No. _____

OCTOBER TERM 2021

IN THE SUPREME COURT OF THE UNITED STATES

JOEL DALE WRIGHT,

Petitioner,

v.

STATE OF FLORIDA

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

CAPITAL CASE

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APPENDIX A

312 So.3d 59
Supreme Court of Florida.

Joel Dale WRIGHT, Appellant,
v.
STATE of Florida, Appellee.

No. SC19-2123
|
January 7, 2021

Synopsis

Background: After his conviction for first-degree murder and other offenses was affirmed, 473 So.2d 1277, defendant appealed from order of the Circuit Court, 7th Judicial Circuit, Putnam County, Raul A. Zambrano, C.J., which denied his successive postconviction motion for collateral relief from his death sentence.

The Supreme Court held that intervening case requiring certain jury sentencing determinations in capital cases did not establish new offense of "capital first-degree murder," as would require that defendant's death sentence be vacated on ground that certain elements of his crime were never found by jury.

Affirmed.

An Appeal from the Circuit Court in and for Putnam County, Raul A. Zambrano, Judge - Case No. 541983CF000376CFAXMX.

Attorneys and Law Firms

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Ashley Moody, Attorney General, Tallahassee, Florida, and Doris Meacham, Assistant Attorney General, Daytona Beach, Florida, for Appellee

Opinion

PER CURIAM.

Joel Dale Wright appeals an order of the circuit court denying his successive postconviction motion filed pursuant to Florida Rule of Criminal Procedure 3.851. We have jurisdiction. *See* Art. V, § 3(b)(1), Fla. Const.

BACKGROUND

In 1983, Wright was convicted of first-degree murder, sexual battery, burglary of a dwelling, and second-degree grand theft. He was sentenced to death. *Wright v. State*, 473 So. 2d 1277 (Fla. 1985). His death sentence became final when the United States Supreme Court denied certiorari review on January 21, 1986. *Wright v. Florida*, 474 U.S. 1094, 106 S.Ct. 870, 88 L.Ed.2d 909 (1986). This Court subsequently affirmed the denial of Wright's first three postconviction motions. *Wright v. State*, 581 So. 2d 882 (Fla. 1991); *Wright v. State*, 857 So. 2d 861 (Fla. 2003); *Wright v. State*, 995 So. 2d 324 (Fla. 2008).

***60** In 2017, Wright filed a third successive postconviction motion raising claims based on the retroactivity of *Hurst v. Florida*, 577 U.S. 92, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), and chapter 2017-1, Laws of Fla.[1] He now appeals the denial of his most recent postconviction claims.

ANALYSIS

The crux of Wright's argument on appeal is that this Court's decision in *Hurst v. State* established a new offense—capital first-degree murder—and that the jury sentencing determinations described in *Hurst* are "elements" of that new offense. From that assertion, Wright insists that *Hurst* created a substantive rule of law that dates back to Florida's original capital sentencing statute, thereby requiring Wright's death sentence to be vacated on the ground that certain elements of his crime were never found by a jury.

We rejected a similar argument in *Foster v. State*, 258 So. 3d 1248, 1251 (Fla. 2018). As we explained in *Foster*, there is no independent crime of "capital first-degree murder"; the crime of first-degree murder is, by definition, a capital crime, and *Hurst v. State* did not change the elements of that

crime. *Id.* at 1251-52 (holding that when a jury makes *Hurst* determinations, "it only does so *after* a jury has unanimously convicted the defendant of the capital crime of first-degree murder").

Moreover, "[w]e have consistently applied our decision in *Asay* [*v. State*, 210 So. 3d 1 (Fla. 2016)], denying the retroactive application of *Hurst v. Florida* as interpreted in *Hurst v. State* to defendants whose death sentences were final when the Supreme Court decided *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)." *Hitchcock v. State*, 226 So. 3d 216, 217 (Fla. 2017). Wright echoes other pre-*Ring* defendants who have advanced myriad legal theories that, in the end, turn on pleas for a retroactive application of *Hurst*. But this Court has rejected such arguments, however styled. *See, e.g.*, *Lambrix v. State*, 227 So. 3d 112, 113 (Fla. 2017) (rejecting arguments based on "the Eighth Amendment," "denial of due process and equal protection," and "a substantive right based on the legislative passage of chapter 2017-1, Laws of Florida").

