DOCKET NO. ____________

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

IAN DECO LIGHTBOURNE,
Petitioner

vs.

STATE OF FLORIDA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

APPENDIX

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APPENDIX INDEX

A. Florida Supreme Court opinion denying relief, reported as *Lightbourne v. State*, 235 So. 3d 285 (Fla. 2018).

B. Postconviction court order denying relief, referenced as *State v. Lightbourne*, Order, Case No. 1981-CF-170-A-W (Fla. 5th Jud. Cir. Apr. 6, 2017).

A

235 So.3d 285
Supreme Court of Florida.

Ian Deco LIGHTBOURNE, Appellant,
v.
STATE of Florida, Appellee.

No. SC17–837
|
[January 26, 2018]

Synopsis
Background: Motion was filed for post-conviction relief following affirmance of death penalty, 438 So.2d 380. The Circuit Court, Marion County, Robert W. Hodges, J., No. 421981CF000170CFAXXX, 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 1984.

Affirmed.

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

Lewis and Canady, JJ., concurred 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 1984. U.S. Const. Amend. 6.

Cases that cite this headnote

***286** An Appeal from the Circuit Court in and for Marion County, Robert W. Hodges, Judge—Case No. 421981CF000170CFAXXX

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Opinion

PER CURIAM.

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

Lightbourne'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 Lightbourne'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, Lightbourne responded to this Court's order to show cause arguing why Hitchcock should not be dispositive in this case.

After reviewing Lightbourne's response to the order to show cause, as well as the State's arguments in reply, we conclude that Lightbourne is not entitled to relief. Lightbourne was sentenced to death following a jury's recommendation for death by an unrecorded vote. See Lightbourne v. State, 438 So.2d 380, 391 (Fla. 1983).[1] Lightbourne's sentence of death became final in 1984. Lightbourne v. Florida, 465 U.S. 1051, 104 S.Ct. 1330, 79 L.Ed.2d 725 (1984). Thus, Hurst does not apply retroactively to Lightbourne's sentence of death. See Hitchcock, 226 So.3d at 217. Accordingly, we affirm the denial of Lightbourne's motion.

The Court having carefully considered all arguments raised by Lightbourne, 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, ––– 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 285, 43 Fla. L. Weekly S44

Footnotes

1 The jury's vote recommending a sentence of death was unrecorded, and, therefore, is not reflected in this Court's opinion on direct appeal. See Appellant's Br. Resp. Show Cause Order, Lightbourne v. State, No. SC17–837 (Fla. Oct. 16, 2017), at 12, 2017 WL 4812802.

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IN THE CIRCUIT COURT OF THE FIFTH
JUDICIAL CIRCUIT, IN AND FOR
MARION COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v. CASE NO.: 1981-CF-170-A-W

IAN D. LIGHTBOURNE,

Defendant.
______________________________/

ORDER DENYING DEFENDANT'S SUCCESSIVE MOTION TO VACATE DEATH SENTENCE

THIS CAUSE is before the Court on the Defendant's "Successive Motion to Vacate Death Sentence Pursuant to Florida Rule of Criminal Procedure 3.851 with Special Request for Leave to Amend," filed with the Clerk on January 11, 2017. The State filed its response on February 8, 2017. The case management conference, pursuant to Rule 3.851(f)(5)(B), *Fla. R. Crim. P.*, was held on March 30, 2017. At the case management conference, the Court heard legal argument from the parties on all grounds. The Court, having considered the legal argument of the parties, reviewed the pleadings, the record, and the applicable law, finds as follows:

FACTS OF THE CASE

On or around January 16, 1981, the Defendant sexually battered and murdered Nancy O'Farrell. *Lightbourne v. State*, 438 So. 2d 380 (Fla. 1983). Testimony at trial established that the Defendant entered the victim's house, surprised her, and took money, a necklace, and a small silver coin bank. *Id*. at 390-91. During the burglary, the Defendant sexually battered the victim. *Id*. at 391. The Defendant then shot the victim on the left side of her head and left the victim to bleed to death. *Id*. Pubic hair matching the Defendant and semen consistent with the Defendant's blood type were found at the crime scene. *Id*.

