

CAPITAL CASE

DOCKET NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD EARL SHERE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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

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Appendix A: The unreported opinion of the Circuit Court in and for Hernando County denying Successive Motion for Postconviction under Florida Rule of Criminal Procedure 3.851 issued August 22, 2017.

Appendix B: The opinion of the Florida Supreme Court affirming the denial of postconviction relief, unreported in the Southern Reporter. It appears at *Shere v. State*, No. SC17-1703, 2018 WL 4346801, at *1 (Fla. Aug. 31, 2018).

Appendix A: The unreported opinion of the Circuit Court in and for Hernando County denying Successive Motion for Postconviction under Florida Rule of Criminal Procedure 3.851 issued August 22, 2017.

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT
IN AND FOR HERNANDO COUNTY, FLORIDA

STATE OF FLORIDA,

vs.

Case No. CF-1988-28

RICHARD EARL SHERE, JR.,
Defendant.

ORDER DENYING DEFENDANT'S SUCCESSIVE MOTION TO VACATE JUDGMENT
OF CONVICTION AND SENTENCE

THIS CAUSE comes before the Court on the Defendant's Successive Motion to Vacate Judgment of Conviction and Sentence, pursuant to Fla. R. Crim. P. 3.850 and 3.851, filed on January 6, 2017. This Court, having reviewed the Motion, the response thereto, having heard oral arguments, and being otherwise fully advised in the premises, hereby finds as follows:

On April 21, 1989, the Defendant was found guilty of Murder in the First Degree by a jury of his peers. On April 26, 1989, the jury returned a 7-5 recommendation of death, and on May 17, 1989, Defendant was sentenced to death. On direct appeal, the Defendant's conviction and sentence was affirmed. *Shere v. State*, 579 So.2d 86 (Fla. 1991).

On July 12, 1993, the Defendant filed his first Motion to Vacate Judgment of Conviction and Sentence, pursuant to Fla. R. Crim. P. 3.850, that was ultimately denied by the trial court on its merits and affirmed on appeal by the Florida Supreme Court. *Shere v. State*, 742 So.2d 215 (Fla. 1999), *r'hrg denied* (August 24, 1999).

On February 24, 2003, the Defendant filed a second Motion to Vacate Judgment of Conviction that was denied by the Circuit Court and affirmed, *per curiam*, by the Florida Supreme Court. *Shere v. State*, 903 So.2d 936 (Fla. 2005), *r'hrg denied* (May 17, 2005).

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On March 25, 2008, the Defendant filed his third Motion for Postconviction Relief. On March 28, 2011, this Court denied the Defendant's motion.

On June 29, 2015, the Defendant filed his fourth successive motion for postconviction relief. The motion was summarily denied on October 27, 2015. The denial of the motion was affirmed on appeal. *Shere v. State*, 2016 WL 3450466 (Fla. June 23, 2016), *r'hrq denied* (August 23, 2016).

Fla. R. Crim. P. 3.851 applies "...to all postconviction motions filed on or after January 1, 2015, by defendants who are under sentence of death." Rule 3.851(d) provides in relevant part that:

(1) Any motion to vacate judgment of conviction and sentence of death shall be filed by the defendant within 1 year after the judgment and sentence become final. For the purposes of this rule, a judgment is final:

(A) on the expiration of the time permitted to file in the United States Supreme Court a petition for writ of certiorari seeking review of the Supreme Court of Florida decision affirming a judgment and sentence of death (90 days after the opinion becomes final); or

(B) on the disposition of the petition for writ of certiorari by the United States Supreme Court, if filed.

(2) No motion shall be filed or considered pursuant to this rule if filed beyond the time limitation provided in subdivision (d)(1) unless it alleges:

(A) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, or

(B) the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively, or

(C) postconviction counsel, through neglect, failed to file the motion.

The Defendant's postconviction motion filed January 6, 2017, is well beyond the specific one (1) year time limitation enumerated within Fla. R. Crim. P. 3.851(d)(1)(a). The Florida Supreme Court upheld the Defendant's conviction and sentence on August 4, 1991. The Writ of Certiorari to the United States Supreme Court expired on or around November 4, 1991. Therefore,

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the Defendant's instant motion is clearly beyond the time limitation provided under Rule 3.851(d). In fact, this is the Defendant's fifth postconviction motion filed on record.

The Defendant fails to set forth any reason why his motion falls with the exceptions to the time limitations of Rule 3.851. The Defendant merely argues that in light of recent case law and statutory developments, the Defendant's sentence violates the Fifth, Sixth, Eighth, and Fourteenth Amendments.

The Court finds that the Defendant's claims, which all stem from the United States Supreme Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), have already been addressed by the Florida Supreme Court. In *Asay v. State*, SC16-102, 2016 WL 7406538 (Fla. Dec. 22, 2016), the Court ruled that *Hurst* does not apply retroactively in a case where a defendant's death sentence became final before the issuance of *Ring v. Arizona*, 536 U.S. 584 (2002). Other recent decisions by the Florida Supreme Court's clearly establish that defendants whose judgments and sentences of death became final pre-*Ring* are not entitled to relief via retroactive application of *Hurst v. Florida* and its Florida progeny. See *Gaskin v. State*, SC15-1884, 2017 WL 224772 (Fla. Jan. 19, 2017); *Mosley v. State*, SC14-2108, 2016 WL 7406506 (Fla. Dec. 22, 2016). See also *Hitchcock v. State*, SC17-445, 2017 WL 3431500 (Fla. Aug. 10, 2017).

