In the Supreme Court of Florida

EXECUTION SCHEDULED FOR
THURSDAY, AUGUST 22, 2019 @ 6:00 p.m.

GARY RAY BOWLES,

Petitioner,

v.

CASE NO.: SC19-1184
CAPITAL CASE

STATE OF FLORIDA,

Respondent.

_____/

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

ANSWER BRIEF

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA

CHARMAINE M. MILLSAPS
SENIOR ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0989134

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL, PL-01
TALLAHASSEE, FL 32399-1050
(850) 414-3300
primary email:
capapp@myfloridalegal.com
secondary email:
charmaine.millsaps@myfloridalegal.com

COUNSEL FOR THE STATE

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STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

This is an appeal from the trial court's summary denial of a successive postconviction motion in an active death warrant capital case.

Gary Ray Bowles was on probation for robbery when he met the victim, Walter Hinton, at Jacksonville Beach. Hinton allowed Bowles to move into his mobile home in exchange for Bowles helping him move. On November 16, 1994, Hinton, Bowles, and a friend smoked some marijuana and drank some beers. After dropping the friend off at the train station, Hinton went to sleep in his bedroom. Bowles went outside the mobile home and picked up a 40 pound concrete stepping stone. Shortly thereafter went into Hinton's bedroom and dropped the concrete stone on Hilton's head, fracturing Hinton's face from cheek to jaw. Bowles then strangled Hinton. Bowles stuffed toilet paper down Hinton's throat and shoved a rag into Hinton's mouth, smothering Hilton. Hilton died of asphyxiation. Bowles confessed to the murder both orally and in writing. *See generally Bowles v. State*, 716 So.2d 769, 770 (Fla.1998); *Bowles v. State*, 979 So.2d 182, 184 (Fla. 2008).

Bowles entered a guilty plea to first-degree murder. *Bowles v. State*, 716 So.2d 769, 770 (Fla.1998). Following the penalty phase, the first jury recommended a death sentence and the trial court imposed a death sentence.

On direct appeal to the Florida Supreme Court, Bowles raised ten issues. *Bowles*, 716 So.2d at 770, n.2 (listing issues raised in the direct appeal).[1] The

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[1] The ten issues were: 1) the trial court erred in admitting evidence of the victim's homosexuality and Bowles' hatred of homosexuals; 2) the trial court erred in denying the motion for a mistrial after witnesses testified that Bowles was "rolling faggots" in Daytona Beach and that he "drank to make it easier to kill"; 3) the trial court erred in failing to find statutory mental mitigators; 4) the trial court erred in finding that the murder was committed during the course of an attempted robbery and for pecuniary gain; 5) the trial court erred in finding the heinous,

Florida Supreme Court affirmed Bowles' conviction for premeditated first-degree murder but remanded for a second sentencing proceeding because the prosecution had made Bowles' hatred of homosexuals a feature of the first penalty phase. *Bowles*, 716 So.2d at 773.

At the second penalty phase in May 1999, Bowles was again represented by Chief Assistant Public Defender Bill White and new co-counsel Assistant Public Defender Brian Morrisey. Following the second penalty phase, the second jury recommended a death sentence unanimously. *Bowles v. State*, 804 So.2d 1173,1175 (Fla. 2001). The trial court found five aggravating circumstances: 1) Bowles was convicted of two other capital felonies and two other violent felonies; 2) Bowles was on felony probation when he committed the murder due to a 1991 Volusia County conviction; 3) the murder was committed during a robbery or an attempted robbery, and the murder was committed for pecuniary gain (merged into one factor); 4) the murder was heinous, atrocious, or cruel (HAC); and 5) themurder was cold, calculated, and premeditated (CCP). *Id.* at 1175. The trial court assigned "tremendous weight" to the prior violent capital felony convictions. *Id.* Indeed, the trial court found the March 15, 1994 prior murder of John Roberts to be "eerily similar" to the facts of the Hinton murder (sentencing order at 106). In the prior Roberts murder, a few days after moving into the victim's home, Bowles approached the victim from behind and hit him with a lamp. *Id.* at 1176. A struggle ensued during which Bowles strangled the victim and stuffed a rag into

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atrocious, and cruel aggravating factor (HAC); 6) the trial court erred in failing to instruct the jury it could consider Bowles defective mental condition to diminish the weight given to HAC; 7) the death sentence is disproportionate; 8) the trial court erred in giving the standard jury instruction on HAC; 9) the trial court erred in instructing the jury on the cold, calculated, and premeditated aggravating factor (CCP) using an unconstitutionally vague instruction; and 10) the felony murder aggravator is unconstitutional facially and as-applied.

his mouth. Bowles then emptied the victim's pockets, took his credit cards, money, keys, and wallet. *Id.* Bowles also murdered Albert Morris in May of 1994 in Nassau County. In the prior Morris murder, the victim befriended Bowles and allowed Bowles to stay at his home. *Id.* Bowles and the victim got into a fight in which Bowles hit the victim over the head with a candy dish and then shot the victim in the chest. Bowles also strangled the victim and tied a towel over his mouth. *Id.* Regarding the remaining aggravators, the trial court assigned great weight to the HAC and CCP aggravators, significant weight to the robbery-pecuniary gain aggravator, and some weight to the "on probation" aggravator. *Id.*

The trial court rejected both statutory mental mitigators. *Bowles*, 804 So.2d at 1176. The trial court found the following nonstatutory mitigating factors: significant weight to Bowles' abusive childhood; some weight to Bowles' history ofalcoholism and absence of a father figure; little weight to Bowles' lack ofeducation; little weight to Bowles' guilty plea and cooperation with police in thisand other cases; and little weight to Bowles' use of intoxicants at the time of the murder. *Id.* The trial court concluded that the aggravating circumstances overwhelmingly outweighed the mitigating circumstances and imposed a death sentence. *Id.*

On appeal to the Florida Supreme Court from the resentencing, Bowles was again represented by Assistant Appellate Public Defender David Davis, who raised

12 issues. *Bowles v. State*, 804 So.2d 1173, 1175 (Fla. 2001).[2] The Florida Supreme Court affirmed the death sentence concluding that the death sentence was proportionate. *Id.* at 1184.

Bowles then filed a petition for writ of certiorari in the United States Supreme Court raising three issues: 1) the prosecutor's use of peremptory challenges to remove prospective jurors who expressed reservations about the death penalty; 2) the trial court erred in refusing to give a special jury instruction defining mitigation; and 3) the trial court erred in refusing to give a special jury instruction informing the jury to consider mental mitigation in weighing the HAC aggravator. On June 17, 2002, the United States Supreme Court denied the petition. *Bowles v. Florida*, 536 U.S. 930 (2002) (No. 01-9716). So, Bowles' conviction and death sentence became final on June 17, 2002.

On December 9, 2002, Bowles, represented by registry counsel Frank Tassone, filed an initial postconviction motion in state court. On August 29, 2003, Bowles filed an amended postconviction motion asserting nine claims. *Bowles v. State*,

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[2] The 12 issues were: 1) the trial court erred in allowing the prosecutor's use of peremptory challenges to remove prospective jurors who expressed reservations about the death penalty; 2) the trial court erred in allowing the introduction of two prior murders for which the defendant was convicted after the first sentencing hearing; 3) the trial court erred in finding the HAC aggravator; 4) the trial court erred in rejecting the proposed HAC jury instruction; 5) the CCP instruction to the jury was unconstitutionally vague; 6) the trial court erred in finding the robbery-pecuniary gain aggravator; 7) the trial court erred by giving little or no weight to nonstatutory mitigators; 8) the trial court erred in rejecting the proposed victim impact evidence jury instruction; 9) the trial court erred by rejecting the statutory mental mitigators of extreme emotional disturbance and substantially diminished capacity; 10) the trial court erred in giving the standard jury instruction on mitigation instead of the requested special instructions; 11) the trial court erred by rejecting the requested jury instructions defining mitigation; and 12) the trialcourt erred by allowing impermissible hearsay. *Bowles*, 804 So.2d at 1176 (listingissues); *see also Bowles v. State*, 979 So.2d 182, 185, n.1 (Fla. 2008) (listing issues on appeal from the new penalty phase).

979 So.2d 182, 186, n.2 (Fla. 2008) (listing the 3.851 claims in a footnote).[3] Bowles also filed a "Motion to Reopen Testimony," arguing that *Crawford v. Washington*, 541 U.S. 36 (2004), required reversal because he was denied the opportunity to confront his accusers. *Bowles*, 979 So.2d at 186.

The Honorable Jack Marvin Schemer presided at the original penalty phase, the second penalty phase, and the postconviction proceedings in state court. On February 8, 2005, the trial court held an evidentiary hearing. During the postconviction evidentiary hearing in state court, among the defense witness wasDr. Harry Krop, a licensed clinical psychologist, with a specialization in forensic psychology. Dr. Krop evaluated Bowles on three separate occasions between 2003 and 2004 (Vol III 89). Dr. Krop had administered a comprehensive neuropsychological examination to Bowles which revealed among other things, that Bowles' IQ was in the "low 80's." (Vol. III 118). Dr. Krop acknowledged that he had diagnosed Bowles with both anti-social personality disorder as well as conduct disorder. (Vol. III 137-38, 139).

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[3] The nine claims were: 1) trial counsel were ineffective for failing to present statutory and nonstatutory mental mitigation, and the trial court erred in finding the two statutory mental mitigators were not proven; 2) the trial court erred in refusing to give the defense's requested jury instructions defining mitigation; 3) the trial court erred in instructing the jury that it could consider victim impact evidence; 4) Florida's death penalty scheme is unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002) and 5) a similar claim regarding Florida's death penalty scheme being unconstitutional under *Ring*; 6) *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring* required the elements of the offense necessary to establish capital murder be charged in the indictment; 7) *Apprendi* and *Ring* required the jury recommendation of death be unanimous; 8) trial counsel were ineffective for failing to adequately investigate and present mitigating evidence; and 9) trial counsel were ineffective for failing to discover and present evidence rebutting the State's proof of the HAC aggravating factor.

On August 15, 2005, the state postconviction court trial court denied postconviction relief following the evidentiary hearing. The postconviction court rejected the first three claims as procedurally barred, either because they were raised or should have been raised on direct appeal. *Bowles*, 979 So.2d at 186. The postconviction court also denied claims four through seven as well as the motion to reopen testimony. *Id*.

In the postconviction appeal to the Florida Supreme Court, Bowles represented by Frank Tassone and Rick Sichta, raised five issues. *Bowles*, 979 So.2d at 186.[4] The Florida Supreme Court affirmed the trial court's denial of postconviction relief. Bowles also filed a writ of habeas corpus in the Florida Supreme Court raising two claims of ineffective assistance of appellate counsel. *Bowles*, 979 So.2d at at 193-94.[5] The Florida Supreme Court rejected the two claims of ineffective assistance of appellate counsel.

On August 8, 2008, Bowles, represented by Frank Tassone, filed a federal

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[4] The five issues were: 1) trial counsel were ineffective for failing to present an expert to testify to mental mitigation including the effects of Bowles' lifelong alcohol and drug abuse; his low IQ; abusive childhood; and neuropsychological impairment; 2) trial counsel were ineffective for failing to refute the State's expert, Medical Examiner Dr. Margarita Arruza, on applicability of the HAC aggravator; 3) the trial court improperly summarily denied the claim of ineffectiveness for failing to present mental mitigation; 4) Florida's death penalty statute violates *Ring* and *Apprendi*; 5) the testimony of Officer Jan Edenfield as to Bowles' 1982 sexual battery and aggravated sexual battery convictions violated his Confrontation Clause rights under *Crawford*.

[5] The two claims of ineffective assistance of appellate counsel were: 1) failing to raise the issue of the prosecutor's comments in closing argument of the penalty phase regarding the mitigators and 2) failing to raise the issue of the admission of seven photographs.

habeas petition in the Middle District of Florida. *Bowles v. Sec'y, Dept. of Corr.*, 3:08-cv-791 (M.D. Fla. 2008). The federal habeas petition raised 10 claims.[6] On December 23, 2009, the federal district court denied the habeas petition but granted a certificate of appealability (COA) on ground 1 regarding whether a prosecutor is prohibited from peremptorily striking jurors who express reservations about the death penalty. (Doc. #18).

