

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 mandate³ 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 Strickland⁵ 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 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 Stovall¹⁰/Linkletter¹¹ 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

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