No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DAVID JOSPEH PITTMAN,

***Petitioner*,**

vs.

STATE OF FLORIDA,

Respondent.

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

---

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

THIS IS A CAPITAL CASE
WITH AN EXECUTION SCHEDULED FOR
WEDNESDAY SEPTEMBER 17, 2025, AT 6:00 P.M.

JULISSA R. FONTÁN*
FLORIDA BAR NUMBER 0032744
LAW OFFICE OF THE CAPITAL COLLATERAL
REGIONAL COUNSEL - MIDDLE REGION
12973 N. TELECOM PARKWAY
TEMPLE TERRACE, FL 33637
TELEPHONE: (813) 558-1600
COUNSEL FOR THE PETITIONER
COUNSEL OF RECORD

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____

DAVID JOSPEH PITTMAN,

***Petitioner*,**

vs.

STATE OF FLORIDA,

Respondent.

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

---

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

THIS IS A CAPITAL CASE
WITH AN EXECUTION SCHEDULED FOR
WEDNESDAY SEPTEMBER 17, 2025, AT 6:00 P.M.

APPENDIX A

Opinion of the Florida Supreme Court is reported at *Pittman v. State*, 337 So.3d 776 (Fla. 2022)

337 So.3d 776
Supreme Court of Florida.

David Joseph PITTMAN, Appellant,

v.

STATE of Florida, Appellee.

No. SC21-1185
|
April 28, 2022

Synopsis

Background: Defendant, whose first-degree murder and death sentence were affirmed on appeal to the Supreme Court, 646 So.2d 167, filed a third motion for postconviction relief. The Circuit Court, 10th Judicial Circuit, Polk County, Jalal Harb, J., denied the motion and defendant appealed.

[Holding:] The Supreme Court held that the time for defendant to file his postconviction relief intellectual disability claim accrued, and the 60-day limitations period began to run, from the effective date of rule of criminal procedure that barred the execution of prisoners with intellectual disabilities.

Affirmed.

West Headnotes (2)

[1] Criminal Law Time for proceedings

The time for defendant to file his postconviction relief intellectual disability claim accrued, and the 60-day limitations period began to run, from the effective date of rule of criminal procedure that barred the execution of prisoners with intellectual disabilities. Fla. R. Crim. P. 3.203.

[2] Criminal Law Proceedings

The record refuted defendant's claim that his intellectual disability could not have been discovered prior to 2015, when it was determined that defendant's IQ score was 70, and which was more than 20 years after defendant's murder convictions, and thus defendant failed to exercise due diligence and his third successive postconviction relief motion arguing that he was intellectually disabled and could not be put to death for his crimes was not timely filed. Fla. R. Crim. P. 3.203.

An Appeal from the Circuit Court in and for Polk County, Jalal A. Harb, Judge – Case No. 531990CF002242A1XXXX

Attorneys and Law Firms

Eric Pinkard, Capital Collateral Regional Counsel, Julissa R. Fontán, Heather A. Forgét, and Natalia C. Reyna-Pimiento, Assistant Capital Collateral Regional Counsel, Middle Region, Temple Terrace, Florida, for Appellant

Ashley Moody, Attorney General, Tallahassee, Florida, and Timothy A. Freeland, Senior Assistant Attorney General, Tampa, Florida, for Appellee

Opinion

PER CURIAM.

David Joseph Pittman, a prisoner under sentence of death, appeals the circuit court's order summarily denying his third amended successive motion for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.851 and his motion to correct illegal sentence filed pursuant to Florida Rule of Criminal Procedure 3.800(a). We affirm the denial of relief.[1]

In 1991, Pittman was convicted of the first-degree murders of Clarence and Barbara Knowles, and their daughter Bonnie, two counts of arson, and grand theft. *See Pittman v. State*, 646 So. 2d 167, 168-69 (Fla. 1994). Pittman was sentenced to death for each murder, and this Court affirmed his convictions and sentences. *Id.* His death sentences became final in 1995 when the United States Supreme Court denied certiorari review. *Pittman v. Florida*, 514 U.S. 1119, 115 S.Ct. 1982, 131 L.Ed.2d 870 (1995). We also affirmed the ***777** denial of Pittman's initial postconviction motion and denied habeas relief. *Pittman v. State*, 90 So. 3d 794, 820 (Fla. 2011).

In 2015, Pittman filed his first successive postconviction motion. Following subsequent amendments,[2] Pittman's third amended successive postconviction motion[3] alleged that he is intellectually disabled and entitled to relief based on *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), and *Hall v. Florida*, 572 U.S. 701, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014). Pittman subsequently filed a rule 3.800(a) motion arguing that his death sentences are illegal because he has not received an evidentiary hearing on his intellectual disability claim. The circuit court summarily denied Pittman's third amended successive postconviction motion, finding that his intellectual disability claim was untimely, and also denied his rule 3.800(a) motion.

[1] **[2]** We agree with the postconviction court that Pittman is not entitled to postconviction relief on his intellectual disability claim because that claim is untimely. As this Court stated in *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020), *Hall* does not apply retroactively. Therefore, under the governing version of Florida Rule of Criminal Procedure 3.203, which this Court adopted in the wake of the Supreme Court's decision in *Atkins*, Pittman was required to raise his intellectual disability claim no later than 60 days after October 1, 2004. *See Amends. to Fla. Rules of Crim. Proc. & Fla. Rules of App. Proc.*, 875 So. 2d 563, 571 (Fla. 2004). To the extent Pittman argues that his IQ score of 70 from 2015 is newly discovered evidence, Pittman's motion was not timely because it was not 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). Record evidence refutes Pittman's claim that this information could not have been discovered prior to 2015.

Accordingly, we affirm the postconviction court's summary denial of Pittman's third amended successive postconviction motion and the denial of his rule 3.800(a) motion.[4]

It is so ordered.

CANADY, C.J., and POLSTON, LAWSON, MUÑIZ, COURIEL, and GROSSHANS, JJ., concur.

LABARGA, J., dissents with an opinion.

LABARGA, J., dissenting.

In light of my dissent in *Phillips v. State*, 299 So 3d 1013 (Fla. 2020) (receding from *Walls v. State*, 213 So. 3d 340 (Fla. 2016), and holding that *Hall v. Florida*, 572 U.S. 701, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014), does not apply retroactively), I dissent to the majority's decision to the extent that it affirms the summary denial of Pittman's third amended successive motion for postconviction relief.

All Citations

337 So.3d 776, 47 Fla. L. Weekly S115

Footnotes

1 We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const.

2 Pittman did not appeal the denial of his prior successive 3.851 motions.

3 Pittman's motion was titled as his “second” amended motion, but it is his third amended motion.

4 We also reject without discussion Pittman's arguments that the circuit court erred in considering the State's motion to dismiss and in allowing arguments not noticed for the motion to dismiss hearing, *see Freeman v. State*, 300 So. 3d 591 (Fla. 2020), and his argument that his prior postconviction counsel was ineffective, *see Sweet v. State*, 293 So. 3d 448 (Fla. 2020).

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DAVID JOSPEH PITTMAN,

***Petitioner*,**

vs.

STATE OF FLORIDA,

Respondent.

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

---

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

THIS IS A CAPITAL CASE
WITH AN EXECUTION SCHEDULED FOR
WEDNESDAY SEPTEMBER 17, 2025, AT 6:00 P.M.

APPENDIX B

Trial court's order denying Pittman's successive motion for post-conviction relief

**IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT,
IN AND FOR POLK COUNTY, FLORIDA**

STATE OF FLORIDA,
Plaintiff,

v. **CASE NO. 1990 CF 2242**

DAVID JOSEPH PITTMAN,
Defendant.
_____/

MOTION FOR REHEARING ON FINAL ORDER DENYING DEFENDANT'S THIRD AMENDED SUCCESSIVE MOTION FOR POSTCONVICTION RELIEF AND DEFENDANT'S MOTION UNDER RULE 3.800(a) CHALLENGING HIS DEATH SENTENCE AS ILLEGAL

David Pittman, by and through his undersigned counsel, respectfully moves this Court, pursuant to Fla.R.Crim.P. 3.851(f)(7), for a rehearing. No claim previously raised is hereby abandoned and no arguments waived if not raised in this Motion for Rehearing. In support thereof, Mr. Pittman respectfully submits as follows:

This Court's denial of an evidentiary hearing as to his successive motion, specifically Claim 1 and 1A causes irreparable harm to Mr. Pittman, and Mr. Pittman respectfully suggests that the Court has overlooked key facts and/or misapprehended the law when it denied an evidentiary hearing on portions of those claims. As such, Mr. Pittman urges this Court to reconsider and grant a rehearing and evidentiary hearing on his intellectual disability claims.

Timeliness:

1. This Court found that Mr. Pittman's claim was untimely, as "the Florida Supreme Court has made it clear that *Hall*[1] is not retroactive". Slip op. 19. However, this finding ignores the plain history of this case.

[1] *Hall v. Florida*, 572 U.S. 701 (2014).

2. Prior postconviction counsel filed Mr. Pittman's successive postconviction motion on March 13, 2017. At the time this motion was filed, according to the prevailing and controlling case law of the time, *Hall* was deemed to apply retroactively. *See Walls v. State*, 213 So.3d 340 (Fla. 2016). At the time Mr. Pittman's motion was filed, his prior postconviction counsel relied on the current state of the law. Although the Florida Supreme Court has since receded from the retroactive application of *Hall*[2], at the time Mr. Pittman's motions were filed, *Hall* was retroactive and such claims were timely at the time of filing.

3. However, the retroactivity of *Hall* was not what triggered prior postconviction counsel to file Mr. Pittman's successive postconviction motion raising intellectual disability. There was another trigger entirely. Unlike the cases cited by this Court's order, where the trigger was cited as *Walls* and the retroactivity ruling (Slip op. 18), prior postconviction counsel alleged that there was newly discovered evidence of Mr. Pittman's intellectual disability. This was evidence that did not exist at the time *Atkins*[3] was decided, or *Hall*, or *Walls*.

4. Normally, when a postconviction motion is summarily denied, all allegations in the motion must be accepted as true to the extent they are not conclusively rebutted by the record. *Hodges v. State*, 885 So.2d 338, 355 (Fla. 2004) (quoting *Gaskin v. State*, 737 So.2d 509, 516 (Fla. 1999)); see also *Moss v. State*, 860 So. 2d 1007 (Fla. 5th DCA 2003)(where post-conviction motion based on newly discovered evidence is summarily denied, defendant's factual allegations must be accepted as true to the extent that they are not refuted by the record). This case is unique, as to the facts, because testimony was taken, specifically as to the issue of newly discovered evidence. This Court heard testimony from prior postconviction counsel, Martin McClain, and from Dr. Gordon Taub during the motion hearing conducted on March 19, 2021.

[2] *See Phillips v. State*, 299 So.3d 1013 (Fla. 2020).
[3] *Atkins v. Virginia*, 536 U.S. 304 (2002).

5. The record in this case shows that Dr. Henry Dee evaluated Mr. Pittman's mental health in 1990. This evaluation included IQ testing. Dr. Dee testified at Mr. Pittman's penalty phase in 1991. Dr. Dee testified that Mr. Pittman had an amnestic disorder and an organic personality disorder. The amnestic disorder meant that Mr. Pittman had an impaired memory. The organic personality disorder diagnosis reflected Dr. Dee's finding that Mr. Pittman's mental functioning was organically impaired. Based upon Mr. Pittman's score on the IQ testing, Dr. Dee concluded that Mr. Pittman was not mentally retarded. Dr. Dee also testified at the 2006 evidentiary hearing which was conducted on Mr. Pittman's 3.851 claims. In his 2006 testimony, Dr. Dee noted that Mr. Pittman had "a 95 IQ." (3.851 Transcript at 291). The verbal score was 89, while the performance score was 103. (3 .851 Transcript at 288).

6. At the hearing, Mr. McClain provided further insight into this history. He testified that he relied on Dr. Dee's testing. "…I rely on the experts. Dr. Dee was an expert who I respected. Dr. Dee testified that the IQ score was 95. I had no basis or reason to look beyond that. He is who I was relying on." (Motion Hearing March 19, 2021 Transcript at 71). As a result of that reliance, and the IQ score, he did not raise an intellectual disability claim for Mr. Pittman. As Mr. McClain testified, "there was no basis to raise the claim." (Motion Hearing March 19, 2021 Transcript at 64).

7. On or about May 15, 2015, Mr. McClain had Dr. Gordon Taub go and see Mr. Pittman. The reason for the evaluation was not about intellectual disability. Mr. McClain testified that Mr. Pittman's evaluation was "more like having contact with him, just checking him out, just so I can point to something in the future if incompetency at execution becomes an issue." (Motion Hearing March 19, 2021 Transcript at 74). The evaluation was supposed to "establish a base line, a progression of how he looked to a mental health expert". Id. The IQ test that was administered

to Mr. Pittman was part of the evaluation, "just a means of sort of taking a temperature, sort of checking on how he's doing." (Motion Hearing March 19, 2021 Transcript at 75).

8. The results of Dr. Taub's evaluation resulted in a score of 70. Mr. McClain testified that this score was "not what I was expecting." Id. It was Dr. Taub's results that caused prior postconviction counsel to review Dr. Dee's work. See Motion Hearing March 19, 2021 Transcript at 76.

9. Prior to this point, and with the testimony before this Court, prior postconviction counsel had no reason to doubt, question, or review the prior results, which prior postconviction counsel had relied upon. That reliance caused prior postconviction counsel to not raise an intellectual disability claim on Mr. Pittman's behalf. The Florida Supreme Court "has established that defense counsel is entitled to rely on the evaluations conducted by qualified mental health experts, even if, in retrospect, those evaluations may not have been as complete as others may desire." *See Darling v. State*, 966 So.2d 366 (Fla. 2007), citing *State v. Sireci*, 502 So.2d 1221, 1223 (Fla.1987).

10. For newly discovered evidence, the asserted facts must have been unknown by the trial court, by the party, or by counsel at the time of the trial, and it must appear that defendant or his counsel could not have known them by the use of diligence. *See Jones v. State*, 709 So. 2d 512 (Fla. 1998).[4] Mr. Pittman's motion was filed within one year of when the facts supporting the claim became available. Fl. R. Crim. Pro. 3.851(d)(1)–(2) and *Clark v. State*, 35 So. 3d 880, 892 (Fla. 2010) (applying 3.851(d)(2)(A) to hold that "[c]laims of newly discovered evidence must be raised within one year of the time of discovery". This is measured from the date of when the information was or could have been first discovered, and not at some later date when a subsequent

[4] The federal court standard is similar to that which applies in Florida. *See U.S. v. Meeks*, 742 F.3d 838 (11th Cir. 2014) and *U.S. v. Johnson*, 596 F.2d 147, 148 (5th Cir. 1979).

document containing the same information is created. *See Long v. State*, 183 So. 3d 342 (Fla. 2016).

11. In this case, the evidence that Dr. Dee's initial testing was defective could not have come to light until the new testing by Dr. Taub was done on May 15, 2015. Mr. Pittman's successive 3.851 motion is therefore timely, both under the law the time and because it was filed within one year of Dr. Taub's results. *See Duckett v. State*, 148 So.3d 1163, 1168 (Fla. 2014)(finding Duckett's motion timely "[b]ecause the review of Malone's work in the instant case was written during these successive post-conviction proceedings, the 2011 Report could not previously have been discovered by due diligence because it did not exist.").

12. This Court made much of prior postconviction counsel's admission that the copyright date on the WAIS Dr. Dee administered indicated that the test was out of date and improperly administered. Slip op. 21. However, this finding ignores the testimony of prior postconviction counsel that he had no basis to doubt his original experts' work until Dr. Taub's results. This Court's findings seem to imply the prior postconviction counsel should always review the work of their experts rather than rely on their expertise, when it found that "[c]ounsel could have discovered Dr. Dee utilized the wrong version of the WAIS in 1991". Slip op. 23. This contrary to Florida law.

13. The evidence from the motion hearing in this matter supports two alternative arguments: 1) that prior postconviction counsel reasonably relied on his expert and that evidence of intellectual disability is newly discovered, or 2) prior postconviction counsel was negligent and failed to diligently investigate Mr. Pittman's case and was thus ineffective[5]. Based upon the

[5] Counsel for Mr. Pittman recognizes the current state of Florida law on the subject of ineffective assistance of postconviction counsel and that currently, the law in Florida does not recognize such a claim. *Sweet v. State*, 293 So.3d 448, 453 (Fla. 2020). However, Mr. Pittman would note that such claims do exist and have been recognized by the United States Supreme Court (see *Martinez v. Ryan*, 566 U.S. 1 (2012)) and

testimony, there is ample evidence to support a finding that the evidence of Mr. Pittman's intellectual disability could not have been discovered until Dr. Taub's testing in 2015. Mr. Pittman's motion was timely filed and he should have a full evidentiary hearing to present his evidence of intellectual disability, beyond his IQ[6].

WHEREFORE, Mr. Pittman requests a rehearing and full evidentiary hearing on the denied intellectual disability claims. Denial of the opportunity to present this evidence in a full and fair hearing causes irreparable harm to Mr. Pittman and is a violation of his due process rights under the Fifth, Sixth, Eighth and Fourteenth Amendments and the corresponding provisions of the Florida Constitution. This Court should grant Rehearing and allow an evidentiary hearing.

Respectfully submitted by

/s/ Julissa R. Fontán
Julissa R. Fontán
Florida Bar No. 0032744
Assistant CCRC
fontan@ccmr.state.fl.us
support@ccmr.state.fl.us

/s/ Natalia C. Reyna-Pimiento
Natalia C. Reyna-Pimiento
Florida Bar No. 1005590
Assistant CCRC
reyna@ccmr.state.fl.us

---

continues to argue in the alternative that some of the facts found in this Court's order do support a possible claim for ineffective assistance of postconviction counsel. Further, as the history of this case is illustrative of, the law can change at any time and although such claims are not cognizable today under Florida law, Mr. Pittman does not waive any such claims or arguments. Prior postconviction did plead this theory in the alternative in this matter, there is testimony and evidence on the record that does support this argument, and current counsel does not waive this alternative theory, even though it is currently not cognizable under the law today. Further, since this has been pled and raised in this litigation, should the law change in the future, the issue of timeliness will be for a future court to determine, however, for the record, this claim was raised at the first possible instance and is not waived by Mr. Pittman.

[6] "While professionals have long agreed that IQ test scores should be read as a range, Florida uses the test score as a fixed number, thus barring further consideration of other relevant evidence, e.g., deficits in adaptive functioning, including evidence of past performance, environment, and upbringing." *Hall v. Florida,* 572 U.S. 701, 702 (2014).

