IN THE SUPREME COURT OF FLORIDA

KEVIN FOSTER,

Appellant,

v.

CASE NO. SC18-860
DEATH PENALTY CASE

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

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The instant appeal involves the trial court's order denying Foster's "fourth" successive motion for postconviction relief. Appellant correctly notes that his third successive motion was struck "without prejudice for Defendant to refile a successive 3.851 motion within the page limit, if he can do so in good faith." (PCR-3:77-78). Thereafter, Appellant filed another motion which both the State and the trial court referred to as a "fourth" motion. For clarity purposes, Appellee will adopt the record citation method utilized by Appellant.

STATEMENT OF THE CASE AND FACTS

In 1998, Kevin Don Foster was convicted of the first-degree murder of Mark Schwebes and sentenced to death. The following factual background was taken from this Court's opinion affirming Foster's conviction and death sentence.

TRIAL

> The evidence presented at trial established that in early April of 1996, a few teenagers organized a group called the "Lords of Chaos." The original membership of the group was made up of Foster, Peter Magnotti and Christopher Black, the latter two of whom were attending Riverdale High School ("Riverdale") at the time. Foster, the leader of the Lords of Chaos, was not a student. The group eventually grew to later include, among other Riverdale students, Derek Shields, Christopher Burnett, Thomas Torrone, Bradley Young and Russell Ballard as additional members. Each member of the Lords of Chaos had a secret code name. Foster's code name was "God." The avowed purpose of the group was to create disorder in the Fort Myers community through a host of criminal acts.
>
> On April 30, 1996, consistent with its purpose, the group decided to vandalize Riverdale and set its auditorium on fire. Foster, Black, and Torrone entered Riverdale and stole some staplers, canned goods, and a fire extinguisher to enable them to break the auditorium windows. Leading the group, Foster carried a gasoline can to start the fire in the auditorium while the other group members, Shields, Young, Burnett, Magnotti, and Ballard, kept watch outside.
>
> The execution of the vandalism was interrupted at around 9:30 p.m., when, to the teenagers' surprise, Riverdale's band teacher, Mark Schwebes, drove up to the auditorium on his way from a school function nearby. Upon seeing the teacher, Foster ran, but Black and Torrone were confronted by Schwebes who seized the stolen items from them. Schwebes told them that he would contact Riverdale's campus police the next day and report the incident. Schwebes then left to have

dinner with a friend, David Adkins.[FN1]

> FN1. Adkins testified that he saw Schwebes' vehicle parked at the spot where Black and Torrone were caught by Schwebes at about 9:30 p.m. He also saw someone running from the general location of Schwebes' vehicle.

When Black and Torrone rejoined the others, Black declared that Schwebes "has got to die," to which Foster replied that it could be done and that if Black could not do it, he would do it himself. Foster was apparently concerned that the arrest of Black and Torrone would lead to the exposure of the group and their criminal activities.

Subsequently, Black suggested that they follow Schwebes and make the killing look like a robbery. However, upon further discussion, the group decided to go to Schwebes' home and kill him there instead. Foster then told the group that he would go home and get his gun. They obtained Schwebes' address and telephone number through a telephone information assistance operator, and confirmed this information by calling and identifying Schwebes' voice on his answering machine. They then went to Foster's home where they obtained a map to confirm the exact location of Schwebes' address, and procured gloves and ski masks in preparation for the killing. Foster decided to use his shotgun in the killing, and replaced the standard birdshot with # 1 buckshot, a more deadly ammunition. The group also retrieved a license tag they had stolen earlier to use during the crime.

Black, Shields, Magnotti, and Foster agreed to participate in the murder, and at 11:30 p.m., drove to Schwebes' home. Shields agreed to knock at the door and for Black to drive. When the group finally arrived there, Foster and Shields walked up to Schwebes' door, and as Shields knocked, Foster hid with the shotgun. As soon as Schwebes opened the door, Shields got out of the way, Foster stepped in front of Schwebes and shot him in the face. As Schwebes' body was convulsing on the ground, Foster shot him once more.

Although there were no other eyewitnesses, two of Schwebes' neighbors heard the shots and a car as it left the scene.[FN2] Paramedics arrived at the scene almost immediately and declared Schwebes dead. The medical examiner confirmed that Schwebes died of shotgun wounds to his head and pelvis, and that Schwebes would have died immediately from the shot to the face.

> FN2. The two witnesses testified to hearing a car with a loud muffler leaving immediately after the two shots. Shields' car had a bad muffler. One testified to seeing a car driving away.

On the way to Foster's home after the killing, the group stopped to remove the stolen tag, and Foster wiped off the tag to remove any fingerprints before discarding it. Once home, the four of them got into a "group hug" as Foster congratulated them for successfully sticking to the plan. Foster then called Burnett and Torrone and boasted about how he blew off part of Schwebes' face and to watch for it in the news. The next day, on May 1, 1996, while at Young's apartment, the six o'clock news reported the murder, and Foster continuously laughed, hollered, and bragged about it. Young testified that Foster said that he looked Schwebes right in the eyes before shooting him in the face and then watched as this "red cloud" flowed out of his face.

