No. 20-8273

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

ROGER G. BABCOCK --PETITIONER

VS.

STATE OF FLORIDA --RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

TWELFTH JUDICIAL CIRCUIT FOR SARASOTA COUNTY, FLORIDA

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

My name is Roger G. Babcock, and in 1997 a Florida jury found me guilty of the crime of sexual battery, a capital felony not punishable by death. At sentencing, the judge informed me that the law required the court to impose a sentence of life imprisonment. The problem is that two years prior to the date of offense, the legislature repealed the only mandatory sentencing requirement from the relevant sentencing statute. At the same time, Florida's general probation statute vested my trial judge with authority to reduce this sentence to probation for offenses not punishable by death (provided that suspension of sentence was not specifically prohibited by statute.) Believing there to be no discretionary sentencing alternatives available at sentencing, the court sentenced me to a term of imprisonment that it was not required to impose.

I then motioned to vacate the life sentence on the grounds that the state had deprived me of due process of law when it required the court to impose a greater punishment than the least it was authorized to choose from and deprived me of the actual assistance of counsel for my defense at sentencing. The Twelfth Judicial Circuit acknowledged that recent legislation had repealed the mandatory sentencing language from the statute, but nonetheless denied relief on the theory that prior state precedent, which required life sentences to be imposed on individuals previously sentenced to death (if capital punishment as a penalty is declared unconstitutional), applied to preclude the court from considering any discretionary sentencing alternatives that were available to me at that time.

The questions presented are:

1. **Because the State of Florida has provided for the defendant the imposition of criminal punishment in the discretion of a trial judge, may the defendant be arbitrarily deprived of his interest in the exercise of that discretion by the misapplication of a state court decision?**

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

RELATED CASES

Babcock v. State, 2D20-1797 (Fla. 2nd DCA) (Jud. entered on February 19, 2021)

Babcock v. State, 97-15469-F (12th Jud. Cir.) (Judgment entered on April 23, 2020)

Babcock v. State, 2D19-1520 (Fla. 2nd DCA) (Judgment entered on May 14, 2019)

Babcock v. State, 2D17-169 (Fla. 2nd DCA) (Judgment entered on February 2, 2017)

Babcock v. State, No. SC06-17 (Fla. Sup. Court) (Jud. entered on January 10, 2006)

Babcock v. State, 2D05-3190 (Fla. 2nd DCA) (Judgment entered on July 13, 2005)

Babcock v. Crosby, 03-10336 (U.S.S.C.) (Judgment entered on October 4, 2004)

Babcock v. Crosby, 8:03-cv-2137-RAL-TGW (COA)(Jud. entered February 10, 2004)

Babcock v. Crosby, 8:03-cv-2137-RAL-TGW (U.S. Dist. Court, Mid., Fla.)(Judgment entered on October 22, 2003)

Babcock v. State, 2D02-4846 (Fla. 2nd DCA) (Judgment entered on May 9, 2003)

Babcock v. State,2D01-2621 (Fla. 2nd DCA) (Judgment entered on July 27, 2001)

Babcock v. State, 2D98-2165 (Fla. 2nd DCA) (Jud. entered on January 12, 2000)

State v. Babcock, 97-15469-F (12th Jud. Cir.) (Judgment entered on May 29, 1998)

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IN THE SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the Second District Court of Appeal has been designated for publication but is not yet reported and is reproduced at Pet. App. A1. The order of the Twelfth Judicial Circuit deciding the federal questions is not officially reported and is reproduced at Pet. App. A2-A4. The unpublished order of the Second District Court of Appeal denying the motion for rehearing and certification to the Supreme Court of Florida is reproduced at Pet. App. A5.

JURISDICTION

The Second District Court of Appeal entered its judgment on February 19, 2021. Pet. App. A1. A timely motion for rehearing and certification to the Supreme Court of Florida was denied on March 11, 2021. Pet. App. A5. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner contends that the following amendments to the United States constitution are involved.

The Sixth Amendment of the United States Constitution, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment of the United States Constitution, which provides in pertinent part:

> Sec. 1. No State shall... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Petitioner further contends that the following Florida Statutes are involved:

Section 775.082, Florida Statutes (1981), which provides in pertinent part:

> (1) A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than 25 years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedure set forth in §921.141 results in a finding by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.
> (2) 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).

