Filing # 49329918 E-Filed 11/28/2016 02:55:01 PM

IN THE FLORIDA SUPREME COURT
Florida Supreme Court Case No. SC16-1946
Circuit Court Case No: CRC08-26829CFANO

PATRICK ALBERT EVANS, Petitioner,

vs.

STATE OF FLORIDA, Respondents.

RECEIVED, 11/28/2016 02:58:42 PM, Clerk, Supreme Court

PETITIONER'S RESPONSE TO STATE'S RESPONSE TO EMERGENCY PETITION FOR WRIT OF PROHIBITION #2

The State of Florida makes two main points arguing in favor of this Court denying the Petitioner's Emergency Petition for Writ of Prohibition #2. First, the Respondent argues that this Court lacks jurisdiction because a writ of prohibition is not the appropriate vehicle where the issues raised could be addressed on direct appeal. Second, the Respondent argues that the unconstitutional provision in F.S. § 921.141 can be severed while leaving the statute's intent intact. Both of these arguments fail.

I. JURISDICTION

As argued in the Emergency Petition for Writ of Prohibition #2, this Court has jurisdiction. This Court has exclusive jurisdiction to review death cases. Fla.

Const. Art. V, Sec. 3(b)(1). The order sought to be reviewed raises issues having a great effect on the proper administration of the death penalty in this state and should appropriately be decided by the Florida Supreme Court. "The obvious purpose of this special grant of jurisdiction is to ensure the uniformity of death-penalty law by preventing the disagreement over controlling points of law that may arise when the district courts of appeal are the only appellate courts with mandatory appellate jurisdiction." Tillman v. State, 591 So. 2d 167, 169 (Fla.1991).

While "the order sought to be reviewed is not a final judgment imposing the death penalty and thus does not fall within the exclusive jurisdictional ambit reserved to the Florida Supreme Court... [T]he spirit of Tillman with its emphasis on the supreme court's preeminent role in the domain of death-penalty law, it would be judicially beneficial to refer the issue posed in the trial court's order to that court for immediate resolution so that trial courts in this state will have the benefit of a definitively uniform pronouncement regarding the application..." State v. Hootman, 697 So. 2d 1259, 1261 (Fla. 2d DCA 1997).

Should this Court determine that certiorari is the appropriate remedy, Petitioner also alternatively seeks certiorari review of the trial court's determination that it will, on its own motion, amend F.S. § 921.141 to allow for the death qualification of the jury, and the penalty phase at the conclusion of the

guilt/innocence phase should Petitioner be convicted as charged. Such alternative review is appropriate under the Florida Constitution which provides that, "no cause shall be dismissed because an improper remedy has been sought." Art. V, Sec. 2(a).

The Petitioner's Petition for Writ of Prohibition #2 should be granted because this is an emergency case with impending injury and there is no other appropriate and adequate legal remedy. See State v. Barati, 150 So. 3d 810, 813 (Fla. 1st DCA 2014). The Respondent's argument that a writ of prohibition is not the appropriate legal vehicle because the Petitioner "has not shown any impending injury by having a death-qualified jury," Response to Emergency Petition for Writ of Prohibition #2 ("Response") at 8, demonstrates lack of understanding of the ramifications of the ultimate punishment, a death sentence. A death sentence is not solely the execution itself but more so, the weight of living under a death sentence, knowing that at any moment the Governor could issue a warrant for your execution, the quality of life on death row, the list goes on... Seemingly the best way to analogize the situation is to compare it to someone awaiting the news from a doctor having been told that he has cancer and it may be terminal.

The Petitioner has already been convicted once illegally and sentenced to death. As such, when the State argues that the Petitioner "cannot show the likelihood of any injury, much less an impending one," is to ignore that fact. The

Petitioner spent several years living on death row, awaiting his execution prior to relief being granted him by this Court.

