APPENDIX

A

236 So.3d 242
Supreme Court of Florida.

Alvin Leroy MORTON, Appellant,
v.
STATE of Florida, Appellee.

No. SC17–1715
|
[February 2, **2018**]

Synopsis

Background: After affirmance of defendant's murder conviction and vacation of death sentence, 689 So.2d 259, and affirmance of resentencing to death, 789 So.2d 324, defendant filed a motion for collateral relief. The Circuit Court, Pasco County, No. 511992CF000308CFAXWS, William Robert Webb, Senior Judge, denied the motion. Defendant appealed.

[Holding:] The Supreme Court held that *Hurst v. State*, 202 So.3d 40, which required a jury to unanimously find that aggravating factors were sufficient to impose death, did not apply retroactively to defendant's death sentence.

Affirmed.

Pariente, J., filed an opinion concurring in result.

Lewis and Canady, JJ., concurred in result.

West Headnotes (1)

[1] Courts
In general;retroactive or prospective operation

Florida Supreme Court decision in *Hurst v. State*, 202 So.3d 40, in which Court held that a jury to was required to unanimously find that aggravating factors were sufficient to impose death, did not apply retroactively to defendant's death sentence; defendant was sentenced to death following a jury's recommendation for death by a vote of eleven to one, and his sentence became final approximately 15 years before *Hurst* was issued.

Cases that cite this headnote

***243** An Appeal from the Circuit Court in and for Pasco County, William Robert Webb, Senior Judge—Case No. 511992CF000308CFAXWS

Attorneys and Law Firms

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Opinion

PER CURIAM.

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

Morton's motion sought relief pursuant to the United States Supreme Court's decision in Hurst v. Florida, —— U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), and our decision on remand in Hurst v. State (Hurst), 202 So.3d 40 (Fla. 2016), cert. denied, —— U.S. ——, 137 S.Ct. 2161, 198 L.Ed.2d 246 (2017). This Court stayed **Morton's** appeal pending the disposition of Hitchcock v. State, 226 So.3d 216 (Fla. 2017), cert. denied, —— U.S. ——, 138 S.Ct. 513, 199 L.Ed.2d 396 (2017). After this Court decided Hitchcock, **Morton** responded to this Court's order to show cause arguing why Hitchcock should not be dispositive in this case.

After reviewing **Morton's** response to the order to show cause, as well as the State's arguments in reply, we conclude that **Morton** is not entitled to relief. **Morton** was convicted of two counts of first-degree murder. **Morton** v.

State, 789 So.2d 324, 327 (Fla. 2001). Following a jury's recommendation for death by a vote of eleven to one on both counts, the trial court sentenced **Morton** to death on both counts, and his sentences became final in 2001. Id. at 328. Thus, Hurst does not apply retroactively to **Morton's** sentences of death. See Hitchcock, 226 So.3d at 217. Accordingly, we affirm the denial of **Morton's** motion.

The Court having carefully considered all arguments raised by **Morton**, we caution that any rehearing motion containing reargument will be stricken. It is so ordered.

LABARGA, C.J., and QUINCE, POLSTON, and LAWSON, JJ., concur.

PARIENTE, J., concurs in result with an opinion.

LEWIS and CANADY, JJ., concur in result.

PARIENTE, J., concurring in result.

***244** I concur in result because I recognize that this Court's opinion in Hitchcock v. State, 226 So.3d 216 (Fla. 2017), cert. denied, —— U.S. ——, 138 S.Ct. 513, 199 L.Ed.2d 396 (2017), is now final. However, I continue to adhere to the views expressed in my dissenting opinion in Hitchcock.

All Citations

236 So.3d 242, 44 Fla. L. Weekly S78

APPENDIX

B

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR PASCO COUNTY CRIMINAL DIVISION

STATE OF FLORIDA,

v.

CASE NO.: CRC92-00308CFAWS
UCN: 511992CF000308CFAXWS
DIVISION: 4

ALVIN MORTON,
SPN: 0073919, Defendant.

ORDER DISMISSING THE DEFENDANT'S "SUCCESSIVE MOTION TO VACATE DEATH SENTENCES;" DIRECTIONS TO THE CLERK

THIS CAUSE came before the Court on the Defendant's "Successive Motion to Vacate Death Sentences," filed January 10, 2017, pursuant to Florida Rule of Criminal Procedure 3.851, and the State's response, filed January 30, 2017. On February 29, 2017, the Court conducted its first case management conference and heard the parties' legal arguments. On April 3, 2017, the Defendant filed a "First Amended Successive Motion to Vacate Death Sentences." On April 19, 2017, the State, in response to the Defendant's supplemental filing, filed its "...Response to Defendant's Amended Successive Motion for Post-Conviction Relief." On May 19, 2017, the Court conducted its second case management conferences and heard the parties' legal arguments. Having considered the pleadings, the oral arguments of the parties, the record, the applicable law, the Court finds as follows:

