Filing # 53332773 E-Filed 03/06/2017 02:52:17 PM

RECEIVED, 03/06/2017 02:53:29 PM, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA
Case No. SC16-1946

PATRICK ALBERT EVANS, Petitioner

vs.

STATE OF FLORIDA, Respondent.

MOTION FOR REHEARING AND CLARIFICATION

COMES NOW, Petitioner, PATRICK ALBERT EVANS, by and through undersigned counsel, pursuant to Fla. R. App. P. 9.330, and respectfully moves this Court to reconsider its opinion denying Mr. Evans's petition for writ of prohibition and/or, in the alternative, provide further clarification. As the following discussion indicates, Mr. Evans submits that this Court has overlooked or misapprehended significant points of law. Mr. Evans further urges that clarification is needed to guide the trial courts in application of the decision of this Court in the above-styled case rendered on February 20, 2017.

In the plurality opinion of the February 20, 2017, decision, Justices Canady, Polston and Lawson agree that Mr. Evans' case may proceed to trial with the jury being "death qualified" as proposed by Circuit Judge Joseph Bulone before the Florida Legislature enacts a new statute. Justices Labarga and Lewis indicate that the unconstitutional portion of the Act is severable and therefore, Mr. Evans' case may not only proceed with death qualification of the jury, but may be tried through penalty phase with law and jury instructions crafted by the trial court to conform

with this Court's opinion in Hurst v. State, 202 So. 3d 40 (Fla. 2016). Justices Pariente and Quince, on the other hand, concurring in part and dissenting in part, specifically wrote that while the trial court may proceed with the guilt phase of Mr. Evans' trial, the penalty phase may not be conducted, if Mr. Evans is convicted as charged, until the Legislature remedies the unconstitutionality of the statute. Hence, the need for clarification.

There are essentially three options available to Mr. Evans at this juncture. First, Mr. Evans' case could be tried through guilt phase without death qualifying the jury as the trial judge did in State v. Theodore, No. 582015CF000203XXXANC (Fla. 12th Cir. Ct. Dec. 12, 2016). If convicted, a separate death qualified jury would likely be empaneled to make a recommendation regarding the issue of sentencing for Mr. Evans. Second, Mr. Evans' guilt could be determined by a death qualified jury in the immediate sense, and if convicted, sentencing postponed until after the legislative session. Third, Mr. Evans' first phase could be conducted by a death qualified jury, and then if convicted, the case could proceed to sentencing, presumably in advance of the Legislature enacting any new law as it relates to capital punishment. Petitioner is moving this Court to clarify its position as to how Mr. Evans' case may proceed at this point.

If this Court is holding that Mr. Evans may be tried with a death qualified jury through penalty phase in the immediate sense, *id est*, in advance of the Legislature enacting a new law, Petitioner asserts that this Court has failed to consider or overlooked its holding in State v. Steele, 921 So. 2d 538 (Fla. 2005) and is moving this Court to reconsider its opinion denying Mr. Evans' petition for writ of prohibition. The Court wrote in Steele,

> **C. The Need for Legislative Action**
>
> Finally, we express our considered view, as the court of last resort charged with implementing Florida's capital sentencing scheme, that in light of developments in other states and at the federal level, the Legislature should revisit the statute to require some unanimity in the jury's recommendations.

Id. at 548.

Justice Wells wrote a concurring opinion in Steele, which Justices Cantero and Bell joined, to address his view that there was a "need for legislative reassessment and revision of Florida capital punishment statute in light of developments in Florida's sentencing law and federal constitutional law." Id. at 551. Justice Pariente, with Justice Anstead, concurred in part and dissented in part, but wrote specifically to stress the need for unanimity, if the jury was going to recommend death in a case, as well as advance notice of aggravating factors. Id. at 553.

One may clearly surmise from Steele, that this Court could have found support for unanimity in capital sentencing but was constrained from writing the

law so instead called upon the legislature to act. That edict is clear in Florida jurisprudence. Courts do not "exercise the legislative function of rewriting the statute..." Florida Horseman Benevolent and Protective Association v. Rudder, 738 So. 2d 449, 452 (Fla. 1st DCA 1999).

Severance of the 10-2 jury recommendation provision rendered the statutory scheme unusable. "Accordingly, it cannot be applied to pending prosecutions." Perry v. State, 41 Fla. L. Weekly S449 (Fla. Oct. 14, 2016). When constitutional and unconstitutional legislative provisions are inextricably intertwined, they may not be severed. Allen v. Butterworth, 756 So. 2d 52, 65 (Fla. 2000). Florida law is clearly established and provides that "if the valid portion of the law would be rendered incomplete, or if severance would cause results unanticipated by the legislature, there can be no severance of the invalid parts; the entire law must be declared unconstitutional." Eastern Air Lines, Inc. v. Department of Revenue, 455 So. 2d 311, 317 (Fla. 1984). Severance is only possible when striking the unconstitutional provision would leave the remainder complete unto itself, which did not and cannot happen as the statutory scheme exists at this time.

**WHEREFORE**, Mr. Evans respectfully requests this Honorable Court to grant rehearing and reconsider the opinion of February 20, 2017, denying the petition for writ of prohibition, and/or in the alternative that this Honorable Court clarify its opinion.

CERTIFICATE OF SERVICE

I do certify that a copy hereof has been furnished by hand delivery to the State Attorney, County Justice Center, Clearwater, Florida; The Honorable Joseph Bulone; and by electronic service to the Office of the Attorney General, Criminal Appeals Division, Tampa, FL, on March 6, 2017.

I CERTIFY that this motion complies with the font requirements of Fla. R. App. P. 3.110(l).

_____/s/_____
ALLISON MILLER, B.C.S
Fla. Bar Number: 55803, For
PUBLIC DEFENDER, SIXTH JUDICIAL CIRCUIT
County Justice Center
14250 49th Street North
Clearwater, FL 33762

_____/s/_____
JANE MCNEILL, B.C.S.
Fla. Bar Number: 923761, For
PUBLIC DEFENDER, SIXTH JUDICIAL CIRCUIT
County Justice Center
14250 49th Street North
Clearwater, FL 33762

_____/s/_____
PETER MILLS, Attorney at Law
Fla. Bar Number: 0998771, For
PUBLIC DEFENDER, TENTH JUDICIAL CIRCUIT
Polk County Courthouse
255 N. Broadway – 3rd Floor
P.O. Box 9000-PD
Bartow, FL 33831-9000
pmills@pd10.org