

IN THE SUPREME COURT OF FLORIDA

Case No. SC18-860

Lower Tribunal Case No. 361996-CF-001362

**KEVIN FOSTER,
Appellant,**

v.

**STATE OF FLORIDA,
Appellee.**

**ON APPEAL FROM THE CIRCUIT COURT
OF THE TWENTIETH JUDICIAL CIRCUIT, IN AND
FOR LEE COUNTY, STATE OF FLORIDA**

REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

ARGUMENT I

THE CIRCUIT COURT ERRED IN DENYING MR. FOSTER'S CLAIM THAT HIS SENTENCE OF DEATH WAS UNCONSTITUTIONAL IN LIGHT OF CHAPTER 2017-1 FLORIDA LAWS AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

The State argues that Mr. Foster's motion is untimely under Fla. R. Crim. Pro. 3.851(d)(1) where it was not filed within one year of his judgement and sentence becoming final and because Chapter 2017-1 does not involve a fundamental constitutional right that has been held to apply retroactively. Response at 15-16. However, as Mr. Foster has argued consistently to this Court, and the lower court below, his claim is not about the retroactivity of Chapter 2017-1 but his right under the Due Process Clause and the Eighth Amendment to a unanimous jury finding beyond a reasonable doubt on all elements of capital first degree murder.

On March 13, 2017, Chapter 2017-1, Laws of Florida became law and revised Florida's capital sentencing statute, § 921.141, Fla. Stat. to expressly provide that a defendant convicted of first degree murder cannot receive a death sentence unless the State convinces a unanimous jury to return a "recommendation" of death. Under the revised § 921.141, the statutory maximum sentence that can be imposed on a first degree murder conviction is one of life imprisonment. For a death sentence to be permissible, the defendant must be convicted of the next higher degree of murder,

i.e. capital first degree murder. The revised § 921.141 provides for proof of the **elements** necessary to raise a conviction of first degree murder up to capital first degree murder to be presented at a penalty phase proceeding.

Florida's substantive law identifies the elements that separate first degree murder from capital first degree murder. To be convicted of capital first degree murder, those elements must be found **in addition to** the elements of first degree murder. A conviction of capital murder without a unanimous jury's finding that the State proved those additional elements beyond a reasonable doubt violates the Due Process Clause. *See In re Winship*, 397 U.S. 358, 364 (1970). The jury verdict, however it is labeled in the statute, is functionally a determination of the defendant's guilt of that higher criminal offense: capital first degree murder.

In *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) this Court reviewed Florida's capital sentencing scheme under § 921.141, Florida Statutes. This Court's ruling in *Hurst v. State*, was a plain reading of the language of Florida's capital sentencing statute. The Court's reading of that language concluded that "just as elements of a crime must be found unanimously by a Florida jury, all these findings necessary for the jury to essentially convict a defendant of capital murder--thus allowing imposition of the death penalty--are also elements that must be found unanimously by the jury." *Hurst v. State*, 202 So. 3d at 53-54. This Court's reading of the statute made clear that the elements arise from the statute itself, were longstanding, and had

been present since its enactment. *Hurst v. State*, 202 So. 3d at 53; *see also Perry v. State*, 210 So. 3d 630, 649 (Fla. 2016).¹

Because these elements were longstanding and have been part of the statute since its enactment, for Mr. Foster to have been convicted of capital first degree murder and subject to a death sentence, a jury was required to have returned a verdict finding these elements proven beyond a reasonable doubt. *See Fiore v. White*, 531 U.S. 225 228-29 (2001) (We have held that the Due Process Clause of the Fourteenth Amendment forbids the State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt.”). Absent a jury determination of each element of capital first degree murder unanimously and beyond a reasonable doubt, there cannot be a constitutionally valid determination of Mr. Foster’s guilt and/or sentence.

In this Court’s recent opinion in *Williams v. State*, 242 So. 3d 280 (Fla. 2018), the Court held that any fact that increases the statutory maximum sentence is an

¹ This Court’s decision in *Victorino v. State*, 241 So. 3d 48, 50 (Fla. 2018) further supports the argument that the elements of capital first degree murder have been present since its enactment. This Court rejected an ex post facto challenge to the defendant’s death sentence where he argued that under the new statute any relief granted in postconviction which resulted in a resentencing rather than a life sentence would violate the ex post facto clause where it would require proof of elements that were not in existence at the time of the offense for which he was convicted. *Victorino*, 241 So. 3d at 50. This Court denied the claim, finding that the elements of capital first degree murder applicable to his case were longstanding and neither altered the definition of criminal conduct nor increased the penalty by which the crime of first degree murder was punishable. *Id.*

