No. 17-___

IN THE

# Supreme Court of the United States

WILLIAM HAROLD KELLEY,

*Petitioner,*

v.

STATE OF FLORIDA,

*Respondent.*

**On Petition for a Writ of Certiorari to the Florida Supreme Court**

## PETITION FOR A WRIT OF CERTIORARI


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**CAPITAL CASE**

## QUESTION PRESENTED

In *Hurst v. Florida*, 136 S. Ct. 616 (2016) ("*Hurst I*"), this Court held that Florida's capital sentencing scheme violated the Sixth Amendment because a jury did not make the findings necessary for a death sentence. In *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) ("*Hurst II*"), the Florida Supreme Court further held that under the Eighth Amendment the jury's findings must be unanimous.

Although the Florida Supreme Court held that the *Hurst* decisions applied retroactively, it created over sharp dissents a novel and unprecedented rule of partial retroactivity, limiting their application only to inmates whose death sentences became final after *Ring v. Arizona*, 536 U.S. 584 (2002). *Ring*, however, addressed Arizona's capital sentencing scheme and was grounded solely on the Sixth Amendment, not the Eighth Amendment.

The Question Presented is:

Whether the Florida Supreme Court's novel and unprecedented decision to allow only partial retroactivity violates the Eighth and Fourteenth Amendments because it arbitrarily uses as the cutoff point for retroactivity an earlier decision invalidating Arizona's capital sentencing scheme under the Sixth Amendment, and denies relief to the inmates who deserve it the most.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner William Harold Kelley respectfully petitions for a writ of certiorari to review the judgment of the Florida Supreme Court.

## OPINIONS BELOW

The trial court's unpublished decision is reproduced at Pet. App. 4a-8a. The Florida Supreme Court's ruling, available online as *Kelley v. State*, 235 So. 3d 280 (Fla. 2018), is reproduced at Pet. App. 1a-3a.

## JURISDICTION

The Florida Supreme Court affirmed the trial court's denial of Kelley's post-conviction motion on January 26, 2018. Pet. App. 1a-2a. This Court has jurisdiction under 28 U.S.C. §§ 1257(a) and 2101(d).

## RELEVANT CONSTITUTIONAL PROVISIONS

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides, in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## OVERVIEW

In 1984, Petitioner Kelley was convicted after a second trial of a murder that occurred 18 years earlier and was sentenced to death. In 1986, the Florida Supreme Court, although expressing doubts about the case, nevertheless affirmed on direct appeal.

In 2016, in *Hurst v. Florida*, 136 S. Ct. 616 (2016) ("*Hurst I*"), this Court declared Florida's capital sentencing scheme unconstitutional under the Sixth Amendment. On remand, in *Hurst v. State*, 202 So. 3d 40 (2016) ("*Hurst II*"), the Florida Supreme Court applied *Hurst I* to hold that the existence of aggravating factors necessary for the death penalty must be found by a jury, and further, that under Florida's jurisprudence and Eighth Amendment principles, those jury findings must be unanimous and beyond a reasonable doubt.

Thereafter, the Florida Supreme Court decided those decisions applied retroactively. It did not, however, apply traditional retroactivity principles and hold them either retroactive for *all* inmates whose death sentences became final before *Hurst I* and *Hurst II* or for *no* such inmates.

Instead, a sharply divided court announced a novel and unprecedented rule of partial retroactivity. It created a bright-line division between similarly situated prisoners, all of whom have equally final convictions and death sentences under an equally unconstitutional sentencing scheme.

The first group consists of inmates with death sentences that became final before *Ring v. Arizona*, 536 U.S. 584 (2002), invalidated *Arizona's* capital sentencing scheme. The court declined to apply the *Hurst* decisions retroactively on collateral review to this group. The second group consists of inmates whose death sentences became final after *Ring*. The court decided to apply the *Hurst* decisions retroactively on collateral review to that group.

The convictions and sentences of individuals in both groups were equally final under the very same death

penalty scheme declared unconstitutional in the *Hurst* decisions. Nonetheless, the two groups of individuals are treated in fundamentally different ways.

On April 26, 2018, Justice Pariente wrote separately to emphasize the "constitutional arbitrariness" created by the Florida Supreme Court's *Ring* cutoff. *Evans v. State*, No. SC17-869, 2018 WL 1959622, *1 (Fla. Apr. 26, 2018) (Pariente, J. concurring in result denying rehearing). As she declared, "a fatal accident of timing" with respect to *Ring* "creates arbitrariness that has no proper place in death penalty jurisprudence." *Id.* at *1, 2.

The Florida Supreme Court's decision to grant retroactivity based solely on a cut-off date of *Ring* is especially arbitrary, given that the holding in *Ring* was grounded solely on the Sixth Amendment, whereas *Hurst II*'s holding that the Florida sentencing scheme used in Kelley's trial was unconstitutional was grounded also on the Eighth Amendment. There are manifest differences in the constitutional underpinnings for the Sixth Amendment holding of *Ring* and the Eighth Amendment holding of *Hurst II*.

This disparate treatment is inconsistent with both the Eighth Amendment's prohibition against the arbitrary and capricious imposition of the death penalty and the Fourteenth Amendment's guarantee of equal protection.

If this were only a straight-forward application of traditional retroactivity principles applied consistently across all prisoners whose sentences became final before the *Hurst* decisions, nothing might seem amiss, since this Court has held that traditional retroactivity rules serve legitimate purposes despite the degree of unequal treatment inherent in denying retroactive effect to any new constitutional rule.

Kelley acknowledges those longstanding principles and does not seek to disrupt them. This, however, is anything but a straight-forward application of traditional retroactivity principles. The Florida Supreme Court's unprecedented "partial retroactivity" approach results in unequal treatment of similarly affected Death Row inmates with equally final sentences, using a cutoff date pegged to a decision involving an entirely *different State's* sentencing scheme and resting on an entirely *different constitutional basis.*

Equally fundamental, the cutoff date chosen by the court is actually worse than merely arbitrary because it increases the probability that death will be imposed on the prisoners least deserving of death and with more compelling cases for relief, contrary to the principles of the Eighth and Fourteenth Amendments

Specifically, inmates whose death sentences became final before *Ring* are more likely than their post-*Ring* counterparts to have been sentenced under standards and practices in death penalty cases that would not support a capital sentence today.

Kelley's circumstances highlight the point. Even under the standards at the time, Kelley had to be tried twice because his first trial ended with a hung jury. His second jury deadlocked, only reaching a verdict after the trial court gave an instruction later acknowledged by the supreme court to be erroneous. And even without hearing critical mitigating evidence from the victim's daughter in support of life, which was presented exclusively to the judge, the jury still was divided 8 to 3 in its penalty recommendation.

In 1984, mitigation practices allowed less in terms of mitigation evidence and required less of defense counsel with respect to mitigation. *See ABA Guidelines*

*for Appointment and Performance of Defense Counsel in Death Penalty Cases* (Rev. Ed. Feb. 2003), Guidelines 4.1(A)(1) and 10.4(C)(2), 31 HOFSTRA L. REV. 913, 952, 999-1000 (2003); *see also Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, Guideline 5.1(B), (C), 36 HOFSTRA L. REV. 677 (2008).

We also know that prosecutorial misconduct by rogue prosecutors existed in Florida in those days. Kelley's trial was bookended by two other prosecutions where the death penalty was imposed. Kelley's prosecutor also prosecuted those cases. Three different courts found prosecutorial misconduct by that same prosecutor in those three capital cases. *See Kelley v. Singletary*, 222 F. Supp. 2d 1357, 1367 (S.D. Fla. 2002), *reversed on other grounds*, *Kelley v. Sec'y for the Dep't of Corr.*, 377 F.3d 1317, 1327 (11th Cir. 2004); *Johnson v. State*, 44 So. 3d 51, 53, 54, 73 (Fla. 2010); *State of Florida v. Melendez*, No: CF-84-1016A2-XX (Tenth Judicial Circuit of Florida), slip op., filed December 5, 2001. *See Kelley*, 222 F. Supp. 2d at 1363 & n.3.

The misconduct was discovered in time for Johnson and Melendez and their lives were spared. But Kelley is still on Death Row despite findings by an experienced federal judge of prosecutorial misconduct in Kelley's trials by that same prosecutor. Given all of the foregoing, it is very unlikely that Kelley's case would result in a capital sentence today (or even in earlier post-*Ring* years).

In addition, most inmates whose death sentences became final before *Ring* have been on Death Row longer than their post-*Ring* counterparts. This is true of Kelley. Although Kelley has steadfastly maintained his innocence, Kelley, now 72 and in failing health, has

remained in prison, under a sentence of death, since 1984.

These long-serving inmates, many now elderly, have demonstrated over a longer period of time that they are capable of adjusting to that environment while continuing to live without endangering any legitimate state interest at this time.

In addition, those who have served the longest on Death Row have experienced for decades the suffering chronicled in *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General*, [1993] 1 Zimb. L.R. 239, 240, 269(8), and recently by Justice Breyer, dissenting from the denial of certiorari in *Sireci v. Florida*, 137 S. Ct. 470 (2016). "This Court, speaking of a period of *four weeks*, not 40 years, once said that a prisoner's uncertainty before execution is 'one of the most horrible feelings to which he can be subjected.'" *Id.* at 470. "At the same time, the longer the delay, the weaker the justification for imposing the death penalty in terms of punishment's basic retributive or deterrent purposes." *Knight v. Florida*, 528 U.S. 990, 120 S. Ct. 459, 462 (1999) (Justice Breyer, dissenting from the denial of certiorari).