PROCEDURAL HISTORY

The Defendant was charged with first degree premeditated murder. The Defendant proceeded to trial and a jury found the Defendant guilty, as charged. *Id*. at 383. The jury recommended that the Defendant be sentenced to death; however, the record is unclear as to how many jurors recommended death over life. *Id*. The Court followed the jury's recommendation and sentenced the Defendant to death. The Court found the existence of five aggravating factors: (1) the capital felony was committed while the defendant was engaged in the commission of a burglary and sexual battery; (2) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest; (3) the capital felony was committed for pecuniary gain; (4) the capital felony was especially heinous, atrocious, or cruel; and (5) the capital felony was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. *Id*. at 390-91.

The Defendant appealed his conviction and the Florida Supreme Court *per curiam* affirmed the Defendant's judgment and sentence. *Id*. at 391. The United States Supreme Court denied certiorari on February 21, 1984. *Lightbourne v. Florida*, 465 U.S. 1051 (1984).

On May 31, 1985, the Defendant filed an emergency application for stay of execution to permit the filing of a motion for post-conviction relief. The Court treated the application as an application for a stay of execution and a motion for post-conviction relief. The Court denied the application for stay of execution and motion for post-conviction relief. The Defendant appealed and the Florida Supreme Court affirmed the Court's denial. *Lightbourne v. State*, 471 So. 2d 27 (Fla. 1985).

The Defendant then filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Florida. The District Court denied the Defendant's petition. The

Defendant appealed and the United States Court of Appeals for the Eleventh Circuit affirmed the Court's denial. *Lightbourne v. Dugger*, 829 F. 2d 1012 (11th Cir. 1987). The United States Supreme Court affirmed the ruling by the United States Court of Appeals for the Eleventh Circuit. *Lightbourne v. Dugger*, 488 U.S. 934 (1988).

The Defendant then filed a second motion for post-conviction relief, which the Court denied. The Defendant appealed and filed a petition for writ of habeas corpus with the Florida Supreme Court. The Florida Supreme Court affirmed the Court's order in part, but reversed and remanded for the Court to hold an evidentiary hearing on the Defendant's claims of a *Brady*[1] violation. *Lightbourne v. State*, 549 So. 2d 1364 (Fla. 1989). On remand, after the evidentiary hearing was held, the Court denied the Defendant's motion for post-conviction relief. The Defendant again appealed and the Florida Supreme Court affirmed the Court's denial. *Lightbourne v. State*, 644 So. 2d 54 (Fla. 1994). The Defendant filed a petition for writ of certiorari with the United States Supreme Court and the United States Supreme Court denied the petition. *Lightbourne v. Florida*, 514 U.S. 1038 (1995).

The Defendant then filed his third motion for post-conviction relief, which the Court denied. The Defendant appealed and the Florida Supreme Court reversed and remanded for the Court to hold an evidentiary hearing. *Lightbourne v. State*, 742 So. 2d 238 (Fla. 1999). After the evidentiary hearing was held, the Court denied the Defendant's motion for post-conviction relief. The Defendant again appealed and the Florida Supreme Court affirmed the Court's denial. *Lightbourne v. State*, 841 So. 2d 431 (Fla. 2003). The United States Supreme Court denied the Defendant's petition for writ of certiorari. *Lightbourne v. Florida*, 540 U.S. 1006 (2003).

The Defendant then filed a petition for writ of habeas corpus, which the Court denied. The Defendant appealed and the Florida Supreme Court affirmed the Court's denial.

[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

Lightbourne v. Crosby, 889 So. 2d 71 (Fla. 2004). The Defendant filed a petition for writ of certiorari with the United States Supreme Court and the United States Supreme Court denied the petition. *Lightbourne v. Crosby*, 545 U.S. 1120 (2005).

The Defendant then filed another motion for post-conviction relief, which the Court denied. The Defendant appealed and the Florida Supreme Court affirmed the Court's denial. *Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007). The Defendant filed a petition for writ of certiorari with the United States Supreme Court and the United States Supreme Court denied the petition. *Lightbourne v. McCollum*, 553 U.S. 1059 (2008).

