

RECEIVED, 7/28/2017 11:28 AM, Clerk, Second District Court of Appeal

DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

NOTICE OF APPEAL TRANSMITTAL FORM

STATE OF FLORIDA
Appellant(s)

SARASOTA COUNTY/ COCC
County/State Agency

v.
JOSEPH P. SMITH
Appellee(s)

L.T. Case No.: 2004 CF 002129 NC

[X] The accompanying notice of appeal was filed on 07/27/17. 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:

A copy of the order that seems to be appealed is included in this transmission.

GEORGIA J. LAVOY

Deputy Clerk

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

STATE OF FLORIDA,

PLAINTIFF/APPELLANT

CASE NO. 2004CF002129NC

VS.

JOSEPH P SMITH,

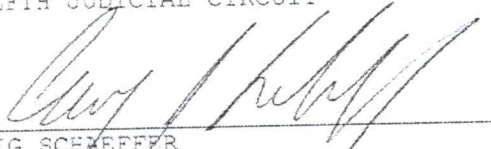
DEFENDANT/APELLEE

NOTICE OF APPEAL

NOTICE IS GIVEN that the State of Florida, Plaintiff, Appellant appeals to the District Court of Appeal, Second District of the State of Florida, the Order of this Court, Order (1) Granting, In Part, Denying, In Part, Defendant's Successive Motion to Vacate Death Sentence; (2) Vacating Death Sentence Imposed on Count 1; And (3) Scheduling Case Management Conference rendered by the Honorable Charles Roberts on July 12<sup>th</sup>, 2017. The nature of the Order appealed is from an order Vacating the Death Sentence Imposed on Count 1 for the First Degree Murder of Carlie Brucia.

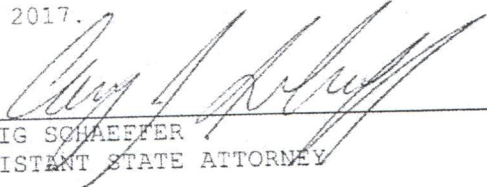
ED BRODSKY, STATE ATTORNEY  
TWELFTH JUDICIAL CIRCUIT

BY:

  
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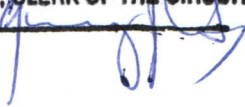
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been Transmitted to this Court through the Florida Courts e-filing Portal, which will serve a Notice of Electronic Filing to: the Honorable Judge Charles Roberts; Circuit Judge; Judge Lynn N. Silvertooth Judicial Center, 2002 Ringling Blvd, Sarasota, FL 34237 at abrass@jud12.flcourts.org; to Public Defender's Office, 2071 Ringling Blvd, 5<sup>th</sup> Floor, Sarasota, FL 34237, Attorney for Defendant/Appellee at lwise@scgov.net; and to Christina Pacheco, Assistant Attorney General, Office of Attorney General, at Christina.pacheco@myfloridalegal.com; Office of the State Attorney, Assistant State Attorney Karen Fraivillig at mfraivil@scgov.net and saleshire@scgov.net and Chief Assistant State Attorney, Craig Schaeffer at cschaeff@scgov.net and lparcels@scgov.net; and a copy will be provided to the defendant, Joseph Smith, DOC #899500, Union Correctional Institution, 7819 N. W. 228<sup>th</sup> Street, Raiford, FL 32026 this 27<sup>th</sup> day of July, 2017.

  
CRAIG SCHAEFFER  
ASSISTANT STATE ATTORNEY



STATE OF FLORIDA, COUNTY OF SARASOTA  
I hereby certify that the foregoing is a true and correct copy of pages 1 through 2 of the instrument filed in this office. The original instrument filed contains 2 pages.  
 This copy has no redactions.  This copy has been redacted pursuant to law.

Witness my hand and official seal this 27 day of July, 2017.  
KAREN E. RUSHING, CLERK OF THE CIRCUIT COURT  
By:   
Deputy Clerk



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

STATE OF FLORIDA,

Plaintiff,

v.

Case No. 2004 CF 2129 NC

JOSEPH P. SMITH,

Defendant.

