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

STATE OF FLORIDA

v.

TROY VICTORINO,

Defendant.
_____/

CASE NO.: 2004-001378-CFAWS

ORDER DENYING AMENDED MOTION TO UTILIZE NEW STATUTORY DEATH PENALTY SENTENCING PROCEDURES OF SECTION 921.141

This matter came before the Court upon filing of the State of Florida's "Amended Motion to Utilize New Statutory Death Penalty Sentencing Procedures of Section 921.141." The State's amended motion is dated April 21, 2023, eleven (11) days after the commencement of the Defendant's instant *Hurst* penalty phase resentencing trial. The Court, having considered the amended motion along with the Defendant's response brief, having also considered the State's reply brief filed last night on April 23, 2023, having heard argument of counsel and reviewed the pertinent case law, and being fully advised in the premises, hereby finds as follows:

PROCEDURAL HISTORY

On July 25, 2006, after a jury trial, the Defendant was found guilty of the following crimes: one count of conspiracy to commit aggravated battery, murder, armed burglary of a dwelling, and tampering with physical evidence (count 1); six counts of first-degree murder of victims [redacted] Francisco Ayo Roman, Jonathon W. Gleason, Roberto Manuel Gonzalez, Michelle Ann Nathan, and Anthony Vega (counts 2 to 7); one count of abuse of a dead human body with a weapon (count 8); one count of armed burglary of a dwelling (count 13); and one count of cruelty to animals (count 14). After the penalty phase the jury returned a recommendation that the Defendant be sentenced to death for the murders of [redacted] (by a vote of 10-2), Francisco Ayo Roman (by a vote of 10-2), Jonathon W. Gleason (by a vote of 7-5),

and Roberto Manuel Gonzalez (by a vote of 9-3), and to life imprisonment without possibility of parole for the murders of Michelle Ann Nathan and Anthony Vega. On September 21, 2006, the trial court, following the jury recommendation, imposed four death sentences on the Defendant.

On November 25, 2009, after the Defendant's direct appeal, the Supreme Court of Florida issued an order affirming the Defendant's convictions and sentences of death. On January 3, 2012, following an evidentiary hearing, the trial court denied the Defendant's amended Rule 3.851 postconviction motion. On October 10, 2013, the Supreme Court of Florida issued an order affirming the denial of the Defendant's Rule 3.851 motion.

Hurst v. Florida and *Hurst v. State*

On December 28, 2016, the Defendant filed "Defendant's Successive Motion for Postconviction Relief and for Correction of Illegal Sentences." The primary claim of the Defendant's successive postconviction motion was based on a "change in the law" following the decisions in *Hurst v. Florida*, 136 S. Ct. 616 (2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). After repeatedly upholding Florida's capital sentencing statute over the past quarter of a century, the United States Supreme Court in 2016 reversed course and held, for the first time, in *Hurst v. Florida* that Florida's capital sentencing scheme was an unconstitutional violation of the Sixth Amendment right to a jury trial because it failed to require a jury, rather than a judge, to make the necessary findings of fact to impose the death sentence. The jury's advisory recommendation for death was deemed "not enough." *Id.* at 624. In so ruling, the United States Supreme Court overruled its own previous decisions in *Spaziano v. Florida*, 468 U.S. 447 (1984), and *Hildwin v. Florida*, 490 U.S. 638 (1989), to the extent that they approved Florida's sentencing scheme in which the judge, independent of the jury's fact-finding, found the facts necessary for imposition of the death penalty. *Id.*

On remand of *Hurst*, the Supreme Court of Florida held that "before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly

find all the aggravating factors that were 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." *Hurst v. State*, 202 So. 3d at 57. Further, in *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), the Supreme Court of Florida concluded that the *Hurst* rulings apply retroactively to all defendants whose sentences were not yet final when the United States Supreme Court issued its opinion in *Ring v. Arizona*, 536 U.S. 585 (2002).

Following the *Hurst* ruling, in every opinion involving a case where *Hurst* was retroactively applicable and the jury did not return a unanimous recommendation of death, the Supreme Court of Florida has held that the *Hurst* error was not harmless error. As a result, over 300 prisoners in Florida had their cases reviewed in light of *Hurst,* and at least 147 death row inmates have had their death sentences vacated and a new penalty phase trial ordered by the Supreme Court. *See "Florida Death-Penalty Appeals Decided in Light of Hurst," Death Penalty Information Center,* https://deathpenaltyinfo.org/stories/florida-death-penalty-appeals-decided-in-light-of-hurst.

Because they were required to follow the Supreme Court's binding precedential authority, trial courts all around this state (including courts in the Seventh Judicial Circuit) began vacating death sentences and ordering new penalty phase trials based on *Hurst* issues raised in postconviction motions. Such is the case with the instant Defendant. In Claim 1 of his postconviction motion, the Defendant correctly argued that he was sentenced to death under a death sentencing statute that had just been declared unconstitutional, and that his existing death sentences must be vacated because their unconstitutionality and illegality had been established in the two *Hurst* decisions. The State conceded that the *Hurst* rulings applied retroactively to the Defendant because his death sentences became final after the *Ring v. Arizona* decision in 2002.

