IN THE SUPREME COURT OF FLORIDA

PERRY ALEXANDER TAYLOR,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC17-1501
L.T. No. 88-CF-15525
DEATH PENALTY CASE

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

PAMELA JO BONDI
ATTORNEY GENERAL
STATE OF FLORIDA

C. SUZANNE BECHARD
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 0147745
Office of the Attorney General
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
capapp@myfloridalegal.com
carlasuzanne.bechard@myfloridalegal.com

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

PRELIMINARY STATEMENT

Citations to the postconviction record in this brief will be designated as "R" followed by the appropriate page number.

STATEMENT CONCERNING ORAL ARGUMENT

Appellee submits that oral argument is not necessary on the appeal from the denial of Appellant's successive motion to vacate. The claims raised in the successive motion were properly denied as procedurally barred or meritless as a matter of established law. Accordingly, argument will not materially aid the decisional process.

STATEMENT OF THE CASE AND FACTS

A jury found Appellant guilty of first-degree murder and sexual battery. The victim was Geraldine Birch "whose severely beaten body was found in a dugout at a little league baseball field." Taylor v. State, 583 So. 2d 323, 325 (Fla. 1991). The jury recommended the death penalty and the trial court imposed the death sentence for Ms. Birch's murder along with a consecutive life sentence for sexual battery. This Court affirmed Appellant's convictions but reversed and remanded for a new penalty phase. Id. at 330.

Appellant was again sentenced to death after his new penalty phase jury recommended the death penalty by an eight-to-four vote. Taylor v. State, 638 So. 2d 30 (Fla. 1994). On

November 14, 1994, the United States Supreme Court denied certiorari review. Taylor v. Florida, 513 U.S. 1003 (1994).

Thereafter, Appellant filed a motion for postconviction relief. Evidentiary hearings were held on two of the claims he raised. The postconviction court ultimately entered an order denying relief on all claims. This Court affirmed. Taylor v. State, 3 So. 3d 986 (Fla. 2009).

On July 14, 2016, Appellant filed a successive motion for postconviction relief alleging, *inter alia*, entitlement to relief based on Hurst v. Florida, 136 S. Ct. 616 (2016), and that "newly discovered evidence" in the form of an affidavit from Dr. Miller, who states that his "one-in-a-million" remark about a kick causing the victim's extensive vaginal injuries was regrettable because a kick *could* have caused the injuries.[1] (R66-88). Following a case management conference, the postconviction court entered an order summarily denying the three claims alleging entitlement to relief based on the affidavit of Dr. Miller. However, because the issue of the retroactive application of Hurst was then pending before this Court, the

[1] Along with the "newly discovered evidence" claim, Appellant also asserted ineffective assistance of trial counsel for not eliciting from Dr. Miller that a kick could have caused the victim's vaginal injuries, and that the State violated Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972), concerning Dr. Miller's belief that a kick could have caused the injuries.

postconviction court reserved ruling on Appellant's Hurst-based claim at that time. (R134-214).

On January 24, 2017, Appellant filed an amended successive motion specifically adding various sub-claims relating to Hurst v. Florida, and Hurst v. State, 202 So. 3d 40 (Fla. 2016). (R301-25). The State filed a response arguing that Hurst was not retroactive to Appellant's case under this Court's binding precedent. (R328-46). On March 22, 2017, Appellant filed a Witness/Exhibit List attaching a report authored by Dr. Harvey A. Moore, Ph.D., of Trial Practices, to which the State objected as purely speculative and inappropriate for the court to consider in determining the outcome of Appellant's purely legal claim. (R374-79). The State objected and filed a motion to strike. (R347-50). On May 18, 2017, the lower court held a hearing on the State's motion to strike Dr. Moore's testimony and his report, and to allow Appellant to proffer this evidence.[2] (R689-749).

[2] This hearing was combined with the hearing on the same witness and report in the Ray Lamar Johnston case. (R689). As the State noted during a status conference on May 4, 2017, the issues in the two cases were different as Mr. Johnston's case was final after Ring v. Arizona, 536 U.S. 584 (2002), but involved a 12-0 jury verdict. (R676). The State's position in Appellant's case was always that the postconviction motion should be decided as purely a matter of law because Hurst was not retroactive to Appellant's case. (R684-85, 735). In Mr. Johnston's case, the State took the position that Dr. Moore's testimony and report were inadmissible under Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). (R732-35).

On June 13, 2017, the lower court entered an Amended Order Granting State's Motion to Strike Defendant's Witness/Exhibit List and Attachments and Order Striking June 15, 2017 Evidentiary hearing. (R850-936). On June 13, 2017, the court also entered a final order denying the amended Claim Four of Appellant's successive motion for postconviction relief. (R568-77). Appellant's motions for rehearing on the striking of Dr. Moore's testimony and report and on the final order were denied on July 13, 2017. (R628-31). Thereafter, Appellant filed a timely notice of appeal. (R632-33).

SUMMARY OF THE ARGUMENT

Issue I: Appellant's argument that Hurst v. Florida, 136 S. Ct. 616 (2016), as interpreted by Hurst v. State, 202 So. 3d 40 (2016), should be held retroactive to Caldwell v. Mississippi, 472 U.S. 320 (1985), is unpreserved as Appellant did not raise this argument in the lower court. Additionally, the postconviction court properly struck the testimony and report of Dr. Moore where the matter of the retroactivity of Hurst is purely a question of law to be determined by the court.

Issues II and III: Hurst v. State is not retroactive to death sentences that were final prior to the decision in Ring v. Arizona, 536 U.S. 584 (2002). Appellant's death sentence was final in 1994, many years before the 2002 decision in Ring. Although Appellant references various state and federal constitutional provisions as bases for arguments that Hurst v. State should entitle him to a new sentencing proceeding, "these are nothing more than arguments that Hurst v. State should be applied retroactively to his sentence which became final prior to Ring." Hitchcock v. State, 226 So. 3d 216, 217 (Fla. 2017), cert. pet. filed, Hitchcock v. Florida, No. 17-6180 (U.S. Sept. 25, 2017).

