Filing # 9189664 Electronically Filed 01/15/2014 01:55:26 PM

RECEIVED, 1/15/2014 13:58:47, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

KENNETH HARTLEY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC13-1470

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

PAMELA JO BONDI
ATTORNEY GENERAL

PATRICK M. DELANEY
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 85824

Office of the Attorney General
PL-01, The Capitol
Tallahassee, Fl 32399-1050
Primary E-Mail: capapp@myfloridalegal.com
Secondary E-Mail: Patrick.Delaney@myfloridalegal.com
(850) 414-3300 Ext. 4583
(850) 487-0997 (FAX)
COUNSEL FOR APPELLEE

TABLE OF CONTENTS

PAGE#

TABLE OF CITATIONS

Cases

Rules

Treatises

PRELIMINARY STATEMENT

Appellant, KENNETH HARTLEY, appeals an order from the trial court which denied his claim under a Second Successive Motion for post-conviction relief. Hartley was convicted of: (Count I) murder in the first degree of Gino Mayhew with premeditation and felony murder present; (Count II) armed robbery of Gino Mayhew; and (Count III) armed kidnapping of Gino Mayhew

References to the appellant will be to "Hartley" or "Appellant." References to the co-defendant will be to "Ferrell." References to the victim in this case will be to "Mayhew" or "Gino Mayhew." Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State.

Hartley's case has been distributed amongst a direct appeal, three post-conviction proceedings and even incorporates his co-defendant's record on appeal. Therefore, the record on appeal for Hartley's direct appeal will be referred to as "Direct Appeal" followed by the appropriate volume and page number "(Direct Appeal – Vol._/p. ##)." The record for the instant post-conviction proceeding will be referred to as "PCR3" followed by the appropriate volume and page number "(PCR3 – Vol.__/p. ##). The supplemental record for the instant post-conviction proceeding, which includes the record from Ferrell's direct appeal and resentencing proceedings, will be referred to as "SPC3" followed by the appropriate volume and page number "(SPC3 – Vol.__/p. ##)." Finally, references

to Hartley's brief will be "IB" followed by the page number "(IB/p. ##)."

STATEMENT OF THE CASE AND FACTS

This is a second successive post-conviction appeal in a capital case. The facts and procedural history of this case are reflected in the Florida Supreme Court's direct appeal opinion, *Hartley v. State*, 686 So. 2d, 1316 (Fla. 1996), and the Florida Supreme Court's post-conviction appeal opinion, *Hartley v. State*, 990 So. 2d 1008 (Fla. 2008), are as follows:

> Hartley, Ronnie Ferrell, and Sylvester Johnson were all convicted of the first-degree murder, robbery and kidnapping of seventeen year-old Gino Mayhew (the victim). They were each tried separately. Ferrell was convicted as charged and sentenced to death for the first degree murder conviction. Johnson was convicted and sentenced to life imprisonment. The following evidence was presented at Hartley's trial.
>
> Sidney Jones worked for the victim in the victim's crack cocaine business. He testified to the following information. On April 22, 1991, the victim was selling crack from his Chevrolet Blazer at an apartment complex. On that date, Jones saw the three codefendants together near the Blazer. He saw Hartley holding a gun to the victim's head and saw him force the victim into the driver's seat. Hartley climbed into the back seat behind the victim. Ferrell climbed into the front, passenger seat. Johnson was outside the Blazer talking to Hartley. After Hartley, Ferrell, and the victim entered the Blazer, Jones saw it leave the apartment complex at a high speed and heard Ferrell shout out of the Blazer that the victim would "be back." Johnson followed soon afterward in a truck.
>
> Another witness confirmed that the victim, Ferrell, and another individual, whom the witness was unable to positively identify, left the apartment complex together in the victim's Blazer at a high rate of speed.
>
> On April 23, police found the victim's Blazer parked in a field behind an elementary school. The victim's body was slumped over in the driver's side seat of the Blazer. The victim had died as a result of

bullet wounds to the head (he had been shot five times: one shot into his forehead, three shots into the back of his head, and one shot into his shoulder).

