EXHIBIT 1

Florida Supreme Court Opinion Below (Feb. 8, 2018)

Supreme Court of Florida

No. SC17-42

RICHARD EUGENE HAMILTON,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[February 8, 2018]

PER CURIAM.

Richard Eugene Hamilton, a prisoner under sentence of death, appeals the circuit court's orders summarily denying his successive motion for postconviction relief, which was filed under Florida Rule of Criminal Procedure 3.851, and his demands for additional public records, which were filed under Florida Rule of Criminal Procedure 3.852. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const.

I. BACKGROUND

Hamilton was convicted of the 1994 first-degree murder, armed sexual battery, armed robbery, and armed kidnapping of Carmen Gayheart. *Hamilton v. State*, 703 So. 2d 1038, 1040 (Fla. 1997), *cert. denied*, 524 U.S. 956 (1998). We

affirmed Hamilton's convictions and sentence of death on direct appeal. *Id.* at 1045. We thereafter affirmed the denial of his initial motion for postconviction relief and denied his petition for a writ of habeas corpus. *Hamilton v. State*, 875 So. 2d 586, 589 (Fla. 2004).

Between January and April 2016, Hamilton filed demands for additional public records under rule 3.852(i) relating to his representation by predecessor postconviction counsel and the judicial candidacy and tenure as a circuit court judge of the Honorable E. Vernon Douglas, who oversaw Hamilton's trial and initial postconviction proceedings. The postconviction court concluded that Hamilton's demands for these additional public records were "of questionable relevance and unlikely to lead to discoverable evidence" and denied the requests.

On June 6, 2016, Hamilton filed a petition in this Court for a writ of habeas corpus, claiming that he was entitled to relief under the United States Supreme Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016). We denied the habeas petition on March 3, 2017, citing *Asay v. State*, 210 So. 3d 1, 22 (Fla. 2016) (holding that *Hurst* does not apply retroactively to sentences of death that became final before the Supreme Court issued its 2002 decision in *Ring v. Arizona*, 536 U.S. 584 (2002)), *cert. denied*, 138 S. Ct. 41 (2017). *Hamilton v. Jones*, No. SC16-984, 2017 WL 836807, at *1 (Fla. Mar. 3, 2017).

On August 24, 2016, while Hamilton's petition for a writ of habeas corpus was still pending in this Court, Hamilton filed a successive postconviction motion in the circuit court. In his successive motion, Hamilton argued that (1) he is entitled to a new postconviction proceeding due to the institutional failure of the trial court, the State, and the Florida Supreme Court that resulted in a violation of his state and federal constitutional rights and (2) his death sentence is unconstitutional under *Hurst v. Florida*. The postconviction court summarily denied the successive motion, concluding that it was "untimely as it was submitted eighteen years after the mandate issued and that none of the three articulated exceptions [in rule 3.851] apply." Hamilton now appeals the denial of his successive postconviction motion and the denial of his demands for additional public records.

II. ANALYSIS

A. Successive Motion

A motion for postconviction relief must be filed within one year of the date the defendant's conviction and sentence become final. Fla. R. Crim. P. 3.851(d)(1). Hamilton's convictions and sentences became final when the United States Supreme Court denied certiorari review of the direct appeal proceedings on June 26, 1998. *Hamilton v. Florida*, 524 U.S. 956 (1998); *see* Fla. R. Crim. P. 3.851(d)(1)(B) ("For the purposes of this rule, a judgment is final . . . on the

disposition of the petition for writ of certiorari by the United States Supreme Court, if filed."). The one-year time limitation therefore expired in 1999.

There are exceptions to the one-year time limitation for motions alleging:

> (A) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, or
>
> (B) the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively, or
>
> (C) postconviction counsel, through neglect, failed to file the motion.

Fla. R. Crim. P. 3.851(d)(2). Hamilton argues that his *Hurst* claim was timely because it was raised within one year of the Supreme Court's decision in *Hurst v. Florida*, but Hamilton is incorrect. The relevant time in which to file a claim based on a new fundamental constitutional right is one year from the date of the decision announcing that the right applies retroactively. *See Dixon v. State*, 730 So. 2d 265, 267 (Fla. 1999) (stating that the basis for calculating a cut-off period for postconviction claims based on a fundamental constitutional right is the date of the issuance of the mandate in the case in which this Court announces retroactivity). But *Hurst* has never been held to be retroactive to defendants in Hamilton's position. To the contrary, we have expressly held that *Hurst* does not apply retroactively to defendants whose convictions and sentences were final prior to the

issuance of *Ring* in 2002. *Hitchcock v. State*, 226 So. 3d 216, 217 (Fla.), *cert. denied*, 138 S. Ct. 513 (2017); *Asay*, 210 So. 3d at 22.

Accordingly, because Hamilton's successive motion was filed after the expiration of the one-year time limitation and none of the exceptions to the one-year time limitation in rule 3.851(d)(2) are applicable to either of the claims raised by Hamilton in his successive postconviction motion, the postconviction court properly denied the successive motion as untimely. *See* Fla. R. Crim. P. 3.851(d)(2) (stating that no motion filed beyond the one-year time limitation shall be considered unless it alleges that one of the three exceptions to the one-year time bar applies).

B. Demands for Additional Public Records

We review the denial of motions for additional public records made under rule 3.852 for an abuse of discretion. *Pardo v. State*, 108 So. 3d 558, 565 (Fla. 2012). Under rule 3.852(i), a

> trial court may order a person or agency to produce additional public records only upon finding each of the following:
>
> (A) collateral counsel has made a timely and diligent search of the records repository;
>
> (B) collateral counsel's affidavit identifies with specificity those additional public records that are not at the records repository;
>
> (C) the additional public records sought are either relevant to the subject matter of a proceeding under rule 3.851 or appear reasonably calculated to lead to the discovery of admissible evidence; and

(D) the additional public records request is not overly broad or unduly burdensome.

Fla. R. Crim. P. 3.852(i)(2). We have held that circuit courts have discretion to deny public records requests that are "overly broad, of questionable relevance, and unlikely to lead to discoverable evidence," *Moore v. State*, 820 So. 2d 199, 204 (Fla. 2002), and that "a defendant bears the burden of demonstrating that the records sought relate to a colorable claim for postconviction relief," *Chavez v. State*, 132 So. 3d 826, 829 (Fla. 2014) (citing *Mann v. State*, 112 So. 3d 1158, 1163 (Fla. 2013)).

Here the trial court made a specific finding that Hamilton's requests were "of questionable relevance and unlikely to lead to discoverable evidence." Hamilton does not explain why he believes the trial court abused its discretion in denying his requests; he appears to simply disagree with the trial court's conclusion. We find no abuse of discretion in the denial of the requests and conclude that Hamilton has failed to meet his burden to demonstrate that the records sought relate to a colorable claim for postconviction relief. Hamilton is therefore not entitled to relief on this claim.

III. CONCLUSION

For these reasons, we affirm the circuit court's orders denying Hamilton's successive motion for postconviction relief and denying his demands for additional public records.

It is so ordered.

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

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

PARIENTE, J., dissenting.

I dissent because I would grant Hamilton a new penalty phase in light of *Hurst*.[1] Also, I write to address the majority's discussion and denial of relief based on timeliness, which is both unnecessary and, more importantly, relies on reasoning that is legally unsound. In my previous dissents, I have explained why fundamental fairness dictates that all capital defendants should be provided a new penalty phase pursuant to *Hurst* where there is a nonunanimous jury recommendation for death.[2]

Hamilton was sentenced to death after the jury recommended a sentence of death by a vote of ten to two. *Hamilton v. State*, 703 So. 2d 1038, 1040 (Fla.

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1. *Hurst v. State* (*Hurst*), 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017); *see Hurst v. Florida*, 136 S. Ct. 616 (2016).

2. *Hannon v. State*, 228 So. 3d 505, 514 (Fla. 2017) (Pariente, J., dissenting); *Lambrix v. State*, 227 So. 3d 112, 114-15 (Fla. 2017) (Pariente, J., dissenting); *Asay v. State* (*Asay VI*), 224 So. 3d 695, 703-09 (Fla. 2017) (Pariente, J., dissenting); *Hitchcock v. State*, 226 So. 3d 216, 220-23 (Fla.) (Pariente, J., dissenting), *cert. denied*, 138 S. Ct. 513 (2017); *see also Asay v. State* (*Asay V*), 210 So. 3d 1, 32-37 (Fla. 2016) (Pariente, J., concurring in part and dissenting in part), *cert. denied*, 138 S. Ct. 41 (2017).

1997), *cert. denied*, 524 U.S. 956 (1998). His sentence became final in 1998. *Id.* I would apply *Hurst* retroactively to Hamilton's sentence and, based on the jury's nonunanimous recommendation for death, would vacate the sentence of death and grant a new penalty phase. I note that this Court already denied Hamilton's prior petition for a writ of habeas corpus requesting *Hurst* relief, where I concurred in result based on this Court's precedent in *Asay V*. *Hamilton v. Jones*, No. SC16-984, 2017 WL 836807 (Fla. order issued Mar. 3, 2017). However, since *Asay V*, this Court has further denied the retroactive application of *Hurst* to pre-2002 defendants without properly addressing defendants' Eighth Amendment claims and allowed three executions to proceed; I have dissented from all of those decisions.[3]

Over and over, the United States Supreme Court and this Court have made clear that "the critical linchpin of the constitutionality of the death penalty is that it be imposed in a reliable and not arbitrary manner." *Asay VI*, 224 So. 3d at 708 & n.8 (Pariente, J., dissenting) (citing *Gregg v. Georgia*, 428 U.S. 153, 188 (1976); *Glossip v. Gross*, 135 S. Ct. 2726, 2760-62 (2015) (Breyer, J., dissenting)); *accord Hurst*, 202 So. 3d at 59-60; *see generally Furman v. Georgia*, 408 U.S. 238 (1972). As I have expressed several times, the Court's retroactivity cut-off of *Ring v. Arizona*, 536 U.S. 584 (2002), results in unconstitutional arbitrariness in the

3. *See Hannon*, 228 So. 3d at 514 (Pariente, J., dissenting); *Lambrix*, 227 So. 3d at 114-15 (Pariente, J., dissenting); *Asay VI*, 224 So. 3d at 703-09 (Pariente, J., dissenting); *Hitchcock*, 226 So. 3d at 220-23 (Pariente, J., dissenting).

imposition of the death penalty. Likewise, Judge Martin of the United States Court of Appeals for the Eleventh Circuit recently stated that "it is arbitrary in the extreme to [distinguish] between people on death row based on nothing other than the date when the constitutional defect in their sentence occurred." *Hannon v. Sec'y, Fla. Dept. of Corrs.*, No. 17-14935, 2017 WL 5177614, at *3 (11th Cir. Nov. 8, 2017) (Martin, J., concurring).

Comparing Hamilton's case with death row inmate Charles Anderson's, for example, demonstrates this unconstitutional arbitrariness. The crimes for which Charles Anderson was sentenced to death occurred on January 16, 1994, three months before the crimes in Hamilton's case. *Anderson v. State*, 841 So. 2d 390, 395 (Fla. 2003). While Hamilton's sentence became final in 1998, Anderson's sentence did not become final until 2003. Thus, Anderson received *Hurst* relief, whereas Hamilton is not even entitled to review of this claim, as the per curiam opinion concludes. *Anderson v. State*, 220 So. 3d 1133, 1150 (Fla. 2017).

Like most defendants whose death sentences have been reviewed by this Court since *Hurst v. Florida* and *Hurst*, Hamilton also raises a claim for relief pursuant to *Caldwell v. Mississippi*, 472 U.S. 320 (1985). In *Caldwell*, the United States Supreme Court held that it is "constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that

the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U.S. at 328-29. The Court explained:

> In evaluating the various procedures developed by States to determine the appropriateness of death, this Court's Eighth Amendment jurisprudence has taken as a given that capital sentencers would view their task as the serious one of determining whether a specific human being should die at the hands of the State. . . . Belief in the truth of the assumption that sentencers treat their power to determine the appropriateness of death as an "awesome responsibility" has allowed this Court to view sentencer discretion as consistent with—and indeed as indispensable to—the Eighth Amendment's "need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, [428 U.S.] at 305 (plurality opinion).
>
> . . . .
>
> In the capital sentencing context there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court.
>
> . . . .
>
> This Court has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its "truly awesome responsibility." In this case, the State sought to minimize the jury's sense of responsibility for determining the appropriateness of death. *Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires*.

Id. at 329-41 (emphasis added). Based on this lack of reliability, the Supreme Court vacated the sentence of death. *Id.* at 341.

Florida's pre-*Hurst* jury instructions referred to the advisory nature of the jury's recommendation over a dozen times. *See* Fla. Std. Jury Instr. (Crim.) 7.11 (2016). Further, the jury was only required to make a recommendation between

life or death to the trial court, which then held the ultimate responsibility of making the requisite factual findings and determining the appropriate sentence. Thus, it was made abundantly clear to the jury that they were not responsible for rendering the final sentencing decision. *Caldwell*, which was decided seventeen years before *Ring*, further supports the conclusion that defendants whose sentences were imposed after a jury nonunanimously recommended a sentence of death should be eligible for *Hurst* relief to avoid unconstitutional arbitrariness and ensure reliability in imposing the death penalty.

Finally, as to the timeliness of Hamilton's motion, the per curiam opinion concludes that "the expiration of the one-year time limitation" for Hamilton to file his motion under Florida Rule of Criminal Procedure 3.851 expired in 1999, "and none of the exceptions to the one-year limitation in rule 3.851(d)(2) are applicable to either of the claims" he raises in his motion. Per curiam op. at 5. However, this conclusion is inaccurate in light of *Hurst v. Florida* and *Hurst*.

The United States Supreme Court decided *Hurst v. Florida* on January 12, 2016, establishing a "fundamental constitutional right." Fla. R. Crim. P. 3.851(d)(2)(B). Hamilton filed the motion at issue on August 24, 2016—before this Court's decision in *Hurst* on October 14, 2016, and before this Court's decisions in *Asay V* and *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), regarding the retroactivity of *Hurst v. Florida* and *Hurst*. *See* per curiam op. at 3. In fact, at a

case management hearing in November 2016—before *Asay V* and *Mosley*—the defense moved for a continuance in anticipation of this Court's ruling regarding the retroactivity of the *Hurst* decision. The circuit court denied the continuance and denied Hamilton's successive postconviction motion as untimely.

Based on the date of the United States Supreme Court's decision in *Hurst v. Florida* and the circuit court's denial of Hamilton's request for a continuance to wait for this Court's ruling on retroactivity, Hamilton's motion was well within the one-year time period for filing a claim under rule 3.851 based on "the fundamental constitutional right" announced in *Hurst v. Florida*, which "was not established within" the one-year time limitation that expired in 1999. Fla. R. Crim. P. 3.851(d)(2)(B). This Court cannot determine that Hamilton's motion was untimely now that it knows it denied retroactive application of *Hurst* to cases like Hamilton's when the motion was filed and heard by the circuit court before retroactivity was denied.

CONCLUSION

Hamilton should not be denied relief of the fundamental constitutional right announced in *Hurst v. Florida* and *Hurst* based on untimeliness. Further, to ensure reliability and protect Hamilton's fundamental constitutional rights, I would apply *Hurst* retroactively to his sentence and reverse for a new penalty phase based on the jury's nonunanimous recommendation for death. Accordingly, I dissent.

An Appeal from the Circuit Court in and for Hamilton County,
David William Fina, Judge - Case No. 241994CF000150CFAXMX

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EXHIBIT 2

IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT
IN AND FOR HAMILTON COUNTY, FLORIDA

STATE OF FLORIDA, CASE NO.: 1994-150-CF (A)

vs.

RICHARD EUGENE HAMILTON,
Defendant.
_____/

ORDER DENYING SUCCESSIVE RULE 3.851 MOTION AS UNTIMELY

THIS CAUSE comes before this Court upon the Defendant's "Successive Motion to Vacate Judgments of Conviction and Sentence," filed with the Hamilton County Clerk of the Court on August 24, 2016, and the State's "Answer to Successive Motion to Vacate Judgments of Conviction and Sentence," filed with the Hamilton County Clerk of the Court on September 13, 2016. The Defendant, through his collateral counsel, sought to file a reply to the State's answer, which the State objected to, arguing that Rule 3.851 does not explicitly allow for such replies. On Friday, November _, 2016, this Court conducted a case management hearing to determine whether an evidentiary hearing on the successive motion was necessary, whether the Defendant's reply to the State's response was legally permissible, and whether the requests for additional public records under rule 3.851(i) were still pending and in need of judicial action.

At the start of the case management hearing, the defense moved for a continuance under the belief that the Florida Supreme Court would shortly be issuing a ruling regarding the retroactivity of the Hurst decision. The State objected, and this Court orally denied the Defendant's *ore tenus* motion for a continuance.

Next, the Defendant's collateral counsel gave a brief overview of the timeline of facts that provides the underpinnings for the Defendant's main claim that the entire initial postconviction proceeding in this case was "flawed," which resulted in no meaningful state or federal review of the death sentence imposed and that this Court has the "right to do equity" and grant a new postconviction proceeding in light of the allegation that the Defendant did not receive a "reliable postconviction process."

The State argued that the motion was procedurally barred as untimely because it was filed eighteen years after the mandate issued and none of the three exceptions articulated in rule 3.851(d)(2)(A)-(C) were alleged or are otherwise applicable. Accordingly, the instant successive 3.851 motion "shall be dismissed."

This Court inquired about any legal authority to support the Defendant's "equity" claim, and the Defendant's collateral counsel explained that various sections of chapter 27 were violated because the

original trial court in this matter did not properly oversee the capital collateral counsels; and that Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985), provides authority as it was a case where a new appeal was ordered because appellate counsel did not render effective service during the appeal; and that the Fourth, Fifth, and Sixth Amendments by way of the Fourteenth Amendment support the equity claim. Moreover, the defense alleged that the motion was timely filed as it was submitted within one year of Capital Collateral Regional Counsel's appointment to this case.

The State alleged that the Wilson case did not support the Defendant's claim because it was at a different procedural posture and that it was premised on the improper conduct of appellate counsel for which Florida law recognizes a claim of ineffective assistance, unlike a claim of ineffective assistance of collateral counsel. Moreover, the State argued that there is no remedy of an evidentiary hearing for this claim.

And finally, regarding the Defendant's reply to the State's response, this Court determined that it was not legally permissible, but that the arguments contained within the response were put forth by the Defendant's collateral counsel at this hearing and were therefore being considered.

This Court, having considered the motion, the State's response, and the arguments submitted at the case management conference, finds that the Defendant's August 24, 2016, successive 3.851 motion is untimely as it was submitted eighteen years after the mandate issued and that none of the three articulated exceptions apply. Moreover, the Defendant's equity-based claim does not render the motion timely.

Therefore, it is hereby **ORDERED**:

The Defendant's "Successive Motion to Vacate Judgments of Conviction and Sentence" is hereby **DENIED** as untimely. The Defendant shall have thirty days from entry of this order to appeal to the Florida Supreme Court.

DONE in Suwannee County, Florida, on December 5th, 2016.

DAVID W. FINA, CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Order was furnished by U.S. Mail/hand delivery/electronic mail, on November ____, 2016, to the following:

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EXHIBIT 3

IN THE SUPREME COURT OF FLORIDA

Case No. SC17-42
Lower Court Case No. 94-150-CFA

RICHARD EUGENE HAMILTON,
Appellant,
v.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRD JUDICIAL CIRCUIT, IN AND
FOR HAMILTON COUNTY, STATE OF FLORIDA

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PRELIMINARY STATEMENT

This is the appeal of the Third Judicial Circuit in and for Hamilton County's final order denying Hamilton's "Successive Motion to Vacate Judgments of Conviction and Sentence."

References to the record on appeal from the successive postconviction proceeding are made with the letters "SPCR" followed by a "p," followed by the page number. References to the supplemental record on appeal from the successive postconviction proceeding are made with the letters "SPCR" followed by "SV1," followed by a "p," followed by the page number.[1] References to the record on appeal from the initial postconviction proceeding are made with the letters "PCR," followed by the record volume number, followed by a "p," followed by the volume page number or numbers. References to the record on appeal from the original trial are made with the letters "TR," followed by the record volume number, followed by a "p," followed by the volume page number or numbers. For ease of reading, the Appellant is referred to as "Hamilton" or "defendant," and the Appellee is referred to as "state" or "prosecution."

[1] As of the date of filing, the Clerk of the Court for Hamilton County has not complied with this Court's order and filed the supplemental record on appeal that was due on April 20, 2017.

REQUEST FOR ORAL ARGUMENT

Appellant requests the opportunity to present oral argument pursuant to Fla. R. App. P. 9.320. This is a capital case, the resolution of the issues presented will determine whether Hamilton will live or die, and a complete understanding of the complex factual, legal, and procedural history of this case is critical to the proper disposition of this appeal.

STATEMENT OF THE CASE AND FACTS

Hamilton was indicted in the Circuit Court for Hamilton County, Florida, for one count of first-degree murder, sexual battery, robbery and kidnapping. He was convicted at trial, and the jury recommended the death penalty by a vote of 10-2. Judge E. Vernon Douglas sentenced Hamilton to death. The judgment was affirmed on appeal. *Hamilton* v. State, 703 So. 2d 1038 (Fla. 1997). The United States Supreme Court denied certiorari. *Hamilton v. Florida*, 118 S. Ct. 2377 (1998). The Florida Supreme Court's mandate issued on February 9, 1998.[2]

The first verifiable appointment of counsel for Hamilton at postconviction was the appointment of registry attorney Gary Printy on November 18, 1998, more than nine months after the mandate issued.[3] (SPCR, p. 25). Printy wrote the court

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[2] More than a *year* elapsed between the issuance of the mandate and the appointment of conflict-free counsel.

[3] The order references notification by CCRC-North that registry counsel needed to be appointed. However, there is no record of CCRC-North's appointment in the

on December 1, 1998, and advised that he did not have time to represent Hamilton. (SPCR, p. 27). Robert Norgard was appointed to replace Printy, but he moved to withdraw as counsel on December 30, 1998, because he already represented a death row inmate in a postconviction proceeding and did not have time to represent Hamilton. The court did not rule on Norgard's motion until February 18, 1999. (SPCR, pp. 29, 31-32) when he appointed Charles Lykes just four months prior to the due date for the Rule 3.851 motion and Hamilton's federal deadline under 28 U.S.C. §2254 of June 28, 1999. (SPCR, p. 34).[4] Lykes entered his appearance a month later on March 18, 1999. (SPCR, p. 315).

Lykes filed multiple motions for extension of time to file Hamilton's 3.851 motion. His first motion for extension of time was filed on June 17, 1999, ten days before the year deadline for filing Hamilton's state postconviction claims and the federal habeas deadline. (SPCR, pp. 37-41, 43-47).[5] He filed additional motions for

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electronic progress records of the Florida Supreme Court and the Hamilton County Clerk of the Court's Office before August 24, 2015, when the undersigned counsel's office was appointed to replace registry attorney George W. Blow, III. CCRC-North never filed a notice of appearance or any pleadings on behalf of Hamilton. The notification by CCRC-North that the trial court referred to is not found in the record on appeal.

[4] To toll the federal statute of limitations, Hamilton must have filed his federal habeas petition by June 28, 1999, if no state postconviction motion was properly filed.

[5] Though Lykes stated that he received 7,780 pages of records and spent approximately 21 hours reviewing those records (SPCR, pp. 49-57, 59-67), he only averaged two and a half hours of work per week on Hamilton's case and did not

extensions of time on June 28, 1999 and October 8, 1999. (SPCR, pp. 73-77). The court granted all of Lykes's motions for extension of time without objection from the state and extended the deadline for filing the 3.851 motion until November 5, 1999. None of the motions certified that Hamilton had been consulted and agreed with the request. Lykes then improperly filed a five-page motion for postconviction relief[6] at the trial court's office in Columbia County, instead of in Hamilton County where the case was prosecuted, on November 8, 1999, over four months after Hamilton's federal deadline expired on June 28, 1999 and three days after his extended state court deadline. (PCR.V1, pp. 3-7).

In March 2000, Hamilton wrote to the court expressing concern about Lykes's handling of his case. (SPCR, p. 317). Hamilton's appellate attorney, Dave Davis, reviewed the motion filed by Lykes and wrote a letter to the trial court and expressed his concerns regarding Lykes's inattention to Hamilton's case and the possible

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work at all on Richard Hamilton's case for a 39-day period from his appointment to when he filed his first motion for extension of time.

[6] After the motion was filed, it was the subject of public criticism, including a January 6, 2000, memorandum from Elizabeth Semel, the director of the American Bar Association Death Penalty Representation Project regarding Florida's Death Penalty Reform Act (SPCR, pp. 108-122), and an article in the St. Petersburg Times. (SPCR, pp. 103-106). Ms. Semel observed that the motion was devoid of citations to the trial or appellate record or judicial authority, raised improper issues for postconviction consideration, and failed to raise constitutional issues that should have been considered. (SPCR, pp. 108-122).

waiver of claims in federal court. (SPCR, pp. 125-126).[7] At the status conference on March 29, 2000, Lykes was advised by the court that Hamilton had written the court and complained about Lykes's representation. (SPCR, p. 317; PCR.V4, p. 2). Lykes was asked to address the letter from Dave Davis and told the court that after speaking to Davis, he (Lykes) needed to look into amending the motion and requested 60 days to do so. (PCR.V4, p. 3). Lykes said he was contacted by Davis after Hamilton insisted Lykes visit him, which Lykes said he could not do. (PCR.V4, p. 3). Lykes told the court that he did not think he was "going to have a problem with Hamilton" but wanted to look into the issue raised by Davis and see Hamilton and that he would get back to the court if there was a problem. (PCR.V4, p. 3). The court made no further inquiry on the issues raised by Davis and Hamilton and granted the 60-day extension from the date of the hearing. The court did not ask counsel about the waiver of the federal deadline. The state requested a hearing on Hamilton's concerns about Lykes's representation after the 60-day extension. (PCR.V4, pp. 4-5).

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[7] In the letter, Davis wrote that Lykes's had done little in the case except to file multiple motions to extend the time for filing the postconviction motion and a "clearly deficient motion that may have irreparably hurt his client's case not only in state court but precluded him from filing a petition for writ of habeas corpus in federal court." *Id.* Davis asked the court to inquire of Lykes at an upcoming status conference to determine if Lykes had the "time, knowledge and resources to adequately represent Hamilton" so as to "ensure that Hamilton has counsel who can zealously represent him in this very serious matter." (SPCR, p. 126).

In April 2000, Hamilton wrote to the court again expressing concern about Lykes's handling of his case citing to a motion filed by Capital Collateral Regional Counsel in the Florida Supreme Court that mentioned Lykes's missing state and federal deadlines in his case.[8] The court did nothing. Lykes filed an amended motion for postconviction relief on June 28, 2000. (PCR.V1, pp. 13-34).

Lykes filed a motion for clarification of his status as counsel on October 30, 2000 in which he alleged that he was appointed late, did not have the trial record until April 20, 2000 (he did not realize he did not have the trial record until October 1999), and then listed several examples of negative publicity about his representation of Hamilton causing Lykes to be concerned about a conflict of interest between himself and his client. (PCR.V1, pp. 42-55).

On September 19, 2000, Hamilton filed a motion requesting the removal of Lykes and the appointment of qualified postconviction counsel. (SPCR, pp. 128-134). At the request of the state, a *Nelson* hearing[9] was held on December 14, 2000, nearly nine months after the issue of Hamilton's concerns with Lykes were discussed at the March 29, 2000 status conference. (PCR.V1, pp. 105-107). Hamilton's chief

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[8] Hamilton wrote the court on at least six occasions. The only letter from him that appears in the initial postconviction record on appeal is dated June 14, 2000 that addressed a confrontation clause violation he wanted raised (Hamilton included a cover letter to the clerk and a copy of a cover letter he sent to Lykes). (PCR.V1, pp. 9-12).

[9] *Nelson v. State*, 274 So. 2d 256 (Fla. 4th DCA 1973).

concern was whether Lykes had forfeited Hamilton's right for habeas corpus review in federal court. Lykes, Dekle, Yates and the court assured Hamilton that his state court motion was properly filed and that the federal clock would not start to run until the state court proceeding was completed. (PCR.V3, pp. 9-12, 16-18,, 21). The state subsequently successfully moved to dismiss Hamilton's federal habeas petition on the grounds that it was was not properly filed in state court. *See* N. 9, *infra.*

The court denied Hamilton's motion to fire Lykes, and stated, "You had some legitimate concerns and they have been resolved." (PCR.V3, p. 27). The court stated, "[t]hen the state has on the record no procedural bar has been waived in state court and no time limits. You have your full time." (PCR.V3, p. 28). The court gave Hamilton the choice of proceeding with Lykes as his counsel or representing himself. (PCR.V3, p. 27). Hamilton elected to proceed with Lykes as his counsel. (PCR.V3, p. 28). The court never inquired of Lykes or Hamilton as to a conflict of interest issue raised in Lykes's motion and his cover letter to the court.

