IN THE SUPREME COURT OF FLORIDA

MATTHEW L. CAYLOR,

Petitioner,

v.

JULIE L. JONES,

Respondent.

Case No. SC16-399

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RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Petitioner, MATTHEW L. CAYLOR, the defendant in the trial court, will be referred to as petitioner. The State of Florida will be referred to as the State. All references will be self-explanatory or otherwise explained herein.

FACTS AND PROCEDURAL HISTORY

The facts and procedural history of this case are recited in the accompanying answer brief to petitioner's post-conviction appeal.

ARGUMENTS IN OPPOSITION TO THE PETITION

ISSUE I

THE UNITED STATES SUPREME COURT'S HOLDING IN *HURST V. FLORIDA*[1] DOES NOT RESULT IN FLA. STAT. § 775.082(2) COMMUTING ALL DEATH SENTENCES ON DEATHROW

Petitioner contends that Fla. Stat. § 775.082(2) requires that all death sentenced capital felons receive life sentences without parole because the United States Supreme Court held Florida's death penalty scheme unconstitutional in *Hurst*. The petitioner's argument fails because (1) *Hurst* did not hold the death penalty unconstitutional, (2) a plain reading of Fla. Stat. § 775.082(2) shows that it does not apply to the holding in *Hurst*, (3) even if Fla. Stat. § 775.082(2) was ambiguous, the legislative history of the statute overwhelmingly reveals a legislative intent that is diametrically opposed to petitioner's argument, and (4) to interpret this statute as petitioner urges would produce an absurd result.

Standard of Review

"Statutory interpretation is a question of law subject to de novo review." *Murray v. Mariner Health*, 994 So. 2d 1051, 1056 (c*iting Daniels v. Fla. Dep't of Health*, 898 So. 2d 61, 65 (Fla. 2005)).

[1] 136 S. Ct. 616, 624 (U.S. 2016).

Argument

Petitioner argues[2] that the plain-language reading of Fla. Stat. § 775.082(2) requires the reduction of petitioner's death sentence to a life sentence without parole. Fla. Stat. § 775.082(2) provides that:

> 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.

Fla. Stat. § 775.082(2) (2016).

Petitioner argues that because the language is plain, the rules of statutory construction require this Court to comply with the statute. It follows, the petitioner contends, that § 775.082(2) commands Florida courts to reduce *all* death sentences

[2] Petitioner's argument in this section is taken verbatim from the Amended Brief of Amici Curiae Justice Harry Lee Anstead, Judge Rosemary Barkett, Martha Barnett, Talbot D' Alemberte, Hank Coxe, Justice Gerald Kogan, Florida Association of Criminal Defense Lawyers, Florida Capital Resource Center, and Florida Center for Capital Representation, on behalf of appellants in *Hurst* filed in this Court.

imposed under the sentencing scheme *Hurst* held unconstitutional. Petitioner further urges that, because the language is unambiguous, this Court need not look at the legislative history of § 775.082(2) for any insight into the Florida Legislature's intentions, but even if this Court did so, the petitioner believes the legislative history nevertheless supports his arguments for a life sentence.

The petitioner's argument fails because the petitioner ignores the plain meaning of the term "death penalty" in the first line of § 775.082(2). *Hurst* did not hold the death penalty unconstitutional, *Hurst* held Florida's capital sentencing scheme unconstitutional. *Hurst*, 136 S. Ct. at 624. Therefore, by the plain language of § 775.082(2), no death sentenced inmate in Florida, including petitioner, is entitled to a reduction to a life sentence. But even if the plain language were not clear, petitioner also does not properly apply the cannons of statutory interpretation, or even his own reasoning, to the entire text of § 775.082(2).

Nevertheless, petitioner undertakes the patently impossible task of presenting the 1972 legislative history and the Florida Supreme Court's rulings involving § 775.082(2) as favorable to inmates on Death Row, despite the notorious efforts in 1972 by all branches of the state government to revive and preserve the death penalty in Florida.

But above all, even if petitioner's statutory interpretation were correct, his argument still fails because the result would be absurd.

The Plain Language of § 775.082(2)

The State agrees that the plain language of §775.082(2) is clear on its face and there is no ambiguity. It is clear that §775.082(2) does not apply to petitioner or any other inmate on Death Row. The only potential dispute on the plainness of language lies in the first line of §775.082(2): "in the event *the death penalty* in a *capital felony* is held to be unconstitutional…**"** *Id.* (emphasis added). This did not happen. In *Hurst*, the United States Supreme Court held that "Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional." *Hurst*, 136 S. Ct. at 624.

The plain reading of Fla. St. § 775.082(2) reveals that this statue was designed to replace a death sentence with a life sentence only when the death sentence was eliminated. Fla. St. § 775.082(2) does not automatically turn potential constitutional arguments into the functional equivalent of a sweeping Supreme Court holding abolishing the death penalty. Unless a Supreme Court applies *Hurst* to invalidate the death penalty as it relates to petitioner, § 775.082(2) does not apply to him. This Court does not need a statute to hold petitioner's death sentence unconstitutional under *Hurst*. By the same logic, this Court cannot use a

state statue to grant itself the authority to extend a United States Supreme Court holding beyond its intended reach.

The State contends that it is not necessary to look further than the plain language of §775.082(2). This Court has recognized that a "statute's plain and ordinary meaning must control." *State v. Burris*, 875 So. 2d 408, (Fla. 2004). The ordinary meaning of "the death penalty" is unambiguous and "unambiguous language is not subject to judicial construction." *Overstreet v. State*, 629 So. 2d 125, 126 (Fla. 1993).