‘element’ of the offense to be found by a jury.” *Id.* at 285. This Court further explained that the decision in *Alleyne v. United States*, 570 U.S. 99, 108 (2013) required elements to “be submitted to a jury and **found beyond a reasonable doubt.**” *Williams v. State* at 286 (emphasis added). Under *Williams v. State*, the facts which this Court identified in both *Hurst v. State* and *Perry v. State* are elements that the State was required to prove beyond a reasonable doubt. And, this Court’s identification in *Perry* of the facts or elements necessary to increase the authorized punishment is a matter of substantive law. *See Alleyne v. United States*, 570 U.S. at 113-14 (“Defining facts that increase a mandatory statutory minimum to be part of the substantive offense enables the defendant to predict the legally applicable penalty from the face of the indictment.”); *see also Bousley v. United States*, 523 U.S. 614, 625 (1998) (Stevens, J., concurring in part and dissenting in part) (holding that court decisions identifying elements of a statutorily defined criminal offense constitute substantive law that dates back to the enactment of the statute). Because the elements which define capital first degree murder in Florida have been in existence since as far back as 1973, they apply to Mr. Foster’s sentence under both the Eighth Amendment and Due Process. It is this point which renders any issues regarding retroactivity inapplicable to Mr. Foster’s claim under Chapter 2017-1 and this Court’s decision in *Hurst v. State*.

In arguing Mr. Foster is not entitled to relief the State is attempting to reframe his claim as one concerning retroactivity when it is not. As Mr. Foster has repeatedly argued, his claim is not merely that “*Hurst* should be retroactively applied to his sentence.” Response at 23. Rather, he contends that the law, as it has always existed, be applied to his case. His citation to *Hurst v. State* is intended to focus attention on this Court’s pronouncement in that case that the necessary elements for capital first degree murder arise from the statute **and have been present since its enactment.** The enactment of Chapter 2017-1 and the revision of Fla. Stat. § 921.141 served to further substantiate their integral inclusion in Florida’s capital sentencing scheme. *Hurst v. State* did not create a new rule; it merely identified the substantive law set forth in the previously enacted version of § 921.141. Given this fact, his claim under Chapter 2017-1 is not untimely under Fla. R. Crim. Pro. 3.851(d)(2) for failing to be retroactively applicable to his sentence. To the extent the State repeatedly attempts to advance this argument throughout its Response, its argument is without merit.

The State contends that the lower court was also correct in finding Mr. Foster’s motion procedurally barred because he had previously raised the “exact same *Hurst*-based claim” in his prior successive motion for postconviction relief related to Chapter 2016-13. Response at 17. Additionally, the State argues that Mr. Foster’s reference to Chapter 2017-1 in his motion for rehearing further precluded any consideration on procedural grounds where it had already been considered by

the court and rejected. (Id.). The State's argument misstates both the record and the law.

Florida law has long held that as a general practice issues raised for the first time on rehearing are not to be considered. *See Eastern Airlines, Inc., v. King*, 561 So. 2d 1220, 1222 (Fla. DCA 3rd 1990).² Mr. Foster's rehearing motion was related to his prior successive motion for postconviction relief raising challenges associated with *Hurst v. Florida*, *Hurst v. State*, and Chapter 2016-13. Due to the timing of the litigation of that successive motion, Mr. Foster was not able to address the application of Chapter 2017-1 to his case, as it had only come into existence just prior to the filing of his motion for rehearing. The mention of it in his motion for rehearing was not to raise a new claim but rather to note that the enactment of Chapter 2017-1 was a development of additional significance. Specifically, Mr. Foster stated that: "In light of the recent enactment of Chapter 2017-1, and under due process and the Eighth Amendment (*See Hall v. Florida*, 134 S. Ct. at 2001), Mr. Foster must be afforded a fair opportunity to research and present any claims he has arising from the enactment of Chapter 2017-1." (PCR-2 385-86).

That request acknowledges Mr. Foster's intention to properly raise a separate claim under Chapter 2017-1 at a later date once he was afforded sufficient time and

² *See also Perez v. State*, 717 So. 2d 605 (Fla. Dist. Ct. App. 1998); *Sarmiento v. State*, 371 So. 2d 1047, 1053 (Fla. Dist. Ct. App. 1979), *approved*, 397 So. 2d 643 (Fla. 1981).

opportunity. In doing so, Mr. Foster neither put the substance of his claim under Chapter 2017-1 before the circuit court for its consideration nor attempted to improperly raise it as an independent claim for relief for the first time in a motion for rehearing. To the extent that State has attempted to assert otherwise in order to argue Mr. Foster's claim is now procedurally barred, that contention is without record support.

