

IN THE SUPREME COURT OF FLORIDA

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CASE NO. SC22-322  
L.T. No. 102009CF000671000AMX

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HECTOR SANCHEZ-TORRES,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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ON APPEAL FROM THE CIRCUIT COURT  
OF THE FOURTH JUDICIAL CIRCUIT,  
IN AND FOR CLAY COUNTY, STATE OF FLORIDA

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INITIAL BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

**REQUEST FOR ORAL ARGUMENT** ..... 1

**STATEMENT OF THE CASE** ..... 1

**STATEMENT OF FACTS RELEVANT TO THIS APPEAL** ..... 2

    A. The conviction, sentencing, and resentencings of Markeil  
        Thomas ..... 2

    B. Appellant’s representation by unqualified counsel, Francis  
        Shea ..... 6

**SUMMARY OF THE ARGUMENT** ..... 15

**ARGUMENT** ..... 17

**ISSUE I: THE CIRCUIT COURT ERRED IN RULING APPELLANT’S  
SUCCESSIVE 3.851 MOTION UNTIMELY** ..... 18

    I. Successive 3.851 motions can be brought through  
        the 3.851(d)(2)(C) attorney-negligence gateway ..... 18

    II. Postconviction counsel, who this Court has already  
        found was never qualified to appear in this case,  
        failed to file the successive Rule 3.851 motion  
        through neglect ..... 22

    III. The circuit court erroneously found that the  
        successive 3.851 motion was not timely ..... 30

    IV. The failure to apply the 3.851(d)(2)(C) attorney-  
        negligence gateway would violate  
        Appellant’s constitutional rights ..... 35

**ISSUE 2: THE CIRCUIT COURT ERRED IN DENYING APPELLANT’S CLAIM OF NEWLY DISCOVERED EVIDENCE REGARDING MARKEIL THOMAS’S NEW SENTENCE AND RELATED NEW EVIDENCE OF THOMAS’S CULPABILITY ..... 37**

I. The newly discovered evidence ..... 40

    A. Thomas’s new sentence ..... 40

    B. Thomas’s recantation ..... 46

    C. The forensic report and prior conviction ..... 51

II. The cumulative prejudice of all newly discovered evidence ..... 54

    A. The evidence at Appellant’s trial ..... 56

    B. The newly discovered evidence ..... 57

**ISSUE 3: THE CIRCUIT COURT ERRED IN DENYING APPELLANT’S CLAIM THAT HIS DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT IN LIGHT OF THOMAS’S TERM-OF-YEARS SENTENCE ..... 63**

**TABLE OF AUTHORITIES**

| <b><u>CASES</u></b>   | <b>Page(s)</b> |
|---|----------------|
| <i>Abdul-Kabir v. Quarterman</i> , 550 U.S. 233 (2007) .....    | 68             |
| <i>Archer v. State</i> , 934 So. 2d 1187 (Fla. 2006) .....      | 48, 59         |
| <i>Atkins v. Virginia</i> , 536 U.S. 304 (2002) .....           | 66, 67         |
| <i>Blake v. State</i> , 972 So. 2d 839 (Fla. 2007) .....        | 62, 69         |
| <i>Bostock v. Clayton County</i> , 140 S. Ct. 1731 (2020) ..... | 19             |

|  |            |
|--|------------|
| <i>Bounds v. Smith</i> , 430 U.S. 817 (1977) .....   | 37         |
| <i>Brooks v. State</i> , 175 So. 3d 204 (Fla. 2015) .....                                  | 33         |
| <i>Cadet v. Fla. Dep't of Corr.</i> , 853 F.3d 1216 (11th Cir. 2017) .....                 | 25         |
| <i>Cartenuto v. Justice Admin. Comm'n</i> ,<br>260 So. 3d 908 (Fla. 2018) .....            | 12         |
| <i>Chandler v. Crosby</i> , 916 So. 2d 728 (Fla. 2005) .....                               | 22         |
| <i>Clisby v. Alabama</i> , 26 F.3d 1054 (11th Cir. 1994) .....                             | 60         |
| <i>Coleman v. Thompson</i> , 501 U.S. 722 (1991) .....                                     | 23         |
| <i>Cruz v. State</i> , 320 So. 3d 695 (Fla. 2021) .....                                    | 65         |
| <i>Cummings v. Sec'y for Dep't of Corr.</i> , 588 F.3d 1331<br>(11th Cir. 2009) .....      | 60         |
| <i>Davis v. State</i> , 26 So. 3d 519 (Fla. 2009) .....                                    | 30         |
| <i>Dist. Atty's Off. for Third Judicial Dist. v. Osborne</i> ,<br>557 U.S. 52 (2009) ..... | 36         |
| <i>Downs v. State</i> , 572 So.2d 895 (Fla.1990) .....                                     | 62         |
| <i>Eddings v. Oklahoma</i> , 455 U.S. 104 (1982) .....                                     | 41         |
| <i>Enmund v. Florida</i> , 458 U.S. 782 (1982) .....                                       | 66         |
| <i>Farina v. State</i> , 937 So. 2d 612 (Fla. 2006) .....                                  | 41, 42, 43 |
| <i>Franqui v. State</i> , 81 So. 3d 414 (Fla. 2012) .....                                  | 21         |
| <i>Freeman v. State</i> , 858 So. 2d 319 (Fla. 2003) .....                                 | 53, 60     |
| <i>Godfrey v. Georgia</i> , 446 U.S. 420 (1980) .....                                      | 67         |

|  |                |
|--|----------------|
| <i>Gonzalez v. State</i> , 136 So. 3d 1125 (Fla. 2014) .....   | 44             |
| <i>Green v. Georgia</i> , 442 U.S. 95 (1979) .....   | 52, 54, 68     |
| <i>Harris v. State</i> , 959 So. 2d 794 (Fla. 2d DCA 2007) .....   | 45, 72         |
| <i>Hildwin v. State</i> , 141 So. 3d 1178 (Fla. 2014) .....  | 39, 54         |
| <i>Holland v. Florida</i> , 560 U.S. 631 (2010) .....  | 22, 24, 25     |
| <i>Howell v. State</i> , 145 So. 3d 774 (Fla. 2013) .....  | 19, 20, 32, 33 |
| <i>Huff v. State</i> , 622 So. 2d 982 (Fla. 1993) .....  | 2              |
| <i>In Re: Amendments to the Florida Rule of<br/>Appellate Procedure 9.141</i> , SC21-673 (Fla. May 19, 2022) ..... | 22             |
| <i>Jones v. State</i> , 591 So. 2d 911 (Fla. 1991) .....   | 16, 46, 53     |
| <i>Jones v. State</i> , 709 So. 2d 512 (Fla. 1998) .....   | 57             |
| <i>K Mart Corp. v. Cartier, Inc.</i> , 486 U.S. 281 (1988) .....   | 20             |
| <i>Kocaker v. State</i> , 311 So. 3d 814 (Fla. 2020) .....   | 17             |
| <i>Lawrence v. State</i> , 308 So. 3d 544 (Fla. 2020) .....  | 16, 64, 65     |
| <i>Lockett v. Ohio</i> , 438 U.S. 586 (1978) .....   | 66             |
| <i>Lukehart v. State</i> , 103 So. 3d 134 (Fla. 2012) .....  | 34             |
| <i>Machules v. Dep't of Admin.</i> , 523 So. 2d 1132 (Fla. 1988) .....   | 23             |
| <i>Maples v. Thomas</i> , 565 U.S. 266 (2012) .....  | <i>passim</i>  |
| <i>Marek v. State</i> , 14 So. 3d 985 (Fla. 2009) .....  | 39             |
| <i>Mastro Plastics Corp. v. Nat'l Lab. Rels. Bd.</i> ,   |                |

|  |          |
|--|----------|
| 350 U.S. 270 (1956) .....  | 21       |
| <i>McCloud v. State</i> , 208 So. 3d 668 (Fla. 2016) .....   | 43, 64   |
| <i>McKoy v. North Carolina</i> , 494 U.S. 433 (1990) .....   | 52       |
| <i>Medina v. California</i> , 505 U.S. 437 (1992) .....  | 36       |
| <i>Miller v. Alabama</i> , 567 U.S. 460 (2012) .....   | 3, 4, 69 |
| <i>Mills v. Maryland</i> , 486 U.S. 367 (1988) .....   | 51       |
| <i>Moskal v. United States</i> , 498 U.S. 103 (1990) .....   | 19       |
| <i>Munaf v. Geren</i> , 553 U.S. 674 (2008) .....  | 22       |
| <i>Parker v. Dugger</i> , 498 U.S. 308 (1991) .....  | 69       |
| <i>Payne v. Tennessee</i> , 501 U.S. 808 (1991) .....  | 52       |
| <i>Penry v. Lynaugh</i> , 492 U.S. 302 (1989) .....  | 66, 68   |
| <i>Pulley v. Harris</i> , 465 U.S. 37 (1984) .....   | 65, 66   |
| <i>Roper v. Simmons</i> , 543 U.S. 551 (2005) .....  | 67, 73   |
| <i>Ross v. Moffitt</i> , 417 U.S. 600 (1974) .....   | 35, 37   |
| <i>Sanchez-Torres v. Justice Administration Commission</i> ,<br>SC20-406 (docketed 3/20/2020) .....      | 1, 13    |
| <i>Sanchez-Torres v. State</i> , 130 So. 3d 661 (Fla. 2013) .....  | 1, 72    |
| <i>Sanchez-Torres v. State</i> , 322 So. 3d 15 (Fla. 2020) .....   | 2        |
| <i>Scott v. Dugger</i> , 604 So. 2d 465 (Fla. 1992) .....  | 41, 43   |
| <i>Shea v. Justice Administration Commission</i> ,<br>1D19-3529 (Fla. Dis. Ct.) (filed 10/01/2019) ..... | 12       |

|  |            |
|--|------------|
| <i>Skinner v. Oklahoma ex rel. Williamson</i> , 316 U.S. 535 (1942) .....  | 67         |
| <i>Slater v. State</i> , 316 So. 2d 539 (Fla.1975) .....   | 69         |
| <i>Spaziano v. Florida</i> , 468 U.S. 447 (1984) <i>overruled on other grounds by Hurst v. Florida</i> , 577 U.S. 92, 101 (2016) ..... | 67, 73     |
| <i>State v. Bolyea</i> , 520 So. 2d 562 (Fla. 1988) .....  | 23         |
| <i>State v. Fleming</i> , 61 So. 3d 399 (Fla. 2011) .....  | 54, 55     |
| <i>State v. Purdy</i> , 252 So. 3d 723 (Fla. 2018) .....   | 44, 69, 71 |
| <i>State v. Thomas</i> , 2009-CF-000604 (Clay Cty. Cir. Ct.) .....   | 3          |
| <i>State v. Sanchez-Torres</i> , 102009CF000671000AMX, Doc #526 (Clay Cty. Cir. Ct. filed February 4, 2019) .....                      | 10         |
| <i>Stein v. State</i> , 995 So. 2d 329 (Fla. 2008) .....   | 39         |
| <i>Sumner v. Shuman</i> , 483 U.S. 66 (1987) .....   | 70, 71     |
| <i>Swafford v. State</i> , 125 So. 3d 760 (Fla. 2013) .....  | 60         |
| <i>Sweet v. State</i> , 293 So. 3d 448 (Fla. 2020) .....   | 33         |
| <i>Tennard v. Dretke</i> , 542 U.S. 274 (2004) .....   | 52, 53     |
| <i>Thomas v. State</i> , 110 So. 3d 541 (Fla. 1st DCA 2013) .....  | 3          |
| <i>Thomas v. State</i> , 1D16-4774 (Fla. 1st DCA 2018) .....   | 6          |
| <i>Thomas v. State</i> , SC14-961 (Fla. Sep. 4, 2015) .....  | 4          |
| <i>Tison v. Arizona</i> , 481 U.S. 137 (1987) .....  | 66         |
| <i>United States v. Watts</i> , 519 U.S. 148 (1997) .....  | 45         |