PROCEDURAL HISTORY

On April 6, 1994, following a jury trial, the Defendant was found guilty of two counts of first-degree murder, in connection with the murder of John Bowers and his mother, Madeline Weisser. Following a penalty phase, the jury recommended death on both counts, by a vote of 11-1. On November 9, 1987, the presiding court sentenced the Defendant to death for the murders of both victims, finding that the aggravating circumstances outweighed the mitigating circumstances. Following a timely filed appeal, the Florida Supreme Court affirmed the Defendant's two first-degree murder convictions, but remanded for a new penalty phase, finding error with the penalty phase, because "much of the evidence...supporting the CCP aggravator was introduced through impeachment, yet [the State] asked jury to accept content of impeaching statements as true." *Morton v. State*, 689 So. 2d 259, 265 (Fla. 1997).

Following a new penalty phase, the jury once again recommended death on both counts, again by a vote of 11-1. On March 1, 1999, the presiding court sentenced the Defendant to death for the murders of both victims, again finding that the aggravating circumstances outweighed the mitigating circumstances. Thereafter, the Defendant filed his second direct appeal, raising four claims. On June 28, 2001, the Florida Supreme Court affirmed the death sentences, finding that the Defendant's claims were either procedurally barred, amounted to harmless error, or were meritless. *Morton v. State*, 789 So. 2d 324, 329-35 (Fla. 2001)

Thereafter, the Defendant filed his first motion for postconviction relief, pursuant to Florida Rule of Criminal Procedure 3.851. Following an evidentiary hearing, the Defendant amended his motion for postconviction relief; however, ultimately, the Court denied relief on all of the Defendant's claims. The Defendant appealed the denial of his 3.851 postconviction motion and filed a petition for writ of habeas corpus. On August 28, 2008, the Florida Supreme Court affirmed denial of the Defendant's 3.851 postconviction motion and denied his writ of habeas corpus. *Morton v. State*, 995 So. 2d 233 (Fla. 2008).

On January 10, 2017, the Defendant filed a successive motion to vacate his death sentences. On January 30, 2017, the State filed its response. On February 29, 2017, the Court held its first case management conference, in accordance with Florida Rule of Criminal Procedure 3.851(f)(5)(B), during which defense counsel requested leave to supplement the Defendant's previously filed motion, with additional information. On March 3, 2017, the Court issued an order, incorporated herein by reference, granting the Defendant's request to supplement his motion. On April 3, 2017, the Defendant filed his "First Amended Successive Motion to Vacate Death Sentences." On April 19, 2017, the State, in response to the Defendant's supplemental filing, filed its "...Response to Defendant's Amended Successive Motion for Post-Conviction Relief." On May 19, 2017, following the filing of the Defendant's amended motion and the State's response to the amended motion, the Court heard the legal arguments of the parties at a second case management conference. Julissa R. Fontán, Maria E. DeLiberato, and Chelsea Rae Shriley, appeared on behalf of the Defendant. Senior Assistant Attorney General Scott A. Browne and Assistant State Attorney Sara Macks appeared on behalf of the State of Florida.

ANALYSIS

A motion for collateral relief from a death sentence must be filed within one year after the judgment and sentence becomes final. *See* Fla. R. Crim. P. 3.851(d)(1). Here, the Defendant's sentence was affirmed on June 28, 2001, following the Florida Supreme Court's opinion affirming the Defendant's death sentences, following resentencing, and the mandate was filed with the trial court on July 30, 2001. Unless the Defendant can establish an applicable exception to the time limit, the instant motion is untimely. To that end, the Defendant seeks to establish an exception to the time limit by alleging that his motion is based upon a fundamental constitutional right that has been held to apply retroactively. *See* Fla. R. Crim. P. 3.851(d)(2). Specifically, the Defendant alleges that the United States Supreme Court's ruling in *Hurst v. Florida*, 136 S. Ct. 616 (2016) ("*Hurst v. Florida*") and the Florida Supreme Court's subsequent ruling in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) ("*Hurst*"), created new Sixth and Eighth Amendment rights that are retroactive to his case.

