IN THE SUPREME COURT OF FLORIDA

LARRY DARNELL PERRY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC16-547

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT OF FLORIDA

ANSWER BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Petitioner in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Perry, the Respondent in the DCA and the Defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

A bold typeface will be used to add emphasis. Italics appeared in original quotations, unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The Petitioner, Larry Darnell Perry, was indicted by the Osceola County, Florida, grand jury on March 5, 2013, for the offenses of First Degree Murder and Aggravated Child Abuse arising out of the February 14, 2013 death of his son, Ayden Perry. (R 019-021). At the time of his death at the hands of his father, Ayden was two months and 24 days old. The State filed a notice of intent not to seek the death penalty, which was subsequently rescinded with the State filing a Notice of Intent to Seek the Penalty of Death on December 17, 2013. (R 023).

On January 12, 2016, the United States Supreme Court ruled in *Hurst v. Florida* that Florida's death penalty sentencing scheme was unconstitutional. *Hurst v. Florida*, 136 S. Ct. 616 (2016). Subsequently, Perry filed a Motion to Strike the State's Notice of Intent to Seek Death on February 1, 2016, citing the

Hurst decision. (R 034). The State filed an Opposition to the Defendant's Motion on February 2, 2016. (R 036-044). After a hearing on the matter, the trial court entered an Order granting Perry's Motion to Strike the State's Notice of Intent to Seek Death on February 11, 2016. (R 046-047).

On February 15, 2016, the Respondent filed an Emergency Petition for Writ of Prohibition before the Fifth District Court of Appeal. (R 003-016). In the Writ, the Respondent asked the appellate court to direct the trial judge to rescind his Order striking the State's Notice of Intent to Seek Death, stay the proceedings and toll speedy trial. (R 003).

While the case was pending, the Florida Legislature passed Chapter 2016-13, Laws of Florida, which was signed into law on March 7, 2016 by Governor Rick Scott. (R 092). The bill amended Florida Statute § 775.082 and § 921.141. The changes to the statutes require that the jury determine the existence of aggravating factors and require at least 10 jurors to recommend a sentence of death. The amendments remove the provisions relating to advisory sentencing by juries and findings by the court. (R 093).

In a consolidated order with the case of *State v. Woodward* (Case No. 5D16-543), the Fifth DCA granted the State's petitions and issued the writs of prohibition in both cases on March 16, 2016. (R 097 – 106). In the Order, the Fifth DCA ruled that *Hurst* did not declare Florida's death penalty to be

unconstitutional and that chapter 2016-13, Laws of Florida, applied to pending prosecutions. (R 106). The Fifth DCA also certified two questions to this Court to be of great public importance:

> 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? (R 106).

The Petitioner subsequently filed with this Court and the Fifth DCA a Notice to Invoke Discretionary Jurisdiction of this Court to review the decision of the Fifth DCA. (R 107 - 109). This Court has accepted jurisdiction of this case. (R 112 – 113). The Fifth DCA filed a corrected opinion on April 20, 2016, however, the ruling and certified questions remained the same as in the original opinion.

SUMMARY OF ARGUMENT

The United States Supreme Court's ruling in *Hurst v. Florida*, 136 S. Ct. 616 (2016), did not declare Florida's death penalty to be unconstitutional. Although the Supreme Court ruled that Florida's sentencing scheme was a violation of the Sixth Amendment, the court did not rule that the state's death penalty itself was unconstitutional.

Chapter 2016-13, Laws of Florida, which was passed following the *Hurst* ruling, should be applied to all capital cases pending prosecution. The legislative history of the revised statute indicates that the intent of the legislature was that the

amendments to the death penalty statutes would apply to pending capital cases. Contrary to the Petitioner's argument, application of Chapter 2016-13 would not violate the prohibition against *ex post facto* laws nor would it be a violation of the Savings Clause in the Florida Constitution. The State disputes the Petitioner's argument that application of the amended statutes would be to the detriment of a defendant. The amendments call for a unanimous jury fact finding of at least one aggravator, that at least 10 jurors are needed to recommend the death sentence and eliminated the trial court's ability to override a jury recommendation of life in prison. These provisions were not present in the prior statutes, thus, the amendments have increased the burden that prosecutors face in obtaining a death sentence.

ARGUMENT

ISSUE 1: *HURST v. FLORIDA*, 136 S. CT. 616 (2016), DID NOT DECLARE FLORIDA'S DEATH PENALTY UNCONSTITUTIONAL.

