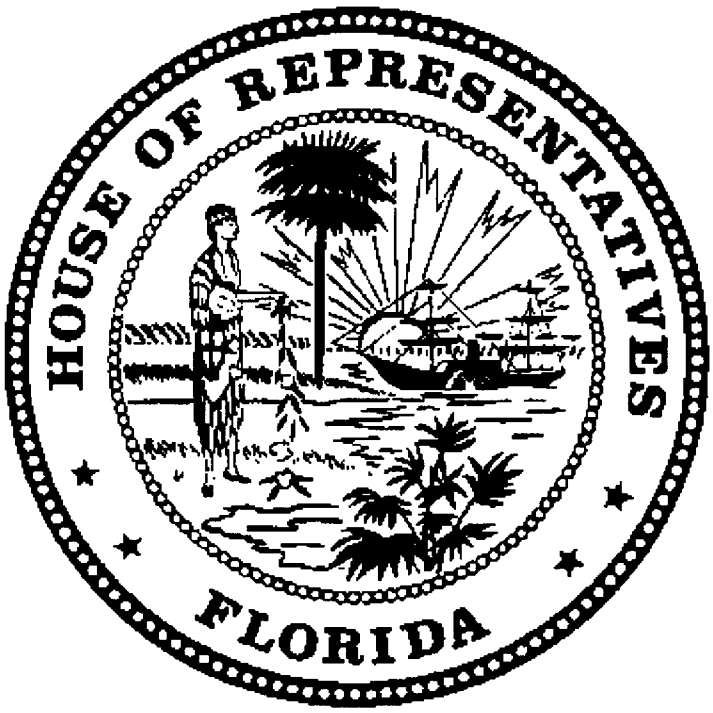

Judiciary Committee

Tuesday, January 10, 2017
3:30 PM
404 HOB

Meeting Packet

Richard Corcoran
Speaker

Chris Sprowls
Chair

Capital Punishment

Hurst v. Florida

Supreme Court of the United States

October 13, 2015, Argued; January 12, 2016, Decided

No. 14-7505

Reporter
136 S. Ct. 616 *; 193 L. Ed. 2d 504 **; 2016 U.S. LEXIS 619 ***; 84 U.S.L.W. 4032; 25 Fla. L. Weekly Fed. S 577

TIMOTHY LEE HURST, Petitioner v. FLORIDA

Notice: The LEXIS pagination of this document is subject to change pending release of the final published version.

Subsequent History: On remand at, Remanded by *Hurst v. State, 2016 Fla. LEXIS 2305 (Fla., Oct. 14, 2016)*

Prior History: [***1] ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Hurst v. State, 147 So. 3d 435, 2014 Fla. LEXIS 1461 (Fla., 2014)

Disposition: Reversed and remanded.

Core Terms

Ring, sentence, murder, recommendation, aggravating circumstances, jury's, death sentence, death penalty, capital sentencing, aggravating factor, mitigating, overruling, robbery, requires, trial court, per curiam, aggravating, restaurant, advisory, sentencing judge, impose sentence, decisions, harmless, factors, felony, cases

Case Summary

Overview

HOLDINGS: [1]-Defendant's death sentence violated the *Sixth Amendment* where the maximum punishment he could have received without any judge-made findings was life in prison without parole, a judge had increased his authorized punishment based on her own factfinding, and the existence of an advisory jury verdict did not impact whether *Fla. Stat. § 921.141(3)* required a judge to make the critical findings necessary to impose the death penalty; [2]-*Spaziano v. Florida, 468 U.S. 447 (1984)*, and *Hildwin v. Florida, 490 U.S. 638 (1989)*, were overruled to the extent they allowed a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that was necessary for imposition of the death penalty; [3]-The State's harmless error assertion was not considered as there was no reason to depart from the usual practice of leaving it for the state court's consideration.

Outcome

Judgment reversed; case remanded. 8-1 decision, 1 concurrence, 1 dissent.

LexisNexis® Headnotes

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Jury Trial

Criminal Law & Procedure > Sentencing > Capital Punishment > Bifurcated Trials

HN1 Florida's sentencing scheme requiring a judge to hold a separate hearing and determine whether sufficient aggravating circumstances existed to justify imposing the death penalty is unconstitutional. The *Sixth Amendment* requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough.

Criminal Law & Procedure > Sentencing > Capital Punishment > Bifurcated Trials

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Statutory Maximums

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Jury Trial

HN2 The *Sixth Amendment* provides that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt. The Apprendi rule holds that any fact that exposes 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. In the years since adoption of the Apprendi rule, it has been applied to instances involving plea bargains, sentencing guidelines, criminal fines, mandatory minimums, and capital punishment.

Criminal Law & Procedure > Sentencing > Capital Punishment > Bifurcated Trials

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Statutory Maximums

HN3 Florida does not require the jury to make the critical findings necessary to impose the death penalty. Rather, Florida requires a judge to find these facts. *Fla. Stat. § 921.141(3)*. Although Florida incorporates an advisory jury verdict that Arizona lacked, judicial precedent previously made clear that this distinction is immaterial: It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona.

Governments > Courts > Judicial Precedent

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Statutory Maximums

HN4 Although the doctrine of stare decisis is of fundamental importance to the rule of law, the United States Supreme Court's precedents are not sacrosanct. The Supreme Court has overruled prior decisions where the necessity and propriety of doing so has been established. And in the Apprendi context, stare decisis does not compel adherence to a decision whose underpinnings have been eroded by subsequent developments of constitutional law.

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Statutory Maximums

Criminal Law & Procedure > Sentencing > Capital Punishment > Bifurcated Trials

HN5 Time and subsequent cases have washed away the logic of *Spaziano v. Florida, 468 U.S. 447 (1984)*, and *Hildwin v. Florida, 490 U.S. 638 (1989)*. The decisions are overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty.

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Harmless Error

HN6 The United States Supreme Court normally leaves it to state courts to consider whether an error is harmless.

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Statutory Maximums

Criminal Law & Procedure > Sentencing > Capital Punishment > Bifurcated Trials

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Jury Trial

HN7 The *Sixth Amendment* protects a defendant's right to an impartial jury. This right requires Florida to base a defendant's death sentence on a jury's verdict, not a judge's factfinding. Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional.

Lawyers' Edition Display

Decision

[**504] Florida's sentencing scheme, requiring judge to determine at separate hearing whether sufficient aggravating circumstances existed to justify imposing death penalty, violated *Federal Constitution's Sixth Amendment*, which required jury to find each fact necessary to impose death penalty.

Summary

Overview: HOLDINGS: [1]-Defendant's death sentence violated the *Sixth Amendment* where the maximum punishment he could have received without any judge-made findings was life in prison without parole, a judge had increased his authorized punishment based on her own factfinding, and the existence of an advisory jury verdict did not impact whether *Fla. Stat. § 921.141(3)*

required a judge to make the critical findings necessary to impose the death penalty; [2]-*Spaziano v. Florida, 468 U.S. 447, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984)*, and *Hildwin v. Florida, 490 U.S. 638, 109 S. Ct. 2055, 104 L. Ed. 2d 728 (1989)*, were overruled to the extent they allowed a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that was necessary for imposition of the death penalty; [3]-The State's harmless error assertion was not considered as there was no reason to depart from the usual practice of leaving it for the state court's consideration.

Outcome: Judgment reversed; case remanded. 8-1 decision, 1 concurrence, 1 dissent.

Headnotes

JURY §33.5 > DEATH PENALTY -- FACTFINDING -- AGGRAVATING CIRCUMSTANCES > Headnote:
LEdHN[1] [1]

Florida's sentencing scheme requiring a judge to hold a separate hearing and determine whether sufficient aggravating circumstances existed to justify imposing the death penalty is unconstitutional. The *Sixth Amendment* requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough. (Sotomayor, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Thomas, Ginsburg, and Kagan, JJ.)

CONSTITUTIONAL LAW §840.9 CONSTITUTIONAL LAW §848 CONSTITUTIONAL LAW §848.7 > CRIME -- STANDARD OF PROOF -- JURY -- CAPITAL PUNISHMENT > Headnote:
LEdHN[2] [2]

The *Sixth Amendment* provides that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. This right, in conjunction with the *due process clause*, requires that each element of a crime be proved to a jury beyond a reasonable doubt. The Apprendi rule holds that any fact that exposes 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. In the years since adoption of the Apprendi rule, it has been applied to instances involving plea bargains, sentencing guidelines, criminal fines, mandatory minimums, and capital punishment. (Sotomayor, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Thomas, Ginsburg, and Kagan, JJ.)

JURY §33.5 > DEATH PENALTY -- FACTFINDING -- AGGRAVATING OR MITIGATING CIRCUMSTANCES > Headnote:
LEdHN[3] [3]

Florida does not require the jury to make the critical findings necessary to impose the death penalty. Rather, Florida requires a judge to find these facts. *Fla. Stat. § 921.141(3)*. Although Florida incorporates an advisory jury verdict that Arizona lacked, judicial precedent previously made clear that this distinction is immaterial: It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona. (Sotomayor, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Thomas, Ginsburg, and Kagan, JJ.)

COURTS §776 > PRIOR DECISIONS -- OVERRULING > Headnote:
LEdHN[4] [4]

Although the doctrine of stare decisis is of fundamental importance to the rule of law, the United States Supreme Court's precedents are not sacrosanct. The Supreme Court has overruled prior decisions where the necessity and propriety of doing so has been established. And in the Apprendi context, stare decisis does not compel adherence to a decision whose underpinnings have been eroded by subsequent developments of constitutional law. (Sotomayor, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Thomas, Ginsburg, and Kagan, JJ.)

CRIMINAL LAW §93.7JURY §33.5 > DEATH PENALTY -- AGGRAVATING CIRCUMSTANCES -- OVERRULING > Headnote:
LEdHN[5] [5]

Time and subsequent cases have washed away the logic of *Spaziano v. Florida, 468 U.S. 447, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984)*, and *Hildwin v. Florida, 490 U.S. 638, 109 S. Ct. 2055, 104 L. Ed. 2d 728 (1989)*. The decisions are overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty. (Sotomayor, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Thomas, Ginsburg, and Kagan, JJ.)

APPEAL §1692.2 > HARMLESS ERROR -- CONSIDERATION BY STATE COURT > Headnote: ***LEdHN[6]*** [6]

The United States Supreme Court normally leaves it to state courts to consider whether an error is harmless. (Sotomayor, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Thomas, Ginsburg, and Kagan, JJ.)

JURY §33.5 > DEATH SENTENCE -- FACTFINDING -- AGGRAVATING CIRCUMSTANCES > Headnote: ***LEdHN[7]*** [7]

The *Sixth Amendment* protects a defendant's right to an impartial jury. This right requires Florida to base a defendant's death sentence on a jury's verdict, not a judge's factfinding. Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional. (Sotomayor, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Thomas, Ginsburg, and Kagan, JJ.)

Syllabus

[**507]

[*617] Under Florida law, the maximum sentence a capital felon may receive on the basis of a conviction alone is life imprisonment. He may be sentenced to death, but only if an additional sentencing proceeding "results in findings by the court that such person shall be punished by death." *Fla. Stat. §775.082(1)*. In that proceeding, the sentencing judge first conducts an evidentiary hearing before a jury. *§921.141(1)*. Next, the jury, by majority vote, renders an "advisory sentence." *§921.141(2)*. Notwithstanding that recommendation, the court must independently find and weigh the aggravating and mitigating circumstances before entering a sentence of life or death. *§921.141(3)*.

A Florida jury convicted petitioner Timothy Hurst of first-degree murder for killing a co-worker and recommended the death penalty. The court sentenced Hurst to death, but he was granted a new sentencing hearing on appeal. At resentencing, the jury again recommended death, and the judge again found the facts necessary to sentence Hurst to death. The Florida Supreme Court affirmed, rejecting Hurst's argument that his sentence violated the *Sixth Amendment* in light of *Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556*, in which this Court found unconstitutional an [***2] Arizona capital sentencing scheme that permitted a judge rather than the jury to find the facts necessary to sentence a defendant to death.

Held: Florida's capital sentencing scheme violates the *Sixth Amendment* in light of *Ring*. *Pp. - , 193 L. Ed. 2d, at 510-514*.

(a) Any fact that "expose[s] the defendant to a greater punishment than that [*618] authorized by the jury's guilty verdict" is an "element" that must be submitted to a jury. *Apprendi v. New Jersey, 530 U.S. 466, 494, 120 S. Ct. 2348, 147 L. Ed. 2d 435*. Applying *Apprendi* to the capital punishment context, the *Ring* Court had little difficulty concluding that an Arizona judge's independent factfinding exposed Ring to a punishment greater than the jury's guilty verdict authorized. *536 U.S., at 604, 120 S. Ct. 2348, 147 L. Ed. 2d 435*. *Ring*'s analysis applies equally here. Florida requires not the jury but a judge to make the critical findings necessary to impose the death penalty. That Florida provides an advisory jury is immaterial. See *Walton v. Arizona, 497 U.S. 639, 648, 110 S. Ct. 3047, 111 L. Ed. 2d 511*. As with Ring, Hurst had the maximum authorized punishment he could receive increased by a judge's own factfinding. *Pp. - , 193 L. Ed. 2d, at 510-511*.

(b) Florida's counterarguments are rejected. *Pp. - , 193 L. Ed. 2d, at 511-514*.

(1) In arguing that the jury's recommendation necessarily included an aggravating circumstance finding, Florida fails to appreciate the judge's central and singular role under Florida law, which makes [***3] the court's findings necessary to impose death and makes the jury's function advisory only. The State cannot now treat the jury's advisory recommendation as the necessary factual finding required by *Ring*. *Pp. - , 193 L. Ed. 2d, at 511-512*.

(2) Florida's reliance on *Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403*, is misplaced. There, this Court stated that under *Apprendi*, a judge may impose any sentence authorized "on the basis of the facts . . . admitted by the defendant," *542 U.S., at 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403*. Florida alleges that Hurst's counsel admitted the existence of a robbery, but *Blakely* applied *Apprendi* to facts admitted in a guilty plea, in which the defendant necessarily waived his right to a jury trial, while Florida has not explained how Hurst's alleged admissions accomplished a similar waiver. In any event, Hurst never admitted to either aggravating circumstance alleged by the State. *Pp. - , 193 L. Ed. 2d, at 512*.

(3) That this Court upheld Florida's capital sentencing scheme in *Hildwin v. Florida, 490 U.S. 638, 109 [**508]*

S. Ct. 2055, 104 L. Ed. 2d 728, and Spaziano v. Florida, 468 U.S. 447, 104 S. Ct. 3154, 82 L. Ed. 2d 340, does not mean that *stare decisis* compels the Court to do so here, see Alleyne v. United States, 570 U.S. ___, ___, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (Sotomayor, J., concurring). Time and subsequent cases have washed away the logic of *Spaziano* and *Hildwin*. Those decisions are thus overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's [***4] factfinding, that is necessary for imposition of the death penalty. Pp. ___-___, 193 L. Ed. 2d, at 512-513.

(4) The State's assertion that any error was harmless is not addressed here, where there is no reason to depart from the Court's normal pattern of leaving such considerations to state courts. P. ___, 193 L. Ed. 2d, at 513.

147 So. 3d 435, reversed and remanded.

Counsel: Seth P. Waxman argued the cause for petitioner.

Allen Winsor argued the cause for respondent.

Judges: Sotomayor, J., delivered the opinion of the Court, in which Roberts, C. J., and Scalia, Kennedy, Thomas, Ginsburg, and Kagan, JJ., joined. Breyer, J., filed an opinion concurring in the judgment. Alito, J., filed a dissenting opinion.

Opinion by: Sotomayor

Opinion

[*619] Justice Sotomayor delivered the opinion of the Court.

A Florida jury convicted Timothy Lee Hurst of murdering his co-worker, Cynthia Harrison. A penalty-phase jury recommended that Hurst's judge impose a death sentence. Notwithstanding this recommendation, Florida law required the judge to hold a separate hearing and determine whether sufficient aggravating circumstances existed to justify imposing the death penalty. The judge so found and sentenced Hurst to death.

HN1 ***LEdHN[1]*** [1] We hold this sentencing scheme unconstitutional. The *Sixth Amendment* requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough.

I

On May [***5] 2, 1998, Cynthia Harrison's body was discovered in the freezer of the restaurant where she worked — bound, gagged, and stabbed over 60 times. The restaurant safe was unlocked and open, missing hundreds of dollars. The State of Florida charged Harrison's co-worker, Timothy Lee Hurst, with her murder. See 819 So. 2d 689, 692-694 (Fla. 2002).

During Hurst's 4-day trial, the State offered substantial forensic evidence linking Hurst to the murder. Witnesses also testified that Hurst announced in advance that he planned to rob the restaurant; that Hurst and Harrison were the only people scheduled to work when Harrison was killed; and that Hurst disposed of blood-stained evidence and used stolen money to purchase shoes and rings.

Hurst responded with an alibi defense. He claimed he never made it to work because his car broke down. Hurst told police that he called the restaurant to let Harrison know he would be late. He said she sounded scared and he could hear another person — presumably the real murderer — whispering in the background.

At the close of Hurst's defense, the [**509] judge instructed the jury that it could find Hurst guilty of first-degree murder under two theories: premeditated murder or felony murder for an unlawful [***6] killing during a robbery. The jury convicted Hurst of [*620] first-degree murder but did not specify which theory it believed.

First-degree murder is a capital felony in Florida. See Fla. Stat. §782.04(1)(a) (2010). Under state law, the maximum sentence a capital felon may receive on the basis of the conviction alone is life imprisonment. §775.082(1). "A person who has been convicted of a capital felony shall be punished by death" only if an additional sentencing proceeding "results in findings by the court that such person shall be punished by death." *Ibid.* "[O]therwise such person shall be punished by life imprisonment and shall be ineligible for parole." *Ibid.*

The additional sentencing proceeding Florida employs is a "hybrid" proceeding "in which [a] jury renders an advisory verdict but the judge makes the ultimate sentencing determinations." Ring v. Arizona, 536 U.S. 584, 608, n. 6, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). First, the sentencing judge conducts an evidentiary hearing before a jury. Fla. Stat. §921.141(1) (2010). Next, the jury renders an "advisory sentence" of life or death without specifying the factual basis of its

recommendation. §921.141(2). "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." [***7] §921.141(3). If the court imposes death, it must "set forth in writing its findings upon which the sentence of death is based." *Ibid.* Although the judge must give the jury recommendation "great weight," Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975) (*per curiam*), the sentencing order must "reflect the trial judge's independent judgment about the existence of aggravating and mitigating factors," Blackwelder v. State, 851 So. 2d 650, 653 (Fla. 2003) (*per curiam*).

Following this procedure, Hurst's jury recommended a death sentence. The judge independently agreed. See 819 So. 2d, at 694-695. On postconviction review, however, the Florida Supreme Court vacated Hurst's sentence for reasons not relevant to this case. See 18 So. 3d 975 (2009).

At resentencing in 2012, the sentencing judge conducted a new hearing during which Hurst offered mitigating evidence that he was not a "major participant" in the murder because he was at home when it happened. App. 505-507. The sentencing judge instructed the advisory jury that it could recommend a death sentence if it found at least one aggravating circumstance beyond a reasonable doubt: that the murder was especially "heinous, atrocious, or cruel" or that it occurred while Hurst was committing a robbery. *Id.*, at 211-212. The jury recommended death by a vote of 7 to 5.

The sentencing judge then sentenced Hurst to death. [***8] In her written order, the judge based the sentence in part on her independent determination that both the heinous-murder and robbery aggravators existed. *Id.*, at 261-263. She assigned "great weight" to her findings as well as to the jury's recommendation of death. *Id.*, at 271.

The Florida Supreme Court affirmed 4 to 3. 147 So. 3d 435 (2014). [**510] As relevant here, the court rejected Hurst's argument that his sentence violated the **Sixth Amendment** in light of Ring, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556. *Ring*, the court recognized, "held that capital defendants are entitled to a jury determination of any fact on which the legislature conditions an increase in the maximum punishment." 147 So. 3d, at 445. But the court considered *Ring* inapplicable in light of this Court's repeated support of Florida's capital sentencing scheme in pre-*Ring* [*621] cases. 147 So. 3d, at 446-447 (citing Hildwin v. Florida, 490 U.S. 638, 109 S. Ct. 2055, 104 L. Ed. 2d 728 (1989) (*per curiam*)); see also Spaziano v. Florida, 468 U.S. 447, 457-465, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984). Specifically, in *Hildwin*, this Court held that the **Sixth Amendment** "does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." 490 U.S., at 640-641, 109 S. Ct. 2055, 104 L. Ed. 2d 728. The Florida court noted that we have "never expressly overruled *Hildwin*, and did not do so in *Ring*." 147 So. 3d, at 446-447.

Justice Pariente, joined by two colleagues, dissented from this portion of the court's opinion. She reiterated her view that "*Ring* requires any fact that qualifies [***9] a capital defendant for a sentence of death to be found by a jury." *Id.*, at 450 (opinion concurring in part and dissenting in part).

We granted certiorari to resolve whether Florida's capital sentencing scheme violates the **Sixth Amendment** in light of Ring, 575 U.S. ___, 135 S. Ct. 1531, 191 L. Ed. 2d 558 (2015). We hold that it does, and reverse.

II

HN2 ***LEdHN[2]*** [2] The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ." This right, in conjunction with the **Due Process Clause**, requires that each element of a crime be proved to a jury beyond a reasonable doubt. Alleyne v. United States, 570 U.S. ___, ___, 133 S. Ct. 2151, 186 L. Ed. 2d 314(2013). In Apprendi v. New Jersey, 530 U.S. 466, 494, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), this Court held 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. In the years since *Apprendi*, we have applied its rule to instances involving plea bargains, Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), sentencing guidelines, United States v. Booker, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), criminal fines, S. Union Co. v. United States, 567 U.S. ___, 132 S. Ct. 2344, 183 L. Ed. 2d 318 (2012), mandatory minimums, Alleyne, 570 U.S., at ___, 133 S. Ct. 2151, 186 L. Ed. 2d 314, and, in Ring, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556, capital punishment.

In *Ring*, we concluded that Arizona's capital sentencing scheme violated *Apprendi*'s rule because the State

allowed a judge to find the facts necessary to sentence a defendant to death. An Arizona jury had convicted Timothy Ring of felony murder. *536 U.S., at 591, 122 S. Ct. 2428, 153 L. Ed. 2d 556*. Under state law, "Ring could not be sentenced to death, [***10] the statutory maximum penalty for first-degree murder, unless further findings were made." *Id., at 592, 122 S. [**511] Ct. 2428, 153 L. Ed. 2d 556*. Specifically, a judge could sentence Ring to death only after independently finding at least one aggravating circumstance. *Id., at 592-593, 122 S. Ct. 2428, 153 L. Ed. 2d 556*. Ring's judge followed this procedure, found an aggravating circumstance, and sentenced Ring to death.

The Court had little difficulty concluding that "'the required finding of an aggravated circumstance exposed Ring to a greater punishment than that authorized by the jury's guilty verdict.'" *Id., at 604, 122 S. Ct. 2428, 153 L. Ed. 2d 556* (quoting *Apprendi, 530 U.S., at 494, 120 S. Ct. 2348, 147 L. Ed. 2d 435*; alterations omitted). Had Ring's judge not engaged in any factfinding, Ring would have received a life sentence. *Ring, 536 U.S., at 597, 122 S. Ct. 2428, 153 L. Ed. 2d 556*. Ring's death sentence therefore violated his right to have a jury find the facts behind his punishment.

The analysis the *Ring* Court applied to Arizona's sentencing scheme applies [*622] equally to Florida's. Like Arizona at the time of *Ring*, ***HN3*** ***LEdHN[3]*** [3] Florida does not require the jury to make the critical findings necessary to impose the death penalty. Rather, Florida requires a judge to find these facts. *Fla. Stat. §921.141(3)*. Although Florida incorporates an advisory jury verdict that Arizona lacked, we have previously made clear that this distinction is immaterial: "It is true [***11] that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." *Walton v. Arizona, 497 U.S. 639, 648, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990)*; accord, *State v. Steele, 921 So. 2d 538, 546 (Fla. 2005)* ("[T]he trial court alone must make detailed findings about the existence and weight of aggravating circumstances; it has no jury findings on which to rely").

As with Timothy Ring, the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole. As with Ring, a judge increased Hurst's authorized punishment based on her own factfinding. In light of *Ring*, we hold that Hurst's sentence violates the *Sixth Amendment*.

III

Without contesting *Ring*'s holding, Florida offers a bevy of arguments for why Hurst's sentence is constitutional. None holds water.

A

Florida concedes that *Ring* required a jury to find every fact necessary to render Hurst eligible for the death penalty. But Florida argues that when Hurst's sentencing jury recommended a death sentence, it "necessarily included [***12] a finding of an aggravating circumstance." Brief for Respondent 44. The State contends that this finding qualified Hurst for the death penalty under Florida law, thus satisfying *Ring*. "[T]he additional requirement that a judge *also* find an aggravator," Florida concludes, "only provides the defendant additional protection." Brief for Respondent 22.

The State fails to appreciate the central and singular role the judge plays under Florida law. As described [**512] above and by the Florida Supreme Court, the Florida sentencing statute does not make a defendant eligible for death until "findings *by the court* that such person shall be punished by death." *Fla. Stat. §775.082(1)* (emphasis added). The trial court *alone* must find "the facts . . . [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." *§921.141(3)*; see *Steele, 921 So. 2d, at 546*. "[T]he jury's function under the Florida death penalty statute is advisory only." *Spaziano v. State, 433 So. 2d 508, 512 (Fla. 1983)*. The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires.

B

Florida launches its second salvo at Hurst himself, arguing that he admitted in various contexts that an aggravating circumstance existed. [***13] Even if *Ring* normally requires a jury to hear all facts necessary to sentence a defendant to death, Florida argues, "*Ring* does not require jury findings on facts defendants have admitted." Brief for Respondent 41. Florida cites our decision in *Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)*, in which we stated that under *Apprendi*, [*623] a judge may impose any sentence authorized "on the basis of the facts reflected

in the jury verdict or admitted by the defendant." 542 U.S., at 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (emphasis deleted). In light of *Blakely*, Florida points to various instances in which Hurst's counsel allegedly admitted the existence of a robbery. Florida contends that these "admissions" made Hurst eligible for the death penalty. Brief for Respondent 42-44.

Blakely, however, was a decision applying *Apprendi* to facts admitted in a guilty plea, in which the defendant necessarily waived his right to a jury trial. See 542 U.S., at 310-312, 124 S. Ct. 2531, 159 L. Ed. 2d 403. Florida has not explained how Hurst's alleged admissions accomplished a similar waiver. Florida's argument is also meritless on its own terms. Hurst never admitted to either aggravating circumstance alleged by the State. At most, his counsel simply refrained from challenging the aggravating circumstances in parts of his appellate briefs. See, *e.g.,* Initial Brief [***14] for Appellant in No. SC12-1947 (Fla.), p. 24 ("not challeng[ing] the trial court's findings" but arguing that death was nevertheless a disproportionate punishment).

C

The State next argues that *stare decisis* compels us to uphold Florida's capital sentencing scheme. As the Florida Supreme Court observed, this Court "repeatedly has reviewed and upheld Florida's capital sentencing statute over the past quarter of a century." Bottoson v. Moore, 833 So. 2d 693, 695 (2002) (*per curiam*) (citing Hildwin, 490 U.S. 638, 109 S. Ct. 2055, 104 L. Ed. 2d 728; Spaziano, 468 U.S. 447, 104 S. Ct. 3154, 82 L. Ed. 2d 340). "In a comparable situation," the Florida court reasoned, "the United States Supreme Court held:

> 'If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [other courts] should follow the case which directly controls, leaving to [**513] this Court the prerogative of overruling its own decisions.'" Bottoson, 833 So. 2d, at 695 (quoting Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989)); see also 147 So. 3d, at 446-447 (case below).

We now expressly overrule Spaziano and Hildwin in relevant part.

Spaziano and *Hildwin* summarized earlier precedent to conclude that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." Hildwin, 490 U.S., at 640-641, 109 S. Ct. 2055, 104 L. Ed. 2d 728. Their conclusion was wrong, and irreconcilable with *Apprendi*. Indeed, today is not the first [***15] time we have recognized as much. In *Ring*, we held that another pre-*Apprendi* decision—Walton, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511— could not "survive the reasoning of *Apprendi*." 536 U.S., at 603, 122 S. Ct. 2428, 153 L. Ed. 2d 556. *Walton*, for its part, was a mere application of *Hildwin*'s holding to Arizona's capital sentencing scheme. 497 U.S., at 648, 110 S. Ct. 3047, 111 L. Ed. 2d 511.

HN4 **LEdHN[4]** [4] "Although ' "the doctrine of *stare decisis* is of fundamental importance to the rule of law[,]" . . . [o]ur precedents are not sacrosanct.' . . . '[W]e have overruled prior decisions where the necessity and propriety of doing so has been established.'" Ring, 536 U.S., at 608, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 172, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989)). And in the *Apprendi* context, we have found that "*stare decisis* does not compel adherence to a decision whose 'underpinnings' have been 'eroded' by subsequent developments of constitutional [*624] law." Alleyne, 570 U.S., at ___, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (Sotomayor, J., concurring); see also United States v. Gaudin, 515 U.S. 506, 519-520, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995) (overruling Sinclair v. United States, 279 U.S. 263, 49 S. Ct. 268, 73 L. Ed. 692 (1929)); Ring, 536 U.S., at 609, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (overruling Walton, 497 U.S., at 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511); Alleyne, 570 U.S., at ___, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (overruling Harris v. United States, 536 U.S. 545, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (2002)).

HN5 **LEdHN[5]** [5] Time and subsequent cases have washed away the logic of *Spaziano* and *Hildwin*. The decisions are overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty.

D

Finally, we do not reach the State's assertion that any error was harmless. See Neder v. United States, 527 U.S. 1, 18-19, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (holding that the failure to submit [***16] an uncontested element of an offense to a jury may be harmless). **HN6** **LEdHN[6]** [6] This Court normally leaves it to state courts to consider whether an error is harmless, and we

see no reason to depart from that pattern here. See Ring, 536 U.S., at 609, n. 7, 122 S. Ct. 2428, 153 L. Ed. 2d 556.