Several weeks after the victim was found, Jones told police what he had seen on April 22, and Ferrell, Hartley, and Johnson were arrested for the victim's murder. Hartley told police that he did not know the victim but told several other witnesses that he had robbed the victim two days before the murder. Specifically, he told one witness that "the only reasons they [are] saying that [I killed the victim] is because I robbed him two days before he was killed." Hartley later told the witness (who at the time of the second statement was Hartley's cellmate) that the plan was Sylvester Johnson's; that they originally planned to rob some "dreads" but then decided to "get [the victim]," i.e., rob and murder the victim; that they forced the victim to drive to the elementary school; that Johnson drove the getaway vehicle; that "I left my trademark, left no witnesses"; and that his trademark was to shoot the person in the head leaving no witnesses." He also told the witness that Ferrell and Johnson acted so nervous that he considered shooting them and that he would "get off" because everyone was too scared to testify. A number of the details provided by the witness were never released to the public.

Additionally, Hartley told another cellmate that he was not involved in the murder but that he had robbed the victim a few days before the murder. He later admitted to the cellmate that he had robbed and murdered the victim and provided numerous details of the crime very similar to those provided by the previous witness.

Another witness testified that he heard Hartley state: "I think I really fucked up this time by doing this with that motherfucker Ferrell. I think he's going to turn on me and testify against me when he's just as guilty in doing this as I am."

Each of these last three witnesses had been convicted of various felony charges and were awaiting sentencing at the time they testified. They were to receive negotiated pleas in exchange for their testimony, but their sentences were potentially lengthy ones (up to twenty-five years, thirty years, and fifteen years, respectively).

> The defense presented no evidence in the guilt phase and Hartley was convicted of armed robbery, armed kidnapping, and first-degree murder.
>
> At the penalty phase, the State introduced evidence of Hartley's three prior violent felony convictions: a 1986 manslaughter conviction for killing a fifteen year-old girl with a shotgun; a 1991 conviction for the armed robbery of a taxi driver; and a second 1991 conviction for the armed robbery of another taxi driver.
>
> Hartley presented two witnesses in his defense. An attorney testified regarding fifteen-year and twenty-five year mandatory minimum sentences. A pastor testified that he had known Hartley since 1980, that he had a quiet and peaceful spirit, that he attended church off and on, that he came from a good family, and that he was intelligent.
>
> The jury recommended the death penalty by a nine-to-three vote, and the trial judge sentenced Hartley to death. The trial judge found six aggravating circumstances (prior violent felony conviction; committed to prevent a lawful arrest; committed for pecuniary gain; heinous, atrocious, or cruel (HAC); and cold, calculated, and premeditated (CCP)). He found minimal mitigation. The trial judge sentenced Hartley to consecutive sentences for the other two convictions: fifteen years as a habitual felony offender for the armed robbery conviction and life imprisonment for the armed kidnapping conviction.

Hartley v. State, 686 So. 2d 1316, 1318 – 1319 (Fla. 1996) (internal footnotes omitted).

> On appeal, Hartley raised eleven issues. Although we [the Florida Supreme Court] found that the trial court erred in finding that the HAC aggravator applied, we the [Florida Supreme Court] nevertheless affirmed both the conviction and the sentence, finding any error harmless.

Hartely v. State, 990 So. 2d 1008, 1010 – 1011 (Fla. 2008). Hartley then filed a 3.850 post-conviction motion, which was amended multiple times. *Hartley*, 990 S. 2d at 1011. Eventually, the circuit court denied all of Hartley's claims. *Id.* at

1011, n.3. On appeal, the Florida Supreme Court affirmed the circuit court's order denying all of Hartley's claims for post-conviction relief. *Id.* at 1016.

On November 22, 2010, Hartley filed a successive Rule 3.851 post-conviction motion based on the United States Supreme Court ruling in *Porter v. McCollum*, 559 U.S. 30 (2009). The circuit court denied Hartley's motion.

Hartley then appealed the trial court's denial of his *Porter* claim to this Court. On May 31, 2012, this Court affirmed the trial court's denial of relief. *Hartley v. State*, 91 So. 3d 848 (Fla. 2012).

