Filing # 40276306 E-Filed 04/14/2016 02:31:16 PM

IN THE SUPREME COURT OF FLORIDA

KENNETH RAY JACKSON,

Appellant,

v. **Case No. SC13-1232**
L.T. No. 07-CF-019884A
STATE OF FLORIDA, **Death Penalty Case**

Appellee.
_____/

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

STATE'S SUPPLEMENTAL ANSWER BRIEF

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RECEIVED, 04/14/2016 02:33:39 PM, Clerk, Supreme Court

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STATEMENT OF THE CASE AND FACTS

The State reiterates its Statement of the Case and Facts from the original Answer Brief, as well as the additions and corrections set forth in the State's previous supplemental briefs.

SUMMARY OF ARGUMENT

The State disputes that Appellant is entitled to any relief pursuant to Hurst v. Florida, __ U.S. __, 136 S. Ct. 616 (2016). Nevertheless, if this Court determines resentencing is appropriate, the procedures set forth in Chapter 2016-13, Laws of Florida would apply. Contrary to Appellant's arguments, the prohibition against *ex post facto* laws would not be an impediment to the application of the revised statute, and the legislative history of the revised statute indicates that the Legislature intended that it be applied to pending cases. Appellant's arguments that "substantive" changes in the law would prevent application of Chapter 2016-13, Laws of Florida, are meritless, as is his claim that the only viable option is to remand this case for the imposition of a life sentence.

Although it is the State's position that there would be no bar to the application of the revised statute to this case, should this Court disagree, application of the prior statute, along with implementation of procedures compliant with Hurst, would be appropriate.

ARGUMENT

SECOND SUPPLEMENTAL BRIEFING ISSUE

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

As it has done in previously filed pleadings and at oral argument, the State continues to dispute that Appellant is entitled to any relief pursuant to Hurst.[1] Nevertheless, this Second Supplemental Answer Brief is filed in compliance with this Court's March 15, 2016, Order, wherein this Court specifically directed the parties to discuss the applicability of Chapter 2016-13, Laws of Florida, in the event this Court remands this matter for resentencing pursuant to Hurst.

Section 921.141, Florida Statutes (2007)

Although it remains the State's position that Chapter 2016-13, Laws of Florida, would be the appropriate remedy should this Court remand for resentencing, the State will address Appellant's claim that the prior statute, § 921.141, Florida Statues (2007), cannot be "saved" by jury instructions because the portions found to be unconstitutional are not severable.

[1] As it did in its Supplemental Initial Brief, the State reiterates here that the parties have extensively argued their positions concerning the application of Hurst to this matter, both in supplemental briefing and at oral argument. So far as possible under the circumstances, arguments will not be reiterated in full here. Rather, without waiving any arguments previously made, the State will respond to the arguments set forth in Appellant's Second Supplemental Initial Brief.

Specifically, Appellant asserts that the jury's advisory role and the judge's fact finding role are too intertwined to allow severability without "rewriting the statute." Appellant is incorrect. Hurst was a narrow procedural ruling, specifying that constitutional error occurs when a trial judge "alone" finds the existence of "an aggravating circumstance." Hurst, 136 S. Ct. at 624. The Sixth Amendment flaw is necessarily one that can be avoided or prevented with the requirement of specific jury findings as to the existence of an aggravating circumstance. While Appellant argues that § 921.141, Florida Statutes (2007), is unconstitutional in its entirety and that subsections (2) and (3) cannot be severed, he misses the point that Hurst is a **procedural ruling**, and therefore a remedy is within the scope of ameliorative measures available to this Court. Indeed, as argued more fully below, the courts of Florida have the power and discretion to fashion rules of procedure when necessary. See, e.g., Galindez v. State, 955 So. 2d 517, 527 (Fla. 2007) (Cantero, J., concurring) ("When confronted with new constitutional problems to which the Legislature has not yet responded, we have the inherent authority to fashion remedies").

