

**IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL
CIRCUIT IN AND FOR LEE COUNTY, FLORIDA**

State of Florida

Lee County Case No.

95-CF-000911-A

vs

Nelson, Joshua D

Trial Judge:

Joseph C Fuller, Jr.

Appeal Case No.

SC17-939

RECORD ON APPEAL

FLORIDA SUPREME COURT

06/05/2017

RECEIVED

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State of Florida
vs
Nelson, Joshua D

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Location: **Div D**
Judicial Officer: **Fuller, Joseph C, Jr.**
Filed on: **04/03/1995**

CASE INFORMATION


Offense	Deg	Date	Case Type: Adult - Felony
1. FIRST DEGREE MURDER OBTS: 0002778833 Sequence: 1 Arrest: 03/27/1995	FC	03/10/1995	Case Flags: Court Appointed Attorney Appeal Under Review by Appellate Court
2. FIRST DEGREE MURDER OBTS: 0002778833 Sequence: 2 Arrest: 03/27/1995	FC	03/10/1995	
3. ARMED ROBBERY(ROB W/FIREARM/DEADLY WEAP) OBTS: 0002778833 Sequence: 3 Arrest: 03/27/1995	FF	03/10/1995	

PARTY INFORMATION

Plaintiff	State of Florida	<i>Lead Attorneys</i> Laboda, Alane Cheryl 239-344-1116(W)
Defendant	Nelson, Joshua D	Abatecola, John Paul <i>Court Appointed</i> 954-560-6742(W)

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04/03/1995	RECORD OF FIRST APPEARANCE AND BOOKING REPORT FILED	<i>Vol./Book 540 , Page 2777</i>
04/03/1995	 - WARRANT & AFFIDAVIT TO ARREST FILED	<i>Vol./Book 540 , Page 2780</i>
04/03/1995	CASE OPENED	
04/03/1995	- NOTICE OF DEF'S INVOCATION OF CONSTITUTIONAL RIGHTS FILED	<i>Vol./Book 540 , Page 2378</i>
04/04/1995	- CAPIAS ISSUED	
04/04/1995	- GRAND JURY PRESENTMENT FILED	<i>Vol./Book 541 , Page 552</i>
04/04/1995	- CAPIAS {ORIGINAL} W/COPY TO CCPD FILED	<i>Vol./Book 541 , Page 555</i>
04/04/1995	INDICTMENT FILED	<i>Vol./Book 541 , Page 553</i>
04/05/1995	Affidavit AFFIDAVIT OF INDIGENCY AND ORDER GRANTED FILED	<i>Vol./Book 541 , Page 1713</i>

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04/06/1995	NOTICE TO THE CLERK FILED	<i>Vol./Book 541 , Page 1714</i>
04/07/1995	Arraignment (8:30 AM) (Judicial Officer: Nelson, William J) <i>Continued by Judge</i>	
04/07/1995	Arraigned <i>ARRAIGNED, PLED NOT GUILTY, TRIAL SET</i>	
04/07/1995	- <i>04/07/95 W J NELSON ARRAIGNMENT</i>	
04/07/1995	Plea (Judicial Officer: Nelson, William J) 1. FIRST DEGREE MURDER Pled Not Guilty OBTS: 0002778833 Sequence: 1 3. ARMED ROBBERY(ROB W/FIREARM/DEADLY WEAP) Pled Not Guilty OBTS: 0002778833 Sequence: 3	
04/11/1995	 MOTION TO WITHDRAW AND ORDER ALLOWING WITHDRAWAL FILED	<i>Vol./Book 542 , Page 1697</i>
04/17/1995	- <i>ORDER GRANT'G PUB DEFENDERS WITHDRAWAL & APPT'G F. ALDERMAN FILED</i>	<i>Vol./Book 543 , Page 2429</i>
04/26/1995	PRAECIPE FOR WITNESS SUBPOENA FILED	<i>Vol./Book 545 , Page 2869</i>
05/02/1995	AMENDED WITNESS LIST FILED	<i>Vol./Book 546 , Page 1576</i>
05/02/1995	PRAECIPE FOR WITNESS SUBPOENA FILED	<i>Vol./Book 546 , Page 2244</i>
05/05/1995	- <i>15 SUBPOENAS RETURNED AND FILED</i>	<i>Vol./Book 547 , Page 1053</i>
05/09/1995	- <i>Defendant Represented by STEVENS, HAROLD M</i>	
05/09/1995	- <i>MTN TO WITHDRAW DUE TO POTENTIAL CONFLICTS FILED</i>	<i>Vol./Book 548 , Page 495</i>
05/10/1995	- <i>4 SUBPOENAS RETURNED AND FILED</i>	<i>Vol./Book 548 , Page 857</i>
05/11/1995	Continued <i>CONTINUED BY COURT</i>	
05/22/1995	MOTION FOR DISCLOSURE OF IMPEACHING INFORMATION FILED	<i>Vol./Book 550 , Page 1496</i>
05/22/1995	DEMAND FOR DISCOVERY FILED	<i>Vol./Book 550 , Page 1494</i>

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05/24/1995	DISCOVERY DISCLOSURE FILED	<i>Vol./Book 550 , Page 2399</i>
05/25/1995	- <i>2 SUBPOENAS RETURNED AND FILED</i>	<i>Vol./Book 551 , Page 725</i>
05/30/1995	Trial (8:30 AM) (Judicial Officer: Nelson, William J)	
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05/30/1995	COURT MINUTES FILED	<i>Vol./Book 551 , Page 2337</i>
05/30/1995	PRESENT WITH ATTORNEY	
06/05/1995	ADDITIONAL DISCOVERY INFORMATION FILED	<i>Vol./Book 552 , Page 2391</i>
06/05/1995	AMENDED WITNESS LIST FILED	<i>Vol./Book 552 , Page 2390</i>
06/05/1995	PRAECIPE FOR WITNESS SUBPOENA FILED	<i>Vol./Book 552 , Page 2814</i>
06/08/1995	ADDITIONAL WITNESS LIST FILED	<i>Vol./Book 553 , Page 1371</i>
06/08/1995	PRAECIPE FOR WITNESS SUBPOENA FILED	<i>Vol./Book 553 , Page 2147</i>
06/14/1995	- <i>1 SUBPOENAS RETURNED AND FILED</i>	<i>Vol./Book 554 , Page 1899</i>
06/20/1995	- <i>1 SUBPOENAS RETURNED AND FILED</i>	<i>Vol./Book 555 , Page 1363</i>
07/11/1995	- <i>1 SUBPOENAS RETURNED AND FILED</i>	<i>Vol./Book 558 , Page 2557</i>
07/14/1995	- <i>1 SUBPOENAS RETURNED AND FILED</i>	<i>Vol./Book 559 , Page 1446</i>
07/26/1995	ADDITIONAL DISCOVERY INFORMATION FILED	<i>Vol./Book 561 , Page 206</i>
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08/10/1995	MOTION AND ORDER FOR COSTS FILED	<i>Vol./Book 563 , Page 2250</i>
08/10/1995	MOTION AND ORDER FOR COSTS FILED	<i>Vol./Book 563 , Page 2252</i>
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09/08/1995	- <i>MOTION TO APPOINT EXPERT FILED</i>	<i>Vol./Book 569 , Page 215</i>
09/11/1995	- <i>ORD GRANT'G MT'N FOR TRAVEL COST DELTA AIRLINES FOR \$681.00 FILED</i>	<i>Vol./Book 569 , Page 887</i>
09/11/1995	- <i>EX PARTE MOTION TO AUTHORIZE TRAVEL EXPENSES FILED</i>	<i>Vol./Book 569 , Page 888</i>
09/18/1995	- <i>ORDER GRANTING MOTION FOR APPOINTMENT OF EXPERT FILED</i>	<i>Vol./Book 570 , Page 1117</i>
09/18/1995	- <i>MOTION & ORDER FOR TRANSPORTATION FILED</i>	<i>Vol./Book 570 , Page 2167</i>
10/10/1995	ADDITIONAL WITNESS LIST FILED	<i>Vol./Book 574 , Page 1696</i>
10/10/1995	- <i>ADDITIONAL DISCOVERY FILED</i>	<i>Vol./Book 574 , Page 1698</i>
10/16/1995	- <i>ORDER TO PAY COSTS OF \$189.69 TO HAROLD M. STEVENS FILED</i>	<i>Vol./Book 575 , Page 2019</i>
10/16/1995	MOTION FOR COSTS FILED	<i>Vol./Book 575 , Page 2020</i>
10/16/1995	- <i>MOT & CERT TO PAY STEPHEN RUSSELL \$141.71 COSTS FILED</i>	<i>Vol./Book 575 , Page 2023</i>
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10/26/1995	- <i>MOTION TO SUPPRESS EVIDENCE FILED</i>	<i>Vol./Book 577 , Page 2490</i>
10/26/1995	- <i>MOTION IN LIMINE--PORTH CONFESSION FILED</i>	<i>Vol./Book 577 , Page 2492</i>
10/26/1995	- <i>MOTION TO SUPPRESS CONFESSION/ADMISSION FILED</i>	<i>Vol./Book 577 , Page 2494</i>
10/27/1995	- <i>COST MOTION FILED</i>	<i>Vol./Book 578 , Page 268</i>
10/27/1995	- <i>CERTIFICATION OF COSTS TO BUDGET CAR RENTAL FOR \$156.55 FILED</i>	<i>Vol./Book 578 , Page 269</i>
11/06/1995	Trial (8:30 AM) (Judicial Officer: Nelson, William J)	
11/06/1995	- <i>COST MOTION FILED</i>	<i>Vol./Book 579 , Page 1506</i>
11/06/1995	- <i>CERTIFICATION OF COSTS TO NORTHEAST REPORTING FOR \$131.00 FILED</i>	<i>Vol./Book 579 , Page 1507</i>
11/14/1995	- <i>NOTICE FILED</i>	<i>Vol./Book 580 , Page 2963</i>
11/21/1995	- <i>MOTION FOR COSTS & ORDER TO PAY FRIIS ASSOC \$301.65 FILED</i>	<i>Vol./Book 582 , Page 556</i>
12/11/1995	- <i>COST MOTION FILED</i>	<i>Vol./Book 585 , Page 1932</i>
12/11/1995	- <i>CERTIFICATION OF COSTS TO ANNA BROWN FOR \$129.28 FILED</i>	<i>Vol./Book 585 , Page 1933</i>
12/14/1995	- <i>COST MOTION FILED</i>	<i>Vol./Book 586 , Page 429</i>
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12/21/1995	- <i>MOTION FOR COSTS & ORDER TO PAY NORTH EAST REPORTING \$131.10 FILED</i>	Vol./Book 587 , Page 1284
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01/17/1996	- <i>MOTION FOR COSTS & ORDER TO PAY AVIS (S RUSSELL)\$113.95 FILED</i>	Vol./Book 590 , Page 3139
01/18/1996	- <i>MOTION FOR COSTS & ORDER TO PAY COURT REPORTER \$43.00 FILED</i>	Vol./Book 590 , Page 3145
01/18/1996	Continued <i>CONTINUED TO TRIAL WILLIAM J NELSON 03/25/1996 08:30 AM,</i>	
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04/03/1996	- <i>CROSS - NOTICE OF TAKING DEPOSITION FILED</i>	Vol./Book 604 , Page 3515
04/03/1996	- <i>CROSS - NOTICE OF TAKING DEPOSITION FILED</i>	Vol./Book 604 , Page 3516
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05/20/1996	Trial (8:30 AM) (Judicial Officer: Nelson, William J)	
05/24/1996	- <i>MO/AUTHORIZATION/FUNDING FOR SPECIAL ASSISTANCE FILED-ATTACHMENT</i>	Vol./Book 613 , Page 1436
05/29/1996	NOTICE OF HEARING FILED	Vol./Book 613 , Page 3427
05/29/1996	- <i>MOTION IN LIMINE - TIME LINE DRAWING FILED</i>	Vol./Book 613 , Page 3428
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05/30/1996	MOTION FOR SANCTIONS FILED	<i>Vol./Book 614 , Page 257</i>
06/04/1996	NOTICE OF HEARING FILED	<i>Vol./Book 614 , Page 2856</i>
06/05/1996	- <i>MOTION FOR SANCTIONS & MOTION FOR AUTHORIZATION OF FUNDING FOR SPECIAL ASSISTANCE - FOR COURTS SPECIFIC RULING REFER TO COURT REPORTERS NOTES ON BOTH MOTIONS</i>	
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06/06/1996	- <i>SECOND MOTION TO COMPEL FILED</i>	<i>Vol./Book 615 , Page 1065</i>
06/06/1996	- <i>MOTION IN LIMINE - DNA FILED</i>	<i>Vol./Book 615 , Page 1067</i>
06/06/1996	- <i>MOTION FOR DNA EXPERT FILED</i>	<i>Vol./Book 615 , Page 1068</i>
06/06/1996	- <i>RENEWED MOTION FOR EXPERTS FILED</i>	<i>Vol./Book 615 , Page 1069</i>
06/06/1996	- <i>MOTION TO EXCLUDE DEATH PENALTY FILED</i>	<i>Vol./Book 615 , Page 1071</i>
06/06/1996	- <i>MOTION FOR CONTINUANCE FILED</i>	<i>Vol./Book 615 , Page 1073</i>
06/10/1996	- <i>ADDITIONAL DISCOVERY FILED</i>	<i>Vol./Book 615 , Page 2934</i>
06/10/1996	ADDITIONAL WITNESS LIST FILED	<i>Vol./Book 615 , Page 2937</i>
06/11/1996	- <i>ADDITIONAL DISCOVERY FILED</i>	<i>Vol./Book 616 , Page 363</i>
06/11/1996	ADDITIONAL WITNESS LIST FILED	<i>Vol./Book 616 , Page 365</i>

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06/11/1996	PRAECIPE FOR WITNESS SUBPOENA FILED	Vol./Book 616 , Page 1768
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06/13/1996	SUBPOENA(S) RETURNED AND FILED	Vol./Book 616 , Page 1997
06/13/1996	COURT MINUTES FILED	Vol./Book 616 , Page 2978
06/13/1996	- <i>RECORD OF EXHIBITS RECEIVED FILED (EXHIBITS IN CIVIL VAULT)</i>	Vol./Book 616 , Page 2979
06/13/1996	- <i>MOTION FOR CONTINUANCE - GRANTED MOTION TO SUPPRESS EVIDENCE - DENIED MOTION IN LIMINE - PORTH CONFESSION - COURT RESERVES RULING MOTION IN LIMINE - TIME LINE DRAWING - COURT RESERVES RULING MOTION TO SUPPRESS CONFESSION/ADMISSION - DENIED MOTION TO COMPEL - NO ACTION TAKEN MOTION IN LIMINE - DNA - DENIED MOTION FOR DNA EXPERT - GRANTED MOTION TO EXCLUDE DEATH PENALTY - DENIED DEFENSE MOTION FOR COSTS - GRANTED DEFENSES MOTION FOR JURY CONSULTANT - DENIED</i>	
06/17/1996	Trial (8:30 AM) (Judicial Officer: Nelson, William J)	
06/19/1996	- <i>COPY OF INVOICE FROM CORALWOOD TRAVEL FOR \$1,660.40 FILED-ATTACHED</i>	Vol./Book 617 , Page 2256
06/20/1996	- <i>MOTION FOR COSTS & ORDER TO PAY HAROLD STEVENS \$76.29 FILED</i>	Vol./Book 618 , Page 608
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07/03/1996	- <i>ORDER DENYING DEFENSE REQUEST FOR JURY CONSULTANT FILED</i>	Vol./Book 620 , Page 401
07/03/1996	- <i>ORDER GRANTING DEFENSE REQUEST FOR DNA EXPERT FILED</i>	Vol./Book 620 , Page 401
07/03/1996	- <i>ORDER ON DEF'S MOTION TO SUPPRESS CONFESSION/ADMISSION FILED</i>	Vol./Book 620 , Page 402
07/03/1996	- <i>ORDER DENYING DEF'S MOTION TO SUPPRESS EVIDENCE FORD PROBE FILED</i>	Vol./Book 620 , Page 403

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07/03/1996	- <i>ORDER ON DEF'S 2ND MOTION TO COMPEL AND MOTION IN LIMINE FILED</i>	<i>Vol./Book 620 , Page 406</i>
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07/19/1996	- <i>SECOND MOTION IN LIMINE-PORTH GIRLS FILED (ATTACHMENTS)</i>	<i>Vol./Book 622 , Page 2905</i>
07/19/1996	- <i>MOTION IN LIMINE--STOLEN CAR FILED (ATTACHMENT)</i>	<i>Vol./Book 622 , Page 3100</i>
07/19/1996	- <i>ORDER GRANTING ADDITIONAL \$500.00 FOR INVESTIGATORY SERVICES FILED</i>	<i>Vol./Book 622 , Page 3106</i>
07/19/1996	- <i>MOTION FOR CONTINUING AUTHORIZATION FILED</i>	<i>Vol./Book 622 , Page 3107</i>
07/23/1996	- <i>MOTION & CERTIFICATION OF COSTS TO PAY HOLIDAY INN \$114.25 FILED</i>	<i>Vol./Book 623 , Page 1262</i>
07/23/1996	- <i>MOTION & CERTIFICATION OF COSTS TO PAY D BEAULIEU \$92.15 FILED</i>	<i>Vol./Book 623 , Page 1269</i>
07/23/1996	- <i>MOTION & CERTIFICATION OF COSTS TO PAY M GUDGEON \$95.90 FILED</i>	<i>Vol./Book 623 , Page 1279</i>
07/23/1996	- <i>MOTION & CERTIFICATION OF COSTS TO PAY HOLIDAY INN \$110.50 FILED</i>	<i>Vol./Book 623 , Page 1289</i>
07/23/1996	- <i>MOTION & CERTIFICATION OF COSTS TO PAY V FRULIO \$95.90 FILED</i>	<i>Vol./Book 623 , Page 1296</i>

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07/31/1996	-	<i>MOTION FOR COSTS & ORDER TO PAY COURT REPORTER \$154.50 FILED</i>	<i>Vol./Book 624 , Page 2040</i>
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08/14/1996	-	<i>THIRD MOTION IN LIMINE-HUBER FILED</i>	<i>Vol./Book 627 , Page 277</i>
08/16/1996		NOTICE OF TAKING DEPOSITION FILED	<i>Vol./Book 627 , Page 1293</i>
08/21/1996		ADDITIONAL WITNESS LIST FILED	<i>Vol./Book 628 , Page 404</i>
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08/23/1996		SUBPOENA(S) RETURNED AND FILED	<i>Vol./Book 628 , Page 2553</i>
08/26/1996	-	<i>MOTION FOR COSTS & ORDER TO PAY H STEVENS ESQ \$1,163.84 FILED</i>	<i>Vol./Book 628 , Page 2213</i>
08/26/1996	-	<i>MOTION TO APPOINT CO-COUNSEL FILED</i>	<i>Vol./Book 628 , Page 3135</i>
08/26/1996	-	<i>ORDER GRANTING MOTION FOR CO-COUNSEL/J MILLS ESQ APPTD FILED</i>	<i>Vol./Book 629 , Page 634</i>
08/28/1996	-	<i>JUDGE'S CERT/UNIFORM ACT TO SECURE ATTENDANCE OF WITNESSESS FILED</i>	<i>Vol./Book 629 , Page 1372</i>

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08/28/1996	-	<i>PET FOR JUDGE'S CERT PURSUANT UNIFORM ACT/WITNESS ATTEND FILED</i>	<i>Vol./Book 629 , Page 1374</i>
08/28/1996	-	<i>JUDGE'S CERT/UNIFORM ACT TO SECURE ATTENDANCE OF WITNESSESS FILED</i>	<i>Vol./Book 629 , Page 1377</i>
08/28/1996	-	<i>PET FOR JUDGE'S CERT PURSUANT UNIFORM ACT/WITNESS ATTEND FILED</i>	<i>Vol./Book 629 , Page 1379</i>
08/28/1996		AMENDED WITNESS LIST FILED	<i>Vol./Book 629 , Page 1382</i>
08/28/1996		PRAECIPE FOR WITNESS SUBPOENA FILED	<i>Vol./Book 629 , Page 2905</i>
08/29/1996		Continued <i>CONTINUED TO TRIAL WILLIAM J NELSON 09/16/1996 08:30 AM,</i>	
08/30/1996	-	<i>NOTICE OF TAKING TELEPHONIC DEPOSITION FILED</i>	<i>Vol./Book 629 , Page 2906</i>
08/30/1996		WITNESS LIST FILED	<i>Vol./Book 629 , Page 2907</i>
08/30/1996	-	<i>PORTH STATEMENTS & DEPOSITIONS-W/ATTACHED COPY OF TRANSCRIPT FILED</i>	<i>Vol./Book 630 , Page 428</i>
09/03/1996		NOTICE OF TAKING DEPOSITION FILED	<i>Vol./Book 630 , Page 437</i>
09/04/1996	-	<i>NOTICE OF HEARING/ALL PENDING MOTIONS FILED</i>	<i>Vol./Book 630 , Page 1135</i>
09/04/1996	-	<i>MOTION IN LIMINE--PHOTOGRAPHS FILED</i>	<i>Vol./Book 630 , Page 1137</i>
09/04/1996	-	<i>MOTION IN LIMINE--VICTIM IMPACT EVIDENCE FILED</i>	<i>Vol./Book 630 , Page 1138</i>
09/04/1996	-	<i>MOTION FOR CONTINUANCE FILED</i>	<i>Vol./Book 630 , Page 1140</i>
09/04/1996	-	<i>MOTION TO AUTHORIZED TRAVEL FUNDS FILED</i>	<i>Vol./Book 630 , Page 1142</i>
09/04/1996	-	<i>MOTION FOR ADDITIONAL EXPERTS FILED</i>	<i>Vol./Book 630 , Page 1143</i>
09/04/1996	-		<i>Vol./Book 630 , Page 1145</i>

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	<i>MOTION FOR GRAND JURY TESTIMONY FILED</i>	
09/05/1996	- <i>STATE'S MOTION IN LIMINE FILED</i>	<i>Vol./Book 630 , Page 1146</i>
09/05/1996	ADDITIONAL DISCOVERY INFORMATION FILED	<i>Vol./Book 630 , Page 1149</i>
09/05/1996	ADDITIONAL WITNESS LIST FILED	<i>Vol./Book 630 , Page 1151</i>
09/05/1996	- <i>AMENDED NOTICE OF HEARING/ALL PENDING MOTIONS FILED</i>	<i>Vol./Book 630 , Page 1855</i>
09/05/1996	- <i>MOTION FOR DISCLOSURE OF PRIOR RECORD FILED</i>	<i>Vol./Book 630 , Page 1857</i>
09/05/1996	- <i>MOTION FOR ADDITIONAL AUTHORIZATION--PETTRY FILED</i>	<i>Vol./Book 630 , Page 1858</i>
09/05/1996	- <i>MOTION FOR COSTS & ORDER TO PAY H STEVENS ESQ \$32.59 FILED</i>	<i>Vol./Book 630 , Page 1859</i>
09/09/1996	Trial (8:30 AM) (Judicial Officer: Nelson, William J)	
09/09/1996	- <i>STATE'S MOTION IN LIMINE - GRANTED STATE'S MOTION IN LIMINE - DENIED MOTION IN LIMINE - RE-COUNTY - GRANTED MOTION AUTHORIZING TRAVEL FUNDS - COURT RESERVES RULING MOTION FOR ADDITIONAL EXPERTS - DENIED DEFENDANTS MOTION IN LIMINE (STOLEN CAR) - DENIED MOTION IN LIMINE (TESTIMONY OF CERTAIN PEOPLE) - DENIED MOTION IN LIMINE (HOUSER) - DENIED MOTION IN LIMINE (PHOTOS) - DENIED MOTION IN GRAND JURY TESTIMONY - DENIED MOTION IN LIMINE (VICTIM IMPACT) - GRANTED MOTION FOR CONTINUANCE - DENIED MOTION FOR DISCLOSURE OF PRIOR RECORD - GRANTED MOTION FOR INDIVIDUAL VIOR DIER - DENIED</i>	
09/09/1996	COURT MINUTES FILED	<i>Vol./Book 631 , Page 2194</i>
09/11/1996	- <i>ADDITIONAL DISCOVERY FILED</i>	<i>Vol./Book 631 , Page 2195</i>
09/12/1996	- <i>MOTION FOR COSTS & ORDER TO PAY COURT REPORTER \$180.50 FILED</i>	<i>Vol./Book 631 , Page 3092</i>
09/13/1996	- <i>DISCLOSURE TO PROSECUTION AND ADDITIONAL WITNESS LIST FILED</i>	<i>Vol./Book 632 , Page 471</i>
09/13/1996	- <i>ORDER GRANTING/DENYING ALL PENDING MOTION FILED</i>	<i>Vol./Book 632 , Page 479</i>
09/13/1996	-	<i>Vol./Book 632 , Page 481</i>

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	<i>COPY OF ORDER AND SUMMONS FROM PENNSYLVANIA FILED</i>	
09/13/1996	-	<i>Vol./Book 632 , Page 482</i>
	<i>COPY OF ORDER AND SUMMONS FROM PENNSYLVANIA FILED</i>	
09/16/1996	Trial (8:30 AM) (Judicial Officer: Nelson, William J)	
09/16/1996	-	<i>Vol./Book 632 , Page 1423</i>
	<i>NOTICE OF ADDITIONAL DISCLOSURE-W/ATTACHED EXHIBIT FILED</i>	
09/16/1996	-	
	<i>DEFENSE RENEWS ALL PREVIOUS MOTIONS BEFORE THE COURT - RULINGS REMAIN</i>	
09/16/1996	-	
	<i>JURY SELECTION WILL RESUME ON 9-17-96 AT 9:00AM</i>	
09/16/1996	Continued <i>CONTINUED TO TRIAL WILLIAM J NELSON 09/17/1996 09:00 AM,</i>	
09/16/1996	COURT MINUTES FILED	<i>Vol./Book 633 , Page 2770</i>
09/16/1996	-	<i>Vol./Book 633 , Page 2771</i>
	<i>JURY CIRCUIT COURT MINUTES FILED</i>	
09/16/1996	JURY PANEL INFORMATION LIST FILED	<i>Vol./Book 633 , Page 2772</i>
09/17/1996	Trial (9:00 AM) (Judicial Officer: Nelson, William J)	
09/17/1996	-	
	<i>CNT 003 JURY SWORN 09/17/96</i>	
09/17/1996	Continued <i>CONTINUED TO TRIAL WILLIAM J NELSON 09/18/1996 09:00 AM,</i>	
09/17/1996	-	
	<i>PRESENT WITH ATTORNEY CONTINUED BY JUDGE</i>	
09/17/1996	COURT MINUTES FILED	<i>Vol./Book 633 , Page 2778</i>
09/17/1996	-	<i>Vol./Book 633 , Page 2779</i>
	<i>JURY CIRCUIT COURT MINUTES FILED</i>	
09/17/1996	-	
	<i>CNT 001 JURY SWORN 09/17/96</i>	
09/17/1996	-	
	<i>CNT 002 JURY SWORN 09/17/96</i>	
09/18/1996	Trial (9:00 AM) (Judicial Officer: Nelson, William J)	
09/18/1996	Continued <i>CONTINUED TO TRIAL WILLIAM J NELSON 09/19/1996 09:00 AM,</i>	

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09/18/1996	- <i>PRESENT WITH ATTORNEY CONTINUED BY JUDGE</i>	
09/18/1996	- <i>DEFENSE'S MOTION FOR JUDGMENT OF ACQUITTAL - DENIED</i>	
09/18/1996	COURT MINUTES FILED	<i>Vol./Book 633 , Page 2781</i>
09/18/1996	- <i>JURY CIRCUIT COURT MINUTES FILED</i>	<i>Vol./Book 633 , Page 2782</i>
09/19/1996	Trial (9:00 AM) (Judicial Officer: Nelson, William J)	
09/19/1996	- <i>CNT 003 DEF FOUND GUILTY BY JURY</i>	
09/19/1996	- <i>CNT 003 ADJUDICATED GUILTY BY JUDGE</i>	
09/19/1996	- <i>CNT 003 PRESENTENCE INVESTIGAT'N ORDERED-RTN DATE: 11/07/96</i>	
09/19/1996	Continued <i>CONTINUED TO TRIAL WILLIAM J NELSON 11/07/1996 09:00 AM,</i>	
09/19/1996	- <i>PRESENT WITH ATTORNEY CONTINUED BY JUDGE</i>	
09/19/1996	COURT MINUTES FILED	<i>Vol./Book 633 , Page 2784</i>
09/19/1996	- <i>JURY CIRCUIT COURT MINUTES FILED</i>	<i>Vol./Book 633 , Page 2786</i>
09/19/1996	- <i>RECORD OF EXHIBITS RECEIVED FILED (EXHIBITS IN CIVIL VAULT)</i>	<i>Vol./Book 633 , Page 2787</i>
09/19/1996	- <i>VERDICT FORM RECORDED IN MINUTE BOOK 40 AND FILED</i>	<i>Vol./Book 633 , Page 2790</i>
09/19/1996	JURY INSTRUCTIONS FILED	<i>Vol./Book 633 , Page 2791</i>
09/19/1996	- <i>COURT EXHIBIT/COPY HIGHEST OFFENSE-DENIED FILED</i>	<i>Vol./Book 633 , Page 2822</i>
09/19/1996	- <i>COURT EXHIBIT/JURY QUESTIONS FILED</i>	<i>Vol./Book 633 , Page 2823</i>
09/19/1996	JUDGMENT FORM (FINGERPRINTS) FILED	<i>Vol./Book 634 , Page 3042</i>
09/19/1996	Evidence Received	

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09/19/1996	-	<i>CNT 001 DEF FOUND GUILTY BY JURY</i>	
09/19/1996	-	<i>CNT 001 ADJUDICATED GUILTY BY JUDGE</i>	
09/19/1996	-	<i>DEFENDANT REMANDED TO CUSTODY W/O BOND PENDING SENTENCE(TO BE SET)</i>	
09/19/1996	-	<i>CASSETTE TAPE (JURY INSTRUCTIONS) READ BY JUDGE NELSON TO BE FILED IN THE COURT FILE - CASSETTE TAPE FILED IN BROWN ENVELOPE & PLACED WITH TRIAL EXHIBITS</i>	
09/19/1996	-	<i>DEFENSE'S MOTION FOR JUDGMENT OF ACQUITTAL - DENIED</i>	
09/19/1996	-	<i>PENALTY PHASE HEARING SET FOR 11-7-96 AT 9:00AM</i>	
09/19/1996	-	<i>CNT 002 DEF FOUND GUILTY BY JURY</i>	
09/19/1996	-	<i>CNT 002 ADJUDICATED GUILTY BY JUDGE</i>	
09/19/1996		Disposition (Judicial Officer: JUDGE, D DIVISION) 1. FIRST DEGREE MURDER Jury Trial - Adjudicated Guilty OBTS: 0002778833 Sequence: 1	
09/19/1996		Disposition (Judicial Officer: JUDGE, D DIVISION) 3. ARMED ROBBERY(ROB W/FIREARM/DEADLY WEAP) Jury Trial - Adjudicated Guilty OBTS: 0002778833 Sequence: 3	
09/24/1996		NOTICE OF HEARING FILED	<i>Vol./Book 634 , Page 135</i>
09/24/1996	-	<i>MOTION TO AUTHORIZE TRANSCRIPT FILED</i>	<i>Vol./Book 634 , Page 136</i>
09/24/1996	-	<i>MOTION TO AUTHORIZE TRAVEL EXPENSES FILED</i>	<i>Vol./Book 634 , Page 137</i>
09/26/1996	-	<i>MOTION & CERTIFICATION OF COSTS TO PAY AM EXPRESS \$183.00 FILED</i>	<i>Vol./Book 634 , Page 1522</i>
09/26/1996	-	<i>MOTION & CERTIFICATION OF COSTS TO PAY S RUSSELL \$165.94 FILED</i>	<i>Vol./Book 634 , Page 1527</i>
09/26/1996	-	<i>MOTION FOR COSTS & ORDER TO PAY COURT REPORTER \$70.50 FILED</i>	<i>Vol./Book 634 , Page 1535</i>

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09/26/1996	- <i>MOTION FOR COSTS & ORDER TO PAY COURT REPORTER \$55.00 FILED</i>	<i>Vol./Book 634 , Page 1537</i>
09/26/1996	- <i>MOTION FOR COSTS & ORDER TO PAY H STEVENS ESQ \$510.59 FILED</i>	<i>Vol./Book 634 , Page 1539</i>
09/27/1996	- <i>MOTION AND ORDER GRANTING MOTION TO APPOINT EXPERT FILED</i>	<i>Vol./Book 634 , Page 2482</i>
09/30/1996	- <i>MOTION TO AUTHORIZE TRAVEL EXPENSES - GRANTED MOTION TO AUTHORIZE TRANSCRIPT OF DEFENDANTS TESTIMONY - GRANTED</i>	
09/30/1996	COURT MINUTES FILED	<i>Vol./Book 634 , Page 3315</i>
10/01/1996	- <i>ORDER GRANTING AUTHORIZATION OF TRANSCRIPT AND FOR TRAVEL FILED</i>	<i>Vol./Book 635 , Page 271</i>
10/03/1996	PRAECIPE FOR WITNESS SUBPOENA FILED	<i>Vol./Book 635 , Page 2859</i>
10/10/1996	- <i>NOTICE OF HEARING/ALL PENDING MOTIONS FILED</i>	<i>Vol./Book 636 , Page 2472</i>
10/11/1996	- <i>DEMAND FOR PENALTY PHASE DISCOVERY FILED</i>	<i>Vol./Book 637 , Page 342</i>
10/16/1996	- <i>NOTICE OF HEARING (ALL PENDING MOTIONS) FILED</i>	<i>Vol./Book 637 , Page 2896</i>
10/16/1996	NOTICE OF HEARING FILED	<i>Vol./Book 637 , Page 2897</i>
10/16/1996	- <i>MOTION IN LIMINE - MITIGATION ARGUMENT FILED</i>	<i>Vol./Book 637 , Page 2898</i>
10/16/1996	- <i>MOTION TO COMPEL FILED</i>	<i>Vol./Book 637 , Page 2900</i>
10/16/1996	- <i>ADDITIONAL DISCOVERY FILED</i>	<i>Vol./Book 637 , Page 2902</i>
10/16/1996	ADDITIONAL WITNESS LIST FILED	<i>Vol./Book 637 , Page 2904</i>
10/16/1996	- <i>RESPONSE TO PENALTY PHASE DISCOVERY FILED</i>	<i>Vol./Book 637 , Page 2906</i>
10/17/1996	-	<i>Vol./Book 638 , Page 265</i>

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10/17/1996	- <i>MOTION & CERTIFICATION OF COSTS TO PAY HRS \$8.00 FILED</i>	<i>Vol./Book 638 , Page 268</i>
10/18/1996	- <i>MOTION & CERTIFICATION OF COSTS TO PAY AVIS \$130.26 FILED</i>	
10/18/1996	NOTICE OF TAKING DEPOSITION FILED	<i>Vol./Book 638 , Page 2241</i>
10/18/1996	PRAECIPE FOR WITNESS SUBPOENA FILED	<i>Vol./Book 638 , Page 2242</i>
10/22/1996	- <i>MOTION & CERTIFICATION OF COSTS TO PAY MED EXAMINER \$32 FILED</i>	<i>Vol./Book 638 , Page 2243</i>
10/22/1996	- <i>MOTION & CERTIFICATION OF COSTS TO PAY B SNYDER \$130.45 FILED</i>	<i>Vol./Book 638 , Page 2246</i>
10/22/1996	- <i>MOTION & CERTIFICATION OF COSTS TO PAY HOLIDAY INN \$190.75 FILED</i>	<i>Vol./Book 638 , Page 2252</i>
10/22/1996	- <i>MOTION & CERTIFICATION OF COSTS TO PAY T HAYES \$124.60 FILED</i>	<i>Vol./Book 638 , Page 2260</i>
10/22/1996	- <i>MOTION & CERTIFICATION OF COSTS TO PAY W MAPLES \$38.50 FILED</i>	<i>Vol./Book 638 , Page 2266</i>
10/22/1996	- <i>MOTION & CERTIFICATION OF COSTS TO PAY HOLIDAY INN \$75.21 FILED</i>	<i>Vol./Book 638 , Page 2272</i>
10/22/1996	- <i>MOTION & CERTIFICATION OF COSTS TO PAY HOLIDAY INN \$75.21 FILED</i>	<i>Vol./Book 638 , Page 2279</i>
10/22/1996	- <i>MOTION & CERTIFICATION OF COSTS TO PAY HOLIDAY INN \$193.60 FILED</i>	<i>Vol./Book 638 , Page 2283</i>
10/22/1996	- <i>MOTION & CERTIFICATION OF COSTS TO PAY HOLIDAY INN \$109.00 FILED</i>	<i>Vol./Book 638 , Page 2291</i>
10/22/1996	- <i>MOTION & CERTIFICATION OF COSTS TO PAY M PANNONE \$100.70 FILED</i>	<i>Vol./Book 638 , Page 2298</i>
10/22/1996	SUBPOENA(S) RETURNED AND FILED	<i>Vol./Book 638 , Page 2618</i>
10/23/1996	- <i>MOTION TO APPOINT EXPERT FILED</i>	<i>Vol./Book 638 , Page 3065</i>
10/23/1996	- <i>MOTION TO EXCLUDE DEATH FILED</i>	<i>Vol./Book 638 , Page 3067</i>

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10/23/1996	-	<i>MOTION TO DECLARE DEATH PENALTY UNCONSTITUTIONAL FILED</i>	<i>Vol./Book 638 , Page 3068</i>
10/23/1996	-	<i>MOTION TO COMPEL DISCOVERY FILED</i>	<i>Vol./Book 638 , Page 3069</i>
10/23/1996	-	<i>MOTION IN LIMINE -- VICTIM IMPACT EVIDENCE PART II FILED</i>	<i>Vol./Book 638 , Page 3070</i>
10/23/1996	-	<i>MOTION TO ADOPT MOTION FOR CHANGE OF VENUE FILED</i>	<i>Vol./Book 638 , Page 3072</i>
10/23/1996	-	<i>MOTION TO VIDEO TAPE VICTIM IMPACT EVIDENCE FILED</i>	<i>Vol./Book 638 , Page 3073</i>
10/23/1996	-	<i>MOTION IN LIMINE -- TATTOO FILED</i>	<i>Vol./Book 638 , Page 3075</i>
10/23/1996	-	<i>MOTION FOR MISTRIAL FILED (ATTACHMENTS)</i>	<i>Vol./Book 638 , Page 3076</i>
10/23/1996		WITNESS LIST FILED	<i>Vol./Book 638 , Page 3081</i>
10/23/1996	-	<i>MOTION IN LIMINE - COURT RESERVES RULING STATE'S MOTION TO COMPEL - GRANTED DEFENSES' MOT'N TO DECLARE DEATH PENALTY UNCONSTITUTIONAL - DENIED DEFENSES' MOTION TO EXCLUDE DEATH - DENIED DEFENSES' MOTION TO COMPEL - GRANTED</i>	
10/23/1996		COURT MINUTES FILED	<i>Vol./Book 639 , Page 430</i>
10/23/1996	-	<i>PRAECIPE/DUCES TECUM FOR WITNESS SUBPOENA FILED</i>	<i>Vol./Book 639 , Page 1340</i>
10/28/1996	-	<i>MOTION FOR & CERTIFICATION OF COSTS TO PAY CT RPTR \$29.00 FILED</i>	<i>Vol./Book 639 , Page 2420</i>
10/28/1996		SUBPOENA(S) RETURNED AND FILED	<i>Vol./Book 639 , Page 2422</i>
10/28/1996	-	<i>MOTION FOR & CERTIFICATION OF COSTS TO PAY CT RPTR \$36.50 FILED</i>	<i>Vol./Book 639 , Page 2424</i>
10/28/1996	-	<i>MOTION FOR & CERTIFICATION OF COSTS TO PAY CT RPTR \$11.00 FILED</i>	<i>Vol./Book 639 , Page 2427</i>
10/29/1996	-	<i>MOTION IN LIMINE - TO ADOPT CHANGE IN VENUE - FOR COURTS SPECIFIC</i>	

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10/29/1996	-	<i>MOTION IN LIMINE - VICTIM IMPACT STATEMENT - DENIED</i>	
10/29/1996	-	<i>MOTION TO VIDEO TAPE VICTIM IMPACT EVIDENCE - DENIED</i>	
10/29/1996	-	<i>MOTION TO CONDUCT VOIR DIRE OF JURY - GRANTED</i>	
10/29/1996	-	<i>MOTION FOR MISTRIAL - DENIED</i>	
10/29/1996		COURT MINUTES FILED	<i>Vol./Book 640 , Page 105</i>
10/29/1996	-	<i>ADDITIONAL DISCOVERY FILED</i>	<i>Vol./Book 640 , Page 106</i>
10/30/1996	-	<i>NOTICE OF TAKING TELEPHONIC DEPOSITION FILED</i>	<i>Vol./Book 640 , Page 1186</i>
10/30/1996	-	<i>MOTION FOR COSTS & ORDER TO PAY COURT REPORTER \$28.00 FILED</i>	<i>Vol./Book 640 , Page 1187</i>
10/31/1996	-	<i>MOTION & CERTIFICATION OF COSTS TO PAY D ESPOSITO \$9.00 FILED</i>	<i>Vol./Book 640 , Page 2075</i>
10/31/1996	-	<i>MOTION & CERTIFICATION OF COSTS TO PAY L BOEHNE \$375.00 FILED</i>	<i>Vol./Book 640 , Page 2082</i>
10/31/1996	-	<i>MOTION & CERTIFICATION OF COSTS TO PAY MED EXAMINER \$400 FILED</i>	<i>Vol./Book 640 , Page 2089</i>
11/01/1996		AMENDED WITNESS LIST FILED	<i>Vol./Book 640 , Page 2808</i>
11/01/1996	-	<i>MEMO SUPPORT OF DEFS REQ FOR JURY INSTRUCT'NS PENALTY PHASE FILED</i>	<i>Vol./Book 640 , Page 2809</i>
11/01/1996	-	<i>JURY INSTRUCTIONS MEMORANDUM FILED</i>	<i>Vol./Book 640 , Page 2812</i>
11/04/1996		ADDITIONAL WITNESS LIST FILED	<i>Vol./Book 641 , Page 345</i>
11/04/1996	-	<i>MOTION FOR & CERTIFICATION OF COSTS TO PAY CT RPTR \$140.00 FILED</i>	<i>Vol./Book 641 , Page 1135</i>
11/04/1996		PRAECIPE FOR WITNESS SUBPOENA FILED	<i>Vol./Book 641 , Page 1984</i>

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11/05/1996	-	<i>COST MOTION FILED</i>	<i>Vol./Book 641 , Page 1137</i>
11/05/1996	-	<i>CERTIFICATION OF COSTS TO HOLIDAY INN FOR \$322.24 FILED</i>	<i>Vol./Book 641 , Page 1138</i>
11/05/1996	-	<i>COST MOTION FILED</i>	<i>Vol./Book 641 , Page 1145</i>
11/05/1996	-	<i>CERTIFICATION OF COSTS TO HOLIDAY INN FOR \$319.98 FILED</i>	<i>Vol./Book 641 , Page 1146</i>
11/07/1996		Trial (9:00 AM) (Judicial Officer: Nelson, William J) <i>Continued by Judge</i>	
11/07/1996	-	<i>MOTION FOR COSTS & ORDER TO PAY COURT REPORTER \$262.30 FILED</i>	<i>Vol./Book 641 , Page 2526</i>
11/07/1996		Continued <i>CONTINUED TO SENTENCING HEARING WILLIAM J NELSON 11/27/1996 09:00 AM,</i>	
11/07/1996	-	<i>PRESENT WITH ATTORNEY CONTINUED BY JUDGE</i>	
11/07/1996	-	<i>PENALTY PHASE HEARING - JURY RECOMMEND TO THE COURT THAT IT IMPOSE THE DEATH PENALTY - SPENCER HEARING SET FOR 11/26/96 @ 9AM</i>	
11/07/1996	-	<i>TRANSCRIPT OF PROCEEDINGS FILED</i>	<i>Vol./Book 642 , Page 1</i>
11/07/1996	-	<i>DEPOSITION OF DONNA WALKER FILED</i>	<i>Vol./Book 642 , Page 2</i>
11/07/1996	-	<i>DEPOSITION OF DIANA OILER FILED</i>	<i>Vol./Book 642 , Page 3</i>
11/07/1996	-	<i>DEPOSITION OF PATRICIA BENNETT FILED</i>	<i>Vol./Book 642 , Page 4</i>
11/07/1996	-	<i>DEPOSITION OF TAMMY LONG FILED</i>	<i>Vol./Book 642 , Page 5</i>
11/07/1996	-	<i>DEPOSITION OF DR SIDNEY J MERIN FILED</i>	<i>Vol./Book 642 , Page 6</i>
11/07/1996		COURT MINUTES FILED	<i>Vol./Book 642 , Page 180</i>
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11/07/1996	- JURY CIRCUIT COURT MINUTES FILED	Page 181
11/07/1996	- RECORD OF EXHIBITS RECEIVED FILED (EXHIBITS IN CIVIL VAULT)	Vol./Book 642 , Page 183
11/07/1996	- VERDICT FORM RECORDED IN MINUTE BOOK 40 AND FILED	Vol./Book 642 , Page 184
11/07/1996	- UNSIGNED VERDICT FORM FILED	Vol./Book 642 , Page 185
11/07/1996	- JURY INSTRUCTIONS/PENALTY PHASE FILED	Vol./Book 642 , Page 186
11/07/1996	Disposition (Judicial Officer: JUDGE, D DIVISION) 2. FIRST DEGREE MURDER Merged For Sentence/Guilty - Jury Trial OBTS: 0002778833 Sequence: 2	
11/13/1996	 - TRANSCRIPT OF PROCEEDINGS FILED	Vol./Book 642 , Page 1315
11/13/1996	SUBPOENA(S) RETURNED AND FILED	Vol./Book 642 , Page 1786
11/13/1996	- MOTION FOR COSTS & ORDER TO PAY COURT REPORTER \$24.00 FILED	Vol./Book 642 , Page 1788
11/15/1996	NOTICE OF HEARING FILED	Vol./Book 643 , Page 118
11/15/1996	- MOTION TO PRESERVE RECORD FILED	Vol./Book 643 , Page 119
11/15/1996	MOTION FOR NEW TRIAL FILED	Vol./Book 643 , Page 120
11/21/1996	- MOTION TO PRESERVE RECORD - FOR COURTS SPECIFIC RULING REFER TO COURT REPORTERS NOTES	
11/21/1996	- MOTION FOR NEW TRIAL - FOR COURTS SPECIFIC RULING REFER TO COURT REPORTERS NOTES	
11/21/1996	COURT MINUTES FILED	Vol./Book 644 , Page 161
11/21/1996	NOTICE OF HEARING FILED	Vol./Book 644 , Page 162
11/21/1996	-	Vol./Book 644 , Page 163

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	<i>NEWS PRESS PUBLISHING CO/MO TO QUASH SUBP & FOR ATTY FEES FILED</i>	
11/22/1996	- <i>MOTION COURT TO INTERVIEW JURORS - DENIED</i>	
11/22/1996	- <i>MOTION FOR NEW TRIAL - DENIED</i>	
11/22/1996	- <i>MOTION TO QUASH SUBPEONA - GRANTED</i>	
11/22/1996	COURT MINUTES FILED	<i>Vol./Book 644 , Page 986</i>
11/22/1996	SUBPOENA(S) RETURNED AND FILED	<i>Vol./Book 644 , Page 987</i>
11/25/1996	- <i>SENTENCING SPENSER MEMORANDUM FILED</i>	<i>Vol./Book 644 , Page 1628</i>
11/26/1996	- <i>SPENCER HEARING - COURT WILL TAKE INTO CONSIDERATION STATEMENTS AND TESTIMONY EVIDENCE PRESENTED IN COURT TODAY</i>	
11/26/1996	COURT MINUTES FILED	<i>Vol./Book 644 , Page 2373</i>
11/26/1996	- <i>RECORD OF EXHIBITS RECEIVED FILED (EXHIBITS IN CIVIL VAULT)</i>	<i>Vol./Book 644 , Page 2374</i>
11/26/1996	- <i>NOTICE OF FILING LETTERS FILED</i>	<i>Vol./Book 644 , Page 2375</i>
11/26/1996	- <i>LETTER FROM TAMMY LONG DATED 11/16/96 TO JUDGE FILED</i>	<i>Vol./Book 644 , Page 2376</i>
11/26/1996	- <i>LETTER FROM PATRICIA BENNETT TO JUDGE FILED</i>	<i>Vol./Book 644 , Page 2379</i>
11/26/1996	- <i>LETTER FROM HEATHER TIMM DATED 11/21/96 TO JUDGE FILED</i>	<i>Vol./Book 644 , Page 2383</i>
11/26/1996	- <i>LETTER FROM JERRY STEWART DATED 11/23/96 TO JUDGE FILED</i>	<i>Vol./Book 644 , Page 2387</i>
11/26/1996	- <i>LETTER FROM REBA OELAR TO JUDGE FILED</i>	<i>Vol./Book 644 , Page 2390</i>
11/26/1996	- <i>MOTION FOR COSTS & ORDER TO PAY COURT REPORTER \$836.00 FILED</i>	<i>Vol./Book 644 , Page 2393</i>
11/26/1996	-	<i>Vol./Book 644 , Page 2395</i>

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	<i>MOTION FOR COSTS & ORDER TO PAY COURT REPORTER \$127.50 FILED</i>	
11/26/1996	- <i>MO & ORDER GRANTING ATTYS FEES OF \$4175 TO J MILLS ESQ FILED</i>	<i>Vol./Book 644 , Page 2398</i>
11/26/1996	- <i>CERTIFICATION OF ATTORNEY FEES FILED</i>	<i>Vol./Book 644 , Page 2399</i>
11/27/1996	Sentencing (9:00 AM) (Judicial Officer: Nelson, William J) <i>Sentenced</i>	
11/27/1996	- <i>CNT 003 DEFENDANT SENTENCED</i>	
11/27/1996	- <i>CNT 003 STATE PRISON FOR 189 MONTHS</i>	
11/27/1996	- <i>CNT 003 CREDIT FOR TIME SERVED IN LEE CO JAIL: 614 DAYS</i>	
11/27/1996	PRESENT WITH ATTORNEY	
11/27/1996	- <i>DEFENDANT COMMITTED TO THE CUSTODY OF DEPT OF CORRECTIONS OF THE</i>	
11/27/1996	- <i>STATE OF FLORIDA FOR EXECUTION OF THIS SENTENCE</i>	
11/27/1996	JUDGMENT FORM RECORDED OR BK AND FILED (FINGERPRINTS)	<i>Vol./Book 645 , Page 2716</i>
11/27/1996	COURT MINUTES FILED	<i>Vol./Book 645 , Page 213</i>
11/27/1996	- <i>SENTENCING ORDER FILED</i>	<i>Vol./Book 645 , Page 215</i>
11/27/1996	- <i>COURT EXHIBIT/LETTER FROM STATE ATTYS OFFICE DATED 11/21/96 FILED</i>	<i>Vol./Book 645 , Page 223</i>
11/27/1996	SENTENCING GUIDELINES FILED	<i>Vol./Book 645 , Page 234</i>
11/27/1996	- <i>ORDER GRANTING MOTION TO QUASH SUBPOENAS FILED</i>	<i>Vol./Book 645 , Page 1195</i>
11/27/1996	- <i>CNT 001 DEFENDANT SENTENCED</i>	
11/27/1996	- <i>CNT 001 DEATH PENALTY IMPOSED</i>	
11/27/1996	- <i>CNT 002 MERGED FOR SENTENCING WITH COUNT 001</i>	
11/27/1996	Sentence (Judicial Officer: Nelson, William J)	


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	1. FIRST DEGREE MURDER 01 - Incarceration After Disposition Confinement (Effective 11/27/1996, Min. , Max. Death, Department of Corrections State Prison) Credit for Time Served: 614 Days Charge Reopen Status (03/02/2017, Other, 1)	
11/27/1996	Sentence (Judicial Officer: JUDGE, D DIVISION) 3. ARMED ROBBERY(ROB W/FIREARM/DEADLY WEAP) Sentence Confinement (Effective 11/27/1996, Min. , Max. 189 Mo , Department of Corrections) Credit for Time Served: 614 Days Charge Reopen Status (03/02/2017, Other, 3)	
12/02/1996	SENTENCE & JUDGMENT FORM RECORDED IN OR BOOK AND FILED	<i>Vol./Book 646 , Page 8</i>
12/02/1996	UNIFORM COMMITMENT TO CUSTODY FILED	<i>Vol./Book 645 , Page 1197</i>
12/06/1996	APPEAL FILED	
12/06/1996	- <i>NOTICE OF APPEAL RECORDED IN MINUTE BOOK 40 AND FILED</i>	<i>Vol./Book 646 , Page 2544</i>
12/06/1996	- <i>APPEAL # 89540-SUPR</i>	
12/09/1996	- <i>CERTIFIED COPY NOTICE OF APPEAL FWD TO SUPREME COURT OF FLORIDA BILL TO PUBLIC DEFENDER \$53.00 FOR AP FILING</i>	
12/09/1996	MEMO FROM APPEAL CLERK TO 2ND DCA FILED	<i>Vol./Book 646 , Page 2546</i>
12/10/1996	- <i>MOTION FOR COSTS & ORDER TO PAY COURT REPORTER \$9.50 FILED</i>	<i>Vol./Book 646 , Page 2515</i>
12/10/1996	- <i>MOTION FOR & CERTIFICATION OF COSTS TO PAY CT RPTR \$757.30 FILED</i>	<i>Vol./Book 646 , Page 2517</i>
12/10/1996	- <i>MOTION FOR & CERTIFICATION OF COSTS TO PAY CT RPTR \$45.00 FILED</i>	<i>Vol./Book 646 , Page 2525</i>
12/10/1996	- <i>COST MOTION FILED</i>	<i>Vol./Book 646 , Page 2529</i>
12/10/1996	- <i>CERTIFICATION OF COSTS TO KEVIN HANNON FOR \$2.08 FILED</i>	<i>Vol./Book 646 , Page 2531</i>
12/10/1996	- <i>MOTION TO WITHDRAW FILED</i>	<i>Vol./Book 646 , Page 2542</i>
12/10/1996	DESIGNATIONS TO THE COURT REPORTER FILED	<i>Vol./Book 646 , Page 3556</i>

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12/10/1996	DIRECTIONS TO THE CLERK FILED	<i>Vol./Book 646 , Page 3558</i>
12/10/1996	STATEMENT OF JUDICIAL ACTS TO BE REVIEWED FILED	<i>Vol./Book 646 , Page 3559</i>
12/16/1996	REPORTER'S ACKNOWLEDGEMENT FILED	<i>Vol./Book 647 , Page 2450</i>
12/17/1996	- <i>MOTION & CERTIFICATION OF COSTS TO PAY S COUNTERMAN \$9.56 FILED</i>	<i>Vol./Book 647 , Page 2453</i>
12/17/1996	- <i>MOTION FOR & CERTIFICATION OF COSTS TO PAY CT RPTR \$75.00 FILED</i>	<i>Vol./Book 647 , Page 2464</i>
12/17/1996	- <i>CORR FROM CAPITAL COLLATERAL RE: DEFENANT'S APPEAL FILED</i>	<i>Vol./Book 647 , Page 3133</i>
12/17/1996	STATEMENT OF JUDICIAL ACTS TO BE REVIEWED FILED	<i>Vol./Book 647 , Page 3135</i>
12/17/1996	DIRECTIONS TO THE CLERK FILED	<i>Vol./Book 647 , Page 3137</i>
12/17/1996	DESIGNATIONS TO THE COURT REPORTER FILED	<i>Vol./Book 647 , Page 3138</i>
12/17/1996	- <i>MOTION TO WITHDRAW FILED</i>	<i>Vol./Book 647 , Page 3140</i>
12/18/1996	Defendant Represented by Public Defender,	
12/18/1996	- <i>ORDER GRANTING MTN OF COUNSEL TO W/DRAW & P.D. APPTM'TN FILED</i>	<i>Vol./Book 648 , Page 64</i>
12/23/1996	- <i>MOTION & CERTIFICATION OF COSTS TO PAY R KEOWN MD \$450 FILED</i>	<i>Vol./Book 648 , Page 2092</i>
01/08/1997	- 717	<i>Vol./Book 650 , Page 1331</i>
01/08/1997	- <i>RECEIPT FROM SUPREME COURT FOR NOTICE OF APPEAL FILED (#89,540)</i>	<i>Vol./Book 650 , Page 1331</i>
01/08/1997	INVOICE FOR APPELLATE FILING FEE FILED	<i>Vol./Book 650 , Page 1332</i>
01/08/1997	- <i>ORDER FROM SUPREME COURT DIRECTING COURT REPORTER TRANS ALL FILED</i>	<i>Vol./Book 650 , Page 1333</i>
01/08/1997	-	<i>Vol./Book 650 , Page 1333</i>

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	<i>ORDER FROM SUPREME COURT DIRECTING CLERK FILED</i>	
01/08/1997	- <i>COPY/ORDER FROM SUPREME COURT LISTING REQ ON CAPITAL CASES FILED</i>	<i>Vol./Book 650 , Page 1335</i>
01/08/1997	- <i>CORRESPONDENCE FROM JUDGE TO APPEALS CLERK FILED</i>	<i>Vol./Book 650 , Page 1336</i>
01/09/1997	- <i>MEMO FROM APPEALS CLERK TO SUPREME COURT FILED</i>	<i>Vol./Book 650 , Page 1337</i>
01/09/1997	- <i>MOTION FOR & CERTIFICATION OF COSTS TO PAY CT RPTR \$105.00 FILED</i>	<i>Vol./Book 650 , Page 1338</i>
01/09/1997	- <i>MOTION FOR & CERTIFICATION OF COSTS TO PAY CT RPTR \$249.50 FILED</i>	<i>Vol./Book 650 , Page 1342</i>
01/22/1997	- <i>MOTION FOR & CERTIFICATION OF COSTS TO PAY CT RPTR \$9.00 FILED</i>	<i>Vol./Book 652 , Page 1050</i>
01/23/1997	- <i>MOTION & CERTIFICATION OF COSTS TO PAY L BAEHNE \$279.55 FILED</i>	<i>Vol./Book 652 , Page 1789</i>
01/24/1997	RECEIPT FROM DCA FOR FILING FEE FILED	<i>Vol./Book 653 , Page 207</i>
01/29/1997	- <i>NOTICE OF HEARING/ATTY'S FEES & PENDING COSTS FILED</i>	<i>Vol./Book 653 , Page 2563</i>
02/10/1997	 - <i>CERTIFICATE OF NON-EXISTANCE FOR 6/4/96/ORIG & 2 COPIES FILED</i>	
02/10/1997	 - <i>TRANSCRIPT OF PROCEEDINGS HELD 11/22/96; ORIGINAL & 2 COPIES FILED</i>	
02/10/1997	 - <i>TRANSCRIPT OF PROCEEDINGS HELD 11/21/96; ORIGINAL & 2 COPIES FILED</i>	
02/10/1997	 - <i>TRANSCRIPT OF PROCEEDINGS HELD 11/26/96; ORIGINAL & 2 COPIES FILED</i>	
02/10/1997	 - <i>TRANSCRIPT OF PROCEEDINGS HELD 10/29/96; ORIGINAL & 2 COPIES FILED</i>	
02/10/1997	 - <i>TRANSCRIPT OF PROCEEDINGS HELD 10/23/96; ORIGINAL & 2 COPIES FILED</i>	
02/10/1997	 - <i>TRANSCRIPT OF PROCEEDINGS HELD 9/9/96; ORIGINAL & 2 COPIES FILED</i>	

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02/10/1997	- <i>TRANSCRIPT OF PROCEEDINGS HELD 11/27/96; ORIGINAL & 2 COPIES FILED</i>	
02/10/1997	- <i>TRANSCRIPT OF PROCEEDINGS HELD 11/7/96 (VOL II of II); ORIG & 2 COPY FILED</i>	
02/10/1997	- <i>TRANSCRIPT OF TRIAL HELD 9/16,17,18 & 19/96 (I OF V VOL) ORIGINAL & 2 COPIES FILED</i>	
02/10/1997	Transcript of Proceedings Filed <i>11/7/96 (VOL I OF II) DUPLICATE ORIGINAL ORIG & 2 COPY FILED</i>	
02/10/1997	Transcript of Proceedings Filed <i>TRIAL HELD 9/16,17,18 & 19/96 (II OF V VOL) ORIGINAL & 2 COPIES FILED</i>	
02/10/1997	Transcript of Proceedings Filed <i>TRIAL HELD 9/16,17,18 & 19/96 (III OF V VOL) ORIGINAL & 2 COPIES FILED</i>	
02/10/1997	Transcript of Proceedings Filed <i>TRIAL HELD 9/16,17,18 & 19/96 (IV OF V VOL) ORIGINAL & 2 COPIES FILED</i>	
02/10/1997	Transcript of Proceedings Filed <i>TRIAL HELD 9/16,17,18 & 19/96 (V OF V VOL) ORIGINAL & 2 COPIES FILED</i>	
02/12/1997	- <i>MOTION FOR ATTORNEYS' FEES - GRANTED MOTION FOR COSTS - GRANTED</i>	
02/12/1997	COURT MINUTES FILED	<i>Vol./Book 656 , Page 1144</i>
02/17/1997	- <i>AMENDED DESIGNATIONS TO THE COURT REPORTER FILED</i>	<i>Vol./Book 656 , Page 3304</i>
02/19/1997	- <i>SUPPLEMENTAL DESIGNATIONS TO THE COURT REPORTER FILED</i>	<i>Vol./Book 657 , Page 2292</i>
02/21/1997	REPORTER'S ACKNOWLEDGEMENT FILED	<i>Vol./Book 657 , Page 3020</i>
02/27/1997	- <i>TRANSCRIPT OF PROCEEDINGS HELD 6/5/96; ORIGINAL & 2 COPIES FILED</i>	
02/27/1997	- <i>TRANSCRIPT OF PROCEEDINGS HELD 6/13/96; VOLUME I OF II ORIGINAL & 2 COPIES FILED</i>	
02/27/1997	Transcript of Proceedings Filed <i>TRANSCRIPT OF PROCEEDINGS HELD 6/13/96; VOLUME II OF II ORIGINAL & 2 COPIES FILED</i>	
03/05/1997	TRANSCRIPT OF RECORD - INDEX OF APPEAL FILED	<i>Vol./Book 659 , Page 3088</i>

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03/06/1997	-	<i>TRANSCRIPT OF RECORD ON APPEAL (18 VOL); HOLDING TILL AFTER STATUS CONF.; BILL TO PUBLIC DEFENDER \$13338.66 FOR AP PREP</i>	
03/06/1997	-	<i>MOTION FOR COSTS & ORDER TO PAY H STEVENS ESQ 282.35 FILED</i>	<i>Vol./Book 659 , Page 3116</i>
03/06/1997	-	<i>MO/COSTS & ORDER TO PAY C PETTRY \$1000 & S MERIN \$750 FILED</i>	<i>Vol./Book 659 , Page 3116</i>
03/06/1997	-	<i>MO & ORDER/PAY STEVENS \$282.35;PETTRY \$1000 & MERIN \$750 FILED</i>	<i>Vol./Book 659 , Page 3124</i>
03/06/1997	-	<i>MO & ORDER PAY STEVENS \$282.35; PETTRY \$1000 & MERLIN \$750 FILED</i>	<i>Vol./Book 659 , Page 3131</i>
03/06/1997	-	<i>MO & ORDER PAY STEVENS \$282.35; PETTRY \$1000 & MERLIN \$750 FILED</i>	<i>Vol./Book 659 , Page 3139</i>
03/06/1997	-	<i>MO & ORDER PAY STEVENS \$282.35; PETTRY \$1000 & MERLIN \$750 FILED</i>	<i>Vol./Book 659 , Page 3144</i>
03/06/1997	-	<i>MO & ORDER PAY STEVENS \$282.35; PETTRY \$1000 & MERLIN \$750 FILED</i>	<i>Vol./Book 659 , Page 3149</i>
03/06/1997	-	<i>MO & ORDER PAY STEVENS \$282.35; PETTRY \$1000 & MERLIN \$750 FILED</i>	<i>Vol./Book 659 , Page 3154</i>
03/06/1997	-	<i>MO & ORDER PAY STEVENS \$282.35; PETTRY \$1000 & MERLIN \$750 FILED</i>	<i>Vol./Book 659 , Page 3159</i>
03/06/1997	-	<i>MO & ORDER PAY STEVENS \$282.35; PETTRY \$1000 & MERLIN \$750 FILED</i>	<i>Vol./Book 659 , Page 3164</i>
03/06/1997	-	<i>MO & ORDER GRANTING ATTYS FEES OF \$22,500 TO H STEVENS ESQ FILED</i>	<i>Vol./Book 659 , Page 3168</i>
03/11/1997	-	<i>NOTICE OF HEARING/STATUS CONFERENCE FILED</i>	<i>Vol./Book 660 , Page 3180</i>
03/12/1997	-	<i>STATUS CONFERENCE OF RECORD - COURT FIND THE RECORDS ARE COMPLETE AND READY TO BE TRANSFERRED FOR APPEAL</i>	
03/12/1997		<i>ACKNOWLEDGMENT FOR RECORD ON APPEAL FILED</i>	<i>Vol./Book 660 , Page 3181</i>
03/12/1997	-		<i>Vol./Book 660 , Page 3182</i>

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NOTICE TO THE PUBLIC DEFENDER ON SUBMITTED APPEAL RECORD FILED

03/12/1997	COURT MINUTES FILED	<i>Vol./Book 661 , Page 277</i>
03/17/1997	- <i>MOTION FOR COSTS & ORDER TO PAY COURT REPORTER \$511.50 FILED</i>	<i>Vol./Book 661 , Page 2072</i>
03/17/1997	ACKNOWLEDGMENT FOR RECORD ON APPEAL FILED	<i>Vol./Book 661 , Page 2854</i>
03/21/1997	- <i>MOTION FOR COSTS & ORDER TO PAY COURT REPORTER \$4366.50 FILED</i>	<i>Vol./Book 662 , Page 1474</i>
03/31/1997	- <i>RECEIPT FROM DCA FOR PETITION FOR WRIT OF CERT #97-1118 FILED</i>	<i>Vol./Book 664 , Page 166</i>
06/11/1997	- <i>ORDER FROM FL SUPREME COURT GRANTING MO TO SUPPLEMENT RECORD FILED</i>	<i>Vol./Book 678 , Page 303</i>
06/16/1997	- <i>SUPPLEMENTAL TRANSCRIPT RECORD ON APPEAL PREPARED/BILL TO</i>	
06/16/1997	- <i>PUBLIC DEFENDER \$49.74</i>	
06/17/1997	ORDER AND FINAL JUDGMENT FILED	<i>Vol./Book 679 , Page 63</i>
06/17/1997	- <i>SUPPLEMENTAL TRANSCRIPT OF RECORD - INDEX OF APPEAL FILED</i>	<i>Vol./Book 679 , Page 286</i>
06/18/1997	- <i>2ND SUPPLEMENTAL TRANSCRIPT OF RECORD - INDEX OF APPEAL FILED</i>	<i>Vol./Book 679 , Page 1885</i>
06/30/1997	- <i>ORDER FROM DCA DENYING MOTION FOR ATTORNEY'S FEES FILED</i>	<i>Vol./Book 681 , Page 2500</i>
10/28/1997	- <i>MOTION & CERTIFICATION OF COSTS TO PAY S RUSSELL \$179.10 FILED</i>	<i>Vol./Book 701 , Page 2113</i>
11/24/1997	- <i>ORIGINAL EXHIBITS FORWARDED TO SUPREME COURT/INDEXES TO ATTORNEYS</i>	
11/24/1997	TRANSCRIPT OF RECORD - INDEX OF APPEAL FILED	<i>Vol./Book 706 , Page 2763</i>
11/04/1999	APPEAL DISPOSED	
11/04/1999	- <i>ORDER BY SUPREME COURT DENYING MTN FOR REHEARING FILED</i>	<i>Vol./Book 845 , Page 1426</i>

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11/04/1999	-	<i>MANDATE RECORDED IN MINUTE BOOK 43 AND FILED</i>	<i>Vol./Book 845 , Page 2293</i>
11/05/1999	-	<i>EXHIBITS RETURNED FROM SUPREME COURT-RETURNED TO ANN PAVESE</i>	
11/08/1999	-	<i>NOTICE TO SEC OF DEPT OF CORRECTIONS OF AFFIRMANCE OF DEATH P FILE</i>	<i>Vol./Book 846 , Page 407</i>
11/08/1999	-	<i>NOTICE TO SOA OF AFFIRMANCE OF DEATH PENALTY FILED</i>	<i>Vol./Book 846 , Page 405</i>
11/18/1999	-	<i>NOTICE TO SUBMIT PUBLIC RECORDS WITHIN 90 DAYS FILED</i>	<i>Vol./Book 848 , Page 1693</i>
02/02/2000	-	<i>NOTICE OF COMPLIANCE BY STATE ATTORNEY FILED</i>	<i>Vol./Book 863 , Page 1318</i>
02/03/2000	-	<i>NOTICE OF COMPLIANCE BY LAW ENFORCEMENT AGENCY FILED</i>	<i>Vol./Book 864 , Page 446</i>
02/04/2000	-	<i>NTC OF DELIVERY OF EXEMPT PUBLIC RECORDS TO CIRCUIT COURT JUDGE FI</i>	<i>Vol./Book 864 , Page 444</i>
02/07/2000	-	<i>NOTICE OF COMPLIANCE BY SECRETARY OF DOC FILED</i>	<i>Vol./Book 864 , Page 1441</i>
02/11/2000	-	<i>LETTER FROM STATE ATTORNEY'S OFFICE RE: EXEMPT RECORDS FILED</i>	<i>Vol./Book 865 , Page 1524</i>
02/11/2000	-	<i>Sealed Records with Letter from State Attorney received by the Clerk and placed in the vault for safekeeping...moved to box 3104844</i>	
03/01/2000		CERTIFICATION OF COSTS AND MOTION FILED	<i>Vol./Book 871 , Page 1872</i>
03/03/2000		CERTIFICATION OF COSTS AND MOTION FILED	<i>Vol./Book 872 , Page 115</i>
04/28/2000	-	<i>NOTICE TO APPOINT REGISTRY COUNSEL FILED</i>	<i>Vol./Book 885 , Page 2223</i>
09/22/2000		NOTICE OF APPEARANCE OF COUNSEL FILED	<i>Vol./Book 920 , Page 1372</i>
01/05/2001		Case Reopened <i>Case Reopened for MOTION FOR POST-CONVICTION</i>	
01/05/2001	-	<i>MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE FILED</i>	<i>Vol./Book 941 , Page 1245</i>

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01/05/2001	- <i>SPECIAL REQUEST FOR LEAVE TO AMEND FILED</i>	<i>Vol./Book 941 , Page 1245</i>
01/05/2001	NOTICE OF APPEARANCE OF COUNSEL FILED	<i>Vol./Book 941 , Page 1886</i>
01/09/2001	- <i>VERIFICATION FILED</i>	<i>Vol./Book 941 , Page 3085</i>
06/22/2001	- <i>DEFENDANT'S DEMAND FOR ADDITIONAL PUBLIC RECORDS/CCPD FILED</i>	<i>Vol./Book 981 , Page 251</i>
06/22/2001	- <i>DEFENDANT'S DEMAND FOR ADDITIONAL PUBLIC RECORDS/DPR FILED</i>	<i>Vol./Book 981 , Page 256</i>
06/22/2001	- <i>DEFENDANT'S DEMAND FOR ADDITIONAL PUBLIC RECORDS/DC&F FILED</i>	<i>Vol./Book 981 , Page 259</i>
06/22/2001	- <i>DEFENDANT'S DEMAND FOR ADDITIONAL PUBLIC RECORDS/FDLE/TAMPA FILED</i>	<i>Vol./Book 981 , Page 263</i>
06/22/2001	- <i>DEFENDANT'S DEMAND FOR ADDITIONAL PUBLIC RECORDS/FDLE/FM FILED</i>	<i>Vol./Book 981 , Page 268</i>
06/22/2001	- <i>DEF'S DEMAND FOR ADDITIONAL PUBLIC RECORDS/FDLE/TALLAHASSEE FILED</i>	<i>Vol./Book 981 , Page 273</i>
06/22/2001	- <i>DEFENDANT'S DEMAND FOR ADDITIONAL PUBLIC RECORDS/LCSO FILED</i>	<i>Vol./Book 981 , Page 278</i>
06/22/2001	- <i>DEF'S DEMAND FOR ADDITIONAL PUBLIC RECORDS/MEDICAL EXAMINER FILED</i>	<i>Vol./Book 981 , Page 283</i>
06/22/2001	- <i>DEFENDANT'S DEMAND FOR ADDITIONAL PUBLIC RECORDS/SAO FILED</i>	<i>Vol./Book 981 , Page 287</i>
06/22/2001	- <i>DEF'S DEMAND FOR ADDITIONAL PUBLIC RECORDS/FL ADDICTION SV FILED</i>	<i>Vol./Book 981 , Page 293</i>
06/22/2001	- <i>DEFENDANT'S DEMAND FOR ADDITIONAL PUBLIC RECORDS/FL DOC FILED</i>	<i>Vol./Book 981 , Page 297</i>
07/31/2001	- <i>SHERIFF OBJECTION TO DEMAND FOR ADDITIONAL PUBLIC RECORDS FILED</i>	<i>Vol./Book 989 , Page 2286</i>
08/14/2001	-	<i>Vol./Book 991 , Page 1331</i>

LEE COUNTY CLERK OF COURTS
CASE SUMMARY
CASE NO. 95-CF-000911-A

	<i>OBJECTION OF SAO TO DEMAND FOR ADDITIONAL RECORDS FILED</i>	
08/23/2001	- <i>DEPART OF HEALTH OBJECTION TO DEMAND FOR PUBLIC RECORDS FILED</i>	<i>Vol./Book 992 , Page 3970</i>
08/24/2001	- <i>RESP/OBJECTIONS TO DEMAND FOR ADDITIONAL PUBLIC RECORDS FILED</i>	<i>Vol./Book 994 , Page 1391</i>
08/27/2001	- <i>OBJECTION OF CC POLICE TO DEMAND FOR PUBLIC RECORDS FILED</i>	<i>Vol./Book 993 , Page 1539</i>
10/25/2001	 - <i>ORDER SETTING STATUS CONFERENCE FILED</i>	<i>Vol./Book 1006, Page 462</i>
11/08/2001	 - <i>ORDER GRANTING MOTION TO APPEAR BY TELEPHONE FILED</i>	<i>Vol./Book 1008, Page 1673</i>
11/08/2001	 - <i>REQUEST TO PARTICIPATE IN STATUS CONFERENCE BY PHONE FILED</i>	<i>Vol./Book 1008, Page 1675</i>
11/09/2001	 - <i>MOTION T50 RESET STATUS HEARING FILED</i>	<i>Vol./Book 1008, Page 2254</i>
11/09/2001	 - <i>ORDER GRANTING MOTION TO RESET STATUS CONFERENCE FILED</i>	<i>Vol./Book 1008, Page 2256</i>
01/02/2002	 - <i>REQUEST TO PARTICIPATE IN STATUS CONFERENCE FILED</i>	<i>Vol./Book 1018, Page 1148</i>
01/04/2002	 - <i>ORDER GRANTING ATT GEN MOTION TO APPEAR BY TELEPHONE FILED</i>	<i>Vol./Book 1018, Page 3109</i>
01/09/2002	- <i>STATUS CONFERENCE - 3.850 HEARING SET FOR 3-12-02 AT 9:00 AM FOR COUNSELS ARGUMENTS AND COURT RULING REFER TO COURT REPORTERS NOTES</i>	
01/15/2002	 COURT MINUTES FILED	<i>Vol./Book 1020, Page 3302</i>
01/17/2002	 - <i>ORDER ON STATUS CONFERENCE HELD 01/09/02 FILED</i>	<i>Vol./Book 1021, Page 1428</i>
01/30/2002	 - <i>PRO SE WAIVER OF PRESENCE FILED</i>	<i>Vol./Book 1023, Page 246</i>
01/30/2002	 - <i>PRO SE NOTICE OF FILING FILED</i>	<i>Vol./Book 1023, Page 247</i>
		<i>Vol./Book 1028,</i>

LEE COUNTY CLERK OF COURTS
CASE SUMMARY
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03/04/2002	- <i>NOTICE OF DEP OF HEALTH,LEE COUNTY HEALTH DEP FILED</i>	Page 1576
03/05/2002	- <i>DOC MOTION TO APPEAR TELEPHONICALLY FOR HEARING FILED</i>	Vol./Book 1028, Page 3187
03/06/2002	- <i>COVERSHEET FOR MEDICAL EXAMINERS REPORT-REPORT NOT ATTACHED FILED</i>	Vol./Book 1029, Page 381
03/08/2002	- <i>MOTION TO APPEAR BY TELEPHONE FILED</i>	Vol./Book 1029, Page 1691
03/12/2002	- <i>PUBLIC RECORDS HEARING - FOR COUNSEL ARGUMENTS AND COURTS RULING REFER TO COURT REPORTERS NOTES PRESENT BY ATTORNEY</i>	
03/12/2002	COURT MINUTES FILED	Vol./Book 1030, Page 409
03/12/2002	- <i>ORDER GRANTING FDLE MOTION TO APPEAR BY TELEPHONE FILED</i>	Vol./Book 1030, Page 410
03/27/2002	- <i>DEFENDANT'S DEMAND FOR ADDITIONAL PUBLIC RECORDS FILED</i>	Vol./Book 1032, Page 2490
04/16/2002	MOTION AND ORDER FOR COSTS FILED	Vol./Book 1037, Page 539
04/26/2002	- <i>NOTICE OF DELIVERY OF EXEMPT PUBLIC RECORDS TO REPOSITORY FILED</i>	Vol./Book 1040, Page 417
04/26/2002	- <i>NOTICE OF COMPLIANCE BY ADDICTION SERVICES FILED</i>	Vol./Book 1040, Page 418
04/29/2002	- <i>ORDER ON STATUS CONFERENCE OF 03/12/02 FILED</i>	Vol./Book 1040, Page 3510
04/29/2002	- <i>ORDER SETTING NEXT STATUS CONFERENCE FOR 05/07/02 FILED</i>	Vol./Book 1040, Page 3510
05/07/2002	- <i>3.850 HEARING: FOR COURT'S SPECIFIC RULING REGARDING MOTIONS ON THIS HEARING REFER TO COURT REPORTER'S NOTES - COURT TO PREPARE ORDER - NEXT HEARING SET FOR 6/4/02 @ 10:00AM - TRANSCRIPT OF PROCEEDINGS OF 3/12/02 FILED IN OPEN COURT</i>	
05/07/2002	- <i>TRANSCRIPT OF PROCEEDINGS ON MARCH 12, 2002 FILED</i>	Vol./Book 1041, Page 4752
05/07/2002	COURT MINUTES FILED	Vol./Book 1041, Page 4767

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05/10/2002	 - <i>NOTICE OF FILING FILED</i>	<i>Vol./Book 1043, Page 2057</i>
05/13/2002	 - <i>REQUEST TO PARTICIPATE IN STATUS CONFERENCE BY PHONE FILED</i>	<i>Vol./Book 1042, Page 3944</i>
05/16/2002	 CERTIFICATION OF COSTS AND MOTION FILED	<i>Vol./Book 1043, Page 2849</i>
05/21/2002	 - <i>ORDER GRANTING ATTORNEY GENERAL'S MOTION TO APPEAL BY PHONE FILED</i>	<i>Vol./Book 1044, Page 1399</i>
05/23/2002	 - <i>DEPT POF HEALTH MOTION TO APPEAR TELEPHONICALLY FILED</i>	<i>Vol./Book 1045, Page 1882</i>
05/29/2002	 - <i>ORDER ON STATUS CONFERENCE/SETTING NEXT STATUS CONFERENCE FILED</i>	<i>Vol./Book 1046, Page 245</i>
05/30/2002	 - <i>RESPONSE OF SAO TO DEMAND FOR ADDITIONAL PUBLIC RECORDS FILED</i>	<i>Vol./Book 1047, Page 1474</i>
05/31/2002	 - <i>NOTICE OF COMPLIANCE BY FLORIDA DEPARTMENT OF JUVENILE FILED</i>	<i>Vol./Book 1046, Page 2939</i>
05/31/2002	 - <i>NOTICE OF DELIVERY OF EXEMPT PUBLIC RECORDS TO DEPOSITORY FILED</i>	<i>Vol./Book 1046, Page 2942</i>
06/03/2002	 - <i>DOC MOTION TO APPEAR BY TELEPHONE FILED</i>	<i>Vol./Book 1047, Page 459</i>
06/04/2002	- <i>STATUS CONFERENCE: FOR COUNSELS ARGUMENTS & COURTS SPECIFIC RULING REFER TO COURT REPORTERS NOTES</i>	
06/04/2002	- <i>STATUS CONFERENCE SET FOR 7/31/02 @ 10.00AM CTRM B</i>	
06/04/2002	 - <i>TRANSCRIPT OF PROCEEDINGS ON 05/07/02 FILED</i>	<i>Vol./Book 1047, Page 1159</i>
06/04/2002	 COURT MINUTES FILED	<i>Vol./Book 1047, Page 1466</i>
06/04/2002	 - <i>LETTER TO JUDGE FILED</i>	<i>Vol./Book 1047, Page 1467</i>
06/04/2002	 - <i>CERTIFIED DOCUMENT FILED</i>	<i>Vol./Book 1047, Page 1469</i>

