APPENDIX B

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

STATE OF FLORIDA,	**CASE NO.: 1996 CF 2517 A**
	DIV.: M
vs.	**S. CT. CASE NO.: SC1960-92089**
MICHAEL DUANE ZACK, III,	**DEATH WARRANT SIGNED FOR EXECUTION – OCTOBER 3, 2023**
Defendant.	**AT 6:00 P.M.**

ORDER DENYING SUCCESSIVE MOTION FOR POSTCONVICTION RELIEF AND MOTION FOR STAY

THIS MATTER came before the Court upon Defendant's Successive Motion for Postconviction Relief and Defendant's Motion for Stay of Execution, Postponement of All Proceedings, and Leave to Amend Motion for Postconviction Relief, as well as attachments thereto, both filed on August 28, 2023, and brought pursuant to Florida Rule of Criminal Procedure 3.851, and upon the State's Answer to Third Successive Postconviction Motion and the State's Response to Zack's Omnibus Motion to Stay His Execution, Postpone All Proceedings, and Amend His Post-Warrant 3.851 Motion, both filed on August 29, 2023. In his successive motion, Defendant raises two claims for relief, and he seeks a stay of execution and other relief in the companion motion. On August 31, 2023, a *Huff*[1] hearing was held to determine whether there was any need for an evidentiary hearing. The Court heard argument as to the claims raised in Defendant's motions and determined there was no need for an evidentiary hearing. Having reviewed the motions and attachments, the State's responses, the record, and relevant legal authority, and having heard and carefully considered argument of counsel, the Court finds as

1 *Huff v. State*, 622 So. 2d 982, 983 (Fla. 1993).

follows:

PROCEDURAL HISTORY

On November 24, 1997, Defendant was sentenced to death for the June 1996 first-degree murder of Ravonne Kennedy Smith after a jury recommendation of 11 to one in favor of death. Defendant's conviction and sentence were affirmed on direct appeal, and the facts of his case are recited in the opinion. *Zack v. State*, 753 So. 2d 9 (Fla. 2000). Defendant's conviction and death sentence became final on October 2, 2000, when the United States Supreme Court denied certiorari review in the direct appeal. *Zack v. Florida*, 531 U.S. 858 (2000).

On May 10, 2002, Defendant filed a motion for relief under Florida Rules of Criminal Procedure 3.850 or 3.851 and an amended motion on October 21, 2002. After an evidentiary hearing, Defendant was denied relief by the order of July 15, 2003. He filed a motion for relief under rule 3.850 on December 1, 2004, which was dismissed with prejudice without a hearing by the order of January 13, 2005. He filed a successive motion under rule 3.851 on May 26, 2015, which was denied by the order of July 8, 2015. Defendant filed a successive motion on January 11, 2017, which included claims under *Hurst v. Florida,* 136 S.Ct. 616 (2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). The motion was denied by the order of January 16, 2018. On August 17, 2023, Governor Ron DeSantis signed a warrant scheduling Defendant's execution for Tuesday, October 3, 2023, at 6:00 p.m.

CLAIM 1

Defendant claims his execution is prohibited by the Eighth and Fourteenth Amendments to the United States Constitution due to a new scientific consensus that individuals with Fetal

Alcohol Syndrome (FAS) meet the functional criteria for intellectual disability. He alleges he has been diagnosed with FAS since 1997, and a new definitive medical consensus establishes that FAS is a disorder equivalent to intellectual disability. He argues FAS should be subject to the same societal supports and protections as intellectual disability, and an IQ score cannot be the sole factor precluding relief under *Atkins v. Virginia*, 536 U.S. 304 (2002).

PROCEDURALLY BARRED AS PREVIOUSLY RAISED

Under *Atkins*, the Eighth Amendment prohibits the execution of an individual who is intellectually disabled. *Id.* at 319; *Haliburton v. State*, 331 So. 3d 640, 645 (Fla. 2021). Defendant is seeking to relitigate his *Atkins* claim, which has been previously decided against him.

Defendant raised an *Atkins* claim in his postconviction motion of October 21, 2002, which was denied by the order of July 15, 2003. It was found that Defendant was not mentally retarded as defined by section 921.137, Florida Statutes, and was not entitled to the Eighth Amendment protections afforded mentally retarded persons facing the death penalty. The ruling was affirmed on appeal. *Zack v. State*, 911 So. 2d 1190, 1202 (Fla. 2005). The Florida Supreme Court noted Defendant's lowest IQ score was 79. *Id.* at 1201.

In his motion of December 1, 2004, Defendant sought relief under Florida Rule of Criminal Procedure 3.203 and for a determination of whether he was mentally retarded. The motion was dismissed with prejudice by the order of January 13, 2005, in which it was found the claim would have been successive and refuted by the record, which showed Defendant had an IQ above the threshold for a finding of mental retardation. The order was affirmed on appeal. *Zack v. State*, 982 So. 2d 1179 (Fla. 2007).