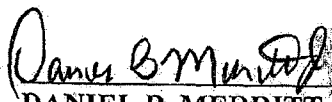
Because the Defendant was sentenced before the issuance of *Ring*, the Court finds the holdings in *Asay* and *Mosley* to be binding and dispositive of the issues raised in the Defendant's motion. Additionally, the Court in *Hitchcock* upheld the trial court's denial of a pre-*Ring* successive postconviction motion that makes similar constitutional arguments that the Defendant in this case makes. Because the changes in the law do not apply retroactively to the Defendant's case, the Defendant's motion does not fall within the exceptions to the time limitations of Rule

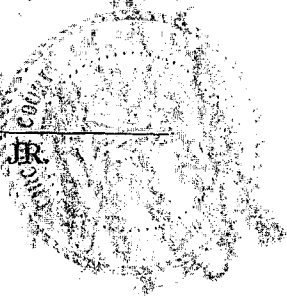
3.851(d)(2). Therefore, the Court must deny the Defendant's motion as untimely.

BASED ON THE FOREGOING, it is hereby,

ORDERED AND ADJUDGED that the Defendant's Successive Motion to Vacate Judgment of Conviction and Sentence, filed on January 6, 2017, is DENIED. The Defendant shall have thirty (30) days from the date of this Order to file an appeal, should he so choose.

DONE AND ORDERED in Chambers, at Brooksville, Hernando County, Florida, this 21st day of August, 2017.


DANIEL B. MERRITT, JR.
CIRCUIT JUDGE



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to the following individuals by hand delivery and/or U.S. Mail/Courthouse box delivery on this 22nd day of August, 2017.

Office of the State Attorney, Fifth Judicial Circuit: eserviceHernando@sao5.org

Pamela Jo Bondi, Attorney General: capapp@myfloridalegal.com and tayo.popoola@myfloridalegal.com

James L. Driscoll, Jr.: driscoll@ccmr.state.fl.us

David D. Henry: Hendry@ccmr.state.fl.us

Gregory W. Brown: brown@ccmr.state.fl.us and support@ccmr.state.fl.us


Judicial Assistant

Appendix B: The opinion of the Florida Supreme Court affirming the denial of postconviction relief, unreported in the Southern Reporter. It appears at *Shere v. State*, No. SC17-1703, 2018 WL 4346801, at *1 (Fla. Aug. 31, 2018).

2018 WL 4346801

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

Richard Earl SHERE, Jr., Appellant(s)

v.

STATE of Florida, Appellee(s)

CASE NO.: SC17-1703

|
AUGUST 31, 2018

Lower Tribunal No(s): 271988CF000028CFAXMX

Opinion

*1 Richard Earl Shere, Jr., appeals a circuit court order denying his motion filed pursuant to Florida Rule of Criminal Procedure 3.851. We have jurisdiction. *See* art. V., § 3(b)(1), Fla. Const.

Shere's postconviction motion sought relief under *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017). This Court issued an order to show cause why this Court should not affirm the circuit court order in light of *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), *cert. denied*, 138 S. Ct. 513 (2017).

After reviewing Shere's response to the order to show cause and the State's arguments in reply, we conclude that Shere is not entitled to relief. Shere was sentenced to death following a jury's recommendation of death by a vote of seven to five. *Shere v. State*, 579 So. 2d 86, 89 (Fla. 1991), *reh'g denied* (Fla. April 4, 1991). His sentence became final in 1991. *Id.* Therefore, *Hurst* does not apply retroactively to Shere's death sentence. *See Hitchcock*, 226 So. 3d at 217. Accordingly, we affirm the denial of Shere's motion. No rehearing will be entertained.

It is so ordered.

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

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

CANADY, C.J., and LEWIS, J., concur in result.

PARIENTE, J., concurring in result.

I concur in result because I recognize that this Court's opinion in *Hitchcock v. State*, 226 So. 3d 216 (Fla.), *cert. denied*, 138 S. Ct. 513 (2017), is final. However, I continue to adhere to the views expressed in my dissenting opinion in *Hitchcock* and would apply *Hurst* retroactively to cases like Shere's. *Id.* at 220-23 (Pariente, J., dissenting). Applying *Hurst*¹ to Shere's case, I would grant a new penalty phase based on the jury's nonunanimous recommendation for death by a vote of seven to five. *Shere v. State*, 579 So. 2d 86, 89 (Fla. 1991).

¹ *Hurst v. State* (*Hurst*), 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017); *see Hurst v. Florida*, 136 S. Ct. 616 (2016).

All Citations

Not Reported in So. Rptr., 2018 WL 4346801

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