No. 17-14960-GG

In the United States Court of Appeals for the Eleventh Circuit

TORRENCE BATES,

Petitioner-Appellant,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS and ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents-Appellees.

On Appeal from the United States District Court for the Middle District of Florida, Tampa Division
Case No. 8:17-cv-1695, Hon. Virginia M. Hernandez Covington

REPLY BRIEF OF TORRENCE BATES

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CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 26.1-1 and 26.1-3, the following is an alphabetical list of the trial judges, attorneys, persons, and firms with any known interest in the outcome of this case. Any additions appear in italicized text.

1. Andrews, Hon. Michael F. – Circuit Judge for the Sixth Judicial Circuit in Case No. 2007-CF-6312 (Fla. 6th Cir. Ct.);

2. Bates, Torrence – Petitioner-Appellant;

3. Baumann, Jr. (Senior Status), Hon. Herbert J. – Circuit Judge for the Thirteenth Judicial Circuit of the State of Florida sitting by designation in Case No. 2D12-5397 (Fla. 2d DCA);

4. Black, Hon. Anthony K. – District Judge for the Second District Court of Appeal for the State of Florida in Case No. 2D12-5397 (Fla. 2d DCA);

5. Burns, P.A. – Appellate counsel for Petitioner-Appellant;

6. Burns, Thomas A. – Appellate counsel for Petitioner-Appellant;

7. Bondi, Pamela J. – Former Attorney General, State of Florida;

8. Covington, Hon. Virginia M. Hernandez – United States District Judge;

9. Crane, Hon. Shawn – Circuit Judge for the Sixth Judicial Circuit in Case No. 2007-CF-6312 (Fla. 6th Cir. Ct.);

10. Crenshaw (Retired), Hon. Marva L. – District Judge for the Second District Court of Appeal for the State of Florida in Case No. 2D10-904 (Fla. 2d DCA);

11. D'Achille, Jr., Joseph N. – Special Assistant Public Defender in Case No. 2D10-904 (Fla. 2d DCA);

12. Davis, Jr. (Retired), Hon. Charles A. – District Judge for the Second District Court of Appeal for the State of Florida in Case No. 2D10-904 (Fla. 2d DCA);

13. Dimmig, II, Howard L. – Public Defender for the Tenth Judicial Circuit of the State of Florida;

14. Godineaux, Jose – Victim;

15. Goker, Arda – Former appellate counsel for Petitioner-Appellant (former associate attorney with Burns, P.A.);

16. Inch, Mark S. – Secretary, Florida Department of Corrections;

17. Jones, Julie L. – Former Secretary, Florida Department of Corrections;

18. Khouzam, Hon. Nelly – District Judge for the Second District Court of Appeal for the State of Florida in Case No. 2D12-5397 (Fla. 2d DCA);

19. Klawikofsky, John – Former Bureau Chief, Tampa Criminal Appeals Division, Office of Florida's Attorney General;

20. Koch, Donna Suarez – Assistant Attorney General;

21. LaRose, Hon. Edward C. – District Judge for the Second District Court of Appeal for the State of Florida in Case Nos. 2D10-904 (Fla. 2d DCA) and 2D16-837 (Fla. 2d DCA);

22. Lucas, Hon. Matthew C. – District Judge for the Second District Court of Appeal for the State of Florida in Case No. 2D16-837 (Fla. 2d DCA);

23. Macks, Sara – Assistant Attorney General in Case No. 2D10-904 (Fla. 2d DCA);

24. McCabe, Bernie – State Attorney for the Sixth Judicial Circuit of the State of Florida;

25. Moody, Ashley – Attorney General, State of Florida;

26. Moorman, James Marion – Former Public Defender for the Tenth Judicial Circuit of the State of Florida;

27. Northcutt, Hon. Stevan T. – District Judge for the Second District Court of Appeal for the State of Florida in Case No. 2D16-837 (Fla. 2d DCA);

28. Porcelli, Hon. Anthony E. – United States Magistrate Judge;

29. Salario, Jr., Hon. Samuel J. – District Judge for the Second District Court of Appeal for the State of Florida in Case No. 2D16-2260 (Fla. 2d DCA);

30. Silberman, Hon. Morris – District Judge for the Second District Court of Appeal for the State of Florida in Case No. 2D16-2260 (Fla. 2d DCA);

31. Siracusa, Hon. Pat – Circuit Judge for the Sixth Judicial Circuit of the State of Florida in Case No. 2007-CF-6312 (Fla. 6th Cir. Ct.);

32. Wallace (Retired), Hon. Douglas A. – District Judge for the Second District Court of Appeal for the State of Florida in Case No. 2D16-2260 (Fla. 2d DCA);

33. Wilson, Carol J.Y. – Assistant Public Defender in Case No. 2D12-5397 (Fla. 2d DCA).

No publicly traded company or corporation has an interest in the outcome of this appeal.

March 24, 2020

/s/ Thomas Burns
Thomas A. Burns

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ARGUMENT AND CITATIONS OF AUTHORITY

In his "supplemental"[1] answer brief, the Secretary defends the dismissal of Bates's petition as untimely with two principal arguments.

First, the Secretary asks a panel of this Court to reject the 90-day rule adopted by prior panels in *Bond* v. *Moore*, 309 F.3d 770, 773-74 (11th Cir. 2002), and *Chavers* v. *Sec'y, Fla. Dep't of Corr.*, 468 F.3d 1273, 1275-76 (11th Cir. 2006). In place of *Bond* and *Chavers*, the Secretary instead asks a panel to adopt the position suggested in Judge Tjoflat's concurrence in *Hall* v. *Sec'y, Fla. Dep't of Corr.*, 921 F.3d 983 (11th Cir. 2019). *See* Sec'y Supp. Br. 1-5 (arguing "blanket 90-day rule applied to all district court of appeal decisions is legally incorrect" and that "applying one time calculation to some decisions and a different one to others contravenes a uniform definition of 'the conclusion of direct review'").

