IN THE SUPREME COURT OF FLORIDA

KHADAFY KAREEM MULLENS, :

Appellant, :

vs. : Case No. SC13-1824

STATE OF FLORIDA, :

Appellee. :

_____:

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PINELLAS COUNTY
STATE OF FLORIDA

INITIAL SUPPLEMENTAL CAPITAL BRIEF OF APPELLANT ADDRESSING *HURST V. FLORIDA*

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STATEMENT OF THE CASE AND FACTS

After pleading guilty to two counts of first-degree murder and one count of attempted first-degree murder with a firearm, Appellant, Khadafy Kareem Mullens, waived a jury for penalty phase. On August 23, 2013, the Honorable Philip J. Federico sentenced Mr. Mullens to death for each of the murders and to life imprisonment for the attempted murder.

Appellant's Initial Brief contains a detailed statement of the facts and proceedings in the trial court. Appellant relies on his statement of the case and facts for purposes of this supplemental brief.

SUMMARY OF THE ARGUMENT

Hurst v. Florida, 136 S.Ct. 616 (2016), rendered Florida's death penalty scheme unconstitutional, just as Furman v. Georgia, 408 U.S. 238 (1972), rendered Florida's death penalty scheme unconstitutional in 1972; therefore, section 775.082(2) applies, and Appellant's sentences must be reduced to life imprisonment.

Florida's death penalty statute is fatally flawed because the advisory role of the jury -- which produces a mere recommendation of death or life imprisonment by majority vote, with no verdict and no specific findings -- is inextricably interwoven with the fact-finding role of the trial judge which was held unconstitutional in Hurst. For that reason, the invalid provisions cannot be severed, and the constitutional defects cannot be remedied without rewriting the statute, which is not a judicial function. Because the statute is unconstitutional on its face, section 775.082(2) applies.

Any argument that section 775.082(2) does not apply after Hurst because the death penalty has not been declared unconstitutional *per se* is not correct. When this Court applied that provision in 1972, the United States Supreme Court had not declared Florida's death penalty unconstitutional *per se*. Just as in 1972, the Supreme Court declared Florida's *sentencing scheme* in violation of the Constitution.

After Furman, there was no disagreement that section

775.082(2) mandated that prisoners under sentence of death be resentenced to life imprisonment. Furthermore, when Florida's amended capital sentencing statute was determined to be constitutional, the Legislature did not eliminate section 775.082(2). In 2002, after Florida's sentencing scheme was called into question by Ring v. Arizona, 536 U.S. 584 (2002) (and Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002), and King v. Moore, 831 So. 2d 143 (2002)), the Legislature did not eliminate the provision, nor did it eliminate the provision when the U. S. Supreme Court accepted jurisdiction in Hurst on March 9, 2015. (Hurst v. Florida, 135 S.Ct. 1531 (2015)).

Section 775.082(2) applies in this case because the statute makes no distinction between a ruling that that invalidates Florida's death penalty scheme based on a violation of the Eighth Amendment as opposed to a violation of the Sixth Amendment (as in Hurst). Finally, if the statute is susceptible of both interpretations, the "rule of lenity" requires that this Court interpret the statute in Appellant's favor.

Mr. Mullens (Appellant) was sentenced while section 921.141 was facially unconstitutional. Because his death sentence is on direct appeal, he must be resentenced to life imprisonment.

ARGUMENT

ISSUE

BECAUSE HURST RENDERED FLORIDA'S DEATH PENALTY SCHEME UNCONSTITUTIONAL, SECTION 775.082(2), FLORIDA STATUTES, APPLIES AND APPELLANT MUST BE RESENTENCED TO LIFE IMPRISONMENT.

By an eight-to-one vote, the United States Supreme Court in Hurst v. Florida, 136 S.Ct. 616 (2016), clearly and unequivocally held that Florida's death penalty scheme is 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; see also id. at 622. Even the lone dissenter, Justice Alito, characterized the Court's decision as "striking down Florida's capital sentencing system". Id. at 625.

Hurst rendered section 921.141, Florida's death penalty scheme unconstitutional just as Furman v. Georgia, 408 U.S. 238 (1972), rendered Florida's death penalty scheme unconstitutional in 1972; therefore, section 775.082(2) applies, and Appellant's sentences must be reduced to life imprisonment.

Mr. Mullens was sentenced while section 921.141 was unconstitutional and his sentence is on direct appeal. Even though Appellant waived a jury for penalty phase, his sentence must be reversed pursuant to section 775.082(2), Florida Statutes, which provides:

> In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1). No sentence of death shall be reduced as a result of a determination that a method of execution is held to be unconstitutional under the State Constitution or the Constitution of the United States.