On June 24, 2002, the United States Supreme Court held the Arizona capital sentencing statute unconstitutional, "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." *Ring v. Arizona*, 536 U.S. 584, 609 (2002). A major development occurred in 2016, when on January 12, 2016, the United States Supreme Court held that the "analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's." *Hurst v. Florida*, 136 S. Ct. at 622. On remand, the Florida Supreme Court held that the Sixth Amendment requires that the jury unanimously find the existence of aggravating factors beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating factors. *Hurst*, 202 So. 3d at 53. The court further held that the Eighth Amendment requires that the jury's recommended sentence of death be unanimous in order for the trial court to impose a sentence of death. *Id.* The Florida Supreme Court then had to determine the retroactive effect of *Hurst v. Florida* and *Hurst*, and in doing so; it announced a bright-line rule that *Hurst* does not apply retroactively to sentences that were final before the United States Supreme Court issued its opinion in *Ring*. *See Asay v. State*, 210 So. 3d 1, 22 (Fla. 2016), *reh'g denied*, SC16-102, 2017 WL 431741 (Fla. Feb. 1, 2017); *but see Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), *reh'g denied*, SC14-2108, 2017 WL 510491 (Fla. Feb. 8, 2017) (holding that *Hurst* applies retroactively to sentences that were final after *Ring* was issued) (emphasis added).

For the reasons discussed below, the Court finds that none of the Defendant's claims warrants the retroactive application of either *Hurst v. Florida* or *Hurst*.

Claim 1: The Defendant's death sentences stand in violation of the Sixth Amendment under *Hurst v. Florida* and *Hurst*, and should be vacated

In support of his first claim, the Defendant has presented four sub-claims that require, and warrant, different analysis. The Court will address each sub-claim, separately.

Claim 1(A): The Defendant is entitled to retroactive application of both *Hurst* decisions under the *Witt* analysis

The Defendant first claims that the right created by the *Hurst v. Florida* decision, meets the retroactivity test as announced in *Witt v. State*, 387 So. 2d 922 (Fla. 1980). *Witt* provides that a change in the law does *not* apply retroactively *unless* the change 1) emanates from the Florida Supreme Court or U.S. Supreme Court, 2) is constitutional in nature, and 3) constitutes a development of fundamental significance. *Witt*, 387 So. 2d at 931. (*emphasis added*). The Defendant argues that changes in Florida law made in the wake of *Hurst v. Florida* satisfy the first two *Witt* retroactivity factors. Additionally, the Defendant argues that the third *Witt* retroactivity is satisfied because *Hurst v. Florida* "constitutes a development of fundamental significance."[1] *Id.* Finally, the Defendant argues that fairness and uniformity requires retroactive application "of *Hurst* and the resulting new Florida law," because "[a]nything less than full retroactivity [would] lead to disparate treatment among Florida capital defendants." The Defendant did not expand on this argument in his amended motion.

In its response, the State does not specifically address the Defendant's claim that he is entitled to relief under the *Witt* analysis; however, the State's response is consistent concerning the Defendant's entitlement to retroactive relief; namely, that there is not a scenario under which the Defendant can demonstrate that he is entitled to retroactive relief under either *Hurst* decision. The State does, however, explicitly address the Defendant's claim that fairness and uniformity require retroactive application of both *Hurst* decisions, and in doing so, the State argues that given the fact the accuracy of the Defendant's sentence is not at issue, fairness does not demand

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[1] The third factor is analyzed under the three-fold test of *Stovall* and *Linkletter*, which requires courts to analyze three factors, including, in pertinent part, the effect that retroactive application of the new rule would have on the administration of justice. *Id.* at 926; *Stovall v. Denno*, 388 U.S. 293, 297, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967); *Linkletter v. Walker*, 381 U.S. 618, 636, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965).

retroactive application of *Hurst v. State*. As to uniformity, the State argues that the concept of retroactivity analysis necessarily means that some defendants will benefit from retroactivity, whereas others will not.

The Defendant's *Witt* argument is unsupported by any existing case law. In fact, the Defendant's argument wholly ignores the Florida Supreme Court's opinion in *Asay*, which forecloses retroactive application of *Hurst v. Florida* to cases such as the Defendant's; namely, cases where the sentences were final before the United States Supreme Court issued its opinion in *Ring*. In fact, the *Asay* court conducted a *Witt* analysis in determining whether the defendant in that case was entitled to retroactive application of *Hurst v. Florida* and ultimately determined that a *Witt* analysis foreclosed retroactive application. *Asay*, 210 So. 3d at 15-22. In reaching this conclusion, the court determined that although *Hurst v. Florida* satisfied the first two prongs under *Witt*, it did *not* satisfy the third prong because, contrary to the Defendant's claim, the potential negative effect on the administration of justice was not just "slight." *Id.* at 22. Instead, the court found that the potential negative effect on the administration of justice, weighed heavily against retroactive application of the new rule to pre-*Ring* individuals such as the Defendant. *Id.*

Incidentally, the Court notes that *Asay* also forecloses the Defendant's claim under *Hurst v. State*. This is so, because the Florida Supreme Court's retroactivity analysis in *Asay*, is explicitly premised upon *Hurst v. State*'s interpretation of *Hurst v. Florida*. *See Asay*, 210 So. 3d at 11 (explaining that the import of *Hurst v. Florida* to Florida's capital sentencing scheme is set forth by *Hurst v. State*, including the portion of the holding requiring a unanimous jury verdict to impose death).

