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APPENDIX

A

237 So.3d 905
Supreme Court of Florida.

Etheria Verdell **JACKSON**, Appellant,
v.
STATE of Florida, Appellee.

No. SC17–703
|
[January 24, **2018**]

Synopsis

Background: Defendant who had been sentenced to death filed a motion for collateral relief. The Circuit Court, Duval County, No. 161985CF012620AXXXMA, Russell L. Healey, J., denied the motion. Defendant appealed.

[Holding:] The Supreme Court held that *Hurst v. State*, 202 So. 3d 40, which required a jury to unanimously find that aggravating factors were sufficient to impose death, did not apply retroactively to defendant's death sentence.

Affirmed.

Pariente, J., filed an opinion concurring in result.

Lewis and Canady, JJ., concurred in result.

West Headnotes (1)

[1] **Courts**
In general;retroactive or prospective operation

Florida Supreme Court decision in *Hurst v. State*, 202 So. 3d 40, in which Court held that a jury to was required to unanimously find that aggravating factors were sufficient to impose death, did not apply retroactively to defendant's death sentence; defendant was sentenced to death following a jury's recommendation for death by a vote of seven to five, and his sentence became final approximately 27 years before *Hurst* was issued.

Cases that cite this headnote

***906** An Appeal from the Circuit Court in and for Duval County, Russell L. Healey, Judge—Case No. 161985CF012620AXXXMA

Attorneys and Law Firms

James Viggiano, Jr., Capital Collateral Regional Counsel, Maria E. DeLiberato, Julissa Fontán, and Chelsea Ray Shirley, Assistant Capital Collateral Regional Counsel, Middle Region, Temple Terrace, Florida, for Appellant

Pamela Jo Bondi, Attorney General, and Charmaine M. Millsaps, Assistant Attorney General, Tallahassee, Florida, for Appellee

Opinion

PER CURIAM.

We have for review **Etheria** Verdell **Jackson's** appeal of the circuit court's order denying **Jackson's** motion filed pursuant to Florida Rule of Criminal Procedure 3.851. This Court has jurisdiction. See art. V, § 3(b)(1), Fla. Const.

Jackson's motion sought relief pursuant to the United States Supreme Court's decision in Hurst v. Florida, —— U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), and our decision on remand in Hurst v. State (Hurst), 202 So.3d 40 (Fla. 2016), cert. denied, —— U.S. ——, 137 S.Ct. 2161, 198 L.Ed.2d 246 (2017). This Court stayed **Jackson's** appeal pending the disposition of Hitchcock v. State, 226 So.3d 216 (Fla. 2017), cert. denied, —— U.S. ——, 138 S.Ct. 513, 199 L.Ed.2d 396 (2017). After this Court decided Hitchcock, **Jackson** responded to this Court's order to show cause arguing why Hitchcock should not be dispositive in this case.

After reviewing **Jackson's** response to the order to show cause, as well as the State's arguments in reply, we conclude that **Jackson** is not entitled to relief. **Jackson** was sentenced to death following a jury's recommendation for death by a vote of seven to five. **Jackson** v. State, 530 So.2d 269, 271 (Fla. 1988). His sentence of death became final in 1989. **Jackson** v. Florida, 488 U.S. 1050, 109 S.Ct. 882, 102 L.Ed.2d 1005 (1989). Thus, Hurst does

not apply retroactively to **Jackson's** sentence of death. See Hitchcock, 226 So.3d at 217. Accordingly, we affirm the denial of **Jackson's** motion.

The Court having carefully considered all arguments raised by **Jackson**, we caution that any rehearing motion containing reargument will be stricken. It is so ordered.

LABARGA, C.J., and QUINCE, POLSTON, and LAWSON, JJ., concur.

PARIENTE, J., concurs in result with an opinion.

LEWIS and CANADY, JJ., concur in result.

PARIENTE, J., concurring in result.

