Appendix

A

Supreme Court of Florida

No. SC17-1269

DUSTY RAY SPENCER,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

November 8, 2018

PER CURIAM.

Dusty Ray Spencer, a prisoner under sentence of death, appeals the circuit court's order summarily denying his successive motion for postconviction relief, which was filed under Florida Rule of Criminal Procedure 3.851. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const.

Spencer was convicted of the 1992 first-degree murder of his wife, Karen Spencer. *Spencer v. State*, 645 So. 2d 377, 380 (Fla. 1994), *cert. denied*, 522 U.S. 884 (1997). The jury recommended a death sentence by a seven to five vote, and the trial judge followed the jury's recommendation and imposed a sentence of death. *Id.* We affirmed Spencer's conviction on direct appeal. *Id.* at 383. As to the death sentence, we concluded that the trial court improperly found an

aggravating factor—that the murder was cold, calculated, and premeditated—and improperly failed to consider the statutory mental mitigating circumstances of extreme disturbance and impaired capacity; thus, we vacated the death sentence and remanded the case for reconsideration of the sentence by the judge. *Id.* at 385. On remand, the trial court again imposed a sentence of death, and we affirmed the sentence. *Spencer v. State*, 691 So. 2d 1062, 1063, 1066 (Fla. 1996), *cert. denied*, 522 U.S. 884 (1997). Spencer's sentence became final in 1997 when the United States Supreme Court denied certiorari review. *See* Fla. R. Crim. P. 3.851(d)(1)(B) (stating that for the purposes of filing postconviction claims under rule 3.851, a judgment and sentence become final "on the disposition of the petition for writ of certiorari by the United States Supreme Court, if filed").

In 2003, we affirmed the denial of Spencer's initial motion for postconviction relief and denied his petition for a writ of habeas corpus. *Spencer v. State*, 842 So. 2d 52, 58 (Fla. 2003). In 2009, we affirmed the summary denial of Spencer's first successive motion for postconviction relief. *Spencer v. State*, 23 So. 3d 712 (Fla. 2009) (table). In January 2017, Spencer filed a successive motion to vacate his death sentence in light of *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State* (*Hurst*), 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017). In April 2017, the circuit court summarily denied the motion. This appeal follows. During the pendency of this case in this Court, we directed the parties to

file briefs addressing why the circuit court's order should not be affirmed based on our precedent in *Hitchcock v. State*, 226 So. 3d 216, 217 (Fla.), *cert. denied*, 138 S. Ct. 513 (2017).

In *Hitchcock*, we held that "our decision in *Asay* [*v. State*, 210 So. 3d 1, 22 (Fla. 2016), *cert. denied*, 138 S. Ct. 41 (2017),] forecloses relief" under *Hurst* for defendants whose convictions and sentences were final prior to the United States Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002). *See also Lambrix v. State*, 227 So. 3d 112, 113 (Fla.) (rejecting Lambrix's argument that the Eighth Amendment, equal protection, and due process require that *Hurst* be applied retroactively to Lambrix even though his sentences were final prior to *Ring*), *cert. denied*, 138 S. Ct. 312 (2017). Thus, because his sentence became final prior to *Ring*, Spencer is not entitled to *Hurst* relief.

Nor is Spencer entitled to relief on his other claims. Spencer's claim that he should have been entitled to have a jury reweigh the aggravation and mitigation when his case was remanded for reconsideration of the sentence by the trial judge in 1994 is untimely and procedurally barred. Spencer's assertion that his death sentence cannot withstand Eighth Amendment scrutiny because this Court's refusal to grant him *Hurst* relief is arbitrary and capricious does not present a basis for relief. This "argument is not novel and has been previously rejected by this Court." *Asay v. State*, 224 So. 3d 695, 703 (Fla. 2017). And Spencer's claim that

his death sentence violates *Caldwell v. Mississippi*, 472 U.S. 320 (1985), and the Eighth Amendment is foreclosed by our recent decision in *Reynolds v. State*, 251 So. 3d 811, 825 (Fla. 2018), *petition for cert. filed*, No. 18-5181 (U.S. July 3, 2018), in which we held that "a *Caldwell* claim based on the rights announced in *Hurst* and *Hurst v. Florida* cannot be used to retroactively invalidate the jury instructions that were proper at the time under Florida law" (citing *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994)). Accordingly, we affirm the circuit court's order summarily denying Spencer's successive motion for postconviction relief.

