No. _____

In the Supreme Court of the United States

DANIEL BURNS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

DEATH PENALTY CASE

MARGARET S. RUSSELL
COUNSEL OF RECORD

JULIE A. MORLEY

LAW OFFICE OF THE CAPITAL COLLATERAL
REGIONAL COUNSEL - MIDDLE REGION
12973 N. TELECOM PARKWAY
TEMPLE TERRACE, FLORIDA 33637
RUSSELL@CCMR.STATE.FL.US
(813) 558-1600

CONTENTS OF APPENDIX

Verdict Form, Orders, and Opinions

Appendix A

Verdict Form, Circuit Court of the Twelfth Judicial Circuit, April 14, 1994

IN THE CIRCUIT COURT IN AND FOR MANATEE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs. CASE NO. 87-2014-F

DANIEL BURNS, JR.,

Defendant.

ADVISORY SENTENCE

_____ A majority of the jury, by a vote of 12 to 0, advises and recommends to the Court that it impose the death penalty upon Daniel Burns, Jr.

_____ The jury, by a vote of six or more, advises and recommends to the Court that it impose a sentence of life imprisonment without possibility of parole for 25 years upon Daniel Burns, Jr.

So say we all.

Bradenton, Florida, this 14 day of APRIL, 1994.

James A. Tisbakon
FOREPERSON

FILED IN OPEN COURT
THIS 14 DAY OF April 1994
R.B. SHORE, CLERK
BY Laura McDonald DC

Appendix B

Order, Circuit Court of the Twelfth Judicial Circuit, March 21, 2017

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR MANATEE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO.: 1987-CF-2014

DANIEL BURNS,

Defendant.

_____/

ORDER SUMMARILY DENYING "DEFENDANT'S SUCCESSIVE MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE (*HURST V. FLORIDA*)"

This matter is before the Court on "Defendant's Successive Motion to Vacate Judgments of Conviction and Sentence (*Hurst v. Florida*)," filed January 9, 2017, pursuant to Florida Rule of Criminal Procedure 3.851. The State filed its answer to the motion on January 27, 2017. The Court conducted a case management conference on February 27, 2017, at which time the Court, pursuant to Fla. R. Crim. P. 3.851(f)(5)(B), heard the parties' arguments on purely legal claims. Neither party requested an evidentiary hearing at the case management conference, and for the reasons set forth below, the Court finds that no evidentiary hearing is necessary. The Court has reviewed Defendant's motion, the State's answer, the court file, and applicable law, and is otherwise duly advised of the premises.

Case History

The Florida Supreme Court summarized the facts of this case as follows:

> A police officer stopped Burns and his companion Samuel Williams as the two were traveling north on Interstate 75. The officer asked the two men for identification and then returned to his vehicle to use the radio. A highway patrol dispatcher confirmed that the officer requested a "persons' check" and a registration

check on the tag of the vehicle in which Burns and Williams were traveling. The officer then walked back to Burns and Williams and asked if he could search their vehicle. While searching the trunk, he discovered what appeared to be cocaine. A struggle between the officer and Burns ensued. Williams and several bystanders witnessed the struggle. Burns obtained the officer's gun, and the officer warned the bystanders to stay away. Despite the officer's pleas, Burns shot and killed the officer. Burns told Williams to leave the vehicle, and then Burns fled the scene on foot.

Burns was convicted of first-degree murder and trafficking in cocaine. The jury recommended death [by 10 to 2], and the trial judge followed the recommendation. On appeal, th[e Florida Supreme] Court affirmed Burns' convictions but vacated his death sentence. *Burns v. State*, 609 So. 2d 600 (Fla. 1992) (*Burns I*). With respect to Burns' sentence, [the Court] concluded that the trial judge erroneously found the heinous, atrocious, or cruel aggravator. *Id.* at 606. [The Florida Supreme Court] further concluded that the trial judge's error could not be deemed harmless because the judge did not indicate what weight he afforded the single remaining aggravator or the various mitigating factors. *Id.* at 606–07.

. . . [The Florida Supreme Court] ordered a complete new sentencing proceeding before a newly empaneled jury. *Id.* at 607.

. . .