The police found Foster's shotgun, a ski mask, gloves, and a newspaper clipping of the murder in the trunk of Magnotti's car. According to Burnett, he was directed by Foster to put those items in Magnotti's trunk. Foster's fingerprint was found on the shotgun, the latex gloves, and the newspaper. Burnett and Magnotti's prints were also found on the newspaper.

Foster's mother, Ruby Foster ("Ms. Foster"), testified on direct examination that Foster called her from home at around 4:30 p.m. on the day of the murder. When she got home that night, at 9 p.m., Foster was there. She later left the house at about 9:45 p.m., but found Foster home when she returned a little past 11 p.m. She made another trip to the

Circle K store and returned at about 11:20 p.m. once again to find Foster where she left him. On cross-examination, however, Ms. Foster admitted that she merely assumed that Foster was at home when he called her. Additionally, all the participants in the conspiracy and the murder testified that when they met at Foster's home on the night of the murder, no one was in the home and Foster had to disable the alarm apparatus upon entering.

All the members of the Lords of Chaos who participated in the murder and the conspiracy cooperated with the State through various plea agreements [FN3] and testified to the above facts at trial against Foster with regard to the make-up of the group, Foster's leadership role in the group, criminal acts committed by the group prior to the murder, and his leadership and mastermind role in the conspiracy and the ensuing murder. Foster was convicted for the murder of Schwebes.

> FN3. Pursuant to plea agreements with the State which required truthful testimony against Foster, the group members were sentenced as follows: Black and Shields were sentenced to life without the possibility of parole; Magnotti was sentenced to thirty-two years' imprisonment; Burnett was sentenced to two years in county jail for non-homicidal offenses; Torrone was sentenced to one year in county jail, ten years probation, one hundred hours of community service and restitution. As to the other members, the record does not indicate whether there was any plea agreement or any jail or prison sentences.

PENALTY PHASE

During the penalty phase, the State presented one witness. The State's witness, Robert Duram, was the director of student assignment for Lee County and former principal of Riverdale. Duram testified to his knowledge and hiring of Schwebes as band director. He also testified that Schwebes' death was devastating not only to the school, but also to the rest of the student body, whose participation in extra-curricular activities dropped significantly as a result of the

tragedy. The school had to bring in numerous counselors to help the students cope with the effects of Schwebes' death.

The defense presented numerous witnesses who presented a picture of Foster as a kind and caring person. May Ann Robinson, Foster's neighbor, testified that he once helped her start her car and offered to let her borrow a lawn mower. Robert Moore, another neighbor, testified that Foster was well-mannered and a hard worker. Shirley Boyette found Foster to be very caring, intelligent, and well-mannered. Robert Fike, Foster's supervisor at a carpentry shop, and James Voorhees, his co-worker, found him to be a reliable worker. Voorhees also testified that Foster was very supportive to Voorhees' son who suffered from and eventually died of leukemia. Similarly, Raymond and Patricia Williams testified that Foster was very nice to their son who suffered from spina bifida. Peter Albert, who is confined to a wheelchair, related how Foster had helped Albert's mother care for him after his wife died. Foster also helped Albert in numerous other ways, including preparing his meals, fixing things around the house, and helping Albert in and out of his swimming pool.

There was additional testimony that described Foster's involvement with foreign exchange students. Foster was also known to have given positive advice to young children. Foster's sister, Kelly Foster, testified to how he obtained his GED after dropping out of high school and that he obtained a certificate for the completion of an "auto cad" program at a vocational-technical school. Finally, Foster's mother testified that he was born prematurely and suffered from allergies, and that Foster's father abandoned him a month after birth. On cross-examination, many of the witnesses who testified to Foster's kindness admitted that they had not been in contact with him for a number of years.

SENTENCE

The jury recommended that Foster be sentenced to death by a nine-to-three vote. Following a Spencer hearing, the trial court found two aggravating factors: (1) the capital felony was committed for the

> purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; and (2) the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. Further, the court rejected the statutory mitigator of age-Foster was eighteen at the time of the crime-and attached very little to no weight to some twenty-three nonstatutory mitigators offered by Foster. The trial court followed the jury's recommendation and imposed the death penalty.

Foster v. State, 778 So. 2d 906, 909-12 (Fla. 2000) (footnotes omitted).

After this Court issued its opinion affirming Foster's judgment and death sentence, Foster filed a motion for rehearing. This Court denied the motion for rehearing on January 22, 2001. Foster did not seek certiorari review in the United States Supreme Court, so his conviction and sentence became final 90 days after the denial of his motion for rehearing – April 22, 2001.

On September 27, 2001, Foster filed his initial postconviction motion, and filed an amended motion in 2010. (PCR-1. 57-123, 1171-1320). Eventually, in 2011, the court conducted an evidentiary hearing on Foster's postconviction claims, and on July 6, 2011, issued an order denying relief. (PCR-1. 3674-3728). Foster appealed, and this Court affirmed the denial of relief. Foster v. State, 132 So. 3d 40 (Fla. 2013).