* * *

HN7 ***LEdHN[7]*** [7] The *Sixth Amendment* protects a defendant's right to an impartial jury. This right required Florida to base [**514] Timothy Hurst's death sentence on a jury's verdict, not a judge's factfinding. Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional.

The judgment of the Florida Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

So ordered.

Concur by: Breyer

Concur

Justice Breyer, concurring in the judgment.

For the reasons explained in my opinion concurring in the judgment in Ring v. Arizona, 536 U.S. 584, 613-619, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), I cannot join the Court's opinion. As in that case, however, I concur in the judgment here based on my view that "the *Eighth Amendment* requires that a jury, not a judge, make the decision to sentence a defendant to death." Id., at 614, 122 S. Ct. 2428, 153 L. Ed. 2d 556; see id., at 618, 122 S. Ct. 2428, 153 L. Ed. 2d 556 ("[T]he danger of unwarranted imposition of the [death] penalty cannot be avoided unless 'the decision to impose the death penalty is made by a jury rather than by a single government [***17] official'" (quoting Spaziano v. Florida, 468 U.S. 447, 469, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984) (Stevens, J., concurring in part and dissenting in part))). No one argues that Florida's juries actually sentence capital defendants to death—that job is left to Florida's judges. See Fla. Stat. §921.141(3) (2010). Like the majority, therefore, I would reverse the judgment of the Florida Supreme Court.

Dissent by: Alito

Dissent

Justice Alito, dissenting.

As the Court acknowledges, "this Court 'repeatedly has reviewed and upheld Florida's capital sentencing statute over the past quarter of a century.'" Ante, at ___, 193 L. Ed. 2d, at 512. And as the Court also concedes, our precedents hold that "'the *Sixth Amendment* does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.'" Ante, at ___, 193 L. Ed. 2d, at 513 (quoting Hildwin v. Florida, 490 U.S. 638, 640-641, 109 S. Ct. 2055, 104 L. Ed. 2d 728 (1989) (*per curiam*); emphasis added); [*625] see also Spaziano v. Florida, 468 U.S. 447, 460, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984). The Court now reverses course, striking down Florida's capital sentencing system, overruling our decisions in *Hildwin* and *Spaziano*, and holding that the *Sixth Amendment* does require that the specific findings authorizing a sentence of death be made by a jury. I disagree.

I

First, I would not overrule *Hildwin* and *Spaziano* without reconsidering the cases on which the Court's present decision is based. The Court relies on later cases holding that any fact that exposes a defendant [***18] to a greater punishment than that authorized by the jury's guilty verdict is an element of the offense that must be submitted to a jury. Ante, at ___, 193 L. Ed. 2d, at 510. But there are strong reasons to question whether this principle is consistent with the original understanding of the jury trial right. See Alleyne v. United States, 570 U.S. ___, ___ - ___, [**515] 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013) (Alito, J., dissenting). Before overruling *Hildwin* and *Spaziano*, I would reconsider the cases, including most prominently Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), on which the Court now relies.

Second, even if *Ring* is assumed to be correct, I would not extend it. Although the Court suggests that today's holding follows ineluctably from *Ring*, the Arizona sentencing scheme at issue in that case was much different from the Florida procedure now before us. In *Ring*, the jury found the defendant guilty of felony murder and did no more. It did not make the findings required by the *Eighth Amendment* before the death penalty may be imposed in a felony-murder case. See id., at 591-592, 594, 122 S. Ct. 2428, 153 L. Ed. 2d 556; Enmund v. Florida, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982); Tison v. Arizona, 481 U.S. 137, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987). Nor did the jury find the presence of any aggravating factor, as required for death eligibility under Arizona law. Ring, supra, at

592-593, 122 S. Ct. 2428, 153 L. Ed. 2d 556. Nor did it consider mitigating factors. And it did not determine whether a capital or noncapital sentence was appropriate. Under that system, the jury played *no* role [***19] in the capital sentencing process.

The Florida system is quite different. In Florida, the jury sits as the initial and primary adjudicator of the factors bearing on the death penalty. After unanimously determining guilt at trial, a Florida jury hears evidence of aggravating and mitigating circumstances. See Fla. Stat. §921.141(1) (2010). At the conclusion of this separate sentencing hearing, the jury may recommend a death sentence only if it finds that the State has proved one or more aggravating factors beyond a reasonable doubt and only after weighing the aggravating and mitigating factors. §921.141(2).

Once the jury has made this decision, the trial court performs what amounts, in practical terms, to a reviewing function. The judge duplicates the steps previously performed by the jury and, while the court can impose a sentence different from that recommended by the jury, the judge must accord the jury's recommendation "great weight." See Lambrix v. Singletary, 520 U.S. 518, 525-526, 117 S. Ct. 1517, 137 L. Ed. 2d 771 (1997) (recounting Florida law and procedure). Indeed, if the jury recommends a life sentence, the judge may override that decision only if "the facts suggesting a sentence of death were so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975) (*per [*626] curiam*). No Florida [***20] trial court has overruled a jury's recommendation of a life sentence for more than 15 years.

Under the Florida system, the jury plays a critically important role. Our decision in *Ring* did not decide whether this procedure violates the Sixth Amendment, and I would not extend *Ring* to cover the Florida system.

II

Finally, even if there was a constitutional violation in this case, I would hold that the error was harmless beyond a reasonable doubt. See Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Although petitioner attacks the [**516] Florida system on numerous grounds, the Court's decision is based on a single perceived defect, *i.e.*, that the jury's determination that at least one aggravating factor was proved is not binding on the trial judge. Ante, at ___, 193 L. Ed. 2d, at 511. The Court makes no pretense that this supposed defect could have prejudiced petitioner, and it seems very clear that it did not.

Attempting to show that he might have been prejudiced by the error, petitioner suggests that the jury might not have found the existence of an aggravating factor had it been instructed that its finding was a prerequisite for the imposition of the death penalty, but this suggestion is hard to credit. The jury was told to consider two aggravating factors: that the murder was committed [***21] during the course of a robbery and that it was especially "heinous, atrocious, or cruel." App. 212. The evidence in support of both factors was overwhelming.

The evidence with regard to the first aggravating factor — that the murder occurred during the commission of a robbery — was as follows. The victim, Cynthia Harrison, an assistant manager of a Popeye's restaurant, arrived at work between 7 a.m. and 8:30 a.m. on the date of her death. When other employees entered the store at about 10:30 a.m., they found that she had been stabbed to death and that the restaurant's safe was open and the previous day's receipts were missing. At trial, the issue was whether Hurst committed the murder. There was no suggestion that the murder did not occur during the robbery. Any alternative scenario — for example, that Cynthia Harrison was first murdered by one person for some reason other than robbery and that a second person came upon the scene shortly after the murder and somehow gained access to and emptied the Popeye's safe — is fanciful.

The evidence concerning the second aggravating factor — that the murder was especially "heinous, atrocious, or cruel" — was also overwhelming. Cynthia Harrison [***22] was bound, gagged, and stabbed more than 60 times. Her injuries included "facial cuts that went all the way down to the underlying bone," "cuts through the eyelid region" and "the top of her lip," and "a large cut to her neck which almost severed her trachea." *Id.*, at 261. It was estimated that death could have taken as long as 15 minutes to occur. The trial court characterized the manner of her death as follows: "The utter terror and pain that Ms. Harrison likely experienced during the incident is unfathomable. Words are inadequate to describe this death, but the photographs introduced as evidence depict a person bound, rendered helpless, and brutally, savagely, and unmercifully slashed and disfigured. The murder of Ms. Harrison was conscienceless, pitiless, and unnecessarily torturous." *Id.*, at 261-262.

In light of this evidence, it defies belief to suggest that

the jury would not have found the existence of either aggravating factor if its finding was binding. More than 17 years have passed since Cynthia Harrison was brutally murdered. In the [*627] interest of bringing this protracted litigation to a close, I would rule on the issue of harmless error and would affirm the decision of the Florida Supreme Court. [***23]

References

U.S.C.S., *Constitution, Amendment 6*

26 Moore's Federal Practice § 632.21 (Matthew Bender 3d ed.)

L Ed Digest, Jury § 33.5

L Ed Index, Capital Offenses and Punishment

Rule of Apprendi v. New Jersey (2000) 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348, and its progeny, as to proof of facts necessary to support criminal sentence--Supreme Court cases. *160 L. Ed. 2d 1163*.

Validity of death penalty, under Federal Constitution, as affected by consideration of aggravating or mitigating circumstances--Supreme Court cases. *111 L. Ed. 2d 947*.

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Hurst v. State

Supreme Court of Florida

October 14, 2016, Decided

No. SC12-1947

Reporter
2016 Fla. LEXIS 2305 *; 202 So. 3d 40; 41 Fla. L. Weekly S 433

TIMOTHY LEE HURST, Appellant, vs. STATE OF FLORIDA, Appellee.

Prior History: [*1] An Appeal from the Circuit Court in and for Escambia County, Linda Lee Nobles, Judge - Case No. 171998CF001795XXXAXX.

Hurst v. Florida, 136 S. Ct. 616, 193 L. Ed. 2d 504, 2016 U.S. LEXIS 619 (U.S., 2016)

Core Terms

sentencing, death sentence, unanimity, Ring, death penalty, recommendation, capital sentencing, aggravator, murder, jury's, jurors, aggravating factor, requires, mitigating circumstances, mitigation, aggravating circumstances, impose sentence, Statutes, reasonable doubt, factfinding, cases, capital punishment, life sentence, harmless, phase, trial court, state constitution, life imprisonment, right to trial, capital case

Case Summary

Overview

HOLDINGS: [1]-The right to a trial by jury under *U.S. Const. amend. VI* mandated that every element necessary for the imposition of the death penalty had to be found by a jury; [2]-Under *Art. I, § 22, Fla. Const.*, before the trial judge could consider imposing a sentence of death, the jury in a capital case had to unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors were sufficient to impose death, unanimously find that the aggravating factors outweighed the mitigating circumstances, and unanimously recommend a sentence of death; [3]-Juror unanimity in any recommended verdict resulting in a death sentence was required under *U.S. Const. amend. VIII*; [4]-*Section 775.082(2), Fla. Stat.*, did not entitle defendant to an automatic sentence of life imprisonment without the possibility of parole.

Outcome

Death sentence vacated and case remanded for new penalty phase proceeding.

LexisNexis® Headnotes

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Statutory Maximums

Criminal Law & Procedure > Sentencing > Capital Punishment

HN1 In Apprendi the United States Supreme Court held that *U.S. Const. amend. VI* does not permit a defendant in a noncapital case, without additional jury findings, to be exposed to a penalty exceeding the maximum he would receive if the punishment was based only on the facts reflected in the jury's guilty verdict. Implementing this same principle in Ring—and applying it to capital defendants—the Supreme Court stated that this prescription governs even if the State characterizes the additional findings made by the judge as "sentencing factors." The Court in Ring held that capital defendants, no less than noncapital defendants, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.

Criminal Law & Procedure > Sentencing > Capital Punishment

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN2 *U.S. Const. amend. VI* requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough. The United States Supreme Court made clear, as it had in Apprendi, that *U.S. Const. amend. VI*, in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt. The Court reiterated, as it had in Apprendi, that any fact that exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict is an element that must be submitted to the jury.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Jury Trial

Criminal Law & Procedure > Sentencing > Capital Punishment

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

HN3 The *U.S. Const. amend. VI* right to a trial by jury mandates that under Florida's capital sentencing scheme, the jury—not the judge—must be the finder of every fact, and thus every element, necessary for the imposition of the death penalty. These necessary facts include, of course, each aggravating factor that the jury finds to have been proven beyond a reasonable doubt. However, the imposition of a death sentence in Florida has in the past required, and continues to require, additional factfinding that now must be conducted by the jury. As the United States Supreme Court long ago recognized in Dugger, under Florida law, the death penalty may be imposed only where sufficient aggravating circumstances exist that outweigh mitigating circumstances. *§ 921.141(3), Fla. Stat.* (1985). Thus, before a sentence of death may be considered by the trial court in Florida, the jury must find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances.

Criminal Law & Procedure > Sentencing > Capital Punishment

Criminal Law & Procedure > Trials > Verdicts > Unanimity

HN4 Just as elements of a crime must be found unanimously by a Florida jury, all these findings necessary for the jury to essentially convict a defendant of capital murder—thus allowing imposition of the death penalty—are also elements that must be found unanimously by the jury. Thus, in addition to unanimously finding the existence of any aggravating factor, the jury must also unanimously find that the aggravating factors are sufficient for the imposition of death and unanimously find that the aggravating factors outweigh the mitigation before a sentence of death may be considered by the judge. This holding is founded upon the Florida Constitution and Florida's long history of requiring jury unanimity in finding all the elements of the offense to be proven; and it gives effect to precedent that the final decision in the weighing process must be supported by sufficient competent evidence in the record. In order for a death sentence to be imposed, the jury's recommendation for death must be unanimous. This recommendation is tantamount to the jury's verdict in the sentencing phase of trial; and historically, and under explicit Florida law, jury verdicts are required to be unanimous.

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

Evidence > Burdens of Proof > Preponderance of Evidence

HN5 Mitigating circumstances need only be established by a preponderance of the evidence, and may include any aspect of the defendant's character or background that is proffered as a basis for a sentence less than death.

Criminal Law & Procedure > Trials > Verdicts > Unanimity

HN6 Florida has always required jury verdicts to be unanimous on the elements of criminal offenses.

Criminal Law & Procedure > Sentencing > Capital Punishment

Criminal Law & Procedure > Trials > Judicial Discretion

HN7 Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action. Accordingly, the United States Supreme Court has made clear that individualized sentencing is required in which the discretion of the jury and the judge in imposing the death penalty will be narrowly channeled, and in which the circumstances of

the offense, the character and record of the defendant, and any evidence of mitigation that may provide a basis for a sentence less than death must be a part of the sentencing decision.

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

HN8 In an effort to meet the requirements for individualized sentencing that narrows the class of murders and murderers for which the death penalty is appropriate, Florida has required the jury to consider evidence of aggravating factors concerning the circumstances of the crime, as well as evidence of mitigating circumstances that a jury may find renders the death penalty inappropriate for an individual defendant in a specific case. These findings are necessary because, as the United States Supreme Court has explained, given that the imposition of death by public authority is so profoundly different from all other penalties, the conclusion cannot be avoided that an individualized decision is essential in capital cases.

Criminal Law & Procedure > Sentencing > Capital Punishment

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Sentencing Issues

Criminal Law & Procedure > Trials > Verdicts > Unanimity

HN9 The United States Supreme Court in Hurst has now made clear that the critical findings necessary for imposition of a sentence of death are the sole province of the jury. And because these findings occupy a position on par with elements of a greater offense, all these findings necessary for the imposition of a sentence of death must be made by the jury—as are all elements—unanimously.

Criminal Law & Procedure > Trials > Verdicts > Unanimity

Constitutional Law > State Constitutional Operation

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process

Constitutional Law > Bill of Rights > Fundamental Rights

HN10 The Florida Supreme Court, in interpreting the Florida Constitution and the rights afforded to persons within the State, may require more protection be afforded criminal defendants than that mandated by the federal Constitution. This is especially true in cases where Florida has a longstanding history requiring unanimous jury verdicts as to the elements of a crime.

Constitutional Law > State Constitutional Operation

HN11 Unless the Florida Constitution specifies otherwise, the Florida Supreme Court, as the ultimate arbiter of the meaning and extent of the safeguards and fundamental rights provided by the Florida Constitution, may interpret those rights as providing greater protections than those in the United States Constitution. Put simply, the United States Constitution generally sets the "floor"—not the "ceiling"—of personal rights and freedoms that must be afforded to a defendant by Florida law. The Florida Supreme Court has the duty to independently examine and determine questions of state law so long as it does not run afoul of federal constitutional protections or the provisions of the Florida Constitution that require the court to apply federal law in state-law contexts. When called upon to decide matters of fundamental rights, Florida's state courts are bound under federalist principles to give primacy to the state Constitution and to give independent legal import to every phrase and clause contained therein.

Criminal Law & Procedure > Sentencing > Capital Punishment

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

Criminal Law & Procedure > Trials > Verdicts > Unanimity

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

HN12 Hurst mandates that all the findings necessary for imposition of a death sentence are "elements" that must be found by a jury, and Florida law has long required that jury verdicts must be unanimous. Accordingly, 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. By so holding, the court does not intend to diminish or impair the jury's right to recommend a sentence of life even if it finds aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating circumstances. Once these critical findings are made unanimously by the jury, each juror may then exercise reasoned judgment in his or her vote as to a

recommended sentence. Nor does eliminate the right of the trial court, even upon receiving a unanimous recommendation for death, to impose a sentence of life.

Criminal Law & Procedure > Sentencing > Capital Punishment

Criminal Law & Procedure > Trials > Verdicts > Unanimity

HN13 Under the commandments of Hurst, Florida's state constitutional right to trial by jury, and Florida jurisprudence, the penalty phase jury must be unanimous in making the critical findings and recommendation that are necessary before a sentence of death may be considered by the judge or imposed.

Criminal Law & Procedure > Trials > Verdicts > Unanimity

Criminal Law & Procedure > Sentencing > Capital Punishment > Cruel & Unusual Punishment

HN14 Juror unanimity in any recommended verdict resulting in a death sentence is required under *U.S. Const. amend. VIII*. Although the United States Supreme Court has not ruled on whether unanimity is required in the jury's advisory verdict in capital cases, the foundational precept of the Eighth Amendment calls for unanimity in any death recommendation that results in a sentence of death. That foundational precept is the principle that death is different. This means that the penalty may not be arbitrarily imposed, but must be reserved only for defendants convicted of the most aggravated and least mitigated of murders. Accordingly, any capital sentencing law must adequately perform a narrowing function in order to ensure that the death penalty is not being arbitrarily or capriciously imposed.

Criminal Law & Procedure > Sentencing > Capital Punishment

Criminal Law & Procedure > Trials > Verdicts > Unanimity

HN15 The United States Supreme Court has imposed a number of requirements on the capital sentencing process to ensure that capital sentencing decisions rest on the individualized inquiry contemplated in Gregg. This individualized sentencing implements the required narrowing function that also ensures that the death penalty is reserved for the most culpable of murderers and for the most aggravated of murders. If death is to be imposed, unanimous jury sentencing recommendations, when made in conjunction with the other critical findings unanimously found by the jury, provide the highest degree of reliability in meeting these constitutional requirements in the capital sentencing process.

Criminal Law & Procedure > Sentencing > Capital Punishment

HN16 The "evolving standards" test considers whether punishments that were within the power of the state to impose at the time, but have since come to be viewed as unconstitutional, should be prohibited on constitutional grounds. This evolving standards test also helps to ensure that the State's power to punish is exercised within the limits of civilized standards. A jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death.

Criminal Law & Procedure > Sentencing > Capital Punishment

Criminal Law & Procedure > Trials > Verdicts > Unanimity

Criminal Law & Procedure > Trials > Jury Instructions

Evidence > Inferences & Presumptions > Presumptions

HN17 It is presumed that jurors will, in good faith, follow the law as it is explained to them. In a capital case, the gravity of the proceeding and the concomitant juror responsibility weigh even more heavily, and it can be presumed that the penalty phase jurors will take special care to understand and follow the law. Thus, there is no basis for concern that requiring a unanimous death recommendation before death may be imposed will allow a single juror, who for personal reasons would under no circumstances vote to impose capital punishment, to derail the process of meaningful jury deliberation on all the facts concerning aggravating factors and mitigating circumstances, and on the ultimate finding of whether death has been proven to be the appropriate penalty in any individual case.

Criminal Law & Procedure > Sentencing > Capital Punishment

HN18 There is no indication in the Hurst decision that the United States Supreme Court intended or even anticipated that all death sentences in Florida would be commuted to life, or that death as a penalty is categorically prohibited. Moreover, the text of *§ 775.082(2), Fla. Stat.* (2015) refers to the occasion that "the death penalty" is held to be unconstitutional to determine when, and if, automatic sentences of life must be imposed. This provision is intended to provide a "fail safe" sentencing option in the event that "the death penalty"—as a penalty—is declared categorically unconstitutional.

Criminal Law & Procedure > Sentencing > Capital Punishment

HN19 Hurst did not invalidate death as a penalty, but invalidated only that portion of the process which had allowed the necessary factfinding to be made by the judge rather than the jury in order to impose a sentence of death.

Criminal Law & Procedure > Appeals > Reversible Error > Structural Errors

HN20 Structural error has been described as follows: Only the rare type of error—in general, one that infects the entire trial process and necessarily renders it fundamentally unfair—requires automatic reversal.

Criminal Law & Procedure > Appeals > Reversible Error > Structural Errors

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Harmless Error

HN21 Since the United States Supreme Court's landmark decision in Chapman, in which the Court adopted the general rule that a constitutional error does not automatically require reversal of a conviction, the Court has applied harmless-error analysis to a wide range of errors and has recognized that most constitutional errors can be harmless. In Neder, the Supreme Court held that structural error can occur in only a very limited class of cases, and is error that always makes the trial fundamentally unfair.

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Harmless Error

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

HN22 The harmless error test, as set forth in Chapman and progeny, places the burden on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction.

Criminal Law & Procedure > Sentencing > Appeals > Standards of Review

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Harmless Error

HN23 Where the error concerns sentencing, the error is harmless only if there is no reasonable possibility that the error contributed to the sentence. Although the harmless error test applies to both constitutional errors and errors not based on constitutional grounds, the harmless error test is to be rigorously applied, and the State bears an extremely heavy burden in cases involving constitutional error. The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the sentence.

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Harmless Error

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

Criminal Law & Procedure > Sentencing > Capital Punishment

Criminal Law & Procedure > Sentencing > Appeals > Standards of Review

HN24 The harmless error test in a capital case is not limited to consideration of only the evidence of aggravation, and it is not an "overwhelming evidence" test.

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Judges: LABARGA, C.J., and PARIENTE, LEWIS, and QUINCE, JJ., concur. PARIENTE, J., concurs with an opinion, in which LABARGA, C.J., concurs. [*2] PERRY, J., concurs in part and dissents in part with an opinion. CANADY, J., dissents with an opinion, in which POLSTON, J., concurs.

Opinion

PER CURIAM.

This case comes before the Court on remand from the decision of the United States Supreme Court in ***Hurst v. Florida*, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016)** (*Hurst v. Florida*), following its certiorari review and reversal of our decision in *Hurst v. State, 147 So. 3d 435 (Fla. 2014)* (*Hurst v. State*). In that case, we affirmed Timothy Lee Hurst's death sentence, which was imposed after a second penalty phase sentencing proceeding. We held there, consistent with longstanding precedent, that Florida's capital sentencing scheme was not violative of the *Sixth Amendment* or the United States Supreme Court's decision in *Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002)*. *See Hurst v. State, 147 So. 3d at 445-46*. We concluded that *section 921.141, Florida Statutes* (2012), the capital sentencing statute under which Hurst was sentenced to death, was not unconstitutional for failing to require the jury to expressly find the facts on which the death sentence was imposed in this case. *Id. at 446*. After Hurst sought certiorari review in the United States Supreme Court, that Court granted review in *Hurst v. Florida, 135 S. Ct. 1531, 191 L. Ed. 2d 558 (2015)*, and agreed to entertain the following question:

> Whether Florida's death sentencing scheme violates the *Sixth Amendment* or the *Eighth Amendment* in light of this Court's decision in *Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002)*.

Id. at 1531.

Upon review, the Supreme Court reversed our decision [*3] in *Hurst v. State* and held, for the first time, that Florida's capital sentencing scheme was unconstitutional to the extent it failed to require the jury, rather than the judge, to find the facts necessary to impose the death sentence—the jury's advisory recommendation for death was "not enough." ***Hurst v. Florida*, 136 S. Ct. at 619**. In so holding, the Supreme Court overruled its decisions in *Spaziano v. Florida, 468 U.S. 447, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984)*, and *Hildwin v. Florida, 490 U.S. 638, 109 S. Ct. 2055, 104 L. Ed. 2d 728 (1989)*, to the extent they approved Florida's sentencing scheme in which the judge, independent of a jury's factfinding, finds the facts necessary for imposition of the death penalty. *See* ***Hurst v. Florida*, 136 S. Ct. at 624**. The Supreme Court's ruling in *Hurst v. Florida* also abrogated this Court's decisions in *Tedder v. State, 322 So. 2d 908 (Fla. 1975)*, *Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002)*, *Blackwelder v. State, 851 So. 2d 650 (Fla. 2003)*, and *State v. Steele, 921 So. 2d 538 (Fla. 2005)*, precedent upon which this Court has also relied in the past to uphold Florida's capital sentencing statute. Finally, the Supreme Court refused to take up the issue of whether the error in sentencing was harmless, but left it to this Court to consider on remand whether the error was harmless beyond a reasonable doubt. ***Hurst v. Florida*, 136 S. Ct. at 624**.

On remand, this Court accepted additional briefing and held oral argument concerning the effect of the Supreme Court's decision in *Hurst v. Florida* on capital sentencing in Florida, as well as on issues raised by Hurst and other issues [*4] of import to this Court. Hurst and amici curiae[1] contend first that Hurst should be granted an automatic life sentence under the provisions of *section 775.082(2), Florida Statutes* (2016). Failing that, Hurst contends that the constitutional error in his sentencing proceeding cannot be deemed harmless beyond a reasonable doubt and that instead a new penalty phase proceeding is required.

As we will explain, we hold that the Supreme Court's decision in *Hurst v. Florida* requires that all the critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury. We reach [*5] this holding based on the mandate of *Hurst v. Florida* and on Florida's constitutional right to jury trial, considered in conjunction with our precedent concerning the requirement of jury unanimity as to the elements of a criminal offense. In capital cases in Florida, these

[1] The Court granted leave to file amici briefs to former Florida Supreme Court Justice Harry Lee Anstead; former Florida Supreme Court Justice Gerald Kogan; former Florida Supreme Court Justice and current judge on the Iran-United States Claims Tribunal Rosemary Barkett; former president of the American Bar Association Martha Barnett; former president of the American Bar Association Talbot D'Alemberte; former president of The Florida Bar Hank Coxe; the Florida Center for Capital Representation at Florida International University College of Law; and the Florida Association of Criminal Defense Lawyers.

specific findings required to be made by the jury include the existence of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances. We also hold, based on Florida's requirement for unanimity in jury verdicts, and under the *Eighth Amendment to the United States Constitution*, that in order for the trial court to impose a sentence of death, the jury's recommended sentence of death must be unanimous.

For the reasons we will explain, we reject Hurst's claim that *section 775.082(2), Florida Statutes* (2016), mandates that Hurst receive an automatic life sentence. However, we conclude that the error in Hurst's sentencing identified by the United States Supreme Court was not harmless beyond a reasonable doubt. Thus, we remand for a new penalty phase proceeding. We will address these issues in turn after a brief review of the facts and procedural background [*6] of this case.

I. FACTS AND PROCEDURAL BACKGROUND

The background and facts of this case were reiterated in our decision in *Hurst v. State* in pertinent part as follows:

> Hurst was convicted for the May 2, 1998, first-degree murder of Cynthia Harrison in a robbery at the Popeye's restaurant where Hurst was employed in Escambia County, Florida. The victim, also an employee, had been bound and gagged and repeatedly cut and stabbed with a weapon consistent with a box cutter found at the scene. Hurst's conviction and death sentence were originally affirmed in *Hurst v. State, 819 So. 2d 689 (Fla. 2002)*. In that decision, we set forth the facts surrounding the murder as follows:
>
> > On the morning of May 2, 1998, a murder and robbery occurred at a Popeye's Fried Chicken restaurant in Escambia County, Florida, where Hurst was employed. Hurst and the victim, assistant manager Cynthia Lee Harrison, were scheduled to work at 8 a.m. on the day of the murder. A worker at a nearby restaurant, Carl Hess, testified that he saw Harrison arriving at work between 7 a.m. and 8:30 a.m. Afterwards, Hess said that he saw a man, who was about six feet tall and weighed between 280 and 300 pounds, arrive at Popeye's and bang on the glass windows until he was [*7] let inside. The man was dressed in a Popeye's uniform and Hess recognized him as someone he had seen working at Popeye's. Shortly after the crime, Hess picked Hurst from a photographic lineup as the man he had seen banging on the windows. Hess was also able to identify Hurst at trial.
>
> > . . . .
>
> > Popeye's was scheduled to open at 10:30 a.m. but Harrison and Hurst were the only employees scheduled to work at 8 a.m. However, at some point before opening, two other Popeye's employees arrived, in addition to the driver of the supply truck. None of them saw Hurst or his car. At 10:30 a.m., another Popeye's assistant manager, Tonya Crenshaw, arrived and found the two Popeye's employees and the truck driver waiting outside the locked restaurant.
>
> > . . . .
>
> > The victim suffered a minimum of sixty incised slash and stab wounds, including severe wounds to the face, neck, back, torso, and arms. The victim also had blood stains on the knees of her pants, indicating that she had been kneeling in her blood. A forensic pathologist, Dr. Michael Berkland, testified that some of the wounds cut through the tissue into the underlying bone, and while several wounds had the potential to be fatal, the victim probably [*8] would not have survived more than fifteen minutes after the wounds were inflicted. Dr. Berkland also testified that the victim's wounds were consistent with the use of a box cutter. A box cutter was found on a baker's rack close to the victim's body. Later testing showed that the box cutter had the victim's blood on it. It was not the type of box cutter that was used at Popeye's, but was similar to a box cutter that Hurst had been seen with several days before the crime.
>
> > Hurst's friend, Michael Williams, testified that Hurst admitted to him that he had killed Harrison. . . .
>
> > Another of Hurst's friends, "Lee-Lee" Smith, testified that the night before the murder, Hurst said he was going to rob Popeye's. On the morning of the murder, Hurst came to Smith's house with a plastic container full of money

> from the Popeye's safe. Hurst instructed Smith to keep the money for him. Hurst said he had killed the victim and put her in the freezer. Smith washed Hurst's pants, which had blood on them, and threw away Hurst's socks and shoes. Later that morning, Smith and Hurst went to Wal-Mart to purchase a new pair of shoes. They also went to a pawn shop where Hurst saw some rings he liked, and after [*9] returning to Smith's house for the stolen money, Hurst returned to the shop and purchased the three rings for $300. . . .
>
> The police interviewed Smith and searched a garbage can in Smith's yard where they found a coin purse that contained the victim's driver's license and other property, a bank bag marked with "Popeye's" and the victim's name, a bank deposit slip, a sock with blood stains on it, and a sheet of notebook paper marked "Lee Smith, language lab."