Bowles then appealed to the Eleventh Circuit arguing the prosecutor's use of peremptory challenges to remove prospective jurors who express reservations about the death penalty violates the Sixth Amendment right to a jury; Due Process; and Equal Protection. On June 18, 2010, the Eleventh Circuit affirmed

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[6] The 10 claims were: 1) a claim that a prosecutor's use of peremptory challenges to remove prospective jurors who expressed reservations about the death penalty violated the Sixth Amendment right to a jury as well as Due Process and Equal Protection; 2) a claim that the Florida Supreme Court's decision allowing the introduction of subsequentconvictions at the second penalty phase violated the federal mandate statue, 28 U.S.C. § 2106; 3) the Florida Supreme Court's affirming the HAC aggravator was a violation of the Eighth Amendment and *Lewis v. Jeffers*, 497 U.S. 764 (1990); 4) the Florida Supreme Court's decision finding the HAC jury instruction was proper, was contrary to, or an unreasonable application of, *Bell v. Cone*, 543 U.S. 447 (2005); 5) Florida's penalty phase evidence statute, § 921.141(1), Florida Statutes (1999), violates the due process and the Eighth Amendment's heightened reliability standards for capital cases; 6) ineffective assistance of appellate counsel for failing to raise the issue of gruesome photographs depicting the decomposing victim; 7) the trial court improperly found the during the course of a robbery and pecuniary gain aggravators because Bowles' taking of the victim's car and watch were an afterthought, not the motive for the murders, in violation of *Lewis v. Jeffers*, 497 U.S. 764 (1990); 8) Florida Supreme Court's decision affirming the trial court rejection of the two statutory mental mitigating circumstance, was contrary to, or an unreasonable application of an unidentified Supreme Court case; 9) Florida Supreme Court's decision finding the death sentence to be proportionate violated the Eighth Amendment; and 10) Florida Supreme Court's decision concluding that counsel was not effective for not presenting a mental health expert, Dr. McMahon, at the *Spencer v. State*, 615 So.2d 688 (Fla.1993), hearing was contrary to, or an unreasonable application of, *Strickland v. Washington*, 466 U.S. 668 (1984).

the district court's denial of the habeas petition. *Bowles v. Sec'y, Dept. of Corr.*, 608 F.3d 1313 (11th Cir. 2010).

Bowles then filed a petition for writ of certiorari in the United States Supreme Court raising the peremptory challenge claim. On November 29, 2010, the United States Supreme Court denied the petition. *Bowles v. McNeil*, 562 U.S. 1068 (2010) (No. 10-6587).

On April 10, 2013, Bowles, represented by registry counsel Frank Tassone, filed a successive 3.851 postconviction motion raising two claims of ineffective assistance of appellate counsel relying on *Martinez v. Ryan*, 566 U.S. 1 (2012). On July 17, 2013, the trial court denied the successive postconviction motion. Bowles did not appeal the denial of the successive motion to the Florida Supreme Court.[7]

On June 14, 2017, Bowles, now represented by registry counsel Francis Shea[8], filed a second successive postconviction motion in the state trial court raising a claim that his death sentence violated *Hurst v. Florida*, 136 S.Ct. 616 (2016), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016), *cert. denied*, *Florida v. Hurst*, 137 S.Ct. 2161 (2017) (No. 16-998). On August 22, 2017, the trial court denied the successive postconviction motion concluding that *Hurst* did not apply

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[7] This Court has held repeatedly and consistently that *Martinez v. Ryan* is limited to federal habeas litigation and does not apply to Florida postconviction proceedings. *Banks v. State*, 150 So.3d 797, 800 (Fla. 2014) ("We have held that *Martinez* applies only to federal habeas proceedings and does not provide an independent basis for relief in state court proceedings" citing *Howell v. State*, 109 So.3d 763, 774 (Fla. 2013), and *Gore v. State*, 91 So.3d 769, 778 (Fla. 2012)). So, there was little point to an appeal.

[8] On September 3, 2015, the state trial court permitted Frank Tassone, who had represented Bowles since 2002, to withdraw as state postconviction counsel and then appointed Francis Shea to represent Bowles as state postconviction counsel.

retroactively to Bowles relying on *Asay v. State*, 210 So.3d 1 (Fla. 2016), *cert. denied*, *Asay v. Florida*, 138 S.Ct. 41 (2017) (No. 16-9033), and *Gaskin v. State*, 218 So.3d 399, 401 (Fla. 2017), *cert. denied*, *Gaskin v. Florida*, 138 S.Ct. 471 (2017) (No. 17-5669).

Bowles appealed the summary denial of successive *Hurst* claim to the Florida Supreme Court. On January 29, 2018, the Florida Supreme Court affirmed the trial court's denial of the *Hurst* claim. *Bowles v. State*, 235 So.3d 292 (Fla. 2018) (SC17-1754), *cert. denied*, *Bowles v. Florida*, 139 S.Ct. 157 (2018) (SC 17-1754). The Florida Supreme Court concluded that *Hurst* did not apply retroactively to Bowles relying on *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017), *cert. denied*, *Hitchcock v. Florida*, 138 S.Ct. 513 (2017) (No. 17-6180).

On October 19, 2017, Bowles, represented by registry counsel Francis Shea, filed another successive postconviction motion raising a claim of intellectually disability based on *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Hall v. Florida*, 572 U.S. 701 (2014).

Warrant litigation

On June 11, 2019, Governor DeSantis signed a death warrant setting the execution for Thursday, August 22, 2019 @ 6:00 p.m. (Succ. PCR 2019 at 404-405). On June 12, 2019, the Florida Supreme Court issued a scheduling order directing that all proceedings in the trial court be completed by July 17, 2019.

On June 17, 2019, the trial court held a case management conference. On June 17, 2019, the trial court also entered a scheduling order. (Succ. PCR 2019 at 189-192).

On July 1, 2019, Bowles, now represented by Capital Collateral Regional Counsel - North (CCRC-N) and the Capital Habeas Unit of the Federal Public

Defender Office of the Northern District of Florida (CHU-N), filed a successive 3.851 postconviction motion raising a single claim of intellectually disability based on *Atkins* and *Hall v. Florida*. (PCR 2019 at 732-835).[9]

On July 3, 2019, the State filed an answer to the successive postconviction motion. (PCR 2019 at 899-923). The State asserted that the intellectual disability claim was untimely under *Blanco v. State*, 249 So.3d 536, 537 (Fla. 2018), *cert. denied*, *Blanco v. Florida*, 139 S.Ct. 1546 (2019), and *Harvey v. State*, 260 So.3d 906, 907 (Fla. 2018), *pet. for cert. filed*, *Harvey v. Florida*, No. 18-1449 (May 17, 2019). Alternatively, the State asserted that the claim was meritless because it was conclusively rebutted by the existing record.

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[9] On March 25, 2019, the state trial court allowed Francis Shea to withdraw and appointed Collateral Regional Counsel-North (CCRC-N) as state postconviction counsel. On March 26, 2019, Karin Moore of CCRC-N entered a notice of appearance.

On September 27, 2017, the federal district court permitted Frank Tassone and Rick Sichta to withdraw as federal habeas counsel and appointed the Capital Habeas Unit of the Federal Public Defender's Office of the Northern District of Florida (CHU-N) as federal habeas counsel. *Bowles v. Sec'y, Dept. of Corr.*, 3:08-cv-791 (M.D. Fla) (Doc. #33). On December 6, 2017, the federal district court also authorized the CHU-N to appear in state court as state postconviction co-counsel. *Bowles v. Sec'y, Dept. of Corr.*, 3:08-cv-791 (M.D. Fla) (Doc. #36). On October 24, 2018, the current chief of the CHU-N, Terri Backhus, entered a notice of appearance as federal habeas counsel. Bowles, 3:08-cv-791 (Doc. #37). On October 26, 2018, Sean Gunn of the CHU-N also entered a notice of appearance as federal habeas counsel. *Bowles*, 3:08-cv-791 (Doc. #38). On June 13, 2019, the State of Florida filed a motion in federal district court to disqualify the CHU-N from appearing in state court. *Bowles*, 3:08-cv-791 (Doc. #39). On June 25, 2019, the federal district court denied the State's motion to disqualify the CHU-N as state postconviction co-counsel. *Bowles*, 3:08-cv-791 (Doc. #47). So, Bowles is currently represented in state court by CCRC-N and the CHU-N and in federal court by the CHU-N.

On July 8, 2019, the trial court held a case management conference, commonly referred to as a *Huff* hearing,[10] to hear the arguments of counsel regarding whether an evidentiary hearing should be held. (PCR 2019 at 1276-1343). The State asserted that the claim was untimely as well as conclusively rebutted by the existing record. (PCR 2019 at 1313-1332).

On July 11, 2019, the trial court entered an written order summarily denying the intellectual disability claim. (PCR 2019 at 1344-53). The trial court concluded that the claim of intellectual disability was untimely under this Court's precedent and waived under rule 3.203(f).

This successive postconviction appeal follows.

[10] *Huff v. State*, 622 So.2d 982 (Fla. 1993)

SUMMARY OF THE ARGUMENT

ISSUE I

Bowles asserts the trial court erred in summarily denying his claim of intellectual disability based on *Atkins v. Virginia*, 536 U.S. 304, 321 (2002), and *Hall v. Florida*, 572 U.S. 701 (2014), as untimely. IB at 12-47. He argues that certain types of claims, such as an *Atkins* claims, are so fundamental they may not be time barred, procedurally barred, or waived. But the intellectual disability claim is time barred under this Court's precedent of *Blanco v. State*, 249 So.3d 536, 537 (Fla. 2018), *cert. denied*, *Blanco v. Florida*, 139 S.Ct. 1546 (2019), and *Harvey v. State*, 260 So.3d 906, 907 (Fla. 2018), *pet. for cert. filed*, *Harvey v. Florida*, No. 18-1449 (May 17, 2019). And the claim was waived under the applicable rule of court, Florida Rule of Criminal Procedure 3.203(f). Alternatively, the trial court could have properly summarily denied the claim both because it is conclusively rebutted by the record and because it was based solely on conclusory allegations. The trial court properly summarily denied the successive postconviction motion.

ISSUE II

Bowles asserts that the trial court abused its discretion by denying his first time public record requests of the Department of Corrections for his disciplinary reports and visitation logs. Additionally, he asserts that the trial court abused its discretion by denying his public record request of the State Attorney's Office for updates of any correspondence between the victim's family and friends and the prosecutor's office. He also asserts that the trial court abused its discretion by denying his public record request of the Medical Examiner, the Department of Corrections, and the Florida Department of Law Enforcement for lethal injection

information. As to the disciplinary reports, housing and movement records, and visitation logs, the trial court properly found the request to be "overbroad and overly burdensome" because they amounted to "any and all" requests. The trial court also properly concluded that these updates which were sought in support of the claim of intellectual disability would not lead to a colorable claim. Furthermore, any error regarding these updates was harmless because the request was made to support the adaptive deficits prong of the claim of intellectual disability at the evidentiary hearing but no evidentiary hearing was conducted. As to the correspondence between the victim's family and friends and the prosecutor, the trial court properly concluded that there was no "reasonable connection" between the correspondence and the claim of intellectual disability and that the basis for the request was "too attenuated" to lead to a colorable claim. The brother-in-law, sister, and neighbor had only a passing acquaintance with Bowles for a short period of time, so they simply could not have known Bowles well enough to provide any meaningful information on Bowles' adaptive functioning. Furthermore, any error was harmless because the request was made to support the adaptive deficit prong of the claim of intellectual disability at the evidentiary hearing but no evidentiary hearing was conducted. As to the lethal injection requests, this Court recently rejected the same argument regarding similar public records requests in *Long v. State*, 271 So.3d 938, 947-48 (Fla. 2019), *cert. denied*, *Long v. Florida*, 139 S.Ct. 2635 (2019). Therefore, the trial court did not abuse its discretion by denying three of the ten public records requests.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT PROPERLY SUMMARILY DENIED THE CLAIM OF INTELLECTUAL DISABILITY? (Restated)

Bowles asserts the trial court erred in summarily denying his claim of intellectual disability based on *Atkins v. Virginia*, 536 U.S. 304, 321 (2002), and *Hall v. Florida*, 572 U.S. 701 (2014), as untimely. IB at 12-47. He argues that certain types of claims, such as an *Atkins* claim, are so fundamental they may not be time barred, procedurally barred, or waived. But the intellectual disability claim is time barred under this Court's precedent of *Blanco v. State*, 249 So.3d 536, 537 (Fla. 2018), *cert. denied*, *Blanco v. Florida*, 139 S.Ct. 1546 (2019), and *Harvey v. State*, 260 So.3d 906, 907 (Fla. 2018), *pet. for cert. filed*, *Harvey v. Florida*, No. 18-1449 (May 17, 2019). And the claim was waived under the applicable rule of court, Florida Rule of Criminal Procedure 3.203(f). Alternatively, the trial court could have properly summarily denied the claim both because it is conclusively rebutted by the record and because it was based solely on conclusory allegations. The trial court properly summarily denied the successive postconviction motion.

Standard of review

The standard of review of a trial court's order summarily denying a postconviction claim is *de novo*. *Zack v. State*, 43 Fla. L. Weekly S429 (Fla. Oct. 4, 2018) (explaining that because a postconviction court's decision "whether to grant an evidentiary hearing on a rule 3.851 motion is ultimately based on written materials before the court, its ruling is tantamount to a pure question of law, subject to *de novo* review" citing *Marek v. State*, 8 So.3d 1123, 1127 (Fla. 2009)); *Duckett v. State*, 148 So.3d 1163, 1168 (Fla. 2014) (explaining that this Court

reviews the circuit court's decision to summarily deny a successive rule 3.851 motion *de novo*).