Foster also sought federal habeas corpus relief by filing a petition for writ of habeas corpus with the United States

District Court – Middle District. After the State filed a response in federal court to the habeas petition, Foster moved to stay the federal proceedings pending the United States Supreme Court's decision in Hurst v. Florida, 136 S. Ct. 616 (2016). The federal court initially denied the motion to stay, but subsequently granted a motion to stay filed by Foster while he litigated a successive postconviction motion in state court.

On February 18, 2016, Foster filed a successive postconviction motion seeking relief pursuant to Hurst v. Florida, 136 S. Ct. 616 (2016). (PCR-2. 142-70). The State responded and argued that the motion should be summarily denied because Foster's successive motion was untimely as this Court had not held that Hurst was retroactive. (PCR-2. 176-86). On April 21, 2016, the lower court denied the motion as "premature and insufficient," without prejudice to file another motion after the Florida Supreme Court determined whether Hurst was retroactive. (PCR-2. 216-17).

On January 12, 2017, Foster filed a second successive postconviction motion again seeking relief based on Hurst. (PCR-2. 218-75). In his motion, Foster presented numerous Hurst-based claims and specifically argued that chapter 2016-13, Laws of Florida (revising Florida Statutes, section 921.141, to require a 10-2 jury recommendation for death), mandated that his death

sentence be vacated. On April 27, 2017, the lower court denied Foster's successive motion. (PCR-2. 350-65). Foster moved for a rehearing and argued that the enactment of chapter 2017-1 required that the Court revisit its prior ruling. (PCR-2. 366-87). The court denied the rehearing and specifically rejected Foster's argument that the enactment of chapter 2017-1 required that his death sentence be vacated. (PCR-2. 388-89). Foster appealed to this Court, and on January 29, 2018, this Court affirmed the lower court's denial of relief. See Foster v. State, 235 So. 3d 294 (Fla. 2018) (noting that Hurst does not apply retroactively to Foster's sentence of death).

On February 2, 2018,[1] Foster filed his third successive motion, totaling 68 pages, raising two claims: (1) a challenge to his death sentence based on the enactment of chapter 2017-1; and (2) a claim under the Eighth Amendment that his death sentence constitutes cruel and unusual punishment because he was 18 years old at the time of the murder and had not yet reached cognitive maturity. Although the trial court noted that Foster's

[1] Foster filed his third motion only two days after this Court affirmed the lower court's denial of his previous successive motion based on Hurst. Once Foster had another pending state motion, he argued in federal court that the court should continue to stay his federal habeas proceedings while he litigated his state court claims. On June 5, 2018, the federal court lifted the stay, and Foster immediately filed another motion seeking to stay his case pending the outcome of this appeal.

two claims were time barred and meritless, the court nevertheless struck the motion "without prejudice for Defendant to refile a successive 3.851 motion within the page limit, if he can do so in good faith." (PCR-3. 77-78).

Two months after the court struck Foster's 68-paged motion, Foster's counsel filed a "fourth" motion and repackaged the same exact two claims and arguments into two separate documents to avoid the 25-page limit imposed by Florida Rule of Criminal Procedure 3.851(d)(2). (PCR-3. 80-393). The trial court, without conducting a case management conference,[2] summarily denied Foster's motion. (PCR-3. 477-85). The instant appeal follows.

[2] Appellant does not allege that the court erred in failing to hold a case management conference as required by Florida Rule of Criminal Procedure 3.851(f)(5)(B), but the State would note that any such failure was clearly harmless error in the instant case. See Sochor v. State, ___ So. 3d ____, 2018 WL 1100831, *1 (Fla. Mar. 1, 2018) ("Because the motion was legally insufficient on its face and refuted by the record, we find that the trial court's failure to hold a case status conference was harmless error, and that no evidentiary hearing was required.").

SUMMARY OF THE ARGUMENT

The postconviction court properly summarily denied Foster's successive motion as the record clearly establishes that his claims are untimely, procedurally barred, and meritless as a matter of law. Foster's first claim involved a challenge to his death sentence based on chapter 2017-1, Laws of Florida, which revised Florida Statutes, section 921.141, in light of Hurst v. Florida, 136 S. Ct. 616 (2016), and Hurst v. State, 202 So. 3d 40 (Fla. 2016), cert. denied, 137 S. Ct. 2161 (2017). Because neither Hurst nor the statute are retroactive to Foster's case, his claim was meritless and untimely under Florida Rule of Criminal Procedure 3.851. The court also properly found the claim procedurally barred as Foster had previously raised this identical claim and it was rejected by the lower court and affirmed by this Court on appeal. Foster v. State, 235 So. 3d 294 (Fla. 2018).

In his second claim, Foster relied on alleged newly discovered evidence in an attempt to extend Roper v. Simmons, 543 U.S. 551 (2005). As the lower court properly found, however, this claim was untimely as the recent research studies did not constitute newly discovered evidence. Additionally, the court properly found that the claim was procedurally barred as Foster had never raised it before in his postconviction proceedings

despite clearly having an opportunity to do so. Lastly, the claim lacked merit as both the United States Supreme Court and this Court have determined that the critical age for Eighth Amendment jurisprudence is eighteen, and because Foster was an eighteen-year-old adult at the time of the murder, his death sentence does not constitute cruel and unusual punishment.