Hurst v. State, 147 So. 3d at 437-38 (quoting *Hurst v. State, 819 So. 2d 689, 692-94 (Fla. 2002)*). Hurst was convicted of first-degree murder and the case proceeded to a penalty phase trial to determine what sentence should be imposed. After a penalty phase proceeding was conducted under the provisions of *section 921.141, Florida Statutes* (1998), at which evidence of aggravating factors and mitigating circumstances was presented, the jury returned an advisory verdict by a vote of eleven to one recommending that Hurst be sentenced to death. The trial court sentenced Hurst to death and this Court affirmed the first-degree murder conviction and the death sentence. *Hurst v. State, 819 So. 2d at 703*.

Hurst then filed his initial postconviction motion under *Florida Rule of Criminal Procedure 3.851* alleging a number of claims, including that trial counsel provided ineffective assistance of counsel in investigating and presenting [*10] mitigation in the penalty phase trial. Hurst appealed the trial court's denial of postconviction relief to this Court. We affirmed denial of relief on most of the claims, but vacated the death sentence and remanded for a new penalty phase proceeding because trial counsel's performance was deficient in failing to investigate and present available, significant mental health mitigation, resulting in prejudice. We explained:

> During the penalty phase of trial, no expert testimony of mental mitigation was presented. Defense counsel did not have Hurst examined by a mental health expert prior to the penalty phase, even though Hurst's former counsel, an assistant public defender, had filed a motion for a mental evaluation. When the court took up the motion, Hurst's trial attorney stated that he did not see any reason to have Hurst examined. Thus, the motion for mental evaluation was denied and no mental evaluation was ever done. Nor did counsel obtain and present school records of the defendant, who was just nineteen at the time of the crime. The records would have shown that Hurst had a low IQ, was in special education classes, and dropped out of school after repeating tenth grade.

Hurst v. State, 18 So. 3d 975, 1009 (Fla. 2009). We stated: [*11] "We reverse the trial court's order denying relief as to [Hurst's] penalty phase claim of ineffective assistance of counsel in investigation and presentation of mental mitigation, vacate his sentence of death, and remand for a new penalty phase proceeding before a jury, which may consider available evidence of aggravation and mitigation." *Id. at 1015-16*.

Thus, the case returned to the trial court for a new penalty phase trial before a jury, which occurred on March 5-9, 2012. At this proceeding, the State presented evidence concerning the murder because the new sentencing jury had not heard evidence concerning the facts and circumstances surrounding the murder. Hurst presented mitigating evidence consisting, in pertinent part, of expert testimony concerning brain damage, low IQ, and other significant mental health mitigation. He also presented mitigating evidence concerning his childhood and poor performance in school. At the conclusion of the penalty phase evidence, the jury was instructed that it should determine if sufficient aggravating circumstances existed to justify recommending imposition of the death sentence, and whether the mitigating circumstances outweighed the aggravating factors. The [*12] jury was also instructed to provide the judge with a recommendation as to the punishment to be imposed, which the jury was told was advisory in nature and not binding, but would be given great weight.

The jury in the second penalty phase proceeding ultimately recommended a sentence of death by a vote of seven to five, and the trial court sentenced Hurst to death. In the sentencing order, the judge found as aggravating factors that the murder was committed while Hurst was engaged in the commission of a robbery, although he was not charged with robbery and the jury did not find him guilty of robbery, and the judge

found that the murder was especially heinous, atrocious, or cruel. *See* §§ 921.141(5)(d), (h), Fla. Stat. (2012). In mitigation, the trial court found the statutory mitigating circumstances that Hurst had no significant history of prior criminal activity, that he was nineteen years old, and that he had an even younger mental age. *See* §§ 921.141(6)(a), (g), Fla. Stat. (2012). The trial court found other mitigating circumstances proven. It found that Hurst had "significant mental issues," including "limited mental and intellectual capacity," and "widespread abnormalities in his brain affecting impulse control and judgment [*13] consistent with fetal alcohol syndrome." *See* Hurst v. State, 147 So. 3d at 440.

Hurst again appealed to this Court and the sentence was affirmed. *See* id. at 449. In that appeal, citing *Ring*, Hurst contended that constitutional error occurred in his resentencing proceeding because the jury was not required under Florida law to find the specific aggravating factors, and that the jury's recommendation of death was not required to be unanimous.[2] *See* id. at 445. The majority of this Court rejected the claim based on longstanding precedent including Bottoson, 833 So. 2d 693, and King v. Moore, 831 So. 2d 143 (Fla. 2002). *See* Hurst v. State, 147 So. 3d at 446. We also relied on Hildwin, 490 U.S. 638, 109 S. Ct. 2055, 104 L. Ed. 2d 728, which predated *Ring*, in which the United States Supreme Court held that the jury was not required to make specific findings authorizing the imposition of a death sentence.[3] *See* Hurst v. State, 147 So. 3d at 446.

It is from this affirmance of Hurst's death sentence, imposed after the second penalty phase proceeding, that Hurst sought and obtained certiorari review in the United States Supreme Court, and where that Court agreed that portions of Florida's capital sentencing scheme are unconstitutional. ***Hurst v. Florida*, 136 S. Ct. at 621**.

II. EFFECT OF *HURST V. FLORIDA* ON FLORIDA'S CAPITAL SENTENCING

The Supreme Court granted certiorari to resolve the question of whether Florida's capital sentencing scheme violates the *Sixth Amendment* in light of *Ring*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556.[4] This required the Supreme Court to determine if the holding in *Ring* applies to Florida's capital sentencing scheme under the dictates of the *Sixth Amendment to the United States Constitution*, made applicable to the states by the *Fourteenth Amendment*, and the right to a jury trial, with all its attendant protections in capital prosecutions. Thus, it is helpful to look first at what the Supreme Court held in *Ring* and the cases before and after that ruling. In *Ring*, the Supreme Court considered Arizona's capital sentencing scheme that allowed the trial judge, sitting [*15] alone, to determine the presence or absence of aggravating factors required by Arizona law for imposition of a death sentence. Id. at 588. The issue before the Court in *Ring* was made more difficult because the Supreme Court had earlier held in *Walton* v. Arizona, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990), that Arizona's death penalty law "was compatible with the *Sixth Amendment* because the . . . facts found by the judge qualified as sentencing considerations, not as 'element[s] of the offense of capital murder.'" *Ring*, 536 U.S. at 588 (quoting *Walton*, 497 U.S. at 649).

Ten years after *Walton*, the Supreme Court decided *Apprendi* v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), ***HN1*** in which the Court held that the *Sixth Amendment* does not permit a defendant in a noncapital case, without additional jury findings, to be exposed to a penalty exceeding the maximum he would receive if the punishment was based only on the facts reflected in the jury's guilty verdict. Implementing this same principle in *Ring*—and applying it to capital defendants—the Supreme Court stated that "[t]his prescription governs . . . even if the State characterizes the additional findings made by the judge as 'sentencing factor[s].'" 536 U.S. at 589 (quoting *Apprendi*, 530 U.S.

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[2] Hurst's counsel requested an interrogatory verdict, but that request was denied.

[3] Recognizing this Court's reliance on the Supreme Court's "repeated support of Florida's capital sentencing scheme in pre-*Ring* cases," the Supreme Court in *Hurst v. Florida* confirmed that in Hildwin, 490 U.S. 638, 109 S. Ct. 2055, 104 L. Ed. 2d 728, it had "held that the ***Sixth Amendment*** '[did] not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.'" ***Hurst v. Florida*, 136 S. Ct. at 621** (quoting Hildwin, 490 U.S. at 640-41). In *Hurst v. Florida*, the Supreme Court overruled its earlier decisions [*14] in *Hildwin* and *Spaziano*, which "summarized earlier precedent to conclude that 'the ***Sixth Amendment*** does not require that the specific findings authorizing the imposition of the sentence of death be made by a jury.'" ***Hurst v. Florida*, 136 S. Ct. at 623** (quoting Hildwin, 490 U.S. at 640-41).

[4] The question posed by the Supreme Court in granting certiorari review also included reference to the ***Eighth Amendment***, but the Court did not decide the case on ***Eighth Amendment*** grounds.

at 492). The Court in *Ring* held, "Capital defendants, no [*16] less than noncapital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." 536 U.S. at 589. In its analysis, the Supreme Court debunked the contention that the maximum penalty for murder in Arizona was death. The Court explained that a defendant convicted of first-degree murder cannot receive a death sentence unless, under the challenged law in that state, the judge makes critical factual findings that allow the imposition of the sentence of death. Id. at 602.

After noting that "the superiority of judicial factfinding in capital cases is far from evident," and the fact that most states responded to the Court's Eighth Amendment decisions by entrusting the factfinding necessary for imposition of the death penalty to juries, the Supreme Court in *Ring* stated: "The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death. We hold that the Sixth Amendment applies to both." 536 U.S. at 607-09.

In concluding that the facts upon which a greater sentence may be imposed are "elements," the Court in *Ring* noted [*17] Justice Stevens's dissent in *Walton*, which *Ring* overruled. *See* id. at 599. The Court in *Ring* stated that in his dissent in *Walton*, Justice Stevens noted that in 1791, when the Sixth Amendment became law, the jury's role in finding facts that would determine a homicide defendant's eligibility for capital punishment was "particularly well established." He wrote in part:

> "[T]he English jury's role in determining critical facts in homicide cases was entrenched. As fact-finder, the jury had the power to determine not only whether the defendant was guilty of homicide but also the degree of the offense. Moreover, *the jury's rol e in finding facts that would determine a homicide defendant's eligibility for capital punishment was particularly well established.* Throughout its history, the jury determined which homicide defendants would be subject to capital punishment by making factual determinations, many of which related to difficult assessments of the defendant's state of mind. By the time the Bill of Rights was adopted, the jury's right to make these determinations was unquestioned."

Ring, 536 U.S. at 599 (quoting Walton, 497 U.S. at 710-11 (Stevens, J., dissenting) (emphasis in opinion) (quoting Welsh S. White, *Fact-Finding & the Death Penalty: The Scope of a Capital Defendant's [*18] Right to Jury Trial* , 65 Notre Dame L. Rev. 1, 10-11 (1989))).

Justice Scalia, joined by Justice Thomas, commented in his concurrence in *Ring* that the "accelerating propensity of both state and federal legislatures to adopt 'sentencing factors' determined by judges that increase punishment beyond what is authorized by the jury's verdict . . . cause[s] me to believe that our people's traditional belief in the right of trial by jury is in perilous decline," and

> [t]hat decline is bound to be confirmed, and indeed accelerated, by the repeated spectacle of a man's going to his death because *a judge* found that an aggravating factor existed. We cannot preserve our veneration for the protection of the jury in criminal cases if we render ourselves callous to the need for that protection by regularly imposing the death penalty without it.

536 U.S. at 611-12 (Scalia, J., concurring). Justice Scalia emphasized that "wherever those factors exist they must be subject to the usual requirements of the common law, and to the requirement enshrined in our Constitution, in criminal cases: they must be found by the jury beyond a reasonable doubt." Id. at 612 (Scalia, J., concurring).[5]

After *Ring*, the Supreme Court decided Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), in which it again applied *Apprendi* and held that the trial judge could not impose an "exceptional sentence" above the statutory maximum after making a judicial determination that the defendant acted with deliberate cruelty in committing a noncapital offense. Blakely, 542 U.S. at 298. In applying its holding in *Apprendi* to *Blakely*, the Court stated:

> Our commitment to *Apprendi* in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but

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[5] Justice Breyer concurred in the judgment in *Ring*, reiterating his long-held view that the **Eighth Amendment** requires the [*19] jury, not the judge, to actually sentence the defendant in a capital case. Ring, 536 U.S. at 614 (Breyer, J., concurring in result). Justice O'Connor dissented and opined that facts that increase the maximum penalty should not be treated as elements. Id. at 619 (O'Connor, J., dissenting).

> a fundamental reservation of power in our constitutional structure. *Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary. See* Letter XV by the Federal Farmer (Jan. 18, 1788), reprinted in 2 The Complete Anti-Federalist 315, 320 (H. Storing ed. 1981) (describing [*20] the jury as "secur[ing] to the people at large, their just and rightful controul in the judicial department"); John Adams, Diary Entry (Feb. 12, 1771), reprinted in 2 Works of John Adams 252, 253 (C. Adams ed. 1850) ("[T]he common people, should have as complete a control . . . in every judgment of a court of judicature" as in the legislature); Letter from Thomas Jefferson to the Abbe Arnoux (July 19, 1789), reprinted in 15 Papers of Thomas Jefferson 282, 283 (J. Boyd ed. 1958) ("Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative"); *Jones v. United States, 526 U.S. 227, 244-248, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999). Apprendi carries out this design by ens uring that the judge's authority to sentence derives wholly from th e jury's verdict.* Without that restriction, the jury would not exercise the control that the Framers intended.

Blakely, 542 U.S. at 305-06 (emphasis added). The Supreme Court also made clear that "the *Sixth Amendment* by its terms is not a limitation on judicial power, but a reservation of jury power." *Id. at 308*. The Court rejected the criticism that leaving the finding of all these facts to the jury impairs the efficiency or fairness of criminal justice. *Id. at 313*. The Court explained that "[t]here is not [*21] one shred of doubt, however, about the Framers' paradigm for criminal justice" which is the "common-law ideal of limited state power accomplished by strict division of authority between judge and jury." *Id.* "As *Apprendi* held, every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment." *Id.*

Against this backdrop of decisions implementing the guarantees of the *Sixth Amendment* in *Apprendi, Ring*, and *Blakely*, the Supreme Court issued its opinion in *Hurst v. Florida*, holding that Florida's capital sentencing scheme violated the *Sixth Amendment* and the principles announced in *Ring* by committing to the judge, and not to the jury, the factfinding necessary for imposition of the death penalty. The Supreme Court in *Hurst v. Florida* began its opinion with the clear dictate that ***HN2*** "[t]he *Sixth Amendment* requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." **136 S. Ct. at 619**. The Supreme Court made clear, as it had in *Apprendi*, that the *Sixth Amendment*, in conjunction with the *Due Process clause*, "requires that each element of a crime be proved to a jury beyond a reasonable doubt." ***Id.* at 621** (citing *Alleyne v. United States, 133 S. Ct. 2151, 2156, 186 L. Ed. 2d 314 (2013)*). The Court reiterated, as it had in *Apprendi*, "that any fact that [*22] '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 [the] jury." *Id.* (quoting *Apprendi, 530 U.S. at 494*).

Before reaching its conclusion in *Hurst v. Florida* that Florida's capital sentencing scheme violated this guarantee of the right to a jury trial on all elements of the crime of capital murder, the Supreme Court evaluated Florida's existing capital sentencing scheme by first noting that, pursuant to *section 775.082(1), Florida Statutes* (2012), the maximum sentence a capital felon may receive on the basis of the conviction alone is life imprisonment. ***Id.* at 620**. That statute made clear that a person convicted of a capital felony shall be punished by death only if a separate sentencing proceeding "results in findings by the court that such person shall be punished by death." *Id.* (quoting *§ 775.082(1), Fla. Stat.* (2012)). The Supreme Court analyzed Florida's scheme as one in which a jury renders only an advisory verdict without specifying the factual basis of its recommendation, while the judge evaluates the evidence of aggravation and mitigation and makes the ultimate sentencing determinations. ***Id.* at 620**. The Court stated, "Florida law required the judge to hold a separate hearing and determine whether sufficient [*23] aggravating circumstances existed to justify imposing the death penalty. . . . We hold this sentencing scheme unconstitutional. The *Sixth Amendment* requires a jury, not a judge, to find each fact necessary to impose a sentence of death." ***Id.* at 619**.

Thus, the Supreme Court was aware that Florida precedent, as well as the applicable capital sentencing scheme,[6] required the judge's sentencing order to "reflect the trial judge's independent judgment about the existence of aggravating and mitigating factors." ***Id.* at 620** (quoting *Blackwelder, 851 So. 2d at 653*). The Supreme Court also distinguished Arizona law and

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[6] *See § 921.141(3), Fla. Stat.* (2012); *§ 775.082(1), Fla. Stat.* (2012).

explained that Florida law, similar to the law invalidated in *Ring*, did not require the jury to make the critical findings necessary to impose death, but required the judge to make these findings—rejecting as significant the distinction that Florida provides for a jury recommendation as to sentence, whereas Arizona law does not. ***Id.* at 622**. "A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." *Id.* (quoting *Walton, 497 U.S. at 648*). The Court explained that in Florida, the trial judge has no jury findings on which to rely. *Id.* (citing *Steele, 921 So. 2d at 546*).

A close review of Florida's [*24] sentencing statutes is necessary to identify those critical findings that underlie imposition of a death sentence, which is a matter of state law. First, *section 775.082(1), Florida Statutes* (2012), provided:

> (1) 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 findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment* and shall be ineligible for parole.

§ 775.082(1), Fla. Stat., (emphasis added). *Section 921.141, Florida Statutes* (2012), provided in pertinent part as follows:

> (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. . . .
>
> (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 [*25] 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.*

§ 921.141(1)-(3), Fla. Stat. (2012) (emphasis added).

Pursuant to this sentencing scheme, Hurst's jury recommended death by a vote of seven to five. The trial court then sentenced Hurst to death after independently determining that the murder was especially heinous, atrocious, or cruel and that the murder was committed while Hurst was engaged in the commission of a robbery, both statutory aggravating factors. These two aggravating factors were assigned great weight by the judge. In order to impose the death sentence, [*26] the trial judge also found that the aggravators outweighed the mitigators, and set forth those findings in the sentencing order. ***Hurst v. Florida*, 136 S. Ct. at 620**.

After evaluating Florida's laws and concluding that the decision in *Ring* applies equally to Florida's capital sentencing scheme, the Supreme Court held:

> As with Timothy Ring, the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole. As with Ring, a judge increased Hurst's authorized punishment based on her own factfinding. In light of *Ring*, we hold that Hurst's sentence violates the *Sixth Amendment*.
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> . . . .
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> The *Sixth Amendment* protects a defendant's right to an impartial jury. *This right required Florida to base Timothy Hurst's death sentence on a jury's verdict, not a judge 's factfinding*. Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional.

***Id.* at 624** (emphasis added). In reaching these

conclusions, the Supreme Court flatly rejected the State's contention that although "*Ring* required a jury to find every fact necessary to render Hurst eligible for the death penalty," the jury's recommended sentence in Hurst's case necessarily included such [*27] findings. ***Id.* at 622**. The Court emphasized that this contention is belied by the fact that the law under which Hurst was sentenced expressly required that a person may not be sentenced to death without "findings by the court" that such person shall be so punished. *Id.* (quoting § 775.082(1), Fla. Stat.). The Supreme Court emphasized that under Florida law, before the sentence of death may be imposed, "the trial court alone must find 'the facts . . . [t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'" *Id.* (quoting § 921.141(3), Fla. Stat. (2012)). The Supreme Court was explicit in *Hurst v. Florida* that the constitutional right to an impartial jury "required Florida to base Timothy Hurst's death sentence on a jury's verdict, not a judge's factfinding." ***Id.* at 624**.

Upon review of the decision in *Hurst v. Florida*, as well as the decisions in *Apprendi* and *Ring*, we conclude that ***HN3*** the *Sixth Amendment* right to a trial by jury mandates that under Florida's capital sentencing scheme, the jury—not the judge—must be the finder of every fact, and thus every element, necessary for the imposition of the death penalty. These necessary facts include, of course, each aggravating factor that the [*28] jury finds to have been proven beyond a reasonable doubt. However, the imposition of a death sentence in Florida has in the past required, and continues to require, additional factfinding that now must be conducted by the jury. As the Supreme Court long ago recognized in *Parker v. Dugger, 498 U.S. 308, 111 S. Ct. 731, 112 L. Ed. 2d 812 (1991)*, under Florida law, "The death penalty may be imposed only where *sufficient aggravating circumstances* exist that *outweigh* mitigating circumstances." *Id. at 313* (emphasis added) (quoting § 921.141(3), Fla. Stat. (1985)). Thus, before a sentence of death may be considered by the trial court in Florida, the jury must find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances.[7] These same requirements existed in Florida law when Hurst was sentenced in 2012—although they were consigned to the trial judge to make.

We also conclude that, ***HN4*** just as elements of a crime must be found unanimously by a Florida jury, all these findings necessary for the jury to essentially convict a defendant of capital murder—thus allowing imposition of the death penalty—are also elements that must be found unanimously by the jury. Thus, we hold that in addition to unanimously finding the *existence* of any aggravating factor, the jury must also unanimously find that the aggravating factors are *sufficient* for the imposition of death and unanimously find that the aggravating factors *outweigh* the mitigation before a sentence of death may be considered by the judge.[8] This holding is founded upon the Florida Constitution and Florida's long history of requiring jury unanimity in finding all the elements of the offense to be proven; and it gives effect to our precedent that the "final decision in the weighing process must be supported by 'sufficient competent evidence in the record.'" *Ford v. State, 802 So. 2d 1121, 1134 (Fla. 2001)* (quoting *Campbell v. State, 571 So. 2d 415, 420 (Fla. 1990)*, *receded from on other grounds by Trease v. State, 768 So. 2d 1050, 1055 (Fla. 2000))*. As we explain, we also find that in order for a death sentence to be imposed, the jury's recommendation for death must be unanimous. This recommendation [*30] is tantamount to the jury's verdict in the sentencing phase of trial; and historically, and under explicit Florida law, jury verdicts are required to be unanimous.

The right to a unanimous jury in English jurisprudence

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[7] Accordingly, we reject the State's argument that *Hurst v. Florida* only requires that the jury unanimously find the existence of one aggravating factor and nothing more. The Supreme Court in *Hurst v. Florida* made clear that the jury must find "each fact necessary to impose a sentence of death," **136 S. Ct. at 619** [*29] , "any fact that expose[s] the defendant to a greater punishment," ***id.* at 621**, "the facts necessary to sentence a defendant to death," *id.*, "the facts behind" the punishment, *id.*, and "the *critical findings* necessary to impose the death penalty," ***id.* at 622** (emphasis added). Florida law has long required findings beyond the existence of a single aggravator before the sentence of death may be recommended or imposed. *See* § 921.141(3), Fla. Stat. (2012).

[8] ***HN5*** Mitigating circumstances need only be established by a preponderance of the evidence, *Diaz v. State, 132 So. 3d 93, 117 (Fla. 2013)*, and may include any aspect of the defendant's character or background that is proffered as a basis for a sentence less than death. *See Lockett v. Ohio, 438 U.S. 586, 604, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978)*; § 921.141(6)(h), Fla. Stat. (2012).

has roots reaching back centuries, as evidenced by Sir William Blackstone in his *Commentaries on the Laws of England*, originally published from 1765 through 1769. There he stated, "But the founders of the English law have with excellent forecast contrived that no man should be called to answer to the king for any capital crime unless upon the preparatory accusation of twelve or more of his fellow-subjects, the grand jury; and that the truth of every accusation . . . should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours." 4 W. Blackstone, *Commentaries on the Laws of England*, 349-50 (Rees Welsh & Co. ed. 1898).[9] The right to trial by jury was brought from England to this country by those who emigrated [*31] here "as their birthright and inheritance, as part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power." *Duncan v. Louisiana, 391 U.S. 145, 154, 88 S. Ct. 1444, 20 L. Ed. 2d 491 & n.21 (1968)* (quoting *Thompson v. Utah, 170 U.S. 343, 349-50, 18 S. Ct. 620, 42 L. Ed. 1061 (1898)*).

In the *Florida Constitution of 1838, article I, section 10* [*32], of the Declaration of Rights enshrined in Florida law the right to trial by jury in criminal cases. *Article I, section 6*, further guaranteed that the "right of trial by jury shall forever remain inviolate." *Art. I, § 6, Fla. Const.* (1838). That right now resides in *article I, section 22, of the Florida Constitution*, which continues to provide that "[t]he right of trial by jury shall be secure to all and remain inviolate." *Art. I, § 22, Fla. Const.*

The principle that, under the common law, jury verdicts shall be unanimous was recognized by this Court very early in Florida's history in *Motion to Call Circuit Judge to Bench*, 8 Fla. 459, 482 (1859). In the 1885 Constitution, the right to trial by jury was given even more protection by the promise that "[t]he right of trial by jury shall be secured to all, and remain inviolate forever." Declaration of Rights, § 3, Fla. Const. (1885). And, in 1894, this Court again recognized that in a criminal prosecution, the jury must return a unanimous verdict. *Grant v. State, 33 Fla. 291, 14 So. 757, 758 (Fla. 1894)*. In 1911, this Court confirmed the unanimity requirement in *Ayers v. State, 62 Fla. 14, 57 So. 349, 350 (Fla. 1911)*, stating that "[o]f course, a verdict must be concurred in by the unanimous vote of the entire jury." Almost half a century later, in *Jones v. State, 92 So. 2d 261 (Fla. 1956)*, again acknowledging that "[i]n this state, the verdict of the jury must be unanimous," this Court held that any interference with the right to a unanimous jury verdict denies the defendant [*33] a fair trial as guaranteed by the Declaration of Rights of the Florida Constitution.[10] *Id. at 261 (On Rehearing Granted)*. Thus, ***HN6*** Florida has always required jury verdicts to be unanimous on the elements of criminal offenses.

In capital cases, Florida's early laws also indicate that jurors controlled which defendants would receive death. When Florida was still a territory, the penalty for defendants convicted of murder was death by hanging. *See Acts of the Legislative Council of the Territory of Florida*, An Act for the Apprehension of Criminals, and the Punishment of Crimes and Misdemeanors, § 21 (1822). Under this type of mandatory statute, the jury's factual findings on the elements of the crime also necessarily served as the elements necessary for imposition of a sentence of death. In later holding such mandatory capital sentencing provisions unconstitutional, the Supreme Court in *Woodson v. North Carolina, 428 U.S. 280, 293, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976)*, observed that since the 1700s [*34] American juries had refused to convict

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[9] In *Blakely*, the Court also remarked on this history, stating:

> This case requires us to apply the rule we expressed in *Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)*: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." This rule reflects two longstanding tenets of common-law criminal jurisprudence: that the "truth of every accusation" against a defendant "should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours," and that "an accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason," 1 J. Bishop, Criminal Procedure § 87, p. 55 (2d ed. 1872). These principles have been acknowledged by courts and treatises since the earliest days of graduated sentencing; . . .

Blakely, 542 U.S. at 301-02 (footnote and citation omitted).

[10] The right to a unanimous jury verdict is incorporated in *Florida Rule of Criminal Procedure 3.440* ("No verdict may be rendered unless all of the trial jurors concur in it."). The Florida Standard Jury Instructions for Criminal Cases also state in pertinent part, "This verdict must be unanimous, that is, all of you must agree to the same verdict." Fla. Std. Jury Instr. (Crim.) 3.12 Verdict.

defendants where the automatic consequence of their conviction was death.

In 1849, the Court noted in *Holton v. State, 2 Fla. 476, 478 (1849)*, that "the jury elected, tried and sworn in this cause came into court, and rendered the following verdict: 'That the said Thomas J. Holton is guilty of murder, in manner and form as in the indictment against him is alleged,' and concluded by recommending the prisoner to mercy." Florida law later expressly provided a mechanism by which the jury could grant mercy in a capital case and assure a life sentence, stating, "Whoever is convicted of a capital offence, and recommended to the mercy of the court by a majority of the jury in their verdict, shall be sentenced to imprisonment in the State prison for life." *See A Digest of the Laws of the State of Florida, from the Year One Thousand Eight Hundred and Twenty-Two, to the Eleventh Day of March, One Thousand Eight Hundred and Eighty-One, Inclusive*, § 19 (McClellan Compilation, 1881).[11] Thus, historically, it was the finding by the jury of all the elements necessary for conviction of murder that subjected the defendant to the ultimate penalty, unless mercy was expressed in the verdict of the jury as allowed [*35] by law.

Florida repealed its mandatory death sentencing provision in 1972 in an attempt to comply with *Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972)*, in which arbitrary and capricious capital sentencing was found unconstitutional. The Legislature, in regular and special session, amended *section 921.141, Florida Statutes* (1972), to provide for consideration of aggravating and mitigating circumstances before a death sentence could be imposed.[12] ***HN7*** "*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia, 428 U.S. 153, 189, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976)*. Accordingly, the Supreme Court has made clear that individualized sentencing is required in which the discretion of the jury and the judge in imposing the death penalty will be narrowly channeled, and in which the circumstances of the offense, the character and record of the defendant, and any evidence of mitigation that may provide a basis for a sentence less than death must be a part of the sentencing decision. *Id.*; *see also Roper v. Simmons, 543 U.S. 551, 568, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)* (capital punishment must be limited to a narrow category of the most serious crimes [*36] and offenders); *Lockett, 438 U.S. at 604* (a defendant may raise as mitigation any aspect of character, record, or circumstances of the offense that may be proffered as a basis for a sentence less than death).[13]

HN8 In an effort to meet these requirements for individualized sentencing that narrows the class of murders and murderers for which the death penalty is appropriate, Florida has required the jury to consider evidence of aggravating factors concerning the circumstances of the crime, as well as evidence of mitigating circumstances that a jury may find renders the death penalty inappropriate for an individual [*37] defendant in a specific case. These findings are necessary because, as the Supreme Court has explained, "Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases." *Lockett, 438 U.S. at 605*. Since 1972, until the Supreme Court's ruling in *Hurst v. Florida*, it has been the Florida judge who ultimately makes his or her own determination of the existence of the aggravating factors, the evidence of mitigation, and the weight to be given each in the sentencing decision before a sentence of death could be imposed.

HN9 The Supreme Court in *Hurst v. Florida* has now made clear that the critical findings necessary for imposition of a sentence of death are the sole province of the jury. And because these findings occupy a position on par with elements of a greater offense, we conclude that all these findings necessary for the imposition of a sentence of death must be made by the jury—as are all elements—unanimously. We are mindful that a plurality of the United States Supreme Court, in a non-capital case, decided that unanimous jury verdicts

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[11] Ch. 1877, Laws of Fla. (1872).

[12] *See* ch. 72-72, § 1, at 241, Laws of Fla.; ch. 72-724, § 9, at 20, Laws of Fla. (special session amendments).