Section 775.082, Florida Statutes (1997), which states in relevant part:

> (1) A person whose 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 §921.141 results in a determination that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole.

Section 948.01, Florida Statutes (1997), which provides in pertinent part:

> (1) Any state court having original jurisdiction of criminal actions may at a time to be determined by the court, with or without an adjudication of guilt of a defendant, hear and determine the question of the probation of a defendant in a criminal case, except for an offense punishable by death, who has been found guilty by the verdict of a jury, has entered a plea of guilty or a plea of nolo contendere, or has been found guilty by the court trying the case without a jury...
>
> (2) If it appears to the court upon a hearing of the matter that the defendant is not likely again to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant presently suffer the penalty imposed by law, the court, in its discretion, may either adjudge the defendant to be guilty or stay and withhold the adjudication of guilt. In either case, the court shall stay and withhold the imposition of sentence upon such defendant and shall place the defendant upon probation.
>
> (3) If, after considering the provisions of subsection (2) and the offender's prior record or the seriousness of the offense, it appears to the court in the case of a felony disposition that probation is an unsuitable dispositional alternative to imprisonment, the court may place the offender in a community control program as provided in §948.10.

STATEMENT OF THE CASE

A Florida jury found the Petitioner guilty of the crime of sexual battery in violation of §794.011(2)(a), Florida Statutes (1997). Record on Appeal (R.O.A.) 76-77. Under Florida law, this crime is classified as a capital felony, not punishable by death. At sentencing, the judge informed the Petitioner, "[y]ou are aware the law requires you to be sentenced to life in prison on this charge, and you are sentenced to that at this time." R.O.A. 78-79, 83-87.

In January 2019, the Petitioner motioned the circuit court of the Twelfth judicial Circuit, in and for Sarasota County, Florida to vacate his prison sentence and to conduct a de novo sentencing hearing in which to hear and determine the question of the probation of the Petitioner. Pet. App. A6-A49.

In this motion, the Petitioner argued:

I. That he was denied the due process of law as a direct result of the trial court's mistaken belief that the Petitioner was required to be sentenced to life imprisonment upon conviction. Pet. App. A12.

II. That Florida Statutes, §948.01(1), entitles the Petitioner a judge who will hear and determine the question of his placement in a program of community corrections, and that the due process clause of the Fourteenth Amendment, and the holding in Hicks v. Oklahoma, 447 U.S. 343 (1980), require the sentencing court to exercise this discretion prior to actually deciding whether the Petitioner should be sentenced to incarceration in accordance with the law. Pet. App. A12-A15.

III. Where the underlying penalty statute, §775.082(1), Florida Statutes (1997), does not prohibit a trial judge from exercising its discretion to withhold sentence for an offense not punishable by death, Florida law, the rule of lenity, and the holding in Hicks v. Oklahoma, 447 U.S. 343 (1980), grants a trial judge discretion to suspend sentence where suspension of sentence is not specifically prohibited by statute. Pet. App. A15-A28.

IV. The State of Florida permits the prison sentence in §775.082(1) to be reduced for criminal defendant's who enter a plea of guilty or nolo contendere to the crime of capital sexual battery. Pet. App. A28-A29.

V. The judicial act of summarily imposing a sentence of imprisonment without ordering a presentence investigation report, without conducting an individualized sentencing hearing, and without hearing evidence or argument, prejudicially undermined the correctness of the sentence imposed and violated the Petitioner's Sixth and Fourteenth Amendment right to the due process of law, the assistance of counsel, and the presentation of witnesses for his defense. Pet. App. A29-A38.

VI. The sentencing judge's mistaken belief that he was compelled to impose a sentence of imprisonment impermissibly infringed the Petitioner's liberty interest in the proper exercise of the sentencing discretion in Florida Statutes, §948.01(1)-(3). Pet. App. A38-A45.