STANDARD OF REVIEW

Florida Rule of Criminal Procedure 3.851(f)(5)(B) permits the summary denial of a successive motion for postconviction relief without an evidentiary hearing "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief." Williamson v. State, 961 So. 2d 229, 234 (Fla. 2007). Postconviction claims may be summarily denied when they are facially or legally insufficient, procedurally barred, or refuted by the record. Connor v. State, 979 So. 2d 852, 868 (Fla. 2007). "This Court reviews the circuit court's decision to summarily deny a successive rule 3.851 motion de novo, accepting the movant's factual allegations as true to the extent they are not refuted by the record, and affirming the ruling if the record conclusively shows that the movant is entitled to no relief." Walton v. State, 3 So. 3d 1000, 1005 (Fla. 2009).

ARGUMENT

ISSUE I

THE POSTCONVICTION COURT PROPERLY SUMMARILY DENIED FOSTER'S CLAIM BASED ON CHAPTER 2017-1, LAWS OF FLORIDA, AS THE RECORD CLEARLY ESTABLISHES THAT HIS CLAIM WAS UNTIMELY, PROCEDURALLY BARRED, AND MERITLESS.

In his second successive motion for postconviction relief filed in January, 2017, Foster alleged that he was entitled to relief from his death sentence based on Hurst v. Florida, 136 S. Ct. 616 (2016), Hurst v. State, 202 So. 3d 40 (Fla. 2016), Mosley v. State, 209 So. 3d 1248 (Fla. 2016), Perry v. State, 210 So. 3d 630 (Fla. 2016), and the enactment of chapter 2016-13, Laws of Florida. After the court denied this motion, Foster moved for rehearing and claimed that the court had to revisit its ruling in light of the enactment of chapter 2017-1, effective March 13, 2017. The court denied the motion for rehearing finding that "[i]n the absence of the Florida Supreme Court finding this statute applies retroactively to cases in which a defendant has already been sentenced, the enactment of the statute has no bearing on Defendant's case." (PCR-2. 388-89). Foster appealed this ruling, and this Court affirmed the lower court's denial of relief. Foster v. State, 235 So. 3d 294 (Fla. 2018).

Foster thereafter returned to circuit court and filed another successive motion, once again based on Hurst and raised

a claim that the enactment of chapter 2017-1, Laws of Florida, required the court to vacate his death sentence. The postconviction court, having determined that the claim was purely legal and did not require an evidentiary hearing, summarily denied the claim and found it untimely, procedurally barred, and without merit. (PCR-3. 480-83). The State submits that the court properly denied the instant claim.

The postconviction court correctly determined that Foster's claim based on Hurst and the enactment of chapter 2017-1, Laws of Florida, was untimely under Florida Rule of Criminal Procedure 3.851. (PCR-3. 481-82). Pursuant to rule 3.851(d)(1), a motion to vacate judgment of conviction and sentence of death must be filed within the one year of the judgment and sentence becoming final. Foster's motion was filed long after his sentence became final in 2001. Therefore, the only way for his motion to be considered timely, is if any one of the following exceptions were properly alleged in his motion:

> (A) 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, or
>
> (B) the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively, or
>
> (C) postconviction counsel, through neglect, failed to file the motion.

Fla. R. Crim. P. 3.851(d)(2). As the lower court correctly found, none of these exceptions applied in Foster's case.

Foster asserted that his motion was timely filed within one year of the enactment of chapter 2017-1, Laws of Florida. However, chapter 2017-1, does not involve a fundamental constitutional right that has been held to apply retroactively. As this Court has noted, on numerous occasions, chapter 2017-1, Laws of Florida, did not create a substantive right that must be applied retroactively. See Hannon v. State, 228 So. 3d 505, 513 (Fla.) (rejecting Hannon's Hurst claims and denying his challenge based on chapter 2017-1, Laws of Florida), cert. denied, 138 S. Ct. 441 (2017); Asay v. State, 224 So. 3d 695 (Fla. 2017) (denying Asay's habeas petition based on chapter 2017-1, Laws of Florida, because Asay "has not presented a novel claim for this Court's consideration"); Lambrix v. State, 227 So. 3d 112, 113 (Fla.) (denying claim based on chapter 2017-1 based on prior precedent), cert. denied, 138 S. Ct. 312 (2017); Taylor v. State, ___ So. 3d ____, 2018 WL 2057452, *8 (Fla. May 3, 2018) (finding that postconviction court did not abuse its discretion when denying Taylor's request to amend his successive motion to add a meritless claim under chapter 2017-1 as the statute did not create a substantive right that must be applied retroactively); Rodriguez v. Jones, SC18-352, 2018 WL 1673423

(Fla. Apr. 6, 2018); Thomas v. Jones, SC17-2268, 2018 WL 3198373 (Fla. June 29, 2018).

