

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC19-841

ROBIN LEE ARCHER,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR ESCAMBIA COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is an appeal from the circuit court's order summarily denying a successive 3.851 motion.

Citations to Archer's record on direct appeal will appear as "AR ___";

Citations to Archer's resentencing record in his 2nd direct appeal will appear as "Arr ___";

Citations to the record in direct appeal by the codefendant, Patrick Bonifay, will appear as "BR ___";

Citations to Bonifay's resentencing record in Bonifay's 2nd direct appeal will appear as "Brr ___";

Citations to the record in Archer's appeal of the denial of his first 3.851 motion will appear as "APC ___";

Citations to the record in Archer's appeal of the denial of his second 3.851 motion will appear as "2PC-R ___";

Citations to the record in Archer's appeal of the denial of his third 3.851 motion will appear as "3PC-R ___";

Citations to the record in Archer's current appeal from the denial of his fourth 3.851 motion will appear as "4PC-R ___".

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REPLY TO STATE'S PRELIMINARY STATEMENT

Within the Answer Brief's "Preliminary Statement," the State "requests" this Court to take judicial notice of court records from four different court cases:

The State requests this Court take judicial notice of the following official court records: 1) Archer's successive Petition for Writ of Habeas Corpus filed with the Clerk of the Supreme Court on November 22, 2016, *Robin Lee Archer v. Jones*, Florida Supreme Court Case No. SC16-2111. Citations to this Court record are designated as "Habeas Petition" and page number; 2) Records filed with the Clerk of Courts in the *State of Florida v. Clifford E. Barth*, Case No. 1991-CF-606C, First Judicial Circuit, Escambia County, Florida, in accordance with Florida Statutes section 90.202(6). Citations to these court records are designated by document title, filing date and docket number for reference; 3) Records filed with the Clerk of the Supreme Court of Florida in *Owen v. State*, Florida Supreme Court Case No. SC18-810; and 4) Records filed with the Clerk of the Supreme Court of Florida in *Reed v. Florida*, Supreme Court Case No. SC19-714.

(Answer Brief at 1).

On October 29, 2019, Mr. Archer filed a motion asking this Court to either strike the State's request appearing in the preliminary statement of the answer brief, or alternatively direct the State to file a motion to supplement the record.

Mr. Archer relied on *State v. Mobley*, 98 So.3d 124, 125 (Fla. 5th DCA 2012). There, the court explained:

Judicial notice is governed by the evidence code. Specifically, section 90.201, Florida Statutes (2011), sets forth matters which must be judicially noticed, and section 90.202 provides matters which may be

judicially noticed. Section 90.202(6) includes records of any court of this State or of any court of record of the United States or of any other state, territory, or jurisdiction of the United States. Sections 90.203 and 90.204 provide the procedure to be followed in taking judicial notice pursuant to section 90.202, including when the trial court elects sua sponte to take judicial notice.

Those matters for which judicial notice is required are: 1) “[d]ecisional, constitutional, and public statutory law;” 2) “Florida rules of court that have statewide application” and the rules of the United States courts adopted by the United States Supreme Court;” and 3) “[r]ules of court of the United States Supreme Court and of the United States Court of Appeal.” A court must take judicial notice of the governing law, whether it is statutory law, case law or rules of procedure.

Section 90.202 on the other hand deals with when a court may take judicial notice of a factual matter. When judicial notice is sought as to factual matters, §§ 90.203 and 90.204 identify the procedure by which a party may ask for judicial notice. As to judicial notice of factual matters, this Court has explained:

The concept of judicial notice is essentially premised on notions of convenience to the court and to the parties; some facts need not be proved because knowledge of the facts judicially noticed is so notorious that everyone is assumed to possess it.

Huff v. State, 495 So.2d 145, 151 (Fla. 1986).