Moreover, the fact that postconviction court mentioned Chapter 2017-1 in its order denying rehearing, and this Court affirmed that denial on appeal, also does not support a finding that the substance of Mr. Foster's claim pursuant to Chapter 2017-1 has previously been considered and rejected. Response at 17. Here, once again, the State seems to ignore entirely the substance of Mr. Foster's claim under Chapter 2017-1 and that which was previously raised in his prior successive motion for postconviction relief. For certain, Mr. Foster is not raising the "exact same *Hurst*-based claim" in his prior successive motion for postconviction relief related to Chapter 2016-13. Response at 17. Mr. Foster's claim presently before this Court is not about retroactivity, nor is it about the substance of what was previously raised in Mr. Foster's successive motion based on Chapter 2016-13 and its application in light of the holdings in *Hurst v. Florida* and *Hurst v. State*. Rather, it is about the substantive right to a life sentence absent a unanimous jury finding beyond a reasonable doubt on all elements of capital first degree murder. And how, the failure

to provide him with that right violated his rights under the Due Process Clause and the Eighth Amendment. That claim is entirely different than the *Hurst*-based claims previously raised by Mr. Foster.

The State contends, that even if the specific challenge to Chapter 2017-1 had not been denied on the merits, Mr. Foster's claim would still be procedurally barred because Chapter 2017-1 merely codifies *Hurst*, and Mr. Foster's previous motion was denied because *Hurst* is inapplicable to his death sentence. Response at 18. That argument, however, continues to miss the point of Mr. Foster's claim. In the attempt to force Mr. Foster's claim into framework of this Court's previous *Hurst*-based jurisprudence, the State refuses to acknowledge that this Court's prior rejection of his *Hurst*-based claims was predicated upon Chapter 2016-13 and the *Hurst* decisions, not Chapter 2017-1. The State fails to recognize the substantive rights Chapter 2017-1 provides to defendants in Florida or that those rights apply to everyone. To the extent that the State continues to try and equate the two different claims for relief, its argument is misplaced.

For example, if Mr. Foster were to obtain resentencing, or if he was to be sentenced in another capital crime, the new statute would apply. If Mr. Foster were found guilty of another alleged crime, even if it occurred years before this crime, the new statute would apply. All of these circumstances have occurred since Chapter 2017-1 was enacted, and in all of those cases those defendants are being afforded

the protections and enhanced reliability provided under the new statute. The distinctions between Mr. Foster and those defendants cannot be rationally squared and because they cannot, Mr. Foster's sentence is arbitrary under the Eighth Amendment. Any attempt to try and shoehorn Mr. Foster's claim asserting those rights under Chapter 2017-1 into this Court's prior consideration of Chapter 2016-13 and its *Hurst*-based analysis is fundamentally flawed and not constitutionally permissible.

This failure to acknowledge the distinctions between the two claims is underscored by the State's argument that because Mr. Foster's *Hurst* claim has already been litigated, the law of the case doctrine and collateral estoppel further preclude re-litigation of this issue. Response at 18. That argument, however, is easily disposed of. Neither the Law of the Case doctrine nor collateral estoppel apply to bar litigation of Mr. Foster's claim for relief based on Chapter 2017-1. As this Court made abundantly clear in *State v. McBride*, the case upon which the State relies for this remarkable position, "[l]aw of the case principles do not apply unless the issues are decided on appeal." 848 So. 2d 287, 289 (Fla. 2003). In other words, the doctrine requires that the questions of law at issue were "*actually decided on appeal.*" *Id.* (emphasis added). The same is true for the judicial doctrine of collateral estoppel. Collateral estoppel serves to prevent identical parties from re-litigation of the same issues that have already been decided. *McBride*, 848 So. 2d at 290. (citation omitted).

It applies when an identical issue has been litigated between the same parties or their privies and was fully litigated and determined in a contest that results in a final decision of a court of competent jurisdiction. *Id.* at 291. (citation omitted).

Neither doctrine is applicable to Mr. Foster's claim under Chapter 2017-1 where the claim which he is now presenting has not been "actually decided on appeal" or "fully litigated and determined in a contest resulting in a final decision of a court with competent jurisdiction." Like the rest of its argument related to procedural bar, the State bases its contention here on the misconception that Mr. Foster has already previously raised this issue either because he mentioned it in his motion for rehearing or because his claim under Chapter 2017-1 is the "exact same *Hurst*-based claim" raised in his prior successive motion for postconviction relief related to Chapter 2016-13. However, as noted just above, both of those arguments are simply wrong.

