No. _____

OCTOBER TERM 2017

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES FINNEY,

Petitioner,

v.

JULIE JONES, Secretary,
Florida Department of Corrections,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FLORIDA SUPREME COURT

CAPITAL CASE

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CAPITAL CASE

QUESTION PRESENTED

1. Does the Florida Supreme Court's creation of a partial retroactivity approach, limiting the class of death sentenced prisoners from obtaining relief pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), violate the Eighth and Fourteenth Amendments to the United States Constitution?

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The Petitioner, Charles Finney, a death sentenced Florida prisoner, was the Appellant in the Florida Supreme Court.

The Respondent, the State of Florida was the Appellee in the state court proceedings.

PETITION FOR A WRIT OF CERTIORARI

Petitioner Charles Finney prays that a Writ of Certiorari issue to review the opinion of the Florida Supreme Court.

CITATIONS TO OPINION BELOW

The opinion of the Florida Supreme Court in this cause, reported as *Finney v. State of Florida*, 235 So. 3d 279 (Fla. 2018), is attached as "Attachment A" to this Petition. The order denying successive motion for postconviction relief in the circuit court is non-published and attached as "Attachment B.

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Florida Supreme Court on the basis of 28 U.S.C. § 1257(a) and 2101 (d). The Florida Supreme Court issued its decision on January 26, 2018. Counsel sought an additional 60 days for filing of this Petition, which was granted up to and including June 25, 2018. This petition is timely filed.

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides in pertinent part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or

> property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

In this Petition Mr. Finney is requesting the Court grant certiorari to review the decision of the Florida Supreme Court rejecting his claim that his sentence of death is unconstitutional pursuant to this Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016) and the Florida Supreme Court's subsequent decision in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). Mr. Finney will present a brief summary of the relevant facts pertinent to the issue below.

A. Mr. Finney's Procedural and Factual Background

Mr. Finney was indicted on February 13, 1991 with first degree murder, robbery with a deadly weapon, sexual battery, and trafficking in stolen property. Mr. Finney pled not guilty to all charges. A trial was held on September 14, 1992 and Mr. Finney was found guilty of first degree murder, sexual battery, and trafficking in stolen property. (T. 756-58). Mr. Finney's penalty phase was held on September 18, 1992 with the jury returning a 9-3 recommendation imposing the death penalty. Thereafter, a *Spencer*[1] hearing was held on November 10, 1992 and Mr. Finney was sentenced to death. The trial court found the following aggravators: prior conviction of a felony using force or the threat of violence; that the capital felony was committed for pecuniary gain; and the crime was especially heinous, atrocious, and cruel. (PCR. 122-24). The trial court also found the following non-statutory mitigators: good work

[1] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

and military history; positive character traits; honorable service and discharge from the military; and potential for rehabilitation. (PCR. 124-25).

Mr. Finney's convictions and sentence were affirmed by the Florida Supreme Court on direct appeal. *Finney v. State*, 660 So. 2d 674 (Fla. 1995). Mr. Finney filed a Petition for Writ of Certiorari in the United States Supreme Court which was denied on January 22, 1996. *Finney v. Florida*, 116 S. Ct. 823 (1996).

Following affirmance on direct appeal, on March 31, 1997 Mr. Finney filed a Fla. R. Crim. Pro. 3.850 Motion to Vacate Judgment of Convictions and Sentences With Special Request for Leave to Amend in the Circuit Court for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida. (PCR 128-154). Thereafter, on April 16, 1998 Mr. Finney filed an Amended Rule 3.850 Motion to Vacate Judgment of Convictions and Sentences raising five issues.[2]

The circuit court granted an evidentiary hearing on only one of Mr. Finney's claims alleging entitlement to relief based upon newly discovered evidence related to semen and hair evidence found at the scene of the crime. (PCR. 188). The other four claims were denied evidentiary development. Prior to the date of the evidentiary hearing, counsel for Mr. Finney informed the court that they were unprepared to go

[2] Mr. Finney's Amended 3.850 Motion raised the following issues: 1) ineffective assistant of counsel at guilt and penalty phase; 2) improper jury instructions; 3) newly discovered evidence showing that Mr. Finney's conviction and sentence were unreliable; 4) Mr. Finney's sentence of death was unconstitutional because its rests on an automatic aggravating factor; and 5) the unconstitutionality of Florida's capital sentencing scheme. (PCR. 156-86).

forward with the newly discovered evidence claim[3] and the court subsequently summarily denied Mr. Finney's 3.850 motion. Counsel for Mr. Finney filed a motion for rehearing which was denied.

A notice of appeal to the Florida Supreme Court was timely filed. During the pendency of the appeal, Mr. Joseph Hobson replaced Mr. Crooks as counsel for Mr. Finney. On October 30, 2000 Hobson filed a Motion to Remand Jurisdiction to Circuit Court and Postpone the Briefing Schedule. (PCR. 193). The basis for Hobson's motion was that predecessor counsel for Mr. Finney in postconviction had not fully pled all of the available issues and Mr. Finney prayed for an opportunity to raise those issues below.[4]

The Florida Supreme Court denied the motion to relinquish jurisdiction. On October 31, 2000 the circuit court issued an order *nunc pro tunc* Denying Defendant's First Motion to Vacate Judgments of Conviction and Sentences with Special Request for Leave to Amend. Following that order, on November 7, 2000 Mr. Finney filed an Amended Motion to Relinquish Jurisdiction to the Circuit Court and Postpone the Briefing Schedule. (PCR. 197). Mr. Finney's Initial Brief in the Florida Supreme Court was then filed on February 13, 2001[5] and his state habeas petition filed 6 days

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[3] Mr. Finney's counsel at that time, Mr. Jack Crooks, informed the court that he could not proceed with the claim due to the fact that evidence swabs had been misplaced.

[4] Mr. Crooks' original Rule 3.850 motion was a mere 30 pages in length.

[5] Included in Mr. Finney's Initial Brief was a claim alleging error by the circuit court below for failing to ensure effective assistance of counsel in postconviction. (PCR. 248).

later on February 19, 2001. (PCR. 211).[6]

The Florida Supreme Court affirmed the summary denial of Mr. Finney's Rule 3.850 motion for postconviction relief on September 26, 2002. *Finney v. State*, 831 So. 2d 651 (Fla. 2002). In affirming the summary denial, the Florida Supreme Court also denied Mr. Finney's claim regarding the ineffective assistance of postconviction counsel. Counsel for Mr. Finney filed a motion for rehearing, along with Mr. Finney also filing a *pro se* motion for rehearing, both of which were denied by the Florida Supreme Court on December 23, 2002.