Second, the Secretary asks a panel of this Court to reject the relation-back rules adopted by prior panels in *Green* v. *Sec'y, Fla. Dep't of Corr.*, 877 F.3d 1244, 1247-49 (11th Cir. 2017), and *Hall*. *See* Sec'y Supp.

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[1] Ordinarily, "[s]upplemental briefs may not be filed without leave of court." 11th Cir. R. 28, I.O.P. 5. Likewise, it usually is not permissible for a party to file two briefs for the price of one. *Williams* v. *Flournoy*, 732 Fed. App'x 810, 811 n.1 (11th Cir. 2018) (striking second brief submitted "in violation of the local rules" and refusing to consider its arguments).

Br. 9 (*Green* and *Hall* "should be reconsidered under federal law"). In place of *Green* and *Hall*, the Secretary asks a panel to adopt his repackaged arguments about 28 U.S.C. § 2244(d)(1)-(2), *Artuz* v. *Bennett*, 531 U.S. 4, 8 (2000), and *Pace* v. *DiGuglielmo*, 544 U.S. 408, 410 (2005), which this Court had expressly rejected in *Green* and *Hall*. *See* Sec'y Supp. Br. 9 ("*Green* and *Hall* do not comply with § 2244(d)(2), *Artuz*, and *Pace*").

Both arguments are wrong. They violate the prior-panel-precedent rule (*see infra* Argument I), ask *Bond* and *Chavers* be reconsidered in an inappropriate case (*see infra* Argument II), and repackage expressly rejected, wrong arguments about *Green* and *Hall* (*see infra* Argument III).

I. Both of the Secretary's arguments invite the Court to violate the prior-panel-precedent rule

As an initial matter, both of the Secretary's arguments—the first to reject *Bond* and *Chavers*, and the second to reject *Green* and *Hall*—are obvious nonstarters due to this Court's prior-panel-precedent rule.[2]

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[2] Nowhere does the Secretary's brief even acknowledge the prior-panel-precedent rule's existence, never mind explain its applicability. And that is so even though the appellant's brief explicitly referenced and explained it at length. *See* Bates Br. 25-26. The Secretary's oversight is inscrutable, because every federal appellate court in the country, with the possible exceptions of the Second, Seventh, and D.C. Circuits, has long employed similar prior-panel-precedent rules. *E.g.*, *United States* v. *Barbosa*, 896 F.3d 60, 74 (1st Cir. 2018); *Reilly* v. *City of Harrisburg*, 858

A. Under the prior-panel-precedent rule, a panel has no authority to overrule a prior panel's holding

"Under our prior precedent rule, a panel cannot overrule a prior one's holding even though convinced it is wrong." *United States* v. *Steele*, 147 F.3d 1316, 1317-18 (11th Cir. 1998) (*en banc*). As such, under the prior-panel-precedent rule, the holdings of *Bond*, *Chavers*, *Green*, and *Hall* cannot be unsettled without legislative, *en banc*, or Supreme Court intervention. *See Smith* v. *GTE Corp.*, 236 F.3d 1292, 1302-03 & n.11 (11th Cir. 2001); *United States* v. *Chubbuck*, 252 F.3d 1300, 1305 n.7 (11th Cir. 2001) (explaining rule vis-à-vis state law).

As *Smith* explained, "the holding of the first panel to address an issue is the law of this Circuit, thereby binding all subsequent panels unless and until the first panel's holding is overruled by the Court sitting

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F.3d 173, 177 (3d Cir. 2017); *Taylor* v. *Grubbs*, 930 F.3d 611, 619 (4th Cir. 2019); *Young* v. *Gutierrez*, 895 F.3d 829, 830 (5th Cir. 2018); *United States* v. *Ferguson*, 868 F.3d 514, 515 (6th Cir. 2017); *United States* v. *Hataway*, 933 F.3d 940, 946 (8th Cir. 2019); *United States* v. *Arriaga-Pinon*, 852 F.3d 1195, 1199 (9th Cir. 2017); *United States* v. *Bettcher*, 911 F.3d 1040, 1046 (10th Cir. 2018); *In re Hodges*, 882 F.3d 1107, 1120-21 (Fed. Cir. 2018). *But see United States* v. *Smith*, 949 F.3d 60, 65 (2d Cir. 2020) (panel may overrule prior panel precedent after circulating slip opinion to all active judges); *United States* v. *Rosciano*, 499 F.2d 173, 176 nn.2 & 4 (7th Cir. 1974) (same); *Jackson* v. *Modly*, 949 F.3d 763, 776 n.14 (D.C. Cir. 2020) (same).

en banc or by the Supreme Court." *Id.* at 1300 n.8. Moreover, the rule "'is not dependent upon a subsequent panel's appraisal of the initial decision's correctness.'" *Id.* at 1301-02 (citation omitted). Nor is there an exception for situations in which a party that litigated the prior panel precedent failed to make a certain argument: "we categorically reject any exception to the prior panel precedent rule based upon a perceived defect in the prior panel's reasoning or analysis as it relates to the law in existence at that time." *Id.* at 1303.

Rather, "erroneous panel decisions should be corrected" *en banc*, because only the *en banc* Court—not a panel—has "the authority" to "chang[e] circuit law." *Id.* at 1303 n.10. Any other approach "would risk 'nullifying the well-established prior panel precedent rule that is an essential part of the governing law of this Circuit.'" *United States* v. *Cingari*, __ F.3d __, 2020 WL 1270480, at *5 (11th Cir. 2020) (quoting *Smith*, 236 F.3d at 1302).

The Secretary does not identify any contrary prior panel precedents from this Court that predated *Bond*, *Chavers*, *Green*, or *Hall*. *See infra* Argument I.B.1. Nor does the Secretary identify any *en banc* or Supreme Court precedents that postdated *Bond*, *Chavers*, *Green*, or *Hall*, were

clearly on point, and directly overruled them. *See infra* Argument I.B.2. Instead, the Secretary mainly complains that *Bond*, *Chavers*, *Green*, and *Hall* were wrongly decided based on the law as it existed at those times. Given those complaints, the Secretary now belatedly implores the Court to reconsider those panel decisions. *See infra* Argument I.C. The Secretary is wrong.