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06/04/2002	- <i>EXHIBIT A-1 FILED</i>	<i>Vol./Book 1047, Page 1472</i>
06/04/2002	- <i>EXHIBIT A-2 FILED</i>	<i>Vol./Book 1047, Page 1473</i>
06/04/2002	- <i>ORDER GRANTING HEALTH DEPT MOTION TO APPEAR TELEPHONICALLY FILED</i>	<i>Vol./Book 1047, Page 2497</i>
06/05/2002	MOTION AND ORDER FOR COSTS FILED	<i>Vol./Book 1047, Page 2495</i>
06/19/2002	CERTIFICATION OF COSTS AND MOTION FILED	<i>Vol./Book 1050, Page 2889</i>
06/20/2002	MOTION AND ORDER FOR COSTS FILED	<i>Vol./Book 1053, Page 633</i>
06/24/2002	- <i>TRANSCRIPT OF PROCEEDINGS ON 06/04/02 FILED</i>	<i>Vol./Book 1052, Page 1086</i>
07/12/2002	- <i>MOTION TO COMPEL TRIAL ATTORNEY TO PROVIDE CASE FILE FILED</i>	<i>Vol./Book 1055, Page 313</i>
07/22/2002	- <i>MOTION TO COMPEL PRODUCTION OF PUBLIC RECORDS FILED</i>	<i>Vol./Book 1056, Page 4587</i>
07/24/2002	- <i>LETTER FROM SWFAS FILED</i>	<i>Vol./Book 1057, Page 2874</i>
07/25/2002	- <i>ORDER ON STATUS CONFERENCE/SETTING NEXT CONFERENCE FILED</i>	<i>Vol./Book 1057, Page 3888</i>
07/29/2002	- <i>REQUEST TO PARTICIPATE IN STATUS CONFERENCE BY TELEPHONE FILED</i>	<i>Vol./Book 1058, Page 1374</i>
07/29/2002	- <i>DOC MOTION TO APPEAR TELEPHONICALLY FILED</i>	<i>Vol./Book 1058, Page 1377</i>
07/31/2002	- <i>STATUS CONFERENCE - NEXT STATUS CONFERENCE SET 10-22-02 AT 10 AM MOTIONS TO COMPEL RECORDS - FOR COURTS SPECIFIC RULING REFER TO COURT REPORTERS NOTES</i>	
07/31/2002	COURT MINUTES FILED	<i>Vol./Book 1058, Page 3774</i>
08/02/2002	CERTIFICATION OF COSTS AND MOTION FILED	<i>Vol./Book 1059, Page 1410</i>
08/07/2002	-	<i>Vol./Book 1060, Page 2340</i>

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	<i>ORDER GRANTING MOTION TO APPEAR BY TELEPHONE FILED</i>	
08/08/2002	- <i>NOTICE OF DELIVERY OF EXEMPT PUBLIC RECORDS TO REPOSITORY FILED</i>	<i>Vol./Book 1060, Page 1491</i>
08/08/2002	- <i>NOTICE OF COMPLIANCE BY DOC WITH ADDITIONAL RECORDS REQUEST FILED</i>	<i>Vol./Book 1060, Page 1493</i>
08/22/2002	MOTION AND ORDER FOR COSTS FILED	<i>Vol./Book 1062, Page 3657</i>
08/27/2002	- <i>DEPARTMENT OF HEALTH NOTICE OF COMPLIANCE FILED</i>	<i>Vol./Book 1063, Page 2244</i>
09/16/2002	CERTIFICATION OF COSTS AND MOTION FILED	<i>Vol./Book 1067, Page 100</i>
09/18/2002	NOTICE OF HEARING FILED	<i>Vol./Book 1068, Page 395</i>
09/18/2002	MOTION FOR COSTS FILED	<i>Vol./Book 1068, Page 397</i>
10/04/2002	- <i>REQUEST TO PARTICIPATE IN STATUS CONFERENCE THRU TELEPHONE FILED</i>	<i>Vol./Book 1071, Page 352</i>
10/07/2002	- <i>REQUEST TO PARTICIPATE IN HEARING ON MO FOR COSTS THRU PHONE FILED</i>	<i>Vol./Book 1071, Page 2058</i>
10/09/2002	- <i>ORDER ON STATUS CONFERENCE 07/31/02 FILED</i>	<i>Vol./Book 1072, Page 2741</i>
10/09/2002	- <i>ORDER SETTING NEXT STATUS CONFERENCE 10/22/02 FILED</i>	<i>Vol./Book 1072, Page 2741</i>
10/11/2002	- <i>ORDER GRANTING ATT GEN MOTION TO APPEAR BY TELEPHONE FILED</i>	<i>Vol./Book 1072, Page 494</i>
10/16/2002	- <i>DOC REQUEST TO PARTICIPATE IN CONFERENCE VIA TELEPHONE FILED</i>	<i>Vol./Book 1073, Page 1912</i>
10/17/2002	- <i>TRANSCRIPT OF PROCEEDINGS ON 07/31/02 FILED</i>	<i>Vol./Book 1073, Page 4143</i>
10/17/2002	- <i>DEPT OF HEALTH MOTION TO APPEAL TELEPHONICALLY FILED</i>	<i>Vol./Book 1073, Page 4508</i>
10/18/2002	- <i>ORDER GRANTING DEPT OF HEALTH'S MTN TO APPEAR TELEPHONICALLY FILED</i>	<i>Vol./Book 1073, Page 4512</i>

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10/18/2002	- <i>ORDER GRANTING DOC MOTION TO APPEAR BY TELEPHONE FILED</i>	<i>Vol./Book 1073, Page 4514</i>
10/21/2002	- <i>ATTORNEY COPY COSTS - GRANTED</i>	
10/21/2002	- <i>STATUS CONFERENCE - FOR COUNSELS ARGUMENTS AND COURTS SPECIFIC RULING REFER TO COURT REPORTERS NOTES STATUS CONFERENCE SET FOR 1-14-03 AT 10:00 AM, CTRM B</i>	
10/21/2002	- <i>NOTICE OF COMPLIANCE BY SWFL ADDITION SERVICES FILED</i>	<i>Vol./Book 1075, Page 0189</i>
10/21/2002	- <i>LETTER FROM SWFAS FILED</i>	<i>Vol./Book 1075, Page 0190</i>
10/22/2002	COURT MINUTES FILED	<i>Vol./Book 1074, Page 1472</i>
11/21/2002	- <i>NOTICE TO COURT IDENTIFYING ILLEGIBLE PUBLIC RECORDS FILED</i>	<i>Vol./Book 1079, Page 3807</i>
12/11/2002	- <i>ORDER GRANTING TRIAL COUNSEL'S MOTION FOR COSTS FILED</i>	<i>Vol./Book 1083, Page 4885</i>
12/11/2002	- <i>LETTER FROM JUDGE 11-18-02 TO COUNSEL FILED</i>	<i>Vol./Book 1083, Page 4887</i>
01/10/2003	- <i>LETTER FROM JUDGE TO COUNSEL FILED</i>	<i>Vol./Book 1087, Page 2373</i>
01/27/2003	- <i>MOTION TO RESCHEDULE STATUS CONFERENCE FILED</i>	<i>Vol./Book 1090, Page 1527</i>
01/27/2003	MOTION AND ORDER FOR COSTS FILED	<i>Vol./Book 1090, Page 2639</i>
01/31/2003	- <i>TRANSCRIPT OF PROCEEDINGS ON 10-22-02 FILED</i>	<i>Vol./Book 1091, Page 2747</i>
01/31/2003	- <i>ORDER ON STATUS CONFERENCE HELD OCTOBER 22 2002 ORDER SETTING NEXT STATUS CONFERENCE FOR FEBRUARY 13 2003 FILED</i>	<i>Vol./Book 1102, Page 323</i>
02/10/2003	CERTIFICATION OF COSTS AND MOTION FILED	<i>Vol./Book 1094, Page 2651</i>
02/27/2003	- <i>ORDER GRANTING MOTION TO RESCHEDULE STATUS CONFERENCE AND ORDER RESCHEDULING STATUS CONFERENCE FILED</i>	<i>Vol./Book 1099, Page 567</i>

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03/14/2003	-	<i>STATUS CONFERENCE: RE: 3.850 - FOR ALL MATTERS REFER TO COURT REPORTERS NOTES - STATUS HRG SET FOR 5/7/03 @ 1:00PM</i>	
03/14/2003	 -	<i>DEPT OF HEALTHS MOTION TO APPEAR TELEPHONICALLY FILED</i>	<i>Vol./Book 1102, Page 360</i>
03/14/2003	 COURT MINUTES FILED		<i>Vol./Book 1102, Page 1777</i>
03/20/2003	 -	<i>DUPL ORDER GRANT COUNSELS MO FOR COSTS/STAMPED BY FINANCE & CT ADMIN FILED (UNSIGNED)</i>	<i>Vol./Book 1103, Page 1972</i>
03/21/2003	 -	<i>LETTER FROM ATTY GENERAL TO JUDGE FILED</i>	<i>Vol./Book 1103, Page 4410</i>
05/01/2003	 -	<i>LETTER FROM JUDGE TO COUNSEL FILED</i>	<i>Vol./Book 1111, Page 2606</i>
06/24/2003	 -	<i>STATUS HEARING FILED</i>	<i>Vol./Book 1122, Page 2691</i>
06/26/2003	 -	<i>ORD ON STATUS CONF/ORD SETTING NEXT CONF FILED</i>	<i>Vol./Book 1123, Page 2469</i>
07/07/2003	 MOTION AND ORDER FOR COSTS FILED		<i>Vol./Book 1125, Page 417</i>
07/14/2003	 -	<i>NOTICE OF INTENT TO PARTICIPATE IN STATUS CONFERENCE THROUGH CONFERENCE TELEPHONE FILED</i>	<i>Vol./Book 1126, Page 1190</i>
08/05/2003	 CERTIFICATION OF COSTS AND MOTION FILED		<i>Vol./Book 1129, Page 3796</i>
08/25/2003	-	<i>STATUS CONFERENCE - REF 3.850 - JUDGE WILL NOTIFY EVERYONE VIA MAIL WITH NEW HEARING DATE</i>	
08/25/2003	PRESENT WITH ATTORNEY		
08/27/2003	 COURT MINUTES FILED		<i>Vol./Book 1134, Page 97</i>
10/21/2003	 MOTION AND ORDER FOR COSTS FILED		<i>Vol./Book 1144, Page 2833</i>
12/09/2003	 -	<i>COPY/LETTER FROM L JEFFREYS/CT ADMIN TO SAO FILED</i>	<i>Vol./Book 1154, Page 1509</i>
12/10/2003	-	<i>Judge Reassignment - Judge CORBIN CIRCUIT JUDGE</i>	


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12/10/2003  ORDER OF REASSIGNMENT FILED

*Vol./Book 1155,
Page 1295*


12/24/2003  MOTION AND ORDER FOR COSTS FILED

*Vol./Book 1158,
Page 3419*


01/05/2004  -

*Vol./Book 1159,
Page 3382*

COPY LETTER FROM JUDGE TO COUNSEL FILED

05/14/2004  Other

*STATE'S MOTION TO STRIKE NELSON'S "SHELL" MOTION FOR POSTCONVICTION
RELIEF*


09/22/2004  -

*Vol./Book 1219,
Page 0400*

ORDER SETTING STATUS CONFERENCE FOR OCT.29,2004

10/29/2004  Motion Filed

Withdraw Due to Conflict of Interest

10/29/2004  Other

Cover Letter from Attorney Regarding Enclosed Motion Filed

04/28/2006  Motion Filed

TO SCHEDULE CASE FOR HEARING

09/15/2006  Correspondence Filed

COPIES OF RECORDS


10/30/2006  Order of Reassignment Filed

to Judge Gerald

10/31/2006  Clerk's Response to Request from Defendant Filed


02/06/2007  Motion Filed

SECOND MOTION TO SCHEDULE CASE FOR HEARING

02/09/2007  Letter from Judge's Office to Attorney's Office Filed


02/16/2007  Correspondence Filed

FOR THE JUDGE

03/20/2007  Letter from Judge's Office to Attorney's Office Filed

03/21/2007  Correspondence Filed

FOR THE JUDGE


04/05/2007  Transcript of Proceedings Filed


held on 10/29/04


04/16/2007  Order Filed

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Setting Status Conference


05/01/2007  Notice Filed
TO PARTICIPATE IN STATUS CONFERENCES THROUGH CONFERENCE TELEPHONE


05/07/2007  Notice of Intention to Participate in Discovery Filed
COPY


05/09/2007  Notice Filed
OF INTENT TO PARTICIPATE IN STATUS CONFERENCE THROUGH CONFERENCE TELEPHONE


05/15/2007 Motion Hearing
Status Conference - No Action


05/15/2007  Court Minutes Filed

05/15/2007  Order Filed
on Status Conference Held 10/29/04

05/16/2007  Order Directing Transportation of Prisoner Filed


05/18/2007  Order Filed
Hearing on June 8, 2007; Defendant to be transported and next status conference tentatively set for August 6, 2007


05/24/2007  Booking Report Filed


06/01/2007  Order Filed
Appointing I Mann Esq as Standby Counsel for Defendant at Hearing on Motion to Withdraw


06/08/2007 Present With Attorney


06/08/2007 Motion Hearing
Motion to Withdraw---Granted.

06/08/2007  Court Minutes Filed
Status Conference set for 8/6/07 @ 2:00 pm. Def. to be transported back to DOC as soon as possible.


06/12/2007  Correspondence Filed
SENT WITH DOCUMENTS TO FILE


06/12/2007  Notice Filed
OF INTENT TO PARTICIPATE IN STATUS CONFERENCE THROUGH CONFERENCE TELEPHONE


07/23/2007  Other
Request to participate in status conference through conference telephone


07/25/2007  Other
REQUEST TO PARTICIPATE IN STATUS CONFERENCE THROUGH CONFERENCE TELEPHONE


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10/04/2007  Correspondence Filed
FROM ADMINISTRATIVE OFFICE OF THE COURTS


10/24/2007  Order Filed
appointing prvt atty


11/28/2007  Other
REPORT TO COURT


04/02/2008  Motion Filed
TO SCHEDULE CASE FOR HEARING


05/13/2008  Order Filed
Scheduling Status Conference

05/14/2008  Motion Filed
State's Motion to Strike Nelson's "Shell" Motion for PostConviction Relief

05/23/2008  Other
REQUEST TO PARTICIPATE IN STATUS CONFERENCE THROUGH CONFERENCE TELEPHONE

05/23/2008  Correspondence Filed


05/23/2008  Correspondence Filed


06/11/2008  Order Filed
Granting Request to Participate in Status Conference Through Telephone


06/23/2008 **Motions (4:00 PM)** (Judicial Officer: Volz, Edward J, Jr.)
Motion Denied


06/23/2008 Present By Attorney (Judicial Officer: Volz, Edward J, Jr.)


06/23/2008 Motion Hearing (Judicial Officer: Volz, Edward J, Jr.)
Status Conference---Post Conviction State's Motion to Strike---Denied. With defense motion to be submitted w/in 90 days .

06/23/2008  Court Minutes Filed (Judicial Officer: Volz, Edward J, Jr.)


07/10/2008  Order Filed
Setting Status Conference


08/07/2008  Correspondence Filed

08/08/2008  Other
REQUEST TO PARTICIPATE IN STATUS CONFERENCE THROUGH CONFERENCE TELEPHONE

09/09/2008  Other
Request to Participate in Status Conference Through Conference Telephone

LEE COUNTY CLERK OF COURTS
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09/11/2008  Other
REQUEST TO PARTICIPATE IN STATUS CONFERENCE THROUGH CONFERENCE TELEPHONE


09/19/2008  Notice of Intention to Participate in Discovery Filed


09/22/2008 **Motions (4:00 PM)** (Judicial Officer: Gerald, Lynn, Jr.)
Continued by Judge


09/22/2008 Present By Attorney (Judicial Officer: Gerald, Lynn, Jr.)
Via telephone----defendant presence was waived.


09/22/2008 Motion Hearing (Judicial Officer: Gerald, Lynn, Jr.)
Status Conference---Medical Records will be released to the Defense attorney with a release


09/23/2008  Court Minutes Filed (Judicial Officer: Gerald, Lynn, Jr.)

01/06/2009  Order Filed
Scheduling Status Conference for 1/26/09

01/16/2009  Pro Se Motion Filed

01/20/2009  Other
REQUEST TO PARTICIPATE IN STATUS CONFERENCE THROUGH CONFERENCE TELEPHONE


01/20/2009  Correspondence Filed


01/23/2009  Other
REQUEST TO PARTICIPATE IN STATUS CONFERENCE THROUGH CONFERENCE TELEPHONE


01/26/2009 **Motions (3:00 PM)** (Judicial Officer: Gerald, Lynn, Jr.)
Other Action Taken (non-specific)


01/26/2009 Present By Attorney (Judicial Officer: Gerald, Lynn, Jr.)


01/26/2009 Motion Hearing (Judicial Officer: Gerald, Lynn, Jr.)
status conference--Defense to prepare consent form for release of medical records/Order prepared to transcribe the last status conference/Motion to withdraw to be set within 30 days

01/26/2009  Court Minutes Filed (Judicial Officer: Gerald, Lynn, Jr.)


01/26/2009  Motion Filed
AMENDED MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE WITH SPECIAL REQUEST FOR LEAVE TO AMEND

02/03/2009  Motion to Withdraw as Counsel Filed

02/11/2009  Notice of Hearing Filed
Motion to Withdraw


02/11/2009  Correspondence Filed

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02/13/2009  Order Filed
Authorizing Telephonic Appearances at Hearing on Motion to Withdraw

02/16/2009  Order Filed
on Status Conference Held on 1/26/09

02/16/2009  Order Filed
on Status Conference Held on 9/22/08

02/16/2009  Order Filed
Directing Clerk to Return Records to State Repository

02/19/2009  Correspondence Filed
UPS ENVELOPES


02/27/2009 **Motions (8:30 AM)** (Judicial Officer: Gerald, Lynn, Jr.)
Continued

02/27/2009 Motion Hearing
Motion to withdraw - Defense Attorney - Reserve Ruling

02/27/2009  Court Minutes Filed

03/04/2009  Order Granting Motion to Withdraw Appointing Counsel Filed
and Appointing Registry Attorney

03/09/2009  Notice of Appearance of Counsel Filed
Info sent to atty

03/12/2009  Other Document Filed
DEFENSE MOTION TO AMEND THE AMENDED MOTION FOR POST CONVICTION RELIEF, FOR THE APPOINTMENT OF AN INVESTIGATOR AND FOR THE APPOINTMENT OF A MENTAL HEALTH EXPERT

03/12/2009  Correspondence Filed

03/16/2009  Notice of Hearing Filed
Motion to amend pending motions

03/17/2009  Transcript of Proceedings Filed
1-26-09

03/19/2009  Other
REQUEST TO PARTICIPATE IN STATUS CONFERENCE THROUGH CONFERENCE TELEPHONE

03/23/2009  Other
MEMORANDUM OF LAW IN SUPPORT OF DEFENSE MOTION TO AMEND THE AMENDED MOTION FOR POST CONVICTION RELIEF

03/24/2009  Other
REQUEST TO PARTICIPATE IN STATUS CONFERENCE THROUGH CONFERENCE TELEPHONE

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03/26/2009 **Motions (1:30 PM)** (Judicial Officer: Volz, Edward J, Jr.)
Continued by Judge

03/26/2009 Motion Hearing (Judicial Officer: Volz, Edward J, Jr.)
Notice/Defendant's Pending Post Conviction Motion-Grant All Motions-May have Expert and Investigator

03/26/2009 Present By Attorney (Judicial Officer: Volz, Edward J, Jr.)
Defendant by Telephone

03/27/2009  Corrected Court Minutes Filed (Judicial Officer: Volz, Edward J, Jr.)

03/27/2009  Other
DEFENSE MOTION TO AMEND THE AMENDED MOTION FOR POST CONVICTION RELIEF, FOR THE APPOINTMENT OF AN INVESTIGATOR AND FOR THE APPOINTMENT OF A MENTAL HEALTH EXPERT

03/27/2009  Order Filed
Granting Motion for Appointment of Experts and Defendant Afforded 80 days to file Amended Motion for Post Conviction Relief

04/01/2009  Order Filed
Scheduling Status Conference for June 19, 2009

04/13/2009  Other
REQUEST TO PARTICIPATE IN STATUS CONFERENCE THROUGH CONFERENCE TELEPHONE

05/07/2009  Other
DEPT. OF FINANCIAL SERVICES APPROVED MOTION FOR THE PAYMENT OF ATTORNEY'S FEES AND INVESTIGATOR'S FEES AND COSTS

05/07/2009  Correspondence Filed

05/14/2009  Order Filed
Dept. of Financial Services to Pay Atty's Fees & Investigator's Fees

06/15/2009  Motion for Post-Conviction Relief Filed
SWORN COMPLETE, SECOND AMENDED INITIAL MOTION FOR POST CONVICTION RELIEF INCLUDING INTEGRATED MEMORANDUM OF LAW

06/19/2009 **Motions (1:30 PM)** (Judicial Officer: Volz, Edward J, Jr.)
Continued by Judge

06/19/2009 Present By Attorney (Judicial Officer: Volz, Edward J, Jr.)
Def's Telephonic Presence Waived Per Defense Counsel

06/19/2009  Court Minutes Filed (Judicial Officer: Volz, Edward J, Jr.)

06/19/2009  Order Filed
on Department of Financial Services Approved Motion for Payment of Investigator Fees and Expenses

06/19/2009  Other

LEE COUNTY CLERK OF COURTS
CASE SUMMARY
CASE NO. 95-CF-000911-A

DEPARTMENT OF FINANCIAL SERVICES APPROVED MOTION FOR PAYMENT OF INVESTIGATOR FEES AND EXPENSES

07/02/2009  Transcript of Proceedings Filed
06-19-09

07/14/2009  Other
State's Answer to Second Amended Motion to Vacte Judgment and Sentence

07/15/2009  Order Filed
Approved 2nd Motion for Pay't of Atty's Fees (Dept. of Financial Services)

07/15/2009  Other
Department of Financial Services Approved Second Motion for Payment of Attorney's Fees


08/06/2009  Order Filed
Result of Status Conference Held on 6/19/09

08/06/2009  Order Filed
Scheduling Hearing Date

08/10/2009  Order Filed
Granting Motion for Payment of Fees

08/10/2009  Confidential Documents Filed
Confidential Medical Document filed August 10, 2009 sealed in Court File until further order of the court.


08/10/2009  Other
REQUEST TO PARTICIPATE IN HUFF HEARING THROUGH CONFERENCE TELEPHONE

08/14/2009  Other
Request To Participate in Huff Hearing Through Conference Telephone

08/20/2009 **Motions (9:00 AM) (Judicial Officer: Gerald, Lynn, Jr.)**
Continued

08/20/2009 Motion Hearing (Judicial Officer: Gerald, Lynn, Jr.)
Huff Hearing-continued for evidentiary matther

08/20/2009  Court Minutes Filed (Judicial Officer: Gerald, Lynn, Jr.)

08/28/2009  Order Filed
Scheduling Evidentiary Hearing on Defendant's Second Amended Motion for Postconviction Relief
















09/03/2009  Order to Transport Filed

09/15/2009  Transcript of Proceedings Filed
HELD ON AUGUST 20, 2009

09/30/2009  Notice Filed

LEE COUNTY CLERK OF COURTS
CASE SUMMARY
CASE NO. 95-CF-000911-A

REGARDING WITNESS FOR EVIDENTIARY HEARING

10/21/2009	 Motion Filed <i>MOTION SEEKING DEPARTMENT OF FINANCIAL SERVICES APPROVED PAYMENT OF INVESTIGATOR FEES AND EXPENSES</i>
10/21/2009	 Order Filed <i>on Motion seeking Department of Financial Services Approved Payment of Investigator Fees and Expenses</i>
10/23/2009	 Subpoena(s) Returned and Filed
10/23/2009	 Subpoena(s) Returned and Filed
10/29/2009	Motions (9:00 AM) (Judicial Officer: Gerald, Lynn, Jr.) <i>Other Action Taken (non-specific)</i>
10/29/2009	 Record of Exhibits Filed
10/29/2009	Present With Attorney (Judicial Officer: Gerald, Lynn, Jr.)
10/29/2009	Motion Hearing (Judicial Officer: Gerald, Lynn, Jr.) <i>Evidentiary hearing--Assistant attorney general Carol Dittmar present court request defendant be transported back to union correctional asap</i>
10/29/2009	 Court Minutes Filed (Judicial Officer: Gerald, Lynn, Jr.)
10/29/2009	 Order to Transport Filed
10/29/2009	 Other <i>Transport booking filed</i>
11/12/2009	 Correspondence Filed <i>from the Appeals department to the Supreme Court</i>
12/22/2009	 Other <i>STATE'S POST-EVIDENTIARY HEARING CLOSING ARGUMENT</i>
12/22/2009	 Other <i>STATE'S POST-EVIDENTIARY HEARING CLOSING ARGUMENT</i>
12/22/2009	 Correspondence Filed
12/28/2009	 Other <i>POST HEARING MEMORANDUM OF LAW REGARDING SWORN COMPLETE, SECOND AMENDED INITIAL MOTION FOR POST CONVICTION RELIEF</i>
12/28/2009	 Correspondence Filed <i>record on appeal temporally returned from the Supreme Court</i>
12/30/2009	 Order Filed <i>on Department of Financial Services Approved Motion for Payment of Investigator Fees and Expenses</i>

LEE COUNTY CLERK OF COURTS
CASE SUMMARY
CASE NO. 95-CF-000911-A

12/30/2009  Motion Filed
DEPARTMENT OF FINANCIAL SERVICES APPROVED MOTION FOR PAYMENT OF INVESTIGATOR FEES AND INVESTIGATOR EXPENSES

01/06/2010  Transcript of Proceedings Filed
HELD ON 9-22-08

01/15/2010  Transcript of Proceedings Filed
held on 10-29-09

01/19/2010 Other
Supreme Court record on appeal provided to the Staff Attorney for the Judge to review

01/19/2010  Acknowledgment Record on Appeal Receipt Filed
2765819

03/05/2010  Order Denying Motion for Post-Conviction Relief Filed

03/18/2010  Notice of Appeal Filed

03/18/2010  Judicial Acts to be Reviewed Filed

03/22/2010 Other
record on appeal returned to the Appeals Department from the Staff Attorney

03/23/2010  Clerk's Certificate of Notice of Appeal to 2nd DCA Filed

03/24/2010 Other
record on appeal returned to the Supreme Court

04/01/2010  Motion Filed
Department of Financial Services Approved Motion For the Payment of Attorney's Fees Upon The Rendition of Order Denying Post Conviction Relief

04/05/2010  Acknowledgment of New Case - Appeal Filed

04/05/2010  Supreme Court Order Filed

04/06/2010  Order Filed
scheduling Status Conference


04/08/2010  Acknowledgment Record on Appeal Receipt Filed


04/15/2010  Other
REQUEST TO PARTICIPATE IN MAY 6, 2010 STATUS HEARING THROUGH CONFERENCE TELEPHONE


04/15/2010  Correspondence Filed


04/15/2010  Other
MEMORANDUM

LEE COUNTY CLERK OF COURTS
CASE SUMMARY
CASE NO. 95-CF-000911-A

04/21/2010  Order Filed
on Department of Financial Services Approved Motion for Payment of Attorney's Fees Upon Rendition of Order Denying Post Conviction Relief

04/21/2010  Directions to Clerk Filed

04/22/2010  Order Filed
Rescheduling Status Conference


04/23/2010  Directions to Clerk Filed


05/05/2010 **Motions (1:30 PM)** (Judicial Officer: Cary, G Keith)
Motion-Status Conference Held

05/05/2010 Present By Attorney (Judicial Officer: Cary, G Keith)


05/05/2010 Motion Hearing (Judicial Officer: Cary, G Keith)
Status conf.-order to follow from staff attorney


05/06/2010 **CANCELED Motions (9:00 AM)** (Judicial Officer: Gerald, Lynn, Jr.)
New Court Date Set


05/06/2010  Court Minutes Filed (Judicial Officer: Cary, G Keith)


05/10/2010  Order Filed
Report on Status Conference Held on May 5, 2010


05/11/2010 Other
record on appeal sent to Supreme Court Attorney General and Baya Harrison Esq


05/11/2010  Transcript of Record - Index of Appeal Filed


05/17/2010  Acknowledgment Record on Appeal Receipt Filed


05/17/2010  Acknowledgment Record on Appeal Receipt Filed


05/19/2010  Motion Filed
For Payment of Court Reporter

06/11/2010  Order Filed
on Motion for Payment of Court Reporter


06/11/2010  Motion Filed
FOR PAYMENT OF COURT REPORTER


10/06/2010  Order for Payment of Attorney's Fees and Costs Filed


10/06/2010  Motion Filed
For Payment of Attorney Fees


03/04/2011  Motion Filed


LEE COUNTY CLERK OF COURTS
CASE SUMMARY
CASE NO. 95-CF-000911-A


03/09/2011  Motion Filed


03/09/2011  Order Filed
RE: Attorney Fees


08/01/2011  Mandate Filed


08/04/2011  Motion Filed
for Payment of Attorney's Fees Upon Order of Supreme Court of Florida Affirming Denial of rule 3.850 Motion to Vacate Judgments of Conviction and Sentences, Including Death Sentence


08/18/2011  Order Filed
granting motion for payment of attorney's fees


06/04/2013  Motion Filed
State's Motion to Confirm Legal Representation


08/05/2013  State Response to Motion Filed
to Determine Counsel


09/11/2013  Other Document Filed
Justice Administrative Commission's Notice to Court as Required


01/17/2014  Order Filed


01/28/2014  Returned Mail and Contents Filed

01/31/2014  Pro Se Motion Filed

02/25/2014  Order Filed

03/10/2014  Notice of Hearing Filed


03/14/2014  Order to Transport Filed


03/20/2014  Notice of Appearance of Counsel Filed

04/21/2014 **Motions (1:30 PM)** (Judicial Officer: Volz, Edward J, Jr.)
Court Reserves Ruling on Motion


04/21/2014 Present With Attorney (Judicial Officer: Volz, Edward J, Jr.)

04/21/2014 Motion Hearing (Judicial Officer: Volz, Edward J, Jr.)
Nelson Farretta Hearing--Court Reserves ruling

04/21/2014  Court Minutes Filed (Judicial Officer: Volz, Edward J, Jr.)

04/24/2014  Order Filed

LEE COUNTY CLERK OF COURTS
CASE SUMMARY
CASE NO. 95-CF-000911-A

05/01/2014	 Returned Mail and Contents Filed
05/02/2014	 Correspondence Filed <i>To judge</i>
10/07/2016	 Motion for Post-Conviction Relief Filed
10/07/2016	 Motion for Post-Conviction Relief Filed
10/07/2016	 Pro Se Motion Filed <i>Motion to Dismiss Counsel</i>
10/10/2016	 Pro Se Motion Filed <i>Motion to dismiss counsel</i>
10/10/2016	 Motion for Post-Conviction Relief Filed
10/10/2016	 Pro Se Motion Filed <i>Motion for Leave to Amend Defendant's 3.851 Successive Motion for Postconviction Relief</i>
10/10/2016	 Motion to Dismiss Filed
10/19/2016	 Order of Reassignment Filed
10/26/2016	 Returned Mail and Contents Filed
10/31/2016	 Response to Motion to Dismiss Filed
11/01/2016	 Order Striking Motion Filed
11/01/2016	 Order Allowing Withdrawal Of Counsel Filed <i>Appointing counsel from registry</i>
11/08/2016	 Motion to Withdraw as Counsel Filed
11/10/2016	 Motion for Rehearing Filed
11/15/2016	 Returned Mail and Contents Filed
11/21/2016	 Order Filed
12/06/2016	 Order Filed <i>Denying Motion to Withdraw</i>
01/11/2017	 Motion for Post-Conviction Relief Filed
01/11/2017	 Motion Filed
01/11/2017	

LEE COUNTY CLERK OF COURTS
CASE SUMMARY
CASE NO. 95-CF-000911-A

 Notice of Appearance of Counsel Filed

01/11/2017  Motion Filed

01/20/2017  Motion to Strike Filed

01/23/2017  Response Filed

01/24/2017  Order Filed
Granting motion to exceed the Page Limit

01/24/2017  Order Filed
denying State's Motion to Strike

01/24/2017 Order - Denied

01/24/2017  Order Dismissing Motion Filed
to Amend

02/03/2017  Answers Filed

02/07/2017  Order Filed
Order Scheduling Case Management Conference

02/08/2017 **Case Management Conference (1:30 PM)** (Judicial Officer: Fuller, Joseph C, Jr.)
Added pre Docket
Hearing Withdrawn/Cancelled

02/08/2017 Motion Hearing
Status--Cancelled prior to court

02/08/2017  Court Minutes Filed

02/09/2017  Motion Filed

02/15/2017  Order Denying Motion for Continuance Filed
CMC

02/17/2017  Request Filed

03/02/2017  Motion Filed










03/02/2017  Defendant's Exhibit Filed

03/02/2017  Motion Filed

03/06/2017  Order Filed
Granting Second Motion to Amend

03/09/2017 **Case Management Conference (9:00 AM)** (Judicial Officer: Fuller, Joseph C, Jr.)
Court Reserves Ruling on Motion

LEE COUNTY CLERK OF COURTS
CASE SUMMARY
CASE NO. 95-CF-000911-A

03/09/2017	Present With Attorney
03/09/2017	Motion Hearing <i>Amended motion to vacate death sentence or correct illegal sentence--Court reserves ruling</i>
03/09/2017	 Court Minutes Filed
03/20/2017	 Transcript of Proceedings Filed <i>3-9-16</i>
04/19/2017	 Order Denying Motion Filed <i>Final Order Denying Successive 3.851 Motion</i>
05/03/2017	 Notice of Substitution/Change of Counsel Filed
05/15/2017	 Notice of Appeal to Supreme Court Filed <i>copy provided to the judge</i>
05/15/2017	 Judicial Acts to be Reviewed Filed
05/15/2017	 Directions to Clerk Filed
05/15/2017	 Designation to Court Reporter Filed
05/22/2017	Other <i>Notice of Appeal Sent to the Supreme Court</i>
05/31/2017	 Request Filed

DATE	FINANCIAL INFORMATION
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Defendant Nelson, Joshua D		
Total Charges		26.00
Total Payments and Credits		26.00
Balance Due as of 6/2/2017		0.00

STATE OF FLORIDA,
PLAINTIFF,

95CF911A
CASE No.: 95-911CF

VS.

JOSHUA D. NELSON,
DEFENDANT.

Copies sent to SAC, Court Admin, (A),
Judge Fuller, Atty. Baya: bayalaw@aol.com
10/07/16 JH

MOTION FOR LEAVE TO AMEND DEFENDANT'S 3.851
SUCCESSIVE MOTION FOR POSTCONVICTION RELIEF

COMES NOW THE DEFENDANT, JOSHUA D. NELSON, PRO SE, BEFORE THIS HONORABLE COURT REQUESTING LEAVE TO AMEND THE DEFENDANT'S SUCCESSIVE 3.851 MOTION FOR POSTCONVICTION RELIEF.

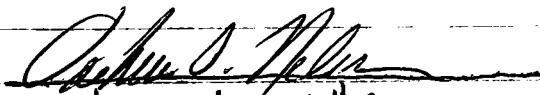
AS THIS COURT IS AWARE ON JANUARY 12, 2016 THE UNITED STATES SUPREME COURT RULED IN HURST V. FLORIDA, 136 S. CT. 616 (2016) THAT FLORIDA'S CAPITAL SENTENCING SCHEME WAS HELD TO BE UNCONSTITUTIONAL. MR. NELSON WAS SENTENCED UNDER THAT UNCONSTITUTIONAL SCHEME. SINCE THE UNITED STATES SUPREME COURT RULING THERE HAVE BEEN NUMEROUS CASES ARGUED BEFORE THE FLORIDA SUPREME COURT TO DETERMINE THE IMPACT OF THE HURST RULING ON CAPITAL CASES INCLUDING POST CONVICTION CAPITAL CASES SUCH AS MR. NELSON'S. IN ORDER TO PROTECT MR. NELSON'S CONSTITUTIONAL RIGHTS INCLUDING HIS SIXTH AMENDMENT RIGHT TO JURY TRIAL THESE ISSUES MUST BE FULLY LITIGATED IN THE STATE COURT TO EXHAUST THE CLAIMS AS REQUIRED BY LAW. THE FULL EXTENT AND IMPACT OF HURST IS NOT KNOWN AT THIS TIME AS THE PENDING CASES WITH THE FLORIDA SUPREME COURT HAVE

1)

YET TO BE RULED ON.

MR. NELSON RESPECTFULLY REQUESTS LEAVE TO AMEND IN ORDER TO FULLY LITIGATE AND EXHAUST EACH ISSUE THAT MAY ARISE IN THE NEAR FUTURE REGARDING "HURST'S" APPLICATION TO FLORIDA CAPITAL LAWS.

RESPECTFULLY SUBMITTED,



JOSHUA D. NELSON # 989102

P-2220

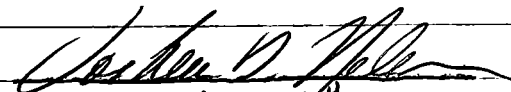
UNION C.I.

P.O. BOX 1000

RAIFORD, FL. 32083

OATH

UNDER PENALTY OF PERJURY, I DECLARE THAT I HAVE READ THE FOREGOING MOTION AND THAT THE FACTS IN IT ARE TRUE.



JOSHUA D. NELSON # 989102

P-2220

UNION C.I.

P.O. BOX 1000

RAIFORD, FL. 32083

COPIES PROVIDED TO:

HON. EDWARD J. VOLZ, JR.

CIRCUIT COURT

LEE COUNTY JUSTICE CENTER,

1700 MONROE STREET,

FT. MYERS, FL. 33902

MRS. CAROL VITMAN

OFFICE OF THE ATTORNEY GENERAL OF FLORIDA

3507 FRONTAGE ROAD, SUITE 200,

TAMPA, FL. 33607

LINDA DOGBETT

CLERK OF COURT

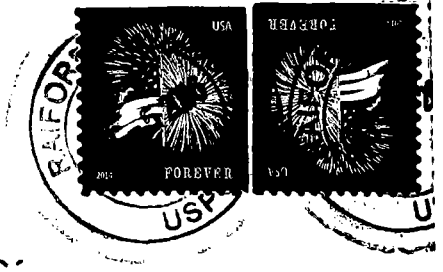
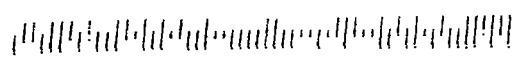
CRIMINAL DIVISION

P.O. BOX 2507

FT. MYERS, FL. 33902-2507

JOSHUA NELSON # 989102

P- 2220
UNION C.I.
P.O. BOX 1000
RAIFORD, FL.
32083



HON. EDWARD J. VOLZ, JR.
CIRCUIT COURT JUDGE
LEE COUNTY JUSTICE CENTER
1700 MONROE STREET
FT. MYERS, FL.

33902

Q

STATE OF FLORIDA,
PLAINTIFF,

95CF911A
CASE NO.: 95-911CF

VS.

JOSHUA D. NELSON,
DEFENDANT.

Copies sent to SAO, (A), Court Admin,
Atty. Baya: bayalaw@aol.com, Judge Fuller
10/07/16 JK

SUCCESSIVE MOTION FOR POSTCONVICTION RELIEF

COMES NOW, THE DEFENDANT, JOSHUA NELSON, PRO SE, AND FILES THIS "SUCCESSIVE MOTION FOR POSTCONVICTION RELIEF" UNDER FLA. R. CRIM. P. 3.851. THIS DEFENDANT MOVES TO VACATE THE SENTENCE OF DEATH IMPOSED IN THE ABOVE-STYLED CASE AND SAYS:

FACTS AND PROCEDURAL HISTORY

1. THE DEFENDANT WAS INDICTED FOR ROBBERY WITH A DEADLY WEAPON AND FIRST DEGREE MURDER IN THE ABOVE-STYLED CASE.
2. THE DEFENDANT ENTERED A PLEA OF NOT GUILTY AND PROCEEDED TO TRIAL, WHERE A JURY OF TWELVE PERSONS FOUND THE DEFENDANT GUILTY AS CHARGED AND RECOMMENDED A SENTENCE OF DEATH BY A VOTE OF 12-0.
3. THE TRIAL COURT THEN CONDUCTED A SPENCER HEARING, AND MADE FACTUAL FINDINGS THAT THE STATE HAD PROVEN THREE AGGRAVATING FACTORS:
(1) THE MURDER WAS

committed in the course of a robbery; (2) the murder was especially heinous, atrocious, or cruel (HAC); and (3) the murder was committed in a cold, calculated, and premeditated manner without any pretense of legal or moral justification (CCP).

4. The trial court found one statutory mitigating circumstance proven: the Defendant's age at the time of the crime, and assigned it great weight. The court also found 15 non-statutory mitigating factors, assigning substantial weight to one and little or moderate weight to the rest.

5. The trial court then sentenced the Defendant to death and to 189 months imprisonment for the robbery.

6. The Defendant appealed to the Florida Supreme Court, raising the following issues:

(1) the trial court erred by failing to properly determine the admissibility of testimony by the State's DNA expert Darren Esposito; (2) the trial court violated Nelson's right to confrontation by admitting evidence of his nontestifying codefendant's out-of-court statement; (3) the trial court failed to weigh Nelson's history of substance abuse as a mitigator; (4) the trial court improperly found CCP; (5) the trial court improperly found HAC; (6) the trial court gave the jury a vague instruction on the HAC aggravator; and (7) the death sentence is disproportionate in this case.

Nelson v. State, 748 So. 2d 237, 240 (Fla. 1999). On May 27, 1999, the Florida Supreme Court affirmed the convictions and sentences. *Id* at 246.

7. The Defendant filed a motion for postconviction relief raising the following claims as described by the Florida Supreme Court:

The specific claims outlined in the second amended motion were that trial counsel were ineffective because they (1) failed to guarantee that a fair and impartial jury tried Nelson; (2) failed to present mitigating evidence of Nelson's drug and substance abuse and mental health problems during the penalty phase; (3) failed to bring to the attention of the jury the nature and extent of the neglect and abuse, especially sexual abuse, which Nelson suffered as a child when they failed to present the testimony of Nelson's mother and stepfather during the penalty phase; (4) failed to provide Nelson's mental health expert with the information necessary to diagnose ADHD, Bipolar Disorder, and Adjustment Disorder with Anxiety, all of which Nelson purportedly suffered from at the time of the homicide; (5) failed to object and move for a mistrial when the State impermissibly appealed to the sympathy of the jury during closing arguments; (6) failed to ask the trial court to sequester the jury or at least to admonish the jury not to listen to, watch, or read media reports concerning Nelson's case between the guilt and penalty phases, which led to juror encounters with media that pertained to a tattoo Nelson engraved on himself between the two phases of trial that read "natural born killer"; (7) failed to ensure that the trial court properly swore the jurors; and (8) the cumulative effect of the various acts and omissions by trial counsel constituted ineffective assistance of counsel. Finally, Nelson argued {"pageset": "S7" *84 that (9) the trial court should vacate his convictions and sentences due to the newly discovered evidence that the State, in the case of codefendant Brennan, alleged that Brennan was more emotionally mature than Nelson, and Brennan received a life sentence.

Nelson v. State, 73 So. 3d 77, 83-84 (Fla. 2011).

8. After an evidentiary hearing, this court denied the motion and the Florida Supreme Court affirmed. *Id* at 91.

9. On May 25, 2011, the Defendant filed a pro se petition for writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court. The petition was transferred to the Fort Myers division and counsel appointed. Counsel filed an amended petition on December 3, 2012, raising the following eight claims:

- (1) Admission of co-defendant's statement violated Confrontation Clause;
- (2) Admission of DNA expert witness testimony resulted in unfair trial;
- (3) Failure to weigh mitigating circumstances violated 8th Amendment;
- (4) Weighing CCP aggravator violated 8th Amendment;
- (5) Weighing HAC aggravator violated 8th Amendment;
- (6) Jury instruction on HAC aggravator was unconstitutionally vague;
- (7) Ineffective assistance of trial counsel at guilt and penalty phases;
- (8) Co-defendant's life sentence renders death sentence unconstitutional.

10. On August 20, 2014, the U.S. District Court entered an order denying grounds 1-7 and dismissing ground 8 as unexhausted and procedurally barred. The court granted a certificate of appealability as to ground one.

11. The Defendant appealed the denial of his federal habeas corpus petition to the Eleventh Circuit Court of Appeals in Case No. 14-14371. The sole issue presented was whether the admission of co-defendant hearsay statements

through the testimony of other witnesses violated the Defendant's Sixth Amendment right of confrontation. That appeal remains pending and oral argument is scheduled for April 5, 2016. The issue presented in that case is wholly unrelated to the claim raised in this motion. Therefore, this court has concurrent jurisdiction to consider a motion raising a new claim. *See Bryant v. State*, 102 So. 3d 660 (Fla. 2nd DCA 2012).

12. No other motions have been filed in this court attacking the judgment and sentence, and no other appeals are pending except for 14-14371.

Ground for Relief

I. IMPOSITION OF THE DEATH PENALTY BASED ON AGGRAVATING FACTORS NOT FOUND BY THE JURY VIOLATED DEFENDANT'S SIXTH AMENDMENT RIGHT TO TRIAL BY JURY

The Defendant was charged with armed robbery and first-degree murder, and exercised his constitutional right to a trial by jury. The jury found the Defendant guilty as charged and returned an advisory recommendation of death by a vote of 12-0. The trial court then conducted a *Spencer* hearing and made factual findings as to the existence of three aggravating circumstances: (1) the murder was committed in the course of a robbery; (2) HAC; and (3) CCP. The jury did not make findings on whether the State proved the aggravating factors beyond a reasonable doubt.

This sentencing procedure violated the Defendant's Sixth Amendment right

to trial by jury. Every fact, other than the fact of a prior conviction, that increases the punishment for a crime is an offense element that must be submitted to the jury and found beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000). On January 12, 2016, the Supreme Court of the United States held that Florida's capital sentencing scheme is unconstitutional. The Court held that § 921.141, Florida Statutes, which requires the jury to make only an advisory recommendation of death and allows the court to make factual findings as to the aggravating factors necessary to allow imposition of the death penalty, violates the Sixth Amendment right to trial by jury. *Hurst v. Florida*, 136 S. Ct. 616 (2016).

a. Timeliness

Any motion to vacate a judgment of conviction and sentence of death must be filed within one year after the judgment and sentence become final. Fla. R. Crim. P. 3.851(d)(1). However, subsection (d)(2) provides an exception to that rule that applies in this case:

(2) No motion shall be filed or considered pursuant to this rule if filed beyond the time limitation provided in subdivision (d)(1) unless it alleges:

* * *

(B) the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively....

Fla. R. Crim. P. 3.851(d)(2); *Walton v. State*, 77 So. 3d 639 (Fla. 2011).

The constitutional right to a jury determination of all facts necessary for the imposition of the death penalty, as announced in *Hurst*, was not established at the time the Defendant's conviction and sentence became final or within one year thereafter. Accordingly, the Defendant is entitled to assert a timely claim under *Hurst* if that decision meets the test for retroactivity under *Witt v. State*, 387 So. 2d 922 (Fla. 1980). For the reasons that follow, *Hurst* is a watershed rule of criminal procedure that should be applied retroactively.

b. Retroactivity:

The rule announced in *Hurst* did not exist when the Defendant filed his first motion for postconviction relief, and in fact, there were precedents in effect at that time holding to the contrary. *See Hildwin v. Florida*, 490 U.S. 638, 109 S. Ct. 2055 (1989) (holding that Sixth Amendment right to trial by jury does not prevent judge from finding aggravating circumstances authorizing death sentence); *Spaziano v. Florida*, 468 U.S. 447, 104 S. Ct. 3154 (1984) (upholding § 921.141 and stating that advisory scheme is not unconstitutional). The Supreme Court had to overrule these prior decisions when deciding *Hurst*. As a result, the *Hurst* decision constitutes a significant upheaval in Sixth Amendment jurisprudence that must be applied retroactively under the standard set forth in *Witt*.

Under *Witt*, the need for decisional finality is balanced against the need for fairness and uniformity in the application of the law. A change in the law will only

be considered in a capital case if it (a) emanates from the Florida Supreme Court or the Supreme Court of the United States, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance. *Witt*, 387 So. 2d at 931. In this case, the *Hurst* decision was rendered by the U.S. Supreme Court based on an interpretation of the right to trial by jury under the Sixth Amendment to the U.S. Constitution. Thus, the first two factors are clearly established.

Cases that constitute a development of fundamental significance generally fall into two categories: (a) changes in the law which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties; or (b) changes in the law which are of sufficient magnitude to necessitate retroactive application under the three-part test established in *Stovall v. Denno*¹ and *Linkletter v. Walker*². *Id* at 961.

Under the *Stovall-Linkletter* test, the “essential considerations in determining whether a new rule of law should be applied retroactively are essentially three: (a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule.” *Id* at 926. In addition, special concerns for individual fairness and uniformity lend additional weight in favor of retroactivity in cases involving the

¹ 388 U.S. 293, 87 S. Ct. 1967 (1967).

² 381 U.S. 618, 85 S. Ct. 1731 (1965).

death penalty. The constitutional validity of the death penalty itself is dependent upon uniform application of one standard to all capital cases. *Id* at 926 n.7.

The purpose of the rule announced in *Hurst* was to protect capital defendants' inalienable and fundamental right under the Sixth Amendment to have any element of an offense that increases the punishment for a crime submitted to a jury and found beyond a reasonable doubt, and to overrule earlier precedents that did not adequately protect that right. The new rule scrupulously honors those constitutional safeguards that stand between a criminal defendant and death by execution, recognizing that death is unlike any other form of criminal punishment:

From the point of view of the defendant, it is different in both its severity and finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.

Gardner v. Florida, 430 U.S. 349, 357-58, 97 S. Ct. 1197 (1977). This compelling interest in promoting the integrity of the judicial process weighs heavily in favor of retroactivity. *Compare Linkletter*, 381 U.S. at 637 (holding that deterrent effect of exclusionary rule on police misconduct would not be advanced by making rule retroactive to conduct that had already occurred).

As to the second factor, Florida's reliance on the old rule is limited. There are presently only 390 condemned prisoners on death row in Florida who were sentenced under the unconstitutional scheme invalidated in *Hurst*. Some of these cases are still pending on direct appeal and entitled to the benefit of *Hurst* anyway. Others may be weeded out by harmless error analysis, which the Supreme Court expressly authorized the states to utilize. *See Hurst*, 136 S. Ct. at 624. Thus, the number of affected cases is limited.

The impact on the administration of justice will also be relatively minor. Applying *Hurst* retroactively will not lead to the suppression of evidence and mass acquittals or other undesirable results. Capital defendants will still face the possibility of a death sentence at a new penalty phase, or a sentence of life imprisonment without parole. In most cases, the State will be able to present the same evidence that was presented in the original penalty phase trial. The convictions will remain intact, with only the question of sentence to be readdressed. As stated above, the number of cases affected by retroactive application of *Hurst* will be limited. The impact on the administration of justice will therefore be very manageable. *Compare Linkletter*, 381 U.S. at 637 (noting that retroactive applicability of exclusionary rule would lead to wholesale release of prisoners).

An additional consideration in capital cases is the need for uniform application of the death penalty to similarly situated defendants. As the Florida Supreme Court stated in *Witt*:

Considerations of fairness and uniformity make it very difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases.

Witt, 387 So. 2d at 925 (internal quotation marks omitted). Thus, when a defendant's life is at stake, the State's interest in finality is less compelling and the need for consistency in results carries more weight in a retroactivity analysis.

Florida has applied other landmark Sixth Amendment decisions retroactively. *See e.g. Witt*, 387 So. 2d at 927 (applying right to counsel announced in *Gideon v. Wainwright* retroactively); *Riley v. Wainwright*, 517 So. 2d 656 (Fla. 1987) (applying right to consideration of non-statutory mitigating evidence announced in *Lockett v. Ohio* and *Hitchcock v. Dugger* retroactively); *Jamés v. State*, 615 So. 2d 668 (Fla. 1993) (applying *Espinoza v. Florida* retroactively to allow resentencing in case where vague instruction on HAC aggravator given). *Hurst* is no less significant than these decisions.

Finally, the Florida Supreme Court's prior decision in *Johnson v. State*, 904 So. 2d 400 (Fla. 2005), which held that *Ring v. Arizona* is not retroactive in Florida, is not *stare decisis* on the retroactivity of *Hurst*. *Johnson* held that *Ring* does not apply retroactively in Florida because it concerned an Arizona sentencing

scheme and had no applicability in Florida. *Id* at 406. By contrast, *Hurst* directly impacts Florida's capital sentencing statute, and overruled the line of cases relied on in *Johnson* to justify the non-retroactivity ruling. *See Hurst*, 2016 WL 112683 (stating that "[w]e now expressly overrule *Spaziano* and *Hildwin* in relevant part).

The Defendant therefore requests that the court apply *Hurst* retroactively to this case. Alternatively, the issue of the retroactivity of the *Hurst* decision has been briefed and orally argued before the Florida Supreme Court in the case of *Cary Lambrix v. State of Florida*, Case No. SC16-56, and a decision is pending. The Defendant requests that the Court hold this motion in abeyance until the matter of retroactivity has been decided.

c. Application of Hurst to this case

The jury did not make factual findings supporting any of the three aggravating factors relied upon to impose the death penalty in this case. The Sixth Amendment right to trial by jury applies to all factual findings necessary to increase the punishment for murder from life imprisonment to the death penalty, other than the fact of a prior conviction. *See Almendarez-Torres v. United States*, 523 U.S. 224; 118 S. Ct. 1219 (1998) (recognizing prior record exception to jury trial requirement). Therefore, application of *Hurst* invalidates all three of the aggravating factors in this case: that the murder was committed in the course of committing a robbery, HAC, and CCP.

As a result, the Defendant did not receive a fair or reliable penalty phase jury trial, and there has been no verdict within the meaning of the Sixth Amendment finding any aggravating factor proven beyond a reasonable doubt. Under *Hurst*, the Defendant was unconstitutionally sentenced to death based on judicial fact-finding under an invalid statutory scheme.

d. Harmless error analysis

It is not possible to determine in this case that the consideration of three invalid aggravating factors was harmless beyond a reasonable doubt. All of the aggravating factors in the case were found in violation of the right to trial by jury. There are no other valid aggravating factors, and there was considerable evidence presented in mitigation.

Harmless error analysis was never intended to be a substitute for a jury trial. *See Sullivan v. Louisiana*, 508 U.S. 275, 279-80 113 S. Ct. 2078 (1993) (stating that proper role of harmless error analysis is to determine effect of error on the jury's verdict actually rendered in the case, not to provide a substitute for a verdict that was never rendered within the meaning of the Sixth Amendment). The prohibition on directed verdicts in criminal cases similarly precludes a court from speculating that a jury would have returned a guilty verdict had they been afforded the opportunity to do so. *Id* at 280; *Compare Arizona v. Fulminante*, 499 U.S. 279, 308, 111 S. Ct. 1246 (1991) (stating that harmless error doctrine is properly

applied to trial error which occurs during the presentation of evidence to the jury rather than to the wholesale denial of basic trial rights). The Defendant is therefore entitled to a new penalty phase jury trial and unanimous jury verdicts as to any aggravating factors that will be used to justify a sentence of death.

e. Application of revised statute

In response to the *Hurst* decision, the Legislature enacted Ch. 2016-13, Laws of Florida (2016), which made substantial revisions to the capital sentencing procedure in § 921.141. The new statute completely eliminates judicial fact-finding and greatly expands the role of the jury in capital sentencing. Under the revised statute, the roles of the judge and jury are as follows:

(2) Findings and recommended sentence by the jury.--
This subsection applies only if the defendant has not waived his or her right a sentencing proceeding by a jury.

(a) After hearing all of the evidence presented regarding aggravating factors and mitigating circumstances, the jury shall deliberate and determine if the state has proven, beyond a reasonable doubt, the existence of at least one aggravating factor set forth in subsection (6).

(b) The jury shall return findings identifying each aggravating factor found to exist. A finding that an aggravating factor exists must be unanimous. If the jury:

1. Does not unanimously find at least one aggravating factor, the defendant is ineligible for a sentence of death.

2. Unanimously finds at least one aggravating factor, the defendant is eligible for a sentence of death and the jury shall make a recommendation to the court as to whether the defendant shall be sentenced to life imprisonment without the possibility of parole or to death. The recommendation shall be based on a weighing of all of the following:

a. Whether sufficient aggravating factors exist.

b. Whether aggravating factors exist which outweigh the mitigating circumstances found to exist.

c. Based on the considerations in subparagraphs a. and b., whether the defendant should be sentenced to life imprisonment without the possibility of parole or to death.

(c) If at least 10 jurors determine that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of death. If fewer than 10 jurors determine that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of life imprisonment without the possibility of parole.

(3) Imposition of sentence of life imprisonment or death.

(a) If the jury has recommended a sentence of:

1. Life imprisonment without the possibility of parole, the court shall impose the recommended sentence.

2. Death, the court, after considering each aggravating factor found by the jury and all mitigating circumstances,

MAY IMPOSE A SENTENCE OF LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE OR A SENTENCE OF DEATH. THE COURT MAY CONSIDER ONLY AN AGGRAVATING FACTOR THAT WAS UNANIMOUSLY FOUND TO EXIST BY THE JURY.

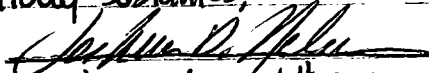
§ 921.141 (2), FLA. STAT. (2016)

THUS, THE SPENCER HEARING PROCEDURE UTILIZED IN THIS CASE IS CONTRARY TO BOTH CONSTITUTIONAL LIMITATIONS AND THE REQUIREMENTS OF THE REVISED STATUTE. BEFORE A DEFENDANT CAN USEFULLY BE SENTENCED TO DEATH UNDER THE SIXTH AMENDMENT AND THE REVISED § 921.141, THE JURY MUST (1) MAKE A UNANIMOUS FINDING THAT THE STATE PROVED AT LEAST ONE AGGRAVATING FACTOR BEYOND A REASONABLE DOUBT, (2) WEIGH THE AGGRAVATING FACTORS FOR SUFFICIENCY, AND TO DETERMINE WHETHER THEY OUTWEIGH THE MITIGATING CIRCUMSTANCES AND JUSTIFY A SENTENCE OF DEATH, AND (3) RECOMMEND TO THE COURT BY A VOTE OF NOT LESS THAN 10-2 THAT THE DEFENDANT BE SENTENCED TO DEATH.

IN CONCLUSION

BASED ON THE FOREGOING, THE DEFENDANT MOVES TO VACATE THE SENTENCE OF DEATH IMPOSED IN THE ABOVE STYLED CASE.

RESPECTFULLY SUBMITTED,


JOSHUA D. NELSON # 989102

P. 2220

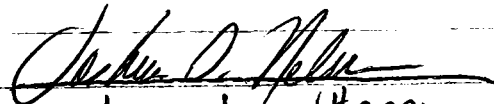
UNION C.I.

P.O. BOX 1000

RAIFORD, FL. 32083

CERTIFICATE OF SERVICE

I, JOSHUA D. NELSON, DO HEREBY CERTIFY THAT A TRUE AND CORRECT COPY OF THE FOREGOING "SUCCESSIVE MOTION FOR POST CONVICTION RELIEF" HAS BEEN SENT BY FIRST CLASS U.S. MAIL THIS DAY 3RD OF OCTOBER TO THE FOLLOWING;


JOSHUA D. NELSON #989102
P. 2220
UNION C.I.
P.O. BOX 1000
UNION, FL. 32083

HON. EDWARD J. VOLZ, JR.
CIRCUIT COURT,
LEE COUNTY JUSTICE CENTER,
1700 MONROE STREET,
FT. MYERS, FL. 33902

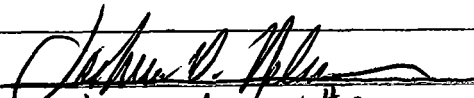
MS. CAROL OTTUM
OFFICE OF THE ATTORNEY GENERAL OF FLORIDA
3507 FRONTAGE ROAD, SUITE 200,
TAMPA, FL. 33607

LINDA DOBGETT
CLERK OF COURT
CRIMINAL DIVISION
P.O. BOX 2507
FT. MYERS, FL. 33902-2507

OATH AND VERIFICATION

UNDER PENALTY OF PERJURY, I, JOSHUA D. NELSON, DECLARE THAT I HAVE
READ THE FOREGOING: "SUCCESSIVE MOTION FOR POSTCONVICTION RELIEF"
AND THAT THE FACTS AND MATTERS STATED HEREIN ARE TRUE AND CORRECT,
(PURSUANT TO FLA. STATUTE 92.525)

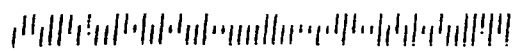
OCTOBER 31ST 2016
DATE


JOSHUA D. NELSON # 999102
P. 9990
UNION C.I.
P.O. BOX 1000
RAIFORD, FL.
32083

JOSHUA NELSON # 989102

P- 2220
UNION C.I.
P.O. BOX 1000
RAIFORD, FL.

32083



HON. EDWARD J. VOLZ, JR.
CIRCUIT COURT JUDGE
LEE COUNTY JUSTICE CENTER
1700 MONROE STREET
FT. MYERS, FL.

33902

④

STATE OF FLORIDA,
PLAINTIFF,

Copies sent to SAO, Court Admin, (A),
Judge Fuller, Harrison, Baya: bayalaw@aol.com
10/07/16 /A

CASE No. 95-911CF
95CF911A

vs.

JOSHUA D. NELSON,
DEFENDANT,

RECIEVED
UNION CORRECTIONAL INSTITUTION

OCT 04 2016

BY: _____
FOR MAILING

MOTION TO DISMISS COUNSEL

COMES NOW THE DEFENDANT, DEATH ROW INMATE, JOSHUA D. NELSON, PRO SE, BEFORE THIS HONORABLE COURT REQUESTING THAT CURRENT REGISTRY COUNSEL, MR. BAYA HARRISON, BE DISMISSED AS COUNSEL OF RECORD. DEFENDANT UNERQUIVOCALLY SEEKS REMOVAL OF BAYA HARRISON, AS COUNSEL, DUE TO IRRECONCILABLE CONFLICTS.

ON JANUARY 31, 2014 THE DEFENDANT FILED A MOTION TO DISCHARGE COURT APPOINTED COUNSEL. ON APRIL 21, 2014 A NELSON HEARING WAS HELD BY THIS COURT. ON APRIL 23, 2014 THIS COURT ISSUED A DECISION BASED UPON THOSE FACTS. ALTHOUGH IN THE COURT'S ORDER, (ATTACHED - EXHIBIT A), DENYING THE DEFENDANT'S MOTION TO DISMISS COURT APPOINTED COUNSEL. THE COURT DID NOT ADDRESS DEFENDANT'S CLAIM THAT A COMPLETE BREAKDOWN OF COMMUNICATIONS HAD OCCURRED. THE DEFENDANT UNDERSTAND THAT THE FEDERAL COURTS HAS NO SAYING ON THIS COURT'S DECISIONS. IN THE FEDERAL COURT'S ORDER IN RESPONSE TO THE DEFENDANT'S MOTION TO DISMISS AND THE FOLLOWING HEARING, (ATTACHED EXHIBIT B), THE COURT STATED, "DURING THE HEARING, IT WAS APPARENT TO THIS COURT THAT MR. HARRISON RECOGNIZES THAT THE ATTORNEY-CLIENT RELATIONSHIP IS UNFORTUNATELY BROKEN." MR. HARRISON ACKNOWLEDGED

THAT THE BREAKDOWN HAD OCCURRED WHICH LEFT THE ATTORNEY-CLIENT RELATIONSHIP IRRETRIEVABLY BROKEN. DURING THE NELSON HEARING HELD IN THIS COURT MR. HARRISON RELUCTANTLY ADMITTED THAT MAYBE HE HAD NOT COMMUNICATED CLEARLY ENOUGH WITH THE DEFENDANT.

FLORIDA RULES REGULATING THE FLORIDA BAR RULE 4-1.4(2), INFORMING CLIENT OF STATUS OF REPRESENTATION (A LAWYER SHALL KEEP A CLIENT REASONABLY INFORMED ABOUT THE STATUS OF A MATTER AND PROMPTLY COMPLY WITH REASONABLE REQUESTS FOR INFORMATION.) EVEN THOUGH DEFENDANT HAD LOST ALL CONFIDENCE IN MR. HARRISON PER THE COURT'S ORDER DENYING DEFENDANT'S MOTION TO DISMISS COURT APPOINTED COUNSEL, DEFENDANT KNEW HE WAS STUCK WITH MR. HARRISON AS COUNSEL. KNOWING THAT MR. HARRISON WOULD BE DEFENDANT'S LAWYER FOR THE FORESEEABLE FUTURE THE DEFENDANT ATTEMPTED TO ESTABLISH A CORDIAL, RESPECTFUL, AND A PRODUCTIVE WORKING RELATIONSHIP WITH MR. HARRISON, EVEN FEIGNING CONFIDENCE IN HIM WITH THE HOPES THAT IT WOULD EVENTUALLY TRANSLATE INTO ACTUAL CONFIDENCE. THE DEFENDANT SENT MR. HARRISON SEVERAL LETTERS WITHOUT RECEIVING A RESPONSE, TRYING TO FIND COMMON GROUND BUT THAT COMMON GROUND WAS NEVER FOUND BASED ON THE FACT THAT HE DID NOT RESPOND TO DEFENDANT'S LETTERS. AFTER GETTING NO RESPONSES TO MY LETTERS I CONTACTED HIM THROUGH MY GIRLFRIEND, VIA E-MAIL. MR. HARRISON'S RESPONSES TO THOSE E-MAILS WERE RUDE, DISRESPECTFUL AND UNPRODUCTIVE AND WITHER IMMATURE. THE DEFENDANT DID RECEIVE A RESPONSE FROM THE FIRST E-MAIL & LETTER FROM MR. HARRISON'S ASSOCIATE MR. GISSENOWER BUT WHEN THE DEFENDANT THEN TRIED TO CORRESPOND WITH MR. HARRISON'S ASSOCIATE HE TO CHOSE NOT TO RESPOND. MR. NELSON THEN RETURNED TO E-MAILING MR. HARRISON THROUGH HIS GIRLFRIEND. IN RESPONSE HE SAID HE WOULD WRITE THE DEFENDANT DIRECTLY. AFTER 21 DAYS HAD PASSED AND NO LETTER FROM MR. HARRISON. MR. NELSON WROTE HIM INQUIRING ABOUT THE STATUS OF MY CASE. MR. HARRISON THEN RESPONDED IN A RUDE AND INAPPROPRIATE MANNER. (ALL CORRESPONDENCES ARE ATTACHED) WHERE DEFENDANT ONCE HAD DESIRE TO REKINDLE A RESPECTFUL RELATIONSHIP WITH MR. HARRISON AT THE URGING OF THIS COURT, THAT DESIRE

HAS BEEN REDUCED BY IRRECONCILABLE DIFFERENCES AS WELL AS A COMPLETE AND UTTER BREAKDOWN OF COMMUNICATION. THE DEFENDANT HAS NO TRUST NOR CONFIDENCE THAT MR. HARRISON WILL FIGHT FOR WHAT IS IN MR. NELSON'S BEST INTEREST.


IN RESPONSE TO MR. NELSON'S E-MAIL (ATTACHED) DATED 3-13-2016, MR. HARRISON SENT A LETTER (ATTACHED) DATED 4-4-2016 WITH A COPY OF A SUCCESSIVE MOTION READY TO BE FILED ON THE HURST CLAIM. MR. NELSON SENT MR. HARRISON A LETTER (ATTACHED) DATED 4-11-16 STATING THAT MR. NELSON WANTED MR. HARRISON TO FILE THE SUCCESSIVE MOTION. MR. NELSON RECEIVED NO RESPONSE TO THAT, NO ACKNOWLEDGEMENT THAT IT WAS EVEN RECEIVED, LETTER. SO MR. NELSON FOLLOWED THAT LETTER WITH ANOTHER ONE (ATTACHED) DATED 4-28-16 AND RECEIVED NO RESPONSE. MR. NELSON THEN RETURNED TO SENDING E-MAILS TRYING TO GET CLARIFICATION AS TO THE STATUS OF HIS CASE (ATTACHED) DATED 8-2-16 AND 8-15-16. IN HIS RESPONSE TO THE 8-15-16 E-MAIL MR. HARRISON STATED HE WOULD WRITE ME DIRECTLY 21 DAYS LATER MR. NELSON SENT MR. HARRISON A LETTER (ATTACHED) DATED 9-5-16. MR. NELSON ASKED WHY MR. HARRISON DID NOT RESPOND TO ANY OF MR. NELSON'S LETTERS AND WHY HE HAD NOT FILED THE SUCCESSIVE MOTION. MR. HARRISON'S RESPONSE (ATTACHED) DATED 9-10-16. APPARENTLY MR. HARRISON DOES NOT RESPOND TO MY LETTERS NOR FILE SUCCESSIVE MOTIONS BECAUSE I TRIED TO GET HIM REMOVED FROM MY CASE AND BECAUSE I AM NOT SHOWING HIM ENOUGH RESPECT.

IN RESPONSE TO LEARNING MR. NELSON FILED A PRO SE ASST MR. HARRISON SENT THE HONOURABLE JUDGE GERRARD AND MS. KOCHTA A LETTER (ATTACHED) EXHIBIT C) DATED 7-29-2011 IN THE LETTER HE STATES. "BUT MR. NELSON HAS A CONSTITUTIONAL RIGHT NOT TO HAVE ME FORCED ON HIM I WISH HIM THE BEST. WHEN THINGS SETTLE DOWN, I WILL SUBMIT A MOTION TO JUDGE GERRARD ASKING THAT I BE ALLOWED TO WITHDRAW AS REGISTRY COUNSEL."

IN CONCLUSION

MR. NELSON NOW IMPLORES THIS HONORABLE COURT TO NOT FORCE MR. HARRISON ON ME AND DISMISS ATTORNEY SAJA HARRISON AND APPOINT SUBSTITUTE COUNSEL OR ALLOW THE DEFENDANT TO INVOKER HIS CONSTITUTIONAL RIGHT TO REPRESENT HIMSELF AND PROCEED PRO SE. IF THIS COURT SHALL CONDUCT A NELSON/FARRERA HEARING, MR. NELSON WAIVES HIS RIGHT TO BE PRESENT IN THE COURTROOM INSTEAD WOULD ASK THIS COURT TO ALLOW HIM TO PARTICIPATE IN THE HEARING TELEPHONICALLY OR BY CLOSE CIRCUIT TV.

RESPECTFULLY SUBMITTED,


JOSHUA D. NELSON # 989102

P. 8280

UNION C.I.


P.O. BOX 1000

DAWSON, FL.

32083

OATH

UNDER PENALTY OF PERJURY I DECLARE THAT I HAVE READ THE FOREGOING MOTION AND THAT THE FACTS IN IT ARE TRUE.


JOSHUA D. NELSON # 989102
P. 8220
UNION C.I.
P.O. BOX 1000
RAIFORD, FL.
32083

COPIES PROVIDED TO:

HON. EDWARD J. VOLZ, JR.
CIRCUIT COURT,
LEE COUNTY JUSTICE CENTER,
1700 MONROE STREET,
FT. MYERS, FL. 33902

MS. CAROL VITALE
OFFICE OF THE ATTORNEY GENERAL OF FLORIDA
3507 FRONTAGE ROAD, SUITE 200,
TAMPA, FL. * 33607

LINDA DOGGETT
CLERK OF COURT
CRIMINAL DIVISION
PO BOX 2507
FT. MYERS, FL. 33902-2507

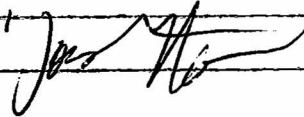
COPY

Mr. Harrison,

4-22-65

I WROTE YOU A LETTER NOT TOO LONG AGO I AM WONDERING IF YOU'VE RECEIVED IT.
I HOPE WE CAN OBTAIN THE BEST BEHIND US AND FIND A WAY TO WORK TOGETHER. I WAS WONDERING
IF I RETURN TO STATE COURT WOULD YOU BE WILLING TO FILE A SUCCESSIVE 3.051 MOTION
ONE THAT I'M ABLE TO PARTICIPATE IN DEVELOPING? I HOPE THIS FINDS YOU DOING WELL. I LOOK
FORWARD TO HEARING FROM YOU. TAKE CARE.

Sincerely,



Subj: **Re: Regarding your client, Joshua D. Nelson #989102 Union C.I.**
Date: 3/14/2016 8:00:44 A.M. Eastern Daylight Time
From: bayalaw@aol.com
To: [REDACTED]

Let's get this clear. I tried my best to help Joshua. He returned my efforts by making false statements to a federal judge and I was removed as his federal counsel. Then, the lawyer who took my place quit on him. So what does he expect of me? And don't tell me what to do re. the state court proceedings.

Sincerely,
BH

Law Office of Baya Harrison
Post Office Box 102
Monticello, FL 32345
850/997-8469
Fax: 850/997-8460

—Original Message—

From: [REDACTED]
To: bayalaw <bayalaw@aol.com>
Sent: Sun, Mar 13, 2016 8:44 pm
Subject: Regarding your client, Joshua D. Nelson #989102 Union C.I.

Mr. Harrison,

I am writing to you on behalf of your client, Mr. Joshua D. Nelson. Please allow this email to serve as official notification that Mr. Nelson has written to you twice under the suggestion of the courts and has not received a response from you. Joshua asks that you withdraw from his case. If you refuse, he will be filing a Faretta hearing to proceed pro se on the Hurst issue. He also asks that you not attempt to file anything on his behalf until the Faretta issue is resolved.

Please respond to Mr. Nelson as soon as possible. If you would like to relay the message through me, I am more than willing to pass it on to him. If not, you may contact him at the address below.

Joshua David Nelson #989102
P-2220 Union C. I.
7819 N.W. 228th Street
Raiford, FL 32026

Thank You

Law Office of Baya Harrison
Post Office Box 102
Monticello, FL 32345
Phone: 850/997-8469
Fax: 850/997-8460

March, 14, 2015

Joshua David Nelson, DC# 989102
P-2220 Union Correctional Institution
7819 N.W. 228th Street
Raiford, Florida 32026

Re: State of Florida vs. Joshua D. Nelson
Case No: 95-00911 Lee County

Dear Mr. Nelson,

My name is Raymond L. Gissendaner and Mr. Baya Harrison has contacted me to assist in your case as it relates to the *Hurst Claim*. Mr. Harrison is in the process of preparing this claim on your behalf and as soon as it is completed and before filing it, he will forward a copy to you for your review.

Please be assured that Mr. Harrison and I will do everything we can to assist in avoiding the death warrant in your case.

If you have any questions, please do not hesitate to contact our office.

Sincerely,



Raymond L. Gissendaner
Paralegal/Investigator to
Baya Harrison, Attorney at Law

cc: file

copy

DEAR MR. GISSENOMER,

3-20-16

THANK YOU FOR YOUR LETTER. I APPRECIATED HEARING FROM YOU. I DO HOPE THAT WE CAN PUT THE PAST BEHIND US AND START FRESH. I DO WANT THIS TO WORK. I AM NOT UNDER ANY ILLUSIONS THAT I KNOW MORE ABOUT THE LAW OR HAVE MORE EXPERIENCE IN THE LAW THAN MR. HARRISON OR YOU BUT AT THE SAME TIME I HAVE EVERY RIGHT TO BE INFORMED ABOUT WHAT IS GOING ON IN MY CASE. TO HAVE MY QUESTIONS ANSWERED, TO HAVE MY LETTERS RESPONDED TO AND TO BE ABLE TO READ AND REVIEW AND OFFER IDEAS FOR WHAT IS TO BE FILED ON MY BEHALF. HAVE THOSE IDEAS HEARD AND RESPONDED TO BEFORE ANYTHING IS FILED.

QUESTION: WOULD IT BE BETTER TO WAIT UNTIL AFTER THE FLORIDA SUPREME COURT MAKES A RULING ON THE HURST ^{CLAIM} BEFORE WE FILE ANYTHING? WHY NOT, IF NOT? ASSUMING THEY DON'T WANT SO LONG WHERE IT WOULD BECOME NECESSARY TO AVOID ANY TIME BAR ISSUES.

IF HE/WO ^S WANT TO FILE SOMETHING BEFORE THE ~~THE~~ F.S.C. RULING I AM OKAY WITH THAT. MATTER OF FACT I HAVE ENCLOSED A COPY OF A SUCCESSFUL 3.950 MOTION ON THE HURST ISSUE THAT I WANT YOU TO USE FOR ME. OBVIOUSLY WHERE IT APPLIES ADD MY INFORMATION. THE AGREEMENTS THEY MADE I WANT YOU TO USE WORD FOR WORD. NOW IF YOU OR MR. HARRISON HAS ANY IDEAS THAT YOU BOTH BELIEVE HELP TO STRENGTHEN MY POSITION OF COURSE INCORPORATE THOSE IDEAS INTO THE MOTION.

THANK YOU FOR YOUR TIME AND PATIENCE.

Sincerely,



Baya Harrison, III
Attorney At Law
736 Silver Lake Rd.
Monticello, FL 32344
bayalaw@aol.com

Tel. 850-997-5554
Fax. 850-997-8460
FBN 099568

Mr. Joshua Nelson
DC No. 989102
Union CI
7819 NW 228th Street
Raiford, FL 32026

April 4, 2016

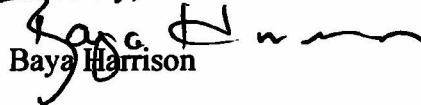
Re: State of Florida v. Joshua Nelson, Lee County Circuit Court Case No. 95-cf-911A; Draft Hurst Claim

Dear Mr. Nelson:

Enclosed is the original of an amended rule 3.851 motion to vacate your death sentence based upon a Hurst claim. I know you are familiar with the issue. I am doing this because, unless there has been a change that I do not know about, I am still your court appointed registry attorney per s.27.710 and .711 in state court. Please recall that you asked the federal court to appoint other counsel when I attempted to file a § 2254 habeas petition for you several years ago as the registry statute required. Another lawyer was appointed by the federal magistrate judge. However, as memory serves me, that lawyer moved to withdraw and was allowed to do so. I assume that Mr. Todd Scher was appointed in her place.

If you wish to have this pleading filed in the form presented, please sign it and mail it back to me. I enclose a copy for your records. I am also mailing or emailing a copy of this pleading to your federal court appointed attorney, Mr. Scher. I will wait to hear back from you and/or Mr. Scher.

Sincerely,


Baya Harrison

cc **Mr. Todd Scher**
Attorney At Law
1555 Palm Beach Lakes Blvd. Suite 1555
West Palm Beach, FL 33401
Phone: 561-804-6800
w/copy of proposed amended rule 3.851 motion raising Hurst claim

MR. HARRISON,

4-11-16

I HOPE THIS FINDS YOU DOING WELL. I RECEIVED YOUR LETTER AND THE COPY OF THE SUPPRESSIVE NOTION REGARDING THE HORST ISSUE. THANK YOU. I DO WANT YOUR HELP AND WANT FOR YOU TO FILE THE NOTION ON MY BEHALF. SINCE THERE WAS ONLY ONE COPY OF THE NOTION ENCLOSED IN GOING TO KEEP IT AND SEND THE OATH AND VERIFICATION PAGE BACK TO YOU SIGNED AND DATED. I THINK YOU DID A VERY GOOD JOB ON THE NOTION. AGAIN THANK YOU. I HOPE YOU RECEIVE THIS. I SENT A LETTER TO YOU WITH A COPY OF ANOTHER PERSON'S SUPPRESSIVE NOTION ON THE HORST ISSUE THAT I WANTED YOU TO USE TO WRITE MINE. IN HAPPY WITH THE ONE YOU WROTE.