A federal habeas petition was timely filed by Mr. Finney on January 14, 2003. (PCR. 296)(DE 10).[7] On February 14, 2003 Attorney Pam Izakowitz was appointed to represent Mr. Finney in his federal habeas corpus proceedings. An Amended Petition for Writ of Habeas Corpus was then filed on July 21, 2003.(DE 23).[8]

Prior to the filing of his amended habeas petition in United States Middle District Court, Mr. Finney filed a Successive Motion to Vacate Judgement of

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[6] Following submission of briefing to the Florida Supreme Court, on April 2, 2001 the State filed a Motion to Prohibit Assertion of New Issues at Oral Argument, arguing that the Court should prohibit Mr. Finney from arguing the merits of his claim alleging the deficient performance of postconviction counsel. (PCR. 291). On May 10, 2001 Mr. Ruck DeMinico then filed a Notice of Appearance in Mr. Finney's case in the circuit court. On September 1, 2001 Mr. Finney filed a *pro se* motion requesting Removal of Counsel and Requesting the Opportunity to Reply to the Responses Ordered by the Florida Supreme Court. The circuit court denied the pro se motion on September 10, 2001.

[7] Prior to the filing of Mr. Finney's habeas petition, CCRC-Middle Attorney James Viggiano filed a Motion to Determine a Conflict of Interest with the United States District Court, Middle District of Florida on December 4, 2002. (DE 1).

[8] Among the claims included in the amended petition was a claim challenging Mr. Finney's sentence pursuant to *Ring v. Arizona*, 536 U.S. 584 (2002).

Conviction and Sentence on July 8, 2003. Mr. Finney's successive motion raised two claims: 1) a claim alleging a violation of *Brady v. Maryland*, 373 U.S. 83 (1963); and 2) a claim alleging a conflict of interest with Mr. Finney's original postconviction counsel. The circuit court summarily denied Mr. Finney's successive motion for postconviction relief and the Florida Supreme Court affirmed without written opinion. *Finney v. State*, 907 So. 2d 1170 (Fla. 2005). (PCR. 302).

Mr. Finney's federal habeas petition remained pending until it was denied by the District Court on July 5, 2006. An Amended Order denying relief was subsequently filed on July 17, 2006. *Finney v. McDonough*, 2006 WL 2024456 (M.D. Fla. July 17, 2006) (DE 44). Mr. Finney timely filed a Notice of Appeal (DE 46) and Application for Certificate of Appealability, (DE 48) which was denied by the District Court on August 14, 2006. (DE 49).

Mr. Finney submitted a COA to the Eleventh Circuit Court of Appeals which was subsequently denied. On November 9, 2006 Mr. Finney filed a Motion for Reconsideration for Certificate of Appealability which was also denied by a three-judge panel. A Petition for Writ of Certiorari to the United States Supreme Court was filed on February 5, 2007 and subsequently denied on June 11, 2007. *Finney v. McDonough*, 127 S. Ct. 2944 (2007).

On June 20, 2007 Mr. Finney filed second successive postconviction motion raising challenges to lethal injection protocols and a newly discovered evidence claim based on a comprehensive report by the American Bar Association on Florida's death penalty system. The successive motion was summarily denied by the circuit court and

affirmed by the Florida Supreme Court. *Finney v. State*, 18 So. 3d 527 (Fla. 2009).

On November 29, 2010, Mr. Finney filed a third successive post-conviction motion, arguing that *Porter v. McCollum*, 130 S. Ct. 447 (2009) required the court to reassess his ineffective assistance of counsel claim. A *Huff* hearing was held on January 21, 2011 and the circuit court entered an order denying the motion. Mr. Finney timely appealed and Florida Supreme Court affirmed.

Following the filing of a motion to withdraw by Ms. Izakowitz, in 2013, CCRC-South was appointed by the circuit court represent Mr. Finney. On May 27, 2014, after extensive public records litigation and disclosure, Mr. Finney then filed a Successive Motion To Vacate Judgment And Sentence With Special Request For Leave To Amend Pursuant To Rule 3.851. (PCR. 84-339). Thereafter, on January 5, 2015 Mr. Finney filed an Amended Successive Motion To Vacate Judgment And Sentence With Special Request For Leave To Amend Pursuant To Rule 3.851. (PCR. 606-892). The circuit court conducted a case management conference on March 27, 2015 and on April 13, 2015 the circuit court issued its order summarily denying Mr. Finney's motion for postconviction relief. Mr. Finney then timely filed his notice of appeal on May 14, 2015.

Mr. Finney filed his Initial Brief in the Florida Supreme Court on July 28, 2015 and was denied relief on December 7, 2015. Mr. Finney then filed a motion for rehearing on December 22, 2015. While that motion remained pending, on January 12, 2016 this Court decided *Hurst v. Florida*, 136 S. Ct. 616 (2016). Thereafter, the Florida Supreme Court denied Mr. Finney's motion for rehearing on February 1,

2016. Following that denial, on October 14, 2016 the Florida Supreme Court issued its opinion in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).

Following the *Hurst* decisions, and subsequent decisions from the Florida Supreme Court related to those decisions, the Florida Legislature enacted Chapter 2016-13, revising Florida's capital sentencing scheme. Based upon those developments, Mr. Finney then filed a successive motion for postconviction relief on January 11, 2017 asking the trial court to set aside his death sentence in light of the *Hurst* decisions. Mr. Finney argued that his death sentence was unconstitutional because the judge, not the jury, made the factual findings required to impose death and because the jury's recommendation in his case was 9-3 and not unanimous. Additionally, Mr. Finney argued that the *Hurst* decisions should be applied retroactively to his case under state and federal law, specifically invoking the Sixth, Eighth, and Fourteenth Amendments.

A case management conference was held and following the hearing, on April 27, 2017 the circuit court denied relief. On May 26, 2017 Mr. Finney timely filed a notice of appeal to the Florida Supreme Court.

On September 25, 2017 the Florida Supreme Court issued an Order to Show Cause, directing Mr. Finney to show why the circuit court's denial of his Rule 3.851 motion should not be affirmed in light of its recent decision in *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017). Mr. Finney then timely submitted his Response to Order to Show Cause on October 15, 2017 and a Reply on November 6, 2017, respectively. In doing so, Mr. Finney challenged the Florida Supreme Court's show cause process,

arguing among other things, that his right to due process was being truncated by the Court's unorthodox procedure limiting his statutory right to appeal pursuant to Fla. R. App. P. 9.140(b)(1)(D). Mr. Finney further argued that the *Ring*-based retroactivity cutoff was violative of the Eighth and Fourteenth Amendments and that denying relief to pre-*Ring* defendants such as himself, but granting it to other post-*Ring* defendants, violated the prohibition against the arbitrary and capricious imposition of the death penalty as well as equal protection.

Thereafter, on January 26, 2018 the Florida Supreme Court denied Mr. Finney's appeal. The substance of the Florida Supreme Court's denial was a generalized stock opinion, nearly identical to numerous other pre-*Ring* defendants who had filed similar claims for relief, denying relief based upon the court's prior decision in *Hitchcock*. The opinion failed to provide any discussion or analysis of Mr. Finney's arguments or the constitutionality of its partial retroactive application of the *Hurst* decisions. The mandate issued on February 13, 2018.

