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

SECOND SUPPLEMENTAL INITIAL 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

Statutes

Amendments and Constitutions

Other Authorities

STATEMENT OF THE CASE AND FACTS

The statement of the case and facts are set forth in the initial brief. Facts pertinent to this supplemental brief are: After penalty phase, the jury was instructed on three aggravating factors: 1)—during the course of a felony, 2)"heinous, atrocious or cruel," and 3)"cold, calculated, and premeditated." (78/5589-91) The trial judge did not find the "cold, calculated, and premeditated," aggravating factor. (17/3042) The jury by a vote of eleven to one advised and recommended that the court impose death. (78/5602)

On March 15, 2016 this Court directed supplemental briefing regarding the procedures to follow in the event this case is remanded for resentencing pursuant to Hurst v. Florida, 136 S. Ct. 616 (Jan 12. 2016).

SUMMARY OF THE ARGUMENT

The procedures detailed in section 921.141 Florida Statutes (2007) were declared unconstitutional by Hurst v. Florida, 136 S.Ct. 616 (2016). The statute is not severable. After excising the unconstitutional parts of the statute, all that remains is a list of aggravating and mitigating circumstances with no guidance on how they are to be applied. It is impossible to fashion jury instructions to make the remainder of section 921.141 Florida Statutes comply with the dictates of Hurst. The statute as written cannot be made constitutional because it does not provide for a jury verdict and Hurst specifically said an advisory recommendation is not adequate.

House Bill 7101 cannot be applied to Mr. Jackson because it contains a substantive provision not contained in the old statute which makes a person death eligible with the finding of one aggravating circumstance. House Bill 7101 does not specifically say it is to apply retroactively, so it does not. Any application of House Bill 7101 to offenses committed prior to the bill becoming law is an ex post facto application and therefor unconstitutional. Since there was no valid death penalty scheme at the time of Mr. Jackson's offense the only constitutional remedy is to impose a life sentence. In addition, House Bill 7101 cannot apply because it requires notice of intention to seek the death penalty be provided within 45 days of arraignment and must allege

specific aggravating factors. Jackson was not given notice of the State's intention to seek the death penalty within 45 days of his arraignment and the notice provided did not specifically state which aggravating factors the State was seeking to prove.

ARGUMENT

ISSUE I

SECTION 921.141 FLORIDA STATUES (2007) IS UNCONSTITUTIONAL. THE STATUTE AS WRITTEN IS NOT SEVERABLE AND CANNOT BE SAVED BY JURY INSTRUCTIONS.

The advisory role of the jury and the fact-finding role of the trial judge are so interwoven into Section 921.141 Florida Statutes (2007) that the invalid portions cannot be severed. The United States Supreme Court in Hurst v. Florida, 136 S.Ct. 616 (2016) clearly held Florida's Death Penalty statute unconstitutional. "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.

The invalid portions of Florida's death penalty statute, specifically subsections (2) and (3) of section 921.141, cannot be severed in an attempt to save the remainder of the statute. Florida law recognizes that "if the valid portion of the law would be rendered incomplete, or if severance would cause results unanticipated by the legislature, there can be no severance of the invalid parts; the entire law must be declared unconstitutional."

Eastern Air Lines, Inc. v. Department of Revenue, 455 So. 2d 311, 317 (Fla. 1984)(emphasis supplied). A court cannot "exercise the legislative function of rewriting the statute..." Florida Horsemen Benevolent and Protective Association v. Rudder, 738 So. 2d 449, 452 (Fla. 1st DCA 1999); see, Ex Parte Levinson, 274 S. W. 2d 76, 78 (Tex. Crim. 1955)(severance can only be accomplished when – after the unconstitutional part is stricken – the remainder is complete in itself; "the courts must not enter the field of legislation and write, rewrite, change, or add to a law." When the constitutional and unconstitutional provisions of a statute are inextricably intertwined, the remaining sections cannot be separated from the unconstitutional sections. Allen v. Butterworth, 756 So. 2d 52, 64 (Fla. 2000). It is only under limited circumstances that the unconstitutional portion of a statute may be severed if:

> "(1) the unconstitutional provisions can be separated from the remaining valid provisions, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other, and (4) an act complete in itself remains after the invalid provisions are stricken."