On remand, the jury unanimously recommended death. The trial judge found and merged the following three aggravators: (1) the victim was engaged in the performance of his official duties as a highway patrol trooper when murdered by Burns; (2) the murder was committed to avoid arrest or to effect an escape from the victim's custody for the crime of cocaine trafficking; and (3) the murder was committed to disrupt the lawful exercise of any governmental function by or the enforcement of laws by the victim relating to cocaine trafficking. In mitigation, the trial judge found two statutory factors: (1) Burns was forty-two years old when he committed the murder; and (2) Burns had no significant history of prior criminal activity. The trial judge noted in his sentencing order that these statutory mitigators were entitled to reduced weight in light of Burns' 1976 conviction for gambling and testimony introduced in the instant proceeding which established that Burns delivered crack cocaine to two of his employees several months before the murder. The trial judge also found a number of nonstatutory mitigating factors: (1) Burns was one of seventeen children raised in a poor rural environment and consequently had few economic, educational, or social advantages, but despite these disadvantages, he is intelligent and became continuously employed after high school; (2) Burns contributed to his community and society, he graduated from high school, worked hard to support his family, with whom he had a loving relationship,

> and was honorably discharged from the military, albeit for excessive demerits after one month and seventeen days of active duty; and (3) Burns has shown some remorse, has a good prison record, behaved appropriately in court, and has demonstrated some spiritual growth. Although the trial judge found this final mitigator, he questioned whether Burns' remorse and spiritual growth were self-serving in light of the fact that Burns was never completely truthful about the details of the crime. Burns continuously maintained that the murder was an accident for which he was sorry. After weighing the aggravating and mitigating factors, the trial judge followed the jury's recommendation and imposed a sentence of death.

Burns v. State, 699 So. 2d 646, 647-49 (Fla. 1997). On appeal of his resentencing, the Florida Supreme Court affirmed Burns' sentence of death. *Id.* at 654. Defendant's sentence became final when the United States Supreme Court denied certiorari review on February 23, 1998. *Burns v. Florida*, 522 U.S. 1121 (1998).

On June 8, 1998, Burns filed his initial rule 3.851 Motion to Vacate Judgment and Sentence, which was denied following a limited evidentiary hearing by order rendered December 18, 2000. Defendant timely appealed that denial. Meanwhile, after promulgation of Florida Rule of Criminal Procedure 3.203 and upon Defendant's first successive rule 3.851 motion filed February 9, 2005, the Florida Supreme Court relinquished jurisdiction to the Court on December 17, 2004, for determination of Defendant's "mental retardation" claim. On June 27, 2005, the Court denied Defendant's claim that he was intellectually disabled. On November 2, 2006, the Florida Supreme Court affirmed the denial of Defendant's initial rule 3.851 motion "and the circuit court's determination that Burns is not mentally retarded." *Burns v. State*, 944 So. 2d 234, 249 (Fla. 2006).

On October 19, 2007, Burns filed a second successive rule 3.851 motion to vacate judgment, which the Court denied following a case management conference by order rendered on January 10, 2008. Burns once again appealed, and the Florida Supreme Court, noting that Defendant's second successive rule 3.851 motion "represents a broad attack on the

constitutionality of Florida's lethal injection system" affirmed the Court's summary denial of that motion. *Burns v. State*, 3 So. 3d 316, 2009 WL 224485 at *1 (Fla. 2009).

Defendant also sought federal habeas relief to no avail. *See Burns v. Secretary, Fla. Dep't of Corrections*, 720 F.3d 1296 (11th Cir. 2013), *cert. denied*, 134 S. Ct. 1936 (2014).

Defendant's Successive Postconviction Motion

Defendant requests that the Court vacate his death sentence in this case because he is entitled to relief under *Hurst v. Florida*[1] and its Florida progeny. Motions under Rule 3.851 generally must be filed within one year of the date the judgment and sentence become final. Fla. R. Crim. P. 3.851(d). Defendant's judgment and sentence became final on February 23, 1998, when the United States Supreme Court denied his petition for writ of certiorari.[2] Defendant argues that the instant motion is nonetheless timely under Rule 3.851(d)(2)(B), which provides an exception where a motion asserts a fundamental constitutional right not established within the one-year window and has been held to apply retroactively. To that end, Defendant notes that the instant motion was filed within one year of: (1) the issuance of *Hurst v. Florida*; (2) the enactment of Chapter 2016-13, Laws of Florida, which changed Florida's capital sentencing procedures in the wake of *Hurst v. Florida*; (3) the issuance of *Perry v. State*;[3] and (4) the issuance of *Hurst v. State*.[4] The timeliness of the instant motion, therefore, turns on whether *Hurst v. Florida* and its Florida progeny have been held to apply retroactively to Defendant.