/s/ Heather A. Forgét
Heather A. Forgét
Florida Bar No. 0032402
Assistant CCRC
forget@ccmr.state.fl.us

Capital Collateral Regional Counsel –
Middle Region
12973 N. Telecom Parkway
Temple Terrace, FL 33637
Telephone: (813) 558-1600

Counsel for the Defendant

CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been served electronically upon the Clerk of the Circuit Court, the Honorable Jalal A. Harb (csullivan@jud10.flcourts.org); Assistant Attorney General, Timothy Freeland (Timothy.Freeland@myfloridalegal.com, and capapp@myfloridalegal.com); Assistant State Attorney Paul Wallace (pwallace@sao10.com, and crhoden@sao10.com) on June 14, 2021.

/s/ Julissa R. Fontán
Julissa R. Fontán

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DAVID JOSPEH PITTMAN,

***Petitioner*,**

vs.

STATE OF FLORIDA,

Respondent.

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

---

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

THIS IS A CAPITAL CASE
WITH AN EXECUTION SCHEDULED FOR
WEDNESDAY SEPTEMBER 17, 2025, AT 6:00 P.M.

APPENDIX C

Trial court order in *State v. Walls*, allowing evidentiary hearing

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

STATE OF FLORIDA,
Plaintiff,

v. Case No. 1987-CF-856

FRANK A. WALLS,
Defendant.

AMENDED SCHEDULING ORDER

This capital postconviction case is before the Court upon the Supreme Court of Florida's October 20, 2016 Order reversing this Court's summary denial of the Defendant's intellectual disability claim and remanding for an evidentiary hearing pursuant to *Hall v. Florida*, 134 S. Ct. 1986 (2014). The parties are hereby **ORDERED** to comply with the deadlines set forth in this order:

1. The Defendant shall file a Witness List disclosing the name of all lay and expert witnesses they intend to call at the evidentiary hearing no later than ***July 22, 2019***. The State shall file a Witness List disclosing the name of all lay and expert witnesses they intend to call at the evidentiary hearing no later than ***September 20, 2019***
    a. All expert witnesses shall be specifically designated as such on the Witness List. To the extent that each expert witness intends to rely upon his or her written report, a copy of said report must be attached to the party's Witness List.
    b. The parties shall be permitted without further motion to depose all witnesses designated as experts.
2. All depositions shall be completed no later than ***November 8, 2019***.
3. All written discovery shall be completed no later than ***December 13, 2019.***

4. The Defense shall file an Exhibit List no later than ***December 20, 2019***. The State shall file an Exhibit List no later than ***February 18, 2020***.
    a. The parties shall also provide clear, legible copies of each exhibit on their respective Exhibit Lists, clearly marking the exhibit number, to the opposing party and the Court on the same date that the Exhibit List is due. The parties may agree amongst themselves whether this discovery should be conducted hard-copy or electronically.
5. An evidentiary hearing on Mr. Walls' intellectual disability claim has been scheduled for ***six (6) days***, beginning on ***Tuesday, June 29, 2021***, through ***Wednesday, July 7, 2021***, before the Honorable William Stone at the Okaloosa County Courthouse, 1940 Lewis Turner Boulevard, Fort Walton Beach, FL. Witnesses shall be permitted to appear via Zoom. Counsel for parties must appear in person.
6. The evidentiary hearing shall be reported by the Official Court Reporters of Okaloosa County, Florida.
7. The official court reporter shall prepare an official transcript of the evidentiary hearing no later than ***August 18, 2021*** and provide a copy to the parties.
8. The parties shall file simultaneous written closing arguments no later than ***September 20, 2021***.
9. The Court will conduct a status hearing ***every 120 days***, or as close thereto as is feasible, to monitor the progress of discovery and address any related issues that arise. The parties may appear by telephone for status hearings through 2021, unless otherwise noticed.
10. The next status conference shall take place no later than ***Monday, May 31, 2021***.

11. The Case Management Conference pursuant to Florida Rules of Criminal Procedure Rule 3.851 (f)(5)(C), was on ***Friday, October 25, 2019.*** At a status conference held on Friday, March 5, 2021, the parties agreed that there was nothing additional that needed to be considered. Therefore, another Case Management Conference is not deemed necessary. No additional witnesses or exhibits will be considered.

DONE AND ORDERED, in Chambers, Okaloosa County, Fort Walton Beach, Florida.

NOTICE REGARDING THE AMERICANS WITH DISABILITIES ACT OF 1990.

If you are a person with disability who need any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact:

Court Administration, ADA Liaison
Okaloosa County
1940 Lewis Turner Boulevard
Fort Walton Beach, FL 32547
Phone (850) 609-4700
Fax (850) 651-7725
ADA.Okaloosa@flcourts1.gov

at least 7 days before your scheduled court appearance, or immediately upon receiving this notification if the time before scheduled appearance is less than 7 days; if you are hearing or voice impaired, call 711.

Copies furnished to:

Charmaine Millsaps
Assistant Attorney General
charmaine.millsaps@myfloridalegal.com

capapp@myfloridalegal.com

Diane Stefani
John Molchan
Assistant State Attorney
jmolchan@osa1.org
dstefani@osa1.org
dmoffitt@osa1.org
oka-div002@osa1.org

Kara R. Ottervanger
Julissa R. Fontan
Natalia C. Reyna-Pimiento
Assistant Capital Collateral Regional Counsel
ottervanger@ccmr.state.fl.us
fontan@ccmr.state.fl.us
reryna@ccmr.state.fl.us
support@ccmr.state.fl.us

Office of the Circuit Court Reporter
Okaloosa County
Okaloosa County Courthouse Annex Extension
1940 Lewis Turner Boulevard
Box 4
Fort Walton Beach, FL 32547

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

STATE OF FLORIDA,

Plaintiff,

v. **Case No. 87-CF-856**
Div. 002

FRANK A. WALLS,

Defendant.

ORDER DENYING STATE'S MOTION FOR SUMMARY DENIAL OF DEFENDANT'S INTELLECTUAL DISABILITY CLAIM
AND
DENYING DEFENDANT'S MOTION TO STRIKE PORTIONS OF STATE'S BRIEF

THIS CAUSE is before the Court on the State's "Motion for Summary Denial of the Intellectual Disability Claim," filed on May 29, 2020. Defendant filed a response on June 29, 2020. The State filed supplemental authority on October 8, 2020, and November 17, 2020. The Court conducted a hearing on the motion on November 18, 2020. Subsequently, on November 20, 2020, the Court entered an order directing the parties to file a brief on the issue of whether Phillips v. State, 299 So. 3d 1013 (Fla. 2020), receding from Walls v. State, 213 So. 3d 340 (Fla. 2016), constitutes an intervening decision by a higher court contrary to the decision reached in Walls and a clear example of the exception to the general rule that requires the trial court to comply with a mandate. The State filed its brief on January 11, 2021, and Defendant filed his brief on January 19, 2021, which included a motion to strike portions of the State's brief.

Having considered the motion, response, supplemental authority, the arguments of the parties presented at the hearing, the briefs, the motion to strike, and the applicable law, the Court finds as follows:

Limited Relevant Background

In June 2006, Defendant filed a motion raising the issue of whether he was ineligible for the death penalty pursuant to rule 3.203. Ultimately, following an evidentiary hearing on the matter, the Court denied relief. The Supreme Court of Florida affirmed the denial of relief on October 31, 2008.[1] During the time of those proceedings, a strict 70-point IQ test score cutoff applied to claims of intellectual disability.

Years later, the United States Supreme Court decided Hall v. Florida, 572 U.S. 701 (2014), and held that Florida's strict 70-point IQ test score cutoff was unconstitutional. Subsequently, in May 2015, based on Hall, Defendant filed a successive postconviction motion to vacate his sentence. After considering the record of the prior evidentiary hearing, this Court found that even if Hall applied retroactively, Defendant would not be entitled to relief, and the Court summarily denied the motion.

Subsequently, in Walls, the Supreme Court of Florida found that Hall applied retroactively, and that Court reversed the summary denial of the intellectual disability claim and remanded the matter for this Court to conduct an evidentiary hearing on the claim. The Walls Court opined that "although Walls has had an earlier evidentiary hearing as to intellectual disability and was allowed to present evidence of all three prongs of the test, he did not receive the type of holistic review to which he is now entitled."[2] The Walls mandate issued on January 25, 2017.

---

[1] Walls v. State, 3 So. 3d 1248 (Fla. 2008) (unpublished table disposition).
[2] Walls v. State, 213 So. 3d 340, 347 (Fla. 2016).

On May 21, 2020, in the Phillips opinion, the Supreme Court of Florida determined that it had erred in concluding that Hall should be applied retroactively, opining, "We cannot escape the conclusion that this Court in *Walls* clearly erred in concluding that *Hall* applies retroactively."[3]

The State's Motion

The State asserts that "[b]ased on Phillips, the evidentiary hearing should be cancelled and the intellectual disability claim should be summarily denied." The State also asserts that, as to the intellectual disability claim itself, "holistic review" of the claim is "prohibited" under Quince v. State, 241 So. 3d 58 (Fla. 2018) and Wright v. State, 256 So. 3d 766 (Fla. 2018). The State argues that Defendant "fails the third prong of the statutory test for intellectual disability of juvenile onset."[4] The State argues that there "is no point in exploring" the other prongs "when Walls fails the third prong of juvenile onset."

Legal Authority

"A mandate may not be recalled more than 120 days after it has been issued." § 43.44, Fla. Stat. (2020). "The mandate is the official mode of communicating the judgment of the appellate court to the lower court, directing the action to be taken or the disposition to be made of the cause by the trial court." Ketcher v. Ketcher, 198 So. 3d 1061, 1063 (Fla. 1st DCA 2016) (quotations omitted).

Discussion

The retroactive application of Hall was the underlying basis for the Supreme Court of Florida's mandate in Walls for this Court to hold another evidentiary hearing. Because the

---

[3] Phillips v. State, 299 So. 3d 1013, 1023 (Fla. 2020).

[4] A "three-prong test" applies to determinations of intellectual disability: "(1) significantly subaverage intellectual functioning; (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition before age eighteen." Franqui v. State, 301 So. 3d 152, 154 (Fla. 2020), reh'g denied, SC19-203, 2020 WL 5562317 (Fla. Sept. 17, 2020).

Supreme Court of Florida has determined in the Phillips opinion that it was clearly erroneous to give Hall retroactive application, the Court would be inclined to grant the State's motion on that basis.

However, further consideration leads the Court to conclude that the Phillips decision does not affect the mandate for this Court to hold the evidentiary hearing. Indeed, because well over 120 days passed between the time the mandate issued in Walls and the time the Phillips decision was rendered, the mandate for this Court to hold an evidentiary hearing on the intellectual disability claim remains undisturbed. See State v. Okafor, 306 So. 3d 930, 933 (Fla. 2020).

As to the State's argument concerning "holistic" review of the intellectual disability claim, the Court finds the argument unavailing at this time, since the mandate requires the Court to hold the evidentiary hearing. Ultimately, when making the determination concerning intellectual disability, the Court certainly intends to apply the appropriate legal standard. See e.g., Fla. R. Crim. P. 3.203; Franqui v. State, 301 So. 3d 152, 154-55 (Fla. 2020); Foster v. State, 260 So. 3d 174, 179 n.7 (Fla. 2018).

Ruling

Therefore, it is **ORDERED and ADJUDGED:**

1. The State's Motion for Summary Denial of the Intellectual Disability Claim is **DENIED**.
2. The Defendant's Motion to Strike Portions of the State's Supplemental Brief is **DENIED**.

DONE AND ORDERED in Fort Walton Beach, Okaloosa County, Florida.

W F Stone

eSigned by CIRCUIT COURT JUDGE WILLIAM STONE
on 02/08/2021 13:04:33 wvzcdPpV

WFS/eeb

Copies to:

Charmaine M. Millsaps, AAG, Office of the Attorney General, charmaine.millsaps@myfloridalegal.com
John Molchan, ASA, Office of the State Attorney, jmolchan@osa1.org
Diane Stefani, ASA, Office of the State Attorney, diane_stefani@osa1.org

Kara R. Ottervanger, Assistant CCRC-Middle, ottervanger@ccmr.state.fl.us
Julissa R. Fontán, Assistant CCRC-Middle, fontan@ccmr.state.fl.us
Natalia C. Reyna-Pimiento, Assistant CCRC – Middle, reyna@ccmr.state.fl.us

By: Frannie A. Natalie
eSigned by Frannie Natalie on 02/08/2021 13:10:18 h6STS8Cz

Judicial Assistant

Copies furnished to the following via U.S. mail by the Clerk:

Frank A. Walls, DC# 112850, Union Correctional Institution, P.O. Box 1000, Raiford, FL 32083

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DAVID JOSPEH PITTMAN,

***Petitioner*,**

vs.

STATE OF FLORIDA,

Respondent.

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

---

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

THIS IS A CAPITAL CASE
WITH AN EXECUTION SCHEDULED FOR
WEDNESDAY SEPTEMBER 17, 2025, AT 6:00 P.M.

APPENDIX D

Court orders granting evidentiary hearings pursuant to *Hall* and *Walls*.

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

CASE NO. 1986-04473CFAWS

STATE OF FLORIDA,

Plaintiff,

v.

ROGER LEE CHERRY,

Defendant.
_____/

JOINT STIPULATION ON CORRECTION OF JUDGMENT & SENTENCE

COME NOW, **THE PARTIES: ROGER LEE CHERRY**, by and through court-appointed Registry Counsel, Linda McDermott, and **THE STATE OF FLORIDA**, by and through counsel for the Office of the State Attorney for the Seventh Judicial Circuit, and advises this Court and the Clerk of the Court of the following joint stipulation of the parties:

1. On April 10, 2017, a hearing was held before the Honorable Matthew S. Foxman at which Mr. Cherry was re-sentenced on Count IV of the indictment in Volusia County Case No. 1986-04473CFAWS.

2. Upon receiving a copy of the judgment and sentence, the parties identified three errors that needed correction by the Clerk of the Court:

> First, as to the judgment, it should reflect that Mr. Cherry was tried and found guilty by a jury (page 1).
>
> Second, the sentence should reflect that Mr. Cherry is to be imprisoned for a term of life, to serve a minimum mandatory twenty-five (25) years, before being eligible for parole. *See* Ch. 94-228, § 1, Laws of Fla. (effective until May 25, 1994). (page 3)
>
> And, third, the sentence should reflect that Mr. Cherry is sentenced for a first degree murder **prior to** May 25, 1994 (page 4).

WHEREFORE, the parties request that this Court direct the Clerk of the Court to make the three changes identified above in the Judgment and Sentence, signed on April 24, 2017 and entered on April 25, 2017.

Respectfully submitted,

Linda McDermott
Florida Bar No. 0102857
McClain & McDermott, P.A.
20301 Grande Oak Blvd.
Suite 118 - 61
Estero, FL 33928

(850) 322-2172
lindammcdermott@msn.com

COUNSEL FOR MR. CHERRY

Date May 9, 2017

Respectfully submitted,

Rosemary Calhoun
Florida Bar No. 611700
Office of the State Attorney for the
Seventh Judicial Circuit
The Justice Center
251 N. Ridgewood Avenue
Daytona Beach, FL 32114
(386) 239-7710
calhounr@sao7.org

COUNSEL FOR THE STATE

Date May 9, 2017

**IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT,
IN AND FOR MARION COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

v. **CASE NO.: 42-1980-CF-000016-CFA-XXX**

SONNY BOY OATS, JR.

Defendant.
_____/

ORDER VACATING THE DEFENDANT'S DEATH SENTENCE IN ACCORD WITH THE PARTIES' JOINT STIPULATION AND IMPOSING A SENTENCE OF LIFE IMPRISONMENT WITHOUT POSSIBILITY OF PAROLE FOR TWENTY-FIVE (25) YEARS

The parties executed a Joint Stipulation which after this Court approved was filed with the Clerk of Court on February 13, 2020, in above-entitled matter. Because the parties stipulated that the Defendant's death sentence should be vacated due to his intellectual disability, it incumbent upon this Court to formally vacated the Defendant's death sentence and resentence him. Having been fully informed regarding matter at hand, particularly as to the scope of its sentencing authority, this Court hereby vacates the Defendant's death sentence and imposes a sentence of life imprisonment without possibility of parole in light of the following:

1. In the Joint Stipulation, it was recognized that because the Defendant's intellectual disability was established, the Defendant's sentence of death was no longer a legally authorized sentence. Thus, the death sentence imposed upon the Defendant on April 26, 1984 has to be vacated. As a result, this Court must impose a legally authorized sentence.

2. The crime for which the Defendant stands convicted was committed in 1979. Under the law in effect at that time, the only sentences that this Court has the authority to impose are either a death sentence or a sentence of life imprisonment without possibility of parole for twenty-

five (25) years. *See Bates v. State*, 750 So. 2d 6, 10-11 (Fla. 1999). Given that the Defendant's intellectual disability precludes the imposition of a death sentence, the only sentence that this Court is now authorized to impose is a sentence of life imprisonment without possibility of parole for twenty-five (25) years.

3. Under *Bates v. State,* this Court does not have the authority to impose a sentence of life imprisonment without the possibility of parole because the legislation providing for such a sentence was not enacted until 1994, and that legislation did not apply retroactively to crimes committed prior to its enactment. While the Joint Stipulation indicated that a sentence of life imprisonment without the possibility of parole should be imposed, the parties cannot stipulate to an illegal sentence. *Williams v. State*, 500 So. 2d 501, 503 (Fla. 1986) ("[a] defendant cannot by agreement confer on the court the authority to impose an illegal sentence.").

4. As was made clear in *Bates v. State*, this Court has no sentencing discretion in the Defendant's case. Since a death sentence cannot be imposed on an intellectually disabled defendant, there is only one sentence that this Court can legally impose, that being a sentence to life imprisonment without possibility of parole for twenty-five (25) years with the Defendant receiving credit for the time that has already been served.

5. Due to the COVID-19 pandemic and with the consent of the parties, this Court has delayed the formal resentencing of the Defendant for the past year. It was understood that unnecessary movement of prison inmates carried the risk of spreading the virus, not to just the inmate, but to correctional officers and others involved transporting an inmate. This Court has proceeded with the resentencing at this time given its understanding that the Defendant has requested and will soon receive a COVID-19 vaccine. Once the Defendant is vaccinated, moving him from death row where he is currently house to a new housing location will not pose a risk to

him becoming infected and potentially infecting they correctional officers involved in transporting moving to his new housing location.

