IN THE SUPREME COURT OF FLORIDA

LEON DAVIS, JR.,

Appellant/Cross-Appellee,

vs. Case No. SC11-1122

STATE OF FLORIDA,

Appellee/Cross-Appellant.

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

SUPPLEMENTAL REPLY BRIEF OF APPELLANT ADDRESSING HURST V. FLORIDA

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Issue IV - FLORIDA'S CAPITAL SENTENCING SCHEME IS CONSTITUTIONALLY INVALID [ADDRESSING THE IMPACT OF HURST V. FLORIDA]

The state's entire argument that either Hurst v. Florida, 136 S.Ct. 616 (2016) doesn't apply to Davis and no Sixth Amendment error occurred (see state's answer brief [SB], p.1, 16-18) or that "any potential Sixth Amendment error would be harmless beyond any reasonable doubt, given the fact of a jury finding supporting the prior violent felony aggravator" (SB 1) is premised on its recycled theory that the existence of a single aggravator automatically makes a defendant eligible for a death sentence (SB 1,6-8, 17-18) and that whenever there is one aggravator "[d]eath is presumptively the appropriate sentence" (SB 13). The state quotes State v. Steele, 921 So.2d 538, 543 (Fla. 2005) for the unremarkable proposition that "[t]o obtain a death sentence, the State must prove beyond a reasonable doubt at least one aggravating circumstance." That, of course, is true; a death sentence is never permissible if there are no aggravators. See, e.g. Banda v. State, 536 So.2d 221, 225 (Fla. 1988). But that is a far cry from the converse proposition insisted upon by the state; i.e., that one aggravator automatically makes a defendant death-eligible. [In fact, under Florida law, death is presumptively an inappropriate sentence where there is only one aggravator, unless it is an especially egregious aggravator on the facts of the case, or unless the mitigating evidence is insubstantial. See, e.g., Yacob v. State, 136 So.3d 539, 551 (Fla.2014); Nibert v. State, 574 So.2d 1059, 1063 (Fla. 1990).

The state seems to be dreaming that Hurst merely found Florida's death penalty scheme unconstitutional as applied to Timothy Lee Hurst:

> There is no reading of Hurst which suggests that a Sixth Amendment violation necessarily occurs in every case where the statute is followed. In considering whether a new sentencing proceeding may be required by Hurst, in a pending pipeline case, this Court needs to determine whether Sixth Amendment error occurred on the facts of that particular case; ...

(SB 16-17)

The state's pinched interpretation (which is not much different from the one it advanced before Hurst) is illogical and unsupportable. If the United States Supreme Court had thought that the Florida judicial factfinding scheme was sufficient to satisfy the Sixth Amendment in those cases (which constitute an overwhelming majority of Florida's death penalty cases) where - - for example - - the defendant has a prior violent felony conviction; or a contemporaneous conviction; or the homicide was committed in the course of an underlying felony; or there is a victim-status aggravator (e.g., law enforcement officer; child under 12); or a defendant-status aggravator (e.g., under sentence of imprisonment; under a domestic violence injunction), the Court could easily have held that the Florida scheme was unconstitutional as applied to Mr. Hurst. See, e.g., United States v. National Treasury Employees Union, 513 U.S. 454,478 (1995); Texas v. Johnson, 491 U.S. 397, 403 n.3 (1989). Instead, the Court, by an 8-1 vote, clearly and unequivocally held that Florida's death penalty scheme is unconstitutional. "We hold this sentencing scheme is unconstitutional. The Sixth Amendment requires a jury,

not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough". Hurst, 136 S.Ct. at 619, see also 622. Even the lone dissenter, Justice Alito, characterized the Court's decision as "striking down Florida's capital sentencing system". 136 S.Ct. at 625.

