DISTRICT COURT OF APPEAL, SECOND DISTRICT
OF FLORIDA

NOTICE OF APPEAL TRANSMITTAL FORM

Ernest Whitfield
Appellant(s)

v.

State of Florida
Appellee(s)

SARASOTA COUNTY/ COCC
County/State Agency

L.T. Case No.: 1995 CF 001588 NC

✓ The accompanying notice of appeal was filed on 07/287/17. A certified electronic copy of the notice accompanies this form.

___ The civil notice carried with it a copy of the order appealed, which is transmitted with the notice.

___ The civil notice was not accompanied by a copy of the order appealed.

___ The district court's filing fee has been received and will promptly be forwarded to the court by U.S. Mail.

___ There is no filing fee in this type of proceeding (e.g., dependency/termination of parental rights; postconviction and habeas corpus appeals; delinquency appeals; administrative reemployment assistance appeals initiated by an employee).

___ The appellant has been determined to be indigent. Included in the transmission of the notice of appeal is an order or certificate of insolvency.

___ An appellate filing fee appears to be required but has not been paid.

___ This is dependency/termination of parental rights case. A designation to the court reporter ___ does or ___does not accompany the notice of appeal in the transmission to the district court.

CASE TYPE:

___ Summary postconviction appeal. An electronic bookmarked record is being transmitted to the district court's FTP server contemporaneously with the notice of appeal.

___ Summary postconviction appeal. The electronic record cannot be transmitted at this time but will follow within 0 days.

___ Nonsummary postconviction appeal. The lower tribunal clerk has ___ has not___ treated the notice of appeal as a designation to the court reporter.

___ Judgment and sentence appeal.

___ Juvenile delinquency appeal.

___ State criminal appeal.

___ Dependency/termination of parental rights appeal.

___ Other civil appeal, including probate/guardianship, Ryce, Baker Act, etc.

___ Administrative appeal.

✓ Criminal appeal of unknown case classification. A copy of the order that seems to be appealed is included in this transmission, or it is impossible to determine what order the appellant is attempting to appeal.

Further comments that might be of value to the district court in determining case classification and jurisdiction are:

Both the Statement of Judicial Acts, and a copy of the Order that seems to be appealed is included in this transmission.

GEORGIA J. LAVOY

Deputy Clerk

Filing # 59654120 E-Filed 07/28/2017 12:05:13 PM

IN THE CIRCUIT COURT FOR THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

v. CASE NO. : 95-1588-CF

ERNEST WHITFIELD,
Defendant.
_____/

NOTICE OF APPEAL

NOTICE IS GIVEN that ERNEST WHITFIELD, Defendant/Appellant, appeals to the Florida Supreme Court, the Final Order Denying Defendant's Successive Postconviction Motion rendered July 24, 2017.

/S/ ROBERT A. NORGARD
ROBERT A. NORGARD

I HEREBY CERTFY that a true and correct copy of the foregoing has been furnished by email to the Office of the Attorney General, at capapp@myfloridalegal.com; CarlaSuzanne.Bechard@myfloridalegal.com, to the Office of the State Attorney, at saorounds@scgov.net; cschaeff@scgov.net and by regular U.S. mail to Ernest Whitfield, DC#764970, Union CI, PO Box 1000, Raiford, FL 32083, this 28th day of July 2017.

/S/ ROBERT A. NORGARD
ROBERT A. NORGARD
Attorney at Law
P.O. Box 811
Bartow, FL 33831
(863)533-8556
norgardlaw@verizon.net
Fla. Bar No. 322059

STATE OF FLORIDA, COUNTY OF SARASOTA
I hereby certify that the foregoing is a true and correct copy of pages 1 through 1 of the instrument filed in this office. The original instrument filed contains 1 pages.
☒ This copy has no redactions. ☐ This copy has been redacted pursuant to law.
Witness my hand and official seal this 28th day of July, 2017.
KAREN E. RUSHING, CLERK OF THE CIRCUIT COURT
By: _____
Deputy Clerk