Last, the State argues that the lower court properly denied relief where it followed this Court's well-established precedent and found that Mr. Foster's claim was meritless as a matter of law. Response at 19. The State argues that this Court had already analyzed the retroactive application of *Hurst* in its prior opinions in *Mosely v. State*, 209 So. 3d 1248, 1276-83 (Fla. 2016) and *Asay v. State*, 201 So. 3d 1 (Fla. 2016), and that because Mr. Foster's sentence became final prior to the *Ring*-based cutoff for retroactivity established in those cases, *Hurst* does not apply to his

sentence. Response at 20. The attempt to re-litigate the issue under Chapter 2017-1, the State argues, is unavailing as this court has consistently found such claims meritless.³ Response at 21.

The State's arguments as to the merits of Mr. Foster claim fail for several reasons. First, the State refuses to acknowledge that neither of this Court's opinions in *Asay* or *Mosley* actually addressed the Eighth and Fourteenth Amendment concerns which are now being raised by Mr. Foster. This is also true for this Court's subsequent decision in *Hitchcock*, despite the fact that case was decided months after the enactment of Chapter 2017-1. This Court's decisions in *Asay*, *Mosley*, and *Hitchcock* addressed the validity of this Court's *Ring*-based retroactivity cutoff on the basis of state law grounds. That is not the same form of review which is required for the constitutional claims Mr. Foster raised based upon Chapter 2017-1, the Due Process Clause, and the Eighth Amendment.

This Court has not "consistently" found claims such as Mr. Foster's under Chapter 2017-1 to be meritless. Response at 21. This Court's opinions in *Asay*, *Lambrix*, and *Hannon* did not meaningfully address the arguments Mr. Foster is now presenting. This Court's decision in *Asay* rejected his Chapter 2017-1 claim on the basis that "*retroactive application of Hurst v. State, and Chapter 2017-1, Laws of*

³ See *Lambrix v. State*, 227 So. 3d 112, 113 (Fla. 2017); *Asay v. State*, 224 So. 3d 695 (Fla. 2017); *Hannon v. State*, 228 So. 3d 505 (Fla. 2017).

Florida, [were] controlled by this Court’s decision in *Hitchcock v. State*, [226 So. 3d 216 (Fla. 2017)]”. *Asay v. State*, 224 So. 3d 695, 703 (Fla. 2017) (emphasis added) (internal citations omitted). The Court’s decision in *Lambrix*, provided one month later in September of 2017, rejected Mr. Lambrix’s Chapter 2017-1 arguments on the basis of the Court’s recent decisions in both *Hitchcock v. State*, 226 So.3d 216, (Fla. 2017) and *Asay v. State (Asay VI)*, 224 So.3d 695 (Fla. 2017). *Lambrix v. State*, 227 So. 3d 112, 113 (Fla.), *cert. denied sub nom. Lambrix v. Fla.*, 138 S. Ct. 312, 199 L. Ed. 2d 202 (2017). This Court then reiterated that same logic two months later in *Hannon v. State*, finding that Mr. Hannon’s Chapter 2017-1 had been previously rejected in *Lambrix*, *Asay (VI)*, and *Hitchcock*. *Hannon v. State*, 228 So. 3d 505, 513 (Fla. 2017). The Court noted it was doing so because it believed Hannon was merely choosing to ignore the Court’s precedent because he disagreed with *the retroactivity cutoff set in Asay*. *Id.* (emphasis added).⁴

This Court’s holding in all three cases was based upon on the issue of retroactivity and this Court’s prior decision in *Asay v. State, (Asay V)*, 210 So. 3d 1 (Fla. 2016) drawing a bright-line cut for retroactive application of the *Hurst* decisions. Any inquiry in each of the three cases, in as much as it dealt with Chapter

⁴ To the extent that this Court’s opinion in *Lambrix* noted he raised a claim regarding a “substantive right based on the legislative passage of Chapter 2017-1, Laws of Florida, prospectively requiring unanimous verdicts,” this Court did not provide any meaningful analysis of that claim, merely instead rejecting it on the basis of its recent decision in *Hitchcock* and *Asay (VI)*. *Lambrix*, 227 So. 3d at 113.