The state also completely ignores the fact that Florida is a weighing state. As explained in Jennings v. McDonough, 490 F.3d 1230, 1249 n.14 (11th Cir.2007)(a federal habeas decision in a Florida capital case):

> A weighing state is one in which the legislative narrowing of death-eligible defendants and the individualized sentencing determination are collapsed into a single step and based on an evaluation of the same sentencing factors. See Brown v. Sanders, 546 U.S. 212, 126 S.Ct. 884, 890, 163 L.Ed.2d 723 (2006). In order to ensure that the process satisfies the constitutionally mandated narrowing functions, all aggravators must be defined by the statute and must identify "distinct and particular aggravating features." *Id.* In a nonweighing state, however, eligibility and the actual sentence are determined separately. This, once eligibility has been determined, the sentencer in a nonweighing state can give aggravating weight to all the facts and circumstances of the crime, not just those that are statutorily defined, without violating the narrowing requirement. *Id.*

Thus, the state's repeated assertion that the existence of a single aggravator makes Hurst inapplicable, or renders Hurst error harmless, either incorrectly treats Florida as a nonweighing system, or incorrectly assumes that there is no difference between the two systems in determining death-eligibility.

Moreover, in nonweighing states the eligibility-determining aggravators are typically fewer and narrower than the aggravating factors (not necessarily limited by statute) which may be considered in the (separate) selection phase. They are also fewer and

narrower than the sixteen aggravating factors (ten of which have been added after the statute was originally enacted) which are provided in the Florida statute. See State v. Steele, 921 So.2d at 543. Very few individuals convicted of first-degree murder in Florida will not have at least one aggravator[1] ; therefore - - under the state's concept - - almost every capital defendant will be death-eligible, and Hurst will apply to almost nobody (or else will be universally "harmless"). The only way that Florida's list of aggravators can satisfy the constitutional requirement of genuinely narrowing the class of persons convicted of first-degree murder who are eligible for the death penalty if it is the totality of the aggravators, as weighed against the mitigators, which makes a defendant death-eligible. And that is what Florida law has always provided, and that is the reason for the requirements that sufficient aggravating circumstances (plural) exist to warrant a death sentence, and that the aggravating circumstances (plural) are not outweighed by the mitigating circumstances.

The state's "single aggravator" argument, if accepted, would convert Florida into a de facto nonweighing state and would put this state's entire capital sentencing scheme - - once again - -

[1] Retired Circuit Judge O.H. Eaton, Jr. - - one of Florida's most experienced trial judges in death penalty cases, and who teaches other judges the death penalty course mandated by the Rule of Judicial Administration [see Aguirre-Jarquin v. State, 9 So.3d 593, 611 (Fla.2009)(Pariente, J., specially concurring)] - - speaking before a Senate Criminal Justice Committee workshop on January 27, 2016, referred to what he called "aggravator creep" and said it would be hard to imagine a Florida first degree murder case without at least one aggravator. Judge Eaton was engaging in slight hyperbole; you can imagine such a case and if you look hard enough you can find some. But they are few and far between.

at risk. See Jones v. State, 705 So.2d 1364, 1366 (Fla. 1998)("in order to ensure [the death penalty's] continued viability under our state and federal constitutions "the legislature has chosen to reserve its application to only the most aggravated and unmitigated of first degree murders").

The state's reliance on Kansas v. Carr, 136 S.Ct 633 (2016)(SB 8, 11-12) is misplaced. The Kansas statute under consideration in Carr provided for jury findings and jury weighing of the aggravating and mitigating factors. See State v. Kleypas, 40 P.3d 139, 253 (Kan.2001). 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."). Moreover, Carr does not even involve a Sixth Amendment issue; the question there was whether the Eighth Amendment required a jury instruction that mitigating circumstances need not be proved beyond a reasonable doubt. In State v. Gleason, 329 P.3d 1102, 1147 (Kan.2014) - - one of the two decisions reversed by the U.S. Supreme Court on the instructional issue - - "the jury found the existence of all four aggravating circumstances alleged by the state beyond a reasonable doubt, determined the aggravating circumstances were not outweighed by any mitigating circumstances, and unanimously agreed to sentence Gleason to death."