As all this illustrates, the Florida Supreme Court's cutoff at *Ring* denies relief to those for whom relief from an unconstitutional death sentence is the most warranted. The partial retroactivity cutoff at *Ring* involves a level of arbitrariness that runs far beyond that tolerated by the principles set forth in this Court's traditional retroactivity jurisprudence.

Here, the Court is faced with the latest chapter in the troubling history of capital punishment in Florida, where an arbitrary application of partial retroactivity intersects with the principles announced in *Furman v.*

*Georgia*, 408 U.S. 238 (1972) (per curiam). In *Furman*, this Court held that the death penalty, as then administered, was unconstitutional. Because the death penalty was only imposed on a "capriciously selected random handful," it was "cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Id.* at 309-310 (Stewart, J., concurring). The Eighth Amendment does not "permit this unique penalty to be so wantonly and so freakishly imposed." *Id.* at 310; *see id.* at 313 (White, J., concurring).

Where the issue is life or death, there must be consistency and completeness in the retroactivity of decisions announcing new constitutional rules, such as that invalidating Florida's death penalty scheme. By denying relief to Kelley and the other prisoners whose sentences became final before *Ring*, the novel, unprecedented rule of partial retroactivity adopted by the Florida Supreme Court is cruel and unusual in the same way that being struck by lightning is cruel and unusual.

## STATEMENT OF THE CASE

### A. The Decisional Framework

In 2002, this Court decided *Ring*, holding that, under the Sixth Amendment, a defendant has the right to have a jury determine the existence of aggravating factors necessary for the imposition of the death penalty. 536 U.S. at 609. The Court, however, did not comment on Florida's similar capital sentencing scheme. It left intact its prior decisions expressly upholding that scheme, and denied post-*Ring* petitions for certiorari raising the *Ring* issue.

After *Ring*, the Florida Supreme Court also denied relief in cases raising *Ring*-based challenges, following the principle that it is for this Court to overrule its own

decisions. *See, e.g., Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002).

In 2016, in *Hurst v. Florida*, this Court declared Florida's then-existing capital sentencing scheme, codified at section 921.141, Florida Statutes (2010), unconstitutional because the "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." 136 S. Ct. at 619. This Court determined that "[t]he analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's" death penalty. *Id.* at 621-22.

On remand, in *Hurst II*, the Florida Supreme Court applied *Hurst I* and Florida law to hold:

> [T]he Supreme Court's decision in *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. We reach this holding based on the mandate of *Hurst v. Florida* and on Florida's constitutional right to jury trial, considered in conjunction with our precedent concerning the requirement of jury unanimity as to the elements of a criminal offense. In capital cases in Florida, these specific findings required to be made by the jury include the existence of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances.

202 So. 3d at 44. The court also expressly grounded its decision on the Eighth Amendment:

> We also hold, based on Florida's requirement for unanimity in jury verdicts, and under the Eighth Amendment to the United States Constitution, that in order for the trial court to impose a sentence of death, the jury's recommended sentence of death must be unanimous.

*Id.*

Thereafter, in two decisions issued on the same day—*Asay v. State*, 210 So. 3d 1 (Fla. 2016), and *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016)—the Florida Supreme Court addressed the retroactivity of the *Hurst* decisions.[1] Unlike traditional retroactivity analysis, however, the Florida Supreme Court did not decide whether the *Hurst* decisions should or should not be applied retroactively to all prisoners whose death sentences became final before those decisions invalidated the scheme under which they were sentenced.

Instead, the Florida Supreme Court divided those prisoners into two classes based entirely on the date their sentences became final relative to this Court's 2002 decision in *Ring* invalidating Arizona's sentencing scheme, *not* relative to the *Hurst* decisions themselves. In *Asay*, the court held that the *Hurst* decisions do not apply retroactively to Florida prisoners whose death sentences became final on direct review before *Ring*. *Asay*, 210 So. 3d at 21-22. In *Mosley*, the court held that the *Hurst* decisions do apply retroactively to prisoners whose death sentences became final after *Ring*. *Mosley*, 209 So. 3d at 1283.

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[1] Florida's retroactivity analysis is still guided by this Court's pre-*Teague* three-factor analysis derived from *Stovall v. Denno*, 388 U.S. 293 (1967), and *Linkletter v. Walker*, 381 U.S. 618 (1965). *See Witt v. State*, 387 So. 2d 922, 926 (Fla. 1980).

The court asserted that *Ring* was an appropriate cut-off date for retroactivity because Florida's capital sentencing scheme was not unconstitutional before *Ring*, but that the "calculus" of the constitutionality of Florida's scheme changed with *Ring*, rendering that scheme "essentially" unconstitutional. *Id*. at 1280-81.

Although acknowledging that it had failed to recognize that unconstitutionality until this Court's decision in *Hurst I*, the Florida Supreme Court laid the blame on this Court for the improper Florida death sentences imposed after *Ring*:

> 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*. In other words, defendants who were sentenced to death based on a statute that was actually rendered unconstitutional by *Ring should not be penalized for the United States Supreme Court's delay in explicitly making this determination*.

*Mosley*, 209 So. 3d at 1283 (emphasis added).

Saying that "[c]onsiderations 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,'" the Court held *post-Ring* inmates would receive the benefit of the *Hurst* decisions. *Id*. (citations omitted). The court did not address the fact that pre-*Ring* inmates also were sentenced to death under a process no longer consid-

ered acceptable under the Eighth Amendment, upon which *Hurst II* rests.

In contrast to the court's majority, several justices of the Florida Supreme Court believed the chosen cutoff does not survive scrutiny. In *Asay*, Justice Pariente wrote: "The majority's conclusion results in an unintended arbitrariness as to who receives relief . . . . To avoid such arbitrariness and to ensure uniformity and fundamental fairness in Florida's capital sentencing . . . *Hurst* should be applied retroactively to all death sentences." *Asay*, 210 So. 3d at 36 (Pariente, J., concurring in part and dissenting in part).

Justice Perry was even more blunt: "In my opinion, the line drawn by the majority is arbitrary and cannot withstand scrutiny under the Eighth Amendment because it creates an arbitrary application of law to two groups of similarly situated persons." *Id.* at 37 (Perry, J., dissenting). Justice Perry correctly predicted: "[T]here will be situations where persons who committed equally violent felonies and whose death sentences became final days apart will be treated differently without justification . . . ." *Id.* at 38.

Thereafter, in *Hitchcock*, Justice Lewis complained that the Court's majority was "tumbl[ing] down the dizzying rabbit hole of untenable line drawing . . . ." *Hitchcock v. State*, 226 So. 3d 216, 218 (Fla. 2017) (Lewis, J., concurring in the result).

After reaffirming the *Ring* dividing line cutoff in *Hitchcock*, 226 So. 3d at 217, the Florida Supreme Court summarily denied *Hurst* relief in numerous "pre-*Ring*" cases, including Kelley's, in just two weeks. In none of its decisions has the Florida Supreme Court made more than fleeting remarks about whether its framework is consistent with the United States

Constitution. *See, e.g.*, *Asay v. State*, 224 So. 3d 695, 702-03 (Fla. 2017); *Lambrix v. State*, 227 So. 3d 112, 113 (Fla. 2017); *Hitchcock*, 226 So. 3d at 217.

In *Hannon v. State*, 228 So. 3d 505, 513 (Fla. 2017), the Florida Supreme Court stated that this Court had "impliedly approved" its *Ring*-based retroactivity cutoff for *Hurst* claims by denying a writ of certiorari in *Asay v. Florida*, 138 S. Ct. 41 (2017). But as this Court has often stated, the denial of a writ of certiorari "imports no expression of opinion on the merits of the case . . . ." *See, e.g.*, *Teague v. Lane*, 489 U.S. 288, 296 (1989) (internal quotation marks omitted).

Counsel has searched diligently but in vain for any precedent in any state or federal court employing an after-the-fact determination of an earlier "essential" unconstitutionality or a changed "calculus of constitutionality" to support the court's choice of only some groups of prisoners with final death sentences to privilege with the benefit of a constitutional ruling, while denying it to others. This Court should review and reverse this important decision of the sharply divided Florida Supreme Court.

### B. Proceedings in Kelley's Case

William Kelley, who has at all times maintained his actual innocence, was convicted of murder after a first jury hung and a second deadlocked. He was sentenced to death on April 2, 1984, after a non-unanimous, advisory jury consisting of only 11 individuals recommended death by an 8 to 3 vote.

In 1966, Charles Von Maxcy was murdered in Highlands County, Florida. The State of Florida subsequently charged John Sweet for arranging Charles Von Maxcy's contract murder. Sweet was a career criminal who had had an affair with Maxcy's wife. The

State's first prosecution of Sweet in 1967 resulted in a mistrial. A second prosecution in 1968 resulted in a conviction that was overturned on appeal. The State did not pursue a third trial. More than a decade passed.

