IN THE SUPREME COURT OF FLORIDA

DONTAE MORRIS,	:	
Appellant,	:	
vs.	:	Case No. SC14-1317
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

SUPPLEMENT CAPITAL REPLY BRIEF OF APPELLANT ADDRESSING *HURST v. FLORIDA*

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TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

Statutes

ARGUMENT

ISSUE

THE DECISION OF THE SUPREME COURT IN HURST DECLARING FLORIDA'S DEATH PENALTY STATUTE UNCONSTITUTIONAL MANDATES THAT APPELLANT'S SENTENCE BE COMMUTED TO LIFE IMPRISONMENT.

Appellee misconstrues Appellant's argument regarding the applicability of section 775.082(2), Florida Statutes.[1] Appellant asserts that Hurst v. Florida, 136 S.Ct. 616, 2016 WL 112683 (2016), renders section 921.141 facially invalid in the same way as Furman rendered Florida's death penalty facially invalid in 1972; therefore, section 775.082(2) applies, and Appellant's sentences must be reduced to life imprisonment. Appellee argues

[1] Appellee also claims that the issue of the applicability of Hurst is "not preserved for appellate review" because it did not appear in Appellant's Initial Brief. Appellee cites three cases in which the appellants merely alluded to issues in their briefs and did not argue them. That is not the case here. First, this case is on direct appeal, no opinion has issued, and oral arguments have not yet occurred. Second, Hurst amounted to a "sea change" in Florida capital litigation. Almost immediately after Hurst issued, Appellant moved for leave to file a supplemental brief addressing the applicability of Hurst. Third, this Court granted the motion for supplemental briefing and Appellant filed 25-page initial supplemental brief asserting the issue – meaning that the initial supplemental brief and this brief "fully brief" and fully argue the issue. Finally, everything in Appellant's supplemental briefs addresses Hurst, which did not exist until January 12, 2016. Before Hurst, Appellee would have pointed out that this Court held in dozens of cases that Ring did not apply to Florida's death penalty statute. See Page 95, Brief of Appellee, Case No. SC13-1550, Delmar Smith v. State, 170 So. 3d 745 (Fla. 2015) (stating: "Frances v. State, 970 So. 2d 806, 822 (Fla. 2007) (noting this Court had rejected Ring claims in over fifty cases)"). Therefore, Appellee's waiver argument does not make any sense in this context.

that this Court should not apply section 775.082(2) to Florida's death penalty, because the death penalty itself has not been declared unconstitutional. That was not the standard for application of the statute in 1972.

In State v. Dixon, 283 So. 2d 1 (Fla. 1973), this Court was asked to determine if the newly enacted section 941.141 (Chapter 72-724, Laws of Florida (1972)), remedied the procedural problems which rendered Florida's death penalty unconstitutional in light of Furman v. Georgia, 408 U.S. 238 (1972), as stated in Donaldson v. Sack, 265 So. 2d 499 (Fla. 1972). In Dixon, this Court explicitly stated: "[Furman] does not abolish capital punishment;" and "Capital punishment is not, Per se, violative of the Constitution of the United States (Furman v. Georgia, Supra) or of Florida."[2] Dixon, 283 So. 2d at 6-7.

Dixon held that the procedural changes enacted in section 921.141 (the "concrete safeguards") were constitutionally sufficient in light of Furman. See id. at 11 ("Having reviewed the statutes under consideration, it is the opinion of this Court that Fla. Stat. ss 775.082, 782.04 and 921.141, F.S.A., are constitutional as measured by the controlling law of this State and under the constitutional test provided by Furman v. Georgia . . . .").

Therefore, the same problem infects Florida's death penalty

[2] In Breedlove v. State, 413 So. 2d 1, 9 (Fla. 1982), this Court also declared: "Both the United States Supreme Court and this Court have found that the death penalty is not per se violative of either the federal or state constitution.") (footnotes omitted).

under Hurst – that the process and the procedures for determining death eligibility are unconstitutional. Therefore, for the same reasons as in Donaldson, Florida's death penalty statue is unconstitutional on its face.