Issue IV: The postconviction court correctly ruled that Appellant's "newly discovered evidence" claim was untimely and

procedurally barred. Appellant knew at least as far back as 2004 that Dr. Miller believed that a kick could have caused the victim's massive vaginal injuries. Moreover, this claim has been raised and rejected both in the postconviction court and on appeal.

STANDARD OF REVIEW

Florida Rule of Criminal Procedure 3.851(f)(5)(B) permits the denial of a successive postconviction motion without an evidentiary hearing "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief." "Because a court's decision whether to grant an evidentiary hearing on a rule 3.851 motion is ultimately based on written materials before the court, its ruling is tantamount to a pure question of law, subject to de novo review." Hunter v. State, 29 So. 3d 256, 261 (Fla. 2008) (citing State v. Coney, 845 So. 2d 120, 137 (Fla. 2003) (holding that "pure questions of law" that are discernible from the record "are subject to de novo review"). "In reviewing a trial court's summary denial of postconviction relief, this Court must accept the defendant's allegations as true to the extent that they are not conclusively refuted by the record." Tompkins v. State, 994 So. 2d 1072, 1081 (Fla. 2008) (citing Rolling v. State, 944 So. 2d 176, 179 (Fla. 2006)). "The summary denial of a newly discovered evidence claim

will be upheld if the motion is legally insufficient or its allegations are conclusively refuted by the record." Hunter, 29 So. 3d at 261-62 (citations omitted).

ARGUMENT

ISSUE I

APPELLANT'S ARGUMENT THAT HURST SHOULD BE HELD RETROACTIVE TO CALDWELL IS UNPRESERVED, AND THE POSTCONVICTION COURT PROPERLY STRUCK THE TESTIMONY AND REPORT OF DR. HARVEY MOORE WHERE THE ONLY ISSUE TO BE DECIDED WAS THE RETROACTIVE APPLICATION OF HURST TO APPELLANT'S CASE WHICH WAS PURELY A QUESTION OF LAW.

Appellant argues that the trial court erred in striking the testimony and report of sociologist Dr. Harvey Moore. He asserts that this Court should hold Hurst retroactive to Caldwell v. Mississippi, 472 U.S. 320 (1985), which would, under his logic, render necessary Dr. Moore's sociological evidence showing that the jury's role was diminished by the arguments and instructions given during his trial. Appellant's claim is meritless. Appellant did not argue below that Hurst should be held retroactive to Caldwell; therefore, this claim is unpreserved. Furthermore, the postconviction court properly struck the testimony and report of Dr. Moore where the matter of the retroactivity of Hurst is purely a question of law to be determined by the court.

Dr. Moore testified during the proffer that he was familiar with the Caldwell case and utilized "content analysis" based on his understanding of Caldwell to form the basis of his written report. (R692-93, 704, 717). He explained that "content analysis involves "[t]he sufficiency of a message [for someone] to

understand its content." (R711). In conducting his study, Dr. Moore used four "coders"—an undergraduate student, a graduate student in psychology, a former *Tampa Tribune* journalist, and himself—to review the transcripts of Appellant's trial. (R719). The only qualification to be a "coder" was the ability to "read the English language." (R726). The "coders" went through the transcripts to determine how many sentences they could find that they thought might "tend to diminish the role of the juror in deciding a capital case." (R720-22).

The State argued that Dr. Moore's testimony and report were inappropriate and unnecessary for the resolution of the purely legal threshold matter of whether Hurst v. State was retroactive to Appellant's case. (R735).

In striking Dr. Moore's evidence, the trial court held:

> After reviewing the State's motion, Defendant's response, and the evidence and argument presented at the May 18, 2017, hearing, the Court first finds Defendant's allegations in his amended claim four are purely legal and do not require an evidentiary hearing. [Footnote omitted]. The Court further finds Dr. Moore's report and testimony are not needed to resolve the outstanding issues in Defendant's amended claim four, and are otherwise inadmissible. The Court recognizes Dr. Moore testified he has previously been certified in one criminal case as an expert in content analysis, with the one case being in this judicial circuit. (*See* Hrg. Trans. P. 23-26, attached). However, this Court must still consider whether Dr. Moore's testimony regarding content analysis and his report in the above-listed cases can meet the necessary standard to be allowed at the evidentiary hearing. Dr. Moore testified that content analysis is

a "well-established methodological technique" and that it has "provided the approach [to] developing theory in the social and behavioral sciences since the mid sixties." (Hrg. Trans. P. 5, attached). Dr. Moore's testimony is that content analysis is commonly used in the social sciences to study and collect empirical data from various forms of media. *Id.* Dr. Moore states he used content analysis to find sentences and phrases used during Defendant's trial and sentencing that would have improperly influenced the jury. *Id.*

The Court does not take issue with the use of content analysis as a means of researching and collecting data. However, there was little to no evidence presented to show that content analysis is widely accepted or used as a means to investigate a trial for biased language or undue prejudice. Dr. Moore's analysis and report may be useful for research purposes, but it is unable to meet the second prong of the *Frye* test. *See Ramirez*, 651 So. 2d at 1166 ("[T]he expert's testimony is [must be] [sic] based on a scientific principle or discovery that is 'sufficiently established to have gained general acceptance in the particular field in which it belongs.'").

The Court further finds that even if Dr. Moore's testimony and methods could meet the required standards, his testimony is still inadmissible as it enters into the purview of the Court's decision making ability. Dr. Moore's content analysis report is based on lay persons' reviews of the record. (*See* Hrg. Trans. P. 33, attached). It does not provide any additional knowledge or ability that the Court does not also possess. *Id.* Dr. Moore advised the Court that the ability to read the English language is "about all that's required" of the individual reviewing the record. (Hrg. Trans. P. 40, attached). While grateful for the assistance offered by Dr. Moore and his staff, the Court finds it is not necessary, as it is the Court's duty to review the record and draw appropriate conclusions based on the arguments and the law.