The state argues that the facts of this case "overwhelmingly demand imposition of the death penalty" (SB 19) and that "[n]o reasonable factfinder could disagree with the weighing decision eloquently outlined in the trial court's sentencing order" (SB 19). No matter how "overwhelming" the state thinks the facts demanding death might be (and it will be interesting to see which cases the state doesn't think that is true of), and no matter how eloquently the state thinks the trial court's findings were expressed, Florida was required by the Sixth Amendment to base Davis' death sentence on the jury's verdict, not the judge's factfinding. Hurst, 136 S.Ct. at 624. Simply put, the required findings were made by the wrong entity, and that Sixth Amendment violation cannot be written off as "harmless" by the state's self-serving assertion that the right entity would have made the same findings. Sullivan v. Louisiana, 508 U.S. 275(1993).

The state's attempt to equate the trial-like factfinding necessary to establish and weigh aggravating and mitigating circumstances in a death penalty case with noncapital sentencing enhancement findings (which typically involve a single, often uncontested or uncontestable, fact like "is it a gun?", "is it within 1000 feet of a school?"; "was the victim 65 years old?") is forced at best. A death sentence imposed without any of the required jury findings is in no way comparable to a jury instruction which omits an uncontested or uncontestable element of a noncapital offense (Neder v. United States, 527 U.S.1 (1999)) or a special verdict form (proposed by the defense) which omits an uncontested or uncontestable noncapital sentencing enhancement

factor (Washington v. Recuenco, 548 U.S. 212 (2006); see also Galindez v. State, 995 So.2d 517, 521-24 (Fla. 2007). Instead, the framework of Davis' penalty trial was affected by the Sixth Amendment violations resulting from Florida's constitutionally invalid capital sentencing scheme, and Justice Scalia's reasoning (for a unanimous Court) in Sullivan controls. In the absence of a verdict (and a nonunanimous advisory recommendation will not suffice), "harmless error" analysis cannot be premised on what the state thinks "any reasonable factfinder" would have done, or how eloquent the state thinks the wrong factfinder might have been. Nor can a reviewing court determine beyond a reasonable doubt what the verdict would have been had there been a verdict. Sullivan.

In concluding that constitutional errors which affect the framework of a trial are structural and are not susceptible to harmless error review, Sullivan not only establishes an exception to the general rule of Chapman v. California, 386 U.S. 18 (1967) that most constitutional errors can be reviewed to determine whether they were harmless beyond a reasonable doubt, but Sullivan - - as Justice Scalia explained - - is also a logical outgrowth of Chapman itself. 508 U.S. at 280. Where "there has been no jury verdict within the meaning of the Sixth Amendment, the entire premise of Chapman review is simply absent." 508 U.S. at 280. The constitutionally invalid allocation of the factfinding role under the pre-Hurst Florida capital sentencing scheme precludes a reviewing court from applying the "harmless error" test urged by the state; i.e., "No reasonable factfinder could disagree with the weighing decision eloquently outlined in the trial court's sen-

tencing order" (SB 19). To conclude that the Hurst errors were "harmless" on the theory advocated by the state would amount to a prohibited directed verdict of death.

Interspersed throughout the state's brief is the contention that Section §775.082(2), Florida Statutes, does not apply because Hurst did not declare the death penalty unconstitutional per se (SB 1-5,14-17). The state's interpretation is wrong, especially when considered in light of the history of that statutory provision, and in light of the rule of lenity.

Just as in 1972, when a previous incarnation of Florida's death penalty scheme was declared unconstitutional after Furman v. Georgia, 408 U.S. 238 (1972) in Donaldson v. Sack, 265 So.2d 499 (Fla.1972), Florida Statutes §775.082(2) sets forth the maximum (and mandatory) sentence which must now be imposed; life imprisonment.