The Fifth District Court of Appeal properly concluded that in *Hurst v. Florida*, 136 S. Ct. 616 (2016), the Supreme Court determined that Florida's sentencing scheme to impose the death sentence was unconstitutional but not the penalty itself. (Exh. 1 – corrected opinion, p. 5). The court ruled that the *Hurst* holding was narrow and was based solely on the Court's determination that the "Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." (Ex. 1, p. 5, citing *Hurst*, 136 S. Ct. at 619). As a result, the

Fifth DCA stated that it had no difficulty in concluding that *Hurst* struck the process of imposing a sentence of death, not the penalty itself. (Exh. 1, p. 5).

The Fifth DCA's conclusion is correct. In *Hurst*, the Court applied *Ring v. Arizona*, 536 U.S. 584 (2002), and held that Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, was unconstitutional. The Court overruled *Hildwin v. Florida*, 490 U.S. 638 (1989), and *Spaziano v. Florida*, 468 U.S. 447 (1984), which had rejected the proposition that the Sixth Amendment required specific jury findings to authorize the imposition of the sentence of death. *Hurst*, 136 S. Ct. at 623-24. The Court recognized that *Ring* had arisen from its prior decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Id*. at 621. It acknowledged that its holding in *Apprendi* was based on a determination that "any fact that 'expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict' is an 'element' that must be submitted to a jury." *Hurst*, 136 S. Ct. at 621 (quoting *Apprendi*, 530 U.S. at 591). Thus, the Court did not rule "the death penalty" to be unconstitutional, but simply mandated that imposition of the sentence be supported by jury fact-finding.

The Supreme Court noted that under Florida Statute § 775.082(1) the jury played an advisory role in the sentencing of capital defendants in Florida, with the trial court being the fact finder as to whether or not aggravating circumstances

existed to impose a death sentence. *Hurst*, 136 S. Ct. at 622. The Court ruled that the state's sentencing scheme violated the Sixth Amendment, which the Court stated "required Florida to base Timothy Hurst's death sentence on a jury's verdict, not a judge's factfinding." *Id*. at 624. However, the Court did not declare that Florida's death penalty was unconstitutional. It simply ruled that the procedure for imposition of such sentence was unconstitutional. Moreover, the fact that the Court remanded for a determination of harmless error shows that Florida's death penalty has not been held unconstitutional. Otherwise, the Supreme Court would have directed that Hurst's death sentence be vacated.

The Supreme Court did not eliminate capital sentencing as an option in Florida. In fact, since *Hurst*, the Supreme Court has denied certiorari in three Florida capital cases which sought review from direct appeal of the imposition of the death penalty - *Fletcher v. State*, 168 So. 3d 186 (Fla. 2015), *cert. denied*, 136 S.Ct. 980 (2016); *Smith v. State*, 170 So. 3d 745 (Fla. 2015), *cert. denied*, 136 S.Ct. 980 (2016); *Hobart v. State*, 175 So. 3d 191 (Fla. 2015), *cert denied*, 2016 WL 1078981 (U.S. Mar. 21, 2016). These cases raised *Apprendi*-based claims similar to *Hurst* but were distinguishable because the defendants had prior violent felony convictions. Had the Court intended to rule Florida's death penalty unconstitutional, the Supreme Court could have granted certiorari with results similar to its decision in *Hurst*.

Hurst is a procedural ruling. The opinion is narrow, focusing only on Sixth Amendment grounds, which have been remedied with the passage of Chapter 2016-13, Laws of Florida that is in compliance with the *Hurst* ruling. The Fifth DCA correctly agreed with the State's argument that Florida's sentencing scheme was found to be unconstitutional under *Hurst* but not the death penalty itself. The Petitioner has not argued in the *Initial Brief t*hat the Fifth DCA ruled incorrectly on this issue.

The amendment to the statute was made by the Legislature to place the statute in compliance with the Supreme Court's ruling in *Hurst*. Thus, the changes have no bearing on whether or not the Court's ruling in *Hurst* declares Florida's death penalty unconstitutional. The Legislature simply followed the direction of the Supreme Court.

ISSUE 2: CHAPTER 2016-13, LAWS OF FLORIDA, APPLIES TO PENDING PROSECUTIONS OF CAPITAL OFFENSES THAT OCCURRED PRIOR TO ITS EFFECTIVE DATE.