A. Hurst rendered section 921.141 unconstitutional on its face; therefore, for the same reasons that section 775.082(2) applied in 1972, that section applies to Appellant's case.

After Furman, in Donaldson v. Sack, 265 So. 2d 499 (Fla. 1972), this Court specifically acknowledged that the 1971 Florida death penalty statutes were unconstitutional because they were inconsistent with the Supreme Court's decision. Even though Donaldson may have arisen by way of a petition for prohibition claiming that the circuit court lacked jurisdiction, this Court made it clear, that in light of Furman, Florida's death penalty was unconstitutional and could not be upheld:

> We have examined every reasonable avenue to uphold the several statutes and rules insofar as they assert 'capital offense,' as we must do under the rule favoring validity unless clearly indicated otherwise. We are unable in the face of existing authorities and logic to find support for the continuance of 'capital offense' as heretofore applied. Accordingly, it must fall with the U.S. Supreme Court's holding against the death penalty as provided under present legislation. Our decision is compelled by that Court's action.

Id. at 501.

In Donaldson, this Court held even though circuit courts did not have jurisdiction over "capital" murder, sentences for life imprisonment could still be imposed in conformity with the intent of the Legislature in section 775.082(2) (which had not yet taken effect), even though the possibility of a death sentence had been eliminated in light of Furman. See id. at 502-503. In Donaldson, this Court commented on the applicability of section 775.082(2) to those defendants already under sentence of death, writing:

> We have given general consideration to any effect upon the current legislative enactment to commute present death sentences to become effective October 1, 1972. The statute was conditioned upon the very holding which has now come to pass by the U.S. Supreme Court in invalidating the death penalty as now legislated. It is worded to apply to those persons already convicted without recommendation of mercy and under sentence of death. This provision is not before us for review and we touch on it only because of its materiality in considering the entire matter.

Id. at 505 (footnote omitted). This Court specifically noted that 775.082(2) applied because the U.S. Supreme Court "invalidat[ed] the death penalty as now legislated." Id.

Chapter 72-118, which added the pertinent language contained in section 775.082(2),[1] was enacted in the 1972 Legislative session in anticipation of Furman. Furman was decided on June 29, 1972, before the statute was to take effect on October 1, 1972.

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[1] The subsection was amended in 1998 to add: "No sentence of death shall be reduced as a result of a determination that a method of execution is held to be unconstitutional under the State Constitution or the Constitution of the United States."

Donaldson was decided on July 17, 1972, and in the opinion, this Court acknowledged that the statute was enacted in anticipation of Furman. See Donaldson, 265 So. 2d at 503 ("At their 1972 Session, the Legislature foresaw the possibility of the current situation.").

In Reino v. State, 352 So. 2d 853, 860-61 (Fla. 1977)[2], this Court noted that the Legislature added 775.082(2) in March of 1972:

> As early as March, 1972, the legislature was cognizant of the possibility of the decision reached in Furman. Not only did the legislature revise the death penalty statute to be effective October 1, 1972 (Ch. 72-72, Laws of Florida), it enacted Ch. 72-118, Laws of Florida, filed in the office of the Secretary of State March 30, 1972, which amended Section 775.082, Florida Statutes, by adding a new subsection reading:
>
> > In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, a person who has been convicted of a capital felony shall be punished by life imprisonment.

Id. at 860-61.

In Anderson v. State, 267 So. 2d 8 (Fla. 1972), this Court determined, upon motion by the Attorney General, that trial courts could resentence all inmates under sentence of death in absentia. It was clear that both this Court and the Attorney General agreed that the newly enacted, but not yet effective, section 775.082(2)

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[2] This Court receded from Reino in Perez v. State, 545 So. 2d 1357 (Fla. 1989), on grounds not related to this argument.

would apply. See also Reed v. State, 267 So. 2d 70 (Fla. 1972) (holding that in light of Donaldson, the defendant's sentences had to be changed from death to life imprisonment).

The State's position, which has been asserted in other cases, that section 775.082(2) does not apply after Hurst -- because the death penalty has not been declared unconstitutional *per se* -- is not correct. When this Court applied that provision in 1972, the Supreme Court in Furman had not declared Florida's death penalty unconstitutional *per se*, it declared Florida's sentencing scheme unconstitutional.

