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OPINION OF THE SUPREME COURT OF FLORIDA (FEBRUARY 28, 2018)

SUPREME COURT OF FLORIDA

PABLO SAN MARTIN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

No. SC17-1778

An Appeal from the Circuit Court in and for Dade County, Ellen Sue Venzer, Judge
Case No. 131992CF006089C000XX

Before: LABARGA, C.J., and QUINCE, POLSTON, and LAWSON, JJ., PARIENTE, J., LEWIS and CANADY, JJ.

PER CURIAM

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

San Martin's motion sought relief pursuant to the United States Supreme Court's decision in *Hurst*

v. Florida, 136 S. Ct. 616 (2016), and our decision on remand in *Hurst v. State* (*Hurst*), 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017). After this Court decided *Hitchcock v. State*, 226 So. 3d 216 (Fla.), *cert. denied*, 138 S. Ct. 513 (2017), San Martin responded to this Court's order to show cause arguing why *Hitchcock* should not be dispositive in this case.

After reviewing San Martin's response to the order to show cause, as well as the State's arguments in reply, we conclude that San Martin is not entitled to relief. San Martin was sentenced to death following a jury's recommendation for death by a vote of nine to three. *San Martin v. State*, 705 So. 2d 1337, 1342 (Fla. 1997). San Martin's sentence of death became final in 1998. *San Martin v. Florida*, 525 U.S. 841 (1998). Thus, *Hurst* does not apply retroactively to San Martin's sentence of death. *See Hitchcock*, 226 So. 3d at 217. Accordingly, we affirm the denial of San Martin's motion.

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

LABARGA, C.J., and QUINCE, POLSTON, and LAWSON, JJ., concur. PARIENTE, J., concurs in result with an opinion. LEWIS and CANADY, JJ., concur in result.

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*, 138 S. Ct. 513 (2017), is now final. However, I continue to adhere to the views expressed in my dissenting opinion in *Hitchcock*.

ORDER DENYING SUCCESSIVE MOTION TO VACATE SENTENCE OF DEATH (AUGUST 30, 2017)

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR MIAMI DADE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

PABLO SAN MARTIN,

Defendant.

Case No. F92-6089C

Before: Ellen SUE VENZER, Circuit Court Judge

This cause having come before the court on Defendant's Successive Motion to Vacate Sentence of Death and the court being fully advised, finds as follows:

Defendant e-filed a Successive Motion to Vacate Sentence of Death on August 7, 2017. The State filed a response on August 18, 2017. A *Huff* hearing was held on August 30, 2017.

In Claim I, Defendant, alleges he is entitled to relief pursuant to *Hurst v. Florida*, 136 S. Ct. 616

(2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). In *Asay v. State*, 210 So. 3d 1, 22 (Fla. 2016), *reh'g denied*, No. SC16-102, 2017 WL 431741 (Fla. Feb. 1, 2017), the Florida Supreme Court held defendant's that death sentences that were final prior to *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L.Ed.2d 556 (2002), are not entitled to retroactive application. Since *Asay*, the Florida Supreme Court has repeatedly held that *Hurst* does not apply retroactively to all death row inmates, only those whose death sentence was not final at the time of *Ring*.

WHEREFORE, it is ORDERED AND ADJUDGED that Defendant's Successive Motion to Vacate Sentence of Death is DENIED.

Done and Ordered in Miami-Dade County this 30th day of August, 2017.

/s/ Ellen Sue Venzer
Circuit Court Judge

SUCCESSIVE MOTION TO VACATE DEATH SENTENCE, AND ALTERNATIVELY MOTION TO CORRECT ILLEGAL SENTENCE WITH SPECIAL REQUEST FOR LEAVE TO AMEND (AUGUST 7, 2017)

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR MIAMI DADE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

PABLO SAN MARTIN,

Defendant.

Case No. 92-6089C

> *Considerations of fairness and uniformity make it very "difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases*." *Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980)

PABLO SAN MARTIN, Defendant in the above-captioned cause, respectfully moves this Court for an Order, pursuant to Florida Rules of Criminal Procedure 3.850, 3.851 vacating and setting aside his sentence

of death, imposed upon him by this Court. In support thereof, Mr. San Martin respectfully submits the following:

JUDGMENT AND SENTENCE UNDER ATTACK AND PROCEDURAL HISTORY

PROCEDURAL HISTORY

The judgments and sentences under attack are as follows: Judgment of guilty for first degree murder.