Legislative Intent and History of §775.082(2)

The legislative history of §775.082(2) does not support petitioner's argument. The peculiar history behind § 775.082(2) begins during the nationwide suspension of the death penalty in 1972 and ends in the subsequent effort by the State to revive the death penalty in Florida. From its inception, §775.082(2) was designed to operate as a remedy should the Supreme Court invalidate the death penalty, not as a windfall to Death Row. A careful review of the history of the enactment of § 775.082(2), the state of the death penalty laws in 1972, and the unmistakable objective of the legislature leads to the inescapable conclusion that this statute was never intended to commute death sentences as petitioner contends.

This Court has previously held that "if the statutory language is unclear, we continue our search for legislative intent." *Joshua v. City of Gainesville*, 768 So. 2d 432, 435 (Fla. 2000). "Where legislative intent is unclear from the plain language of the statute, we look to canons of statutory construction." *Joshua*, 768 So. at 435 ("[I]f the language of the statute is unclear, then rules of statutory construction control."). *Kasischke v. State*, 991 So. 2d 803, (Fla. 2008). However, "[i]n discerning the legislative intent of an unclear statute, [this Court] 'consider[s] the *statute as a whole*, including the evil to be corrected, the language, title, and history of its enactment, and the state of law already in existence on the statute.'" *McKibben v. Mallory*, 293 So. 2d 48, 52 (Fla. 1974)) (emphasis added).

A detailed account of the events that led to the creation of Fla. Stat. §775.082(2) are necessary in light of petitioner's arguments and assertions.

Pre-Furman

On January 17, 1972 the United States Supreme Court granted certiorari to three death-sentenced petitioners in *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726 (1972). "The certiorari was limited to the following question: [d]oes the imposition and carrying out of the death penalty in (these cases) constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments" *Furman*, 408 U.S. at 239, 92 S. Ct. at 2727.

By the time the United States Supreme Court granted certiorari in *Furman*, Senate Bill 153 (SB 153) was already filed in the Florida Senate. *See* SB 153 (1971). Senate Bill 153 created Fla. Stat. §§ 775.082(2) and (3), which eventually evolved into the current version of Fla. Stat. § 775.082(2) that petitioner argues should commute his death sentence. *See* SB 153 (1971). Both §§ 775.082(2) and (3) would not become effective until October 1, 1972, three months after the Supreme Court ultimately decided *Furman*. *Id.*

The United States Supreme Court granting certiorari in *Furman* was not a huge surprise in Florida in 1972. The United States District Court for the Middle District of Florida had already issued a stay on all executions in Florida in 1967, which was still pending the outcome of the Supreme Court litigation on the constitutionality of capital punishment. *See Adderly v. Wainwright*, 272 F. Supp. 530 (M.D. Fla. 1967). The State of Florida was also in no hurry to create a new death penalty scheme until all the constitutional issues were settled. Before *Furman* was decided, in February of 1972 the Governor of Florida issued an executive order staying executions until July 1, 1973 in order to allow the legislature time to consider the matter of capital punishment after the end of the litigation. Exec. Order [Fla.] No. 72-8 (February 21, 1972).

The possibility that the United States Supreme Court would eventually hold the death penalty unconstitutional was the reason for the creation of the original §§ 775.082(2) & (3) in 1972. The purpose of §§ 775.082(2) & (3) was to keep the 1972 capital sentencing system functional if the death penalty was abolished. The 1972 capital sentencing scheme was a simple procedure that was explained in two sentences:

> [A] person who has been convicted of a capital felony shall be punished by death unless the verdict includes a recommendation to mercy by the majority of the jury, in which case the punishment shall be life imprisonment. A defendant found guilty by the court of a capital felony on a plea of guilty or when a jury is waived shall be sentenced to death or life imprisonment, in the discretion of the court.

Fla. Stat. § 775.082(1) (1972).

However, the scheme was vulnerable to a Supreme Court holding because under the 1972 sentencing scheme a defendant could be facing a death sentence that a court had no discretion to prevent. *Id.* Therefore, if the Supreme Court held the death penalty unconstitutional, the system could not be used for any capital felonies. As a result, § 775.082(2) (1972) was implemented to fix this problem by providing for an automatic life sentence for a defendant convicted of a capital offense in the event the death penalty was held to be unconstitutional. The 1972 version (which no longer exists in any form) of §775.082(2) provided:

> 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.

Fla. Stat. § 775.082(2) (1972). In other words, this statute was designed to keep the system afloat until the legislature drafted a new scheme the following year.

There were also 100 inmates on Death Row in 1972. *Discussed infra*. If the Supreme Court abolished the death penalty, 100 death row inmates would have to be resentenced. It was important to establish the replacement sentence that any court asserting jurisdiction must impose. Therefore, Fla. Stat. § 775.082(3) (1972) was enacted to ensure the death row inmates were properly resentenced to life without parole, ensure the 100 death row inmates were not disproportionately sentenced, and ensure that 100 inmates did not suddenly become eligible for parole if the Supreme Court held the death penalty unconstitutional. Fla. Stat. § 775.082(3) (1972) had *almost* the same text as the modern § 775.082(2) (2016). In 1972, § 775.082(3) provided:

> 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 with no eligibility for parole.

Fla. Stat. § 775.082(3) (1972). But under the sentencing scheme in 1972, it did not make a difference whether or not the scheme was held unconstitutional or the death penalty in a capital felony was held unconstitutional, the immediate effect was the same. *Id.* It is important to keep in mind that the first version of § 775.082(3) was created when the death penalty scheme was simple compared to the modern scheme. The complexity arrived with *Furman*.