Then, in 1981, Sweet cut a deal with State authorities to admit masterminding the Maxcy murder but implicating Kelley in the murder, in exchange for immunity from prosecution for the murder and for his admitted perjury about it in his trials. The State thereupon indicted Kelley for the 1966 murder.

Kelley's first trial ended in a hung jury. In a second trial in 1984, the jury deadlocked. After the second jury announced it had reached an impasse, the jury received a non-standard deadlock instruction that erroneously told the jurors that no further evidence existed. The jury continued its deliberations and asked a pointed question about Sweet's immunity deal. *See Kelley v. State*, 486 So. 2d 578, 579-80, 583-84 (Fla. 1986). At the State's behest, the trial court did not answer that question. Thereafter, the jury found Kelley guilty. *Id.*; *Kelley v. Singletary*, 222 F. Supp. 2d at 1363-64.

The penalty phase took place on April 2, 1984. Before it began, one of the jurors had a death in the family, Pet. App. 12a-13a, and Kelley waived his right to a 12-person advisory jury in the penalty phase. *Id*. He consented to either a 10- or 11-person jury. *Id.*

The penalty-phase jury did not hear mitigating evidence from the victim's daughter, which was presented exclusively to the judge, and it did not make any specific factual findings regarding aggravating and mitigating circumstances. *Id*. at 17a-18a, 26a.

The jury was instructed by the court to make an advisory sentencing recommendation of either life or death "based upon [its] determination as to whether sufficient aggravating circumstances exist[ed] to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist[ed] to outweigh any aggravating circumstances found to exist." Pet. App. 14a. The jury was affirmatively told its advisory sentence did not need to be unanimous and could be made by a simple majority of at least 6 jurors. *Id*. at 15a-16a.

Under those instructions, the jury recommended a sentence of death by a vote of 8 to 3. *Id*. at 25a. The jury was not instructed to make, and did not make, any written factual findings regarding either aggravating or mitigating circumstances. *Id*.

After the jury was discharged, defense counsel notified the court that it had "some statements for the Court on behalf of Mr. Kelley." *Id*. at 17a. The court asked if these were "statements that were not presented to the jury," and counsel responded, "That's correct. They are for you since you do the sentencing." *Id*. Counsel explained that he wished to present testimony of the daughter of the victim, Marivon Adams. *Id*. at 18a.

The judge said he was "vastly puzzled why these [statements] were not [made] before the jury." *Id.* Kelley's counsel explained: "It was my impression that they should be presented before you since you are the decider." *Id.*

Marivon Adams then asked the court to "consider[] Mr. Kelley's life." She testified that she knew Kelley was not guilty but that Sweet was, and that Sweet, the "master-mind[]" of the murder, should be sitting in

Kelley's chair but instead was walking free. *Id*. The defense then argued to the court—at greater length than it had argued to the jury—that the court should sentence Kelley to life instead of death, stressing the "particularly troublesome" facts of the case. *Id*. at 18a-24a.

That same day, the judge made written findings of fact. Pet. App. 26a-31a. He found the existence of three aggravating factors: (1) Kelley was previously convicted of a felony in 1959, a robbery; (2) the homicide of Charles Maxcy was committed for pecuniary gain; and (3) it was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification. *Id*. at 26a-27a. He found one (non-statutory) mitigating factor: that Kelley, who was "not the instigator," was the only participant in the crime to receive punishment. *Id*. at 30a. The judge found that the aggravating circumstances substantially outweighed the mitigating circumstances. *Id*. at 31a. Based on the Florida statutory law at the time, the judge made these findings and sentenced Kelley to death. *Id*.

The Florida Supreme Court affirmed Kelley's death sentence, although it expressed significant concern about the fairness of Kelley's trial. *See generally Kelley v. State*, 486 So. 2d at 584-85. This Court denied certiorari. *Kelley v. Florida*, 479 U.S. 871 (1986).

On November 20, 1987, Kelley filed a motion to vacate his judgment and sentence pursuant to Florida Rule of Criminal Procedure 3.850. The trial court denied the claims, and the Florida Supreme Court affirmed. *See Kelley v. State*, 569 So. 2d 754 (Fla. 1990). On April 8, 1991, Kelley filed a petition for habeas corpus in the Florida Supreme Court, which

was denied on March 12, 1992. *See Kelley v. Dugger*, 597 So. 2d 262 (Fla. 1992).

On October 9, 1992, Kelley petitioned the United States District Court for the Southern District of Florida for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. *Kelley v. Singletary*, 222 F. Supp. 2d at 1361.

Following evidentiary hearings, the court granted habeas relief to Kelley on September 19, 2002, reversing his conviction and ordering a new trial, based on the judge's finding of significant *Brady* violations by the prosecutor, Hardy Pickard. *Kelley*, 222 F. Supp. 2d at 1367.

On July 23, 2004, the Eleventh Circuit Court of Appeals reversed, and reinstated Kelley's conviction. *Kelley*, 377 F.3d at 1369. It held that the district court had erroneously granted an evidentiary hearing and that, in any event, the prosecutor's misconduct did not prejudice Kelley. *Id*. at 1333, 1340-43, 1369. This Court denied certiorari. *Kelley v. Crosby*, 545 U.S. 1149 (2005).

In 2003, Kelley filed a successive habeas petition in the Florida Supreme Court challenging his death sentence under the then newly-issued decision in *Ring*. *See* Petition for Writ of Habeas Corpus, *Kelley v. Crosby*, No. SC03-1903, 2003 WL 23306615 (2003). Kelley argued that the Florida statute under which he was sentenced likewise violated his Sixth Amendment right to a jury trial because it required the judge to make the factual findings upon which his death sentence was based. *Id*. at *15. He also argued that his non-unanimous jury recommendation was unconstitutional. *Id*. at *16-17. The Florida Supreme Court

denied the petition on May 4, 2004. *See Kelley v. Crosby*, 874 So. 2d 1192 (Fla. 2004).

At the time, *Hildwin v. Florida*, 490 U.S. 638 (1989), and *Spaziano v. Florida*, 468 U.S. 447 (1984), which had upheld Florida's sentencing scheme from constitutional attack, had not yet been overturned. *Hildwin* and *Spaziano* ultimately were overturned by this Court in *Hurst I* in 2016. *See Hurst I*, 136 S. Ct. at 623.

On November 21, 2016, Kelley filed a successive motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.851(e)(2), asking the trial court to set aside his death sentence in the light of *Hurst I* and *Hurst II*. *See* Pet. App. 4a-10a.

Kelley asserted that his death sentence must be vacated because the judge, and not the jury, made the factual findings required to impose his sentence of death and because the jury's recommendation of death was not unanimous. *Id*. at 6a.

Kelley also asserted that *Hurst I* and *Hurst II* should be applied retroactively to him under state and federal law. He specifically invoked federal constitutional claims under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. *Id*. at 8a.

In doing so, Kelley asserted that drawing a bright-line rule using the date of the *Ring* decision as the dividing line for relief from an indisputably unconstitutional sentencing scheme violates both the state and federal constitutions. Kelley's counsel explained the arbitrariness of that cut-off date. The State brushed aside this argument and declared at a hearing on the motion that this difference in relief from Florida's indisputably unconstitutional sentencing scheme is merely "the luck of the draw." Pet. App. 35a-36a.

The trial judge denied Kelley's motion on March 28, 2017. Pet. App. 4a-8a. Kelley timely appealed to the Florida Supreme Court. His appeal was stayed pending the resolution of *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017). On August 10, 2017, the Florida Supreme Court denied relief in *Hitchcock*. *Id.*

On January 26, 2018, the Florida Supreme Court issued its opinion summarily affirming the trial court's denial of relief in this case. *See Kelley v. State*, 235 So. 3d 280 (Fla. 2018), Pet. App. 1a-3a.

## REASONS FOR GRANTING THE WRIT

### I. AFTER DETERMINING THAT THE *HURST* DECISIONS MUST BE APPLIED RETROACTIVELY, THE FLORIDA SUPREME COURT CREATED AN UNPRECEDENTED RULE OF PARTIAL RETROACTIVITY THAT OFFENDS THE EIGHTH AND FOURTEENTH AMENDMENTS IN CAPITAL CASES.

The Florida Supreme Court determined that its decision holding Florida's capital sentencing scheme unconstitutional under the Eighth Amendment had to be applied retroactively, but then applied retroactivity in a disparate fashion to similarly situated inmates on Death Row. Prisoners with final sentences prior to a different decision, *Ring*, involving Arizona's capital sentencing scheme, were denied the benefit of the *Hurst* rulings, even though *Ring* was decided only on Sixth Amendment grounds and nothing in *Ring* suggested any Eighth Amendment issue.

This is no trivial difference in constitutional requirements. It directly implicates Kelley's right to have a jury of his peers determine unanimously whether he lives or dies.

This Court has allowed the denial of retroactivity to withhold the benefit of new constitutional decisions from prisoners whose cases have already become final on direct review in order to protect, *inter alia*, States' interests in the finality of criminal convictions. *See, e.g.*, *Teague*, 489 U.S. at 309. Kelley acknowledges this Court's longstanding principles regarding retroactivity rules in general, and he does not seek to upset them. *Cf. Schriro v. Summerlin*, 542 U.S. 348 (2004).

