ATTACHMENT A

Supreme Court of Florida

No. SC19-841

ROBIN LEE ARCHER,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

April 23, 2020

PER CURIAM.

Robin Lee Archer appeals an order of the circuit court denying his successive motion to vacate his sentence of death under Florida Rule of Criminal Procedure 3.851. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const. For the reasons explained below, we affirm.

Archer was convicted of first-degree murder, armed robbery, and grand theft, and he was sentenced to death for the murder. *Archer v. State* (*Archer I*), 613 So. 2d 446, 447 & n.1 (Fla. 1993). We affirmed his convictions and the sentences for armed robbery and grand theft but reversed his death sentence and remanded for a new penalty phase. *Id.* After the new penalty phase, Archer was

again sentenced to death, resulting in a 1996 finality date for Archer's sentence. *Archer v. State* (*Archer II*), 673 So. 2d 17, 18 (Fla.), *cert. denied, Archer v. Florida*, 519 U.S. 876 (1996).[1] The successive rule 3.851 motion at issue in this appeal raised three claims, and Archer seeks relief from the circuit court's denial of all three. We address each claim in turn.

Hurst v. Florida and *Hurst v. State*

Archer's first claim was that his death sentence, which was final in 1996, violates the Sixth and Eighth Amendments in light of *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *receded from in State v. Poole*, 45 Fla. L. Weekly S41(Fla. Jan. 23, 2020), *clarified*, 45 Fla. L. Weekly S121 (Fla. Apr. 2, 2020). The circuit court correctly ruled that this claim is procedurally barred because we denied this same claim when Archer raised it in a petition for a writ of habeas corpus. *Archer v. Jones*, No. SC16-2111, 2017 WL 1034409 (Fla. Mar. 17, 2017); *see Davis v. State*, 589 So. 2d 896, 898 (Fla. 1991) ("Claims that have been previously raised are procedurally barred."). However, we also note that there is no *Hurst* violation in Archer's sentence, as his guilt-phase jury found him guilty of the facts that establish the basis for one of the aggravating

1. The facts of this case, as determined in the appeals from Archer's original trial and resentencing, are outlined in *Archer v. State*, 934 So. 2d 1187, 1191-92 (Fla. 2006).

factors on which the sentencing court relied to determine that he is eligible for the death penalty. *See Poole*, 45 Fla. L. Weekly at S41 (receding from *Hurst v. State* "except to the extent that it held that a jury must unanimously find the existence of a statutory aggravating circumstance beyond a reasonable doubt" and finding no *Hurst* violation where the jury found the defendant guilty of a contemporaneous robbery, among other qualifying offenses). Specifically, Archer's jury found him guilty of a contemporaneous armed robbery, and one of the aggravators supporting his eligibility for a death sentence was that the murder "was committed while the defendant was engaged in or was an accomplice in the commission of a robbery." *Archer II*, 673 So. 2d at 18 & n.1. For these reasons, the circuit court properly denied this claim.

Elements of "Capital Murder"

Archer's second claim was that his sentence violates the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution and corresponding provisions of the Florida Constitution because this Court's statutory construction in *Hurst v. State* shows that Archer has not been convicted beyond a reasonable doubt of all the elements of the offense for which he is under a sentence of death. This claim was based on the contentions that *Hurst v. State* recognized (1) that section 921.141, Florida Statutes, as it existed at the time of the *Hurst v. State* decision and at the time of Archer's crime, created an

offense of "capital murder," a greater offense than first-degree murder, and (2) that included in the elements of this offense that must be proven beyond a reasonable doubt are the determinations that sufficient aggravating circumstances exist to impose the death penalty, that there are insufficient mitigating circumstances to outweigh the aggravating circumstances, and that death is the appropriate sentence. Even if this claim is not procedurally barred, it is without merit, as we explained in *Rogers v. State*, 285 So. 3d 872, 885-86 (Fla. 2019). Accordingly, the circuit court's denial of this claim was correct.