SINCERELY,

copy

MR. HARRISON,

4-28-16

IM WRITING WONDERING IF YOUVE RECEIVED MY LETTER WITH THE SIGNED OATH OF VERIFICATION? ARE YOU RECEIVING MY LETTERS AT THE P.O. BOX ADDRESS. IVE SENT 3 LETTERS IN TOTAL AND IVE NOT RECEIVED A RESPONSE TO ANY OF THEM.

SINCERELY,

Filed 10/07/2016

Subj: **Re: Joshua Nelson #989102**
Date: 8/2/2016 6:30:04 P.M. Eastern Daylight Time
From: bayalaw@aol.com
To: [REDACTED]

No. BH

Sincerely,

Law Office of Baya Harrison
Post Office Box 102
Monticello, FL 32345
850/997-8469
Fax: 850/997-8460

-----Original Message-----

From: [REDACTED] <[REDACTED]@aol.com>
To: bayalaw <bayalaw@aol.com>
Sent: Tue, Aug 2, 2016 6:02 pm
Subject: Joshua Nelson #989102

Joshua would like to know if you've recently filed anything on his behalf.

Thank you.

Subj: **Re: Joshua Nelson #989102**
Date: 8/16/2016 9:53:27 A.M. Eastern Daylight Time
From: bayalaw@aol.com
To: ██████████@aol.com

I will write Mr. Nelson.

Sincerely,
BH

Law Office of Baya Harrison
Post Office Box 102
Monticello, FL 32345
850/997-8469
Fax: 850/997-8460

-----Original Message-----

From: ██████████ <██████████@aol.com>
To: bayalaw <bayalaw@aol.com>
Sent: Mon, Aug 15, 2016 11:15 pm
Subject: Joshua Nelson #989102

Mr. Harrison,

Joshua would like to know why you have not filed the successive motion on his behalf?

Thank you.

Mr. Harrison,

copy

9-5-16

IN TRYING TO UNDERSTAND IVE WRITTEN YOU NUMEROUS TIMES AND HAVE RECEIVED NO RESPONSE TO THOSE LETTERS. SO THEN I FIGURED IT WOULD BE MUCH EASIER FOR YOU TO RESPOND IN E-MAIL FORM. I DID RECEIVE A LETTER FROM YOUR COLLEAGUE MR. GISSENDANER IN RESPONSE TO AN E-MAIL. I THEN ATTEMPTED TO CORRESPOND WITH HIM AND GOT NO RESPONSE. NOT LONG AFTER THAT I RECEIVED A LETTER FROM YOU WITH A COPY OF A 3.850 SUCCESSIVE MOTION ON THE HORST ISSUE WHICH I EXPRESSED TO WANTING YOU TO FILE IT ON MY BEHALF. I SENT YOU TWO LETTERS AND RECEIVED NO RESPONSES. I THEN RETURNED TO TRYING TO CONTACT YOU THROUGH MY GIRLFRIEND VIA E-MAIL. I ASKED YOU IF YOU HAD RECENTLY FILED ANYTHING ON MY BEHALF WHICH YOU REPLIED NO. I ALSO ASKED YOU WHY YOU HAD NOT FILED THE 3.850 'SUCCESSIVE' MOTION AND YOU REPLIED YOU WOULD WRITE MR. NELSON. ITS BEEN 21 DAYS SINCE THAT E-MAIL AND IVE NOT HEARD ANYTHING FROM YOU. WHAT I WANT TO KNOW IS HAVE YOU FILED A 3.850 SUCCESSIVE MOTION ON THE HORST ISSUE ON MY BEHALF? IF NOT, WHY NOT? I HOPE TO HEAR FROM YOU SOON.

SINCERELY,

Baya Harrison, III
Attorney At Law
Post Office Box 102
Monticello, FL 32344

Tel. 850-997-5554
Fax. 850 997-8460

September 10, 2016

Mr. Joshua Nelson
DC No. 989102
Union CI
7819 NW 228th Street
Raiford, FL 320

Dear Mr. Nelson:

I have your letter of 9/2/16 received yesterday. I am working on a Hurst claim for you. I have been waiting to see if Hurst is going to be applied retroactively. I will stay in touch. You need to remember that you took it upon yourself several years ago to make false allegations against me and have me removed as your counsel regarding the habeas petition I prepared for you. You also refused to meet with me when I drove to Raiford to meet with you.

The lawyers who was involved in this then abandoned you. You now want me to forget all of that and continue to represent you. The fact that you are on death row does not give you the right to fail to show me any respect. Nevertheless I will perform my ethical obligation to you. In the meantime if you want to get other counsel to represent you under the registry statute, be my guest.

Sincerely,


Baya Harrison

EXHIBIT A

**IN THE CIRCUIT COURT FOR THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA**

**STATE OF FLORIDA,
Plaintiff,**

vs.

CASE NO: 95-CF-911A

**JOSHUA D. NELSON,
Defendant.**

ORDER DENYING DEFENDANT'S MOTION TO DISCHARGE COUNSEL

THIS CAUSE comes before the Court on Defendant's "Motion To Discharge Court Appointed Counsel," filed January 31, 2014. Having reviewed the motion, the case file, the applicable law, and having heard argument at a hearing on April 21, 2014, the Court finds as follows:

1. In the motion, Defendant argues that appointed counsel, Baya Harrison, was ineffective during his postconviction proceedings, creating a conflict. Defendant first argued Mr. Harrison was ineffective for failing to file a petition for ineffective appellate counsel on the issues that appellate counsel failed to raise on appeal that the trial court erred in not swearing the venire and gave no weight to the statutory mitigators. Defendant next argued that Mr. Harrison was ineffective for failing to call at the evidentiary hearing retained expert Dr. Robison. Defendant also argued that Mr. Harrison did not include him in the development of the issues raised during the postconviction or appeal proceedings. Defendant requests Mr. Harrison be discharged, and counsel representing him in federal court, Todd Scher, be appointed. To the extent Defendant cited his desire to file a motion arguing ineffectiveness of Mr. Harrison as postconviction counsel, the Court notes that there is no right to effective postconviction counsel in Florida. Moore v. State, 2013 WL 6223205, 38 Fla. L. Weekly S869 (2013); Mann v. State,

2013 WL 1760908 (Fla. 2013); Howell v. State, 38 Fla L. Weekly S140 (Fla. 2013); and Gore v. State, 91 So.3d 769 (Fla. 2012).

2. Mr. Scher did not appear at the hearing, although he was noticed. There is no indication that Mr. Scher would like to be appointed to this case at the state court level, that he is on the registry of capital attorneys, or that he has signed a contract with the Justice Administrative Commission. It appears that Mr. Scher also contracted with Capital Collateral Regional Counsel (CCRC) at times, and there is concern that he was associated with CCRC at the time CCRC conflicted off this case, which would create a conflict with him as well.

3. Mr. Harrison argued that he was committed to Defendant, and to this case. He argued that he did raise the venire claim in the postconviction proceedings, and trial counsel testified at the evidentiary hearing that was the procedure in this circuit. He further argued that since the venire claim was not objected to at trial, it could not have been raised on appeal, and it would have been frivolous to file that claim in a petition to find appellate counsel ineffective. He believed that since the Florida Supreme Court found the trial court did give weight to both statutory and nonstatutory mitigating factors, such an argument would likewise be frivolous in a petition to find appellate counsel ineffective. Mr. Harrison stated he did not call Dr. Robison to testify at the evidentiary hearing because the doctor found nothing that would help Defendant, so his strategy was not to call him. Mr. Harrison also expressed concern that Defendant had filed the doctor's report as part of his motion to the Florida Supreme Court, and it was now public record for the State to use against Defendant. Mr. Harrison conceded that maybe he had not communicated clearly enough with Defendant.

4. The State indicated its only interest was in ensuring Defendant was represented, and that the record was clear. The State had no concerns with Mr. Harrison's representation of

Defendant.

5. The Court finds Mr. Harrison's representation of Defendant has been competent and has not been ineffective. Mr. Harrison was passionate and committed. Mr. Harrison answered all Defendant's concerns. It appears that Defendant lacks understanding of the legal process and the legal requirements for filing valid claims. Defendants have four fundamental decisions in a case: to enter a plea, to waive a jury trial, to testify, or to appeal, and for all other decisions, counsel has sole authority to exercise his or her professional judgment to decide tactics. Puglisi v. State, 56 So.3d 787, 792-793 (Fla. 4th DCA 2010) quoting United States v. Burke, 257 F.3d 1321, 1323 (11th Cir.2001). Mr. Harrison is not ineffective for not raising the claims Defendant wished raised that Mr. Harrison, in the exercise of his professional judgment, determined to be frivolous or meritless. After considering the motion and testimony, the Court finds there is no basis for discharge of Mr. Harrison.

Accordingly, it is

ORDERED AND ADJUDGED that Defendant's motion to discharge counsel is DENIED. Attorney Baya Harrison, Esq. shall remain attorney of record and continue representing Defendant in this case at the state court level.

DONE AND ORDERED in Chambers at Fort Myers Lee County, Florida, this 23
day of April, 2014.

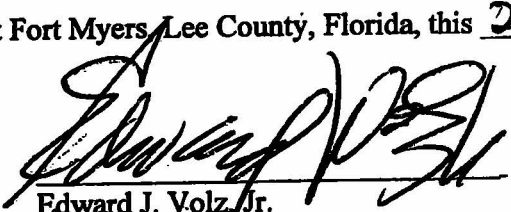

Edward J. Volz, Jr.
Circuit Judge

EXHIBIT B

FILED

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

2012 JAN 27 PM 2:14

JOSHUA D. NELSON,

U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS, FLORIDA

Petitioner,

vs.

Case Nos. 2:11-cv-327-FTM-29SPC
2:11-cv-423-FTM-99SPC

SECRETARY, FLORIDA DEPARTMENT OF
CORRECTIONS, ATTORNEY GENERAL,
STATE OF FLORIDA,

Respondents.

ORDER

This matter comes before the Court upon Petitioner's repeated requests to have alternate counsel appointed to represent him in a federal habeas corpus action challenging Petitioner's conviction and sentence of death entered in the Twentieth Judicial Circuit Court, Lee County, Florida. On November 8, 2011, the Court held a telephonic hearing in connection with Petitioner's requests. Petitioner Joshua D. Nelson; Baya Harrison, Petitioner's current appointed counsel; Melissa Minsk Donoho, the attorney who Petitioner requests to be appointed in Mr. Harrison's stead; and, Senior Assistant Attorney General Carol Marie Dittmar participated in the hearing. As discussed during the hearing, Petitioner currently has two § 2254 actions pending before this Court challenging Petitioner's conviction and sentence of death: (1) case number 2:11-cv-327, which Petitioner filed *pro se* on May 25, 2011 (hereinafter the "First Petition"); and (2) case number 2:11-cv-

423, which Petitioner's current appointed counsel Mr. Harrison filed on August 3, 2011 (hereinafter the "Second Petition").

The First Petition contains seven grounds for relief with various sub-parts. See First Petition (Doc. #16). In this *pro se* action, Petitioner initially advised the Court that he "knowingly, voluntarily and intelligently" was waiving his right to counsel because an "irreconcilable conflict" existed between Petitioner and appointed counsel, Mr. Harrison. See Motion to Proceed *Pro Se* (Doc. #11). Subsequently, Petitioner moved for appointment of counsel, but specifically requested that Mr. Harrison "NOT be appointed" to represent him in his federal habeas action. See Motion for Appointment of Counsel Pursuant to 18 U.S.C. § 848, et. seq. For Representation in Federal Habeas Corpus Proceedings in A Capital Case (Doc. #13) (emphasis in original).

Mr. Harrison, consistent with the dictates of Fla. Stat. § 27.711(1)(c) and this Court's August 2, 2011 Order entered in case number 2:11-cv-327 (Doc. #18), filed the Second Petition. The Second Petition contains three grounds for relief. See Second Petition (Doc. #1). Mr. Harrison moved to have Petitioner granted *in forma pauperis* status and appointed counsel for his federal habeas action. See Petitioner's Motion to Proceed *In Forma Pauperis* and for the Appointment of Counsel in This 28 U.S.C. § 2254 Habeas Corpus Proceeding (Doc. #2). Notably, the motion requested the Court to "appoint Baya Harrison - or some other qualified attorney - - as Mr. Nelson's counsel, requiring the

federal government to pay approved and reasonable fees, costs and expenses." Id. at 3.

It is clear that Petitioner, who is indigent and under a sentence of death, has a right to counsel in a federal petition seeking to vacate or set aside his sentence of death. McFarland v. Scott, 512 U.S. 849 (1994). It is also undisputed that due to Petitioner's indigent status, Petitioner does not have a right to counsel of his choice. United States v. Gonzalez-Lopez, 548 U.S. 140, 147-152 (2006); Wheat v. United States, 486 U.S. 153, 159 (1988); Chaplin & Drysdale, Chartered v. United States, 491 U.S. 617, 624-25 (1989); Thomas v. Wainwright, 767 F.2d 738, 742 (11th Cir. 1985). Consequently, an indigent defendant seeking a change in appointed counsel must demonstrate "good cause" in order to be granted substitute counsel. Thomas at 742; see also United States v. Garey, 540 F.3d 1253, 1263 (11th Cir. 2008).

"Good cause" requires a showing of a "conflict of interest, a complete breakdown in communication or an irreconcilable conflict" U.S. v. Garey at 1263. Nonetheless, whether the defendant and his counsel have a "meaningful attorney-client relationship" is of no consequence to whether substitute counsel should be appointed. Morris v. Slappy, 461 U.S. 1, 14 (1983).

Based upon applicable law and the testimony elicited during the November 8, 2011 Telephonic Hearing, the Court will grant Petitioner's request to appoint substitute counsel for his federal habeas action. At the outset, the Court does not find that

Court.

Further, the Court will appoint Attorney Melissa Minsk Donoho as counsel in Mr. Harrison's stead pursuant to 18 U.S.C. § 3599 (a), as requested by Petitioner and as agreed to by Attorney Donoho at the November 8, 2011 Telephonic Hearing. Based upon the representations of Ms. Donoho, the Court finds she is well qualified under the applicable provisions to undertake representation of Petitioner. See 18 U.S.C. § 3599 (a) (2) (b-f), Volume VII, Guide to Judiciary Policies and Procedures, Chapter VI § 6.01. Alternatively, the Court finds good cause to appoint Ms. Donoho since she has handled other capital cases before the state and federal appellate courts.

Additionally, as noted *supra*, because the grounds for relief raised in the operative petitions in case numbers 2:11-cv-327 and 2:11-cv-423 are different and because Petitioner is only permitted to proceed on one petition, Attorney Donoho shall advise the Court, within twenty-eight (28) days of this Order how Petitioner wishes to proceed in this matter. Further, in light of the gravity of this matter and the application of the one-year AEDPA limitations period, the parties shall, to the extent possible, confer and attempt to resolve the issues presented by the two actions in a mutually agreeable and equitable manner consistent with Local Rule 3.01(g) .

ACCORDINGLY it is hereby **ORDERED**:

1. Petitioner's Motion to Proceed *In Forma Pauperis* and

Motion to Appoint Counsel (Doc. #2), which were previously deferred in case number 2:11-cv-423 is **GRANTED** to the extent set forth herein.

2. Attorney Melissa Minsk Donoho is appointed for the purpose of representing the Petitioner in connection with his federal habeas corpus proceeding. The **Deputy Clerk** shall prepare and issue to Ms. Donoho simultaneously herewith the appropriate federal Criminal Justice Act form - a CJA-30 ("Death Penalty Proceedings: Appointment of and Authority to Pay Court Appointed Counsel").

3. Attorney Baya Harrison is **dismissed** as counsel for Petitioner. The Clerk shall forward a CJA-30 Compensation Voucher to Mr. Harrison for his use in connection with the preparation of the Second Petition.

4. As more fully set forth above, Petitioner shall advise the Court, **within twenty-eight (28) days** of this Order, how he wishes to proceed.

DONE AND ORDERED in Fort Myers, Florida, on this 27th day of January, 2012.


SHERI POLSTER CHAPPELL
UNITED STATES MAGISTRATE JUDGE

SA: hmk
Copies: All Parties of Record

EXHIBIT C

BAYA HARRISON
Attorney At Law

310 North Jefferson Street
Monticello, Florida 32344
Email: bayalaw@aol.com

Tel. 850.997.8469
FAX: 850.997.5852
Fla. Bar No.099568

July 29, 2011

Hon. F. Lynn Gerald, Jr.
Circuit Judge
The Lee County Courthouse
1700 Monroe Street
Ft. Myers, FL 33902

Helena Kutcha, Esq.
Court Attorney
U.S. District Court
2110 First Street
Ft. Myers, FL 33901

Re: State v. Nelson, Case No. 95-911-CF; Status Report in Capital Case

Dear Judge Gerald and Ms. Kuchta:

Judge Gerald, per your original order of appointment, I have been serving as registry counsel under Sec. 27.710 and .711, Fla. Stat., for death row inmate Joshua D. Nelson. On July 7, 2011, the Supreme Court of Florida in Case No. SC10-540 affirmed your March 5, 2010 order that denied Mr. Nelson's Fla. R. Crim. P. 3.850/851 collateral attack upon his judgments and sentences, including the death sentence. I sent Mr. Nelson a copy. The mandate in the Florida Supreme Court's was issued yesterday, July 28, 2011.

And Ms. Kutcha, under these statutes and my contract with the Commission on Capital Cases and the Florida Department of Financial Services, unless the client does not want my services, I am obligated to represent Mr. Nelson, not only in the Florida state courts, but in the federal courts as well. This includes providing representation in "any authorized federal habeas corpus litigation . . ." Sec. 27.711(1)(c), Fla. Stat. Furthermore, the registry attorney " . . . agrees to continue such representation under the terms and conditions set forth in this section until the capital defendant's sentence is reversed, reduced or carried out and the attorney is permitted to withdraw from such representation by a court of competent jurisdiction."

There is a very short, rigidly enforced window of opportunity for Mr. Nelson to seek habeas corpus relief in federal court once the mandate in Case No. SC10-540 is issued. Therefore, several months ago, I began preparing a habeas petition for Mr. Nelson's signature along with a motion to allow him to proceed in forma pauperis. I also obtained a copy of his Florida Inmate Trust Account record (showing some \$28.20 in that account) and prepared a proposed insolvency affidavit and motion for the appointment of counsel.

Last Wednesday, July 27, 2011, I showed up at Union Correctional Institution where Mr. Nelson is incarcerated to go over the aforementioned legal papers with Mr. Nelson, get his signature on the documents and overnight them by US Express Mail to the USDC

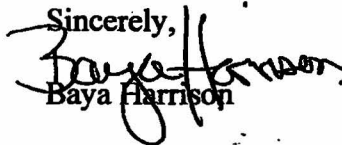
Page Two

clerk's office in Ft. Myers for filing. This was a prearranged meeting. Mr. Nelson refused to meet with me. See the attached copy of his signed "refusal" statement.

I checked with the USDC clerk's office in Ft. Myers and was surprised to learn that Mr. Nelson filed a pro se habeas corpus petition in that court late last May. The case has been given No. 2:11cv-327-FTM 29-S-P-C. I have not been able to download these pleadings. I understand that Mr. Nelson includes a motion for the appointment of counsel and other documents, possibly including a memorandum of law. (It is also my understanding that he has also filed documents in the Florida Supreme Court and elsewhere to the effect that he does not want me to represent him any further.)

Had Mr. Nelson not filed his own pro se habeas petition, had that petition not been received and docketed by the clerk of the USDC in Ft. Myers, and had he made it so crystal clear that he does not want my services, I would have exercised the authority I believe I have to file a timely and otherwise proper habeas petition on his behalf without his signature -- due to the real danger of him being time barred in federal court.

I send you this in order to let you know that I was/am more than willing to continue to assist Mr. Nelson. But Mr. Nelson has a constitutional right not to have me forced on him. I wish him the best. When things settle down, I will submit a motion to Judge Gerald asking that I be allowed to withdraw as registry counsel. If any court feels that I owe Mr. Nelson further representation, I will of course obey the court's directive.

Sincerely,

Baya Harrison

cc Ms. Tangy Williams, Deputy Clerk, Supreme Court of Florida
500 South Duval Street, Tallahassee, FL 32399-1900

Mr. Joshua Nelson, DC No. 989102
7819 NW 228th St., Raiford, FL 32026-2601

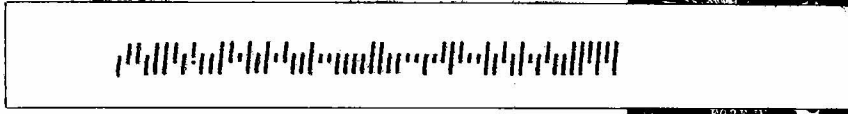
Hon. Steven B. Russell, State Attorney, and
Assistant State Attorney Dean Plattner
Office of the State Attorney, Twentieth Judicial Circuit of Florida
The Lee County Courthouse, 1700 Monroe Street
Post Office Box 339, Ft. Myers, Florida 33901

Carol M. Dittman, Esq., Senior Assistant Attorney General
Florida Department of Legal Affairs, Concourse Center 4, 3507 Frontage Road
Suite 200, Tampa, Florida 33607

Mac/Documents/Law Office/Nelson/Nelsonjosh.doc

JOSHUA NELSON # 989102

P-2220
UNION C.I.
P.O. BOX 1000
RAIFORD, FL.
32083



HON. EDWARD J. VOLZ, JR.
CIRCUIT COURT JUDGE
LEE COUNTY JUSTICE CENTER
1700 MONROE STREET
FT. MYERS, FL.

33902

CP

Filed 10/10/2016

STATE OF FLORIDA,
PLAINTIFF,

vs.

JOSHUA D. NELSON,
DEFENDANT,

CASE NO. 95-911CF

Corrected Case # 95CF 911-A

Verified on Odyssey

Clerk Initials RS

cc: SAO, bayalaw@aol.com, Judge Fuller, Court Admin. (A)
10-10-16 RS

MOTION TO DISMISS COUNSEL

COMES NOW THE DEFENDANT, DEATH ROW INMATE, JOSHUA D. NELSON, PRO SE, BEFORE THIS HONORABLE COURT REQUESTING THAT CURRENT REGISTRY COUNSEL, MR. GUYA HARRISON, BE DISMISSED AS COUNSEL OF RECORD. DEFENDANT UNEQUIVOCALLY SEEKS REMOVAL OF GUYA HARRISON, AS COUNSEL, DUE TO IRRECONCILABLE CONFLICTS.

ON JANUARY 31, 2014 THE DEFENDANT FILED A MOTION TO DISCHARGE COURT APPOINTED COUNSEL. ON APRIL 21, 2014 A NELSON HEARING WAS HELD BY THIS COURT. ON APRIL 23, 2014 THIS COURT ISSUED A DECISION BASED UPON THOSE FACTS. ALTHOUGH IN THE COURT'S ORDER, (ATTACHED - EXHIBIT A), DENYING THE DEFENDANT'S MOTION TO DISMISS COURT APPOINTED COUNSEL. THE COURT DID NOT ADDRESS DEFENDANT'S CLAIM THAT A COMPLETE BREAKDOWN OF COMMUNICATION HAD OCCURRED. THE DEFENDANT UNDERSTAND THAT THE FEDERAL COURTS HAS NO SAYING ON THIS COURT'S DECISIONS. IN THE FEDERAL COURT'S ORDER IN RESPONSE TO THE DEFENDANT'S MOTION TO DISMISS AND THE FOLLOWING HEARING, (ATTACHED EXHIBIT B), THE COURT STATED, "DURING THE HEARING, IT WAS APPARENT TO THIS COURT THAT MR. HARRISON RECOGNIZES THAT THE ATTORNEY-CLIENT RELATIONSHIP IS UNFORTUNATELY BROKEN." MR. HARRISON ACKNOWLEDGED

THAT THE BREAKDOWN HAD OCCURRED WHICH LEFT THE ATTORNEY-CLIENT RELATIONSHIP IRRETRIEVABLY BROKEN. DURING THE NELSON HEARING HELD IN THIS COURT MR. HARRISON RELUCTANTLY ADMITTED THAT MAYBE HE HAD NOT COMMUNICATED CLEARLY ENOUGH WITH THE DEFENDANT.

FLORIDA RULES REGULATING THE FLORIDA BAR RULE 4-1.4(a), INFORMING CLIENT OF STATUS OF REPRESENTATION. (A LAWYER SHALL KEEP A CLIENT REASONABLY INFORMED ABOUT THE STATUS OF A MATTER AND PROMPTLY COMPLY WITH REASONABLE REQUESTS FOR INFORMATION.) EVENTHOUGH DEFENDANT HAD LOST ALL CONFIDENCE IN MR. HARRISON PER THE COURT'S ORDER DENYING DEFENDANT'S MOTION TO DISMISS COURT APPOINTED COUNSEL. DEFENDANT KNEW HE WAS STUCK WITH MR. HARRISON AS COUNSEL. KNOWING THAT MR. HARRISON WOULD BE DEFENDANT'S LAWYER FOR THE FORESEEABLE FUTURE THE DEFENDANT ATTEMPTED TO ESTABLISH A CORDIAL, RESPECTFUL, AND A PRODUCTIVE WORKING RELATIONSHIP WITH MR. HARRISON, EVEN FEIGNING CONFIDENCE IN HIM WITH THE HOPES THAT IT WOULD EVENTUALLY TRANSLATE INTO ACTUAL CONFIDENCE. THE DEFENDANT SENT MR. HARRISON SEVERAL LETTERS WITHOUT RECEIVING A RESPONSE, TRYING TO FIND COMMON GROUND BUT THAT COMMON GROUND WAS NEVER FOUND BASED ON THE FACT THAT HE DID NOT RESPOND TO DEFENDANT'S LETTERS. AFTER GETTING NO RESPONSES TO MY LETTERS I CONTACTED HIM THROUGH MY GIRLFRIEND, VIA E-MAIL. MR. HARRISON'S RESPONSES TO THOSE E-MAILS WERE RUDE, DISRESPECTFUL AND UNPRODUCTIVE AND RATHER INHUMANE. THE DEFENDANT DID RECEIVE A RESPONSE FROM THE FIRST E-MAIL & LETTER FROM MR. HARRISON'S ASSOCIATE MR. GISSENDNER BUT WHEN THE DEFENDANT THEN TRIED TO CORRESPOND WITH MR. HARRISON'S ASSOCIATE HE TO CHOSE NOT TO RESPOND. MR. NELSON THEN RETURNED TO E-MAILING MR. HARRISON THROUGH HIS GIRLFRIEND. IN RESPONSE HE SAID HE WOULD WRITE THE DEFENDANT DIRECTLY. AFTER 21 DAYS HAD PASSED AND NO LETTER FROM MR. HARRISON. MR. NELSON WROTE HIM INQUIRING ABOUT THE STATUS OF MY CASE. MR. HARRISON THEN RESPONDED IN A RUDE AND INAPPROPRIATE MANNER. (ALL CORRESPONDENCES ARE ATTACHED) WHERE DEFENDANT ONCE HAD DESIRE TO REKNOWLE A RESPECTFUL RELATIONSHIP WITH MR. HARRISON AT THE ORGING OF THIS COURT, THAT DESIRE

HAS BEEN REPLACED BY IRRECONCILABLE DIFFERENCES, AS WELL AS A COMPLETE AND UTTER BREAKDOWN OF COMMUNICATION. THE DEFENDANT HAS NO TRUST NOR CONFIDENCE THAT MR. HARRISON WILL FIGHT FOR WHAT IS IN MR. NELSON'S BEST INTEREST.

IN RESPONSE TO MR. NELSON'S E-MAIL (ATTACHED) DATED 3-13-2016. MR. HARRISON SENT A LETTER (ATTACHED) DATED 4-4-2016 WITH A COPY OF A SUCCESSIVE MOTION READY TO BE FILED ON THE HURST CLAIM. MR. NELSON SENT MR. HARRISON A LETTER (ATTACHED) DATED 4-11-16 STATING THAT MR. NELSON WANTED MR. HARRISON TO FILE THE SUCCESSIVE MOTION. MR. NELSON RECEIVED NO RESPONSE TO THAT, NO ACKNOWLEDGEMENT THAT IT WAS EVEN RECEIVED, LETTER. SO MR. NELSON FOLLOWED THAT LETTER WITH ANOTHER ONE (ATTACHED) DATED 4-28-16 AND RECEIVED NO RESPONSE. MR. NELSON THEN RETURNED TO SENDING E-MAILS TRYING TO GET CLARIFICATION AS TO THE STATUS OF HIS CASE (ATTACHED) DATED 8-2-16 AND 8-15-16. IN HIS RESPONSE TO THE 8-15-16 E-MAIL MR. HARRISON STATED HE WOULD WRITE ME DIRECTLY. 21 DAYS LATER MR. NELSON SENT MR. HARRISON A LETTER (ATTACHED) DATED 9-5-16. MR. NELSON ASKED WHY MR. HARRISON DID NOT RESPOND TO ANY OF MR. NELSON'S LETTERS AND WHY HE HAD NOT FILED THE SUCCESSIVE MOTION. MR. HARRISON'S RESPONSE (ATTACHED) DATED 9-10-16. APPARENTLY MR. HARRISON DOES NOT RESPOND TO MY LETTERS NOR FILE SUCCESSIVE MOTIONS BECAUSE I TRIED TO GET HIM REMOVED FROM MY CASE AND BECAUSE I AM NOT SHOWING HIM ENOUGH RESPECT.

IN RESPONSE TO LEARNING MR. NELSON FILED A PRO SE ASST MR. HARRISON SENT THE HONORABLE JUDGE GERALD AND MS. KUCHTA A LETTER (ATTACHED) EXHIBIT C) DATED 7-29-2011 IN THE LETTER HE STATES. "BUT MR. NELSON HAS A CONSTITUTIONAL RIGHT NOT TO HAVE ME FORCED ON HIM. I WISH HIM THE BEST. WHEN THINGS SETTLE DOWN, I WILL SUBMIT A MOTION TO JUDGE GERALD ASKING THAT I BE ALLOWED TO WITHDRAW AS REGISTRY COUNSEL."

IN CONCLUSION

MR. NELSON NOW IMPLORES THIS HONORABLE COURT TO NOT FORCE MR. HARRISON ON ME AND DISMISS ATTORNEY GUYA HARRISON AND APPOINT SUBSTITUTE COUNSEL OR ALLOW THE DEFENDANT TO INVOKER HIS CONSTITUTIONAL RIGHT TO REPRESENT HIMSELF AND PROCEED PRO SE. IF THIS COURT SHALL CONDUCT A NELSON/FARRETTA HEARING MR. NELSON WAIVES HIS RIGHT TO BE PRESENT IN THE COURTROOM INSTEAD WOULD ASK THIS COURT TO ALLOW HIM TO PARTICIPATE IN THE HEARING TELEPHONICALLY OR BY CLOSE CIRCUIT T.V.

RESPECTFULLY SUBMITTED,



JOSHUA D. NELSON # 989102

P. 2220

UNION C.I.


P.O. BOX 1000

WHEFORD, FL.

32093

OATH

UNDER PENALTY OF PERJURY I DECLARE THAT I HAVE READ THE FOREGOING MOTION AND THAT THE FACTS IN IT ARE TRUE.


JOSHUA D. NELSON # 989102
P. 2220
UNION C.I.
P.O. BOX 1000
RAFFORD, FL.
32083

COPIES PROVIDED TO:

HON. EDWARD J. VOLZ, JR.
CIRCUIT COURT,
LEE COUNTY JUSTICE CENTER,
1700 MONROE STREET,
FT. MYERS, FL. 33902

MS. CAROL OTTMAR
OFFICE OF THE ATTORNEY GENERAL OF FLORIDA
3507 FRONTAGE ROAD, SUITE 200,
TAMPA, FL. * 33607

LINDA DOGGETT
CLERK OF COURT
CRIMINAL DIVISION
PO. BOX 2507
FT. MYERS, FL. 33902 2507

COPY

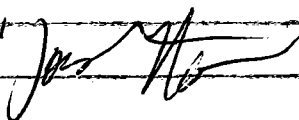
FILED
10/10/2016

Mr. Henderson,

4.22.15

I WROTE YOU A LETTER NOT TOO LONG AGO I'M WONDERING IF YOU'VE RECEIVED IT.
I HOPE WE CAN GET THE CASE BEHIND US AND FIND A WAY TO WORK TOGETHER. I WAS WONDERING
IF I RETURN TO STATE COURT WOULD YOU BE WILLING TO FILE A SUCCESSIVE 3.051 MOTION
ONE THAT I'M ABLE TO PARTICIPATE IN DEVELOPING? I HOPE THIS FINDS YOU DOING WELL. I LOOK
FORWARD TO HEARING FROM YOU. TAKE CARE.

Sincerely,



Subj: Re: Regarding your client, Joshua D. Nelson #989102 Union C.I.
Date: 3/14/2016 8:00:44 A.M. Eastern Daylight Time
From: bayalaw@aol.com
To: [REDACTED]

Let's get this clear. I tried my best to help Joshua. He returned my efforts by making false statements to a federal judge and I was removed as his federal counsel. Then, the lawyer who took my place quit on him. So what does he expect of me? And don't tell me what to do re. the state court proceedings.

Sincerely,
BH

Law Office of Baya Harrison
Post Office Box 102
Monticello, FL 32345
850/997-8469
Fax: 850/997-8460

—Original Message—

From: [REDACTED]
To: bayalaw <bayalaw@aol.com>
Sent: Sun, Mar 13, 2016 8:44 pm
Subject: Regarding your client, Joshua D. Nelson #989102 Union C.I.

Mr. Harrison,

I am writing to you on behalf of your client, Mr. Joshua D. Nelson. Please allow this email to serve as official notification that Mr. Nelson has written to you twice under the suggestion of the courts and has not received a response from you. Joshua asks that you withdraw from his case. If you refuse, he will be filing a Faretta hearing to proceed prose on the Hurst issue. He also asks that you not attempt to file anything on his behalf until the Faretta issue is resolved.

Please respond to Mr. Nelson as soon as possible. If you would like to relay the message through me, I am more than willing to pass it on to him. If not, you may contact him at the address below.

Joshua David Nelson #989102
P-2220 Union C. I.
7819 N.W. 228th Street
Raiford, FL 32026

Thank You.

Law Office of Baya Harrison
Post Office Box 102
Monticello, FL 32345
Phone: 850/997-8469
Fax: 850/997-8460

March, 14, 2015

Joshua David Nelson, DC# 989102
P-2220 Union Correctional Institution
7819 N.W. 228th Street
Raiford, Florida 32026

Re: State of Florida vs. Joshua D. Nelson
Case No: 95-00911 Lee County

Dear Mr. Nelson,

My name is Raymond L. Gissendaner and Mr. Baya Harrison has contacted me to assist in your case as it relates to the *Hurst Claim*. Mr. Harrison is in the process of preparing this claim on your behalf and as soon as it is completed and before filing it, he will forward a copy to you for your review.

Please be assured that Mr. Harrison and I will do everything we can to assist in avoiding the death warrant in your case.

If you have any questions, please do not hesitate to contact our office.

Sincerely,



Raymond L. Gissendaner
Paralegal/Investigator to
Baya Harrison, Attorney at Law

cc: file

copy

DEAR MR. GISENOWER,

5-20-16

THANK YOU FOR YOUR LETTER - I APPRECIATED HEARING FROM YOU. I DO HOPE THAT WE CAN PUT THE PAST BEHIND US AND START FRESH - I DO WANT THIS TO WORK - I AM NOT UNDER ANY ILLUSIONS THAT I KNOW MORE ABOUT THE LAW OR HAVE MORE EXPERIENCE IN THE LAW THAN MR. HARRISON OR YOU BUT AT THE SAME TIME I HAVE EVERY RIGHT TO BE INFORMED ABOUT WHAT IS GOING ON IN MY CASE - TO HAVE MY QUESTIONS ANSWERED, TO HAVE MY LETTERS RESPONDED TO AND TO BE ABLE TO READ AND REVIEW AND OFFER IDEAS FOR WHAT IS TO BE FILED ON MY BEHALF - HAVE THOSE IDEAS HEARD AND RESPONDED TO BEFORE ANYTHING IS FILED.

QUESTION: WOULD IT BE BETTER TO WAIT UNTIL AFTER THE FLORIDA SUPREME COURT NAMES A ROUND ON ^{THE} HURST ^{CLAIM} BEFORE WE FILE ANYTHING? WHY NOT, IF NOT? ASSUMING THEY DON'T WAIT SO LONG WHERE IT WOULD BECOME NECESSARY TO AVOID ANY TIME BAR ISSUES -

IF HE/~~YOU~~ WANTS TO FILE SOMETHING BEFORE THE ~~F.S.C.~~ F.S.C. ROUND I AM ONLY WITH THAT - MATTER OF FACT I HAVE ENCLOSED A COPY OF A SUCCESSIVE 3.950 MOTION ON THE HURST ISSUE THAT I WANT YOU TO USE FOR ME - OBVIOUSLY WHERE IT APPLIES ADD MY INFORMATION - THE ARGUMENTS THEY MADE I WANT YOU TO USE WORD FOR WORD - NOW IF YOU OR MR. HARRISON HAS ANY IDEAS THAT YOU BOTH BELIEVE HELP TO STRENGTHEN MY POSITION OF COURSE INCORPORATE THOSE IDEAS INTO THE MOTION

THANK YOU FOR YOUR TIME AND PATIENCE.

Sincerely,



Baya Harrison, III
Attorney At Law
736 Silver Lake Rd.
Monticello, FL 32344
bayalaw@aol.com

Tel. 850-997-5554
Fax. 850-997-8460
FBN 099568

Mr. Joshua Nelson
DC No. 989102
Union CI
7819 NW 228th Street
Raiford, FL 32026

April 4, 2016

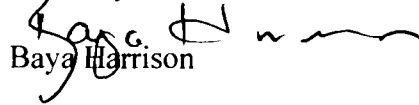
Re: State of Florida v. Joshua Nelson, Lee County Circuit Court Case No. 95-cf-911A; Draft Hurst Claim

Dear Mr. Nelson:

Enclosed is the original of an amended rule 3.851 motion to vacate your death sentence based upon a Hurst claim. I know you are familiar with the issue. I am doing this because, unless there has been a change that I do not know about, I am still your court appointed registry attorney per s.27.710 and .711 in state court. Please recall that you asked the federal court to appoint other counsel when I attempted to file a § 2254 habeas petition for you several years ago as the registry statute required. Another lawyer was appointed by the federal magistrate judge. However, as memory serves me, that lawyer moved to withdraw and was allowed to do so. I assume that Mr. Todd Scher was appointed in her place.

If you wish to have this pleading filed in the form presented, please sign it and mail it back to me. I enclose a copy for your records. I am also mailing or emailing a copy of this pleading to your federal court appointed attorney, Mr. Scher. I will wait to hear back from you and/or Mr. Scher.

Sincerely,


Baya Harrison

cc Mr. Todd Scher
Attorney At Law
1555 Palm Beach Lakes Blvd. Suite 1555
West Palm Beach, FL 33401
Phone: 561-804-6800
w/copy of proposed amended rule 3.851 motion raising Hurst claim

Mr. Harrison,

4-11-16

I HOPE THIS FINDS YOU DOING WELL. I RECEIVED YOUR LETTER AND THE COPY OF THE SUCCESSIVE NOTIONS REGARDING THE HURST ISSUE. THANK YOU - I DO WANT YOUR HELP AND WANT FOR YOU TO FILE THE NOTION ON MY BEHALF. SINCE THERE WAS ONLY ONE COPY OF THE NOTION ENCLOSED IM GOING TO KEEP IT AND SEND THE OATH AND VERIFICATION PAGE BACK TO YOU SIGNED AND DATED. I THINK YOU DID A VERY GOOD JOB ON THE NOTIONS - AGAIN THANK YOU. I HOPE YOU RECEIVE THIS - I SENT A LETTER TO YOU WITH A COPY OF ANOTHER PERSON'S SUCCESSIVE NOTION ON THE HURST ISSUE THAT I WANTED YOU TO USE TO WRITE MINE. IM HAPPY WITH THE ONE YOU WROTE.

SINCERELY,

copy

MR. HARRISON,

4-28-16

IM WRITING. WONDERING IF YOU'VE RECEIVED MY LETTER WITH THE SIGNED OATH OF VERIFICATION? ARE YOU RECEIVING MY LETTERS AT THE P.O. BOX ADDRESS. IVE SENT 3 LETTERS IN TOTAL AND IVE NOT RECEIVED A RESPONSE TO ANY OF THEM.

SINCERELY,

Subj: **Re: Joshua Nelson #989102**
Date: 8/2/2016 6:30:04 P.M. Eastern Daylight Time
From: bayalaw@aol.com
To: [REDACTED]

No. BH

Sincerely,

Law Office of Baya Harrison
Post Office Box 102
Monticello, FL 32345
850/997-8469
Fax: 850/997-8460

—Original Message—

From: [REDACTED] <[REDACTED]@aol.com>
To: bayalaw <bayalaw@aol.com>
Sent: Tue, Aug 2, 2016 6:02 pm
Subject: Joshua Nelson #989102

Joshua would like to know if you've recently filed anything on his behalf.

Thank you.

Subj: **Re: Joshua Nelson #989102**
Date: 8/16/2016 9:53:27 A.M. Eastern Daylight Time
From: bayalaw@aol.com
To: [REDACTED]@aol.com

I will write Mr. Nelson.

Sincerely,
BH

Law Office of Baya Harrison
Post Office Box 102
Monticello, FL 32345
850/997-8469
Fax: 850/997-8460

-----Original Message-----

From: [REDACTED] <[REDACTED]@aol.com>
To: bayalaw <bayalaw@aol.com>
Sent: Mon, Aug 15, 2016 11:15 pm
Subject: Joshua Nelson #989102

Mr. Harrison,

Joshua would like to know why you have not filed the successive motion on his behalf?

Thank you.

Mr. Harrison,

copy

9-5-16

Filed 10/10/2016

IM TRYING TO UNDERSTAND - IVE WRITTEN YOU NUMEROUS TIMES AND HAVE RECEIVED NO RESPONSE TO THOSE LETTERS - SO THEN I FIGURED IT WOULD BE MUCH EASIER FOR YOU TO RESPOND IN E-MAIL FORM. I DID RECEIVE A LETTER FROM YOUR COLLEAGUE MR. GISSENDANKER IN RESPONSE TO AN E-MAIL - I THEN ATTEMPTED TO CORRESPOND WITH HIM AND GOT NO RESPONSE. NOT LONG AFTER THAT I RECEIVED A LETTER FROM YOU WITH A COPY OF A 3,850 SUCCESSIVE MOTION ON THE HORST ISSUE - WHICH I EXPRESSED TO WANTING YOU TO FILE IT ON MY BEHALF - I SENT YOU TWO LETTERS AND RECEIVED NO RESPONSES - I THEN RETURNED TO TRYING TO CONTACT YOU THROUGH MY FRIENDS VIA E-MAIL. I ASKED YOU IF YOU HAD RECENTLY FILED ANYTHING ON MY BEHALF - WHICH YOU REPLIED NO. I ALSO ASKED YOU WHY YOU HAD NOT FILED THE 3,850 'SUCCESSIVE' MOTION AND YOU REPLIED YOU WOULD WRITE MR. NELSON. ITS BEEN 21 DAYS SINCE THAT E-MAIL AND IVE NOT HEARD ANYTHING FROM YOU. WHAT I WANT TO KNOW IS - HAVE YOU FILED A 3,850 SUCCESSIVE MOTION ON THE HORST ISSUE ON MY BEHALF? IF NOT, WHY NOT? I HOPE TO HEAR FROM YOU SOON.

Sincerely,

Baya Harrison, III
Attorney At Law
Post Office Box 102
Monticello, FL 32344

Tel. 850-997-5554
Fax. 850 997-8460

Filed 10/10/2016

September 10, 2016

Mr. Joshua Nelson
DC No. 989102
Union CI
7819 NW 228th Street
Raiford, FL 320

Dear Mr. Nelson:

I have your letter of 9/2/16 received yesterday. I am working on a Hurst claim for you. I have been waiting to see if Hurst is going to be applied retroactively. I will stay in touch. You need to remember that you took it upon yourself several years ago to make false allegations against me and have me removed as your counsel regarding the habeas petition I prepared for you. You also refused to meet with me when I drove to Raiford to meet with you.

The lawyers who was involved in this then abandoned you. You now want me to forget all of that and continue to represent you. The fact that you are on death row does not give you the right to fail to show me any respect. Nevertheless I will perform my ethical obligation to you. In the meantime if you want to get other counsel to represent you under the registry statute, be my guest.

Sincerely,


Baya Harrison

EXHIBIT A

**IN THE CIRCUIT COURT FOR THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA**

**STATE OF FLORIDA,
Plaintiff,**

vs.

CASE NO: 95-CF-911A

**JOSHUA D. NELSON,
Defendant.**

_____ /

ORDER DENYING DEFENDANT'S MOTION TO DISCHARGE COUNSEL

THIS CAUSE comes before the Court on Defendant's "Motion To Discharge Court Appointed Counsel," filed January 31, 2014. Having reviewed the motion, the case file, the applicable law, and having heard argument at a hearing on April 21, 2014, the Court finds as follows:

1. In the motion, Defendant argues that appointed counsel, Baya Harrison, was ineffective during his postconviction proceedings, creating a conflict. Defendant first argued Mr. Harrison was ineffective for failing to file a petition for ineffective appellate counsel on the issues that appellate counsel failed to raise on appeal that the trial court erred in not swearing the venire and gave no weight to the statutory mitigators. Defendant next argued that Mr. Harrison was ineffective for failing to call at the evidentiary hearing retained expert Dr. Robison. Defendant also argued that Mr. Harrison did not include him in the development of the issues raised during the postconviction or appeal proceedings. Defendant requests Mr. Harrison be discharged, and counsel representing him in federal court, Todd Scher, be appointed. To the extent Defendant cited his desire to file a motion arguing ineffectiveness of Mr. Harrison as postconviction counsel, the Court notes that there is no right to effective postconviction counsel in Florida. Moore v. State, 2013 WL 6223205, 38 Fla. L. Weekly S869 (2013); Mann v. State,

FILED 10/10/2016

2013 WL 1760908 (Fla. 2013); Howell v. State, 38 Fla L. Weekly S140 (Fla. 2013); and Gore v. State, 91 So.3d 769 (Fla. 2012).

2. Mr. Scher did not appear at the hearing, although he was noticed. There is no indication that Mr. Scher would like to be appointed to this case at the state court level, that he is on the registry of capital attorneys, or that he has signed a contract with the Justice Administrative Commission. It appears that Mr. Scher also contracted with Capital Collateral Regional Counsel (CCRC) at times, and there is concern that he was associated with CCRC at the time CCRC conflicted off this case, which would create a conflict with him as well.

3. Mr. Harrison argued that he was committed to Defendant, and to this case. He argued that he did raise the venire claim in the postconviction proceedings, and trial counsel testified at the evidentiary hearing that was the procedure in this circuit. He further argued that since the venire claim was not objected to at trial, it could not have been raised on appeal, and it would have been frivolous to file that claim in a petition to find appellate counsel ineffective. He believed that since the Florida Supreme Court found the trial court did give weight to both statutory and nonstatutory mitigating factors, such an argument would likewise be frivolous in a petition to find appellate counsel ineffective. Mr. Harrison stated he did not call Dr. Robison to testify at the evidentiary hearing because the doctor found nothing that would help Defendant, so his strategy was not to call him. Mr. Harrison also expressed concern that Defendant had filed the doctor's report as part of his motion to the Florida Supreme Court, and it was now public record for the State to use against Defendant. Mr. Harrison conceded that maybe he had not communicated clearly enough with Defendant.

4. The State indicated its only interest was in ensuring Defendant was represented, and that the record was clear. The State had no concerns with Mr. Harrison's representation of

Defendant.

5. The Court finds Mr. Harrison's representation of Defendant has been competent and has not been ineffective. Mr. Harrison was passionate and committed. Mr. Harrison answered all Defendant's concerns. It appears that Defendant lacks understanding of the legal process and the legal requirements for filing valid claims. Defendants have four fundamental decisions in a case: to enter a plea, to waive a jury trial, to testify, or to appeal, and for all other decisions, counsel has sole authority to exercise his or her professional judgment to decide tactics. Puglisi v. State, 56 So.3d 787, 792-793 (Fla. 4th DCA 2010) quoting United States v. Burke, 257 F.3d 1321, 1323 (11th Cir.2001). Mr. Harrison is not ineffective for not raising the claims Defendant wished raised that Mr. Harrison, in the exercise of his professional judgment, determined to be frivolous or meritless. After considering the motion and testimony, the Court finds there is no basis for discharge of Mr. Harrison.

Accordingly, it is

ORDERED AND ADJUDGED that Defendant's motion to discharge counsel is DENIED. Attorney Baya Harrison, Esq. shall remain attorney of record and continue representing Defendant in this case at the state court level.

DONE AND ORDERED in Chambers at Fort Myers Lee County, Florida, this 23
day of April, 2014.

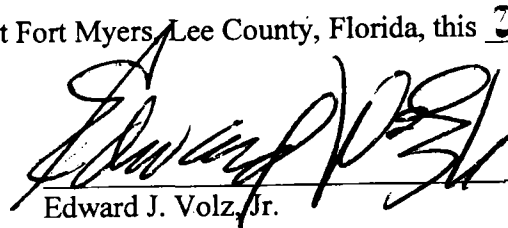

Edward J. Volz, Jr.
Circuit Judge

EXHIBIT B

FILED

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

2012 JAN 27 PM 2: 14

JOSHUA D. NELSON,

U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS, FLORIDA

Petitioner,

vs.

Case Nos. 2:11-cv-327-FTM-29SPC
2:11-cv-423-FTM-99SPC

SECRETARY, FLORIDA DEPARTMENT OF
CORRECTIONS, ATTORNEY GENERAL,
STATE OF FLORIDA,

Respondents.

ORDER

This matter comes before the Court upon Petitioner's repeated requests to have alternate counsel appointed to represent him in a federal habeas corpus action challenging Petitioner's conviction and sentence of death entered in the Twentieth Judicial Circuit Court, Lee County, Florida. On November 8, 2011, the Court held a telephonic hearing in connection with Petitioner's requests. Petitioner Joshua D. Nelson; Baya Harrison, Petitioner's current appointed counsel; Melissa Minsk Donoho, the attorney who Petitioner requests to be appointed in Mr. Harrison's stead; and, Senior Assistant Attorney General Carol Marie Dittmar participated in the hearing. As discussed during the hearing, Petitioner currently has two § 2254 actions pending before this Court challenging Petitioner's conviction and sentence of death: (1) case number 2:11-cv-327, which Petitioner filed *pro se* on May 25, 2011 (hereinafter the "First Petition"); and (2) case number 2:11-cv-

423, which Petitioner's current appointed counsel Mr. Harrison filed on August 3, 2011 (hereinafter the "Second Petition").

The First Petition contains seven grounds for relief with various sub-parts. See First Petition (Doc. #16). In this *pro se* action, Petitioner initially advised the Court that he "knowingly, voluntarily and intelligently" was waiving his right to counsel because an "irreconcilable conflict" existed between Petitioner and appointed counsel, Mr. Harrison. See Motion to Proceed *Pro Se* (Doc. #11). Subsequently, Petitioner moved for appointment of counsel, but specifically requested that Mr. Harrison "**NOT** be appointed" to represent him in his federal habeas action. See Motion for Appointment of Counsel Pursuant to 18 U.S.C. § 848, et. seq. For Representation in Federal Habeas Corpus Proceedings in A Capital Case (Doc. #13) (emphasis in original).

Mr. Harrison, consistent with the dictates of Fla. Stat. § 27.711(1)(c) and this Court's August 2, 2011 Order entered in case number 2:11-cv-327 (Doc. #18), filed the Second Petition. The Second Petition contains three grounds for relief. See Second Petition (Doc. #1). Mr. Harrison moved to have Petitioner granted *in forma pauperis* status and appointed counsel for his federal habeas action. See Petitioner's Motion to Proceed *In Forma Pauperis* and for the Appointment of Counsel in This 28 U.S.C. § 2254 Habeas Corpus Proceeding (Doc. #2). Notably, the motion requested the Court to "appoint Baya Harrison - or some other qualified attorney - - as Mr. Nelson's counsel, requiring the

federal government to pay approved and reasonable fees, costs and expenses." Id. at 3.

It is clear that Petitioner, who is indigent and under a sentence of death, has a right to counsel in a federal petition seeking to vacate or set aside his sentence of death. McFarland v. Scott, 512 U.S. 849 (1994). It is also undisputed that due to Petitioner's indigent status, Petitioner does not have a right to counsel of his choice. United States v. Gonzalez-Lopez, 548 U.S. 140, 147-152 (2006); Wheat v. United States, 486 U.S. 153, 159 (1988); Chaplin & Drysdale, Chartered v. United States, 491 U.S. 617, 624-25 (1989); Thomas v. Wainwright, 767 F.2d 738, 742 (11th Cir. 1985). Consequently, an indigent defendant seeking a change in appointed counsel must demonstrate "good cause" in order to be granted substitute counsel. Thomas at 742; see also United States v. Garey, 540 F.3d 1253, 1263 (11th Cir. 2008).

"Good cause" requires a showing of a "conflict of interest, a complete breakdown in communication or an irreconcilable conflict" U.S. v. Garey at 1263. Nonetheless, whether the defendant and his counsel have a "meaningful attorney-client relationship" is of no consequence to whether substitute counsel should be appointed. Morris v. Slappy, 461 U.S. 1, 14 (1983).

Based upon applicable law and the testimony elicited during the November 8, 2011 Telephonic Hearing, the Court will grant Petitioner's request to appoint substitute counsel for his federal habeas action. At the outset, the Court does not find that

Petitioner has demonstrated either incompetence or ineffectiveness on behalf of appointed counsel Mr. Harrison. See 28 U.S.C. § 2262(e). However, the Court finds that Petitioner has established good cause necessitating the substitution of counsel due to a complete breakdown in communication between Petitioner and appointed counsel, Mr. Harrison, which has resulted in an irretrievably broken attorney-client relationship.¹ Significantly, Petitioner lacks not only trust and confidence in his current counsel, but Petitioner refuses to meet or communicate with his current counsel. Indeed, despite Attorney Harrison's efforts, Petitioner declined to attend a meeting with Mr. Harrison when Mr. Harrison traveled to Union Correctional Institution for purposes of preparing a habeas petition on behalf of Petitioner. During the Hearing, it was apparent to the Court that Mr. Harrison recognizes that the attorney-client relationship is unfortunately broken.

Consequently, the Court will dismiss Mr. Harrison as counsel for Petitioner. Because the Court finds that Mr. Harrison is entitled to be paid for his fees, costs and expenses reasonably incurred in preparation of the Second Petition, Mr. Harrison shall submit for payment the appropriate paperwork with the District

¹The Court expresses no opinion as to which party, if either, is responsible for the deteriorated state of the parties' current relationship. The Court understands that the parties have a major difference of opinion about the significance and potential value of a psychological report. During the hearing, in an abundance of caution, the Court chose not to further inquire into any facts relative to the report.

Court.

Further, the Court will appoint Attorney Melissa Minsk Donoho as counsel in Mr. Harrison's stead pursuant to 18 U.S.C. § 3599 (a), as requested by Petitioner and as agreed to by Attorney Donoho at the November 8, 2011 Telephonic Hearing. Based upon the representations of Ms. Donoho, the Court finds she is well qualified under the applicable provisions to undertake representation of Petitioner. See 18 U.S.C. § 3599 (a)(2)(b-f), Volume VII, Guide to Judiciary Policies and Procedures, Chapter VI § 6.01. Alternatively, the Court finds good cause to appoint Ms. Donoho since she has handled other capital cases before the state and federal appellate courts.

Additionally, as noted *supra*, because the grounds for relief raised in the operative petitions in case numbers 2:11-cv-327 and 2:11-cv-423 are different and because Petitioner is only permitted to proceed on one petition, Attorney Donoho shall advise the Court, within twenty-eight (28) days of this Order how Petitioner wishes to proceed in this matter. Further, in light of the gravity of this matter and the application of the one-year AEDPA limitations period, the parties shall, to the extent possible, confer and attempt to resolve the issues presented by the two actions in a mutually agreeable and equitable manner consistent with Local Rule 3.01(g) .

ACCORDINGLY it is hereby **ORDERED**:

1. Petitioner's Motion to Proceed *In Forma Pauperis* and

Motion to Appoint Counsel (Doc. #2), which were previously deferred in case number 2:11-cv-423 is **GRANTED** to the extent set forth herein.

2. Attorney Melissa Minsk Donoho is appointed for the purpose of representing the Petitioner in connection with his federal habeas corpus proceeding. The **Deputy Clerk** shall prepare and issue to Ms. Donoho simultaneously herewith the appropriate federal Criminal Justice Act form - a CJA-30 ("Death Penalty Proceedings: Appointment of and Authority to Pay Court Appointed Counsel").

3. Attorney Baya Harrison is **dismissed** as counsel for Petitioner. The Clerk shall forward a CJA-30 Compensation Voucher to Mr. Harrison for his use in connection with the preparation of the Second Petition.

4. As more fully set forth above, Petitioner shall advise the Court, **within twenty-eight (28) days** of this Order, how he wishes to proceed.

DONE AND ORDERED in Fort Myers, Florida, on this 27th day of January, 2012.


SHERI POLSTER CHAPPELL
UNITED STATES MAGISTRATE JUDGE

SA: hmk
Copies: All Parties of Record

EXHIBIT C

BAYA HARRISON
Attorney At Law

310 North Jefferson Street
Monticello, Florida 32344
Email: bayalaw@aol.com

Tel. 850.997.8469
FAX: 850.997.5852
Fla. Bar No.099568

July 29, 2011

Hon. F. Lynn Gerald, Jr.
Circuit Judge
The Lee County Courthouse
1700 Monroe Street
Ft. Myers, FL 33902

Helena Kutcha, Esq.
Court Attorney
U.S. District Court
2110 First Street
Ft. Myers, FL 33901

Re: State v. Nelson, Case No. 95-911-CF; Status Report in Capital Case

Dear Judge Gerald and Ms. Kuchta:

Judge Gerald, per your original order of appointment, I have been serving as registry counsel under Sec. 27.710 and .711, Fla. Stat., for death row inmate Joshua D. Nelson. On July 7, 2011, the Supreme Court of Florida in Case No. SC10-540 affirmed your March 5, 2010 order that denied Mr. Nelson's Fla. R. Crim. P. 3.850/851 collateral attack upon his judgments and sentences, including the death sentence. I sent Mr. Nelson a copy. The mandate in the Florida Supreme Court's was issued yesterday, July 28, 2011.

And Ms. Kutcha, under these statutes and my contract with the Commission on Capital Cases and the Florida Department of Financial Services, unless the client does not want my services, I am obligated to represent Mr. Nelson, not only in the Florida state courts, but in the federal courts as well. This includes providing representation in "any authorized federal habeas corpus litigation . . ." Sec. 27.711(1)(c), Fla. Stat. Furthermore, the registry attorney " . . . agrees to continue such representation under the terms and conditions set forth in this section until the capital defendant's sentence is reversed, reduced or carried out and the attorney is permitted to withdraw from such representation by a court of competent jurisdiction."

There is a very short, rigidly enforced window of opportunity for Mr. Nelson to seek habeas corpus relief in federal court once the mandate in Case No. SC10-540 is issued. Therefore, several months ago, I began preparing a habeas petition for Mr. Nelson's signature along with a motion to allow him to proceed in forma pauperis. I also obtained a copy of his Florida Inmate Trust Account record (showing some \$28.20 in that account) and prepared a proposed insolvency affidavit and motion for the appointment of counsel.

Last Wednesday, July 27, 2011, I showed up at Union Correctional Institution where Mr. Nelson is incarcerated to go over the aforementioned legal papers with Mr. Nelson, get his signature on the documents and overnight them by US Express Mail to the USDC

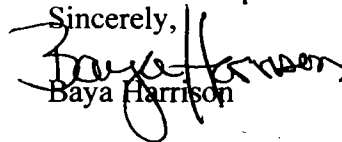
Page Two

clerk's office in Ft. Myers for filing. This was a prearranged meeting. Mr. Nelson refused to meet with me. See the attached copy of his signed "refusal" statement.

I checked with the USDC clerk's office in Ft. Myers and was surprised to learn that Mr. Nelson filed a pro se habeas corpus petition in that court late last May. The case has been given No. 2:11cv-327-FTM 29-S-P-C. I have not been able to download these pleadings. I understand that Mr. Nelson includes a motion for the appointment of counsel and other documents, possibly including a memorandum of law. (It is also my understanding that he has also filed documents in the Florida Supreme Court and elsewhere to the effect that he does not want me to represent him any further.)

Had Mr. Nelson not filed his own pro se habeas petition, had that petition not been received and docketed by the clerk of the USDC in Ft. Myers, and had he made it so crystal clear that he does not want my services, I would have exercised the authority I believe I have to file a timely and otherwise proper habeas petition on his behalf without his signature -- due to the real danger of him being time barred in federal court.

I send you this in order to let you know that I was/am more than willing to continue to assist Mr. Nelson. But Mr. Nelson has a constitutional right not to have me forced on him. I wish him the best. When things settle down, I will submit a motion to Judge Gerald asking that I be allowed to withdraw as registry counsel. If any court feels that I owe Mr. Nelson further representation, I will of course obey the court's directive.

Sincerely,

Baya Harrison

cc Ms. Tangy Williams, Deputy Clerk, Supreme Court of Florida
500 South Duval Street, Tallahassee, FL 32399-1900

Mr. Joshua Nelson, DC No. 989102
7819 NW 228th St., Raiford, FL 32026-2601

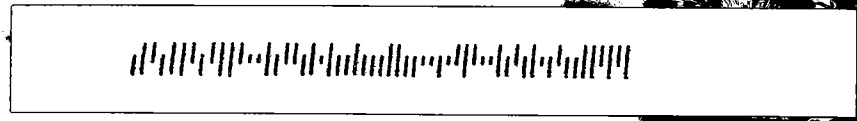
Hon. Steven B. Russell, State Attorney, and
Assistant State Attorney Dean Plattner
Office of the State Attorney, Twentieth Judicial Circuit of Florida
The Lee County Courthouse, 1700 Monroe Street
Post Office Box 339, Ft. Myers, Florida 33901

Carol M. Dittman, Esq., Senior Assistant Attorney General
Florida Department of Legal Affairs, Concourse Center 4, 3507 Frontage Road
Suite 200, Tampa, Florida 33607

Mac/Documents/Law Office/Nelson/Nelsonjosh.doc

JOSHUA NELSON #939102

P-2220
UNION C.I.



P.O. BOX 1000
RAIFORD, FL.
32083



CLERK OF COURT
c/o LINDA DOGGETT
CRIMINAL DIVISION
P.O. BOX 2507
FT. MYERS, FL.

REC'D
OCT 10 2014
RAIFORD

33902-2507

POTTS

STATE OF FLORIDA,
PLAINTIFF,

Vs.

JOSHUA D. NELSON,
DEFENDANT.

CASE No.: 95-911CF

Corrected Case # 95-CF-911-A

Verified on Odyssey

Clerk Initials KS

SUCCESSIVE MOTION FOR POSTCONVICTION RELIEF

COMES NOW, THE DEFENDANT, JOSHUA NELSON, PRO SE, AND FILES THIS "SUCCESSIVE MOTION FOR POSTCONVICTION RELIEF" UNDER FLA. R. CRIM. P. 3.951. THIS DEFENDANT MOVES TO VACATE THE SENTENCE OF DEATH IMPOSED IN THE ABOVE-STYLED CASE AND SAYS:

FACTS AND PROCEDURAL HISTORY

1. THE DEFENDANT WAS INDICTED FOR ROBBERY WITH A DEADLY WEAPON AND FIRST DEGREE MURDER IN THE ABOVE-STYLED CASE.
2. THE DEFENDANT ENTERED A PLEA OF NOT GUILTY AND PROCEEDED TO TRIAL, WHERE A JURY OF TWELVE PERSONS FOUND THE DEFENDANT GUILTY AS CHARGED AND RECOMMENDED A SENTENCE OF DEATH BY A VOTE OF 12-0.
3. THE TRIAL COURT THEN CONDUCTED A SPENCER HEARING, AND MADE FACTUAL FINDINGS THAT THE STATE HAD PROVEN THREE AGGRAVATING FACTORS:
(1) THE MURDER WAS

cc: SAO, bayalaw@aol.com, Judge Fuller, Court Admin, (A)
10-10-16 KS

1)

committed in the course of a robbery; (2) the murder was especially heinous, atrocious, or cruel (HAC); and (3) the murder was committed in a cold, calculated, and premeditated manner without any pretense of legal or moral justification (CCP).

4. The trial court found one statutory mitigating circumstance proven: the Defendant's age at the time of the crime, and assigned it great weight. The court also found 15 non-statutory mitigating factors, assigning substantial weight to one and little or moderate weight to the rest.

5. The trial court then sentenced the Defendant to death and to 189 months imprisonment for the robbery.

6. The Defendant appealed to the Florida Supreme Court, raising the following issues:

(1) the trial court erred by failing to properly determine the admissibility of testimony by the State's DNA expert Darren Esposito; (2) the trial court violated Nelson's right to confrontation by admitting evidence of his nontestifying codefendant's out-of-court statement; (3) the trial court failed to weigh Nelson's history of substance abuse as a mitigator; (4) the trial court improperly found CCP; (5) the trial court improperly found HAC; (6) the trial court gave the jury a vague instruction on the HAC aggravator; and (7) the death sentence is disproportionate in this case.

Nelson v. State, 748 So. 2d 237, 240 (Fla. 1999). On May 27, 1999, the Florida Supreme Court affirmed the convictions and sentences. *Id* at 246.

7. The Defendant filed a motion for postconviction relief raising the following claims as described by the Florida Supreme Court:

The specific claims outlined in the second amended motion were that trial counsel were ineffective because they (1) failed to guarantee that a fair and impartial jury tried Nelson; (2) failed to present mitigating evidence of Nelson's drug and substance abuse and mental health problems during the penalty phase; (3) failed to bring to the attention of the jury the nature and extent of the neglect and abuse, especially sexual abuse, which Nelson suffered as a child when they failed to present the testimony of Nelson's mother and stepfather during the penalty phase; (4) failed to provide Nelson's mental health expert with the information necessary to diagnose ADHD, Bipolar Disorder, and Adjustment Disorder with Anxiety, all of which Nelson purportedly suffered from at the time of the homicide; (5) failed to object and move for a mistrial when the State impermissibly appealed to the sympathy of the jury during closing arguments; (6) failed to ask the trial court to sequester the jury or at least to admonish the jury not to listen to, watch, or read media reports concerning Nelson's case between the guilt and penalty phases, which led to juror encounters with media that pertained to a tattoo Nelson engraved on himself between the two phases of trial that read "natural born killer"; (7) failed to ensure that the trial court properly swore the jurors; and (8) the cumulative effect of the various acts and omissions by trial counsel constituted ineffective assistance of counsel. Finally, Nelson argued {"pageset": "S7" *84 that (9) the trial court should vacate his convictions and sentences due to the newly discovered evidence that the State, in the case of codefendant Brennan, alleged that Brennan was more emotionally mature than Nelson, and Brennan received a life sentence.

Nelson v. State, 73 So. 3d 77, 83-84 (Fla. 2011).

8. After an evidentiary hearing, this court denied the motion and the Florida Supreme Court affirmed. *Id* at 91.

9. On May 25, 2011, the Defendant filed a pro se petition for writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court. The petition was transferred to the Fort Myers division and counsel appointed. Counsel filed an amended petition on December 3, 2012, raising the following eight claims:

- (1) Admission of co-defendant's statement violated Confrontation Clause;
- (2) Admission of DNA expert witness testimony resulted in unfair trial;
- (3) Failure to weigh mitigating circumstances violated 8th Amendment;
- (4) Weighing CCP aggravator violated 8th Amendment;
- (5) Weighing HAC aggravator violated 8th Amendment;
- (6) Jury instruction on HAC aggravator was unconstitutionally vague;
- (7) Ineffective assistance of trial counsel at guilt and penalty phases;
- (8) Co-defendant's life sentence renders death sentence unconstitutional.

10. On August 20, 2014, the U.S. District Court entered an order denying grounds 1-7 and dismissing ground 8 as unexhausted and procedurally barred. The court granted a certificate of appealability as to ground one.

11. The Defendant appealed the denial of his federal habeas corpus petition to the Eleventh Circuit Court of Appeals in Case No. 14-14371. The sole issue presented was whether the admission of co-defendant hearsay statements

through the testimony of other witnesses violated the Defendant's Sixth Amendment right of confrontation. That appeal remains pending and oral argument is scheduled for April 5, 2016. The issue presented in that case is wholly unrelated to the claim raised in this motion. Therefore, this court has concurrent jurisdiction to consider a motion raising a new claim. *See Bryant v. State*, 102 So. 3d 660 (Fla. 2nd DCA 2012).

12. No other motions have been filed in this court attacking the judgment and sentence, and no other appeals are pending except for 14-14371.

Ground for Relief

I. IMPOSITION OF THE DEATH PENALTY BASED ON AGGRAVATING FACTORS NOT FOUND BY THE JURY VIOLATED DEFENDANT'S SIXTH AMENDMENT RIGHT TO TRIAL BY JURY

The Defendant was charged with armed robbery and first-degree murder, and exercised his constitutional right to a trial by jury. The jury found the Defendant guilty as charged and returned an advisory recommendation of death by a vote of 12-0. The trial court then conducted a *Spencer* hearing and made factual findings as to the existence of three aggravating circumstances: (1) the murder was committed in the course of a robbery; (2) HAC; and (3) CCP. The jury did not make findings on whether the State proved the aggravating factors beyond a reasonable doubt.

This sentencing procedure violated the Defendant's Sixth Amendment right

to trial by jury. Every fact, other than the fact of a prior conviction, that increases the punishment for a crime is an offense element that must be submitted to the jury and found beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000). On January 12, 2016, the Supreme Court of the United States held that Florida's capital sentencing scheme is unconstitutional. The Court held that § 921.141, Florida Statutes, which requires the jury to make only an advisory recommendation of death and allows the court to make factual findings as to the aggravating factors necessary to allow imposition of the death penalty, violates the Sixth Amendment right to trial by jury. *Hurst v. Florida*, 136 S. Ct. 616 (2016).

a. Timeliness

Any motion to vacate a judgment of conviction and sentence of death must be filed within one year after the judgment and sentence become final. Fla. R. Crim. P. 3.851(d)(1). However, subsection (d)(2) provides an exception to that rule that applies in this case:

(2) No motion shall be filed or considered pursuant to this rule if filed beyond the time limitation provided in subdivision (d)(1) unless it alleges:

* * *

(B) the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively....

Fla. R. Crim. P. 3.851(d)(2); *Walton v. State*, 77 So. 3d 639 (Fla. 2011).

The constitutional right to a jury determination of all facts necessary for the imposition of the death penalty, as announced in *Hurst*, was not established at the time the Defendant's conviction and sentence became final or within one year thereafter. Accordingly, the Defendant is entitled to assert a timely claim under *Hurst* if that decision meets the test for retroactivity under *Witt v. State*, 387 So. 2d 922 (Fla. 1980). For the reasons that follow, *Hurst* is a watershed rule of criminal procedure that should be applied retroactively.

b. Retroactivity:

The rule announced in *Hurst* did not exist when the Defendant filed his first motion for postconviction relief, and in fact, there were precedents in effect at that time holding to the contrary. *See Hildwin v. Florida*, 490 U.S. 638, 109 S. Ct. 2055 (1989) (holding that Sixth Amendment right to trial by jury does not prevent judge from finding aggravating circumstances authorizing death sentence); *Spaziano v. Florida*, 468 U.S. 447, 104 S. Ct. 3154 (1984) (upholding § 921.141 and stating that advisory scheme is not unconstitutional). The Supreme Court had to overrule these prior decisions when deciding *Hurst*. As a result, the *Hurst* decision constitutes a significant upheaval in Sixth Amendment jurisprudence that must be applied retroactively under the standard set forth in *Witt*.

Under *Witt*, the need for decisional finality is balanced against the need for fairness and uniformity in the application of the law. A change in the law will only

be considered in a capital case if it (a) emanates from the Florida Supreme Court or the Supreme Court of the United States, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance. *Witt*, 387 So. 2d at 931. In this case, the *Hurst* decision was rendered by the U.S. Supreme Court based on an interpretation of the right to trial by jury under the Sixth Amendment to the U.S. Constitution. Thus, the first two factors are clearly established.

Cases that constitute a development of fundamental significance generally fall into two categories: (a) changes in the law which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties; or (b) changes in the law which are of sufficient magnitude to necessitate retroactive application under the three-part test established in *Stovall v. Denno*¹ and *Linkletter v. Walker*². *Id* at 961.

Under the *Stovall-Linkletter* test, the “essential considerations in determining whether a new rule of law should be applied retroactively are essentially three: (a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule.” *Id* at 926. In addition, special concerns for individual fairness and uniformity lend additional weight in favor of retroactivity in cases involving the

¹ 388 U.S. 293, 87 S. Ct. 1967 (1967).

² 381 U.S. 618, 85 S. Ct. 1731 (1965).

death penalty. The constitutional validity of the death penalty itself is dependent upon uniform application of one standard to all capital cases. *Id* at 926 n.7.

The purpose of the rule announced in *Hurst* was to protect capital defendants' inalienable and fundamental right under the Sixth Amendment to have any element of an offense that increases the punishment for a crime submitted to a jury and found beyond a reasonable doubt, and to overrule earlier precedents that did not adequately protect that right. The new rule scrupulously honors those constitutional safeguards that stand between a criminal defendant and death by execution, recognizing that death is unlike any other form of criminal punishment:

From the point of view of the defendant, it is different in both its severity and finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.

Gardner v. Florida, 430 U.S. 349, 357-58, 97 S. Ct. 1197 (1977). This compelling interest in promoting the integrity of the judicial process weighs heavily in favor of retroactivity. *Compare Linkletter*, 381 U.S. at 637 (holding that deterrent effect of exclusionary rule on police misconduct would not be advanced by making rule retroactive to conduct that had already occurred).

As to the second factor, Florida's reliance on the old rule is limited. There are presently only 390 condemned prisoners on death row in Florida who were sentenced under the unconstitutional scheme invalidated in *Hurst*. Some of these cases are still pending on direct appeal and entitled to the benefit of *Hurst* anyway. Others may be weeded out by harmless error analysis, which the Supreme Court expressly authorized the states to utilize. *See Hurst*, 136 S. Ct. at 624. Thus, the number of affected cases is limited.

The impact on the administration of justice will also be relatively minor. Applying *Hurst* retroactively will not lead to the suppression of evidence and mass acquittals or other undesirable results. Capital defendants will still face the possibility of a death sentence at a new penalty phase, or a sentence of life imprisonment without parole. In most cases, the State will be able to present the same evidence that was presented in the original penalty phase trial. The convictions will remain intact, with only the question of sentence to be readdressed. As stated above, the number of cases affected by retroactive application of *Hurst* will be limited. The impact on the administration of justice will therefore be very manageable. *Compare Linkletter*, 381 U.S. at 637 (noting that retroactive applicability of exclusionary rule would lead to wholesale release of prisoners).

An additional consideration in capital cases is the need for uniform application of the death penalty to similarly situated defendants. As the Florida Supreme Court stated in *Witt*:

Considerations of fairness and uniformity make it very difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases.

Witt, 387 So. 2d at 925 (internal quotation marks omitted). Thus, when a defendant's life is at stake, the State's interest in finality is less compelling and the need for consistency in results carries more weight in a retroactivity analysis.

Florida has applied other landmark Sixth Amendment decisions retroactively. *See e.g. Witt*, 387 So. 2d at 927 (applying right to counsel announced in *Gideon v. Wainwright* retroactively); *Riley v. Wainwright*, 517 So. 2d 656 (Fla. 1987) (applying right to consideration of non-statutory mitigating evidence announced in *Lockett v. Ohio* and *Hitchcock v. Dugger* retroactively); *James v. State*, 615 So. 2d 668 (Fla. 1993) (applying *Espinoza v. Florida* retroactively to allow resentencing in case where vague instruction on HAC aggravator given). *Hurst* is no less significant than these decisions.

Finally, the Florida Supreme Court's prior decision in *Johnson v. State*, 904 So. 2d 400 (Fla. 2005), which held that *Ring v. Arizona* is not retroactive in Florida, is not *stare decisis* on the retroactivity of *Hurst*. *Johnson* held that *Ring* does not apply retroactively in Florida because it concerned an Arizona sentencing

scheme and had no applicability in Florida. *Id* at 406. By contrast, *Hurst* directly impacts Florida’s capital sentencing statute, and overruled the line of cases relied on in *Johnson* to justify the non-retroactivity ruling. *See Hurst*, 2016 WL 112683 (stating that “[w]e now expressly overrule *Spaziano* and *Hildwin* in relevant part).

The Defendant therefore requests that the court apply *Hurst* retroactively to this case. Alternatively, the issue of the retroactivity of the *Hurst* decision has been briefed and orally argued before the Florida Supreme Court in the case of *Cary Lambrix v. State of Florida*, Case No. SC16-56, and a decision is pending. The Defendant requests that the Court hold this motion in abeyance until the matter of retroactivity has been decided.

c. Application of Hurst to this case

The jury did not make factual findings supporting any of the three aggravating factors relied upon to impose the death penalty in this case. The Sixth Amendment right to trial by jury applies to all factual findings necessary to increase the punishment for murder from life imprisonment to the death penalty, other than the fact of a prior conviction. *See Almendarez-Torres v. United States*, 523 U.S. 224; 118 S. Ct. 1219 (1998) (recognizing prior record exception to jury trial requirement). Therefore, application of *Hurst* invalidates all three of the aggravating factors in this case: that the murder was committed in the course of committing a robbery, HAC, and CCP.

As a result, the Defendant did not receive a fair or reliable penalty phase jury trial, and there has been no verdict within the meaning of the Sixth Amendment finding any aggravating factor proven beyond a reasonable doubt. Under *Hurst*, the Defendant was unconstitutionally sentenced to death based on judicial fact-finding under an invalid statutory scheme.

d. Harmless error analysis

It is not possible to determine in this case that the consideration of three invalid aggravating factors was harmless beyond a reasonable doubt. All of the aggravating factors in the case were found in violation of the right to trial by jury. There are no other valid aggravating factors, and there was considerable evidence presented in mitigation.

Harmless error analysis was never intended to be a substitute for a jury trial. *See Sullivan v. Louisiana*, 508 U.S. 275, 279-80 113 S. Ct. 2078 (1993) (stating that proper role of harmless error analysis is to determine effect of error on the jury's verdict actually rendered in the case, not to provide a substitute for a verdict that was never rendered within the meaning of the Sixth Amendment). The prohibition on directed verdicts in criminal cases similarly precludes a court from speculating that a jury would have returned a guilty verdict had they been afforded the opportunity to do so. *Id* at 280; *Compare Arizona v. Fulminante*, 499 U.S. 279, 308, 111 S. Ct. 1246 (1991) (stating that harmless error doctrine is properly

applied to trial error which occurs during the presentation of evidence to the jury rather than to the wholesale denial of basic trial rights). The Defendant is therefore entitled to a new penalty phase jury trial and unanimous jury verdicts as to any aggravating factors that will be used to justify a sentence of death.

e. Application of revised statute

In response to the *Hurst* decision, the Legislature enacted Ch. 2016-13, Laws of Florida (2016), which made substantial revisions to the capital sentencing procedure in § 921.141. The new statute completely eliminates judicial fact-finding and greatly expands the role of the jury in capital sentencing. Under the revised statute, the roles of the judge and jury are as follows:

(2) Findings and recommended sentence by the jury.--
This subsection applies only if the defendant has not waived his or her right a sentencing proceeding by a jury.

(a) After hearing all of the evidence presented regarding aggravating factors and mitigating circumstances, the jury shall deliberate and determine if the state has proven, beyond a reasonable doubt, the existence of at least one aggravating factor set forth in subsection (6).

(b) The jury shall return findings identifying each aggravating factor found to exist. A finding that an aggravating factor exists must be unanimous. If the jury:

1. Does not unanimously find at least one aggravating factor, the defendant is ineligible for a sentence of death.

2. Unanimously finds at least one aggravating factor, the defendant is eligible for a sentence of death and the jury shall make a recommendation to the court as to whether the defendant shall be sentenced to life imprisonment without the possibility of parole or to death. The recommendation shall be based on a weighing of all of the following:

a. Whether sufficient aggravating factors exist.

b. Whether aggravating factors exist which outweigh the mitigating circumstances found to exist.

c. Based on the considerations in sub-paragraphs a. and b., whether the defendant should be sentenced to life imprisonment without the possibility of parole or to death.