Section 90.202(6) provides that a court may take judicial notice of “[r]ecords of any court of this state”. But, the content of the court records does not automatically become admissible evidence of a factual matter. In *Stoll v. State*, 762 So.2d 870, 876 (Fla. 2000), this Court held:

Although a trial court may take judicial notice of court records, see § 90.202(6), Fla. Stat. (1997), it does not follow that this provision permits the wholesale admission of all hearsay statements contained within those court records. We have never held that such otherwise inadmissible documents are automatically admissible just because they were included in a judicially noticed court file.

A party’s request that judicial notice be taken of a court record should not be used to mask the party’s failure to prove or contest a fact:

the facts to be judicially noticed must be of common notoriety, and second, courts should exercise great caution when using judicial notice. As has been held in this state and elsewhere, judicial notice is not intended to “fill the vacuum created by the failure of a party to prove an essential fact.”

Huff v. State, 495 So.2d at 151.

A party’s request that judicial notice be taken of court records may raise serious issues as to what in the court record is treated as admissible evidence and what is not. For that reason, § 90.203 requires the party asking for the judicial notice to “[g]ive each adverse party timely written notice of the request ... to enable the adverse party to prepare to meet the

request." It also requires that the party seeking judicial notice to "[f]urnish[] the court with sufficient information to enable it to take judicial notice of the matter." This sufficient information must inform the court and the adverse party of the fact that judicial notice of the court record will demonstrate.

The State filed a response to Mr. Archer's motion and indicated that it had meant for the judicial notice to be limited to certain documents in the court records which were identified in its preliminary statement. As to the proceedings before this Court in Case No. 16-2111, the only document that the State meant to be considered by this Court was Mr. Archer's petition for writ of habeas corpus filed November 22, 2016. As Mr. Archer explained in his motion, this Court has long treated proceedings before this Court concerning a death sentenced individual to be part of the court record in a subsequent proceeding concerning the same individual's death sentence. Thus, the State's request concerning Mr. Archer's habeas petition was entirely unnecessary.

As to the circuit court record concerning Mr. Archer's co-defendant, Clifford Barth, the State indicated that it sought judicial notice of the following four documents:

1. Co-defendant Clifford E. Barth's Motion for Juvenile ReSentencing and/or Judicial Review, May 8, 2017, Docket No. 241. This document was referenced in the State's Answer Brief on page 27;

2. Co-defendant Clifford E. Barth's Written plea agreement dated September 18, 1991, Docket No. 150. This document was referenced in the State's Answer Brief on page 27;

3. Judgment and Sentence for Co-defendant Clifford E. Barth dated September 18, 1991, Docket No. 149. This document was referenced in the State's Answer Brief on page 27; and

4. Order Granting Juvenile Resentencing on Count One, et seq., for Co-defendant Clifford E. Barth dated September 14, 2017, Docket No. 264. This document was referenced in the State's Answer Brief on page 28.

State's Response to Motion to Strike at 2. These four documents were not part of the record before the circuit court when it summarily denied Mr. Archer's amended 3.851 motion.

As to the court records in *Owen v. State*, Case No. SC18-810; and *Reed v. State*, Case No. SC19-714, the State explained in response to the motion to strike:

Undersigned counsel inartfully used the term, "records," and did not intend to mean the official record on appeal in these cases currently pending 3 before the Court. Instead, the undersigned intended to specifically reference the briefs filed in *Owen* and *Reed*, to alert the Court to contemporaneously related issues before it.

State's Response to Motion to Strike at 2-3. Thus, **the State did not mean to have the court records in *Owen* and *Reed* judicially notice by this Court.** It merely meant to apprise this Court of a related issue in those currently pending appeals.

So, the State's response to Mr. Archer's motion to strike

clarified that it was seeking judicial notice of only four documents from the court record for Mr. Archer's co-defendant, Clifford Barth. The State relies on these four documents in its answer addressing Argument III of Mr. Archer's initial brief. When he replying to the State's discussion of Argument III, Mr. Archer further addresses the State reliance on the documents that were not presented to or before the circuit court.

After receiving the State's response to the motion to strike, this Court entered an order denying the motion to strike.