And while judicial economy should not be argued to the detriment of a defendant's due process rights, the cost incurred at the expense of the taxpayers of the state of Florida in trying a capital case is astronomical. The Respondent here is essentially arguing that it should be done for the second time in Petitioner's case with perhaps invited error. To do so would be imprudent. This Court knows from experience that it spends a disproportionate amount of time and effort handling capital cases when compared with the actual number of cases.

It is well established that death qualified jurors are more likely to convict in the guilt/innocence phase than their peers who indicated they could not impose a death sentence for whatever reason. Therefore, to allow for the death qualification of the jury deciding the Petitioner's guilt based on law authored by the trial court is injurious to the Petitioner and the only available remedy is prohibition. A recent quantitative study of Witherspoon strikes published in, "The Eighth Amendment's Lost Jurors: Death Qualification and Evolving Standards of Decency," by Aliza Plener Cover, found at 92 Ind. L.J. ___(forthcoming 2016), found that of, "1445 potential jurors questioned [in Louisiana], 325 individuals (22.5%) were excluded from service on the basis of their opposition to the death penalty." Similarly, here, by allowing for the death qualification of the jury where there is no constitutional

mechanism by which someone could be sentenced to death, nearly 25% of potential jurors are being eliminated to decide the Petitioner's guilt or innocence.

The Respondent's position is that even if the trial court's actions in this case are erroneous, the Petitioner should wait to address those issues on direct appeal. A direct appeal comes before the reviewing court with the "presumption of correctness." See Carpenter v. State, 785 So.2d 1182 (Fla. 2001), wherein this Court held that the, "...trial court has wide discretion in instructing the jury, and the court's decision regarding the charge to the jury is reviewed with a presumption of correctness on appeal. Kearse v. State, 662 So. 2d 677, 682 (Fla. 1995)." The trial court authoring its own law in an effort to ensure that capital punishment is an available penalty for the defendant should not come before the reviewing court with a presumption of correctness standard. Furthermore, this Court in Carpenter also notes,

> We also note, however, that is preferable that a standard jury instruction be given if it adequately explains the law, see, e.g., McGuire v. State, 639 So. 2d 1043, 1047 (Fla. 5th DCA 1994), and giving a non-standard jury instruction that misleads the jury is reversible error. See, e.g., Doyle v. State, 483 So. 2d 89, 90 (Fla. 4th DCA 1986). Id. at 1200.

Presumably neither side is attempting to argue Judge Joseph Bulone in the instant case is relying on standard jury instructions. It seems to be without dispute that Judge Bulone is authoring his own law based on how he interprets this Court's decision in Hurst v. State, ___ So. 3d ___ , 2016 WL 60336978 (Fla. Oct. 14, 2016),

and writing his own jury instructions based on the law as he has written it. To do so is misleading the jury regarding the law. There is no constitutional provision for the application of the death penalty in Florida, which this Court addressed in Perry v. State, ___ So. 3d ___ , 2016 WL 6036982 (Fla. Oct. 14, 2016) when it wrote, "The Act, however, is unconstitutional because it requires that only ten jurors recommend death as opposed to the constitutionally required unanimous, twelve-member jury. Accordingly, it cannot be applied to pending prosecutions." Id. If this Court permits the trial court to capital qualify the jury in the Petitioner's case, the judge will be giving a non-standard jury instruction that misleads the jury.

The Respondent concedes that "while prohibition is generally available only to prevent courts from acting when there is no jurisdiction to act, it is also appropriately used for immediate review of a denial of a motion to disqualify a trial judge." Response at 3. First, the Petitioner argues that the trial court does not have jurisdiction to death qualify a jury based on law the trial court has written, empanel that jury and then proceed to penalty phase should the Petitioner be convicted, again under law authored by the trial court. As such, prohibition is available to the Petitioner.

It is clear there is no statutory authority for Judge Bulone to death qualify this jury. The Respondent attempts to use State v. Jones, ___ So. 3d ___ , 2016 WL 4197854 (Fla. 2d DCA 2016), as legal authority for the trial court's actions.