(c) If at least 10 jurors determine that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of death. If fewer than 10 jurors determine that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of life imprisonment without the possibility of parole.

(3) Imposition of sentence of life imprisonment or death.

(a) If the jury has recommended a sentence of:

1. Life imprisonment without the possibility of parole, the court shall impose the recommended sentence.

2. Death, the court, after considering each aggravating factor found by the jury and all mitigating circumstances,

MAY IMPOSE A SENTENCE OF LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE OR A SENTENCE OF DEATH. THE COURT MAY CONSIDER ONLY AN AGGRAVATING FACTOR THAT WAS UNANIMOUSLY FOUND TO EXIST BY THE JURY.


§ 921.141 (2), FLA. STAT. (2016)

THUS, THE SPENCER HEARING PROCEDURE UTILIZED IN THIS CASE IS CONTRARY TO BOTH CONSTITUTIONAL LIMITATIONS AND THE REQUIREMENTS OF THE REVISED STATUTE. BEFORE A DEFENDANT CAN UNLAWFULLY BE SENTENCED TO DEATH UNDER THE SIXTH AMENDMENT AND THE REVISED § 921.141, THE JURY MUST (1) MAKE A UNANIMOUS FINDING THAT THE STATE PROVED AT LEAST ONE AGGRAVATING FACTOR BEYOND A REASONABLE DOUBT, (2) WEIGH THE AGGRAVATING FACTORS FOR SUFFICIENCY, AND TO DETERMINE WHETHER THEY OUTWEIGH THE MITIGATING CIRCUMSTANCES AND JUSTIFY A SENTENCE OF DEATH, AND (3) RECOMMEND TO THE COURT BY A VOTE OF NOT LESS THAN 10-2 THAT THE DEFENDANT BE SENTENCED TO DEATH.

IN CONCLUSION

BASED ON THE FOREGOING, THE DEFENDANT MOVES TO VACATE THE SENTENCE OF DEATH IMPOSED IN THE ABOVE-CITED CASE.

RESPECTFULLY SUBMITTED,


JOSHUA D. NELSON # 989102

P. 2220

UNION C.I.

P.O. Box 1000

RAIFORD, FL. 32083

CERTIFICATE OF SERVICE

I, JOSHUA D. NELSON, DO HEREBY CERTIFY THAT A TRUE AND CORRECT COPY OF THE FOREGOING "SUCCESSIVE MOTION FOR POST CONVICTION RELIEF" HAS BEEN SENT BY FIRST CLASS U.S. MAIL THIS DAY 3RD OF ~~OCTOBER~~ TO THE FOLLOWING;

Joshua Nelson
JOSHUA D. NELSON # 989102
P. 2220
UNION C.I.
P.O. BOX 1000
RAIFORD, FL. 32083

HON. EDWARD J. VOLZ, JR.
CIRCUIT COURT,
LEE COUNTY JUSTICE CENTER,
1700 MONROE STREET,
FT. MYERS, FL. 33902

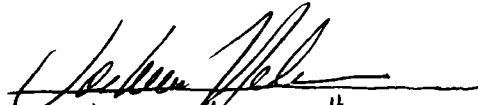
MS. CAROL DITMIR
OFFICE OF THE ATTORNEY GENERAL OF FLORIDA
3507 FRONTAGE ROAD, SUITE 200,
TAUNTA, FL. 33607

LINDA BOGGETT
CLERK OF COURT
CRIMINAL DIVISION
P.O. BOX 2507
FT. MYERS, FL. 33902-2507

OATH AND VERIFICATION

UNDER PENALTY OF PERJURY, I, JOSHUA D. NELSON DECLARE THAT I HAVE
READ THE FOREGOING, "SUCCESSIVE MOTION FOR POSTCONVICTION RELIEF"
AND THAT THE FACTS AND MATTERS STATED HEREIN ARE TRUE AND CORRECT,
(PURSUANT TO FLA. STATUTE 92.525)

OCTOBER 3RD 2016
DATE


JOSHUA D. NELSON # 989102
P. 2220
UNION C.I.
P.O. BOX 1000
RAIFORD, FL.
32083

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA.

Filed 10/10/2016

STATE OF FLORIDA,
PLAINTIFF,

CASE No.: 95-911CF

VS.

Corrected Case # 95-CF-911-A

JOSHUA D. NELSON,
DEFENDANT.

Verified on Odyssey
Clerk Initials KS

(4)

Judge Fuller, Court Admin.

MOTION FOR LEAVE TO AMEND DEFENDANT'S 3.851
SUCCESSIVE MOTION FOR POSTCONVICTION RELIEF

COMES NOW THE DEFENDANT, JOSHUA D. NELSON, PRO SE, BEFORE THIS HONORABLE COURT REQUESTING LEAVE TO AMEND THE DEFENDANT'S SUCCESSIVE 3.851 MOTION FOR POST CONVICTION RELIEF.

AS THIS COURT IS AWARE ON JANUARY 12, 2016 THE UNITED STATES SUPREME COURT RULED IN HURST V. FLORIDA, 136 S. CT. 616 (2016) THAT FLORIDA'S CAPITAL SENTENCING SCHEME WAS HELD TO BE UNCONSTITUTIONAL. MR. NELSON WAS SENTENCED UNDER THAT UNCONSTITUTIONAL SCHEME. SINCE THE UNITED STATES SUPREME COURT RULING THERE HAVE BEEN NUMEROUS CASES ARGUED BEFORE THE FLORIDA SUPREME COURT TO DETERMINE THE IMPACT OF THE HURST RULING ON CAPITAL CASES INCLUDING POST CONVICTION CAPITAL CASES SUCH AS MR. NELSON'S. IN ORDER TO PROTECT MR. NELSON'S CONSTITUTIONAL RIGHTS INCLUDING HIS SIXTH AMENDMENT RIGHT TO JURY TRIAL THESE ISSUES MUST BE FULLY LITIGATED IN THE STATE COURT TO EXHAUST THE CLAIMS AS REQUIRED BY LAW. THE FULL EXTENT AND IMPACT OF HURST IS NOT KNOWN AT THIS TIME AS THE PENDING CASES WITH THE FLORIDA SUPREME COURT HAVE


10-10-16
KS

1)

YET TO BE RULED ON.

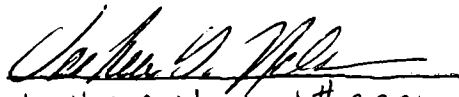
MR. NELSON RESPECTFULLY REQUESTS LEAVE TO AMEND IN ORDER TO FULLY LITIGATE AND EXHAUST EACH ISSUE THAT MAY ARISE IN THE NEAR FUTURE REGARDING "HURST'S" APPLICATION TO FLORIDA CAPITAL LAWS.

RESPECTFULLY SUBMITTED,


JOSHUA D. NELSON # 989102
P. 2220
UNION C.I.
P.O. BOX 1000
DAWFOOD, FL. 32083

OATH

UNDER PENALTY OF PERJURY, I DECLARE THAT I HAVE READ THE FOREGOING MOTION AND THAT THE FACTS IN IT ARE TRUE.


JOSHUA D. NELSON # 989102
P. 2220
UNION C.I.
PO BOX 1000
DAWFOOD, FL. 32083

COPIES PROVIDED TO:

HON. EDWARD J. VOLZ, JR.
CIRCUIT COURT
LEE COUNTY JUSTICE CENTER,
1700 MONROE STREET,
FT. MYERS, FL. 33902


MS. CAROL WITMAR
OFFICE OF THE ATTORNEY GENERAL OF FLORIDA
3507 FRONTAGE ROAD, SUITE 200,
TAMPA, FL. 33607

LINDA DOGGETT
CLERK OF COURT
CRIMINAL DIVISION
P.O. BOX 2507
FT. MYERS, FL. 33902-2507

95-CF-911-A

RECIEVED
UNION CORRECTIONAL INSTITUTION

ATTN: LINDA DOGGETT
CLERK OF THE COURT
CRIMINAL DIVISION
P.O. BOX 2507
FT. MYERS, FL. 33902-2507

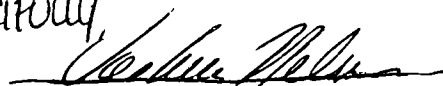
OCT 04 2016
BY: 
FOR MAILING

RE: DEFENDANT'S MOTION TO DISMISS COUNSEL,
DEFENDANT'S SUCCESSIVE 3.851 MOTION FOR POSTCONVICTION RELIEF,
DEFENDANT'S MOTION FOR LEAVE TO AMEND DEFENDANT'S 3.851
SUCCESSIVE MOTION FOR POSTCONVICTION RELIEF.

OCTOBER 3RD, 2016

DEAR HONORABLE CLERK LINDA DOGGETT,

ENCLOSED PLEASE FIND THE ABOVE-TITLED MOTIONS. PLEASE FILE
THEM WITH THE COURT ON MY BEHALF. THANK YOU.

RESPECTFULLY,

JOSHUA NELSON

IN THE CIRCUIT COURT FOR THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

CASE NO: 95CF911A

JOSHUA D. NELSON,

Defendant.

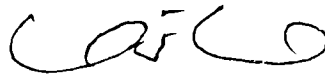
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ORDER OF REASSIGNMENT

THIS CAUSE comes before the Court on its own motion. The above-captioned case is hereby reassigned to the Honorable Joseph C. Fuller, Jr., who is duly qualified to preside over capital cases pursuant to Fla. R. Jud. Admin. 2.215(b)(10). Judge Fuller will review the matter and advise counsel as to how this case shall progress in accordance with any applicable orders of the Florida Supreme Court, rules of judicial administration and rules of criminal procedure.

DONE AND ORDERED in Chambers at Fort Myers, Lee County, Florida, this

19th day of October, 2016.



Michael T. McHugh
Chief Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Order has been furnished to **Joshua D. Nelson**, DC# 989102, Union Correctional Institution, 7819 N.W. 228th Street, Raiford, FL 32026-4000; **Carol M. Dittmar, Esq.**, Office of the Attorney General, 3507 E. Frontage Road, Suite 200, Tampa, Florida 33607; **Cynthia A. Ross**, Assistant State Attorney, P.O. Box 399, Fort Myers, Florida 33902-0399; **Baya Harrison, III, Esq.**, 310 N. Jefferson Street, Monticello, Florida 32344-2057; **The Honorable Joseph C. Fuller**; and **Administrative Office of the Courts (XIV)**, 1700 Monroe Street, Fort Myers, FL 33901; this 19th day of October, 2016.

LINDA DOGGETT
Clerk of Court

By:



Deputy Clerk

Linda Doggett
Clerk of Court
Criminal Division
P.O. Box 2507
Fort Myers, Florida 33902-2507

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OCT 26 2016

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LEE COUNTY
FLORIDA

Baya Harrison, III, Esq.
310 N. Jefferson Street
Monticello, Florida 32344-2057

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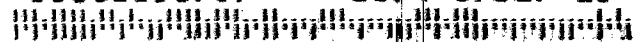
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**IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA**

**STATE OF FLORIDA,
Plaintiff,**

v.

Case No. 95-911-CFA

**JOSHUA D. NELSON,
Defendant.**

_____ /

**STATE'S RESPONSE TO MOTION TO DISMISS COUNSEL AND
STATE'S MOTION TO STRIKE PRO SE MOTIONS
FOR SUCCESSIVE POSTCONVICTION RELIEF AND FOR LEAVE TO AMEND**

COMES NOW, the State of Florida, by and through the undersigned attorneys, and hereby responds to Defendant Nelson's motion to dismiss Baya Harrison, Esq., as his counsel of record. The State respectfully submits that Nelson's motion must be denied, and his other pro se motions must be stricken, for the reasons that follow:

Defendant Nelson was convicted of first degree murder and sentenced to death by this Court on November 27, 1996. The Florida Supreme Court affirmed the conviction and sentence. Nelson v. State, 748 So. 2d 237 (Fla. 1999), cert. denied, 520 U.S. 1123 (2000). Nelson's attempt to secure postconviction relief was rejected by this Court in 2010, and the Florida Supreme Court affirmed that ruling. Nelson v. State, 73 So. 3d 77 (Fla. 2011). In federal court, Nelson's petition for a writ of habeas corpus was denied by the district court in 2014, and his appeal from that decision remains pending in the Eleventh Circuit Court of Appeals. Nelson v. Secretary, Dept. of Corrections, USCA Case No. 14-14371-P.

Nelson has returned to this Court pro se, filing an unauthorized successive motion for postconviction relief, a motion to amend his postconviction motion, and a motion to dismiss Harrison as counsel. In 2014, the Florida Supreme Court adopted an amendment to Florida Rule of Criminal Procedure 3.851, adding subdivision (b)(6), which prohibits self-representation in capital collateral proceedings. In re Amendments to Florida Rules, 148 So. 3d 1171, 1173-74 (Fla. 2014). As mandated by the rule, Nelson's pro se motions for successive postconviction relief and for leave to amend his successive motion must be stricken as unauthorized.

Rule 3.851(b)(6) also mandates that counsel in such cases can only be dismissed due to an actual conflict, unless the defendant is seeking to waive his postconviction proceedings entirely. Id. Nelson has not indicated that he intends to waive all potential future claims, and he can only secure a new attorney if he establishes that Mr. Harrison is laboring under an actual conflict of interest.

Nelson's motion clearly fails to identify, let alone demonstrate, any conflict of interest. Nelson simply maintains that he and Harrison have "irreconcilable differences," and claims an "utter breakdown of communication" as purportedly reflected in correspondence attached to the motion to dismiss. The correspondence relates to the anticipated filing of a new successive motion for postconviction relief premised on Hurst v. Florida, 136 S. Ct. 616 (2016). In the correspondences, Mr. Harrison explains that he intends to file a successive motion, but has "been waiting to see if Hurst is going to be applied retroactively." See Harrison letter of Sept. 10, 2016. The correspondence reflects that Nelson was provided a copy of the anticipated motion, and even praised Harrison's work ("I think you did a very good job on the motion"). See Nelson letter of April 11, 2016.

Rather than follow his attorney's advice to wait, Nelson has instead filed his own unauthorized Hurst motion, along with a motion to amend that pleading which admits that the full impact of Hurst is not yet known, and requesting permission to amend once the Florida Supreme Court resolves the relevant issues. Had Nelson's motion been filed by an attorney, it would be deemed untimely, since Rule 3.851 does not permit the filing of a successive motion based upon new case law unless there has been a fundamental constitutional right established which has been held to apply retroactively. See Fla. R. Crim. P. 3.851(d)(2)(B). Notably, another capital defendant from the Twentieth Circuit with a case pending in federal court did file a successive motion under Hurst, and that motion was denied as premature and insufficient on April 19, 2016. See State v. Jennings, 20th Circuit Case No. 95-CF-2284A.

Mr. Harrison was appointed by this Court in 2009, after Nelson's initial postconviction motion had been pending for more than eight years, and after several other collateral attorneys had withdrawn from representing Nelson. Once his state court collateral litigation concluded, Nelson requested a new attorney in federal court, asserting a dispute with Harrison. Ultimately, the federal district court appointed new attorneys to Nelson's case, finding specifically that Harrison had not performed incompetently or ineffectively in acting on behalf of Nelson. Thereafter, Nelson sought to have Harrison dismissed as counsel in state court, but this Court denied his motion to discharge counsel in April, 2014. Following that ruling, Nelson and Harrison exchanged correspondence regarding the filing of a new motion under Hurst, with Harrison correctly observing that the rules governing successive motions require a ruling of retroactivity before a new motion can be filed. The asserted conflict arises from the fact that Nelson wanted his motion to be filed immediately rather than waiting for the proper time as

required in the rules of criminal procedure. His conflict is with the relevant rules, not with the performance of attorney Harrison.

Nelson asserts that he has a constitutional right to represent himself and requests this Court to conduct hearings pursuant to Nelson v. State, 274 So. 2d 256 (Fla. 4th DCA 1973), and Faretta v. California, 422 U.S. 806 (1975). However, both the Florida Supreme Court and the United States Supreme Court have rejected claims of a constitutional right to self-representation in appeals and collateral proceedings. See In re Amendments, 148 So. 3d at 1174 (“A defendant sentenced to death does not have a right to self-representation on direct appeal under either the United States or Florida Constitutions, and we have previously held that we will not accept pro se filings in direct appeals in capital cases. See Davis v. State, 789 So. 2d 978, 980–81 (Fla.2001); see also Martinez v. Court of Appeal of Cal., 528 U.S. 152, 120 S. Ct. 684, 145 L.Ed.2d 597 (2000). We have also held that defendants sentenced to death may not appear pro se in any postconviction appeals. See Gordon v. State, 75 So. 3d 200, 202 (Fla. 2011). In adopting the Subcommittee's proposal, we now extend the prohibition against self-representation to include postconviction proceedings in the trial court”). Accordingly, no Faretta hearing is necessary or available to Nelson at this time.

In order to obtain a hearing to secure new postconviction representation, Nelson must at least identify an actual conflict of interest. Fla. R. Crim. P. 3.851(b)(6). As his motion fails to provide any basis to conclude that a conflict exists, his request for a hearing for dismissal and substitution of registry counsel must be denied.

WHEREFORE, the State respectfully requests that this Honorable Court issue an Order DENYING Nelson's Motion to Dismiss Counsel, and STRIKING the Successive Motion for Postconviction Relief and the Motion for Leave to Amend.

Respectfully submitted,

STEPHEN B. RUSSELL
STATE ATTORNEY

PAMELA J. BONDI
ATTORNEY GENERAL

/s/ Cynthia Ross
CYNTHIA ROSS
Assistant State Attorney
Florida Bar No. 0142085
Post Office Box 399
Ft. Myers, Florida 33902
Telephone: (239) 533-1000
Co-Counsel for State of Florida

/s/ Carol M. Dittmar
CAROL M. DITTMAR
Senior Assistant Attorney General
Florida Bar No. 0503843
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
Co-Counsel for State of Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of October 31, 2016, I electronically filed the foregoing STATE'S RESPONSE TO MOTION TO DISMISS COUNSEL AND STATE'S MOTION TO STRIKE PRO SE MOTIONS FOR SUCCESSIVE POSTCONVICTION RELIEF AND FOR LEAVE TO AMEND with the Clerk of the Court by using the E-filing Portal which will send a notice of electronic filing to the following: Baya Harrison, Esquire, 310 North Jefferson Street, Monticello, Florida 32344, **bayalaw@aol.com**; Todd G. Scher, Esquire 398 East Dania Boulevard, #300, Dania Beach, Florida 33004, **tscher@msn.com** and a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to: The Honorable Joseph C. Fuller, Jr., Lee County Justice Center, 1700 Monroe Street, Ft. Myers, Florida 33901 and Joshua D. Nelson, DC # 989102, Union Correctional Institution, Post Office Box 1000, Raiford, Florida 32083.

/s/ Carol M. Dittmar
CO-COUNSEL FOR THE STATE

IN THE CIRCUIT COURT FOR THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

vs.

CASE NO: 95-CF-911A

JOSHUA D. NELSON,
Defendant.

_____ /

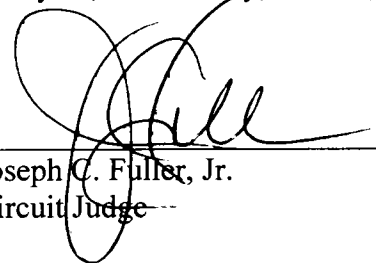
ORDER STRIKING PRO SE SUCCESSIVE 3.851 MOTION

THIS CAUSE comes before the Court on Defendant's pro se "Successive Motion For Postconviction Relief," filed October 7, 2016. Having reviewed the motion, the case file, the applicable law, the Court finds that Defendant raises claims related to the Hurst decision. That decision has not been held retroactive.

Accordingly, it is

ORDERED AND ADJUDGED that Defendant's successive motion is STRICKEN, as premature, without prejudice to file a successive motion should the Hurst decision be held retroactive.

DONE AND ORDERED in Chambers at Fort Myers, Lee County, Florida, this 28th
day of Oct, 2016.



Joseph C. Fuller, Jr.
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above order has been furnished to: **Joshua D. Nelson**, DC#989102, Union Correctional Institution, 7819 N.W. 228th St., Raiford, FL 32026; **John P. Abatecola, Esq.**, 20528 Torre Del Lago St., Estero, FL 33928; ; **Carol M. Dittmar, Esq.**, Office of the Attorney General, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607; **Cynthia Ross, Esq.**, Office of the State Attorney, P.O. Box 399, Ft. Myers, FL 33902-0399; and **Administrative Office of the Courts (XIV)**, 1700 Monroe St., Ft. Myers, FL 33901; this 1st day of November, 2016.

LINDA DOGGETT

Clerk of Court

By: Janeil Marcia
Deputy Clerk

**IN THE CIRCUIT COURT FOR THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA**

**STATE OF FLORIDA,
Plaintiff,**

vs.

CASE NO: 95-CF-911A

**JOSHUA D. NELSON,
Defendant.**

**ORDER GRANTING MOTION TO DISMISS COUNSEL AND APPOINTING
COUNSEL FROM REGISTRY**

THIS CAUSE comes before the Court on Defendant's "Motion To Dismiss Counsel," filed October 7, 2016. Having reviewed the motion, the case file, the applicable law, the Court finds as follows:

1. The Florida Supreme Court affirmed the denial of Defendant's postconviction motion on July 7, 2011.

2. On January 31, 2014, Defendant filed a motion to discharge counsel, arguing that a conflict was created by the ineffectiveness of Mr. Harrison during his postconviction proceedings. That motion was heard on April 21, 2014, and subsequently denied. In the denial, the Court found that Mr. Harrison stated he was committed to Defendant and to the case, and that Mr. Harrison had addressed all the concerns raised by Defendant. At that hearing, Mr. Harrison conceded that maybe he had not communicated clearly enough with Defendant.

3. In the current motion, Defendant argues that irreconcilable conflicts had arisen in the relationship with Mr. Harrison. Defendant attached to the motion various communications. Defendant argued that Mr. Harrison had not responded to his requests for information, and had not filed a motion raising a Hurst claim, as requested by Defendant. Defendant also cites to a federal court decision finding that the attorney-client relationship was broken.

4. The Court has reviewed Defendant's motion and the documents attached to it. The federal court order does not include the fourth page, where presumably the federal court made its findings. The Court notes that the federal court did remove Mr. Harrison from the case, and thus takes as true Defendant's representations of the federal court's findings. The Court finds that the communications attached to the motion sufficiently demonstrate that a complete breakdown in the relationship had occurred. The documents demonstrate that Defendant attempted to contact Mr. Harrison on April 22, 2015, asking if he had received Defendant's prior letter and expressing a desire to work together. On March 13, 2016, a friend of Defendant sent Mr. Harrison an email, advising him of Defendant's concern that he had not responded to Defendant, and asking him to withdraw from the case. Mr. Harrison responded by email on March 14, 2016 stating "don't tell me what to do re: the state court proceedings," and stating that Defendant had made "false statements to a federal judge and I was removed as his federal counsel." In a letter dated March 14, 2015, which presumably was actually 2016 as it references the Hurst decision, Mr. Harrison's paralegal sent Defendant a letter indicating that Mr. Harrison was preparing a motion raising a Hurst claim. On March 20, 2016, Defendant sent a letter in response, asking to be kept informed, asking questions about the proper procedure, and providing his input. On April 4, 2016, Mr. Harrison sent Defendant a letter with a 3.851 motion, requesting Defendant sign and return the motion. On April 11, 2016, Defendant responded, expressing his gratitude, and indicating he was sending the oath and verification page back so the motion could be filed. On April 28, 2016, Defendant sent Mr. Harrison a letter asking if he had received the signed oath, and expressing concern that Mr. Harrison was not receiving his letters. On August 2, 2016, the friend emailed Mr. Harrison on Defendant's behalf to ask if a motion had been filed. Mr. Harrison responded "No." On August 15, 2016, the friend emailed, stating that Defendant

wanted to know why the successive motion had not been filed. Mr. Harrison responded on August 16, 2016 that he would write Defendant. On September 5, 2016, Defendant wrote Mr. Harrison a letter expressing concern that he had not received any responses to his letters, and asking if a successive motion had been filed. On September 10, 2016, Mr. Harrison sent Defendant a letter indicating that he was working on the Hurst claim, but waiting to see if the decision would apply retroactively. Mr. Harrison stated that Defendant had made “false allegations” against him and had him removed from the federal case, and that “you now want me to forget all of that and continue to represent you.” While Mr. Harrison indicates he would continue to comply with his ethical obligations, he closes by stating “if you want to get other counsel to represent you under the registry statute, be my guest.”

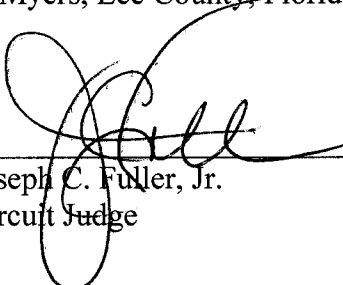
5. It is clear from the correspondence that there is frustration on both sides. Defendant is frustrated by the lack of communication and that Mr. Harrison is not keeping him informed about his case as extensively as Defendant wishes. Lack of communication is not grounds to find an attorney incompetent. Guardado v. State, 965 So. 2d 108, 114 (Fla. 2007). However, the correspondence attached to the motion shows that Defendant expressed a desire to put the past behind them and work together, while Mr. Harrison appears to blame Defendant for his removal from the federal case. The apparent bitterness displayed by Mr. Harrison in the communications, coupled with Defendant’s frustration, demonstrate that the attorney-client relationship is irretrievably broken in this case. The Court finds that it is unlikely Defendant would trust Mr. Harrison, and equally unlikely that Mr. Harrison would be able to set aside his frustrations with Defendant in order to represent Defendant to the best of his ability. The Court finds that a hearing will not assist it in this matter, and that the correspondence attached to the motion is sufficient to demonstrate that Defendant and Mr. Harrison can no longer work together in a

successful attorney-client relationship.

Accordingly, it is

ORDERED AND ADJUDGED that Defendant's motion to dismiss counsel is GRANTED. Attorney Baya Harrison, Esq. is removed as attorney of record in this case. John P. Abatecola, Esq., is appointed from the registry to represent Defendant.

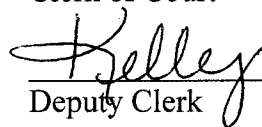
DONE AND ORDERED in Chambers at Fort Myers, Lee County, Florida, this 28TH day of Oct, 2016.



Joseph C. Fuller, Jr.
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above order has been furnished to: **Joshua D. Nelson**, DC#989102, Union Correctional Institution, 7819 N.W. 228th St., Raiford, FL 32026; **John P. Abatecola, Esq.**, 20528 Torre Del Lago St., Estero, FL 33928; ; **Carol M. Dittmar, Esq.**, Office of the Attorney General, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607; **Cynthia Ross, Esq.**, Office of the State Attorney, P.O. Box 399, Ft. Myers, FL 33902-0399; **Baya Harrison, III, Esq.**, 310 N. Jefferson Street, Monticello, FL 32344-2057; and **Administrative Office of the Courts (XIV)**, 1700 Monroe St., Ft. Myers, FL 33901; this 1 day of November, 2016.

LINDA DOGGETT
Clerk of Court
By: 

Deputy Clerk

IN THE CIRCUIT COURT OF THE
TWENTIETH JUDICIAL CIRCUIT, IN
AND FOR LEE COUNTY, FLORIDA

CASE NO. 95-CF-911A

STATE OF FLORIDA,

Plaintiff,

v.

JOSHUA D. NELSON,

Defendant.

_____ /

NOTICE TO THE COURT AND/OR MOTION TO WITHDRAW

COMES NOW undersigned, **JOHN ABATECOLA, Esq.**, and files the
aforementioned notice to the court and/or motion to withdraw. In
support of his pleading, undersigned states the following:

1. On Friday, November 4, 2016, undersigned received by
mail from the Lee County Clerk of Court a copy of an order
striking a pro se successive 3.851 motion filed by an individual
named Joshua Nelson. The order, which was dated November 1, 2016,
lists undersigned in the certificate of service.

2. Undersigned is unfamiliar with Mr. Nelson. Undersigned
has never represented Mr. Nelson nor has he corresponded with Mr.
Nelson in any manner. Perplexed as to why he was receiving a copy
of the Court's order, undersigned looked up Mr. Nelson's court
docket on the Lee County Clerk of Court website. There, the
online docket indicates that an order was issued on November 1,
2016, allowing for the withdrawal of counsel and the appointment

of counsel from the registry. Undersigned was unable to access the document, nor has he received a copy of it.

3. To the extent that undersigned is being asked to represent Mr. Nelson as registry counsel, he respectfully notifies this Court that he is unable to accept such an appointment. To the extent that undersigned has been appointed to represent Mr. Nelson as registry counsel, he respectfully moves to withdraw. Undersigned's present professional and personal commitments preclude him from being able to devote the time necessary to provide the adequate and effective legal representation to which Mr. Nelson is entitled in his collateral proceedings. See Spalding v. Dugger, 526 So. 2d 71, 72 (Fla. 1988)

4. Undersigned respectfully suggests that one of the three Capital Collateral Regional Counsel Offices in Florida would be best equipped to represent Mr. Nelson given the current procedural posture of his case.¹ These agencies have extensive resources and a significant number of attorneys, investigators and support staff at their disposal. Moreover, in the event of a conflict by of one the these offices, Florida Statute § 27.703 allows for the designation of another regional counsel office as

¹After being sent the order striking Mr. Nelson's pro se 3.851 motion, undersigned briefly looked into the status of Mr. Nelson's proceedings. From what undersigned could gather, Mr. Nelson's case is not only quite extensive, he is also eligible for a death warrant to be signed by the Governor of Florida.

replacement counsel.

WHEREFORE, undersigned notifies this Court of his unavailability to represent Mr. Nelson and to the extent necessary, undersigned respectfully urges that this Court grant him leave to withdraw as registry counsel for Mr. Nelson.

Respectfully submitted,

/s/ John Abatecola
John Abatecola
Florida Bar No. 112887
20301 Grande Oak Blvd.
Suite 118 - 61
Estero, FL 33928
Tel: 954 560-6742
jabatecola@comcast.net

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished through the Florida Courts E-Filing Portal to Carol Dittmar, carol.dittmar@myfloridalegal.com, Office of the Attorney General, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607; Cynthia Ross, cross@sao.cjis20.org, Assistant State Attorney, Office of the State Attorney, P.O. Box 399, Fort Myers, FL 33902-0399, on November 8, 2016.

/s/ John Abatecola
JOHN ABATECOLA

**IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA**

**STATE OF FLORIDA,
Plaintiff,**

v.

Case No. 95-911-CFA

**JOSHUA D. NELSON,
Defendant.**

_____ /

STATE'S MOTION FOR REHEARING

COMES NOW, the State of Florida, by and through the undersigned attorney, and hereby petitions this Court for reconsideration of two Orders recently entered on pro se motions filed by Defendant Nelson. The State respectfully submits that rehearing is necessary, for the following reasons:

Defendant Nelson recently filed several pro se pleadings in this Court. Since the pleadings were not e-filed, undersigned counsel did not receive a copy of the motions until October 10, 2016. The motions were: an unauthorized successive motion for postconviction relief, a motion to amend his postconviction motion, and a motion to dismiss Baya Harrison, Esq., as counsel of record for Nelson. On October 28, 2016, this Court entered two Orders, granting Nelson's motion to dismiss counsel and striking his pro se successive motion for postconviction relief. Unfortunately, the State's response to the pro se motions was not filed until October 31, 2016, and this Court's Orders were rendered without benefit of said response. In addition, this Court's Orders are inconsistent with the law as provided in Florida Rule of Criminal Procedure 3.851. Therefore, reconsideration is necessary.

In 2014, the Florida Supreme Court adopted an amendment to Florida Rule of Criminal Procedure 3.851, adding subdivision (b)(6), which prohibits self-representation in capital collateral proceedings. In re Amendments to Florida Rules, 148 So. 3d 1171, 1173-74 (Fla. 2014). As mandated by the rule, Nelson's pro se motions for successive postconviction relief and for leave to amend his successive motion must be stricken as unauthorized. While this Court's Order did strike the postconviction motion, it did so "without prejudice to file a successive motion should the Hurst decision be held retroactive." However, because Nelson cannot file a pro se motion, this Court should clarify that any successive motion must be filed by Nelson's counsel of record, and that any further pro se motion will be stricken as unauthorized, even if not untimely.

Rule 3.851(b)(6) also mandates that counsel in such cases can only be dismissed due to an actual conflict, unless the defendant is seeking to waive his postconviction proceedings entirely. Id. Nelson has not indicated that he intends to waive all potential future claims, and he can only secure a new attorney if he establishes that Mr. Harrison is laboring under an actual conflict of interest. Because there is no indication that this Court considered and applied this subdivision, and no direct finding of an actual conflict of interest, this Court should reconsider its Order granting Nelson's motion to dismiss counsel.

Nelson's motion clearly fails to identify, let alone demonstrate, any conflict of interest. Nelson simply maintains that he and Harrison have "irreconcilable differences," and claims an "utter breakdown of communication" as purportedly reflected in correspondence attached to the motion to dismiss. The emails relate to the anticipated filing of a new successive motion for postconviction relief premised on Hurst v. Florida, 136 S. Ct. 616 (2016). In the emails, Mr. Harrison explains that he intends to file a successive motion, but has "been waiting to see if

Hurst is going to be applied retroactively.” See Harrison letter of Sept. 10, 2016. The emails reflect that Nelson was provided a copy of the anticipated motion, and even praised Harrison’s work (“I think you did a very good job on the motion”). See Nelson letter of April 11, 2016.

Rather than follow his attorney’s advice to wait, Nelson has instead filed his own unauthorized Hurst motion, along with a motion to amend that pleading which admits that the full impact of Hurst is not yet known, and requesting permission to amend once the Florida Supreme Court resolves the relevant issues. Had Nelson’s motion been filed by an attorney, it would be deemed untimely, since Rule 3.851 does not permit the filing of a successive motion based upon new case law unless there has been a fundamental constitutional right established which has been held to apply retroactively. See Fla. R. Crim. P. 3.851(d)(2)(B). Notably, another capital defendant from the Twentieth Circuit with a case pending in federal court did file a successive motion under Hurst, and that motion was denied as premature and insufficient on April 19, 2016. See State v. Jennings, 20th Circuit Case No. 95-CF-2284A.

Mr. Harrison was appointed by this Court in 2009, after Nelson’s initial postconviction motion had been pending for more than eight years, and after several other collateral attorneys had withdrawn from representing Nelson. Once his state court collateral litigation concluded, Nelson requested a new attorney in federal court, asserting a dispute with Harrison. Ultimately, the federal district court appointed new attorneys to Nelson’s case, finding specifically that Harrison had not performed incompetently or ineffectively in acting on behalf of Nelson. Thereafter, Nelson sought to have Harrison dismissed as counsel in state court, but this Court denied his motion to discharge counsel in April, 2014. Following that ruling, Nelson and Harrison exchanged correspondence regarding the filing of a new motion under Hurst, with Harrison correctly observing that the rules governing successive motions require a ruling of

retroactivity before a new motion can be filed. The asserted conflict arises from the fact that Nelson wanted his motion to be filed immediately rather than waiting for the proper time as required in the rules of criminal procedure. His conflict is with the relevant rules, not with the performance of attorney Harrison.

Nelson asserts that he has a constitutional right to represent himself and requests this Court to conduct hearings pursuant to Nelson v. State, 274 So. 2d 256 (Fla. 4th DCA 1973), and Faretta v. California, 422 U.S. 806 (1975). However, both the Florida Supreme Court and the United States Supreme Court have rejected claims of a constitutional right to self-representation in appeals and collateral proceedings. See In re Amendments, 148 So. 3d at 1174 (“A defendant sentenced to death does not have a right to self-representation on direct appeal under either the United States or Florida Constitutions, and we have previously held that we will not accept pro se filings in direct appeals in capital cases. See Davis v. State, 789 So. 2d 978, 980–81 (Fla.2001); see also Martinez v. Court of Appeal of Cal., 528 U.S. 152, 120 S. Ct. 684, 145 L.Ed.2d 597 (2000). We have also held that defendants sentenced to death may not appear pro se in any postconviction appeals. See Gordon v. State, 75 So. 3d 200, 202 (Fla. 2011). In adopting the Subcommittee's proposal, we now extend the prohibition against self-representation to include postconviction proceedings in the trial court”). Accordingly, no Faretta hearing is necessary or available to Nelson at this time.

In order to obtain a hearing to secure new postconviction representation, Nelson must at least identify an actual conflict of interest. Fla. R. Crim. P. 3.851(b)(6). As his motion fails to provide any basis to conclude that a conflict exists, his request for a hearing for dismissal and substitution of registry counsel should have been denied, and rehearing is warranted.

WHEREFORE, the State respectfully requests that this Honorable Court issue an Order GRANTING this motion for rehearing, DENYING Nelson's Motion to Dismiss Counsel, and STRIKING the Successive Motion for Postconviction Relief and the Motion for Leave to Amend.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

s/ Carol M. Dittmar
CAROL M. DITTMAR
Senior Assistant Attorney General
Florida Bar No. 0503843
Office of the Attorney General
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: 813-287-7910
Facsimile: 813-281-5501
capapp@myfloridalegal.com [and]
carol.dittmar@myfloridalegal.com
Co-Counsel for State of Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of November, 2016, I electronically filed the foregoing STATE'S MOTION FOR REHEARING with the Clerk of the Court by using the E-filing Portal which will send a notice of electronic filing to the following: Baya Harrison, Esquire, 310 North Jefferson Street, Monticello, Florida 32344, **bayalaw@aol.com**; Todd G. Scher, Esquire 398 East Dania Boulevard, #300, Dania Beach, Florida 33004, **tscher@msn.com**; Cynthia Ross, Assistant State Attorney, Post Office Box 399, Ft. Myers, Florida 33902-0399, **cross@sao.cjis20.org**; John Abatecola, Esquire, 20301 Grande Oak Boulevard, Suite 118 - 61, Estero, Florida 33928, **jabatecola@comcast.net** and a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to: The Honorable Joseph C. Fuller, Jr., Lee County Justice Center, 1700 Monroe Street, Ft. Myers, Florida 33901 and Joshua D. Nelson, DC # 989102, Union Correctional Institution, Post Office Box 1000, Raiford, Florida 32083.

s/ Carol M. Dittmar
CO-COUNSEL FOR THE STATE

Linda Doggett
Clerk of Court
Criminal Division
P.O. Box 2507
Fort Myers, Florida 33902-2507

95CF911A

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CIRCUIT/COUNTY COURTS
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BAYA HARRISON, III ESQ.
310 N JEFFERSON ST
MONTICELLO, FL 32344-2057

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RETURN TO SENDER
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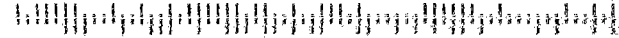
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**IN THE CIRCUIT COURT FOR THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA**

**STATE OF FLORIDA,
Plaintiff,**

vs.

CASE NO: 95-CF-911A

**JOSHUA D. NELSON,
Defendant.**

_____ /

ORDER ON STATE'S MOTION FOR REHEARING

THIS CAUSE comes before the Court on the State's "Motion For Rehearing," filed November 10, 2016. Having reviewed the motion, the case file, and the applicable law, the Court finds as follows:

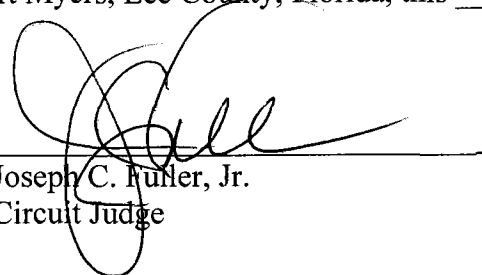
1. To the extent the Attorney General argued that it believed Defendant did not allege an actual conflict of interest, the Court disagrees. The Court finds, based on the motion and the attached documents, that an actual conflict of interest exists between Mr. Harrison and Defendant.

2. To the extent the Attorney General argued that the motion striking the successive 3.851 motion allowed Defendant the opportunity to file a successive motion should Hurst be held retroactive, the Court agrees with the Attorney General's analysis. It was the Court's intention that a successive motion would be filed by the newly appointed counsel on behalf of Defendant, not by Defendant himself.

Accordingly, it is

ORDERED AND ADJUDGED that the State's motion for rehearing is addressed as indicated above.

DONE AND ORDERED in Chambers at Fort Myers, Lee County, Florida, this 21ST
day of Nov., 2016.




Joseph C. Fuller, Jr.
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above order has been furnished to: **Joshua D. Nelson**, DC#989102, Union Correctional Institution, 7819 N.W. 228th St., Raiford, FL 32026; **John P. Abatecola, Esq.**, 20528 Torre Del Lago St., Estero, FL 33928; ; **Carol M. Dittmar, Esq.**, Office of the Attorney General, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607; **Cynthia Ross, Esq.**, Office of the State Attorney, P.O. Box 399, Ft. Myers, FL 33902-0399; and **Administrative Office of the Courts (XIV)**, 1700 Monroe St., Ft. Myers, FL 33901; this 21 day of November, 2016.

LINDA DOGGETT
Clerk of Court

By: 

Deputy Clerk

IN THE CIRCUIT COURT FOR THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

vs.

CASE NO: 95-CF-911A

JOSHUA D. NELSON,
Defendant.

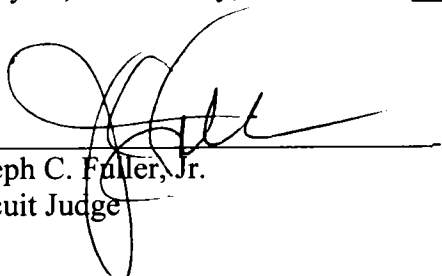
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ORDER DENYING MOTION TO WITHDRAW

THIS CAUSE comes before the Court on defense counsel's "Notice To The Court And/Or Motion To Withdraw," filed November 8, 2016. Having reviewed the motion, the case file, the applicable law, and upon consideration, it is

ORDERED AND ADJUDGED that defense counsel's motion to withdraw is DENIED.

DONE AND ORDERED in Chambers at Fort Myers, Lee County, Florida, this 5TH day of Dec., 2016.



Joseph C. Fuller, Jr.
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above order has been furnished to: **Joshua D. Nelson**, DC#989102, Union Correctional Institution, 7819 N.W. 228th St., Raiford, FL 32026; **John P. Abatecola, Esq.**, 20528 Torre Del Lago St., Estero, FL 33928; **Carol M. Dittmar, Esq.**, Office of the Attorney General, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607; **Cynthia Ross, Esq.**, Office of the State Attorney, P.O. Box 399, Ft. Myers, FL 33902-0399; and **Administrative Office of the Courts (XIV)**, 1700 Monroe St., Ft. Myers, FL 33901; this 6th day of December, 2016.

LINDA DOGGETT
Clerk of Court

By: 

Deputy Clerk

**IN THE CIRCUIT COURT OF THE
TWENTIETH JUDICIAL CIRCUIT, IN AND
FOR LEE COUNTY, FLORIDA**

CASE NO. 95-CF-911A

STATE OF FLORIDA,

Plaintiff,

v.

JOSHUA D. NELSON,

Defendant.

**SUCCESSIVE MOTION TO VACATE DEATH SENTENCE, AND ALTERNATIVELY
MOTION TO CORRECT ILLEGAL SENTENCE**

The Defendant, Joshua D. Nelson, by and through undersigned counsel, respectfully moves this Court for an order under Florida Rule of Criminal Procedure 3.851, vacating and setting aside the sentence of death imposed upon him by this Court and alternatively an order pursuant to Florida Rule of Criminal Procedure 3.800(a) correcting his illegal sentence of death. In support of this motion, Nelson states:

Facts and Procedural History

A. STATEMENT OF THE CASE

1. On April 4, 1995, Nelson and his co-defendant, Keith Brennan, were indicted for first-degree murder and robbery with a deadly weapon (I, R 1-2).¹

2. Nelson proceeded to trial on September 16, 1996 (XIV, T1, 7). He was found guilty as charged (VII, R527; XVIII, T 989-90). After the jury unanimously recommended the death penalty (XI, R 930, 935), the trial court sentenced Nelson to death on November 27, 1996 (XII, R 1070-85; 1088-94; XIII, R 1114, 1119). In its sentencing order, the trial court found the following aggravating circumstances: 1) the murder was committed during the course of a robbery; 2) the murder was especially heinous, atrocious, or cruel (HAC); and 3) the murder was

¹References to the record are designated by a Roman numeral for the volume number, R for the record on appeal, T for the trial transcript, and DR for the supplemental record.

committed in a cold, calculated, and premeditated manner without any pretense of legal or moral justification (CCP). In mitigation, the court found one statutory mitigating circumstance, Nelson's age of 18 at the time of the crime, and fifteen nonstatutory mitigating factors.² The statutory mitigating factor of age was given great weight. The first nonstatutory mitigating factor was given substantial weight and the remaining nonstatutory mitigating factors were given from moderate to great weight.

3. On direct appeal, the Florida Supreme Court affirmed Nelson's convictions and sentence of death. *Nelson v. State*, 748 So. 2d 237 (Fla. 1999).³ Certiorari was denied by the United States Supreme Court on January 18, 2000. *See Nelson v. Florida*, 520 U.S. 1123 (2000).

4. On January 5, 2001, Nelson filed a postconviction motion in the state circuit court (PCR 17-85). After several amendments, an evidentiary hearing was held on October 29, 2009 (PCR 1034-1109). On March 5, 2010, the circuit court entered an order denying relief (PCR 1100-31). On July 7, 2011, subsequent to briefing and oral argument, the Florida Supreme Court

²The following nonstatutory mitigating circumstances were presented during the penalty phase: 1) Nelson gave a voluntary confession; 2) Nelson was not the person who killed the victim; 3) death was caused by the codefendant Brennan; 4) Nelson suffered from a deprived childhood; 5) Nelson's childhood saddled him with emotional handicaps; 6) outside influences saddled Nelson with emotional handicaps; 7) Nelson suffered great situational stresses leading up to the time of the homicide; 8) Nelson was suffering emotional turmoil before and at the time of the homicide; 9) Nelson's anger stems from circumstances beyond his control; 10) Nelson suffered physical, mental, and sexual family abuse; 11) Nelson has no prior criminal convictions for violent felonies; 12) the homicide was committed for emotional reasons; 13) there was a conditional guilty plea subject to a life sentence which was refused by the State; 14) Nelson has potential for rehabilitation in prison; and 15) the death penalty as applied to Nelson is disproportionate. *See Nelson v. State*, 748 So. 2d 237, 240 n.1 (Fla. 1999).

³On direct appeal, Nelson raised the following issues: 1) the trial court erred by failing to properly determine the admissibility of testimony by the State's DNA expert; 2) the trial court violated Nelson's right to confrontation by admitting evidence of his nontestifying codefendant's out-of court statement; 3) the trial court failed to weigh Nelson's history of substance abuse as a mitigator; 4) the trial court improperly found the CCP aggravating circumstance; 5) the trial court improperly found the HAC aggravating circumstance; 6) the trial court gave the jury a vague instruction on the HAC aggravating circumstance; and 7) the death sentence is disproportionate.

affirmed the denial of postconviction relief. *Nelson v. State*, 73 So. 3d 77 (Fla. 2011)⁴

5. On May 25, 2011, Nelson filed a pro se federal habeas petition in the Middle District of Florida. Counsel was appointed, and an amended petition was ultimately filed on December 3, 2012. Nelson's petition was denied on August 20, 2014. Nelson's appeal to the Eleventh Circuit Court of Appeals was denied on December 19, 2016. *Nelson v. Secretary*, Case No. 14-14371 (11th Cir. 2016).

6. On October 7, 2016, Nelson filed a pro se postconviction motion based on the decision in *Hurst v. Florida*, 136 S.Ct. 616 (2016). The Court struck the motion on November 1, 2016, as premature, without prejudice to file a successive motion should the *Hurst* decision be held retroactive.⁵

B. THE TRIAL

7. The facts set out by the Florida Supreme Court are as follows:

Nelson and Keith Brennan wanted to leave the city of Cape Coral. The two devised a plan to murder Tommy Owens and steal his car. Nelson and Brennan knew that Owens kept a baseball bat in his car. On the evening of March 10, 1995, Owens was lured under false pretenses to a remote street. Nelson and Brennan were able to convince Owens to exit his car, whereupon Nelson hit Owens with the bat. After a number of blows, Owens eventually fell to the ground. Nelson and Brennan tied Owens' legs and arms. Owens pleaded for his life, stating that the two could take his car. After a brief discussion, Nelson and Brennan concluded that to avoid being caught, they should kill Owens. Brennan attempted to slice Owens' throat with a box cutter. Owens was not unconscious when the attacks began and he begged Nelson to hit him again with the bat so as to knock him unconscious before the stabbing continued. Nelson did as Owens requested and Brennan continued to attack Owens with the box cutter. Nelson and Brennan also continued to strike Owens a number of times with the bat. The two

⁴Nelson raised the following issues on appeal: 1) trial counsel rendered ineffective assistance of counsel for failing to ensure that Nelson was tried by a fair and impartial jury; 2) trial counsel rendered ineffective assistance during the penalty phase because he failed to protect Nelson from adverse publicity related to the tattoo issue; 3) trial counsel rendered ineffective assistance during the penalty phase because he failed to call Nelson's mother and stepfather as witnesses on his behalf; and 4) the trial court erred in denying Nelson's newly discovered evidence claim based on the State's position regarding the reversal of codefendant Brennan's death sentence.

⁵As explained in Nelson's Motion to Amend being filed simultaneous to this postconviction motion, undersigned does not yet have copies of most of the pleadings previously filed in this case, including Nelson's pro se filings.

eventually dragged Owens' body to nearby bushes, where Owens later died.

Nelson and Brennan picked up Tina Porth and Misty Porth and the four left the city in Owens' car. After stopping in Daytona Beach, the four left the state and drove to New Jersey. At different times during the trip, Nelson and Brennan informed Tina and Misty that they had murdered Owens. Both Tina and Misty testified at trial.

Nelson and Brennan were apprehended by law enforcement officers in New Jersey. Nelson gave a video- and audio-taped confession. In the confession, Nelson detailed his account of the murder, both at the crime scene and at the place where the bat was recovered. The video-taped confession was played to the jury. Additionally, an analyst for the Florida Department of Law Enforcement testified that blood stains on Nelson's shoes, the box cutter, and a pair of underwear that the box cutter was wrapped in all matched Owens' DNA.

Nelson, 748 So. 2d at 239-40.

C. THE PENALTY PHASE

8. Dr. Sidney Merin, a clinical psychologist and neuropsychologist, examined Joshua Nelson on October 23, and 27, 1996. He obtained Nelson's version of the offense, his background, family history, education, medical history, and use of drugs and alcohol (X, R 776-80, 794-95, 800). He administered tests concerning Nelson's personality, emotions, thought processes, and the condition of his brain functioning (X, R 781, 795-96). The testing indicated that Nelson's brain was in good order and not defective (X, R 782, 801).

9. Dr. Merin found four mitigating circumstances. First, although Nelson was 19 years old, he had the emotional maturity of a 12-13 year old (X, R 783). Second, he was a bright young man with average intelligence, with an IQ between 100 and 110 (X, R 783-84). Third, Nelson came from a markedly dysfunctional family (X, R 784, 806). He never had the opportunity to learn proper rules, how to process information, deal with discipline, and handle problems. He got into trouble at age 8 for molesting a 3 or 4 year old girl, and was arrested at age 11 for breaking into a theater (X, R 785, 798-99, 806). His family behaved like gypsies (X, R 785). His father had bizarre concepts of life, lived in a box or tent, withdrew from society, and had a family history of schizophrenia (X, R 785-86, 802, 804). It was likely that Nelson had latent genes of a mental disorder which emerged while he was under heightened stress and while

he was incarcerated. He had auditory hallucinations which went away with medication (X, R 784, 786, 802, 804, 806-07). His father was an alcoholic who abused his mother (X, R 787, 803). His mother hit his father with a frying pan (X, R 803). His stepfather, Greg Percifield, abused him sexually (X, R 787-88). Because he was neglected as a child, Nelson gravitated towards law breakers, drug and alcohol users. He got in trouble with the law for burglaries and stealing cars and waived a gun at an officer in one incident (X, R 789, 799). He used alcohol and drugs at an early age and spent 15 months in the SWFAS treatment center (X, R 789-90, 7899-800).

10. The fourth mitigator according to Dr. Merin was that Nelson could be rehabilitated in a structured environment (X, R 791). Also, he was under the domination of Brennan in the commission of the offense (X, R 791-92). Finally, Nelson was very angry on the date of the offense because his mother told him to leave the house after he resisted his stepfather's sexual advance (X, R 792-93).

11. Nelson's father, James Allen Nelson, testified that he was unemployed, lived in a tent in Orlando, and received SSI (X, R 808-09, 814). He was an alcoholic and used drugs (X, R 809-10, 812). He was married to Joshua's mother Peggy and lived with his son from 1977 to 1981 (X, R 809-10). James Nelson testified that they put liquor in Joshua's water when he was a baby and had colic (X, R 810). Once, James came home drunk, and Peggy beat him with a frying pan (X, R 811). He never took Joshua to a library or fishing and never read to him at bedtime (X, R 811-12). After James left, he saw Joshua only once in a while (X, R 811, 813-14).

12. Heather Timm testified that Joshua Nelson was her half-brother. They had the same mother. Her father obtained custody of her when she was 7 and Joshua was 2 years old (X, R 814-15). When she lived with her mother, there was alcoholism and abuse. She visited Joshua after she left (X, R 816). Her mother did not take care of him. He wore the same clothes for days at a time. There was no schedule for bedtime or meal (X, R 817). She had not seen Joshua since he had been in Florida (X, R 819).

13. Nelson's aunt, Patricia Bennett, testified that her brother Allan was his father and

was an alcoholic and drug addict (X, R 821-23). There was a history of mental illness in her family involving her grandfather, mother, brother, and uncle (X, R 821-23). Allan and Peggy sometimes left Joshua at home alone while Peggy was working at night. They did not provide for his basic needs like school clothes and supplies (X, R 823-24). Bennett was present when Allan came home drunk and Peggy beat him with a skillet (X, R 824-25, 827). Allan divorced Peggy in 1986 and did not have any contact with Joshua after they moved to Florida (X, R 827). Bennett had no contact with Joshua since he came to Florida in 1991 (X, R 828). In Indiana, Joshua was intelligent, behaved, and knew how to follow rules (X, R 829). Peggy called Patricia during Joshua's trial and asked her not to come because nothing would help Joshua and there would be accusations of sexual abuse (X, R 825-26).

14. Tammy Long testified that Joshua was her nephew; her brother was his father (X, R 830-31). Peggy begged Tammy not to come because Joshua did not have a chance and Peggy and Greg would be lucky not to have charges brought against them as well (X, R 830-32). There was a history of mental illness in Long's family involving her mother and grandfather (X, R 833). Her brother was an alcoholic, used drugs, and is schizophrenic (X, R 834, 840). Peggy quit a good job with no regard for Joshua's needs. He was not their priority (X, R 834). Long's family provided most of Joshua's clothing (X, R 835). When Long gave Joshua money, he was happy because his mother could use it for cigarettes or gas (X, R 835-36). Joshua loved his mother and felt responsible for her (X, R 837). Long had not seen Joshua since he left Indiana in 1991 when he was 14. At that time he was loving, sweet, intelligent, well-behaved and appreciative (X, R 841-43).

15. Reba Oular testified that Joshua was her nephew; his mother was married to her brother (X, R 843-44). Peggy chose not to care for Joshua. She did not appear to feed him and never bought him clothes. Oular's mother bought diapers and formula for Joshua even when Peggy had a good job. Joshua loved his mother and was protective of her (X, R 845). Oular felt Joshua did not have a chance because of his parents (X, R 845-48). Joshua could contribute to

society because he is intelligent and his experiences could help someone else (X, R 846). Oular did not have much contact with Joshua after 1991. She came to Florida and took him to Disney World a month before the crime. He “ditched” her and she feared he might have stolen her car (X, R 847). When he left Indiana, Joshua was intelligent and well-behaved (X, R 848).

16. Donna Walker testified that Nelson was her son’s friend while they were in high school (X, R 849). Nelson and Owens were at her house all the time working on cars with her son. She met Brennan and did not like him (X, R 850, 853). Once the boys had some problems while out on a boat at night, and the Coast Guard was looking for them. Peggy came to Walker’s house, but appeared not to be concerned (X, R 850-51). Walker had Nelson over for Christmas. She took him, Owens, Owens’ girlfriend, and her son to dinner for Nelson’s birthday (X, R 851-52). Nelson was a good boy. The boys got along well together until Brennan got involved (X, R 852). Nelson complied with her rules and was courteous and well behaved. He worked at McDonald’s and sometimes mowed Walker’s lawn. She sometimes gave him money and bought some school clothes for him (X, R 854).

17. While he testified at the guilt phase, Nelson relayed the following mitigating information as to his background: Nelson was born in Kokomo, Indiana, on January 16, 1977 (XVIII, T 795). In March, 1995, he was 18 years old (XVIII, T 837). His parents were alcoholics. His father beat his mother (XVIII, T 795). His mother sometimes kicked his father out, then let him return. His father left them when Nelson was 13. His mother had a number of boyfriends. Some of them, including his stepfather, beat Nelson (XVIII, T 796). Nelson stayed with his aunts on weekends, Christmas, and his birthday (XVIII, T 796-97). Also, his mother gave him food stamps to buy candy which he sold to other children at school. His mother used the money to buy cigarettes (XVIII, T 797-98). Nelson attended several different schools and dropped out in the 11th grade (XVIII, T 798, 837-38).

18. Nelson saw a psychiatrist when was 9 or 10 because of a sexual incident with a younger girl (XVIII, T 798). While Nelson was in jail, he was given Thorazine because he was

hearing voices, and Zolof, an antidepressant (XVIII, T 798-99). Nelson moved to Florida in 1990 with his mother and stepfather, Greg Percifield. He thought they moved because Percifield stole money from a motorcycle gang (XVIII, T 799). Percifield began beating Nelson. When the beatings slowed down, Percifield began molesting Nelson by performing oral sex on him two or three times a week. If Nelson refused, Percifield used his mother against him, refused to buy things he needed, or hit him. This continued for two or three years (XVIII, T 800-01).

19. Nelson began using drugs when he moved to Florida. He used marijuana, ruffies, alcohol, ecstasy, acid, and mushrooms. He also huffed gasoline (XVIII, T 802). He was sent to Southwest Florida Addiction Services (SWFAS) for help with his drug addiction. He was there for 6 months, then ran away when a staff member slapped him. He was sent back for 9 more months. He met and became friends with Brennan while he was there (XVIII, T 802-03, 831, 834-35).

Introduction to Claims

20. On January 12, 2016, *Hurst v. Florida*, 136 S.Ct. 616 (2016), declared Florida's capital sentencing scheme unconstitutional. On March 7, 2016, the governor signed into law Chapter 2016-13, the legislature's effort to rewrite § 921.141 in the wake of *Hurst* to cure the constitutional deficiencies. It was intended to apply in any trial, penalty phase, retrial or resentencing conducted in Florida, even when the homicide at issue had occurred prior to March 7, 2016. The revised sentencing statute provided that when 3 or more jurors voted in favor of a life sentence, the judge could not impose a death sentence. For a death recommendation to be returned, 10 jurors must have voted in favor of a death sentence. On October 14, 2016, the Florida Supreme Court decided *Perry v. State*, ___ So. 3d ___, 2016 WL 6036982 (Fla. October 14, 2016), and declared the 10-2 provision contained in Chapter 2016-13 to be unconstitutional under *Hurst v. Florida* and Florida law. The Court concluded that the Sixth and the Eighth Amendments required a unanimous jury verdict recommending a death sentence before one

could be imposed. Accordingly, the jury must unanimously find that sufficient aggravators existed to justify a death sentence and that the aggravators outweighed the mitigating factors that are present. The jury must then unanimously reject mercy for the Defendant and vote in favor of a death sentence. If a unanimous death recommendation is not returned, a death sentence cannot be imposed. Thus, a life sentence is mandated if one or more jurors vote in favor of a life sentence due to a desire to be merciful even if the jury unanimously determined that sufficient aggravators existed and that they outweighed the mitigators that were present. *Perry v. State*, 2016WL 6036982 at *8, quoting *Hurst v. State*, 202 So.3d 40, 59 (Fla. 2016)) (“the penalty phase jury must be unanimous in making the critical findings **and recommendation** that are necessary **before a sentence of death may be considered by the judge or imposed.**”) (emphasis added). See also *Hurst v. State*, 202 So. 3d at 62 n.18. On December 22, 2016, the Florida Supreme Court held that *Hurst v. Florida* was retroactive. *Mosley v. State*, _ So. 3d _, 2016 WL 7406506 (Fla. Dec. 22, 2016).⁶ On the basis of the new Florida law arising from *Hurst v. Florida*, the enactment of Chapter 2016-13, *Perry v. State*, *Hurst v. State*, and *Mosley v. State*, Nelson files this motion to vacate and presents his claims for relief arising from the new Florida law resulting in the wake of *Hurst v. Florida*.

CLAIM I

NELSON’S DEATH SENTENCE VIOLATES THE SIXTH AMENDMENT UNDER *HURST V. FLORIDA*.

This claim is evidenced by the following:

⁶In *Mosley v. State*, the Florida Supreme Court held: “we conclude that *Hurst* should apply retroactively to *Mosley*.” 2016 WL 7406506 at *18. This means that Rule 3.851(d)(2)(B) has been satisfied and motions to vacate may be “considered” that rely on the constitutional right recognized in *Hurst v. Florida* which “has been held to apply retroactively.” The Florida Supreme Court also found that *Mosley* satisfied the alternative retroactivity path because he demonstrated that failing to apply *Hurst v. Florida* to his case violated fundamental fairness. *Id.* (“This Court has previously held that fundamental fairness alone may require the retroactive application of certain decisions involving the death penalty after the United States Supreme Court decides a case that changes our jurisprudence.”).

1. All other factual allegations in this motion and in Nelson’s previous motions to vacate, and all evidence presented by him during his trial and previous postconviction proceedings, are incorporated herein by specific reference.

2. This motion is filed with one year of the issuance of *Hurst v. Florida*, *Perry v. State*, 2016 WL 6036982 (Fla. Oct. 14, 2016), *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), and *Mosley v. State*, 2016 WL 7406506 (Fla. Dec. 22, 2016)⁷, all of which constitute a change in Florida law. The claims presented herein could not have been presented before the change in Florida law that these cases brought about. Accordingly, this motion is timely.

3. In *Mosley v. State*, the Florida Supreme Court discussed *Hurst v. Florida*:

In *Hurst v. Florida*, the United States Supreme Court declared our capital sentencing scheme, codified at section 921.141(3)(a)-(b), Florida Statutes (2015), unconstitutional because the “[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.” 136 S.Ct. at 619.

2016 WL 7406506 at *17. In *Hurst v. State*, the Florida Supreme Court explained the change in law that resulted from *Hurst v. Florida*:

In so holding, the Supreme Court overruled its decisions in *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), and *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989), to the extent they approved Florida’s sentencing scheme in which the judge, independent of a jury’s factfinding, finds the facts necessary for imposition of the death penalty. See *Hurst v. Florida*, 136 S.Ct. at 624. The Supreme Court’s ruling in *Hurst v. Florida* also abrogated this Court’s decisions in *Tedder v. State*, 322 So.2d 908 (Fla.1975), *Bottoson v. Moore*, 833 So.2d 693 (Fla.2002), *Blackwelder v. State*, 851 So.2d 650 (Fla.2003), and *State v. Steele*, 921 So.2d 538 (Fla.2005), precedent upon which this Court has also relied in the past to uphold Florida’s capital sentencing statute.

202 So. 3d at 44. The Sixth Amendment right enunciated and applied in *Hurst v. Florida* gives defendants the right to a jury determination of the facts that are statutorily necessary to authorize a judge to impose a death sentence. *Hurst v. Florida* invalidated Fla. Stat. §§ 921.141(2) and (3)

⁷*Mosley v. State* is not yet final. Nelson requests the opportunity to amend his claim once *Mosley* becomes final.

as unconstitutional. Under those provisions, a defendant who had been convicted of a capital felony could be sentenced to death only after the sentencing judge entered written fact findings that: 1) sufficient aggravating circumstances existed that justify the imposition a death sentence, and 2) insufficient mitigating circumstances existed to outweigh the aggravating circumstances. *Hurst*, 136 S.Ct. at 620-21. *Hurst v. Florida* found this scheme unconstitutional. “Florida does not require the jury to make critical findings necessary to impose the death penalty,” but rather, “requires a judge to find these facts.” *Id.* at 622. On remand, the Florida Supreme Court held in *Hurst v. State* that *Hurst v. Florida* means “that before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death.” *Hurst v. State*, 202 So. 3d at 57.

4. *Hurst v. Florida* changed Florida law and established that capital defendants had a constitutional right to a unanimous jury finding the facts necessary to authorize a judge to impose a death sentence. *See* Rule 3.851(d)(2)(B) (“the fundamental constitutional right asserted ... has been held to apply retroactively”). In *Mosley*, the Florida Supreme Court held: “we conclude that *Hurst* should apply retroactively to *Mosley*.” 2016 WL 7406506 at *18. This means that Rule 3.851(d)(2)(B) has been satisfied and motions to vacate may be “considered” that rely on the constitutional right recognized in *Hurst v. Florida* which “has been held to apply retroactively.” *Mosley* does indicate that whether a specific defendant receives the benefit of *Hurst v. Florida* requires a case-by-case and/or category-by-category analysis.

5. In *Mosley v. State*⁸, the Florida Supreme Court determined that *Hurst v. Florida*,

⁸In *Mosley v. State*, the Florida Supreme Court referenced the decision in *Asay v. State*, 2016 WL 7406538 (Fla. Dec. 22, 2016), which issued the same day as *Mosley*. The Court in *Mosley* noted that in *Asay* it had not extended the benefit of the change in law created by *Hurst v. Florida* to *Asay*. *See Asay v. State*, 2016 WL 7406538 at *13 (“we conclude that *Hurst* should

136 S.Ct. 616 (2016), constituted a change in Florida law that was to be applied retroactively to Mosley and required the Court to grant postconviction relief, vacate Mosley's death sentence and remand for a resentencing.⁹ As the Court in *Mosley* observed: "it is undeniable that *Hurst v. Florida* changed the calculus of the constitutionality of capital sentencing in this State." 2016 WL 7406506 at *23.

6. In *Mosley*, the Florida Supreme Court held that under Florida law, there are two separate and distinct approaches for conducting a retroactivity analysis. 2016 WL 7406506 at *20 n.13.¹⁰ The first approach to retroactivity discussed in *Mosley* was explained as follows:

This Court has previously held that **fundamental fairness alone may require the retroactive application of certain decisions involving the death penalty after the United States Supreme Court decides a case that changes our jurisprudence**. For example, in *James*, this Court reviewed whether the United States Supreme Court's decision in *Espinosa v. Florida*, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), should apply retroactively. *James*, 615 So.2d at 669. Although pre-*Espinosa* this Court had rejected claims that our jury instruction on the extremely heinous, atrocious or cruel (HAC) aggravator was unconstitutionally vague, the United States Supreme Court disagreed and held in *Espinosa* that our instruction was, indeed, unconstitutionally vague. 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854. This Court then held that defendants who had raised a claim at trial or on direct appeal that the jury instruction pertaining to the HAC aggravating factor was unconstitutionally vague were entitled to

not be applied retroactively to Asay's case"); *Id.* ("When considering the three factors of the *Stovall/Linkletter* test together, we conclude that they weigh against applying *Hurst* retroactively to all death case litigation in Florida"). However, *Mosley* noted that the Court in *Asay* had not foreclosed the retroactive application of *Hurst v. Florida* to other to other capital postconviction defendants. Thus, *Mosley* is a follow-up opinion to *Asay* that makes clear that *Asay* is limited in its scope and merely concludes that Asay is not entitled to the benefit of *Hurst v. Florida*. *Asay* does not mean that *Hurst v. Florida* is not to be applied retroactively in any capital collateral case; in fact, *Mosley* holds that *Hurst v. Florida* is to be applied retroactively to at least 2002, and when fundamental fairness dictates and/or when the *Witt* balancing test warrants to cases final before June 24, 2002. Because of its broader scope and its statement of the two approaches for determining when retroactive application of *Hurst v. Florida* is necessary, this motion primarily focuses on the opinion in *Mosley v. State*.

⁹The homicide at issue in *Mosley* occurred in 2004. Thereafter, Mosley was tried, convicted and sentenced to death. The judgment and sentence were affirmed on direct appeal. *Mosley v. State*, 46 So. 3d 510 (Fla. 2009), *cert denied* 562 U.S. 887 (2010).

¹⁰The State has already filed a motion for rehearing in *Mosley* complaining that by providing for a case-by-case analysis "this Court has created confusion and caused an unnecessary unsettling of the law." (Motion for Rehearing at 2, *Mosley v. State*, Case No. SC14-2108).

retroactive application of *Espinosa James*, 615 So.2d at 669. While this Court did not employ a standard retroactivity analysis in *James*, the basis for granting relief was that of fundamental fairness. *Id.* This Court reasoned that, because *James* had raised the exact claim that was validated by the United States Supreme Court in *Espinosa*, “it would not be fair to deprive him of the *Espinosa* ruling.” *Id.*

Mosley, 2016 WL 7406506 at * 19 (emphasis added). Clearly, *James* is cited just as an example of the fundamental fairness approach to determining when a particular defendant is entitled to the retroactive application of a change in law mandated by a decision from the U.S. Supreme Court. It is also clear that the fundamental fairness approach requires a case-by-case determination of which collateral litigants get the benefit of the change in law retroactively.

7. The second approach to retroactivity discussed in *Mosley* is the analysis set forth in *Witt v. State*, 387 So. 2d 922 (Fla. 1980). Employing *Witt*, the Court in *Mosley* concluded: “Because Florida’s capital sentencing statute has essentially been unconstitutional since *Ring* in 2002, fairness strongly favors applying *Hurst*, retroactively to that time.” 2016 WL 7406506 at *23.¹¹ Further, the Court in *Mosley* explained that:

holding *Hurst* retroactive would only affect the sentences of capital defendants. Further, in addition to the fact that convictions will not be disturbed, not every defendant to whom *Hurst* applies will ultimately receive relief. As we determined in *Hurst*, each error should be reviewed under a harmless error analysis to individually determine whether each defendant will receive a new penalty phase. *Hurst*, 202 So.3d at 67–68; *James*, 615 So.2d at 669. Additionally, we have declined to find *Hurst* applicable to those cases where the defendant waived his/her right to trial by jury. See *Mullens v. State*, 197 So.3d 16 (Fla.), *pet. for cert. filed*, No. 16–6773 (Nov. 4, 2016).

Finally, we again emphasize that this decision will only impact the sentence of death, not the conviction. The difference is not guilt or innocence but, instead, life or death.

2016 WL 7406506 at *24-25. Here, the retroactive application of *Hurst* to Nelson’s death sentence “will only impact the sentence of death, not the conviction.”

¹¹The use of the word “fairness” in the context of the *Witt* analysis would suggest that fairness, indeed fundamental fairness, is the Florida Supreme Court’s central concern in determining which defendants should retroactively receive the benefit of *Hurst v. Florida*.

8. In *Mosley*, the Florida Supreme Court concluded that under either the fundamental fairness approach to retroactivity or under the *Witt* analysis, *Hurst v. Florida* was a change in law that was to be retroactively applied:

Applying *Hurst* retroactively to *Mosley*, in light of the rights guaranteed by the United States and Florida Constitutions, supports basic tenets of fundamental fairness. And it is fundamental fairness that underlies the reasons for retroactivity of certain constitutionally important decisions, especially those involving the death penalty. Indeed, as we stated in *Witt*:

[S]ociety recognizes that a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice. Considerations of fairness and uniformity make it very “difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases.”

387 So.2d at 925 (citations omitted) (emphasis added).

2016 WL 7406506 at *25.¹²

9. Here, fundamental fairness demands that *Hurst v. Florida* be applied retroactively in Nelson’s case. Nelson’s death sentence became final after the issuance of *Jones v.*

¹²In *Asay v. State*, the Florida Supreme Court ruled that *Hurst v. Florida* was not to be applied retroactively to *Asay*’s case. *Asay v. State*, 2015 WL 7406538 at *13 (“we conclude that *Hurst* should not be applied retroactively to *Asay*’s case, in which the death sentence became final before the issuance of *Ring*.”). Despite this statement, two justices indicated that *Hurst v. Florida* would be applied to judicial override cases that were “final before the issuance of *Ring*” and possible other cases “final before the issuance of *Ring*.” See *Id.* at *20 (Labarga, C.J., concurring) (“The impact of *Hurst v. Florida* and *Hurst* upon their death sentences is an issue for another day.”); *Id.* at *25 (Pariente, J., dissenting) (“Even under the majority’s holding today, relief should be granted to two Florida death row inmates whose sentences were a result of a judicial override”). Two other justices indicated that pre-*Ring* defendants may be able to have *Hurst v. Florida* apply retroactively to their cases. *Id.* at *21 (Lewis, J., concurring in result) (Pre-*Ring* “defendants who challenged Florida’s unconstitutional sentencing scheme based on the substantive matters addressed in *Hurst* are entitled to consideration of that constitutional challenge.”); *Id.* at 27 (Perry, J., dissenting) (“I would find that *Hurst v. Florida* applies retroactively, period.”).

In *Mosley v. State*, a majority of the Florida Supreme Court embraced Justice Lewis’ position in his concurrence in *Asay*, that pre-*Ring* defendants were entitled to the retroactive application of *Hurst v. Florida* in their cases if fundamental fairness warranted it. *Mosley*, 2016 WL 7406506 at *19 (“fundamental fairness alone may require the retroactive application” of *Hurst v. Florida*).

United States, 526 U.S. 227 (1999), which was the foundation for the subsequent *Ring* line of cases. Indeed, in *Ring*, the U.S. Supreme Court noted that “[o]n appeal, Ring argued that Arizona’s capital sentencing scheme violates the Sixth and Fourteenth Amendments to the U.S. Constitution because it entrusts to a judge the finding of a fact raising the defendant’s maximum penalty. See *Jones v. United States*, 526 U.S. 227 (1999); *Apprendi v. New Jersey*, 530 U.S. 466 (2000).” *Ring*, 536 U.S. at 595.

10. In *Jones*, the Supreme Court considered whether a federal car jacking statute “defined three distinct offenses or a single crime with a choice of three maximum penalties, two of them dependent on sentencing factors exempt from the requirements of charge and jury verdict.” *Ring*, 536 U.S. at 600, quoting *Jones*, 526 U.S. at 229. The Court determined that the carjacking statute, if read to define a single crime, might violate the Constitution: “[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.” *Ring*, 536 U.S. at 600, quoting *Jones*, 526 U.S. at 243, n. 6.

11. Thereafter, in *Apprendi*, which was decided in the year after *Jones*, the Supreme Court indicated that its ruling there:

was foreshadowed by our opinion in *Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), construing a federal statute. We there noted that “under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.” *Id.*, at 243, n. 6, 119 S.Ct. 1215. The Fourteenth Amendment commands the same answer in this case involving a state statute.

Apprendi, 530 U.S. at 476.

12. Subsequently, in *Hurst v. Florida*, 136 S.Ct. at 621, the Supreme Court determined that *Spaziano v. Florida*, 468 U.S. 447 (1984) and *Hildwin v. Florida*, 490 U.S. 638

(1989) were “wrong, and irreconcilable with *Apprendi*.” 136 S.Ct. at 623. The Supreme Court specifically held: “And in the *Apprendi* context, we have found that ‘stare decisis does not compel adherence to a decision whose “underpinnings” have been “eroded” by subsequent developments of constitutional law.’” *Id.* at 623-24. Thus, while Nelson’s case became final before the decision in *Ring*, fundamental fairness dictates that he receive the benefit of that decision, as *Ring* was based on *Apprendi* and *Jones* before it, which itself preceded Nelson’s case.

13. Fundamental fairness also dictates that *Hurst v. Florida* be applied retroactively due the fact that Nelson at trial and on direct appeal challenged Florida’s death penalty process. For instance, Nelson raised an issue concerning the heinous, atrocious and cruel (HAC) aggravating factor. As Nelson explained, the jury instruction was unconstitutionally vague. When the jury is instructed that it may consider a vague aggravating circumstance, it must be presumed that the jury found and weighed an invalid circumstance.¹³

14. Another aspect of a fundamental fairness analysis requires the retroactive application of *Hurst v. Florida* to Nelson because the decision in *Perry v. State* demonstrates that capital defendants charged with murders that were committed long before *Hurst v. Florida* issued will have *Hurst v. Florida* govern the capital sentencing procedures applicable at a retrial or resentencing occurring in the future, as well as those that have already occurred if a resulting death sentence was not final when *Hurst v. Florida* issued on January 12, 2016. For example, Douglas Ray Meeks will receive the benefit of *Hurst v. Florida* and the new Florida law when he is sentenced on two first degree murder convictions for two 1974 homicides. Meeks had separate

¹³As explained in Nelson’s Motion to Amend being filed simultaneous to this postconviction motion, undersigned does not yet have copies of Nelson’s records on appeal. There is a significant possibility that Nelson’s trial counsel filed pretrial motions challenging Florida’s death penalty statute. Such filings could constitute a basis for Nelson to receive consideration of the constitutional challenges set forth in *Hurst*. Thus, Nelson will seek to amend the instant motion upon receipt and review of his trial records.

trials on each homicide and was convicted at both trials of first degree murder. He received two death sentences. Both were affirmed in his direct appeals. *Meeks v. State*, 336 So. 2d 1142 (Fla. 1976); *Meeks v. State*, 339 So. 2d 186 (Fla. 1976). However, after *Hitchcock v. Dugger*, 481 U.S. 393 (1987), issued, the Florida Supreme Court ordered an evidentiary hearing on Meeks' claims that *Hitchcock* error infected both death sentences. *Meeks v. Dugger*, 576 So. 2d 713 (Fla. 1991). Subsequently, the State stipulated that Meeks was entitled to new penalty phases due to the *Hitchcock* error. *Meeks v. Moore*, 216 F.3d 951, 959 (11th Cir. 2000) ("In its order, the [district] court observed that 'the State of Florida stipulated that Meeks would be provided with a new penalty phase in both cases.'"). Because those new penalty phases have yet to occur, *Hurst v. Florida* and the new Florida law will govern the sentencing procedure in both cases. Even though Meeks was convicted of homicides that were committed in 1974, he can only get death sentences now if his juries unanimously make the requisite findings of fact and unanimously recommend a death sentence.

15. As another example, Jacob Dougan was convicted of a 1974 homicide and was then sentenced to death. His conviction and death sentence were affirmed in his first direct appeal which was a joint appeal with his co-defendant (Barclay) and was reported in the name of the co-defendant. *Barclay v. State*, 343 So. 2d 1266 (Fla. 1977). Subsequently, the Florida Supreme Court vacated the death sentence because of error under *Gardner v. Florida*, 430 U.S. 349 (1977), and remanded Barclay's and Dougan's cases for judge resentencing. *Barclay v. State*, 362 So. 2d 657 (1978). After a death sentence was again imposed, it was affirmed in Dougan's second direct appeal. *Dougan v. State*, 398 So. 2d 439 (Fla. 1981). Later on the basis of appellate counsel's ineffective assistance in that direct appeal, the Florida Supreme Court granted Dougan habeas relief and ordered a third direct appeal. *Dougan v. Wainwright*, 448 So. 2d 1005 (Fla. 1984). In the third direct appeal, Dougan's conviction was affirmed, but his death sentence was vacated and a jury resentencing was ordered. *Dougan v. State*, 470 So. 2d 697 (Fla. 1985). After another death sentence was imposed, the death sentence was affirmed in Dougan's fourth direct

appeal. *Dougan v. State*, 595 So. 2d 1 (Fla. 1992). Thereafter, Dougan filed a 3.850 motion in the circuit court where it remained pending for some time. In 2013 after an evidentiary hearing was conducted, the trial court vacated Dougan's conviction and ordered a new trial. In *State v. Dougan*, ___ So. 3d ___, 2016 WL 6137285 (Fla. Oct. 20, 2016), the Florida Supreme Court affirmed the order granting Dougan a new trial. *Hurst v. Florida* will govern at the retrial and as to the sentencing procedure if a first degree murder conviction is returned. As with Meeks, Dougan will be eligible for a death sentence for the 1974 murder only if the jury unanimously makes the necessary findings of fact and unanimously recommends a death sentence.