On February 18, 1992, a grand jury sitting in Miami-Dade County indictment Mr. San Martin with one count of first degree murder. Mr. San Martin pled not guilty.

Mr. San Martin was tried by a jury. The jury rendered a verdict of guilt for the charge of First Degree Murder on September 23, 1993.

After a penalty phase, the jury recommended death by a vote of 9 to 3 on November 4th, 1993.

The jury found Mr. San Martin guilty as charged on all counts and recommended the death penalty by a nine-to-three vote as to the first-degree murder conviction. The trial court found three aggravating circumstances beyond a reasonable doubt: (1) prior violent felony convictions; (2) the murder was committed during the course of an attempted robbery and for pecuniary gain; and (3) that the murder was committed in a cold, calculated, and premeditated manner (CCP). The court found no statutory mitigating circumstances and only one non-statutory mitigating circumstance, that being that Mr. San Martin was a good son, grandson, and brother, had found religion in jail, and displayed a good attitude during his

incarceration. The court found that the aggravating circumstances outweighed the mitigating circumstances and sentenced Mr. San Martin to death on the first-degree murder charge. The trial court imposed a death sentence on January 25th, 1994.

Mr. San Martin filed an appeal with the Florida Supreme Court. On Direct Appeal, Mr. San Martin raised sixteen (16) grounds.[1]

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[1] The grounds alleged were: (1) the jury was death-qualified and San Martin was denied individual sequestered voir dire of the prospective jurors; (2) the trial court denied San Martin's motion to sever his trial from codefendant Franqui which violated his Confrontation Clause rights because Franqui's confession incriminating San Martin was admitted into evidence at their joint trial; (3) the court admitted into evidence San Martin's and Franqui's statements to the police; (4) and (5) the evidence was insufficient to sustain the conviction for premeditated murder; (6) the prosecutor commented on San Martin's right to remain silent; (7) the general verdict form did not specify whether the jury found San Martin guilty of premeditated or felony murder; (8) San Martin was denied the use of experts at trial: (9) the State's mental health expert misstated the law relating to mitigating circumstances and the trial court erred in subsequently rejecting San Martin's claimed mitigating circumstances; (10) the trial court erred by instructing the jury on the CCP aggravating circumstance and by finding that CCP was applicable; (11) the trial court prohibited either argument or instruction to the jury regarding the potential imposition of consecutive sentences; (12) defense counsel was prohibited from fully cross-examining State witnesses who testified about San Martin's past convictions; (13) the trial court failed to instruct the jury as to specific non-statutory mitigating circumstances that San Martin claimed were applicable; (14) the death penalty statute and instructions unconstitutionally shift the burden to the defendant to prove that a death sentence is not warranted; (15) the death penalty statute is unconstitutional; (16) numerous instances of prosecutorial misconduct rendered the trial unfair; and (17) the trial court made reference to a separate,

On direct appeal, this Court affirmed the conviction and sentence. *San Martin v. State*, 705 So.2d 1337 (Fla. 1998). The Florida Supreme Court ruled as to the different grounds: (1) that the issue had not been preserved below and further found no merit on the issue; (2) The Court found the error harmless beyond a reasonable doubt; (3) found that the trial's court ruling on the confession should be upheld; (4) & (5) the Court found no merits; The court found regarding issue VI that testimony about Petitioner's refusal to have his confession recorded did not amount to a comment on silence; (7) The court found that there was no requirement for a special verdict regarding the theory of first degree murder; (8) The Court determined that there was no abuse of discretion; (9) through 13 the court found that any error in the admission of the rebuttal testimony was invited by the defense, that the trial court had properly found the aggravators and rejected the mitigators based on competent substantial evidence, that the trial court had not abused its discretion regarding the admissibility of evidence at the penalty phase and that the jury instruction on nonstatutory mitigation was proper. *Id.* at 1347-50. Regarding the issues concerning alleged burden shifting and the State's comments, the court found that they were unpreserved and without merit. *Id.* at 1350. The Court also determined that the trial court erred in discussing the disparity in roles in the Bauer murder in discussing Abreu's life sentence but found that error harmless.

