OA 12-10-97

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,

vs.

JAMES R. HOOTMAN,
Respondent.

Case No. 91,105

REVIEW OF ORDER CERTIFIED AS REQUIRING IMMEDIATE RESOLUTION BY FLORIDA SUPREME COURT

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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TENTH JUDICIAL CIRCUIT

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CITATION OF AUTHORITIES

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Respondent would agree that petitioner's statement of the case and facts is an accurate synopsis of what transpired below.

SUMMARY OF THE ARGUMENT

The adding of another death penalty aggravator enlarges the range of cases warranting death as a punishment and thereby the penalty that can be imposed. To apply this aggravator to an offense which transpired prior to its enactment, constitutes an ex post facto violation contrary to the protections of the United States and Florida Constitutions. The amendment here is more than a procedural change. Furthermore, it cannot be said that advanced age is a long established element of the offense of first degree murder nor is it merely the refinement or extension of an existing aggravator.

ARGUMENT

ISSUE

WHETHER THE TRIAL COURT ERRED IN GRANTING HOOTMAN'S MOTION TO PROHIBIT APPLICATION OF SECTION 921.141(5)(m), FLORIDA STATUTES AND HOLDING THAT THE APPLICATION OF THE "ADVANCED AGE" AGGRAVATING FACTOR TO HOOTMAN'S CASE WOULD BE A VIOLATION OF THE EX POST FACTO CLAUSES OF BOTH THE UNITED STATES AND FLORIDA CONSTITUTIONS.

Petitioner maintains that the trial court erred in granting respondent Hootman's motion to prohibit application of section 921.141(5)(m), Fla. Stat. as an aggravator.[1] Respondent's motion sought to preclude application of 921.141(m)(5) to his case because its application would violate the ex post facto provisions of both the Florida and Federal constitutions.

The murder with which respondent Hootman was charged was alleged to have taken place on February 17th or 18th of 1996. The statutory aggravator enacted by the 1996 legislature, went into effect on May 30, 1996. Application of the new aggravator would clearly prejudice respondent as it would "attach legal consequences" to a crime committed before the new law took effect. The application of an additional statutory aggravating circumstance would substantially increase the probability that respondent would receive a death sentence, disadvantaging him in a substantive

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[1] 921.141(5)(m) Fla.Stat. - The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.

fashion.

Provisions of both the United States and Florida Constitutions[2] prohibit the state from altering the law and applying it retroactively to prior circumstances. The United States Constitution specifically prohibits the states from passing ex post facto legislation.[3] It is axiomatic that penal laws are not to be applied retroactively.

The United States Supreme Court has evoked the ex post facto provisions of the Federal Constitution to forbid not only retroactive application of laws defining or establishing **new** offenses, but also to **modifications in statutory punishment schemes** such as the sentencing guidelines. Miller v. Florida, 482 U.S. 423, 107 S. Ct. 2446, 96 L. Ed. 2d 351 (1987). The court has also applied the ex post facto provisions to Florida's statutory parole scheme. see Weaver v. Graham, 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981).

The Supreme Court of Florida has also applied the constitutional prohibitions against ex post facto laws to situations where a law "**is retrospective in effect**" and "diminishes a substantial substantive right the party would have enjoyed under the law existing at the time of the alleged offense." Dugger v. Williams, 593 So. 2d 180 (Fla. 1991). Petitioner maintains that this change in the law is merely procedural, as opposed to

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[2] Article X, section 9 provides:
Repeal or amendment of a criminal statute shall not affect prosection or punishment for any crime previously committed.

[3] Article I, section 10 of the United States Constitution

substantive, therefore there is no ex post facto violation. However, as this court stated in Williams, id.

> ... it is too simplistic to say that an ex post facto violation can occur only with regard to substantive law, not procedural law. Clearly, some procedural matters have substantive effect. Where this is so, an ex post facto violation also is possible, even though the general rule is that the ex post facto provision of the state Constitution does not apply to purely procedural matters.

There is no doubt that the prohibitions against retroactive application of penal statutes is applicable here. The Florida Supreme Court has stated that the statutory aggravators **"actually define those crimes . . . in which the death penalty is applicable."** State v. Dixon, 283 So. 2d 1 (Fla. 1973). Clearly, aggravating circumstances are part and parcel of the substantive law concerning capital offenses. Redefining or revising what constitutes a death penalty offense is a far more significant modification to the existing law than those changes involved in Miller, Weaver and Dugger, id. In essence, the legislature has changed the **proof** necessary to impose a death sentence.

Moreover, it is obvious that advanced age or disability was not a part of the denotation of a death penalty crime at the time this homicide was alleged to have occurred, therefore it cannot be constitutionally applied in respondent's **case.**

Application of 921.141 (5)(m) in this case fulfills both factors defining ex post facto laws. First, the section became effective approximately 3 months after the offense was alleged to have been committed, thus its application would have to be

retrospective. Secondly, introduction of an additional aggravating factor during the penalty phase could potentially influence the jury to recommend death instead of life imprisonment. Furthermore, the introduction of a single aggravator would allow the state to introduce "victim impact" evidence under 921,141 (7) Fla. Stat..

