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 ANSWER BRIEF OF APPELLANT

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TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

Other Authorities

SUMMARY OF THE ARGUMENT

The only constitutional penalty remaining in section 921.141 Florida Statues (2007) is life imprisonment without the possibility of parole. This is the penalty that should apply in Mr. Jackson's case.

House Bill 7101 violates the ex post facto clause of the United States and Florida Constitutions because there were substantive changes made to the statute. HB 7101 also violates Article X section 9, the savings clause, of the Florida Constitution. HB 7101 was approved by the Governor and became a law, Chapter 2016-13, Laws of Florida, on March 7, 2016. Mr. Jackson is entitled to be sentenced under the statute in effect at the time of his initial trial if there remains a valid constitutional penalty. The penalty of life imprisonment remains as the only valid constitutional option available for Mr. Jackson.

ARGUMENT
ISSUE I

FLORIDA'S DEATH PENALTY SCHEME AS SET FORTH IN SECTION 921.141 FLORIDA STATUTES (2007) IS UNCONSTITUTIONAL. PORTIONS OF THE DEATH PENALTY STATUTE AS WRITTEN ARE NOT SEVERABLE FROM EACH OTHER AND CANNOT BE SAVED BY JURY INSTRUCTIONS. HOWEVER, THE DEATH PENALTY PROVISION OF THE STATUTE CAN BE SEVERED FROM THE SENTENCE OF LIFE IMPRISONMENT.

The State has not argued that section 921.141 Florida Statutes (2007) could apply if Mr. Jackson receives a new sentencing hearing. Appellant notes that although the death penalty scheme has been declared unconstitutional and the various portions of that scheme are not severable, the other penalty option of life imprisonment is severable and remains in full force.

Severance of an unconstitutional death penalty provision and imposition of a life sentence has been a prevalent remedy choice. See, e.g., French v. State, 362 N.E. 2d 834, 838 (Ind. 1977)(life sentence required where defendant sentenced under mandatory statute and death penalty severable); Rockwell v. State, 556 P.2d 1101, 1116 (Cal. 1976)(unconstitutional mandatory death penalty; court severs death penalty provision, leaving life imprisonment, consistent with legislative intent that invalidity of any section shall not affect remaining statutory provisions); see also State v. Jenkins, 340 So. 2d 157, 179 (La. 1976)(death sentence reduced to life, court noting that this was not the first time its death penalty statute was unconstitutional and in "each case we

instructed the trial courts to substitute life imprisonment for the death sentence.")

In Florida, only the death penalty scheme was declared unconstitutional by Hurst v. Florida, 136 S. Ct. 616, 619 (2016). The penalty of life imprisonment without the possibility of parole, remains a viable sentence. The death penalty provision, therefore, can be severed from the statute without running afoul of legislative intent. Mr. Jackson should be re-sentenced to life imprisonment, the only remaining constitutionally viable penalty under the statute that was in effect at the time of his initial trial.

ISSUE II

CHAPTER 2016-13, LAWS OF FLORIDA DOES NOT EXPRESSLY APPLY RETROACTIVELY AND CANNOT APPLY RETROACTIVELY BECAUSE IT PROVIDES FOR SUBSTANTIVE CHANGES.

Both the United States Constitution and the Florida Constitution prohibit ex post facto laws. See U.S. Constitution article I, section 10, ("No State shall...pass any...ex post facto Law."); Florida Constitution article I, section 10 ("No...ex post facto law...shall be passed."). An ex post facto law is one which "punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for the crime, after its commission, or which deprives one charged with a crime of any defense available according to law at the time when the act was committed." State v. Hootman 709 So. 2d 1357, 1359 (Fla. 1998)(abrogated on other grounds by State v. Matute-

Chirinos, 713 So. 2d 1006 (Fla. 1998)). In Florida, a law violates ex post facto laws if: 1) it is retrospective in effect; and 2) it diminishes a substantial substantive right the party would have enjoyed under the law existing at the time of the alleged offense. Dugger v. Williams, 593 So. 2d 180, 181 (Fla. 1991). The error occurs not because the person is being denied the advantage, but because the person is denied the same level of access to the advantage that existed at the time the crime was committed. An ex post facto violation can occur with regard to a substantive law or a procedural law, because some procedural matters have a substantive effect. Id. at 181. Thus, if changes made in Chapter 2016-13, Laws of Florida have a substantive effect, the law violates the ex post facto clause.

Chapter 2016-13, Laws of Florida, makes substantive changes to section 921.141 Florida Statutes, because it expands the pool of individuals that are necessarily eligible for the death penalty. The ex post facto clause of the United States and Florida Constitutions, is violated by Chapter 2016-13, Laws of Florida, because it deprives Appellant of the defense that one aggravator does not necessarily make him eligible for the death penalty. Although the old statute required a finding of at least one aggravator before the death penalty could be a possible penalty, the finding of one aggravator did not necessarily make a defendant death eligible. The old statute required that there be sufficient aggravating circumstances and insufficient mitigating circumstances to outweigh the aggravating circumstances before a

person became eligible for the death penalty. Under Chapter 2016-13, Laws of Florida, Mr. Jackson will no longer be able to argue that he is not necessarily eligible for the death penalty if only one aggravating circumstance is found, and that there must be sufficient aggravating circumstances and insufficient mitigating circumstances before he becomes eligible for the death penalty.