Newly Discovered Evidence

Archer's third and final claim alleged newly discovered evidence of codefendant Clifford Barth's release from prison on parole, even though the jury had been told at Archer's penalty phase that Barth would serve a life sentence for his role in the murder. The circuit court determined that Archer's allegation that Barth was released on parole was factually incorrect, as Barth, a seventeen-year-old at the time of the crimes, had actually been resentenced due to a change in the law invalidating most life sentences for juvenile offenders. *See Miller v. Alabama*, 567 U.S. 460, 479-80 (2012); *Montgomery v. Louisiana*, 136 S. Ct. 718, 734-37 (2016). Citing our precedent in *Farina v. State*, 937 So. 2d 612 (Fla. 2006), the circuit court explained that this resentencing "for purely legal reasons" had no bearing on Archer's culpability and therefore would not probably result in a less

severe sentence for Archer. If Barth was resentenced pursuant to *Miller*, which Archer does not argue to be untrue on appeal, the circuit court's ruling was legally correct. *See Farina*, 937 So. 2d at 620.

Archer argues, however, that the circuit court should have accepted Archer's factual allegation that Barth was released on parole as true, as Barth's resentencing is not a part of the record in Archer's case and no evidentiary hearing was held. However, even accepting the facts as alleged by Archer, he is not entitled to relief.

Archer's motion alleged that, after Barth testified against Archer and another codefendant, he "was permitted to plead guilty to first degree murder and receive a life sentence in which he would be eligible for parole after 25 years." Assuming this fact is true, it has been a matter of public record for decades that Barth was not given a sentence of life without the possibility of parole, as was communicated to Archer's resentencing jury. Therefore, Barth's actual sentence could have been discovered by Archer or counsel with the exercise of due diligence long ago, and the only potentially newly discovered evidence is the fact that he was actually released on parole. The information that might be relevant to a jury's assessment of the sentence Archer should receive is not Barth's actual release on parole, an event far removed from the facts of the crime, but the fact that his sentence provided the opportunity for release after twenty-five years, and that aspect of the claim is untimely. *See Reed v. State*, 116 So. 3d 260, 264 (Fla. 2013) (explaining

that a claim of newly discovered evidence must be brought within one year of the date on which the claim became discoverable through the exercise of due diligence).[2]

CONCLUSION

For the foregoing reasons, we affirm the denial of Archer's successive rule 3.851 motion.

It is so ordered.

CANADY, C.J., and POLSTON, LAWSON, and MUÑIZ, JJ., concur.
LABARGA, 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,
W. Joel Boles, Judge - Case No. 171991CF000606XXXAXX

Martin J. McClain of McClain & McDermott, P.A., Wilton Manors, Florida; and Michael P. Reiter, Venice, Florida,

for Appellant

Ashley Moody, Attorney General, and Janine D. Robinson, Assistant Attorney General, Tallahassee, Florida,

for Appellee

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2. We also note that, below, Archer's claim concerning Barth's sentence included a subclaim under *Johnson v. Mississippi*, 486 U.S. 578 (1988). Because Archer did not argue this point in his initial brief, but instead reintroduced it in his reply brief, he abandoned it. *See Hoskins v. State*, 75 So. 3d 250, 257 (Fla. 2011).

ATTACHMENT B

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

STATE OF FLORIDA,

vs.

Case No.: 1991-CF-0606A
Division: "K"

ROBIN LEE ARCHER,

Defendant.

ORDER DENYING DEFENDANT'S SUCCESSIVE RULE 3.851 MOTIONS TO VACATE JUDGMENT AND/OR SENTENCE OF DEATH

THIS CAUSE comes before the Court on "Defendant's Successive Rule 3.851 Motion for Postconviction Relief in Light of *Hurst v. Florida* and *Hurst v. State*," filed January 6, 2017, and Defendant's "Amended Successive Rule 3.851 Motion to Vacate Judgment and/or Sentence of Death," filed October 31, 2018. The State filed its response to the successive amended rule 3.851 motion on November 7, 2018. Defendant filed his "Reply to State's Answer to Amended Successive Postconviction Motion," on November 24, 2018.