Lawnwood Medical Center v. Seeger, 990 So. 2d 503, 518 (Fla. 2008) (quoting Cramp v. Board of Public Instruction, 137 So. 2d 828 (Fla. 1962); State v. Catalano, 104 So. 3d 1069, 1080 (Fla. 2012).

Section 921.141(2) provides for an advisory sentence by the

jury, and subsection (3) states: **"Findings in support of the sentence of death.**-Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:" The judge must determine if sufficient aggravating circumstances exist and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances. The jury's advisory role and judge's fact finding role cannot be severed from the statute; the judge's and jury's functions can only be changed by rewriting the statute, which only the legislature may do.

A judicial rewrite of a statute violates the separation of powers clause in Article 2 Section 3 of the Florida Constitution. Without subsections (2) and (3), there is no procedure in section 921.141 for determining who is sentenced to death and who is sentenced to life imprisonment. There is only a list of aggravating and mitigating circumstances with no direction as to how to apply them or who shall apply them. Without the unconstitutional provisions, the remainder of the statute is incomplete, and does not provide for imposition of the death penalty. Without the unconstitutional provisions, the remainder of the statute is incomplete and incoherent and cannot comply with the test set forth by this Court in Lawnwood Medical Center.

Two recent Pennsylvania decisions illustrate how the jury's advisory role and the judge's fact-finding role are interwoven into section 921.141. In Commonwealth v. Hopkins, 117 A.3d 247 (Pa.2015), a statute requiring imposition of an increased mandatory minimum sentence if certain controlled substance crimes occurred within 1000 feet of a school was found unconstitutional under Alleyne v. United States, 133 S.Ct. 2151 (2013), because the statute mandated that the enhanced sentencing factor be determined by the trial judge at sentencing rather than by a jury verdict. The commonwealth's core position was that only certain limited procedural provisions of the statute run afoul of Alleyne, and that these were severable and the substantive provisions remained viable. Hopkins, 117 A.2d at 252. The commonwealth's "severability" argument was rejected in Hopkins, at 252-62, as it had been in Commonwealth v. Newman, 99 A.3d 86, 101-02 (Pa.Super. 2014):

> We find that Subsections (a) and (c) of Section 9712.1 are essentially and inseparably connected. Following Alleyne, Subsection (a) must be regarded as the elements of the aggravated crime of possessing a firearm while trafficking drugs. If Subsection (a) is the predicate arm of Section 9712.1, then Subsection (c) is the "enforcement" arm. Without Subsection (c), there is no mechanism in place to determine whether the predicate of Subsection (a) has been met.
>
> The Commonwealth's suggestion that we remand for a sentencing jury would require this court to manufacture whole cloth a replacement enforcement mechanism for Section 9712.1; in other words, the Commonwealth is asking us to legislate.
>
> Similarly, without its unconstitutional provisions, Florida's

death penalty statute contains no mechanism for determining who lives and who dies. Those provisions are integral to the former statutory scheme and cannot be severed from it; the entire law regarding imposition of the death penalty is unconstitutional.

The suggested fix of jury instructions compliant with Hurst is not a possible option. It is impossible to formulate jury instructions giving the jury the authority to render a verdict as to which sentence to apply because such an instruction would be mutually exclusive of what section 921.141 requires the jury to do. Section 921.141 authorizes a jury to return an advisory recommendation of life or death, reached by a majority of the jurors. Hurst says a jury recommendation is not sufficient: "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." Hurst v. Florida, 136 S. Ct. at 619. Each element of a crime must be proven to a jury beyond a reasonable doubt. Any fact that exposes a defendant to greater punishment is an element of the crime. Id. at 121. Therefore, there must be a jury verdict as to the facts required for imposition of the death penalty. In Florida, a verdict of the jury must be unanimous. Jones v. State, 92 So. 2d 261 (Fla. 1956). A jury instruction requiring the jury to unanimously find that there are sufficient aggravating circumstances and insufficient mitigating circumstances would in effect be rewriting the statute which only the legislature may do.