REPLY TO ANSWER BRIEF'S STATEMENT OF THE CASE

The State's Statement of the Case is not an adequate nor a complete recitation of the facts of Mr. Archer's case and its procedural history. Mr. Archer stands by the Statement of the Case which he provided in his initial brief as it provided a fuller and more complete picture of his case and its procedural history.

A glaring omission from the Statement of the Case provided by the State is a discussion of the position that Mr. Archer took in circuit court in his reply filed on November 24, 2018, and at the case management conference conducted on November 26, 2018. By then, Mr. Archer's pending amended 3.851 motion contained three claims. Claim I of the amended motion was based upon the Sixth Amendment ruling in *Hurst v. Florida*, 136 S.Ct. 616 (2016), and

the Sixth Amendment and the Eighth Amendment rulings in *Hurst v. State*, 202 So.3d 40 (Fla. 2016).¹ In his circuit court reply to the State's answer, Mr. Archer discussed Claim I of the motion and stated:

While Mr. Archer does not wish to abandon or waive his constitutional claims appearing in Claim of the January 6, 2017 motion to vacate, Mr. Archer must acknowledge that the Florida Supreme Court's decision in *Archer v. Jones* rejected his arguments in Claim I on the basis of *Asay v. State* and the *Witt* analysis conducted therein. Most of the first half of the State's answer concerns the constitutional arguments arising from *Hurst v. Florida* and *Hurst v. State* that were the basis for Claim I. However, Mr. Archer cannot contest that the Florida Supreme Court said that it had determined under *Asay v. State* that Mr. Archer is not entitled to the retroactive benefit of the Sixth and Eighth Amendment rulings in *Hurst v. Florida* and *Hurst v. State*.

(4PC-R 559).

At the case management conference, Mr. Archer's counsel again acknowledged that as to Claim I, the circuit court was bound by precedent from this Court:

MR. MCCLAIN: Well, Your Honor, as -- I just filed this reply to sort of let you know what I would be arguing. And to clarify that, the amendment -- Your Honor, when we -- you issued an order for show cause earlier this year in reference to the State's habeas opinion in *Archer v. Jones* and if it controlled. As to the claim that is in the January 6th, 2017, 3.851, I cannot dispute that the decision in *Archer v. Jones* pretty much covers it. As I said, in this reply file I'm not waiving it, I'm not abandoning it, but I recognize -- and Ms. Millsaps' argument, her answer, that as to that

¹ Claim I of the amended 3.851 motion is the subject of Argument II of the initial brief.

claim, the ruling in *Archer v. Jones* is from the Florida Supreme Court and I recognize Your Honor that you are kind of bound to follow what the U.S. Supreme Court says. So, it's more about argument -- or Claim II, which is the amended motion.

(4PC-R 575). When the judge inquired if Claim I was being waived,

Mr. Archer's counsel explained:

I'm not waiving the claim. I'm contending that the Florida Supreme Court was wrong, but I recognize you're bound by the Florida Supreme Court. And so I don't really have anything further to say about it.

(4PC-R 576).

Mr. Archer's counsel then turned to Claim II.² He began by explaining the difference between Claim I and Claim II:

Claim II is really premised upon the statutory construction aspect of *Hurst v. State* because what had been in Claim I was really the Eighth -- Sixth and Eighth Amendments, constitutional ruling, which is generally regarded as procedural in nature and governed by *Witt v. State*. And in *Archer v. Jones* is this recognition that the Florida Supreme Court has determined under *Witt v. State* analysis. It's not retroactive -- or Mr. Archer is not entitled to the retroactive benefit of it. What was not presented in Claim I, which is One and is in Claim II is the focus on the statutory construction component in *Hurst v. State*, but it's not just *Hurst v. State*, there is also the decision in *Perry v. State*, which issued the same day as *Hurst v. State*. And then also the statute, which was addressed in *Perry v. State*, it was chapter 2016-13, which was the legislation that was enacted after *Hurst v. Florida* came out to, in essence, fix the defect.

² Claim II of the amended 3.851 motion is the subject of Argument I of the initial brief.

(4PC-R 577-78).

