

BILLY LEON KEARSE
APPELLANT

IN THE NINETEENTH JUDICIAL
CIRCUIT COURT, IN AND FOR
ST. LUCIE COUNTY, FLORIDA

VS

L.T. CASE NO: 1991CF000136 A

STATE OF FLORIDA
APPELLEE

H.T. CASE NO: SC18-458

RECEIVED, 04/25/2018 09:03:30 AM, Clerk, Supreme Court

RECORD ON APPEAL

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SEPTEMBER 18, 2017	<u>SUPREME COURT ORDER DATED 9/13/17</u>	025
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<u>Date</u>	<u>Docket Description/Text</u>
April 18, 2018	TRANSCRIPT - HEARING ON FEBRUARY 5, 2018 (V)
April 10, 2018	TRANSCRIPT (V)
March 26, 2018	SUPREME COURT ORDER (V)
	CLERK ACKNOWLEDGMENT OF NEW CASE (V)
March 23, 2018	CERTIFIED NOTICE OF APPEAL (V)
	SUPREME COURT ORDER DATED 5/09/17 (V)
March 22, 2018	DIRECTIONS TO CLERK (V)
	DESIGNATION TO COURT REPORTER (V)
	NOTICE OF APPEAL TO SUPREME COURT (V)
February 22, 2018	REOPENED CASE CLOSED
	ORDER DENYING MOTION FOR REHEARING (V)
February 21, 2018	MOTION FOR REHEARING (V)
February 07, 2018	"RECIPIENTS: - SUBJECT: SERVICE OF COURT DOCUMENT SAO, TINA REL CCRC SOUTH ASSIT ATTORNEY GENERAL STAFF ATTORNEY 19TH CIRCUIT- 1991CF000136 A, STATE OF FLORIDA VS. KEARSE, BILLY LEON - ATTACHMENT COUNT: 1 - EMAIL DOCKET DESCRIPTIONS: EFJDGORDER-2/6/2018"
February 06, 2018	ORDER DENYING SUCCESSIVE MOTION TO VACATE DEATH SENTENCE UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.851 (V)
February 05, 2018	COURT MINUTES: HEARING: DEFENDANT NOT PRESENT IN OPEN COURT, IN D.O.C. (PRESENCE WAIVED). CCRC P. KALIL AND J. KRUSZKA WERE PRESENT. ASA R. BUTLER AND ATTY GENERAL L. CAMPBELL WERE PRESENT. COURT REPORTER K. ENLOE WAS PRESENT. DEFENSE MADE A SUCCESSIVE MOTION TO VACATE DEATH SENTENCE UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.851. CASE LAW WAS PROVIDED BY BOTH PARTIES. COURT HEARD ARGUMENTS. COURT RESERVED RULING AND REDUCE TO WRITTEN ORDER. AP/DC
January 29, 2018	HEARING SET FOR 02/05/2018 AT 11:00 AM IN 3B/ , CIRCUIT JUDGE: VAUGHN, DAN L
January 08, 2018	NOTICE OF HEARING (V)
January 02, 2018	CIRCUIT JUDGE VAUGHN, DAN L: ASSIGNED
December 19, 2017	STATE'S RESPONSE (V)
November 30, 2017	CIRCUIT JUDGE MCCANN, JAMES W: ASSIGNED
	REOPENED CASE CLOSED
November 29, 2017	CASE REOPENED FOR OTHER
	MOTION FOR POST CONVICTION RELIEF FILED (V)
September 18, 2017	SUPREME COURT ORDER
April 20, 2017	ORDER APPELLATE RECORD PREPARATION STATUS REPORT (V)
April 17, 2017	CLERKS APPELLATE INDEX/CERTIFICATE (V)
	CERTIFICATE OF CLERK (V)
April 12, 2017	TRANSCRIPT (V)
March 31, 2017	SUPREME COURT ORDER (V)
March 30, 2017	COURT MINUTES (V)
March 27, 2017	COURT MINUTES: STATUS HEARING: DEFENDANT WAS NOT PRESENT. ATTY KALIL WAS PRESENT. ASA CAMPBELL AND ASA BUTLER WERE PRESENT.

<u>Date</u>	<u>Docket Description/Text</u>
	ESQUIRE COURT REPORTING WAS PRESENT. STATE TO FILE MOTION TO RELINQUISH FOR FINAL ORDER TO BE ENTERED. ATTY KALIL TO FILE MOTION TO SUPPLEMENT WITH TRANSCRIPTS OF THIS HEARING. ATTY KALIL TO MOVE FORWARD WITH BRIEFING SCHEDULE BASED ON THE ORDER PREVIOUSLY ENTERED. COURT WILL WAIT FOR ORDER FROM SUPREME COURT FOR DIRECTION.
March 08, 2017	ORDER NOTICE OF HEARING (V) ORDER APPOINTING ESQUIRE COURT REPORTING (V) CLERKS APPELLATE INDEX/CERTIFICATE (V) CERTIFICATE OF CLERK
March 02, 2017	SUPREME COURT ORDER (V) CLERK ACKNOWLEDGMENT OF NEW CASE (V) CERTIFIED NOTICE OF APPEAL (V)
March 01, 2017	NOTICE OF APPEAL TO SUPREME COURT (V)
February 09, 2017	TRANSCRIPT - HEARING JULY 11, 2016 (ORIGINAL PLUS 1 COPY) (V)
January 30, 2017	ORDER DENYING MOTION FOR REHEARING (V) ORDER DISCHARGING TREASURE COAST COURT REPORTING (AMENDED) (V)
January 27, 2017	ORDER DISCHARGING TREASURE COAST COURT REPORTING (V) CASE REOPENED FOR OTHER
January 25, 2017	MOTION FOR REHEARING (V)
January 20, 2017	"RECIPIENTS: SAO, LESLIE CAMPBELL, SHARON ROBSON & PAUL KALIL - SUBJECT: SERVICE OF COURT DOCUMENT – 1991CF000136 A, STATE OF FLORIDA VS. KEARSE, BILLY LEON - ATTACHMENT COUNT: 1 - EMAIL DOCKET DESCRIPTIONS: EFJDGORDER-1/20/2017" ORDER DENYING MOTION TO EXCEED PAGE LIMITATION AND DISMISSING SUCESSIVE MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE (HURST CLAIM) (V)
January 19, 2017	REPLY (V) STATE'S RESPONSE (V)
January 12, 2017	MOTION (V) TO EXCEED PAGE LIMITATION MOTION FOR POST CONVICTION RELIEF FILED (V)
July 15, 2016	ORDER DISMISSING SUCCESSIVE MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE (HURST CLAIM)
July 13, 2016	IN-COURT DOCKETING NOTES - OKEECHOBEE COUNTY
June 09, 2016	NOTICE OF CASE MANAGEMENT CONFERENCE (HURST CLAIM)
June 06, 2016	APPENDIX STATE'S RESPONSE
May 02, 2016	MOTION FOR POST CONVICTION RELIEF FILED SUPPLEMENT (V)
March 17, 2016	NOTICE OF FILING SUPPLEMENTAL AUTHORITY (V) ORDER REQUIRING SUPPLEMENTAL PLEADINGS FROM THE DEFENSE AND THE STATE
March 14, 2016	STATE'S RESPONSE
February 23, 2016	MOTION FOR POST CONVICTION RELIEF FILED (V)
December 02, 2011	SUPREME COURT ORDER
March 15, 2011	APPEAL NOTE APPEAL NOTE
March 11, 2011	INDEX TO RECORD ON APPEAL
March 04, 2011	TRANSCRIPTS

<u>Date</u>	<u>Docket Description/Text</u>
March 03, 2011	ORDER STIPULATED ORDER IN LIEU OF STATUS HEARING ON PREPARATION OF APPELLATE RECORD
March 02, 2011	ORDER OF ASSIGNMENT ORDER OF DISQUALIFICATION
February 16, 2011	SUPREME COURT ORDER SETTING DUE DATES SUPREME COURT ACKNOWLEDGMENT
February 04, 2011	COVER LETTER RE: APPEAL
February 03, 2011	COVER LETTER RE: APPEAL DIRECTIONS TO THE CLERK DESIGNATION TO COURT REPORTER NOTICE OF APPEAL SUPREME COURT
January 07, 2011	REOPENED CASE CLOSED ORDER DENYING SECOND SUCCESSIVE MOTION VACATE JUDGMENTS OF CONVICTION AND SENTENCE, INCLUDING SENTENCE OF DEATH, WITH SPECIAL REQUEST FOR LEAVE TO AMEND
January 04, 2011	1:15 PM HEARING - DEFENDANT NOT PRESENT (IN DOC) IN OPEN COURT WITH ATTY PAUL KALIL AND ATTY CRAIG TROCINO FROM CCRC. ASST. ATTORNEY GENERAL RYAN BUTLER AND LESLIE CAMPBELL. COURT REPORTER NANCY CHIVARI PRESENT. DEFENSE MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE OF DEATH WITH SPECIAL REQUEST FOR LEAVE TO AMEND. COURT HEARD ARGUMENTS AND RESERVED RULING. WRITTEN ORDER TO BE ENTERED. JM/DC
November 18, 2010	DOCUMENT RECEIVED - STATE'S RESPONSE TO DEFENDANT'S SECOND SUCCESSIVE MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE OF DEATH WITH SPECIAL REQUEST FOR LEAVE TO AMEND
November 03, 2010	ORDERS - ORDER APPOINTING COURT REPORTER AND NOTICE OF CASE MANAGEMENT CONFERENCE
October 29, 2010	MOTION FILED - SECOND SUCCESSIVE MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE INCLUDING SENTENCE OF DEATH WITH SPECIAL REQUEST FOR LEAVE TO AMEND FILED DOCUMENT RECEIVED - LETTER FROM LAW OFC OF THE CAPITOL COLLATERAL REGIONAL COUNSEL-SOUTH FILED
June 15, 2009	SUPREME COURT ORDER - 05/22/09 - WE AFFIRM TRIAL COURT'S ORDER SUMMARILY DENYING RELIEF AND DENYING REQUEST FOR ADDITIONAL PUBLIC RECORDS; SC08-1986
November 13, 2008	ORDERS - STIPULATED STATUS REPORT IN LIEU OF STATUS HEARING ON PREPARATION OF APPELLATE RECORD WITH ATTACHMENTS FILED
October 31, 2008	APPEAL NOTE - ROA TO SUPREME COURT, AG, ATTY KALIL, COPY OF INDEX
October 30, 2008	SUPREME COURT ORDER - 10/24/08 - TRANSCRIPTS SHOULD BE FILED WITHIN 50 DAYS FROM THE FILING OF NOA. ROA DUE 20 DAYS AFTER; SC08-1986 SUPREME COURT ORDER - 10/24/08 - ACKNOWLEDGMENT OF NEW CASE-3.851; SC08-1986
October 24, 2008	TRANSCRIPTS - PUBLIC RECORDS REQUEST HEARING ON SEPTEMBER 5, 2008
October 21, 2008	APPEAL NOTE - LETTER W/CERT. COPY OF NOA TO SUPREME COURT, AG, ATTY KALIL
October 17, 2008	APPEAL NOTE - DIRECTIONS TO CLERK APPEAL NOTE - DESIGNATION TO COURT REPORTER (COPY SENT TO TREASURE COAST REPORTING 10/17/08)

<u>Date</u>	<u>Docket Description/Text</u>
	APPEAL NOTE - LETTER TO CLERK FROM ATTY PAUL KALIL RE: DESIGNATION AND DIRECTIONS
October 13, 2008	APPEAL NOTE - LETTER TO CLERK RE: NOTICE OF APPEAL
September 17, 2008	NOTICE OF APPEAL - BY ATTY PAUL KALIL, ASST. CCRC-SOUT ORDERS - ORDER DENYING AMENDED MOTION TO VACATE JUDGMENTS AND SENTENCE AND DENYING FOUR DEMANDS FOR ADDITIONAL PUBLIC RECORDS FILED
September 15, 2008	DOCUMENT RECEIVED - DEPARTMENT OF CORRECTION'S NOTICE OF SUPPLEMENTAL AUTHORITY (COPY SENT TO JUDGE VAUGHN)
September 12, 2008	DOCUMENT RECEIVED - STATE'S NOTICE OF FILING SUPPLEMENTAL AUTHORITY
September 08, 2008	DOCUMENT RECEIVED - FDLE'S RESPONSE AND OBJECTIONS TO DEFENDANT'S DEMAND FOR ADDITIONAL RECORDS - COPY SENT TO JUDGE VAUGHN
September 04, 2008	DOCUMENT RECEIVED - OBJECTION TO DEFENDANT'S DEMAND FOR ADDITIONAL PUBLIC RECORDS FROM THE OFFICE OF THE GOVERNOR DOCUMENT RECEIVED - OBJECTION TO DEFENDANT'S DEMAND FOR ADDITIONAL PUBLIC RECORDS FROM THE OFFICE OF THE ATTORNEY GENERAL
August 28, 2008	ORDERS - AMENDED NOTICE OF SEPTEMBER 5, 2008, CASE MANAGEMENT CONFERENCE & PUBLIC RECORDS HEARING FILED
August 15, 2008	DOCUMENT RECEIVED - REPLY TO STATE'S RESPONSE TO MOTION FOR POSTCONVICTION RELIEF (COPY SENT TO JUDGE VAUGHN) DOCUMENT RECEIVED - LETTER TO CLERK RE: DEFENDANT'S REPLY TO STATE'S RESPONSE TO MOTION FOR POSTCONVICTION RELIEF
August 11, 2008	DOCUMENT RECEIVED - DEPARTMENT OF CORRECTIONS RESPONSE TO DEFENDANT'S REQUEST FOR PUBLIC RECORDS WITH ATTACHMENTS NOTICE OF APPEARANCE - ON BEHALF OF FLORIDA DEPARTMENT OF CORRECTIONS - ALAN R. DAKAN, ASST GENERAL COUNSEL, 2601 BLAIR STONE ROAD, TALLAHASSEE, FL 32399-2500
August 07, 2008	ORDERS - ORDER REQUIRING DEFENDANT'S REPLY FILED
July 29, 2008	DOCUMENT RECEIVED - STATE'S RESPONSE TO DEFENDANT'S AMENDED MOTION TO VACATE JUDGMENTS AND SENTENCE (SUCCESSIVE MOTION) (COPY SENT TO JUDGE VAUGHN)
July 24, 2008	DOCUMENT RECEIVED - (VOL. 2 OF 2 CONT.) PUBLIC RECORDS RELATING TO LETHAL INJECTION AT CAPITAL POSTCONVICTION RECORDS REPOSITORY SINCE 2006 (6-DEPARTMENT OF CORRECTIONS) DOCUMENT RECEIVED - (VOL. 2 OF 2 CONT.) PUBLIC RECORDS RELATING TO LETHAL INJECTION AT CAPITAL POSTCONVICTION RECORDS REPOSITORY SINCE 2006 (5-FLORIDA DEPARTMENT OF LAW ENFORCEMENT) DOCUMENT RECEIVED - (VOL. 2 OF 2 CONT.) PUBLIC RECORDS RELATING TO LETHAL INJECTION AT CAPITAL POSTCONVICTION RECORDS REPOSITORY SINCE 2006 (4-FLORIDA DEPARTMENT OF LAW ENFORCEMENT) DOCUMENT RECEIVED - (VOL. 2 OF 2 CONT.) PUBLIC RECORDS RELATING TO LETHAL INJECTION AT CAPITAL POSTCONVICTION RECORDS REPOSITORY SINCE 2006 (3-OFFICE OF THE GOVERNOR-CONT.) DOCUMENT RECEIVED - (VOL. 2 OF 2) PUBLIC RECORDS RELATING TO LETHAL INJECTION AT CAPITAL POSTCONVICTION RECORDS REPOSITORY SINCE 2006 (3-OFFICE OF THE GOVERNOR) DOCUMENT RECEIVED - (VOL. 1 OF 2 CONT.) PUBLIC RECORDS RELATING TO LETHAL INJECTION AT CAPITAL POSTCONVICTION RECORDS REPOSITORY

<u>Date</u>	<u>Docket Description/Text</u>
	SINCE 2006 (2-DEPARTMENT OF CORRECTIONS CONT.)
	DOCUMENT RECEIVED - (VOL. 1 OF 2 CONT.) PUBLIC RECORDS RELATING TO
	LETHAL INJECTION AT CAPITAL POSTCONVICTION RECORDS REPOSITORY
	SINCE 2006 (2-DEPARTMENT OF CORRECTIONS CONT.)
	DOCUMENT RECEIVED - (VOL. 1 OF 2 CONT.) PUBLIC RECORDS RELATING TO
	LETHAL INJECTION AT CAPITAL POSTCONVICTION RECORDS REPOSITORY
	SINCE 2006 (2-DEPARTMENT OF CORRECTIONS)
	DOCUMENT RECEIVED - (VOL. 1 OF 2) PUBLIC RECORDS RELATING TO
	LETHAL INJECTION AT CAPITAL POSTCONVICTION RECORDS REPOSITORY
	SINCE 2006 (1-OFFICE OF ATTORNEY GENERAL)
	DOCUMENT RECEIVED - DEFENDANT'S DEMAND FOR ADDITONAL PUBLIC
	RECORDS PURSUANT TO FLA.R.C.RIM.P. 3.852(I) - GOVERNOR CHARLIE CRIST
	(COPY SENT TO JUDGE VAUGHN)
	DOCUMENT RECEIVED - DEFENDANT'S DEMAND FOR ADDITONAL PUBLIC
	RECORDS PURSUANT TO FLA.R.C.RIM.P. 3.852(I) - FLORIDA DEPARTMENT OF
	CORRECTIONS (COPY SENT TO JUDGE VAUGHN)
	DOCUMENT RECEIVED - DEFENDANT'S DEMAND FOR ADDITONAL PUBLIC
	RECORDS PURSUANT TO FLA.R.C.RIM.P. 3.852(I) - FLORIDA DEPARTMENT OF
	LAW ENFORCEMENT (COPY SENT TO JUDGE VAUGHN)
	DOCUMENT RECEIVED - DEFENDANT'S DEMAND FOR ADDITONAL PUBLIC
	RECORDS PURSUANT TO FLA.R.C.RIM.P. 3.852(I) - OFFICE OF THE ATTORNEY
	GENERAL (COPY SENT TO JUDGE VAUGHN)
	MOTION FILED - MOTION FOR HEARING ON DEMANDS FOR ADDITIONAL
	PUBLIC RECORDS (COPY SENT TO JUDGE VAUGHN)
	DOCUMENT RECEIVED - NOTICE OF FILING
	DOCUMENT RECEIVED - LETTER TO CLERK RE: FILING MOTION FOR
	HEARING ON DEMANDS FOR ADDITIONAL PUBLIC RECORDS
July 11, 2008	DOCUMENT RECEIVED - VERIFICATION RE: AMENDED MOTION TO VACATE
	JUDGMENT AND SENTENCE
	MOTION AMENDED - AMENDED MOTION TO VACATE JUDGMENTS AND
	SENTENCE
	DOCUMENT RECEIVED - DEFENDANT'S NOTICE OF FILING
	DOCUMENT RECEIVED - LETTER TO CLERK RE: NOTICE OF FILING
July 01, 2008	MOTION FILED - MOTION FOR HEARING ON OUTSTANDING DEMANDS FOR
	ADDITIONAL PUBLIC RECORDS (COPY SENT TO JUDGE VAUGHN)
	MOTION FILED - AMENDED MOTION TO VACATE JUDGMENTS AND SENTENCE
	WITH ATTACHMENTS (COPY SENT TO JUDGE VAUGHN)
	DOCUMENT RECEIVED - LETTER TO CLERK OF COURT RE: AMENDED MOTION
	TO VACATE JUDGMENT AND SENTENCE
June 27, 2008	ORDERS - ORDER DISMISSING FOUR DEMANDS FOR ADDITIONAL PUBLIC
	RECORDS FROM THE GOVERNOR'S OFFICE, THE OFFICE OF THE ATTORNEY
	GENERAL, THE DEPARTMENT OF LAW ENFORCEMENT, AND THE
	DEPARTMENT OF CORRECTIONS FILED
	ORDERS - NOTICE OF SEPTEMBER 5, 2008, CASE MANAGEMENT CONFERENCE
	FILED
May 30, 2008	ORDERS - ORDER GRANTING LEAVE TO AMEND SUCCESSIVE
	POSTCONVICTION MOTION FILED
May 21, 2008	ORDERS - ORDER LIFTING STAY OF SUCCESSIVE MOTION TO VACATE
	JUDGMENTS AND SENTENCE WITH REQUEST TO AMEND, DIRECTING STATE
	TO FILE AN ANSWER, AND APPOINTING COURT REPORTER FILED
May 20, 2008	DOCUMENT RECEIVED - NOTICE OF UNAVAILABILITY BY ASST. ATTY

<u>Date</u>	<u>Docket Description/Text</u>
	GENERAL LESLIE T. CAMPBELL
May 15, 2008	DOCUMENT RECEIVED - DEFENDANT'S SECOND RESPONSE TO STATE'S MOTION FOR REHEARING AND/OR MOTION TO LIFT STAY (COPY SENT TO JUDGE VAUGHN)
	DOCUMENT RECEIVED - LETTER TO CLERK RE: DEFENDANT'S SECOND RESPONSE TO STATE'S MOTION
April 21, 2008	MOTION FILED - STATE'S SUPPLEMENTAL MOTION FOR REHEARING OF ORDER STAYING SUCCESSIVE POSTCONVICTION MOTION AND/OR MOTION TO LIFT STAY
April 04, 2008	ORDERS - ORDER REQUIRING DEFENSE RESPONSE TO STATE'S MOTION FOR REHEARING OF ORDER STAYING SUCCESSIVE POSTCONVICTION MOTION AND/OR MOTION TO LIFT STAY FILED
March 27, 2008	DOCUMENT RECEIVED - DEFENDANT'S RESPONSE TO STATE'S MOTION FOR REHEARING AND/OR MOTION TO LIFT STAY
	DOCUMENT RECEIVED - LETTER TO CLERK RE: DEFENDANT'S RESPONSE TO STATE'S MOTION FOR REHEARING
March 26, 2008	DOCUMENT RECEIVED - STATE'S NOTICE OF FILING SUPPLEMENTAL AUTHORITY (COPY SENT TO JUDGE VAUGHN)
March 18, 2008	MOTION FILED - STATE'S MOTION FOR REHEARING OF ORDER STAYING SUCCESSIVE POSTCONVICTION MOTION AND/OR MOTION TO LIFT STAY (COPY SENT TO JUDGE VAUGHN)
March 11, 2008	DOCUMENT RECEIVED - FDLE'S RESPONSE AND OBJECTION TO DEFENDANT'S DEMAND FOR ADDITIONAL RECORDS
February 05, 2008	DOCUMENT RECEIVED - DEPT OF CORR' RESPONSE TO DEFT'S REQUEST FOR PUBLIC RECORDS FILED
January 29, 2008	ORDERS - ORDER STAYING DISPOSITION OF SUCCESSIVE MOTION TO VACATE JUDGMENTS AND SENTENCE WITH REQUEST TO AMEND
January 28, 2008	DOCUMENT RECEIVED - OBJECTION TO DEFENDANT'S DEMAND FOR ADDITIONAL PUBLIC RECORDS FROM THE GOVERNOR'S OFFICE
	DOCUMENT RECEIVED - OBJECTION TO DEFENDANT'S DEMAND FOR ADDITIONAL PUBLIC RECORDS FROM THE OFFICE OF THE ATTORNEY GENERAL
January 24, 2008	ORDERS - ORDER OF ASSIGNMENT HONORABLE DAN L. VAUGHN FILED
January 17, 2008	MOTION FILED - STATE'S RESPONSE TO DEFENDANT'S MOTION TO VACATE JUDGMENTS AND SENTENCE WITH REQUEST TO AMEND (SUCCESSIVE MOTION) FILED BY DEFENDANT
January 07, 2008	DOCUMENT RECEIVED - DEFENDANT'S DEMAND FOR ADDITIONAL PUBLIC RECORDS PURSUANT TO FLA.R.CRIM.P. 3.852(I) FLORIDA DEPARTMENT OF CORRECTIONS)
	DOCUMENT RECEIVED - DEFENDANT'S DEMAND FOR ADDITIONAL PUBLIC RECORDS PURSUANT TO FLA.R.CRIM.P. 3.852(I) (FLORIDA DEPARTMENT OF LAW ENFORCEMENT)
	DOCUMENT RECEIVED - DEFENDANT'S DEMAND FOR ADDITIONAL PUBLIC RECORDS PURSUANT TO FLA.R.CRIM.P. 3.852(I) (GOVERNOR CHARLIE CRIST)
	DOCUMENT RECEIVED - DEFENDANT'S DEMAND FOR ADDITIONAL PUBLIC RECORDS PURSUANT TO FLA.R.CRIM.P. 3.852(I) (HON. BILL MCCOLLUM, ATTORNEY GENERAL)
	DOCUMENT RECEIVED - NOTICE OF FILING
December 26, 2007	DOCUMENT RECEIVED - LETTER TO CLERK OF COURT RE: NOTICE OF FILING POST-CONVICTION RELIEF - MOTION TO VACATE JUDGMENTS AND SENTENCE WITH REQUEST TO AMEND WITH ATTACHMENTS FILED

<u>Date</u>	<u>Docket Description/Text</u>
	MANDATE - SUPREME COURT MANDATE ISSUED 12/17/07 AND OPINION ISSUED 8/30/07 - AFFIRM THE CIRCUIT COURT'S ORDER AND DENY KEARSE'S PETITION; SC05-1876; SC06-942
	SUPREME COURT ORDER - 11/30/07 - APPELLANT'S MOTION FOR REHEARING IS DENIED; SC05-1876; SC06-942
	DOCUMENT RECEIVED - LETTER TO CLERK FROM CAPITAL COLLATERAL REGIONAL COUNSEL (PAUL KALIL) ASSISTANT CCRC-SOUTH FILED
April 05, 2006	APPEAL NOTE - **ORIGINAL EXEMPT RECORDS SENT TO SUPREME COURT RE: ORDER ON COURT'S IN CAMERA INSPECTION OF DOCUMENTS FROM AGENCY FOR HEALTH CARE ADMINISTRATION-FRED PETRILLA
	APPEAL NOTE - **ORIGINAL EXEMPT RECORDS SENT TO SUPREME COURT RE: ORDER ON COURT'S IN CAMERA INSPECTION OF DOCUMENTS FROM DEPARTMENT OF CHILDREN AND FAMILY SERVICES REGARDING BERTHA KEARS AND TIMOTHY KEARSE
	APPEAL NOTE - **ORIGINAL EXEMPT RECORDS SENT TO SUPREME COURT RE: ORDER ON COURT'S IN CAMERA INSPECTION OF DOCUMENTS FROM AGENCY FOR HEALTH CARE ADMINISTRATION-HARRY KROP
April 04, 2006	APPEAL NOTE - SUPPLEMENTAL ROA TO SUPREME COURT, AG, ATTY KALIL, COPY OF INDEX
	APPEAL NOTE - AFFIDAVIT RE: SUPPLEMENTAL RECORD WITH COPIES OF ORDERS ATTACHED
March 31, 2006	DOCUMENT RECEIVED - FAXED COPY OF NOTICE OF COMPLIANCE BY LAW ENFORCEMENT AGENCY, ST. LUCIE COUNTY SHERIFF'S OFFICE
	DOCUMENT RECEIVED - FAXED COPY OF STATE'S WITNESS AND EXHIBIT LIST
	APPEAL NOTE - FAXED COPY OF SUPREME COURT ORDER SENT TO DEPT OF STATE/REPOSITORY RE: SUPPLEMENTAL RECORD
March 09, 2006	SUPREME COURT ORDER - 02/28/06 - APPELLANT'S CORRECTED AMENDED MOTION TO SUPPLEMENT THE RECORD - GRANTED (COPY OF MOTION ATTACHED)
March 07, 2006	MOTION FILED - FAXED COPY OF COPY OF APPELLANT'S CORRECTED AMENDED MOTION TO SUPPLEMENT THE RECORD ON APPEAL
	SUPREME COURT ORDER - FAXED COPY OF 02/28/06 - APPELLANT'S CORRECTED AMENDED MOTION TO SUPPLEMENT THE RECORD - GRANTED. DUE ON OR BEFORE 3/30/06.
November 16, 2005	APPEAL NOTE - ROA TO DCA, AG, PD15, COPY OF INDEX
November 09, 2005	SUPREME COURT ORDER - 10/28/05 - TRANSCRIPTS DUE 11/28/05 AND ROA DUE 20 DAYS AFTER.
	APPEAL NOTE - SUPREME COURT ACKNOWLEDGMENT - SC05-1876
October 14, 2005	DOCUMENT RECEIVED - TRANSCRIPT - STATUS CONFERENCES ON APRIL 1, 2002, JUNE 9, 2003, JULY 18, 2003, SEPTEMBER 3, 2003 AND DECEMBER 12, 2003
	APPEAL NOTE - COPY OF STMT FOR TRANSCRIPTS - \$886.50/GOLLNICK
September 29, 2005	APPEAL NOTE - LETTER W/CERT. COPY OF NOA TO SUPREME COURT, AG, ATTY KALIL
September 28, 2005	APPEAL NOTE - LETTER TO CLERK FROM ATTY KALIL RE: APPEAL PACKET
	APPEAL NOTE - DIRECTIONS TO CLERK
	APPEAL NOTE - STATEMENT OF JUDICIAL ACTS TO BE REVIEWED
	APPEAL NOTE - DESIGNATION TO COURT REPORTER
	NOTICE OF APPEAL - BY ATTY PAUL KALIL, ASST. CCRC-SOUTH