Because Defendant's remaining allegations are purely legal in light of the Court's ruling herein, the Court finds no additional hearings are required.

(R853-55).

The trial court did not err in striking Dr. Moore's evidence in light of the purely legal questions before it with respect to Appellant's Hurst based claims.

In the lower court, Appellant sought through Dr. Moore's testimony and report to establish that Caldwell was violated in his trial. This is not the same argument he now raises on appeal. Appellant now argues that Hurst should be held retroactive to Caldwell instead of Ring. This claim was not raised below and is therefore not preserved for appellate review. See Smith v. State, 931 So. 2d 790, 798, 802 (Fla. 2006) (refusing to consider issues raised for the first time on appeal from denial of postconviction relief); Henyard v. State, 992 So. 2d 120, 126, n.2 (Fla. 2008).

Furthermore, although Appellant suggests that Dr. Moore's testimony and report would be necessary should this Court hold Hurst v. State retroactive to Caldwell, this Court has not so held. In Asay v. State (Asay V), 210 So. 3d 1, 22 (Fla. 2016), cert. denied, No. 16-9033, ___ U.S. ___, 2017 WL 1807588 (U.S. Aug. 24, 2017), this Court denied retroactive application of Hurst v. Florida as interpreted by Hurst v. State, to defendants whose death sentences were final when the United States Supreme Court decided Ring. In fact, this Court has repeatedly held that

Hurst v. State is retroactive only to Ring. See, e.g., Hannon v. State, 42 Fla. L. Weekly S879 (Fla. Nov. 1, 2017) ("We have consistently held that Hurst is not retroactive prior to June 24, 2002, the date that Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L.Ed.2d 556 (2002), was released."). Appellant's death sentence was final on November 14, 1994, long before Ring was decided. Therefore, he is not entitled to Hurst relief.

Additionally, the trial court did not err in not allowing Appellant to present Dr. Moore as a witness because the proffered testimony does not support a departure from this Court's precedent. Appellant proffered Dr. Moore's testimony and report, consisting of "content analysis" of the arguments and the jury instructions given in Appellant's trial, in an effort to show that Caldwell was violated. (R692-93, 704-06, 715-23). To the extent Appellant asserts entitlement to relief based on Caldwell, this Court has repeatedly rejected challenges to the standard jury instructions in death penalty cases based on Caldwell. Hall v. State, 212 So. 3d 1001, 1032-33 (Fla. 2017). "To establish a Caldwell violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." Dugger v. Adams, 489 U.S. 401, 407 (1989); see also Romano v. Oklahoma, 512 U.S. 1, 9 (1994). Thus, references and descriptions that accurately

characterize the jury's and judge's sentencing roles under Florida law do not violate Caldwell.

Moreover, even under the current death penalty statute, the jury's final unanimous recommendation of death is still an "advisory" verdict as the judge is free to disagree with the jury's recommendation and sentence a defendant to life imprisonment. After such a decision is made, under double jeopardy principles, a defendant "can no longer be put in jeopardy of receiving the death penalty." Williams v. State, 595 So. 2d 936, 938 (Fla. 1992). The judge remains the final sentencing authority in Florida and the jury's recommendation remains "advisory."

Finally, § 90.702, Fla. Stat. (2016), provides that "[i]f scientific, technical, or other specialized knowledge will assist the **trier of fact** in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise. . . ." (emphasis added). A postconviction court determining whether legal precedent is retroactive to a particular case is not a "trier of fact" who would be assisted by expert opinion testimony. See Hildwin v. State, 951 So. 2d 784, 791 (Fla. 2006).

In sum, Appellant's argument that Hurst should be held retroactive to Caldwell rather than Ring is unpreserved for appellate review because this claim was not raised below. The trial court properly struck Dr. Moore's proffered testimony and report because, as the lower court correctly noted, the testimony and report—based on "lay persons' reviews of the record"—would not provide any knowledge or ability the court did not also possess. It was the postconviction court's "duty to review the record and draw appropriate conclusions based on the arguments and the law." (R856). Finally, any claim of entitlement to relief based on Caldwell is meritless. For these reasons, relief should be denied.

ISSUES II-III

THE LOWER COURT PROPERLY FOUND THAT APPELLANT WAS NOT ENTITLED TO RELIEF BECAUSE HURST V. FLORIDA AS INTERPRETED BY HURST V. STATE WERE NOT RETROACTIVE TO APPELLANT'S CASE WHERE HIS DEATH SENTENCE WAS FINAL PRIOR TO THE SUPREME COURT'S DECISION IN RING V. ARIZONA.

Appellant argues in Issues II and III that Hurst v. State should be retroactive to him because denying relief violates the Florida and federal constitutions and that the summary denial of his motion to amend his claim based on the enactment of Chapter 2017-1, Laws of Florida was error. This claim is meritless. Hurst is not retroactive to Appellant's pre-Ring case under this Court's firmly established precedent, and Chapter 2017-1 does not apply retrospectively to provide any relief to Appellant.

As to Appellant's Hurst based sub-claims, the lower court found:

> In amended claim four, Defendant asserts various claims in light of the United States Supreme Court's opinion in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and the Florida Supreme Court's decision in *Hurst v. State*, 202 So. 3d 40 (2016). Defendant requests that the Court vacate his death sentence.
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> In sub-claim 4-1, Defendant contends his death sentence is unconstitutional because he was deprived of his right to a jury trial on the essential elements that led to his death sentence. Defendant cites to the *Hurst* decisions as well as *Ring v. Arizona*, 536 U.S. 584 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and the United States and Florida constitutions. Defendant further asserts that he

raised the issue of the unconstitutionality of Florida's death penalty scheme at trial and on direct appeal, but previously lacked the specific application of *Ring* and *Hurst*.