*Ventura v. State*, 794 So. 2d 553 (Fla. 2001) ..... 32, 62, 69

*Wainwright v. Sykes*, 433 U.S. 72 (1977) ..... 29

*Weems v. United States*, 217 U.S. 349 (1910) ..... 66

*Wiggins v. Smith*, 539 U.S. 510 (2003) ..... 30, 56

*Young v. United States*, 535 U.S. 43 (2002) ..... 24

**CONSTITUTIONAL PROVISIONS**

U.S. Const. Amend. VIII ..... *passim*

U.S. Const. Amend. XIV ..... 37

Article I, §17, Fla. Const. .... 65

**STATUTES**

Fla. Stat. §27.710 ..... 13

Fla. Stat. §27.711 ..... 13

Fla. Stat. §27.704 ..... 14

28 U.S.C. §2255 ..... 23

28 U.S.C. §2265 ..... 26

§ 921.141, Fla. Stat. (2021) ..... 55

**RULES**

Fla. R. Crim. P. 3.851 ..... *passim*

Fla. R. Crim. P. 3.112 ..... *passim*

Fla. R. App. P. 9.142 ..... 21, 22

|                              |    |
|------------------------------|----|
| Fla. R. App. P. 9.141 .....  | 22 |
| Fla. R. Crim. P. 3.850 ..... | 23 |
| Fla. R. Crim. P. 3.113 ..... | 27 |
| Fla. R. Crim. P. 3.170 ..... | 31 |

**OTHER AUTHORITY**

|   |    |
|---|----|
| Restatement (Second) of Agency § 111 (1958) ..... | 27 |
|---|----|

## **REQUEST FOR ORAL ARGUMENT**

Appellant respectfully requests oral argument in this matter.

### **STATEMENT OF THE CASE**

Appellant Hector Sanchez-Torres was indicted in the Clay County Circuit Court for the first-degree murder and armed robbery of Erick Colon on March 30, 2009. Appellant pleaded guilty to both counts on April 29, 2011. (7 R 39).<sup>1</sup> After waiving a penalty-phase jury, he was sentenced to death by Judge John Skinner on September 1, 2011. (9 R 490). On direct appeal, this Court affirmed Appellant's conviction and death sentence. *Sanchez-Torres v. State*, 130 So. 3d 661 (Fla. 2013).

Appellant filed an initial motion for postconviction relief under Rule 3.851 on February 13, 2015. On January 16, 2019, the circuit

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<sup>1</sup> References to the Record on Appeal for the direct appeal in this case are designated “[volume] R [page].” References to the Supplemental Record on Appeal are designated “[volume] R Supp [page].” References to the Record on Appeal for the initial postconviction proceeding are designated “PCR [page].” References to the Record on Appeal generated for the appeal of Markeil Thomas, Appellant's codefendant, are designated “[volume] MT-R [page].” References to the Record on Appeal generated in *Sanchez-Torres v. Justice Administration Commission*, SC20-406 (docketed 3/20/2020) are designated “FS-R [page].” References to the Record on Appeal of the proceeding below are designated “PCR-2 [page].”

court denied relief. On appeal, this Court affirmed and denied habeas corpus relief. *Sanchez-Torres v. State*, 322 So. 3d 15 (Fla. 2020).

On November 24, 2020, Appellant filed a Successive Motion to Vacate Judgement and Sentence with Special Request for Leave to Amend Pursuant to Rule 3.851. Without holding a *Huff* hearing, the circuit court summarily denied the motion.<sup>2</sup> In light of the *Huff* error, the circuit court granted Appellant's unopposed motion for rehearing and held a *Huff* hearing on January 5, 2022. Following that hearing, the circuit court entered an order summarily denying the successive 3.851 motion. This appeal follows.

### **STATEMENT OF FACTS RELEVANT TO THIS APPEAL**

#### **A. The conviction, sentencing, and resentencings of Markeil Thomas**

When Appellant confessed in this case, he implicated his roommate, Markeil Thomas, in the crime. Days later, detectives interviewed Thomas. After showing him a video of Appellant stating that Thomas was the shooter, detectives told Thomas they knew Appellant was the shooter and just wanted Thomas to tell them what he witnessed. Thomas denied being the shooter but confirmed he was

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<sup>2</sup> *Huff v. State*, 622 So. 2d 982 (Fla. 1993).

present at the scene. At the conclusion of the interview, he was arrested for the murder of Colon.

Thomas was charged in a separate indictment for Colon's murder. *See State v. Thomas*, 2009-CF-000604 (Clay Cty. Cir. Ct.). The State did not move to join his trial with Appellant's. Like in Appellant's case, the State pursued alternate theories of premeditated murder and felony murder. Also like Appellant, Thomas was tried before Judge Skinner. Judge Skinner held Thomas's entire trial during a recess of Appellant's penalty phase, from June 13 to 15, 2011. Thomas was found guilty of first-degree murder and armed robbery. (9 R 416). On August 9, 2011, Thomas was sentenced to concurrent sentences of life in prison without the possibility of parole for first-degree murder and 30 years for armed robbery.

The First District Court of Appeal affirmed Thomas's convictions but ordered resentencing under *Miller v. Alabama*, 567 U.S. 460 (2012) because Thomas was 17 years old at the time of the crime. *Thomas v. State*, 110 So. 3d 541 (Fla. 1st DCA 2013). On May 30, 2013, Judge Skinner resentenced Thomas to 40 years without parole for first-degree murder and 30 years for armed robbery to run concurrently.

The First DCA affirmed Thomas's new sentence, but this Court reversed and remanded for a resentencing that conformed to Florida's newly established framework for sentencing juveniles post-*Miller*. *Thomas v. State*, SC14-961 (Fla. Sep. 4, 2015).

Between those two appeals, on March 26, 2015, Thomas confessed to being the sole shooter of Colon in a sworn statement to Appellant's postconviction counsel, Gonzalo Andux. (PCR 473-83). Thomas stated that he was not offered or promised anything in exchange for his confession. He stated that only he possessed the gun on the night of the crime. After Thomas noticed Colon walking, he said that he "got out of the car and met the victim." (PCR 479). Thomas shot Colon after taking his phone, money, and marijuana. This account was consistent with Appellant's account that he was walking towards the victim at the time that Thomas shot him.

Over a year later, and 14 days before his second resentencing, Thomas recanted this confession. (PCR-2 57-59). In a new statement, Thomas claimed that, before executing the first sworn statement in 2015, Andux pulled him into a private office inside the prison and promised that Appellant would confess to committing perjury on the stand during Thomas's trial in exchange for a statement that Thomas

was the triggerman. (PCR-2 58). Thomas stated that he only made the first confession with the understanding that it could not harm his own case. *Id.* Thomas also filed a bar complaint against Andux, which was dismissed.

During Thomas's second resentencing, other evidence was made public for the first time. Dr. William Meadows, who was originally hired by Thomas's trial counsel as a mental health expert, was again hired to generate a new forensic report for the 2016 resentencing. (PCR-2 146-54). Dr. Meadows noted that in his original report at the time of trial, he diagnosed Thomas with antisocial personality disorder. (PCR-2 148). His psychosocial history and test profile were "indicative of an individual with recurrent problems with anger management and explosiveness." *Id.* Additionally, Dr. Meadows noted, and Thomas confirmed during his testimony, that as a juvenile, Thomas bludgeoned a fellow classmate in the back of the head with brass knuckles on a dare. (PCR-2 65-66, 121-22).

After the two-day resentencing hearing, Judge Skinner again sentenced Thomas to concurrent sentences of 40 and 30 years, but now with a statutorily mandated juvenile-offender review of each sentence after 15 and 20 years, respectively. The First DCA affirmed,

and Thomas's sentence became final when the mandate issued on February 26, 2018. *Thomas v. State*, 1D16-4774 (Fla. 1st DCA 2018).

**B. Appellant's representation by unqualified counsel, Francis Shea**

Appellant was originally represented in his initial 3.851 proceeding by Andux. (PCR 90). Appellant filed his initial 3.851 motion and the amendments to that motion through Andux. However, after Thomas recanted his confession and filed a bar complaint against Andux, Andux cited a conflict of interest and moved to withdraw from the case. (PCR 484).

After Andux's motion to withdraw was granted, the circuit court first appointed W. Charles Fletcher as counsel from the Registry List for the Fourth Judicial Circuit. (PCR 676-77). Judge Skinner's order stated that Fletcher "is available, qualified to handle death penalty cases and has agreed to represent the Defendant in this case" and has "executed a contract with the Justice Administrative Commission (JAC)." *Id.* Fletcher filed a notice of appearance two weeks later. (PCR 680). The State filed a Motion to Strike Notice of Appearance three days later. (PCR 681). The State asked for the court to require a new notice of appearance to be filed because:

Mr. Fletcher's notice of appearance did not contain a statement that Mr. Fletcher was death-qualified. Nor did the notice of appearance state whether Mr. Fletcher intends to be lead postconviction counsel or appear as co-counsel. The notice of appearance did not contain a statement that counsel has a current contract as a registry attorney or a statement acknowledging that as registry counsel he understands that he may not withdraw from a capital case without a showing of good cause under the registry statute.

(PCR 681). The State noted that the requirement that counsel be death qualified to be lead postconviction counsel is mandated by Florida law. *See Fla. R. Crim. Pro. 3.112*. Thus, “the State has no knowledge that Mr. Fletcher is not qualified or is not on JAC's registry list,” and “[w]ithout this information, this Court cannot ensure that the statutes and rules of court are being complied with.” (PCR 684). Additionally, the State noted that the NOA did not supply the court with adequate information to assure the court that it complied with its “statutory obligation to ensure quality representation in postconviction proceedings.” (PCR 684).

The circuit court, without ruling on the motion to strike or asking Fletcher to file a proper NOA, appointed Francis Shea as counsel on February 28, 2017. (PCR 687). Judge Skinner used the same order stating Shea “is available, qualified to handle death

penalty cases and has agreed to represent the Defendant in this case” and has “executed a contract with the Justice Administrative Commission (JAC).” (PCR 687). Unlike Fletcher, Shea never filed an NOA. The State, despite objecting to an insufficient NOA less than two weeks earlier, raised no contemporaneous concern over Shea’s appearance and Judge Skinner never required Shea to file an NOA.

Two years later, and nine days after the trial court denied Appellant’s motion for postconviction relief, the State raised its first objection to Shea appearing in the case. (PCR 2524). The State moved to have CCRC-N appointed for the appeal and for Shea to be removed because “it appears that Mr. Shea did not file a notice of appearance, and thus there is no certification that he meets the requirements of the rule [3.112(k)].”<sup>3</sup> (PCR 2526). The State noted that “it is unclear if [Shea] had previously conducted post-conviction evidentiary hearings in any other cases.” *Id.* The State laid out the following concern:

Mr. Shea lacks the requisite qualifications to handle post-conviction cases. This concern is especially highlighted in his lack of appellate experience. Initial post-conviction

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<sup>3</sup> Fla. R. Crim. Pro. 3.112(k) governs the minimal qualifications required to be appointed or retained as lead counsel in a capital postconviction proceeding after April 1, 2015.

appellate litigation is extremely complex and has a significant body of caselaw attached to it, unlike successive post-conviction appellate litigation, which often involves a single claim.

(PCR 2527). Despite acknowledging the grave concern regarding Shea conducting the evidentiary hearing, the State noted that it waited until after both the evidentiary hearing and the order in the circuit court because “as this case will shortly be appealed to the Florida Supreme Court, this is the most appropriate juncture at which to appoint CCRC-North.” (PCR 2524).