Finally, Wright offers an extensive critique of this Court's decision in *State v. Poole*, 297 So. 3d 487 (Fla. 2020), where we partially receded from *Hurst*. We need not address *Poole* here, however, because Wright's claims fail even under our pre-*Poole* jurisprudence on *Hurst* and retroactivity.

For these reasons, we affirm the trial court's denial of postconviction relief.

It is so ordered.

POLSTON, LABARGA, LAWSON, MUÑIZ, COURIEL, and GROSSHANS, JJ., concur.

CANADY, C.J., concurs in result.

All Citations

312 So.3d 59, 46 Fla. L. Weekly S17

Footnotes

1 Chapter 2017-1, Laws of Florida was a legislative enactment by which Florida's capital sentencing statute was amended to require jury sentencing determinations of the kind described in *Hurst v. State*.

APPENDIX B

2021 WL 914174
Only the Westlaw citation is currently available.
Supreme Court of Florida.

Joel Dale WRIGHT, Appellant(s)

v.

STATE of Florida, Appellee(s)

CASE NO.: SC19-2123

|

MARCH 10, 2021

Lower Tribunal No(s).: 541983CF000376CFAXMX

Opinion

***1** Appellant's Motion for Rehearing is hereby denied.

CANADY, C.J., and POLSTON, LABARGA, LAWSON, MUÑIZ, COURIEL, and GROSSHANS, JJ., concur.

All Citations

Not Reported in So. Rptr., 2021 WL 914174

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APPENDIX C

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR PUTNAM COUNTY, FLORIDA

CASE NO.: 83-376-CF

STATE OF FLORIDA,
Plaintiff,
vs.

JOEL DALE WRIGHT,
Defendant.
_____/

ORDER DENYING AMENDED SUCCESSIVE MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE AND ALTERNATIVELY MOTION TO CORRECT ILLEGAL SENTENCE AND SUPPLEMENT TO AMEND 3.851

THIS MATTER came before the Court on the defendant's Amended Successive Motion to Vacate Judgments of Conviction and Sentence and Alternatively Motion to Correct Illegal Sentence filed with the Clerk's Office on May 16, 2017, and the State's Response to the defendant's Amended Successive Motion to Vacate Death Sentence received by the Clerk on June 2, 2017. Based on this Response, a Case Management Conference was held on August 24, 2017, where arguments were heard. On March 1, 2019, the defendant filed a Supplement to Amend 3.851 and on March 20, 2019, the State responded to the Supplement to Amended 3.851 motion. On July 12, 2019, an additional Case Management Conference was held where supplemental arguments were heard.

The case *sub judice* was assigned to the Honorable Clyde Wolfe; Circuit Judge formerly assigned to the Putnam County Courthouse. Judge Wolfe conducted the hearings that took place on August 24, 2017. Subsequent to the hearings, Judge Wolfe succumbed to an illness and died. The undersigned, as Chief Judge of the Seventh Circuit undertook the responsibility to monitor this case and give some continuity to the case. The United States Supreme Court's ruling in

FILED 10-10-19
TIM SMITH
CLERK OF COURTS
BY _____ D.C.

Hurst v. Florida, 136 S. Ct. 616 (2016), allowed a supplementation of the argument initially made before Judge Wolfe. The undersigned reviewed the record of the August 24, 2017, hearing and has become sufficiently familiarized with the case and the record to undertake this ruling.

Procedurally, on April 22, 1983, the defendant was indicted for the February 6, 1983, murder of Lima Paige Smith. A jury found the defendant guilty on September 1, 1983, of First Degree Murder, Sexual Battery, Burglary of a Dwelling, and Second Degree Grand Theft. One day later, the advisory jury recommended that the defendant be sentenced to death by a vote of 9 to 3. The trial judge found four aggravators and no mitigating circumstances. On appeal, the Florida Supreme Court affirmed the death sentence. See Wright v. State, 473 So. 2d 1277 (Fla. 1985). The United States Supreme Court denied certiorari review on January 21, 1986. See Wright v. Florida, 474 U.S. 1094 (1986).

