IN THE SUPREME COURT OF FLORIDA

Case No.: SC16-547

LARRY DARNELL PERRY

Petitioner,

v.

STATE OF FLORIDA

Respondent

On Discretionary Review from the District Court of Appeal of the State of Florida, Fifth District
Case No.: 5D16-516

PETITIONER'S INITIAL BRIEF ON THE MERITS

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I. Statement of the Facts and Case

Petitioner, Larry Darnell Perry, was indicted for first-degree murder and aggravated child abuse on March 5, 2013. The State of Florida filed its Notice of Intent to Not Seek Death on March 21, 2013 and then filed its Notice of Intent to Seek Death on January 14, 2014. Petitioner was appointed conflict counsel on February 12, 2014 and second chair conflict counsel on March 6, 2014.

On January 15, 2016, Petitioner filed his Demand for Speedy Trial and hearing was held on said Motion on January 20, 2016. The case was set for jury trial commencing February 15, 2016.

On January 12, 2016, the United States Supreme Court, in the matter of Timothy E. Hurst, v. Florida, 136 S. Ct. (2016) found Florida's death penalty and death penalty sentencing scheme, that required a judge alone to find sufficient aggravating circumstances and insufficient mitigating circumstances to outweigh the aggravating circumstances, unconstitutional.

On February 1, 2016, Petitioner filed his Motion to Strike the State's Notice of Intent to Seek Death filed on January 14, 2014. On February 10, 2016, the trial court entered its Order Striking the States Notice of Intent to Seek Death finding that under Hurst, Florida's death penalty was not available.

On February 15, 2016, the State of Florida filed its Emergency Petition for a Writ of Prohibition in the Fifth District Court of Appeal.

On March 16, 2016, the Fifth District Court of Appeal granted prohibition and certified the following questions to the Florida Supreme Court as matters of great public interest:

> 1.) Did Hurst v. Florida, 136 S.Ct. 616 (2016) declare Florida's death penalty unconstitutional?
>
> 2.) If not, does Chapter 2016 – 13, Laws of Florida, apply to pending prosecutions for capital offenses that occurred prior to its effective date?

Petitioner filed his Notice to Invoke Discretionary Jurisdiction with this Honorable Court on March 30, 2016, and this Court accepted jurisdiction on April 6, 2016. The Fifth District Court of Appeal entered a corrected opinion on April 20, 2016 and the certified questions remained the same as the original opinion.

II. Summary of Argument

At the time of Petitioner's Indictment, Florida Statute 775.082 (1), provided that a person who had been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedures set forth in s. 921.141 results in *findings by the court* (emphasis added) that such person shall be punished by death. Florida Statutes 775.082 (1) and 921.141 were found to be unconstitutional by the United States Supreme Court in Hurst, supra.

In late February or early March, 2016, in apparent response to Hurst, the Florida Legislature enacted House Bill 1701, which later became Chapter 2016 –

13, Laws of Florida. The legislation did not evince an intent that the amendments to §775.082 (1) and §921.141 be applied retroactively.

To apply the new statute retroactively would violate Article X, Section 9 of the Florida Constitution and the Ex Post Facto Clauses of the United States and Florida Constitution.

III. ARGUMENT

A. Florida's Death Penalty Statute was Found to be Unconstitutional by the United States Supreme Court's Decision in Hurst v. Florida, 14-7505 (2016).

Florida's death penalty, contained in Florida Statutes 775.082 (1) and 921.141. §775.082 (1), is the sole statutory authority for the State of Florida to seek a sentence of death and was described by the United States Supreme Court in Hurst, No.14-7505 at pg. 9, as "... The Florida sentencing statute..." and does not make a defendant eligible for death until "findings *by the court* (emphasis added) that such a person shall be punished by death. Hurst, supra, at pg. 9. Further, the trial court alone must find "the facts... [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." See: §921.141(3) and State v. Steele, 921 So. 2d 538 at 546 (Fla. 2005) holding that the trial court alone must make detailed findings about the existence and weight of aggravating circumstances; it has no jury findings on which to rely. The jury's function under the Florida death penalty statute is advisory only. Spaziano v. State, 433 So. 2d 508 at 512 (Fla. 1983).