The Fifth DCA correctly concluded that Chapter 2016-13, Laws of Florida, applies to capital cases that are pending. The court ruled that *ex post facto* principles generally do not bar applying procedural changes to pending criminal proceedings. (Exh. 1, p. 8). The court noted that the general framework of a state's statutory capital sentencing scheme is procedural in nature. (Exh. 1, p. 8). The court ruled that Chapter 2016-13, Laws of Florida, alters the process used to

determine whether the death penalty will be imposed, but makes no change to the punishment attached to first-degree murder. (Exh. 1, p. 8). The court noted that the new sentencing scheme added no new element, or functional equivalent of an element, to first-degree murder. (Exh. 1, p. 8). As a result, the changes to the state's capital sentencing scheme do not present the problems contemplated by the *ex post facto* doctrine, the court found. (Exh. 1, p. 8-9).

In the *Initial Brief*, Perry argues that the wording of Chapter 2016-13 indicates that there was no legislative intent that the law be applied to capital offenses that occurred prior to its effective date. *I.B.* at 4-5. Perry argues that there must be "clear evidence" of legislative intent to apply the statute to all pending cases, otherwise the legislation is presumed to operate prospectively. *I.B.* at 5-6. While that principle is generally true, in this case there is clear evidence of intent for the new statute to apply to all pending cases. The February 25, 2016 Senate amendment to the proposed legislation deleted the following: "Section 7. The amendments made by this act to ss. 775,082, 782.04, 921.141, and 921.142, Florida Statutes, shall apply only to criminal acts that occur on or after the effective date of this act." Fla. SB 7068, Amend. 163840 (Feb. 25, 2016). The fact that the Legislature removed proposed language applying the new law prospectively only indicates clear legislative intent favoring application to pending cases. A law is presumed to operate prospectively in the absence of clear

legislative intent to the contrary. *See Old Port Cove Holdings, Inc. v. Old Port Cove Condominium Ass'n One, Inc.*, 986 So. 2d 1279, 1284 (Fla. 2008). Here, there is no absence of clear legislative intent because if the lawmakers wanted the amendments to apply prospectively only, they would not have removed the language in the Senate amendment to the proposed bill. Furthermore, it is clear that the lawmakers wanted the new law to have immediate application, versus some date in the future, such as July 1 or October 1. As capital trials are not held within days of the murder, this presumes the statute will apply to crimes committed prior to the effective date.

This result is consistent with recent cases from this Court. In 2014, the Florida Legislature passed a juvenile statute to comply with the United States Supreme Court's holding in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), which invalidated Florida's mandatory life without parole sentence for juveniles convicted of First Degree Murder. Subsequently, this Court held in *Horsley v. State*, 160 So. 3d 393 (Fla. 2015), that the statute would be applied to juveniles whose crimes were committed before the effective date of the 2014 statute. Then, in *Henry v. State*, 175 So. 3d 675 (Fla. 2015) and *Gridine v. State*, 175 So. 3d 673 (Fla. 2015), this Court held that the new statutes would also apply to juvenile defendants whose non-homicide sentences violated the Eighth Amendment under *Graham v. Florida*, 560 U.S. 48 (2011).

Perry also argues that Chapter 2016-13 is a substantive change to the death penalty statutes, pointing to the changes made to §775.082 and §921.141. *I.B.* at 9. This argument is without merit, as the changes are procedural only and are not substantive changes to the statutes. The most relevant changes to the statutes are 1) requiring the jury to unanimously find the existence of at least one aggravating factor proven beyond a reasonable doubt; 2) requiring at least 10 jurors to recommend a death sentence; 3) deleting provisions relating to advisory sentencing by juries and findings by the court in support of a death sentence; 4) restricting the trial judge to only consider an aggravating factor that was unanimously found to exist by the jury; and 5) eliminating the trial court's ability to override a jury recommended sentence of life, while allowing the trial court to sentence the defendant to life even if the jury recommended death. Chapter 2016-13. These are not substantive changes but are changes to the procedure or manner which the jury and trial judge would use to determine what sentence would be imposed on a defendant convicted of a capital offense.

Perry argues that the burden of proof has been inverted, citing that aggravating factors must outweigh mitigating circumstances under the amended §921.141. *I.B.* at 9. Under the prior statute, the jury had to consider whether sufficient mitigating circumstances exist which outweighed the aggravating circumstances found to exist. Fla. Stat. §921.141(2)(b) (2015). The change in the statute does not invert

the burden of proof, as Perry argues, but, rather increases it. The burden of proof is still on the State, but now requires the additional burden to prove to the jury that the aggravators outweighed the mitigators. Thus, this is not a substantive change but merely a procedural change that inures to the benefit of the defendant.

