IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16-2004-CF-730-AXXX-MA
DIVISION: CR-C

STATE OF FLORIDA

v.

PINKNEY CARTER,
Defendant.
_____/

ORDER GRANTING DEFENDANT'S RENEWED MOTION FOR POST-CONVICTION RELIEF IN LIGHT OF *HURST v. FLORIDA* AND *HURST v. STATE*, DENYING DEFENDANT'S MOTION FOR LEAVE TO REPLY, DENYING DEFENDANT'S RENEWED MOTION FOR LEAVE TO REPLY, AND DENYING DEFENDANT'S MOTION FOR SUMMARY RELIEF

This matter is before the Court upon Defendant's Renewed Motion for Post-Conviction Relief in Light of *Hurst v. Florida* and *Hurst v. State* ("Renewed Motion"), filed January 10, 2017. The State filed its Answer on February 15, 2017. The Court timely held a case management conference on March 14, 2017, at which it also heard argument on: Defendant's Motion for Leave to Reply, filed February 16, 2017; Defendant's Renewed Motion for Leave to Reply, filed March 7, 2017; and Defendant's Motion for Summary Relief, filed March 8, 2017. The Court held a second case management conference on April 19, 2017. The Court held a third case management conference on July 14, 2017, at which it expressed its concern over whether it had jurisdiction to rule on the instant Renewed Motion during the pendency of Defendant's Petition for Writ of Habeas Corpus, filed in the Florida Supreme Court on June 21, 2017 (Case Number SC17-1163). On September 13, 2017, the Florida Supreme Court granted Defendant's Motion for Voluntary Dismissal, Without Prejudice, of Petitioner's Current Habeas Corpus Proceedings.

At the March 14, 2017 case management conference and hearing, the State agreed that the facts of this matter are undisputed, and that the merits of the Renewed Motion may be addressed as a matter of law. The facts are reported in the opinion affirming Defendant's convictions and sentences, Carter v. State, 980 So. 2d 473 (Fla. 2008). Defendant was convicted of three counts of first-degree premeditated and felony murder. Carter, 980 So. 2d at 479. In the penalty phase, the jury recommended death by a vote of nine to three for the murder of Glenn Pafford, death by a vote of eight to four for the murder of Elizabeth Reed, and life imprisonment for the murder of Courtney Smith. Id. At the March 14, 2017 hearing, the State conceded that, under the current state of the law, Hurst v. State, 202 So. 3d 40 (Fla. 2016) applies retroactively to afford Defendant relief. However, the State requested a stay until it was known whether the United States Supreme Court would hear the State's petition for writ of certiorari. Alternatively, the State represented it would not object to an Order granting the Renewed Motion, but would file a motion to stay new penalty phase proceedings if the United States Supreme Court granted certiorari in the case of Florida v. Hurst, Case No. 16-998 (2016). On March 17, 2017, Defendant filed his Consent to Stay Resentencing. At the April 19, 2017 case management conference, the State confirmed its concession that, under controlling precedent, Defendant is entitled to relief.

On May 22, 2017, the United States Supreme Court denied the State's petition for writ of certiorari (Ex. "A" at 7.) Therefore, there is no longer a reason to stay a new penalty phase.

Defendant's death sentences violate the Sixth and Eighth Amendments as well as Florida Law under *Hurst v. Florida* and *Hurst v. State.*

In Hurst v. Florida, --- U.S. ---, 136 S. Ct. 616, 619 (2016), the United States Supreme Court held Florida's statute governing the imposition of the death penalty was unconstitutional to the extent that it failed to require the jury, rather than the judge, to find the facts necessary to

impose the death sentence. The jury's advisory recommendation of death was not enough. Id. Upon remand, the Florida Supreme Court held the Supreme Court's decision in Hurst v. Florida "requires that all the critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously be the jury." Hurst v. State, 202 So. 3d at 44. That court determined a jury must unanimously make the following specific findings: "the existence of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances." Id. The court also held, "the jury's recommended sentence of death must be unanimous." Id.