Clearly, the Hurst Court found §775.082 (1) and §921.141 inextricably intertwined, each being dependent upon the other. §775.082 (1) allows a trial judge to find an aggravating circumstance, independent of the jury's fact-finding, that is necessary for imposition of the death penalty. Hurst, supra, at pg. 11.

The Sixth Amendment protects a defendant's right to an impartial jury. This right required Florida to based Timothy Hurst's death sentence on a jury's verdict, not a judge's fact-finding. Florida's sentencing scheme, which requires the judge alone to find the existence of aggravating circumstances, is therefore unconstitutional. Hurst, supra, at pg. 12.

It is important to note that the Florida Legislature amended 775.082 (1) (a), with Chapter 2016 – 13, §1, Laws of Florida, to delete the language requiring "... findings by the court..." and inserting the language "...a determination...". This is the very language that the Supreme Court found violative of a defendant's Sixth Amendment right that a sentence of death be based upon a jury's verdict, not a judge's fact-finding. Hurst, supra, at pg. 13.

B. The Amendments to Florida Statutes 775.082(1) and 921.141 Can Not Be Retroactively Applied.

Chapter 2016 – 13, Laws of Florida, was enacted in response to the United State Supreme Court's decision in Hurst and was approved by the Governor on March 7, 2016, and filed in the Office of the Secretary of State on the same day. Chapter 2016 – 13 (7) provides that "This act shall take effect upon becoming

law". Absent the legislature providing a different effective date, each section of the legislation became effective on March 7, 2016.

When the legislature amended s. 775. 082 (1) and 921.141 it did not indicate an intention that the legislation be applied retroactively. The legislature is presumed to know this rule of construction when it enacts legislation. See: Crescent Miami Center, LLC v. Florida Department of Revenue, 903 So. 2d 913 at 918 (Fla. 2005) and Williams v Jones, 326 So 2d at 435 (Fla. 1975) wherein this Court reasoned that this of principle of statutory construction provides that the legislature is presumed to be acquainted with the judicial construction of former laws on the subject concerning when a later statute is enacted further supports the Court's conclusion. Given this Court's reasoning, it is abundantly clear that the legislature did not intend for Chapter 2016 – 13 to apply retroactively.

This Court has established a two-pronged test to determine whether a statute can be applied retroactively. See: Menendez v. Progressive Express Insurance Company, Inc, 35 So.3d 873 (Fla. 2010); Old Port Cove Holdings, Inc. v. Old Port Cove Condominium Association, One, Inc. 986 So.2d 1279 at 1284 (Fla. 2008); and Metropolitan Dade County v. Chase Federal Housing Corporation, 737 So. 2d 494 at 499 (Fla 1999). First, the court should look to statutory construction and determine "whether there is clear evidence of legislative intent to apply the statute retrospectively." Metropolitian Dade County, supra, at 499. If the legislature

clearly stated its intent for a statute to be applied retroactively, then the court should next determine whether retroactive the application is constitutionally permissible. Metropolitan Dade, at 499. Also see Pondella Hall for Hire, Inc. v. Lamar, 866 So. 2d 719 at 722 (Fla. 5th DCA 2004). Florida legislation is presumed to operate prospectively unless there exists a showing on *the face of the law that retroactive application is intended* (emphasis added). Yamaha Parts Distribution, Inc. v. Ehrman, 316 So.2d 557 at 559 (Fla. 1975). Only where the legislation itself clearly expresses an intent of retroactive application will the court address the second prong to determine whether the retroactive application is constitutionally permissible. Old Port Holdings, Inc. supra at 1284.

Chapter 2016 – 13, Laws of Florida (a 557) unequivocally states that the legislation becomes effective upon becoming a law. Clearly, the legislation became effective on March 7, 2016, upon being signed by the Governor and filed in the Secretary of State's office. The body of Chapter 2016 – 13 does not contain any language even hinting that the legislation is to be retroactively applied. Absent such a showing, this Court need not address the second prong set forth in Old Port Holdings, Inc.. It is basic that statutes are to be prospectively applied. See Dade County v. Ferro, 384 So. 2d 1283 at 1285 (Fla. 1980); and Foley v. Morris, 339 So. 2d 215 at 216-17 (Fla. 1976). Middlebrooks v. Department of State, Div. of Licensing, 565 So. 2d 727, 728 (Fla. 1st DCA 1990) ("Absent a clear legislative

expression requiring retroactive application, a law is presumed to operate prospectively, meaning that it will apply only to conduct occurring after the statute becomes effective.") (citation omitted)).

