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IN THE SUPREME COURT OF FLORIDA

LOUIS BERNARD GASKIN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC15-1884
L.T. No. 1995-034327-CFAES
DEATH PENALTY CASE

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA

ANSWER BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

This is an appeal from the trial court's summary denial of Gaskin's *successive* motion to vacate.

The record from the appeal of the denial of post-conviction relief following the evidentiary hearing [Case No. SC00-2025] will be cited as "PCR" followed by the appropriate volume and page number.

The instant record on appeal, from the denial of Gaskin's successive post-conviction motion will be cited as "V" followed by the appropriate volume and page number.

STATEMENT OF THE CASE AND FACTS

On March 27, 1990, Gaskin was charged by indictment with two counts of first degree murder (victims Robert and Georgette Sturmfels), two counts of attempted first degree murder with a firearm (victims Joseph and Mary Rector), two counts of armed robbery with a firearm, and two counts of burglary of a dwelling with a firearm. The case proceeded to trial and Gaskin was convicted on all counts. On June 19, 1990, Gaskin was sentenced to death for the murder of Robert and Georgette Sturmfels. On the non-capital offenses, Gaskin was sentenced to two thirty year terms and three terms of natural life ordered to run consecutive to one another. Pursuant to a stipulation, the case was remanded to vacate the consecutive thirty year sentences for imposition of consecutive life sentences on counts V and IX. (PCR7/1332-40). Pursuant to a subsequent plea with the State, Gaskin pled guilty to the murder of Charles Miller. Id.

In upholding the convictions and death sentences, this Court set forth the following summary of the facts:

> The convictions arise from events occurring on the night of December 20, 1989, when Gaskin drove from Bunnell to Palm Coast and spotted a light in the house of the victims, Robert and Georgette Sturmfels. Gaskin parked his car in the woods and, with a loaded gun, approached the house. Through a window he saw the Sturmfels sitting in their den. After circling the house a number of times, Gaskin shot Mr. Sturmfels twice through the window. As Mrs. Sturmfels rose to

leave the room, Gaskin shot her and then shot Mr. Sturmfels a third time. Mrs. Sturmfels crawled into the hallway, and Gaskin pursued her around the house until he saw her through the door and shot her again. Gaskin then pulled out a screen, broke the window, and entered the home. He fired one more bullet into each of the Sturmfels' heads and covered the bodies with blankets. Gaskin then went through the house taking lamps, video cassette recorders, some cash, and jewelry.

Gaskin then proceeded to the home of Joseph and Mary Rector, whom he again spied through a window sitting in their den. While Gaskin cut their phone lines, the Rectors went to bed and turned out the lights. In an effort to roust Mr. Rector, Gaskin threw a log and some rocks at the house. When Mr. Rector rose to investigate, Gaskin shot him from outside the house. The Rectors managed to get to their car and drive to the hospital in spite of additional shots fired at their car as they sped away. Gaskin then burglarized the house.

Gaskin's involvement in the shootings was brought to the attention of the authorities by Alfonso Golden, cousin of Gaskin's girlfriend. The night of the murders, Gaskin had appeared at Golden's home and asked to leave some "Christmas presents." Gaskin told Golden that he had "jacked" the presents and left the victims "stiff." Golden learned of the robberies and murders after watching the news and called the authorities to report what he knew. The property that had been left with Golden was subsequently identified as belonging to the Sturmfels.

Gaskin was arrested on December 30, and a search of Gaskin's home produced more of the stolen items. After signing a rights-waiver form, Gaskin confessed to the crimes and directed the authorities to further evidence of the crime in a nearby canal.

Gaskin v. State, 591 So. 2d 917, 918 (Fla. 1991).