The defendant subsequently sought Post-Conviction Relief and filed a Motion to Vacate his Death Sentence raising eighteen claims. See Wright v. State, 581 So. 2d 882 (Fla. 1991). The Motion was summarily denied by the trial court. On appeal, the Florida Supreme Court reversed and remanded for an evidentiary hearing. On remand for the evidentiary hearing, the defendant amended his Motion for Post-Conviction Relief and added a claim that he was entitled to relief under Ring v. Arizona, 536 U.S. 584, 621 (2002) (decided June 24, 2002). Wright v. State, 857 So. 2d 861, 865 (Fla. 2003). After an evidentiary hearing, the trial court denied the defendant relief. Id. On appeal, the Florida Supreme Court affirmed the trial court's denial and simultaneously denied the defendant's Petition for Writ of Habeas Corpus and expressly found that Ring did not apply to the defendant's case. The defendant petitioned to the United States Supreme Court for certiorari review and the Court denied his Petition. Wright v. Crosby, 541

U.S. 961 (2004).

The defendant filed a successive Motion for Post-Conviction Relief, which was denied by the trial court. Wright v. State, 995 So. 2d 324, 326 (Fla. 2008). The Florida Supreme Court affirmed the trial court's Order denying the defendant's Motion for Post-Conviction Relief. The defendant filed a Petition for Writ of Habeas Corpus in the United States District Court, and the Court denied the Petition. Wright v. Secretary Florida Dept. of Corrections, No. 3:09-cv-99-J-32JBT, 2013 WL 1137478 at *33 (M.D. Fla. Mar. 19, 2013). The defendant appealed the denial of the Petition and the United States Court of Appeals for the Eleventh Circuit affirmed the District Court's Order. Wright v. Secretary, Florida Dept. of Corrections, 761 F.3d 1256, 1285 (11th Cir. 2014). The defendant then appealed to the United States Supreme Court, and the Court denied relief. Wright v. Jones, 135 S. Ct. 2380 (2015).

ARGUMENT

Claim I

The defendant claims that the Death Sentence imposed in his case violates the Sixth Amendment under Hurst v. Florida and should be vacated. His argument is premised on the basis that the United States Supreme Court ruling in Hurst v. Florida, 136 S. Ct. 616 (2016) (Hurst I), and the Florida Supreme Court ruling in Hurst v. State, 202 So. 3d 40, 45 (Fla. 2016) (Hurst II), grant retroactive relief to his sentence. In Hurst I, the United States Supreme Court held that Florida's capital sentencing scheme is unconstitutional because the judge, and not the jury, made the necessary findings of fact to impose the death sentence. Id. at 619. Subsequently, in Hurst II, the Florida Supreme Court held:

> *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 II, 202 So. 3d at 57 (emphasis added).

In Mosley v. State, the Florida Supreme Court further held that the Hurst rulings apply to all defendants whose sentences were not yet final when the United State Supreme Court issued its opinion in Ring v. Arizona, 536 U.S. 584 (2002). 209 So. 3d 1248, 1274 (Fla. 2016). Ring was decided on June 24, 2002. The defendant's conviction in the case *sub judice* became final on January 21, 1986, when Wright v. Florida, 474 U.S. 1094 (1986) was decided. This was the date that the United States Supreme Court rendered his case final based on the denial of his Petition for writ of certiorari.

In the hearing, Capital Collateral Counsel acknowledged that the defendant's conviction became final in 1986 and was considered "pre-Ring". Counsel argued in **Claim I** citing Mosley that the defendant raised a Ring claim at every possible stage in his case from trial to post-conviction and fundamental fairness requires a retroactive application of Hurst in general.

On the other hand, the State counter argued that any case in which the death sentence was final before Ring was decided would not receive relief based on Hurst. See Bogle v. State, 213 So. 3d 833 (Fla. 2017); Gaskin v. State, 218 So. 3d 399 (Fla. 2017); Asay v. State, 210 So. 3d 1 (Fla. 2016); Mosley, 210 So. 3d at 1274 ("we have now held in Asay v. State that Hurst does not apply retroactively to capital defendant's whose sentences were final before the United States Supreme Court issued its opinion in Ring."). The State further relies on the authority of State v. Dwyer, 332 So. 2d 333 (Fla. 1976), in which the Court specifically said, that when an issue has been decided in the Supreme Court of the State, the lower courts are bound to adhere to the

Court's ruling when considering similar issues, even though the lower court may believe otherwise.