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**ORDER (1) GRANTING, IN PART, AND DENYING, IN PART, DEFENDANT'S  
SUCCESSIVE MOTION TO VACATE DEATH SENTENCE;  
(2) VACATING DEATH SENTENCE IMPOSED ON COUNT 1; AND  
(3) SCHEDULING CASE MANAGEMENT CONFERENCE**

This matter came before the Court for a case management conference on March 10, 2017, on Defendant's Successive Motion to Vacate Death Sentence, filed by the Office of Capital Collateral Regional Counsel on January 5, 2017, pursuant to Fla. R. Crim. P. 3.851. The State filed its Response to the Successive Motion to Vacate Death Sentence on February 22, 2017. Defendant filed supplemental authority on March 7, 2017, and May 11, 2017. The March 21, 2017, retirement of the Honorable Andrew Owens necessitated the reassignment of the instant case to the undersigned judge.<sup>1</sup> The Court has carefully reviewed the parties' pleadings, the court file, the record from the case management conference held March 10, 2017, and the applicable law, and is otherwise duly advised of the premises.

By an indictment and a separate information filed February 20, 2004, the State charged Defendant with the First-Degree Murder (Count 1), Sexual Battery (Count 2), and Kidnapping

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<sup>1</sup> Since the parties did not present evidence at the hearing held March 10, 2017, the merits of the instant motion are properly before the undersigned successor judge. See *Tompkins Land & Hous., Inc. v. White*, 431 So. 2d 259, 260 (Fla. 2d DCA 1983), "[a] successor judge may complete acts left uncompleted by a predecessor but may not weigh and compare testimony heard before the other judge."

(Count 3) of eleven-year-old Carlie Brucia. Following a trial, which commenced<sup>2</sup> on November 7, 2015, and concluded on November 17, 2015, a jury found Defendant guilty as charged on each count. The Court held the penalty phase from November 28 to November 30, 2015. On December 1, 2015, the jury recommended a sentence of death on Count 1 by a vote of 10 to 2.

The trial record reveals that Defendant's February 1, 2004, abduction of Carlie Brucia was captured on surveillance video obtained from a carwash on Bee Ridge Road. Defendant quickly became a suspect in her disappearance based on tips generated from the public dissemination of the surveillance video. Defendant's instructions to his brother aided law enforcement in the February 5, 2004, recovery of Carlie's body, which he had dragged into a wooded area near a church on Proctor Road. She was discovered essentially naked from the waist down, with ligature marks on her wrists and neck, and Defendant's semen on the back of her shirt. Defendant made statements indicating that he had "Rough Sex" with Carlie. The medical examiner opined that the cause of death was ligature strangulation, that Carlie was sexually battered while still alive, and that she was likely conscious at the time Defendant applied the ligature that took her life.

Defendant returned for sentencing on March 15, 2006. At that time, the Court entered a 36-page sentencing order outlining and analyzing the aggravating and mitigating circumstances presented and proven in this case. In that order, the Court found that the State demonstrated the following aggravating circumstances beyond a reasonable doubt:

1. The capital felony was committed by a person previously convicted of a felony and placed on felony probation (moderate weight assigned).
2. The capital felony was committed while Defendant was engaged in sexual battery or kidnapping (significant weight assigned).
3. The capital felony was committed for the purpose of avoiding or preventing a lawful arrest (great weight assigned).

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<sup>2</sup> Jury selection began on October 25, 2015, and concluded on November 4, 2015.



4. The capital felony was especially heinous, atrocious, or cruel (“HAC”) (great weight assigned).
5. The capital felony was a homicide and was committed in a cold and calculated and premeditated manner without any pretense of moral or legal justification (great weight assigned).
6. The victim of the capital felony was a person less than twelve years of age (great weight assigned).

While the Court found evidence of statutory mitigating circumstances lacking,<sup>3</sup> the Court found that Defendant established the following non-statutory mitigating circumstances:

1. Defendant has a long and well-documented history of mental illness (moderate weight assigned).
2. Defendant has a long and well-document history of drug abuse (moderate weight assigned).
3. Defendant suffered longstanding severe pain from back injuries that contributed to his addiction (little weight assigned).
4. Defendant repeatedly sought help for his problems (little weight assigned).
5. Defendant was repeatedly denied treatment or received inadequate treatment (little weight assigned).
6. Defendant has many positive qualities including (moderate weight assigned):
  - a. Defendant has skills as a carpenter, plumber, and mechanic.
  - b. Defendant performed kind deeds for others.
  - c. Defendant shares love and support with his family.
  - d. Defendant has attempted to have a positive influence on family members, despite his incarceration.
  - e. Defendant has artistic skills
  - f. Defendant cares about animals.
7. Defendant provided information that led to the resolution of this case (very little weight assigned).