Hartley's co-defendant, Ronnie Ferrell, was also tried and convicted of armed robbery, armed kidnapping, and first-degree murder – receiving a sentence of death for the charge of first-degree murder. *Ferrell v. State*, 686 So. 2d 1234, 1326 – 1327 (Fla. 1996). The Florida Supreme Court upheld all of Ferrell's convictions and sentences on direct appeal, but ordered Ferrell's convictions for armed robbery and armed kidnapping to run concurrently rather than consecutively. *Ferrell*, 686 So. 2d at 1331. Ferrell then filed a 3.850 post-conviction motion, which was granted in part as to the penalty phase. The Florida Supreme Court affirmed this ruling because Ferrell's trial counsel failed to present meaningful mitigation evidence during the penalty phase. *Ferrell v. State*, 29 So. 3d 959 (Fla. 2010). Ferrell's case was then remanded for re-sentencing. *Id.*

On December 9, 2010, Ferrell was sentenced to life in prison for the charge of

first-degree murder. (PCR3 – Vol. 10/p. 1841; Appendix 1). The State had agreed to waive the death penalty, on the condition that Ferrell swore under-oath he was not the shooter of Gino Mayhew. (PCR3 – Vol. 10/p. 1837, 1839; Appendix 1). During this hearing, Ferrell wanted to make it clear to the court that he was not pleading guilty to the charges. (PCR3 – Vol. 10/p. 1839). The court accepted this, but pointed out that Ferrell had already been found guilty of first-degree murder by a jury, and his agreement was to the sentence the court was imposing. (PCR3 – Vol. 10/p. 1839 – 1840).

Hartley then filed a Second Successive Motion for post-conviction relief under Fla. R. Crim. P. 3.851 on November 17, 2011. The basis for this motion was a claim of newly discovered evidence based on Ferrell's life-sentence. On June 21, 2013, following responsive briefs from the State, and an evidentiary hearing in which Ferrell's record on appeal was incorporated into Hartley's record, the circuit court denied Hartley's Second Successive Motion for post-conviction relief. (PCR3 – Vol. 10/p. 1932). This appeal followed.

SUMMARY OF ARGUMENT

I – When a non fact-finder takes the death penalty off of the table for a co-defendant, through either a plea, prosecutorial discretion, or as a matter of law, the remaining co-defendant is not precluded from receiving the death penalty. This Court has rejected claims of disparate sentencing when the co-defendant's reduced sentence was the result of prosecutorial discretion. Ferrell received a life sentence when the prosecution agreed to a life sentence, so long as Ferrell swore under oath that he was not the shooter. As such, a review based on relative culpability between Ferrell's case and Hartely's case is now inappropriate because the cases are incomparable.

II – Hartley cannot meet the two prong test under *Stein v. State*, 995 So. 2d 329 (Fla. 2008), for relief regarding newly discovered evidence, because Hartley cannot show that he more than likely would have received a life sentence. While the emergence of Ferrell's life sentence does meet the first prong to qualify as newly discovered evidence, Hartley is not likely to receive a life sentence due to the fact that he was the triggerman, was a dominating force in the murder, and had a case which was extremely more aggravated than Ferrell's. Moreover, should this Court determine Hartley is entitled to relief the proper remedy is not an immediate life sentence, but a new penalty phase where a fact-finder may properly weigh the aggravators and mitigators.

ARGUMENT

I. REVIEWING HARTLEY'S SENTENCE FOR RELATIVE CULPABILITY BECAUSE OF FERRELL'S LIFE SENTENCE IS INAPPROPRIATE BECAUSE FERRELL'S SENTENCE WAS THE PRODUCT OF PROSECUTORIAL DISCRETION.

Hartley asserts that since his co-defendant – Ronnie Ferrell – has now received a life sentence, his sentence of death is disparate and unconstitutional and he is therefore entitled to a life sentence. (IB/p. 31). However, Ferrell's life sentence was the result of prosecutorial discretion. (PCR3 – Vol. 10/p. 1837, 1839 – 1840; Appendix 1). As such, an evaluation of relative culpability is not warranted because Ferrell did not receive a life sentence while being eligible for a death sentence.

