar to his *Ring* claim by presenting it under the guise of ineffective assistance of appellate counsel. Florida law is settled that “habeas corpus petitions are not to be used for additional appeals on questions which could have been, should have been, or were raised on appeal or in a rule 3.850 motion, or on matters that were not objected to at trial.” *Parker v. Dugger*, 550 So. 2d 459, 460 (Fla. 1989).” *Hardwick v. Dugger*, 648 So. 2d 100, 105 (Fla. 1994); *Simmons v. State*,

105 So. 3d 475, 511 (Fla. 2012) “[C]laims of ineffective assistance of appellate counsel may not be used to camouflage issues that should have been raised on direct appeal or in a postconviction motion.” *Rutherford*, 774 So. 2d at 643 (citing *Thompson*, 759 So. 2d at 657 n. 6; *Breedlove v. Singletary*, 595 So. 2d 8, 10 (Fla. 1992)). To the extent that Gregory is claiming *Ring* as a basis for habeas relief, that claim is not properly presented here and should be stricken.

To the extent that Gregory alleges ineffectiveness on the part of his direct appeal counsel for failing to raise a *Ring* claim, that claim must also fail. As this Court stated in *Simmons v. State*, 105 So. 3d 475, 512 (Fla. 2012), “[w]hen analyzing the merits of the claim, ‘[t]he criteria for proving ineffective assistance of appellate counsel parallel the *Strickland* standard for ineffective trial counsel.’ (citing *Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000); *Wilson v. Wainwright*, 474 So. 2d 1162, 1163 (Fla. 1985)). Habeas relief based on appellate counsel's ineffectiveness “is limited to those situations where the petitioner establishes first, that appellate counsel's performance was deficient and second, that the petitioner was prejudiced because appellate counsel's deficiency compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.” *Davis*, 928 So. 2d at 1126.

Prior to the United States Supreme Court’s decision in *Hurst* which urged the recent change in Florida’s capital sentencing scheme, this Court had previously

rejected every challenge to Florida's capital sentencing statute based upon *Ring*. *Rigterink v. State*, 66 So. 3d 866, 895-96 (Fla. 2011) (noting that "[i]n over fifty cases since *Ring*'s release, this Court has rejected similar *Ring* claims."). Had appellate counsel raised a *Ring* claim on direct appeal it would have been similarly rejected. There is no reasonable probability of a reversal on appeal, so there can be no ineffectiveness for failing to raise a *Ring* claim that would have been denied.

Petitioner suggests that any appellate counsel who fails to divine future changes in the law after 40 years of rejecting said claims is ineffective. Petitioner recognizes that such a standard is, in fact, what he is arguing, stating, "[w]hile admittedly there is no requirement that trial counsel, to be reasonably effective, must anticipate changes in the law." [sic] (*Petition* at 23-24); and, "[a]ppellate counsel could and should have seen it coming and acted to preserve the issue" (*Petition* at 24). Petitioner also makes the confounding assertion that "all the other reasonably competent appellate capital defense lawyers did [forsee the *Hurst* decision], arguing, essentially, that **all** other capital direct appeals included a *Ring* claim, and if they did not, the appellate attorney was *per se* ineffective. These arguments are simply incorrect. "[T]here is no requirement that counsel, to be reasonably effective, must anticipate changes in the law." *Knight v. State*, 394 So. 2d 997, 1003 (Fla. 1981) (citing *Parker v. North Carolina*, 397 U.S. 790 (1970)).

Furthermore, Petitioner would not have been entitled to any relief under *Ring* even if appellate counsel had raised the claim on direct appeal because the Supreme Court specifically excluded from consideration cases in which one of the aggravators was a conviction for a prior violent felony. *See Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (permitting judge to impose higher sentence based on prior conviction); *Ring*, 536 U.S. at 598 n.4 (noting *Ring* does not challenge *Almendarez-Torres*, “which held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence”); *Alleyne*, 133 S. Ct. at 2160 n.1 (affirming *Almendarez-Torres* provides valid exception for prior convictions). In *Franklin v. State*, 965 So. 2d 79, 101-02 (Fla. 2007), this Court held:

Additionally, *Ring* did not alter the express exemption in *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), that prior convictions are exempt from the Sixth Amendment requirements announced in the two cases. This Court has repeatedly relied on the presence of the prior violent felony aggravating circumstance in denying *Ring* claims. *See, e.g., Smith v. State*, 866 So. 2d 51, 68 (Fla. 2004) (denying relief on *Ring* claim and “specifically not[ing] that one of the aggravating factors present in this matter is a prior violent felony conviction”); *Davis v. State*, 875 So. 2d 359, 374 (Fla. 2003) (stating that “[w]e have denied relief in direct appeals where there has been a prior violent felony aggravator”); *Johnston v. State*, 863 So. 2d 271, 286 (Fla. 2003) (stating that the existence of a “prior violent felony conviction alone satisfies constitutional mandates because the conviction was heard by a jury and determined beyond a reasonable doubt”), *cert. denied*, 541 U.S. 946, 124 S.Ct. 1676, 158 L.Ed.2d 372 (2004); *Henry v. State*, 862 So. 2d 679, 687 (Fla. 2003) (stating in postconviction case that this Court has

previously rejected *Ring* claims “in cases involving the aggravating factor of a previous violent felony conviction”).

*Franklin v. State*, 965 So. 2d at 101-02. This line of authority was undisturbed by the recent decision in *Hurst*. See *Smith v. Florida*; 136 S.Ct. 980 (2016) *reh’g denied*, 2016 WL 1079054 (U.S. Mar. 21, 2016); *Hobart v. Florida*, 2016 WL 1078981 (U.S. Mar. 21, 2016).

Here, Gregory was proven not only to have been previously convicted of a prior violent felony, an aggravator to which the trial court assigned “very substantial weight;” the murders were also committed during the course of felony for which the jury unanimously convicted Gregory,<sup>1</sup> and an aggravator to which the trial court assigned “moderate weight”; and Gregory was on felony probation at the time he murdered Skyler Meekins and Daniel Dyer, an aggravator to which the trial court assigned moderate weight. *Gregory v. State*, 118 So. 3d. at 777. Each of these aggravators, independently and collectively, removes this case from the considerations in *Ring*, and now *Hurst*. There was no violation of Gregory’s Sixth Amendment right to be sentenced to death only after a jury finding as to an aggravator.

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<sup>1</sup> “The jury found Gregory guilty of two counts of first-degree murder, one count of burglary, and one count of possession of a firearm by a convicted felon.” *Gregory v. State*, 118 So. 3d at 777.

This Court should deny this claim because Gregory has failed to show that appellate counsel seriously erred in declining to argue *Ring*; and, to the extent that counsel could and should have raised a *Ring* claim, such claim would have been unavailing because this Court has consistently rejected *Ring* claims in cases analogous to Petitioner's. This Court should deny Claim I.

**GROUND II: NEITHER THE SIXTH NOR EIGHTH AMENDMENTS ENTITLE GREGORY TO A UNANIMOUS DEATH SENTENCE RECOMMENDATION. (PETITION 24-36, RESTATED).**

In his second claim, Gregory again argues that he is entitled to relief based upon the recent decision in *Hurst*, but fails to present any cognizable claim for habeas relief. Again, this *Apprendi/Ring/Hurst* claim is not properly presented in this state habeas petition. Florida law is long-settled that “habeas corpus petitions are not to be used for additional appeals on questions which could have been, should have been, or were raised on appeal or in a rule 3.850 motion, or on matters that were not objected to at trial.’ *Parker v. Dugger*, 550 So. 2d 459, 460 (Fla. 1989).” *Hardwick v. Dugger*, 648 So. 2d at 105. To the extent that Gregory is claiming the unconstitutionality of Florida’s death penalty statute as a basis for habeas relief, that claim is not properly presented here and should be stricken. To the extent further substantive argument is necessary, the State submits the following.