Prospective application is particularly mandated when criminal statutes are at issue. It is well-established that criminal defendants are to be sentenced in accordance with the statutes in effect at the time that the offenders committed their crimes. Larkins v. State, 739 So. 2d 90 at 96 n.5 (Fla. 1999); Lamore v. State, 86 So. 3d 546 at 548 (Fla. 2d DCA 2012); Roca v. State, 58 So. 3d 384 at 385 (Fla. 2d DCA 2011); and State v. Miranda, 793 So. 2d 1042 at 1044 (Fla. 3d DCA 2001). Indeed, "it is axiomatic that a criminal sentence is governed by the laws in effect at the time of the offense." Vonador v. State, 857 So. 2d 323 at 324 (Fla. 2d DCA 2003) .

Consistent with this fundamental precept, the Legislature chose to make its new death-penalty statute prospective. Not only does the statute not manifest retrospective intent, it reflects the precise contrary. Chapter 2016-13, Laws of Florida, specifies that the new statute "shall take effect upon becoming a law."[1]

[1] Of course, if there was any ambiguity, the rule of lenity codified in the Florida Statutes would require that the statute be construed in the light most favorable to petitioner. Florida Statute 775.021(1)

There are two reasons why the legislature chose to enact a prospective statute. To attempt to do otherwise would contravene the Florida and the United States Constitutions.

Article X, Section 9, Florida Constitution provides: "Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed." In Raines v. State, 42 Fla. 141, 28 So. 57at 58 (1900), this Court explained the purpose of the progenitor constitutional provision, then set forth in Article III Section 32, , Florida Constitution, as precluding the retroactive force of statutes [such as Chapter 2016-13] reasoning that

> The effect of this constitutional provision is to give *all criminal legislation*(emphasis added) a prospective effectiveness; that is to say, the repeal or amendment by subsequent legislation, of a preexisting criminal statute does not become effective, either as repeal or as an amendment of such preexisting statute, in so far as offenses are concerned that have been already committed prior to the taking effect of such repealing or amending law.

This "Savings Clause" of the Florida Constitution thus precludes a newly enacted criminal statute from applying to pending criminal cases. The predecessor constitutional provision in Article III, Section 32 -- providing that "the repeal or amendment of any criminal statute shall not affect the prosecution or punishment of any crime committed before such repeal or amendment," -- was broadly construed by this Court in Washington v. Dowling, 92 Fla. 601, 109 So. 588 (Fla. 1926).

> [W[e may define a "criminal statute" as an act of the Legislature as an organized body, defining crime, treating of its nature, or providing for its punishment. It is sufficiently broad and comprehensive as to include within its scope and meaning all those acts of the Legislature as an organized body which deal in any way with crime or its punishment. Washington, supra at 610-11, 109 So. at 591 (Fla. 1926).

And equally so, "[w]ith regard to Article X, Section 9, the term "criminal statute" is defined in a broad context." Smiley v. State, 966 So. 2d 330 at 337 (Fla. 2007). A statute would qualify as a "criminal statute" if it has a direct impact on the prosecution of the criminal offense. *Id.* This constitutional provision applies so long as the amendments cannot be dismissed as merely procedural or remedial. State v. Pizarro, 383 So. 2d 762 at 763 (Fla. 4th DCA 1980).