The United States Supreme Court, by an 8-1 vote in Hurst v. Florida, 136 S.Ct. 616 (2016), clearly and unequivocally held that Florida's death penalty scheme is unconstitutional. §775.082(2), enacted by the Florida legislature in March 1972 in anticipation of the Furman decision[2], provides that "[i]n 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, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought

[2] See Reino v. State, 352 So.2d 853,860 (Fla.1977), receded from in part on other grounds in Perez v. State, 545 So.2d 157,158 (Fla.1989).

before the court and the court shall sentence such person to life imprisonment as provided in subsection (1)." And that is exactly what happened after Furman and Donaldson. See Anderson v. State, 267 So.2d 8 (Fla.1972)(lists of defendants at 10); In re Baker, 267 So.2d 331 (Fla.1972)(lists of defendants at 332-34, notes 1,2, and 3). In fact, it was the position of the Attorney General that the numerous death sentences were illegal and the defendants should be resentenced to life imprisonment. Anderson, 267 So.2d at 9; Baker, 267 So.2d at 332. Due to the logistical and public safety problems of transporting that many prisoners, this Court -- exercising its "inherent powers" authority - - chose to itself "correct the illegal sentences previously imposed without returning the prisoners to the trial court." Anderson, 267 So.2d at 9-10; see Baker, 267 So.2d; at 334-35.

Now, nearly 44 years later, the applicable statute is still the same[3], but the Attorney General's office is taking a much different approach; i.e., that the provision only applies when the death penalty has been declared unconstitutional per se, but does not apply when it is the death penalty statute or scheme which has been declared unconstitutional.

The state's current self-serving interpretation of §775.082(2) is mistaken. Furman didn't declare the death penalty per se unconstitutional any more than Hurst did; if it did, we

[3] The only change in the statute is a 1998 amendment which provides that no sentence of death shall be reduced to life imprisonment if a particular method of execution is declared unconstitutional. See Provenzano v. Moore, 744 So.2d 413,438-39 (Fla.1999)(Shaw, J., dissenting)(discussing a series of botched electrocutions which occurred in the 1990s before Florida switched its method to lethal injection).

wouldn't be here arguing any of this. Furman (or, more accurately Donaldson v. Sack) and Hurst each found Florida's death penalty scheme to be unconstitutional. Florida, like every other state which chose to do so, was free after Furman to rewrite its death penalty statute, and it promptly did so. In State v. Dixon, 283 So.2d 1 (Fla.1973) - - the decision in which this Court approved the legislature's new statute - - this Court emphasized that the actual one-paragraph per curiam holding and the only controlling law in Furman was that the death penalty could not constitutionally be imposed or carried out in the three cases (two from Georgia, one from Texas) before it. 283 So.2d at 6.

> Two points can, however, be gleaned from a careful reading of the nine separate opinions constituting Furman v. Georgia, Supra. First, the opinion does not abolish capital punishment, as only two justices- Mr. Justice Brennan and Mr. Justice Marshall-adopted that extreme position. The second point is a corollary to the first, and one easily drawn. The mere presence of discretion in the sentencing procedure cannot render the procedure violative of Furman v. Georgia, Supra; it was, rather, the quality of discretion and the manner in which it was applied that dictated the rule of law which constitutes Furman v. Georgia, Supra.

Dixon, 283 So.2d at 6 (emphasis supplied).

As if that weren't clear enough, the Dixon Court went on to say "Capital punishment is not, Per se, violative of the Constitution of the United States (Furman v. Georgia, Supra) or of Florida. Wilson v. State, 225 So.2d 321 (Fla.1969)"

So what is the purported distinction between Furman and Hurst for purposes of applying the mandate of §775.082(2)? Is it that one found that Florida's old death penalty scheme violated the Eighth Amendment while the other found that Florida's current death penalty scheme violates the Sixth Amendment? §775.082(2)

makes no such distinction.