In its response, the State asserts Defendant's motion is untimely, procedurally barred and without merit. The State asserts the Florida Supreme Court has drawn "a bright-line rule" holding *Hurst* does not afford relief to defendants whose sentences became final before *Ring* was decided. The State posits the Court's analysis as to all of Defendant's allegations should end there, and urges the Court to summarily deny Defendant's amended claim four.

The Court agrees with the State's response and finds the Florida Supreme Court has clearly held *Hurst v. Florida* and *Hurst v. State* simply do not apply retroactively to cases that were final before the issuance of *Ring*. [FN2] *See Asay v. State*, 210 So. 3d 1, 22 (Fla. 2016) ("[W]e conclude that *Hurst v. Florida* should not apply retroactively to cases that were final when *Ring* was decided."); *Mosley v. State*, 209 So. 3d 1248, 1274 (Fla. 2016) ("[W]e have now held in *Asay v. State*, that *Hurst* does not apply retroactively to capital defendants whose sentences were final before the United States Supreme Court issued its opinion in *Ring*."); *Gaskin v. State*, SC15-1884, 2017 WL 224772, at *2 (Fla. Jan. 19, 2017) (citing *Asay* and finding defendant, whose sentence became final in 1993, is not entitled to relief under *Hurst*); *Bogle v. State*, No. SC11-2403 and No. SC12-2465, 2017 WL 526507, *16 (Fla. February 9, 2017) (citing *Asay* and finding defendant is not "entitled to *Hurst* relief because *Hurst* does not apply retroactively to cases that were final before *Ring* was decided."); *Lambrix v. State*, SC16-8, 2017 WL 931105, *8 (Fla. March 9, 2017) (citing *Asay* and concluding defendant is not entitled to a new penalty phase based on *Hurst v. Florida* or *Hurst v. State*). This Court is bound by the decisions of the Florida Supreme Court.

[FN2] *Ring* was decided on June 24, 2002. *See Ring*, 536 U.S. at 584.

Here, Defendant's sentence became final on November 14, 1994, when the United States Supreme Court denied certiorari. *See Taylor v. State*, 115 S. Ct. 518 (1994); Fla. R. Crim. P. 3.851(d)(1)(B) ("For purposes of this rule, a judgment is final . . . on disposition of the petition for writ of certiorari by the United States Supreme Court, if filed."). Because Defendant's sentence was final before *Ring* was decided, this Court finds *Hurst v. Florida* and *Hurst v. State* do not retroactively apply to this instant case. **No relief is warranted on sub-claim 4-1.**

***

In sub-claim 4-2, Defendant asserts his death sentence violates the Eighth Amendment, is contrary to evolving standards of decency and is arbitrary and capricious. Defendant cites to various cases involving the reliability requirements of the Eighth Amendment, and asserts his death sentence lacks such Eighth Amendment reliability as he "had no jury to determine his death sentence in the guided manner necessary to avoid being condemned to death in an arbitrary and capricious manner." Defendant further asserts the instant jury was instructed that its recommendation was only advisory and cites to *Caldwell v. Mississippi*, 472 U.S. 320 (1985). Defendant argues that any reliance on the advisory recommendation is misplaced and the instruction of the jury's role in such an unconstitutional death penalty scheme fails to meet the Eighth Amendment requirements of *Caldwell*. Defendant further cites to *Hurst v. State*, and argues the Florida Supreme Court required jury unanimity in the recommendation verdict based on the Eighth Amendment and evolving standards of decency, and to prevent arbitrary and capricious imposition of the death penalty. Defendant posits that subjecting him to the death penalty based on Florida's previous unconstitutional scheme violates the Eighth and Fourteenth Amendments of the United States Constitution and the corresponding provisions of the Florida Constitution, and "is the very definition of arbitrary and capricious." Defendant contends that in light of *Hurst v. Florida* and *Hurst v. State*, he "is ensconced in a class of individuals who may not be subject to the death penalty."

In its response, the State asserts the Eighth Amendment has never required a unanimous jury sentencing recommendation and the United States Supreme Court has never held the Eighth Amendment requires a unanimous jury sentencing recommendation. The State contends in *Spaziano v. State*, 468 U.S. 447 (1984), the United States Supreme Court held the Eighth Amendment is not violated when the ultimate sentencing responsibility rests with the judge. The State further contends *Hurst v. Florida* overruled *Spaziano* only to the extent *Spaziano* allows a sentencing judge to find an aggravating circumstance independent of the jury's fact-finding, but the Court did not overrule *Spaziano* on Eighth Amendment grounds. The State also contends the conformity clause of the Florida Constitution requires this Court to construe Florida's prohibition against cruel and unusual punishment consistently with the United States Supreme Court's precedent on Eighth Amendment claims. The State further argues any allegation that *Caldwell* mandates relief is without merit, untimely and procedurally barred.

As discussed in sub-claim 4-1 above, the *Hurst* decisions do not apply retroactively to the instant case. There is no United States Supreme Court or Florida Supreme Court precedent that would require this Court to vacate Defendant's death sentence as violative of the Eighth Amendment. **No relief is warranted on sub-claim 4-2.**

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In sub-claim 4-3 Defendant contends his death sentence is unconstitutional because he was not only deprived of his right to a jury trial on the essential elements that led to his death sentence, but also because he was denied his right to proof of those elements beyond a reasonable doubt. Defendant argues "*Hurst v. Florida* mandates that the State prove each element beyond a reasonable doubt."

The State contends this argument is procedurally barred. The State further asserts these allegations are meritless as the jury was "unequivocally instructed as to Taylor's right to proof beyond a

reasonable doubt on the aggravation that subjected him to the death penalty."