It is unclear why Gaskin's brief recites selective portions of testimony from the evidentiary hearing held on his initial motion for post-conviction relief. Following a multiple day evidentiary hearing, Gaskin's initial motion for post-conviction relief was denied on August 23, 2000. This Court affirmed the denial of post-conviction relief on June 13, 2002. Gaskin v. State, 822 So. 2d 1243 (Fla. 2002). In its opinion this Court extensively discussed the tactical reasons counsel offered for not presenting some very damaging psychological testimony to the jury. This Court provided the following, in part:

> Gaskin argues that counsel was ineffective during the penalty phase of his trial for failing to investigate and present mitigating testimony of mental health experts and additional lay witnesses. Gaskin alleges trial counsel should have presented more penalty phase witnesses to testify about Gaskin's problems in school, his mental health problems, and his environmental problems.[fn4] To prevail on this claim, Gaskin must demonstrate that but for counsel's errors, he probably would have received a life sentence. *See Hildwin v. Dugger,* 654 So. 2d 107, 109 (Fla. 1995). Such a demonstration is made if "counsel's errors deprived [defendant] of a reliable penalty phase proceeding." *Id.* at 110.[fn5] Trial counsel has a duty to conduct a reasonable investigation into the defendant's background for possible mitigating evidence. *See Rose v. State,* 675 So. 2d 567, 571 (Fla. 1996). However, we have also stated, "The failure to investigate and present available mitigating evidence is a relevant concern along with the reasons for not doing so." *Rose,* 675 So. 2d at 571 (citing *Hildwin*).
>
> In the order denying relief, the trial court addressed Gaskin's allegation that trial counsel should have called mental health experts to testify at the penalty

phase about mental mitigation. The trial court noted that Dr. Krop, one of the defense mental health experts at trial, testified at the evidentiary hearing that he expressly told counsel before trial that he would not be of much help to the defense because he would have to testify about Gaskin's extensive history of past criminal conduct, sexual deviancy, and lack of remorse. The trial court also stated that trial counsel testified at the hearing that he made a strategic decision not to present mental health experts precisely because Gaskin's background contained many negatives (including Dr. Krop's proposed testimony).[fn6]

The trial court denied relief as to this claim, stating:

> This Court finds that counsel was not deficient because counsel did conduct a reasonable investigation of mental health mitigation prior to trial and made a reasonable, strategic decision not to present this information to the jury and not to present Dr. Krop's findings to the judge. Therefore, this claim is also legally insufficient.

In the order denying relief, the trial court also addressed Gaskin's allegation that additional lay witnesses should have been called during the penalty phase to testify about mitigating evidence. At the evidentiary hearing Gaskin presented the testimony of friends, family members, former teachers, and school administrators. Their testimony revealed the following facts as related by the trial court:

> [T]here was testimony regarding the Defendant sexually forcing himself on a six-year-old boy, the Defendant's consensual, incestuous relationships and sexual deviancy, including bestiality, the Defendant's violent attempt to sexually force himself on his former girlfriend, the Defendant's admission that he loved to kill and that he killed cats and snakes, and his history of stealing at school and from his great-grandparents.

The trial court remarked in its order that trial counsel testified at the evidentiary hearing that he purposely chose to keep Gaskin's past violent and criminal conduct from the jury because he felt that the jury would consider Gaskin's past (including school records) as aggravating circumstances. Thus, the trial court found "that counsel made a reasonable strategic decision not to present this nonstatutory, non-mental health mitigation."

Trial counsel will not be held to be deficient when she makes a reasonable strategic decision to not present mental mitigation testimony during the penalty phase because it could open the door to other damaging testimony. *See Ferguson v. State,* 593 So. 2d 508, 510 (Fla. 1992) (finding that counsel's decision to not put on mental health experts was a "reasonable strategy in light of the negative aspects of the expert testimony" because the experts had indicated that they thought that the defendant was malingering, a sociopath, and a very dangerous person); *see also State v. Bolender,* 503 So. 2d 1247, 1250 (Fla. 1987) (holding that "[s]trategic decisions do not constitute ineffective assistance if alternative courses of action have been considered and rejected"). It is apparent from the record that the witnesses who Gaskin alleges should have testified on his behalf were subject to being cross-examined about disturbing information about Gaskin, which would have defeated trial counsel's strategy. We find no error in the trial court's conclusion that counsel acted reasonably by not putting on evidence that would open the door to other damaging testimony about Gaskin. *See Robinson v. State,* 707 So. 2d 688, 697 (Fla. 1998) (noting that the trial court could have concluded that trial counsel was not ineffective in not opening the door to potentially devastating rebuttal evidence); *Medina v. State,* 573 So. 2d 293, 298 (Fla. 1990) (finding no ineffectiveness for counsel's choice not to present witnesses who would have opened the door for the State to cross-examine them about the defendant's violent past).

