No. _____

OCTOBER TERM 2021

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD BARRY RANDOLPH,

Petitioner,

v.

STATE OF FLORIDA

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

CAPITAL CASE

Marie-Louise Samuels Parmer
Special Assistant CCRC-South
Fla. Bar No.: 0005584
Counsel of Record

OFFICE OF THE CAPITAL
COLLATERAL REGIONAL
COUNSEL-SOUTHERN REGION
110 SE 6th St., Suite 701
Fort Lauderdale, FL 33301
TEL: (954) 713-1284
FAX: (954) 713-1299

COUNSEL FOR PETITIONER

INDEX TO APPENDIX

APPENDIX A

Supreme Court of Florida

No. SC20-287

RICHARD BARRY RANDOLPH,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

February 4, 2021

PER CURIAM.

Richard Barry Randolph appeals a circuit court order denying his second successive postconviction motion filed pursuant to Florida Rule of Criminal Procedure 3.851. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const.

BACKGROUND

Randolph was convicted of first-degree murder and sentenced to death in 1990, and this Court affirmed his conviction and sentence. *Randolph v. State*, 562 So. 2d 331, 332-34 (Fla. 1990), *cert. denied*, 498 U.S. 992 (1990). In 2003, Randolph filed a motion to vacate the judgment and sentence, and we affirmed the denial of that motion. *Randolph v. State*, 853 So. 2d 1051, 1069 (Fla. 2003). We

also denied a petition in which Randolph sought relief under *Ring v. Arizona*, 536 U.S. 584 (2002). *Randolph v. Crosby*, 861 So. 2d 430 (Fla. 2003).

In 2010, Randolph filed another postconviction motion, which the trial court denied for being untimely, successive, procedurally barred, and failing to present any new basis for relief that applied retroactively. In 2017, Randolph filed a second successive postconviction motion, raising four claims—all based on the retroactivity of *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *Hurst v. Florida*, 577 U.S. 92 (2016), and chapter 2017-1, Laws of Florida.[1] Randolph amended his motion to add a fifth claim, asserting that his sentence violated the Eighth Amendment. He now appeals the denial of his most recent postconviction claims.

ANALYSIS

Randolph's primary argument on appeal is that this Court's decision in *Hurst v. State* established a new criminal offense—capital first-degree murder—and that the jury sentencing determinations described in *Hurst* are "elements" of that new offense. From that assertion, Randolph insists that *Hurst* created a substantive rule of law that dates back to Florida's original capital sentencing statute, thereby requiring Randolph's death sentence to be vacated on the ground that certain elements of his crime were never found by a jury.

1. Chapter 2017-1, Laws of Florida was a legislative enactment by which Florida's capital sentencing statute was amended to require jury sentencing determinations of the kind described in *Hurst v. State*.

We rejected a similar argument in *Foster v. State*, 258 So. 3d 1248, 1251 (Fla. 2018). As we explained in *Foster*, there is no independent crime of "capital first-degree murder"; the crime of first-degree murder is, by definition, a capital crime, and *Hurst v. State* did not change the elements of that crime. *Id.* at 1251-52 (holding that when a jury makes *Hurst* determinations, "it only does so *after* a jury has unanimously convicted the defendant of the capital crime of first-degree murder").

Moreover, "[w]e have consistently applied our decision in *Asay* [*v. State*, 210 So. 3d 1 (Fla. 2016)], denying the retroactive application of *Hurst v. Florida* as interpreted in *Hurst v. State* to defendants whose death sentences were final when the Supreme Court decided *Ring v. Arizona*, 536 U.S. 584 (2002)." *Hitchcock v. State*, 226 So. 3d 216, 217 (Fla. 2017). Randolph echoes other pre-*Ring* defendants who have advanced myriad legal theories that, in the end, turn on pleas for a retroactive application of *Hurst*. But this Court has rejected such arguments, however styled. *See, e.g., Lambrix v. State*, 227 So. 3d 112, 113 (Fla. 2017) (rejecting arguments based on "the Eighth Amendment," "denial of due process and equal protection," and "a substantive right based on the legislative passage of chapter 2017-1, Laws of Florida"). Randolph's argument that his death sentence was insufficiently reliable to satisfy the Eighth Amendment is similarly unavailing.

Finally, Randolph offers an extensive critique of this Court's decision in *State v. Poole*, 297 So. 3d 487 (Fla. 2020), where we partially receded from *Hurst*. We need not address *Poole* here, however, because Randolph's claims fail even under our pre-*Poole* jurisprudence on *Hurst* and retroactivity.

For these reasons, we affirm the trial court's denial of postconviction relief.

It is so ordered.

POLSTON, LABARGA, LAWSON, MUÑIZ, COURIEL, and GROSSHANS, JJ., concur.
CANADY, C.J., concurs in result.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

An Appeal from the Circuit Court in and for Putnam County,
Howard Ogle McGillin, Jr., Judge - Case No. 541988CF001357CFAXMX

Neal Dupree, Capital Collateral Regional Counsel, Marta Jaszczolt, Staff Attorney, and Rachel L. Day, Assistant Capital Collateral Regional Counsel, Southern Region, Fort Lauderdale, Florida,

for Appellant

Ashley Moody, Attorney General, Tallahassee, Florida, and Doris Meacham, Assistant Attorney General, Daytona Beach, Florida,

for Appellee

APPENDIX B

IN THE CIRCUIT COURT OF THE
SEVENTH JUDICIAL CIRCUIT
IN AND FOR PUTNAM COUNTY,
FLORIDA

CASE NO: 88-1357-CF

DIV: 52

STATE OF FLORIDA,

PLAINTIFF,

VS.

RICHARD BARRY RANDOLPH,

DEFENDANT.

_____/

ORDER DENYING SUCCESSIVE MOTION, AMENDED MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE, AND SECOND AMENDMENT TO MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE WITH SPECIAL REQUEST FOR LEAVE TO AMEND

THIS MATTER came before the Court on the Defendant's Second Motion to Vacate Judgment of Conviction and Sentence pursuant to Rule 3.851 (Filed January 10, 2017 – Document Identification Number (DIN) 40) (Claims I-III), State's Response To Defendants Successive Motion To Vacate Judgement To Conviction And sentence Pursuant To Rule 3.851 (Filed February 8, 2017 – Document Identification Number (DIN) 67), Amendment to Motion to Vacate Judgment of Conviction and sentence with Special Request for Leave to Amend (Filed May 12, 2017 – Document Identification Number (DIN) 70) (adding Claim IV), State's Response to Amendment (Filed June 1, 2017 – Document Identification Number (DIN) 71) and Defendant's Second Amendment to Motion to Vacate Judgment of Conviction and sentence with Special Request for Leave to Amend (Filed February 28, 2019 – Document Identification Number (DIN) 93)(Adding Claim V) and State's Response (Filed Mar 20, 2019 – Document Identification Number (DIN) 95). The State also filed Supplemental Authority on September 16, 2019, and October 10, 2019.