As discussed above in sub-claim 4-1, the *Hurst* decisions do not apply retroactively to the instant case. **No relief is warranted on sub-claim 4-3.**

***

In sub-claim 4-5, Defendant asserts his death sentence is unconstitutional and in violation of the Sixth Amendment pursuant to *Hurst v. Florida* and *Hurst v. State*. Defendant asserts *Hurst v. Florida* should be applied retroactively to his case under the *Witt* [FN4] retroactivity analysis as well as principles of fundamental fairness as set forth in *Mosley* and *James v. State*, 615 So. 2d 668 (Fla. 1993). Defendant asserts he raised *Ring* and *Hurst*-like issues at trial and on direct appeal, even before those opinions issued. Defendant argues that considerations of fairness and uniformity require retroactive application of *Hurst*, and defendants who raised and preserved *Hurst*-type challenges should be treated the same, regardless of when their sentences became final. Failure to do so "would not only be fundamentally unfair, but would render Florida's entire capital punishment system unconstitutional as arbitrary and capricious under the Eighth Amendment, because eligibility for a death sentence would be based on when a conviction became final…"

> [FN4] *Witt v. State*, 387 So. 2d 922 (Fla. 1980).

In response, the State asserts Defendant's position is not supported by a reasonable reading of *Mosley*. The State further cites to *Gaskin* and asserts the Florida Supreme Court denied Gaskin, who raised *Hurst*-type challenges at trial and on direct appeal, *Hurst* relief because his sentence became final in 1993. The State further argues that Defendant's reliance on any unfairness in jury fact-finding is misplaced, and this Court is obligated to follow Florida Supreme Court precedent.

> As discussed in sub-claim 4-1 above, the Florida Supreme Court has held *Hurst v. Florida* and *Hurst v. State* do not apply retroactively to cases such as the instant case, and this Court is bound by such decisions. **No relief is warranted on sub-claim 4-5.**
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> Defendant asserts harmless error has no application to the violation of his Eighth Amendment rights. Defendant further contends that in light of *Hurst v. Florida* and *Hurst v. State*, the State bears the burden of proving any *Hurst* error is harmless here, but the State cannot do so based on the non-unanimous (8-4) advisory recommendation in this case. Defendant cites to various Florida Supreme Court opinions wherein the court declined to find harmless error in cases involving non-unanimous jury recommendations. Defendant further alleges his case is highly mitigated, including additional postconviction evidence of abuse and brain damage. Defendant contends the constitutional violations alleged in his motion are not harmless beyond a reasonable doubt.
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> In its response, the States asserts that "[n]o harmless error analysis is necessary in this case, since no cognizable constitutional error has been present in the motion." The State further contends it does not bear the burden of proving harmless error and that any *Hurst* error is harmless in this case.
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> As discussed in sub-claim 4-1 above, *Hurst v. Florida* and *Hurst v. State* do not apply retroactively to the instant case, and there is no cognizable constitutional error. Therefore, the Court agrees with the State's assertion that a harmless error analysis is not necessary here. **No relief is warranted on sub-claim 4-7.**

(R569-77) (Emphasis in original).

The circuit court properly found that Appellant was not entitled to relief based on this Court's precedent, and Appellant has failed to show why the lower court's ruling should

not be affirmed. In Asay v. State, 210 So. 3d 1 (Fla. 2016), this Court held that any capital defendant whose death sentence was final before Ring was decided in 2002 was not entitled to Hurst relief. This Court performed a retroactivity analysis under state law using the standard set forth in Witt v. State, 387 So. 2d 922 (Fla. 1980), which provides "more expansive retroactivity standards than those adopted in Teague,"[3] which enumerates the federal retroactivity standards. Asay, 210 So. 3d at 15-16 (emphasis in original) (quoting Johnson v. State, 904 So. 2d 400, 409 (Fla. 2005)); see also Danforth v. Minnesota, 522 U.S. 264, 280-81 (2008) (allowing states to adopt a retroactivity test that is broader than Teague).

This Court reaffirmed its Asay holding in Hitchcock v. State, 226 So. 3d 216 (Fla. 2017), and rejected several constitutional challenges to its non-retroactivity rule. Appellant makes many of the same constitutional challenges that this Court explicitly rejected in Hitchcock and more recently in the death warrant litigation of Hannon v. State, 42 Fla. L. Weekly S879 (Fla. Nov. 1, 2017) (rejecting Hannon's due process and Eighth Amendment arguments regarding the retroactivity of Hurst v. Florida and Hurst v. State); Asay v. State (Asay VI), 224 So. 3d 695, 702-03 (Fla. 2017) (denying Eighth Amendment

[3] Teague v. Lane, 489 U.S. 288 (1989).

challenge to the holding in Asay); Lambrix v. State, 42 Fla. L. Weekly S825 (Fla. Sept. 29, 2017) (denying Eighth Amendment, due process, and equal protection challenges to the holding in Asay). This Court should again reject these various constitutional challenges as they are "nothing more than arguments that Hurst v. State should be applied retroactively to [Appellant's] sentence, which became final prior to Ring." Hitchcock, 226 So. 3d 216.

Additionally, Appellant asserts that he should receive the benefit of Hurst based on "fundamental fairness." However, the fundamental fairness doctrine discussed in Mosley v. State, 209 So. 3d 1248 (Fla. 2016), does not create a basis for retroactive application of Hurst to pre-Ring cases. See Mosley, 209 So. 3d at 1274-75. This Court rejected such an argument in Gaskin v. State, 218 So. 3d 399, 401 (Fla. 2017). Gaskin raised the substance of a Hurst claim both at his trial and on direct appeal. Gaskin v. State, 591 So. 2d 917, 920 (Fla. 1991). However, this Court held "[b]ecause Gaksin's sentence became final in 1993, Gaskin is not entitled to relief under Hurst v. Florida." Gaskin, 218 So. 3d at 401. As in Gaskin, Appellant is not entitled to retroactive application of Hurst because his sentence became final prior to the decision in Ring.