VII. The Petitioner prayed the court to vacate his prison sentence to allow the court to properly consider the discretionary sentencing alternative of community corrections with knowledge that it has discretion to reduce the prison sentence, rather than being of the belief that it was required to sentence in a particular way. Pet. App. A45-A48

In its decision, the Twelfth Judicial Circuit recognized that legislation had in fact repealed the only mandatory sentencing requirement from Petitioner's sentencing statute, but nonetheless denied relief on the theory that Buford v. State, 403 So. 2d 943 (Fla. 1981), which requires a life sentence to be imposed on individuals previously sentenced to death (if capital punishment as a penalty is declared unconstitutional), applied to preclude the court from considering any discretionary sentencing alternatives available to the Petitioner. Pet. App. A2-A4.

On rehearing, the Petitioner advanced the first of two arguments with respect to the misapplication of Buford to his case: the legislature's repeal of the mandatory sentencing requirement from §775.082(1) supersedes Buford, and the

holding in Buford could not add the requirement back into the statute without violating the separation of powers clause of Florida's Constitution. R.O.A 109-124. In a one page order the circuit court denied rehearing. R.O.A. 126.

On appeal before the Second District Court of Appeal, Petitioner advanced, verbatim, the exact same arguments raised in the circuit court, distinguished only by the format requirements in Florida Rule of Appellate procedure, Rule 9.210, which sets forth the rules for submitting documents on appeal. Subsequently, the appellate court issued a silent per curiam opinion affirming the circuit court's order. Pet. App. A1.

On rehearing, the Petitioner advanced the second argument with respect to the misapplication of Buford to his case: The defendant in Buford was required by the mandatory language in §775.082(2), which applies only to individuals previously sentenced to death, to receive the prison sentence in §775.082(1). The Petitioner was not. Petitioner then requested a written opinion in which to provide (1) a basis for state Supreme Court review, and (2) an explanation for the apparent deviation from the accepted and usual course of judicial proceedings in this context. Pet. App. A50-A58. The court denied rehearing without opinion. Pet. App. A5.

REASONS FOR GRANTING THE PETITION

The State Court, by misapplying the decision in Buford v. State, 403 So. 2d 943 (Fla. 1981), has decided an important question of due process in a way that contradicts this Court's decision in Hicks v. Oklahoma, 447 U.S. 343 (1980).

In Hicks, this Court made the following decision:

> Where...a State has provided for the imposition of criminal punishment in the discretion of the trial jury,[1] it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State. Hicks, 447 U.S. 343, at 346 (citations in original).

Undeterred, the state court concludes that the Petitioner's claim to due process of law at sentencing is without merit because the court in Buford v. State, 403 So. 2d 943 (Fla. 1981), had held that life imprisonment is automatic for defendants convicted of capital sexual battery, and thereby applied to preclude the consideration of any discretionary sentencing alternatives available to the Petitioner. Pet. App. A2-A4.

In Buford, the issue was whether the punishment of death for the crime of sexual battery constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. Buford, 403 So. 2d at 950, Pet. App. A67. Relying on the reasoning in Coker v. Georgia, 433 U.S. 584 (1977), the court held that it did stating: "a sentence of death is grossly disproportionate and excessive punishment for the crime of sexual assault and is

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[1] In Prater v. Maggio, 686 F2d 346, at 350 n. 8 (5th Cir. 1982), the court held that the Hicks rule is not limited to cases which sentence is imposed by the jury. Defendants who are sentenced by a judge have the same expectation, equally strong.

therefore forbidden by the Eighth Amendment as cruel and unusual punishment." 403 So. 2d at 951. The court then concluded:

> "The sentence of death imposed for conviction of sexual assault is vacated. Section 775.082(1), Florida Statutes, mandates a punishment of life imprisonment with a requirement that defendant serve no less than twenty-five years before becoming eligible for parole. This is an automatic sentence, and the court has no discretion." Buford, 403 So. 2d 943, at 954; Pet. App. A71.

The state court here relies on Buford for the conclusion that imprisonment is automatic upon conviction. Buford involved the resentencing of a defendant previously sentenced to death. Petitioner's situation here is different. Here the issue is not whether a sentence of imprisonment is automatic for defendants previously sentenced to death but whether a sentence of imprisonment is discretionary for defendants convicted of an offense not punishable by death.

First, when the court in Buford declared the sentence of death unconstitutional, the court invoked the automatic sentencing criteria of Florida Statutes, §775.082(2), (1981), which provides:

> "(2) 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)."