Lykes was given an additional 30 days to file an amended motion. (PCR.V3, p. 28). Lykes filed another amended motion on February 15, 2001, a month after the deadline expired. (PCR.V1, pp. 112-137). The court held an evidentiary hearing on some claims contained in the amended petition. (PCR.V6-7, pp. 1-218). The court denied relief on May 24, 2002 (PCR.V2, pp. 291-296), and the Florida Supreme Court affirmed on June 3, 2004. *Hamilton v. State*, 875 So. 2d 589 (Fla.

2004). Prior to the Supreme Court of Florida issuing its decision on June 3, 2004, Lykes's Army Reserve unit was called up to active duty and he was deployed to Iraq. Lykes was allowed to withdraw as postconviction counsel and George W. Blow, III, was appointed on July 22, 2004. The mandate was issued August 26, 2004.

On June 14, 2005, Hamilton wrote to the then-presiding Chief Justice of the Supreme Court of Florida, Justice Pariente, regarding Blow's failure to diligently pursue Hamilton's collateral claims in state and federal court, and invoked the Court's obligation under Section 27.710, Florida Statutes, to monitor the performance of counsel assigned to capital defendants to ensure quality representation. (SPCR, pp. 136-139).

On August 26, 2005, approximately 13 months after he was appointed, registry attorney Blow filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Florida on behalf of Hamilton. On October 17, 2005, Hamilton filed a pro se Motion for Inquiry Regarding Current Assigned Postconviction Counsel, Request for Conflict-Free Counsel to be Appointed and Leave to Amend Pending Habeas Corpus Petition in the United States District Court for the Middle District of Florida. (SPCR, pp. 141-147).

Blow was relieved as counsel in the federal matter on June 26, 2006, and Mark Olive was appointed to represent Hamilton in federal court.[10] Blow was still counsel of record in state court. Blow did not take any action on behalf of Hamilton in state court until he filed a motion to withdraw as counsel in July 2015. (SPCR, pp. 149-154). At the hearing on his motion to relieve counsel on August 14, 2015, Blow admitted he never received any records on Hamilton's case, and did not do any work on Hamilton's case after he was relieved in the federal matter more than nine years prior to Blow's motion to withdraw was granted and the undersigned was appointed

[10] Olive filed an amended habeas petition on June 22, 2007. The State submitted a motion to dismiss on July 13, 2007, on statute of limitations grounds. The district court granted the state's motion on July 7, 2008. Hamilton filed a motion to alter or amend and a Notice of Pendency of Related Cases on July 17, 2008. The lower court denied the motion on July 23, 2008. Hamilton filed a Notice of Appeal and an Application for Certificate of Appealability ("COA") on August 18, 2008. The district court denied the COA request on August 19, 2008, but the circuit court granted a COA and remanded to the district court for further findings regarding whether the State should be estopped from asserting a statute of limitations defense. *Hamilton v. Secretary, DOC*, 325 Fed.Appx. 832, 2009 WL 1144018 (11th Cir. 2009). The district court conducted an evidentiary hearing, denied relief, and the circuit court affirmed. *Hamilton v. Secretary, DOC*, 410 Fed.Appx. 216, 2010 WL 5095880 (11th Cir. 2010). On March 15, 2013, Hamilton filed a motion in the district court pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. The district court denied the Rule 60(b) motion, a COA, and permission to proceed on appeal in forma pauperis. Hamilton timely filed a notice of appeal. The circuit court granted permission to proceed on appeal in forma pauperis and appointed counsel, but ultimately denied a COA. *Hamilton v. Secretary, DOC,* 793 F. 3d 1261, 2015 WL 4272094 (11th Cir. 2015). On January 25, 2016, Hamilton filed a Petition for Writ of Certiorari in the United States Supreme Court. The Supreme Court denied certiorari on April 18, 2016. *Hamilton v. Jones*, 136 S. Ct. 1661 (Mem) (2016).

to represent Hamilton (SPCR, pp. 160-162, 167-168). Blow never met with Hamilton.

The undersigned conducted an extensive investigation of Hamilton's case and filed numerous requests for additional public records pursuant to Rule 3.852. On March 17, 2016, the undersigned filed demands for additional public records for Lykes's billing records to the Pinellas County Clerk of Court, Pasco County Clerk of Court, and Hillsborough County Clerk of Court in other conflict cases. The undersigned also filed demands for additional public records for the billing records of Lykes and Blow to the Columbia County Clerk of Court and Hamilton County Clerk of Court. (SPCR, SV1, p. ___). The trial court denied the requests. (SPCR, p. 421). On April 29, 2016, the undersigned filed demands for additional public records to the Judicial Administrative Commission, Division of Elections, and Judicial Qualifications Commission. (SPCR, SV1, p. ___). The trial court denied the requests. (SPCR, p. 421).

On June 6, 2016, the undersigned filed a Petition for Writ of Habeas Corpus on Hamilton's behalf in the Florida Supreme Court based on *Hurst v. Florida*, 136 S. Ct. 616 (2016). The Florida Supreme Court denied the writ on March 3, 2017, citing its previous decision in *Asay v. State*, 210 So. 3d 1 (Fla. 2016).

Undersigned counsel filed a Successive Motion to Vacate Judgments of Conviction and Sentence on August 24, 2016. (SPCR, pp. 1-23). Claim 1 of the

successive 3.851 motion was the systemic or institutional failure of the trial court, the Florida Supreme Court, and the state of Florida to ensure a full and fair postconviction process and prevent a blown federal habeas corpus deadline. Claim 2 was a *Hurst* claim based on *Hurst v. Florida*, supra. A *Huff* hearing[11] was held on November 18, 2016. The state argued Hamilton's successive Rule 3.851 motion was procedurally barred. The trial court heard argument on Claim 1, but refused to hear argument on Claim 2 because of the then-pending petition for writ of habeas corpus before the Florida Supreme Court. (SPCR, pp. 386-417). On December 5, 2016, the circuit court entered an order summarily denying Hamilton's motion as procedurally barred. (SPCR, pp. 418-420). Hamilton now timely files this appeal.

STANDARD OF REVIEW

Hamilton sought an evidentiary hearing pursuant to Fla. R. Civ. P. 3.851 for all claims requiring a factual determination. "A postconviction court's decision regarding whether to grant a rule 3.851 evidentiary hearing depends on the written materials before the court; therefore, for all intents and purposes, its ruling constitutes a pure question of law and is subject to de novo review." *Tompkins v. State*, 994 So. 2d 1072, 1081 (Fla. 2008); see also *State v. Coney*, 845 So. 2d 120, 137 (Fla. 2003). "In reviewing a trial court's summary denial of postconviction

[11] *Huff v. State*, 622 So. 2d 982 (Fla. 1993

relief, this Court must accept the defendant's allegations as true to the extent that they are not conclusively refuted by the record." *Id.*; see also *Rolling v. State*, 944 So. 2d 176, 179 (Fla. 2006).

SUMMARY OF THE ARGUMENT

Hamilton has suffered from the institutional and systemic failures of the trial court, the State of Florida, and this Court, in his initial postconviction proceeding, resulting in an unreliable process, which substantially undermine confidence in his conviction and sentence of death. This Court should permit Hamilton an opportunity to start the postconviction process anew and prove his claims.

I. Hamilton's successive 3.851 motion was timely filed because the motion was filed within one year of the undersigned's appointment to represent him in Florida state courts after over nine years of abandonment by former counsel George Blow.

II. Hamilton's conviction and sentence should be reversed due to the institutional failures of the trial court, this Court, and the State of Florida to ensure a full and fair postconviction process and prevent a blown federal habeas deadline.

III. Hamilton's demands for additional public records related to the representation of Lykes and Blow, and Judge Douglas's judicial candidacy and tenure should have been granted by the trial court because these records are related to claims raised in his successive 3.851 motion and are reasonably calculated to lead to the discovery of admissible evidence.

IV. Hamilton is entitled to the retroactive application of *Hurst v. Florida* and *Hurst v. State* under Florida's *Witt* test and fundamental fairness doctrine, as well as federal principles of retroactivity.

ARGUMENT I

THE TRIAL COURT ERRED IN SUMMARILY DENYING HAMILTON'S SUCCESSIVE 3.851 MOTION AS PROCEDURALLY BARRED.

Hamilton's claim of the institutional failure of the trial court, the state and the Florida Supreme Court in his initial postconviction proceeding is timely filed. The one-year clock by which a capital defendant may file a successive motion pursuant to Rule 3.851 cannot start ticking until collateral counsel is in place. Undersigned counsel was appointed to represent Hamilton by an order dated August 24, 2015. She filed the successive Rule 3.851 motion within one year of her office's appointment on August 24, 2016. Thus, the motion is timely. Indeed, the idea of the one-year clock was premised upon the assumption that there would be collateral counsel in place. In the 1993 Court Commentary to Rule 3.851, the Supreme Court Committee on Postconviction Relief in Capital Cases recognized that "to make the process work properly, each death row prisoner should have counsel available to represent him or her in postconviction proceedings."

Hamilton was without counsel in state court for nearly 11 years, from attorney George Blow's appointment and abandonment in 2004 until the appointment of undersigned counsel in August of 2015. Undersigned counsel diligently investigated

the circumstances of Hamilton's original postconviction proceeding and the systemic neglect and errors committed by the trial court, prior postconviction counsel, the state, and this court's failure to provide adequate procedural safeguards for the postconviction process and to monitor the original postconviction process, and filed the successive 3.851 motion within one year of her appointment.

The Florida Supreme Court recognized that the statutory right to postconviction counsel necessarily encompasses a right to effective assistance by the postconviction attorney assigned to the case. *Spaziano v. State*, 660 So. 2d 1363, 1370 (Fla. 1995) (recognizing that Spaziano was entitled to "adequate counsel and resources."); *Spalding v. Dugger*, 526 So. 2d 72 (Fla. 1988) ("each defendant under sentence of death is entitled, as a statutory right, to effective legal representation by the capital collateral representative in all collateral relief proceedings.") *Spalding* was a promise made to death-sentenced individuals like Hamilton that effective representation would be provided. What the Florida Supreme Court did not advise Hamilton was that, for the right it had recognized in *Spalding*, there would be no remedy. So death-sentenced individuals like Hamilton relied, to their detriment, on the Florida Supreme Court's promise that effective representation would be provided in both state and federal court, not knowing that the promise was empty. As a result,

34 death row inmates in Florida lost their opportunity to argue the Great Writ and three have been executed.[12]

As to the systemic failure to ensure Hamilton had collateral counsel as Section 27.7001 et seq. of the Florida Statutes promised: "[T]he government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Marbury v. Madison*, 1 Cranch 137, 163 (1803).

Attorney abandonment cannot be counted against the client. Here, Blow abandoned Hamilton, insofar as he failed to notify the court that he was no longer actively representing Hamilton, and that Registry counsel needed to be appointed. See *Maples v. Thomas*, 132 S. Ct. 912 (2012). In *Maples*, the Court reasoned:

> A markedly different situation arises, however, when an attorney abandons his client without notice, and thereby occasions the default. In such cases, the principal-agent relationship is severed and the attorney's acts or omissions "cannot be fairly attributed to [the client]. Nor can the client be faulted for failing to act on his behalf when he lacks reason to believe his attorneys of record, in fact, are not representing him.

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[12] *See Lugo v. Sec'y, Fla. DOC*, 750 F. 3d 1198 (2014), (Martin, CJ, concurring), and Florida leads the nation in blown federal habeas corpus deadlines with at least 34. *See id.* at 1212, 1216. To date, Chadwick Banks, Paul Howell, and Juan Chavez have been executed without the opportunity to avail themselves of the "Great Writ," according to Marshall Project report entitled *Death by Deadline: How Bad Lawyering and an Unforgiving Law Cost Condemned Men Their Last Appeal* (2014). Indeed, the report cites to Hamilton's case as one where judicial errors compounded those of the attorneys. *Id.* at 4.

(emphasis added). (internal citations omitted). *Maples*, 132 S. Ct. at 914-15. Blow had a duty to withdraw from the case and obtain state collateral counsel for Hamilton. Having not informed the court that he was no longer representing Hamilton as his state collateral counsel, Blow effectively abandoned his client. As long as Blow remained counsel of record, the court was led to believe that Blow was continuing his representation of Hamilton. However, unbeknownst to the court, Hamilton was in fact without a functioning attorney of record in his state proceedings.

The United States Supreme Court has held that: "[t]he fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case." *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988). *See Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014) ("Persons facing the most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution."). Hamilton has not been afforded a fair opportunity to show that the Eighth Amendment prohibit his execution. This claim was timely filed and is not procedurally barred.

ARGUMENT II

THE TRIAL COURT ERRED IN SUMMARILY DENYING HAMILTON'S CLAIM OF THE INSTITUTIONAL FAILURE OF THE TRIAL COURT, THE STATE, AND THE FLORIDA SUPREME COURT.

Hamilton's Claim 1 of his successive postconviction motion is not an ineffective assistance of postconviction counsel claim. It is a claim based in the equitable power of the Florida courts to right the myriad failures of the trial court that denied Hamilton a full and fair state postconviction process and resulted in a blown federal habeas corpus deadline. *See Wilson v. Wainwright*, 474 So. 2d 1162 (Fla. 1985) (Defendant was entitled to a new direct appeal where his appointed counsel was ineffective).

Hamilton's postconviction proceeding was fraught with procedural and substantive errors, which combined, deprived him the due process right to a fundamentally fair and constitutionally reliable hearing that directly resulted in a blown federal habeas deadline. The failures were institutional: from the trial court, Judge Douglas, who failed to timely appoint competent counsel and to monitor the progress of the case and the conduct of counsel that permitted one registry lawyer, Lykes, to miss Hamilton's federal habeas corpus deadline; to his successor registry counsel, Blow, who abandoned Hamilton's case for nine years; to the prosecutors, Assistant State Attorney Dekle and Assistant Attorney General Yates, who assured Hamilton and the court that his state court postconviction motion had been properly filed and then successfully argued, for dismissal of his federal habeas petition

because it was not properly filed; to the Florida Supreme Court that failed to provide adequate safeguards capital defendants in their postconviction proceedings .[13]

The decision below unjustly penalizes Hamilton for the deficiencies of of of a trial court that failed to appoint qualified counsel in a timely manner and then ignored obvious signs that Hamilton was not properly represented, the prosecution that represented to the court and to Hamilton that his state court motion was properly filed and then successfully argued that his federal habeas petition should be dismissed because the state court motion was tardy, and this court for failing to put in place sufficient safeguards for the proper representation of death-sentenced and failing to monitor the conduct of the postconviction process.

In the 1990s, this Court grappled with delays in the postconviction process and problems in providing qualified counsel to death-sentenced defendants in a timely manner, among other things.[14] It established Rule 3.851 in 1993 specifically for capital postconviction cases. The rule cut in half the two-year filing period for filing for postconviction motions in felony cases. The justification for the one-year

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[13] In 1997, this Court required the chief judge of each circuit to submit quarterly reports on the progress of all capital postconviction cases. The only reports filed by the chief judge in Hamilton's circuit while his initial postconviction case was pending were filed in April 1999 and July 2002. (SPCR, pp. 357-362). The next report was filed February 2010 and failed to report Blow's abandonment of Hamilton in state court. (SPCR, pp. 363-365).

[14] Often counsel was not appointed until a death warrant was issued so postconviction issues had not been raised or litigated, resulting in long delays.

filing period was that counsel would be appointed almost immediately—at the time the mandate issued or when the defendant's petition for certiorari was denied by the United States Supreme Court.

There were not enough qualified lawyers to handle the cases, especially after the federal government defunded a volunteer lawyer service that had assisted the statewide Capital Regional Counsel. This Court had to grant multiple stays because of the inability of CCR to file within the year deadline. The legislature created the registry counsel to help fill the need for capital postconviction counsel in 1998. Unfortunately, there was little oversight over the conduct of registry counsel.

A. The trial court errors.

Trial courts have a duty to timely appoint qualified counsel to represent capital defendants and monitor the performance of counsel. *See* §§ 27.702(1)-(4), Fla. Stat. (1998) and § 27.710, Fla. Stat. (1998) and *Wilson v. Wainwright*, 474 So. 2d 1162, 1165 (Fla. 1985) (noting that "[a] perfunctory appointment of counsel without consideration of counsel's ability to fully, fairly, and zealously advocate the defendant's cause is a denial of meaningful representation which will not be tolerated. The gravity of the charge, the attorney's skill and experience and counsel's positive appreciation of his role and its significance are all factors which must be in the court's minds when an appointment is made."), and Amendments to Florida Rules of Criminal Procedure 3.851, 3.852, and 3.993, and Florida Rule of

Judicial Administration 2.050, 797 So. 2d 1213 (Fla. 2001) ("requiring that [t]here must be active and reasonable judicial oversight of the postconviction process to ensure that the defendant's claims are timely investigated and fairly and efficiently processed once presented.")

1. The trial court failed to monitor the progress of the case.

The court had a duty to monitor the progress of capital cases under Fla. R. of Jud. Admin. 2.050(b)(7). That rule took effect in 1996 and required the chief judge of each circuit to file quarterly reports on the progress of all capital cases in its circuit. *See also Allen v. Butterworth*, 756 So. 2d 52, 58 (Fla. 2000). Only one such report was filed in Hamilton's case.

The one-year deadline for Hamilton, through counsel, to file his postconviction motion began to run on June 26, 1998, the date the conviction was final under Fla. R. Civ. P. 3.851. Under the rule in existence at the time, counsel should have been appointed to represent Hamilton on his postconviction review within thirty days of the date certiorari was denied, or by July 26, 1999. *See* Fla. R. Crim. P. 3.851(b)(3) and In re Rule of Criminal Procedure 3.851 (Collateral Relief After Death Sentence Has Been Imposed) and Rule 3.850 (Motion to Vacate, Set Aside, or Correct Sentence), 626 So. 2d 198 (Fla. 1993).

By the time Lykes was finally appointed to represent Hamilton in his postconviction proceeding, the one-year deadline for filing a 3.851 motion was

rapidly approaching.[15] Lykes had less than four months to review records previously deposited with the Repository pursuant to Fla. R. Crim. P. 3.852, gather additional public records, study the record on appeal, conduct an independent investigation of the case, request appointment of experts and investigators, and prepare and file a motion for postconviction relief.

Had the trial court monitored Hamilton's capital postconviction proceeding as he was required to do by Fla. R. of Jud. Admin. 2.050(b)(7), he would have been aware that Hamilton's state and federal deadlines were looming, would have appointed counsel sooner, and would have discovered counsel could not perform the necessary investigation to prepare a proper 3.851 motion, file it on time, and preserve Hamilton's federal habeas corpus deadline.

2. The trial court failed to make the required findings that counsel was qualified.

At the time Lykes was appointed, Section 27.710(5), Fla. Stat. (1998), required the court appointing counsel in capital postconviction cases to "give priority to attorneys whose experience and abilities in criminal law, especially in capital proceedings, are known by the court to be commensurate with the responsibility of representing a person sentenced to death." That section also required the court to "make specific findings that the appointed counsel meets the statutory requirements

[15] *See* Fla. R. Crim. P. Rule 3.851(b)(1), (provides one-year deadline for filing motion for postconviction relief from the date the conviction is final).

and has high ethical standards necessary to represent a person sentenced to death." *Id.* The trial court made no such findings in the orders appointing attorneys Printy, Norgard or Lykes. None of these lawyers regularly practiced in the Third Judicial Circuit where the court presided and could have observed them.[16] Although the three lawyers were on the registry list, the trial court made no independent findings of record that the lawyers had the necessary experience, abilities, and high ethical standards necessary to undertake representation of a death-sentenced defendant in state and federal court nor did he inquire of their availability to accept the appointment.

In *Wilson v. Wainwright*, 474 So. 2d 1162 (Fla. 1985), the Florida Supreme Court awarded the defendant a new appeal where it found appellate counsel ineffective under the *Strickland* standards and urged trial courts to carefully consider the qualifications of counsel before appointment, and not to appoint counsel,

> ...[w]ithout due recognition of the skills and attitudes necessary for effective appellate representation. A perfunctory appointment of counsel without counsel's ability to fully, fairly, and zealously advocate the defendant's cause is a denial of meaningful representation, which will not be tolerated. The gravity of the charge, the attorney's skill and experience and counsel's positive appreciation of his role and its significance are all factors which must be in the court's mind when an appointment is made.

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[16] Printy was served with the order appointing him in Tallahassee (SPCR, p. 25), Norgard was served with the order in Bartow (SPCR, p. 29), and Lykes was served with the order in Clearwater. (SPCR, p. 34).

Id. at 1164-65. Had the court made the required findings under Section 27.710(5), Fla. Stat. (1998) before appointing Lykes to represent Hamilton in his initial postconviction proceeding, he would have learned that Lykes had U.S. Army reserve duty from April 13-14, April 17-23, May 14-16, June 11-13, and June 18-20; a three-day death penalty seminar from March 11-13; a federal criminal practice seminar on April 30th; oral argument in Atlanta in a federal case from March 15-17; a trial in state court from March 30-April 7, April 12-17, June 7-8, and June 21-22; sentencing hearings in four federal cases in May and June; and briefs due in three state court cases in July and August. Had the trial court met the requirements of Section 27.710(5), Fla. Stat. (1998), he would have known that Lykes did not have the time or resources to represent a capital defendant in his postconviction proceeding and appointed competent, qualified counsel.

3. The trial court failed to monitor Lykes's representation.

The court had a duty to monitor the performance of postconviction counsel. *See Wilson*, *supra*, at 1164-1165 ("Appointment of appellate counsel for indigent defendants is the responsibility of the trial court. We strongly urge trial judges not to take this responsibility lightly or to appoint appellate counsel without due recognition of the skills and attitudes necessary for effective representation").

There were multiple events and omissions that should have led the court to question whether Lykes had the time and the ability to competently and zealously

represent Hamilton. In this time-sensitive proceeding, Lykes demonstrated no sense of urgency. His notice of appearance was filed a month after his appointment. (SPCR, p. 353). He did not request the trial court record on appeal that had been prepared years earlier for the direct appeal and was available for the asking, nor did he review it prior to filing an initial five-page motion for postconviction relief. Lykes did not move for appointment of any experts (except for reappointment of the psychiatrist who briefly examined Hamilton two weeks before trial), nor did he request the assistance of an investigator. He did not visit Hamilton until November 8, 1999, nearly nine months after his appointment, and five months after the state and federal deadline had expired, for the purpose of meeting him, explaining the process of the case, and securing Hamilton's verification of the Rule 3.851 motion. According to his sworn fee request, Lykes spent a total of 2.7 hours drafting the initial postconviction motion for Hamilton, which he filed in the wrong court, Columbia County, on November 8, 1999. (PCR.V1, pp. 1-2).

Although the motion filed by Lykes was referred to as a "placeholder" motion by Lykes and the State at the December 14, 2000 hearing (PCR.V3, pp. 5, 17), Lykes did nothing on the case for more than three months after filing it in November 1999. In fact, he was not prompted to move to amend the motion until he spoke to Davis, Hamilton's appellant attorney, as evidenced by this statement by Lykes at the March 29, 2000 status conference, "[A]nd apparently, as a result of his (Davis's) discussion

with Hamilton, there – there is at last one area that I would like to as Your Honor for leave of 60 days to look into and amend my petition." (PCR.V3, p. 3). He filed an amended motion on June 28, 2000, nearly 30 days after the expiration of the 60-day extension granted by the court at the March 29, 2000 status conference. (PCR.V1, pp. 13-34). From that statement and the errors and omissions by Lykes recounted above and in Hamilton's successive petition, Lykes was not competent to represent Hamilton in his postconviction proceeding, and the trial court ignored the misconduct, which resulted in an unreliable postconviction process.

Moreover, the court received at least six letters from Hamilton and a letter from Davis, Hamilton's attorney at his direct appeal, questioning Lykes's representation of Hamilton. At the March 29, 2000 status conference, the only inquiry the court made of Lykes about the allegations by Davis was to ask him who Davis was. (PCR.V4.2). The trial court was made aware of an ABA report and news article criticizing Lykes's representation, particularly the issue of the blown deadline. The court did not ask Lykes if he had conducted any research on the deadline issue (nor did the court conduct its own research). (PCR.V4). Lykes never billed for any research on the federal issue, but consistently protested against the unfair accusations made against him for blowing Hamilton's federal deadline.

The letters from Davis and Hamilton should have triggered an immediate hearing under *Nelson v. State*, 274 So. 2d 256 (Fla. 4th DCA 1973). Instead, the case

languished for more than eight months before a *Nelson* hearing was finally conducted on December 14, 2000 at the request of the state.

In *Nelson*, the court held that when a defendant asks for discharge of his appointed counsel before trial on grounds that counsel has not rendered effective assistance, the court must inquire of the defendant and counsel to determine if counsel has made "a reasonable investigation into the facts of the case and to acquaint himself with the law pertinent to the facts. In addition, effective counsel should be free of any influence or prejudice which might substantially impair his ability to render independent legal advice to his indigent claim." *Id.* at 258-259.

At the *Nelson* hearing, Lykes, Dekle, Yates and the court each assured Hamilton that the state court motion was properly filed and that the federal claim could not commence until the state court proceeding was concluded. (PCR.V3, pp. 11, 16, 21). Each of the lawyers professed no knowledge of what the federal law was and had no idea what the federal court would do with Hamilton's eventual habeas claim. (PCR.V3, pp. 9, 11, 18, 20, 24). No one researched the issue but all made representations that the motion was properly filed. (PCR.V3, pp. 12, 17, 18, 20). They were wrong.

The court summarily dispensed with Hamilton's complaint that Lykes's had blown his federal deadline after hearing from counsel. The court relied upon the state and defense counsel's erroneous "beliefs", unsupported by rudimentary research,

that Lykes's state court motion would be deemed timely by the federal court despite it being filed late. He told Hamilton, "You understand we have to exhaust all state remedies before your one year runs in the federal system." (PCR.V3, p. 16). Hamilton continued to question whether his federal deadline was blown. (PCR.V3, pp. 16-22). The court told him, "It has been resolved" to which Hamilton responded, "If you say so, that's good enough for me." (PCR.V3, p. 22). The court then assured Hamilton the decision was on the record and "could not be reversed." *Id.*

Had anyone other than Hamilton questioned whether the motion was timely and thus properly filed under AEDPA, the obvious answer would have been that it was untimely and did not toll the federal deadline. Had the court or counsel researched the issue, the court would have been compelled to find the failure of counsel to timely file the motion to preserve Hamilton's right to file a federal habeas corpus petition was grounds for finding that counsel had rendered deficient representation and that counsel should have been discharged under *Nelson*. *Nelson* holds that the trial court should discharge counsel if there is "reasonable cause to believe counsel is not rendering effective assistance to the defendant." *Id.* at 258. Missing a filing deadline is ample evidence of deficient representation.

There is no indication of record that the court conducted any research on how to calculate the federal deadline nor did he ask counsel for memoranda on the issue. He had before him a letter from an appellate lawyer who had taken the time and

effort to review the court file and visit Hamilton that voiced concerns about blown state and federal deadlines and Lykes's competence to represent Hamilton, a letter from Hunt, Hamilton's trial attorney, who informed the court that there was no 3.851 motion in the court file, and letters from Hamilton that implored the court to take action because the ABA and St. Petersburg Times had highlighted Lykes's tardy, ill-pled motion as an example of how death row inmates were not being properly represented by registry counsel in Florida state court postconviction cases.

Hamilton did not "agree" that Lykes should continue to represent him at the conclusion of the *Nelson* hearing. Hamilton's "agreement" to continue with Lykes as his counsel was based upon the trial court's erroneous conclusion and assurances that no deadlines had been blown. Hamilton relied on those assurances and when faced with the choice given to him by the court of proceeding with Lykes or representing himself in capital postconviction proceedings, Hamilton chose to be represented by counsel. (PCR.V3, pp. 27-28).

Most importantly, the court also failed to inquire into a potential conflict of interest between Hamilton and Lykes due to the negative publicity against Lykes related to the blown deadline issue at the December 14, 2000 hearing. Lykes alleged his concerns in his motion for clarification of his status and in his cover letter he sent with his motion. (PCR.V1, pp. 42-55). Lykes had concerns that the fallout from publicized accusations that he was incompetent and had forfeited Hamilton's federal

habeas rights had injured him (Lykes) financially and professionally and damaged his relationship with Hamilton to the point that he was not certain that he could continue to represent him. (PCR.V1, pp. 44-45). Lykes alleged he had been "personally injured" by the news accounts and the ABA memorandum (PCR.V1, p. 51) and feared it had negatively affected his relationship with his client. (PCR.V1, p. 44). This should have prompted an inquiry by the court of Lykes and Hamilton and, if the conflict existed, it would have been one of presumed prejudice. The court did not inquire of Lykes or Hamilton on a distinct disqualification issue. In conflict of interest cases, the general rule is that prejudice is presumed "if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Strickland v. Washington*, 466 U.S. 668, 692 (1984) (quoting *James v. Kentucky*, 466 U.S. at 350, 348) and *see Nelson, supra,* where this Court stated "effective counsel should be free of any influence or prejudice which might substantially impair his ability to render independent legal advice to his indigent claim." *Id.* at 258-259. Here the issue was squarely before the court in Lykes's motion for clarification and accompanying cover letter, but it was never addressed at the hearing.

