In the Supreme Court of Florida

GROVER B. REED,

Appellant,

v. CASE NO. SC17-896

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

SUPPLEMENTAL ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, GROVER B. REED, the defendant in the trial court, will be referred to as appellant, the defendant or by his proper name. Appellee, the State of Florida, will be referred to as the State. Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by the appropriate page number within the volume. The symbol "IB" will refer to appellant's initial brief and will be followed by any appropriate page number. All double underlined emphasis is supplied. The symbol SIB will refer to the supplemental initial brief followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Grover Reed raped, then strangled, and stabbed to death a minister's wife. As part of the charity Traveler's Aid, Reverend Oermann and his wife Betty Oermann had invited Reed and his family, who were homeless, to stay in their home. *Reed v. Sec'y, Fla. Dept. of Corr.*, 593 F.3d 1217, 1220 (11th Cir. 2010). This Court summarized the evidence against Reed in the direct appeal, including his fingerprints being found on the victim's checks found in the yard of the victim's house and his baseball cap being found inside the victim's home. *Reed v. State*, 560 So.2d 203, 204 (Fla. 1990). Reed was convicted of first-degree murder; sexual battery; and robbery with a deadly weapon and sentenced to death. *Reed*, 593 F.3d at 1223.

Neither the State nor the defendant presented additional evidence in the penalty phase. The jury recommended death eleven to one. The trial court considered mitigating evidence including the presentence investigation report (PSI) and Reed's medical record verifying his substance abuse, prior to sentencing. On

January 9, 1987, Judge Southwood sentenced Reed to death finding six aggravating circumstances: 1) prior violent felony conviction (PVF); 2) felony murder; 3) avoid arrest; 4) pecuniary gain; 5) heinous, atrocious, and cruel (HAC); and 6) cold, caluclated and premeditated (CCP). Judge Southwood found no statutory or nonstatutory mitigating circumstances and concluded that "sufficiently compelling aggravating circumstances exist to justify and require the imposition of the death penalty."

In the direct appeal to this Court, Reed raised six issues including a *Caldwell v. Mississippi*, 472 U.S. 320 (1985), claim based on the judge and the prosecutor referring to the jury recommendation as advisory. *Reed v. State*, 560 So.2d 203, 205 (Fla. 1990). This Court rejected the *Caldwell* claim reasoning that "both the prosecutor and the judge were correctly stating the law." *Id.* at 206. This Court affirmed the convictions and death sentence. *Reed v. State*, 560 So.2d 203 (Fla. 1990). Furthermore, this Court struck both the PVF aggravator and the CCP aggravator on appeal. *Reed*, 560 So.2d at 207.

Reed filed a petition for writ of certiorari in the United States Supreme Court raising the *Caldwell* claim. On October 1, 1990, Reed's death sentence became final when the United States Supreme Court denied his petition. *Reed v. Florida*, 498 U.S. 882 (1990).

On February 28, 1992, Reed filed a motion for postconviction relief in state court. Reed filed an supplemental 3.850 motion on July 20, 1992. The trial court summarily denied the motion.

On appeal, this Court affirmed the trial court's summary denial of several of the claims but remanded for an evidentiary hearing on the ineffective assistance of counsel claims and the public records claim. *Reed v. State*, 640 So.2d 1094 (Fla. 1994).

On February 12, 1996, Reed filed a second supplemental or amended 3.850 motion in the state trial court raising 14 claims. Following an interlocutory appeal, the trial court held an evidentiary hearing on February 19 through February 22, 2002. *Reed v. State*, 751 So.2d 51 (Fla. 1999) (prohibition denied). At the evidentiary hearing, the State offered to conduct DNA testing on the rape kit, provided it still had the rape kit, but the defendant personally declined the offer. (Trial court order at 3). On August 26, 2002, the trial court entered an order denying postconviction relief.

In the second postconviction appeal to the Florida Supreme Court, Reed raised 13 issues. Reed also filed a petition for writ of habeas corpus raising four issues. This Court affirmed the trial court's denial of postconviction relief and denied Reed's state habeas petition. *Reed v. State*, 875 So.2d 415 (Fla. 2004).

On August 30, 2004, Reed filed a petition for writ of certiorari in the United States Supreme Court raising two claims of ineffectiveness. On November 8, 2004, the Supreme Court denied the petition. *Reed v. Florida*, 543 U.S. 980 (2004).

On July 5, 2005, Reed filed a federal habeas petition in federal district court raising nine claims. Reed also raised a supplemental claim of actual innocence in federal habeas court. On September 29, 2008, the district court denied the habeas petition. (Order Doc. #33). The district court granted a certificate of appealability on two issues.

Reed appealed the denial of habeas relief to the Eleventh Circuit raising three claims: 1) a claim regarding jury selection based on *Batson v. Kentucky*, 476 U.S. 79 (1986); 2) a claim of ineffectiveness in the guilt phase for failing to consult and present a serology expert; and 3) a claim of ineffectiveness at the penalty phase for failing to present family mitigation and expert mental health testimony despite Reed's instruction to his counsel not to present any mitigation. The Eleventh

Circuit affirmed the district court's denial of federal habeas relief. *Reed v. Sec'y, Fla. Dept. of Corr.*, 593 F.3d 1217, 1220 (11th Cir. 2010).