In Florida, section 775.082(2) "exists only to assure that a life sentence will be imposed on individuals previously sentenced to death if capital punishment is declared unconstitutional generally or for any given capital offense." Hurst v. State, 202 So. 3d 40, 65 (Fla. 2016).

In this case, on the other hand, the automatic sentencing requirement in §775.082(2) could not have been invoked by the state court. The court could not have invoked the automatic sentencing criteria in §775.082(2) because the

Petitioner could not have been previously sentenced to death. See, State v. Perry, 192 So. 3d 70, 74 (Fla. 5th DCA 2016)(noting that §775.082(2), by its express terms applies only to offenders "previously sentenced to death.").

Also, the 1981 version of §775.082(1) required the court to impose an automatic mandatory minimum term of imprisonment,[2] whereas the 1997 version of §775.082(1) does not contain a mandatory minimum sentencing requirement.

Moreover, Buford could not have qualified for sentencing (or even resentencing) under the provisions of §948.01(1) because his offense was punishable by death. By contrast, the Petitioner's criminal offense is not punishable by death, and therefore his criminal case qualifies for discretionary sentencing under that provision. Accordingly, there were no discretionary sentencing alternatives available to Buford, while in the present case there are.

Next, the state court maintains that the court held in Buford that life imprisonment is automatic for all defendants convicted of capital sexual battery. This is not a correct description of the holding in Buford. It is true that a life sentence must be imposed on those individuals previously sentenced to death (when capital punishment as a penalty is declared unconstitutional). And it is also true

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[2] In Florida, the phrase "shall be required to serve no less than..." denotes mandatory sentencing. For example, in Rochester v. State, 140 So. 3d 973 (Fla. 2014), the supreme court of Florida stated, "the use of the phrase 'of not less than 25 years' establishes that the twenty-five year sentence in [§775.082(3)(a)(4), Fla. Stat. (2008)] is a mandatory minimum sentence. Also, in Stoletz v. State, 875 So. 2d 572, 576 (Fla. 2004), the same court interpreted the phrase "for not less than 5 years" in §322.28(2)(a)(2), Fla. Stat. (1999), to establish a mandatory minimum period of license revocation.

that the presence of a mandatory minimum term of imprisonment in the underlying penalty requires automatic sentencing as a matter of law.

But the court's opinion in Buford is silent on the question that has now been presented to the courts in this case. The Buford opinion does not quote (much less analyze) the discretionary sentencing provisions of §948.01 for offenses not punishable by death, it does not mention the absence of a mandatory minimum sentencing requirement, and it says nothing about the discretion to suspend the prison sentence in §775.082(1)(1997) where suspension of that sentence is not specifically prohibited by law. As this Court noted long ago, "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." Webster v. Fall, 266 U.S. 507, 511(1925).

Finally, the state court relies on Buford for the conclusion that sentencing is not discretionary for defendants convicted of capital sexual battery. This is also not a correct description of the law. As noted, Buford involved the non-discretionary resentencing of a defendant previously sentenced to death. Again, Petitioner's situation here is different. Here the issue is whether sentencing is discretionary in a criminal case that qualifies for discretionary sentencing under the provisions of Florida Statutes §948.01(1)-(3)(1997).

In Florida Statutes §948.01(1)-(3) the State provides for the suspension of a prison sentence in the discretion of a trial judge where suspension of sentence is not

specifically prohibited by statute.[3] In that regard, the operative language in Florida Statute §775.082(1)(1997) states that a defendant "shall be punished by life imprisonment and shall be ineligible for parole." Ibid. Under Florida law this sentencing language is permissive. Suspension of sentence is not specifically prohibited and imposition of sentence is not specifically automatic. Pet. App. A15-A28. On its face, sentencing under §775.082(1) is discretionary in a criminal case that qualifies for discretionary sentencing under §948.01(1).

In this case, Petitioner relies on the Court's decision in Hicks v. Oklahoma, 447 U.S. 343 (1980), for the holding that where state law provides for sentencing in the discretion of a trial judge, due process requires the judge to be correctly instructed on the law applicable to sentencing for the given defendant.