[13] It is not necessary for our analysis to conclude that a right to individualized sentencing existed in the law at the time Florida became a state. It is sufficient for our analysis that individualized sentencing in capital cases is now the law of the land. *See, e.g., Gregg, 428 U.S. at 189*. It is also sufficient for our analysis that juries in Florida have always been required to be unanimous in finding the elements of the crime, which we now know encompass all the critical findings necessary for imposition of a death sentence.

are not required in all cases under the [*38] *Sixth Amendment to the United States Constitution*. *See Apodaca v. Oregon, 406 U.S. 404, 92 S. Ct. 1628, 32 L. Ed. 2d 184 (1972)* (plurality opinion).[14] However, ***HN10*** this Court, in interpreting the Florida Constitution and the rights afforded to persons within this State, may require more protection be afforded criminal defendants than that mandated by the federal Constitution. This is especially true, we believe, in cases where, as here, Florida has a longstanding history requiring unanimous jury verdicts as to the elements of a crime. We recently explained:

> ***HN11*** Unless the Florida Constitution specifies otherwise, this Court, as the ultimate arbiter of the meaning and extent of the safeguards and fundamental rights provided by the Florida Constitution, may interpret those rights as providing greater protections than those in the United States Constitution. *State v. Kelly, 999 So. 2d 1029, 1042 (Fla. 2008)*. Put simply, the United States Constitution generally sets the "floor"—not the "ceiling"—of personal rights and freedoms that must be afforded to a defendant by Florida law. *Id.* As we explained in *Kelly*, "we have the duty to *independently* examine and determine questions of state law so long as we do not run afoul of federal constitutional protections or the provisions of the Florida Constitution that require us to apply federal law in state-law contexts." *999 So. 2d at 1043* (emphasis [*39] in original). Our Court reemphasized what we previously stated in *Traylor*: "[w]hen called upon to decide matters of fundamental rights, Florida's state courts are bound under federalist principles to give primacy to our state Constitution and to give independent legal import to every phrase and clause contained therein." *Id. at 1044* (quoting *Traylor, 596 So. 2d at 962-63*).

State v. Horwitz, 191 So. 3d 429, 438 (Fla. 2016) (footnote omitted).

HN12 *Hurst v. Florida* mandates that all the findings necessary for imposition of a death sentence are "elements" that must be found by a jury, and Florida law has long required that jury verdicts must be unanimous. Accordingly, we reiterate our holding 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. We equally emphasize that by so holding, we do not intend to diminish or [*40] impair the jury's right to recommend a sentence of life even if it finds aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating circumstances. *See Brooks v. State, 762 So. 2d 879, 902 (Fla. 2000)*. As the relevant jury instruction states: "Regardless of your findings . . . you are neither compelled nor required to recommend a sentence of death." Fla. Std. Jury Instr. (Crim.) 7.11 Penalty Proceedings—Capital Cases. Once these critical findings are made unanimously by the jury, each juror may then "exercis[e] reasoned judgment" in his or her vote as to a recommended sentence. *See Henyard v. State, 689 So. 2d 239, 249 (Fla. 1996)* (quoting *Alvord v. State, 322 So. 2d 533, 540 (Fla. 1975)*). Nor do we intend by our decision to eliminate the right of the trial court, even upon receiving a unanimous recommendation for death, to impose a sentence of life.

In requiring jury unanimity in these findings and in its final recommendation if death is to be imposed, we are cognizant of significant benefits that will further the administration of justice. Supreme Court Justice Anthony Kennedy, while a judge on the Ninth Circuit Court of Appeals, noted the salutary benefits of the unanimity requirement on jury deliberations as follows:

> The dynamics of the jury process are such that often only one or two members express doubt as to [the] view [*41] held by a majority at the outset of deliberations. A rule which insists on unanimity furthers the deliberative process by requiring the minority view to be examined and, if possible, accepted or rejected by the entire jury. The requirement of jury unanimity thus has a precise effect on the fact-finding process, one which gives particular significance and conclusiveness to the jury's verdict.

United States v. Lopez, 581 F.2d 1338, 1341 (9th Cir. 1978). That court further noted that "[b]oth the defendant and society can place special confidence in a unanimous verdict." *Id.* Comparing the unanimous jury requirement to the requirement for proof beyond a

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[14] Nonetheless, unanimous juries have been required by the Supreme Court in the case of six-person state juries. *See Burch v. Louisiana, 441 U.S. 130, 137-38, 99 S. Ct. 1623, 60 L. Ed. 2d 96 (1979)*.

reasonable doubt, the Fifth Circuit Court of Appeals stated, "the unanimous jury requirement 'impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.'" *United States v. Gipson, 553 F.2d 453, 457 (5th Cir. 1977)*.

Further, it has been found based on data that "behavior in juries asked to reach a unanimous verdict is more thorough and grave than in majority-rule juries, and that the former were more likely than the latter jurors to agree on the issues underlying their verdict. Majority jurors had a relatively negative view of their fellow jurors' openmindedness and persuasiveness." *See* Elizabeth F. Loftus & [*42] Edith Greene, *Twelve Angry People: The Collective Mind of the Jury*, *84 Colum. L. Rev. 1425, 1428 (1984)*. Another study disclosed that capital jurors work especially hard to evaluate the evidence and reach a unanimous verdict where they can find agreement. *See* Scott E. Sundby, *War & Peace in the Jury Room: How Capital Juries Reach Unanimity*, *62 Hastings L.J. 103 (2010)*. Unanimous-verdict juries tend to be more evidence driven, generally delaying their first vote until the evidence has been discussed. *See* Kate Riordan, *Ten Angry Men: Unanimous Jury Verdicts in Criminal Trials and Incorporation After McDonald*, *101 J. Crim. L. & Criminology 1403, 1429 (2011)*. Further, juries not required to reach unanimity tend to take less time deliberating and cease deliberating when the required majority vote is achieved rather than attempting to obtain full consensus; and jurors operating under majority rule express less confidence in the justness of their decisions. *See, e.g.*, Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, *113 Harv. L. Rev. 1261, 1272-73 (2000)*. All these principles would apply with even more gravity, and more significance, in capital sentencing proceedings. We also note that the requirement of unanimity in capital jury findings will help to ensure the heightened level of protection necessary for a defendant who stands [*43] to lose his life as a penalty.

In the past, we expressed our view that unanimity in capital sentencing was necessary in *Steele, 921 So. 2d 538*. There, based on established precedent, we were constrained to find that the jury was not required to report its findings on an interrogatory verdict. *See id. at 548*. Nevertheless, we urged the Florida Legislature to take action to require at least some unanimity by the jury in capital penalty proceedings. We explained:

> Many courts and scholars have recognized the value of unanimous verdicts. For example, the Connecticut Supreme Court has stated:
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> [W]e perceive a special need for jury unanimity in capital sentencing. Under ordinary circumstances, the requirement of unanimity induces a jury to deliberate thoroughly and helps to assure the reliability of the ultimate verdict. The "heightened reliability demanded by the *Eighth Amendment* in the determination whether the death penalty is appropriate"; *Sumner v. Shuman, 483 U.S. 66, 107 S. Ct. 2716, 97 L. Ed. 2d 56 (1987)*; convinces us that jury unanimity is an especially important safeguard at a capital sentencing hearing. In its death penalty decisions since the mid—1970s, the United States Supreme Court has emphasized the importance of ensuring reliable and informed judgments. These cases stand for the general proposition [*44] that the "reliability" of death sentences depends on adhering to guided procedures that promote a reasoned judgment by the trier of fact. The requirement of a unanimous verdict can only assist the capital sentencing jury in reaching such a reasoned decision.
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> *Id. at 549* (quoting *State v. Daniels, 207 Conn. 374, 542 A.2d 306, 315 (Conn. 1988)* (some citations omitted)); *see also Coday v. State, 946 So. 2d 988, 1022 (Fla. 2006)* (Pariente, J., concurring in part and dissenting in part) (reiterating this Court's suggestion to the Legislature to revise the capital sentencing statute to require unanimity in jury findings and recommendations).

Based on the foregoing, we conclude that ***HN13*** under the commandments of *Hurst v. Florida*, Florida's state constitutional right to trial by jury, and our Florida jurisprudence, the penalty phase jury must be unanimous in making the critical findings and recommendation that are necessary before a sentence of death may be considered by the judge or imposed.

III. THE *EIGHTH AMENDMENT*

In addition to the requirements of unanimity that flow from the *Sixth Amendment* and from Florida's right to trial by jury, we conclude that ***HN14*** juror unanimity in any recommended verdict resulting in a death sentence is required under the *Eighth Amendment*. Although the United States Supreme Court has not ruled on whether unanimity is required in the jury's [*45] advisory verdict in capital cases, the foundational precept of the *Eighth Amendment* calls for unanimity in any death recommendation that results in a sentence of death.

That foundational precept is the principle that death is different.[15] This means that the penalty may not be arbitrarily imposed, but must be reserved only for defendants convicted of the most aggravated and least mitigated of murders.[16] Accordingly, any capital sentencing law must adequately perform a narrowing function in order to ensure that the death penalty is not being arbitrarily or capriciously imposed. *See* Gregg, 428 U.S. at 199. The Supreme Court subsequently explained in *McCleskey v. Kemp* that ***HN15*** "the Court has imposed a number of requirements on the capital sentencing process to ensure that capital sentencing decisions rest on the individualized inquiry contemplated in *Gregg*." McCleskey, 481 U.S. 279, 303, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987). This individualized sentencing implements the required narrowing function that also ensures that the death penalty is reserved for the most culpable of murderers and for the most aggravated of murders. If death is to be imposed, unanimous jury sentencing recommendations, when made in conjunction with the other critical findings unanimously found by the jury, provide the highest [*46] degree of reliability in meeting these constitutional requirements in the capital sentencing process.

As we hold in this case, the unanimous finding of the aggravating factors and the fact they are sufficient to impose death, as well as the unanimous finding that they outweigh the mitigating circumstances, all serve to help narrow the class of murderers subject to capital punishment. However, the further requirement that a jury must unanimously recommend death in order to make a death sentence possible serves that narrowing function required by the Eighth Amendment even more significantly, and expresses the values of the community as they currently [*47] relate to imposition of death as a penalty.

The Supreme Court has described the jury as a "significant and reliable objective index of contemporary values." Gregg, 428 U.S. at 181. Requiring unanimous jury recommendations of death before the ultimate penalty may be imposed will ensure that in the view of the jury—a veritable microcosm of the community—the defendant committed the worst of murders with the least amount of mitigation. This is in accord with the goal that capital sentencing laws keep pace with "evolving standards of decency." Trop v. Dulles, 356 U.S. 86, 101, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958) (plurality opinion) (holding that the Eighth Amendment must "draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

HN16 The "evolving standards" test considers whether punishments that were within the power of the state to impose at the time, but have since come to be viewed as unconstitutional, should be prohibited on constitutional grounds. *See* Montgomery v. Louisiana, 136 S. Ct. 718, 742, 193 L. Ed. 2d 599 (2016) (describing the "evolving standards of decency" test in evaluating the retroactive application of Miller v. Alabama, 132 S. Ct. 2455, 2475, 183 L. Ed. 2d 407 (2012), which held that mandatory sentences of life without parole for juveniles are unconstitutional). This evolving standards test also helps to ensure that "the State's power to punish is exercised within [*48] the limits of civilized standards." Woodson v. North Carolina, 428 U.S. 280, 288, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976) (quoting Trop, 356 U.S. at 100). "[A] jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death." Witherspoon v. Illinois, 391 U.S. 510, 519, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968).

The Supreme Court in Powers v. Ohio, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991), a case holding that prosecutors cannot strike jurors based on their race, quoted Alexis de Tocqueville on the significance of the jury to the direction of society, stating: "[T]he institution of the jury raises the people itself, or at least a class of citizens, to the bench of judicial authority [and] invests the people, or that class of citizens, with the direction of society." Powers, 499 U.S. at 407 (quoting Alexis de Tocqueville, 1 *Democracy in America* 334-37 (Schocken 1st ed. 1961)). This "direction of society" that is invested in the jury is also reflected in the capital sentencing laws of the

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[15] *See, e.g.*, Lockett v. Ohio, 438 U.S. 586, 604, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978) (finding there is a "qualitative difference" between death and other penalties requiring "a greater degree of reliability when the death sentence is imposed"); Gregg, 428 U.S. at 187-88 (stating that "death is different in kind" and as a punishment is "unique in its severity and irrevocability"); Furman, 408 U.S. at 286 (Brennan, J., concurring) ("Death is a unique punishment in the United States.").

[16] "As we have stated time and again, death is a unique punishment. Accordingly, the death penalty must be limited to the most aggravated and least mitigated of first-degree murders." Larkins v. State, 739 So. 2d 90, 92-93 (Fla. 1999) (citations omitted).

majority of states that still impose the death penalty.

In failing to require a unanimous recommendation for death as a predicate for possible imposition of the ultimate penalty, Florida has been a clear outlier. Of the states that have retained the death penalty, Florida is one of only three that does not require a unanimous jury recommendation [*49] for death.[17] Additionally, federal law requires the jury's recommendation for death in a capital case to be unanimous. *See* 18 U.S.C. § 3593(e); Fed. R. Crim. P. 31(a). The Supreme Court reiterated that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Atkins v. Virginia, 536 U.S. 304, 312, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002)* (quoting *Penry v. Lynaugh, 492 U.S. 302, 331, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989)* (abrogated on other grounds in *Atkins, 536 U.S. at 321*)). The vast majority of capital sentencing laws enacted in this country provide the clearest and most reliable evidence that contemporary values demand a defendant not be put to death except upon the unanimous consent of the jurors who have deliberated upon all the evidence of aggravating factors and mitigating circumstances. By requiring unanimity in a recommendation of death in order for death to be considered and imposed, Florida will achieve the important goal of bringing its capital sentencing laws into harmony with the direction of society reflected in all these states and with federal law.

Moreover, Florida's capital sentencing law will comport with these *Eighth Amendment* principles in order to more surely protect the rights of defendants guaranteed by the Florida and United States Constitutions. When all jurors must agree to a recommendation of death, their collective voice will be heard and will inform the final recommendation. This means that the voices of minority jurors cannot simply be disregarded by the majority, and that all jurors' views on the proof and sufficiency of the aggravating factors and the relative weight of the aggravating factors to the mitigating circumstances must be equally heard and considered.

There are other pragmatic reasons why Florida's capital sentencing law must require unanimity in a jury recommendation of death before any sentence of death may be considered or imposed by the trial court. When the Supreme Court decided *Hurst v. Florida* and finally applied *Ring* to capital sentencing in Florida, it invalidated a portion of [*51] Florida's capital sentencing scheme. Since the issuance of *Ring* almost fifteen years ago, many death row inmates have raised *Ring* claims in this Court and have been repeatedly rebuffed based on pre-*Ring* precedent that held the jury was not required to make the critical findings necessary for imposition of the death penalty. Once the Supreme Court made clear in *Hurst v. Florida* that these findings are the sole province of the jury and that *Ring* applies to Florida's capital sentencing laws, the Florida Legislature was required to immediately attempt to craft a new sentencing law in accord with *Hurst v. Florida*. Florida need not face a similar crisis in the future. Requiring a unanimous jury recommendation before death may be imposed, in accord with the precepts of the *Eighth Amendment* and Florida's right to trial by jury, is a critical step toward ensuring that Florida will continue to have a constitutional and viable death penalty law, which is surely the intent of the Legislature. This requirement will dispel most, if not all, doubts about the future validity and long-term viability of the death penalty in Florida.[18]

We also note that there is no valid basis for concern that such requirement will allow a single juror with a fixed objection to the death penalty to impede the proper conduct of the penalty phase process. Although a prospective juror who voices only general objections to the death penalty cannot be excluded from the jury on that basis, *Guardado v. State, 176 So. 3d 886, 898 (Fla. 2015)* (citing *Witherspoon, 391 U.S. at 522*), a prospective juror may be found unqualified to serve if he or she expresses an unyielding conviction and rigidity toward the death penalty. *Conde v. State, 860 So. 2d 930, 939 (Fla. 2003)*. This Court has made clear that, although a juror's initial response to questioning about

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[17] The Delaware Supreme Court recently declared that state's capital sentencing law unconstitutional under the ***Sixth Amendment*** because it failed to require the jury to unanimously find all the aggravating circumstances to be weighed, and because the ***Sixth Amendment*** requires the jury, not the judge, [*50] to find that the aggravating circumstances outweigh the mitigating circumstances. This latter finding was, under Delaware law, "the critical finding upon which the sentencing judge 'shall impose a sentence of death.'" *See Rauf v. Delaware, 2016 Del. LEXIS 419, 2016 WL 4224252, *1-*2 (Del. Aug. 2, 2016)* (quoting *11 Del. C. § 4209*).

[18] As we stated earlier, even if the jurors unanimously find that sufficient aggravating [*52] factors were proven beyond a reasonable doubt, and that the aggravators outweigh the mitigating circumstances, the jurors are never required to recommend death. And, even if the jury unanimously recommends a death sentence, the trial court is never required to impose death.

the death penalty alone will not automatically provide good cause to remove that juror, a juror's "[p]ersistent equivocation or vacillation . . . on whether he or she can set aside biases or misgivings concerning the death penalty in a capital penalty phase supplies the reasonable doubt as to the juror's impartiality which justifies dismissal." *Johnson v. State, 969 So. 2d 938, 947-48 (Fla. 2007)*. This is [*53] in accord with the United States Supreme Court's holding in *Wainwright v. Witt, 469 U.S. 412, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985)*, that a prospective juror may be excused for cause when the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Id. at 433* (quoting *Adams v. Texas, 448 U.S. 38, 45, 100 S. Ct. 2521, 65 L. Ed. 2d 581 (1980)*).

Furthermore, ***HN17*** it is presumed that jurors will, in good faith, follow the law as it is explained to them. *See Weeks v. Angelone, 528 U.S. 225, 234, 120 S. Ct. 727, 145 L. Ed. 2d 727 (2000)* (citing *Richardson v. Marsh, 481 U.S. 200, 211, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987)*). "[We] presume that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." *Davis v. State, 121 So. 3d 462, 492 (Fla. 2013)* (quoting *United States v. Olano, 507 U.S. 725, 740-41, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993)* (quoting *Francis v. Franklin, 471 U.S. 307, 324 n.9, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985)*)). In a capital case, the gravity of the proceeding and the concomitant juror responsibility weigh even more heavily, and it can be presumed that the penalty phase jurors will take special care to understand and follow the law. Thus, there is no basis for concern that requiring a unanimous death recommendation before death may be imposed will allow a single juror, who for personal reasons would under no circumstances vote to impose capital punishment, to derail the process of meaningful jury deliberation on all the facts concerning aggravating [*54] factors and mitigating circumstances, and on the ultimate finding of whether death has been proven to be the appropriate penalty in any individual case.

For all the foregoing reasons, the United States and Florida Constitutions, as well as the administration of justice, are implemented by requiring unanimity in jury verdicts recommending death as a penalty before such a penalty may be imposed.

Because the Supreme Court in *Hurst v. Florida* held that a portion of Florida's capital sentencing scheme under which Hurst was sentenced to death violated the *Sixth Amendment* and Hurst's right to critical jury findings, and *Hurst v. Florida* error occurred in this case, we must next determine if, as Hurst contends, he is entitled to an automatic sentence of life imprisonment without the possibility of parole.

IV. *SECTION 775.082(2), FLORIDA STATUTES*

Because the Supreme Court held that a portion of Florida's sentencing scheme that bases imposition of a death sentence on judicial factfinding violates the *Sixth Amendment*, Hurst and supporting amici contend that *section 775.082(2), Florida Statutes* (2015), requires this Court to vacate his death sentence and sentence him to life in prison without the possibility of parole. That statute provides:

> (2) In the event the death penalty in a capital felony is [*55] 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.

§ 775.082(2), Fla. Stat. This statutory provision was originally passed in the spring of 1972,[19] in large part in anticipation that the decision in *Furman, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972)*, might strike down the death penalty in its entirety.

As support for his position, Hurst cites what occurred after the Supreme Court issued its decision in *Furman* on June 29, 1972. In that case, a plurality of the Court struck down Georgia and Texas death penalty statutes as violative of the *Eighth* and *Fourteenth Amendments*. After *Furman*, the Florida Attorney General asked this Court to vacate the death sentences of forty death row inmates who were sentenced under the statute as it existed at the time of *Furman* and [*56] impose life sentences. *See Anderson v. State, 267 So. 2d 8, 9-10 (Fla. 1972)*. This Court agreed and, pursuant to the

[19] *See* ch. 72-118, § 1, at 388, Laws of Fla. (effective October 1, 1972).

motion of the Attorney General, the sentences at issue were commuted to life. *Id. at 9*. However, nowhere in *Anderson* did this Court construe or express any opinion regarding the meaning of *section 775.082(2)*, in light of the Supreme Court's decision in *Furman*. We did state in *Anderson*, "[a]lthough this Court has never declared the death penalty to be unconstitutional, we nevertheless recognized and followed the concensus [sic] determination of the several opinions rendered by the United States Supreme Court in *Furman v. Georgia*." *Id. at 9*. We also noted in *Anderson* that the United States District Court in *United States ex rel. Young v. Wainwright*, (No. 64-16-Civ.-J-S) (Fla. M.D.), had set aside the death sentences imposed "upon all persons incarcerated in 'Death Row' of the State prison whose cases had terminated," and had retained jurisdiction over other defendants whose cases were still in the appellate process. *Anderson, 267 So. 2d at 9*.

The one paragraph, per curiam opinion in *Furman* simply states that in three capital cases—two in Georgia and one in Texas—the "imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of [*57] the *Eighth* and *Fourteenth Amendments*. The judgment in each case is therefore reversed insofar as it leaves undisturbed the death sentence imposed, and the cases are remanded for further proceedings." *Furman, 408 U.S. at 239-40*. Five justices filed separate opinions in support of the judgments, and four justices filed dissenting opinions. It is this multiplicity of separate opinions and the diversity of views expressed in them that made the true scope of *Furman* difficult to ascertain. The views expressed in the many concurring opinions created a level of uncertainty in the state of capital sentencing law after *Furman*, and thus provided the impetus for the Florida Attorney General to request this Court to impose life sentences on a number of death row inmates. To illustrate, we recount portions of the *Furman* concurring opinions here.

Justice Douglas concurred in the judgment and opined that "these discretionary statutes are unconstitutional" mainly because they are discriminatorily applied. *Id. at 256-57* (Douglas, J., concurring). Justice Brennan concurred in the judgment and concluded that "[t]he punishment of death is therefore 'cruel and unusual,' and the States may no longer inflict it as punishment for crimes." *Id. at 305* (Brennan, J., concurring). Justice Stewart [*58] concurred in *Furman*, and noted that "at least two of my Brothers have concluded that the infliction of the death penalty is constitutionally impermissible in all circumstances under the *Eighth* and *Fourteenth Amendments*." *Id. at 306* (Stewart, J., concurring). However, he found it unnecessary to reach that question. Justice White also concurred in *Furman*, expressing his concern with statutes that delegate to judges or juries the decision of when the penalty will be imposed without mandating any particular kind or class of case in which it should be imposed. *Id. at 311* (White, J., concurring). Finally, Justice Marshall concurred in *Furman*, and noted that the judgments of the Court affected not only the three petitioners but "the almost 600 other condemned men and women in this country currently awaiting execution." *Id. at 316* (Marshall, J., concurring). Justice Marshall referred to the Court's decision as "striking down capital punishment" and indicated that the Court was concluding "that the death penalty violates the *Eighth Amendment*." *Id. at 370-71* (Marshall, J., concurring).[20] While it is impossible to glean a consistent ruling from the plurality decisions of the Justices in *Furman*, it can be seen why the Florida Attorney General asked this Court to vacate a large number [*59] of death sentences after *Furman* was issued, and why, in *Anderson*, this Court agreed.

The State contends that *section 775.082(2)* exists only to assure that a life sentence will be imposed on individuals previously sentenced to death if capital punishment as a penalty is [*60] declared unconstitutional generally or for any given capital offense. Indeed, the death penalty has, for several types of crimes and individuals, been declared categorically unconstitutional. *See, e.g., Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002)* (holding capital punishment for intellectually disabled persons is unconstitutional); *Coker v. Georgia, 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977)* (holding capital

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[20] Comments in the dissents in *Furman* also added to the uncertainty of the scope of the *Furman* plurality. Justice Burger, in his dissenting opinion, noted, "The actual scope of the Court's ruling, which I take to be embodied in these concurring opinions, is not entirely clear." *Furman, 408 U.S. at 397* (Burger, J., dissenting). He also commented that because there was no majority of the Court on the ultimate issue, "the future of capital punishment in this country has been left in an uncertain limbo." *Id. at 403* (Burger, J., dissenting). Justice Blackmun, in his dissent, stated, "The Court has just decided that it is time to strike down the death penalty." *Id. at 408* (Blackmun, J., dissenting). He also referred to the Court's action as "abolish[ing] capital punishment as heretofore known in this country." *Id. at 461* (Blackmun, J., dissenting). Justice Rehnquist, in his dissenting opinion, referred to the Court's judgments as "strik[ing] down a penalty . . . [long] thought necessary." *Id. at 465* (Rehnquist, J., dissenting).

punishment as a penalty for raping an adult woman violates the *Eighth Amendment*). We agree with the State.

When *section 775.082(2)* is viewed in the context of this State's response to the plurality opinion in *Furman*, and in light of the fact that *Furman* was based on *Eighth* and *Fourteenth Amendment* principles, we conclude that the statute does not mandate automatic commutation to life sentences after the decision in *Hurst v. Florida. Hurst v. Florida* was decided on *Sixth Amendment* grounds and nothing in that decision suggests a broad indictment of the imposition of the death penalty generally. *Ring* was also decided on *Sixth Amendment* grounds, and that decision did not require the state court to vacate all death sentences and enter sentences of life and did not address the range of conduct that a state may criminalize. After *Hurst v. Florida*, the death penalty still remains the ultimate punishment in Florida, although the Supreme Court has now required that all the critical [*61] findings necessary for imposition of the death penalty be transferred to the jury.

HN18 There is no indication in the *Hurst v. Florida* decision that the Supreme Court intended or even anticipated that all death sentences in Florida would be commuted to life, or that death as a penalty is categorically prohibited. Moreover, the text of *section 775.082(2)* refers to the occasion that "the death penalty" is held to be unconstitutional to determine when, and if, automatic sentences of life must be imposed. This provision is intended to provide a "fail safe" sentencing option in the event that "the death penalty"—as a penalty—is declared categorically unconstitutional.[21]

The Supreme Court in *Hurst v. Florida* focused its decision on that portion of the capital sentencing process requiring a judge rather than a jury to make all the findings critical to the imposition of the death penalty. The Court did not declare the death penalty unconstitutional. Accordingly, we hold that *section 775.082(2)* does not require commutation to life under the holding of ***HN19*** *Hurst v. Florida*, which did not invalidate death as a penalty, but invalidated only that portion of the process which had allowed the [*63] necessary factfinding to be made by the judge rather than the jury in order to impose a sentence of death. Because Hurst is not entitled to have his sentence automatically commuted to life in prison without the possibility of parole, we turn to the issue of whether the error in sentencing Hurst that was identified by the United States Supreme Court is harmless beyond a reasonable doubt.

V. HARMLESS ERROR ANALYSIS

In its decision finding that portions of Florida's sentencing scheme violate the *Sixth Amendment* because the factfinding necessary for imposition of a death sentence is entrusted to the judge and not the jury, the Supreme Court expressly declined to reach the question of whether the error was harmless in Hurst's case. The Court stated, "Finally, we do not reach the State's assertion that any error was harmless. This Court normally leaves it to state courts to consider whether an error is harmless, and we see no reason to depart from that pattern here." ***Hurst*, 136 S. Ct. at 624** (citation omitted). This was the same procedure followed in *Ring*, where the Supreme Court also declined to reach the question of harmless error, but left that question to the state court to pass on in the first instance. *536 U.S. at 609 n.7*. Accordingly, we examine [*64] the contention of the State that the error in this case was harmless beyond a reasonable doubt.

Hurst contends that harmless error review cannot apply at all because the error identified by the Supreme Court in this case is structural—that is, error that is per se reversible because it results in a proceeding that is always fundamentally unfair.[22] He contends that even if

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[21] Our construction of *section 775.082(2)* is supported by historical records concerning this legislation at the time it was being considered by the Legislature. For example, in a September 13, 1971, letter from then-Attorney General Robert L. Shevin to Senator David McClain, who introduced Senate Bill 153 which enacted the statutory language at issue, the Attorney General stated, "I have read with interest your prefiled bill to amend the State's death penalty statute to provide life imprisonment if the Supreme Court of the United States bans the death penalty." (Available [*62] at Fla. Dep't of State, Div. of Archives, Tallahassee, Fla., Series 19, Box 458). Within those same records appears a report titled "Subject: SB 153 by McCLAIN declaring that persons sentenced to death shall, if the death penalty is ruled unconstitutional, be sentenced to life imprisonment." In that memorandum, it is also stated, "The death penalty is currently being considered by the Supreme Court. If it is declared unconstitutional, some disposition will need to be made of persons who are currently under a death sentence." *Id.* The memorandum further states, "Assuming that capital punishment is held unconstitutional, life imprisonment would still be a constitutional means of punishment." *Id.*

[22] ***HN20*** Structural error has been described as follows: "Only the rare type of error—in general, one that 'infect[s] the entire

harmless error review is allowed, the *Hurst v. Florida* error cannot be quantified or assessed in a harmless error review in this case because the record is silent as to what any particular juror, much less a unanimous jury, actually found. We conclude that the error that occurred in Hurst's sentencing proceeding, in which the judge rather than the jury made all the necessary findings to impose a death sentence, is not structural error incapable of harmless error review. Nevertheless, here, we agree that the error in Hurst's penalty phase proceeding was not harmless beyond a reasonable doubt.

The Supreme Court [*65] has explained: ***HN21*** "Since this Court's landmark decision in *Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)*, in which we adopted the general rule that a constitutional error does not automatically require reversal of a conviction, the Court has applied harmless-error analysis to a wide range of errors and has recognized that most constitutional errors can be harmless." *Arizona v. Fulminante, 499 U.S. 279, 306, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991)*. In *Neder v. United States, 527 U.S. 1, 7-8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)*, the Supreme Court held that structural error can occur in "only a 'very limited class of cases,'" and is error that always makes the trial fundamentally unfair. Where an element of the offense was erroneously not submitted to the jury in *Neder*, the Court found harmless error review applied and that such an error "differs markedly from the constitutional violations we have found to defy harmless-error review." *Id. at 8*.