6. This resentencing is being conducted at this time with the expectation that the Defendant will receive the vaccine against the COVID-19 virus which he has requested before he is moved from death row. This Court has delayed the resentencing in an effort to minimize the health risks to the Defendant, correctional officers, and court personnel. The Court's intention is to allow the Defendant to be fully vaccinated before he is physically removed from death row.

WHEREFORE, the death sentence imposed on the Defendant is hereby formally vacated, and this Court hereby resentences the Defendant to life imprisonment without possibility of parole for twenty-five (25) years with the Defendant receiving credit for the time that has already been served. To minimize the health risks to the Defendant and to correctional officers, this Court does request that the Defendant not be transported from death row until he has been fully vaccinated against COVID-19.

DONE AND ORDERED in the chambers of Ocala, Marion County, Florida on April 1, 2021.

STEVEN G. ROGERS, Circuit Court Judge

Copies sent to:

Stephen D. Ake, Senior Assistant Attorney General, stephen.ake@myfloridalegal.com;
Rich Buxman, Assistant State Attorney, rbuxman@sao5.org, eservicemarion@sao.org;
Martin J. McClain, Special Assistant CCRC-S, martymcclain@comcast.net, ccrcpleadings@ccsr.state.fl.us;
Vincent M. D'Agostino, Esq., Assistant CCRC-S, dagostinoV@ccsr.state.fl.us

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DAVID JOSPEH PITTMAN,

***Petitioner*,**

vs.

STATE OF FLORIDA,

Respondent.

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

---

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

THIS IS A CAPITAL CASE
WITH AN EXECUTION SCHEDULED FOR
WEDNESDAY SEPTEMBER 17, 2025, AT 6:00 P.M.

APPENDIX E

Opinion of the Florida Supreme Court, Pittman v. State, SC2025-1320, 2025 WL_____ (Fla. September 10, 2025.)

Supreme Court of Florida

No. SC2025-1320

DAVID JOSEPH PITTMAN,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

September 10, 2025

PER CURIAM.

David Joseph Pittman is a prisoner under a sentence of death for whom a warrant has been signed and an execution set for September 17, 2025. He appeals the circuit court's order summarily denying his fourth successive motion for postconviction relief filed under Florida Rule of Criminal Procedure 3.851 and denying his motion for a stay of execution filed under section 922.07(1), Florida Statutes (2025).[1] For the reasons that follow, we

1. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const.

affirm the circuit court's order and deny Pittman's motion for stay of execution.

I

In 1990, Pittman was going through a contentious divorce with his former wife, Marie. *Pittman v. State* (*Pittman I*), 646 So. 2d 167, 168 (Fla. 1994).[2] Pittman had made several threats against Marie and her family. *Id.* He had also recently learned that Marie's sister, Bonnie, was attempting to press criminal charges against him for an alleged rape that happened years earlier. *Id.*

After cutting their phone lines from the outside, Pittman went to the Knowles' home on May 15, 1990. *Id.* at 168, 169 n.2. Pittman was planning to speak with Bonnie about the problems he was having with her family when Bonnie let him into the home. *Id.* at 168. When she refused his sexual advances, Pittman killed her by stabbing her multiple times and slitting her throat to silence her cries for help. *Id.* Pittman then stabbed and killed Marie's mother outside of Bonnie's bedroom and, as Marie's father was attempting to use the phone, stabbed and killed him also. *Id.* After killing

2. The full facts of this case are set forth in this Court's opinion on direct appeal. *See Pittman I*, 646 So. 2d 167.

Marie's family, Pittman doused the home and yard with gasoline, burned the home down, and stole Bonnie's car. *Id.* at 168, 169 n.2.

Pittman was indicted on three counts of first-degree murder, two counts of arson, and one count each of burglary and grand theft. A jury ultimately found Pittman guilty of all but burglary. *Id.* at 169. At the conclusion of the penalty phase proceedings, the jury recommend the death penalty for all three murders by a vote of nine to three. *Id.* The trial court sentenced Pittman to death, finding two aggravating circumstances for each murder: (1) a previous conviction of a violent felony, and (2) the heinous, atrocious, or cruel nature of the murders. *Id.* In doing so, the trial court rejected Pittman's mitigating factors of extreme mental and emotional disturbance, concluding that the aggravating factors substantially outweighed the mitigating factors Pittman had proven. *Id.*[3]

---

3. The trial court acknowledged that Pittman put forward expert opinions that his "capacity to conform his conduct to the requirements of the law was substantially impaired" and that he suffered brain damage. *See id.* at 169 n.2. However, the court noted that these expert opinions were the only evidence in the record supporting these mitigating circumstances. *Id.* The court additionally found that Pittman was a "hyperactive personality," "may have suffered physical and sexual abuse as a child," and was

Pittman has since unsuccessfully challenged his convictions and death sentences in both state and federal court. In 1994, we affirmed each of Pittman's convictions and sentences on direct appeal and denied rehearing. *Id.* at 173.[4] The United States Supreme Court denied Pittman's certiorari petition. *Pittman v. Florida*, 514 U.S. 1119 (1995). Pittman then sought postconviction relief under Florida Rule of Criminal Procedure 3.850, which the circuit court denied. We affirmed.[5] *Pittman v. State* (*Pittman II*),

---

an "impulsive person with memory problems and impaired social judgment." *Id.* Ultimately, however, the court determined that these mitigating circumstances were both unrelated to the murders and substantially outweighed by the established aggravating circumstances. *Id.*

4. Pittman's claims on direct appeal were: (1) the trial court erred in allowing evidence of collateral crimes and bad acts; (2) the trial court erred in admitting identification testimony; (3) the trial court erred in excluding hearsay statements of a third party's alleged confession; (4) the trial court failed to hold a presentencing hearing; (5) the trial court rendered a legally insufficient sentencing order; (6) the heinous, atrocious, or cruel aggravating circumstance is unconstitutionally vague; (7) the trial court erred in instructing the jury on the heinous, atrocious, or cruel aggravating circumstance; (8) the trial court erred in failing to find the two statutory mental mitigating circumstances; (9) the trial court erred in failing to find nonstatutory mitigating circumstances; and (10) the death penalty is disproportionate in this case. *Id.* at 170 n.3.

5. Pittman raised the following claims on appeal: (1) the postconviction court erred in denying his *Brady v. Maryland*, 373

90 So. 3d 794, 799 (Fla. 2011). We also denied Pittman's initial habeas petition. *See id.*[6]

U.S. 83 (1963), claim with respect to inmate Carl Hughes; (2) the postconviction court erred in denying his *Brady* claim with respect to inmate David Pounds; (3) the postconviction court erred in denying his *Brady* claim with respect to the handwritten notes of other witness interviews; (4) the postconviction court erred in denying his *Brady* claim with respect to Dennis Waters's identification of the wrecker; (5) the postconviction court erred in denying his *Brady* claim with respect to the letter concerning William Smith; (6) the postconviction court erred in denying relief based on the cumulative effect of all withheld and newly discovered evidence; (7) the postconviction court erred in denying his *Giglio v. United States*, 405 U.S. 150 (1972), claim; (8) the postconviction court erred in denying his guilt phase ineffective assistance of counsel claim; (9) the postconviction court erred in denying his guilt phase newly discovered evidence claim; (10) the postconviction court erred in denying his penalty phase *Brady* claim; (11) the postconviction court erred in denying his penalty phase ineffective assistance of counsel claim; and (12) the postconviction court erred in denying his penalty phase newly discovered evidence claim. *Pittman II*, 90 So. 3d at 803 n.8.

6. The habeas petition raised the following claims: (1) appellate counsel was ineffective in failing to challenge the sufficiency of the evidence; (2) the Florida Supreme Court erred in affirming the exclusion of certain evidence; (3) the Florida Supreme Court erred in affirming Pittman's convictions and sentences where the State withheld pertinent facts; (4) appellate counsel was ineffective in failing to argue that Pittman's death sentences were based on an improper aggravator; (5) appellate counsel was ineffective in failing to argue that the prosecutor used improper argument in the penalty phase; and (6) appellate counsel was ineffective in failing to argue that the penalty phase jury was misled by improper comments and instructions. *Id.* at 804 n.9.

Pittman then sought relief in federal court, but the United States District Court for the Middle District of Florida denied his habeas petition and the United States Court of Appeals for the Eleventh Circuit affirmed. *Pittman v. Sec'y, Dep't of Corr.* (*Pittman III*), No. 8:12-cv-1600-T-17EAJ, 2015 WL 736417, at *1 (M.D. Fla. Feb. 20, 2015); *see also id.* at *68 (declining to issue a certificate of appealability); *Pittman v. Sec'y, Fla. Dep't of Corr.* (*Pittman IV*), 871 F.3d 1231, 1254 (11th Cir. 2017). Pittman also unsuccessfully sought certiorari relief in the United States Supreme Court. *Pittman v. Jones*, 586 U.S. 839 (2018).

Most recently, Pittman filed a third successive motion for postconviction relief and a Florida Rule of Criminal Procedure 3.800(a) motion to correct illegal sentence. *Pittman v. State* (*Pittman V*), 337 So. 3d 776, 776 (Fla. 2022).[7] The amended postconviction motion raised an intellectual disability claim, and the 3.800(a) motion asserted that Pittman's death sentences were illegal because he did not receive an evidentiary hearing on the

7. Pittman filed his first and second successive motions for postconviction relief but did not appeal their denial by the circuit court. *See id.* at 777 n.2.

intellectual disability claim. *Id.* The postconviction court denied both motions, and we affirmed. *Id.* at 777.

On August 15, 2025, Governor DeSantis issued a death warrant for the execution of Pittman. As a result, Pittman filed a fourth successive motion for postconviction relief and a motion for a stay of execution. His fourth successive motion raised one claim: that his death sentence is unconstitutional because he is entitled to an evidentiary hearing to show that his execution is constitutionally prohibited due to his intellectual disability. The postconviction court entered an order summarily denying Pittman's motions. Pittman timely appeals and filed a motion for a stay of execution.

II

A

"Summary denial of a successive postconviction motion is appropriate '[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief.' " *Bogle v. State*, 322 So. 3d 44, 46 (Fla. 2021) (alteration in original) (quoting Fla. R. Crim. P. 3.851(f)(5)(B)); *see also* Fla. R. Crim. P. 3.851(h)(6). In reviewing a circuit court's summary denial, "this Court must accept the defendant's allegations as true to the extent that they are

not conclusively refuted by the record." *Tompkins v. State*, 994 So. 2d 1072, 1081 (Fla. 2008) (citing *Rolling v. State*, 944 So. 2d 176, 179 (Fla. 2006)). Still, "[t]he defendant bears the burden to establish a prima facie case based on a legally valid claim; mere conclusory allegations are insufficient." *Franqui v. State*, 59 So. 3d 82, 96 (Fla. 2011) (citing *Freeman v. State*, 761 So. 2d 1055, 1061 (Fla. 2000)). A circuit court's decision whether to grant an evidentiary hearing on a rule 3.851 motion "is tantamount to a pure question of law, subject to de novo review." *Marek v. State*, 8 So. 3d 1123, 1127 (Fla. 2009) (citing *State v. Coney*, 845 So. 2d 120, 137 (Fla. 2003)).

Also relevant here, postconviction claims in capital cases must generally be filed within one year after the judgment and sentence become final. Fla. R. Crim. P. 3.851(d)(1). With certain exceptions, rule 3.851 prohibits both untimely and repetitive claims. Fla. R. Crim. P. 3.851(e)(2); *see also Hendrix v. State*, 136 So. 3d 1122, 1125 (Fla. 2014) ("Claims raised and rejected in prior postconviction proceedings are procedurally barred from being relitigated in a successive motion." (citing *Van Poyck v. State*, 116 So. 3d 347, 362 (Fla. 2013))).

B

On appeal, Pittman challenges the postconviction court's denial of his intellectual disability claim. His claim relies in large part on retroactive application of *Hall v. Florida*, 572 U.S. 701 (2014), which this Court decided should be applied retroactively in *Walls v. State* (*Walls I*), 213 So. 3d 340, 346 (Fla. 2016). But in *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020), we held that the *Walls I* decision was clearly erroneous and that *Hall* should not be retroactively applied. *Id.* at 1019-21. So, Pittman argues that *Phillips* was wrongly decided.

Like we have before, we decline to revisit *Phillips* and conclude the postconviction court correctly applied it to Pittman's claim. *See Foster v. State*, 395 So. 3d 127, 130 (Fla. 2024) (rejecting invitation to recede from *Phillips*), *cert. denied*, 145 S. Ct. 1939 (2025); *Walls v. State* (*Walls II*), 361 So. 3d 231, 233 (Fla.) (noting we have already rejected arguments to recede from *Phillips* and have instead consistently applied its holding in the postconviction context), *cert. denied*, 144 S. Ct. 174 (2023).

Because *Phillips* governs, Pittman's claim fails for several reasons. First, his claim is untimely, as we already held in

Pittman V. *See* 337 So. 3d at 777 (holding Pittman was required to raise his intellectual disability claim no later than 60 days after October 1, 2004).

Second, because Pittman has already raised his intellectual disability claim, it is procedurally barred. *See Hendrix*, 136 So. 3d at 1125 ("Claims raised and rejected in prior postconviction proceedings are procedurally barred from being relitigated in a successive motion." (citing *Van Poyck*, 116 So. 3d at 362)). We equally reject Pittman's argument that procedural bars should not apply to intellectual disability claims. Indeed, we have regularly applied procedural bars to exemption-from-execution claims. *See Dillbeck v. State*, 357 So. 3d 94, 100 (Fla. 2023) (holding that this Court's precedent "flatly refutes Dillbeck's contention that no time limits apply to categorical exemption claims"); *Barwick v. State*, 361 So. 3d 785, 795 (Fla. 2023) (same); *Carroll v. State*, 114 So. 3d 883, 886 (Fla. 2013) (same). And our approach is consistent with the Eleventh Circuit's. *See In Re Bowles*, 935 F.3d 1210 (11th Cir. 2019).[8]

8. Because the claim is both untimely and procedurally barred, Pittman is not entitled to an evidentiary hearing. Moreover,

Finally, we reject Pittman's argument that his execution is constitutionally prohibited. To the extent that Pittman presents a due process argument, it fails. "Due process requires that a defendant be given notice and an opportunity to be heard on a matter before it is decided." *Asay v. State*, 210 So. 3d 1, 27 (Fla. 2016) (citing *Huff v. State*, 622 So. 2d 982, 983 (Fla. 1993)). Here, Pittman has received the process due to him and has failed to meet the requisite standards for overcoming summary denial. *See Bates v. State*, No. SC2025-1127, 50 Fla. L. Weekly S223, S224-25, 2025 WL 2319001, at *4-5 (Fla. Aug. 12, 2025) (rejecting a death row defendant's request for due process relief to further demonstrate his mental state at the time of his offense because it was time-barred), *cert. denied*, No. 25-5370, 2025 WL 2396797 (U.S. Aug. 19, 2025).

Likewise, this Court's decision to adhere to *Phillips* does not result in an arbitrary and capricious application of the death penalty. We recently rejected a similar Eighth Amendment challenge, noting that developments in the case law did not alter our previously held position that Florida's death penalty scheme is

---

this Court will not subvert its role as an appellate court and make a factual finding about Pittman's intellectual capabilities.

constitutionally sound. *See Miller v. State*, 379 So. 3d 1109, 1127 (Fla.) (rejecting argument that *Lawrence v. State*, 308 So. 3d 544 (Fla. 2020), and *Bush v. State*, 295 So. 3d 179 (Fla. 2020), result in arbitrary application of death penalty), *cert. denied*, 145 S. Ct. 241 (2024). Our decision in *Phillips*, which correctly applies our established retroactivity test, also does not alter that analysis.

C

Because Pittman is not entitled to relief, we deny his motion for a stay of execution. *See Dillbeck*, 357 So. 3d at 103 ("[A] stay of execution on a successive motion for postconviction relief is warranted only where there are substantial grounds upon which relief might be granted." (quoting *Davis v. State*, 142 So. 3d 867, 873-74 (Fla. 2014))).

III

We affirm the summary denial of Pittman's fourth successive motion for postconviction relief. We also deny his motion for stay of execution. No oral argument is necessary, and no motion for rehearing will be considered by this Court. The mandate shall issue immediately.

It is so ordered.

MUÑIZ, C.J., and COURIEL, GROSSHANS, FRANCIS, and SASSO, JJ., concur.
LABARGA, J., dissents with an opinion.
CANADY, J., recused.

LABARGA, J., dissenting.

In *Pittman v. State* (*Pittman V*), 337 So. 3d 776, 777 (Fla. 2022), I dissented to the majority's decision affirming the summary denial of Pittman's intellectual disability claim. The majority's affirmance was based on its conclusion in *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020) (receding from *Walls v. State*, 213 So. 3d 340 (Fla. 2016), and holding that *Hall v. Florida*, 572 U.S. 701 (2014), does not apply retroactively).

I dissented in *Phillips* in light of my concern that the decision "potentially deprives certain individuals of consideration of their intellectual disability claims, and it results in an inconsistent handling of these cases among similarly situated individuals." 299 So. 3d at 1026 (Labarga, J., dissenting).

In this death warrant case, Pittman yet maintains that he is intellectually disabled, and he urges this Court to allow him "the opportunity to present a full and complete picture of his intellectual disability." Because I continue to adhere to my dissent in *Phillips*, I

dissent to today's decision affirming the summary denial of Pittman's fourth successive motion for postconviction relief.

An Appeal from the Circuit Court in and for Polk County,
Jon K. Abdoney, Judge – Case No. 531990CF002242A1XXXX

Eric Pinkard, Capital Collateral Regional Counsel, Julissa R. Fontán, Assistant Capital Collateral Regional Counsel, Megan Montagno, Assistant Capital Collateral Regional Counsel, and John "Jack" LoBianco, Assistant Capital Collateral Regional Counsel, Middle Region, Temple Terrace, Florida,

for Appellant

James Uthmeier, Attorney General, Tallahassee, Florida, Timothy A. Freeland, Special Counsel, Assistant Attorney General, and Michael W. Mervine, Special Counsel, Assistant Attorney General, Tampa, Florida,

for Appellee

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DAVID JOSPEH PITTMAN,

***Petitioner*,**

vs.

STATE OF FLORIDA,

Respondent.

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

---

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

THIS IS A CAPITAL CASE
WITH AN EXECUTION SCHEDULED FOR
WEDNESDAY SEPTEMBER 17, 2025, AT 6:00 P.M.