2017-1, was focused upon this Court's *Ring*-based partial retroactivity approach *not* the Due Process and Eighth Amendment concerns Mr. Foster is now raising. Constitutional concerns which Mr. Foster has made abundantly clear, do not implicate retroactivity.⁵

Mr. Foster's argument for relief is not merely a claim that *Hurst v. State* should be retroactively applied to his sentence. Response at 23; citing *Hitchcock*, 226 So. 3d at 217. His claim is about the substantive rights which are afforded to capital defendants under Florida's capital sentencing scheme to a unanimous jury determination beyond a reasonable doubt as to all elements of capital first degree murder. As Mr. Foster has argued throughout his litigation of this successive motion,

⁵ Additionally, the basis for all three denials of relief was also in large part predicated upon this Court's prior holding in *Hitchcock*. *Hitchcock*, however, did not address Chapter 2017-1. The substance of *Hitchcock*'s appeal to this Court dealt with the issue of the retroactive application of the *Hurst* decisions to his case under this Court's *Ring*-based cutoff approach announced in *Asay*. *Hitchcock*'s argument focused upon the post-*Apprendi* pre-*Ring* cutoff and the arbitrariness which results from its application to his sentence of death. Nothing was raised by Mr. *Hitchcock* concerning the implications of the enactment of Chapter 2017-1 or how it provides substantive rights to capital defendants. Given that fact, this Court's opinion in *Hitchcock* cannot be said to have meaningfully addressed the issue of Chapter 2017-1 and the substantive rights Mr. Foster now argues his entitled to where it was never before the Court.

The same is equally true for this Court's holding in *Asay v. State (Asay V)*, which this Court's opinions in *Asay (VI)*, *Hannon*, and *Lambrix* rely. Like *Hitchcock*, *Asay V* did not present any arguments or constitutional claims that his sentence of death violated the Eighth Amendment or Due Process based on Chapter 2017-1.

Hitchcock did not dispose of these arguments. To the extent the State continues to argue otherwise, its contention is without merit.

ARGUMENT II

MR. FOSTER’S DEATH SENTENCE VIOLATES THE FLORIDA CONSTITUTION AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AS IT CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT UNDER EVOLVING STANDARDS OF DECENCY WHERE MR. FOSTER WAS 18 AT THE TIME OF THE CRIME

The State contends that summary denial was appropriate where “[i]t is clear that [Mr.] Foster’s claim is untimely and procedurally barred as found by the postconviction court.” Response at 24. In support of this contention the State asserts that because Mr. Foster’s claim essentially “mirrors” the claim previously filed by Eric Branch during his death warrant litigation proceedings, this Court’s affirmance of the summary denial of that claim forecloses any possibility for relief in Mr. Foster’s case. Response at 24-25.

The State’s argument is legally unsound in the manner which it attempts to affix a *per se* rule that denial of a claim in one case is immutably controlling of the outcome of similar claims in other cases, regardless of the different factual records in each. Such an argument glaringly ignores the Eighth Amendment requirement for individualized sentencing determinations in capital cases, *see Lockett v. Ohio*, 438 U.S. 586, 605 (1978); *see also Proffitt v. Florida*, 428 U.S. 242, 258 (1976), and this

Court's requirement to review capital cases and the factual record below to ensure the death penalty is not being applied arbitrarily or capriciously. The State's argument ignores that the denial of such claims are premised upon the Court's review of not only the applicable law but also the factual record present below. Such a review is of particular importance here where the factual record and procedural posture in which this claim is being presented is different than that which was present in Mr. Branch's appeal to this Court. As Mr. Foster made plainly clear in his pleadings below, and in his Initial Brief to this Court, those differences are critical where they serve to differentiate Mr. Foster's claim from both Mr. Branch and other defendants on significant points which this Court has previously focused upon.

For example, Mr. Foster is not raising this claim following the signing of a death warrant. Mr. Foster has been steadfast that the impetus behind raising this claim at this juncture in his postconviction proceedings is based upon the newly emergent science within the scientific community and the development of recent case law and objective indicia supporting a national consensus under 'evolving standards of decency.' Mr. Foster has been both diligent in the manner which he has raised this claim and in the manner which he has advanced it at the appropriate timing under Fla. R. Crim. Pro. 3.851(d)(2). Unlike the circumstances in *Branch*, this is not a scenario where it could be implied that Mr. Foster has been dilatory or waited until the last minute in his postconviction appeals to litigate this issue.

Despite the differences in the records underlying each case, the State refuses to acknowledge that Mr. Foster is not in the same procedural posture as Mr. Branch. The State argues that, “like Branch, [Mr.] Foster’s claim is procedurally barred because he had the opportunity to raise his *Roper* based claim in a prior postconviction motion.” Response at 30. However, the fact that Mr. Foster did not raise such a claim in his prior postconviction motions does not procedurally bar his raising it now. The appropriate time to raise such a claim was upon the emergence of the national consensus both within the scientific community and based upon other objective indicia, which Mr. Foster has properly done under Fla. R. Crim. Pro. 3.851(d)(2). Mr. Foster’s successive motion laid out in detail and great length the wealth of scientific research and additional objective indicia, in all of its various forms, which establishes this national consensus under Eighth Amendment jurisprudence. (PCR-3 90-105; 118-144). To the extent that the State attempts to erect a procedural bar where one does not exist, that argument is without merit.