Shea filed a motion to strike the State’s motion to appoint CCRC-N. (PCR 4075-78). Shea laid out previous cases in which he was the attorney and claimed that this experience qualified him under the rule. Additionally, despite the explicit requirement that collateral counsel represent a death-sentenced inmate through their execution warrant, Shea stated that it was his “understanding that my representation of Hector Sanchez-Torres for his Rule 3.851 Motion for Post-Conviction Relief will be concluded upon my filing the appropriate Notice and Designations for Appeal.” (PCR 4077). In

response, the State noted that none of the cases Shea cited met the requirement under rule 3.112(k)(3)(C-E).<sup>4</sup> (PCR 4079-82).

Four days later, Shea filed a notice of appeal to the First DCA. (PCR 2533). Shea withdrew that notice the following day and filed a notice of appeal to this Court, which has exclusive jurisdiction over appeals from capital proceedings. (PCR 4084-85). The circuit court was thus divested of jurisdiction to remedy the grave problems caused by Shea's representation of Appellant. Within a week, Shea moved to withdraw from the case, noting that "Counsel for Defendant complete his Post-Conviction Trial representation."<sup>5</sup> However, while Appellant was in front of this Court, the fallout regarding Shea's appearance in the case continued in the circuit court.

Shea filed a motion for attorney fees in April 2019. (FS-R 5-32). Judge Lester set a hearing, which was held over two days. (FS-R 54-

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<sup>4</sup> Rule 3.112(k)(3) requires lead counsel to have participated in at least two proceedings in subsections C, D, or E, which include capital postconviction evidentiary hearings, capital postconviction evidentiary appeals, and capital federal habeas proceedings. Instead, Shea cited two capital resentencings and a noncapital criminal appeal in the First DCA.

<sup>5</sup> Shea's motion to withdraw was inexplicably not included in any ROA in this case, but this Court can take judicial notice of it regardless. *See State v. Sanchez-Torres*, 102009CF000671000AMX, Doc #526 (Clay Cty. Cir. Ct. filed February 4, 2019).

83, 91-101). At the hearing, Shea made no attempt to prove that the cases he had provided the court met the criteria under rule 3.112(k). Instead, through his expert witness, attorney Christopher Anderson, Shea argued that “participation” in a capital collateral proceeding is not limited to “counsel of record,” but also includes testifying as the trial attorney who has been alleged to have rendered ineffective assistance of counsel in the case, and being called over the phone by the counsel of record to informally provide advice regarding whether “certain actions of an attorney might rise to the level of ineffective representation of counsel.” (FS-R 70-72). Thus, according to Anderson, because Shea has been “contacted by other postconviction counsel asking what he thinks” regarding a claim of IAC, “arguably that’s a form of participation.” (FS-R 72). However, Anderson did concede that Shea was “vulnerable to being challenged” because Shea “doesn’t have a memory” and “doesn’t keep records” of all his cases. (FS-R 74-75). Anderson mentioned “the issue of waiver,” and that “a defendant cannot, under the law, sit and wait till the representation is completed and then object or complain about the representation.” (FS-R 77-78).

Judge Lester denied Shea all attorney fees. (FS-R 41-48). Judge Lester found that because Shea “has not participated in any capital postconviction evidentiary hearings, capital collateral postconviction appeals, or capital federal habeas proceedings,” Shea was “unqualified to represent Appellant-Torres for his capital postconviction case.” (FS-R 44). Judge Lester noted that “rule 3.112 helps ensure that capital defendants are represented by attorneys qualified in the highly specialized area of defending individuals whose lives, not just their liberties are at stake.” (FS-R 43). Judge Lester cited *Cartenuto v. Justice Admin. Comm’n*, 260 So. 3d 908 (Fla. 2018), which held that attorney fees can be denied if there is competent substantial evidence of an attorney’s lack of qualifications. Judge Lester thus found that “employing the reasoning of *Cartenuto*, and considering the critical concerns underscoring public policy in this State to provide qualified representation to capital defendants, the Court finds Mr. Shea is not entitled to attorney fees.” (FS-R 44-45).

Following this order, Shea filed a petition for writ of certiorari in the First DCA. *Shea v. Justice Administration Commission*, 1D19-3529 (Fla. Dis. Ct.) (filed 10/01/2019). Although this was the appropriate vehicle and court to appeal attorney fees related to

noncapital criminal matters, the First DCA transferred the petition to this Court, which has exclusive capital appellate jurisdiction, where the petition was treated as a “Notice of Appeal (3.851 – Attorney’s fees),” the vehicle for the appeal of attorney fees in a capital collateral case. Additionally, this Court changed the style of case because Shea had improperly named himself as a party. *Sanchez-Torres v. JAC*, SC20-406 (docketed 3/20/2020).

This Court vacated the order and remanded the case. *Sanchez-Torres v. JAC*, SC20-406 (Fla. January 8, 2021). This Court found that “[c]ompetent, substantial evidence in the record supports the trial court’s finding that Mr. Shea failed to meet the criteria of rule 3.112(k).” *Id.* at 1. However, this Court vacated the order because the circuit court failed to consider Shea’s entitlement to fees “in light of the terms of his contract with the Justice Administrative Commission and the requirements of sections 27.710 and 27.711, Florida Statutes.” This Court instructed the circuit court to consider, among other things, whether Shea was “eligible for court appointment under the governing statutory criteria” and “the extent of the trial court’s obligation or discretion . . . to consider the attorney’s underlying

eligibility for appointment when ruling on a motion for attorney's fees." *Id.* at 2.

On remand, the circuit court, without allowing argument or holding a hearing, granted Shea's motion for attorney fees. (PCR-2 316-43). The circuit court attached the contract executed by Shea to represented Appellant in this case to the order which states: "Attorney affirms that he . . . has complied with the requirements of Rule 3.112(k), Fla. R. Crim. P." (PCR-2 323). In its order, the circuit court noted that this Court upheld the finding that Shea was not qualified to represent a death-sentenced inmate in a Rule 3.851 proceeding under rule 3.112(k). (PCR-2 316-17). Despite this finding and the instructions included in this Court's remand order, the circuit court did not consider the impact of Shea's underlying ineligibility for appointment. Instead, the circuit court granted Shea's motion for attorney fees because he was separately qualified under § 27.704(2), Fla. Stat. (2021), which, unlike rule 3.112(k), does not require an attorney to have previously appeared in a capital postconviction proceeding. (PCR-2 318).

## **SUMMARY OF THE ARGUMENT**

First, the circuit court erred in finding that Appellant's successive 3.851 motion was not timely filed. Appellant argued below that the postconviction motion was timely under Fla. R. Crim. P. 3.851(d)(2)(C) because it was not previously filed due to counsel's neglect. At the time the claims raised in the motion became ripe, Appellant was represented by Francis Shea. Two courts, including this one, have found Shea was not qualified to appear in a capital collateral proceeding. The circuit court agreed that 3.851(d)(2)(C) applies in this case. However, the court found the motion untimely because there was not "good cause" to have raised the claims in a successive postconviction motion because Appellant's initial 3.851 motion was pending in the circuit court and could have been amended at the time the successive motion was filed. This was erroneous and this Court should reverse.

Second, the circuit court erred in finding that the newly discovered evidence—Markeil Thomas's new sentence of, at most, 40 years for the same crime for which Appellant is sentenced to death; Thomas's eligibility for release as early as March 2024; and new evidence that Thomas was likely the shooter in this case, including

his erratic recantation, diagnosis of ASPD and history of anger management and explosiveness, and his prior violent felony—did not entitle Appellant to relief. The circuit court correctly found that the evidence met the first prong of the *Jones* test for newly discovered evidence because it was not discoverable at the time of Appellant’s trial. *See Jones v. State*, 591 So. 2d 911 (Fla. 1991). However, the circuit court erroneously found that the evidence failed the second prong as either legally irrelevant, raised in a previous claim, or inadmissible at a new trial. The court further erred in failing to cumulatively weigh the impact of the newly discovered evidence. This Court should reverse because the newly discovered evidence is relevant, not based on any previously raised claims, and admissible at a new penalty phase trial. Further, when cumulatively weighed, the newly discovered evidence is compelling and would probably result in a lesser sentence for Appellant at a new trial.

Third, the circuit court erred in denying Appellant’s claim that Thomas’s new sentence and eligibility for release as a juvenile offender rendered Appellant’s death sentence unconstitutional under the Eighth Amendment. In doing so, the circuit court relied exclusively on this Court’s opinion in *Lawrence v. State*, 308 So. 3d

544 (Fla. 2020). There, this Court receded from past precedent which required, on direct appeal, this Court to conduct a proportionality review, in which this Court compared the death sentence being challenged against the larger universe of death sentences that have been imposed to determine whether it was proportionate. But here, Appellant's claim was one of relative culpability, which compares the sentences received by individual participants in a single case. Both this Court and the United States Supreme Court have recognized that relative culpability is a central constitutional inquiry. This Court should reverse Appellant's unconstitutional death sentence for a crime in which his equally or more culpable codefendant has now received a sentence of, at most, 40 years, and could potentially be released from prison as early as March 2024.

### **ARGUMENT**

This Court should reverse the circuit court's summary denial of Appellant's successive 3.851 motion. This Court's review of the circuit court's order is *de novo* and the factual allegations presented in Appellant's motion and in this appeal must be taken as true unless conclusively refuted by the record. *See Kocaker v. State*, 311 So. 3d 814, 821 (Fla. 2020).

## ISSUE I

### **THE CIRCUIT COURT ERRED IN RULING APPELLANT'S SUCCESSIVE 3.851 MOTION UNTIMELY**

When Thomas's new sentence became final, and during the year in which qualified postconviction counsel would have filed a claim based on this newly discovered evidence, Appellant was represented by attorney Francis Jerome Shea. This Court, the circuit court (twice), and the State have all agreed that Shea was not qualified to appear in a capital collateral proceeding. It is exactly because Appellant was represented by unqualified counsel that this 3.851 motion was not filed during that one-year window. Because any reasonably competent attorney would have filed the successive motion in light of the newly discovered evidence, this Court should find that the successive motion filed on November 24, 2020 was timely under Florida's gateway for attorney negligence.

#### **I. Successive 3.851 motions can be brought through the 3.851(d)(2)(C) attorney-negligence gateway**

Under Fla. R. Crim. Pro. 3.851(d)(2)(C), a court can consider an untimely postconviction motion if "postconviction counsel, through neglect, failed to file the motion." This Court has previously held that 3.851(d)(2)(C) cannot be used as a gateway to later raise a claim that,

through negligence of the attorney, was not raised in an initial postconviction motion. See *Howell v. State*, 145 So. 3d 774, 775 (Fla. 2013). However, the 3.851(d)(2)(C) gateway applies to a successive postconviction motion that, through the negligence of the attorney, was not timely filed.

Applying 3.851(d)(2)(C) to this case is supported by the plain terms of rule 3.851. See *Bostock v. Clayton County*, 140 S. Ct. 1731, 1749 (2020) (“This Court has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end.”). A successive postconviction motion, which is any postconviction motion filed after “a state court has previously ruled on a postconviction motion challenging the same judgment and sentence,” is governed by Fla. R. Crim. Pro. 3.851(e)(2). Under 3.851(e)(2), “[a] claim raised in a successive motion shall be dismissed . . . if the trial court finds the claim fails to meet the time limitation exceptions set forth in subdivision (d)(2)(A), (d)(2)(B), or (d)(2)(C).” Therefore, under the plain text of the rule, a successive postconviction motion must be analyzed for timeliness under 3.851(d)(2)(C)’s attorney-negligence gateway. See *Moskal v. United States*, 498 U.S. 103, 109 (1990) (noting the “established principle

that a court should give effect, if possible, to every clause and word of a statute”) (cleaned up).