APPENDIX F

Order of the Circuit Court for the Tenth Judicial Circuit, Polk County, Florida denying postconviction relief dated August 27, 2025.

Filing # 230378717 E-Filed 08/27/2025 04:25:51 PM

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, STATE OF FLORIDA
CRIMINAL DIVISION

CASE NO.: 53-1990-CF-002242-A1XX-XX
DIVISION: F9

DEATH WARRANT SIGNED
EXECUTION SCHEDULED
September 17, 2025 at 6:00 p.m.

STATE OF FLORIDA,

Plaintiff,

vs.

DAVID JOSEPH PITTMAN,

Defendant.
_____/

FINAL ORDER SUMMARILY DENYING DEFENDANT'S SUCCESSIVE MOTION TO VACATE JUDGMENT AND CONVICTION OF DEATH AFTER DEATH WARRANT SIGNED
AND
ORDER DENYING DEFENDANT'S MOTION FOR STAY OF EXECUTION

THIS CAUSE is before the Court upon the Defendant's *Successive Motion to Vacate Judgment and Conviction of Sentence of Death after Death Warrant Signed*, (hereinafter "Successive Motion"), filed on August 24, 2025, and the *Defendant's Motion for Stay of Execution*, filed on August 25, 2025.

On Friday, August 15, 2025, the Supreme Court of Florida entered an Order recognizing that the Governor, on the same date, signed a death warrant for the execution of the Defendant to take place on September 17, 2025 at 6:00 p.m. *See*

Death Warrant for David Joseph Pittman and incorporated letter from Governor, attached. Pursuant to the Order of the Florida Supreme Court, this court commenced proceedings in accordance with Rule 3.851(h).

An initial case management conference was conducted on Monday, August 18, 2025, by the Honorable Jalal A. Harb due to the undersigned being out of the State of Florida on annual leave. Present at the initial case management conference were counsel for the State of Florida, Timothy A. Freeland, Michael Mervine, and Tenth Circuit Assistant State Attorney Jacob Orr; counsel for the Defendant, Julissa R. Fontán, Megan Montagno, and John "Jack" LoBianco; and counsel for the Florida Department of Corrections, Kristen Lonergan. At the initial case management conference, this court orally approved a scheduling order proposed by the State of Florida and scheduled a second case management conference before the undersigned for Thursday, August 21, 2025.

At the second case management conference, the same counsel for the parties appeared. Senior Appellate Clerk, Theresa Medler, of the Polk County Clerk of Courts also attended. This court confirmed the schedule approved by Judge Harb and subsequently entered a written Scheduling Order on the same date.

On Sunday, August 24, 2025, the Defendant, pursuant to the Scheduling Order, submitted his Successive Motion advancing a single claim for relief. On Monday, August 25, 2025, the State of Florida, pursuant to the Scheduling Order,

filed the *State's Response to Defendant's Successive Motion for Postconviction Relief* (hereinafter, State's Response). On Tuesday, August 26, 2025, the Court conducted a case management conference pursuant to Rule 3.851(h)(6) of the Florida Rules of Criminal Procedure and *Huff v. State*, 622 So. 2d 982 (Fla. 1993), as well as a hearing on the *Defendant's Motion for Stay of Execution*, filed on Monday, August 25, 2025. Present were counsel for the State of Florida, Timothy A. Freeland, Michael Mervine, and Tenth Circuit State Attorney Brian Haas; counsel for the Defendant, Julissa R. Fontán, Megan Montagno, and John "Jack" LoBianco; and counsel for the Florida Department of Corrections, Kristen Lonergan and William Gwaltney. The Court heard argument of counsel as to whether an evidentiary hearing should be held on the Defendant's claim as well as whether the Defendant's impending execution should be stayed. At the conclusion of the hearing, the Court announced that an evidentiary hearing should not be held on the claim and that the Court's ruling on the *Defendant's Motion for Stay of Execution* would be included in the instant order. Following the *Huff* hearing, on August 26, 2025, the Court entered its *Order Following Case Management Conference of August 26, 2025*, memorializing its ruling that no evidentiary hearing was required.

The Court has considered the Successive Motion; the State's Response; *The Course of Prior Proceedings and Statement of the Case and Facts*, filed by the

State of Florida on August 20, 2025; the opinions of the Supreme Court of Florida, the Eleventh Circuit Court of Appeals, and the Supreme Court of the United States in *Pittman v.* State, 646 So. 2d 167 (Fla. 1994); *Pittman v. Florida*, 514 U.S. 1119, 115 S. Ct. 1982, 131 L. Ed. 2d 870 (1995); *Pittman v. State*, 90 So. 3d 794 (Fla. 2011); *Pittman v. Sec'y, Fla. Dep't of Corr.*, 871 F.3d 1231 (11th Cir. 2017); *Pittman v. Jones*, 586 U.S. 839, 139 S. Ct. 102, 202 L. Ed. 2d 65 (2018); and *Pittman v. State*, 337 So. 3d 776 (Fla. 2022); the oral arguments of the parties presented at the Case Management Conference of August 26, 2025; the contents of the file; and applicable law. After careful consideration, the Court enters its Order herein.

The Successive Motion advances a single claim for relief, to wit: that the Defendant's death sentence is unconstitutional because he has not received a fair opportunity to show that the Constitution prohibits his execution due to his intellectual disability in accordance with *Hall v. Florida*, 572 U.S. 701, 134 S. Ct. 1986, 188 L. Ed. 2d 1007 (2014). The Defendant candidly concedes that this very same claim was previously raised in his *Successive Motion to Vacate Judgments of Conviction amd* [sic] *Sentences,* filed on May 27, 2015, (R. 156-62)[1]; his *Amended Successive Motion to Vacate Judgments of Conviction and Sentences, and Alternatively Motion to Correct Illegal Sentences*, filed on February 9, 2016, (R.

[1] References to the Record on Appeal are designated by the notation "R." followed by the record page number, and refer to the record relating to the Notice of Appeal to the Supreme Court of Florida filed on August 12, 2021.

182-88); his *Second Amended Successive Motion to Vacate Judgments of Conviction amd* [sic] *Sentences and Alternatively Motion to Correct Illegal Sentences*, filed on October 14, 2016, (R. 344-50); and his *Second*[2] *Amended Successive Motion to Vacate Judgments of Conviction amd* [sic] *Sentences and Alternatively Motion to Correct Illegal Sentences*, filed on March 13, 2017, (R. 605-614).

During the previous postconviction litigation of the Defendant's intellectual disability claim, this court originally determined that an evidentiary hearing was warranted. *See* Order on Case Management Conference, (R. 805), attached. At the time, controlling precedent from the Supreme Court of Florida provided that *Hall* applied retroactively which permitted the Defendant in 2015 to file an intellectual disability claim and present evidence as to all three prongs of intellectual disability under a holistic approach without any one factor – including IQ score – being considered dispositive. *Walls v. State*, 213 So. 3d 340, 346 (Fla. 2016). However, prior to the evidentiary hearing, the Supreme Court of Florida determined that it "clearly erred in concluding that *Hall* applies retroactively." *Phillips v. State*, 299 So. 3d 1013, 1023 (Fla. 2020). Ultimately, the Supreme Court of Florida announced that it would no longer apply the reasoning in *Walls*. *Phillips*, 299 So. 3d at 1024.

[2] The filing of March 13, 2017 was mistitled and is actually the Third Amended Successive Motion to Vacate Judgments of Conviction and Sentences, and Alternatively Motion to Correct Illegal Sentences.

The State of Florida thereafter moved to dismiss the Defendant's intellectual disability claim alleging that it was untimely as filed well past one year following his judgment and sentence becoming final. *See* State's Motion to Dismiss Claims 1 and 1A of Second Amended Successive (Third) Motion for Postconviction Relief and Memorandum of Law in Support of Motion to Dismiss Claims 1 and 1A of Second Amended Successive (Third) Motion for Postconviction Relief, (R. 1199-1207), attached. The Court ultimately denied in summary fashion the Defendant's intellectual disability claim, concluding that the Defendant's claim was untimely as *Hall* does not apply retroactively, relying on *Phillips*, 299 So. 3d 1013. *See* Final Order Denying Defendant's Third Amended Successive Motion for Postconviction Relief and Defendant's Motion under Rule 3.800(a) Challenging His Death Sentence as Illegal, (R. 1866-98, especially 1883-84), attached. The Court further determined that the Defendant had not demonstrated good cause for the late filing because evidence of the Defendant's intellectual disability could have been discovered through the exercise of due diligence as early as 1991, long before 2015 when the Defendant first advanced the claim. *See* Final Order Denying Defendant's Third Amended Successive Motion for Postconviction Relief and Defendant's Motion under Rule 3.800(a) Challenging His Death Sentence as Illegal, (R. 1866-98, especially 1884-88), attached.

On appeal, the Supreme Court of Florida affirmed the summary denial of the Defendant's intellectual disability claim. *Pittman*, 337 So. 3d at 777. Specifically, it held that the Defendant was required to bring his claim no later than 60 days after October 1, 2004, when Rule 3.203 of the Florida Rules of Criminal Procedure relating to intellectual disability[3] as a bar to imposition of the death penalty was first adopted in the wake of *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002). *See Id*. The Court further held that "[t]o the extent [the Defendant] argues that his IQ score of 70 from 2015 is newly discovered evidence, [the Defendant's] motion was not timely because it was not filed within one year of the date upon which the claim became discoverable through due diligence," observing that "[r]ecord evidence refutes [the Defendant's] claim that this information could not have been discovered prior to 2015." *Id*.

While admitting he has previously raised the instant claim, the Defendant's position is simply that *Phillips*, and, by implication, *Pittman*, 337 So. 3d 776, were wrongly decided. This court is bound by the decisions of the Supreme Court of Florida. If any court is to say *Phillips* and *Pittman*, 337 So. 3d 776, were wrongly decided, it is not this court.

As such, pursuant to the law of this case, the Court concludes that the Defendant's instant claim is untimely. The Court further concludes that the

[3] At the time of its original adoption, intellectual disability was termed "mental retardation." *Amends. to Fla. Rules of Crim. Proc. & Fla. Rules of App. Proc.*, 875 So. 2d 563, 569 (Fla. 2004).

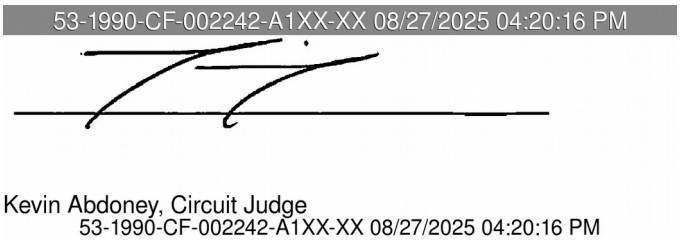
Defendant's instant claim is procedurally barred because the same claim was raised and disposed of in the postconviction litigation that began in 2015. *See King v. State*, 597 So. 2d 780, 782 (Fla. 1992). Therefore, the Defendant's Successive Motion should be denied. Further, because the Successive Motion is being denied on the simple grounds that it is time barred and procedurally barred, the equities do not favor a stay of execution.

[THIS SPACE INTENTIONALLY LEFT BLANK]

It is therefore **ORDERED** as follows:

1. The Defendant's *Successive Motion to Vacate Judgment and Conviction of Sentence of Death after Death Warrant Signed*, filed on August 24, 2025, is **SUMMARILY DENIED**.
2. The *Defendant's Motion for Stay of Execution*, filed on August 25, 2025, is **DENIED**.
3. **Pursuant to the Order of the Supreme Court of Florida of August 15, 2015, the Defendant will have until <u>1:00 p.m. on Friday, August 29, 2025</u> to file a notice of appeal**.

ORDERED in Polk County, Florida on Wednesday, August 27, 2025.



Kevin Abdoney, Circuit Judge
53-1990-CF-002242-A1XX-XX 08/27/2025 04:20:16 PM

Copies:

Timothy A. Freeland, Office of the Attorney General,
timothy.freeland@myfloridalegal.com; capapp@myfloridalegal.com;
stephanie.tesoro@myfloridalegal.com;
paula.montlary@myfloridalegal.com
Michael Mervine, Office of the Attorney General,
michael.mervine@myfloridalegal.com
Brian Haas, State Attorney, bhaas@sao10.com
Jacob Orr, Office of the State Attorney, jorr@sao10.com;
felonypolk@sao10.com
Julissa R. Fontán, Capital Collateral Regional Counsel – Middle,
fontan@ccmr.state.fl.us, support@ccmr.state.fl.us
Megan Montagno, Capital Collateral Regional Counsel – Middle,
montagno@ccmr.state.fl.us, support@ccmr.state.fl.us
John "Jack" LoBianco, Capital Collateral Regional Counsel – Middle,
lobianco@ccmr.state.fl.us, support@ccmr.state.fl.us
Kristen Lonergan, Florida Department of Corrections,
kristen.lonergan@fdc.myflorida.com;
christina.porrelo@fdc.myflorida.com;
courtfilings@fdc.myflorida.com
William Gwaltney, Florida Department of Corrections,
william.gwaltney@fdc.myflorida.com
Theresa Medler, Polk County Clerk of Courts,
theresamedler@polk-county.net
Lewis and Long, LLC, Court Reporter, office@lewisandlong.com
Kendall Canova, Supreme Court of Florida, Capital Case Clerk
warrant@flcourts.org

DEATH WARRANT
STATE OF FLORIDA

WHEREAS, DAVID JOSEPH PITTMAN, on or about the 15th day of May, 1990, murdered Bonnie Knowles, Barbara Knowles, and Clarence Knowles; and

WHEREAS, DAVID JOSEPH PITTMAN, on the 19th day of April, 1991, was convicted of three counts of first degree murder, two counts of arson, and one count of grand theft and, on the 25th day of April, 1991, was sentenced to death for the murders of Bonnie Knowles, Barbara Knowles, and Clarence Knowles; and

WHEREAS, on the 29th day of September, 1994, the Supreme Court of Florida affirmed the convictions and death sentences of DAVID JOSEPH PITTMAN; and

WHEREAS, on the 30th day of June, 2011, the Supreme Court of Florida affirmed the trial court order denying DAVID JOSEPH PITTMAN's initial Motion for Postconviction Relief and denied his Petition for Writ of Habeas Corpus; and

WHEREAS, on the 20th day of February, 2015, the United States District Court for the Middle District of Florida denied DAVID JOSEPH PITTMAN's federal Petition for Writ of Habeas Corpus; and

WHEREAS, on the 22nd day of September, 2017, the United States Court of Appeals for the Eleventh Circuit affirmed the denial of DAVID JOSEPH PITTMAN's federal Petition for Writ of Habeas Corpus; and

WHEREAS, further postconviction motions and petitions filed by DAVID JOSEPH PITTMAN have been denied and the denials affirmed on appeal; and

WHEREAS, executive clemency for DAVID JOSEPH PITTMAN, as authorized by Article IV, Section 8(a), of the Florida Constitution, was considered pursuant to the Rules of Executive Clemency, and it has been determined that executive clemency is not appropriate; and

WHEREAS, attached hereto is a certified copy of the record of the conviction and sentence pursuant to section 922.052, Florida Statutes.

NOW, THEREFORE, I, RON DESANTIS, as Governor of the State of Florida and pursuant to the authority and responsibility vested in me by the Constitution and Laws of Florida, do hereby issue this warrant, directing the Warden of the Florida State Prison to cause the sentence of death to be executed upon DAVID JOSEPH PITTMAN, in accordance with the provisions of the Laws of the State of Florida.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of Florida to be affixed at Tallahassee, this 15th day of August, 2025.

GOVERNOR

ATTEST:

SECRETARY OF STATE

FILED
2025 AUG 15 PM 3:42
DEPARTMENT OF STATE
TALLAHASSEE, FL

RON DESANTIS
GOVERNOR

August 15, 2025

Warden David Allen
Florida State Prison
7819 N.W. 228th Street
Raiford, Florida 32036-1000

Re: Execution Date for David Joseph Pittman, DC# 351997

Dear Warden Allen:

Enclosed is the death warrant that I signed to carry out the sentence for David Joseph Pittman, as well as certified copies of his judgment and sentence. I have designated the week beginning at 12:00 noon on Wednesday, September 17, 2025, through 12:00 noon on Wednesday, September 24, 2025, for the execution. I have been advised that you have set the date and time of execution for Wednesday, September 17 at 6:00 p.m.

This letter is incorporated into and made a part of the death warrant identified above.

Sincerely,

Ron DeSantis
Governor

Enclosures

FILED
2025 AUG 15 PM 3:42
DEPARTMENT OF STATE
TALLAHASSEE, FL

THE CAPITOL
TALLAHASSEE, FLORIDA 32399 • (850) 717-9249

cc:

Honorable Carlos G. Muñiz
Chief Justice
Supreme Court of Florida
500 S. Duval Street
Tallahassee, Florida 32399

Honorable James A. Yancey
255 N. Broadway Avenue
Bartow, Florida 33830

Secretary Ricky Dixon
Department of Corrections
501 S. Calhoun Street
Tallahassee, Florida 32399-2500

C. Suzanne Bechard
Associate Deputy Attorney General
Office of the Attorney General
The Capitol, FL-01
Tallahassee, Florida 32300-0001

Eric Pinkard
Capital Collateral Regional Counsel
12973 N. Telecom Parkway
Temple Terrace, Florida 33637

Julissa Fontan
CCRC-Middle
12973 N Telecom Pkwy
Tampa, FL 33637-0907

Office of Executive Clemency
4070 Esplanade Way
Building C, Rm. 229
Tallahassee, Florida 32399-2450

David Joseph Pittman, DC# 351997
Union Correctional Institution
7819 N.W. 228th Street
Raiford, Florida 32026-4000

ORIGINAL

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

v.

CASE NO: CF90-2242A1-XX
SECTION: F9

DAVID JOSEPH PITTMAN,
Defendant.

_____/

ORDER ON CASE MANAGEMENT CONFERENCE

This cause came on for a for a Case Management Conference on November 9, 2017, pursuant to Rule 3.851, Fla. R. Crim. P. Upon review of the court file, applicable law, and consideration of the views of the respective parties, the Court finds as follows:

The Court finds that it would be appropriate to have an evidentiary hearing on Claim I and Claim IA of the Defendant's Successive Motion To Vacate Judgments of Conviction And Sentences. The Court does not find it necessary to have an evidentiary hearing on Claim II, Claim III, Claim IV, Claim V, and Claim VI of the Defendant's Successive Motion To Vacate Judgments of Conviction And Sentences to make a ruling on those Claims. A status hearing is scheduled in this matter for December 14, 2017 at 2:30 p.m., to schedule a date and time for an evidentiary hearing.

