

FLORIDA SUPREME COURT

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

**STATE OF FLORIDA,
Plaintiff,**

CASE NO. 1992-CF-1305

vs.

**CURTIS WINDOM,
Defendant.**

_____ /

NOTICE OF APPEAL

Defendant, **CURTIS WINDOM**, takes and enters his appeal to the Supreme Court of Florida to review the Orders or Judgments of the Circuit Court of the Ninth Judicial Circuit, and any and all other rulings, or acts adverse to the Defendant in support of said judgment.

The nature of the Orders appealed from are the denial of Mr. Windom's Successive Motion to Vacate Death Sentences, filed on January 5, 2017, pursuant to Florida Rule of Criminal Procedure 3.851. The order denying relief styled **ORDER DENYING DEFENDANT'S SUCCESSIVE MOTION TO VACATE DEATH SENTENCE**, was filed on March 7, 2017. **ORDER DENYING DEFENDANT'S MOTION FOR REHEARING** was filed April 17, 2017. Jurisdiction of this appeal is properly in the Supreme Court of Florida and this appeal is timely.

All parties to said cause are hereby notified of the entry of this appeal.

05/16/2017

RECEIVED

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Notice of Appeal has been furnished by email to: Renee A. Roche, Circuit Judge, c/o Sheri Presutti, ctjaspl@ocnjcc.org; Scott A. Browne, Assistant Attorney General, Scott.Browne@myfloridalegal.com, and CapApp@myfloridalegal.com; Kenneth Nunnelley, Assistant State Attorney; kunnelley@sao9.org; and by United States Mail, first class Postage prepaid, to Curtis Windom, DOC# 368527, Union Correctional Institution, P.O. Box 1000, Raiford, Florida 32083 on this 15th day of May, 2017.

/s/ Ann Marie Mirialakis
ANN MARIE MIRIALAKIS
Florida Bar No. 0658308
Assistant CCC

/s/ Ali A. Shakoor
ALI A. SHAKOOR
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**IN THE CIRCUIT COURT OF THE NINTH
JUDICIAL CIRCUIT IN AND FOR
ORANGE COUNTY, FLORIDA**

**CASE NO: 1992-CF-001305-A-O
DIV.: 20**

STATE OF FLORIDA,

Plaintiff,

v.

CURTIS WINDOM,

Defendant.

**ORDER DENYING DEFENDANT'S SUCCESSIVE MOTION
TO VACATE DEATH SENTENCE**

THIS MATTER came before the Court on Defendant's "Successive Motion to Vacate Death Sentences," filed on January 5, 2017, pursuant to Florida Rule of Criminal Procedure 3.851. Upon review of Defendant's Motion; the State's Response filed on January 24, 2017; the case management conference held on February 20, 2017; the court file, and the record, the Court finds and concludes as follows:

Procedural History

On March 3, 1992, Defendant was charged by Indictment with 1) Murder in the First Degree, 2) Murder in the First Degree, 3) Murder in the First Degree, and 4) Attempt to Commit Murder in the First Degree. On August 28, 1992, he was found guilty as charged on all counts. He was sentenced to death on Counts 1, 2, and 3, and 22 years in the Department of Corrections, with a three-year minimum mandatory and 278 days of credit for time served, on Count 4. Each count was set to run consecutively to the others.

He appealed. The Florida Supreme Court affirmed. *Windom v. State*, 886 So. 2d 915 (Fla. 2004). The Mandate issued on April 27, 1995.

On March 20, 1997, Defendant filed a Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend. He then filed an Amended Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend on August 7, 2000, which was denied on November 1, 2001. He appealed. The Florida Supreme Court affirmed. *Windom v. State*, 886 So. 2d 915 (Fla. 2004). The Mandate issued on August 9, 2004.

On December 1, 2006, Defendant filed a Motion to Vacate Judgment and Sentence Pursuant to Rule 3.851, which was denied on May 9, 2007.

On August 21, 2007, Defendant filed a Successive Motion to Vacate Death Sentences, which was denied on January 9, 2008.

On September 27, 2013, Defendant filed another Successive Motion to Vacate Judgment Conviction and Sentence, which was stricken as legally insufficient on January 30, 2014.

On September 3, 2014, Defendant filed a *pro se* Second or Successive Motion for Postconviction Relief, which was stricken as a nullity on September 17, 2014, because Defendant was represented by counsel.

On October 15, 2014, Defendant filed a Motion for New Trial, which was denied on July 5, 2016. He appealed. This case is still active in front of the Florida Supreme Court. *Windom v. State*, SC16-1371.