4. The trial court failed to monitor Blow's representation.

The trial court also failed to monitor Hamilton's next registry counsel, Blow, who was appointed on July 22, 2004. (SPCR, p. 100). Blow was appointed to

represent Hamilton in state and federal court. The only document or pleading filed by Blow in state court in over nine years of representation was his Motion to Withdraw in July 2015. (SPCR, pp. 149-154). Blow filed a habeas petition in federal court on August 26, 2005, some 13 months after he was appointed. (SPCR, p. 149). It is unclear why it took 13 months to file the petition, as it appears that Blow simply copied Hamilton's 3.851 motion and put it in a format compliant with the federal requirements.

Blow did not meet or speak with Hamilton or any of Hamilton's friends or family members, retain a mitigation specialist or fact investigator, or hire or consult with a mental health expert; develop mitigation or investigate any aspect of Hamilton's case; obtain any documents or files from Hamilton's former postconviction attorney obtain any records from the document repository; or request any of Hamilton's medical records from North Carolina that showed he suffered at least four head injuries before he was 12 years old and suffered an eye injury at age 10 or 11 that resulted in numerous painful surgeries and the removal of his eye at 15, and other significant injuries, drug and alcohol abuse, and suicide attempts described more fully infra.

Blow was relieved as counsel in federal court on June 26, 2006, but effectively abandoned Hamilton in state court and did not visit or communicate with him or investigate his case for nine years. Blow reappeared in August 2015 when he moved

to withdraw as counsel of record in state court. (SPCR, pp. 149-154). He testified at the hearing on his motion to withdraw that he took his removal from Hamilton's federal case "as the end of my involvement in the case and have had no further involvement with Hamilton or this case in the subsequent ten years." (SPCR, p. 160). Blow further testified that he "never even received the files in this case." (SPCR, p. 162).

B. Resulting Prejudice to Hamilton

1. Counsel failed to develop compelling mitigation regarding Hamilton's mental illness and brain damage.

Had the court timely appointed competent counsel to represent Hamilton, counsel would have developed significant mitigating evidence regarding Hamilton's mental illness and brain damage at the time of the crime. Competent postconviction counsel would have collected Hamilton's medical records from Pitt County Memorial Hospital, Duke University, and Greenville Pediatric Services and discovered that Hamilton suffered three significant head injuries before he was six years old. He was hit by a car in 1965 when he was two years old, injured his head in an automobile accident in 1967 when he was four years old, and suffered a head injury that required sutures in 1968 when he was five years old.

The state argued that Hamilton's eye injury was sufficiently described at the penalty phase and thus may not be raised again in his successive Rule 3.851 motion. The transcript of Hamilton's penalty phase is a mere 84 pages long, inclusive of

closing arguments and exclusive of jury instructions and conferences with counsel outside the presence of the jury. (R.V16). The defense offered testimony from only three witnesses: Donnie Simmons, Hamilton's mother's first cousin; Timothy Hamilton, Hamilton's brother; and Ann Baker, Hamilton's former employer. Simmons's testimony about the defendant's eye injury mentioned the injury and about "five operations." (R.V16, pp. 2078-2079). Timothy Hamilton's testimony regarding the defendant's eye injury stated that Richard Hamilton became "depressed" after the injury and the loss of his eye and started running away and getting into trouble as a result, (R.V16, pp. 2086-2087) and the last witness, Ann Baker, met Hamilton when he was 17 or 18, which would have been after the loss of his eye. (R.V16, p. 2096). No testimony was offered about the initial treatments, the types of surgeries and pain endured by Hamilton, or about the resulting brain injury likely caused by the injury and attempts at treatment (SPCR, pp. 196-202). Nor was any evidence presented of the numerous head injuries suffered by Hamilton described in the successive motion. None of this was raised at the subsequent 3.851 hearing because Lykes never requested Hamilton's medical and hospital records (that are still obtainable at the time of the filing of the successive motion) nor did he ever seek psychological or neuropsychological testing.

Although Hamilton's BB gun injury in December of 1974 was discussed at trial, competent postconviction counsel would have further developed as compelling

mitigation the number of hospitalizations, procedures, and pain Hamilton endured when he was just a child. Hamilton was hospitalized numerous times for treatment of his eye. He endured such painful procedures as two cyclodialyses[17] of the left eye in 1975, trabeculectomy[18] of his right eye in 1975, cataract surgery in 1978, posterior lip sclerectomy with peripheral irridectomy in 1978, cryotherapy and drainage in 1978, and enucleation (removal) of the left eye in 1979. Hamilton lost his eye when he was a fifteen-year-old child, and competent postconviction counsel would have developed compelling mitigating evidence of what it was like to be an adolescent with an oozing, draining eye, and to later lose his eye at age fifteen and face the stigma and ridicule of other teenagers while suffering with such a handicap.

Competent postconviction counsel would have also developed compelling mitigating evidence regarding the psychological aftermath of Hamilton's eye injury and subsequent removal. He plummeted into a downward spiral of drug use and depression. He was injured in a motorcycle accident in 1977 at age 14, and had his first admission for drug use at age 14 when his father found him unconscious in the

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[17] A cyclodialysis procedure is defined as the surgical opening of a passage between the anterior chamber and the suprachoroidal space in order to reduce pressure within the eye in glaucoma. *See* medical-dictionary.thefreedictionary.com/cyclodialysis.

[18] According to WebMD, during a trabeculectomy, "a piece of tissue in the drainage angle of the eye is removed, creating an opening. The opening is partially covered with a flap of tissue from the sclera, the white part of the eye, and the conjunctiva, the clear then covering over the sclera. This new opening allows fluid to drain out of the eye, bypassing the clogged drainage channels of trabecular meshwork."

back hard with breath smelling of airplane glue. He was admitted again at age 15 in 1978 when he overdosed on alcohol and pills. Hamilton was admitted again in 1979 at age 16 for an overdose of pills and alcohol. He attempted suicide in 1980 at age 17. Hamilton was knocked out by a blow to the head with a crowbar in 1982 when he was 19 years old, and sought treatment for a cocaine and heroin addiction several months later in 1983. Hamilton attempted suicide again in 1983 when he was 20 years old after his wife left him, and was admitted again six months later in January 1984 with suicidal ideations and a heroin overdose. Hamilton suffered yet another head injury in a motorcycle accident in February 1984 when he was 21 years old. He was yet again admitted for drug and alcohol abuse and suicidal ideations in June 1988 when he was 25 years old, and admitted again three months later in September 1988 after he used three bags of heroin in one day.

Competent postconviction counsel would have obtained Hamilton's extensive medical history and provided them to a qualified mental health expert to develop compelling mitigating evidence. Hamilton's federal court attorney, Olive, obtained his medical records and hired Dr. Barry Crown to evaluate Hamilton in 2007. According to Dr. Crown, Hamilton suffers from organic brain damage and fronto-orbital syndrome, and his neuropsychological impairments impact his executive functioning, reasoning, impulsivity, and judgment. (SPCR, p. 196-202). Hamilton's jury recommended a death sentence by a vote of 10-2. Had the jury heard the

testimony of Dr. Crown and been informed of Hamilton's multiple head injuries and brain injury, the result would likely have been different.

2. Hamilton's deadline for federal habeas review was blown.

The trial court delayed the appointment of counsel to Hamilton's postconviction case, and then ultimately appointed an attorney to handle his claim with no apparent experience or knowledge of postconviction death penalty procedure. Lykes filed and received multiple extensions to file Hamilton's 3.851 motion, and in the process blew Hamilton's federal deadline for habeas review. Because postconviction counsel's incompetence forfeited any opportunity for federal review of Hamilton's state court postconviction counsel's performance, this court, as a court of equity, must ensure a reliable result by granting Hamilton a new sentencing hearing or a new postconviction proceeding as if the first one never occurred as it did in *Wilson, supra.*

The United States Supreme Court has held that: "The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in determining that death is the appropriate punishment' in any capital case." *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988), *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014) ("Persons facing the most severe faction must have a fair opportunity to show that the Constitution prohibits their execution."). The trial court's errors and omissions and the

postconviction procedure in place at the relevant times failed to ensure Hamilton's right to due process and effective assistance of counsel and resulted in a constitutionally unreliable postconviction process under the 5th, 6th, and 8th Amendments to the United States Constitution and corresponding provisions of the Florida Constitution. This Court has held that in capital postconviction cases, its "primary responsibility is to follow the law in each case and to ensure that the death penalty is fairly administered in accordance with the rule of law and both the United States and Florida Constitutions." *Allen, supra* at 59.

To hold Hamilton, a death row inmate with a high school diploma and extremely limited ability to research any legal issues, to a higher standard than his attorney, the state and the trial court were held to would be a travesty, and to deny him a new postconviction proceeding would be an injustice. Although the federal courts have declined to grant Hamilton habeas review, Florida courts may grant equity under the circumstances. Hamilton has not been afforded a fair opportunity to show that the Eighth Amendment prohibits his execution and he deserves a new postconviction proceeding as if the first had never occurred, or withdrawal of the mandate from the direct appeal.

ARGUMENT III

THE TRIAL COURT ERRED IN DENYING HAMILTON'S MOTIONS FOR ADDITIONAL PUBLIC RECORDS UNDER RULE 3.852.

Hamilton filed demands for additional public records related to the representation of Lykes and Blow, and records related to Judge Douglas's judicial candidacy and tenure as a court judge. (SPCR.SV1, pp. ___). The trial court denied Hamilton's motions, finding the requests of "questionable relevance and unlikely to lead to discoverable evidence." (SPCR, p. 421).

The records Hamilton sought are records that would have been readily available to him during the pre-trial discovery process through a public records request. In fact, they are records that would be available to any citizen of Florida pursuant to a public records request, regardless of their motive or purpose. *Curry v. State*, 811 So. 2d 736 (Fla. 4th DCA 2002). This placed Hamilton at a severe disadvantage, as Fla. R. Crim. P. 3.852 is now the only mechanism by which he can obtain public records that he would be constitutionally entitled to but for the fact that he is a death sentenced inmate.

Under Rule 3.852(i), the Court should order the production of the requested records if it determines that counsel made a timely and diligent search for the records, avers that those records are not in the repository, that the records are either relevant or may lead to the discovery of admissible evidence, and the request is not overbroad or unduly burdensome. *See* Rule 3.852(i)(2). Hamilton does not have to prove a legally sufficient claim under Rule 3.851 in order to meet the requirements of Rule 3.851(i). The records were necessary to examine the work done by counsel

and the qualifications of the trial court and Hamilton met his burden. The trial court erred in refusing disclosure of these records.

ARGUMENT IV

THE TRIAL COURT ERRED IN SUMMARILY DENYING HAMILTON'S *HURST* CLAIM.

The trial court refused to hear argument on Hamilton's Claim 2 because he had a pending petition for writ of habeas corpus in the Florida Supreme Court. The Court denied Hamilton's habeas petition. *Hamilton v. Jones*, SC16-984, 2017 WL 836807 (Fla. March 3, 2017). Hamilton's habeas petition was filed on June 6, 2016, prior to this Court's decisions in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016); *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016); and *Asay v. State*, 210 So. 3d 1 (Fla. 2016). This initial brief in Hamilton's appeal of the summary denial of his successive 3.851 motion is the first and only opportunity for this Court to consider the Sixth Amendment implications of *Hurst v. Florida*, 136 S. Ct. 616 (2016), Eighth Amendment implications of *Hurst v. State*, the individual retroactivity analysis of *Mosley*, and the principles of federal retroactivity.

A. Hamilton's death sentence is unconstitutional under *Hurst v. State* and *Hurst v. Florida*.

Hamilton's death sentence violates *Hurst v. Florida* and *Hurst v. State*. In *Hurst v. Florida*, the United States Supreme Court held that Florida's capital sentencing scheme violated the Sixth Amendment because it required the judge, not

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

In *Hurst v. State*, this Court held that, in addition to the principles articulated in *Hurst v. Florida*, the Eighth Amendment also requires unanimous jury factfinding as to (1) which aggravating factors were proven, (2) whether those aggravators were "sufficient" to impose the death penalty, and (3) whether those aggravators outweighed the mitigation. 202 So. 3d at 53-59. The Court made clear that each of those determinations are "elements" that must be found by a unanimous jury beyond a reasonable doubt. *Id.* at 57; see also *Jones v. State*, No. SC14-990, 2017 WL 823600, at *16 (Fla. Mar. 2, 2017). In addition to rendering unanimous findings on each of those elements, the Court explained that the jury must unanimously

recommend the death penalty before a death sentence may be imposed. *Hurst v. State*, 202 So. 3d at 57 ("[B]efore the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors were sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death."). The Court further cautioned that, even if the jury unanimously found each of the elements required to impose the death penalty satisfied, the jury was not required to recommend the death penalty. *Id.* at 57-58 ("We equally emphasize that . . . we do not intend to diminish or impair the jury's right to recommend a sentence of life even if it finds the aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating circumstances.").

This Court also ruled that *Hurst* claims must be subjected to individualized harmless error review, and that the burden is on the state to prove, beyond a reasonable doubt, that the *Hurst* error did not impact the sentence. *Id.* at 67-68. If the state is unable to make that showing, this Court should vacate the death sentence.

Hamilton's jury was never asked to render unanimous findings on any of the elements required to impose a death sentence under Florida law. Instead, after being instructed that its verdict was advisory, and that the ultimate responsibility for

imposing a death sentence rested with the judge, Hamilton's jury rendered only a generalized advisory recommendation to impose the death penalty. The record does not reveal whether the jurors unanimously agreed that any particular aggravating factor was proven beyond a reasonable doubt, or unanimously agreed that the aggravators were sufficient to impose the death penalty, or unanimously agreed that the aggravators outweighed the mitigation.

Accordingly, Hamilton's death sentence violates the Sixth and Eighth Amendments in light of *Hurst v. Florida* and *Hurst v. State*.

B. *Hurst v. Florida* and *Hurst v. State* apply retroactively to Hamilton's case.

Retroactivity principles do not bar Hamilton from seeking the relief now available to dozens of similarly-situated death row prisoners who were sentenced in violation of the United States and Florida Constitutions. As explained below, this Court's decisions in *Asay* and *Mosley* rejected traditional notions of retroactivity as a binary concept and endorsed an individualized, case-specific retroactivity approach to *Hurst* claims. Under such an individualized assessment, Hamilton should be afforded retroactive application of both *Hurst* decisions on three independent grounds: (1) under the fundamental fairness doctrine, which this Court has applied in cases including *Mosley* and *James v. State*, 615 So. 2d 668 (Fla. 1993); (2) under the traditional Florida retroactivity analysis established in *Witt v. State*,

387 So. 2d 922 (Fla. 1980); and (3) as a matter of federal law in light of the United States Supreme Court's decision in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

1. *Asay* and *Mosley* required individualized retroactivity analysis for *Hurst* claims.

Contrary to traditional notions of retroactivity as a binary concept—i.e., a new constitutional rule is either retroactive to all cases or to none—*Asay* and *Mosley* established that determining retroactivity in *Hurst* cases requires individualized assessments much in the same way that harmless error must be assessed on a case-by-case basis. *Cf. Mosley*, 209 So. 3d 1248, 1282 (Fla. 2016) ("As we determined in *Hurst*, each error should be reviewed under a harmless error analysis to individually determine whether each defendant will receive a new penalty phase."). Individualized retroactivity analysis is necessitated in part by the fact that in *Mosley*, the Court held that the *Hurst* decisions may be found retroactive either by virtue of Florida's traditional *Witt* test, or under the separate fundamental fairness doctrine. In order to assess retroactivity under the fundamental fairness approach, courts must review and assess all of the facts of each case.

In *Asay* and *Mosley*, this Court suggested that courts must conduct an individualized assessment in order to decide which *Hurst* decision or decisions to analyze for retroactivity, and then to decide whether to apply the *Witt* test, the fundamental fairness approach, or both. For example, the Court assessed retroactivity in *Asay* only as to *Hurst v. Florida*, while in *Mosley*, the Court also

addressed *Hurst v. State*. In *Mosley*, the Court applied two independent retroactivity analyses—*Witt* and fundamental fairness—and reached separate conclusions under each approach. *Mosley*, 209 So. 3d at 1274-76. In *Asay*, the Court applied *Witt*, but not fundamental fairness, suggesting a case-specific reason for the omission.

Even in applying a traditional *Witt* analysis, the Court reached individualized conclusions in *Asay* and *Mosley* as to the dispositive third *Witt* prong, which requires examination of three factors borrowed from *Stovall v. Denno*, 388 U.S. 293 (1967), and *Linkletter v. Walker*, 381 U.S. 618 (1965). In *Asay*, the Florida Supreme Court ruled that the first *Stovall/Linkletter* factor—the purpose of *Hurst*—weighed "in favor" of retroactivity, while in *Mosley*, the Court ruled that the purpose of the same *Hurst* decisions weighed "heavily in favor of retroactivity." *See Asay*, 210 So. 3d at 1; *Mosley*, 209 So. 3d at 1277 (emphasis added). As to the second *Stovall/Linkletter* factor—the extent of reliance on pre-*Hurst* law—this Court found in *Asay* that the extent of reliance on Florida's unconstitutional death penalty scheme weighed "heavily against" retroactivity, while in *Mosley*, this Court reached the opposite conclusion, holding that the extent of reliance on the same pre-*Hurst* law weighed "in favor" of retroactivity. *See Asay*, 210 So. 3d at 20; *Mosley*, 209 So. 3d at 1281. And *Asay* and *Mosley* also differed as to the third *Stovall/Linkletter* factor—effect on the administration of justice—finding that it weighed "heavily against"

retroactive application as to Asay, but in favor of retroactive application as to Mosley. See *Asay*, 210 So. 3d at 22; *Mosley*, 209 So. 3d at 1282.

2. Hamilton is entitled to an individualized retroactivity analysis.

Hamilton is entitled to an individualized retroactivity analysis to the same extent as Asay and Mosley. An individualized assessment is first necessary to determine that Hamilton is entitled to retroactivity of the *Hurst* decisions under the fundamental fairness doctrine, due to his repeated attempts to challenge Florida's unconstitutional capital sentencing scheme, all of which were thwarted by this Court's pre-*Hurst* law. An individualized assessment is also necessary to determine that Hamilton is separately entitled to retroactivity of the *Hurst* decisions under Florida's *Witt* test, given that the *Stovall/Linkletter* factors as applied in his case align with this Court's analysis in *Mosley*, where, unlike in *Asay*, retroactivity was found.

Hamilton's individualized retroactivity assessment must, unlike in *Asay*, consider his claims under both *Hurst v. Florida* and *Hurst v. State*. In *Asay*, this Court limited its retroactivity analysis to the United States Supreme Court's decision in *Hurst v. Florida* and did not consider the retroactivity of *Hurst v. State*. Here, there is no justification for limiting the retroactivity analysis to *Hurst v. Florida*. Unlike in *Asay*, Hamilton's claims are being raised in this Court after the decision in *Hurst v. State*, and Hamilton affirmatively raises both Sixth Amendment claims under *Hurst v. Florida* and Eighth Amendment claims under *Hurst v. State*.

Whatever this Court's reasoning in *Asay* for remaining silent on *Hurst v. State* retroactivity, Hamilton should receive an individualized retroactivity analysis of both of the *Hurst* decisions.

As discussed below, the absence of any holding on the retroactivity of *Hurst v. State* in *Asay* also means that *Asay*'s retroactivity ruling is applicable only to *Hurst v. Florida* claims. Thus, to the extent, *Asay* suggests that categories of defendants might be ineligible for retroactive application of *Hurst v. Florida*, that holding does not apply to any claims that defendants may raise under *Hurst v. State*. Hence, Hamilton has raised claims under both *Hurst* decisions. *Hamilton v. Jones*, SC16-984, 2017 WL 836807 (Fla. March 3, 2017).

3. *Hurst* is retroactive to Hamilton under the fundamental fairness doctrine.

The *Hurst* decisions apply retroactively to Hamilton under the equitable "fundamental fairness" doctrine, which this Court has applied in cases such as *Mosley*. In *Mosley*, this Court explained that although *Witt* is the "standard" retroactivity test in Florida, defendants may also be entitled to retroactive application of the *Hurst* decisions by virtue of the fundamental fairness doctrine, which had been applied in case like *James*. *See Mosley*, 209 So. 3d at 1274-75 ("This Court has previously held that fundamental fairness alone may require the retroactive application of certain decisions involving the death penalty").

Unlike this Court's *Witt* analysis in *Mosley*, which considered whether *Mosley*'s sentence became final after the *Ring* decision as a factor in assessing *Hurst* retroactivity, this Court's fundamental fairness analysis made no distinction between pre-*Ring* and post-*Ring* sentences. *Id.* at 1274-75. Rather, this Court's separate fundamental fairness analysis in *Mosley* focused on whether it would be unfair to bar Mosley from seeking *Hurst* relief, regardless of when his sentence became final, by virtue of the fact that he had previously attempted to challenge Florida's unconstitutional capital sentencing scheme and was "rejected at every turn" under this Court's flawed pre-*Hurst* law. *Mosley*, 209 So. 3d at 1275.[19]

Although *Mosley* was a post-*Ring* case, this Court's fundamental fairness approach applies to pre-*Ring* defendants, who may also obtain retroactive *Hurst* relief on fundamental fairness grounds. *See id.* at 1276 n. 13 ("The difference between a retroactivity approach under *James* and a retroactivity approach under a standard *Witt* analysis is that under *James*, a defendant or his lawyer would have had to timely raise a constitutional argument, in this case a Sixth Amendment argument, before this Court would grant relief. However, using a *Witt* analysis, any defendant

[19] To the extent that certain statements in other sections of *Mosley* or *Asay* imply that *no* pre-*Ring* defendants can seek *Hurst* relief, whether under fundamental fairness or *Witt*, such an interpretation would lead to unconstitutional results. The United States and Florida Constitutions do not tolerate "partial retroactivity," whereby similarly-situated defendants are arbitrarily granted or denied the ability to seek *Hurst* relief based on when their sentences were finalized.

who falls within the ambit of the retroactivity period would be entitled to relief regardless of whether the defendant or his or her lawyer had raised the Sixth Amendment argument."). In other words, to the extent *Mosley* stands for the proposition that defendants sentenced after *Ring* are categorically entitled to *Hurst* relief under *Witt*, it also stands for the proposition that any defendant, regardless of when they were sentenced, can receive the same retroactive application of the *Hurst* decisions as a matter of fundamental fairness.

In assessing fundamental fairness, this Court in *Mosley* explained that an important inquiry is whether the defendant unsuccessfully attempted to raise a challenge to Florida's capital sentencing scheme before *Hurst v. Florida* and *Hurst v. State* were decided. *See id.* at 1276. If *Mosley* had raised such a challenge, this Court reasoned, it would be fundamentally unfair to prohibit him from seeking postconviction relief under *Hurst*, given that he had accurately anticipated the fatal defects in Florida's capital sentencing scheme even before they were recognized in *Hurst* decisions. *See id.* This Court emphasized in *Mosley* that ensuring fundamental fairness in assessing retroactivity outweighed any State interest in finality of death sentences. *Id.* ("In this instance . . . the interests of finality must yield to fundamental fairness.").

To illustrate why the *Hurst* decisions should apply to Mosley as a matter of fundamental fairness, this Court drew a historical analogy to *James*'s retroactive

application of the United States Supreme Court's decision in *Espinosa*. *Id.* In *James*, this Court concluded "that defendants who had raised a claim at trial or on direct appeal that the jury instruction pertaining to the HAC aggravating factor was unconstitutionally vague were entitled to retroactive application of *Espinosa*." *Id.* In *Mosley*, this Court held that "[t]he situation presented by the United States Supreme Court's holding in *Hurst* is not only analogous to the situation presented by *James*, but also concerns a decision of greater fundamental importance than was at issue in *James*." *Id.* This Court was correct because, under *Hurst v. Florida* and *Hurst v. State*, "the fundamental right to a trial by jury under both the United States and Florida Constitutions is implicated, and Florida's death penalty sentencing procedure has been held unconstitutional, thereby making the machinery of post-conviction relief . . . necessary to avoid individual instances of obvious injustice." *Id.* (internal quotation omitted). The application of the fundamental fairness retroactivity doctrine thus makes as much sense for *Hurst* claims as it did for *Espinosa* claims.

Here, as in *Mosley*, the *Hurst* decisions are retroactive under the fundamental fairness doctrine. Although Hamilton's direct appeal was pre-*Ring*, he attempted to challenge Florida's unconstitutional capital sentencing statute before *Hurst*. In his petition for writ of habeas corpus and his appeal of the denial of his initial motion for postconviction relief, Hamilton raised the claim that Florida's capital sentencing

scheme is unconstitutional under *Ring*. *Hamilton v. State*, 875 So. 2d 586, 594 (Fla. 2004). Under the rationale of *Mosley*, these circumstances provide a sufficient basis to apply the *Hurst* decisions retroactively to Hamilton, regardless of the fact that his sentence became final before the issuance of *Ring*. See *Mosley*, 209 So. 3d, at 1276 n. 13. This is true even though Hamilton did not seek state-court relief based on *Ring* after that decision issued. That is because the decision was prudent; this Court has made clear that it was widely known that *Ring* or *Ring*-like claims were futile in the Florida state courts, given this Court's mistaken belief that *Ring* did not apply in Florida. *See id.* at 1279.

Here, as this Court found in *Mosley*, this Court should find that the interests of finality must yield to fundamental fairness. Hamilton, who anticipated the defects in Florida's statute that were later articulated in *Hurst v. Florida* and *Hurst v. State*, should not be denied the chance to now see relief under the *Hurst* decisions. Applying the *Hurst* decisions retroactively to Hamilton "in light of the rights guaranteed by the United States and Florida Constitutions, supports basic tenets of fundamental fairness," and "it is fundamental fairness that underlies the reasons for retroactivity of certain constitutional decisions, especially those involving the death penalty." *Mosley*, 209 So. 3d at 1283.

4. Hamilton is also entitled to retroactive application of both *Hurst* decisions under the traditional *Witt* test, pursuant to an individualized analysis.

In addition to the fundamental fairness doctrine, the *Hurst* decisions are separately retroactive to Hamilton under a traditional *Witt* analysis. As explained above, *Asay* and *Mosley* show that the importance and weight of each of the *Witt* factors depend on the circumstances of the particular case. *Compare Asay*, 210 So. 3d at 17-22 (concluding as to the third *Witt* prong that the first *Stovall/Linkletter* factor weighed "in favor" of retroactivity, the second *Stovall/Linkletter* factor weighed "heavily against" retroactivity, and the third *Stovall/Linkletter* factor weighed "heavily against" retroactivity), with *Mosley*, 209 So. 3d at 1277-82 (concluding as to the same third *Witt* prong that the first *Stovall/Linkletter* factor weighed "heavily in favor" of retroactivity, the second *Stovall/Linkletter* factor weighed "in favor" of retroactivity, and the third *Stovall/Linkletter* factor weighed in favor of retroactivity).

There is no dispute that Hamilton's *Hurst* claims satisfy the first two *Witt* prongs because they (1) arise from decisions of the United States Supreme Court and the Florida Supreme Court, and (2) are constitutional in nature. The only question is whether the third *Witt* prong is satisfied—i.e., whether the *Hurst* decisions are of "fundamental significance" as measured by the *Stovall/Linkletter* factors. As applied here, the *Stovall/Linkletter* factors favor retroactivity.

a. Purpose of new rule.

As applied to Hamilton, the first *Stovall/Linkletter* factor—the purpose of the *Hurst* decisions—weighs in favor of retroactivity. In *Asay*, which analyzed only *Hurst v. Florida*, this Court stated that the purpose of the decision "is to ensure that a criminal defendant's right to a jury is not eroded and encroached upon by sentencing schemes that permit a higher penalty to be imposed based on findings of fact that were not made by the jury." *Asay*, 210 So. 3d at 17. In *Mosley*, where this Court considered both *Hurst v. Florida* and the more expansive decision in *Hurst v. State*, this Court added that the purpose of *Hurst v. State* was to enshrine Florida's "longstanding history requiring unanimous jury verdicts as the elements of a crime" into the state's capital sentencing scheme. *Mosley*, 209 So. 3d at 1277. In *Asay*, this Court concluded that the purpose of *Hurst v. Florida* weighs "in favor" of retroactive application. *Asay*, 210 So. 3d at 18. In *Mosley*, given the circumstances, this Court concluded that the combined purpose of the decisions in *Hurst v. Florida* and *Hurst v. State* weighed "heavily in favor" of retroactive application. *Mosley*, 209 So. 3d at 1278.

Here, Hamilton has raised claims under both *Hurst v. Florida* and *Hurst v. State*. Under the decisions in *Asay* and *Mosley*, the purpose of those decisions weighs "heavily" in favor of retroactive application to Hamilton. As this Court emphasized, the right to a trial by jury is a fundamental feature of the United States and Florida Constitutions and its protections must be among the highest priorities of the courts,

particularly in capital cases. *See Asay*, 210 So. 3d at 18 ("[I]n death cases, this Court has taken care to ensure all necessary constitutional protections are in place before one forfeits his or her life").

b. Extent of reliance on old rule.