***907** I concur in result because I recognize that this Court's opinion in Hitchcock v. State, 226 So.3d 216 (Fla. 2017), cert. denied, —— U.S. ——, 138 S.Ct. 513, 199 L.Ed.2d 396 (2017), is now final. However, I continue to adhere to the views expressed in my dissenting opinion in Hitchcock.

All Citations

237 So.3d 905, 43 Fla. L. Weekly S30

APPENDIX

B

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO.: 16-1985-CF-12620-AXXX

DIVISION: CR-C

STATE OF FLORIDA

v.

ETHERIA VERDELL JACKSON,
Defendant.
_____/

ORDER DENYING DEFENDANT'S SUCCESSIVE POSTCONVICTION MOTION TO VACATE SENTENCE OF DEATH

This cause comes before this Court on Defendant's "Successive Motion to Vacate Death Sentence," filed through counsel on January 10, 2017, pursuant to Florida Rule of Criminal Procedure 3.851.

A jury convicted Defendant of first-degree murder and, by a vote of 7 to 5, voted for the death sentence, which the Court imposed. Jackson v. State, 530 So. 2d 269, 271 (Fla. 1988). The Florida Supreme Court affirmed the judgment and sentence of death in a Mandate issued on September 1, 1988. Id. On September 5, 1990, Defendant filed a Florida Rule of Criminal Procedure 3.850 motion, which the Court denied on the merits. Jackson v. Dugger, 633 So. 2d 1051, 1053 (Fla. 1993). In a Mandate issued on January 13, 1994, the Florida Supreme Court affirmed the Court's denial of Defendant's rule 3.850 motion. Id.

A rule 3.851 motion must be filed within one year of the conviction and sentence of death becoming final. Fla. R. Crim. P. 3.851(d)(1). A rule 3.851 motion may be considered beyond the one-year time-bar, however, if it alleges that "the fundamental constitutional right asserted

was not established within the [one-year] period provided for in subsection (d)(1) and has been held to apply retroactively." Fla. R. Crim. P. 3.851(d)(2)(B).

Even if found to be timely, a successive rule 3.851 motion may be denied without an evidentiary hearing if the record conclusively shows the defendant is not entitled to relief. Gaskin v. State, SC15-1884, 2017 WL 224772, at *1 (Fla. Jan. 19, 2017) (citing Reed v. State, 116 So. 3d 260, 264 (Fla. 2013)). "Under rule 3.851, 'postconviction claims may be summarily denied when they are legally insufficient, should have been brought on direct appeal, or are positively refuted by the record.'" Carroll v. State, 114 So. 3d 883, 885-86 (Fla. 2013) (quoting Marek v. State, 8 So. 3d 1123, 1127 (Fla. 2009)).

Defendant's convictions and sentence of death became final on January 23, 1989, when the United States Supreme Court denied Defendant's petition for writ of certiorari on direct appeal. See Fla. R. Crim. P. 3.851(d)(1)(B) (stating, for purposes of rule 3.851, that a sentence of death becomes final under subsection (d)(1)(B) "on the disposition of the petition for writ of certiorari by the United States Supreme Court, if filed."); Jackson v. Florida, 488 U.S. 1050 (1989). Thus, any postconviction claim asserted more than a year after Defendant's convictions and sentence of death became final must be denied unless the claim falls within the newly-recognized retroactive constitutional right exception in subsection (d)(2)(B). Carroll, 114 So. 3d at 886 ("Rule 3.851 requires . . . that motions for postconviction relief must be filed within one year from when the conviction and sentence become final unless the claim is based on . . . a newly recognized fundamental constitutional right that has been held to apply retroactively.").

ANALYSIS OF *HURST* CLAIM

Defendant contends he was sentenced to death unconstitutionally, and that his sentence of death must be vacated, pursuant to Hurst v. Florida, 136 S. Ct. 616 (2016), which held Florida's

capital sentencing scheme unconstitutional in light of Ring v. Arizona, 536 U.S. 584 (2002), because "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death."[1] Hurst v. Florida, 136 S. Ct. at 619. Defendant alleges he is entitled to retroactive relief under Hurst v. Florida because Defendant properly asserted, presented, and preserved challenges to the lack of jury fact finding and unanimity.