<u>Date</u>	<u>Docket Description/Text</u>
September 06, 2005	ORDERS - ORDER DENYING AMENDED MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE FILED BY JUDGE CIANCA
August 15, 2005	DOCUMENT RECEIVED - DEF'S POST HEARING MEMORANDUM FILED DOCUMENT RECEIVED - LETTER FELONY DIV FROM ATTY PAUL KALIL ASSIST CCRC SOUTH FIELD
August 11, 2005	DOCUMENT RECEIVED - STATE'S POST-HEARING MEMORANDUM FILED (JUDGE CIANCA PRESIDING JUDGE) FILED
August 01, 2005	ORDERS - ORDER GRANTING MOTION FOR EXTENSION OF TIME TO FILE POST-HEARING MEMORANDUM
July 29, 2005	MOTION FILED - STATE'S MOTION FOR EXTENSION OF TIME TO FILE POST-HEARING MEMORANDUM FILED
June 16, 2005	DOCUMENT RECEIVED - TRANSCRIPT - HEARINGS BEFORE HON. MARC A. CIANCA AT INDIAN RIVER COURTHOUSE ON MAY 25, 2005 (VOLUME VIII) DOCUMENT RECEIVED - TRANSCRIPT - HEARINGS BEFORE HON. MARC A. CIANCA AT INDIAN RIVER COURTHOUSE ON APRIL 18, APRIL 19, APRIL 20 AND APRIL 21, 2005 (VOLUME VII)
June 03, 2005	DOCUMENT RECEIVED - TRANSCRIPT OF PROCEEDINGS FILED
June 01, 2005	ORDERS - ADMINISITRATIVE ORDER FILED DOCUMENT RECEIVED - DEF'S RESPONSE TO STATE'S MOTION IN LIMINE PREVENTING IMPROPER HEARSAY TESTIMONY AND MOTION FOR CLARIFICATION FILED
May 26, 2005	DOCUMENT RECEIVED - DEFENSE EVIDENCE LIST FROM EVIDENTIARY LIST FROM INDIAN RIVER CO., FILED DOCUMENT RECEIVED - STATE'S EVIDENCE LIST FROM EVIDENTIARY HEARING FROM INDIAN RIVER CO., FILED DOCUMENT RECEIVED - WITNESS LIST FORM EVIDENTIARY HEARING FROM INDIAN RIVER CO., FILED DOCUMENT RECEIVED - EVIDENTIARY HEARING COURT NOTES FROM INDIAN RIVER CO., FILED
May 25, 2005	DOCUMENT RECEIVED - TRANSCRIPT OF PROCEEDINGS FILED
May 20, 2005	MOTION FILED - MOTION FOR IN-CAMERA INSPECTION OF DOCUMENTS FILED MOTION FILED - MOTION FOR IN-CAMERA INSPECTION OF DOCUMENTS FILED DOCUMENT RECEIVED - LETTER TO CLERK FROM ATTY PAUL KALIL ASSIST CCRC SOUTH FILED DOCUMENT RECEIVED - STATE'S RESPONSE TO DEF'S M/ FOR IN CAMERA INSPECTION OF DOCUMENTS
May 19, 2005	DOCUMENT RECEIVED - TRANSCRIPT OF PROCEEDINGS FILED DOCUMENT RECEIVED - TRANSCRIPT OF PROCEEDINGS FILED
May 10, 2005	DOCUMENT RECEIVED - NOTICE OF HEARING 5/25/2005 1:30 PM , VERO BEACH FLORIDA, JUDGE CIANCA PRESIDING FOR DEFENDANTS MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTECNE FILED BY ATTY. PAUL KALIL DOCUMENT RECEIVED - LETTER FROM CAPITAL COLLATERAL REGIONAL COUNSEL SOUTH FILED DOCUMENT RECEIVED - LETTER TO FELONY DIV FROM ATTY PAUL KALIL ASSIST CCRC-S FILED
May 06, 2005	DOCUMENT RECEIVED - TRANSCRIPT OF PROCEEDINGS FILED DOCUMENT RECEIVED - TRANSCRIPT OF PROCEEDINGS FILED
April 12, 2005	DOCUMENT RECEIVED - LETTER FROM LAW OF THE CAPITAL COLLATERAL REGIONAL COUNSEL-SOUTH FILED

<u>Date</u>	<u>Docket Description/Text</u>
	ORDERS - ORDER TO TRANSPORT FILED
	DOCUMENT RECEIVED - WRIT OF HABEAS CORPUS AD TESTIFICATION (CHARLES VAN PULLEN) FILED
	DOCUMENT RECEIVED - WRIT OF HABEAS CORPUS AD TESTIFICATION (JOHN KEARSE) FILED
	DOCUMENT RECEIVED - WRIT OF HABEAS CORPUS AD TESTIFICATION (FABIAN BUTLER) FILED
	DOCUMENT RECEIVED - WRIT OF HABEAS CORPUS AD TESTIFICATION (DEMETRIUS SOLOMON) FILED
	MOTION FILED - MOTION TO ALLOW WITNESS ALAN F FRIEDMAN PHD TO APPEAR BY TELECONFERENCE AT EVIDENTIARY HEARING FILED
April 05, 2005	DOCUMENT RECEIVED - STATE'S AMENDED WITNESS AND EXHIBIT LIST
March 31, 2005	MOTION FILED - MOTION FOR ORDER TO TRANSPORT FILED
	MOTION FILED - MOTION FOR WRIT OF HABEAS CORPUS AD TESTIFICANDUM FILED
	MOTION FILED - MOTION FOR WRIT OF HABEAS CORPUS AD TESTIFICANDUM FILED
	MOTION FILED - MOTION FOR WRIT OF HABEAS CORPUS AD TESTIFICANDUM FILED
	MOTION FILED - MOTION FOR WRIT OF HABEAS CORPUS AD TESTIFICANDUM FILED
	DOCUMENT RECEIVED - DEFENDANT'S RESPONSE TO STATE'S MOTION TO PRECLUDE TESTIMONY FROM ROBERT NORGARD ESQ FILED
	DOCUMENT RECEIVED - LETTER TO FELONY DIV FROM ATTY PAUL KALIL FILED
March 29, 2005	MOTION FILED - STATE'S MOTION TO PRECLUDE TESTIMONY FROM DEFENSE WITNESS, ROBERT NORGARD, ESQ. IDENTIFIED AS A STRICKLAND V. WASHINGTON EXPERT FILED
March 23, 2005	DOCUMENT RECEIVED - LETTER TO PAUL KALIL FROM THOMAS M HYDE MD
March 22, 2005	ORDERS - CERTIFICATE OF MATERIALITY OF OUT-OF-STATE WITNESS JOHN J. KELLY FILED
	ORDERS - CERTIFICATE OF MATERIALITY OF OUT-OF-STATE WITNESS SHAWN MARTIN FILED
	ORDERS - CERTIFICATE OF MATERIALITY OF OUT-OF-STATE WITNESS STEVEN LE MARTIN FILED
	ORDERS - CERTIFICATE OF MATERIALITY OF OUT-OF-STATE WITNESS JAMES NEWTON FILED
	ORDERS - CERTIFICATE OF MATERIALITY OF OUT-OF-STATE WITNESS PAUL J. KENNEDY FILED
	ORDERS - CERTIFICATE OF MATERIALITY OF OUT-OF-STATE WITNESS BILLY R. BLACKBURN FILED
	DOCUMENT RECEIVED - DEFENDANT'S AMENDED WITNESS LIST FILED
	DOCUMENT RECEIVED - DEFENDANT'S AMENDMENT TO LIST OF DOCUMENTARY EXHIBITS BILLY R BLACKBURN FILED
	ORDERS - CERTIFICATE TO SECURE ATTENDANCE OF OUT-OF-STATE WITNESS JAMES NEWTON FILED
	DOCUMENT RECEIVED - APPLICATION FOR CERTIFICATE TO SECURE ATTENDANCE OF OUT-OF-STATE WINESS SHAWN MARTIN
	DOCUMENT RECEIVED - APPLICATION FOR CERTIFICATE TO SECURE ATTENDANCE OF OUT-OF-STATE WINESS

<u>Date</u>	<u>Docket Description/Text</u>
	STEVEN LEE MARTIN
	DOCUMENT RECEIVED - APPLICATION FOR CERTIFICATE TO SECURE ATTENDANCE OF OUT-OF-STATE WINESS
	BILLY R BALCKBURN
	DOCUMENT RECEIVED - APPLICATION FOR CERTIFICATE TO SECURE ATTENDANCE OF OUT-OF-STATE WINESS
	PAUL J KENNEDY
	ORDERS - CERTIFICATE TO SECURE ATTENDANCE OF OUT-OF -STATE WITNESS SHAWN MARTIN FILED
	DOCUMENT RECEIVED - APPLICATION FOR CERTIFICATE TO SECURE ATTENDANCE OF OUT-OF-STATE WINESS
	JOHN J KELLY
	ORDERS - CERTIFICATE TO SECURE ATTENDANCE OF OUT-OF-STATE WITNESS PAUL J. KELLY FILED
	DOCUMENT RECEIVED - APPLICATION FOR CERTIFICATE TO SECURE ATTENDANCE OF OUT-OF-STATE WINESS
	JAMES NEWTON
	ORDERS - CERTIFICATE TO SECURE ATTENDANCE OF OUT-OF- STATE WITNESS BILLY R. BLACKBURN FILED
	ORDERS - CERTIFICATE TO SECURE ATTENDANCE OF OUT- OF STATE WITNESS JOHN J. KELLY FILED
	ORDERS - CERTIFICATE TO SECURE ATTENDANCE OF OUT- OF - STATE WITNESS STEVEN LEE MARTIN FILED
	DOCUMENT RECEIVED - LETTER WITH ATTACHMENMTS TO CLERK OF COURT FROM LAW OFC OF CAPITOL COLLATERAL REGIONAL COUNSEL- SOUTH (PAIL KALIL) FILED
March 18, 2005	DOCUMENT RECEIVED - CY OF NOTICE OF HEARING 18 MAR 2005 9:15 AM EVIDENCTIARY HEARING
March 08, 2005	DOCUMENT RECEIVED - COPY OF LETTER FROM JUGE VAUGHN TO JUDGE ROBY FILED
March 04, 2005	STATE EXHIBIT- PROFFERED ITEMS FOR THE STATE (SEALED)
	ORDERS - ORDER OF REASSIGNMENT FILED
	ORDERS - ORDER REGARDING AMENDMENTS TO WITNESS LISTS FILED
	DOCUMENT RECEIVED - COPY OF ORDER OF REASSIGNMENT (JUDGE MARC CIANCA) FILED
February 17, 2005	11:00 AM HEARING - STATE'S M/ IN LIMINE TO PRECLUDE IMPROPER HEARSAY TESTIMONY REGARDING STATE'S TRIAL MENTAL HEALTH EXPERT DANIEL MARTELL AND IN THE ALTERNATIVE M/ FOR CLARIFICATION OF COURT'S RULING REGARDING WHETHER THIS SPECIFIC ISSUE IS SUBJ TP EVIDENTIARY HEARING
February 01, 2005	DOCUMENT RECEIVED - NOTICE HEARING 17 FEB 2005 11 AM/MOTION
January 21, 2005	MOTION FILED - STATE'S MOTION IN LIMINE TO PRECLUDE IMPROPER HEARSAY TESTIMONY REGARDING STATE'S TRIAL MENTAL HEALTH EXPERT DANIEL MARTELL AND IN THE ALTERNATIVE MOTION FOR CLARIFICATION OF THE COURT'S RULING REGARDING WHETHER THIS SPECIFIC ISSUE IS SUBJECT TO EVIDENTIARY HEARING FILED
January 19, 2005	DOCUMENT RECEIVED - NOTICE HEARING 28 JAN 2005 3 PM/ STATUS HEARING FILED
December 22, 2004	ORDERS - ORDER OF REASSIGNMENT FILED

<u>Date</u>	<u>Docket Description/Text</u>
October 26, 2004	DOCUMENT RECEIVED - LETTE TO JUDGE STEVEN LEVIN FROM JUDGE MARC CIANCA FILED
October 20, 2004	ORDERS - ORDER EXTENDING TIME TO HOLD EVIDENTIARY HEARING FILED DOCUMENT RECEIVED - DEFENDANT'S WITNESS LIST FILED
October 12, 2004	DOCUMENT RECEIVED - LETTER TO JOANNE HOLMAN FROM ASSIST CCRC SOUTH FILED DOCUMENT RECEIVED - DEFENDANT'S LIST OF DOCUMENTARY EXHIBITS FILED
August 23, 2004	ORDERS - ORDER RE: AUGUST 18, 2004, CASE MANAGEMENT CONFERENCE FILED WITH ATTACHMENTS ORDERS - ORDER ON IN CAMERA INSPECTION FILED
August 18, 2004	1:30 PM HEARING - DEFENDANT NOT PRESENT, IN DOC. ATTY KALIL, ASA MIRMAN & ATTY GENERAL CAMPBELL WERE PRESENT. SARAH DYEHOUSE, DOC, WAS PRESENT VIA TELEPHONE. COURT ADDRESSED THE RELEASE OF THE DEFENDANTS MEDICAL AND MENTAL HEALTH RECORDS. COURT IS TO HOLD AN IMCAMERA INSPECTION OF ALL THE DOCUMENTS AND AN ORDER IS TO BE ENTERED. COURT HELD CASE MANAGEMENT CONFERENCE. COURT ADDRESSED THE CLAIMS THAT NEED A HEARING. COURT RULED CLAIM 2, 3 & 4 NEED AN EVIDENTARY HEARING. CLAIM 1,5, 6, 7, 8, & 9- ARE DENIED AND DO NOT NEED A HAERING. COURT IS TO ENTER AN ORDER SETTING THE EVIDENTARY HEARING DATE. (TM/DC) Hearing DEFENDANT NOT PRESENT, IN DOC.
June 29, 2004	DOCUMENT RECEIVED - STATE'S NOTICE OF FILING SUPPLEMENTAL AUTHORITY FILED BY ASST ATTY GENERAL LESLIE T. CAMPBELL
May 28, 2004	ORDERS - ORDER FOR HEARING FILED (8-18-04 1:30 PM)
May 11, 2004	ORDERS - ORDER SETTING CASE MANAGEMENT CONFERENCE FILED
May 03, 2004	DOCUMENT RECEIVED - STATE'S RESPONSE TO MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE WITH SPECIAL REQUEST FOR LEAVE TO AMEND FILED
April 24, 2004	DOCUMENT RECEIVED - PAY SHEET (LONDON GRAPHICS) \$312.85 COPY TO FINANCE FILED
April 22, 2004	DOCUMENT RECEIVED - CERTIFICATION OF COSTS BY STATAE ATTORNEY W/ATTACHMENTS- STATEMENT FROM LONDON GRAPHICS \$312.85 FILED
March 01, 2004	MOTION FILED - AMENDED M/ TO VACATE JUDGMENTS OF CONVICTION/SENTENCE, INCLUDING SENTENCE OF DEATH AND MEMO OF LAW FILED
December 30, 2003	DOCUMENT RECEIVED - CERTIFICATION OF COST BY SA W/ATTACHMENTS - STATEMENT FROM (PAGE ONE REPORTING, INC.) \$45.00 COPY OF REQUEST FOR TRANSCRIPTION FILED PAY SHEET (PAGE ONE REPORTING, INC.) \$45.00 , COPY TO FINANCE FILED
December 19, 2003	ORDERS - ORDER RE: DECEMBER 12, 2003 STATUS CONFERENCE AND SETTING BRIEFING SCHEDULE
December 15, 2003	DOCUMENT RECEIVED - LETTER TO JUDGE CIANCA FROM LESLIE TO CAMPBELL ASA FILED DOCUMENT RECEIVED - LETTER FROM OFFICE OF THE ATTORNEY GENERAL THE CAPITOL SIGNED BY LESLIE CAMPBELL, ASSISTANT ATTORNEY GENERAL FILED
December 12, 2003	TAPE LOG - STATUS DISK 03-637 LOG 335 PG 298 2:00 PM HEARING - CASE CALLED IN OPEN COURT. ATTY KALIL WAS

<u>Date</u>	<u>Docket Description/Text</u>
	PRESENT. ASA MIRMAN WAS PRESENT. ATTY GENERAL LESLIE CAMPBELL PRESENT VIA PHONE. DEFENSE INFORMED THE COURT THAT THE RECORDS OF OFFICER HAMRICK ARE STILL OUTSTANDING. COURT GAVE ADDITIONAL 15 DAYS IF HAVE NOT RECEIVED THE DEFENSE WILL NOTIFY THE COURTS. DEFENSE MOTION FOR MORE TIME TO FILE THE AMENDED 3.850. MOTION GRANTED. DEFENSE HAS UNTIL 2/27/04 TO 3/1/04. STATE WILL HAVE 60 DAYS TO FILE THE RESPONDS. 3.850 HEARING SHOULD BE READY IN APRIL 2004. MA/DC Hearing
December 03, 2003	CASE CALLED IN OPEN COURT. ATT DOCUMENT RECEIVED - CERTIFICATION OF COST BY SA W/ATTACHMENTS - STATEMENT FROM (PAGE ONE REPORING, INC.) \$100.00 PAY SHEET (PAGE ONE REPORTING, INC.) \$100.00 , COPY TO FINANCE FILED
November 24, 2003	DOCUMENT RECEIVED - CITY OF FT PIERCE NOTICE OF COMPLIANCE FILED
November 18, 2003	DOCUMENT RECEIVED - DEFENDANT'S DEMAND FOR ADDITIONAL PUBLIC RECORDS
November 17, 2003	ORDERS - ORDER RE: NOVEMBER 12,2003 STATUS CONFERENCE FILED
November 14, 2003	DOCUMENT RECEIVED - NOTICE OF COMPLIANCE BY LAW ENFORCEMENT AGENCY FILED
November 12, 2003	DOCUMENT RECEIVED - LETTER TO PAUL KALIL FROM LEWIS R WILLIAMS BUREAU CHIEF FILED DOCUMENT RECEIVED - LETTER TO ATTY ROBERT V SCHWERER FROM PAUL KALIL ASSIST CCRC FILED TAPE LOG - STATUS HEARING DISC 03-590 LOG 333 PG 73 1:30 PM HEARING - DEFENDANT NOT PRESENT, IN DOC. ATTY KALIL & ASA MIRMAN WERE PRESENT. ROBERT SCHWERER FOR THE CITY OF FORT PIERCE, JEAN BRIDGES FOR SLC SO & SGT TEDDER WERE PRESENT IN OPEN COURT. LESLIE CAMPBELL FROM ATTY GENERALS OFFICE WAS PRESENT VIA TELEPHONE. COURT HELD A STATUS HEARING. DIVISION OF RISK MANAGMENT AND DEPT OF CORRECTIONS ARE IN COMPLIANCE. ATTY KALIL IS TO ORDER THE THREE PERSONEL RECORDS THRU CITY OF FORT PIERCE AND CITY OF FORT PIERCE IS TO SUBMIT A WRITTEN COMPLIANCE TO THE ATTORNEY. COURT SET NEXT STATUS HEARING ON 12-12-2003 AT 2:00 PM. (TM/DC) Hearing
November 07, 2003	DEFENDANT NOT PRESENT, IN DOC. ORDERS - ORDER GRANTING STATE'S REQUEST TO APPEAR TELEPHONICALLY FOR HEARING SCHEDULED ON NOVEMBER 12, 2003 DOCUMENT RECEIVED - HEARING FOR RESOLVE OUTSTANDING ISSUES REGARDING DFEFENDANT'S DEMANDS FOR ADDITIONAL PUBLIC RECORDS BY ATTY KENNETH MALNIK 101 NE 3RD AV STE 400 FORT LAUDERDALE FL 33301 FILED DOCUMENT RECEIVED - LETTER TO JOANN HOLMAN FROM ATTY PAUL KALIL ASSIST CCRC-S FILED
November 06, 2003	DOCUMENT RECEIVED - STATE'S REQUEST TO APPEAR TELEPHONICALLY FOR HEARING SCHEDULED FOR NOVEMBER 12. 2003 FILED
October 03, 2003	DOCUMENT RECEIVED - DEFENDANT'S DEMAND FOR ADDITIONAL PUBLIC RECORDS FILED DOCUMENT RECEIVED - COVER LETTER FROM LAW OFFICE OF THE CAPITAL

<u>Date</u>	<u>Docket Description/Text</u>
September 30, 2003	COLLATERAL REGIONAL COUNSEL-SOUTH FILED BY PAUL KALIL DOCUMENT RECEIVED - DEFENDANT'S DEMAND FOR ADDITIONAL PUBLIC RECORDS FILED
September 26, 2003	DOCUMENT RECEIVED - DEFENDANT'S DEMAND FOR ADDITIONAL PUBLIC RECORDS FILED
September 18, 2003	DOCUMENT RECEIVED - DEFENDANT'S DEMAND FOR ADDITIONAL PUBLIC RECORDS FILED DOCUMENT RECEIVED - COVER LETTER FROM PAUL KALIL, ASSISTANT CGRC-SOUTH FILED
September 08, 2003	ORDERS - ORDER RE: SEPTEMBER 3,2003 STATUS CONFERENCE FILED DOCUMENT RECEIVED - DEPARTMENT OF CORRECTIONS SUPPLEMENTAL RESPONSE TO DEFENDANT'S DEMAND FOR ADDITIONAL PUBLIC RECORDS FILED
September 04, 2003	DOCUMENT RECEIVED - ORDER-RE:SLC SHERIFF RECORDS FILED
September 03, 2003	TAPE LOG - DEMAND FOR PUBLIC RECORDS DISC 03-457 LOG 330 PG 90, 91 1:30 PM HEARING - DEFENDANT NOT PRESENT, IN DOC. ATTY KALIL & ATTY MALNIK WERE PRESENT FOR THE DEFENSE. ASA MIRMAN WAS RPRESENT FOR THE STATE & LESLIE CAMPBELL WAS PRESENT FOR THE ATTORNYE GENERALS OFFICE. COURT HELD PUBLIC RECORDS DEMAND HEARING. SUSAN SHWARTZ- DOC, SAM POWER- DEPT OF HEALTH & JAMES MARTIN- FDLE WERE PRESENT VIA TELEPHONE. DAN NIPPES- IRCC CRIME LAB, MR. SCHWER-FPPD, SGT. TEDDER-FPPD & CPT. WIRTHMAN-FPPD WERE PRESENT IN COURT. COURT FOUND IRCC CRIME LAB WAS INCOMPLIANCE, DEPT OF HEALTH & FDLE WERE NO LONGER NEEDED FOR THIS HEARING, DOC IS TO PROVIDE REQUESTED DOCUMENTS, & ATTY KALIL IS TO SCHEDULE A DATE AND TIME WITH FPPD TO VIEW ALL EVIDENCE & COPIES OF ALL PHOTOS ARE TO BE COPIED FROM THE NEGITIVES AT THE DEFENSE'S EXPENSE, WITH IN 30 DAYS. CASE SET FOR A STATUS HEARING ON 11-12-2003 AT 1:30 PM. DEFENSE IS TO NOTICE DOC. (TM/DC) Hearing DEFENDANT NOT PRESENT, IN DOC.
August 20, 2003	MOTION FILED - DEPARTMENT OF CORRECTIONS MOTION TO APPEAR BY TELEPHONE FILED
August 19, 2003	Orders ORDERS - ORDER GRANTING DEPARTMENT OF CORRECTIONS' MOTION TO APPEAR BY TELEPHONE FILED MOTION FILED - DEPARTMENT OF CORRECTIONS' MOTION TO APPEAR BY TELEPHONE FILED DOCUMENT RECEIVED - DEPARTMENT OF CORRECTIONS RESPONSE TO DEFENDANT'S DEMAND FOR ADDITIONAL PUBLIC RECORDS WITH ATTACHMENTS FILED DOCUMENT RECEIVED - LETTER TO JUDGE MARC A CIANCA FROM DOC SUSAN SCHWARTZ AGC FILED
August 14, 2003	DOCUMENT RECEIVED - BOX/PACKAGE OF PUBLIC RECORDS CONTAINING INFORMATION EXEMPT FROM RELEASE AS REQUIRED BY DEFENDANT'S DEMAND FOR ADDITIONAL PUBLIC RECORDS FILED
August 13, 2003	ORDERS - ORDER ON COURT'S IN CAMERA INSPECTION OF DOCUMENTS FROM AGENCY FOR HEALTH CARE ADMINISTRATION FILED

<u>Date</u>	<u>Docket Description/Text</u>
	ORDERS - ORDER ON COURT'S IN CAMERA INSPECTION OF DOCUMENTS FROM AGENCY FOR HEALTH CARE ADMINISTRATION FILED
	ORDERS - ORDER ON COURT'S IN CAMERA INSPECTION OF DOCUMENTS FROM DEPARTMENT OF CHILDREN AND FAMILY SERVICES FILED
August 07, 2003	ORDERS - ORDER RE:JULY 18, 2003 STATUS CONFERENCE FILED
July 25, 2003	DOCUMENT RECEIVED - FAX COVER SHEET TO LINDA FROM PAUL KALIL FILED
	DOCUMENT RECEIVED - LETTER TO LINDA JUDICIAL ASSIST TO JUDGE MARC A CIANCA FROM PAUL PAUL KALIL FILED
July 23, 2003	ORDERS - ORDER ON TRIAL COURTS IN CAMERA INSPECTION OF PUBLIC RECORDS FILED WITH ATTACHMENT
July 22, 2003	ORDERS - ORDER FOR HEARING
	DOCUMENT RECEIVED - COVER LETTER TO JUDGE MARC A CIANCA FROM ATTY MARVIN E BARKIN FILED
	ORDERS - ORDER SUSTAINING OBJECTION OF FLORIDA JUDICIAL QUALIFICATION COMMISSION FILED
July 18, 2003	TAPE LOG - STATUS DISC 03-360 LOG 327 PG 11
	2:00 PM HEARING - DEFENDANT NOT PRESENT, IN DOC. ATTY KALIL WAS PRESENT FOR THE DEFENSE. ASA MIRMAN WAS PRESENT FOR THE STATE AND ATTY CAMPBELL WAS PRESENT FOR THE ATTY GENERALS OFFICE. COURT ADDRESSED NOTICE OF OUTSTANDING PUBLIC RECORDS. ATTY BARKIN FROM JUDICIAL QUALIFICATIONS COMMISSION (JQC) WAS PRESENT VIA TELEPHONE. COURT HEARED ARGUMENTS. OBJECTION WAS SUSTAINED. ATTY BARKIN IS TO PREPARE AN ORDER. COURT FURTHER ADDRESSED NOTICE OF OUTSTANDING PUBLIC RECORDS AS TO: DEPT OF HEALTH/ DCF, FPPD, ASA, DOC, HEALTH CARE ADMINISTRATION, DJJ & FDLE/IRCC CRIME LAB. COURT SET A HEARING FOR A PUBLIC RECORDS DEMAND ON 9-3-2003 AT 1:30 PM. FPPD, DEPT OF HEALTH/DCF, DOC, & FDLE/IRCC CRIME LAB ARE TO BE NOTICE BY THE COURT. (TM/DC)
July 14, 2003	Document Received
July 10, 2003	DOCUMENT RECEIVED - CERTIFICATION OF COSTS BY SA W/ATTACHMENTS - STMT FROM (TREASURE COAST COURT REPORTING) \$94.00
	COPY OF REQUEST FOR TRANSCRIPTION FILED
	PAYSHEET (TREASURE COAST COURT REPORTING) \$94.00, COPY TO FINANCE, FILED
July 08, 2003	Notice of Appearance
	Document Received
	Appeal Note
July 07, 2003	DOCUMENT RECEIVED - NOTICE OF APPEARANCE FILED BY ATTY MARVIN BARKIN 101E KENNEDY BLVD SUITE 2700 TAMPA, FLA. 33602
	DOCUMENT RECEIVED - OBJECTION AND RESPONSE OF FLORIDA JUDUCUAL QUALIFICATIONS COMISSION TO DEFENDANT'S DEMAND FOR AFFITIONAL PUBLIC RECORDS FILED
	DOCUMENT RECEIVED - REQUEST TO PARTICIPATE IN STATUS CONFERENCE BY TELEPHONE FILED
	DOCUMENT RECEIVED - NOTICE OF DELIVERY OF EXEMPT PUBLIC RECORDS TO CLERK OF CIRCUIT COURT WITH (5) CONFIDENTIAL EVELOPES (5 EVELOPES HAND DELIVERED TO JUDGE CIANCA)
July 03, 2003	Orders
July 01, 2003	Document Received
June 30, 2003	ORDERS - ORDER TO DELIVER EXEMPT PUBLIC RECORDS FILED

<u>Date</u>	<u>Docket Description/Text</u>
June 24, 2003	Motion Filed Document Received
June 20, 2003	MOTION FILED - MOTION FOR IN CAMERA INSPECTION OF PUBLIC RECORDS FILED DOCUMENT RECEIVED - NOTICE OF OUTSTANDING PUBLIC RECORDS FILED DOCUMENT RECEIVED - LETTER TO CLERK OFFICE FROM LAW OFFICE OF THE CAPITAL COLLATERAL REGIONAL COUNSEL-SOUTH FILED
June 09, 2003	TAPE LOG - STATUS DISK 03-287 LOG 324 PG 395, 396 3:30 PM HEARING - DEFENDANT NOT PRESENT, IN D.O.C. JUDGE CIANCA APPEARED VIA TELEPHONE. ASA MIRMAN AND LESLIE CAMPBELL FROM THE ATTORNEY GENERAL OFFICE WERE PRESENT. DEFENSE MOTION TO COMPEL RECORDS FROM THE FT. PIERCE POLICE, MOTION GRANTED. RECORDS HAS 10 DAYS FROM THE ORDER TO GIVE THE DEFENSE COPIES. DEFENSE BROUGHT TO THE COURTS ATTENTION THAT ST. LUCIE COUNTY AND JUVENILE JUSTICE IS NOT RESPONDING TO THE REQUEST OF PUBLIC RECORDS. DEFENSE WILL NOTICE THOSE THAT HAVE NOT COMPLIED WITH THE PUBLIC RECORDS. COURT SET CASE FOR A STATUS 7/18/03@2:00PM. MA/DC
May 07, 2003	DOCUMENT RECEIVED - NOTICE OF HEARING 9 JUN 2003 3:30 PM STATUS CHECK
April 03, 2003	ORDERS - ORDER RE: DEMAND FOR ADDITIONAL PUBLIC RECORDS CONCERNING EMPLOYEES OF THE FORT PIERCE POLICE DEPARTMENT FILED
February 18, 2003	TAPE LOG - STATUS CONFERENCE DISK 03-86 LOG 318 PAGE 264 MOTION FILED - STATE'S MOTION TO TOLL THE TIME TO FILE A RESPONSE TO AN AMENDMENT TO DEFENDANT'S POSTCONVICTION RELIEF MOTION UNTIL THE PUBLIC RECORDS ISSUES HAVE BEEN RESOLVED FILED 11:00 AM HEARING - DEFENDANT NOT PRESENT (D.O.C.) WITH ATTY. MALIK AND ATTY. KALIL. LESLIE CAMPBELL FROM THE ATTORNEY GENERAL'S OFFICE PRESENT AND MADE MOTION TO TOLL THE TIME TO FILE A RESPONSE TO AN AMENDMENT TO DEFENSE POST CONVICTION RELIEF MOTION UNTIL THE PUBLIC RECORDS ISSUES HAVE BEEN RESOLVED. COURT HEARD ARGUMENTS. MOTION GRANTED. DEFENSE MADE MOTION FOR PERSONAL RECORDS OF FPPD OFFICERS IN REFERENCE TO THIS CASE. CITY ATTORNEY ROB SCHWERER ADDRESSED THE COURT. COURT TO REVIEW MEMO FROM THE DEFENSE AND DECIDE WHOSE PERSONAL RECORDS ARE RELEVANT TO THE MOTION FOR POST CONVICTION RELIEF. ORDER TO BE ENTERED. STATE HEARING TO BE HELD AFTER THE ORDER IS ENTERED. COURT REPORTER NANCY SCHIVARI PRESENT. EM/DC
January 31, 2003	ORDERS - ORDER RE: IN CAMERA INSPECTION OF PERSONNEL RECORDS OF THE STATE ATTORNEY'S OFFICE DENIED FILED
January 29, 2003	DOCUMENT RECEIVED - NOTICE OF COMPLIANCE BY LAW ENFORCEMENT AGENCY FILED
January 16, 2003	MOTION FILED - MOTION TO MITIGATE SENTENCE FILED DOCUMENT RECEIVED - NOTICE OF HEARING 2/18/03 11:00 AM STATUS CONFERENCE
January 07, 2003	DOCUMENT RECEIVED - DEF'S DEMAND FOR ADDITIONAL PUBLIC RECORDS FILED DOCUMENT RECEIVED - DEF'S DEMAND FOR ADDITIONAL PUBLIC RECORDS FILED DOCUMENT RECEIVED - LTR FROM CAPITAL COLLATERAL REG COUNSEL S