B. The prior-panel-precedent rule requires a panel of this Court to follow *Bond*, *Chavers*, *Green*, and *Hall*

The prior-panel-precedent rule requires a panel of this Court to follow *Bond*, *Chavers*, *Green*, and *Hall*. That is because no contrary panel precedents from this Court predate *Bond*, *Chavers*, *Green*, or *Hall* (*see infra* Argument I.B.1), and no Supreme Court or *en banc* precedents postdate *Bond*, *Chavers*, *Green*, or *Hall*, are clearly on point, and directly overrule them (*see infra* Argument I.B.2).

1. No contrary prior panel precedents from this Court predate *Green* or *Hall*

Scrambling to identify potentially contrary prior panel precedents that predate *Green* and *Hall*,[3] the Secretary cites this Court's published decisions in *Melson* v. *Allen*, 548 F.3d 993 (11th Cir. 2008), *vacated*, 561

[3] The Secretary does not attempt to identify potentially contrary prior panel precedents with respect to *Bond* or *Chavers*.

U.S. 1001 (2010), *Sibley* v. *Culliver*, 377 F.3d 1196 (11th Cir. 2004), and *Hurley* v. *Moore*, 233 F.3d 1295 (11th Cir. 2000). *See* Sec'y Supp. Br. 8-9. The Secretary's reliance is misplaced.

First of all, the opinion in *Melson* was vacated. The Secretary asserts it was "vacated on other grounds" (Sec'y Supp. Br. 9), but that wrongly implies some part of *Melson* remains good law. Not so. When an opinion is vacated, all its rulings and statements are void and have no legal effect. *E.g.*, *United States* v. *Sigma Int'l, Inc.*, 300 F.3d 1278, 1280 (11th Cir. 2002) ("Both opinions remain vacated, and are officially gone. They have no legal effect whatever. They are void. None of the statements made in either of them has any remaining force and cannot be considered to express the view of this Court."). Because *Melson* was vacated, it is void; thus, for purposes of the prior-panel-precedent rule, the Court cannot rely on anything in it as binding precedent. *See Anders* v. *Hometown Mortg. Serv., Inc.*, 346 F.3d 1024, 1030-31 & n.5 (11th Cir. 2003) (refusing to apply prior-panel-precedent rule to decision that had been vacated).

In any event, *Green* and *Hall* had expressly distinguished *Melson*, *Sibley*, and *Hurley*. Specifically, *Green* distinguished *Melson* and *Sibley* because "Mr. Green does not seek to revive an *expired* limitations period."

877 F.3d at 1249 (emphasis added). Similarly, *Green* distinguished *Hurley* because "Mr. Hurley *never corrected the oath* in his Rule 3.850 motion, and therefore his case provided no basis for this Court to decide whether a corrected, properly filed motion would relate back to the original filing date." *Id.* at 1248 (emphasis added). Likewise, although *Hall* did not trouble itself to regurgitate *Green*'s distinction of *Melson* and *Sibley*, it still explained *Green*'s distinction of *Hurley*. 921 F.3d at 987-88. There simply is no inconsistency between *Green* and *Hall* on one hand and *Melson*, *Sibley*, and *Hurley* on the other. *See Anders*, 346 F.3d at 1031 ("we are not obligated to extend [prior panel precedent] to different situations").

Continuing his quixotic quest to identify potentially contrary prior panel precedents, the Secretary next argues that *Green* and *Hall* are inconsistent with a series of unpublished decisions from this Court and a smattering of published and unpublished district court orders.[4] *See* Sec'y Supp. Br. 8-9 & n.3. Again, the Secretary is wrong.

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[4] To wit, the District Court had relied on several unpublished decisions from this Court and a smattering of published and unpublished district court orders. *See* Doc. 10 at 3-4 (citing *Jones* v. *Sec'y, Fla. Dep't of Corr.*, 499 Fed. App'x 945, 951 (11th Cir. 2012), *Delguidice* v. *Fla. Dep't of Corr.*, 351 Fed. App'x 425, 428 (11th Cir. 2009), *Goldsmith* v. *Sec'y, Fla. Dep't of Corr.*, 2016 WL 4154145, at *5 (N.D. Fla. June 30, 2016), *Overton* v. *Jones*, 155 F. Supp. 3d 1253, 1269 (S.D. Fla. 2016), and *Butler* v. *Sec'y,*

Bates's appellant's brief had argued the Court did not need to consider any of those citations. Bates Br. 19-20 & nn.12-13. In a footnote, the Secretary now asserts Bates's "effort … to get this court to ignore its own *precedent* and that of the district courts should be rejected." Sec'y Supp. Br. 9 n.3 (emphasis added). The Secretary further asserts those cases "display intra-circuit conflict and confusion regarding the applicable law" and "highlight the long-standing principles of law regarding properly filed applications and tolling under federal law." Sec'y Supp. Br. 9 n.3.

But the Secretary's assertions reflect serious confusion about what "precedent" is and, indeed, how the law in general and Article III courts in particular work. In this Court, "precedent" regarding federal law is created only by the Supreme Court and this Court's published decisions, not by its unpublished decisions or any kind of district court orders.