The Defendant then filed another motion for post-conviction relief, which the Court denied. The Defendant appealed and the Florida Supreme Court affirmed the Court's denial. *Lightbourne v. State*, 94 So. 3d 501 (Fla. 2012).

The instant motion follows.

CLAIMS FOR RELIEF

The Defendant has alleged four claims for relief. All of the Defendant's claims are based on the recent opinions of *Hurst v. Florida*, 136 S. Ct. 616 (2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). In *Hurst v. Florida*, the United States Supreme Court found Florida's sentencing scheme, which permitted the judge to determine the existence of aggravating circumstances, to be unconstitutional. *Hurst v. Florida*, 136 S. Ct. at 624. In *Hurst v. State*, the Florida Supreme Court found that, before a judge may consider imposing a death sentence, the jury must unanimously find that all aggravating factors were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose a death sentence, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death. *Hurst v. State*, 202 So. 3d at 57.

CLAIM 1

In his first claim, the Defendant argues his death sentence violates the Sixth Amendment under *Hurst v. Florida*. According to the Defendant, because the jury returned an advisory recommendation that a death sentence should be imposed, rather than returning a verdict with findings of fact, the Defendant's death sentence must be vacated. The Defendant argues that, in *Mosely v. State*, 209 So. 3d 1248 (Fla. 2016), the Florida Supreme Court created two approaches to determining the retroactivity application of *Hurst v. Florida*—a fundamental fairness approach and a standard retroactivity analysis pursuant to *Witt v. State*, 387 So. 2d 922 (Fla. 1980). According to the Defendant, because he has raised various challenges to Florida's death penalty, under the fundamental fairness approach, he is entitled to retroactive application of *Hurst v. Florida*. The State argues the Defendant is not entitled to any relief because *Hurst v. Florida* does not apply retroactively to the Defendant's case, a case which became final on February 21, 1984, prior to the United State Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002)[2].

It's important to note that on the same day that it issued its ruling in *Mosely*, December 22, 2016, the Florida Supreme Court issued its ruling in *Asay v. State*, 210 So. 3d 1 (Fla. 2016). In doing so, the Court created a binary approach, which divided the retroactive application of the *Hurst* decisions between those defendants whose convictions were finalized before *Ring* and those defendant's whose convictions were finalized after *Ring*.

In *Asay*, the Florida Supreme Court determined that *Hurst v. Florida* and *Hurst v. State* do not apply retroactively to a defendant whose conviction and death sentence was final at the time of the United States Supreme Court's ruling in *Ring*. *Asay* at 13. In *Mosely*, the Florida

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[2] In *Ring*, the United States Supreme Court held the Arizona capital sentencing statute, which allowed the judge, and not the jury, to find all aggravating circumstances necessary to impose a death sentence, unconstitutional.

Supreme Court held that, for defendant's whose cases were final after *Ring*, and who unsuccessfully raised *Ring*-like claims, *Hurst v. Florida* and *Hurst v. State* applied retroactively. *Mosely*, 209 So. 3d 1248. Importantly, in its fundamental fairness analysis, the Court in *Mosely* specifically limited its opinion to those defendants whose convictions became final after *Ring*. *Mosley* at 1283.

Contrary to the Defendant's arguments, the Florida Supreme Court has not held that fundamental fairness acts as an alternative basis for retroactivity for those cases finalized before *Ring*. The Florida Supreme Court cited to fundamental fairness in *Mosely* only when analyzing why post-*Ring* cases should the receive retroactive application of *Hurst v. Florida* and *Hurst v. State*, ("Defendants who were sentenced to death under Florida's former, unconstitutional capital sentencing scheme **after** Ring should not suffer due to the United States Supreme Court's fourteen-year delay in applying Ring to Florida."). *Id.* (emphasis added).

No Florida Supreme Court case since *Mosely* has held that fundamental fairness can be used to apply a retroactive application of *Hurst v. Florida* and *Hurst v. State* to cases final prior to the *Ring* decision. Moreover, *Mosely* does not hold that *Hurst v. Florida* and *Hurst v. State* apply retroactively to cases final before *Ring* was decided if a *Ring*-like issue was originally raised. Therefore, *Hurst v. Florida* does not apply retroactively to cases which were final before *Ring* was decided. *See also Gaskin v. State*, No. SC15-1884, 2017 WL 224772, at *3 (Fla. January 19, 2017).