Reed filed a petition for writ of certiorari in the United States Supreme Court from the Eleventh Circuit opinion. On October 4, 2010, the Supreme Court denied the petition. *Reed v. McNeil*, 562 U.S. 873 (2010).

On March 16, 2011, Reed filed a successive postconviction motion in state trial court raising three claims. *Reed v. State*, 116 So.3d 260, 262 (Fla. 2013) (listing claims). The claim of newly discovered evidence was based on affidavits from James Wayne Hazen and Johnny Shane Kormondy stating that another death row inmate, Dwayne Kirkland, confessed to them that he killed an old white lady in Jacksonville in the mid-1980s before he died. On May 7, 2011, Reed filed a motion for discovery to support his claim of newly discovered evidence claim requesting production of a photograph card of an unidentified fingerprint found on the victim's check. Reed sought to compare the unidentified fingerprint with that of Dwayne Kirkland, a now-deceased death row inmate who Reed claimed was the "real" murderer. The trial court denied the motion for discovery and summarily denied the successive postconviction motion.

Reed appealed the summary denial of the successive postconviction motion to the Florida Supreme Court raising four claims. *Reed v. State*, 116 So.3d 260 (Fla. 2013) (No. SC11-2149). This Court found the motion to be untimely. This Court also rejected the newly discovered evidence claim reasoning that there were no specific names, places, or dates in the affidavits that linked Kirkland to this particular murder and because none of the information in the affidavits negated "the ample evidence" implicating Reed in the murder, including "his fingerprints, hat, and hair found at the murder scene." Additionally, this Court rejected the *Brady v. Maryland*, 373 U.S. 83 (1963), claim based on Edith Bosso's statement.

On August 3, 2012, Reed filed a successive habeas petition in the Florida Supreme Court raising two claims: 1) an argument that this Court should revisit its prior ruling in the direct appeal regarding the *Batson* claim based on more recent United States Supreme Court caselaw; and 2) a claim of ineffective assistance of appellate counsel for failing to raise a convoluted conflict of interest claim regarding former counsel representing a state witness. This Court denied the habeas petition. *Reed v. Tucker*, 116 So.3d 1262 (Fla. 2013) (No. SC12-1634).

On January 12, 2017, Reed, represented by registry counsel Martin McClain, filed a successive rule 3.851 motion for postconviction relief raising four claims based on *Hurst v. Florida*, 136 S.Ct. 616 (2016) (*Hurst v. Florida*), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (*Hurst v. State*). The trial court summarily denied the successive postconviction motion.

Reed then appealed the denial of his successive postconviction *Hurst* motion to this Court. *Reed v. State*, SC17-896. On September 27, 2017, this Court issued an order for Reed to show cause why *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017), *cert. denied, Hitchcock v. Florida*, 138 S.Ct. 513 (2017), did not control. On October 30, 2017, Reed filed a response to the order to show cause. On November 3, 2017, the State filed a reply to the response, arguing that under Court's decisions in *Asay v. State*, 210 So.3d 1 (Fla. 2016) (*Asay V*), and *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017), Reed was not entitled to any *Hurst* relief because his sentence became final years before *Ring v. Arizona*, 536 U.S. 584 (2002), was decided. On November 29, 2017, Reed filed a reply to the State's reply.

On December 11, 2017, Reed filed a motion to permit expanded briefing. On January 25, 2018, this Court ordered additional briefing on the non-*Hurst* claims. On March 22, 2018, Reed filed an initial supplemental brief. This is the State's supplemental answer brief on the non-*Hurst* claims.

SUMMARY OF ARGUMENT

ISSUE I

Reed asserts that the trial court erred in not granting his motion to disqualify the postconviction judge. The motion to disqualify was based on the fact the postconviction judge was a former prosecutor many years ago who had been involved with other capital cases, not with this particular case. Due process only requires the disqualification of a judge who previously had a "significant, personal involvement in a critical trial decision" as a prosecutor. Judge McCallum had no involvement in the prosecution of this particular case. Furthermore, a judge being a former prosecutor does not give rise to a well-founded fear that he will not receive a fair postconviction proceeding. Neither due process nor Florida law requires the disqualification of the postconviction judge in this case. The trial court properly concluded that the motion was legally insufficient and properly denied the motion to disqualify.

ISSUE II

Reed also asserts that *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (*Hurst v. State*), somehow resurrects his previously denied postconviction claims. Opposing counsel seeks to relitigate his previously denied newly discovered evidence claim; his previously denied *Brady v. Maryland*, 373 U.S. 83 (1963), claims; as well as his previously denied *Strickland v. Washington*, 466 U.S. 668 (1984), ineffectiveness claims. The newly discovered evidence claim; the *Brady* claims; and the *Strickland* claims are all barred by the law-of-the-case doctrine. Reed may not invoke the manifest injustice exception to the doctrine based on *Mosley v. State*, 209 So.3d 1248 (Fla. 2016), because *Mosley* does not apply to Reed. Rather, *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017), and *Asay v. State*, 210 So.3d 1 (Fla. 2016), apply and under that precedent, *Hurst* does not apply retroactively

to Reed and does not resurrect any of these previously denied postconviction claims. Additionally, all of this Court's original reasoning rejecting the newly discovered evidence claim; the *Brady* claims; as well as the ineffectiveness claims remains valid in the wake of *Hurst*. Moreover, there is little logic to the proposed remedy. The proper remedy for a *Hurst* violation is a new penalty phase, not a new postconviction appeal. The trial court properly summarily denied this claim.