Following issuance of the mandate, on April 16, 2018 Mr. Finney filed an Application for Sixty Day Extension Of Time In Which to File Petition For Writ Of Certiorari To the Florida Supreme Court. Justice Thomas granted Mr. Finney's request for a sixty-day extension of time, providing up to and including June 25, 2018 for Mr. Finney to file his Petition for Writ of Certiorari. This Petition follows.

REASONS FOR GRANTING THE WRIT

THE FLORIDA SUPREME COURT'S CREATION OF A PREVIOUSLY UNANNOUNCED RULE OF PARTIAL RETROACTIVE APPLICATION OF THE *HURST* DECISIONS VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Introduction

In *Hurst v. Florida*, 136 S. Ct. 616 (2016) this Court held that Florida's capital sentencing scheme was unconstitutional under the Sixth Amendment where it permitted a judge, and not a jury, to make the requisite findings of fact necessary for the imposition of death. Upon remand to the Florida Supreme Court in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) the Florida Supreme Court, applying this Court's holding in *Hurst v. Florida*, held that the existence of aggravating factors necessary for the imposition of death must be found by a jury and also that under Florida's jurisprudence and the Eighth Amendment, those findings were required to be unanimous.

Following its decision in *Hurst v. State*, the Florida Supreme Court employed a non-traditional approach of partial retroactivity, implementing a bright-line cutoff for those capital defendants who would receive the benefit of the *Hurst* decisions based upon this Court's prior decision in *Ring v. Arizona*, 536 U.S. 584 (2002). In doing so, the Florida Supreme Court created two distinct classes of death sentenced prisoners, all of whom were similarly situated in that they were convicted and sentenced to death under the same unconstitutional sentencing scheme invalidated by this Court in *Hurst*. Despite that fact, the Florida Supreme Court has continued

to maintain its approach of partial retroactive application of the *Hurst* decisions to capital defendants and denied relief to those whose convictions and sentences became final prior to this Court's decision in *Ring*.

The disparate treatment created by the Florida Supreme Court's non-traditional retroactivity ruling is inconsistent with the Eighth Amendment prohibition against the arbitrary and capricious imposition of the death penalty and the Fourteenth Amendment's guarantee of equal protection. The Florida Supreme Court's retroactivity cutoff at *Ring* injects a level of arbitrariness that far exceeds that which is permissible under the principles set forth in this Court's traditional retroactivity jurisprudence. The Florida Supreme Court's bright-line retroactivity cutoff for *Hurst* claims presents this Court with yet another in a long line of occasions where capital punishment has been applied arbitrarily and capriciously in Florida.

Where the state seeks to impose a sentence of death, the Eighth Amendment requires that it must be applied consistently, or not at all. *Furman v. Georgia*, 408 U.S. 238, 309-310 (1972). In implementing a partial retroactivity approach to the availability of *Hurst* relief to only those prisoners who sentences of death became final after *Ring*, the Florida Supreme Court has created a framework that raises grave concerns as to the arbitrariness and cruelty with which Florida imposes the death penalty on capital defendants. By denying *Hurst* relief to Mr. Finney and other similarly situated prisoners whose sentences became final before *Ring*, the Florida Supreme Court has acted in a manner that is both cruel and unusual and prohibited by the Eighth Amendment.

This Court should now resolve the constitutional infirmities within the Florida Supreme Court's partial retroactivity approach to *Hurst* relief. Mr. Finney's case, who became final prior to this Court's decision in *Ring*, provides an appropriate vehicle for this Court to address the Florida Supreme Court's partial retroactivity framework and resolve this matter now.

B. Relevant Decisional Framework

In *Ring v. Arizona*,536 U.S. 584 (2002) this Court held that under the Sixth Amendment a defendant has the right to a jury determination of each fact necessary to establish the aggravating circumstances necessary for the imposition of a sentence of death. This Court's *Ring* decision, however, was confined to a review of Arizona's death penalty statute and did not comment at large on every individual state death penalty scheme. Specifically, this Court did not address Florida's capital sentencing scheme and did not engage post-*Ring* in certiorari review of petitions raising *Ring*-based claims with respect to Florida's system.

Following *Ring*, the Florida Supreme Court did not grant relief in cases raising *Ring*-based challenges. The Florida Supreme Court repeatedly held fast to the determination that it was not that court's province to determine the constitutionality of its prior precedents upholding the constitutionality of its death penalty statutory sentencing scheme. *See e.g., King v. Moore*, 831 So. 2d 143 (Fla. 2002); *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002).

Roughly fourteen years later, in *Hurst v. Florida*, this Court declared Florida's capital sentencing scheme, Fla. Stat. 921.141, unconstitutional. In striking down

Florida's capital sentencing scheme, this Court determined that Florida's statute violated the Sixth Amendment right to a jury determination of every fact necessary to impose a sentence of death. *Hurst*, 136 S. Ct. at 619. In doing so, this Court noted that its prior decision in *Ring* applied with equal force to Florida's capital sentencing scheme. *Id.* at 621-22. This Court then remanded *Hurst* to the Florida Supreme Court.

On remand, in *Hurst v. State*, the Florida Supreme Court determined that Mr. Hurst was entitled to relief on two grounds: 1) under the Sixth Amendment right to a jury finding of every fact necessary to impose a sentence of death; and 2) under the Eighth Amendment, and the Florida Constitution's requirement for unanimity in jury verdicts, that in order to impose a sentence of death a jury's recommendation must be unanimous. *Hurst v. State*, 202 So. 3d 40, 44 (Fla. 2016). Essentially, *Hurst v. State* established a presumption of a life sentence that is the equivalent of the guilt phase presumption of innocence, which cannot be overcome unless the jury unanimously makes the requisite findings beyond a reasonable doubt and unanimously recommends a death sentence. The Florida Supreme Court recognized that the requirement that the jury must unanimously recommend death before the presumption of a life sentence can be overcome does not arise from the Sixth Amendment, or from *Hurst v. Florida*, or from *Ring*. This right emanates from the Florida Constitution and the Eighth Amendment. In extending this Court's holding in *Hurst v. Florida* to provide for juror unanimity, the Florida Supreme Court noted

it was doing so in light of the recognition of the need for heightened reliability in capital cases. *Id.* at 59; citing *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988).

