

IN THE SUPREME COURT OF FLORIDA
STATE OF FLORIDA
500 South Duval Street
Tallahassee, Florida 32399-1927

CASE NO.: SC16-289
L.T. NO.: 2005-CF-011551

ROBERT PETERSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

*On Appeal from the Fourth
Judicial Circuit, in and for Duval County, Florida*

*Honorable Lawrence P. Haddock
Judge of the Circuit Court, Division CR-F*

APPELLANT'S AMMENDED REPLY BRIEF

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PRELIMINARY STATEMENT

ROBERT PETERSON will be referred to as “Appellant” or “Mr. Peterson.”
The State of Florida will be referred to as “Appellee” or “the State.”

References to the Record on Appeal for the Direct Appeal will be designated “R” with the volume number, followed by the page number, for instance (1 ROA 1). References to the Postconviction Record on Appeal for the Initial Brief will be designated “PCR” with the page number following, for instance (PCR 1).

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING MR. PETERSON’S MOTION TO RECUSE OR DISQUALIFY BASED ON THE TRIAL COURT EXCEEDING ITS PROPER SCOPE OF INQUIRY BY DETERMINING FACTS AND ADJUDICATING THE QUESTION OF DISQUALIFICATION.

In Appellee’s response, Appellee argues that Mr. Peterson’s case is not like the cases of *Shands Teaching Hosp. & Clinics, Inc. v. Samuel ex rel. Mathis*, 926 So. 2d 441 (Fla. 1st DCA 2006) and *City of Hollywood v. Witt*, 868 So. 2d 1214 (Fla. 4th DCA 2004) because the comments made by the lower tribunal Circuit Court Judge, Hon. Lawrence Haddock in the cases of Tajuane Dubose in 2010 and Thomas Bevel in 2014 were not similar to the cases of *Shands* and *City of Hollywood*. The cases of *Shands* and *City of Hollywood* actually help Mr. Peterson’s case.

In *City of Hollywood*, the City filed a motion to disqualify the trial court judge in three other cases because there was a signed affidavit alleging that the trial court judge did not believe the City's witnesses were truthful and did not believe the arguments made by the City's trial counsel. 868 So. 2d 1214, 1215-16 (Fla. 4th DCA 2004). The 4th DCA agreed with the City in meeting the burden to disqualify the judge in one case but not the other three cases because

there is no indication in the record that the attorney who represents the City in the Diamond litigation also represents the City in the trial court proceedings . . . there is no indication in the record that the claims in the other three cases have any relationship with the Diamond claims or that the witnesses in the other cases will be the same witnesses whose veracity was questioned in the Diamond cases.

Id. Although the City did not meet burden to disqualify the judge in the other cases, the City did meet the burden to disqualify the judge where the same trial counsel and witnesses were present.

In Mr. Peterson's case, the same post-conviction counsel and mitigation specialist were present in Thomas Bevel's case where the Judge Haddock stated

[t]his court should not and will not codify or institutionalize the burgeoning cottage industry of former paralegals or social workers who are ardent death penalty opponents who declare themselves to be 'mitigation experts' and demand exorbitant fees from the judicial system for doing work that any competent paralegals or investigator could do for one-third of the cost.

State v. Bevel, Case No.: 16-2004-CF-4525 (quote from the trial court's order denying amended motion for post-conviction relief). Mr. Peterson's case is the

same from the one case in *City of Hollywood* where the Fourth DCA found sufficient grounds to disqualify the trial judge. Based on Appellee's reliance on *City of Hollywood*, this Court should find the trial court erred in denying Mr. Peterson's motion to recuse or disqualify based on the trial court exceeding its proper scope of inquiry by determining facts and adjudicating the question of disqualification.