In his reply to the State's answer and during the case management conference, Mr. Archer's counsel explained that Claim II was premised upon a judicial decision (*Hurst v. State*) construing a criminal statute. The statutory construction announced in *Hurst v. State* was a change in how this Court read § 921.141. This change in this Court's construction of § 921.141 was a change in substantive law, not a change in procedural law. In his reply to the State's answer, Mr. Archer addressed the significance of this distinction:

A judicial decision construing substantive criminal law or identifying the elements of a criminal offense is substantive law. It is not a procedural rule. The analyses used to determine when a new procedural rule is to be applied retroactively do not apply to the issued Petitioner raises. *Bousley v. United States*, 523 U.S. 614, 620 (1998) ("[B]ecause *Teague*[v. *Lane*, 489 U.S. 288 (1989)] by its terms applies only to procedural rules, we think it is inapplicable to the situation in which this Court decides the meaning of a criminal statute enacted by Congress."); *Thompson v. State*, 887 So.2d 1260, 1263-64 (Fla.2004) ("[T]he question of retroactivity under *Witt* is not applicable to this case because we are examining a change in the statutory law of this state not a change in decisional law emanating from this Court or the United States Supreme Court").

(4PC-R 562).

As to Claim II of the amended 3.851 motion, Mr. Archer's argued that the retroactivity analysis set out in *Witt v. State*, 387 So.2d 922 (Fla. 1980), did not provide the proper framework

for determining the date on which a change in statutory construction of a criminal statute became effective. Under the Savings Clause, Art. X, Section 9 of the Constitution of the Florida, the substantive law on the date of the criminal offense governed all aspects of a criminal prosecution, including the sentence to be imposed (4PC-R 568).

In *Card v. Jones*, 219 So.3d 47 (Fla. 2017), the statutory construction of § 921.141 adopted in *Hurst v. State* was held to govern as to what sentence was to be impose for a 1981 homicide. Thus, this Court's construction of the statute in *Hurst v. State* was recognized as the governing substantive law as of the date of the homicide for which Mr. Card had been prosecuted. (4PC-R 567-68). Mr. Archer asserted that if it was the governing law at the time of the 1981 homicide in *Card v. Jones*, then statutory construction set out in *Hurst v. State* had to have been the governing law at the time of the 1991 homicide at issue in Mr. Archer's case.

As to Claim III, Mr. Archer noted that it was premised upon the Eighth Amendment ruling in *Johnson v. Mississippi*, 486 U.S. 578 (1988) (the Eighth Amendment is shown to have been violated when new evidence shows that "the jury was allowed to consider evidence that has been revealed to be materially inaccurate."). (4PC-R 568). Before Mr. Archer's resentencing was conducted in

1993, Clifford Barth had pled guilty to first degree murder and received a mandatory life sentence. However in 2017, Mr. Barth's sentence was reduced to 26 years and he was released from prison.

ARGUMENT IN REPLY

In his initial brief filed with this Court, Mr. Archer presented three arguments. Argument I addressed the merits of Claim II of the amended 3.851 motion. Argument II discussed Claim I of the amended 3.851 motion. Argument III concerned the circuit court's denial of Claim III of the amended 3.851 motion.

ARGUMENT I

In addressing Argument I, the State refused to recognize the difference between Claim I and Claim II of the amended 3.851 motion. Claim I was premised upon the Sixth Amendment ruling in *Hurst v. Florida* and the Sixth and Eighth Amendment rulings in *Hurst v. State*. Claim II was based upon this Court's construction of a statute, § 921.141, Fla. Stat.

Argument I of the initial brief addressed Mr. Archer's claim that the statutory construction of § 921.141 announced in *Hurst v. State* was a change in Florida's substantive law. Because in *Hurst v. State*, this Court simply relied on the plain language of the statute, its construction of § 921.141 dates to the statute's enactment. The statutory construction in *Hurst v. State* must be held to have been Florida's substantive law on January 26, 1991.