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and at the time untried, charge against San Martin for the murder of a police officer. *San Martin v. State*, 705 So.2d 1337 (1997).

On October 4th, 1999, Mr. San Martin filed a motion to vacate judgment of conviction and sentence with special request for leave to amend. Mr. San Martin filed a contemporaneous motion for continuance of deadline for filing his post-conviction relief motion. Mr. San Martin then filed a motion to disqualify the sitting judge. He supplemented this motion on April 18, 2000. The Court recused itself at the May 25th, 2000, hearing, due to the specific allegations that the prosecutor in the case, Ms. Millian, had threatened or coerced a witness into testifying falsely.

The Court held the *Huff* hearing on January 7th, 2002, wherein it denied 28 of the 30 claims of error presented in Mr. San Martin's amended motion. The Court granted an evidentiary hearing as to claims IV, V, and VI. The hearings were held on December 18th, 2002, and February 4, 2003.

Subsequent to the hearings, Defendant filed his notice of appeal as to the denial of his motion for post-conviction relief. San Martin appealed the denial of claim 5 after an evidentiary hearing, and the summary denial of claims 3, 9, 10, 11, 12, 17, 25, and 29. Claim five dealt with the allegation of the use of perjured testimony by the government. The Supreme Court found that even if the inconsistency was false, there was no reasonable possibility that it court had affected the proceedings. As to the balance of the count, the court found that only two, 3 and 9 had not been waived or insufficiently plead. As to claim 3, the court found no prejudice and the confidence in the outcome was not undermined. AS to Claim 9, the Court found that San Martin had not established prejudice. The Court entered its opinion on August 28th, 2008, affirming the Court below.

December 18, 2008, Mr. San Martin filed a Writ in Federal Court, case number 08-23497-CIV-Huck. Mr. San Martin raised five claims, with sub-claims. The claims were I, actual innocence, II Denial of reliable adversarial testing at the guilt phase, III denial of effective assistance of counsel at the penalty phase, IV Denial of a full and faith hearing in State Court claims, and V the Florida death penalty scheme is unconstitutional.

On August 14th, 2009, the Court denied the Writ of Habeas Corpus as filed untimely. The Court issued a certificate of appealability on September 9th, 2009. San Martin filed an Appeal on November 20th, 2009. It raised two issues: Where the Clerk of Courts for the Florida Supreme Court fails to Docket and notify the parties of the receipt of the Mandate from the U.S. Supreme Court, the lower Court should hold an evidentiary hearing to determine whether that delay ultimately resulted in the untimely filing of the Habeas Corpus petition; and where a Writ of Habeas Corpus petition is untimely filed because the petitioner did not receive actual notice of a U.S. Supreme Court order triggering the commencement of the one-year limitation set forth in 28 U.S.C. § 2244(d)(1)(A) until that order was docketed two weeks later with the state supreme court, the district court should apply equitable tolling to account for that delay where such equitable tolling would allow the petition to be heard on its merits. On February 23, 2011, the Eleventh Circuit Court of Appeal entered an order affirming the lower Court's ruling.

On May 20th, 2011, Mr. San Martin filed a Petition for Writ of Certiorari with the US Supreme Court. The Petition was denied on October 3rd, 2011.

On Jan 12, 2016, the U.S. Supreme Court issued its decision in the case of *Hurst v. Florida*, 136 S. Ct. 616 (2016). On December 22nd, 2016, the Florida Supreme Court issued its decision in the case of *Mosley v. Florida*, No. SC14-2108.

STATEMENT OF FACTS

Below is the Florida Supreme Court's summary of the fact of the case.

Danilo Cabanas Sr., and his son Danilo Cabanas, Jr., operated a check-cashing business in Medley, Florida. On Fridays, Cabanas Senior would pick up cash from his bank for the business. After Cabanas Senior was robbed during one of his bank trips, his son and a friend, Raul Lopez, regularly accompanied him to the bank. On Friday, December 6, 1991, the trio left the bank with $25,000 in cash. The Cabanases rode together in a Chevrolet Blazer driven by the son; Lopez followed in his Ford pickup truck. As the trio drove alongside the Palmetto Expressway, their vehicles were "boxed in" at an intersection by two Chevrolet Suburbans. Two masked men exited from the front Suburban and began shooting at the Cabanases. When Cabanas Senior returned fire, the assailants returned to their vehicles and fled. Cabanas Junior also saw one masked person exit the rear Suburban.