The *Shands* case is also similar to Mr. Peterson's case because the First DCA held in *Shands* that when a judge determines the facts are legally sufficient to show bias in one case, disqualification is also warranted in other cases in which the same basis exists and disqualification is timely sought. *Shands*, 926 So. 2d at 444. In *Shands*, the First DCA noticed that during a medical negligence action where Shands Hospital and the University of Florida's Board of Trustees were involved, the trial judge "made comments questioning the propriety of litigation tactics employed by Shands and the University of Florida Board of Trustees." *Id.* at 443-44. A motion for disqualification was granted in the medical negligence action and then Shands Hospital filed motion to disqualify the same judge in other cases involving the University of Florida Board of Trustees. *Id.* at 444. Although the trial court denied the motions to disqualify the judge in the other cases involving the University of Florida Board of Trustees, the First DCA granted the motion to disqualify the judge. *Id.* ("the petitions for writ of prohibition are GRANTED. On

remand, a new judge shall be assigned to hear further proceedings in each of these cases”).

The trial judge in Mr. Peterson’s case, Judge Haddock, had recently been overturned in *Criminal Specialist Investigations, Inc. v. State*, where Judge Haddock opined that Florida law did not recognize the position of a mitigation coordinator and the overpayment of mitigation coordinators was becoming a trend in capital cases. 58 So. 3d 883, 885 (Fla 1st DCA 2011). The reason why the trial court was overturned was specifically for the trial judge’s remarks and denying the compensation for the mitigation coordinator’s fees. *Id.* at 886. While *Criminal Specialist Investigations, Inc.* was not regarding a trial judge disqualification, the case demonstrated the trial judge’s feeling towards mitigations specialist and that should be enough to warrant a recusal in this case like the First DCA made in *Shands*.

Like this Court stated in *Bundy v. Rudd*, when a judge is presented with a motion for disqualification, the judge shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification. 366 So. 2d 440, 442 (Fla. 1978). Also, when a judge has looked beyond the mere legal sufficiency of a suggestion of prejudice and attempted to refute the charges of partiality, he has then exceeded the proper scope of his inquiry and on that basis alone establishes the grounds for disqualification. *Id.* While Appellee may allege that Mr. Peterson’s motion to

disqualify the Judge Haddock is legally insufficient, the case law cited in Mr. Peterson's initial brief along with the case law of *Shands* and *City of Hollywood* in Appellee's response brief, the record demonstrates that Mr. Peterson's motion to disqualify the Judge Haddock is legally sufficient. Therefore, this Court should find the trial court erred in failing to disqualify Judge Haddock.

II. THE TRIAL COURT ERRED IN DENYING MR. PETERSON'S MOTION TO EXCLUDE THE TESTIMONY OF STATE'S EXPERT, DR. ALAN J. WALDMAN, BASED ON HIS FAILURE TO MEET THE DAUBERT STANDARD AND THE LOWER COURT'S FINDINGS ARE NOT SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE.

Appellee's asserts that Mr. Peterson's claim is without any merit because of a disagreement with the trial court about the weight that should have been allocated to each expert. (RB p. 28). Appellee makes the assertions based on the disagreement between Dr. Frederick and Dr. Waldman. (RB p. 31). While there are definitely disagreements between Dr. Frederick and Dr. Waldman, the crux of the trial court's error in denying Mr. Peterson's motion to exclude the testimony of Dr. Waldman lies on the fact that Dr. Waldman himself admitted to not administering the M-Fast test properly. (PCR 1976)(Dr. Waldman further testified that he was aware the answer choices of the M-FAST are required to be read verbatim. However, Dr. Waldman testified he did not read the answer choices verbatim).

As Appellee states, in order for scientific evidence to be admissible based on Fla. Stat. § 90.702, the scientific evidence must be 1) based upon sufficient facts or

data; 2) the product of reliable principles and methods; and 3) the witness must have applied the principles and methods reliable to the facts of the case. Dr. Waldman's testimony demonstrates that he failed the three requirements of Fla. Stat. § 90.702.