Following its decision in *Hurst v. State*, the Florida Supreme Court issued its opinions in *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016) and *Asay v. State*, 210 So. 3d 1 (Fla. 2016). The Florida Supreme Court's opinions in both cases, issued the same day, addressed the retroactivity of the *Hurst* decisions under its *Witt* analysis.[9] The Court's decisions in *Mosley* and *Asay* divided capital defendants in two classes for purpose of eligibility of retroactive application of *Hurst*: to those whose cases became final prior to this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002) and those whose cases became final after. *Mosley*, 209 So. 3d at 1283; *Asay*, 210 So. 3d at 21-22. In determining the decision in *Ring* as the appropriate cut-off date for retroactivity purposes, the Florida Supreme Court predicated its reasoning on the basis that it was not until *Hurst v. Florida* that this Court ultimately made the determination that *Ring* was applicable to Florida's capital sentencing scheme. *Mosley*, 209 So. 3d at 1283. The Florida Supreme Court did not address the issue as to whether those defendants who were sentenced to death under Florida's unconstitutional sentencing pre-*Ring* violated the Eighth Amendment under its holding in *Hurst v. State*.[10]

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[9] *See Witt v. State*, 387 So. 2d 922, 926 (Fla. 1980) (applying the pre-*Teague* three factor analysis found in *Linkletter v. Walker*, 381 U.S. 618 (1965) and *Stovall v. Deno*, 388 U.S. 293 (1967).

[10] Despite failing to address the Eighth Amendment implications of imposing a partial retroactivity approach, both Justice Pariente and Justice Lewis writing in dissent noted the inherent Eighth Amendment implications of creating such an approach, arguing that doing so violated notions of fundamental fairness and the

Following its decisions in *Asay* and *Mosley*, the Florida Supreme Court reaffirmed its partial retroactivity approach of the *Hurst* decisions and its line drawing at the June 24th, 2002 *Ring* decision in *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017). In *Hitchcock*, the majority wrote:

> Although Hitchcock references various constitutional provisions as a basis for arguments that *Hurst v. State* should entitle him to a new sentencing proceeding, these are nothing more than arguments that *Hurst v. State* should be applied retroactively to his sentence, which became final prior to *Ring*. As such, these arguments were rejected when we decided *Asay*.

Hitchcock, 226 So. 3d 216, 217 (Fla. 2017). But, as Justice Pariente pointed out in her dissent, "[t]his Court did not in *Asay*, however, discuss the new right announced by this Court in *Hurst* to a unanimous recommendation for death under the Eighth Amendment. . . . Therefore, *Asay* does not foreclose relief in this case, as the majority opinion assumes without explanation." Id. at 220. (Pariente, J., dissenting).

In *Asay v. State*, 210 So. 3d 1, 14 (Fla. 2016), the Florida Supreme Court acknowledged that the U.S. Supreme Court in *Hurst v. Florida* did not address "whether Florida's sentencing scheme violated the Eighth Amendment." The entirety of the Florida Supreme Court's analysis in *Asay* hinged on whether *Hurst v. Florida*, 136 S. Ct. 616 (2016) should apply retroactively to Asay. *See id.* at 15. *Hurst v. Florida* is a Sixth Amendment case. The Sixth Amendment rights addressed in *Hurst v.*

Eighth Amendment's prohibition against the arbitrary and capricious imposition of the death penalty to similarly situated defendants. *Asay*, 210 So. 3d at 36 (Pariente, J., concurring in part and dissenting in part); *Asay*, 210 So. 3d at 37-38. (Perry, J., dissenting).

Florida have nothing to do with the substantive Eighth Amendment rights addressed in *Hurst v. State*.

The *Asay* majority acknowledged that "*Hurst v. Florida* derives from *Ring*[*v. Arizona*, 536 U.S. 584 (2002)]," *Asay*, 210 So. 3d at 15, and ultimately concluded that *Hurst v. Florida* should not apply retroactively under *Witt v. State*, 387 So. 2d 922 (Fla. 1980) to people whose convictions were final before *Ring*. But as the Florida Supreme Court also recognized in *Asay*, *Hurst v. Florida* did not address the question of whether Florida's scheme violated the Eighth Amendment. *Id.* at 14. (emphasis added). Thus, although the Florida Supreme Court decided in *Asay* that *Hurst v. Florida* should not apply to pre-Ring individuals, *Asay* did not foreclose Eighth Amendment relief under *Hurst v. State*.

Following its decision in *Hitchcock*, the Florida Supreme Court then summarily denied relief in a number of pre-*Ring* cases, including Mr. Finney's, engaging in a truncated show cause process on appeal. In doing so, the Florida Supreme Court has failed to date to engage in any analysis as to the constitutionality of its partial retroactive application of the *Hurst* decisions under the Eighth and Fourteenth Amendments and failed to consider the application of *Hurst v. State*, specifically its holding that the Eighth Amendment demands unanimity, to those individuals whose sentences became final before *Ring*.

C. The Florida Supreme Court's partial retroactivity cutoff violates the Eighth Amendment prohibition against arbitrary and capricious imposition of capital punishment

In *Furman v. Georgia*, 408 U.S. 238 (1972) this Court held that where the death penalty was wantonly and freakishly imposed such that it was administered in an arbitrary and capricious manner it violated the Eighth Amendment prohibition on cruel and unusual punishment. *Id.* at 310. Following this Court's post-*Furman* jurisprudence, this Court has repeatedly held that the Eighth Amendment requires consistency and uniformity in the application of death sentences for purposes of ensuring reliability and fundamental fairness. *See Godfrey v. Georgia*, 446 U.S. 420, 428 (1980)E; *Kennedy v. Louisiana*, 554 U.S. 407, 436 (2008). This heightened need for reliability stems from the gravity and finality which accompanies a death sentence and the understanding that "death is different." *See McClesky v. Kemp,* 481 U.S. 279 (1987)

This Court has long recognized the constitutionality of non-retroactivity rules which result in the denial of application of new rules of constitutional law to prisoners whose cases became final on direct review prior to a particular decision announcing the rule. The Court has noted that the denial of retroactivity in such circumstances finds its justification in the need to protect States' interests in the finality of criminal convictions. *See Teague v. Lane,* 489 U.S. 288, 309 (1989). Those rules, however, are still bound by constitutional restraints. In capital cases, the Eighth Amendment requires that States must administer the death penalty in a way that can rationally distinguish between for whom death is an appropriate sentence and those for whom it is not. *Spaziano v. Florida*, 468 U.S. 447, 460 (1984). Moreover, the Fourteenth Amendment right to equal protection also requires that the law treat similarly those

defendants who have committed the same quality of offense. *See Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). States do not have unfettered discretion to arbitrarily create classes of condemned prisoners.

The Florida Supreme Court opinions in *Asay* and *Mosley*, creating a partial retroactivity approach to application of the *Hurst* decisions, offends those constitutional restraints. In creating a dividing line for retroactive application of the *Hurst* decisions at the date of the decision in *Ring*, the Florida Supreme Court has provided no justifiable basis for doing so which does not run afoul of both the Eighth and Fourteenth Amendments. In fashioning its partial retroactivity approach, the Florida Supreme Court has drawn an arbitrary line that results in the granting of relief under the *Hurst* decisions to some death sentenced inmates with longstanding final convictions, while also denying retroactive relief to others whose convictions are equally longstanding. Such disparate outcomes of similarly situated prisoners is not only arbitrary but also offensive to the notions underpinning the Eighth Amendment's prohibition against cruel and unusual punishment.