As applied to Hamilton, the second *Stovall/Linkletter* factor—extent of reliance on Florida's unconstitutional pre-*Hurst* scheme—also weighs in favor of applying those decisions retroactively. The decisions in *Asay* and *Mosley* offer confused conceptions of the familiar "extent of reliance" factor. As noted above, in an ordinary retroactivity analysis—whether under *Witt* or any other mechanism that considers reliance—the extent of reliance on the law prior to the creation of the new rule would be the same, given that the body of law that developed and was applied before the new rule does not change no matter the particular case in which retroactivity is analyzed. But in *Asay* and *Mosley*, this Court drew different conclusions regarding the extent of reliance on pre-Hurst law depending on the date the defendant's death sentence became final. In addition, *Asay* and *Mosley* split with each other regarding whether "good faith" should be considered in analyzing the second *Stovall/Linkletter* factor, which further confused the matter.

In *Asay*, which considered only the decision in *Hurst v. Florida*, this Court said that the extent of reliance on pre-*Hurst* law as applied to Asay's pre-*Ring* sentence weighed heavily against retroactivity because, before the issuance of *Ring*

in 2002, the Florida courts and the State of Florida had relied in good faith on Florida's unconstitutional death penalty law, in light of the United States Supreme Court's failure to inform them otherwise until *Hurst v. Florida*. *See id.* at *11 n.18 ("In fact, our reliance on the old rule was well-placed up until the decision in *Ring*, after which point this Court struggled with how *Ring* should be properly interpreted in Florida, since the Supreme Court deliberately did not make broad pronouncements . . .."). In light of that good faith, the *Asay* Court held, the extent of reliance factor weighed "heavily against" retroactive application of *Hurst v. Florida* to pre-*Ring* sentences.

In *Mosley*, this Court held that "[t]he 'extent of reliance' prong is not a question of whether this Court properly or in good faith relied on United States Supreme Court precedent, but how the precedent changed the calculus of the constitutionality of Florida's death penalty scheme." *Mosley*, 209 So. 3d at 1280 (emphasis added). Examining the extent of reliance on pre-*Hurst* law without considering "good faith," the *Mosley* court concluded that the second *Stovall/Linkletter* factor weighed "in favor" of applying the *Hurst* decisions retroactively to all post-*Ring* defendants. *Id.* This Court limited its analysis to the extent of reliance after *Ring* only because *Mosley* was a post-*Ring* case.

Here, this Court should consider exactly what the second *Stovall/Linkletter* factor requires: the extent of reliance on Florida's capital sentencing scheme before

the *Hurst* decisions, i.e., "[t]he extent to which a condemned practice infect[ed] the integrity of the truth-determining process at trial." *Stovall*, 388 U.S. at 297. Florida's unconstitutional sentencing scheme has not just been unconstitutional since *Ring* was decided in 2002, it has always been unconstitutional, and it has consistently and systematically infected the truth-determining process at penalty-phase proceedings since the statute was enacted following *Furman v. Georgia*, 408 U.S. 238 (1972), including during Hamilton's trial. Accordingly, as *Mosley* concluded, the second *Stovall/Linkletter* factor weighs in favor of applying the *Hurst* decisions retroactively in this case.

c. Effect on the administration of justice.

As applied to Hamilton, the third *Stovall/Linkletter* factor—the effect on the administration of justice—also weighs in favor of applying the *Hurst* decisions retroactively. As recognized in *Asay*, this factor does not weigh against retroactivity unless applying the *Hurst* decisions retroactively could "destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit." *Asay*, 210 So. 3d at 20 (quoting *Witt*, 387 So. 2d at 929-30). In *Mosley*, this Court held that categorically applying the *Hurst* decisions retroactively to all post-*Ring* defendants, of which there are approximately 175, would not grind this state's judiciary to a halt. *See Mosley*, 209 So. 3d at 1281-83. In light of that conclusion, there can be no serious

rationale for a prediction that categorically permitting the retroactive application of the *Hurst* decisions to all pre-*Ring* defendants, like Hamilton, of which there are also only approximately 175, would tip the balance so far in the other direction as to "destroy" the judiciary.

Undoubtedly, retroactive application of the *Hurst* decisions to pre-*Ring* defendants will have more impact on the administration of justice than arbitrarily limiting retroactivity to post-*Ring* defendants—but that is not the test. Without sufficient rationale for predicting that 175 retroactive *Hurst* proceedings would be manageable, but that 175 more would "destroy" the judiciary, retroactivity should not be denied to pre-*Ring* defendants like Hamilton. There is no serious administrative rationale for such an arbitrary cut-off. Retroactive application of new rules affecting much larger populations have been approved. In *Montgomery*, the United States Supreme Court approved of retroactive application of a new rule prohibiting mandatory life sentences for all juveniles, which one study estimated could impact as many as 2,300 cases nationwide. See John R. Mills, Anna M. Dorn, and Amelia C. Hritz, *No Hope: Re-Examining Lifetime Sentences for Juvenile Offenders*, The Phillips Black Project, available at http://www.phillipsblack.org/s/JLWOP-2.pdf (last visited April 24, 2017).

In Florida, "capital cases make up only a small percentage (0.09 percent) of the 171,141 criminal cases filed in circuit court during the fiscal year 2014-15, and

an even smaller percentage (0.02 percent) of the 753,011 total cases filed in circuit court." *Asay*, 210 So. 3d at 39 (Perry, J., dissenting).

Any argument that resentencing hearings would be problematic because the State would have to reassemble old witnesses and evidence is not a basis to deny Hamilton the opportunity to be sentenced in compliance with the United States and Florida Constitutions. "Hurst creates the rare situation in which finality yields to fundamental fairness in order to ensure that the constitutional rights of all capital defendants in Florida are upheld." *Asay*, 210 So. 3d at 35 (Pariente, J., dissenting). Difficulty assembling witnesses or evidence in a new penalty phase proceeding, even adopting the dubious assumption that prior evidence could not be reintroduced, is not an appropriate basis to force Hamilton to continue living under an unconstitutional death sentence. Accordingly, the third *Stovall/Linkletter* factor, like the first two factors, weighs in favor of applying the *Hurst* decisions retroactively to Hamilton under the *Witt* test.

5. Hamilton has a federal right to *Hurst* retroactivity.

Hamilton has a federal right to *Hurst* retroactivity under the United States Constitution. As a matter of federal law, Hamilton's right to *Hurst* retroactivity does not turn on when his sentence became final in relation to *Ring* or any other case that preceded *Hurst*. The Eighth and Fourteenth Amendments do not countenance the

problematic concept of "partial retroactivity," where a new constitutional rule is applied to some but not all collateral cases, leading to arbitrary results.

The United States Constitution requires that *Hurst*, and this Court's decision on remand in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), be applied retroactively to Florida defendants because those decisions announced substantive rules. Where a constitutional rule is substantive, the Supremacy Clause of the federal Constitution requires a state post-conviction court to apply it retroactively. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 731-32 (2016) ("Where state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge."). This federal-law requirement applies even where a state supreme court is applying a state retroactivity doctrine. *See id.*

Hamilton's federal right to *Hurst* retroactivity, even in a state proceeding, is highlighted by the United States Supreme Court's recent decision in *Montgomery*. In that case, a Louisiana defendant initiated a state post-conviction proceeding seeking retroactive application of *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (holding imposition of mandatory sentences of life without parole on juveniles violates Eighth Amendment). The Louisiana Supreme Court—in contrast to what this Court did in *Falcon v. State*, 162 So. 3d 954 (Fla. 2015)—held that *Miller* was not retroactive under its state retroactivity doctrines. *Montgomery*, 136 S. Ct. at 727.

The United States Supreme Court granted a writ of certiorari and reversed, holding that, notwithstanding the state court's determinations under its state retroactivity doctrines, the *Miller* rule was substantive and therefore the federal Constitution required it to be applied retroactively on state post-conviction review. *Id.* at 732-34.

The *Hurst* decisions announced substantive rules that, under the federal Constitution, may not be denied to Florida defendants on state retroactivity grounds. In *Hurst v. State*, this Court announced two substantive rules. First, the Court held that the Sixth Amendment requires that a jury decide whether the aggravating factors have been proven beyond a reasonable doubt, whether they are sufficient to impose the death penalty under the circumstances, and whether they are outweighed by the mitigation. *See Hurst v. State*, 202 So. 3d at 44. Such findings are manifestly substantive.[20] See *Montgomery*, 136 S. Ct. at 734 (holding that decision whether a

[20] The decision in *Schriro v. Summerlin*, 542 U.S. 348, 364 (2004), is inapposite in the *Hurst* retroactivity context. In *Summerlin*, the Supreme Court applied the federal retroactivity test articulated in *Teague v. Lane*, 489 U.S. 288 (1989), and determined that *Ring* was not retroactive on federal habeas review because the requirement that the jury rather than the judge make findings as to whether the defendant had a prior violent felony aggravator was procedural rather than substantive. *Summerlin* did not review statute like Florida's that required the jury not only to conduct the fact-finding regarding the aggravators, but also the fact-finding as to whether the aggravators were *sufficient* to impose death. Moreover, *Hurst,* unlike *Ring*, addressed the proof-beyond-a-reasonable-doubt standard in addition to the jury trial right, and the Supreme Court has always regarded such decisions as substantive. *See Powell v. Delaware*, 153 A. 3d 69 (Del. 2016) (holding that *Hurst v. Florida* is retroactive under the state's *Teague*-like retroactivity doctrine and distinguishing *Summerlin* on the ground that *Summerlin* "only addressed the misallocation of fact-

particular juvenile is or is not a person "whose crimes reflect the transient immaturity of youth" is substantive, not procedural). Indeed, the United States Supreme Court has consistently applied proof-beyond-a-reasonable-doubt rules retroactively to all defendants. *See, e.g., Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972).

Second, this Court held that the Eighth Amendment requires the jury's fact-finding during the penalty phase to be unanimous. The Court explained that the unanimity rule is required to implement the constitutional mandate that the death penalty be reserved for a narrow class of the worst offenders, and assures that the determination "expresses the values of the community as they currently relate to the imposition of the death penalty." *Hurst v. State*, 202 So. 3d at 60-61 ("By requiring unanimity in a recommendation of death in order for death to be considered and imposed, Florida will achieve the important goal of bringing its capital sentencing laws into harmony with the direction of the society reflected in [the majority of death penalty] states and with federal law."). As the Court made clear, the function of the unanimity rule is to ensure that Florida's overall capital system complies with the Eighth Amendment. *See id.* at 61-62. That makes the rule substantive for purposes

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finding responsibility (judge versus jury) and not . . . the applicable burden of proof."); *see also Guardado v. Jones*, No. 4:15-cv-256 (N.D. Fla. May 27, 2016) (federal judge explaining that *Hurst* retroactivity is possible notwithstanding *Summerlin* because *Summerlin*, unlike *Hurst*, "did not address the requirement for proof beyond a reasonable doubt," and "[t]he Supreme Court has held a proof-beyond-a-reasonable-doubt decision retroactive. *See Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972).").

of federal retroactivity law, *see Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) ("[T]his Court has determined whether a new rule is substantive or procedural by considering the function of the rule"), which is true even though the rule's subject concerns the method by which a jury makes decisions, *see Montgomery*, 136 S. Ct. at 735 (noting that existence of state flexibility in determining method by which to enforce constitutional rule does not convert substantive rule to procedural one).

The United States Supreme Court's decision in *Welch* further illustrates the substantive nature of *Hurst*. *Welch* addressed the retroactivity of the constitutional rule announced in *Johnson v. United States*, 135 S. Ct. 2551, 2560 (2015). In *Johnson*, the Court held that the residual clause of the federal Armed Career Criminal Act ("ACCA"), which allowed for a sentencing increase where the defendant had three or more prior convictions for any felony that "involves conduct that presents a serious risk of physical injury to another," was unconstitutional under the Fifth and Fourteenth Amendment's void-for-vagueness doctrine. *Id.* at 2556. In *Welch*, the Court ruled that *Johnson* must be retroactive because it announced a substantive rule, rather than a procedural rule, given that the invalidation of the ACCA's residual clause "affected the reach of the underlying statute rather than the judicial procedures by which the statute is applied." *Welch*, 136 S. Ct. at 1265. The *Welch* Court explained in this context that its determination of whether a constitutional rule is substantive "does not depend on whether the underlying

constitutional guarantee is characterized as procedural or substantive," but whether "the new rule itself has a procedural function or a substantive function—that is whether it alters only the procedures used to obtain the conviction, or alters instead the range of conduct or class of persons that the law punishes." *Id.* at 1266. The Court observed that, "[a]fter *Johnson*, the same person engaging in the same conduct is no longer subject to the Act and faces at most 10 years in prison. The residual clause is invalid under *Johnson*, so it can no longer mandate or authorize any sentence." *Id.* "*Johnson* establishes, in other words, that even the use of impeccable factfinding procedures could not legitimate a sentence based on that clause. It follows that *Johnson* is a substantive decision." *Id.* (internal quotation omitted).

The *Hurst* decisions announced substantive rules under the reasoning of *Welch*. In holding that the Sixth Amendment requires each element of a Florida death sentence to be found beyond a reasonable doubt, and that jury unanimity is required to ensure that Florida's overall capital system complies with the Eighth Amendment by narrowing the class of death-eligible defendants to those "convicted of the most aggravated and the least mitigated of murders," *Hurst v. State*, 202 So. 3d at 50, the Court announced rules that certain murders "beyond the State's power to punish," *Welch*, 136 S. Ct. at 1265. After *Hurst*, individuals engaging in the same conduct will no longer be subject to the unconstitutional capital sentencing scheme that did not import the beyond-a-reasonable-doubt standard and allowed non-

unanimous recommendations to support a death sentence. The unconstitutional scheme was invalidated by *Hurst*, "so it can no longer mandate or authorize any sentence," and "[e]ven the use of impeccable factfinding procedures could not legitimate' a sentence based on" Florida's prior capital sentencing scheme. *Id.* This Court stated that the "unanimous finding of aggravating factors and the fact that are sufficient to impose death, as well as the unanimous finding that they outweigh the mitigating circumstances, all serve to help narrow the class of murderers subject to capital punishment." *Hurst*, 202 So. 3d at 60 (emphasis added). This language mirrors Welch's explanation of a substantive rule. *See Welch*, 136 S. Ct. at 1264-65 (a substantive rule "alters . . . the class of persons that the law punishes.").

Hamilton's entitlement to *Hurst* retroactivity does not turn on when his sentence became final in relation to *Ring* or any other case that preceded *Hurst*. The United States Constitution does not tolerate the concept of "partial retroactivity," whereby similarly-situated defendants are arbitrarily granted or denied the ability to seek *Hurst* relief based on when their sentences were finalized. The concept of partial retroactivity has no basis in this Court's or the United States Supreme Court's precedent, will lead to arbitrary and unfair results, and is violative of the Eighth and Fourteenth Amendments. The arbitrariness inherent in making *Hurst* only partially retroactive based on the date *Ring* was decided is illustrated by, among other things, the denial of *Hurst* retroactivity to individuals whose death sentences became final

on direct appeal shortly before *Ring*, while at the same time granting *Hurst* retroactivity to other individuals who arrived on death row perhaps decades earlier but were granted new penalty phases on other grounds and then resentenced to death after *Ring*.[21] In addition, although not directly relevant here, making *Hurst* only partially retroactive to post-*Ring* sentences would violate the United States Constitution by arbitrarily denying *Hurst* access to defendants who were sentenced between the decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring*.[22]

Failure to address any of the foregoing concepts or recognize Hamilton's right to *Hurst* retroactivity under federal law would violate Hamilton's due process rights under the federal Constitution by not recognizing and adhering to the constitutional retroactivity "floor" that has been established by the applicable decisions of the

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[21] *See, Armstrong v. State,* 2017 WL 224428 (Fla. Jan. 19, 2017); and *Orme v. State*, 2017 WL 1201781 (Fla. March 30, 2017).

[22] Such arbitrariness is particularly stark in light of the fact that the Supreme Court made clear in *Ring* that its decision flowed directly from *Apprendi*. *See Ring*, 536 U.S. at 588-89. And in *Hurst*, the Court repeatedly stated that Florida's scheme was incompatible with "*Apprendi*'s rule," of which *Ring* was an application. 136 S. Ct. at 621. This Court has also acknowledged that *Ring* was an application of *Apprendi*. *See Mosley v. State*, 209 So. 3d 1248, 1279 (Fla. 2016). Failure to include post-*Apprendi* defendants among those eligible to seek *Hurst* relief violates both the Eighth Amendment requirement of culpability-related decision-making in capital cases, and the Fourteenth Amendment requirement that distinctions in state criminal laws that impinge upon fundamental rights must be strictly scrutinized. *See, e.g.*, *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964); *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972).

United States Supreme Court. Although states may grant broader retrospective relief when reviewing their own state convictions, *see Danforth v. Minnesota*, 552 U.S. 264, 277, 280-82 (2008), states may not grant "partial retroactivity" that denies relief to a subset of their state convictions where federal retroactivity law requires that a constitutional rule be retroactively applied generally.

B. The *Hurst* error in Hamilton's case was not harmless beyond a reasonable doubt.

Because Hamilton's death sentence violates *Hurst v. Florida* and *Hurst v. State*, and those decisions are retroactive to him under both state law (the *Witt* and fundamental fairness doctrines) and federal law, Hamilton should be granted relief from his death sentence unless the State can prove that the *Hurst* error in his case was "harmless beyond a reasonable doubt." In the *Hurst* context, the Florida Supreme Court has defined "harmless beyond a reasonable doubt" as "no reasonable probability that the error contributed to the sentence." *Hurst v. State*, 202 So. 3d at 68.

1. The State bears the burden of establishing harmlessness.

This Court has repeatedly held that the burden is on the State to prove, beyond a reasonable doubt, that the *Hurst* error did not impact Hamilton's death sentence. *See id.* at 67-68 ("[T]he burden is on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to [the] death

sentence."). The "State bears an extremely heavy burden" in this context. *Id.* at 68. A court's finding that a *Hurst* error was harmless will be "rare." *King v. State*, No. SC14-1949, 2017 WL 372081, at *17 (Fla. Jan. 26, 2017).

2. This Court has indicated that a non-unanimous jury recommendation is a virtually dispositive factor in *Hurst* harmless error analysis.

Here, the State cannot establish harmlessness beyond a reasonable doubt. Hamilton's jury recommended death by a vote of 10-2. Where "the recommendation of death . . . was not unanimous, [the court] cannot find beyond a reasonable doubt that the error did not contribute to [the] sentence." *Dubose v. State*, 210 So. 3d 641, 657 (Fla. 2017). Indeed, this Court has not found harmless error in any cases where, like this one, the jury vote was not unanimous.[23]

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[23] *See*, *Mosley v. State*, 209 So. 3d 1248 (Fla.2016) (error not harmless when jury vote was 8-4); *Johnson v. State,* 205 So. 3d 1285 (Fla. 2016) (error not harmless when jury vote was 11-1 for each of three murder convictions); *Simmons v. State*, 207 So. 3d 860 (Fla. 2016) (error not harmless when jury vote was 8-4, and where jury completed special verdict form indicating unanimous votes for three aggravating circumstances); *Franklin v. State*, 209 So. 3d 1241 (Fla. 2016) (error not harmless when jury vote was 9-3); *Williams v. State*, 209 So. 3d 543 (Fla. 2017) (error not harmless when jury vote was 9-3); *Armstrong v. State*, 2017 WL 224428 (Fla. Jan. 19, 2017) (error not harmless when jury vote was 9-3); *Kopsho v. State*, 209 So. 3d 568 (Fla. 2017) (error not harmless when jury vote was 10-2); *Calloway v. State,* 2017 WL 372058 (Fla. Jan. 26, 2017) (error not harmless when jury vote was 7-5 for each of the five murder convictions); *McGirth v. State* 209 So. 3d 1146 (Fla. 2017) (error not harmless when jury vote was 11-1); *Hojan v. State*, 2017 WL 410215 (Fla. Jan. 31, 2017) (error not harmless when jury vote was 9-3 for two murder convictions); *Durousseau v. State*, 2017 WL 411331 (Fla. Jan. 31, 2017) (error not harmless when jury vote was 10-2); *Dubose v. State*, 210 So. 3d 641 (Fla. 2017) (error not harmless when jury vote was 8-4); *Anderson v. State*, 2017 WL

3. In Hamilton's case, the jury's recommendation is insufficient to reliably conclude that the jury would have unanimously found all of the required elements in a constitutional proceeding, particularly in light of the jury's belief about is role and the mitigation presented.

Florida juries before *Hurst*, including Hamilton's, made only a general recommendation to impose the death penalty, without deciding if any of the other required elements had been satisfied. In *Hurst v. State*, this Court held that the jury must render unanimous fact-finding, under a beyond-a-reasonable-doubt standard, on all of the required elements for a death sentence: (1) which aggravating factors

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930924 (Fla. March 9, 2017) (error not harmless when jury vote was 8-3); *Ault v. State*, 2017 WL 930926 (Fla. March 9, 2017) (error not harmless when jury vote was 9-3); *Smith v. State*, 2017 WL 1023710 (Fla. March 16, 2017) (error not harmless with four murder convictions which resulted in two life recommendations and two death recommendations with jury votes of 10-2 and 9-3); *Hodges v. State*, 2017 WL 1024527 (Fla. March 16, 2017) (error not harmless when jury vote was 10-2); *Jackson v. State*, 2017 WL 1090546 (Fla. March 23, 2017) (error not harmless when jury vote was 11-1); *Baker v. State*, 2017 WL 1090559 (Fla. March 23, 2017) (error not harmless when jury vote was 9-3); *Deviney v. State*, 2017 WL 1090560 (Fla. March 23, 2017) (error not harmless when jury vote was 8-4); *White v. State*, 2017 WL 1177640 (Fla. March 30, 2017) (error not harmless when jury vote was 8-4); *Bradley v. State*, 2017 WL 1177618 (Fla. March 30, 2017) (error not harmless when jury vote was 10-2); *Orme v. State*, 2017 WL 1201781 (Fla. March 30, 2017) (error not harmless when jury vote was 7-5); *Guzman v. State*, 2017 WL 1282099 (Fla. April 6, 2017) (error not harmless when jury vote was 7-5); *Abdool v. State*, 2017 WL 1282105 (Fla. April 6, 2017) (error not harmless when jury vote was 10-2); *Newberry v. State*, 2017 WL 1282108 (Fla. April 6, 2017) (error not harmless when jury vote was 8-4); *Heyne v. State*, 2017 WL 1282104 (Fla. April 6, 2017) (error not harmless when jury vote was 10-2); and *Robards v. State*, 2017 WL 1282109 (Fla. April 6, 2017) (error not harmless when the jury vote was 7-5); *McMillian v. State*, 2017 WL 1366120 (Fla. April 13, 2017) (error not harmless when the jury vote was 10-2); *Brookins v. State*, 2017 WL 1409664 (Fla. April 20, 2017) (error not harmless when the jury vote was 10-2); and *Banks v. State*, 2017 WL 1409666 (Fla. April 20, 2017) (error not harmless when the jury vote was 10-2).

were proven, (2) whether those aggravators were "sufficient" to impose the death penalty, and (3) whether those aggravators outweighed the mitigation. 202 So. 3d at 53-59. The jury's unanimous findings on those elements must precede the jury's vote as to whether to recommend a death sentence. *See id.* at 57 ("[B]efore the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death."). Given that two of Hamilton's jurors recommended life, there is no way to know what, if any, of the necessary preceding elements were found unanimously beyond a reasonable doubt. (E.g. did two jurors find that the aggravators were insufficient to recommend death; did two jurors find the mitigation outweighed the aggravation; or did two jurors exercise mercy?). Indeed, there is nothing in the record that reveals the basis for the recommendation and there is therefore a reasonable probability that each juror, or group of jurors, may have based their recommendations on a different calculus. This Court has made clear that all jurors must be on the same page with respect to each of the underlying elements.

As this Court cautioned in *Hurst v. State*, engaging in speculation about the jury's fact-finding "would be contrary to our clear precedent governing harmless

error review." 202 So. 3d at 68; *see also Mosley,* 209 So. 3d at 1284. The reasoning this Court supplied in declining to speculate about the jury's fact-finding in *Hurst v. State* applies equally to Hamilton's jury recommendation:

> Because there was no interrogatory verdict, we cannot determine what aggravators the jury unanimously found proven beyond a reasonable doubt. We cannot determine how many jurors may have found the aggravation sufficient for death. We cannot determine if the jury unanimously concluded that there were sufficient aggravating factors to outweigh the mitigating circumstances.

202 So. 3d at 68. Here too, this Court cannot determine what aggravators Hamilton's jury found proven beyond a reasonable doubt, how many jurors found which particular aggravators sufficient for death, or how the jurors conducted the weighing process (particularly given the uncertainty about what aggravators each juror considered in the first place).

This uncertainty as to what the advisory jury would have decided if tasked with making the critical findings of fact takes on additional significance in light of the principles articulated in the United States Supreme Court's decision *in Caldwell v. Mississippi*, 472 U.S. 320 (1985). In *Caldwel*l, the Court held that a capital sentence is invalid if it was imposed by a jury that believed that the ultimate responsibility for determining the appropriateness of a death sentence rested elsewhere and not with the jury. *Id.* at 328-29. The Supreme Court explained that it "has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the

appropriate awareness of its truly awesome responsibility," and that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death sentence lies elsewhere." *Id.* at 328-29, 341 (internal quotation omitted).

Hamilton's jury was led to believe that its role in sentencing was diminished when the Court instructed it that its sentence was an "advisory sentence" and the "final decision as to what punishment shall be imposed is the responsibility of the judge." (TR16, p. 2140). Given the jury's belief that it was not ultimately responsible for the imposition of Hamilton's death sentence, this Court cannot even be certain, to the exclusion of all reasonable doubt, that the jury would have made the same recommendation without the *Hurst* error.

Moreover, the jury's consideration of the aggravation and mitigation in Hamilton's case may have been significantly impacted by the jury's knowledge that it was ultimately responsible for the sentence. In a constitutional proceeding, where the jury was properly apprised of its role as fact-finder, the jury may have afforded greater weight to the mitigation in Hamilton's case. As such, it cannot be concluded that a jury would have unanimously found or rejected any specific mitigators in a constitutional proceeding. *Cf. Mills v. Maryland*, 486 U.S. 367, 375-84 (1988); *McKoy v. North Carolina*, 494 U.S. 433, 444 (1990) (both holding in the mitigation

context that the Eighth Amendment is violated when there is uncertainty about jury's vote). In *Hurst v. State*, this Court emphasized this mitigation is an important consideration in assessing harmless error. 202 So. 3d at 68-69. ("Because we do not have an interrogatory verdict commemorating the findings of the jury . . . we cannot find beyond a reasonable doubt that no rational jury, as trier of fact, would determine that the mitigation was 'sufficiently substantial' to call for a life sentence.").

In Hamilton's case, the court found six aggravating factors had been proven beyond a reasonable doubt: (1) the capital felony was committed by a person under sentence of imprisonment or placed on community control; (2) Hamilton had previously been convicted of a felony involving the use or threat of violence to the person; (3) the capital felony was committed while Hamilton was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing or discharging of a destructive device or bomb; (4) the capital felony was committed for the purpose of avoiding or prevent a lawful arrest or effecting an escape from custody; (5) the murder was especially heinous, atrocious or cruel; (6) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. In Hamilton's case, the court rejected two proposed statutory mitigating circumstances: (1) Hamilton was an accomplice in the capital felony

committed by another person and his participation was relatively minor; and (2) Hamilton acted under extreme mental duress or under the substantial domination of another person. The court found five non-statutory mitigators: (1) Hamilton was raised in a drug-ridden, crime-infested neighborhood; (2) Hamilton's mother was mentally ill; (3) Hamilton suffered various childhood traumas, including the loss if an eye in a B-B gun accident; (4) Hamilton had been gainfully employed and had good work habits; and (5) Hamilton assisted law enforcement in the location of the victim's body. Given this mitigation, there is a reasonable probability that at least some jurors in a constitutional proceeding, having been properly instructed and advised of their role as fact-finder in deciding whether to sentence Hamilton to death, would have made different findings on mitigation and decided that the death penalty should not be imposed.

4. The trial court may have exercised its discretion to impose a life sentence if it was bound by the jury's findings on each of the elements.

The jury's recommendation, with no actual fact-finding, does not account for the possibility that the sentencing court may have exercised its discretion to impose a life sentence if the Court had been bound by the jury's finding on each of the elements required for a death sentence, rather than the court's own findings on those elements. *See Hurst v. State*, 202 So. 3d at 57 (noting that nothing in *Hurst* has diminished "the right of the trial court, even upon receiving a unanimous recommendation for death, to impose a sentence of life."); Fla. Stat. § 921.141(3)(2)

(revised Florida capital sentencing statute providing that, even if the jury recommends death, "the court, after considering each aggravating factor found by the jury and all the mitigating circumstances, may impose a sentence of life imprisonment without the possibility of parole or a sentence of death. The court may consider only an aggravating factor that was unanimously found to exist by the jury."). The *Hurst* decisions have fundamentally altered the source of information upon which judges are required to determine whether to impose a life sentence as a matter of discretion.