Appellant's reliance on Pennsylvania cases interpreting that state's minimum mandatory sentencing statutes in light of

Alleyne v. United States, 133 S. Ct. 2151 (2013),[2] is misplaced. The statute at issue in Commonwealth v. Hopkins, 117 A.3d 247, 249 (Pa. 2015), was 18 Pa.C.S. § 6317, which imposed a mandatory minimum sentence of two years imprisonment upon a defendant for conviction if delivery or possession with intent to deliver a controlled substance occurred within 1,000 feet of, *inter alia*, a school. The Hopkins court examined the statute, noting that in enacting the provision, the General Assembly expressly indicated that the minimum mandatory provisions contained therein "were not intended to constitute an element of a crime, and, thus, part of an offense." Id. at 257. Indeed, 18 Pa.C.S. § 6317(b) stated: "The provisions of this section shall not be an element of the crime." The court found that "Alleyne transforms the proximity sentencing factor of Section 6317 into exactly what the General Assembly expressly did not intend—a proximity requirement constituting an element of a new aggravated offense." Id. at 258. Further, the Hopkins court noted that numerous other provisions of § 6317 made it clear that the legislature intended it to be a "sentencing statute" only. Id. at 259 (emphasis omitted). The court found that "virtually every provision" of the minimum mandatory statute "runs afoul of the

[2] In Alleyne, the Court held that any fact which increases a mandatory minimum sentence is an "element" of the crime, and not a "sentencing factor," and thus must be submitted to the jury pursuant to the Sixth Amendment.

notice, jury trial, burden of proof, and post-trial rights of the accused after Alleyne." Id. The court concluded that the "unoffending portions of the statute, standing alone, without a wholesale rewriting, are incomplete and incapable of being vindicated in accord with the legislature's intent." Id. at 261.

The statute at issue in Commonwealth v. Newman, 99 A.3d 86 (Pa. Super. 2014), suffered from the same infirmities as the statute discussed in Hopkins. That is, the Pennsylvania legislature had expressly indicated that the minimum mandatory provisions "shall not be an element of the crime...." Id. at 91 (quoting 42 Pa.C.S.A. § 9712.1). The court rejected the State's request to remand for resentencing before a sentencing jury because, although such a bifurcated proceeding existed in capital cases, there was no similar mechanism for non-capital cases and the court could not create one. Id. at 102.

Unlike the situation in Hopkins and Newman, there is no similar express provision in Florida's death penalty statute indicating legislative intent that aggravating circumstances "shall not be an element of the crime." Additionally, there has always existed a bifurcated proceeding in Florida capital cases wherein the jury first determines guilt and then weighs aggravating and mitigating factors in the sentencing proceeding. In fact, it appears following Hurst that Justice Pariente's opinion concurring in part and dissenting in part in State v.

Steele, 921 So. 2d 538, 552-56 (Fla. 2005), is the correct analysis on the procedure to be employed in order to satisfy Ring v. Arizona, 536 U.S 584 (2002) (and now Hurst), and should therefore be applied to pending cases should this Court find that Chapter 2016-13, Laws of Florida, cannot be applied retroactively. In her Steele opinion, Justice Pariente quoted her prior concurring opinion in Bottoson v. Moore, 833 So. 2d 693, 724-25 (Fla. 2002) (Pariente, J., concurring in result only), post-Ring, in which she discussed requiring special verdicts for aggravating circumstances: "By acting prospectively, we can act to ensure that future verdicts comply with our state constitutional requirements ... as well as the Sixth Amendment dictates of Ring." Justice Pariente approved the special verdict forms formulated by trial courts in Huggins v. State, 889 So. 2d 743 (Fla. 2004), Floyd v. State, 913 So. 2d 564 (Fla. 2005), and Simmons v. State, 934 So. 2d 1000 (Fla. 2006). Steele, 921 So. 2d at 554-55. The referenced procedures were put in place by trial courts in the absence of a statute or rule. Id. at 554 n.11. Justice Pariente opined that allowing special verdict forms until the Court promulgated a rule would not result in an unconstitutional application of the death penalty. Id. at 555. See also Galindez v. State, 955 So. 2d 517, 527 (Fla. 2007) (Cantero, J., concurring) (observing that courts had the authority to fashion procedural remedies for violations

of Apprendi and Blakely v. Washington, 542 U.S. 296 (2004), including empanelling new juries, even though such was not provided for by the Legislature).