It is so ordered.

LEWIS, QUINCE, POLSTON, LABARGA, and LAWSON, JJ., concur.
CANADY, C.J., concurs in result.
PARIENTE, J., dissents with an opinion.

ANY MOTION FOR REHEARING OR CLARIFICATION MUST BE FILED WITHIN SEVEN DAYS. A RESPONSE TO THE MOTION FOR REHEARING/CLARIFICATION MAY BE FILED WITHIN FIVE DAYS AFTER THE FILING OF THE MOTION FOR REHEARING/CLARIFICATION. NOT FINAL UNTIL THIS TIME PERIOD EXPIRES TO FILE A REHEARING/CLARIFICATION MOTION AND, IF FILED, DETERMINED.

PARIENTE, J., dissenting.

I dissent. While I realize that this Court's precedent directs us to affirm Spencer's death sentence,[1] in my view, the combination of several critical and

1. *See Hitchcock v. State*, 226 So. 3d 216 (Fla.), *cert. denied*, 138 S. Ct. 513 (2017); *Asay v. State* (*Asay V*), 210 So. 3d 1 (Fla. 2016), *cert. denied*, 138 S. Ct. 41 (2017); *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016).

unique factors in this case mandate a new penalty phase under *Hurst*.[2] The most critical error was the complete absence of a jury in the last determination that Spencer should be sentenced to death after this Court struck the aggravating factor that the murder was committed in a cold, calculated, and premeditated manner (CCP) and remanded for reconsideration by the trial judge.

After the jury nonunanimously recommended a sentence of death by a vote of seven to five—the barest of majority—this Court determined on direct appeal that (1) the jury and trial judge, in sentencing Spencer to death, improperly considered the aggravating factor of CCP, and (2) the trial court improperly failed to consider statutory mitigation in sentencing Spencer to death. *See Spencer v. State*, 691 So. 2d 1062, 1063 (Fla. 1996); *Spencer v. State*, 645 So. 2d 377, 384 (Fla. 1994).

Based on this Court's "rejection of the CCP aggravating factor and the trial court's failure to consider the statutory mental mitigating circumstances of extreme disturbance and impaired capacity," this Court vacated Spencer's sentence of death and "remand[ed] th[e] case for reconsideration of the death sentence by the judge."

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2. *Hurst v. State* (*Hurst*), 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017); *see Hurst v. Florida*, 136 S. Ct. 616 (2016). I would further note that Spencer raised the unconstitutionality of Florida's death penalty on direct appeal in 1994—years before *Ring*—arguing that "Florida's death penalty is unconstitutional." *Spencer v. State*, 645 So. 2d 377, 384 (1994). Without discussion, this Court summarily rejected that argument. *Id.*

Spencer, 645 So. 2d at 385. Despite clear precedent that this Court should have reviewed whether striking the CCP aggravator was harmless beyond a reasonable doubt,[3] this Court did not and, instead of reversing for a new penalty phase in front of a jury, remanded for reconsideration by the trial court alone. *See Spencer*, 645 So. 2d at 384-85. After reviewing the evidence on remand, the trial judge again imposed death, finding two aggravating factors and three statutory mitigating circumstances. *Spencer*, 691 So. 2d at 1063.[4]