The State likewise ignores that the factual determinations upon which this Court relied for its affirmance of the summary denial of Mr. Branch’s claim are not applicable to Mr. Foster’s case. First, in affirming denial of relief in *Branch* this Court relied upon Branch’s age of twenty-one years of age at the time of the crime. *Branch v. State*, 236 So. 3d 981, 986 (Fla. 2018). Mr. Foster’s chronological age, however, was eighteen years, ten months and fourteen days, which put him less than

one year over the current “bright-line” cutoff of eighteen established in *Roper*⁶. This fact makes his case significantly different than the scenario in *Branch*, especially when taking into account the disparities between the development in adolescent brains of individuals who are eighteen and those who are twenty-one years of age. The fact that Mr. Foster was barely over the age of eighteen at the time of the crime, coupled with his extensive mental health mitigation, places the substance of his claim in a much different context than *Branch*.

Second, unlike the scenario in *Branch*, Mr. Foster did not testify at his trial with “great specificity and detail.” Cf. *Branch*, 236 So. 3d at 986. In this regard, the Court was acknowledging that the record did not reflect that *Branch* suffered from any significant mental health disabilities or issues which impaired his cognitive functioning. Contrary to *Branch*, however, Mr. Foster does suffer from significant issues with his mental health and presented extensive evidence in postconviction establishing impairments with cognitive functioning, decision making, and the ability to control his impulsivity.

Third, unlike *Branch*, Mr. Foster challenged the trial court’s rejection of age as a mitigating circumstance on direct appeal. IB at 29; *Foster v. State*, 778 So. 2d 906, 920-21 (Fla. 2000). While not in the same context as Mr. Foster now challenges his sentence pursuant to the Eighth Amendment, Mr. Foster raised a claim

⁶ See *Roper v. Simmons*, 543 U.S. 551 (2005)

challenging the trial court's rejection of his age as a mitigating circumstance. On review, this Court rejected that challenge based on the finding that he had produced no evidence of any "emotional or mental irregularities, chronic, or otherwise..." *Id.* That finding, however, is no longer valid in light of both the extensive mental health mitigation Mr. Foster presented in postconviction and the emergent scientific consensus regarding the maturation and development of the adolescent brain.

These factual distinctions make the State's reliance upon this Court's decision in *Branch* both misguided and inappropriate. Yet, in its rush to force Mr. Foster's claim into a one-size fits-all analysis, the State either purposefully ignores these distinctions or fails to acknowledge the differences in the factual records of each case. Rather than grapple with the distinctions present between the two cases, the State merely reproduces this Court's opinion in *Branch* without anything more. The failure to do so renders the State's argument nothing more than an attempt to elevate form over substance.

Also as equally misguided is the State's attempt to mischaracterize the newly discovered evidence upon which Mr. Foster relies. In arguing that the postconviction court properly determined Mr. Foster's research studies did not qualify as newly discovered evidence, the State relies upon "this Court's well established precedent from *Branch*, *Schwab*, *Davis*, and other cases..." Response at 29. This Court's decisions in each of those cases, however, do not provide a basis upon which to deny

Mr. Foster's claim for relief. As is the case with much of its Response, the State's argument here once again seems to be merely referencing this Court's opinion in *Branch*, and the attendant analysis within, without looking to the specific factual record in Mr. Foster's case.

This Court's decision in *Schwab v. State* does not provide a basis for denying Mr. Foster relief. The denial in *Schwab* was premised upon the determination that the research supporting his claim of newly discovered evidence had not been drawn from conclusions based upon any new data. *Schwab v. State*, 969 So. 2d 318, 325 (Fla. 2007) (citations omitted). The Court's holding was specific to the research Schwab presented dealing with studies on neurological impairment and the connection between brain pathology and sexual offenses. *Schwab*, 969 So. 2d at 325. Implicit in this Court's rejection of that science was the determination that the studies upon which he was relying had previously been available and/or considered by the Court. Based upon that determination, this Court faulted Schwab for not having previously presented it at an earlier stage in his litigation. *Id.*⁷

⁷ The analysis of Schwab's claim, however, did not end there. The Court proceeded to the second prong of the *Jones*-newly discovered evidence standard and ultimately determined that the reports were "not of such a nature that [they] would probably yield a less severe sentence on retrial." That analysis of the second prong of the *Jones*-standard for newly discovered evidence is inherently different in the context of Mr. Foster's case where evidence of a national consensus against imposition of the death penalty for defendants who are 18-21 years of age under evolving standards of decency would not merely "produce an acquittal on re-trial" but would bar altogether the imposition of the death penalty.