On November 26, 2018, a case management conference was convened regarding Defendant's successive motions. Assistant Attorney General Charmaine Millsaps appeared via teleconference. Counsel for Defendant by designation, Martin McClain, and Assistant State Attorney Joseph Schiller both attended in person.

At the case management conference, the parties presented arguments in support of their respective positions on the successive motions. Having reviewed the motions, the State's response, the record, and controlling legal authority; and after careful consideration of the

arguments presented at the case management conference, the Court finds that the successive motions can be addressed without evidentiary hearing.

PROCEDURAL HISTORY

On September 20, 1991, Defendant was sentenced to death after being convicted of first-degree murder, armed robbery, and grand theft. The Supreme Court of Florida affirmed Defendant's convictions, but vacated his death sentence because the trial court improperly instructed the jury on the heinous, atrocious, or cruel aggravating factor. Archer v. State, 613 So. 2d 446, 448 (Fla. 1993). On remand after a new penalty phase, the jury again recommended a death sentence for the first-degree murder conviction. The trial court followed the jury's recommendation and on January 19, 1994, sentenced Defendant to death. The Supreme Court of Florida affirmed Defendant's death sentence. Archer v. State, 673 So. 2d 17 (Fla. 1996). The United States Supreme Court denied certiorari review on October 7, 1996. Archer v. Florida, 519 U.S. 876 (1996).

Defendant filed a motion for postconviction relief and amended the motion twice before it was denied after evidentiary hearing by order filed February 25, 2004. The Supreme Court of Florida affirmed the denial of Defendant's motion in Archer v. State, 934 So. 2d 1187 (Fla. 2006). Defendant also filed a petition for writ of habeas corpus in the Florida Supreme Court and the petition was denied. Archer v. McDonough, No. 3:06-cv-00312-RS, 2008 WL 616115 (Fla. Mar. 3, 2008).

In 2010, Defendant filed a successive motion for postconviction relief, which was denied via order filed October 7, 2011. The Supreme Court of Florida affirmed the denial of the motion in 2013. Defendant filed another successive motion on June 6, 2013. After amendment, the trial

court denied the amended successive motion by order filed August 27, 2013. The Supreme Court of Florida affirmed the denial in 2014.

Procedural History Regarding Hurst Claims

On November 22, 2016, Defendant filed in the Supreme Court of Florida a successive habeas petition raising a Hurst claim. On March 17, 2017, the Florida Supreme Court denied the habeas petition in Archer v. Jones, No. SC16-2111, 2017 WL 1034409 (Fla. Mar. 17, 2017). The opinion provides as follows:

> Robin Lee Archer is a prisoner under sentence of death whose death sentence became final in 1996. See Archer v. State, 673 So. 2d 17 (Fla. 1996), cert. denied, 519 U.S. 876 (1996). Following the United States Supreme Court's decision in Hurst v. Florida, 136 S. Ct. 616 (2016), and this court's decision in Hurst v. State, 202 So. 3d 40 (Fla. 2016), Archer filed a successive petition for habeas corpus wherein he challenges the validity of his death sentence. We hereby deny Archer's petition pursuant to our holding in Asay v. State, 41 Fla. L. Weekly S646 (Fla. Dec. 22, 2016), that Hurst v. Florida and Hurst v. State do not apply retroactively to capital defendants whose death sentences were final when Ring v. Arizona, 536 U.S. 584 (2002) was decided.[1]

On January 6, 2017, while his habeas petition was pending in the Florida Supreme Court, the federal public defender's office filed a successive 3.851 postconviction motion on Defendant's behalf in the trial court raising Hurst claims. Consideration of this motion was held in abeyance until the Supreme Court of Florida ruled on the habeas petition. After the Supreme Court of Florida's ruling, the trial court convened a status conference to clarify the identity of counsel in this case and to discuss the next steps regarding the pending successive motion for postconviction relief. At the status, the Court determined that Michael Reiter is Defendant's

[1] Id.

registry counsel, and Martin McClain continues to be designated by Mr. Reiter to assist him in representing Defendant in this case. The Court further found that Federal Public Defender Billy Nolas, who took the lead in filing the successive motion, could not represent Defendant on the Hurst claims in the trial court. As such, the Court found it appropriate to permit Defendant's counsel leave to amend the successive motion. Defendant's successive motion and amended successive motion are now before the Court for consideration.