In Argument I, Mr. Archer specifically asserted that the retroactivity analysis set forth in *Witt v. State*, 387 So.2d 922 (Fla. 1980), was not the proper analysis for determining whether a judicial decision that made a change in Florida's substantive criminal law by announcing a new of different construction of a criminal statute is retroactive.

Failing to recognize the specific basis of the claim at issue in Argument I, the State's answer brief contends that this Court has already addressed and denied Mr. Archer's claim when it denied his petition for a writ of habeas corpus:

Appellant claims entitlement to retroactive relief under *Hurst v. State*. IB 41, et seq. However, this claim was raised and litigated in his Habeas Petition and is therefore barred by the law-of-the-case doctrine.

(AB at 12). The State's assertion is in error. The habeas petition concerned the constitutional rulings in *Hurst v. Florida* and *Hurst v. State*. The habeas petition was premised entirely on Mr. Archer's argument that *Hurst v. Florida* and *Hurst v. State* should apply retroactively under the *Witt* analysis. See Habeas Petition at 14-20.

To be clear, Mr. Archer does not dispute that this Court denied his habeas petition in an unpublished order. See *Archer v. Jones*, 2017 WL 1034409 (Fla. 2017). As to the claim presented in the petition, the decision in *Archer v. Jones* is currently the

law of the case. As stated in *Wilder v. Punta Gorda State Bank*, 129 So. 865, 866 (1930), the law of the case doctrine “has no applicability to, and is not decisive of, points presented upon a second writ of error that were not presented upon a former writ of error and consequently were not before the appellate court for adjudication.” In *Archer v. Jones*, this Court relied upon *Asay v. State*, 210 So.3d 1 (Fla. 2016), as holding that *Hurst v. Florida* and *Hurst v. State* did not apply retroactively. Of course, the ruling in *Asay v. State* was premised upon its application of the *Witt* retroactivity analysis. It did not address this Court’s construction of § 921.141.

Again, Argument I of the initial brief concerns this Court’s construction of a criminal statute. The construction of a criminal statute is a matter of substantive law. The analysis from *Witt v. State* only applies to constitutional rulings that set forth procedural rules.

Mr. Archer noted in his initial brief that, in another case currently pending before this Court (*Reed v. State*, Case No. SC19-714), the State had acknowledged that the *Witt* retroactivity analysis was inapplicable to judicial decisions that resulted in a change in statutory construction of criminal statute. See IB at 52. In its answer brief, the State does not address the position it took in *Reed v. State* regarding the inapplicability of *Witt*

analysis to a judicial construction of a criminal statute. But, the State does note that Mr. Archer's counsel also represented Mr. Reed, and made nearly identical arguments in the two cases. (AB at 24, n.11).

In its answer brief, the State does not specifically address Mr. Archer's contention that this Court in *Hurst v. State* construed § 921.141, and that the resulting construction of the statute constitutes substantive law. Instead, the State merely asserts "changes in Florida death penalty statute following *Hurst v. Florida* were procedural in nature and did not affect the substantive crime charged, which was based upon a defendant's conduct." (AB at 15). The State ignored the plain language of § 921.002 which provides: "The provision of criminal penalties and of limitations upon the application of such penalties is a matter of predominantly substantive law, and, as such, is a matter properly addressed by the Legislature." The construction of § 921.141 is a matter of substantive law.

When this Court rendered its decision in *Hurst v. State*, the Florida Constitution imposed a restriction on retroactive application of criminal legislation. Article X, section 9 of the Florida Constitution provided: "Repeal or amendment of a criminal statute **shall not affect prosecution or punishment** for any crime previously committed." (emphasis added). This meant the law in

effect at the time a criminal offense was committed governed a criminal prosecution and the resulting sentence imposed on the defendant. Under Art. X, § 9, this Court was required to construe § 921.141 as of the date of the homicide at issue in *Hurst v. State*. By virtue of this provision, this Court was required to apply the substantive law in effect on the date of the 1981 homicide at issue when it rendered *Card v. Jones*, 219 So.3d 47 (Fla. 2017).