Furman

On June 29, 1972, the United States Supreme Court reversed the three death sentences in *Furman*. 408 U.S. 238 (1972). In a 5-4 decision, the Court held "that the imposition and carrying out of the death penalty (in these cases) constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *Furman*, 408 U.S. at 239–40. Surprisingly, all nine justices wrote separate opinions about their views on the constitutionality of the death penalty itself and also the constitutional problems with state death penalty schemes. *See generally id.*

It was impossible to expect such a puzzling holding, and widespread confusion followed over the impact of the one paragraph opinion holding the death penalty unconstitutional (in those cases) in conjunction with nine different views on the constitutionality of state death penalty schemes. *Infra*. The original

versions of §775.082(2) and (3) were not designed to withstand the chaos of every corner of government coming in conflict over the ultimate consequences of *Furman* on the future of the death penalty in Florida. *See infra.*

The unusual series of events in Tallahassee that followed *Furman* lead to the eventual wording of Fla. Stat. §775.082(2) that is in place today. *See infra*. However, it is difficult to draw meaningful comparisons between what happened after *Furman* and what petitioner argues should happen after *Hurst* without first recognizing the struggle that took place in state and federal courts over the implication of *Furman* and §775.082(3). *Furman*, 408 U.S. at 239, 92 S. Ct. at 2727; *discussed infra*. It is also important to recognize that the nine different opinions in *Furman* created a convoluted possibility that the Florida legislature could reform the death penalty scheme to withstand a constitutional attack. The resulting response to *Furman* in the Florida Supreme Court, the Florida legislature, and the Florida Governor's office ultimately lead to the creation of the first post-*Furman* death penalty scheme in the nation less than six months, and this included the creation of the exact language in §775.082(2) (2016). Ch. 72-724, § 9 [1972] Fla. Sess. Laws __ (Spec. Sess. 1972).

Judicial Response to Furman

This Court first confronted *Furman* in *Donaldson v. Sack*, 265 So. 2d 499 (Fla. 1972), three weeks after the ruling, and announced an "urgent need" to "immediately determine the effect" of *Furman* on capital punishment. *Id.* at 500. This Court held that *Furman* effectively eliminated capital punishment and capital felonies in Florida, until the legislature "revive[d]" Florida's capital punishment scheme. *Id.* at 501. This eliminated a court's ability to sentence defendants charged with capital crimes, which § 775.082(2) was supposed to fix on October 1, 1972—provided this Court held the death penalty unconstitutional or interpreted *Furman* as holding the death penalty unconstitutional in Florida, which this Court would never do. *Id.*; *infra*.

Instead, this Court "[found] no difficulty with a continuation of the sentencing of these former "capital offenses" under § 775.082(1) as automatically life imprisonment upon conviction". *Id.* at 502–03. This Court reasoned this was consistent with legislative intent in § 775.082(2) because the result was the same. *Id.* at 503. But If this Court did not hold the death penalty unconstitutional, or acknowledge that *Furman* did so in Florida, § 775.082(3) would not commute the sentences of the 100 inmates on Death Row. However, this Court did not address the issue of Death Row, and only stated:

> 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 (emphasis added).

In other words, this Court eliminated the capital penalty scheme used to institute the death penalty and would wait for the legislature to create a new penalty scheme that could withstand a constitutional attack.[3] *Id.*; *see State v. Dixon*, 283 So. 2d 1, 6, 11 (1973) (noting that *Furman* never abolished the death penalty and holding Florida's new death penalty scheme constitutional under *Furman*); *discussed infra* p 1. It is difficult to see how this Court could now hold that *Hurst* held the death penalty unconstitutional.

[3] By eliminating capital felonies in Florida, the Florida Supreme Court effectively eliminated a death penalty scheme created by the legislature in March, 1972, that was set to take effect on October 1, 1982. Ch. 72-72 [1972] Fla. Sess. Laws 122. However, the scheme did not require a finding of the presence of an aggravator, which was condemned by *Furman*. *Id.*

Soon after this Court announced its *Furman* stance in *Donaldson,* on July 31, 1972, the United States Court of Appeals for the Fifth Circuit held the death penalty in Florida was unconstitutional under *Furman*. *Newman v. Wainwright*, 464 F.2d 615, 616 (5th Cir. 1972). In reversing a federal district court's denial of a Florida's Death Row inmate's habeas corpus petition, the Fifth Circuit announced that "in Florida, the death penalty has been inequitable, arbitrarily, and infrequently imposed and thus constitutes cruel and unusual punishment…" *Id.* at 616. The Fifth Circuit then instructed the district court to "grant the writ if the state of Florida should fail or refuse within a reasonable period of time to reduce [the defendant's] sentence to a period not exceeding life imprisonment." *Id.*

The difference of opinions between the Fifth Circuit and this Court was only complicated by the approaching effective date of §775.082 (3) on October 1, 1972. But §775.082 (3) only applied to decisions of this Court or the United States Supreme Court, not a Federal Appellate Court. On the other hand, a Federal Appellate Court holding that a United States Supreme Court ruling declared the death penalty unconstitutional in Florida certainly applied to Florida's Death Row. But §775.082 (3) only provided a life sentence when the inmate was brought before a court with the jurisdiction to sentence them under state law. This scenario was made even more precarious because in *Donaldson* this Court had declared

capital felonies non-existent, which affected the jurisdiction of the lower courts to sentence capital defendants, and required legislation to fix. *Donaldson*, 265 So. 2d at 501.