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<sup>3</sup> Defendant attempted, but ultimately failed to demonstrate the following statutory mitigating circumstances: 1) The capital felony was committed while Defendant was under the influence of extreme mental or emotional disturbance; and 2) 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.

8. Defendant's family assisted law enforcement with the knowledge and cooperation of Defendant (slight weight assigned).
9. Defendant has demonstrated spiritual growth (moderate weight assigned).
10. Defendant has maintained gainful employment (slight weight assigned).
11. Defendant was a kind and loving father to his three young daughters (moderate weight assigned).
12. Defendant is remorseful (little weight assigned).
13. Defendant is amenable to rehabilitation and a productive life in prison (little weight assigned).

Ultimately, the Court concluded that the aggravating circumstances far outweighed the mitigating circumstances in this case. More specifically, with the exception of the first aggravating circumstance identified above, the Court concluded that each aggravating circumstance, standing alone, outweighed the totality of the non-statutory mitigating circumstances proven in this case. As a consequence, the Court adopted the jury's recommendation, sentenced Defendant to death on Count 1, and imposed concurrent terms of life in prison on Counts 2 and 3. The Florida Supreme Court issued a detailed opinion in *Smith v. State*, 28 So. 3d 838 (Fla. 2009), affirming the judgments and sentences imposed by this Court. The opinion became final on June 28, 2011, when the United States Supreme Court denied Defendant's petition for writ of certiorari. *Smith v. Florida*, 564 U.S. 1052, 131 S. Ct. 3087 (2011), reh. den., 567 U.S. 954, 133 S.Ct. 73 (2012); see *U.S. v. Willis*, 202 F.3d 1279, 1281 (10th Cir. 2000) ("[D]efendant's judgment of conviction was final when the United States Supreme Court denied his petition for writ of certiorari, notwithstanding the fact that he could have filed a petition for rehearing of the order denying his petition for writ of certiorari").

Defendant timely filed his initial Rule 3.851 Motion for Postconviction Relief on June 21, 2012. The Court denied the motion by prior order rendered December 26, 2012, and that denial



was affirmed by the Florida Supreme Court in a mandate issued December 12, 2014. *Smith v. State*, 151 So. 3d 1177 (Fla. 2014).

In his present motion, Defendant raises the following claims for relief from his sentence of death in this matter:

- 1) In light of *Hurst v. Florida*,<sup>4</sup> Defendant's death sentence violates the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and corresponding provisions of the Florida Constitution.
- 2) Defendant's death sentence violates the Eighth Amendment under *Hurst v. State*<sup>5</sup> and should "be vacated and a life sentence substituted."
- 3) "The Court should vacate [Defendant's] death sentence because the fact-finding that subjected him to a death sentence was not proven beyond a reasonable doubt."
- 4) Under the decisions in *Hurst v. Florida*, *Hurst v. State*, and *Perry v. State*,<sup>6</sup> the absence of a unanimous penalty phase verdict renders Defendant's death sentence unconstitutional. Defendant adds that the death sentence imposed in this case is unconstitutional because "the State never presented the aggravating factors of elements for the Grand Jury to consider."

In its Response, the State contends that:

- 1) Defendant failed to demonstrate an entitlement to postconviction relief and any error pursuant to *Hurst v. Florida* was harmless beyond a reasonable doubt because any rational jury, if properly instructed, would have unanimously found the existence of aggravating factors and unanimously recommended death.
- 2) "Neither the Florida Constitution nor the Eighth Amendment require Smith's sentence to be vacated."
- 3) "The fact-finding that subjected Smith to a death sentence was proven beyond a reasonable doubt."
- 4) The indictment used in Smith's case does not warrant a new penalty phase.

Defendant's successive postconviction motion was submitted within one year of the issuance of *Hurst v. Florida* and the issuance of *Hurst v. State*. The timeliness of the instant

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<sup>4</sup> 136 S. Ct. 616 (2016).

<sup>5</sup> 202 So. 3d 40 (Fla. 2016).