On March 16, 2015, Defendant filed a *pro se* Second or Successive Motion for Postconviction Relief. On March 25, 2015, the State filed a Motion to Strike. No action has been taken on this motion.

On January 5, 2017, Defendant filed a Successive Motion to Vacate Death Sentences pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016). The State filed a Response on January 24, 2017. Defendant filed a Motion to Stay and Hold in Abeyance Successive Motion to Vacate Death Sentence, pursuant to *Tompkins v. State*, 894 So. 2d 857 (Fla. 2005), due to the pendency of his appeal before the Florida Supreme Court. This was denied on February 10, 2017. A case management conference was held on February 20, 2017.

Defendant acknowledges that the advisory panel in his case recommended death sentences by a vote of twelve to zero, but its recommendation did not contain a verdict or fact-finding. The Court found aggravating and mitigating factors and weighed them without the benefit of an individual factual determination from a jury. He thereby argues that his death sentences were imposed by the Court without a jury verdict, which is contrary to the decision found in *Perry v. State*, No. SC16-547, 41 Fla. L. Weekly S449 (Fla. Oct. 14, 2016), requiring a unanimous jury verdict recommending death before such a sentence can be imposed.

Defendant further argues that *Hurst* applies differently to two classes of defendants: those whose sentences became final after the Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428 (2002), and those who specifically preserved the *Ring* issue. Defendant

contends that he is a member of this second class of defendant and is entitled to a retroactive application of *Hurst*. He contends the Court is prohibited from arbitrarily limiting the retroactivity of *Hurst* based on its determination in *Mosley v. State*, No. SC14-436, 41 Fla. L. Weekly S629 (Fla. Dec. 22, 2016), and that the concept of partial retroactivity has no basis in precedent and “will lead to bizarre and unfair results, and would violate the Eighth and Fourteenth Amendments.” At the case management conference, counsel cited *Johnson v. State*, 205 So. 3d 1285 (Fla. 2016); *Armstrong v. State*, No. SC14-1967, 42 Fla. L. Weekly S15 (Fla. Jan. 19, 2017); and *Israel v. State*, 837 So. 2d 381 (Fla. 2002), arguing that each involved a murder which took place prior to the imposition of the *Ring* opinion, but has received the benefit of retroactivity under *Hurst*.

The State argues that *Hurst* does not affect Defendant’s death sentence as the Supreme Court did not announce that it would have retroactive application to cases on collateral review, and the Florida Supreme Court has determined it will have no impact on cases that were final when *Ring* was announced in 2002. The State cites *Asay v. State*, No. SC16-223, 41 Fla. L. Weekly S646 (Fla. Dec. 22, 2016), and *Mosley*. At the case management conference, the State argued that the denial of a development in the law decades after a crime has been committed is not unfair to a defendant.

In *Asay*, the Florida Supreme Court ruled that the right to a jury’s determination of each element of an offense is of the utmost importance. However, it determined that *Hurst* would not apply retroactively to defendants who received the death sentence before the finding in *Ring*. *Asay v. State*, No. SC16-223, 41 Fla. L. Weekly S646, at *13 (Fla. Dec. 22, 2016). The Florida Supreme Court determined that Florida’s capital sentencing statute has been unconstitutional only since the issuance of *Ring*, and therefore, *Hurst* should be retroactive from the date of the *Ring* opinion, but no earlier. *Mosley v. State*, No. SC14-436, 41 Fla. L. Weekly S629 (Fla. Dec.

22, 2016). A Motion for Rehearing on this matter was recently denied. *Mosley v. State*, SC14-436, 2017 WL 510491 (Fla. Feb. 8, 2017).¹

This Court is compelled to follow the Florida Supreme Court's ruling in cases such as *Asay* and *Bogle v. State*, No. SC11-2403, 2017 WL 526507 (Fla. Feb. 9, 2017), which find that *Hurst* does not apply to any death sentences that became final prior to the issuance of the United States Supreme Court's opinion in *Ring* on June 24, 2002. The cases Defendant cites are not comparable to the facts here. Although Defendant argues that the defendants in *Johnson* and *Armstrong* committed their offenses in 1981 and 1990, respectively, their death sentences were not finalized before the imposition of the *Ring* opinion. In *Johnson*, the defendant's sentence was not finalized until 2013, as the result of a new penalty phase. In *Armstrong*, the defendant's sentence was not finalized until 2003, as the result of a second penalty phase. Neither of these sentences were final when the *Ring* opinion was issued, and therefore they can receive the benefit of retroactivity under *Hurst*. Defendant also cites *Israel*, claiming that the defendant is "positioned to receive relief." As such relief has not been granted, it will not be considered at this time.