Appellant further argues that the lower court erred in refusing to allow him to amend his motion to add a claim of entitlement to relief under Chapter 2017-1, Fla. Laws. He argues that he is entitled to a life sentence under Chapter 2017-1 because his jury did not unanimously recommend a death sentence. In denying Appellant's motion to amend, the postconviction court reasoned:

> In his second motion to amend, Defendant seeks to add a fifth claim based on the recent enactment of Chapter 2017-1, Laws of Florida, which amended section 921.141(2)(c), Florida Statutes, to require a unanimous jury sentencing recommendation. In claim five, Defendant posits Article I, sections 9 and 16, of the Florida Constitution and the Eighth and Fourteenth Amendments of the United States Constitution require retroactive application of Chapter 2017-1, which statutorily established a substantive right, to the instant case.
>
> The Court notes that a motion filed under rule 3.851, "may not be amended unless good cause is shown." Fla. R. Crim. P. 3.851(f)(4). The Court finds Defendant has not shown good cause to amend his pending amended successive motion for postconviction relief to add this fifth claim. Additionally, even if the Court allowed Defendant to add claim five, his claim would be without merit; Chapter 2017-1 is inapplicable here as Defendant's case is final [FN1], and Chapter 2017-1 does not create a substantive right requiring retroactive application in the instant case. No relief is warranted on Defendant's second motion to amend.

(R424) (footnote omitted).

As this Court has explained, a statute is applied retrospectively only if there is "clear evidence of legislative

intent to apply the statute retrospectively." Florida Ins. Guar. Assn., Inc. v. Devon Neighborhood Assn., Inc., 67 So. 3d 187, 194 (Fla. 2011). Absent such clear intent, the statute is not applied retrospectively.

Nothing in the text of the new statute or legislative history of Chapter 2017-1, Laws of Florida, evinces a legislative intent to wipe out all prior death sentences and require a new penalty phase proceeding, much less an intent to commute all existing death sentences to life imprisonment. Appellant points to no language in the text of the statute or any statement in the legislative history that supports such an argument. There is nothing to support a claim that the legislature intended the statute to apply to all capital cases instead of applying only to those defendants granted new penalty phases under the existing law. In Asay VI, this Court rejected the defendant's claim that Chapter 2017-1, Laws of Florida, applied to his case. Asay VI, 224 So. 3d at 703.

In sum, Hurst v. State does not apply retroactively to Appellant's pre-Ring case. He is entitled to neither a new penalty phase nor a life sentence based on Chapter 2017-1, Laws of Florida. The lower court properly denied all of his Hurst related claims based on this Court's binding precedent.

ISSUE IV

THE POSTCONVICTION COURT CORRECTLY DENIED APPELLANT'S NEWLY DISCOVERED EVIDENCE CLAIM.

Appellant argues that the postconviction court erred in rejecting his claim that newly discovered evidence in the form of Dr. Miller's affidavit casts doubt on the State's theory that sexual battery occurred. Dr. Miller's affidavit stated that his remark that there was a "one-in-a-million" chance that the victim's injuries could have been caused by a kick was regrettable and that courts had misinterpreted that remark. Appellant asserts that, as a consequence of this newly discovered evidence, his conviction for felony murder and the resulting death sentence should be vacated. Appellant is incorrect.

In denying this claim, the postconviction court held:

> In claim one, Defendant alleges newly discovered evidence. Specifically, Defendant attaches an affidavit from Lee Robert Miller, M.D., the assistant medical examiner who testified at Defendant's trial as well as his previous postconviction proceedings. In his affidavit, Dr. Miller asserts that on June 7, 2004, he testified it was "reasonably possible, perhaps probable" that the victim's vaginal injuries were caused by the penetration of the toe of a shoe, and it was a "one in a million shot." Dr. Miller further asserts that his postconviction testimony and use of the phrase "one in a million" in reference to a kick that could have caused the victim's genital injuries was a regrettable and "unfortunate choice of words." Dr. Miller further avers, "I can only reiterate my previous [postconviction] testimony that Dr. Wright's interpretation of these injuries having

been caused by a kick and not by an object having been deliberately inserted in the vagina is a very reasonable probability."

Defendant asserts that in the previous postconviction proceedings, Dr. Miller agreed with the defense's postconviction expert, Dr. Wright, that the victim's genital injuries were probably caused by a kick and not by a stretch injury as Dr. Miller testified at trial. Defendant further asserts the postconviction court, as well as subsequent reviewing courts, misinterpreted and latched onto Dr. Miller's "one in a million" testimony to find Dr. Miller's postconviction testimony did not differ from his trial testimony and deny Defendant relief on his postconviction claims. In his motion, Defendant asserts Dr. Miller "now makes clear that he considers the victim's genital injuries were possibly, perhaps probably, caused by a kick, an act which negates the sexual battery in this case." Defendant also alleges, "Dr. Miller's affidavit establishes that his off-hand remark that the kick was 'one in a million' was misconstrued by the trial court and every reviewing court thereafter."

Defendant further alleges Dr. Miller's affidavit is newly discovered evidence because Dr. Miller was not aware of the incorrect interpretation of his postconviction testimony and, despite good faith efforts to do so, postconviction counsel was not able to contact Dr. Miller until June 2015. Defendant asserts the outcome of the proceedings would have been different where he would have been convicted of a lesser offense and not subject to the death penalty.

In its response, the State asserts Defendant's claim is untimely, successive and procedurally barred. The State posits Defendant has known since at least 2004 that Dr. Miller agreed the victim's vaginal injuries could have been caused by a kick. The State cites to the record, Dr. Miller's June 7, 2004, postconviction testimony and Dr. Miller's affidavit (wherein Dr. Miller reiterates his previous postconviction testimony). The State contends the instant motion is untimely as it is filed more than one year after Dr. Miller's June 7, 2004,

postconviction testimony. The State further argues Defendant is essentially re-alleging his previous postconviction claim that Dr. Miller recanted his trial testimony and agreed the victim's vaginal injuries could have been caused by a kick. Therefore, the State contends, this claim is also procedurally barred. The State also argues that Defendant's "real complaint is with the way courts have interpreted the evidence from the previous post-conviction evidentiary hearing," but that does not constitute newly discovered evidence. The State requests that the Court summarily [sic] Defendant's claim.