Here, the Defendant's first degree murder conviction and death sentence became final in 1984, prior to the United States Supreme Court's decision in *Ring*. As such, *Hurst v. Florida* does not apply retroactively to the Defendant's case. The Defendant is not entitled to relief on this claim as a matter of law.

CLAIM 2

In his second claim, the Defendant argues his death sentence violates the Eighth Amendment under *Hurst v. State*. In *Hurst v. State*, the Florida Supreme Court broadened the United States Supreme Court's holding in *Hurst v. Florida* to include the requirement that the jury must unanimously recommend a sentence of death before death may be imposed. *Hurst v. State*, 202 So. 3d at 57. According to the Defendant, because the record does not show that the jury unanimously recommended a sentence of death, his death sentence constitutes cruel and unusual punishment.[3]

At the case management conference, the defense acknowledged that the United States Supreme Court's decision in *Hurst v. Florida*, which analyzed the constitutionality of Florida's death penalty under Sixth Amendment grounds, was found not to apply retroactively to cases which were final prior to the *Ring* decision in *Asay*. But, according to the defense, *Asay* did not consider the retroactivity of the Florida Supreme Court's decision in *Hurst v. State* under the Eighth Amendment and the Florida Constitution.

Contrary to the defense's argument, the Florida Supreme Court in *Asay* determined the retroactivity of *Hurst v. State* by considering the application of *Hurst v. State* in conjunction with their retroactivity analysis of *Hurst v. Florida*. *See Asay*, at 15. ("As we have explained fully in Hurst, 'Hurst v. Florida requires that all the critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury.' Hurst, 202 So.3d at 44. Also, 'based on Florida's requirement for unanimity in jury verdicts, and under the Eighth Amendment to the United States Constitution, . . . the jury's recommended sentence of death must be unanimous.' Id. Accordingly, we next consider whether Hurst v. Florida applies retroactively to Asay.").

[3] The jury verdict form used in Lightbourne's trial did not reveal the jury vote.

After such analysis, the Florida Supreme Court determined that *Hurst v. Florida* and *Hurst v. State* do not apply retroactively to cases final prior to the *Ring* decision. *Id*. ("After weighing all three of the above factors, we conclude that Hurst should not be applied retroactively to Asay's case, in which the death sentence became final before the issuance of Ring."). *See also, Mosely* at 1274. ("We approach our retroactivity analysis based on the United States Supreme Court's holding in Hurst v. Florida under the United States Constitution's Sixth Amendment right to trial by jury and our opinion in Hurst, interpreting the meaning of Hurst v. Florida as applied to Florida's capital sentencing scheme and considering Florida's independent right to trial by jury . . . [and] we conclude that Hurst should apply retroactively to Mosely."). Thus, it's clear that the Florida Supreme Court considered the retroactive application of *Hurst v. State* in both *Asay* and *Mosely*; but only applied it retroactively to post *Ring* cases.

Moreover, the factors that strongly weighed against the retroactive application of *Hurst v. Florida* under a Sixth Amendment analysis would also weigh against the retroactive application of *Hurst v. State* under a Florida Constitution and Eighth Amendment analysis. As stated in *Asay*, to determine retroactivity, the Florida Supreme Court does an analysis pursuant its decision in *Witt v. State*, 387 So.2d 922 (Fla. 1980). *Asay* at 15. To determine the third prong of *Witt*, whether the decision constitutes a "development of fundamental significance," the Court applies the three fold test of *Stovall*[4] and *Linkletter*.[5] *Asay* at 16 (quoting *Witt* at 931).

The last prong of *Stovall/Linkletter* test examines the effect of the new rule on the administration of justice and requires a balancing of the justice system's goals of fairness and finality. *Asay* at 20. The Florida Supreme Court found that this factor alone weighed heavily against retroactive application. *Id.* The Florida Supreme Court found that resentencing of pre-

[4] *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967).
[5] *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965).

