IN THE THIRTEENTH JUDICIAL CIRCUIT COURT
FOR HILLSBOROUGH COUNTY, FLORIDA
Criminal Justice and Trial Division

STATE OF FLORIDA,

CASE NO: 10-CF-018429

v.

DIVISION: TD-3 (I)

MICHAEL EDWARD KEETLEY,
Defendant.
_____/

ORDER GRANTING
DEFENDANT'S MOTION TO DECLARE
FLORIDA STATUTE 921.141 UNCONSTITUTIONAL

THIS MATTER is before the Court on defendant Michael Keetley's Motion to Declare Florida Statute 921.141 Unconstitutional, filed by counsel on May 16, 2016. Mr. Keetley filed attachments to the motion on May 18, 2016, and June 7, 2016. The State filed its response in opposition on May 27, 2016, and a supplemental response on June 3, 2016. On June 2, 2016, the Court conducted a hearing on the matter. After reviewing the motion and accompanying attachments, the State's responses, the court file, and the record, and having considered the arguments made at the hearing, the Court finds as follows:

Background

The State charged Mr. Keetley by indictment with two counts of first degree murder and four counts of attempted first degree murder based on an incident alleged to have occurred on November 25, 2010. On February 7, 2011, the State filed its Notice of Intent to Seek the Death Penalty. On March 29, 2016, the State filed an Amended Notice of Intent to Seek the Death Penalty, alleging the aggravating factors that the State believes it can prove beyond a reasonable doubt.

Mr. Keetley moves the Court to declare Florida's death penalty sentencing scheme, codified at § 921.141, Fla. Stat. (2016), unconstitutional because (1) it permits a jury to make non-unanimous factual findings justifying a death sentence in violation of the Sixth Amendment, and (2) it allows for non-unanimous death sentencing verdicts in violation of the Eighth Amendment. On the other hand, the State argues that § 921.141 complies with prevailing Sixth and Eighth Amendment jurisprudence and urges the Court to deny Mr. Keetley's motion.

Discussion

It is a fundamental principal of our justice system and a well-settled mandate of the Sixth Amendment that "any fact that 'expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict' is an 'element' that must be submitted to a jury." *Hurst*, 136 S. Ct. 616, 621 (2016) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000)). *Hurst* emphasized that this principal applies equally to death penalty sentencing schemes, explaining that "the Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." *Id.* at 619. That jury finding only meets constitutional standards if it is made unanimously, based on proof beyond a reasonable doubt. *See Apprendi*, 530 U.S. 466 at 498 (noting that charges against the accused, and the corresponding maximum exposure he faces, must be determined "*beyond a reasonable doubt by the unanimous vote of 12 of his fellow citizens*" (emphasis in original)) (Scalia, J., concurring). "[T]he fundamental meaning of the Sixth Amendment's guarantee of the jury trial is that all facts essential to the imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt." *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring).

In *Hurst*, the Supreme Court determined that Florida's capital sentencing scheme, under which an advisory jury made a recommendation to the judge, and the judge made the critical findings needed for the imposition of the death sentence, violated the Sixth Amendment right to a jury trial. 136 S. Ct. at 621-22. The explicit holding of *Hurst* was more narrowly defined: Florida's sentencing scheme was unconstitutional because it required the judge alone to find the existence of an aggravating circumstance. *Id.* at 624. In response to *Hurst*, the Florida legislature passed Chapter 2016-13, Laws of Florida (§ 921.141, Fla. Stat. (2016)), effective March 7, 2016, in an attempt to rectify the constitutional infirmities in Florida's death penalty scheme as identified by the Supreme Court.

Mr. Keetley maintains that the newly enacted version of § 921.141 does not comprehensively remedy the Sixth Amendment concerns raised in *Hurst*. Though the statute now requires a jury to find the presence of at least one aggravating circumstance beyond a reasonable doubt in seeming compliance with the black letter holding of the case, he maintains that it still runs afoul of *Hurst* and its predecessors because it allows a non-unanimous jury finding pursuant to an unstated burden of proof. In addition, Mr. Keetley argues that the statute violates the Eighth Amendment's prohibition against cruel and unusual punishment because it is contrary to the national consensus against non-unanimous sentencing in capital cases. Because the Court agrees that the newly enacted statute is irreconcilable with the Sixth Amendment, it does not reach Mr. Keetley's Eighth Amendment concerns.