The United States Supreme Court, in Hurst v. Florida, held the Sixth Amendment mandates that each fact necessary to impose a greater punishment than authorized by the jury's guilty verdict, such as a sentence of death, must be submitted to and found by the jury. Id. at 621-22. On remand, the Florida Supreme Court concluded "Hurst v. Florida requires that all the critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury" and that "the jury's recommended sentence of death must be unanimous." Hurst v. State ("Hurst"), 202 So. 3d 40, 44 (Fla. 2016). It further clarified the meaning of Hurst v. Florida by proclaiming: "[I]n addition to unanimously finding the *existence* of any aggravating factor, the jury must also unanimously find that the aggravating factors are *sufficient* for the imposition of death and unanimously find that the aggravating factors *outweigh* the mitigation before a sentence of death may be considered by the judge." Id. at 54.

In Asay v. State, No. SC16-223, 2016 WL 7406538 (Fla. Dec. 22, 2016), the Florida Supreme Court addressed whether Hurst v. Florida and Hurst should apply retroactively. The majority employed the traditional Witt[2] retroactivity framework to conclude that Hurst v. Florida

[1] Defendant also asserts that all of his previous postconviction claims must be reheard and determined under the new constitutional framework provided in the Hurst decisions. Such a rehearing is not authorized by rule or law. See Fla. R. Crim. P. 3.851(d)(2)(B); Taylor v. State, 62 So. 3d 1101, 1111 (Fla. 2011) (citing Nelms v. State, 596 So. 2d 441, 442 (Fla. 1992)) (holding that "trial counsel 'cannot be held ineffective for failing to anticipate the change in the law.'"). To the extent Defendant argues the Hurst opinions constitute newly discovered evidence, newly discovered evidence means facts, not law. See Fla. R. Crim. P. 3.851(d)(2)(A)&(B).

[2] Witt v. State, 387 So. 2d 922 (Fla. 1980).

and Hurst do not apply retroactively to capital cases that became final prior to June 24, 2002, the date on which Ring was decided. Id. at *13.

The Florida Supreme Court considered whether Hurst v. Florida and Hurst should apply retroactively to post-Ring capital cases in Mosley v. State, No. SC14-436, 2016 WL 7406506 (Fla. Dec. 22, 2016). In Mosley, the Court employed the Witt retroactivity framework as well as the fundamental fairness retroactivity analysis set forth in James v. State, 615 So. 2d 688 (Fla. 1993). Id. at *18-19. The Court held that, "because [the defendant] raised a Ring claim at his first opportunity and was then rejected at every turn, . . . fundamental fairness requires the retroactive application of Hurst, which defined the effect of Hurst v. Florida, to [the defendant]." Id. at *19. The Court further found the Witt framework also supported the retroactive application of Hurst v. Florida and Hurst to post-Ring cases. See id. at *19-25.

In Gaskin v. State, SC15-1884, 2017 WL 224772 (Fla. Jan. 19, 2017), the Florida Supreme Court made clear that the fundamental fairness retroactivity analysis only applies to post-Ring cases. In that case, the defendant had argued, both at trial and on direct appeal, that Florida's capital sentencing scheme was facially unconstitutional "for the reasons espoused by the United States Supreme Court in Ring and Hurst v. Florida . . . ." Id. at *3 (Pariente, J., concurring in part and dissenting in part) (footnote omitted). In spite of the defendant's repeated constitutional assaults on Florida's capital sentencing scheme based on the reasoning subsequently established in Ring, the defendant was not entitled to retroactive relief under Hurst v. Florida because the defendant's sentence of death became final pre-Ring. Id. at *2 (citing Asay, 2016 WL 7406538 at *13).