ISSUE III

Reed additionally asserts that his death sentence is unreliable in violation of the Eighth Amendment. Relying on *Johnson v. Mississippi*, 486 U.S. 578 (1988), he claims that his death sentence is unreliable due to unidentified materially inaccurate information. This claim should not be considered because it was not raised below. *Johnson* does not apply because the prior violent felony aggravator is not involved and was not based on a conviction that was vacated. Assuming the Eighth Amendment's heightened reliability requirement applies to guilt phase evidence and assuming that the serology evidence is the evidence being challenged on appeal as being inaccurate, the serology evidence was scientifically accurate. Reed, although a nonsecretor, is a possible contributor of the semen, just as this Court explained in the first postconviction appeal. The serology evidence was not materially inaccurate. Reed's death sentence does not violate the Eighth Amendment's heightened reliability requirement.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT PROPERLY DENIED THE MOTION TO DISQUALIFY THE POSTCONVICTION JUDGE, WHO WAS A FORMER PROSECUTOR, AS LEGALLY INSUFFICIENT? (Restated)

Reed asserts that the trial court erred in not granting his motion to disqualify the postconviction judge. SIB at 5. The motion to disqualify was based on the fact the postconviction judge was a former prosecutor many years ago who had been involved with other capital cases, not with this particular case. Due process only requires the disqualification of a judge who previously had a "significant, personal involvement in a critical trial decision" as a prosecutor. Judge McCallum had no involvement in the prosecution of this particular case. Furthermore, a judge being a former prosecutor does not give rise to a well-founded fear that he will not receive a fair postconviction proceeding. Neither due process nor Florida law requires the disqualification of the postconviction judge in this case. The trial court properly concluded that the motion was legally insufficient and properly denied the motion to disqualify.

Standard of review

This Court reviews a trial court's ruling on a motion to disqualify *de novo*. *Wall v. State*, 43 Fla. L. Weekly S97, 2018 WL 1007960, *13 (Fla. Feb. 22, 2018) (citing *Barnhill v. State*, 834 So.2d 836, 843 (Fla. 2002)). The standard of review is *de novo*.

The trial court's ruling

The trial court denied the motion to disqualify concluding that it was legally insufficient citing *Parker v. State*, 3 So.3d 974, 982 (Fla. 2009). The trial court

noted that the motion failed to "allege any specific instances of prejudice or bias of the Court."

Untimely

The motion to disqualify was untimely. *Wall v. State*, 43 Fla. L. Weekly S97, 2018 WL 1007960, *13 (Fla. Feb. 22, 2018) (concluding the motion to disqualify the trial court was properly denied as legally insufficient because it was time-barred).

Any motion to disqualify the judge must be filed within 10 days of discovering the facts that give rise to the motion. Fla. R. Jud. Admin. 2.330(e) (providing: a "motion to disqualify shall be filed within a reasonable time not to exceed 10 days after discovery of the facts constituting the grounds for the motion . . ."). Even assuming that the clock for filing the motion starts when counsel is served with an order signed by the new judge, the motion is still untimely. Opposing counsel stated that he received the order signed by the new judge on March 1, 2017, yet he did not file the motion to disqualify her until March 16, 2017. Even under his own timing, opposing counsel, was required to file the motion to disqualify by March 11, 2017. The motion was five days late. *State v. Oliu*, 183 So.3d 1161 (Fla. 3d DCA 2016) (holding a motion for disqualification of the judge was untimely because it was filed 30 days late even though the appellate court found the allegations did give rise to an objectively reasonable fear of bias or prejudice requiring disqualification of the trial judge who had been the defendant's lawyer in a related case). The motion to disqualify was not timely filed.

Merits

To be legally sufficient, the facts as alleged in the motion to disqualify must create a well-founded fear that he or she will not receive a fair trial. This fear of

judicial bias must be objectively reasonable. *Wall v. State*, 43 Fla. L. Weekly S97 (Fla. Feb. 22, 2018). A motion to disqualify is governed substantively by section 38.10, Florida Statutes and procedurally by Florida Rule of Judicial Administration 2.330. *Peterson v. State*, 221 So.3d 571, 581 (Fla. 2017) (citing *Gore v. State*, 964 So.2d 1257, 1268 (Fla. 2007)). A motion to disqualify must show "that the party fears that he or she will not receive a fair trial or hearing because of specifically described prejudice or bias of the judge." Fla. R. Jud. Admin. 2.330(d)(1). As the Florida Supreme Court explained in *Parker v. State*, 3 So.3d 974, 982 (Fla. 2009), the standard is "whether the facts alleged, which must be assumed to be true, would cause the movant to have a well-founded fear that he or she will not receive a fair trial at the hands of that judge." The fear of judicial bias "must be objectively reasonable"; a "subjective fear" is "not sufficient." *Id.* at 982. The "facts and reasons given for the disqualification of a judge must tend to show the judge's undue bias, prejudice, or sympathy." *Id.*