Under Florida's previous death penalty sentencing scheme, the maximum penalty a capital defendant could receive on the basis of a conviction alone was life imprisonment. *Hurst*, 136 S. Ct. at 617. Capital punishment could be imposed only if an additional sentencing

proceeding resulted in findings by the court that a defendant could be sentenced to death. *Id.* The pertinent portions of the statutory scheme read:

> (2) Advisory sentence by the jury. --After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:
> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
> (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
> (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.
> (3) Findings in support of sentence of death. --Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, *but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:*
> *(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and*
> *(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.*
> In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

§ 921.141(2), (3), Fla. Stat. (2015) (emphasis added).

The Supreme Court in *Hurst* took issue with the fact that, under this statute, "Florida [did] not require the jury to make the critical findings necessary to impose the death penalty. Rather, Florida require[d] a judge to find these facts." 136 S. Ct. at 622. It emphasized that though the jury recommended a sentence, "it [did] not make specific factual findings with regard to the existence of mitigating or aggravating circumstances." *Id.*

In the aftermath of *Hurst*, the Florida Legislature amended select portions of § 921.141. The new statute provides, in relevant part, as follows:

> (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 at least 10 jurors determine that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of death. If fewer than 10 jurors 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.

§ 921.141(2), Fla. Stat. (2016) (emphasis added).

It is apparent that the Legislature responded to the overt holding of *Hurst* that a jury, and not a judge, must find the existence of an aggravating circumstance necessary for imposition of the death penalty. *See Hurst*, 136 S. Ct. at 624. Still, the Court finds the statute constitutionally infirm in light of the spirit of *Hurst* and the express holdings of its predecessors. It is uncontroverted that *Ring*, as clarified by *Hurst*, requires a jury to hear *all* facts necessary to sentence a defendant to death. *See Hurst*, 136 S. Ct. at 621. The facts necessary to sentence a defendant to death under the new statute (in addition to the existence of at least one aggravator) are that sufficient aggravators exist and that they outweigh the mitigating circumstances.[1] *See* § 921.141(2)(b)2.a., b., Fla. Stat. (2016). Without these findings, the death penalty cannot be imposed. "It is clear, then that [these] factual finding[s] expose[] the defendant to a greater punishment than he would otherwise receive: death, as opposed to life without parole . . . [A] finding that has such an effect must be made by a jury." *Woodward v. Alabama*, 134 S. Ct. 405, 410-11 (2013) (Sotomayor, J., dissenting). Under a plain reading of *Hurst* and the statute, the jury is required to find those factors unanimously[2] and beyond a reasonable doubt.

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[1] The Court recognizes that the statute also directs the jury to consider whether death should be imposed. *See* § 921.141(2)(b)2.c., Fla. Stat. (2016). But the Court does not construe this finding as a *factual* finding subject to the requirements of *Apprendi* and its progeny. Rather, it reflects the jury's ability to exercise its mercy and leniency to pardon a defendant from the ultimate punishment of death even where it finds that the requisite facts for its imposition exist. Accordingly, this factor is not subject to a Sixth Amendment analysis.

[2] The Florida Constitution requires that in all criminal cases "the verdict of the jury must be unanimous." *Jones v. State*, 92 So. 2d 261, 261 (Fla. 1957). The Sixth Amendment requires the same. It is true that in *Apodaca v. Oregon*, 406 U.S. 404, 410-11 (1972), a splintered Supreme Court determined that though the Sixth Amendment requires unanimity in federal cases, a supermajority rule satisfies the Fourteenth Amendment as far as the individual states are concerned. But *Apprendi* and its successor *Blakely* indicate that the Sixth Amendment does in fact necessitate unanimous jury findings. *See Apprendi*, 530 U.S. at 498 (Scalia, J., concurring); *Blakely*, 542 U.S. 296,

The Court finds the State's arguments to the contrary unavailing. The State argues that the requirement to find at least one aggravating factor, unanimously and beyond a reasonable doubt, is sufficient to comport with *Ring's* requirement. But it defies logic, and the dictates of *Ring* through *Hurst*, to have the jury find *one* of the prerequisites unanimously and beyond a reasonable doubt (that at least one aggravating factor exists), but not the other *two* prerequisites (that sufficient aggravators exist and that they outweigh the mitigating circumstances). *Hurst* specifically stated "[t]he Sixth Amendment requires a jury, not a judge, to find *each fact necessary* to impose a sentence of death." *Hurst*, 136 S. Ct. at 619. (emphasis added).