Contrary to Appellee's argument, Donaldson, 265 So. 2d 499, was a case of statutory construction. Donaldson may have arisen by way of a petition for prohibition claiming that the circuit court lacked jurisdiction, but the Court made it clear, that in light of Furman, Florida's death penalty was unconstitutional and could not be upheld:

> We have examined every reasonable avenue to uphold the several statutes and rules insofar as they assert 'capital offense,' as we must do under the rule favoring validity unless clearly indicated otherwise. We are unable in the face of existing authorities and logic to find support for the continuance of 'capital offense' as heretofore applied. Accordingly, it must fall with the U.S. Supreme Court's holding against the death penalty as provided under present legislation. Our decision is compelled by that Court's action.

Id. at 501.

In Anderson v. State, 267 So. 2d 8 (Fla. 1972), this Court determined, upon motion by the Attorney General, that trial courts could resentence all inmates under sentence of death in absentia. It was clear that both this Court and the Attorney General agreed that the newly enacted, but not yet effective, section 775.082(2) (Ch. 72-118, effective October 1, 1972) would apply. See also Reed v. State, 267 So. 2d 70 (Fla. 1972) (holding that in light of Donaldson, the defendant's sentences had to be changed from death

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to life imprisonment). Therefore, contrary to Appellee's argument on pages 5-6, the legal reasoning for the commutation of the sentences is obvious.[3]

As in Donaldson, the unconstitutional portion of the statute cannot be severed because the judicial findings requirement is "inextricably intertwined" with the rest of the statute.

> An unconstitutional portion of a general law may be deleted and the remainder allowed to stand if the unconstitutional provision can be logically separated from the remaining provisions, i.e., if the expressed legislative purpose can be accomplished independently of those provisions which are void, if the valid and invalid provisions are not inseparable, if the Legislature would have passed one without the other, and if an act complete in itself remains after the invalid provisions are stricken.... The test remains whether the portion to be stricken is of such import that the remainder would not be complete or would cause results not contemplated by the Legislature.

Allen v. Butterworth, 756 So. 2d 52, 64 (Fla. 2000) (citing State ex rel. Boyd v. Green, 355 So.2d 789, 794-95 (Fla. 1978))[4].

Florida law requires extensive written findings of fact regarding aggravating and mitigating factors. Excising the

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[3] In its brief, Appellee argues that Anderson does not apply to this case because the case was decided before the current rules of retroactivity. This case is on direct appeal and no opinion has been filed. Therefore, Appellee's concern has no application to this case. Furthermore, by its plain language, section 775.082(2) applies to any "person previously sentenced to death for a capital felony."

[4] In Allen, this Court found that the unconstitutional provisions of the Death Penalty Reform Act were "inextricably intertwined" with all but a few remaining sections, such that the unconstitutional provisions could not be severed.

requirement that the determination of aggravating circumstances is made by the trial judge does not create a statutory mechanism for a binding jury verdict regarding any factor; therefore, without the unconstitutional judicial findings, the statute has no jury verdict as to required factors, and the statute is still unconstitutional.

Appellee also argues (on page 4 of its supplemental answer brief) that Chapter 72-118, which added the pertinent language now contained in section 775.082(2), was enacted after Furman. That is not correct. Chapter 72-118 was enacted in the 1972 Legislative session in anticipation of Furman. In Reino v. State, 352 So. 2d 853, 860-61 (Fla. 1977)[5], this Court noted that the addition occurred in March of 1972:

> As early as March, 1972, the legislature was cognizant of the possibility of the decision reached in Furman. Not only did the legislature revise the death penalty statute to be effective October 1, 1972 (Ch. 72-72, Laws of Florida), it enacted Ch. 72-118, Laws of Florida, filed in the office of the Secretary of State March 30, 1972, which amended Section 775.082, Florida Statutes, by adding a new subsection reading:
>
> > In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, a person who has been convicted of a capital felony shall be punished by life imprisonment.

Id. at 860-61. Furman was decided later, on June 29, 1972, but the statute was to take effect on October 1, 1972.

(..continued)

[5] This Court receded from Reino in Perez v. State, 545 So. 2d 1357 (Fla. 1989).

Therefore, there is no basis for Appellee's assertion that section 775.082(2) was enacted "to protect society in the event that capital punishment as a whole for capital felonies were to be deemed unconstitutional." (Appellee's Supp. Ans. Br., page 4.) It is clear that in 1972 the Legislature was not contemplating a scenario in which the Supreme Court declared the death penalty unavailable for the rape of an adult woman.