***Hurst* does not entitle Gregory to a life sentence.**

First, Appellant presents the meritless argument that Section 775.082(2), *Florida Statutes* entitles Gregory “to an automatic life sentence.” (*Petition* at 26-27). It is pivotal to note however, *Hurst* did not determine capital punishment to be unconstitutional; *Hurst* merely invalidated Florida’s procedures for implementation, finding that they *could* result in a Sixth Amendment violation if the judge makes factual findings which are **not supported by a jury verdict**. See *State v. Perry, slip op.*, Case No. 5D16-516, (Mar. 16, 2016)<sup>2</sup> Section 775.082(2), *Florida Statutes* does not apply because it provides that life sentences without parole are mandated “[i]n the event the death penalty in a capital felony is held to be unconstitutional.” This provision was enacted following *Furman v. Georgia*, 408 U.S. 238 (1972), in order to fully protect society in the event that capital punishment as a whole for capital felonies were to be deemed unconstitutional. See *Coker v. Georgia*, 433 U.S. 584 (1977).

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<sup>2</sup> “*Hurst* determined that Florida’s “scheme” to impose the death penalty was unconstitutional, not the penalty itself. The Court recognized that section 775.082(1), *Florida Statutes* (2010), “does not make a defendant eligible for death until ‘findings by the court that such person shall be punished by death.’” 136 S. Ct. at 622 (quoting §775.082(1), Fla. Stat. (2010)). In holding Florida’s capital sentencing procedure unconstitutional, the Court was particularly concerned that “Florida does not require the jury to make the critical findings necessary to impose the death penalty.” *Id.* We believe that *Hurst*’s holding is narrow and based solely on the Court’s determination that the “Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death.” *Id.* at 619. Thus, we have no difficulty in concluding that *Hurst* struck the process of imposing a sentence of death, not the penalty itself.” (*Slip op.*, at 5).

In *Anderson v. State*, 267 So. 2d 8 (Fla. 1972), this Court explained that following *Furman*, the Attorney General filed the motion requesting that this Court relinquish jurisdiction to the respective circuit courts for resentencing to life, taking the position that the death sentences were illegal sentences.<sup>3</sup> That is certainly not the case here.

This Court should reject the blanket approach of commuting all capital sentences currently pending before this Court on direct appeal. *Furman* was a decision that invalidated all death penalty statutes in the country, with the United States Supreme Court offering nine separate opinions that left many courts “not yet certain what rule of law, if any, was announced.” *Donaldson v. Sack*, 265 So. 2d 499, 565 n. 10 (Fla. 1972) (Roberts, C.J., concurring specially). The Court held that the death penalty, as imposed for murder and for rape, constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. The various separate opinions provided little guidance on what procedures might be necessary in order to satisfy the constitutional issues, and whether a constitutional scheme would be possible. The situation following *Furman* simply has no application to the limited procedural ruling issued by the

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<sup>3</sup> It is also notable that this was before the time that either this Court or the United States Supreme Court had determined the appropriate rules for retroactivity, as in *Witt v. State*, 387 So. 2d 922 (1980) and *Teague v. Lane*, 489 U.S. 288 (1989), respectively.

Supreme Court in *Hurst*, which merely prompted the change in procedure in sentencing a defendant to death, but did not “remove capital offenses” from Florida law as Gregory asserts.

***Hurst* is not retroactive.**

Gregory’s conviction was final October 16, 2013. When a constitutional rule is announced, its requirements apply to defendants whose convictions or sentences are pending on direct review or not otherwise final. *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987). However, once a criminal conviction has been upheld on appeal, the application of a new rule of constitutional criminal procedure is limited. The Supreme Court has held that new rules of criminal procedure will apply retroactively only if they fit within one of two narrow exceptions.<sup>4</sup> *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004).

In *Hurst*, the Court held that Florida’s capital sentencing structure violated *Ring v. Arizona*, 536 U.S. 584 (2002), because it required a judge to conduct the fact-finding necessary to enhance a defendant’s sentence. *Hurst*, at 624. In arriving

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<sup>4</sup> Those exceptions are: (1) a substantive rule that “places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe or if it prohibits a certain category of punishment for a class of defendants because of their status or offense”; and (2) a procedural rule which constitutes a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. *Teague v. Lane*, 489 U.S. 288, 310–13 (1989); *Penry v. Lynaugh*, 492 U.S. 302 (1989) (abrogated on other grounds by *Atkins v. Virginia*, 536 U.S. 304 (2002)); *Butler v. McKellar*, 494 U.S. 407 (1990); *Saffle v. Parks*, 494 U.S. 484 (1990)).