CLAIM ONE

In the January 6, 2017 successive motion, Defendant claims his death sentence violates the Sixth and Eight Amendments under Hurst v. Florida, 136 S. Ct. 616 (2016) and Hurst v. State, 202 So. 3d 40 (Fla. 2016). He argues Hurst v. Florida and Hurst v. State should be applied retroactively to his case.

The Supreme Court of Florida has already specifically held that Hurst v. Florida and Hurst v. State do not apply retroactively to the death sentence in Defendant's case. Archer v. Jones, No. SC16-2111, 2017 WL 1034409 (Fla. Mar. 17, 2017). Defendant is not entitled to relief under any of his current arguments, as each depends on a retroactive application of the Hurst decisions.[2] To the extent Defendant claims that the denial of retroactivity to pre-Ring Defendants is unconstitutional, this Court is compelled to follow the rulings entered by the Florida Supreme Court. See Lambrix v. State, 227 So. 3d 112, 113 (Fla. 2017), cert. denied, 138 S. Ct. 312 (2017). At the case management conference, Mr. McClain admitted that he "cannot dispute"[3] that the Archer v. Jones decision has already addressed the entirety of Defendant's

[2] This Court also does not reach the harmless error issue as neither Hurst decision applies retroactively to Defendant's case.

[3] See Transcript, Case Management Conference, November 26, 2018, p. 4.

claim one. Consequently, claim one is procedurally barred, and Defendant is not entitled to relief as to this claim.

CLAIM TWO

Defendant next alleges that Hurst v. State announces substantive law, which has now been codified in Chapter 2017-1, Laws of Florida. Defendant argues that because the change is substantive, the amendment to the statute should be applied retroactively to Defendant's case. Defendant further argues Hurst v. State and section 921.141, Florida Statutes (amended by Chapter 2017-1, Laws of Florida) have now identified the elements of a newly created offense known as "capital murder." Consequently, Defendant alleges that because the "elements" of the new offense of "capital murder" have not been proven beyond a reasonable doubt, Defendant's due process rights are being violated. Defendant contends that neither of these claims are procedurally barred as they were not considered by the Florida Supreme Court in Archer v. Jones.

While Archer v. Jones, might not have specifically addressed the retroactive application of Chapter 2017-1, Laws of Florida, the Florida Supreme Court has consistently rejected this argument. Conahan v. State, 258 So. 3d 1237 (Fla. 2018); Taylor v. State, 246 So. 3d 231, 240 (Fla. 2018); Thomas v. Jones, No. SC17-2268, 2018 WL 3198373 (Fla. June 29, 2018); Rodriguez v. Jones, No. SC18-352, 2018 WL 1673423 (Fla. Apr. 6, 2018); Hannon v. State, 229 So. 3d 505, 513 (Fla. 2017); Lambrix v. State, 227 So. 3d 112, 113 (Fla. 2017); and Asay v. State, 224 So. 3d 695, 703 (Fla. 2017). Defendant's argument regarding the retroactivity of Chapter 2017-1 lacks merit and shall be denied.

Additionally, Defendant's contention that the Due Process Clause is violated because the

State did not have to prove the "elements" of "capital murder" beyond a reasonable doubt is also without merit. In the recent case of Foster v. State, 258 So. 3d 1248 (Fla. 2018), the Supreme Court of Florida specifically rejected this claim, finding that no new greater offense of "capital first-degree murder" has been created. Id. at 1251-52. Defendant is not entitled to relief as to this claim.