The attorneys may appear telephonically at the status hearing if they wish. If so, the necessary arrangements must be made in advance.

DONE AND ORDERED in Bartow, Polk County, Florida this 14TH day of November, 2017.

JALAL A. HARB
Circuit Court Judge

cc:
Martin J. McClain, Esq.
Counsel For Defendant
McClain & McDermott, P.A.
141 N.E. 30th St.
Wilton Manors, FL 33334

Hope Pattey, Esq.
State Attorney's Office

Timothy A. Freeland, Esq
Office of the Attorney General
Concourse Center #4
3507 E. Frontage Road, Suite 200
Tampa, FL 33607-7013

JAH/drb

RECEIVED AND FILED
NOV 15 2017
STACY M. BUTTERFIELD, CLERK

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT,
IN AND FOR POLK COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs. CASE NO. CF90-2242A1-XX
DEATH PENALTY CASE

DAVID JOSEPH PITTMAN,

Defendant.
_____/

MOTION TO DISMISS CLAIMS 1 AND 1A OF SECOND AMENDED SUCCESSIVE (THIRD) MOTION FOR POSTCONVICTION RELIEF

Comes now the State of Florida, by and through the undersigned attorney, and files the instant Motion to Dismiss Pittman's Intellectual Disability Claim and as grounds therefore would state:

1. Pittman's Second Amended Successive (Third) Motion for Postconviction Relief includes claims 1 and 1A, in which he generally asserts entitlement to relief because he is intellectually disabled.

2. The State's Response, filed April 13, 2017, opposed relief on grounds that any claim alleging intellectual disability is time barred.

3. This Honorable Court ordered a hearing on Pittman's intellectual disability claims in an Order rendered November 14, 2017. Because of a dearth of precedent directly addressing the issue of timeliness, the State did not strongly oppose Pittman's demand for an evidentiary hearing, but notes that it advised the

Court at the time that it did not waive any argument that the matter was time barred.

4. Since 2017, the Florida Supreme Court has issued several opinions directly addressing the time bar issue as well as Pittman's claim that his intellectual disability is a fact question that should have been determined by a jury. Accordingly, the State is now of the opinion that this Court must dismiss Pittman's intellectual disability claims because to proceed further would violate binding precedent from the Florida Supreme Court. In support of the State's position, a memorandum of law is attached.

WHEREFORE, the State demands that this Honorable Court find that claims 1 and 1A are time barred and enter a Final Order resolving all pending claims.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA

/s/ Timothy A. Freeland
TIMOTHY A. FREELAND
Senior Assistant Attorney General
Florida Bar No. 0539181
Office of the Attorney General
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
timothy.freeland@myfloridalegal.com
capapp@myfloridalegal.com
CO-COUNSEL FOR STATE OF FLORIDA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of October, 2019, I electronically filed the foregoing with the Clerk of the Court by using the e-portal filing system which will send a notice of electronic filing to the following: The Honorable Jalal Harb, Circuit Judge, 255 North Broadway Avenue, Post Office Box 9000, Drawer J-140, Bartow, Florida 33831-9000, **csullivan@jud10.flcourts.org;** Martin J. McClain, Esquire, McClain and McDermott, P.A., Post Office Box 101386, Ft. Lauderdale, Florida 33310, **martymcclain@comcast.net;** Paul Wallace and Bonde Johnson, Assistant State Attorneys, Post Office Box 9000, Drawer SA, Bartow, Florida 33831-9000, **pwallace@sao10.com, bjohnson@sao10.com, crhoden@sao10.com** and **felonypolk@sao10.com.**

/s/ Timothy A. Freeland
CO-COUNSEL FOR STATE OF FLORIDA

**IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT,
IN AND FOR POLK COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

vs. **CASE NO. CF90-2242A1-XX**
DEATH PENALTY CASE

DAVID JOSEPH PITTMAN,

Defendant.
_____/

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS CLAIMS 1 AND 1A OF SECOND AMENDED SUCCESSIVE (THIRD) MOTION FOR POSTCONVICTION RELIEF

Pittman is a death row inmate whose conviction became final in 1995.[1] Pittman's first motion for postconviction relief was filed in 1997 with additional claims being added in 2001, 2005 and 2007. This Court denied relief in 2007, a decision that was affirmed on review. Pittman v. State, 90 So. 3d 794 (Fla. 2012). Pittman's present motion for postconviction relief was filed February 9, 2016, which is well beyond the one-year time limitation after his judgment and sentence became final. See Fla. R. Crim. P. 3.851(d)(1). Therefore, the motion is untimely and subject to summary denial unless Pittman can show that his claim is either based on newly discovered evidence that could not have been ascertained by the exercise of due diligence, or a

[1] The procedural history of Pittman's case is outlined in the State's Response filed in this Court April 13, 2017.

fundamental constitutional right not established within one year of his judgment and sentence becoming final and the constitutional right has been held to apply retroactively. See Fla. R. Crim. P. 3.851(d)(2) (emphasis added).

Pittman asserts that his present claim is timely because of a combination of two things; first, the decision in Hall v. Florida, 572 U.S. 701 (2014) and second, a determination by his expert in 2015 that Pittman is intellectually disabled. In Pittman's view, he had no basis for filing an intellectual disability claim until the United States Supreme Court decided Hall v. Florida, 572 U.S. 701 (2014); in Hall, the court rejected Florida's "bright line" rule regarding the use of IQ scoring, and mandated that the standard error of measurement be included when assessing intellectual disability. And while Pittman had *never* raised such a claim before, he hired an expert and produced a report in 2015 indicating that his IQ falls within the range of intellectual disability. The instant claim was filed within one year of Pittman's receipt of the report from his expert. It is, nevertheless, untimely.

In the wake of the Florida legislature's enacting section 921.137 and the United States Supreme Court's decision in Atkins v. Virginia, 536 U.S. 304 (2002), the Florida Supreme Court created Rule 3.203, which provided a mechanism for advancing an

intellectual disability claim for those who had not done so before and who were eligible, under Atkins, for possible relief. See Amendments to Fla. R. Crim. P. & Fla. R. App. P., 875 So. 2d 563 (Fla. 2004). Where (like Pittman) a defendant's initial postconviction motion was pending, the new rule permitted him sixty days to amend– in other words, no later than December 1, 2004. Id. at 570. The rule clearly authorized Pittman to advance an Atkins claim in 2004. Pittman, however, made no effort to do so; indeed, he has *never* mentioned intellectual disability until after the Supreme Court released Hall in 2015. The grounds on which Pittman's present claim is advanced were available to him at the time of his initial Rule 3.851 motion to advance the claim; that he chose not to do so prohibits him from advancing it here.

Accordingly, there are two grounds on which this Court should rule in deciding to dismiss Pittman's intellectual disability claims. First, his claim is untimely and second, Pittman waived it by failing to comply with Rule 3.203. The Florida Supreme Court has repeatedly affirmed summary dismissals of similarly situated defendants in recent opinions. See Rodriguez v. State, 250 So. 3d 616 (2016); Harvey v. State, 260 So. 3d 906 (Fla. 2018); Blanco v. State, 249 So. 3d 536 (Fla. 2018), and Bowles v. State, 276 So. 3d 791 (Fla. 2019). In each

case, the Florida Supreme Court held that the Supreme Court's release of Hall in 2015 did not create sufficient grounds for advancing a new claim of intellectual disability; the defendant must have preserved the claim by complying with Rule 3.203. Also significant is the Court's ruling in Bowles, which reaffirmed its previous ruling that whereas Hall is retroactive, it is only applicable to those who timely filed an intellectual disability claim under the provisions of Rule 3.203 as it existed in 2004. For example, the defendant in Walls v. State, 213 So. 3d 340 (Fla. 2016) was granted an evidentiary hearing because he raised what the Court found was a timely intellectual disability claim. As previously noted, Pittman has *never* challenged the validity of his death sentence on those grounds. The State notes that the Florida Supreme Court's ruling in each of the above cited cases was unanimous in affirming the lower court's dismissal based on the defendant's failure to advance an intellectual disability claim within the time limits afforded by Rule 3.203 as it existed in 2004.

To the extent that Pittman contends that the Eighth Amendment precludes execution of an intellectually disabled defendant, the State notes that this argument fails to alter his obligations to timely advance available claims under the Rule. If Pittman is intellectually disabled, as he now claims, his

disability was surely discoverable in 2004. His present claim is untimely and this Court, being bound by precedent, must dismiss it.

Finally with regard to Claim 1A, Pittman contends that intellectual disability is a factual determination and, as such, must be determined by a jury because, in his view, the Supreme Court in Hurst v. Florida, 136 U.S. 616 (2016) requires the jury to determine all facts necessary to a death sentence. This claim is foreclosed by Oats v. Jones, 220 So. 3d 1127 (Fla. 2017), in which the Florida Supreme court expressly found that intellectual disability is not a jury question but rather a fact that must be determined by the sentencing court. This is so, the Court found, because intellectual disability is "a fact that bars death" rather than being a prerequisite to its imposition. Id at 1130.

WHEREFORE, the State demands that this Honorable Court dismiss Claims 1 and 1A, rescind its previous Order granting an evidentiary hearing as to those claims, and render its final Order on all claims.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA

/s/ Timothy A. Freeland
TIMOTHY A. FREELAND
Senior Assistant Attorney General
Florida Bar No. 0539181
Office of the Attorney General
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
timothy.freeland@myfloridalegal.com
capapp@myfloridalegal.com

CO-COUNSEL FOR STATE OF FLORIDA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of October, 2019, I electronically filed the foregoing with the Clerk of the Court by using the e-portal filing system which will send a notice of electronic filing to the following: The Honorable Jalal Harb, Circuit Judge, 255 North Broadway Avenue, Post Office Box 9000, Drawer J-140, Bartow, Florida 33831-9000, **csullivan@jud10.flcourts.org;** Martin J. McClain, Esquire, McClain and McDermott, P.A., Post Office Box 101386, Ft. Lauderdale, Florida 33310, **martymcclain@comcast.net;** Paul Wallace and Bonde Johnson, Assistant State Attorneys, Post Office Box 9000, Drawer SA, Bartow, Florida 33831-9000, **pwallace@sao10.com, bjohnson@sao10.com, crhoden@sao10.com** and **felonypolk@sao10.com.**

/s/ Timothy A. Freeland
CO-COUNSEL FOR STATE OF FLORIDA

FINAL

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

v.

CASE NO.: 53-1990-CF-02242-A1XX-XX
SECTION: F9

DAVID JOSEPH PITTMAN,
Defendant.

_____/

FINAL ORDER DENYING DEFENDANT'S THIRD AMENDED SUCCESSIVE MOTION FOR POSTCONVICTION RELIEF
AND
DEFENDANT'S MOTION UNDER RULE 3.800(a) CHALLENGING HIS DEATH SENTENCE AS ILLEGAL

THIS MATTER came before the Court upon a successive motion for postconviction relief pursuant to rule 3.851 and a motion alleging an illegal sentence pursuant to rule 3.800.[1] On March 19, 2021, a hearing was held on the State's "MOTION TO DISMISS CLAIMS I AND IA OF SECOND AMENDED SUCCESSIVE (THIRD) MOTION FOR POSTCONVICTION RELIEF" filed on October 4, 2019, and the "DEFENDANT'S MOTION UNDER RULE 3.800(a) CHALLENGING HIS DEATH SENTENCE AS ILLEGAL" filed on October 22, 2019. Present at the hearing were: For the State, Assistant State Attorney Paul Wallace, and via Microsoft Teams, Assistant Attorney General Timothy Freeland; for the Defense,[2] Kara R. Ottervanger, Esq.,[3] Julissa R. Fontán, Esq., and Natalia C. Reyna-Pimiento, Esq. Defendant's presence was waived. The Court, having reviewed Defendant's Motions, Amendments, and Memoranda; the State's Responses; Notices of Filing and Notices of Supplemental Authority; having heard the

[1] A detailed history of the various postconviction filings and amendments is provided below.
[2] The motions addressed in this Order were filed by prior postconviction counsel, Martin J. McClain, Esq. Mr. McClain withdrew from representation on January 28, 2020, and the Office of the Capital Collateral Regional Counsel – Middle Region, was appointed.
[3] Prior to the issuance of this Order, Ms. Ottervanger, Esq., filed a "NOTICE OF WITHDRAWAL OF COUNSEL" as she left employment with the Law Office of the Capital Collateral Regional Counsel – Middle Region.

arguments of legal counsel; having reviewed the case file; having reviewed the applicable case and statutory law; and being otherwise fully advised in the premises, finds as follows:

STATEMENT OF CASE FACTS AND PROCEDURAL HISTORY:

On April 25, 1991, Defendant was sentenced to death for the murders of Clarence, Barbara, and Bonnie Knowles. The underlying facts were set forth in the Florida Supreme Court's opinion on direct appeal as follows:

> The record reflects that, shortly after 3 a.m. on May 15, 1990, a newspaper deliveryman in Mulberry, Florida, reported to law enforcement authorities that he had just seen a burst of flame on the horizon. When the authorities investigated they found the home of Clarence and Barbara Knowles fully engulfed in fire. After the fire was extinguished, the police entered the house and discovered the bodies of Clarence and Barbara, as well as the body of their twenty-year-old daughter, Bonnie. Although all of the bodies were burned in the fire, a medical examiner determined that the cause of death in each instance was massive bleeding from multiple stab wounds. In addition, the medical examiner testified that Bonnie Knowles' throat had been cut. A subsequent investigation revealed that the fire was the result of arson, that the phone line to the house had been cut, and that Bonnie Knowles' brown Toyota was missing.
>
> A construction worker testified that, when he arrived at work at 6:30 a.m. on the morning of the fire, he noticed a brown Toyota in a ditch on the side of the road near his job site. Other testimony revealed that the location of the Toyota was about one-half mile from the Knowles residence. The worker also observed a homemade wrecker, which he later identified as belonging to Pittman, pull up to the Toyota and, shortly thereafter, saw a cloud of smoke coming from that direction. Another witness who lived near the construction site also saw the smoke and observed a man running away from a burning car. This witness later identified Pittman from a photo-pack as the man she saw that morning. Investigators determined that the car fire, like the earlier house fire, was the work of an arsonist.
>
> At the time of the murders, another of the Knowles' daughters, Marie, was in the process of divorcing Pittman. The divorce was not amicable and the State introduced testimony that Pittman had made several threats against Marie and her family. The

State also produced evidence that Pittman had recently learned that Bonnie Knowles had tried to press criminal charges against him for an alleged rape that had occurred five years earlier.

Carl Hughes, a jailhouse informant, testified that Pittman told him that he had gone to the Knowles' house on the evening of the murders to speak with Bonnie Knowles about the problems he was having with her family. Bonnie let Pittman in the house and, when she refused his sexual advances, he killed her to stop her cries for help. Pittman then admitted to killing Barbara Knowles in the hallway outside Bonnie's bedroom and to killing Clarence in the living room as Clarence tried to use the phone. Pittman also told Hughes that he burned the house, stole the Toyota and abandoned it on the side of the road, and later returned to the Toyota and burned it as well.

The record further reflects that Pittman feared that the police suspected his involvement in the murders, and, at the prompting of his mother, Pittman turned himself in to the police on the day after the murders.

In response to the prosecution's case, the defense presented testimony critical of the police investigation and attempted to establish that Marie, Pittman's former wife, and her new husband had a motive to commit the murders. Pittman testified in his own defense and stated that he had nothing to do with the crimes charged. He also denied that he had told anyone he had committed the murders. The jury found Pittman guilty of three counts of first-degree murder, two counts of arson, and one count of grand theft, and found him not guilty of burglary.

In the penalty phase, the State established that Pittman was convicted of aggravated assault in 1985. In mitigation, Pittman presented the testimony of his mother that he was a difficult child to deal with and that she had disciplined him severely. A clinical psychologist testified that Pittman's father was a paranoid schizophrenic; that as a child Pittman suffered from a severe attention deficit disorder with hyperactivity; and that Pittman has organic personality syndrome, which causes paranoia and an unstable mood. After hearing this testimony, the jury recommended the death penalty for each murder conviction by a vote of 9 to 3. In his sentencing order, the judge found two aggravating circumstances for each murder: (1) previous conviction of another capital or violent felony, and (2) the murders were heinous, atrocious, or cruel. The judge then expressly rejected the mitigating factors of Pittman's being under the influence of extreme mental and emotional

> disturbance and concluded that the aggravating factors outweighed the proven mitigating factors. The judge imposed the death penalty for each murder.

Pittman v. State, 646 So. 2d 167, 168-69 (Fla. 1994) (*Pittman I*). Ten issues were raised on direct appeal.[4] The Florida Supreme Court affirmed Defendant's convictions and sentences. *Id.* at 173.

Defendant filed a motion for postconviction relief, the procedural history of which is set forth in the Florida Supreme Court's opinion affirming the denial of the motion as follows:

> Pittman filed a rule 3.850 motion in 1997 and then filed an amended motion in 2001. After holding a *Huff* hearing in March 2002, the postconviction court ruled that an evidentiary hearing was required on claims 1, 2, 3 and 7, and the court summarily denied the remaining claims. Pittman then filed a further amended motion in 2005, and the court, after holding a second *Huff* hearing in January 2006, again ruled that an evidentiary hearing was required on claims 1, 2, 3 and 7. The court held the evidentiary hearing on May 8–11, 2006. The court also held a limited evidentiary hearing on a sub-claim on February 15, 2007. Pittman subsequently filed an additional amendment in March 2007, raising two lethal injection claims, and the court held a third *Huff* hearing in April 2007. The court ruled that an evidentiary hearing was not required on the new claims. Pittman then filed an additional amendment in June 2007, raising a newly discovered evidence claim with respect to witness Chastity Eagan. The court held a fourth *Huff* hearing in June 2007 and ruled that an evidentiary hearing was required on this claim. The court held the evidentiary hearing on July 27, 2007. Several months later, on November 5, 2007, the court entered an order denying postconviction relief. Pittman filed the present appeal, raising nine guilt phase issues and three penalty phase issues. He also filed the present habeas petition, raising six issues.