16. Another example is John Hardwick who was charged with a 1984 homicide. He was convicted and sentenced to death. His conviction and death sentence were affirmed in his direct appeal. *Hardwick v. State*, 521 So. 2d 1071 (Fla. 1988). Later, the Florida Supreme Court affirmed the denial of Hardwick's 3.850 motion, while also denying Hardwick's habeas petition. *Hardwick v. Dugger*, 648 So. 2d 100 (Fla. 1994). Hardwick then filed for habeas relief in federal court. After the district court granted habeas relief and ordered the death sentence vacated and a new penalty phase to be conducted due to trial counsel's ineffective assistance, the Eleventh Circuit affirmed the grant of habeas relief. *Hardwick v. Sec'y Fla. Dep't of Corr.*, 803 F.3d 541 (11th Cir. 2015). Currently, Hardwick's case is pending in the trial court for a resentencing. As a result, *Hurst v. Florida* and the new Florida law will govern the sentencing procedure and the question of whether Hardwick can receive a death sentence for a 1984 murder. As with Meeks and Dougan, Hardwick will be eligible for a death sentence only if his jury unanimously makes the requisite findings of fact and unanimously recommends a death sentence.

17. Yet another example is Paul Hildwin who was charged and convicted of a 1985 homicide. After a death sentence was imposed, his conviction and death sentence were affirmed in his first direct appeal. *Hildwin v. State*, 531 So. 2d 124 (Fla. 1988). See *Hildwin v. Florida*, 490 U.S. 638 (1989). In collateral proceedings, a resentencing was ordered. *Hildwin v. Dugger*,

654 So. 2d 107 (Fla. 1995). After the imposition of another death sentence, a second direct appeal resulted in another affirmance. *Hildwin v. State*, 727 So. 2d 193 (Fla. 1998). In the course of new collateral proceedings, Hildwin's conviction was vacated by the Florida Supreme Court and a new trial ordered. *Hildwin v. State*, 141 So. 3d 1178 (Fla. 2014). Currently, Hildwin is awaiting his new trial. At that trial on a first degree murder charge for a 1985 homicide, *Hurst v. Florida* and the resulting new Florida law will govern at the retrial and as to the sentencing procedure if a first degree murder conviction is returned on the 1985 homicide. As with Meeks, Dougan, and Hardwick, he will be eligible for a death sentence only if his jury unanimously makes the requisite findings of fact and unanimously recommends a death sentence.

18. Still another example is Ana Cardona who was charged with a 1990 homicide. After she received a death sentence, her conviction and death sentence were affirmed on direct appeal. *Cardona v. State*, 641 So. 2d 361 (Fla. 1994), *cert denied* 513 U.S. 1160 (1995). Later, her conviction was vacated and a new trial ordered by the Florida Supreme Court during her appeal from the denial of 3.851 relief. *Cardona v. State*, 826 So. 2d 968 (Fla. 2002). After she was again convicted and again sentenced to death, the conviction and death sentence were again vacated and another new trial ordered by the Florida Supreme Court in Cardona's second direct appeal. *Cardona v. State*, 185 So. 3d 514 (Fla. 2016). Currently, Cardona's case is pending in the circuit court as she awaits her new trial. At that trial on a first degree murder charge for a 1985 homicide, *Hurst v. Florida* and the resulting new Florida law will govern at the retrial and as to the sentencing procedure if a first degree murder conviction is returned on the 1985 homicide. As with Meeks, Dougan, Hardwick, and Hildwin, Cardona will be eligible for a death sentence only if her jury unanimously makes the requisite findings of fact and unanimously recommends a death sentence.

19. There are also cases in which a capital defendant has had a death sentence vacated in collateral proceedings, a resentencing ordered, and another death sentence imposed which was

pending on a direct appeal when *Hurst v. Florida* issued. In those circumstances, the capital defendant will receive the benefit of *Hurst v. Florida* because a final death sentence was not in place when *Hurst* issued. For example, Paul Beasley Johnson was convicted of first degree murder for three 1981 homicides and sentenced to death. His convictions and death sentences were affirmed on direct appeal. *Johnson v. State*, 483 So. 2d 774 (Fla. 1983). However, habeas relief was granted on an appellate counsel ineffectiveness claim, and a new trial was ordered. *Johnson v. Wainwright*, 498 So. 2d 938 (Fla. 1986). His subsequent convictions and death sentences were affirmed in his second direct appeal. *Johnson v. State*, 608 So. 2d 4 (Fla. 1992). Later, the denial of 3.850 relief was affirmed. *Johnson v. State*, 769 So. 2d 990 (Fla. 2000). Then, habeas relief was denied. *Johnson v. Moore*, 837 So. 2d 343 (Fla. 2002). Next, the denial of a successive 3.851 motion was affirmed. *Johnson v. State*, 933 So. 2d 1153 (Fla. 2006). But then in 2010, the denial of yet another successive 3.851 motion was reversed, Johnson's death sentences were vacated, and a resentencing was ordered. *Johnson v. State*, 44 So. 3d 51 (Fla. 2010). Though Johnson again received death sentences, his third direct appeal was pending before the Florida Supreme Court when *Hurst v. Florida* issued on January 12, 2016. This means that Johnson will receive the benefit of *Hurst* and the resulting new Florida law even though the 1981 murders that he was convicted of were committed 35 years before the decision in *Hurst* was rendered.

20. With Meeks, Dougan, Hardwick, Hildwin, Cardona and Johnson all entitled to the benefit of *Hurst v. Florida* and the resulting new Florida law for murders committed as early as 1974, ensuring uniformity and fundamental fairness in circumstances in Florida's application of the death penalty requires the retroactive application of *Hurst* and the resulting new Florida law to Nelson's case. Indeed, the logic of *Griffith v. Kentucky*, 479 U.S. 314, 327-28 (1987), is applicable:

Justice POWELL has pointed out that it "hardly comports with the ideal of 'administration of justice with an even hand,' " when "one chance beneficiary-the lucky individual whose case was chosen as the occasion for announcing the new

principle-enjoys retroactive application, while others similarly situated have their claims adjudicated under the old doctrine.” *Hankerson v. North Carolina*, 432 U.S. 233, 247, 97 S.Ct. 2339, 2347, 53 L.Ed.2d 306 (1977) (opinion concurring in judgment), quoting *Desist v. United States*, 394 U.S., at 255, 89 S.Ct., at 1037 (Douglas, J., dissenting). See also *Michigan v. Payne*, 412 U.S. 47, 60, 93 S.Ct. 1966, 1973, 36 L.Ed.2d 736 (1973) (MARSHALL, J., dissenting) (“Different treatment of two cases is justified under our Constitution only when the cases differ in some respect relevant to the different treatment”). **The fact that the new rule may constitute a clear break with the past has no bearing on the “actual inequity that results” when only one of many similarly situated defendants receives the benefit of the new rule.** *United States v. Johnson*, 457 U.S., at 556, n. 16, 102 S.Ct., at 2590, n. 16 (emphasis omitted).

We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a “clear break” with the past.

(Emphasis added).¹⁴ “[S]elective application of new rules violates the principle of treating similarly situated defendants the same.” *Id.* at 323. While Nelson’s death sentence was final when *Hurst v. Florida* issued, numerous other capital defendants’ death sentences had also been final, including Hurst’s, when good fortune and good timing meant that at the moment that *Hurst v. Florida* issued, those defendants were free of the shackles of finality.¹⁵ Clearly, uniformity and fairness require that Nelson be given the benefit of *Hurst v. Florida* and the resulting new Florida

¹⁴Justice Harlan in his dissent in *Desist v. United States* wrote:

We do not release a criminal from jail because we like to do so, or because we think it wise to do so, but only because the government has offended constitutional principle in the conduct of his case. And when another similarly situated defendant comes before us, we must grant the same relief or give a principled reason for acting differently. We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a ‘new’ rule of constitutional law.

394 U.S. at 258-59.

¹⁵In *Witt v. State*, 387 So. 2d 922, 926 (Fla. 1980), the Florida Supreme Court noted the Eighth Amendment required extra consideration to be given to “individual fairness because of the possible imposition of a penalty as unredeeming as death.” In a footnote, the Florida Supreme Court wrote: “It bears mention that the constitutionality of Florida’s capital sentencing procedures, s 921.141, Florida Statutes (1979), is contingent upon this Court’s role of reviewing each case to ensure uniformity in the imposition of the death penalty.” *Id.* at 926 n.7.

law. After all, “death is a different kind of punishment from any other that may be imposed in this country,” and “[i]t is of vital importance . . . that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice” *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977).

21. The procedure employed when Nelson received a death sentence deprived him of his Sixth Amendment rights under *Hurst v. Florida* and the resulting new Florida law requiring the jury’s verdict authorizing a death sentence to be unanimous or else a life sentence is required. In the wake of *Hurst v. Florida*, the Florida Supreme Court has held that each juror is free to vote for a life sentence even if the requisite facts have been found by the jury unanimously. *Hurst v. State*, 202 So. 3d at 58, 62, n. 18. Individual jurors may decide to exercise “mercy” and vote for a life sentence and in so doing preclude the imposition of a death sentence. *Perry v. State*, 2016 WL 6036982 at *8.

22. Nelson’s jury recommended a sentence of death by a vote of 12 to 0. However, the jury did not return verdicts making any findings of fact. The only document returned by the jury was an advisory recommendation that a death sentence be imposed; it reflects nothing about the jury’s findings leading to the final vote. A final 12 to 0 recommendation does not necessarily mean that the other findings leading to the recommendation were unanimous. It could well mean that after the other findings were made by a majority vote, jurors in the minority acceded to the majority’s findings. In fact, *Hurst v. State* made just this point:

Because there was no interrogatory verdict, we cannot determine what aggravators, if any, the jury unanimously found proven beyond a reasonable doubt. We cannot determine how many jurors may have found the aggravation sufficient for death. We cannot determine if the jury unanimously concluded that there were sufficient aggravating factors to outweigh the mitigating circumstances.

202 So. 3d at 69. The unanimous vote could also mean the jurors did not attend to the gravity of their task, as they were told the judge could impose death regardless of the jury’s recommendation.

23. In *Hurst v. State*, the Florida Supreme Court held that Sixth Amendment error under *Hurst v. Florida* would be subject to a strict harmless error test in which “the State bears an extremely heavy burden” of proving beyond a reasonable doubt that “the jury’s failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to Hurst’s death sentence in this case.” 202 So. 3d at 68. See *Mosley v. State*, 2016 WL 7406506 at *25-26 (applying the *Hurst v. State* harmless error analysis when *Hurst v. Florida* is retroactively applied in collateral proceedings); *Johnson v. State*, 44 So. 3d 51, 69 (Fla. 2010) (as to constitutional error established in a successive 3.851 motion, death sentence was vacated because “the State has not met its burden of showing that Smith’s testimony was harmless beyond a reasonable doubt.”); *James v. State*, 615 So. 2d 668, 669 (Fla. 1993) (in collateral appeal, the Florida Supreme Court held “[w]e cannot say beyond a reasonable doubt, however, that the invalid instruction did not affect the jury’s consideration or that its recommendation would have been the same if the requested expanded instruction had been given.”); *Way v. Dugger*, 568 So. 2d 1263, 1266 (Fla. 1990) (in collateral appeal, the Florida Supreme Court held: “we are not convinced that the error was harmless beyond a reasonable doubt.”); *Hall v. State*, 541 So. 2d 1125, 1128 (Fla. 1989) (*Hitchcock* error presented in collateral proceedings was subject to the harmless beyond a reasonable doubt standard); *Mikenas v. Dugger*, 519 So. 2d 601, 602 (Fla. 1988) (in a collateral appeal, the court held: “we cannot say beyond a reasonable doubt that had the jury known that nonstatutory mitigating evidence could be considered, it would not have recommended life rather than death.”). In other words, the State must prove beyond a reasonable doubt that the jury’s failure to unanimously find not only the existence of each aggravating factor, that the aggravating factors are sufficient, and that the aggravating factors outweigh the mitigating circumstances, had no effect on the death recommendation. The State must also show beyond a reasonable doubt that no properly instructed juror would have dispensed mercy to Nelson by voting for a life sentence. All of these considerations must be factored into any evaluation of the reliability of Nelson’s death sentence and the likely outcome if a resentencing

were conducted in conformity with Florida's new capital sentencing procedure.

24. The State cannot establish beyond a reasonable doubt that the *Hurst v. Florida* error in Nelson's case was harmless. A harmless error analysis must be performed on a case-by-case basis, and there is no one-size fits all analysis; rather, there must be a "detailed explanation based on the record" supporting a finding of harmless error. See *Clemons v. Mississippi*, 494 U.S. 738, 753 (1990). Accord *Sochor v. Florida*, 504 U.S. 527, 540 (1992). Therefore, first, as the Florida Supreme Court pointed out in *Hurst v. State*, "[b]ecause there was no interrogatory verdict, we cannot determine what aggravators, if any, the jury unanimously found proven beyond a reasonable doubt. We cannot determine how many jurors may have found the aggravation sufficient for death. We cannot determine if the jury unanimously concluded that there were sufficient aggravating factors to outweigh the mitigating circumstances." 202 So. 3d at 69. This Court cannot rely upon a legally meaningless recommendation by an advisory jury, *Hurst v. Florida*, 136 S.Ct. at 622 (Sixth Amendment cannot be satisfied by merely treating "an advisory recommendation by the jury as the necessary factfinding"), as making findings the Sixth Amendment requires a jury to make.

25. Moreover, in the wake of *Hurst v. Florida* and the resulting new Florida law, the jury must be correctly instructed as to its sentencing responsibility under *Caldwell v. Mississippi*, 472 U.S. 320 (1985). In *Hurst v. Florida*, the Court wrote that "[t]he State cannot now treat the advisory recommendation by the jury as a necessary factual finding that *Ring* requires." 136 S. Ct. at 622. This means that post-*Hurst* the individual jurors must know that they each will bear the responsibility for a death sentence resulting in a defendant's execution since each juror possesses the power to require the imposition of a life sentence simply by voting against a death recommendation. See *Perry v. State*. Nelson's jury was told the exact opposite—that Nelson could be sentenced to death regardless of the jury's recommendation. As was explained in *Caldwell*, jurors must feel the weight of their sentencing responsibility if the defendant is ultimately executed after no juror exercised his or her power to preclude the a death sentence. Indeed

because the jury's sense of responsibility was inaccurately diminished in *Caldwell*, the Supreme Court held that the jury's unanimous verdict imposing a death sentence in that case violated the Eighth Amendment and required the resulting death sentence to be vacated even though the jury's verdict there was unanimous. *Caldwell*, 472 U.S. at 341 ("Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires."). Nelson's death sentence likewise violates the Eighth Amendment under *Caldwell*. Not only was Nelson's jury told its sentencing decisions were merely advisory, but the jury also was never told it could extend mercy to him. The chances that at least one juror would not join a death recommendation if a resentencing were now conducted is likely given that proper *Caldwell* instructions would be required. The likelihood of one or more jurors voting for a life sentence increases when a jury is told a death sentence could only be authorized if the jury returned a unanimous death recommendation and that each juror had the ability to preclude a death sentence simply by refusing to agree to a death recommendation. *Caldwell*, 472 U.S. at 330 ("In the capital sentencing context there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court."). In Nelson's case, the State cannot prove beyond a reasonable doubt that not a single juror would have voted for life given proper *Caldwell*-compliant instructions.

26. Additionally, Nelson's jury was never told or instructed that it could recommend a life sentence as an expression of mercy or that it was neither compelled nor required to vote for death even if it determined there were sufficient aggravating circumstances that outweighed the mitigating circumstances. As the Florida Supreme Court stated in *Hurst v. State and Perry*, each juror in a Florida capital case has the "right to recommend a sentence of life even if [he or she] finds aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating circumstances." *Hurst*, 202 So. 3d at 57-58 (citation omitted). *Accord Perry*, 2016 WL 6036982 at *7-8 ("It has long been true that a juror is not required to recommend the death

sentence even if the jury concludes that the aggravating factors outweigh the mitigating circumstances.”).

27. Thus, not only were Nelson’s jurors not properly informed of their actual responsibility in violation of *Caldwell*, but they were also not told they could exercise mercy by not joining a death recommendation irrespective of their views on the aggravation and mitigation. This significant fact distinguishes Nelson’s case from *Davis v. State*, ___ So. 3d ___, 2016 WL 6649941 at *29 (Fla. Nov. 10, 2016), where the Florida Supreme Court placed great emphasis on the fact that Nelson’s jury was instructed that “it was not required to recommend death even if the aggravators outweighed the mitigators” and that it nonetheless returned unanimous death recommendations. *Davis*, 2016 WL 6649941 at *29. The State cannot establish beyond a reasonable doubt that at least one juror, properly instructed, would have decided to dispense mercy to Nelson.

28. The Florida Supreme Court has addressed whether or not error under *Hurst v. Florida* is harmless in several recent cases. In *Hurst v. State*, the Court concluded that although “[t]he evidence of the circumstances surrounding this murder can be considered overwhelming and essentially uncontroverted,” “the harmless error test is not limited to consideration of only the evidence of aggravation, and it is not an ‘overwhelming evidence’ test.” 202 So. 3d at 69. The Court found that “the evidence of mitigation was extensive and compelling” but, absent an interrogatory verdict, it could not “say with any certainty how the jury viewed that mitigation.” *Id.* However, in light of the mitigation and the jury’s 7 to 5 death recommendation, the Court could not “find beyond a reasonable doubt that no rational jury, as the trier of fact, would determine that the mitigation was ‘sufficiently substantial’ to call for a life sentence.” *Id.* (quoting *State v. Ring*, 65 P.3d 915, 946 (Ariz. 2003)).

29. In *Davis v. State*, ___ So. 3d ___, 2016 WL 6649941 at *29 (Fla. Nov. 10, 2016), where the jury recommended two death sentences by 12 to 0 votes, the Florida Supreme Court found *Hurst* error harmless because the unanimous jury recommendations “allow us to conclude

beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors.” The Court based this conclusion in part on the jury instructions, including an instruction saying, “Regardless of your findings in this respect, however, you are neither compelled nor required to recommend a sentence of death.” *Id.* The Court also relied upon “the egregious facts of this case” in which “Davis set two women on fire, one of who was pregnant, during an armed robbery, and shot in the face a Good Samaritan who was responding to the scene.” *Id.* Thus, the Court concluded, “[t]he evidence in support of the *six* aggravating circumstances found as to both victims was significant and essentially uncontroverted.” *Id.* Earlier in the opinion in a discussion of proportionality, the Court found, “This case is truly among the most aggravated and least mitigated.” *Id.* at *27.

30. In *Franklin v. State*, ___ So. 3d ___, 2016 WL 6901498 at *6 (Fla. Nov. 23, 2016), the Florida Supreme Court noted that “the jury that recommended death did not find the facts necessary to sentence him to death” because the jury returned a non-unanimous recommendation. The Court rejected “the State’s contention that Franklin’s prior convictions for other violent felonies insulate Franklin’s death sentence from *Ring* and *Hurst v. Florida*.” *Id.*

31. In *Johnson v. State*, ___ So. 3d ___, 2016 WL 7013856 at *3 (Fla. Dec. 1, 2016), the jury recommended three death sentences by votes of 11 to 1. There were three victims in *Johnson*, as opposed to one here. The trial court found three aggravating factors in the deaths of victims Evans and Beasley, including the cold, calculated and premeditated aggravator, and two aggravating factors in the death of victim Burnham. *Id.* at *3 & n.1. The trial court also found three statutory and ten nonstatutory mitigating circumstances. *Id.* at 3 & nn.2,3. The trial court gave most of the mitigating factors slight or very slight weight. *Id.* In addressing whether the *Hurst* error was harmless, the Florida Supreme Court first rejected “the State’s contention that Johnson’s contemporaneous convictions for other violent felonies insulate Johnson’s death sentences from *Ring* and *Hurst v. Florida*.” *Id.* at *3. The Court found the case “obviously include[s] substantial aggravation”:

Johnson set out on a drug-fueled hunt for money to purchase more drugs, so determined to succeed that “if he would have to shoot someone, he would have to shoot someone.” Johnson murdered a taxi driver who had been dispatched to pick up a fare, a Good Samaritan who Johnson tricked into believing that his car was broken down, and a deputy sheriff who had stopped Johnson as part of the manhunt for the perpetrator of Johnson’s two earlier murders.

Id. at *4. However, the Court also found that “the evidence of mitigation was extensive and compelling.” *Id.* Based on “a nonunanimous jury recommendation and a substantial volume of mitigation evidence,” the Court could not conclude “beyond a reasonable doubt, that no rational trier of fact would determine that the mitigating circumstances were sufficiently substantial to call for leniency.” *Id.* (quoting *State v. Ring*, 65 P.3d 915, 946 (Ariz. 2003)).

32. Most recently, in *Mosley v. State*, ___ So. 3d ___, 2016 WL 7406506 *26 (Fla. Dec. 22, 2016), the Florida Supreme Court reiterated: “As applied to the right to a jury trial with regard to the facts necessary to impose the death penalty, it must be clear beyond a reasonable doubt that a rational jury would have unanimously found all facts necessary to impose death and that death was the appropriate sentence.” The Court then considered the fact that Mosley was convicted of killing the mother of his child, Lynda Wilkes, and his infant son, Jay-Quan Mosley. The jury recommended life for the murder of Wilkes. However, the jury recommended death, by a vote of eight to four for Jay-Quan. *Id.* The Court noted that the trial court found four aggravators and assigned each great weight, including 1) the victim was under twelve years of age; 2) the murder was cold, calculated and premeditated; 3) the murder was committed for pecuniary gain and 4) Mosley had previously convicted of a capital felony. *Id.* In determining that the error was not harmless, the Florida Supreme Court pointed to the less than unanimous jury verdict, twenty-nine nonstatutory mitigators and the disparate sentence for Wilkes. *Id.* The Court also indicated that “[w]ithout written findings, any attempt to discern what mitigation the four jurors who recommended against death relied on, what aggravating factors, if any, were found unanimously to be sufficient to impose a sentence of death, and why the jury gave such disparate recommendations in this case would be mere speculation.” *Id.*

33. The State cannot show beyond a reasonable doubt that the *Hurst* error in Nelson's case was harmless. As the court held in *Johnson*, Nelson's contemporaneous conviction does not render the error harmless. Further, as in *Hurst v. State*, *Johnson* and *Mosley*, Nelson's case involved substantial and compelling mitigation. And, although as in *Davis*, Nelson's jury returned a unanimous recommendation, the other factors the Florida Supreme Court relied upon in finding harmless error in *Davis* are not present in Nelson's case. In addition to the unanimous recommendations in *Davis*, the court found the error harmless because the jury received a mercy instruction which Nelson's jury did not receive.

34. Consideration must also be given to the fact that trial counsel would have tried the case differently under *Hurst v. Florida* and the resulting new Florida law. This is further evidence that it is more likely than not that at least one juror would not join a death recommendation at a resentencing. Equally important is any failure by sentencing counsel to properly present mitigating evidence to the jury because of Florida law that the jury vote was merely an advisory recommendation and the judge was the actual sentencer and fact finder. A hearing is warranted to evaluate the effect of the statute invalidated by *Hurst* on counsel's development of challenges to aggravation, mitigation, and defense penalty-phase theories at sentencing.

35. Nelson's death sentence stands in violation of the Sixth Amendment, *Hurst v. Florida*, *Perry v. State*, and *Hurst v. State*. His jury did not return a verdict making any findings of fact, his jury was not instructed that all of its findings had to be unanimous, the jury was not told that each individual juror carried responsibility for whether a death sentence was authorized or a life sentence was mandated, and the jurors did not know that they each were authorized to preclude a death sentence simply to be merciful.

36. The *Hurst* error in Nelson's case warrants relief. The State simply cannot show the error to be harmless beyond a reasonable doubt that no properly instructed juror would have

refused to vote in favor of a death recommendation. Unless it is proven beyond a reasonable doubt that no juror would have voted for a life sentence and through such a vote mandated that Nelson receive a life sentence, his death sentence must be vacated and a resentencing ordered. Because the State cannot meet its burden here, Rule 3.851 relief is required.

CLAIM II

FAILING TO APPLY *HURST v. FLORIDA* TO NELSON'S DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT.

This claim is evidenced by the following:

1. All other factual allegations in this motion and in Nelson's previous motions to vacate, and all evidence presented by him during his trial and previous postconviction proceedings, are incorporated herein by specific reference.
2. In *Mosley v. State*, the Florida Supreme Court determined that *Hurst v. Florida*, 136 S.Ct. 616 (2016) constituted a change in Florida law that was to be applied retroactively to Mosley and required the Court to grant postconviction relief, vacate Mosley's death sentence and remand for a resentencing. As the Court in *Mosley* observed: "it is undeniable that *Hurst v. Florida* changed the calculus of the constitutionality of capital sentencing in this State." 2016 WL 7406506 at *23.
3. However, in *Asay v. State*, the Florida Supreme Court ruled that *Hurst v. Florida* was not to be applied retroactively to Asay's case. *Asay v. State*, 2015 WL 7406538 at *13 ("we conclude that *Hurst* should not be applied retroactively to Asay's case, in which the death sentence became final before the issuance of *Ring*").
4. Should this Court determine that Nelson is not entitled to the retroactivity of *Hurst v. Florida*, his death sentence violates the Eighth Amendment. Put simply, as the several members of the Florida Supreme Court determined, failing to apply retroactivity uniformly to those whose cases became final both before and after *Ring v. Arizona* cannot withstand

constitutional scrutiny. *See Asay* at *58 (Lewis, J., concurring in result) (“As Justice Perry noted in his dissent, there is no salient difference between June 23 and Jun 24, 2002 – the days before and after the case named Ring arrived ... However, that is where the majority opinion draws its determinative, albeit arbitrary line. As a result, Florida will treat similarly situated defendants differently – here, the difference between life and death – for potentially the simple reason of one’s defendant’s docket delay. Vindication of these constitutional rights cannot be reduced to either fatal or fortuitous accidents of timing.”); *Id.* *68 (Pariente, J., concurring in part and dissenting in part) (“For these reasons, I conclude that Hurst should apply to all defendants who were sentenced to death under Florida’s prior, unconstitutional capital sentencing scheme. The majority’s conclusion results in an unintended arbitrariness as to who receives relief depending on when the defendant was sentenced or, in some cases resentenced.”); *Id.* * (Perry, J., dissenting)(“In my opinion, the line drawn by the majority is arbitrary and cannot withstand scrutiny under the Eighth Amendment because it creates an arbitrary application of law to two groups of similarly situated persons.”).

5. Thus, as recognized by three justices of the Florida Supreme Court, treating Nelson differently than Mosley and depriving him the benefit of *Hurst v. Florida*, based solely on when his conviction and sentence became final, violates the Eighth Amendment. Rule 3.851 relief must issue and Nelson’s death sentence must be vacated and he must be granted a re-sentencing.

CLAIM III

NELSON’S DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT UNDER *HURST V. STATE* AND SHOULD BE VACATED.

This claim is evidenced by the following:

1. All other factual allegations in this motion and in Nelson’s previous motions to vacate, and all evidence presented by him during his trial and previous postconviction proceedings, are incorporated herein by specific reference.

2. In *Hurst v. State*, 202 So.3d 40 (Fla. 2016), the Florida Supreme Court explained that, in accordance with Florida’s capital sentencing scheme, the jury has a “right to recommend a sentence of life even if it finds aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating circumstances.” *Hurst*, 202 So. 3d at 58, citing *Brooks v. State*, 762 So. 2d 879, 902 (Fla. 2000). In other words, before a judge can impose the death penalty, the jury must be told it has the right to recommend a life sentence, even if the precedent factual findings are all made unanimously. This safeguard is to allow jurors in capital cases to “exercise reasoned judgment in his or her vote as to a recommended sentence.” *Hurst*, 202 So. 3d at 58.¹⁶ Accord *Perry*, 2016 WL 6036982 at *7-8 (“It has long been true that a juror is not required to recommend the death sentence even if the jury concludes that the aggravating factors outweigh the mitigating circumstances”). See also *Hurst*, 202 So. 3d at 58 (“Regardless of your findings . . . you are neither compelled nor required to recommend a sentence of death”).

3. The Florida Supreme Court further held in *Hurst v. State* that there is an Eighth Amendment right to have a jury unanimously recommend a death sentence before a death sentence is permissible. *Hurst v. State*, 202 So. 3d at 59 (“we conclude that juror unanimity in any recommended verdict resulting in a death sentence is required under the Eighth Amendment.”). The Court in *Hurst* explained:

This individualized sentencing implements the required narrowing function that also ensures that the death penalty is reserved for the most culpable of murderers and for the most aggravated of murders. If death is to be imposed, unanimous jury sentencing recommendations, when made in conjunction with the other critical findings unanimously found by the jury, provide the highest degree of reliability in meeting these constitutional requirements in the capital sentencing process.

Id. at 60. Thus, the Eighth Amendment’s evolving standards of decency now requires a unanimous death recommendation before a death sentence is permissible:

¹⁶The U.S. Supreme Court as far back as 1974 held that a capital sentencer can constitutionally dispense mercy in a case that otherwise might warrant imposition of the death penalty. *Gregg v. Georgia*, 428 U.S. 153, 203 (1976). In Florida prior to *Hurst*, it was the sentencing judge who had been given the authority to dispense mercy in a capital case. However, that authority has now been transferred to the jury under *Hurst v. State*.

Requiring unanimous jury recommendations of death before the ultimate penalty may be imposed will ensure that in the view of the jury—a veritable microcosm of the community—the defendant committed the worst of murders with the least amount of mitigation. This is in accord with the goal that capital sentencing laws keep pace with “evolving standards of decency.” *Trop v. Dulles*, 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion) (holding that the Eighth Amendment must “draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”).

Id. at 60. In *Hurst v. State*, the Florida Supreme Court ruled that on the basis of the Eighth Amendment and on the basis of the Florida Constitution, the evolving standards of decency now requires jury “unanimity in a recommendation of death in order for death to be considered and imposed”. *Id.* at 61.

4. But of course, the jury must know and appreciate the significance of its verdict:

In a capital case, the gravity of the proceeding and the concomitant juror responsibility weigh even more heavily, and it can be presumed that the penalty phase jurors will take special care to understand and follow the law.

Id. at 63. Indeed, under *Caldwell v. Mississippi*, 472 U.S. 320 (1985), a unanimous jury verdict in favor of a death sentence violates the Eighth Amendment if the jury was not correctly instructed as to its sentencing responsibility. *Caldwell* held: “it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.” *Id.* 328-29. Jurors must feel the weight of their sentencing responsibility; they must know that if the defendant is ultimately executed it will be because no juror exercised her power to preclude a death sentence.

5. In *Caldwell*, the prosecutor responding to defense counsel’s argument stated in his argument before the jury: “Now, they would have you believe that you’re going to kill this man and they know—they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable.” *Id.* at 325.¹⁷ Because the jury’s sense of responsibility was

¹⁷In her concurrence, Justice O’Connor wrote: “In telling the jurors, ‘your decision is not the final decision ... [y]our job is reviewable,’ the prosecutor sought to minimize the sentencing

improperly diminished by this argument, the Supreme Court held that the jury's unanimous verdict imposing a death sentence in that case violated the Eighth Amendment and required the death sentence to be vacated. *Caldwell*, 472 U.S. at 341 ("Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires."). *Caldwell* explained: "Even when a sentencing jury is unconvinced that death is the appropriate punishment, it might nevertheless wish to 'send a message' of extreme disapproval for the defendant's acts. This desire might make the jury very receptive to the prosecutor's assurance that it can more freely 'err because the error may be corrected on appeal.'" *Id.* at 331.¹⁸

6. Jurors must feel the weight of their sentencing responsibility and know about their individual authority to preclude a death sentence. *See Blackwell v. State*, 79So. 731, 736 (Fla. 1918) (prejudicial error found in "the remark of the assistant state attorney as to the existence of a Supreme Court to correct any error that might be made in the trial of the cause, in effect told the jury that it was proper matter for them to consider when they retired to make up their verdict. Calling this vividly to the attention of the jury tended to lessen their estimate of the weight of their responsibility, and cause them to shift it from their consciences to the Supreme Court."). Where the jurors' sense of responsibility for a death sentence is not explained or is diminished, a jury's unanimous verdict in favor of a death sentence violates the Eighth Amendment and the death sentence cannot stand. *Caldwell*, 472 U.S. at 341 ("Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires.").

7. The U.S. Supreme Court in *Caldwell* found that diminishing an individual juror's

jury's role, by creating the mistaken impression that automatic appellate review of the jury's sentence would provide the authoritative determination of whether death was appropriate." *Caldwell*, 472 U.S. at 342-43.

¹⁸This would certainly apply to the circumstances in Nelson's case when the jury was repeatedly reminded its penalty phase verdict was merely an advisory recommendation.

sense of responsibility for the imposition of a death sentence creates a bias in favor of a juror voting for death. *Caldwell*, 472 U.S. at 330 (“In the capital sentencing context there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court.”).

8. If a bias in favor a death recommendation increases when the jury’s sense of responsibility is diminished, removing the basis for that bias increases the likelihood that one or more jurors will vote for a life sentence. The likelihood increases even more when the jury receives accurate instruction as to each juror’s power and authority to dispense mercy and preclude a death sentence. In this regard, the context of the prosecutor’s improper argument in *Caldwell* is important. The prosecutor was responding to and trying to blunt defense counsel’s assertion that the sentencing decision rested with the jury and that it could choose mercy:

I implore you to exercise your prerogative to spare the life of Bobby Caldwell.... I'm sure [the prosecutor is] going to say to you that Bobby Caldwell is not a merciful person, but I say unto you he is a human being. That he has a life that rests in your hands. You can give him life or you can give him death. It's going to be your decision. I don't know what else I can say to you but we live in a society where we are taught that an eye for an eye is not the solution.... You are the judges and you will have to decide his fate. It is an awesome responsibility, I know—an awesome responsibility.

Caldwell, 472 U.S. at 324.

9. Nelson’s jury was not advised of each jurors’ authority to dispense mercy. Indeed, the instructions suggested otherwise.

10. The circumstances under which Nelson’s jury returned its 12-0 death recommendation shows that it cannot now be viewed as a valid unanimous verdict or that the *Hurst* error was harmless without violating the Eighth Amendment. “Even when a sentencing jury is unconvinced that death is the appropriate punishment, it might nevertheless wish to ‘send a message’ of extreme disapproval for the defendant's acts. This desire might make the jury very receptive to the prosecutor's assurance that it can more freely ‘err because the error may be

corrected on appeal.” *Caldwell*, 472 U.S. at 331. The advisory recommendation simply “does not meet the standard of reliability that the Eighth Amendment requires.” *Id.* at 341.

11. This Court cannot rely on the jury’s death recommendation in Nelson’s case as showing either that he was not deprived of his Eighth Amendment right to require a unanimous jury’s death recommendation or that the violation of the right was harmless. To do so would violate the Eighth Amendment because the advisory verdict was not returned in proceedings compliant with the Eighth Amendment. *Caldwell*, 472 U.S. at 332 (“The death sentence that would emerge from such a sentencing proceeding would simply not represent a decision that the State had demonstrated the appropriateness of the defendant's death.”).

12. In *Hurst v. Florida*, the U.S. Supreme Court warned against using what was an advisory verdict to conclude that the findings necessary to authorize the imposition a death sentence had been made by the jury:

“[T]he jury's function under the Florida death penalty statute is advisory only.” *Spaziano v. State*, 433 So.2d 508, 512 (Fla.1983). The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires.

Hurst v. Florida, 136 S.Ct. at 622. An advisory verdict (premised upon inaccurate information regarding the binding nature of a life recommendation and the juror’s inability to be merciful based upon sympathy) cannot be used as a substitute for a unanimous verdict from a properly instructed jury. *California v. Ramos*, 463 U.S. 992, 1004 (1983) (“Because of the potential that the sentencer might have rested its decision in part on erroneous or inaccurate information that the defendant had no opportunity to explain or deny, the need for reliability in capital sentencing dictated that the death penalty be reversed.”).

13. Under *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), the Florida Supreme Court’s Eighth Amendment ruling in *Hurst v. State* must be applied retroactively. Under *Witt v. State*, the Florida Supreme Court’s decision in *Hurst v. State* must be applied retroactively. It is not constitutionally permissible to execute a person whose death sentence was imposed under an

unconstitutional scheme.

14. The Florida Supreme Court's recent decision in *Walls v. State*, 2016 WL 6137287 (Fla. Oct. 20, 2016), also indicates that *Hurst v. State* must be applied retroactively. Although *Walls* addressed the retroactivity of another Supreme Court decision involving an Eighth Amendment violation under *Hall v. Florida*, 134 S. Ct. 1986 (2014), it is instructive here. There, the Court concluded that the Eighth Amendment decision in *Hall* "removes from the State [the] authority to impose death sentences" in a category of cases. *Walls*, 2016 WL 6137287 at *5. "[Nelson's] eligibility or ineligibility for execution must be determined in accordance with the correct United States Supreme Court jurisprudence." *Id.* at *8 (Pariente, J., concurring). "More than fundamental fairness and a clear manifest injustice, **the risk of executing a person who is not constitutionally able to be executed**, trumps any other considerations that this Court looks to when determining if a subsequent decision of the United States Supreme Court should be applied." *Id.* (emphasis added).

15. Nelson's death sentence stands in violation of the Eighth Amendment and the Florida Constitution. Rule 3.851 relief must issue and his sentence must be vacated.

CLAIM IV

THE DECISIONS IN *HURST V. STATE* AND *PERRY V. STATE* ALONG WITH THE RECENT ENACTMENT OF A REVISED SENTENCING STATUTE, ALL OF WHICH ARE NEW LAW THAT WOULD GOVERN AT A RESENTENCING AND REQUIRE THE JURY TO UNANIMOUSLY FIND THE STATUTORILY REQUIRED FACTS NECESSARY TO AUTHORIZE A DEATH SENTENCE AND ALSO REQUIRE THE JURY TO UNANIMOUSLY RECOMMEND A DEATH SENTENCE BEFORE THE JUDGE WOULD BE AUTHORIZED TO IMPOSE A DEATH SENTENCE, MUST BE PART OF THE SECOND PRONG ANALYSIS OF NELSON'S PREVIOUSLY PRESENTED NEWLY DISCOVERED EVIDENCE CLAIM AND HIS PREVIOUSLY PRESENTED *STRICKLAND* CLAIMS. THE NEW LAW, DUE PROCESS PRINCIPLES, AND THE EIGHTH AMENDMENT ALL REQUIRE THIS COURT TO REVISIT NELSON'S PREVIOUSLY PRESENTED CLAIMS AND DETERMINE WHETHER THE EVIDENCE PRESENTED TO SUPPORT EACH CLAIM AND ALL THE OTHER ADMISSIBLE EVIDENCE AT A FUTURE RESENTENCING WOULD PROBABLY RESULT IN A LIFE SENTENCE IN LIGHT OF THE NEW LAW THAT WOULD GOVERN AT A RESENTENCING, AND WHEN THE PROPER ANALYSIS IS

CONDUCTED IT IS CLEAR THAT IT IS LIKELY THAT A DIFFERENT OUTCOME WOULD RESULT, RULE 3.851 RELIEF IS REQUIRED.

This claim is evidenced by the following:

1. All other factual allegations in this motion and in Nelson’s previous motions to vacate, and all evidence presented by him during his trial and previous postconviction proceedings, are incorporated herein by specific reference.
2. On March 7, 2016, Chapter 2016-13 was signed into law. It substantially revised Florida’s capital sentencing statute and constitutes new law cognizable in Rule 3.851 proceedings. As the Staff Analysis of the Criminal Justice Subcommittee accompanying HB 7101 (Chapter 2016-13) makes clear, its adoption was intended to cure the constitutional defect in Florida’s capital sentencing scheme identified in *Hurst v. Florida*, 136 S. Ct. 616 (2016).¹⁹
3. The Staff Analysis also discussed that the Petitioner in *Hurst* had argued that a simple majority vote by the jury violated the United States Constitution. *See id.* at 7 (“The Court’s opinion did not address Hurst’s contention that a jury’s advisory verdict must be greater than a simple majority in order to comport with the Sixth and Eighth Amendments.”). Though the Staff Analysis acknowledged that the Supreme Court did not specifically address Hurst’s argument, it noted HB 7101’s requirement that at least ten jurors vote to recommend death before a judge was authorized to impose a death sentence. *See id.* at 8 (“To recommend a sentence of death, a minimum of 10 jurors must concur in the recommendation. If fewer than 10 jurors concur, a sentence of life imprisonment without the possibility of parole will be the jury’s recommendation to the court. If the jury recommends life imprisonment without the possibility of parole, the judge must impose the recommended sentence.”).

¹⁹*See* House of Representatives Final Bill Analysis, H.B. 7101, at 8 (Fla. 2016) (“The bill amends ss. 921.141 and 921.142, F.S., to comply with the United States Supreme Court’s holding that a jury, not a judge, must find each fact necessary to impose a sentence of death.”).

4. The new § 921.141 includes a new subsection (2) describing the jury's function in a capital penalty phase:

(2) Findings and recommended sentence by the jury.—This subsection applies only if the defendant has not waived his or her right to a sentencing proceeding by a jury.

(a) After hearing all of the evidence presented regarding aggravating factors and mitigating circumstances, the jury shall deliberate and determine if the state has proven, beyond a reasonable doubt, the existence of at least one aggravating factor set forth in subsection (6).

(b) The jury shall return findings identifying each aggravating factor found to exist. A finding that an aggravating factor exists must be unanimous. If the jury:

1. Does not unanimously find at least one aggravating factor, the defendant is ineligible for a sentence of death.

2. Unanimously finds at least one aggravating factor, the defendant is eligible for a sentence of death and the jury shall make a recommendation to the court as to whether the defendant shall be sentenced to life imprisonment without the possibility of parole or to death. The recommendation shall be based on a weighing of all of the following:

a. Whether sufficient aggravating factors exist.

b. Whether aggravating factors exist which outweigh the mitigating circumstances found to exist.

c. Based on the considerations in sub-subparagraphs a. and b., whether the defendant should be sentenced to life imprisonment without the possibility of parole or to death.

(c) If at least 10 jurors determine that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of death. If fewer than 10 jurors determine that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of life imprisonment without the possibility of parole.

§ 921.141(2), Fla. Stat. (2016).

5. In *Perry v. State*, the Florida Supreme Court addressed the newly revised statute.

While generally approving all other aspects of the newly revised statute, it held that the 10-2

provision was unconstitutional under *Hurst v. Florida* because to be constitutional the findings of fact and the death recommendation necessary to authorize the imposition of a death sentence had to be reached unanimously by the jury. *Perry* held:

to increase the penalty from a life sentence to a sentence of death, the jury must unanimously find the existence of any aggravating factor, that the aggravating factors are sufficient to warrant a sentence of death, that the aggravating factors outweigh the mitigating circumstances, and must unanimously recommend a sentence of death.

2016 WL 6036982 at 8. In deciding whether to recommend a death sentence, jurors may choose to vote in favor of a life sentence to be merciful. *Id.* (“This final jury recommendation, apart from the findings that sufficient aggravating factors exist and that the aggravating factors outweigh the mitigating circumstances, has sometimes been referred to as the ‘mercy’ recommendation.”).

This is the law that now governs when a death sentence is vacated and a resentencing is ordered in a capital case. In *Hurst v. State*, the Florida Supreme Court explained:

Requiring a unanimous jury recommendation before death may be imposed, in accord with precepts of the Eighth Amendment and Florida’s right to trial by jury, is a critical step toward ensuring that Florida will continue to have a constitutional and viable death penalty law, which is surely the intent of the Legislature. The requirement will dispel most, if not all, doubts about the future validity and long-term viability of the death penalty in Florida.

2016 WL 6036978 at *17.

6. In *Hildwin v. State*, 141 So.3d 1178, 1184 (Fla.2014), the Florida Supreme Court explained that when presented with qualifying newly discovered evidence:

the postconviction court must consider the effect of the newly discovered evidence, in addition to all of the evidence that could be introduced at a new trial. *Swafford v. State*, 125 So.3d 760, 775-76 (Fla. 2013). In determining the impact of the newly discovered evidence, the court must conduct a cumulative analysis of all the evidence so that there is a ‘total picture’ of the case.

In *Swafford*, the Florida Supreme Court indicated the evidence to be considered in evaluating whether a different outcome was probable included “evidence that [had been] previously excluded as procedurally barred or presented in another proceeding.” *Swafford v. State*, 125

So.3d at 775-76. The “standard focuses on the likely result that would occur during a new trial with all admissible evidence at the new trial being relevant to that analysis.” *Id.* Put simply, the analysis requires envisioning how a new trial or resentencing would look with all of the evidence that would be available. Obviously, the law that would govern at a new trial must be part of the analysis. Here, the revised capital sentencing statute would apply at a resentencing and would require the jury to determine unanimously that sufficient aggravators exist and that they outweigh the mitigators. It would also require the jury to unanimously recommend a death sentence before the sentencing judge would be authorized to impose a death sentence. One single juror voting in favor of a life sentence would require the imposition of a life sentence.

7. This is new Florida law that did not exist when Nelson previously presented his newly discovered evidence and *Strickland* claims. Accordingly, before the enactment of Chapter 2016-13 on March 7, 2016, and before the issuance of *Perry v. State* and *Hurst v. State* on October 14, 2016, Nelson could not present his claims as set forth herein because the new law that would govern any resentencing ordered in Nelson’s case was previously unavailable. Nelson’s previously presented claims must be re-evaluated in light of the new Florida law.

8. The Florida Supreme Court explained in *Hurst v. State* that “the requirement of unanimity in capital jury findings will help to ensure the heightened level of protection necessary for a defendant who stands to lose his life as a penalty.” 2016 WL 6036978 at *14. *See State v. Steele*, 921 So. 2d 538, 549 (Fla. 2005), quoting *State v. Daniels*, 542 A.2d 306, 315 (Conn. 1988) (“[W]e perceive a special need for jury unanimity in capital sentencing. Under ordinary circumstances, the requirement of unanimity induces a jury to deliberate thoroughly and helps to assure the reliability of the ultimate verdict.”). The Court in *Hurst v. State* also held:

If death is to be imposed, unanimous jury sentencing recommendations, when made in conjunction with the other critical findings unanimously found by the jury, provide the highest degree of reliability in meeting these constitutional requirements in the capital sentencing process.

2016 WL 6036978 at *15. Thus, reliability of Florida death sentences is the touchstone of the

new Florida law requiring a unanimous jury to make the factual determinations necessary for the imposition of a death sentence and requiring the jury to unanimously return a death recommendation before a death sentence is authorized as a sentencing option. Implicit in the justification for the new Florida law is an acknowledgment that death sentences imposed under the old capital sentencing scheme were (or are) less reliable. Before executions are carried out in a case in which the reliability of a death sentence is subpar, a re-evaluation of such a death sentence in light of the changes made by Chapter 2016-13, *Hurst v. State*, and *Perry v. State* is warranted. A previous rejection of a death sentenced defendant's *Strickland* and/or newly discovered evidence claims should be re-evaluated in light of the new requirement that juries must unanimously make the necessary findings of fact and return a unanimous death recommendation before a death sentence is even a sentencing option. Certainly the previous rejection of a newly discovered evidence claim on the basis of a defendant's failure to show that the new evidence would have likely led to six jurors to vote for a life sentence no longer comports with the law since Florida law now provides that if one juror votes for a life sentence, a life sentence must be imposed. Further, the *Strickland* prejudice analysis requires a determination of whether confidence in the reliability of the outcome - the imposition of a death sentence - is undermined by the evidence the jury did not hear due to the *Strickland* violations. The new Florida law should be part of the evaluation of whether confidence in the reliability of the outcome is undermined, particular since the touchstone of the new Florida law is the likely enhancement of the reliability of any resulting death sentence.

9. The evidence supporting Nelson's newly discovered evidence and *Strickland* claims presented in his previous Rule 3.851 motions must be evaluated under the standard set forth in *Swafford* and *Hildwin*, and that means that all of the evidence that would be admissible at a resentencing which includes the mitigating evidence presented to meet the prejudice prong of the *Strickland* standard governing ineffectiveness claims and newly discovered evidence relating to Nelson's culpability. With all the new evidence that would be admissible at a resentencing, the

State cannot demonstrate beyond a reasonable doubt that not a single juror would have voted in favor of a life sentence. A single juror voting for a life sentence under *Hurst v. State* and *Perry v. State* would mean that a life sentence would be the only sentencing option. Thus, when the proper *Swafford/Hildwin* analysis is conducted with proper consideration given to the new Florida law arising from Chapter 2016-13, *Hurst v. State* and *Perry v. State*, it is more likely than not that Nelson would be able to persuade at least one juror to vote for a life sentence. That means a life sentence would be required and that the outcome of a resentencing would be different. One juror's vote in favor of a life sentence is much more likely to undermine confidence in the reliability of the decision to impose death in light of the new unanimity requirement when a court is considering the prejudice arising from *Strickland* claims or whether the newly discovered evidence would probably produce a life sentence.

10. This Court must re-evaluate Nelson's newly discovered evidence and *Strickland* claims in light of the new Florida law which would govern at a resentencing. In *Walton v. State*, where a Rule 3.851 appeal is pending in the Florida Supreme Court, the Court recently granted a motion to relinquish jurisdiction raising this identical argument. *Walton v. State*, Case No. SC16-448 (Fla. Sept. 13, 2016). When a re-evaluation such as will be held in *Walton* is conducted, it is apparent that the outcome would probably be different and that Nelson would receive a binding life recommendation from the jury.

11. Because the new Florida law will apply at a retrial or resentencing, it extends a new right to capital defendants, i.e. the right to a life sentence if one juror votes in favor of a life sentence. This requires this Court to revisit Nelson's previously presented claims and determine whether under the requisite analysis set forth in *Hildwin* and *Swafford*, a different result, i.e. a life sentence, is more likely than not. Nelson can meet the *Hildwin/Swafford* test. He could also demonstrate that confidence in the reliability of the outcome is undermined on the basis of the *Strickland* claims. Accordingly, he is entitled to Rule 3.851 relief on his *Strickland* claims on the basis of new Florida law set forth in *Perry v. State* and *Hurst v. State*.

12. Rule 3.851 relief is warranted. Nelson's death sentence should be vacated and a new penalty phase ordered.

CONCLUSION AND RELIEF SOUGHT

Based on the foregoing, Nelson prays for the following relief, based on his prima facie allegations showing violations of his constitutional rights: 1) a "fair opportunity" to demonstrate that his death sentence stands in violation of the Sixth and Eighth Amendments and *Hurst v. Florida*, *Perry v. State* and *Hurst v. State*; 2) a re-evaluation of his previously presented *Strickland* and newly discovered evidence claims in light of the new Florida law that would govern at a resentencing in order to enhance the reliability of any resulting death sentence; 3) an opportunity for further evidentiary development to the extent necessary; 4) authorization to proceed *in forma pauperis*; 5) leave to amend for the reasons set forth in his motion to amend; and; 6) on the basis of the reasons presented herein, Rule 3.851 relief vacating his death sentence and substituting a life sentence or alternatively a new penalty phase proceeding.

CERTIFICATION PURSUANT TO FLA. R. CRIM. P. 3.851 (e)

Pursuant to Fla. R. Crim P. 3.851(e)(2)(A) and (e)(1)(F), undersigned counsel hereby certifies that counsel has endeavored to fully discuss and explain the contents of this motion with Nelson, and that counsel to the best of his ability has complied with Rule 4-1.4 of the Rules of Professional Conduct, and that this motion is filed in good faith.

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished through the Florida Courts E-Filing Portal to Carol Dittmar, carol.dittmar@myfloridalegal.com, Office of the Attorney General, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607; Cynthia Ross, cross@sao.cjis20.org, Assistant State Attorney, Office of the State Attorney, P.O. Box 399, Fort Myers, FL 33902-0399, on January 11, 2017.

/s/ John Abatecola
JOHN ABATECOLA
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Counsel for Mr. Nelson

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**IN THE CIRCUIT COURT OF THE
TWENTIETH JUDICIAL CIRCUIT, IN AND
FOR LEE COUNTY, FLORIDA**

CASE NO. 95-CF-911A

STATE OF FLORIDA,

Plaintiff,

v.

JOSHUA D. NELSON,

Defendant.

_____ /

MOTION TO EXCEED PAGE LIMITATION

The Defendant, **JOSHUA D. NELSON**, by and through undersigned counsel, respectfully moves this Court to allow him to exceed the page limitation for his successive Rule 3.851 motion, filed simultaneously with this motion. In support, Mr. Nelson submits as follows:

1. Mr. Nelson is under a sentence of death. With this motion, Mr. Nelson is filing a successive motion to vacate his sentence of death pursuant to Rule 3.851.

2. Fla. R. Crim. P. 3.851(e)(2) directs that “a successive motion shall not exceed 25 pages, exclusive of attachments.”

3. Mr. Nelson’s successive motion is 45 pages in length. Mr. Nelson’s motion includes claims premised upon the January 12, 2016 ruling in *Hurst v. Florida*, 136 S. Ct. 616 (2016), *Perry v. State*, 2016 WL 6036982 (Fla. Oct. 14, 2016), *Hurst v. State*, 2016 WL 6036978 (Fla. Oct. 14, 2016), and *Mosley v. State*, 2016 WL 7406506 (Fla. Dec. 22, 2016). The excess pages are due to the significance of the new Florida law and Mr. Nelson’s need to coherently set forth the significance of the new Florida law and the basis of his claims arising from the new law.

WHEREFORE, based on the foregoing, Mr. Nelson requests that this Court allow him to exceed the page limitation set forth in Rule 3.851(e)(2) in his accompanying successive Rule 3.851 motion.

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished through the Florida Courts E-Filing Portal to Carol Dittmar, carol.dittmar@myfloridalegal.com, Office of the Attorney General, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607; Cynthia Ross, cross@sao.cjis20.org, Assistant State Attorney, Office of the State Attorney, P.O. Box 399, Fort Myers, FL 33902-0399, on January 11, 2017.

/s/ John Abatecola
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**IN THE CIRCUIT COURT OF THE
TWENTIETH JUDICIAL CIRCUIT, IN AND
FOR LEE COUNTY, FLORIDA**

CASE NO. 95-CF-911A

STATE OF FLORIDA,

Plaintiff,

v.

JOSHUA D. NELSON,

Defendant.

_____ /

NOTICE OF APPEARANCE

PLEASE TAKE NOTICE that John Abatecola enters his appearance as Mr. Nelson's Registry Counsel, along with Linda McDermott as Designated Counsel for Mr. Nelson. Accordingly, please serve all pleadings, orders, notices of hearing, etc. to undersigned counsel as follows:

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jabatecola@comcast.net

LINDA McDERMOTT
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Estero, FL 33928
(850) 322-2172
lindammcdermott@msn.com

I HEREBY CERTIFY that a true copy of the foregoing notice has been furnished through the Florida Courts E-Filing Portal to Carol Dittmar, carol.dittmar@myfloridalegal.com, Office of the Attorney General, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607; Cynthia Ross, cross@sao.cjis20.org, Assistant State Attorney, Office of the State Attorney, P.O. Box 399, Fort Myers, FL 33902-0399, on January 11, 2017.

/s/ John Abatecola

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**IN THE CIRCUIT COURT OF THE
TWENTIETH JUDICIAL CIRCUIT, IN AND
FOR LEE COUNTY, FLORIDA**

CASE NO. 95-CF-911A

STATE OF FLORIDA,

Plaintiff,

v.

JOSHUA D. NELSON,

Defendant.

MOTION TO AMEND

The Defendant, Joshua D. Nelson, by and through undersigned counsel, respectfully moves this Court for an order granting him leave to amend his successive postconviction motion which is being filed simultaneously to the instant pleading. In support of this motion, Nelson states:

1. On November 1, 2016, undersigned counsel was appointed to represent Nelson.
2. On November 8, 2016, undersigned filed a Notice to the Court and/or Motion to Withdraw.¹ Undersigned explained that he was unfamiliar with Nelson and his case. Undersigned further explained that his present professional and personal commitments precluded him from being able to devote the time necessary to provide the adequate and effective legal representation to which Nelson is entitled in his collateral proceedings. Undersigned respectfully suggested that one of the three Capital Collateral Regional Counsel Offices in Florida would be best equipped to represent Nelson given the current procedural posture of his case.

¹At this juncture, undersigned had yet to receive a copy of the order appointing him. Undersigned was alerted to his possible involvement in Nelson's case after receiving by mail from the Lee County Clerk of Court a copy of an order striking a pro se successive 3.851 motion filed by Nelson. The order, which was dated November 1, 2016, listed undersigned in the certificate of service. Within a couple of days of filing the Notice to the Court and/or Motion to Withdraw, undersigned received the notice of appointment.

3. On December 6, 2016, this Court issued an Order denying undersigned's motion. Undersigned, however, never received a copy of the Order.

4. During the first week of January, 2017, undersigned checked Nelson's court docket on the Lee County Clerk of Court website in order to verify that this Court had yet to issue a ruling. There, undersigned was alerted to the fact that an order had in fact issued, and an accompanying comment indicated that undersigned's motion was denied.²

5. At the present time, undersigned is beginning to compile records and documents in Nelson's case, which spans approximately twenty years. Undersigned does not yet have a record on appeal, either for Nelson's direct appeal or his postconviction proceedings. Nor does undersigned have copies of any of Nelson's public records or DOC records.

6. Give the lack of records in the instant case, Nelson's postconviction motion is incomplete. However, time is of the essence, as the State may argue that, for preservation purposes, a motion based on *Hurst v. Florida* must be filed within one year of its issuance, January 12, 2016. Thus, in an abundance of caution, undersigned is filing the successive motion today, January 11, 2017.

7. Undersigned was able to gain a limited factual understanding of Nelson's case based on appellate briefs obtained from the Florida Supreme Court website and federal pleadings from the district court's online docket. However, in order to fully address Nelson's *Hurst*-related claims, undersigned needs time to obtain and review Nelson's case history, primarily his direct appeal record. Undersigned requests a period of ninety days to amend so that he can obtain pertinent records and familiarize himself with Nelson's case.

WHEREFORE, Nelson respectfully requests the this Court grant his motion to amend.

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished through the Florida Courts E-Filing Portal to Carol Dittmar, carol.dittmar@myfloridalegal.com,

²Undersigned requested from the Clerk's website online access to the document, and he was able to view this Court's Order as of January 9, 2017.

Office of the Attorney General, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607; Cynthia Ross, cross@sao.cjis20.org, Assistant State Attorney, Office of the State Attorney, P.O. Box 399, Fort Myers, FL 33902-0399, on January 11, 2017.

/s/ John Abatecola
JOHN ABATECOLA
Florida Bar No. 0112887
jabatecola@comcast.net
Counsel for Mr. Nelson

LINDA MCDERMOTT
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Designated counsel for Mr. Nelson

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IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT,
IN AND FOR LEE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO. 95-CF-000911-A
DEATH PENALTY CASE

JOSHUA D. NELSON,

Defendant.

MOTION TO STRIKE DEFENDANT'S SUCCESSIVE POSTCONVICTION MOTION
AND MOTION TO TOLL TIME FOR FILING OF AN ANSWER

COMES NOW, the State of Florida, by and through the undersigned counsel, and hereby moves this Court to strike Defendant's successive motion for postconviction relief filed on January 11, 2017, and to toll the time for the filing of an answer, and in support thereof states the following:

1. On January 11, 2017, Defendant Joshua D. Nelson filed a 45-page successive motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.851, and also filed a motion to exceed page limitations.

2. Pursuant to Florida Rule of Criminal Procedure 3.851(e)(2), a "successive motion shall not exceed 25 pages, exclusive of attachments."

3. Nelson filed the instant motion raising four interrelated claims for relief, all purportedly based on the

decisions in Hurst v. Florida, 136 S. Ct. 616 (Fla. 2016), Hurst v. State, 202 So. 3d 40 (Fla. 2016), Perry v. State, ___ So. 3d ___, 2016 WL 6036982 (Fla. Oct. 14, 2016), Asay v. State, ___ So. 3d ___, 2016 WL 7406538 (Fla. Dec. 22, 2016), Mosley v. State, ___ So. 3d ___, 2016 WL 7406506 (Fla. Dec. 22, 2016), and the enactment of Chapter 2016-13 on March 7, 2016.

4. The State requests that this Court deny the motion to exceed page limitations and strike the successive motion without prejudice to filing a motion which complies with the applicable rules. As another circuit court judge has recently noted when dismissing a similar successive postconviction motion based on Hurst, "the Court finds Defendant's claims can be contained in the twenty-five (25) pages required by the rule and there is no need for the Motion to exceed the page limit set out by the rule." State v. Peede, Case No. 1983-CF-001682-A-0, Order of Jan. 5, 2017 (Attached as Exhibit A).

5. Because Florida Rule of Criminal Procedure 3.851(f)(3)(B) imposes a 20-day response time for the filing of an answer following the proper filing of a successive motion, the State requests that this Court toll this time period until the resolution of the instant motion.

WHEREFORE, the State requests that this Court strike Defendant's successive postconviction motion without prejudice and toll the time for filing an answer.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of January, 2017, 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: John Abatecola, Counsel for Mr. Nelson and Linda McDermott, Designated counsel for Mr. Nelson, McClain & McDermott, P.A., 20301 Grande Oak Boulevard, Suite 118-61, Estero, Florida 33928 **jabatecola@comcast.net** and **lindammcdermott@msn.com**; Cynthia Ross, Assistant State Attorney, Office of the State Attorney, Post Office Box 399, Fort Myers, Florida 33902-0399 **cross@sao.cjis20.org** and **servicesao-lee@sao.cjis20.org**; and a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to: The Honorable Joseph C. Fuller, Jr., Lee County Justice Center, 1700 Monroe Street, Fort Myers, Florida 33901.

Respectfully submitted,

**PAMELA JO BONDI
ATTORNEY GENERAL**

/s/ Carol M. Dittmar

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COUNSEL FOR STATE OF FLORIDA

ATTACHMENT A

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

ROBERT IRA PEEDE,

Defendant.

CASE NO.: 1983-CF-001682-A-O
DIVISION NO.: 11

**ORDER STRIKING "SUCCESSIVE MOTION TO VACATE DEATH SENTENCES
PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851"
WITH LEAVE TO AMEND AND DENYING "MOTION TO EXCEED PAGE
LIMITATION"**

THIS MATTER is before the Court on Defendant's "Successive Motion to Vacate Death Sentences Pursuant to Florida Rule of Criminal Procedure 3.851" filed through counsel on January 4, 2017, pursuant to Florida Rule of Criminal Procedure 3.851, and "Motion to Exceed Page Limitation," filed the same day. After reviewing Defendant's Motion, the court file, and the record, the Court finds as follows:

The Court finds Defendant's Motion exceeds the length authorized by rule 3.851(e)(2).¹ Additionally, the Court finds Defendant's claims can be contained in the twenty-five (25) pages required by the rule and there is no need for the Motion to exceed the page limit set out by the rule. Defendant is entitled to one good-faith opportunity to amend his motion in order to comply with the requirements of rule 3.851.

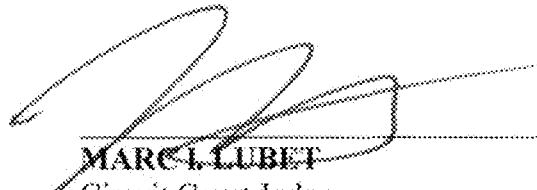
Based upon the foregoing, it is hereby **ORDERED AND ADJUDGED** that:

1. Defendant's "Successive Motion to Vacate Death Sentences Pursuant to Florida Rule of Criminal Procedure 3.851" is **STRICKEN**.

¹ The rule requires a successive motion not exceed twenty-five (25) pages.

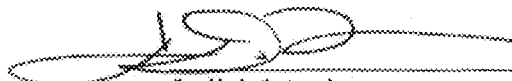
2. Defendant has **THIRTY (30) DAYS** from the date of rendition of this Order within which to amend the motion, subject to all filing requirements outlined in Rule 3.851.²
3. **This Order is a nonfinal, nonappealable Order. Defendant may not appeal until such time as this Court has entered a Final Order.**
4. The Clerk of the Court shall promptly serve a copy of this Order upon Defendant, including an appropriate certificate of service.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 4 day of January, 2017.


MARC I. LUBET
Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Order has been furnished by U.S. Mail or hand delivery to **Linda McDermott, McClain & McDermott, P.A.**, 20301 Grande Oak Blvd., Suite 118-61, Estero, Florida 33928; and to **Kenneth Nunnelley**, Assistant State Attorney, Office of the State Attorney, Postconviction Felony Unit, 415 North Orange Avenue, Post Office Box 1673, Orlando, Florida 32801, on this 5th day of January, 2017.


Judicial Assistant

² See Rule 3.851(e).

**IN THE CIRCUIT COURT OF THE
TWENTIETH JUDICIAL CIRCUIT, IN AND
FOR LEE COUNTY, FLORIDA**

CASE NO. 95-CF-911A

STATE OF FLORIDA,

Plaintiff,

v.

JOSHUA D. NELSON,

Defendant.

**RESPONSE TO STATE'S MOTION TO STRIKE
SUCCESSIVE POSTCONVICTION MOTION**

The Defendant, **JOSHUA D. NELSON**, by and through undersigned counsel, respectfully responds to the State's motion to strike his successive Rule 3.851 motion. Mr. Nelson submits as follows:

1. On January 11, 2017, Mr. Nelson filed a successive Rule 3.851 motion related to the United States Supreme Court's opinion in *Hurst v. Florida*, 136 S.Ct. 616 (2016), which declared Florida's capital sentencing scheme unconstitutional. Additionally, Mr. Nelson included an Eighth Amendment claim based upon *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). He also included an Eighth Amendment claim related to the inconsistency of the Florida Supreme Court's *Witt v. State*, 387 So. 2d 922 (Fla. 1980) analysis in *Asay v. State*, __ So. 3d __, 2016 WL 7406538 (Fla. Dec. 22, 2016), and *Mosley v. State*, __ So. 3d __, 2016 WL 7406506 (Fla. Dec. 22, 2016). And, Mr. Nelson included a fourth claim related to the need to revisit his prior claims due to the change in analysis of prejudice based upon *Hurst v. Florida* and its progeny.

2. Mr. Nelson's motion was 45 pages in length. Simultaneously with his motion, Mr. Nelson requested the Court grant an extension of pages over the 25 page limit. Mr. Nelson explained that the excess pages were due to the significance of the new Florida law and his need to coherently set forth the basis of his claims arising from the new law.

3. On January 20, 2017, the State filed a motion to strike Mr. Nelson's successive motion due to the excess pages. In support, the State attached a single order, entered in *State v.*

Peede, Orange County Case No. 1983-CF-001682-A-O, in which the circuit court struck Mr. Peede's successive motion and allowed him thirty days to amend the motion to comply with the page limitation.

4. Mr. Nelson respectfully requests that this Court deny the State's motion. First, the claims contained in Mr. Nelson's motion relate to a series of cases stemming from the United States Supreme Court's decision in *Hurst v. Florida*. The opinions are extremely lengthy and many of the opinions include concurring and dissenting opinions. The Florida Supreme Court's opinion in *Hurst v. State* comprises 89 pages; *Perry v. State*, 23 pages; *Johnson v. State*, 12 pages; *Davis v. State*, 71 pages; *Mosley v. State*, 83 pages; and *Asay v. State*, 80 pages. These are just the decisions that have issued since *Hurst v. Florida* and relate to either the retroactivity issue and/or the harmless error analysis. The list is not all inclusive. Lengthy analysis of critical issues, relevant to Mr. Nelson's motion, have been written by the Florida Supreme Court. Mr. Nelson simply cannot present the claims comprehensively without relying on the critical aspects of the Supreme Court's analysis.

5. Moreover, while the State relied upon and attached the order in *Peede*, the State did not include information about the numerous circuit courts that have permitted similar motions that exceeded the page limitation: In *State v. Willacy*, Brevard County Case No. 05-1990-CF-016062-AXXX-XX, the presiding judge granted Mr. Willacy's motion to exceed the page limitation (*See Attachment A*). Mr. Willacy's successive motion related to *Hurst* issues was 38 pages in length.

6. In *State v. Ford*, Case No. 97-CF-351 (Charlotte County, 20th Jud. Cir), the presiding judge granted Mr. Ford's motion to exceed the page limitation (*See Attachment B*). Mr. Ford's successive motion related to *Hurst* issues was 70 pages in length.

7. In *State v. Oats*, Case No. 80-16 (Marion County 5th Jud. Cir.), a 35 page successive motion to vacate was filed on October 28, 2016. The motion presented *Hurst* related claims. The presiding judge without objection orally granted Oats' motion for leave to exceed the

25-page limitation at a November 1, 2016 status hearing.

8. In *State v. Jennings*, Case No. 79-000773 (Brevard County 18th Jud. Cir.), a 31 page successive motion to vacate was filed on October 20, 2016. The motion presented *Hurst* related claims. The presiding judge on November 2, 2016, granted Jennings' motion for leave to exceed the 25-page limitation (*See* Attachment C).

9. In *State v. Raleigh*, Case No. 94-00723 (Volusia County 7th Jud. Cir.), a 74 page successive motion to vacate was filed on December 11, 2016. The motion presented *Hurst* related claims. The presiding judge on December 19, 2016, granted Raleigh's motion for leave to exceed the 25-page limitation (*See* Attachment D).

10. In *State v. Pittman*, Case No. 90-2242A1-XX (Polk County 10th Jud. Cir.), an 89 page amended successive motion to vacate was filed on October 14, 2016. The motion presented *Hurst* related claims, as well as a *Hall v. Florida* claim. The presiding judge on November 2, 2016, granted Pittman's motion for leave to exceed the 25-page limitation (*See* Attachment E).

11. In addition, in numerous similar cases, the State did not object to the excess pages, but rather simply responded to the motions. *See e.g., State v. Hodges*, Hillsborough County Case No. 89-2165 (36 page successive motion); *State v. Ponticelli*, Marion County Case No. 87-2719 CF (50 page successive motion); *State v. Bogle*, Hillsborough County Case No. 91-CF-012952 (44 page successive motion); *State v. Brown*, Volusia County Case No. 1992-34756-CFAES (43 page successive motion); *State v. Davis*, Pinellas County Case No. 85-8933 CFANO (53 page successive motion). Of course the State is represented by the same representative, the Office of the Attorney General, in all of these cases. Certainly, the inconsistent treatment of various capital postconviction defendants, depending on which specific attorney representing the State is assigned to a case, is another example of the arbitrariness of Florida's death penalty system.

12. Permitting a page extension would also save judicial resources and cause Mr. Nelson's proceedings to be conducted more quickly – two goals that are generally what is

intended by the Court, the State, and undersigned.

13. Finally, there would be no prejudice to the State if the Court were to grant Mr. Nelson's motion. Certainly, Mr. Nelson would not object if the State requested to exceed the 25 page limit for its answer. *See* Fla. R. Crim. P. 3.851 (f)(3)(B).

WHEREFORE, based on the foregoing, Mr. Nelson requests that this Court deny the State's motion to strike.

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished through the Florida Courts E-Filing Portal to Carol Dittmar, carol.dittmar@myfloridalegal.com, Office of the Attorney General, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607; Cynthia Ross, cross@sao.cjis20.org, Assistant State Attorney, Office of the State Attorney, P.O. Box 399, Fort Myers, FL 33902-0399, on January 23, 2017.

/s/ John Abatecola

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Counsel for Mr. Nelson

/s/ Linda McDermott

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Designated Counsel for Mr. Nelson

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ATTACHMENT A

IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY,
FLORIDA

CASE NO.: 05-1990-CF-016062-AXXX-XX

STATE OF FLORIDA,

Plaintiff,

v.

CHADWICK WILLACY,

Defendant.

**ORDER FOR STATE TO RESPOND TO DEFENDANT'S "SUCCESSIVE
MOTION TO VACATE DEATH SENTENCE AND ALTERNATIVELY MOTION
TO CORRECT ILLEGAL SENTENCE" AND ORDER GRANTING MOTION TO
EXCEED PAGE LIMITATIONS**

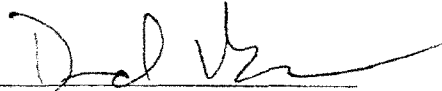
THIS CAUSE came before the Court on the Defendant's "Successive Motion to Vacate Death Sentence and Alternatively Motion to Correct Illegal Sentence," pursuant to Rule 3.851, Florida Rules of Criminal Procedure, and alternatively Rule 3.800(a), Florida Rules of Criminal Procedure, filed herein on January 10, 2017. Based on a review of the Defendant's motion, the official Court file, and being otherwise fully advised in the premises, it is hereupon **ORDERED:**

1. The State is ordered to respond to the issues raised in the Defendant's successive motion for post-conviction relief.
2. The Defendant's Motion to Exceed Page Limitations filed on January 10, 2017, is **GRANTED.**

3. Pursuant to Rule 3.851(f)(3)(B), the State has twenty (20) days from the date of filing the successive motion to file a response.

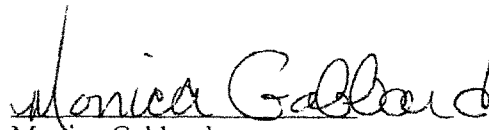
4. In addition to timely filing a copy of its response with the Clerk of Court, the State is directed to provide the Court with a courtesy copy.

DONE AND ORDERED at the Moore Justice Center, Viera, Brevard County, Florida, this 12 day of JAN, 2017.


DAVID DUGAN
CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I do certify that copies hereof have been furnished by ~~U.S. Mail~~ and e-service through the E-Portal to **Office of the State Attorney**, Government Center, 2725 Judge Fran Jamieson Way, Building D, Viera, Florida 32940, stac@sa18.state.fl.us, brespess@sa18.org; ledmiston@sa18.org; **Linda McDermott, Esq.**, McClain & McDermott, P.A., 20301 Grande Oak Boulevard, Suite 118-61, Estero, Florida 33928, lindammcdermott@msn.com; and **Attorney General's Office**, The Capitol, PL-01, Tallahassee, Florida 32399-1050 this 12 day of Jan., 2017.


Monica Gabbard
Judicial Assistant
Harry T. and Harriette V. Moore Justice Center
2825 Judge Fran Jamieson Way
Viera, Florida 32940

ATTACHMENT B

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR CHARLOTTE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

vs.

Case No. 97-CF-351

JAMES DENNIS FORD,
Defendant.

ROGER D. EATON
CLERK OF CIRCUIT COURT
CHARLOTTE COUNTY, FLA

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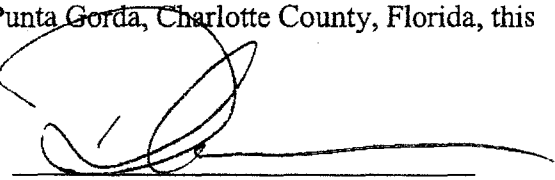
ORDER GRANTING MOTION TO EXCEED PAGE LIMIT

THIS CAUSE came before the Court on Defendant' "Motion To Exceed Page Limitation," filed January 12, 2017. Defendant requests to exceed the page limit on his successive motion filed pursuant to Fla. R. Crim. P. 3.851. Accordingly, it is

ORDERED AND ADJUDGED that the motion to exceed the page limit is GRANTED.

DONE AND ORDERED in Chambers in Punta Gorda, Charlotte County, Florida, this

_____ day of JAN 19 2017, 2017.



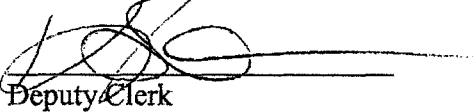
Donald H. Mason
Circuit Judge

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing order has been furnished to: Martin J. McClain, Esq., 141 N.E. 30th St., Wilton Manors, FL 33334; Carol Dittmar, Assistant Attorney General, Department of Legal Affairs, 3507 E. Frontage Road, 2nd Floor, Tampa, FL 33607; Cynthia Ross, Office of the State Attorney, P.O. Box 399, Ft. Myers, FL 33902-0399; and Court Administration (XIV), 1700 Monroe St., Ft. Myers, FL 33901, this 19th day of January, 2017.

ROGER D. EATON
Clerk of the Court

By:


Deputy Clerk

ATTACHMENT C

**IN THE CIRCUIT COURT
EIGHTEENTH JUDICIAL CIRCUIT
BREVARD COUNTY, FLORIDA**

CASE NO.: 05-1979-CF-000773-A

**STATE OF FLORIDA,
Plaintiff,**

v.

**BRYAN FREDRICK JENNINGS,
Defendant.**


**ORDER GRANTING DEFENDANT'S MOTION
TO EXCEED PAGE LIMITATION**

THIS CAUSE came before the Court upon the Defendant's Motion to Exceed Page Limitation, directed to the Defendant's Successive Motion to Vacate Death Sentence, both filed on October 20, 2016. The Court having reviewed the Motion and the Official Court file and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED:

The Defendant's Motion to Exceed Page Limitation is **GRANTED**.

DONE AND ORDERED at Moore Justice Center, Viera, Brevard County, Florida, this 20 day of November, 2016.


**GEORGE W. MAXWELL III
CIRCUIT JUDGE**

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing was furnished by e-filing to James D. Riecks, Esq., Office of the Attorney General; Phil Archer, Esq., State Attorney, Eighteenth Judicial Circuit; and Martin McClain, Esq., 141 N.E. 30th Street, Wilton Manors, Florida 33334; this 2nd day of November, 2016.

Kim Pagan for Melissa Dix
Judicial Assistant
Moore Justice Center
2825 Judge Fran Jamieson Way
Viera FL 32940

ATTACHMENT D

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

CASE NO: 1994-00723 CFAWS
⁰⁰⁰⁷²³

STATE OF FLORIDA,

v.

BOBBY RALEIGH,

ORDER GRANTING MOTION TO EXCEED PAGE LIMITATION/ ORDER FOR STATE TO
FILE AN ANSWER TO THE SUCCESSIVE MOTION TO VACATE JUDGMENTS OF
CONVICTION AND SENTENCES, AND ALTERNATIVELY MOTION TO CORRECT
ILLEGAL SENTENCES

THIS MATTER came before the Court upon Defendant's "Motion to Exceed Page Limitation" and "Successive Motion to Vacate Judgments of Conviction and Sentences, and Alternatively Motion to Correct Illegal Sentence." The Court having reviewed the motions, the record herein, and being otherwise duly apprised of the premises, hereby:

ORDERS that:

- 1) Defendant's "Motion to Exceed Page Limitation" is GRANTED;
- 2) The Office of the State Attorney is directed to file an answer to Defendant's successive motion within 20 days from the date the motion was filed as required by Florida Rule of Criminal Procedure 3.851(f)(3)(B);
- 3) The Office of the State Attorney is directed to forward copies of its answer to Defendant and the Court; and
- 4) A case management conference will be held within 30 days of the filing of the answer.

DONE AND ORDERED in Chambers, in Volusia County, Daytona Beach, Florida, this
19 day of Dec, 2016.


LEAH R. CASE
CIRCUIT COURT JUDGE

cc: Martin J. McClain, McClain & McDermott, P.A., Attorneys at Law, 141 N.E. 30th Street,
Wilton Manors, FL 33334
Rosemary Calhoun, Assistant State Attorney
Vivian Singleton, Assistant Attorney General

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& CIV COURT VOLUSIA CTY, FL
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ATTACHMENT E

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

**DAVID JOSEPH PITTMAN,
Defendant.**

**ORDER GRANTING DEFENDANT'S
MOTION TO EXCEED PAGE LIMITATION**

THIS MATTER is before the Court on Defendant's "Motion To Exceed Page Limitation," (the "Motion"), filed on October 14, 2016. Upon review of the Defendant's Motion, the case file and applicable law, the Court finds as follows:

At a Status Conference on September 16, 2016, counsel for the Defendant advised the Court that he would be filing an amended successive motion with additional claims within the next 30 days. At that time, the State advised the Court that it would file a Response or an Objection to an amended successive motion filed by defense counsel within 30 days of the filing of the amended successive motion.


On the same day that the Defendant filed his "Motion To Exceed Page Limitation," he filed a "Second Amended Successive Motion To Vacate Judgments Of Conviction And Sentences And Alternatively Motion To Correct Illegal Sentence." In his "Motion to Exceed Page Limitation," the Defendant asks the Court to allow him to exceed the page limitation in Rule 3.851(e)(2), Fla. R. Crim. P. of 25 pages for a successive motion. He alleges that his "Second Amended Successive Motion To Vacate Judgments Of Conviction And Sentences And Alternatively Motion To Correct Illegal Sentences" is 89 pages length. He asserts that his Second Amended Successive Motion "includes two additional claims based upon the March 7, 2016, enactment of Chapter

2016-13.” He further asserts that “[t]he procedural, factual and legal aspects of Mr. Pittmans claims are extremely complex in nature. Permitting the filing of an amended motion in excess of the prescribed limitation set forth in the rules will allow Mr. Pittman to fully explain his claims of entitlement to relief.” Additionally, the Defendant argues, “[i]t should also be noted that Rule 3.800(a) does not contain a page limitation, and Mr. Pittman has alternatively presented his claims as a Rule 3.800(a) claims.”