Here, however, the Florida Supreme Court did not choose a determinative dividing line using the fact of finality with respect to the decision announcing the new constitutional rule. Instead, the court cobbled together an arbitrary form of partial retroactivity that *granted* retroactive relief under the *Hurst* decisions to many death-sentenced inmates with long-final convictions and sentences, while at the same time *denying* retroactive relief to many other death-sentenced inmates who also have long-final convictions and sentences. That is not merely disparate. Worse, it turns justice on its head by denying relief to the very class of inmates most likely to be deserving of relief from their unconstitutional death sentences.

In capital cases, the Eighth and Fourteenth Amendments impose boundaries on a state court's application of such an arbitrary partial retroactivity rule. The Florida Supreme Court's split decision offends those constitutional restraints.

*Furman v. Georgia*, 408 U.S. 238 (1972), and *Godfrey v. Georgia*, 446 U.S. 420 (1980), stand for the proposition that, "if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Id.* at 428. This principle "insist[s] upon general rules

that ensure consistency in determining who receives a death sentence." *Kennedy v. Louisiana*, 554 U.S. 407, 436, *modified on reh'g*, 554 U.S. 945 (2008).

This Court has long read the Eighth Amendment to bar "the arbitrary or irrational imposition of the death penalty." *Parker v. Dugger*, 498 U.S. 308, 321 (1991). "If a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." *Spaziano v. Florida*, 468 U.S. 447, 460 (1984), *overruled on other grounds*, *Hurst v. Florida*, 136 S. Ct. 616 (2016).

This principle also is consistent with another constitutional premise—that the Fourteenth Amendment right to equal protection of the laws is denied "[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense and . . . [subjects] one and not the other" to a uniquely harsh form of punishment. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

The Florida Supreme Court's partial retroactivity ruling violates both of these precepts. Its dividing line leaves a more deserving class without relief from their death sentences imposed under an unconstitutional sentencing scheme.

Although this Court has not previously addressed a partial retroactivity scheme as arbitrary and indeed perverse as this one, the proposition that States can draw retroactivity cutoffs other than finality before the new constitutional ruling necessarily implicates these Eighth and Fourteenth Amendment precepts. If the Florida Supreme Court had chosen to close the

book on inmates with convictions and death sentences imposed in violation of the 2016 *Hurst* decisions that had become final before the year 2000, making *Hurst* available only to those whose convictions and death sentences became final in this century—or, for that matter, only to those death-sentenced inmates who had not consistently maintained their actual innocence—the arbitrariness of that cutoff would be obvious. No less arbitrary is making *Hurst* available only to those death-sentenced inmates whose convictions and sentences became final after *Ring* was decided in 2002.

The fact that the Florida Supreme Court chose to divide the class of death-sentenced inmates with final convictions and sentences roughly in half with its novel rule of partial retroactivity is every bit as arbitrary.

To be sure, the Florida Supreme Court attempted to articulate a rational basis for use of *Ring* as the partial retroactivity cutoff, based on its new-found recognition that *Ring* prefigured the ultimate decision in *Hurst I*, and thereby rendered Florida's capital sentencing scheme "essentially unconstitutional." The scheme was, however, unconstitutional even before *Ring*, as the Sixth Amendment requirements fully applied to it at all times.

But worse, this judicial attempt at rationalization completely ignores the fact that the court also used *Ring* as the partial retroactivity cutoff for its own *Hurst II* decision based on Eighth Amendment requirements, which manifestly was *not* prefigured by *Ring*.

Whereas *Ring* addressed Sixth Amendment issues when invalidating Arizona's capital sentencing scheme, with no mention whatever of a unanimity requirement, *Hurst II* imposed a unanimity requirement guided by Eighth Amendment principles. The Florida

Supreme Court has never explained why *Ring* makes any sense as a partial retroactivity cutoff for its Eighth Amendment unanimity requirement in *Hurst II*. It does not.

At bottom, the *Hurst* decisions represent the latest in a series of cases evincing an eroding confidence in the fair application of Florida's death penalty. We now know that all death-sentenced inmates that had final convictions and sentences at the time of *Hurst I* were sentenced under an unconstitutional sentencing scheme. It is critical to avoid arbitrariness in this situation, where life and death are at stake.

The strong dissenting opinions on the sharply divided Florida Supreme Court got it right: it was arbitrary to apply the court's Eighth Amendment ruling only to prisoners with death sentences that were final after *Ring*. Having determined that *Hurst II* would apply retroactively, the court should have given all Death Row prisoners the benefit of its Eighth Amendment ruling.

## II. THE *RING*-BASED DIVIDING LINE CREATES MORE ARBITRARY AND UNEQUAL RESULTS THAN TRADITIONAL RETROACTIVITY DECISIONS.

The rule of partial retroactivity announced by the Florida Supreme Court makes matters worse by exacerbating the arbitrary and disparate results on similarly-situated inmates. Its temporal cut-off actually singles out for the denial of relief many cases that would be thought the least death-worthy today.

As set forth above, inmates whose death sentences became final before *Ring* are more likely than their post-*Ring* counterparts to have been sentenced under

standards that would not support a capital sentence today. *See supra* at 5-7.

The Florida Supreme Court's partial retroactivity rule nevertheless denies relief to those likely to have been convicted under less reliable standards and procedures and likely to have suffered on Death Row longer, while granting relief to other prisoners with final sentences.

It remains to note that full retroactive application of *Hurst I* and *Hurst II* would not preclude penalty-phase retrials. Whereas penalty retrials in the older cases might be more difficult in some circumstances, there is no reason to believe that penalty retrials for the post-*Ring* group to whom the Florida Supreme Court granted retroactive relief would be uniformly easier or more practical than those in the pre-*Ring* group.

It also bears emphasis that, even if a prosecutor does opt to seek a penalty retrial and fails to obtain a new death sentence, the bottom-line consequence is that the inmate will continue to be incarcerated for life. *See* Fla. Stat. § 921.141 (2017). An acquittal in a new guilt-phase proceeding is not in the cards. That prospect, which has concerned the Court in the past, is not at issue here. Rather, aged (and sometimes elderly) inmates who were sentenced under an undeniably unconstitutional sentencing scheme would be given the opportunity to get a re-sentencing that would result either in another death sentence or life in prison.

## III. THIS IS AN IDEAL VEHICLE FOR ADDRESSING WHETHER THE FLORIDA SUPREME COURT'S *HURST* RETROACTIVITY CUTOFF AT *RING* EXCEEDS THE LIMITS OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Certiorari also is warranted because this case is an ideal vehicle in which to resolve the important question presented.

Kelley has been on Florida's Death Row since 1984, and he is now over 70 years old and in failing health. He was not convicted until 18 years after the murder at issue, which took place in 1966. He has consistently maintained his innocence, and his conviction rested on the testimony of an admitted perjurer and mastermind behind the murder fingering Kelley under a grant of immunity.

Kelley's first trial ended in a hung jury. The second jury was hung as well, until the judge broke the deadlock by instructing the jurors erroneously that no further evidence existed. The second jury also asked a pointed question about Sweet's immunity deal. The trial court would not answer that question. The jury then found Kelley guilty.

Further, the jury was not unanimous in recommending the death penalty. Rather, it divided 8 to 3 in recommending that Kelley be sentenced to death. Even so, the penalty-phase jury did not hear important mitigating evidence from the victim's daughter.

Specifically, the victim's daughter asked the court, but not the advisory jury, to "consider[] Mr. Kelley's life." She testified that she knew Kelley was not guilty but that Sweet was and that Sweet, the "mastermind[]" of the murder, should be sitting in Kelley's

chair but instead was walking free. Pet. App. 18a; *see also Kelley v. State*, 486 So. 2d at 586 (Overton, J., concurring specially) (lamenting that "our system of justice has allowed Sweet, who instigated, planned, and directed this murder, to receive total immunity from prosecution for this murder"). Hearing none of that, the jury could not weigh it.

## CONCLUSION

The Florida Supreme Court has held that *Hurst I* and *Hurst II* do apply retroactively. Given that determination, full retroactive application of the those new constitutional rulings should not be denied. Instead, the Florida Supreme Court has crafted an unprecedented, novel rule of partial retroactivity that cannot pass muster under the Eighth or Fourteenth Amendments.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 25, 2018

# APPENDIX

**APPENDIX A**

SUPREME COURT OF FLORIDA

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No. SC17-830

---

WILLIAM H. KELLEY,

*Appellant*,

vs.

STATE OF FLORIDA,

*Appellee*.

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January 26, 2018

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PER CURIAM.

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

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

After reviewing Kelley's response to the order to show cause, as well as the State's arguments in reply, we conclude that Kelley is not entitled to relief. Kelley was sentenced to death following the jury's recommendation for death by a vote of eight to three, and his sentence of death became final in 1986. *See Kelley v. State*, 486 So. 2d 578, 580 (Fla. 1986).[1] Thus, *Hurst* does not apply retroactively to Kelley's sentence of death. *See Hitchcock*, 226 So. 3d at 217. Accordingly, we affirm the denial of Kelley's motion.

The Court having carefully considered all arguments raised by Kelley, 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*.