Defendant is not entitled to relief under any of his current claims, each of which depends on a retroactive application of the *Hurst* ruling, because his judgment and sentence became final on April 27, 1995, when the Florida Supreme Court issued its Mandate affirming the judgment and sentence imposed.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that:

1. Defendant's "Successive Motion to Vacate Death Sentences" is **DENIED**.
2. Defendant may file a notice of appeal in writing within **thirty (30) days** of the date of rendition of this Order.

¹ Not reported in So. 3d.

3. The Clerk of the 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, on the

7 day of March, 2017.


Renee A. Roche
Circuit Court Judge

Certificate of Service

E-filed I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished by ~~U. S. Mail or hand delivery~~ to **Ann Marie Mirialakis, Assistant CCRC**, and **Ali A. Shakoor, Assistant CCRC**, CCRC-Middle, 12973 N. Telecom Parkway, Temple Terrace, Florida, 33637, as counsels for Defendant; **Scott A. Browne, Assistant Attorney General**, Office of the Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, Florida 32118, and **Kenneth Nunnelley, Assistant State Attorney**, Office of the State Attorney, 415 North Orange Avenue, Orlando, Florida 32801-1546, as counsels for Plaintiff, on the 7 day of March, 2017.


Judicial Assistant



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

**CASE NO: 1992-CF-001305-A-O
DIV.: 20**

STATE OF FLORIDA,

Plaintiff,

v.

CURTIS WINDOM,

Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR REHEARING

THIS MATTER came before the Court on Defendant's "Motion for Rehearing," filed on March 21, 2017, pursuant to Florida Rule of Criminal Procedure 3.851. Upon review of Defendant's Motion, the court file, and the record, the Court finds and concludes as follows:

Defendant argues that the Court misapprehended his reason for citing *Johnson*¹ and *Armstrong*.² However, Defendant does not argue that the Court has misapprehended the law. Both *Johnson* and *Armstrong* were decided after *Ring*,³ and *Hurst*⁴ applies to both cases. Defendant's sentence was final before *Ring* and *Hurst* does not apply. Therefore, *Johnson* and *Armstrong* are distinguishable and do not assist Defendant in the way he desires.

Further, Defendant reargues issues he claims the Court failed to consider. Such arguments are not appropriately raised by a motion for rehearing. *McDonnell v. Sanford Airport Auth.*, 200 So. 3d 83, 84-85 (Fla. 5th DCA 2015). Under current case law, Defendant is not entitled to relief. As was previously stated, the Florida Supreme Court determined that the capital

¹ *Johnson v. State*, 205 So. 3d 1285 (Fla. 2016).

² *Armstrong v. State*, SC14-1967, SC15-767, 42 Fla. L. Weekly S15 (Fla. Jan. 19, 2017).

³ *Ring v. Arizona*, 536 U.S. 584 (2002).

⁴ *Hurst v. Florida*, 136 S. Ct. 616 (2016).

sentencing statute utilized in Florida has been unconstitutional only since the issuance of *Ring*, and further that *Hurst* will not be retroactively applied to cases made final prior to the date of the *Ring* opinion. *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), *reh'g denied*, SC14-2108, 2017 WL 510491 (Fla. Feb. 8, 2017).

The Court stands by its ruling and the reasons set forth in support thereof. Accordingly, a rehearing is not warranted.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that:

1. Defendant's "Motion for Rehearing" is **DENIED**.
2. Defendant may file a notice of appeal in writing within **thirty (30) days** of the date of rendition of this Order.
3. The Clerk of the 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, on the

17 day of April, 2017.



Renee A. Roche
Circuit Court Judge

Certificate of Service

I **HEREBY CERTIFY** that a true and correct copy of the foregoing Order has been furnished by U. S. Mail or hand delivery to **Ann Marie Mirialakis, Assistant CCRC**, and **Ali A. Shakoor, Assistant CCRC**, CCRC-Middle, 12973 N. Telecom Parkway, Temple Terrace, Florida, 33637, as counsels for Defendant; **Scott A. Browne, Assistant Attorney General**, Office of the Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, Florida 32118, and **Kenneth Nunnelley, Assistant State Attorney**, Office of the State Attorney, 415 North Orange Avenue, Orlando, Florida 32801-1546, as counsels for Plaintiff, on the 17 day of April, 2017.



Judicial Assistant



State of Florida, County of Orange

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I hereby certify that the foregoing is a true and correct copy of the instrument filed in this office.

Confidential or sealed items, if any, have been removed per Fla.R.Jud.Admin.2.420.

Witness my hand and official seal this 05/16/17. Tiffany M. Russell, Clerk of the Circuit Court

By: /s/ Christine Choong