Prosecutorial Discretion of Ferrell's Life Sentence

This Court has rejected claims of disparate sentencing when the co-defendant's sentence was the result of a plea or prosecutorial discretion. *Wade v. State*, 41 So. 3d 857, 874 – 75 (Fla. 2010); *England v. State*, 940 So. 2d 389, 406 (Fla. 2006). Moreover, in *Henyard v. State*, 689 So. 2d 239 (Fla. 1996) this Court held that since death was never a valid punishment option for the 14 year old co-defendant, Heynard's case and his co-defendant's case were "per se incomparable." *Henyard*, 689 So. 2d at 254 – 255. As such, when co-defendant's are charged with the same crime, but the death penalty is not a valid punishment option for one because a non-fact finder has taken the death penalty off of the table, this Court should not

review the cases for relative culpability because the cases are per se incomparable. *See Henyard v. State*, 689 So. 2d 239 (Fla. 1996); *see also, Roper v. Simmons*, 543 U.S. 551, 578 (2005) (holding "[t]he Eight and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed"); *Atkins v. Virginia,* 536 U.S. 304 (2002) (holding the execution of a mentally retarded person to be unconstitutional).

In the instant case, Ferrell received a life sentence not because of a jury recommendation or the trial judge's determination based on a weighing of aggravating and mitigating circumstances; but, because prosecutorial discretion took the death penalty off the table as a valid punishment so long as Ferrell affirmed he was not the shooter. (PCR3 – Vol. 10/p. 1837, 1839 – 1840; Appendix 1). Hartley is technically correct in his assertion that Ferrell's sentence was not the product of a plea negotiation; however, the Acknowledgment of Ronnie Ferrell, which was executed at Ferrell's sentencing, clearly shows a quid pro quo agreement between Ferrell and the prosecution. (Appendix 1).

Time and again, this court has declined to review cases for relative culpability and disparate sentencing when the co-defendant's lesser sentence was the result of a plea **or prosecutorial discretion**. *Wade v. State*, 41 So. 3d 857, 874 – 75 (Fla. 2010); *England v. State*, 940 So. 2d 389, 406 (Fla. 2006) (finding "[t]he law on such claims is clear. '[I]n instances where the codefendant's lesser sentence was

the result of a plea agreement or prosecutorial discretion, this Court has rejected claims of disparate sentencing"); *Kight v. State*, 784 So. 2d 396, 401 (2001) (declining to review the defendant's case and his co-defendant's case for relative culpability because co-defendant plead guilty to a lesser offense); *San Martin v. State*, 705 So. 2d 1337, 1350 – 1351 (Fla. 1997) (upholding the trial court's rejection of the co-defendant's life sentence as a mitigating circumstance where the codefendant's plea, sentence, and agreement to testify for the State were the products of prosecutorial discretion and negotiation); *Melendez v. State*, 612 So. 2d 1336, 1368 – 1369 (Fla. 1992) (finding "[a]rguments relating to proportionality and disparate treatment are not appropriate . . . where the prosecutor has not charged the alleged accomplice with a capital offense."); *Brown v. State*, 473 So. 2d 1260, 1268 (Fla. 1985) (finding that death sentence was proper even though accomplice received disparate prosecutorial and judicial treatment after pleading to second degree murder in return for life sentence); *Downs v. State*, 386 So. 2d 788, 795 (Fla. 1980) (holding the defendant's claim that the prosecutorial discretion to grant the codefendant immunity violated his constitutional rights and rendered Florida's Death Penalty statute unconstitutional to be without merit); *see also Krawczuk v. State*, 92 So. 3d 195, 207 (Fla. 2012) (quoting *Melendez*).

Furthermore, the United States Supreme Court has voiced its support for the exercise of prosecutorial discretion and declined to grant relief when that discretion

results in disparate sentences. *See McCleskey v. Kemp*, 481 U.S. 279, 311 – 312 (1987) (stating "the capacity of prosecutorial discretion to provide individualized justice is 'firmly entrenched in American law.'" (citing 2 W. LaFave & D. Israel, § 13.2(a) Crim. P., p. 160 (1984)); *Sorola v. Texas*, 493 U.S. 1005, 1009 n.6 (1989) (noting "A prosecutor's decision to waive the death penalty rather than burden the defendant, the court, and the jury with a meaningless proceeding should be respected, if not applauded"). Moreover, in *Proffitt v. Florida*, 428 U.S. 242 (1976), the United States Supreme Court upheld Florida's death penalty statute when the defendant asserted that the discretion which could be applied at each stage of the proceedings made the entire process arbitrary. *Proffitt*, 428 U.S. at 254 (citing *Gregg v. Georgia*, 428 U.S. 153, 199 (1976)). In other words, if a co-defendant in a death penalty case receives the benefit of prosecutorial discretion the remaining co-defendant is not barred from receiving a death sentence because the procedures enacted in Florida still allow for a meaningful adversarial process.