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[1] While the jury's vote recommending a sentence of death is not reflected in this Court's opinion on direct appeal, Kelley represents in his response that the vote was eight to three. Appellant's Br. in Resp. to Show Cause Order, *Kelley v. State*, No. SC17-830 (Fla. Oct. 2, 2017), at 1. The record in Kelley's direct appeal reflects that Kelley agreed to proceed with only eleven jurors when one of his jurors was excluded during the penalty phase due to an illness and a death in the family.

An Appeal from the Circuit Court in and for Highlands County, Frederick J. Lauten, Judge – Case No. 281981CF000535CFAXMX

Kevin J. Napper, The Law Offices of Kevin J. Napper, P.A., Tampa, Florida, and Sylvia H. Walbolt, Joseph H. Lang, Jr., Chris S. Coutroulis, E. Kelly Bittick, Jr., and Mariko Shitama Outman, Carlton Fields Jorden Burt, PA., Tampa, Florida,

*for Appellant*

Pamela Jo Bondi, Attorney General, and Christina Z. Pacheco, Assistant Attorney General, Tampa, Florida,

*for Appellee*

**APPENDIX B**

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT,
IN AND FOR HIGHLANDS COUNTY, FLORIDA

[Filed 3/28/2017]

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Case No. 1981-CF-535

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STATE OF FLORIDA,

*Plaintiff*,

vs.

WILLIAM HAROLD KELLEY,

*Defendant*.

---

ORDER DENYING SUCCESSIVE MOTION FOR POSTCONVICTION RELIEF IN THE LIGHT OF *HURST V. FLORIDA*

This matter came before the Court for consideration of Defendant William Harold Kelley's Successive Motion to Vacate Judgment of Conviction and Sentence, filed November 21, 2016, pursuant to Florida Rule of Criminal Procedure 3.851; *Hurst v. Florida,* 136 S.Ct. 616 (2016); and *Hurst v. State,* 202 So. 3d 40 (Fla. 2016). After reviewing the Motion, file, and record, together with the State's Response, filed December 6, 2016; the State's Motion to Dismiss, filed February 6, 2017; Defendant's Response in Opposition to Plaintiff's Motion to Dismiss, filed February 22, 2017; and State's Reply to Defendant's Response to Motion to Dismiss, filed February 24, 2017; conducting a case management conference on March 15, 2017; and considering Defendant's Supplemental Memorandum,

filed March 24, 2017; this Court finds that Defendant is not entitled to relief.

Procedural History

Defendant was indicted in 1981 in the above-styled case for a murder that took place in 1966. His first trial ended in a mistrial. The second resulted in his conviction and death sentence in 1984, which the Florida Supreme Court affirmed; *Kelley v. State,* 486 So. 2d 578, 579-580 (Fla. 1986), *cert. denied,* 479 So. 2d 871 (1986).

On November 20, 1987, Mr. Kelley filed a Rule 3.850 motion, which was denied in August 1988. The Florida Supreme Court affirmed; *Kelley v. State,* 569 So. 2d 754, 756758 (Fla. 1990).

On April 8, 1991, Mr. Kelley filed a Petition for Writ of Habeas Corpus, and the Florida Supreme Court denied relief; *Kelley v. Dugger,* 597 So. 2d 262 (Fla. 1992). The United States District Court reversed his conviction and ordered a new trial; *Kelley v. Singletary,* 222 F.Supp.2d 1357, 1363-1364 (S.D. Florida 2002). The Eleventh Circuit Court of Appeals reversed the district court and held that the conviction and sentence should stand; *Kelley v. Secretary for Department of Corrections,* 377 F. 3d 1317, 1354-1361 (11th Cir. 2004), *cert. denied,* 125 S. Ct. 2962 (2005).

In 2002, Mr. Kelley filed a successive Petition for Writ of Habeas Corpus citing *Ring v. Arizona,* 536 U.S. 584 (2002), and the Florida Supreme Court denied relief on May 4, 2004. *Kelley v. Crosby,* 874 So. 2d 1192 (Fla. 2004).

On January 17, 2006, Mr. Kelley filed a Motion for Postconviction DNA Evidence Testing pursuant to Rule 3.853, which was denied after an evidentiary

hearing. The Florida Supreme Court affirmed; *Kelley v. State,* 974 So. 2d 1047 (Fla. 2007).

On May 9, 2007, Mr. Kelley filed a successive Rule 3.851 Motion, which was denied. The Florida Supreme Court affirmed; *Kelley v. State,* 3 So. 3d 970, 972 (Fla. 2009), *rev, denied,* 558 U.S. 946 (2009).

On October 17, 2014, Mr. Kelley filed another successive Rule 3.851 Motion, which was denied. The Florida Supreme Court affirmed; *Kelley v. State,* 192 So. 3d 38 (Fla. 2015).

Through collateral counsel, Mr. Kelley now alleges his death sentence must be vacated pursuant to the *Hurst* decisions because the judge, not the jury, made the factual findings required to impose his death sentence and because the jury's recommendation of death was not unanimous. He argues that these decisions are retroactive under Florida's long-established retroactivity test, set forth in *Witt v. State,* 387 So. 2d 922 (Fla. 1980); retroactivity ensures protection of the Sixth and Eighth amendment rights of Florida death row inmates; he sought timely relief after the United States Supreme Court issued *Ring v. Arizona,* 536 U.S. 584 (2002); and retroactivity should not be truncated or limited to the subset of death sentences finalized after *Ring*. He concludes that in *Hurst v. Florida,* the United States Supreme Court overruled its prior cases, *Hildwin v. Florida,* 490 U.S. 638 (1989), and *Spaziano v. Florida,* 468 U.S. 447 (1984), which formed the basis for the Florida Supreme Court's ruling that *Ring* was not retroactive.

Mr. Kelley further alleges the errors are not harmless, because three of the eleven jurors in his case refused to recommend death and there was no way to determine which aggravators, if any, the jurors

unanimously found proven beyond a reasonable doubt, whether they found the existence of any mitigating circumstances, and whether they unanimously concluded there were sufficient aggravating factors to outweigh the mitigating circumstances. He notes that one juror was released before the penalty phase, and he agreed on the record to continue with the remaining jurors, but contends he would not have done so if the sentencing decision had to be unanimous.

Finally, Mr. Kelley concludes that his death sentence violates the Eighth Amendment, because in *Hurst v. State,* the Florida Supreme Court ruled that "jury unanimity in any recommended verdict resulting in a death sentence is required under the Eighth Amendment."

In its Response, the State argues that *Hurst v. Florida* did not create or recognize a new constitutional right, holding only that Florida's procedure for imposing the death penalty violated a defendant's Sixth Amendment right to a jury trial, as that right is construed in *Ring v. Arizona.* The State further argues that neither *Hurst v. Florida* nor *Hurst v. State* have been held to apply retroactively, and *Ring v. Arizona* itself is not subject to retroactive application. *Schriro v. Summerlin,* 542 U.S. 348 (2004).

With regard to the claim of an Eighth Amendment violation, the Florida Supreme Court has noted that while *Hurst v. State* cited both the Sixth and Eighth Amendments to the United States Constitution as a basis for the requirement of unanimity, "our basic reasoning rests on Florida's independent constitutional right to trial by jury." *Perry v. State,* No. SC16-547, 41 Fla. L. Weekly S449, n.4 (Fla. Oct. 14, 2016).

Notwithstanding Mr. Kelley's arguments in favor of retroactivity, he acknowledges in the Supplemental Memorandum that on March 17, 2017, the Florida Supreme Court issued an order denying relief in *Archer v. Jones,* SC16-2111, 2017 WL 1034409 (Fla. Mar. 17, 2017), expressly stating that "*Hurst v. Florida* and *Hurst v. State* do not apply retroactively to capital defendants whose death sentences were final when *Ring v. Arizona,* 536 U.S. 584 (2002), was decided." In the interest of preserving his claims, Mr. Kelley states in the Supplemental Memorandum:

> Still unresolved, in all events, are the issues of whether *Hurst v. Florida* and *Hurst v. State* must be applied retroactively to Kelley under federal law and whether the creation of a bright-line rule based on the date *Ring* was issued is arbitrary and capricious. Kelley expressly invokes the Sixth Amendment, the Eighth Amendment, and the Fourteenth Amendment, including due process and equal protection doctrines in this regard. Given the recent development described above, Kelley will devote the rest of this memorandum to those unresolved issues under the federal constitution.

However, this Court concludes that it is bound by the Florida Supreme Court's rulings in *Archer* as well as Asay *v. State,* No. SC16-223, 41 Fla. L. Weekly S646 (Fla. Dec. 22, 2016); *Gaskin v. State,* No. SC15-1884, 42 Fla. L. Weekly S16 (Fla. Jan. 19, 2017); *Bogle v. State,* No. SC11-2403, 2017 WL 526507 (Fla. Feb. 9, 2017); *Lambrix v. State,* SC16-8, 2017 WL 931105 (Fla. March 9, 2017); *et al.* Therefore, the Court is obliged to find that Defendant is not entitled to relief

from his death sentence based on a retroactive application of *Hurst v. Florida* and *Hurst v. State.*

Based on the foregoing, it is ORDERED AND ADJUDGED:

1. The Successive Motion for Postconviction Relief is hereby DENIED.

2. Mr. Kelley may file a Notice of Appeal in writing within 30 days of the date of rendition of this Order.

3. The Clerk of Court shall promptly serve a copy of this Order upon Defendant, including an appropriate certificate of service.