The trial court's ruling

The trial court concluded that the claim of intellectual disability was untimely under this Court's precedent and waived under rule 3.203(f). (PCR 2019 at 1344-53). The trial court relied this Court's decisions in *Blanco v. State*, 249 So.3d 536, 537 (Fla. 2018), *cert. denied*, *Blanco v. Florida*, 139 S.Ct. 1546 (2019), and *Harvey v. State*, 260 So.3d 906, 907 (Fla. 2018), *pet. for cert. filed*, *Harvey v. Florida*, No. 18-1449 (May 17, 2019), to find the claim untimely. (PCR 2019 at 1349-50). The trial court noted its obligation to follow Florida Supreme Court precedent. (PCR 2019 at 1350 citing *State v. Dwyer*, 332 So.2d 333, 335 (Fla. 1976)).

The trial court explained that, in the wake of the legislature enacting § 921.137, Florida Statutes and the United States Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), the Florida Supreme Court enacted a rule of criminal procedure, rule 3.203, which required capital defendants, like Bowles, whose initial postconviction motions were still pending in October of 2004, to file an amendment raising an intellectual disability claim within 60 days. Fla. R. Crim. P. 3.203(d)(4)(C); (PCR 2019 at 1349 citing 3.203(d)(4)(E)). But, as the trial court noted, Bowles did not file any such amendment. Instead, Bowles raised this intellectual disability claim for the first time in 2017. Therefore, the trial court concluded that Bowles' claim was untimely.

Additionally, the trial court also concluded that the intellectual disability claim was waived under rule 3.203(f). The trial court rejected two arguments that the good cause exception in rule 3.203(f) applied. (PCR 2019 at 1347-49). The trial court rejected *Walls v. State*, 213 So.3d 340 (Fla. 2016), as a basis for finding good

cause based on this Court rejecting that same argument in *Rodriguez v. State*, 250 So.3d 616 (Fla. 2016). The trial court also reasoned that Bowles could not have actually relied on *Cherry v. State*, 959 So.2d 702 (Fla. 2007), as a basis for not filing an amendment in 2004. The trial court also rejected ineffective assistance of postconviction counsel as an alternative basis for a finding of good cause, reasoning that claims of ineffectiveness of postconviction counsel are not cognizable. (PCR 2019 at 1348-49). The trial court reasoned that the good cause exception could not be permitted "to serve as a backdoor for claims of ineffective assistance of postconviction counsel." (PCR 2019 at 1348). The trial court also noted that without time and procedural bars, capital defendants would bring claims of intellectual disability "at the eleventh hour, such as when a death warrant is signed, in order to create delay." (PCR 2019 at 1349).

The trial court concluded that no evidentiary hearing was necessary because there was controlling precedent regarding the timeliness issue. When "there is controlling Florida Supreme Court precedent disposing of a claim, the trial court should summarily deny the postconviction claim." (PCR 2019 at 1350 citing *Mann v. State*, 112 So.3d 1158, 1162-63 (Fla. 2013)).

Summary denials of postconviction claims

Postconviction claims that are untimely should be summarily denied. *Lukehart v. State*, 103 So.3d 134, 136 (Fla. 2012) (affirming the summary denial of a successive postconviction motion because it was untimely); *Reed v. State*, 116 So.3d 260, 263-64 (Fla. 2013) (affirming the summary denial of a successive postconviction motion, in part, because it was untimely); *Archer v. State*, 151 So.3d 1223 (Fla. 2014) (unpublished) (affirming the summary denial of a successive postconviction motion because it was facially insufficient and

untimely). And when there is controlling Florida Supreme Court precedent disposing of the claim, the trial court should also summarily deny the postconviction claim. *Mann v. State*, 112 So.3d 1158, 1162 (Fla. 2013) (explaining that because Mann "raised purely legal claims that have been previously rejected by this Court, the circuit court properly summarily denied relief"). Furthermore, this Court affirmed summary denials of intellectual disability claims as untimely in both *Blanco v. State*, 249 So.3d 536, 537 (Fla. 2018), and *Harvey v. State*, 260 So.3d 906, 907 (Fla. 2018).

A court must accept the defendant's factual allegations in the postconviction motion but only "to the extent that they are not conclusively refuted by the record." *Jimenez v. State*, 265 So.3d 462, 480 (Fla. 2018) (citing *Tompkins v. State*, 994 So.2d 1072, 1081 (Fla. 2008)), *cert. denied*, *Jimenez v. Florida*, 139 S.Ct. 659 (2018); *Duckett v. State*, 148 So.3d 1163, 1168 (Fla. 2014) (explaining that this Court accepts the movant's factual allegations as true to the extent they are not refuted by the record). But when those allegations are refuted by the record, the claim should be summarily denied. Fla. R. Crim. P. 3.851(f)(5)(B) (governing successive motions) (providing: "If the motion, files, and records in the case conclusively show that the movant is entitled to no relief, the motion may be denied without an evidentiary hearing."); Fla. R. Crim. P. 3.851(h)(6) (governing warrant successive postconviction motions) (providing: "If the motion, files, and records in the case conclusively show that the movant is entitled to no relief, the motion may be denied without an evidentiary hearing"). Additionally, conclusory allegations are not sufficient to warrant an evidentiary hearing. *Jimenez*, 265 So.3d at 480-81 ("mere conclusory allegations do not warrant an evidentiary hearing").

Untimely

The intellectual disability claim is untimely under this Court's precedent. *Blanco v. State*, 249 So.3d 536, 537 (Fla. 2018) (applying the time bar contained within rule 3.203 to a defendant who sought to raise an intellectual disability claim for the first time in light of *Hall*), *cert. denied*, *Blanco v. Florida*, 139 S.Ct. 1546 (2019); *Harvey v. State*, 260 So.3d 906, 907 (Fla. 2018) (affirming a trial court's summary denial of an intellectual disability claim because the claim was untimely because it was raised for the first time in 2016 citing *Rodriguez v. State*, 250 So.3d 616 (Fla. 2016), and rejecting an assertion that the motion was timely based on restarting the clock from the decision in *Walls v. State*, 213 So.3d 340 (Fla. 2016)), *pet. for cert. filed*, *Harvey v. Florida*, No. 18-1449 (May 17, 2019).[11] The Florida Supreme Court noted in *Harvey* that "the record conclusively" showed that Harvey's intellectual disability claim was "untimely" and therefore, he was "not entitled to relief." *Harvey*, 260 So.3d at 907. Both *Blanco* and *Harvey* are published opinions without dissents.

Bowles, like Blanco and Harvey, did not raise an intellectual disability claim in the wake of *Atkins*. Bowles did not raise an intellectual disability claim in his initial postconviction motion, that was filed on August 29, 2003, which was after *Atkins* was decided in 2002. Bowles also could have amended his then pending initial postconviction motion when rule 3.203 was adopted in 2004, as permitted by the then new rule. *Franqui v. State*, 14 So.3d 238, 239 (Fla. 2009) (Canady, J.,

[11] The untimeliness of the intellectual disability claim is *not* being raised in the petition filed in the United States Supreme Court in *Harvey*; the sole issue being raised is the retroactivity of *Hurst v. State*, 202 So.3d 40 (Fla. 2016). So, this Court's decision regarding timeliness will not be reviewed by the High Court in the *Harvey* case.

dissenting) (noting, under the prior version of rule 3.203, a defendant, whose initial postconviction motion was pending when the original version of rule 3.203 was adopted on October 1, 2004, had 60 days to amend the pending postconviction motion to include an intellectual disability claim). But Bowles did not amend his initial postconviction motion as he was entitled to do under the new rule governing claims of intellectual disability. Rather, Bowles raised this claim for the first time in 2017.

Opposing counsel insists that some claims, such as an *Atkins* claim, are so fundamental, they cannot be time barred. IB at 17-25. But the United States Supreme Court disagrees. The High Court has held that even a claim of actual factual innocence may be rejected based on delay. *McQuiggin v. Perkins*, 569 U.S. 383 (2013). Perkins was convicted of first-degree murder in Michigan and sentenced to life without parole. *Id.* at 388. Perkins missed the one-year deadline to timely file his federal habeas petition. He filed the federal habeas petition 11 years late. *Id.* at 389. He asserted a claim of newly discovered evidence of actual innocence to overcome the time bar. *Id.* But the federal district court dismissed the petition as untimely, reasoning that even applying an actual innocence exception to the statute of limitations, Perkins had waited five years after discovering the new evidence to file the petition. *Id.* at 390. The United States Supreme Court held that there was an actual innocence exception to the habeas statute of limitations but the Court explained that an unjustifiable delay in bringing a claim of actual innocence, while not an absolute barrier to relief, is a factor that may be considered in evaluating the reliability of a petitioner's claim of innocence. *Id.* at 399. An unexplained delay would "seriously undermine the credibility of the actual-innocence claim." *Id.* at 400. The Supreme Court

determined that Perkins' claim of innocence was not adequate to establish his actual innocence. *Id*.

Additionally, the United States Supreme Court recently observed that claims in capital cases that are raised "in a dilatory fashion," as this claim was, should be dismissed. *Bucklew v. Precythe*, 139 S.Ct. 1112, 1134 (2019) (stating that courts "can and should protect settled state judgments from undue interference by invoking their equitable powers to dismiss or curtail suits that are pursued in a dilatory fashion or based on speculative theories.").

If an actual innocence claim may be rejected due to unexplained delay, as in *Perkins*, or dismissed altogether due to be pursued in a dilatory fashion, as in *Bucklew*, then an intellectual disability claim certainly can be time barred. And, as in *Perkins*, Bowles' many years of delay in bringing his intellectual disability claim "seriously" undermines the credibility of his *Atkins* claim.

Both *Blanco* and *Harvey* were unanimous opinions on the issue of timeliness. No Justice of the Florida Supreme Court dissented in either opinion regarding timeliness. At the *Huff* hearing regarding this claim, opposing counsel quoted Justice Pariente's statement in her concurring opinion that more "than fundamental fairness and a clear manifest injustice," is "the risk of executing a person who is not constitutionally able to be executed, trumps any other considerations." (Succ. PCR 2019 at 2017 quoting *Walls v. State*, 213 So.3d 340, 348 (Fla. 2016) (Pariente, J., concurring)). And opposing counsel again quotes Justice Pariente's statement in *Walls* in the initial brief. IB at 24. But this is not Justice Pariente's position regarding untimely intellectual disability claims. Justice Pariente agreed that the *Atkins* claim was untimely in *Harvey*. Specifically, she wrote: "I agree that Harvey is not entitled to relief on his

intellectual disability claim because he failed to raise a timely claim under *Atkins*." *Harvey*, 260 So.3d at 907 (Fla. 2018) (Pariente, J., concurring).

Furthermore, the Eleventh Circuit takes much the same position as the Florida Supreme Court regarding the importance of raising intellectual disability claims in a proper and timely manner. Federal habeas petitioners were permitted to file successive habeas petitions raising intellectual disability claims in the wake of *Atkins*, but are not permitted to file successive habeas petitions raising intellectual disability claims in the wake of *Hall v. Florida*. *In re Holladay*, 331 F.3d 1169 (11th Cir. 2003) (concluding that *Atkins* was retroactive and therefore, a proper basis for filing a successive habeas petition); *In re Henry*, 757 F.3d 1151 (11th Cir. 2014) (concluding that *Hall v. Florida* was not retroactive and therefore, not a proper basis for filing a successive habeas petition).

Intellectual disability claims, like most other constitutional claims, can be time barred, procedurally barred, and waived. *Cf. Class v. United States*, 138 S.Ct. 798, 808 (2018) ("We have held that most personal constitutional rights may be waived" citing *Peretz v. United States*, 501 U.S. 923, 936 (1991)); *Peretz v. United States*, 501 U.S. 923, 936 (1991) (observing that the "most basic rights of criminal defendants are similarly subject to waiver" citing cases).[12]

Opposing counsel's reliance on dicta from the dissenting opinion in *State ex rel. Clayton v. Griffith*, 457 S.W.3d 735, 757 (Mo. 2015) (Stith, J., dissenting), that a claim of intellectual disability is not waiveable, is misplaced. IB at 20. The

[12] It may be more accurate to refer to the operation of rule 3.203(f) as a forfeiture rather than as a waiver but, regardless of the correct terminology, intellectual disability claims must be raised in a timely manner. *Cf. Peretz*, 501 U.S. at 936-37 (citing *Yakus v. United States*, 321 U.S. 414, 444 (1944) ("No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right.").

majority opinion of the Missouri Supreme Court rejected the *Atkins* claim because while an injury had damaged the capital defendant's mental abilities, the defendant was of average intelligence as a child and therefore, he "cannot be intellectually disabled." *Id.* at 753. The majority concluded that the claim of brain damage was properly classified as a claim under *Ford v. Wainwright*, 477 U.S. 399 (1986), not as an *Atkins* intellectual disability claim. *Id.* at 753-54.[13] It is the United States Supreme Court's view in *Perkins* that this Court should be guided by, not a dissenting opinion from the Missouri Supreme Court. The *Hall v. Florida* claim can be, and is, time barred.

