No. _____

IN THE

Supreme Court of the United States

MICHAEL DUANE ZACK, III,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

PETITIONER'S APPENDIX

ROBERT S. FRIEDMAN
Counsel of Record
DAWN B. MACREADY
STACY BIGGART
Capital Collateral Regional Counsel – Northern Region
1004 DeSoto Park Drive
Tallahassee, Florida 32301
(850) 487-0922
Robert.Friedman@ccrc-north.org
Dawn.Macready@ccrc-north.org
Stacy.Biggart@ccrc-north.org

INDEX TO APPENDIX

EXHIBIT 1

Supreme Court of Florida

No. SC18-243

MICHAEL DUANE ZACK, III,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

October 4, 2018

PER CURIAM.

This case is before the Court on appeal from an order denying a motion to vacate a sentence of death under Florida Rule of Criminal Procedure 3.851. This Court has jurisdiction. *See* art. V, § 3(b)(1), Fla. Const.

Michael Duane Zack, III, was convicted for the 1996 sexual assault and murder of Ravonne Smith. We previously described the facts in *Zack v. State*, 753 So. 2d 9, 13-14 (Fla. 2000). We affirmed Zack's convictions and sentence. *Id.* at 26. His sentence became final on October 2, 2000, when the United States Supreme Court denied certiorari review. *Zack v. Florida*, 531 U.S. 858 (2000).

We affirmed the denial of Zack's initial motion for postconviction relief and his petition for a writ of habeas corpus in *Zack v. State*, 911 So. 2d 1190 (Fla. 2005). Zack raised a claim pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002), in his successive motion for postconviction relief. The circuit court denied the claim without a hearing. This Court, relying on *Cherry v. State*, 781 So. 2d 1040 (Fla. 2000), held that Zack failed to demonstrate that his IQ was below 70. *Zack v. State*, 911 So. 2d 1190, 1202 (Fla. 2005). Additionally, we denied Zack's second petition for a writ of habeas corpus based on *Crawford v. Washington*, 541 U.S. 36 (2004). Zack then filed a second successive postconviction motion raising claims pursuant to *Hall v. Florida*, 134 S. Ct. 1986 (2014). We affirmed the circuit court's denial of that motion. *Zack v. State*, 228 So. 3d 41 (Fla. 2017). We also denied Zack's petition for a writ of habeas corpus claiming relief pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016). *Zack*, 228 So. 3d at 41.

Zack filed his third successive motion for postconviction relief on January 11, 2017, raising five claims. The circuit court summarily denied the motion, finding:

> The Supreme Court of Florida has held that *Hurst v. Florida* and *Hurst v. State* do not apply retroactively to any death sentence that became final prior to the issuance of the United States Supreme Court's June 24, 2002, opinion of *Ring v. Arizona*, 536 U.S. 584 (2002). *See Asay v. State*, 210 So. 3d 1 (Fla. 2016); *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016). It is uncontested that Defendant's sentence was final before *Ring* was decided.

> . . . Consequently, the Court concludes that Defendant is not entitled to relief as to any of his present claims as each depends on a retroactive application of the *Hurst* decisions. Additionally, the Florida Supreme Court has recently addressed Defendant's fifth claim as it pertains to a jury finding of intellectual disability, and found it to be without merit.

(some citations omitted). Zack now appeals.

In a motion governed by rule 3.851, where a defendant makes a facially sufficient claim that requires a factual determination, the circuit court must hold an evidentiary hearing. *See Mann v. State*, 112 So. 3d 1158, 1161 (Fla. 2013). Nevertheless, "claims may be summarily denied when they are legally insufficient, should have been brought on direct appeal, or are positively refuted by the record." *Id.* (quoting *Marek v. State*, 8 So. 3d 1123, 1127 (Fla. 2009)). "Because a postconviction court's decision whether to grant an evidentiary hearing on a rule 3.851 motion is ultimately based on written materials before the court, its ruling is tantamount to a pure question of law, subject to de novo review." *Marek v. State*, 8 So. 3d 1123, 1127 (Fla. 2009).

Here, as a matter of law, Zack is not entitled to relief. *See Hitchcock v. State*, 226 So. 3d 216, 217 (Fla. 2017); *Oats v. Jones*, 220 So. 3d 1127 (Fla. 2017); *Asay v. State*, 224 So. 3d 695, 703 (Fla. 2017); *Asay v. State*, 210 So. 3d 1, 22 (Fla. 2016). We have previously addressed and rejected each of the claims presented. Zack has not provided a compelling argument for this Court to reconsider our

previous rulings. Accordingly, we affirm the circuit court's order summarily denying Zack's claims.

It is so ordered.