Looking at the issue from another perspective, Florida law requires the existence of at least one aggravating factor before a sentence of death can be imposed. This being the case, respondent could face a death sentence based upon this single aggravator, even though that aggravator did not exist at the time the offense was committed.

Petitioner cites various cases where the Florida Supreme Court found no violations of the ex post facto prohibition, even though the aggravators in question had been enacted after the commission of the offenses. Valle v. State, 581 So. 2d 40 (Fla. 1991); Hitchcock v. State, 578 So. 2d 685 (Fla. 1990) and Trotter v. State, 690 So. 2d 1234 (Fla. 1996). However, all of these cases justified their holdings on the grounds that the "new" aggravators weren't new at all, but merely refinements of an already existing factor or reiterated an element already present in the crime of premeditated or felony murder.

> . . . in this case the aggravating factor that the victim was a law enforcement officer who was murdered while performing his official duties is not an entirely new factor, and Valle is not disadvantaged by its application. At the time Valle had committed this crime the legislature had established the aggravating factors of murder to prevent lawful arrest and murder to hinder the lawful exercise of any governmental function or the enforcement of

> **laws.** Secs. 921.141(5)(e),(g), Fla.Stat. (1977) . By proving the elements of these two factors in this case, the state has essentially proven the elements necessary to prove the murder of a law enforcement aggravating factor. Valle, **id.**

In other words, the same factors could have been found pursuant to the aggravating factors already in existence.

However, 921.141 (5) (m) is neither a refinement of an existing aggravating factor nor a part of the statutory definition of homicide nor a mere procedural change. The age of the victim is an entirely new consideration. Petitioner cites the case of Muehleman v. State, 503 So. 2d 310 (Fla. 1987) and others, to substantiate its contention that age has always been considered an aggravating factor, In Muehleman, id. the prosecutor in his penalty phase argument to the jury called the victim a "feeble, sickly, 97 year old man." Defense counsel objected to this remark on the grounds it constituted an inflammatory and abusive argument by the prosecutor which improperly influenced the jurors's passions and resulted in prejudice to his case. In rejecting his claim, the Florida Supreme Court held the statements were relevant to establish several aggravating factors including: commission of the murder during the course of a robbery; avoiding lawful arrest; cold, calculated and premeditated; and heinous, atrocious and cruel. However, the fact that the victim's advanced age was a factual circumstance used to establish several long-standing aggravating factors in this particular case, it does not necessarily follow that advanced age has always been an element or an essential part of an existing aggravator or that advanced age in

itself always constitutes an aggravating circumstance.

For example, in Clark v. State, 443 So. 2d 973 (Fla. 1983) the defendant killed an elderly woman and attempted to kill her husband. This court held that:

> The trial court's fourth aggravating circumstance, **that the murder was especially** heinous, **atrocious, or** cruel, on the other hand, is insufficiently supported by the record. The murder of a disabled and defenseless elderly woman is a vile and despicable act. But under the standard set forth in State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S. Ct. 1950, 40 L. Ed. 2d 295 (1974), an especially heinous, atrocious, or cruel homicide is one where the actual commission of the capital felony was accompanied by such additional facts as to set the crime apart from the norm of capital felonies--the conscienceless or pitiless crime which is unnecessarily torturous to the victim.
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> Id. at 9. Directing a pistol shot to the head of the victim does not establish a homicide as especially heinous, atrocious, or cruel. Kampff v. State, 371 So. 2d 1007 (Fla. 1979). Although Mr. Satey testified that he heard his wife moan after being shot, there was no evidence of whether she was conscious after being shot, nor did the medical examiner **indicate how long Mrs. Satey** survived or what degree of pain, if **any, she** suffered. Although the helpless anticipation of **impending death may serve as the basis for** this aggravating factor, there is no evidence to prove that Mrs. Satey knew for more than an instant before she was shot what was about to happen to her. Similarly, as pitiable as were Mr. **Satey's** vain efforts to dissuade his attackers from harming his wife, it is the effect upon the victim herself that must be considered in determining the existence of **this aggravating factor. See Riley v. State,** 366 So. 2d at 21.

In all the capital murder cases the undersigned could find, in

addition to those noted by petitioner, where the victim was described as elderly and a death penalty aggravator or aggravators were established, all involved the additional factual circumstances of multiple stabbings, strangulation, severe beating, prolonged and tortuous deaths or a combination thereof. There was no case where the circumstance of advanced age alone constituted the basis for an aggravator. In all these cases, the circumstances of the victim's death would have warranted the finding of an aggravating factor or factors, no matter what the victim's age had been.

By enactment of the additional factor of advanced age, the legislature has enlarged the scope of murders warranting death as a penalty. If the victim is shown to be of advanced age,[4] then the aggravator is conclusively established. Furthermore, it would necessarily increase respondent's punishment from life imprisonment to death, if it were the only aggravating factor established. The trial court acted correctly in granting respondent Hootman's motion to prohibit application of 921.141(5)(m) Fla. Stat. as an aggravating factor in his case.

[4] Respondent would note that the term advanced age in itself is subject to attack for vagueness, although that specific issue was not raised in the trial court.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Candance M. Sabella, Assistant Attorney General, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this 10 day of October, 1997.

Respectfully submitted,

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