The motion to disqualify was based on the fact the judge was a former prosecutor many years ago. Judge McCallum became a county judge circa 1995 and a circuit judge circa 2002. She had been involved with other capital cases but not with this particular case. She was a prosecutor with the State Attorney's Office at the same time this case was being tried. She was a prosecutor over 20 years ago and was never a prosecutor in this case.

The motion to disqualify was legally insufficient. As the trial court properly ruled, a judge being a former prosecutor does not give rise to a reasonable fear of not receiving a fair and impartial postconviction proceeding. The judge being a former prosecutor does not give rise to an objectively reasonable fear that the judge is biased. And this is especially true of a judge that was a prosecutor over two decades ago. Unless this Court is willing to disqualify every former prosecutor who becomes a judge from ever presiding at any postconviction proceeding of all

criminal and capital cases that were prosecuted during the time that the judge was with the prosecutor's office even though the judge was not involved in the particular prosecution (and every former public defender as well), the motion is legally insufficient.

In *Quince v. State*, 732 So. 2d 1059, 1061-62 (Fla. 1999), the Florida Supreme Court held that the trial court did not abuse its discretion in denying a motion to disqualify. The successor postconviction judge was a former Assistant Public Defender who had worked at the public defender's office at the same time as the defendant was being represented by the office. The judge was the appellate coordinator in the public defender's office at the time of the prosecution of Quince. The postconviction judge was also a collogue of the Assistant Public Defender who represented Quince whose effectiveness and conflict of interest was at issue in the postconviction litigation. The Florida Supreme Court noted that the judge "may have had an administrative responsibility" involving the appeal but concluded that such facts do not support an allegation of bias. The Florida Supreme Court concluded there was no error in the denial of the motion to disqualify the judge.

Opposing counsel's reliance on *Williams v. Pennsylvania*, 136 S.Ct. 1899 (2016), is misplaced. The United States Supreme Court in *Williams* held that the Due Process Clause required the disqualification of any judge who previously had "significant, personal involvement" in a "critical" decision in the defendant's case. The Chief Justice of a state supreme court had, years earlier when he was the elected District Attorney, personally approved the decision to seek the death penalty in Williams' case. Decades later, when the postconviction appeal was pending in the Supreme Court of Pennsylvania, Williams filed a motion to disqualify the Chief Justice based on his prior role in the case of approving of seeking the death penalty. The Chief Justice denied the motion to disqualify and participated in the postconviction appeal despite his prior role in the case.

The United States Supreme Court reversed explaining that due process requires the disqualification of a judge who previously had "significant, personal involvement in a critical trial decision" because it creates an "unacceptable risk of actual bias." *Williams* 136 S.Ct. at 1907-08. The *Williams* Court concluded that making the decision to seek the death penalty was a critical decision in the case and amounted to significant, personal involvement in the case requiring disqualification of the Chief Justice. The High Court concluded that the error in not granting the motion to disqualify was not subject to harmless error analysis explaining that it does not matter whether the disqualified judge's vote was not necessary to the disposition of the case and then remanded the case for a new postconviction appeal. *See also Matiru v. Sessions*, 705 Fed. Appx. 476, 477 (8th Cir. 2017) (holding that *Williams* did not require the immigration judge, who previously worked as an attorney for the Department of Homeland Security to recuse herself because "she had no previous knowledge or involvement" in the particular case).

Here, as in *Matiru*, but unlike *Williams*, the judge had no involvement in this particular case. There is no allegation that Judge McCallum had "significant, personal involvement in a critical trial decision" in Reed's case. The judge here certainly was not the elected State Attorney who approved of seeking the death penalty in Reed's case, unlike the situation in *Williams*. Due process does not require the disqualification of Judge McCallum.

Opposing counsel's reliance on *Cave v. State*, 660 So.2d 705 (Fla. 1995), is equally misplaced. The actual holding in *Cave* was that the judge erred by looking beyond the sufficiency of defendant's motion for disqualification. *Cave*, 660 So.2d at 707-08. The trial court in *Cave* "conducted a hearing in which he allowed the State to present several witnesses in rebuttal to the factual allegations contained in Cave's motion." *Id.* at 708. The trial court in this case did not conduct a

hearing on the motion to disqualify unlike the judge in *Cave*. Here, in contrast to *Cave*, the trial court did not look beyond the sufficiency of the motion. Instead, the trial court ruled the motion was legally insufficient. Therefore, *Cave* does not apply.