Defendant argues that the Florida Supreme Court's recent decisions in *Mosley v. State*[5] and *Asay v. State*,[6] "make clear that determining the retroactivity of *Hurst v. Florida* and *Hurst v. State*

---

[1] 136 S. Ct. 616 (2016).
[2] *Burns v. Florida*, 522 U.S. 1121 (1998).
[3] 41 Fla. L. Weekly S449 (Fla. Oct. 14, 2016).
[4] 202 So. 3d 40 (Fla. 2016).
[5] 41 Fla. L. Weekly S629 (Fla. Dec. 22, 2016), *reh'g denied*, SC14-2108, 2017 WL 510491 (Fla. Feb. 8, 2017).
[6] 41 Fla. L. Weekly S646 (Fla. Dec. 22, 2016), *reh'g denied*, SC16-102, 2017 WL 431741 (Fla. Feb. 1, 2017).

claims requires individualized assessments that account for the circumstances of each capital case, much in the same way that harmless error must be assessed on a case-by-case basis."[7] Defendant further argues that both *Hurst* decisions are retroactively applicable to him based on three independent grounds: (1) under the fundamental fairness doctrine, which the Florida Supreme Court has applied in cases including *Mosley* and *James v. State*, 615 So. 2d 668 (Fla. 1993); (2) under the traditional Florida retroactivity analysis established in *Witt v. State*, 387 So. 2d 922 (1980); and (3) under the federal retroactivity test first established in *Teague v. Lane*, 489 U.S. 288 (1989), and recently applied in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

In *Mosley*, the Florida Supreme Court addressed retroactive application of *Hurst v. Florida* and *Hurst v. State* under two approaches. First, the Florida Supreme Court held that Mosley was entitled to retroactive application under the principle of fundamental fairness established in *James v. State*, 615 So. 2d 668 (Fla. 1993), because he "raised a *Ring* claim at his first opportunity and was then rejected at every turn."[8] Second, the Florida Supreme Court separately found that Mosley was entitled to retroactive application based upon a *Witt*[9] analysis.[10] Notably, Mosley's "sentence[] of death became final *after* the United States Supreme Court decided *Ring*."[11] Defendant cites a portion of the initial brief filed on direct appeal of his resentencing and claims that Issue VII of that brief, which alleged the trial court violated the Eighth Amendment by denying Burns' requested jury instruction that its sentencing recommendation must be given great weight by the court, "was at least in part a Hurst/Ring claim raised at trial and on direct appeal." Thus,

---

[7] "Defendant's Successive Motion to Vacate Judgments of Conviction and Sentence (*Hurst v. Florida*)," filed January 9, 2017, at 6-7.
[8] *Mosley*, 2016 WL 7406506 at *19.
[9] *Witt v. State*, 387 So. 2d 922 (Fla. 1980).
[10] *Mosley*, 2016 WL 7406506 at *19-25.
[11] *Id.* at *18 (emphasis added).

Defendant contends he is entitled to retroactive application of *Hurst v. Florida* and *Hurst v. State* under *James*.

In contrast with the *Mosley* decision, *Asay v. State*, issued the same day as *Mosley*, addressed retroactivity where, as in this case, the defendant's judgment and sentence of death became final *before* issuance of *Ring*.[12] There, the Florida Supreme Court conducted a *Witt* analysis and concluded that "*Hurst* should not be applied retroactively to Asay's case, in which the death sentence became final before the issuance of *Ring*."[13] In fact, *Mosley* clarified the nature of *Asay*'s holding by stating, "[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*."[14] That bright-line cutoff for retroactivity is further evidenced by the subsequent Florida Supreme Court decisions in *Gaskin v. State*,[15] denying relief under *Hurst v. Florida* on the sole basis that Gaskin's sentence became final in 1993,[16] and *Bogle v. State*,[17] similarly denying relief under *Hurst v Florida* on the basis that Bogle's "first-degree murder conviction and sentence of death were final in 1995, before the Supreme Court decided *Ring*."[18]