Therefore, because Ferrell's life sentence was the result of prosecutorial discretion and not the decision of a fact finder based on a review of the aggravators and mitigators in the case, this court should deny Hartley's claim of a disparate sentence and affirm the sentence of death.

II. ALTHOUGH FERRELL'S LIFE SENTENCE DOES CONSTITUTE NEWLY DISCOVERED EVIDENCE, HARTELY IS UNLIKELY TO RECEIVE A LIFE SENTENCE ON REMAND BECAUSE HE WAS THE TRIGGERMAN.

Hartley asserts that his co-defendant's life sentence constitutes newly discovered evidence and because the trial judge in Ferrell's case determined both parties were equally culpable that he is therefore entitled to a life sentence. (IB/p. 31). The trial court considered Hartley's claim under the rubric of newly discovered evidence and denied relief because the "record clearly shows that [Hartley] was the shooter, and that Ferrell was not a dominating force behind the murder; therefore, [Hartley] and Ferrell were not equally culpable." (PCR3 – Vol. 10/p. 1930 – 1931). In addition, the trial court found Hartley's case to be more aggravated. As such, this Court should affirm the trial court's denial of relief.

Standard of Review

A claim of newly discovered evidence based on the co-defendant receiving a life sentence is evaluated under the two-part test outlined in the Florida Supreme Court's opinion in *Stein v. State*, 995 So. 2d 329, 341 (Fla. 2008).

> For evidence to be considered newly discovered and sufficient to set aside a conviction, two requirements must be met:
>
> > First, in order to be considered newly discovered, the evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by the use of due diligence."

> Second, the newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial.
>
> Specifically, for a defendant to succeed on a claim that a death sentence must be set aside because of a codefendant's subsequent life sentence the defendant must show: '1) the life sentence could not have been known to the parties by the use of due diligence at the time of trial; and 2) the codefendant's life sentence would probably result in a life sentence for the defendant on retrial.

Stein, 995 So. 2d at 341 (citing *Ventura v. State*, 794 So. 2d 553, 570 – 571 (Fla. 2001). In addition, as this Court has recognized, "[a] trial court's determination concerning the relative culpability of the co-perpetrators in a first-degree murder case is a finding of fact and will be sustained on review if supported by competent substantial evidence." *Puccio v. State*, 701 So.2d 858, 860 (Fla.1997).

Ferrell's Life Sentence was Unknown to Hartley

Hartley was sentenced to death for the murder of Gino Mayhew on December 9, 1993. (Direct Appeal – Vol. 72/p. 2683 – 2686). It is undisputed that neither Hartley nor his counsel could have known about Ferrell's life sentence through the use of due diligence, because Ferrell's life sentence was pronounced 17 years later. (PCR3 – Vol. 10/p. 1839 – 1840). Therefore, Hartley meets the first prong of the test under *Stein* and the question turns on whether or not Ferrell's life sentence would have resulted in a life sentence for Hartley on retrial.

Unlikely Hartley Would Receive a Life Sentence

"When a codefendant . . . is equally as culpable or more culpable than the defendant, disparate treatment of the codefendant may render the defendant's

punishment disproportionate." *Larzelere v. State*, 676 So. 2d 394, 406 (Fla. 1996). However, where the circumstances indicate the defendant is more culpable than the co-defendant, or the dominating force behind the murder, then disparate treatment is permissible despite the codefendant's sentence. *See Marquad v. State*, 820 So. 2d 417, 423 (Fla. 2002); *see also Brown v. State*, 721 So. 2d 274, 282 (Fla. 1998). In addition, this Court has "rejected relative culpability arguments where the defendant sentenced to death was the 'triggerman.'" *See, e.g., Ventura v. State*, 794 So. 2d 553, 571 (Fla. 2001) (finding codefendants not equally culpable where a codefendant hired Ventura to kill the victim, but Ventura was the triggerman).