<u>Date</u>	<u>Docket Description/Text</u>
January 03, 2003	TO CLERK OF COURTS FILED TAPE LOG - STATUS DISC 03-3 CF LOG BOOK 316 PG 87-88 10:00 AM HEARING - DEFENDANT NOT PRESENT (D.O.C.) WITH ATTY. KALIL AND ATTY. MALNIK. ASA MIRMAN PRESENT. COURT REPORTER NANCY SCHIVARI PRESENT. COURT HELD STATUS HEARING AS TO PERSONNEL RECORDS FROM THE STATE ATTORNEY'S OFFICE TO BE SUBMITTED TO THE COURT FOR INCAMERA REVIEW. SGT. TEDDAR ADDRESSED THE COURT. CITY ATTY. SCHWERER PRESENT VIA TELEPHONE AND IS TO RESPOND TO THE COURT WITHIN 10 DAYS REGARDING THE FT. PIERCE POLICE DEPARTMENT PERSONNEL RECORDS. COURT SET STATUS HEARING FOR 2/18/03 AT 11:00 AM. DEFENDANT DOES NOT NEED TO BE PRESENT. EM/DC DOCUMENT RECEIVED - DEF'S MEMO RE PUBLIC RECORDS FILED
December 27, 2002	
December 26, 2002	ORDERS - ORDER RE: DEMAND FOR ADDITIONAL PUBLIC RECORDS FILED
December 18, 2002	ORDERS - ORDER GRANTING LEAVE TO AMEND AND REQUIRING RESPONSIVE PLEADING FILED
November 27, 2002	DOCUMENT RECEIVED - NOTICE OF HEARING 1/3/03 10:00 AM (STATUS CONFERENCE)
November 08, 2002	DOCUMENT RECEIVED - STATE'S RESPONSE TO MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE W/ SPECIAL REQ FOR LEAVE TO AMEND FILED
September 27, 2002	DOCUMENT RECEIVED - LETTER TO CLERK OFFICE FROM LAW OFFICE OF THE CAPITAL COLLATERAL REGIONAL COUNSEL-SOUTH, 101 N.E 3RD AVE, SUITE 400 FORT LAUDERDALE, FL 33301 WITH ATTACHED 1. THE ORIGINAL OF DEFENDANT'S MOTION FOR LEAVE TO AMEND MOTION TO VACATE JUDGEMENTS OF CONVICTION AND SENTENCE WITH ATTACHED AMENDMENT TO MOTION TO VACATE JUDGEMENTS OF CONVICTION AND SENTENCE 2. COPIES OF FIRST AND LAST PAGES OF THE MOTION FOR LEAVE TO AMEND MOTION TO VACATE J&S WITH ATTACHED AMENDMENT TO MOTION TO VACATE FOR RETURN TO CCRC- SOUTH AFTER DATE STAMPING AND FILING & PRE-ADDRESSED, STAMPED ENVELOPE FOR USE IN RETURNING THE DATE - STAMPED PAGES FILED MOTION FILED - MOTION FOR LEAVE TO AMEND MOTION TO VACATE JUDGEMENTS OF CONVICTION AND SENTENCE PURSUANT TO RULE 3.850 FILED
September 23, 2002	ORDERS - ORDER RE: MOTION FOR REHEARING AND/OR CLARIFICATION OF COURT'S ORDER DATED SEPTEMBER 11, 2002 FILED MOTION IS DENIED
September 20, 2002	MOTION FILED - STATE'S MOTION FOR REHEARING AND/OR CLARIFICATION OF COURT'S ORDER DATED SEPTEMBER 11, 2002 FILED
September 11, 2002	ORDERS - ORDER DENYING STATE'S MOTION TO DISMISS AND REQUEST FOR ADDITIONAL RELIEF
July 18, 2002	MOTION FILED - STATE'S MOTION TO DISMISS
June 21, 2002	MOTION FILED - MOTION TO VACATE JUDGEMENTS OF CONVICTION AND SENTENCE WITH SPECIAL REQUEST FOR LEAVE TO AMEND DOCUMENT RECEIVED - VERIFICATION FILED DOCUMENT RECEIVED - NOTICE OF FILING FILED BY KENNETH M. MALNIK, SPEC. ASSISTANT CCRC- SOUTH, 101 N.E. 3RD AVE, SUITE 400, FORT LAUDERDALE, FL

<u>Date</u>	<u>Docket Description/Text</u>
	DOCUMENT RECEIVED - LETTER TO JUDGE GEIGER FROM LAW OFFICE OF CAPITAL COLLATERAL REGIONAL COUNSEL - SOUTH FILED
June 20, 2002	DOCUMENT RECEIVED - LETTER TO CLERK'S OFFICE FROM LAW OFFICE OF THE CAPITAL COLLATERAL REGIONAL COUNSEL - SOUTH FILED FILED APPEAL NOTE - SUPREME COURT ORDER 6/13/02 - APPELLANT HAVING FILED PROPER NOTICE OF DISMISSAL, APPEAL IS HEREBY VOLUNTARILY DISMISSED; APPELLEE'S MOTION TO DISMISS APPEAL IS DENIED AS MOOT; SC02-716
June 07, 2002	ORDERS - ORDER RE: MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE
May 31, 2002	DOCUMENT RECEIVED - NOTICE OF FILING FILED DOCUMENT RECEIVED - VERIFICATION FILED
May 21, 2002	DOCUMENT RECEIVED - LETTER TO CLERK FROM THE LAW OFFICE OF THE CAPITAL COLLATERAL REGIONAL COUNSEL-SOUTH FILED MOTION FILED - MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE WITH SPECIAL REQUEST FOR LEAVE TO AMEND FILED
May 17, 2002	APPEAL NOTE - DEFENDANT - CASE DATA
May 07, 2002	ROA TO SUPREME COURT, AG, ATTY MALNICK, COPY OF INDEX DOCUMENT RECEIVED - CERTIFICATION OF COST BY SA W/ATTACHMENTS - STATEMENT FROM (PAGE COURT REPORTING) \$128.00 COPY OF REQUEST FOR TRANSCRIPTION FILED
April 26, 2002	PAY SHEET (PAGE COURT REPORTING) \$128.00 , COPY TO FINANCE FILED APPEAL NOTE - SUPREME COURT ACKNOWLEDGMENT; SC #SC02-716 3.850 SUMMARY DENIAL
April 24, 2002	04/23/02 SUPREME COURT ORDER - COURT REPORTER TO IMMEDIATELY TRANSCRIBE PROCEEDINGS ALONG WITH DISKETTES (PROCEDURES ATTACHED)
April 03, 2002	APPEAL NOTE - NOTE TO CLERK FROM PAGE ONE REPORTING RE: DISKETTES APPEAL NOTE - LETTER TO CLERK FROM ASSISTANT CCRC RE: APPEAL DESIGNATION TO COURT REPORTER
April 01, 2002	DIRECTIONS TO THE CLERK TAPE LOG - DEMAND FOR ADDITIONAL PUBLIC RECORD DISK 02-148 LOG 301 PG 227,228
	2:00 PM HEARING - DEFENDANT NOT PRESENT, IN PRISON. ATTY KALIL & ATTY MALKIK WERE PRESENT FOR THE DEFENSE. ASA MIRMAN WAS PRESENT FOR THE STATE. BY PHONE ATTY LESLIE CAMPBELL FOR ATTY. GENERAL'S OFFICE & ATTY CHERRY SHAW FOR DEPT. OF HEALTH WERE PRESENT. ATTY SCHWERER WAS PRESENT FOR FT. PIERCE PD. EACH ATTY. ADDRESSED THE DEFENSE MOTION FOR ADDITIONAL PUBLIC RECORD. OBJECTIONS WERE: SPECIFICITY, BURDENSOME & SOME MATERIAL IS CONFIDENTIAL. ATTY SCHWERER REQUESTED COURT ADDRESS THE COST OF PROVIDING INFORMATION. DEFENSE REQUESTED FIFTEEN (15) DAYS TO FILE REASON INFORMATION IS NEEDED. COURT GRANTED MOTION FOR FIFTEEN (15) DAYS. CASE TO BE RESET IF NEEDED. (GI/DC)
March 28, 2002	DOCUMENT RECEIVED - NOTICE OF COMPLIANCE BY LAW ENFORCEMENT AGENCY
March 27, 2002	DOCUMENT RECEIVED - STATE'S NOTICE TO COURT REGARDING FLORIDA RULE OF CRIMINAL PROCEDURE 3.851 (D)(5) FILED APPEAL NOTE - LETTER W/CERT. COPY OF NOA TO SUPREME COURT, AG, ATTY MALNIK
March 25, 2002	APPEAL NOTE - NOTICE OF APPEAL BY SPECIAL ASSISTANT CCRC KENNETH

<u>Date</u>	<u>Docket Description/Text</u>
	M. MALNIK
March 22, 2002	LETTER TO CLERK FROM ATTY MALNIK RE: APPEAL ORDERS - ORDER RE: MOTION FOR REHEARING FILED MOTION FILED - MOTION FOR REINSTATEMENT OF PETITION UNDER RULE 3.850 FILED DOCUMENT RECEIVED - LETTER TO JUDGE CIANCA FROM LAW OFFICES OF MALNIK & SALKIN ATTY AT LAW FILED DOCUMENT RECEIVED - STATE'S RESPONSE TO MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE WITH SPECIAL REQUEST FOR LEAVE TO AMEND FILED DOCUMENT RECEIVED - FAX COVER LETTER TO KENNETH MALNIH FILED DOCUMENT RECEIVED - FAX COVER LETTER TO LESLIE CAMPBELL FILED
March 20, 2002	DOCUMENT RECEIVED - NOTICE HEARING 1 APR 2002 2 PM/ FT PIERCE POLICE AND DEPT OF HEALTH/ OBJECTIONS TO DEMAND FOR ADDITIONAL PUBLIC RECORDS ASA MIRMAM
March 18, 2002	ORDERS - ORDER GRANTING STATE'S REQUEST TO APPEAR TELEPHONICALLY FOR HEARING SCHEDULED ON APRIL 1, 2002 DOCUMENT RECEIVED - NOTICE OF APPEARING TELEPHONICALLY FILED DOCUMENT RECEIVED - STATE'S REQ TO APPEAR TELEPHONICALLY FOR HEARING SCHEDULED ON APR 1 2002 DOCUMENT RECEIVED - STATE'S RESPONSE TO DEF'S M/ FOR REINSTATEMENT OF PETITION UNDER RULE 3.850 DOCUMENT RECEIVED - NOTIE OF APPEARING TELEPHONICALLY FILED
March 08, 2002	DOCUMENT RECEIVED - CERTIFICATION OF COST BY SA W/ATTACHMENTS - STATEMENT FROM (PAGE ONE COURT REPORTING) \$164.00 COPY OF REQUEST FOR TRANSCRIPTION FILED PAY SHEET (PAGE ONE COURT REPORTING) \$164.00 , COPY TO FINANCE FILED
March 06, 2002	MOTION FILED - MOTION FOR REINSTATEMENT OF PETITION UNDER RULE 3.850 FILED
February 20, 2002	DOCUMENT RECEIVED - BOX/PACKAGE OF PUBLIC RECORDS CONTAINING INFO EXEMPT FRM RELEASE AS REQ BY DEF'S DEMAND FOR ADDITIONAL PUBLIC RECORDS ATTY HOPPER DOCUMENT RECEIVED - BOX/PACKAGE OF PUBLIC RECORDS CONTAINING INFO AS REQ BY DEF'S DEMAND FOR ADDITIONAL PUBLIC RECORDS ATTY HOPPER DOCUMENT RECEIVED - NOTICE OF FILING RESPONSE TO DEF'S DEMAND FOR ADDITIONAL PUBLIC RECORDS DOCUMENT RECEIVED - NOTICE OF FILING RESPONSE TO DEF'S DEMAND FOR ADDTNL PUBLIC RECORDS
February 18, 2002	DOCUMENT RECEIVED - DEPARTMENT OF HEALTH'S OBJECTIONS TO DEFENDANT'S WRITTEN DEMAND FOR ADDITIONAL PUBLIC RECORDS PURSUANT TO EMERGENCY FLORIDA RULES OF CRIMINAL PROCEDURE 3.852(G) FILED DOCUMENT RECEIVED - LETTER TO JUDGE MAKEMSON FROM FLA DEPARTMENT OF HEALTH FILED
February 15, 2002	DOCUMENT RECEIVED - DEFENDANT'S RESPONSE TO FDLE OBJECTIONS TO DEFENDANT'S DEMAND FOR ADDITIONAL PUBLIC RECORDS DOCUMENT RECEIVED - DEFENDANT'S MEMORANDUM / RE: PUBLIC RECORDS DOCUMENT RECEIVED - DEPT OF HEALTH'S OBJECTIONS TO DEF'S WRITTEN DEMAND FOR ADDITIONAL PUBLIC RECORDS PURSUANT TO EMERGENCY

<u>Date</u>	<u>Docket Description/Text</u>
	FLA RULES OF CRIMINAL PROCEDURE 3.852 G
	DOCUMENT RECEIVED - LTR FROM FLA HEALTH DEPT TO CLERK FILED
	DOCUMENT RECEIVED - CITY OF FT IERCE POLICE DEPTS OBJECTION TO
February 04, 2002	DEF'S DEMAND FOR ADDITIONAL PUBLIC RECORDS ATTY SCHWERER
	DOCUMENT RECEIVED - RESPONSE AND OBJECTIONS TO DEFENDANT'S
	DEMAND FOR ADDITIONAL PUBLIC RECORDS FILED
January 30, 2002	TAPE LOG - M/PUBLIC RECORDS DISK 02-47 LOG 298 PG 1-4
	1:30 PM HEARING - DEFENDANT NOT PRESENT WITH ATTY. MALNIK AND
	ATTY. KALIL. ASA MIRMAN PRESENT. COURT REPORTER DANA KIBBEY
	PRESENT. DEFENSE MADE MOTION FOR RECORDS FROM THE DEPARTMENT
	OF HEALTH; PERSONEL RECORDS FROM THE MEDICAL EXAMINER'S OFFICE;
	RECORDS FROM THE DIVISION OF ELECTIONS AS TO CAMPAIGN
	CONTRIBUTIONS TO JUDGE CIANCA AND JUDGE TROWBRIDGE;
	INFORMATION ON 36 PEOPLE WHO MAY OR MAY NOT HAVE HAD ANYTHING
	TO DO WITH THIS CASE; PERSONEL FILES RICK MCILWAIN, DAVID MORGAN
	AND SALLY SAVAGE-TIMMEL; PRIOR RECORDS ON THE JURORS; AND COLOR
	COPIES OF ALL PHOTO'S PUT IN EVIDENCE. LAURA HOPPER FROM THE
	DEPARTMENT OF CHILDREN AND FAMILIES, LYDIA CASON FROM THE
	MEDICAL EXAMINER'S OFFICE, LESLIE CAMBELL FROM THE ATTORNEY
	GENERAL'S OFFICE (APPEARED BY PHONE) HEIDI HUGHES FROM THE
	DIVISION OF ELECTIONS (APPEARED BY PHONE), JAMES MARTIN FROM
	F.D.L.E. (APPEARED BY PHONE), BUCKY WALTERS FROM THE SLCSO AND MS.
	BRIDGES FROM THE SLCSO ADDRESSED THE COURT. COURT HEARD
	ARGUMENTS & RESERVED RULING. DEFENSE TO RESPOND IN WRITING
	WITHIN 15 DAYS. ORDER TO BE ENTERED.
	EM/DC
January 28, 2002	DOCUMENT RECEIVED - RESPONSE AND OBJECTION OF AGENCY FOR
	HEALTH CARE ADMINISTRATION TO DEF'S DEMAND FOR ADDITIONAL PUBLIC
	RECORDS ATTY WM PORTER
January 24, 2002	DOCUMENT RECEIVED - COPY ORDER APPOINTING COURT REPORTER TO
	ATTORNEY RET UNDELIVERED FILED
January 18, 2002	DOCUMENT RECEIVED - NOTICE OF COMPLIANCE BY LAW ENFORCEMENT
	AGENCY
January 16, 2002	DOCUMENT RECEIVED - RESPONSE OF THE ST LUCIE COUNTY SHERIFF'S
	OFFICE TO DEFT DEMAND FOR ADDITIONAL PUBLIC RECORDS FROM THE
	OFFICE OF THE SHERIFF FILED
January 15, 2002	ORDERS - ORDER GRANTING STATE'S REQUEST TO APPEAR
	TELEPHONICALLY FOR HEARING SCHEDULED ON JANUARY 30, 2002
	DOCUMENT RECEIVED - OBJECTION TO DEFENDANT'S DEMAND FOR
	ADDITIONAL PUBLIC RECORD FIELD
January 14, 2002	DOCUMENT RECEIVED - RESPONSE OF MEDICAL EXAMINERS OFFICE/
	DISTRICT 19 TO DEF'S DEMAND FOR ADDITIONAL PUBLIC RECORDS FROM
	OFFICE OF MEDICAL EXAMINERS
January 11, 2002	DOCUMENT RECEIVED - NOTICE OF HEARING 1/30/02 1:30 PM
	DOCUMENT RECEIVED - STATE'S REQUEST TO APPEAR TELEPHONICALLY
	FOR HEARING SCHEDULED ON JANUARY 30,2002 FILED
	ORDERS - ORDER APPOINTING COURT REPORTER
January 09, 2002	ORDERS - ORDER APPOINTING COURT REPORTER
	ORDERS - ORDER APPOINTING COURT REPORTER
January 07, 2002	DOCUMENT RECEIVED - RESPONSE OF STATE ATTNY OF 19 JUDICIAL CIRCUIT
	TO DEF'S DEMAND FOR ADDITIONAL PUBLIC RECORDS FRM OFFICE OF

<u>Date</u>	<u>Docket Description/Text</u>
	STATE ATTNY
December 14, 2001	DOCUMENT RECEIVED - DEFT DEMAND FOR ADDITIONAL PUBLIC RECORDS FILED
	DOCUMENT RECEIVED - NOTICE OF FILING FILED
November 30, 2001	DOCUMENT RECEIVED - LETTER TO CLERK FROM ATTY PAUL KALIL FILED
November 16, 2001	ORDERS - ORDER RE: MOTION FOR POST-CONVICTION RELIEF
	DOCUMENT RECEIVED - INDEX TO APPENDIX FILED
	MOTION FILED - STATES RESPONSE TO MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE WITH SPECIAL REQUEST FOR LEAVE TO AMEND FILED
October 11, 2001	ORDERS - ORDER REQUIRING RESPONSIVE PLEADING FILED OR BOOK 1444 PAGES 316-317
October 09, 2001	ORDERS - ORDER OF REASSIGNMENT
October 03, 2001	MOTION FILED - MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE W/SPECIA. REQ FOR LEAV TO AMEND
	DOCUMENT RECEIVED - LTR TO CLERK FROM LAW OFFICE OF CAPITAL COLLATERAL REG COUNSEL SOUTH
July 23, 2001	DOCUMENT RECEIVED - NOTICE OF APPEARANCE FILED BY ATTY PAUL KALIL 101 NE 3RD AVE SUITE 400 FT LAUDERDALE, FL 33301
	DOCUMENT RECEIVED - LETTER TO CLERK FROM ATTY PAUL KALIL FILED
	DOCUMENT RECEIVED - NOTICE OF FILING FILED
October 16, 2000	DOCUMENT RECEIVED - NOTICE TO STATE ATTORNEY AFFIRMING DEATH PENALTY, FILED
	DOCUMENT RECEIVED - NOTICE TO DEPARTMENT OF CORRECTIONS AFFIRMING DEATH PENALTY, FILED
October 10, 2000	DOCUMENT RECEIVED - CHECK-IN RECEIPT FOR EVIDENCE RETURNED FROM 4TH DCA LOCATED ON (D-5)
October 04, 2000	APPEAL NOTE - LIST OF EVIDENCE RETURNED FROM SUPREME COURT AND RETURNED TO EVIDENCE CUSTODIAN
	APPEAL NOTE - SUPREME COURT ORDER 8/24/00 - APPELLANT'S MOTION FOR REHEARING - DENIED; SC #SC90310
	MANDATE - SUPREME COURT MANDATE ISSUED 9/25/00 AND OPINION ISSUED 6/29/00 - WE AFFIRM THE DEATH SENTENCE; SUPREME COURT CASE #SC90310
June 13, 2000	DOCUMENT RECEIVED - NOTICE OF COMPLIANCE BY LAW ENFORCEMENT AGENCY FILED
March 27, 2000	DOCUMENT RECEIVED - NOTICE OF COMPLIANCE BY THE SECRETARY OF THE DEPT. OF CORRECTIONS FILED BY ATTY. MICHAEL W. MOORE, SECRETARY OF THE DEPT. OF CORRECTIONS, 2601 BLAIRSTONE ROAD, TALLAHASSEE, FL 32399-2500.
	DOCUMENT RECEIVED - NOTICE OF DELIVERY OF EXEMPT PUBLIC RECORDS TO CIRCUIT COURT JUDGE FILED BY ROGER PICKLES, ASST. GENERAL COUNSEL, DEPT. OF CORRECTIONS, 2601 BLAIRSTONE ROAD, TALLAHASSEE, FL 32399-2500.
February 23, 2000	DEPARTMENT OF CORRECTIONS RELEASE OF INFORMATION (CONFIDENTIAL RECORDS CONTAINING SEALED DOCUMENTS)
February 15, 2000	DOCUMENT RECEIVED - NOTICE OF FILING RESPONSE TO NOTICE OF IMPOSITION OF DEATH PENALTY AND TO DUTY TO PRODUCE PUBLIC RECORD FILED.

<u>Date</u>	<u>Docket Description/Text</u>
	DOCUMENT RECEIVED - BOX/PACKAGE OF PUBLIC RECORDS CONTAINING INFORMATION EXEMPT FROM RELEASE AS REQUIRED BY NOTICE OF IMPOSITION OF DEATH PENALTY AND DUTY TO PRODUCE PUBLIC RECORDS FILED
January 25, 2000	DOCUMENT RECEIVED - NOTICE OF IMPOSITION OF DEATH PENALTY/TODUTY TO PRODUCE PUBLIC RECORDS/ MICHAEL MOORE,DEPT OF CORRECTIONS
	DOCUMENT RECEIVED - NOTICE OF IMPOSITION OF DEATH PENALTY/TO DUTY TO PRODUCE PUBLIC RECORDS/ DEPT OF CHILDREN/FAMILY
	DOCUMENT RECEIVED - NOTICE OF IMPOSITION OF DEATH PENALTY/TO DUTY TO PRODUCE PUBLIC RECORDS/ SHERIFF R KNOWLES
	DOCUMENT RECEIVED - NOTICE OF IMPOSITION OF DEATH PENALTY/TO DUTY TO PRODUCE PUBLIC RECORDS/ CHIEF E SAVAGE
	DOCUMENT RECEIVED - NOTICE OF IMPOSITION OF DEATH PENALTY AND TO DUTY TO PRODUCE PUBLIC RECORDS/ FRED HOBIN
	DOCUMENT RECEIVED - NOTICE OF IMPOSITINO OF DEATH PENALTY AND TO DUTY TO PRODUCE PUBLIC RECORDS/ DAN NIPPES
February 05, 1991	INFORMATION FILED
January 18, 1991	OFFENSE COMMITTED
	INITIAL ARREST

Filing # 55359642 E-Filed 04/20/2017 01:12:57 PM

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR SAINT LUCIE COUNTY, FLORIDA

STATE OF FLORIDA,

FELONY DIVISION

CASE NO. 561991CF000136A

vs.

Appellate case: SC17-346

BILLY LEON KEARSE,

Defendant.

APPELLATE RECORD PREPARATION STATUS REPORT

THIS CASE came before the court on March 10, 2017, in this capital postconviction case for a status conference on appellate record preparation in case number SC17-346.

The appellate record in this case was transmitted to the Florida Supreme Court on March 8, 2017, prior to the status hearing. As a result of the status hearing and with the approval of FSC, a supplemental record was transmitted on April 17, 2017. The appellate record is now complete.

DONE AND ORDERED in chambers in Okeechobee, Florida, on

April 18, 2017.


DAN L. VAUGHN
CIRCUIT JUDGE

Copies to:

- ✓ Paul Kalil, Asst. CCRC kalilp@ccsr.state.fl.us
- ✓ Ryan Butler, ASA rbutler@sao19.org
- ✓ Leslie Campbell, AAG Leslie.Campbell@myfloridalegal.com
- ✓ Kathy Enloe, Esquire Court Reporting esquire3@bellsouth.net
- ✓ Kathy Maldonado, Appellate Clerk Maldonadok@stlcuieclerk.com
- ✓ Sharon Robson, Senior Staff Attorney robsons@circuit19.org

✓ John A Tomasino, Clerk
Florida Supreme Court
500 South Duval Street
Tallahassee, FL 32399-1927

4/20/17
RC

Filing # 61489858 E-Filed 09/13/2017 10:31:03 AM

Supreme Court of Florida

WEDNESDAY, SEPTEMBER 13, 2017

CASE NO.: SC17-346

Lower Tribunal No(s).:

561991CF000136AXXXXX

BILLY LEON KEARSE

vs.

STATE OF FLORIDA

Appellant(s)

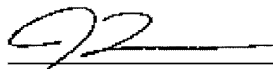
Appellee(s)

Appellant's Motion for Rehearing is hereby denied.

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

A True Copy

Test:



John A. Tomasino
Clerk, Supreme Court



cd

Served:

LESLIE T. CAMPBELL

PAUL EDWARD KALIL

RYAN LEWIS BUTLER

HON. ELIZABETH ANN METZGER, CHIEF JUDGE

HON. JOSEPH E. SMITH, CLERK

HON. DAN LEWIS VAUGHN, JUDGE

Filing # 64742252 E-Filed 11/29/2017 03:43:08 PM

**IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR ST. LUCIE COUNTY, FLORIDA**

**STATE OF FLORIDA,
Plaintiff,**

v.

CASE NO. 1991CF000136A

**BILLY LEON KEARSE,
Defendant.**

**SUCCESSIVE MOTION TO VACATE DEATH SENTENCE
UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.851**

The Defendant, BILLY LEON KEARSE, by and through undersigned counsel, files this successive motion to vacate under Fla. R. Crim. P. 3.851. All other claims made in Mr. Kearse's previous motions for postconviction relief and all evidence introduced at previous evidentiary hearings are incorporated here by specific reference.

FACTS AND PROCEDURAL HISTORY

The Circuit Court for the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida, entered the judgment of conviction and sentences of death at issue in this case. Mr. Kearse was found guilty of first degree murder and robbery with a firearm in October, 1991. After a penalty phase proceeding, the jury voted 11-to-1 in favor of death. The Court sentenced Mr. Kearse to die in the electric chair. (Attachment A) On direct appeal, the Florida Supreme Court affirmed the conviction but found multiple errors at the penalty phase, vacated the death sentence, and remanded for resentencing. *Kearse v. State*, 662 So. 2d 677 (1995).

At the second penalty phase proceeding the jury recommended death by vote of 12-to-0 and the Court again sentenced to Mr. Kearse death (Attachment B). When the jury was brought in to begin the penalty phase, the judge instructed them that "[t]he final decision as to what punishment shall be imposed rests solely with the Judge of this Court; however, the law requires

that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed upon the defendant” (R. 1137-38). At the close of evidence, the judge instructed the jury on four aggravating circumstances: (1) the crime was committed while the Defendant was engaged in the commission or flight after committing or attempting to commit a crime of robbery; (2) the crime was committed for the purpose of avoiding a lawful arrest or effecting an escape from custody; (3) The crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; (4) the victim was a law enforcement officer engaged in the performance of his official duties. (R. 2685-86). The jury was instructed on four mitigating circumstances: (1) the crime was committed while Defendant was under the influence of extreme mental or emotional disturbance; (2) the capacity of the Defendant to conform his conduct to the requirements of law was substantially impaired; (3) the age of the Defendant at the time of the crime; (4) any other aspect of the Defendant’s character or record in any other circumstance of the offense. (R. 2687).

Before sending the jury out to deliberate, the court instructed the jury, “As you’ve been told, final decision as to what punishment shall be imposed is the responsibility of the judge.” (R. 2684). The court also instructed that “[i]n these proceedings, it is not necessary that the advisory sentence of the Jury be unanimous. (R. 2691).

The judge alone made findings regarding the existence and weight of two aggravators: (1) the murder was committed during a robbery; (2) and the murder was committed to avoid arrest and hinder law enforcement and the victim was law enforcement officer engaged in performance of his official duties (merged into one factor). *Kearse v. State*, 770 So.2d 1119, 1124 (2000). The judge found one statutory mitigator: the Defendant’s age at the time of the offense, which he gave “little weight.” *Id.* The Court also found that “Kearse exhibited acceptable behavior at trial; he had a difficult childhood and this resulted in psychological and emotional problems.” *Id.* On March

24, 1997, the Court imposed a death sentence (R. 1564-72). The Florida Supreme Court upheld that sentence on direct appeal. *Kearse v. State*, 770 So. 2d 1119 (2000); *cert. denied*, *Kearse v. Florida*, 121 S. Ct. 1411 (2000).

On September 29, 2001, Mr. Kearse filed a “shell” motion for postconviction relief which he subsequently amended. On March 1, 2004, Mr. Kearse filed his final amended rule 3.851 motion to vacate raising several claims including a claim that Florida’s death penalty scheme violates *Ring v. Arizona*, 536 U.S. 584 (2002). After a limited evidentiary hearing, the Court denied relief as to all claims. Mr. Kearse appealed the denial of his motion for postconviction relief and simultaneously filed a Petition for Writ of Habeas Corpus in the Supreme Court of Florida alleging, *inter alia*, that Florida’s death penalty sentencing scheme is unconstitutional under *Ring v. Arizona*. The Florida Supreme Court affirmed the denial of relief and denied the petition for writ of habeas corpus. *Kearse v. State*, 969 So. 2d 976 (Fla. 2007).

Mr. Kearse filed a Successive Motion to Vacate Judgments and Sentence pursuant to Fla. R. Crim. P. 3.851 challenging the constitutionality of Florida’s lethal injection procedures, which he subsequently amended on July 1, 2008. The Court summarily denied that motion and Mr. Kearse timely appealed to the Florida Supreme Court, who affirmed.

On July 16, 2009, Mr. Kearse timely filed a Petition for Writ of Habeas Corpus in United States District Court for the Southern District of Florida. *Kearse v. McNeil*, Case No. 09-cv-14240. While that petition was pending, on October 28, 2010, Mr. Kearse filed a successive rule 3.851 motion alleging new evidence that trial counsel was ineffective and was untruthful in his prior evidentiary hearing testimony. The circuit court summarily denied that motion and the Florida Supreme Court affirmed. *Kearse v. State*, 75 So. 3d 1244 (Fla. 2011)(Unpublished Order).