Appellee argues that the Supreme Court misinterprets Florida's law as to death eligibility. See Supp. Ans. Brief of Appellee, page 7. The Supreme Court in Hurst was correct in declaring that "the Florida sentencing statute does not make a defendant eligible for death until findings by the court that such person shall be punished by death." Hurst, 2016 WL 112683 at *6 "'A person who has been convicted of a capital felony shall be punished by death' only if an additional sentencing proceeding 'results in findings by the court that such person shall be punished by death.'" Id. at *3 (citing § 775.082(1), Fla. Stat.).

The opinions of this Court support the conclusion that death eligibility is contingent on the written findings of fact required by Florida law. For example, in finding that section 921.141 meets the requirements of Furman, this Court explained "the Legislature has chosen to reserve [the death penalty's] application to only the most aggravated and unmitigated of most serious crimes." See Dixon, 283 So. 2d at 7. "The people of Florida have designated the death penalty as an appropriate sanction for certain crimes, and in order to ensure its continued viability under our state and

federal constitutions 'the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of [the] most serious crimes.'" Jones v. State, 705 So. 2d 1364, 1366 (Fla. 1998) (citing Dixon). See also LaMarca v. State, 785 So. 2d 1209, 1216 (Fla. 2001) ("The Legislature has reserved application of the death penalty only to the most aggravated and least mitigated of the most serious crimes.").

In Dixon this court explained the legislative scheme:

> It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.

Dixon, 283 So. 2d at 10.

Appellee also argues that Ring v. Arizona, 536 U.S. 584 (2002), and Alleyne v. United States, 133 S. Ct. 2151 (2013), "recognize[] the critical distinction of an enhanced sentence supported by a prior conviction." (See Brief of Appellee, page 17). This is not accurate because neither Ring nor Alleyne addressed the distinction because the issue was not asserted by the defendants. See Ring, 536 U.S. at 598 n.4 ("No aggravating circumstance related to past convictions in his case; Ring therefore does not challenge Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), which held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence."); Alleyne, 133

S.Ct. at 2160 n.1 ("In Almendarez-Torres . . . we recognized a narrow exception to this general rule for the fact of a prior conviction. Because the parties do not contest that decision's vitality, we do not revisit it for purposes of our decision today."). Similarly, the issue was not presented in Hurst, and Hurst does not carve out an exception for aggravators involving a prior (or contemporaneous) convictions.

On pages 7-8 Appellee argues that the Supreme Court has recently denied certiorari in two Florida cases involving prior violent felony aggravators. However, this Court should not read anything into the Supreme Court's denial of certiorari because the Supreme Court denied certiorari of Florida Ring issues for the 13 years between Ring and the grant of certiorari in Hurst. It is clear that the 13-year denial of certiorari did not mean Ring would not apply to Florida.

Appellee also cites Kansas v. Carr, 2016 WL 228342 (January 20, 2016), in support of its argument that mitigating circumstances are not "facts." The Kansas statute under consideration in Carr (§ 21-4624(e), repealed) provided for actual "jury sentencing" along with jury findings regarding the aggravating circumstances.[6] Therefore, unlike in Florida, there

[6] The Kansas statute provided:

> If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in K.S.A. 21-4625 and amendments thereto exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating

was a specific binding jury finding as to both the aggravating factors and the finding that the aggravating factors are not outweighed by any mitigating circumstances found to exist. Also, the Kansas law did not require written findings regarding mitigating circumstances as does Florida.

Furthermore, the issue of whether jury findings regarding mitigating circumstances are "factual" findings was not the issue in Carr. Instead, the Court was asked to determine whether the Constitution required the sentencing court to instruct the jury that mitigating circumstances "need not be proved beyond a reasonable doubt." In Florida it is clear that statutory mitigating circumstances are "facts" which can be determined by jury verdict just as aggravators now have to be. Similarly, as the sentencing order in this case and in other cases shows, the factfinder certainly determines whether or not certain mitigating

(..continued)

> circumstances which are found to exist, the defendant shall be sentenced to death; otherwise, the defendant shall be sentenced as provided by law.