More recently, in *Washington v. Recuenco, 548 U.S. 212, 218-19, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006)*, the Supreme Court held in a noncapital case that failure to submit a sentencing factor to the jury in violation of *Apprendi, Blakely*, and the *Sixth Amendment* was not structural error that would always result in reversal. On this same issue, we explained in *Galindez v. State*:

> Because the question of *Apprendi/Blakely* error also involved judicial factfinding versus jury factfinding, the Court concluded that the harmless error analysis applied in *Neder* also [*66] applied to the error in *Recuenco. Id. In Neder, the Court framed th e test as follows: "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" Neder, 527 U.S. at 18*. The Court concluded that the same harmless error analysis developed in *Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)*, and applied in cases concerning the erroneous admission of evidence under the *Fifth* and *Sixth Amendments*, also applied to infringement of the jury's factfinding role under the *Sixth Amendment*. *Neder, 527 U.S. at 18*. The [Supreme] Court explained that
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> > a court, in typical appellate-court fashion, asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element. *if the answer to that question is "no," holding the error harmless does not "re flec[t] a denigration of th e constitutional rights involved." Rose*[*v. Clark], 478 U.S. [570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986)]*.
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> *Galindez v. State, 955 So. 2d 517, 522 (2007)* (emphasis added) (quoting *Neder, 527 U.S. at 19*).

Having concluded that *Hurst v. Florida* error is capable of harmless error review, we must now conduct a harmless error analysis under Florida law. Following the harmless error principles announced in *Chapman*, we set forth the test for harmless error review in Florida in *State v. DiGuilio*, stating:

> ***HN22*** The harmless error test, as set forth in *Chapman* and progeny, places the burden on [*67] the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction.

State v. DiGuilio, 491 So. 2d 1129, 1138 (Fla. 1986). ***HN23*** Where the error concerns sentencing, the error is harmless only if there is no reasonable possibility that the error contributed to the sentence. *See, e.g., Zack v. State, 753 So. 2d 9, 20 (Fla. 2000)*. Although the harmless error test applies to both constitutional errors and errors not based on constitutional grounds, "the harmless error test is to be rigorously applied," *DiGuilio, 491 So. 2d at 1137*, and the State bears an extremely heavy burden in cases involving constitutional error. Therefore, in the context of a *Hurst v. Florida* error, the burden is on the State, as the beneficiary of the error, to

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trial process' and 'necessarily render[s] [it] fundamentally unfair'—requires automatic reversal." *Glebe v. Frost, 135 S. Ct. 429, 430-31, 190 L. Ed. 2d 317 (2014)* (quoting *Neder v. United States, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)*).

prove beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to Hurst's death sentence in this case. We reiterate:

> The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. [*68] Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact.

DiGuilio, 491 So. 2d at 1139. "The question is whether there is a reasonable possibility that the error affected the [sentence]." *Id.*

Justice Alito, in his dissent in *Hurst v. Florida*, opined that the error was harmless beyond a reasonable doubt because, in his view, "it defies belief to suggest that the jury would not have found the existence of either aggravating factor if its finding was binding." ***Hurst v. Florida*, 136 S. Ct. at 626** (Alito, J., dissenting). Despite Justice Alito's confidence on this point, after a detailed review of the evidence presented as proof of the aggravating factors and evidence of substantial mitigation, we are not so sanguine as to conclude that Hurst's jury would without doubt have found both aggravating factors—and, as importantly, that the jury would have found the aggravators sufficient to impose death and that the aggravating factors outweighed the mitigation. The jury recommended death by only a seven to five vote, a bare majority. Because there was no interrogatory verdict, we cannot determine what aggravators, if any, [*69] the jury unanimously found proven beyond a reasonable doubt. We cannot determine how many jurors may have found the aggravation sufficient for death. We cannot determine if the jury unanimously concluded that there were sufficient aggravating factors to outweigh the mitigating circumstances. Nevertheless, the fact that only seven jurors recommended death strongly suggests to the contrary.

We are fully aware of the brutal actions that resulted in the murder in this case. The evidence of the circumstances surrounding this murder can be considered overwhelming and essentially uncontroverted. However, ***HN24*** the harmless error test is not limited to consideration of only the evidence of aggravation, and it is not an "overwhelming evidence" test. The record in this case demonstrated that the evidence of mitigation was extensive and compelling. Hurst was slow mentally while growing up and did poorly in school. He had difficulty caring for himself and performing normal daily activities. Experts presented evidence of brain abnormalities in multiple areas of his brain. Hurst's IQ testing showed scores dipping into the intellectually disabled range, although he had scored higher on occasion. Because [*70] we do not have an interrogatory verdict commemorating the findings of the jury, we cannot say with any certainty how the jury viewed that mitigation, although we do know that the jury recommended death by only a bare majority. The trial judge found that Hurst's young chronological age of 19, and his even younger mental age, at the time of the murder was mitigating. The judge also found that Hurst had significant mental mitigation including low IQ and likely brain abnormalities due to fetal alcohol syndrome.

It is noteworthy that after *Ring*, the Arizona Supreme Court did not find the *Ring* error to be structural, but did a rigorous harmless error review. *State v. Ring, 204 Ariz. 534, 65 P.3d 915, 933 (Ariz. 2003)*. The Arizona court held that Arizona's statutes required more than the presence of one or more statutorily defined aggravating factors. Thus, the Arizona court explained, "Because a trier of fact must determine whether mitigating circumstances call for leniency, we will affirm a capital sentence only if we conclude, beyond a reasonable doubt, that no rational trier of fact would determine that the mitigating circumstances were sufficiently substantial to call for leniency. If we cannot reach that conclusion, we must find reversible error [*71] and remand the case for resentencing." *Id. at 946*. Thus, the Arizona court concluded that the review must extend to the mitigation and to the weighing decision, and that it would affirm a capital sentence on harmless error review only if it found "beyond a reasonable doubt, that no rational trier of fact would determine that the mitigating circumstances were sufficiently substantial to call for leniency." *Id.*

In Hurst's case, we cannot find beyond a reasonable doubt that no rational jury, as the trier of fact, would determine that the mitigation was "sufficiently substantial" to call for a life sentence. Nor can we say beyond a reasonable doubt there is no possibility that the *Hurst v. Florida* error in this case contributed to the sentence. We decline to speculate as to why seven jurors in this case recommended death and why five jurors were persuaded that death was not the appropriate penalty. To do so would be contrary to our clear precedent governing harmless error review. Thus, the error in Hurst's sentencing has not been shown to

be harmless beyond a reasonable doubt.

VI. CONCLUSION

Because the death sentence was imposed on Hurst in violation of the *Sixth Amendment* right to a jury determination of every [*72] critical finding necessary for imposition of the death sentence, and because we conclude that the error is not harmless beyond a reasonable doubt under the facts and circumstances of this case, we vacate Hurst's death sentence and remand for a new penalty phase proceeding consistent with this opinion.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, and QUINCE, JJ., concur. PARIENTE, J., concurs with an opinion, in which LABARGA, C.J., concurs. PERRY, J., concurs in part and dissents in part with an opinion. CANADY, J., dissents with an opinion, in which POLSTON, J., concurs.

Concur by: PARIENTE; PERRY (In Part)

Concur

PARIENTE, J., concurring.

If "death is different," as this Court and the United States Supreme Court have repeatedly pronounced,[23] then requiring unanimity in the jury's final recommendation of life or death is an essential prerequisite to the continued constitutionality of the death penalty in this State. I fully concur with the majority in requiring that, before a sentence of death may be constitutionally imposed, the jury must find unanimously the existence of any aggravating factor, that the aggravating factors are sufficient for the imposition of death, that the aggravating factors [*73] outweigh the mitigating circumstances, and finally the recommendation for death. *See* majority op. at 23-24. I write separately to emphasize the historical foundations for this Court's holding requiring unanimity in the jury's final recommendation of death under Florida's constitutional right to jury trial, guaranteed by *article I, section 22, of the Florida Constitution.*

I also agree with the majority that the *Eighth Amendment* further buttresses the conclusion that a jury must unanimously recommend death. Simply put, Florida's extreme outlier status in not requiring unanimity in the jury's final recommendation renders the current imposition of the death penalty in Florida cruel and unusual under the *Eighth Amendment to the United States Constitution*. Additionally, as the majority notes, resolving this issue now, as opposed to later, ensures that, for as long as death is a permissible punishment in the United States, Florida's death penalty will be constitutionally sound. *See* majority op. at 41-42.

Lastly, I write to address the dissent's argument that this Court has exceeded the scope of the remand proceeding from the United States Supreme Court.

Right to Jury Trial Under the Florida Constitution

"[A] defendant's right to a jury trial is indisputably one of the most basic rights guaranteed [*74] by our constitution." *State v. Griffith, 561 So. 2d 528, 530 (Fla. 1990)*. As the majority detailed, unanimity in jury verdicts has been the polestar of Florida's criminal justice system since our State's first Constitution in 1838. Majority op. at 25. Likewise, this Court has "always considered the right to jury trial an indispensable component of our system of justice." *Blair v. State, 698 So. 2d 1210, 1213 (Fla. 1997)*. In Florida, "the requirement of unanimity has been scrupulously honored in the criminal law of this state for any finding of guilt and for any fact that increases the maximum punishment." *Butler v. State, 842 So. 2d 817, 837 (Fla. 2003)* (Pariente, J., concurring in part, dissenting in part); *see also In re Std. Jury Instrs. in Crim. Cases—Report No. 2011-05, 141 So. 3d 132, 138 (Fla. 2013)* ("Your verdict finding the defendant either guilty or not guilty must be unanimous."). The history of the constitutional right to jury trial in Florida supports the majority's determination that Florida's constitutional right to a trial by jury requires unanimity in the jury's final and ultimate recommendation: whether the defendant shall live or die.

The right to a trial by jury is not a right to trial by individual jurors. As the majority explains, when considering its functional qualities, a unanimity requirement "furthers the deliberative process by requiring the minority [*75] view to be examined and, if possible, accepted or rejected by the *entire* jury." Majority op. at 33 (quoting *United States v. Lopez, 581 F.2d 1338, 1341 (9th Cir. 1978)*) (emphasis added). Requiring unanimity also ensures that every juror's

[23] *See Yacob v. State, 136 So. 3d 539, 546 (Fla. 2014)* (quoting *Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988)*); *Miller v. Alabama, 132 S. Ct. 2455, 2470, 183 L. Ed. 2d 407 (2012)*.

voice, with their attendant backgrounds, is heard and considered. "Unanimous verdicts [] protect jury representativeness—each point of view must be considered and all jurors persuaded. [In fact, s]tudies have shown that minority jurors participate more actively when decisions must be unanimous." *Principles for Juries and Jury Trials*, SM078 ALI-ABA 753, 782 (2007) (citing Valerie P. Hans, *The Power of Twelve: The Impact of Jury Size and Unanimity on Civil Jury Decision Making*, 4 Del. L. Rev. 2, 23 (2001)). A unanimous verdict also "gives particular significance and conclusiveness to the jury's verdict." *Lopez*, 581 F.2d at 1341; *see also* majority op. at 33. Additionally, "[u]nanimous-verdict juries . . . tend to be more evidence-driven, generally delaying their first votes until the evidence has been discussed." Kate Riordan, *Ten Angry Men: Unanimous Jury Verdicts in Criminal Trials and Incorporation After McDonald*, 101 J. Crim. L. & Criminology 1403, 1429 (2011). As former Justice Raoul Cantero has explained, "Unanimous verdicts are more likely to fulfill the jury's role as the voice of the community's conscience. [*76] When less than a unanimous jury is allowed to speak for the community, the likelihood increases that the jury will misrepresent community values." Raoul G. Cantero & Robert M. Kline, *Death is Different: The Need for Jury Unanimity in Death Penalty Cases*, 22 St. Thomas L. Rev. 4, 32 (2009) (citing *Schriro v. Summerlin*, 542 U.S. 348, 360, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004) (Breyer, J., dissenting)).

The majority explains the significance of this Court's holding in *Jones v. State* that "any interference with the right to a unanimous jury verdict denies the defendant a fair trial as guaranteed by the Declaration of Rights of the Florida Constitution." Majority op. at 26 (citing *Jones*, 92 So. 2d 261, 261 (Fla. 1956)). Given this State's historical adherence to unanimity and the significance of the right to trial by jury, the majority correctly concludes that *article I, section 22, of the Florida Constitution* requires that all of the jury fact-finding, including the jury's final recommendation of death, be unanimous.

Eighth Amendment to the United States Constitution

I also agree with the majority that the *Eighth Amendment to the United States Constitution* further supports the constitutional basis for requiring a unanimous jury recommendation. The *cruel and unusual punishment clause of the Eighth Amendment* was viewed by the Framers, and later by the United States Supreme Court, as "a 'constitutional check' that would ensure that 'when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives.'" [*77] *Furman v. Georgia*, 408 U.S. 238 at 261, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) (Brennan, J., concurring). As Justice Kennedy has stated, "Jury unanimity . . . is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." *McKoy v. North Carolina*, 494 U.S. 433, 452, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990) (Kennedy, J., concurring).

Due to the severity and irreversibility of death, "the *Eighth Amendment* requires [in capital cases] a greater degree of accuracy . . . than would be true in a noncapital case." *Gilmore v. Taylor*, 508 U.S. 333, 342, 113 S. Ct. 2112, 124 L. Ed. 2d 306 (1993). As some commentators, including former Justice Raoul Cantero, have observed:

> The Supreme Court has consistently recognized that the death penalty is "qualitatively different" from all other punishments, and therefore "*demands extraordinary procedural protection against error.*"
>
> . . .
>
> Because "death is different," allowing a simple majority to render a verdict in a capital case may violate the *Eighth Amendment's* prohibition on cruel and unusual punishment.

Cantero & Kline, *Death is Different*, 22 St. Thomas L. Rev. at 12-13 (citing Jeffrey Abramson, *Death-is-Different Jurisprudence and the Role of the Capital Jury*, 2 Ohio St. L.J. Crim. L. 117, 117 (2004)) (emphasis added).

Not only does jury unanimity further the goal that a defendant will receive a fair trial and help to guard against arbitrariness [*78] in the ultimate decision of whether a defendant lives or dies, jury unanimity in the jury's final recommendation of death also ensures that Florida conforms to "the evolving standards of decency that mark the progress of a maturing society," which inform *Eighth Amendment* analyses. *Roper v. Simmons*, 543 U.S. 551, 561, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958) (plurality opinion)); *see also Hall v. Florida*, 134 S. Ct. 1986, 1992, 188 L. Ed. 2d 1007 (2014) ("The *Eighth Amendment's* protection of dignity reflects the Nation we have been,

the Nation we are, and the Nation we aspire to be. This is to affirm that the Nation's constant, unyielding purpose must be to transmit the Constitution so that its precepts and guarantees retain their meaning and force.").

At the time *Ring* was decided, death was not a penalty in twelve states.[24] Since the United States Supreme Court decided *Ring*, seven additional states have eliminated the death penalty as a punishment altogether. *See* Hall, 134 S. Ct. at 1997 (noting that Connecticut, Illinois, Maryland, New Jersey, New Mexico, and New York have eliminated the death penalty since 2002); S.B. 268, 104th Leg. 1st Sess. (Neb. 2015) (repealing the death penalty). Therefore, when *Hurst v. Florida* was decided, a total of nineteen states had eliminated the death penalty.

As to the requirement of jury unanimity, until *Hurst v. Florida*, Florida was one of only three states that permitted capital defendants to be sentenced to death without all twelve penalty phase jurors recommending in unison that the defendant was deserving of the ultimate punishment. *See* majority op. at 39. Of the thirty-one states that still had the death penalty at the time of *Hurst v. Florida*, twenty-eight states required a unanimous vote of twelve jurors with respect to the final verdict or recommendation, making Florida, Alabama, and Delaware glaring outliers.[25] However, Delaware just recently declared its capital sentencing statute unconstitutional. Rauf v. Delaware, 2016 Del. LEXIS 419, 2016 WL 4224252 (Del. Aug. 2, 2016). The United States Supreme Court has also vacated the death sentences of four Alabama inmates in light of *Hurst v. Florida*. *See* Russell v. Alabama, No.15-9918, 2016 U.S. LEXIS 4959, 2016 WL 3486659 (U.S. Oct. 3, 2016); Kirksey v. Alabama, 136 S. Ct. 2409, 195 L. Ed. 2d 777 (2016); Wimbley v. Alabama, 136 S. Ct. 2387, 195 L. Ed. 2d 760 (2016); Johnson v. Alabama, 136 S. Ct. 1837 (2016).[26]

The current practices of these other states emphasize Florida's outlier status, as this Court expressly acknowledged eleven years ago in State v. Steele, 921 So. 2d 538, 548 (Fla. 2005). In that case we observed that Florida was then "the *only* state in the country that allows a jury to decide that aggravators exist *and* to recommend a sentence of death by a mere majority vote." *Id.* (first emphasis added). At the time, we acknowledged that even though Alabama and Delaware did not require unanimity as to the jury's final recommendation, they at least required unanimity as to the jury's finding of at least one aggravator. *Id.* at 548-49, n.4 & 5.

Taken together, the [*81] trend of states either eliminating the death penalty as a punishment or requiring jury unanimity in fact-finding and the final recommendation before sentencing a defendant to death demonstrates "the evolving standards of decency" with respect to the jury's fact-finding role in capital punishment in the United States. Roper, 543 U.S. at 561. This trend solidifies Florida's devolution from an outlier to an extreme outlier.

The United States Supreme Court has also considered international trends when addressing *Eighth Amendment* claims, and these trends further confirm Florida's outlier status. *Id.* 543 U.S. at 577-78. Amnesty International's 2015 Report indicates that the United States was the only member of the Organization of American States (OAS)—an organization whose thirty-five member nations aim to uphold the pillars of democracy, human rights, security, and development—to carry out executions, and one of the countries with the most executions in the world.[27] Both Florida and the

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[24] The states without a death penalty when *Ring* was decided are, from earliest to most [*79] recent in abolishing the death penalty: Michigan, Wisconsin, Maine, Minnesota, Alaska, Hawaii, Vermont, West Virginia, North Dakota, Iowa, Massachusetts, and Rhode Island. *See States With and Without the Death Penalty*, Death Penalty Info. Ctr., http://www.deathpenaltyinfo.org/states-and-without-death-penalty (last visited Sept. 22, 2016).

[25] [*80] Moreover, federal law provides that a jury must unanimously recommend whether a defendant should be sentenced to death. 18 U.S.C. § 3593(e) (2016).

[26] Additionally, although contrary to our decision today, the Alabama Supreme Court recently decided that its capital sentencing scheme is constitutional under *Hurst v. Florida* because its capital sentencing scheme requires the jury to unanimously find one aggravating factor when determining if a defendant is eligible for the death penalty. *See* Ex parte Bohannon, No. 1150640, 2016 Ala. LEXIS 114, 2016 WL 5817692, at *5 (Ala. Sept. 30, 2016). However, we note that the Alabama Supreme Court in *Bohannon* did not discuss its statute's constitutionality under its own state constitution and did not mention the Alabama cases remanded by the United States Supreme Court in light of *Hurst v. Florida*.

[27] *See* Amnesty Int'l, *Global Report: Death Sentences and Executions 2015* 10,

United States are outliers as to the imposition of the death penalty, and Florida's non-unanimous recommendation for imposing the death penalty only entrenches the State in outlier territory.

For all of these reasons, I agree that the failure to require jury unanimity before the ultimate decision of death is imposed violates the *Eighth Amendment*.

Unanimity of the Final Recommendation is Properly Addressed

Finally, I address the dissent's argument that in requiring unanimity in the final jury recommendation this Court exceeds the scope of its proper considerations in this case. *See* Canady, J., dissenting op. at 76. Contrary to the dissent's assertions, the issue of a unanimous recommendation is properly at issue in this case. In *Hurst v. Florida*, the United States Supreme Court instructed that "[t]he judgment of the Florida Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion." **136 S. Ct. at 624**. Nowhere in the opinion is the requirement that this Court may only consider "how we are to apply *Hurst v. Florida*'s *Sixth Amendment* holding," as the dissent suggests. *See* Canady, J., dissenting op. at 76. The *Hurst v. Florida* remand requires only that this Court's proceedings not be inconsistent with the United States Supreme Court's opinion in ***Hurst v. Florida*. 136 S. Ct. at 624**. This Court's decision is based on both Florida's constitutional [*83] right to jury trial as well as the federal *Sixth* and *Eighth Amendments*.

This Court's opinion is firmly rooted in *article I, section 22, of the Florida Constitution.* As to the *Eighth Amendment* argument, the last time this Court actually considered an *Eighth Amendment* argument on its merits was decades ago. *See Alvord, 322 So. 2d at 533*; *Watson v. State, 190 So. 2d at 161*. Subsequently, the Court has rejected the claim, providing virtually no analysis and seemingly relying on cases from this Court dating back to the reinstitution of the death penalty, and so it is unclear whether the claim was based on the *Eighth Amendment* or some other constitutional ground. *See, e.g., Hunter v. State, 175 So. 3d 699, 710 (Fla. 2015)* (denying this argument by citing to this Court's previous rejection of the same argument); *Ford v. State, 168 So. 3d 224, 2015 WL 1741803 (Fla. 2015)* (denying *Eighth Amendment* claim because it "has been repeatedly rejected by this Court"), *cert. denied*, *136 S. Ct. 538, 193 L. Ed. 2d 433 (2015)*; *Kimbrough v. State, 125 So. 3d 752, 754 (Fla. 2013)* (denying the claim due to this Court's "general jurisprudence that non-unanimous jury recommendations to impose the sentence of death are not unconstitutional"); *Robards v. State, 112 So. 3d 1256, 1267 (Fla. 2013)*; *Mann v. State, 112 So. 3d 1158, 1162 (Fla. 2013)*; *Larzelere v. State, 676 So. 2d 394, 407 (Fla. 1996)* (explaining that the claim had been "previously rejected" without addressing the merits); *Hunter v. State, 660 So. 2d 244, 252-53 (Fla. 1995)*; *James v. State, 453 So. 2d 786, 792 (Fla. 1984)* (rejecting the claim based on *Alvord*).

Following this Court's rejections of the *Eighth Amendment* argument challenging Florida's capital sentencing scheme for allowing a non-unanimous recommendation of death, the United States Supreme Court [*84] issued its decision in *Hurst v. Florida*, which did not address the *Eighth Amendment*. Therefore, there is no United States Supreme Court precedent this Court must follow asserting that the *Eighth Amendment* does or does not require unanimity in jury capital sentencing recommendations.

Clearly our holding requiring unanimity in the jury's ultimate recommendation is not inconsistent with *Hurst v. Florida* or any other decision from the United States Supreme Court. Moreover, the issue of unanimity in the final recommendation was raised before this Court in *Hurst v. State*, argued before the United States Supreme Court in *Hurst v. Florida*, raised by Hurst in his Motion requesting imposition of a life sentence,[28] and serves to provide a complete analysis of what the Florida and United States Constitutions require before the death penalty can be constitutionally imposed.

For all these reasons, I fully concur in the majority's opinion today.

LABARGA, C.J., concurs.

Dissent by: PERRY (In Part); CANADY

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http://www.amnestyusa.org/research/reports/death-sentences-and-executions-2015 [*82] (2015); Org. of Am. States, *Who We Are*, *http://www.oas.org/en/about/who_we_are.asp* (last visited September 21, 2016).

[28] Hurst's Amended Motion for Remand for Imposition of a Sentence of Life in Prison raising the ***Eighth Amendment*** argument was filed shortly after the issuance of the Supreme Court mandate, even before Hurst's Supplemental Initial Brief on the Merits was filed in front of this Court on remand. While the majority addresses the ***Eighth Amendment*** basis for unanimity in addition to the ***Sixth Amendment*** argument, we [*85] have rejected his argument that *section 775.082(2), Florida Statutes* (2016), requires reducing his sentence to life.

Dissent

PERRY, J., concurring in part and dissenting in part.

I concur with the entirety of the majority decision except its determination that section 775.082(2), Florida Statutes (2016), is not applicable. *See* majority op. at 4, 44-51. I therefore disagree with the majority's decision to remand for a new penalty phase proceeding instead of remanding for imposition of a life sentence. *Id.* at 4, 50.

There is no compelling reason for this Court not to apply the plain language of section 775.082(2), Florida Statutes, and instead contort all reasoning to apply a sentencing statute that cannot be resuscitated. Because the majority of this Court has determined that Hurst's death sentence was unconstitutionally imposed, *see* majority op. at 58, Hurst is entitled to the clear and unambiguous statutory remedy that the Legislature has specified. *See* § 775.082(2), Fla. Stat. (2016).

The statute's language is clear and unambiguous:

> 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 [*86] 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.

Id.

The plain language of the statute does not rely on a specific amendment to the United States Constitution, nor does it refer to a specific decision by this Court or the United States Supreme Court. Further, it does not contemplate that all forms of the death penalty in all cases must be found unconstitutional. Instead, the statute uses singular articles to describe the circumstances by which the statute is to be triggered. Indeed, the statute repeatedly references a singular defendant being brought before a court for sentencing to life imprisonment. "[T]he death penalty in [Hurst's] capital felony [has been] held to be unconstitutional," and accordingly, "the court having jurisdiction over [Hurst, who was] previously sentenced to death for a capital felony[,] shall cause [him] to be brought before the court, [*87] and the court shall sentence [him] to life imprisonment." *Id.* We need conduct no further legal gymnastics to carry out the will of the Legislature. *See, e.g.*, English v. State, 191 So. 3d 448, 450 (Fla. 2016) ("When the statutory language is clear or unambiguous, this Court need not look behind the statute's plain language or employ principles of statutory construction to determine legislative intent."). The sentencing court must impose a life sentence pursuant to section 775.082(2), Florida Statutes.

My reasoning here is supported by no fewer than three former justices of this Court: Rosemary Barkett, Harry Lee Anstead, and Gerald Kogan; a former President of The Florida Bar, Hank Coxe, who also served on this Court's Innocence Commission; and a former president of The American Bar Association, Talbot D'Alemberte, who chaired Florida's Constitution Revision Commission and the Judiciary Committee in the Florida House of Representatives during the 1972 session, when the Legislature enacted section 775.082(2), Florida Statutes. *See* Amended Brief of Amici Curiae Harry Lee Anstead, et al., at 6, *Hurst v. State*, No. 12-1947 (Fla. May 3, 2016) ("The plain language contained in the first sentence of could not offer a clearer command . . . .").

The argument that section 775.082(2), Florida Statutes, applies only if capital punishment were itself unconstitutional and not if the capital punishment procedure [*88] in a particular case were invalid is contrary to the text of the statute. Such argument also runs counter to this Court's actions forty years ago, when the Court vacated death sentences and imposed life sentences in the wake of Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), a United States Supreme Court decision invalidating certain death penalty procedures. *See* id. at 309 ("The *Eighth* and *Fourteenth Amendments* cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."); Stewart v. Massachusetts, 408 U.S. 845, 845, 92 S. Ct. 2845, 33 L. Ed. 2d 744 (1972). This Court responded, not by ordering new *Furman*-compliant capital penalty phase proceedings for these death row prisoners, but by vacating existing death sentences and ordering the prisoners sentenced to life in prison. *See* In re Baker, 267 So. 2d 331, 335 (Fla. 1972); Anderson v. State, 267 So. 2d 8, 10 (Fla. 1972). This Court never conceded that capital punishment as a whole was unconstitutional and did not read *Furman* to hold otherwise. Dixon, 283 So. 2d at 6 ("[*Furman*] does

not abolish capital punishment . . . ."); *Baker, 267 So. 2d at 331* ([D]eath sentences *previously imposed* are void . . . .") (emphasis added); *Anderson, 267 So. 2d at 9* ("Although this Court has never declared the death penalty to be unconstitutional, we nevertheless recognized and followed the con[s]ensus determination of the several opinions rendered by the United States Supreme Court in [*Furman*].."). The [*89] Court even expressly noted that *section 775.082(2)* "was conditioned upon the very holding which has now come to pass by the United States Supreme Court in invalidating the death penalty *as now legislated*." *Donaldson v. Sack, 265 So. 2d 499, 505 (Fla. 1972)* (emphasis added). Nonetheless, the Court vacated death sentences and imposed life sentences in their place. *See Baker, 267 So. 2d at 335*; *Anderson, 267 So. 2d at 10*. There is absolutely no logical reason for not doing so here. I consequently cannot agree with the majority's reasoning that the statute was intended as a fail-safe mechanism for when this Court or the United States Supreme Court declared that the death penalty was categorically unconstitutional. *See* majority op. at 50. This Court should follow its existing precedent and impose a life sentence.

CANADY, J., dissenting.

Because I conclude that the *Sixth Amendment* as explained by the Supreme Court's decision in ***Hurst v. Florida*, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016)**, simply requires that an aggravating circumstance be found by the jury, I disagree with the majority's expansive understanding of *Hurst v. Florida*.[29] And because I conclude that the absence of a finding of an aggravator by the jury that tried Hurst was harmless beyond a reasonable doubt and agree with the majority's rejection of Hurst's claim that he is entitled to be sentenced to life, I would affirm [*90] the sentence of death.

The majority concludes that the Supreme Court decided in *Hurst v. Florida* that the *Sixth Amendment* requires jury sentencing in death cases so that no death sentence can be imposed unless a unanimous jury decides that death should be the penalty. But this conclusion cannot be reconciled with the reasoning of the Court's opinion in *Hurst v. Florida* or with the underlying framework established by the Court in *Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)*, and *Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002)*. The majority's reading of *Hurst v. Florida* wrenches the Court's reference to "each fact necessary to impose a sentence of death," **136 S. Ct. at 619**, out of context, ignoring how the Court has used the term "facts" in its *Sixth Amendment* jurisprudence, and failing to account for the *Hurst v. Florida* Court's repeated identification of Florida's failure to [*91] require a jury finding of an aggravator as the flaw that renders Florida's death penalty law unconstitutional.