The jury's function under the death penalty statute is

advisory only. Spaziano v. State, 433 So. 2d 508, 512 (Fla. 1983). The advisory recommendation by the jury cannot be treated as the necessary factual findings that Ring requires. Hurst v. Florida, 136 S. Ct. at 622. The California Supreme Court addressed a judicial fix to a defective death penalty scheme:

> They ask us not to interpret, but to rewrite the law in a manner which we have shown would be contrary to the manifest legislative intent in enacting sections 190 through 190.3. Decisions as to which criminal defendants shall suffer the death penalty, whether these decisions shall be made by a judge or jury, whether and to what extent a jury determination is reviewable by the trial court and/or the reviewing court, and the scope of responsibility to be given this court to safeguard against arbitrary imposition of the death penalty are matters of legislative concern.

Rockwell v. Superior Court, 556 P.2d 1101, 1116 (Cal. 1976). Any jury instructions that comply with Hurst would not accurately and adequately state the law as set forth section 921.141. Thus a jury instruction compliant with Hurst would essentially change the law. This Court has recognized that the power to create substantive law lies exclusively with the legislature. See State v. Raymond, 906 So. 2d 1045, 1048 (Fla. 2005); see also State v. Steele, 921 So. 2d 538 (Fla. 2006) (asking the Legislature to correct the problems with the death penalty scheme.) Any jury instructions that comply with Hurst would impose upon the jury duties, and grant it authority which section 921.141 Florida Statutes does not provide. Changing the death penalty statute to comply with Hurst is of "legislative concern" and must not be performed by the judicial

branch.

ISSUE II

HOUSE BILL 7101 DOES NOT EXPRESSLY APPLY RETROACTIVELY AND CANNOT APPLY RETROACTIVELY BECAUSE IT PROVIDES FOR SUBSTANTIVE CHANGES.

Important substantive changes that House Bill (HB) 7101 makes to Florida's death penalty sentencing scheme preclude retroactive application of the bill. Two changes are that a defendant is now eligible for the death penalty upon a finding by the jury of a single aggravating factor, and the prosecutor must provide notice of intent to seek the death penalty and list the aggravating factors it intends to prove. In addition HB 7101 is clearly a criminal statute. Article 10 section 9 of the Florida Constitution prohibits retroactive application of criminal statutes: "Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed." In Raines v. State, 28 So. 57, 58 (Fla. 1900), the court explained this constitutional provision:

> The effect of this constitutional provision is to give all criminal legislation a prospective effectiveness; that is to say, the repeal or amendment, by subsequent legislation, of a pre-existing criminal statute does not become effective, either as a repeal or as an amendment of such pre-existing statute, in so far as offenses are concerned that have been already committed prior to the taking effect of such repealing or amending law.

HB 7101 may not be applied to crimes committed before March 7,

2016, when Governor Scott signed the bill.

There are two interrelated inquiries when a court is considering whether statutes or amendments thereto should apply retroactively. Metropolitan Dade County v. Chase Federal Housing Corp., 737 So. 2d 494, 499 (Fla. 1999). The first inquiry is whether there is clear evidence of legislative intent to apply the statute retrospectively, and the second inquiry is whether retroactive application is constitutionally permissible. Id. at 499. HB 7101 is silent as to retroactive application. The only reference to timing in the bill is Section 7, which states: "This act shall take effect upon becoming law." There is no explicit or clear intent by the legislature that HB 7101 be applied retroactively. When there is no clear legislative intent, the general rule is that a law affecting substantive rights is presumed to apply prospectively only while procedural or remedial statutes are presumed to operate retrospectively. Basel v. McFarland & Sons, Inc., 815 So. 2d 687, 692 (Fla. 5th DCA 2002).

HB 7101 did more than make procedural changes in an attempt to make Florida's death penalty constitutional after Hurst. Now a defendant is necessarily eligible for the death penalty if the jury unanimously finds at least one aggravating factor. This is a substantive change that broadens the field of death eligible defendants without narrowing the lengthy list of aggravating factors. The present list of aggravating circumstances is so broad that almost every first degree murder has at least one aggravating factor. Prior to HB 7101, Florida was a weighing state where there

was not an initial eligibility determination made by the jury. "[T]he Florida sentencing statute does not make a defendant eligible for death until "findings *by the court* that such person shall be punished by death." Fla. Stat. § 775.082(1) (emphasis added). The trial court *alone* must find "the facts ... [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Hurst, 136 S. Ct. at 622.