As for Defendant's reliance on the "federal retroactivity test" established in *Teague*, the Florida Supreme Court, in rendering its decision in *Asay*, recalled that Florida's *Witt* analysis "provides more expansive retroactivity standards than those adopted in *Teague*" and rejected application of the much narrower *Teague* test to a successive capital postconviction motion like the one presently before the Court.[19]

---

[12] 41 Fla. L. Weekly S646 (Fla. Dec. 22, 2016), *reh'g denied*, SC16-102, 2017 WL 431741 (Fla. Feb. 1, 2017).
[13] *Asay*, 2016 WL 7406538 at *13.
[14] *Mosley*, 2016 WL 7406506 at *18.
[15] *Gaskin v. State*, 42 Fla. L. Weekly S16, 2017 WL 224772 (Fla. Jan. 19, 2017).
[16] *Id.* at *2.
[17] *Bogle v. State*, SC11-2403, 2017 WL 526507 (Fla. Feb. 9, 2017).
[18] *Id.* at *16.
[19] *Asay*, 2016 WL 7406538 at *8.

Defendant's remaining arguments flow from some of the more nuanced matters inherent in Florida's post-*Hurst* retroactivity decisions, including whether a *Ring*-like challenge was previously raised, a distinction between the Sixth Amendment and Eighth Amendment issues addressed in *Hurst v. State*, and the potentially arbitrary effects and "disparate treatment among Florida capital defendants" of using *Ring* as a bright-line cutoff for retroactivity. However, the Florida Supreme Court's recent decisions clearly establish that defendants whose judgments and sentences of death became final pre-*Ring* are not entitled to relief via retroactive application of *Hurst v. Florida* and its Florida progeny.[20]

Whether the undersigned agrees with the Florida Supreme Court's allegedly arbitrary application of the pre-*Ring*/post-*Ring* demarcation for retroactivity, the undersigned has "received the interpretation of the law from [the Florida] Supreme Court" and is bound to follow it.[21] Because the fundamental constitutional rights relied on by Defendant have not been held to apply retroactively to this case, the instant motion is untimely under Rule 3.851(d).

Accordingly, it is hereby,

---

[20] *See Bogle v. State*, SC11-2403, 2017 WL 526507, at *16 ("*Hurst* does not apply retroactively to cases that were final before *Ring* was decided"); *Gaskin*, 2017 WL 224772, at *2 ("Because Gaskin's sentence became final in 1993, Gaskin is not entitled to relief under *Hurst v. Florida*."); *Mosley*, 2016 WL 7406506, at *18 ("we 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*").

[21] *Hill v. State*, 302 So. 2d 785, 787 (Fla. 2d DCA 1974) ("[W]hether we agree with the decision of the Supreme Court, . . . we must follow it. To quote our erstwhile brother, Judge Mann, . . . we receive the interpretation of the law 'from our Supreme Court, agreeing with some, disagreeing with some, following all . . . .'"); *see also State v. Dwyer*, 332 So. 2d 333 (Fla. 1976).

ORDERED AND ADJUDGED that "Defendant's Successive Motion to Vacate Judgments of Conviction and Sentence (*Hurst v. Florida*)," filed January 9, 2017, is **DENIED**. Defendant has the right to appeal within thirty (30) days of rendition of this order.

DONE AND ORDERED in Chambers in Bradenton, Manatee County, Florida, on this 24 day of March 2017.

Diana Moreland, Circuit Judge

CERTIFICATE OF SERVICE

I certify that on this 21 day of March 2017 copies of the foregoing Order were furnished by U.S. Mail, hand delivery, and/or electronic mail to:

- **Mark S. Gruber, Esq. and**
  Julie Morley, Esq.
  Assistant Capital Collateral Regional Counsel – Middle Region
  12973 North Telecom Parkway
  Temple Terrace, FL 33637-0907
  gruber@ccmr.state.fl.us
  support@ccmr.state.fl.us

- **Carol M. Dittmar, Esq.**
  Assistant Attorney General
  3507 Frontage Rd. - Suite 200
  Tampa, FL 33607-7013
  capapp@myfloridalegal.com
  carol.dittmar@myfloridalegal.com

- **Office of the State Attorney**
  Art Brown, Esq.
  P.O. Box 1000
  Bradenton, Florida 34206
  sao.rounds@mymanatee.org