For instance, it is hornbook law that only this Court's published opinions, not its unpublished ones, count as binding precedent. *Compare Martin* v. *Singletary*, 965 F.2d 944, 945 n.1 (11th Cir. 1992) (published decision was binding precedent even though mandate had not yet issued),

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Fla. Dep't of Corr., 2015 WL 3671227, at *2 n.4 (M.D. Fla. June 12, 2015)). Additionally, the Secretary also cites *Price* v. *Sec'y, Dep't of Corr.*, 489 Fed. App'x 354 (11th Cir. 2012). *See* Sec'y Supp. Br. 8.

with Twin City Fire Ins. Co. v. *Ohio Cas. Ins. Co.*, 480 F.3d 1254, 1260 n.3 (11th Cir. 2007) (an unpublished opinion is persuasive "only to the extent that a subsequent panel finds the rationale expressed in that opinion to be persuasive after an independent consideration of the legal issue"). Likewise, it is obvious that published decisions from other federal appellate courts are "not precedent for this court." *United States* v. *Ignancio Munio*, 909 F.2d 436, 439 n.4 (11th Cir. 1990).[5]

And it also is hornbook law that district court orders, whether published or unpublished, never qualify as binding precedent. *Am. Elec. Power Co., Inc.* v. *Connecticut*, 564 U.S. 410, 428 (2011) ("federal district judges, sitting as sole adjudicators, lack authority to render precedential decisions binding other judges, even members of the same court"). In that vein, consider *Midlock* v. *Apple Vacations West, Inc.*, 406 F.3d 453, 457-58 (7th Cir. 2005). There, Judge Posner held an attorney "was properly sanctioned" for relying on a federal district court opinion, because, "as we

[5] Similarly, even the decisions of state intermediate appellate courts are not binding precedent regarding questions of state law in this Court whenever there is a "persuasive indication" that a state supreme court would decide the issue differently. *Silverberg* v. *Paine, Webber, Jackson & Curtis, Inc.*, 710 F.2d 678, 690 (11th Cir. 1983); *see also infra* Argument III & note 15.

have noted repeatedly, a district court decision does not have *stare decisis* effect; it is not a precedent." *Id.* at 457. Instead, the "fact of such a decision is not a reason for following it," because it is "no different from a persuasive article or treatise." *Id.* at 458 (collecting cases). "This conclusion is based not on a disrespect for district judges, but on the sheer unmanageability of a system in which the authority to lay down legal rules is dispersed across a multitude of independent courts." *Id.*

All told, that means the cases cited by the District Court, in footnotes 12 and 13 of Bates's brief, and by the Secretary (*i.e.*, *Jones*, *Delguidice*, *Goldsmith*, *Overton*, *Butler*, and *Price*) need not be considered at all—especially given any potential conflict they might have with *Green* and *Hall*. *See* 11th Cir. R. 36, I.O.P. 7 ("The court generally does not cite to its 'unpublished' opinions because they are not binding precedent."). Indeed, the Secretary's invitation for this Court to treat those cases as "precedent" is baseless. They are all either unpublished, mere district court orders, or both. In contrast, *Green* and *Hall* are published. Those are the binding precedents, and they must be followed.

2. No Supreme Court or *en banc* precedents postdate *Bond*, *Chavers*, *Green*, or *Hall*, are clearly on point, and directly overrule or undermine them to the point of abrogation

The next tool in the Secretary's toolbox would be to cast about for Supreme Court or *en banc* precedents that postdate *Bond*, *Chavers*, *Green*, or *Hall*, are clearly on point, and directly overrule or undermine them to the point of abrogation.[6] But the Secretary's efforts fall short.

To undermine *Green* and *Hall*, the Secretary cites *Artuz* (decided in 2000) and *Pace* (decided in 2005) as inconsistent cases. But neither *Artuz* nor *Pace* postdated *Green* (decided in 2017) or *Hall* (decided in 2019).

Moreover, it is not clear why the Secretary believes *Green* and *Hall* are inconsistent with *Artuz* and *Pace* in the first place. That is because *Green* cited *Artuz* three times and faithfully applied its teaching that

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[6] *See, e.g.*, *United States* v. *Blankenship*, 382 F.3d 1110, 1140 (11th Cir. 2004) ("Because neither *Lowe* nor its central holding has []ever been overruled by the Supreme Court or this court sitting *en banc*, it remains good law. The fact that it is supported by solid policy … considerations is merely an additional benefit."); *Garrett* v. *Univ. of Ala. at Birmingham Bd. of Trs.*, 344 F.3d 1288, 1292 (11th Cir. 2003) ("While an intervening decision of the Supreme Court can overrule the decision of a prior panel of our court, the Supreme Court decision must be clearly on point."); *Fla. League of Prof. Lobbyists, Inc.* v. *Meggs*, 87 F.3d 457, 462 (11th Cir. 1996) ("we are not at liberty to disregard binding case law that is so closely on point and that has only been [allegedly] weakened, rather than directly overruled, by the Supreme Court").

state procedural rules determine whether an application was "properly filed." 877 F.3d at 1247-48. Indeed, circuit precedent had so held since *Wade* v. *Battle*, 379 F.3d 1254, 1260 (11th Cir. 2004) ("under *Artuz*, we look to the state procedural rules governing filings to determine whether an application for state post-conviction relief is 'properly filed'"). Evidently, the Secretary wants a panel to reconsider not only *Green* and *Hall*, but *Wade* as well. This a panel cannot do. *See supra* Argument I.A.

To undermine *Bond* (decided in 2002) and *Chavers* (decided in 2006), the Secretary next relies on *Gonzalez* v. *Thaler*, 565 U.S. 134, 154 (2012), as having directly overruled them. *See* Sec'y Supp. Br. 3-4. For the Secretary's sake, at least *Gonzalez* postdates *Bond* and *Chavers*. Nevertheless, *Gonzalez* is easily distinguished (and has been repeatedly distinguished) because it did not directly overrule *Bond* or *Chavers*. *See, e.g.*, *Gilding* v. *Sec'y, Dep't of Corr.*, 2012 WL 1883745, at *2 n.6 (M.D. Fla. 2012) (distinguishing *Gonzalez* and relying on *Bond* and *Chavers*).

