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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

SUPPLEMENTAL (CAPITAL) REPLY BRIEF OF APPELLANT ADDRESSING *HURST V. FLORIDA*

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ISSUE

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

Appellee argues that section 775.082(2) was enacted "following" Furman v. Georgia, 408 U.S. 238 (1972), and that it was meant to apply to situations such as that in Coker v. Georgia, 433 U.S. 584 (1977), which held that capital punishment for the rape of an adult woman was unconstitutional. As explained in detail on pages 5 through 9 of Appellant's Supplemental Initial Brief, Appellee's assertion is demonstrably incorrect. Section 775.082(2) was enacted in anticipation of Furman. That section now mandates that Mr. Mullens be resentenced to life imprisonment.

The United States Supreme Court, by an 8-1 vote 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." Id. at 619. Section 775.082(2), Florida Statutes, enacted by the Florida legislature in March 1972 in anticipation of the Furman decision, provides that "[i]n 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)." And that is exactly what happened after Furman and Donaldson v. Sack, 265 So. 2d 499 (Fla. 1972). See Anderson v. State, 267 So. 2d 8, 10 (Fla. 1972) (lists of defendants); In re Baker, 267 So. 2d 331, 332-34 n.1,2,3 (Fla. 1972) (lists of defendants).

In fact, it was the position of the Attorney General that the numerous death sentences were illegal and the defendants should be resentenced to life imprisonment. Anderson, 267 So. 2d at 9; Baker, 267 So. 2d at 332. Due to the logistical and public safety problems of transporting that many prisoners, this Court -- exercising its "inherent powers" authority -- chose to itself "correct the illegal sentences previously imposed without returning the prisoners to the trial court." Anderson, 267 So. 2d at 9-10. See Baker, 267 So. 2d at 334-35.

Now, nearly 44 years later, the applicable statute is still the same, but the Attorney General's office is taking a much different approach; *i.e.*, that the provision applies only when the death penalty has been declared unconstitutional per se, but does not apply when it is the death penalty statute or scheme which has been declared unconstitutional.

The State's current self-serving interpretation of § 775.082(2) is mistaken. Furman did not declare the death penalty per se unconstitutional any more than Hurst did; if it did, there would be no death penalty and we would not be here arguing any of this. Furman (or, more accurately Donaldson v. Sack) and Hurst

each found Florida's death penalty scheme to be unconstitutional.

Florida, like every other state which chose to do so, was free after Furman to rewrite its death penalty statute, and it promptly did so. In State v. Dixon, 283 So. 2d 1 (Fla. 1973) -- the decision in which this Court approved the legislature's new statute -- this Court emphasized that the actual one-paragraph per curiam holding and the only controlling law in Furman was that the death penalty could not constitutionally be imposed or carried out in the three cases (two from Georgia, one from Texas) before it. See id. at 6.

> 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). The Dixon Court went on to say "Capital punishment is not, Per se, violative of the Constitution of the United States (Furman v. Georgia, Supra) or of Florida. Wilson v. State, 225 So. 2d 321 (Fla. 1969)." Id.

Appellee argues on page 6 of its brief that this situation is different from the one confronting this Court after Furman because Furman invalidated "all death penalty statutes in the country." That is not so. Furman had a sweeping effect only because the

numerous death penalty statutes generally allowed for unbridled discretion. However, Virginia had a mandatory penalty of death for an inmate who killed a prison guard. Because a death sentence was mandatory with no discretion involved, the statute survived Furman. See Jefferson v. Commonwealth, 214 Va. 747, 204 S.E.2d 258 (1974); Washington v. Commonwealth, 216 Va. 185, 217 S.E.2d 815 (1975).[1] See also State v. Leigh, 285 N.E.2d 333 (Ohio 1972) (invalidating Ohio's death penalty in light of Furman, but stating that portions of the statute mandating a death sentence for the murder or attempted murder of certain government officials would probably survive Furman).

That being so, what is the purported distinction between Furman and Hurst for purposes of applying the mandate of § 775.082(2)? Is it that one found that Florida's old death penalty scheme violated the Eighth Amendment because of flawed procedural protections while the other found that Florida's current death penalty scheme violates the Sixth Amendment for the same reason? Section 775.082(2) makes no such distinction, and none should be made by this Court.