A. Retroactivity

In Asay v. State, 210 So. 3d 1 (Fla. 2016), the court held Hurst v. Florida is not retroactive to cases in which the conviction and sentence became final before the United States Supreme Court's decision in Ring v. Arizona, 536 U.S. 584 (2002).[1] In Asay, the court engaged in a lengthy analysis to determine whether Hurst v. Florida is retroactive.

> Applying cases retroactively is a "thorny" issue, "requiring that [this Court] resolve a conflict between two important goals of the criminal justice system ensuring finality of decisions on the one hand, and ensuring fairness and uniformity in individual cases on the other within the context of postconviction relief from a sentence of death."

Asay, 210 So. 3d at 16 (citation omitted).

The Court, relying on Witt v. State, 387 So. 2d 922 (Fla. 1980), found its analysis must focus on whether the development in the law is of fundamental significance. Asay, 210 So. 3d at 16-17. The Court considered three factors: purpose of the new rule; reliance on the old rule; and administration of justice. Id. The court found the purpose of the new rule weighs in favor of

[1] In Ring, the Court concluded that Arizona capital sentencing statute was unconstitutional "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for the imposition of death." Id. at 609.

retroactivity while reliance on the old rule and the effect on the administration of justice weigh heavily against retroactive application. Id. at 17-22. The court, weighing the factors, reasoned Hurst I should be retroactive but only to cases that became final after Ring became final on June 24, 2002. Consequently, because Asay's conviction and sentence became final in 1991, he was not entitled to relief. Id. at 22. In Mosley v. State, 209 So. 3d 1248 (Fla. 2016), applying the same analysis as it did in Asay, the court ruled that Mr. Mosley, "whose sentence was final in 2009, falls into the category of defendants who are entitled to the benefit of Hurst[v. State]." Mosley, 209 So. 3d at 1283.

This Defendant's conviction and sentence became final on October 14, 2008, when the United States Supreme Court denied Defendant's petition for certiorari. Pursuant to Asay and Mosley, Defendant has crossed the first hurdle in seeking relief pursuant to Hurst v. State. If the error is harmless, however, Defendant will not be entitled to relief.

B. Harmless Error Analysis

In Hurst v. Florida, the Court left it to the Florida Supreme Court to determine whether a defendant's sentencing error was harmless. Hurst v. Florida, 136 S. Ct. at 624. The test for harmless error focuses on the effect of the error on the trier of fact. State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986).

> The question is whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful.

Id.

In Mosley, the court explained it could not conclude the Hurst v. State error was harmless beyond a reasonable doubt because there were no written findings "to discern what mitigation the four jurors who recommended against death relied on [and] what aggravating factors, if any,

were found unanimously to be sufficient to impose a sentence of death . . . ." Mosley, 209 So. 3d at 1284; see also Durousseau v. State, 218 So. 3d 405, 414 (Fla. 2017)(reasoning that without unanimous recommendation for death, jury did not make requisite factual findings beyond reasonable doubt); cf. Kaczmar v. State, 42 Fla. L. Weekly S127a, 2017 WL 410214 at *4-5 (Fla. Jan. 31, 2017)(denying new penalty phase when jury recommendation was unanimous); Davis v. State, 207 So. 3d 142, 174 (Fla. 2016)(concluding unanimous recommendation of death establishes jury found beyond reasonable doubt there were "sufficient aggravators to outweigh the mitigating factors").

Here, the jury's recommendation of death was not unanimous. Although typically an appellate court will undertake the harmless error analysis, this Court, relying on the aforementioned cases, finds Defendant's death sentences were not harmless error. Defendant is entitled to a new penalty phase. The Court's disposition of the Renewed Motion makes the other pending motions moot.

Therefore, it is

ORDERED as follows:

1. Defendant's Renewed Motion for Post-Conviction Relief in Light of *Hurst v. Florida* and *Hurst v. State* is hereby **GRANTED** as to Counts 1 and 2 of the Indictment charging the murders of Glenn Pafford and Elizabeth Reed, respectively.