Before *Hurst*, judges first rendered findings on each of the elements required to impose a death sentence, and if the court found those requirements for the death penalty were satisfied, the judge then decided, based on his own findings, whether to impose a death sentence or life. That is what occurred here: the judge made findings and then, based on those findings, decided that a death sentence was warranted. However, after *Hurst*, juries now make the underlying findings on the elements required to impose death. If the jury finds that the requirements for the death penalty are satisfied, the judge still decides whether to sentence the defendant to death or exercise his or her discretion to impose a life sentence, but now based on the jury's findings. Thus, it is unknown whether Hamilton's judge would have exercised his discretion to impose a life sentence in the same way if he was bound by the jury's underlying findings, rather than his own.

For example, the jury's findings in a proceeding that complied with *Hurst* may have yielded a lesser number of aggravators or greater number of mitigators than the judge's findings, which may have led the judge to decide that a life sentence was appropriate. The jury's findings may have also yielded different "sufficiency" and "insufficiency" determinations than those made by Hamilton's judge. And the jury may have made different findings regarding the relative weight of the aggravators and mitigators. Whereas Hamilton's judge was bound by his own findings on those elements in determining whether to exercise his discretion to impose a life sentence, the judge in a constitutional proceeding that complied with *Hurst* would be required to exercise his discretion in the context of the jury's findings, not his own. The jury's recommendation, with no specific fact-finding, does not allow this Court to reliably conclude that there is no reasonable probability that a life sentence would have been imposed if bound by the jury's finding rather than its own.

5. The *Hurst* error is not harmless due to the judge's finding of the prior violent felony and contemporaneous felony aggravators.

To the extent the State may argue that the *Hurst* error is rendered harmless by the fact that, among the aggravators applied to Defendant, was the aggravator of a prior violent felony, the Florida Supreme Court has rejected the idea that a judge's findings of a prior violent is dispositive in the harmless-error analysis of *Hurst* claims, and has granted *Hurst* relief despite the presence of such aggravators. *See, e.g., Franklin v. State*, 209 So. 3d 1241, 1248 (Fla. 2016) (rejecting "the State's

contention that Franklin's prior convictions for other violent felonies insulate Franklin's death sentence from *Ring* and *Hurst v. Florida*.").[24] To the extent the State argues that the *Hurst* error in Hamilton's case is harmless due to the contemporaneous conviction for kidnapping and sexual battery, such an argument has also been rejected by this Court in nearly every *Hurst* reversal.[25] Notably, this

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[24] *See also Armstrong v. State*, 2017 WL 224428 (Fla. Jan. 19, 2017); *Calloway v. State,* 2017 WL 372058 (Fla. Jan. 26, 2017); *Durousseau v. State*, 2017 WL 411331 (Fla. Jan. 31, 2017); *Simmons v. State*, 207 So.3d 860, 861 (Fla. 2016); *White v.State*, 2017 WL 1177640 (Fla. March 30, 2017); *Bradley v. State*, 2017 WL 1177618 (Fla. March 30, 2017); *Guzman v. State*, 2017 WL 1282099 (Fla. April 6, 2017); *Newberry v. State*, 2017 WL 1282108 (Fla. April 6, 2017); *Brookins v. State*, 2017 WL 1409664 (Fla. April 20, 2017); and *Banks v. State*, 2017 WL 1409666 (Fla. April 20, 2017).

[25] *See Simmons v. State*, 207 So. 3d 860 (Fla. 2016) (granting *Hurst* relief despite contemporaneous convictions for kidnapping and sexual battery and a unanimous finding by the jury of the existence of the aggravating factor that the murder was done in the commission, or attempt to commit, a sexual battery, kidnapping or both); *Williams v. State*, 209 So. 3d 543 (Fla. 2017) (granting *Hurst* relief despite contemporaneous convictions for kidnapping and robbery); *Armstrong v. State*, 2017 WL 224428 (Fla. Jan. 19, 2017) (granting *Hurst* relief despite a contemporaneous conviction for robbery); *Kopsho v. State*, 209 So. 3d 568 (Fla. 2017) (granting *Hurst* relief despite a contemporaneous conviction for kidnapping); *Calloway v. State,* 2017 WL 372058 (Fla. Jan. 26, 2017) (granting *Hurst* relief despite contemporaneous convictions for armed robbery, armed kidnapping and armed burglary); *McGirth v. State* 209 So. 3d 1146 (Fla. 2017) (granting *Hurst* relief despite contemporaneous convictions for attempted first degree murder and armed robbery); *Jackson v. State*, 2017 WL 1090546 (Fla. March 23, 2017) (rejecting argument that Jackson's sentence was unaffected by *Hurst* due to contemporaneous sexual battery conviction); *Baker v. State*, 2017 WL 1090559 (Fla. March 23, 2017) (*Hurst* relief granted despite contemporaneous convictions for home invasion robbery with a firearm and kidnapping); *Deviney v. State*, 2017 WL 1090560 (Fla. March 23, 2017) ("Moreover, we reject the State's assertion that Deviney's

Court found the *Hurst* error not harmless in *Mosley* despite the fact that the judge in that case had found a contemporaneous felony aggravator. *Mosley*, 209 So. 3d at 1256. The same reasoning should apply in Hamilton's case.

CONCLUSION

For the reasons set forth in this Initial Brief, Appellant, Richard Eugene Hamilton, requests that he be granted an evidentiary hearing on his claims, and any other relief deemed appropriate by this Court.

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conviction for felony murder was sufficient to insulate his death sentence from *Hurst v. Florida* error."); *Bradley v. State*, 2017 WL 1177618 (Fla. March 30, 2017) (granting *Hurst* relief despite contemporaneous conviction for robbery); *Orme v. State*, 2017 WL 1201781 (Fla. March 30, 2017) (granting *Hurst* relief despite contemporaneous convictions for robbery and sexual battery); *Guzman v. State*, 2017 WL 1282099 (Fla. April 6, 2017) (granting *Hurst* relief despite conviction for felony first-degree murder based on jury finding that the murder occurred as a consequence of and while Guzman was attempting to commit sexual battery); *Robards v. State*, 2017 WL 1282109 (Fla. April 6, 2017) (granting *Hurst* relief despite contemporaneous conviction for murder); and *McMillian v. State*, 2017 WL 1366120 (Fla. April 13, 2017) (granting *Hurst* relief despite contemporaneous conviction for attempted second-degree murder.

Respectfully submitted,

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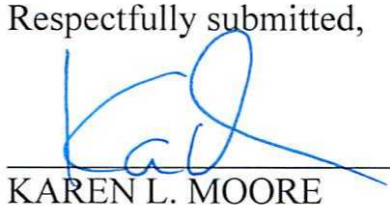
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by electronic service to Jennifer Keegan, Assistant Attorney General, (capapp@myfloridalegal.com and Jennifer.Keegan@myfloridalegal.com); and by U.S. Mail to Richard Hamilton, DOC# 123846, Union Correctional Institution, P.O. Box 1000, Raiford, FL 32083; on this date, April 24, 2017.

Respectfully submitted,



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CERTIFICATE OF FONT

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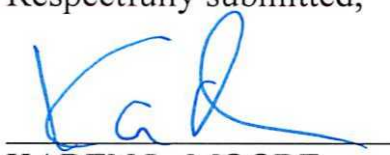
Respectfully submitted,



KAREN L. MOORE

EXHIBIT 4

IN THE SUPREME COURT OF FLORIDA

RICHARD EUGENE HAMILTON,

Appellant,

CASE NO. SC17-42
L.T. No. 1994-CF-0150-CFA

v.

STATE OF FLORIDA,

DEATH PENALTY CASE

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRD JUDICIAL CIRCUIT,
IN AND FOR HAMILTON COUNTY, FLORIDA

ANSWER BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

Citations to the record in this brief will be designated as follows: the record on appeal from the successive postconviction proceedings shall be referred to by "SPCR," followed by the page number; the related supplemental record shall be referred to by "SPCR SV" and followed by the volume and page number; the record on appeal from the initial postconviction proceedings shall be referred to by "PCR" and followed by the volume and page number; references to the direct appeal record shall be referred to by "R," followed by the volume and page number; Hamilton's Initial Brief shall be referred to by "IB" followed by the page number.

STATEMENT OF THE CASE AND FACTS

Hamilton was convicted of first-degree murder, sexual battery, robbery, and kidnapping of Carmen Gayheart, (R 26:3879-81), and was sentenced to death. The facts of this case are set forth in this Court's opinion in Hamilton v. State, 703 So. 2d 1038 (Fla. 1997):

> Richard Hamilton and Anthony Wainwright escaped from a North Carolina prison, stole guns and a Cadillac, and headed for Florida. When the car overheated, April 27, 1994, in Lake City, Florida, they abducted Carmen Gayheart, a young mother of two, at gunpoint from a Winn-Dixie parking lot as she loaded groceries into her Ford Bronco. The men stole the Bronco and proceeded north on I-75. They raped, strangled, and executed Gayheart by shooting her twice in the

back of the head. The men were arrested the next day in Mississippi following a shootout with a trooper.

Hamilton gave several statements to police wherein he admitted kidnapping, robbing, and raping Gayheart, but he claimed Wainwright strangled and shot her. Wainwright, on the other hand, admitted participating in the kidnapping and robbery, but asserted that Hamilton raped and killed her. Hamilton was charged with first-degree murder, sexual battery, robbery, and kidnapping, all with a firearm, and was found guilty as charged. During the penalty phase, Hamilton called two relatives and a friend, who testified that he grew up in a dysfunctional family in a poor neighborhood, and was shot in the eye with a BB gun as a child. The jury recommended death by a ten-to-two vote and the judge imposed a sentence of death based on six aggravating circumstances,[1] no statutory mitigating circumstances, and five nonstatutory mitigating circumstances.[2]

[FN 1] The trial court found the following: (1) Hamilton was under sentence of imprisonment; (2) Hamilton had been previously convicted of a violent felony; (3) the murder was committed in the course of a kidnapping, robbery, and sexual battery; (4) the murder was committed to avoid arrest; (5) the murder was especially heinous, atrocious or cruel; and (6) the murder was committed in a cold, calculated and premeditated manner.

[FN 2] The trial court found the following: (1) Hamilton was raised in a drug-ridden, crime-infested neighborhood; (2) Hamilton's mother was mentally ill; (3) Hamilton suffered various childhood traumas, including the loss of an eye in a BB gun accident; (4) Hamilton had been gainfully employed and had good work habits; and (5) Hamilton assisted police in locating the victim's body.

Hamilton appealed his conviction and sentence, and on October 23, 1997, this Court affirmed his convictions and sentences. Hamilton, 703 So. 2d at 1038. Hamilton's convictions and sentences became final on June 26, 1998, when the

United States Supreme Court denied certiorari review. Hamilton v. Florida, 524 U.S. 956 (1998).

On June 19, 2000, Hamilton filed his initial motion for postconviction relief. (PCR 1:3-8) He amended his motion on June 28, 2000. (PCR 1:13-34) On February 15, 2001, Hamilton filed his second amended motion for postconviction relief. (PCR 1:112-37) On February 19-20, 2002, an evidentiary hearing was held on Hamilton's motion. (PCR 6, 7) On May 29, 2002, the postconviction court denied the second amended motion. (PCR 2:301-06)

On June 28, 2002, Hamilton filed a notice of appeal from the denial of his motion for postconviction relief, along with a habeas petition. He raised nine issues on appeal.[1] Only two of the claims merited discussion from the Court: (1) whether trial counsel was ineffective regarding the issue of venue; and (2) whether trial counsel was ineffective regarding the presentation of mitigation during the penalty phase. Hamilton v. State, 875 So. 2d 586 (Fla. 2004).

[1] The other seven issues raised were rejected without extended discussion: Hamilton raised Strickland claims for (1) failing to present testimony from Hamilton's family members in support of a motion to suppress; (2) regarding Hamilton's jury overhearing testimony meant only for the codefendant's jury; (3) regarding a claim of juror misconduct; (4) for allowing Hamilton's jury to hear the codefendant's cross-examination of a witness; and (5) for failing to request an independent act instruction. Additionally, Hamilton claimed that (6) his statements were involuntary and that (7) Ring v. Arizona, 536 U.S. 584 (2002), invalidates his death sentence.

On June 3, 2004, this Court affirmed the trial court's order denying Hamilton's motion for postconviction relief. Hamilton, 875 So. 2d at 586. The Court also denied his state petition for a writ of habeas corpus. Id. at 593-94.

On June 6, 2016, Hamilton filed a petition for writ of habeas corpus before this Court, seeking Hurst relief. On March 3, 2017, this Court issued its order denying Hamilton's petition, relying on Asay v. State, 210 So. 3d 1 (Fla. 2016). Hamilton v. Jones, No. SC16-984, 2017 WL 836807 (Fla. March 3, 2017).

On August 24, 2016, while Hamilton's petition for writ of habeas corpus was still pending before this Court, Hamilton filed a Successive Motion to Vacate Judgments of Conviction and Sentence, pursuant to Rule 3.851, Fla. R. Crim. P. (hereinafter, "Successive Motion"). The Successive Motion addressed whether Hamilton's death sentence is unconstitutional under Hurst v. Florida, 136 S. Ct. 616 (2016), and whether Hamilton is entitled to a new postconviction review or the withdrawal of the mandate due to the institutional failure of the trial court, the State, and this Court. (SPCR 1) The State filed its answer on September 13, 2016. (SPCR 203) On December 5, 2016, the trial court issued an order denying Hamilton's Successive Motion, holding, "the Defendant's August 24, 2016, successive 3.851 motion is untimely as it was submitted eighteen years after the mandate issued and that none of the three articulated exceptions apply. Moreover,

the Defendant's equity-based claim does not render the motion timely." (SPCR 418-20) This appeal follows.

SUMMARY OF THE ARGUMENT

The trial court properly denied Hamilton's Successive Motion as procedurally barred. Hamilton's postconviction claims were successive and did not comport with the timeliness requirements of Rule 3.851, Florida Rules of Criminal Procedure. Hamilton's claim that equitable considerations should excuse his untimeliness is unsupported by the law. The trial court's denial of Hamilton's Successive Motion as procedurally barred was proper and should be upheld.

The trial court properly denied Hamilton's claim addressing the institutional failure of the trial court, the State, and this Court. Hamilton's claim is based on allegations that his postconviction counsel was ineffective. Such a claim is not cognizable in Florida. This claim is procedurally barred, and an equitable claim that alleges fundamental unfairness in postconviction proceedings cannot excuse the procedural bar. There was no institutional failure in this case and Hamilton's postconviction proceedings were not fundamentally unfair.

The trial court properly denied Hamilton's motions for additional public records under Rule 3.852. Hamilton's motions for public records did not comply with the requirements of Rule 3.852, Florida Rules of Criminal Procedure. Hamilton failed to identify the specific postconviction claim to which his public

records motions related, and failed to demonstrate that the records he sought related to any colorable claim for postconviction relief.

The trial court properly denied Hamilton's claim for relief under Hurst v. Florida, 136 S. Ct. 616 (2016), and Hurst v. State, 202 So. 2d 40 (Fla. 2016). Hamilton's claim is meritless because Hurst is not retroactive to Hamilton's case pursuant to Asay v. State, 2010 So. 3d 1 (Fla. 2016). Furthermore, because Hurst is not retroactive to Hamilton's case, this claim was untimely pursuant to Rule 3.851, Florida Rules of Criminal Procedure.

ARGUMENT

ISSUE I: THE TRIAL COURT PROPERLY DENIED HAMILTON'S SUCCESSIVE MOTION AS PROCEDURALLY BARRED

Hamilton alleges that his Successive Motion was not procedurally barred because it was filed within one year of the trial court's appointment of current postconviction counsel. As Hamilton's Successive Motion did not fall within the timeliness requirements of Rule 3.851, Florida Rules of Criminal Procedure, and no lawful timeliness exception applies, the trial court properly denied the Successive Motion.

Rule 3.851(f)(5)(B), Florida Rules of Criminal Procedure permits the denial of a successive postconviction motion without an evidentiary hearing "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief." A court's decision to grant or deny an evidentiary hearing on a Rule 3.851 motion is ultimately based on written materials before the trial court, thus, its ruling is subject to de novo review. See State v. Coney, 845 So. 2d 120, 137 (Fla. 2003) (holding that "pure questions of law" that are discernible from the record "are subject to de novo review"). In reviewing a trial court's summary denial of postconviction relief, this Court must accept the defendant's allegations as true to the extent that the record does not conclusively refute them. Rutherford v. State,

926 So. 2d 1100, 1108 (Fla. 2006) (citing Hodges v. State, 885 So.2d 338, 355 (Fla.2004)).

A motion for postconviction relief must be filed within one year of the date the defendant's conviction and sentence become final. Fla. R. Crim. P. 3.851(d)(1). There is an exception provided in the Rule when an otherwise untimely claim falls into any of three narrow categories: (1) newly discovered evidence; (2) the fundamental constitutional right asserted was not established within the one-year period for filing a postconviction motion and the new rule has been held to apply retroactively; and (3) postconviction counsel, through neglect, failed to file the motion. Fla. R. Crim. P. 3.851(d)(2). The Rule requires a trial court to dismiss a successive postconviction motion when it does not meet the time limitations exceptions provided in subsection (d)(2) of the Rule. Fla. R. Crim. P. 3.851(e)(2).

This Court has repeatedly upheld the summary denial of postconviction motions that did not comply with the time limitations of Rule 3.851. Byrd v. State, 118 So. 3d 807 (Table) (Fla. 2013) (prisoner's successive 3.851 motion procedurally barred where it raised a constitutional right that was not retroactive); Carroll v. State, 114 So. 3d 883, 886-87 (Fla. 2013) (prisoner's claim that his mental illness was a categorical bar to execution was seeking the recognition of a new fundamental right, and was thus untimely raised per Rule 3.851(d)(2)).

Hamilton attempts to excuse his noncompliance with Rule 3.851(d)(2) by alleging that the one-year time limit cannot begin until postconviction counsel is appointed. (IB 13) He concludes that the one-year time limit began running when current postconviction counsel was appointed on August 24, 2015. Notably, Hamilton fails to cite to any legal authority that establishes such a time calculation. Further, Hamilton's argument fails to consider the fact that postconviction counsel has represented him since 1998, with the appointment of Capital Collateral Regional Counsel – North ("CCRC").[2] (SPCR 25) If Hamilton's time calculation were valid, the one-year time limit would have expired in 1999, long before he filed his Successive Motion. The time during which Hamilton alleges he was without postconviction counsel was from 2004 until current postconviction counsel was appointed. (IB 13) Even if this gap in representation did exist, it would have had no effect on whether Hamilton's postconviction claims were filed within the one-year time limit.

Here, Hamilton's conviction and sentence became final on June 26, 1998, when the United States Supreme Court denied certiorari review from Hamilton's

[2] The record is silent on the exact date CCRC was appointed. Both the State and one of Hamilton's postconviction attorneys confirmed on the record during his postconviction proceedings that CCRC was the original postconviction counsel. (PCR 3:4, 10) Gary Printy replaced CCRC on November 18, 1998. (SPCR 25) Robert Norgard was appointed to replace Printy on December 21, 1998. (SPCR 29) Each withdrew shortly after appointment due to conflict. (SPCR 27, 31) Following their withdrawals, Charles Lykes was appointed on February 18, 1999. (SPCR 34)

direct appeal. Hamilton v. Florida, 524 U.S. at 956 (1998). Hamilton's Successive Motion was filed on August 24, 2016, claiming his death sentence was unconstitutional under Hurst v. Florida, and that he is entitled to a new postconviction review or the withdrawal of the mandate due to the institutional failure of the trial court, the State and this Court. (SPCR 1-23)

Hamilton's first claim in his Successive Motion was untimely because it sought Hurst relief, based on a new constitutional rule that was not held to be retroactive to his case. Pursuant to Rule 3.851(d)(2)(B), Florida Rules of Criminal Procedure, a successive postconviction motion based on a new constitutional rule must demonstrate that the rule is retroactive in order for the pleading to be timely. Since the filing of his Successive Motion, this Court issued its ruling in Asay v. State, 210 So. 3d 1 (Fla. 2016), holding that Hurst was not retroactive to Hamilton's case. Thus, Hamilton's claim for Hurst relief remains procedurally barred in a Rule 3.851 motion, and the trial court's ruling was proper. See Byrd, 118 So. 3d at 1; 3.851(d)(2)(B), Fla. R. Crim. P.

Hamilton's second claim, which seeks a new postconviction review or the withdrawal of the mandate[3] due to the institutional failure of the trial court, the State, and this Court, was untimely because it seeks application of a novel

[3] Hamilton does not identify the specific mandate to which he refers.

constitutional right that has not been recognized by another court. Carroll, 114 So. 3d at 886-87, makes clear that a successive Rule 3.851 motion is an improper forum in which to raise a novel constitutional claim. Hamilton's claim, which was referred to repeatedly at the Huff hearing as an "equity" argument (SPCR 402-03, 406), seeks the application of a novel constitutional protection which has not yet been recognized by Florida courts. It is particularly telling that at the case management conference, Hamilton was unable to identify a single legal authority that established the constitutional relief he sought.[4] (SPCR 406-07)

As this claim was merely a novel constitutional claim filed in a successive postconviction motion that did not fit within any of the three exceptions articulated in Rule 3.851(d)(2), this claim is procedurally barred. Neither Hamilton's Hurst claim nor his equity claim comport with the timeliness requirements of the Rule. The trial court's ruling was proper and should be upheld.

[4] When pressed by the trial court for a legal basis to justify the equity claim, Hamilton cited Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985). Wilson is easily distinguishable from the present case because it involved a claim of ineffective assistance of appellate counsel, which is consistently recognized as a valid postconviction claim. This is distinctly different from Hamilton's novel constitutional claim, which seeks relief based on ineffectiveness of his postconviction counsel.

ISSUE II: THE TRIAL COURT PROPERLY DENIED HAMILTON'S CLAIM ADDRESSING THE INSTITUTIONAL FAILURE OF THE TRIAL COURT, THE STATE, AND THE FLORIDA SUPREME COURT

Hamilton alleges that he is entitled to a new postconviction proceeding or withdrawal of his mandate because the trial court's errors and the postconviction procedures in place at the time resulted in a constitutionally unreliable postconviction process. (IB 17, 35-36) Specifically, Hamilton alleges that his postconviction counsel was ineffective, and the trial court failed to monitor his case, inquire into potential attorney-client conflicts, monitor his postconviction counsel's performance, and make findings that Hamilton's postconviction lawyer was qualified to represent him. This claim fails for multiple reasons: ineffective assistance of postconviction counsel is not a cognizable claim in Florida; an equitable postconviction claim cannot excuse a procedural bar in Florida; and no institutional failure occurred in Hamilton's case.

Hamilton bases this claim, in large part, on allegations of ineffectiveness of postconviction counsel, which is not a cognizable claim in Florida. This Court has repeatedly held that an action taken by postconviction counsel cannot be the basis for a Strickland[5] claim. Moore v. State, 132 So. 3d 718, 724 (Fla. 2013) ("[T]his Court has not recognized a claim of ineffective assistance of postconviction

[5] Strickland v. Washington, 466 U.S. 668 (1984).

counsel"); Mann v. State, 112 So. 3d 1158, 1163 (Fla. 2013); Gore v. State, 91 So. 3d 769, 778 (Fla. 2012). Thus, Hamilton's claims of ineffectiveness related to his postconviction counsel, Charles Lykes and George Blow III, do not warrant relief.

Florida courts do not recognize equity as an excuse for procedural noncompliance. As discussed at length, supra, Claim I, the two claims Hamilton raised in his Successive Motion were untimely pursuant to Rule 3.851(d)(2), Florida Rules of Criminal Procedure. Hamilton now seeks to bypass this procedural bar by claiming his postconviction proceedings were unfair and he should be provided an equitable remedy.

In Mann, 112 So. 3d at 1163-64, this Court rejected an argument much like Hamilton's. Mann claimed he was entitled to bring postconviction claims that were procedurally barred because his postconviction counsel was ineffective. Mann relied on Martinez v. Ryan, 566 U.S. 1 (2012),[6] saying it established an equity exception to procedural bars when the underlying postconviction proceeding was unfair due to ineffective assistance of postconviction counsel. Brief of Appellant at 67-68, Mann, 112 So. 3d at 1158. Mann's argument was not that he should be entitled to a Strickland claim as to postconviction counsel, but that the equitable

[6] Martinez v. Ryan addressed whether a federal habeas court may excuse a procedural default of an ineffective-assistance claim when the claim was not properly presented in state court due to an attorney's errors in an initial-review collateral proceeding.

concept created in Martinez v. Ryan should be extended to unfair state postconviction proceedings. Brief of Appellant at 68, Mann. This Court firmly rejected Mann's claim, holding that Martinez v. Ryan did not extend any equitable remedy to state proceedings. Mann, So. 3d at 1164; see also Howell v. State, 109 So. 3d 763, 774 (Fla. 2013). As Hamilton's claim relies on equity in the same manner as Mann's argument, it is meritless and this Court should deny it.

Hamilton's claim also alleges that his postconviction proceedings were unfair because of various failures of the postconviction trial court. (IB 19-20) This claim fails because the trial court fulfilled its obligations as they existed under the law at the time of the postconviction proceedings.

Firstly, Hamilton alleges that the trial court failed to "monitor" his case by timely appointing counsel and filing quarterly reports on the progress of Hamilton's postconviction case. (IB 20-21) The record refutes this claim. Lykes was the third registry attorney to be appointed to Hamilton's postconviction case. (SPCR 25, 29, 34) The first registry attorney, Gary Printy, was appointed on November 18, 1998. In the trial court's order of appointment, the Office of Capitol Collateral Regional Counsel – North ("CCRC") is referenced (SPCR 25), indicating that CCRC was representing Hamilton until Printy's appointment. After Printy sought withdrawal, the trial court appointed Robert Norgard on December

21, 1998. (SPCR 29) After Norgard sought withdrawal, Lykes was appointed on February 18, 1999. (SPCR 34) Both the State and Lykes confirmed this series of appointments to the trial court during Hamilton's postconviction hearing. (PCR 3:4, 10) The record demonstrates that the trial court took the proper steps to ensure that conflict-free counsel was appointed.

Furthermore, any failure of the trial court to submit quarterly reports on the status of postconviction cases would not have prejudiced Hamilton. The record reflects that the trial court filed three reports. (SPCR 319) The rule that required quarterly reports of the trial court, Rule 2.050(b)(7), Florida Rules of Judicial Administration, was implemented to avoid "unnecessary judicial labor and assist [this Court] in eliminating unnecessary administrative delays." In re Amendments to Florida Rules of Judicial Administration Regarding Death Notices, 672 So. 2d 523 (Mem) (Fla. 1996). The purpose of the rule was not to provide a substantive constitutional protection to Hamilton, thus, any failure of the trial court to submit reports would not impact the fairness of Hamilton's postconviction proceedings. As the trial court took the proper steps to appoint conflict-free counsel and as the trial court's failure to file reports would not have impacted the fairness of Hamilton's postconviction proceedings, this claim is meritless and should be denied.

Secondly, Hamilton alleges that the trial court failed to make the required findings that Hamilton's postconviction counsel was qualified at the time of appointment. (IB 21-23) Under the law in effect at the time, the trial court was not deficient for failing to make specific findings on the record about the qualifications of the attorneys appointed to Hamilton's case.

The law at the time provided for a registry of private practice attorneys who qualified for appointment to capital postconviction proceedings and met specified requirements. § 27.710(2) and (3), Fla. Stat. (1998). The only requirement imposed on the trial court in making an assignment from the registry was that the court must give priority to attorneys whose experience and abilities in criminal law, especially in capital proceedings, are known by the court to be commensurate with the responsibility of representing a person sentenced to death. § 27.710(5)(c), Fla. Stat. (1998). There is no requirement that the trial court know postconviction counsel personally nor that he inquire about counsel's schedule prior to appointment, as Hamilton seems to suggest. (IB 21-23) As registry counsel had to be qualified before being added to the registry list, there was no need for the trial court to duplicate those efforts. The trial court's failure to include findings as to the registry attorneys' qualifications would have had no consequence in Hamilton's case.

Thirdly, Hamilton alleges that the trial court did not properly monitor Lykes' or Blow's representation of Hamilton in his postconviction proceedings. (IB 23-31) This claim is a thinly-veiled attempt to litigate the alleged ineffectiveness of Hamilton's postconviction counsel. The record demonstrates that the trial court took the steps reasonably expected of it in the circumstances. Thus, the trial court was not deficient and Hamilton was not prejudiced by the trial court's actions.

While Lykes represented Hamilton, the trial court held hearings where the progress of the case and the development of Hamilton's postconviction claims were discussed. The trial court also addressed concerns Hamilton had regarding his representation. On December 14, 2000, the trial court addressed Lykes' concerns that there may be a conflict of interest, as well as the possible waiver of Hamilton's federal habeas rights and Hamilton's pro se motion to discharge Lykes as his attorney. (PCR 3:4-24) The trial court gave Hamilton the opportunity to voice any concerns he had, Hamilton was unable to provide the court with a sufficient basis to remove Lykes as his attorney, and Hamilton ultimately agreed to proceed with Lykes as his attorney. (Id. at 13-17, 21, 27-28) While Hamilton also claims the trial court was deficient for failing to monitor Hamilton's federal habeas deadline, the state court has no authority to intervene in federal court proceedings nor to appoint

Hamilton's federal counsel. Thus, the trial court was not deficient for any failure to monitor Hamilton's federal habeas deadlines.

