IN THE SUPREME COURT OF FLORIDA

KENNETH RAY JACKSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

Case No. SC13-1232
L.T. No. 07-CF-019884A
Death Penalty Case

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

STATE'S SUPPLEMENTAL INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

The State reiterates and incorporates its Statement of the Case and Facts from the Answer Brief, with the following additions pertinent to the issue on which this Court ordered supplemental briefing.

This is a pending direct appeal from a conviction for first-degree murder that resulted in a death sentence. Appellant filed a pretrial motion asking the trial court to declare the death penalty unconstitutional pursuant to Ring v. Arizona, 536 U.S. 584 (2002). (V4/510-18). The trial court denied the motion. (V5/714). The jury convicted Appellant as charged on all counts: first-degree murder of Cuc Thu Tran, sexual battery with a deadly weapon or force likely to cause serious personal injury, second-degree arson of a conveyance, and grand theft of a motor vehicle. (V11/1852-53). Following the penalty phase, the jury recommended by a vote of eleven to one that Appellant receive the death penalty. (V78/5602-05).

The trial court followed the jury's eleven-to-one recommendation and sentenced Appellant to death for Tran's murder. (V17/3034-56; V81/5639-43). The court found two aggravating factors: (1) the murder was committed while Appellant was engaged in commission of sexual battery; and (2) the murder was especially heinous, atrocious, or cruel. The court accorded great weight to both circumstances and found they

were not duplicative. (V17/3037-40). The court found thirteen nonstatutory mitigating circumstances, and *sua sponte* found that the mitigating circumstances "cumulatively diminished [Appellant's] capacity or ability to conform his conduct to the requirements of the law, but [did] not determine that such circumstances diminished his capacity or ability to appreciate the criminality of his conduct." (V17/3051-53).

After briefing was completed, this Court directed the parties to file supplemental briefs addressing the application, if any, of the recent decision in Hurst v. Florida, _ U.S._, 136 S. Ct. 616 (2016). On March 10, 2016, this Court heard oral arguments, and on March 15, 2016, this Court directed the parties to file additional supplemental briefs regarding the procedures to be followed in the event that this Court were to remand the case for resentencing pursuant to Hurst. Specifically, this Court directed the parties to "discuss whether the procedures detailed in section 921.141, Florida Statutes (2007), as supplemented by jury instructions complaint with Hurst, or the procedures detailed in House Bill 7101 as signed by Governor Scott on March 7, 2016, govern." This Court further directed the parties to "discuss any constitutional issues that may arise in this context."

SUMMARY OF ARGUMENT

Although the State disputes that Appellant is entitled to relief pursuant to Hurst, if this Court determines that resentencing is appropriate, the procedures set forth in Chapter 2016-13, Laws of Florida would apply. Neither the prohibition against *ex post facto* laws, Art. I, § 10, U.S. Const., nor the "Savings Clause" of the Florida Constitution, Art. X, § 9, Fla. Const., would impede the application of the new statute should this Court remand this matter for resentencing based on Hurst.

ARGUMENT

SECOND SUPPLEMENTAL BRIEFING ISSUE

IF THIS COURT REMANDS THIS MATTER FOR RESENTENCING PURSUANT TO HURST V. FLORIDA, 136 S. CT. 616 (JAN. 12, 2016), THE PROVISIONS SET FORTH IN CHAPTER 2016-13, LAWS OF FLORIDA SHOULD GOVERN.

The State disputes that Appellant is entitled to relief pursuant to Hurst.[1] Nevertheless, in compliance with this Court's March 15, 2016, Order, the State offers the following analysis on the applicability of Chapter 2016-13, Laws of Florida, in the event this Court remands this matter for resentencing pursuant to Hurst. The State further addresses various constitutional issues that may arise in this context.

[1] The parties have extensively argued their positions concerning the application of Hurst to this matter, both in supplemental briefing and at oral argument. Those arguments will not be reiterated here because they have already been made and because this Court's Order did not contemplate a rehashing of those arguments.

The State submits that if this Court were to order that Appellant be resentenced, Chapter 2016-13, Laws of Florida, would govern. If this Court orders resentencing based on Hurst, such a proceeding would be *de novo*. See, e.g., State v. Fleming, 61 So. 3d 399, 406 (Fla. 2011)("[T]is Court has long held that where a sentence has been reversed or vacated, the resentencings in all criminal proceedings, including death penalty cases, are *de novo* in nature."). Because resentencing is *de novo*, "both parties may present new evidence bearing on the sentence." Id.