Mr. Kearse’s federal habeas petition was denied on procedural grounds. *Kearse v. McNeil*, Case No. 09-cv-14240 and Mr. Kearse appealed. The Eleventh Circuit Court of Appeals reversed

and remanded to the district court. *Kearse v. Secretary*, 669 F.3d 1197 (2011). On remand, the district court again denied Mr. Kearse's petition on procedural grounds. Mr. Kearse again appealed. The Eleventh Circuit Court of Appeals again reversed, and remanded to the district court for consideration on the merits. *Kearse v. Secretary*, 736 F.3d 1359 (2013). On second remand, the district court denied the petition on the merits. Mr. Kearse again timely appealed to the Eleventh Circuit Court of Appeals. That appeal is pending. *Kearse v. Secretary*, Case No. 15-15228.

On July 6, 2012, while the remand was pending in federal district court, Mr. Kearse filed a second petition for writ of habeas corpus in the Florida Supreme Court premised on that court's admission in *Wyatt v. State*, 71 So. 3d 86 (Fla. 2011) that the court had applied the wrong standard when affirming the denial Mr. Kearse's initial 3.851 motion. The Florida Supreme Court denied a writ of habeas corpus.

On February 23, 2016, Mr. Kearse filed a successive motion to vacate premised on the United States Supreme Court's opinion in *Hurst v. Florida*, 136 S. Ct. 616 (2016). After the State responded and the Court conducted a case management conference, the Court dismissed Mr. Kearse's successive motion "without prejudice to timely refile the claim if *Hurst* is later held to apply retroactively to the specific circumstances of the Defendant's conviction and sentence." (Order Dismissing Successive Motion to Vacate Judgments of Conviction and Sentence (*Hurst* Claim), at p. 2).

On January 12, 2017, Mr. Kearse filed a successive Rule 3.851 motion raising claims related to *Hurst v. Florida*, 136 S. Ct. 616 (2016), *Perry v. State*, 210 So. 3d 630 (Fla. 2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), as well as a motion to exceed the page limitations. (2016-PCR. 229) The court denied the motion to exceed page limits and dismissed Mr. Kearse's motion. The order did not state whether the dismissal was with or without prejudice to re-file a motion

which complies with rule 3.851. Mr. Kearsé filed a motion for rehearing, which this Court denied. Mr. Kearsé then appealed to the Florida Supreme Court. On the State's motion, the appeal was dismissed.

Claims Not Previously Presented

On January 12, 2016, the United States Supreme Court declared Florida's capital sentencing scheme to be unconstitutional and violative of the Sixth Amendment right to jury trial. *Hurst v. Florida*, 136 S. Ct. 616 (2016), "Florida does not require the jury to make critical findings necessary to impose the death penalty," but rather, "requires a judge to find these facts." *Id.* at 622. On March 7, 2016, the Legislature enacted Chapter 2016-13 in an attempt to cure the constitutional deficiencies found in Florida's death penalty statute. On October 14, 2016, the Florida Supreme Court issued *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), construing *Hurst v. Florida* to require unanimous findings of fact to be made by a jury before a death sentence can be imposed:

[B]efore the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death.

Id. at 57. The Court also concluded that the Eighth Amendment requires a unanimous jury verdict prior to the imposition of a death sentence. *Id.* at 59.

On the same day, the Florida Supreme Court also decided *Perry v. State*, 201 So. 3d 630 (Fla. 2016), and declared that the 10-2 provision contained in Chapter 2016-13 was unconstitutional under *Hurst* because a jury must unanimously find that sufficient aggravators existed to justify a death sentence and that the aggravators outweighed the mitigating factors. The jury must then unanimously reject mercy and vote in favor of a death sentence. If a unanimous death recommendation is not returned, a death sentence cannot be imposed, and a life sentence is

mandated. *Perry v. State*, 201 So. 3d at 640, quoting *Hurst v. State*, 202 So. 3d at 59 (“the penalty phase jury must be unanimous in making the critical findings and recommendation that are necessary before a sentence of death may be considered by the judge or imposed.”) Thus, a life sentence is mandated if one or more jurors vote in favor of a life sentence due to a desire to be merciful, even if the jury unanimously determined that sufficient aggravators existed and that they outweighed the mitigators that were present. *Hurst v. State*, 202 So.3d at 62 n.18. (“[E]ven if the jurors unanimously find that sufficient aggravating factors were proven beyond a reasonable doubt, and that the aggravators outweigh the mitigating circumstances, the jurors are never required to recommend death”).

On December 22, 2016, the Florida Supreme Court found *Hurst v. Florida* retroactive. *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016). That same day, the Court also issued *Asay v. State*, 201 So. 3d 1 (Fla. 2016) and held that *Hurst v. Florida* should apply retroactively only to those defendants whose cases became final after the issuance of *Ring* on June 24, 2002.

In the wake of these developments, the Florida Legislature passed a new statute, Chapter 2017-1, which provides that a capital defendant may only be sentenced to death after a jury unanimously makes all of the requisite findings and unanimously returns a death recommendation. This motion raises claims pursuant to *Hurst v. State*, *Hurst v. Florida* and Florida Statute Chapter 2017-1 enacted on March 13, 2017. This motion is timely because the Mr. Kearse’s previous motion for postconviction relief raising *Hurst*-related claims was denied without prejudice to refile a motion that complies with rule 3.851, and because this motion is being filed within one year of the enactment of Chapter 2017-1.

CLAIMS FOR RELIEF

CLAIM 1

MR. KEARSE’S DEATH SENTENCE VIOLATES THE SIXTH AMENDMENT UNDER *HURST V. FLORIDA* AND IT WOULD VIOLATE HIS FEDERAL CONSTITUTIONAL RIGHTS TO DEPRIVE HIM OF *HURST’S* RETROACTIVE BENEFIT.

Mr. Kearsse’s death sentence was obtained through an unconstitutional death penalty scheme which violated Mr. Kearsse’s Sixth Amendment right to a factual determination of death eligibility and a unanimous jury verdict. *Hurst v. Florida*, 136 S. Ct. 616 (2016); *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). As set out above, the Florida Supreme Court held that *Hurst v. Florida* and *Hurst v. State* were to be applied retroactively only to defendants whose cases became final after the issuance of *Ring* in 2002. *Mosley*, 209 So. 3d at 1274; *Asay*, 210 So. 3d at 10. Mr. Kearsse falls in that class of defendants whose death sentence – through mere happenstance – became final prior to the issuance of *Ring* in 2002.

A. *Hurst v. Florida* and *Hurst v. State* should be applied retroactively to Mr. Kearsse.

To deny Mr. Kearsse retroactive relief under *Hurst v. Florida*, 136 S.Ct. 616 (2016), on the ground that his death sentence became final before June 24, 2002 under the decisions in *Asay* and *Mosley*, while granting retroactive *Hurst* relief to inmates whose death sentences became final after June 24, 2002 violates Mr. Kearsse’s right to Equal Protection of the Laws under the Fourteenth Amendment to the Constitution of the United States (e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942)) and his right against arbitrary infliction of the punishment of death under the Eighth Amendment to the Constitution of the United States (e.g., *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Espinosa v. Florida*, 505 U.S. 1079 (1992) (per curiam)).

Additionally, Mr. Kearshe has a federal right to retroactivity under *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). Where a constitutional rule is substantive, the Supremacy Clause of the United States Constitution requires a state post-conviction court to apply it retroactively. *See Montgomery*, 136 S. Ct. at 731-32 (“Where state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge.”). In *Montgomery*, the Defendant initiated a state post-conviction proceeding seeking retroactive application of *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (holding imposition of mandatory sentences of life without parole on juveniles violates Eighth Amendment). The United States Supreme Court reversed the State court, holding that Louisiana could not bar retroactivity under its state doctrines because the *Miller* rule was substantive and therefore Louisiana was obligated under the federal Constitution to apply it retroactively on state post-conviction review.

In *Hurst v. State*, the Florida Supreme Court announced substantive rules that under the federal Constitution may not be denied to Florida defendants on state retroactivity grounds. The court held that the Sixth Amendment requires that a jury unanimously decide whether the aggravating factors have been proven beyond a reasonable doubt, whether they are sufficient to impose the death penalty, and whether they are outweighed by the mitigating factors. Such findings are manifestly substantive. *See Montgomery*, 136 S. Ct. at 734 (holding that the decision whether a particular juvenile is or is not a person “whose crimes reflect the transient immaturity of youth” is substantive, not procedural).

Second, and which will be addressed in Claim II below, the Florida Supreme Court held that the Eighth Amendment requires the jury’s factfinding during the penalty phase to be unanimous. The court explained that the unanimity rule is required to implement the Eighth Amendment’s mandate that the death penalty be reserved for a narrow class of the worst offenders,

and assures that the determination “expresses the values of the community as they currently relate to the imposition of the death penalty.” *Hurst v. State*, 202 So. 3d at 60-61 (“By requiring unanimity in a recommendation of death in order for death to be considered and imposed, Florida will achieve the important goal of bringing its capital sentencing laws into harmony with the direction of the society reflected in [the majority of death penalty] states and with federal law.”). That makes the rule substantive, *see Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) (“[T]his Court has determined whether a new rule is substantive or procedural by considering the function of the rule”), even though its subject has to do with the method by which a jury makes decisions. *See Montgomery*, 136 S. Ct. at 735 (noting that existence of state flexibility in determining method by which to enforce constitutional rule does not convert substantive rule into procedural one).

This Court should reject the problematic concept of limited retroactivity, whereby the *Hurst* decisions apply to some cases on collateral review but not others. The concept of limited retroactivity has no basis in Florida Supreme Court or United States Supreme Court precedent and results in death sentences that are arbitrary and capricious in violation of the Eighth Amendment and the Florida Constitution, and which violate due process and equal protection rights under the federal Constitution. *See, e.g., Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (applying strict scrutiny and invalidating Oklahoma sterilization law for applying to some theft offenses and not others because “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.); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) (invalidating promiscuity law applicable to interracial couples but not others); *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972).

In *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972) the Supreme Court found that the death penalty “could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.” *Gregg v. Georgia*, 428 U.S. 153,

188 (1976); *see also Furman*, 408 U.S. at 239-40. Because of the recognition that “the penalty of death is qualitatively different from a sentence of imprisonment, however long . . . there is a corresponding difference in the need for reliability” in capital cases. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (finding there is a “qualitative difference” between death and other penalties requiring “a greater degree of reliability when the death sentence is imposed”); *Gregg*, 428 U.S. at 187–88 (stating that “death is different in kind” and as a punishment is “unique in its severity and irrevocability”); *Furman*, 408 U.S. at 238, 286 (Brennan, J., concurring) (“Death is a unique punishment in the United States.”). 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 (2008).

The second principle, originating in *Linkletter v. Walker*, 381 U.S. 618 (1965), and later refined in *Teague v. Lane*, 489 U.S. 288 (1989), recognizes the pragmatic necessity for the Court to evolve constitutional protections prospectively without undue cost to the finality of preexisting judgments. While a level of arbitrariness is inherent in drawing temporal lines, the Florida Supreme Court’s line-drawing inaugurates a kind and degree of capriciousness that far exceeds the level justified by normal non-retroactivity jurisprudence.

On the same day that the Florida Supreme Court issued *Asay*, it also issued *Mosley*. Both defendants had challenged their death sentences in light of *Hurst v. Florida*. *Asay*’s death sentences and *Mosley*’s death sentence were final before the decision in *Hurst v. Florida* issued. Both cases presented the question of retroactivity. However, the Florida Supreme Court broke from its own jurisprudence and held *Hurst v. Florida* to be retroactive in *Mosley*’s death sentence under its *Witt* analysis, while in *Asay*, its *Witt* analysis found *Hurst v. Florida* was not retroactive to *Asay*’s case.

A majority of the Florida Supreme Court, in separate opinions in the two decisions,

complained that through the two rulings, the Court had injected unacceptable arbitrariness into Florida's capital sentencing process by endorsing limited retroactivity. As a result, the distinction between who gets the benefit of *Hurst v. Florida* and 3.851 relief and who does and does not get executed will be an arbitrary one. *See Asay*, 210 So. 3d at 31 (Lewis, J., concurring in result) ("As Justice Perry noted in his dissent, there is no salient difference between June 23 and June 24, 2002—the days before and after the case named *Ring* arrived. *See Perry*, J., dissenting op. at --. However, that is where the majority opinion draws its determinative, albeit arbitrary, line. As a result, Florida will treat similarly situated defendants differently—here, the difference between life and death—for potentially the simple reason of one defendant's docket delay."); *Id.* at 36 (Pariente, J., concurring in part, 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.") (emphasis added); *Id.* at 37 (Perry, J., dissenting) ("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.") (emphasis added); *Mosley*, 209 So. 3d at 1291 (Canady, J., concurring in part, dissenting in part) ("the supposed rule of 'fundamental unfairness' articulated in *James* is deeply problematic—if not entirely incoherent—when judged by its own terms. If counsel accepted our decisions at face value and relied on the United States Supreme Court's repeated rejection of *Ring* claims, the client loses under *James*. But if counsel raised claims that had been consistently rejected, the client wins. This hardly comports with the notion of fundamental fairness.") (emphasis added); *Id.* (Canady, J., concurring in part, dissenting in part) ("Based on an indefensible misreading of *Hurst v. Florida* and a retroactivity analysis that leaves the *Witt* framework in tatters, the majority unjustifiably plunges the administration of the death penalty in Florida into turmoil that will undoubtedly extend for years. I strongly dissent from this badly flawed decision.").

Completely ignored in *Asay* and *Mosley* is the logic of *Griffith v. Kentucky*, 479 U.S. 314, 327-28 (1987), that justice should be administered with an even hand:

We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state, or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a “clear break” with the past.

The Court further observed that “selective application of new rules violates the principle of treating similarly situated defendants the same.” *Id.* at 323.

The decisions in *Asay* and *Mosley* have infected Florida’s death penalty system with arbitrariness in violation of the Eighth Amendment. *See Desist v. United States*, 394 U.S., at 258-259 (Harlan, J., dissenting) (“[W]hen another similarly situated defendant comes before us, we must grant the same relief or give a principled reason for acting differently. We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a ‘new’ rule of constitutional law.”). Moreover, *Hurst*, unlike *Ring*, addressed the proof-beyond-a-reasonable-doubt standard in addition to the jury trial right, and the United States Supreme Court has always regarded proof-beyond-a-reasonable-doubt decisions as substantive.¹ Because the rules announced in the *Hurst* decisions are substantive within the meaning of federal law, this Court has a duty under the U.S. Constitution to apply them retroactively to Mr. Kearse.

¹ *See, e.g., Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972) (explaining that “the major purpose of the constitutional standard of proof beyond a reasonable doubt announced in [*In re Winship*, 397 U.S. 358 (1970)] was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function, and *Winship* is thus to be given complete retroactive effect.”); *Powell v. Delaware*, 153 A.3d 69 (Del. 2016) (holding *Hurst* retroactive under Delaware’s state *Teague*-like retroactivity doctrine and distinguishing *Summerlin* on the ground that *Summerlin* “only addressed the misallocation of fact-finding responsibility (judge versus jury) and not . . . the applicable burden of proof.”).

B. Mr. Kearsse should be afforded retroactive relief under State law.

Mr. Kearsse should be afforded retroactive application of *Hurst v. State* and *Hurst v. Florida* under the fundamental fairness doctrine, which the Florida Supreme Court applied in cases including *Mosley* and *James v. State*, 615 So. 2d 668 (Fla. 1993). The *Mosley* Court's fundamental fairness analysis focused on whether it would be fundamentally unfair to bar Mosley from seeking *Hurst* relief on retroactivity grounds, regardless of when his sentence became final, by virtue of the fact that Mosley had previously attempted to challenge Florida's unconstitutional capital sentencing scheme and was "rejected at every turn" under the Court's flawed pre-*Hurst* law. *Id.* at 1275. The *Mosley* Court emphasized that ensuring fundamental fairness in assessing retroactivity outweighed the State's interests in the finality of death sentences.

Mr. Kearsse, who anticipated the defects in Florida's capital sentencing scheme that were later articulated in *Hurst* and *Hurst v. State*, and who raised a *Ring* claim at the earliest opportunity, should not be denied the chance to now seek relief under the *Hurst* decisions. Applying the *Hurst* decisions retroactively to Mr. Kearsse "in light of the rights guaranteed by the United States and Florida Constitutions, supports basic tenets of fundamental fairness," and "it is fundamental fairness that underlies the reasons for retroactivity of certain constitutional decisions, especially those involving the death penalty." *Mosley*, 209 So. 3d at 1283. Accordingly, this Court should hold that fundamental fairness requires retroactive application of *Hurst v. State* and *Hurst v. Florida*.

Moreover, the court's decisions in *Asay* and *Mosley* did consider those death sentences, like Mr. Kearsse's, that became final after the issuance of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), but before the issuance of *Ring*. In *Hurst v. Florida*, 136 S. Ct. 616 (2016), the United States Supreme Court relied upon *Apprendi* as the basis for ruling that *Spaziano v. Florida*, 468 U.S. 447 (1984) and *Hildwin v. Florida*, 490 U.S. 638 (1989) were "wrong, and irreconcilable

with *Apprendi*.” 136 S. Ct. at 623. The Supreme Court specifically held: “And in the *Apprendi* context, we have found that ‘stare decisis does not compel adherence to a decision whose “underpinnings” have been “eroded” by subsequent developments of constitutional law.’” *Id.* at 623-24. It was on the basis of *Apprendi* that the Supreme Court concluded that the legal principle employed in *Spaziano* and *Hildwin* “was wrong.” *Hurst*, 136 S. Ct. at 623. Thus it is the date that *Apprendi* -- not *Ring* -- was decided that should be considered in any retroactivity analysis. In neither *Asay* nor *Mosley* did the Florida Supreme Court conduct a *Witt* analysis of the post-*Apprendi* cases.

C. The State cannot establish that the *Hurst* error in Mr. Kearsse’s case was harmless.

The Sixth Amendment error under *Hurst v. Florida* cannot be proven by the State to be harmless beyond a reasonable doubt in Mr. Kearsse’s case. The unconstitutional manner in which the State obtained Mr. Kearsse’s sentence of death violated Mr. Kearsse’s Sixth, Eighth and Fourteenth Amendment rights, his rights under the provisions of the Florida Constitution, Florida statutory and common law and the newly enunciated rights in *Hurst*, *Perry*, and the new statute. In the wake of *Hurst v. Florida*, the resulting new Florida law, and the requirements under *Caldwell v. Mississippi*, 472 U.S. 320 (1985), that a jury must be instructed as to the gravity of its sentencing responsibility, and *Atkins*’ prohibition against sentencing the Intellectually Disabled to death, the State cannot possibly show that the multiple constitutional errors in Mr. Kearsse’s penalty phase proceedings were not harmless beyond a reasonable doubt.

Although Mr. Kearsse’s resentencing jury voted 12-to-0 in favor of death, the jury did not return a verdict making any findings of fact. The only document returned by the jury was an advisory death recommendation. Although the recommendation was unanimous, it does not reflect anything about the jury’s findings. Without jury fact finding, “[e]ven though the jury unanimously

recommended the death penalty, whether the jury unanimously found each aggravating factor remains unknown.” *Truehill v. State*, 211 So. 3d 930, 961 (Fla. 2017) (Quince, J., dissenting).

A final 12 0 recommendation does not necessarily mean that the other findings leading to the recommendation were unanimous. It could well mean that after the other findings were made by a majority vote, jurors in the minority acceded to the majority’s findings. *See Wood v. State*, 2017 WL 411336 (Fla. Jan. 31, 2017). *Hurst v. State* made exactly this point:

Because there was no interrogatory verdict, we cannot determine what aggravators, if any, the jury unanimously found proven beyond a reasonable doubt. We cannot determine how many jurors may have found the aggravation sufficient for death. We cannot determine if the jury unanimously concluded that there were sufficient aggravating factors to outweigh the mitigating circumstances.

202 So. 3d at 69.

A unanimous recommendation could also mean the jurors did not attend to the gravity of their task, as they were instructed that the judge could impose death regardless of what they recommended. Therefore, this Court cannot rely upon a legally meaningless recommendation by an advisory jury. *Hurst v. Florida*, 136 S. Ct. at 622 (Sixth Amendment cannot be satisfied by merely treating “an advisory recommendation by the jury as the necessary factfinding”). For a court to reweigh aggravators and mitigators or otherwise substitute its judgment rather than focusing on the effect of the error on the trier of fact is improper. *See Truehill*, 211 So.3d 930, 961 (Fla. 2017) (Quince, J., dissenting) (“The majority’s reweighing of the evidence to support its conclusion [that the Hurst error was harmless] is not an appropriate harmless error review. . . . By ignoring the record and concluding that all aggravators were unanimously found by the jury, the majority is engaging in the exact type of conduct the United States Supreme Court cautioned against in *Hurst v. Florida*.”). *See also, U.S. v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977).

Rule 3.851 relief is required. Mr. Kearse’s death sentence must be vacated and at a

minimum, a resentencing ordered.

CLAIM 2

MR. KEARSE’S DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT UNDER *HURST V. STATE* AND IT WOULD BE FUNDAMENTALLY UNFAIR TO DEPRIVE HIM OF ITS BENEFIT.

A. Mr. Kearsse’s death sentence violates the Eighth Amendment and *Hurst v. State* should be applied retroactively.

The Florida Supreme Court held in *Hurst v. State* that enhanced reliability required by the Eighth Amendment in capital cases requires a jury to unanimously find all facts before a death sentence is permissible. *Hurst v. State*, 202 So. 3d at 59 (“we conclude that juror unanimity in any recommended verdict resulting in a death sentence is required under the Eighth Amendment.”). The right to a unanimous jury recommendation of death requires full retroactivity and anything less is unreliable and violates the Eighth Amendment. In the wake of *Hurst v. Florida*, the resulting new Florida statute, and the principle set out many years ago in *Caldwell v. Mississippi*, a death sentence is constitutionally invalid when individual jurors are not told that they each bear the responsibility for a death sentence, since each juror possesses the power to require the imposition of a life sentence simply by voting against a death recommendation. *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985).

Hurst v. State established an Eighth Amendment rule that requires the three beyond-a-reasonable-doubt findings: (1) each aggravating circumstance; (2) that those particular aggravating circumstances together are “sufficient” to justify imposition of the death penalty; and (3) that those particular aggravating circumstances together outweigh the mitigation in the case, to be made unanimously by the jury. The substantive nature of the unanimity rule is apparent from the court’s explanation in *Hurst v. State* that unanimity (1) is necessary to ensure compliance with the constitutional requirement that the death penalty be applied narrowly to the worst offenders, and

(2) ensures that the sentencing determination “expresses the values of the community as they currently relate to the imposition of the death penalty.” *Hurst v. State*, 202 So. 3d at 60-61. The function of the unanimity rule is to ensure that Florida’s death-sentencing scheme complies with the Eighth Amendment and “achieve[s] the important goal of bringing [Florida’s] capital sentencing laws into harmony with the direction of the society reflected in [the majority of death penalty] states and with federal law.” *Id.* As a matter of federal retroactivity law, the rule is therefore substantive. *See Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) (“[T]his Court has determined whether a new rule is substantive or procedural by considering the function of the rule”). This is true even though the rule’s subject concerns the method by which a jury makes its decision. *See Montgomery*, 136 S. Ct. at 735 (noting that state’s ability to determine method of enforcing constitutional rule does not convert rule from substantive to procedural).

Mr. Kearsse also has a federal right to retroactivity under *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). Where a constitutional rule is substantive, the Supremacy Clause of the United States Constitution requires a state post-conviction court to apply it retroactively. *See Montgomery*, 136 S. Ct. at 731-32 (“Where state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge.”).

As was explained in *Caldwell*, jurors must feel the full weight of their responsibility of sentencing an individual to death. *Caldwell*, 472 U.S. at 341 (“Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires.”). In Mr. Kearsse’s case, the trial court repeatedly instructed the jury that their role was merely advisory, that they would only be giving a “recommendation” as to the sentence, and that the final decision as to punishment “rest[ed] solely with the court” (R. 1137-38). These instructions were repeated throughout the trial by the court and

the prosecutor.

The likelihood of one or more jurors voting for a life sentence increases when a jury is told that it must unanimously recommend death, that the judge cannot override the jury's recommendation for life, and that each juror has the ability to preclude a death sentence simply by refusing to agree to a death recommendation. *Caldwell*, 472 U.S. at 330 ("In the capital sentencing context there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court."). Mr. Kears's jury did not make any findings at all regarding the elements necessary to allow for the imposition of a death sentence. Further, **even if** a properly instructed jury made the requisite findings unanimously to allow for a death sentence, one juror may have precluded the imposition of a death sentence simply by voting for mercy.

B. Mr. Kears should also be afforded retroactive relief based on State law.

Mr. Kears should be afforded retroactive application of *Hurst v. State* under the fundamental fairness doctrine set out in *Mosley* and *James v. State*, 615 So. 2d 668 (Fla. 1993). The *Mosley* Court's fundamental fairness analysis focused on whether it would be fundamentally unfair to bar Mosley from seeking *Hurst* relief on retroactivity grounds, regardless of when his sentence became final, by virtue of the fact that Mosley had previously attempted to challenge Florida's unconstitutional capital sentencing scheme and was "rejected at every turn" under the Court's flawed pre-*Hurst* law. *Id.* at 1275. The *Mosley* Court emphasized that ensuring fundamental fairness in assessing retroactivity outweighed the State's interests in the finality of death sentences.

Mr. Kears, who anticipated the defects in Florida's capital sentencing scheme that were later articulated in *Hurst* and *Hurst v. State*, and who raised a *Ring* claim at the earliest opportunity, should not be denied the chance to now seek relief under the *Hurst* decisions.

Applying the *Hurst* decisions retroactively to Mr. Kearsae “in light of the rights guaranteed by the United States and Florida Constitutions, supports basic tenets of fundamental fairness,” and “it is fundamental fairness that underlies the reasons for retroactivity of certain constitutional decisions, especially those involving the death penalty.” *Mosley*, 209 So. 3d at 1283. Accordingly, this Court should hold that fundamental fairness requires retroactive application of *Hurst v. State*.

CLAIM 3

THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION REQUIRE THE RETROACTIVE APPLICATION OF THE SUBSTANTIVE RULE ESTABLISHED BY CHAPTER 2017-1.

A. Florida created a substantive right in enacting Chapter 2017-1.

In Chapter 2017-1, the Florida Legislature expanded the substantive right created in Chapter 2016-13 and rewrote the statute to provide that a defendant convicted of first degree murder was to receive a life sentence unless a jury returned a unanimous death recommendation. The right was extended to defendants in all homicide prosecutions regardless of the date of the underlying homicide or the date that a conviction became final.

With the enactment of Chapter 2016-13 and Chapter 2017-1, the Florida Legislature created a substantive right. For the first time, a capital defendant in Florida had a right to a life sentence unless a jury unanimously voted to recommend a death sentence. Chapter 2017-1 provides that a defendant convicted of first degree murder has a right to be sentenced to life imprisonment unless the State convinces a jury to unanimously return a death recommendation. This right is a substantive right. It is not merely a procedural rule. If it were, it would violate the separation of powers doctrine for the Legislature to enact it.

While *Hurst v. State* and *Perry* were premised upon the Florida Constitution, Chapter 2016-13 and Chapter 2017-1 were both crafted by the Florida Legislature and signed into law

by the Governor. The Florida Supreme Court has stated: “Generally, the Legislature has the power to enact substantive law, while the Court has the power to enact procedural law.” *Allen v. Butterworth*, 756 So. 2d 52, 59 (Fla. 2000). The Court has also written: “Substantive law has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer.” *State v. Garcia*, 229 So. 2d 236, 238 (Fla. 1969). The Court further explained that substantive law “includes those rules and principles which fix and declare the primary rights of individuals with respect towards their persons and property. *Adams v. Wright*, 403 So.2d 391 (Fla.1981).” *Haven Federal Savings & Loan Ass’n v. Kirian*, 579 So. 2d 730, 732 (Fla. 1991). In *Benyard v. Wainwright*, 322 So. 2d 473, 475 (Fla. 1975), the Court reiterated, “Substantive law prescribes the duties and rights under our system of government. The responsibility to make substantive law is in the legislature within the limits of the state and federal constitutions.”

Under the doctrine of separation of powers, procedural matters are a judicial function, not a legislative one. *See State v. Raymond*, 906 So. 2d 1045, 1049 (Fla. 2005) (“where there is no substantive right conveyed by the statute, the procedural aspects are not incidental; accordingly, such a statute is unconstitutional.”); *Massey v. David*, 979 So. 2d 931, 937 (Fla. 2008) (“We have held that where a statute contains some procedural aspects, but those provisions are so intimately intertwined with the substantive rights created by the statute, that statute will not impermissibly intrude on the practice and procedure of the courts in a constitutional sense, causing a constitutional challenge to fail.”). If Chapter 2016-13 had been purely procedural, it would have violated the separation of powers doctrine enshrined in the Florida Constitution. Moreover, when the Court determined in *Perry* that the 10-2 provision was unconstitutional, it could have fixed the defect and rewritten the governing law if the offending provision was procedural. The Court did not do that because it recognized that what was at issue was substantive law, or “that part of the law which

creates, defines, and regulates rights.” *Garcia v. State*, 229 So. 2d at 238.

If Chapter 2017-1 were merely procedural, besides being enacted in violation of the separation of powers doctrine, it would be proper for it to attach to any capital sentencing proceeding conducted after its effective date because it only sets out the manner by which the parties should seek to litigate. *State v. Raymond*, 906 So. 2d at 1048 (“practice and procedure is the method of conducting litigation involving rights and corresponding defenses.”). However, Chapter 2017-1 is clearly substantive because it gives a defendant convicted of first degree murder something that he or she did not have before: a right to a life sentence unless the jury returns a unanimous death recommendation.

Chapter 2017-1 sets forth a substantive right that is personal. For example, the Sixth Amendment right to representation by counsel attaches to a defendant who is criminally charged. A substantive right must attach to a person, not a proceeding. Clearly, the right to a life sentence unless the jury unanimously returns a death recommendation attaches to a defendant who is convicted of first degree murder. It is a right that springs to life when the first degree murder conviction is returned. It is a presumption of a life sentence, akin to the presumption of innocence. Certainly, the Legislature could have provided that the right set forth in Chapter 2017-1 only attached to defendants convicted of first degree murder after March 13, 2017, when Chapter 2017-1 became effective. The Legislature chose not to do it that way. Chapter 2017-1 established a substantive right that was meant to apply retrospectively.

B. A substantive right cannot be extended arbitrarily without offending due process.

In *Evitts v. Lucey*, 469 U.S. 387, 400 (1985), the United States Supreme Court recognized that “a State need not provide a system of appellate review as of right at all.” States have the option to not provide appellate review of criminal convictions. See *McKane v. Durston*, 153 U.S. 684

(1894). But “when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause.” *Evitts v. Lucey*, 469 U.S. at 401. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983) (“There is, of course, no constitutional right to an appeal, but in *Griffin v. Illinois*, 351 U.S. 12, 18 (1955), and *Douglas v. California*, 372 U.S. 353 (1963), the Court held that if an appeal is open to those who can pay for it, an appeal must be provided for an indigent.”). “Once a State has granted prisoners a liberty interest, [the United States Supreme Court has] held that due process protections are necessary ‘to insure that the state-created right is not arbitrarily abrogated.’” *Vitek v. Jones*, 445 U.S. at 488-89.