The Court finds that it is appropriate to allow the Defendant to exceed the aforementioned page limitation with regard to his “Second Amended Successive Motion To Vacate Judgments Of Conviction And Sentences, And Alternatively Motion To Correct Illegal Sentences.”

Therefore, it is **ORDERED AND ADJUDGED** that the Defendant’s “Motion To Exceed Page Limitation” is **GRANTED**. The State is directed to file a Response and/or Objection to the Defendant’s “Second Amended Successive Motion To Vacate Judgments Of Conviction And Sentences And Alternatively Motion To Correct Illegal Sentences,” within thirty (30) days of the date of this Order.

DONE AND ORDERED in Bartow, Polk County, Florida this 2d day of November, 2016.



JALAL A. HARB, Circuit Judge

cc:

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

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

Victoria Avalon, Esq.
State Attorney’s Office

JAH/drb

**IN THE CIRCUIT COURT FOR THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA**

**STATE OF FLORIDA,
Plaintiff,**

vs.

CASE NO: 95-CF-911A

**JOSHUA D. NELSON,
Defendant.**

_____ /

ORDER GRANTING MOTION TO EXCEED THE PAGE LIMIT

THIS CAUSE comes before the Court on Defendant's "Motion To Exceed Page Limitations," filed January 11, 2017. Having reviewed the pleading, and given the new and evolving nature of the case law, the Court grants Defendant's motion to exceed the page limit.

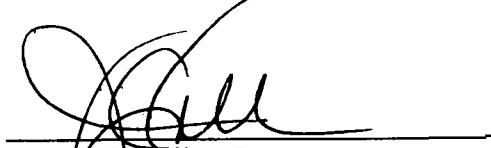
Accordingly, it is

ORDERED AND ADJUDGED that Defendant's motion is GRANTED.

DONE AND ORDERED in Chambers at Fort Myers, Lee County, Florida, this 23rd

day of Jan, 2017.





Joseph C. Fuller, Jr.
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above order has been furnished to: **Joshua D. Nelson**, DC#989102, Union Correctional Institution, 7819 N.W. 228th St., Raiford, FL 32026; **John P. Abatecola, Esq.**, 20528 Torre Del Lago St., Estero, FL 33928; **Carol M. Dittmar, Esq.**, Office of the Attorney General, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607; **Cynthia Ross, Esq.**, Office of the State Attorney, P.O. Box 399, Ft. Myers, FL 33902-0399; and **Administrative Office of the Courts (XIV)**, 1700 Monroe St., Ft. Myers, FL 33901; this 24th day of January, 2017.

LINDA DOGGETT
Clerk of Court

By: J. Garcia
Deputy Clerk

**IN THE CIRCUIT COURT FOR THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA**

**STATE OF FLORIDA,
Plaintiff,**

vs.

CASE NO: 95-CF-911A

**JOSHUA D. NELSON,
Defendant.**

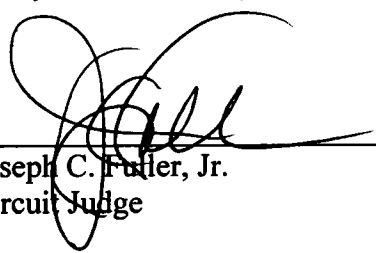
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ORDER DENYING STATE'S MOTION TO STRIKE

THIS CAUSE came before the Court on the State's "Motion To Strike Defendant's Successive Postconviction Motion And Motion To Toll Time For Filing Of An Answer," filed January 23, 2017. Given the new and evolving nature of the case law, and having granted the Defendant's motion to exceed the page limit, since the basis of the motion to strike is that Defendant's motion exceeded the page limit, it is

ORDERED AND ADJUDGED that the State's motion to strike is DENIED, without prejudice for the State to request an extension of time to respond to the successive motion.

DONE AND ORDERED in Chambers at Fort Myers, Lee County, Florida, this 23rd day of Jan., 2017.



Joseph C. Fuller, Jr.
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above order has been furnished to: **John P. Abatecola, Esq.**, jabatecola@comcast.net, 20301 Grande Oak Blvd., Ste. 118-61, Estero, FL 33928; **Carol M. Dittmar, Esq.**, carol.dittmar@myfloridalegal.com, capapp@myfloridalegal.com, Office of the Attorney General, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607; **Cynthia Ross, Esq.**, servicesao-lee@sao.cjis20.org, Office of the State Attorney, P.O. Box 399, Ft. Myers, FL 33902-0399; and **Administrative Office of the Courts (XIV)**, 1700 Monroe St., Ft. Myers, FL 33901; this 24th day of January, 2017.

LINDA DOGGETT
Clerk of Court

By: A. Garcia
Deputy Clerk

**IN THE CIRCUIT COURT FOR THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA**

**STATE OF FLORIDA,
Plaintiff,**

vs.

CASE NO: 95-CF-911A

**JOSHUA D. NELSON,
Defendant.**

_____ /


ORDER DISMISSING MOTION TO AMEND

THIS CAUSE comes before the Court on Defendant's "Motion To Amend," filed January 11, 2017. A 3.851 motion may be amended for good cause shown provided it is filed at least 45 days before a scheduled evidentiary hearing, and the claims to be added must be attached to the motion to amend. Fla. R. Crim. P. 3.851(f)(4). No additional claims have been attached to the motion to amend, and it appears the motion to amend is premature at this time.

Accordingly, it is

ORDERED AND ADJUDGED that Defendant's motion to amend is DISMISSED, without prejudice to file a motion to amend, attaching the claims to be added, in compliance with rule 3.851.

DONE AND ORDERED in Chambers at Fort Myers, Lee County, Florida, this 23RD day of Jan, 2017.



Joseph C. Fuller, Jr.
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above order has been furnished to: **Joshua D. Nelson**, DC#989102, Union Correctional Institution, 7819 N.W. 228th St., Raiford, FL 32026; **John P. Abatecola, Esq.**, 20528 Torre Del Lago St., Estero, FL 33928; **Carol M. Dittmar, Esq.**, Office of the Attorney General, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607; **Cynthia Ross, Esq.**, Office of the State Attorney, P.O. Box 399, Ft. Myers, FL 33902-0399; and **Administrative Office of the Courts (XIV)**, 1700 Monroe St., Ft. Myers, FL 33901; this 24th day of January, 2017.

LINDA DOGGETT
Clerk of Court

By: J. Garcia
Deputy Clerk

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

Case No. 95-CF-911A
Death Penalty Case

JOSHUA D. NELSON,

Defendant.

_____ /

STATE'S ANSWER TO DEFENDANT'S
SUCCESSIVE MOTION FOR POSTCONVICTION RELIEF

COMES NOW, the State of Florida, by and through the undersigned counsel, and hereby responds to the Successive Motion to Vacate filed in this case on January 11, 2017. The State respectfully submits that, as explained below, the motion must be summarily denied as untimely and meritless.

FACTS AND PROCEDURAL HISTORY

Defendant Nelson was convicted of the first degree murder of Tommy Owen and robbery with a deadly weapon in 1996. Nelson and his friend, Keith Brennan, lured another friend, Mr. Owen, to a remote area, so they could kill him and steal his car. Nelson and Brennan picked up two sisters they met by prior arrangement, and they all traveled to New Jersey, where Nelson and Brennan were ultimately arrested. The sisters testified to

conversations where Owens' killing was admitted by Nelson, and other physical and forensic evidence from the scene corroborated their participation in Owen's murder.

Following the penalty phase, the jury recommended imposition of a death sentence by a vote of 12 to 0. This Court followed the recommendation, finding three aggravating factors (during the course of a robbery; especially heinous, atrocious or cruel; cold, calculated and premeditated), which outweighed the statutory mitigating factor of age (18) and other nonstatutory mitigation. The Florida Supreme Court affirmed the convictions and sentences. Nelson v. State, 748 So. 2d 237 (Fla. 1999), cert. denied, 528 U.S. 1123 (2000).

Nelson's initial motion for postconviction relief was denied following an evidentiary hearing. The Florida Supreme Court affirmed that ruling. Nelson v. State, 73 So. 3d 77 (Fla. 2011). Recently, the Eleventh Circuit Court of Appeals upheld the denial of Nelson's federal petition for writ of habeas corpus. Nelson v. Secretary, Fla. Dept. of Corrections, 2016 WL 7336574 (11th Cir. Dec. 19, 2016) (motion for rehearing filed Jan. 24, 2017).

ARGUMENT

Nelson, a death row inmate whose conviction became final in 2000, seeks relief pursuant to the United States Supreme Court's opinion in Hurst v. Florida, 136 S. Ct. 616 (2016) [Hurst v. Florida], and the Florida Supreme Court's Hurst v. State, 202 So. 3d 40 (Fla. 2016) [Hurst], opinion. Nelson's successive motion for postconviction relief was filed January 11, 2017, 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 his claim is either based on newly discovered evidence that could not have been ascertained by the exercise of due diligence, or a 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).

As will be established below, Nelson cannot meet these requirements, and his motion must be summarily denied.

HURST DOES NOT APPLY RETROACTIVELY TO NELSON

In Hurst v. Florida, the United States Supreme Court declared the portion of Florida's capital sentencing scheme

requiring the judge, rather than a jury, to find each fact necessary to impose a sentence of death unconstitutional in light of Ring v. Arizona, 536 U.S. 583 (2002). The Florida Supreme Court has recently held that Hurst v. Florida and Hurst can be retroactively applied to cases that were not final when the Ring opinion was issued June 24, 2002. Mosley v. State, 2016 WL 7406506 (Fla. Dec. 22, 2016). Significantly, the Court also held that any case in which the death sentence was final before Ring was decided would not receive relief based on Hurst. Gaskin v. State, 2017 WL 224772 (Fla. Jan. 19, 2017); Asay v. State, 2016 WL 7406538 at *13 (Fla. Dec. 22, 2016); see also Mosley v. State, 2016 WL 7406506 at *18 (Fla. Dec. 22, 2016) (“we have now held in Asay v. State that Hurst does not apply retroactively to capital defendants whose sentences were final before the United States Supreme Court issued its opinion in Ring”).

Nelson’s death sentence was final in 2000. This was before Ring was decided in 2002. Under the Florida Supreme Court’s controlling precedent, Hurst is not retroactive to his case, and his motion must be denied. Gaskin; Asay.

Despite the Florida Supreme Court’s unequivocal rulings on the issue, Nelson claims his motion is timely and that Hurst can be applied to his case. Specifically, Nelson argues that Mosley in fact created two sets of capital defendants entitled to seek

relief under Hurst: (1) all cases which were not yet final when Ring was decided in June, 2002; and (2) all cases where the defendants specifically preserved a Ring issue, regardless of the date of finality. Nelson claims to be a member of the second class, and therefore entitled to seek relief under Hurst.

However, Nelson's interpretation is not supported by a reasonable reading of Mosley. Although the Florida Supreme Court analyzes the issue under both the fundamental fairness principles of James v. State, 615 So. 2d 668 (Fla. 1994), and the traditional retroactivity factors of Witt v. State, 387 So. 2d 922 (Fla.), cert. denied, 449 U.S. 1067 (1980), the opinion gives no indication that any defendant who has challenged the lack of jury factfinding at sentencing at any time can now seek relief under Hurst. To the contrary, Mosley cited to and built on Asay, where the Court expressly held that Ring does not apply to cases that were final prior to Ring. Mosley, 2016 WL 7406506 at *18. Accordingly, the time-of-finality factor was in play prior to Mosley even being decided and applies to both retroactivity analyses conducted.

If Mosley itself is not clear on the issue, the Florida Supreme Court has recently reiterated that capital sentences that were final prior to 2002 are not entitled to any reconsideration under Hurst. In Gaskin v. State, 2017 WL 224772,

at *3 (Pariante, J., concurring and dissenting), the defendant raised the substance of a Hurst claim both at trial and on direct appeal, specifically challenging the lack of unanimous jury factfinding as to sentencing factors. The Florida Supreme Court found this unpersuasive in deciding retroactivity and held that “[b]ecause Gaskin’s sentence became final in 1993, Gaskin is not entitled to relief under Hurst v. Florida.” Gaskin, 2017 WL 224772 at *2 (citing Asay, 2016 WL 7406538 at *13). Gaskin clearly renders Nelson’s claim meritless and it should be denied.¹

Despite Nelson’s complaints that the result is not fair, this Court is obligated to follow the precedent of the Florida Supreme Court in Gaskin and Asay. State v. Herring, 76 So. 3d 891, 897 (Fla. 2011); State v. Dwyer, 332 So. 2d 333, 335 (Fla. 1976) (“Where an issue has been decided in the Supreme Court of the state, the lower courts are bound to adhere to the Court’s ruling when considering similar issues, even though the court might believe that the law should be otherwise”). There is no language in Asay or any other case which supports the suggestion

¹ Moreover, it is readily apparent that Nelson did not present this constitutional claim prior to trial and on appeal, as necessary to preserve it for consideration under the fundamental fairness exception. Nelson lists the issues raised on direct appeal in footnote 3 of his motion (p. 2), and no Sixth Amendment right to jury factfinding was pursued.

that retroactivity is to be reconsidered anew in every case. The rules of procedure counsel against such action, since a successive motion is only timely once a new constitutional decision has been affirmatively held to be retroactive. This rule is meaningless if retroactivity is to be a case-by-case, individualized determination. Accordingly, this Court must apply Gaskin and Asay and find this motion to be untimely.

NELSON HAS FAILED TO ESTABLISH HARMFUL ERROR

No harmless error analysis is necessary in this case, since no cognizable constitutional error has been presented in the motion. Moreover, as this case is on collateral review, it would not be the State's burden to demonstrate harmlessness. See Caratelli v. State, 961 So. 2d 312, 317-320 (Fla. 2007); Freeman v. State, 761 So. 2d 1055, 1061 (Fla. 2000) (explaining that in order to obtain postconviction relief, "[t]he defendant bears the burden of establishing a prima facie case based upon a legally valid claim."); Ives v. State, 993 So. 2d 117, 121 (Fla. 4th DCA 2008) (observing that the burden is generally on the State to prove harmlessness on direct appeal, but rests with the defendant to prove prejudice in postconviction); but see Mosley v. State, 2016 WL 7406506, at *25-26 (Fla. Dec. 22, 2016). Thus, it is Nelson's burden to meet, and he has failed to do so.

While the court need not consider whether any error was harmless because Hurst is not retroactive, even if the court were to conduct such an analysis, Nelson cannot meet his burden. In order to be harmless error, there must be no reasonable possibility that the Hurst error contributed to his death sentence. Davis v. State, 41 Fla. L. Weekly S528 at *28-29 (Fla. Nov. 10, 2016), reh'g denied, 2017 WL 56089 (Fla. Jan. 5, 2017); see also Hurst v. State, 202 So. 3d at 68 (analyzing whether the jury's failure to unanimously find all the facts necessary for imposition of the death penalty contributed to Hurst's death sentence); Galindez v. State, 955 So. 2d 517, 523 (Fla. 2007) (explaining that the harmless error analysis for a violation of Apprendi v. New Jersey, 530 U.S. 466 (2000), is whether the record demonstrates beyond a reasonable doubt that a rational jury would have found penetration when there was a failure to have the jury make the victim injury finding regarding penetration).

Significantly, the jury in this case unanimously recommended Nelson's sentence of death. The jury's unanimous recommendation is "precisely what [the Florida Supreme Court] determined in Hurst to be constitutionally necessary to impose a sentence of death." Davis, 41 Fla. L. Weekly S528 at *30. Thus, the jury's unanimous recommendation satisfies the unanimity

requirement of Hurst. See also Kaczmar v. State, 2017 WL 410214 (Fla. Jan. 31, 2017) (finding Hurst error harmless where jury recommendation was 12-0, jury was given standard instructions, and egregious aggravating factors applied); Knight v. State, 2017 WL 411329 (Fla. Jan. 31, 2017) (same); King v. State, 2017 WL 372081 (Fla. Jan. 26, 2017) (same).

The Florida Supreme Court has emphasized that in analyzing the right to a jury trial with regard to the facts necessary to impose the death penalty, "it must be clear beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravating factors that outweighed the mitigating circumstances." Davis, 41 Fla. L. Weekly S528 at *29. The jury was not required to recommend death if the aggravators outweighed the mitigators, and it was never instructed that its recommendation must be unanimous or that it must unanimously find that sufficient aggravating circumstances outweighed the mitigating circumstances, but the jury, nevertheless, unanimously recommended death. The 12-0 recommendation establishes that the jury unanimously made the requisite factual findings to impose death. Id. The jury's unanimous recommendation further proves that there is no reasonable possibility that a Hurst error contributed to Nelson's sentence. Davis, 41 Fla. L. Weekly S528 at *29-30. Consequently, any Hurst

error must be deemed harmless in this case.

Nelson suggests that the error was harmful in this case because the jury was allegedly not given the proper instructions. In the absence of newly discovered evidence or a new retroactive constitutional right to certain instructions, any jury instruction claim is not cognizable in this motion. In addition, the juries in Davis, King, Knight and Kaczmar were also told that their recommendation was only advisory, and that was not an obstacle to the Florida Supreme Court finding the error harmless in those cases.

Nelson also suggests that Hurst created new law with regard to a juror's right to exercise mercy. However, the Florida Supreme Court has not only recognized that principle before, but has held expressly that no jury instruction relating to this principle was required. Downs v. Moore, 801 So. 2d 906, 912 (Fla. 2001); Correll v. Dugger, 558 So. 2d 422, 425 (Fla. 1990). Thus, his jury was properly instructed under the law in place at the time of Nelson's penalty phase. The Florida Supreme Court has never granted relief under Hurst when the jury recommendation was unanimous. No prejudice can be shown from any potential Sixth or Eighth Amendment error due to the unanimous jury recommendation for death returned in this case.

**NELSON IS NOT ENTITLED TO RETROACTIVE APPLICATION OF
HURST UNDER THE EIGHTH AMENDMENT**

Nelson's second claim asserts that this Court's adherence to the Florida Supreme Court precedent will violate the Eighth Amendment to the United States Constitution. As this claim is not premised on newly discovered evidence or a newly recognized, retroactive constitutional right, it is beyond the scope of any successive motion and must be denied as procedurally barred.

The claim is also meritless. The only authority Nelson notes for such a claim is the dissenting opinions offered in Asay. However, the United States Supreme Court has acknowledged that the issue of postconviction retroactivity, even for federal constitutional violations, is primarily a matter of state law. Danforth v. Minnesota, 552 U.S. 264, 288 (2008). There is no Eighth Amendment decision which supports Nelson's claim.

Nelson is not being treated any differently than similarly situated capital defendants, as Ring was a landmark ruling which the Florida Supreme Court has now determined invalidated our death penalty. As this claim fails procedurally and substantively, it must be denied.

NO EIGHTH AMENDMENT VIOLATION IS PRESENT

Nelson also asserts a separate, stand-alone argument of constitutional error based on the Eighth Amendment, but this

claim is similarly subject to summary denial. As the United States Supreme Court has never held that the Eighth Amendment requires a unanimous jury recommendation, this claim is procedurally barred and meritless.

In Spaziano v. Florida, 468 U.S. 447, 463-64, (1984), the United States Supreme Court held that the Eighth Amendment is not violated in a capital case when the ultimate responsibility of imposing death rests with the judge. In deciding Hurst v. Florida, the United States Supreme Court analyzed the case pursuant to Sixth Amendment grounds and overruled Spaziano to the extent that it allows a sentencing judge to find aggravating circumstances independent of a jury's factfinding. Hurst v. Florida, 136 S. Ct. at 618. The Court did not address the issue of any possible Eighth Amendment violation, and similarly, it did not overrule Spaziano on Eighth Amendment grounds.

While the Florida Supreme Court initially included the Eighth Amendment as a reason for warranting unanimous jury recommendations in its Hurst decision, the Court did not, and cannot, overrule the United State Supreme Court's surviving precedent in Spaziano. In addition, Florida has a conformity clause in its state constitution that requires the state courts to interpret Florida's prohibition on cruel and unusual punishments in conformity with the United States Supreme Court's

Eighth Amendment jurisprudence. Art. I, § 17, Fla. Const.; Henry v. State, 134 So. 3d 938, 947 (Fla. 2014) (noting that under Article I, section 17 of the Florida Constitution, Florida courts are “bound by the precedent of the United States Supreme Court” regarding Eighth Amendment claims). Given that there is no United States Supreme Court case holding that the Eighth Amendment requires the jury’s final recommendation be unanimous, Nelson’s argument must fail.

While the Florida Supreme Court found unanimity necessary under the state and federal constitutions in Hurst, as previously demonstrated, that case is not retroactive to Nelson. Nelson’s current claim focuses on the purported improper jury instructions, but no jury instruction claim is presented or discussed in Hurst and any error cannot be within the scope of a successive motion premised on that decision. Notably, contrary to Nelson’s position, the concept that the jury can exercise mercy at sentencing is not new or different under Hurst. The principle that no juror was ever required to vote to recommend a death sentence, even when the aggravators outweighed the mitigators, has been recognized for many years; yet no specific instruction on this point was compelled. See Franqui v. State, 804 So. 2d 1185, 1192 (Fla. 2001); Downs v. Moore, 801 So. 2d 906, 912 (Fla. 2001); Brooks v. State, 762 So. 2d 879, 902 (Fla.

2000); Henryard v. State, 689 So. 2d 239, 249-50 (Fla. 1996) (defendant not entitled to jury instruction on mercy); Correll v. Dugger, 558 So. 2d 422, 425 (Fla. 1990) (same). Nelson's Eighth Amendment claim must be rejected as procedurally barred and meritless.

Finally, reliance on any purported fairness in jury factfinding is misplaced. Just like Ring did not enhance the fairness or efficiency of death penalty procedures, neither does Hurst. Johnson, 904 So. 2d at 409. As the United States Supreme Court has explained, "for every argument why juries are more accurate factfinders, there is another why they are less accurate." Summerlin, 542 U.S. at 356. Because the accuracy of Nelson's death sentence is not at issue, fairness does not demand retroactive application of Hurst.

In short, the Florida Supreme Court has made it very clear that Hurst should not be applied retroactively to cases in which the death sentence became final before the issuance of Ring. Nelson's case squarely falls within this parameter. Each claim presented in this successive motion is premised on Hurst being applied to Nelson's case, which is contrary to established law. Therefore, all relief must be denied.

NELSON IS NOT ENTITLED TO REEVALUATION OF HIS
PREVIOUSLY LITIGATED CLAIMS

Nelson also contends that he is entitled to reconsideration of his previously presented postconviction claims. Hurst, a Sixth Amendment right-to-a-jury-trial case, does not operate to breathe new life into unrelated, previously denied claims.

Nelson's reliance on Hildwin v. State, 141 So. 3d 1178 (Fla. 2014), and Swafford v. State, 125 So. 3d 760 (Fla. 2013), is misplaced. Both cases require a cumulative analysis of all the evidence when a claim of newly discovered evidence is being raised, but a Hurst claim is not a claim of newly discovered evidence and is not premised in any way on evidentiary concerns. Hurst is a purely legal issue, and no language from any case offers support for Nelson's position that his previously denied claims must be reconsidered under Hurst.

Nelson further argues that the new requirements for jury unanimity would impact the prejudice prong of his previously litigated Strickland v. Washington, 466 U.S. 668 (1984) claims, because he would allegedly be more likely to receive a life sentence. This argument assumes he is entitled to relief under Hurst, when as previously explained, he is not. It further assumes that his prior claims can be resurrected, when they cannot be. Even if Nelson could relitigate his previously

disposed of claims, he would be entitled to no relief because the prejudice standard requires a showing that the defendant was prejudiced by other constitutional errors, not a Sixth Amendment factfinding error. Strickland, 466 U.S. at 695.

CONCLUSION

In sum, the Florida Supreme Court has precluded Hurst from being retroactively applied to capital defendants like Nelson whose sentences were final before Ring. Because Hurst is not retroactive to this case, Nelson is not entitled to relief as a matter of law. Each claim raised in this untimely, successive motion is without merit and provides no basis for relief. Accordingly, the motion must be summarily denied.

PAMELA JO BONDI
ATTORNEY GENERAL

STEPHEN B. RUSSEL
STATE ATTORNEY

/s/ Carol M. Dittmar
CAROL M. DITTMAR
Senior Assistant Attorney General
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Co-Counsel, State of Florida

/s/ Cynthia Ross
CYNTHIA ROSS
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cross@sao.cjis20.org
servicesao-lee@sao.cjis20.org
Co-Counsel, State of Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of February, 2017, I

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: John Abatecola, Counsel for Mr. Nelson and Linda McDermott, Designated counsel for Mr. Nelson, McClain & McDermott, P.A., 20301 Grande Oak Boulevard, Suite 118-61, Estero, Florida 33928 **jabatecola@comcast.net** and **lindammcdermott@msn.com**; Cynthia Ross, Assistant State Attorney, Office of the State Attorney, Post Office Box 399, Fort Myers, Florida 33902-0399 **cross@sao.cjis20.org** and **servicesao-lee@sao.cjis20.org**; and a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to: The Honorable Joseph C. Fuller, Jr., Lee County Justice Center, 1700 Monroe Street, Fort Myers, Florida 33901.

/s/ Carol M. Dittmar
CAROL M. DITTMAR
CO-COUNSEL, STATE OF FLORIDA

**IN THE CIRCUIT COURT FOR THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA**

**STATE OF FLORIDA,
Plaintiff,**

vs.

CASE NO: 95-CF-911A

**JOSHUA D. NELSON,
Defendant.**

**ORDER SCHEDULING CASE MANAGEMENT CONFERENCE FOR
MARCH 9, 2017**

THIS CAUSE comes before the Court on Defendant's "Successive Motion To Vacate Death Sentence, And Alternatively Motion To Correct Illegal Sentence," filed January 11, 2017. The State responded on February 3, 2017. In accordance with Fla. R. Crim. P. 3.851(f)(5)(B), it is

ORDERED AND ADJUDGED as follows:

1. A case management conference is scheduled in this matter for **Thursday, March 9, 2017, at 9:00 a.m. in Courtroom 8B at the Lee County Justice Center, 1700 Monroe Street, Fort Myers, Florida 33901.** The Court has set aside two hours for this hearing.

2. If counsel for the parties intend to argue motions or other matters which may require reference to portions of the record, lead counsel should make arrangements to be physically present at the case management conference.

3. Attendance at the case management conference may be arranged by means of a conference telephone call. In the event that counsel wish to participate by telephone, they may do so only if they file a written request in accordance with Fla. R. Jud. Admin. 2.530, no later than five (5) days prior to the status conference. All such requests shall be filed with the Clerk of Court, with courtesy copies provided to the Court and to all other counsel of record. **Counsel**

should note that any timely request to appear via conference call will be honored and that no court order will be entered in response.

4. Counsel who appear by telephone must abide by the following procedures. All participants are directed to call the toll free telephone number (1-888-670-3525) at precisely 9:00 a.m. Participants should then enter participant code number 1128857779, followed by the pound (#) sign. Next, participants will be prompted to state their name, thereby completing the connection. Thereafter, the chairperson will initiate and facilitate the conference, and the call will end when the chairperson ends the call.

5. Counsel are advised that the Court cannot be responsible for any technological difficulties that may arise should counsel wish to attend by telephone.

6. The Court will ensure the presence of a court reporter and a Clerk of the Court. Counsel shall be prepared to argue all pending matters before the Court. Counsel should also be prepared to argue any other pending matters that may arise between the date this order is rendered and the date of the case management conference. Counsel shall bring their calendars to the hearing so that any further matters may be scheduled at that time.

7. As there will be no testimony taken at the case management conference, the Defendant's presence is not needed. Accordingly, Defendant will not be transported from the Florida Department of Corrections to the Lee County Justice Center for the case management conference.

DONE AND ORDERED in Chambers at Fort Myers, Lee County, Florida, this 6TH day of Feb., 2017.



Joseph C. Fuller, Jr.
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above order has been furnished to: **John P. Abatecola, Esq.**, jabatecola@comcast.net, 20301 Grande Oak Blvd., Ste. 118-61, Estero, FL 33928; **Carol M. Dittmar, Esq.**, carol.dittmar@myfloridalegal.com, capapp@myfloridalegal.com, Office of the Attorney General, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607; **Cynthia Ross, Esq.**, servicesao-lee@sao.cjis20.org, Office of the State Attorney, P.O. Box 399, Ft. Myers, FL 33902-0399; and **Administrative Office of the Courts (XIV)**, 1700 Monroe St., Ft. Myers, FL 33901; this 7th day of February, 2017.

LINDA DOGGETT
Clerk of Court

By: J. Garcia
Deputy Clerk

If you are a person with a disability who needs 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 Brooke Dean, Operations Division Manager whose office is located at Lee County Justice Center, 1700 Monroe Street, Fort Myers, Florida 33901, and whose telephone number is (239) 533-1771, at least 7 days before your scheduled court appearance, or immediately upon receiving this notification if the time before the scheduled appearance is less than 7 days; if you are hearing or voice impaired, call 711.

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA CRIMINAL DIVISION

State of Florida vs Joshua D Nelson

Case Number: 95-CF-000911-A

Minutes

Time: 800 Court Room: Courtroom 8-B
Judge: Joseph C Fuller, Jr. State Attorney: N/A
Court Reporter/Smart: Smart Defense Attorney: John Paul Abatecola
Deputy Sheriff: Setzer/Leahy Deputy Clerk: Eberl
Date of Action: 02/08/2017 Custody Status:
DOB: 01/16/1977 Gender: Male Race: White
Arrest Date: 03/27/1995 Arrest Agency: Cape Coral Police Location: Lee County

Table with 5 columns: Count, Description, Statute - Degree, Filed Status, Reopened Reason. Rows include 1. FIRST DEGREE MURDER and 3. ARMED ROBBERY(ROB W/

APPEARANCE

Present w/attorney Present by/attorney Present w/o attorney
Present w/interpreter Interpreter Services Requested-Language
Failed to appear BW Ordered-Hold No Bond BW Ordered-Bond Set @ \$
ROR Revoked PTS Revoked
Bond Estreature Ordered Set Aside Estreature Set Aside BW (Notify Clerk's Office/LCSO)

CONTINUANCE

Cont. to @ AM / PM in Courtroom 4A 7A 7B 8A 8B
Continued by State Defense Judge
for ERC TR SE CMC PTC Plea Pre-Trial Diversion Pre-Trial Diversion 6A
Speedy Trial Waived Speedy Trial Tolled
Screen for MHC DC PTD
Pre-Sentence Investigation/Pretrial Disposition Report Ordered Waived None

PLEA

Guilty Ea Ct Ct(s)
Nolo Contendere Ea Ct Ct(s)
As Charged Amended Offense Lesser Offense Ea Ct Ct(s)
State Orally Amends Information in Open Court as to Ct (s)
Charge(s)
Statute(s) Degree Misdemeanor / Felony
Formal Filing of Information is Waived Information Filed in Open Court Entering Plea to Traffic Citation

ADJUDICATION

Adjudicated Guilty Ea Ct Ct(s)
Adjudication Withheld Ea Ct Ct(s)
Adjudicated Delinquent (Juvenile)

DISPOSITION

Nolle Prose Ea Ct Ct(s)
Dismissed Ea Ct Ct(s)
Merged & Dismissed Merge Count(s) into Count for Sentencing & Dismissal

VERDICT

Guilty by Jury Ct(s) Not Guilty by Jury Ct(s)
Mistrial
Guilty of Lesser Offense Statute
Remanded into Custody w/out Bond

DEFENDANT / ATTORNEY FL BAR #

If you are a person with a disability who needs 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 Brooke Dean, Operations Division Manager, whose office is located at Lee County Justice Center, 1700 Monroe Street, Fort Myers, FL 33901, and whose telephone number is (239) 533-1771, at least 7 days before your scheduled court appearance, or immediately upon receiving this notification if the time before the scheduled appearance is less than 7 days; if you are hearing or voice impaired, call 711.

SENTENCE (Previously Pled Nolo / Guilty on _____ Found Guilty by Jury on _____)

PRISON: _____ MM/YY _____ Each Ct _____ Count(s) _____
____ Ea Ct Concurrent _____ and Concurrent w/ _____
____ Consecutive _____ Ct(s) _____
____ Minimum Mandatory _____ MM/ YY _____ Ct(s) _____
____ Sentence Suspended _____

JAIL: _____ DD/MM/YY _____ Each Ct _____ Count(s) _____
____ Ea Ct Concurrent _____ and Concurrent w/ _____
____ Consecutive _____ Ct(s) _____
____ As a Condition of Probation _____ Followed By Probation _____
____ CTS _____ DD _____ DOC to Compute Prison Time & Prior Jail Time
____ Weekend Jail Time Fri 6PM to Sun 6 PM _____ Day Work Program _____
____ Beginning _____ Days Prior to Sentencing _____
____ Sentence Suspended _____ Days from VOP/VOCC Arrest on Split Sentence _____

COMM CONTROL: _____ MM/YY _____ Each Ct _____ Count(s) _____
____ Each Count Concurrent _____ And Concurrent with Case(s) _____

PROBATION: _____ MM/YY _____ Each Ct _____ Count(s) _____
____ S-State _____ R-County _____ Drug Offender Probation _____ Intensive Supervision _____
____ Sex Offender Probation _____ FDLE Fingerprints taken in Court (Sex Offenders/Predators) _____
____ Each Count Concurrent _____ and Concurrent with Case(s) _____
____ Consecutive _____ Ct(s) _____
____ One Time Cost of Supervision \$ _____
____ May petition the Court for _____ Early Termination _____ Half early out of Supervision (Once all conditions are met) _____
____ No early termination of Supervision _____ May transfer probation to _____
____ Curfew From _____ AM / PM to _____ AM / PM _____
____ Curfew maybe modified by Probation for treatment and/or work purposes _____
____ Report to Probation today _____ Report to Probation upon Release within _____

SENTENCING PROVISIONS

____ Perform _____ hours of Community Service within _____ DD / MM/ YY _____
____ Sentenced as _____ Habitual Felony Offender _____ Habitual Violent Felony Offender _____ Prison Release Re-Offender _____
____ An Adult _____ Youthful Offender _____ Ct(s) _____
____ DNA Testing-Taken _____ at LCJ _____ in Court _____
____ No Contact w/ Victim (s) _____ No Violent Contact w/ Victim(s) _____
____ DL SUSP / REV _____ DD / MM / YY _____ May Apply for Hardship License after Six Months _____
____ DUI Attend _____ Victim Impact Panel _____ Lee Memorial High Risk Driver's/Trauma Course _____
____ DUI-Attend DUI School _____ Phase 1 _____ Phase 2 _____
____ DUI -Impound Vehicle for _____ Days as a condition of Probation unless statutory conditions are met _____
____ Ignition Interlock Device Ordered for _____ DD/MM _____
____ Be evaluated/screened for Substance Abuse by SalusCare, Inc. (or equivalent program) enter & complete outpatient aftercare; follow recommendations. Complete on 1st attempt _____
____ Drug Testing Without probable cause at own expense; during period of supervision _____
____ Remain in Custody until bed space becomes available _____
____ Attend & Complete Program: _____ RSAT _____ Life Skills Program _____ Anti-Theft School _____ Mile Post Program _____
____ Anger Management Program _____ Batterer's Intervention Program _____
____ Stay away from Place of Arrest _____
____ Other _____
____ Remanded into Custody _____ Release from Custody on this case only _____

REVOCAION HEARINGS: (_____ State _____ County)

____ Arraigned _____ PL NG/Denies VOP/VOCC _____ PL G/Admits VOP/VOCC _____
____ Hrg set for _____ Rev Hrg Cont to _____ VOP Advisement Cont to _____
____ Date _____ @ _____ AM / PM in Courtroom 4A 7A 7B 8A 8B _____
____ Adjudicated Guilty _____ Ct(s) _____
____ Adjudication Withheld _____ Ct(s) _____
____ Court finds defendant guilty of violation(s); ruling read into Court record (no need to record each violation) _____
____ Probation/Community Control _____ Modified _____ Reinstated _____ Continue on Probation _____ Revoked _____
____ Probation extended for _____ MO / YR from original term date _____
____ Same terms and conditions apply as previously imposed _____
____ All Standard, Special Terms, Conditions, & Financials are terminated _____
____ Dismiss Warrant _____ (Notify Clerk's Office/LCSO)

MOTIONS

Set Bond _____ Reduce Bond _____ Revoke Bond _____ Revoke PTR _____ Revoke ROR _____
Bond Set @ \$ _____
Motion to Suppress _____ Motion in Limine _____ Competency Hearing _____ W/draw as Counsel _____ W/draw Plea _____
New Trial _____ Continuance _____ Dismiss _____ Clarify or Correct Sentence _____
Early Term of Probation _____ State _____ County _____
HFO Hrg _____ HVFO Hrg _____ PRR Hrg _____ Post Conviction (3.850) _____ Nelson Farretta Hrg _____ Jimmy Rice Hrg _____
Expunge/Seal (Outstanding monetary obligations must be addressed in court & the \$42.00 fee must be paid to Clerk's Office before case is officially expunged /sealed) _____
Motion for Judgment of Acquittal _____
 Other STATUS

MOTION RESULTS

Granted _____ Denied _____ Reserves Ruling _____ Withdrawn Cancelled prior to court _____ Not Addressed _____
Other _____

FINE ASSESSMENTS

Fine \$ _____ (775.083) _____ Ea Ct _____
\$ _____ Ct 1; \$ _____ Ct 4
\$ _____ Ct 2; \$ _____ Ct 5
\$ _____ Ct 3; \$ _____ Ct 6
\$ _____
5% Surcharge \$ _____ (938.04) _____ Ea Ct _____
\$ _____ Ct 1; \$ _____ Ct 4
\$ _____ Ct 2; \$ _____ Ct 5
\$ _____ Ct 3; \$ _____ Ct 6
\$ _____
Fine Waived/Reduced 893.135 (4)

ATTORNEY FEES & SURCHARGES

\$50.00 Public Def Application Fee (27.52)
Add'l Application Fees \$ _____
(Must be Addressed on the Record)
Defense Attorney Costs at Conviction (938.29)
\$50.00 \$100.00 Other \$ _____
Cost of Prosecution (938.27)
\$50.00 \$100.00 Other \$ _____

RESTITUTION

Court Orders Restitution & Reserves on Amount _____
Restitution \$ _____ to _____
Minimum Payment of \$ _____ per Month to: _____
As a Condition of Probation _____
Restitution is Ordered Joint & Several with Co-defendant(s) _____
Continue Restitution payments of: _____
\$ _____ each month (VOP)

MANDATORY ASSESSMENTS

Court Cost
(775.083 / 938.01 / 938.03 / 938.05 / 938.06 / 939.185)
\$413.00 \$383.00 Other \$ _____
If Ordered Under - Reason: _____
\$2.00 Law Enforcement Education (938.15 w/ Ord.)
\$33.00 Certain Traffic Offense Court Cost (318.17/318.18)
\$135.00 DUI Add'l Court Costs (938.07)
\$70.00 Reckless Driving Court Cost (318.18 / 316.192)
\$65.00 Racing Court Cost (318.18)
\$5.00 Leaving the Scene Add'l Court Cost (316.061)
\$195.00 BUI Add'l Court Cost (938.07 / 327.35)
\$201.00 Domestic Violence Surcharge (938.08)
\$151.00 Rape Crisis Trust Fund (938.085)
\$151.00 Crimes Against Minors (938.10)
\$5000.00 Civil Penalty (796.07)

DISPOSITION OF MONETARY OBLIGATIONS

Monetary Obligations Due within _____ DD/MM/YY
Monetary Obligations, excluding Restitution & Attorney Fees, & COS
Fees May Be Converted to Community Service at \$10 per Hour
Monetary Obligations Reduced to Judgment (excluding Restitution)
_____ Previous Only
Monetary Obligations Referred to Clerk of Court Collections
Monetary Obligations to be paid to Dept. of Corrections
Monetary Obligations Due & Owing Carried Forward (VOP)
Minimum Payment of \$ _____ per Month Toward _____
Financial Obligations

DISCRETIONARY ASSESSMENTS

\$ _____ Alcohol & Drug Abuse Program
Up to fine amount (938.21)
\$100.00 FDLE Trust Fund/State Crime Lab (938.055)
\$ _____ Investigative Fee to:
_____ FMP _____ LCS _____ FDLE _____ Statewide Pros
_____ Other _____ (938.27)
Worthless Check Diversion Fee \$ _____ (832.08)
Diversion Cost of Supervision \$ _____ (948.09)
Victim Restitution/Crime Compensation \$ _____

Unpaid financial obligations still remaining 90 days after payment due date will be referred by the Clerk of Court to a collection agency and an additional fee of up to 40% of the outstanding balance owed will be added at that time (28.246).
Failure to comply with payment of financial obligations may result in a suspension of your driver license privilege (322.245).

Mandatory assessments are imposed and shall be included in the judgment without regard to whether the assessment was announced in open court.

Received by: _____
LCSO _____ Date _____ Judge 

**IN THE CIRCUIT COURT OF THE
TWENTIETH JUDICIAL CIRCUIT, IN AND
FOR LEE COUNTY, FLORIDA**

CASE NO. 95-CF-911A

STATE OF FLORIDA,

Plaintiff,

v.

JOSHUA D. NELSON,

Defendant.

MOTION TO RESCHEDULE CASE MANAGEMENT CONFERENCE

The Defendant, **JOSHUA D. NELSON**, by and through undersigned counsel, respectfully moves this Court to reschedule the case management conference set for March 9, 2016. In support thereof, Mr. Nelson submits as follows:

1. On January 11, 2017, Mr. Nelson filed a successive Rule 3.851 motion related to the United States Supreme Court's opinion in *Hurst v. Florida*, 136 S.Ct. 616 (2016).

2. On February 6, 2017, this Court set a case management conference for March 9, 2017 at 9:00 a.m.

3. Mr. Nelson's counsel have previously scheduled commitments for March 9, and therefore neither is available for that date.¹

4. Mr. Nelson's counsel contacted Senior Assistant Attorney General Carol Dittmar to determine her availability for alternate dates in the vicinity of March 9, 2017. Ms. Dittmar advised that her schedule was pretty clear after February 27, that most of March was open, and that anytime around the 9th should work for her.

5. At the present time, Mr. Nelson's counsel likewise have similar availability. After February 27, counsel is available through the end of March with the exception of March 8th, 9th and 24th.

WHEREFORE, Mr. Nelson requests that this Court reschedule the case management

¹Mr. Abatecola has a prior personal commitment and Ms. McDermott has an oral argument in the Florida Supreme Court.

conference set in this cause.

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished through the Florida Courts E-Filing Portal to Carol Dittmar, carol.dittmar@myfloridalegal.com, Office of the Attorney General, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607; Cynthia Ross, cross@sao.cjis20.org, Assistant State Attorney, Office of the State Attorney, P.O. Box 399, Fort Myers, FL 33902-0399, on February 9, 2017.

/s/ John Abatecola
JOHN ABATECOLA
Florida Bar No. 0112887
jabatecola@comcast.net
Counsel for Mr. Nelson

/s/ Linda McDermott
LINDA MCDERMOTT
Fla. Bar No. 0102857
McClain & McDermott, P.A.
lindammcdermott@msn.com
Designated Counsel for Mr. Nelson

20301 Grande Oak Blvd
Suite 118-61
Estero, FL 33928

**IN THE CIRCUIT COURT FOR THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA**

**STATE OF FLORIDA,
Plaintiff,**

vs.

CASE NO: 95-CF-911A

**JOSHUA D. NELSON,
Defendant.**

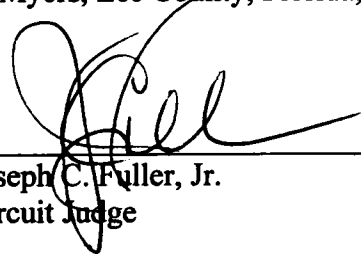
_____ /

**ORDER DENYING MOTION TO RESCHEDULE CASE MANAGEMENT
CONFERENCE**

THIS CAUSE comes before the Court on Defendant's "Motion To Reschedule Case Management Conference," filed February 9, 2017. In the motion, defense counsel states he has a "prior personal commitment" on the scheduled date, while co-counsel is required to be present for oral arguments before the Florida Supreme Court. The Court finds that presence at a capital hearing should take precedence over personal commitments absent extraordinary good cause. Only one defense attorney is necessary to present arguments at the case management conference. Although co-counsel's attendance at oral arguments before the Florida Supreme Court constitutes good cause on her part, Mr. Abatecola has not demonstrated that the nature of his personal commitment constitutes extraordinary good cause to justify rescheduling the case management conference. Accordingly, it is

ORDERED AND ADJUDGED that the motion to reschedule the case management conference is DENIED.

DONE AND ORDERED in Chambers at Fort Myers, Lee County, Florida, this 14TH day of Feb, 2017.



Joseph C. Fuller, Jr.
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above order has been furnished to: **John P. Abatecola, Esq.**, jabatecola@comcast.net, 20301 Grande Oak Blvd., Ste. 118-61, Estero, FL 33928; **Carol M. Dittmar, Esq.**, carol.dittmar@myfloridalegal.com, capapp@myfloridalegal.com, Office of the Attorney General, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607; **Cynthia Ross, Esq.**, servicesao-lee@sao.cjis20.org, Office of the State Attorney, P.O. Box 399, Ft. Myers, FL 33902-0399; and **Administrative Office of the Courts (XIV)**, 1700 Monroe St., Ft. Myers, FL 33901; this 15th day of February, 2017.

LINDA DOGGETT
Clerk of Court

By: J. Garcia
Deputy Clerk

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO. 95-CF-911-A

JOSHUA D. NELSON,

Defendant.

_____ /

REQUEST TO PARTICIPATE IN MARCH 9, 2017
CASE MANAGEMENT CONFERENCE THROUGH CONFERENCE TELEPHONE

COMES NOW the undersigned, Carol M. Dittmar, Senior Assistant Attorney General and requests to participate via telephone in the Case Management Conference scheduled in the above-styled cause for 9:00 a.m. on March 9, 2017. In support of this request, the undersigned states:

1. The undersigned resides in Tampa, Florida, and appearance through conference telephone will conserve State resources by avoiding the time and expense necessary for a personal appearance by counsel.

2. The Florida Supreme Court has strongly encouraged the use of telephonic appearances for non-evidentiary, capital postconviction hearings. See, Florida Rule of Criminal Procedure 3.851, Court Commentary, 1996 Amendments; see generally, Florida Rule of Judicial Administration 2.530.

3. At the time of the hearing, the undersigned shall call in to the telephone number designated for this purpose by this Court in its Order of February 7, 2017.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

/s/ Carol M. Dittmar
CAROL M. DITTMAR
Senior Assistant Attorney General
Florida Bar No. 0503843
Office of the Attorney General
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
CO-COUNSEL FOR STATE OF FLORIDA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of February, 2017, filed the foregoing with the Clerk of Court by using the E-Portal Filing System which will send a notice of electronic filing to the following: John Abatecola, Counsel for Mr. Nelson and Linda McDermott, Designated counsel for Mr. Nelson, McClain & McDermott, P.A., 20301 Grande Oak Boulevard, Suite 118-61, Estero, Florida 33928 **jabatecola@comcast.net** and **lindammcdermott@msn.com**; Cynthia Ross, Assistant State Attorney, Office of the State Attorney, Post Office Box 399, Fort Myers, Florida 33902-0399 **cross@sao.cjis20.org** and **servicesao-lee@sao.cjis20.org**; and a true and correct copy of the foregoing

has been furnished by U.S. Regular Mail to: The Honorable Joseph
C. Fuller, Jr., Lee County Justice Center, 1700 Monroe Street,
Fort Myers, Florida 33901.

/s/ Carol M. Dittmar
CAROL M. DITTMAR
CO-COUNSEL, STATE OF FLORIDA

**IN THE CIRCUIT COURT OF THE
TWENTIETH JUDICIAL CIRCUIT, IN AND
FOR LEE COUNTY, FLORIDA**

CASE NO. 95-CF-911A

STATE OF FLORIDA,

Plaintiff,

v.

JOSHUA D. NELSON,

Defendant.

MOTION TO AMEND

The Defendant, Joshua D. Nelson, by and through undersigned counsel, respectfully moves this Court for an order granting him leave to amend his successive postconviction motion.

In support of this motion, Mr. Nelson states:

1. On November 1, 2016, undersigned counsel was appointed to represent Mr. Nelson.

2. On November 8, 2016, undersigned filed a Notice to the Court and/or Motion to Withdraw.¹ Undersigned explained that he was unfamiliar with Mr. Nelson and his case. Undersigned further explained that his present professional and personal commitments precluded him from being able to devote the time necessary to provide the adequate and effective legal representation to which Mr. Nelson is entitled in his collateral proceedings. Undersigned respectfully suggested that one of the three Capital Collateral Regional Counsel Offices in Florida would be best equipped to represent Nelson given the current procedural posture of his case.

¹At that juncture, undersigned had yet to receive a copy of the order appointing him. Undersigned was alerted to his possible involvement in Mr. Nelson's case after receiving by mail from the Lee County Clerk of Court a copy of an order striking a pro se successive 3.851 motion filed by Nelson. The order, which was dated November 1, 2016, listed undersigned in the certificate of service. Within a couple of days of filing the Notice to the Court and/or Motion to Withdraw, undersigned received the notice of appointment.

3. On December 6, 2016, this Court issued an Order denying undersigned's motion. Undersigned, however, did not receive service of the Order.

4. During the first week of January, 2017, undersigned checked Mr. Nelson's court docket on the Lee County Clerk of Court website in order to verify that this Court had yet to issue a ruling. There, undersigned was alerted to the fact that an order had in fact issued, and an accompanying comment indicated that undersigned's motion was denied.²

5. On January 11, 2017, undersigned filed a successive postconviction motion on behalf of Mr. Nelson based on *Hurst v. Florida*. On that same date, undersigned filed a motion to amend. Undersigned stated:

5. At the present time, undersigned is beginning to compile records and documents in Nelson's case, which spans approximately twenty years. Undersigned does not yet have a record on appeal, either for Nelson's direct appeal or his postconviction proceedings. Nor does undersigned have copies of any of Nelson's public records or DOC records.

6. Give the lack of records in the instant case, Nelson's postconviction motion is incomplete. However, time is of the essence, as the State may argue that, for preservation purposes, a motion based on *Hurst v. Florida* must be filed within one year of its issuance, January 12, 2016. Thus, in an abundance of caution, undersigned is filing the successive motion today, January 11, 2017.

7. Undersigned was able to gain a limited factual understanding of Nelson's case based on appellate briefs obtained from the Florida Supreme Court website and federal pleadings from the district court's online docket. However, in order to fully address Nelson's *Hurst*-related claims, undersigned needs time to obtain and review Nelson's case history, primarily his direct appeal record. Undersigned requests a period of ninety days to amend so that he can obtain pertinent records and familiarize himself with Nelson's case.

6. On January 24, 2017, this Court issued an order dismissing, without prejudice, the motion to amend. This Court stated that "[n]o additional claims have been attached to the motion to amend, and it appears the motion to amend is premature at this time."

7. Attached to the instant motion to amend is Mr. Nelson's amended successive

²Undersigned requested from the Clerk's website online access to the document, and he was able to view this Court's Order as of January 9, 2017.

postconviction motion which he seeks to file in this cause. Subsequent to the January 11, 2017, successive postconviction motion being filed, undersigned has obtained a significant number of records pertaining to Mr. Nelson's case, including his direct appeal record. Having reviewed the direct appeal record, undersigned has discovered facts pertinent to Mr. Nelson's issues raised in his successive postconviction motion. These facts, contained in the direct appeal record and not available to undersigned at the time Mr. Nelson's successive postconviction motion was filed, have been integrated into Claims I, II and III of Mr. Nelson's amended motion.³

8. Additionally, numerous *Hurst*-related decisions have issued since Mr. Nelson filed his successive postconviction motion on January 11, 2017. Undersigned has incorporated a number of these decision in Mr. Nelson's amended postconviction motion, particularly in Claim I.⁴

9. Further, having now had additional time to examine *Hurst*-related case law and as it pertains to Mr. Nelson's case, which time was previously limited given the circumstances of undersigned's appointment, undersigned has significantly supplemented and refined the legal arguments in Claim II and has made some limited additions to Claim I.⁵ Undersigned submits that these changes have resulted in more articulate and substantive arguments being made on

³These facts include instances where the jury was informed that its penalty phase verdict was a recommendation and/or advisory in nature; arguments made by the State that the jury should not consider sympathy or mercy; motions filed by the defense regarding the standard jury instructions; the length of the jury deliberations; and the instructions provided by the Court.

⁴These cases include *McGirth v. State*, ___ So. 3d ___, 2017 WL 372095 (Fla. Jan. 26, 2017); *Hojan v. State*, ___ So. 3d ___, 2017 WL 410215 (Fla. Jan. 31, 2017); *Durousseau v. State*, ___ So. 3d ___, 2017 WL 411331 (Fla. Jan. 31, 2017); *Calloway v. State*, ___ So. 3d ___, 2017 WL 372058 (Fla. Jan. 26, 2017); *Wood v. State*, No. SC15-954 (Fla. January 31, 2017); *King v. State*, ___ So. 3d ___, 2017 WL 372081 (Fla. Jan. 26, 2017); *Kaczmar v. State*, ___ So. 3d ___, 2017 WL 410214 (Fla. Jan. 31, 2017); and *Armstrong v. State*, ___ So. 3d ___, 2017 WL 224428 (Fla. Jan. 19, 2017).

⁵No substantive legal arguments have been added to Claims III and IV.

behalf of Mr. Nelson.⁶

10. Mr. Nelson is not seeking to add any additional claims to his successive postconviction motion. Rather, he is seeking to amend the claims previously plead; thus, he is attaching the amended successive postconviction motion which he seeks to file in this cause.

11. Mr. Nelson submits that he has established good cause for the filing of an amended motion and that as no evidentiary hearing has been scheduled, this motion is timely.

WHEREFORE, Mr. Nelson respectfully requests the this Court grant his motion to amend.

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished through the Florida Courts E-Filing Portal to Carol Dittmar, carol.dittmar@myfloridalegal.com, Office of the Attorney General, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607; Cynthia Ross, cross@sao.cjis20.org, Assistant State Attorney, Office of the State Attorney, P.O. Box 399, Fort Myers, FL 33902-0399, on March 2, 2017.

/s/ John Abatecola

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⁶Any additional changes, not previously mentioned, to Mr. Nelson's successive postconviction motion are non-substantive and/or cosmetic in nature.

**IN THE CIRCUIT COURT OF THE
TWENTIETH JUDICIAL CIRCUIT, IN AND
FOR LEE COUNTY, FLORIDA**

CASE NO. 95-CF-911A

STATE OF FLORIDA,

Plaintiff,

v.

JOSHUA D. NELSON,

Defendant.

**AMENDED SUCCESSIVE MOTION TO VACATE DEATH SENTENCE, AND
ALTERNATIVELY MOTION TO CORRECT ILLEGAL SENTENCE**

The Defendant, Joshua D. Nelson, by and through undersigned counsel, respectfully moves this Court for an order under Florida Rule of Criminal Procedure 3.851, vacating and setting aside the sentence of death imposed upon him by this Court and alternatively an order pursuant to Florida Rule of Criminal Procedure 3.800(a) correcting his illegal sentence of death. In support of this motion, Nelson states:

Facts and Procedural History

A. STATEMENT OF THE CASE

1. On April 4, 1995, Nelson and his co-defendant, Keith Brennan, were indicted for first-degree murder and robbery with a deadly weapon (I, R 1-2).¹

2. Nelson proceeded to trial on September 16, 1996 (XIV, T 1, 7). He was found guilty as charged (VII, R 527; XVIII, T 989-90). After the jury unanimously recommended the death penalty (XI, R 930, 935), the trial court sentenced Nelson to death on November 27, 1996 (XII, R 1070-85; 1088-94; XIII, R 1114, 1119). In its sentencing order, the trial court found the following aggravating circumstances: 1) the murder was committed during the course of a robbery; 2) the murder was especially heinous, atrocious, or cruel (HAC); and 3) the murder was

¹References to the record are designated by a Roman numeral for the volume number, R for the record on appeal, T for the trial transcript, and DR for the supplemental record.

committed in a cold, calculated, and premeditated manner without any pretense of legal or moral justification (CCP). In mitigation, the court found one statutory mitigating circumstance, Nelson's age of 18 at the time of the crime, and fifteen nonstatutory mitigating factors.² The statutory mitigating factor of age was given great weight. The first nonstatutory mitigating factor was given substantial weight and the remaining nonstatutory mitigating factors were given from moderate to little weight. *Nelson*, 748 So. 2d at 240.

3. On direct appeal, the Florida Supreme Court affirmed Nelson's convictions and sentence of death. *Id.*³ Certiorari was denied by the United States Supreme Court on January 18, 2000. *See Nelson v. Florida*, 520 U.S. 1123 (2000).

4. On January 5, 2001, Nelson filed a postconviction motion in the state circuit court (PCR 17-85). After several amendments, an evidentiary hearing was held on October 29, 2009 (PCR 1034-1109). On March 5, 2010, the circuit court entered an order denying relief (PCR 1100-31). On July 7, 2011, subsequent to briefing and oral argument, the Florida Supreme Court

²The following nonstatutory mitigating circumstances were presented during the penalty phase: 1) Nelson gave a voluntary confession; 2) Nelson was not the person who killed the victim; 3) death was caused by the codefendant Brennan; 4) Nelson suffered from a deprived childhood; 5) Nelson's childhood saddled him with emotional handicaps; 6) outside influences saddled Nelson with emotional handicaps; 7) Nelson suffered great situational stresses leading up to the time of the homicide; 8) Nelson was suffering emotional turmoil before and at the time of the homicide; 9) Nelson's anger stems from circumstances beyond his control; 10) Nelson suffered physical, mental, and sexual family abuse; 11) Nelson has no prior criminal convictions for violent felonies; 12) the homicide was committed for emotional reasons; 13) there was a conditional guilty plea subject to a life sentence which was refused by the State; 14) Nelson has potential for rehabilitation in prison; and 15) the death penalty as applied to Nelson is disproportionate. *See Nelson v. State*, 748 So. 2d 237, 240 n.1 (Fla. 1999).

³On direct appeal, Nelson raised the following issues: 1) the trial court erred by failing to properly determine the admissibility of testimony by the State's DNA expert; 2) the trial court violated Nelson's right to confrontation by admitting evidence of his nontestifying codefendant's out-of court statement; 3) the trial court failed to weigh Nelson's history of substance abuse as a mitigator; 4) the trial court improperly found the CCP aggravating circumstance; 5) the trial court improperly found the HAC aggravating circumstance; 6) the trial court gave the jury a vague instruction on the HAC aggravating circumstance; and 7) the death sentence is disproportionate.

affirmed the denial of postconviction relief. *Nelson v. State*, 73 So. 3d 77 (Fla. 2011)⁴

5. On May 25, 2011, Nelson filed a pro se federal habeas petition in the Middle District of Florida. Counsel was appointed, and an amended petition was ultimately filed on December 3, 2012. Nelson's petition was denied on August 20, 2014. Nelson's appeal to the Eleventh Circuit Court of Appeals was denied on December 19, 2016. *Nelson v. Secretary*, Case No. 14-14371 (11th Cir. 2016).

6. On October 7, 2016, Nelson filed a pro se postconviction motion based on the decision in *Hurst v. Florida*, 136 S.Ct. 616 (2016). The Court struck the motion on November 1, 2016, as premature, without prejudice to file a successive motion should the *Hurst* decision be held retroactive.

7. On January 11, 2017, Nelson, through counsel, filed a successive postconviction motion on the basis of new Florida law arising from *Hurst v. Florida*, the enactment of Chapter 2016-13, *Perry v. State*, _ So. 3d _, 2016 WL 6036982 (Fla. Oct. 14, 2016), *Hurst v. State*, 202 So.3d 40, 59 (Fla. 2016), and *Mosley v. State*, _ So. 3d _, 2016 WL 7406506 (Fla. Dec. 22, 2016).

B. THE TRIAL

8. The facts set out by the Florida Supreme Court are as follows:

Nelson and Keith Brennan wanted to leave the city of Cape Coral. The two devised a plan to murder Tommy Owens and steal his car. Nelson and Brennan knew that Owens kept a baseball bat in his car. On the evening of March 10, 1995, Owens was lured under false pretenses to a remote street. Nelson and Brennan were able to convince Owens to exit his car, whereupon Nelson hit Owens with the bat. After a number of blows, Owens eventually fell to the ground. Nelson and Brennan tied Owens' legs and arms. Owens pleaded for his life, stating that the two could take his car. After a brief discussion, Nelson and

⁴Nelson raised the following issues on appeal: 1) trial counsel rendered ineffective assistance of counsel for failing to ensure that Nelson was tried by a fair and impartial jury; 2) trial counsel rendered ineffective assistance during the penalty phase because he failed to protect Nelson from adverse publicity related to the tattoo issue; 3) trial counsel rendered ineffective assistance during the penalty phase because he failed to call Nelson's mother and stepfather as witnesses on his behalf; and 4) the trial court erred in denying Nelson's newly discovered evidence claim based on the State's position regarding the reversal of codefendant Brennan's death sentence.

Brennan concluded that to avoid being caught, they should kill Owens. Brennan attempted to slice Owens' throat with a box cutter. Owens was not unconscious when the attacks began and he begged Nelson to hit him again with the bat so as to knock him unconscious before the stabbing continued. Nelson did as Owens requested and Brennan continued to attack Owens with the box cutter. Nelson and Brennan also continued to strike Owens a number of times with the bat. The two eventually dragged Owens' body to nearby bushes, where Owens later died.

Nelson and Brennan picked up Tina Porth and Misty Porth and the four left the city in Owens' car. After stopping in Daytona Beach, the four left the state and drove to New Jersey. At different times during the trip, Nelson and Brennan informed Tina and Misty that they had murdered Owens. Both Tina and Misty testified at trial.

Nelson and Brennan were apprehended by law enforcement officers in New Jersey. Nelson gave a video- and audio-taped confession. In the confession, Nelson detailed his account of the murder, both at the crime scene and at the place where the bat was recovered. The video-taped confession was played to the jury. Additionally, an analyst for the Florida Department of Law Enforcement testified that blood stains on Nelson's shoes, the box cutter, and a pair of underwear that the box cutter was wrapped in all matched Owens' DNA.

Nelson, 748 So. 2d at 239-40.

C. THE PENALTY PHASE

9. Dr. Sidney Merin, a clinical psychologist and neuropsychologist, examined Joshua Nelson on October 23, and 27, 1996. He obtained Nelson's version of the offense, his background, family history, education, medical history, and use of drugs and alcohol (X, R 776-80, 794-95, 800). He administered tests concerning Nelson's personality, emotions, thought processes, and the condition of his brain functioning (X, R 781, 795-96). The testing indicated that Nelson's brain was in good order and not defective (X, R 782, 801).

10. Dr. Merin found four mitigating circumstances. First, although Nelson was 19 years old, he had the emotional maturity of a 12-13 year old (X, R 783). Second, he was a bright young man with average intelligence, with an IQ between 100 and 110 (X, R 783-84). Third, Nelson came from a markedly dysfunctional family (X, R 784, 806). He never had the opportunity to learn proper rules, how to process information, deal with discipline, and handle problems. He got into trouble at age 8 for molesting a 3 or 4 year old girl, and was arrested at age 11 for breaking into a theater (X, R 785, 798-99, 806). His family behaved like gypsies (X, R

785). His father had bizarre concepts of life, lived in a box or tent, withdrew from society, and had a family history of schizophrenia (X, R 785-86, 802, 804). It was likely that Nelson had latent genes of a mental disorder which emerged while he was under heightened stress and while he was incarcerated. He had auditory hallucinations which went away with medication (X, R 784, 786, 802, 804, 806-07). His father was an alcoholic who abused his mother (X, R 787, 803). His mother hit his father with a frying pan (X, R 803). His stepfather, Greg Percifield, abused him sexually (X, R 787-88). Because he was neglected as a child, Nelson gravitated towards law breakers, drug and alcohol users. He got in trouble with the law for burglaries and stealing cars and waived a gun at an officer in one incident (X, R 789, 799). He used alcohol and drugs at an early age and spent 15 months in the SWFAS treatment center (X, R 789-90, 7899-800).

11. The fourth mitigator according to Dr. Merin was that Nelson could be rehabilitated in a structured environment (X, R 791). Also, he was under the domination of Brennan in the commission of the offense (X, R 791-92). Finally, Nelson was very angry on the date of the offense because his mother told him to leave the house after he resisted his stepfather's sexual advance (X, R 792-93).

12. Nelson's father, James Allan Nelson, testified that he was unemployed, lived in a tent in Orlando, and received SSI (X, R 808-09, 814). He was an alcoholic and used drugs (X, R 809-10, 812). He was married to Joshua's mother Peggy and lived with his son from 1977 to 1981 (X, R 809-10). James Nelson testified that they put liquor in Joshua's water when he was a baby and had colic (X, R 810). Once, James came home drunk, and Peggy beat him with a frying pan (X, R 811). He never took Joshua to a library or fishing and never read to him at bedtime (X, R 811-12). After James left, he saw Joshua only once in a while (X, R 811, 813-14).

13. Heather Timm testified that Joshua Nelson was her half-brother. They had the same mother. Her father obtained custody of her when she was 7 and Joshua was 2 years old (X, R 814-15). When she lived with her mother, there was alcoholism and abuse. She visited Joshua after she left (X, R 816). Her mother did not take care of him. He wore the same clothes for days

at a time. There was no schedule for bedtime or meal (X, R 817). She had not seen Joshua since he had been in Florida (X, R 819).

14. Nelson's aunt, Patricia Bennett, testified that her brother Allan was his father and was an alcoholic and drug addict (X, R 821-23). There was a history of mental illness in her family involving her grandfather, mother, brother, and uncle (X, R 821-23). Allan and Peggy sometimes left Joshua at home alone while Peggy was working at night. They did not provide for his basic needs like school clothes and supplies (X, R 823-24). Bennett was present when Allan came home drunk and Peggy beat him with a skillet (X, R 824-25, 827). Allan divorced Peggy in 1986 and did not have any contact with Joshua after they moved to Florida (X, R 827). Bennett had no contact with Joshua since he came to Florida in 1991 (X, R 828). In Indiana, Joshua was intelligent, behaved, and knew how to follow rules (X, R 829). Peggy called Patricia during Joshua's trial and asked her not to come because nothing would help Joshua and there would be accusations of sexual abuse (X, R 825-26).

15. Tammy Long testified that Joshua was her nephew; her brother was his father (X, R 830-31). Peggy begged Tammy not to come because Joshua did not have a chance and Peggy and Greg would be lucky not to have charges brought against them as well (X, R 830-32). There was a history of mental illness in Long's family involving her mother and grandfather (X, R 833). Her brother was an alcoholic, used drugs, and is schizophrenic (X, R 834, 840). Peggy quit a good job with no regard for Joshua's needs. He was not their priority (X, R 834). Long's family provided most of Joshua's clothing (X, R 835). When Long gave Joshua money, he was happy because his mother could use it for cigarettes or gas (X, R 835-36). Joshua loved his mother and felt responsible for her (X, R 837). Long had not seen Joshua since he left Indiana in 1991 when he was 14. At that time he was loving, sweet, intelligent, well-behaved and appreciative (X, R 841-43).

16. Reba Oular testified that Joshua was her nephew; his mother was married to her brother (X, R 843-44). Peggy chose not to care for Joshua. She did not appear to feed him and

never bought him clothes. Oular's mother bought diapers and formula for Joshua even when Peggy had a good job. Joshua loved his mother and was protective of her (X, R 845). Oular felt Joshua did not have a chance because of his parents (X, R 845-48). Joshua could contribute to society because he is intelligent and his experiences could help someone else (X, R 846). Oular did not have much contact with Joshua after 1991. She came to Florida and took him to Disney World a month before the crime. He "ditched" her and she feared he might have stolen her car (X, R 847). When he left Indiana, Joshua was intelligent and well-behaved (X, R 848).

17. Donna Walker testified that Nelson was her son's friend while they were in high school (X, R 849). Nelson and Owens were at her house all the time working on cars with her son. She met Brennan and did not like him (X, R 850, 853). Once the boys had some problems while out on a boat at night, and the Coast Guard was looking for them. Peggy came to Walker's house, but appeared not to be concerned (X, R 850-51). Walker had Nelson over for Christmas. She took him, Owens, Owens' girlfriend, and her son to dinner for Nelson's birthday (X, R 851-52). Nelson was a good boy. The boys got along well together until Brennan got involved (X, R 852). Nelson complied with her rules and was courteous and well behaved. He worked at McDonald's and sometimes mowed Walker's lawn. She sometimes gave him money and bought school clothes for him (X, R 854).

18. While he testified at the guilt phase, Nelson relayed the following mitigating information as to his background: Nelson was born in Kokomo, Indiana, on January 16, 1977 (XVIII, T 795). In March, 1995, he was 18 years old (XVIII, T 837). His parents were alcoholics. His father beat his mother (XVIII, T 795). His mother sometimes kicked his father out, then let him return. His father left them when Nelson was 13. His mother had a number of boyfriends. Some of them, including his stepfather, beat Nelson (XVIII, T 796). Nelson stayed with his aunts on weekends, Christmas, and his birthday (XVIII, T 796-97). Also, his mother gave him food stamps to buy candy which he sold to other children at school. His mother used the money to buy cigarettes (XVIII, T 797-98). Nelson attended several different schools and dropped out in the

11th grade (XVIII, T 798, 837-38).

19. Nelson saw a psychiatrist when was 9 or 10 because of a sexual incident with a younger girl (XVIII, T 798). While Nelson was in jail, he was given Thorazine because he was hearing voices, and Zoloft, an antidepressant (XVIII, T 798-99). Nelson moved to Florida in 1990 with his mother and stepfather, Greg Percifield. He thought they moved because Percifield stole money from a motorcycle gang (XVIII, T 799). Percifield began beating Nelson. When the beatings slowed down, Percifield began molesting Nelson by performing oral sex on him two or three times a week. If Nelson refused, Percifield used his mother against him, refused to buy things he needed, or hit him. This continued for two or three years (XVIII, T 800-01).

20. Nelson began using drugs when he moved to Florida. He used marijuana, ruffies, alcohol, ecstasy, acid, and mushrooms. He also huffed gasoline (XVIII, T 802). He was sent to Southwest Florida Addiction Services (SWFAS) for help with his drug addiction. He was there for 6 months, then ran away when a staff member slapped him. He was sent back for 9 more months. He met and became friends with Brennan while he was there (XVIII, T 802-03, 831, 834-35).

CLAIM I

NELSON'S DEATH SENTENCE VIOLATES THE SIXTH AMENDMENT UNDER *HURST V. FLORIDA*.

This claim is evidenced by the following:

1. All other factual allegations in this motion and in Nelson's previous motions to vacate, and all evidence presented by him during his trial and previous postconviction proceedings, are incorporated herein by specific reference.

2. This motion is filed with one year of the issuance of *Hurst v. Florida, Perry v. State*, 2016 WL 6036982 (Fla. Oct. 14, 2016), *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), and *Mosley v. State*, 2016 WL 7406506 (Fla. Dec. 22, 2016), all of which constitute a change in

Florida law. The claims presented herein could not have been presented before the change in Florida law that these cases brought about. Accordingly, this motion is timely.

3. In *Mosley v. State*, the Florida Supreme Court discussed *Hurst v. Florida*:

In *Hurst v. Florida*, the United States Supreme Court declared our capital sentencing scheme, codified at section 921.141(3)(a)-(b), Florida Statutes (2015), unconstitutional because the “[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.” 136 S.Ct. at 619.

2016 WL 7406506 at *17. In *Hurst v. State*, the Florida Supreme Court explained the change in law that resulted from *Hurst v. Florida*:

In so holding, the Supreme Court overruled its decisions in *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), and *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989), to the extent they approved Florida’s sentencing scheme in which the judge, independent of a jury’s factfinding, finds the facts necessary for imposition of the death penalty. See *Hurst v. Florida*, 136 S.Ct. at 624. The Supreme Court’s ruling in *Hurst v. Florida* also abrogated this Court’s decisions in *Tedder v. State*, 322 So.2d 908 (Fla.1975), *Bottoson v. Moore*, 833 So.2d 693 (Fla.2002), *Blackwelder v. State*, 851 So.2d 650 (Fla.2003), and *State v. Steele*, 921 So.2d 538 (Fla.2005), precedent upon which this Court has also relied in the past to uphold Florida’s capital sentencing statute.

202 So. 3d at 44. The Sixth Amendment right enunciated and applied in *Hurst v. Florida* gives defendants the right to a jury determination of the facts that are statutorily necessary to authorize a judge to impose a death sentence. *Hurst v. Florida* invalidated Fla. Stat. §§ 921.141(2) and (3) as unconstitutional. Under those provisions, a defendant who had been convicted of a capital felony could be sentenced to death only after the sentencing judge entered written fact findings that: 1) sufficient aggravating circumstances existed that justify the imposition a death sentence, and 2) insufficient mitigating circumstances existed to outweigh the aggravating circumstances. *Hurst*, 136 S.Ct. at 620-21. *Hurst v. Florida* found this scheme unconstitutional. “Florida does not require the jury to make critical findings necessary to impose the death penalty,” but rather, “requires a judge to find these facts.” *Id.* at 622. On remand, the Florida Supreme Court held in *Hurst v. State* that *Hurst v. Florida* means “that before the trial judge may consider imposing a

sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death.” *Hurst v. State*, 202 So. 3d at 57.

4. *Hurst v. Florida* changed Florida law and established that capital defendants had a constitutional right to a jury that finds the facts statutorily necessary to authorize a judge to impose a death sentence. See Rule 3.851(d)(2)(B) (“the fundamental constitutional right asserted ... has been held to apply retroactively”). In *Mosley*, the Florida Supreme Court held: “we conclude that *Hurst* should apply retroactively to *Mosley*.” 2016 WL 7406506 at *18. See also *Armstrong v. State*, _ So. 3d _, 2017 WL 224428 (Fla. Jan. 19, 2017) (*Hurst* applied retroactively to collateral appeal without discussion). This means that Rule 3.851(d)(2)(B) has been satisfied and motions to vacate may be “considered” that rely on the constitutional right recognized in *Hurst v. Florida* which “has been held to apply retroactively.” *Mosley* does indicate that whether a specific defendant receives the benefit of *Hurst v. Florida* requires a case-by-case and/or category-by-category analysis.

5. In *Mosley*,⁵ the Florida Supreme Court determined that *Hurst v. Florida* and *Hurst*

⁵In *Mosley v. State*, the Florida Supreme Court referenced the decision in *Asay v. State*, 2016 WL 7406538 (Fla. Dec. 22, 2016), which issued the same day as *Mosley*. The Court in *Mosley* noted that in *Asay* it had not extended the benefit of the change in law created by *Hurst v. Florida* to *Asay*. See *Asay v. State*, 2016 WL 7406538 at *13 (“we conclude that *Hurst* should not be applied retroactively to *Asay*’s case”); *Id.* (“When considering the three factors of the *Stovall/Linkletter* test together, we conclude that they weigh against applying *Hurst* retroactively to all death case litigation in Florida”). However, *Mosley* noted that the Court in *Asay* had not foreclosed the retroactive application of *Hurst v. Florida* to other to other capital postconviction defendants. Thus, Nelson submits that *Mosley* is a follow-up opinion to *Asay* that makes clear that *Asay* is limited in its scope and merely concludes that *Asay* is not entitled to the benefit of *Hurst v. Florida*. *Asay* does not mean that *Hurst v. Florida* is not to be applied retroactively in any capital collateral case; in fact, *Mosley* holds that *Hurst v. Florida* is to be applied retroactively to at least 2002, and when fundamental fairness dictates and/or when the *Witt* balancing test warrants, to cases final before June 24, 2002. Because of its broader scope and its statement of the two approaches for determining when retroactive application of *Hurst v. Florida* is necessary, this motion primarily focuses on the opinion in *Mosley v. State*.

v. State constituted a change in Florida law that was to be applied retroactively to Mosley and required the Court to grant postconviction relief, vacate Mosley's death sentence and remand for a resentencing.⁶ As the Court in *Mosley* observed: "it is undeniable that *Hurst v. Florida* changed the calculus of the constitutionality of capital sentencing in this State." 2016 WL 7406506 at *23.

6. In *Mosley*, the Florida Supreme Court held that under Florida law, there are two separate and distinct approaches for conducting a retroactivity analysis. 2016 WL 7406506 at *20 n.13.⁷ The first approach to retroactivity discussed in *Mosley* was explained as follows:

This Court has previously held that **fundamental fairness alone may require the retroactive application of certain decisions involving the death penalty after the United States Supreme Court decides a case that changes our jurisprudence**. For example, in *James*, this Court reviewed whether the United States Supreme Court's decision in *Espinosa v. Florida*, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), should apply retroactively. *James*, 615 So.2d at 669. Although pre-*Espinosa* this Court had rejected claims that our jury instruction on the extremely heinous, atrocious or cruel (HAC) aggravator was unconstitutionally vague, the United States Supreme Court disagreed and held in *Espinosa* that our instruction was, indeed, unconstitutionally vague. 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854. This Court then held that defendants who had raised a claim at trial or on direct appeal that the jury instruction pertaining to the HAC aggravating factor was unconstitutionally vague were entitled to retroactive application of *Espinosa*. *James*, 615 So.2d at 669. While this Court did not employ a standard retroactivity analysis in *James*, the basis for granting relief was that of fundamental fairness. *Id.* This Court reasoned that, because *James* had raised the exact claim that was validated by the United States Supreme Court in *Espinosa*, "it would not be fair to deprive him of the *Espinosa* ruling." *Id.*

Mosley, 2016 WL 7406506 at * 19 (emphasis added). Clearly, *James* is cited just as an example of the fundamental fairness approach to determining when a particular defendant is entitled to the retroactive application of a change in law mandated by a decision from the U.S. Supreme Court. It is also clear that the fundamental fairness approach requires a case-by-case determination of

⁶The homicide at issue in *Mosley* occurred in 2004. Thereafter, Mosley was tried, convicted and sentenced to death. The judgment and sentence were affirmed on direct appeal. *Mosley v. State*, 46 So. 3d 510 (Fla. 2009).

⁷The State filed a motion for rehearing in *Mosley* complaining that by providing for a case-by-case analysis "this Court has created confusion and caused an unnecessary unsettling of the law." (Motion for Rehearing at 2, *Mosley v. State*, Case No. SC14-2108).

which collateral litigants get the benefit of the change in law retroactively.

7. The second approach to retroactivity discussed in *Mosley* is the analysis set forth in *Witt v. State*, 387 So. 2d 922 (Fla. 1980). Employing *Witt*, the Court in *Mosley* concluded: “Because Florida’s capital sentencing statute has essentially been unconstitutional since *Ring* in 2002, fairness strongly favors applying *Hurst*, retroactively to that time.” 2016 WL 7406506 at *23.⁸ Further, the Court in *Mosley* explained that:

holding *Hurst* retroactive would only affect the sentences of capital defendants. Further, in addition to the fact that convictions will not be disturbed, not every defendant to whom *Hurst* applies will ultimately receive relief. As we determined in *Hurst*, each error should be reviewed under a harmless error analysis to individually determine whether each defendant will receive a new penalty phase. *Hurst*, 202 So.3d at 67–68; *James*, 615 So.2d at 669. Additionally, we have declined to find *Hurst* applicable to those cases where the defendant waived his/her right to trial by jury. See *Mullens v. State*, 197 So.3d 16 (Fla.), *pet. for cert. filed*, No. 16–6773 (Nov. 4, 2016).

Finally, we again emphasize that this decision will only impact the sentence of death, not the conviction. The difference is not guilt or innocence but, instead, life or death.

2016 WL 7406506 at *24-25. Here, the retroactive application of *Hurst* to Nelson’s death sentence “will only impact the sentence of death, not the conviction.”

8. In *Mosley*, the Florida Supreme Court concluded that under either the fundamental fairness approach to retroactivity or under the *Witt* analysis, *Hurst v. Florida* was a change in law that was to be retroactively applied:

Applying *Hurst* retroactively to *Mosley*, in light of the rights guaranteed by the United States and Florida Constitutions, supports basic tenets of fundamental fairness. And it is fundamental fairness that underlies the reasons for retroactivity of certain constitutionally important decisions, especially those involving the death penalty. Indeed, as we stated in *Witt*:

[S]ociety recognizes that a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and

⁸The use of the word “fairness” in the context of the *Witt* analysis would suggest that fairness, indeed fundamental fairness, is the Florida Supreme Court’s central concern in determining which defendants should retroactively receive the benefit of *Hurst v. Florida*.

sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice. Considerations of fairness and uniformity make it very “difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases.”