Contrary to the majority's view, "each fact necessary to impose a sentence of death" that must be found by a jury is not equivalent to each determination necessary to impose a death sentence. The case law makes clear beyond any doubt that when the Court refers to "facts" in this context it denotes "elements" or their functional equivalent. And the case law also makes clear beyond any doubt that in the process for imposing a sentence of death, once the jury has found the element of an aggravator, no additional "facts" need be proved by the government to the jury. After an aggravator has been found, all the determinations necessary for the imposition of a death sentence fall outside the category of such "facts."

This understanding of the use of the phrase "each fact necessary to impose a sentence of death" in *Hurst v. Florida* is consistent with *Hurst v. Florida*'s repeated statements that the failure to require that a jury find an aggravator is the feature of Florida's death penalty law that renders it unconstitutional under the requirements of the *Sixth Amendment* as explained in *Apprendi* and [*92] *Ring*. Most saliently, *Hurst v. Florida* overrules *Spaziano v. Florida, 468 U.S. 447, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984)*—which held that jury sentencing is not required by the Constitution in death cases—only to the extent that *Spaziano* did not require that the jury find an aggravator.

Not content with its undue expansion of *Hurst v. Florida*'s holding regarding the requirements of the *Sixth Amendment*, the majority injects conclusions based on the *Eighth Amendment* even though *Hurst v. Florida* does not address the *Eighth Amendment*. Remarkably,

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[29] The view expressed in this dissent concerning the scope of *Hurst v. Florida* follows the same line of analysis recently adopted by the Supreme Court of Alabama in rejecting a challenge to Alabama's death penalty law. *See Ex parte Bohannon, No. 1150640, 2016 Ala. LEXIS 114, 2016 WL 5817692, at *5 (Ala. Sept. 30, 2016)* ("*Ring* and *Hurst*[*v. Florida*] require only that the jury find the existence of the aggravating factor that makes a defendant eligible for the death penalty—the plain language in those cases requires nothing more and nothing less.").

the majority adopts the view of the Eighth Amendment expressed by Justice Breyer in his concurring opinions in *Ring* and *Hurst v. Florida*. In doing so, the majority addresses a question that is not even properly at issue in this remand proceeding—which solely concerns how we are to apply *Hurst v. Florida*'s Sixth Amendment holding—and delivers a ruling that dramatically departs from binding precedent from the Supreme Court.

In short, the majority fundamentally misapprehends and misuses *Hurst v. Florida*, thereby unnecessarily disrupting the administration of the death penalty in Florida. I strongly dissent.

Ring's Application of _Apprendi_: An Aggravator Constitutes an Element That Must Be Found by the Jury

In *Apprendi*, the Court held, based on the Sixth Amendment, that any fact that "expose[s] the defendant to a greater punishment [*93] than that authorized by the jury's guilty verdict" is an "element" that must be found to exist by the jury. 530 U.S. at 494. Although *Apprendi* sought to distinguish the sentencing process in death cases, *Ring* rejected that distinction and applied *Apprendi* to Arizona's death penalty law, which provided no role for the jury in the sentencing process.

Applying the logic of *Apprendi, Ring* concluded that before a sentence of death can be imposed, the Sixth Amendment entitles capital defendants "to a jury determination of any *fact* on which the legislature conditions an increase in their maximum punishment." 536 U.S. at 589 (emphasis added). The Court recognized that "a death sentence may not legally be imposed . . . unless at least one aggravating factor is found to exist beyond a reasonable doubt." Id. at 597 (citation omitted). The *Ring* Court thus framed the question to be decided: "The question presented is whether that aggravating factor may be found by the judge, as Arizona law specifies, or whether the Sixth Amendment's jury trial guarantee, made applicable to the States by the Fourteenth Amendment, requires that the aggravating factor determination be entrusted to the jury." *Id.* (footnote omitted).

The Court concluded that "the aggravating factor determination" must be made [*94] by a jury. *Id.* So the Court reversed the Arizona decision affirming Ring's sentence and overruled Walton v. Arizona, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990)—in which the Court had upheld the constitutionality of the Arizona statute against a Sixth Amendment challenge. Specifically, the Court "overrule[d] *Walton* to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." Ring, 536 U.S. at 609. Justice Breyer concurred in the judgment and stated his conclusion "that the Eighth Amendment requires that a jury, not a judge, make the decision to sentence a defendant to death." Id. at 614 (Breyer, J., concurring).

In sum, *Ring* held that "[b]ecause Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury." Id. at 609 (quoting Apprendi, 530 U.S. at 494 n.19). The reasoning of *Ring* thus is predicated on the understanding that "for purposes of the Sixth Amendment's jury-trial guarantee, the underlying offense of 'murder' is a distinct, lesser included offense of 'murder plus one or more aggravating circumstances'" and that murder without an aggravator "exposes a defendant to a maximum penalty of life imprisonment" but murder with an aggravator "increases the maximum permissible sentence to death." [*95] Sattazahn v. Pennsylvania, 537 U.S. 101, 111, 123 S. Ct. 732, 154 L. Ed. 2d 588 (2003) (plurality opinion).

Hurst v. Florida's Application of _Ring_: A Jury's Advisory Recommendation of Death Cannot Be Treated as the Jury's Finding of an Aggravator

Hurst v. Florida simply applies the reasoning of *Ring* and *Apprendi* to Florida's death penalty statute and concludes that the jury's advisory role under Florida law does not satisfy the requirements of the Sixth Amendment. *Hurst v. Florida* goes beyond *Ring* because *Hurst v. Florida* addressed a sentencing process in which the jury played an advisory role as distinct from the process at issue in *Ring* in which the jury had no role. But the reasoning of *Hurst v. Florida* closely mirrors the reasoning of *Ring*, and the requirements of the Sixth Amendment articulated in *Hurst v. Florida* are the same as the requirements articulated in *Ring*. *Hurst v. Florida* merely establishes that an advisory determination of a jury cannot satisfy *Ring*'s requirement that an aggravator be found by the jury. In *Hurst v. Florida*, unlike numerous Florida direct appeal death cases in which the Court has denied relief under *Ring*, the existence of an aggravator was not established by a jury finding embodied in either a conviction for a contemporaneous crime or a prior conviction.

The *Hurst [*96] v. Florida* Court recognized the

foundational importance of *Apprendi*'s holding under 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 v. Florida*, 136 S. Ct. at 621** (quoting *Apprendi, 530 U.S. at 494*). The Court observed that in *Ring* it "had little difficulty concluding that 'the required finding of an aggravated circumstance exposed Ring to a greater punishment than that authorized by the jury's guilty verdict.'" *Id.* (quoting *Ring, 536 U.S. at 604*).

Hurst v. Florida went on to hold that "[t]he analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's," ***id.* at 621-22**, and that the State was precluded from "treat[ing] the advisory recommendation by the jury as the necessary factual finding that *Ring* requires," ***id.* at 622**. That "necessary factual finding" is, of course, the finding that an aggravator exists. In its analysis, the Court took pains to reject the State's argument—which would have been dispositive—that Hurst had admitted the existence of an aggravator. ***Id.* at 622-23**. The *Hurst v. Florida* opinion concludes with this statement of the Court's holding regarding the *Sixth Amendment*: "Florida's sentencing scheme, which required the judge alone to find the existence of an [*97] aggravating circumstance, is therefore unconstitutional." ***Id.* at 624**.

In so holding, the Court accepted the precise *Sixth Amendment* argument that Hurst had presented to the Court. But in its imposition of jury sentencing, the majority here has adopted an understanding of *Hurst v. Florida*'s *Sixth Amendment* holding that not only departs from the Court's statement of its holding but also indisputably goes far beyond the *Sixth Amendment* argument that Hurst presented to the Court.

Hurst made an argument—supported by Justice Breyer's concurring opinion in *Ring*—for jury sentencing based on the *Eighth Amendment*. This *Eighth Amendment* argument was in *Hurst v. Florida* once again accepted by Justice Breyer in a concurring opinion, but it was not accepted by the *Hurst v. Florida* majority. Hurst did not, however, make any *Sixth Amendment* argument for jury sentencing. Instead, Hurst argued that "Florida's capital sentencing scheme violates" the *Sixth Amendment* as explained in *Apprendi* and *Ring* "because it entrusts to the trial court instead of the jury the task of 'find[ing] an aggravating circumstance necessary for imposition of the death penalty.'" Brief for Petitioner at 18, ***Hurst v. Florida*, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016), 2015 WL 3523406, at *18** (quoting *Ring, 536 U.S. at 609*).[30] In the oral argument before the Court, Hurst's counsel summed up the *Sixth Amendment* argument:

> [L]eaving aside our *Eighth Amendment* point in our brief that -- [*98] that followed on Justice Breyer's concurrence in *Ring*, the -- this is all about the eligibility, not the determination of what sentence applies. And you have held that the existence of a specified statutory aggravating factor is a condition. It is an element of capital murder, and it is, by statute and Florida Supreme Court decision, an element of capital murder in Florida."

Tr. of Oral Argument at 12, ***Hurst v. Florida*, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016), 2015 WL 5970064, at *12**.

Hurst v. Florida's Limited Overruling of Precedent: _Spaziano_'s Vindication of Judicial Sentencing is Undisturbed Except to the Extent That it Did Not Require the Jury to Find an Aggravator

In its articulation of the overruling of *Spaziano* and *Hildwin*—the two cases this Court relied on when rejecting *Ring* claims—the *Hurst v. Florida* Court once again makes clear the limited scope of its holding. [*99] Like *Ring*'s overruling of *Walton, Hurst v. Florida*'s overruling of *Spaziano* and *Hildwin* is precisely focused on the absence of a jury finding of an aggravator: "The decisions are overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty." ***Hurst v. Florida*, 136 S. Ct. at 624**.

Therefore, except "to the extent" that *Spaziano* and *Hildwin* "allow a sentencing judge to find an aggravating circumstance," they are left undisturbed by *Hurst v. Florida*. Of particular relevance here is the portion of *Spaziano* that is not affected by *Hurst v. Florida*. In *Spaziano*, the Court was urged to find Florida's death penalty law unconstitutional under both the *Sixth* and

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[30] This point followed the reasoning of Justice Pariente's dissent from this Court's decision regarding Hurst's sentence: "I dissent from the majority's affirmance of Hurst's death sentence because there is no unanimous finding by the jury that any of the applicable aggravators apply." *Hurst v. State, 147 So. 3d 435, 452 (Fla. 2014)* (Pariente, J., concurring in part and dissenting in part), *cert. granted in part*, ***135 S. Ct. 1531, 191 L. Ed. 2d 558 (2015)***, *and rev'd* , **136 S. Ct. 616, 193 L. Ed. 2d 504 (2016)**.

Eighth Amendments. The Court unequivocally rejected the "fundamental premise" of Spaziano's argument: "that the capital sentencing decision is one that, in all cases, should be made by a jury." *Spaziano, 468 U.S. at 458*.

Rejecting Spaziano's *Sixth Amendment* argument, the Court stated: "[D]espite its unique aspects, a capital sentencing proceeding involves the same fundamental issue involved in any other sentencing proceeding—a determination of the appropriate punishment to be imposed on an individual. The *Sixth Amendment* never has been thought [*100] to guarantee a right to a jury determination of that issue." *Id. at 459* (citations omitted). Regarding the *Eighth Amendment*, the Court held that "there certainly is nothing in the safeguards necessitated by the Court's recognition of the qualitative difference of the death penalty that *requires* that the sentence be imposed by a jury." *Id. at 460*. The Court further explained "that the purpose of the death penalty is not frustrated by, or inconsistent with, a scheme in which the imposition of the penalty in individual cases is determined by a judge." *Id. at 462-63*. The Court summed up its rejection of the "fundamental premise" regarding jury sentencing argued by Spaziano:

> In light of the facts that the *Sixth Amendment* does not require jury sentencing, that the demands of fairness and reliability in capital cases do not require it, and that neither the nature of, nor the purpose behind, the death penalty requires jury sentencing, we cannot conclude that placing responsibility on the trial judge to impose the sentence in a capital case is unconstitutional.

Id. at 464.

The majority decision here collides with these undisturbed and binding holdings of *Spaziano* regarding both the *Eighth Amendment* and the *Sixth Amendment*. There is no plausible explanation of why the Court would overrule *Spaziano [*101]* only to the extent that *Spaziano* did not require the jury to find an aggravator if the Court intended to hold that jury sentencing is required in death cases. Indeed, neither the majority opinion nor the concurrence even attempts to offer such an explanation. The point is met with total silence.

The Majority's Basic Error: Confusing "Facts" with Other Determinations in the Sentencing Process

The majority's misinterpretation of *Hurst v. Florida* is rooted in its misunderstanding of the Court's *Sixth Amendment* jurisprudence concerning "facts" that must be found by a jury. The majority confuses the "facts" that must be proved by the government to a jury in order for a defendant to pass the threshold of eligibility for a death sentence with the other determinations that may lead to the imposition of a death sentence. This confusion apparently causes the majority to overlook the limited nature of the overruling of *Spaziano* as well as *Hurst v. Florida*'s focus—in which it follows *Ring*—on the absence of an aggravator found by a jury.

Apprendi, Ring, and *Hurst v. Florida* are all based on the principle that the *Sixth Amendment* requires that a jury—rather than a judge—determine whether the government has proved every element [*102] of an offense. The Court therefore has explained that "the essential *Sixth Amendment* inquiry is whether a fact is an element of the crime" and that "[w]hen a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury." *Alleyne v. United States, 133 S. Ct. 2151, 2162, 186 L. Ed. 2d 314 (2013)*. "Elements" are "facts" that the State must prove to the jury. *Ring* made clear and *Hurst v. Florida* reaffirmed that in death cases, the necessary elements include the existence of an aggravating circumstance. But the other determinations made in a death penalty proceeding—whether the aggravation is sufficient to justify a death sentence; whether mitigating circumstances (which are established by the defendant) outweigh the aggravation; whether a death sentence is the appropriate penalty—are not elements to be proven by the State. Rather, they are determinations that require subjective judgment. And nothing in *Ring* or *Hurst v. Florida* suggests—much less holds—that such determinations are elements and therefore "facts" that must be found by a jury.

This understanding of the distinction between the facts that the government must prove to the jury and the other determinations [*103] required to be made in the process for imposing a death sentence is reinforced by comments made in the Supreme Court's opinion in *Kansas v. Carr, 136 S. Ct. 633, 193 L. Ed. 2d 535 (2016)*, which was released after *Hurst v. Florida*. In *Carr*, the Court referred to the determination of the existence of an aggravating circumstance as the "eligibility phase" in which it is decided whether a defendant is eligible for a death sentence. *136 S. Ct. at 642*. After a defendant is determined to be "eligibl[e]", the "selection phase" occurs in which the existence of mitigating circumstances is determined, and a judgment is made whether mitigating circumstances outweigh the aggravation to determine whether a death-eligible

defendant should be selected to receive a death sentence. *Id.* The Court explained that although the determination of whether an aggravating circumstance does or does not exist "is a purely factual determination," a determination of whether mitigation exists "is largely a judgment call," and "what one juror might consider mitigating another might not." *Id.* Whether the mitigating circumstances outweigh aggravating circumstances, the Court said, "is mostly a question of mercy." *Id.*; *see also Tuilaepa v. California, 512 U.S. 967, 973, 114 S. Ct. 2630, 129 L. Ed. 2d 750 (1994)* (stating that "[e]ligibility factors almost of necessity require an answer to a question [*104] with a factual nexus to the crime or the defendant so as to 'make rationally reviewable the process for imposing a sentence of death,'" while "[t]he selection decision . . . requires individualized sentencing and must be expansive enough to accommodate relevant mitigating evidence so as to assure an assessment of the defendant's culpability" (quoting *Arave v. Creech, 507 U.S. 463, 471, 113 S. Ct. 1534, 123 L. Ed. 2d 188 (1993)*)).

Thus, the only factual findings necessary to impose a sentence of death are findings regarding the elements of first-degree murder plus the existence of an aggravating circumstance, which is the functional equivalent of an element. Neither the *Sixth Amendment* nor *Hurst v. Florida* requires a jury to determine the sufficiency of the aggravation, the weight of the aggravation relative to any mitigating circumstances, or whether a death sentence should be imposed.

The Absence Here of an Aggravator Found by the Jury Is Harmless Beyond a Reasonable Doubt

Although Hurst's jury did not find an aggravator and no conviction reflected a jury finding of an aggravator, I would conclude that this error was harmless beyond a reasonable doubt. As Justice Alito explained in his dissent in *Hurst v. Florida*:

> The jury was told to consider two aggravating factors: that the murder [*105] was committed during the course of a robbery and that it was especially heinous, atrocious, or cruel. The evidence in support of both factors was overwhelming.
>
> The evidence with regard to the first aggravating factor—that the murder occurred during the commission of a robbery—was as follows. The victim, Cynthia Harrison, an assistant manager of a Popeye's restaurant, arrived at work between 7 a.m. and 8:30 a.m. on the date of her death. When other employees entered the store at about 10:30 a.m., they found that she had been stabbed to death and that the restaurant's safe was open and the previous day's receipts were missing. At trial, the issue was whether Hurst committed the murder. There was no suggestion that the murder did not occur during the robbery. Any alternative scenario—for example, that Cynthia Harrison was first murdered by one person for some reason other than robbery and that a second person came upon the scene shortly after the murder and somehow gained access to and emptied the Popeye's safe—is fanciful.
>
> The evidence concerning the second aggravating factor—that the murder was especially "heinous, atrocious, or cruel"—was also overwhelming. Cynthia Harrison was bound, [*106] gagged, and stabbed more than 60 times. Her injuries included facial cuts that went all the way down to the underlying bone, cuts through the eyelid region and the top of her lip, and a large cut to her neck which almost severed her trachea. It was estimated that death could have taken as long as 15 minutes to occur. The trial court characterized the manner of her death as follows:
>
> > The utter terror and pain that Ms. Harrison likely experienced during the incident is unfathomable. Words are inadequate to describe this death, but the photographs introduced as evidence depict a person bound, rendered helpless, and brutally, savagely, and unmercifully slashed and disfigured. The murder of Ms. Harrison was conscienceless, pitiless, and unnecessarily torturous.
>
> In light of this evidence, it defies belief to suggest that the jury would not have found the existence of either aggravating factor if its finding was binding.

***Hurst v. Florida*, 136 S. Ct. at 626** (Alito, J., dissenting) (citations omitted).

On the basis of the record here I would conclude that any rational juror would have found that both of the two aggravating circumstances on which the trial court relied in imposing the death sentence were proven beyond a reasonable [*107] doubt. Although the jury may not have reached unanimous determinations regarding the sufficiency of the aggravating circumstances, whether they were outweighed by the mitigating circumstances, and whether a death sentence should be imposed, such

determinations—as I have explained—are not required by *Hurst v. Florida* or the *Sixth Amendment*. Hurst's death sentence should be affirmed.

POLSTON, J., concurs.

End of Document

Perry v. State

Supreme Court of Florida

October 14, 2016, Decided

No. SC16-547

Reporter
2016 Fla. LEXIS 2304 *; 41 Fla. L. Weekly S 449

LARRY DARNELL PERRY, Petitioner, vs. STATE OF FLORIDA, Respondent.

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

Prior History: [*1] Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance. Fifth District - Case No. 5D16-516. (Osceola County).

State v. Perry, 192 So. 3d 70, 2016 Fla. App. LEXIS 4243 (Fla. Dist. Ct. App. 5th Dist., 2016)

Core Terms

aggravating factor, recommendation, sentencing, death sentence, unanimity, mitigating circumstances, death penalty, aggravating circumstances, jurors, slip op, Statutes, outweigh, changes, aggravating factors outweigh, pending prosecution, notice, cases, life sentence, construe, requires, certified question, reasonable doubt, trial court, jury's, jury's recommendation, provides, possibility of parole, new statute, imprisonment, questions

Case Summary

Overview

ISSUE: Whether Florida's revised death penalty law (Act) could be constitutionally applied to pending prosecutions for capital offenses that occurred before its effective date. HOLDINGS: [1]-*Section 921.141(2)(b)2., Fla. Stat.*, which provided that only 10 of 12 jurors were needed to recommend a death sentence, was contrary to U.S. and state Supreme Court precedent; [2]-The Act could not be applied constitutionally to pending prosecutions because it did not require unanimity in the jury's final recommendation as to the death penalty, in violation of the right to a jury trial under *art. I, § 22, Fla. Const.*; [2]-To partially preserve its constitutionality, the high court construed *§ 921.141(2)(b)2.* to require the jury to unanimously find that each aggravating factor existed, that sufficient aggravating factors existed to impose death, and that they outweighed the mitigating circumstances.

Outcome

The high court answered the certified questions in the negative.

LexisNexis® Headnotes

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

Criminal Law & Procedure > Trials > Verdicts > Unanimity

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Sentencing Issues

HN1 As a result of the long-standing adherence to unanimity in criminal jury trials in Florida, the right to a jury trial set forth in *art. I, § 22, Fla. Const.*, requires that in cases in which the penalty phase jury is not waived, the findings necessary to increase the penalty from a mandatory life sentence to death must be found beyond a reasonable doubt by a unanimous jury. Those findings specifically include unanimity as to all aggravating factors to be considered, unanimity that sufficient aggravating factors exist for the imposition of the death penalty, unanimity that the aggravating factors outweigh the mitigating circumstances, and unanimity in the final

jury recommendation for death.

Criminal Law & Procedure > Sentencing > Capital Punishment

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Jury Trial

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Sentencing Issues

HN2 The United States Supreme Court has held in Hurst v. Florida that Florida's capital sentencing scheme was unconstitutional because it did not require the jury to determine the facts necessary for the imposition of the death penalty. The Supreme Court has emphasized that under Florida law, before the sentence of death may be imposed, the trial court alone must find the facts that sufficient aggravating circumstances exist and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances. *§ 921.141(3), Fla. Stat.* (2012). The Supreme Court has been explicit in Hurst that the constitutional right to an impartial jury required Florida to base the defendant's sentence on a jury's verdict, not a judge's factfinding.

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

Criminal Law & Procedure > Trials > Verdicts > Unanimity

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Jury Trial

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Sentencing Issues

HN3 The revised *§ 921.141(2)(b)1., Fla. Stat.* (2016), states that if the jury does not unanimously find at least one aggravating factor, the defendant is ineligible for a sentence of death. The significance of this change is that *§ 921.141* expressly indicates that a death sentence cannot be considered unless at least one aggravating factor has been proven beyond a reasonable doubt. This change is consistent with preexisting case law.

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Jury Trial

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Sentencing Issues

HN4 Ch. 2016-13, § 3, Laws of Fla., changes former *§ 921.141(3), Fla. Stat.* (2015), which required the court to find whether sufficient aggravating circumstances existed to impose death and to determine that there are insufficient mitigating circumstances to outweigh the aggravating circumstances, to *§ 921.141(2)(b)2., Fla. Stat.* (2016), requiring the jury to make a sentencing recommendation based on the weighing of whether sufficient aggravating factors exist, whether those aggravating factors outweigh the mitigating circumstances found to exist, and based on those two considerations, whether the defendant should be sentenced to life or death. The change from a finding that there are insufficient mitigating circumstances to outweigh the aggravating circumstances in former *§ 921.141(3)*, to the jury considering whether aggravating factors exist which outweigh the mitigating circumstances found to exist in *§ 921.141(2)(b)2.b., Fla. Stat.* (2016), is a change to a reciprocal, synonymous statement. The previous version of *§ 921.141* also indicated that the jury's advisory recommendation would be based on whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist. Former *§ 921.141(2)(b), Fla. Stat.* (2015). Death can be imposed only when the aggravating factors outweigh the mitigating circumstances, rather than the opposite.

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Sentencing Issues

Criminal Law & Procedure > Sentencing > Capital Punishment

HN5 Under the amended *§ 921.141(2)(c), Fla. Stat.* (2016), the jury may recommend a death sentence so long as at least 10 jurors agree that the defendant should be sentenced to death, whereas under former *§ 921.141(3), Fla. Stat.* (2015), a bare majority of the 12-member jury was sufficient.

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

Criminal Law & Procedure > Juries & Jurors > Province of

Court & Jury > Sentencing Issues

Criminal Law & Procedure > Trials > Verdicts > Unanimity

HN6 The amendments to *§ 921.141, Fla. Stat.* (2016), clearly require the jury to explicitly find at least one aggravating factor unanimously. Additionally, they require unanimity as to each aggravating factor that may be considered by the jury and trial court in determining the appropriate sentence. The changes also require the jury to consider whether there are sufficient aggravating factors to outweigh the mitigating circumstances in order to impose death. The changes further mandate that a life sentence be imposed unless 10 or more jurors vote for death.

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

HN7 With respect to the death penalty, under the amendments to *§ 921.141, Fla. Stat.* (2016), the burden of proof is not inverted--the State still must prove the requisite facts beyond a reasonable doubt to establish the same elements as were previously required under the prior version of *§ 921.141*. Ch. 2016-13, § 3, Laws of Fla., did not change the list of aggravating factors and mitigating circumstances that affect the weighing process.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Jury Trial

Criminal Law & Procedure > Sentencing > Capital Punishment

HN8 The changes made by Ch. 2016-13, Laws of Fla., enacted in response to the United States Supreme Court's declaration in Hurst v. Florida, that Florida's prior death penalty statute was unconstitutional in not requiring the jury to make all findings necessary to render the defendant eligible for the death penalty, clearly place the jury in the all-important and constitutionally required factfinding role.

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation

Governments > Legislation > Interpretation

HN9 The Florida Supreme Court has an obligation to construe a statute in a way that preserves its constitutionality. It is the Supreme Court's duty to save Florida statutes from the constitutional dust bin whenever possible. It is bound to resolve all doubts as to the validity of the statute in favor of its constitutionality, provided the statute may be given a fair construction that is consistent with the federal and state constitutions as well as with legislative intent. However, it may only do so, if to do so does not effectively rewrite the enactment.

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Sentencing Issues

Criminal Law & Procedure > Trials > Verdicts > Unanimity

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

HN10 The Florida Supreme Court has held that the United States Supreme Court's decision in Hurst v. Florida and Florida's right to a jury trial provided under *art. I, § 22, Fla. Const.*, require the jury's findings of the aggravating factors, that there are sufficient aggravating factors to impose death, that those aggravating factors outweigh the mitigation, and that death is the appropriate sentence are all required to be found unanimously by the jury for the defendant to be sentenced to death. The state Supreme Court has also held that, based on Florida's requirement for unanimity in jury verdicts and on the *Eighth Amendment to the United States Constitution*, a jury's ultimate recommendation of the death sentence must be unanimous. It interprets ch. 2016-13, Laws of Fla., consistent with those opinions defining the parameters of a defendant's right to a jury trial before the maximum penalty--a death sentence--may be constitutionally imposed.

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

Criminal Law & Procedure > Trials > Verdicts > Unanimity

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Jury Trial

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Sentencing Issues

HN11 Ch. 2016-13, § 3, Laws of Fla., amends Florida's

death penalty statute to provide that the jury must make a recommendation that is based on the considerations of whether sufficient aggravating factors exist and whether they outweigh the mitigating circumstances found to exist, but it does not specify whether these findings themselves must be unanimous or explicit. § 921.141(2)(b)2., Fla. Stat. (2016). Amended § 921.141(2)(b)2. also provides that the death recommendation must be made by only 10 jurors. See Section 921.141 is not explicit as to whether the requirement of a 10-to-2 vote applies to the factual findings that there are sufficient aggravators and that the aggravating factors outweigh the mitigating circumstances or to the ultimate death recommendation. The Florida Supreme Court construes § 921.141(2)(b)2. to require the penalty phase jury to unanimously find beyond a reasonable doubt that each aggravating factor exists, that sufficient aggravating factors exist to impose death, and that they outweigh the mitigating circumstances found to exist. Clearly, if the intent was to apply a non-unanimous vote requirement to those separate factual findings, this would be unconstitutional as inconsistent with Hurst v. State, in which the supreme court has held that those findings must be made unanimously.

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Sentencing Issues

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

HN12 With respect to the death penalty, the jury's sentencing recommendation is a separate conclusion distinct from the jury's findings of whether sufficient aggravating factors exist and whether the aggravating factors outweigh the mitigation. A juror is not required to recommend the death sentence even if the jury concludes that the aggravating factors outweigh the mitigating circumstances. This final jury recommendation, apart from the findings that sufficient aggravating factors exist and that the aggravating factors outweigh the mitigating circumstances, has sometimes been referred to as the "mercy" recommendation.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Jury Trial

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Sentencing Issues

Criminal Law & Procedure > Trials > Verdicts > Unanimity

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

HN13 The provision of ch. 2016-13, § 3, Laws of Fla., not requiring that the jury's ultimate recommendation for death be unanimous is unconstitutional under the Florida Supreme Court's holding in Hurst v. State, and the Supreme Court is unable to construe that provision to be consistent with Hurst. Under the commandments of Hurst v. Florida, Florida's state constitutional right to trial by jury, and Florida jurisprudence, the penalty phase jury must be unanimous in making the critical findings and recommendation that are necessary before a sentence of death may be considered by the judge or imposed.

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Judges: LABARGA, C.J., and PARIENTE, LEWIS, [*3] QUINCE, and PERRY, JJ., concur. CANADY, J., concurs in part and dissents in part with an opinion, in which POLSTON, J., concurs.

Opinion

PER CURIAM.

The issue before this Court is whether the newly enacted death penalty law, passed after the United States Supreme Court held a portion of Florida's capital sentencing scheme unconstitutional in *Hurst v. Florida, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016)* ("*Hurst v. Florida*"), may be constitutionally applied to pending prosecutions for capital offenses that occurred prior to the new law's effective date. The Fifth District Court of Appeal concluded in *State v. Perry, 192 So. 3d 70 (Fla. 5th DCA 2016)*, that chapter 2016-13, Laws of Florida (2016) ("the Act"), could apply to pending prosecutions without constitutional impediment.[1]

In its decision, the Fifth District [*4] passed on the following questions, which the court certified to be of great public importance:

> 1) DID *HURST V. FLORIDA, 136 S. CT. 616, 193 L. Ed. 2d 504 (2016)*, DECLARE FLORIDA'S DEATH PENALTY UNCONSTITUTIONAL?
>
> 2) 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 76.[2] Perry filed his Notice to Invoke Discretionary Jurisdiction in this Court based upon the two certified questions.[3] We have jurisdiction. *See art. V, § 3(b)(4),*

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[1] Two trial courts in two different circuits have recently held the Act unconstitutional as to pending prosecutions because unanimity was not required in the final vote for death or in the jury fact-finding. *State v. Keetley*, No. 10-CF-018429 (Fla. 13th Jud. Cir. Ct., June 9, 2016) (pending before the Second District Court of Appeal in Case No. 2D16-2717); *State v. Gaiter*, No. F01-128535 (Fla. 11th Jud. Cir. Ct. May 9, 2016) (pending before the Third District Court of Appeal in Case No. 3D16-1174).

