IN THE SUPREME COURT OF FLORIDA

WAYNE TREACY

Petitioner,

vs.

AL LAMBERTI, as Sheriff of Broward County, Florida

Respondent.
_____/

Supreme Court Case No: SC12-647

4-DCA No.: 4D11-4645
Lower Tribunal No.: 10-6720CF10A

AMENDED PETITIONER'S JURISDICTIONAL BRIEF

ON REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL, STATE OF FLORIDA
(denial of habeas corpus – pre-trial bond)

Law Offices of Jason T. Forman, P.A.
633 South Andrews Avenue, Suite 201
Fort Lauderdale, FL 33301
(954) 527-5557
Florida Bar No. 109850
Counsel for Appellant

TABLE OF CONTENTS

TABLE OF CITATIONS

INTRODUCTION

The Petitioner seeks discretionary review of a Fourth District Court of Appeal decision denying Habeas Corpus Relief by expressly construing Article I, §14 of the Florida Constitution.

STATEMENT OF FACTS AND CASE

The Petitioner, a juvenile, is charged with attempted first-degree premeditated murder with a deadly weapon, a life felony. The Petitioner filed a Motion to Set Bond as a matter of right without considerations under *State v. Arthur*, but it was denied by the trial court. The petitioner filed a Writ of Habeas Corpus with the Fourth District Court of Appeal, Case no.: 4D10-2958, but it was denied on July 20, 2010 without a written opinion. Because there was no written opinion rendered by the Fourth District Court of Appeal, this Honorable Court had no jurisdiction to review said matter. See SC10-1861.

Subsequently, on November 8, 2011, the Fourth District Court of Appeal, via an order, granted relief to a different juvenile identically situated to the Petitioner based upon *Graham v. Florida* and its application to Article I, §14 of the Florida Constitution. *McCray v. Lambertti*, No. 4D11-3884 (Fla. 4th DCA Nov. 8, 2011).

As a result, on December 16, 2011, the Petitioner, sought the same relief granted in *McCray*, and moved the trial court for bond as a matter of right,

which was again denied. The Petitioner filed a second Petition for Writ of Habeas Corpus, including reference to the *McCray* matter which the Fourth District Court of Appeal granted in identical circumstances.

On January 25, 2012, the Fourth District Court of Appeals rendered an opinion denying the Petitioner's Writ of Habeas Corpus. See Appendix A. In reaching its opinion, the Fourth District Court of Appeal expressly construed Article I, §14 of the Florida Constitution as focusing solely on the classification of the offense to determine eligibility for pre-trial release, and not the potential severity of punishment.

Judge Polen's specially concurring opinion acknowledged that the previous relief given in McCray was improper, but recognized that "**it may well be that our Supreme Court may eventually address this issue."** A timely motion for rehearing, rehearing en banc, and motion to certify the cause to the Florida Supreme Court were filed, but was denied on March 12, 2012. This timely jurisdictional brief ensues.

SUMMARY OF ARGUMENT

The Petitioner contends that jurisdiction is appropriate because the decision of the Fourth District Court of Appeal expressly and improperly construed Article I, §14 of the Florida Constitution and the effect of the landmark U.S. Supreme

Court decision in *Graham v. Florida*.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly construes a provision of the State Constitution. See Art. V, § 3(b)(3) Fla. Const. (1980); Fla. R. App. P. 9.030 (a)(2)(A)(ii).

ARGUMENT

JURISDICTION IS APPROPRIATE BECAUSE THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IMPROPERLY AND EXPRESSLY CONSTRUES ARTICLE I, §14 OF THE FLORIDA CONSTITUTION AND THE EFFECT ON THIS PROVISION BY *GRAHAM V. FLORIDA*.

The district court improperly construed Article I, §14 of the Florida Constitution when it denied the Petitioner's Writ of Habeas Corpus finding that *Graham v. Florida*, - U.S. -, 130 S. Ct. 2011 (2010), did not entitle that the Petitioner be given a bond as a matter of right without considerations under *State v. Arthur*.[1] The District Court denied the habeas petition because it construed Article I, §14 of the Florida Constitution to focus solely on the classification of the offense, not the potential severity of punishment. See Appendix A at 3. Importantly, all of the cases that the District Court relied upon dealt with a

[1] 390 So.2d 717 (Fla. 1980).

Defendant post-conviction, not before trial.[2]

In *Graham*, the Supreme Court held that the Eighth Amendment to the United States Constitution prohibits the imposition of a life sentence without parole on a juvenile offender who committed a non-homicide offense. As such, since the Petitioner's offense is no longer punishable by life imprisonment, he, as well as other similarly situated juveniles, are entitled to bail as a matter of law.