In Cramp v. Board of Public Instruction, 137 So. 2d 828, 830 (Fla. 1962), this Court set forth a test for severability, to determine the extent to which a statute which has been deemed unconstitutional may still be operable. An act will be permitted to stand provided: "(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 the 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." Id. Hurst was a **procedural** ruling in which the Court concluded that § 921.141 was unconstitutional to the extent that it "require[s] the judge alone to find the existence of an aggravating circumstance." Hurst, 136 S. Ct. at 624. The elimination of the offending language would "leave intact a valid, coherent, workable statute," Cramp, 137 So. 2d at 831, particularly in light of the inherent power of the court to fashion necessary procedures. Galindez, 955 So. 2d at 527.

Application of Chapter 2016-13, Laws of Florida

As argued in its Supplemental Initial Brief, it is the State's position that if this Court remands this matter for resentencing pursuant to Hurst, the provisions of Chapter 2016-13, Laws of Florida should apply. As the State explained in its prior brief, neither the prohibition against *ex post facto* laws, nor the Savings Clause of the Florida Constitution would impede the application of the new statute.

Appellant argues that Chapter 2016-13, Laws of Florida cannot apply retroactively because it contains a "substantive" provision which makes a person eligible for the death penalty upon the finding of a single aggravating circumstance. This is not a substantive change in Florida's death penalty law. This Court has long interpreted the prior statute to provide that eligibility for the death penalty arises upon the finding that "at least one aggravating circumstance exists." Steele, 921 So. 2d at 543. See also State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973) (interpreting the term "sufficient aggravating circumstances" in Florida's capital sentencing scheme to mean one or more such circumstances); Zommer v. State, 31 So. 3d 733, 754 (Fla. 2010) ("Since the Legislature in the last thirty-six years has not amended the Florida Statutes to provide that at least two aggravating circumstances must be found to impose a sentence of death, it can be presumed that the Legislature agrees with and has adopted this Court's interpretation of the term 'sufficient

aggravating circumstances' that was articulated in Dixon.). Thus, contrary to Appellant's argument, the new statute does not "broaden[] the field of death eligible defendants without narrowing the lengthy list of aggravating factors." (Appellant's Second Supp. IB at 10).

Appellant further suggests that the new statute "risks" being unconstitutional because its list of aggravating factors may fail to narrow the field of persons eligible for the death penalty. First, Chapter 2016-13 does not add any additional aggravating factors to those contained in the previous statute.[3] See Blanco v. State, 706 So. 2d 7, 11 (Fla. 1997) (rejecting similar argument that Florida's capital felony sentencing statute is unconstitutional because it fails to adequately narrow the field of first-degree murderers sentenced to death). Second, this is an issue which should only be addressed, if at all, by the circuit court below, upon proper motion and argument by counsel. At this juncture, it is premature for the parties to address, for the first time, any potential and speculative arguments challenging the impact of the new legislation as this issue has not, and potentially may not, be litigated below. Assuming this case is remanded for resentencing, and assuming

[3] Indeed, the only change is in terminology, changing "aggravating circumstances" to "aggravating factors." Ch. 2016-13, Laws of Fla.

further that the State continues to seek the death penalty, it can be assumed that Appellant would encounter the same aggravating circumstances the State pressed at his first penalty phase. In other words, the "aggravator creep" he claims to fear simply would not be a factor in his case. If this Court were to address the constitutionality of the new statute as applied to a hypothetical defendant, it would be rendering what amounts to an advisory opinion. See, e.g., M.Z. v. State, 747 So. 2d 978 (Fla. 1st DCA 1999) (noting that "constitutional questions should be decided in a case only when they are necessary to the disposition of that case"). This Court should decline Appellant's invitation to speculate in this case on the potential "risk" that the new statute would be unconstitutional as applied to a hypothetical defendant.