Gonzalez involved a petitioner who failed to seek further appellate review from the Texas Court of Criminal Appeals (that state's highest court for criminal appeals). 565 U.S. at 138. Importantly, that Texas appellate court had plenary, albeit discretionary, jurisdiction to review

Gonzalez's case. *Id.* Gonzalez failed to petition the Texas court for discretionary appellate review. *Id.* Given Gonzalez's failure to exhaust discretionary state review, the Supreme Court held the date his state deadline expired constituted the "conclusion of direct review or the expiration of the time for seeking such review" for purposes of § 2244(d)(1). *Id.* at 656.

In contrast, unlike the Texas court in *Gonzalez*, the Florida Supreme Court's subject-matter jurisdiction to review the per curiam affirmance without opinion (which Florida lawyers call a "PCA") in *Bates II* was neither plenary nor discretionary—rather, it did not exist at all. *See infra* Argument II. That is precisely why cases like *Gilding* distinguish *Gonzalez* instead of holding it had directly overruled *Bond* and *Chavers*.

C. It is too late for the Secretary to petition this Court to hear the case initially *en banc*

Given all the prior-panel-precedent hurdles impeding the Secretary from his fervent desire that this Court reconsider *Bond*, *Chavers*, *Green*, and *Hall*, one might have thought he would have petitioned the Court to hear the case initially *en banc*. *See* Fed. R. App. P. 35(b) ("A party may petition for a hearing or rehearing *en banc*."). But the deadline by which to file such a petition has already expired. *See id.* 35(c) ("A petition that an appeal be heard initially *en banc* must be filed by the date when the

appellee's brief is due."). The appellee's brief was due 30 days after Bates served his appellant's brief via CM/ECF on February 21, 2020: *i.e.*, the deadline was March 23, 2020, which expired yesterday.

As such, the "supplemental" appellee's brief ultimately stands for nothing more than an implicit concession that Bates would prevail under existing precedent (*i.e.*, *Bond*, *Chavers*, *Green*, and *Hall*) with which the Secretary continues to disagree. And it therefore constitutes an implicit invitation for a panel of this Court to rule in Bates's favor.[7]

II. This is not an "appropriate case" to address the concerns Judge Tjoflat's *Hall* concurrence identified about *Bond*

Aside from wrongly inviting the Court to violate its prior-panel-precedent rule, the Secretary's arguments have additional flaws.

As to Judge Tjoflat's concurrence in *Hall*, Bates already explained his appeal is not the "appropriate case" for this Court to reconsider *Bond*'s

[7] Once a panel has ruled in Bates's favor, the Secretary may then attempt to seek further appellate review by filing a petition for rehearing *en banc* or a certiorari petition. *E.g.*, *United States* v. *Travis*, 747 F.3d 1312, 1314 n.1 (11th Cir. 2014) (noting appellant preserved for further appellate review argument he conceded was foreclosed by binding precedent); *United States* v. *Cunningham*, 705 Fed. App'x 906, 908 (11th Cir. 2017) (same). Unlike the appellants in *Cunningham* and *Travis*, however, nowhere does the Secretary explicitly concede binding precedent forecloses all his arguments.

and *Chavers*'s 90-day rule. Bates Br. 26. That is because *Bates II* was a PCA. As such, it was jurisdictionally impossible for Bates to obtain further appellate review of his *Bates II* PCA from the Florida Supreme Court. Bates Br. 26.

The Secretary does not dispute that jurisdictional reality.[8] *See* Sec'y Supp. Br. 4 (citing *Gilding*, 2012 WL 1883745, at *2 n.6). Nevertheless, the Secretary observes, "*Arguably*, literally applying 'the conclusion of direct review' set forth in § 2244(d)(1)(A), to *per curium* [*sic*] affirmances

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[8] Although not cited or argued by the Secretary, two Florida appellate practitioners have explained there "may be an exception to the general rule that the Florida Supreme Court may not review a PCA." Steven Brannock & Sarah Weinzierl, *Confronting a PCA: Finding a Path around a Brick Wall*, 32 STETSON L. REV. 367, 390 (2003). That putative exception, even if it existed, would not apply here.

It would involve a hypothetical situation where a PCA was deemed to have necessarily declared a state statute or constitutional provision invalid, thus triggering the Florida Supreme Court's mandatory jurisdiction (not its discretionary conflict jurisdiction). *Id.* at 390-91 (citing Fla. Const. art. V, § 3(b)(1)). Of course, that hypothetical exception would "beg[] the question of whether a PCA can 'declare' a statute [or constitutional provision] invalid" when it is ordinarily understood that a PCA "does not declare anything." *Id.* at 390; *accord The Florida Star* v. *B.J.F.*, 530 So. 2d 286, 288 & n.3 (Fla. 1988). And this "untested theory still awaits its first reported decision," Brannock & Weinzierl, *supra*, at 391, so it may not even exist.

Even if it did exist, however, there is no indication on this record that, in affirming Bates's conviction and sentence on direct review, the *Bates II* PCA had somehow declared any statute invalid. Thus, this possible exception is inapplicable.

by Florida district courts of appeal *could* mean the AEDPA period commences the day after issuance of the *per curium* [*sic*] affirmance." Sec'y Supp. Br. 4-5 (emphases added).

No, it most certainly could not.[9] It is true that the Florida Supreme Court does have subject-matter jurisdiction to entertain a discretionary appeal from any written opinion that expressly addresses a question of law (*i.e.*, anything *but* a PCA):

> This Court in the broadest sense has subject-matter jurisdiction under article V, section 3(b)(3) of the Florida Constitution, over any decision of a district court that expressly addresses a question of law within the four corners of the opinion itself. That is, the opinion must contain a statement or citation effectively establishing a point of law upon which the decision rests.