In 1973, in State v. Dixon, 283 So. 2d 1 (Fla. 1973), this Court acknowledged that the Supreme Court did not abolish the death penalty. This Court reiterated that in Furman the Supreme Court held only that the imposition of the death penalty in the three cases before it (one from Texas and two from Georgia) was cruel and unusual punishment in violation of the Eighth Amendment. See id. at 6. In upholding the constitutionality of newly-enacted section 921.141, Dixon explicitly states: "[Furman] does not abolish capital punishment"; and "Capital punishment is not, Per se, violative of the Constitution of the United States . . . or of Florida." Id. at 6-7. This Court explained Furman, writing:

> Two points can, however, be gleaned from a careful reading of the nine separate opinions constituting Furman v. Georgia, Supra. First, the opinion does not abolish capital punishment, as only two justices - Mr. Justice Brennan and Mr. Justice Marshall - adopted that extreme position. The

> second point is a corollary to the first, and one easily drawn. The mere presence of discretion in the sentencing procedure cannot render the procedure violative of Furman v. Georgia, Supra; it was, rather, the quality of discretion and the manner in which it was applied that dictated the rule of law which constitutes Furman v. Georgia, Supra.

Dixon, 283 So. 2d at 6 (emphasis supplied). See also Breedlove v. State, 413 So. 2d 1, 9 (Fla. 1982) ("Both the United States Supreme Court and this Court have found that the death penalty is not per se violative of either the federal or state constitution.").

In other words, it was the *procedure or scheme* for imposing the death penalty that rendered Florida's death penalty unconstitutional in Donaldson, when this Court determined that section 775.082(2) applied. Furthermore, there was no ambiguity about the application of the section after Furman, Donaldson, Anderson, 267 So. 2d 8, and Reed, 267 So. 2d 70. In addition, section 775.082(2) makes no distinction between a ruling which invalidates Florida's death penalty scheme on Eighth Amendment grounds and a ruling which invalidates the scheme on Sixth Amendment grounds (as in Hurst). Therefore, this post-Hurst situation cannot be dismissed as different from that in 1972, and Appellant must be sentenced to life imprisonment because no individual case-by-case determination has been provided for by statute.

As explained above, a position that section 775.082(2)

applies only if the death penalty itself has been declared unconstitutional is not historically accurate. But even assuming, for the sake of argument, that section 775.082(2) were subject to both interpretations, it is a basic rule of statutory construction under Florida law that any ambiguity in a penal statute must be construed in the manner most favorable to the defendant -- not in the manner most favorable to the state. See, e.g., Reino, 352 So. 2d at 860. This principle has been codified in section 775.021(1). See Wallace v. State, 860 So. 2d 494, 497 (Fla. 4th DCA 2003) ("The Legislature committed itself to the 'Rule of Lenity' in the construction of criminal statues").

The "rule of lenity" plainly applies to sentencing statutes as well as statutes defining crimes. For example, a sex offender sentencing statute was at issue in Kasischke v. State, 991 So. 2d 803, 814 (Fla. 2008), in which this Court recognized that the rule of lenity "in Florida . . . is not just an interpretive tool, but a statutory directive" and "[a]ny ambiguity or situations in which statutory language is susceptible to different constructions must be resolved in favor of the person charged with an offense." Id. at 814 (quoting State v. Byars, 823 So. 2d 740, 742 (Fla. 2002) (emphasis in original)).

In Lamont v. State, 610 So. 2d 435, 437-38 (Fla. 1992), this Court - in holding that a defendant convicted of a life felony is not subject to enhanced punishment as an habitual offender - employed the rule of lenity noting "even if we were to find the

statute ambiguous, it must be construed in the manner most favorable to the accused." Three years later the Florida Legislature amended the applicable statute to (prospectively) provide that life felonies are subject to habitual offender sentencing. See Lafleur v. State, 661 So. 2d 346, 349 n.1 (Fla. 3d DCA 1995). This legislative action had the effect of abrogating Lamont's holding, but not its reasoning.

If the Legislature has previously enacted an unambiguous statute which it doesn't like (or, as in the instant situation, one which it no longer likes), it can amend the statute prospectively. If the Legislature has enacted an ambiguous statute which, under the rule of lenity, has been interpreted in a way it doesn't like, it can amend the statute prospectively. What the State must not be permitted to do is to prevail on an interpretation (i.e., that § 775.082(2) applies only if the death penalty is found to be *per se* unconstitutional) when there was universal agreement (which included the State) that the State's current interpretation was not what the Legislature intended when the statute was enacted and first applied over four decades ago.