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3. *Williams v. State*, 967 So. 2d 735, 765 (Fla. 2007) ("When this Court strikes an aggravating factor on appeal, 'the harmless error test is applied to determine whether there is no reasonable possibility that the error affected the sentence.' " (quoting *Jennings v. State*, 782 So. 2d 853, 863 n.9 (Fla. 2001))); *see Wood v. State*, 209 So. 3d 1217, 1229 (Fla. 2017) ("[T]he CCP aggravating factor is 'one of the most serious aggravators set out in the statutory scheme.' " (quoting *Silvia v. State*, 60 So. 3d 959, 974 (Fla. 2011))); *id.* at 1233-34; *Mahn v. State*, 714 So. 2d 391, 398-99 (Fla. 1998).

4. The aggravating factors were "1) Spencer was previously convicted of a violent felony, based upon his contemporaneous convictions for aggravated assault, aggravated battery, and attempted second-degree murder; and 2) the murder was especially heinous, atrocious, or cruel (HAC)." *Spencer*, 691 So. 2d at 1063 (citing § 921.141(5)(b), (h), Fla. Stat. (1993)). The mitigating circumstances were "1) the murder was committed while Spencer was under the influence of extreme mental or emotional disturbance; 2) Spencer's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and 3) the existence of a number of nonstatutory mitigating factors in Spencer's background, including drug and alcohol abuse, paranoid personality disorder, sexual abuse by his father, honorable military record, good employment record, and ability to function in a structured environment that does not contain women." *Id.* (citing § 921.141(6)(b), (f), Fla. Stat. (1993)).

Ironically, if this Court had reversed for a new penalty phase rather than remanding the case for "reconsideration" of the aggravation and mitigation by the trial court, Spencer might be entitled to *Hurst* relief. By the time the case came back to this Court after a new penalty phase (assuming the jury's recommendation was nonunanimous), Spencer would have likely been entitled to a new penalty phase pursuant to *Hurst* under *Mosley v. State*, 209 So. 3d 1248, 1283 (Fla. 2016).[5]

Spencer's case involves the quintessential *Hurst* error—a defendant being sentenced to death without trial by jury, as guaranteed by the United States and Florida Constitutions. For these reasons, I would grant Spencer a new penalty phase.

Accordingly, I dissent.

An Appeal from the Circuit Court in and for Orange County,
A. James Craner, Judge - Case No. 481992CF000473000AOX

Maria E. DeLiberato, Interim Capital Collateral Regional Counsel, Julissa R. Fontán and Chelsea R. Shirley, Assistant Capital Collateral Regional Counsel, Middle Region, Temple Terrace, Florida,

for Appellant

Pamela Jo Bondi, Attorney General, Tallahassee, Florida, and Scott A. Browne, Senior Assistant Attorney General, Tampa, Florida,

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5. For example, James Card committed the crimes for which he was sentenced to death in 1981 and was originally sentenced to death in 1984—years before Spencer. *See Card v. State*, 803 So. 2d 613, 617 (Fla. 2001). However, because this Court granted Card a resentencing, his sentence of death did not become final until after *Ring v. Arizona*, 536 U.S. 584 (2002), and he was granted *Hurst* relief. *Card v. Jones*, 219 So. 3d 47 (Fla. 2017).

for Appellee

Appendix

B

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

CASE NO.: 1992-CF-00473-A-O

STATE OF FLORIDA,

Plaintiff,

vs.

DUSTY RAY SPENCER,

Defendant.
_____/

ORDER DENYING "SUCCESSIVE MOTION TO VACATE DEATH SENTENCE"

THIS MATTER came before the Court for consideration of Defendant's "Successive Motion to Vacate Death Sentence" filed January 9, 2017, pursuant to Florida Rule of Criminal Procedure 3.851. After reviewing the Successive Motion, the State's Response filed March 1, 2017, arguments at the Case Management Conference held April 21, 2017, the court file, and the record, the Court concludes summary denial is warranted.