Finally, the Court notes that the Defendant's fairness and uniformity argument, while compelling, deviates from the crux of the issue before the Court on this motion, which is whether the Defendant can establish an exception to the time bar under Rule 3.851. In order to do so, the Defendant is relying on Rule 3.851(d)(2), which allows an otherwise untimely claim *if* it is based on a fundamental constitutional right that has been held to apply retroactively. However, as explained above, there is no authority holding either *Hurst* or *Hurst v. Florida* retroactive to the Defendant.

Claim 1(B): The Defendant is entitled to retroactive application of both *Hurst* decisions under the fundamental fairness doctrine

Next, the Defendant argues that "fundamental fairness" entitles him to retroactive application of both *Hurst* decisions and claims that certain decisions involving the death penalty should be given retroactive effect on the basis of fundamental fairness. He draws support for this argument from the *Mosley* court's discussion of *James v. State*, 615 So. 2d 668 (Fla. 1993) (applying opinion finding capital jury instruction unconstitutional retroactively to defendants who challenged the instruction at trial or on appeal). The *James* opinion was founded upon "fundamental fairness," rather than a *Witt* retroactivity analysis. *Id.* at 669. In discussing the *James* decision, the *Mosely* court concluded that because Mosely, like James, raised a *Ring* claim at his first opportunity and was "rejected at every turn," considerations of fundamental fairness warranted retroactive application, in addition to a *Witt* analysis. The Defendant argues that he is similarly situated because he challenged the constitutionality of Florida's sentencing scheme "just after *Ring* was decided," and had previously raised *Apprendi*[2] issues in a motion for postconviction relief. In fact, the Defendant argues that based on the fact he, "specifically preserved" this issue, he is a part of a purported second class of individuals, entitled to retroactive relief under *Hurst*. The Defendant did not expand on this argument in his amended motion.

In its response, the State argues that regardless of whether the Defendant previously raised a *Ring* claim, he is still not entitled to relief because his sentence was prior to *Ring*. The State also takes exception to the Defendant "improperly creat[ing] a second class of defendants in which retroactively allegedly applies." The State argues that the Defendant's claim on this point, is done in an effort to "circumvent the requirement that the sentence must not be final prior to *Ring*."

The Defendant's argument is misplaced and overlooks the fact that the *Mosley* court expressly addressed the fact that *Asay* foreclosed retroactive relief to capital defendants, whose sentences, like the Defendant's sentence, became final before *Ring*. *Mosley*, 209 So. 3d at 1274. The only question left open in *Mosley* concerned the retroactive application to **post-*Ring*** defendants and as the Defendant acknowledges, he is not a post-*Ring* defendant. *Id.* (**emphasis added**). Again, the Defendant's sentence became final well before *Ring*; therefore, *Asay* is

[2] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

controlling. To that end, the binding majority opinion in *Asay* implicitly rejected the defendant's contention that barring relief to defendants who had the foresight to raise constitutional challenges to Florida's death penalty scheme before *Ring*, is fundamentally unfair. *See Asay*, 210 So. 3d at 30 (Lewis, J., concurring) ("[T]he majority opinion has incorrectly limited the retroactive application of *Hurst* by barring relief to even those defendants who, prior to *Ring*, had properly asserted, presented, and preserved challenges to the lack of jury fact finding and unanimity in Florida's capital sentencing procedure at the trial level and on direct appeal, the underlying gravamen of this entire issue."). Moreover, the Court notes that the same type of fundamental fairness argument was addressed in both the concurring and dissenting opinions of *Asay*. *See Asay*, 210 So. 3d at 36 (J. Pariente concurring in part and dissenting in part) ("The majority's conclusion results in an unintended arbitrariness as to who receives relief depending on when the defendant was sentenced or, in some cases, resentenced. For example, many defendants whose crimes were committed before 2002 will receive the benefit of *Hurst* because they were previously granted a resentencing on other grounds and their newest death sentence was not final when *Ring* was decided."). Clearly, by addressing this issue, the Florida Supreme Court was aware of the impact of the bright-line rule it announced and the potential for non-uniformity. The Defendant is asking this Court to issue a ruling that is in clear opposition to the Florida Supreme Court's explicit holding on this issue; however, it declines to do so. *See State v. Dwyer*, 332 So. 2d 333, 335 (Fla. 1976) (holding that where the Florida Supreme Court has decided an issue, Florida circuit courts are bound to adhere to that ruling).