Davis does not concede that there is any ambiguity in whether §775.082(2) applies when the death penalty statute is declared unconstitutional or whether the death penalty is per se unconstitutional - - nobody seemed to perceive any ambiguity after Furman and Donaldson. But even assuming for the sake of argument that §775.082(2) were subject to each of those interpretations, it is a basic rule of construction under Florida law that any ambiguity in a penal statute must be construed in the manner most favor-able to the defendant; not in the manner most favorable to the state. See, e.g., Reino v. State, supra, 352 So.2d at 860. This principle has been codified in Fla.Stat.§775.021(1) [see Wallace v. State, 860 So.2d 494,497 (Fla.4th DCA 2003)("The Legislature committed itself to the 'Rule of Lenity' in the construction of criminal statutes")], and it plainly applies to sentencing statutes as well as statutes defining crimes. A sentencing statute was at issue in Kasischke v. State, 991 So.2d 803,814 (Fla.2008), where this Court recognized that the rule of lenity "in Florida . . . is not just an interpretive tool, but a statutory directive" and (quoting State v. Byars, 823 So.2d 740,742 (Fla.2002)) "[a]ny ambiguity or situations in which statutory language is susceptible to different constructions must be resolved in favor of the person charged with an offense." (Emphasis in Kasischke opinion).

In Lamont v. State, 610 So.2d 435,437,438 (Fla.1992), this Court - - in holding that a defendant convicted of a life felony is not subject to enhanced punishment as an habitual offender - - employed the rule of lenity, noting "even if we were to find the

statute ambiguous, it must be construed in the manner most favorable to the accused." Three years later the Florida legislature amended the applicable statute to (prospectively) provide that life felonies are subject to habitual offender sentencing. See Lafleur v. State, 661 So.2d 346,349 n.1 (Fla.3d DCA 1995). This legislative action had the effect of abrogating Lamont's holding, but not its reasoning. If the legislature has previously enacted a clear statute which it doesn't like (or, as in the instant situation, one which it no longer likes), it can amend it prospectively. If the legislature has enacted an ambiguous statute which, under the rule of lenity, has been interpreted in a way it doesn't like, it can amend the statute prospectively. What the state must not be permitted to do is rely successfully on an interpretation (i.e., that §775.082(2) only applies if the death penalty is found to be per se unconstitutional) which nobody thought the statute meant when it was enacted and first applied four-plus decades ago. If the legislature had a problem with the way §775.082(2) was applied after Furman and Donaldson, it could have (prospectively) repealed or amended it upon its adoption of the newly enacted 1972 death penalty statute, or at any time thereafter for more than 43 years.

[Moreover, if the legislature believed that §775.082(2) only applied if the death penalty were to be declared unconstitutional per se, it would have had no reason to insert the 1998 exception that no death sentence shall be reduced to life imprisonment if the method of execution is held to be unconstitutional].

And it's not like the legislature didn't have reason to

anticipate that Florida's death penalty scheme was likely to be declared unconstitutional. As early as 2002, in the wake of Ring v. Arizona, 536 U.S. 584(2002), at least four members of this Court expressed serious concerns about the constitutional viability of various aspects of Florida's scheme. See Bottoson v. Moore, 833 So.2d 693,703-34 (Fla.2002)(concurring opinions of Justices Anstead, Shaw, Pariente, and Lewis). Four years later (and ten years ago) all seven members of the Court expressed similar doubts and urged the legislature to revisit the statute to (1) ensure compliance with Ring and (2) provide for at least some form of juror unanimity (and end Florida's "outlier" status in that regard). State v. Steele, 921 So.2d 538,548-56 (Fla.2006)[4]. The legislature's non-response was deafening. For fourteen years it has had plenty of opportunity to fix, or attempt to fix, the constitutional defects in Florida's death penalty scheme, and plenty of opportunity to repeal or amend §775.082(2) (prospectively, since it is a substantive penal statute), but it chose inaction. Now that the contingency which triggers §775.082(2) has actually occurred, any attempt to repeal or amend it now would be an unconstitutional ex post facto law if applied retroactively to individuals who were sentenced to death under the unconstitutional statute. See Woldt v. People, 64 P.3d 256,270-72 (Colo.2003); see also Carnell v. Texas, 529 U.S. 513,533 (2000); Thomas v. Hannigan, 6 P.3d 933,937 (Kan.App.2000).