When a state creates a right that carries a liberty or life interest, that right is protected by the Due Process Clause of the Fourteenth Amendment. The United States Supreme Court has recognized that states “may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment.” *Vitek v. Jones*, 445 U.S. 480, 488 (1980). A state cannot establish a substantive right that provides a life and/or liberty interest which it arbitrarily extends to some, but not others. To give some the benefit of Chapter 2017-1 while depriving Mr. Kearse of the same benefit can only be described as arbitrary and a violation of due process. *See Griffith v. Kentucky*, 479 U.S. 314, 323 (1987); *Smith v. State*, 598 So. 2d 1063, 1066 (Fla. 1992). Due process requires that the substantive right set forth in Chapter 2017-1—which has been extended retrospectively to others—must also be extended to Mr. Kearse.

C. In addition to violating the Due Process Clause, depriving Mr. Kearse of the benefit of Chapter 2017-1 also violates the Eighth Amendment.

The Eighth Amendment is violated if substantive rights are doled out arbitrarily in capital cases. In *Johnson v. Mississippi*, 486 U.S. 578 (1988), the United States Supreme Court discussed the Eighth Amendment’s requirement that death sentences be reliable and free from

arbitrary factors:

The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special "need for reliability in the determination that death is the appropriate punishment" in any capital case. . . . Although we have acknowledged that "there can be 'no perfect procedure for deciding in which cases governmental authority should be used to impose death,' " we have also made it clear that such decisions cannot be predicated on mere "caprice" or on "factors that are constitutionally impermissible or totally irrelevant to the sentencing process."

Id. at 584-85 (internal citations omitted).

Mr. Kearsé remains sentenced to death even though his jury received unconstitutional instructions and made no findings of fact. Meanwhile, many others whose crimes also predated *Ring* will receive the benefit of the *Hurst* decisions and the new statute at their resentencing proceedings. There is only one word to describe the distinction between their circumstances and Mr. Kearsé's, and that word is "arbitrary." To allow this arbitrary distinction and leave Mr. Kearsé's death sentences intact while others receive the right to a life sentence unless the jury returns a unanimous death recommendation violates *Furman v. Georgia*, 408 U.S. 238 (1972). This claim is not about retroactivity of a court ruling. It is about a statutorily created, substantive right that was intended to be retrospective.

Rule 3.851 relief is required. Mr. Kearsé's death sentence must be vacated and at a minimum, a resentencing ordered.

CLAIM 4

MR. KEARSE'S RESENTENCING PROCEEDING, AFTER HE WAS ACQUITTED OF CAPITAL MURDER AT HIS PREVIOUS PENALTY PHASE, EXPOSED HIM TO DOUBLE JEOPARDY, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The Double Jeopardy Clause of the Fifth Amendment commands that "[n]o person shall . . .

be subject for the same offence to be twice put in jeopardy of life or limb.” Under this Clause, once a defendant is placed in jeopardy for an offense, and jeopardy terminates with respect to that offense, the defendant may neither be tried nor punished a second time for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969).

The Double Jeopardy Clause applies to capital sentencing proceedings where such proceedings “have the hallmarks of the trial on guilt or innocence.” *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981). The United States Supreme Court in *Bullington* identified several aspects of Missouri's sentencing proceeding that resembled a trial, including the requirement that the prosecution prove certain statutorily defined facts beyond a reasonable doubt to support a sentence of death. *Id.*, at 438, 101 S. Ct. 1852. Such a procedure, “explicitly requires the jury to determine whether the prosecution has ‘proved its case.’ ” *Id.*, at 444, 101 S.Ct. 1852. The Court concluded that a sentence of life imprisonment signifies that “ ‘the jury has already acquitted the defendant of whatever was necessary to impose the death sentence,’ ” thus, the Double Jeopardy Clause bars a State from seeking the death penalty on retrial. *Id.*, at 445.

Jeopardy terminates where there has been a “separate sentencing proceeding at which the prosecution was required to prove-beyond a reasonable doubt or otherwise-additional facts in order to justify the particular sentence.” *Bullington*, 451 U.S., at 439, 101 S.Ct. 1852. “[F]or purposes of the Double Jeopardy clause, capital sentencing proceedings involving proof of one or more aggravating factors are to be treated as trials of offenses, not merely sentencing proceedings.” *Sattazahn v. Pennsylvania*, 123 S. Ct. 732, 747, *n.6 (2003), citing *Ring v. Arizona*, 122 S. Ct., at 2428; *Bullington v. Missouri*, 451 U.S. 430 (1981)(emphasis added).

In *Hurst v. State*, the Florida Supreme Court recognized that “the Sixth Amendment right to a trial by jury mandates that under Florida's capital sentencing scheme, the jury—not the judge—must be the finder of every fact, and thus every element, necessary for the imposition of the death

penalty.” 202 So. 3d 40, 53 (Fla. 2016). It follows that “findings necessary for the jury to essentially convict a defendant of capital murder—thus allowing imposition of the death penalty—are also elements that must be found unanimously by the jury.” *Id.* At Mr. Kearsse’s first penalty phase proceeding, the jury recommended death by a vote of 11-to-1. Mr. Kearsse’s first penalty phase jury did not unanimously find the existence of any aggravating factor, did not unanimously find that the aggravating factors are sufficient for the imposition of death, and did not unanimously find that the aggravating factors outweigh the mitigation presented. Under *Hurst*, Mr. Kearsse’s first penalty phase jury effectively acquitted him of offense of capital murder that would allow the imposition of the death penalty.

“An ‘acquittal’ at a trial-like sentencing phase, rather than the mere imposition of a life sentence, is required to give rise to double-jeopardy protections.” *Sattazahn v. Pennsylvania*, 123 S.Ct. 732 (2003), citing *Bullington*, at 446, 101 S.Ct. 1852. Retrying Mr. Kearsse after he was acquitted of capital murder allowing the imposition of the death penalty twice put him in jeopardy for the same offense, in violation his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and corresponding provisions of the Florida Constitution. Relief in the form of a life sentence is warranted.

CONCLUSION AND NATURE OF RELIEF SOUGHT

Based on the foregoing, Mr. Kearsse requests the following relief: (1) a fair opportunity to demonstrate that his death sentence stands in violation of the Sixth and Eighth Amendments and *Hurst v. Florida*, *Perry v. State*, and *Hurst v. State*; (2) an opportunity for further evidentiary development to the extent necessary; (3) leave to supplement this motion should new claims, facts, or law arise; and (4) Rule 3.851 relief vacating his death sentence.

Respectfully submitted,

/s/ Paul Kalil

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(954) 713-1284 Tel.
kalilp@ccsr.state.fl.us
COUNSEL FOR MR. KEARSE

CERTIFICATE OF COUNSEL

I HEREBY CERTIFY that I am the attorney for the Defendant in the above-styled cause, that I have discussed the contents of the foregoing Successive Motion To Vacate Judgments Of Conviction And Sentence fully with the Defendant, that I have complied with Rule 4-1.4 of the Rules of Professional Conduct, and that the foregoing motion is filed in good faith.

/s/ Paul Kalil

Paul Kalil
Assistant CCRC-South

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been provided to the following by United States Mail and/or electronic service this 29th day of November. 2017.

/s/ Paul Kalil

Paul Kalil
Assistant CCRC-South

Copies provided to:

The Honorable Dan L. Vaughn
113 Courthouse Addition
218 South Second Street
Fort Pierce, Florida 34950

Ryan Butler, ASA, *RButler@SAO19.org*

Leslie T. Campbell, AAG, *capapp@myfloridalegal.com*

ATTACHMENT A

OPEN COURT
12 DAY OF Nov 91
DOUGLAS DIXON, CLERK
BY: *[Signature]*

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR ST. LUCIE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

Case No. 91-136-CF

BILLY LEON KEARSE,

Defendant.

JUDGMENT AND SENTENCE ON COUNTS I & II, AND
VIOLATION OF PROBATION, INCLUDING FINDINGS OF FACT
ON AGGRAVATING AND MITIGATING CIRCUMSTANCES

BILLY LEON KEARSE, you are now before this Court for the pronouncement of sentence on you for the offense of Murder in the First Degree, Robbery with a Firearm and for violating probation in case Number 89-2835-CF-B a case in which you were sentenced on February 27, 1990, and on which a two (2) year period of probation was imposed by the Court.

On October 22, 1991, a jury in Vero Beach, Indian River County found you guilty of First Degree Murder and Robbery With a Firearm. This Court contemporaneously with the guilt phase of your jury trial weighted and considered the evidence, including your own taped statement and the statements of other witnesses presented regarding the allegations that you violated conditions #4 & #5 of your probation in Case No. 89-2835-CF-B. By the greater weight of the evidence the Court finds you violated condition #4 by having in your possession a firearm, to wit: a 9mm pistol, taken illegally from Officer Danny Parrish, a Fort Pierce Police Officer, and you

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did not have the consent of your probation officer, and Condition #5 by committing First Degree Murder and Robbery with a Firearm.

Pursuant to the scoresheet prepared primarily for the offense of robbery with a firearm, this Court revokes your probation in Case Number 89-2835-CF-B, and sentences you to five (5) years in the DOC on Count I Burglary of a Conveyance, and five (5) years on Count II Possession of Burglary Tools consecutive to Count I; your sentence for violating probation will be consecutive to the sentence to be imposed on your conviction for the charge of Robbery with a Firearm.

On Count II of the Indictment, Robbery with a Firearm, the Court adjudicates you guilty of Robbery with a Firearm and sentences you to life in prison. A scoresheet has been prepared; corrections have been made pursuant to the input from counsel at the sentencing hearing held on November 4, 1991, and the scoresheet has been filed. The sentence is outside the guidelines and is legally justified and necessary. The reasons for the departure are as follows:

- 1) The unscored conviction for first degree murder;
- 2) The victim in this robbery was a uniformed police officer;
- 3) The offense committed here was committed while the Defendant was on DOC probation;
- 4) The facts of the offense committed here, robbery with a firearm, evidence extreme cruelty toward the victim; to wit: the victim, a uniformed police officer was shot thirteen (13) times with the officers service pistol;
- 5) The defendant has displayed he is not amenable to previous attempts at rehabilitation;

- 6) The Defendant's course of conduct in this offense and the resulting homicide, demonstrates the Defendant is a danger to others, lacks any regard for the law and our legal systems, and has since his youth, resisted any and all efforts at rehabilitation and assistance offered by the school system, Department of Health & Rehabilitative Services and the Department Of Corrections.

On October 24, 1991 the same jury that found you guilty of First Degree Murder and Robbery With a Firearm, pursuant to the provisions of Chapter 921.141(1) & (2) F.S. returned an advisory sentence of 11 to 1, recommending that this Court impose the death penalty for the charge of First Degree murder, rather than life imprisonment without eligibility for parole or release.

COUNT I

On Count I, the First Degree Murder of Office Danny Parrish, this Court notes the eleven to one (11-1) advisory sentence of the jury recommending the death penalty. Notwithstanding this recommendation the Court makes its own independent evaluation of the aggravating and mitigating circumstances as required by Chapter 921. 141(3) Florida Statutes.

The State has argued and presented evidence on the following aggravating circumstance in urging the Court to impose the death penalty.

AGGRAVATING CIRCUMSTANCES

#1) The capital felony was committed while the defendant was engaged in the commission of, or an attempt, or flight after committing or attempting to commit the crime of robbery. Chapter 921.141(5)(d).

This aggravating circumstance was proven beyond a reasonable

doubt. The evidence presented establishes clearly that the defendant snatched Officer Parrish's service pistol from him as the officer was attempting to arrest and handcuff the Defendant. The defendant fired fourteen (14) shots at Officer Parrish, thirteen (13) shots struck him, killing him. The Defendant, as supported by his own taped statement, and the testimony of the passenger in his vehicle, Rhonda Pendleton, got in the vehicle he was driving, set Officer Parrish's gun on the front seat and drove away. He then returned to the residence of Derrick Dickerson, the owner of the vehicle being driven by the Defendant, where the Defendant hid the vehicle behind the house so it would be out of sight, flattened a tire to give the impression the car was inoperable, and then buried Officer Parrish's gun in the backyard. Before burying the gun, the Defendant removed two unspent cartridges from the clip of the gun. The clip held sixteen (16) cartridges. The two unspent cartridges were found in the Defendant's pocket when arrested later. Initially, in the Defendant's first statement to Colonel Mann of the St. Lucie County Sheriff's Office, the Defendant said he "threw the gun into the canal"; the Defendant was cognizant and concerned about his fingerprints being found on the gun. He later told the officers where he buried the gun and the officers retrieved it.

From the evidence, and particularly the Defendant's own statement, the Court finds the Defendant feared his probation would be violated, resisted the officer's arrest, by force and violence, forcibly stole the officer's service pistol, then turned the weapon on the officer killing the officer to facilitate his escape from the scene. The robbery of the weapon did create an independent reason for the defendant to kill Officer Parrish. The gun provided the instrument to eliminate one who could now identify the Defendant and permitted the Defendant to flee the scene. The armed robbery was not incidental to the killing; on the contrary, the armed robbery, according to the Defendant's own taped statement, revealed the Defendant did not wish to be arrested and have his probation revoked and for this reason the murder was precipitated.

#2) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. Chapter 921.141(5)(e).

#3) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws. Chapter 921.141(5)(g).

From the evidence arguably, this Court could find sufficient facts to support a finding beyond a reasonable doubt of the existence of either one of these two (2) aggravating circumstances independently of each other. Mindful though of the pitfalls of the doubling prohibition of Florida's Supreme Court as enunciated in Province vs. State, 337 So2d 763, (1976) and White vs. State 403 So2d 331 (1981), and the many cases thereafter, this Court has chosen to consider the two (2) aggravating circumstances set out in

Chapter 921.141(5)(e) & (g) as one circumstance. The facts adduced during the trial that would apply clearly and uncontroverted to these two separate circumstances are interlocking, interwoven, with many of the same facts certainly applicable to one or both of these circumstances.

In support of this circumstance, the Court finds from the following facts:

a) At the time of his death, Danny Parrish had effectuated a routine traffic stop of the vehicle the Defendant was driving. The Defendant's vehicle had been halted by the victim for traveling the wrong way on a one-way street.

b) Officer Danny Parrish pulled the Defendant over at the intersection of Avenue A and Fifth Street, as indicated by his communication to the dispatcher. A description of the Defendant's vehicle and the tag number was relayed to the dispatcher.

c) Officer Parrish as his duties required, sought to determine if the Defendant had a valid driver license, which was a lawful exercise of his function to enforce the law.

d) The Defendant gave Officer Parrish fictitious names, all of which were proven to be false by the dispatcher's response to the officer's transmission requesting driver license checks for the names given by the Defendant. This was the defendant's initial effort to avoid a lawful arrest as he could not produce a valid driver license.

e) Supported by the Defendant's own statement and the testimony of the defendant's passenger, Rhonda Pendleton, Officer Parrish had the Defendant exit the vehicle after repeated efforts by the Officer to obtain a correct name, and had the defendant place his hands on the roof of the vehicle. After Officer Parrish's preliminary investigative efforts failed to produce a valid driver license for any of the names the Defendant gave him, Officer Parrish initiated procedures to effect an arrest of the Defendant for a traffic misdemeanor; the officer's citation book placed in evidence indicates the officer had earlier started to write a citation, listing the vehicle's tag number on the citation. From this fact we can determine that Officer Parrish intended to write at least one citation for the Defendant.

f) Office Parrish was preparing to handcuff the Defendant to start his arrest procedure, when, according to the Defendant's own statement, words were exchanged with the officer; the Defendant then pulled his arms down from atop the vehicle and away from the officer, offering resistance to the arrest, and in the period of time shortly thereafter, in the movements back and forth between the Defendant and the officer, the Defendant, from his statement, grabbed and gained control of the officer's service gun and with it, shot and killed Office Parrish, preventing the arrest and effecting an escape from custody; the Defendant's actions in killing Officer Parrish and then fleeing the scene with the Officer's gun was committed by the Defendant to disrupt the

Officer's lawful duties which would have resulted in the Defendant's arrest and probably a violation of the Defendant's probation as the Defendant indicates was his concern. The Defendant's capital felony eliminated the officer as an eye witness.

Even though the Court will weigh and consider it as only one aggravating circumstance, the Court finds from the facts stated above that either Chapter 921.141(5)(e) or 921.141(5)(g) F.S. are proven beyond a reasonable doubt.

- 4) The victim of the capital felony was a law enforcement officer engaged in the performance of his official duties. Chapter 921.141(5)(j) F.S.

a) The evidence is uncontroverted that the victim, Danny Parrish, on January 18, 1991, was a law enforcement officer employed by the Fort Pierce Police Department at the time he was killed by the Defendant. Danny Parrish was engaged in the performance of his official duties as a law enforcement officer on the night of January 18, 1991; he was in uniform and in his patrol car when he stopped the vehicle driven by the Defendant.

b) On the night when he stopped the vehicle the Defendant was driving, Danny Parrish was a duly authorized police officer fulfilling his sworn obligation to maintain the safety and peace of the people of Ft. Pierce, including the enforcement of traffic regulations to insure and protect the safety of all motorists traveling on the streets of the City of Ft. Pierce.

This aggravating circumstance has been proven beyond a

reasonable doubt.

5) The capital felony was especially heinous, atrocious or cruel. Chapter 921.141(5)(h) F.S.

From the following evidence this Court concludes without any reasonable doubt that the aggravating factor set out in Chapter 921.141(5)(h) has been proven.

a) The Defendant obtained Officer Parrish's service gun and shot fourteen (14) times at the Officer, striking him thirteen (13) times; four (4) shots struck the officer's body armor, and nine (9) shots struck the officer's body.

b) Dr. Fred Hobin, the medical examiner, testified in his opinion the first shot, probably knocked Officer Parrish to the ground; the gun and ammunition constituted a powerful weapon.

c) The Officer was struck twice in the back as the autopsy report reveals large bruises on the victim's back even though the bullets were stopped by the body armor. Dr. Hobin's testimony indicates the shots were fired from very close range; he could not give an opinion on actual distance; as the Officer lay on the ground the remaining shots were fired; one shattered Officer Parrish's left elbow, one shattered his left leg. Other bullets penetrated the abdomen beneath the bullet proof vest; one bullet severed the Officer's spinal cord. From the Defendant's own statement it is reported that the Officer was conscious through this ordeal, and even after his body had been struck by those many bullets, Officer Parrish pleaded with the Defendant not to shoot

him! There is evidence indicating Officer Parrish tried to move to safety, but bled to death as the Defendant fled the scene. Medically, Dr. Hobin could not determine the time the victim remained conscious or whether the Officer could have moved after all the shots were fired. One bullet had severed the victims spinal cord, rendering the victim paralyzed from the waist down.

c) The shots were heard by witnesses Bruce Heinson, a cab driver, and John Bohler who lived adjacent to the scene in an apartment building. Heinson drove to the scene after hearing the shots; he saw a car leaving the scene; that car was later determined to be the one driven by the Defendant when stopped by the victim; Heinson saw Officer Parrish lying in the street; he tried to assist the officer but to no avail. Heinson managed to communicate a message to the dispatcher on Officer Parrish's car radio; his transmission was recorded and is in evidence. Bohler lived adjacent to the scene in an apartment house; he heard the shots and looked out the window and saw the Officer's vehicle and another vehicle. He saw the outline of figures. Both Heinson and Bohler recall hearing a shot, a definite pause of two or three seconds, then the sounds of the rapid fire of the remaining bullets. The evidence supports the fact beyond a reasonable doubt that the Defendant fired a shot, then after a definite pause squeezed the trigger again and again until the remaining thirteen (13) additional shots were fired at the downed officer, all but one of the fourteen (14) shots hit the victim. If the Defendant had

simply wished to kill the officer, silencing the lone witness, he could have dispatched the officer with a round to the head and fled. Instead he chose to fire, almost point blank, thirteen (13) additional rounds inflicting a high degree of pain into the victim with each bullet that struck unprotected bone and abdomen, while Officer Parrish lay conscious, suffering immensely as the victim contemplated his death.

d) In the testimony of witness Reed Knight, we find uncontroverted facts established that Officer Parrish's service gun did not malfunction in the hands of the Defendant. Knight test fired the gun, a Sig-Sauer P-226 over one hundred (100) times. It never misfired; it requires a steady pull, or squeezing of the trigger, before each one of the sixteen (16) rounds in the clip are fired. Knight referred to this particular handgun as the "Cadillac" of 9mm handguns. It contains a built in safety to avoid firing more than one round per pull of the trigger. Therefore the Defendant could not have squeezed the trigger once in the excitement of the moment, firing thirteen (13) additional rounds automatically before stopping and releasing his trigger finger, leaving two unspent rounds in the clip as he left the scene with the gun. This is a semi-automatic weapon. Each shot requires, contemplation, reflection, and a brief pause before pulling or squeezing the trigger for the next round. The Defendant had to deliberate; he had to think, if only for a few seconds, or even for a partial second, before firing each of the last thirteen (13) of

the fourteen (14) rounds he fired at the victim. Each shot heightened the defendant's level of premeditation, as the shots struck and shattered bone and penetrated the abdominal cavity, inflicting a higher and more intense degree of pain upon the victim; Defendant's actions displayed a conscious and total indifference to the suffering of Officer Parrish. In effect the Defendant torturously executed the victim. This capital felony and the facts surrounding it are beyond the pale of the normal "one shot capital felony", and sets this case apart from what is not contemplated as heinous, atrocious or cruel by the decision of Cheshire vs. State 568 So2d. 908 (Fl 1990), and placed it into what is contemplated as heinous, atrocious or cruel by State vs. Dixon, 283 So2d 1 (Fla. 1973).

6) The capital felony was a homicide and was committed in a cold calculated and premeditated manner without any pretense of moral or legal justification. Chapter 921.141(5)(i)

Even though this circumstance was presented and argued by the State at the penalty phase, the State has chosen not to argue or support it further in their sentencing memorandum and at the sentencing hearing. Therefore the Court finds this circumstance has not been proven beyond a reasonable doubt.

MITIGATING CIRCUMSTANCES

The Defendant, by counsel announced to the Court prior to the start of the penalty phase of the trial that the Defendant would not present any testimony on Chapter 921.141(6)(a) F.S.; but would present testimony as to the mitigating statutory circumstances

contained in Chapter 921.141(6)(b),(f) & (g) F.S. The remaining statutory mitigating circumstances were not applicable and the Defendant chose not to argue or present any evidence on them. Additionally, the Defendant argued and presented evidence on non-statutory mitigating circumstances. The Defendant argued and presented evidence on the following statutory mitigating circumstances.

1) The capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance. Chapter 921.141(6)(b) F.S.

The Defendant presented evidence that he had been in a fight with his stepfather earlier in the day on January 18, 1991, the day Officer Parrish was killed. Factually this is supported by the Defendant's own statement, and the testimony of Dr. Fred Petrilla, a psychologist who had interviewed the Defendant prior to trial, spoken with the Defendant's mother, and reviewed the Defendant's records and tests going back to grade school, including the Defendant's records from the HRS Detention facility and had reviewed the Defendant's taped statements. The circumstances of the fight had been related to Dr. Petrilla. It had occurred when the Defendant's stepfather called his mother derogatory names. From the fight the Defendant received noticeable, but superficial scratches. Later the Defendant admitted and acknowledged to the arresting officers the scratches were not from the actions of Officer Parrish. Dr. Petrilla reported the fight was fairly violent with furniture being broken and tossed about the house.

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After the fight, the Defendant reportedly sullen and distressed, left his mother's house on bicycle and went to the home of Derrick Dickerson, where Rhonda Pendleton was staying. As best as can be ascertained from the greater weight of the evidence, this fight occurred over three (3) hours before the killing of Officer Parrish. The Court accepts without doubt the fight occurred. The bare facts of the Defendant's own statement, and the recounting of the facts surrounding this fight by Dr. Petrilla, support this conclusion. This could constitute a mental and emotional disturbance; however absent the Defendant's statement and Dr. Petrilla's testimony, there were no other independent facts presented to support the influence and extremity of this particular mitigating circumstance. There is little or no testimony from witness Rhonda Pendleton, who was with the Defendant from the time he left the Dickerson home to purchase pizza, that indicated she observed the Defendant laboring under, or being influenced by, some extreme mental or emotional disturbance, as set out in Chapter 921.141(6)(b) F.S., that in some way could mitigate the conduct engaged in by the Defendant when stopped for a traffic violation. Yet from the evidence, we know a fight occurred and therefore this mitigating circumstance has been proven by the greater weight of the evidence; however, the weight to be accorded this mitigating circumstance is not substantial.

2) The capacity of the Defendant to appreciate the criminality of his conduct or to conform to the requirements of law was substantially impaired. Chapter 921.141(6)(f).

The Defendant presented testimony from psychologists and guidance counselors who knew and tested the Defendant when he was between eight to nine years old and attending grade school. Both Dr. Angeline Desai, a psychiatrist and Dr. Linda Koshner, a psychologist had seen and tested the Defendant between the ages of eight and nine years old. The Defendant had been referred to them by the St. Lucie County School system. Both concluded that the Defendant's I.Q. was low in relation to average intelligence quotients; the Defendant's low intelligence level was just slightly above the borderline for what can be diagnosed psychologically as mentally handicapped.

Guidance counselor Sharon Kraft, from the St. Lucie County School system testified that in 1982 the Defendant was identified, after psychological testing, as being a severely emotionally disturbed child and was placed in emotionally handicapped classes and referred to special education programs and given regular counseling. Mrs. Kraft, said the Defendant had a history of fighting and a poor attention span while in grade school, and did very poorly in his classwork. Mrs. Kraft recalled from her notes, that the Defendant had a lot of energy at the age of nine and seemed to be "streetwise" and "liked to play dumb". Others from the Defendant's early grade school and junior high school days testified to the Defendant's poor school performance, and the Defendant's continued assignment to special educational programs and counseling. Witness Pam Baker, a teacher who last saw the

Defendant in the eighth grade indicated the Defendant had "limited educational tools" and academically functioned on a third grade level.

Dr. Fred Petrilla, testified the Defendant has a borderline I.Q., just above the retarded level. In Dr. Petrilla's opinion, garnered from his evaluation of the Defendant's records and statements, the Defendant remains within the bottom one percentile or less, of average intelligence, and has a poor verbal memory and continues to read at a low grade school level. Dr. Petrilla opined the Defendant's capacity to appreciate the criminality of his conduct or to conform to the requirements of the law was substantially impaired.

Even though Dr. Petrilla testified that the Defendant has a low I.Q. and learns mostly from a rote process, Dr. Petrilla testified the Defendant does have the ability to comprehend the nature and the consequences of his acts. Nevertheless, from the above facts, the Court determines the Defendant has established by the greater weight of the evidence the mitigating circumstance of Chapter 921.141(6)(f), although this finding is not supported substantially by any recent factual data developed by a testing paradigm.

3) The age of the Defendant at the time of the crime. Chapter 921.141(6)(g) F.S.

The Court finds no evidence in the record to support this statutory mitigating circumstance.

Our facts indicate clearly the Defendant was nineteen (19) years old when the homicide took place. He was an adult under the law. The Defendant had previously been convicted of a crime and placed on probation with the Department of Corrections. Even though competency was never an issue in this case, we do have testimony from Dr. Fred Petrilla that the Defendant did know the nature of his acts and the consequences of them. The Defendant is a competent adult and his conduct should be held to the same standard as any other adult.

NON-STATUTORY MITIGATING CIRCUMSTANCES

Defense counsel argued and presented evidence on the following non-statutory mitigating circumstances.

- 1) The Defendant comes from an impoverished and culturally deprived background.
- 2) The Defendant was a severely emotionally disturbed child.
- 3) The Defendant's I.Q. is just above the retarded line.

All three of the above listed non-statutory mitigating factors have been proven by the greater weight of the evidence. In support of these circumstances, the Court finds:

- a) The Defendant's father abandoned the Defendant at the age of three (3).
- b) The Defendant's mother neglected him, and at times rejected him, and washed her hands of him at an early age because the defendant was uncontrollable and unable to be disciplined, leaving home often, even after beatings with an electrical cord;
- c) The Defendant as a child was malnourished and poorly clothed; he roamed the streets foraging for himself;
- d) The Defendant was placed in special educational programs as a child and did poorly, and was tested frequently and referred to various special education programs throughout grade school.

- e) The Defendant dropped out of school at an early age, and today has a third grade reading level.
- f) The Defendant's mother never appeared in school when the Defendant was in grade school undergoing testing and counseling; the mother was never present at school to show any interest in the Defendant, or to offer assistance in any way with her son's severe learning disabilities.

Utilizing the three part test recently enunciated by the Supreme Court in Santos vs. State, 16 FLW S633, at S634 (Oct 4, 1991), the Court concludes by competent, substantial evidence that the statutory and non-statutory mitigating circumstances are not of the kind capable of mitigating the Defendant's punishment. Considered and weighed fairly and deliberately, these factors, or circumstances when considered in the totality of the Defendant's life and character, can not be considered as extenuating or reducing the degree of the Defendant's moral culpability for the murder of Officer Parrish, when considered and weighed with the evidence presented at both phases of the trial. From the taped statements given by the Defendant, the Court heard the Defendant speak coherently and deliberately. The Defendant was able to quickly flee the scene of crime, devising a scheme to avoid detection. He parked the vehicle behind a house so it could not be detected from the street; he flattened a tire so it would appear the vehicle was inoperable; he buried the gun, admitting he was concerned about his fingerprints being on the gun. Initially the defendant lied about throwing the gun into the canal; at a later interview, he answered clearly, comprehensively and normally as to

the gun's correct location. Neither Defendant's borderline I.Q., nor his emotionally, culturally and physically deprived childhood prevented the Defendant from being able to quickly execute the logistics of his plan to avoid detection.

The Court in specifically weighing all the facts in the mitigating circumstances, statutory and non-statutory, proven by the greater weight of the evidence, finds the mitigating circumstances are not substantial and are found not to be of sufficient support and weight to outweigh any of the aggravating circumstances proved beyond a reasonable doubt.

In conclusion the Court finds beyond a reasonable doubt that the State has proven by very clear, convincing and credible evidence, each of the four (4) aggravating circumstances set forth above and, that none of the mitigating circumstances proven, statutory or non-statutory, are substantial or sufficient to outweigh any aggravating circumstance.

After weighing all of the aggravating circumstances proven as established by the evidence and arguments presented during the guilt and penalty phases of the trial, and the sentencing procedure, this Court finds that there are sufficient aggravating circumstances to justify the imposition of the death penalty for Count I, First Degree Murder; therefore it is:

ORDERED AND ADJUDGED that you, BILLY LEON KEARSE, shall be adjudged guilty of the First Degree Murder of Police Officer Danny Parrish as charged in Count I of the indictment for which you were

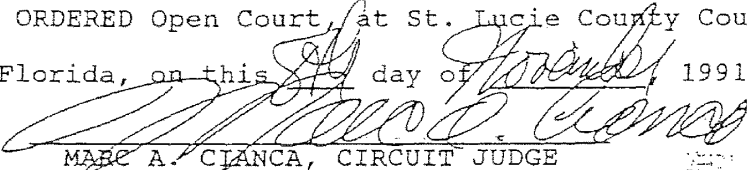
found guilty By the jury and you are hereby sentenced to death for the murder of Officer Danny Parrish and it is;

Further ORDERED AND ADJUDGED that you, BILLY LEON KEARSE, will be remanded to the custody of the Sheriff of St. Lucie County, who will transport you to the Florida State Prison, where you will be housed and securely confined until the date your execution is set.