SECTION I: Procedural Posture.

A. These motions were initially heard at a Case Management Conference on September 22, 2017, on the pleadings then filed, before the Honorable Clyde E. Wolfe, then presiding in this division. A transcript of those proceedings was filed with Court approval on January 25, 2019. (See Transcript at Document Identification Number (DIN) 26 and Order Filing Transcript at Document Identification Number (DIN) 92). Judge Wolfe passed away, after a protracted illness, on October 31, 2018. The undersigned was assigned to this division on January 7, 2019, and became qualified under Fla. R. Jud. Admin. 2.215(10) as of July 7, 2019, to handle capital cases. In the interim the Chief Judge of the Seventh Circuit and other visiting judges handled this case in a caretaker capacity. Final hearing on all of these matters was conducted on September 12, 2019. The undersigned has reviewed, with the consent of the parties, the transcript of the hearing on September 22, 2017 and is sufficiently familiar with the legal arguments therein to rule on the matters presently before the Court.

B. Procedurally, the Defendant was found guilty of Count I, First Degree Murder, Count II Armed Robbery, Count III Sexual Battery, and Count IV Grand Theft of a Motor Vehicle on February 23, 1989. The court sentenced to death on Count I on April 5, 1989, after a jury recommended the death penalty by an 8-4 vote. The Defendant filed an appeal and the Defendant's Judgment and Sentence were affirmed with a Mandate on September 14, 1990. *Randolph v. State*, 562 So. 2d 331, 332 (Fla. 1990). The case became final on November 26, 1990, when the U. S. Supreme Court denied the Defendant's Petition for Writ of Certiorari. *Randolph v. Florida*, 498 U.S. 992, 111 S. Ct. 538 (1990). This court notes this finality date is over a decade before the U.S. Supreme Court issued its decision in *Ring v. Arizona*, 536 U.S. 584 (2002) on June 24, 2002.

C. The Defendant filed prior motions to vacate judgments and sentence, which were amended several times. He also sought relief by writ of habeas corpus. His requests were denied. *Randolph v. State*, 853 So. 2d 1051 (Fla. 2003). In his 2003 claim, the Defendant specifically raised a claim pursuant to *Ring*. This claim was also denied in an unpublished opinion. *Randolph v. Crosby*, 861 So. 2d 430 (Fla. 2003). The Defendant subsequently sought Federal Habeas Corpus relief with the United States District Court for the Middle District of Florida, which denied the petition. *Randolph*

v. McNeil, 590 F. 3d 1273, 1275 (11th Cir. 2009). The United States Court of Appeals for the Eleventh Circuit affirmed the District Court's denial of Randolph's petition. *Id.* The Supreme Court of the United States denied the Defendant's Petition for Writ of Certiorari. *Randolph v. McNeil*, 562 U.S. 1006 (2010).

SECTION II: Analysis of Claims

Defendant has made several claims, cloaked in a variety of distinct and intricate arguments. The court addresses each below. In summary, however, he bases all of his arguments on a claim of error in the procedure by which the original trial court sentenced him to death. Boiled to its essence, he is asking this court to apply several new holdings by the US Supreme Court and the Florida Supreme Court, as well as the newly enacted Florida death penalty procedure statute to his case.

A. Claim I.

The Defendant claims his death sentence violates the Sixth Amendment under *Hurst v. Florida,* 136 S. Ct. 616, 621 (2016), hereinafter *Hurst I,* and *Hurst v. State,* 202 So.3d 40, 45 (Fla. 2016), hereinafter *Hurst II.* In *Hurst I,* the United States Supreme Court held that Florida's capital sentencing scheme was unconstitutional under the Sixth Amendment of the U.S. Constitution because the judge, not the jury, made the necessary findings of fact to impose the death sentence. 136 S. Ct. at 619. In *Hurst II,* the Florida Supreme Court held that under the Eighth Amendment to the U.S. Constitution, before the trial judge may consider imposing a sentence of death, the jury must unanimously and expressly find that at least one aggravating factor is proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death.

In *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016) and *Asay v. State*, 210 So. 3d 1 (Fla. 2016) (Decided the same day as *Mosley*), the Florida Supreme Court concluded that the *Hurst* rulings apply to all Defendants whose sentences were not yet final when the United State Supreme Court issued its opinion in *Ring*. *Mosely, Id* at 1283, *Asay, Id* at 22. *Ring* was issued on June 24, 2002. The Defendant's conviction became final on November 26, 1990, when the Supreme Court of the

United States denied the Defendant's Petition for Writ of Certiorari. *Randolph v. Florida*, 498 U.S. 992 (1990).

In the hearing, Capital Collateral Counsel acknowledged that the Defendant's conviction became final in 1990 and was considered "pre-*Ring*". Counsel acknowledged that through *Asay,* the *Witt* analysis (*Witt v. State*, 387 So. 2d 922 (Fla. 1980)) is applied to matters of retroactive application of *Hurst II.* Counsel argued however in Claim I citing *Mosely v. State*, 209 So.3d 1248 (Florida, 2016) that the Defendant raised a *Ring* claim at every possible stage in his case from trial to post-conviction and fundamental fairness requires a retroactive application of *Hurst.*

The State argued that any case in which the death sentence was final before *Ring* was decided would not receive relief based on *Hurst. Bogle v. State*, 213 So. 3d 833 (Fla. 2017); *Gaskin v. State*, 218 So. 3d 399 (Fla. 2017) and *Asay*, 210 So. 3d at 1 ("*Hurst* does not apply retroactively to cases that were final before *Ring* was decided." *Bogle v. State*, 213 So. 3d 833, 855 (Fla. 2017)). In *State v. Dwyer*, 332 So. 2d 333 (Fla. 1976), the Florida Supreme Court specifically said, where an issue has been decided in the Supreme Court of the State, the lower courts *are bound to adhere* to the Court's ruling when considering similar issues even though the Court may believe otherwise.

The Defendant's death sentence became final in 1990 well before *Ring,* which was decided in 2002. On its face, Defendant raises what may appear to raise a ground of fundamental fairness. It is in this context that the Court analyzes one specific issue embedded within this Defendant's Claim I.