Furthermore, like *Hurst v. Florida*, *Hurst*'s retroactivity is limited to death sentences that became final after *Ring* was issued. *See King v. State*, 211 So. 3d 866, 889 (Fla. 2017), *reh'g denied,* SC14-1949, 2017 WL 961818 (Fla. Mar. 13, 2017) (*quoting Mosley*, 209 So. 3d at 1273-74) ("we further held that our decision in *Hurst v. State* applies retroactively to those postconviction defendants whose sentences were final after the United States Supreme Court's 2002 decision in *Ring* . . ."); *Asay*, 210 So. 3d at 22 ("we conclude that *Hurst* [*v. State*] should not be applied retroactively to Asay's case"); *Archer v. Jones*, SC16-2111, 2017 WL 1034409, at *1 (Fla. Mar. 17, 2017) ("We hereby deny Archer's petition pursuant to our holding in *Asay* . . . that *Hurst v. Florida* and *Hurst v. State* do not apply retroactively to capital defendants whose death sentences were final when *Ring* . . . was decided.").

Finally, the Court would be remiss in failing to point out that the Defendant's claim that

there is a second class of individuals entitled to retroactive relief of the *Hurst* decisions; namely, those who "specifically preserved the *Ring* issue," is an entirely misplaced argument that has no support in existing case law. Contrary to the Defendant's suggestion, *Mosley* did not create or announce a second class of individuals entitled to relief under *Hurst v. Florida* and the *Mosley* decision offers no support for the Defendant's argument on this point. In fact, as noted above, the *Mosley* court expressly addressed the fact that *Asay* foreclosed retroactive relief to capital defendants, whose sentences, like the Defendant's sentence, became final before *Ring*. *Mosley*, 209 So. 3d at 1274. In accordance with the Florida Supreme Court's opinion in *Asay*, *Hurst v. Florida* is **not** retroactive to the Defendant's case. *Asay*, 210 So. 3d at 22; *see also Mosley*, 209 So. 3d at 1248; *Gaskin v. State*, 218 So. 3d 399, 401 (Fla. 2017), *reh'g denied,* SC15-1884, 2017 WL 2210388 (Fla. May 17, 2017) (denying defendant's claim that he is entitled to retroactive application of *Hurst v. Florida* when the defendant's sentence became final in 1993); *Lambrix v. State*, 217 So. 3d 977, 989 (Fla. 2017), *reh'g denied,* SC16-56, 2017 WL 1927739 (Fla. May 10, 2017) (denying defendant's claim that he is entitled to retroactive application of *Hurst v. Florida* when the defendant's sentence became final in 1986). The Court finds that the Defendant is not entitled to retroactive application of either *Hurst* decision based on fundamental fairness.

Claim 1(C): The Defendant has a federal right to retroactive application of the *Hurst* decisions

Next, the Defendant argues that he is entitled to relief under federal law because he claims, *Hurst*, in particular, announced substantive changes in constitutional law, which requires state courts to grant retroactive relief in collateral proceedings. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 729 (2016), *as revised* (Jan. 27, 2016) ("[W]hen a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule."). Specifically, the Defendant claims that the Florida Supreme Court in *Hurst* announced two substantive constitutional rules. The first one, the Defendant argues, is rooted in the Sixth Amendment, and requires that the jury decide whether the aggravating factors that have been proven beyond a reasonable doubt, are sufficient to warrant a death sentence. The second one, the Defendant argues, is rooted in the Eighth Amendment, and requires that the jury must find the final recommendation of death, unanimously. The Defendant argues that these are both substantive changes to constitutional law, such that Florida courts must give them retroactive effect. The Defendant did not expand on

this argument in his amended motion.

In its response, the State argues that contrary to the Defendant's claim, *Hurst*, does not represent a substantive ruling. The State points this Court's attention to *Schriro v. Summerlin*, 542 U.S. 348 (2004), in support of its argument that procedural rules, like the one announced in *Hurst*, regulate only the manner of determining a defendant's culpability, while substantive rules alter the range of conduct or the class of persons that the law punishes. The State continues that the United States Supreme Court has previously found that *Ring* set forth a procedural change and was therefore not retroactive on federal collateral review. *Id.* at 354-55; 358 (2004) (holding that the United States Supreme Court's opinion in *Ring* set forth a procedural, rather than substantive, rule and therefore did not apply retroactively to cases already final on direct review). The State argues that *Hurst*, like *Ring*, is a "prototypical procedural decision."