In his reply, Defendant posits that a kick would not constitute sexual battery, and if the trial court had been properly informed the injuries were likely from a kick and not insertion of a large object, there would have been insufficient evidence of sexual battery to survive a motion for judgment of acquittal at trial. Defendant further argues that without the underlying conviction for sexual battery, Defendant's general first degree murder conviction cannot be sustained solely based on premeditation as there is no indication on what theory the jury based its conviction.

In order to obtain relief based on newly discovered evidence, the Florida Supreme Court has set forth the following two-prong test:

> First, in order to be considered newly discovered evidence, the evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by the use of diligence."
>
> Second, the newly discovered evidence must be of such nature that it would probably produce and acquittal on retrial.

Jones v. State, 709 So. 2d 512, 521 (Fla. 1998) (internal citations omitted). In his affidavit, Dr. Miller reiterates and clarifies his previous postconviction testimony. Dr. Miller asserts he regrets using the phrase "one in a million" in

reference to a kick that could have caused the victim's genital injuries. Dr. Miller further asserts, "I can only reiterate my previous [postconviction] testimony that Dr. Wright's interpretation of these injuries having been caused by a kick and not by an object having been deliberately inserted in the vagina is a very reasonable probability." However, the Court finds such evidence is not of such a nature that it could not have been known through the exercise of due diligence nor would it probably produce an acquittal on retrial. Defendant's attempt to clarify, tweak or expand upon Dr. Miller's postconviction testimony simply does not constitute newly discovered evidence. Similarly, Defendant's allegation that courts have consistently misconstrued Dr. Miller's postconviction testimony also does not qualify as newly discovered evidence. Because Defendant's conviction and sentence became final on November 14, 1994, and Defendant's allegations do not fall within any of the time limitation exceptions set forth in rule 3.851(d)(2), Defendant's allegations in claim one are procedurally barred as untimely.

Additionally, Defendant is essentially re-alleging that Dr. Miller has recanted his trial testimony and is again agreeing that the victim's vaginal injuries could have been caused by a kick. However, Defendant has previously raised allegations regarding Dr. Miller's trial and postconviction testimony, and both the postconviction court and the Florida Supreme Court have already addressed and rejected such allegations. In affirming the postconviction court's ruling, the Florida Supreme Court even addressed Dr. Miller's testimony as construed in the manner alleged by Defendant herein and his previous postconviction proceedings, and the court held as follows:

> **DR. MILLER'S TESTIMONY**
>
> Taylor raised multiple claims concerning Dr. Miller's trial testimony concerning the extensive injuries suffered by the victim. The trial court addressed these claims together, finding Taylor's allegations of recantation by Miller as to the victim's sexual injuries to be an inaccurate

characterization of Miller's testimony. The trial court denied these claims, finding no newly discovered evidence, that trial counsel was not deficient, and that any possible deficiencies did not have the cumulative effect of denying Taylor a fair trial.

At trial, Dr. Miller testified that the injuries to the victim's vagina were, within a reasonable degree of medical probability, caused by something "inserted into the vagina which stretched the vagina enough for it to tear over the object that was inserted in there." Dr. Miller further testified that the injuries were inconsistent with someone having kicked the victim. Relying on this evidence, we noted on review that "the medical examiner's testimony contradicted Taylor's version of what happened…. The medical examiner testified that the extensive injuries to the interior and exterior of the victim's vagina were caused by a hand or object other than a penis inserted into the vagina." *Taylor*, 583 So. 2d at 329.

At the postconviction evidentiary hearing, Dr. Miller testified that the injuries sustained were mostly confined to the labia minora and radiated inward, while some were inside the labia minora in "what anyone would describe as the vaginal canal." However, Dr. Miller further testified that the injuries could possibly have been the result of a kick if the blow had been struck where the toe of the shoe actually went into the vagina, stretching it, that any shoe would have been able to penetrate the victim's vagina due to extraversion, but that ultimately the injuries were caused by stretching and not direct impact. Miller testified that the probability of a kick causing the injury was "a one in a million shot" and that his opinions as expressed at trial had not changed. He attributed any

differences in his testimony to differences in the questions being asked and, in some instances more elaboration in exploring possibilities. Taylor contends that had Miller's testimony about a kick possibly causing the vaginal injuries been presented at trial he could not have been convicted of sexual battery or felony murder. Taylor alleges that (1) this is new evidence that requires a new trial, (2) the State withheld this evidence, (3) the State allowed Dr. Miller to present false testimony, or (4) his trial counsel was deficient for not having discovered this evidence before trial.

Newly Discovered Evidence

In ruling on this issue, the trial court found Taylor's claim of a "supposed recantation" by Dr. Miller of his trial testimony was "not an accurate statement of [Dr. Miller's] testimony." Hence, the trial court concluded Taylor had not actually established the existence of important new evidence of his innocence of sexual battery. We agree.

****

In essence, the postconviction court concluded that, at trial, Dr. Miller testified that the lacerations were not, within reasonable medical probability, caused by a kick. Similarly, at the evidentiary hearing, Dr. Miller testified that it was his opinion that there was only a one-in-a-million chance that the lacerations could have been caused by a kick. Hence, because the record refutes Taylor's interpretation of the testimony, Taylor fails to show that Miller's postconviction testimony qualifies as newly discovered evidence. While it is true that Miller's trial testimony did not admit to this one-in-a-million possibility, we find this omission insufficient to overturn the

trial court's conclusion that sufficient "new evidence" had not been established.