In Claim I, this Defendant argues that he is *uniquely* entitled to a new sentencing proceeding because he raised, *both at the trial court and upon direct appeal*, the Constitutionality of Florida's sentencing scheme. Specifically, at trial he requested an instruction that the jury must unanimously find the presence of aggravating factors and make a unanimous recommendation of death. The trial court at sentencing rejected this requested instruction. The Defendant's direct appeal likewise failed, *inter alia*, at the Florida Supreme Court's by that Court's reliance on *Hildwin v. Florida,* 490 US 638 (1989). See *Randolph v. State*, 562 So. 2d 331 at 339 (Fla. 1990). (rejecting claimed error requiring unanimous jury findings as "meritless").

The State argues that *Asay* and *Mosely* and control this issue. In *Asay* and *Mosely*, the Supreme Court conducted its own retroactivity analysis under *Witt*. As part of that analysis, the Court concluded that it must apply a three-part test of retroactivity. As this inferior court reads the opinions in *Asay and Mosely*, the Florida Supreme Court has made three findings of *law* applicable to the retroactivity analysis. First, the Supreme Court found that the issue was a matter of great significance, suggesting retroactivity was appropriate. However, under both the second and third prongs of the test, the Florida Supreme Court found that retroactivity was *not* justified. The Florida Supreme Court found the second factor (of the *Witt* analysis), "most important" (*Asay* Id. at 18). Namely, it held that the "extent of reliance on the old rule – in this case, the principle that *the judge* would make the factual determinations necessary to impose death and that a jury determination of those facts was not required" was critical. *Id.* In this finding, as this trial court reads it, the Florida Supreme Court has found, *as a matter of law*, that the reliance was so great as to militate strongly against retroactivity.

This particular finding is significant because that same issue was raised, and litigated at the trial level and on appeal and was denied in reliance on <u>*then existing*</u> law. The Defendant seeks to renew that issue now. It appears, however, that under controlling precedent the result is controlled by *Asay* and *Mosely*.

Justice Lewis' concurrence in *Asay* notes that the day might come when the Florida Supreme Court must analyze a specific claim that the Defendant has raised the "*Ring* like" issues before *Ring*, and was denied relief. It would appear that day is here, in this case. This court finds Justice Lewis' concurrence prescient, and instructive, but not controlling. While the Supreme Court *could* have drawn the line where Justice Lewis suggested, it did not. As such, it is not for this court to attempt to erase that line and ignore the controlling precedent. The presence of the concurrence is also significant because it highlights what the Florida Supreme Court *did not find.* Specifically, the Court <u>did not</u> reserve to another day a determination that a "*Ring*-like" claim preserved pre-*Ring* would be subject to retroactive relief. Thus the Florida Court appears to have *already* foreclosed the specific claim this Defendant raises.

Consequently, this court is bound to find *Hurst* relief is simply not retroactive to this Defendant's case. The *Asay* and *Mosely* holdings are conclusive. Finally, the State's reliance on

Hitchcock v. State, 226 So. 3d 216 (Florida 2017) is equally well placed. In *Hitchcock*, the Florida Supreme Court reiterated the stance it has taken in *Asay*, which is that *any* case that was final prior to *Ring* would not benefit from *Hurst*.

Because the *Hurst* does not apply retroactively to the case at bar, Claim I is Denied.

B. Claim II.

The Defendant claims that his death sentence violates the Eighth Amendment under *Hurst II*. The United States Supreme Court has never held that the Eighth Amendment requires a unanimous jury recommendation. In *Spaziano v. Florida*, 468 U.S. 447, 463-64 (1984), the United States Supreme Court held that the Eighth Amendment is not violated in a Capital case when the ultimate responsibility of imposing death rests with the judge. In deciding *Hurst v. Florida*, the United States Supreme Court analyzed the case pursuant to Sixth Amendment grounds and overruled *Spaziano* to the extent that it allows a sentencing judge to find aggravating circumstances independent of a jury's fact finding. *Hurst v. Florida*, 136 S. Ct. at 618. The Court did not address the issue of any possible Eighth Amendment violation, and similarly it did not overrule *Spaziano* on Eighth Amendment grounds.

While the Florida Supreme Court initially included the Eighth Amendment as a reason for warranting unanimous jury recommendations in its *Hurst* II decision, the Court did not and cannot overrule the United States Supreme Court's surviving precedent in *Spaziano*. Florida has a conformity clause in its Constitution.

The Defendant argues he is within a protected class because four jurors voted against the imposition of the death sentence and as a result his sentence violates the Eighth Amendment and the Florida Constitution. However, the Defendant was sentenced by a jury which heard evidence of both aggravating and mitigating factors. The Defendant is not among the group of people for which the death penalty is not an option, such as juveniles or the intellectually disabled. The Eighth Amendment only places limits on the imposition of the death penalty in that it cannot be imposed in an arbitrary or capricious manner. Such was not the case in the Defendant's trial. The aggravators in this case were substantial. Moreover, the court does not agree that application of

the new Florida Statute to the Defendant is a substantive right. It is, and has been held consistently to be, procedural only. Claim II must be denied by adherence to controlling precedent.

C. Claim III.

The Defendant claims that this court's denial of the Defendant's prior Post Conviction claims must be reheard and determined under a "new" constitutional framework. The Defendant argues decisions in *Hurst II* and *Perry v. State* control. Those decisions, along with the recent enactment of a revised sentencing statute, should (he argues) govern at a resentencing. Those would, the argument continues, require a jury to unanimously find the statutorily required facts necessary to authorize a death sentence, and also require the jury to unanimously recommend a death sentence before the Judge would be authorized to impose a death sentence. He argues he is entitled to a new sentencing hearing under the newly mandated sentencing framework.

Here, the court finds this is an attempt by the Defendant to ask the Court to reconsider the same facts alleged in his previously filed successive motion, but apply law that did not exist at the time that the court's order was rendered. The court finds that the rules of procedure do not authorize this court to revisit an identical factual claim merely because of a change in the law. The Defendant's argues that if such a reevaluation is conducted, the outcome would probably be different. The Court finds that this is speculation. Claim III is denied.

D. Claim IV.

The Defendant claims that the Fourteenth Amendment to the United States Constitution requires the retroactive application of the substantive rule established by Chapter 2017-1 which precludes the imposition of a death sentence unless a jury unanimously returns a death recommendation.

First, the Court finds (consistent with the findings above) that the referenced change in statute only applies to cases in which the Defendants have pending trials or are being resentenced. The Florida Supreme Court made it abundantly clear that *Hurst* does not apply retroactively to Capital Defendants whose sentences were final before the United States Supreme Court issued its opinion in *Ring*. The revised statute cannot apply to the Defendant because the Defendant is not entitled to a new penalty phase under *Hurst*. His sentence was final in 1990.

Additionally, the court does not agree that application of the Statute to the Defendant is a substantive right. It is procedural. Claim VI is denied.