PARIENTE, LEWIS, QUINCE, POLSTON, LABARGA, and LAWSON, JJ., concur.
CANADY, C.J., concurs in result.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

An Appeal from the Circuit Court in and for Escambia County,
Linda L. Nobles, Judge - Case No. 171996CF002517XXXAXX

Robert S. Friedman, Capital Collateral Regional Counsel, Dawn B. Macready and Stacy Biggart, Assistant Capital Collateral Regional Counsel, Northern Region, Tallahassee, Florida,

for Appellant

Pamela Jo Bondi, Attorney General, and Charmaine M. Millsaps, Senior Assistant Attorney General, Tallahassee, Florida,

for Appellee

EXHIBIT 2

Filing # 66558650 E-Filed 01/16/2018 10:21:46 AM

IN THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR ESCAMBIA COUNTY, FLORIDA

STATE OF FLORIDA,

vs.

MICHAEL DUANE ZACK, III, **Case No.: 1996 CF 002517A**

Defendant. **Div.: "C"**

ORDER DENYING "SUCCESSIVE MOTION TO VACATE DEATH SENTENCE, AND ALTERNATIVELY MOTION TO CORRECT ILLEGAL SENTENCE"

THIS CAUSE came before the Court on Defendant's "Successive Motion to Vacate Death Sentence, and Alternatively Motion to Correct Illegal Sentence," filed January 11, 2017. A case management conference was held on November 14, 2017, at which the parties presented legal argument as it pertains to the pending motion.

On November 24, 1997, the Court sentenced Defendant to death for the first degree murder of Ravonne Smith. In April 2000, the Supreme Court of Florida affirmed the judgment and sentence. Three previous motions for postconviction relief were denied or dismissed with prejudice. The most recent order denying postconviction relief was affirmed by mandate and opinion of the Supreme Court of Florida on October 30, 2017.

Defendant now raises five claims for postconviction relief, all founded on the recent decisions in Hurst v. Florida, 136 S. Ct. 616 (2016) and Hurst v. State, 202 So. 3d 40 (Fla. 2016): 1) Defendant's death sentence violates the Sixth Amendment under Hurst v. Florida; 2) failing to apply Hurst v. Florida to Defendant's death sentence violates the Eighth Amendment; 3) Defendant's death sentence violates the Eighth Amendment under Hurst v. State; 4) the decisions in Hurst v. State and

Perry v. State, [1] along with recent statutory revisions, require the Court to reconsider Defendant's previously raised claims of ineffective assistance of counsel; and 5) Defendant's intellectual disability determination is subject to his 6th Amendment right to a jury trial.

In Defendant's first claim, he asserts that fundamental fairness demands that he should be given retroactive application of Hurst v. Florida for several reasons, including that he raised a challenge at the time of his trial to the lack of a unanimous jury recommendation for the death penalty. He also points to the fact that other capital defendants who committed their crimes before Defendant, but who have had additional sentencing proceedings after Ring [2] was final, will receive the benefit of Hurst. In his second claim, Defendant argues that failing to apply Hurst v. Florida to Defendant's death sentence violates the Eighth Amendment because failing to apply retroactivity uniformly creates an arbitrary application of law to two groups of similarly situated persons. In his related third claim, Defendant argues that his death sentence violates the Eighth Amendment under Hurst v. State, because it is not constitutionally permissible to execute a defendant who is within a class that society's evolving standards of decency have deemed to be ineligible for a death sentence (in this case, one who was not the subject of a unanimous jury recommendation). In his fourth claim, Defendant asserts that the changes in the law that would govern at any resentencing of Defendant require the Court to reexamine Defendant's previous claims of ineffective assistance of counsel to determine whether the evidence presented to support each claim and all other admissible evidence which would be presented at any future resentencing "would probably result in a life sentence." He asserts, "The new Florida law should be part of the evaluation of whether confidence in the reliability of the outcome is undermined, particularly since the touchstone of the new Florida law is the likely

[1] 210 So. 3d 630 (Fla. 2016).
[2] Ring v. Arizona, 536 U.S. 584 (2002).

enhancement of the reliability of any resulting death sentence." Finally in his fifth claim, Defendant asserts that a determination of his intellectual disability is subject to his Sixth Amendment right to a jury trial under Hurst v. Florida and Hurst v. State. This is so, he argues, because under Hurst v. Florida, all facts that are statutorily necessary before a judge may impose a sentence of death are subject to a defendant's right to a jury trial, and whether a defendant is intellectually disabled is a question of fact.

The Supreme Court of Florida has held that Hurst v. Florida and Hurst v. State do not apply retroactively to any death sentence that became final prior to the issuance of the United States Supreme Court's June 24, 2002 opinion of Ring v. Arizona, 536 U.S. 584 (2002). See Asay v. State, 210 So. 3d 1 (Fla. 2016); Mosley v. State, 209 So. 3d 1248 (Fla. 2016). It is uncontested that Defendant's sentence was final before Ring was decided.