DONE AND ORDERED in chambers at Orlando, Orange County, Florida this 28 day of March 2017.

/s/ Frederick J. Lauten
FREDERICK J. LAUTEN
Chief Judge

Certificate of Service

I certify that a copy of the foregoing Order has been provided this 28th day of

March 2017 via U.S. Mail / electronic mail to the following parties of record:

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/s/ [Illegible]
Judicial Assistant

**APPENDIX C**

[941] IN THE CIRCUIT COURT OF THE 10TH JUDICIAL CIRCUIT IN AND FOR HIGHLANDS COUNTY, FLORIDA

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Case No. CR31-535

---

STATE OF FLORIDA,

*Plaintiff*,

v.

WILLIAM HAROLD KELLEY,

*Defendant*.

---

Proceeding had and taken before the Honorable E. RANDOLPH BENTLEY, Judge of the Circuit Court, Tenth Judicial Circuit, at the Highlands County Courthouse, Sebring, Florida, on Monday, April 2, 1984, commencing at or about 10:00 o'clock a.m.

APPEARANCES:

HARDY O. PICKARD, ESQ.,
Assistant State Attorney,
appearing on behalf of the State.

JACK T. EDMUND, ESQ.,
appearing on behalf of the Defendant.

WILLIAM M. KUNSTLER, ESQ.,
appearing on behalf of the Defendant.

* * *

[949] MR. KUNSTLER: Judge, what is the procedure normally?

MR. EDMUND: He puts on his case, we put on our case.

MR. PICKARD: I argue and then the Defense argues.

THE COURT: How long do you all want? That's the next question.

MR. PICKARD: I don't need any more than ten minutes.

MR. EDMUND: That's enough.

THE COURT: Okay. Then it looks like what we need to do is get the typing done.

I'm inclined to give them one written copy.

MR. EDMUND: We will get out of your hair then.

(Thereupon a recess was taken, after which, with all parties present, the following proceeding were had:)

THE COURT: Be seated please.

Does the State have anything?

MR. PICKARD: Number one would be it's my understanding that we're going to go with eleven rather than [950] twelve jurors?

THE COURT: Yes, that is true. That needs to be put on record. That was decided after the illness of one of the jurors.

Mr. Edmund?

MR. EDMUND: Yes, sir, we waived that.

THE COURT: For the record, I think your client needs to acquiesce in that also.

MR. EDMUND: Bill, do you understand that we have agreed to go to this jury with twelve or fewer but not fewer than ten? Do you acquiesce?

THE DEFENDANT: Yes.

THE COURT: Is it agreeable to the State also that the one juror has been excluded because of a death in the family?

MR. PICKARD: Yes. I would ask that the record show that the defendant is aware of a situation of six jurors rather than what normally would be seven would return an advisory recommendation.

THE COURT: All right. Is that the defendant's understanding?

MR. EDMUND: We understand that.

THE DEFENDANT: Yes, your Honor.

THE COURT: Is there anything else we need to deal with?

* * *

[953] jury is thinking in order to find some purpose to impeach the verdict.

MR. KUNSTLER: What if it is something to impeach the verdict?

THE COURT: Should you put a monitor on a juror during the trial?

MR. KUNSTLER: No, but that may be repudiation of something.

THE COURT: If they did or did not take the notes, the accuracy of the notes they took are not a matter of more than the recollection of what goes on.

All right, motion denied.

Ladies and Gentleman, first of all, thank you for your promptness today. I'm sorry we are late getting started. It certainly wasn't your fault.

I think one thing should be explained to you. I think you will notice there's one less of you today than Friday. The lady who is missing had a death in the family and had to travel out of state. The Court and attorneys for both sides have stipulated to that and agreed to continue without her.

Now, ladies and gentlemen, you have found the Defendant, William Kelley, guilty of the crime of First Degree Murder.

Now, the punishment for this crime is

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[978] copies for each one of you, but there will be a copy you can take back to the jury room with you.

Now, Ladies and Gentlemen of the Jury, it is now your duty to advise the Court as to what punishment should be imposed upon the Defendant for his crime of first degree murder.

As you have been told, the final decision as to what the punishment shall be imposed is the responsibility of the Judge; however, it is your duty to follow the law that will now be given you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

Your advisory sentence should be based upon the evidence that you heard while trying the guilt or

innocence of the Defendant and evidence that has been presented to you in these proceedings.

The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence:

1. The crime for which William Kelley is to be sentenced was committed while he was under sentence of imprisonment.

* * *

[982] If you are reasonably convinced that mitigating circumstance exists, you may consider it as established.

The sentence that you recommend to the Court must be based upon the facts as you find them from the evidence and the law. You should weigh the aggravating circumstances against the mitigating circumstances, and your advisory sentence must be based on these considerations.

In these proceedings it is not necessary that the advisory sentence of the jury be unanimous. Your decision may be made by a majority of the jury.

The fact that the determination of whether a majority of you recommend a sentence of death or sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot you should carefully weigh, sift and consider the evidence, and all of it, realizing that a human life is at stake, and bring to bear your best judgment in reaching your advisory sentence.

If a majority of the jury determine that William Kelley should be sentenced to death, your advisory sentence will read:

A majority of the jury by a vote of blank to blank – put in the vote – advise and recommend to the [983] Court that it impose the death penalty upon William Kelley.

On the other hand, if by six or more votes the jury determines that William Kelley should not be sentenced to death, your advisory sentence will be:

The jury advises and recommends to the Court that it impose a sentence of life imprisonment upon William Kelley.

You will be given verdict forms for those recommendations.

In just a moment you will retire to consider your recommendation. When six or more of you are in agreement to recommend the imposition of the death sentence or when six or more of you are in agreement to recommend life imprisonment, then the appropriate form of recommendation should be signed by your foreman or forewoman and presented to the Court.

Counsel approach the Bench.

(Thereupon, Counsel for the respective parties approached the Bench and conferred with the Court out of the hearing of the Jury as follows:)

THE COURT: Did I omit any instructions I advised Counsel I would give or are there any objections other than those already on record?

MR. EDMUND: Only those that are on the

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[989] question, not for any jury notes to be available for any purpose whatsoever or the mental process of the jury as they listen to the testimony.

For that reason I will enter that order.

MR. EDMUND: Will you extend that to two weeks from today? We have to go to Tallahassee. I don't know what things look like in my office.

THE COURT: I will make it two weeks from today. Two weeks from Monday at Monday noon they will be destroyed.

Anything else before court recesses?

Let me advise Counsel that Court will retire to chambers and unless something arises it would be my intention to impose sentence today. I can assure you it will be at least an hour before court will be reconvened. Thereafter court will reconvene when the Court has reached a decision. You will be available, but it will be that long, and I suspect somewhat longer.

MR. KUNSTLER: We have some statement for the Court on behalf of Mr. Kelley.

THE COURT: You certainly need to present them now.

MR. KUNSTLER: It will only take ten minutes.

THE COURT: Yes, sir, you may proceed then.

[990] These are statements that were not presented to the jury?

MR. KUNSTLER: That's correct. They are for you since you do the sentencing.

THE COURT: All right, you may present them in open court.

MR. KUNSTLER: We only have essentially one witness who is Marivon Adams who is the daughter.

THE COURT: I am vastly puzzled why these were not done before the jury, but you may proceed.

MR. KUNSTLER: It was my impression that they should be presented before you since you are the decider.

THE COURT: Do you wish the witness sworn?

MR. KUNSTLER: No.

MS. ADAMS: I would just –

THE COURT: Excuse me. I don't want to disrupt you. Your name, please.

MS. ADAMS: Marivon Adams, 1106 Worth Road, Ocala, Florida 32761.

THE COURT: Thank you. Go ahead.

MS. ADAMS: I would just like you to take into consideration Mr. Kelley's life. I don't believe he's gui8lty. I know this man is not guilty but I know that John Sweet is.

[991] The man that should be sitting in his chair should be John J. Sweet. He master-minded this, he manipulated everybody's minds, and he's walking free.

So that is what I would like to say.

MR. KUNSTLER: Thank you very much.

Judge, what I have to deliver will only be five minutes. We thought it more appropriate for you than for the jury.

Judge Bentley, because I wanted my last words in this courtroom to be exactly as I meant them, I wrote

them out, which I don't usually do, but I felt the solemnity of the occasion called for something more than off-the-cuff remarks. Accordingly, I spent together a considerable amount of time this past weekend putting together the words which I have put down on paper, and, if Your Honor does not mind, I will read them rather than try to say them from memory.

In a short time, this Court will sentence William Kelley to die or to live. In England, the royal judges gave proceedings such as this an awesome and graphic solemnity by placing a black cloth over their wigged heads, if the sentence was to be death, and sometimes pointing the tip of an unsheathed dagger in the condemned prisoner's direction before imposing the dread punishment of extinction. On these shores, we have long since [992] dispensed with such pomp and circumstance, and our sentencing sessions in capital cases are conducted with no more ceremony than other far less fateful court appearances. Yet, the result is the same – the State is specifically authorized to terminate a human life.

In making these brief pre-sentencing remarks, it is my desperate hope that their import will travel far beyond the walls of this tiny courtroom and perhaps reach the consciousness of as society which likes to pride itself upon its fervant dedication to the highest principles of ethics and morality. Accordingly, I want to talk on two levels – the general one and the other specifically addressed to this case and this particular Defendant.