Again, the defendant's death sentence became final in 1986—years before Ring's decision in 2002. This court is bound by the Florida Supreme Court's controlling precedent. Hurst is not retroactive to this case. The Asay Court's ruling is a clear and unequivocal ruling, and this court is legally bound to follow that decision. See State v. Herring, 76 So. 3d 891, 897 (Fla. 2011). The defense refers to Mosley regarding fundamental fairness to allow retroactive relief but that fundamental fairness analysis only applies to defendants whose sentences became final after Ring in 2002. Hurst and its progeny of cases therefore do not apply to the case at bar.

In his Supplement to Amend, the defendant once again raises, pursuant to Mosley, an alternative analysis whereby "certain decisions should be given retroactive effect on the basis of fundamental fairness. See James v. State, 615 So. 2d 668 (Fla. 1993). However, this Court agrees with the State that the Florida Supreme Court has consistently applied the decision in Asay by denying retroactive application of Hurst relief to defendants whose death sentences became final prior to Ring. See Hitchcock v. State, 226 So. 3d 216 (Fla. 2017). **Claim I and Supplement are denied.**

Claim II

The defendant claims that his death sentence violates the Florida Constitution and the Eighth Amendment under Hurst II, and therefore should be vacated. However, this court finds that this claim is also subject to denial. The United States Supreme Court has never held that the Eighth Amendment requires a unanimous jury recommendation. In Spaziano v. Florida, 468 U.S. 447, 463–64 (1984), the United States Supreme Court held that the Eighth Amendment is not

violated in capital cases when the ultimate responsibility of imposing death rests with the judge. In deciding Hurst I, the United States Supreme Court analyzed the case pursuant to Sixth Amendment grounds and overruled Spaziano to the extent that it allows a sentencing judge to find aggravating circumstances independent of a jury's fact-finding. See Hurst I, 136 S. Ct. at 618. The Court did not address the issue of any possible Eighth Amendment violation, and similarly it did not overrule Spaziano on Eighth Amendment grounds. While the Florida Supreme Court initially included the Eighth Amendment as a reason for warranting unanimous jury recommendations in its Hurst II decision, it did not and cannot overrule the United States Supreme Court's surviving precedent in Spaziano because of Florida's conformity clause. This claim is procedurally barred and meritless.

In the Supplement to Amend, the defendant appears to further claim that Chapter 2017-1, Laws of Florida is substantive law that applies to him in changing section 921.141, Florida Statutes. The Court agrees that the Florida Supreme Court has repeatedly denied challenges here. See Lambrix v. State, 227 So. 3d 112, 113 (Fla. 2017); Asay v. State, 224 So. 3d 695 (Fla. 2017) (Asay VI); Hannon v. State, 228 So. 3d 505 (Fla. 2017); see also Griffin v. State, 236 So. 3d 237 (Fla. 2018) (affirming the denial of post-conviction motion based on Hurst where defendant included a claim regarding enactment of chapter 2017-1, Laws of Florida). The Court is bound by the retroactive findings in Hurst II. **Claim II and Supplement are denied.**

Claim III

In claim III, the defendant asserts that the retroactivity rulings in Asay and Mosley allow partial retroactivity and/or category by category and/or case by case retroactivity of new law in death penalty proceedings which inject arbitrariness into the Florida's Capital Sentencing

scheme that violates the Eighth Amendment principles of Furman v. Georgia, 408 U.S. 238 (1972).

In Asay, the court specifically addressed the issue of fairness in its analysis of determining whether Hurst should be applied retroactively to pre-Ring cases. The court reasoned:

> *Resentencing hearing necessitated by retroactive application of Ring would be problematic. For prosecutors and defense attorneys to reassemble witnesses and evidence literally decades after an early conviction would be extremely difficult. We fear that any new penalty phase proceedings would actually be less complete and therefore less (not more) accurate than the proceedings they would replace.*

Asay, 210 So. 3d at 21 (emphasis added) (quoting Johnson v. State, 904 So. 2d 400, 411–12 (Fla. 2005)).

The State argued at the hearing that, because some defendants' sentences were unconstitutional because of the Ring decision, and other defendants' sentences were constitutional because Ring had not yet been decided, there was no arbitrariness.