There should be no impediment to the imposition of a sentence in accordance with the new legislation that amended § 921.141, Florida Statutes. In relevant parts, the amendments now require: (1) that the jury find each aggravating factor unanimously beyond a reasonable doubt; (2) that a jury must recommend a death sentence with at least ten jurors; (3) that the judge may not find an aggravating factor not found by the jury; and (4) that the judge may not override a jury recommendation of life, but may override a jury recommendation of death. All of these changes inure to the benefit of a defendant.

The Prohibition on *Ex Post Facto* Laws

The application of House Bill 7101 would not violate the prohibition against *ex post facto* laws. Art. I, § 10, U.S. Const. The United States Supreme Court has summarized the characteristics of an *ex post facto* law:

> It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*.

Beazell v. Ohio, 269 U.S. 167, 169-70 (1925). Furthermore, "[e]ven though it may work to the disadvantage of a defendant, a procedural change is not *ex post facto*." Dobbert v. Florida, 432 U.S. 282, 293 (1977).

The United States Supreme Court addressed a similar issue in Dobbert. Dobbert had committed the first-degree murders of two of his children in 1971 and 1972. The procedures utilized in Florida's then-existing capital sentencing statute were held unconstitutional under the Eighth Amendment in June 1972, and a revised capital sentencing statute was enacted in late 1972, after Dobbert committed the murders of his children.

The Court rejected *ex post facto* challenges to the application of the revised statute, and also emphasized that the "operative fact" of the existence of the prior death penalty statute at the time of the offenses served to warn Dobbert of the penalty that could be imposed. Dobbert, 432 U.S. at 298. Furthermore, like the amendments to the statutes in Chapter 2016-13, Laws of Florida, as set forth above, the Court found the 1972 amendments to be ameliorative, and less onerous to the

defendant. Id. at 294. Looking at legislative intent, the Court further found that the passing of the amended statutes "clearly indicated Florida's view of the severity of murder and of the degree of punishment which the legislature wished to impose on murderers." Id. at 297. Thus, the existence of a statutory sentence of death at the time of the commission of the offense served as an indication of the controlling legislative intent, i.e., that the legislature would want the sentencing court to be able to entertain a revised statutory scheme in order to implement its obvious intent that the sentence of death should be considered as a viable option in the case. Likewise, in this instance, the passage of the present amended statute is clearly indicative of legislative intent regarding the "severity of murder and of the degree of punishment which the legislature wished to impose on murderers." Id.

The foregoing point is further consistent with the United States Supreme Court's analysis in United States v. Booker, 543 U.S. 220 (2005). After declaring the United States Sentencing Guidelines unconstitutional, the Court addressed the remedy to impose. Under such circumstances, the Court emphasized that the remedial issue was one of legislative intent: "We answer the remedial question by looking to legislative intent. . . . We determine what 'Congress would have intended in light of the Court's constitutional holding.'" Id. at 246 (quoting Denver

Area Ed. Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727, 767 (1996)(plurality opinion)).

This conclusion is further supported by the United States Supreme Court's decision in Schriro v. Summerlin, 542 U.S. 348 (2005). There, the Court held that its prior decision in Ring v. Arizona, 536 U.S. 584 (2002), was ***procedural in nature***, not substantive. Ring, like Hurst, had held that a sentencing judge, sitting without a jury, could not find the existence of an aggravating circumstance necessary for the imposition of the sentence of death. Ring was therefore procedural and did not render the death penalty itself unconstitutional. As Ring is based on Apprendi v. New Jersey, 530 U.S. 466 (2000)[2], and Hurst is based on both Ring and Apprendi, it necessarily follows that Hurst merely goes to the procedures of the sentencing statute, not the validity of the death sentence itself. See also Hughes v. State, 901 So. 2d 837, 841, 843 (Fla. 2005)(concluding that "Apprendi affects only the procedure for enhancing the *sentence*")(emphasis in original).

Accordingly, under the circumstances, the *ex post facto* clause of the United States Constitution would be no impediment

[2] The Apprendi Court held: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490.

to the application of Chapter 2016-13, Laws of Florida, in the event this Court remands this matter for resentencing.

The Savings Clause

The Savings Clause of the Florida Constitution prevents retroactive application of criminal statutes:

> Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed.

Art. X, § 9, Fla. Const. "Criminal statute" is defined broadly as: "'[A]n act of the Legislature as an organized body relating to crime or its punishment … defining crime, treating of its nature or providing for its punishment … [or] deal[ing] in any way with crime or its punishment.'" Smiley v. State, 966 So. 2d 330, 337 (Fla. 2007)(quoting Washington v. Dowling, 109 So. 2d 588, 591 (Fla. 1926)). However, the Savings Clause does not prevent the application of a new or amended statute when the purpose of the statute is to remedy a violation of the federal constitution. This is precisely what this Court concluded when it was confronted with a similar issue in Horsley v. State, 160 So. 3d 393 (Fla. 2015), after Miller v. Alabama, 132 S. Ct. 2455 (2012), was issued.