Article I, section 14, of the Florida Constitution, Pretrial Release and Detention, provides as follows:

> Unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great, every person charged with a crime or violation of municipal or county ordinance shall be entitled to pretrial release on reasonable conditions . . .

The clear and unambiguous language of the constitution demonstrates that the Petitioner is entitled to pretrial release with reasonable conditions. The Petitioner is charged with a life felony offense, but the trial court is prohibited from imposing a sentence of life imprisonment. Florida's current sentencing scheme abolished parole and thus, a sentence of life imprisonment in prison means life in prison without parole. *Graham*, 130 S.Ct. at 2020.

---

[2] See *Batie v. State*, 534 So.2d 694 (Fla. 1988); *State v. Hogan*, 451 So.2d 844, 845 (Fla. 1984); *Florida Parole Commission v. Criner*, 642 So.2d 51 (Fla. 1st DCA 1994).

Due to the recent Supreme Court decision in *Graham*, it appears that this is a matter of first impression in the State of Florida. However, the situation presented to this Honorable Court is analogous to the situation that arose throughout the Country when the United States Supreme Court deemed the death penalty to be unconstitutional in *Furman v. Georgia*, 408 U.S. 238 (1972). **This court once opined that "it is apparent that all incidents of capital crimes, substantive as well as procedural, become inapplicable upon abolition of the death penalty".**[3]

As forecasted by Chief Justice Burger in *Furman*, the temporary abolishment of the death penalty caused confusion regarding bail, indictment, jury selection and trial procedure. *Edinger v. Metzger*, 32 Ohio App. 2d 263, 266, 290 N.E. 577, 579 (Ohio App.6 Dist. 1972); *Furman* at 92 S.Ct. 2809. Courts were divided as to whether or not judicial invalidation of the death penalty destroyed the "capital" character of offenses previously punishable by death for purposes relating to pre-trial bail, where limitation upon the right to bail was constitutionally reserved for capital offenses where proof of guilt was evident or the presumption was great.

Some jurisdictions adopted the "classification" approach, which, despite the prohibition against imposing death as a sentence, made no distinction for purposes

[3] See *Reino v. State*, 352 So.2d 853 (Fla. 1977) receded from in part on other ground by *Perez v. State*, 545 So.2d 1357 (Fla. 1989).

of entitlement to pre-trial bail, as it was the gravity of the offense, and not the penalty which could be imposed, that controlled. See, for example, *Roll v. Larson*, 30 Utah 2d 271, 516 p.2d 1392 (1973); *Hudson v. McAdory*, 268 So.2d 916 (miss. 1972); *People exrel. Dunbar v. District Court*, 179 Colo. 304, 500 P.2d 358 (1972); *People v. Anderson*, 6 Cal. 3d 628, 100 Cal. rptr. 152, 493 P.2d 880 (1972), superseded by *Cal*. *Const*., Article I, §27.

Other jurisdictions adopted the "punishment" approach, recognizing that the phrase "capital offense" is a definition of a penalty, i.e. the death penalty, rather than a definition or classification of a crime. See, for example, *State v. Johnson*,[4] 61 N.J. 351, 294 A.2d (1972); *Commonwealth v. Truesdale*, 449 Pa. 325, 296 A.2d 829 (1972); *Edinger v. Metzger*, 32 Ohio App.2d 263, 290 N.E.2d 577 (1972); *Ex parte Contella*, 485 A.W. 2d 910 (Tex.Crim.App. 1972); *Baumgarner v. Hall*, 252 Ark. 723, 506 A.W. 834 (1972); *In re Tarr*, 109 Ariz. 264, 508 P.2d 728 (1973).

However, the Florida Supreme Court was not required to decide this issue because Article I, section 14 of the Florida Constitution treated those offenses punishable by life imprisonment the same as a capital offense for the purposes of bail. *Donaldson v. Sack*, 265 So.2d 499, 504 (Fla. 1972) (constitutional and

[4] Procedurally, the facts in *State v. Johnson*, as well as in *Commonwealth v. Truesdale*, are similar to the Petitioner's case. All three Defendants were arrested and charged prior to the change of the law removing the possibility of the punishment – the death penalty, or in the Petitioner's case, life imprisonment.

statutory provision for bail do not change by elimination of "capital offense" because constitution also limits right to bail to those offenses punishable by life).