As this Court recognized in *Howell*, “the express terms” of 3.851(d)(2)(C) apply “based on the inaction of counsel to file a timely *motion* for postconviction relief, not to file a specific *claim*.” 145 So. 3d at 775 (emphasis in original). So, while 3.851(d)(2)(C) may not provide an avenue through which defendants can raise claims that could have only been raised through an initial postconviction motion, the facts contained in Appellant’s November 2020 motion did not come into existence until after Appellant filed his initial postconviction motion. Appellant's attorney, through negligence, entirely failed to file a successive postconviction motion, which would have included an Eighth Amendment claim and a newly discovered evidence claim, neither of which could have only been raised in Appellant's initial postconviction motion. Thus, under the plain text of 3.851(e)(2) and *Howell*, Appellant’s successive 3.851 motion must be analyzed under 3.851(d)(2)(C).

Further, 3.851(d)(2)(C) must be read in conjunction with the rest of rule 3.851. See *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (“In ascertaining the plain meaning of the statute, the court

must look to . . . the language and design of the statute as a whole.”); *Mastro Plastics Corp. v. Nat'l Lab. Rels. Bd.*, 350 U.S. 270, 285 (1956) (“In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law...”) (internal quotation omitted). The application of the 3.851(d)(2)(C) negligence gateway to successive 3.851 motions is supported by 3.851(f)(8), through which “a defendant under sentence of death may petition for a belated appeal.” *See also* Fla. R. App. Pro. 9.142(b)(3).

Notably, 3.851(f)(8) allows a death sentenced inmate to appeal the denial of a successive 3.851 motion when they otherwise would have been barred from taking the appeal due to the neglect of counsel. For example, in *Franqui v. State*, 81 So. 3d 414 (Fla. 2012), this Court granted a belated appeal of the denial of a successive 3.851 motion when the appeal was originally “dismissed as untimely due to collateral counsel's failure to properly comprehend the provisions of the rules of criminal procedure and the rules of appellate procedure.” *Id.* It would be a truly absurd result if attorney negligence could form the basis for forgiving the failure to appeal the denial of a successive 3.851 motion, but not the failure to file the

motion in the first place, despite the plain text of 3.851(e)(2) requiring otherwise.<sup>6</sup>

**II. Postconviction counsel, who this Court has already found was never qualified to appear in this case, failed to file the successive Rule 3.851 motion through neglect**

In analyzing attorney negligence under 3.851(d)(2)(C), this Court should take guidance from traditional habeas principles. Rule 3.851 is the codification of the common law writ of habeas corpus. *See Chandler v. Crosby*, 916 So. 2d 728, 737 (Fla. 2005) (Anstead, J., concurring). Habeas corpus is governed by equitable principles. *See Holland v. Florida*, 560 U.S. 631, 646 (2010) (noting that equitable principles have traditionally governed habeas corpus); *Munaf v. Geren*, 553 U.S. 674, 693 (2008) (“Habeas corpus is governed by equitable principles.”). Because of the history and purpose of 3.851, the law regarding both the common law writ and habeas corpus in

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<sup>6</sup> Of note, this Court recently amended Fla. R. App. Pro 9.141—the noncapital analog to rule 9.142—to “allow for a case-by-case assessment of whether, and to what extent, counsel’s alleged neglect or mistake ‘interfered with the petitioner’s ability to file a timely . . . notice to invoke’” discretionary appellate review in noncapital collateral cases. *In Re: Amendments to the Florida Rule of Appellate Procedure 9.141*, SC21-673, Slip Op. at 3 (Fla. May 19, 2022). Thus, this Court has extended the protection afforded to defendants in postconviction proceedings from the neglect of counsel.

federal court guides this Court in construing rule 3.851. As this Court has explained:

Rule 3.850 was taken nearly word-for-word from the federal habeas corpus statute . . . and we plainly have given the rule the same broad scope as its federal counterpart. Moreover, we explicitly have recognized federal precedent interpreting 28 U.S.C. § 2255 as persuasive authority in construing Rule 3.850.

*State v. Bolyea*, 520 So. 2d 562, 563 (Fla. 1988) (cleaned up).<sup>7</sup>

Equitable doctrines frequently applied in habeas proceedings favor the application of 3.851(d)(2)(C) to successive postconviction motions. *See, e.g., Machules v. Dep't of Admin.*, 523 So. 2d 1132, 1134 (Fla. 1988) (noting that the doctrine of equitable tolling was “developed to permit under certain circumstances the filing of a lawsuit that otherwise would be barred by a limitations period” and “serves to ameliorate harsh results that sometimes flow from a strict, literalistic construction and application of administrative time limits contained in statutes and rules.”); *Coleman v. Thompson*, 501 U.S. 722, 747-48 (1991) (noting that equity dictates that when a defendant would have otherwise procedurally defaulted a claim, that claim can still be heard if the defendant can establish ‘cause’ and

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<sup>7</sup> Rule 3.850 was an earlier form of rule 3.851.

‘prejudice’ for failure to bring the claim earlier). As common law doctrines, these equitable principles apply so long as they are not specifically ousted by statute. *Young v. United States*, 535 U.S. 43, 49 (2002) (“It is hornbook law that limitations periods are customarily subject to equitable tolling.”) (internal citations omitted). Both have often been applied to habeas claims in federal court, *see, e.g., Holland*, 560 U.S., and are not barred by 3.851.

While equitable doctrines generally do not apply when the failure can be attributed to the defendant or his attorney, there is an exception applicable here. In *Maples v. Thomas*, 565 U.S. 266 (2012), the Supreme Court held that, for the purposes of applying equitable principles through the lens of federal habeas review, the relationship between a defendant and their attorney during state postconviction proceedings is governed by the principles of agency law and the relationship will not be considered one between a principal and an agent when the relationship is severed under agency law. Thus, while the conduct of an attorney is generally attributable to the defendant they represent during state-court proceedings, that is not the case when the attorney is not acting as the defendant’s agent. This Court should hold that 3.851(d)(2)(C) is met when a defendant fails to file a

successive postconviction motion because he is represented by an attorney who is not acting as his agent.

In *Maples*, the Court addressed a situation in which a defendant procedurally defaulted a claim in state court because his attorneys had abandoned him. Normally, this would have barred the defendant from getting review of the merits of his petition in federal court “because the attorney is the prisoner's agent, and under well-settled principles of agency law, the principal bears the risk of negligent conduct on the part of his agent.” *Id.* at 280-81 (internal quotation omitted).<sup>8</sup> However, because the defendant’s attorney had severed the principal-agent relationship under agency law, “[h]is acts or omissions therefore cannot fairly be attributed to [the defendant],” and the *Maples* was entitled to have his claim heard. *Id.* at 281. This is because “[c]ommon sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word.” *Id.* at 282 (quoting *Holland*, 560 U.S. at 657 (Alito, J., concurring)).

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<sup>8</sup> *Maples* was a case about procedural default. Courts have held that the considerations present in *Maples* apply equally with respect to other equitable doctrines. See *Cadet v. Fla. Dep't of Corr.*, 853 F.3d 1216, 1219 (11th Cir. 2017) (applying *Maples* to equitable tolling).

Shea's appointment in this case was illegal and thus, under *Maples*, he was not Appellant's agent. As this Court has already acknowledged, Shea was not qualified to appear in the rule 3.851 proceeding because he did not meet the requirements of Fla. R. Crim. Pro. 3.112(k). (PCR-2 197). Despite this, Shea actively misrepresented his qualifications in his contract with the JAC, which requires attorneys to affirm that they met the rule 3.112(k) requirements. (PCR-2 290).

The purpose of adopting rule 3.112(k) was to ensure that defendants in capital collateral proceedings would be represented by "competent" counsel.<sup>9</sup> As the Committee Comments note, this Court "has not only the authority, but the constitutional responsibility to ensure that indigent defendants are provided with competent counsel, especially in capital cases where the State seeks to take the life of the indigent defendant." Further, this Court, as an implied power under its state-constitutional responsibility to regulate the

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<sup>9</sup> As the Criminal Court Steering Committee Note to the 2014 Amendment states, Rule 3.112(k) was adopted for the express purpose of "ensur[ing] a requisite level of expertise in capital postconviction cases" to provide "competent" counsel during state postconviction proceedings, as defined by federal law. *See also* 28 U.S.C. § 2265(a).

admission and discipline of those practicing law, has “the power to set the minimum requirements for the admission to practice law . . . as well as the minimum requirements for certain kind of specialized legal work.” Rule 3.113 Criminal Court Steering Committee Note to the 2014 Amendment. If those bare minimum qualifications under rule 3.112(k) are what ensure “competent” counsel, Appellant did not receive that.

Shea, because his appointment was illegal, was never Appellant’s agent. As stated in the agency law treatise used by the Supreme Court in *Maples*, 565 U.S. at 284, when an agent is not qualified to represent a principal, the agent has no authority to act on behalf of the principal. See Restatement (Second) of Agency § 111 (1958) (“The loss of or failure to acquire a qualification by the agent without which it is illegal to do an authorized act . . . terminates the agent's authority to act.”); see also *Maples*, 565 U.S. at 286 (noting that *Maples* did not have principal-agent relationship with his attorneys under § 111 during the time “none of [the attorneys representing him] had the legal authority to act on *Maples*' behalf” in Alabama state court). The State acknowledged that Shea was unqualified when they moved to remove him from the case, and both

the circuit court and this Court agreed. Thus, forced to proceed constructively without counsel, Appellant was without an agent acting on his behalf. *See Maples*, 565 U.S. at 289 (noting that although Maples still technically had counsel, he was constructively without counsel because he “lacked the assistance of any *authorized attorney*”) (emphasis added).

This is particularly concerning because the appointment of postconviction counsel was entirely outside of Appellant’s control. *See id.* (“Maples was disarmed by extraordinary circumstances quite beyond his control”). At every stage of this case, he has been declared indigent and counsel was appointed for him. State postconviction was no different. Under Florida law, it is the duty of the circuit court to appoint counsel—either from the relevant Capital Collateral Regional Counsel office or an attorney from the list of registry counsel. Fla. R. Crim. Pro. 3.851(b). Appellant, because he was indigent, had no alternative. Indeed, he was not even allowed to forgo counsel and represent himself. *See Fla. R. Crim. Pro. 3.815(b)(6).*

Therefore, Appellant was simply stuck with the unqualified counsel appointed to him.<sup>10</sup>

Further, this Court must consider the State's actions and inactions. The State withheld its objection to Shea's appointment for two years and only filed a motion to remove him after the circuit court ruled on the 3.851 motion. The State gave no explanation for why the objection was dilatory except to say that the conclusion of proceedings in the trial court was "the most appropriate juncture" to appoint qualified counsel. This Court should not permit such tactics. *See Wainwright v. Sykes*, 433 U.S. 72, 89 (1977) (disapproving of the practice of "sandbagging" in which parties attempt to gain a litigation advantage by strategically withholding an objection).

If this Court does not decide the illegal appointment of Shea constitutes negligence *per se*, the correct remedy is to remand for an evidentiary hearing on whether Shea's failure to file the successive

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<sup>10</sup> Under 3.851(b)(6), the "only bases" for a defendant to seek to dismiss postconviction counsel exist are a conflict of interest (as defined by statute) or if the defendant is seeking to waive all proceedings in his case. Because Shea misrepresented his qualifications in the JAC contract, Appellant had no way of knowing the truth of that misrepresentation until, two years after he was appointed and the circuit court proceedings had concluded, the State finally raised the issue.