In step one where it is required for the scientific evidence being based upon sufficient facts or data, in determining whether or not Mr. Peterson suffered from post-traumatic stress disorder, Dr. Waldman disregarded Mr. Peterson's description of his symptoms because he couldn't articulate properly the correct symptoms. (PCR 1834) Dr. Waldman conceded that he asked very few questions about post-traumatic stress disorder. (PCR 1832) Dr. Waldman further acknowledged that one of the questions he asked Mr. Peterson about post-traumatic stress disorder was, "Do you have it?" (PCR 1914) Dr. Waldman testified that he told Mr. Peterson on numerous occasions that his problems weren't really problems (PCR 1916) and certain symptoms were ridiculous. (PCR 1916) Dr. Waldman testified that Mr. Peterson's description of auditory hallucinations were odd and inconsistent with psychosis. (PCR 1896, 1898) Dr. Waldman stated that somebody planted the word paranoia in Mr. Peterson's mind to describe how he was feeling but Dr. Waldman conceded that he did not have any evidence of that determination. (PCR 1899). Dr. Waldman's combative demeanor was further demonstrated when he discussed with Mr. Peterson his sexual abuse as a child. Dr.

Waldman testified that he asked Mr. Peterson, “He didn’t fuck you in the ass though?” Dr. Waldman acknowledged that this question was inappropriate. (PCR 1949). In Dr. Waldman trying to come up with facts and data for Dr. Waldman’s findings, Dr. Waldman conceded many times throughout the evidentiary hearing that he made inappropriate questions, comments, and did not have evidence for his determinations.

In step two the scientific evidence must be the product of reliable principles and methods and Dr. Waldman made test he did not like himself. (PCR 1834). Dr. Waldman testified he wasn’t sure whether or not the M-FAST identified itself as a screening test, and could not recall what the acronym of the test stood for. (PCR 1845). Dr. Waldman testified that he did not read the instructions of the M-FAST before conducting the examination, although he agreed the instructions are important and should be read verbatim. (PCR 1847). Dr. Waldman further testified that he was aware the answer choices of the M-FAST are required to be read verbatim. However, Dr. Waldman testified he did not read the answer choices verbatim to Mr. Peterson. (PCR 1976).

In step three the witness must have applied the principles and methods reliably to the facts of the case. This step is established with Dr. Frederick’s testimony as Dr. Frederick stressed the importance of standardized methods and testified that the purpose of a standardized procedure is to develop a pool of

information that you can compare people to, and it only works if you agree to give the test the way that everybody else in that sample took the test. (PCR 2179) Dr. Frederick testified that he uses standardized procedures in his assessment so that he can make reliable and valid conclusions about the individual that can be used to meet a standard. (PCR 2180) Dr. Frederick further cautioned the risk associated with failing to adhere to standardized procedures, stating that “you’re depending on your intuition, your judgment to make decision, but there’s a lot of variability associated with that. You may have bad judgment; you may have bad clinical intuition.” (PCR 2180) He testified that in a standardized procedure, you are taking the element of the clinician out of the process so information can be provided that everyone agrees upon. (PCR 2180) Dr. Frederick testified that “reliability means repeatability. If it’s not repeatable, it’s not reliable. If it’s not reliable, it can’t be valid.” (PCR 2181) Moreover, Dr. Frederick emphasized that whether or not someone lies about committing a crime does not have any bearing on the likelihood they will malingering a mental disorder, and to make that connection is not supportable. (PCR 2183).

As the record shows, this claim is not just about a disagreements within two experts, but also Dr. Waldman’s testimony should have been excluded for not following the three steps required by Florida’s *Daubert* statute. The trial court did abuse his discretion by admitting Dr. Waldman’s testimony as Dr. Waldman’s

scientific evidence did not follow Florida's *Daubert* statute. Therefore, the court did err in admitting Dr. Waldman's testimony.

III. THE TRIAL COURT ERRED IN DENYING MR. PETERSON'S CLAIM THAT HIS DUE PROCESS RIGHTS WERE VIOLATED WHEN TRIAL COUNSEL LOST OR DESTROYED MR. PETERSON'S TRIAL RECORDS, THEREBY PROHIBITING APPELLATE COUNSEL FROM ADEQUATELY INVESTIGATING AND PLEADING CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

Appellee cites the case of *Jones v. State*, where this Court held that missing trial counsel notes did not demonstrate a hindrance to collateral counsel's investigation. 928 So. 2d 1178, 1193 (Fla. 2006). This Court should take into account that the *Jones* case is distinguishable from Mr. Peterson's case because the *Jones* case dealt with trial counsel's files being lost due to a fire that was caused deliberately while Mr. Peterson's trial counsel either destroyed or conveniently lost Mr. Peterson's file on his own. In the words of Sir Isaac Newton, "What we know is a drop, what we don't know is an ocean."