Defendant alleged he was intellectually disabled and sought relief under *Atkins* and *Hall v. Florida*, 572 U.S. 701 (2014), in his motion of May 26, 2015, which was denied by the order of

July 8, 2015. In the opinion affirming the order, the Florida Supreme Court again noted Defendant's IQ scores were well outside the margin of error, precluding him relief. *Zack v. State*, 228 So. 3d 41, 47 (Fla. 2017). In his motion of January 11, 2017, Defendant sought to raise a claim under *Hurst* regarding intellectual disability, which was found to be without merit by the order of January 16, 2018.

Based on the foregoing, Defendant's claim is procedurally barred. *See Barwick v. State*, 361 So. 3d 785, 794-95 (Fla. 2023).

UNTIMELY

Defendant's claim is not filed within the time provided by rule 3.851(d)(1) or as otherwise provided in 2004 in the wake of *Atkins*. *See Amendments to Florida Rules of Criminal Procedure & Florida Rules of Appellate Procedure*, 875 So. 2d 563, 571 (Fla. 2004). Defendant seeks to avoid this procedural bar by asserting there is a new consensus that FAS is an equivalent to intellectual disability. *See* Fla. R. Crim. P. 3.851(d)(2). However, "resolutions, consensus opinions, articles, research, and the like, do not constitute newly discovered evidence." *Barwick v. State*, 361 So. 3d 785, 793 (Fla. 2023). Further, Defendant's allegations and attachments show the alleged consensus has existed since at least 2021, and the facts of FAS were known to Defendant well before 2021. For example, the "tipping point" referenced by Defendant is based on a 2021 publication, which relies on older sources. Such "'opinions or research studies based on a compilation or analysis of previously existing data and scientific information are not generally considered newly discovered evidence." *Dillbeck v. State*, 357 So. 3d 94, 99 (Fla. 2023) (quoting *Henry v. State*, 125 So. 3d 745, 750 (Fla. 2013)).

A successive motion for relief under rule 3.851 must be filed "within one year of the date upon which the claim became discoverable through due diligence." *See Dillbeck v. State*, 304 So.

3d 286, 288 (Fla. 2020). The alleged consensus does not constitute newly discovered evidence and even if it were, it has not been timely raised. Thus, Defendant's claim is untimely. Otherwise, Defendant's claim is also procedurally barred because it could have been previously raised. *See Barwick*, 361 So. 3d at 795.

MERITS

Defendant's claim is without merit. Intellectual disability is clearly defined under Florida law, and Defendant does not now claim he qualifies as intellectually disabled as so defined. *See* § 921.137, Fla. Stat; Fla. R. Crim. P. 3.203(b). Instead, he seeks to expand the protection of *Atkins* to FAS. However, "the categorical bar of *Atkins* that shields the intellectually disabled from execution does not apply to individuals with other forms of mental illness or brain damage." *See Dillbeck,* 357 So. 3d at 100. *See also Lawrence v. State*, 969 So. 2d 294, 300 n.9 (Fla. 2007) (finding the Equal Protection Clause does not require the extension of *Atkins* to the mentally ill). Moreover, under the State's conformity clause, the Court may not expand *Atkins* to apply to a diagnosis of FAS. *See Barwick,* 361 So. 3d at 795; Fla. Const. art. 1, § 7.

CLAIM 2

Defendant claims his execution would violate the Eighth Amendment because one juror voted to spare his life. Defendant challenged the non-unanimous jury sentencing recommendation under *Hurst* in his motion of January 11, 2017, which was denied by the order of January 16, 2018. Therefore, his claim is untimely and procedurally barred. Moreover, a unanimous jury recommendation is not required under the Eighth Amendment. *See Dillbeck,* 357 So. 3d at 104.

MOTION FOR STAY OF EXECUTION AND OTHER RELIEF

Defendant requests a stay of execution and postponement of proceedings to provide an

opportunity for meaningful consideration of his claims and an evidentiary hearing. He asserts the period of time between the signing of the death warrant and the execution date deprives him of due process and meaningful postconviction proceedings. He also seeks leave to file an amended rule 3.851 motion.

In light of the Court's findings as to Claims 1 and 2 above, the Court finds Defendant fails to raise substantial grounds for relief warranting a stay. *See Barwick,* 361 So. 3d at 791; *Chavez v. State*, 132 So. 3d 826, 832 (Fla. 2014). The warrant and execution schedule fails to provide Defendant with a sufficient ground for a stay or postponement of proceedings. *See Id.,* 361 So. 3d at 789. Finally, Defendant's request for leave to amend his motion fails to show good cause and fails to otherwise comply with rule 3.851(f)(4).

Accordingly, it is hereby,

ORDERED AND ADJUDGED Defendant's Successive Motion for Postconviction Relief and Defendant's Motion for Stay of Execution, Postponement of All Proceedings, and Leave to Amend Motion for Postconviction Relief are **DENIED**.

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

eSigned by CIRCUIT COURT JUDGE LINDA L. NOBLES
on 08/31/2023 17:03:24 ijuy59nH

LLN/awg

Clerk of Court to Serve a Copy of this Order on the Following:

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