

IN THE THIRTEENTH JUDICIAL CIRCUIT COURT
FOR HILLSBOROUGH COUNTY, FLORIDA

STATE OF FLORIDA
Plaintiff,

Case No.: 84-CF-013346

v.

Division: J

ROBERT JOE LONG,
Defendant.

_____ /

NOTICE OF APPEAL

NOTICE IS GIVEN that ROBERT JOE LONG, Defendant/Appellant, appeals to the Florida Supreme Court, the Order Denying Defendant's Second Successive Postconviction Motion rendered April 27, 2017.

/S/ ROBERT A. NORGARD

ROBERT A. NORGARD

I HEREBY CERTIFY a true and correct copy of the foregoing has been served electronically on the Office of the Attorney General at stephen.ake@myfloridalegal.com, to the Office of the State Attorney, at pruner_j@sao13th.com and by U.S. mail to Robert J. Long, DOC # 494041, Union Correctional Institution, P.O. Box 1000, Raiford, FL 32083 this 22nd day of May 2017.

/S/ ROBERT A. NORGARD

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Fla. Bar No. 322059

This is to certify that
the foregoing is a true
and correct copy of the
document on file in my
office. Witness my hand
and official seal this %
date%.

By: Noelia
Castro-Radilla-Reyes, D.C.



RECEIVED, 05/23/2017 08:58:33 AM, Clerk, Supreme Court

IN THE THIRTEENTH JUDICIAL CIRCUIT COURT
FOR HILLSBOROUGH COUNTY, FLORIDA
Criminal Justice and Trial Division

STATE OF FLORIDA

CASE NO.: 84-CF-013346

v.

ROBERT JOE LONG,
Defendant.

DIVISION: J

ORDER DENYING DEFENDANT'S SECOND SUCCESSIVE
POSTCONVICTION MOTION

THIS MATTER is before the Court on Defendant's Second Successive Postconviction, filed on January 3, 2017, pursuant to Florida Rule of Criminal Procedure 3.851. On January 23, 2017, the State filed its response to Defendant's motion and, on February 21, 2017, the Court held a case management conference. Defendant's claims are purely legal and do not require an evidentiary hearing. After considering Defendant's motion, the State's response, the court file and record, as well as the arguments of counsel presented during the February 21, 2017, case management conference, the Court finds as follows.

A jury found Defendant pleaded guilty to first degree murder among other charges. Following a penalty phase, the jury recommended a sentence of death by a unanimous vote of twelve to zero. On direct appeal the sentence of death was reversed and the case remanded for a new penalty phase. *See Long v. State*, 529 So. 2d 286 (Fla. 1988). Following a new penalty phase, the jury again recommended a sentence of death by a unanimous vote of twelve to zero. The trial court imposed a death sentence. The Florida Supreme Court affirmed Defendant's conviction and death sentence. *See Long v. State*, 610 So. 2d 1268 (Fla. 1992). The United States Supreme Court denied Defendant's petition for writ of certiorari on October 4, 1993. *See Long v. Florida*, 510 U.S. 832 (1993).

Defendant filed two motions for postconviction relief, which were subsequently denied, and the Florida Supreme Court affirmed the denials. *See Long v. State*, 118 So. 3d 798 (Fla. 2013); *See also Long v. State*, 183 So. 2d 342 (Fla. 2016).

In this successive motion, Defendant asserts various claims in light of the United States Supreme Court's opinion in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and the Florida Supreme Court's decisions in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016); *Perry v. State*, No. SC16-547, 2016 WL 6036982 (Fla. October 14, 2016), *Mosley v. State*, No. SC14-436 and No. SC14-2108, 2016 WL 7406506 (Fla. December 22, 2016), and *Asay v. State*, 2016 WL 7406538, No. SC16-223, No. SC16-102, No. SC16-628, 2016 WL 7406538 (Fla. December 22, 2016), and the enactment of Chapter 2016-13, Law of Florida. Defendant requests that the Court vacate his death sentence and grant a new penalty phase or sentence him to life in prison.

CLAIM I

MR. LONG'S DEATH SENTENCE STANDS IN VIOLATION OF THE SIXTH AND EIGHTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SHOULD BE VACATED

In claim I, Defendant asserts his death sentence is unconstitutional and in violation of the Sixth and Eighth Amendments of the United States Constitution. Defendant asserts *Hurst v. Florida* should be applied retroactively to his case under the *Witt*¹ analysis as well as principles of fundamental fairness. Defendant contends considerations of fairness and uniformity require retroactive application of *Hurst*, and he cites to numerous defendants whose crimes were committed before his own, but will still receive the benefit of *Hurst* because their convictions or death sentences were vacated for other reasons. Defendant cites to the dissenting opinion of Justice Lewis in *Asay* and to *James v. State*, 615 So. 2d 668 (Fla. 1993), arguing that the retroactivity of

¹ *Witt v. State*, 387 So. 2d 922 (Fla. 1980).

Hurst should be extended to those defendants who, prior to *Ring*², properly asserted, presented, and preserved *Ring*-type errors (regardless of when their death sentences became final).

Defendant further asserts that in *Hurst v. State*, the Florida Supreme Court held the Eighth Amendment requires jury unanimity in recommending a death sentence. Defendant further asserts that failure to properly inform the jury of its role violates the Eighth Amendment, and cites to *Caldwell v. Mississippi*, 472 U.S. 320 (1985). Defendant argues that failure to properly instruct the jury in this case violates the Eighth Amendment, and reflects *Hurst* error is not harmless here. Defendant also asserts the State cannot establish beyond a reasonable doubt any *Hurst* error was harmless here.