The Defendant's argument is unsupported by existing case law. Indeed, there is no authority holding the *Hurst* opinion retroactive to the Defendant under federal law. To the contrary, there is federal law supporting the State's position that, where an evolution in death penalty jurisprudence modifies the procedure required to impose the death penalty and does not bar the imposition of the death penalty to a category of persons, the change is *procedural* in nature and state courts are not required to give such changes retroactive effect. *See Schriro*, 542 U.S. at 354–55 (*emphasis added*); *see also Montgomery*, 136 S. Ct. at 729–30 (explaining that "[s]ubstantive rules . . . set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose," and "procedural rules are designed to enhance the accuracy of a conviction or sentence by regulating the manner of determining the defendant's culpability.") (*quoting id.* at 353) (internal quotations omitted). The Court finds that Defendant does not have a federal right to retroactive relief.

Claim 1(D): The State cannot establish that the *Hurst* error in the Defendant's sentencing was harmless beyond a reasonable doubt

Next, the Defendant claims that he is entitled to a new penalty phase because the non-unanimous jury recommendation for death is not harmless beyond a reasonable doubt. The Defendant contends that the jury's 11-1 recommendation constitutes a *Hurst* error because it was not unanimous. The Defendant argues that his case, in particular, represents a situation whereby it would be "fundamentally unfair for *Hurst* to not apply to him." He finds support for this argument, by again pointing this Court's attention to the fact that he previously raised *Apprendi*

and *Ring* type claims in a timely fashion "and at the first opportunity to raise them," but that he was denied each time, "due to prior erroneous legal interpretations." In his amended motion, the Defendant expands on this argument, by claiming that this Court must give consideration to the fact that trial counsel would have tried the case different under *Hurst v. Florida* and the resulting new Florida law. The Defendant contends that trial counsel provided affidavits, stating that he or she would have tried the case and picked the jury differently had the law been different. The Defendant continues that trial counsel's affidavits making the aforementioned statements, further evidences that "it is more likely than not that at least one juror would not join a death recommendation at a resentencing." Finally, the Defendant claims that the failure of trial counsel to properly present mitigating evidence to the jury, because of existing case law that the jury vote was merely an advisory recommendation and the judge was "the actual sentence and fact finder," was equally important and warrants further consideration.

In its response, the State argues that the aggravators found in this case, "were either inherent in the jury's verdict or uncontestable under the facts of this case." The State argues that in a case such as the instant case, the Florida Supreme Court has held that *Ring* is not satisfied when the aggravating factors were established by prior violent felonies and contemporaneous felonies. *See, e.g., Miller v. State*, 42 So. 3d 204, 218-219 (Fla. 2010). The State argues that since *Hurst* is necessarily an application of *Ring* to Florida, and since the Florida Supreme Court has found that contemporaneous convictions and prior violent felonies remove a case from the scope of *Ring*, then it should follow that those same things, remove the instant case from the scope of *Hurst*. Finally, the State argues that even if this Court rejects the State's argument on this point, it can still be established that a rational jury would have unanimously found the aggravating factors and recommended death. In its response to the Defendant's amended motion, the State argues that the Defendant's amended argument concerning trial counsel's affidavits about what he or she would have done differently, had the law been different, are "irrelevant to the first and dispositive issue" before this Court. Namely, the question of retroactivity application of *Hurst*, which the State argues, the Defendant is not entitled to.

First, as to the Defendant's request that the Court consider trial counsel's affidavits, stating that they would have tried the case and chosen the jury differently in light of recent case law, having determined that the Defendant is not entitled to a new penalty phase the Court declines to do so. To be sure, consideration of these affidavits, now, would require this Court to

ignore the threshold issue before this Court. As the State points out in its response to the Defendant's amended motion, this Court must first establish whether the Defendant can even establish an exception to the clearly enunciated time bar under Rule 3.851, which, as explained above, the Defendant cannot do. The Defendant is relying on Rule 3.851(d)(2), which allows an otherwise untimely claim *if* it is based on a fundamental constitutional right that has been held to apply retroactively; however, again, there is no authority holding *Hurst v. Florida* retroactive to the Defendant. Nevertheless, again, given the fact, this Court finds that there was no *Hurst* error in this case; the instant claim fails. *See Hurst v. State*, 202 So. 3d at 68.

Next, having found that Defendant is not entitled to retroactive application of *Hurst*, the Court need not address whether the *Hurst* error in this case was harmless. *See Hurst v. State*, 202 So. 3d at 68 (holding that a *Hurst* error is subject to harmless error review). Nevertheless, the Court notes that it does not find persuasive the State's argument that the Defendant's prior convictions for other violent felonies, insulates his death sentence from *Ring* and *Hurst v. Florida.* As the State aptly points out, the Florida Supreme Court has rejected this very same argument. *See e.g., Franklin v. State*, 209 So. 3d 1241, 1248 (Fla. 2016). Incidentally, the Court observes that the Florida Supreme Court has yet to find a *Hurst* error harmless where the jury's vote was not unanimous. *See Mosley*, 209 So. 3d at 1284; *see also Kospho v. State*, 209 So. 3d 568 (Fla. 2017). The Court further observes that the State's contention that a rational jury would unanimously recommend the death penalty is entirely speculative and unsupported by the existing law, which requires the penalty phase jury to unanimously find all the facts necessary to impose the death sentence and unanimously recommend death. *See Mosley*, 209 So. 3d at 1284; *see also Hodges v. State*, 213 So. 3d 863, 881 (Fla. 2017) (reversing a post-*Ring* death sentence where the jury recommended death by a 10-2 vote). Nevertheless, for the reasons stated above, the Defendant's harmless error claim must be denied.