Taken together, the Asay/Mosley/Gaskin triad creates a categorical bar against the retroactive application of Hurst v. Florida and Hurst to capital cases that became final before

Ring was decided. Therefore, Defendant's belated Hurst claims do not fall within the newly-established retroactive constitutional right exception in subdivision (d)(2)(B) because the right has not been held to apply retroactively to capital cases that became final before Ring was issued. Accordingly, Defendant's claim is denied.

Accordingly, it is **ORDERED AND ADJUDGED** that Defendant's "Successive Motion to Vacate Death Sentence," filed through counsel on January 10, 2017, is **DENIED**. This is a final order, and Defendant shall have thirty (30) days from the date this Order is filed to take an appeal by filing a Notice of Appeal with the Clerk of the Court.

DONE AND ORDERED in Jacksonville, Duval County, Florida on February 14, 2017.

RUSSELL HEALEY
Circuit Judge

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CERTIFICATE OF SERVICE

I do certify that a copy hereof has been furnished to the above-listed parties by United States mail on FEBRUARY 14TH, 2017.

Deputy Clerk

Case No.: 16-1985-CF-12620-AXXX
/act

APPENDIX

C

Filing # 67672138 E-Filed 02/08/2018 08:14:51 AM

IN THE SUPREME COURT OF FLORIDA

ETHERIA V. JACKSON
Appellant,

v.

SC17-703

STATE OF FLORIDA
Appellee.

MOTION FOR REHEARING

Appellant Etheria Jackson, through counsel, respectfully moves for rehearing of this Court's Opinion of January 24, 2018, denying Mr. Jackson's Successive Motion to Vacate his Sentence of Death. Mr. Jackson respectfully submits that this Court overlooked and misapprehended points of law and fact, and specifically neglected to review Mr. Jackson's substantial non-*Hurst* federal constitutional claims. No claim previously raised is hereby abandoned.

The Opinion denying Mr. Jackson relief was one amongst the first of 80 virtually identical Opinions that has been released by this Court, in groups of 10, starting on Monday, January 22, 2018. There was no individual analysis conducted in Mr. Jackson's case. Instead, this Court just issued a two-page Opinion stating what his jury recommendation was and the fact that his case was final in 1989. (Opinion, p. 2). However, Mr. Jackson had substantial issues which were not addressed.

This Court specifically failed to address his non-*Hurst* claim that his death sentence was obtained in violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985). In at least six other cases in an identical posture before this Court, the Court has allowed for additional briefing on "non-*Hurst* related issues." *See e.g. Spencer v. State*, SC17-1269. At the very least, Mr. Jackson should be entitled to full briefing on his *Caldwell* claim.

In all death penalty cases, this Court, both because of the Eighth Amendment and because of the special role assigned to it by the laws and Constitution of Florida, is "required to conduct a comprehensive analysis in order to determine whether the crime falls within the category of both the most aggravated and the least mitigated of murders, thereby assuring uniformity in the application of the sentence." *Davis v. State*, 207 So. 3d 142, 172 (Fla. 2016)(internal quotations and citations omitted). Even if by issuing 80 identical opinions denying relief, without any individual analysis, this Court had not violated its duty to ensure that Florida's death penalty is uniformly and fairly administered, by allowing for additional briefing of "non-*Hurst* related issues" in some cases but not this one– notwithstanding the explicit request made herein (*see* Response on Order to Show cause p. 1-2 and Response to State's Reply, p. 1-2) - this Court has been arbitrary in its evaluation of Florida's death penalty cases. Such disparate treatment is a violation of due process and equal protection under the law. See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982).

Further, this Court is obligated to meaningfully address Jackson's federal arguments because state courts have a duty to adjudicate claims pressed upon them under federal law. See *Howlett v. Rose*, 496 U.S. 356, 367-72 (1990) (unanimously reversing Florida court). In fact, to the extent this Court arbitrarily narrows Mr. Jackson's rights under state law to have his federal constitutional claims fully heard on appeal, it is committing an independent violation of his due process rights. See, e. g., *Barr v. City of Columbia*, 378 U.S. 146 (1964); *Wright v. Georgia*, 373 U.S. 284, 291 (1963); *N. A. A. C. P. v. Alabama*, 357 U.S. 449, 456 -458 (1958).