Following this exchange of gunfire, Lopez was found outside his vehicle with a bullet wound in his chest. He was transported to the hospital, but died shortly thereafter. The Suburbans driven by the masked men were found abandoned. It was subsequently determined that both vehicles had been stolen. The Suburbans suffered bullet damage, including thirteen

bullet holes in one vehicle. The Cabanases' Blazer was also riddled with ten bullet holes.

San Martin's confession and a subsequent statement, in which he told the police where he had disposed of the weapons used in the incident, were admitted at trial. San Martin refused to allow either statement to be recorded stenographically, but did sign a waiver of his Miranda 1 rights and orally confessed to the crime. San Martin admitted his involvement in the incident and recounted the details of the plan and how it was executed. He explained that Fernando Fernandez had told him and Franqui about Cabanas's check cashing business several months before this incident and that they had planned the robbery by watching Cabanas to learn his routine. He also explained how they used the stolen Suburbans to "box in" the victims at an intersection: San Martin and Abreu drove in front of the Cabanases' Blazer and Franqui pulled alongside the Blazer in the second Suburban so that the Cabanases could not escape. He also recounted that a brown pickup driven by Cabanas's "bodyguard" drove up behind the Blazer. San Martin stated that he exited the passenger side of the first Suburban armed with a 9 mm semiautomatic pistol and that Abreu exited the driver side armed with a "small machine gun." San Martin admitted that he initiated the robbery attempt by telling the occupants of the Blazer not to move and that he shot at the Blazer when the driver fired at them. However, he denied firing at Lopez's pickup. San Martin also detailed Franqui's role in the planning and execution of the crime. He placed Franqui in proximity to Lopez's pickup, but could not tell if Franqui fired his gun during the incident. San Martin initially claimed

that he had thrown the weapons used in the incident off a Miami Beach bridge, but in a subsequent statement admitted that he had thrown the weapons into a river near his home and drew a map detailing the location. Two weapons, a 9 mm semiautomatic pistol and a .357 revolver, were later recovered from that location by a police diver. San Martin did not testify at trial, but his oral confession and subsequent statement about the guns were admitted into evidence. Franqui's formal written confession was also admitted at trial, over San Martin's objection. Franqui initially denied any knowledge of the Lopez shooting, but confessed when confronted with photographs of the bank and the Suburbans. Franqui recounted the same details of the planning and execution of the crime that San Martin had detailed. Franqui admitted that he had a .357 or .38 revolver. He also stated that San Martin's 9mm semiautomatic jammed at times and that Abreu carried a Tech-9 9 mm semiautomatic which resembles a small machine gun. Franqui claimed that he returned fire in Lopez's direction after Lopez opened fire on him. A police firearms expert testified that the bullet recovered from Lopez's body was consistent with the .357 revolver used by Franqui during the attempted robbery. The expert also stated that a bullet recovered from the passenger mirror of one of the Suburbans and a bullet found in the hood of the Blazer was definitely tired from the same gun as the Lopez bullet. However, due to the rust on the .357 recovered from the river, the expert could not rule out the possibility that all three bullets had been fired from another .357 revolver.

Id. at 1341-42.

NATURE OF RELIEF SOUGHT

By his motion for relief under Florida Rule of Criminal Procedure, 3.850, 3.851, Mr. San martin asserts that his sentences of death is the result of violations of the Sixth Amendments to the United States Constitution and of the Florida's independent right to trial by jury in article I, section 22, of the Florida Constitution. Mr. San Martin had preserved this claim in the prior pleadings and post-conviction relief process.

Thus Mr. San Martin requests that this Court to vacate his sentence of death and order that he be granted a new penalty phase, one that comports with constitutional imperatives.

REASON THIS CLAIM WAS NOT RAISED IN FORMER MOTIONS

Mr. San Martin has previously raised the illegality of the Florida Sentencing statute. This Petition is based on the recent *Mosley* decision.

CLAIM I
SAN MARTIN'S DEATH SENTENCE VIOLATES THE SIXTH AMENDMENT UNDER *HURST v. FLORIDA*.

This claim is evidenced by the following:

1. All other factual allegations in this motion and in San Martin's previous motions to vacate, and all evidence presented by him during his trial and previous post-conviction proceedings, are incorporated herein by specific reference.