Hamilton alleges he was prejudiced by the trial court's failure to monitor Lykes because otherwise counsel would have developed compelling mental illness and brain damage mitigation during his initial postconviction hearing. Lykes raised seventeen issues during Hamilton's initial postconviction proceeding.[7] The trial court held an evidentiary hearing on claims (3), (4), (5), (8), (9), and (10), each of which addressed ineffectiveness of trial counsel. Hamilton, 875 So. 2d at 589. The record demonstrates that that Lykes compiled the relevant mental mitigation and that no additional reasonable steps could have been taken to enable Hamilton to prevail on his postconviction claims.

At his trial, Hamilton's trial counsel presented testimony regarding the eye injury Hamilton suffered, and the major impact it had on his life, the high-crime

[7] The motion asserted the following: (1) electrocution is cruel and unusual; (2) Strickland claim for counsel's handling of venue; (3) Strickland claim for failing to present certain witnesses at motion to suppress hearing; (4) Strickland claim for allowing Hamilton's jury to hear the codefendant's cross-examination of a witness; (5) Strickland claim regarding Hamilton's jury overhearing testimony intended for the codefendant's jury; (6) Strickland claim for failing to allow co-counsel to conduct the penalty phase; (7) Strickland claim regarding a request for mitigation jury instructions; (8) Strickland claim regarding the presentation of mitigation; (9) Strickland claim regarding juror misconduct; (10) Strickland claim for failing to consult a psychiatrist; (11) the DNA evidence was insufficient to establish Hamilton's guilt; (12) DNA testing would reveal new exonerating evidence; (13) lethal injection is an ex post facto punishment; (14) Strickland claim for failing to object to the jury's sentencing recommendation; (15) Strickland claim for failing to request an independent act instruction; (16) Strickland claim concerning appellate counsel's representation; and (17) new evidence may be discovered.

neighborhood he grew up in, his unstable family life, and his mother's mental illness. (R 16:2072-87) At the postconviction evidentiary hearing, Lykes called multiple lay witnesses, who mostly echoed the trial testimony. (PCR 6:33-40, 51-56, 67-72, 94-100) Lykes also called Dr. Umesh Mhatre, a psychiatrist who was consulted by Hamilton's trial counsel and evaluated Hamilton prior to his trial. (PCR 7:138-40) He testified regarding Hamilton's eye injury and his history of drug addictions. (PCR 7:140-43) On cross-examination, Dr. Mhatre conceded that he previously told trial counsel that his testimony would do more harm than good, primarily because of his diagnosis that Hamilton had antisocial personality disorder. (PCR 7:148-53) Finally, Lykes called Hamilton's trial counsel, Jimmy Hunt, to testify. He said he did not call Dr. Mhatre at trial because he believed it would do more harm than good, and Dr. Mhatre told him there was not any substantial mental health mitigation. (PCR 7:184-85) He discussed the penalty-phase strategy with Hamilton repeatedly and Hamilton understood and approved of the strategy. (PCR 7:186) When Hamilton appealed the denial of his initial postconviction motion, this Court found "[t]his is not a case where trial counsel failed to investigate any available mitigating witnesses or evidence." Hamilton, 875 So. 2d at 592.

It is plain from the record that Hamilton was denied relief on his initial postconviction motion because the claims were not meritorious. Trial counsel took reasonable steps to investigate and present mitigation at Hamilton's trial, and despite Lykes' efforts, the evidence in the record demonstrated that Hamilton's trial counsel was not deficient. Hamilton's initial postconviction claims were meritless and would have been denied whether Lykes represented Hamilton or not. Thus, Hamilton was not prejudiced by Lykes' representation during his initial postconviction proceedings.

Hamilton's claim that the trial court failed to properly monitor Blow largely concerns Blow's failure to file a timely federal habeas pleading in federal court. (IB 29-31) However, the state trial court has no obligation to monitor Hamilton's federal court proceedings, and would not have the jurisdiction to do so.

Hamilton also alleges that the trial court was deficient for not noticing that Blow was not actively litigating Hamilton's case in the trial court. However, Blow was appointed after Hamilton's initial postconviction proceeding had completed and the appeal was pending before this Court. (SPCR 100) Hamilton assigns blame to the trial court for failing to act when Blow did not file any state court pleadings over the course of nine years. (IB 30) However, it is not at all unusual for a capital

case to remain inactive in state court for several years after the first round of state postconviction litigation is completed.

As demonstrated, no institutional failure occurred in this case and Hamilton's postconviction proceedings were not unreliable or unfair. Furthermore, this claim raises ineffective assistance of postconviction counsel claims, which are meritless and not cognizable in Florida. As such, the trial court's ruling was proper and should be upheld.

ISSUE III: THE TRIAL COURT PROPERLY DENIED HAMILTON'S MOTIONS FOR ADDITIONAL PUBLIC RECORDS UNDER RULE 3.852

Hamilton asserts that the trial court erred in denying his motion for public records because these records would have been available to him during the pre-trial process through a public records request, and the records were "necessary to examine the work done by counsel and the qualifications of the trial court." (IB 37-38) Hamilton's claim is meritless because he has failed to comply with Rule 3.852, Florida Rule of Criminal Procedure, and demonstrate that the records he sought related to a colorable claim for postconviction relief.

This Court reviews the denial of public records motions pursuant to Rule 3.852, Florida Rules of Criminal Procedure, under the abuse of discretion standard. Pardo v. State, 108 So. 3d 558, 565 (Fla. 2012). Rule 3.852 governs the production of public records for capital postconviction defendants. A trial court may only order the production of public records under Rule 3.852(i) upon a finding that:

> (A) collateral counsel has made a timely and diligent search of the records repository;
>
> (B) collateral counsel's affidavit identifies with specificity those additional public records that are not at the records repository;
>
> (C) the additional public records sought are either relevant to the subject matter of a proceeding under rule 3.851 or appear reasonably calculated to lead to the discovery of admissible evidence; and
>
> (D) the additional records request is not overly broad or unduly burdensome.

Fla. R. Crim. P. 3.852(i)(2). Additionally, Hamilton must demonstrate that the records relate to a colorable claim for postconviction relief. Chavez v. State, 132 So. 3d 826, 829 (Fla. 2014); Mann, 112 So. 3d at 1163.

In Chavez, the defendant was denied a request for the Florida Department of Law Enforcement ("FDLE") to produce execution logs and notes written by FDLE agents who had observed eleven prior executions and autopsy records for three previously executed inmates. 132 So. 3d at 829-30. This Court noted that the constitutionality of Florida's lethal injection procedure has been fully litigated, making it unlikely that the records would provide the basis for a colorable claim. Furthermore, the autopsy records would not establish when the executed inmates became unconscious or if they suffered any pain. Thus, the trial court properly denied the request. Id. at 830.

In Mann, the defendant was denied a request for records to support his assertion that that the governor's choice to select Mann for a death warrant was tainted by public input. 112 So. 3d at 1163. This Court held that the trial court's denial of Mann's request was proper because the claim Mann was seeking to prove did not warrant relief. Even if the records Mann sought would have supported his claim, the trial court's denial was proper. Id.

In the present case, Hamilton filed public records motions that sought billing records, capital case assignments, and related materials for Charles Lykes and George Blow III, as well as records related to the Honorable E. Vernon Douglas's judicial candidacy. (SPCR SV 1:2-33) Hamilton fails to explain what colorable claim these records would have supported, saying, "[t]he records were necessary to examine the work done by counsel and the qualifications of the trial court and Hamilton met his burden."[8] (IB 37-38)

Although Hamilton does not identify the potential claim that the requested records relate to, any claim Hamilton may have supported with the records is meritless. If Hamilton sought the records to support his claim of institutional failure, this claim is plainly meritless, as discussed at length, supra, Claim II. A claim based on a judge's unfitness also would not be cognizable in the postconviction context. Such complaints must be dealt with in a motion to disqualify or a complaint to the Judicial Qualifications Commission. See Art. V, § 12, Fla. Const.; Inquiry Concerning Davey, 645 So. 2d 398, 403 (Fla. 1994) (noting that the Judicial Qualifications Commission has the authority to address judicial misconduct or unfitness); Fla. R. Jud. Admin. 2.330. Neither a motion to

[8] The public records motions Hamilton filed in the trial court provided a similarly vague justification, failing to identify with specificity the nature of the claim he sought to prove. (SPCR SV 1:3, 7, 11, 15, 19, 23, 27, 31-32)

disqualify nor a complaint to the Judicial Qualifications Commission would warrant postconviction relief.

As Lykes and Blow both represented Hamilton as postconviction counsel (SPCR 159-60, 315), any Strickland claim related to their representation would not be cognizable. Hartley v. State, 990 So. 2d 1008, 1016 (Fla. 2008) (holding that Strickland claims as to postconviction counsel's representation were not cognizable because the Sixth Amendment does not guarantee a right to the effective assistance of postconviction counsel). Much like the records requests in Chavez and Mann, the records that Hamilton sought did not related to a colorable claim. The trial court rightly denied Hamilton's motion for public records, and the ruling should be affirmed.

ISSUE IV: THE TRIAL COURT PROPERLY DENIED HAMILTON'S CLAIM FOR RELIEF UNDER *HURST V. FLORIDA*, 136 S. CT. 616 (2016), AND *HURST V. STATE*, 202 SO. 2D 40 (FLA. 2016)

A. Hurst is not Retroactive to Hamilton's Case

Hamilton alleges that he is entitled to resentencing under Hurst v. Florida, 136 S. Ct. 616 (2016), and Hurst v. State, 202 So. 3d 40 (Fla. 2016), and that the trial court was wrong to summarily deny his claim. Specifically, he argues Hurst should apply retroactively to his case.[9] Hamilton's claim is meritless because his sentence was final on June 26, 1998, and Hurst is not retroactive to Hamilton's case, pursuant to Asay v. State, 210 So. 3d 1 (Fla. 2016).

Firstly, the trial court properly denied Hamilton's Hurst claim below because it was untimely. As discussed at length, supra, Claim I, Hurst has not been held to be retroactive to Hamilton's case, thus the claim was untimely under Rule 3.851(d)(2). See Carroll, 114 So. 3d at 886-87. As the trial court properly denied Hamilton's Hurst claim, this claim should be denied.

In arguing that Hurst applies retroactively to his case, Hamilton claims that Mosley v. State, 209 So. 3d 1248 (Fla. 2016), and Asay, 210 So. 3d at 1, require an "individualized, case-specific retroactivity approach to Hurst claims." (IB 41)

[9] This Court has already heard and rejected the substance of this claim in Hamilton's petition for writ of habeas corpus. Hamilton v. Jones, No. SC16-984, 2017 WL 836807 (Fla. March 3, 2017). This Court should, once again, reject Hamilton's claim in light of Asay, 210 So. 3d at 15-17.

Hamilton appears to believe that because Hurst retroactivity applies to some, but not all cases, the analysis must require a comprehensive case-by-case approach. He further argues that the differences in the analyses used in Asay and Mosley indicate that a comprehensive case-by-case approach was used. Hamilton's analysis focuses on differences that are clearly attributable to the fact that Mosley's case was not final when Ring was issued, but Asay's case was. A review of Mosley and Asay reveals that Hamilton's conclusions are incorrect; the sole determining factor for Hurst retroactivity is whether the sentence in question was final before Ring v. Arizona, 536 U.S. 584 (2002), was decided on June 24, 2002. Mosley, 209 So. 3d at 1272-74; Asay, 210 So. 3d at 15-17. In fact, this Court's holding in Mosley noted, "we have now held in Asay v. State, that Hurst does not apply retroactively to capital defendants whose sentences were final before the United States Supreme Court issued its opinion in Ring." Mosley, at 1274. The Mosley/Asay holdings are extremely clear that Hurst only applies retroactively to those sentences that were not final when Ring was issued.

This Court has consistently denied Hurst relief in cases that were final before Ring was issued. See Rodriguez v. State, No. SC15-1795, 2017 WL 1409668 (Fla. April 20, 2017); Lambrix v. State, Nos. SC16-8, SC16-56, 2017 WL 931105 (Fla. March 9, 2017); Gaskin v. State, No. SC15-1884, 2017 WL 224772

(Fla. January 19, 2017). This Court declined to enter into a case-by-case retroactivity analysis in these cases and has consistently applied the Asay/Mosley retroactivity rule, considering only whether the sentence was final before the Ring opinion was issued.

Hamilton's death sentence was final on June 26, 1998. Hamilton, 524 U.S. at 956, well before Ring was decided in 2002. Under this Court's controlling precedent of Asay, Hurst is not retroactive to Hamilton's sentence. Asay, 210 So. 3d at 15-17.

Hamilton further asserts that fundamental fairness requires retroactive application of Hurst relief to his case. (IB 45-49) Hamilton misinterprets Mosley's holding to extend Hurst relief to pre-Ring cases through the fundamental fairness doctrine, particularly when an Apprendi or Ring claim was previously raised. (IB 46) Hamilton also appears to place significance on the fact that he is specifically raising a claim for relief under Hurst v. State. (IB 42-43) He argues that the fundamental fairness test warrants relief in cases where the defendant specifically raises a Hurst v. State claim. (Id.)

This Court's discussion of fundamental fairness in Mosley concerned the impact this Court's reliance on pre-Hurst precedent had on Mosley's post-Ring case. Specifically, the Court noted that Mosley attempted to receive Ring relief and

was denied on legal bases this Court now holds were incorrect. Mosley, 209 So. 3d at 1275.

While Hamilton uses the language of Mosley to argue that Hurst should be retroactive to all cases in which a Ring-type claim was raised, this Court has rejected that concept in Gaskin, No. SC15-1884, 2017 WL 224772. Gaskin raised the substance of a Hurst claim both at his trial and on direct appeal. Gaskin v. State, 591 So. 2d 917, 920 (Fla. 1991). This Court found such facts unpersuasive in deciding retroactivity and held that "[b]ecause Gaskin's sentence became final in 1993, Gaskin is not entitled to relief under Hurst v. Florida." Gaskin, No. SC15-1884, 2017 WL 224772 at *2 (citing Asay, 210 So. 3d at 15-17). Gaskin and Mosley make it clear that the fundamental fairness doctrine discussed in Mosley does not create a basis for retroactive application of Hurst to pre-Ring cases.

Hamilton alleges he is entitled to retroactivity pursuant to Witt v. State, 387 So. 2d 922 (Fla. 1980). He argues that his pre-Ring sentence should not be a factor in determining retroactivity, and encourages this Court to break with its precedent in Asay. (IB 50) Hamilton's claim fails because this Court thoroughly assessed retroactivity in Asay, and has already rejected the arguments that Hamilton now puts forth.

Under Witt, a change in the law does not apply retroactively "unless the change: (a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance." 387 So. 3d at 931. To be a "development of fundamental significance," the Court must evaluate the change in the law under the three-prong Stovall[10]/Linkletter[11] test. The Stovall/Linkletter test addresses (1) the purpose of the new rule; (2) reliance on the old rule; and (3) effect on the administration of justice. Asay, 210 So. 3d at 17-22. In Asay, this Court held that in pre-Ring cases, the first factor weighed in favor of retroactivity, but the other two did not. Id.

Hamilton argues that this Court should break with its precedent in Asay and find that all three Stovall/Linkletter prongs weigh in favor of retroactivity in his case. (IB 49-56) Specifically, Hamilton argues that Florida's capital sentencing scheme was unconstitutional before Ring was issued, and as such, reliance on the old rule warrants retroactive application in pre-Ring cases just as it does in post-Ring cases. (IB 52-54) He further argues that resentencing all pre-Ring cases with a Hurst error would not "destroy" the judiciary, thus, the burden is not significant enough to prohibit retroactive application to all cases. (IB 54-56) This Court clearly rejected such arguments in Asay, where it addressed the Stovall/Linkletter

[10] Stovall v. Denno, 388 U.S. 293 (1967).
[11] Linkletter v. Walker, 381 U.S. 618 (1965).

prongs, and found that the test weighed decidedly against retroactive application in pre-Ring cases. Asay, 210 So. 3d at 22. Throughout this Court's opinion, it was clear that the decision centered on whether the sentence was final before or after Ring was issued. Hamilton's arguments are clearly refuted by this Court's holding in Asay, and should be denied.

Hamilton also alleges he has a federal constitutional right to retroactive application of Hurst. He relies on Teague v. Lane, 489 U.S. 288 (1989), arguing that the federal test would support retroactive application in his case because the Hurst decision was substantive. (IB 57-58) This claim fails because Hurst is not a substantive constitutional change and this Court has already found Hurst is not retroactive to pre-Ring cases using the more expansive Witt test.

Firstly, Hurst does not create a substantive constitutional change in the law. Substantive rules alter "the range of conduct or the class of persons that the law punishes," Schriro v. Summerlin, 542 U.S. 348, 353 (2004). Procedural rules, by contrast, "regulate only the manner of determining the defendant's culpability." Id. In Schriro, the Supreme Court determined that Ring, the case upon which Hurst is based, was not substantive, and thus, not retroactive. 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. If Ring was not retroactive under the federal test, then Hurst likewise cannot be retroactive because Hurst merely extends Ring to Florida's capital sentencing scheme.

Secondly, this Court has already assessed Hurst retroactivity using the Witt test and has found Hurst to not be retroactive to pre-Ring cases. This Court noted in Asay that the Witt test "'provides more expansive retroactivity standards than those adopted in Teague.'" Asay, 210 So. 3d at 15. As this Court has already applied the more expansive Witt test and has found Hurst not retroactive to pre-Ring cases, Hamilton is not entitled to retroactivity under federal constitutional law.

In sum, this Court's holdings in Asay and Mosley establish a clear delineation between cases to which Hurst applies retroactively and those it does not. This Court's opinions have consistently held that sentences that were final before Ring was issued are not subject to the retroactive application of Hurst. As such, Hamilton's claim that Hurst should apply to his case is meritless and should be denied.

B. Any Hurst Error in Hamilton's Case is Harmless

Hamilton argues that any Hurst error in his case is harmful. Hamilton is not entitled to relief because his jury made unanimous guilt phase findings convicting

him of the contemporaneous felonies of robbery, kidnapping, and sexual battery, satisfying Hurst v. Florida. These findings render any Hurst error harmless beyond a reasonable doubt.

A proper harmless error analysis inquires whether the record demonstrates beyond a reasonable doubt that the jury would have unanimously recommended death had it been instructed in accordance with Hurst v. State. See Hurst, 202 So. 3d at 68 (analyzing whether the jury's failure to unanimously find all the facts necessary for imposition of the death penalty contributed to Hurst's death sentence); see also Galindez v. State, 955 So. 2d 517, 523 (Fla. 2007) (explaining that the harmless error analysis for a violation of Apprendi v. New Jersey, 530 U.S. 466 (2000), is whether the record demonstrates beyond a reasonable doubt that a rational jury would have found penetration when there was a failure to have the jury make the victim injury finding regarding penetration).

In Hamilton's case, he had three prior violent felony convictions for aggravated battery and two separate robberies. (R 27:4148) Hamilton's jury also convicted him of the contemporaneous crimes of robbery, kidnapping, and sexual battery. (R 26:3879-81) Thus, unanimous jury findings underlie two of the aggravators in Hamilton's case: (1) that Hamilton had been previously convicted of a violent felony; and (2) the murder was committed in the course of a kidnapping,

robbery, and sexual battery. These jury findings satisfy the requirements of Hurst v. Florida.

This Court has repeatedly found that Ring is not applicable to other cases under similar circumstances. See Miller v. State, 42 So. 3d 204, 218-19 (Fla. 2010) (Ring is not violated where Miller's aggravating factors were established by prior violent felonies and contemporaneous felonies); Belcher v. State, 851 So. 2d 678, 685 (Fla. 2003) (concluding that aggravators of prior violent felony conviction and murder in the course of a felony supported by separate guilty verdict exempting the sentence from holding in Ring); see also Poole v. State, 997 So. 2d 382, 396 (Fla. 2008); Guardado v. State, 965 So. 2d 108 (Fla. 2007); Smith v. State, 866 So. 2d 51, 68 (Fla. 2004); Ray Lamar Johnston v. State, 863 So. 2d 271, 286 (Fla. 2003).

Hamilton's death sentence was also exempted from Hurst because Hamilton had three prior violent felony convictions. Hurst is derived from Ring, which is based on Apprendi, 530 U.S. at 466. Apprendi held that any fact, "other than the fact of a prior conviction," that increases the penalty for a crime must be submitted to a jury, and proved beyond a reasonable doubt. 530 U.S. at 490 (relying on Almendarez-Torres v. United States, 523 U.S. 224 (1998)). The concept that prior convictions are exempt from Apprendi has not been receded from and is applicable

to Hurst.[12] Given that Hurst is an application of Ring to Florida, and this Court has found that contemporaneous convictions and prior violent felonies remove a case from the scope of Ring, it should also follow that they remove this case from the scope of Hurst.[13]

Even if this Court should disagree, it can still be established that a rational jury would have unanimously found all the aggravating factors and recommended death. The jury clearly found that the capital felony was committed during a kidnapping, robbery, and sexual battery, given the contemporaneous convictions. Similarly, Hamilton's prior violent felonies were all supported by jury verdicts or guilty pleas. Had the jury been told that it had to unanimously find the four remaining aggravating circumstances, it would have done so.

The remaining aggravators found in Hamilton's case were that (1) Hamilton was under sentence of imprisonment; (2) the murder was committed to avoid arrest; (3) the murder was especially heinous, atrocious or cruel; and (4) the

[12] Hurst v. Florida did not overrule Almendarez-Torres, and it is still good law in the wake of Apprendi and all its progeny including Hurst. United States v. King, 751 F. 3d 1268, 1280 (11th Cir. 2014) ("We have explained that the Supreme Court's holding in Almendarez-Torres was left undisturbed by Apprendi, [530 U.S. at 466], Blakely [v. Washington, 542 U.S. 296 (2004)], and [United States v. Booker, 543 U.S. 220 (2005)]").

[13] The State acknowledges that the Florida Supreme Court has recently rejected this argument in Franklin v. State, 209 So. 3d 1241 (Fla. 2016) and Paul Beasley Johnson v. State, 205 So. 3d 1285 (Fla. 2016); however, it maintains that the cases were wrongly decided, especially given the Court's long history of finding cases not implicated by Ring when they involved prior violent felonies and contemporaneous felonies.

murder was committed in a cold, calculated and premeditated manner. Hamilton, 703 So. 2d at 1040. Unrefuted testimony at trial established that Hamilton was incarcerated at the Carteret Correctional Center in Newport, North Carolina, until his escape on April 24, 1994. Furthermore, Hamilton gave several incriminating statements to officers, admitting that he kidnapped, robbed, and raped Gayheart with his co-defendant. Id. Evidence at trial also demonstrated that Gayheart experienced a terrifying and drawn-out ordeal, during which she told her captors she had children and asked them not to kill her. Id. at 1044.

A rational jury would have unanimously found all the aggravating factors if it had been so instructed, and it would have unanimously found that the aggravating factors were sufficient for the imposition of death, and that they outweighed the mitigation. Ten jurors in Hamilton's case already recommended death. (R 27:4106) Had the jury been told that a unanimous recommendation was required to sentence Hamilton to death, the jury would have certainly done so in this case.

Hamilton also raises the tenuous argument that the trial court "may" have imposed a life sentence if it had been bound by the jury's findings. He claims that this possibility renders Hurst error harmful. (IB 71-73) These arguments are unpersuasive because they are highly speculative. Valle v. State, 70 So. 3d 530,

549 (Fla. 2011) (holding that speculative arguments do not warrant postconviction relief). Furthermore, even if bound to the jury's findings, the trial court's sentence would have been the same, given the jury findings underlying two aggravators, and the significant evidence demonstrating the brutality of the murder and supporting the other four aggravators.

As Hurst is not retroactive to Hamilton's case, and as any Hurst error would be harmless beyond a reasonable doubt, Hamilton is not entitled to Hurst relief.

CONCLUSION

Based on the foregoing arguments and authorities, Appellee, the State of Florida, respectfully urges this Court to affirm the trial court's denial of Hamilton's Successive Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via the eportal to Karen Moore, Esq., Karen.Moore@ccrc-north.org, and Stacy Biggart, Esq., Stacy.Biggart@ccrc-north.org, Counsel for Appellant, this 15th day of May, 2017.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Times New Roman, in compliance with Rule 9.210(a) (2), Florida Rules of Appellate Procedure.

/s/*Jennifer L. Keegan*
COUNSEL FOR APPELLEE

EXHIBIT 5

IN THE SUPREME COURT OF FLORIDA

Case No. SC17-42
Lower Court Case No. 94-150-CFA

RICHARD EUGENE HAMILTON,
Appellant,
v.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRD JUDICIAL CIRCUIT, IN AND
FOR HAMILTON COUNTY, STATE OF FLORIDA

REPLY BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

This is the appeal of the Third Judicial Circuit in and for Hamilton County's final order denying Hamilton's "Successive Motion to Vacate Judgments of Conviction and Sentence." Appellee has filed its answer to Hamilton's initial brief, and this reply follows. References to the Appellee's Answer Brief are made with the letters AB, followed by the page number(s). This reply will address only the most salient points argued by the Appellee. Mr. Hamilton relies upon his initial brief in reply to any argument or authority argued by Appellee that is not specifically addressed in this reply.

References to the record on appeal from the successive postconviction proceeding are made with the letters "SPCR" followed by a "p," followed by the page number. References to the supplemental record on appeal from the successive postconviction proceeding are made with the letters "SPCR" followed by "SV1," followed by a "p," followed by the page number. References to the record on appeal from the initial postconviction proceeding are made with the letters "PCR," followed by the record volume number, followed by a "p," followed by the volume page number or numbers. References to the record on appeal from the original trial are made with the letters "TR," followed by the record volume number, followed by a "p," followed by the volume page number or numbers. For ease of reading, the

Appellant is referred to as "Hamilton" or "defendant," and the Appellee is referred to as "state" or "prosecution."

REPLY TO ARGUMENT I

THE TRIAL COURT ERRED IN SUMMARILY DENYING HAMILTON'S SUCCESSIVE 3.851 MOTION AS PROCEDURALLY BARRED.

The State argues that Mr. Hamilton's claims regarding the institutional failures of the trial court, the State, and the Florida Supreme Court and his *Hurst* claim are untimely. (AB, p. 8).

Mr. Hamilton was without counsel in state court for nearly eleven years, from attorney George Blow's appointment and abandonment in 2004 until the appointment of undersigned counsel in August of 2015. Mr. Blow never visited Mr. Hamilton and filed no pleadings in state court except his motion to withdraw in 2015. Undersigned counsel diligently investigated the circumstances of Mr. Hamilton's original postconviction proceeding and the systemic neglect and errors committed by the trial court, this Court, and the State and filed the successive 3.851 motion within one year of her appointment.

The State argues that the claims raised by Mr. Hamilton are untimely because they do not fall within the recognized exceptions to a late filing under Rule 3.851(d)(2)(c) and it characterizes Mr. Hamilton's institutional failure claim as one for ineffective assistance of postconviction counsel, a claim that may not be raised under Rule 3.851. (AB, p. 9). However, Mr. Hamilton's institutional failure claim is

one based on the equitable power of Florida courts to right a wrong. Mr. Hamilton has alleged that the trial court and the postconviction process in place at all relevant times failed to afford Mr. Hamilton timely appointed competent counsel that resulted in an unreliable postconviction process in state court and a missed habeas corpus deadline in federal court.

This Court recognized that the statutory right to postconviction counsel necessarily encompasses a right to effective assistance by the postconviction attorney assigned to the case. *Spaziano v. State*, 660 So. 2d 1363 (Fla. 1995) (recognizing that Spaziano was entitled to "adequate counsel and resources."); *Spalding v. Dugger*, 526 So. 2d 72 (Fla. 1988) ("each defendant under sentence of death is entitled, as a statutory right, to effective legal representation by the capital collateral representative in all collateral relief proceedings."). *Spalding* was a promise made to death-sentenced people like Mr. Hamilton that effective representation would be provided. This Court did not advise them or Mr. Hamilton that there would be no remedy for the right recognized in *Spalding*. Mr. Hamilton relied, to his detriment, on this Court's promise that effective representation would be provided in both state and federal court, not knowing the promise was empty.

The State's argument that Mr. Hamilton's *Hurst* claim is procedurally barred is meritless, because Mr. Hamilton could not possibly have raised this claim until it was ripe for consideration. (AB, p. 11). *Hurst v. Florida* was decided on January

12, 2016, by the United States Supreme Court, and Mr. Hamilton's raised his *Hurst* claim within one year of the issuance of the opinion.

REPLY TO ARGUMENT II

THE TRIAL COURT ERRED IN SUMMARILY DENYING HAMILTON'S CLAIM OF THE INSTITUTIONAL FAILURE OF THE TRIAL COURT, THE STATE, AND THE FLORIDA SUPREME COURT.