This Court undoubtedly plays a critical role in ensuring that the death penalty in Florida is administered in a fundamentally fair and balanced way. Mr. Jackson asserts that the issuance of an individualized opinion detailing the Court's findings, as to the specific facts and issues raised by Mr. Jackson, is necessary to fulfill that important role, and to ensure that no citizen is executed without having his claims comprehensively analyzed.

Mr. Jackson respectfully requests this Court allow additional and full briefing on his *Caldwell* claim, or, in the alternative, grant Rehearing and conduct an individual and specific analysis of his *Caldwell* claim that was preserved and briefed before this Court.

Respectfully Submitted,

/s/ Julissa Fontán
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Status Report has been electronically filed with the Clerk of the Florida Supreme Court, and electronically delivered to Assistant Attorney General Charmaine Millsaps, Charmaine.millsaps@myfloridalegal.com, cappapp@myfloridalegal.com, on this 8th day of February, 2018.

Respectfully submitted,

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Filing # 68535543 E-Filed 02/27/2018 03:13:38 PM

Supreme Court of Florida

TUESDAY, FEBRUARY 27, 2018

CASE NO.: SC17-703
Lower Tribunal No(s).:
161985CF012620AXXXMA

ETHERIA VERDEL JACKSON vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

Appellant's Motion for Rehearing is hereby stricken.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, POLSTON, and LAWSON, JJ., concur.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

tw
Served:

CHELSEA RAE SHIRLEY
JULISSA FONTÁN
CHARMAINE M. MILLSAPS
MARIA E. DELIBERATO
HON. RUSSELL L. HEALEY, JUDGE
HON. RONNIE FUSSELL, CLERK
MEREDITH CHARBULA

APPENDIX

D

State Attorney Number: 85-56357

NCA: 5-5-86

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 85-12620 CF

DIVISION: Q

STATE OF FLORIDA

VS.

ETHERIA JACKSON

FILED

APR 04 1986

CLERK - CIRCUIT COURT

MOTION TO VACATE DEATH PENALTY

Defendant, ETHERIA JACKSON, by and through the undersigned attorney, the Public Defender for the Fourth Judicial Circuit of Florida, respectfully moves this Honorable Court to vacate the death penalty as a possible sentence in this cause, or, in the alternative, to declare Section 921.141, Florida Statutes (1983), unconstitutional as it applies to Defendant in this cause. Defendant asserts the following grounds in support of this motion:

1. Section 921.141, Florida Statutes (1983), is unconstitutional on its face because the death penalty per se is cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 17 of the Florida Constitution. See Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960 (1976), dissenting opinions of Justices Brennan and Marshall at 2971.

2. Section 921.141, Florida Statutes (1983), is unconstitutional on its face as it allows for excessive and disproportionate penalties to be imposed upon persons who have not deliberately taken the life of another, in violation of the Eighth and Fourteenth Amendments to the United States Constitution. See Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, concurring opinion of Justice White at 2981, (1978); Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, at 2932 (1976); Coker v. Georgia, 438 U.S. 584, 97 S.Ct. 2861 (1977); Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