Perry's argument that Chapter 2016-13 attempts to reduce the state's burden of establishing that a capital defendant is eligible for a death sentence with the requirement in §921.141 that the jury find "at least one aggravating factor" is meritless. *I.B.* at 14. Prior to the passage of Chapter 2016-13, one of the matters the jury had to consider in making a sentencing recommendation to the trial court was whether sufficient aggravating circumstances existed. Fla. Stat. §921.141(2)(a) (2015). Thus, the State still has the burden of proving at least one aggravating factor to make the defendant eligible for the death penalty. This Court has long interpreted the prior statute to provide that eligibility for the death penalty arises upon the finding that "at least one aggravating circumstance exists." *State v. Steele*, 921 So. 2d 538, 543 (Fla. 2005); *See also State v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973) (interpreting the term "sufficient aggravating circumstances" in Florida's capital sentencing scheme to mean one or more such circumstances). The enactment of Chapter 2016-13 does not change that requirement.

The Petitioner's argument that the amendment to §921.141(2) changes the definition of a capital crime to the defendant's detriment is also without merit. *I.B.*

at 14. First, the Petitioner does not specify in the *Initial Brief* what changed in the definition of a capital crime. To the contrary, the definition of a capital crime has not changed. *See Zommer v. State*, 31 So. 3d 733, 754 (Fla. 2010) ("Since the Legislature in the last thirty-six years has not amended the Florida Statutes to provide that at least two aggravating circumstances must be found to impose a sentence of death, it can be presumed that the Legislature agrees with and has adopted this Court's interpretation of the term 'sufficient aggravating circumstances' that was articulated in *Dixon*."). Secondly, contrary to Perry's argument, the change in the procedure is not to the detriment of the defendant. The amendments actually benefit the defendant since the new law requires a unanimous finding by the jury. Previously, unanimity was not required.

A procedural change is not a violation of the prohibition against *ex post facto* laws. U.S. Const. Art. I, §10. The United States Supreme Court has summarized the characteristics of an *ex post facto* law as follows:

> It is settled, by decisions of this court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done, which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*. *Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925).

In *Dobbert v. Florida*, the Supreme Court ruled that even a procedural change that may work to the disadvantage of the defendant is not *ex post facto*. *Dobbert v.*

Florida, 432 U. S. 282, 293 (1977). The defendant there committed first degree murders in 1971 and 1972. The procedures used in Florida's then-existing Capital Sentencing Statute were found unconstitutional in June of 1972, and the revised Capital Sentencing Statute was enacted in late 1972, after the commission of Dobbert's last murder. Not only were *ex post facto* challenges to the application of the revised Statute to Dobbert rejected by the United States Supreme Court, but the Court emphasized the "operative fact" of the existence of the prior Death Penalty Statute at the time of the offenses served to warn Dobbert of the penalty that could be imposed. *Dobbert*, 432 U.S. at 298. The existence of the statutory sentence of death at the time of the commission of the offense served as an indication of the controlling legislative intent, i.e., that the Florida Legislature intended that a sentence of death be a viable option in that case. Significantly, the *Dobbert* court expressly concluded that the revised procedures implemented by the Florida Legislature did not violate the rule forbidding application of *ex post facto* laws, as the changes effected were merely a matter of procedure.

Likewise, in *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court, having declared the federal sentencing guidelines unconstitutional, addressed the remedy, which the Court emphasized was merely remedial: "We answered the remedial question by looking to the legislative intent … We seek to determine

what Congress would have intended in light of the Court's constitutional holding." *Booker*, 543 U.S. at 246.

Perry argues that the *Dobbert* holding is inapposite here "because the amendatory scheme is predominately 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." *I.B.* at 15. This argument is nonsensical because the prior statute allowed death eligibility with the establishment of a single aggravating factor. In *State v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973), the seminal case upholding the death penalty in 1972, this Court observed that "[w]hen one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances. . ." Thus, the eligibility standards required for a defendant to qualify for the death penalty have not changed with the amendments to the statutes.