387 So.2d at 925 (citations omitted) (emphasis added).

2016 WL 7406506 at *25.⁹

9. Turning to Nelson’s death sentence, fundamental fairness demands that *Hurst v. Florida* be applied retroactively to his case. As explained earlier, fundamental fairness can be shown in a variety of ways. One way involves looking at what the jury was told concerning its role at the penalty phase and what that means under *Hurst v. Florida*. During the voir dire process and at the penalty phase, Nelson’s jury was repeatedly informed that its penalty phase verdict was a recommendation and/or advisory in nature. *See e.g.* (XIV, T 113) (“The jury does not actually sentence the defendant. The jury makes a recommendation, but the trial court, under the law, is required to give the jury’s recommendation great weight.”); (XV, T 264) (“Now, you understand in that regard, Ms. Shockey, as we were talking yesterday, and I - - that the jury gives

⁹In *Asay v. State*, the Florida Supreme Court ruled that *Hurst v. Florida* was not to be applied retroactively to Asay’s case. *Asay v. State*, 2015 WL 7406538 at *13 (“we conclude that *Hurst* should not be applied retroactively to Asay’s case, in which the death sentence became final before the issuance of *Ring*.”). Despite this statement, two justices indicated that *Hurst v. Florida* would be applied to judicial override cases that were “final before the issuance of *Ring*” and possible other cases “final before the issuance of *Ring*.” *See Id.* at *20 (Labarga, C.J., concurring) (“The impact of *Hurst v. Florida* and *Hurst* upon their death sentences is an issue for another day.”); *Id.* at *25 (Pariente, J., dissenting) (“Even under the majority’s holding today, relief should be granted to two Florida death row inmates whose sentences were a result of a judicial override”). Two other justices indicated that pre-*Ring* defendants may be able to have *Hurst v. Florida* apply retroactively to their cases. *Id.* at *21 (Lewis, J., concurring in result) (Pre-*Ring* “defendants who challenged Florida’s unconstitutional sentencing scheme based on the substantive matters addressed in *Hurst* are entitled to consideration of that constitutional challenge.”); *Id.* at 27 (Perry, J., dissenting) (“I would find that *Hurst v. Florida* applies retroactively, period.”).

In *Mosley v. State*, a majority of the Florida Supreme Court embraced Justice Lewis’ position in his concurrence in *Asay*, that pre-*Ring* defendants were entitled to the retroactive application of *Hurst v. Florida* in their cases if fundamental fairness warranted it. *Mosley*, 2016 WL 7406506 at *19 (“fundamental fairness alone may require the retroactive application” of *Hurst v. Florida*).

a recommendation, the jury doesn't sentence and give the final sentence, the Court does. But the recommendation must be given great weight by the Court under the law.”). *See also* (XIV, T 114, 117, 165, 176; XV, T 217, 229, 232, 233, 234; X, T 755, 866; XI, T 903, 907, 910, 911, 915, 916, 917, 918, 921, 922, 923).

10. At the time of Nelson's 1996 trial, what the jury was told may have been consistent with the procedure set forth in Florida law at that time. *See Combs v. State*, 525 So. 2d 853 (Fla. 1988). But now under the Sixth Amendment, it has been recognized that the procedure was unconstitutional. *See Hurst v. Florida*, 136 S. Ct. at 622 (“The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires.”). This is because it was recognized in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), that diminishing an individual juror's sense of responsibility for the imposition of a death sentence creates a bias in favor of a juror voting for death. *Caldwell*, 472 U.S. at 330 (“In the capital sentencing context there are specific reasons to fear substantial unreliability as well as **bias in favor of death sentences** when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court.”) (emphasis added).¹⁰

11. Indeed in *Caldwell*, a unanimous jury verdict in favor of a death sentence was

¹⁰If a bias in favor a death recommendation increases when the jury's sense of responsibility is diminished, removing the basis for that bias increases the likelihood that one or more jurors will vote for a life sentence. The likelihood increases even more when the jury receives accurate instruction as to each juror's power and authority to dispense mercy and preclude a death sentence. In this regard, the context of the prosecutor's improper argument in *Caldwell* is important. The prosecutor was responding to and trying to blunt defense counsel's assertion that the sentencing decision rested with the jury and that it could choose mercy:

I implore you to exercise your prerogative to spare the life of Bobby Caldwell.... I'm sure [the prosecutor is] going to say to you that Bobby Caldwell is not a merciful person, but I say unto you he is a human being. That he has a life that rests in your hands. You can give him life or you can give him death. It's going to be your decision. I don't know what else I can say to you but we live in a society where we are taught that an eye for an eye is not the solution.... You are the judges and you will have to decide his fate. It is an awesome responsibility, I know—an awesome responsibility.

Caldwell, 472 U.S. at 324.

vacated because the jury was not correctly instructed as to its sentencing responsibility.¹¹ *Caldwell* held: “it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant’s death rests elsewhere.” *Id.* 328-29. Jurors must feel the weight of their sentencing responsibility; they must know that if the defendant is ultimately executed it will be because no juror exercised his power to preclude a death sentence. Part of feeling the weight of a juror’s sentencing responsibility is dependent upon knowing of their individual authority to preclude a death sentence. *See Blackwell v. State*, 79 So. 731, 736 (Fla. 1918) (prejudicial error found in “the remark of the assistant state attorney as to the existence of a Supreme Court to correct any error that might be made in the trial of the cause, in effect told the jury that it was proper matter for them to consider when they retired to make up their verdict. Calling this vividly to the attention of the jury tended to lessen their estimate of the weight of their responsibility, and cause them to shift it from their consciences to the Supreme Court.”). Where the jurors’ sense of responsibility for a death sentence is either not explained or is in fact diminished, a jury’s unanimous verdict in favor of a death sentence violates the Eighth Amendment and the resulting death sentence cannot stand. *Caldwell*, 472 U.S. at 341 (“Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires.”).

¹¹In *Caldwell*, the prosecutor responding to defense counsel’s argument had stated in his closing argument to the jury: “Now, they would have you believe that you’re going to kill this man and they know—they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable.” *Id.* at 325. Because the jury’s sense of responsibility was improperly diminished by this argument, the Supreme Court held that **the jury’s unanimous verdict** imposing a death sentence in that case violated the Eighth Amendment and required the death sentence to be vacated. *Caldwell*, 472 U.S. at 341 (“Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires.”). *Caldwell* explained: “Even when a sentencing jury is unconvinced that death is the appropriate punishment, it might nevertheless wish to ‘send a message’ of extreme disapproval for the defendant’s acts. This desire might make the jury very receptive to the prosecutor’s assurance that it can more freely ‘err because the error may be corrected on appeal.’” *Id.* at 331.

12. Another example of fundamental fairness warranting retroactive application as to Nelson's case is the fact that his death sentence became final after the issuance of *Jones v. United States*, 526 U.S. 227 (1999), which was the foundation for the subsequent *Ring* line of cases. Indeed, in *Ring*, the U.S. Supreme Court noted that “[o]n appeal, Ring argued that Arizona’s capital sentencing scheme violates the Sixth and Fourteenth Amendments to the U.S. Constitution because it entrusts to a judge the finding of a fact raising the defendant’s maximum penalty. See *Jones v. United States*, 526 U.S. 227 (1999); *Apprendi v. New Jersey*, 530 U.S. 466 (2000).” *Ring*, 536 U.S. at 595.

13. In *Jones*, the Supreme Court considered whether a federal car jacking statute “defined three distinct offenses or a single crime with a choice of three maximum penalties, two of them dependent on sentencing factors exempt from the requirements of charge and jury verdict.” *Ring*, 536 U.S. at 600, quoting *Jones*, 526 U.S. at 229. The Court determined that the carjacking statute, if read to define a single crime, might violate the Constitution: “[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.” *Ring*, 536 U.S. at 600, quoting *Jones*, 526 U.S. at 243, n. 6.

14. Thereafter, in *Apprendi*, which was decided in the year after *Jones*, the Supreme Court indicated that its ruling there:

was foreshadowed by our opinion in *Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), construing a federal statute. We there noted that “under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.” *Id.*, at 243, n. 6, 119 S.Ct. 1215. The Fourteenth Amendment commands the same answer in this case involving a state statute.

Apprendi, 530 U.S. at 476.

15. Subsequently, in *Hurst v. Florida*, 136 S.Ct. at 621, the Supreme Court determined that *Spaziano v. Florida*, 468 U.S. 447 (1984) and *Hildwin v. Florida*, 490 U.S. 638 (1989) were “wrong, and irreconcilable with *Apprendi*.” 136 S.Ct. at 623. The Supreme Court specifically held: “And in the *Apprendi* context, we have found that ‘stare decisis does not compel adherence to a decision whose “underpinnings” have been “eroded” by subsequent developments of constitutional law.’” *Id.* at 623-24. Thus, while Nelson’s case became final before the decision in *Ring*, fundamental fairness dictates that he receive the benefit of that decision, as *Ring* was based on *Apprendi* and *Jones* before it, which itself preceded Nelson’s case.

16. Fundamental fairness also dictates that *Hurst v. Florida* be applied retroactively due the fact that Nelson challenged Florida’s death penalty process. For instance, Nelson raised at trial and on direct appeal an issue concerning the heinous, atrocious and cruel (HAC) aggravating factor. As Nelson explained, the jury instruction was unconstitutionally vague. When the jury is instructed that it may consider a vague aggravating circumstance, it must be presumed that the jury found and weighed an invalid circumstance.

17. Additionally, prior to trial, the defense filed a motion to declare the death penalty unconstitutional (VIII, T 581). The defense also filed a memorandum in support of special jury instructions (IX, T 670). The defense argued that the standard jury instruction belittled the jury’s role in the capital sentencing scheme; that they shifted the burden on the defense to prove that the mitigation outweighed the evidence in aggravation; and that due process requires the jury to unanimously find an aggravating circumstance to exist before it can be considered (IX, T 677-82).

18. Another aspect of fundamental fairness warranting retroactive application of *Hurst v. Florida* is the fact that the decision in *Perry v. State* shows that capital defendants charged with murders that were committed long before *Hurst v. Florida* issued will have

Hurst-compliant procedures govern at a retrial or resentencing. For example, Douglas Ray Meeks will receive the benefit of *Hurst v. Florida* and the new Florida law when he is sentenced on two first degree murder convictions for two 1974 homicides. Meeks had separate trials on each homicide and was convicted at both trials of first degree murder. He received two death sentences. Both were affirmed in his direct appeals. *Meeks v. State*, 336 So. 2d 1142 (Fla. 1976); *Meeks v. State*, 339 So. 2d 186 (Fla. 1976). However, because Meeks obtained relief in light of *Hitchcock v. Dugger*, 481 U.S. 393 (1987), and those penalty phases have yet to occur, *Hurst v. Florida* and the new Florida law will govern the sentencing procedure in both cases.

19. As another example, Jacob Dougan was convicted of a 1974 homicide and was then sentenced to death. His conviction and death sentence were affirmed in his first direct appeal which was a joint appeal with his co-defendant (Barclay) and was reported in the name of the co-defendant. *Barclay v. State*, 343 So. 2d 1266 (Fla. 1977). Subsequently, after protracted proceedings and multiple grants of relief from his death sentence, and being re-sentenced to death, the circuit court granted Dougan a new trial in 2013. In *State v. Dougan*, ___ So. 3d ___, 2016 WL 6137285 (Fla. Oct. 20, 2016), the Florida Supreme Court affirmed. *Hurst v. Florida* will govern at the retrial and as to the sentencing procedure if a first degree murder conviction is returned.

20. Another example is John Hardwick who was charged with a 1984 homicide. He was convicted and sentenced to death. His conviction and death sentence were affirmed in his direct appeal. *Hardwick v. State*, 521 So. 2d 1071 (Fla. 1988). In pursuing relief in the federal courts, the district court granted habeas relief and ordered the death sentence vacated and a new penalty phase to be conducted due to trial counsel's ineffective assistance. The Eleventh Circuit affirmed the grant of habeas relief. *Hardwick v. Sec'y Fla. Dep't of Corr.*, 803 F.3d 541 (11th Cir. 2015). Currently, Hardwick's case is pending in the trial court for a resentencing. As a result, *Hurst v. Florida* and the new Florida law will govern the sentencing procedure and the question

of whether Hardwick can receive a death sentence for a 1984 murder.

21. Yet another example is Paul Hildwin who was charged and convicted of a 1985 homicide. After a death sentence was imposed, his conviction and death sentence were affirmed in his first direct appeal. *Hildwin v. State*, 531 So. 2d 124 (Fla. 1988). See *Hildwin v. Florida*, 490 U.S. 638 (1989). In collateral proceedings, a resentencing was ordered. *Hildwin v. Dugger*, 654 So. 2d 107 (Fla. 1995). After the imposition of another death sentence, a second direct appeal resulted in another affirmance. *Hildwin v. State*, 727 So. 2d 193 (Fla. 1998). In the course of new collateral proceedings, Hildwin's conviction was vacated by the Florida Supreme Court and a new trial ordered. *Hildwin v. State*, 141 So. 3d 1178 (Fla. 2014). Currently, Hildwin is awaiting his new trial. At that trial on a first degree murder charge for a 1985 homicide, *Hurst v. Florida* and the resulting new Florida law will govern as to the sentencing procedure if a first degree murder conviction is returned.

22. Still another example is Ana Cardona who was charged with a 1990 homicide. After she received a death sentence, her conviction and death sentence were affirmed on direct appeal. *Cardona v. State*, 641 So. 2d 361 (Fla. 1994). Later, after the Florida Supreme Court vacated her conviction and ordered a new trial, *Cardona v. State*, 826 So. 2d 968 (Fla. 2002), she was again convicted and sentenced to death. That conviction and sentence were again vacated. *Cardona v. State*, 185 So. 3d 514 (Fla. 2016). Currently, Cardona's case is pending in the circuit court as she awaits her new trial. At that trial on a first degree murder charge for a 1985 homicide, *Hurst v. Florida* and the resulting new Florida law will govern as to the sentencing procedure if a first degree murder conviction is returned.

23. There are also cases in which a capital defendant has had a death sentence vacated in collateral proceedings, a resentencing ordered, and another death sentence imposed which was pending on a direct appeal when *Hurst v. Florida* issued. In those circumstances, the capital defendant will receive the benefit of *Hurst v. Florida* because a final death sentence was not in

place when *Hurst* issued. For example, Paul Beasley Johnson was convicted of first degree murder for three 1981 homicides and sentenced to death. His convictions and death sentences were affirmed on direct appeal. *Johnson v. State*, 483 So. 2d 774 (Fla. 1983). After multiple proceedings, in 2010, Johnson's death sentences were vacated, and a resentencing was ordered. *Johnson v. State*, 44 So. 3d 51 (Fla. 2010). Though Johnson again received death sentences, his third direct appeal was pending before the Florida Supreme Court when *Hurst v. Florida* issued on January 12, 2016. This means that Johnson will receive the benefit of *Hurst* and the resulting new Florida law even though the 1981 murders that he was convicted of were committed 35 years before the decision in *Hurst* was rendered.

24. The Florida Supreme Court recently issued *Armstrong v. State*, __ So. 3d __, 2017 WL 224428 (Fla. Jan. 19, 2017), and on the basis of *Hurst v. State* vacated Armstrong's death sentence. The homicide at issue occurred in February of 1990. Armstrong was tried and convicted for the murder of one deputy sheriff and the attempted murder of a second deputy. He was then sentenced to death. In August of 1994, the Florida Supreme Court affirmed the convictions and death sentence. *Armstrong v. State*, 642 So. 2d 730 (Fla. 1994). In 2003, the Florida Supreme Court granted Armstrong Rule 3.850 relief, vacated his death sentence, and ordered a resentencing. At his resentencing, the jury returned a 9-3 death recommendation, and a death sentence was again imposed. It was affirmed on direct appeal. *Armstrong v. State*, 73 So. 3d 155 (Fla. 2011). Armstrong filed for collateral relief. His appeal from the denial of collateral relief was before the Florida Supreme Court when *Hurst v. Florida* issued. Without even discussing retroactivity, the Florida Supreme Court granted Armstrong collateral relief on the basis of *Hurst v. State*: "we vacate Armstrong's sentence and remand for a new penalty phase consistent with *Hurst v. State*, 202 So.3d 40 (Fla. 2016)."

25. With Meeks, Dougan, Hardwick, Hildwin, Cardona, Johnson and Armstrong all entitled to the benefit of *Hurst v. Florida* and the resulting new Florida law for murders committed as early as 1974, ensuring uniformity and fairness in circumstances in Florida's

application of the death penalty requires the retroactive application of *Hurst* and the resulting new Florida law to Nelson. Indeed, the logic of *Griffith v. Kentucky*, 479 U.S. 314, 327-28 (1987), is applicable:

Justice POWELL has pointed out that it “hardly comports with the ideal of ‘administration of justice with an even hand,’ ” when “one chance beneficiary—the lucky individual whose case was chosen as the occasion for announcing the new principle—enjoys retroactive application, while others similarly situated have their claims adjudicated under the old doctrine.” *Hankerson v. North Carolina*, 432 U.S. 233, 247, 97 S.Ct. 2339, 2347, 53 L.Ed.2d 306 (1977) (opinion concurring in judgment), quoting *Desist v. United States*, 394 U.S., at 255, 89 S.Ct., at 1037 (Douglas, J., dissenting). See also *Michigan v. Payne*, 412 U.S. 47, 60, 93 S.Ct. 1966, 1973, 36 L.Ed.2d 736 (1973) (MARSHALL, J., dissenting) (“Different treatment of two cases is justified under our Constitution only when the cases differ in some respect relevant to the different treatment”). **The fact that the new rule may constitute a clear break with the past has no bearing on the “actual inequity that results” when only one of many similarly situated defendants receives the benefit of the new rule.** *United States v. Johnson*, 457 U.S., at 556, n. 16, 102 S.Ct., at 2590, n. 16 (emphasis omitted).

We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a “clear break” with the past.

(Emphasis added).¹² “[S]elective application of new rules violates the principle of treating similarly situated defendants the same.” *Id.* at 323. While Nelson’s death sentence was final when *Hurst v. Florida* issued, numerous other capital defendants’ death sentences had been final, including Hurst’s, when good fortune and good timing meant that at the moment that *Hurst v.*

¹²Justice Harlan in his dissent in *Desist v. United States* wrote:

We do not release a criminal from jail because we like to do so, or because we think it wise to do so, but only because the government has offended constitutional principle in the conduct of his case. And when another similarly situated defendant comes before us, we must grant the same relief or give a principled reason for acting differently. We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a ‘new’ rule of constitutional law.

394 U.S. 244, 258-59 (1969).

Florida issued, those defendants were free of the shackles of finality.¹³ Fundamental fairness requires Nelson to get the benefit of the change in law.

26. Moreover, in *Hurst v. State*, the Florida Supreme Court noted that “[i]n requiring jury unanimity in [the statutorily required fact] findings and in [the jury’s] final recommendation if death is to be imposed, we are cognizant of significant benefits that will further the administration of justice.” 202 So. 3d at 58. *Hurst v. State* specifically noted that “the requirement of unanimity in capital jury findings will help to ensure the heightened level of protection necessary for a defendant who stands to lose his life as a penalty.” *Id.* at 59. The new Florida law enhances and promotes the reliability of death sentences that juries unanimously authorize. Implicit in the holding that unanimity promotes reliable death sentences is the acknowledgment that non-unanimous death sentences are less reliable. Clearly, uniformity and fairness require that Nelson be given the benefit of *Hurst v. Florida* and the resulting new Florida law. After all, “death is a different kind of punishment from any other that may be imposed in this country,” and “[i]t is of vital importance . . . that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice” *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977).

27. Additionally, fundamental fairness requires relief on the basis that in the wake of *Hurst v. Florida*, the Florida Supreme Court has held that each juror is free to vote for a life sentence even if the requisite facts have been found by the jury unanimously. *Hurst v. State*, 202 So. 3d at 58, 62, n. 18. Individual jurors may decide to exercise “mercy” and vote for a life sentence and in so doing preclude the imposition of a death sentence. *Perry v. State*, 2016 WL 6036982 at *8.

¹³ In *Witt v. State*, 387 So. 2d 922, 926 (Fla. 1980), the Florida Supreme Court noted the Eighth Amendment required extra weight to be given to “individual fairness because of the possible imposition of a penalty as unredeeming as death.” In a footnote, the Court wrote: “It bears mention that the constitutionality of Florida’s capital sentencing procedures, s 921.141, Florida Statutes (1979), is **contingent upon this Court’s role of reviewing each case to ensure uniformity in the imposition of the death penalty.**” *Id.* at 926 n.7 (emphasis added).

28. Nelson's jury recommended a sentence of death by a vote of 12 to 0. However, the jury did not return verdicts making any findings of fact. The only document returned by the jury was an advisory recommendation that a death sentence be imposed; it reflects nothing about the jury's findings leading to the final vote. A final 12 to 0 recommendation does not necessarily mean that the other findings leading to the recommendation were unanimous. It could well mean that after the other findings were made by a majority vote, jurors in the minority acceded to the majority's findings. In fact, *Hurst v. State* made just this point:

Because there was no interrogatory verdict, we cannot determine what aggravators, if any, the jury unanimously found proven beyond a reasonable doubt. We cannot determine how many jurors may have found the aggravation sufficient for death. We cannot determine if the jury unanimously concluded that there were sufficient aggravating factors to outweigh the mitigating circumstances.

202 So. 3d at 69. The unanimous vote could also mean the jurors did not attend to the gravity of their task, as they were told the judge could impose death regardless of the jury's recommendation. In Nelson's case, for instance, the jury deliberated for only 34 minutes. In its sentencing memorandum, the defense asserted that "[a] realistic weighing of the evidence should have taken more than 34 minutes." (XI, T 1015).

29. In *Hurst v. State*, the Florida Supreme Court held that Sixth Amendment error under *Hurst v. Florida* would be subject to a strict harmless error test in which "the State bears an extremely heavy burden" of proving beyond a reasonable doubt that "the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to Hurst's death sentence in this case." 202 So. 3d at 68. See *Mosley v. State*, 2016 WL 7406506 at *25-26 (applying the *Hurst v. State* harmless error analysis when *Hurst v. Florida* is retroactively applied in collateral proceedings); *Johnson v. State*, 44 So. 3d 51, 69 (Fla. 2010) (as to constitutional error established in a successive 3.851 motion, death sentence was vacated because "the State has not met its burden of showing that Smith's testimony was harmless beyond a reasonable doubt."). In other words, the State must prove beyond a reasonable doubt that the

jury's failure to unanimously find not only the existence of each aggravating factor, that the aggravating factors are sufficient, and that the aggravating factors outweigh the mitigating circumstances, had no effect on the death recommendation. The State must also show beyond a reasonable doubt that no properly instructed juror would have dispensed mercy to Nelson by voting for a life sentence. All of these considerations must be factored into any evaluation of the reliability of Nelson's death sentence and the likely outcome if a resentencing were conducted in conformity with Florida's new capital sentencing procedure.

30. The State cannot establish beyond a reasonable doubt that the *Hurst v. Florida* error in Nelson's case was harmless. A harmless error analysis must be performed on a case-by-case basis, and there is no one-size fits all analysis; rather, there must be a "detailed explanation based on the record" supporting a finding of harmless error. See *Clemons v. Mississippi*, 494 U.S. 738, 753 (1990). Accord *Sochor v. Florida*, 504 U.S. 527, 540 (1992). Therefore, first, as the Florida Supreme Court pointed out in *Hurst v. State*, "[b]ecause there was no interrogatory verdict, we cannot determine what aggravators, if any, the jury unanimously found proven beyond a reasonable doubt. We cannot determine how many jurors may have found the aggravation sufficient for death. We cannot determine if the jury unanimously concluded that there were sufficient aggravating factors to outweigh the mitigating circumstances." 202 So. 3d at 69. This Court cannot rely upon a legally meaningless recommendation by an advisory jury, *Hurst v. Florida*, 136 S.Ct. at 622 (Sixth Amendment cannot be satisfied by merely treating "an advisory recommendation by the jury as the necessary factfinding"), as making findings the Sixth Amendment requires a jury to make.

31. Moreover, in the wake of *Hurst v. Florida* and the resulting new Florida law, the jury must be correctly instructed as to its sentencing responsibility under *Caldwell v. Mississippi*, 472 U.S. 320 (1985). In *Hurst v. Florida*, the Court wrote that "[t]he State cannot now treat the advisory recommendation by the jury as a necessary factual finding that *Ring* requires." 136 S. Ct. at 622. This means that post-*Hurst* the individual jurors must know that they each will bear

the responsibility for a death sentence resulting in a defendant's execution since each juror possesses the power to require the imposition of a life sentence simply by voting against a death recommendation. *See Perry v. State*. Nelson's jury was told the exact opposite—that Nelson could be sentenced to death regardless of the jury's recommendation. As was explained in *Caldwell*, jurors must feel the weight of their sentencing responsibility if the defendant is ultimately executed after no juror exercised his or her power to preclude the death sentence. Indeed because the jury's sense of responsibility was inaccurately diminished in *Caldwell*, the Supreme Court held that the jury's unanimous verdict imposing a death sentence in that case violated the Eighth Amendment and required the resulting death sentence to be vacated even though the jury's verdict there was unanimous. *Caldwell*, 472 U.S. at 341 ("Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires."). Nelson's death sentence likewise violates the Eighth Amendment under *Caldwell*. Not only was Nelson's jury told its sentencing decision was merely advisory, but the jury also was never told it could extend mercy to him. The chances that at least one juror would not join a death recommendation if a resentencing were now conducted is likely given that proper *Caldwell* instructions would be required. The likelihood of one or more jurors voting for a life sentence increases when a jury is told a death sentence could only be authorized if the jury returned a unanimous death recommendation and that each juror had the ability to preclude a death sentence simply by refusing to agree to a death recommendation. *Caldwell*, 472 U.S. at 330 ("In the capital sentencing context there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court."). In Nelson's case, the State cannot prove beyond a reasonable doubt that not a single juror would have voted for life given proper *Caldwell*-compliant instructions.

32. Additionally, Nelson's jury was never told or instructed that it could recommend a life sentence as an expression of mercy or that it was neither compelled nor required to vote for

death even if it determined there were sufficient aggravating circumstances that outweighed the mitigating circumstances. Instead, the State argued to the jury during its closing argument that it should not consider sympathy or mercy:

When I sit down, I anticipate you will hear argument, perhaps emotional argument. I don't know what defense counsel will say, but I'm sure he will do his best to represent his client as he has done.

But when it's all over, whether - - and I'm sure he'll talk about life versus death. And I don't know what's going [sic] happen, citing versus, emotions. I don't know.

But when he's done, **the criminal justice system does not make decisions, if there is going to be justice, based on emotion and sympathy and those kinds of feelings, or it's not justice.**

You-all agreed when you took your oaths to those concepts. We talked at great length about them some time ago in jury selection. **So you have to, again, as hard as it is, put those types of emotions aside.**

And there is only one person who is accountable here. These people that you have listened to today, good, well-meaning people, are not responsible for this crime, nor are the attorneys or the Court. The defendant is responsible for this crime. He is accountable.

But those arguments [sic] be will be made, and I'm sure they will probably have the effect of trying, in some way, to make your burden heavy, **but you still come down to the criminal justice system, how it's designed with your oath.**

So when you go back and something comes up, I won't have a chance to rebut it, I ask you to go back and pause and think, what am I here for; what is my duty; what does the law and the evidence require?

If you leave here and you can honestly say that, you will have done your duty. No one's asked you to leave here and be happy. These aren't happy cases for anyone, but that's what your duty requires.

(X, T 864-66) (emphasis added).

* * * *

Defense will, no doubt, argue for mercy, life imprisonment. Not this case, not this murder and not this defendant.

As has been said, there are times, **if justice means anything, that mercy must yield to justice,** and this is one of those times.

I merely asked you to follow your oath, listen closely to what defense counsel says, and go back. And then I request you come out and advise the Court that you feel the Court should sentence this defendant to death for all these reasons we just went over.

I appreciate your attention. I know that it is not - - this is not an easy [sic] things thing to do, but I know, and I have every confidence, **that you will follow that oath.**

(XI, T 903-04) (emphasis added).

33. Contrary to the State’s argument, and as the Florida Supreme Court stated in *Hurst v. State* and *Perry*, each juror in a Florida capital case has the “right to recommend a sentence of life even if [he or she] finds aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating circumstances.” *Hurst*, 202 So. 3d at 57-58 (citation omitted). *Accord Perry*, 2016 WL 6036982 at *7-8 (“It has long been true that a juror is not required to recommend the death sentence even if the jury concludes that the aggravating factors outweigh the mitigating circumstances.”). Here, the State cannot establish beyond a reasonable doubt that at least one juror, properly instructed, would have decided to dispense mercy to Nelson.

34. The Florida Supreme Court has addressed whether or not error under *Hurst v. Florida* is harmless in numerous cases. First, no case in which a less than unanimous jury recommendation was returned has been determined to be harmless. *See e.g. Dubose v. State*, No. SC10-2363 at *31 (Fla. February 9, 2017); *Hojan v. State*, ___ So. 3d ___, 2017 WL 410215 (Fla. Jan. 31, 2017); *Durousseau v. State*, ___ So. 3d ___, 2017 WL 411331 (Fla. Jan. 31, 2017); *McGirth v. State*, ___ So. 3d ___, 2017 WL 372095 (Fla. Jan. 26, 2017); *Calloway v. State*, ___ So. 3d ___, 2017 WL 372058 (Fla. Jan. 26, 2017); *Kopsho v. State*, ___ So. 3d ___, 2017 WL 224727 (Jan. 19, 2017); *Williams v. State*, ___ So. 3d ___, 2017 WL 224529 (Fla. Jan. 19, 2017); *Armstrong v. State*, ___ So. 3d ___, 2017 WL 224428 (Jan 19, 2017); *Mosley v. State*, ___ So. 3d ___, 2016 WL 7406506 (Fla. Dec. 22, 2016); *Hurst v. State*, 202 So. 3d at 69; *Johnson v. State*, ___ So. 3d ___, 2016 WL 7013856 (Fla. Dec. 1, 2016); *Franklin v. State*, ___ So. 3d ___, 2016 WL 6901498 (Fla. Nov. 23, 2016) .

35. Second, the Florida Supreme Court has found *Hurst* error not to be harmless even in cases where there was a contemporaneous or prior violent felony conviction. In *Johnson*, for example, the Florida Supreme Court rejected “the State’s contention that Johnson’s contemporaneous convictions for other violent felonies insulate Johnson’s death sentences from *Ring* and *Hurst v. Florida*.” 2016 WL 7013856 at *3. And in *McGirth*, 2017 WL 372095, the

Florida Supreme Court reiterated that neither a a prior violent felony nor a “during the course of” aggravating circumstance rendered *Hurst* inapplicable:

Although the **prior violent felony aggravating circumstance was found** unanimously by the jury by virtue of McGirth’s conviction for attempted first-degree murder of James Miller, whether this aggravating circumstance was “sufficient” to qualify for the death penalty would also be a jury determination. Because the jury vote was eleven to one, there is no way of knowing if such a finding was unanimous. **The same rationale applies to the aggravating factor that the murder occurred during the commission of a robbery.** Moreover, there is no way of knowing if the jury found any of the other aggravating circumstances unanimously, or if any aggravators that were unanimously found were also unanimously found to be sufficient to qualify for the death penalty.

(Emphasis added). *See also Calloway*, 2017 WL 372058 (Remanding for new penalty phase proceeding based on *Hurst* error despite the presence of prior conviction of a capital felony and during the course of a kidnapping aggravating circumstances); *Armstrong*, 2017 WL 224428 (Remanding for new penalty phase proceeding based on *Hurst* error despite the presence of prior conviction of a capital felony and during the course of a kidnapping aggravating circumstances); *Kopsho*, WL 224727 (Remanding for new penalty phase proceeding based on *Hurst* error despite the presence of prior violent felony and during the course of an armed kidnapping aggravating circumstances); *Hojan*, 2017 WL 410215 (Remanding for new penalty phase proceeding based on *Hurst* error despite the presence of prior capital felony and during the course of an armed kidnapping aggravating circumstances); and *Durrouseau*, 2017 WL 411331 (Remanding for new penalty phase proceeding based on *Hurst* error despite the presence of prior violent felony and during the course of a robbery or sexual battery aggravating circumstances).

36. Third, as to cases in which there has been a unanimous verdict, the Florida Supreme Court’s harmless error inquiry has not ended there. Indeed, in *Wood v. State*, No. SC15-954 (Fla. January 31, 2017), where there was a unanimous death recommendation, *id.* at *13, the Florida Supreme Court found that *Hurst* relief was warranted (“Thus, we are unable to conclude that the trial court’s instruction to the jury to consider the improper CCP and avoid arrest aggravators was not harmless under Hurst and would otherwise be compelled to remand for a

new penalty phase.”). *Id.* at *32. However, since the Florida Supreme Court also found that Wood was entitled to a life sentence under its proportionality review, it did not remand Wood’s case for a new penalty phase proceeding. *Id.*

37. The Florida Supreme Court’s analysis in unanimous death recommendation cases has focused on a number of factors, in addition to unanimity, including the jury instructions, the number of aggravating circumstances, and the strength of the mitigation. In *Davis v. State*, ___ So. 3d ___, 2016 WL 6649941 at *29 (Fla. Nov. 10, 2016), for example, where the jury recommended two death sentences by 12 to 0 votes, the Florida Supreme Court found *Hurst* error harmless because the unanimous jury recommendations “allow us to conclude beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors.” The Court based this conclusion in part on the jury instructions, including an instruction saying, “Regardless of your findings in this respect, however, you are neither compelled nor required to recommend a sentence of death.” *Id.*¹⁴ The Court also relied upon “the egregious facts of this case” in which “Davis set two women on fire, one of who was pregnant, during an armed robbery, and shot in the face a Good Samaritan who was responding to the scene.” *Id.* Thus, the Court concluded, “[t]he evidence in support of the *six* aggravating circumstances found as to both victims was significant and essentially uncontroverted.” *Id.* Earlier in the opinion in a discussion of proportionality, the Court found, “This case is truly among the most aggravated and least mitigated.” *Id.* at *27.¹⁵

38. The State cannot show beyond a reasonable doubt that the *Hurst* error in Nelson’s

¹⁴In *King v. State*, ___ So. 3d ___, 2017 WL 372081 (Fla. Jan. 26, 2017) and *Kaczmar v. State*, ___ So. 3d ___, 2017 WL 410214 (Fla. Jan. 31, 2017), where there were unanimous death recommendations and the Florida Supreme Court found the error to be harmless, the jury was instructed that it needed to determine whether the aggravation outweighed the mitigation, and that regardless of its findings, it was not required to recommend a sentence of death.

¹⁵In another unanimous death recommendation case where there Florida Supreme Court found the *Hurst* error to be harmless, *Knight v. State*, ___ So. 3d ___, 2017 WL 411329 (Fla. Jan. 31, 2017), there were two murders and two unanimous death recommendations.

case was harmless. As the court held in *Johnson*, Nelson's contemporaneous conviction does not render the error harmless. Further, as in *Hurst v. State*, *Johnson* and *Mosley*, Nelson's case involved substantial and compelling mitigation. And, unlike in *Davis*, *King* and *Kaczmar*, the jury in Nelson's case was never instructed that it was not required to recommend death even if the aggravators outweighed the mitigators.¹⁶ Moreover, unlike in *King* and *Kaczmar*, the jury in Nelson's case was instructed to consider whether the mitigating circumstances outweighed the aggravating ones.¹⁷ Finally, unlike in *Davis* and *Knight*, there was only victim and one unanimous death recommendation in Nelson's case.

39. Nelson's death sentence stands in violation of the Sixth Amendment, *Hurst v. Florida*, *Perry v. State*, and *Hurst v. State*. His jury did not return a verdict making any findings of fact, his jury was not instructed that all of its findings had to be unanimous, the jury was not told that each individual juror carried responsibility for whether a death sentence was authorized or a life sentence was mandated, and the jurors did not know that they each were authorized to preclude a death sentence simply to be merciful.

40. The *Hurst* error in Nelson's case warrants relief. The State cannot show the error to be harmless beyond a reasonable doubt that no properly instructed juror would have refused to vote in favor of a death recommendation. Unless it is proven beyond a reasonable doubt that no

¹⁶Rather, the jury was instructed that "[y]ou should weigh the aggravating circumstances against the mitigating circumstances, and your advisory sentence must be based on those considerations." (XI, T 922). Moreover, as discussed earlier, the State informed the jury during closing arguments that in accordance with its oath, it should not consider sympathy or mercy (X, T 864-66, 903-04).

¹⁷The jury in Nelson's case was instructed as follows:

It is your duty to follow the law that will now be given to you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist.

(XI, T 918).

juror would have voted for a life sentence and through such a vote mandated that Nelson receive a life sentence, his death sentence must be vacated and a resentencing ordered. Because the State cannot meet its burden here, Rule 3.851 relief is required.

CLAIM II

FAILING TO APPLY *HURST v. FLORIDA* TO NELSON'S DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT.

This claim is evidenced by the following:

1. All other factual allegations in this motion and in Nelson's previous motions to vacate, and all evidence presented by him during his trial and previous postconviction proceedings, are incorporated herein by specific reference.
2. In *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972), the U.S. Supreme Court found that the death penalty "could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976); *see also Furman*, 408 U.S. at 239-40. Because of the recognition that "the penalty of death is qualitatively different from a sentence of imprisonment, however long * * * there is a corresponding difference in the need for reliability" in capital cases. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (finding there is a "qualitative difference" between death and other penalties requiring "a greater degree of reliability when the death sentence is imposed"); *Gregg v. Georgia*, 428 U.S. 153, 187-88 (1976) (stating that "death is different in kind" and as a punishment is "unique in its severity and irrevocability"); *Furman v. Georgia*, 408 U.S. at 238, 286 (1972) (Brennan, J., concurring) ("Death is a unique punishment in the United States.").
3. On the same day that the Florida Supreme Court issued *Asay v. State*, 2016 WL 7406538, it also issued *Mosley v. State*, 2016 WL 7406506. Both *Asay* and *Mosley* had challenged their death sentences in light of *Hurst v. Florida*. *Asay's* death sentences and *Mosley's* death sentence were final before the decision in *Hurst v. Florida* issued. Both cases

presented the question of the retroactivity of *Hurst v. Florida*. However, the Florida Supreme Court broke apart its *Witt v. State* standard and held *Hurst v. Florida* to be retroactive in Mosley’s death sentence under its *Witt* analysis, while in *Asay* its *Witt* analysis found *Hurst v. Florida* was not retroactive to *Asay*’s case. *See Mosley v. State*, 2016 WL 7406506 at *32 (Canady, J., dissenting) (“Based on an indefensible misreading of *Hurst v. Florida* and a **retroactivity analysis that leaves the *Witt* framework in tatters**, the majority unjustifiably plunges the administration of the death penalty in Florida into turmoil that will undoubtedly extend for years.”) (emphasis added). The repudiation of a binary approach to retroactivity set forth in *Witt* was also a repudiation of the *Stoval/Linkletter* standard that was adopted in *Witt*. It means that the retroactivity standard in Florida is now without an objective principled basis, but instead rests upon some variable subjective standard of two justices.¹⁸ In *Asay*, the Florida Supreme Court superficially at least seemed to suggest that there were just two categories of collateral cases at issue in a *Witt* analysis of *Hurst v. Florida* - those cases final after the issuance of *Ring v. Arizona*, 536 U.S. 584 (2002), and those final before it *Ring* issued. Full analysis of the various concurring and dissenting opinions in *Asay* and *Mosley* suggests that there are likely more categories of cases that warrant specific consideration under *Witt* than merely the two referenced in *Asay*. That is a by product of eschewing an objective standard in favor of standardless subjectivity.

4. In *Asay v. State*, Chief Justice Labarga was one of three justices who concurred in the lead opinion that announced the result. But he wrote a concurring opinion stating: “I write

¹⁸When the decisions in *Asay* and *Mosley* are analyzed and attention paid to the various separate opinions, there are only two justices of the Florida Supreme Court who seem to be on board for the break up of the *Witt* binary approach. Justice Polston joined Justice Canady’s dissent in *Mosley* that asserted that the majority had left “the *Witt* framework in tatters.” Justices Pariente and Perry had dissented in *Asay* because the majority had not applied *Hurst v. Florida* retroactively to *Asay* under *Witt*. And Justice Lewis in a specially concurring opinion agreed with Justice Perry that “there is no salient difference between June 23 and June 24, 2002—the days before and after the case name *Ring* arrived. *See Perry, J., dissenting op.* at 58. However, that is where the majority opinion draws its determinative, albeit arbitrary, line.” *Asay v. State*, 2016 WL 7406538 at *22 (Lewis, J., concurring in result).

separately to express my view that our decision today does not apply to those defendants whose death sentences were imposed based upon, and who are facing execution solely as a result of, a judicial override.” *Asay v. State*, 2016 WL 7406538 at *20. That is an explicit recognition that there are pre-*Ring* people who may get the benefit of *Hurst*. If two pre-*Ring* defendants who were sentenced to death pursuant to a judicial override of a life recommendation qualify to get the benefit of *Ring* because their jury voted 6-6, and thus returned a life recommendation, the distinction between a 6-6 life recommendation and a 7-5 death recommendation could hardly justify granting the benefit of *Hurst v. Florida* to the defendant with the jury voting 6-6 while denying it to the defendant whose jury returned a 7-5 death recommendation, particularly with the bias created in favor of death noted in *Caldwell v. Mississippi* when jurors are told responsibility for a death sentence rests elsewhere.

5. Justice Lewis, who provided a fifth vote in favor of denying *Asay* the benefit of *Hurst*, wrote:

in my view, the majority opinion has incorrectly limited the retroactive application of *Hurst* by barring relief to even those defendants who, prior to *Ring*, had properly asserted, presented, and preserved challenges to the lack of jury factfinding and unanimity in Florida's capital sentencing procedure at the trial level and on direct appeal, the underlying gravamen of this entire issue.

Asay, 2016 WL 7406538 at *20. Thus, Justice Lewis suggests that pre-*Ring* defendants should be able to get the benefit of *Hurst v. Florida* on a case-by-case basis.

6. When the opinions of Chief Justice Labarga and Justice Lewis are considered with the two dissenting opinions, a majority of the Court is clearly open to granting the benefit of *Hurst* to pre-*Ring* people.

7. In *Mosley*, Justice Quince joined the majority opinion recognizing that pre-*Ring* defendants may be entitled to the benefit of *Hurst* if they can show on a case-by-case basis that depriving them of the benefit of *Hurst v. Florida* would be fundamentally unfair. This means five justices of the Florida Supreme Court have concluded that the benefit of *Hurst v. Florida* may be

extended to pre-*Ring* cases either on a category-by-category approach or a case-by-case approach.

8. The State filed a motion for rehearing in *Mosley* complaining that the Florida Supreme Court “has created confusion and caused an unnecessary unsettling of the law.” (Motion for Rehearing at 2, *Mosley v. State*, Case No. SC14-2108). The State noted that only “on rare and limited occasion, [had the] Court [] permitted retroactive application of new law out of a concern for fairness without performing the three-part analysis from *Witt*.” (Motion for Rehearing at 3, *Mosley v. State*, Case No. 14-2108). This concession made clear that until December 22, 2016, the *Witt* analysis had always been binary. The two cases that the State cites as the occasions that the Florida Supreme Court has permitted a retroactive application did not involve or include the *Witt* analysis, but instead turned on fundamental fairness. So, it appears that the State agrees that a partial retroactivity result under *Witt* is unprecedented. In fact, the State argues the “**substantive analyses set forth in [Mosley] violate fundamental principles found in existing precedent.**” (Motion for Rehearing at 2, *Mosley v. State*, Case No. SC14-2108) (emphasis added). This is another way of saying the retroactivity analyses employed in *Asay* and *Mosley* were arbitrary and ad hoc.

9. The State is not alone in that view. A majority of the justices of the Florida Supreme Court in separate opinions in the two decisions complained that the Court through the two rulings had injected unacceptable arbitrariness into Florida’s capital sentencing process. As a result, the distinction between who gets the benefit of *Hurst v. Florida* and 3.851 relief and who doesn’t and gets executed will be an arbitrary one. *See Asay*, 2016 WL 7406538 at *22 (Lewis, J., concurring in result) (“As Justice Perry noted in his dissent, there is no salient difference between June 23 and June 24, 2002—the days before and after the case name *Ring* arrived. *See Perry*, J., dissenting op. at 58. However, that is where the majority opinion **draws its determinative, albeit arbitrary, line**. As a result, Florida will treat similarly situated defendants differently—here, the difference between life and death—for potentially the simple reason of one defendant’s docket delay.”) (emphasis added); *Id.* at *26 (Pariante, J., concurring in part,

dissenting in part) (“The majority’s conclusion results in an unintended **arbitrariness** as to who receives relief depending on when the defendant was sentenced or, in some cases, resentenced.”) (emphasis added); *Id.* at 26 (Perry, J., dissenting) (“In my opinion, the line drawn by the majority is **arbitrary and cannot withstand scrutiny under the Eighth Amendment** because it creates an arbitrary application of law to two groups of similarly situated persons.”) (emphasis added); *Mosley*, 2016 WL 7406506 at *32 (Canady, J., concurring in part, dissenting in part) (“the supposed rule of ‘fundamental unfairness’ articulated in *James* is deeply problematic—if not entirely incoherent—when judged by its own terms. If counsel accepted our decisions at face value and relied on the United States Supreme Court’s repeated rejection of *Ring* claims, the client loses under *James*. But if counsel raised claims that had been consistently rejected, the client wins. **This hardly comports with the notion of fundamental fairness.**”) (emphasis added); *Id.* at *32 (Canady, J., concurring in part, dissenting in part) (“Based on an indefensible misreading of *Hurst v. Florida* and **a retroactivity analysis that leaves the *Witt* framework in tatters**, the majority **unjustifiably plunges the administration of the death penalty in Florida into turmoil that will undoubtedly extend for years**. I strongly dissent from this badly flawed decision.”).¹⁹ Justice Polston concurred in Justice Canady’s dissent in *Mosley*.

¹⁹Justice Canady also disagrees with the Court’s action in abandoning the binary approach of the *Witt* analysis, and Justice Polston concurred in Justice Canady’s dissent. Thus, five of the seven Florida Supreme Court justices do not support discarding the either-it-is-or-isn’t-retroactive *Witt* analysis. Once the binary approach is abandoned and the issue is no longer between just a prospective (nonretroactive) application of *Hurst v. Florida* and a retroactive application to cases final when *Hurst v. Florida* issued, necessarily the retroactive application of the law can be given to some and not to others. But, there are no governable standards. This is particularly true when, applying the same *Witt* test to *Asay* and *Mosley*, the majority reached different conclusions on the issue. For example, the third prong of *Witt* requires an analysis of the extent of the reliance factor on pre-*Hurst* law. In *Asay*, the Court found that the extent of reliance on Florida’s unconstitutional death penalty scheme weighed “heavily against” retroactive application to *Asay*, while in *Mosley*, the Court reached the opposite conclusion, holding that the extent of reliance on the same pre-*Hurst* law weighed “in favor” of retroactive application to *Mosley*. See *Asay*, 2016 WL 7406538, at *12; *Mosley*, 2016 WL 7406506, at *23. The distinction is simply arbitrary. *Asay* and *Mosley* also differed as to the third *Stovall/Linkletter* retroactivity factor — the effect on the administration of justice—finding that it weighed “heavily against” retroactive application as to *Asay*, but in favor of retroactive application as to *Mosley*. See *Asay*, 2016 WL 7406538, at *13; *Mosley*, 2016 WL 7406506, at *24.

10. Completely ignored in *Asay* and *Mosley* is the logic of *Griffith v. Kentucky*, 479 U.S. 314, 327-28 (1987) that justice should be administered with an even hand:

Justice POWELL has pointed out that it “**hardly comports with the ideal of ‘administration of justice with an even hand,’**” when “**one chance beneficiary-the lucky individual whose case was chosen as the occasion for announcing the new principle-enjoys retroactive application, while others similarly situated have their claims adjudicated under the old doctrine.**” *Hankerson v. North Carolina*, 432 U.S. 233, 247, 97 S.Ct. 2339, 2347, 53 L.Ed.2d 306 (1977) (opinion concurring in judgment), quoting *Desist v. United States*, 394 U.S., at 255, 89 S.Ct., at 1037 (Douglas, J., dissenting). See also *Michigan v. Payne*, 412 U.S. 47, 60, 93 S.Ct. 1966, 1973, 36 L.Ed.2d 736 (1973) (MARSHALL, J., dissenting) (“**Different treatment of two cases is justified under our Constitution only when the cases differ in some respect relevant to the different treatment**”). The fact that the new rule may constitute a clear break with the past has no bearing on the “actual inequity that results” when only one of many similarly situated defendants receives the benefit of the new rule. *United States v. Johnson*, 457 U.S., at 556, n. 16, 102 S.Ct., at 2590, n. 16 (emphasis omitted).

We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a “clear break” with the past.

(emphasis added). “[S]elective application of new rules violates the principle of treating similarly situated defendants the same.” *Id.* at 323.

11. While Nelson’s death sentence was final when *Hurst v. Florida* issued, numerous other capital defendants’ death sentences had been final, including Hurst’s, when good fortune and good timing meant that at the moment that *Hurst v. Florida* issued, those defendants were free of the shackles of finality.²⁰ The decisions in *Asay* and *Mosley* have opened the door to arbitrariness infecting Florida’s death penalty system in violation of the Eighth Amendment. In abandoning the binary approach to retroactivity, the Court has embraced imprecision as it sifts

²⁰ In *Witt v. State*, 387 So. 2d 922, 926 (Fla. 1980), the Florida Supreme Court noted the Eighth Amendment required extra weight to be given to “individual fairness because of the possible imposition of a penalty as unredeeming as death.” In a footnote, the Florida Supreme Court wrote: “It bears mention that **the constitutionality of Florida’s capital sentencing procedures**, s 921.141, Florida Statutes (1979), **is contingent upon this Court’s role of reviewing each case to ensure uniformity in the imposition of the death penalty.**” *Id.* at 926 n.7 (emphasis added).

through death penalty cases in collateral review on a case by case ad hoc approach.²¹ As five justices of the Florida Supreme Court recognized, the new approach to retroactivity insures an unreliable and arbitrary death penalty system will govern collateral review of capital cases in Florida. Rule 3.851 relief is warranted.

CLAIM III

NELSON'S DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT UNDER *HURST V. STATE* AND SHOULD BE VACATED.

This claim is evidenced by the following:

1. All other factual allegations in this motion and in Nelson's previous motions to vacate, and all evidence presented by him during his trial and previous postconviction proceedings, are incorporated herein by specific reference.
2. In *Hurst v. State*, 202 So.3d 40 (Fla. 2016), the Florida Supreme Court explained that, in accordance with Florida's capital sentencing scheme, the jury has a "right to recommend a sentence of life even if it finds aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating circumstances." *Hurst*, 202 So. 3d at 58, citing *Brooks v. State*, 762 So. 2d 879, 902 (Fla. 2000). In other words, before a judge can impose the death penalty, the jury must be told it has the right to recommend a life sentence, even if the precedent factual findings are all made unanimously. This safeguard is to allow jurors in capital cases to "exercise reasoned judgment in his or her vote as to a recommended sentence." *Hurst*, 202 So. 3d at 58.²² Accord *Perry*, 2016 WL 6036982 at *7-8 ("It has long been true that a juror is not required to recommend the death sentence even if the jury concludes that the aggravating

²¹The lengthy time consuming and costly case-by-case analysis that the Florida Supreme Court has mandated in its *Asay* and *Mosley* opinions was not factored into the effect on the administration of justice analysis when the Court denied *Asay* the benefit of *Hurst v. Florida*.

²²The U.S. Supreme Court as far back as 1974 held that a capital sentencer can constitutionally dispense mercy in a case that otherwise might warrant imposition of the death penalty. *Gregg v. Georgia*, 428 U.S. 153, 203 (1976).

factors outweigh the mitigating circumstances”). See also *Hurst*, 202 So. 3d at 58 (“Regardless of your findings . . . you are neither compelled nor required to recommend a sentence of death”).

3. The Florida Supreme Court further held in *Hurst v. State* that there is an Eighth Amendment right to have a jury unanimously recommend a death sentence before a death sentence is permissible. *Hurst v. State*, 202 So. 3d at 59 (“we conclude that juror unanimity in any recommended verdict resulting in a death sentence is required under the Eighth Amendment.”). The Court in *Hurst* explained:

This individualized sentencing implements the required narrowing function that also ensures that the death penalty is reserved for the most culpable of murderers and for the most aggravated of murders. If death is to be imposed, unanimous jury sentencing recommendations, when made in conjunction with the other critical findings unanimously found by the jury, provide the highest degree of reliability in meeting these constitutional requirements in the capital sentencing process.

Id. at 60. Thus, the Eighth Amendment’s evolving standards of decency now requires a unanimous death recommendation before a death sentence is permissible:

Requiring unanimous jury recommendations of death before the ultimate penalty may be imposed will ensure that in the view of the jury—a veritable microcosm of the community—the defendant committed the worst of murders with the least amount of mitigation. This is in accord with the goal that capital sentencing laws keep pace with “evolving standards of decency.” *Trop v. Dulles*, 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion) (holding that the Eighth Amendment must “draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”).

Id. at 60. In *Hurst v. State*, the Florida Supreme Court ruled that on the basis of the Eighth Amendment and on the basis of the Florida Constitution, the evolving standards of decency now require jury “unanimity in a recommendation of death in order for death to be considered and imposed”. *Id.* at 61.

4. But of course, the jury must know and appreciate the significance of its verdict:

In a capital case, the gravity of the proceeding and the concomitant juror responsibility weigh even more heavily, and it can be presumed that the penalty phase jurors will take special care to understand and follow the law.

Id. at 63. Indeed, under *Caldwell v. Mississippi*, 472 U.S. 320 (1985), a unanimous jury verdict in

favor of a death sentence violates the Eighth Amendment if the jury was not correctly instructed as to its sentencing responsibility. *Caldwell* held: “it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.” *Id.* 328-29. Jurors must feel the weight of their sentencing responsibility; they must know that if the defendant is ultimately executed it will be because no juror exercised his power to preclude a death sentence.

5. In *Caldwell*, the prosecutor responding to defense counsel’s argument stated in his argument before the jury: “Now, they would have you believe that you’re going to kill this man and they know—they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable.” *Id.* at 325.²³ Because the jury’s sense of responsibility was improperly diminished by this argument, the Supreme Court held that the jury’s unanimous verdict imposing a death sentence in that case violated the Eighth Amendment and required the death sentence to be vacated. *Caldwell*, 472 U.S. at 341 (“Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires.”). *Caldwell* explained: “Even when a sentencing jury is unconvinced that death is the appropriate punishment, it might nevertheless wish to ‘send a message’ of extreme disapproval for the defendant’s acts. This desire might make the jury very receptive to the prosecutor's assurance that it can more freely ‘err because the error may be corrected on appeal.’” *Id.* at 331.²⁴

6. Jurors must feel the weight of their sentencing responsibility and know about their

²³In her concurrence, Justice O’Connor wrote: “In telling the jurors, ‘your decision is not the final decision ... [y]our job is reviewable,’ the prosecutor sought to minimize the sentencing jury’s role, by creating the mistaken impression that automatic appellate review of the jury’s sentence would provide the authoritative determination of whether death was appropriate.” *Caldwell*, 472 U.S. at 342-43.

²⁴This would certainly apply to the circumstances in Nelson’s case when the jury was repeatedly reminded its penalty phase verdict was merely an advisory recommendation.

individual authority to preclude a death sentence. *See Blackwell v. State*, 79 So. 731, 736 (Fla. 1918) (prejudicial error found in “the remark of the assistant state attorney as to the existence of a Supreme Court to correct any error that might be made in the trial of the cause, in effect told the jury that it was proper matter for them to consider when they retired to make up their verdict. Calling this vividly to the attention of the jury tended to lessen their estimate of the weight of their responsibility, and cause them to shift it from their consciences to the Supreme Court.”). Where the jurors’ sense of responsibility for a death sentence is not explained or is diminished, a jury’s unanimous verdict in favor of a death sentence violates the Eighth Amendment and the death sentence cannot stand. *Caldwell*, 472 U.S. at 341 (“Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires.”).

7. The U.S. Supreme Court in *Caldwell* found that diminishing an individual juror’s sense of responsibility for the imposition of a death sentence creates a bias in favor of a juror voting for death. *Caldwell*, 472 U.S. at 330 (“In the capital sentencing context there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court.”).

8. If a bias in favor a death recommendation increases when the jury’s sense of responsibility is diminished, removing the basis for that bias increases the likelihood that one or more jurors will vote for a life sentence. The likelihood increases even more when the jury receives accurate instruction as to each juror’s power and authority to dispense mercy and preclude a death sentence. In this regard, the context of the prosecutor’s improper argument in *Caldwell* is important. The prosecutor was responding to and trying to blunt defense counsel’s assertion that the sentencing decision rested with the jury and that it could choose mercy:

I implore you to exercise your prerogative to spare the life of Bobby Caldwell.... I'm sure [the prosecutor is] going to say to you that Bobby Caldwell is not a merciful person, but I say unto you he is a human being. That he has a life that

rests in your hands. You can give him life or you can give him death. It's going to be your decision. I don't know what else I can say to you but we live in a society where we are taught that an eye for an eye is not the solution.... You are the judges and you will have to decide his fate. It is an awesome responsibility, I know—an awesome responsibility.

Caldwell, 472 U.S. at 324.

9. Nelson's jury was not advised of each jurors' authority to dispense mercy. Indeed, the State informed the jury otherwise, arguing that it should not consider sympathy or mercy in accordance with its oath (X, T 864-66, 903-04). And the trial court instructed the jury that "[t]he sentence that you recommend to the Court must be based upon the facts as you find them from the evidence and the law." (XI, T 922).

10. The circumstances under which Nelson's jury returned its 12-0 death recommendation shows that it cannot now be viewed as a valid unanimous verdict or that the *Hurst* error was harmless without violating the Eighth Amendment. "Even when a sentencing jury is unconvinced that death is the appropriate punishment, it might nevertheless wish to 'send a message' of extreme disapproval for the defendant's acts. This desire might make the jury very receptive to the prosecutor's assurance that it can more freely 'err because the error may be corrected on appeal.'" *Caldwell*, 472 U.S. at 331. The advisory recommendation simply "does not meet the standard of reliability that the Eighth Amendment requires." *Id.* at 341.

11. This Court cannot rely on the jury's death recommendation in Nelson's case as showing either that he was not deprived of his Eighth Amendment right to require a unanimous jury's death recommendation or that the violation of the right was harmless. To do so would violate the Eighth Amendment because the advisory verdict was not returned in proceedings compliant with the Eighth Amendment. *Caldwell*, 472 U.S. at 332 ("The death sentence that would emerge from such a sentencing proceeding would simply not represent a decision that the State had demonstrated the appropriateness of the defendant's death.").

12. In *Hurst v. Florida*, the U.S. Supreme Court warned against using what was an

advisory verdict to conclude that the findings necessary to authorize the imposition a death sentence had been made by the jury:

“[T]he jury’s function under the Florida death penalty statute is advisory only.” *Spaziano v. State*, 433 So.2d 508, 512 (Fla.1983). The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires.

Hurst v. Florida, 136 S.Ct. at 622. An advisory verdict (premised upon inaccurate information regarding the binding nature of a life recommendation and the juror’s inability to be merciful based upon sympathy) cannot be used as a substitute for a unanimous verdict from a properly instructed jury. *California v. Ramos*, 463 U.S. 992, 1004 (1983) (“Because of the potential that the sentencer might have rested its decision in part on erroneous or inaccurate information that the defendant had no opportunity to explain or deny, the need for reliability in capital sentencing dictated that the death penalty be reversed.”).

13. Under *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), the Florida Supreme Court’s Eighth Amendment ruling in *Hurst v. State* must be applied retroactively. Under *Witt v. State*, the Florida Supreme Court’s decision in *Hurst v. State* must be applied retroactively. It is not constitutionally permissible to execute a person whose death sentence was imposed under an unconstitutional scheme.

14. The Florida Supreme Court’s recent decision in *Walls v. State*, 2016 WL 6137287 (Fla. Oct. 20, 2016), also indicates that *Hurst v. State* must be applied retroactively. Although *Walls* addressed the retroactivity of another Supreme Court decision involving an Eighth Amendment violation under *Hall v. Florida*, 134 S. Ct. 1986 (2014), it is instructive here. There, the Court concluded that the Eighth Amendment decision in *Hall* “removes from the State [the] authority to impose death sentences” in a category of cases. *Walls*, 2016 WL 6137287 at *5. “[Nelson’s] eligibility or ineligibility for execution must be determined in accordance with the correct United States Supreme Court jurisprudence.” *Id.* at *8 (Pariente, J., concurring). “More than fundamental fairness and a clear manifest injustice, **the risk of executing a person who is**

not constitutionally able to be executed, trumps any other considerations that this Court looks to when determining if a subsequent decision of the United States Supreme Court should be applied.” *Id.* (emphasis added).

15. Nelson’s death sentence stands in violation of the Eighth Amendment and the Florida Constitution. Rule 3.851 relief must issue and his sentence must be vacated.

CLAIM IV

THE DECISIONS IN *HURST V. STATE* AND *PERRY V. STATE* ALONG WITH THE RECENT ENACTMENT OF A REVISED SENTENCING STATUTE, ALL OF WHICH ARE NEW LAW THAT WOULD GOVERN AT A RESENTENCING AND REQUIRE THE JURY TO UNANIMOUSLY FIND THE STATUTORILY REQUIRED FACTS NECESSARY TO AUTHORIZE A DEATH SENTENCE AND ALSO REQUIRE THE JURY TO UNANIMOUSLY RECOMMEND A DEATH SENTENCE BEFORE THE JUDGE WOULD BE AUTHORIZED TO IMPOSE A DEATH SENTENCE, MUST BE PART OF THE SECOND PRONG ANALYSIS OF NELSON’S PREVIOUSLY PRESENTED NEWLY DISCOVERED EVIDENCE CLAIM AND HIS PREVIOUSLY PRESENTED *STRICKLAND* CLAIMS. THE NEW LAW, DUE PROCESS PRINCIPLES, AND THE EIGHTH AMENDMENT ALL REQUIRE THIS COURT TO REVISIT NELSON’S PREVIOUSLY PRESENTED CLAIMS AND DETERMINE WHETHER THE EVIDENCE PRESENTED TO SUPPORT EACH CLAIM AND ALL THE OTHER ADMISSIBLE EVIDENCE AT A FUTURE RESENTENCING WOULD PROBABLY RESULT IN A LIFE SENTENCE IN LIGHT OF THE NEW LAW THAT WOULD GOVERN AT A RESENTENCING, AND WHEN THE PROPER ANALYSIS IS CONDUCTED IT IS CLEAR THAT IT IS LIKELY THAT A DIFFERENT OUTCOME WOULD RESULT, RULE 3.851 RELIEF IS REQUIRED.

This claim is evidenced by the following:

1. All other factual allegations in this motion and in Nelson’s previous motions to vacate, and all evidence presented by him during his trial and previous postconviction proceedings, are incorporated herein by specific reference.

2. On March 7, 2016, Chapter 2016-13 was signed into law. It substantially revised Florida’s capital sentencing statute and constitutes new law cognizable in Rule 3.851 proceedings. As the Staff Analysis of the Criminal Justice Subcommittee accompanying HB 7101 (Chapter 2016-13) makes clear, its adoption was intended to cure the constitutional defect

in Florida’s capital sentencing scheme identified in *Hurst v. Florida*, 136 S. Ct. 616 (2016).²⁵

3. The Staff Analysis also discussed that the Petitioner in *Hurst* had argued that a simple majority vote by the jury violated the United States Constitution. *See id.* at 7 (“The Court’s opinion did not address Hurst’s contention that a jury’s advisory verdict must be greater than a simple majority in order to comport with the Sixth and Eighth Amendments.”). Though the Staff Analysis acknowledged that the Supreme Court did not specifically address Hurst’s argument, it noted HB 7101’s requirement that at least ten jurors vote to recommend death before a judge was authorized to impose a death sentence. *See id.* at 8 (“To recommend a sentence of death, a minimum of 10 jurors must concur in the recommendation. If fewer than 10 jurors concur, a sentence of life imprisonment without the possibility of parole will be the jury’s recommendation to the court. If the jury recommends life imprisonment without the possibility of parole, the judge must impose the recommended sentence.”).

4. The new § 921.141 includes a new subsection (2) describing the jury’s function in a capital penalty phase:

(2) Findings and recommended sentence by the jury.—This subsection applies only if the defendant has not waived his or her right to a sentencing proceeding by a jury.

(a) After hearing all of the evidence presented regarding aggravating factors and mitigating circumstances, the jury shall deliberate and determine if the state has proven, beyond a reasonable doubt, the existence of at least one aggravating factor set forth in subsection (6).

(b) The jury shall return findings identifying each aggravating factor found to exist. A finding that an aggravating factor exists must be unanimous. If the jury:

1. Does not unanimously find at least one aggravating factor, the defendant is ineligible for a sentence of death.

2. Unanimously finds at least one aggravating factor, the defendant is eligible for a sentence of death and the jury shall make a recommendation to the court as to whether the defendant shall be sentenced to life imprisonment without the possibility of parole or to death. The recommendation shall be based on a weighing of all of the following:

²⁵*See* House of Representatives Final Bill Analysis, H.B. 7101, at 8 (Fla. 2016) (“The bill amends ss. 921.141 and 921.142, F.S., to comply with the United States Supreme Court’s holding that a jury, not a judge, must find each fact necessary to impose a sentence of death.”).

- a. Whether sufficient aggravating factors exist.
- b. Whether aggravating factors exist which outweigh the mitigating circumstances found to exist.
- c. Based on the considerations in sub-subparagraphs a. and b., whether the defendant should be sentenced to life imprisonment without the possibility of parole or to death.
- (c) If at least 10 jurors determine that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of death. If fewer than 10 jurors determine that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of life imprisonment without the possibility of parole.

§ 921.141(2), Fla. Stat. (2016).

5. In *Perry v. State*, the Florida Supreme Court addressed the newly revised statute.

While generally approving all other aspects of the newly revised statute, it held that the 10-2 provision was unconstitutional under *Hurst v. Florida* because to be constitutional the findings of fact and the death recommendation necessary to authorize the imposition of a death sentence had to be reached unanimously by the jury. *Perry* held:

to increase the penalty from a life sentence to a sentence of death, the jury must unanimously find the existence of any aggravating factor, that the aggravating factors are sufficient to warrant a sentence of death, that the aggravating factors outweigh the mitigating circumstances, and must unanimously recommend a sentence of death.

2016 WL 6036982 at 8. In deciding whether to recommend a death sentence, jurors may choose to vote in favor of a life sentence to be merciful. *Id.* (“This final jury recommendation, apart from the findings that sufficient aggravating factors exist and that the aggravating factors outweigh the mitigating circumstances, has sometimes been referred to as the ‘mercy’ recommendation.”).

This is the law that now governs when a death sentence is vacated and a resentencing is ordered in a capital case. In *Hurst v. State*, the Florida Supreme Court explained:

Requiring a unanimous jury recommendation before death may be imposed, in accord with precepts of the Eighth Amendment and Florida’s right to trial by jury, is a critical step toward ensuring that Florida will continue to have a constitutional and viable death penalty law, which is surely the intent of the Legislature. The requirement will dispel most, if not all, doubts about the future validity and long-term viability of the death penalty in Florida.

2016 WL 6036978 at *17.

6. In *Hildwin v. State*, 141 So. 3d 1178, 1184 (Fla. 2014), the Florida Supreme Court explained that when presented with qualifying newly discovered evidence:

the postconviction court must consider the effect of the newly discovered evidence, in addition to all of the evidence that could be introduced at a new trial. *Swafford v. State*, 125 So.3d 760, 775-76 (Fla. 2013). In determining the impact of the newly discovered evidence, the court must conduct a cumulative analysis of all the evidence so that there is a ‘total picture’ of the case.

In *Swafford*, the Florida Supreme Court indicated the evidence to be considered in evaluating whether a different outcome was probable included “evidence that [had been] previously excluded as procedurally barred or presented in another proceeding.” *Swafford v. State*, 125 So. 3d at 775-76. The “standard focuses on the likely result that would occur during a new trial with all admissible evidence at the new trial being relevant to that analysis.” *Id.* Put simply, the analysis requires envisioning how a new trial or resentencing would look with all of the evidence that would be available. Obviously, the law that would govern at a new trial must be part of the analysis. Here, the revised capital sentencing statute would apply at a resentencing and would require the jury to determine unanimously that sufficient aggravators exist and that they outweigh the mitigators. It would also require the jury to unanimously recommend a death sentence before the sentencing judge would be authorized to impose a death sentence. One single juror voting in favor of a life sentence would require the imposition of a life sentence.

7. This is new Florida law that did not exist when Nelson previously presented his newly discovered evidence and *Strickland* claims. Accordingly, before the enactment of Chapter 2016-13 on March 7, 2016, and before the issuance of *Perry v. State* and *Hurst v. State* on October 14, 2016, Nelson could not present his claims as set forth herein because the new law that would govern any resentencing ordered in Nelson’s case was previously unavailable. Nelson’s previously presented claims must be re-evaluated in light of the new Florida law.

8. The Florida Supreme Court explained in *Hurst v. State* that “the requirement of unanimity in capital jury findings will help to ensure the heightened level of protection necessary for a defendant who stands to lose his life as a penalty.” 2016 WL 6036978 at *14. See *State v. Steele*, 921 So. 2d 538, 549 (Fla. 2005), quoting *State v. Daniels*, 542 A.2d 306, 315 (Conn. 1988) (“[W]e perceive a special need for jury unanimity in capital sentencing. Under ordinary circumstances, the requirement of unanimity induces a jury to deliberate thoroughly and helps to assure the reliability of the ultimate verdict.”). The Court in *Hurst v. State* also held:

If death is to be imposed, unanimous jury sentencing recommendations, when made in conjunction with the other critical findings unanimously found by the jury, provide the highest degree of reliability in meeting these constitutional requirements in the capital sentencing process.

2016 WL 6036978 at *15. Thus, reliability of Florida death sentences is the touchstone of the new Florida law requiring a unanimous jury to make the factual determinations necessary for the imposition of a death sentence and requiring the jury to unanimously return a death recommendation before a death sentence is authorized as a sentencing option. Implicit in the justification for the new Florida law is an acknowledgment that death sentences imposed under the old capital sentencing scheme were (or are) less reliable. Before executions are carried out in a case in which the reliability of a death sentence is subpar, a re-evaluation of such a death sentence in light of the changes made by Chapter 2016-13, *Hurst v. State*, and *Perry v. State* is warranted. A previous rejection of a death sentenced defendant’s *Strickland* and/or newly discovered evidence claims should be re-evaluated in light of the new requirement that juries must unanimously make the necessary findings of fact and return a unanimous death recommendation before a death sentence is even a sentencing option. Certainly the previous rejection of a newly discovered evidence claim on the basis of a defendant’s failure to show that the new evidence would have likely led to six jurors to vote for a life sentence no longer comports with the law since Florida law now provides that if one juror votes for a life sentence, a life sentence must be imposed. Further, the *Strickland* prejudice analysis requires a determination

of whether confidence in the reliability of the outcome - the imposition of a death sentence - is undermined by the evidence the jury did not hear due to the *Strickland* violations. The new Florida law should be part of the evaluation of whether confidence in the reliability of the outcome is undermined, particular since the touchstone of the new Florida law is the likely enhancement of the reliability of any resulting death sentence.

9. The evidence supporting Nelson's newly discovered evidence and *Strickland* claims presented in his previous Rule 3.851 motions must be evaluated under the standard set forth in *Swafford* and *Hildwin*, and that means that all of the evidence that would be admissible at a resentencing which includes the mitigating evidence presented to meet the prejudice prong of the *Strickland* standard governing ineffectiveness claims and newly discovered evidence relating to Nelson's culpability. With all the new evidence that would be admissible at a resentencing, the State cannot demonstrate beyond a reasonable doubt that not a single juror would have voted in favor of a life sentence. A single juror voting for a life sentence under *Hurst v. State* and *Perry v. State* would mean that a life sentence would be the only sentencing option. Thus, when the proper *Swafford/Hildwin* analysis is conducted with proper consideration given to the new Florida law arising from Chapter 2016-13, *Hurst v. State* and *Perry v. State*, it is more likely than not that Nelson would be able to persuade at least one juror to vote for a life sentence. That means a life sentence would be required and that the outcome of a resentencing would be different. One juror's vote in favor of a life sentence is much more likely to undermine confidence in the reliability of the decision to impose death in light of the new unanimity requirement when a court is considering the prejudice arising from *Strickland* claims or whether the newly discovered evidence would probably produce a life sentence.

10. Because the new Florida law will apply at a retrial or resentencing, it extends a new right to capital defendants, i.e. the right to a life sentence if one juror votes in favor of a life sentence. This requires this Court to revisit Nelson's previously presented claims and determine whether under the requisite analysis set forth in *Hildwin* and *Swafford*, a different result, i.e. a

life sentence, is more likely than not. Nelson can meet the *Hildwin/Swafford* test. He could also demonstrate that confidence in the reliability of the outcome is undermined on the basis of the *Strickland* claims. Accordingly, he is entitled to Rule 3.851 relief on his *Strickland* claims on the basis of new Florida law set forth in *Perry v. State* and *Hurst v. State*.

11. Rule 3.851 relief is warranted. Nelson's death sentence should be vacated and a new penalty phase ordered.

CONCLUSION AND RELIEF SOUGHT

Based on the foregoing, Nelson requests that this Court grant him a new penalty phase and/or a life sentence.

CERTIFICATION PURSUANT TO FLA. R. CRIM. P. 3.851 (e)

Pursuant to Fla. R. Crim P. 3.851(e)(2)(A) and (e)(1)(F), undersigned counsel hereby certifies that counsel has endeavored to fully discuss and explain the contents of this motion with Nelson, and that counsel to the best of his ability has complied with Rule 4-1.4 of the Rules of Professional Conduct, and that this motion is filed in good faith.

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished through the Florida Courts E-Filing Portal to Carol Dittmar, carol.dittmar@myfloridalegal.com, Office of the Attorney General, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607; Cynthia Ross, cross@sao.cjis20.org, Assistant State Attorney, Office of the State Attorney, P.O. Box 399, Fort Myers, FL 33902-0399, on March 2, 2017.

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**IN THE CIRCUIT COURT OF THE
TWENTIETH JUDICIAL CIRCUIT, IN AND
FOR LEE COUNTY, FLORIDA**

CASE NO. 95-CF-911A

STATE OF FLORIDA,

Plaintiff,

v.

JOSHUA D. NELSON,

Defendant.

_____ /

MOTION TO EXCEED PAGE LIMITATION

The Defendant, **JOSHUA D. NELSON**, by and through undersigned counsel, respectfully moves this Court to allow him to exceed the page limitation for his amended successive Rule 3.851 motion. In support, Mr. Nelson submits as follows:

1. Mr. Nelson is under a sentence of death.
2. Fla. R. Crim. P. 3.851(e)(2) directs that “a successive motion shall not exceed 25 pages, exclusive of attachments.”
3. On January 11, 2017, Mr. Nelson filed a successive postconviction, premised on *Hurst v. Florida*, 136 S. Ct. 616 (2016) and the case law emanating from that decision. Mr. Nelson’s motion was 45 pages in length. As such, he filed a motion to exceed the page limitation.
4. On January 24, 2017, this Court issued an order granting Nelson’s motion (“Having reviewed the pleading, and given the new and evolving nature of the case law, the Court grants Defendant’s motion to exceed the page limit.”).
5. Simultaneous to this motion, Mr. Nelson has filed a motion to amend his successive postconviction motion with additional facts, new case law and argument. Mr. Nelson’s amended successive motion, which is attached to his motion to amend, is 50 pages in length.
6. As Mr. Nelson asserted in his previous motion to exceed page limitation, the excess pages are due to the significance of the new Florida law and Mr. Nelson’s need to coherently set forth the significance of the new Florida law and the basis of his claims arising

from the new law. Moreover, in light of the fact that undersigned counsel now has access to record transcripts that were not available previously, Mr. Nelson's postconviction motion has been supplemented with facts pertinent to his issues.

WHEREFORE, based on the foregoing, Mr. Nelson requests that this Court allow him to exceed the page limitation set forth in Rule 3.851(e)(2) in his accompanying amended successive Rule 3.851 motion.

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished through the Florida Courts E-Filing Portal to Carol Dittmar, carol.dittmar@myfloridalegal.com, Office of the Attorney General, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607; Cynthia Ross, cross@sao.cjis20.org, Assistant State Attorney, Office of the State Attorney, P.O. Box 399, Fort Myers, FL 33902-0399, on March 2, 2017.

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**IN THE CIRCUIT COURT FOR THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA**

**STATE OF FLORIDA,
Plaintiff,**

vs.

CASE NO: 95-CF-911A

**JOSHUA D. NELSON,
Defendant.**

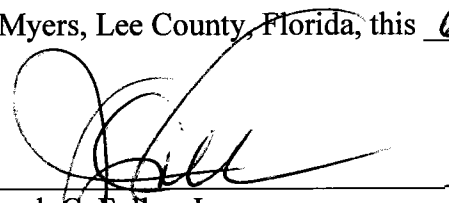
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ORDER GRANTING SECOND MOTION TO AMEND

THIS CAUSE comes before the Court on Defendant's second "Motion To Amend," filed March 2, 2017. A 3.851 motion may be amended for good cause shown provided it is filed at least 45 days before a scheduled evidentiary hearing, and the claims to be added must be attached to the motion to amend. Fla. R. Crim. P. 3.851(f)(4). Since counsel seeks only to add facts and case law, and has not added any new claims after the State responded, it is

ORDERED AND ADJUDGED that Defendant's motion to amend is GRANTED. Since the State response has already been filed, if the State requires additional time to respond to the amended claims, the State may request written closing arguments following the case management conference.

DONE AND ORDERED in Chambers at Fort Myers, Lee County, Florida, this 6TH day of March, 2017.



Joseph C. Fuller, Jr.
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above order has been furnished to: **John P. Abatecola, Esq.**, jabatecola@comcast.net, 20301 Grande Oak Blvd., Ste. 118-61, Estero, FL 33928; **Carol M. Dittmar, Esq.**, carol.dittmar@myfloridalegal.com, capapp@myfloridalegal.com, Office of the Attorney General, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607; **Cynthia Ross, Esq.**, servicesao-lee@sao.cjis20.org, Office of the State Attorney, P.O. Box 399, Ft. Myers, FL 33902-0399; and **Administrative Office of the Courts (XIV)**, 1700 Monroe St., Ft. Myers, FL 33901; this 3 day of March, 2017.