Opposing counsel also insists that this Court's holdings in *Blanco* and *Harvey* violate due process by denying him an opportunity to be heard. IB at 26. Following this logic, all time bars of any sort violate due process. Due process simply does not prohibit timely filing requirements. *Vining v. State*, 827 So.2d 201, 215 (Fla. 2002) (rejecting a claim that the one-year filing requirement for postconviction motions in capital cases violated due process or suspended the right of habeas corpus citing *Arbelaez v. State*, 775 So.2d 909, 919 (Fla. 2000),

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[13] The State agrees that such a claim is properly litigated as a *Ford* claim, not as an *Atkins* claim. If a capital defendant's intellectual functioning deteriorates to the point he does not understand why he is being executed, for whatever reason, as an adult, while he is, by definition, not intellectually disabled, he certainly would have a valid claim that the Eighth Amendment prohibits his execution under *Ford*. *Cf. Dunn v. Madison*, 138 S.Ct. 9 (2017) (analyzing a claim that strokes had rendered a capital defendant too mentally infirm to be executed under *Ford* but concluding the defendant did not meet the *Ford* standard). Because *Ford* claims are not ripe until an execution is set, they may be raised in successive habeas petitions under *Panetti v. Quarterman*, 551 U.S. 930 (2007), and are not time barred for that same reason. But that is not true of *Atkins* claims. *Atkins* intellectual disability claims are ripe when a death sentence is imposed and should be raised in the direct appeal in cases where the death sentence was imposed after 2002 when *Atkins* was decided.

and *Koon v. Dugger*, 619 So.2d 246, 251 (Fla. 1993)); *cf*. *Delaney v. Matesanz*, 264 F.3d 7, 12 (1st Cir. 2001) (holding that the federal habeas statute one-year limitation period does not, as a general matter, violate the Suspension Clause citing other circuit cases including *Wyzykowski v. Dept. of Corr.*, 226 F.3d 1213, 1217-18 (11th Cir. 2000), and *Turner v. Johnson*, 177 F.3d 390, 392-93 (5th Cir. 1999)). This Court's holdings in *Blanco* and *Harvey* do not violate the Eighth Amendment or due process.

No exception based on *Hall v. Florida* or *Walls v. State*

Opposing counsel attempts to evade this time bar by invoking the exception for new fundamental constitutional decisions that are retroactive in rule 3.851(d)(2)(B). IB at 31. But even using that exception as an alternative starting date, the claim remains untimely. *Hall v. Florida* was decided on May 27, 2014. To be timely, any intellectual disability claim had to be filed within one year of the date *Hall* was decided which would be by Wednesday, May 27, 2015. But this intellectual disability claim was not filed until October 19, 2017, which was over two years late. The intellectual disability claim is years late even applying an exception based on *Hall v. Florida*.

Opposing counsel additionally attempts to evade this time bar by invoking the exception for new fundamental constitutional decisions that are retroactive in rule 3.851(d)(2)(B), based on *Walls v. State*, 213 So.3d 340 (Fla. 2016). IB at 32. In *Walls*, this Court held that *Hall v. Florida* was retroactive. *Walls*, 213 So.3d at 345-46 (applying *Witt v. State*, 387 So.2d 922 (Fla. 1980), and determining *Hall v. Florida* was retroactive). But this is the exact argument this Court rejected in *Harvey*, when it determined that the prior decision in *Walls* did not restart the clock to timely file an intellectual disability claim. *Harvey*, 260 So.3d at 907. And,

in *Harvey*, the capital defendant filed the intellectual disability claim two months after *Walls* was decided; whereas, here, Bowles did not file this claim until nearly a year after *Walls* was decided. *Harvey*, 260 So.3d at 907 (noting that Harvey's motion was filed two months after *Walls* was decided). So, this intellectual disability claim is even more untimely than the intellectual disability claim in *Harvey*. The intellectual disability claim remains untimely regardless of the exception for new retroactive constitutional decisions in rule 3.851.[14]

Rule 3.203(f) and good cause

Additionally, the intellectual disability claim is waived or forfeited under the rules of court. Fla. R. Crim. P. 3.203(f) (noting a claim of intellectual disability is

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[14] This Court used the current state test for retroactivity, *Witt v. State*, to determine that *Hall v. Florida* was retroactive in *Walls*. This Court should adopt *Teague v. Lane*, 489 U.S. 288 (1989), as the state test for retroactivity in place of *Witt*. This Court should do as many other state supreme courts have done and adopt *Teague* as the state test for retroactivity. *Thiersaint v. Comm'r of Corr.*, 111 A.3d 829 (Conn. 2015) (adopting *Teague* as the state test for retroactivity and noting that thirty-three other states and the District of Columbia use *Teague* in deciding state law claims); *Windom v. State*, 886 So.2d 915, 942-50 (Fla. 2004) (Cantero, J., concurring) (advocating that Florida courts adopt *Teague*). *Witt* does not give finality its paramount place in retroactivity analysis. Nor does *Witt* account for the distinction between substantive and procedural or the importance of statutory interpretation decisions. *See also Reed v. State*, SC19-714 at 2-7 (State's reply advocating the adoption of *Teague*); *Owen v. State*, SC18-810 at 30-45 (State's answer brief advocating the adoption of *Teague*).

Under *Teague*, *Hall v. Florida* is not retroactive. *In re Hill*, 777 F.3d 1214, 1223 (11th Cir. 2015) (explaining that *Hall v. Florida* is not retroactive citing *In re Henry*, 757 F.3d 1151 (11th Cir. 2014)); *see also Smith v. Comm'r, Ala. Dept, of Corr.*, 924 F.3d 1330, 1337-40 (11th Cir. 2019) (holding *Moore v. Texas*, 137 S.Ct. 1039 (2017), was not retroactive under *Teague* because it is procedural, not substantive). This Court should not follow *Walls*, much less allow it to serve as a basis to restart the clock in rule 3.851 or as a basis for good cause in rule 3.203(f).

deemed to have been waived if not timely filed). Bowles attempts to invoke the good cause exception in subsection (f), which provides: "A claim authorized under this rule is waived if not filed in accord with the time requirements for filing set out in this rule, unless good cause is shown for the failure to comply with the time requirements." IB at 35.

Opposing counsel argues two different bases for a finding of good cause: 1) the decision in *Walls v. State*, 213 So.3d 340 (Fla. 2016), and 2) a claim of ineffective assistance of postconviction counsel. IB at 36. But neither is a basis for a finding of good cause under rule 3.203(f).

***Walls v. State* is not good cause**

First, opposing counsel asserts that the decision in *Walls v. State*, 213 So.3d 340 (Fla. 2016), as a basis for a finding of good cause. IB at 42. This is the same argument that this Court rejected in *Harvey* merely wrapped in a different color cloth. If a decision does not restart the clock for purposes of rule 3.851, then it should not provide a basis for good cause for purposes of rule 3.203. And opposing counsel provides no reason or explanation why *Walls v. State* is insufficient under one rule of court to restart the clock but should be considered sufficient under another rule of court. The decision in *Walls v. State* does not provide a basis for a finding of good cause under rule 3.203(f).

Ineffectiveness of postconviction counsel is not good cause

Second, opposing counsel asserts a claim of ineffective assistance of postconviction counsel as a basis for a finding of good cause. IB at 36. Opposing counsel asserts that Bowles' state postconviction counsel, Frank Tassone, was ineffective for not raising an *Atkins* claim during the initial postconviction motion

proceedings and for not having the defense postconviction mental health expert, Dr. Harry Krop, administer a full IQ test or assess Mr. Bowles for intellectual disability.

While opposing counsel uses the phrases "attorney misconduct" and "attorney neglect" instead of the phrase ineffective assistance of postconviction counsel, like a rose, a claim of ineffective assistance of postconviction counsel is still a claim of ineffective assistance of postconviction counsel even when referred to by another name. IB at 40. And claims of ineffective assistance of postconviction counsel are not cognizable in Florida. *Zack v. State*, 911 So.2d 1190, 1203 (Fla. 2005) (observing that under Florida and federal law, a defendant has no constitutional right to effective collateral counsel and therefore, claims of ineffective assistance of postconviction counsel are not a valid basis for relief citing *Lambrix v. State*, 698 So.2d 247, 248 (Fla. 1996); *King v. State*, 808 So.2d 1237, 1245 (Fla. 2002); and *Pennsylvania v. Finley*, 481 U.S. 551 (1987)); *see also* § 27.711(10), Fla. Stat. (2018) (providing: "An action taken by an attorney who represents a capital defendant in postconviction capital collateral proceedings may not be the basis for a claim of ineffective assistance of counsel."). A claim that is not cognizable, cannot be a basis for "good" cause.

And, even if ineffectiveness of postconviction counsel was cognizable or a proper basis for a claim of good cause, postconviction counsel was not ineffective. Postconviction counsel had two IQ scores from two different mental health experts — an IQ score of 80 from Dr. McMahon and an IQ score of 83 from Dr. Krop. There is no reason to investigate intellectual disability any further once two defense experts provide postconviction counsel with IQ scores that were much higher than the cut-off score of 70 under the statute and *Cherry v. State*, 959 So.2d 702 (Fla. 2007), and which are higher than the 75 cut-off to this day under

Hall v. Florida. Postconviction counsel cannot be ineffective for not foreseeing that *Cherry* would be overruled by the United States Supreme Court years later. *Lynch v. State*, 254 So.3d 312, 323 (Fla. 2018) ("We have repeatedly held that trial counsel is not required to anticipate changes in the law in order to provide effective legal representation" citing *Lebron v. State*, 135 So.3d 1040, 1054 (Fla. 2014)), *cert. denied*, *Lynch v. Florida*, 139 S.Ct. 1266 (2019); *Smith v. State*, 213 So.3d 722, 746 (Fla. 2017) (noting that appellate counsel cannot be deemed ineffective for failing to anticipate the change in law citing *Nelms v. State*, 596 So.2d 441, 442 (Fla. 1992)).[15] Additionally, postconviction counsel focused on brain damage instead of intellectual disability during the initial postconviction proceedings, which given the two IQ scores from the two defense experts being in the 80s, was understandable and certainly not ineffective. Stacking postconviction theories is no more wise than stacking trial defenses. *Fuston v. Kentucky*, 217 S.W.3d 892, 896 (Ky. Ct. App. 2007) ("Stacking defenses can hurt a case."); *Chandler v. United States*, 218 F.3d 1305, 1319 (11th Cir. 2000) (en banc) ("Good advocacy requires winnowing out some arguments, witnesses, evidence" to "stress others."); *Rogers v. Zant*, 13 F.3d 384, 388 (11th Cir. 1994)

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[15] While *Cherry* had not been decided at the time of initial postconviction proceedings in this case, the holding in *Cherry* was based on the statutory language, the text of the rule, and prior caselaw. *Cherry*, 959 So.2d at 711, 713 (quoting expert testimony that "the two standard deviations language in the rule would place the mental retardation cutoff score at 70" and stating that the "Legislature set the IQ cutoff score at two standard deviations from the mean, and this Court has enforced this cutoff" citing *Zack v. State*, 911 So.2d 1190, 1201 (Fla. 2005)), *abrogated by Hall v. Florida*, 572 U.S. 701 (2014). Postconviction counsel in this case would have faced the same hurdle of the text of the statute and the case of *Zack*. Indeed, postconviction counsel in this case was in a worse position than postconviction counsel in *Cherry*, because both Bowles' IQ scores were in the 80s whereas Cherry's IQ score was 72. Cherry was within the statistical error of measurement but Bowles was not (and is not to this day).

(observing that a "multiplicity of arguments or defenses hints at the lack of confidence in any one"). Postconviction counsel was not ineffective for not investigating intellectual disability further given the state of the law and the two relatively high IQ scores.

Furthermore, the underlying allegation regarding the scope of Dr. Krop's examination is rebutted by the record. Dr. Krop testified during the 2005 evidentiary hearing that he performed a "comprehensive neurological examination." (PC 118). According to his report, Dr. Krop administered the Wechsler Abbreviated Scale of Intelligence (WASI) in April of 2003 to Bowles and Bowles' score was 83. Dr. Krop testified at the evidentiary hearing that his assessment of Bowles' intellectual functioning was that it was "somewhere in the low 80's." (PC 118). Dr. Krop testified that his assessment of Bowles' intellectual functioning was "consistent" with Dr. McMahon's assessment. (PC 118). There is no basis for a finding of good cause based on either state postconviction counsel's conduct or the postconviction mental health expert's conduct.