> The Second District held that trial judges lacked authority to determine that the State could not prosecute capital cases as death penalty cases, and courts are without authority to make pretrial determinations that death is not an available sentence." Response at 7.

Interestingly enough, the history of Larry Darnell Perry and William Theodore Woodward's cases includes the trial courts in both cases granting the defendants' respective motions to strike the State's notice of intent to seek the death penalty. Additionally in Mr. Woodward's case the trial court refused to death qualify the jury. In both cases, the State filed petitions for writ of prohibition to the Fifth District Court of Appeal. The Fifth District consolidated the cases.

"The Fifth District first determined that prohibition is appropriate when a trial court strikes a notice of intent to seek the death penalty or refuses to death qualify a jury in a capital case. Id." Perry v. State, ___ So. 3d ___ , 2016 WL 6036982 at 7 of Florida Supreme Court opinion No. SC16-547. The Petitioner would argue that the inverse is true here too, where the trial court intends to death qualify a jury based on an unconstitutional statute and a law that the trial court has authored.

Ultimately the Fifth District held that the Act did apply to pending prosecutions, overruling the trial courts' decisions, and certified two questions of great public importance to the Florida Supreme Court, one of those questions being, "If not, does Chapter 2016-13, Laws of Florida, apply to pending

prosecutions for capital offenses that occurred prior to its effective date?" Id. at 2. In answering that question in the negative, the Florida Supreme Court writes, "The Act, however, is unconstitutional because it requires that only ten jurors recommend death as opposed to the constitutionally required unanimous, twelve-member jury. **Accordingly, it cannot be applied to pending prosecutions.**" (Emphasis added). Id. at 21.

As such, arguably the Florida Supreme Court's decision in Perry overturned the Firth District's decision overturning the trial court's decision. The State's reliance on State v. Jones, ___ So. 3d ___, 2016 WL 4197854 (Fla. 2d DCA 2016) in its Response therefore seems misguided. Also of note, the petition for writ of prohibition filed in Jones on behalf of the State of Florida was filed before the "Act" was even enacted.

Second, the Respondent agrees a petition for writ of prohibition is appropriate where the trial court denied a motion to disqualify itself. Presumably the Respondent's argument then is that a petition for prohibition is only appropriate for the State's use because the issues raised, as it relates to a petition filed after a judge fails to disqualify himself, could also be raised by the defendant on direct appeal. Prohibition is available as a remedy to both sides.

As argued in the Petitioner's Petition for Writ of Prohibition #2, there are 67 counties in the state of Florida, 20 judicial circuits and hundreds of circuit judges.

It simply cannot be this Court's intent for each circuit judge to write his own law according to that judge's interpretation of the Court's decisions in Perry and Hurst. To allow for such chaos is the essence of what the Eighth Amendment to the United States Constitution aims to prevent: the arbitrary and capricious application of the death penalty. As such, where trial courts are attempting to do so, a petition for writ of prohibition to the Florida Supreme Court is appropriate and this Court has jurisdiction.

II. SEVERABIILITY

Notwithstanding this Court's holding in Perry that the Act cannot apply to pending prosecutions, Respondent suggests that the doctrine of severability can be applied to the Act in an effort to allow the State to seek the death penalty. The test for severability requires that, without the unconstitutional portion of the statute, a full and complete statute remains such that the intent of the legislature can be effectuated.

Without conceding that the Act can apply to this pending case at all given this Court's holding in Perry, if the 10-2 portion of the Act is severed out, there is not a statute remaining that can be applied to impose the death penalty. The jury must engage in a step by step process before reaching a decision of life or death. First, the jury must determine whether the state has proven the existence of at least one aggravating factor beyond a reasonable doubt. If the jury finds the existence

of at least one aggravating factor, then the jury must determine whether sufficient aggravating factors exist, and then whether the aggravating factors outweigh the mitigating circumstances found to exist. Based on those considerations, the jury is then to determine whether the defendant should be sentenced to life or death. The last step in this process, under the Act as it currently exists, is that at least 10 jurors must determine that the defendant be sentenced to death in order to make that recommendation to the court. Without this last step in the process, the Act is incomplete and a death sentence cannot be recommended. As such, if the doctrine of severability could be applied to the Act, the only remaining constitutional penalty upon a conviction for murder in the first degree is life in prison without parole.