---

[4] The issues, as set forth in *Pittman I* were as follows:

> (1) whether the trial court erred in allowing evidence of collateral crimes and bad acts; (2) whether the trial court erred in admitting identification testimony; (3) whether the trial court erred in excluding hearsay statements of a third party's alleged confession; (4) whether the trial court failed to hold a presentencing hearing; (5) whether the trial court rendered a legally insufficient sentencing order; (6) whether the heinous, atrocious or cruel aggravating circumstance is unconstitutionally vague; (7) whether the trial court erred in instructing the jury on the heinous, atrocious or cruel aggravating circumstance; (8) whether the trial court erred in failing to find the two statutory mental mitigating circumstances; (9) whether the trial court erred in failing to find nonstatutory mitigating circumstances; (10) whether the death penalty is disproportionate in this case.

Pittman I, 646 So. 2d at 170 n. 3.

Pittman v. State, 90 So. 3d 794, 802-04 (Fla. 2011) *(Pittman II)* (footnotes omitted). The issues raised in the appeal of the initial motion for postconviction relief included the following:

> Pittman raise[d] the following guilt phase claims . . .:(1) whether the postconviction court erred in denying his claim under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), with respect to inmate Carl Hughes; (2) whether the postconviction court erred in denying his *Brady* claim with respect to inmate David Pounds; (3) whether the postconviction court erred in denying his *Brady* claim with respect to the handwritten notes of other witness interviews; (4) whether the postconviction court erred in denying his *Brady* claim with respect to Dennis Waters' identification of the wrecker; (5) whether the postconviction court erred in denying his *Brady* claim with respect to the letter concerning William Smith; (6) whether the postconviction court erred in denying relief based on the cumulative effect of all the withheld and newly discovered evidence; (7) whether the postconviction court erred in denying his *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), claim; (8) whether the postconviction court erred in denying his ineffective assistance of counsel claim; and (9) whether the postconviction court erred in denying his newly discovered evidence claim.
>
> Pittman also raise[d] the following penalty phase claims: (10) whether the postconviction court erred in denying his *Brady* claim; (11) whether the postconviction court erred in denying his ineffective assistance of counsel claim; and (12) whether the postconviction court erred in denying his newly discovered evidence claim.

Pittman II, 90 So. 3d at 804-03, FN8.

SUCCESSIVE POSTCONVICTION MOTIONS:

On May 27, 2015, Defendant filed the "SUCCESSIVE MOTION TO VACATE JUDGMENTS OF CONVICTIONS AMD [sic] SENTENCES" raising a single claim captioned as follows:

> MR. PITTMAN'S DEATH SENTENCE IS UNCONSTITUTIONAL BECAUSE HE HAS NOT RECEIVED THAT TO WHICH HE IS ENTITLED: "A FAIR OPPORTUNITY

> TO SHOW THAT THE CONSTITUTION PROHIBITS [HIS] EXECUTION" DUE TO HIS INTELLECTUAL DISABILITY.

In support of this claim, Defendant alleged as newly discovered evidence, that Dr. Gordon Taub administered a WAIS-IV test on May 18, 2015, where Defendant achieved an IQ score of 70. On July 9, 2015, this Court entered the "ORDER STRIKING SUCCESSIVE MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCES" and provided Defendant with sixty days to re-file a facially sufficient amended motion.

On February 9, 2016, Defendant filed the "AMENDED SUCCESSIVE MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCES, AND ALTERNATIVELY MOTION TO CORRECT ILLEGAL SENTENCES". This amended motion raised the following two claims, as captioned:

> CLAIM I: MR. PITTMAN'S DEATH SENTENCE IS UNCONSTITUTIONAL BECAUSE HE HAS NOT RECEIVED THAT TO WHICH HE IS ENTITLED: "A FAIR OPPORTUNITY TO SHOW THAT THE CONSTITUTION PROHIBITS [HIS] EXECUTION" DUE TO HIS INTELLECTUAL DISABILITY.
>
> CLAIM II: MR. PITTMAN'S DEATH SENTENCE IS UNCONSTITUTIONAL UNDER *HURST V. FLORIDA* BECAUSE A JUDGE, RATHER THAN A JURY, MADE THE FINDINGS THAT SUFFICIENT AGGRAVATING CIRCUMSTANCES EXISTED AND THAT THEY WERE NOT OUTWEIGHED BY MITIGATING CIRCUMSTANCES, WHICH RENDERED MR. PITTMAN DEATH ELIGIBLE.[5]

The "STATE'S RESPONSE TO AMENDED SUCCESSIVE MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCES, AND ALTERNATIVELY MOTION TO CORRECT ILLEGAL SENTENCES" was filed on February 29, 2016.

---

[5] This claim alleged it was being raised pursuant to Fla. R. Crim. P. 3.850 and 3.800(a). It would appear the intent was to also raise this claim pursuant to rule 3.851 and 3.800(a).

On October 14, 2016, Defendant filed the "SECOND AMENDED SUCCESSIVE MOTION TO VACATE JUDGMENTS OF CONVICTION AMD [sic] SENTENCES, AND ALTERNATIVELY MOTION TO CORRECT ILLEGAL SENTENCES". The second amended motion re-alleged the previous two claims, and added these additional claims:

> CLAIM III: THE AMENDED VERSION OF § 921.141, FLA. STAT. (2016), ESTABLISHES AN EIGHTH AMENDMENT CONSENSUS THAT WHEN THREE OR MORE JURORS VOTE IN FAVOR [OF] A LIFE SENTENCE FOR A DEFENDANT CONVICTED OF FIRST DEGREE MURDER, THAT DEFENDANT CANNOT BE GIVEN A DEATH SENTENCE FOR THAT CRIME BECAUSE SUCH A DEATH SENTENCE WOULD VIOLATE THE EIGHTH AMENDMENTS EVOLVING STANDARDS OF DECENCY AND A FAILURE TO GIVE MR. PITTMAN THE BENEFIT OF THIS PROVISION WOULD BE ARBITRARY AND CAPRICIOUS UNDER THE EIGHTH AMENDMENT AND VIOLATE THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT.
>
> CLAIM IV: THE RECENT ENACTMENT OF A REVISED SENTENCING STATUTE WHICH WOULD GOVERN AT A RESENTENCING MUST BE PART OF THE SECOND PRONG ANALYSIS OF MR. PITTMAN'S PREVIOUSLY PRESENTED NEWLY DISCOVERED EVIDENCE CLAIM, AND THUS IT CONSTITUTES NEW LAW AND DUE PROCESS AND THE EIGHTH AMENDMENT REQUIRE THAT THIS COURT REVISIT MR. PITTMAN'S NEWLY DISCOVERED EVIDENCE CLAIMS AND DETERMINE WHETHER THE NEW EVIDENCE AND ALL THE OTHER ADMISSIBLE EVIDENCE AT A RESENTENCING IN WHICH THE NEW STATUTE WOULD GOVERN WOULD PROBABLY RESULT IN LIFE SENTENCES.

The "STATE'S RESPONSE TO SECOND AMENDED SUCCESSIVE MOTION TO VACATE JUDGMENTS FILED OCTOBER 14, 2016" was filed on November 7, 2016.

On February 7, 2017, Defendant filed the "MOTION TO AMEND MOTION TO VACATE". This motion sought to amend claims I, II, and IV; "completely rewrite" claim III; and to add an additional claim. On February 16, 2017, this Court entered the "ORDER ON

FEBRUARY 9, 2017 STATUS CONFERENCE AND ORDER SETTING APRIL 6, 2017 STATUS CONFERENCE", granting Defendant's "MOTION TO AMEND MOTION TO VACATE".

On March 13, 2017, Defendant filed the "SECOND [sic] AMENDED SUCCESSIVE MOTION TO VACATE JUDGMENTS OF CONVICTION AMD [sic] SENTENCES, AND ALTERNATIVELY MOTION TO CORRECT ILLEGAL SENTENCES".[6] The third amended motion raised the following claims:

> CLAIM I: MR. PITTMAN'S DEATH SENTENCE IS UNCONSTITUTIONAL BECAUSE HE HAS NOT RECEIVED THAT TO WHICH HE IS ENTITLED: "A FAIR OPPORTUNITY TO SHOW THAT THE CONSTITUTION PROHIBITS [HIS] EXECUTION" DUE TO HIS INTELLECTUAL DISABILITY.
>
> CLAIM I(A): BECAUSE AN INTELLECTUALLY DISABLED DEFENDANT IS NOT ELIGIBLE FOR A DEATH SENTENCE AND THE SENTENCING JUDGE MUST FIND AS A MATTER OF A FACT THAT A DEFENDANT WHO HAS RAISED THE ISSUE IS NOT INTELLECTUALLY DISABLED BEFORE A DEATH SENTENCE MAY BE IMPOSED, THE RIGHT TO A UNANIMOUS JURY ATTACHES TO THE DETERMINATION OF A DEFENDANT'S INTELLECTUAL DISABILITY UNDER *HURST V. FLORIDA* AND *HURST V. STATE*.
>
> CLAIM II: MR. PITTMAN'S DEATH SENTENCES STAND IN VIOLATION OF THE SIXTH AMENDMENT UNDER *HURST V. FLORIDA* BECAUSE A JUDGE, RATHER THAN A JURY, MADE THE FINDINGS THAT SUFFICIENT AGGRAVATING CIRCUMSTANCES EXISTED AND THAT THEY WERE NOT OUTWEIGHED BY MITIGATING CIRCUMSTANCES, WHICH WERE STATUTORILY NECESSARY TO RENDER MR. PITTMAN DEATH ELIGIBLE.
>
> CLAIM III: MR. PITTMAN'S DEATH SENTENCES VIOLATE THE EIGHTH AMENDMENT AND THE FLORIDA CONSTITUTION UNDER *HURST V. STATE* AND MUST BE VACATED.

[6] Although titled as the "second" such amended motion, as correctly noted in footnote 1 of the motion, this was the third amended successive motion.

> CLAIM IV: THE RECENT DECISIONS IN *HURST V. STATE* AND IN *PERRY V. STATE* MEAN THAT AT A RESENTENCING ORDERED IN A CAPITAL CASE A UNANIMOUS DEATH RECOMMENDATION WILL BE REQUIRED AND THAT ASPECT OF A RESENTENCING ORDER IN MR. PITTMAN'S CASE MUST BE PART OF THE SECOND PRONG ANALYSIS OF MR. PITTMAN'S PREVIOUSLY PRESENTED NEWLY DISCOVERED EVIDENCE CLAIMS, AND REQUIRES THIS COURT REVISIT MR. PITTMAN'S NEWLY DISCOVERED EVIDENCE CLAIMS AND DETERMINE WHETHER THE NEW EVIDENCE AND ALL THE OTHER ADMISSIBLE EVIDENCE AT A RESENTENCING IN WHICH THE NEW STATUTE WOULD GOVERN WOULD PROBABLY RESULT IN LIFE SENTENCES.
>
> CLAIM V: THE RETROACTIVITY RULINGS IN *ASAY V. STATE* AND *MOSLEY V. STATE* THAT SEEMINGLY PERMIT PARTIAL RETROACTIVITY AND/OR CATEGORY BY CATEGORY AND/OR CASE BY CASE RETROACTIVITY OF NEW LAW IN DEATH PENALTY PROCEEDINGS INJECTS ARBITRARINESS INTO THE FLORIDA'S CAPITAL SENTENCING SCHEME THAT VIOLATES THE EIGHTH AMENDMENT PRINCIPLES OF *FURMAN V. GEORGIA*.

The "STATE'S RESPONSE TO THIRD AMENDED SUCCESSIVE MOTION TO VACATE JUDGMENTS FILED MARCH 13, 2017" was filed on April 13, 2017. On April 17, 2017, Defendant filed the "MOTION TO ACCEPT THE ACCOMPANYING SUPPLEMENT TO THE THIRD AMENDED SUCCESSIVE MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCES, AND ALTERNATIVELY MOTION TO CORRECT ILLEGAL SENTENCE AS TIMELY FILED" along with the "SUPPLEMENT TO THIRD AMENDED SUCCESSIVE MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCES, AND ALTERNATIVELY MOTION TO CORRECT ILLEGAL SENTENCES" which included the following claim:

> CLAIM VI: THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION REQUIRES THE RETROACTIVE APPLICATION OF THE SUBSTANTIVE RULE ESTABLISHED BY CHAPTER 2017-1, WHICH

PRECLUDES THE IMPOSITION OF A DEATH SENTENCE UNLESS A JURY UNANIMOUSLY RETURNS A DEATH RECOMMENDATION.

On October 4, 2019, the State filed the "MOTION TO DISMISS CLAIMS I AND IA OF SECOND AMENDED SUCCESSIVE (THIRD) MOTION FOR POSTCONVICTION RELIEF" along with the "MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS CLAIMS 1 AND 1A OF SECOND AMENDED SUCCESSIVE (THIRD) MOTION FOR POSTCONVICTION RELIEF". Defendant filed the "RESPONSE TO STATE'S MOTION TO DISMISS CLAIMS I AND IA OF SECOND AMENDED SUCCESSIVE (THIRD) MOTION FOR POSTCONVICTION RELIEF AND SUPPORTING MEMORANDUM OF LAW" on October 23, 2019.

On October 22, 2019, the "DEFENDANT'S MOTION UNDER RULE 3.800(a) CHALLENGING HIS DEATH SENTENCE AS ILLEGAL" was filed. The "STATE'S RESPONSE TO PITTMAN'S RULE 3.800(A) MOTION" was filed on November 1, 2019.

A hearing on the State's motion to dismiss and the Defendant's motion under rule 3.800(a) was scheduled for December 6, 2019. Prior postconviction counsel for Defendant mistakenly believed the hearing on these motions was to be heard on December 10, 2019. As a result, the hearing on these motions was rescheduled to January 9, 2020. On January 9, 2020, prior postconviction counsel represented that he intended to file a motion to withdraw as counsel. That motion was filed on January 24, 2020, and in the "ORDER GRANTING MOTION TO WITHDRAW" entered on January 28, 2020, the Office of the Capital Collateral Regional Counsel-Middle Region was appointed to represent Defendant. On February 6, 2020, the "CERTIFICATION OF CONFLICT AND MOTION TO WITDRAW [sic] AND HAVE CAPITAL COLLATERAL – SOUTHERN REGION OR IN THE ALTERNATIVE CONFLICT

COUNSEL APPOINTED" was filed. The "ORDER DENYING DEFENDANT'S MOTION TO WITHDRAW" was entered on May 22, 2020, and on June 8, 2020, current counsel for Defendant filed a Notice of Appearance.

CASE MANAGEMENT CONFERENCE:

On November 9, 2017, the Court held a Case Management Conference pursuant to Fla. R. Crim. P. 3.851(f)(5)(B), on claims I-VI as set forth in the Third Amended Successive Motion and Supplement set forth above. In the "ORDER ON CASE MANAGEMENT CONFERENCE" entered on November 14, 2017, the Court determined "it would be appropriate to have an evidentiary hearing on Claim I and Claim IA. . ." The Court did not find it necessary to have an evidentiary hearing on the remaining claims.

STATE'S MOTION TO DISMISS CLAIMS 1 AND 1A:

On March 19, 2021, a hearing was held on the State's motion to dismiss. After hearing the arguments of the parties and reviewing the motion, response, and accompanying memoranda, it seems clear that the relief sought is not simply a dismissal of claims I and I(A), but rather a reconsideration of this Court's prior determination at the case management conference that an evidentiary hearing is appropriate for the resolution of these claims.

In a twist of irony, witnesses were called at this hearing. Following arguments that the claims should be resolved by the Court in summary, the Defense called Dr. Gordon Taub, and prior postconviction counsel Martin McClain. The State called trial counsel, Robert Norgard.

As a preliminary matter, Defendant argues the State's motion to dismiss is now procedurally barred, as this Court has already determined an evidentiary hearing would be appropriate to resolve claims I and I(A). Defendant argues rule 3.851 only provides for 15 days

for either party to seek rehearing under this rule, and as the order was entered on November 14, 2017, the State's motion to dismiss is untimely. Defendant also cites to *State v. Jackson*, 306 So. 3d 936 (Fla. 2020) and *State v. Okafor*, 306 So. 3d 930 (Fla. 2020), to support its argument

Rule 3.851(f)(7) states the following:

> *Rehearing*. Motions for rehearing shall be filed within 15 days of the rendition of the trial court's order and a response thereto filed within 10 days thereafter. A motion for rehearing shall be based on a good faith belief that the court has overlooked a previously argued issue of fact or law or an argument based on a legal precedent or statute not available prior to the court's ruling. The trial court's order disposing of the motion for rehearing shall be rendered not later than 30 days from the filing of the motion for rehearing. If no order is filed within 30 days from the filing of the motion for rehearing, the motion is deemed denied. A motion for rehearing is not required to preserve any issue for review.

Although the subsection does not specify the precise order referenced by the phrase "rendition of the trial court's order," it appears to this Court that this rule is applicable only to the final order. Rule 3.851(f)(5)(F) provides the time in which the court must render a final order. Rule 3.851(f)(8) provides the time in which any party may appeal the final order. There is nothing in this rule or any logical reason why a postconviction court should be limited by this subsection from reconsidering a prior non-final order. An analogy is found in Fla. R. Crim. P. 3.192, which allows the state to file a motion for rehearing when an appeal by the state is authorized. Although this rule specifically excludes rules 3.800(a) and 3.851, it states: "[n]othing in this rule precludes the trial court from exercising its inherent authority to reconsider a ruling while the court has jurisdiction of the case." The "inherent authority" to reconsider an interlocutory, nonfinal order, while the court has jurisdiction of the case has been long recognized. See *State v. Crecy*, 46 Fla. L. Weekly D769 (Fla. 2d DCA 2021); *Taufer v. Wells Fargo Bank, N.A.*, 278 So. 3d 335 (Fla. 3d DCA 2019); *Silvestrone v. Edell*, 721 So. 2d 1173, 1175 (Fla. 1998); *Monte Campbell Crane Co., Inc. v. Hancock*, 510 So. 2d 1104 (Fla. 4th DCA 1987); *Alabama Hotel Co. v. J.L. Mott Iron Works*,

86 Fla. 608, 98 So. 825 (Fla. 1924). If this Court was prohibited from reconsidering the nonfinal "ORDER ON CASE MANAGEMENT CONFERENCE," it would require an unnecessary evidentiary hearing. Since the filing of many of the claims raised, the Florida Supreme Court has addressed several of the arguments raised by the defense.

A final order has not been rendered. This Court still has jurisdiction over these postconviction proceedings. This is not a situation where a party has sought reconsideration of a final order, divesting the court of jurisdiction over the postconviction proceedings. See *Wittemen v. State*, 310 So. 3d 1037 (Fla. 2d DCA 2020). The "ORDER ON CASE MANAGEMENT CONFERENCE" entered on November 14, 2019, is a nonfinal interlocutory order. Judicial labor is not completed, as the order and the requirements for such an order in rule 3.851 and *Huff v. State*, 622 So. 2d 982 (Fla. 1993) contemplate the manner in which further postconviction proceedings must occur.