3.851 motion was a result of neglect. *See Davis v. State*, 26 So. 3d 519, 528-29 (Fla. 2009) (noting that whether a postconviction motion has met the standards of rule 3.851 is subject to factual testing at a hearing). There is strong evidence of Shea's negligent performance in the record. For example, as the circuit court noted, Shea entered Thomas's 2016 sentencing order into evidence during the evidentiary hearing on Appellant's initial 3.851 motion. (PCR-2 461). With that knowledge, the successive 3.851 motion is something that a competent (*i.e.*, qualified under rule 3.112(k)) postconviction attorney would have filed. *Cf. Wiggins v. Smith*, 539 U.S. 510, 535 (2003).<sup>11</sup>

### **III. The circuit court erroneously found that the successive 3.851 motion was not timely**

The circuit court was correct in applying the 3.851(d)(2)(C) gateway to Appellant's claims but erred in finding that the claims were not timely under that analysis. The circuit court's conclusion that the successive Rule 3.851 motion was not timely rested on two errors. First, the circuit court misconstrued this Court's longstanding

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<sup>11</sup> That hearing could also be used to explore why the State waited two years to object to Shea's illegal appointment, only moving to get him off the case after the circuit court ruled on Appellant's initial Rule 3.851 motion.

precedents regarding how the timeliness of a newly discovered evidence claim is to be calculated. Second, the circuit court failed to apply the good cause provision in 3.851(e)(2).

First, the circuit court failed to follow this Court's precedent in analyzing the timeliness of a successive 3.851 motion. The circuit court concluded that 3.851(d)(2)(C) did not apply in this case because some of the newly discovered evidence pleaded in Appellant's successive motion became discoverable before Appellant amended his initial 3.851 motion.<sup>12</sup> Thus, in the eyes of the circuit court, Appellant could have amended his initial 3.851 motion to include the claims in the successive motion.

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<sup>12</sup> Appellant last amended the initial 3.851 motion in February 2017, a year before Thomas's new sentence became final on appeal. (PCR 486-87). The circuit court also noted that it considered in its final order the motion to withdraw Appellant's guilty plea, which was filed ten days before the evidentiary hearing, as evidence that Appellant could have amended his initial 3.851 motion to include the claims presented in his successive motion. That motion to withdraw was improper and untimely, the State argued, but requested that it be considered in the final order in the name of "judicial economy." (PCR 949). The circuit court agreed with the State on both points. (PCR 1101) ("As to Defendant's Motions to Withdraw Guilty Plea and Jury Waiver[,] . . . the Court finds them untimely under Florida Rule of Criminal Procedure 3.170(1) and rule 3.851."). Instead of using that against Appellant, the improper motion is further proof of Shea's negligent handling of this case.

Despite noting that Thomas's sentence became final on February 26, 2018, and thus discoverable for purposes of 3.851(d)(2)(A), the circuit court strangely concluded that, for purposes of 3.851(d)(2)(C), Appellant could have pleaded this as a claim years before Thomas's sentence became final. (PCR-2 460-61). This Court has long held that a codefendant's new sentence only becomes discoverable when it becomes final on appeal. See *Ventura v. State*, 794 So. 2d 553, 571 (Fla. 2001). Moreover, particularly in a case like this, in which the codefendant received multiple resentencings, the circuit court's ruling in this case requires capital defendants to engage in piecemeal litigation, which is strongly disfavored by this Court.

Second, the circuit court seemingly failed to apply the good cause provision in 3.851(e)(2). The circuit court found that 3.851(d)(2)(C) did not apply because Appellant could have raised the claims in his initial 3.851 by amendment. The circuit court misunderstood this Court's precedents. In *Howell*, 145 So. 3d, this Court held that 3.851(d)(2)(C) does not apply to a claim that could have only been raised in an initial 3.851 motion. This is because the subsection "applies based on the inaction of counsel to file a timely

*motion* for postconviction relief, not to file a specific *claim*.” *Id.* (emphasis in original); see also *Sweet v. State*, 293 So. 3d 448, 453 (Fla. 2020) (finding 3.851(d)(2)(C) does not apply to ineffective assistance of counsel claim that could only have been raised in initial 3.851 motion). Here, the claims at issue only became discoverable multiple years after Appellant first filed his initial 3.851 motion, as the circuit court acknowledged. Thus, none of the newly discovered evidence—even if considered through the circuit court’s piecemeal analysis—falls within the purview of *Howell*.

By ending its analysis after concluding that Appellant could have raised the claims included in his successive motion in his initial 3.851 motion, the circuit court failed to consider whether good cause existed not to have done so. If the court had conducted this analysis, it would have found good cause. As an initial matter, there is no requirement that newly discovered evidence claims be amended into an already pending Rule 3.851 motion. Indeed, it is common practice to file successive Rule 3.851 motions during the pendency of an initial Rule 3.851 motion. See, e.g., *Brooks v. State*, 175 So. 3d 204, 217 (Fla. 2015) (“[A]fter the evidentiary hearing was completed, but before a final order was issued, Brooks filed a successive

postconviction motion in which he alleged . . . newly discovered evidence . . .”).

Good cause is also apparent from the limitations placed on amending 3.851 motions. Under 3.851(f)(4), a motion to amend cannot be made within “45 days before the scheduled evidentiary hearing.” Here, the newly discovered evidence claim became ripe when Thomas’s sentence became final on February 26, 2018. The evidentiary hearing date was scheduled soon after for August 2018. Given the 3.851(f)(4) limitations, Appellant would have only had about four months—out of the twelve he was entitled—to move to amend to add the two claims. Thus, it would have been reasonable for competent counsel to forgo an amendment on such a truncated timeline. *See, e.g., Lukehart v. State*, 103 So. 3d 134, 136 n. 1 (Fla. 2012) (faulting defendant for moving to amend 3.851 motion on the eve of evidentiary hearing “because he should have filed a successive motion”). Moreover, the circuit court’s logic subverts this Court’s longstanding precedents regarding the one-year statute of limitations on newly discovered evidence claims. Requiring defendants to ensure that all potential claims are timely raised under 3.851(f)(4) would encourage defendants to constantly amend initial Rule 3.851

motions immediately after every new claim becomes discoverable, regardless how much time is left on the one-year newly-discovered-evidence clock.

Because good cause existed to not amend the initial 3.851 motion, the circuit court erred in not applying both 3.851(d)(2)(C) and 3.851(e) in its analysis of the timeliness of this successive motion.

#### **IV. The failure to apply the 3.851(d)(2)(C) attorney-negligence gateway would violate Appellant’s constitutional rights**

The failure to apply 3.851(d)(2)(C) to successive motions would violate Appellant’s constitutional rights. Because state-mandated review of criminal capital convictions creates life and liberty interests that cannot be deprived without due process, states have a “duty” to provide “an adequate opportunity to present . . . claims fairly in the context of the State’s appellate process.” *Ross v. Moffitt*, 417 U.S. 600, 616 (1974). “[T]he question is whether consideration of [the] claim within the framework of the State’s procedures for post-conviction relief ‘offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,’ or ‘transgresses any recognized principle of fundamental fairness in

operation.” *Dist. Atty’s Off. for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 69 (2009) (citing *Medina v. California*, 505 U.S. 437 (1992)).

Rule 3.851 is the exclusive vehicle through which death-sentenced inmates can collaterally challenge their conviction and sentence in Florida. A scheme in which there is no remedy for the appointment of an unqualified and incompetent attorney and that attorney’s negligent failure to file a meritorious successive postconviction motion violates federal due process. This is particularly so when the death-sentenced inmate has no say in who represents them, cannot proceed *pro se*, the circuit court fails in its duty to ensure adequate representation, and the State withholds its objection to unqualified defense counsel in order to gain a litigation advantage. This does not constitute an adequate opportunity to present one’s claims. Thus, to deny Appellant the opportunity to file a successive motion, “offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,” and “transgresses any recognized principle of fundamental fairness in operation.” *Id.*

Further, barring Appellant from bringing the successive motion through 3.851(d)(2)(C) violates his rights to meaningfully access the

courts, *Bounds v. Smith*, 430 U.S. 817, 823 (1977), and to state-mandated review of his criminal conviction under the Due Process Clause of the Fourteenth Amendment. And because unqualified counsel was only thrust upon him because he was indigent, this scheme violates equal protection. *See Ross*, 417 U.S. at 612 (“The State cannot adopt procedures which . . . extend to . . . indigent defendants merely a meaningless ritual while others in better economic circumstances have a meaningful appeal.”) (cleaned up).

This Court should find that Appellant’s successive 3.851 motion is timely under 3.851(d)(2)(C) because Shea, who was unqualified to appear in this proceeding, failed to file the motion as a result of negligence.

## ISSUE 2

### **THE CIRCUIT COURT ERRED IN DENYING APPELLANT’S CLAIM OF NEWLY DISCOVERED EVIDENCE REGARDING MARKEIL THOMAS’S NEW SENTENCE AND RELATED NEW EVIDENCE OF THOMAS’S CULPABILITY**

In his successive Rule 3.851 motion, Appellant presented a newly discovered evidence claim based on his codefendant, Markeil Thomas, receiving a new term-of-years sentence with the potential for early release. After being sentenced to life in prison without the

possibility of parole at trial, Thomas has now been resentenced to concurrent sentences of 40 and 30 years with a statutorily mandated review of each sentence after 15 and 20 years, respectively. Thus, Thomas may walk out of prison as early as 2024, at the age of 33, for the same crime that sent Appellant to death row.

Appellant also raised evidence that came to light during Thomas's resentencing as newly discovered evidence bearing on his culpability in his case. This evidence included (1) Thomas's recantation to being the shooter made two weeks before his resentencing hearing and the dubious circumstances surrounding that recantation; (2) the forensic psychological report diagnosing Thomas with Antisocial Personality Disorder and as an individual "with recurrent problems with anger management and explosiveness" and suffering "from significant emotional disturbances"; and (3) Thomas's prior conviction for "assaulting a peer with brass knuckles" in which he "hit another student in the back of the head" on a dare from a friend.

When presenting a claim of newly discovered evidence, a defendant can obtain a new trial through a two-step test established by this Court. "First, the evidence must not have been known by the

trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence[.]” *Hildwin v. State*, 141 So. 3d 1178, 1184 (Fla. 2014) (internal quotations and citations omitted). If the defendant is seeking to vacate a sentence, the second prong, which looks to the materiality of the new evidence, is satisfied if the newly discovered evidence creates a reasonable doubt as to the culpability of the defendant and “would probably yield a less severe sentence” at a new trial. *Marek v. State*, 14 So. 3d 985, 990 (Fla. 2009).

When a codefendant receives a sentence that could not have been known to the parties at the time of trial, a death-sentenced defendant is entitled to relief if the codefendant’s “sentence would probably result in a life sentence for the defendant on retrial.” *Stein v. State*, 995 So. 2d 329, 341 (Fla. 2008). When the death-sentenced defendant is less or equally culpable as his codefendants, the reduction of a codefendant’s sentence entitles the death-sentenced defendant to collateral relief. *Id.*

The circuit court denied the claim. The circuit court correctly found that the first prong was satisfied because the evidence was not discoverable at the time of trial. (PCR-2 462). However, the circuit

court erroneously found that each piece of newly discovered evidence failed the second prong. (PCR-2 463-66). Due to this error, the circuit court also failed to cumulatively weigh the materiality of the newly discovered evidence.

### **III. The newly discovered evidence**

#### **D. Thomas's new sentence**

The circuit court erred in failing to consider Thomas's new sentence and potential for early release as newly discovered evidence. The circuit court first found that Thomas's new sentence was "irrelevant" because he was never eligible for the death penalty and because he was resentenced for "purely legal reasons." (PCR-2 464). The circuit court also found that Thomas was not equally or more culpable than Appellant because at Thomas's trial "the jury determined that [Thomas] was not the shooter." (PCR-2 464-65). The circuit court misconstrued both this Court's precedent and Appellant's argument below.