The Respondent argues that nothing has to be added to the statute in order to constitutionally apply it to the pending case. That argument ignores, however, that without the final step in the process, there is no statutory authorization for imposition of the death penalty. Severance is authorized only when "an act complete in itself remains after the invalid provisions are stricken." State ex rel. Boyd v. Green, 355 So. 2d 789, 794 (Fla. 1978). Striking the 10-2 provision of the statute leaves an incomplete statute that does not address what recommendation the jury must make to the judge in order to authorize the death penalty.

It is improper for the judiciary branch to write law based on speculation of what the Florida Legislature may do in response to the recent opinions of the court. The Legislature's response to Hurst v. State, 136 S. Ct. 616 (S. Ct. 2016), was, in many ways, much broader than what was required by the United States Supreme Court's opinion, and in other ways, it did not go far enough. It is impossible to speculate what the response will be this time. The final bill that was passed in March was the product of much debate and ultimately compromise. In the next session, the Legislature may determine that provisions of the statute that granted more protections to the defendant should now be rolled back given the requirement of unanimity. Perhaps the Legislature will actually try to pass a constitutional statute that truly narrows the class of defendants that are potentially subject to the death penalty. Perhaps the Legislature will determine that is finally time to end the practice of the death penalty altogether. For each trial judge in each of Florida's 67 different counties to write a version of the law based on what the legislature might do in the future is a clear violation of the Article II, Section 3 of the Florida Constitution separation of powers doctrine and of the 8th Amendment to the United States Constitution.

The Respondent cites to State v. Ford, 626 So. 2d 1338 (Fla. 1993), for the proposition that the trial court can implement a procedure not expressly authorized by law or the Court if it is necessary to further an important public policy interest.

At issue in the Ford case was the procedure the trial court used for allowing child witnesses to a murder to testify by closed-circuit television. The Court held that while there is an important public policy interest in protecting child witnesses and that it is within the inherent power of the court to do so, the procedures employed by the trial court violated the defendant's constitutional rights. Id.

There is a vast difference between a trial court exercising its inherent authority to implement procedures to effectuate an important public policy interest and a trial court writing its own law to effectuate what it believes the legislature might do in the future. Implementing procedure is one thing; writing law is another, and to allow the trial court to do so would clearly violate the separation of powers doctrine. Further, the Respondent fails to address what important public policy interest is at stake, but if what they are suggesting is that there is an important public policy interest in killing its citizens, there can be no greater public policy interest than in ensuring that if the government is seeking the ultimate punishment, it must be required to do so in a constitutional and statutorily authorized manner, neither of which can happen under the current statute.

This Court in Perry very clearly stated that the Act is unconstitutional because it does not require a unanimous jury verdict to impose death, and in reaching that conclusion, as was pointed out in the original Petition, the Court considered the principles of statutory construction and interpretation. And, after

doing so, this Court said it could NOT rewrite the Act to make it constitutional, and surely what this Court has said it cannot do, the trial court cannot do either.

CONCLUSION

The Petitioner fundamentally cannot be afforded the Due Process right to a fair trial when the trial court, on its own motion, is writing law to attempt to "fix" an unconstitutional Act so that the death penalty might be imposed. There cannot be a fair trial when there is a not a constitutional law in place to follow. As such, for the all reasons argued in the Emergency Petition for Writ of Prohibition #2 and this Response, Petitioner is requesting this Honorable Court enter its Order granting this Petition and restraining Judge Bulone from death qualifying a jury to try Petitioner.

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 via facsimile delivery (813-281-5500) to the Office of the Attorney General, Criminal Appeals Division, Tampa, FL on November 28, 2016.

I CERTIFY that this petition complies with the font requirements of FLA. R. APP. P. 9.100(l).

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