Perry points to several cases in the *Initial Brief* to argue that some procedural matters have a substantive effect. *I.B.* at 14. But in *Dugger v. Williams*, 593 So. 2d 180, 181 (Fla. 1991), this Court also noted that "the general rule is that the ex post facto provision of the state Constitution does not apply to purely procedural matters." Furthermore, the amendment to the statute at issue in *Dugger* was found to be a substantial disadvantage when applied retrospectively to Williams. *Id*. at 182. However, that is not the case with the amendments enacted with the passage

of Chapter 2016-13. In fact, capital defendants will benefit from the changes, which include a requirement that jurors vote by at least a 10-2 margin in order to recommend a sentence of death. Perry's reference to other cases in regards to this argument is misplaced. The statute at issue in *Smiley v. State*, 966 So. 2d 330, 332-3 (Fla. 2007), involved changes to the elements of a self defense instruction; *Troy v. State*, 948 So. 2d 635, 644-5 (Fla. 2006), focused on the constitutionality of the elimination of voluntary intoxication as a defense; and in *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016), the United States Supreme Court held that *Miller v. Alabama*, 132 S. Ct. 2455 (2012), announced a substantive rule of constitutional law. These cases cited by Perry are distinguishable because they involve substantive issues specifically, whereas Chapter 2016-13 merely deals with the manner of determining if a defendant should be sentenced to death or life in prison. Chapter 2016-13 does not change the elements of any capital crimes or jury instructions, nor does it eliminate any defense. It only changes the procedure that would be followed in determining how a person convicted of a capital crime would be sentenced.

In a footnote, the Petitioner argues that while a statute must operate to the detriment of a defendant to constitute an *ex post facto* law, the same is not true with respect to Article X, Section 9 of the Florida Constitution. *I.B.* at 14, n. 2. Perry argues that the Savings Clause of the Florida Constitution precludes a newly

enacted criminal statute from applying to pending criminal cases. *I.B.* at 8. However that argument is defeated by this Court's holding in *Horsley v. State*, 160 So. 3d 393 (Fla. 2015). In *Horsley*, this Court was asked to consider whether the 2014 statutory scheme to address juvenile sentencing should be applied to cases pending resentencing. It held that since the statute was enacted to cure a violation of the federal constitution, the Savings Clause was not an impediment to such application. *Id.*, at 406, 395 ("presented with this unique situation in which a federal constitutional infirmity in a sentencing statute has now been specifically remedied by our Legislature, we conclude that the proper remedy is to apply Chapter 2014-220, Laws of Florida, to all juvenile offenders" being resentenced due to *Miller*). *See also, Henry v. State*, 175 So. 3d 675, 680 (Fla. 2015) (holding that resentencing pursuant to Chapter 2014-220 is the proper remedy for a sentence that violates *Graham v. Florida*, 560 U.S. 48 (2010)); *Lawton v. State*, 181 So. 3d 452, 453 (Fla. 2015) (reaching same conclusion despite existence of viable alternative sentence). Chapter 2016-13, Laws of Florida was also a quick and reasoned response to the finding of a constitutional violation in *Hurst*, and therefore the Savings Clause does not preclude application.

Perry argues that *Horsley* is not analogous, arguing that the statute at issue was wholly unconstitutional as applied to juveniles, but that Section 775.082(1)(a), as it existed at the time of the offenses at issue, is not wholly unconstitutional. *I.B.* at

12. This argument contradicts the Petitioner's argument in the *Initial Brief* that Florida's death penalty statute, which consists of §775.082(1) and §921.141, was found to be unconstitutional by *Hurst*. *I.B.* at 3-4. Nevertheless, Perry argues that Fla. Stat. §775.082(1)(a) contains a separate and severable provision that authorizes a life sentence without the possibility of parole. *I.B.* at 12.

It is unclear what the Petitioner is suggesting. However, if the Petitioner is suggesting that only the parts of the prior statute that contained the provisions for a life sentence should remain, then the death penalty would not be available under the statute, which is improper because Florida's death penalty has not been abolished nor found to be unconstitutional. As Petitioner has offered no basis for finding the court below to be in error on this point, this Court must affirm the ruling of the Fifth District Court of Appeal below as to the application of Chapter 2016-13.

CONCLUSION

Based on the foregoing reason, the State respectfully requests this Honorable Court find that *Hurst v. Florida* did not hold that Florida's death penalty statute was unconstitutional and that Chapter 2016-13, Laws of Florida, should be applied to capital cases pending at the time of the passage of the law.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have electronically filed the foregoing with the Clerk of the Florida Supreme Court using the E-File Portal which will send notice of electronic filing to: J. Edwin Mills, Esquire, jemillslaw@hotmail.com, 126 East Jefferson Street, Orlando, FL 32801; and Frank J. Bankowitz, Esquire, fjb@bankowitzlaw.com, 215 East Livingston Street, Orlando, FL 32801 on May 2, 2016.

CERTIFICATE OF COMPLIANCE

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

Respectfully submitted and certified,

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EXHIBIT 1

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

STATE OF FLORIDA,

Petitioner,

v.

