No. 25-5605

In The
Supreme Court of the United States

DAVID JOSEPH PITTMAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

APPENDIX TO THE
BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

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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.

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[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

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JAH/jwl

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

Case No. CF90-2242A1-XX

STATE OF FLORIDA,

Plaintiff,

vs.

DAVID PITTMAN,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Volume I

BEFORE: HONORABLE HARVEY KORNSTEIN
CIRCUIT JUDGE

DATE TAKEN: May 8-11, 2006
PLACE: Polk County Courthouse, Courtroom 7B
255 North Broadway Avenue
Bartow, Florida 33830

Proceedings taken before:

Joan L. Pitt
Registered Merit Reporter

Defendant, having been first duly sworn, testified as follows:

THE COURT: Ma'am, please be seated. Ma'am, if you would please speak loud and clear so that everybody can hear you. Please listen very carefully to the questions that will be asked by both sides and simply be responsive only to those questions. All right? Thank you.

THE WITNESS: Thank you.

THE COURT: Your witness.

MS. McDERMOTT: Thank you, Judge.

DIRECT EXAMINATION

BY MS. McDERMOTT:

Q. Ms. Woody, can you state your name for the record, please?

A. Tillie Amos Woody.

Q. Can you spell your first name?

A. Tillie?

Q. Yes. Can you spell it for me? Can you spell it for me?

A. T-i-l-l-i-e.

Q. And can you spell your last name?

A. W-o-o-d-y.

Q. Mrs. Woody, you live in Polk County?

A. Yes.

Q. And are you currently employed?
A. No.
Q. You're retired?
A. Retired.
Q. And what are you retired from? What's your former profession?
A. Polk County School Board.
Q. Okay. And you were also a teacher?
A. Yes.
Q. And how many years were you a teacher before you retired?
A. Forty years of teaching.
Q. Now, do you remember a student named David Pittman?
A. Yes.
Q. Okay. And do you remember what grades you had him for?
A. Yes.
Q. What grades did you have him for?
A. In the middle school. Sixth, seventh and eighth.
Q. So you had him three years in a row?
A. In between, yes.
Q. And what school was that?
A. Mulberry Middle School.