

SUPREME COURT OF FLORIDA

NOTICE OF APPEAL TRANSMITTAL FORM

WILLIAM HAROLD KELLEY

Appellant (s)

Highlands County

County/State Agency

v.

STATE OF FLORIDA

Appellee (s)

L.T. Case No.: **CR 81-535**

The accompanying notice of appeal was filed on **04 / 25 / 2017**. 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; post-conviction 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 post-conviction appeal. An electronic bookmarked record is being transmitted to the district court's FTP server contemporaneously with the notice of appeal.

Summary post-conviction appeal. The electronic record cannot be transmitted at this time but will follow within _____ days.

Non-summary post-conviction appeal. The lower tribunal clerk has has not treated the notice of as a designation to the court reporter.

RECEIVED, 05/04/2017 02:33:26 PM, Clerk, Supreme Court

- ___ 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 the 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:



Rebekah Raulerson
Rebekah Raulerson, Deputy Clerk
Highlands County Clerk's Office
(863) 402-6905

5.4.17
Date

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT IN AND FOR
HIGHLANDS COUNTY, FLORIDA

WILLIAM HAROLD KELLEY,
Defendant/Appellant,

v.

CASE NO.: CR81-0535
DIVISION: FELONY

STATE OF FLORIDA,
Plaintiff/Appellee.

_____ /

NOTICE OF APPEAL

NOTICE IS GIVEN that Defendant William Harold Kelley (“Kelley”), appeals to the Supreme Court of Florida this Court’s Order Denying Successive Motion for Postconviction Relief in Light of *Hurst v. Florida*; attached hereto as Exhibit A. This order was signed and filed on March 28, 2017.

The nature of this order is a final order in a death penalty proceeding seeking postconviction relief pursuant to Florida Rule of Criminal Procedure 3.851. *See* Art. V, § 3(b)(1), Fla. Const.; *State v. Fourth Dist. Court of Appeal*, 697 So. 2d 70, 71 (Fla. 1997) (holding that the Supreme Court has exclusive jurisdiction to review collateral proceedings in death penalty cases).

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CERTIFIED
TO BE A TRUE COPY
ROBERT W. GERMAINE, CLERK
BY Rebekah Paulson, D.C.

Dated: April 25, 2017

/s/ Kevin J. Napper

Kevin J. Napper
Florida Bar No. 656062
knapper@kevinnapperlaw.com
The Law Offices of Kevin J. Napper, P.A.
604 South Boulevard
Tampa, FL 33604
Telephone: (813) 443-8432
Facsimile: (813) 924-0499

/s/ Sylvia H. Walbolt

Sylvia H. Walbolt
Florida Bar No.: 033604
Email: swalbolt@carltonfields.com
Joseph H. Lang, Jr.
Florida Bar No.: 059404
Email: jlang@carltonfields.com
Chris S. Coutroulis
Florida Bar No. 300705
Email: ccoutroulis@carltonfields.com
E. Kelly Bittick, Jr.
Florida Bar No.: 654035
Email: kbittick@carltonfields.com

CARLTON FIELDS JORDEN BURT, P.A.
4221 West Boy Scout Blvd., Suite 1000
Tampa, FL 33607-5780
Telephone: (813) 223-7000
Facsimile: (813) 229-4133

Counsel for Appellant/ Defendant William H. Kelley

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was electronically filed using the Court's e-portal and a true and correct copy of the foregoing has been furnished via email and U.S. Mail to the following on April 25, 2017.

Pam Bondi, Attorney General
Office of the Attorney General
State of Florida
The Capital PL-01
Tallahassee, FL 32399-1050
pam.bondi@myfloridalegal.com

Carol M. Dittmar, Esq.
Sr. Assistant Attorney General
Office of the Attorney General
3507 E. Frontage Rd., Suite 200
Tampa, FL 33607
carol.dittmar@myfloridalegal.com
capapp@myfloridalegal.com

Victoria J. Avalon
Assistant State Attorney
Office of the State Attorney
10th Judicial Circuit
P.O. Box 9000, Drawer SA
Bartow, FL 33831
vavalon@sao10.com

/s/ Sylvia H. Walbolt
Sylvia H. Walbolt
FBN 033604

EXHIBIT A

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR **HIGHLANDS** COUNTY, FLORIDA

CASE NO. 1981-CF-535

STATE OF FLORIDA,
Plaintiff,

vs.

WILLIAM HAROLD KELLEY,
Defendant.