However, even if trial counsel was deficient for failing to investigate mental mitigation more thoroughly or to present mental mitigation in this case, Gaskin is unable to meet the *Strickland* prejudice prong in this claim. As we stated in *Rose*, "[S]evere mental disturbance is a mitigating factor of the most weighty order, and the failure to present it in the penalty phase may constitute prejudicial ineffectiveness." 675 So. 2d at 573 (citations omitted). In this case, the trial court also concluded that Gaskin had not met the *Strickland* prejudice prong, stating:

> [I]n light of the eight-to-four vote recommending death without hearing about the Defendant's prior violent and criminal conduct, sexual deviancy, and lack of remorse, there is no reasonable probability that Dr. Krop's testimony regarding nonstatutory mitigation would have outweighed the substantial and compelling aggravation of prior violent felonies, commission during a robbery or burglary, CCP, and HAC.

Due to the fact that most of the witnesses who testified at the evidentiary hearing admitted on cross-examination that they were aware of other, very negative information about Gaskin, we agree with the trial court that Gaskin has not demonstrated that he was deprived of a reliable penalty phase proceeding. *See Breedlove v. State,* 692 So. 2d 874, 877 (Fla. 1997) (stating that the presentation of lay witnesses to address Breedlove's father's drug addiction and his beatings of Breedlove would have allowed cross-examination and rebuttal evidence that would have countered any value of that information); *Rose v. State,* 617 So. 2d 291, 295 (Fla. 1993) ("In light of the harmful testimony that could have been adduced from Rose's brother and the minimal probative value of the cousins' testimony, we are convinced that the outcome would not have been different had their testimony been presented at the penalty phase."). We also note the trial court's conclusion that the statutory aggravators that were found in this case would have overwhelmed any mitigating testimony that

the lay witnesses would provide. *See Breedlove,* 692 So. 2d at 878.[fn7]

Further, despite what Gaskin characterizes as counsel's deficient performance for failing to investigate and present mental mitigation, the trial court did find two mental mitigators: the murders were committed while Gaskin was under the influence of extreme mental or emotional disturbance and Gaskin had a deprived childhood. At the evidentiary hearing, defense expert Dr. Toomer testified that if he had testified at trial, he would have expressed his opinion that Gaskin lacked the ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law at the time of the murders. However, State expert Dr. Rotstein previously opined that the same mitigator applied in this case. Dr. Rotstein's report was presented to the trial court during the penalty phase, yet the trial court chose to reject this mitigator. *See Gaskin,* 591 So. 2d at 921-22.

We have held that counsel's reasonable mental health investigation is not rendered incompetent "merely because the defendant has now secured the testimony of a more favorable mental health expert." *Asay v. State,* 769 So. 2d 974, 986 (Fla. 2000). In this case, Dr. Toomer's testimony represents not only a recent and more favorable defense expert opinion, but a cumulative opinion to one that was already presented to the trial court.

The trial court was also not convinced that Gaskin would have received a life sentence if the evidentiary hearing testimony had been presented at trial because the new evidence merely included much cumulative information that had already been considered and rejected by the trial court, and the new information painted a much more negative and prejudicial picture of Gaskin. The fact that mental health experts and more lay witnesses were not called during the penalty phase does not undermine our confidence in the outcome of this proceeding. Thus, we affirm the trial court's denial of relief as to this claim.

BACKGROUND INFORMATION

In Gaskin's second claim, he argues that trial counsel was ineffective for failing to provide Dr. Krop with requested background information. The trial court denied relief on this claim, stating:

> Dr. Krop testified that the school records were the only information he was unaware of for his initial evaluations and diagnosis of the Defendant.... Dr. Krop also testified that his diagnosis of the Defendant would be the same as it was originally on June 8, 1990, only four (4) days after his deposition, with the addition of the opinion that the Defendant suffers from a learning disability, attention deficit disorder, based on the school records.

The trial court found that Gaskin did not establish that he suffered any actual prejudice from counsel's failure to give Dr. Krop school records. The trial court held: "[I]n light of Dr. Krop's postconviction testimony, there is not a reasonable probability that Dr. Krop's diagnosis would have been different; it was the same with only one minor addition-a learning disability, a nonstatutory mitigator."