In addressing Argument I, the State also relies heavily on *Foster v. State*, 258 So.3d 1248 (Fla. 2018).³ Specifically, the State relies on the language in *Foster* indicating that the facts, that *Hurst v. State* held must be found proven by the State before a defendant could be eligible for the imposition of a death sentence, were not elements.

³ The State also relies upon *Rivera v. State*, 260 So.3d 920 (Fla. 2018), which issued shortly after *Foster*. In *Rivera*, the decision in *Foster* is quoted at length. In rejecting Mr. Rivera's claims, this Court stated:

These arguments, however, are "nothing more than arguments that *Hurst v. State* should be applied retroactively to [Rivera's] sentence, which became final prior to *Ring*. As such, these arguments were rejected when [this Court] decided *Asay*." *Hitchcock*, 226 So.3d at 217. Therefore, we conclude that this claim is meritless, based on our clear and repeated precedent on the retroactive application of *Hurst*.

Rivera v. State, 260 So. 3d at 927.

Mr. Archer addressed *Foster v. State* in his initial brief.

There, he wrote:

A recent opinion from this Court overlooked Justice Scalia's concurrence in *Ring* and engaged in a discussion about whether the additional statutorily required findings had been labeled "elements." *Foster v. State*, 258 So.3d 1248 (Fla. 2018). Without acknowledging that *Hurst v. State* had used the "elements" label over Justice Canady's dissent, *Foster* did say that *Hurst v. State* "**reflected a change in this state's decisional law.**" *Foster v. State*, 258 So.3d at 1251 (emphasis added). This Court's opinion in *Foster* then acknowledged that *Hurst v. State* required that:

in order for a defendant to be sentenced to death, the jury must: (1) unanimously find at least one aggravating factor beyond a reasonable doubt; (2) identify all aggravating factors that it unanimously finds beyond a reasonable doubt; (3) unanimously determine whether sufficient aggravating factors exist to impose a sentence of death; (4) determine whether any mitigating circumstances exist and unanimously determine whether the aggravating factors outweigh those mitigating circumstances; and (5) unanimously determine that the defendant should be sentenced to death. See *Hurst*, 202 So.3d at 57; § 921.141(2), Fla. Stat. (2018); ch. 2017-1, Laws of Fla. **If the jury makes these findings**, it only does so after a jury has unanimously convicted the defendant of the capital crime of first-degree murder that is delineated in section 782.04, Florida Statutes (2018).

Foster v. State, 258 So.3d at 1251 (emphasis added). This Court in *Foster*, then stated:

[T]he *Hurst* penalty phase findings **are not elements** of the capital felony of first-degree murder. Rather, **they are findings required of a jury: (1) before the court can**

impose the death penalty for first-degree murder, and (2) only after a conviction or adjudication of guilt for first-degree murder has occurred.

Id. at 1252 (emphasis added).

Using the "findings" label in lieu of the "elements" label is as Justice Scalia explained, a distinction without meaning. What matters is that Florida's substantive criminal law requires findings to be made before "the court can impose the death penalty for first-degree murder."

(IB at 47-48).

Certainly, it is for the legislature to identify those facts that must be proven before a defendant is eligible for a death sentence. Once the legislature has done its job and identified the factual matters that must be found before a judge can consider imposing a death sentence, whether those factual findings are elements is not a matter of legislative intent. It is a matter of constitutional law. See *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring) ("all facts essential to imposition of the level of punishment that the defendant receives—**whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt.**") (emphasis added).

At the time of the 1991 homicide at issue in Mr. Archer's case, § 921.141(3) provided:

if the court imposes a sentence of death it shall

set forth in writing its findings upon which the sentence of death is based as to **the facts**:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings.

(emphasis added).