Filing # 59654120 E-Filed 07/28/2017 12:05:13 PM

IN THE CIRCUIT COURT FOR THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

v. CASE NO. : 95-1588-CF

ERNEST WHITFIELD,
Defendant.
_____/

STATEMENT OF JUDICIAL ACTS TO BE REVIEWED

Defendant, ERNEST WHITFIELD, submits the following statement of judicial acts to be reviewed:

1. The Court's denial of Defendant's Successive Postconviction Motion

I HEREBY CERTFY that a true and correct copy of the foregoing has been furnished by email to the Office of the Attorney General, at capapp@myfloridalegal.com; CarlaSuzanne.Bechard@myfloridalegal.com, to the Office of the State Attorney, at saorounds@scgov.net; cschaeff@scgov.net and by regular U.S. mail to Ernest Whitfield, DC#764970, Union CI, PO Box 1000, Raiford, FL 32083, this 28th day of July 2017.

/s/ ROBERT A. NORGARD
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Filed 07/28/2017 12:52 PM - Karen E. Rushing, Clerk of the Circuit Court, Sarasota County, FL

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT IN AND FOR SARASOTA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v. **CASE NO.: 1995-CF-1588**

ERNEST WHITFIELD,

Defendant.

_____/

FINAL ORDER DENYING SUCCESSIVE POSTCONVICTION MOTION

This matter is before the Court on Defendant's "Successive Postconviction Motion," filed January 3, 2017, pursuant to Florida Rule of Criminal Procedure 3.851. The State filed its answer to the motion on January 23, 2017. The Court conducted a case management conference on February 6, 2017, at which time the Court, pursuant to Fla. R. Crim. P. 3.851(f)(5)(B), heard the parties' arguments on purely legal claims. Though Defendant requested an evidentiary hearing, for the reasons set forth below, the Court finds that no evidentiary hearing is necessary. The Court has reviewed the motion, the answer, the court file, and applicable law, and is otherwise duly advised in the premises.

Case History

A grand jury indicted Defendant for the first-degree murder of Claretha Reynolds. The State further charged Whitfield in Case No. 1995-CF-1951 with sexual battery with a deadly weapon and armed burglary. The Court consolidated these cases prior to trial, and a jury found Defendant guilty on all counts. After the penalty phase, the jury recommended death by a seven-to-five vote. The Court subsequently determined that the State proved three aggravating circumstances, specifically: 1) the existence of two prior violent felonies for aggravated battery

and also a contemporaneous conviction for sexual battery of another victim; 2) the murder occurred during the commission of a burglary; and 3) the murder was heinous, atrocious, or cruel. The Court assigned great weight to each of these aggravators. While the Court determined no statutory mitigating circumstances were proven, the Court did find several nonstatutory mitigating circumstances existed, including: Defendant cooperated with authorities (little weight); Defendant had an impoverished background (considerable weight); Defendant was addicted to crack cocaine (substantial weight); Defendant's father abandoned him (some weight); Defendant's mother suffered from alcoholism (some weight); and the Defendant had been the victim of a near fatal shooting but he forgave his assailant (little or no weight). After weighing these factors, the Court sentenced Defendant to death for first-degree murder and to concurrent terms of natural life for sexual battery with a deadly weapon and armed burglary. The Defendant appealed, and the Florida Supreme Court affirmed. *Whitfield v. State*, 706 So. 2d 1 (Fla. 1997). The Court's judgment and sentence became final on October 5, 1998, when the United States Supreme Court denied Defendant's petition for writ of certiorari. *Whitfield v. Florida*, 525 U.S. 840 (1998).

By an order rendered December 7, 2001, the Court appointed the Office CCRC-M to represent Defendant on postconviction proceedings in this case. On January 28, 2002, Assistant CCRC-M, Peter Cannon, filed his notice of appearance. The Court subsequently denied postconviction relief by an order rendered March 17, 2004. The Florida Supreme Court affirmed this Court's order denying postconviction relief by mandate issued March 6, 2006. *Whitfield v. State*, 923 So. 2d 375 (Fla. 2005). A request for federal habeas relief was denied on the merits by an order issued July 11, 2014. *Whitfield v. Sec'y, Dept. of Corr.*, 2013 WL 3636296, at *1 (M.D.