It was public knowledge that the legislature and the governor were already forming committees to figure out a death penalty scheme that could pass *Furman*.[4] But, while the State worked to figure out how deal with *Furman*, there was a federal certified class of 60 of Florida's death row inmates in federal court represented by a group of attorneys and organizations determined to empty out Death Row and abolish the death penalty.[5]

But it wasn't until over a month later that this Court started to commute sentences on death row. *Infra*. After the 5th Circuit decided *Newman*, the United States District Court for the Middle District of Florida vacated and set aside the death sentences of the 60 Death Row inmates (Anthony Amsterdam's federal

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[4] *See* Final Report of the [Fla.] House Select Committee on the Death Penalty 1 (1972); *see also* Exec. Order [Fla.] No. 72-37 (July 28, 1972) (creating the Governor's Committee to Study Capital Punishment).

[5] "The petitioners were well represented by the American Civil Liberties Union, the NAACP Legal Defense Fund, and Anthony Amsterdam, the preeminent capital defense lawyer in the country then and now." *Williams v. Kasich*, No. 3:15-cv-254, 2015 U.S. Dist. LEXIS 130364, at *3 (S.D. Ohio Sep. 28, 2015). The class made repeated attacks on the state death penalty statute. *Id.* Anthony Amsterdam argued *Furman* before the United States Supreme Court.

class) who had no pending appeals in this Court. *Ex. Rel. Young v. Wainwright* (No. 64-16-Cix-J-S) (Fla. M.D.). But the federal district court had also vacated the sentences and retained jurisdiction over the other 40 death row inmates who had appeals pending "a decision of [this Court] to vacate and set aside the sentences of death." *Id.*

It appeared this Court was put in a difficult position because of § 775.082(3), the federal class action, and the Fifth Circuit holding. *Id.* After October 1, 1972, the Court would have to address the effect of § 775.082(3), which means it would have to either declare the death penalty unconstitutional (after already eliminating the capital punishment system in *Douglas*), or blatantly oppose the 5th Circuit's ruling.

However, this Court did not have to do either because, on September 9, 1972, the Florida Attorney General[6] filed a motion requesting that this Court "remand 40 cases in which the death penalty was imposed to the respective circuit courts for the imposition of life sentences" because the sentences appeared to be

[6] The Attorney General, in a memo dated July 7, 1972, analyzed *Furman* and concluded: "it is my view that the United States Supreme Court's decision has not impaired and does not prevent the enactment of legislation calling for the death penalty so long as said legislation is mandatory in its terms." Memorandum, Attorney General of Florida 7 (July 7, 1972).

"illegal." *Anderson v. State*, 267 So. 2d 8, (Fla. 1972). These 40 inmates all had appeals pending in the Florida Supreme Court, and the inmates readily agreed to join the Attorney General's motion to correct their "illegal" sentences in order to receive a life sentence instead of a life sentence without parole that could occur on October 1, 1972. Therefore, without holding the death penalty unconstitutional, this Court granted the Attorney General's motion and resentenced the 40 death row inmates to life in prison right in the Florida Supreme Court without the inmates present, citing, among other things, the "inherent powers to do all things that are reasonably necessary for the administration of justice." *Id*.

A few weeks later, on September 26, 1972, days before § 775.082(3) went into effect, the other 60 death row inmates, who already had their death sentences set aside by the federal district court and had no appeals in this Court, petitioned this Court for re-sentencing before § 775.082(3) came into effect. *In re Baker*, 267 So. 2d 331, 331–34 (1972). The Middle District of Florida had remanded the 60 inmates to the lower state courts for resentencing. *Id.* at 332–33; *see Adderly v. Wainwright*, 46 F.R.D. 97 (M.D. Fla. 1968). Therefore, without holding the death penalty unconstitutional, this Court granted the petition and pronounced the sentences in the Florida Supreme Court, holding that to do otherwise would "create a class statutorily denied parole" and "foster litigation attacking [the validity of §

775.082(3)] and its selective application to an indistinguishable few—a seeming denial of equal protection." *Id.*

Now death row was empty, but this "Court has itself never declared the death penalty unconstitutional." *Baker*, 267 So. at 331; *Anderson*, 267 So. 2d at 9. If this Court had not commuted the sentences, it probably would have had to rule on the whether the death penalty was unconstitutional cruel and unusual punishment before the legislature had a chance to draft a new sentencing scheme and revive the death penalty. The following year, after Florida's new death penalty scheme was enacted, this Court held that the new death penalty scheme was constitutional under *Furman*. *State v. Dixon*, 283 So. 2d 1, 11 (1973). This Court explained that "a careful reading of the nine separate opinions constituting *Furman v. Georgia* [reveals] that the opinion does not abolish capital punishment." *Id.* at 6.

Legislative Response to Furman

After *Furman*, the Florida legislature and the Governor immediately began working on creating a capital sentencing scheme that would revive the death penalty. *See* Final Report of the [Fla.] House Select Committee on the Death Penalty 1 (1972); *see also* Exec. Order [Fla.] No. 72-37 (July 28, 1972) (creating the Governor's Committee to Study Capital Punishment). Less than six months later, Florida became the first state to enact a post-*Furman* capital punishment

system. Ch. 72-724, [1974] Fla. Sess. Laws (Spec. Sess. 1972) However, the capital punishment system was created when the Florida legislature convened in special session on November, 28, 1972. Fla. H.R. Jour., Spec. Sess. 1 (1972). On December 1, 1972, the new capital punishment statue was enacted by the Florida Legislature[7] and signed by the Governor on December 8, 1972. In other words, the first edition of the modern death penalty scheme was created in four days.

