IN THE SUPREME COURT OF FLORIDA

DONALD OTIS WILLIAMS,

Appellant,

vs.

CASE NO. SC14-814

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT,
FIFTH JUDICIAL CIRCUIT,
IN AND FOR LAKE COUNTY

APPELLANT'S SUPPLEMENTAL REPLY BRIEF IN LIGHT OF HURST v. FLORIDA

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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SUMMARY OF ARGUMENT

The State argues that Section 775.082(2), Florida Statutes, does not apply here, since in *Hurst*, the Supreme Court did not invalidate the *practice* of capital sentencing. This court has construed the statute as mandating relief where, as here, Florida's death penalty is declared unconstitutional *as legislated*.

The State argues that the Sixth Amendment is not implicated as long as the defendant has a conviction for a violent felony, or as long as the jury made findings that one statutory aggravator is present. The State's theory is not borne out by Florida's legislation, jury instructions, or caselaw.

The State argues that the unconstitutional subsections of Section 921.141 of the Statutes, *i.e.*, subsections 2 and 3, can be severed, and that pipeline cases can be evaluated solely for whether a statutory aggravator is present. However, discarding subsections 2 and 3 would not leave "an act complete in itself" behind.

The State further notes that the Court in *Hurst* did not declare Florida's standard jury instructions for use in capital cases unconstitutional. While this is true, *Hurst* and *Caldwell v. Mississippi*, 472 U.S. 320 (1985), inescapably lead to the conclusion that constitutional errors infect the current proceedings to the extent that a new penalty phase cannot be avoided in this case.

ARGUMENT

IN REPLY: THE DEATH SENTENCE APPEALED FROM WAS IMPOSED IN VIOLATION OF *HURST v. FLORIDA*.

SECTION 775.082(2), F.S.

The State argues that Section 775.082(2) of the Florida Statutes does not apply here, since in *Hurst v. Florida*, 136 S. Ct. 616 (2016), the Supreme Court did not declare the *practice* of capital sentencing unconstitutional, but instead held only that Florida's death-penalty procedures run afoul of the Sixth Amendment. (Supplemental Brief ("SB") at 4-7) The State's position is based on its reading of the statutory subsection at issue, which by its terms is activated "[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." Section 775.082(2), Fla. Stat. Without citation, the State announces that after *Furman v. Georgia*, 408 U.S. 238 (1972), was decided, the law which became that statute "was enacted...in order to fully protect society in the event that capital punishment *as a whole* for capital felonies were to be deemed unconstitutional." (SB at 5; emphasis added) This court, however, differently construed the language "in the event the death penalty in a capital felony is held to be unconstitutional" in *Donaldson v. Sack*, 265 So. 2d 499 (Fla. 1972). In that case, this court noted the legislative language

at issue "was conditioned upon the very holding which now has come to pass [in *Furman*], invalidating the death penalty *as now legislated."* *Donaldson* at 505 (emphasis added).

Appellant maintains his view that *Hurst*, as did *Furman*, invalidates Florida's death penalty as currently legislated, and that the relief this court granted in *Anderson v. State*, 267 So. 2d 8 (Fla. 1972), should again be granted

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The State argues that Sixth Amendment interests are not implicated in any Florida capital case where the defendant has a conviction for a prior violent felony, or was convicted of a violent felony contemporaneously with the murder. (SB at 8-11) It reasons that in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court excluded the existence of a prior conviction from those facts which a jury, as distinct from the sentencing judge, must make in support of an enhanced sentence. (SB at 8-10) The State further posits that the only actual fact needed in Florida to make a defendant eligible for the death penalty is the existence of a single aggravating factor, and that all other findings made in a capital case are in fact global judgments rather than fact-based findings governed by *Apprendi*. (SB 10-11) In reaching that position, the State relies on language from the Court's recent decision in *Kansas v. Carr*, 136 S. Ct. 633 (2016). (SB 10)

In *Carr*, the Court referred to the "eligibility phase" and the "selection phase" featured in the Kansas death-sentencing scheme. In *State v. Gleason*, 329 P. 3rd 1102 (Kansas 2014), the decision overturned in *Carr*, the Kansas Supreme Court explained that juries in that state must find beyond a reasonable doubt (a) that the charged aggravating circumstances exist, and (b) that their existence is not outweighed by any mitigating circumstances. *Gleason* at 1141. Here, the State of Florida observes that in that scheme there is a clear dichotomy between an initial factual "eligibility" finding (one aggravator exists) and a further, less specific finding "selecting" the defendant for the death penalty, and it extrapolates that such a dichotomy must exist in Florida as well. However, Florida's capital sentencing statute does not fit that mold. Instead, Section 921.141, Florida Statutes, dictates that the required findings are "that *sufficient* aggravating circumstances exist," and that there are insufficient mitigating circumstances to outweigh them. 92l.141(3) (emphasis added). Thus Florida intertwines the factual findings it requires to support a death penalty with the "judgment calls" that decision requires.

Florida's standard jury instructions do not, any more clearly than the statute, set out a dichotomy between an initial factual finding governed by *Apprendi* and a later global determination which is not so governed. First the instructions tell the

jurors they are to advise the court of their ultimate recommendation based on their determinations about *sufficient* aggravating circumstances and whether they are outweighed; then the instructions set out general rules for weighing the evidence and general rules for deliberation; then they instruct that at least one aggravating circumstance must be proven beyond a reasonable doubt; then they return to the duty to find *sufficient* aggravators; then they instruct on mitigation, pointing out the lesser burden of proof on the defense; then they instruct on victim impact; then they again return to the duty to find at least one aggravator that is in the jurors' minds *sufficient*. Fla. Std. Jury Instr. (Crim.) 7.11, *West's Florida Criminal Laws and Rules* (2015) at J-72 to J-77.