E. Claim V.

In his Second Amendment to his Motion to Vacate filed on February 28, 2019, the Defendant claims his death sentence violates the Due Process Clause and the Eighth and Fourteenth Amendments to the United States Constitution because under Fla. Stat. § 921.141, death is only authorized if a Jury finds the necessary elements required to convict of the Greater Offense of Capital First Degree Murder. The Defendant asserts based on the revisions made to Fla. Stat. §921.141. Florida's death penalty statute, Fla. Stat. §921.141(2017), was amended after, and in comport with, the decisions in *Hurst I* and *Hurst II.*

The State counters in a response filed on March 20, 2019, that once a criminal conviction has been upheld on appeal, the application of a new rule of constitutional criminal procedure is limited. The Florida Supreme Court has held that new rules of criminal procedure will apply retroactively only if they fit within one of two narrow exceptions. Those exceptions are: (1) a substantive rule that "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe or if it prohibits a certain category of punishment for a class of Defendants because of their status or offense"; and (2) a procedural rule which constitutes a watershed rule of criminal procedure implicating fundamental fairness and accuracy of the criminal proceeding. *Teague v. Lane*, 489 U. S. 288, 310-13 (1989); *Penry v. Lynaugh*, 492 U.S. 302 (1989) (abrogated on other grounds by *Atkins v. Virginia*, 536 U.S. 304 (2002); *Butler v. McKellar*, 494 U.S. 407 (1990); *Saffle v. Parks*, 494 U.S. 484 (1990)). Moreover, certain matters are not retroactive at all. A decision that modifies the elements of an offense is normally substantive rather than procedural.

Florida's new capital sentencing scheme requires a jury to unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt. It also requires that the jury unanimously find that sufficient aggravating factors were proven beyond a reasonable doubt, and unanimously find that sufficient aggravating factors exist to impose death. The jury must also unanimously find that aggravating factors outweigh the mitigating circumstances and unanimously

recommend a sentence of death before the trial judge may consider imposing a sentence of death. Fla. Stat. § 921.141(2). Contrary to Defendant's argument, this new statute neither alters the definition of criminal conduct, nor increases the penalty by which the crime of First Degree murder is punishable. *Victorino v. State*, 241 So. 3d 48 (Fla. 2018). These changes to the sentencing procedure *did not create* a new offense. The class of persons who are death eligible and the range of conduct which causes those defendants to be death eligible did not change. The only changes made for the death recommendation were the requirement of specific jury findings of unanimity for the existence and sufficiency of the aggravating factors, and that they must outweigh mitigation. *Hurst* like *Ring*, merely "altered the range of permissible methods for determining whether a Defendant's conduct is punishable by death, requiring a jury rather than a Judge find the essential facts bearing on the punishment." *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004). *Hurst* did not announce substantive change in law and is *not* retroactive under federal law precedent.

The Supreme Court's opinion in *Alleyne v. United States*, 570 U.S. 99 (2013), like the Supreme Court's opinion in *Hurst I*, was explicitly based on *Apprendi*. Both *Alleyne* and *Hurst* are the offspring of *Apprendi*. The *Alleyne* majority and the *Alleyne* concurrence both characterized that *Apprendi*-based right as procedural.

In support of his argument that *Hurst* should be retroactive as a substantive change because it "addressed the proof-beyond a reasonable doubt standard," the Defendant relies upon *In re Winship,* 397 U.S. 358 (1970) and *Fiore v. White*, 531 U.S. 225 (2001). However, this court finds that *Hurst I* is distinguishable from these cases because it did not address the proof-beyond a reasonable doubt standard. *Hurst I* did not alter the burden of proof during the adjudication phase in finding the Defendant guilty of First Degree Murder.

The Florida Supreme Court has repeatedly rejected *Hurst* retroactivity arguments based on Sixth and Eight Amendments as well as Due Process and Equal Protection grounds. In *Hitchcock v. State*, 226 So.3d 216, 217 (Fla. 2017), the Florida Supreme Court held:

> We have consistently applied our decision in *Asay*, denying the retroactive application of *Hurst v. Florida* as interpreted in *Hurst v. State* to Defendants whose death sentences were final when the Supreme Court decided *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L.ED.2d 556 (2002). Hitchcock is

among those Defendants whose death sentences were final before *Ring*, and his arguments do not compel departing from our precedent.

Although Hitchcock references various constitutional provisions as a basis for arguments that *Hurst v. State* should entitle him to a new sentencing proceeding, these are nothing more than arguments that *Hurst v. State* should be applied retroactively to his sentence, which became final prior to *Ring*. As such these arguments were rejected when we decided *Asay*. Accordingly, we affirm the Circuit Court's Order summarily denying Hitchcock's successive Post Conviction Motion pursuant to *Asay*.

The Defendant in our case attempts to distinguish his case from *Hitchcock* by arguing he presented different grounds to support his assertion that he is entitled to retroactive application of *Hurst*. The Defendant claims his arguments are different than the ones presented in *Hitchcock*, in that they rely upon different legal arguments or different constitutional arguments.

Here, the Court agrees with the State, as in *Hitchcock*, the Defendant's arguments amount to nothing more than argument that *Hurst I and II* should be retroactively applied to his sentence. Nothing he has presented is novel or distinct and there is legal precedent in opposition to the Defendant's claims. The Court is obligated to follow the precedent of the Florida Supreme Court. *State v. Dwyer*, 332 So. 2d 333, 335 (Fla. 1976). Where an issue has been decided in the Supreme Court of the State, the lower Courts are ***bound to adhere*** to the Court's ruling when considering similar issues, even though the Court might believe that the law should be otherwise. Ground V is denied.

Therefore, in consideration of the foregoing, it is hereby, ORDERED AND ADJUDGED that:

1. The Defendant's Successive Motion and Amended Motion to Vacate Judgment of Conviction and Sentence and Second Amendment to Successive Motion to Vacate Judgment of Conviction and Sentence are hereby DENIED.

2. The Defendant has thirty (30) days from the date of this Order in which to appeal.

DONE this 31st day of December 2019, in Chambers in Palatka, Putnam County, Florida.

HOWARD O. MCGILLIN, JR.
CIRCUIT JUDGE

Copies furnished to:

Rachel L. Day, Marta Jaszczol, Capital Collateral Regional Counsel – South, 1 East Broward Blvd., Suite 444, Ft. Lauderdale, FL 33301; dayr@ccsr.state.fl.us

Doris Meacham, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118; Vivian.Singletary@myfloridalegal.com

Rosemary L. Calhoun, Assistant State Attorney, 251 N. Ridgewood Avenue, Daytona Beach, FL 32114; calhounr@sao7.org

APPENDIX C

861 So.2d 430 (Table)
(The decision of the Supreme Court of Florida is referenced in the Southern Reporter in a table captioned 'Florida Decisions Without Published Opinions.')
Supreme Court of Florida.

