

IN THE SUPREME COURT OF FLORIDA

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

RICHARD EUGENE HAMILTON,
Appellant,
v.

STATE OF FLORIDA,
Appellee.

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

REPLY BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

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

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

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

REPLY TO ARGUMENT I

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

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

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

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

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

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

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

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

REPLY TO ARGUMENT II

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

REPLY TO ARGUMENT III

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

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

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

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

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

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

REPLY TO ARGUMENT IV

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

Respectfully submitted,

/s/ Karen L. Moore _____
KAREN L. MOORE

CERTIFICATE OF FONT

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

Respectfully submitted,

/s/ Karen L. Moore _____
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