EXHIBIT 1

Supreme Court of Florida

No. SC17-1118

GARY RICHARD WHITTON,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[January 31, 2018]

PER CURIAM.

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

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

After reviewing Whitton's response to the order to show cause, as well as the State's arguments in reply, we conclude that Whitton is not entitled to relief. Whitton was sentenced to death following a jury's unanimous recommendation for death. Whitton v. State, 649 So. 2d 861, 864 (Fla. 1994). Whitton's sentence of death became final in 1995. Whitton v. Florida, 516 U.S. 832 (1995). Thus, Hurst does not apply retroactively to Whitton's sentence of death. See Hitchcock, 226 So. 3d at 217. Accordingly, we affirm the denial of Whitton's motion.

The Court having carefully considered all arguments raised by Whitton, 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.

An Appeal from the Circuit Court in and for Walton County,
Michael G. Allen, Judge - Case No. 661990CF000429CFAXMX

Mark E. Olive of Law Office of Mark Olive, P.A., Tallahassee, Florida,

for Appellant

Pamela Jo Bondi, Attorney General, and Lisa A. Hopkins, Assistant Attorney General, Tallahassee, Florida,

for Appellee

EXHIBIT 2

Supreme Court of Florida

TUESDAY, MARCH 13, 2018

CASE NO.: SC17-1118
Lower Tribunal No(s).:
661990CF000429CFAXMX

GARY RICHARD WHITTON vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

Appellant's Motion for Rehearing and Clarification is hereby denied.

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

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

cd
Served:

MARK EVAN OLIVE
LISA HOPKINS
BILLY H. NOLAS
JOHN A. MOLCHAN
HON. ALEX ALFORD, CLERK
HON. MICHAEL GORDON ALLEN, JUDGE

EXHIBIT 3

IN THE CIRCUIT COURT, FIRST JUDICIAL CIRCUIT
IN AND FOR WALTON COUNTY, FLORIDA

STATE OF FLORIDA,

vs.

GARY RICHARD WHITTON, **Case No.: 1990-CF-0429**

Defendant. **(In Division "H," Judge Allen, Escambia County, Florida for Postconviction Relief Proceedings)**

ORDER DENYING DEFENDANT'S AMENDED SUCCESSIVE RULE 3.851 MOTION FOR POSTCONVICTION RELIEF IN LIGHT OF HURST v. FLORIDA AND HURST v. STATE

THIS CAUSE comes before the Court on "Defendant's Amended Successive Rule 3.851 Motion for Postconviction Relief in Light of Hurst v. Florida and Hurst v. State," filed March 8, 2017, and Defendant's "Motion for Page-Limit Enlargement," filed March 8, 2017. The State filed its response to the successive amended rule 3.851 motion pursuant to rule 3.851(f)(3)(B), Florida Rules of Procedure, on March 28, 2017.

On April 18, 2017, a case management conference was convened regarding Defendant's amended successive motion. Counsel for Defendant, Mark Olive, and Assistant Attorney General Berdene Beckles both appeared via teleconference. Assistant State Attorney Diane Stefani was present on behalf of Assistant State Attorney John Molchan with the Office of the State Attorney.

At the onset of the case management conference, the Court granted Defendant's "Motion for Page-Limit Enlargement," without objection from the State. At the case management

conference, Defendant sought leave to file a written reply to the State's answer. The State objected to Defendant filing the written reply. The parties then presented arguments in support of their respective positions on the successive amended motion and Defendant's request for leave to file a reply. Having reviewed the amended motion, the State's response, the record, and controlling legal authority; and after careful consideration of the arguments presented at the case management conference, the Court finds that the successive amended motion can be denied without evidentiary hearing. The Court also finds that after hearing oral argument at the case management conference there is no further need for Defendant to file a written reply to the State's answer.

PROCEDURAL HISTORY

On September 10, 1992, Defendant was sentenced to death after being convicted of first-degree murder and armed robbery. Defendant's convictions and sentences were affirmed on direct appeal. Whitton v. State, 649 So. 2d 861 (Fla. 1994). The United States Supreme Court denied certiorari review on October 2, 1995. Whitton v. Florida, 516 U.S. 832, 116 S. Ct. 106, 133 L. Ed. 2d 59 (1995).

Defendant filed a motion for postconviction relief that was denied after evidentiary hearing by order filed June 2, 2011. The Supreme Court of Florida affirmed the denial of Defendant's motion for postconviction relief in Whitton v. State, 161 So. 3d 314, 333 (Fla. 2014). Defendant also filed a petition for writ of habeas corpus in the Florida Supreme Court and the petition was denied. Id. In 2015, Defendant filed a petition for federal habeas corpus relief in the United States District Court for the Northern District of Florida which is currently being held in abeyance until Defendant's Hurst litigation is concluded in the State Courts.

DEFENDANT'S CLAIMS

In the successive amended motion, Defendant claims his death sentence violates the Sixth and Eight Amendments under Hurst v. Florida, 136 S. Ct. 616 (2016) and Hurst v. State, 202 So. 3d 40 (Fla. 2016). He argues Hurst v. Florida and Hurst v. State should be applied retroactively to his case. Defendant further argues that imposition of a sentence of death was error and was not harmless error, even though he was sentenced to death based on a 12-0 jury recommendation. He argues a new penalty phase should be ordered.

The Supreme Court of Florida has held that Hurst v. Florida and Hurst v. State do not apply retroactively to any death sentence that became final prior to the issuance of the United States Supreme Court's June 24, 2002 opinion of Ring v. Arizona, 536 U.S. 584 (2002). See Asay v. State, 210 So. 3d 1 (Fla. 2016);[1] Mosley v. State, 209 So. 3d 1248 (Fla. 2016). Defendant's case became final in 1995, well before Ring was decided in 2002. Defendant is not entitled to relief under any of his current arguments as each depends on a retroactive application of the Hurst decisions. To the extent Defendant claims that the denial of retroactivity to pre-Ring Defendants is unconstitutional as it constitutes "partial retroactivity," this Court is compelled to follow the rulings entered by the Florida Supreme Court.

This Court also does not reach the harmless error issue as neither Hurst decision applies retroactively to Defendant's case. However, the current state of the law indicates that if the Hurst decisions were applied retroactively to Defendant's case, he would not be entitled to a new penalty phase based on a harmless error analysis. See Davis v. State, 207 So. 3d 142 (Fla. 2016).

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[1] Defendant contends that because Asay was silent as to the retroactive application of Hurst v. State it might be applied retroactively to Defendant. The Court rejects Defendant's contention based on the Florida Supreme Court's ruling that Asay addresses the retroactive status of both Hurst v. Florida and Hurst v. State. See Archer v. Jones, No. SC16-2111, 2017 WL 1034409 at *1 (Fla. Mar. 17, 2017) (holding of Asay is that Hurst v. Florida and Hurst v. State do not apply retroactively to capital defendants whose death sentences were final when Ring was decided.)

ACCORDINGLY, it is hereby **ORDERED and ADJUDGED** that Defendant's motion filed March 8, 2017 which is titled "Defendant's Amended Successive Rule 3.851 Motion for Postconviction Relief in Light of Hurst v. Florida and Hurst v. State" is **DENIED**. Defendant may file a notice of appeal within thirty (30) days of the rendition date of this order, if he so chooses.

DONE and ORDERED in chambers.

MICHAEL G. ALLEN
CIRCUIT JUDGE

MGA/mco

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing order has been furnished by E-Service (*unless otherwise indicated*) to:

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ALEX ALFORD
Walton County Clerk of Court

BY: 

Deputy Clerk