The State argues that Mr. Hamilton's institutional failure claim is actually a claim for ineffective assistance of counsel, a claim that may not be raised in a successive motion under Rule 3.851. (AB, p. 13). The State is wrong. It is an equity claim based upon the myriad failures of the trial court and this Court to ensure a full and fair postconviction process for Mr. Hamilton, including timely appointment of competent counsel. *See Wilson v. Wainwright*, 474 So. 2d 1162 (Fla. 1985) (Defendant was entitled to a new direct appeal where his appointed counsel was ineffective.). Those failures resulted in incompetent counsel being appointed, postconviction counsel Lykes's filing a deficient postconviction motion challenging the conduct of trial counsel, especially in the penalty phase, resulting in the level of prejudice required under *Strickland v. Washington*, 466 U.S. 668 (1984), and the expiration of Mr. Hamilton's right for a federal court review of his state court conviction and death sentence.

The State's argument that Mr. Hamilton's claim is analogous to the equitable claim raised in *Mann v. State*, 112 So. 3d 1158 (Fla. 2013), is meritless. (AB, p. 14).

Mann raised an equitable claim under *Martinez v. Ryan*, 566 U.S. 1 (2012) to permit him to raise an ineffective assistance of counsel claim despite any procedural bar. *Mann*, 112 So. 3d at 1163-64. Again, Mr. Hamilton has not raised a claim under *Martinez* in the instant state court case and he has not raised a claim of ineffective assistance of postconviction counsel. Mr. Hamilton's claim requests relief from the institutional failures of the institutions responsible for ensuring he receive a fair and reliable postconviction process.

The trial court had a duty to timely appoint competent counsel to represent Mr. Hamilton under the statute in existence at the time, Fla. Stat. §27.710(5)(c) (1988). The State assumes CCRC was appointed in a timely manner (AB, p. 15), but there is nothing of record to support that and there was no statute or rule in place that provided automatic appointment of CCRC when any death-sentenced inmate's conviction became final. The State would absolve the trial court of its responsibility to ensure that attorneys appointed in capital postconviction cases were qualified despite the clear statutory language requiring it to do so. (AB, p. 17). Under §27.710(5)(c), the court had a duty to appoint counsel known to the court to have the "experiences and abilities . . . commensurate with the responsibility of representing an individual sentenced to death." *Id*. Mr. Lykes, as well as prior appointed counsel Mr. Printy and Mr. Norgard, did not practice in the Third Judicial Circuit, were apparently unknown to the court, the court made no effort to determine

their qualifications and availability to represent Mr. Hamilton, and it made no findings of fact that counsel was qualified.

In *Wilson v. Wainwright*, 474 So. 2d 1162 (Fla. 1985), this Court awarded the defendant a new appeal where it found appellate counsel ineffective under the *Strickland* standards and urged trial courts to carefully consider the qualifications of counsel before appointment, and not to appoint counsel,

> …[w]ithout due recognition of the skills and attitudes necessary for effective appellate representation. A perfunctory appointment of counsel without counsel's ability to fully, fairly, and zealously advocate the defendant's cause is a denial of meaningful representation, which will not be tolerated. The gravity of the charge, the attorney's skill and experience and counsel's positive appreciation of his role and its significance are all factors which must be in the court's mind when an appointment is made.

Here, contrary to the State's assertion, the trial court had a duty under the statute to appoint competent counsel. Additionally, the court had a duty to monitor the progress of the capital cases under Fla. R. Jud. Admin. 2.050(b)(7). That rule took effect in 1996 and required the chief judge of each circuit to file quarterly reports on the progress of the capital cases. *See also Allen v. Butterworth*, 756 So. 2d 52, 58 (Fla. 2000).

It should have been apparent to the court that Mr. Lykes did not appreciate the enormity of the task before him. It should have been apparent to the court that state and federal deadlines were imminent and Mr. Lykes's schedule did not allow the time necessary to conduct an independent investigation of the case, and complete

the necessary research on cognizable claims and applicable rules of procedure, including state and federal deadlines. Under the controlling statute, the court was appointing counsel to represent Mr. Hamilton in state and federal postconviction claims. *See* Fla. Stat. §27.711 (1998).

The State argues the court conducted sufficient inquiries into whether Mr. Lykes was providing Mr. Hamilton with competent representation. (AB, p. 18). As the March 29, 2000 status conference, the only inquiry the court made of Mr. Lykes about the allegations by Dave Davis, Mr. Hamilton's attorney on direct appeal, was to ask him who Mr. Davis was. (PCR.V4, p. 2). The letters from Mr. Davis and Mr. Hamilton should have triggered an immediate hearing under *Nelson v. State*, 274 So. 2d 256 (Fla. 4th DCA 1973). Instead, the case languished for more than eight months before a *Nelson* hearing was finally conducted on December 14, 2000.

In *Nelson*, the court held that when a defendant asks for discharge of his appointed counsel before trial on grounds that counsel has not rendered effective assistance, the court must inquire of the defendant and counsel to determine if counsel has made "a reasonable investigation into the facts of the case and to acquaint himself with the law pertinent to the facts. In addition, effective counsel should be free of any influence or prejudice which might substantially impair his ability to render independent legal advice to his indigent client." *Id*. at 258-259. There is no indication of record that the court conducted any research on how to

calculate the federal deadline nor did he ask counsel for memoranda on the issue. He had before him a letter from an appellate lawyer (who had taken the time and effort to review the court file and visit Mr. Hamilton) that voiced concerns about blown state and federal deadlines and Mr. Lykes's competence to represent Mr. Hamilton. The trial court also had a letter from Mr. Hunt, Mr. Hamilton's trial counsel, who informed the court there was no 3.851 motion in the court file, and letters from Mr. Hamilton that implored the court to take action because the ABA and the St. Petersburg Times had highlighted Mr. Lykes's tardy, ill-pled motion as an example of how death row inmates were not being properly represented by registry counsel in Florida state court postconviction cases.

At the December 14, 2000 hearing, the court did not inquire into whether a conflict of interest existed between Mr. Lykes and Mr. Hamilton and that Mr. Lykes alleged in his motion for clarification of his status and the cover letter he sent with the motion. Mr. Lykes was concerned about the fallout from publicized accusations that he was incompetent and had forfeited Mr. Hamilton's federal habeas rights. Mr. Lykes claimed the allegations had injured him financially and professionally, and had also damaged his relationship with Mr. Hamilton to the point that he was not certain that he could continue to represent him. This should have prompted an inquiry by the court of Mr. Lykes and Mr. Hamilton and, if the conflict existed, it would have been one of presumed prejudice. The court did not inquire of Mr. Lykes

or Mr. Hamilton on that issue. In conflict of interest cases, the general rule is that prejudice is presumed "if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Strickland v. Washington*, 466 U.S. 668, 692 (1984) (quoting *James v. Kentucky*, 466 U.S. at 350, 358). Here, the issue was squarely before the court in Mr. Lykes's motion for clarification and accompanying cover letter but it was never addressed at the hearing.

Instead of inquiring into whether a fatal conflict of interest existed that would have required appointment of new counsel, the court summarily dispensed with Mr. Hamilton's complaint that Mr. Lykes's had blown his federal deadline after hearing from counsel. The court relied upon the state and defense counsel's erroneous "beliefs", unsupported by rudimentary research, that Mr. Lykes's state court motion would be deemed timely despite it being filed late. He told Mr. Hamilton, "You understand we have to exhaust all state remedies before your one year runs in the federal system." (PCR.V3, p. 16). Hamilton continued to question whether his federal deadline was blown. (PCR.V3, pp. 16-22). The court told him, "It has been resolved" to which Hamilton responded, "If you say so, that's good enough for me." (PCR.V3, p. 22). The court then assured Mr. Hamilton the decision was on the record and "could not be reversed." *Id*.

Had anyone other than Mr. Hamilton questioned whether the motion was timely filed and thus properly filed under AEDPA, the obvious answer would have been that it was untimely and did not toll the federal deadline. Had the court or counsel researched the issue, the court would have been compelled to find the failure of counsel to timely file the motion was grounds for finding that counsel had rendered deficient representation and that counsel should have been discharged under *Nelson*. *Nelson* hold that the trial court should discharge counsel if there is "reasonable cause to believe counsel is not rendering effective assistance to the defendant." *Nelson,* 274 So. 2d at 258. Missing a filing deadline is ample evidence of deficient representation.

Mr. Lykes did nothing on the case for more than three months after filing the initial motion in November 1999 and was not prompted to move to amend the motion until he spoke to Dave Davis, Mr. Hamilton's appellate attorney, as evidenced by this statement by Mr. Lykes at the March 29, 2000 status conference: "[A]nd apparently, as a result of his (Davis's) discussion with Mr. Hamilton, there – there is at least one area that I would like to ask Your Honor for leave of 60 days to look into and amend my petition." (PCR.V3, p. 3). He filed an amended motion on June 28, 2000, nearly 30 days after the 60-day extension granted by the court at the March 29th status conference. (PCR.V1, pp. 13-34). From that statement and the errors and omissions by Mr. Lykes recounted above and in Mr. Hamilton's Initial Brief, Mr.

Lykes was not competent to represent Mr. Hamilton in his postconviction proceeding, the trial court ignored the misconduct, which resulted in an unreliable postconviction process.

The State argues that Mr. Hamilton agreed that Mr. Lykes should continue to represent him at the conclusion of the *Nelson* hearing. (AB, p. 18). Mr. Hamilton's "agreement" to continue with Mr. Lykes as his counsel was based upon the trial court's erroneous conclusion and assurances that no deadlines had been blown. Mr. Hamilton relied on those assurances and when faced with the choice given to him by the court of proceeding with Mr. Lykes or representing himself in capital postconviction proceedings, Mr. Hamilton chose to be represented by counsel. (PCR.V3, pp. 27-28).

The State argues that Mr. Hamilton's eye injury was sufficiently described at the penalty phase and thus may not be raised again in his successive 3.851. (AB, pp. 19-20). The transcript of Mr. Hamilton's penalty phase is a mere 84 pages long, inclusive of closing arguments and exclusive of jury instructions and conferences with counsel outside the presence of the jury. (R.V16). The defense offered testimony from three witnesses: Donnie Simmons, Mr. Hamilton's mother's first cousin; Timothy Hamilton, Mr. Hamilton's brother; and Ann Baker, Mr. Hamilton's former employer. Mr. Simmons mentioned the injury and about "five operations." (TR.16, pp. 2078-79). Timothy Hamilton simply stated that Mr. Hamilton became

"depressed" after the injury and the loss of his eye and started running away and getting into trouble. (TR.16, pp. 2086-87). The last witness, Ann Baker, met Mr. Hamilton when he was 17 or 18, which would have been after the loss of his eye. (TR.16, p. 2096). No testimony was offered about the initial treatments, the types of surgeries and pain endured by Mr. Hamilton, or about the resulting brain injury likely caused by the injury and attempts at treatment. Nor was any evidence presented of the numerous head injuries suffered by Mr. Hamilton and described in his successive motion. None of this was raised at the subsequent 3.851 hearing because Mr. Lykes never requested Mr. Hamilton's medical and hospital records (that were still obtainable at the time of the filing of the successive 3.851) nor did he ever seek psychological or neuropsychological testing. A cursory review of Mr. Hamilton's medical and hospital records would have alerted trial counsel and Mr. Lykes that Mr. Hamilton had likely suffered traumatic brain injuries. Mr. Hamilton's jury recommended a death sentence by a vote of 10-2. Had the jury heard the testimony of Dr. Crown and been informed of Mr. Hamilton's multiple head injuries and the brain injury, the result would likely have been different.

The United States Supreme Court has held that: "The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in determination that death is the appropriate punishment' in any capital case." *Johnson v. Mississippi*, 486 U.S.

578, 584 (1988); *see also Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014) ("Persons facing the most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution."). The trial court's errors and omissions and the postconviction procedure in place at the relevant times failed to ensure Mr. Hamilton's right to due process and effective assistance of counsel and resulted in a constitutionally unreliable postconviction process under the Fifth, Sixth, and Eighth Amendments to the United States Constitution and corresponding provisions of the Florida Constitution.

It is a travesty to hold Mr. Hamilton, a death row inmate with a high school degree and extremely limited ability to research any legal issues, to a higher standard than his attorney, the State, and the trial court. It is an injustice to deny him a new postconviction proceeding. Florida courts may grant equity under the circumstances. Mr. Hamilton has not been afforded a fair opportunity to show that the Eighth Amendment prohibits his execution and he deserves a new postconviction proceeding as if the first had never occurred, or withdrawal of the mandate from the direct appeal, or imposition of a life sentence.

REPLY TO ARGUMENT III

THE TRIAL COURT ERRED IN DENYING HAMILTON'S MOTIONS FOR ADDITIONAL PUBLIC RECORDS UNDER RULE 3.852.

The State bases its arguments against Mr. Hamilton's 3.852 claim on *Chavez v. State*, 132 So. 3d 826 (Fla. 2014) and *Mann v. State*, 115 So. 3d 1158 (Fla. 2013),

two active death warrant cases with records requests related to the issues of lethal injection and the governor's unfettered discretion to issue death warrants.

Chavez requested the records from FDLE and DOC related to lethal injection procedure, and he also requested the autopsy records of previously executed Florida death row inmates. *Chavez*, 132 So. 3d at 829-831. This Court denied those requests because the constitutionality of Florida's lethal injection procedure had been fully considered by this Court, and the autopsy records would not establish whether those inmates were unconscious or if they experienced pain during execution. *Id*.

Mann requested records regarding the governor's selection of inmates for death warrants, and this Court denied this claim based on the executive powers of the governor. *Mann*, 112 So. 3d at 1163.

Mr. Hamilton's case is easily distinguishable because the records he requested are directly related to his meritorious claim of the institutional failure of the trial court, the State and this Court to ensure Mr. Hamilton received a constitutionally reliable postconviction process. Mr. Hamilton is not under and active death warrant, and he is not seeking records related to an issue within realm of the governor's executive powers or an issue, like lethal injection, that has been fully considered by this Court. Contrary to the State's misstatement of his claim, Mr. Hamilton's institutional failure claim is not a claim of ineffective assistance of counsel.

REPLY TO ARGUMENT IV

THE TRIAL COURT ERRED IN SUMMARILY DENYING HAMILTON'S *HURST* CLAIM.

A. *Hurst* applies retroactively to Mr. Hamilton as a matter of Florida law.

In its Answer Brief, the State first contends Mr. Hamilton's *Hurst* claim is untimely because *Hurst* does not apply retroactively to Mr. Hamilton. (AB, p. 27). As explained in Mr. Hamilton's Initial Brief, Florida law mandates the retroactive application of *Hurst* to Mr. Hamilton under both (1) the fundamental fairness doctrine, which the Florida Supreme Court has applied in cases including *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), and *James v. State*, 615 So. 2d 669 (Fla. 1993); and (2) the traditional Florida retroactivity analysis established under *Witt v. State*, 387 So. 2d 922 (Fla. 1980).

The State argues that the sole determining factor for *Hurst* retroactivity under *Asay v. State*, 210 So. 3d 1 (Fla. 2016) and *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016) is whether the sentence was final before *Ring*, and Mr. Hamilton's death sentence was final on June 26, 1998. (AB, p. 29). The State cites *Gaskin v. State*, No. SC15-1884, 2017 WL 224772, where the defendant raised a *Ring*-type claim at his trial and on direct appeal, to refute Mr. Hamilton's fundamental fairness argument. (AB, p. 30).

In other words, the State is arguing that in *Asay* and/or *Gaskin*, this Court overruled its most recent holdings almost immediately. First, the State suggests that

this Court overruled *James* and *Mosley*, where this Court explained that "fundamental fairness alone may require the retroactive application of certain decisions involving the death penalty after the United States Supreme Court decides a case that changes our jurisprudence." *Mosley*, 209 So. 3d at 1274. Second, the State's argument necessarily means that this Court quickly overruled its approach in *Mosley* and in *Asay*, where it explained that *Witt* should be applied in an individualized manner. *Compare Asay*, 210 So. 3d 15-22 (concluding as to the third *Witt* prong that the first *Stovall*/*Linkletter* factor weighed "in favor" of retroactivity, the second *Stovall/Linkletter* factor weighed "heavily against" retroactivity, and the third *Stovall/Linkletter* factor weighed "heavily against" retroactivity), with *Mosley*, 209 So. 3d at 1276-83 (concluding as to the same third *Witt* prong that the first *Stovall/Linkletter* factor weighed "heavily in favor" of retroactivity, the second *Stovall/Linkletter* factor weighed "in favor" of retroactivity, and the third *Stovall/Linkletter* factor weighed in favor of retroactivity). This argument is without merit for two reasons.

First, this Court has made it clear that it "does not intentionally overrule itself sub silentio." *Puryear v. State*, 810 So. 2d 901, 905 (Fla. 2002). This Court continued: "Where a court encounters an express holding from this Court on a specific issue and a subsequent contrary dicta statement on the same specific issue, the court is to apply our express holding in the former decision until such time as

this Court recedes from the express holding." *Id.* This Court has never expressly overruled any part of *James*, *Mosley*, or *Asay*. These cases, therefore, are still good law, and Mr. Hamilton is entitled to retroactive application of *Hurst* under their holdings.

Second, contrary to the State's position, this Court's opinions in *Asay* and *Gaskin* are not inconsistent with fundamental fairness analysis. The legally sound explanation for this Court's failure to address the *Mosley*/*James* retroactivity tests in *Asay* and *Gaskin* is that Asay and Gaskin never raised those arguments in their briefing, while Mosley did. *See Jones v. State*, 966 So. 2d 319, 330 (Fla. 2007) (It is well established that arguments not raised in the initial brief are considered barred.). Indeed, Mosley argued that he was entitled to retroactive application of *Hurst* under both the fundamental fairness doctrine and *Witt*. Mosley dedicated an entire section of his initial brief to the fundamental fairness argument: "B. *Hurst* should be held to be particularly retroactive in Mosley's case under this Court's holding in *James v. State*, 615 So. 2d 668 (Fla. 1993)." *Mosley*, Pet. Brief at 11-13. This Court, therefore, addressed this argument: "[B]ecause Mosley raised a *Ring* claim at his first opportunity and was then rejected at every turn, we conclude that fundamental fairness requires the retroactive application of *Hurst*, which defined the effect of *Hurst v. Florida*, to Mosley." *Mosley*, 209 So. 3d at 1275.

B. *Hurst* applies retroactively to Mr. Hamilton as a matter of federal law.

Mr. Hamilton also has a federal right to *Hurst* retroactivity. First, the State contends that *Schriro v. Summerlin*, 542 U.S. 348 (2004) precludes the federal retroactivity of *Hurst.* (AB, p. 32). *Summerlin*, however, is inapposite in the *Hurst* retroactivity context. *Summerlin* applied the federal retroactivity test articulated *Teague v. Lane*, 489 U.S. 288 (1989), and determined that *Ring* was not retroactive on federal habeas review because the requirement that the jury rather than the judge make findings as to whether the defendant had a prior violent felony aggravator was procedural rather than substantive. *Summerlin* did not review a statute like Florida's that required the jury not only to conduct the fact-finding regarding the aggravators, but also the fact-finding as to whether the aggravators were *sufficient* to impose death. Moreover, *Hurst*, unlike *Ring*, addressed the proof-beyond-a-reasonable-doubt standard in addition to the jury trial right, and the Supreme Court has always regarded such decisions as substantive. *See Powell v. Delaware*, 153 A. 3d 69, 73 (Del. 2016) (holding that *Hurst* is retroactive under the state's *Teague*-like retroactivity doctrine and distinguishing *Summerlin* on the ground that *Summerlin* "only addressed the misallocation of fact-finding responsibility (judge versus jury) and not . . . the applicable burden of proof."); *see also Guardado v. Jones*, No. 4:15-cv-256 (N.D. Fla. May 27, 2016) (federal judge explaining that *Hurst* retroactivity is possible notwithstanding *Summerlin* because *Summerlin*, unlike *Hurst*, "did not

address the requirement for proof beyond a reasonable doubt," and "[t]he Supreme Court has held a proof-beyond-a-reasonable-doubt decision retroactive. *See Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972).").

C. Under federal law, states must apply a substantive rule retroactively regardless of state retroactivity tests.

Florida state courts must apply *Hurst* retroactively to Mr. Hamilton because *all* defendants are entitled to *Hurst* relief under federal law. *Montgomery v. Louisiana*, 136 S. Ct. 718, 729 (2016) (states are *not* free to deny retroactive application of a substantive rule). The State's arguments to the contrary are unpersuasive.

The State's assertion that this Court's *Witt* retroactivity ruling is more "expansive" than the United States Supreme Court's retroactivity ruling is misleading. Upon finding that a rule is retroactive, the United States Supreme Court has *never* granted only partial retroactivity; its retroactivity rulings, both pre-*Teague* and post-*Teague*, have applied to *all* postconviction litigants or none. *See, e.g., Montgomery*, 136 S. Ct. at 736 (applying a substantive rule retroactively to *all* defendants); *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) (same).

D. The *Hurst* error in Mr. Hamilton's case is not harmless.

The State erroneously argues that the *Hurst* error in Mr. Hamilton's case is harmless because his jury made guilt phase findings convicting him of

contemporaneously felonies, and prior juries in North Carolina convicted him of aggravated battery and two separate robberies. (AB, p. 34).

This issue was fully briefed in Mr. Hamilton's Initial Brief (see pgs. 66-71), and the State concedes that this Court has rejected this argument in *Franklin v. State*, 209 So. 3d 1241 (Fla. 2016) and *Paul Beasley Johnson v. State*, 205 So. 3d 1285 (Fla. 2016). (AB, p. 36, fn.13).

Mr. Hamilton's jury recommendation for death was 10-2, and the State asks this Court to speculate that the jury would have made unanimous findings of the aggravating factors, that the aggravating factors were sufficient to impose death, and that the aggravating factors outweighed the mitigation. (AB, p. 37). The State argues that had the jury been told that a unanimous vote was required to sentence Mr. Hamilton to death, the jury would have returned a 12-0 recommendation rather than a 10-2 recommendation. This Court has rejected the State's speculative argument in every non-unanimous jury recommendation considered by this Court. See Initial Brief, p. 65-66.

CONCLUSION

For the reasons set forth in his Initial Brief and this Reply Brief, Appellant, Richard Eugene Hamilton, requests that he be granted an evidentiary hearing on his claims, and any other relief deemed appropriate by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by electronic service to Jennifer Keegan, Assistant Attorney General, (capapp@myfloridalegal.com and Jennifer.Keegan@myfloridalegal.com); and by U.S. Mail to Richard Hamilton, DOC# 123846, Union Correctional Institution, P.O. Box 1000, Raiford, FL 32083; on this date, June 5, 2017.

Respectfully submitted,

/s/ Karen L. Moore
KAREN L. MOORE

CERTIFICATE OF FONT

This is to certify that the foregoing Initial Brief of Appellant has been reproduced in Times New Roman 14-point font, pursuant to Rule 9.100(1), Florida Rules of Appellate Procedure.

Respectfully submitted,

/s/ Karen L. Moore
KAREN L. MOORE

EXHIBIT 6

Florida Death-Penalty Appeals Decided in Light of Hurst

Last updated: April 6, 2018

Total number of prisoners whose cases have been reviewed by Florida Supreme Court (or, if relief is granted, by a Circuit Court) in light of *Hurst*: 257

Number of prisoners who have obtained relief under *Hurst*: 128 (49.81%)

Number of prisoners who have been denied relief under *Hurst*: 129 (50.19%)

The Florida Supreme Court has declared that it will apply its decisions in *Hurst v. State* and *Asay v. State*—which held that non-unanimous jury recommendation of death violate the Florida state constitution and the Sixth Amendment of the U.S. Constitution—to new death penalty cases and to older cases in which the direct appeal process was final on or before the U.S. Supreme Court decided *Ring v. Arizona* in June 2002.

Prisoner Name	County of Conviction	Conviction Final Before Ring?	Jury Recommendation Unanimous?	Jury Vote(s)	Death Sentence Reversed?	Date of Cou Order
Abdool, Dane	Orange	N	N	10-2	Y	4/6/17
Allred, Andrew	Seminole	N	WAIVED JURY		N	11/16/17
Alston, Pressley Bernard	Duval	Y	N	9-3	N	1/22/18
Altersberger, Joshua Lee	Highlands	N	N	9-3	Y	4/27/17
Anderson, Charles L.	Broward	N	N	8-4	Y	3/9/17
Anderson, Richard	Hillsborough	Y	N	11-1	N	1/26/18
Archer, Robin Lee	Escambia	Y	N	7-5	N	3/17/17
Armstrong, Lancelot Uriley	Broward	N	N	9-3	Y	1/19/17
Asay, Marc	Duval	Y	N	9-3, 9-3	N **(EXECUTED)**	12/22/16
Atwater, Jeffrey Lee	Pinellas	Y	N	11-1	N	1/23/18
Ault, Howard Steven	Broward	N	N	9-3, 10-2	Y	3/9/17
Bailey, Robert J.	Bay	N	N	11-1	Y	7/6/17
Baker, Cornelius	Flagler	N	N	9-3	Y	3/23/17
Banks, Donald	Duval	N	N	10-2	Y	4/20/17
Bargo, Michael Shane	Marion	N	N	10-2	Y	6/29/17
Barnhill, Arthur	Seminole	N	N	9-3	Y	2/20/17
Barwick, Darryl Brian	Bay	Y	Y	12-0	N	2/28/18
Bates, Kayle Barrington	Bay	Y	N	9-3	N	1/22/18
Beasley, Curtis W.	Polk	Y	N	10-2	N	1/23/18
Belcher, James	Duval	N	N	9-3	Y	11/2/17
Bell, Michael	Duval	Y	Y	12-0, 12-0	N	1/29/18
Bevel, Thomas	Duval	N	N	8-4, 12-0	Y*	6/15/17

Prisoner Name	County of Conviction	Conviction Final Before Ring?	Jury Recommendation Unanimous?	Jury Vote(s)	Death Sentence Reversed?	Date of Cou Order
Booker, Stephen Todd	Duval	Y	N	8-4	N	1/30/18
Bowles, Gary Ray	Duval	Y	Y	12-0	N	1/29/18
Braddy, Harrel	Miami-Dade	N	N	11-1	Y	6/15/17
Bradley, Brandon Lee	Brevard	N	N	10-2	Y	3/30/17
Bradley, Donald	Clay	Y	N	10-2	N	1/22/18
Branch, Eric Scott	Escambia	Y	N	10-2	N **(EXECUTED)**	1/22/18
Brookins, Elijah	Gadsden	N	N	10-2	Y	4/20/17
Brooks, Lamar	Okaloosa	N	N	9-3, 11-1	Y	3/10/17
Brown, Paul Alfred	Hillsborough	Y	N	7-5	N	1/29/18
Brown, Paul Anthony	Volusia	Y	Y	12-0	N	2/28/18
Burns, Daniel Jr.	Manatee	Y	Y	12-0	N	1/23/18
Buzia, John	Seminole	N	N	8-4	Y	4/6/17
Byrd, Milford Wade	Hillsborough	Y	Unknown	Unknown	N	2/28/18
Calloway, Tavares David	Miami-Dade	N	N	7-5, 7-5, 7-5, 7-5, 7-5	Y	1/26/17
Campbell, John	Citrus	N	N	8-4	Y	8/30/17
Card, James	Bay	N	N	11-1	Y	5/4/17
Carr, Emilia	Marion	N	N	7-5	Y	2/7/17
Carter, Pinkney	Duval	N	N	9-3, 8-4	Y	10/4//17
Caylor, Matthew	Bay	N	N	8-4	Y	5/18/17
Clark, Ronald Wayne Jr.	Duval	Y	N	11-1	N	1/23/18
Cole, Loran	Marion	Y	Y	12-0	N	1/23/18
Cole, Tiffany Ann	Duval	N	N	9-3, 9-3	Y	6/29/17
Conde, Rory	Miami-Dade	N	N	9-3	Y	8/31/17
Consalvo, Robert	Broward	Y	N	11-1	N	1/31/18
Cox, Allen	Lake	N	N	10-2	Y	7/23/17
Cozzie, Steven Anthony	Walton	N	Y	12-0	N	5/11/17
Crain, Willie Seth	Hillsborough	N	Y	12-0	N	4/5/18
Damren, Floyd William	Clay	Y	Y	12-0	N	2/2/18
Darling, Dolan a/k/a Sean Smith	Orange	N	N	11-1	Y	3/29/17
Davis, Adam W.	Hillsborough	N	N	7-5	Y	5/2/17
Davis, Barry T.	Walton	N	N	9-3, 10-2	Y	5/11/17
Davis, Jr., Leon	Polk	N	Y	12-0, 12-0, 8-4	N	11/10/16
Davis, Jr., Leon	Polk	N	WAIVED JURY		N	11/10/16
Davis, Mark Allen	Pinellas	Y	N	8-4	N	1/29/18
Davis, Toney D.	Duval	Y	N	11-1	N	2/17/17
Dennis, Labrant	Miami-Dade	N	N	11-1, 11-1	Y	7/7/17