Under Chapter 2016-13, Laws of Florida, the eligibility determination is made much earlier in the process and made much more easily. By placing a defendant in the eligibility category it is much more likely that he will be selected to receive the death penalty because it implies to the jury that death is the proper penalty. The pool of people eligible for the death penalty has been greatly expanded by Chapter 2016-13, Laws of Florida. It is no longer necessary that there are sufficient aggravating circumstances and insufficient mitigating circumstances for a person to be eligible for the death penalty. This change by Chapter 2016-13, Laws of Florida, certainly appears to be substantive, and even if it is procedural it certainly has a substantive effect. Under the new law, Mr. Jackson would no longer be able to argue that he is not necessarily eligible for the death penalty upon a finding of one aggravating circumstance, and there must be sufficient aggravating circumstances and insufficient mitigating circumstances to outweigh the aggravating circumstances before he becomes eligible for the death penalty.

Appellee cites to Dobbert v. Florida, 432 U.S. 282 (1977) for the proposition that the Court rejected ex post facto challenges

to the application of the revised death penalty statute. Florida's death penalty statute that was in effect at the time Dobbert committed his crimes was declared unconstitutional. A revised capital sentencing statute was enacted after Dobbert committed his crimes, but before he was ever tried. The present case is distinguished from Dobbert, because Jackson was tried and sentenced under a death penalty statute that was declared unconstitutional. The Court in Dobbert said there was nothing wrong with the line drawing done by Florida:

> But petitioner is simply not similarly situated to those whose sentences were commuted. 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 the 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. There is nothing irrational about Florida's decision to relegate petitioner to the latter class, since the new statute was in effect at the time of his trial and sentence.

Id. at 301.

After Hurst declared Florida's capital sentencing statute unconstitutional, the only remaining viable sentence for first-degree murder was life imprisonment. Mr. 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. The line drawing in Dobbert was to apply the new statute only to defendants not tried and sentenced under the old statute. The same line drawing should occur in applying Chapter 2016-13, Laws of Florida. Jackson was tried and sentenced before enactment of Chapter 2016-13, Laws of Florida, and he is entitled to be sentenced under the only remaining constitutionally valid penalty, in the old statute, of life imprisonment.

Appellee cites to U.S. v. Booker, 543 U.S. 220, 246 (2005) for the proposition that the Court answers the remedial question by looking at legislative intent. That is of little help in the present situation because Chapter 2016-13, Laws of Florida expresses only that the bill is to take effect upon becoming a law. It makes no declaration that the bill should apply retroactively.

In Booker, the sentencing guidelines were mandatory and had the force and effect of laws. Id. at 234. The Sixth Amendment was violated by the imposition of an enhanced sentence under the guidelines based on the sentencing judge's determination of a fact that was not found by the jury. Id. at 245. The remedy was to excise the mandatory provision and the appeal related provision of the guidelines. Id. 260 The act, without its mandatory provision and related language, remained consistent with Congress' initial and basic sentencing intent. Id. at 264. Thus, if Congress knew the mandatory provision would have run afoul of the Sixth

Amendment they would not have included the mandatory provision in the sentencing guidelines. In the present case, the legislature did know that section 921.141 Florida Statutes (2007) ran afoul of the Sixth Amendment. If the legislature wanted Chapter 2016-13, Laws of Florida to provide a remedy for those tried under the old unconstitutional statute, they could have made that known, which they failed to do.

The Savings Clause

The purpose of Article X Section 9, commonly known as the "Savings Clause", is to require the statute in effect at the time of the crime to govern the sentence an offender receives for the commission of that crime. Horsley v. State, 160 So. 3d 393, 406 (Fla. 2015). In Horsley, this Court found that in this "unique context" the savings clause does not apply because the statute in effect at the time of the crime was unconstitutional. The statute in effect allowed only one penalty for juveniles convicted of first degree murder; life without the possibility of parole. The savings clause did not apply in Horsley because of the unique situation that the statute provided for no possible penalty that was constitutional. The present case is distinguished from Horsley, because after the United States Supreme Court found Florida's death penalty sentencing scheme unconstitutional, there remained the constitutionally valid sentence of life without the possibility of parole. Horsley does not apply to the present case where the Savings Clause is an impediment to applying Chapter 2016-13, Laws of Florida retroactively, because there remains a

constitutionally valid sentencing option.