Richard Barry Randolph v. James V.

Crosby

NO. SC03-1056
|
November 21, 2003

Opinion

Disposition: Hab.Corp.den.

All Citations

861 So.2d 430 (Table)

End of Document

APPENDIX D

Filing # 129225591 E-Filed 06/22/2021 10:52:58 AM

Supreme Court of Florida

TUESDAY, JUNE 22, 2021

CASE NO.: SC20-287
Lower Tribunal No(s).:
541988CF001357CFAXMX

RICHARD BARRY RANDOLPH vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

Appellant's Motion for Rehearing is hereby denied.

CANADY, C.J., and POLSTON, LABARGA, LAWSON, MUÑIZ, COURIEL, and GROSSHANS, JJ., concur.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

kc
Served:

RACHEL DAY
DORIS MEACHAM
MARIE-LOUISE SAMUELS PARMER
MARTA VENESSA JASZCZOLT
HON. HOWARD OGLE MCGILLIN JR., JUDGE

HON. MATT REYNOLDS, CLERK
HON. RAUL ANTONIO ZAMBRANO, CHIEF JUDGE
ROSEMARY CALHOUN

APPENDIX E

The 2021 Florida Statutes

775.082 Penalties; applicability of sentencing structures; mandatory minimum sentences for certain reoffenders previously released from prison.—

(1)(a) Except as provided in paragraph (b), a person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in 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.

(b)1. A person who actually killed, intended to kill, or attempted to kill the victim and who is convicted under s. 782.04 of a capital felony, or an offense that was reclassified as a capital felony, which was committed before the person attained 18 years of age shall be punished by a term of imprisonment for life if, after a sentencing hearing conducted by the court in accordance with s. 921.1401, the court finds that life imprisonment is an appropriate sentence. If the court finds that life imprisonment is not an appropriate sentence, such person shall be punished by a term of imprisonment of at least 40 years. A person sentenced pursuant to this subparagraph is entitled to a review of his or her sentence in accordance with s. 921.1402(2)(a).

2. A person who did not actually kill, intend to kill, or attempt to kill the victim and who is convicted under s. 782.04 of a capital felony, or an offense that was reclassified as a capital felony, which was committed before the person attained 18 years of age may be punished by a term of imprisonment for life or by a term of years equal to life if, after a sentencing hearing conducted by the court in accordance with s. 921.1401, the court finds that life imprisonment is an appropriate sentence. A person who is sentenced to a term of imprisonment of more than 15 years is entitled to a review of his or her sentence in accordance with s. 921.1402(2)(c).

3. The court shall make a written finding as to whether a person is eligible for a sentence review hearing under s. 921.1402(2)(a) or (c). Such a finding shall be based upon whether the person actually killed, intended to kill, or attempted to kill the victim. The court may find that multiple defendants killed, intended to kill, or attempted to kill the victim.

(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). No sentence of death shall be reduced as a result of a determination that a method of execution is held to be unconstitutional under the State Constitution or the Constitution of the United States.

(3) A person who has been convicted of any other designated felony may be punished as follows:

(a)1. For a life felony committed before October 1, 1983, by a term of imprisonment for life or for a term of at least 30 years.

2. For a life felony committed on or after October 1, 1983, by a term of imprisonment for life or by a term of imprisonment not exceeding 40 years.

3. Except as provided in subparagraph 4., for a life felony committed on or after July 1, 1995, by a term of imprisonment for life or by imprisonment for a term of years not exceeding life imprisonment.

4.a. Except as provided in sub-subparagraph b., for a life felony committed on or after September 1, 2005, which is a violation of s. 800.04(5)(b), by:

(I) A term of imprisonment for life; or

(II) A split sentence that is a term of at least 25 years' imprisonment and not exceeding life imprisonment, followed by probation or community control for the remainder of the person's natural life, as provided in s. 948.012(4).

b. For a life felony committed on or after July 1, 2008, which is a person's second or subsequent violation of s. 800.04(5)(b), by a term of imprisonment for life.

5. Notwithstanding subparagraphs 1.-4., a person who is convicted under s. 782.04 of an offense that was reclassified as a life felony which was committed before the person attained 18 years of age may be punished by a term of imprisonment for life or by a term of years equal to life imprisonment if the judge conducts a sentencing hearing in accordance with s. 921.1401 and finds that life imprisonment or a term of years equal to life imprisonment is an appropriate sentence.

a. A person who actually killed, intended to kill, or attempted to kill the victim and is sentenced to a term of imprisonment of more than 25 years is entitled to a review of his or her sentence in accordance with s. 921.1402(2)(b).

b. A person who did not actually kill, intend to kill, or attempt to kill the victim and is sentenced to a term of imprisonment of more than 15 years is entitled to a review of his or her sentence in accordance with s. 921.1402(2)(c).

c. The court shall make a written finding as to whether a person is eligible for a sentence review hearing under s. 921.1402(2)(b) or (c). Such a finding shall be based upon whether the person actually killed, intended to kill, or attempted to kill the victim. The court may find that multiple defendants killed, intended to kill, or attempted to kill the victim.

6. For a life felony committed on or after October 1, 2014, which is a violation of s. 787.06(3)(g), by a term of imprisonment for life.

(b)1. For a felony of the first degree, by a term of imprisonment not exceeding 30 years or, when specifically provided by statute, by imprisonment for a term of years not exceeding life imprisonment.

2. Notwithstanding subparagraph 1., a person convicted under s. 782.04 of a first degree felony punishable by a term of years not exceeding life imprisonment, or an offense that was reclassified as a first degree felony punishable by a term of years not exceeding life, which was committed before the person attained 18 years of age may be punished by a term of years equal to life imprisonment if the judge conducts a sentencing hearing in accordance with s. 921.1401 and finds that a term of years equal to life imprisonment is an appropriate sentence.

a. A person who actually killed, intended to kill, or attempted to kill the victim and is sentenced to a term of imprisonment of more than 25 years is entitled to a review of his or her sentence in accordance with s. 921.1402(2)(b).

b. A person who did not actually kill, intend to kill, or attempt to kill the victim and is sentenced to a term of imprisonment of more than 15 years is entitled to a review of his or her sentence in accordance with s. 921.1402(2)(c).

c. The court shall make a written finding as to whether a person is eligible for a sentence review hearing under s. 921.1402(2)(b) or (c). Such a finding shall be based upon whether the person actually killed, intended to kill, or attempted to kill the victim. The court may find that multiple defendants killed, intended to kill, or attempted to kill the victim.