Appellant further notes that Chapter 2016-13 provides that notice of State's intent to seek the death penalty must be given within 45 days of arraignment and must contain a list of the aggravating factors the State intends to prove. He avers that because it would be impossible for the State to comply with these provisions, the new statute cannot be applied to him upon remand. Revised § 782.04 as provided in Chapter 2016-13, states:

> "If the prosecutor intends to seek the death penalty, the prosecutor must give notice to the defendant and must file the notice with the court within 45 days after arraignment. The notice must contain a list of the aggravating factors the state intends to prove and has reason to believe it can

> prove beyond a reasonable doubt. The court may allow the prosecutor to amend the notice upon a showing of good cause."

Ch. 2016-13, Laws of Fla. The provision does not state that any failure to provide such notice on time mandates that the State cannot seek the death penalty. See Schneider v. Gustafson Industries, Inc., 139 So. 2d 423, 424 (Fla. 1962) (noting that statutes setting the time when an act is to be done are regarded as directory and not jurisdictional where no provision restraining the doing of it after that time is included and the act in question is not one upon which court jurisdiction depends). See also State v. Sousa, 903 So. 2d 923, 928 (Fla. 2005) (reiterating that the "fundamental rule of construction in determining legislative intent is to first give effect to the plain and ordinary meaning of the language used by the Legislature").

In claiming Chapter 2016-13 is not retroactive to pending cases, Appellant argues that Dobbert v. Florida, 432 U.S. 282 (1977), is factually distinguishable because Dobbert was never sentenced under an unconstitutional statute. That distinction is immaterial to an *ex post facto* analysis. In Knapp v. Cardwell, 513 F. Supp. 4 (D. Ariz. 1980), aff'd, 667 F.2d 1253 (9th Cir. 1982), the federal district court found:

> [w]hile petitioners cite several state court decisions which have distinguished Dobbert on the basis that their defendants had been tried and sentenced under unconstitutional death penalty

> statutes, including Meller v. State, 94 Nev. 408, 581 P.2d 3 (1978);[4] State v. Rogers, 270 S.C. 285, 242 S.E.2d 215 (1978), these cases do not state rationale which this Court finds persuasive in dealing with the facts before it. Dobbert, and other Supreme Court decisions discussing the ex post facto clause, see, e.g., Beazell v. Ohio, supra, suggest that the two key areas for inquiry in the present case are the law at the time of the criminal act and the law at the time of final sentencing. The ex post facto clause only prohibits detrimental substantive alterations of the applicable law "at the time the act was committed." 269 U.S. at 169, 46 S. Ct. at 68. This Court holds that, for ex post facto purposes, the status of the death penalty between the dates of petitioners' crimes and their final sentencing was irrelevant. What is important is that petitioners were forewarned of the existence of the death penalty at the time they committed their crimes and that the procedure by which they were ultimately sentenced was constitutional.

Knapp, 513 F. Supp. at 17 (footnote omitted).