The rationale provided by the Florida Supreme Court as to why it determined *Ring* as the cut-off point for retroactivity does nothing to justify its arbitrariness. In attempting to explain its reasoning for imposing *Ring* as the cutoff, the Florida Supreme Court held in *Mosley* that "[b]ecause Florida's capital sentencing statue has essentially been unconstitutional since *Ring* in 2002, fairness strongly favors applying *Hurst* retroactively to that time" *Mosely,* 209 So. 3d at 1280. That reasoning, however, is flawed. The Florida Supreme Court's analysis overlooks that this Court's

decision in *Ring* did not invalidate Florida's capital sentencing scheme but rather Arizona's. While this Court's opinion in *Ring* made note of, and comparison between, Florida and Arizona's capital sentencing scheme, its opinion did nothing either explicitly or impliedly to render Florida's scheme unconstitutional. Such a rationale also overlooks that Florida's capital sentencing scheme was unconstitutional even before *Ring*, given that the Sixth Amendment requirement of a jury fact-finding of each fact necessary for the imposition of death had always applied with full force even before this Court's decision in *Ring*. This Court's decision in *Ring* did not create that right but rather recognized that Arizona's capital sentencing scheme had failed to provide for it.

The purported justification provided by the Florida Supreme Court does nothing to establish a rational basis to explain why *Ring* serves as the cutoff date for purposes of retroactive application of the *Hurst* decisions or how it aids in the fair application of the death penalty under Florida's capital sentencing scheme. Most critically, it does nothing to address the arbitrariness which results in providing the benefit of the *Hurst* decisions to some death sentenced inmates and not others where there are no other meaningful differences other than the date of finality of their conviction and sentence. Such a lack of justification is especially troublesome when also considering the fact that every death sentenced prisoner in Florida was sentenced under the same unconstitutional sentencing scheme.

That the Florida Supreme Court's partial retroactivity approach is entirely arbitrary and without justification is further underscored by the recognition that the

date of finality of a particular defendant's sentence is dependent on a number of variable factors which are entirely random and not uniform. Delays in production of the record on appeal to the Florida Supreme Court, possible issues with re-scheduling of dates due to conflicts of appointed counsel, requests for extension of time to file briefing, the length of time a case remained at the Florida Supreme Court before an opinion issued, and whether a motion to file a rehearing was sought or not, are to name but a few. Such an arbitrary cut-off period also fails to acknowledge the disparate treatment which results from those individuals who may have committed crimes long before other capital defendants who miss the *Ring* cut-off date and but for the fact that they were granted re-sentencing or some other form of relief, will receive the benefit of the *Hurst* decisions because their case was not final at the time of the *Ring* decision.

Finally, and significantly, the Florida Supreme Court's rationale ignores entirely that its decision in *Hurst v. State*, unlike this Court's decision in *Ring*, was not based upon the Sixth Amendment but rather the Eighth Amendment, thus making it impossible for *Ring* to have prefigured the ruling in that case. "Reliability is the linchpin of Eighth Amendment jurisprudence, and a death sentence imposed without a unanimous jury verdict for death is inherently unreliable." *Hitchcock*, 226 So. 3d at 220. (Pariente, J., dissenting). The requirement that the jury unanimously vote in favor of a death recommendation before a death sentence is authorized was embraced as a way to enhance the reliability of death sentences. "A reliable penalty phase proceeding requires that 'the penalty phase jury must be unanimous in making

the critical findings and recommendation that are necessary before a sentence of death may be considered by the judge or imposed." *Hurst v. State*, 202 So. 3d at 59. The court also recognized the need for heightened reliability in capital cases. *Id.* ("We also note that the requirement of unanimity in capital jury findings will help to ensure the heightened level of protection necessary for a defendant who stands to lose his life as a penalty.). *See Johnson v. Mississippi*, 486 U.S. 578, 584 (1988) ("The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case.").

Hurst v. State demonstrates that Finney's death sentence lacks the heightened reliability demanded by the Eighth Amendment. His jury's vote was 9-3, which was returned the same day the penalty phase began. As the Florida Supreme Court recognized, "juries not required to reach unanimity tend to take less time deliberating and cease deliberating when the required majority vote is achieved rather than attempting to obtain full consensus. . . ." *Hurst v. State*, 202 So. 3d at 58. A 9-3 advisory recommendation after a one-day penalty phase cannot possibly be considered reliable. As indicated in *Mosley v. State,* 209 So. 3d 1248 (Fla. 2016), the *Witt*[11] analysis in the context of *Hurst v. State* requires courts to consider the need to cure "individual injustice." The layers of unreliability and errors in Finney's penalty phase demonstrate an individual injustice in need of a cure.

Moreover, *Hurst v. State* recognized that evolving standards of decency

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[11] *Witt v. State*, 387 So. 2d 922, 925 (Fla.1980).

require unanimous recommendations.

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

Hurst v. State, 202 So. 3d at 60. Such Eighth Amendment protections are generally understood to be retroactive. *See, e.g., Miller v. Alabama*, 132 S. Ct. 2455 (2012) (holding retroactive a case which held that mandatory sentences of life without parole for juveniles are unconstitutional); *Atkins v. Virginia*, 536 U.S. 304 (2002).

Additionally, the jury was repeatedly instructed that its penalty phase verdict was merely advisory and only needed to be returned by a majority vote. However, the Eighth Amendment requires that jurors must feel the weight of their sentencing responsibility. As the U.S. Supreme Court explained in *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985), "it is not constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *See also Blackwell v. State*, 79 So. 731, 736 (Fla. 1918).[12] Diminishing an

[12] The Florida Supreme Court has previously rejected *Caldwell* challenges in the context of the prior sentencing scheme, where the judge was the final decision-maker, not the jury. But three Justices of this Court have dissented from the denial of certiorari in two capital cases because the Florida Supreme Court's rationale for denying *Caldwell* claims has been undermined by *Hurst v. Florida*, and would grant

individual juror's sense of responsibility for the imposition of a death sentence creates a "bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court." *Caldwell*, 472 U.S. at 330.

Finney's jurors were not told that their vote had to be unanimous, and that their decision was binding on the sentencing judge. The jurors were not advised of each juror's authority to dispense mercy. The jury was never instructed that it could still recommend life as an expression of mercy, or that they were "neither compelled nor required" to vote for death even if it determined that there were sufficient aggravating circumstances that outweighed the mitigating circumstances. Finney's jury's non-unanimous 9-3 advisory recommendation simply "does not meet the standard of reliability that the Eighth Amendment requires." *Id.* at 341.