To the extent that the State relied upon *Rogers v. State*, 2019 WL 4197021, _ So.3d _ (Fla. Sept. 5, 2019), this Court noted there that it had "receded" from *Hurst v. State*. This Court can only recede from *Hurst v. State* prospectively. Retroactively applying a decision receding from *Hurst v. State* and its identification of Florida's substantive law would operate to a criminal defendant's detriment and run afoul of the Due Process Clause. *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964) ("The fundamental principle that 'the required criminal law must have existed when the conduct in issue occurred,' Hall, General Principles of Criminal Law (2d ed. 1960), at 58-59, must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures."). See also *State v. Miranda*, 793

So.2d 1042, 1044 (Fla. 3rd DCA 2001) (holding that a statutory amendment characterized by the State as a clarification could not be applied retroactively because the statute as written at the time of the crime was unclear, and retroactive application of the statute as amended would result in an increased period of incarceration).

Clearly, the statute referenced the sufficiency of the aggravating circumstances as a fact that had to be found before a death sentence was permissible. This Court in *Foster* acknowledged that a finding that the aggravating circumstances were sufficient was required before a death sentence could be imposed. As explained by Justice Scalia in *Ring v. Arizona*, the necessity of a finding that the aggravating factors are sufficient before a death sentence can be imposed means that the finding constitutes an element.

ARGUMENT II

In Argument II of his initial brief, Mr. Archer acknowledged that Claim I of his amended 3.851 motion was essentially the same claim presented in his habeas petition filed with this Court on November 22, 2016. He also acknowledged that this Court in its unpublished order in *Archer v. Jones* denied the claim on the basis of *Asay v. State*. The decision in *Asay* rested on the balancing of the interests of fairness versus the interests of

finality as required under the *Witt* retroactivity analysis. Given that this Court has recently demonstrated that it a devaluation of the interests of finality has occurred, Mr. Archer argued that the *Witt* analysis should be undertaken anew.

In its answer brief, the State cited to many decisions by this Court that relied on *Asay v. State* and the *Witt* analysis conducted therein. But, it never actually addressed the devaluation of finality arising from this Court's recent willingness to ignore stare decisis and overturn this Court's own precedent. Instead, the State asserted that the law-of-the-case doctrine barred this Court from hearing the Mr. Archer's argument.

However, the law-of-the-case doctrine does not preclude this Court from revisiting its earlier decision:

Moreover, even as to those issues actually decided, the law of the case doctrine is more flexible than *res judicata* in that it also provides that an appellate court has the power to reconsider and correct an erroneous ruling that has become the law of the case where a prior ruling would result in a "manifest injustice."

Fla. Dep't of Transportation v. Juliano, 801 So.2d 101, 106 (Fla. 2001). In *State v. Owen*, 696 So.2d 715, 720 (Fla. 1997), this Court explained:

However, the doctrine **is not an absolute mandate, but rather a self-imposed restraint** that courts abide by to promote finality and efficiency in the judicial process

and prevent relitigation of the same issue in a case.
(emphasis added).

While the circuit court was bound to follow this Court ruling in *Archer v. Jones*, the law-of-the-case doctrine does not preclude this Court from revisiting a previously decided issue. For the reasons stated in the initial brief, Mr. Archer submits that this Court can and should revisit its rejection of his Sixth and Eighth Amendment claims based upon *Hurst v. Florida* and *Hurst v. State*.

ARGUMENT III

In Argument III of its answer brief, the State relies upon four documents that were not before the circuit court. The State says that these four documents are from the court record in Clifford Barth's case. The State seeks to rely on these four documents as to factual matters. While these documents existed at the time of the case management conference, the State did not present them or rely on them at any point in the proceedings below. In determining whether the circuit court erred in summarily denying Claim III of Mr. Archer's amended 3.851 motion, this Court is required to accept his factual allegations as true except to the extent rebut by the record. *Lightbourne v. Dugger*, 549 So.2d 1364, 1365 (Fla. 1989).

The four documents from the files in *State v. Barth* were not

before the circuit court and are not part of the record on appeal before this Court. To the extent that the State is seeking to go outside the record to refute Mr. Archer's factual allegations, it has conceded the necessity of an evidentiary hearing in order to determine the facts. *McClain v. State*, 629 So.2d 320, 321 (Fla. 1st DCA 1993) (in an appeal from the summary denial of a 3.850 motion, "the state's admitted inability to refute the facially sufficient allegations of ineffective assistance of counsel without recourse to matters outside the record, warrants reversal").