IV. TRIAL COURT ERRED IN DETERMINING THAT COUNSEL WAS NOT INEFFECTIVE IN THE GUILT AND PENALTY PHASE IN FAILING TO ESTABLISH AN ATTORNEY-CLIENT RELATIONSHIP, AND FAILING TO INVESTIGATE AND PRESENT EXPERTS AND LAY –WITNESSES WHICH DEMONSTRATE SUBSTANTIAL MITIGATION UNDERMINING CONFIDENCE IN THE OUTCOME OF MR. PETERSON’S TRIAL BECAUSE THE LOWER COURT’S FINDINGS ARE NOT SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES AND FLORIDA CONSTITUTIONS

Appellee asserts that trial counsel’s work on the case of Billy Shepard should not be allowed in appeal due the issue not being preserved. (RB 45). However, the case of Billy Shepard was brought to the trial court and the email is merely an example of Mr. Fletcher’s high caseload and inability to provide Mr. Peterson effective assistance of counsel. In fact, this Court should find that Mr. Fletcher’s high case load was provided to the trial court in the initial motion to vacate judgment and sentence¹ and also during the trial hearing. During the trial hearing, undersigned counsel demonstrated to the trial court that during the exact time trial counsel was supposed to be working with Mr. Peterson, trial counsel was also

¹Mr. Peterson delivered a speech to the court on December 10, 2013 where Mr. Peterson stated: “In no way am I saying that Mr. Fletcher is not qualified or competent. What I am saying for whatever reason, may it be heavy caseload, demands at home, break-up of a partnership or personal feelings of a client’s guilt, or all of the above. In my case and my case alone, I feel I have showed that his performance was inadequate and I prejudiced thereby.” (Motion to Vacate Judgment and Sentence p. 15).

working on other capital cases such as the cases of Terrell Dubose, Jermaine Wilson, Cedric Cutter, Major Brown, Derwin Lambrick, and the case of Billy Shepard. (Evidentiary Hearing p.44-45). Therefore, as the case of Billy Shepard was brought to the trial court, this Court should find the issue preserved for appeal.

Appellee also states that “[Mr. Peterson] cannot claim prejudice for failure to present mental health evidence when no beneficial evidence was presented during postconviction hearing.” (RB p.55). Beneficial evidence from mental health experts was presented as Dr. Ouaou testified that his clinical impression of Mr. Peterson was multiple head injuries, in particular the one that occurred at age twelve had an impact on the testing he performed. There was also evidence of brain injury that might be significant and “has not been fully evaluated up to this point.” (PCR 1551). With a brain injury that occurred at age twelve, the record demonstrates there was a brain injury during the murder and that satisfies the requirements of *Gaskin v. State*, 822 So. 2d 1243, 1247 (Fla. 2007) (To prevail in an ineffective assistance of counsel claim, the defendant “must demonstrate that but for counsel’s errors, he probably would have received a life sentence.”).

Other beneficial evidence from a mental health expert was presented in the postconviction hearing with Dr. Steven Gold. Dr. Gold is a psychologist, professor, and director of the trauma clinic at Nova Southeastern University. (PCR 1578) Dr. Gold evaluated Mr. Peterson to assess his history in order to identify whether there

was trauma and other factors in Mr. Peterson's background, especially during childhood that are likely to affect his adult functioning. (PCR 1579) Dr. Gold relied on the reports of people present in Mr. Peterson's life in order to determine if Mr. Peterson's self-reporting could be corroborated. (PCR 1579) Dr. Gold reviewed the social history prepared for by mitigation specialist, Sara Flynn; the testimony of Dr. Morton, a psychopharmacologist, who testified at the Spencer Hearing; as well as medical records prepared by Mr. Peterson's physician, Dr. Jacqmein. (PCR 1579).