During the four-day special session, the legislature amended the language of § 775.082(3). The petitioner argues that the original § 775.082(3) is exactly the same as § 775.082(2) today, and therefore he is entitled to life without parole. But it is not. While § 775.082(3) had almost the same text as the current version of § 775.082(2), there is a slight change in wording, but the result is profound. On November 28, 1972 the legislature changed "the court shall sentence such person to life imprisonment with no eligibility for parole" to "the court shall sentence such person to life imprisonment as provided in subsection (1)." Fla. Stat. § 775.082(3) (1973).

The wording in "subsection (1)" was also changed during the four-day special legislative session, and§ 775.082 (1) (1971) was amended to:

[7] The enactment of the bill was a concession between the Senate and the House, because they could not agree on the procedure and composition of the sentencing procedure. Fla. H.R. Jour., Spec. Sess. 42 (1972).

> A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than twenty-five calendar years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedure set forth in § 921.141 results in findings by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.

Fla. Stat. § 775.082(1) (1973).

This change prevented the type of rigid application that caused the problems in the post-*Furman* decisions. The flexibility allows for the legislature to adjust the scheme in response to a constitutional problem and also change the remedy for the death penalty being declared unconstitutional. The legislature created this statute in the wake of the problems that followed *Furman* and in preparation for the challenges of creating a death penalty scheme that satisfied the United States Supreme Court. It would be unreasonable to conclude that this statue was designed to clean out death row every time there was a procedural problem in the scheme, like in *Hurst*. The remedy is now contained within the scheme, which provides a life sentence when death is not an option.

The death penalty remained suspended nationwide for four years after *Furman*. But in 1974, § 775.082(2) was eliminated and § 775.082(2) was

renumbered §775.082(2), but the language remained the same for the next four decades. *See* Fla. Stat. § 775.082 (1974).

In contrast, in the past four decades § 775.082(1) has changed many times to adapt to the Supreme Court's evolving death penalty jurisprudence as it imposes constraints on state death penalty laws. *see Apprendi v. New Jersey*, 530 U.S. 466 (2000) (Thomas, J., concurring) ("In the area of capital punishment, unlike any other area, we have imposed special constraints on a legislature's ability to determine what facts shall lead to what punishment—we have restricted the legislature's ability to define crimes); *see also Maynard v. Cartwright*, 486 U.S. 356, 108 S. Ct. 1853 (1988) ("Since *Furman* our cases have insisted that…limiting the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action.").

The legislative history overwhelmingly shows this statute was designed to protect the death penalty scheme from federal rulings, not cause further damage. Disagreeing on whether the death penalty was held unconstitutional is as old as §775.082(2). But the statute was not meant to be over inclusive, it was designed to so the scheme would not be vulnerable to attack or fall apart while it was being fixed. Moreover, this Court has already recognized in the cases following *Furman*

that if the sentencing scheme can be fixed to revive the death penalty, then the death penalty was not held unconstitutional and § 775.082(2) has no effect. *See § Judicial Response, supra.* The result the petitioner requests is the same result the 1972 litigants forced on this Court while the death penalty scheme was under revision, which is the reason §775.082(2) was amended.

1998 Addition to § 775.082(2)

Petitioner points out there was one addition to § 775.082(2) in 1998 when the legislature suddenly added a line to § 775.082(2) in response to concerns about the constitutionality of the electric chair. *See* § 775.082(2) (1998). The legislature added:

> 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.

Fla. St. § 775.082(2) (1998).

In the text of the bill adding this sentence there are multiples stated reasons for the addition. 1997 Fla. HB 3033. Including that the Legislature "determined that death by electrocution is the preferred method of carrying out the death penalty." *Id.* Also, the Legislature enacted this section "to ensure that the lawful punishment of death imposed on persons in this state is carried out, and considers it

to be appropriate to provide alternative methods for imposing death only if legally required to do so." *Id.*

The petitioner argues that the 1998 addition is "perhaps the most compelling" reason to conclude the legislature intended for § 775.082(2) to automatically commute life sentences in the event of holdings like *Hurst*. However, the 1998 addition is the most compelling reason in the past two decades to conclude the legislature did not intend for § 775.082(2) to clean out death row.

Legislative intent is overwhelmingly revealed by one of the legislature's listed reasons in enacting this sentence being "the Florida Supreme Court, in *Jones v. State*, 701 So.2d 76 (1997), [] held death by electrocution to be constitutional." While this seems odd at first glance, but in *Jones*, the Florida Supreme upheld a constitutional challenge to Florida's use of the electric chair as the only means of execution. *Id.* However, multiple Florida Supreme Court Justices wrote and joined in dissenting opinions imploring the legislature to adopt another method of execution. *Id.* at 80–89.

Justice Kogan dissented and "encourage[d] the Legislature to carefully consider the findings and recommendations of the Florida Corrections Commission. *Id.* at 82. Justice Harding "wrote separately to encourage the legislature to amend section 922.10, Florida Statutes (Supp. 1996), to provide that

a death sentence may be executed either by electrocution or by lethal injection. *Id.* at 80. And, Justice Shaw, joined by two other Justices, warned that:

> "[b]ecause electrocution is the sole means of execution approved for use in Florida, the legislature has, so to speak, placed all its constitutional eggs in this one basket. As a result, any infirmity in this method cannot be mitigated at this time by the presence of an acceptable alternative. Such an all-or-nothing approach has proved fatal to the capital sentencing scheme in other states…[which]puts the burden back on the legislature to implement an alternative method.