This new eligibility stage is a substantive change, and runs the risk of being unconstitutional because: "In the eligibility stage, the United States Constitution requires safeguards to ensure that the jury's discretion is "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Zant v. Stephens, 462 U.S. 862, 874 (1983). Moreover, in non-weighing 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. Under HB 7101 the eligibility aggravating factors are the same as the selection aggravating factors. Florida expanded its list of aggravating factors, when they were selection factors, not eligibility factors, to sixteen (ten of which have been added after the statute was originally enacted). See State v. Steele, 921 So. 2d 538, 543 (Fla. 2005). Thus, there is the risk that the list of aggravating factors will prove to be unconstitutional because they do not narrow the field of persons eligible for the death penalty.

Very few defendants convicted of first-degree murder will not have at least one of the listed aggravating factors. Under this new substantive change, almost every capital defendant will be death-eligible. 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.

This change in HB 7101 essentially makes Florida a non-weighing state, or at least adopts elements of a non-weighing state, but unconstitutionally expands the pool of the death-eligible defendants rather than narrow the field. 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.") This expanded pool of death-eligible defendants violates the Eighth Amendment of the United States Constitution. "To avoid this constitutional flaw, an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty

of murder." Zant v. Stephens, 462 U.S. at 877.

Another change made in HB 7101 is that the State must provide notice within 45 days of arraignment that it is seeking the death penalty and the State must list which aggravating factors it intends to prove. This language indicates a legislative intent that HB 7101 is to only apply prospectively because it is impossible for the State to comply with this section of the law and provide notice in cases where arraignment has occurred more than 45 days prior to Governor Scott signing this bill into law on March 7, 2016.

In other states with similar notice requirements the State has been precluded from seeking the death penalty where they failed to provide timely notice. Miller v. Eighteenth Judicial District Court, 162 P.3d 121, 123 (Mont. 2007) (State failed to file notice of intent to seek the death penalty within 60 days as required. Petitioner filed motions to preclude the State from seeking the death penalty based on, in addition to state grounds, the Due Process Clause of the Fifth and Fourteenth Amendment and the Cruel and Unusual Punishment Clauses of the Eighth Amendment. The Montana Supreme Court held that the notice requirement is a categorical time prescription and where a defendant timely files a motion to preclude the death penalty, the motion must be granted.) Id. at 132. See also Holmberg v. DeLeon, 938 P.2d 1110 (Ariz. 1997) (An Arizona rule of criminal procedure required the State to file a notice of intent to seek the death penalty no later than 30 days after the arraignment. The Arizona Supreme Court found that

notice given one year and three months after the arraignment is a particularly egregious violation, and remanded the case with instructions to grant defendant's motion to strike the state's notice of intent to seek the death penalty.) Id. at 1114. In the present case, the State did not and cannot comply with HB 7101. Jackson was arraigned on October 15, 2007. He was not provided notice of intent to seek the death penalty, which did not list the aggravating factors the State intended to prove, until February 23, 2009, nearly 16 months after his arraignment.

HB 7101 cannot be retroactively applied to Jackson because it makes substantive changes to Florida's death penalty scheme and it unconstitutionally broadens the pool of death-eligible defendants. This bill is much different than the new statute that Ernest Dobbert was tried under, after the version of the death penalty in effect at the time of his crime, was declared unconstitutional. The new statute Dobbert was tried under was not an ex post facto application because the changes were procedural and ameliorative. Dobbert v. Florida, 432 U.S. 282, 290 (1977). Dobbert was never tried and sentenced under an unconstitutional statute. In situations where a defendant was tried and sentenced under an unconstitutional statute, various state supreme courts confronted with the retroactive application of a new death penalty statute have distinguished Dobbert and found that the new or amended death penalty law could not apply to defendants who were sentenced to death before the new law was enacted. See Woldt v. People, 64 P3d 256 (Colo. 2003); 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); Commonwealth v. Story, 440 A.2d 488(Pa. 1981).