In the State of Florida, both theories have been used in determining the effect on certain issues as it relates to capital offenses. The "punishment" approach, as well as the "classification" approach, were actually both used by the Florida Supreme Court in *State v. Hogan*, 451 So.2d 844, 845 (Fla. 1984). In *Hogan*, the Court held that the Defendant, on trial for capital sexual battery, was not entitled to a trial by twelve jurors because his crime was no longer a capital offense – one where death is a possible penalty. Thus, the "punishment" approach was used for this pre-trial matter.

Interestingly, in the same *Hogan* case, the court held that sexual battery is still a "capital offense" for purposes of determining Hogan's sentence after the jury found him guilty of attempted sexual battery. Id. at 845. Thus, the "classification" approach was used post-conviction.

Numerous Florida Courts have utilized the "punishment" approach in determining whether certain rights and procedures remain intact despite the inability to impose the death penalty upon certain capital crimes. See *Donaldson v. Sack*, 265 So.2d 499 (Fla. 1972) (12 person jury no longer required due to abolishment of death penalty); *Generazio v. State*, 727 So.2d 333 (Fla. 4th DCA

1999) (since capital sexual battery is not a "capital" offense in which the death penalty can be given, the failure to instruct on a necessarily lesser-included offense is not fundamental error); *Hall v. State*, 853 So.2d 546 (Fla. 1st DCA 2003)(first degree murder was not "capital" offense for purposes of requiring a twelve person jury because death was not a possible penalty as a matter of law); *Carter v. State*, 483 So.2d 740 (Fla. 5th DCA 1986)(because death is no longer a possible penalty for the offense of sexual battery, the Defendant may be charged with a crime via information rather than an indictment.); *State v. Wells*, 466 So.2d 291 (Fla. 2d DCA 1985) (capital offense of sexual battery can be charged via information as opposed to indictment since his death is no longer a possible penalty).

The drafters of the constitution looked at the punishment, and not the classification of the offense, in determining which offenses were bailable as a matter of right under Florida's Constitution. This is illustrated by the language chosen to describe the applicable offense as one "punishable by life imprisonment." If the drafters intended to restrict bail based upon the classification of the offense, and not the punishment, they would have used the phrase "classified as an offense punishable by life imprisonment." See *Lawnwood Medical Center, Inc. v. Seeger, M.D.*, 990 So.2d 503, 510, 511 (Fla.2008)(citations omitted) ("less latitude is permitted when construing constitutional provisions

because it is presumed that they have been more carefully and deliberately framed than statutes.").

The Petitioner respectfully submits that the logic of the Second District Court in *Wells*, in analyzing the rationale of *Hogan*, should be adopted by this court. Specifically, the *Wells* court opined:

> The rationale of *Hogan* may be perceived to be that if conviction of that felony is not serious enough to be punishable by death, it is not serious enough to be classified as a capital felony within the meaning and intent of the statute calling for a twelve person jury in capital felony cases.
>
> Consistent with that rationale, we believe that since conviction of that felony is not serious enough to be punishable by death, it is not serious enough to be classified as a capital felony within the meaning and the intent to the foregoing constitutional provision calling for indictment by grand jury in a capital felony case. *Wells* at 292.

The rationale in *Wells* is consistent with the holdings of *Generazio*, *Hall*, *Carter*, and even *Hogan*. If a capital offense is no longer punishable by death, than it is logical that the benefits conferred upon one charged with this type of capital offense are no longer applicable. Likewise, in the Petitioner's case, if an offense is not serious enough to be punishable by life imprisonment, then it is not serious enough to exclude bail as a matter of right.

CONCLUSION

This Court has discretionary jurisdiction to review the decision below and

the Court should exercise that jurisdiction to consider the merits of the Petitioner's arguments.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Amended Jurisdictional Brief has been furnished by U.S. Mail and e-filed to the Supreme Court of Florida, 500 Duval Street, Tallahassee, Florida 32399 and to the Office of the Attorney General, 1515 North Flagler Drive, 9th Floor, West Palm Beach, Florida 33401 on this _____ day of _____, 2012.

CERTIFICATE OF TYPEFACE COMPLIANCE

Counsel for Petitioner, WAYNE TREACY, hereby certifies this Amended Jurisdictional Brief is printed in 14-point Times New Roman font, as required by the Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

Law Offices of Jason T. Forman, P.A.
633 South Andrews Avenue, Suite 201
Fort Lauderdale, FL. 33301
(954) 527-5557
attorneyforman@yahoo.com

By: _____
Jason T. Forman, Esq.
Florida Bar No. 109850
Counsel for Appellant