The issue of whether *Hurst v. State*'s right to a unanimous jury recommendation should be retroactively applied was never addressed by the Florida Supreme Court in *Hitchcock* or *Asay*. *See Hitchcock*, 226 So. 3d at 220. (Pariente, J. dissenting) ("This Court did not in *Asay*, however, discuss the new right announced by this Court in *Hurst [v. State]* to a unanimous recommendation for death under the Eighth Amendment. Indeed, although the right to a unanimous jury recommendation for death may exist under both the Sixth and Eighth Amendments, the retroactivity analysis, which is based on the purpose of the new rule and reliance on the old rule,

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certiorari to address this "potentially meritorious Eighth Amendment challenge." *Truehill v. Florida*, 138 S. Ct. 3, 4 (Oct. 16, 2017) (Sotomayor, J., dissenting).

is undoubtedly different in each context. Therefore, *Asay* does not foreclose relief in this case, as the majority opinion assumes without explanation."). These issues were not addressed or decided in *Hitchcock*, and Finney must have a fair opportunity to show that the Eighth Amendment prohibits his execution.

D. The Florida Supreme Court's partial retroactivity cutoff at *Ring* exceeds the limits of the Equal Protection Clause of the Fourteenth Amendment

The arbitrariness which the *Ring*-based cutoff infects Florida's capital sentencing system with also violates the Equal Protection Clause under the Fourteenth Amendment. The Florida Supreme Court's basis for partial retroactivity provides no justifiable or reliable basis for separating Florida's death sentenced defendants into pre-*Ring* and post-*Ring* categories. When two classes are created to receive different treatment, as the Florida Supreme Court has done here, the question is "whether there is some ground of difference that rationally explains the different treatment..." *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972); *see also McLaughlin v. Florida*, 379 U.S. 184, 191 (1964). Under the Fourteenth Amendment, state laws the impinge upon fundamental rights must be reviewed under strict scrutiny. *See, e.g., Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). When a state draws a line between those capital defendants who will receive the benefit of a fundamental right afforded to every defendant-i.e. the right to fact finding by a jury-and those who will not be provided that right, the justification for that line drawing must survive strict scrutiny. The Florida Supreme Court's rule of partial retroactivity falls well short of those standards.

The concerns about the constitutionality of the Florida Supreme Court's approach of partial retroactivity have not been lost on the Court's members. Several members of the Florida Supreme Court have acknowledged that partial retroactivity does not survive scrutiny. Justice Pariente noted in *Asay* that "[t]he majority's conclusion results in an unintended arbitrariness as to who receives relief...To avoid such arbitrariness and to ensure uniformity and fundamental fairness in Florida's capital sentencing...*Hurst* should be applied retroactively to all death sentences." *Asay*, 210 So. 3d at 36. (Pariente, J., concurring in part and dissenting in part). Similarly, Justice Perry also noted in *Asay*: "In my opinion the line drawn by the majority is arbitrary and cannot withstand scrutiny under the Eighth Amendment because it creates an arbitrary application of law to two grounds of similarly situated persons." *Asay*, 210 So. 3d at 37 (Perry, J., dissenting). Justice Perry also correctly pointed out that the result of partial retroactive application would be that there would be defendants who committed equally violent crimes but whose death sentences became final mere days apart and will be treated differently without any justification. *Id.* As those quotes illustrate, members of the Florida Supreme Court maintain strong reservations as to the disparate treatment which results from partial retroactive application of the *Hurst* decisions.

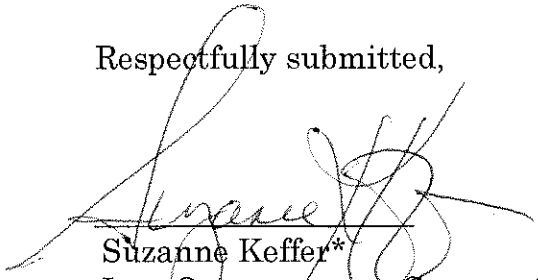
CONCLUSION

Florida Supreme Court jurisprudence has repeatedly held that *Hurst v. Florida* and *Hurst v. State* apply retroactively. However, rather than apply retroactive application of those decisions consistently and evenly to all those

defendants previously sentenced under Florida's unconstitutional sentencing scheme, the Florida Supreme Court has crafted an unworkable and arbitrary rule of partial retroactivity which does not comport with the Eighth Amendment prohibition against the arbitrary imposition of the death penalty and the Fourteenth Amendment right to Due Process and Equal Protection.

As such, Mr. Finney's Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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June 25, 2018

INDEX TO APPENDICES

Appendix A

Florida Supreme Court Opinion affirming the state circuit court denial of postconviction relief. *Finney v. State,* 235 So. 3d 279 (Fla. 2018).

Appendix B

Circuit Court Order Summarily Denying Successive Motion for Postconviction Relief. *Finney v. State*, Case No. 91-CF-001611 (Order dated April 27, 2017).

APPENDIX A

235 So.3d 279
Supreme Court of Florida.

Charles William FINNEY, Appellant,
v.
STATE of Florida, Appellee.

No. SC17–985
|
[January 26, 2018]

Synopsis

Background: Motion was filed for post-conviction relief following affirmance of death sentence, 660 So.2d 674. The Circuit Court, Hillsborough County, Michelle Sisco, J., No. 291991CF001611000AHC, denied motion. Movant appealed.

[Holding:] The Supreme Court held that Supreme Court's *Hurst*, 136 S.Ct. 616, decision invalidating capital sentencing scheme did not apply retroactively to conviction that became final in 1996.

Affirmed.

Pariente, J., concurred in result and filed statement.

Lewis and Canady, JJ., concur in result.

West Headnotes (1)

[1] **Courts** ⇐ In general;retroactive or prospective operation

United States Supreme Court's *Hurst*, 136 S.Ct. 616, decision invalidating capital sentencing scheme as violating Sixth Amendment did not apply retroactively to conviction that became final in 1996. (Per curiam with the Chief Justice and two justices concurring and three justices concurring in result.). U.S. Const. Amend. 6.

Cases that cite this headnote

An Appeal from the Circuit Court in and for Hillsborough County, Michelle Sisco, Judge—Case No. 291991CF001611000AHC

Attorneys and Law Firms

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Pamela Jo Bondi, Attorney General, and Christina Z. Pacheco, Assistant Attorney General, Tampa, Florida, for Appellee

Opinion

PER CURIAM.

We have for review Charles William Finney's appeal of the circuit court's order denying Finney's motion filed pursuant to Florida Rule of Criminal Procedure 3.851. This Court has jurisdiction. See art. V, § 3(b)(1), Fla. Const.

Finney's motion sought relief pursuant to the United States Supreme Court's decision in Hurst v. Florida, —— U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), and our decision on remand in Hurst v. State (Hurst), 202 So.3d 40 (Fla. 2016), cert. denied, —— U.S. ——, 137 S.Ct. 2161, 198 L.Ed.2d 246 (2017). This Court stayed Finney's appeal pending the disposition of Hitchcock v. State, 226 So.3d 216 (Fla. 2017), cert. denied, —— U.S. ——, 138 S.Ct. 513, 199 L.Ed.2d 396 (2017). After this Court decided Hitchcock, Finney responded to this Court's order to show cause arguing why Hitchcock should not be dispositive in this case.