LARRY DARNELL PERRY,

Respondent.
_____/

CORRECTED OPINION

Case No. 5D16-516

Opinion filed March 16, 2016

Petition for Writ of Prohibition,
Jon Morgan, Respondent Judge.

Pamela Jo Bondi, Attorney General, Tallahassee, and Vivian Singleton, Assistant Attorney General, Daytona Beach, for Petitioner.

Frank J. Bankowitz and J. Edwin Mills, Orlando, for Respondent.

STATE OF FLORIDA,

Petitioner,

v.

WILLIAM THEODORE WOODWARD,

Respondent.
_____/

Case No. 5D16-543

Petition for Writ of Prohibition,
James Earp, Respondent Judge.

Pamela Jo Bondi, Attorney General, Tallahassee, and Vivian Singleton, Assistant Attorney General, Daytona Beach, for Petitioner.

Robert R. Berry and Gregory W. Eisenmenger, of Eisenmenger, Berry, Blaue & Peters, P.A., Viera, for Respondent.

ORFINGER, J.

In Hurst v. Florida, 136 S. Ct. 616, 619 (2016), the United States Supreme Court held that Florida's capital "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." The issue we address is the impact of Hurst on pending prosecutions for first-degree murder.[1] In addressing this issue, we must also consider the effect of legislation recently enacted in response to Hurst.

I.

Larry D. Perry was indicted for first-degree murder and aggravated child abuse arising from the death of his son in February 2013. The State filed its notice of intent to seek the death penalty. Shortly after the Supreme Court's Hurst decision, Perry filed a demand for speedy trial and moved to strike the State's notice of intent to seek the death penalty, asserting that "Florida no longer has a death penalty statute." Following

[1] First-degree murder is a capital felony in Florida. See § 782.04(1)(a), Fla. Stat. (2010). A person 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 . . . ." § 775.082(1), Fla. Stat. (2010). This is a "hybrid" proceeding "in which [a] jury renders an advisory verdict but the judge makes the ultimate sentencing determinations." Hurst, 136 S. Ct. at 620 (quoting Ring v. Arizona, 536 U.S. 584, 608 n.6 (2002)).

a hearing, the trial court granted Perry's motion to strike, reasoning that, without a procedure in place that complies with Hurst's mandates, the State could not seek to impose the death penalty.

Similarly, William T. Woodward was indicted for two counts of first-degree murder arising from the deaths of two of his neighbors in September 2012. The State filed its notice of intent to seek the death penalty. Following Hurst, Woodward moved to prohibit the death qualification of the jury, arguing that after Hurst, there is "no constitutionally permitted version of the death penalty" in Florida. The trial court agreed, holding that "there currently exists no statutory authority in Florida under which the State can seek the death penalty . . . ." In response to the trial courts' rulings, the State filed petitions for writs of prohibition, seeking to prohibit the trial courts from striking its notice of intent to seek the death penalty in Perry's case, and refusing to death qualify the jury or conduct a penalty phase proceeding in Woodward's case.[2]

II.

We first consider whether prohibition is available in this matter. The State argues that prohibition is available because it has the exclusive discretion to decide whether to seek the death penalty in a given case and the trial court's order impermissibly invades this discretion. We agree.

Prohibition lies to prevent a court from acting without authority of law or in excess of its jurisdiction. English v. McCrary, 348 So. 2d 293, 297 (Fla. 1977). "[A] circuit judge lacks authority to decide pre-trial whether the death penalty will be imposed in a first-degree murder case." State v. Bloom, 497 So. 2d 2, 2 (Fla. 1986). Absent certain

[2] We have consolidated these cases for purposes of disposition only.

exceptions inapplicable in this case, the State "has absolute discretion at pre-trial" to determine whether to seek the death penalty in a given case.[3] Id. at 3 (discussing State v. Jogan, 388 So. 2d 322 (Fla. 3d DCA 1980)). Thus, we conclude that prohibition is appropriate when the trial court strikes a notice of intent to seek the death penalty or refuses to death qualify a jury in a capital case. See id. (concluding that pretrial death penalty determination by trial judge would unconstitutionally interfere with complete discretionary executive function vested in prosecutor to charge and prosecute cases); see also State v. Donner, 500 So. 2d 532, 533 (Fla. 1987) (explaining that judiciary cannot interfere with prosecutor's decision to seek death penalty except where impermissible motives may be attributed to prosecution); Cleveland v. State, 417 So. 2d 653, 654 (Fla. 1982) (holding that statutory scheme for pretrial diversion created alternative to prosecution, which should remain in prosecutor's discretion). Cf. Wade v. State, 41 So. 3d 857, 874-76 (Fla. 2010) (holding, on defendant's appeal, that trial court did not err in denying motion to strike state's notice of intent to seek death penalty because that decision was in prosecutor's discretion).