As this court noted in Claim I, there is an extrinsic inequality in that the pertinent and groundbreaking changes to fundamental law in this area may apply retroactively to one defendant but not a neighboring defendant in the next cell on death row. However, as noted previously in State v. Dwyer, 332 So. 2d 333 (Fla. 1976), the court specifically said, where an issue has been decided in the Supreme Court of the State, the lower courts are bound to adhere to the Court's ruling when considering similar issues even though the court may believe otherwise. Also as noted before, the Asay court clearly issued a holding, and this court is legally bound to follow that decision. State v. Herring, 76 So. 3d 891, 897 (Fla. 2011). The defense refers to Mosley regarding fundamental fairness to allow retroactive relief but that fundamental fairness

analysis only applies to defendants whose sentences became final after Ring in 2002. Hurst relief does not apply retroactively to the case *sub judice*.

In the defendant's Supplement, he acknowledges the Florida Supreme Court's rulings are adverse to his claims on Claim III but does not abandon his argument on the claim. This Court is bound by the Florida Supreme Court's ruling. **Claim III and Supplement are denied.**

Claim IV

The defendant claims that the decisions in Hurst II and Perry v. State, 210 So. 3d 360 (Fla. 2016), along with the recent enactment of a revised sentencing statute[1] must be part of the second prong analysis of the defendant's prior argument. His prior arguments include a claim of newly discovered evidence, a Brady claim, and a Strickland claim.

Due process principles and the Eighth Amendment require this court to revisit the defendant's previously presented claims and determine (1) whether the evidence presented to support each claim and all the other admissible evidence at a future resentencing would probably result in a life sentence in light of the law that now governs any resentencing, and (2) when the proper analysis is conducted it is clear that it is likely that a different outcome would result. An affirmative finding as to either element would require relief to be granted under Florida Rule of Criminal Procedure 3.851.

Here, this court finds that the defense's reliance on Hildwin v. State, 141 So. 3d 1178 (Fla. 2014), and Swafford v. State, 125 So. 3d 760 (Fla. 2013), is misplaced. These cases require a cumulative analysis of all the evidence when a claim of newly discovered evidence is being raised. However, a Hurst II claim does not dwell in the premise of newly discovered evidence.

[1] All of which would govern at a resentencing and require a jury to unanimously find the statutorily required facts necessary to authorize a death sentence and also require the jury to unanimously recommend a death sentence before the judge would be authorized to impose a death sentence.

These cases concern the treatment of evidence, not pure legal issues which is what in reality a Hurst claim entails. Ironically, even if the defendant was post-Ring, neither Hildwin nor Swafford could be read as resurrecting previously denied claims.

In the defendant's supplement, the defendant acknowledges the Florida Supreme Court's rulings are adverse to his claims on Claim IV but he does not abandon his argument on the claim. This court is bound by the Florida Supreme Court's ruling. *See Walton v. State*, 246 So. 3d 246, 250–52 (Fla. 2018) (holding change in law regarding jury's recommendation of death sentence did not constitute newly-discovered evidence that entitled capital murder defendant to be resentenced). **Claim IV and Supplement are denied.**

Claim V

The defendant also claims that his conviction and death sentence violate the Fourteenth Amendment pursuant to Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972). This argument is premised in light of his allegation of newly discovered evidence. He contends that his claim of newly discovered evidence is premised on evidence that could not have been discovered previously, even with the exercise of due diligence.

In sum, the defendant proffers the following alleged facts as newly discovered evidence. The evidence to be considered by the court consists of (1) a witness who speculates that the defendant's brother was responsible for murder, and (2) that another witness was threatened with obstruction of justice if the witness did not give a piece of uncollected evidence or disposed of said evidence by giving it to a man whose identity is unknown.

First, it does not appear that the addresses of witnesses and affidavits upon which the defendant are relying were listed as per required by Rule 3.851(e)(2)(c). However, even if the

claim appeared legally sufficient, it is not clear that he is entitled to an evidentiary hearing for the following reasons. On a claim of newly discovered evidence (1) the asserted facts must have been unknown by the trial court, the party, or by counsel at the time of trial, and it must appear that the defendant or his counsel could not have known of them by the use of due diligence, and (2) the newly discovered evidence must be of such nature that it probably would produce an acquittal on retrial. See Rutherford v. State, 926 So. 2d 1100, 1107–08 (Fla. 2006) (citing Jones v. State, 591 So. 2d 911, 915–16 (Fla. 1991)).