In Miller, the United States Supreme Court invalidated mandatory life without parole sentences for juveniles convicted of first-degree murder, reasoning that such sentences violated the Eighth Amendment. In response, the Florida Legislature

enacted Chapter 2014-220, Laws of Florida, as a remedy. In Horsley, this Court found that application of Chapter 2014-220 to juvenile offenders whose sentences were unconstitutional under Miller was the appropriate remedy. "First and foremost, this is the remedy that is most consistent with the legislative intent regarding how to comply with Miller, as it is the remedy the Legislature itself has specifically adopted." Horsley, 160 So. 3d at 405. Further, the Savings Clause was no impediment because the new statute was enacted to remedy a violation of the federal constitution. Id. at 406.

Then, in Henry v. State, 175 So. 3d 675, 680 (Fla. 2015), Gridine v. State, 175 So. 3d 673, 675 (Fla. 2015), and Lawton v. State, 181 So. 3d 452, 453 (Fla. 2015), this Court held that the new statute would also be applied to juvenile defendants whose non-homicide sentences violated the Eighth Amendment under Graham v. Florida, 560 U.S. 75 (2011). Again, the new statutes were enacted to remedy a violation of the federal constitution. The Graham cases are of significance because, unlike the situation in Horsley, where there was no other viable sentence available to those first-degree murder defendants, in the Graham line of cases, there was always a viable non-life sentence available for a juvenile defendant whose initial sentence violated Graham. Similarly, there has always existed the alternative sentence of life in prison for those convicted of

first-degree murder. As Henry, Gridine, and Lawton illustrate, the existence of an alternative to the death penalty in this instance does not preclude courts from applying Chapter 2016-13, Laws of Florida, to remedy the Sixth Amendment violation condemned in Hurst.

In enacting Chapter 2016-13, Laws of Florida, the Legislature's intent was to keep open the option of the imposition of the death penalty in pending cases rather than having courts automatically impose a sentence of life in prison without further consideration. As such, it is clear that the Legislature intended that the newly amended statute be applied to pending cases. Chapter 2016-13, Laws of Florida, took effect upon becoming law, as opposed to taking effect at a later date such as July 1, 2016, or October 1, 2016. Ch. 2016-13, § 7, Laws of Fla. In fact, a February 25, 2016, Senate amendment to the proposed legislation deleted the following language: "The amendments made by this act to ss. 775.082, 782.04, 921.141, and 921.142, Florida Statutes, shall apply only to criminal acts that occur on or after the effective date of this act." This revision further reinforces the Legislature's clear intent that the amended statute be applied to pending cases. Fla. SB 7068, Amend. 163840 (Feb. 25, 2016).

As this Court stated in Horsley, even if the Savings Clause were to apply, "the requirements of the federal constitution

must trump those of our state constitution." Horsley, 160 So. 3d at 406 (citing Art. VI, cl. 2, U.S. Const.). Fashioning a remedy that complies with the Sixth Amendment "must take precedence over a state constitutional provision that would prevent this Court from effectuating that remedy." Id.

Thus, the provisions of Chapter 2016-13, Laws of Florida should apply in this case in the event Appellant is resentenced. Under these circumstances, applying the provision is "the remedy most faithful to the [Sixth] Amendment principles established by the United States Supreme Court, to the intent of the Florida Legislature, and to the doctrine of separation of powers." Id.

In sum, the State disputes that Appellant is entitled to resentencing based upon the United States Supreme Court's decision in Hurst v. Florida, 136 S. Ct. 616 (2016). Nevertheless, should this Court order resentencing in this case, the provisions of Chapter 2016-13, Laws of Florida, should apply. Neither the prohibition against *ex post facto* laws nor the Savings Clause of the Florida constitution would impede application of the new statute.

CONCLUSION

WHEREFORE, the State respectfully requests that this Honorable Court AFFIRM the judgment and sentence imposed on Appellant Kenneth Ray Jackson.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 4, 2016, I electronically filed the foregoing with the Clerk of the Court by using the e-portal filing system which will send a notice of electronic filing to the following: **Julius Aulisio**, Assistant Public Defender, Public Defenders Office, Tenth Judicial Circuit, P.O. Box 9000-Drawer PD, Bartow, Florida 33831, **jaulisio@pd10.org**, **mjudino@pd10.state.fl.us**.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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