(c) Notwithstanding paragraphs (a) and (b), a person convicted of an offense that is not included in s. 782.04 but that is an offense that is a life felony or is punishable by a term of imprisonment for life or by a term of years not exceeding life imprisonment, or an offense that was reclassified as a life felony or an offense punishable by a term of imprisonment for life or by a term of years not exceeding life imprisonment, which was committed before the person attained 18 years of age may be punished by a term of imprisonment for life or a term of years equal to life imprisonment if the judge conducts a sentencing hearing in accordance with s. 921.1401 and finds that life imprisonment or a term of years equal to life imprisonment is an appropriate sentence. A person who is sentenced to a term of imprisonment of more than 20 years is entitled to a review of his or her sentence in accordance with s. 921.1402(2)(d).

(d) For a felony of the second degree, by a term of imprisonment not exceeding 15 years.

(e) For a felony of the third degree, by a term of imprisonment not exceeding 5 years.

(4) A person who has been convicted of a designated misdemeanor may be sentenced as follows:

(a) For a misdemeanor of the first degree, by a definite term of imprisonment not exceeding 1 year;

(b) For a misdemeanor of the second degree, by a definite term of imprisonment not exceeding 60 days.

(5) Any person who has been convicted of a noncriminal violation may not be sentenced to a term of imprisonment nor to any other punishment more severe than a fine, forfeiture, or other civil penalty, except as provided in chapter 316 or by ordinance of any city or county.

(6) Nothing in this section shall be construed to alter the operation of any statute of this state authorizing a trial court, in its discretion, to impose a sentence of imprisonment for an indeterminate period within minimum and maximum limits as provided by law, except as provided in subsection (1).

(7) This section does not deprive the court of any authority conferred by law to decree a forfeiture of property, suspend or cancel a license, remove a person from office, or impose any other civil penalty. Such a judgment or order may be included in the sentence.

(8)(a) The sentencing guidelines that were effective October 1, 1983, and any revisions thereto, apply to all felonies, except capital felonies, committed on or after October 1, 1983, and before January 1, 1994, and to all felonies, except capital felonies and life felonies, committed before October 1, 1983, when the defendant affirmatively selects to be sentenced pursuant to such provisions.

(b) The 1994 sentencing guidelines, that were effective January 1, 1994, and any revisions thereto, apply to all felonies, except capital felonies, committed on or after January 1, 1994, and before October 1, 1995.

(c) The 1995 sentencing guidelines that were effective October 1, 1995, and any revisions thereto, apply to all felonies, except capital felonies, committed on or after October 1, 1995, and before October 1, 1998.

(d) The Criminal Punishment Code applies to all felonies, except capital felonies, committed on or after October 1, 1998. Any revision to the Criminal Punishment Code applies to sentencing for all felonies, except capital felonies, committed on or after the effective date of the revision.

(e) Felonies, except capital felonies, with continuing dates of enterprise shall be sentenced under the sentencing guidelines or the Criminal Punishment Code in effect on the beginning date of the criminal activity.

(9)(a)1. “Prison releasee reoffender” means any defendant who commits, or attempts to commit:

a. Treason;

b. Murder;

c. Manslaughter;

d. Sexual battery;

e. Carjacking;

f. Home-invasion robbery;

g. Robbery;

h. Arson;

i. Kidnapping;

j. Aggravated assault with a deadly weapon;

k. Aggravated battery;

l. Aggravated stalking;

m. Aircraft piracy;

n. Unlawful throwing, placing, or discharging of a destructive device or bomb;

o. Any felony that involves the use or threat of physical force or violence against an individual;

p. Armed burglary;

q. Burglary of a dwelling or burglary of an occupied structure; or

r. Any felony violation of s. 790.07, s. 800.04, s. 827.03, s. 827.071, or s. 847.0135(5);

within 3 years after being released from a state correctional facility operated by the Department of Corrections or a private vendor, a county detention facility following incarceration for an offense for which the sentence

pronounced was a prison sentence, or a correctional institution of another state, the District of Columbia, the United States, any possession or territory of the United States, or any foreign jurisdiction, following incarceration for an offense for which the sentence is punishable by more than 1 year in this state.

2. "Prison releasee reoffender" also means any defendant who commits or attempts to commit any offense listed in sub-subparagraphs (a)1.a.-r. while the defendant was serving a prison sentence or on escape status from a state correctional facility operated by the Department of Corrections or a private vendor or while the defendant was on escape status from a correctional institution of another state, the District of Columbia, the United States, any possession or territory of the United States, or any foreign jurisdiction, following incarceration for an offense for which the sentence is punishable by more than 1 year in this state.

3. If the state attorney determines that a defendant is a prison releasee reoffender as defined in subparagraph 1., the state attorney may seek to have the court sentence the defendant as a prison releasee reoffender. Upon proof from the state attorney that establishes by a preponderance of the evidence that a defendant is a prison releasee reoffender as defined in this section, such defendant is not eligible for sentencing under the sentencing guidelines and must be sentenced as follows:

a. For a felony punishable by life, by a term of imprisonment for life;

b. For a felony of the first degree, by a term of imprisonment of 30 years;

c. For a felony of the second degree, by a term of imprisonment of 15 years; and

d. For a felony of the third degree, by a term of imprisonment of 5 years.

(b) A person sentenced under paragraph (a) shall be released only by expiration of sentence and shall not be eligible for parole, control release, or any form of early release. Any person sentenced under paragraph (a) must serve 100 percent of the court-imposed sentence.

(c) Nothing in this subsection shall prevent a court from imposing a greater sentence of incarceration as authorized by law, pursuant to s. 775.084 or any other provision of law.

(d)1. It is the intent of the Legislature that offenders previously released from prison or a county detention facility following incarceration for an offense for which the sentence pronounced was a prison sentence who meet the criteria in paragraph (a) be punished to the fullest extent of the law and as provided in this subsection, unless the state attorney determines that extenuating circumstances exist which preclude the just prosecution of the offender, including whether the victim recommends that the offender not be sentenced as provided in this subsection.

2. For every case in which the offender meets the criteria in paragraph (a) and does not receive the mandatory minimum prison sentence, the state attorney must explain the sentencing deviation in writing and place such explanation in the case file maintained by the state attorney.

(10) If a defendant is sentenced for an offense committed on or after July 1, 2009, which is a third degree felony but not a forcible felony as defined in s. 776.08, and excluding any third degree felony violation under chapter 810, and if the total sentence points pursuant to s. 921.0024 are 22 points or fewer, the court must sentence the offender to a nonstate prison sanction. However, if the court makes written findings that a nonstate prison sanction could present a danger to the public, the court may sentence the offender to a state correctional facility pursuant to this section.