It is Further ORDERED AND ADJUDGED that at such time as scheduled by the Governor of the State of Florida, at the place of execution named in the Governor's Warrant of Execution, and within the walls of the State's Death Chamber where you will be seated and strapped into the electric chair; the electric current to the chair will be turned on, sending an electric current through your body until you are pronounced dead.

BILLY LEON KEARSE you are hereby notified that the judgment of conviction and the sentence of death are subject to automatic review by the Supreme Court of Florida. You have the right to assistance of counsel in filing and preparing your appeal. If you wish to have counsel appointed for the preparation of your appeal, you may advise this Court through your lawyer and then counsel will be appointed on your behalf.

DONE AND ORDERED Open Court, at St. Lucie County Courthouse, Fort Pierce, Florida, on this 24 day of November, 1991.


MARC A. CIANCA, CIRCUIT JUDGE

cc: ✓ State Attorney
✓ Robert Udell, Defense Counsel

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ATTACHMENT B

- CASE NUMBER 91-136-CF

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The Defendant in open Court was advised of the right to appeal from this Sentence by filing notice of appeal within 30 days from this date with the Clerk of this Court and the Defendant's right to the assistance of counsel in taking the appeal at the expense of the State on showing of indigency.

[Signature]
JUDGE

FINGERPRINTS OF DEFENDANT

1. Right Thumb	2. Right Index	3. Right Middle	4. Right Ring	5. Right Little
				
6. Left Thumb	7. Left Index	8. Left Middle	9. Left Ring	10. Left Little
				

Fingerprints taken by: *[Signature]* #556 *[Signature]* Deputy / B.I.F.
Name Title

I HEREBY CERTIFY that the above and foregoing fingerprints are the fingerprints of the Defendant, BILLY L.
KEARSE

and that they were placed thereon by said Defendant in my presence in open Court this date.
Indian River
DONE AND ORDERED in open Court at ~~St. Lucie~~ County, Florida, this 24th day of March A.D., 199 2.

[Signature]
JUDGE

702

1585

Circuit Ct. Min.

3

- ☐ Violation of Probation, Previously Adjudged Guilty
☐ Violation of Community Control, Previously Adjudged Guilty
☐ Amended

Case Number 96-136-CF

OBTS Number 3723740

Defendant BILLY L. KEARSE

SENTENCE

(As to Count I)

The Defendant, being personally before this Court, accompanied by the Defendant's attorney of record, ROBERT UDELL, and having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why the Defendant should not be sentenced as provided by law, and no cause being shown

(Check one
if applicable.)

- ☐ and the Court having on _____ (date) deferred imposition of sentence until this date.
☐ and the Court having previously entered a judgment in this case on _____ (date) now resentsences the Defendant.
☐ and the Court having placed the Defendant on Probation/Community Control and having subsequently revoked the Defendant's Probation/Community Control.

It Is The Sentence Of The Court that:

- ☐ The Defendant pay a fine of \$ _____, pursuant to section 775.083, Florida Statutes, plus \$ _____ as the 5% surcharge required by section 960.25, Florida Statutes.
☐ The Defendant pay to the Drug Trust Fund, a fine of \$ _____, plus \$ _____ as the 5% surcharge required by F.S. 893.16 and 893.165.
☒ The Defendant is hereby committed to the custody of the Department of Corrections.
☐ The Defendant is hereby committed to the custody of the Sheriff of ☐ St. Lucie ☐ _____ County, Florida.
☐ The Defendant is sentenced as a youthful offender in accordance with section 958.04, Florida Statutes.

To Be Imprisoned (Check one; unmarked sections are inapplicable.):

☒ DEATH BY ELECTROCUTION

- ☐ For a term of Natural Life.
☐ For a term of Natural Life with a 25 year mandatory minimum.
☐ For a term of _____
☐ Said SENTENCE SUSPENDED for a period of _____ subject to conditions set forth in this Order.

If "split" sentence,
complete the appropriate
paragraph.

- ☐ Followed by a period of _____ on Probation/Community Control under the supervision of the Department of Corrections according to the terms and conditions of supervision set forth in a separate order entered herein.
☐ However, after serving a period of _____ imprisonment in _____, the balance of the sentence shall be suspended and the Defendant shall be placed on Probation/Community Control for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of Probation/Community Control set forth in a separate order entered herein.

In the event the Defendant is ordered to serve additional split sentences, all incarceration portions shall be satisfied before the Defendant begins service of the supervision terms.

703

Circuit Ct. Min. 1566

SPECIAL PROVISIONS

(As to Count I)

By appropriate notation, the following provisions apply to the sentence imposed:

Mandatory/Minimum Provisions:

- Firearm* ☐ It is further ordered that the 3-year minimum imprisonment provisions of section 775.087(2), Florida Statutes, is hereby imposed for the sentence specified in this count.
- Drug Trafficking* ☐ It is further ordered that the _____ mandatory minimum imprisonment provisions of section 893.135(1), Florida Statutes, is hereby imposed for the sentence specified in this count and pay fine \$ _____ plus \$ _____ as the 5% surcharge required.
- Controlled Substance Within 1,000 Feet of School* ☐ It is further ordered that the 3-year minimum imprisonment provisions of section 893.13(1)(e)1, Florida Statutes, is hereby imposed for the sentence specified in this count.
- Habitual Felony Offender* ☐ The Defendant is adjudicated a habitual felony offender and has been sentenced to an extended term in accordance with the provisions of section 775.084(4)(a), Florida Statutes. The requisite findings by the Court are set forth in a separate order or stated on the record in open Court.
- Habitual Violent Felony Offender* ☐ The Defendant is adjudicated a habitual violent felony offender and has been sentenced to an extended term in accordance with the provisions of section 775.084(4)(b), Florida Statutes. A minimum term of _____ year(s) must be served prior to release. The requisite findings of the Court are set forth in a separate order or stated on the record in open Court.
- Law Enforcement Protection Act* ☐ It is further ordered that the Defendant shall serve a minimum of _____ year(s) before release in accordance with section 775.0823, Florida Statutes.
- Capital Offense* ☐ It is further ordered that the Defendant shall serve no less than 25 years in accordance with the provisions of section 775.082(1), Florida Statutes.
- Short-Barreled Rifle, Shotgun, Machine Gun* ☐ It is further ordered that 5-year minimum provisions of section 790.221(2), Florida Statutes, are hereby imposed for the sentence specified in this count.
- Continuing Criminal Enterprise* ☐ It is further ordered that the 25-year minimum sentence provisions of section 893.20, Florida Statutes, are hereby imposed for the sentence specified in this count.

Other Provisions:

- Jail Credit* ☐ It is further ordered that the Defendant shall be allowed a total of _____ days as credit for time incarcerated before imposition of this sentence.
- Prison Credit* ☐ It is further ordered that the Defendant be allowed day for day credit for all time previously served on this count in the Department of Corrections prior to resentencing.
- Consecutive/ Concurrent As To Other Counts* ☐ It is further ordered that the sentence imposed for this count shall run (check one) ☐ consecutive to ☐ concurrent with the sentence set forth in count _____ of this case.

704

Circuit Ct. # 7567

5

Defendant BILLYV L. KEARSE

Case Number 91-136-CF

Other Provisions, continued:

Consecutive/Concurrent ☐ It is further ordered that the composite term of all sentences imposed for the counts specified in this
As To Other Convictions order shall run
(check one) ☐ consecutive to ☐ concurrent with the following:
(check one)
☐ any active sentence being served.
☐ specific sentences: _____

Retention of Jurisdiction ☐ The court retains jurisdiction over the Defendant pursuant to section 947.16(3), Florida Statutes (1983).

In the event the above sentence is to the Department of Corrections, the Sheriff of ☐ St. Lucie ☐ _____
County, Florida, is hereby ordered and directed to deliver the Defendant to the Department of Corrections at the facility designated
by the department together with a copy of this Judgment and Sentence and any other documents specified by Florida Statute.

The Defendant in open Court was advised of the right to appeal from this Sentence by filing notice of appeal within 30 days
from this date with the Clerk of this Court and the Defendant's right to the assistance of counsel in taking the appeal at the expense
of the State on showing of indigency.

In imposing the above sentence, the Court further recommends / orders _____

97 PM 28 PM 1 15
JOHNSON
CLERK CIRCUIT COURT

Indian River

DONE AND ORDERED in open Court at ~~St. Lucie~~ County, Florida, this 24 day of MARCH, 1997.

C. P. Beiffer
JUDGE

705

Circuit CL Min. 1588

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR ST. LUCIE COUNTY, FLORIDA

STATE OF FLORIDA

v.

Case No. 91-136-CF

BILLY LEON KEARSE

Defendant

SENTENCE AND FINDINGS OF FACT

This cause came on to be heard March 12, 1997, for Determination of Sentence for Count 1, Murder in the First Degree, and the Court having presided over the Sentencing Hearing before the Jury, and having received it's 12/0 Recommendation for the Death Penalty, and the Court having heard argument on March 12, 1997, and having considered the Memoranda submitted by the State and the Defendant, and notwithstanding the recommendation of the jury, the Court has made its own independent evaluation of the aggravating and mitigating circumstances as required by Chapter 921.141(3) Florida Statutes:

a. The crime for which the defendant is to be sentenced was committed while he was engaged in the commission of or during flight after committing or attempting to commit the crime of robbery, 921.141(5)(d):

The evidence shows that Defendant forcibly took Officer Parish's service pistol, turned that weapon on the officer and killed him. Even though the Defendant may have been motivated by his desire to avoid arrest when he took the gun, the incident still constituted a robbery under the definition of that offense. The taking was not incidental to the killing. The Supreme Court so ruled in the prior appeal and also found that this circumstance did not constitute doubling. The Court finds that this aggravator has been proven beyond a reasonable doubt. It's weight, however, is diminished somewhat as stealing the officer's pistol was not a planned activity such as occurs in a purse snatching or a holdup. While technically defendant's actions constituted robbery, the reality is that defendant took the weapon to effect the killing and then kept it to conceal the fingerprints and other evidentiary matters it presented.

b. The crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. 921.141(5)(c):

The evidence clearly shows that defendant's actions were taken for this purpose. There is no evidence that defendant carried any grudge against the officer, that the defendant planned the encounter, or that there was any reason to kill the officer other than the defendant's intention that he not be arrested. The Court finds that this aggravating factor has been proven beyond a reasonable doubt.

c. The crime for which the defendant is to be sentenced was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws. 921.141(5)(g):

Effecting an arrest was the lawful exercise of a governmental function and the enforcement of laws. When the defendant killed the officer to prevent the arrest, this aggravating factor was established. The Court finds that this aggravating factor has been proven beyond a reasonable doubt.

d. The victim of the crime for which the defendant is to be sentenced was a law enforcement officer engaged in the performance of his official duties. 921.141(5)(j):

Again, there is no question but that Officer Parrish was a law enforcement officer and was acting within his official duties when he stopped the defendant and attempted to arrest him. The Court finds that this aggravating factor has been proven beyond a reasonable doubt.

The Court also finds that aggravating factors b, c, and d, above, are based upon a single aspect of the case and, accordingly, are considered as only one aggravating factor. This means that the Court has found a total of two aggravating factors, a, above, and the combined factors b, c, and d, proven beyond a reasonable doubt.

STATUTORY MITIGATING FACTORS

a. 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.

b. The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

Each of these possible mitigating factors must be considered in two ways: first, on the basis of the extensive psychological evidence presented, and second, in the light of the evidence regarding the defendant's conduct at the time of the offense.

There is no doubt but that defendant grew up in bad circumstances. His childhood and early family training were horrible. The evidence does not establish that defendant has organic brain damage from any source including fetal alcohol syndrome. He obviously has some personality disorders and has indulged in bad conduct all of his life. While the experts who testified disagreed, the court finds that any mental or emotional disturbance was not "extreme."

The evidence shows that defendant exhibited a clear thinking process throughout the criminal episode. He lied to the officer about his name to the extent that the officer made several attempts to verify it in different forms. When this failed, defendant had presence of mind to take the officer's pistol. He fired fourteen shots in several groups with pauses in between during which the officer begged for his life. He then thought to keep the pistol with his fingerprints on it and to later hide it. He made an effort to conceal the automobile. When questioned after the offense, he led the officers on a wild goose chase for the pistol. This evidence shows defendant's ability to appreciate the criminality of his conduct, to make conscious choices about that conduct, and to purposely engage in the criminal activities. The Court finds that neither of these two statutory mitigating factors has been proven by the greater weight of the evidence.

c. The age of the defendant at the time of the crime.

Since there is no magic cutoff age under this factor, the Court must find that it has been established by the greater weight of the evidence. However, the evidence shows that defendant had already been through many stages of the criminal justice system including state prison time. Although eighteen years of age at the time, defendant exhibited sophistication rather than naiveté. The obvious intent of this statutory mitigator is to give consideration to a youth who acts from immaturity. This is just not the case here and the mitigator is entitled to some but not much weight.

NON-STATUTORY MITIGATING FACTORS

Defendant's attorney has listed forty such possible factors but with no written or oral argument at the penalty phase to support them. The Court has considered whether each of these has been established by the greater weight of the evidence.

Items 1 and 2 relate to lack of heightened premeditation and lack of being, heinous, atrocious, or cruel. This Court doubts that the absence of a statutory aggravating factor can become a non-statutory mitigating factor. Even if it could be, the evidence here, while not sufficient for aggravating factors, certainly does not disclose anything meritorious in the manner of this murder. The officer was hit by thirteen bullets, begged for his life, and was partially paralyzed before he died. The Court cannot find that the greater weight of this evidence establishes either of these suggested mitigating factors.

Item 3 is "Time between any decision to cause death and the shooting insufficient to allow cool and thoughtful consideration of conduct." For the reasons discussed in Items 1 & 2 above, the Court cannot find that this suggested mitigating factor has been established by the greater weight of the evidence.

Item 4 relates to defendant's cooperation with law enforcement, confession, and sincere remorse. The evidence shows that defendant initially did anything but cooperate and that even after he was confronted with evidence of his guilt, he blamed the conduct of the officer for the killing. While the Court must find that the defendant did confess, little weight should be given to this act under the circumstances and the Court cannot find from the greater weight of the evidence any true remorse.

Item 5. The Court finds that the defendant's behavior at the trial was acceptable and will give this some weight.

Items 6 through 39 are a laundry list of factors that essentially relate to defendant's difficult childhood and his psychological and emotional condition because of it. While the Court finds that the greater weight of the evidence does not establish fetal alcohol effect or organic brain damage, there was evidence regarding the remaining conditions and the Court has considered individually and will give some weight to each of these suggested factors.

Item 40 states "Defendant entered the adult penal system at a very early age." While this is true, the Court fails to see how this could be a mitigating factor. If it is, somehow, it is entitled to little weight.

CONCLUSION

In conclusion the Court finds beyond a reasonable doubt that the State has proven by very clear, convincing and credible evidence aggravating circumstances a, b, c, and d, above (which total only two) and that the statutory and nonstatutory mitigating circumstances found proven above are not individually or in toto substantial or sufficient to outweigh the aggravating circumstances.

Accordingly, after weighing all the aggravating and mitigating circumstances proven as established by the evidence in these proceedings, and the arguments presented during the penalty phase of this case, and the recommendation of the jury, the Court finds that there are sufficient aggravating circumstances beyond a reasonable doubt (and insufficient mitigating circumstances) to justify the imposition of the death penalty for Count 1, First Degree Murder.

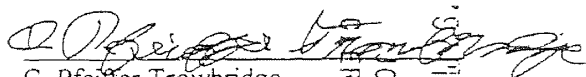
It is, therefore, ORDERED AND ADJUDGED that you, Billy Leon Kears, are hereby sentenced to be put to death according to the law.

You have the automatic right to appeal this Sentence and to have the assistance of appointed counsel for this purpose.

May God have mercy upon your soul.

Done and ordered in open court in Vero Beach, Indian River County, Florida, this

24th day of March, 1997.


C. Pfeiffer Trowbridge
Senior Circuit Judge

Copies furnished:
Bruce Colton, State Attorney
Robert G. Udell, Esq., Defense Attorney
Clerk, Indian River County Circuit Court

FILED
MAR 25 PM 1 15
CLERK OF COURT
INDIAN RIVER COUNTY

Filing # 65603287 E-Filed 12/19/2017 04:23:03 PM

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR ST. LUCIE, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

CASE No.: 1991CF000136A

BILLY LEON KEARSE

Defendant.

STATE'S RESPONSE TO DEFENDANT'S SUCCESSIVE MOTION TO VACATE
DEATH SENTENCE UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.851

COMES NOW Plaintiff, State of Florida, by and through undersigned counsel, and hereby responds to Defendant's Successive Motion to Vacate Death Sentence Under Florida Rule of Criminal Procedure 3.851 filed on November 29, 2017, and states:

1. Defendant, Billy Leon Kearse ("Kearse") has litigated three prior postconviction motions pursuant to Florida Rule of Criminal Procedure 3.851 and currently his federal habeas litigation is pending before the United States Circuit Court of Appeals.¹ The instant motion should be denied summarily as Kearse has not carried his burden under Rule 3.851 (e)(2) which governs this litigation. The constitutional right upon which he relies arises from *Hurst v. Florida*, 136 S.Ct. 616 (2016) and *Hurst v. State*, 202 So.3d 40 (Fla. 2016) and intervening case

¹ Because the federal litigation is not relevant for resolving the instant issue presented here, the State will not address the matter further.

law has determined that those cases are not retroactive to cases on collateral review, such as his, which were final before June 24, 2002. See *Asay v. State*, 210 So.3d 1 (Fla. 2016); *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017); *Asay v. State*, 224 So.3d 695 (Fla. 2017); *Lambrix v. State*, 227 So3d 112 (Fla. 2017), cert. denied, 17-6222, 2017 WL 4409398 (U.S. Oct. 5, 2017). Within 30 days after the State files its responsive pleading, a case management conference should be held in accordance with Rule 3.851(f)(5)(B).

2. Procedural History of State Court Litigation

Kearse is in custody and under a sentence of death based on a valid judgment of guilt entered November 8, 1991 and sentence entered on March 24, 1997. On February 5, 1991, Kearse was indicted for the January 18, 1991 first-degree murder of police officer Danny Parrish ("Parrish") and possession of a firearm by a convicted felon. The indictment was amended on May 8, 1991 to include a robbery with a firearm count. Trial commenced October 14, 1991 and a week later, the jury convicted Kearse of armed robbery and first-degree murder and he was sentenced to death. *Kearse v. State*, 662 So.2d 677, 680 (Fla. 1995).

On direct appeal, the Florida Supreme Court found the following facts:

After [police officer Danny] Parrish observed Kearse driving in the wrong direction on a one-way street, he called in the vehicle license number and stopped the

vehicle. Kearsse was unable to produce a driver's license, and instead gave Parrish several alias names that did not match any driver's license history. Parrish then ordered Kearsse to exit the car and put his hands on top of the car. While Parrish was attempting to handcuff Kearsse, a scuffle ensued, Kearsse grabbed Parrish's weapon and fired fourteen shots. Thirteen of the shots struck Parrish, nine in his body and four in his bullet-proof vest. A taxi driver in the vicinity heard the shots, saw a dark blue vehicle occupied by a black male and female drive away from the scene, and called for assistance on the police officer's radio. Emergency personnel transported Parrish to the hospital where he died from the gunshot injuries.

The police issued a be-on-the-lookout (BOLO) for a black male driving a dark blue 1979 Monte Carlo. By checking the license plate that Officer Parrish had called in, the police determined that the car was registered to an address in Fort Pierce. Kearsse was arrested at that address. After being informed of his rights and waiving them, Kearsse confessed that he shot Parrish during a struggle that ensued after the traffic stop.

Kearsse, 662 So.2d at 680. The Florida Supreme Court affirmed the conviction, however, it vacated the death sentence, and remanded the matter for re-sentencing. *Id.*, at 685-86.

The new penalty phase commenced on December 9, 1996, and following the jury's *unanimous recommendation of death*, on March 25, 1997, the trial court again sentenced Kearsse to death for the first-degree murder of Officer Danny Parrish. The Florida Supreme Court affirmed finding:

The trial court found two aggravating circumstances: the murder was committed during a robbery; and the murder was committed to avoid arrest and hinder law enforcement and the victim was law enforcement officer engaged in performance of his official duties (merged

into one factor). The court found age to be a statutory mitigating circumstance and gave it "some but not much weight." Of the forty possible nonstatutory mitigating factors urged by defense counsel, the court found the following to be established: Kearse exhibited acceptable behavior at trial; he had a difficult childhood and this resulted in psychological and emotional problems. The court determined that the mitigating circumstances, neither individually nor collectively, were "substantial or sufficient to outweigh the aggravating circumstances."

Kearse v. State, 770 So.2d 1119, 1122-23 (Fla. 2000). *Kearse's case became final on March 26, 2000*, with the denial of certiorari by the United States Supreme Court. *Kearse v. Florida*, 121 S.Ct. 1411 (2000).

On October 3, 2001, Kearse filed a "shell" motion and following months of litigation, not at issue here, on June 21, 2002, filed his Amended postconviction motion which was accepted and the State responded. An evidentiary hearing was granted following which relief was denied. The Florida Supreme Court affirmed. *Kearse v. State*, 969 So.2d 976 (Fla. 2007). In the related state habeas litigation, Kearse claimed his death sentence was unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002). In rejecting the issue, the Florida Supreme Court opined:

Kearse also argues that Florida's capital sentencing scheme is unconstitutional under *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), because instructions diminish the role of the jury, all elements are not charged in the indictment, a unanimous jury is not required, and the jury does not decide all the elements. First, *Ring* is not

retroactive to Kearse's case. See *Johnson v. State*, 904 So.2d 400, 402 (Fla. 2005) ("We hold that ... the United States Supreme Court's decision in *Ring v. Arizona* ... does not apply retroactively in Florida."). We also note that Kearse's resentencing jury returned a unanimous recommendation of death. Further, this Court has rejected all of these claims previously. See *Parker v. State*, 904 So.2d 370, 383 (Fla. 2005) (listing claims and citing cases in which the Court denied these and other claims).

Kearse, 969 So.2d at 992.

Subsequently, Kearse presented his first successive postconviction relief motion on December 26, 2009 challenging Florida's lethal injection protocols. The denial of relief was affirmed on appeal. *Kearse v. State*, 11 So.3d 355 (Fla. 2009). On October 27, 2010, Kearse filed his second successive postconviction relief motion claiming newly discovered evidence based on defense counsel's, Robert Udell, recent disbarment. Again, relief was denied and the ruling was affirmed. *Kearse v. State*, 75 So.3d 1244 (Fla. 2011).

On January 12, 2016, the United States Supreme Court issued *Hurst v. Florida*, 136 S.Ct. 616 (2016) finding Florida's capital sentencing procedure unconstitutional to the extent that it did not require unanimous jury findings necessary to render the defendant death eligible and remanding for consideration of harmless error. As a result, on January 12, 2017, Kearse filed an over-large third successive postconviction motion challenging his death sentence under *Hurst v. Florida*. On January 20, 2017,

this Court denied Kearsse's motion to exceed the page limitations and Kearsse appealed. On May 9, 2017, upon the State's motion, the appeal was dismissed for lack of jurisdiction.

While the Florida Supreme Court has held that *Hurst v. Florida* and *Hurst* do not apply retroactively to cases like Kearsse's case which was final before the issuance of *Ring v. Arizona*, 536 U.S. 584 (2002), Kearsse refiled his motion on November 29, 2017, and it is to this motion the State responds.

3. Standard of Review

This is a successive motion as "a state court has previously ruled on a postconviction motion challenging the same judgment and sentence." Florida Rule of Criminal Procedure 3.851 (e)(2). In order to bring a successive postconviction claim and one outside the one year time limitation, the defendant must show either newly discovered evidence or a new constitutional right made retroactive to his case. See Rule 3.851 (d)(2); *Knight v. State*, 784 So.2d 396, 400 (Fla. 2001); *Francis v. Barton*, 581 So.2d 583, 584 (Fla. 1991). Absent such a showing, summary denial is proper.²

² Additionally, procedurally barred claims can be denied without an evidentiary hearing or the attachment of records. *Muhammad v. State*, 603 So.2d 488, 489 (Fla. 1992) (noting "[i]ssues which either were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack."); *Medina v. State*, 573 So. 2d 293, 295 (Fla. 1990) (holding the "[a]llegations of ineffective assistance cannot be used to circumvent the rule that postconviction proceedings cannot serve

4. Argument

CLAIMS I - III - THIS SUCCESSIVE RULE 3.851 MOTION SHOULD BE DENIED SUMMARILY AS *HURST V. FLORIDA* AND *HURST* ARE NOT RETROACTIVE TO CASES THAT WERE FINAL BEFORE JUNE 24, 2002.

Kearse asserts that *Hurst v. Florida*, 136 S.Ct. 616 (2016) and *Hurst v. State*, 202 So.3d 40 (Fla. 2016) ("*Hurst*") should be applied to him retroactively even though his case was final before June 24, 2002, the day *Ring* was decided. It is his position that *Hurst v. Florida* and *Hurst* created a new substantive right and failure to apply it retroactively violates the Equal Protection Clause and Eighth Amendment. He asserts further that the State has not shown the violation to be harmless beyond a reasonable doubt. The Florida Supreme Court has rejected Kearse's claims for retroactive application and this Court is bound by that precedent. As such, postconviction relief must be denied summarily.

Hurst v. Florida and *Hurst* Are Not Retroactive - The Florida Supreme Court has determined that *Hurst v. Florida* and *Hurst* are not retroactive to cases in a similar posture to the instant case. As such *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017) and *Lambrix v. State*, 227 So.3d 112 (Fla. 2017), cert.

as a second appeal"; *Harvey v. Dugger*, 656 So. 2d 1253, 1256 (Fla. 1995). All other claims may be summarily denied "when the motion and the record conclusively demonstrate that the movant is entitled to no relief." *Kennedy v. State*, 547 So. 2d 912, 913 (Fla. 1989).

denied, 17-6222, 2017 WL 4409398 (U.S. Oct. 5, 2017) foreclose Kearse's challenges raised here. Additionally, *Asay*, 210 So.3d at 22; *Hitchcock*; *Asay*, 224 So.3d at 703 (rejecting claim that *Hurst* and Chapter 2017-1, Laws of Florida should be applied retroactively to a defendant whose case became final before June 24, 2002); and *Lambrix v. State*, 227 So.3d 112 (Fla. 2017), cert. denied, 17-6222, 2017 WL 4409398 (U.S. Oct. 5, 2017) make clear Kearse is not entitled to relief as those cases reject each of his arguments for retroactivity to cases final before June 24, 2002.

In *Asay*, 210 So.3d at 22, the Florida Supreme Court held *Hurst v. Florida* and *Hurst* are not retroactive to cases final before June 24, 2004, the day *Ring* was issued. The judgment at issue in *Asay*, 210 So.3d at 1 became final October 7, 1991, and thus, *Asay* was not eligible for relief under *Hurst v. Florida* or *Hurst*. *Asay*, 210 So.3d at 8. See also, *Asay*, 224 So.3d at 703 (reiterating *Hurst* and *Hurst v. Florida* were not retroactive to case final before *Ring* issued); *Hitchcock*, 2017 WL 3431500, at *1 (stating "[w]e have consistently applied our decision in *Asay* V, [210 So.3d at 22], denying the retroactive application of *Hurst v. Florida* as interpreted in *Hurst v. State* to defendants whose death sentences were final when the Supreme Court decided *Ring v. Arizona*")

Also in *Asay*, 210 So.3d at 15-16, the Florida Supreme Court

discussed the appropriate test for determining retroactivity of *Hurst* and applied the *Witt v. State*, 387 So.2d 922 (Fla. 1980) analysis "which provides **more expansive retroactivity standards** than those adopted in *Teague [v. Lane]*, 489 U.S. 288 (1989)," which enumerates the federal retroactivity standards. *Id.* (emphasis in original), quoting *Johnson v. State*, 904 So.2d 400, 409 (Fla. 2005). See also *Danforth v. Minnesota*, 522 U.S. 264, 280-81 (2008) (allowing states to adopt a retroactivity test that is broader than *Teague*). As recognized in *Hitchcock*, after *Asay*, 210 So.3d at 1, the Florida Supreme Court has adhered staunchly to using the *Ring* decision date as the bright-line cutoff point for retroactivity of a *Hurst* claim. Thus far, the Florida Supreme Court has refused to extend *Hurst v. Florida* and *Hurst* to 23 defendants, including *Asay*, based solely on the fact that their judgments were final prior to the decision in *Ring*.³

³ See *Asay*, 210 So.3d at 8, 22 (sentence final in 1991; see *Asay v. Florida*, 502 U.S. 895 (1991)); *Jones v. State*, No. SC15-1549, 2017 WL 4296370, *2 (Sept. 28, 2017); *Hitchcock v. State*, No. SC17-445, 2017 WL 3431500 (Fla. Aug. 10, 2017) (sentence final in 2000; see *Hitchcock v. State*, 531 U.S. 1040 (2000)); *Zack v. State*, Nos. SC15-1756, SC16-1090, 2017 WL 2590703, *5 (Fla. June 15, 2017) (sentence final in 2000; see *Zack v. Florida*, 531 U.S. 858 (2000)); *Zakrzewski v. Jones*, 221 So.3d 1159, 1159 (Fla. 2017) (sentence final in 1999; see *Zakrzewski v. Florida*, 525 U.S. 1126 (1999)); *Oats v. Jones*, 220 So.3d 1127, 1129 (Fla. 2017) (sentence final in 1985; see *Oats v. Florida*, 474 U.S. 865 (1985)); *Marshall v. Jones*, No. SC16-779, 2017 WL 1739246 (May 4, 2017) (sentence final in 1993; see *Marshall v. Florida*, 508 U.S. 915 (1993)); *Rodriguez v. State*, 219 So.3d 751, 760 (Fla. 2017) (sentence final in 1993; see *Rodriguez v. Florida*, 510 U.S. 830 (1993)); *Willacy v. Jones*, No. SC16-497, 2017 WL 1033679

On August 10, 2017, the Florida Supreme Court reaffirmed its decision in *Asay* stating:

Although *Hitchcock* references various constitutional provisions as a basis for arguments that *Hurst v. State* should entitle him to a new sentencing proceeding, these are nothing more than arguments that *Hurst v. State* should be applied retroactively to his sentence, which became final prior to *Ring*. As such, these arguments were rejected when we decided *Asay*. Accordingly, we affirm the circuit court's order summarily denying *Hitchcock's* successive

(Mar. 17, 2017)(sentence final in 1997; see *Willacy v. Florida*, 522 U.S. 970 (1997)); *Suggs v. Jones*, No. SC16-1066, 2017 WL 1033680, *1 (Mar. 17, 2017)(sentence final in 1995; see *Suggs v. Florida*, 514 U.S. 1083 (1995)); *Lukehart v. Jones*, No. SC16-1225, 2017 WL 1033691, *1 (Mar. 17, 2017)(sentence final 2001; see *Lukehart v. Florida*, 533 U.S. 934 (2001)); *Cherry v. Jones*, No. SC16-694, 2017 WL 1033693, *1 (Mar. 17, 2017)(sentence final in 1990; see *Cherry v. Florida*, 494 U.S. 1090 (1990)); *Archer v. Jones*, No. SC16-2111, 2017 WL 1034409, *1 (Mar. 17, 2017)(sentence final in 1996; see *Archer v. Florida*, 519 U.S. 876 (1996)); *Jones v. Jones*, No. SC16-607, 2017 WL 1034410 (Mar. 17, 2017)(sentence final in 1995; see *Jones v. Florida*, 515 U.S. 1147 (1995)); *Hartley v. Jones*, No. SC16-1359, 2017 WL 944232, *1 (Mar. 10, 2017)(sentence final in 1997; see *Hartley v. Florida*, 522 U.S. 825 (1997)); *Geralds v. Jones*, No. SC16-659, 2017 WL 944236, *1 (Mar. 10, 2017)(sentence final in 1996; see *Geralds v. Florida*, 519 U.S. 891 (1996)); *Lambrix v. State*, SC17-1687, 2017 WL 4320637 (Fla. Sept. 29, 2017), cert. denied, 17-6222, 2017 WL 4409398 (U.S. Oct. 5, 2017); *Lambrix v. State*, 217 So.3d 977, 989 (Mar. 9, 2017)(sentence final in 1986); *Stein v. Jones*, No. SC16-621, 2017 WL 836806 (Mar. 3, 2017)(sentence final in 1994; see *Stein v. Florida*, 513 U.S. 834 (1994)); *Hamilton v. Jones*, No. SC16-984, 2017 WL 836807 (Mar. 3, 2017)(sentence final in 1998; see *Hamilton v. Florida*, 524 U.S. 956 (1998)); *Davis v. State*, No. SC16-264, 2017 WL 656307 (Feb. 17, 2017)(sentence final in 1998; see *Davis v. Florida*, 524 U.S. 930 (1998)); *Bogle v. State*, 213 So.3d 833, 855 (Fla. 2017)(sentence final in 1995; see *Bogle v. Florida*, 516 U.S. 978 (1995)); *Wainwright v. State*, No. SC15-2280, 2017 WL 394509 (Jan. 30, 2017)(sentence final in 1998; see *Wainwright v. Florida*, 523 U.S. 1127 (1998)); *Gaskin v. State*, 218 So.3d 399, 400 (Jan. 19, 2017)(sentence final in 1993; see *Gaskin v. Florida*, 510 U.S. 925 (1993)).

postconviction motion pursuant to *Asay*.

