IN THE SUPREME COURT OF FLORIDA

KENNETH JACKSON, :

Appellant, :

vs. : Case No. SC13-1232

STATE OF FLORIDA, :

Appellee. :

:

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

SUPPLEMENTAL REPLY BRIEF OF APPELLANT

HOWARD L. "REX" DIMMIG, II
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

JULIUS J. AULISIO
Assistant Public Defender
FLORIDA BAR NUMBER 0561304

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831
(863) 534-4200

ATTORNEYS FOR APPELLANT

TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

ARGUMENT
ISSUE

HURST V. FLORIDA DECLARING FLORIDA'S DEATH PENALTY STATUTE UNCONSTITUTIONAL IS APPLICABLE TO MR. JACKSON. IMPOSITION OF DEATH UNDER FLORIDA'S UNCONSTITUTIONAL STATUTE IS NOT HARMLESS ERROR AND THE ONLY LEGAL REMEDY IS TO REDUCE THE SENTENCE TO LIFE IMPRISONMENT.

Hurst v. Florida, 136 S.Ct. 616 (2016) leaves much for this Court to determine as there are no clear directives how to apply the holding that Florida's death penalty sentencing statute is unconstitutional. Hurst can be interpreted broadly or narrowly, but what may not be done is to simply give meaning to parts of the opinion while ignoring other parts. Any discussion necessary to the court's decision is not dicta. Sturdivant v. State, 84 So. 3d 1044 (Fla. 1st DCA 2010) reversed on other grounds in State v. Sturdivant, 94 So. 3d 434 (Fla. 2012). The State has ignored parts of the opinion, claiming Hurst held Florida's death penalty scheme unconstitutional under the Sixth Amendment to the extent that it "require[s] the judge alone to find the existence of an aggravating circumstance." Id. at 624. (SB 3) The State chose to highlight this very narrow language and ignore other language in the opinion that is detrimental to their argument. "We hold this sentencing scheme 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." Id. at 619.

Without citing a page reference, Appellee incorrectly claims that "Appellant asserts that Florida's law is facially invalid because Hurst requires that a jury enter specific, written factual findings to support the imposition of any death sentence." (SB 3) Appellant asserts only what the language in Hurst states — "The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." Id. at 619.

Hurst did not say, as the State claims, that Florida's procedures for implementing the death penalty "facially could result in a Sixth Amendment violation if the judge makes factual findings which are not supported by a jury verdict." (SB 4) But rather, Hurst held that Florida's sentencing scheme is unconstitutional because it violates the Sixth Amendment. The United States Supreme Court could have, but did not, narrowly apply its holding only to Hurst, and that is the preferred approach if possible. "First, although the occasional case requires us to entertain a facial challenge in order to vindicate a party's right not to be bound by an unconstitutional statute, (citations omitted) we neither want nor need to provide relief to nonparties when a narrower remedy will fully protect the litigants. U.S. v. National Treasury Employees Union, 513 U.S. 454, 478 (1995). Hurst is one of those occasional cases where a narrower remedy would not suffice and the statute itself was declared unconstitutional.

Contrary to Appellee's assertion, Hurst does declare capital sentencing under Florida's statute to be unconstitutional. Thus,

section 775.082(2) Florida Statutes does apply to Mr. Jackson. Currently, Florida has no valid death penalty statute. Furman v. Georgia, 408 U.S. 238 (1972) was decided on June 29, 1972. Section 775.082(2) was enacted in March 1972 in anticipation of the Furman decision, and became effective October 1, 1972. 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). The amendment read as follows:

> 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. Donaldson v. Sack, 265 So. 2d 499, 505 (Fla. 1972) did not have to give effect to section 775.082(2) as amended because it was decided on July 17, 1972, before the amended statute took effect. However, in Donaldson, this Court generally considered the legislative enactment to commute death sentences and said: "The statute was conditioned upon the very holding which has now come to pass by the U.S. Supreme Court in invalidating the death penalty as now legislated." Id. at 505. Even though not part of the holding, this Court interpreted section 775.082(2) as applying not only when the death penalty is abolished, but also when the death penalty as legislated is declared unconstitutional, as was done in Hurst.

If section 775.082(2) were to apply only if the death penalty itself was declared unconstitutional, the legislature never would

have passed the amendment, which would be meaningless, providing that if the method of execution is declared unconstitutional the death sentence shall not be reduced. Thus Florida's section 775.082(2) is essentially the same as Colorado's statute that commuted death to life sentences if the death penalty as legislated was found to be unconstitutional. The Supreme Court of Colorado held that their statute commuting sentences to life 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, 64 P.3d 256, 258-59, 269-72 (Colo. 2003). Section 775.082 (2) is similar to Colorado's statute and applies in the current situation where the death penalty as legislated is declared unconstitutional, which Hurst did.

The State's insistence that one aggravator makes a defendant eligible for death 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 satisfied 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. Thus, 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.*

The State's assertion that a jury need only find a single aggravator to make Hurst inapplicable, or Hurst error harmless, incorrectly treats Florida as a nonweighing system and fails to realize the difference between a weighing and nonweighing state. In nonweighing states, the aggravating circumstances 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 538, 543 (2005). In Florida, a weighing state, the legislative narrowing of death eligible defendants and the individualized sentencing determination are collapsed into a single step and cannot be separated. If a single aggravator authorized a sentence of death, Florida's sentencing statute would also violate the Eighth Amendment by ignoring the Furman requirement that the death penalty not be arbitrarily and capriciously applied.