After reviewing Finney's response to the order to show cause, as well as the State's arguments in reply, we conclude that Finney is not entitled to relief. Finney was *280 sentenced to death following a jury's recommendation for death by a vote of nine to three. Finney v. State, 660 So.2d 674, 679 (Fla. 1995). Finney's sentence of death became final in 1996. Finney v. Florida, 516 U.S. 1096, 116 S.Ct. 823, 133 L.Ed.2d 766 (1996). Thus, Hurst does not apply retroactively to Finney's sentence of death. See Hitchcock, 226 So.3d at 217. Accordingly, we affirm the denial of Finney's motion.

The Court having carefully considered all arguments raised by Finney, we caution that any rehearing motion containing reargument will be stricken. It is so ordered.

LABARGA, C.J., and POLSTON, and LAWSON, JJ., concur.

PARIENTE, J., concurs in result with an opinion.

LEWIS and CANADY, JJ., concur in result.

QUINCE, J., recused.

PARIENTE, J., concurring in result.
I concur in result because I recognize that this Court's opinion in Hitchcock v. State, 226 So.3d 216 (Fla. 2017), cert. denied, —— U.S. ——, 138 S.Ct. 513, 199 L.Ed.2d 396 (2017), is now final. However, I continue to adhere to the views expressed in my dissenting opinion in Hitchcock.

All Citations

235 So.3d 279, 43 Fla. L. Weekly S43

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APPENDIX B

IN THE THIRTEENTH JUDICIAL CIRCUIT COURT
FOR HILLSBOROUGH COUNTY, FLORIDA
Criminal Justice and Trial Division

STATE OF FLORIDA RECEIVED BY **CASE NO.: 91-CF-001611**

MAY - 1 2017

v.

CHARLES W. FINNEY, CCRC-SOUTH **DIVISION: J**
Defendant.
_____/

ORDER DENYING DEFENDANT'S SUCCESSIVE MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE PURSUANT TO RULE 3.851 WITH SPECIAL REQUEST FOR LEAVE TO AMEND

THIS MATTER is before the Court on Defendant's Successive Motion to Vacate Judgment of Conviction and Sentence Pursuant to Rule 3.851 with Special Request for Leave to Amend, filed on January 11, 2017, pursuant to Florida Rule of Criminal Procedure 3.851. On February 15, 2017, the State filed its response to Defendant's motion and, on March 8, 2017, the Court held a case management conference. Defendant's claims are purely legal and do not require an evidentiary hearing. After considering Defendant's motion, the State's response, the court file and record, as well as the arguments of counsel presented during the March 8, 2017, case management conference, the Court finds as follows.

A jury found Defendant guilty of first degree murder and recommended a sentence of death by a vote of nine to three. On November 10, 1992, the trial court imposed a death sentence. The Florida Supreme Court affirmed Defendant's conviction and death sentence. *See Finney v. State*, 660 So. 2d 674 (Fla. 1995). The United States Supreme Court denied Defendant's petition for writ of certiorari on January 22, 1996. *See Finney v. Florida*, 116 S. Ct. 823 (1996).

Defendant filed five motions for postconviction relief, which were subsequently denied, and the Florida Supreme Court affirmed the denial. *See Finney v. State*, 831 So. 2d 651 (Fla.

2002); *See also Finney v. State*, 907 So. 2d 1170 (Fla. 2005); *See also Finney v. State*, 18 So. 3d 527 (Fla. 2009).

In this successive motion, Defendant asserts various claims in light of the United States Supreme Court's opinion in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and the Florida Supreme Court's decisions in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016); *Perry v. State*, No. SC16-547, 2016 WL 6036982 (Fla. October 14, 2016), *Mosley v. State*, No. SC14-436 and No. SC14-2108, 2016 WL 7406506 (Fla. December 22, 2016), and *Asay v. State*, 2016 WL 7406538, No. SC16-223, No. SC16-102, No. SC16-628, 2016 WL 7406538 (Fla. December 22, 2016), and the enactment of Chapter 2016-13, Law of Florida. Defendant requests that the Court vacate his death sentence and grant a new penalty phase or sentence him to life in prison.

CLAIM I

MR. FINNEY'S DEATH SENTENCE STANDS IN VIOLATION OF THE SIXTH AMENDMENT UNDER *HURST V. FLORIDA* AND *HURST V. STATE* AND MUST BE VACATED

In claim I, Defendant asserts his death sentence is unconstitutional and in violation of the Sixth Amendment pursuant to *Hurst v. Florida* and *Hurst v. State*. Defendant asserts *Hurst v. Florida* should be applied retroactively to his case under the *Witt*[1] analysis as well as principles of fundamental fairness as set forth in *Mosley* and *James v. State*, 615 So. 2d 668 (Fla. 1993). Defendant posits that in *Mosley*, the court found two classes of defendants are entitled to retroactive application of the *Hurst* decisions: those whose sentences were final after *Ring*,[2] and those who preserved a *Ring*-type error (regardless of when their death sentences became final). Defendant asserts he falls into the latter category. Defendant contends considerations of fairness

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1 *Witt v. State*, 387 So. 2d 922 (Fla. 1980).
2 *Ring v. Arizona*, 536 U.S. 584 (2002).

and uniformity require retroactive application of *Hurst*, and he cites to numerous defendants whose crimes were committed before his own, but will still receive the benefit of *Hurst* because their convictions or death sentences were vacated for other reasons. Defendant also asserts the State cannot establish beyond a reasonable doubt any *Hurst* error was harmless here.

In its response, the State asserts Defendant's motion is untimely, procedurally barred and without merit. The State contends a reasonable reading of *Mosley*, *Asay* and *Gaskin v. State*, No. SC15-1884, 2017 WL 224772 (Fla. January 19, 2017) reflect that *Hurst v. Florida* and *Hurst v. State* do not apply retroactively to Defendant's case. The State further contends it does not bear the burden of proving harmless error, and any *Hurst* error here is harmless. The State requests that the Court summarily deny claim I.

The Court disagrees with Defendant's interpretation of *Mosley*. The *Mosley* court specifically noted that its decision in *Asay* held *Hurst* does not apply retroactively to defendants whose sentences were final before *Ring* but left unanswered the question of whether *Hurst* applies retroactively to defendants whose death sentences became final after *Ring*. *Mosley*, 2016 WL 7406506, at *18. The Court finds the Florida Supreme Court has held *Hurst v. Florida* and *Hurst v. State* simply do not apply retroactively to cases that were final at the time of *Ring*.[3] *See Asay*, 2016 WL 7406538, at *4-13 (conducting a retroactivity analysis and concluding that *Hurst* should not be applied to defendant's case, which became final before *Ring*); *Mosley*, 2016 WL 7406506, at *18 ("[W]e have now held in *Asay v. State*, that *Hurst* does not apply retroactively to capital defendants whose sentences were final before the United States Supreme Court issued its opinion in *Ring*."); *Gaskin*, 2017 WL 224772, at *2 (citing *Asay* and finding defendant is not entitled to relief under *Hurst v. Florida* because his sentence became final in 1993); *Bogle v. State*, No. SC11-

[3] *Ring* was decided on June 24, 2002. *See Ring*, 536 U.S. at 584.