at its decision, the Court looked directly to Florida’s sentencing statute, finding that it does not “make a defendant eligible for death until ‘findings *by the court* that such a person shall be punished by death.’” *Id.* at 620 (citing *Fla. Stat.* § 775.082(1) (emphasis in opinion). Also, under *Spaziano v. State*, 433 So. 2d 508, 512 (Fla. 1983), the jury’s role in sentencing a defendant to capital punishment was viewed as advisory. *Spaziano*, 433 So. 2d at 512. Thus, the Supreme Court held Florida’s capital sentencing structure, “which required the judge alone to find the existence of an aggravating circumstance,” violated its decision in *Ring*, and overruled the prior decisions of *Spaziano*, and *Hildwin v. Florida*, 490 U.S. 638 (1989). *Hurst*, at 620-24.

However, the Supreme Court reaffirmed that the Sixth Amendment right underlying *Ring* and *Apprendi* did not apply to factual findings made in selecting a sentence for a defendant after the defendant has been found eligible to receive a sentence within a particular range. *Alleyne v. United States*, 133 S. Ct. 2151, 2161 n.2 (2013) (“Juries must find any facts that increase either the statutory maximum or minimum because the Sixth Amendment applies where a finding of fact both alters the legally prescribed range and does so in a way that aggravates the penalty. Importantly, this is distinct from factfinding used to guide judicial discretion in selecting a punishment ‘within limits fixed by law.’ *Williams v. New York*, 337 U.S. 241, 246, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949). While such findings of fact

may lead judges to select sentences that are more severe than the ones they would have selected without those facts, the Sixth Amendment does not govern that element of sentencing.”); *see also United States v. O’Brien*, 560 U.S. 218, 224 (2010) (recognizing that *Apprendi* does not apply to sentencing factors that merely guide sentencing discretion without increasing the applicable range of punishment to which a defendant is eligible). Here, Gregory was eligible for a death sentence before entering the sentencing phase of his trial based upon his prior violent felony conviction and his contemporaneous conviction in the guilt phase.

Significantly, this Court has already decided that *Ring* does not apply retroactively in Florida; logically, neither should any case applying *Ring*. In *Johnson v. State*, 904 So. 2d 400, 412 (Fla. 2005), this Court comprehensively applied the *Witt* factors to determine that *Ring* was not subject to retroactive application. This Court concluded:

We conclude that the three *Witt* factors, separately and together, weigh against the retroactive application of *Ring* in Florida. To apply *Ring* retroactively “would, we are convinced, destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state ... beyond any tolerable limit.” *Witt*, 387 So. 2d at 929-30. Our analysis reveals that *Ring*, although an important development in criminal procedure, is not a “jurisprudential upheaval” of “sufficient magnitude to necessitate retroactive application.” *Id.* at 929. We therefore hold that *Ring* does not apply retroactively in Florida and affirm the denial of Johnson’s request for collateral relief under *Ring*.

Contrary to Gregory’s assertion, in *Johnson*, this Court specifically noted

the severe and unsettling impact that retroactive application would have on our justice system (commuting 389 death sentences to life in prison.) *Johnson*, 904 So. 2d at 411-12. Appellant’s invitation for this Court to revisit this decision is unpersuasive. He asserts that a blanket commutation of all death sentences to life imprisonment would be favorable, stating, “Florida would suffer very little in terms of an impact on its administration of justice.” (*Petition* at 33). However, there is no support for this proposition. Neither the Federal nor Florida Constitutions justify or authorize this Court to take such action. Such a decision would ignore the considerable interests of the citizens of this State and, in particular, victims’ family members upon whom the emotional toll of such an action cannot be measured. Moreover, the floodgate of litigation that has already opened as a result of the *Hurst* decision would be exponentially amplified as every defendant sought relief, regardless of the finality of their sentences or the decades since their convictions.