PROCEDURAL HISTORY

The facts and procedural history of this case are set forth in the Florida Supreme Court's previous opinions. *See Spencer v. State*, 645 So. 2d 377, 379-80 (Fla. 1994); *Spencer v. State*, 842 So. 2d 52 (Fla. 2003); and *Spencer v. State*, 23 So. 3d 712 (Table) (Fla. 2009). Defendant's Petition for Writ of Habeas Corpus was denied by the U.S. District Court for the Middle District of Florida on September 7, 2006. Defendant filed a Notice of Appeal and Certificate of Appealability in the United States Court of Appeal for the Eleventh Circuit (Case No. 06-16503-P), which was denied. *Spencer v. Secretary, Dep't of Corrections*, 609 F. 3d 1170 (11th Cir. 2010). Defendant filed a Petition for Writ of Certiorari, which was denied. *Spencer v. McNeil*, 562 U.S. 1203 (2010).

ANALYSIS AND RULING

Claim 1: Defendant alleges his death sentence violates the Sixth Amendment under *Hurst v. Florida* and *Hurst v. State* and should be vacated. Defendant contends he is entitled to retroactive

application of both *Hurst* decisions under the *Witt* test, the fundamental fairness doctrine, and the *Hurst* error in Defendant's sentencing was not harmless beyond a reasonable doubt.

In its Response, the State argues *Hurst* does not apply retroactively to capital defendants whose convictions and sentences were final before the United States Supreme Court issued its opinion in *Ring v. Arizona*, 536 U.S. 584 (2002); therefore, Defendant's claim is procedurally barred. A rule 3.851 motion for post-conviction relief must be filed within one year of the judgment and sentence becoming final. Fla. R. Crim. P. 3.851(d). The State contends Defendant's motion is untimely and must be summarily denied.

Defendant's case became final in 1997 when the Supreme Court denied certiorari following the affirmance of his sentence on direct appeal. The Florida Supreme Court held that *Hurst v. Florida* can be retroactively applied to cases that were not final when the *Ring* opinion was issued June 24, 2002. *Mosley v. State*, Nos. SC14-436, SC14-2108, 2016 WL 7406506 (Fla. Dec. 22, 2016). Therefore, the State asserts Defendant is not entitled to relief under *Mosley*, because *Hurst* does not retroactively apply to him. The State further avers this conclusion is reinforced by the Florida Supreme Court's decision in *Asay v. State*, Nos. SC16-223, SC16-102, SC16-628, 2016 WL 7406538, *13 (Fla. Dec. 22, 2016), in which the Court held that any case in which the death sentence was final before *Ring* was decided would not receive relief based on *Hurst*. The State argues that *Asay* is controlling, and Defendant's motion must be summarily denied.

Furthermore, the State points out that despite this clear precedent from the Florida Supreme Court, Defendant alleges that the retroactivity of *Hurst* applies to two classes of defendants: those whose sentences became final after the Supreme Court issued its decision in *Ring*, and those who specifically preserved the *Ring* issue. However, the Florida Supreme Court has never held that *Hurst* is retroactive to any defendant who specifically preserved the *Ring* issue, as Defendant suggests. In fact, the Florida Supreme Court has denied retroactive application of *Hurst* to all cases that were final before *Ring* was decided. *Asay*, 2016 WL 7406538 at *4.

In *Asay*, the Court explained that the factors of the Stovall/Linkletter[1] test together, "weigh against applying *Hurst* retroactively to all death case litigation in Florida." *Id.* The Court drew a very clear distinction between cases that are retroactive and cases that are not, by using the June 24, 2002 date in which *Ring* was issued. In *Mosley*, the Court explained that it has "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*." *Mosley*, 2016 WL 7406506, *18.