[4] Opinion of the Court authored by Justice Cantero, joined by Justices Wells, Lewis, Quince, and Bell; concurring opinion of Justice Wells, joined by Justices Cantero and Bell; concurring and dissenting opinion of Justice Pariente, joined by Justice Anstead.

Finally, Davis would point out that of the five western states whose death penalty schemes were expressly declared unconstitutional by Ring in 2002, two of them - - Colorado and Arizona - - had "saving clauses" substantially similar to Florida's §775.082(2). The Supreme Court of Colorado held that it applied to individuals previously sentenced to death under the unconstitutional statute, and they must be resentenced to life imprisonment rather than be exposed to new death penalty resentencing trials under the newly enacted statute. Woldt v. People, supra, 64 P.3d at 258-59,262-72. The Supreme Court of Arizona reached the contrary conclusion in State v. Pandeli, 161 P.3d 557,573-74 (Ariz.2007), but it did not do so based upon any statutory interpretation that its saving clause applied only if the death penalty were found to be per se unconstitutional. Instead, the Arizona court's conclusion was based on a theory of "severability" which this Court, under well-established Florida law, cannot adopt. See Davis' supplemental initial brief, Part A, p.2-5.

The Colorado Supreme Court's decision was complicated by the fact that that state's legislature had enacted two conflicting statutes; one required the imposition of a life sentence in the event the death penalty statute was found to be unconstitutional (referred to throughout Woldt as the mandatory provision), while the other granted the court discretion to affirm the death sentences or order new penalty trials (the discretionary provision). 64 P.3d at 267. Using principles of statutory construction, the Woldt court determined that the mandatory provision must prevail. Id., at 269. In addition, affirming the death sentences on a

quasi-"harmless error" theory, based on whether the juries "implicitly found the aggravators which were found (under the unconstitutional procedure) by the three-judge panels, would place the appellate court in an impermissible (under Ring and now Hurst) factfinding role [Id., at 269-70], while returning the cases to the trial court for new jury penalty trials would raise serious ex post facto questions since, inter alia, "the mandatory provision . . . dictates life imprisonment as the remedy for this constitutional violation". Id. at 270-72.

As was done after Furman, §775.082(2) requires that individuals previously sentenced to death under the unconstitutional capital sentencing scheme be resentenced to life imprisonment.[5] This Court should either impose a life sentence on Davis [see Anderson and In re Baker], or remand for the trial court to do so.

CONCLUSION - Davis respectfully requests that this Court reverse his death sentences.

[5] Dobbert v. Florida, 432 U.S. 282 (1977) does not authorize this state to expose defendants who were previously sentenced to death under the unconstitutional statute to death penalty retrials under a newly enacted statute, for the reasons explained in State v. Rodgers, 242 S.E.2d 285 (S.C. 1978); Meller v. State, 581 P.2d 3 (Nev. 1978); State v. Lindquist, 589 P.2d 101 (Idaho 1979); State v. Collins, 370 So.2d 533 (La. 1979); Hudson v. Commonwealth, 597 S.W.2d 610 (Ky. 1980); and Commonwealth v. Story, 440 A.2d 488 (Pa. 1981).

CERTIFICATE OF SERVICE

I certify that a copy has been emailed to Assistant Attorney General Timothy Freeland, Office of the Attorney General, at capapp@myfloridalegal.com, on this 4th day of March, 2016.

Respectfully submitted,

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