The death penalty has ever been on of humanity's more tragic illusions. Throughout all recorded history, it has been proferred as a most effective deterrent to every crime from high treason to pickpocketing. Despite all evidence to the contrary, including this case itself,

many thoughtful people, the world over, panicked by what they perceived to be the seemingly inexorable increase in the violent crime rate, shocked by particularly heinous acts, or frightened by real or imagined threats to their country's national security, have acquiesced in the initiation, maintenance, restoration or extension of capital punishment. In this nation, after an [993] inspired hiatus of many years, we are now witnessing the wholesale return of the firing squad, the gallows, the gas chamber and the electric chair, to say nothing of such novel methods of taking life as the injection of lethal drugs, in the pathetic and mistaken hope that, somehow, the corpses created by these mechanisms will make the future safe for us all.

Over the centuries, in grasping for this illusory straw, we have authorized our public executioners to draw and quarter, poison, press, crucify, impale, gas, beat, garrot, burn, drown, guillotine, hang, starve, stone, shoot, bury alive, inject, disembowel, electrocute and cut the throats of hundreds and thousands of our fellow human beings. In so doing, we have rationalized our resort to officially sanctioned murder by clinging to the earnest hope that the desired end of a relatively safe environment justifies any means taken to obtain it. What we always fail to take into consideration, and even strenuously deny, is the existence within ourselves of the unreasoning need for revenge and retribution – the eye for an eye and tooth for a tooth stricture of the Mosaic Code. However psychologically satisfying may be the fulfillment of such a compelling urge, it does nothing to advance the slow and halting progress of humankind to some dimly viewed, albeit deeply desired and needed, concept of universal morality.

[994] Some of those who favor the death penalty often ask its opponents whether they would feel the same way if the victim was someone near and dear to them. Surely, ethical standards cannot be dedicated by the grief or fury of those most immediately affected by a criminal act. As feeling persons, our hearts must go out to Charles Von Maxcy's survivors and friends, but we simply cannot build the moral edifice of our civilization upon the transient emotions, no matter how heartfelt, of those who have borne the outlaw's sting. Just as surgeons find it well nigh impossible to operate on their own kin, so we must seek our El Dorado by the application of abstract rather than personalized principles of human conduct.

It has been a long and arduous journey up the mountain since our long-forgotten ancestors first began to walk upright among the face of the earth. Slowly but surely, as rationality began to replace or temper superstition and mythology, we have managed to put aside the devils and demi-gods who ruled our fantasy world of cause and effect in favor of analyses based upon the application of logic and reason. Unfortunately, we have not been able to subjugate all of our very real and pressing fears of the unknown and often unseen forces that seem to control or influence our destinies. Periodically, we yield to the compulsion of such terrors and burn our [995] witches or our books until, at long last, our minds overtake our manias. Then, shaken by shame and contrition, we vow that never again will we surrender to the primordial in our nature, a promise we somehow seem unable to keep for a very long period.

This has been a particularly troublesome case for all thinking and feeling human beings. A member of an extremely prominent family in this community was

brutally and cruelly murdered for no reason than to profit others. He was cut off from the prime of life and all of us on the defense team have been daily reminded of this fact by the presence of Marivon, his daughter, who, at the time of his death, was only five years old and forced to grow up without her natural father. We have seen the color photographs of his murdered body and we can easily imagine the terror and pain which must have accompanied his death almost two decades ago.

On the other hand, we also realize that everyone, other than the Defendant here, who has been accused of instigating or participating in Mr. Maxcy's slaying has, in the long run, escaped the punishment that will be meted out by this Court today. In fact, the man, without whose aid there would have been no murder, not only avoided final punishment, but has gained from his involvement. The Court is also well cognizant of the [996] immoral character of such a man and the nature of the evil he has wreaked upon young and old alike wherever his presence has been.

I will not touch upon the guidelines available to Your Honor as we both read them together last Friday after the verdict was returned by the jury and you will apply them as you see fit. What I do want to stress are the unfortunate facts that Mr. Kelley was forced to stand trial almost a score of years after the crime, that he was denied access to pertinent evidence which was destroyed by court order upon application by the prosecution, and that his conviction was squarely based upon the testimony of a moral leper with the world to gain for it. This was an impossible case to defend and I do not like to think that reasonable men could differ on the fact that there are significant legal

issues to be decided by the appellate courts before this saga will have run its course.

The Supreme Court of the United States has reminded us, in Enmund vs. Florida, 102 S. Ct. 3368 (1982), that the Eighth Amendment poses some obstacles to the identical treatment of convicted criminals and their accomplices, insofar as the death penalty is concerned. The evidence before you clearly shows this particular murder was planned and instigated by others than William [997] Kelley, with the goal of immense personal gain. Assuming him to be guilty for the sake of this argument, he was but the tool of others who used him to reap an enormous financial advantage. Twenty-three years old at the time, he was nothing more than the impersonal adjunct of others, without whose unholy alliance Charles Von Maxcy might very well be alive today.

What is significant to all of us today is that we are joint participants in what may be a stark and deadly ritual, at the end of which there is an oaken chair capable of subjecting a human being to 2,000 lethal volts of electricity. For us, the defense lawyers, the agony is second only to that of the man we represent. No one who has not experienced the terrible responsibility of defending an accused in a capital case can possibly know or appreciate the inner anguish of hearing a court clerk utter the single, paralyzing word, "Guilty," at the end of such a trial. This is particularly so where, as here, the proof fell considerably below the reasonable doubt standard.

As professionals, we attorneys always feel that we must hide our true feelings at moments like these from the Court, the press, the general public and, difficult as it is, even from the client himself. But all of us associated with the defense of William Kelley, despite

the gnawing ache in our hearts, are determined that [998] we will not rest until we have done everything in our power to exonerate him and to eliminate capital punishment in this and all states. We swear this to him, to ourselves, and to all others with whom we share this planet. Feeling as we do, we can do no other.

Now, Judge Bentley, we have done with words and you must do what you must do. We can only ask that, whatever penalty you impose, you do so with thought, understanding and compassion, so that you are able to live with yourself when you have done so. In the long run, the quality of our civilization will not be measured by the lives we take in the name of the State but by our ability to reach beyond ourselves for the omnipresent stars. If you opt for life rather than death, your eyes will be on the heavens and not the depths of the earth upon which we mortals now stand.

Thank you for your consideration and patience in listening to these remarks and for the care that you will give to your fateful decision.

Thank you, judge.

THE COURT: Thank you, sir. All right. Is there anything further? If not, the Court will be in recess.

(Thereupon, a recess was taken, after which all parties present,

* * *

**APPENDIX D**

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT IN AND FOR
HIGHLANDS COUNTY, FLORIDA

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Case No: CR81-535

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STATE OF FLORIDA,

*Plaintiffs*,

vs.

WILLIAM KELLEY,

*Defendant*.

---

ADVISORY RECOMMENDATION

A MAJORITY OF THE JURY, BY A VOTE OF 8-3 ADVISE AND RECOMMEND TO THE COURT THAT IT IMPOSE THE DEATH PENALTY UPON WILLIAM KELLEY.

DATED THIS 2nd day of April, 1984.

/s/ Blake Allen Longshore
FOREPERSON

**APPENDIX E**

IN THE CIRCUIT OF HIGHLANDS COUNTY, FLORIDA

---

Case No. CR81-535

---

STATE OF FLORIDA,

*Plaintiff,*

vs.

WILLIAM KELLEY,

*Defendant*.

---

FINDINGS OF FACT

The defendant was indicted by the Grand Jury of Highlands County, Florida, for First Degree Murder. Trial by jury was held and the defendant was found guilty of First Degree Murder.

In a separate proceeding a majority of the trial jury recommended to the court that the death penalty be imposed on the defendant as to the offense of Murder in the First Degree.

In making the following findings of fact and conclusions of law the court has taken into consideration the testimony produced at trial and at the penalty phase.

The court makes the following findings of fact.

1. As an aggravating circumstance, the defendant WILLIAM KELLEY was previously convicted of a felony involving the use or threat of violence to the person, in that he was convicted of conspiracy to rob in the State of Massachussetts in 1959, and on the same

date convicted of robbery. Since these two charges, from their dates, appear to have arisen from the same transaction the court will consider these as only one crime.

2. As an aggravating circumstance, the capital felony, that is, murder of Mr. Maxcy, was committed for pecuniary gain. The sum of $20,000 was paid to a third man to procure the murder. Mr. Kelley and Mr. Von Etter traveled to Florida and accomplished the killing. There is testimony to the effect that Mr. Kelley received $5,000 of this sum. Even if the precise amount received is incorrect, the evidence establishes without question that Mr. Kelley's participation was for pecuniary gain.

3. As an aggravating circumstance, the capital felony was a homicide and was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification. Mr. Kelley had never met the victim, Mr. Maxcy. The killing was preceded by telephone calls and a "scouting trip" by Mr. Von Etter. The killing was thoroughly planned in advance. The purpose of the killing was to prevent Mr. Maxcy from disinheriting Irene Maxcy or divorcing her. None of the parties have any pretense of moral or legal justification. This particularly applies to Mr. Kelley and Mr. Von Etter who were hired killers.