In the instant case, Hartley argues that because Ferrell has received a life sentence, he too is entitled to life sentence because Ferrell was equally culpable. (IB/p. 32 – 34, 43). The foundation of Hartley's argument lies within: (1) statements made by the prosecution during voir dire; (2) statements made by the prosecution during opening; (3) the closing arguments of the prosecution during Ferrell's trial; (4) the prosecution's reliance on the law of principals; (5) the trial court's original sentencing order dated December 17, 1993; and (6) portions of the Florida Supreme Court's opinion on direct appeal.

First, statements or arguments made by the prosecution during voir dire, opening, and closing arguments are not evidence and do not constitute a finding of fact by the trial court. In addition, the prosecutor's statements during voir dire and

arguments are not newly discovered evidence. Any claim of a violation of due process due to inconsistent theories of prosecution is procedurally barred because it was available during Hartley's direct appeal and could have been raised years ago. *See Bradshaw v. Stumpf*, 545 U.S. 175, 187 – 188 (2005) (finding that inconsistent theories of prosecution as to the identity of the shooter did not invalidate the defendant's plea); *Raleigh v. State*, 932 So. 2d 1054, 1065 – 1067 (Fla. 2006). Outside of Ferrell's life sentence, none of the statements Hartley is attempting to use to bolster his claim constitute newly discovered evidence. Hartley therefore, is improperly melding a claim of inconsistent theory of prosecution with a claim of newly discovered evidence. The only relevant new evidence that this Court should consider is that Ferrell has now received a life sentence.

Second, the theory of the prosecution was consistent within both Hartley's trial and Ferrell's trial – Ferrell played a significant role in the robbery, kidnapping, and murder of Gino Mayhew, but Hartley was the actual shooter. Third, while the trial court and this Court previously stated that Hartley and Ferrell were equally culpable, Hartley's argument ignores the fact that he was the triggerman.

Hartley was the Triggerman

This court has rejected relative culpability arguments where the defendant sentenced to death was in fact the triggerman. *See Blake v. State*, 972 So. 2d 839 (2007). In the instant case, the record clearly and conclusively shows that Hartley was both the triggerman, and the dominating force behind the murder of Gino

Mayhew.

When Gino Mayhew was kidnapped, a witness saw Hartley hold a gun to Mayhew's head and force him into the driver's seat of the victim's Chevrolet Blazer. *Hartley*, 686 So. 2d at 1318. This same witness testified that when the Blazer sped away he heard Ferrell "shout out of the Blazer that the victim would 'be back;'" which shows that Ferrell lacked intent to kill Mayhew. *Id.*

At least two witnesses testified to statements Hartley made regarding the murder while he was in jail awaiting trial. *Id.* at 1318 – 1319. Hartley told one cellmate "'I left my trade mark, left no witnesses'; and that his trademark was to 'shoot the person in the head leaving no witnesses.'" *Id.* at 1318. Hartley also told the cellmate "that Ferrell and Johnson acted so nervous that he considered shooting them and that he would 'get off' because everyone was too scared to testify;" which highlights Hartley's domination over his co-defendants. *Id.* at 1318. Many of the details these witnesses testified to were never released to the public. *Id.* at 1319. In addition, Hartley told a different cellmate that "he had robbed and murdered the victim and provided numerous details of the crime very similar to those provided by the previous witness." *Id.* at 1319. Furthermore, the testimony of Ronald Bronner, a jail informant and childhood acquaintance of Hartely, indicated that while the initial plan was formed between the group; Hartley directed the actions of both Ferrell and Johnson in kidnapping, robbing, and

murdering Mayhew; again showing Hartley's leadership in the murder. (Direct Appeal - Vol. 68/ 2217 – 2230). Moreover, Ferrell's life sentence was predicated on a statement under oath that he in fact was not the shooter. (PCR3 – Vol. 10/1837, 1839 – 1840; Appendix 1). The testimony of these witnesses definitively shows Hartely as the triggerman and dominant force in the murder of Gino Mayhew.

As such, Hartley's case is comparable to *Jennings v. State*, 718 So. 2d 144 (1998). In *Jennings v. State*, Jennings was convicted and sentenced to death for the robbery and murder of three restaurant employees. *Jennings*, 718 So. 2d at 145. Jennings and his codefendant, Graves, had previously worked in the restaurant, and together plotted the robbery. *Id.* at 145. The victims had all been stabbed and had their throats cut. *Id.* at 145. Jennings told police following his arrest "I think I could have been the killer. In my mind I could have killed them, but in my heart I don't think I could have." *Id.* at 146. In addition, witnesses testified that on occasions prior to the murder, Jennings spoke of robbing the restaurant and "not leaving any witnesses." *Id.* at 146. Graves was also convicted as charged and received a life sentence. *Jennings*, 718 So. 2d at 153. On direct appeal this Court denied Jennings' claim of a disparate sentence when compared to Graves because the record supported the finding that Jennings was the actual killer and therefore more culpable than Graves.