At the evidentiary hearing, Dr. Gold testified that trauma is a specific type of event defined as either directly being confronted with or witnessing death, serious physical injury or sexual violation. (PCR 1579). In addition to other factors, repeated trauma, especially during childhood, has an extremely negative impact on an individual's development in a number of areas, including emotional functioning, intellectual functioning, and social functioning. (PCR 1579). Dr. Gold further testified that traumatic events that occur during childhood often last lifelong, especially when an individual doesn't receive treatment. (PCR 1579). Trauma is a significant mental and emotional impairment. Dr. Gold defined post-traumatic stress disorder as a specific disorder that only occurs in response to a traumatic event and that person is, in various ways, haunted by that event. The individual finds the horrible event intruding on their awareness. (PCR 1580). In

addition, their physiological activity is chronically elevated, and their thinking and their mood is negatively altered by the event. (PCR 1580). Dr. Gold opined that it is absolutely necessary to have a competent and full social history before or while you evaluate whether someone has trauma or complex trauma. (PCR 1583-84).

In evaluating Mr. Peterson, Dr. Gold relied upon studies that have identified ten factors in a person's childhood as being significantly related to various forms of both psychological impairment and even medical impairment. (PCR 1585). Dr. Gold's findings indicated that Mr. Peterson's history included all ten of those adverse factors in his childhood. (PCR 1586). Dr. Gold stressed that it's not just about the factors in and of themselves and the impact they have, but the general atmosphere in which a child is growing up, which is not conducive to optimal development. (PCR 1587). Dr. Gold found that Mr. Peterson sustained childhood physical abuse at the hands of his stepfather, Bobby Jenkins, his Uncle Ronald, and by his maternal grandfather. (PCR 1587). Mr. Peterson also was subject to physical neglect since he grew up in substandard housing where there was a leaking septic tank right outside of his bedroom window where he slept. (PCR 1587). Mr. Peterson was verbally and emotionally abused by his mother, his stepfather, Bobby Jenkins, his grandfather, and his uncle who killed several pet rabbits in front of him. (PCR 1587). Mr. Peterson was emotionally neglected by his mother, largely due to the fact that she was absent during his growing up years, his family didn't

protect him, and in many ways didn't take care of him. (PCR 1588). Mr. Peterson was also sexually abused by his Uncle Ronald. (PCR 1588). Mr. Peterson's parents were also divorced during his childhood when he was only five or six years old. (PCR 1588). Mr. Peterson was extensively exposed to domestic violence in the home. His parents were frequently violent towards each other; Mr. Peterson's mother shot at his father on more than one occasion, and his mother was often beaten by his stepfather. Mr. Peterson also witnessed his grandfather beat his grandmother. (PCR 1588). Mr. Peterson grew up with a household member in prison when his father was sentenced to prison in the 1970's and he was taken to visit him there. (PCR 1588). Mr. Peterson also grew up in a household with an alcohol or drug problem. His father, his grandfather, and his uncles all abused drugs and alcohol. (PCR 1589). Mr. Peterson grew up in a household where a family member was chronically depressed, mentally ill, or suicidal. His grandmother was severely mentally ill, psychotic, and was treated in an inpatient psychiatric facility. (PCR 1589). Mr. Peterson's Uncle Jimmy, who he considered his hero, also committed suicide when Mr. Peterson was a child. (PCR 1589). Dr. Gold testified that the presence of all ten factors is very rare. (PCR 1589). Mr. Peterson "grew up in a very chaotic situation where he was not receiving the resources that a child needs in order to reach adulthood with anywhere near the adequate functioning. (PCR 1589-90).

In addition to the ten factors, Dr. Gold testified that Mr. Peterson had several other traumatic events occur in his life. Mr. Peterson was exposed to several incidents of rape. Mr. Peterson's first wife was raped early in their marriage, and he was present while his second wife was raped. (PCR 1594). Mr. Peterson also witnessed his grandmother being raped by his grandfather while he was hiding under the bed. He saw his grandmother bleeding and heard her crying after it occurred. (PCR 1594). Mr. Peterson also witnessed his grandfather beat up his father and was told that his father was dead as a result of that incident. (PCR 1595). He often heard his mother and stepfather, Bobby Jenkins, have loud sex in the next room and his grandmother would rock and sing him to sleep in order to comfort him because he believed his mother was being hurt. (PCR 1595).