Another problem is this Court's holding in *Johnson v. State*, 660 So.2d 648 (Fla. 1995). There, the State had prosecuted Mr. Johnson for two murders in two separate criminal proceedings. The victim's last name in one of the murders was McCahon, in the other murder the last name was White. This Court heard two separate direct appeals and then issued two separate opinions on the same day. In its opinion affirming the conviction of the McCahon murder, the Florida Supreme Court announced:

Effective as of the date this opinion is released, we hold that the proper method of bringing relevant matters before this Court that are contained in separate records of pending cases is by way of a motion to supplement the record, not by a request for the taking of judicial notice.

Johnson v. State, 660 So.2d at 653 (footnote omitted). In a

footnote, this Court observed: "The motion obviously must be accompanied by verified and complete copies of the material urged as a supplement." *Id.* at 653 n.1.

This Court explained that this change was warranted due to this Court's role as an appellate court that undertakes appellate review. The *Johnson* opinion then quoted language from *Jackson v. State*, 575 So.2d 181, 193 (Fla. 1991),⁴ which stated:

This Court decides cases solely based on the record under review. We must blind ourselves to facts not presented in this record.

Johnson v. State, 660 So.2d at 652. Over the years, this Court has continued to follow its ruling in *Johnson v. State*. See *Smith v. State*, 998 So.2d 516, 525 (Fla. 2008) ("We have previously held that to bring relevant matters contained in separate records before the Court, the party must move to supplement the record and attach verified and complete copies of the material."); *Marek v. State*, 8 So.3d 1123, 1128 n.2 (Fla. 2009) (this Court found that Mr. Marek had not moved to supplement his record with his

⁴ In *Jackson v. State*, two brothers had been charged with a murder as co-defendants. The brothers were tried separately. This Court ordered a life sentence for one brother even though the other brother's death sentence had been affirmed. In these circumstances that this Court wrote: "While the two results appear to be inconsistent, we emphasize that this Court decides cases solely based on the record under review. We must blind ourselves to facts not presented in this record." *Jackson v. State*, 570 So.2d at 193.

co-defendant's record as *Johnson* required, so it only consider the excerpt of the co-defendant's record that were attached to the motion for rehearing filed in the circuit court and referenced in Mr. Marek's briefs.).

The State request for this Court to take judicial notice of the court record in other cases did not comply with this Court's holding in *Johnson v. State* which was followed in *Smith v. State* and *Marek v. State*. The State's request that this Court take judicial notice of court records in other cases should be treated as a nullity. Procedural rules must be applied evenhandedly. The State is required to follow the same rules that the capital appellant must follow.

The State does not address the case on which Mr. Archer's Claim III was based - *Johnson v. Mississippi*, 486 U.S. 578 (1988). There, a prior conviction that was before the penalty phase jury was subsequently vacated. The US Supreme Court found that the Eighth Amendment was violated when a jury heard evidence that was subsequently shown to be materially inaccurate.

The State also does not address this Court's jurisprudence detailed in the initial brief that requires the new evidence to be evaluated cumulatively with evidence presented in prior collateral proceedings that will be admissible if a resentencing is granted. The State's argument simply ignores that previously

presented evidence in violation of this Court's jurisprudence. *Hildwin v. State*, 141 So. 3d 1178 (Fla. 2014); *Swafford v. State*, 125 So. 3d 760, 776 (Fla. 2013).

When properly analyzed, an evidentiary hearing is warranted at the very minimum, particularly given the State's reliance on documents that were not part of the record below.

CONCLUSION

In light of the foregoing arguments, Archer is entitled to 3.851 relief or at the very least, a remand for evidentiary development on Argument III.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been electronically served on Janine Robinson, Assistant Attorney General, Office of the Attorney General, at her primary email address janine.robinson@myfloridalegal.com on November 18, 2019.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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