[9] Also, the Secretary's wishy-washy observation, framed in the subjunctive voice ("Arguably," "could"), is not a cognizable argument. *See Sapuppo* v. *Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014) ("an appellant abandons a claim when he either makes only passing references to it or raises it in a perfunctory manner without supporting arguments and authority"); *Hamilton* v. *Southland Christian Sch., Inc.*, 680 F.3d 1316, 1318-19 (11th Cir. 2012) (appellee waived argument by omitting it from answer brief); *La Grasta* v. *First Union Sec., Inc.*, 358 F.3d 840, 847 n.4 (11th Cir. 2004) (same); *see also United States* v. *Bobo*, 419 F.3d 1264, 1269 (11th Cir. 2005) ("courts generally do not make a habit of hiding away important holdings in after-thought footnotes or surrounding them with subjunctive constructions ('we would still be') and noncommittal musings ('we seriously question' and 'it appears')").

The Florida Star v. *B.J.F.*, 530 So. 2d 286, 288 (Fla. 1988) (footnote omitted). In other words, the Florida Supreme Court has subject-matter jurisdiction over any state district court's non-PCA, written opinion. *Id.*

But the Florida Supreme Court has no jurisdiction to entertain discretionary appeals from a PCA. *Id.* at 288 n.3 ("This Court does not, however, have subject-matter jurisdiction over a district court opinion that fails to expressly address a question of law, such as opinions issued without opinion or citation."). As such, *The Florida Star* held, "a district court decision rendered without opinion or citation constitutes a decision from the highest state court empowered to hear the cause, and appeal may be taken directly to the United States Supreme Court." *Id.*

That jurisdictional limitation is significant here. On one hand, numerous cases have repeatedly held that litigants who seek review of a state court judgment in the Supreme Court must first exhaust all avenues of appellate review available in that state's courts.[10] On the other hand, however, the Supreme Court has also held this exhaustion requirement is excused (or satisfied) when it would be impossible to seek further

[10] *E.g.*, *Gotthilf* v. *Sills*, 375 U.S. 79, 80 (1963); *Gorman* v. *Washington Univ.*, 316 U.S. 98, 100-01 (1942); *Am. Ry. Express* v. *Levee*, 263 U.S. 19, 20-21 (1923); *Stratton* v. *Stratton*, 239 U.S. 55, 56-57 (1915).

appellate review from a higher state court. *See, e.g.*, *Hobbie* v. *Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 139 & n.4 (1987) (noting Florida petitioner had successfully obtained writ of certiorari from PCA, considering appeal, and reversing state district court's judgment).[11]

In fact, this appeal presents the precise exception to exhausting further state appellate review that Judge Tjoflat envisioned: any PCA, including the PCA in *Bates II*, necessarily involves a "constitutional bar to higher court review." 921 F.3d at 990 (Tjoflat, J., concurring). That is because the Florida Constitution (since its amendment in 1980) has deprived the Florida Supreme Court of subject-matter jurisdiction to entertain discretionary appeals from PCAs. *See The Florida Star*, 530 So. 2d at 288 n.3 (describing constitutional history); *accord Jenkins* v. *State*, 385 So. 2d 1356, 1359 (Fla. 1980); *Pena* v. *Tampa Fed. S&L Ass'n*, 385 So. 2d 1370, 1370-71 (Fla. 1980); *Wells* v. *State*, 132 So. 3d 1110, 1114 (Fla. 2014); *see also* Fla. R. App. P. 9.030(a)(1); Fla. Const. art. V, § 3(b).

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[11] *See also Brown* v. *Texas*, 443 U.S. 47, 50 (1979) (county court's rejection of petitioner's constitutional claims was a decision by highest state court "'in which a decision could be had'" because Texas law forbade further appellate review unless fine exceeded $100 (citations omitted)); *Thompson* v. *City of Louisville*, 362 U.S. 199, 202 & n.4 (1960) (certiorari issued to local police court whose decisions were not otherwise appealable within the state court system).

Indeed, this impossibility-of-further-state-review exception is statutorily mandated by 28 U.S.C. § 1257(a), which provides "[f]inal judgments or decrees rendered by the highest court of a State in which a decision *could* be had, may be reviewed by the Supreme Court by writ of certiorari." *Id.* (emphasis added). Thus, for purposes of § 1257(a)'s exhaustion requirement, Bates had exhausted all possibility for state court appellate review when the Second District issued the *Bates II* PCA.

As such, Bates unquestionably had 90 days from the date the *Bates II* PCA was rendered to file a petition for writ of certiorari in the Supreme Court of the United States. *E.g.*, *Hobbie*, 480 U.S. at 139 & n.4 (1987) (Florida petitioner successfully obtained writ of certiorari from PCA); 28 U.S.C. § 2101(c) (90-day certiorari deadline); Sup. Ct. R. 13.1 (same). Likewise, for purposes of 28 U.S.C. § 2244(d)(1)(A), the "conclusion of direct review or the expiration of the time for seeking such review" occurred on the date his 90-day certiorari deadline expired. *E.g.*, *Gilding*, 2012 WL 1883745, at *2 n.6.

And nothing requires a litigant like Bates to go through the futile exercise of seeking further appellate review in a higher state court that lacks jurisdiction. As mentioned, that is precisely what *Gilding* and other

district courts correctly ruled. 2012 WL 1883745, at *2 n.6 (distinguishing *Gonzalez* "because filing a petition for writ of discretionary review with the Supreme Court of Florida would have been futile," so "it was not necessary in order to receive 90 additional days for the time in which Petitioner could have filed a petition for writ of certiorari").

Accordingly, because the PCA in *Bates II* means this is not an "appropriate case" in which to address Judge Tjoflat's concern about *Bond*, the Secretary is in reality asking this Court to issue an advisory opinion for it to deploy in some future case it might have. Of course, any opinion the Court might pronounce on this point regarding *Bond* and *Chavers*—because it would by definition exceed the scope of the facts and circumstances presented in this appeal—would be mere *obiter dicta*.[12] And the needless and wasteful issuance of nonbinding advisory opinions is precisely what the Cases or Controversies Clause forbids Article III courts from doing.[13]

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[12] *See Fresh Results, LLC* v. *ASF Holland, B.V.*, 921 F.3d 1043, 1049 (11th Cir. 2019) ("'regardless of what a court says in its opinion, the decision can hold nothing beyond the facts of that case'" (citation omitted)); *United States* v. *Caraballo-Martinez*, 866 F.3d 1233, 1244-45 (11th Cir. 2017) (distinguishing *obiter dicta* from holdings).