We find no error in the trial court's determination that Gaskin has not suffered prejudice from counsel's alleged deficient performance. As the trial court noted, because Dr. Krop testified at the evidentiary hearing that his diagnosis of Gaskin would have changed little if counsel had given him Gaskin's school records, Gaskin has not met his burden of showing that but for counsel's alleged deficiency, the result of the penalty phase would have been different. *See Breedlove v. State,* 692 So. 2d 874, 877 (Fla. 1997) (holding that because the psychologists testified that their opinions would remain unchanged even considering the additional information, there was not a reasonable probability that the result of the penalty phase would have been different); *see also Brown v. State,* 755 So. 2d 616, 636 (Fla. 2000) (holding that trial counsel's performance was not deficient for failing to give a mental health expert additional information because the expert testified at

> the evidentiary hearing that the collateral data would not have changed his testimony). The fact remains that even if Dr. Krop had the benefit of the school records, he still possessed a wealth of damaging information about Gaskin that counsel did not want the jury to hear. The fact that trial counsel did not give Dr. Krop school records, which indicated that Gaskin suffered from a learning disability, does not undermine our confidence in the outcome of the proceedings when considered in light of all the information before the trial court. Thus, we affirm the trial court's denial of this claim.

Gaskin, 822 So. 2d at 1247-51 (footnotes omitted).

Gaskin filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Florida on June 25, 2003 which was denied on March 23, 2006. On August 3, 2007, the Eleventh Circuit affirmed the denial of habeas relief. Gaskin v. Secretary, Dept. of Corrections, 494 F.3d 997 (11th Cir. 2007). Gaskin served a petition for writ of Certiorari on December 3, 2007, which was not accepted by the U.S. Supreme Court and was returned to him as untimely.

On August 12 2014, the Honorable J. David Walsh issued a corrected judgment and sentence vacating the duplicative convictions for felony murder on counts II and IV of Gaskin's convictions. (V1/47). On May 6, 2015, Gaskin filed a successive rule 3.851 motion for post-conviction relief, alleging an improper "doubling" of aggravating circumstances. (V1/95). The State filed its response to Gaskin's motion for post-conviction

relief on May 21, 2015. (V1/112-121). Following a case management hearing (V2) and supplemental argument from both parties (V1/126-132; SV1/1-8), the trial court denied relief in a corrected order issued August 6, 2015. (V1/148-150). Gaskin filed a notice of appeal on September 4, 2015 but the case number was incorrect; he filed an amended notice of appeal on October 12, 2015.

SUMMARY OF THE ARGUMENT

This claim is untimely and procedurally barred. This claim arises from his duplicative convictions for felony murder in addition to first degree murder, a claim which was raised on Gaskin's direct appeal. This Court has already determined the appropriate remedy---to vacate the duplicative felony murder convictions. Since the trial court has vacated the duplicative convictions there is no additional remedy available or warranted in this case. There was no improper doubling of aggravators and such an argument should have been made, if at all, at trial and on direct appeal. This claim was properly denied by the trial court below.

ARGUMENT

GASKIN'S SUCCESSIVE MOTION FOR POST-CONVICTION RELIEF WAS PROPERLY DENIED WHERE THIS COURT ADDRESSED THE ERROR OF DUPLICATIVE FELONY MURDER CONVICTIONS ON DIRECT APPEAL AND THIS CLAIM IS THEREFORE PROCEDURALLY BARRED AS WELL AS UNTIMELY AND WITHOUT MERIT.

Gaskin claims that the lower court erred in summarily denying his successive motion for post-conviction relief which alleged that his two death sentences should be vacated on the basis of improper doubling because the court vacated two felony murder convictions as directed by this Court in its decision on direct appeal. This claim is untimely, procedurally barred, and without merit.