Ineffective assistance of postconviction counsel does not provide a basis for a finding of good cause under rule 3.203(f).

The good cause exception does not apply and the claim remains waived or forfeited due to its untimeliness.

Under *Blanco* and *Harvey*, the intellectual disability claim was untimely and the trial court properly summarily denied it as untimely. On the basis of untimeliness alone, the trial court properly summarily denied the intellectual disability claim.

Merits

Alternatively, the claim would be properly summarily denied both because the claim is conclusively rebutted by the record and because the claim was based solely on conclusory allegations regarding intellectual disability. Bowles is not intellectually disabled based on the record.

IQ scores in the existing record

There are three IQ scores in the current record. Dr. Elizabeth McMahon, the defense expert hired by the Public Defender's Office prior to the first penalty phase, testified via depositions in the state postconviction proceedings. Dr. McMahon administered the Wechsler Adult Intelligence Scale - Revised (WAIS-R) in 1995. According to Dr. McMahon, Bowles' full-scale IQ score was 80. (PCR 196, 239).

Dr. Harry Krop, the defense expert in the initial state postconviction proceedings, administered the Wechsler Abbreviated Scale of Intelligence (WASI) in April of 2003. Dr. Krop, in his written report dated April 21, 2003, reported Bowles' IQ to be 83.

Dr. Jethro Toomer, the defense expert in the current successive postconviction motion, stated that he administered the WAIS-IV to Bowles in October of 2017. According to Dr. Toomer's report, Bowles' full scale IQ score was 74.

So, the three IQ scores in the existing record are 80, 83, and 74.

***Hall v. Florida* does not apply**

In *Hall v. Florida*, 572 U.S. 701 (2014), the United States Supreme Court held that Florida's interpretation of its statute prohibiting the imposition of the death sentence upon an intellectually disabled defendant establishing a strict IQ test

score cutoff of 70 was unconstitutional because the rigid rule created "an unacceptable risk that persons with intellectual disability will be executed." *Id.* at 704. Instead of applying the strict cutoff when assessing the subaverage intellectual functioning prong of the intellectual disability standard, courts must take into account the standard error of measurement (SEM) of IQ tests. And, when a defendant's IQ test score falls within the SEM, the defendant must be allowed to present additional evidence of intellectual disability, including testimony regarding adaptive deficits. *Id.* at 723.

But *Hall v. Florida* does not apply to any defendant whose full scale IQ score is above 75. As the United States Supreme Court clarified in *Moore v. Texas*, 137 S.Ct. 1039 (2017), it is only capital defendants whose IQ score is 75 or below that are entitled to an evidentiary hearing to explore the other two prongs. The *Moore* Court wrote that "*Hall* instructs that, where an IQ score is ***close*** to, but above, 70, courts must account for the test's standard error of measurement." *Id.* at 1049 (emphasis added). The High Court in *Moore* explained that "in line with *Hall*, we require that courts continue the inquiry and consider other evidence of intellectual disability where an individual's IQ score, adjusted for the test's standard error, falls ***within*** the clinically established range for intellectual-functioning deficits." *Id.* at 1050 (emphasis added). The *Moore* majority explained that "***because*** the lower end of Moore's score range falls at or below 70," the Texas courts "had to move on to consider Moore's adaptive functioning." *Id.* at 1049 (emphasis added).

But, as is clear from the *Moore* decision, a defendant whose IQ is above 75 is not entitled to an evidentiary hearing under *Hall v. Florida*. As this Court has explained, it is only "when a defendant establishes an IQ score range — adjusted for the SEM — at or below 70," that "a court must move on to consider the defendant's adaptive functioning." *Wright v. State*, 256 So.3d 766, 771 (Fla. 2018)

(citing *Moore*, 137 S.Ct. at 1049), *cert. denied*, *Wright v. Florida*, 2019 WL 1458194 (June 3, 2019) (No. 18-8653). *Hall v. Florida* does not apply at all to a defendant whose collective IQ score is above 75.

Considered collectively, Bowles' IQ is between 78 and 79. His collective score is above 75. So, *Hall v. Florida* does not apply to Bowles. The trial court did not violate the United States Supreme Court's directions in *Hall v. Florida*, as clarified in *Moore v. Texas*, or this Court's directions in *Wright* by refusing to conduct an evidentiary hearing on the claim of intellectual disability. *Hall v. Florida* does not apply and therefore, Bowles was not entitled to an evidentiary hearing.

Florida's statutory definition of intellectual disability

Florida has a statutory definition of intellectual disability for capital cases. The "[i]mposition of the death sentence upon an intellectually disabled defendant prohibited" statute, section 921.137(1), Florida Statute (2018), provides:

> As used in this section, the term "intellectually disabled" or "intellectual disability" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities. The term "adaptive behavior," for the purpose of this definition, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community. The Agency for Persons with Disabilities shall adopt rules to specify the standardized intelligence tests as provided in this subsection.

See also Fla. R. Crim. P. 3.203(b). Florida's statutory definition of intellectual disability parallels the clinical definition of intellectual disability.[16] Under the

[16] Florida's statutory definition of intellectual disability was derived from the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-IV), which was a standard clinical definition in 2001 when the

statute, a capital defendant must show that he is intellectually disabled by clear and convincing evidence. § 921.137(4), Fla. Stat. (2018); *Wright v. State*, 256 So.3d 766, 771 (Fla. 2018) ("a defendant must make this showing by clear and convincing evidence" citing § 921.137(4), Fla. Stat.), *cert. denied*, *Wright v. Florida*, 2019 WL 1458194 (June 3, 2019) (No. 18-8653).

Under both the statute and Florida Supreme Court precedent, a defendant must establish three prongs to show intellectual disability: 1) significantly subaverage general intellectual functioning; 2) concurrent deficits in adaptive behavior; and 3) manifestation of the condition before age eighteen. *Salazar v. State*, 188 So.3d 799, 811 (Fla. 2016). The Florida Supreme Court has explained that, if a defendant fails to prove any one of these three prongs, "the defendant will not be found to be intellectually disabled." *Quince v. State*, 241 So.3d 58, 62 (Fla. 2018) (six Justice majority) (citing *Salazar*, 188 So.3d at 812; *Williams v. State*, 226 So.3d 758, 773 (Fla. 2017), *cert. denied*, *Williams v. Florida*, 138 S.Ct. 2574 (2018) (No. 17-7924); *Snelgrove v. State*, 217 So.3d 992, 1002 (Fla. 2017)); *see also Wright*, 256 So.3d at 778-79 (Labarga, J., concurring) (emphasizing that a trial court is not required to consider other prongs of the test for intellectual disability when the defendant fails other prong); *Wright*, 256 So.3d at 779-80 (Lawson, J., concurring) (observing that the "statute contains a three-prong test for intellectual disability" and if "the defendant fails to prove any one of these components, the defendant will not be found to be intellectually disabled" and noting that Wright failed to prove the first prong and for "this reason alone, Wright does not qualify as intellectually disabled under Florida law"). The Florida Supreme Court has

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statute prohibiting the imposition of the death penalty on intellectually disabled defendants was first adopted by the Florida legislature, before *Atkins* had even been decided. *Atkins*, 536 U.S. at 308, n.3 (reciting the definition of intellectual disability in the DSM-IV published in 2000); § 921.137(1), Fla. Stat. (2001).

explained that a defendant must meet all three prongs of the test for intellectual disability and if he cannot, it is proper to summarily deny the intellectual disability claim. *Quince*, 241 So.3d at 62 (citing the summary denial case of *Zack v. State*, 228 So.3d 41, 47 (Fla. 2017), *cert. denied*, *Zack v. Florida*, 138 S.Ct. 2653 (2018) (No. 17-8134)).

The Florida Supreme Court has also rejected an argument that a trial court was required to make findings as to all three prongs. *Quince*, 241 So.3d at 62.

The three prongs of the intellectual disability test

Bowles is not intellectually disabled. He does not meet any of the three prongs of the statutory test for intellectual disability, much less all three prongs. And certainly not by clear and convincing evidence. The State will address each of the three prongs in turn.

Significant subaverage intellectual functioning

The first prong is significant subaverage intellectual functioning. Bowles' current intellectual functioning is not "significantly subaverage." When multiple IQ scores are present, they should be considered collectively. *Hall*, 572 U.S. at 714 (stating that the "analysis of multiple IQ scores jointly is a complicated endeavor" citing Schneider, *Principles of Assessment of Aptitude and Achievement*, in The Oxford Handbook of Child Psychological Assessment 286, 289-91, 318 (D. Saklofske, C. Reynolds, V. Schwean, eds. 2013)); *Hall*, 572 U.S. at 742 (Alito, J., dissenting) (noting the "well-accepted view is that multiple consistent scores establish a much higher degree of confidence"). In general, higher IQ scores are more reliable than lower scores. A. Frances, *Essentials of Psychiatric Diagnosis: Responding to the Challenge of DSM-5*, 31 (rev. ed. 2013) (explaining that there are

many reasons why a given score might underestimate a person's intelligence, but no reason why scores should overestimate it); *Forensic Psychology* 56 ("Although one cannot do better on an IQ test than one is capable of doing, one can certainly do worse.").

The three defense experts' IQ scores of 80, 83, and 74, considered collectively, do not establish by clear and convincing evidence significantly subaverage general intellectual functioning. Based on the three IQ scores, considered collectively, Bowles' IQ is between 78 and 79.[17] An IQ of 78 or 79 is not significantly subaverage intelligence. Bowles' factual allegations regarding his intellectual functioning are conclusively refuted by the record. *Zack*, 228 So.3d at 47 (affirming a postconviction court's summary denial of a *Hall* claim based solely on the first prong). Bowles fails the first prong.

Adaptive functioning

The second prong is significant deficits in adaptive functioning. Deficits in adaptive functioning are concurrent deficits in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure,

[17] The average of Bowles' three IQ scores is 79. The median of Bowles' three IQ scores is 78.5. Another means of considering IQ scores collectively, referred to by the *Hall* majority, is a "composite" score. *Hall v. Florida*, 572 U.S. at 714 (citing to Schneider, *Principles of Assessment of Aptitude and Achievement* at 289-91). Schneider has a complicated formula for determining the "composite" score. The author acknowledges that an average is a "rough approximation of a composite score," but he advocates the use of a "composite" score in cases of low and high scorers. *Id.* at 290. But he does not explain why using the median instead the mean does not accomplish much the same goal. But regardless of the method, the IQ scores should be considered collectively as is standard mathematical practice when measuring the same phenomena, such as IQ scores.

health, and safety. *Atkins*, 536 U.S. at 308 n.3 (quoting Am. Ass'n on Mental Retardation, Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th ed. 1992)); *Phillips v. State*, 984 So.2d 503, 511 (Fla. 2008) (stating that a capital defendant must show "significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety" citing *Rodriguez v. State*, 919 So.2d at 1252, 1266, n.8 (Fla. 2005) (quoting American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 41 (4th ed. 2000)). It is currently defined as deficits in one of three broad categories or "domains": conceptual, social, and practical. *Wright v. State*, 256 So.3d 766, 773 (Fla. 2018) (citing DSM-5), *cert. denied*, *Wright v. Florida*, 2019 WL 1458194 (June 3, 2019).

Bowles does not have significant deficits in adaptive functioning. Bowles obtained his General Education Development (GED) diploma. Dr. McMahon, the defense mental health expert hired pre-trial, testified in her deposition that Bowles obtained his GED diploma while incarcerated at DeSoto Correctional Institution. (Depo at 62). Dr. Krop also testified at the 2005 evidentiary hearing that Bowles had obtained his GED. (PCR Vol. II 148). This Court has observed that obtaining a GED is "***clear evidence***" and "***direct proof***" that the defendant does not suffer from adaptive deficits. *Dufour v. State*, 69 So.3d 235, 251 (Fla. 2011) (stating that obtaining a GED diploma, which involves "a battery of questions that generally emphasize the ability to read, write, think, and solve mathematical problems" is "clear evidence" and "direct proof" that "a deficit in adaptive behavior does not exist") (emphasis added); *see also Williams v. State*, 226 So.3d 758, 773 (Fla. 2017) (stating the "fact that Williams successfully obtained his GED diploma supports

the conclusion that he does not suffer from adaptive deficits" citing *Dufour*, 69 So.3d at 250), *cert. denied*, *Williams v. Florida*, 138 S.Ct. 2574 (2018). This Court in *Williams* recounted Dr. Prichard's testimony that he "has not encountered an intellectually disabled person who can pass even a single section of the GED test, let alone the entire examination." *Williams*, 226 So.3d at 771.