Chapter 2016-13 amends multiple criminal statutes, two of which are key as establishing that the amendments qualify as substantive "criminal statutes" for purposes of Article X, Section 9. Washington, supra, 92 Fla. at 615-16, 109 So. at 593 (Brown, C.J., concurring) (different statutory sections read in pari materia where each are part of one general subject). First, §775.082(1)(a), the substantive provision which actually establishes the penalty of death, is amended by substituting "a determination" for "findings by the court." Second, §921.141, which sets forth the death-penalty scheme, is substantially amended to provide for multiple substantive changes. The burden of proof has been inverted (aggravating factors must outweigh mitigating circumstances under the amended

§921.141(2)(b)1.b.); the jury must return findings identifying each aggravating factor found to exist, and a unanimous vote is now required under §921.141(2)(b)2.; death eligibility is modified so that a defendant becomes "eligible for a sentence of death" once the jury unanimously finds "at least one aggravating factor" under §921.141(2)(b)2.; the jury death verdict requires a vote of at least 10 jurors under §921.141(2)(c); and a verdict of life is now binding under §921.141(3)(a)1.

It is clear that these amendments are substantive "criminal statutes" within the ambit of Article X, Section 9. While some modifications have "procedural elements," these are closely related to the substantive components of the statute, and distinct substantive changes have undoubtedly been made. Horseley v. State, 160 So. 3d 393at 401 (Fla. 2015) (amendments to juvenile-sentencing statutes characterized as "substantive provisions"); Smiley, supra at 336 (statutes that create or abrogate affirmative defenses are classified as substantive change in the law although possessing procedural elements); Troy v. State, 948 So. 2d 635 at 644-45 (Fla. 2006) (although statute has procedural elements, it constitutes a substantive change in the law because those elements are closely related to the substantive elements); and Montgomery v. Louisiana, 136 S. Ct. 718 at 734-35 (2016) (some rules of law may have procedural and substantive ramifications, but be best categorized as substantive).

Accordingly, while Florida's death-penalty scheme has indeed been declared unconstitutional by the Supreme Court in Hurst, Article X, Section 9 precludes the amendment from applying retroactively to pending cases. See also Smiley v. State, supra at 335-37 (statute that created a new affirmative defense, but did not alter the definition or elements of the murder statute, qualified as substantive criminal statute and retrospective application was precluded by Article X, Section 9).

That this Court sanctioned the use of the new juvenile-sentencing statutes in Horsley, over the State's assertion that Article X, Section 9 precluded their retrospective application, does not authorize using the new death-penalty statutes here. As noted, the Court found such amendments of a substantive nature, but found Article X, Section 9, referred to as the "Savings Clause," not controlling based on the purpose of the Clause. The purpose, according to the Court, "is to require the statute in effect at the time of the crime to govern the sentence an offender receives for commission of that crime." Horsley , supra at 406. The Court continued, that the statute in effect at the time of the crime was unconstitutional under the federal constitution so it could not be enforced, and, even if the Savings Clause could apply, the federal constitution "must trump" the state constitution. *Id.*

The juvenile-sentencing case is not analogous. For while the statute considered there was wholly unconstitutional as applied to juveniles, in that the Eighth Amendment precluded both the death penalty and mandatory life imprisonment, Section 775.082(1)(a), as it existed at the time of the offenses at issue, is not wholly unconstitutional. That statute contains a separate – and severable – provision that authorizes a sentence of life imprisonment without the possibility of parole. The statute provides in pertinent part:

> [A] person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole.

The "unconstitutional portion of a general law may be deleted and the remainder allowed to stand if the unconstitutional provision can be logically separated from the remaining provisions," State ex rel. Boyd v. Green, 355 So. 2d 789 at 794 (Fla. 1978). Because the legislative purpose can be furthered independently of the void death-penalty provision, because the valid and invalid provisions can be neatly separated, because the Legislature would have passed one without the other, and because a complete act remains after the invalid portion is stricken, severance is proper. *Id.*

This Court has so recognized once before in considering the severability of this statute. In Donaldson v. Sack, 265 So. 2d 499 at 502-03 (Fla. 1972), the

Court, after Florida's death-penalty scheme was, in effect, rendered unconstitutional by Furman v. Georgia, 408 U.S. 238 (1972), held that the automatic sentence upon conviction of a formerly "capital offense" was life imprisonment:

> We find no difficulty with a continuation of the Sentencing for these former "capital offenses" under s 775.082(1) as automatically life imprisonment upon conviction, inasmuch as that is the only offense left in the statute. . . . The elimination of the death penalty from the statute does not of course destroy the entire statute. We have steadfastly ruled that the remaining consistent portions of statutes shall be held constitutional if there is any reasonable basis for doing so and of course this clearly exists in these circumstances.