The state quotes State v. Steele, 921 So.2d at 543 for the unreasonable 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 not permissible if there are no aggravators. See, e.g. Banda v. State, 536 So.2d 221, 225 (Fla. 1988). But the converse is not, i.e., that one aggravating circumstance automatically makes a defendant death-eligible. There have been many refinements in the law since State v. Dixon, 283 So. 2d 1 (1973) was decided where it was noted that if one aggravating circumstance is found "death is presumptively the appropriate sentence." (SB 12) 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 fact that the United States Supreme Court denied certiorari review means nothing yet the State tries to imply it means something. As we now know, the assumption that Florida's sentencing statute was constitutional because the United States Supreme Court denied certiorari was totally incorrect even though it took us roughly fourteen years to find that out. Certiorari review is totally discretionary and nothing can be assumed from the denial of certiorari. Making any assumption regarding a cert. denial is even more egregious when the cases are still pending for rehearing. See Fletcher v. State, 168 So. 3d 186 (Fla. 2015), cert. denied, 2016 WL 280859 (Jan. 25, 2016) No.15-6075; Smith v.

State, 170 So. 3d 745 (Fla. 2015), cert. denied, 2016 WL 280862 (Jan. 25, 2016) No. 15-6430. After Hurst, we know that Jackson was sentenced to death under an unconstitutional statute.

Williams v. New York, 337 U.S. 241 (1949) is inapplicable to the present case because it addresses a trial court's discretion in sentencing a defendant within a range of possible penalties available, based simply on the jury verdict. Death is not a possible penalty in Florida based simply on a jury verdict. There is no set of circumstances under which a defendant can be put to death under the Florida sentencing scheme where the judge has not made factual findings and reduced them to writing. "If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082." Section 921.141(3)(b) Florida Statutes.

The State's reliance on Kansas v. Carr, 136 S.Ct. 633 (2016)(SB 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). 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. The Kansas statute is different from the Florida Statute that requires a sentence of life imprisonment if the trial court does not make the required written findings of the existence of sufficient

aggravating circumstances and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

The State asserts that the Sixth Amendment error in Florida's sentencing scheme found by Hurst can be avoided or prevented with the requirement of specific jury findings as to the existence of an aggravating circumstance. Florida's current statute requires more, and a complete rewrite of the statute is required for a constitutional fix. The unconstitutionality of a portion of a statute will not necessarily condemn the entire statute. Cramp v. Board of Public Instruction of Orange County, 137 So. 2d 828, 830 (Fla. 1962). But here, after removing the judge's fact finding duties from Florida's death penalty sentencing scheme, the statute is not complete in itself, so the statute itself may no longer stand. See Id. at 830.

Florida's unconstitutional sentencing scheme is not subject to harmless error analysis because Florida's sentencing scheme did not provide for deficient fact finding, but rather fact finding by the wrong entity. Simply put, the required findings were made by the wrong entity, and that Sixth Amendment violation cannot be written off as "harmless" because this was structural error involving the entire sentencing scheme.

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 often involve a single 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. Rencuenco, 548 U.S. 212 (2006). Instead, the framework of the penalty trial was affected by the Sixth Amendment violations resulting from Florida's unconstitutional capital sentencing scheme, and Justice Scalia's reasoning (for a unanimous Court) in Sullivan v. Louisiana, 508 U.S. 275(1993), controls. In the absence of a verdict (and a non-unanimous advisory recommendation will not suffice), "harmless error" analysis cannot be premised on what "any reasonable factfinder" would have done, or how eloquent the wrong factfinder might have been. There is no object upon which harmless error scrutiny can operate. Id. at 280.

Appellee's claim that no Sixth Amendment error has been shown in this case completely ignores the plain wording of the statute. A contemporaneous felony conviction alone is not enough to increase the penalty for first degree murder from life imprisonment to death. Florida's unconstitutional death penalty scheme requires a judge to make written findings that there are sufficient aggravating circumstances and insufficient mitigating circumstances to outweigh the aggravating circumstances. Absent

these written findings a sentence of life must be imposed. Essentially the State is asking this Court to ignore Florida's sentencing statute and perform a legislative rewrite, allowing the death penalty to be imposed based solely on a contemporaneous felony conviction. Florida's sentencing statute does not allow the death penalty to be imposed simply upon the finding that there was a contemporaneous felony. It requires a judge to find each fact necessary to impose a sentence of death and the statute cannot be saved absent a legislative rewrite which can only be imposed prospectively.

CONCLUSION

Mr. Jackson respectfully requests that this Court reverse his death sentence and impose a sentence of life imprisonment.

CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to C. Suzanne Bechard at the Office of the Attorney General at CrimappTPA@myfloridalegal.com, on this 22nd day of February, 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,

/S/Julius J. Aulisio

JULIUS J. AULISIO
Assistant Public Defender
Florida Bar Number 0561304
P. O. Box 9000 - Drawer PD
Bartow, FL 33831
appealfilings@pd10.org
jaulisio@pd10.org
mlinton@pd10.org

HOWARD L. "REX" DIMMIG,II
Public Defender
Tenth Judicial Circuit
(863) 534-4200