Similar to *Schwab*, this Court's decision in *Branch* was premised upon the Court's determination that the scientific research Branch was relying upon regarding brain development in emergent adolescents was not newly discovered evidence where it was previously available to him. *Branch*, 236 So. 3d at 985. The Court relied in part on its previous holding in *Morton v. State*, finding that a 2004 brain mapping study establishing sections of the human brain are not fully developed until twenty-five years old did not constitute newly discovered evidence where they are based on previously available data. *Morton v. State*, 995 So. 2d 233, 245 (Fla. 2008). This Court held in *Morton* that even though the brain mapping study was not published at the time of his trial, Morton could have discovered similar research at that time stating that the human brain was not fully developed until early adulthood. *Id.* at 245-46.

This Court's holding in *Davis v. State*, 142 So. 3d 867 (Fla. 2014) is also distinguishable. Significantly, Davis was twenty-five at the time of his crime and not eighteen. Additionally, the newly discovered evidence upon which Davis relied dealt with the effects of sexual abuse and alcoholism on the development of the brain. Davis presented a generalized claim that the effects from both had rendered him the functional equivalent of a child. *Id.* at 870, 874. Citing its opinion in *Schwab and Farina v. State*, 992 So. 2d 819 (Fla. 2008), this Court denied relief finding that the

articles Davis had relied upon fell squarely into the ‘new research studies’ or ‘new opinions’ which this Court had previously rejected in both of those cases. *Id.* at 875. Implicit in the Court’s reliance upon *Schwab* and *Farina* was the determination that the information that Davis was relying upon had previously been available to him at an earlier date.

Unlike the circumstances in *Schwab*, *Davis*, and *Branch*, Mr. Foster’s claim for relief does not rely upon evidence which was previously available. Mr. Foster’s claim is based upon scientific research and additional objective indicia establishing a national consensus as to how society at large views emerging adolescents aged 18-21 years of age. It deals with the science behind the development of the adolescent brain during that time period and how society has evolved to incorporate that understanding into the way it treats emergent adolescents for purposes of legal and societal considerations. It relies upon research and objective data which in many cases was not in existence until the last two to three years. Additionally, it also relies upon the national consensus which has emerged in the legal community in support of that science as demonstrated in recent cases such as *Bredhold v. Kentucky*, Case No. 14-CR-161 (August 1, 2017), *Diaz v. Kentucky*, Case No. 15-CR-584-001 (September 6, 2017), and this Court’s decision in *Ellerbee v. State*, 232 So. 3d 909 (Fla 2017). As Mr. Foster argued in his successive postconviction motion, it was the emergence of this additional objective indicia of a national consensus *along with* the

research and consensus within the scientific community that supported the timeliness of Mr. Foster's filing of his successive motion for postconviction relief under Fla. R. Crim. Pro. 3.851(d)(2). This evidence was not "readily available" to counsel by other means at the time of the trial such that counsel could have discovered it and presented to Mr. Foster's jury. Unlike the scenarios present in *Schwab*, *Branch*, and *Davis*, Mr. Foster could not have previously presented the evidence upon which he is now relying at an earlier stage in his litigation, much less at trial.

In contrast to the factual scenarios present in *Schwab*, *Davis*, and *Branch*, Mr. Foster's claim is based upon information which this Court has previously recognized can constitute newly discovered evidence. *See Clark v. State*, 995 So. 2d 1112, 1113 (Fla. 2d DCA 2008).⁸ The reports, studies, research, and objective indicia upon which Mr. Foster relies were not previously in existence at the time of his trial in 1998 or during his postconviction evidentiary hearing in 2011. *Cf. Johnson v. State*, 27 So. 3d 11, 20-21 (Fla. 2010). Nor are they merely a "compilation of previously available information" related to the development and cognitive functioning of adolescents aged eighteen to twenty-one years old. *Cf. Rutherford v. State*, 940 So. 2d 1112, 1117 (Fla. 2006). Mr. Foster's claim is based on new data and scientific

⁸ The Court in *Clark* held that because the claim below had been summarily denied, the court was required to accept the factual allegations as true to the extent they were not refuted by the record. In doing so, the court determined that it disagreed with the postconviction court's conclusion that the scientific evidence could not be considered newly discovered evidence. *Clark*, 995 So. 2d at 1113.

research, in companion with additional objective indicia, that establishes a newly emergent national consensus within the scientific community that was not previously available. *See Henry v. State*, 125 So. 3d 745, 750-51 (Fla. 2013). Such information is far different than the ‘new opinions’ and ‘new research studies’ which this Court has previously determined did not constitute newly discovered evidence in *Davis*, *Schwab*, *Branch*, and other similar cases. *See Schwab v. State*, 969 So. 2d 318, 326 (Fla. 2007); *see also Farina v. State*, 992 So. 2d 819 (Fla. 2008).