Bowles made many statements in his confession which contradict any claim of adaptive deficits. Bowles talked about making phone calls and driving victims' cars. (TR 581, 636-38, 748, 776-77). Though Bowles had his own driver's license, he procured fake identification with his picture under the name of Timothy Whitfield by using a social security card and birth certificate found at one of his victim's homes. (TR 605, 699). A driver's licence is evidence of adaptive functioning, not adaptive deficits. *State v. Rodriguez*, 814 S.E.2d 11, 20 (N.C. 2018) (recounting the testimony of the State's expert, Stephen Kramer, M.D., a forensic neuropsychiatrist and professor of psychiatry at Wake Forest Baptist Medical Center, who testified that the ability to pay taxes and to obtain a driver's license showed that defendant had a level of adaptive functioning beyond that expected of those with intellectual disability and the testimony of one of the defense experts, Dr. John Olley, a professor at the University of North Carolina at Chapel Hill and a psychologist at the Carolina Institute for Developmental Disabilities, who testified that only one-third of mildly intellectually disabled persons are able to obtain a driver's license or learner's permit); *Oats v. State*, 181 So.3d 457, 464 (Fla. 2015) (noting that "Oats was never able to obtain a driver's license" which could be evidence of deficits in adaptive functioning).

Bowles admitted in the confession that he was planning to drive the victim's car from Florida to his mother's in Branson, Missouri but ran out of money in Tennessee, so he left the car and got a bus ticket to travel the rest of the way. (TR

783). So, Bowles know how to travel and use the national bus system. *Wright v. State*, 256 So.3d 766, 778 (Fla. 2018) (explaining that the testimony that he "knew how to use the city bus system" which cuts "against a finding of adaptive deficits in the conceptual domain" and affirming the trial court's finding that the defendant failed to prove the second prong of adaptive deficits); *Hodges v. State*, 55 So.3d 515, 535 (Fla. 2010) (affirming the trial court's finding that the defendant failed to prove the second prong of adaptive deficits, noting Hodges was capable of traveling independently to and from work and from Ohio to Alabama and Florida and was capable of driving without anyone instructing him on how to get to his destination and of arranging travel by bus).

Furthermore, Bowles can read and write which also cuts against a finding of adaptive deficits. Bowles reads at a high school level and is at a sixth or seventh grade level "in terms of spelling and arithmetic." (PCR VOL II 148). As part of the confession, Bowles was also required to understand and sign rights forms, fill out written statements, and read his statements before signing them. (TR 634, 700, 703-04, 755, 764). One of the defense experts, Dr. Kessel, noted in her report that Bowles "would write letters to his mother constantly" and that he can "write and read a sentence." Bowles' ability to read and write rebuts any claim of adaptive deficits. *Hodges v. State*, 55 So.3d 515, 535 (Fla. 2010) (affirming the trial court's finding that the defendant failed to prove the second prong of adaptive deficits based in part on the defendant's ability to read and write).

Additionally, Bowles' employment history negates the claim of adaptive deficits. *Phillips v. State*, 984 So.2d 503, 511 (Fla. 2008) (affirming the trial court's finding that the defendant failed to prove the second prong of adaptive deficits based in part on the defendant's jobs as a short-order cook, a garbage collector, and a dishwasher which are job skills that people with mental retardation

normally lack and recounting that the defense expert admitted that a position "as a short-order cook was an 'unusually high level job'" for someone who is intellectually disabled). Bowles had various jobs including working on an oil rig for two years. (Record at 754-60; Depo at 62). Bowles was also employed as a machinist and a roofer. (PCR 2019 at 796).

Moreover, any deficits that Bowles may have, could be due to his anti-social personality disorder and not a function of his intellectual ability at all. In the initial postconvition proceedings, the defense expert, Dr. Krop, diagnosed Bowles with anti-social personality disorder. (PCR Vol. II at 110, 137). Poor impulse control is also one of the symptoms of anti-social personality disorder. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 706 (rev. 4th ed. 2000) (DSM-IV) (detailing the seven criteria for antisocial personality disorder including impulsivity).

Bowles' factual allegations regarding his adaptive functioning are conclusively refuted by the record. Bowles fails the second prong as well.[18]

Onset as a minor

The third prong is onset of the condition prior to age 18. Bowles was not intellectually disabled as a child. Parts of Bowles' school records from Kankakee Illinois School District 111 were discussed during the 2005 postconviction evidentiary hearing. Bowles made As and Bs in first grade. His grades in first grade were an A, a B, another B, and another A. Bowles made As and B+s in

[18] Dr. Kessel's affidavit is inherently incredible because she describes how Bowles fended for himself at home and had jobs as a machinist and roofer. *Nordelo v. State*, 93 So.3d 178, 185 (Fla. 2012) (stating that if an affidavit supporting a claim is inherently incredible, the claim of may be summarily denied).

math in regular classes in the early grades of elementary school. A child who is intellectually disabled does not make As in math in grade school. Furthermore, one of the handwritten notations on his achievement tests in his school records is "high normal." A child with intellectual disability cannot make "high normal" scores on achievement tests.

The school records show that Bowles' grades declined over the years with his declining attendance. Indeed, one comment in the school records regarding the extent of his absences was that Bowles was "never present!!" The defense mental health expert, Dr. McMahon, testified that in sixth or seventh grade, Bowles' "grades went from A's, B's, and C's to D's and F's as he started skipping school." (Depo at 66, 72, 74). Bowles' grades dropping coincides with the start of his drug use around ten years old. (Depo 66). Bowles also fails the third prong.

Bowles fails all three prongs of the test. Bowles is not intellectually disabled.

Conclusively rebutted by the record

A trial court may properly summarily deny a claim that is conclusively rebutted. Fla. R. Crim. P. 3.851(h)(6) ("If the motion, files, and records in the case conclusively show that the movant is entitled to no relief, the motion may be denied without an evidentiary hearing."). Bowles' factual allegations regarding intellectual disability are conclusively refuted by the record. Again, the record need not establish that the defendant fails all three prongs. Conclusively rebutting one prong, conclusively rebuts the entire claim. If the record conclusively rebuts one prong, the claim of intellectual disability is properly summarily denied, as it was in *Zack*.

At the *Huff* hearing, opposing counsel never addressed any of the three prongs; she merely stated that the claim was not conclusively rebutted without

any explanation why the State was incorrect that the claim was conclusively rebutted or any attempt to highlight any factual disputes. (PCR 2019 at 1312). Nor does the initial brief explain why the claim is not conclusively rebutted by the record. IB at 46-47. The initial brief improperly limits its analysis to new facts developed by current counsel without accounting for the facts in the existing record developed in all the previous litigation. There is no prong by prong analysis. The claim of intellectual disability is conclusively rebutted by the record and therefore, the claim would be properly denied on the merits without an evidentiary hearing under the rules.

Conclusory allegations

Alternatively, the claim would be properly summarily denied because it was based on conclusory allegations. *Jimenez*, 265 So.3d at 480-81 (stating that conclusory allegations are not sufficient to warrant an evidentiary hearing). Bowles' claim was based solely on conclusory allegations regarding intellectual disability. The 2017 successive postconviction motion, as well as the 2019 successive postconviction motion, contained only conclusory allegations. For example, Dr. Toomer report was conclusory. (PCR 2019 at 778-783). Dr. Toomer, was the defense mental health expert who administered the IQ test to Bowles in 2017 and who was named in the motion. Dr. Toomer's report regarding the onset prong merely stated: Bowles' "deficits had their onset during the developmental, pre-18 period" based on his "record of school failure" and his grades dropping. (PCR 2019 at 782). Dr. Crown's 1½ page report was even more conclusory. (PCR 2019 at 784-785). After discussing his finding that Bowles had mild to moderate brain impairment, Dr. Crown concluded that Bowles' "brain damage supports the finding that he is intellectually disabled with adaptive deficits." (PCR 2019 at

785). There was no discussion of any of the three prongs or any facts to given to support any adaptive deficits. Dr. Kessel's report is also conclusory regarding the onset prong, merely stating: "Bowles' intellectual disability and adaptive deficits were clearly present prior to the age of 18, beginning in his early childhood." (PCR 2019 at 801).

Even after the State filed a motion to compel more detailed expert reports, opposing counsel did not file amended reports from the defense experts addressing each prong in sufficient detail to move beyond mere conclusions. (PCR 2019 429-440). Opposing counsel's failure to provide detailed expert reports, in the end, means this claim was based solely on conclusory allegations.

Bowles was required to provide non-conclusory allegations on each of the three prongs and at a burden higher than the normal preponderance standard of proof, but he did not do so. Experts' reports that contain conclusory statements regarding any of the prongs or that do not address any one of the three prongs fail to meet this burden. Bowles was not entitled to an evidentiary hearing due to his inadequate and conclusory allegations in both the motion itself and in the defense experts' reports attached to the motion.[19]

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[19] The current rule of criminal procedure governing "Defendant's Intellectual Disability as a Bar to Imposition of the Death Penalty," rule 3.203(c)(2), provides:

> The motion shall state that the defendant is intellectually disabled and, if the defendant has been tested, evaluated, or examined by 1 or more experts, the names and addresses of the experts. Copies of reports containing the opinions of any experts named in the motion shall be attached to the motion. The court shall appoint an expert chosen by the state attorney if the state attorney so requests. The expert shall promptly test, evaluate, or examine the defendant and shall submit a written report of any findings to the parties and the court.

The rule of criminal procedure governing intellectual disability claims currently requires "reports containing the opinions of any experts named in the motion" to be attached to the motion and that the expert file a "written report of any findings" which means all findings of all experts who will be testifying. And, while the State believes the current rule requires just that, the trial court did not grant the State's motion to compel more detailed reports due to the lack of caselaw. (PCR 2019 at 840-842; 864-865). Opposing counsel during the hearing on the State's motion to compel argued that the phrase in the rule: "The expert shall promptly test, evaluate, or examine the defendant and shall submit a written report of any findings to the parties and the court" is limited to the State's expert. (PCR 2019 at 875876). This Court should clarify that that phrase applies to all experts. This Court should also clarify that the rule requires full reports of all mental health experts. The rule should be clarified to explicitly require a detailed report on all three prongs of intellectual disability. *Biestek v. Berryhill*, 139 S.Ct. 1148, 1154 (2019) (observing in federal court, an expert witness must produce all data she has considered in reaching her conclusions citing Fed. R. Civ. P. 26(a)(2)(B)); Fed. R. Civ. P. 26(a)(2)(b)(i) (providing that the expert report must contain "a complete statement of all opinions the witness will express and the basis and reasons for them"); *Reese v. Herbert*, 527 F.3d 1253, 1265 (11th Cir. 2008) (explaining the purpose of the expert disclosure rule is to provide opposing parties an opportunity to prepare for effective cross-examination and to hire their own experts to rebut the expert's testimony); *Rembrandt Vision Techs., L.P. v. Johnson & Johnson Vision Care, Inc.*, 725 F.3d 1377, 1381 (Fed. Cir. 2013) (noting that an expert witness may not testify to subject matter beyond the scope of his report). And the rule should not be limited to named experts. Because many mental health experts destroy their files after a certain number of years, as do many schools, the State often does not have access to older defense experts' reports or the defendant's school records but the defense often does have these documents. As part of the good faith requirement that was originally required in rule 3.203, all records and defense mental health experts' reports should be required to be disclosed in postconviction litigation where the defendant is seeking to overturn a death sentence. There should be no confidentiality in the postconviction setting. This Court should refer the rule to the appropriate committee with directions to clarify and correct the rule regarding these matters.

The "tipsy coachman" doctrine

Alternatively to the time bar, the claim of intellectual disability would have been properly summarily denied because it is conclusively rebutted by the record and because it was based solely on conclusory allegations.

The "tipsy coachman" doctrine is a long-established appellate principle in both state and federal appellate courts. *Lee v. Porter*, 63 Ga. 345 (1879) (observing the "human mind is so constituted that in many instances it finds the truth when wholly unable to find the way that leads to it" and quoting lines from Oliver Goldsmith's poem "Retaliation," "His conduct still right, with his argument wrong" and though the "coachman was tipsy, the chariot drove home."); *Carraway v. Armour & Co.*, 156 So.2d 494, 497 (Fla. 1963) (quoting the same poem citing *Lee v. Porter*); *Rodriguez v. Farm Stores Grocery, Inc.*, 518 F.3d 1259, 1269 & n.6 (11th Cir. 2008) (explaining the origin of the name of the "tipsy coachman" doctrine is Oliver Goldsmith's poem "Retaliation"). The federal courts, including the United States Supreme Court, have also long-employed the doctrine, albeit under the less colorful expression of the "right for the wrong reason" principle. *Rodriguez v. Farm Stores Grocery, Inc.*, 518 F.3d 1259, 1269 (11th Cir. 2008) (explaining the "right for the wrong reasons" principle is the equivalent of the "tipsy coachman" doctrine); *Helvering v. Gowran*, 302 U.S. 238, 245 (1937) (explaining in the review of judicial proceedings "the rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason" citing numerous cases).