Dr. Gold testified that due to these traumatic events experienced by Mr. Peterson, he is subject to a wide range of possible effects, including: post-traumatic stress disorder, depression, anxiety, substance abuse, anger, and difficulty controlling anger. (PCR 1596). Mr. Peterson is also subject to several medical risk factors such as increased likelihood of abusing drugs, increased likelihood of engaging in unprotected and promiscuous sex, and an increased likelihood of various medical problems such as diabetes or heart disease. (PCR 1596). Each additional factor in one's background increases the severity and range of difficulties, both psychological and medical, that a person is likely to have. The

factors are exacerbated; two factors are worse than one, and so on. (PCR 1595). The intensity and range of difficulties increase with each additional factor. (PCR 1597).

Dr. Gold emphasized that a person could not determine someone had trauma simply by looking at that person (as trial counsel alleged) and one would have to talk to them in a clinical setting in order to make that determination. (PCR 1597-98). A child requires necessary resources that were not present in Mr. Peterson's life, including: supervision, care, and guidance. (PCR 1598). Dr. Gold testified that Mr. Peterson indicated his parents were too intoxicated and involved in abusing drugs and alcohol to be attentive to him. (PCR 1600). In addition to the negative impact of traumatic factors, there is also absence of the necessary factors for normal development psychologically. (PCR 1598). More generally, growing up with people who routinely engage in criminal behaviors or nonconforming behaviors makes it difficult for a child, and later an adult, to recognize where the dividing line is between acceptable and unacceptable behavior. (PCR 1599). Dr. Gold testified that when individuals are brought up with people who routinely violate the law, they are more likely to violate the law than people who grow up demonstrating socially responsible behavior. (PCR 1599).

Therefore, Mr. Peterson can claim prejudice for failure to present mental health evidence because the record demonstrates there was beneficial evidence

presented in the postconviction hearing. Dr. Gold and Dr. Ouaou are two mental health experts that testified on behalf of Mr. Peterson in the postconviction hearing. Their testimonies are enough for Mr. Peterson to claim prejudice.

V. MR. PETERSON’S DUE PROCESS RIGHTS WERE VIOLATED WHEN THE TRIAL COURT DENIED HIS MOTION TO APPOINT DR. MORTON IN POSTCONVICTION

Appellee’s response states “the trial court’s refusal to appoint Dr. Morton and refusal to admit Defense Exhibit C into evidence was not unfair and does not violate Appellant’s right to due process of the law.” (RB p. 63). Mr. Peterson’s right to due process of law was violated because the records and testimony of Dr. Morton would have helped establish that Mr. Nolan did not talk to Dr. Morton until September 30, 2009, after the jury had delivered their verdict. Dr. Morton would have helped establish the *Strickland* claim because Dr. Morton was the only expert that testified during Mr. Peterson’s Spencer hearing and is the only person that can verify his conversations with Mr. Nolan.

VI. THE *HURST* JUDGMENT APPLIES TO MR. PETERSON BECAUSE MR. PETERSON WAS SENTENCED TO DEATH UNDER THE NOW UNCONSTITUTIONAL FLORIDA DEATH PENALTY SCHEME

Appellee insists that *Hurst v. Florida*, 136 So. 3d 328 (2016) cannot be retroactive because *Hurst* merely extends *Ring v. Arizona*, 536 U.S. 584 (2002) to Florida’s capital sentencing scheme. (RB p. 66). However, this Court’s retroactive

application of *Witt v. State*, 387 So. 2d 922 (Fla. 1988) proves otherwise. This Court in *Witt* made a three prong test to determine a retroactive application meaning a change in the law must follow step (1) the change emanates from the Florida Supreme Court or the United States Supreme Court, step (2) the change is constitutional in nature, and step (3) the change constitutes a development of fundamental significance. *Id.* at 931. Here, the *Hurst* judgment meets the three prong test of *Witt* because the *Hurst* judgment (1) emanated from the United States Supreme Court; (2) is constitutional in nature because the United States Supreme Court held that Florida's death sentencing scheme violates the Sixth Amendment of the United States Constitution; and (3) constitutes a development of fundamental significance.