ORDER DENYING SUCCESSIVE MOTION FOR
POSTCONVICTION RELIEF IN THE LIGHT OF *HURST V. FLORIDA*

This matter came before the Court for consideration of Defendant William Harold Kelley's Successive Motion to Vacate Judgment of Conviction and Sentence, filed November 21, 2016, pursuant to Florida Rule of Criminal Procedure 3.851; *Hurst v. Florida*, 136 S.Ct. 616 (2016); and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). After reviewing the Motion, file, and record, together with the State's Response, filed December 6, 2016; the State's Motion to Dismiss, filed February 6, 2017; Defendant's Response in Opposition to Plaintiff's Motion to Dismiss, filed February 22, 2017; and State's Reply to Defendant's Response to Motion to Dismiss, filed February 24, 2017; conducting a case management conference on March 15, 2017; and considering Defendant's Supplemental Memorandum, filed March 24, 2017; this Court finds that Defendant is not entitled to relief.

Procedural History

Defendant was indicted in 1981 in the above-styled case for a murder that took place in 1966. His first trial ended in a mistrial. The second resulted in his conviction and death sentence in 1984, which the Florida Supreme Court affirmed; *Kelley v. State*, 486 So. 2d 578, 579-580 (Fla. 1986), *cert. denied*, 479 So. 2d 871 (1986).

On November 20, 1987, Mr. Kelley filed a Rule 3.850 motion, which was denied in August 1988. The Florida Supreme Court affirmed; *Kelley v. State*, 569 So. 2d 754, 756-758 (Fla. 1990).

On April 8, 1991, Mr. Kelley filed a Petition for Writ of Habeas Corpus, and the Florida Supreme Court denied relief; *Kelley v. Dugger*, 597 So. 2d 262 (Fla. 1992). The United States District Court reversed his conviction and ordered a new trial; *Kelley v. Singletary*, 222 F.Supp.2d 1357, 1363-1364 (S.D. Florida 2002). The Eleventh Circuit Court of Appeals reversed the district court and held that the conviction and sentence should stand; *Kelley v. Secretary for Department of Corrections*, 377 F. 3d 1317, 1354-1361 (11th Cir. 2004), *cert. denied*, 125 S. Ct. 2962 (2005).

In 2002, Mr. Kelley filed a successive Petition for Writ of Habeas Corpus citing *Ring v. Arizona*, 536 U.S. 584 (2002), and the Florida Supreme Court denied relief on May 4, 2004. *Kelley v. Crosby*, 874 So. 2d 1192 (Fla. 2004).

On January 17, 2006, Mr. Kelley filed a Motion for Postconviction DNA Evidence Testing pursuant to Rule 3.853, which was denied after an evidentiary hearing. The Florida Supreme Court affirmed; *Kelley v. State*, 974 So. 2d 1047 (Fla. 2007).

On May 9, 2007, Mr. Kelley filed a successive Rule 3.851 Motion, which was denied. The Florida Supreme Court affirmed; *Kelley v. State*, 3 So. 3d 970, 972 (Fla. 2009), *rev. denied*, 558 U.S. 946 (2009).

On October 17, 2014, Mr. Kelley filed another successive Rule 3.851 Motion, which was denied. The Florida Supreme Court affirmed; *Kelley v. State*, 192 So. 3d 38 (Fla. 2015).

Through collateral counsel, Mr. Kelley now alleges his death sentence must be vacated pursuant to the *Hurst* decisions because the judge, not the jury, made the factual findings required to impose his death sentence and because the jury's recommendation of death was not unanimous. He argues that these decisions are retroactive under Florida's long-established retroactivity test, set forth in *Witt v. State*, 387 So. 2d 922 (Fla. 1980); retroactivity ensures protection of the Sixth and Eighth amendment rights of Florida death row inmates; he sought timely relief after the United States Supreme Court issued *Ring v. Arizona*, 536 U.S. 584 (2002); and retroactivity should not be truncated or limited to the subset of death sentences finalized after *Ring*. He concludes that in *Hurst v. Florida*, the

United States Supreme Court overruled its prior cases, *Hildwin v. Florida*, 490 U.S. 638 (1989), and *Spaziano v. Florida*, 468 U.S. 447 (1984), which formed the basis for the Florida Supreme Court's ruling that *Ring* was not retroactive.

Mr. Kelley further alleges the errors are not harmless, because three of the eleven jurors in his case refused to recommend death and there was no way to determine which aggravators, if any, the jurors unanimously found proven beyond a reasonable doubt, whether they found the existence of any mitigating circumstances, and whether they unanimously concluded there were sufficient aggravating factors to outweigh the mitigating circumstances. He notes that one juror was released before the penalty phase, and he agreed on the record to continue with the remaining jurors, but contends he would not have done so if the sentencing decision had to be unanimous.

Finally, Mr. Kelley concludes that his death sentence violates the Eighth Amendment, because in *Hurst v. State*, the Florida Supreme Court ruled that "jury unanimity in any recommended verdict resulting in a death sentence is required under the Eighth Amendment."