In addition to properly finding that Foster's claim was untimely under rule 3.851, the court also correctly noted that the claim was procedurally barred. As noted earlier, Foster raised this exact same Hurst-based claim, then under the guise of the enactment of chapter 2016-13, Laws of Florida, in his second successive postconviction motion. After the trial court summarily denied the motion, Foster argued in a motion for rehearing that the recent enactment of chapter 2017-1 required the court to reconsider its ruling. The postconviction court denied the rehearing and noted that chapter 2017-1 did not require the court to alter its ruling. On appeal, this Court affirmed the lower court's denial of relief. Foster v. State, 235 So. 3d 294 (Fla. 2018).

As this Court has noted, "[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); see also Asay, 224 So. 3d at 703 (rejecting an identical argument as Foster currently makes and noting that "[d]espite Asay's contention that this claim is based purely on chapter 2017-1, but for the title and the jury vote requirement, this claim is identical to Asay's previous

claim [under chapter 2016-13]"); Fla. R. Crim. P. 3.851(e)(2) (stating that "[a] claim raised in a successive motion shall be dismissed if the trial court finds that it fails to allege new or different grounds for relief and the prior determination was on the merits."). Even if the specific challenge to chapter 2017-1 had not been denied on the merits, Foster's claim would still be procedurally barred. Chapter 2017-1 merely codifies Hurst, and Foster's previous motion was denied because Hurst is not applicable to his death sentence.

Here, both the postconviction court and this Court have already determined that Foster is not entitled to Hurst relief. Because Foster's Hurst claim has already been litigated, the doctrines of law-of-the-case and collateral estoppel further preclude re-litigation of this issue. In State v. McBride, 848 So. 2d 287, 289-90 (Fla. 2003), citing Florida Dep't of Transp. v. Juliano, 801 So. 2d 101, 105 (Fla. 2001), this Court explained that under the law-of-the-case doctrine, "questions of law *actually decided on appeal* must govern the case in the same court and the trial court, through all subsequent stages of the proceedings." The court further noted that collateral estoppel applies in the postconviction context to prevent parties from rearguing the same issues that have been decided between them. Id. at 290-91. It was improper for Foster to re-raise his Hurst-

based claim in another successive motion when it had already been resolved by the postconviction court and that ruling affirmed by this Court on appeal. As such, the postconviction court properly found that Foster's claim was procedurally barred.

Finally, the lower court followed this Court's well-established precedent and found that Foster's claim was meritless as a matter of law. Foster's claim in his successive motion was premised on chapter 2017-1, Laws of Florida, and the revision to Florida Statutes, section 921.141, following the decisions in Hurst v. Florida, 136 S. Ct. 616 (2016), and Hurst v. State, 202 So. 3d 40 (Fla. 2016), cert. denied, 137 S. Ct. 2161 (2017). In Hurst v. Florida, the United States Supreme Court declared the portion of Florida's capital sentencing scheme requiring the judge, rather than a jury, to find each fact necessary to impose a sentence of death unconstitutional in light of Ring v. Arizona, 536 U.S. 583 (2002). After being remanded to this Court for a harmless-error analysis, this Court expanded the holding and determined that Hurst v. Florida requires that all critical findings must be unanimously found by the jury before the trial court may consider imposing a death sentence. "The jury in a capital case must unanimously and expressly find all the aggravating factors that were proven

beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death." Hurst v. State, 202 So. 3d at 57.

This Court analyzed the retroactive application of Hurst in Mosley v. State, 209 So. 3d 1248, 1276-83 (Fla. 2016), and Asay v. State, 210 So. 3d 1, 15-22 (Fla. 2016), cert. denied, 138 S. Ct. 41 (2017). In Mosley, this Court determined that Hurst is retroactively applicable to cases that were not final when the Ring opinion was issued in 2002. Mosley, 209 So. 3d at 1283. However, in Asay, this Court held that Hurst is not retroactive to cases, like Foster's, where the death sentences became final prior to Ring.

Here, Foster's death sentence became final in 2001; therefore, as this Court has already determined, Hurst does not apply to his case. Foster, 235 So. 3d at 295. This Court has consistently applied Asay by denying retroactive application of Hurst to defendants whose death sentences were final prior to Ring. See, e.g., Asay v. State, 210 So. 3d 1 (Fla. 2016), cert. denied, 138 S. Ct. 41 (2017); Hitchcock v. State, 226 So. 3d 216 (Fla.), cert. denied, 138 S. Ct. 513 (2017); Lambrix v. State, 227 So. 3d 112 (Fla.), cert. denied, 138 S. Ct. 312 (2017);

Hannon v. State, 228 So. 3d 505 (Fla.), cert. denied, 138 S. Ct. 441 (2017); Branch v. State, 234 So. 3d 548 (Fla.), cert. denied, 138 S. Ct. 1164 (2018); Kaczmar v. State, 228 So. 3d 1 (Fla. 2017), cert. denied, 138 S. Ct. 1973 (2018).