Hitchcock, 226 So.3d at 217; see also *Asay*, 224 So.3d at 703 (rejecting claim chapter 2017-1, Laws of Florida, "creates a substantive right to a life sentence unless a jury unanimously recommends otherwise"); *Lambrix*, 227 So.3d at 113 (rejecting arguments based on Eighth Amendment, due process, equal protection, and a substantive right based on new legislation).

Here, just as was presented in *Hitchcock*, Kearse raises various constitutional provisions to argue that *Hurst* should be applied retroactively to him. However, as determined in *Asay*, 210 So.3d at 8, 22 and reaffirmed in *Hitchcock*; *Lambrix*; and *Asay*, 224 So.3d at 703, *Hurst* does not apply retroactively. Kearse's case became final on March 26, 2000 when certiorari was denied. *Kearse v. Florida*, 121 S.Ct. 1411 (2000). As such, *Hurst* and *Hurst v. Florida* are not retroactive to this case and this Court must deny relief summarily.

Furthermore, Kearse's assertion that *Hurst v. Florida* and *Hurst* created a substantive right deserving of retroactive application is unsupported. In *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004), the United States Supreme Court determined that *Ring* was a procedural change in the law, not a substantive change, because it only "altered the range of permissible methods for determining whether a defendant's conduct is punishable by death, requiring that a jury rather than a judge

find the essential facts bearing on punishment" and was not retroactive to cases on collateral review. Such a finding supports the conclusion that *Hurst*, which was an expansion of *Ring* to Florida capital cases, would likewise not be retroactive under federal or state retroactive analysis. Thus, *Ring* "announced a new procedural rule that does not apply retroactively to cases already final on direct review." *Id.* at 358. Because *Hurst* is an expansion of *Ring* to Florida, *Hurst* like *Ring* did not create a substantive rule and is not retroactive under federal law.

Kearse relies on *Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972); *Powell v. Delaware*, 153 A.3d 69 (Del. 2016) for the premise that *Hurst* should be retroactive as a substantive change (Motion at 12) and offers that retroactivity should be back to the date *Apprendi* was decided in 2000 as *Summerlin* addressed the proof-beyond-a-reasonable-doubt standard not the jury unanimity required in *Hurst v. Florida* and *Hurst*. However, long before *Ring*, let alone *Hurst*, "beyond a reasonable doubt" was the standard of proof required for proving aggravating factors in Florida. See *Floyd v. State*, 497 So.2d 1211, 1214-15 (Fla. 1986); *Zeigler v. State*, 580 So.2d 127, 129 (Fla. 1991); *Finney v. State*, 660 So.2d 674, 680 (Fla. 1995). The Delaware Court in *Powell* agreed: "neither *Ring* nor *Hurst* involved a Due Process Clause violation caused by the unconstitutional use of a lower

burden of proof." *Powell*, 153 A.3d at 74. The Delaware Supreme Court used this fact to distinguish Delaware's "watershed ruling" in *Rauf v. State*, 145 A.3d 430 (Del. 2016) which was the basis for finding that retroactivity applied to *Powell* under *Teague*, from *Ring* and *Hurst*. *Powell*, 153 A.3d at 74. Thus, *Powell* applies to Delaware cases and distinguishes *Hurst* and *Ring* under Delaware law.

The Eleventh Circuit has rejected the argument that *Hurst* is retroactive under federal law, stating: "[t]he Supreme Court has held that *Ring* does not apply retroactively to cases on collateral review. See *Schriro v. Summerlin*, 542 U.S. 348, 358 [] (2004) (holding that *Ring* does not apply retroactively under federal law to death-penalty cases already final on direct review.)." *Lambrix v. Sec'y, Fla. Dep't of Corr.*, 872 F.3d 1170 (11th Cir. 2017), cert. denied *Lambrix v. Florida*, Nos. 17-6290, 17A380, 2017 WL 4456332 (Oct. 5, 2017). Further, the Eleventh Circuit held that the Florida Supreme Court's ruling that *Hurst* did not apply retroactively to *Lambrix*, whose judgment was final in 1986, "is fully in accord with the U.S. Supreme Court's precedent in *Ring* and *Schriro*." *Lambrix*, 872 F.3d at 1182-83. The Eleventh Circuit also rejected the statutory retroactivity argument stating:

jurists of reason would not find this position debatable: the Florida court's rejection of *Lambrix*'s constitutional-statutory claim was not contrary to, or

an unreasonable application of, the holding of a Supreme Court decision.

Id. at 1183; see *Dobbert v. Florida*, 432 U.S. 282, 301 (1977).

Moreover, with retroactivity, there is usually a cutoff date to provide for finality in appellate processing. *Penry v. Lynaugh*, 492 U.S. 302, 314 (1989) (holding finality concerns in retroactivity are applicable in the capital context). In *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987), the Supreme Court held "that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." See also, *Smith v. State*, 598 So.2d 1063, 1065 (Fla. 1992). Under this "pipeline" concept, only those cases still pending on direct review would receive the benefit of relief from *Hurst* error. The fact that the Florida Supreme Court has drawn the line at the decision date of *Ring* instead of the decision date in *Hurst*, benefits more defendants. Thus, that Court's retroactivity cutoff does not violate the Fourteenth Amendment's guarantee of equal protection, due process, or the Eighth Amendment.

In *Asay*, 210 So.3d at 11-19, the Florida Supreme Court also discussed the role the *Apprendi* opinion had in the Supreme Court's decisions in *Ring* and *Hurst*. There however, "the Supreme

Court distinguished capital cases from its holding in *Apprendi*." *Asay*, 210 So.3d at 19; *citing Apprendi v. New Jersey*, 530 U.S. 466, 496-97 (2000) ("this Court has previously considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes . . ."). Because *Apprendi* does not apply to capital cases, contrary to Kearse's suggestion otherwise, *Apprendi* should not be used as the cutoff date for *Hurst* retroactivity.

Neither the Eighth Amendment nor Chapter 2017-1 require a resentencing - As noted above, the Florida Supreme Court has rejected the notion that the passage of Chapter 2017-1, Laws of Florida created a substantive right to a resentencing in a case final before June 24, 2002. As set forth above, the fact that the Legislature has enacted a new statute following the dictates of *Hurst*, does not give Kearse a new substantive right. See *Asay*, 210 So.3d at 8, 22; *Hitchcock*; *Lambrix*, 227 So.3d at 113 (rejecting arguments based on Eighth Amendment, due process, equal protection, and a substantive right based on new legislation); and *Asay*, 224 So.3d at 703 (rejecting claim chapter 2017-1, Laws of Florida, "creates a substantive right to a life sentence unless a jury unanimously recommends otherwise"). Furthermore, the new statute does not apply to Kearse. Kearse's litigation here is a successive collateral attack upon his death sentence as "a state court has previously

ruled on a postconviction motion challenging the same judgment and sentence." Florida Rule of Criminal Procedure 3.851 (e)(2).

In *Spaziano v. Florida*, 468 U.S. 447, 463-64, (1984), the United States Supreme Court held that the Eighth Amendment is not violated in a capital case when the ultimate responsibility of imposing death rests with the judge. *Spaziano v. Florida*, 468 U.S. 447, 463-64, (1984) *overruled on other grounds by Hurst v. Florida*, 136 S. Ct. 616 (2016). In deciding *Hurst v. Florida*, the United States Supreme Court only analyzed the case pursuant to Sixth Amendment grounds. The Court did not address the issue of any possible Eighth Amendment violation. Consequently, *Hurst v. Florida* only overrules *Spaziano* to the extent that it allows a sentencing judge to find an aggravating circumstance independent of a jury's fact-finding. *Hurst v. Florida*, 136 S. Ct. at 618. The United States Supreme Court has never held that a unanimous jury recommendation is required under the Eighth Amendment.

While the Florida Supreme Court initially included the Eighth Amendment as a reason for warranting unanimous jury recommendations in its *Hurst v. State* decision, the Court did not, and cannot, overrule the United State Supreme Court's surviving precedent in *Spaziano*. In addition, Florida has a conformity clause in its state constitution that requires the state courts to interpret Florida's prohibition on cruel and

unusual punishments in conformity with the United States Supreme Court's Eighth Amendment jurisprudence. Art. I, § 17, Fla. Const.; *Henry v. State*, 134 So. 3d 938, 947 (Fla. 2014) (noting that under Article I, section 17 of the Florida Constitution, Florida courts are "bound by the precedent of the United States Supreme Court" regarding Eighth Amendment claims). Given Florida's conformity Clause and that there is no United States Supreme Court case holding that the Eighth Amendment requires the jury's final recommendation be unanimous, Kearsse's reliance on the Eighth Amendment discussed in *Hurst v. State* is misplaced and does not support his claim for relief. No Eighth Amendment right was created, thus, there is no right to be applied retroactively and his arguments must fail.

It is well settled that a decision by the Florida Supreme Court is binding on lower tribunals. The Florida Supreme Court has stated that "[t]he decisions of the district courts of appeal represent the law of Florida unless and until they are overruled by this Court." *Stanfill v. State*, 384 So.2d 141, 143 (Fla. 1980). The Fourth District Court of Appeals has recognized this stating: "[t]he District Courts of Appeal are required to follow Supreme Court decisions. As an adjunct to this rule it is logical and necessary in order to preserve stability and predictability in the law that, likewise, trial courts be required to follow the holdings of higher courts" *State v.*

Hayes, 333 So.2d 51, 53 (Fla. 4th DCA 1976) (footnote and citations omitted). See *Hoffman v. Jones*, 280 So.2d 431 (Fla. 1973) (reiterating that trial court is bound by Florida Supreme Court decisions "just as the District Courts of Appeal follow controlling precedents set by the Florida Supreme Court"); *State v. Washington*, 114 So. 3d 182, 185 (Fla. 3d DCA 2012) (opining "[w]hile a lower court is free to disagree and to express its disagreement with an appellate court ruling, it is duty-bound to follow it"). The precedential decisions in *Asay*, *Hitchcock*, and *Lambrix* make clear that, *Hurst* is not retroactive to cases final before June 24, 2002; no constitutional provisions support a resentencing of such final cases; and Chapter 2017-1 does not create a basis for resentencing of capital defendant's whose cases were final before *Ring*. *Asay*; *Hitchcock*; and *Lambrix* are binding upon this Court and are dispositive of the claims Kearse has raised here.

Harmless Error - Even if Kearse's motion could be considered properly, no relief would be warranted. First of all, his jury recommended death unanimously. The Florida Supreme Court has found harmless error consistently in post-*Ring* cases where the jury recommended death unanimously. See *Davis v. State*, 207 So.3d 142, 173-74 (Fla. 2016).⁴ Second, on the

⁴ See also *Cozzie v. State*, 42 Fla. L. Weekly S579 (Fla. May 11, 2017), reh'g denied, SC13-2393, 2017 WL 3751293 (Fla. Aug. 31,

facts of his case, any potential Sixth Amendment error would be harmless beyond any reasonable doubt as Kearse had the contemporaneous violent felony conviction and his conviction of killing a law enforcement officer was supported by the jury's guilt phase conviction. The Florida Supreme Court consistently has held deficient jury factfinding, under the Sixth Amendment, often is harmless.⁵ *Galindez v. State*, 955 So. 2d 517, 521-23

2017); *Knight v. State*, 42 Fla. L. Weekly S133 (Fla. Jan. 31, 2017), reh'g denied, SC14-1775, 2017 WL 4020597 (Fla. Sept. 13, 2017); *Guardado v. Jones*, 42 Fla. L. Weekly S552 (Fla. May 11, 2017), reh'g denied, SC17-389, 2017 WL 4150352 (Fla. Sept. 19, 2017); *Tundidor v. State*, 221 So. 3d 587, 608 (Fla. 2017), reh'g denied, SC14-2276, 2017 WL 2794223 (Fla. June 28, 2017); *Middleton v. State*, 220 So.3d 1152, 1185 (Fla. 2017), reh'g denied, 42 Fla. L. Weekly S637 (Fla. June 1, 2017); *Morris v. State*, 219 So.3d 33, 46 (Fla. 2017), reh'g denied, SC14-1317, 2017 WL 2463873 (Fla. June 7, 2017); *Oliver v. State*, 214 So.3d 606, 618 (Fla. 2017); *Hall v. State*, 212 So. 3d 1001, 1035 (Fla. 2017), reh'g denied, SC15-1662, 2017 WL 1150799 (Fla. Mar. 28, 2017); *Jones v. State*, 212 So. 3d 321, 344 (Fla. 2017), cert. denied, 16-9651, 2017 WL 2734810 (U.S. Oct. 2, 2017); *Truehill v. State*, 211 So. 3d 930, 957 (Fla. 2017); *King v. State*, 211 So. 3d 866, 890 (Fla. 2017), reh'g denied, SC14-1949, 2017 WL 961818 (Fla. Mar. 13, 2017).

⁵ *Hurst* did not find structural error. Moreover, it permits application of harmless error. In *Neder v. United States*, 527 U.S. 1 (1999), the Court rejected the argument that a conviction returned after one element of the offense was mistakenly not submitted to the jury presented a case of structural error. *Neder* explains why reliance on *Sullivan v. Louisiana*, 508 U.S. 275 (1993), is misplaced. Although *Sullivan* found constitutional error which prevented a jury from returning a "complete verdict" could not be harmless, it reviewed *Neder* and determined reversal was not required where evidence of the omitted element was overwhelming and uncontested. *Neder*, 527 U.S. at 19. The determination that deficient factfinding under the Sixth Amendment can be harmless is cemented by *Washington v. Recuenco*, 548 U.S. 212 (2006), where the Supreme Court reversed the state

(Fla. 2007); *Johnson v. State*, 994 So.2d 960, 964-65 (Fla. 2008). A Florida defendant is death eligible if at least one aggravating factor applies. *Steele*, 921 So.2d at 543. Kearse was death eligible based on the guilt phase verdict as it supported both aggravators in this case.⁶

Significantly, the recent Supreme Court decision in *Jenkins v. Hutton*, 582 U.S. ___, 137 S. Ct. 1769 (2017), confirmed the constitutionality of an Ohio death sentence based on a jury's guilt-phase determination of facts. In *Jenkins*, the lower court ordered a new sentencing trial because, in that court's view, the penalty phase jury failed to make the necessary factual findings to support a death sentence. However, because the necessary aggravating factors were established beyond a reasonable doubt by the jury during the guilt phase, the Supreme Court reversed and reinstated the death sentence. See also *Waldrop v. Comm'r, Alabama Dep't of Corr.*, 15-10881, 2017 WL 4271115, at *20 (11th Cir. Sept. 26, 2017) (explaining its rejection of a *Hurst* claim, Circuit Court of Appeals stated: "Alabama requires the existence of only one aggravating circumstance in order for a defendant to be death-eligible, and

holding that *Blakely v. Washington*, 542 U.S. 296 (2004) error, was structural and could never be harmless.

⁶ The Supreme Court recognized the critical distinction of an enhanced sentence supported by a prior conviction in *Almendarez-Torres*, 523 U.S. 224; *Ring*, 536 U.S. at 598 n.4; *Alleyne*, 133 S.Ct. at 2160 n.1. *Hurst* did not disturb this precedent that a *Ring* claim is harmless in the face of a prior felony conviction.

in Mr. Waldrop's case the jury found the existence of a qualifying aggravator beyond a reasonable doubt when it returned its guilty verdict. See §13A-5-45(e).").

Kearse's suggestion that the likelihood one or more jurors may have voted for a life sentence increases had the jury been told its decision must be unanimous and that the judge could not override a life recommendation had one juror refused to vote for death is not well taken in light of the discussion in *Mugnin v. State*, 689 So.2d 1026, 1030 (Fla. 1995) and *Hurst* itself. There are two well settled principles regarding juries and their fact-finding role. First, jurors are obviously well equipped to analyze evidence and, therefore, it should be assumed that if the evidence supports but one of two different theories, the jury would have found that which was supported by the evidence. Cf. *Mugnin*, 689 So.2d at 1030 (finding harmless error where jury instructed on both felony murder and premeditated murder and rendered general verdict of first degree murder where evidence clearly supported felony murder but not premeditation).

The second principle which is relevant to whether the *Hurst* error was harmless beyond a reasonable doubt, is what effect a "Hurst instruction on unanimity" would have had on a rational jury. According to the Florida Supreme Court's rationale outlined in *Hurst*, a requirement of unanimity in capital sentencing, leads jurors to be more thorough, they take more

time in deliberations, they are more likely to agree on issues, they work harder to evaluate the evidence and to reach a consensus; and they tend to be more "evidence driven." *Hurst*, 202 So.3d at 58. Based on this data, a rational jury, instructed in conformity with *Hurst*, would be a jury that would be more focused and motivated to follow the evidence and reach a consensus. Here, it is clear that Kearses jury found a contemporaneous violent felony and that the victim killed was a law enforcement officer. As such, it is not reasonable to assert that had the jury be instructed on the unanimity requirement that it would reject its guilt phase decision, reject the aggravation, and recommend life. Kearses jury was instructed in accordance with the jury instruction in effect and recommended death unanimously. Such supports a finding of harmless error beyond a reasonable doubt even if this Court were to find *Hurst* applies.

Given the fact that Kearses case was final before June 24, 2002 and the Florida Supreme Court has rejected previously all of Kearses claims that *Hurst* should be applied retroactively, the instant postconviction relief motion must be denied summarily. Moreover, given the fact the guilt phase verdict rendered Kearses death eligible and the jury recommended death unanimously, there is no Sixth Amendment violation.

CLAIM IV

**KEARSE WAS NEVER ACQUITTED OF THE DEATH PENALTY; THERE
IS NO DOUBLE JEOPARDY VIOLATION (Restated)**

It is Kearsse's position that this Court should ignore the 1997 unanimous jury death recommendation and instead look to his overturned 1991 jury recommendation to find he was acquitted on the death penalty and that in light of *Hurst*, his instant death sentence is a violation of double jeopardy. Not only has Kearsse not been acquitted of the death penalty, his jury recommended death unanimously and *Hurst* is not retroactive. Relief must be denied.

After being granted a new sentencing as a result of *Hurst v. Florida* and *Hurst*, Timothy Hurst filed a petition for writ of prohibition suggesting he could not be resentenced to death given that his prior death sentence was based on a seven-to-five jury recommendation and that resentencing him to death would be a double jeopardy violation. Although the decision has not been released for publication in the permanent law reports, it is instructive. There, the Florida Supreme Court denied the writ stating:

Petitioner Timothy Lee Hurst has filed an amended petition for writ of prohibition contending that Respondent, the State of Florida, is precluded from seeking the death penalty during the current resentencing proceedings on double jeopardy and due process grounds. Having determined that the arguments presented are without merit, the petition is hereby denied.

Hurst v. State, SC17-302, 2017 WL 1023762, at *1 (Fla. Mar. 16, 2017).⁷

Kearse cites to *Bullington v. Mousouri*, 451 U.S. 430 (1981) and *Sattazahn v. Pennsylvania*, 537 U.S. 101, 123 S.Ct. 732 (2003). Contrary to his suggestion, *Bullington* does not demand Kearse be resentenced to life as no jury ever recommended Kearse receive a life sentence. In fact, *Sattazahn*, supports the conclusion that Kearse's instant death sentence is proper and not violative of double jeopardy. The Supreme Court in *Sattazahn* held that a trial court's discharge of the jury after it failed to reach a unanimous verdict and the trial court's entry of a life sentence did not bar the death penalty on retrial. Double jeopardy only prohibits a new penalty phase when a defendant was acquitted of death originally. *Sattazahn*, 537 U.S. 101. See also, *Poland v. Arizona*, 476 U.S. 147 (1986). A defendant who was originally sentenced to death based on a jury recommendation of death, as was Kearse, has no valid double jeopardy claim.

CONCLUSION

Based on the foregoing arguments and authority, this Court should deny summarily the instant **successive** postconviction motion.

⁷ Copy attached.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Paul Kalil, Esq., at KalilP@CCSR.state.fl.us, Ryan Butler, Assistant State Attorney, RButler@sao19.org, and Sharon L. Robson, Staff Attorney at RobsonS@circuit19.org this 19th day of December, 2017.

___/S/ Leslie T. Campbell_____
LESLIE T. CAMPBELL
Assistant Attorney General

Hurst v. State, Not Reported in So.3d (2017)

2017 WL 1023762

Only the Westlaw citation is currently available.

NOTICE: THIS OPINION HAS NOT BEEN
RELEASED FOR PUBLICATION IN THE
PERMANENT LAW REPORTS. UNTIL RELEASED,
IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Supreme Court of Florida.

Timothy Lee HURST, Petitioner(s)

v.

STATE of Florida, Respondent(s)

CASE NO.: SC17--302

|

MARCH 16, 2017

Lower Tribunal No(s): 171998CF001795XXXAXX

Opinion

*1 Petitioner Timothy Lee **Hurst** has filed an amended petition for writ of prohibition contending that Respondent, the State of Florida, is precluded from seeking the **death penalty** during the current resentencing proceedings on **double jeopardy** and due process grounds. Having determined that the arguments presented are without merit, the petition is hereby denied.

It is so ordered.

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

All Citations

Not Reported in So.3d, 2017 WL 1023762

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IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR SAINT LUCIE COUNTY, FLORIDA

STATE OF FLORIDA,

FELONY DIVISION

CASE NO. 561991CF000136A

vs.

BILLY LEON KEARSE,

Defendant.

NOTICE OF HEARING

THIS CASE came before the court in this capital postconviction case for a case management conference on the Defendant's successive Rule 3.851 motion.

A case management conference will be conducted at **11:00 a.m. on Monday, February 5, 2018**; in Courtroom "3B", at the Saint Lucie County Courthouse, 218 South Second Street, Fort Pierce, Florida. (30 minutes have been reserved.) The Defendant will not be present at the hearing. Esquire Court Reporting will be present. Counsel may appear in person or by telephone. If appearing by telephone, the conference bridge telephone number is 772 807-5272. The conference ID number is 000#.

DONE AND ORDERED in chambers in Okeechobee, Florida, on

January 5, 2018


DAN L. VAUGHN
CIRCUIT JUDGE

1/8/18
PC

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IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR SAINT LUCIE COUNTY, FLORIDA

STATE OF FLORIDA,

FELONY DIVISION

CASE NO. 561991CF000136A

vs.

BILLY LEON KEARSE,

Defendant.

**ORDER DENYING SUCCESSIVE MOTION TO VACATE DEATH SENTENCE
UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.851**

THIS CASE came before the court for a case management hearing on February 5, 2018, in this capital postconviction case on the Defendant's successive motion filed on November 29, 2017; and the State's response filed on December 19, 2017, pursuant to Florida Rule of Criminal Procedure 3.851. The court finds and orders as follows.

Upon remand on direct appeal, the Defendant was resentenced to death after a unanimous jury recommendation. The death sentence became final on March 26, 2000, with the denial of certiorari by the United States Supreme Court. *Kearse v. Florida* 121 S. Ct. 1411 (2000). The Defendant's postconviction history is outlined in the motion.

The Defendant now files this successive Rule 3.851 motion seeking relief pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). The court incorporates by reference the State's response and hearing argument, and adopts the State's reasoning in finding *Hurst* does not apply retroactively to the Defendant's case which became final before *Ring v. Arizona*, 536 U.S. 584 (2002) was decided on June 24, 2002. And even if *Hurst* did apply retroactively, the Defendant is not entitled to relief due to a unanimous jury recommendation for a death sentence. Therefore,

The Defendant's motion is denied.

DONE AND ORDERED in chambers in Fort Pierce, Florida, on Feb 5
2018.



DAN L. VAUGHN
CIRCUIT JUDGE

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**IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR ST. LUCIE COUNTY, FLORIDA**

**STATE OF FLORIDA,
Plaintiff,**

v.

CASE NO. 91-136 CF

**BILLY LEON KEARSE,
Defendant.**

_____ /

MOTION FOR REHEARING

THE DEFENDANT, BILLY LEON KEARSE, by and through undersigned counsel, respectfully moves for rehearing from the Court's February 6, 2018 Order Denying Successive Motion to Vacate Death Sentence Under Florida Rule of Criminal Procedure 3.851. In support thereof, Mr. Kearsé submits:

On November 29, 2017, Mr. Kearsé filed his successive rule 3.851 motion alleging, *inter alia*, that his sentence of death violates the Sixth and Eighth Amendments under *Hurst v. Florida*, 136 S. Ct. 616 (2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), and that Chapter 2017-1, Florida's newly-enacted sentencing statute, creates a substantive right that requires retroactive application to Mr. Kearsé under the Eighth and Fourteenth Amendments.

In its February 6, 2018 Order, this Court does not address the merits Mr. Kearsé's claims and denies the motion without explanation:

The Defendant now files this successive Rule 3.851 motion seeking relief pursuant to *Hurst v. Florida*, 136 S.

Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). The court incorporates by reference the State's response and hearing argument, and adopts the State's reasoning in finding Hurst does not apply retroactively to the Defendant's case which became final -before *Ring v. Arizona*, 536 U.S. 584 (2002) was decided on June 24, 2002. And even if Hurst did apply retroactively, the Defendant is not entitled to relief due to a unanimous jury recommendation for a death sentence.

The Court's order does not mention, let alone discuss, Mr. Kears's claim that the Eighth and Fourteenth Amendments require the retroactive application of Chapter 2017-1. Nor does the Court address Mr. Kears's claim that he is entitled to the retroactive application of *Hurst v. Florida* and *Hurst v. State* because his conviction and sentence were final after the Supreme Court decided *Apprendi v. New Jersey*. This Court's failure to specifically address the constitutional basis for Mr. Kears's motion for postconviction relief violates his rights to due process rights warrants rehearing.

CLAIM 1

MR. KEARSE'S DEATH SENTENCE VIOLATES THE SIXTH AMENDMENT UNDER HURST V. FLORIDA AND IT WOULD VIOLATE HIS FEDERAL CONSTITUTIONAL RIGHTS TO DEPRIVE HIM OF HURST'S RETROACTIVE BENEFIT.

In denying relief, this Court did not address Mr. Kears's argument that *Hurst v. Florida*, 136 S. Ct. 616 (2016), should be retroactive to death sentences final post-*Apprendi New Jersey*, 530 U.S. 466 (2000) under *Witt v. State*, 387 So. 2d 922

(Fla. 1980). While the Florida Supreme Court has conducted a *Witt* retroactivity analysis of *Hurst v. Florida* to cases final after the issuance of *Ring v. Arizona*, 536 U.S. 584 (2002), *see Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), at no time has any court, in any case, conducted a *Witt* analysis of the post-*Apprendi* death sentences to determine if those death sentenced individuals should receive the retroactive benefit of *Hurst v. Florida*.

The Florida Supreme Court's *Witt* analyses in *Mosley v. State* and *Asay v. State* were lengthy and detailed. But neither case addresses a death sentence, like Mr. Kears's, that became final after *Apprendi* issued. Neither *Mosley* nor *Asay* and apply the *Witt* balancing test to determine if *Hurst v. Florida* should be retroactively applied to a post-*Apprendi* death sentence.

The basis for the non-retroactivity ruling in *Asay* was the number of resentencings that would be required. However, the number of death sentences that became final in the two years between *Apprendi* and *Ring* was much smaller. The *Witt* analysis in *Asay* is simply inapplicable Mr. Kears's argument. The effect on the administration of justice resulting from applying *Hurst v. Florida* retroactive to post-*Apprendi* death sentences would be minimal and the outcome of the *Witt* balancing test would shift in favor of retroactive application. This particularly true since *Hurst v. Florida* itself relied upon the logic and legal principle enunciated in *Apprendi* as the basis for declared Florida's capital sentencing scheme

unconstitutional.

This Court should grant rehearing and issue an order addressing the merits of Mr. Kearses claim that he is entitled to relief.

CLAIM 3

THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION REQUIRE THE RETROACTIVE APPLICATION OF THE SUBSTANTIVE RULE ESTABLISHED BY CHAPTER 2017-1.

In denying relief, the Court does not address Mr. Kearses claim that he is entitled to the retroactive application of Chapter 2017-1. Mr. Kearses respectfully submits that this Court overlooked or misapprehended Mr. Kearses claim.

In *Hurst v. State*, 202 So. 3d 40, 53-54 (Fla. 2016) the Florida Supreme Court held:

We also conclude that, just as elements of a crime must be found unanimously by a Florida jury, all these findings necessary for the jury to essentially convict a defendant of capital murder — thus allowing imposition of the death penalty — are also elements that must be found unanimously by the jury. Thus, we hold that in addition to unanimously finding the existence of any aggravating factor, the jury must also unanimously find that the aggravating factors are sufficient for the imposition of death and unanimously find that the aggravating factors outweigh the mitigation before a sentence of death may be considered by the judge.