Appellee believes *Hurst* was not a case of fundamental significance because “only Florida's scheme for implementing the death penalty was found unconstitutional.” (RB p. 67). On the other hand, after *Furman v. Georgia*, 408 U.S. 238 (1972), where the United States Supreme Court held that three non-Florida death sentences were unconstitutional, this Court made a significant change in *In re Baker*, where this Court considered the application of 60 death sentenced defendants and held that after *Furman v. Georgia*, 408 U.S. 238 (1972), “it is clearly to the best interest of the public that this Court impose sentences upon the class of petitioners as follows: All of the members of class of persons under

sentence of death who have been convicted of murder are hereby sentenced to life imprisonment.” 267 So. 2d 331, 335 (Fla. 1972). In *Baker*, the petitioner asserted that death sentences previously imposed before *Furman* were void and this Court agreed even though “This Court itself never declared the death penalty unconstitutional.” *Id.*

Appellee also asserts that if this Court finds *Hurst* to apply, then any *Hurst* error is harmless because the record demonstrates that Mr. Peterson’s aggravators far outweigh the mitigation. To be more specific Appellee asserts “no statutory mitigation was found, and the nonstatutory mitigation constituted only of Appellant’s long history of drug use and a few positive personal qualities, including being a good son and being a skilled mechanic.” (RB p. 69). The main reason why no statutory mitigation was found was because trial counsel was ineffective in finding and/or presenting any statutory mitigation. Mr. Peterson is here in front of the Florida Supreme Court proving his *Strickland* claim and Appellee seems to agree with Mr. Peterson when it comes to statutory mitigation. Lastly, Appellee insists that Fla. Stat. § 775.082(2) does not apply to Mr. Peterson because *Hurst* did not hold that capital sentencing itself is unconstitutional. (RB p. 71). This Court applied Fla. Stat. § 775.082 first in *Donaldson v. Sack*, where this Court held “we find no difficulty with a continuation of the Sentencing for these former ‘capital offenses’ under s 775.082(1) as automatically life imprisonment

upon conviction, inasmuch as that is the only offense left in the statute.” 265 So. 2d 499, 502 (Fla. 1973). Then this Court applied *Donaldson* to *Baker* and impose life sentence based on Fla. Stat. § 775.082 even though “This Court itself never declared the death penalty unconstitutional.” *Baker*, 267 So. 2d at 335.

CONCLUSION

Mr. Peterson’s sentence must be remanded for a new trial and a new penalty phase. The mitigation presented at Mr. Peterson’s evidentiary hearing was qualitatively and quantitatively different from that presented at trial, and included substantial evidence concerning both his mental and cognitive conditions, consistently recognized as “mitigating factors” of the most weighty order. *See Hurst*, 18. So. 3d at 1014.

Many other serious mitigating factors concerning Mr. Peterson’s social, environmental, and socioeconomic backgrounds were also introduced, depicting a picture of someone who did not have everything going for him; an individual who truly was disadvantaged, even prior to birth. Mr. Peterson’s jury heard “almost nothing” in this regard. *See Simmons v. State*, 105 So. 3d 475, 507 (Fla. 2012).

Although trial counsel had access to Mr. Peterson’s family background and personal mitigation, they ignored this information and failed to investigate further in order to present powerful mitigation to the jury. A reasonable probability exists that jurors would have struck a different balance had they heard the complete

history of this unfortunate individual. *Wiggins v. Smith*, 539 U.S. 510, 537 (2003). Both the *Strickland* prongs have been met, and a new trial and penalty phase is warranted.

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CERTIFICATE OF COMPLIANCE AND AS TO FONT

I HEREBY CERTIFY that this brief is submitted by Appellant, using Times New Roman, 14 point font, pursuant to Florida Rules of Appellate Procedure, Rule 9.210. Further, Appellant, pursuant to Florida Rules of Appellate Procedure, Rule 9.210(a)(2), gives Notice and files this Certificate of Compliance as to the font in this reply brief.

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a copy of the foregoing has been sent via electronic mail to the Office of the Attorney General at Jennifer.Keegan@myfloridalegal.com, Attorney for Appellee, and the Office of the State Attorney, at sao4@coj.net this 30th day of January, 2017.

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