Appellant does not concede that there is any ambiguity in whether § 775.082(2) applies when the death penalty statute is declared unconstitutional as opposed to when the death penalty is declared per se unconstitutional. Indeed, nobody seemed to perceive any ambiguity after Furman and Donaldson. But even

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[1] However, mandatory death sentences were later invalidated in Woodson v. North Carolina, 428 U.S. 280 (1976), and Roberts v. Louisiana, 428 U.S. 325 (1976).

assuming for the sake of argument that § 775.082(2) were subject to both interpretations, it is a basic rule of 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 v. State, 352 So. 2d 853, 860 (Fla. 1977). This principle has been codified in § 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 statutes.").

The "Rule of Lenity" plainly applies to sentencing statutes as well as statutes defining crimes. For example, a sentencing statute was at issue in Kasischke v. State, 991 So. 2d 803 (Fla. 2008), where this Court recognized that the rule of lenity "in Florida . . . is not just an interpretive tool, but a statutory directive." Id. at 814 (quoting State v. Byars, 823 So. 2d 740, 742 (Fla. 2002)). "Any 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. (emphasis in original). See also Lamont v. State, 610 So. 2d 435, 437, 438 (Fla. 1992) (employing the rule of lenity in holding that a defendant convicted of a life felony is not subject to enhanced punishment as an habitual offender).

Appellee argues on pages 14-16 of its brief that this Court can fashion a remedy that upholds section 921.141 by separating out the "bad features" of the statute. However, nowhere in the brief does Appellee suggest how this can be accomplished in any

way other than a proactive (as opposed to a retroactive) rewriting of the statute. Appellee never actually asserts that § 921.141 (as it stood at the time of Mr. Mullens' sentencing) can be reinterpreted or re-written to render it whole, coherent, and constitutional, and in conformance with legislative intent, without retroactively applying a totally new revised statute to those inmates already under sentence of death. Such a retroactive application would be unconstitutional.[2] See State v. Dickerson, 298 A.2d 761 (Del. 1972) (severing Delaware's "Recommendation of Mercy Statute", which entailed discretion, from its "Murder Statute", which mandated a sentence of death, to comply with Furman, but holding that retroactive application of the severed statute to require a mandatory death penalty would be a violation of due process of law and ex post facto prohibitions).

Section 921.141 cannot be salvaged by excising the unconstitutional portion of the procedure for imposing the death penalty; however, what can be excised from Florida's death penalty statutes is the death penalty itself. What remains would be a mandatory life sentence, which would be constitutional.

Appellee also argues that the statute is constitutional in those cases where there is a prior or contemporaneous qualifying felony. The United States Supreme Court could easily have held that the Florida scheme was unconstitutional "as applied" to Mr. Hurst, but it did not do so. If the Court had thought that the

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[2] Appellant is absolutely not conceding that this Court may usurp the traditional function of the Florida Legislature to draft death penalty legislation.

Florida judicial factfinding scheme was sufficient to satisfy the Sixth Amendment in those cases (which constitute an overwhelming majority of Florida's death penalty cases) where, for example, the defendant has a prior violent felony conviction; or a contemporaneous conviction; or the homicide was committed in the course of an underlying felony; or there is a victim-status aggravator (e.g., law enforcement officer or child under 12); or a defendant-status aggravator (e.g., under sentence of imprisonment or under a domestic violence injunction), the Court could easily have said so. See, e.g., Texas v. Johnson, 491 U.S. 397, 403 n.3 (1989) (stating that the decision was "as applied").

Instead, the Court, by an 8-1 vote, clearly and unequivocally held that Florida's death penalty scheme is unconstitutional. "We hold this sentencing scheme is 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, 136 S.Ct. at 619. Even the lone dissenter, Justice Alito, characterized the Court's decision as "striking down Florida's capital sentencing system." Id. at 625.

Appellee also argues that Hurst should be read very narrowly by ignoring the language in Hurst which correctly states 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. See Hurst, 136 S. Ct. at 622 ("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. § 775.082(1).'"). "'A person who has been 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.'" Id. at 620 (citing § 775.082(1), Fla. Stat.).

Appellee argues on page 8 of its brief that Appellant "improperly conflates a jury determination of facts necessary to impose a sentence of death with proportionality," and then Appellee proceeds to misconstrue the concept of "death eligibility" as determined by the Florida Legislature.