The court in *Hurst v. State* addressed and construed Floridas capital sentencing statute, § 921.141, Fla. Stat., and found that it identified “elements” of

“capital murder” that a jury must find to “essentially convict.” The court further recognized that these “elements” of the substantive crime of “capital murder” were longstanding and appeared in the statute. *See Id.* at 53 (“As the Supreme Court long ago recognized in *Parker v. Dugger*, 498 U.S. 308 (1991), under Florida law, ‘The death penalty may be imposed only where sufficient aggravating circumstances exist that outweigh mitigating circumstances.’ *Id.* at 313 (quoting § 921.141(3), Fla. Stat. (1985)).”).

On March 13, 2017, Chapter 2017-1, Laws of Florida, was enacted. It revised Fla. Stat. § 921.141 to confirm that a defendant convicted of first degree murder cannot receive a death sentence unless the State convinces a unanimous jury to return a “recommendation” of death. Before it can return a unanimous death “recommendation” and authorize a death sentence, the jury must first “identify[] each aggravating factor” that it has unanimously found proven beyond a reasonable doubt. *See* Fla. Stat. § 921.141(2)(b). Next, the jury must unanimously find beyond a reasonable doubt that the aggravators that found to exist are sufficient to justify a death sentence. Then, the jury must unanimously find beyond a reasonable doubt that the aggravators outweigh the mitigators. *See* Fla. Stat. § 921.141(2)(b)(2). Having made these unanimous findings, the jurors must then unanimously reject mercy in favor of a death sentence. Only if the jury returns a unanimous death verdict, can a judge under the revised § 921.141 impose a death sentence.

Under the revised Fla. Stat. § 921.141, the statutory maximum sentence that can be imposed on a first degree murder conviction is one of life imprisonment. For a death sentence to be permissible, the defendant must be convicted of the next higher degree of murder, *i.e.* capital first degree murder. The revised Fla. Stat. § 921.141 provides for proof of the elements necessary to raise a conviction of first degree murder up to capital first degree murder to be presented at a penalty phase proceeding. But, a unanimous jury's finding that the State has proven the necessary elements beyond a reasonable doubt is functionally a verdict finding the defendant guilty of capital first degree murder.

Identifying the facts or elements necessary to increase the authorized punishment is a matter of substantive law. *Alleyne v. United States*, 133 S. Ct. 2151, 2161 (2013) (“Defining facts that increase a mandatory statutory minimum to be part of the substantive offense enables the defendant to predict the legally applicable penalty from the face of the indictment.”). A court decision identifying the elements of a statutorily defined criminal offense constitutes substantive law that dates back to the enactment of the statute. *Bousley v. United States*, 523 U.S. 614, 625 (1998) (Stevens, J., concurring in part and dissenting in part) (“This case does not raise any question concerning the possible retroactive application of a new rule of law, *cf. Teague v. Lane*, 489 U.S. 288 (1989), because our decision in *Bailey v. United States*, 516 U.S. 137 (1995), did not change the law. It merely explained what § 924(c) had

meant ever since the statute was enacted. The fact that a number of Courts of Appeals had construed the statute differently is of no greater legal significance than the fact that 42 U.S.C. § 1981 had been consistently misconstrued prior to our decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).” . “A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.” *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 312-13 (1994) .

Fiore v. White, 531 U.S. 225, 226 (2001), addressed the import of the Due Process Clause in the context the substantive law defining a criminal offense:

We granted certiorari in part to decide when, or whether, the Federal Due Process Clause requires a State to apply a new interpretation of a state criminal statute retroactively to cases on collateral review.

But before resolving the issue, the U.S. Supreme Court asked the Pennsylvania Supreme Court to explain the basis for one of its decisions regarding the elements of the statutorily defined criminal offense for which Fiore had been convicted.¹ Was

¹ Fiore was convicted of operating a hazardous waste facility without a permit. While Fiore had a permit, the State had “argued that Fiore had deviated so dramatically from the permit's terms that he nonetheless had violated the statute.” 531 U.S. at 227.

On the State’s theory, Mr. Fiore was convicted. After Fiore’s unsuccessful appeals had concluded, the Pennsylvania Supreme Court in a different case held: “[t]he statute made it unlawful to operate a facility without a permit; one who deviated from his permit's terms was not a person without a permit; hence, a person who deviated from his permit's terms did not violate the statute.” *Id.* at 227. After

the decision construing the criminal statute a new interpretation or was it a straightforward reading of the statute? *Fiore v. White*, 531 U.S. at 226. The Pennsylvania Supreme Court explained that its earlier ruling “merely clarified the plain language of the statute.” *Id.* at 228. This meant that the ruling dated back to the statute’s enactment. It was the substantive law when the statute was enacted. The U.S. Supreme Court held the Due Process Clause was violated and collateral relief was warranted:

This Court's precedents make clear that Fiore's conviction and continued incarceration on this charge violate due process. We have held that the Due Process Clause of the Fourteenth Amendment forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt.

Id. at 228-29. Because the Petitioner, Mr. Fiore had not been found guilty of an essential element of the substantively defined criminal offense, his conviction was not constitutionally valid.²

Fiore unsuccessfully challenged his conviction in state court collateral proceedings based on the Due Process Clause, he sought federal habeas relief. “The Court of Appeals believed that the Pennsylvania Supreme Court, in Scarpone’s case, had announced a new rule of law and thus was inapplicable to Fiore’s already final conviction.” *Id.*, at 227.

² In *Schriro v. Summerlin*, 542 U.S. 348 (2004), the Supreme Court wrote: “A decision that modifies the elements of an offense is normally substantive rather than procedural. New elements alter the range of conduct the statute punishes, rendering some formerly unlawful conduct lawful or vice versa. *See Bousley*, 523 U.S., at 620-621, 118 S.Ct. 1604.” *Schriro*, 542 U.S. at 354. The Supreme Court explained: “This Court’s holding that, because Arizona has made a certain fact essential to the death

The U.S. Supreme Court has held “that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *In re Winship*, 397 U.S. 358, 364 (1970). *See Patterson v. New York*, 432 U.S. 197, 215 (1977) (“a State must prove every ingredient of an offense beyond a reasonable doubt, and [] it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense”); *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979) (since the jury may have read the instruction as relieving the State of proving an element beyond a reasonable doubt, defendant was denied “his right to the due process of law”).

Florida’s substantive law identifies the elements that separate first degree murder from capital first degree murder. To be convicted of capital first degree murder those elements must be found in addition to the elements of first degree murder. A conviction of capital murder without a unanimous jury’s finding that the State proved those additional elements beyond a reasonable, violates the Due Process Clause. *Winship*. Without a constitutional conviction of capital first degree murder, any death sentence imposed is illegal because it is in excess of the statutory

penalty, that fact must be found by a jury, is not the same as this Court's making a certain fact essential to the death penalty. The former was a procedural holding; the latter would be substantive.” *Id.* Mr. Griffin’s claim is premised Florida substantive law regarding the elements of capital first degree murder.

maximum for a conviction of first degree murder.

Mr. Kearses claim is that under the governing substantive law at the time of the homicide at issue, he was not convicted of capital first degree murder because the elements set forth in *Hurst v. State* and confirmed in Chapter 2017-1 were not found to have been proven beyond a reasonable doubt by a unanimous jury. This claim cannot be decided by a mere reference to the retroactivity of the *Hurst* decisions. Rehearing, with a decision addressing the merits of this claim, is warranted.

WHEREFORE, Mr. Kearses respectfully submits that this Court should grant rehearing and issue an order addressing the merits of his postconviction claims.

Respectfully submitted,

Paul Kalil

Paul Kalil

Assistant CCRC-South

Fla. Bar No. 174114

Capital Collateral Regional Counsel-South

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COUNSEL FOR MR. KEARSE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been provided to the following by United States Mail and/or electronic service this 21st day of February, 2018.

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Filing # 68326845 E-Filed 02/22/2018 01:39:16 PM

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR SAINT LUCIE COUNTY, FLORIDA

STATE OF FLORIDA,

FELONY DIVISION
CASE NO. 561991CF000136A

vs.

BILLY LEON KEARSE,

Defendant.

ORDER DENYING MOTION FOR REHEARING

THIS CASE came before the court in chambers on the Defendant's motion filed on February 21, 2018, pursuant to Florida Rule of Criminal Procedure 3.851. The court finds and orders as follows.

The Defendant seeks rehearing of the order denying his successive Rule 3.851 motion. The court finds that rehearing is not warranted. Therefore,

The Defendant's motion is denied.

DONE AND ORDERED in chambers in Fort Pierce, Florida, on Feb 22,
2018.



DAN L. VAUGHN
CIRCUIT JUDGE

alaalis
AC

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Filing # 69675920 E-Filed 03/22/2018 02:49:43 PM

**IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR ST. LUCIE COUNTY, FLORIDA**

**STATE OF FLORIDA,
Plaintiff,**

FELONY DIVISION

v.

CASE NO. 561991CF000136A

**BILLY LEON KEARSE,
Defendant.**

_____ /

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that the DEFENDANT, BILLY LEON KEARSE, takes and enters his appeal to the Florida Supreme Court for review of the Order Denying Successive Motion to Vacate Death Sentence Under Florida Rule of Criminal Procedure 3.851 entered by the Circuit Court of the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida, on February 6, 2018 and all other rulings, actions, or acts rendered adversely to the Defendant.

The nature of the order being appealed is a final judgment denying Appellant/Defendant's successive motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.851.

Respectfully submitted,

/s/Paul Kalil
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Assistant CCRC-South
Fla. Bar No. 174114

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COUNSEL FOR MR. KEARSE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been provided to the following
by United States Mail and/or electronic service this 22nd day of March, 2018.

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Filing # 69675920 E-Filed 03/22/2018 02:49:43 PM

**IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR ST. LUCIE COUNTY, FLORIDA**

**STATE OF FLORIDA,
Plaintiff,**

FELONY DIVISION

v.

CASE NO. 561991CF000136A

**BILLY LEON KEARSE,
Defendant.**

_____ /

DESIGNATION TO COURT REPORTER

The Defendant, BILLY LEON KEARSE, files the following designation to the court reporter directing preparation of all transcripts including the hearing held on February 5, 2018.

I, counsel for Defendant, certify that CCRC-South is responsible for payment to the official court reporter for preparation of the transcripts, pursuant to *Porter v. State*, 700 So. 2d 647 (Fla. 1997), and that immediate payment will be made upon receipt of an invoice from the court reporter.

Respectfully submitted,

/s/Paul Kalil
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COUNSEL FOR MR. KEARSE

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by United States Mail and/or electronic service this 22nd day of March, 2018.

/s/Paul Kalil

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Filing # 69675920 E-Filed 03/22/2018 02:49:43 PM

**IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR ST. LUCIE COUNTY, FLORIDA**

**STATE OF FLORIDA,
Plaintiff,**

FELONY DIVISION

v.

CASE NO. 561991CF000136A

**BILLY LEON KEARSE,
Defendant.**

_____/

DIRECTIONS TO CLERK

The Defendant, BILLY LEON KEARSE, directs the Clerk to include all items filed in this postconviction proceeding in the record on appeal, including all pleadings, original documents, exhibits and transcripts of proceedings.

Respectfully submitted,

/s/Paul Kalil

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Fla. Bar No. 174114

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COUNSEL FOR MR. KEARSE

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Paul Kalil
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Florida Bar No. 174114

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Sharon Robson, Senior Staff Attorney
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Supreme Court of Florida

TUESDAY, MAY 9, 2017

CASE NO.: SC17-346

Lower Tribunal No(s).:
561991CF000136AXXXXX

BILLY LEON KEARSE

vs.

STATE OF FLORIDA

Appellant(s)

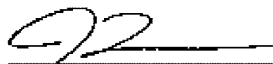
Appellee(s)

The State's Motion to Dismiss Appeal for Lack of Jurisdiction is granted.
The Notice of Appeal is hereby dismissed.

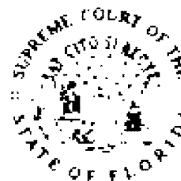
NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND,
IF FILED, DETERMINED.

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

A True Copy
Test:



John A. Tomasino
Clerk, Supreme Court



tw
Served:

PAUL EDWARD KALIL
LESLIE T. CAMPBELL
RYAN LEWIS BUTLER
HON. JOSEPH E. SMITH, CLERK
HON. DAN LEWIS VAUGHN, JUDGE
HON. ELIZABETH ANN METZGER, CHIEF JUDGE

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**IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR ST. LUCIE COUNTY, FLORIDA**

**STATE OF FLORIDA,
Plaintiff,**

FELONY DIVISION

v.

CASE NO. 561991CF000136A

**BILLY LEON KEARSE,
Defendant.**

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that the DEFENDANT, BILLY LEON KEARSE, takes and enters his appeal to the Florida Supreme Court for review of the Order Denying Successive Motion to Vacate Death Sentence Under Florida Rule of Criminal Procedure 3.851 entered by the Circuit Court of the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida, on February 6, 2018 and all other rulings, actions, or acts rendered adversely to the Defendant.

The nature of the order being appealed is a final judgment denying Appellant/Defendant's successive motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.851.

Respectfully submitted,

/s/Paul Kalil

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COUNSEL FOR MR. KEARSE



CERTIFICATE OF SERVICE

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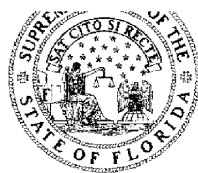
STATE OF FLORIDA
ST. LUCIE COUNTY
THIS IS TO CERTIFY THAT THIS IS A
TRUE AND CORRECT COPY OF THE
ORIGINAL.

JOSEPH E. SMITH, CLERK
By: Kathryn Maldonado
Deputy Clerk



Appeals 3-23-18
Date: AIN#461 2 of 2 pages.

Filing # 69774367 E-Filed 03/26/2018 10:24:25 AM



Supreme Court of Florida

Office of the Clerk
500 South Duval Street
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MARK CLAYTON
CHIEF DEPUTY CLERK
JULIA BREEDING
STAFF ATTORNEY

PHONE NUMBER: (850) 488-0125
www.floridasupremecourt.org

ACKNOWLEDGMENT OF NEW CASE

March 26, 2018

RE: BILLY LEON KEARSE vs. STATE OF FLORIDA

CASE NUMBER: SC18-458

Lower Tribunal Case Number(s): 561991CF000136AXXXXX

Lower Tribunal Filing Date: 3/22/2018

The Florida Supreme Court has received the following documents reflecting a filing date of 3/23/2018.

Notice of Appeal

The Florida Supreme Court's case number must be utilized on all pleadings and correspondence filed in this cause.

cd

cc:

PAUL EDWARD KALIL

JASON JAY KRUSZKA

LESLIE T. CAMPBELL

HON. JOSEPH E. SMITH, CLERK

RYAN LEWIS BUTLER

Filing # 69774367 E-Filed 03/26/2018 10:24:25 AM

Supreme Court of Florida

MONDAY, MARCH 26, 2018

CASE NO.: SC18-458

Lower Tribunal No(s):
561991CF000136AXXXXX

BILLY LEON KEARSE

vs. STATE OF FLORIDA

Appellant(s)

Appellee(s)

We have received a notice of appeal (3.851-Successor) in the above-captioned case, which is an appeal from a first-degree murder conviction with a sentence of death.

The transcripts should be filed with the trial court clerk **within fifty days from the filing of the notice of appeal in this Court.** As the time for filing the transcript has already been extended, the Court does not anticipate that any further extensions of time will be necessary.

The trial court clerk shall have twenty days after the filing of the transcript(s) in which to transmit the record on appeal to this Court. The complete record in a death penalty appeal shall include all items required by rule 9.200 and by any order issued by the supreme court. In any appeal following the initial direct appeal, the record transmitted shall begin with the most recent mandate issued by the supreme court, or the most recent filing not already transmitted in a prior record in the event the preceding appeal was disposed of without a mandate, and shall exclude any materials already transmitted to the supreme court as the record in any prior appeal. The supreme court shall take judicial notice of the appellate records in all prior appeals and writ proceedings involving a challenge to the same judgment of conviction and sentence of death. Appellate records subject to judicial notice under this subdivision shall not be duplicated in the record transmitted for the appeal under review.

The record on appeal shall be timely transmitted to this Court unless there are substantial reasons requiring delay. The trial court is reminded that only this Court can extend the deadline for transmitting the record on appeal.

CASE NO.: SC18-458

Page Two

Pursuant to Florida Rule of Appellate Procedure 9.200(e), the burden to ensure that the record on appeal is prepared and transmitted in accordance with the Florida Rules of Appellate Procedure shall be on the appellant. **The failure to timely transmit a record on appeal substantially affects this Court's ability to timely process its death cases and will not be tolerated.**

A True Copy

Test:



John A. Tomasino
Clerk, Supreme Court



cd

Served:

PAUL EDWARD KALIL
JASON JAY KRUSZKA
LESLIE T. CAMPBELL
ESQUIRE REPORTING, INC.
HON. JOSEPH E. SMITH, CLERK
HON. DAN LEWIS VAUGHN, JUDGE
RYAN LEWIS BUTLER

Filing # 70514833 E-Filed 04/10/2018 04:12:07 PM

1

IN THE CIRCUIT COURT OF THE
NINETEENTH JUDICIAL CIRCUIT
IN AND FOR ST. LUCIE COUNTY,
FLORIDA

CASE NO. 56-1991-CF-000136A

STATE OF FLORIDA,
Plaintiff,

vs.

BILLY LEON KEARSE,
Defendant.

ORIGINAL

TRANSCRIPT OF PROCEEDINGS

This cause came on for hearing before the
Honorable Dan Vaughn, Judge of the Circuit Court,
at the St. Lucie County Courthouse, 218 South Second
Stuart, Fort Pierce, Florida, beginning at 10:53 A.M.
on the 5th day of February, 2018.

The appearances at said time and place were as
follows:

FOR THE PLAINTIFF:

OFFICE OF THE STATE ATTORNEY
BY: RYAN L. BUTLER, ESQ.
2000 16th Avenue
Suite 329
Vero Beach, Florida 32960

OFFICE OF THE ATTORNEY GENERAL
BY: LESLIE CAMPBELL, ESQ.
515 North Flagler Avenue
Suite 900
West Palm Beach, Florida 33401

ESQUIRE REPORTING - STUART AND FORT PIERCE, FLORIDA

APPEARANCES CONTINUED:

FOR THE DEFENDANT:

CCRC - SOUTH
BY: PAUL KALIL, ESQ.
JASON KRUSZKA, ESQ.
1 East Broward Boulevard
Fort Lauderdale, Florida 33301

1 (Whereupon, the following is a transcript of the
2 proceedings had on February 5, 2018:)

3 THE COURT: This is State versus Billy Leon
4 Kearse, Case No. 91-CF-136. Mr. Butler and Miss
5 Campbell are here on behalf of the State; Mr. Butler
6 from the State Attorney's Office and Miss Campbell
7 from the Attorney General's Office. And one of you
8 all are Mr. Kalil?

9 MR. KALIL: Good morning, Your Honor, Paul
10 Kalil, CCRC South.

11 THE COURT: And your name, sir?

12 MR. KRUSZKA: Good morning, Your Honor, Jason
13 Kruszka, also from CCRC South.

14 THE COURT: Can you spell that for me, please?

15 MR. KRUSZKA: Sure. It's K-R-U-S-Z-K-A.

16 THE COURT: Okay. I'll do my best to pronounce
17 you all's names properly, but if I don't, forgive me.
18 Those two I can handle, it's yours where I'll have
19 trouble.

20 And of course, our court reporter is here also
21 from Esquire Court Reporting.

22 All right. This was set for case management
23 hearing on a successive 3.851 motion filed on behalf
24 of the defense.

25 Do you all wish to make any comment or

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2 MR. KALIL: Just very briefly, Judge. I'm going
3 to rely on the motion for the most part, I think it's
4 laid out pretty well.

5 In all candor, there are cases since Hitchcock
6 versus State that discuss some of the retroactivity
7 arguments we've made. And I'm, you know, pursuing
8 these arguments in good faith, but in candor to the
9 Court, in some of the instances the case law is
10 against me at this stage.

11 But without waiving these claims, you know,
12 I pled them to preserve them.

13 One important thing that I would like the Court
14 to consider is that unlike Hitchcock and the other
15 cases that I'm aware of where Hurst has been found to
16 be not retroactive, Mr. Kearse's case, while it
17 predates Ring versus Arizona, it postdates Apprendi
18 versus New Jersey. And in Hurst v. Florida, the
19 Supreme Court explained that it was Apprendi and not
20 Ring that determined that Florida's death penalty
21 statute was unconstitutional. The language that they
22 used was to the effect that it was -- it was Apprendi
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24 So I would like to bring that to the Court's
25 attention, because this is not a case like the others

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1 involving retroactivity post -- or pre-Ring cases.
2 I think it's significant to the analysis that the
3 Court must look at the fact that this case postdates
4 Apprendi versus New Jersey.

5 I don't have any additional arguments, unless
6 the Court has any questions. I would like to have an
7 opportunity to rebut the State's argument if I may.

8 THE COURT: Of course.

9 MR. KALIL: Thank you.

10 THE COURT: Mr. Butler or Miss Campbell?

11 MS. CAMPBELL: Good morning, Your Honor.

12 Just with regard to the Apprendi argument,
13 Apprendi overruled non-capital cases and specifically
14 upheld Walton, which was a capital case. And it was
15 not until Ring that the U.S. Supreme Court said
16 "Okay, Apprendi applies" and extended Apprendi to
17 capital cases. However, in two instances, or
18 multiple instances, but both Apprendi and Ring have
19 been held by the U.S. Supreme Court not to be
20 retroactive. So the mere fact that Apprendi is
21 discussed in Hurst does not breathe new life into a
22 retroactive -- retroactivity argument.

23 Further, Hurst itself has been held not to be
24 retroactive, both Hurst v. Florida and Hurst v.
25 State. And those were held to be not retroactive

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1 under State law, which is an even more expansive
2 analysis for retroactivity than the Federal law.
3 And again, Federal law has held both Ring and
4 Apprendi not to be retroactive.

5 Further, Mr. Kearse's jury -- Mr. Kearse's jury
6 has been -- was unanimous as far as the death
7 recommendation. And so even if Hurst were to be held
8 retroactive or considered retroactive, it would be
9 harmless beyond a reasonable doubt. That is
10 something that the Florida Supreme Court has
11 consistently found to be harmless, even where Hurst
12 has been applied to cases.

13 For instance, in Philmore, which was decided
14 recently by the Florida Supreme Court, that's a case
15 out of this circuit, the Florida Supreme Court relied
16 on the fact that -- partly on the fact that Mr.
17 Philmore's jury was unanimous. So Kearse does not
18 get relief under both the fact that it's not
19 retroactive, Hurst is not retroactive, and the fact
20 that his jury was instructed and came back with a
21 unanimous recommendation of death in the killing of
22 this police officer.

23 THE COURT: Thank you.

24 Mr. Kalil?

25 MR. KALIL: Kalil. Thanks, Judge.

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1 Just so we're clear, I mean Hurst was not --
2 Hurst was held to be retroactive in some cases and
3 one of the reasons that it was held to be retroactive
4 in Mosley v. State was on the basis of fundamental
5 fairness. And the Florida Supreme Court said under
6 the fundamental fairness doctrine alone, Hurst could
7 be held to be retroactive.

8 Now, they've -- in Asay and several other cases
9 since, the Florida Supreme Court has said that Hurst
10 is not retroactive to pre-Ring cases. Again, I think
11 there's an important distinction to be made.
12 Regardless of the fact that Apprendi was not a death
13 penalty case, when Hurst v. Florida was decided by
14 the U.S. Supreme Court -- of course, Hurst is a death
15 penalty case -- they specifically stated that it
16 was -- that the underpinnings of the Florida
17 sentencing statute were eroded by Apprendi. And it's
18 Apprendi that gave rise to the whole principle behind
19 Florida's death penalty statute being held to be
20 unconstitutional, not Ring.

21 So it's cited in the motion, and I would just
22 again bring the Court's attention to that.

23 And with regard to harmless error, yes, in his
24 second sentencing Mr. Kearsse had a 12-to-zero jury
25 recommendation. I think if any case would be one to

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2 Kearsse's where the aggravating factors were disputed,
3 and even the Florida Supreme Court in looking at the
4 facts of the case on two occasions was split on
5 whether or not the aggravating factors such as
6 robbery of a firearm should even apply.

7 And the other thing that I would want to stress
8 again is that on Mr. Kearsse's first trial, as we've
9 laid out in the claim, that it violates double
10 jeopardy. It was not unanimous.

11 I have nothing further unless the Court has
12 additional questions.

13 THE COURT: Okay. Thank you. Mr. Kruszka,
14 do you wish to make any comment? I'm not ignoring
15 you, I'm just --

16 MR. KRUSZKA: No, Your Honor.

17 THE COURT: Mr. Butler, you want to chime in?

18 MR. BUTLER: No, thank you, Judge.

19 THE COURT: Okay. Thank y'all. I'll consider
20 the motion and y'all's comments. I'll enter an order
21 on it probably within just a few weeks.

22 Thank y'all very much. Have a good day. We can
23 go off the record.

24 (PROCEEDINGS CONCLUDED AT 11:05 A.M.)

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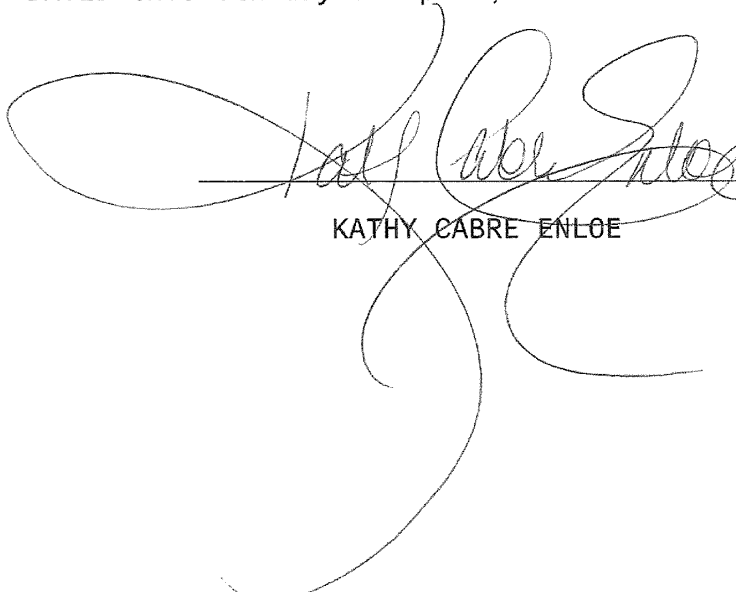
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STATE OF FLORIDA)
COUNTY OF MARTIN)

CERTIFICATE

I, KATHY CABRE ENLOE, a Registered Professional
Reporter, do certify that in STATE OF FLORIDA VS. BILLY
LEON KEARSE, CASE NO. 91-CF-136, a hearing was held
before the Honorable Dan Vaughn, Circuit Court Judge,
beginning at the hour of 10:53 A.M. on the 5th day of
February, 2018; that I was authorized to and did
stenographically report the proceedings in that hearing,
and that the foregoing pages, numbered 3 through 8,
comprise a true and correct transcript of those
proceedings.

DATED this 6th day of April, 2018.


KATHY CABRE ENLOE

ESQUIRE REPORTING - STUART AND FORT PIERCE, FLORIDA

IN THE CIRCUIT COURT OF THE
NINETEENTH JUDICIAL CIRCUIT
IN AND FOR ST. LUCIE COUNTY,
FLORIDA

CASE NO. 56-1991-CF-000136A

STATE OF FLORIDA,
Plaintiff,

vs.

BILLY LEON KEARSE,
Defendant.

ORIGINAL

TRANSCRIPT OF PROCEEDINGS

This cause came on for hearing before the
Honorable Dan Vaughn, Judge of the Circuit Court,
at the St. Lucie County Courthouse, 218 South Second
Stuart, Fort Pierce, Florida, beginning at 10:53 A.M.
on the 5th day of February, 2018.

The appearances at said time and place were as
follows:

FOR THE PLAINTIFF:

OFFICE OF THE STATE ATTORNEY
BY: RYAN L. BUTLER, ESQ.
2000 16th Avenue
Suite 329
Vero Beach, Florida 32960

OFFICE OF THE ATTORNEY GENERAL
BY: LESLIE CAMPBELL, ESQ.
515 North Flagler Avenue
Suite 900
West Palm Beach, Florida 33401

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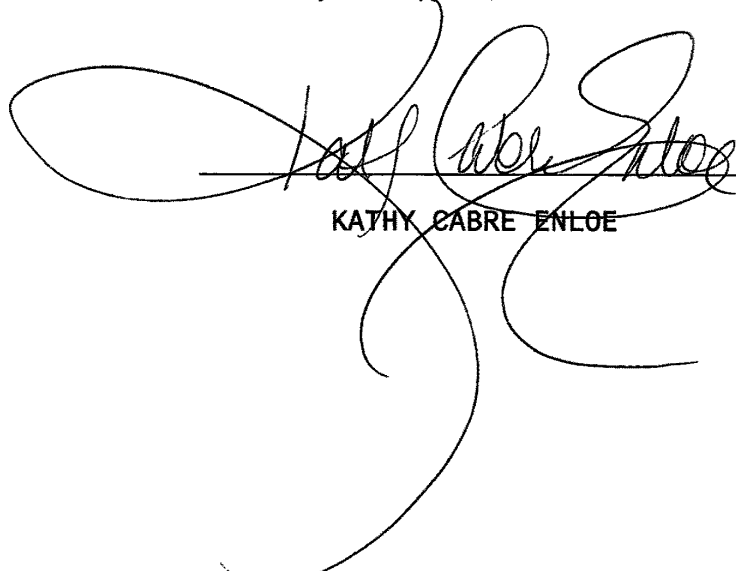
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DATED this 6th day of April, 2018.



KATHY CABRE ENLOE

ESQUIRE REPORTING - STUART AND FORT PIERCE, FLORIDA

CERTIFICATE OF CLERK

JOSEPH E. SMITH
CLERK OF THE CIRCUIT COURT
ST. LUCIE COUNTY, FLORIDA

I, Joseph E. Smith, Clerk of the Circuit Court for the County of St. Lucie, State of Florida, do hereby certify that the record contains a correct transcript of the file in the case of, BILLY LEON KEARSE V STATE OF FLORIDA.

I hereby certify that a true and correct copy of the record has been mailed to: Supreme Court e-serviced, Paul Kalil at kalilp@ccsr.state.fl.us and Leslie T. Campbell at capapp@myfloridalegal.com and Leslie.Campbell@myfloridalegal.com, IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of said Court this 25TH day of April, 2018.

JOSEPH E. SMITH
CLERK OF THE CIRCUIT COURT
ST. LUCIE COUNTY, FLORIDA

Lower Court / Tribunal/State Agency Clerk
Address P.O. Box 700, Ft, Pierce, FL 34954
Telephone Number (772) 462-6940
Email Address: appeals@stlucieclerk.com

Kathryn Maldonado

KATHRYN MALDONADO
DEPUTY CLERK