The State also argues that the process of weighing the aggravating factors and mitigating circumstances is not a "factual finding" or "element" subject to the requirements of *Apprendi, Ring, Hurst,* and the Sixth Amendment. However, the newly enacted statute clearly and unambiguously does not relieve the jury of fact finding after the determination that "at least one aggravating factor exists beyond a reasonable doubt," § 921.141(2)(a). It is clearly instructed to further decide (1) if sufficient aggravating factors exist *and* (2) if the aggravating factors outweigh the mitigating circumstances. *See* § 921.141(2)(b)2.a., b. Relieving the jury of unanimously making these finding beyond a reasonable doubt puts the decision making right back where *Hurst* said it did not belong – with the judge.[3]

The State cites *Kansas v. Carr*, 136 S. Ct. 633 (2016), (decided ten days after *Hurst*) in support of the principle that the weighing process described above is not a "factual finding"

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301 (2004). Further, on its face, *Apodaca* applies to verdicts in non-capital cases. 406 U.S. at 404. For these reasons, *Apodaca* is not controlling.

[3] Though Mr. Keetley does not specifically raise this issue, the Court writes to note that it finds potentially problematic the provisions of the statute that direct the jury to "make a recommendation to the court" regarding sentencing and instructing the court to "consider[] each aggravating factor found by the jury and all mitigating circumstances" to determine whether it should abide the jury's death recommendation or impose a sentence of life imprisonment. *See* § 921.141(2)(b)2., (3)(a)2, Fla. Stat. (2016). The *Hurst* court observed that "[a] jury's mere recommendation is not enough." *But see Spaziano v. Florida*, 468 U.S. 447, 457-65 (1984) (holding that jury sentencing is not constitutionally required in capital cases); *Hildwin v. Florida*, 490 U.S. 638, 639-40 (1989) (reaffirming the principle espoused in *Spaziano*) (both overturned by *Hurst* on other grounds).

making the defendant death eligible. In that case, the Supreme Court reversed the Kansas Supreme Court's judgment vacating death sentences based upon the lack of a requirement to affirmatively instruct the jury that mitigating factors need not be proven beyond a reasonable doubt. *Id.* at 642-44. Interestingly, though, the Court specifically found that the "[jury] instruction makes clear that both the existence of aggravating circumstances *and the conclusion that they outweigh mitigating circumstances* must be proved beyond a reasonable doubt; mitigating circumstances themselves, on the other hand, must merely be 'found to exist.'" *Id.* at 643 (emphasis added). *Carr* certainly does not stand for the proposition for which the State argues that it does. Rather, it supports the conclusion demanded by the Court's reading of the Florida Statue – that it *is* a factual determination to be made by a jury, not a judge. *See Woodward*, 134 S. Ct. at 410-11 (Sotomayor, J., dissenting); *State v. Ring*, 65 P.3d 915, 943 (Ariz. 2003) ("Neither a judge, under the superseded statutes, nor the jury, under the new statutes, can impose the death penalty unless that entity concludes that the mitigating factors are not sufficiently substantial to call for leniency . . . The process involved in determining whether mitigating factors prohibit imposing the death penalty plays an important part in Arizona's capital sentencing scheme."); *State v. Whitfield*, 107 S.W.3d 253, 257-58 (Mo. 2003) (asserting that, under Missouri's death sentencing process, findings that all of the aggravating factors warrant imposition of the death penalty and that the evidence in aggravation outweighs the evidence in mitigation are factual findings the Sixth Amendment requires a jury to make) (en banc). *See also* Ark. Code Ann. § 5-4-603; Kan. Stat. Ann. § 21-6617(e); Ohio Rev. Code Ann. § 2929.03(D); Tenn. Code Ann. § 39-13-204(g)(1)B; Utah Code Ann. § 76-3-207(5)(b); Wash Rev. Code § 10.95.060(4) (all requiring the jury to unanimously find beyond a reasonable doubt

that the aggravating factors outweigh the mitigating factors). The same holds true with respect to the required finding that sufficient aggravating factors exist.

Conclusion

The Sixth Amendment unequivocally demands that a jury unanimously find the existence of any fact that subjects a defendant to a sentence in excess of that statutorily authorized by a guilty verdict beyond a reasonable doubt. Florida's existing death penalty sentencing scheme is incongruous with this decree. In amending § 921.141, the Florida Legislature appears to have construed *Hurst* exceedingly narrowly and incorporated only its specific holding that the jury must find the existence of at least one aggravating circumstance beyond a reasonable doubt. But the statute still permits the jury to make findings requisite to the imposition of death (in excess of the statutory maximum of life imprisonment based on a conviction alone). Antithetical to well-founded Sixth Amendment principles, this provision renders the statute patently unconstitutional.

It is therefore **ORDERED AND ADJUDGED** that Defendant's Motion to Declare Florida Statute 921.141 Unconstitutional is **GRANTED**.

DONE AND ORDERED in Chambers in Hillsborough County, Florida, this _____ day of June, 2016.

Electronically Conformed 6/9/2016

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SAMANTHA L. WARD, Circuit Judge

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