CLAIM THREE

Defendant next alleges that it is newly discovered evidence that his codefendant, Clifford Barth, was released on parole. Defendant appears to assert that this Court should consider this evidence under the Eighth Amendment in light of the federal case of Johnson v. Mississippi, 486 U.S. 578 (1998), instead of the usually applied "newly discovered evidence" test. Defendant argues that according to Johnson, this new evidence shows that his death sentence violates the Eighth Amendment because the jury was permitted to consider evidence that was "materially inaccurate." Defendant claims that Johnson does not apply to the limited situation of "throwing out a conviction,"[4] but applies in Defendant's situation in which the jury was permitted to consider the now "materially inaccurate information" that Mr. Barth had received a mandatory life sentence. Defendant urges this Court to consider the new evidence of Mr. Barth's parole release in conjunction with the "other favorable evidence presented in prior postconviction proceedings that would be admissible at a resentencing." Defendant contends that conducting this cumulative analysis would entitle him to relief.

Initially, the Court notes that Defendant is incorrect in his factual assertions. According to the record, Mr. Barth was not paroled, but instead received a juvenile resentencing because of

[4] See Transcript, Case Management Conference, November 26, 2018, p. 36.

his age at the time of the offense. Additionally, contrary to Defendant's contentions, the Johnson opinion is not applicable to this case. See Stano v. State, 708 So. 2d 271, 275 (Fla. 1998) (Johnson does not apply in cases in which a prior conviction has not been set aside). Even if the Johnson case were applicable, this Court finds Defendant's argument unpersuasive that Mr. Barth's juvenile resentencing now creates a situation of "materially inaccurate information" having been presented to the jury. Further, Mr. Barth's juvenile resentencing does not afford Defendant the right to resurrect previously rejected postconviction claims for this Court's consideration. Consequently, Defendant's claim that his death sentence violates the Eighth Amendment based on the application of Johnson, fails.

If Mr. Barth's juvenile resentencing is viewed pursuant to the traditional "newly discovered evidence" test, Defendant is also not entitled to relief.

> To obtain a new trial based on newly discovered evidence, a defendant must meet two requirements. First, the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence. Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. See Jones v. State, 709 So. 2d 512, 521 (Fla. 1998) (Jones II). Newly discovered evidence satisfies the second prong of the Jones II test if it "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability." Jones II, 709 So. 2d at 526 (quoting Jones v. State, 678 So. 2d 309, 315 (Fla. 1996). If the defendant is seeking to vacate a sentence, the second prong requires that the newly discovered evidence would probably yield a less severe sentence. See Jones v. State, 591 So. 2d 911, 915 (Fla. 1991) (Jones I).

Walton v. State, 246 So. 3d 246, 249 (Fla. 2018).

In 1991, Mr. Barth, a juvenile at the time of the crime, entered into a plea agreement to avoid the death penalty, for which he was then eligible. The record shows that Mr. Barth's life

sentence was included in the evidence considered by the jury at Defendant's new penalty phase convened in 1993.[5] In 2005, the U.S. Supreme Court held that juveniles were no longer eligible to receive the death penalty.[6] As a result, James Bonifay, another of Defendant's juvenile codefendants, had his death sentence reduced to life in prison.[7] Mr. Barth's sentence was unaffected at this time because he entered the plea previously to life in prison. In 2014, because of U.S. Supreme Court decisions regarding juvenile sentencing,[8] Florida enacted juvenile sentencing statutes that have been held to apply retroactively.[9] As a result, Mr. Barth filed a postconviction motion alleging an entitlement to juvenile resentencing. Mr. Barth's motion was well-taken and he received a reduced sentence in 2017.

The resentencing of Mr. Barth satisfies the first prong of the "newly discovered evidence" test. See Farina v. State, 937 So. 2d 612, 619 (Fla. 2006). However, Defendant fails to meet the second prong: that Mr. Barth's juvenile resentencing would probably result in a life sentence for Defendant if he were granted another penalty phase.