It is telling that after the application of 775.082(2) to death sentences that were already final, the Legislature did not amend the statute. If the legislature had a problem with the way section 775.082(2) was applied after Furman, Donaldson, and Anderson, it could have (prospectively) repealed or amended it. The Legislature could also have amended the statute after

confirmation of the constitutionality of its newly-enacted 1972 death penalty statute (section 921.141) in Dixon, or at any time during the 43 years between 1972 and Hurst. It did not do so. Moreover, if the legislature believed that section 775.082(2) only applied if the death penalty were to be declared unconstitutional *per se*, it would have had no reason to insert the 1998 exception that no death sentence shall be reduced to life imprisonment if the method of execution is held to be unconstitutional.

What is more persuasive is the fact that the Legislature had every reason to anticipate that Florida's death penalty scheme was likely to be declared unconstitutional, yet it did not amend section 775.082(2). As early as 2002, in the wake of Ring v. Arizona, 536 U.S. 584 (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). Ten years ago all seven members of the Court expressed similar doubts and urged the legislature to revisit the statute to: (1) ensure compliance with Ring, and (2) provide for at least some form of juror unanimity (and end Florida's "outlier" status in that regard). State v. Steele, 921 So. 2d 538, 548-56 (Fla. 2006).[3]

[3] Opinion of the Court authored by Justice Cantero, joined by Justices Wells Lewis, Quince, and Bell; concurring opinion of Justice Wells, joined by Justices Cantero and Bell; concurring

The legislature's non-response was deafening. For fourteen years it has had plenty of opportunity to fix, or attempt to fix, the constitutional defects in Florida's death penalty scheme, and plenty of opportunity to repeal or amend (prospectively, since it is a substantive penal statute) section 775.082, but it chose inaction. Now that the contingency which triggers section 775.082(2) has actually occurred, any attempt to repeal or amend it now would be an unconstitutional ex post facto law if applied retroactively 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, 533 (2000); Thomas v. Hannigan, 6 P.3d 933, 937 (Kan. App. 2000).

Finally, Mr. Mullens would point out that of the five western states whose death penalty schemes were expressly declared unconstitutional by Ring in 2002, two of them, Colorado and Arizona, had "savings clauses" substantially similar to Florida's § 775.082(2). The Supreme Court of Colorado held that the savings clause applied to individuals previously sentenced to death under the unconstitutional statute, and that those defendants had to be resentenced to life imprisonment rather than be exposed to new death penalty resentencing trials under the newly enacted statute. Woldt v. People, 64 P.3d at 258-59, 262-72.[4] The Supreme Court of

(..continued)

and dissenting opinion of Justice Pariente, joined by Justice Anstead.

[4] The Colorado Supreme Court's decision in Woldt was complicated

Arizona reached the contrary conclusion in State v. Pandeli, 161 P.3d 557, 573-74 (Ariz. 2007), but it did not do so based upon any statutory interpretation that its savings clause applied only if the death penalty were found to be per se unconstitutional. Instead, the Arizona court's conclusion was based on a theory of "severability" which this Court, under well-established Florida law, cannot adopt. See Part B, below.

Therefore, because Florida's death penalty process has been declared unconstitutional in Hurst, the statute is unconstitutional for the same reasons as in Donaldson, and section 775.082(2) applies.

(..continued)

by the fact that that state's legislature had enacted two conflicting statutes; one required the imposition of a life sentence in the event the death penalty statute was found to be unconstitutional (referred to throughout Woldt as the mandatory provision), while the other granted the court discretion to affirm the death sentences or order new penalty trials (the discretionary provision). 64 P.3d at 267. Using principles of statutory construction, the Woldt court determined that the mandatory provision must prevail. Id. at 269. In addition, affirming the death sentences on a quasi – "harmless error" theory, based on whether the juries "implicitly found the aggravators which were found (under the unconstitutional procedure) by the three-judge panels, would place the appellate court in an impermissible (under Ring and now Hurst) fact-finding role (see id. at 269-70), while returning the cases to the trial court for new jury penalty trials would raise serious ex post facto questions since, inter alia, "the mandatory provision . . . dictates life imprisonment as the remedy for this constitutional violation. Id. at 270-72.

B. Section 921.141, Florida Statutes is unconstitutional on its face and the unconstitutional components cannot be severed from the statute without rendering the statute incomplete and incomprehensible.

Section 921.141 was enacted in December of 1972 (Ch. 72-724, Laws of Florida) in response to Furman. See Proffitt, 428 U.S. at 247-48 ("In response to Furman v. Georgia, . . . Florida adopted a new capital-sentencing procedure, patterned in large part on the Model Penal Code."). To its credit, the Legislature formulated a two-tiered system which required extensive written findings of fact before a defendant was eligible to be sentenced to death by a trial judge, who was the designated sentencer. This Court cannot retroactively rewrite that highly-specific statute in an effort to uphold section 921.141 after Hurst.