<sup>6</sup> 210 So. 3d 630 (Fla. 2016).

motion, therefore, turns on whether *Hurst v. Florida* and its Florida progeny have been held to apply retroactively to Defendant.

In *Mosley v. State*,<sup>7</sup> the Florida Supreme Court addressed retroactive application of *Hurst v. Florida* and *Hurst v. State* under two approaches. First, the Florida Supreme Court held that Mosley was entitled to retroactive application under the principle of fundamental fairness established in *James v. State*, 615 So. 2d 668 (Fla. 1993), because he “raised a *Ring*<sup>8</sup> claim at his first opportunity and was then rejected at every turn.”<sup>9</sup> Second, the Florida Supreme Court separately found that Mosley was entitled to retroactive application based upon a *Witt*<sup>10</sup> analysis.<sup>11</sup> Notably, Mosley’s “sentence[] of death became final *after* the United States Supreme Court decided *Ring*.”<sup>12</sup>

In contrast with the *Mosley* decision, *Asay v. State*,<sup>13</sup> issued the same day as *Mosley*, addressed retroactivity where the defendant’s judgment and sentence of death became final *before* issuance of *Ring*.<sup>14</sup> There, the Florida Supreme Court conducted a *Witt* analysis and concluded that “*Hurst* should not be applied retroactively to Asay’s case, in which the death sentence became final before the issuance of *Ring*.”<sup>15</sup> In fact, *Mosley* clarified the nature of *Asay*’s holding by stating, “[W]e 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*.”<sup>16</sup> That bright-line cutoff for retroactivity is further evidenced by the subsequent Florida

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<sup>7</sup> 41 Fla. L. Weekly S629 (Fla. Dec. 22, 2016), *reh’g denied*, SC14-2108, 2017 WL 510491 (Fla. Feb. 8, 2017).

<sup>8</sup> *Ring v. Arizona*, 536 U.S. 583 (2002).

<sup>9</sup> *Mosley*, 2016 WL 7406506 at \*19.

<sup>10</sup> *Witt v. State*, 387 So. 2d 922 (Fla. 1980).

<sup>11</sup> *Mosley*, 2016 WL 7406506 at \*19-25.

<sup>12</sup> *Id.* at \*18 (emphasis added).

<sup>13</sup> 41 Fla. L. Weekly S646 (Fla. Dec. 22, 2016), *reh’g denied*, SC16-102, 2017 WL 431741 (Fla. Feb. 1, 2017).

<sup>14</sup> 41 Fla. L. Weekly S646 (Fla. Dec. 22, 2016), *reh’g denied*, SC16-102, 2017 WL 431741 (Fla. Feb. 1, 2017).

<sup>15</sup> *Asay*, 2016 WL 7406538 at \*13.

<sup>16</sup> *Mosley*, 2016 WL 7406506 at \*18.



Supreme Court decisions in *Gaskin v. State*,<sup>17</sup> denying relief under *Hurst v. Florida* on the sole basis that Gaskin's sentence became final in 1993,<sup>18</sup> and *Bogle v. State*,<sup>19</sup> similarly denying relief under *Hurst v. Florida* on the basis that Bogle's "first-degree murder conviction and sentence of death were final in 1995, before the Supreme Court decided *Ring*."<sup>20</sup>

Notably, while expressing disagreement with the Florida Supreme Court's ruling in *Hurst v. State* and its progeny, the State essentially concedes that this Court is bound by such precedent. Thus, the Court finds—particularly since Defendant Smith's death sentence became final *after Ring* was decided and he even raised a pre-trial claim that the Florida death penalty statute was at-that-time unconstitutional under *Ring*—the constitutional principles determined in *Hurst* apply retroactively to this case. Moreover, since the Florida Supreme Court has consistently and repeatedly held "that in cases where the jury makes a non-unanimous recommendation of death, the *Hurst* error is not harmless,"<sup>21</sup> this Court finds that Defendant Smith is entitled to a new penalty phase trial in this matter. *See, e.g., Dubose v. State*, 210 So. 3d 641 (Fla. Feb. 9, 2017) (jury vote 8 to 4 for death penalty not harmless); *Jackson v. State*, 213 So. 3d 754 (Fla. March 23, 2017) (jury vote 11 to 1 for death penalty not harmless); *Kopsho v. State*, 209 So. 3d 568 (Fla. Jan. 19, 2017) (jury vote 10 to 2 for death penalty not harmless); *Hodges v. State*, 213 So. 3d 863 (Fla. March 16, 2017) (jury vote 10 to 2 for death penalty not harmless). *Cole v. State*, --- So. 3d ---, 2017 WL 2806992 (Fla. June 29, 2017) (jury vote 9 to 3 for death penalty not harmless); *Sexton v. State*, --- So. 3d ---, 2017 WL 2806993 (Fla. June 29, 2017) (jury vote 10 to 2 for death penalty not harmless); *Williams v. State*, --- So. 3d ---, 2017 WL 2806711 (Fla. June 29, 2017) (jury vote 10

