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

INITIAL BRIEF OF THE APPELLANT

ROBERT S. FRIEDMAN
Capital Collateral Regional Counsel – North

KAREN L. MOORE
Assistant CCRC – North
Florida Bar No. 351652

STACY R. BIGGART
Assistant CCRC – North
Florida Bar No. 0089388

OFFICE OF THE CAPITAL
COLLATERAL REGIONAL COUNSEL –
NORTH
175 Salem Court
Tallahassee, Florida 32301
COUNSEL FOR 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."

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,

ROBERT S. FRIEDMAN
Capital Collateral Regional Counsel-North

KAREN L. MOORE
Assistant CCRC – North
Florida Bar No. 351652
Karen.Moore@ccrc-north.org

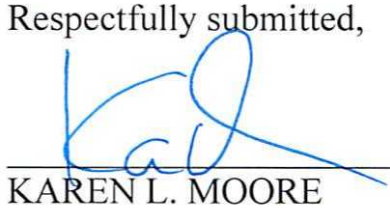
STACY R. BIGGART
Assistant CCRC – North
Florida Bar No. 0089388
Stacy.Biggart@ccrc.north

OFFICE OF THE CAPITAL
COLLATERAL COUNSEL – NORTH
175 Salem Court
Tallahassee, Florida 32301
(850) 487-0922
COUNSEL FOR APPELLANT

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,



KAREN L. MOORE

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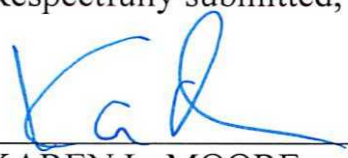

KAREN L. MOORE