3. The Florida death penalty statute is unconstitutional on its face because it creates a presumption in favor of death for those convicted under the felony-murder rule. Under Section 921.141(5)(d), Florida Statutes (1983), the perpetration of a homicide during the commission of a designed felony constitutes an aggravating circumstance. When one or more statutory aggravating circumstances are proved beyond a reasonable doubt, a presumption arises that death is the appropriate penalty by operation of a law. State v. Dixon, 283 So.2d 1, at 9, (Fla. 1973). Therefore, anyone convicted of first degree murder under the felony-murder doctrine is presumptively destined for death, regardless of his limited participation in the felony and lack of participation in the homicide. There is no such aggravating circumstance applicable in the case of every premeditated murder, since Section 921.141(5)(i), Florida Statutes (1983), utilizes qualifying language to make only certain premeditated acts an aggravating circumstance. The statute, therefore, makes possible a disproportionately higher frequency of death sentences for those convicted of felony murder than those convicted of premeditated murder. There is no rational basis for this disproportionately in sentencing, since in felony-murder the liability can be for aiding and abetting a felony that resulted in death, while in a premeditated murder the defendant can be the actual perpetrator who intended death to result. The Florida death penalty statute therefore violates the defendant's right to equal protection and due process of law, and the right to be free from an arbitrary and capricious sentencing process, as guaranteed by Article I, Sections 2, 9, 16, and 17 of the Florida Constitution and the Fifth, Eighth and Fourteenth Amendments to the United States Constitution. Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

4. The presumption in favor of death created by the establishment of only one single aggravating circumstance has the

result of imposing upon the defendant the burden of establishing why he should live. This impermissible shift in the burden of proof and persuasion contravenes every fundamental principle underlying our system of criminal justice, in violation of Article I, Sections 9, 16, and 17, of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. See Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881 (1974); Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450 (1979).

5. Liability for first degree murder in Florida arises from evidence of a killing during the commission of an enumerated felony, or from evidence of a killing from a premeditated design. Section 921.141(5)(d), Florida Statutes (1983), permits the fact that the murder occurred during the commission of the same enumerated felonies to be used as an aggravating circumstance in the penalty phase of the trial. This practice has the effect of twice penalizing the defendant for the same aspect of the crime, and at the penalty phase shifts the burden of proof to the defendant because the existence of an aggravating circumstance is automatic upon conviction. To punish a defendant in the penalty phase for the same element of the crime which was necessary to prove a conviction in the guilt phase is to violate the double jeopardy and collateral estoppel concepts of Article I, Section 9 of the Florida Constitution and the Sixth and Fourteenth Amendments to the United States Constitution. See State v. Hegstrom, 401 So.2d 1343 (Fla. 1981); Provence v. State, 337 So.2d 783 (Fla. 1976); State v. Cherry, 298 N.C. 86, 257 S.E. 2d 551 (1979).

6. Section 921.141, Florida Statutes (1983), is unconstitutional on its face because a jury recommendation of life imprisonment need not be followed by the trial court judge. The standard to be applied by the judge in overruling a life recommendation is that "facts suggesting a sentence of death" are

"so clear and convincing that no reasonable person could differ." Tedder v. State, 332 So.2d 908, at 910 (Fla. 1975). To sustain a death sentence in the face of a jury life recommendation necessarily requires a determination that the jury's recommendation is unreasonable. This standard is impossible to implement. As the Fifth Circuit Court of Appeals has said, "reasonable persons can differ over the fate of every criminal defendant in every death penalty case." Spinkellink v. Wainwright, 578 F.2d 582, at 605 (5th Cir. 1978). Because reasonable persons can and virtually always do disagree over whether a particular defendant should be sentenced to death, the Tedder standard is not susceptible of rational application, and fosters the arbitrary, unreliable, and capricious imposition of capital punishment, in violation of Article I, Section 9, 16, and 17 of the Florida Constitution and the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

7. Section 921.141, Florida Statutes (1983), is unconstitutional because it permits the trial judge to overrule a jury life recommendation, contrary to the clear expression of the conscience of the community. "Juries are the conscience of our communities." McCaskill v. State, 344 So.2d 1276, at 1280 (Fla. 1977). In determining whether punishment comports with the Eighth Amendment's ban against cruel and unusual punishments, an assessment of contemporary values or "evolving standards of decency" is required. Trop v. Dulles, 356 U.S. 86, 78 S.Ct. 590 (1958); Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909 (1976). A jury life recommendation reflects a determination that, in an individual case, imposition of the death penalty does not accord with contemporary values. To discard such a determination is to ignore the vital source from which the "cruel and unusual punishment" clause derives its meaning, in violation of Article I, Section 17 of the Florida Constitution and the Eighth and Fourteenth Amendments to the United States Constitution.