Fla. 2013). As Mr. Cannon is no longer a practicing attorney,[1] Defendant is now represented by Peter Norgard, Esq., of the Office of CCRC-M.

Defendant's Successive Postconviction Motion

In the present motion, Defendant seeks an order vacating the death sentence imposed in this case based on the decision in *Hurst v. Florida*[2] and its Florida progeny, which invalidated Florida's previous death penalty scheme to the extent that it did not require juror unanimity during penalty phase proceedings. Motions under Rule 3.851 generally must be filed within one year of the date the judgment and sentence become final. Fla. R. Crim. P. 3.851(d). Rule 3.851(d)(2)(B) provides an exception where a motion asserts a fundamental constitutional right not established within the one-year window, which has been held to apply retroactively. Defendant notes that the instant motion was filed within one year of: (1) the issuance of *Hurst v. Florida*; (2) the enactment of Chapter 2016-13, Laws of Florida, which changed Florida's capital sentencing procedures in the wake of *Hurst v. Florida*; (3) the issuance of *Perry v. State*;[3] and (4) the issuance of *Hurst v. State*.[4] Though he acknowledges the decision in *Asay v. State*,[5] which limits the retroactive application of *Hurst* to cases that became final after the issuance of *Ring v. Arizona*, 536 U.S. 584 (2002), Defendant nevertheless argues an entitlement to relief on a number of bases.

Defendant's motion presents three claims (numbered I – III) and seeks an evidentiary hearing as to each claim. First, Defendant alleges that his death sentence violates the Sixth and Eight Amendments to the United States Constitution. More specifically, Defendant argues that: (A.) the limited application of *Hurst v. Florida* established in *Asay* violates the requirement of

[1] During the course of federal habeas proceedings, Mr. Cannon was deemed grossly negligent for failing to timely seek federal habeas relief. *Id.* Mr. Cannon was subsequently disbarred by an order of the Florida Supreme Court issued January 24, 2013.
[2] 136 S. Ct. 616 (2016).
[3] 210 So. 3d 630 (Fla. 2016).
[4] 202 So. 3d 40 (Fla. 2016).
[5] 210 So. 3d 1, 22 (Fla. 2016).

fairness and uniformity; (B.) the failure to apply *Hurst* retroactively to his case deprives Defendant of a jury vote of mercy; (C.) the failure to apply *Hurst* retroactively to his case violates the dictates of *Caldwell v. Mississippi*, 472 U.S. 320 (1985); and (D.) the jury must be provided with constitutionally sound instructions regarding aggravating factors and mitigating circumstances. According to Defendant, "[t]he retroactivity of *Hurst* should be extended to those who, prior to *Ring*, properly asserted, presented, and preserved challenges to the lack of jury fact finding and/or unanimity."

Mosley v. State[6] addressed the retroactive application of *Hurst v. Florida* and *Hurst v. State* under two approaches. First, the court held that Mosley was entitled to retroactive application under the principle of fundamental fairness established in *James v. State*[7] because he "raised a *Ring* claim at his first opportunity and was then rejected at every turn."[8] Second, the court separately found that Mosley was entitled to retroactive application based upon a *Witt*[9] analysis.[10] Notably, Mosley's "sentence[] of death became final *after* the United States Supreme Court decided *Ring*."[11] Defendant argues that because he raised *Ring*-like Sixth Amendment challenges to Florida's capital sentencing scheme during his trial, he is entitled to retroactive application of *Hurst v. Florida* and *Hurst v. State* under *James*.