Additionally, we note the jury was not instructed to and did not differentiate between first-degree premeditated murder and first-degree felony murder in determining Taylor's guilt. There is no indication that Taylor was convicted of first-degree murder predicated solely upon the felony of sexual battery. This Court previously detailed the massive injuries sustained by the victim to support the State's alternative theories of premeditation and felony murder:

> [T]he jury reasonably could have rejected as untruthful Taylor's testimony that he beat the victim in a rage after she injured him. Although Taylor claimed that the victim bit his penis, an examination did not reveal injuries consistent with a bite. According to Taylor, even after he sufficiently incapacitated the victim by choking her so that she released her bite on him, he continued to beat and kick her. The medical examiner testified that the victim sustained a minimum of ten massive blows to her head, neck, chest, and abdomen. Virtually all of her internal organs were damaged. Her brain was bleeding. Her larynx was fractured. Her heart was torn. Her liver was reduced to pulp. Her kidneys and intestines were torn from their attachments. Her lungs were bruised and torn. Nearly all of the ribs on both sides were broken. Her spleen was torn. She had a bite mark on her arm and patches of her hair were torn off. Her face, chest, and stomach were scraped and bruised. Although

> Taylor denied dragging the victim, evidence showed that she had been dragged from one end of the dugout to the other. The evidence was sufficient to submit the question of premeditation to the jury.

Taylor, 583 So. 2d at 329.

> *Accordingly, even if Dr. Miller's alleged change in testimony were considered sufficient to call into question Taylor's sexual battery conviction, it would not be sufficient to outweigh the evidence that Taylor committed premeditated murder or to cast doubt on his conviction for first-degree murder based on premeditation. Ultimately, then, even if we were to construe Dr. Miller's testimony at the evidentiary hearing the way Taylor seeks, there remains an abundance of evidence the jury could have used to convict Taylor of premeditated first-degree murder. Hence, we conclude the trial court did not err in denying this claim.*

Taylor v. State, 3 So. 3d 986, 993-94 (Fla. 2009), *as revised on denial of reh'g* (Jan. 29, 2009) (emphasis added). Defendant's allegations are successive, untimely and procedurally barred.

(R135-41).

The postconviction court properly denied this claim. A Rule 3.851 motion for postconviction relief must be filed within one year after the judgment and sentence are finalized. Fla. R. Crim. P. 3.851(d). If this time period expires, a motion filed thereafter is procedurally barred unless, as pertinent to this claim, "the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been

ascertained by the exercise of due diligence." Fla. R. Crim. P. 3.851(d)(2)(A).

Appellant argues that Dr. Miller's conclusion that his one-in-a-million remark about the massive injuries to the victim's vagina being caused by a kick was misinterpreted, and that this misinterpretation amounted to newly discovered evidence. The essence of Appellant's argument is that evidence that the victim's vaginal injuries could have been caused by a kick establishes that he is innocent of sexual battery and of felony murder (and therefore should not have received the death penalty).

However, Appellant has been aware since at least 2004 that Dr. Miller agreed it was a reasonable possibility that a kick could have caused the victim's vaginal injuries. The record establishes that Appellant was aware at least at the time of Dr. Miller's July 7, 2004, testimony at the postconviction hearing that Dr. Miller agreed that the injuries could have been caused by a kick. Appellant's motion for postconviction relief quoted Dr. Miller as testifying at the hearing that "[the ten internal radial lacerations] could have been the result of a kick." (R72). Dr. Miller's affidavit in support of the motion stated: "I can only reiterate my previous testimony that Dr. Wright's interpretation of these injuries having been caused by a kick .

. . is a very reasonable possibility." (R88). Appellant's successive motion was not filed within one year of Dr. Miller's 2004 testimony; therefore, the evidence was not "newly discovered" and did not provide a basis for the lower court to review the merits of this claim. Fla. R. Crim. P. 3.851(d)(2)(A). Therefore, the court below properly found that the claim was untimely.

Furthermore, the claim is procedurally barred. The principle is well-settled that "[c]laims raised and rejected in prior postconviction proceedings are procedurally barred from being relitigated in a successive motion." Hendrix v. State, 136 So. 3d 1122, 1125 (Fla. 2014) (citation omitted). In his prior postconviction proceeding, Appellant argued that Dr. Miller "recanted" his trial testimony at the evidentiary hearing by acknowledging that the victim's vaginal injuries could have been caused by a kick. Taylor v. State, 3 So. 3d 986, 993 (Fla. 2009). At that time, the postconviction court found, and this Court agreed, that Appellant had mischaracterized Dr. Miller's evidentiary hearing testimony. Id.

Moreover, the fact that courts have relied on Dr. Miller's "one-in-a-million" remark in their rejection of Appellant's claims does not qualify as newly discovered evidence. Beyond his complaint about the way courts have interpreted Dr. Miller's

remark, his claim is the same claim he raised in his previous postconviction proceeding: purported newly discovered evidence through Dr. Miller that a kick could have caused the victim's vaginal injuries. Because this same claim was previously considered and rejected by both the postconviction court and by this Court, this claim is procedurally barred. See Hannon v. State, 42 Fla. L. Weekly S879 (Fla. Nov. 1, 2017) (holding that because this Court had addressed Hannon's proportionality claim "on direct appeal and postconviction, it is both procedurally barred and without substantive merit").

Appellant is entitled to no relief on this this claim.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm the lower court's order denying Appellant's successive motion for postconviction relief.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL
STATE OF FLORIDA

/s/ C. Suzanne Bechard
C. SUZANNE BECHARD
Assistant Attorney General
Florida Bar No. 0147745
Office of the Attorney General
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
capapp@myfloridalegal.com *[and]*
carlasuzanne.bechard@myfloridalegal.com
COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 17th day of November, 2017, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: David D. Hendry, Gregory W. Brown and James Driscoll, Assistants CCRC-M, Law Office of the Capital Collateral Regional Counsel, Middle Region, 12973 No. Telecom Parkway Temple Terrace, Florida 33637-0907, at **hendry@ccmr.state.fl.us**, **brown@ccmr.state.fl.us**, **driscoll@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/ C. Suzanne Bechard
COUNSEL FOR APPELLEE