Jennings also argued for equal culpability between himself and Graves, based on the States' argument during Graves' trial that Graves was the "leader" of the robbery. *Id.* at 154. This Court was not swayed by Jennings' argument because ultimately the State took the same position in both trials – Graves was the leader of the robbery and Jennings was the actual killer. *Jennings*, 718 So. 2d at 154. Ultimately, this court stated "[t]he fact that the eighteen-year-old codefendant received life does not prevent the imposition of the death penalty on Jennings, whom the trial court found to be the actual killer and to be more culpable." *Id.* at 154.

Similarily, in *Ventura v. State*, the defendant was convicted of first-degree murder and sentenced to death. *Ventura*, 794 So. 2d at 558. The defendant was hired to kill the victim after a group of men conspired to commit the murder in order to obtain the insurance policy held by the victim. *Id.* at 558. Ventura scouted the location for the murder, set a meeting with the victim, drove with the victim to the location, and then shot the victim multiple times. *Id.* at 558. Wright, the leader of the conspiracy, received a life sentence which was affirmed on appeal roughly a year following the Florida Supreme Court's decision to affirm Ventura's death sentence. *Id.* at 571. Ventura filed a 3.850 claim and alleged that Wright's life sentence constituted newly discovered evidence which entitled him to a life sentence as well. *Id.* at 571. On appeal, this Court held that Ventura was not

entitled to relief given than he was the triggerman and therefore was not equally culpable to his co-defendants. *Id.* at 571.

Likewise, in *Marquard v. State*, 850 So. 2d 417 (2002), Marquard and his co-defendant, Abshire, conspired to kill a young woman who had accompanied them to Florida. *Marquard*, 850 So. 2d at 422. Marquard confessed to the murder and told police he remembered "standing over her body with a knife in hand." *Id.* Abshire testified and gave a grisly account of the murder. *Id.* During this testimony, Abshire admitted to stabbing the victim and attempting to decapitate her with Marquard's help. *Id.* at 422. Marquard was convicted of first-degree murder and sentenced to death. *Id.* Abshire was tried separately, found guilty of first degree murder and also sentenced to death. *Id.* "This Court subsequently reversed Abshire's conviction and vacated his death sentence based on the fact that during Abshire's trial," the prosecution discriminated against jurors based on their gender. *Id.* at 422. "On remand Abshire received a life sentence." *Id.* at 422. Marquard filed a 3.850 claim and asserted that Abshire's life sentence constituted newly discovered evidence which, when combined with Abshire's admission of participation in the murder, entitled him to a life sentence as well. This Court disagreed with Marquard because the trial court made a determination that he was the more culpable of the two parties and therefore he was not entitled to relief. *Marquard*, 850 So. 2d at 423 – 424.

Hartley relies on this Court's decision in *Scott v. Dugger*, 604 So. 2d 465 (1992), to support his position that when a co-defendant's sentence is commuted to life, then an equally culpable co-defendant must receive like treatment. This reasoning though is misplaced and based on an incomplete comparison of *Scott* and Hartley's case. In *Scott* the co-defendant received a life sentence following a jury recommendation. *Scott*, 604 So. 2d at 468. As such, it was a fact finder who determined the co-defendant's punishment. Furthermore, this Court in *Scott* based its decision to commute Scott's death sentence not only because of their equal culpability, but also because Scott and his co-defendant had: (1) similar criminal records; (2) were approximately the same age; (3) had comparable low IQs; and (4) determined that it "was not a case where Scott was the 'triggerman' and Robinson [co-defendant] a mere unwitting accomplice along for the ride." *Scott*, 604 So. 2d at 468.