A recent Florida Supreme Court case with a similar claim of intellectual disability based on the retroactive application of *Hall v. Florida*, 572 U.S. 701 (2014), was affirmed after the postconviction court summarily denied the claim. *Freeman v. State*, 300 So. 3d 591 (Fla. 2020). The postconviction court had initially granted an evidentiary hearing, but later reconsidered after the Florida Supreme Court receded from the retroactive application of *Hall*. *Id.* at 593-94.

Defendant's cited cases do not prevent this Court from reconsidering the "ORDER ON CASE MANAGEMENT CONFERENCE". In *Okafor*, the Florida Supreme Court held they could not reconsider its prior judgment and reinstate Okafor's death sentence, when the underlying law relied upon in the vacation of the death sentence was later receded from in *State v. Poole*, 297 So. 3d 487 (Fla. 2020). 306 So. 3d at 933-36. In *Jackson*, the Florida Supreme Court held a final order granting postconviction relief could not be reconsidered beyond the time limits established

in rule 3.851. 306 So. 3d at 940-43. In this case, there has not been a final order granting any relief, and the time limits regarding rehearing do not prevent reconsideration of the non-final order.

Furthermore, the State has never waived the argument that Defendant's claims are procedurally barred and should be summarily denied. At the case management conference held on November 9, 2017, the State argued it was not waiving its argument that Defendant's claims of intellectual disability is procedurally barred. At a status conference held on October 5, 2018, in discussing two notices of supplemental authority, the State emphasized it had not previously waived, and intends to continue to raise the argument that Defendant's claim of intellectual disability is procedurally barred.

For the reasons discussed more fully below, the Court has reconsidered the "ORDER ON CASE MANAGEMENT CONFERENCE" and has now determined an evidentiary hearing is not necessary to resolve claims I and I(A). This Court notes that despite the testimony presented at the hearing on the State's motion to dismiss, the Court has reached this conclusion based solely upon the case law and court file.[7]

DEFENDANT'S THIRD AMENDED SUCCESSIVE MOTION FOR POSTCONVICTION RELIEF:

ANALYSIS OF DEFENDANT'S CLAIMS:

APPLICABLE STANDARDS:

Strickland Standard:

[7] This emphasis is to ensure that a limited evidentiary hearing was not conducted to resolve the Defendant's claims in contradiction to the procedures set forth in Fla. R. Crim. P. 3.851(f)(5).

The United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), set forth the standard for determining ineffective assistance of counsel. To establish ineffective assistance of counsel, a defendant must prove two elements. First, the defendant must show that counsel's performance was deficient. The defendant must show that counsel's representation fell below an objective standard of reasonableness. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. Second, the defendant must show that counsel's deficient performance prejudiced the defense. This occurs when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. *Strickland*, 466 U.S. at 687. The *Strickland* standard requires establishment of both prongs. Where a defendant fails to make a showing as to one prong, it is not necessary to delve in whether he has made a showing as to the other prong. See *Waterhouse v. State*, 792 So. 2d 1176 (Fla. 2001).

Newly Discovered Evidence;

Two requirements must be met in order to obtain postconviction relief and set aside a conviction on the basis of newly discovered evidence. First, to be considered newly discovered evidence, the evidence must be unknown to the defendant at the time of trial and could not have been discovered through due diligence. Second, the evidence must be of such a character that it

would probably produce an acquittal on retrial. See *Jones v. State*, 709 So. 2d 512 (Fla. 1998) and *Hannon v. State*, 941 So. 2d 1109 (Fla. 2006).

The second prong of *Jones* is satisfied if the evidence weakens the case against the defendant so as to give rise to reasonable doubt as to his culpability. According to *Jones*:

> In considering the second prong, the trial court should initially consider whether the evidence would have been admissible at trial or whether there would have been any evidentiary bars to its admissibility. See *Johnson v. Singletary*, 647 So.2d 106, 110-11 (Fla..1994); cf. *Bain v. State*, 691 So. 2d 508, 509 (Fla. 5th DCA 1997). Once this is determined, an evaluation of the weight to be accorded the evidence includes whether the evidence goes to the merits of the case or whether it constitutes impeachment evidence. See *Williamson v. Dugger*, 651 So.2d 84, 89 (Fla. 1994). The trial court should also determine whether the evidence is cumulative to other evidence in the case. See *State v. Spaziano*, 692 So.2d 174, 177 (Fla. 1997); *Williamson*, 651 So.2d at 89. The trial court should further consider the materiality and relevance of the evidence and any inconsistencies in the newly discovered evidence.

To better analyze Defendant's claims, the Court will address them in the order they were presented in the "[THIRD] AMENDED SUCCESSIVE MOTION TO VACATE JUDGMENTS OF CONVICTION AMD [sic] SENTENCES, AND ALTERNATIVELY MOTION TO CORRECT ILLEGAL SENTENCES" filed on March 13, 2017.

CLAIM I

MR. PITTMAN'S DEATH SENTENCE IS UNCONSTITUTIONAL BECAUSE HE HAS NOT RECEIVED THAT TO WHICH HE IS ENTITLED: "A FAIR OPPORTUNITY TO SHOW THAT THE CONSTITUTION PROHIBITS [HIS] EXECUTION" DUE TO HIS INTELLECTUAL DISABILITY.

In Defendant's first claim, he argues that under Fla. R. Crim. P. 3.203(f), he has sufficiently alleged "good cause" for not having previously raised a claim of intellectual disability. The "good

cause" set forth by Defendant is the alleged newly discovered evidence in the form of Dr. Taub's 2015 evaluation, reporting a full-scale IQ of 70.

A. *Atkins* and Subsequent Law on the Prohibition of the Death Penalty for Those with an Intellectual Disability.

On June 12, 2001, § 921.137, Fla. Stat. was enacted, prohibiting the imposition of the death penalty on a defendant that has been found to be intellectually disabled. Ch. 2001-202, § 1, Laws of Fla. In *Atkins v. Virginia*, the Supreme Court held that the Eighth Amendment prohibits the execution of an individual with an intellectual disability. 536 U.S. 304, 321 (2002). Under the statute and Fla. R. Crim. P. 3.203, "intellectual disability" is defined as " 'significantly subaverage general intellectual functioning,' [which] . . . means performance that is 2 or more standard deviations from the mean score on a standardized intelligence test. . . ." Rule 3.203(f) further provides that "[a] claim authorized under this rule is waived if not filed in accord with the time requirements for filing set out in this rule, unless good cause is shown for the failure to comply with the time requirements."

In *Cherry v. State*, 959 So. 2d 702 (Fla. 2007), the definition of an intellectual disability was refined to require a rigid IQ score of 70 or below. In 2014, the Supreme Court reversed this rigid score requirement in *Hall v. Florida*, 572 U.S. 701 (2014), as the failure to take into account the standard error of measurement created an unacceptable risk that persons with an intellectual disability would be executed.

On December 17, 2015, the Florida Supreme Court reversed the denial of a motion filed pursuant to rule 3.203 in *Oats v. State*, 181 So. 3d 457 (Fla. 2015). Oats was convicted in 1979, and after a resentencing was ordered, his death sentence was affirmed in 1985. Oats raised a timely claim following *Atkins*, the appeal of which was still pending when the Supreme Court decided

Hall. *Id.* at 460-63. The Florida Supreme Court reversed the lower court as it had relied on testimony from an expert witness based on *Cherry*, later disapproved by *Hall*. *Id.* at 468-70.

In *Walls v. State*, 213 So. 3d 340 (Fla. 2016), *Hall* was found to apply retroactively. Walls had filed a timely motion under rule 3.203, and a subsequent successive motion following *Hall*. Two months before *Walls*, the Florida Supreme Court held in *Rodriguez v. State*, 250 So. 3d 616 (2016), that a claim of intellectual disability never previously raised was untimely under rule 3.203, despite *Hall*. The Florida Supreme Court reasoned that Rodriguez could not have relied on *Cherry*, as he never raised a claim following *Atkins*, as was required by rule 3.203. *Rodriguez* was followed in *Blanco v. State*, 249 So. 3d 536 (Fla. 2018); *Harvey v. State*, 260 So. 3d 906 (Fla. 2018); and *Bowles v. State*, 276 So. 3d 791 (Fla. 2019). Recently in *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020), the Florida Supreme Court receded from *Walls*, and held *Hall* does not apply retroactively. Following *Phillips*, summary denial of untimely claims predicated upon the retroactive application of *Hall* is appropriate. See *Lawrence v. State*, 296 So. 3d 892 (Fla. 2020); *Cave v. State*, 299 So. 3d 352 (Fla. 2020); *Pooler v. State*, 302 So. 3d 744 (Fla. 2020); and *Freeman v. State* 300 So 3d. 591, 594 (Fla. 2020).

B. Defendant's Claim is Untimely as *Hall* Does Not Apply Retroactively.

When *Atkins* was decided by the Supreme Court on June 20, 2002, Defendant was actively litigating his first motion for postconviction relief. Following *Atkins*, rule 3.203 was adopted. During the time the case law, rules, and statutes were evolving to recognize a claim that a sentence of death cannot be imposed on a person with an intellectual disability, Defendant continued to actively litigate his first motion for postconviction relief. Rule 3.203(d)(4)(C) provided Defendant with 60 days after October 1, 2004, to amend his initial motion for postconviction relief, to include a claim under this rule. *Amendments to Fla. Rules of Criminal Procedure & Fla. Rules of Appellate*

Procedure, 875 So. 2d 563 (Fla. 2004). After raising several additional claims in subsequent amendments as was detailed in the history of the case above, Defendant's initial motion for postconviction relief (which was filed in 1997) was not denied until November 5, 2007. The appeal of the denial of the initial motion for postconviction relief was affirmed on June 30, 2011. *Pittman II*, 90 So. 3d at 802-04.

Despite the adoption of rule 3.203 and *Atkins*, Defendant failed to raise a claim that he has an intellectual disability until he filed the successive motion for postconviction relief on May 27, 2015. Rule 3.203(f) has always stated that a failure to comply with the time requirements for raising such a claim, "unless good cause is shown," amounts to a waiver of any such claim. Since the filing of Defendant's claim in the successive motion, the Florida Supreme Court has made it clear that *Hall* is not retroactive, and any reliance on *Cherry* for failing to previously raise such a claim is misplaced, if the claim was not timely raised following *Atkins* and rule 3.203. See *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020); *Rodriguez v. State*, 250 So. 3d 616 (2016). Any reliance on *Oats v. State* is misplaced, as Oats had raised a timely claim following *Atkins*. 181 So. 3d at 463.

As Defendant did not comply with the time requirements of rule 3.203 and alleged the claim for the first time on May 27, 2015, the claim has been waived and is now untimely.

C. Defendant's Claim is Untimely as he has Failed to Demonstrate "Good Cause" Based Upon Newly Discovered Evidence.

Defendant argues that waiver under rule 3.203(f) is not applicable as he has alleged "good cause" for failing to previously raise this claim. Under Defendant's theory, he could not have previously raised this claim, as he had no reason to know of the intellectual disability. Dr. Taub's administration of a WAIS-IV test to Defendant on May 18, 2015, is the date offered by Defendant as the earliest time this claim could have been discovered. Although Defendant was administered

an IQ test by Dr. Henry Dee in 1991, Defendant now claims that test was invalid as the wrong test instrument was used.

Dr. Dee testified at trial and at the evidentiary hearing for the initial motion for postconviction relief. Evidentiary Hr'g Tr. 284, May 8-11, 2006. After testing, Dr. Dee determined Defendant had an IQ of 95. Hr'g Tr. 287. At the case management conference held on November 9, 2017, counsel for Defendant represented that it was only for investigation of a possible future claim that he requested Dr. Taub evaluate Defendant. After Dr. Taub determined Defendant's IQ was 70, counsel and Dr. Taub began investigating the discrepancy between the two scores. Counsel located Dr. Dee's file "that had been included with the record" which showed the version of test administered to Defendant was the original WAIS, with a 1955 copyright date. Counsel assumed this test was administered by mistake, as the original WAIS was replaced by the WAIS-R in 1981. As a new version of the WAIS is adopted, the older versions are discontinued and should no longer be administered. Counsel hypothesized this is the reason for the discrepancy in scores, and Defendant's actual IQ in 1991 should be much lower than the test results by Dr. Dee.

"Any claim of newly discovered evidence in a death penalty case must be brought within one year of the date such evidence was discovered or could have been discovered through the exercise of due diligence." *Glock v. Moore*, 776 So.2d 243, 251 (Fla. 2001). This is measured from the date of when the information was or could have been first discovered, and not at some later date when a subsequent document containing the same information is created. See *Long v. State*, 183 So. 3d 342 (Fla. 2016) (a letter from the United States Department of Justice in 2013 regarding questionable forensic testing practices of one of the analysts is not newly discovered evidence, when the defendant was made aware of this analyst's questionable forensic work in

2000). Although trial counsel argued he had no reason to previously question Dr. Dee's results, the record refutes this claim.

Prior postconviction counsel himself acknowledged he obtained Dr. Dee's file "that had been included with the record" to determine the original WAIS test had been improperly administered in 1991. As prior postconviction counsel stated, this was obvious simply from looking at the copyright date. This existed well before Dr. Taub's evaluation in 2015 and could have been timely discovered with due diligence.

Prior postconviction counsel argued that until Dr. Taub's evaluation, he had no reason to doubt and further investigate Dr. Dee's results. However, school records from Defendant's childhood were available and indicated a possibility that Defendant had an intellectual disability. Jean Wesley testified in 2006 at the evidentiary hearing on the initial motion for postconviction relief, that while employed as a teacher aid, Defendant was in her class for emotionally handicapped students and functioned at a lower level than his age. Hr'g Tr. 224-225. Tillie Woody testified at the same hearing that she was Defendant's teacher when he was in sixth, seventh, and eighth grade. Hr'g Tr. 129-130. Defendant was in special education classes, classified as "educable mentally handicapped," and during these years Defendant functioned on a low elementary level. Hr'g Tr. 132-133. Such classification was accomplished through psychological examination. *Id.* Dr. Dee himself testified at this hearing, that ". . . [Defendant] was thought to be retarded, as a matter of fact, and was even put in special education, but he's got a 95 IQ, which makes little sense. He was learning disabled also." Hr'g Tr. 291. Dr. Taub reviewed Defendant's school records, and in his report attached to the successive motion for postconviction relief, noted that Defendant obtained an IQ score of 70 at the age of 6-years old. The author of the report indicating that score, dated November 11, 1967, noted "IQ of 70 must be considered as a minimal

estimate of his ability, although it may represent a fair appraisal of his typical, daily functioning level." The report concluded, "[t]he findings of this testing in conjunction with his kindergarten teacher's comments should be used to decide if [Defendant] would be better off in a primary special class program (for EMR) [e.g. Intellectual Disability] or if a regular first grade would suit his needs better." Dr. Taub's report also noted that on June 3, 1975, Defendant was evaluated with "the Weschler Intelligence Scale for Children- Revised" and obtained a score of 71.

The Supreme Court noted that even consistent results could be the effect of repeated flaws, ". . .so that even a consistent score is not conclusive evidence of intellectual functioning." *Hall v. Florida*, 5720 U.S. 701, 714 (2014). This case does not even involve multiple consistent scores showing an IQ inconsistent with an intellectual disability, but one test from Dr. Dee, which was inconsistent with Defendant's school records and previous IQ tests.

Dr. Dee believed the discrepancy between Defendant's IQ during the test he administered and supposed mental deficiencies was explained by brain damage. However, there is no reason to believe a diagnosis of brain damage in this case must also necessarily exclude the possibility of an intellectual disability. Dr. Dee's conclusion also failed to account for Defendant's prior testing reflecting an IQ of 70 and 71. It has frequently been noted that absent some intervening injury or medical condition, an individual's IQ remains fairly consistent. See *Nicholson v. Branker*, 739 F. Supp. 2d 839, 854 (E.D.N.C. 2010); *State v. White*, 118 Ohio St. 3d 12, 885 N.E.2d 905 (2008); *Muncy v. Apfel*, 247 F.3d 728, 734 (8th Cir. 2001); Steven J. Mulroy, Execution by Accident: Evidentiary and Constitutional Problems with the "Childhood Onset" Requirement in Atkins Claims, 37 Vt. L. Rev. 591, 608 (Spring 2013). The brain damage certainly could not account for the large increase in Defendant's IQ from Defendant's childhood, to the test administered by Dr. Dee in 1991.

Counsel could have discovered Dr. Dee utilized the wrong version of the WAIS in 1991 when the test was administered, thus explaining this discrepancy and allowing a timely claim to have been made following *Atkins*. The information was available as early as 1991 when Dr. Dee administered the test, and certainly by the time Dr. Dee testified at trial. Therefore, this evidence now in the form of Dr. Taub's report is neither "newly discovered evidence" or a showing of "good cause" under rule 3.203.

D. Defendant is Not Entitled to Relief Under a Claim of Ineffective Assistance of Postconviction Counsel.

In Defendant's "RESPONSE TO STATE'S MOTION TO DISMISS CLAIMS 1 AND 1A OF SECOND AMENDED SUCCESSIVE (THIRD) MOTION FOR POSTCONVICTION RELIEF AND SUPPORTING MEMORANDUM OF LAW" filed on October 23, 2019, prior postconviction counsel argued that any finding that he failed to exercise due diligence would give rise to a claim that he provided ineffective assistance in violation of the Sixth Amendment, citing to *Hooks v. Workman*, 689 F.3d 1148 (10th Cir. 2012).

The Florida Supreme Court has "repeatedly held that claims of ineffective assistance of postconviction counsel are not cognizable." *Sweet v. State*, 293 So. 3d 448, 453 (Fla. 2020) (quoting *Banks v. State*, 150 So. 3d 797, 800 (Fla. 2014)). As in *Sweet*, "[c]ounsel's failure to include this . . . claim in the original postconviction motion does not make the new claim forever timely." *Id.* This Court finds the holding of *Sweet* from the Florida Supreme Court to be correct, and that this claim cannot be "timely" raised at any point in the future.[8]

[8] This Court notes that the opinion in *Hooks v. Workman*, 689 F.3d 1148 (10th Cir. 2012), does not address 28 U.S.C. § 2254(i), which states: "[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254."

For the reasons set forth above, claim I is untimely, and therefore DENIED.