As mentioned above, *Asay v. State* – issued the same day as *Mosley* – provides that *Hurst* does not apply retroactively to judgments and sentences (like the one imposed in this case) that became final prior to the issuance of *Ring*.[12] There, the court conducted a *Witt* analysis and concluded that "*Hurst* should not be applied retroactively to Asay's case, in which the death

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[6] 209 So. 3d 1248 (Fla. 2016).
[7] 615 So. 2d 668 (Fla. 1993).
[8] *Mosley*, 209 So. 3d at 1275.
[9] *Witt v. State*, 387 So. 2d 922 (Fla. 1980).
[10] *Mosley*, 209 So. 3d at 1276-1283.
[11] *Id.* at 1274.
[12] 210 So. 3d at 22.

sentence became final before the issuance of *Ring*."[13] *Mosley* clarified the holding in *Asay,* stating: "we have now held in *Asay v. State*, that *Hurst* does not apply retroactively to capital defendants whose sentences were final before the United States Supreme Court issued its opinion in *Ring*."[14] The Supreme Court of Florida has consistently reapplied this bright-line cutoff for retroactivity, first in *Gaskin v. State*[15] and *Bogle v. State*,[16] and also in a number of decisions that have followed.

Many of Defendant's arguments flow from some of the more nuanced matters inherent in Florida's post-*Hurst* retroactivity decisions, including whether a *Ring*-like challenge was raised, the distinction between the Sixth Amendment and Eighth Amendment issues addressed in *Hurst v. State*, and the potentially arbitrary effects of using *Ring* as a bright-line cutoff for retroactivity. However, the recent decisions from the Supreme Court of Florida clearly establish that defendants whose judgments and sentences of death became final pre-*Ring* are not entitled to relief via retroactive application of *Hurst v. Florida* and its Florida progeny. As such, Defendant's claims are untimely filed and, for that reason, do not warrant an evidentiary hearing. Mindful of this determination, the Court need not reach the matter of whether any *Hurst* error in this case was harmless.

In his second claim, Defendant alleges that he "must be sentenced to life" because § 775.082(2) requires the imposition of a life sentence in the event that Florida's death sentencing scheme is deemed unconstitutional. As this claim was specifically rejected in *Hurst v. State*, 202 So. 3d at 63-66, the Court finds that Defendant has failed to demonstrate an entitlement to the relief requested in Claim II. *See also Jeffries v. State*, 2017 WL 2982120 at *9 (Fla. July 13, 2017).

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[13] *Id.*
[14] *Mosley*, 209 So. 3d at 1274.
[15] 218 So. 3d 399-401 (Fla. 2017) (denying relief under *Hurst v. Florida* on the sole basis that Gaskin's sentence became final in 1993).
[16] 213 So. 3d 833 (Fla. 2017) (denying relief under *Hurst v. Florida* on the basis that Bogle's conviction and sentence of death were final in 1995).

Finally, in Claim III, Defendant asserts that he is entitled to a new guilt / innocence phase on the basis that the jury was selected under an unconstitutional capital sentencing scheme that permitted a recommendation of death by a bare majority. Defendant seems to argue that the jury might have had a different composition if it was selected with knowledge that jurors must make unanimous findings at the penalty phase. As an initial matter, conclusory and speculative postconviction claims, like the one presented in Claim III, are legally insufficient and do not warrant an evidentiary hearing. *Moore v. State*, 132 So. 3d 718, 734 (Fla. 2013) (citing *Ragsdale v. State,* 720 So.2d 203, 207 (Fla.1998); and *Jones v. State,* 845 So.2d 55, 64 (Fla.2003)). Ultimately, because the fundamental constitutional rights relied on by Defendant have not been held to apply retroactively to this case, Claim III, like all others presented in this motion, is untimely under Rule 3.851(d).

Accordingly, it is

ORDERED AND ADJUDGED that Defendant's "Successive Motion to Vacate Death Sentence" is **DENIED**. Defendant has the right to appeal within thirty (30) days of the rendition of this order.

DONE AND ORDERED in Chambers in Punta Gorda, Charlotte County, Florida, this 24 day of July 2017.

George C. Richards
Circuit Judge

CERTIFICATE OF SERVICE

I certify that on this 24 day of July 2017 copies of the foregoing Order were furnished by U.S. Mail, hand delivery, and/or electronic mail to:

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By: _____
Judicial Assistant

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