State and Federal courts have uniformly held that *Ring* is not retroactive. *See State v. Towery*, 204 Ariz. 386, 393-94, 64 P.3d 828, 835-36 (2003), *cert. dismissed*, 539 U.S. 986 (2003). (“Conducting new sentencing hearings, many requiring witnesses no longer available, would impose a substantial and unjustified burden on Arizona’s administration of justice” and would be inconstant with the Court’s duty to protect victim’s rights under the Arizona

Constitution); *Rhoades v. State*, 233 P.3d 61, 70-71 (2010), *cert. denied*, 562 U.S. 1258 (2011) (holding that *Ring* is not retroactive after conducting its own independent *Teague* analysis and observing, as the Supreme Court did in *Summerlin*, that there is debate as to whether juries or judges are the better factfinders and that it could not say “confidently” that judicial factfinding “seriously diminishes accuracy.”); *Colwell v. State*, 59 P.3d 463, 473 (2002), *cert. denied*, 540 U.S. 981 (2003) (applying *Teague* to find that *Ring* announced a new procedural rule that would not be subject to retroactive application).

In *Schriro v. Summerlin*, the Supreme Court directly addressed whether its decision in *Ring v. Arizona* was retroactive. *Summerlin*, 542 U.S. at 349. The Court held the decision in *Ring* was **procedural** and non-retroactive. *Id.* at 353. This was because *Ring* only “altered the range of permissible methods for determining whether a defendant’s conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment.” *Id.* The Court concluded its opinion stating: “The right to jury trial is fundamental to our system of criminal procedure, and States are bound to enforce the Sixth Amendment’s guarantees as we interpret them. But it does not follow that, when a criminal defendant has had a full trial and one round of appeals in which the State faithfully applied the Constitution as we understood it at the time, he may nevertheless continue to litigate his claims indefinitely in hopes that we will one

day have a change of heart. *Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review.” *Summerlin*, 542 U.S. at 358. See *Whorton v. Bockting*, 549 U.S. 406, 416 (2007) (holding *Crawford v. Washington*, 541 U.S. 36 (2004) was not retroactive under *Teague* and relying extensively on the analysis of *Summerlin*).

*Ring* did not create a new constitutional right. That right was created by the Sixth Amendment guaranteeing the right to a jury trial.<sup>5</sup> If *Ring* was not retroactive, then *Hurst* cannot be retroactive as *Hurst* is merely an application of *Ring* to Florida. In fact, the decision in *Hurst* is based on an entire line of jurisprudence which courts have almost universally held to not have retroactive application. See *DeStefano v. Woods*, 392 U.S. 631 (1968) (*per curiam*) (holding the Court’s decision in *Duncan v. Louisiana*, which guaranteed the right to a jury trial to the States was not retroactive); *McCoy v. United States*, 266 F.3d 1245, 1255, 1259 (11th Cir. 2001) (holding *Apprendi* not retroactive under *Teague*, and acknowledging that every federal circuit to consider the issue reached the same conclusion); *Varela v. United States*, 400 F.3d 864, 866–67 (11th Cir. 2005) (explaining that Supreme Court decisions, such as *Ring*, *Blakely*, and *Booker*,

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<sup>5</sup> The right to a jury trial was extended to the States in *Duncan v. Louisiana*, 391 U.S. 145 (1968). But, in *DeStefano v. Woods*, 392 U.S. 631 (1968) (*per curiam*), the Court declined to apply the holding of *Duncan* retroactively. *Apprendi* merely extended the right to a jury trial to the sentencing phase, when the State sought to increase the maximum possible punishment. *Apprendi*, 530 U.S. at 494.

applying *Apprendi*'s "prototypical procedural rule" in various contexts are not retroactive); *Crayton v. United States*, 799 F.3d 623, 624-25 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 424 (2015) (holding that *Alleyne v. United States*, 133 S. Ct. 2151, 2156 (2013), which extended *Apprendi* from maximum to minimum sentences, did not, like *Apprendi* or *Ring*, apply retroactively); *State v. Johnson*, 122 So. 3d 856, 865-66 (Fla. 2013) (holding *Blakely* not retroactive in Florida).

**Gregory's Sixth Amendment Rights were not violated and harmless error analysis is appropriate.**

Appellant takes the position that any *Hurst* error is structural and not subject to harmless error review. Because *Ring* is merely procedural, then a decision applying *Ring*, such as *Hurst*, could only be procedural. Harmless error review is available to a procedural rule. Moreover, the Court necessarily contemplated harmless error review in *Hurst* when the Court stated:

Finally, we do not reach the State's assertion that any error was harmless. *See Neder v. United States*, 527 U.S. 1, 18-19 (1999) (holding that the failure to submit an uncontested element of an offense to a jury may be harmless). This Court normally leaves it to state courts to consider whether an error is harmless, and we see no reason to depart from that pattern here. *See Ring*, 536 U.S. at 609 n.7."