Ring cases would be problematic in that they would possibly be less complete and thus less accurate than the original proceedings. *Id* at 21. Thus, whether the analysis is done under the Sixth Amendment, the Eighth Amendment or the Florida Constitution, the factors listed by the Court in *Asay* will continue to weigh heavily against the retroactive application of *Hurst v. State* to pre-*Ring* cases. Therefore, because *Hurst v. State* does not apply retroactively to the Defendant's case, the Defendant is not entitled to relief on this claim as a matter of law.

CLAIM 3

In his third claim, the Defendant argues the Florida Supreme Court's rulings regarding the retroactivity of *Hurst v. Florida* and *Hurst v. State* decided in *Asay* and *Mosely* injects arbitrariness into Florida's death penalty sentencing scheme and violates the Eighth Amendment. As discussed above, the Florida Supreme Court in *Asay* determined that *Hurst v. Florida* and *Hurst v. State* will not apply retroactively to a defendant whose conviction and death sentence was final at the time of the United States Supreme Court's ruling in *Ring*.

The Court's use of the *Ring* case as the dividing line between retroactive application and non-retroactive application is not arbitrary. Prior to *Ring*, the United States Supreme Court had ruled that Arizona's capital sentencing scheme wherein the Court alone found the existence of aggravating factors was compatible with the Sixth Amendment. *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct.3047, 111 L.Ed.2d 511 (1990). Twelve years later, the United States Supreme Court reversed itself in *Ring*. However, the United States Supreme Court waited another 14 years to find that *Ring* applied in Florida.

During that 14 year period, defendants repeatedly raised claims under *Ring* but were consistently rejected. In *Mosley*, the Florida Supreme Court ruled that "[b]ecause Florida's capital sentencing statute has essentially been unconstitutional since <u>Ring</u> in 2002, fairness

strongly favors applying Hurst retroactively to that time." *Mosley* at 1280. Thus, the Florida Supreme Court created the bright line at *Ring* because it felt that in post-*Ring* cases the scales had tipped and finality would have to yield to fundamental fairness. *Id* at 1275. Therefore, because the Florida Supreme Court's rule for determining the retroactivity of *Hurst v. Florida* and *Hurst v. State* is not arbitrary, the Defendant is not entitled to relief on this claim as a matter of law.

CLAIM 4

In his fourth claim, the Defendant argues that *Hurst v. State* and *Perry v. State*, No. SC16-547, 2016 WL 6036982 (Fla. February 20, 2017) are new law that require the Court to reconsider previously raised post-conviction claims. The Defendant cites to *Hildwin v. State*, 141 So. 3d 1178 (Fla. 2014) and *Swafford v. State*, 125 So. 3d 760 (Fla. 2013) to support his argument that the standard for newly discovered evidence—whether a different outcome was probable—should be applied by the Court to reconsider the Defendant's previously raised post-conviction claims in light of the new law requiring the jury to unanimously determine that there are sufficient aggravating factors to justify a death sentence, unanimously determine that the aggravators outweigh the mitigating factors, and unanimously recommend a death sentence. The Defendant argues the prejudice analysis would be different now and there is a reasonable probability that one juror would vote in favor of a life sentence. However, the Defendant has provided no legal authority which would require this Court to reconsider previously denied post-conviction claims. Moreover, as previously discussed above, *Hurst v. Florida* and *Hurst v. State* do not apply retroactively to the Defendant's case. Therefore, there is no new law for the Court to consider or apply to the defendant's case. The Defendant is not entitled to relief on this claim as a matter of law. *See Gaskin*, 2017 WL 224772.

Based on the foregoing, it is,

ORDERED: The Defendant's "Successive Motion to Vacate Death Sentence Pursuant to Florida Rule of Criminal Procedure 3.851 with Special Request for Leave to Amend" is **DENIED**. The Defendant may appeal this decision to the Florida Supreme Court within 30 days of this Order's effective date.

ORDERED on this 6 day of April, 2017, at Ocala, Florida.

ROBERT W. HODGES
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by U.S. and/or inter-office mail to the following on this 6th day of April, 2017:

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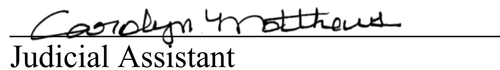

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