Additionally, the Florida Supreme Court in *Cave* ordered a different judge to preside at the resentencing citing *Duest v. Goldstein*, 654 So.2d 1004 (Fla. 4th DCA 1995). *Cave*, 660 So.2d at 708, n.5. In *Duest*, the distrist court of appeals prohibited a judge from presiding over a capital resentencing where the judge, who was a former assistant state attorney, had "participated in the proceeding" by delivering documents to the prosecutor during the trial and was a supervisor of the division that prosecuted defendant. Here, there is no allegation that the judge handled any documents or participated in any manner in this particular case or was head of the division that prosecuted Reed. Contrary to opposing counsel's argument the facts of *Cave* and *Duest* are not "virtually identical." SIB at 10. And opposing counsel is well aware of the facts of *Duest* because he was the appellate attorney on the case. *Duest*, 654 So.2d at 1004 (listing Marty McClain of the Office of the Capital Collateral Representative as counsel of record). Florida law does not require the disqualification of Judge McCallum.

The trial court properly summarily denied the motion to disqualify.[1]

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[1] Opposing counsel complains that the trial court did not hold a case management conference, commonly referred to as a *Huff* hearing, before summarily denying the successive postconviction motion. *Huff v. State*, 622 So.2d 982 (Fla. 1993); Fla. R. Crim. P. 3.851(f)(5)(B) (stating: "Within 30 days after the state files its answer to a successive motion for postconviction relief, the trial court shall hold a case management conference."). The purpose of a *Huff* hearing is to determine which issues need additional factual development at an evidentiary hearing. *Mordenti v. State*, 711 So.2d 30, 32 (Fla. 1998) (stating that the purpose of a *Huff* hearing "is to allow the trial judge to determine whether an evidentiary hearing is required and to hear legal argument relating to the motion"). But when the issue is purely a legal issue which does not require any factual development

or the motion is a successive motion, the failure to hold a *Huff* hearing is harmless error. *Groover v. State*, 703 So.2d 1035 (Fla. 1997) (failure to hold a *Huff* hearing in a successive postconviction proceeding, as opposed to an initial postconviction proceeding, was harmless); *Marek v. State*, 14 So.3d 985, 999 (Fla. 2009) (concluding the failure to hold a *Huff* hearing on a successive postconviction motion that was "legally insufficient" and "without merit" was harmless); *Archer v. State*, 151 So.3d 1223 (Fla. 2014) (failure to conduct a *Huff* hearing on a successive motion that was "insufficiently pleaded, facially insufficient, and untimely" was harmless).

Indeed, when the issue raised is a purely legal issue with controlling precedent, it is not error at all to summarily deny a postconviction motion without conducting a *Huff* hearing, because, regardless of any argument defense counsel presents, the trial court must follow the controlling Florida Supreme Court precedent. A *Huff* hearing in the face of controlling precedent would be a useless exercise. The trial court did not error by not conducting a *Huff* hearing due to the controlling precedent, or alternatively, the error was harmless.

In addition to making an argument based on the applicable rule of court, opposing counsel raises a due process opportunity-to-be-heard challenge to the trial court's failure to hold a *Huff* hearing. But the due process right to be heard does not extend to oral presentations if written submissions are permitted instead. Appellate courts often decide the case based on the parties' written briefs alone and do not conduct an oral argument. David R. Cleveland & Steven Wisotsky, *The Decline of Oral Argument in the Federal Courts of Appeals: A Modest Proposal for Reform*, 13 J. App. Prac. & Process 119 (2012) (noting, that in 2011, only one quarter of all federal appeals were orally argued). This Court does not automatically hold oral arguments in non-capital criminal cases or in successive postconviction appeals or in warrant cases. The common practice of courts to decide matters based on written submissions alone does not violate due process. The failure of the trial court to conduct a *Huff* hearing which is, in effect, an oral argument, does not violate due process.

Opposing counsel was given his due process opportunity to be heard in the successive motion itself. Indeed, he was heard for 78 pages. Opposing counsel's massive successive motion was over three times the pages permitted by the applicable rule of court and was, in the trial court's word's, an abuse of process. He was given more process than he was due. The trial court's not conducting a *Huff* hearing did not violate due process.

ISSUE II

WHETHER THE TRIAL COURT PROPERLY SUMMARILY DENIED THE CLAIM THAT *HURST V. STATE*, 202 SO.3D 40 (FLA. 2016), APPLIED AND ENTITLED THE DEFENDANT TO RELITIGATE HIS PREVIOUSLY DENIED POSTCONVICTION CLAIMS? (Restated)

Reed also asserts that *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (*Hurst v. State*), somehow resurrects his previously denied postconviction claims. Opposing counsel seeks to relitigate his previously denied newly discovered evidence claim; his previously denied *Brady v. Maryland*, 373 U.S. 83 (1963), claims; as well as his previously denied *Strickland v. Washington*, 466 U.S. 668 (1984), ineffectiveness claims. The newly discovered evidence claim; the *Brady* claims; and the *Strickland* claims are all barred by the law-of-the-case doctrine. Reed may not invoke the manifest injustice exception to the doctrine based on *Mosley v. State*, 209 So.3d 1248 (Fla. 2016), because *Mosley* does not apply to Reed. Rather, *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017), and *Asay v. State*, 210 So.3d 1 (Fla. 2016), apply and under that precedent, *Hurst* does not apply retroactively to Reed and does not resurrect any of these previously denied postconviction claims. Additionally, all of this Court's original reasoning rejecting the newly discovered evidence claim; the *Brady* claims; as well as the ineffectiveness claims remains valid in the wake of *Hurst*. Moreover, there is little logic to the proposed remedy. The proper remedy for a *Hurst* violation is a new penalty phase, not a new postconviction appeal. The trial court properly summarily denied this claim.