(11) The purpose of this section is to provide uniform punishment for those crimes made punishable under this section and, to this end, a reference to this section constitutes a general reference under the doctrine of incorporation by reference.

History.—s. 3, ch. 71-136; ss. 1, 2, ch. 72-118; s. 2, ch. 72-724; s. 5, ch. 74-383; s. 1, ch. 77-174; s. 1, ch. 83-87; s. 1, ch. 94-228; s. 16, ch. 95-184; s. 4, ch. 95-294; s. 2, ch. 97-239; s. 2, ch. 98-3; s. 10, ch. 98-204; s. 2, ch. 99-188; s. 3, ch. 2000-246; s. 1, ch. 2001-239; s. 2, ch. 2002-70; ss. 1, 2, ch. 2002-211; s. 4, ch. 2005-28; s. 13, ch. 2008-172; s. 1, ch. 2008-182; s. 1, ch. 2009-63; s. 2, ch. 2011-200; s. 8, ch. 2014-160; s. 1, ch. 2014-220; s. 1, ch. 2016-13; s. 19, ch. 2016-24; s. 3, ch. 2017-1; s. 21, ch. 2017-37; s. 11, ch. 2017-107; s. 30, ch. 2019-167.

APPENDIX F

The 2021 Florida Statutes

782.04 Murder.—

(1)(a) The unlawful killing of a human being:

1. When perpetrated from a premeditated design to effect the death of the person killed or any human being;

2. When committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any:

a. Trafficking offense prohibited by s. 893.135(1),

b. Arson,

c. Sexual battery,

d. Robbery,

e. Burglary,

f. Kidnapping,

g. Escape,

h. Aggravated child abuse,

i. Aggravated abuse of an elderly person or disabled adult,

j. Aircraft piracy,

k. Unlawful throwing, placing, or discharging of a destructive device or bomb,

l. Carjacking,

m. Home-invasion robbery,

n. Aggravated stalking,

o. Murder of another human being,

p. Resisting an officer with violence to his or her person,

q. Aggravated fleeing or eluding with serious bodily injury or death,

r. Felony that is an act of terrorism or is in furtherance of an act of terrorism, including a felony under s. 775.30, s. 775.32, s. 775.33, s. 775.34, or s. 775.35, or

s. Human trafficking; or

3. Which resulted from the unlawful distribution by a person 18 years of age or older of any of the following substances, or mixture containing any of the following substances, when such substance or mixture is proven to be the proximate cause of the death of the user:

a. A substance controlled under s. 893.03(1);

b. Cocaine, as described in s. 893.03(2)(a)4.;

c. Opium or any synthetic or natural salt, compound, derivative, or preparation of opium;

d. Methadone;

e. Alfentanil, as described in s. 893.03(2)(b)1.;

f. Carfentanil, as described in s. 893.03(2)(b)6.;

g. Fentanyl, as described in s. 893.03(2)(b)9.;

h. Sufentanil, as described in s. 893.03(2)(b)30.; or

i. A controlled substance analog, as described in s. 893.0356, of any substance specified in sub-subparagraphs a.-h.,

is murder in the first degree and constitutes a capital felony, punishable as provided in s. 775.082.

(b) In all cases under this section, the procedure set forth in s. 921.141 shall be followed in order to determine sentence of death or life imprisonment. If the prosecutor intends to seek the death penalty, the prosecutor must give notice to the defendant and file the notice with the court within 45 days after arraignment. The notice must contain a list of the aggravating factors the state intends to prove and has reason to believe it can prove beyond a reasonable doubt. The court may allow the prosecutor to amend the notice upon a showing of good cause.

(2) The unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, is murder in the second degree and constitutes a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in s. 775.082, s. 775.083, or s. 775.084.

(3) When a human being is killed during the perpetration of, or during the attempt to perpetrate, any:

(a) Trafficking offense prohibited by s. 893.135(1),

(b) Arson,

(c) Sexual battery,

(d) Robbery,

(e) Burglary,

(f) Kidnapping,

(g) Escape,

(h) Aggravated child abuse,

(i) Aggravated abuse of an elderly person or disabled adult,

(j) Aircraft piracy,

(k) Unlawful throwing, placing, or discharging of a destructive device or bomb,

(l) Carjacking,

(m) Home-invasion robbery,

(n) Aggravated stalking,

(o) Murder of another human being,

(p) Aggravated fleeing or eluding with serious bodily injury or death,

(q) Resisting an officer with violence to his or her person, or

(r) Felony that is an act of terrorism or is in furtherance of an act of terrorism, including a felony under s. 775.30, s. 775.32, s. 775.33, s. 775.34, or s. 775.35,

by a person other than the person engaged in the perpetration of or in the attempt to perpetrate such felony, the person perpetrating or attempting to perpetrate such felony commits murder in the second degree, which constitutes a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in s. 775.082, s. 775.083, or s. 775.084.

(4) The unlawful killing of a human being, when perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony other than any:

(a) Trafficking offense prohibited by s. 893.135(1),

(b) Arson,

(c) Sexual battery,

(d) Robbery,

(e) Burglary,

(f) Kidnapping,

(g) Escape,

(h) Aggravated child abuse,

(i) Aggravated abuse of an elderly person or disabled adult,

(j) Aircraft piracy,

(k) Unlawful throwing, placing, or discharging of a destructive device or bomb,

(l) Unlawful distribution of any substance controlled under s. 893.03(1), cocaine as described in s. 893.03(2)(a)4., or opium or any synthetic or natural salt, compound, derivative, or preparation of opium by a person 18 years of age or older, when such drug is proven to be the proximate cause of the death of the user,

(m) Carjacking,

(n) Home-invasion robbery,

(o) Aggravated stalking,

(p) Murder of another human being,

(q) Aggravated fleeing or eluding with serious bodily injury or death,

(r) Resisting an officer with violence to his or her person, or

(s) Felony that is an act of terrorism or is in furtherance of an act of terrorism, including a felony under s. 775.30, s. 775.32, s. 775.33, s. 775.34, or s. 775.35,

is murder in the third degree and constitutes a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(5) As used in this section, the term "terrorism" means an activity that:

(a)1. Involves a violent act or an act dangerous to human life which is a violation of the criminal laws of this state or of the United States; or

2. Involves a violation of s. 815.06; and

(b) Is intended to:

1. Intimidate, injure, or coerce a civilian population;

2. Influence the policy of a government by intimidation or coercion; or

3. Affect the conduct of government through destruction of property, assassination, murder, kidnapping, or aircraft piracy.