The lower court held that vacating the two duplicative murder convictions was merely a ministerial act and that there was no improper doubling of aggravators necessitating a new penalty phase. The court held in relevant part:

> Following a jury trial Mr. Gaskin was convicted of the first degree premeditated murders and first degree felony murders of Robert and Georgette Sturmfels, attempted murder of Joseph Rector, two counts of armed robbery with a firearm and two counts of burglary with a firearm. Mr. Gaskin was sentenced to four death penalties in the capital cases although there were only two murders. On August 12, 2014 the trial court entered a corrected judgment as directed by the Florida Supreme Court in *Gaskin v. State*, 591 So. 2d 917 (Fla. 1991). The Florida Supreme Court had affirmed Gaskin's convictions and sentences, but ordered the trial court to vacate two of the adjudications for first-degree murder: one for each victim, leaving in place two convictions for first

degree murder and two death sentences. *See Gaskin* at 920. The case was remanded to the trial court to effectuate this ministerial task.

Defendant Gaskin now alleges the corrected judgment and sentence vacating the death penalties imposed in Counts II and IV of the indictment, and the adjudication of guilt in said counts, establishes that the death sentences given on counts I and III of the indictment were the result of unconstitutional doubling of the aggravating circumstance of prior violent felonies.

While ordering the vacation of duplicative convictions, the Florida Supreme Court found the trial court properly considered aggravating and mitigating circumstances. *Id.* The finding of aggravation that Gaskin had previously been convicted of another capital offense or of a felony involving the use or threat of violence was supported in Robert Sturmfels' death with the contemporaneous convictions for the offenses involving the Rectors[fn1] and Georgette Sturmfels; in Georgette Sturmfels' death, with the contemporaneous convictions involving the Rectors and Robert Sturmfels. Mr. Gaskin clearly qualified for the prior felony murder conviction aggravators for the contemporaneous murders of the Sturmfels, and the crimes committed against the Rectors. "[T]he contemporaneous conviction of a violent felony may qualify as an aggravating circumstance, so long as the two crimes involved multiple victims or separate episodes." *Frances v. State*, 970 So. 2d 806, 816 (Fla. 2007) citing *Pardo v. State*, 563 So. 2d 77, 80 (Fla. 1990); *see also Winkles v. State*, 894 So. 2d 842, 846 (Fla. 2005) (finding that each murder in the indictment to which defendant pled guilty constituted a prior violent felony conviction as to the other murder conviction); *Doorbal v. State*, 837 So. 2d 940, 963 (Fla. 2003) (noting that one of the aggravating factors found was prior violent felony based on the contemporaneous murders of the two victims); *Francis v. State*, 808 So. 2d 110, 136 (Fla. 2001) (finding that trial court correctly found that murder conviction as to one victim aggravated the murder

> conviction as to other victim, and vice versa). There was no improper doubling.
>
> > fn1. Following the murders of the Sturmfels, Mr. Gaskin proceeded to the home of Joseph and Mary Rector where he shot Mr. Rector from outside the home; the Rectors were able to get in their car and head to the hospital while still being shot at by Mr. Gaskin. He then burglarized their home. Gaskin was convicted of attempted murder of Mr. Rector, armed robbery of the Rectors and burglary of the Rector's home.

(V1/133-34).

While the lower court correctly found the claim was without merit, it was also procedurally barred and untimely as argued by the State below. See Downs v. State, 740 So. 2d 506, 517 n.17 (Fla. 1999) (noting that failure to challenge specific instructions at trial and on appeal, including "the allegedly improper doubling" argument operates to bar this claim from review in a motion for post-conviction relief). This claim was raised and resolved on direct appeal in Gaskin v. State, 591 So. 2d 917, 920 (Fla. 1991):

> Gaskin next argues that the trial court erred in adjudicating him guilty of both premeditated and felony murder for each of the two deaths for a total of four convictions. We agree that each death will support only one adjudication. *See Lamb v. State*, 532 So. 2d 1051 (Fla. 1988); *Houser v. State*, 474 So. 2d 1193 (Fla. 1985). Accordingly, we vacate one adjudication for first-degree murder for each victim.

This Court has decided the remedy in this case, and, ordered the trial court to simply strike the duplicative felony

murder convictions. In doing so, the court affirmed Gaskin's two death sentences. See Denson v. State, 775 So. 2d 288, 290 (Fla. 2000) (applying *res judicata* to deny a habeas petition where the defendant had raised the same claim in a 3.800 motion decided against him on the merits and the defendant had exhausted all appropriate appellate review). There is no basis in law or fact to revisit this decision. See Sireci v. State, 773 So. 2d 34, 40 (Fla. 2000) (finding claims procedurally barred because they either were or could have been raised in prior proceedings and noting that "to the extent that Sireci uses a different argument to relitigate the same issue, the claims remain procedurally barred.").