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<sup>17</sup> *Gaskin v. State*, 42 Fla. L. Weekly S16, 2017 WL 224772 (Fla. Jan. 19, 2017).

<sup>18</sup> *Id.* at \*2.

<sup>19</sup> *Bogle v. State*, SC11-2403, 2017 WL 526507 (Fla. Feb. 9, 2017).

<sup>20</sup> *Id.* at \*16.

<sup>21</sup> *Dubose v. State*, 210 So. 3d 641 (Fla. Feb. 9, 2017).



to 2 for death penalty not harmless); *Bargo v. State*, --- So. 3d ---, 2017 WL 2807957 (Fla. June 29, 2017) (jury vote 10 to 2 for death penalty not harmless).

With this established, the Court rejects Defendant's assertion in Claim 2 that a life sentence should be substituted for the death sentence imposed on Count 1 in this case. The foregoing authority clearly indicates that the State is entitled to an opportunity to seek the reimposition of the death penalty under the amended death penalty scheme.

Finally, the Court rejects Defendant's contention in Claim 4 that his death sentence should be vacated based on the State's failure to procure an indictment identifying the aggravating circumstances applicable to this case. As observed in *State v. Lopez*, --- So.3d ----, 2017 WL 2350132 at \*1 (Fla 4th DCA May 31, 2017), "a long line of precedent from the Florida Supreme Court holds that aggravating factors need not be charged in an indictment." (citing *Miller v. State*, 42 So. 3d 204, 215 (Fla. 2010); *Smith v. State*, 151 So. 3d 1177, 1182-83 (Fla. 2014); *Tai A. Pham v. State*, 70 So. 3d 485, 496 (Fla. 2011); *Rogers v. State*, 957 So. 2d 538, 554 (Fla. 2007); *Coday v. State*, 946 So. 2d 988, 1006 (Fla. 2006); *Porter v. Crosby*, 840 So. 2d 981, 986 (Fla. 2003); *Kormondy v. State*, 845 So. 2d 41, 54 (Fla. 2003); *Sireci v. State*, 399 So. 2d 964, 970 (Fla. 1981)).

Based on the foregoing, it is hereby,

**ORDERED AND ADJUDGED** that Defendant's Successive Motion to Vacate Sentence, filed January 5, 2017, is **GRANTED** to the extent that he has demonstrated an entitlement to the vacation of his sentence and a new penalty phase under amended death penalty statute in accordance with *Hurst v. State* and its progeny. However, the motion is **DENIED** to the extent Defendant seeks the automatic substitution of a life sentence as a remedy and/or relief based on

alleged defects in the State's indictment. Defendant has thirty (30) days within which to appeal any adverse decision issued in this order.

It is further,

**ORDERED AND ADJUDGED** that Defendant Smith's sentence of death for the first degree murder of Carlie Brucia (Count 1) is **VACATED**, and Defendant Smith shall be granted a new penalty phase trial in this matter.

Finally, it is,

**ORDERED AND ADJUDGED** that the Court will hold a case management conference in this matter before the undersigned judge on AUGUST 31, 2017, at 1:30 p.m., in Sarasota County Judicial Center Courtroom 3B. Defendant's counsel maintains the responsibility of notifying Defendant regarding any hearing(s) and drafting any orders necessary to transport Defendant for hearings.

**DONE AND ORDERED** in Chambers, in Sarasota, Sarasota County, Florida on this 12 day of July 2017.



Charles E. Roberts  
Circuit Court Judge

**CERTIFICATE OF SERVICE**

I certify that on this 12 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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