Claim 2: The Defendant's Death Sentence Violates the Eighth Amendment under *Hurst v. State* (*"Hurst"*) and should be vacated

The Defendant next claims that evolving standards of decency now require that a jury recommendation for death be unanimous and because the jury recommendation of death was not unanimous in his case, his death sentence should be vacated for violating the Eighth Amendment of the United States Constitution as interpreted by *Hurst*. *See Hurst*, 202 So. 3d at 72 (noting that jury unanimity in the jury's final recommendation of death also ensures that Florida

conforms to 'the evolving standards of decency that mark the progress of a maturing society,' which inform Eighth Amendment analyses."). The Defendant also relies on *Caldwell v. Mississippi*, 472 U.S. 320 (1980) in support of his claim that a unanimous jury verdict in favor of a death sentence violates the Eighth Amendment, if the jury was not correctly instructed as to its sentencing responsibility. *Id.* at 328-29. The Defendant argues that this did not occur in his case and that the *Hurst* holding, requiring a unanimous jury recommendation under the Eighth Amendment, created a protected class of defendants and that he is a member of this protected class (i.e. defendants that had at least one jury member vote against imposing the death penalty). As a corollary to his Eighth Amendment argument, the Defendant also argues that his death sentences should be vacated "based on the Florida Constitution." Specifically, he argues that he was denied a jury trial on the elements that subjected him to the death penalty, that he was denied his right to proof beyond a reasonable doubt, and that because the indictment did not list the aggravating factors; he is entitled to a new trial. Finally, the Defendant continues to argue that he is entitled to relief under the *Witt* analysis and that because he is member of protected class of individuals that is entitled to retroactive relief under *Hurst*; namely, an individual who previously raised a *Ring* type claim. The Defendant did not expand on this argument in his amended motion.

In its response, the State argues that the Defendant's Eighth Amendment claim is both flawed and without merit. The State points this Court's attention to *Spaziano v. Florida*, where the United States Supreme Court held that the Eighth Amendment is not violated in a capital case when the ultimate responsibility of imposing death, rests with the judge. 468 U.S. 447, 463-64 (1984), *Spaziano v. Florida*, 468 U.S. 447, 465 (1984), *overruled in part by Hurst v. Florida*, 136 S. Ct. at 616. The State argues that in deciding *Hurst v. Florida*, the United States Supreme Court analyzed the case on Sixth Amendment grounds and overruled *Spaziano* only to the extent it allows a sentencing judge to find an aggravating circumstance, independent of a jury's fact finding, that is necessary for imposition of the death penalty, but that the court never addressed the issue of any possible Eighth Amendment violation nor did it overrule *Spaziano* on Eighth Amendment Grounds. *Hurst v. Florida*, 136 S. Ct. at 618. The State argues that since the United States Supreme Court has never held that a unanimous jury recommendation is required under the Eighth Amendment, *Spaziano* is surviving precedent that the Florida Supreme Court, nor this court for that matter, has no authority to overrule on this matter. As to the Defendant's

claim that he was denied his right to proof beyond a reasonable doubt on the elements that subjected him to the death penalty, the State argues that this is a claim that should have been raised on direct appeal and as such, it is procedurally barred. The State also argues that this claim is without merit, because the jury in this case, was in fact instructed that the aggravating circumstances they could consider had to be proven beyond a reasonable doubt. As to his claim that the grand jury indictment failed to contemplate the aggravating factors such that he was never formally informed of the full nature and cause of the accusations against him, the State argues that this claim too is procedurally barred, as it should have been raised on direct appeal. The State also argues that this claim is without merit, because the Florida Supreme Court has "long rejected the argument that aggravating circumstances must be alleged in the indictment."