Foster's attempt to relitigate Hurst under the guise of chapter 2017-1, Laws of Florida, is unavailing and, as previously noted, this Court has consistently found such a claim meritless. See Lambrix v. State, 227 So. 3d 112, 113 (Fla. 2017), cert. denied, 138 S. Ct. 312 (2017); Asay v. State, 224 So. 3d 695 (Fla. 2017); Hannon v. State, 228 So. 3d 505 (Fla. 2017), cert. denied, 138 S. Ct. 441 (2017). Like Hannon, Foster has "choose[n] to ignore [this Court's] precedent because he disagrees with the retroactivity cutoff . . . set in Asay V, however, that decision is final and has been impliedly approved by the United States Supreme Court, which denied certiorari review." Hannon, 228 So. 3d at 513.

The revision to Florida's death penalty statute in 2017 was made in the aftermath of Hurst and implements the changes from Hurst. In general, there is a presumption against retroactive application of statutes absent an express statement of legislative intent. Fla. Ins. Guar. Ass'n, Inc. v. Devon Neighborhood Ass'n, Inc., 67 So. 3d 187, 195 (Fla. 2011). There is no express statement that the legislature intended that

chapter 2017-1 be applied retroactively, and thus this presumption cannot be rebutted. See also Senate Bill Analysis and Fiscal Impact Statement, SB 280, Feb. 21, 2017, at 6-7 (noting that this Court's retroactive application to post-Ring decisions will "significantly increase both the workload and associated costs of public defender offices for several years to come"). Further, as the Eleventh Circuit Court of Appeals noted in Lambrix v. Secretary, Dep't of Corr., 872 F.3d 1170, 1183 (11th Cir. 2017):

> no U.S. Supreme Court decision holds that the failure of a state legislature to make revisions in a capital sentencing statute retroactively applicable to all of those who have been sentenced to death before the effective date of the new statute violates the Equal Protection Clause, the Due Process Clause, or the Eighth Amendment.

Since the legislature did not express an intent for the statute to be retroactive, it is not retroactive to cases which were final prior to enactment of the new statute. Foster's judgment became final in 2001 and he has not received a new guilt or penalty phase since that time. Thus, the 2017 enactment of changes to the capital sentencing statute would not be applicable to Foster's case unless he were to receive a new guilt and/or penalty phase.

In sum, Foster's attempt to distinguish the instant claim to circumvent the time and the procedural bars in this case is

unavailing. In Hitchcock, this Court succinctly indicated, "[a]lthough Hitchcock references various constitutional provisions as a basis 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, 226 So. 3d at 217. The same is true here. Foster's arguments are nothing more than a claim that Hurst should be retroactively applied to his sentence, and this Court has already held that Foster is not entitled to such relief. For all these reasons, this Court should affirm the lower court's denial of relief.

ISSUE II

THE POSTCONVICTION COURT PROPERLY SUMMARILY DENIED FOSTER'S NEWLY DISCOVERED EVIDENCE CLAIM SEEKING AN EXTENSION OF ROPER V. SIMMONS, 543 U.S. 551 (2005), AND CLAIMING THAT THE EXECUTION OF A DEFENDANT WHO WAS EIGHTEEN AT THE TIME OF THE MURDER VIOLATED THE EIGHTH AMENDMENT'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

Foster alleged as his second claim in his successive postconviction motion that "newly discovered evidence" establishes that, despite the fact that he was 18 years of age when he committed the murder, he was not "cognitively" an adult. Foster sought to extend the United States Supreme Court's holding in Roper v. Simmons, 543 U.S. 551 (2005), prohibiting the execution of any individual who was under the age of 18 at the time of the murder, and claimed that there is now a national consensus based on this alleged newly discovered evidence that executing someone who was under the age of 21 at the time of the murder would constitute cruel and unusual punishment in violation of the Eighth Amendment. The postconviction court summarily denied Foster's claim as untimely, procedurally barred, and without merit. (PCR-3. 483-84).

First, it is clear that Foster's claim is untimely and procedurally barred as found by the postconviction court. Foster's instant claim mirrored the claim filed by Eric Scott Branch in his recent death warrant proceedings, and Foster, like

Branch, "argues for an expansion of Roper on the basis that newly discovered evidence — in the form of scientific research with respect to development of the human brain, as well as the evolution of state and international law — mandates that individuals who committed murder in their late teens and early twenties be treated like juveniles." Branch v. State, 236 So. 3d 981, 985 (Fla.), cert. denied, 138 S. Ct. 1164 (2018).

In Branch, the defendant filed a successive postconviction motion following the signing of a death warrant and made the same exact arguments as Foster currently makes based on alleged newly discovered evidence. The trial court summarily denied Branch's claim without an evidentiary hearing. In affirming the summary denial, this Court stated:

> Branch next contends that the circuit court erred when it summarily denied his claim that he is ineligible for the death penalty. However, the Supreme Court in Roper designated eighteen as the critical age for determining death eligibility, stating:
>
> > Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. *The qualities that distinguish juveniles from adults do not disappear when an individual turns 18.* By the same token, some under 18 have already attained a level of maturity some adults will never reach.... [H]owever, a line must be drawn.... The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, *we conclude, the age at which the line for death eligibility ought to rest*.

543 U.S. at 574, 125 S. Ct. 1183 (emphasis added). Branch argues for an expansion of Roper on the basis that newly discovered evidence—in the form of scientific research with respect to development of the human brain, as well as the evolution of state and international law—mandates that individuals who committed murder in their late teens and early twenties be treated like juveniles.[*5] The circuit court properly denied this claim without an evidentiary hearing.