III.

Turning to the merits, Perry and Woodward contend that Hurst leaves Florida without a death penalty. The State counters, arguing that Hurst struck down only Florida's procedure for imposing the death penalty, not the death penalty itself. We agree with the State's position.

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[3] A narrow exception exists where the prosecutor in a particular case has impermissible motives such as bad faith, race, religion, or a desire to prevent the exercise of a constitutional right. Bloom, 497 So. 2d at 3 (citing United States v. Smith, 523 F.2d 771, 782 (5th Cir. 1975)). There is no allegation of an impermissible motive here.

Hurst determined that Florida's "scheme" to impose the death penalty was unconstitutional, not the penalty itself. The Court recognized that section 775.082(1), Florida Statutes (2010), "does not make a defendant eligible for death until 'findings by the court that such person shall be punished by death.'" 136 S. Ct. at 622 (quoting § 775.082(1), Fla. Stat. (2010)). In holding Florida's capital sentencing procedure unconstitutional, the Court was particularly concerned that "Florida does not require the jury to make the critical findings necessary to impose the death penalty." Id. We believe that Hurst's holding is narrow and based solely on the Court's determination that the "Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." Id. at 619. Thus, we have no difficulty in concluding that Hurst struck the process of imposing a sentence of death, not the penalty itself.

IV.

After the State filed its petitions in these cases, the Florida Legislature passed, and the Governor signed into law, new capital sentencing legislation in response to Hurst. See ch. 2016-13, Laws of Fla. We now consider the impact of this new legislation on Perry's and Woodward's pending prosecutions.

We consider two arguments opposing the application of the new legislation to pending cases. The first is that the new legislation does not apply because the Legislature has already provided an alternative sentence if the death penalty was deemed unconstitutional. This argument is based on section 775.082(2), Florida Statutes (2015), which provides, in relevant part:

> 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).

(Emphasis added). Section 775.082(2) does not address the situation presented here because, by its express terms, the statute applies only to offenders "previously sentenced to death." More importantly, for the reasons previously explained, the United States Supreme Court in Hurst did not hold that the death penalty was unconstitutional.

The second argument opposing the application of the new legislation to pending cases is that applying the new sentencing law would constitute an ex post facto violation under both United States and Florida Constitutions. Art. I, § 10, cl. 1, U.S. Const.; Art. I, § 10, Fla. Const. The ex post facto doctrine prohibits a state from "retroactively alter[ing] the definition of crimes or increas[ing] the punishment for criminal acts." Collins v. Youngblood, 497 U.S. 37, 43 (1990). In Dobbert v. Florida, 432 U.S. 282, 292 (1977), the Court held that ex post facto prohibitions reach only those legislative enactments that affect substantive criminal law. The Court summarized the categories of laws constituting substantive changes to criminal law:

> [A]ny statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto.

Id. (quoting Beazell v. Ohio, 269 U.S. 167, 169-70 (1925)). Thus, a legislative act affecting changes in criminal procedure, including procedural changes that disadvantage a defendant, generally does not violate the ex post facto clause. Carmell v. Texas, 529 U.S. 513, 543-44 (2000) (recognizing no one has vested right in mode of procedure); Collins, 497 U.S. at 45 ("[Procedural] refers to changes in the procedures

by which a criminal case is adjudicated, as opposed to changes in the substantive law of crimes."). The question before us is whether Florida's new capital sentencing statutes made a substantive or procedural change in the law as it existed when Perry's and Woodward's crimes allegedly occurred.

Dobbert is particularly instructive. Dobbert killed his children in 1972. At that time, Florida mandated a death sentence for capital felony convictions, unless the jury, in its discretion, recommended mercy to the judge. Shortly after Dobbert murdered his children, the Supreme Court decided Furman v. Georgia, 408 U.S. 238 (1972), which struck down the Georgia death sentencing statute as unconstitutional. A month later, in Donaldson v. Sack, 265 So. 2d 499, 501 (Fla. 1972), our supreme court held that the Florida death sentencing statute was also unconstitutional under Furman. Later that year, the Florida Legislature enacted a new capital sentencing procedure to comply with Furman and Donaldson, under which Dobbert was tried, convicted and sentenced to death. Dobbert, 432 U.S. at 284, 287-88.