This Court has previously held that when a codefendant receives a sentence less than death because they are ineligible for the death penalty, that change does not entitle a death-sentenced codefendant to relief based on that change in circumstances.

Likewise, the same is true when a codefendant receives a new sentence based on “purely legal reasons.” *Farina v. State*, 937 So. 2d 612 (Fla. 2006).

In *Farina*, this Court explained why that is so. For a codefendant’s new sentence to meet the relevance threshold during the penalty phase of another codefendant, the new sentence must in some way relate to “the circumstances of the crime or the presence or absence of aggravating or mitigating factors.” *Id.* at 620. So, when a new sentence is purely legal, the “sentence reduction has no connection to the nature or circumstances of the crime or to the defendant's character or record” and is thus irrelevant under *Eddings v. Oklahoma*, 455 U.S. 104 (1982) and related cases. *Id.*

In *Scott v. Dugger*, 604 So. 2d 465 (Fla. 1992), the codefendant’s new sentence met the relevance threshold. There, in reaching the determination of what new sentence the codefendant would receive, a jury, after considering the aggravating and mitigating circumstances, recommended a lesser sentence. The new sentence in *Scott*, unlike the one in *Farina*, had a direct connection “to the nature or circumstances of the crime or to the defendant’s character or record” because it necessarily included factfinding regarding the

codefendant's role in the crime. *Farina*, 937 So. 2d at 620. Thus, the *Farina* exception to relative culpability only applies when a codefendant receives a new sentence without having vested discretion in the sentencer to consider the circumstances of the crime and the characteristics and role of the codefendant.

At the time of Appellant's sentencing, Thomas, as a juvenile, had been sentenced to life in prison without the possibility of parole—*i.e.*, the maximum sentence Thomas could receive under law. Therefore, when Appellant was originally sentenced, there was no sentencing disparity in this case because both codefendants received the maximum sentence for which they were eligible under then existing law. That has since changed for Thomas. In his resentencing, under juvenile offender sentencing law, when Judge Skinner resentenced Thomas, he was required to make a holistic assessment of Thomas, which necessarily included his relative culpability. And rather than ministerially imposing a sentence of life on Thomas, Judge Skinner had wide discretion in imposing a sentence and could have sentenced Thomas to life, if he had made the relevant findings.

Thomas's new sentence is thus different in both degree and kind than those previously rejected by this Court as irrelevant. Thomas's

sentence, which was originally the maximum he could receive under the law, has now been drastically reduced based on the same findings that this Court pointed to as relevant in *Scott* and *Farina*. Thomas's new sentence is not relevant because he has received a sentence less than death or due to the fact that he received a new sentence, but rather because the actual new sentence Thomas received bears a direct "connection to the nature or circumstances of the crime." *Farina*, 937 So. 2d at 620.

Analogously, this Court has held that relative culpability analysis still applies when one codefendant has been convicted of a crime less than first-degree murder. *McCloud v. State*, 208 So. 3d 668, 687-89 (Fla. 2016). Notably, if this Court had followed the circuit court's reasoning below that the fact that a codefendant is ineligible for the death penalty means that their new sentence does not trigger a cognizable claim, *McCloud* would not have been entitled to relief because his codefendant, convicted of second-degree murder, was ineligible for death. This Court rejected such logic and conducted a searching review of the relative culpability of the codefendants and found the fact that they had received term-of-years sentences rendered *McCloud*'s sentence disproportionate. *Id.* at 689. The same

should occur here in light of Thomas's holistic juvenile-offender resentencing.

This Court has already recognized that Florida's juvenile offender review scheme is replete with disparity that implicates the Eighth Amendment. *See State v. Purdy*, 252 So. 3d 723 (Fla. 2018). For example, the statutory scheme under which Thomas received the new sentence has created potential Eighth Amendment problems exactly because defendants like Thomas are eligible for early release while other non-violent juveniles are not. *Id.* at 729 (“[B]y limiting the review provisions to certain serious offenses, the Legislature has placed juveniles convicted of serious violent felonies in a better position than juveniles who commit less serious nonviolent offenses.”). If this Court felt compelled to point out these disparities in *Purdy*, surely it is probable that at least one juror might find Thomas's potential for early release compelling in Appellant's case.

The circuit court's finding that Thomas was not equally or more culpable than Appellant rested on both legal and factual error. A trial court's determination regarding relative culpability is a “finding of fact and will be sustained on review if supported by competent substantial evidence.” *Gonzalez v. State*, 136 So. 3d 1125, 1165 (Fla.

2014). However, for the proposition that Thomas was not the shooter, the circuit court relied solely on Thomas's jury's finding that the State did not prove beyond a reasonable doubt that Thomas possessed a firearm during the offense. (PCR-2 464-65). This faulty logic has long been rejected. See *United States v. Watts*, 519 U.S. 148 (1997); *Harris v. State*, 959 So. 2d 794, 799 (Fla. 2d DCA 2007) (Canady, J., dissenting) (noting that "a jury's acquittal is not a rejection of facts; it is merely an acknowledgment that the government failed to prove an essential element of the offense beyond a reasonable doubt") (internal quotations omitted). In fact, neither codefendant was found to be the shooter at either trial or on direct appeal. Thus, the finding below cannot be sustained.

Further, the circuit court failed to consider any of the evidence that has come to light since trial. In a case in which a single shot was fired, both codefendants have now confessed and retracted their confessions to being the shooter. Additionally, evidence that has come to light since trial has diminished Appellant's culpability while increasing Thomas's. Because the evidence demonstrates that Thomas is more than or, at least equally as culpable as Appellant, his new term-of-years sentence and potential for early release is

admissible at a new trial and satisfies the second prong of the *Jones* test as newly discovered evidence. *Jones*, 591 So. 2d. 911 (Fla. 1991).

### **E. Thomas's recantation**

The circuit court declined to consider Thomas's recantation as newly discovered evidence because Appellant previously raised a claim related to Thomas's earlier, separate confession, and because Appellant did "not provide any new or different argument addressing this issue." (PCR-2 465). The circuit court erred on both points.

First, the circuit court erred in analyzing this newly discovered evidence because it misconstrued the claim. Any statement made by a codefendant can form the basis for a claim of newly discovered evidence. Here, Appellant has now raised two distinct claims in two separate motions based on two different statements by Thomas: (1) the 2015 confession, and (2) the 2016 recantation. The circuit court's failure to treat these as two distinct claims was error. Appellant's newly discovered evidence claim, which relates solely to the recantation and the circumstances under which Thomas recanted the prior confession, is a new and entirely distinct legal claim.

In 2015, Thomas confessed in a sworn statement to shooting Colon. (PCR 473-83). This confession formed the basis of a claim that

Appellant raised in his initial 3.851 motion. (PCR 78-81). In Appellant's successive 3.851 motion, he noted that the confession itself had been raised as a claim previously. (PCR-2 13 n.7).

Almost a year and a half later, in 2016, Thomas recanted this confession in a new sworn statement executed a mere two weeks before his second resentencing. (PCR-2 57-59).<sup>13</sup> In that statement, Thomas implausibly claimed that before executing his confession, Appellant's postconviction attorney Andux pulled him into a private office inside a prison and shut the door. According to Thomas, while in that room, Andux allegedly promised that Appellant would confess to committing perjury on the stand when he testified during Thomas's trial in exchange for Thomas's confession to being the triggerman. (PCR-2 58). In his recantation, Thomas stated that he only made the earlier statement with the understanding that it could not harm his own appeals. Thomas then filed a bar complaint against Andux, which was subsequently dismissed. At his second resentencing, Thomas insisted that his sentence should be reduced

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<sup>13</sup> The second sworn statement was executed on August 22, 2016. (PCR-2 59). The first day of the resentencing was September 9, 2016. (PCR-2 61).

because he was, again, claiming not be the shooter and thus less culpable in the crime. This recantation, and the circumstances surrounding it, formed the basis for the newly discovered evidence raised in the motion below.

The second error the circuit court made was finding that “the defendant does not provide any new or different argument addressing” the claim from the previous confession claim. (PCR-2 465). However, Appellant made clear below that the recantation would have particularly strong probative value at a new trial distinct from the original confession.

The circumstances under which Thomas made the recantation were highly dubious. The recantation itself was incredible as it came well over a year after his original confession in the form of a new sworn statement that gave an implausible account of the original confession. Additionally, because the recantation was made two weeks before Thomas argued at the resentencing that he was not the shooter and thus should be given a lower sentence as a minor participant, Thomas had strong motive to lie. *See Archer v. State*, 934 So. 2d 1187, 1198 (Fla. 2006) (noting that a “self-serving” recantation is not credible when it is made by a codefendant with motive to limit

the potential sentence he faced). In addition to those circumstances, he was impeached at the resentencing with multiple disciplinary reports which demonstrated a history of lying to prison staff. (PCR-2 112-15).

While the 2015 confession would be substantive evidence at a new trial that Thomas was the shooter, the 2016 recantation would have distinct probative value. The recantation would allow Appellant to highlight the wild inconsistencies in Thomas's statements over time. Significantly, at Appellant's original trial, the trial court rejected the statutory mitigating circumstance that Appellant was an accomplice or minor participant by relying on the apparent credibility—and consistency—of Thomas:

In addition, the Court was presented with competent evidence that Defendant may have in fact been the individual who pulled the trigger and shot Eric Joel Colon. As discussed above, the only eyewitness accounts of the events in question were the separate statements by Defendant and co-defendant to law enforcement. **The co-defendant consistently denied being the person who shot Eric Joel Colon and always maintained that he stayed in the car when Defendant got out, robbed and shot the victim.** On the other hand, Defendant's description of the events changed several times as he was interviewed by law enforcement. Defendant initially told detectives that Markeil was the one who shot the victim. However, after being asked to memorialize his account in writing, Defendant indicated that he was the one who shot

and killed Eric Joel Colon. Defendant now maintains that the first account was truthful and Markeil was the shooter. According to Defendant, he gave two conflicted statements because he had nothing to lose, as he had already confessed to the murder of Levi Rollins.

The various inconsistencies in Defendant's statements regarding his involvement in the robbery of Eric Joel Colon cause the Court to question the credibility of Defendant's present claim that Markeil was the triggerman. **Furthermore, Defendant's written statement corroborates Markeil's consistent account of the events in question, most notably Markeil's assertion that he never got out of the car during the robbery and that Defendant was the person who shot and killed Eric Joel Colon.**

(5 R 885-86) (emphasis added).<sup>14</sup> Thomas has now admitted to being outside the car during the robbery and shooting the victim. Given the circuit court's previous reliance on the apparent 'consistency' of Thomas's statements, the new inconsistencies clearly would have

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<sup>14</sup> That being said, Judge Skinner's recounting of Thomas's statement was not accurate. Thomas gave detectives several inconsistent and implausible accounts of the crime. (5 MT-R 864, 929, 954). Contrary to Judge Skinner's finding that Appellant was the only one to accurately describe that the victim was shot below the left eye, Thomas did the same—the State even argued during closing arguments at Thomas's trial that his knowledge of that detail supported finding that he was the shooter. (6 MT-R 1105) ("The way [Thomas] has them angled Erick Colon's back is to him if he's never out of the car. His back's to him. Yet he describes for law enforcement exactly how close he remembers that gun being to his left eye, something that's taking place on the other side of him . . .").

weighed strongly in favor in discrediting Thomas's account of the crime. Thus, Appellant presented a distinct newly discovered evidence claim that is supported by new legal argument regarding Thomas's recantation of his confession to being the shooter.

#### **F. The forensic report and prior conviction**

The circuit court failed to consider the forensic psychological report and Thomas's prior conviction as newly discovered evidence because the court erroneously found that this evidence would not be admissible at a new trial. (PCR-2 465-66). The circuit court noted that the rules of evidence are generally relaxed during the penalty phase of a capital trial, but the circuit court found that the evidence was inadmissible because it was not "relevant to the crimes in this case or the defendant's character" and because the sentence "was imposed without the Court's reliance on the defendant's triggerman status." (PCR-2 466). The circuit court erred on both accounts.