Id. at 87–88

But the Florida Legislature's response to the Supreme Court Justices was to implement this sentence steadfastly refusing to give up the electric chair or provide an alternative. Fla. Stat. § 775.082(2) (1998). *See* 1997 Fla. HB 3033.

Petitioner next argues that the "rule of lenity" requires this court to construes the statute in his favor. However, "the rule of lenity is a canon of last resort." *See, e.g., United States v. Shabani*, 513 U.S. 10, 17 (1994) ("The rule of lenity, however, applies only when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute."); cf. *Bautista v. State*, 863 So. 2d 1180, 1185 n.4 (Fla. 2003) (recognizing that the rule of lenity does not apply where legislative intent to the contrary is clear). It is impossible to arrive at the

rule of lenity without ignoring the history and plain meaning of § 775.082(2), but even if it were, this Court cannot apply lenity when the result leads to absurdity.

Absurdity

The "golden rule" of statutory construction forbids the use of any theory or method that leads to absurdity. *See* Robert J. Martineau, *Craft and Technique, Not Canons and Grand Theories: A Neo-Realist View of Statutory Construction*, 62 Geo. Wash. L. Rev. 1, 8 (1993). This Court has already recognized that "courts should avoid a statutory interpretation which leads to an absurd result." *Amente v. Newman*, 653 So. 2d 1030, 1032 (Fla. 1995); *Haworth v. Chapman*, 113 Fla. 591, 152 So. 663, 665 (Fla. 1933) ("There is a strong presumption against absurdity in a statutory provision; it being unreasonable to suppose that the Legislature intended their own stultification").

In light of the long history of § 775.082(2), it is absurd to conclude that this section operates in the fashion petitioner contends.

The legislative intent at the time was to create a death penalty scheme that could survive a constitutional attack. The change in the language of § 775.082(3) that redirects the definition of a life sentence to the death penalty scheme prevents

the type of problems this Court faced in the summer of 1972 with the rigid statute. Now section one can be amended to fix mistakes and the only thing preventing the death sentence in § 775.082(1) is a judicial holding allows for mistakes to be made without automatically commuting every death sentence in the state.

ISSUE II

PETITIONER IS NOT ENTITLED TO RELIEF UNDER *HURST*

Petitioner argues that *Hurst* invalidates his death sentence because the jury at the penalty phase did not make a specific finding that an aggravator existed at his penalty phase. The United States Supreme Court in *Hurst* held that Florida's sentencing scheme is unconstitutional because it allows a Judge to find the existence of an aggravating circumstance, which is required for a death sentence, which is a violation of the Sixth Amendment right to an impartial jury. *Hurst*, 136 S. Ct. at 624 .

Petitioner's argument fails because *Hurst* is not applied retroactively, and Petitioner's death sentence became final after this Court decided his direct appeal in 2011. *Caylor v. State*, 78 So. 3d 482 (Fla. 2011), cert. denied, ___ U.S. ___, 132 S. Ct. 2405 (2012). Therefore, petitioner is not entitled to relief because *Hurst* does not apply to him.

But, even if *Hurst* did apply to petitioner, petitioner's argument still fails because he was convicted of two other violent felonies by the same jury and he had a prior felony conviction at the time of his death sentence.

Retroactivity

Hurst is not retroactive. *Hurst* was based on *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428 (2002), and under controlling precedent from both the United States Supreme Court and the Florida Supreme Court, *Ring* is not retroactive. *Schriro v. Summerlin*, 542 U.S. 348, 352, 124 S. Ct. 2519, 2526 (2004) (applying *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989), and holding that "*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review"); *Johnson v. State*, 904 So. 2d 400, 405 (Fla. 2005) (applying *Witt v. State*, 387 So.2d 922 (Fla. 1980), and holding *Ring* would not be applied retroactively in Florida).

The United States Supreme Court held that its decision in *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444 (1968), which extended the Sixth Amendment right-to-a-trial to the states was not retroactive. *DeStefano v. Woods*, 392 U.S. 631, 88 S. Ct. 2093 (1968). The *Summerlin* Court relied heavily on *DeStefano*, observing "if under *DeStefano* a trial held entirely without a jury was not impermissibly inaccurate, it is hard to see how a trial in which a judge finds

only aggravating factors could be." *Summerlin*, 542 U.S. at 357, 124 S. Ct. at 2526. The United States Supreme Court's main reasoning in *Summerlin* was that *Ring* was procedural, not substantive, and therefore, did not warrant retroactive application. The Florida Supreme Court's main reasoning in *Johnson* was that judge versus jury did not seriously increase accuracy, so *Ring* should not be applied retroactively. The same logic applies to *Hurst*.

Therefore, because petitioner's direct appeal from his convictions became final in 2011, before *Hurst* was decided, its holding does not apply to petitioner's case.

Aggravators

In its written sentencing order, the trial court found and assigned weight to the following aggravating circumstances: (1) the capital felony was committed by a person previously convicted of a felony and under a sentence of imprisonment or placed on community control or on felony probation (great weight); (2) the capital felony was committed while the defendant was engaged in the commission of sexual battery and aggravated child abuse (great weight); and (3) the capital felony was especially heinous, atrocious, or cruel ("HAC") (great weight).