In Woldt Colorado's death penalty statute was unconstitutional because a three judge panel rather than a jury made findings of fact for imposition of the death penalty. A key difference between Woldt and the reasoning used in Dobbert is that Woldt had been sentenced under an unconstitutional statute and Dobbert had not. Woldt v. People 64 P.3d at 271, 72. Application of the new death penalty statute enacted after Woldt had been sentenced under the unconstitutional statute raised federal and state constitutional issues, because the legislation permitting resentencing was enacted after the defendant's crimes, trial, and sentencing, and the issuance of Ring. Id. at 272. Application of the HB 7101 to Jackson would violate the ex post facto clauses of the United States and Florida Constitutions.

In Rodgers, the South Carolina Supreme Court considered six cases tried under that state's 1974 death penalty act where death sentences were imposed. State v. Rodgers, 242 S.E.2d at 216, 17. In July of 1976, the United States Supreme Court found that the 1974 Act was unconstitutional because it violated the Eighth Amendment prohibition against cruel and unusual punishment. On June 8, 1977, the South Carolina General Assembly amended the death penalty statute. In August of 1977 the Attorney General filed petitions in the South Carolina Supreme Court to have each

of the defendants remanded to the trial court to have them sentenced under the state's 1977 death penalty act. The Attorney General based its request on Dobbert, which upheld the conviction and sentence of Dobbert because it was proper to punish Dobbert under the new statute, since the new statute was only procedural and was in effect at the time of the trial, although not at the time of crime. Id. at 290.

The court in Rodgers, distinguished Dobbert because the cases at bar were committed at a time when an invalid capital punishment statute was in effect, and each defendant was tried and sentenced to death under the invalid statute. Id. at 218. The court was not persuaded by the State's argument that the Act of 1977 was procedural and remedial which could operate retroactively. The court noted that nothing in the Act of 1977 suggested it was to apply retroactively and concluded that the Act of 1977 could not be applied to defendants tried before the act became effective, and they must be given life sentences. Id. at 218, 19. Jackson is in the same posture as Rodgers et. al. who were tried and convicted under an unconstitutional death penalty statute and not subject to the provision in effect at the time of their resentencing, because the new death penalty did not specifically call for retroactive application. Since HB 7101 has no specific retroactivity clause and the death penalty portion of the statute Jackson was sentenced under was declared unconstitutional, the only remaining constitutional penalty Jackson can receive is life imprisonment.

Meller was convicted of first degree murder and sentenced to death under a sentencing statute later declared unconstitutional. His death sentence was vacated and a sentence of life imprisonment was imposed. Meller was distinguished from Dobbert in footnote 3 because it was more like Rodgers. Meller v. State, 581 P.2d at 3, 4.

Lindquist was found guilty of first degree murder and sentenced to death under a sentencing statute later found unconstitutional. His death sentence was set aside and the amended sentencing statute could not apply to Lindquist because the amended statute was not expressly retroactive. State v. Lindquist, 589 P.2d at 103, 04.

Collins was convicted of first degree murder and sentenced to death under a statute later declared unconstitutional. Collins was resentenced to death under an amended statute. The Louisiana Supreme Court held that the amended statute could not apply to Collins, because nowhere in the statute was there language that it was to apply retroactively. The case was remanded with instructions to impose a life sentence. State v. Collins, 370 So. 2d at 533, 34.

Hudson was tried and convicted of first degree murder after the sentencing statute, which was found to be unconstitutional, was amended. However, his crime occurred before the amended sentencing statute took effect. Hudson was sentenced to death under the amended statute. The Kentucky Supreme Court held that the amended statue could not apply to Hudson, because the amended

statute could only apply to crimes committed after the effective date of the amended statute. The case was remanded for imposition of a life sentence. Hudson v. Commonwealth, 597 S.W.2d at 610-12.