First, the evidence is relevant and probative mitigating evidence. "It is beyond dispute that in a capital case the sentencer may not be precluded from considering, as a mitigating factor . . . any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Mills v. Maryland*, 486 U.S. 367, 374

(1988) (internal quotations omitted). The threshold for relevance for mitigation evidence is “low” and, accordingly, must be considered “in the most expansive terms.” *Tennard v. Dretke*, 542 U.S. 274, 275 (2004). Indeed, “virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce.” *Payne v. Tennessee*, 501 U.S. 808, 822 (1991). “It is universally recognized that evidence, to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue, but only have any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” *McKoy v. North Carolina*, 494 U.S. 433, 440 (1990). “Once this low threshold for relevance is met, the Eighth Amendment requires that the [sentencer] be able to consider and give effect to a capital defendant's mitigating evidence.” *Tennard*, 543 U.S. at 275 (internal quotations omitted).

In this case, the question of which defendant fired the fatal shot—and thus was more culpable—would be a central one for the jury at a new penalty-phase trial. See *Green v. Georgia*, 442 U.S. 95, 97 (1979). The forensic report and Thomas’s prior violent history, particularly when considered in tandem with all other newly

discovered evidence, meet the Eighth Amendment’s “low threshold for relevance” because they make it more likely that Thomas was the shooter. *Tennard*, 543 U.S. at 275. With respect to the forensic report finding that Thomas has been diagnosed with ASPD and elucidating a history and profile that are “indicative of an individual with recurrent problems with anger management and explosiveness,” (PCR-2 148), courts, including this one, have universally recognized that this kind of evidence is damning because it makes a defendant appear to a jury to be more prone to violence. *See Freeman v. State*, 858 So. 2d 319, 327 (Fla. 2003) (noting that jurors look unfavorably upon antisocial personality disorder). This would be particularly strong because the mental health experts who testified in Appellant’s case explicitly rejected the same diagnosis for Appellant. (PCR 2564-65, 2610). Further, evidence of Thomas’s violent history, consistent with the forensic report, would also show that it is more likely that Thomas was the shooter.

As to the determination that the evidence was irrelevant because Appellant was sentenced to death “without the Court’s reliance on the defendant’s triggerman status,” the circuit court misconstrued the nature of a newly discovered evidence claim.

Because resentencing proceedings are held *de novo*, the *Jones* inquiry must necessarily be a forward-looking one. See *State v. Fleming*, 61 So. 3d 399, 406-08 (Fla. 2011). At a new trial, Appellant would be able to present the newly discovered evidence to a jury. The question is not whether Appellant was previously sentenced in reliance upon shooter-status, but rather whether there is a probability that, in light of all the new evidence, at least one juror would vote for life. As noted above, the identity of the shooter is a central question during a capital sentencing. *Green*, 442 U.S. at 97. Because this evidence meets the low threshold of tending to show that it is more probable that Thomas was the shooter, it would be admissible at a new penalty-phase trial.

#### **IV. The cumulative prejudice of all newly discovered evidence**

The cumulative impact of the newly discovered evidence in this case entitles Appellant to a new penalty phase trial. “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 and ‘all the circumstances of the case.’” *Hildwin*,

141 So. 3d at 1184.<sup>15</sup> This requires this Court to consider the weight of the evidence that was introduced at trial against all newly discovered evidence and all evidence that has emerged since trial. Because this newly discovered evidence gives rise to a “reasonable doubt as to his culpability,” there is a probability that Appellant would receive a less severe sentence at a new trial. *Id.*

When considering the impact of the evidence, this Court is required to consider the probability that Appellant would receive a new sentence under Florida’s current capital sentencing statute, which requires jurors to unanimously make each of the following findings: that at least one aggravating factor exists, that any aggravating factors are sufficient, that those aggravating factors outweigh any mitigating factors, and whether the defendant should be sentenced to death or life without parole. § 921.141, Fla. Stat. (2021). *See Fleming*, 61 So. 3d at 406-08. Therefore, the question is whether at a new trial there is a probably that a single juror would

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<sup>15</sup> Because the circuit court wrongly failed to consider each of the individual pieces of newly discovered evidence, it also did not conduct a cumulative weighing of the impact the new evidence would have at a new trial.

answer “no” to any of the questions above in light of the newly discovered evidence. *Cf. Wiggins*, 539 U.S. at 537.

**A. The evidence at Appellant’s trial**

At the time of Appellant’s sentencing, Thomas had been convicted and sentenced to life without the possibility of parole. Unlike today, there was no disparity in sentencing to consider because Thomas received the maximum sentence he could as a juvenile. That has now changed.

As to relative culpability, Judge Skinner did not find that either codefendant was more culpable than the other. Judge Skinner found that Appellant was instrumental in planning and robbing the victim, but he expressly declined to find that he was the shooter. (5 R 886). Judge Skinner noted there was evidence to support the inference that Appellant may have been the shooter, and thus the more culpable codefendant—namely his inconsistent statements to law enforcement in which Appellant vacillated between saying he was and was not the shooter over the course of an interrogation. (5 R 885-86). Judge Skinner contrasted Appellant’s inconsistent statements with the statements Thomas made in his interview with law enforcement—

statements Judge Skinner mistakenly found to be consistent. *Id.*<sup>16</sup> However, Appellant did argue during the penalty phase that his statements to law enforcement were the result of coercion and that he had passed a polygraph examination that showed he did not shoot the victim.<sup>17</sup> So, while Judge Skinner declined to rest any findings regarding the aggravation in this case on Appellant being the shooter, Judge Skinner also rejected finding any mitigation regarding Appellant not being the shooter, meaning that both the aggravation and mitigation sides of the scale would change at a new trial.

### **B. The newly discovered evidence**

Because Judge Skinner did not find that Appellant was more culpable than Thomas, and the evidence that has since come to light supports the relative culpability of Thomas, this newly discovered evidence of Thomas's resentencing is particularly important. Thomas is now serving concurrent sentences of 40 and 30 years with a

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<sup>16</sup> Troublingly, the interview of Thomas was not actually evidence in this case. Instead, the taped interview was only played during Thomas's trial, which took place during a recess in Appellant's trial. Because the *Jones* test requires this Court to consider new evidence against "evidence introduced at trial," *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998), this Court should disregard any finding made by the trial court which relied upon any of those statements.

<sup>17</sup> The polygraph evidence was ruled inadmissible. (5 R 886).

statutorily mandated review of each sentence after 15 and 20 years, respectively. The difference between Thomas's sentence at the time of trial and now is stark. At a new trial, Appellant would be able to argue to the factfinder that a sentence of death is unjust and he is deserving of a sentence less than death when his equally culpable codefendant could walk out of prison after serving merely 15 years for the same crime.

This Court must also consider the new evidence. First, Thomas has now confessed to being the shooter in a sworn statement and the circumstances under which he recanted this statement—two weeks before a resentencing proceeding in which he was arguing that he was a minor participant—are dubious. As noted above, Appellant would be able to highlight the wild inconsistencies in Thomas's statements over time at a new trial. Significantly, the trial court rejected the statutory mitigating circumstance that Appellant was an accomplice or minor participant in part by rejecting Appellant's argument at trial that he was not the shooter by relying on the credibility and apparent consistency of Thomas. (5 R 885-86). Thomas has now admitted to being outside the car during the robbery and shooting the victim, only to take back that confession two weeks

before a resentencing hearing. That recantation is simply not credible. *Archer*, 934 So. 2d at 1198. Given Judge Skinner’s previous reliance on the “consistency” of the codefendants’ statements, the new inconsistencies would have weighed strongly in favor of finding the statutory mitigating circumstance.<sup>18</sup> Second, Thomas has ASPD and a history and profile of someone who suffers from anger problems and explosiveness. Third, consistent with the findings of Dr. Meadows, Thomas has a violent history, which includes attacking a classmate with brass knuckles without provocation.<sup>19</sup>

As a whole, these pieces of evidence, unknown to Judge Skinner when he sentenced Appellant in 2011, tend to show that Thomas was the triggerman. This likelihood is only increased by when this new evidence is compared to evidence from Appellant’s postconviction

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<sup>18</sup> Based on the circuit court’s order, Appellant is stuck in a catch-22 in which he was sentenced to death because Thomas’s account of the crime was too “credible” and too “consistent,” but he is now stuck on death row because Thomas’s account of the crime is now too incredible and too inconsistent.

<sup>19</sup> While Appellant has a prior conviction for first-degree murder, which was the basis for an aggravating circumstance, the facts of that case are that Appellant shot an adult male who had sexually assaulted him and threatened to murder his unborn child and girlfriend. The expert who examined Appellant in that case found that he was under the influence of extreme mental or emotional distress at the time of the crime. (PCR 301).

proceedings. See *Swafford v. State*, 125 So. 3d 760, 775 (Fla. 2013) (“The *Jones* standard requires that, in considering the effect of the newly discovered evidence, we consider all of the admissible evidence that could be introduced at a new trial.”). Notably, none of this information was presented at trial.

For example, Thomas’s diagnosis of ASPD and history and profile regarding anger management issues and explosiveness would enable Appellant to argue that Thomas was more culpable. See *Freeman*, 858 So. 2d at 327 (noting that jurors look unfavorably upon ASPD); see also *Cummings v. Sec’y for Dep’t of Corr.*, 588 F.3d 1331, 1368 (11th Cir. 2009) (noting that ASPD is “not mitigating but damaging”); *Clisby v. Alabama*, 26 F.3d 1054, 1056 (11th Cir. 1994) (noting that, “by common definition,” those who are antisocial “have little respect for social norms or the rights of others”). As noted above, this evidence would be particularly strong because the two mental health experts who testified in this case, Dr. Stephen Bloomfield and Dr. Julie Kessel, both rejected the same diagnosis for Appellant. (PCR 2564-65, 2610). Instead, they found that Appellant had a personality type that was submissive and dependent. (PCR 2555, 2610-11).

Appellant would also be able to show that despite being slightly older than Thomas, his cognitive function and brain development were immature and underdeveloped. Dr. Bloomfield and Dr. Kessel both testified during postconviction that Appellant's functioning and development were impaired by "a number of cognitive problems," (PCR 2549, 2610), an underdeveloped brain, (PCR 2551-53, 2603-04), major depressive disorder, (PCR 2561), "incredibly intense substance abuse," (PCR 2606), and significantly, that "the capital felony was committed while [Appellant] was under the influence of extreme mental or emotional distress," (PCR 470, 2610).<sup>20</sup>

Even if the newly discovered evidence did not support the finding of the statutory mitigating circumstance, it would still establish that Thomas was likely the more culpable codefendant and that a death sentence was not appropriate for Appellant. Separate from any statutory mitigating circumstance, the relative culpability of codefendants is a persuasive consideration in assessing the weight

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<sup>20</sup> As mentioned above, Dr. Harry Krop, who evaluated Appellant in the case regarding his prior capital felony, found that he committed that crime, which occurred six weeks before the crime in this case, while he was under the influence of extreme mental or emotional distress. (PCR 301).

of aggravating and mitigating evidence to support a death sentence. Thus, as this Court as repeatedly held, it does not matter that Judge Skinner also rejected this statutory mitigating circumstance based on Appellant's role in the "planning and robbing" of the victim because the triggerman is inherently more culpable. *See, e.g., Blake v. State*, 972 So. 2d 839, 849–50 (Fla. 2007) (noting that because the jury found Blake was the triggerman, he was more culpable than his codefendant); *Ventura v. State*, 794 So.2d 553, 571 (Fla.2001) (finding codefendants not equally culpable where a codefendant hired Ventura to kill the victim, but Ventura was the triggerman); *Downs v. State*, 572 So.2d 895, 901 (Fla.1990) ("[E]vidence in the record supports the trial court's conclusion that Downs was the triggerman and thus was more culpable than Johnson.").<sup>21</sup> Therefore, with the use of this newly discovered evidence at a new trial, Appellant would be able to establish the statutory mitigating circumstance and, even if not, successfully argue that the death penalty was not appropriate because Thomas was likely the triggerman. *Cf. Ventura*, 794 So.2d at

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<sup>21</sup> The only exception is when the non-triggerman is the dominant force, which the trial court did not find and is not applicable in this case.