8. Since Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726 (1972), a majority of American jurisdictions have enacted capital punishment statutes that permit jury participation in sentencing. A majority of these jurisdictions have made a jury life verdict binding. A majority of these states having death penalty statutes make a life sentence automatic if even one juror refuses to vote for death. However, Section 921.141, Florida Statutes (1983), only requires a majority recommendation from the jury and permits the judge to overrule it. The infliction of the death penalty contrary to a jury's verdict of life is repugnant to the representative scheme of checks and balances basis to our government system. As Justice Powell has observed:

> One of the criticisms leveled against our system is the absence of a remedy for an unjustified acquittal by a jury...The founding fathers, in light of history, decided that the balance here should be struck in favor of the individual. To reverse this today would negate the key role of the jury as a popular check on government. It might even unbalance our entire system of constitutional checks and balances. Powell, "Jury Trial of Crimes," 23 Wash. & Lee L. Rev. 1, at 7-8, (1966).

The overruling of a jury life verdict therefore violates the concept of limited and representative government as embodied in the Ninth and Fourteenth Amendments to the United States Constitution.

9. Section 921.141, Florida Statutes (1983), is unconstitutional on its face because the jury recommendation need not be unanimous, thereby depriving the defendant of the rights to due process and to a unanimous jury verdict, in violation of Article I, Sections 9, 16, and 22 of the Florida Constitution, and the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

10. Section 921.141, Florida Statutes 91983), is unconstitutional in its face because the State is not required to specifically allege in any pleading the aggravating circumstances it intends to prove in order to justify the imposition of the

death penalty, nor is the State required to give the defense any notice of what aggravating circumstances it intends to rely upon to justify the death penalty. To force defense counsel to proceed into the penalty phase of the trial without formal notice of what specific aggravating circumstances the State intends to rely upon is to deny the defendant due process, the effective assistance of counsel and serves to foster unreliable and disproportionate imposition of the death penalty, in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 and 17 of the Florida Supreme Court that uphold the constitutionality of the application of the death penalty in this state. Sullivan v. State, 441 So.2d 609 (Fla. 1983); Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981); State v. Dixon, 283 So.2d 1 (Fla.1973).

11. The death penalty in Florida is unconstitutional because neither the Florida Statutes, the Florida Rules of Criminal Procedure nor the Florida Standard Jury Instructions requires the Court to instruct the jury that, in order to return a recommendation of death, the jury must be convinced beyond every reasonable doubt that the aggravating circumstances outweigh any mitigating circumstances. The failure to require such an instruction serves to foster unreliable and arbitrary imposition of the death penalty, in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 and 17 of the Florida Constitution. Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983).

12. The death penalty in Florida is unconstitutional because upon conviction of the defendant the jury is not required to list the specific aggravating circumstances they have found beyond a reasonable doubt when they recommend the death penalty. in that situation the trial judge is deprived of the opportunity to know what aggravating circumstances the jury found and what aggravating circumstances the jury did not find. This permits the

trial judge when imposing sentence to consider and find aggravating circumstances that the jury did not. This results in disproportionate and unreliable imposition of the death penalty, in violation of Article I, Sections 9 and 17 of the Florida Constitution, Section 921.141, Florida Statutes (1983), and holdings of the Florida Supreme Court that uphold the constitutionality of the application of the death penalty in this state. Sullivan v. State, 441 So.2d 609 (Fla. 1983); Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981); State v. Dixon, 283 So.2d 1 (Fla 1973). It also prevents the Florida Supreme Court from conducting a meaningful review of a particular case relative to other cases in which the death penalty has been imposed. See Dixon and Sullivan, supra.