[13] *See Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975) ("a federal court has neither the power to render advisory opinions nor 'to decide questions

In sum, the Court should decline the Secretary's invitation to reconsider *Bond* and *Chavers*. In addition to the prior-panel-precedent and prophylactic concerns Bates identified (*see* Bates Br. 25-28) and to which the Secretary never responded, this simply is not the appropriate case.

III. The Secretary's regurgitated gripes that Rule 3.850 motions must both be "pending" and "properly filed" and that the relation-back doctrine derives from a misreading of Florida law have already been rejected and are wrong in any event

Trying to avoid the relation-back holdings of *Green* and *Hall*, the Secretary argues Bates's original Rule 3.850 motion did not qualify as a tolling motion because, per § 2244(d)(2), it was neither "properly filed" nor "pending." *See* Sec'y Supp. Br. 5-9. For that reason, the Secretary complains *Green*'s and *Hall*'s "properly filed" and "pending" holdings contradict federal law. Sec'y Supp. Br. 5-9.

This is not the first time the Secretary has made these arguments.[14] And it will not be the first time this Court has rejected them. Specifically,

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that cannot affect the rights of litigants in the case before them'" (citation omitted)); *Miller* v. *FCC*, 66 F.3d 1140, 1146 (11th Cir. 1995) ("prohibition on advisory opinions is a logical corollary of the case or controversy requirement").

[14] In his original brief here (filed after *Green* but before *Hall* was decided), the Secretary continues to argue:

> Bates's amended rule 3.850 motion could not "relate back", as this court has construed that concept, to his original rule

when briefing *Hall*, the Secretary attempted to distinguish *Green* on the basis that a postconviction motion must not only be "properly filed," but also must remain "pending" for statutory tolling to occur. 921 F.3d at 988.

But *Hall* expressly rejected that argument. Construing Florida law, *Hall* held it would "upend[] the procedure Florida courts have developed for processing facially deficient postconviction motions." *Id.* at 989. Additionally, *Hall* held Florida law deems a postconviction proceeding to be "'in continuance'" until rendition of an order denying or dismissing it with prejudice. *Id.* As such, *Hall* held, "for the purposes of tolling under 28 U.S.C. § 2244(d)(2), a petitioner's Rule 3.850 motion is 'pending' until it is denied with prejudice." *Id.* at 990.

Unhappy with that interpretation of Florida law, the Secretary now argues the relation-back holdings of *Green* and *Hall* misread Florida law.

> 3.850 motion because that motion had been dismissed by the state court for failing to meet the state's oath requirement. That dismissal operated to conclude the rule 3.850 proceeding and therefore the proceeding was not pending at the time Bates filed an amended motion.

State Original Br. 7. Other than the parties' names, the Secretary's brief in *Hall* (again, filed after *Green* but before *Hall* was decided) had made the identical, word-for-word argument. *See* Sec'y Br. 6, *Hall* v. *Sec'y, Fla. Dep't of Corr.*, 921 F.3d 983 (11th Cir. 2019) (No. 18-10767).

Sec'y Supp. Br. 9-15. Alas, all but one of the state decisions the Secretary discusses preceded *Green* and *Hall*,[15] which he misinterprets in any case.

Green had relied on *Gore* v. *State*, 24 So. 3d 1 (Fla. 2009), *Spera* v. *State*, 971 So. 2d 754 (Fla. 2007), and *Bryant* v. *State*, 901 So. 2d 810 (Fla. 2005), for two propositions: first, that "when a postconviction motion is stricken with leave to amend, the amended motion relates back to the date of the original filing"; and second, that for filing date purposes, an amended Rule 3.850 motion relates back to an original Rule 3.850 motion. 877 F.3d at 1248-49.

Hall explained how *Spera* allowed one opportunity to amend facially insufficient claims. 921 F.3d at 989-90 (discussing *Nelson* v. *State*, 977 So. 2d 710, 711 (Fla. 1st DCA 2008)). Additionally, *Hall* noted the dismissal of a facially insufficient postconviction motion is not a final, appealable order. *Id.* at 989 (citing *Russell* v. *State*, 46 So. 3d 151, 151-52 (Fla. 2d DCA 2010)). As such, *Hall* concluded *Spera* and *Russell* "suggest[] that Florida's 'state collateral review process is 'in continuance"

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[15] When a prior panel precedent's interpretation of state law is at issue, "the prior precedent rule would not apply if intervening on-point case law from … the Florida Supreme Court existed." *Chubbuck*, 252 F.3d at 1305 n.7. But here, the Secretary cites no "*intervening* on-point case law" from the Florida Supreme Court. *Id.* (emphasis added).

until the court issues a final decision on the Rule 3.850 motion." *Id.* at 989-90 (quoting *Carey* v. *Saffold*, 536 U.S. 214, 219-20 (2002)).

The Secretary disputes *Green*'s and *Hall*'s interpretations because, he contends, per his interpretations of *Artuz* and *Pace*, § 2244(d)(2)'s "properly filed" requirement is exclusively "a federal law concept." Sec'y Supp. Br. 10. But that assertion has been wrong for over 15 years: "under *Artuz*, we look to the state procedural rules governing filings to determine whether an application for state post-conviction relief is 'properly filed.'" *Wade*, 379 F.3d at 1260.

Next, the Secretary complains that *Green* and *Hall* misinterpreted *Gore*, *Spera*, and *Bryant*. But that argument misfires because *Green* and *Hall* are the prior panel precedents, and the Secretary fails to cite any contrary, intervening, on-point case from the Florida Supreme Court. *See supra* Argument I & note 15.