- **Daniel Burns**, DOC # 111918
  Union Correctional Institution
  7819 N.W. 228th Street
  Raiford, FL 32026-4000

By: _____
Judicial Assistant

Appendix C

Order, Supreme Court of Florida, June 5, 2017

Filing # 57300892 E-Filed 06/05/2017 12:55:22 PM

Supreme Court of Florida

MONDAY, JUNE 5, 2017

CASE NO.: SC17-726
Lower Tribunal No(s).:
411987CF002014CFAXMA

DANIEL BURNS, JR. vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

This appeal is stayed pending disposition of Hitchcock v. State, SC17-445.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

jat
Served:

CHRISTINA Z. PACHECO
MARK S. GRUBER
JULIE A. MORLEY

Appendix D

Order, Supreme Court of Florida, September 22, 2017

Filing # 61878652 E-Filed 09/22/2017 01:58:00 PM

Supreme Court of Florida

FRIDAY, SEPTEMBER 22, 2017

CASE NO.: SC17-726
Lower Tribunal No(s).:
411987CF002014CFAXMA

DANIEL BURNS, JR. vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

Appellant shall show cause on or before Thursday, October 12, 2017, why the trial court's order should not be affirmed in light of this Court's decision Hitchcock v. State, SC17-445. The response shall be limited to no more than 20 pages. Appellee may file a reply on or before Monday, October 22, 2017, limited to no more than 15 pages. Appellant may file a reply to the Respondent's reply on or before Wednesday, November 1, 2017, limited to no more than 10 pages.

Motions for extensions of time will not be considered unless due to a medical emergency.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

jat
Served:

JULIE A. MORLEY
MARK S. GRUBER
LISA MARTIN

Appendix E

Opinion, Supreme Court of Florida, January 23, 2018

Filing # 66886180 E-Filed 01/23/2018 10:59:42 AM

Supreme Court of Florida

No. SC17-726

DANIEL BURNS, JR.,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[January 23, 2018]

PER CURIAM.

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

Burns' 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). This Court stayed Burns' appeal pending the disposition of Hitchcock v. State, 226 So. 3d 216 (Fla. 2017), cert. denied, 138 S. Ct. 513 (2017). After this

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

After reviewing Burns' response to the order to show cause, as well as the State's arguments in reply, we conclude that Burns is not entitled to relief. Burns was sentenced to death following a jury's unanimous recommendation for death. Burns v. State, 699 So. 2d 646, 652 (Fla. 1997). Burns' sentence of death became final in 1998. Burns v. Florida, 522 U.S. 1121 (1998). Thus, Hurst does not apply retroactively to Burns' sentence of death. See Hitchcock, 226 So. 3d at 217. Accordingly, we affirm the denial of Burns' motion.

The Court having carefully considered all arguments raised by Burns, 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, 138 S. Ct. 513 (2017), is now final. However, I continue to adhere to the views expressed in my dissenting opinion in Hitchcock.

An Appeal from the Circuit Court in and for Manatee County,
Diana Lee Moreland, Judge - Case No. 411987CF002014CFAXMA

James Vigianno, Capital Collateral Regional Counsel, Mark S. Gruber, and Julie A. Morley, Assistant Capital Collateral Regional Counsel, Temple Terrace, Florida,

for Appellant

Pamela Jo Bondi, Attorney General, and Lisa Martin, Assistant Attorney General, Tampa, Florida,

for Appellee

Appendix F

Mandate, Supreme Court of Florida, February 8, 2018

Filing # 67693725 E-Filed 02/08/2018 12:12:14 PM

MANDATE

SUPREME COURT OF FLORIDA

To the Honorable, the Judges of the:

Circuit Court in and for Manatee County, Florida

WHEREAS, in that certain cause filed in this Court styled:

DANIEL BURNS, JR. vs. STATE OF FLORIDA

Case No.: **SC17-726**

Your Case No.: **411987CF002014CFAXMA**

The attached opinion was rendered on: **01/23/2018**

YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinion, the rule of this Court and the laws of the State of Florida.

WITNESS, The Honorable JORGE LABARGA, Chief Justice of the Supreme Court of Florida and the Seal of said Court at Tallahassee, the Capital, on this 8th day of February 2018.

SUPREME COURT OF THE STATE OF FLORIDA

Clerk of the Supreme Court of Florida