Finally, the State contends that the trial court properly denied the claim on the merits based on this Court’s finding in *Branch* that “research studies on the brain’s development are not ‘new,’ as the United States Supreme Court was well aware of this information at the time of the *Roper* decision and nevertheless, drew a bright-line at the age of 18 for death eligibility.” Response at 31. This argument, however, is flawed for several reasons. Rather than address the Eighth Amendment argument and the science relied upon by Mr. Foster, the State would rather advance the position that this Court’s decision in *Branch*, and its reliance upon the United States Supreme Court’s decision in *Roper*, renders any consideration of further advances in both science and the law irrelevant. Such a rationale, however, is contrary to the Eighth Amendment and ‘evolving standards of decency.’ *See Hall v. Florida*, 134 S. Ct. 1986, 1992 (2014) (“The Eighth Amendment ‘is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane

justice.’”) (quoting *Weems v. United States*, 217 U.S. 349 (1910)).⁹ United States Supreme Court jurisprudence is clear that courts are not free to disregard established medical practice or diminish the force of the medical community’s consensus. *See Hall v. Florida*, 134 S. Ct. 1986 (2014); *see also Moore v. Texas*, 137 S. Ct. 1039 (2017). Arguing that this Court’s decision in *Branch*, and its reliance on the holding in *Roper*, somehow inoculates any later review of the bright-line cutoff of 18 for application of death penalty, in the face of advances in both science and society at large, flies in the face of that clearly established federal law.

The State’s reliance on *Roper* is also flawed in the manner which it ignores the difference between the science dealing with the development of the brain of people under the age of eighteen, i.e. the science relied upon by the United States Supreme Court in *Roper*, and the scientific research dealing with the development of the adolescent brain in those aged eighteen to twenty-one and how that impacts behavior and decision-making as evidenced in research which has become newly emergent since as recently as 2016. As Mr. Foster pled in his Initial Brief, this is not a claim based on the science used to support *Roper*. Mr. Foster’s claim is based upon

⁹Because ‘evolving standards of decency’ necessarily evolve, that progression requires revisiting prior decisions to determine if they prove acceptable at a later point in time. Merely because a decision was rendered determining something constitutional at an earlier time does not foreclose revisiting that determination as prevailing societal norms change over time. Cf *Penry v. Lynaugh*, 492 U.S. 302 (1989) with *Atkins v. Virginia*, 536 U.S. 304 (2002).

the scientific research, along with the additional sources of objective indicia supporting a national consensus, that have been developed and emerged *since the United States Supreme Court's decision in Roper*. It consists of scientific research that, while previously thought to be true, was not fully developed and/or confirmed until after the timing of the decision in *Roper*. This newly emergent science could not have been part of the United States Supreme Court's analysis in *Roper* as it did not exist back at the time that case was decided in 2001.

This Court should not ignore the developments in both science and society at large. It should take the opportunity in Mr. Foster's case to meaningfully consider its Eighth Amendment jurisprudence and the continued viability of the application of the death penalty to individuals who are not yet full-fledged adults at the time of their crimes. Individuals who society has determined are in need of added protections. It should faithfully adhere to the Eighth Amendment requirement that medical science must not be not ignored and take into consideration the newly emergent science and additional objective indicia establishing a national consensus against the imposition of the death penalty. *See Hall v. Florida*, 134 S. Ct. 1986 (2014); *see also Moore v. Texas*, 137 S. Ct. 1039 (2017). And it should provide individuals facing the most severe sanction, especially those such as Mr. Foster who were eighteen years old at the time of their crime, a fair opportunity to show that the Constitution prohibits [his] execution. *Hall*, 134 S. Ct. at 2001.

Respectfully submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished on this day August 20th, 2018 via electronic service to Stephen Ake, Assistant Attorney General, 3507 East Frontage Road, Suite 200, Tampa, FL 33607-7013 at capapp@myfloridalegal.com; and stephen.ake@myfloridalegal.com.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the foregoing Initial Brief has been reproduced in 14 Times New Roman type, pursuant to Rule 9.100 (1), Florida Rules of Appellate Procedure.

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