Prisoner Name	County of Conviction	Conviction Final Before Ring?	Jury Recommendation Unanimous?	Jury Vote(s)	Death Sentence Reversed?	Date of Cou Order
Deparvine, Williams James	Hillsborough	N	N	8-4, 8-4	Y	4/6/17
Derrick, Samuel Jason	Pasco	Y	N	7-5	N	2/2/18
Dessaure, Kenneth	Pinellas	N	WAIVED JURY		N	11/16/17
Deviney, Randall	Duval	N	N	8-4	Y	3/23/17
Diaz, Joel	Lee	N	N	9-3	Y	6/15/17
Dillbeck, Donald David	Leon	Y	N	8-4	N	1/24/18
Doorbal, Noel	Miami-Dade	N	N	8-4, 8-4	Y	9/20/17
Doty, Wayne	Bradford	N	N	10-2	Y	8/7/17
Douglas, Luther	Duval	N	N	11-1	Y	6/29/17
Dubose, Rasheem	Duval	N	N	8-4	Y	2/9/17
Durousseau, Paul	Duval	N	N	10-2	Y	1/31/17
Eaglin, Dwight	Charlotte	N	N	8-4, 8-4	Y	4/3/17
England, Richard	Volusia	N	N	8-4	Y	5/22/17
Evans, Paul H.	Indian River	N	N	9-3	Y	3/20/17
Evans, Steven Maurice	Orange	Y	N	11-1	N	1/24/18
Evans, Wydell Jody	Brevard	N	N	10-2	Y	
Finney, Charles	Hillsborough	Y	N	9-3	N	1/26/18
Floyd, Maurice Lamar	Putnam	N	N	11-1	Y	5/17/17
Ford, James D.	Charlotte	Y	N	11-1, 11-1	N	1/23/18
Foster, Charles	Bay	Y	N	8-4	N	1/29/18
Foster, Kevin Don	Lee	Y	N	9-3	N	1/29/18
Fotopoulos, Konstantinos	Volusia	Y	N	8-4, 8-4	N	1/29/18
Frances, David	Orange	N	N	9-3, 10-2	Y	3/29/17
Franklin, Richard P.	Columbia	N	N	9-3	Y	11/23/16
Gamble, Guy R.	Lake	Y	N	10-2	N	1/29/18
Gaskin, Louis	Flagler	Y	N	8-4, 8-4	N	2/28/18
Geralds, Mark Allen	Bay	Y	Y	12-0	N	2/28/18
Glover, Dennis T.	Duval	N	N	10-2	Y	9/14/17
Gonzalez, Leonard	Escambia	N	N	10-2	Y	5/23/17
Gonzalez, Ricardo	Miami-Dade	Y	N	8-4	N	3/23/18
Gordon, Robert R.	Pinellas	Y	N	9-3	N	1/31/18
Gregory, William	Volusia	N	N	7-5, 7-5	Y	8/31/17
Griffin, Michael Allen	Miami-Dade	Y	N	10-2	N	2/2/18
Grim, Norman	Santa Rosa	N	Y	12-0	N	3/29/18
Guardado, Jesse	Walton	N	Y	12-0	N	5/11/17
Gudinas, Thomas Lee	Collier	Y	N	10-2	N	1/30/18
Guzman, James	Volusia	N	N	11-1	Y	2/22/18

Prisoner Name	County of Conviction	Conviction Final Before Ring?	Jury Recommendation Unanimous?	Jury Vote(s)	Death Sentence Reversed?	Date of Cou Order
Guzman, Victor	Miami-Dade	N	N	7-5	Y	4/6/17
Hall, Donte Jermaine	Lake	N	N	8-4	Y	6/15/17
Hall, Enoch D.	Volusia	N	Y	12-0	N	2/9/17
Hamilton, Richard	Hamilton	Y	N	10-2	N	2/18/18
Hampton, John	Pinellas	N	N	9-3	Y	5/4/17
Hannon, Patrick	Hillsborough	Y	Y	12-0	N **(EXECUTED)**	11/1/17
Hartley, Kenneth	Duval	Y	N	9-3	N	1/26/18
Hayward, Steven	St. Lucie	N	N	8-4	Y	3/24/17
Heath, Ronald Palmer	Alachua	Y	N	10-2	N	2/28/18
Hernandez, Michael	Santa Rosa	N	N	11-1	Y	5/11/17
Hernandez-Alberto, Pedro	Hillsborough	N	N	10-2, 10-2	Y	5/9/17
Hertz, Gerry	Wakulla	N	N	10-2, 10-2	Y	5/18/17
Heyne, Justin	Brevard	N	N	10-2, 8-4	Y	4/6/17
Hitchcock, James	Orange	Y	N	10-2	N	8/10/17
Hobart, Robert	Santa Rosa	N	N	7-5	Y	2/21/18
Hodges, George Michael	Hillsborough	Y	N	10-2	N	2/2/18
Hodges, Willie James	Escambia	N	N	10-2	Y	3/16/17
Hojan, Gerhard	Broward	N	N	9-3, 9-3	Y	1/31/17
Huggins, John	Orange	N	N	9-3	Y	5/23/17
Hunter, Jerone	Volusia	N	N	10-2, 10-2, 9-3, 9-3	Y	6/16/17
Hurst, Timothy	Escambia	N	N	7-5	Y	10/14/16
Hutchinson, Jeffrey	Okaloosa	N	WAIVED JURY	WAIVED JURY	N	3/15/18
Israel, Connie Ray	Duval	N	N	7-5	Y	3/21/17
Jackson, Etheria Verdell	Duval	Y	N	7-5	N	1/24/18
Jackson, Kenneth R.	Hillsborough	N	N	11-1	Y	3/23/17
Jackson, Michael James	Duval	N	N	8-4, 8-4	Y	6/9/17
Jackson, Ray	Volusia	N	N	9-3	Y	4/24/17
Jeffries, Kevin G.	Bay	N	N	10-2	Y	7/13/17
Jeffries, Sonny Ray	Orange	Y	N	11-1	N	1/26/18
Jennings, Brandy Bain	Collier	Y	N	10-2, 10-2, 10-2	N	1/29/18
Johnson, Emanuel	Sarasota	Y	N	8-4, 10-2	N	2/2/18
Johnson, Paul Beasley	Polk	N	N	11-1, 11-1, 11-1	Y	12/1/16
Johnson, Richard Allen	St. Lucie	N	N	11-1	Y	3/24/17
Johnson, Ronnie	Miami-Dade	Y	N	7-5, 9-3	N	3/27/18
Johnston, Ray	Hillsborough	N	N	11-1	Y	7/21/17

Prisoner Name	County of Conviction	Conviction Final Before Ring?	Jury Recommendation Unanimous?	Jury Vote(s)	Death Sentence Reversed?	Date of Cou Order
Johnston, Ray	Hillsborough	N	Y	12-0	N	7/21/17
Jones, Henry Lee	Brevard	N	Y	12-0	N	3/2/17
Jones, Marvin Burnett	Duval	Y	N	9-3	N	1/22/18
Jones, Victor	Miami-Dade	Y	Y/N	10-2, 12-0	N	9/28/17
Jordan, Joseph	Volusia	N	N	10-2	Y	8/22/17
Kaczmar, III, Leo L.	Clay	N	Y	12-0	N	1/31/17
Kelley, William H.	Highlands	Y	N	8-3 [not a typo]	N	1/26/18
King, Cecil	Duval	N	N	8-4	Y	7/12/17
King, Michael L.	Sarasota	N	Y	12-0	N	1/26/17
Kirkman, Vahtiece	Brevard	N	Y	10-2	Y	1/11/18
Knight, Richard	Broward	N	Y	12-0, 12-0	N	1/31/17
Kocaker, Genghis	Pinellas	N	N	11-1	Y	10/6/17
Kokal, Gregory Alan	Duval	Y	Y	12-0	N	1/24/18
Kopsho, William M.	Marion	N	N	10-2	Y	1/19/17
Krawczuk, Anton	Duval	Y	Y	12-0	N	1/31/18
Lamarca, Anthony	Pinellas	Y	N	11-1	N	1/30/18
Lambrix, Cary Michael	Glades	Y	N	8-4, 10-2	N **(EXECUTED)**	9/29/17
Lawrence, Gary	Santa Rosa	Y	N	9-3	N	2/2/18
Lebron, Joel	Osceola	N	N	7-5	Y	4/20/17
Lightbourne, Ian	Marion	Y	N	Unrecorded	N	1/26/18
Long, Robert Joe	Hillsborough	Y	Y	12-0	N	1/29/18
Lucas, Harold Gene	Lee	Y	N	11-1	N	1/24/18
Marquard, John	St. Johns	Y	Y	12-0	N	1/24/18
Martin, David	Clay	N	N	9-3	Y	7/13/17
Matthews, Douglas	Volusia	N	N	10-2	Y	12/5/17
McCoy, Richard (aka Jamil Rashid)	Duval	N	N	7-5	Y	9/6/17
McCoy, Thomas	Walton	N	N	11-1	Y	11/8/17
McGirth, Renaldo Devon	Marion	N	N	11-1	Y	1/26/17
McKenzie, Norman Blake	St. Johns	N	N	10-2, 10-2	Y	6/19/17
McLean, Derrick	Orange	N	N	9-3	Y	4/24/17
McMillian, Justin	Duval	N	N	10-2	Y	4/13/17
Melton, Antonio Lebaron	Escambia	Y	N	8-4	N	2/2/18
Mendoza, Marbel	Miami-Dade	Y	N	7-5	N	1/30/18
Merck, Jr., Troy	Pinellas	N	N	9-3	Y	5/5/17
Middleton, Dale	Okeechobee	N	Y	12-0	N	3/9/17
Miller, David Jr.	Duval	Y	N	7-5	N	1/31/18
Miller, Lionel Michael	Orange	N	N	11-1	Y	5/8/17

Prisoner Name	County of Conviction	Conviction Final Before Ring?	Jury Recommendation Unanimous?	Jury Vote(s)	Death Sentence Reversed?	Date of Cou Order
Morton, Alvin	Pasco	Y	N	11-1, 11-1	N	2/2/18
Morris, Dontae	Hillsborough	N	Y	12-0, 12-0	N	4/27/17
Morris, Dontae	Hillsborough	N	N	10-2	Y	1/11/18
Morris, Robert D.	Polk	Y	N	8-4	N	1/26/18
Mosley, John F.	Duval	N	N	8-4	Y	12/22/16
Mullens, Khadafy	Pinellas	N	WAIVED JURY		N	6/16/16
Murray, Gerald Delane	Duval	N	N	11-1	Y	4/4/17
Nelson, Joshua D.	Lee	Y	Y	12-0	N	1/31/18
Nelson, Micah	Polk	N	N	9-3	Y	3/8/17
Newberry, Rodney	Duval	N	N	8-4	Y	4/6/17
Oats, Jr. Sonny Boy	Marion	Y	UNKNOWN		N	5/25/17
Occhicone, Dominick A.	Pasco	Y	N	7-5	N	1/30/18
Okafor, Bessman	Orange	N	N	11-1	Y	6/8/17
Oliver, Terence Tabius	Brevard	N	Y	12-0, 12-0	N	4/6/17
Orme, Roderick	Bay	N	N	11-1	Y	3/30/17
Overton, Thomas M.	Monroe	Y	N	8-4, 9-3	N	2/2/18
Pace, Bruce Douglas	Santa Rosa	Y	N	7-5	N	1/30/18
Pagan, Alex	Broward	N	N	7-5, 7-5	Y	2/1/18
Parker, J.B.	Martin	N	N	11-1	Y	4/20/17
Partin, Phillup Alan	Pasco	N	N	9-3	Y	3/27/17
Pasha, Khalid	Hillsborough	N	N	11-1, 11-1	Y	5/11/17
Peterka, Daniel Jon	Okaloosa	Y	N	8-4	N	1/22/18
Peterson, Robert Earl	Duval	N	N	7-5	Y	7/6/17
Pham, Tai	Seminole	N	N	10-2	Y	3/22/17
Phillips, Galante	Duval	N	N	7-5	Y	4/20/17
Phillips, Harry Franklin	Miami-Dade	Y	N	7-5	N	1/22/18
Philmore, Lenard James	Martin	N	Y	12-0	N	1/25/18
Pietri, Norberto	Palm Beach	Y	N	8-4	N	2/2/18
Poole, Mark	Polk	N	N	11-1	Y	3/31/17
Pope, Thomas Dewey	Broward	Y	N	9-3	N	2/28/18
Puiatti, Carl	Pasco	Y	N	11-1	N	1/23/18
Quince, Kenneth Darcell	Volusia	Y	WAIVED JURY		N	1/18/18
Raleigh, Bobby Allen	Volusia	Y	Y	12-0, 12-0	N	2/28/18
Reynolds, Michael	Seminole	N	Y	12-0, 12-0	N	4/5/18
Rhodes, Richard Wallace	Pinellas	Y	N	10-2	N	1/23/18
Rigterink, Thomas William	Polk	N	N	7-5, 7-5	Y	4/6/17
Rimmer, Robert	Broward	N	N	9-3, 9-3	Y	6/29/17

Prisoner Name	County of Conviction	Conviction Final Before Ring?	Jury Recommendation Unanimous?	Jury Vote(s)	Death Sentence Reversed?	Date of Cou Order
Robards, Richard	Pinellas	N	N	7-5, 7-5	Y	4/6/17
Rodgers, Jeremiah	Santa Rosa	N	WAIVED JURY		N	2/8/18
Rodgers, Theodore	Orange	N	N	8-4	Y	4/3/17
Rogers, Glen Edward	Hillsborough	Y	Y	12-0	N	1/30/18
Rodriguez, Manuel Antonio	Miami-Dade	Y	Y	12-0, 12-0, 12-0	N	1/31/18
San Martin, Pablo	Miami-Dade	Y	N	9-3	N	2/28/18
Schoenwetter, Randy	Brevard	N	N	10-2, 9-3	Y	4/7/17
Seibert, Michael	Broward	N	N	9-3	Y	6/22/17
Serrano, Nelson	Polk	N	N	9-3, 9-3, 9-3, 9-3	Y	5/11/17
Sexton, John	Pasco	N	N	10-2	Y	6/29/17
Silvia, William	Seminole	N	N	11-1	Y	2/20/17
Simmons, Eric Lee	Lake	N	N	8-4	Y	12/22/16
Sireci, Henry Perry	Orange	Y	N	11-1	N	1/31/18
Sliney, Jack R.	Charlotte	Y	N	7-5	N	1/31/18
Smith, Corey	Miami-Dade	N	N	9-3, 10-2	Y	3/16/17
Smith, Joseph	Sarasota	N	N	10-2	Y	7/13/17
Smith, Stephen V.	Charlotte	N	Y	9-3	Y	4/21/17
Smithers, Samuel	Hillsborough	N	Y	12-0, 12-0	N	3/29/18
Snelgrove, David B.	Flagler	N	N	8-4, 8-4	Y	5/11/17
Sochor, Dennis	Broward	Y	N	10-2	N	1/30/18
Stein, Steven Edward	Duval	Y	N	10-2	N	1/31/18
Stephens, Jason Demetrius	Duval	Y	N	9-3	N	1/22/18
Stewart, Kenneth Allen	Hillsborough	Y	N	10-2	Y	4/25/17
Stewart, Kenneth Allen	Hillsborough	Y	N	10-2	N	1/26/18
Sweet, William Earl	Duval	Y	N	10-2	N	1/24/18
Suggs, Ernest	Walton	Y	N	7-5	N	3/17/17
Tanzi, Michael	Monroe	N	Y	12-0	N	4/5/18
Taylor, John Calvin	Clay	N	N	10-2	Y	10/12/17
Taylor, Steven Richard	Duval	Y	N	10-2	N	1/24/18
Taylor, William Kenneth	Hillsborough	N	Y	12-0	N	4/5/18
Thomas, William Gregory	Duval	Y	N	11-1	N	1/24/18
Trease, Robert J.	Sarasota	Y	N	11-1	N	1/24/18
Trepal, George	Polk	Y	N	9-3	N	1/26/18
Trotter, Melvin	Manatee	Y	N	11-1	N	1/26/18
Troy, John	Sarasota	N	N	11-1	Y	6/13/17
Truehill, Quentin	St. Johns	N	Y	12-0	N	2/23/17

Prisoner Name	County of Conviction	Conviction Final Before Ring?	Jury Recommendation Unanimous?	Jury Vote(s)	Death Sentence Reversed?	Date of Cou Order
Tundidor, Randy W.	Broward	N	Y	12-0	N	4/27/17
Turner, James Daniel	St. Johns	N	N	10-2	Y	6/19/17
Twilegar, Mark	Lee	Y	WAIVED JURY		N	11/2/17
Victorino, Troy	Volusia	N	N	10-2, 10-2, 9-3, 7-5	Y	6/14/17
Wade, Alan L.	Duval	N	N	11-1, 11-1	Y	5/1/17
Walls, Frank	Okaloosa	Y	Y	12-0	N	1/22/18
Wheeler, Jason	Lake	N	N	10-2	Y	5/23/17
White, Dwayne	Seminole	N	N	8-4	Y	3/30/17
Whitfield, Ernest	Sarasota	Y	N	7-5	Y	1/30/18
White, William Melvin	Orange	N	N	10-2	Y	4/20/17
Whitton, Gary Richard	Walton	Y	Y	12-0	N	1/31/18
Willacy, Chadwick	Brevard	Y	N	11-1	N	1/23/18
Williams, Donald Otis	Lake	N	N	9-3	Y	1/19/17
Williams , Ronnie Keith	Broward	N	N	10-2	Y	6/29/17
Windom, Curtis	Orange	Y	Y	12-0, 12-0, 12-0	N	1/23/18
Wood, Zachary Taylor	Washington	N	Y	12-0	Y**	1/31/17
Woodel, Thomas	Polk	N	N	7-5	Y	8/18/17
Zack, Michael Duane	Escambia	Y	N	11-1	N	6/15/17
Zakrzewski, Edward	Okaloosa	Y	N	7-5, 7-5, 6-6	N	5/25/17
Zommer, Todd	Osceola	N	N	10-2	Y	4/13/17

* The Florida Supreme Court granted relief under *Hurst* on Bevel's non-unanimous death sentence, but granted relief based on ineffective assistance of counsel on Bevel's unanimous death sentence.

** The Florida Supreme Court noted that Wood's sentence would not have been harmless under *Hurst* because it struck two of the three aggravating circumstances found by the trial court; however, the court vacated the death sentence and imposed a life sentence under its statutory review for proportionality. Not counted in total.

For more background on the Florida legislative and court actions related to the jury unanimity issue, see ***Hurst v. Florida* Background**.

To check on the status of cases involving Florida death-row prisoners with non-unanimous jury recommendations for death whose sentences became final after the U.S. Supreme Court's June 2002 decision in *Ring v. Arizona*, see **this chart**.

Hannah Gorman, with the Florida Center for Capital Representation at Florida International University, created the pie chart below (November 16, 201 based on her analysis of Florida death sentences that have been or will be overturned based on *Hurst*, as well as sentences that have been or will be affirmed because they either (A) became final before *Ring* (i.e., based on the date of their appeal) or (B) were presumed harmless based on a unanimous jury verdict or the defendant's waiver of a jury sentence. This chart includes prisoners who have had their death sentences affirmed by Circuit Courts. According to this information, there are a total of 377 prisoners who were sentenced under the unconstitutional sentencing scheme, but only 42% (157) of Florida death-row prisoners who were sentenced under that scheme will be entitled to relief.

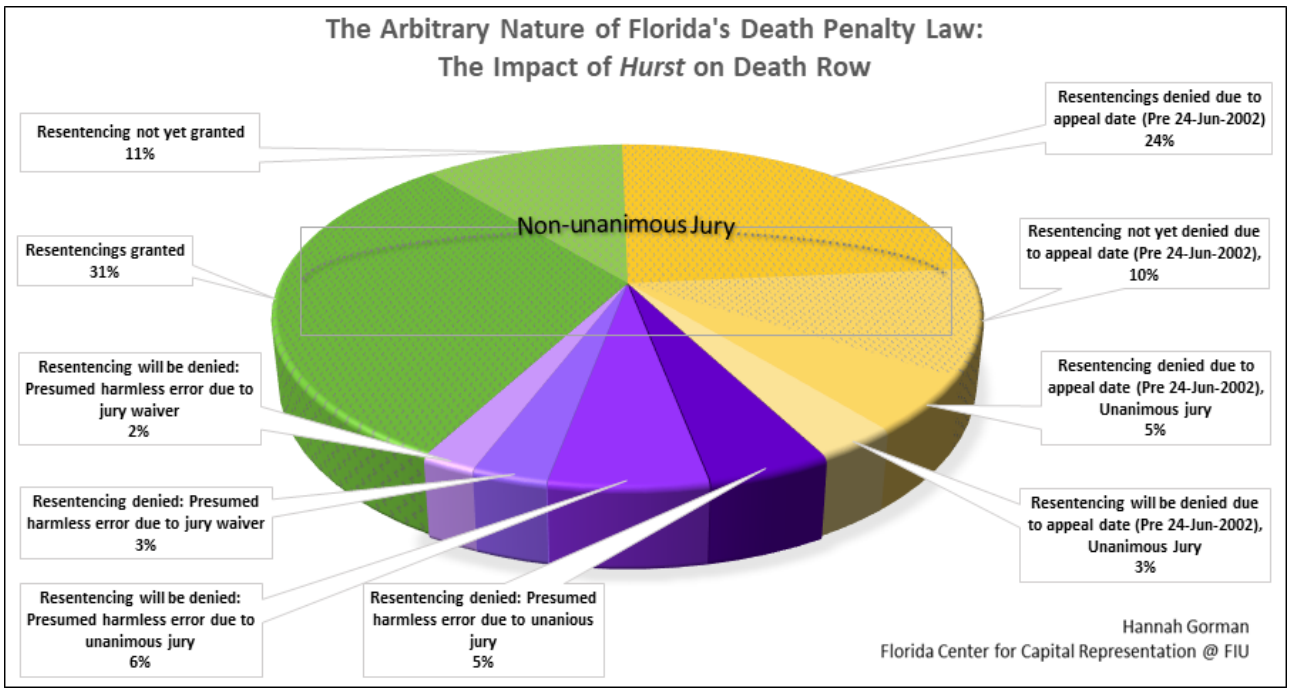
The Arbitrary Nature of Florida's Death Penalty Law:
The Impact of *Hurst* on Death Row
Resentencing not yet granted
11%
Resentencings denied due to appeal date (Pre 24-Jun-2002)
24%
Non-unanimous Jury
Resentencings granted
31%
Resentencing not yet denied due to appeal date (Pre 24-Jun-2002),
10%
Resentencing will be denied: Presumed harmless error due to jury waiver
2%
Resentencing denied due to appeal date (Pre 24-Jun-2002), Unanimous jury
5%
Resentencing denied: Presumed harmless error due to jury waiver
3%
Resentencing will be denied due to appeal date (Pre 24-Jun-2002), Unanimous Jury
3%
Resentencing will be denied: Presumed harmless error due to unanimous jury
6%
Resentencing denied: Presumed harmless error due to unanious jury
5%
Hannah Gorman
Florida Center for Capital Representation @ FIU

EXHIBIT 7

1. *Alston v. State*, Nos. SC17-499, SC17-983, 2018 WL 494427 (Fla. Jan. 22, 2018)
2. *Bates v. State*, 238 So. 3d 98 (Fla. 2018)
3. *Bradley v. Jones*, 238 So. 3d 95 (Fla. 2018)
4. *Branch v. State*, 234 So. 3d 548 (Fla. 2018)
5. *Jones v. State*, 234 So. 3d 545 (Fla. 2018)
6. *Peterka v. State*, 237 So. 3d 903 (Fla. 2018)
7. *Phillips v. State*, 234 So. 3d 547 (Fla. 2018)
8. *Stephens v. State*, 238 So. 3d 94 (Fla. 2018)
9. *Suggs v. State*, 234 So. 3d 546 (Fla. 2018)
10. *Walls v. State*, 238 So. 3d 96 (Fla. 2018)
11. *Atwater v. State*, 234 So. 3d 550 (Fla. 2018)
12. *Beasley v. State*, 234 So. 3d 553 (Fla. 2018)
13. *Burns v. State*, 234 So. 3d 555 (Fla. 2018)
14. *Clark v. State*, 238 So. 3d 99 (Fla. 2018)
15. *Cole v. State*, 234 So. 3d 644 (Fla. 2018)
16. *Ford v. State*, 237 So. 3d 904 (Fla. 2018)
17. *Puiatti v. State*, 234 So. 3d 551 (Fla. 2018)
18. *Rhodes v. State*, 234 So. 3d 554 (Fla. 2018)
19. *Willacy v. State*, 238 So. 3d 100 (Fla. 2018)
20. *Windom v. State*, 234 So. 3d 556 (Fla. 2018)
21. *Dillbeck v. State*, 234 So. 3d 558 (Fla. 2018)
22. *Evans v. State*, No. SC17-869, 2018 WL 524796 (Fla. 2018)
23. *Jackson v. State*, 237 So. 3d 905 (Fla. 2018)

24. *Kokal v. State*, 237 So. 3d 907 (Fla. 2018)

25. *Lucas v. State*, 234 So. 3d 647 (Fla. 2018)

26. *Marquard v. State*, 234 So. 3d 560 (Fla. Jan. 24, 2018)

27. *Sweet v. State*, 234 So. 3d 646 (Fla. 2018)

28. *Taylor v. State*, 234 So. 3d 649 (Fla. 2018)

29. *Thomas v. State*, 234 So. 3d 559 (Fla. 2018)

30. *Trease v. State*, No. SC17-686, 2018 WL 1959603 (Fla. Apr. 26, 2018)

31. *Anderson v. State*, 235 So. 3d 277 (Fla. 2018)

32. *Finney v. State*, 235 So. 3d 279 (Fla. 2018)

33. *Hartley v. State*, 237 So. 3d 908 (Fla. 2018)

34. *Jeffries v. State*, 235 So. 3d 283 (Fla. 2018)

35. *Kelley v. State*, 235 So. 3d 280 (Fla. 2018)

36. *Lightbourne v. State*, 235 So. 3d 285 (Fla. 2018)

37. *Morris v. State*, 236 So. 3d 324 (Fla. 2018)

38. *Stewart v. State*, 235 So. 3d 798 (Fla. 2018)

39. *Trepal v. State*, 235 So. 3d 281 (Fla. 2018)

40. *Trotter v. State*, 235 So. 3d 284 (Fla. 2018)

41. *Bell v. State*, 235 So. 3d 287 (Fla. 2018)

42. *Bowles v. State*, 235 So. 3d 292 (Fla. 2018)

43. *Brown v. State*, 235 So. 3d 289 (Fla. 2018)

44. *Davis v. State*, 235 So. 3d 295 (Fla. 2018)

45. *Foster v. State*, 235 So. 3d 290 (Fla. 2018)

46. *Foster v. State*, 235 So. 3d 294 (Fla. 2018)

47. *Fotopoulos v. State*, 237 So. 3d 911 (Fla. 2018)

48. *Gamble v. State*, 235 So. 3d 288 (Fla. 2018)

49. *Jennings v. State*, 237 So. 3d 909 (Fla. 2018)

50. *Long v. State*, 235 So. 3d 293 (Fla. 2018)

51. *Booker v. Jones*, 235 So. 3d 298 (Fla. 2018)

52. *Davis v. Jones*, 235 So. 3d 301 (Fla. 2018)

53. *Gudinas v. State*, 235 So. 3d 303 (Fla. 2018)

54. *Lamarca v. State*, 237 So. 3d 914 (Fla. 2018)

55. *Mendoza v. State*, 235 So. 3d 302 (Fla. 2018)

56. *Occhicone v. State*, 235 So. 3d 299 (Fla. 2018)

57. *Pace v. State*, 237 So. 3d 912 (Fla. 2018)

58. *Rogers v. State*, 235 So. 3d 306 (Fla. 2018)

59. *Sochor v. State*, 235 So. 3d 304 (Fla. 2018)

60. *Whitfield v. State*, 235 So. 3d 297 (Fla. 2018)

61. *Consalvo v. State*, 235 So. 3d 307 (Fla. 2018)

62. *Gordon v. State*, 235 So. 3d 311 (Fla. 2018)

63. *Krawczuk v. State*, 237 So. 3d 915 (Fla. 2018)

64. *Miller v. Jones*, 237 So. 3d 921 (Fla. 2018)

65. *Nelson v. State*, 235 So. 3d 308 (Fla. 2018)

66. *Rodriguez v. State*, 237 So. 3d 918 (Fla. 2018)

67. *Sireci v. State*, 237 So. 3d 916 (Fla. 2018)

68. *Sliney v. State*, 235 So. 3d 310 (Fla. 2018)

69. *Stein v. State*, 237 So. 3d 919 (Fla. 2018)

70. *Whitton v. State*, 238 So. 3d 724 (Fla. 2018)

71. *Damren v. State*, 236 So. 3d 230 (Fla. 2018)

72. *Derrick v. State*, 236 So. 3d 231 (Fla. 2018)

73. *Griffin v. State*, 236 So. 3d 237 (Fla. 2018)

74. *Hodges v. State*, 236 So. 3d 241 (Fla. 2018)

75. *Johnson v. State*, 236 So. 3d 232 (Fla. 2018)

76. *Lawrence v. State*, 236 So. 3d 240 (Fla. 2018)

77. *Melton v. State*, 236 So. 3d 234 (Fla. 2018)

78. *Morton v. State*, 236 So. 3d 242 (Fla. 2018)

79. *Overton v. State*, 236 So. 3d 238 (Fla. 2018)

80. *Pietri v. State*, 236 So. 3d 235 (Fla. 2018)