In the present case, Ferrell's life sentence was the result of prosecutorial discretion, and as such his case is not comparable to *Scott*. Furthermore, while Ferrell was an integral part in planning and gaining the trust of the victim, it was Hartley who was the leader of the robbery, kidnapping, and murder of Gino Mayhew. The trial court in this case also determined that Hartley was the more culpable party since he was the shooter, and because Ferrell was not a dominating force behind the murder. (PCR3 – Vol. 10/p. 1930 – 1931). Therefore, this court

should affirm the trial court's order denying Hartley any relief.

Hartley's Case is More Aggravated

Should this Court review the aggravators and mitigators in Hartley and Ferrell's cases; it will become apparent that Hartley's case is the more aggravated of the two. Ferrell's prior convictions were for an unarmed robbery in 1984, and participation in a jail riot in 1988. No one was harmed in the jail riot. Conversely, Hartley was previously convicted of manslaughter for killing a 15 year-old girl with a shotgun blast to the face. (Direct Appeal – Vol. 70/p. 2461 – 2463). Just 69 days after being released from prison on the manslaughter charges, Hartley murdered Gino Mayhew. In addition, Hartley was also convicted of two separate armed robberies which occurred 66 days following his release from prison, and 74 days following his release from prison respectively. (Direct Appeal – Vol. 70/p. 2461 – 2463). Furthermore, while minimal mitigation was found, five aggravators were found and affirmed on appeal by this Court: (1) Cold, Calculated, and Premeditated ("CCP"); (2) prior violent felony convictions; (3) committed during the course of a kidnapping; (4) committed to prevent lawful arrest; and (5) committed for pecuniary gain. Finally, the jury voted nine to three (9-3) in its recommendation that Hartley receive the death penalty. Therefore, it is unlikely Hartley would receive a life sentence on retrial of penalty phase. As such, this Court should affirm the trial court's denial of Hartely's Second Successive Motion for post-conviction relief.

Law of the Case Doctrine

Lastly, Hartley maintains that the law of the case doctrine entitles him to relief, since Ferrell's trial court made a notation in its original sentencing order that "Ferrell was just as culpable as the shooter." (IB/p. 28; *Ferrell*, 686 So. 2d at 1327). Hartley cites to *Florida Dept. of Trans. v. Juliano*, 801 So. 2d 101 (Fla. 2001), *Greene v. Massey*, 384 So. 2d 24 (Fla. 1980), and *Strazzulla v. Hendrick*, 177 So. 2d 1 (Fla. 1965), which all stand for the legal propositions that trial courts cannot overrule an appellate court on a matter already determined, and that all points of law which have been adjudicated cannot be revisited at a later proceeding. (IB/p. 2 – 3). Nevertheless, this argument fails for two reasons. First, while both Hartley and Ferrell were guilty of first-degree murder, there is no dispute that Hartley was the triggerman. Second, when this Court granted a new penalty phase to Ferrell it effectively vacated the original sentencing order entered in Ferrell's original sentence of death. *See Ferrell v. State*, 29 So. 3d 959, 984 – 988 (2010). Therefore, Hartley is not entitled to any relief via law of the case.

CONCLUSION

For the aforementioned reasons, the State respectfully requests this Honorable Court affirm the trial court's order denying Hartley's Second Successive Motion for post-conviction relief.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by U.S. MAIL and E-MAIL on January 15th, 2014, to: Linda McDermott, Esq. at - McClain & Mcdermott, P.A. 2031 Grande Oak Blvd. Suite 118-61, Estero, FL 33928, lindammcdermott@msn.com.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Times New Roman 14 point font.

Respectfully submitted and certified,
PAMELA JO BONDI
ATTORNEY GENERAL

/s/ Patrick M. Delaney
By: PATRICK M. DELANEY
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 85824

Attorney for Appellee, State of Fla.
Office of the Attorney General
PL-01, The Capitol
Tallahassee, Fl 32399-1050
Primary E-Mail: capapp@myfloridalegal.com
Secondary E-Mail: Patrick.Delaney@myfloridalegal.com
(850) 414-3300 Ext. 4583
(850) 487-0997 (FAX)

IN THE SUPREME COURT OF FLORIDA

KENNETH HARTLEY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC13-1470

APPENDIX

1. Acknowledgment of Ronnie Ferrell – Dated December 9, 2010

2. Order Denying the Defendant's Second Successive 3.851 Motion – Date June 21, 2013.

AG#: L13-2-1470