Under the "tipsy coachman" doctrine, an appellate court can, and should, affirm a trial court's order that reaches the right result on any alternative ground in the record. *Rolling v. State*, 218 So.3d 911, 912-13 & n.2 (Fla. 3d DCA 2016) (invoking the "tipsy coachman" doctrine which allows an appellate court to affirm

a trial court's order that reaches the right result on an alternative ground provided there is a basis for doing so in the record citing *Robertson v. State*, 829 So.2d 901 (Fla. 2002), and *Dade Cty. Sch. Bd. v. Radio Station WQBA*, 731 So.2d 638, 644-45 (Fla.1999), and affirming the trial court's order denying a successive 3.800(a) motion, albeit "for reasons other than those stated by the trial court"); *Whisby v. State*, 262 So.3d 228, 232 (Fla. 1st DCA 2018) (affirming the admission of collateral-crime evidence based on different statute invoking the "tipsy coachman" doctrine citing *Radio Station WQBA* and *Robertson*, in the direct appeal of a criminal conviction for armed kidnapping and multiple counts of sexual battery).

The point of the "tipsy coachman" doctrine is judicial efficiency. *Sec. and Exch. Comm'n. v. Chenery Corp.*, 318 U.S. 80, 88 (1943) ("It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground . . ."). It serves no purpose for an appellate court to remand for a new trial for the trial court to yet again deny the same motion or again overrule the same objection or again exclude the same evidence at the new trial but this time repeat the appellate court's correct reasoning. What matters is the bottom line of the motion being denied or the objection being overruled or the evidence being excluded. The second trial in such a situation would be exactly the same in terms of the evidence and testimony.

In this case, there is no point in this Court remanding a case to the trial court to once again summarily deny the successive postconviction motion in a second order but just to mimic this Court's reasoning in the second order. It is the bottom line of the summary denial that matters. Either way, the motion will be denied without an evidentiary hearing and the end result will be the same.

Based on the "tipsy coachman" doctrine and the record, this Court may affirm the summary denial of the successive postconviction motion on the alternative basis that the claim of intellectual disability is conclusively rebutted by the record ***or*** that the claim of intellectual disability was based solely on conclusory allegations. On either of these alternative grounds, the claim of intellectual disability would be properly summarily denied as well.

Accordingly, the trial court properly summarily denied the intellectual disability claim as time barred under this Court's precedent.

ISSUE II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THREE OF THE TEN PUBLIC RECORDS REQUESTS? (Restated)

Bowles asserts that the trial court abused its discretion by denying his first time public record requests of the Department of Corrections for his disciplinary reports and visitation logs. Additionally, he asserts that the trial court abused its discretion by denying his public record request of the State Attorney's Office for updates of any correspondence between the victim's family and friends and the prosecutor's office. He also asserts that the trial court abused its discretion by denying his public record request of the Medical Examiner, the Department of Corrections, and the Florida Department of Law Enforcement for lethal injection information. As to the disciplinary reports, housing and movement records, and visitation logs, the trial court properly found the request to be "overbroad and overly burdensome" because they amounted to "any and all" requests. The trial court also properly concluded that these updates which were sought in support of the claim of intellectual disability would not lead to a colorable claim. Furthermore, any error regarding these updates was harmless because the request was made to support the adaptive deficits prong of the claim of intellectual disability at the evidentiary hearing but no evidentiary hearing was conducted. As to the correspondence between the victim's family and friends and the prosecutor, the trial court properly concluded that there was no "reasonable connection" between the correspondence and the claim of intellectual disability and that the basis for the request was "too attenuated" to lead to a colorable claim. The brother-in-law, sister, and neighbor had only a passing acquaintance with Bowles for a short period of time, so they simply could not have known Bowles well enough to provide any meaningful information on Bowles' adaptive functioning. Furthermore, any error was harmless because the request was made to support

the adaptive deficit prong of the claim of intellectual disability at the evidentiary hearing but no evidentiary hearing was conducted. As to the lethal injection requests, this Court recently rejected the same argument regarding similar public records requests in *Long v. State*, 271 So.3d 938, 947-48 (Fla. 2019), *cert. denied*, *Long v. Florida*, 139 S.Ct. 2635 (2019). Therefore, the trial court did not abuse its discretion by denying three of the ten public records requests.

Standard of review

The standard of review of a trial court's ruling on a public records request is abuse of discretion. *Jimenez v. State*, 265 So.3d 462, 472 (Fla. 2018) ("We review rulings on public records requests pursuant to Florida Rule of Criminal Procedure 3.852 for abuse of discretion" citing *Hannon v. State*, 228 So.3d 505, 511 (Fla. 2017), *cert. denied*, *Hannon v. Florida*, 138 S.Ct. 441 (2017). "Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court." *Hannon v. State*, 228 So.3d 505, 511 (Fla. 2017) (quoting *Parker v. State*, 904 So.2d 370, 379 (Fla. 2005)), *cert. denied*, *Hannon v. Florida*, 138 S.Ct. 441 (2017). There was no abuse of discretion. The denial of three out of the ten public records requests was not arbitrary, fanciful, or unreasonable.

The trial court's ruling

On June 18, 2019, opposing counsel made ten demands on various state agencies. (PCR 2019 at 198-337). The Department of Corrections provided Bowles his medical and psychological files but filed an objection to the public records request regarding his disciplinary reports, housing and moving records, and

visitation logs stating that these were first-time requests for 17 years worth of different types of records. (PCR 2019 at 375-376). The State Attorney Office filed an objection to the request for correspondence from the victim's family and friends. (PCR 2019 at 362-372). The Medical Examiner's Office, the Department of Corrections, and the Florida Department of Law Enforcement all filed objections to the lethal injections requests. (PCR 2019 at 354-361; 377-383;344-353)

On June 21, 2019, the trial court held a hearing on the objections to the public records requests. (PCR 2019 at 556-691). The State Attorney argued that the correspondence from the victim's family and friends was not relevant to the intellectual disability claim . (PCR 2019 at 604). During the hearing on the public records, the trial court asked the State if they would agree that they would not use any of disciplinary reports or visitation logs against the defense at any evidentiary hearing on intellectual disability, if one was ultimately held. The State agreed not to use any of the disciplinary reports against the defense. (PCR 2019 at 658-659).

On June 24, 2019, the trial court entered a written order regarding the objections to the public records requests. (PCR 2019 at 415-426). The trial court sustained the objection of the Department of Corrections to the public records request for disciplinary reports and visitation logs. (PCR 2019 at 421). The trial court reasoned that request was "overbroad and overly burdensome" because they amounted to "any and all" requests. (PCR 2019 at 421). The trial court noted that these were not updates of prior requests but rather were first time requests (PCR 2019 at 421). The trial court explained that this made the records sought "exponentially more voluminous" than the records at issue in *Muhammad v. State*, 132 So.3d 176, 201 (Fla. 2013). The trial court distinguished the first-time requests under 3.852(i) from updates under 3.851(h)(3), just as this Court did in *Jimenez v. State*, 265 So.3d 462, 472 (Fla. 2018), *cert. denied*, *Jimenez v. Florida*,

139 S.Ct. 659 (2018). (PCR 2019 at 421). The trial court also concluded that disciplinary reports and visitation logs which were sought in support of the claim of intellectual disability would not lead to a colorable claim. (PCR 2019 at 422).

The trial court also sustained the objection of the State Attorney's Office to the public records request for correspondence from the victim's family and friends. (PCR 2019 at 417). The trial court reasoned that the request was "overbroad and unduly burdensome." (PCR 2019 at 417). The trial court found no "reasonable connection" between the correspondence and the claim of intellectual disability. The trial court ruled that the basis for the request was "too attenuated" to lead to a colorable claim. (PCR 2019 at 417).

The trial court additionally sustained the objection of the Medical Examiner; the Department of Corrections, and FDLE to the public records request for lethal injection information. (PCR 2019 at 419-420; 422). The trial court reasoned that the requests were overbroad and unduly burdensome as well unlikely to lead to a colorable claim because challenges to the current lethal injection protocol had been "rejected multiple times" citing cases. The trial court noted that the current protocol had been "extensively litigated and remains constitutional." (PCR 2019 at 422 citing *Jimenez v. State*, 265 So.3d 462, 473-74 (Fla. 2018)).

Merits

"Rule 3.852 is not intended to be a procedure authorizing a fishing expedition for records." *Hannon v. State*, 228 So.3d 505, 511 (Fla. 2017) (quoting *Sims v. State*, 753 So.2d 66, 70 (Fla. 2000)), *cert. denied*, *Hannon v. Florida*, 138 S.Ct. 441 (2017). For that reason, records requests under Rule 3.852(h) are limited to persons and agencies who were the recipients of a public records request at the time the defendant began his or her postconviction odyssey; whereas, records

requests under Rule 3.852(i) must show how the requested records relate to a colorable claim for postconviction relief and good cause as to why the public records request was not made until after the death warrant was signed." *Hannon*, 228 So.3d at 511.

Department of Corrections records[20]

Bowles asserts that the trial court abused its discretion in denying his public records request for updates of his disciplinary reports, housing and movement records, and visitation logs from the Department of Corrections (DOC). IB at 50.

The trial court properly concluded that the request was "overbroad and overly burdensome" because they amounted to "any and all" requests. (PCR 2019 at 421). This Court has repeatedly condemned such "any and all" public records requests as burdensome. *Geralds v. State*, 111 So.3d 778, 802 (Fla. 2010) (condemning "any and all" public records requests as overly broad and noting this Court has consistently held that a defendant must plead with specificity the outstanding public records he seeks citing *Rodriguez v. State*, 919 So.2d 1252, 1273 (Fla. 2005). And providing the defendant with 17 years worth of four different types of records is burdensome.

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[20] The trial court mistakenly thought these were first time requests rather than updates of prior requests. (PCR 2019 at 421). DOC stated in its objection, these were first-time requests for 17 years worth of four different types of records. (PCR 2019 at 375-376). DOC also stated that these were first time requests at the public records hearing. (PCR 2019 at 653-654). This is not completely accurate, however. DOC had previously provided many of these types of records including disciplinary reports to the repository during the initial postconviction proceedings circa 2002. For this reason the State does not rely on this Court's decision in *Jimenez v. State*, 265 So.3d 462, 472 (Fla. 2018), *cert. denied*, *Jimenez v. Florida*, 139 S.Ct. 659 (2018). The State discovered the mistake after the public records hearing. The State regrets the mistake.

The trial court also properly concluded that these updates which were sought in support of the claim of intellectual disability would not lead to a colorable claim. (PCR 2019 at 422). Providing the defendant with 17 years worth of four different types of records is particularly burdensome in light of their marginal relevance. Most of these types of records have little to no relevance to proving an intellectual disability claim. Most of these types of records, such as housing and movement records, have little to no value in establishing adaptive functioning. The updates were not relevant to the claim. The requests for housing and movement records and the visitation logs were an improper fishing expedition.

The only type of records that could be of some relevance to proving adaptive functioning would be disciplinary reports (DRs). But any disciplinary reports were just as likely to be used by the State against the defense to rebut adaptive functioning at any evidentiary hearing as they were likely to be used by the defense to establish adaptive functioning. For example, if Bowles had a DR for gambling, the State could have used that type of DR to establish that he knew how to keep accounting records in his head to rebut any claim of deficits in adaptive functioning.

This Court in *Muhammad v. State*, 132 So.3d 176, 201 (Fla. 2013), concluded that the trial court abused its discretion in denying a rule 3.852(h)(3) request to DOC for his own inmate and medical records because those records could potentially be relevant to an incompetency-to-be-executed claim under *Ford v. Wainwright*, 477 U.S. 399 (1986).[21]

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[21] This Court has amended rule 3.852 to require DOC to provide a copy of the defendant's medical, psychological, substance abuse, and psychiatric records to the defendant's counsel of record, that amendment did not include disciplinary reports or housing and moving records or visitation logs . *In re Amendments to Florida Rule of Criminal Procedure 3.852,* 163 So.3d 476, 478 (Fla. 2015). Bowles'

But this is not a *Ford* claim; it is an *Atkins* claims. While DOC records are important to a *Ford* claim because *Ford* looks at the defendant's current mental state, that is not true of an *Atkins* claim which requires looking at the defendant's childhood development as one of the prongs. The records that are the most important in an *Atkins* claim are not prison records but earlier records, such as school records, and expert reports. Indeed, the High Court warned against too much emphasis being placed on the defendant's actions in prison when determining adaptive deficits. *Moore v. Texas*, 137 S.Ct. 1039, 1050 (2017) (criticizing the lower court for stressing the capital defendant's improved behavior in prison because clinicians caution against reliance on adaptive strengths developed in a controlled setting, "as a prison surely is"). For that reason, *Muhammad* is not directly on point.