2. The sentences of death as to Counts 1 and 2 of the Indictment, charging the murders of Glenn Pafford and Elizabeth Reed, respectively, are hereby set aside, pending further proceedings.

3. This Order does not affect the life sentence imposed on Count 3 of the Indictment for the murder of Courtney Smith.

4. This Order does not affect any of the convictions on Counts 1, 2, or 3 of the Indictment.

5. Defendant's Motion for Leave to Reply and Renewed Motion for Leave to Reply are hereby **DENIED** as moot.

6. Defendant's Motion for Summary Relief is hereby **DENIED** as moot.

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida, this 4th day of October, 2017.

LANCE M. DAY, Circuit Judge

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CERTIFICATE OF SERVICE

I do certify that a copy hereof has been furnished to the persons listed above by email this _____ day of _____, 2017.

_____,
Deputy Clerk

Case No.: 16-2004-CF-730-AXXX-MA
Exhibit "A"
/bw

(ORDER LIST: 581 U.S.)

MONDAY, MAY 22, 2017

APPEAL -- SUMMARY DISPOSITION

16-865 REPUBLICAN PARTY OF LA, ET AL. V. FEC

The judgment is affirmed. Justice Thomas and Justice Gorsuch would note probable jurisdiction and set the case for oral argument.

CERTIORARI -- SUMMARY DISPOSITION

15-1139 MERRILL, ROBERT V. MERRILL, DIANE

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the Supreme Court of Arizona for further consideration in light of *Howell* v. *Howell*, 581 U.S. ____ (2017).

ORDERS IN PENDING CASES

16M127 WILLIAMS, JERRY W. V. DAVIS, DIR., TX DCJ

The motion for leave to proceed as a veteran is denied.

16M128 FONTANA, MARCUS A. V. COLORADO

16M129 JEANE, JOSEPH D. V. SERHAN, JOYCE J., ET AL.

16M130 GARMAN, LYNDA J. V. SERHAN, JOYCE J., ET AL.

The motions to direct the Clerk to file petitions for writs of certiorari out of time are denied.

16M131 GRANADOS, ALBERTO V. CROWLEY COUNTY FACILITY, ET AL.

The motion for leave to proceed as a veteran is denied. Justice Gorsuch took no part in the consideration or decision of this motion.

EXHIBIT "A"

16-687) SONOCO PRODUCTS CO., ET AL. V. MI DEPT. OF TREASURY
)
16-688) SKADDEN, ARPS, SLATE, ETC. V. MI DEPT. OF TREASURY
)
16-697) GILLETTE COMMERCIAL OPERATIONS V. MI DEPT. OF TREASURY
)
16-698) IBM CORP. V. MI DEPT. OF TREASURY
)
16-699) GOODYEAR, ET AL. V. MI DEPT. OF TREASURY
)
16-736) DIRECTV GROUP HOLDINGS V. MI DEPT. OF TREASURY

The petitions for writs of certiorari are denied. Justice Alito took no part in the consideration or decision of these petitions.

16-998 FLORIDA V. HURST, TIMOTHY L.

The motion of respondent for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is denied.

16-1241 BROADBAND ITV, INC. V. HAWAIIAN TELCOM, INC., ET AL.

The motion of US Inventor, Inc., et al. for leave to file a brief as *amici curiae* is granted. The motion of AliphCom, dba Jawbone for leave to file a brief as *amicus curiae* is granted. The petition for a writ of certiorari is denied.

16-1271 PARALLEL NETWORKS V. JENNER & BLOCK LLP

The motion of Eagle Forum Education & Legal Defense Fund for leave to file a brief as *amicus curiae* is granted. The petition for a writ of certiorari is denied.

16-8348 BOONE, THOMAS E. V. DAVIS, DIR., TX DCJ

The petition for a writ of certiorari before judgment is denied.