But more importantly, *Green* and *Hall* correctly interpreted Florida law. Indeed, many Florida cases have held amended Rule 3.850 motions can and do relate back to original Rule 3.850 motions, particularly when—as here—the postconviction court dismissed the original Rule 3.850 motion without prejudice and *expressly* with leave to amend. *See,*

e.g., *Lukehart* v. *State*, 70 So. 3d 503, 516-17 (Fla. 2011) (collecting cases); *Keevis* v. *State*, 908 So. 2d 552, 553 (Fla. 2d DCA 2005) ("when any post-conviction motion fails to meet the pleading requirements of a rule itself, the proper procedure is to strike the motion with leave to amend").

Undaunted, the Secretary argues an amended Rule 3.850 motion cannot relate back to an original Rule 3.850 motion because they are motions, not pleadings under Florida Rule of Civil Procedure 1.190(c). *See* Sec'y Supp. Br. 14-15. But this argument also is too cute by half and has been repeatedly rejected. *Lukehart*, 70 So. 3d at 516-17 (Rule 1.190(c) "applies to postconviction cases" (collecting cases)).

For example, consider *Venable* v. *State*, 227 So. 3d 644 (Fla. 4th DCA 2017). There, an inmate timely filed a Rule 3.850 motion. *Id.* at 645. That motion raised two claims, but he failed to include a proper oath. *Id.* at 645. As here, the trial court "denied the original motion without prejudice for [the inmate] to file an amended motion with a proper oath." *Id.* That order "did not set a specific time for him to refile." *Id.* Nevertheless, the inmate timely filed his amended motion within 30 days. *Id.* (citing Fla. R. Crim. P. 3.850(e)). This amended motion corrected the oath deficiency and included the original two claims, but it also included a new

third claim. *Id.* The trial court denied the amended motion as time barred. *Id.*

On appeal, the Fourth District reversed in part and affirmed in part. *Id.* It held that, notwithstanding the original motion's improper oath, the "first two claims relate back to the original motion, which was timely filed." *Id.* In fact, in response to the Fourth District's show cause order, the State of Florida, unlike the Secretary here, had *conceded* those claims related back. *Id.* The new third claim, however, did not relate back, so its dismissal as untimely was affirmed. *Id.*

Venable and cases like it[16]—none of which the Secretary cites, never mind distinguishes—sound the death knell for the Secretary's appellate arguments. Those cases conclusively establish that, under Florida law,

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[16] Importantly, *Venable* is not some outlier. Rather, many Florida cases have held timely amended Rule 3.850 motions that corrected oath defects related back to timely original Rule 3.850 motions. *See, e.g.*, *Rico* v. *State*, 71 So. 3d 245, 245 (Fla. 4th DCA 2011) (reversing dismissal of amended motion that corrected defective oath because it related back to the original motion); *Armstrong* v. *State*, 989 So. 2d 1291, 1292 (Fla. 4th DCA 2008) (same); *Jumper* v. *State*, 903 So. 2d 264, 265-66 (Fla. 2d DCA 2005) (same). Indeed, trial courts are often reversed for dismissing amended Rule 3.850 motions as untimely when the orders dismissing the original Rule 3.850 motion, as here (*see* Doc. 5.1 at 30), "contained no time limit for compliance." *Hayes* v. *State*, 59 So. 3d 384, 385 (Fla. 4th DCA 2011); *accord Woods* v. *State*, 963 So. 2d 348, 349 (Fla. 4th DCA 2007).

when an original Rule 3.850 motion is dismissed without prejudice and with leave to amend due to a faulty oath, and the inmate timely files an amended motion that corrects that defect, the amended motion relates back to the original motion. That is precisely how *Green* and *Hall* had correctly interpreted Florida law. And the Secretary's argument to the contrary is not merely incorrect, but baseless.

Summary

Ultimately, this appeal begins and ends with a routine application of *Green* and *Hall* to the facts. Like *Green* and *Hall*, Bates initially filed a timely Rule 3.850 motion with a procedural defect. Like *Green* and *Hall*, viewed alone, that original Rule 3.850 motion was not "properly filed." Like *Green* and *Hall*, however, Bates corrected that procedural defect in a timely amended Rule 3.850 motion. Like *Green* and *Hall*, that timely amended Rule 3.850 motion related back to the original Rule 3.850 motion under Florida procedural law. Like *Green* and *Hall*, that meant the original Rule 3.850 motion was both "properly filed" and "pending" until its disposition was finally resolved on appeal in *Bates III* and the mandate issued.

That means Bates was entitled to statutory tolling from the date he filed his original Rule 3.850 motion (March 17, 2015) until the *Bates III* mandate issued (January 26, 2017). Given that extra tolling, Bates filed his federal habeas petition after only 339 AEDPA days expired (174 + 165). As such, his petition was timely, and the order of dismissal should be reversed.

CONCLUSION

The Court should reverse the dismissal of the habeas petition as untimely, vacate the judgment, and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B)'s type-volume requirement. As determined by Microsoft Word 2010's word-count function, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and 11th Circuit Rule 32-4, this brief contains 6,484 words.

2. This brief further complies with Federal Rule of Appellate Procedure 32(a)(5)'s typeface requirements and with Federal Rule of Appellate Procedure 32(a)(6)'s type-style requirements. Its text has been prepared in a proportionally spaced serif typeface in roman style using Microsoft Word 2010's 14-point Century Schoolbook font.

March 24, 2020

/s/ Thomas Burns
Thomas A. Burns

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I filed the original and six copies of the foregoing brief with the Clerk of Court via CM/ECF and regular mail on this 24th day of March, 2020, to:

David J. Smith, Clerk of Court
U.S. COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT
56 Forsyth Street N.W.
Atlanta, GA 30303

I FURTHER CERTIFY that I served a true and correct copy of the foregoing brief via CM/ECF on this 24th day of March, 2020, to:

Office of the Attorney General

AAG Donna Suarez Koch

I FURTHER CERTIFY that I served a true and correct copy of the foregoing brief via regular mail on this 24th day of March, 2020, to:

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