This claim is also untimely. This claim arises from his duplicative convictions for felony murder in addition to first degree murder. Gaskin appears to argue that the jury was incorrectly instructed that the felony murder convictions could be improperly considered in aggravation. Assuming such a claim is true, and, it is not, this claim would be untimely. Obviously, since Gaskin was sentenced in June of 1990, such a claim is untimely as presented in this successive motion for post-conviction relief. See Fla. R. Crim. P. 3.851(d)(2) (there is a one year time limit on filing a motion for post-conviction relief); Glock v. Moore, 776 So. 2d 243, 251 (Fla. 2001) (Claims

of newly discovered evidence must be brought within a year of the date the evidence was or could have been discovered through due diligence.); Jimenez v. State, 997 So. 2d 1056, 1064 (Fla. 2008) ("To be considered timely filed as newly discovered evidence, the successive rule 3.851 motion was required to have been filed within one year of the date upon which the claim became discoverable through due diligence.").[1] The claim also lacks merit as found by the trial court below.

Gaskin's improper doubling argument suggests that the balance of aggravating factors would have been altered without the duplicative felony murder convictions. That is not true. As pointed out by the State, Gaskin qualified for both the prior violent felony and contemporaneous felony aggravators. There is no new evidence, nor any new mitigation that would alter the sentencing balance in this case. Nor, was this a close case as Gaskin now contends. Gaskin coldly planned and executed the murder of two individuals in their own home for his financial

[1] Gaskin's reliance upon Clemons v. Mississippi, 494 U.S. 738 (1990) (Appellant's Brief at 27), is misplaced. First, with any diligence, this claim could have been raised much earlier and is clearly time barred. In addition, neither this Court on direct appeal nor the circuit court in issuing a corrected judgment and sentence struck any aggravating circumstances. The prior violent felony aggravator was supported by multiple valid convictions. Not a single aggravator has been removed from the sentencing equation. Consequently, Clemons provides no support for either resentencing or additional appellate review in this case.

gain. Immediately after murdering the Sturmfels and taking items of value from their home, he stalked two other individuals in their home, and, attempted to murder them. In a case with such heavy aggravation, the ministerial matter Gaskin raises here---the duplicative felony murder convictions---could not alter the outcome. In addition to being procedurally barred and untimely, the instant claim is plainly meritless.

Moreover, the jury was not instructed that they could find in aggravation the fact Gaskin was convicted of both premeditated and felony murder in this case. See PCR6/998-1000. Of course, both the jury and the trial court could properly consider the contemporaneous convictions for burglary and prior conviction of a capital offense [contemporaneous murder of each Georgette Sturmfels and Robert Sturmfels] in sentencing Gaskin. The duplicative felony murder convictions did not support an independent or invalid aggravator in this case. There was no improper "doubling" of aggravators. Gaskin clearly qualified for the prior felony murder conviction for not only the contemporaneous murder, but also an independent attempted first degree murder [Joseph Rector], and armed robbery of two victims [Joseph and Mary Rector] as well as burglary of a dwelling. (PCR8/1313). Consequently, this is clearly not a case where the

sentencing equation has been altered by an improper sentencing consideration.

Gaskin was convicted on two separate theories of first degree murder for each of the two victims in this case. It was certainly proper to instruct on these two theories of murder and for the jury to find sufficient evidence to support each theory of murder. However, the trial court erred in entering two murder convictions for each murder---as recognized by this Court in its direct appeal opinion. This Court did not vacate either of Gaskin's death sentences or remand for a new penalty phase. See Gaskin, 591 So. 2d at 922.

