IN THE SUPREME COURT OF FLORIDA

RICHARD F. FRANKLIN,

Appellant,

v. **CASE NO. SC13-1632**

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRD JUDICIAL CIRCUIT,
IN AND FOR COLUMBIA COUNTY, FLORIDA

SUPPLEMENTAL REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

CASES

STATUTES

TABLE OF AUTHORITIES

PAGE(S)

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ARGUMENT

ISSUE

FRANKLIN'S DEATH SENTENCE WAS IMPOSED IN VIOLATION OF THE SIXTH AMENDMENT AND MUST BE VACATED UNDER HURST V. FLORIDA, 136 S. Ct. 616 (2016).

The state first argues that Franklin's death sentence is constitutional because one of the aggravating factors found by the judge to support the death sentence, the prior violent felony aggravator, is a "recidivist" aggravator, i.e., it relates to a prior conviction, and under Almendarez-Torres v. United States, 523 U.S. 224 (1998), a recidivist aggravator may be found by a judge even if it increases the sentence beyond the statutory maximum.

The state's position cannot be squared either with the Supreme Court's decision in Hurst v. Florida, 136 U.S. 616 (2016), or with this Court's own interpretations of Florida's capital sentencing statute. As the Supreme Court in Hurst

recognized, under Florida's capital sentencing scheme, a person convicted of a capital felony shall be punished by death only if an additional sentencing proceeding "results in findings by the court that such person shall be punished by death." s. 775.082(1), Fla. Stat. (2012). Otherwise, such person shall be punished by life without parole. The trial court, after weighing aggravating and mitigating circumstances, imposes sentence, and if the court imposes death, it must "set forth in writing its findings upon which the sentence of death is based." s. 921.141(3). Id. at 620. The Supreme Court recognized that Florida's sentencing statute, as interpreted by this Court, requires more than the finding of a single aggravating factor to make a defendant eligible for death:

> As described above and by the Florida Supreme Court, the 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. s. 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." s. 921.141(3).

136 S. Ct. at 622. The "critical [factual] findings necessary to impose the death penalty" in Florida, then are whether "sufficient aggravating circumstances exist" and whether "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Id. Without such findings, the penalty of death may not be imposed in Florida. See, e.g.,

Bottoson v. Moore, 833 So. 2d 693, 719-23, 725 (Fla. 2002)(Pariente, J., concurring in result only)("[T]he maximum penalty of death can be imposed only with the additional factual finding that aggravating factors outweigh mitigating factors").

Further, Hurst states that "the Sixth Amendment requires a jury ... to find each fact necessary to impose a sentence of death." In the present case, the judge imposed the death sentence based not simply on the prior violent felony aggravating factor but on its factual findings as to five aggravating factors, including the disrupt/hinder, CCP, and EHAC aggravators, all disputed. The trial judge also found that the aggravating factors were not outweighed by the mitigating factors. It is these findings--whether and which aggravating circumstances apply and whether the aggravating factors are outweighed by the mitigation--that subject a defendant (make a defendant eligible) to a sentence of death in Florida, not simply the finding of a single aggravating circumstance. Because Ring[1] requires that a jury make the findings of fact necessary to impose the death sentence in the same manner that a jury must find all the elements of the crime of murder in the guilt phase, Hurst requires the jury to find each aggravating factor upon which the sentence is based and to then determine whether the aggravating factors are outweighed by the mitigation.

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[1]Ring v. Arizona, 536 U. S. 584 (2002)

The state next argues that Franklin is not entitled to a life sentence under section 775.082(2), Florida Statutes. The state argues that the post-Furman[2] situation is different from the current situation because Furman, which struck various capital sentencing schemes under the Eighth Amendment, provided little guidance on what procedures would make the imposition of death constitutional, whereas Hurst "is a specific ruling to extend the Sixth Amendment protections first identified in Ring to Florida cases." Answer Brief at 7. While it is true that the Supreme Court invalidated the death penalty scheme in Furman under the Eighth Amendment and invalidated the death penalty scheme in Hurst under the Sixth Amendment, the state offers no rationale for applying 775.082(2) to one situation and not the other.

In Furman, as in Hurst, the United States Supreme Court declared the capital sentencing scheme unconstitutional, not the death penalty itself. In both situations, the Court held the death penalty was being applied in an unconstitutional manner. As this Court recognized in State v. Dixon, 283 So. 2d 1, 6-7 (Fla. 1973), the Court in Furman did not abolish capital punishment; it merely held that in the three cases before it, the death penalty had been imposed in violation of the Eighth Amendment.

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[2]Furman v. Georgia, 408 U. S. 308 (1972)

Thus, it was the procedure or scheme for imposing the death penalty that rendered Florida's death penalty unconstitutional when this Court determined in Donaldson v. Sack, 265 So. 2d 499 (Fla. 1972), that section 775.082(2) applied. And there was no ambiguity about the application of section 775.082(2) after Furman.