The first prong of Rutherford and Jones fails. During the deposition process, trial counsel could have asked the State's witness, Mr. Westberry, whether he was curious that another was responsible. The court therefore finds that trial counsel could have discovered this alleged evidence through due diligence.

Next, the second prong of Rutherford and Jones also fails. There was other sufficient and supportive evidence to point the jury into the verdict it rendered. There was apparently a confession and the defendant's fingerprints were found inside the victim's house where she was murdered. This court concludes that the defendant meets neither prong of Rutherford and Jones.

In the defendant's Supplement, the defendant stands by his claim as pled in the Amended Successive 3.851 motion as argued at the August 24, 2017, Case Management Conference and the argument at the July 12, 2019, Case Management Conference. **Claim V and Supplement are summarily denied and no evidentiary hearing is granted.**

Claim VI

The defendant claims that the Fourteenth Amendment to the United States Constitution requires the retroactive application of the substantive rule established by chapter 2017-1, Laws of

Florida, which precludes the imposition of a death sentence unless a jury unanimously returns a death recommendation. Collateral Counsel's argument surrounding evolving changes to decency is foreclosed due to a lack of authority addressing or in support of this issue.

First, this court finds that the Florida Supreme Court made it abundantly clear that Hurst relief does not apply retroactively to capital defendants whose sentences were final before the United States Supreme Court issued its opinion in Ring. The revised statute does not apply to the defendant here because he is not entitled to a new penalty phase under Hurst. His sentence was finalized in 1986.

Additionally, the court disagrees with the defendant's assertion that application of the statute to him is a substantive right. In the case *sub judice* it is an inapplicable procedural right.

In his supplemental argument, the defendant asserts that the revisions made to Florida's Death Penalty scheme statute were done after, and to comport with, the decisions in Hurst I and Hurst II. See § 921.141, Fla. Stat. (2017).

This court finds that neither Hurst II nor the new statute created a new crime or added new elements to the crime. Conduct that was prohibited before the changes were made is still the same after the enactment of the new statute. Only the process (not the crime) by which the sentence is to be determined has been altered. No substantive changes to the law have been made. Once a criminal conviction has been upheld on appeal, the application of a new rule of constitutional criminal procedure is limited. The Florida Supreme Court has held that new rules of criminal procedure will apply retroactively only if they fit within one of two narrow exceptions. Those exceptions are: (1) a substantive rule that "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe

or if it prohibits a certain category of punishment for a class of defendants because of their status of offense"; and (2) a procedural rule which constitutes a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. Teague v. Lane, 489 U.S. 288, 310–13 (1989); Penry v. Lynaugh, 492 U.S. 302 (1989), *abrogated on other grounds by* Atkins v. Virginia, 536 U.S. 304 (2002); Butler v. McKeller, 494 U.S. 407 (1990); Saffle v. Parks, 494 U.S. 484 (1990).

Florida's new capital sentencing scheme requires the jury to unanimously and expressly find that: (1) all the aggravating factors are proven beyond a reasonable doubt, (2) sufficient aggravating factors exist to impose a death sentence, (3) the aggravating factors do in fact outweigh the mitigating circumstances, and (4) the defendant should be sentenced to death. All these elements must be established to the court before the trial judge may consider the actual imposition of a death sentence. See § 921.141(2), Fla. Stat. The new sentencing scheme neither alters that definition of criminal conduct nor increases the penalty in which the crime of First Degree Murder is punishable. Victorino v. State, 241 So. 3d 48 (Fla. 2018). The class of persons who are death eligible and the range of conduct which causes those defendants to be death eligible did not change. The aggravating factors necessary to qualify a defendant as eligible for the death penalty did not change. The State argues, and this court finds that the specific aggravators used in the defendant's case had been in place for decades. The only changes made for death recommendation were the requirement for specific jury findings of unanimity for the existence and sufficiency of aggravation factors and that they outweigh mitigation.

The State further argues that the defendant's reliance on Alleyne v. United States, 570 U.S. 99 (2013), is misplaced. Both the majority opinion and the concurring opinion in Alleyne

classified the right to a jury trial regarding facts required to impose a minimum mandatory sentence as procedural. Both Alleyne and Hurst are the offspring of Apprendi. The Alleyne majority and the Alleyne concurrence both characterized that Apprendi stands for the legal principle that the right to a jury trial in sentencing is a procedural right. This court views Apprendi and its entire offspring, including Hurst I, as procedural, not substantive.