571 (finding codefendant who hired hitman less culpable than hitman because he was the triggerman).

It is clear from the total picture of the evidence in this case that the newly discovered evidence of Thomas's new sentence and the evidence that has come to light during his resentencing, which significantly changes the relative aggravation and mitigation in this case, would give rise to a reasonable doubt as to the culpability of Appellant and thus probably produce a less severe sentence at a new trial. Therefore, Appellant's death sentence should be vacated.

### **ISSUE 3**

#### **THE CIRCUIT COURT ERRED IN DENYING APPELLANT'S CLAIM THAT HIS DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT IN LIGHT OF THOMAS'S TERM-OF-YEARS SENTENCE**

Even though neither codefendant has ever been found to be more culpable than the other in this case in which a single shot was fired, one codefendant is facing a sentence of death while the other could be released from of prison as soon as March 2024. At most, Thomas will serve 40 years. Appellant, convicted of the same charges, faces a death sentence merely because he is twenty months older. This violates the Eighth Amendment.

The circuit court erroneously denied this claim. In doing so, the circuit court relied solely on *Lawrence v. State*, 308 So. 3d 544 (Fla. 2020). (PCR-2 463). In *Lawrence*, this Court held that proportionality review—which involves comparing the death sentence being challenged against the application of the death penalty across every case in which a death sentence was handed down—is not constitutionally required and thus this Court would no longer engage in mandatory proportionality review as part of its direct appeal review in death penalty cases. 308 So. 3d at 548.

Appellant’s claim, however, was one of relative culpability, which looks only at the sentences handed down to codefendants with respect to the same crime. *See McCloud*, 208 So. 3d at 687-88 (“While the first analysis focuses on the larger universe of death sentences that have been imposed, the latter analysis hones in on the smaller universe of the perpetrators and participants in a given capital murder.”) (internal quotation omitted). The circuit court erred by failing to follow the binding precedent of this Court. Indeed, this Court has continued to apply relative culpability post-*Lawrence*. Just last year, this Court distinguished between proportionality and relative culpability:

### *A. Proportionality*

Cruz first argues that his death sentence is disproportionate in comparison with other death penalty cases. Given our recent decision in *Lawrence v. State*, 308 So. 3d 544 (Fla. 2020) (receding from the judge-made requirement to review the comparative proportionality of death sentences as contrary to the conformity clause of article I, section 17 of the Florida Constitution), we need not address this claim.

We do not reach the issue of relative culpability and Cruz's argument that codefendant Charles' life sentence should also provide a life sentence for Cruz because of the need for resentencing caused by the error of reliance on facts not in evidence.

*Cruz v. State*, 320 So. 3d 695, 723 (Fla. 2021).

This Court was correct to do so. In receding from proportionality review, this Court based its decision on *Pulley v. Harris*, 465 U.S. 37 (1984). *Lawrence*, 308 So. 3d at 548. In *Pulley*, the Supreme Court declined to hold that states are required to engage in proportionality review that looks across the universe of cases in which the sentence was imposed as a mandatory component of the direct appeal review process. Notably, however, the Supreme Court has held elsewhere that a review of the relative culpability of codefendants is

constitutionally required. *See, e.g., Lockett v. Ohio*, 438 U.S. 586, 612 (1978) (plurality) (ruling it violates the Eighth Amendment to preclude a jury from considering a “defendant's comparatively minor role in the offense”); *id.* at 613 (Blackmun, J., concurring) (joining the judgment on the ground that it is impermissible to prohibit a sentencer from considering the defendant’s role in the crime relative to other codefendants); *Enmund v. Florida*, 458 U.S. 782, 798 (1982) (finding it impermissible under the Eighth Amendment to treat codefendants alike when their relative culpability was “plainly different”); *Tison v. Arizona*, 481 U.S. 137 (1987). Indeed, the Supreme Court made this distinction in *Pulley* itself. *See* 465 U.S. at 43 (noting that the culpability review in *Enmund* is of a “different sort” than the proportion review at question in *Pulley*).

The Eighth Amendment is built on the principle that punishment should be directly related to the personal culpability of the defendant. *See Penry v. Lynaugh*, 492 U.S. 302, 319 (1989). “It is a precept of justice that punishment for crime should be graduated and proportioned to the offense.” *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (quoting *Weems v. United States*, 217 U.S. 349 (1910)). Thus, “[c]apital punishment must be limited to those offenders who commit

‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’” *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (quoting *Atkins*, 536 U.S. at 319). “[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty.” *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980). In order to fulfill this constitutional mandate, “once a state determines that death is available as a penalty for a certain crime, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not.” *Spaziano v. Florida*, 468 U.S. 447, 460 (1984) *overruled on other grounds by Hurst v. Florida*, 577 U.S. 92, 101 (2016); *Cf. Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (holding that equal protection is violated “[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense and . . . [subjects] one and not the other” to a harsh form of punishment).

Both the United States Supreme Court and this Court have made it clear that the relative culpability of codefendants is a central

constitutional question, particularly as it relates to who actually killed the victim. As the United States Supreme Court has repeatedly held, the sentencer in a capital proceeding must be allowed to meaningfully consider and give effect to any circumstance of the crime that may result in a sentence less than death, which specifically includes the relative culpability of the defendant. See *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246-56 (2007). Under the Eighth Amendment, punishment should be directly related to the personal culpability of that particular criminal defendant. *Penry*, 492 U.S. at 319. Indeed, whether or not a defendant actually fired the shots that killed the victim is a “critical issue” in the penalty phase of a capital trial when the relative culpability of the defendant is at issue. *Green*, 442 U.S. at 97.

This Court has consistently held that a less or equally culpable codefendant cannot be sentenced to death when an equally, or more culpable, codefendant receives a lesser sentence. This Court has done so under “the principle that equally culpable co-defendants should be treated alike in capital sentencing and receive equal punishment.” *Blake v. State*, 972 So. 2d 839, 849 (Fla. 2007). This Court has noted that the triggerman—*i.e.*, the codefendant who

actually killed the victim—is generally the more culpable party. See *Id.* at 849–50 (noting that because the jury found Blake was the triggerman, he was more culpable than his codefendant); *Ventura*, 794 So. 2d at 571 (finding codefendants not equally culpable where a codefendant hired Ventura to kill the victim, but Ventura was the triggerman); *Slater v. State*, 316 So. 2d 539 (Fla.1975) (reducing defendant's death sentence to life imprisonment because “triggerman” codefendant was sentenced to life in a plea bargain).

Therefore, as recognized by both the United States Supreme Court and this Court, it is unconstitutionally arbitrary and irrational to maintain an individual’s death sentence when his codefendant, who is at least equally culpable, now faces a lesser sentence. Here, because Appellant is no more culpable than his codefendant, who faces a term of, at most, 40 years, his death sentence is exactly the kind of arbitrary and irrational sentence that is prohibited by the constitution. *Parker v. Dugger*, 498 U.S. 308, 321 (1991).

In fact, this Court has recognized that the “gaps” and “anomalies” lurking in Florida’s post-*Miller* statutory scheme have Eighth Amendment implications that this Court will have to address. *Purdy*, 252 So. 3d at 729. In particular, this Court pointed to the fact

that juveniles, like Thomas, who committed violent crimes received a windfall and can become eligible for release after just 15 years. *Id.* This case presents the opportunity for this Court to fix one of those unconstitutional anomalies—namely, that the only difference between the codefendant facing execution and the codefendant who may soon walk out of prison is the few months between their ages at the time of the crime.

On point is *Sumner v. Shuman*, 483 U.S. 66 (1987). There the United States Supreme Court struck down Nevada’s death penalty statute to the extent that it required the automatic imposition of a sentence of death for prison murders committed by those serving sentences of life without the possibility of parole. *Id.* at 85. The Supreme Court first noted that it has “recognized time and again that the level of criminal responsibility of a person convicted of murder may vary according to the extent of that individual's participation in the crime” and thus must be considered in sentencing. *Id.* at 79. The Nevada statute was therefore unconstitutional because it prevented consideration of the level of participation of the defendant in the crime compared to his codefendants.

Like the “gaps” and “anomalies” this Court identified in *Purdy*, 252 So. 3d at 729, the Supreme Court in *Sumner* noted an absurd result under the Nevada statute that is essentially identical to the one present in Appellant’s case:

Mandating that sentences imposed on inmates serving life terms be different from sentences imposed on other inmates could produce the odd result of a riot's more culpable participant's being accorded a less harsh sentence than the less culpable participant simply because the less culpable one is serving a life sentence and the more culpable one is serving a sentence of years.

483 U.S. at 79 n.8. This absurd result that rendered Nevada’s statute unconstitutional is materially indistinguishable from the absurd result in this case that Appellant has been sentenced to death while his equally or more culpable codefendant will be released after a term of years.

Despite being a case in which the victim was killed by a single gunshot wound, no factfinder has ever determined who was the more culpable codefendant. Regarding Appellant, the trial court explicitly declined to find that Appellant was the shooter. (5 R 886). And in Thomas’s case, the jury returned a verdict finding that the State did not prove beyond a reasonable doubt that he possessed a gun during

the offenses. (9 R 416).<sup>22</sup> Notably, neither codefendant was found to be the more culpable party despite the State affirmatively arguing at both trials that the evidence could support the finding that either codefendant was the shooter.

On direct appeal, this Court declined to conduct a relative culpability proportionality analysis between Appellant and Thomas. *Sanchez-Torres*, 130 So. 3d at 675. Under precedent, the relative culpability of codefendants is only considered by this Court when there is a disparity in the sentences of codefendants to be considered. Thus, because Thomas was then serving the maximum sentence for which he was eligible under law, there was no relative culpability analysis to be performed. So, no factfinder or court found that either codefendant was more culpable than the other.

In light of Thomas's new sentence and related newly discovered evidence, the disparity in Appellant's and Thomas's sentences makes Appellant's death sentence unconstitutional. Appellant is not among those "whose extreme culpability makes them 'the most deserving of

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<sup>22</sup> The circuit court erroneously relied on this jury verdict in finding Thomas less culpable. (PCR-2 464-65); *see Harris*, 959 So. 2d at 799 (Canady, J., dissenting) ("[A] jury's acquittal is not a rejection of facts").

execution,” *Roper*, 543 U.S. at 568, as there is no rational distinction between his sentence and the sentence of Thomas, *Spaziano*, 468 U.S. at 460. The disparity is particularly troubling where one codefendant was 19 at the time of the crime while the other was 17, meaning that the sole difference between a death sentence and the potential to walk out of prison after 15 years is the months between the births of each codefendant. This is the epitome of arbitrary and irrational and violates the Eighth Amendment.

### **CONCLUSION**

This Court should reverse the lower court, and either vacate Appellant’s sentence of death or remand the cause for an evidentiary hearing.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I **HEREBY CERTIFY** that a true and correct copy of the foregoing pleading has been furnished by electronic service to all counsel of record on this 19th day of August, 2022.

/s/ Karin L. Moore \_\_\_\_\_

**CERTIFICATION OF TYPE SIZE AND STYLE**

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/s/ Karin L. Moore \_\_\_\_\_