13. Section 921.141, Florida Statutes (1983), is unconstitutional because it permits the trial judge to consider aggravating circumstances in imposing the death sentence that the advisory jury may not have considered, or that the jury may have decided did not exist. Furthermore, Section 921.141, Florida Statutes (1983), permits the trial judge to find that aggravating circumstances outweigh any mitigating circumstances despite a jury recommendation of life imprisonment. A jury recommendation of life instead of death necessarily involves a finding that (a) no aggravating circumstances exist, or (b) the aggravating circumstances do not outweigh any mitigating circumstances. The collateral estoppel concept of the prohibition against double jeopardy prevents the trial judge from reconsidering the issues of whether certain aggravating circumstances exist, or whether the aggravating circumstances outweigh any mitigating circumstances. Since Section 921.141, Florida Statutes (1983), permits such factual findings to be twice litigated and twice decided, it violates the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 9 of the Florida Constitution.

14. The enumerated aggravating and mitigating circumstances are unconstitutionally vague and overbroad, in violation of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 17 of the Florida Constitution.

15. Section 921.141, Florida Statutes (1983), is unconstitutional because the qualifying language describing the statutory mitigating circumstances places an unnecessary limitation on the reception and finding of such evidence by the jury and court. It thus violates the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 17 of the Florida Constitution. Examples of such language include "extreme mental or emotional disturbance", Section 921.141(6)(b), Florida Statutes (1983) (emphasis supplied); "substantially impaired", Section 921.141(6)(f), Florida Statutes (1983) (emphasis supplied); and "extreme duress", Section 921.141(6)(e), Florida Statutes (1983) (emphasis supplied). See Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954 (1978); State v. Stokes, 304 S.E.2d 184 (N.C. 1983).

WHEREFORE, Defendant prays this Honorable Court to grant this motion and vacate the death penalty as a possible sentence in this cause.

Respectfully submitted,

LOUIS O. FROST, JR.
PUBLIC DEFENDER

BY: Alan Chipperfield
Alan Chipperfield
Assistant Public Defender

I HEREBY CERTIFY that a copy of the above and foregoing Motion to Vacate Death Penalty has been furnished to the Office of the State Attorney, by hand, this 4th day of April, 1986.

/gew

Alan Chipperfield

APPENDIX

E

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 85-12620 CF

DIVISION: Q

STATE OF FLORIDA

VS.

ETHERIA JACKSON

Denied
L C Waddell

FILED
July 8, 1986
E. Nungezer
CLERK - CIRCUIT COURT

DEFENSE REQUESTED PENALTY PHASE VERDICT FORM #1

We, the jury, by a majority vote, recommend that the Defendant receive a sentence of:

Death by Electrocution

By a majority vote we find the following Aggravating Circumstances to exist beyond a reasonable doubt:

____(a) The capital felony was committed by a person under sentence of imprisonment.

____(b) The defendant was previously convicted of another capital felony, or of a felony involving the use or threat of violence to the person.

____(c) The defendant knowingly created a great risk of death to many persons.

____(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

____(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

____(f) The capital felony was committed for pecuniary gain.

____(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

____(h) The capital felony was especially heinous, atrocious, or cruel.

____(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

FOREMAN

DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished to the Office of the State Attorney, by hand, this 10th day of April, 1986.

Alan Chipperfield

/gew

APPENDIX

F

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

DIVISION: Q

CASE NO.: 85-12620 CF

STATE OF FLORIDA

vs.

ETHERIA JACKSON

FILED
JUL 11 1986
CLERK CIRCUIT COURT

JURY'S ADVISORY SENTENCE

✓ ________ A majority of the jury, by a vote of 7 - 5, advise and recommend to the Court that it impose the death penalty upon Etheria Jackson.

________ The jury advises and recommends to the Court that it impose a sentence of life imprisonment upon Etheria Jackson without possibility of parole for twenty-five (25) years.

Mary E. Durham
Foreman