[2] After accepting jurisdiction and during merits briefing, this Court ordered that Perry and the State "address whether the provision within *section 921.141(2)(c), Florida Statutes* (2016), Chapter 2016-13, Laws of Florida, requiring that 'at least 10 jurors determine that the defendant should be sentenced to death' is unconstitutional." **Perry v. State**, *SC16-547, 2016 Fla. App. LEXIS 6924 (Fla. Sup. Ct. Order filed May 5, 2016)*.

[3] William T. Woodward, the other defendant whose case was considered by the Fifth District, moved for a motion for rehearing in the Fifth District, which was still pending at the time Perry sought review in this Court. Woodward did not move for joinder in this case, but instead filed a motion for leave to appear as amicus curiae, which this Court granted on April 18, 2016. After the Fifth District denied [*5] Woodward's motion for rehearing on April 21, 2016, Woodward filed his Notice to Invoke Discretionary Jurisdiction in this Court. On April 29, 2016, this Court stayed that case pending disposition of this case. *See Woodward v. State*, No. SC16-696 (Fla. Sup. Ct. Order accepting jurisdiction filed April 29, 2016).

William T. Woodward and McClain & McDermott, P.A., the Law Offices of Todd G. Scher, P.L. and the Law Offices of John Abatecola, filed amicus curiae briefs on the certified questions in which they explain that they do not take the positions of either party. Capital Collateral Regional Counsel-South was granted leave to appear as amicus curiae by joining in the brief filed by McClain & McDermott, P.A., the Law Offices of Todd G. Scher, P.L., and the Law Offices of John Abatecola.

The Tenth Judicial Circuit Public Defender, Howard L. "Rex" Dimmig, II, the Constitution Project (TCP), and the American Civil Liberties Union Capital Punishment Project (ACLU-CPP) and the American Civil Liberties Union of Florida (ACLU-FL) filed amicus curiae briefs in support of Perry on the issue of whether *section 921.141(2)(c), Florida Statutes* (2016), chapter 2016-13, Laws of Florida, requiring that at least ten jurors determine that [*6] the defendant should be sentenced to death is unconstitutional under the Florida or United States Constitution. The Florida Association of Criminal Defense Lawyers (FACDL), Florida Capital Resource Center (FCRC), Florida International University College of Law's Center for Capital Representation (FIU CCR), and the Florida Public

Fla. Const.

We have addressed the first certified question in our opinion on remand in Hurst v. State, No. SC12-1947, 2016 Fla. LEXIS 2305 (slip op. issued Fla. Oct. 14, 2016) ("Hurst"). Based on that decision, in which we concluded that the death penalty was not declared unconstitutional, we answer the first certified question in the negative. See Hurst, SC12-1947, 2016 Fla. LEXIS 2305, [slip op.] at 50-51. Further, by its own terms, section 775.082(2), Florida Statutes (2013), is limited to those cases in which the defendant was "previously sentenced to death." Because this case involves a pending prosecution where the death penalty is sought, section 775.082(2) is inapplicable.

In addressing the second certified question of whether the Act may be applied to pending prosecutions, we necessarily review the constitutionality [*7] of the Act in light of our opinion in *Hurst*. In that opinion, we held that ***HN1*** as a result of the longstanding adherence to unanimity in criminal jury trials in Florida, the right to a jury trial set forth in article I, section 22 of the Florida Constitution requires that in cases in which the penalty phase jury is not waived, the findings necessary to increase the penalty from a mandatory life sentence to death must be found beyond a reasonable doubt by a unanimous jury.[4] Hurst, SC12-1947, 2016 Fla. LEXIS 2305, [slip op.] at 4. Those findings specifically include unanimity as to all aggravating factors to be considered, unanimity that sufficient aggravating factors exist for the imposition of the death penalty, unanimity that the aggravating factors outweigh the mitigating circumstances, and unanimity in the final jury recommendation for death. 2016 Fla. LEXIS 2305, [slip op.] at 23-24, 36.

While most of the provisions of the Act can be construed constitutionally in accordance with *Hurst*, the Act's requirement that only ten jurors, rather than all twelve, must recommend a death sentence is contrary to our holding in *Hurst*. See 2016 Fla. LEXIS 2305, at *44 ("[W]e conclude under [*8] the commandments of Hurst v. Florida, [136 S. Ct. 616, 193 L. Ed. 2d 504 (2016)], Florida's state constitutional right to trial by jury, and our Florida jurisprudence, the penalty phase jury must be unanimous in making the critical findings and recommendation that are necessary before a sentence of death may be considered by the judge or imposed.").[5] Therefore, we answer the second certified question in the negative, holding that the Act cannot be applied constitutionally to pending prosecutions because the Act does not require unanimity in the jury's final recommendation as to whether the defendant should be sentenced to death.

BACKGROUND

In *State v. Perry*, the Fifth District Court of Appeal addressed two cases involving defendants awaiting trial for charges of first-degree murder, in which the State filed notices of intent to seek the death penalty prior to the United [*9] States Supreme Court issuing its decision in *Hurst v. Florida* on January 12, 2016. Perry, 192 So. 3d at 73 n.2. In *Hurst v. Florida*, the United States Supreme Court held that Florida's capital "sentencing scheme [was] unconstitutional." 136 S. Ct. at 619. On March 7, 2016, the Florida Legislature, in response to *Hurst v. Florida*, amended Florida's capital sentencing scheme ("the Act"). See ch. 2016-13, Fla. Laws (2016). When the Act went into effect, the State had already filed its petition in the Fifth District. Perry, 192 So. 3d at 73.

The first case addressed by the Fifth District involves Larry Darnell Perry, who was indicted for first-degree murder and aggravated child abuse for the 2013 death of his son. Id. at 72. After *Hurst v. Florida* was issued, Perry moved to strike the State's notice of intent to seek the death penalty. *Id.* The second case concerns William Theodore Woodward, who was charged with two counts of first-degree murder for the 2012 deaths of his two neighbors. *Id.* After *Hurst v. Florida*, Woodward moved to prohibit the death qualification of the jury. *Id.*

The trial courts in both cases granted the defendants' respective motions and, in both cases, the State filed petitions for writs of prohibition in the Fifth District

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Defender Association (FPDA) were granted leave to join as amici curiae and adopted Mr. Dimmig's amicus brief on the issue of the constitutionality of the ten-juror recommendation.

[4] In *Hurst*, we also decided the requirements of unanimity under both the ***Sixth*** and ***Eighth Amendments to the United States Constitution***, but our basic reasoning rests on Florida's independent constitutional right to trial by jury. Art. I, § 22, Fla. Const.

[5] The statutory provision requiring "at least 10 jurors recommend death" was a result of compromise after the Florida House of Representatives and the Florida Senate promulgated two separate proposals, the House's proposing a final recommendation of nine to three and the Senate requiring a unanimous recommendation. Fla. S.B. 7068, § 3 (Feb. 3, 2016); Fla. H.B. 7101, § 2 (Feb. 5, 2016).

seeking to prohibit [*10] the trial courts from striking its notice of intent to seek the death penalty in Perry's case and refusing to death qualify the jury in Woodward's case. *Id.* The Fifth District consolidated the cases for the purposes of disposition only. *Id.* at n.2.

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.* Then the Fifth District determined that the United States Supreme Court's decision in *Hurst v. Florida* did not leave Florida without a death penalty, as contended by Perry and Woodward, but rather "struck [only] the process of imposing a sentence of death." *Id. at 73*. Thus, the Fifth District rejected Petitioners' arguments that the Act does not apply because *section 775.082(2), Florida Statutes* (2015), provides for a mandatory, alternative sentence of life imprisonment when the death penalty is stricken. *Id.* We rejected the same arguments in *Hurst*, reasoning, first, that *section 775.082(2)* specifically applied only to "individuals *previously sentenced to death*," and, second, as stated above, that *Hurst v. Florida* did not hold the death penalty unconstitutional. *SC12-1947, 2016 Fla. LEXIS 2305, [slip op.] at 50-52*.

The Fifth District next turned to [*11] the argument that application of the new law to pending cases would constitute an ex post facto violation under the United States and Florida Constitutions. *Perry, 192 So. 3d at 74* (citing U.S. Const. art. I, § 10; *art. I, § 10, Fla. Const.*). The Fifth District concluded that since ex post facto principles generally do not bar the application of procedural changes to pending criminal proceedings, and because it determined that the new law is procedural rather than substantive, there was no ex post facto violation. *Id. at 75*. The court likened the situation to that in *Dobbert v. Florida, 432 U.S. 282, 97 S. Ct. 2290, 53 L. Ed. 2d 344 (1977)*, in which the United States Supreme Court determined that Florida's newly enacted death sentencing law, passed in response to *Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972)*, did not constitute an ex post facto violation when it was applied to capital defendants who had not yet been sentenced because it "simply altered the methods employed in determining whether the death penalty was imposed." *Perry, 192 So. 3d at 75* (quoting *Dobbert, 432 U.S. at 293-94*). The Fifth District also found guidance in this Court's decision in *Horsley v. State, 160 So. 3d 393 (Fla. 2015)*, which held that the new juvenile sentencing law, enacted in response to *Miller v. Alabama, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012)*, would apply to juvenile offenders whose offenses predated the new law. *Perry, 192 So. 3d at 75*. After determining that the Act applies to pending prosecutions, the Fifth District certified the two questions regarding the applicability [*12] of the Act. *Id. at 76*.

ANALYSIS

We now address the important question of whether the Act, chapter 2016-13, Laws of Florida, applies to cases in which the underlying crime was committed prior to the Act's effective date (March 7, 2016). We begin our analysis with an explanation of the statutory changes and how we construe these changes consistent with the United States Supreme Court's decision in *Hurst v. Florida* and our decision in *Hurst*. Ultimately, we conclude that while most of the provisions of the Act can be construed constitutionally and could otherwise be validly applied to pending prosecutions, because the Act requires that only ten jurors, rather than all twelve, recommend a final sentence of death for death to be imposed, the Act is unconstitutional to that extent pursuant to *Hurst* and requires us to answer the second certified question in the negative.

I. STATUTORY CHANGES

We begin with a discussion of the Act's changes to Florida's capital sentencing scheme. The most important changes made to the previously existing statutes appear in *sections 775.082*, *782.04*, and *921.141*. Ch. 2016-13, Laws of Fla. (2016). This Act was adopted shortly after ***HN2*** the United States Supreme Court held in *Hurst v. Florida* that Florida's [*13] capital sentencing scheme was unconstitutional because it did not require the jury to determine the facts necessary for the imposition of the death penalty. *136 S. Ct. 616, 193 L. Ed. 2d 504 (2016)*. As we explained in *Hurst*:

> The Supreme Court emphasized that under Florida law, before the sentence of death may be imposed, the trial court alone must find "'the facts . . . [t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'" *Id.* (quoting *§ 921.141(3), Fla. Stat.* (2012)). The Supreme Court was explicit in *Hurst v. Florida* that the constitutional right to an impartial jury "required Florida to base Timothy Hurst's death sentence on a jury's verdict, not a judge's factfinding." *Id. at 624*.

SC12-1947, 2016 Fla. LEXIS 2305, [slip op.] at 21.

Section 1 of the Act amends section 775.082(1)(a), Florida Statutes, from referring to the results of the sentencing procedure set forth in section 921.141 as "findings by the court" to "a determination" that such person shall be punished by death. Ch. 2016-13, § 1. Section 2 of the Act amends section 782.04(1) to create a notice requirement whereby prosecutors must notify the defendant within forty-five days after arraignment of the aggravating factors the State intends to prove at trial. *Id.* at § 2. Though not required by the United State Supreme Court's decision in [*14] *Hurst v. Florida*, by providing notice of aggravating factors, this change in section 2 provides a benefit to capital defendants that they were not previously afforded. State v. Steele, 921 So. 2d 538, 543 (Fla. 2005) (finding that no statute, rule of procedure, or decision of the Florida Supreme Court or United States Supreme Court compelled a trial court to require advance notice of aggravating factors).

Section 3 of the Act defines the facts required to be found by the jury for a sentence of death to be imposed. Section 3 contains the most substantial changes, significantly amending section 921.141, Florida Statutes. Ch. 2016-13, § 3. Specifically, it changes the expression "aggravating circumstances" to "aggravating factors" throughout section 921.141. The amended section 921.141(1) limits the State to presenting evidence of only those aggravating factors of which it provided notice to the defendant pursuant to section 782.04(1)(b), as amended by section 2 of the law. *Id.*

The amended section 921.141(2) now expressly provides that the requirements in the statute apply to cases in which the defendant has not waived his or her right to a sentencing proceeding by a jury. Section 921.141(2)(a) now requires the jury to determine whether at least one aggravating factor has been proven beyond a reasonable doubt, and section 921.141(2)(b) requires the jury to find the aggravating factors unanimously and to specify which [*15] aggravating factors have been found unanimously:

> (2) FINDINGS AND RECOMMENDED SENTENCE BY THE 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.

§ 921.141(2), Fla. Stat. (2016).

HN3 The revised statute also now states that if the jury does not unanimously find at least one aggravating factor, the defendant is "ineligible for a sentence of death." *Id.* § 921.141(2)(b)1. The significance of this change is that the statute now expressly indicates that a death sentence cannot be considered unless at least one aggravating factor has been proven beyond a reasonable doubt. Of course, this change is consistent with preexisting case law. *See, e.g.*, Steele, 921 So. 2d at 543 ("To obtain a death sentence, the State must prove beyond a reasonable doubt at least one aggravating circumstance, whereas to obtain a life sentence the defendant need not prove any mitigating circumstances at all.").

Next, ***HN4*** section 3 [*16] changes former subsection (3) of section 921.141, which required the court to find whether sufficient aggravating circumstances existed to impose death and to determine that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances," to subsection (2)(b)2. of the new section 921.141, now requiring the jury to make a sentencing recommendation based on the weighing of whether sufficient aggravating factors exist, whether those aggravating factors outweigh the mitigating circumstances found to exist, and based on those two considerations, whether the defendant should be sentenced to life or death:

> (2) FINDINGS AND RECOMMENDED SENTENCE BY THE JURY. . . .
>
> . . .
>
> (b) . . . If the jury:
>
> . . .
>
> 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.

§ 921.141(2)(b)2., Fla. Stat. (2016).

The change from a finding "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances" in section 921.141(3), Florida Statutes (2015), to the jury considering whether "aggravating factors exist which outweigh the mitigating circumstances found to exist" in section 921.141(2)(b)2.b., Florida Statutes (2016), is a change to a reciprocal, synonymous statement. The previous version of the statute also indicated that the jury's advisory recommendation would be based on "[w]hether sufficient [*17] mitigating circumstances exist which outweigh the aggravating circumstances found to exist." § 921.141(2)(b), Fla. Stat. (2015). It has always been that death can be imposed only when the aggravating factors outweigh the mitigating circumstances, rather than the opposite.

HN5 Under the amended statute, the jury may recommend a death sentence so long as at least ten jurors agree that the defendant should be sentenced to death, whereas under the previous statute, a bare majority of the twelve-member jury was sufficient. *Compare* § 921.141(2)(c), Fla. Stat. (2016) ("If at least 10 jurors determine that the defendant should be sentenced to death . . ."), *with* § 921.141(3), Fla. Stat. (2015) ("Notwithstanding the recommendation of a majority of the jury . . . "). The new statute provides in pertinent part:

> 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.

§ 921.141(2)(c), Fla. Stat. (2016).

Finally, the law expressly eliminates the ability of the court to override a jury's recommendation for a life sentence [*18] with the imposition of a sentence of death, while expressly allowing the court to impose a life sentence even where the jury recommends death. *Id.* § 921.141(3)(a)1. (setting forth that if the jury recommends "[l]ife imprisonment without the possibility of parole, the court shall impose the recommended sentence."); *id.* § 921.141(3)(a)2. (setting forth that if the jury recommends death, "the court, after considering each aggravating factor found by the jury and all mitigating circumstances, may impose a sentence of life . . . ."). Section 3 also removes all reference to the jury playing an "advisory" role in the sentencing process. Ch. 2016-13, § 3.

As to the effective date, the Act provides, "[t]his act shall take effect upon becoming a law." *Id.* § 7. The Act became a law on March 7, 2016.

HN6 The amendments to section 921.141 clearly require the jury to explicitly find at least one aggravating factor unanimously. Additionally, they require unanimity as to each aggravating factor that may be considered by the jury and trial court in determining the appropriate sentence. The changes also require the jury to consider whether there are sufficient aggravating factors to outweigh the mitigating circumstances in order to impose death. The changes further mandate that [*19] a life sentence be imposed unless ten or more jurors vote for death.

We reject Perry's argument that the burden of proof is inverted. ***HN7*** The burden of proof is not inverted—the State still must prove the requisite facts beyond a reasonable doubt to establish the same elements as were previously required under the prior statute. The Act did not change the list of aggravating factors and mitigating circumstances that affect the weighing process. The prior statute, which is mirrored in the jury instructions, stated that "after hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters: . . . Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist." § 921.141(2), Fla. Stat. (2015); *In re Std. Jury Instrs. in Crim. Cases—Report No. 2013-03, 146 So. 3d 1110, 1120 (Fla. 2014)*. The statute, as well as this Court's precedent, then required that "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[, including] [t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." § 921.141(3), Fla. Stat. (2015).

HN8 The changes made by the Act, enacted in response [*20] to the United States Supreme Court's

declaration in *Hurst v. Florida*, that Florida's prior statute was unconstitutional in not requiring the jury to make all findings necessary to render the defendant eligible for the death penalty, clearly place the jury in the all-important and constitutionally required factfinding role.

II. WHETHER THE AMENDED STATUTE COMPLIES WITH *HURST*

We next construe the statutes amended by the Act to ensure that the Act is consistent with the United States Supreme Court's decision in *Hurst v. Florida*, as we interpreted that decision in *Hurst*. ***HN9*** This Court has an obligation to construe a statute in a way that preserves its constitutionality. *See State v. Harris, 356 So. 2d 315, 316-17 (Fla. 1978)* (construing section 812.021(3), in a constitutional manner where the statute was procedurally flawed); *see also Fla. Dep't of Children & Families v. F.L., 880 So. 2d 602, 609 (Fla. 2004)* (stating that the Court has an obligation to construe a statute in a way that preserves its constitutionality). It is this Court's duty to "save Florida statutes from the constitutional dustbin whenever possible." *Doe v. Mortham, 708 So. 2d 929, 934 (Fla. 1998)*. This Court is bound to "resolve all doubts as to the validity of the statute in favor of its constitutionality, provided the statute may be given a fair construction that is consistent with the federal and state constitutions [*21] as well as with legislative intent." *Heart of Adoptions, Inc. v. J.A., Inc., 963 So. 2d 189, 207 (Fla. 2007)* (citation omitted). However, this Court may only do so, if "to do so does not effectively rewrite the enactment." *State v. Stalder, 630 So. 2d 1072, 1076 (Fla. 1994)* (quoting *Firestone v. News-Press Publ'g Co., 538 So. 2d 457, 459-60 (Fla. 1989)*).

In *Hurst*, ***HN10*** we held that the United States Supreme Court's decision in *Hurst v. Florida* and Florida's right to a jury trial provided under *article I, section 22 of the Florida Constitution* require the jury's findings of the aggravating factors, that there are sufficient aggravating factors to impose death, that those aggravating factors outweigh the mitigation, and that death is the appropriate sentence are all required to be found unanimously by the jury for the defendant to be sentenced to death. *Hurst, SC12-1947, 2016 Fla. LEXIS 2305, [slip op.] at 23-24*. We also held that, based on Florida's requirement for unanimity in jury verdicts and on the *Eighth Amendment to the United States Constitution*, a jury's ultimate recommendation of the death sentence must be unanimous. *2016 Fla. LEXIS 2305, [slip op.] at 4*. We interpret the Act consistent with those opinions defining the parameters of a defendant's right to a jury trial before the maximum penalty—a death sentence—may be constitutionally imposed. *See 2016 Fla. LEXIS 2305, [slip op.] at 24-28*.

HN11 The Act amends Florida's death penalty statute to provide that the jury must make a recommendation that is "based on" the "considerations" of whether sufficient aggravating factors exist and whether [*22] they outweigh the mitigating circumstances found to exist, but it does not specify whether these findings themselves must be unanimous or explicit. *§ 921.141(2)(b)2., Fla. Stat.* (2016). We recognize that the amended statute also provides that the death recommendation must be made by only ten jurors. *See id.* The statute is not explicit as to whether the requirement of a ten-to-two vote applies to the factual findings that there are sufficient aggravators and that the aggravating factors outweigh the mitigating circumstances or to the ultimate death recommendation. *Compare § 921.141(2)(b), Fla. Stat.* (2016), *with § 921.141(2)(c), Fla. Stat.* (2016). Consistent with our decision in *Hurst*, we construe *section 921.141(2)(b)2.* to require the penalty phase jury to *unanimously find* beyond a reasonable doubt that each aggravating factor exists, that sufficient aggravating factors exist to impose death, and that they outweigh the mitigating circumstances found to exist. *Hurst, 2016 Fla. LEXIS 2305, [slip op.] at 23*. Clearly, if the intent was to apply a non-unanimous vote requirement to those separate factual findings, this would be unconstitutional as inconsistent with *Hurst*, where we have held that those findings must be made unanimously. *See id.*

However, we determine that ***HN12*** the sentencing recommendation is a separate conclusion distinct from [*23] the jury's findings of whether sufficient aggravating factors exist and whether the aggravating factors outweigh the mitigation. It has long been true that a juror is not required to recommend the death sentence even if the jury concludes that the aggravating factors outweigh the mitigating circumstances. *See, e.g., Cox v. State, 819 So. 2d 705, 717 (Fla. 2002)* ("[W]e have declared many times that 'a jury is neither compelled nor required to recommend death where aggravating factors outweigh mitigating factors.'" (quoting *Henyard v. State, 689 So. 2d 239, 249-50 (Fla. 1996)*)). That instruction is contained in the jury instructions used before *Hurst v. Florida*:

> If, after weighing the aggravating and mitigating circumstances, you determine that at least one aggravating circumstance is found to exist and that the mitigating circumstances do not outweigh the

> aggravating circumstances, or, in the absence of mitigating factors, that the aggravating factors alone are sufficient, you may recommend that a sentence of death be imposed rather than a sentence of life in prison without the possibility of parole. *Regardless of your findings in this respect, however, you are neither compelled nor required to recommend a sentence of death.*

In re Std. Jury Instrs. in Crim. Cases—Report No. 2013-03, 146 So. 3d at 1127-28 [*24] (emphasis added). This final jury recommendation, apart from the findings that sufficient aggravating factors exist and that the aggravating factors outweigh the mitigating circumstances, has sometimes been referred to as the "mercy" recommendation. *See, e.g., Alvord v. State, 322 So. 2d 533, 540 (Fla. 1975), receded from on other grounds, Caso v. State, 524 So. 2d 422 (Fla. 1988)* (explaining that the jury and judge may exercise mercy in their recommendation even if the factual situations may warrant capital punishment).

HN13 This provision of the Act not requiring that the jury's ultimate recommendation for death be unanimous is unconstitutional under this Court's holding in *Hurst*, and we are unable to construe that provision to be consistent with *Hurst*. As we held in *Hurst*, "under the commandments of *Hurst v. Florida*, Florida's state constitutional right to trial by jury, and our Florida jurisprudence, the penalty phase jury must be unanimous in making the critical findings and recommendation that are necessary before a sentence of death may be considered by the judge or imposed." *SC12-1947, 2016 Fla. LEXIS 2305, at *44*.

In conclusion, we resolve any ambiguity in the Act consistent with our decision in *Hurst*. Namely, to increase the penalty from a life sentence to a sentence of death, the jury must unanimously [*25] find the existence of any aggravating factor, that the aggravating factors are sufficient to warrant a sentence of death, that the aggravating factors outweigh the mitigating circumstances, and must unanimously recommend a sentence of death. *2016 Fla. LEXIS 2305, [slip op.] at 23-24*. While most of the Act can be construed constitutionally under our holding in *Hurst*, the Act's 10-2 jury recommendation requirement renders the Act unconstitutional.

CONCLUSION

Based on the reasoning of our opinion in *Hurst*, we answer both certified questions in the negative. As to the second question, we construe the fact-finding provisions of the revised *section 921.141, Florida Statutes*, constitutionally in conformance with *Hurst* to require unanimous findings on all statutory elements required to impose death. 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.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, and PERRY, JJ., concur. CANADY, J., concurs in part and dissents in part with an opinion, in which POLSTON, J., concurs.

Concur by: CANADY (In Part)

Dissent by: CANADY (In Part)

Dissent

CANADY, J., concurring in part and [*26] dissenting in part.

I agree with the majority in approving the Fifth District's rejection of Perry's argument that the Supreme Court's decision in *Hurst v. Florida* "leave[s] Florida without a death penalty." I therefore concur with the majority in answering the first certified question in the negative.

But I dissent from the negative answer to the second certified question. Although I agree with the majority that the Fifth District correctly rejected Perry's argument that application of Florida's new death penalty statute to his case would be an ex post facto violation, I strongly disagree with the majority's conclusion that the new statute is unconstitutional under *Hurst v. Florida*. As I explained in my dissent in *Hurst, SC12-1947, 2016 Fla. LEXIS 2305, [slip op.] at 75* (Canady, J., dissenting), the Supreme Court "repeated[ly] identifi[ed]" "Florida's failure to require a jury finding of an aggravator as the flaw that renders Florida's death penalty law unconstitutional." *See, e.g., Hurst v. Florida, 136 S. Ct. at 624* ("Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional."). The new statute has remedied that flaw. *See § 921.141(2)(a)-(b), Fla. Stat.* (2016).

The Legislature's work in enacting the new statute reflects careful attention [*27] to the holding of *Hurst v.*

Florida, which does not require jury sentencing. In rejecting the new statute, the majority has "fundamentally misapprehend[ed] and misuse[d] *Hurst v. Florida*," *Hurst, SC12-1947, 2016 Fla. LEXIS 2305, at *92* (Canady, J., dissenting).

POLSTON, J., concurs.

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Workers' Compensation

Overview of Recent Workers' Compensation Case Law

For the last two years, staff has been monitoring several workers' compensation cases that are now resolved and will have a significant impact on Florida's workers' compensation system. In April 2016, the Florida Supreme Court resolved two of the cases, one of which found the workers' compensation attorney fee schedule unconstitutional. This case, *Castellanos v. Next Door Company*, has been widely reported in the media and resulted in increased workers' compensation premiums following an off-cycle workers' compensation rate filing that was approved by the Office of Insurance Regulation (OIR). The OIR rate order increased workers' compensation rates by 14.5 percent on December 1, 2016, with an increase of 10.1 percent allocated to *Castellanos* (this rate order is the subject of ongoing litigation over compliance with the Sunshine Law and Public Records Law). The outcome of the second April case was not adverse to the current statute.

In June 2016, the Court found another portion of the workers' compensation law unconstitutional. In *Westphal v. City of St. Petersburg, etc., et al.*, the Court, because of an unconstitutional gap in indemnity benefits, increased temporary total disability benefits for certain injured workers from 104 weeks to 260 weeks of benefits. This restores the standard number of weeks available under the 1993 version of the statute. In November 2016, the First District Court of Appeal (1st DCA) in *Jones v. Food Lion, Inc.*, applied *Westphal* to the 104 week limitation on temporary partial disability benefits finding it unconstitutional and also increasing this limitation to 260 weeks of benefit.

Finally, the 1st DCA issued an opinion in a case that holds another portion of the workers' compensation law concerning attorney fees unconstitutional. In *Miles v. City of Edgewater Police Department*, the Court invalidated a limitation on claimant's attorneys accepting payment directly from the claimant (i.e., the injured worker) or others on the claimant's behalf. While adverse to the current statute, *Miles* was determined by OIR to not have an effect on rates.

The status, background, and outcome of each case is summarized below.

Cases Adverse To Current Statute

CASTELLANOS V. NEXT DOOR COMPANY[1]

Status

Resolved by Florida Supreme Court on April 28, 2016; the National Council on Compensation Insurance (NCCI) made an off-cycle rate filing that was approved by the OIR increasing workers' compensation rates by 14.5 percent (an increase of 10.1 percent is assignable to the *Castellanos* decision).

Background

Based on the formula for calculating workers' compensation attorney fees set forth in s. 440.34(1), F.S., a Judge of Compensation Claims (JCC) awarded the attorney for an injured employee $164.54 in fees for 107.2 hours of legal work that was legally necessary to secure the employee's workers' compensation benefits. The statutory fee schedule bases the attorney fee award on the value of the benefits secured. In this case, $822.70 in benefits were secured, which yields a statutory attorney fee of $164.54. This equals an hourly rate of $1.53.

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[1] *Castellanos v. Next Door Company*, 192 So. 3d 431 (Fla. 2016). Opinion below – 124 So. 3d 392 (Fla. 1st DCA 2013).

The fee award was affirmed on appeal. The 1st DCA, based on past decisions of the court, found the statutory attorney fee provision constitutional on its face and as applied. Due to the circumstances of the case, the 1st DCA also certified to the Florida Supreme Court the following question of great public importance.

> *Whether the award of attorney's fees in this case is adequate, and consistent with the access to courts, due process, equal protection, and other requirements of the Florida and Federal Constitutions.*

Outcome[2]

The Florida Supreme Court found an unconstitutional violation of the claimant's due process rights[3] – there must be an opportunity to deviate from the statutory fee schedule to award the claimant's attorney a reasonable fee. Reasonableness will be determined using the factors established in *Lee Eng'g & Constr. Co. v. Fellows*, 209 So. 2d 454 (Fla. 1968), which are now listed in Florida Bar Rule 4-1.5 (These are very similar to the factors previously listed in the statute until 2002).

> "*It is the irrebuttable statutory presumption–not the ultimate statutory fee awarded in a given case–that we hold unconstitutional.*" *Castellanos*, p. 6.