2403 and No. SC12-2465, 2017 WL 526507, *16 (Fla. February 9, 2017) (citing *Asay* and finding defendant is not "entitled to *Hurst* relief because *Hurst* does not apply retroactively to cases that were final before *Ring* was decided."); *Davis v. State*, No. SC16-264, 2017 WL 656307, *2 (Fla. February 17, 2017) (citing *Asay* and denying defendant's *Hurst v. Florida* claim); *Lambrix v. State*, SC16-8 (Fla. March 9, 2017) (citing *Asay* and concluding defendant is not entitled to a new penalty phase based on *Hurst v. Florida* or *Hurst v. State*). This Court is bound by the decisions of the Florida Supreme Court.

Here, Defendant's sentence became final when the United State Supreme Court denied certiorari on January 22, 1996. *See* Fla. R. Crim. P. 3.851(d)(1)(B) ("For purposes of this rule, a judgment is final . . . on disposition of the petition for writ of certiorari by the United States Supreme Court, if filed."). Because Defendant's sentence was final before *Ring* was decided, the Court finds *Hurst v. Florida* and *Hurst v. State* do not retroactively apply to the instant case.[4] **No relief is warranted on claim I.**

CLAIM II[5]

MR. FINNEY'S DEATH SENTENCE STANDS IN VIOLATION OF THE EIGHTH AMENDMENT UNDER *HURST V. STATE* AND MUST BE VACATED

In claim II, Defendant asserts the Florida Supreme Court in *Hurst v. State*, held the Eighth Amendment requires jury unanimity in recommending a death sentence and the jury must be informed of its right to recommend a life sentence even if it unanimously makes the necessary factual findings. Defendant asserts the death sentence in his case rests on a non-unanimous jury verdict. Defendant asserts what constitutes cruel and unusual punishment under the Eighth

[4] Because the *Hurst* decisions are not retroactively applicable to Defendant's case, the Court does not further address the issue of harmless error.

[5] The Court notes that based on the content of the claims, it will address Claims II and IV together under Claim II.

Amendment turns upon considerations of the evolving standards of decency that mark the progress of a maturing society. Defendant asserts that according to *Hurst v. State*, the evolving standards of decency reflected in a national consensus that a defendant could only be given a death sentence when a penalty phase jury has voted unanimously in favor of the imposition of death. Defendant further asserts that failure to properly inform the jury of its role violates the Eighth Amendment, and cites to *Caldwell v. Mississippi*, 472 U.S. 320 (1985). Defendant argues that failure to properly instruct the jury and the jury's non-unanimous advisory recommendation in this case violate the Eighth Amendment, and reflect *Hurst* error is not harmless here. Defendant again argues *Hurst v. State* applies retroactively to his case under *Montgomery*[6], *Witt*, and principles of fundamental fairness. Defendant further cites to *Furman v. Georgia*, 408 U.S. 238, 239-240 (1972), asserting that the United States Supreme Court held that the death penalty "could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." Defendant further argues that the retroactivity analyses employed in *Mosley* and *Asay* were arbitrary and ad hoc, and that the resulting partial retroactivity is intolerable under the United States and Florida Constitutions.

In its response, the State asserts the Eighth Amendment has never required a unanimous jury sentencing recommendation and the United States Supreme Court has never held the Eighth Amendment requires a unanimous jury sentencing recommendation, or only full retroactive application of new procedural rules. The State contends in *Spaziano v. State*, 468 U.S. 447 (1984), the United States Supreme Court held the Eighth Amendment is not violated when the ultimate sentencing responsibility rests with the judge. The State further contends *Hurst v. Florida* overruled *Spaziano* only to the extent *Spaziano* allows a sentencing judge to find an aggravating

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[6] *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016)

circumstance independent of the jury's fact-finding, but the Court did not overrule *Spaziano* on Eighth Amendment grounds. The State also contends the conformity clause of the Florida Constitution requires this Court to construe Florida's prohibition against cruel and unusual punishment consistently with the United States Supreme Court's precedent on Eighth Amendment claims. The State again argues *Hurst* is not retroactive to Defendant's case. The State also contends Defendant's allegations regarding jury instructions exceeds the scope of claims predicated on *Hurst* as *Hurst* did not address such issues. The State urges the Court to summarily reject this claim.

As previously discussed in claim I above, the *Hurst* decisions do not retroactively apply to Defendant's case. No relief is warranted on claim II or claim IV.

CLAIM III

THE DENIAL OF MR. FINNEY'S PRIOR POSTCONVICTION CLAIMS MUST BE REHEARD AND DETERMINED UNDER A CONSTITUTIONAL FRAMEWORK

In claim III, Defendant asserts the Court should review his previously presented *Strickland*, *Brady* and *Giglio* claims in light of the new Florida law which would govern at a resentencing and the requirement that the jury now make all findings unanimously. Defendant cites to *Hildwin v. State*, 141 So. 3d 1178 (Fla. 2014), and *Swafford v. State*, 125 So. 3d 760 (Fla. 2014). Defendant asserts that under such a re-evaluation, it is apparent the outcome of the proceedings would have been different as Defendant would likely receive a binding life recommendation.

In its response, the State asserts *Hurst* "does not operate to breathe new life into unrelated, previously denied claims." The State further contends the cases relied on by Defendant are inapplicable here as those cases address a cumulative analysis standard for newly discovered evidence, which is not at issue here. The State requests that the Court summarily this claim.

As discussed in claim I above, *Hurst v. Florida* and *Hurst v. State* do not apply retroactively to the instant case. The Court agrees with the State's assertion that there is no legal authority which would permit or require this Court to re-evaluate and reconsider previously presented postconviction claims in light of either *Hurst* decision or the new death penalty statute. **No relief is warranted on claim III.**

It is therefore **ORDERED AND ADJUDGED** that Defendant's Successive Motion to Vacate Judgment of Conviction and Sentence Pursuant to Rule 3.851 with Special Request for Leave to Amend is hereby **DENIED.**

Defendant has thirty (30) days from the rendition of this Order within which to file an appeal.

DONE AND ORDERED in Chambers in Hillsborough County, Florida, this ORIGINAL SIGNED day of April, 2017.

APR 27 2017

MICHELLE SISCO
CIRCUIT JUDGE

MICHELLE SISCO
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this order has been furnished to Suzanne Keffer, Esquire, and Scott Gavin, Esquire, CCRC-South, 1 East Broward Boulevard, Suite 444, Fort Lauderdale, Florida 33301; Carol M. Dittmar, Esquire, Office of the Attorney General, 3507 East Frontage Road, Suite 200, Tampa, FL 33607; John Terry, Esquire, Office of the State Attorney, 419 North Pierce Street, Tamp, FL 33602, by U.S. mail, on this 27th day of April, 2017.

Deputy Clerk