> [*5: Branch further relies upon American Bar Association Resolution 111 which "urges each jurisdiction that imposes capital punishment to prohibit the imposition of a death sentence on or execution of any individual who was 21 years old or younger at the time of the offense." ABA House of Delegates Resolution 111 (adopted Feb. 5, 2018), https://www.americanbar.org/content/dam/aba/images/abanews/mym2018res/111.pdf. The resolution is based on the same considerations as those presented by Branch in these proceedings. See, e.g., A.B.A. Death Penalty Due Process Rev. Project & Sec. Civ. Rts. & Soc. Just., Report to the House of Delegates 3 (2018) ("The newly-understood similarities between juvenile and late adolescent brains, as well as the evolution of death penalty law and relevant standards under the Eighth Amendment lead to the clear conclusion that individuals in late adolescence should be exempted from capital punishment.").]

First, this issue is procedurally barred. The trial court's order sentencing Branch to death found that Branch's age was not a mitigating circumstance:

> The defendant was twenty-one years of age at the time of this offense. There was testimony from the defendant's brother and grandfather that he was not particularly mature for his age, and that he frequently requested the assistance of relatives, primarily his grandfather, in making important decisions. The defendant did not, however, appear to be mentally deficient in any way. He assisted his counsel throughout trial,

> and testified at trial with great specificity and detail. The defendant's age at the time of the crime is not a mitigating factor.

On direct appeal, Branch did not challenge the trial court's rejection of age as a mitigating circumstance. **Furthermore, the Supreme Court decided Roper on March 1, 2005. Branch filed the habeas petition in Branch II on August 31, 2005, and he did not assert that he was ineligible for execution pursuant to Roper. Accordingly, this claim is waived as it could have been raised previously.**

Second, we have rejected similar claims on the basis that scientific research with respect to brain development does not qualify as newly discovered evidence. For example, in Morton v. State, 995 So. 2d 233, 245 (Fla. 2008), the defendant claimed that a 2004 brain mapping study established that sections of the human brain are not fully developed until the age of twenty-five. He argued this constituted newly discovered evidence which required a reweighing of his age—nineteen-and-a-half years old at the time of the murder—as a mitigating circumstance. Id. In rejecting this claim, we stated:

> We have previously rejected recognizing "new research studies" as newly discovered evidence if based on previously available data. See Schwab [v. State, 969 So. 2d 318, 325 (Fla. 2007)] (citing Diaz v. State, 945 So. 2d 1136, 1144 (Fla. 2006) (concluding doctor's letter addressing lethal injection research was not newly discovered evidence because conclusions in letter were based on old data)). Although this 2004 brain mapping study had not yet been published at the time of Morton's trials, Morton or his counsel could have discovered similar research at that time that stated that the human brain was not fully developed until early adulthood. See Jay D. Aronson, Brain Imaging, Culpability and the Juvenile Death Penalty, 13 Psychol. Pub. Pol'y & L. 115, 120 (2007) ("In the past few decades ... neuroscientists have discovered that two key developmental processes, myelination ... and pruning of neural

> connections, continue to take place during adolescence and well into adulthood .... [B]rain regions responsible for basic life processes and sensory perception tend to mature fastest, whereas the regions responsible for behavioral inhibition and control, risk assessment, decision making, and emotion maturing take longer (Yakovlev & Lecours, 1967).”). Therefore, the 2004 study would not constitute newly discovered evidence and the trial court correctly denied this claim without an evidentiary hearing.

Id. at 245–46 (some alterations in original). We further rejected on the merits Morton’s claim that he was entitled to relief pursuant to Roper:

> Roper has no application here where the facts are undisputed that Morton’s chronological age was above nineteen at the time he committed the crimes. Because it is impossible for Morton to demonstrate that he falls within the ages of exemption, his claim is facially insufficient and it was proper for the court to deny Morton a hearing on this claim.

Id. at 245.

Similarly, in Davis v. State, 142 So. 3d 867 (Fla. 2014), the defendant—who was under an active death warrant—contended that he was not eligible for the death penalty because, despite his chronological age of twenty-five at the time of the murder, he was the “functional equivalent of a child.” Id. at 870. The defendant relied upon “allegedly newly discovered evidence regarding the effects of alcoholism and sexual abuse on brain development in children, and ... Roper.” Id. at 874. This Court concluded that the evidence presented by the defendant was not newly discovered and, even if it was, the claim would still fail on the merits:

> The studies cited by Davis, addressing the effects of alcoholism and sexual abuse on brain development, do not constitute newly discovered evidence. This Court has previously stated that

> it "has not recognized 'new opinions' or 'new research studies' as newly discovered evidence." Schwab v. State, 969 So. 2d 318, 325 (Fla. 2007). The articles that Davis relies upon fall squarely within this subject area and therefore do not constitute newly discovered evidence. See Farina v. State, 992 So. 2d 819 (Fla. 2008) (table decision) (holding that a "study on brain mapping is not newly discovered evidence"); Schwab, 969 So. 2d at 325 (concluding that "two recent scientific articles regarding brain anatomy and sexual offense" did not constitute newly discovered evidence).
>
> Further, as explained above, even if these recently published articles were considered newly discovered evidence, Davis still fails to put forth a cognizable claim. The United States Supreme Court's decision in Roper prohibits the execution of those individuals "who were under the age of 18 when their crimes were committed." 543 U.S. at 578, 125 S. Ct. 1183. In interpreting the Supreme Court's decision, this Court has previously stated that "Roper only prohibits the execution of those defendants whose chronological age is below eighteen." Hill [v. State, 921 So.2d 579, 584 (Fla. 2006)]. Therefore, because Davis was over the age of eighteen when he committed murder, Roper does not apply, and his claim is without merit.
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> Id. at 875–76.