LINDA DOGGETT
Clerk of Court

By: _____

KS
Deputy Clerk

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR
LEE COUNTY, FLORIDA
CRIMINAL DIVISION

State of Florida vs Joshua D Nelson

Case Number: 95-CF-000911-A

Minutes

Time: 9:21 Court Room: Courtroom 8-B
Judge: Joseph C Fuller, Jr. State Attorney: ~~DEBBY DEBOS~~ / 1/12/2015
Court Reporter/Smart: Smart ~~Kathy Nicolcov~~ Defense Attorney: John Paul Abatecola
Deputy Sheriff: Setzer/Leahy Deputy Clerk: Eberl
Date of Action: 03/09/2017 Custody Status: _____

DOB: 01/16/1977 Gender: Male Race: White
Arrest Date: 03/27/1995 Arrest Agency: Cape Coral Police Location: Fort Myers
Count Description Statute - Degree Filed Status Reopened Reason
1. FIRST DEGREE MURDER 782.04(1A) - FC FI OTHER
3. ARMED ROBBERY(ROB W/ 812.13(2A) - FF FI OTHER

APPEARANCE

Present w/attorney Present by/attorney _____ Present w/o attorney _____
Present w/interpreter _____ Interpreter Services Requested-Language _____
Failed to appear _____ BW Ordered-Hold No Bond _____ BW Ordered-Bond Set @ \$ _____
ROR Revoked _____ PTS Revoked _____
Bond Estreature Ordered _____ Set Aside Estreature _____ Set Aside BW (Notify Clerk's Office/LCSO) _____

CONTINUANCE

Cont. to _____ @ _____ AM / PM in Courtroom 4A 7A 7B 8A 8B _____
Continued by _____ State _____ Defense _____ Judge _____
for _____ ERC _____ TR _____ SE _____ CMC _____ PTC _____ Plea _____ Pre- Trial Diversion _____ Pre- Trial Diversion 6A _____
Speedy Trial Waived _____ Speedy Trial Tolled _____
Screen for _____ MHC _____ DC _____ PTD _____
Pre-Sentence Investigation/Pretrial Disposition Report _____ Ordered _____ Waived _____ None _____

*Attorney General
Appeal
By
Telephone
Carol
Dittman
Christina
Prechto*

PLEA

Guilty _____ Ea Ct _____ Ct(s) _____
Nolo Contendere _____ Ea Ct _____ Ct(s) _____
As Charged _____ Amended Offense _____ Lesser Offense _____ Ea Ct _____ Ct(s) _____
State Orally Amends Information in Open Court as to Ct (s) _____
Charge(s) _____
Statute(s) _____ Degree _____ Misdemeanor / Felony _____
Formal Filing of Information is Waived _____ Information Filed in Open Court _____ Entering Plea to Traffic Citation _____

ADJUDICATION

Adjudicated Guilty _____ Ea Ct _____ Ct(s) _____
Adjudication Withheld _____ Ea Ct _____ Ct(s) _____
Adjudicated Delinquent (Juvenile) _____

DISPOSITION

Nolle Prose _____ Ea Ct _____ Ct(s) _____
Dismissed _____ Ea Ct _____ Ct(s) _____
Merged & Dismissed _____ Merge Count(s) _____ into Count _____ for Sentencing & Dismissal _____

VERDICT

Guilty by Jury _____ Ct(s) _____ Not Guilty by Jury _____ Ct(s) _____
Mistrial _____
Guilty of Lesser Offense _____ Statute _____
Remanded into Custody w/out Bond _____

DEFENDANT / ATTORNEY _____ FL BAR # _____

If you are a person with a disability who needs 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 Brooke Dean, Operations Division Manager, whose office is located at Lee County Justice Center, 1700 Monroe Street, Fort Myers, FL 33901, and whose telephone number is (239) 533-1771, at least 7 days before your scheduled court appearance, or immediately upon receiving this notification if the time before the scheduled appearance is less than 7 days; if you are hearing or voice impaired, call 711.

Continuation of proceedings on 03/09/2017
For **Joshua D Nelson**

On Case: **95-CF-000911-A**

SENTENCE (Previously Pled Nolo / Guilty on _____ Found Guilty by Jury on _____)

PRISON: _____ MM/YY _____ Each Ct _____ Count(s) _____
____ Ea Ct Concurrent _____ and Concurrent w/ _____
____ Consecutive _____ Ct(s) _____
____ Minimum Mandatory _____ MM/ YY _____ Ct(s) _____
____ Sentence Suspended _____

JAIL: _____ DD/MM/YY _____ Each Ct _____ Count(s) _____
____ Ea Ct Concurrent _____ and Concurrent w/ _____
____ Consecutive _____ Ct(s) _____
____ As a Condition of Probation _____ Followed By Probation _____
____ CTS _____ DD _____ DOC to Compute Prison Time & Prior Jail Time _____
____ Weekend Jail Time Fri 6PM to Sun 6 PM _____ Day Work Program _____
____ Beginning _____ Days Prior to Sentencing _____
____ Sentence Suspended _____ Days from VOP/VOCC Arrest on Split Sentence _____

COMM CONTROL: _____ MM/YY _____ Each Ct _____ Count(s) _____
____ Each Count Concurrent _____ And Concurrent with Case(s) _____

PROBATION: _____ MM/YY _____ Each Ct _____ Count(s) _____
____ S-State _____ R-County _____ Drug Offender Probation _____ Intensive Supervision _____
____ Sex Offender Probation _____ FDLE Fingerprints taken in Court (Sex Offenders/Predators) _____
____ Each Count Concurrent _____ and Concurrent with Case(s) _____
____ Consecutive _____ Ct(s) _____
____ One Time Cost of Supervision \$ _____
____ May petition the Court for _____ Early Termination _____ Half early out of Supervision (Once all conditions are met) _____
____ No early termination of Supervision _____ May transfer probation to _____
____ Curfew From _____ AM / PM to _____ AM / PM _____
____ Curfew maybe modified by Probation for treatment and/or work purposes _____
____ Report to Probation today _____ Report to Probation upon Release within _____

SENTENCING PROVISIONS

____ Perform _____ hours of Community Service within _____ DD / MM/ YY _____
____ Sentenced as _____ Habitual Felony Offender _____ Habitual Violent Felony Offender _____ Prison Release Re-Offender _____
____ An Adult _____ Youthful Offender _____ Ct(s) _____
____ DNA Testing-Taken _____ at LCJ _____ in Court _____
____ No Contact w/ Victim (s) _____ No Violent Contact w/ Victim(s) _____
____ DL SUSP / REV _____ DD / MM / YY _____ May Apply for Hardship License after Six Months _____
____ DUI Attend _____ Victim Impact Panel _____ Lee Memorial High Risk Driver's/Trauma Course _____
____ DUI-Attend DUI School _____ Phase 1 _____ Phase 2 _____
____ DUI -Impound Vehicle for _____ Days as a condition of Probation unless statutory conditions are met _____
____ Ignition Interlock Device Ordered for _____ DD/MM _____
____ Be evaluated/screened for Substance Abuse by SalusCare, Inc. (or equivalent program) enter & complete outpatient aftercare; follow recommendations. Complete on 1st attempt _____
____ Drug Testing Without probable cause at own expense; during period of supervision _____
____ Remain in Custody until bed space becomes available _____
____ Attend & Complete Program: _____ RSAT _____ Life Skills Program _____ Anti-Theft School _____ Mile Post Program _____
____ Anger Management Program _____ Batterer's Intervention Program _____
____ Stay away from Place of Arrest _____
____ Other _____
____ Remanded into Custody _____ Release from Custody on this case only _____

REVOCAION HEARINGS: (_____ State _____ County)

____ Arraigned _____ PL NG/Denies VOP/VOCC _____ PL G/Admits VOP/VOCC _____
____ Hrg set for _____ Rev Hrg Cont to _____ VOP Advisement Cont to _____
____ Date _____ @ _____ AM / PM in Courtroom 4A 7A 7B 8A 8B _____
____ Adjudicated Guilty _____ Ct(s) _____
____ Adjudication Withheld _____ Ct(s) _____
____ Court finds defendant guilty of violation(s); ruling read into Court record (no need to record each violation) _____
____ Probation/Community Control _____ Modified _____ Reinstated _____ Continue on Probation _____ Revoked _____
____ Probation extended for _____ MO / YR from original term date _____
____ Same terms and conditions apply as previously imposed _____
____ All Standard, Special Terms, Conditions, & Financials are terminated _____
____ Dismiss Warrant _____ (Notify Clerk's Office/LCSO)

Continuation of proceedings on 03/09/2017
For **Joshua D Nelson**

On Case: **95-CF-000911-A**

MOTIONS

Set Bond _____ Reduce Bond _____ Revoke Bond _____ Revoke PTR _____ Revoke ROR _____
 Bond Set @ \$ _____
 Motion to Suppress _____ Motion in Limine _____ Competency Hearing _____ W/draw as Counsel _____ W/draw Plea _____
 New Trial _____ Continuance _____ Dismiss _____ Clarify or Correct Sentence _____
 Early Term of Probation _____ State _____ County _____
 HFO Hrg _____ HVFO Hrg _____ PRR Hrg _____ Post Conviction (3.850) _____ Nelson Farretta Hrg _____ Jimmy Rice Hrg _____
 Expunge/Seal (Outstanding monetary obligations must be addressed in court & the \$42.00 fee must be paid to Clerk's Office before case is officially expunged /sealed)
 Motion for Judgment of Acquittal _____
 Other Amended Statute Conference Motion To Vacate Death Sentence or Collect Illegal Sentence

MOTION RESULTS

Granted _____ Denied _____ Reserves Ruling _____ Withdrawn _____ Cancelled prior to court _____ Not Addressed _____
 Other See Below

FINE ASSESSMENTS

Fine \$ _____ (775.083) _____ Ea Ct _____
 \$ _____ Ct 1; \$ _____ Ct 4
 \$ _____ Ct 2; \$ _____ Ct 5
 \$ _____ Ct 3; \$ _____ Ct 6
 \$ _____
 5% Surcharge \$ _____ (938.04) _____ Ea Ct _____
 \$ _____ Ct 1; \$ _____ Ct 4
 \$ _____ Ct 2; \$ _____ Ct 5
 \$ _____ Ct 3; \$ _____ Ct 6
 \$ _____
 Fine Waived/Reduced 893.135 (4)

ATTORNEY FEES & SURCHARGES

\$50.00 Public Def Application Fee (27.52)
 Add'l Application Fees \$ _____
 (Must be Addressed on the Record)
 Defense Attorney Costs at Conviction (938.29)
 \$50.00 \$100.00 Other \$ _____
 Cost of Prosecution (938.27)
 \$50.00 \$100.00 Other \$ _____

RESTITUTION

Court Orders Restitution & Reserves on Amount _____
 Restitution \$ _____ to _____
 Minimum Payment of \$ _____ per Month to: _____
 As a Condition of Probation _____
 Restitution is Ordered Joint & Several with Co-defendant(s) _____
 Continue Restitution payments of: _____
 \$ _____ each month (VOP)

MANDATORY ASSESSMENTS

Court Cost
 (775.083 / 938.01 / 938.03 / 938.05 / 938.06 / 939.185)
 \$413.00 \$383.00 Other \$ _____
 If Ordered Under - Reason: _____
 \$2.00 Law Enforcement Education (938.15 w/ Ord.)
 \$33.00 Certain Traffic Offense Court Cost (318.17/318.18)
 \$135.00 DUI Add'l Court Costs (938.07)
 \$70.00 Reckless Driving Court Cost (318.18 / 316.192)
 \$65.00 Racing Court Cost (318.18)
 \$5.00 Leaving the Scene Add'l Court Cost (316.061)
 \$195.00 BUI Add'l Court Cost (938.07 / 327.35)
 \$201.00 Domestic Violence Surcharge (938.08)
 \$151.00 Rape Crisis Trust Fund (938.085)
 \$151.00 Crimes Against Minors (938.10)
 \$5000.00 Civil Penalty (796.07)

DISPOSITION OF MONETARY OBLIGATIONS

Monetary Obligations Due within _____ DD/MM/YY
 Monetary Obligations, excluding Restitution & Attorney Fees, & COS
Fees May Be Converted to Community Service at \$10 per Hour
 Monetary Obligations Reduced to Judgment (excluding Restitution)
 Previous Only
 Monetary Obligations Referred to Clerk of Court Collections
 Monetary Obligations to be paid to Dept. of Corrections
 Monetary Obligations Due & Owing Carried Forward (VOP)
 Minimum Payment of \$ _____ per Month Toward _____
 Financial Obligations

DISCRETIONARY ASSESSMENTS

\$ _____ Alcohol & Drug Abuse Program
 Up to fine amount (938.21)
 \$100.00 FDLE Trust Fund/State Crime Lab (938.055)
 \$ _____ Investigative Fee to:
 FMP _____ LCS _____ FDLE _____ Statewide Pros
 Other _____ (938.27)
 Worthless Check Diversion Fee \$ _____ (832.08)
 Diversion Cost of Supervision \$ _____ (948.09)
 Victim Restitution/Crime Compensation \$ _____

Claim I - Reserve Ruling
Claim II - Reserve Ruling
Claim III - Reserve Ruling
Claim IV - Reserve Ruling

Unpaid financial obligations still remaining 90 days after payment due date will be referred by the Clerk of Court to a collection agency and an additional fee of up to 40% of the outstanding balance owed will be added at that time (28.246). Failure to comply with payment of financial obligations may result in a suspension of your driver license privilege (322.245).

Mandatory assessments are imposed and shall be included in the judgment without regard to whether the assessment was announced in open court.

Received by: _____ LCSO _____ Date _____ Judge [Signature]

1 IN THE CIRCUIT COURT IN THE TWENTIETH JUDICIAL CIRCUIT
2 IN AND FOR LEE COUNTY, FLORIDA CRIMINAL DIVISION

3 STATE OF FLORIDA,)
4 Plaintiff,)
5 vs.)
6 JOSHUA NELSON,)
7 Defendant.)

Case No. 95-CF-911A

8
9 HEARING

10 TRANSCRIPT OF PROCEEDINGS

11
12 Before the Honorable Joseph C. Fuller,
13 Circuit Judge, at proceedings had in the
14 above-styled action, held at the Lee County
15 Justice Center, Fort Myers, Florida, on the 9th
16 day of March, 2016.

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18
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22 -----
23 MARTINA REPORTING SERVICES
24 Courtney Building, Suite 201
25 2069 First Street
Fort Myers, Florida 33901
(239) 334-6545

ORIGINAL

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A P P E A R A N C E S

CHRISTINA PACHECO, Assistant Attorney General
(via speakerphone)
OFFICE OF ATTORNEY GENERAL
3507 East Frontage Road, Suite 200
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representing the State of Florida.

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20301 Grande Oak Blvd., Suite 118-61
Estero, FL 33928;
representing the Defendant.

* * *

I N D E X

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* * *

1 THE COURT: For the record, we're here on
2 Joshua D. Nelson, *State v Nelson*, case number
3 95-CF-911A. Want to get the other counsel on
4 the phone here.

5 MS. PACHECO: Hello?

6 THE COURT: Good morning. Can you hear
7 us?

8 MS. PACHECO: Yes, I can hear you.

9 THE COURT: Okay. We'll put the phone up
10 here on the bench so that the court reporter
11 and other counsel can hear you. If you have
12 any difficulty hearing us this morning, let us
13 know, please; okay?

14 MS. PACHECO: Okay. Thank you.

15 THE COURT: Everybody please identify
16 themselves for the record.

17 MS. ROSS: Cynthia Ross on behalf of the
18 State.

19 MR. ABATECOLA: John Abatecola on behalf
20 of Mr. Nelson.

21 THE COURT: All right.

22 MS. PACHECO: This is Christina Pacheco
23 from the Attorney General's Office, and I'm
24 covering for Carol Dittmar.

25 THE COURT: All right. Counsel, it's your

1 motion. Are we ready to begin?

2 MR. ABATECOLA: I am, Your Honor, Your
3 Honor. Your Honor, would you like me to get
4 closer or use the podium? Whatever -- can you
5 hear me? Ma'am?

6 THE COURT: Can you hear? Hello?

7 MS. PACHECO: I am able to hear. Once in
8 a while, it cuts in and out, but right now, you
9 are clear.

10 THE COURT: Okay. All right. Just stick
11 the microphone up. I'll turn up the sound.

12 MS. PACHECO: Thank you.

13 THE COURT: All right, sir.

14 MR. ABATECOLA: Your Honor, is it okay if
15 I stay seated?

16 THE COURT: No, you can stay seated,
17 certainly.

18 MR. ABATECOLA: Thank you, Your Honor.

19 Okay. So I'm going to start with claim
20 one, and claim one concerns Mr. Nelson's death
21 sentence being a violation of the Sixth
22 Amendment under *Hurst v Florida*, and so it's
23 premised on Sixth Amendment analysis contained
24 in *Hurst*.

25 THE COURT: Uh-huh.

1 MR. ABATECOLA: And I would jump to
2 there's two issues that I believe need to be
3 focused on in claim one. The first one being
4 retroactivity, whether *Hurst* should apply to
5 Mr. Nelson's case, and number two, if so,
6 whether the *Hurst* error in Mr. Nelson's case
7 was harmless.

8 So I'll begin with the retroactivity
9 analysis, and there's two seminal cases from
10 the Florida Supreme Court; *Asay v State* and
11 *Mosley v State*. And so *Asay* applying an
12 analysis under *Witt v State* held that *Hurst* was
13 not retroactive to his case, and *Asay* was a
14 pre-*Ring* case, so *Asay* went as far back as
15 basically *Ring v Arizona* decisions in 2002.

16 *Mosley*, conversely, *Mosley* was a
17 post-*Hurst* case. I'm sorry, post-*Ring* case.
18 Post-2002 case. And in *Mosley*, they also
19 applied a *Witt* retroactivity analysis, but
20 *Mosley* also, and this is our contention today
21 is that *Mosley* applied a second test to
22 determine retroactivity, and that was under the
23 fundamental fairness doctrine, so it's an
24 equitable approach that does not rely on *Witt*.
25 So utilizing the fundamental fairness doctrine,

1 Nelson submits that *Hurst* should be applied
2 retroactively to his case.

3 And in Mr. Nelson's motion, he outlined a
4 number of bases as to why fundamental fairness,
5 he believes, requires retroactive application.
6 I'll go over a few of them if Your Honor would
7 like.

8 THE COURT: Certainly. Go ahead.

9 MR. ABATECOLA: So one of the bases is
10 that Nelson's death sentence became final after
11 the issuance of this case called *Jones v United*
12 *States*. It's in the motion, and *Jones* was what
13 we believe is a foundation of the subsequent
14 line of *Ring* cases. It was quoted in *Apprendi*
15 and *Ring*. Discusses *Hylton* and *Spaziano*, and
16 in *Jones*, the Court determines that any fact
17 that increases the maximum penalty for a crime
18 must be charged in the indictment, submitted to
19 the jury, and proven beyond a reasonable doubt.

20 And so it's our position that based on
21 *Jones* coming before Mr. Nelson's case,
22 fundamental fairness would dictate that *Hurst*
23 applied to his case.

24 Another basis would be that during the
25 voir dire process and at the penalty phase, the

1 jury was repeatedly told that its verdict was a
2 recommendation or advisory in nature. We now
3 know that that procedure is wrong.

4 Further, Nelson on appeal did challenge
5 Florida's death penalty statute. He
6 asserted -- it was limited. He asserted that
7 the heinous, atrocious, and cruel aggravating
8 factors were unconstitutionally vague. He also
9 filed a motion at trial to declare the death
10 penalty statute unconstitutional. He argued at
11 trial that due process requires a jury to
12 unanimously find an aggravating circumstance to
13 exist before it can be considered.

14 A further basis for fundamental fairness,
15 and we think this is a significant one, is that
16 numerous capital defendants --

17 MS. PACHECO: Excuse me. I'm sorry. It's
18 completely cutting out at this point. I'm not
19 catching any full sentences.

20 THE COURT: Okay. I don't know if there
21 is -- can we recall this number into the
22 conference and get you back because apparently
23 we have a bad connection.

24 MS. PACHECO: So just call the same
25 number?

1 THE COURT: I hear it cutting in and out
2 as well. Call the same number and same code
3 again.

4 MS. PACHECO: All right. Thank you. I
5 will do that, Your Honor.

6 THE COURT: Are you going to do that or
7 you want me to do that?

8 MS. PACHECO: Whichever you prefer.

9 THE COURT: I'm calling you. Okay.

10 MS. PACHECO: Okay. You're calling me.
11 Okay.

12 THE COURT: I'll call you, and I'll put
13 back in the code, and we'll see if we
14 conference together again; okay?

15 MS. PACHECO: Okay. Thank you.

16 THE COURT: Yes, ma'am.

17 MS. ROSS: Your Honor, I actually have her
18 number, her direct number. Would you like me
19 just to call it to tell her to call back in?

20 THE COURT: Yeah, if you don't mind.

21 MS. ROSS: I don't mind. Let me dial it
22 really quickly.

23 THE COURT: I would assume she knew to do
24 that.

25 MR. ABATECOLA: You could always try

1 putting her on speakerphone there.

2 MS. ROSS: I think it's better to do it
3 through -- it's just that she sent me a number
4 in case something went wrong.

5 THE COURT: Tell her to call back in. I'm
6 already in conference.

7 MS. ROSS: I'll tell her to call back in.
8 Of course, that would require her picking up
9 the number she -- Your Honor, unfortunately,
10 that did not work. I do have the general
11 number for that office. I could call.

12 THE COURT: Give them a call if you would,
13 please, ma'am. I assume she had to call into
14 the conference.

15 MS. ROSS: This is Cynthia Ross with the
16 state attorney's office. I'm in court with
17 Judge Fuller, and Christina Pacheco was
18 calling, and there's been some
19 miscommunication. We're waiting for her to
20 redial into the conference call. Can I get a
21 message to her? She's in the capital appeals
22 division.

23 I'm listening to music.

24 Hi, this is Cynthia Ross. I'm in Judge
25 Fuller's courtroom. You -- he has called back

1 in. If you could call back in as well into the
2 number, into the conference call. Thank you.
3 Yes. Use the same codes as before. All right.
4 Bye-bye.

5 That was Ms. Pacheco on the phone, so she
6 should be calling back in.

7 THE COURT: We should hear her shortly
8 then.

9 MS. PACHECO: Hello.

10 THE COURT: Hello. There you are.

11 MS. PACHECO: Hi.

12 THE COURT: I thought we were going to
13 simultaneously call back in. Okay.

14 MS. PACHECO: Okay.

15 THE COURT: Sounds like a much better
16 connection. We'll try it again.

17 MR. ABATECOLA: All set?

18 THE COURT: Okay. Are we set?

19 MS. PACHECO: Yes.

20 THE COURT: Okay.

21 MR. ABATECOLA: Okay. So back to the
22 bases for fundamental fairness. The one I want
23 to focus on here is that Mr. Nelson's crime is
24 in 1995. Other defendants, Douglas Ray Meeks
25 was in 19 -- his crime was in 1974. Jacob

1 Dougan was in 1977. John Hardwick was in 1984.
2 And each of these defendants, those three
3 defendants will get the benefit of *Hurst* under
4 the *Witt* analysis because they were granted
5 resentencings or new trials at some point in
6 time, and while we just don't think that's fair
7 that he would be treated differently given the
8 fact that their crimes actually occurred before
9 his and his convictions occurred before his and
10 to be treated differently in that manner.

11 And the final point under fundamental
12 fairness that I wanted to bring up was that I
13 believe it was in 2009, standard jury
14 instruction was issued where the jury was told
15 that even if they found sufficient aggravating
16 circumstances, and they found that the
17 aggravating circumstances outweighed the
18 mitigating circumstances, they were still not
19 required to recommend death, and which we find,
20 you know, we've termed as being tantamount to a
21 mercy recommendation, and this was -- this
22 instruction was not given in Mr. Nelson's case.

23 That wasn't in the standard jury
24 instructions. The jury was not told that it
25 could consider mercy under any circumstances,

1 and in fact, the prosecutor in the case
2 instructed the jury the opposite, that in
3 accordance with their oath, they shouldn't
4 consider sympathy or mercy.

5 So those would be the bases that I would
6 argue that fundamental fairness should apply to
7 his case.

8 And then from there, we would move on to
9 whether or not the error, the *Hurst* error in
10 Mr. Nelson's case is harmless. And the State
11 in their motion, I'm sure they'll address it,
12 they make the claim that it's the burden --
13 it's our burden to prove harmlessness. I
14 submit that it's actually the State's burden,
15 and I refer the Court to *Mosley v State* which
16 clearly states that it's the State's burden to
17 show harmless error.

18 And in this case, I would point out that
19 there was no interrogatory verdict. We don't
20 know which aggravators were the jury
21 unanimously found. There were three acts.
22 Now, one, I believe, is that during the course
23 of an act which during the course of burglary,
24 I assume there was a burglary charge and was
25 probably -- that was probably unanimous, but

1 the other two aggs were HAC -- heinous,
2 atrocious, and cruel -- and cold, calculated,
3 premeditated, and there's no way of knowing
4 whether those were by majority vote or
5 unanimously found.

6 And a couple of these intertwined with my
7 earlier argument. The jury -- it's the
8 harmlessness the jury was not instructed
9 correctly. As to a sentencing responsibility
10 under *Caldwell*, they didn't know -- we don't
11 know if they understood the responsibility for
12 the death sentence and the weight that they
13 were to be given to it in light of the fact
14 that, you know, ultimately the judge would make
15 the determination.

16 They were, again, they were never told
17 that they could recommend mercy. There is a
18 contemporaneous conviction, but as a -- it's in
19 the 3.850 motion, this case called *Johnson*,
20 which contemporaneous conviction did not render
21 the error harmless.

22 And now, the one big impediment for
23 Mr. Nelson is that it was a twelve to zero jury
24 rec, and we recognize it was a twelve to zero
25 jury rec, but again, the State seems to be of

1 the opinion that that's the be all/end all from
2 what I can tell from their pleading, and I
3 would submit that's not the case.

4 There's actually -- there's a case of *Wood*
5 *v State* I would refer to Your Honor. It's in
6 the 3.850 motion. *Wood* was a twelve to zero
7 rec. The Florida Supreme Court granted him
8 relief. The caveat on it is that they said
9 that they would find *Hurst* relief even though
10 there was a 12-0 rec, but they actually ended
11 up striking two aggs, and they gave him a life
12 sentence based on proportionality, so there was
13 no point in giving him a new penalty phase
14 since he was getting a life sentence. So but
15 that is a 12-0 rec where he would have gotten
16 *Hurst* relief had he not gotten a life sentence.

17 The other thing, this five or six other
18 cases, and these are the only cases where
19 there's been a 12-0 rec, where there's been a
20 finding of harmlessness. They're 12-0 rec
21 cases, and I would distinguish Mr. Nelson's
22 case in several of these. In two of the cases,
23 *Davis* and *Knight*, there were multiple victims,
24 multiple death recommendations. There's only
25 one in Mr. Davis' case.

1 In *King* and *Kaczmar*, the jury was actually
2 given the instruction that they could consider
3 whether the mitigating circumstances outweigh
4 the acts, that they could regardless of whether
5 the aggs outweigh the mits, they could still
6 give life. In that case, they actually
7 received those instructions.

8 One of these cases had seven aggravators,
9 another one had six, and, you know, Mr. Nelson
10 also had what I believe to be significant
11 mitigation, and the Court also looked at those
12 kinds of factors in determining harmless error,
13 and that basically concludes my argument one.

14 I don't know if you want me to run through
15 all four, if you want the State to respond to
16 each one.

17 THE COURT: Ms. Ross, how would you care
18 to respond, one at a time or all at once?

19 MS. ROSS: All at once, Your Honor.

20 THE COURT: All right, sir.

21 MR. ABATECOLA: And that was the most
22 extensive of the arguments I can tell Your
23 Honor.

24 Issue two concerns -- well, issue one was
25 a Sixth Amendment claim. Issue two is an

1 Eighth Amendment claim, and it's basically
2 it's -- it concerns *Hurst v State* as opposed to
3 *Hurst v Florida*, and the failure to apply *Hurst*
4 *v State* for submitting violates the Eight
5 Amendment, and our submission is that the
6 decisions in *Asay* and *Mosley* have opened the
7 door to arbitrariness in the proceeding because
8 prior -- since *Witt v State* issued, it was all
9 cases were determined on -- retroactivity was
10 determined on a binary approach. Either it was
11 retroactive or it wasn't retroactive.

12 THE COURT: Uh-huh.

13 MR. ABATECOLA: So this is really the
14 first time where they've kind of cut the line,
15 you know, they split the baby so to say. They
16 picked, you know, cases before June 24th, 2002.
17 Okay. These ones aren't retroactive and the
18 next day they are retroactive or vice versa. I
19 mean, that's what they did in this case.

20 And so our concern and, you know, our
21 claim is that similarly situated defendants are
22 being treated differently than arbitrary
23 manner, and if you look at some of the
24 concurring opinions and dissenting opinions in
25 *Asay* and *Mosley*, you'll see that numerous

1 Supreme Court justices likewise agree.

2 Justice Perry, he said there's no salient
3 difference between June 23rd and June 24th,
4 2002, the days before and after *Ring* arrived,
5 and he says that there's -- the majority
6 opinion draws its determinative albeit
7 arbitrary line, and Florida will treat
8 similarly treated defendants differently. And
9 again, it's -- our submission there is it's
10 caused an arbitrary result under the Eighth
11 Amendment. And that's argument two.

12 THE COURT: All right, sir.

13 MR. ABATECOLA: Argument three is also an
14 Eighth Amendment argument. This one is a
15 little bit different. This one is on the
16 Florida Supreme Court's determination in *Hurst*
17 *v State* that unanimity applies under the Eighth
18 Amendment to these cases because actually, the
19 US Supreme Court in *Hurst v Florida* did not
20 make that determination. It was actually the
21 Florida Supreme Court that decides that *Hurst v*
22 *State*, it's got to be a 12-0 decision, and they
23 talk about the evolving standards of decency,
24 and our position is that this case, the Eighth
25 Amendment involving standards of decency

1 requires that this likewise be applied to
2 Mr. Nelson's case.

3 Now, again, the issue that he faces is
4 that he had a twelve to nothing recommendation.
5 My response to that would be to say that it was
6 by an advisory verdict. It wasn't given proper
7 instructions. It didn't understand the weight
8 of what they were doing.

9 I think there was a claim by defense
10 counsel at the time that the jury was only out
11 for 26 minutes, so I think if they -- if they
12 more understood, if they appreciated the
13 significance of their verdict, one juror would
14 have recommended life, and I would point the
15 Court to *Caldwell*, which in *Caldwell* where they
16 reversed, there was a unanimous death rec in
17 that case also.

18 And I would just point out that in *Hurst V*
19 *Florida*, the Supreme Court warned against using
20 what was an advisory verdict to conclude that
21 the fact finder, the findings necessary to
22 authorize imposition of a death sentence had
23 been made by the jury. In *Hurst V Florida*,
24 there's a quote, the State cannot now treat the
25 advisory recommendation by the jury as a

1 necessary factual finding that *Ring* requires.

2 So I would submit that unanimity should
3 apply, and because of the errors in
4 Mr. Nelson's case, it should still apply. And
5 that basically is ground -- issue three.

6 And then the final issue is -- this one is
7 based on due process and the Eighth Amendment,
8 and in a nutshell, this issue is that we're
9 arguing that Mr. Nelson's -- all his previous
10 post-conviction claims must be reevaluated in
11 the light of new Florida law, so Mr. Nelson
12 had -- had a newly discovered claim, I believe.
13 I wasn't the attorney, but from what I recall,
14 he had a newly discovered claim, ineffective
15 assistance of counsel claim.

16 And what we're saying here is that the
17 standard, when you did a reasonable probability
18 standard under *Strickland* under prejudice, that
19 standard was would six jurors have changed
20 their mind, and so the standard has to be
21 different because now it would be would one
22 juror have changed their mind because that's
23 going forward, anyone who gets a resentencing
24 and goes into post-conviction, that's going to
25 be the new standard under a *Strickland*, you

1 know, test. It's not when you do reasonable
2 probability, it won't be, you know, six or
3 more. It's one. And so we believe that that
4 requires his previous issues to be reevaluated.

5 And that is the substance of my argument,
6 Your Honor. Thank you.

7 THE COURT: Yes, sir.

8 Ms. Ross?

9 MS. ROSS: Your Honor, as to this
10 particular individual, Mr. Nelson, the Florida
11 Supreme Court has spoken. The Florida Supreme
12 Court has set a bright line which is post-*Ring*
13 and pre-*Ring*. And so this, the State's
14 position is this Court's hands are tied, that
15 if the Florida Supreme Court wishes to change
16 its decision, it -- we may be back here, but at
17 this point, that that is the law, and that that
18 must be applied in Mr. Nelson's case which is a
19 pre-*Ring* case. And so I really almost want to
20 limit it to that because I think upon that, all
21 other arguments are subsumed and fall.

22 As counsel did note, this is a 12-0
23 decision, so in those cases, and I do not
24 believe a harmless error analysis is necessary
25 because we don't get past the fact that it's

1 not -- that it's not -- *Hurst* is not
2 retroactive to Nelson. Were that discussion to
3 occur, the cases where the Supreme Court of
4 Florida has held that it's harmless error are
5 those that have a 12-0 decision, and this is a
6 12-0 decision.

7 So I'm going to be very brief. The AG may
8 want to go further into the matters that have
9 been raised, but I do think that the bottom
10 line is that our Florida Supreme Court has
11 spoken, has set out a post-*Ring*/pre-*Ring*
12 demarcation. This is pre-*Ring*, and therefore,
13 the Court should and must follow the Florida
14 Supreme Court ruling as it now stands and deny
15 this motion.

16 THE COURT: Thank you, ma'am.

17 Counsel?

18 MS. PACHECO: Yes, Your Honor. We would
19 also adopt everything that Ms. Ross has stated
20 and just note that because *Hurst* is not
21 retroactive, Mr. Nelson's motion is
22 procedurally barred and untimely because it
23 does not fit within any of the exceptions and
24 Rule 3.851(d) of the Florida Rules of Criminal
25 Procedure.

1 It -- she is exactly correct in that the
2 Florida Supreme Court has held a bright line
3 rule that cases that are final prior to *Ring* do
4 not have the benefit of *Hurst* being applied
5 retroactively to them. We cited the case of
6 *Asay* and *Gaskin* in our response to send the
7 case of *Bogle v State*, number SC11-2403.

8 That's 2017 Westlaw 526507 from February 9th of
9 2017, also stands for this proposition, and
10 contrary to what opposing counsel has argued to
11 Your Honor, the Florida Supreme Court does not
12 consider any sort of caveats to their bright
13 line rule.

14 It doesn't matter whether -- whether he
15 has preserved any sort of similar issues on
16 appeal regarding his aggravating factors. It
17 doesn't matter whether there were other
18 defendants who were convicted around that time
19 and resentenced, whether he should be treated
20 similarly like that -- like them. What matters
21 is when his sentence became final, that was in
22 2000 prior to *Ring*, therefore, *Hurst* is not
23 retroactive to him.

24 I would also like to point this court to a
25 case. It's a case called *Davis*, and there is a

1 Westlaw citation, and there's also an order on
2 the Florida Supreme Court. I can give the
3 Westlaw citation. It's SC16-264. That's
4 SC16-264. That's 2017 Westlaw 656307.

5 And what's important about the *Davis* case
6 is this is a post-conviction case, an appeal,
7 and it's a pre-*Ring* case. What happened is
8 during the appeal of a successive motion, *Hurst*
9 *v Florida* was issued by the United States
10 Supreme Court. So then Mr. *Davis* was permitted
11 to do supplemental briefing on the issue of
12 *Hurst*.

13 However, after *Mosley* came out, he again
14 asked for supplemental briefing in light of
15 *Mosley* and making a harmless error claim,
16 basically everything that counsel has argued in
17 his motion. And the Florida Supreme Court
18 denied the request for supplemental briefing.

19 So basically, what that says is the Court
20 is not looking at harmless error. They're not
21 considering the fundamental fairness argument
22 in *Mosley* in applying that to pre-*Ring* cases.
23 They're not even allowing supplemental briefing
24 on that. So that should point this court in
25 the direction of knowing that it's very clear

1 and there's no exception and this court is
2 bound by the Florida Supreme Court's rulings in
3 *Asay, Gaskin, and Bogle*.

4 As to the harmless error, as Ms. Ross
5 stated, it's really not necessary to go there.
6 It would be improper to conduct a harmless
7 error analysis because *Hurst* just does not
8 apply to his case, but it is worth noting that
9 all of the -- there's been numerous cases where
10 there's been unanimous recommendations, and the
11 Court has found those cases to be harmless
12 error. We cited several in our response;
13 *Davis, Kaczmar, Knight, and King*.

14 Since then, there's been three additional
15 cases, *Hall versus State*. That's number
16 SC15-1662 2017 Westlaw 526509. There's
17 *Truehill versus State*, SC14-1514 2017 Westlaw
18 727167, and also *Jones versus State*, SC14-990
19 2017 Westlaw 823600.

20 So no matter which way you look at it,
21 Mr. Nelson is not entitled to relief, and
22 although harmless error analysis would be
23 improper in this case, if one were to be
24 conducted, any error would be considered
25 harmless.

1 As to the Eighth Amendment arguments,
2 again, because -- because of the Florida
3 Supreme Court's rulings, there is just -- there
4 is no entitlement to relief. There's no Eighth
5 Amendment decision that supports any of the
6 arguments that he's been -- that he's made, and
7 defendants are in -- similarly situated
8 defendants are being treated the same in that
9 all defendants' sentences were final before
10 *Ring* do not have the benefit of *Hurst*.

11 With regard to the argument that different
12 defendants are being treated differently based
13 on either the dates of their crimes or the
14 dates of resentencing, as stated before, what
15 we look at is when their sentence is actually
16 final, and if we were to go by trying to
17 compare defendants based on if they were
18 getting a resentencing, how they're being
19 treated differently in that way as opposing
20 counsel suggests, then we would never have any
21 sort of finality because when you look at it
22 from that context, cases are always going to be
23 treated a little bit differently based on
24 whether they get a new sentencing, whether a
25 case comes out that before the case becomes

1 final, there's always going to be a little bit
2 difference because the criminal justice system
3 is evolving and changing, and if we were to
4 hold all new laws applicable to every
5 defendant, then there would never be finality,
6 so that's just not the proper standard to
7 follow.

8 And the Florida Supreme Court has not --
9 has completely held contrary to that and has
10 not found any sort of Eighth Amendment
11 violation to pre-*Ring* cases.

12 As to the unanimity arguments, I don't
13 feel that we have to even consider that given
14 that Mr. Nelson's recommendation was unanimous,
15 but even so, the Eighth Amendment is not held
16 retroactive to cases, and *Hurst v State* hasn't
17 been held retroactive to cases.

18 And *Hurst v Florida* is a Sixth Amendment
19 case only. There is no US Supreme Court
20 precedent saying that a nonunanimous verdict
21 violates the Eighth Amendment, and Florida also
22 has a conformity clause in the constitution
23 that we are to follow the US Supreme Court
24 precedent on the Eighth Amendment.

25 As to the final claim, Mr. Nelson is not

1 entitled to a reevaluation of any of his prior
2 claims. That's just -- it's not the standard
3 that he gets to look at all of his new claims
4 based on *Hurst*. These are claims of *Hurst* is a
5 new law. It's not newly discovered evidence.
6 He can't use that under the guise of newly
7 discovered evidence.

8 This is purely a legal issue here, and
9 the -- the standards for *Strickland*, if we're
10 looking at it under a *Strickland* claim, we look
11 at whether the prejudice was caused by
12 counsel's deficiency. So it's not whether -- I
13 believe counsel stated that we are to look at
14 whether one juror would have changed his or her
15 mind. That's just not what we look at. We
16 look at whether there was a deficiency from
17 counsel and whether that deficiency prejudiced
18 Mr. Nelson, and we do not -- we don't have that
19 here. Those claims have already been
20 litigated, and there is no reason or legal
21 avenue that would allow him to revive those old
22 claims.

23 So with that, we would ask Your Honor to
24 either dismiss or deny the successive motion,
25 and with any other arguments that were not

1 covered today, just rely on the arguments that
2 we put forth in our answer, and I also just
3 would like to let this court know there was an
4 amended motion that was filed, and we don't
5 intend to file any sort of amended response.
6 We just would like to rely on everything
7 contained in our original answer.

8 THE COURT: All right. Thank you, ma'am.

9 Yes, sir. I'm going to give you the last
10 word.

11 MR. ABATECOLA: I appreciate it, Your
12 Honor.

13 Just on the -- I'm just going to work my
14 way backwards for a second here. On the
15 *Strickland* prejudice standard, counsel's
16 talking about deficient performance, but the
17 prejudice portion is if there's a reasonable
18 probability that the outcome of the proceedings
19 would have been different. So you're now --

20 THE COURT: How do you make that analysis
21 though on probability unless there's newly
22 discovered evidence, something that would have
23 changed that was not presented until now that
24 was not presented to the jury?

25 MR. ABATECOLA: Correct.

1 THE COURT: Otherwise, it's pure
2 speculation on the part of the Court; is it
3 not?

4 MR. ABATECOLA: Correct, Your Honor, but
5 what we're saying is that in their previous --
6 he had a previous post-conviction proceeding
7 where he had newly discovered evidence and a
8 *Strickland* claim, so what we're arguing is that
9 those claims need to be reevaluated under the
10 prejudice standard of looking at one juror as
11 opposed to six in a penalty phase issue. I
12 guess that's the point. I apologize if I
13 didn't make that clear.

14 THE COURT: All right, sir. I see what
15 you're saying.

16 MR. ABATECOLA: And then I do want to go
17 backwards here. The State seems to be
18 indicating that this is all set in stone and
19 *Mosley*, and it all makes sense, but I would
20 point out, you know, the State filed a motion
21 for rehearing in *Mosley*, and in that case, they
22 complain that the Court in *Mosley* offered two
23 different analyses to determine retroactivity.
24 One of equity under *James* and one under law
25 under *Witt* is where the State made the

1 argument.

2 They said the courts created confusion and
3 caused an unnecessary unsettling of the law,
4 and the State further on page four of the
5 motion, they say in instant case, the Court
6 extends the unprincipled and undefined fairness
7 exception to Witt into the context of potential
8 Sixth Amendment error under *Hurst*, and then
9 they question do we now have two completely
10 separate and distinct analyses for
11 consideration of the issue in capital cases?

12 And the Court asks -- the State asked the
13 Court to rehear the case and decide
14 retroactivity solely on the basis of Witt.

15 THE COURT: What happened?

16 MR. ABATECOLA: The Court denied their
17 motion for rehearing, Your Honor.

18 THE COURT: Okay.

19 MR. ABATECOLA: So I would just to make
20 that clear there, I don't think the State is
21 happy with portions of this, and they also
22 recognize that there is this second
23 retroactivity analysis, and I would point out
24 while the State mentioned several cases, they
25 mentioned *Gaskin*, I believe *Stein*, *Hamilton*,

1 and *Bogle*, I would point out that each of these
2 cases has very little to do with many of the
3 claims raised here. None of these -- each of
4 these cases are pre-*Mosley*, so they don't deal
5 with the fundamental fairness doctrine in
6 *Mosley*.

7 THE COURT: Yeah, but I understand that
8 dissenting opinions, but this court's bound by
9 the majority opinions of the Florida Supreme
10 Court; am I not?

11 MR. ABATECOLA: Of course, Your Honor.

12 THE COURT: All right, sir.

13 MR. ABATECOLA: Yes.

14 THE COURT: So with regard to the *Mosley*
15 analysis, the majority, there have been no
16 cases that have come out since *Mosley* where the
17 Court has changed its mind in any way; is
18 there?

19 MR. ABATECOLA: You're correct, Your
20 Honor. I would just point out that to my
21 knowledge, and if the State knows otherwise, I
22 would welcome it. To my knowledge, no case has
23 yet gone before the Court making an argument
24 based on *Mosley*. And certainly, if the State
25 is aware otherwise, but that's what I was going

1 to say.

2 This case *Gaskin*, I mean some of these
3 cases, *Bogle*, oral argument was held in 2014.
4 They had a, you know, a *Ring* claim from way
5 back when. So that's the case they're saying
6 see *Asay*, and *Hamilton* had a habeas petition
7 filed in June of '16, well before it, so
8 *Hamilton* is post-*Hurst v Florida*, but it's
9 pre-*Hurst v State, Mosley*, and those cases, and
10 so I would submit, I in all candor am unaware
11 of the Florida Supreme Court addressing a case
12 that has raised *Mosley* to this point, and I --
13 they're here.

14 MS. PACHECO: To that?

15 THE COURT: Yes, ma'am.

16 MS. PACHECO: Your Honor, that is
17 precisely why I cited the *Davis* case because
18 the Florida Supreme Court does not want to
19 address any cases involving an argument
20 applying *Mosley* to a pre-*Ring* case. They
21 haven't done so because it does not apply.
22 That fundamental fairness argument in *Mosley*
23 does not apply pre-*Ring*, and that is exactly
24 why the Florida Supreme Court denied
25 supplemental briefing on *Mosley*.

1 They granted it in relation to *Hurst*, but
2 they denied it in light of *Mosley* and any sort
3 of harmless error analysis in a pre-*Ring* case,
4 so that -- the Florida Supreme Court has not
5 addressed it because it does not even apply.

6 And as for the motion for rehearing that
7 we find in *Mosley*, we're not offering -- the
8 State is not offering two different positions.
9 The argument relating to *Mosley* was for
10 post-*Ring* cases, and that does not apply to
11 anything that we have today, Your Honor, in a
12 pre-*Ring* case.

13 THE COURT: Okay. We'll make the
14 assumption that the Supreme Court is saying
15 that they're not willing -- *Mosley* does not
16 apply based on their denial of the request for
17 additional briefing; is that correct?

18 MS. PACHECO: Yes, Your Honor.

19 THE COURT: Okay. That's just an
20 assumption on our part and an inference that we
21 can draw from their denial.

22 Yes, sir. Do you want to continue?

23 MR. ABATECOLA: If that's okay, Your
24 Honor. I don't have much more.

25 THE COURT: Okay.

1 MR. ABATECOLA: I would point out that the
2 companion case to *Asay*, Michael Lambrix, he was
3 also under warrant at the same time as *Asay*.
4 And he has similar issues. He is a pre-*Ring*
5 case. They have not ruled in his case yet, and
6 again, I don't know what that means. I'm just
7 pointing out that there is a case out there
8 that hasn't been ruled on, and also, you know,
9 I'm looking at my notes.

10 There's three cases that are pre-*Ring*
11 where the State -- where the Florida Supreme
12 Court has recently ordered the State to file
13 responses on *Hurst/Mosley* issues, so I'm not
14 sure that you can -- until we get a definitive
15 ruling in that regard that we can read into --
16 I expect the Florida Supreme Court to
17 ultimately decide the issue.

18 THE COURT: Uh-huh.

19 MR. ABATECOLA: Just to the State talking
20 about dismissal, I would point to Your Honor,
21 we are arguing under *Mosley*, it is a
22 retroactive application, but then you have to
23 look at it on a case-by-case basis in order to
24 do that, so you can't -- without a filing, you
25 can't get to that point.

1 So I think the rule has to show some
2 flexibility there, but I would also point out
3 that the Florida Supreme Court and -- has
4 treated the rule as one of giving way in
5 situations like this constantly. In numerous
6 cases throughout history, in *Chandler v Crosby*,
7 that might have been a state habeas, but that
8 was a determination of whether *Crawford v*
9 *Washington* was retroactive, and they took that
10 case.

11 Recently, in *Walls v State*, it's -- the
12 Westlaw cite is 2016 Westlaw 6137287. Was
13 October 20th, 2016. In *Walls*, they found
14 intellectual disability, that intellectual
15 disability issue in *Hall v Florida* to be
16 retroactive. *Walls* was a successive 3.850
17 motion.

18 And there's a good concurrence in *Chandler*
19 *v Crosby*. It's 916 So.2d 728, and it's a 2005
20 case, and the justice said -- basically
21 explains that we can never make determinations
22 of retroactivity in post-conviction cases if we
23 don't hear post-conviction cases, and he points
24 out a litany of cases from *Hitchcock* to *Ring*
25 where they were post-conviction appeals that

1 they had to make a determination of
2 retroactivity on. Otherwise, you would never
3 get to that determination.

4 So -- and he points out the rule is meant
5 to be flexible, and I believe -- just one
6 second, Your Honor. I don't have anything
7 further.

8 THE COURT: All right, sir.

9 Ms. Ross, anything you wanted to say in
10 response to, for instance, the *Davis* case and
11 the inference?

12 MS. ROSS: No, Your Honor.

13 THE COURT: All right. Okay. Everybody
14 satisfied we have everything on the record that
15 everyone wants to have in today?

16 MS. ROSS: Yes, Your Honor.

17 MR. ABATECOLA: Yes, Your Honor.

18 MS. PACHECO: Yes, your Honor.

19 THE COURT: Thank you. I tell what you
20 I'm going to do. I'm not going to make a
21 ruling from the bench today, but I will issue a
22 written order, and one will be forthcoming.
23 Okay. Thank you very much.

24 MR. ABATECOLA: Thank you, Your Honor.

25 MS. ROSS: Thank you.

1 STATE OF FLORIDA)

2 COUNTY OF LEE)

3

4 I, Kathy Nicholson, FPR, RPR, CRR,

5 Contract Court Reporter for the Circuit Court

6 of the 20th Judicial Circuit of the State of

7 Florida, do hereby certify that a hearing was

8 had in the cause styled in the caption hereof;

9 that I was authorized to and did attend said

10 hearing and report the proceedings had therein,

11 fully and accurately in shorthand, and that the

12 foregoing typewritten pages, numbered 1 through

13 36, inclusive, constitute a transcript of my

14 shorthand report of the proceedings taken at

15 said time.

16 IN WITNESS WHEREOF, I have hereunto set my

17 hand this 14th day of March, 2017.

18

19 /s/ Kathy Nicholson

20 Kathy Nicholson, FPR, RPR, CRR

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**IN THE CIRCUIT COURT FOR THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA**

**STATE OF FLORIDA,
Plaintiff,**

vs.

CASE NO: 95-CF-911A

**JOSHUA D. NELSON,
Defendant.**

_____ /

FINAL ORDER DENYING SUCCESSIVE 3.851 MOTION

THIS CAUSE comes before the Court on Defendant's "Successive Motion To Vacate Death Sentence, And Alternatively Motion To Correct Illegal Sentence," filed January 11, 2017 and "Amended Successive Motion To Vacate Death Sentence, And Alternatively Motion To Correct Illegal Sentence," filed on March 2, 2017, pursuant to Fla. R. Crim. P. 3.800(a) and 3.851. The State filed a response to the initial motion on March 2, 2017. Being otherwise fully advised, the Court finds as follows:

1. The facts of this case are outlined in the initial Florida Supreme Court opinion on direct appeal, Nelson v. State, 748 So. 2d 237 (Fla. 1999).

Nelson and Keith Brennan wanted to leave the city of Cape Coral. The two devised a plan to murder Tommy Owens and steal his car. Nelson and Brennan knew that Owens kept a baseball bat in his car. On the evening of March 10, 1995, Owens was lured under false pretenses to a remote street. Nelson and Brennan were able to convince Owens to exit his car, whereupon Nelson hit Owens with the bat. After a number of blows, Owens eventually fell to the ground. Nelson and Brennan tied Owens' legs and arms. Owens pleaded for his life, stating that the two could take his car. After a brief discussion, Nelson and Brennan concluded that to avoid being caught, they should kill Owens. Brennan attempted to slice Owens' throat with a box cutter. Owens was not unconscious when the attacks began and he begged Nelson to hit him again with the bat so as to knock him unconscious before the stabbing continued. Nelson did as Owens requested and Brennan continued to attack Owens with the box cutter. Nelson and Brennan also continued to strike Owens a number of times with the bat. The two eventually dragged Owens' body to nearby bushes, where Owens later died.

Nelson and Brennan picked up Tina Porth and Misty Porth and the four left the city in Owens' car. After stopping in Daytona Beach, the four left the state and drove to New Jersey. At different times during the trip, Nelson and Brennan informed Tina and Misty that they had murdered Owens. Both Tina and Misty testified at trial.

Nelson and Brennan were apprehended by law enforcement officers in New Jersey. Nelson gave a video- and audio-taped confession. In the confession, Nelson detailed his account of the murder, both at the crime scene and at the place where the bat was recovered. The video-taped confession was played to the jury. Additionally, an analyst for the Florida Department of Law Enforcement testified that blood stains on Nelson's shoes, the box cutter, and a pair of underwear that the box cutter was wrapped in all matched Owens' DNA.

Id. at 239-240.

2. A jury convicted Defendant of first-degree murder and robbery with a deadly weapon and recommended a sentence of death by a vote of twelve to zero. The Court followed the recommendation, finding three aggravating factors and concluding that the mitigating factors did not outweigh the aggravating factors. The Florida Supreme Court affirmed Defendant's convictions and sentences on direct appeal. Id. The United States Supreme Court denied Defendant certiorari relief on January 18, 2000. Nelson v. Florida, 528 U.S. 1123 (2000).

3. Defendant filed an initial motion for postconviction relief on January 5, 2001. He filed a "Sworn Complete, Second Amended Initial Motion for Post Conviction Relief Including Integrated Memorandum of Law" on June 15, 2009, which supplanted his initial motion. The evidentiary hearing was held on October 29, 2009. The postconviction motion was denied, and the denial upheld by the Florida Supreme Court. Nelson v. State, 73 So.3d 77 (Fla. 2011).

4. In this current successive motion, Defendant raised four claims that he is entitled to relief under Hurst v. Florida, 136 S. Ct. 616 (2016) and Hurst v. State, 202 So.3d 40 (Fla. 2016). A case management conference was held on March 9, 2017. Having determined that the claims raised are purely legal arguments which do not require an evidentiary hearing, the Court makes the following findings as to Defendant's claims.

5. As to Claim I, Defendant argued that his death sentence violates the Sixth Amendment under Hurst v. Florida. Defendant argued that his sentence was erroneous because all factors to impose the sentence were not found by a jury. He argued that the trial judge, not the jury, found the existence of aggravating and mitigating factors. Defendant also argued that he is in a protected class of pre-Ring death row inmates who are not being treated equally with post-Ring defendants, or other pre-Ring defendants who are receiving new penalty phases after collateral proceedings. Defendant argued that this error was not harmless because the State could not show beyond a reasonable doubt that no juror would have voted for a life sentence had the jury been properly instructed as to mercy.

6. The State argued that no harmless error analysis was necessary, since the Hurst decisions do not apply retroactively to this case, and thus there was no constitutionally cognizable error. The State argued that even if a harmless analysis was done, Defendant received a unanimous verdict, and any error would be harmless.

7. Defendant argued that although his case was final before Ring v. Arizona, 536 U.S. 583 (2002), he is still entitled to have the Hurst decisions apply retroactively to his case because he raised and specifically preserved a Ring claim, citing Mosley v. State, ___ So.3d ___, 2016 WL 7406506, *45 (Fla. 2016). Defendant contended that Mosley created two classes of defendants entitled to retroactive application of Hurst v. Florida - those whose cases were final after Ring was decided, and those whose cases were final before Ring, but who preserved a Ring claim. Defendant argued that fundamental fairness, as argued in Mosley, also required retroactive application of the Hurst decisions to his case. However, a plain reading of the opinion does not support that argument. In Mosley, the Florida Supreme Court held that for defendants whose cases were final after Ring, and who raised Ring claims in vain, Hurst v.

Florida applied retroactively. Id. at *25 (“Defendants who were sentenced to death under Florida’s former, unconstitutional capital sentencing scheme after Ring should not suffer due to the United States Supreme Court’s fourteen-year delay in applying Ring to Florida”). Mosley does not hold that Hurst applies retroactively for cases which were final before Ring was decided, even if a Ring claim was made. In Asay v. State, ___ So.3d ___, 2016 WL 7406538 (Fla. 2016), the Florida Supreme Court held that Hurst did not apply retroactively for any capital case final before Ring, because a new penalty phase for decades-old cases would be less complete and less accurate than the original proceedings. The Florida Supreme Court has not held that fundamental fairness acts as an alternative basis for retroactivity. On the contrary, the Florida Supreme Court cited fundamental fairness in Mosley only when analyzing why cases final after Ring should receive retroactive application of Hurst v. Florida, since it had previously ruled in Asay that Hurst v. Florida did not apply retroactively to cases final before Ring. No Florida Supreme Court case since Mosley has held that fundamental fairness can be used to make a retroactive application of Hurst to cases final before Ring. While Defendant cited to the concurring and dissenting opinions in Asay and Mosley in support of retroactive application to his case, this Court is bound by the majority opinions of the Florida Supreme Court. Hurst v. Florida does not apply retroactively to Defendant’s case even though he preserved a Ring claim. See Gaskin v. State, ___ So.3d ___, 2017 WL 224772 (Fla. 2017) (Hurst does not apply retroactively to a defendant whose case was final before Ring was decided, regardless of that defendant having raised and preserved Ring claims); Bogle v. State, ___ So.3d ___, 2017 WL 526507 (Fla. 2017).

8. Even if Hurst applied retroactively to this case, any error would be harmless, since the jury rendered a unanimous verdict recommending a death sentence. In doing so, the jury had to

have found at least one aggravating factor was proven beyond a reasonable doubt, that the aggravating factors outweighed the mitigating factors, and that death was the appropriate sentence. See Hall v. State, ___ So.3d ___, 2017 WL 526509 *22 (Fla. 2017). Defendant argued that the jury was not instructed it could dispense mercy. Defendant's jury was not instructed it could decline to recommend a death sentence even if it found the aggravating factors outweighed the mitigating factors. Relevant portions of the jury instructions are attached. However, the jury "received substantially the same critical instructions" to conclude beyond a reasonable doubt that the jury unanimously made the requisite findings before it made the unanimous recommendation. Knight v. State, ___ So.3d ___, 2017 WL 411329 *14 (Fla. 2017). Therefore, **Claim I is DENIED.**

9. **As to Claim II**, Defendant argued that his death sentence violates the Eighth Amendment under Hurst v. Florida. Defendant argued that the recent Florida Supreme Court decisions permitting partial retroactivity inject arbitrariness into the capital sentencing scheme and violate the Eighth Amendment. Defendant argued that in Furman v. Georgia, 408 U.S. 238 (1972), the Supreme Court held that the death penalty could be not imposed in an arbitrary or capricious manner. This Court is bound by the decisions of the Florida Supreme Court, and it is outside of this Court's authority to find Florida Supreme Court decisions unconstitutional. Since the Hurst decisions do not apply retroactively to Defendant's case, he is not entitled to relief as a matter of law. Therefore, **Claim II is DENIED.**

10. **As to Claim III**, Defendant argued that his death sentence violates the Eighth Amendment under Hurst v. State. Defendant argued that his sentence constituted cruel and unusual punishment, because the Hurst v. State decision held that the Eighth Amendment required a unanimous jury verdict by a properly instructed jury in order to impose a death

sentence. Defendant believed his jury was not properly instructed, as the jury was not instructed it could dispense mercy even if the aggravating factors outweighed the mitigating factors.

Defendant also argued that he is in a protected class of pre-Ring death row inmates who are not being treated equally with post-Ring defendants, or other pre-Ring defendants who are receiving new penalty phases after collateral proceedings.

11. The State argued that this claim is procedurally barred, because the U.S. Supreme Court has never held that the Eighth Amendment requires unanimous jury verdicts in capital cases. The State argued that the U.S. Supreme Court overruled Spaziano v. Florida 468 U.S. 447 (1984) in Hurst solely to the extent that it allowed a sentencing judge to find aggravating factors independent of a jury's factfinding, and did not overrule it on Eighth Amendment grounds. The State noted that the Florida Supreme Court is required by the Florida Constitution's conformity clause to interpret Florida's prohibition against cruel and unusual punishment in conformity with the Supreme Court's holdings on the Eighth Amendment. To the extent Defendant raised fairness, the State argued that the accuracy of Defendant's death sentence was not at issue, such that fairness did not demand retroactive application of Hurst.

12. Since the Hurst decisions do not apply retroactively to Defendant's case, he is not entitled to relief as a matter of law, and his death sentence does not constitute cruel and unusual punishment. The Florida Supreme Court has held that even if a jury is not instructed it could dispense mercy, jury instructions are sufficient if they adequately informed the jury of the requisite findings required. Knight v. State, 2017 WL 411329; Hall v. State, ___ So.3d ___, 2017 WL 526509, *22-23 (Fla. 2017); King v. State, ___ So.3d ___, 2017 WL 372081 (Fla. 2017); Kaczmar v. State, ___ So.3d ___, 2017 WL 410214 (Fla. 2017). The jury instructions in this case did so. This Court has no authority to find decisions of the Florida Supreme Court

unconstitutional. Therefore, **Claim III is DENIED.**

13. As to **Claim IV**, Defendant argued that Hurst v. State and Perry v. State, 41 Fla. L. Weekly S449 (Fla. 2016), are new law that would apply at resentencing, and require the Court to revisit previously raised postconviction claims. Defendant argued that his previously presented postconviction claims must be re-visited and re-evaluated in light of the new Florida law which would govern at resentencing. Defendant cited to Hildwin v. State, 141 So.3d 1178 (Fla. 2014) and Swafford v. State, 125 So.3d 760 (Fla. 2013) in arguing that the standard for newly discovered evidence – whether a different outcome was probable – should be applied by the Court to reconsider all his prior postconviction claims in light of the requirement that the jury must now make all findings unanimously. Defendant believed that the prejudice analysis would be different now, and that the prior postconviction claims would be granted because there was a reasonable probability that on resentencing, at least one juror would again vote for a life sentence. The State argued that the cases relied on by Defendant apply to claims of newly discovered evidence, not to claims of new law. The State argued that Hurst “does not operate to breathe new life into unrelated, previously denied claims.” Response p. 15. As the State pointed out, Defendant cited to no legal authority which would authorize, much less require, this Court to reconsider previously denied postconviction claims. Defendant has not claimed the existence of any newly discovered evidence. Since Hurst does not apply retroactively to this case, Defendant is not entitled to relief as a matter of law. Therefore, **Claim IV is DENIED.**

14. To the extent Defendant argued his sentence was illegal, Defendant has failed to establish that the records demonstrate on their face any illegality in his sentence. Defendant’s sentence was legal at the time it was imposed, and since the Florida Supreme Court has held that Hurst does not apply retroactively to cases such as Defendant’s case, then Defendant’s sentence

is still legal.

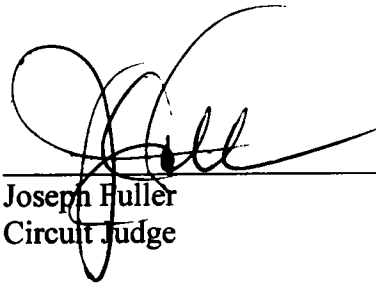
15. The following are attached hereto: (1) relevant portions of the trial transcript.

Therefore, it is

ORDERED AND ADJUDGED that Defendant's "Amended Successive Motion To Vacate Death Sentence, And Alternatively Motion To Correct Illegal Sentence" is DENIED.

Defendant may file a notice of appeal within thirty days of the date this order is rendered.

DONE AND ORDERED in Chambers at Fort Myers, Lee County, Florida, this 17TH
day of April, 2017.



Joseph Fuller
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above order has been furnished to: **John P. Abatecola, Esq.**, jabatecola@comcast.net, 20301 Grande Oak Blvd., Ste. 118-61, Estero, FL 33928; **Carol M. Dittmar, Esq.**, carol.dittmar@myfloridalegal.com, capapp@myfloridalegal.com, Office of the Attorney General, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607; **Cynthia Ross, Esq.**, servicesao-lee@sao.cjis20.org, Office of the State Attorney, P.O. Box 399, Ft. Myers, FL 33902-0399; and **Administrative Office of the Courts (XIV)**, 1700 Monroe St., Ft. Myers, FL 33901; this 19th day of April, 2017.

LINDA DOGGETT
Clerk of Court

By: J. Marcia
Deputy Clerk

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN
AND FOR LEE COUNTY, FLORIDA CRIMINAL ACTION

STATE OF FLORIDA,

-vs-

CASE NO: 95-911CFA-WJN

JOSHUA D. NELSON,

VOLUME II of II

Defendant.

Pages 197 - 237

TRANSCRIPT OF PROCEEDINGS

Before the Honorable WILLIAM J. NELSON, Judge of said Court, at the proceedings in the above-styled cause on November 7, 1996, commencing at 8:30 a.m. at the Lee County Justice Center, Ft. Myers, Florida.

FILED

FEB 10 1997

CHARLE GREEN, CLERK
CIRCUIT/COUNTY COURTS
BY *A. Trapani* D.C.

FILED

SID J. WHITE

MAR 18 1997

NOLEN-MARTINA REPORTING SERVICES
Courtney Building, Suite 201
2069 First Street
Fort Myers, Florida 33901
(941) 334-6545
FAX (941) 332-2913

CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

DUPLICATE
ORIGINAL

1 THE COURT: Ladies and gentlemen of the jury, it
2 is now your duty to advise the Court as to what
3 punishment should be imposed upon the defendant for his
4 crime of first degree premeditated murder.

5 As you have been told, the final decision as to
6 what punishment shall be imposed is a responsibility of
7 the judge.

8 Your advisory sentence as to what sentence should
9 be imposed on this defendant is entitled by law and
10 will be given great weight by this court in determining
11 what sentence to impose in this case. It is only under
12 rare circumstances that this court could impose a
13 sentence other than what you recommend.

14 It is your duty to follow the law that will now
15 be given to you by the Court and render to the Court an
16 advisory sentence based upon your determination as to
17 whether sufficient aggravating circumstances exist to
18 justify the imposition of the death penalty and whether
19 sufficient mitigating circumstances exist to outweigh
20 the aggravating circumstances found to exist.

21 Your advisory sentence should be based upon the
22 evidence that you have heard while trying the guilt or
23 innocence of the defendant and evidence that has been
24 presented to you in these proceedings.

25 The aggravating circumstances that you may

1 consider are limited to any of the following that are
2 established by the evidence:

3 One, the crime for which the defendant is to be
4 sentenced was committed while he was engaged in the
5 commission of the crime of robbery.

6 Two, the crime for which the defendant is to be
7 sentenced was especially heinous, atrocious or cruel.

8 Heinous means extremely wicked or shockingly
9 evil.

10 Atrocious means outrageously wicked and vile.

11 Cruel means designed to inflict a high degree of
12 pain with utter indifference to or even enjoyment of
13 the suffering others.

14 The kind of crime intended to be included as
15 heinous, atrocious or cruel is one accompanied by
16 additional abilities that show that the crime was
17 conscienceless or pitiless and was unnecessarily
18 torturous to the victim.

19 Three, the crime for which the defendant is to be
20 sentenced was committed in a cold and calculated and
21 premeditated manner and without any pretense of moral
22 or legal justification.

23 In order for you to consider this aggravating
24 factor, you must find the murder was cold and
25 calculated and premeditated and that there was no

1 pretense of moral or legal justification.

2 Cold means the murder was the product of calm and
3 cool reflection.

4 Calculated means having a careful plan or
5 prearranged design to commit murder.

6 As I have previously defined for you, a killing
7 is premeditated if it occurs after the defendant
8 consciously decides to kill.

9 The decision must be present in the mind at the
10 time of the killing.

11 The law does not fix the exact period of time
12 that must pass between the formation of the
13 premeditated intent to kill and the killing.

14 The period of time must be long enough to allow
15 reflection by the defendant.

16 The premeditated intent to kill must be formed
17 before the killing; however, in order for this
18 aggravating circumstance to apply, a heightened level
19 of premeditated -- premeditation demonstrated by a
20 substantial period of reflection is required.

21 A pretense of moral or legal justification is any
22 claim of justification or excuse that, though
23 insufficient to reduce the degree of murder,
24 nevertheless rebuts the otherwise cold, calculated or
25 premeditated nature of the murder.

1 If you find the aggravating circumstances do not
2 justify the death penalty, your advisory sentence
3 should be one of life imprisonment without the
4 possibility of parole.

5 Should you find sufficient aggravating
6 circumstances do exist, it will then be your duty to
7 determine whether mitigating circumstances exist that
8 outweigh the aggravating circumstances.

9 Among the mitigating circumstances you may
10 consider if established by the evidence are: One, the
11 crime for which the defendant is to be sentenced was
12 committed while he was under the influence of extreme
13 mental or emotional disturbance.

14 Two, the defendant was an accomplice in an
15 offense for which he is to be sentenced but the offense
16 was committed by another person and the defendant's
17 participation was relatively minor.

18 Three, the defendant acted under extreme duress
19 or under the substantial domination of another person.

20 Four, the capacity of the defendant to appreciate
21 the criminality of his conduct or to conform his
22 conduct to the requirements of law was substantially
23 impairment.

24 Five, the age of the defendant at the time of the
25 crime.

1 And six, the existence of any other factor in the
2 defendant's background that would mitigate against the
3 imposition of the death penalty.

4 Each aggravating circumstance must be established
5 beyond a reasonable doubt before it may be considered
6 by you in arriving at your decision.

7 If one or more aggravating circumstances are
8 established, you consider -- you should consider all
9 the evidence tending to establish one or more of the
10 mitigating circumstances and give that evidence such
11 weight as you feel it should receive in reaching your
12 conclusion as to the sentence that should be imposed.

13 A mitigating circumstance need not be proved
14 beyond a reasonable doubt by the defendant. If you are
15 reasonably convinced that a mitigating circumstance
16 exists, you may consider it as established.

17 The sentence that you recommend to the Court must
18 be based upon the facts as you find them from the
19 evidence and the law.

20 You should weigh the aggravating circumstances
21 against the mitigating circumstances, and your advisory
22 sentence must be based on these considerations.

23 In these proceedings, it is not necessary that
24 the advisory sentence of the jury be unanimous.

25 The fact that the determination of whether you

1 recommend a sentence of death or sentence of life
2 imprisonment in this case can be reached by a single
3 ballot, should not influence you to act hastily or
4 without due regard to the gravity of these proceedings.

5 Before you ballot, you should carefully weigh,
6 sift and consider the evidence and all of it realizing
7 that human life is at stake, and bring to bear your
8 best judgment in reaching your advisory sentence.

9 If a majority of the jury determines that Joshua
10 D. Nelson should be sentenced to death, your advisory
11 sentence will be, a majority of the jury by a vote of,
12 and then there's a place for the vote, advise and
13 recommend to the Court that it impose the death penalty
14 upon Joshua D. Nelson.

15 On the other hand, if by six or more votes the
16 jury determines that Joshua D. Nelson should not be
17 sentenced to death, your advisory sentence will be, the
18 jury advises and recommends to the Court that it is to
19 impose a sentence of life imprisonment upon Joshua D.
20 Nelson without the possibility of parole.

21 You will now require to consider your
22 recommendation. When you have reached an advisory
23 sentence in conformity with these instructions, that
24 form of recommendation should be signed by your
25 foreperson and returned to the Court.

1 I now give to the bailiff the two forms that I
2 have mentioned in my instructions and instruct him to
3 take those forms.

4 And Ms. Wyatt and Ms. Graham, I thank you very
5 much for your attention in this case, and you are now
6 hereby discharged since the other 12 folks have
7 obviously remained healthy and are able to participate,
8 and you may now step down.

9 The rest of you may now retire to consider your
10 recommendation.

11 (The jury left the courtroom and trial
12 proceedings continued as follows:)

13 THE COURT: Any objections to the jury
14 instructions as --

15 MR. STEVENS: Yes, Your Honor.

16 THE COURT: State them.

17 MR. STEVENS: I've already stated them, the ones
18 we said this morning.

19 THE COURT: Renewing?

20 MR. STEVENS: Renewing the objections that we set
21 forth orally and in writing.

22 THE COURT: Very well. Let the record reflect.
23 Counsel?

24 MR. RUSSELL: State would just reiterate the same
25 objections that were discussed this morning.

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

CASE NO: 95-CF-911-A
DEATH PENALTY CASE

v.

JOSHUA D. NELSON,

Defendant.

_____/

NOTICE OF SUBSTITUTION OF CO-COUNSEL

COMES NOW, the STATE OF FLORIDA, by and through the undersigned counsel, and hereby gives notice that CHRISTINA Z. PACHECO, Assistant Attorney General, is substituted for Carol M. Dittmar as co-counsel for Plaintiff in the instant case. Any and all pleadings should be sent to Christina Z. Pacheco, rather than Carol M. Dittmar, and service should also be sent to the State Attorney's Office.

ALL PARTIES PLEASE TAKE NOTICE.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of May, 2017, I 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: John Abatecola, Counsel for Mr. Nelson and Linda McDermott, Designated counsel for Mr. Nelson, McClain & McDermott, P.A., 20301 Grande Oak Boulevard, Suite 118-61, Estero, Florida 33928 **jabatecola@comcast.net** and **lindammcdermott@msn.com**; Cynthia Ross, Assistant State Attorney, Office of the State Attorney, Post Office Box 399, Fort Myers, Florida 33902-0399 **cross@sao.cjis20.org** and **servicesao-lee@sao.cjis20.org**; and a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to: The Honorable Joseph C. Fuller, Jr., Lee County Justice Center, 1700 Monroe Street, Fort Myers, Florida 33901.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

/s/ Christina Z. Pacheco
CHRISTINA Z. PACHECO
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capapp@myfloridalegal.com [and]
christina.pacheco@myfloridalegal.com
CO-COUNSEL, STATE OF FLORIDA

**IN THE CIRCUIT COURT OF THE
TWENTIETH JUDICIAL CIRCUIT, IN AND
FOR LEE COUNTY, FLORIDA**

CASE NO. 95-CF-911A

STATE OF FLORIDA,

Plaintiff,

v.

JOSHUA D. NELSON,

Defendant.

_____ /

NOTICE OF APPEAL

Defendant, **JOSHUA D. NELSON**, takes and enters his appeal to the Florida Supreme Court to review the Orders and Judgments of the Circuit Court of the Twentieth Judicial Circuit, in and for Lee County, Florida, bearing the date of April 17, 2017, and all other rulings, actions, or acts rendered adversely to the Defendant in support of said judgment.

The nature of the order appealed from is the denial of Defendant's Amended Successive Motion to Vacate Death Sentence, in the above-captioned case, which is a final order.

All parties to said cause are hereby notified of the entry of this appeal.

I HEREBY CERTIFY that a true copy of the foregoing notice of appeal has been furnished through the Florida Courts E-Filing Portal to Christina Z. Pacheco, christina.pacheco@myfloridalegal.com, Office of the Attorney General, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607; Cynthia Ross, cross@sao.cjis20.org, Assistant State Attorney, Office of the State Attorney, P.O. Box 399, Fort Myers, FL 33902-0399, on May 15, 2017.

/s/ John Abatecola

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Counsel for Mr. Nelson

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Designated Counsel for Mr. Nelson

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**IN THE CIRCUIT COURT OF THE
TWENTIETH JUDICIAL CIRCUIT, IN AND
FOR LEE COUNTY, FLORIDA**

CASE NO. 95-CF-911A

STATE OF FLORIDA,

Plaintiff,

v.

JOSHUA D. NELSON,

Defendant.

_____ /

STATEMENT OF JUDICIAL ACTS TO BE REVIEWED

Defendant, **JOSHUA D. NELSON**, files the following Statement of Judicial Acts to be reviewed:

Final Order Denying Successive 3.851 Motion

I HEREBY CERTIFY that a true copy of the foregoing Statement of Judicial Acts to Be Reviewed has been furnished through the Florida Courts E-Filing Portal to Christina Z. Pacheco, christina.pacheco @myfloridalegal.com, Office of the Attorney General, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607; Cynthia Ross, cross@sao.cjis20.org, Assistant State Attorney, Office of the State Attorney, P.O. Box 399, Fort Myers, FL 33902-0399, on May 15, 2017.

/s/ John Abatecola

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**IN THE CIRCUIT COURT OF THE
TWENTIETH JUDICIAL CIRCUIT, IN AND
FOR LEE COUNTY, FLORIDA**

CASE NO. 95-CF-911A

STATE OF FLORIDA,

Plaintiff,

v.

JOSHUA D. NELSON,

Defendant.

DIRECTIONS TO THE CLERK

Defendant, **JOSHUA D. NELSON**, directs the Clerk to include all items filed in this postconviction proceeding in the record on appeal since October 7, 2016, including the following pleadings and orders:

- a. Pro se Successive Motion for Postconviction Relief, October 7, 2016
- b. Pro se Motion to Dismiss Counsel, October 7, 2016
- c. Pro se Motion for Leave to Amend, October 10, 2016
- d. Order of Reassignment, October 19, 2016
- e. Response to Motion to Dismiss, October 31, 2016
- f. Order Granting Motion to Dismiss Counsel and Appointing Counsel from Registry, November 1, 2016
- g. Order Striking Pro Se Successive 3.851 Motion, November 1, 2016
- h. Notice to the Court and/or Motion to Withdraw, November 8, 2016
- i. Motion for Rehearing, November 10, 2016
- j. Order on State's Motion for Rehearing, November 21, 2016
- k. Order Denying Motion to Withdraw, December 6, 2016
- l. Successive Motion to Vacate Death Sentence, January 11, 2017
- m. Notice of Appearance, January 11, 2017
- n. Motion to Exceed Page Limitation, January 11, 2017
- o. Motion to Amend, January 11, 2017

- p. Motion to Strike, January 20, 2017
- q. Response to State's Motion to Strike, January 23, 2017
- r. Order Denying State's Motion to Strike, January 24, 2017
- s. Order Dismissing Motion to Amend, January 24, 2017
- t. Order Granting Motion to Exceed the Page Limit, January 24, 2017
- u. State's Answer to Successive Motion for Postconviction Relief, February 3, 2017
- v. Order Scheduling Case Management Conference, February 7, 2017
- w. Motion to Reschedule Case Management Conference, February 9, 2017
- x. Order Denying Motion for Continuance, February 15, 2017
- y. Motion to Amend, March 2, 2017
- z. Amended Successive Motion to Vacate Death Sentence, March 2, 2017
- aa. Motion to Exceed Page Limitation, March 2, 2017
- bb. Order Granting Second Motion to Amend, March 6, 2017
- cc. Final Order Denying Successive 3.851 Motion, April 19, 2017
- dd. Notice of Substitution of Co-Counsel, May 3, 2017

I HEREBY CERTIFY that a true copy of the foregoing Directions to the Clerk has been furnished through the Florida Courts E-Filing Portal to Christina Z. Pacheco, christina.pacheco@myfloridalegal.com, Office of the Attorney General, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607; Cynthia Ross, cross@sao.cjis20.org, Assistant State Attorney, Office of the State Attorney, P.O. Box 399, Fort Myers, FL 33902-0399, on May 15, 2017.

/s/ John Abatecola
JOHN ABATECOLA
Florida Bar No. 0112887
jabatecola@comcast.net
Counsel for Mr. Nelson

LINDA MCDERMOTT
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Designated Counsel for Mr. Nelson

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**IN THE CIRCUIT COURT OF THE
TWENTIETH JUDICIAL CIRCUIT, IN AND
FOR LEE COUNTY, FLORIDA**

CASE NO. 95-CF-911A

STATE OF FLORIDA,

Plaintiff,

v.

JOSHUA D. NELSON,

Defendant.

**DEFENDANT'S DESIGNATION TO COURT REPORTER
AND REPORTER'S ACKNOWLEDGMENT**

I. DESIGNATION.

Defendant, **JOSHUA D. NELSON**, files this Designation to Court Reporter and directs that the official court reporters transcribe an original of the postconviction proceedings to be used in this appeal:

1. All postconviction proceedings recorded by the Court Reporter from October 7, 2016, to date. No portion of the postconviction record should be excepted. Counsel has determined that there was a hearing on the following date:

a. March 9, 2017

2. The Court Reporter is directed to file the original with the clerk of the lower tribunal.

I, counsel for Defendant, certify that satisfactory financial arrangements have been made with the Court Reporter for preparation of the transcript.

/s/ John Abatecola
JOHN ABATECOLA

Counsel for Defendant

II. REPORTER'S ACKNOWLEDGMENT.

1. The following designation was served on _____, 2017, and received on _____, 2017.

2. Satisfactory arrangements have/have not been made for payment of the transcript cost. These financial arrangements were completed on _____, 2017.

3. Number of hearing days to be transcribed: _____.

4. Estimated number of pages: _____.

5a. The transcript will be available within _____ days of service of the foregoing designation and will be filed on or before the _____ day of _____, 2017.

OR

5b. For the following reason(s) the Court Reporter requests an extension of time of _____ days for preparation of the transcript which will be filed on or before the _____ day of _____, 2017:

6. Completion and filing of this acknowledgment by the Court Reporter constitutes submission to the jurisdiction of the Court for all purposes in connection with these appellate proceedings.

7. The undersigned Court Reporter certifies that the foregoing is true and correct and that a copy has been furnished by mail/hand delivery this _____ day of _____, 2017, to each of the parties or their counsel.

Court Reporters

I HEREBY CERTIFY that a true copy of the foregoing Designation has been furnished through the Florida Courts E-Filing Portal to Christina Z. Pacheco, christina.pacheco@myfloridalegal.com, Office of the Attorney General, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607; Cynthia Ross, cross@sao.cjis20.org, Assistant State Attorney, Office of the State Attorney, P.O. Box 399, Fort Myers, FL 33902-0399, on May 15, 2017.

/s/ John Abatecola
JOHN ABATECOLA
Florida Bar No. 0112887
jabatecola@comcast.net
Counsel for Mr. Nelson

LINDA MCDERMOTT
Fla. Bar No. 0102857
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lindammcdermott@msn.com
Designated Counsel for Mr. Nelson

20301 Grande Oak Blvd
Suite 118-61
Estero, FL 33928

CERTIFICATE OF CLERK

STATE OF FLORIDA,
COUNTY OF LEE

I, LINDA DOGGETT, Clerk of Court, In and For Lee County, Florida DO HEREBY CERTIFY that the foregoing record inclusive contain a true and correct copy of the case of:

State of Florida
vs
Nelson, Joshua D

and a true and correct recital and inclusion of all such copies of official imaged documents and proceedings in said cause as they appear from the records and files of my office that have been included in said record pursuant to Florida Rules of Appellate Procedures.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Court at Fort Myers, Lee County, Florida on June 2, 2017.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the record on appeal in the above styled case has been mailed to:

Attorney General
John Abatecola Esq.



LINDA DOGGETT
Clerk of Court
PO Box 310
Fort Myers, FL 33902

By: Lori Slisz
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