As to the Defendant's Eighth Amendment claim, the Court's continues to find that the Defendant has failed to demonstrate that he is entitled to retroactive relief of either *Hurst* decision; this holds true even when considered under the Eighth Amendment. Again, the Florida Supreme Court has determined the limit of the retroactive application of *Hurst*, which again limits retroactivity to death sentences that became final after *Ring* was issued. *See King*, 211 So. 3d at 889; *Asay*, 210 So. 3d at 22; *Archer*, SC16-2111, 2017 WL 1034409, at *1. These cases are not limited to Sixth Amendment rulings. Therefore, the Eighth Amendment holding in *Hurst* is not retroactive to the Defendant. The explicit limitation on retroactivity, imposed by the Florida Supreme Court, created a bright-line rule on retroactive application. The date of finality associated with the Defendant's sentence, puts him on the side of that bright-line rule that means he is not entitled to retroactive relief. By virtue of his claim, the Defendant is asking this Court to hold that the Florida Supreme Court's rulings violate the Eighth Amendment, which this Court cannot do. *See Dwyer*, 332 So. 2d at 335.

As to the Defendant's claim that the lack of unanimity in the jury decision constitutes a violation of the Florida Constitution, as it relates to both the aggravating factors considered and the recommendation of death, the Court finds that this claim is procedurally barred. *See Gaskin v.*, 218 So. 3d at, 401. Likewise, the Court finds that the Defendant's claim concerning the alleged deficiency with the indictment is claim that is procedurally barred. *See Troy v. State*, 57 So. 3d 828, 843 (Fla. 2011) (finding that the defendant's claim that "the indictment fails to provide notice as to aggravator" was a procedurally barred claim.).

Finally, the Court continues to find the Defendant's final claims, that he is entitled to

relief under the *Witt* analysis and that because he is member of protected class of individuals that is entitled to retroactive relief under *Hurst*, without merit for the reasons discussed elsewhere in this order. *Asay*, 210 So. 3d at 22; *Mosley*, 209 So. 3d at 1274.

Claim 3: The Court's denial of the Defendant's prior postconviction claims must be reheard and determined under a constitutional framework

In the Defendant's final claim, he argues that this Court "must re-visit and re-evaluate the rejection of [his] *Strickland*[3] claims in light of the new Florida law, which would govern at resentencing." Specifically, he claims that the decision in *Hurst v. State* and *Perry v. State*, 210 So.3d 630 (Fla. 2016), along with the revised sentencing statute, which would govern at a resentencing, would likely result in a different outcome for the Defendant. The Defendant claims that the recent case law and revised sentencing statute requiring the jury to find, unanimously, the required facts to authorize a death sentence and require the jury to recommend, unanimously, a death sentence must be considered in the Defendant's previously presented postconviction claims. Finally, he claims that the Court's previous analysis failed to consider prejudice in the context of the new death penalty law requiring a unanimous jury verdict to impose death. The Defendant did not expand on this argument in his amended motion.

In its response, the State argues that the Defendant's claim should be dismissed as insufficiently pled, because the Defendant "makes no effort to explain which claims he is referring to." The State goes on to argue that the claim is also without merit, since neither *Hurst* nor *Perry* "operate to breathe new life into previously denied claims."

At the outset, the Court agrees with the State's observation that the Defendant has failed to explain exactly which of his prior *Strickland* claims he seeks to resuscitate or have this Court reconsider. Regardless, this Court need not belabor this issue. These claims have already been decided against the Defendant and he is not entitled to successive review of claims already decided against him and affirmed on appeal. *See State v. McBride*, 848 So. 2d 287, 291 (Fla. 2003) (holding that a defendant "is not entitled to successive review of a specific issue which has already been decided against him."). Therefore, even if the Defendant could establish that *Hurst* applies retroactively to him, he remains procedurally barred from successive litigation of any prior postconviction claim.

Accordingly, it is:

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[3] *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

ORDERED AND ADJUDGED that the Defendant's "Successive Motion to Vacate Death Sentences," is hereby **DISMISSED**.

THE CLERK IS HEREBY DIRECTED, in accordance with Florida Rule of Criminal Procedure 3.851(f)(5)(F), to promptly serve a copy of this order upon the State, the Attorney General, and counsel for the Defendant with a certificate of service.

THE DEFENDANT IS HEREBY NOTIFIED that this is a **FINAL** order, and he has 30 days from the rendition date of this order to file an appeal, should he choose to do so.

DONE AND ORDERED in Chambers at New Port Richey, Pasco County, Florida, this 25 day of August, 2017. A true and correct copy of this order has been furnished to the parties listed below.

William Webb, Senior Judge

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APPENDIX

C

2018 WL 1052713
Only the Westlaw citation is currently available.

Supreme Court of Florida.

Alvin Leroy MORTON, Appellant(s)
v.
STATE of Florida, Appellee(s)

CASE NO.: SC17–1715
|
FEBRUARY 26, 2018

Lower Tribunal No(s).: 511992CF000308CFAXWS

Opinion

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

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

All Citations

Not Reported in So.3d, 2018 WL 1052713