Section 921.141 can be severed from section 775.082(1), which defines murder and provides a mandatory life sentence without parole eligibility for first-degree murder. See Donaldson, 265 So. 2d at 502-503 (holding that eliminating the death penalty from section 775.082(1) did not do away with mandatory sentencing of life imprisonment because the death penalty could be severed from the statute). However, the unconstitutional portions of 921.141 cannot be severed from 921.141 itself.

Hurst has unequivocally declared that a jury recommendation is "not sufficient." Hurst clearly states that a jury verdict cannot substitute for a unanimous finding of an aggravating

circumstance. See Hurst, 136 S. Ct. at 622 ("The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that Ring requires."). The Supreme Court did not hold that the statute was unconstitutional as applied to Timothy Hurst; it declared that Florida's sentencing scheme itself was 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; see also id. at 622.

Therefore, in order to render the statute constitutional, section 921.141 would have to be re-written to provide for an actual binding (and perhaps unanimous) jury verdict with regard to aggravating circumstances. In addition, in order to comport with the express intention of the Legislature in section 921.141, there would have to be an actual binding jury verdict stating that the mitigation did not outweigh the aggravating circumstances. It is also arguable that in order to comply with legislative intent, the jury would have to make findings regarding mitigating factors in addition to aggravating factors. See State v. Dixon, 283 So. 2d 1, 8 (1973), *superseded by statute on other grounds, as stated in* State v. Dene, 533 So. 2d 265, 267 (Fla. 1988) (stating: "The most important safeguard presented in Fla. Stat. s 921.141, F.S.A., is the propounding of aggravating and mitigating circumstances which must be determinative of the sentence

imposed"; and, "The fourth step required by Fla. Stat. s 921.141, F.S.A., is that the trial judge justifies his sentence of death in writing, to provide the opportunity for meaningful review by this Court.").

Whether or not this Court can, in effect, "re-write" section 921.141 for future proceedings to provide for "procedural safeguards" that comply with Hurst, it is undisputed that this Court cannot retroactively re-write this statute to render it constitutional. This Court cannot re-write an unambiguous statute to make it constitutional. See Richardson v. Richardson, 766 So. 2d 1036, 1040-41 (Fla. 2000) (holding that the unambiguous language of § 61.13(7) could not be rendered constitutional by severing portions giving grandparents equal footing with parents or by applying a narrowing construction); State v. Egan, 287 So. 2d 1, 7 (Fla. 1973) ("Under our constitutional system of government . . . courts cannot legislate."); State v. Cronin, 774 So. 2d 871, 875-75 (Fla. 1st DCA 2000), *approved*, 801 So. 2d 94 (Fla. 2001) (declining the State's invitation to re-write § 817.234(8) to include an intent to defraud as an element); Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984) ("[C]ourts of this state are without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power." (quoting American Bankers Life

Assurance Company of Florida v. Williams, 212 So. 2d 777, 778 (Fla. 1st DCA 1968))).

When the constitutional and unconstitutional provisions of a statute are inextricably intertwined the invalid portions cannot be severed. Allen v. Butterworth, 756 So. 2d 52, 64 (Fla. 2000). "[I]f the valid portion of the law would be rendered incomplete, of if severance would cause results un-anticipated 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).

Section 921.141(2) provides for an advisory sentence by the jury, and subsection (3) provides that "[n]otwithstanding the recommendation of a majority of the jury" the trial court shall enter a sentence of life imprisonment or death, and if a death sentence is imposed the trial judge shall make the written findings of fact as to the aggravating and mitigating circumstances "upon which the sentence of death is based." The jury's advisory role and the judge's factfinding role cannot be "severed" from the statute; their respective functions can be addressed only by rewriting the statute (which the Legislature, after fourteen years of inaction, is now hard at work trying to

do). Without subsections (2) and (3) there is no procedure in § 921.141 for determining who is sentenced to death and who is sentenced to life imprisonment; there is merely a list of aggravating and mitigating factors with no direction as to how to apply them or as to who shall apply them. Without the unconstitutional provisions, the remainder of the statute is incomplete and incoherent.

Mr. Mullens was sentenced while section 921.141 was facially unconstitutional. Because he is on direct appeal, he must be resentenced to life imprisonment.

CONCLUSION

In light of the foregoing, Appellant respectfully requests that this Court vacate his death sentences and remand the case to the trial court for re-sentencing to life imprisonment.

CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to the Attorney General's Office at capappTPA@myfloridalegal.com, through the Court's portal, on this 16th day of February, 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,

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