History.—s. 2, ch. 1637, 1868; RS 2380; GS 3205; RGS 5035; s. 1, ch. 8470, 1921; CGL 7137; s. 1, ch. 28023, 1953; s. 712, ch. 71-136; s. 3, ch. 72-724; s. 14, ch. 74-383; s. 6, ch. 75-298; s. 1, ch. 76-141; s. 290, ch. 79-400; s. 1, ch. 82-4; s. 1, ch. 82-69; s. 1, ch. 84-16; s. 6, ch. 87-243; ss. 2, 4, ch. 89-281; s. 4, ch. 90-112; s. 3, ch. 93-212; s. 11, ch. 95-195; s. 18, ch. 96-322; s. 1, ch. 98-417; s. 10, ch. 99-188; s. 16, ch. 2000-320; s. 2, ch. 2001-236; s. 2, ch. 2001-357; s. 1, ch. 2002-212; s. 12, ch. 2005-128; s. 1, ch. 2010-121; s. 2, ch. 2012-21; s. 4, ch. 2014-176; s. 9, ch. 2015-34; s. 2, ch. 2016-13; s. 2, ch. 2016-24; s. 24, ch. 2016-105; s. 4, ch. 2017-1; s. 7, ch. 2017-37; s. 2, ch. 2017-107; s. 17, ch. 2018-13; ss. 114, 122, ch. 2019-167.

APPENDIX G

The 2021 Florida Statutes

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating factors enumerated in subsection (6) and for which notice has been provided pursuant to s. 782.04(1)(b) or mitigating circumstances enumerated in subsection (7). Any such evidence that the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or the defendant's counsel shall be permitted to present argument for or against sentence of death.

(2) FINDINGS AND RECOMMENDED SENTENCE BY THE JURY.—This subsection applies only if the defendant has not waived his or her right to a sentencing proceeding by a jury.

(a) After hearing all of the evidence presented regarding aggravating factors and mitigating circumstances, the jury shall deliberate and determine if the state has proven, beyond a reasonable doubt, the existence of at least one aggravating factor set forth in subsection (6).

(b) The jury shall return findings identifying each aggravating factor found to exist. A finding that an aggravating factor exists must be unanimous. If the jury:

1. Does not unanimously find at least one aggravating factor, the defendant is ineligible for a sentence of death.

2. Unanimously finds at least one aggravating factor, the defendant is eligible for a sentence of death and the jury shall make a recommendation to the court as to whether the defendant shall be sentenced to life imprisonment without the possibility of parole or to death. The recommendation shall be based on a weighing of all of the following:

a. Whether sufficient aggravating factors exist.

b. Whether aggravating factors exist which outweigh the mitigating circumstances found to exist.

c. Based on the considerations in sub-subparagraphs a. and b., whether the defendant should be sentenced to life imprisonment without the possibility of parole or to death.

(c) If a unanimous jury determines that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of death. If a unanimous jury does not determine that the

defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of life imprisonment without the possibility of parole.

(3) IMPOSITION OF SENTENCE OF LIFE IMPRISONMENT OR DEATH.—

(a) If the jury has recommended a sentence of:

1. Life imprisonment without the possibility of parole, the court shall impose the recommended sentence.

2. Death, the court, after considering each aggravating factor found by the jury and all mitigating circumstances, may impose a sentence of life imprisonment without the possibility of parole or a sentence of death. The court may consider only an aggravating factor that was unanimously found to exist by the jury.

(b) If the defendant waived his or her right to a sentencing proceeding by a jury, the court, after considering all aggravating factors and mitigating circumstances, may impose a sentence of life imprisonment without the possibility of parole or a sentence of death. The court may impose a sentence of death only if the court finds that at least one aggravating factor has been proven to exist beyond a reasonable doubt.

(4) ORDER OF THE COURT IN SUPPORT OF SENTENCE OF DEATH.—In each case in which the court imposes a sentence of death, the court shall, considering the records of the trial and the sentencing proceedings, enter a written order addressing the aggravating factors set forth in subsection (6) found to exist, the mitigating circumstances in subsection (7) reasonably established by the evidence, whether there are sufficient aggravating factors to warrant the death penalty, and whether the aggravating factors outweigh the mitigating circumstances reasonably established by the evidence. If the court does not issue its order requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose a sentence of life imprisonment without the possibility of parole in accordance with s. 775.082.

(5) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida and disposition rendered within 2 years after the filing of a notice of appeal. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules adopted by the Supreme Court.

(6) AGGRAVATING FACTORS.—Aggravating factors shall be limited to the following:

(a) The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation.

(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; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary; kidnapping; aircraft piracy; or 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.

(j) The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties.

(k) The victim of the capital felony was an elected or appointed public official engaged in the performance of his or her official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity.

(l) The victim of the capital felony was a person less than 12 years of age.

(m) The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.

(n) The capital felony was committed by a criminal gang member, as defined in s. 874.03.

(o) The capital felony was committed by a person designated as a sexual predator pursuant to s. 775.21 or a person previously designated as a sexual predator who had the sexual predator designation removed.

(p) The capital felony was committed by a person subject to an injunction issued pursuant to s. 741.30 or s. 784.046, or a foreign protection order accorded full faith and credit pursuant to s. 741.315, and was committed against the petitioner who obtained the injunction or protection order or any spouse, child, sibling, or parent of the petitioner.

(7) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

(h) The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.

(8) VICTIM IMPACT EVIDENCE.—Once the prosecution has provided evidence of the existence of one or more aggravating factors as described in subsection (6), the prosecution may introduce, and subsequently argue, victim impact evidence to the jury. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

(9) APPLICABILITY.—This section does not apply to a person convicted or adjudicated guilty of a capital drug trafficking felony under s. 893.135.

History.—s. 237a, ch. 19554, 1939; CGL 1940 Supp. 8663(246); s. 119, ch. 70-339; s. 1, ch. 72-72; s. 9, ch. 72-724; s. 1, ch. 74-379; s. 248, ch. 77-104; s. 1, ch. 77-174; s. 1, ch. 79-353; s. 177, ch. 83-216; s. 1, ch. 87-368; s. 10, ch. 88-381; s. 3, ch. 90-112; s. 1, ch. 91-270; s. 1, ch. 92-81; s. 1, ch. 95-159; s. 5, ch. 96-290; s. 1, ch. 96-302; s. 7, ch. 2005-28; s. 2, ch. 2005-64; s. 27, ch. 2008-238; s. 25, ch. 2010-117; s. 1, ch. 2010-120; s. 3, ch. 2016-13; s. 49, ch. 2016-24; s. 1, ch. 2017-1; s. 129, ch. 2019-167.

Note.—Former s. 919.23.