Recently in *Gaskin v. State*, SC15-1884, 2017 WL 224772 (Fla. Jan. 19, 2017), the Court again denied relief in a *Hurst* claim. The Court explained that Gaskin was not entitled to relief under *Hurst* because his sentence became final in 1993. *Id.* at *2. *See also Bogle v. State*, Nos. SC11-2403, SC12-2465, 2017 WL 526507 (Fla. Feb. 9, 2017) (*Hurst* based claims rejected because Bogle's conviction and sentence were final when *Ring* was issued). Whether or not Defendant previously raised a *Ring* claim is of no consequence as to whether he is entitled to relief because his sentence was final prior to *Ring*. *Asay*, 2016 WL 7406538 at *13; *Mosley*, 2016 WL 7406506, *18; *Gaskin*, 2017 WL 224772 at *2; and *Bogle*, 2017 WL 526507 at *16. The Florida Supreme Court has set a clear rule for the retroactive application of *Hurst*, and it does not apply to Defendant.

Additionally, Defendant claims that fundamental fairness and uniformity require that *Hurst* be retroactively applied to all cases. The State argues, and the Court agrees, Defendant cannot establish his sentencing procedure was less accurate than future sentencing procedures employing the new standards announced in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). Just like *Ring* did not enhance the fairness or efficiency of death penalty procedures, neither does *Hurst*. *Johnson v. State*, 904 So. 2d 400, 409 (Fla. 2005). Because the accuracy of Defendant's death sentence is not at issue, fairness does not demand retroactive application of *Hurst v. State*.

[1] *Stovall v. Denno*, 388 U.S. 293 (1967) and *Linkletter v. Walker*, 381 U.S. 618 (1965).

As to uniformity, inherent in the concept of non-retroactivity is that some defendants will get the benefit of a new development, while other defendants will not. The Florida Supreme Court has mandated that *Hurst* be retroactive only to cases not final when *Ring* was decided, and this Court is obligated to follow the authoritative precedent of the Florida Supreme Court. Regardless, the Florida Supreme Court held that *Hurst* is not retroactive to defendants whose sentence was final when *Ring* was announced. *See Gaskin*, 2017 WL 224772 at *2 ("Because Gaskin's sentence became final in 1993, Gaskin is not entitled to relief under *Hurst v. Florida*.") (citing *Asay v. State*); *Bogle v. State*, 2017 WL 526507, at *16 (Fla. Feb. 9, 2017) (rejecting defendant's post-conviction claims "because *Hurst* does not apply retroactively to cases that were final before *Ring* was decided).

Lastly, any harmless error analysis is inapplicable in this case because the Florida Supreme Court specifically determined that *Hurst* does not apply in cases that were final prior to *Ring*. Thus, this Court is not required to determine whether any violation of *Hurst* was harmless. Accordingly, Claim 1 is denied.

Claim 2: Defendant alleges his death sentence stands in violation of the Eighth Amendment under *Hurst v. State* and should be vacated. Defendant asserts that any jury recommendation of death that is not unanimous violates the Eighth Amendment. Additionally, Defendant contends that because the State proceeded against Defendant under an unconstitutional system, the State never presented the aggravating factors as elements for the Grand Jury to consider in determining whether to indict Defendant, and that a proper indictment would require that the Grand Jury find that there were sufficient aggravating factors to go forward with a capital prosecution.

Even if the Eighth Amendment mandates unanimous jury recommendations of death, that requirement would only apply to Defendant on a retrial, and, as stated in Claim 1 above, Defendant is not entitled to retrial under *Asay*. Defendant is not entitled to retroactive application of *Hurst*. Furthermore, the Florida Supreme Court has rejected claims that aggravating factors are required to be

alleged in an indictment. *See Ferrell v. State*, 918 So. 2d 163, 180 (Fla. 2005). According, Claim 2 is denied.