2. This motion is timely as it's based on the Supreme Court's ruling upon *Mosley v. State*, of December of 2016.

3. On December 22nd, 2016, the Florida Supreme Court ruled that *Hurst* should be applied to Mosley and other defendants whose sentences became final after the United States Supreme Court issued its opinion in *Ring v. Arizona*, 536 U.S. 584 (2002). The basis of the application lies on the Court's conclusion that Florida's capital sentencing statute "has essentially been unconstitutional since *Ring* in 2002," and, thus, basic fairness required that the *Hurst* opinion be applied to cases not final at that time.

4. Mr. San Martin preserved the arguments of the illegality of the Florida Death Sentence statute throughout his appellate and post conviction relief process.

5. The Sixth Amendment right enunciated in *Hurst v. Florida* and found applicable to Florida's capital sentencing scheme guarantees that all facts that are statutorily necessary before a judge is authorized to impose death are to be found by a jury, pursuant to the capital defendant's constitutional right to a jury trial. *Hurst v. Florida* held, "Florida's capital sentencing scheme violates the Sixth Amendment . . . " On remand, the Florida Supreme Court held in *Hurst v. State* that *Hurst v. Florida* means "that before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient

to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death." *Hurst v. State*, 202 So. 3d 40 (2016), at 57.

6. As stated in *Witt v. State*, Considerations of fairness and uniformity make it very "difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases." *Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980)

7. In *Witt*, the court presented the three factors to determine retroactive application: These are

(a) the purpose to be served by the new rule;

(b) the extent of reliance on the old rule; and

(c) the effect on the administration of justice of a retroactive application of the new rule. *Witt v. State*, 387 So. 2d 922, 926 (Fla. 1980)

8. In the case at bar, *Ring* was a fundamental change, based on a clearly defined constitutional right.

9. The Florida Supreme Court founded to a great degree based fundamental fairness. The Court has previously held that fundamental fairness alone may require the retroactive application of certain decisions involving the death penalty after the United States Supreme Court decides a case that changes our jurisprudence.

10. In the *Mosley* decision, in regards to the date for the retroactive application, the Court stated "There can, therefore, be no precise mathematical

formula, and the prongs should not and cannot be mechanically applied."

11. While the *Asay v. Florida*, SC16-102 case held that the *Mosley* decision was not applicable to cases that were final before *Ring v. Arizona* case, Mr. San Martin respectfully notes in his appeal for the denial of the Post Conviction relief, he raised the fundamental constitutional issue of the illegality of the Florida Capital sentencing scheme. The Supreme Court should have ruled in his favor on the basis of *Ring*.

12. In the case at bar, the date of the US Supreme Court in *Ring v. Arizona* is critical—June 24, 2002. Thus, Mr. San Martin's then pending post conviction relief claim should have been granted.

13. Mr. San Martin's appeal on the denial was heard well after *Ring*, and thus the *Mosley* decision should apply to Mr. San Martin.

CONCLUSION AND RELIEF SOUGHT

Based on the foregoing, Mr. San Martin prays for the following relief, based on his prima facie allegations showing violation of his constitutional rights: 1) that this Court vacate the death sentence and grant a new sentencing hearing, and 2) a re-evaluation of his previously presented Strickland claim in light of the new Florida law that would govern at a re-sentencing in order to enhance the reliability of any resulting death sentence; 3) an opportunity for further evidentiary development to the extent necessary; 4) authorization to proceed in *forma pauperis*; 5) leave to supplement this motion should new claims, facts, or legal precedent become available to counsel; and, 6) on the

basis of the reasons presented herein, Rule 3.851 relief vacating his sentence of death and substituting a life sentence, or alternatively a new penalty phase proceeding.

CERTIFICATION PURSUANT TO FLA. R. CRIM. P. 3.851(E)

Pursuant to Fla. R. Crim. P. 3.851(e)(2)(A) and (e)(1)(F), undersigned counsel hereby certifies that he has discussed the contents of this motion fully with Mr. San Martin, and that he has complied with Rule 4-1.4 of the Rules of Professional Conduct, and that this motion is filed in good faith.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed through the Florida Clerk of Courts System this Monday, August 07, 2017. [to]

Sandra Jaggard, Esq.
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