Appellant's reliance on State v. Rogers, 242 S.E.2d 215 (S.C. 1978) is misplaced. Rogers had already been resentenced to life imprisonment after the effective date of the new death penalty statute. Further, Appellant cites numerous cases from other states that all held retroactive application of a new death penalty statute was impermissible under **state law**. See State v. Lindquist, 589 P.2d 101, 104 (Idaho 1979) ("[W]e need not decide

[4] Appellant also cites Meller v. State, 581 P.2d 3 (Nev. 1978); however, that case is distinguishable in that Meller did not deal with a Dobbert issue. In fact, the court included a footnote stating, "[w]e are cognizant of the sentencing procedures recently approved by the U.S. Supreme Court in [Dobbert]. However, because the present case is factually distinguishable from Dobbert, we find those procedures inapposite." Meller, 581 P.2d at 410 n.3.

whether Dobbert is applicable to the circumstances of this case or whether the ex post facto clause of the Idaho Constitution requires a different interpretation.... Here, our statutes themselves clearly prohibit the retroactive application of the 1977 statute to this defendant."); State v. Collins, 370 So. 2d 533, 534 n.3 (La. 1979) (finding the new death penalty statute could not be applied retroactively because Louisiana law expressly prohibited retroactive application of any new legislation); Hudson v. Commonwealth, 597 S.W.2d 610, 611 (Ky. 1980) (because Kentucky had a statute providing "[n]o statute shall be construed to be retroactive, unless expressly so declared," and new death penalty statute failed to expressly address retroactivity, the court was without a proper vehicle to apply the new statute retroactively); Commonwealth v. Story, 440 A.2d 488, 489-90 (Pa. 1981) (new death penalty statute could not be applied retroactively because Pennsylvania legislature expressly mandated "[n]o statute shall be construed to be retroactive unless clearly and manifestly intended by the General Assembly"). Florida has no such limiting statute;[5]

[5] As explained in the State's Supplemental Initial Brief, the Savings Clause of the Florida Constitution 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. Art. X, § 9, Fla. Const.; Horsley v. State, 160 So. 3d 393 (Fla. 2015).

therefore, contrary to Appellant's position, Dobbert is controlling authority and should govern this Court's retroactivity analysis.

Appellant's reliance on the Colorado Supreme Court's decision to remand two pending pipeline cases for imposition of life sentences after Colorado's death penalty statute was declared unconstitutional under Ring is misplaced. The Colorado statute at issue differs from § 775.082(2), Florida Statutes (2007), in that it is not triggered by a finding that "the death penalty" is unconstitutional. Rather, the Colorado statute specifies that, in the event the death penalty "as provided for in this section," is found to be unconstitutional, life sentences are mandated. Woldt v. People, 64 P.3d 256, 259 (Colo. 2003). Relying on that language, as well as the fact that the defendants in Woldt were two of three identifiable targets of post-Ring legislation allowing the Colorado Supreme Court, upon review, to uphold the death sentences already imposed, the court ruled that application of the new legislation to the defendants would violate state and federal prohibitions on *ex post facto* laws. Id. at 271-72.

Appellant contends that he cannot be resentenced under the new statute because nothing in the statute indicates legislative intent for it to apply to pending cases. As pointed out in the State's Supplemental Initial Brief, the February 25, 2016,

Senate amendment to the proposed legislation deleted the following: "Section 7. 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." The fact that our Legislature removed proposed language applying the new law prospectively makes it clear that its intent was to apply it both prospectively and retroactively to pending cases. Fla. SB 7068, Amend. 163840 (Feb. 25, 2016).[6]

In sum, the State disputes that Appellant is entitled to resentencing based on Hurst. Should this Court order resentencing, the provisions of Chapter 2016-13, Laws of Florida, should apply. If this Court finds that the amended statutes would not be retroactive, this Court may implement procedural changes that comply with Hurst and remand for proceedings under the prior statute. In no event is Appellant entitled to an automatic life sentence because of the ruling in Hurst.

[6] Thayer v. State, 335 So. 2d 815 (Fla. 1976), upon which Appellant relies, does not advance his argument. There, the legislation at issue provided that it would apply to licenses issued "henceforth," leaving "no doubt as to legislative intent" that it apply prospectively to licenses issued after the effective date of the Act and not ... retroactively....") Id. at 818. Chapter 2016-13, Laws of Florida, contains no such limitation.

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 14, 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** and **appealfilings@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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