Claim 3: Defendant alleges the Court denial of Defendant's prior postconviction claims must be reheard and determined under a constitutional framework. Defendant offers no authority to support his request for a rehearing of claims raised in his previous motions, nor does he specify which claims should be reheard, and this Court finds none. Defendant's prior claims were denied on the merits and affirmed by the Florida Supreme Court. Neither *Hurst* nor *Perry*[2] resurrect previously denied claims for relief. Accordingly, Claim 3 is denied.

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

1. Defendant's "Successive Motion to Vacate Death Sentence" 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 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 _____ day of April, 2017.

ORIGINAL SIGNED
APR 28 2017
A. JAMES CRANER

A. JAMES CRANER
Circuit Court Judge

[2] *Perry v. State*, 2016 WL 6036982 (Fla. October 14, 2016).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished by U.S. Mail; E-Mail, or hand delivery on this _____ day of April, 2017, to the following:

- **Julissa Fontan,** Fontan@ccmr.state.fl.us, **Maria DeLiberato,** deliberato@ccmr.state.fl.us, and **Chelsea Shirley**, Shirley@ccmr.state.fl.us, Assistant Capital Collateral Counsel - Office of the Capital Collateral Regional Counsel - Middle Region, 12973 N. Telecom Parkway, Temple Terrace, Florida 33637;
- **Scott A. Browne, Senior Assistant Attorney General,** scott.browne@myfloridalegal.com; capapp@myfloridalegal.com, Office of the Attorney General, 3507 East Frontage Road, Suite 200, Concourse Center 4, Tampa, Florida 33607-7013;
- **Kenneth Nunnelley, Assistant State Attorney**, knunnelley@sao9.org, CCF@sao9.org, 415 North Orange Avenue, Orlando, Florida 32801,

CONFORMING

APR 28 2017

JERI CASTEEL

Judicial Assistant

Appendix

C

Filing # 82101933 E-Filed 12/13/2018 05:00:56 PM

Supreme Court of Florida

THURSDAY, DECEMBER 13, 2018

CASE NO.: SC17-1269
Lower Tribunal No(s).:
481992CF000473000AOX

DUSTY RAY SPENCER vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

Appellant's Motion for Rehearing is hereby denied.

CANADY, C.J., and LEWIS, QUINCE, POLSTON, LABARGA, and LAWSON, JJ., concur.
PARIENTE, J., dissents.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

cd
Served:

KARA RENEE OTTERVANGER
MARIA E. DELIBERATO
SCOTT A. BROWNE
CHELSEA RAE SHIRLEY
JULISSA FONTÁN
HON. TIFFANY MOORE RUSSELL, CLERK
HON. A. JAMES CRANER, JUDGE
KENNETH NUNNELLEY

Appendix

D

Filing # 67022529 E-Filed 01/25/2018 11:23:05 AM

Supreme Court of Florida

THURSDAY, JANUARY 25, 2018

CASE NO.: SC17-1269
Lower Tribunal No(s).:
481992CF000473000AOX

DUSTY RAY SPENCER vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

After reviewing the responses to the order to show cause, the Court directs further briefing on the non-Hurst[1] related issues in this case. Appellant's initial brief on the merits, not to exceed twenty-five pages, is to be filed on or before Monday, February 26, 2018; appellee's answer brief on the merits, not to exceed fifteen pages, shall be filed fifteen days after service of the initial brief; and appellant's reply brief on the merits, not to exceed ten pages, shall be filed ten days after service of the answer brief.

Multiple extensions of time for the same filing are discouraged. Absent extenuating circumstances, subsequent requests may be denied.

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John A. Tomasino
Clerk, Supreme Court

1. Hurst v. State (Hurst), 202 So. 3d 40 (Fla. 2016), cert. denied, 137 S. Ct. 2161 (2017); see Hurst v. Florida, 136 S. Ct. 616 (2016); Hitchcock v. State, 226 So. 3d 216 (Fla. 2017), cert. denied, 138 S. Ct. 513 (2017).

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Test:

John A. Tomasino
Clerk, Supreme Court

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CHELSEA RAE SHIRLEY