Standard of review

When a trial court summarily denies a claim in a postconviction motion, this Court reviews that ruling *de novo*. *Pardo v. State*, 108 So.3d 558, 561 (Fla. 2012). Because a trial court's decision to summarily deny a postconviction 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." *Barnes v. State*, 124 So.3d 904, 911 (Fla. 2013); *Staples v. State*, 202 So.3d 28, 32 (Fla. 2016) (explaining that "where the issue presented is a question of law, the standard of review is *de novo*"). The standard of review is *de novo*.

The trial court's ruling

The trial court declined "to reconsider any previous rule 3.851 motions or claims; particularly, claims that have already been denied and affirmed on appeal."

Procedural bar

Opposing counsel asserts that *Hurst* somehow resurrects Reed's previously denied postconviction claims. *Hurst v. State*, which is a right-to-a-jury-trial and an Eighth Amendment unanimity case, does not operate to breathe new life into a previously denied newly discovered evidence claim, or previously denied *Brady* claims or previously denied *Strickland* claims. *Hurst* is not a right to counsel case as was *Strickland*. Nor is *Hurst* a due process case, as was *Brady*. *Hurst* involves an entirely different constitutional right than either *Strickland* or *Brady*. There has not even been a change on the law in those areas due to *Hurst*. *Hurst* entitles a defendant to litigate a Sixth Amendment right-to-a-jury-trial claim and an Eighth Amendment right to a unanimous recommendation, not other types of constitutional claims.

Under the law-of-the-case doctrine, all questions of law decided on appeal govern the case through all subsequent stages of the proceedings. *Fla. Dept. of Transp. v. Juliano*, 801 So.2d 101, 105 (Fla. 2001). The newly discovered evidence claim, the *Brady* claims, and the *Strickland* claims are all procedurally barred by the law-of-the-case doctrine and should not be revisited by this Court.

Opposing counsel invokes the manifest injustice exception to the doctrine citing *Mosley v. State*, 209 So.3d 1248 (Fla. 2016). But opposing counsel is confusing with retroactivity analysis with the concept of manifest injustice. The two concepts are not equivalent. Opposing counsel may not use a retroactivity case to establish the exception.

Furthermore, *Mosley* does not apply to Reed. Rather, *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017), and *Asay v. State*, 210 So.3d 1 (Fla. 2016), apply to him. And under that precedent, *Hurst* does not apply retroactively to Reed and does not resurrect any of these previously denied postconviction claims. There is no manifest injustice to this Court following the law-of-the-case doctrine and its precedent of *Hitchcock* and *Asay*.

The newly discovered evidence claim, the *Brady* claims, and the ineffectiveness claims are all barred by the law-of-the-case doctrine.

Merits

Even ignoring the law-of-the-case doctrine and the non-retroactivity of *Hurst* to Reed, this Court should not reconsider its prior ruling on the postconviction claims. All of this Court's original reasoning rejecting the newly discovered evidence claim; the *Brady* claim; as well as the ineffectiveness claims remains valid in the wake of *Hurst*.

As to the 2013 newly discovered evidence claim, this Court originally held the Hazen and Kormondy affidavits would not probably produce an acquittal or less severe sentence on retrial. *Reed v. State*, 116 So.3d 260, 264-65 (Fla. 2013). This Court explained that the affidavits stating that Kirkland confessed to murdering an old white woman in Jacksonville in February of 1986, "do not implicate Kirkland in the murder for which Reed was convicted" because no "specific names, places, or dates were provided by Kirkland or the affidavits in order to link

Kirkland's confession to the murder for which Reed was convicted." Moreover, as this Court observed "none of the information in the affidavits negates the ample evidence implicating Reed in the murder, including Reed's own confessions and his fingerprints, hat, and hair found at the murder scene." *Id.* at 265. There is nothing about *Hurst* that changes any of this Court's analysis regarding the 2013 newly discovered evidence claim.[2]

As to the 2004 *Brady* claims regarding the fingerprint examiner being under investigation for drug use, this Court concluded that there was no prejudice because the investigation was "not sufficiently related to Reed's case to have permitted its admission." *Reed v. State*, 875 So.2d 415, 430-32 (Fla. 2004). Furthermore, as this Court noted, the prosecutor testified at the evidentiary hearing, if he known about the examiner being under investigation, he simply would have presented the testimony of his supervisor instead of the examiner. Based on the prosecutor's testimony, this Court concluded that the "State could have and likely would have presented Hamm's testimony in substitution." This Court also found no prejudice regarding Officer Summersill's report. *Id.* at 432, n.9. There is nothing about *Hurst* that changes any of this Court's analysis regarding the 2004 *Brady* claims.