Ordinarily, the Court would conduct a culpability analysis of the cumulative evidence in the case to determine whether the newly discovered evidence of Mr. Barth's reduced sentence would make a difference in Defendant's sentence.[10] However, the Supreme Court of Florida has

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[5] See Transcript, New Penalty Phase, October 27, 1993, pp. 453-54.

[6] See Roper v. Simmons, 543 U.S. 551 (2005).

[7] Although Defendant mentions Mr. Bonifay's reduction of sentence in his pleading, any claim regarding Mr. Bonifay's reduced sentence would be untimely. Even if it were not untimely, Mr. Bonifay's reduced sentence would be irrelevant for the reason that it was reduced because of Mr. Bonifay's ineligibility for the death penalty. See Walton v. State, 246 So. 3d 246, 252 (Fla. 2018); Farina v. State, 937 So. 2d 612, 619-20 (Fla. 2006).

[8] See Miller v. Alabama, 567 U.S. 460 (2012); Graham v. Florida, 560 U.S. 48 (2010).

[9] See Horsley v. State, 160 So. 3d 393 (Fla. 2015).

[10] If this Court were to perform a relative culpability analysis based on the cumulative evidence presented at trial and Defendant's resentencing, the Court would find Defendant more culpable than Mr. Barth, based on the fact that Mr. Archer hired his cousin, Mr. Bonifay, to murder the clerk at the Trout Auto Parts store; Defendant supplied Mr.

"historically refused to review the relative culpability of codefendants when a codefendant pleads guilty and receives a lesser sentence as a result." Jeffries v. State, 222 So. 3d 538, 547 (Fla. 2017). Additionally, the Supreme Court of Florida has held that a culpability analysis cannot be performed if "a codefendant is ineligible for the death penalty because of age. . . ." Id. (citing Farina v. State, 801 So. 2d 44, 56 (Fla. 2001). In this case, both of those situations apply to Mr. Barth. Defendant is unable to show that the mere fact Mr. Barth has now received a reduced sentence because of his age at the time of the crime would result in a less severe sentence for Defendant. Mr. Barth's reduced sentence does nothing to weaken the case against Defendant to give rise to a reasonable doubt as to Defendant's culpability. Additionally, Mr. Barth's reduced sentence is irrelevant because he received a lesser sentence for purely legal reasons. See Walton v. State, 246 So. 3d 246, 252 (Fla. 2018); see also Farina, 937 So. 2d at 619-20 (Fla. 2006) (juvenile codefendant's reduced sentence did not meet the low threshold to qualify as relevant mitigating evidence). As such, Defendant has failed to show Mr. Barth's reduced sentence would have resulted in a less severe sentence. Defendant is not entitled to relief as to this claim.

ACCORDINGLY, it is hereby **ORDERED and ADJUDGED** that "Defendant's Successive Rule 3.851 Motion for Postconviction Relief in Light of *Hurst v. Florida* and *Hurst v. State*" and Defendant's "Amended Successive Rule 3.851 Motion to Vacate Judgment and/or Sentence of Death" are **DENIED**. Defendant may file a notice of appeal within thirty (30) days of the rendition date of this order, if he so chooses.

Bonifay with the gun that murdered the clerk; and Defendant provided Mr. Bonifay with a detailed layout of the store. See Archer v. State, 934 So. 2d 1187, 1191-92 (Fla. 2006). Mr. Barth, in contrast, thought the plan was to rob the store, not murder the clerk. Id.

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

eSigned by CIRCUIT COURT JUDGE W. JOEL BOLES
on 02/12/2019 10:13:23 ZaPCYaHy

W. JOEL BOLES
CIRCUIT JUDGE

WJB/mco

The Clerk of Court shall effectuate Service upon the following:

--**Michael Reiter**, 4 Mulligan Court, Ocala, FL 34472, mreiter37@comcast.net *(via electronic delivery)*

--**Martin J. McClain**, McClain & McDermott, P.A., 141 North East 30th Street, Wilton Manors, FL 33334, martymcclain@earthlink.net *(via electronic delivery)*

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