4. The other aggravating circumstances are inapplicable in this case.

As to mitigating circumstances, the court makes the following findings:

1. The defendant has a significant history of prior criminal activity and therefore this is not a mitigating factor.

In 1963 in federal court he was convicted of 14 counts of forgery of a money order.

In the State of Massachussetts in 1963 he was convicted of 2 counts of uttering a forged instrument and 2 counts of theft.

In 1957 he was convicted in the State of Massachussetts of carrying in a vehicle an automatic spring-release knife; unlawful use of an automobile; and possession of burglary tools.

In 1967 in the State of Massachussetts he was convicted of burglary of a restaurant, and possession of burglary tools.

In 1971, he was convicted in the State of Massachussetts of possession of burglary tools and burglary of a, dwelling.

In addition, as previously indicated under aggravating circumstances, he was convicted in 1959 in the State of Massachussetts of conspiracy to rob and robbery.

2. There is no evidence that this murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

3. There is no evidence that the victim was a participant in the defendant's conduct or consented to the act.

4. There is no evidence that the defendant was an accomplice in a capital felony committed by another person and that his participation was relatively minor. It has been argued that it is unknown who actually murdered Mr. Maxcy. There is credible evidence that the defendant later said that after he stabbed Mr. Maxcy the victim did not die and that he then shot him. Even if the court disregarded this statement, the

fact remains that Mr. Kelley was one of the two people who entered the house, after which one or both of them murdered Mr. Maxcy. This is in no way a case of an accomplice waiting outside or not actively participating. The court finds this mitigating circumstance does not apply.

5. There is no evidence that the defendant acted under extreme duress or under the substantial domination of another person.

6. There is no evidence that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.

7. The defendant was 23 years of age at the time of this crime, and his age is therefore not a mitgating circumstance.

8. The following other mitigating circumstances have been advanced.

It is contended that Mr. Kelley's prior criminal history is not significant because of its age, the lack of very recent convictions, and because many of the acts are petty criminal acts. The court disagrees. Mr. Kelley's record begins with robbery in 1959, and ends with burglary of a dwelling in 1971. It includes 2 burglaries and a robbery in addition to the other enumerated crimes.

It is argued that the sentencing guidelines in effect in the State of Florida discount older crimes. The guidelines do not apply to first-degree murder.

It is contended that the date of the crime is a factor in mitigation. There is no statute of limitations for first-degree murder. Remoteness in time by itself is not a mitigating factor.

It is contended that there is a disparity in punishment in that no one else has been convicted of this crime and that Mr. Kelley was only a tool and not the instigator. Irene Maxcy stood to gain an immense amount of wealth and Mr. Sweet would have benefited greatly. Mr. Sweet was tried once and the jury could not agree. Upon his second trial he was convicted but the appellate court reversed. He was never tried again. Irene Maxcy was tried and convicted for perjury at Mr. Sweet's trial. She was never tried for murder. Mr. Von Etter died by an act of violence not long after this killing.

Although strictly speaking disparity of punishment applies to those convicted of the crime, the court is troubled by these circumstances. The court understands the argument that dictates the giving of immunity on occasion so that other guilty parties may be convicted. However, under the circumstances, the court finds that this is a mitigating factor.

It is contended that the destruction of evidence is a mitigating factor. The legal issue in that regard has already been ruled on by this court. Over and beyond that, there is no indication that the destruction of evidence years ago affected Mr. Kelley's case. In many instances copies of destroyed documents existed. The most important missing items were the sheet with which the victim was covered and the bullet. The court is of the opinion that the missing evidence did not affect or cloud the issues sufficiently to be treated as a mitigating factor.

Finally, it is suggested that Mr. Sweet's character is so bad that this constitutes a mitigating factor. Without question Mr. Sweet is a bad and evil person. The question, however, is whether he is telling the truth or not in this case. The jury, by its verdict,

demonstrated that it, like the court, believes his testimony. This is not a mitigating circumstance.

It is the finding and determination of the court that as to the charge of first-degree murder the aggravating circumstances substantially outweigh the mitigating circumstances and that therefore the death penalty should be imposed upon the defendant.

DONE this 2nd day of April, 1984, in open court in Highlands County, Florida.

/s/ E. Randolph Bentley
E. RANDOLPH BENTLEY, Circuit Judge

**APPENDIX F**

[1] IN THE CIRCUIT COURT OF THE NINTH
JUDICIAL CIRCUIT, IN AND FOR
ORANGE COUNTY, FLORIDA
CRIMINAL JUSTICE DIVISION

———

Case No.: 1981-CF-0535
Division No.: 99

———

STATE OF FLORIDA,

*Plaintiff*,

vs.

WILLIAM HAROLD KELLEY,

*Defendant.*

———

CASE MANAGEMENT CONFERENCE

BEFORE

THE HONORABLE CHIEF JUDGE
FREDERICK J. LAUTEN

———

In the Orange County Courthouse
Courtroom 19 D
Orlando, Florida 32801
March 15, 2017
Susan McGee, RMR, CRR

APPEARANCES:

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On behalf of the Defendant via Teleconference

* * *

[14] requirement embraces that and also embraces the evolving standards of decency that the United States Supreme Court has enunciated as an Eighth Amendment concept. And all of that points to the fact that this is substantive. And an Eighth Amendment, um, substantive change in the law that *Montgomery vs. Louisiana* would dictate should be retroactive to all defendants.

I would also note that this *Ring vs. Florida* line I think is arbitrary, we argue is arbitrary and capricious as a place to draw a line, either for the Sixth Amendment or the Eighth Amendment claim.

And, first, as to the Sixth Amendment claim, it's arbitrary to draw a line in *Ring* when somebody whose conviction became final the day before *Ring* would, under the State's theory, not get the benefit of this, and somebody whose conviction became final the day after would.

But what's more interesting to me than just that one-day difference are cases like this, the *Paul Beasley Johnson* case, Your Honor.

There is a case where Mr. Johnson's conviction became final decades ago. But by virtue of getting a new sentencing -- he got a new sentencing proceeding. And his new sentence would have been imposed after [15] *Ring*. And so somebody like Paul Beasley Johnson would get the benefit of retroactivity under the State's approach to retroactivity, but Mr. Kelley, under the State's approach, would not because he – his conviction, which also became final prior to *Ring*, he didn't get a resentencing that fell after *Ring*. But the reason I bring this up is, as far as a conviction being final, Mr. Johnson's conviction and Mr. Kelley's conviction were both final before *Ring*. But this is going to apply differently to Mr. Johnson and to Mr. Kelley under the State's approach, which just underscores the arbitrariness of this rule under the State's approach.

More to the point, though, or a separate point that I think makes my arbitrary and capricious point even better, is we know that under the Sixth Amendment there is a tie to *Ring*. *Ring* is what is the undergirding of the *Hurst vs. Florida* United States Supreme Court opinion. It builds out of the *Ring* opinion.

But as far as the unanimity decision in Hurst *vs. State* from the Florida Supreme Court, there's no

direct tie at all between the unanimity requirement under the Eighth Amendment and this arbitrary – this arbitrary point in time when *Ring* was decided. *Ring*, [16] in the Eighth Amendment issue, has no relationship at all. And if the reason we're not going to make the Eighth Amendment change retroactive to before *Ring* doesn't have any reason to it, it's arbitrary.

Now, no court has even said that specifically, that they're not going to do that. Because the Eighth Amendment retroactivity issue is still an open issue. The *Asay* case did not say that the Eighth Amendment unanimity requirement was even being addressed.

I think that the final point I want to make before turning it over, I guess, to the Court and to the State is that I would like to, um, point out that in the motion to dismiss, the State makes the point that we can tell what's going on here by looking at the dissents in *Gaskin*, for instance.

Justin Pariente dissented in *Gaskin*, and sets out what the State says sounds a lot like the argument I'm making today. But you can't – as a very fundamental rule of appellate procedure and appellant practice, you cannot define a majority opinion based on what the dissent says. Many dissents are written to try to prompt a reaction from the majority, to try to prompt the majority to write about something that may have been waived, it might have been abandoned, but the

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[21] I would also argue he mentioned Paul Beasley Johnson as getting a retroactive benefit. But Paul Beasley Johnson is getting the benefit of the fact he had constitutional error, unrelated to any *Hurst* or Sixth Amendment or jury claim, that tainted his – his

other sentencing, and he was awarded a new sentencing proceeding on that basis. It just so happens that before his new sentencing proceeding had been held, *Hurst* came out and the law had changed. And, yes, he will get the benefit of this new law, but he's not getting it retroactively. He hasn't had the sentencing proceeding yet. So I think that's a little bit disingenuous to rely on a case and argue that he's getting the retroactive benefit from *Hurst*, when he's really just getting the luck of the draw of the timing on having his constitutional claim actually recognized by the court.

So we would ask that Your Honor deny this motion. I agree there's been a flood of case law, but it has all been consistent, and consistently all relief under *Hurst* and *Hurst v. State* is being denied by any cases up in the Florida Supreme Court where the decision was final, the sentence was final prior to *Ring* in 2002.

THE COURT: Okay. Thanks, Ms. Dittmar.

Mr. Lang, I'm gonna ask your patience for just

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