State v. Scott, 183 P.3d 801, 827 (Kan. 2008). See also Kansas v. Marsh, 548 U.S. 163, 166 (2006) ("The jury found beyond a reasonable doubt the existence of three aggravating circumstances, and that those circumstances were not outweighed by any mitigating circumstances. On the basis of those findings, the jury sentenced Marsh to death for the capital murder of M.P."); State v. Kleypas, 40 P.3d 139, 253 (Kan. 2001) ("K.S.A. 21-4624(e) requires the jury, if its verdict is a unanimous recommendation of death, to designate in writing the statutory aggravating circumstances it found beyond a reasonable doubt. K.S.A. 21-4624(f) directs the trial court to review the jury verdict of death to determine whether the verdict is supported by the evidence.").

facts exist.[7] ("It would be possible, of course, to instruct the jury that the facts establishing mitigating circumstances need only be proved by a preponderance, leaving the judgment whether those facts are indeed mitigating, and whether they outweigh the aggravators, to the jury's discretion without a standard of proof." Carr, 136 S. Ct. 633.) Certainly, factual findings regarding mitigators are no more nebulous than a factual finding of HAC or CCP.

On page 12 Appellee makes the unequivocal claim that "[d]eath is presumptively the appropriate sentence." Contrary to Appellee's argument, State v. Dixon, 283 So. 2d 1 (Fla. 1973), actually states:

> When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence **unless it or they are overridden by one or more of the mitigating circumstances provided in Fla. Stat. s 921.141(7), F.S.A.** All evidence of mitigating circumstances may be considered by the judge or jury.

Id. at 9 (emphasis added). In Dixon, this Court wrote: "The aggravating circumstances of Fla. Stat. s 921.141(6) . . . actually define those crimes . . . to which the death penalty is applicable **in the absence of mitigating circumstances**." Id. (emphasis added).

Therefore, even when aggravators are present, death is not presumed, and the death penalty is only "applicable" when no mitigating circumstances are present. Also, as explained on page

[7] In this case, the trial judge found 22 mitigating

18 of Appellant's Initial Supplemental Brief, the presence of a single aggravator, even if it is a prior violent felony aggravator, does not compel a death sentence.[8] See Besaraba v. State, 656 So.2d 441, 446-47 (Fla. 1995) (finding the death sentence disproportionate where defendant's sole aggravator was a prior violent felony); Jorgenson v. State, 714 So. 2d 423, 425, 428 (Fla. 1998) (finding death disproportionate where the sole aggravator consisted of a prior conviction for second-degree murder).

In this case, one of the aggravating circumstances upon which the judge relied was that the victims were law enforcement officers engaged in the performance of their official duties. Appellee argues that the aggravator was "uncontested"; however, there is no exception in Hurst for "uncontested" aggravators. Hurst found that the fact that Hurst did not contest that a robbery occurred did not mean that he admitted that the aggravator (that the crime was committed during the course of a robbery) was proven. See Hurst.

Although Washington v. Recuenco, 548 U.S. 212, 222 (2006), held that the failure to submit a sentencing factor to the jury, like failure to submit an element to the jury, was not

(..continued)
circumstances.

[8] State v. Steele, 921 So. 2d 538, 543 (Fla. 2005), indicates only that the death penalty is not available without a finding of one or more aggravators. However, as explained in Hurst, death eligibility in Florida is not determined until factual findings are made as to aggravators and mitigators, and the mitigation is weighed against the aggravators.

"structural error," the Court did not hold that the error was harmless. The Court remanded the case for the trial court to determine if the error was harmless. On remand, the Washington Supreme Court held that under state law, harmless error analysis did not apply when the court imposes a "firearm" enhancement when the jury returned a verdict that the defendant possessed only a "deadly weapon," because the charging document specified "deadly weapon" and the State did not prove the gun was "operable." State v. Recuenco, 180 P.3d 1276 (Wash. 2008). Also, the error in Recuenco did not render an entire statutory sentencing scheme unconstitutional.

Also, the harmless error test of Recuenco cannot be applied in this case because Florida's death penalty statute is unlike the simple enhancement statute in Recuenco. As explained on pages 17-18 of Appellant's Initial Supplemental Brief, Florida is a "weighing state" – mitigation must be weighed against aggravating circumstances. Florida has never required just "one aggravator" or even any specific number of aggravating circumstances. Instead, the statute requires a finding that "sufficient aggravating circumstances exist," which then must be weighed against the mitigators before death selection can take place.

Therefore, for the reasons in Appellant's Supplemental Briefs, Appellant's should be resentenced to life imprisonment on both counts.

CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to the Attorney General's Office at capappTPA@myfloridalegal.com, through the Court's portal, on this 29th day of January, 2016.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

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