Donaldson, supra at 502-03 The Court concluded that this result was proper under the rule of severability. *Id.* at 503. And the result is equally proper in this case.

This remedy upon severance is also compelled because applying Chapter 2016-13 to pending cases would violate the Ex post facto Clause of the state and the federal Constitutions. The Supreme Court of the United States has recognized that laws that seek retrospectively to "reduce the quantum of evidence" necessary for the state to meet its burden of proof will run afoul of the Ex Post Facto Clause. Carmell v. Texas, 529 U.S. 513 at 531 (2000). Likewise, a statute that alters the "definition of crimes" to the defendant's disadvantage is the archetypical example of a new law that cannot be retroactively applied. Collins v. Youngblood, 497 U.S. 37 at 51 (1990).

As has been established, Chapter 2016-13 attempts to reduce the state's burden of establishing that a capital defendant is eligible for a death-sentence by virtue of the language in section 921.141(2)(b)2 that a defendant is eligible for a death sentence upon the jury finding "at least one aggravating factor." Such an alteration reduces the state's burden of proof and changes the definition of a capital crime to the defendant's detriment, and cannot, consistent with the Ex post facto Clauses, be applied to capital defendants whose offenses preceded the statute's effective date.[2]

And the Florida Constitution's Ex Post Facto Clause has been liberally construed so that even some procedural matters give rise to an ex post facto violation. As this Court explained in Dugger v. Williams, 593 So. 2d 180, 181 (Fla. 1991), "it is too simplistic to say that an ex post facto violation can occur only with regard to substantive law, not procedural law. Clearly, some procedural matters have a substantive effect." The new death-penalty scheme, like the sentencing scheme for juvenile homicide offenders,[3] effects substantial substantive

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[2] While a statute must operate to a defendant's detriment to constitute an ex post facto law, see Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798), the same is not true with respect to Article X, Section 9 of the Florida Constitution. See State v. Watts, 558 So. 2d at 999.

[3] See Horsley v. State, 160 So. 3d 393, 401 (Fla. 2015) (amendments to juvenile-sentencing statutes are "substantive provisions").

changes, and cannot be retrospectively applied to capital defendants whose crimes occurred long before the statutes were enacted.

Dobbert v. Florida, 432 U.S. 282 (1977), is not to the contrary. There, the Supreme Court held that the statutory transformation that occurred when Florida adopted the 1972 death penalty scheme was procedural and ameliorative in nature, and consequently retrospective application did not give rise to an ex post facto violation. *Id.* at 292. But that holding is inapposite here, because the amendatory scheme is predominantly substantive and to the defendant's detriment to the extent that the state can establish eligibility for a death sentence upon proof of a single aggravating factor. This is particularly so because the statute fails to reduce that which can be considered in aggravation, and therefore denies a capital defendant the Eighth Amendment guarantee that the category of homicide offenders will be "genuinely narrowed" by specified aggravators before a death sentence may be considered. See Zant v. Stephens, 462 U.S. 862, 877 (1983).

IV.Conclusion

United States Supreme Court found Florida Statutes 775.082 (1) and 921.141 unconstitutional because they permitted Mr. Hurst's death sentence to be based upon a judge's fact-finding rather than a jury's verdict.

Chapter 2016 – 13, Laws of Florida, is completely devoid of any legislative intent that the amendments contained therein are to apply retroactively. Accordingly, the Act is effective from March 7, 2016 and has no retroactive application. Any retroactive application clearly violates the Florida Constitution's ex post facto provision.

CERTIFICATE OF TYPEFACE COMPLIANCE

Counsel for Petitioner certifies that this Initial Brief on the Merits is typed in 14 point Times New Roman, in compliance with Rule 9.210 of the Florida Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE.

I HEREBY CERTIFY that I have electronically filed the foregoing with the Clerk of the Florida Supreme Court using the Court's E-File Portal which will send a notice of electronic filing to the Office of the Office of the Attorney General, 5th District; and the Office of the State Attorney, Ninth Judicial Circuit, and all counsel of record receiving service of documents via the Florida Supreme Court E-File Portal this 21st day of April, 2016.

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