Branch, 236 So. 3d at 985–87 (emphasis added).

Thus, based on this Court's well-established precedent from Branch, Schwab, Davis, and other cases, the postconviction court properly determined that Foster's research studies did not qualify as "newly discovered evidence" for the purposes of avoiding the time limitations of rule 3.851. See also Henry v. State, 125 So. 3d 745, 750-51 (Fla. 2013) (rejecting a claim

that the American Society of Addiction Medicine (ASAM) 2011 Public Policy Statement defining addiction as a brain disorder was newly discovered evidence); Tompkins v. State, 994 So. 2d 1072, 1082-83 (Fla. 2008); Rutherford v. State, 926 So. 2d 1100, 1113 (Fla. 2006) (holding that a study published in the British medical journal, The Lancet, was not new scientific evidence and affirming a summary denial of a successive motion); Henyard v. State, 992 So. 2d 120, 130 n.8 (Fla. 2008) (noting that this Court had previously affirmed the denial of Henyard's successive postconviction seeking an extension of Roper in a 2006 decision) (citing Henyard v. State, 929 So. 2d 1052 (Fla. 2006) (table)).[3]

Furthermore, like Branch, Foster's claim is procedurally barred because Foster had the opportunity to raise his Roper-based claim in his prior postconviction motion. Foster filed his original postconviction motion in 2001, and eventually filed an amended motion in 2010. The lower court conducted an evidentiary hearing on the amended motion in 2011. Obviously, as the Branch court noted, "the Supreme Court decided Roper on March 1, 2005" and because Branch "did not assert that he was ineligible for execution pursuant to Roper" in his August 31, 2005 habeas petition, his claim was procedurally barred. Branch, 236 So. 3d

[3] Henyard raised this same Roper-based claim in a 2005 successive postconviction motion and relied on a brain mapping study published in May, 2005.

at 986. Similarly, because Foster did not previously raise his Roper-based claim in his original postconviction proceedings, the lower court correctly determined that the instant claim was procedurally barred in his fourth successive motion filed in 2018. Furthermore, the State would note that Foster did not raise his Roper-based claim in his first successive postconviction motion filed on February 18, 2016, nor did he raise it in his second motion filed on January 12, 2017.

Lastly, in addition to finding Foster's Roper-based claim untimely and procedurally barred, the trial court also properly denied the claim on the merits. As this Court noted in Branch, research studies on the brain's development are not "new," as the United States Supreme Court was well aware of this information at the time of the Roper decision. Nevertheless, the United States Supreme Court drew a bright-line at the age of eighteen for death eligibility. Branch, 236 So. 3d at 985 (quoting Roper, 543 U.S. at 574). The Roper Court was well aware of the research studies indicating that maturity levels differ between juveniles and young adults and discussed the research supporting the three areas of differences between juveniles and adults. Juveniles have a lack of maturity and underdeveloped sense of responsibility, are more easily influenced by peer pressure and negative influences, and their character is not as

well formed as adults. Roper, 543 U.S. at 568-71. Nevertheless, the Roper Court found that a categorical line had to be drawn and, for Eighth Amendment purposes, the Court drew the line at individuals under the age of eighteen. Id. at 571, 574.

In Branch, this Court further noted that the United States Supreme Court had not altered its Eighth Amendment jurisprudence in this regard even after Roper, and still identifies eighteen as the critical age for purposes of Eighth Amendment jurisprudence. Branch, 236 So. 3d at 987 (citing Miller v. Alabama, 567 U.S. 460, 465 (2012) (prohibiting mandatory sentences of life without parole for homicide offenders who committed their crimes before the age of eighteen); Graham v. Florida, 560 U.S. 48, 74–75 (2010) (prohibiting sentences of life without parole for nonhomicide offenders who committed their crimes before the age of eighteen)). Here, Foster's more recent research studies do not alter the rationale underlying Roper and subsequent cases. As such, the lower court properly determined that his claim lacked merit as the Eighth Amendment does not prohibit a death sentence for a defendant, like Foster, who was eighteen at the time of the murder. Accordingly, this Court should affirm the lower court's denial of Foster's successive postconviction motion.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of July, 2018, 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: Scott Gavin, Assistant CCRC, Capital Collateral Regional Counsel-South, 1 East Broward Boulevard, Suite 444, Fort Lauderdale, Florida 33301, at gavins@ccsr.state.fl.us.

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