As to the 2013 *Brady* claim, regarding Edith Bosso's statement about seeing a black man walking in the neighborhood at about 6:30 p.m. toward Ortega Forest

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[2] Opposing counsel repeatedly refers to a 2004 newly discovered evidence claim in his supplemental brief, but the 2004 postconviction appeal did not contain a claim of newly discovered evidence. *Reed v. State*, 875 So.2d 415 (Fla. 2004). Opposing counsel never identifies the substance of the 2004 newly discovered evidence in his supplemental brief either. Nor could the State find a newly discovered evidence claim in its answer brief to this Court in the postconviction appeal or in the State's response to the first habeas petition. *Reed v. State*, SC02-2191; *Reed v. Crosby*, SC03-558. The State cannot respond to a claim that it cannot identify.

Drive, this Court held that the statement was "not material or prejudicial" because it did not "negate or impeach" the "ample evidence of Reed's guilt, including Reed's own confessions and Reed's fingerprints, hat, and hair at the crime scene." *Reed v. State*, 116 So.3d 260, 265-66 (Fla. 2013). There is nothing about *Hurst* that changes any of this Court's analysis regarding the 2013 *Brady* claim.

As to the ineffectiveness claims, this Court found no ineffectiveness. *Reed v. State*, 875 So.2d 415 (Fla. 2004). This Court quoted the trial court's order that defense counsel was "well known to the Bar in the Fourth Circuit, who by the time he represented Reed, had been involved in fifteen to twenty prior murder cases both as an assistant state attorney and a criminal defense attorney." *Id.* at 422. The trial court found defense counsel's "testimony at the evidentiary hearing to be credible and to reveal sound tactical and ethical decisions devolved from his conclusion that Reed effectively had admitted that he was in fact responsible for the rape and murder of the victim." *Id.* There is nothing about *Hurst* that changes any of this Court's analysis regarding the various ineffectiveness claims.

There is nothing about *Hurst* that changes any of this Court's analysis regarding any of these claims. All of this Court's original reasoning rejecting the various postconviction claims remains valid in the wake of *Hurst*. And therefore, none of this Court's prior holdings should be revisited.

Remedy

Opposing counsel is asserting that any subsequent change in the law regarding the right-to-a-jury-trial means that his numerous and various prior postconviction claims should be relitigated. But the remedy for a violation of the right to a jury trial is a new jury trial, not a new postconviction appeal. There is no connection between the purported error and the proposed remedy.

Furthermore, the proposed remedy of a new postconviction proceeding is designed to evade this Court's non-retroactivity holdings. This Court has never employed such a remedy for a *Hurst* error. While this Court has ordered dozens of new penalty phase proceedings based on *Hurst* error, this Court has never ordered new postconviction proceedings based on *Hurst* error. While this argument regarding the appropriate remedy has been presented to this Court in other cases, this Court has not adopted that remedy. If there is no *Hurst* error due to the non-retroactivity of *Hurst* to the particular defendant, this Court denies all relief. Reed is not entitled to any relief.

Accordingly, the trial court properly summarily denied this claim.

ISSUE III

WHETHER THE DEATH SENTENCE IS UNRELIABLE IN VIOLATION OF THE EIGHTH AMENDMENT? (Restated)

Reed additionally asserts that his death sentence is unreliable in violation of the Eighth Amendment. SIB at 28. Relying on *Johnson v. Mississippi*, 486 U.S. 578 (1988), he claims that his death sentence is unreliable due to unidentified materially inaccurate information. This claim should not be considered because it was not raised below. *Johnson* does not apply because the prior violent felony aggravator is not involved and was not based on a conviction that was vacated. Assuming the Eighth Amendment's heightened reliability requirement applies to guilt phase evidence and assuming that the serology evidence is the evidence being challenged on appeal as being inaccurate, the serology evidence was scientifically accurate. Reed, although a nonsecretor, is a possible contributor of the semen, just as this Court explained in the first postconviction appeal. The serology evidence was not materially inaccurate. Reed's death sentence does not violate the Eighth Amendment's heightened reliability requirement.

Standard of review

The standard of review of such an Eighth Amendment claim is unclear under Florida law, but it probably is *de novo*.

The trial court's ruling

There is no ruling from the trial court on this Eighth Amendment unreliability claim because it was not raised as a separate claim below.

Preservation

This issue is not preserved because it was not raised below as a separate claim. Indeed, *Johnson v. Mississippi*, 486 U.S. 578 (1988), was not even cited in Reed's 2017 successive postconviction motion. This Court does not consider postconviction claims not raised below. *Hildwin v. State*, 84 So.3d 180, 187, n.5 (Fla. 2011) (refusing to consider a claim of ineffectiveness because it was not raised below citing *Green v. State*, 975 So.2d 1090, 1104 (Fla. 2008)); *Crain v. State*, 78 So.3d 1025, 1038, n.8 (Fla. 2011) (same). The Eighth Amendment claim was not preserved and should not be considered for the first time on appeal.