Under both United States Supreme Court and Florida Supreme Court jurisprudence, a sentence of death is authorized upon the finding of the existence of one aggravating factor. *Tuilaepa v. California*, 512 U.S. 967, 971-72, 114 S. Ct. 2630, 2634 (1994) (explaining that to "render a defendant eligible for the death penalty ... the trier of fact must convict the defendant of murder and find one aggravating circumstance (or its equivalent) at either the guilt or penalty phase" citing cases); *Ault v. State*, 53 So.3d 175, 205 (Fla. 2010)(stating that "to return an advisory sentence in favor of death a majority of the jury must find beyond a reasonable doubt the existence of at least one aggravating circumstance listed in the capital sentencing statute."); *Zommer v. State*, 31 So.3d 733, 754 (Fla. 2010)(noting that, in *State v. Dixon*, 283 So.2d 1 (Fla. 1973), "this Court interpreted the term 'sufficient aggravating circumstances' in Florida's capital sentencing scheme to mean one or more such circumstances)(emphasis in original). Additional aggravating circumstances do not increase the penalty. So, it is only one aggravating circumstances that the jury must find. Death is presumptively the appropriate sentence. *State v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973). As the availability of the death sentence in a particular circumstance is a matter of state law, this Court's determination controls. *Ring*, 536 U.S. at 603 ("the Arizona court's construction of the State's own law is authoritative").

First, the holding in *Hurst* would never entitle petitioner to relief from his death sentence because petitioner was convicted of sexual battery involving great physical force and aggravated child abuse by the same jury that found him guilty of first degree murder and sentenced him to death. Therefore, even if *Hurst* applied, the constitutional requirements were satisfied when the jury found beyond a reasonable doubt the existence of two aggravating violent felonies.

Second, the prior conviction standing alone would prevent petitioner from obtaining relief under *Hurst.* *Hurst* was based on *Ring*, and *Ring* was based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Apprendi* held that any fact, "other than the fact of a prior conviction" that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490, 120 S. Ct. at 2362–63. *Hurst* did not overrule *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219 (1998).

Third, even if an error exited, violations of the right-to-a-jury trial are subject to harmless error. *Washington v. Recuenco*, 548 U.S. 212, 222, 126 S. Ct. 2546, 2553, 165 L.Ed.2d 466 (2006) (relying on *Neder v. United States*, 527 U.S. 1, 8, 119 S. Ct. 1827 (1999), and holding that the "failure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural

error"); *Galindez v. State*, 955 So.2d 517, 524 (Fla. 2007) (holding harmless error analysis applies to *Apprendi* and *Blakely* error). Even assuming the jury did not already find the aggravator of petitioner committing sexual battery while committing murder, and assuming petitioner has not felony convictions, any error is still harmless. A rational jury could have easily found that raping a 13-year-old girl and murdering her by strangling her with a phone cord while she pleaded and struggled, was heinous atrocious and cruel. *See Caylor v. State*, 78 So. 3d 482, 486–91 (Fla. 2011).

Caldwell

Petitioner argues that under *Caldwell v. Mississippi*, 472 U.S. 320 (1985), it is impermissible to rest a death sentence on the determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the sentence rests elsewhere. This Court addressed *Caldwell* in deciding *Foster v. State*, 518 So. 2d 901 (1987) and found it inapplicable to Foster's claim that the jury was told its role was only advisory in nature, thereby diminishing its sense of responsibility because "unlike *Caldwell*, in Florida the judge rather than the jury is the ultimate sentencing authority." *Id*. at 901–02. In short, Petitioner's reliance on *Caldwell* is erroneous.

Petitioner however argues that because this is his first opportunity to raise a

Caldwell claim and because *Hurst* declared Florida's sentencing unconstitutional after his conviction, the jury was substantially misled on whether the responsibility for determining the death sentence lies with the judge. Petitioner declines to elaborate on exactly how the jury was substantially misled.

Florida has a conformity clause; Florida courts must follow the United States Supreme Court precedent in all matters related to the Eighth Amendment. The *Hurst* Court did not address the *Caldwell* claim. Fla. Const. Art. I, § 17.

It is true that the Eighth Amendment requires a "heightened need for reliability in determination that the death penalty is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). However, there was no attempt to minimize the jury's sense of importance in its role in petitioner's death sentence. But for argument's sake, assuming the ruling in *Hurst* applies to petitioner, and that in theory the jurors did not know that their unanimous vote for the existence of an aggravator would allow the judge to impose the sentence of death, and had they known, the result had been different petitioner's argument still fails. Petitioner's prior conviction was not subject to a jury vote and it does not need, even under *Hurst*, for it to qualify as an aggravator. *See Apprendi*, 530 U.S. 466. Therefore, petitioner is not entitled to relief under *Hurst*.

ISSUE III

APPELLATE COUNSEL WAS NOT INEFFECTIVE BECAUSE AN *AKE* CLAIM WOULD BE MERITLESS

Petitioner argues his appellate counsel's decision to not raise a claim based on *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087 (1985) was ineffective. Appellate counsel's performance was not deficient because his *Ake* claim is meritless. Petitioner was provided a psychologist who evaluated him for competency and sanity before his trial which is all *Ake* requires. There was no prejudice from appellate counsel's strategic decision to forgo the *Ake* claim.

Standard of Review

The standard of review of an ineffectiveness claim is de novo. *Stephens v. State*, 748 So.2d 1028, 1034 (Fla. 1999); *Holladay v. State*, 209 F.3d 1243, 1247 (11th Cir. 2000).

Ineffective Assistance of Appellate Counsel

This Court has explained that a habeas petition is the proper vehicle to assert ineffective assistance of appellate counsel. *Wickham v. State*, 124 So.3d 841, 863 (Fla. 2013) (citing *Valle v. Moore*, 837 So.2d 905, 907 (Fla. 2002)); *Rutherford v. Moore*, 774 So.2d 637, 643 (Fla. 2000); *Thompson v. State*, 759 So.2d 650, 660 (Fla. 2000). "Claims of ineffective assistance of appellate counsel are properly

raised in a petition for writ of habeas corpus addressed to the appellate court that heard the direct appeal." *Connor v. State*, 979 So.2d 852, 868-69 (Fla. 2007).