Story was tried and convicted of first degree murder in March of 1975 for a crime that occurred in July of 1974. He was sentenced to death under a sentencing statute declared unconstitutional while his appeal was pending. He was granted a new trial. On retrial, he was again convicted and this time sentenced to death under a new death penalty statute. The Pennsylvania Supreme court held that the new sentencing statute used to impose death did not apply retroactively to a 1974 offense. Story's sentence of death was set aside for imposition of a life sentence. Commonwealth v. Story, 440 A.2d at 488, 89.

The cases of Woldt, Rodgers, Meller, and Story, along with the present case are distinguishable from Dobbert, because they were all tried, convicted, and sentenced to death for first degree murder under death penalty sentencing schemes that were later declared unconstitutional. The possible sentences for first degree murder under those penalty schemes were death or life imprisonment. Life imprisonment was not declared unconstitutional as a possible penalty. Life imprisonment is the penalty that Woldt, Rodgers, Meller, and Story received, and is the penalty Jackson should receive.

For Dobbert, jeopardy never attached because he was never tried and sentenced under an unconstitutional statute. This is an important distinction and one that the United States Supreme Court

recognized in Dobbert when drawing lines as to when the new amended death penalty statute applies:

> He was neither tried nor sentenced prior to Furman, as were they, and the only effect of the former statute was to provide sufficient warning of the gravity Florida attached to first-degree murder so as to make the application of this new statute to him consistent with the Ex Post Facto Clause of the United States Constitution. Florida obviously had to draw the line at some point between those whose cases had progressed sufficiently far in the legal process as to be governed solely by the old statute, with the concomitant unconstitutionality of its death penalty provision, and those whose cases involved acts which could properly subject them to punishment under the new statute.

Dobbert v. Florida, 432 U.S. at 301.

Mr. Jackson was tried and convicted of first degree murder and sentenced under section 921.141 Florida Statutes (2007), which called for a sentence of death or life imprisonment. Jackson was both tried and sentenced prior to Hurst, when the sentencing statute was declared unconstitutional. Jackson's case had "progressed sufficiently far in the legal process as to be governed solely by the old statute, with the concomitant unconstitutionality of its death penalty provision." Dobbert, 432 U.S. at 301. The penalty of life imprisonment was never declared unconstitutional and still is a possible penalty. Mr. Jackson should be sentenced to life imprisonment under the remaining constitutional provision of section 921.141 Florida Statutes.

HB 7101 cannot be applied to Mr. Jackson because there is a

well-established rule of statutory construction against retroactive applications in the absence of an express statement of legislative intent:

> A statute operates prospectively unless the intent that it operate retrospectively is clearly expressed. Indeed, an act should never be construed retrospectively unless this was clearly the intention of the legislature. This is especially so where the effect of giving it a retroactive operation would be to interfere with an existing contract, destroy a vested right, or create a new liability in connection with a past transaction. The presumption is that it was intended to operate prospectively, unless its language requires that it be given retrospective operation. The basis for retrospective interpretation must be unequivocal and leave no doubt as to the legislative intent.

Thayer v. State, 335 So. 2d 815, 817, 18 Fla. (1976). There is no legislative intent that HB 7101 apply retroactively. The bill itself states that it shall take effect upon becoming law. Similar language in Story, "this act shall take effect immediately", was determined not to apply retrospectively. Commonwealth v. Story, 440 A.2d at 490. Certainly the Florida legislature is well aware of Article 10 section 9 of the Florida Constitution: "Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed." This very well may be why HB 7101 was does not indicate it is to apply retroactively and clearly states: "This act shall take effect upon becoming law." Because HB 7101, does not say it is to apply retroactively and Mr. Jackson was tried and sentenced under the old sentencing

scheme, he must be resentenced to the only remaining valid punishment under the old sentencing statute of life imprisonment.

CONCLUSION

Based on the arguments presented in prior briefs, Kenneth Jackson, respectfully asks that he be granted a new trial. In the alternative, based on the arguments presented here, Appellant, asks that his case be remanded for imposition of a life sentence.

CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to the Office of the Attorney General at CrimappTPA@myfloridalegal.com, on this 4th day of April, 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.state.fl.us
jaulisio@pd10.org
mlinton@pd10.org

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

Jja