Based on the controlling authority of the Supreme Court, this Court had no choice but to find that the Defendant's death sentences are rendered unconstitutional by the *Hurst* decisions and that the *Hurst* rulings applied to the Defendant because his death sentences became final after the 2002 *Ring* decision. Given that the jury's death sentence recommendations for the Defendant were not unanimous, this Court was required to find that the State had not met, and could not meet, its burden of establishing that the *Hurst* error in this case is harmless beyond a reasonable doubt. Therefore, this Court was left with absolutely no legal option but to grant the Defendant the relief he sought in Claim 1 of his postconviction motion.

On June 14, 2017, pursuant to the Supreme Court of Florida's mandates in *Hurst* and its progeny, this Court reluctantly granted the Defendant's postconviction motion as to Claim 1 and vacated the Defendant's sentences of death on counts 2, 3, 4, and 5. The Defendant's sentences on the other counts were not affected by that ruling and remained unchanged. Thereafter, this case was returned to this Court's docket for a new penalty phase proceeding on the affected counts. On July 6, 2017, the State filed its "Notice of Intent to Seek Death Penalty and Aggravating Circumstances in Capital Proceeding," and counsel was appointed to represent the Defendant.

After the Supreme Court's *Hurst* decision, the Florida Legislature amended Sections 921.141 and 921.142 of the Florida Statutes to require a unanimous vote of the jury for a sentencing verdict of death.

State v. Poole

On January 23, 2020, the Supreme Court of Florida reversed most of its decision in *Hurst v. State*. In *State v. Poole*, 292 So. 3d 694 (Fla. 2020), the Supreme Court of Florida held that the United States Supreme Court in *Hurst v. Florida* requires only that a death sentencing jury find the existence of one statutory aggravator beyond a reasonable doubt, that it does not require the jury to find all the aggravators beyond a reasonable doubt, that it does not require the jury to find

that the aggravating factors outweigh the mitigating factors, and, most significantly, that it does not require the jury to unanimously recommend a sentence of death. In *Poole* the Supreme Court of Florida expressly receded from *Hurst v. State* except to the extent that it held that a jury must unanimously find the existence of a statutory aggravating circumstance beyond a reasonable doubt. *Poole*, 292 So. 3d at 697.

The Court in *Poole* went on to hold that "we cannot escape the conclusion that, to the extent it went beyond what a correct interpretation of *Hurst v. Florida* required, our Court in *Hurst v. State* got it wrong.... Without legal justification, this Court used *Hurst v. Florida* – a narrow and predictable ruling that should have had limited practical effect on the administration of the death penalty in our state as an occasion to disregard decades of settled Supreme Court and Florida precedent. Under these circumstances, it would be unreasonable for us *not* to recede from *Hurst v. State's* erroneous holdings." *Id.* at 712-13.

State v. Jackson

In light of the *Poole* decision and the Florida Supreme Court's reinstatement of that defendant's death sentence, this Court prepared to reinstate the instant Defendant's death sentences. However, the instant case, and others like it around the state, were put on hold pending the Florida Supreme Court's ruling in *State v. Jackson*, 306 So. 3d 936 (Fla. 2020). In *Jackson*, the State of Florida filed a petition seeking to dismiss pending resentencing proceedings and to reinstate death sentences due to the intervening change of law. The Supreme Court in *Jackson* denied the State's petition and held that the vacated death sentences cannot be retroactively reinstated. *Id.* at 945.

Thus, in 2020 the Florida Supreme Court effectively passed on the opportunity to reinstate the instant Defendant's death sentences under the previous non unanimity state statute.

ANALYSIS

On April 10, 2023, the Defendant's *Hurst* penalty phase resentencing trial began. On that date jury selection commenced with the swearing by the clerk of the venire. Over the next two weeks, approximately 288 prospective jurors were questioned regarding their attitudes about the death penalty and were repeatedly instructed by the Court and counsel that Florida's death penalty statute in effect at the time requires a unanimous vote of the jury for a sentencing verdict of death.

Ten (10) days **after** the trial commenced, on April 20, 2023, the governor signed into law Senate Bill 450 which changed the law from a unanimous jury verdict to a majority vote. Among other things, this new law states that if at least eight jurors determine that a defendant should be sentenced to death, the jury's recommendation to the court must be a sentence of death; and that if fewer than eight jurors determine that a defendant should be sentenced to death, then the jury's recommendation must be a sentence of life in prison without the possibility of parole. On that same day, April 20, 2023, the instant Defendant's jury of 15 individuals was selected and sworn to be the penalty phase jurors for this case. As a result of the new law being signed, the State filed its instant "Amended Motion to Utilize New Statutory Death Penalty Sentencing Procedures of Section 921.141," in which it requests that this Court declare that the new law no longer requiring juror unanimity "is to be the law governing the Defendant's sentencing proceeding."