The defendant argues that Hurst relief should be retroactive as a substantive change because it addressed the "proof beyond a reasonable doubt standard." The defendant relies upon In re Winship, 397 U.S. 358 (1970), and Fiore v. White, 531 U.S. 225 (2001). The State argues that Hurst I is distinguishable from these cases because it did not address the proof beyond a reasonable doubt standard. Hurst I did not alter the burden of proof during the adjudication phase in finding the defendant guilty of First Degree Murder. Nor did Hurst I truly involve a standard of proof. The issue in Hurst I was whether the findings of the existence of an aggravator lies with the judge versus the jury. The standard of proof was not an issue in the case. The new unanimity requirement established by the Florida Supreme Court in Hurst II is also not the equivalent to the standard of proof. These are two very different concepts. The retroactivity of the beyond a reasonable doubt standard of proof is a non-issue in this case and all other Florida capital cases as well. Hurst II did not alter the burden of proof as aggravating circumstances have long been required to be proven beyond a reasonable doubt in Florida. As related to the finding that the aggravation outweighs the mitigation, Hurst II did not ascribe a standard of proof. Hurst II, 202 So. 3d at 54.

The State argues that while the defendant may view the right to a jury trial in sentencing proceedings as substantive, the United States Supreme Court has repeatedly classified it as

procedural and in very similar context to Hurst II. As the United States Supreme Court noted, "holding that, because [a state] has made a certain fact essential to the death penalty, that fact must be found by a jury, is not the same as this Court's making a certain fact essential to the death penalty. The former was a procedural holding; the latter would be substantive." Schriro v. Summerlin, 542 U.S. 348, 354 (2004). Thus, Hurst II's requirement that the jury make specific factual findings before the imposition of the death penalty is a procedural change.

The defendant asserts that Florida's arbitrary decision not to offer him the benefit of the retroactive application of the revised penalty phase statute not only violates his Eighth Amendment rights but also implicates the Due Process and Equal Protection clauses of the Fourteenth Amendment. The claim hinges on the assertion that he is being treated differently than other capital inmates who will get the benefit of the revised statute because they have been awarded new penalty phase trials. As an example, the defendant cites Card v. Jones, 219 So. 3d 47, 48 (Fla. 2017), where Hurst relief was applied retroactively to defendant Card. Card is distinguishable in that regardless of when Card's murder took place, his death sentence was final after Ring was decided. The defendant's death sentence in the present case was final well before Ring was decided. The State argues that the different outcome in the defendant's case is not a violation of equal protection but is instead based on reasoned application of Florida law.

Lastly, the Florida Supreme Court has not limited its retroactivity analysis to the Sixth Amendment issue addressed in Hurst I. Instead, the Florida Supreme Court has denied retroactive application of Hurst I as interpreted in Hurst II to defendants whose death sentences were final when the Supreme Court decided Ring. See Hitchcock, 226 So. 3d at 217. Therefore, the Florida Supreme Court has repeatedly rejected Hurst retroactivity arguments based on Sixth

and the Eighth Amendments as well as Due Process and Equal Protection grounds.

The court finds that, despite the defendant's claims that the result is not fair; this court is obligated to follow the precedent of the Florida Supreme Court. As noted previously, in State v. Dwyer, 332 So. 2d 333 (Fla. 1976), the court specifically said, where an issue has been decided in the Florida Supreme Court, the lower courts are bound to adhere to the court's ruling when considering similar issues. The defendant's death sentence became final in 1986 well before Ring, which was decided in 2002. **Claim VI and Supplement are denied.**

Therefore, in consideration of the foregoing, it is hereby,

ORDERED AND ADJUDGED that:

(1) The defendant's Amended Successive Motion to Vacate Judgments of Conviction and Sentence and Alternatively Motion to Correct Illegal Sentence and Supplement to Amend 3.851 are **Denied.**

(2) The defendant has thirty (30) days in which to appeal this order.

DONE AND ORDERED in Chambers, in Volusia County, Florida this 8 day of October, 2019.

RAUL A. ZAMBRANO
Circuit Court Judge

Copy furnished to:
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