Moreover, neither side had access to most of these records. The point of these records, according to the request itself, was to help establish Bowles' adaptive functioning at an evidentiary hearing on intellectual disability. The trial court denied the requests on the condition that the State agreed it would not use those types of records at any evidentiary hearing. The State agreed. (PCR 2019 at 658-659). So, neither side had access to the updates to the housing and movement records, or visitation logs. The State was limited in the same manner as the defense was regarding these records. Indeed, regarding the updates of any disciplinary reports, it was only the State that lacked access to the new disciplinary reports. Bowles had access to his own DRs after 2002 but the state did not. Under DOC rules governing the inmate discipline process, an inmate is provided hard copies of the documents associated with the inmate discipline

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medical, psychological, substance abuse, and psychiatric records were disclosed. The trial court's order complies with the amended rule.

process and is allowed to retain those files. DOC rule 33-601.301-33.-601.314. So, if Bowles kept his files, the defense would have had all disciplinary reports including those after the initial postconviction proceedings in 2002 but the State only has the disciplinary reports prior to 2002.

The error, if any, in denying the updates was harmless. Even if the updates should have been disclosed, the trial court's denial of those files was harmless. The point of these records, according to the requests themselves and the initial brief, was to help establish Bowles' adaptive functioning at an evidentiary hearing on intellectual disability. But there was no evidentiary hearing. The intellectual disability claim was summarily denied on timeliness grounds. So, any error was harmless. *Cf. Groover v. State*, 703 So.2d 1035, 1038 (Fla. 1997) (holding the trial court's failure to hold a case management hearing was harmless error because no evidentiary hearing was required).

The trial court did not abuse its discretion in denying the public records request of the Department of Corrections.

State Attorney's Office records

Bowles asserts that the trial court abused its discretion in denying his request for correspondence between the Fourth Judicial Circuit State Attorney's office and the victim's family and friends. IB at 53. He argues that because the victim's brother-in-law, sister, and neighbor had met Bowles and speculates that they may have shared their thoughts on Bowles' intellectual abilities with the prosecutor in the years after the first disclosure of public records circa 2002.

The trial court properly concluded that there was no "reasonable connection" between the correspondence and the claim of intellectual disability and that the basis for the request was "too attenuated" to lead to a colorable claim. (PCR 2019

at 417). The brother-in-law, sister, and neighbor had only a passing acquaintance with Bowles for a short period of time before Bowles murdered the victim. Indeed, the victim himself had not known Bowles for long. The victim met Bowles just a few weeks before Bowles murdered him on November 16, 1994. *Bowles v. State*, 716 So.2d 769, 770 (Fla. 1998) (noting Bowles "met Walter Hinton, the victim in this case, at Jacksonville Beach in late October or early November 1994). Even if brother-in-law, sister, or neighbor had conveyed some impressions regarding Bowles' intellectual functioning to the prosecutor, which is itself highly unlikely, they simply could not have known Bowles well enough to provide any meaningful information on Bowles' adaptive functioning.

Contrary to opposing counsel's argument, relevance is material to a rule 3.852(h)(3) public records request. IB at 54. Relevance is a perquisite to every type of postconviction public records request. *Jimenez v. State*, 265 So.3d 462, 472-73 (Fla. 2018) (affirming the denial of a public records request under rule 3.852(h)(3) that did not "provide any context as to how those records were ***relevant*** to a potential, colorable claim") (emphasis added), *cert. denied*, *Jimenez v. Florida*, 139 S.Ct. 659 (2018).

The error, if any, in denying the public records request was harmless. Even if the updates to any correspondence between the State Attorney's office and the victim's family and friends should have been disclosed, the trial court' denial of the updates of those correspondence was harmless. The point of these records, according to the requests themselves and the initial brief, was to help establish Bowles' adaptive functioning at an evidentiary hearing on intellectual disability. But there was no evidentiary hearing. The intellectual disability claim was summarily denied on timeliness grounds. So, any error was harmless. *Cf. Groover v. State*, 703 So.2d 1035, 1038 (Fla. 1997) (holding the trial court's failure to hold

a case management hearing was harmless error because no evidentiary hearing was required).

The trial court did not abuse its discretion in denying the public records request of the State Attorney's Office.

Lethal injection records

Finally, Bowles asserts that the trial court abused its discretion in denying his request for lethal injections records from the Medical Examiner of the Eighth District, the Department of Corrections, and the Florida Department of Law Enforcement. IB at 55. Bowles argues that due process and equal protection require that he be allowed access to the minute details of Florida's lethal injection procedures.

But, under this Court's controlling precedent, the trial court properly denied these public records requests. This Court recently rejected this same due process and equal protection argument regarding similar public records requests on the ME, DOC, and FDLE in *Long v. State*, 271 So.3d 938, 947-48 (Fla. 2019), *cert. denied*, *Long v. Florida*, 139 S.Ct. 2635 (2019). This Court, in *Long*, concluded that the postconviction court acted within its discretion because the additional records that Long requested related to his challenges to the lethal injection protocol and were "unlikely to lead to a colorable claim given that the current protocol has been fully considered and approved." *Id.* at 948. This Court "fully considered and approved" Florida's current lethal injection protocol using etomidate after an evidentiary hearing in *Asay v. State*, 224 So.3d 695, 700-02 (Fla. 2017). And this Court again rejected challenges to the current protocol in *Jimenez v. State*, 265 So.3d 462, 474 (Fla. 2018), and *Hannon v. State*, 228 So.3d 505, 508-09 (Fla. 2017). Bowles' public records requests are no more to lead to

a colorable claim than Long's requests were. This Court's recent decision in *Long* controls.

This Court has also repeatedly explained that public record demands on the Medical Examiner regarding the autopsy of previously executed inmates are properly denied because those "autopsy records are not likely to lead to a colorable claim because they would not establish when the inmates became unconscious or whether they experienced pain during their executions." *Branch v. State*, 236 So.3d 981, 985 (Fla. 2018) (citing *Chavez v. State*, 132 So.3d 826, 830 (Fla. 2014)), *cert. denied*, *Branch v. Florida*, 138 S.Ct. 1164 (2018).

This Court has repeatedly rejected equal protection challenges to the rule of criminal procedure governing public records requests in capital cases, rule 3.852, on the basis that citizens willing to pay would have access to these records under Florida's public record law. *Mills v. State*, 786 So.2d 547, 549 (Fla. 2001) (rejecting due process and equal protection challenges to rule 3.852(h)(3) and (i) because the requests were "overly broad, of questionable relevance, and unlikely to lead to discoverable evidence"); *Long v. State*, 271 So.3d 938, 947 (Fla. 2019) (rejecting due process and equal protection challenges to rule 3.852(i) regarding requests made to the ME, DOC, and FDLE), *cert. denied*, *Long v. Florida*, 139 S.Ct. 2635 (2019). Indeed, Long made the same argument as Bowles does, asserting that the denial of these records would deny him "a fair opportunity to show that his execution will violate the Eighth Amendment." *Id.* at 947.

Capital defendants are not similarly situated to Florida citizens for purposes of equal protection analysis. *Dawson v. Scott*, 50 F.3d 884, 892 (11th Cir. 1995) ("if the two groups are not similarly situated, then we need not proceed with the constitutional analysis because there is no equal protection violation."). Citizens are not only required to prepay for the records they request but they often wait

months to obtain the records. Capital defendants with an active warrant are not required to pay and get the records within a few days of the requests. Because they are not similarly situated groups, equal protection does not apply.

Alternatively, even if equal protection applied, requiring defendants to establish relevance before being provided free records at the very last minute is perfectly reasonable and has a rational basis. The legitimate governmental purpose is to prevent state employees working until late hours to produce records that are so voluminous that there is no possibility that they can be read by counsel and which have no connection to any possible claim is a perfectly valid purpose. *Armour v. City of Indianapolis*, 566 U.S. 673, 680 (2012) (explaining a classification neither involving fundamental rights nor a suspect class does not run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose."). There is no violation of equal protection.

Furthermore, regarding due process, Bowles does not lack information regarding Florida's current lethal injection protocol. On June 13, 2019, the Department of Corrections filed a copy of Florida's current lethal injection protocol using etomidate in the trial court in this case. (PCR 2019 at 143-159). Moreover, Florida's detailed lethal injection protocol is publicly available on the internet and has been since it was adopted years ago in 2017. *Long v. Sec'y, Dept. of Corr.*, 924 F.3d 1171, 1177 (11th Cir. 2019) (noting Florida adopted etomidate as the first drug in its three-drug protocol in January of 2017), *cert. denied*, *Long v. Inch*, 139 S.Ct. 2635 (2019).[22] There was no violation of due process.

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[22] The current protocol was certified by the current Secretary of the Department of Corrections on February 27, 2019, and is available at:

Opposing counsel's reliance on *Bucklew v. Precythe*, 139 S.Ct. 1112 (2019), is misplaced. The United States Supreme Court in *Bucklew* did not hold, or even hint, that due process or equal protection requires a state to disclose the details of its lethal injection protocols. That discovery was permitted by the lower court in *Bucklew* was merely a procedural fact reported in the opinion. *Id.* at 1121. Furthermore, Bucklew was a § 1983 action filed in federal court arising from a Missouri conviction and sentence, not a successive postconviction motion filed in a Florida state court. And, while the federal district court allowed Bucklew "extensive discovery," this Court is not required to follow the federal rules of civil procedure in a Florida postconviction case governed by Florida Rule of Criminal Procedure, rule 3.851(h). *Bucklew*, 139 S.Ct. at 1121. *Bucklew* is not even persuasive precedent because a different set of rules apply. And it was clear from the tone of the United States Supreme Court's opinion in *Bucklew* that the majority of the Justices did not approve of the lower court's handling of the case, no doubt, including allowing such extensive discovery. *Id.* at 1121 ("despite this dispositive shortcoming, the court of appeals decided to give Mr. Bucklew another chance to plead his case"); *Id.* at 1133-34 (stating that the State's and the victims' "important interest in the timely enforcement of a sentence" had "been frustrated in this case" by Bucklew managing "to secure delay through lawsuit after lawsuit"); *Id.* at 1134 (characterizing Bucklew's § 1983 as amounting "to little more than an attack on settled precedent, lacking enough evidence even to survive summary judgment"); *Id.* at 1134(observing that the people of Missouri and the surviving victims and others like them "deserve better"); *Id.* at 1134 (directing courts to "police carefully against attempts to use such challenges as tools to

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http://www.dc.state.fl.us/ci/docs/Lethal%20Injection%20Certification%20Ltr%20and%20Procedure%202-27-19%20Final%20.pdf

interpose unjustified delay"). Indeed, the High Court thought Bucklew's § 1983 action should have been dismissed. *Bucklew*, 139 S.Ct. at 1134 (advocating courts invoke their equitable powers to dismiss or curtail suits that are pursued in a dilatory fashion or based on speculative theories). This Court certainly should not follow the actions of lower courts that were implicitly disapproved of by the Highest Court.

The trial court did not abuse its discretion in denying the lethal injection public records requests of the ME, DOC, and FDLE.

Accordingly, this Court should affirm the trial court's summary denial of the postconviction motion and the trial court's ruling on the public records requests.

CONCLUSION

The State respectfully requests that this Honorable Court affirm the summary denial of the successive rule 3.851 motion for postconviction relief.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA

/s/ *Charmaine Millsaps*
CHARMAINE M. MILLSAPS
SENIOR ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0989134
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL, PL-01
TALLAHASSEE, FL 32399-1050
(850) 414-3300
COUNSEL FOR THE STATE
primary email:
capapp@myfloridalegal.com
secondary email:
charmaine.millsaps@myfloridalegal.com

COUNSEL FOR THE STATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished via the e-portal to **KARIN LEE MOORE**, Capital Collateral Regional Counsel-North, 1004 Desota Park Dr., Tallahassee, FL 32301-4555; phone: 850-487-0922; email: karen.moore@ccrc-north.org; **ELIZABETH SPIAGGI**, Capital Collateral Regional Counsel-North, 1004 Desota Park Dr., Tallahassee, FL 32301-4555; phone: 850-487-0922; email: Elizabeth.Spiaggi@ccrc-north.org; **TERRI BACKHUS**, Chief, Capital Habeas Unit, Office of the Federal Public Defender, Northern District of Florida, 227 N. Bronough Street, Suite 4200, Tallahassee, FL 32301-1300; phone: (850) 942-8818; email: terri_backhus@fd.org; **KIMBERLY L. SHARKEY**, Capital Habeas Unit of the Office of the Federal Public Defender of the Northern District of Florida, 227 N. Bronough Street, Suite 4200, Tallahassee, FL 32301-1300; phone: (850) 942-8818; email: kimberly_sharkey@fd.org this 2nd day of August, 2019.

/s/ *Charmaine Millsaps*
Charmaine M. Millsaps
Attorney for the State of Florida

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/s/ *Charmaine Millsaps*
Charmaine M. Millsaps
Attorney for the State of Florida