In attempting to overturn his death sentence, Dobbert failed to persuade the Supreme Court that sentencing him under the amended capital sentencing procedures violated the ex post facto clause. The Court limited ex post facto violations to those occurring when a statute criminalizes a previously innocent act, aggravates a crime previously committed, provides greater punishment, or changes the quantum of proof needed to convict a defendant. Id. at 292 (quoting Beazell, 269 U.S. at 169-70). The Dobbert Court held that none of those categories applied to the new capital sentencing methods. Instead, the Court concluded that the statutory change between the two sentencing methods was "clearly procedural," and "[t]he new statute simply altered the

methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime." Id. at 293-94. This is precisely what has occurred here.

More recently, in Horsley v. State, 160 So. 3d 393 (Fla. 2015), the Florida Supreme Court dealt with a juvenile offender whose life sentence in prison without the possibility of parole was deemed unconstitutional under Miller v. Alabama, 132 S. Ct. 2455 (2012). Responding to Miller, the Florida Legislature enacted, and the Governor signed into law, a new juvenile sentencing law, which provided juveniles sentenced for non-homicide offenses with an opportunity for release. The question in Horsley was the impact of the newly-enacted legislation on offenders whose offenses predated the new law. In holding that the new law applied to offenders whose crimes predated its enactment, the Florida Supreme Court concluded that because the Legislature had cured the constitutional infirmity, applying the new law was "most consistent with the legislative intent regarding how to comply with Miller," and it did not require the courts to fashion a "remedy out of whole cloth." Horsley, 160 So. 3d at 405, 406.

These cases indicate to us that ex post facto principles generally do not bar applying procedural changes to pending criminal proceedings and the general framework of a state's statutory capital sentencing scheme is procedural in nature. Chapter 2016-13, Laws of Florida, alters the process used to determine whether the death penalty will be imposed, but makes no change to the punishment attached to first-degree murder. The new sentencing statute added no new element, or functional equivalent of an element, to first-degree murder. Hence, the changes to our capital

sentencing procedures do not resemble the type of after-the-fact legislative evil contemplated by the ex post facto doctrine.

Finally, we note that Hurst is an extension of Ring v. Arizona, 536 U.S. 584 (2002), and Ring was based on Apprendi v. New Jersey, 530 U.S. 466 (2000).[4] Apprendi has been held to establish a rule of procedure. See McCoy v. United States, 266 F.3d 1245, 1258 (11th Cir. 2001); United States v. Sanders, 247 F.3d 139, 147 (4th Cir. 2001). Likewise, Ring has been classified as a procedural rule rather than a substantive one. See Schriro v. Summerlin, 542 U.S. 348 (2004). Logically, it follows that Hurst's holding is also procedural rather than substantive.[5]

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[4] In Ring, the Supreme Court specifically held that the rule of law stated in Apprendi is applicable to capital defendants. That is—the "Sixth Amendment does not permit a defendant to be 'expose[d] . . . to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone.'" Ring, 536 U.S. at 588-89 (quoting Apprendi, 530 U.S. at 483).

[5] As our supreme court stated in Smiley v. State, 966 So. 2d 330, 334 (Fla. 2007):

> In the analysis of a change in statutory law, a key determination is whether the statute constitutes a procedural/remedial change or a substantive change in the law. The rule for procedural/remedial changes, in contrast to the presumption against retroactive application for substantive changes, is as follows:
>
> > Remedial statutes or statutes relating to remedies or modes of procedure, which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of rights already existing, do not come within the legal conception of a retrospective law, or the general rule against retrospective operation of statutes.
>
> City of Lakeland v. Catinella, 129 So. 2d 133, 136 (Fla. 1961) (emphasis added). Moreover, the "presumption in

In sum, we hold that Hurst did not declare Florida's death penalty to be unconstitutional and that chapter 2016-13, Laws of Florida, applies to pending prosecutions. Consequently, we grant the State's petitions and issue the writs of prohibition.

Because the issues presented here involve questions of great public importance and have a great effect on the proper administration of justice, we certify the following questions to the Florida Supreme Court:

> 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?

PROHIBITION GRANTED; QUESTIONS CERTIFIED.

EVANDER and WALLIS, JJ., concur.

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favor of prospective application generally does not apply to 'remedial' legislation; rather, whenever possible, such legislation should be applied to pending cases in order to fully effectuate the legislation's intended purpose." Arrow Air, Inc. v. Walsh, 645 So. 2d 422, 424 (Fla. 1994) (citing City of Orlando v. Desjardins, 493 So. 2d 1027 (Fla. 1986)).