The State relies on *State v. Dixon*, 283 So. 2d 1 (Fla. 1973), where this court stated that death is presumed the appropriate sentence where at least one aggravating factor is found. *Dixon* at 9. (SB at 11) As Justice Pariente has pointed out, that statement of law is inconsistent with more recent authority, which holds that the jury is never compelled or required to return a recommendation of death. *Zommer v. State*, 31 So. 3rd 733, 756 (Pariente, J., specially concurring), *citing* the standard jury instructions approved in 2009 and *State v. Steele*, 921 So. 2d 538, 543 (Fla. 2005). The federal Sixth Amendment requires jury involvement in making the findings that the Court in *Hurst* pointed out must be made in Florida,

i.e., "that sufficient aggravating circumstances exist and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances." *Hurst* at 622, citing Section 921.141(3), Florida Statutes.

HARMLESS OR STRUCTURAL ERROR

The State also argues that the fact the jury found aggravating factors in this case shows that *Hurst* has no effect here. (SB 12-14) This position, again, depends on its assumptions that the Florida Legislature clearly says that the only finding a capital jury must make is that a single aggravating circumstance exists, and that the Sixth Amendment therefore does not apply to any remaining findings or weighings during the process. As noted above, Appellant disagrees that this assumption is borne out by Florida's capital sentencing statute and instructions.

The State argues that it is well within this court's power to craft a procedural remedy for the constitutional problem identified in *Hurst*, because the unconstitutional subsections of Section 921.141 of the Statutes, *i.e.*, subsections 2 and 3, can be severed and discarded, and pipeline cases can then be examined solely for whether they comply with the State's *Apprendi*-based analysis - *i.e.*, whether an aggravating factor is found by the jury. (SB at 11-12; see SB at 4 (conceding that subsections 2 and 3 are affected by *Hurst*.) The State cites cases where trial courts permissibly crafted protective measures which were not

expressly authorized by any rule or statute for witnesses giving sensitive testimony, and cites those cases for the general principle that the courts have the inherent power to fashion remedies for constitutional problems. (SB at 11-12 and n.1) The State, however, does not grapple with the fact that subsections 2 and 3 of the capital sentencing statute are at its very heart. "An act complete in itself" must survive the process for severance of an unconstitutional statutory provision to be a valid option. *E.g.*, *Schmitt v. State*, 590 So. 2d 404, 415 (Fla. 1991).

The State rejects Appellant's "structural error" argument, arguing that even if the Sixth Amendment applies in this case it was no more than harmless error that the trial court, not the jury, made the findings in support of the death penalty. (SB 14-16) It relies on *Neder v. United States*, 527 U.S. 1 (1999) and on Florida cases that apply *Neder*, specifically *Johnson v. State*, 994 So. 2d 960 (Fla. 2008), and *Galindez v. State*, 955 So. 2d 517 (Fla. 2007). *Neder* held that omission from jury instructions of a single element of a single crime could sensibly be analyzed for harmless error, based on the strength of the proof supporting that element and the resulting likelihood the verdict was in fact affected by the Sixth Amendment lapse. *Galindez* applies *Neder* in the sentencing-scoresheet context; there this court held that points for sexual penetration were properly assessed despite no jury involvement in finding penetration, given the young victim's pregnant status. This

court reached a similar result in *Johnson*, a felony DUI case where the court bifurcated the trial then dismissed the jury before considering the defendant's prior record. This court held that harmless error analysis could, and should, be applied although the defendant had not waived a jury trial, since he did not contest the contents of his driving record, which warranted a misdemeanor-to-felony enhancement. Appellant maintains his position that there was structural error in this case, based on the limited factfinding done by the jury.

The State relies on its perception that "the United States Supreme Court remanded *Hurst* itself to this court for determination of harmlessness," arguing that structural-error analysis must therefore not apply here. (SB at 14) A close reading of *Hurst* shows that the Supreme Court did not itself consider whether harmless-error analysis could or should apply, leaving all such determinations to this court. *Hurst* at 624.

The State further notes that the Court in *Hurst* did not declare Florida's standard jury instructions for use in capital cases unconstitutional. (SB at 16) While this is true, *Hurst* and *Caldwell v. Mississippi*, 472 U.S. 320 (1985), read together with those standard instructions, inescapably lead to the conclusion that constitutional errors infect the current proceedings to the extent that a new penalty phase cannot be avoided in this case.

CONCLUSION

In addition to the relief sought in the earlier briefing in this case, Appellant has shown that this court must vacate Appellant's death sentence and either remand for imposition of a life sentence (if the statutory remedy briefed above andin Appellant's supplemental initial brief is approved by this court) or remand for a new penalty phase.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing supplemental reply brief has been electronically delivered to Assistant Attorney General Suzanne Bechard, at capapp@myfloridalegal.com, and mailed to Appellant this 25th day of February, 2016.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with Rule 9.210(2)(a), Florida Rules of Appellate Procedure, in that it is set in Times New Roman 14-point font.

Nancy Ryan

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