Appellee cites to 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) in attempt to further support retroactive application of a new statute enacted to remedy a violation of the federal constitution. In Henry, Gridine, and Lawton, this Court held that the new statute would also be applied to juveniles whose non-homicide sentences violated the Eighth Amendment under Graham v. Florida, 560 U.S. 75 (2001). Appellee points to the significance of these Graham cases because, unlike Horsley, where there was no other viable sentence, there was always a viable non-life sentence available for juveniles whose initial sentence violated Graham. However, Appellee fails to recognize that the alternative penalty in the Graham cases was not a constitutionally viable alternative. "We conclude that Graham prohibits the state trial courts from sentencing juvenile nonhomicide offenders to prison terms that ensure these offenders will be imprisoned without obtaining a meaningful opportunity to obtain future early release during their natural lives based on their demonstrated maturity and rehabilitation." Henry v. State, 175 So. 2d at 680.

There was not a constitutionally viable alternative sentencing statute for juveniles because the remedy available did not provide juveniles a meaningful opportunity for future release based upon a demonstration of maturity and rehabilitation. Id. at 680. The only available remedy was to find that application

of the new statute which allows for a meaningful review does not violate the "Savings Clause." It is only in this very unique circumstance that a new statute enacted to cure a constitutional defect in an old sentencing statute may be applied retroactively. The present case does not present such a unique circumstance, because there is the constitutionally viable alternative sentence of life imprisonment without the possibility of parole. The sentence of life imprisonment without the possibility of parole should be imposed, because the "Savings Clause" prevents retroactive application of Chapter 2016-13, Laws of Florida.

Appellant disagrees with Appellee's assertion that the legislature, by enacting Chapter 2016-13, Laws of Florida, intended to keep open the option of the imposition of the death penalty in pending cases rather than have the courts automatically impose a sentence of life imprisonment. Certainly the legislature is aware of Article X Section 9 of the Florida Constitution which prohibits retroactive application of criminal statutes. If the legislature intended for Chapter 2016-13, Laws of Florida to apply to pending cases they would have stated that the new law is to apply retroactively, rather than making it effective upon becoming a law. The fact that Chapter 2016-13, Laws of Florida became effective upon becoming a law rather than on July 1, 2016 or October 1, 2016, indicates that they wanted the law to become effective as soon as possible, not that it was to apply retroactively. The new law became effective immediately so that individuals who committed first-degree murder after March 7, 2016,

but before the first of July or October, 2016, would not be able to evade the possibility of a death sentence.

Appellee cites to a February 25, 2016, Senate amendment to the proposed legislation that 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." Appellee suggests that this "revision further reinforces the Legislature's clear intent that the amended statute be applied to pending cases." If the legislature's intent was so clear, why would they hide it from the rest of the world? One purpose of a statute is to put people on notice. If the legislature intended for Chapter 2016-13, Laws of Florida, to apply to pending cases they should have made that clear with explicit language. As this Court stated in Bates v. State, 750 So. 2d 6, 10 (Fla. 1999), "any basis for retroactive application must be unequivocal and leave no doubt as to the legislative intent." The failure of the legislature to address retroactivity means the amendment only applies prospectively.

The more likely reason the legislature left out the language, that the amendment only applies to criminal acts that occur on or after the effective date of this act, is because it was meaningless and redundant to the "Savings Clause." See State v. Lavazzoli, 434 So. 2d 321, 323 (Fla. 1983)(It is a well-established rule of statutory construction that without a clear legislative expression to the contrary, a law is presumed to

operate prospectively.)

"In addition to the statute's plain language, a basic rule of statutory construction provides that the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless." State v. Goode, 830 So. 2d 817, 824 (Fla. 2002). The language that was left out was a useless provision because all criminal statutes apply to criminal acts that occur after the effective date of the act. Language that the legislature did include, which confirms their intent that the amendments are not to apply retroactively, is the notice provision which states:

> If the prosecutor intends to seek the death penalty, the prosecutor must give notice to the defendant and 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.

Amendment to 782.04 (1)(a)3(b) Florida Statutes. This would be a useless provision if the amendments were other than prospective, because it would be impossible for the prosecutor to comply with this notice provision if the person had been arraigned more than 45 days prior to HB 7101 becoming a law.

The State argues that 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.) This is true in the unique

situation presented in Horsley where there was no available remedy compliant with the federal constitution. However, in the present case, where the penalty of life imprisonment without the possibility of parole is available and compliant with the federal constitution, this remedy must be applied. Appellant is entitled to be resentenced. Applying the sentence of life imprisonment, which is the only remaining constitutionally viable penalty set for the in section 921.141 Florida Statutes (2007), 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. Because we are not faced with the unique situation that existed in Horsley, the imposition of life imprisonment not only satisfies the concerns in Horsley, but also is consistent with the Savings Clause.

CONCLUSION

Based on the arguments presented in prior briefs, Kenneth Jackson, respectfully asks that he be granted a new trial. In the alternative, 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 14TH 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

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