Furthermore, section 775.082(2) makes no distinction between a ruling invalidating a capital sentencing scheme on Eighth Amendment grounds and a ruling invalidating a capital sentencing scheme on Sixth Amendment, due process, or any other grounds, and basic rules of statutory construction preclude reading such a distinction into the statute. See Velez v. Miami-Dade County Police Dep't, 934 So. 2d 1162, 1164-65 (Fla. 2006)("We are without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonably obvious implications. To do so would be an abrogation of legislative power.").

The plain, unambiguous text of section 775.082(2) could not be clearer: Upon the condition precedent that the death penalty in a capital felony is held unconstitutional by this Court or the United States Supreme Court, the court having original jurisdiction over the case "shall" resentence the defendant to life imprisonment. The Supreme Court in Hurst held Florida's death penalty scheme unconstitutional, the condition precedent is

thus satisfied, and under section 775.082(2)'s clear language, the circuit court having jurisdiction over Franklin's offenses must replace his death sentence with a sentence of life without parole.

This remedy is also dictated by the lack of any qualifying or limiting language in the statute. After the application of 775.082(2) to death sentences that were already final, the Legislature did not amend the statute. The Legislature could have repealed or limited the statute's reach to Eighth Amendment violations after confirmation of the constitutionality of its newly-enacted 1972 death penalty statute in Dixon, or at any time between 1972 and Hurst, but it did not. Moreover, in 1998, many years after the statute was enacted, the legislature did insert the exception that no death sentences shall be reduced to life imprisonment if the method of execution is held unconstitutional. Exceptions in statutes are "narrowly and strictly construed." See Samara Dev. Corp. v. Marlow, 556 So. 2d 1097, 1100-01 (Fla. 1990). Here, construing together the two sentences, the first sentence establishes the general rule, with the second establishing the one exception. As enacted, the section's first sentence, whether read in isolation or in pari materia with the second sentence, requires this Court to reduce to a life sentence any death sentence imposed under the statute held unconstitutional in Hurst.

The Legislature had every reason to anticipate that Florida's death penalty scheme was likely to be held unconstitutional, yet did not amend section 775.082(2). As early as 2002, at least four members of this Court expressed serious concerns about the constitutional viability of various aspects of Florida's scheme. See Bottoson v. Moore, 833 So. 2d 693, 703-34 (Fla. 2002)(concurring opinions of Justices Anstead, Shaw, Pariente, and Lewis), and ten years ago, all seven members of the Court expressed similar doubts and urged the legislature to revisit the statute to ensure compliance with Ring, and provide for some form of juror unanimity. State v. Steele, 921 So. 2d 538, 548-56 (Fla. 2006).

The legislature did nothing. Now that the contingency that triggers section 775.082(2) has occurred, any attempt to repeal or amend it now would be an unconstitutional ex post facto law if applied to individuals who were sentenced to death under the unconstitutional statute. See Woldt v. People, 64 P. 3d 256, 270-72 (Colo. 2003); see also Carnell v. Texas, 529 U.S. 513 (2000); Thomas v. Hannigan, 6 P.3d 933, 937 (Kan. App. 2000).

Last, the state argues that the recent denials of certiorari in Smith v. Florida, No. 15-6430 (2016), and Fletcher v. Florida, No. 15-6075 (2016), "show[] us the Court's intention," and "if the Court believed capital punishment in Florida was unconstitutional a la Furman," the petitions for certiorari would

have been granted but has instead "allowed executions to proceed forward." Answer Brief at 7-8. This argument must be rejected because, one, "denials of certiorari cannot be interpreted as an 'expression of opinion on the merits,'" Daniels v. Allen, 344 U.S. 443, 497 (1953)(quoting Sunal v. Large, 332 U.S. 174, 181 (1947)), and, two, it is this Court, not the United States Supreme Court, who must interpret the legislative intent of section 775.082(2). As discussed above, the intent of the legislature is codified in the plain, unambiguous language of the statute.

Accordingly, this Court should vacate Franklin's death sentence and remand his case for the imposition of a life sentence.

CONCLUSION

For the reasons presented in this brief, the Supplemental Brief, and the Initial and Reply Briefs on the Merits, appellant respectfully asks this Court to remand his case for a life sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by electronic mail to Patrick Delaney, Assistant Attorney General, Appeals Division, The Capitol, PL-01, Tallahassee, FL, 32399-1050, at Capapp@myfloridalegal.com as agreed by the parties, and by U.S. Mail to Richard Franklin, #990054, Florida State Prison, 7819 NW 228th St., Raiford, FL, 32026, on this date, March 7, 2016.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using Courier New 12 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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