This Court has also explained that the standard for proving ineffective assistance of appellate counsel mirrors the standard for proving ineffective assistance of trial counsel established in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). *See Rutherford v. Moore*, 774 So.2d 637, 643 (Fla. 2000); *State v. Riechmann*, 777 So.2d 342, 364 (Fla. 2000); *Wickham v. State*, 124 So.3d 841, 863 (Fla. 2013) (stating that the standard for ineffective appellate counsel claims mirrors the *Strickland* standard for ineffective assistance of trial counsel). To grant habeas relief on the basis of ineffectiveness of appellate counsel, this Court must come to two conclusions: (1) the omissions were of such a magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance; and (2) the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. *Bradley v. State*, 33 So.3d 664, 684 (Fla. 2010). Additionally, there is a "strong presumption" that counsel's performance was not deficient. *Johnston v. State*, 63 So.3d 730, 737 (Fla. 2011).

Analysis

There was no deficient performance. The petitioner argues he was deprived access to a mental health expert because his trial counsel decided not to pursue mental health mitigation. Petitioner argues the same thing in his post-conviction brief under an ineffective assistance of trial counsel theory. Petitioner cites to no authority to support his contention that trial counsel's decisions to not use mental health mitigation somehow violates *Ake*. Petitioner does not dispute that he was provided with a mental health expert (Dr. Jill Rowan) and does not dispute that he was evaluated for competency and sanity before his trial. Therefore, petitioner has no valid *Ake* claim.

Petitioner must show that appellate counsel's decision to not raise an *Ake* claim constitute a serious error or substantial deficiency. *Bradley*, 33 So.3d at 684. Petitioner cannot show his appellate counsel's performance was deficient because no reasonable appellate attorney would file an *Ake* argument under the caselaw, especially when petitioner admits that he was evaluated by a psychologist paid for by the state before his trial. Appellate counsel's performance is also not deficient because no reasonable appellate attorney would attempt to disguise a *Strickland* claim as an *Ake* claim on direct appeal, similar to how petitioner disguised his *Ake* arguments in his post-conviction appeal as *Strickland* arguments.

Petitioner's *Ake* argument on direct appeal was meritless. In *Ake*, the United States Supreme Court held that "when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Ake*, 470 U.S. at 83. *Ake*'s holding relates to an indigent defendant's access to expert psychiatric assistance—not whether or not trial counsel's performance was defective for decisions relating to presentation and investigation of mental health mitigation. *See generally id*. *Ake* applies where a "defendant's mental health is 'seriously in question'…and the State's obligation [does] not go beyond providing…. assistance of *one* competent psychiatric expert." *Id.* at 82–83, 105 S. Ct. 1087 (emphasis added). Moreover, appellant is not entitled to "choose a psychiatrist of his personal liking." *Id.*

The petitioner acknowledges in his brief (p. 55) that he was evaluated by Dr. Jill Rowan, a licensed psychologist, and she assisted with the preparation of appellant's defense at the penalty phase by relaying what she found in the evaluation to trial counsel—this alone satisfied *Ake*. *Ake* does not entitle the Appellant to another expert because he is dissatisfied with Dr. Rowan's assistance, nor does *Ake* require defense counsel to seek out another expert after the first

mental health evaluation yielded bad news. *Id*. *Ake* cannot be read to force a defense attorney to pursue further mitigation against his better judgment. Therefore, this claim is meritless.

Because appellant's *Ake* argument is meritless, appellate counsel's performance was not deficient. Appellate counsel's performance will not be deficient if the legal issue that appellate counsel failed to raise was meritless. *Wyatt v. State*, 71 So.3d 86, 112–13 (Fla. 2011) (explaining that the failure of appellate counsel to raise a meritless issue will not render appellate counsel's performance ineffective (citing *Walls v. State*, 926 So.2d 1156, 1175-76 (Fla. 2006) (quoting *Rutherford v. Moore*, 774 So.2d 637, 643 (Fla. 2000))); *Spencer v. State*, 842 So.2d 52, 74 (Fla. 2003) (observing that appellate counsel will not be considered ineffective for failing to raise issues that have little or no chance of success). Appellate counsel has a "professional duty to winnow out weaker arguments in order to concentrate on key issues" even in capital cases. *Thompson v. State*, 759 So.2d 650, 656, n.5 (Fla. 2000) (citing *Cave v. State*, 476 So.2d 180, 183, n.1) (Fla. 1985)). Appellate counsel is not required to raise every claim that might have had some possibility of success; effective appellate counsel need not raise *every conceivable non frivolous* issue. *Zack v. State*, 911 So.2d 1190, 1204 (Fla. 2005) (emphasis in original). Therefore, petitioner's claim of ineffective assistance of appellate counsel fails.

But even if appellate counsel's performance were deficient, any deficiency in performance did not compromise the appellate process to such a degree as to undermine confidence in the correctness of the result. *Bradley v. State*, 33 So.3d 664, 684 (Fla. 2010). If Petitioner's Ake claim could not succeed, then it follows that he cannot show prejudice or that the deficiency undermines the correctness of the result of the appellate process.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court dismiss or deny the Petition for Writ of Habeas Corpus in all respects.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished by eportal to Michael P. Reiter, 4 Mulligan Court, Ocala, FL 34472, mreiter37@comcast.net on the ___ day of June 2016.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Times New Roman 14 point font.

Respectfully submitted,

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