"Although the trial court may bring its concerns regarding the application of specific case law to the appellate courts, it is always bound to follow binding precedent." Bozeman v. Higginbotham, 923 So. 2d 535, 537 (Fla. 1st DCA 2006). Consequently, the Court concludes that Defendant is not entitled to relief as to any of his present claims as each depends on a retroactive application of the Hurst decisions. See Archer v. Jones, No. SC16-2111, 2017 WL 1034409 at *1 (Fla. Mar. 17, 2017) (observing that the holding in Asay is that "Hurst v. Florida and Hurst v. State do not apply retroactively" to capital defendants whose death sentences were final when Ring was decided); Hannon v. State, 228 So. 3d 505, 513 (Fla. 2017), cert. denied, 138 S. Ct. 441 (2017). [3]

[3] "Hannon's case became final on February 21, 1995. We have consistently held that Hurst is not retroactive prior to June 24, 2002, the date that Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L.Ed.2d 556 (2002), was released. E.g., Lambrix v. State, 42 Fla. L. Weekly S833, —So. 3d——, 2017 WL 4320637 (Fla. Sept. 29, 2017), cert. denied, Nos. 17–6222, 17A375, — U.S. ——, — S.Ct. ——, L.Ed.2d ——, 2017 WL 4409398 (U.S. Oct. 5, 2017); Hitchcock, 42 Fla. L. Weekly S753, — So.3d ——; Asay v. State (Asay V), 210 So. 3d 1, 22 (Fla. 2016), cert. denied, No. 16-

Additionally, the Florida Supreme Court has recently addressed Defendant's fifth claim as it pertains to a jury finding of intellectual disability, and found it to be without merit. [4]

9033, — U.S. —, — S. Ct. —, — L.Ed.2d —, 2017 WL 1807588 (U.S. Aug. 24, 2017). Hannon contends that he raises novel chapter 2017–1, Laws of Florida, and Eighth Amendment challenges and that we have not addressed those issues; yet, Hannon is mistaken because we have expressly rejected these claims. Lambrix, 42 Fla. L. Weekly S833, — So. 3d — (rejecting chapter 2017–1 and Eighth Amendment claims under Hurst); Asay VI, 224 So. 3d at 702–03 (rejecting chapter 2017–1 and Eighth Amendment claims as 'not novel and [ ] previously rejected by this Court'); Hitchcock, 42 Fla. L. Weekly at S753, — So. 3d — (denying Hurst relief despite the fact that Hitchcock raised Eighth Amendment claims). Hannon chooses to ignore our precedent because he disagrees with the retroactivity cutoff that we set in Asay V, however, that decision is final and has been impliedly approved by the United States Supreme Court, which denied certiorari review. See Asay v. Florida, No. 16-9033, — U.S. —, — S.Ct. —, — L.Ed.2d —, 2017 WL 1807588 (U.S. Aug. 24, 2017). Clearly, Hannon is not entitled to Hurst relief, thus, there is no Hurst error to review for harmless error." Hannon v. State, 228 So. 3d 505, 513 (Fla. 2017), cert. denied, 138 S. Ct. 441 (2017).

[4] "It is clear that the Florida Legislature designated the trial judge, not the jury, as the factfinder for intellectual disability determinations. Intellectual disability is not a 'necessary finding[ ] to impose a death sentence' but is, rather, the opposite—a fact that bars death. Hurst, 202 So. 3d at 67. Therefore, nothing from the United States Supreme Court's decisions in Ring, Atkins, Hall, or Hurst v. Florida, compel a conclusion either way on the issue of whether a judge or jury must determine that a criminal defendant is intellectually disabled. Rather, the United States Supreme Court explicitly left the implementation of Atkins to the states. Thus, Oats has not demonstrated that Florida's Atkins procedure, as set forth in section 921.137, is unconstitutional. Accordingly, Oats is not entitled to relief on this claim." Oats v. Jones, 220 So. 3d 1127, 1129–30 (Fla. 2017).

Accordingly, it is hereby,

ORDERED and ADJUDGED that the "Successive Motion to Vacate Death Sentence, and Alternatively Motion to Correct Illegal Sentence" is **DENIED**. Defendant may file a notice of appeal within thirty (30) days of the rendition date of this order, if he so chooses.

DONE and ORDERED in Chambers at Pensacola, Escambia County, Florida.

LLN/ krw

Copies to be Served on the following by the Clerk of the Court:

DAWN MACREADY
Asst. Capital Collateral Regional Counsel
Northern Region
175 Salem Court
Tallahassee, FL 32301
Dawn.Macready@ccrc-north.org

JOHN MOLCHAN
Assistant State Attorney
Office of the State Attorney
190 Governmental Center
Pensacola, FL 32502
JMolchan@sa01.org

CHARMAINE MILLSAPS, AAG
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399
Charmaine.millsaps@myfloridalegal.com
capapp@myfloridalegal.com

STACY BIGGART
Asst. Capital Collateral Regional Counsel
Northern Region
175 Salem Court
Tallahassee, FL 32301
Stacy.Biggart@ccrc-north.org