In its response, the State asserts Defendant's motion is untimely, procedurally barred and without merit. The State contends a reasonable reading of *Mosley, Asay* and *Gaskin v. State*, No. SC15-1884, 2017 WL 224772 (Fla. January 19, 2017) reflect that *Hurst v. Florida* and *Hurst v. State* do not apply retroactively to Defendant's case. The State asserts that a dissenting opinion is not binding precedent and the Court is bound by the ruling of the majority. The State further contends it does not bear the burden of proving harmless error, and any *Hurst* error here is harmless. The State requests that the Court summarily deny claim I.

The Court finds the Florida Supreme Court has held *Hurst v. Florida* and *Hurst v. State* simply do not apply retroactively to cases that were final at the time of *Ring*.³ See *Asay*, 2016 WL 7406538, at *4-13 (conducting a retroactivity analysis and concluding that *Hurst* should not be applied to defendant's case, which became final before *Ring*); *Mosley*, 2016 WL 7406506, at *18 (“[W]e have now held in *Asay v. State*, that *Hurst* does not apply retroactively to capital defendants

² *Ring v. Arizona*, 536 U.S. 584 (2002).

³ *Ring* was decided on June 24, 2002. See *Ring*, 536 U.S. at 584.

whose sentences were final before the United States Supreme Court issued its opinion in *Ring*.”); *Gaskin*, 2017 WL 224772, at *2 (citing *Asay* and finding defendant is not entitled to relief under *Hurst v. Florida* because his sentence became final in 1993); *Bogle v. State*, No. SC11-2403 and No. SC12-2465, 2017 WL 526507, *16 (Fla. February 9, 2017) (citing *Asay* and finding defendant is not “entitled to *Hurst* relief because *Hurst* does not apply to retroactively to cases that were final before *Ring* was decided.”); *Davis v. State*, No. SC16-264, 2017 WL 656307, *2 (Fla. February 17, 2017) (citing *Asay* and denying defendant’s *Hurst v. Florida* claim); *Lambrix v. State*, SC16-8 (Fla. March 9, 2017) (citing *Asay* and concluding defendant is not entitled to a new penalty phase based on *Hurst v. Florida* or *Hurst v. State*). This Court is bound by the decisions of the Florida Supreme Court.

Here, Defendant’s sentence became final when the United State Supreme Court denied certiorari on October 4, 1993. *See* Fla. R. Crim. P. 3.851(d)(1)(B) (“For purposes of this rule, a judgment is final . . . on disposition of the petition for writ of certiorari by the United States Supreme Court, if filed.”). Because Defendant’s sentence was final before *Ring* was decided, the Court finds *Hurst v. Florida* and *Hurst v. State* do not retroactively apply to the instant case.⁴ **No relief is warranted on claim I.**

CLAIM II

MR. LONG’S MUST BE SENTENCED TO LIFE

In claim II, Defendant asserts that he should be sentenced to life pursuant to the plain language of Section 775.082(2)⁵, Florida Statutes, which states that in the event the death penalty

⁴ Because the *Hurst* decisions are not retroactively applicable to Defendant’s case, the Court does not further address the issue of harmless error.

⁵ Defendant cites to Section 775.082(5), Florida Statutes, but based on his argument it appears to the Court that he is referring to Section 775.082(2).

is held to be unconstitutional the court shall resentence any defendant previously sentenced to death to a life sentence.

In its response, the State asserts that this provision only applies if capital punishment as a penalty is found to be unconstitutional. The State asserts that that has clearly not happened here, citing to the Florida Supreme Court's explanation of such in *Perry* and *Hurst v. State*. The State asserts that the Florida Supreme Court has consistently rejected similar claims.

The Court finds that the court in *Hurst v. State* explicitly stated that, "section 775.082(2) does not require commutation to life under the holding of *Hurst v. Florida*, which did *not* invalidate death as a penalty." See *Hurst v. State*, 202 So. 3d at 66 (emphasis added). **No relief is warranted on Claim II.**

CLAIM III

MR. LONG'S IS ENTITLED TO A NEW PENALTY PHASE

In claim III, Defendant asserts that he is entitled to a new penalty phase because he was tried under a death penalty statute that has been held to be unconstitutional. Defendant contends that the denial of a new penalty phase deprives him of a fair and impartial trial, effective assistance of counsel, due process, and freedom from cruel and unusual punishment under both the Florida and the United States Constitutions.

In its response, the State asserts that Defendant has cited to no legal authority which would require the Court to grant Defendant's requested relief.

As previously discussed in claim I above, the *Hurst* decisions do not retroactively apply to Defendant's case. **No relief is warranted on claim III.**

It is therefore **ORDERED AND ADJUDGED** that Defendant's Second Successive Postconviction Motion is hereby **DENIED**.

Defendant has thirty (30) days from the rendition of this Order within which to appeal.

DONE AND ORDERED in Chambers in Hillsborough County, Florida this ____ day of April, 2017.

MICHELLE SISCO
Circuit Judge

ORIGINAL SIGNED

APR 27 2017

MICHELLE SISCO
CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this order has been furnished to Robert Norgard, Esquire, Norgard, Norgard & Chastang, P.O. Box 811, Bartow, Florida 33813; Stephen D. Ake, Esquire, Office of the Attorney General, 3507 East Frontage Road, Suite 200, Tampa, FL 33607; Jay Pruner, Esquire, Office of the State Attorney, 419 North Pierce Street, Tampa, FL 33602, by U.S. mail, on this 27th day of April, 2017.



Deputy Clerk