In its motion the State relies on *Dobbert v. Florida*, 97 S.Ct. 2290 (1977). In that case, during the period of time between the defendant's commission of his crime and his trial, Florida's death penalty was amended. The Florida Supreme Court held that the change in the law was procedural and must be applied to the defendant's trial in that case. The State interprets that decision to mean that the new death penalty law in the instant case must apply to the Defendant. However, the decision in *Dobbert* is clearly distinguishable from the instant case in

that the defendant's trial in that case had not even begun when the law changed. The huge difference in the instant case is that the Defendant's penalty phase trial had been underway for almost two weeks when the new law was signed by the governor.

In case there is any doubt about when the Defendant's trial started, it is settled law that trial begins when the selection of a jury to try the case commences. *State v. Singletary*, 549 So. 2d 996, 998 (Fla. 1989); *State v. Melendez*, 244 So. 2d 137, 139 (Fla. 1971). *See also United States v. White*, 980 F.2d 838, 841 (2d Cir. 1992) (holding that the start of voir dire marks the start of trial and that "the trial commences at least from the time when the work of empanelling the jury begins.").

A new procedural statute does not necessarily apply in all pending cases. "Rather, the 'commonsense' application of a new procedure generally "depends on the posture of the particular case." *Love v. State*, 286 So. 3d 177, 187 (Fla. 2019). In *Love*, unlike in the instant case, the subject proceeding took place after the effective date of the new procedural change and thus the new law was held to apply. *Id.* at 190. In the instant trial, the "commonsense application" of the new death penalty law is that it should not apply at all because of the "posture of th[is] particular case." The posture of the Defendant's trial is that, well before the new law was signed, the jury had been sworn for voir dire and examination was for the most part completed. Subsequently, the jury was empaneled the same day the law was signed. Jury selection began and ended under the assumption of unanimity required under the now old law and, apart from the final swearing of the jury, took place entirely during the pendency of the old law requiring unanimity. According to defense counsel, the Defendant and his attorneys made privileged strategic decisions based on the assumption of unanimity and based on the fact that the State itself voir dired on unanimity. Defense counsel has advised this Court that the Defendant has proceeded under the assurances of a new penalty phase trial wherein unanimity would be required before a death sentence could be imposed. He has prepared and tailored his

jury selection and his case under the belief that his sentencing would be in the hands of a jury that would have to unanimously agree to a death sentence before he will again be sentenced to death. According to the Defendant, if the new procedures are now utilized two weeks into his trial, he will have relied on the assurances of the Court, the State, and his lawyers to his detriment, and he will have received no notice of the rules by which he is trying his case. Further, the defense argues that it would be impossible to go back and undo what has already been done with this venire. It has been repeatedly drilled into this jury that a unanimous verdict is required to impose the death sentence. To suddenly tell the jury to disregard everything they were told for nearly two weeks and to instruct them on an entirely different new law that was not in place when the jury was selected would no doubt lead to mass juror confusion. The jurors likely would become irate if they feel that they had been misled on the law and their obligation. Some jurors may have answered questions differently and not been selected had they been instructed on the new law that was not yet in effect. The possibility of a jury revolt if the new law is suddenly sprung on them after having been instructed and selected under the old law then in place would undoubtedly lead to a motion for a mistrial. Thus, under *Love*, given the posture of this case, the "commonsense application" of the new death penalty law is that it should not be applied here.

Given the heightened due process standards that apply in death penalty cases, this Court agrees with the Defendant's argument that to apply a change in the law mid-trial would violate his right to procedural due process. Fundamental fairness would seem to require that the Defendant be sentenced under the law that was in effect when his trial started. Fair notice is one of the essentials in a trial, and "[t]he Due Process Clause guarantees a criminal defendant that his trial will comport with prevailing notions of fundamental fairness." *United States v. Pacheco*, 434 F.3d 106, 116 (1st Cir. 2006). A basic element of the procedural due process notice requirement is that all parties know the rules of the game when the game starts, and that the rules

cannot thereafter be changed. *Brotherhood of Locomotive Engineers and Trainmen General Committee of Adjustment, Central Region v. Union Pacific Railroad Company,* 522 F.3d 746, 752 (7th Cir. 2008). "It is unfair to alter the rules of the game mid-play." *Id.* "Changing horses in midstream … is a bad idea." *Rombola v. Botchey,* 149 So.3d 1138, 1139 (Fla. 1st DCA 2014). The State "cannot switch horses midstream … in hopes of securing a swifter steed." *Securities and Exchange Commission v. Tambone,* 597 F.3d 436, 450 (1st Cir. 2010).

For all of the foregoing reasons, and based on the Defendant's arguments, it is hereby

ORDERED AND ADJUDGED:

That the State's Amended Motion to Utilize New Statutory Death Penalty Sentencing Procedures of Section 921.141 is DENIED.

DONE AND ORDERED in DeLand, Volusia County, Florida, this 24th day of April, 2023.

RANDELL H. ROWE, III
CIRCUIT JUDGE

Copy to:

Ann E. Finnell, Esq., Counsel for Defendant
Andrew J. Urbanak, Assistant State Attorney
Heatha Trigones, Assistant State Attorney