Merits

First, opposing counsel does not specifically identify what he considers to be the "materially inaccurate information" that is the basis of the claim. But because the fingerprints were reconfirmed at the postconviction evidentiary hearing to, in fact, be Reed's fingerprints by another expert and the fingerprints were, in fact, established to be "fresh" based on the surrounding circumstances,[3] the State is

[3] While the State agrees that fingerprints cannot be dated, the circumstances of the crime establish that the fingerprints on the checks were recently placed on the checks. Reed's fingerprints were found on the victim's check in the **backyard** of the house. Reed had stolen her wallet and then discarded her checks in the backyard, and then discarded the credit cards and wallet itself in the water behind the victim's home as he was escaping. Obviously, the checks were not stored in the backyard but were moved as part of the crime and obviously fingerprints do not last long on items exposed to Florida's rain and sun. While Reed had lived with the victim weeks before the murders, he had no access to the victim's checkbook. These facts establish that Reed's fingerprints were, in fact, "fresh." As this Court observed, "other circumstances beyond the ninhydrin reaction effectively 'dated' the fingerprint." *Reed v. State*, 875 So.2d 415, 427 (Fla. 2004). This Court also quoted the trial court's findings regarding the freshness, "it was obvious to the jury that the fingerprint was fresh as it was found on a check to which the defendant had no access, in a wallet to which the defendant had no access, which had been inside the residence prior to the rape

going to assume that opposing counsel's reference to "materially inaccurate information" refers to the serology evidence.

But, as this Court observed regarding the serology evidence in the postconviction appeal in rejecting the claim of ineffectiveness for failure to retain a serology expert, the testimony that Reed could have been the source of the semen was "not illogical." *Reed v. State*, 875 So.2d 415, 423 (Fla. 2004). "Reed, a nonsecretor, fell within the male population from which the semen could have derived." *Id.* at 424. The defense expert at the evidentiary hearing acknowledged on cross-examination the correctness of State's expert testimony at trial that "Reed fell within the fifty-six to fifty-seven percent of the male population that could have had intercourse with the victim." *Id.* at 425. This Court noted that a defense serologist "would not have changed the statistical numbers in any way." *Id.* The serology evidence, while it may have been somewhat confusing to the jury, was scientifically accurate.

Furthermore, if Reed actually wanted to attack the scientific validity of the evidence of the semen used against him, he should have agreed to the DNA testing that the State offered to perform on the rape kit during the postconviction proceedings. Instead, Reed personally waived DNA testing. Reed may not now attempt to relitigate the scientific accuracy of the semen in light of that waiver.

Opposing counsel's reliance on *Johnson v. Mississippi*, 486 U.S. 578 (1988), is misplaced. *Johnson* involved a prior violent felony aggravator that was based on a conviction that was later vacated. This case does not involve the prior violent felony aggravator, much less a vacated prior conviction used as an aggravator.

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and murder of the victim, and which was found laying in the backyard by investigating officers." *Reed*, 875 So.2d at 427. The State could have, and would have, argued that the fingerprints were recently placed on the check and the check was recently moved as part of the crime to the jury based on these facts without any reliance on the fingerprint expert's testimony regarding freshness.

This Court struck the prior violent felony aggravator in the direct appeal. *Reed*, 560 So.2d at 207. Moreover, as this Court has explained, *Johnson* does not apply unless the prior conviction used as an aggravator has been vacated or set aside. *Wickham v. State*, 124 So.3d 841, 864 (Fla. 2013) (explaining in order to state a valid claim under *Johnson*, a defendant must show that the conviction on which the prior violent felony aggravator is based has been reversed citing *Phillips v. State*, 894 So.2d 28, 36 (Fla. 2004)). *Johnson* does not apply.

Furthermore, the reasoning of *Johnson* regarding materially inaccurate information cannot be expanded to cover any evidence that opposing counsel disputes. *Johnson* cannot be read that broadly. Materially inaccurate information must concern evidence that has been demonstrated to be false, not that is merely in some dispute. Reed was granted an opportunity to demonstrate the serology evidence was false at the first evidentiary hearing and failed to do so. The reasoning of *Johnson* does not apply either.

Additionally, the inaccurate information involved in *Johnson* related to the sentencing phase, not the guilt phase. But here the serology evidence relates to the guilt phase. The Eighth Amendment concerns cruel and unusual ***punishment***. Given the actual language of the amendment, the Eighth Amendment's heightened reliability requirement does not apply to the guilt phase. But, even extending the heightened reliability requirement to evidence of guilt, the serology evidence was accurate, as explained above. Reed was not convicted based on materially inaccurate information. The death sentence does not violate the Eighth Amendment's heightened reliability requirement.

Accordingly, the trial court's summary denial of the postconviction motion should be affirmed.

CONCLUSION

The State respectfully requests that this Court affirm the trial court's summary denial of the successive postconviction motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing SUPPLEMENTAL ANSWER BRIEF has been furnished by electronic mail via the e-portal to Martin J. McClain of McClain & McDermott, 141 N.E. 30 Street, Wilton Manors, FL 33334-1064; phone: (305) 984-8344; email: martymcclain@earthlink.net this 27th day of March, 2018.

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CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Bookman Old Style 12-point font.

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