*Hurst*, at 624.

Clearly, any error in sentencing a defendant to death, contrary to Petitioner's position, is subject to harmless error review in the context of a *Ring/Hurst* claim –

which asks only whether a defendant's Sixth Amendment right to jury sentencing was violated under the facts of his particular case. This Court need not reach that issue here, however, because this claim is not properly raised in a state habeas petition.

To the extent it is relevant; *Hurst* was in a distinctly different position from Gregory. *Hurst* presented the United States Supreme Court with a 'pure' claim under *Ring*, where none of the established aggravating circumstances were identifiable as having come from a jury verdict. *Hurst*, 147 So. 3d at 445–47. Here, we know Gregory's jury convicted Gregory of the contemporaneous offense of Armed Burglary and a second First-Degree Murder. The jury also heard that Gregory had been under a sentence of felony probation, which was not contested in the penalty phase, and that he had committed a prior violent felony. Each of these facts, independently, and considered together, remove Gregory from any considerations under *Ring/Hurst*.

In Florida, a defendant is *eligible* for a capital sentence if at least one aggravating factor applied to the case. *See Ault v. State*, 53 So. 3d 175, 205 (Fla. 2010); *Zommer v. State*, 31 So. 3d 733, 752-54 (Fla. 2010); *State v. Steele*, 921 So. 2d 538, 540 (Fla. 2005). In Gregory's case, a unanimous jury convicted him of Armed Burglary, and two contemporaneous murders, either of which could have been used to establish the prior violent felony for the other, based on these

convictions, he was eligible for his 7-5 recommendation of death. Unlike Hurst, Gregory's death sentence eligibility is supported by unanimous jury findings.

Once the jury found one aggravator, Gregory became eligible for the higher range penalty-death. In *Alleyne*, 133 S. Ct. at 2162-63, the Court explained that “[t]he essential point is that the aggravating fact produced a higher range, which, in turn, conclusively indicates that the fact is an element of a distinct and aggravated crime.” In Florida, only one aggravating factor is necessary to support the higher range penalty-death. This Court has consistently rejected *Ring* claims where the defendant is convicted of a qualifying contemporaneous felony. *Ellerbee v. State*, 87 So. 3d 730, 747 (Fla. 2012).

As discussed *supra*, Supreme Court has recognized the distinction of an enhanced sentence supported by a prior conviction. See *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (permitting judge to impose higher sentence based on prior conviction); *Ring*, 536 U.S. at 598 n.4 (noting *Ring* does not challenge *Almendarez-Torres*, “which held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence”); *Alleyne*, 133 S. Ct. at 2160 n.1 (affirming *Almendarez-Torres* provides valid exception for prior convictions). Consequently, this Court's well-established precedent that any *Ring* claim is meritless in the face of Gregory's contemporaneous qualifying felony conviction was not disturbed by *Hurst*.

Petitioner's assertion that the entire capital trial process will change because a jury "will make the ultimate decision of whether the defendant's life will be spared" is beyond even the most expansive reading of *Hurst*, which did not grant a defendant a right to jury sentencing and did not invalidate a judge's role the ultimate sentencer in any case. This issue is procedurally barred and meritless, and should be denied.

### **CONCLUSION**

Based on the foregoing authority and arguments, the Respondents respectfully request that this Honorable Court deny Gregory's petition for a writ of habeas corpus.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by email via e-Portal filing to: Mark Gruber, Assistant CCRC – Middle Region, (gruber@ccmr.state.fl.us); and Julie Morley, Assistant CCRC-Middle Region, (morley@ccmr.state.fl.us); support@ccmr.state.fl.us; on this 11th day of April, 2016.

**CERTIFICATE OF COMPLIANCE**

I certify that this brief was computer generated using Times New Roman 14-point font.

Respectfully submitted and certified,

PAMELA JO BONDI  
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*/s/ Stacey E. Kircher*

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