Gaskin's attempt to undercut the strength of his death recommendation based upon selective citation to a doctor's testimony is inappropriate and not well taken. Any claim surrounding the failure to present Dr. Rotstein's testimony to the jury was litigated in Gaskin's first motion for post-conviction relief. Reference to that testimony here does not serve to resurrect this untimely and procedurally barred claim. Moreover, testimony from that hearing established that trial counsel had strong tactical reasons for not presenting this testimony to the jury.[2] Gaskin v. State, 822 So. 2d 1243, 1247-49

[2] While Dr. Rotstein did find one statutory mental mitigator, trial defense counsel determined that the negatives contained in

(Fla. 2002) (rejecting ineffective assistance of counsel claim for failing to present mental health expert testimony in the penalty phase).

Finally, in his supplemental argument below, Gaskin improperly raised for the first time an entirely new argument when he challenged the non-unanimous jury recommendation based upon the Supreme Court's grant of certiorari in Hurst v. Florida, --- U.S. ----, 135 S. Ct. 1531 (2015). (SV1/6-7). This entirely new argument was not properly raised following the case management conference and the trial court did not address this argument below.[3] While on appeal, Gaskin contends that Hurst supports his argument; in reality, he is simply making a

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the report outweighed the positives in terms of presenting that information to the jury. (PCR5/679). Cass believed that cross-examination of an expert would reveal that Gaskin committed an attempted murder and robbery at an ATM machine in Volusia County. (PCR5/662). Also, Gaskin admitted that prior to killing the victims in this case he had killed a man named Miller in Flagler County. (PCR5/662). The fact that Gaskin had tried to force himself on a six-year-old boy and that he was involved in incestuous sex with his first cousin could also be revealed through use of an expert. (PCR5/663-64). Presenting Dr. Rotstein's report to only the judge [Spencer Hearing] with the apparent agreement of the prosecutor, allowed the defense to present evidence of a statutory mitigating factor without exposing the expert to potentially damaging cross-examination. (PCR5/704-05).

[3] The State argued that this was an inappropriate attempt to inject an entirely new argument into the Defendant's motion pending before the lower court. (V1/129).

Ring[4]/Hurst claim. Such a challenge to the statute should have been lodged at trial and on direct appeal. Any such claim is now untimely and procedurally barred. Moreover, as a matter of established law, such a Ring based claim is not retroactive.[5] See Peede v. State, 955 So. 2d 480, 498 (Fla. 2007) ("Peede's death sentence became final long before Ring was decided in 2002; therefore, Peede cannot rely on Ring to find his death sentence unconstitutional.") (citations omitted).

In addition, Defendant's case presents a much different procedural and factual posture from the case pending before the Supreme Court in Hurst. Hurst is a direct appeal case. Hurst v. State, 147 So. 3d 435 (Fla. 2014). Defendant, unlike Hurst, was convicted of qualifying contemporaneous felony convictions for burglary and prior conviction of a capital offense [contemporaneous murder of each Georgette Sturmfels and Robert Sturmfels] in sentencing Gaskin. These qualifying convictions, found by the jury and the trial court, supported the aggravator of conviction of another capital felony or of a felony involving use or threat of violence to the person.

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[4] Ring v. Arizona, 536 U.S. 584 (2002).

[5] Notably, the Supreme Court has held that its decision in Ring is not subject to retroactive application. Schriro v. Summerlin, 542 U.S. 348 (2004).

These convictions establish that a unanimous jury found Defendant eligible for the death penalty at the guilt phase of his trial, precluding the finding of any Hurst or Ring based error in this case. See Ellerbee v. State, 87 So. 3d 730, 747 (Fla. 2012) ("This Court has consistently held that a defendant is not entitled to relief under Ring if he is convicted of murder committed during the commission of a felony, or otherwise where the jury of necessity has unanimously made the findings of fact that support an aggravator.") (string cites omitted). This claim is legally and factually without merit. See Correll v. State, --- So. 3d ----, 2015 WL 5771838 (Fla. Oct. 2, 2015), cert. denied, --- S. Ct. ----, 2015 WL 6111441 (Oct. 29, 2015).

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court AFFIRM the order denying Gaskin's Successive Motion to Vacate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of December, 2015, I electronically filed the foregoing with the Clerk of the Florida Supreme Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Eric C. Pinkard, Chief Assistant CCRC-M, Law Office of the Capital Collateral Regional Counsel, Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619-1136 (**pinkard@ccmr.state.fl.us** and **support@ccmr.state.fl.us**).

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

s/ Scott A. Browne
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