CLAIM I(A)

BECAUSE AN INTELLECTUALLY DISABLED DEFENDANT IS NOT ELIGIBLE FOR A DEATH SENTENCE AND THE SENTENCING JUDGE MUST FIND AS A MATTER OF A FACT THAT A DEFENDANT WHO HAS RAISED THE ISSUE IS NOT INTELLECTUALLY DISABLED BEFORE A DEATH SENTENCE MAY BE IMPOSED, THE RIGHT TO A UNANIMOUS JURY ATTACHES TO THE DETERMINATION OF A DEFENDANT'S INTELLECTUAL DISABILITY UNDER *HURST V. FLORIDA* AND *HURST V. STATE*.

In Claim I(A), Defendant again asserts he is intellectually disabled, and thus not statutorily eligible to be sentenced to death. Defendant then relies on *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), to argue that as a jury must be the finder of every fact necessary for the imposition of the death penalty, a unanimous jury finding that Defendant is not intellectually disabled is required before he is eligible for a death sentence.

This claim is without merit for several reasons. First, for the reasons set forth above, Defendant's claim of intellectual disability is procedurally barred. Second, under Florida law, both the statute and rule governing intellectual disability in capital cases provide that the determination is to be made by a judge, and not a jury. § 921.137, Fla. Stat.; Fla. R. Crim. P. 3.203(e). Third, the Florida Supreme Court has consistently held that a capital defendant is not entitled to a jury determination on the issue of intellectual disability. See *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002); *Arbelaez v. State*, 898 So. 2d 25, 43 (Fla. 2005); *Nixon v. State*, 2 So. 3d 137, 145 (Fla. 2009); *Hodges v. State*, 55 So. 3d 515 (Fla. 2010); *Kilgore v. State*, 55 So. 3d 487, 510-11 (Fla. 2010). Even after *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), the Florida Supreme Court continues

to hold that a judge, and not a jury, is to determine the issue of intellectual disability. *Oats v. Jones*, 220 So. 3d 1127 (Fla. 2017); *Franqui v. State*, 301 So. 3d 152, 156 (Fla. 2020).

Claim I(A) is DENIED.

CLAIM II

MR. PITTMAN'S DEATH SENTENCES STAND IN VIOLATION OF THE SIXTH AMENDMENT UNDER *HURST V. FLORIDA* BECAUSE A JUDGE, RATHER THAN A JURY, MADE THE FINDINGS THAT SUFFICIENT AGGRAVATING CIRCUMSTANCES EXISTED AND THAT THEY WERE NOT OUTWEIGHED BY MITIGATING CIRCUMSTANCES, WHICH WERE STATUTORILY NECESSARY TO RENDER MR. PITTMAN DEATH ELIGIBLE.

Defendant's second claim alleges his death sentences are illegal under *Hurst v. Florida*, 577 U.S. 92 (2016), which held "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." Defendant's Motion argues:

> [b]ecause the result of *Mosley* [*v. State*, 209 So. 3d 1248 (Fla. 2016)] and *Asay* [*v. State*, 210 So. 3d 1 (Fla. 2016)] unsettled the law, created confusion, plunged Florida's death penalty into turmoil that will likely last for years, and left existing retroactivity analysis under *Witt v. State*, 387 So. 2d 922 (Fla. 1980), in tatters, careful examination of the decisions is warranted within [Defendant's] claim based upon *Hurst v. Florida*. It also gives rise to another constitutional claim that the method for determining who gets the retroactive benefit of *Hurst v. Florida* and who does not has injected an unacceptable and unjustifiable level of arbitrariness into Florida's capital sentencing scheme in violation of *Furman v. Georgia* and the Eight Amendment.

Defendant's Motion at 32, ¶ 22.

In *Mosley*, the Florida Supreme Court held that *Hurst v. Florida* was retroactive "to the point of the issuance of *Ring*." 209 So. 3d at 1281. Mosley, whose crimes occurred in April 2004,

raised a *Ring v. Arizona*, 536 U.S. 584 (2002) claim at the trial level and on direct appeal. *Id.* at 1274. The United States Supreme Court denied his petition for certiorari on October 4, 2010. *Mosley v. Florida*, 562 U.S. 887 (2010). In *Asay*, released on the same day as *Mosley*, the Florida Supreme Court further held that *Hurst* relief was not retroactive to cases "in which the death sentence became final before the issuance of *Ring*." *Asay*, 210 So. 3d at 22.

Despite any initial "confusion," the Florida Supreme Court has "consistently applied [the] decision in *Asay*, denying the retroactive application of *Hurst v. Florida* as interpreted in *Hurst v. State* to defendants whose death sentences were final when the supreme Court decided *Ring*." *Hitchcock v. State*, 226 So. 3d 216, 217 (Fla. 2017) (citing *Zack v. State*, 228 So. 3d 41 (Fla. 2017); *Marshall v. Jones*, 226 So. 3d 211 (Fla. 2017); *Lambrix v. State*, 217 So. 3d 977 (Fla. 2017); *Willacy v. Jones*, No. SC16-297, 2017 WL 1033679 (Fla. Mar. 17, 2017); *Bogle v. State*, 213 So. 3d 833 (Fla. 2017); *Gaskin v. State*, 218 So. 3d 399 (Fla. 2017)). See also, *Rivera v. State*, 260 So. 3d 920 (Fla. 2018); *Evans v. State*, No. SC17-869, 2018 WL 3617642 (Fla. Jan. 24, 2018); *Reese v. State*, 261 So. 3d 1246 (Fla. 2019); *Jones v. State*, 259 So. 3d 803 (Fla. 2018); *Mungin v. State*, 259 So. 3d 716 (Fla. 2018). Defendant's sentence became final in 1995, when the United States Supreme Court denied his petition for writ of certiorari. *Pittman v. Florida*, 514 U.S. 1119 (1995). Therefore, the law is well settled that under *Asay*, Defendant is not entitled to retroactive application of *Hurst v. Florida*.

Defendant also raises a claim under *Caldwell v. Mississippi*, 472 U.S. 320 (1985), as the jury was not instructed according to the current state of the law at the time of his trial. As discussed in the State's response, this claim was expressly rejected in *Hall v. State*, 212 So. 3d 1001, 1032-33 (Fla. 2017). In *Reynolds v. State*, 251 So. 3d 911, 825 (Fla. 2018), the Florida Supreme Court further held "a *Caldwell* claim based on the rights announced in *Hurst* [*v. State*] and *Hurst v.*

Florida cannot be used to retroactively invalidate the jury instructions that were proper at the time under Florida law."

Finally, Defendant argues fundamental fairness as other defendants have been afforded *Hurst* relief, would therefore warrant such relief in this case. All cases referenced in the Motion involve defendants who received new trials or penalty phases based on unrelated issues, where those proceedings were not yet final when *Hurst v. Florida* was decided. Defendant's Motion at 59-67. As the original sentences were vacated, they were not proceeding with a final sentence prior to *Ring*. Defendant's case is clearly distinguishable, as was discussed above.

For the reasons set forth above, claim II is DENIED.

CLAIM III

MR. PITTMAN'S DEATH SENTENCES VIOLATE THE EIGHTH AMENDMENT AND THE FLORIDA CONSTITUTION UNDER *HURST V. STATE* AND MUST BE VACATED.

Defendant's third claim argues that *Hurst v. State*, which required a jury to return unanimous verdict findings for the necessary facts and a unanimous death recommendation before a death sentence was authorized, was derived from the Florida Constitution, and alternatively, the Eighth Amendment. The Florida Supreme Court has previously rejected this argument. See *Asay v. State*, 224 So. 3d 695, 702-03 (Fla. 2017); *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017); and *Lambrix v. State* 227 So. 3d 112 (Fla. 2017).

Furthermore, as was discussed in claim II above regarding *Hurst v. Florida*, the Florida Supreme Court has consistently held defendants with sentences that were final prior to *Ring* are not entitled to retroactive *Hurst* relief.

Finally, the Florida Supreme Court receded from *Hurst v. State* in *State v. Poole*, 297 So. 3d 487 (Fla. 2020).[9] As to this same argument, the Florida Supreme Court stated:

> . . . lest there be any doubt, we hold that our state constitution's prohibition on cruel and unusual punishment, article I, section 17, does not require a unanimous jury recommendation – or any jury recommendation – before a death sentence can be imposed. The text of our constitution requires us to construe the state cruel and unusual punishment provision in conformity with decisions of the Supreme Court interpreting the Eighth Amendment. Binding Supreme Court precedent in *Spaziano* [*v. Florida*, 468 U.S. 447 (1984)] holds that the Eighth Amendment does not require a jury's favorable recommendation before a death penalty can be imposed. *See Spaziano*, 468 U.S. at 464-65, 104 S.Ct. 3154. Therefore, the same is true of article I, section 17.

297 So. 3d at 505. Under *Poole*, a jury is only required to find the existence of one or more statutory aggravating circumstance. *Id.* at 502-03. "Neither *Hurst v. Florida*, nor the Sixth or Eighth Amendment, nor the Florida Constitution mandates that the jury make the section 941.121(3)(b) selection finding or that the jury recommend a sentence of death." *Id.* Defendant was convicted on three counts of first-degree murder and the State also established Defendant was convicted of aggravated assault in 1985. *Pittman I*, 646 So. 2d at 169-70. As such, even assuming arguendo Defendant was somehow entitled to retroactive application of *Hurst v. State*, he is not entitled to *Hurst* relief under *Poole*.

Therefore, claim III is DENIED.

CLAIM IV

THE RECENT DECISIONS IN *HURST V. STATE* AND IN *PERRY V. STATE* MEAN THAT AT A RESENTENCING ORDERED IN A CAPITAL CASE A UNANIMOUS DEATH RECOMMENDATION WILL BE REQUIRED AND THAT ASPECT OF A RESENTENCING ORDER IN MR.

[9] In fairness to Defendant, this Court is aware this decision, as well as several of those cited in this Order, were not issued until after the Motion was filed.

PITTMAN'S CASE MUST BE PART OF THE SECOND PRONG ANALYSIS OF MR. PITTMAN'S PREVIOUSLY PRESENTED NEWLY DISCOVERED EVIDENCE CLAIMS, AND REQUIRES THIS COURT REVISIT MR. PITTMAN'S NEWLY DISCOVERED EVIDENCE CLAIMS AND DETERMINE WHETHER THE NEW EVIDENCE AND ALL THE OTHER ADMISSIBLE EVIDENCE AT A RESENTENCING IN WHICH THE NEW STATUTE WOULD GOVERN WOULD PROBABLY RESULT IN LIFE SENTENCES.

Defendant's fourth claim argues that as revised sentencing statutes would govern if Defendant's sentences were vacated and a resentencing ordered, this Court must evaluate his previously presented newly discovered evidence claim in light of the new law. At the case management conference, prior postconviction counsel made it clear the "previously presented newly discovered evidence claim" relevant to this claim was the claim raised in the initial motion for postconviction relief, denied on November 5, 2007, and affirmed on June 30, 2011. *Pittman II*, 90 So. 3d at 803-04.

The Florida Supreme Court has expressly rejected the argument that changes in Florida's capital sentencing law are part of the cumulative review of newly discovered evidence in *Walton v. State*, 246 So. 3d 246 (Fla. 2018). ". . . [I]n neither *Swafford* [*v. State*, 125 So. 3d 760 (Fla. 2013)] nor *Hildwin* [*v. State*, 141 So. 3d 1178 (Fla. 2014)] did [the Florida Supreme Court] hold that a cumulative analysis requires consideration of changes in the law that might apply if a new trial were granted. . . Viewing decisional changes in the law as newly discovered 'facts' would erase the need for a retroactivity analysis pursuant to *Witt*." Furthermore, any subsequent changes in the law cannot themselves serve as newly discovered evidence to revive postconviction claims which have already been addressed several years prior.

For these reasons, claim IV is DENIED.

CLAIM V

THE RETROACTIVITY RULINGS IN *ASAY V. STATE* AND *MOSLEY V. STATE* THAT SEEMINGLY PERMIT PARTIAL RETROACTIVITY AND/OR CATEGORY BY CATEGORY AND/OR CASE BY CASE RETROACTIVITY OF NEW LAW IN DEATH PENALTY PROCEEDINGS INJECTS ARBITRARINESS INTO THE FLORIDA'S CAPITAL SENTENCING SCHEME THAT VIOLATES THE EIGHTH AMENDMENT PRINCIPLES OF *FURMAN V. GEORGIA*.

Defendant's fifth claim alleges the Florida Supreme Court's determination on retroactivity as held in *Asay* and *Mosley* is arbitrary. For the reasons stated above in addressing claim II, the Florida Supreme Court has consistently held Defendant is not entitled to retroactive application of *Hurst*. Claim V is DENIED.

CLAIM VI

THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION REQUIRES THE RETROACTIVE APPLICATION OF THE SUBSTANTIVE RULE ESTABLISHED BY CHAPTER 2017-1, WHICH PRECLUDES THE IMPOSITION OF A DEATH SENTENCE UNLESS A JURY UNANIMOUSLY RETURNS A DEATH RECOMMENDATION.

Defendant's final claim alleges denial of equal protection and a substantive right based on the legislative passage of chapter 2017-1. The Florida Supreme Court has previously rejected these arguments. See *Lambrix v. State*, 227 So. 3d 112, 113 (Fla. 2017) (citing *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017) and *Asay v. State*, 224 So. 3d 695 (Fla. 2017)). For the reasons stated therein, claim VI is DENIED.

DEFENDANT'S MOTION TO CORRECT AN ILLEGAL SENTENCE:

On October 22, 2019, Defendant filed the "DEFENDANT'S MOTION UNDER RULE 3.800(a) CHALLENGING HIS DEATH SENTENCE AS ILLEGAL". This motion raises a single claim, that Defendant is intellectually disabled and thus not eligible for a sentence of death. The motion alleges that as this Court granted an evidentiary hearing on Defendant's claim–"a critical stage in the criminal process"–he is entitled to application of Fla. R. Crim. P. 3.203. Under this rule, Defendant claims a hearing on his intellectual disability must be conducted, or his sentence is illegal under rule 3.800(a).

The Court held a hearing on this Motion to hear further arguments from the parties. At the hearing, the State contended a defendant sentenced to death may not raise any claim pursuant to rule 3.800(a). In *Anderson v. State*, 267 So. 2d 8 (Fla. 1972), a motion under rule 3.800(a) was filed by the Attorney General alleging several death sentences were illegal pursuant to *Furman v. Georgia*, 408 U.S. 238 (1972). In *Hitchcock v. State*, 755 So. 2d 638 (Fla. 2000) and *Rutherford v. State*, 940 So. 2d 1112 (Fla. 2006), the Florida Supreme Court reviewed denial of claims raised under rule 3.800(a) by prisoners serving death sentences, addressing the merits rather than dismissing based on a procedural bar that rule 3.800(a) is not applicable.

One would reason if there were a truly "illegal sentence" as the term of art has been defined in which a sentence of death has been imposed, a procedural bar based solely on the fact that the ultimate sentence of death has been imposed would serve no purpose. However, Defendant's Motion has not alleged an "illegal sentence" pursuant to rule 3.800(a).

The rule itself makes it clear that any such allegation must affirmatively allege "that the court records demonstrate on their face an entitlement to that relief". Fla. R. Crim. P. 3.800(a)(1). To be illegal, the sentence "must impose a kind of punishment that no judge under the entire body of sentencing statutes could possibly inflict under any set of factual circumstances." *Carter v.*

State, 76 So. 2d 1173, 1178 (Fla. 2001) (quoting *Blakley v. State*, 746 So. 2d 1182, 1186-87 (Fla. 4th DCA 1999)). Such errors may be resolved as a matter of law, and do not require contested evidentiary hearings. *Williams v. State*, 957 So. 2d 600, 602 (Fla. 2007) (citing *Renaud v. State*, 926 So. 2d 1241 (Fla. 2006); *State v. Mancino*, 714 So. 2d 429 (Fla. 1998); *Hopping v. State*, 709 So. 2d 263 (Fla. 1998); *State v. Callaway*, 658 So. 2d 983, 988 (Fla. 1995)).

In this claim, Defendant is relying upon his own unconfirmed allegation in a motion for postconviction relief pursuant to rule 3.851, to "establish" he is intellectually disabled. This allegation is not record evidence upon which a rule 3.800(a) motion can be based. Otherwise, any defendant with sentence of death could allege intellectual disability and rely on that allegation as the basis for an "illegal sentence". Such circular reasoning would clearly contravene the intended purpose of rule 3.800(a).

That this Court had initially granted an evidentiary hearing on claims I and I(A) also does not establish Defendant has an intellectual disability. A postconviction court is required to "accept the movant's factual allegations as true to the extent they are not refuted by the record." *Duckett v. State*, 148 So. 3d 1163, 1168 (Fla. 2014) (quoting *Walton v. State*, 3 So. 3d 1000, 1008 (Fla. 2009)). This "acceptance" of allegations is only for the purposes of whether the claim can be summarily denied, and not for acceptance of these facts as record evidence.

Defendant's reliance on rule 3.203 is also misplaced. Defendant has not filed a motion under rule 3.203. He has filed a successive motion for postconviction relief. Rule 3.203 does not apply to capital postconviction proceedings. The rule itself provides any such motions ". . . shall be filed no later than 90 days prior to trial, or at such time as ordered by the court." Rule 3.203(d). Unless a new trial were to be granted, Defendant clearly cannot comply with this rule. And as was

discussed in claim I above. Defendant waived any claim pursuant to this rule and has failed to establish good cause for the failure to comply with the time requirements.

As there is no record evidence establishing Defendant is intellectually disabled, his claim that his sentence is illegal is DENIED.

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1) Defendant's SECOND [sic] AMENDED SUCCESSIVE MOTION TO VACATE JUDGMENTS OF CONVICTION AMD [sic] SENTENCES, AND ALTERNATIVELY MOTION TO CORRECT ILLEGAL SENTENCES is hereby **DENIED**.
2) Defendant's MOTION UNDER RULE 3.800(a) CHALLENGING HIS DEATH SENTENCE AS ILLEGAL is hereby **DENIED**.
3) The Status Conference presently scheduled for June 4, 2021, is **CANCELLED**.
4) This is a final order. Defendant has thirty (30) days to appeal this Order to the Florida Supreme Court.

DONE AND ORDERED in Bartow, Polk County, Florida, this 28th day of May, 2021.

JALAL A. HARB
Circuit Court Judge

Copies furnished to:
David J. Pittman #351997
Union Correctional Institution
7819 N.W. 228th Street
Raiford, FL 32026-4000