Hicks was brought to trial on the charge of distributing heroin. Since he also qualified under the state's then-existing habitual offender statute, Hicks's jury was instructed pursuant to this statute that if they found him guilty of distributing

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[3] McKendry v. State, 641 So. 2d 45, 47 (Fla. 1994)("[S]ection 948.01 was created to generally address the trial court's authority to grant leniency in any criminal sentencing."); Caston v. State, 58 So. 2d 694, 698 (Fla. 1952)("The courts of Florida by Chapter 948, F.S.A., are authorized to place defendants in criminal cases on probation rather than sentence them to prison for a term of years."); State v. Crews, 884 So. 2d 1139, 1141-1142 (Fla. 2nd DCA 2004)("On initial examination, [§948.01] appears to apply broadly to permit a judge to withhold a sentence and impose a term of probation in lieu of imprisonment in any case where (1) 'the defendant is not likely again to engage in a criminal course of conduct and...the ends of justice and the welfare of society do not require that the defendant presently suffer the penalty imposed by law' and (2) there is no statutory provision specifically prohibiting the application of section 948.01."); State v. Robertson, 614 So. 2d 1155, 1155-1156 (Fla. 4th DCA 1993)("Unless there is something in the individual sentencing statute to the contrary, section 948.01 is an open-ended invitation to the sentencing judges to impose an alternative to confinement in a prison.")(Farmer, J., concurring specially with opinion.).

heroin, they were required to assess the punishment at 40 years imprisonment. The jury returned a verdict of guilty and imposed the mandatory 40-year prison sentence. 447 U.S. at 344-345.

Shortly after, the Oklahoma appellate court (in a separate case) declared the same provision of the habitual offender statute unconstitutional. Without the unconstitutional provision, a 10-year minimum rather than a 40-year minimum would have applied to Hicks's sentencing. Hicks appealed seeking to have his sentence set aside in light of the unconstitutionality of this statute. The appellate court acknowledged the unconstitutional provision, but nonetheless affirmed the sentence, reasoning that Hicks was not prejudiced by the impact of the invalid statute, since his sentence was within the range of punishment that could have been imposed in any event. Id. at 345.

On certiorari review, this Court reversed. The Court noted that Hicks had a "statutory right to have a jury fix his punishment in the first instance" and that this right "substantially affects the punishment imposed." Id. at 347. It also noted that "had the jury been correctly instructed," they "could have imposed any sentence of 'not less than ten (10) years.'" ID. at 346. "The possibility that the jury would have returned a sentence of less than 40 years is thus substantial." Ibid.

Petitioner's situation here is similar. Petitioner was brought to trial on the charge of sexual battery. Since this offense qualified under the case law as a capital felony not punishable by death, the holding in Buford instructed Petitioner's trial judge that if the jury found him guilty, section 775.082(1) required an automatic

sentence of imprisonment. But Buford is both factually and legally distinguishable, and without its influence, section 948.01(1) would have applied to Petitioner's sentencing. In view of these truths, Petitioner sought to set aside his prison sentence. Undeterred, the state courts denied relief, reasoning that Buford precludes the consideration of any discretionary sentencing alternatives available to the Petitioner.

By Florida law, however, Petitioner has a statutory right to have his judge "hear and determine the question of the probation of a defendant in a criminal case, except for an offense punishable by death..." Florida Statutes, §948.01(1)(1997). And, had the court that sentenced the Petitioner been correctly instructed concerning this provision, it could have (after hearing evidence and argument) withheld "the imposition of sentence upon such defendant" and either "place[d] the defendant upon probation," Florida Statutes, §948.01(2), or "place[d] the offender in a community control program..." Florida Statutes, §948.01 (3). Therefore, whether final disposition is by probation or by community control, or both, (or even incarceration) the possibility that Petitioner's judge would not have required a sentence of imprisonment is thus substantial.

In this case, the state courts hold that Petitioner's interest and expectation in section 948.01(1) is not enough. Instead, the state courts apply a per se rule that, absent Buford's explicit consent to discretionary sentencing, life imprisonment must be automatic for every defendant tried and convicted for the crime of capital sexual

battery. This imposition is exactly the kind of "state procedural law" which this Court rejected in Hicks. 447 U.S. at 346.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Roger G. Babcock
Date: May 27, 2021