In misconstruing the concept of "death eligibility" Appellee completely ignores the fact that Florida is a weighing state. As explained in Jennings v. McDonough, 490 F.3d 1230, 1249 n.14 (11th Cir. 2007) (a federal habeas decision in a Florida capital case):

> A weighing state is one in which the legislative narrowing of death-eligible defendants and the individualized sentencing determination are collapsed into a single step and based on an evaluation of the same sentencing factors. See Brown v. Sanders, 546 U.S. 212, 126 S.Ct. 884, 890, 163 L.Ed.2d 723 (2006). In order to ensure that the process satisfies the constitutionally mandated narrowing functions, all aggravators must be defined by the statute and must identify "distinct and particular aggravating features." Id. In a non-weighing state, however, eligibility and the actual sentence are determined separately. Thus, once eligibility has been determined, the sentencer in a nonweighing state can give aggravating weight to all the facts and circumstances of the crime, not just those that are statutorily defined, without violating the narrowing requirement. Id.

Thus, the State's repeated assertion that the existence of a single aggravator makes Hurst inapplicable to some cases, or that such an aggravator renders Hurst error harmless, either incorrectly treats Florida as a nonweighing system, or incorrectly assumes that there is no difference between the two systems in determining death-eligibility.

Moreover, in nonweighing 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. They are also fewer and narrower than the sixteen aggravating factors (ten of which have been added after the statute was originally enacted) which are provided in the Florida statute. See State v. Steele, 921 So. 2d 538, 543 (Fla. 2005). Very few individuals convicted of first-degree murder in Florida will not have at least one aggravator; therefore, under the state's concept, almost every capital defendant will be death-eligible, and Hurst will apply to almost nobody (or else will be universally "harmless").

The only way that Florida's list of aggravators can satisfy the constitutional requirement of genuinely narrowing the class of persons convicted of first-degree murder who are eligible for the death penalty is if the totality of the aggravators, as weighed against the mitigators, makes a defendant death-eligible. That is what Florida law has always provided, and that is the reason for the requirements that sufficient aggravating circumstances (plural) exist to warrant a death sentence, and that the

aggravating circumstances (plural) are not outweighed by the mitigating circumstances.

The state's "single aggravator" argument, if accepted, would convert Florida into a de facto nonweighing state and would put this state's entire capital sentencing scheme -- once again -- at risk. 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").

The state's reliance on Kansas v. Carr, 136 S.Ct 633 (2016), is misplaced. The Kansas statute under consideration in Carr provided for "jury sentencing" – binding jury findings regarding aggravating circumstances and jury weighing of the aggravating and mitigating factors. See State v. Kleypas, 40 P.3d 139, 253 (Kan. 2001). See also Kansas v. Marsh, 548 U.S. 163, 166 (2006) ("The jury found beyond a reasonable doubt the existence of three aggravating circumstances, and that those circumstances were not outweighed by any mitigating circumstances. On the basis of those findings, the jury sentenced Marsh to death for the capital murder of M.P."). Moreover, Carr does not even involve a Sixth Amendment issue; the question there was whether the Eighth Amendment required a jury instruction that mitigating circumstances need not be proved beyond a reasonable doubt. In State v. Gleason, 329 P.3d 1102, 1147 (Kan. 2014) -- one of the two decisions reversed by the U.S. Supreme Court on the instructional issue -- "the jury found

the existence of all four aggravating circumstances alleged by the state beyond a reasonable doubt, determined the aggravating circumstances were not outweighed by any mitigating circumstances, and unanimously agreed to sentence Gleason to death.”

Finally, in addressing Appellant’s single narrow argument that section 775.082(2) mandates a life sentence in this case because Florida’s death penalty statute has been declared unconstitutional, Appellee repeatedly asserts an argument that Hurst does not apply to Mr. Mullens, either because he waived a jury or because he had contemporaneous prior violent felony convictions. This is a “straw man” argument; it was never asserted by Appellant. Appellant argued that the statute is void, and because the statute is void, there is no reason to conduct a harmless-error analysis as suggested by Appellee on pages 18-20 of its brief.

Florida’s death penalty statutes have been declared unconstitutional. There is no way to salvage the statutes in a way that would make them applicable to Mr. Mullens whose penalty phase occurred while the statutes were unconstitutional. Because the Florida Legislature has provided for such a contingency, Mr. Mullens must be resentenced 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 2nd day of March, 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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