In its Response, the State argues that *Hurst v. Florida* did not create or recognize a new constitutional right, holding only that Florida's procedure for imposing the death penalty violated a defendant's Sixth Amendment right to a jury trial, as that right is construed in *Ring v. Arizona*. The State further argues that neither *Hurst v. Florida* nor *Hurst v. State* have been held to apply retroactively, and *Ring v. Arizona* itself is not subject to retroactive application. *Schriro v. Summerlin*, 542 U.S. 348 (2004).

With regard to the claim of an Eighth Amendment violation, the Florida Supreme

Court has noted that while *Hurst v. State* cited both the Sixth and Eighth Amendments to the United States Constitution as a basis for the requirement of unanimity, “our basic reasoning rests on Florida’s independent constitutional right to trial by jury.” *Perry v. State*, No. SC16-547, 41 Fla. L. Weekly S449, n.4 (Fla. Oct. 14, 2016).

Notwithstanding Mr. Kelley’s arguments in favor of retroactivity, he acknowledges in the Supplemental Memorandum that on March 17, 2017, the Florida Supreme Court issued an order denying relief in *Archer v. Jones*, SC16-2111, 2017 WL 1034409 (Fla. Mar. 17, 2017), expressly stating that “*Hurst v. Florida* and *Hurst v. State* do not apply retroactively to capital defendants whose death sentences were final when *Ring v. Arizona*, 536 U.S. 584 (2002), was decided.” In the interest of preserving his claims, Mr. Kelley states in the Supplemental Memorandum:

Still unresolved, in all events, are the issues of whether *Hurst v. Florida* and *Hurst v. State* must be applied retroactively to Kelley under federal law and whether the creation of a bright-line rule based on the date *Ring* was issued is arbitrary and capricious. Kelley expressly invokes the Sixth Amendment, the Eighth Amendment, and the Fourteenth Amendment, including due process and equal protection doctrines in this regard. Given the recent development described above, Kelley will devote the rest of this memorandum to those unresolved issues under the federal constitution.

However, this Court concludes that it is bound by the Florida Supreme Court’s rulings in *Archer* as well as *Asay v. State*, No. SC16-223, 41 Fla. L. Weekly S646 (Fla. Dec. 22, 2016); *Gaskin v. State*, No. SC15-1884, 42 Fla. L. Weekly S16 (Fla. Jan. 19, 2017); *Bogle v. State*, No. SC11-2403, 2017 WL 526507 (Fla. Feb. 9, 2017); *Lambrix v. State*, SC16-8, 2017 WL 931105 (Fla. March 9, 2017); *et al.* Therefore, the Court is obliged to find that Defendant is not entitled to relief from his death sentence based on a retroactive application of *Hurst v. Florida* and *Hurst v. State*.

Based on the foregoing, it is ORDERED AND ADJUDGED:

1. The Successive Motion for Postconviction Relief is hereby DENIED.
2. Mr. Kelley may file a Notice of Appeal in writing within 30 days of the date of rendition of this Order.
3. The Clerk of Court shall promptly serve a copy of this Order upon Defendant, including an appropriate certificate of service.


DONE AND ORDERED in chambers at Orlando, Orange County, Florida this 28 day of March 2017.


FREDERICK J. LAUTEN
Chief Judge

Certificate of Service

I certify that a copy of the foregoing Order has been provided this 28th day of March 2017 via U.S. Mail / electronic mail to the following parties of record:

- Kevin J. Napper, The Law Offices of Kevin J. Napper, P.A., 604 South Boulevard, Tampa, Florida 33606, knapper@kevinapperlaw.com, lgarrett@kevinapperlaw.com.
- Sylvia H. Walbolt, Chris S. Courtoulis, E. Kelley Bittick, Joseph H. Lang, Mariko Shitama Outman, and Colton M. Peterson, Carlton Fields Jordan Burt, P.A., 4221 West Boy Scout Boulevard, Suite 1000, Tampa, Florida 33607-5736, swalbolt@carltonfields.com, ccourtoulis@carltonfields.com, kbittick@carltonfields.com, jang@carltonfields.com, jwiley@carltonfields.com, msoutman@carltonfields.com, cpeterson@carltonfields.com.
- Carol M. Dittmar, Senior Assistant Attorney General, 3507 East Frontage Road, Suite 200, Tampa, Florida 33607-7013, carol.dittmar@myfloridalegal.com and capapp@myfloridalegal.com.
- Victoria J. Avalon, Assistant State Attorney, Post Office Box 9000-SA, Bartow, Florida 33831-9000, vavalon@sao10.org.


Judicial Assistant