WESTPHAL V. CITY OF ST. PETERSBURG[4]

Status

Resolved by the Florida Supreme Court on June 9, 2016; the National Council on Compensation Insurance (NCCI) made an off-cycle rate filing that was approved by the Office of Insurance Regulation (OIR) increasing workers' compensation rates by 14.5 percent (an increase of 2.2 percent is assignable to the combined impact of the *Westphal* and *Jones* decisions).

Background

An injured firefighter, who had received the maximum duration of temporary disability indemnity benefits under Florida's workers' compensation law (104 weeks), sought permanent total disability benefits. The JCC denied the request, finding that since the firefighter had not reached "maximum medical improvement"[5] he was not eligible for permanent total disability benefits.

On appeal, the 1st DCA reversed, holding that the 104-week limit on temporary disability benefits violated the Florida Constitution by denying access to courts to workers who remain totally disabled but are still improving when their temporary benefits expire. The 1st DCA also revived a repealed portion of

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[2] The Florida Supreme Court also quashed the 1st DCA opinion in the following cases and remanded them to the JCC because of the outcome in *Castellanos*: *Cynthia Richardson v. Aramark/Sedgwick CMS*, SC14-738; *Louis P. Pfeffer, et al v. Labor Ready Southeast, Inc., et al.*, SC14-1325; and *Henry Diaz v. Palmetto General Hospital*, SC14-1916. The Court also notes that the 1st DCA has certified that it has 18 other cases that depend upon the outcome of *Castellanos*.

[3] While the 1st DCA certified the question regarding whether the award of attorney's fees in the case was adequate, and consistent with the access to courts, due process, equal protection, and other requirements of the Florida and Federal Constitutions, the Court rephrased the certified question to limit it only to due process considerations. The Court did not rule on the constitutionality of the challenged statutes in relation to access to courts, equal protection, or any other constitutionally protected right. *Castellanos v. Next Door Company*, No. 13-2082, 2016 WL 1700521 (Fla. Apr. 28, 2016).

[4] *Westphal v. City of St. Petersburg*, 194 So. 3d 311 (Fla. 2016). Opinion below – 122 So. 3d 440 (Fla. 1st DCA 2013).

[5] Florida's workers' compensation law defines "date of maximum medical improvement" as the date after which further recovery from, or lasting improvement to, an injury or disease can no longer reasonably be anticipated, based upon reasonable medical probability. See s. 440.02(10), F.S.

the workers' compensation statute that had provided up to 260 weeks of temporary total benefits for injured employees (the maximum duration had been reduced from 260 weeks to 104 weeks in 1994). The State of Florida and the City of St. Petersburg then successfully moved for rehearing en banc (before the entire panel of 1st DCA judges).

Upon rehearing, the 1st DCA withdrew the panel opinion that held the 104-week limitation unconstitutional, and held that a worker who is totally disabled as a result of a workplace accident and remains totally disabled by the end of their eligibility for temporary total disability benefits is deemed to be at maximum medical improvement by operation of law and is therefore eligible to assert a claim for permanent and total disability benefits.

Outcome

The Florida Supreme Court found an unconstitutional violation of the claimant's right to access to courts – where the application of the statute for certain injured workers results in them being deprived of disability benefits because their statutory limit of 104 weeks of temporary total disability benefits has been reached, but they are not yet eligible for permanent total disability benefits, they have been denied their constitutional right and are entitled to additional temporary total disability benefits, not to exceed 260 weeks of benefit (inclusive of the 104 weeks of benefit previously received).

JONES V. FOOD LION, INC. [6]

Status

Resolved by the 1st DCA on November 9, 2016; the National Council on Compensation Insurance (NCCI) made an off-cycle rate filing that was approved by the Office of Insurance Regulation (OIR) increasing workers' compensation rates by 14.5 percent (an increase of 2.2 percent is assignable to the combined impact of the *Westphal* and *Jones* decisions).

Background

An injured grocery store manager, who had received the maximum duration of temporary disability indemnity benefits under Florida's workers' compensation law (104 weeks), sought permanent total disability benefits. The JCC denied the request, finding that since the grocery store manager had not reached "maximum medical improvement" his claim for permanent total disability benefits was premature.

On appeal, the 1st DCA affirmed the finding of the JCC, but on different grounds. The 1st DCA applied the reasoning in *Westphal*, which involved the time limitation on temporary total disability benefits, to the statute limiting temporary partial disability benefits to 104 weeks and found s. 440.15(4)(e), F.S., unconstitutional and revived the statute as it existed before 1994. This allows injured workers to receive temporary partial disability benefits for up to 260 weeks. The portion of the statute that limits the combined amount of temporary total and temporary partial disability benefits to the same duration, now 260 weeks, was not affected.

Outcome

The 1st DCA's decision in *Westphal*, which found an unconstitutional gap in temporary total disability benefits, applies to the gap that can occur when injured workers have exhausted their 104 weeks of temporary partial disability benefits, but they are not yet at maximum medical improvement (making claims for permanent disability benefits premature). Such injured workers are entitled to additional

[6] *Jones v. Food Lion, Inc.*, No. 1D15-3488, 2016 Fla. App. LEXIS 16710 (Fla. 1st DCA Nov. 9, 2016).

temporary partial disability benefits, not to exceed 260 weeks of temporary benefits (inclusive of the 104 weeks of benefit previously received).

MILES V. CITY OF EDGEWATER POLICE DEPARTMENT[7]

Status

First District Court of Appeal (1st DCA) opinion issued on April 20, 2016; not appealed further.

Background

Martha Miles, a law enforcement officer, filed a claim against her employer, the City of Edgewater Police Department, through its third party administrator, Preferred Governmental Claims Solutions (collectively referred to as the E/C). Officer Miles obtained new counsel through a $1,500 retainer paid by the Fraternal Order of Police and an agreement that made her personally responsible for any attorney fees in excess of 15 hours. It is a misdemeanor for an attorney to accept fees other than those approved by JCC and the JCC can only approve E/C paid claimant attorney fees following successful prosecution of a petition for benefits. At the time, such fees were limited only to a statutory fee schedule based upon the amount of the benefit secured by the attorney.

She acknowledged in writing that such a claimant paid attorney fee is prohibited by statute and waived statutory prohibitions. Since exposure injuries are very difficult to prove, it was understood that the initial retainer fee would likely be insufficient to compensate the attorney in the matter.

Two new petitions for the alleged exposure injuries and disability were filed on behalf of Officer Miles, which the E/C denied. Since an E/C paid claimant attorney fee is only awarded if the claimant prevails in full or in part on their petition for benefits, Officer Miles sought approval of the retainer agreements that would provide for claimant paid attorney fees in the event of a negative outcome. Miles' attorney alleged that, given the low probability of success on the merits, it would not be economically feasible for the attorney to continue the representation without establishing the certainty of the fee. The JCC refused to approve the retainer agreements because of the statutory limitations. Officer Miles' attorney withdrew and she proceeded to hearing representing herself. Despite it being the claimant's burden to prove causation with medical evidence, she presented no medical evidence at hearing and only offered her personal testimony. The JCC ruled in favor of the E/C and Officer Miles appealed to the 1st DCA.

Outcome

The 1st DCA considered the appeal as an "as-applied" constitutional challenge to the two statutes limiting claimant paid attorney fees to those approved by the JCC following a successful prosecution of a petition for benefits and using an exclusive formula based upon the value of the benefits secured through the attorney's action. The 1st DCA reviewed an earlier decision, *Jacobson v. Se. Pers. Leasing, Inc.*,[8] where it found these same two statutes unconstitutional as-applied to a workers' compensation claimant attorney fee related to a case where no benefits were at issue (i.e., there would be no basis for a JCC awarded E/C paid claimant attorney fee). The 1st DCA found that the First Amendment of the United States Constitution protects Officer Miles' right to free speech, with the attorney of her choosing providing the mouth-piece, free association and petition. Additionally, the 1st DCA found that the statutes unconstitutionally interfered with the officer's right to contract. The essential factor that led to this outcome is that there is no increase to the E/C's workers' compensation costs in this sort of case. This is because if the claimant loses the case, she will pay the attorney's fees. Her personal costs do not affect

[7] *Miles v. City of Edgewater Police Department*, 190 So. 3d 171 (Fla. 1st DCA 2016).

[8] *Jacobson v. Se. Pers. Leasing, Inc.*, 113 So. 3d 1042 (Fla. 1st DCA 2013). Under *Jacobson*, the workers' compensation attorney fee statute and criminal penalty prohibiting claimant attorneys from accepting a fee that is not approved by the JCC does not apply to cases where a JCC approved attorney fee is impossible.

workers' compensation rates. Accordingly, there is no state interest in controlling Officer Miles' personal costs that would justify a limitation on fundamental constitutional rights.

The 1st DCA reversed the JCC's order and remanded the case for a new hearing on the approval of the retainer agreements and the petitions for benefit (i.e., a hearing on the merits).

Non-Adverse Case

STAHL V. HIALEAH HOSPITAL[9]

Status

Resolved by Florida Supreme Court on April 28, 2016; no opinion issued; Florida Supreme Court discharged jurisdiction and dismissed the case.

Background

In this matter, the constitutionality of the workers' compensation law is challenged regarding the 2003 elimination of Permanent Partial Disability (PPD) Benefits and the 1994 institution of the $10.00 copay by the injured worker for medical services provided following the date of maximum medical improvement. The 1st DCA, in a very brief opinion, found that these changes withstood a rational basis review.

The 1st DCA relied on the fact that the PPD benefits were replaced by Impairment Income Benefits. In regard to the copay, they found that it "furthers the legitimate stated purpose of ensuring reasonable medical costs after the injured worker has reached maximum medical improvement. . . ."

The Florida Supreme Court accepted jurisdiction in October 2015. Oral arguments were held on April 6, 2016. The Florida Supreme Court discharged jurisdiction and dismissed the case on April 28, 2016.

This case involves similar issues and arguments as *Westphal*; however, the outcome in *Stahl* is not determinative of the outcome in *Westphal*.

Outcome[10]

Discharged jurisdiction and dismissed appeal. This is not a decision on the merits. The petitioner appealed the case to the Supreme Court of the United States, which declined to hear the matter. The 1st DCA opinion is the law of the case (i.e., the two challenged provisions are constitutional).

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[9] *Stahl v. Hialeah Hospital*, 191 So. 3d (Fla. 2016). Opinion below – 160 So. 3d 519 (Fla. 1st DCA 2015).
[10] Id.

Overview of the 2016 Workers' Compensation Rate Increase

On September 27, 2016, the Office of Insurance Regulation (OIR) approved a workers' compensation rate increase of 14.5 percent.[1] However, on November 23, 2016, the rate increase was blocked by a court order and voided due to violations of the Sunshine Law and Public Records Act.[2] OIR appealed the court order and the rate increase went into effect on December 1, 2016, while the ongoing litigation is resolved.

The rate increase is the result of several apellate court decisions and an increase in reimbursement paid to workers' compensation health care providers. The factors that were considered in compiling the rate increase are described below.

In April 2016, the Florida Supreme Court (Court) resolved *Castellanos v. Next Door Company*,[3] which found the workers' compensation attorney fee schedule unconstitutional. This case has been widely reported in the media and is responsible for a significant portion of the 2016 increase in workers' compensation rates (see table below). The Court found that an exclusive statutory attorney fee schedule that did not allow for an award of a reasonable attorney fee violated constitutional due process protections.

Also in April 2016, the First District Court of Appeal (1st DCA) issued an opinion in a case that holds another portion of the workers' compensation law concerning attorney fees unconstitutional. In *Miles v. City of Edgewater Police Department*,[4] the 1st DCA invalidated a limitation on claimant's attorneys accepting payment directly from the claimant (i.e., the injured worker). This case did not affect workers' compensation rates.

In June 2016, the Court found another portion of the workers' compensation law unconstitutional. In *Westphal v. City of St. Petersburg*,[5] the Court invalidated the statute because of a gap in wage replacement (indemnity) benefits that occurs when an injured worker has exhausted their 104 weeks of temporary total indemnity benefits, but are not yet eligible for permanent indemnity benefits. The Court increased temporary total indemnity benefits for these injured workers from 104 weeks to 260 weeks of benefits. This restores the standard number of weeks available under the 1993 version of the statute. In November 2016, the 1st DCA in *Jones v. Food Lion, Inc.*,[6] applied *Westphal* to the 104 week limitation on temporary partial disability benefits and also extended them to 260 weeks. This change in temporary indemnity benefit limits contributed to the 2016 increase in workers' compensation rates (see table below).

Finally, during the 2016 Regular Session, the Legislature ratified a rule by the Department of Financial Services that increased reimbursements to workers' compensation health care providers. This change in medical provider reimbursements contributed to the 2016 increase in workers' compensation rates (see table below).

Rate Increase Components

Castellanos	10.1 percent
Westphal and *Jones*	2.2 percent
Increase in provider reimbursement	1.8 percent
Total	**14.5 percent**[7]

[1] *Revised Workers' Compensation Rates and Rating Values as Filed by the NATIONAL COUNCIL ON COMPENSATION INSURANCE, INC.*, Case No. 191880-16, http://www.floir.com/siteDocuments/NCCI191880-16-FOORF.pdf (Fla. OIR Sept. 27, 2016).

[2] *Order on Non-Jury Trial and Final Judg[]ment Providing Declaratory and Injunctive Relief*, Case No. 37 2016 CA 002159 (Fla. 2nd Cir. Nov. 23, 2016).

[3] *Castellanos v. Next Door Company*, 192 So. 3d 431 (Fla. 2016). Opinion below – 124 So. 3d 392 (Fla. 1st DCA 2013).

[4] *Miles v. City of Edgewater Police Department*, 190 So. 3d 171 (Fla. 1st DCA 2016).

[5] *Westphal v. City of St. Petersburg*, 194 So. 3d 311 (Fla. 2016). Opinion below – 122 So. 3d 440 (Fla. 1st DCA 2013).

[6] *Jones v. Food Lion, Inc.*, No. 1D15-3488, 2016 Fla. App. LEXIS 16710 (Fla. 1st DCA Nov. 9, 2016).

[7] The components of the rate increase are compiled together for the net increase. Therefore, the total amount of the increase exceeds the sum of the three components (i.e., rates are increased by 10.1 percent, then by 2.2 percent, and then by the final 1.8 percent for an overall increase of 14.5 percent).

Castellanos v. Next Door Co.

Supreme Court of Florida

April 28, 2016, Decided

No. SC13-2082

Reporter

192 So. 3d 431 *; 2016 Fla. LEXIS 885 **; 166 Lab. Cas. (CCH) P61,703; 41 Fla. L. Weekly S 197; 2016 WL 1700521

MARVIN CASTELLANOS, Petitioner, vs. NEXT DOOR COMPANY, et al., Respondents.

Prior History: [**1] Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance. First District - Case No. 1D12-3639.

Castellanos v. Next Door Co., 124 So. 3d 392, 2013 Fla. App. LEXIS 16898 (Fla. Dist. Ct. App. 1st Dist., 2013)

Core Terms

claimant, attorney's fees, workers' compensation, benefits, fee schedule, reasonable attorney's fees, cases, injured worker, carrier, irrebuttable presumption, statutory fee, Statutes, fee award, conclusive, factors, due process, amount of benefits, circumstances, conclusive presumption, compensation claim, elimination, reasonable fee, compensability, attorneys, services, facial challenge, awarding, defenses, invalid, Door

Case Summary

Overview

HOLDINGS: [1]-Because the mandatory fee schedule in *§ 440.34, Fla. Stat.*, which created an irrebuttable presumption that precluded any consideration of whether an attorney's fee award in a workers' compensation case was reasonable to compensate the attorney, was unconstitutional under both the Fourteenth Amendment and *Art. I, § 9, Fla. Const.* as a violation of due process, and the application of the fee schedule here resulted in a patently unreasonable fee of $1.53 per hour, remand was required for the judge of compensation claims to enter a reasonable attorney's fee in accordance with the statute's immediate predecessor.

Outcome

Certified question answered in affirmative; decision upholding fee award quashed; and case remanded.

LexisNexis® Headnotes

Workers' Compensation & SSDI > Administrative Proceedings > Costs & Attorney Fees

Constitutional Law > Substantive Due Process

HN1 The mandatory fee schedule in *§ 440.34, Fla. Stat.* (2009), which creates an irrebuttable presumption that precludes any consideration of whether the fee award is reasonable to compensate the attorney, is unconstitutional under both the Florida and United States Constitutions as a violation of due process. *Art. I, § 9, Fla. Const.*; *U.S. Const. amend. XIV, § 1*.

Business & Corporate Compliance > ... > Benefit Determinations > Workers' Compensation & SSDI > Benefit Determinations

Governments > Legislation > Interpretation

HN2 See *§ 440.015, Fla. Stat.*

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation

Evidence > Inferences & Presumptions > Presumptions > Particular Presumptions

HN3 The Florida Supreme Court has set forth the following three-part test for determining the constitutionality of a conclusive statutory presumption:

(1) whether the concern of the legislature was reasonably aroused by the possibility of an abuse which it legitimately desired to avoid; (2) whether there was a reasonable basis for a conclusion that the statute would protect against its occurrence; and (3) whether the expense and other difficulties of individual determinations justify the inherent imprecision of a conclusive presumption.

Workers' Compensation & SSDI > Administrative Proceedings > Costs & Attorney Fees

HN4 A workers' compensation fee schedule has typically been considered merely a starting point in determining an appropriate fee award.

Legal Ethics > Client Relations > Attorney Fees > Excessive Fees

HN5 *R. Regulating Fla. Bar 4-1.5* prevents excessive fees. That rule provides a number of factors to be considered as a guide to determining a reasonable fee, including, among many others, the time and labor required, the novelty, complexity, and difficulty of the questions involved, and the skill requisite to perform the legal service properly. *Rule 4-1.5(b)(1)(A)*. In fact, the Florida Supreme Court has made clear that it does not condone excessive fee awards.

Workers' Compensation & SSDI > Administrative Proceedings > Costs & Attorney Fees

HN6 See *§ 440.105(3)(c), Fla. Stat.*

Governments > Legislation > Expiration, Repeal & Suspension

Governments > Legislation > Extension & Revival

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation

HN7 Florida law has long held that, when the legislature approves unconstitutional statutory language and simultaneously repeals its predecessor, then the judicial act of striking the new statutory language automatically revives the predecessor unless it, too, would be unconstitutional.

Governments > Legislation > Extension & Revival

Workers' Compensation & SSDI > Administrative Proceedings > Costs & Attorney Fees

HN8 The Florida Supreme Court's holding that the conclusive fee schedule in *§ 440.34, Fla. Stat.* (2009) is unconstitutional operates to revive the statute's immediate predecessor. This is the statute addressed by the court in Murray, where the court construed the statute to provide for a reasonable award of attorney's fees. With Murray as a guide, a judge of compensation claims must allow for a claimant to present evidence to show that application of the statutory fee schedule will result in an unreasonable fee. The court emphasizes, however, that the fee schedule remains the starting point, and that the revival of the predecessor statute does not mean that claimants' attorneys will receive a windfall. Only where the claimant can demonstrate, based on the standard the court articulated long ago in Lee Engineering, that the fee schedule results in an unreasonable fee will the claimant's attorney be entitled to a fee that deviates from the fee schedule.

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Mark Kenneth Delegal and Matthew Harrison Mears of Holland & Knight LLP, Tallahassee, Florida; and William Wells Large, Tallahassee, Florida, for Amici Curiae Florida Justice Reform Institute and Florida Chamber of Commerce, Inc.

Rayford Huxford Taylor of Casey Gilson P.C., Atlanta, Georgia, for Amici Curiae Associated Industries of Florida, Inc., Associated Builders & Contractors, Florida Electric Cooperatives Assocation, Florida Retail Federation, Florida Roofing, Sheet Metal and Air Conditioning Contractors Association, Florida United Businesses Association, and Publix Supermarkets.

Amy Lyn Koltnow and Maria Elena Abate of Colodny, Fass, Talenfeld, Karlinsky, Abate & Webb, P.A., Fort Lauderdale, Florida, for Amici Curiae Property Casualty Insurers Association of America, Florida Insurance Council, American Insurance Association, and National Association of Mutual Insurance Companies.

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Louis Paul Pfeffer, Jupiter, Florida, for Amicus Curiae National Employment Lawyers Association, Florida Chapter.

Judges: PARIENTE, J. LABARGA, C.J., and QUINCE, and PERRY, JJ., concur. LEWIS, J., concurs with an opinion. CANADY, J., dissents with an opinion, in which POLSTON, J., concurs. POLSTON, J., dissents with an opinion.

Opinion by: PARIENTE

Opinion

[*432] PARIENTE, J.

This case asks us to evaluate the constitutionality of the mandatory fee schedule in section 440.34, Florida Statutes (2009), which eliminates the requirement of a reasonable attorney's fee to the successful claimant. Considering that the right of a claimant to obtain a reasonable attorney's fee has been a critical feature of the workers' compensation law, we conclude that ***HN1*** the mandatory fee schedule in section 440.34, which creates an irrebuttable presumption that precludes any consideration of whether the fee award is reasonable to compensate the attorney, is unconstitutional under both the Florida and United States Constitutions as a violation of due process. *See* art. I, § 9, Fla. Const.; U.S. Const. amend. XIV, § 1.[1]

[*433] This issue arises out of a question certified by the First District Court of Appeal to be of great public importance,[2] which we rephrase as follows:

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[1] Castellanos challenges the constitutionality [**4] of the statute on numerous grounds, arguing that it violates the right of access to courts under article I, section 21, of the Florida Constitution; the separation of powers doctrine; due process; equal protection; the right to contract and speak freely; the right to be rewarded for industry; and constitutes an unconstitutional taking of property. We decide the constitutional issue in this case on the basis of the constitutional rights of the claimant under due process and do not address the other grounds raised.

[2] The following question was certified by the First District:

> WHETHER THE AWARD OF ATTORNEY'S FEES IN THIS CASE IS ADEQUATE, AND CONSISTENT WITH THE ACCESS TO COURTS, DUE PROCESS, EQUAL PROTECTION, AND OTHER REQUIREMENTS OF THE FLORIDA AND FEDERAL CONSTITUTIONS.

Castellanos v. Next Door Co./Amerisure Ins. Co., 124 So. 3d 392, 394 (Fla. 1st DCA 2013). We have jurisdiction. *See* art. V, § 3(b)(4), Fla. Const.

Clearly this issue is affecting numerous claimants. Since *Castellanos [**5]*, the First District has certified that its disposition in eighteen additional cases passes upon the same question: *Joe Taylor v. Rodney Gunder Plastering & Stucco, LLC*, No. 1D15-5895, 188 So. 3d 983, 2016 Fla. App. LEXIS 5948, 2016 WL 1579228 (Fla.1st DCA Apr. 20, 2016); ***Stephens v. Dominos Pizza, No. 1D15-5418, 187 So. 3d 954, 2016 Fla. App. LEXIS 4550, 2016 WL 1169975 (Fla. 1st DCA Mar. 24, 2016)***; *De Mesa v. Dollar Tree Stores, Inc./Sedgwick CMS*, No. 1D15-5635, 2016 Fla. App. LEXIS 454, 2016 WL 1169978 (Fla. 1st DCA Mar. 24, 2016); ***Shannon v. Hillsborough Area Reg'l Transit Auth. et al., 184 So. 3d 665 (Fla. 1st DCA 2016)***; ***Perez v. Univision Network LP/Sentry Claims Service, 184 So. 3d 653 (Fla. 1st DCA 2016)***; ***Weimar v. L'Oreal USA S/D, Inc., 176 So. 3d 1288 (Fla. 1st DCA 2015)***; ***Rankine v. AMR Corp., 176 So. 3d 392 (Fla. 1st DCA 2015)***; *Zaldivar v. Prieto*, 174 So. 3d 1126 (Fla. 1st DCA 2015); ***Gallagher Law Grp., P.A. v. Vic Renovations, 174 So. 3d 1124 (Fla. 1st DCA 2015)***; ***Zaldivar v. Dyke Indus., Inc., 168 So. 3d 336 (Fla. 1st DCA 2015)***;

WHETHER *SECTION 440.34, FLORIDA STATUTES* (2009), WHICH MANDATES A CONCLUSIVE FEE SCHEDULE FOR AWARDING ATTORNEY'S FEES TO THE CLAIMANT IN A WORKERS' COMPENSATION CASE, IS UNCONSTITUTIONAL AS A DENIAL OF DUE PROCESS UNDER THE FLORIDA AND UNITED STATES CONSTITUTIONS.

The Petitioner, Marvin Castellanos, was injured during the course of his employment with the Respondent, Next Door Company. Through the assistance of an attorney, Castellanos prevailed in his workers' compensation claim, after the attorney successfully refuted numerous defenses raised by the employer and its insurance carrier. However, because *section 440.34* limits a claimant's ability to recover attorney's fees to a sliding scale based on the amount of workers' compensation benefits obtained, the fee awarded to Castellanos' attorney amounted to only $1.53 per hour for 107.2 hours of work determined by the Judge of Compensation Claims (JCC) to be "reasonable and necessary" in litigating this complex case.

Castellanos had no ability to challenge the reasonableness of the $1.53 hourly rate, and both the JCC and the First District were precluded by *section 440.34* from assessing whether the fee [**6] award—calculated in strict compliance with the statutory fee schedule—was reasonable. Instead, the statute presumes that the ultimate fee will always be reasonable to compensate the attorney, without providing any mechanism for refutation.

The right of a claimant to obtain a reasonable attorney's fee when successful in securing benefits has been considered a critical feature of the workers' compensation [*434] law since 1941. *See Murray v. Mariner Health, 994 So. 2d 1051, 1057-58 (Fla. 2008)*. From its outset, the workers' compensation law was designed to assure, as the current legislative statement of purpose provides, "the quick and efficient delivery of disability and medical benefits to an injured worker." *§ 440.015, Fla. Stat.* (2009).

Yet, while the Legislature has continued to enunciate this purpose, in reality, the workers' compensation system has become increasingly complex to the detriment of the claimant, who depends on the assistance of a competent attorney to navigate the thicket.[3] Indeed, as this Court long ago observed, allowing a claimant to "engage competent legal assistance" actually "discourages the carrier from unnecessarily resisting claims" and encourages attorneys to undertake representation in non-frivolous claims, "realizing that a reasonable fee will [**7] be paid for [their] labor." *Ohio Cas. Grp. v. Parrish, 350 So. 2d 466, 470 (Fla. 1977)*.

We reject the assertion of Justice Polston's dissenting opinion that our holding "turns this Court's well-established precedent regarding facial challenges on its head." Dissenting op. at 53 (Polston, J.). It is immaterial to our holding whether, as Justice Polston [**8] points out, the statutory fee schedule could, in some cases, result in a constitutionally adequate fee. It certainly could.

But the facial constitutional due process issue, based on our well-established precedent regarding conclusive irrebuttable presumptions, is that the statute precludes *every* injured worker from challenging the reasonableness of the fee award. *See Recchi Am. Inc. v. Hall, 692 So. 2d 153, 154 (Fla. 1997)* (clarifying that its holding "invalidates the irrebuttable presumption altogether," including as applied to certain situations). It

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Ferrer v. Truly Nolen of Am., Inc., 164 So. 3d 700 (Fla. 1st DCA 2015); ***Flores v. Vanlex Clothing Corp., 160 So. 3d 961 (Fla. 1st DCA 2015)***; ***Mayorga v. Sun Elecs. Int'l, Inc., 159 So. 3d 1032 (Fla. 1st DCA 2015)***; ***Leon v. Miami Dade Pub. Schs., 159 So. 3d 422 (Fla. 1st DCA 2015)***; ***Gonzalez v. McDonald's, 156 So. 3d 1127 (Fla. 1st DCA 2015)***; ***Diaz v. Palmetto Gen. Hosp./Sedgwick CMS, 146 So. 3d 1288 (Fla. 1st DCA 2014)***; *Pfeffer v. Labor Ready Se., Inc., 155 So. 3d 1155 (Fla. 1st DCA 2014)*; ***Richardson v. Aramark/Sedgewick CMS, 134 So. 3d 1133 (Fla. 1st DCA 2014)***.

[3] To name just a few of the ways in which the workers' compensation system has become increasingly complex and difficult, if not impossible, for an injured worker to successfully navigate without the assistance of an attorney: (1) the elimination of the provision that the workers' compensation law be liberally construed in favor of the injured worker, *§ 440.015, Fla. Stat.*; (2) reductions in the duration of temporary benefits, *§ 440.15(2)(a), Fla. Stat.*; (3) an extensive fraud and penalty provision, *§ 440.105, Fla. Stat.*; (4) a heightened standard of "major contributing cause" that applies in a majority of cases rather than the less stringent "proximate cause" standard in civil cases, *§ 440.09(1), Fla. Stat.*; (5) a heightened burden of proof of "clear and convincing evidence" in some types of cases, *§§ 440.02(1), 440.09(1), Fla. Stat.*; (6) the elimination of the "opt out" provision, *§§ 440.015, 440.03, Fla. Stat.*; and (7) the addition of an offer of settlement provision that allows only the employer, and not the claimant, to make an offer to settle, *§ 440.34(2), Fla. Stat.*

is the irrebuttable statutory presumption—not the ultimate statutory fee awarded in a given case—that we hold unconstitutional.

The contrary approach embraced by Justice Polston's dissenting opinion, which leaves open the possibility of an as applied challenge to the statute on a case-by-case basis, would be both unworkable and without any standards for determining when the fee schedule produces a constitutionally inadequate fee. Simply put, the statute is not susceptible to an as applied challenge, but instead fits into our precedent governing the constitutionality of irrebuttable presumptions, which is a distinct body of case law that differs from the typical "facial" versus "as applied" [**9] cases cited by Justice Polston's dissent.

We also reject the assertion of Justice Canady's dissenting opinion that we "fail[] to directly address the actual policy of the statute." Dissenting op. at 41 (Canady, J.). Rather, it is Justice Canady's dissent [*435] that fails to acknowledge that a reasonable attorney's fee has always been the linchpin to the constitutionality of the workers' compensation law.

It is undeniable that without the right to an attorney with a reasonable fee, the workers' compensation law can no longer "assure the quick and efficient delivery of disability and medical benefits to an injured worker," as is the stated legislative intent in *section 440.015, Florida Statutes* (2009), nor can it provide workers with "full medical care and wage-loss payments for total or partial disability regardless of fault and without the delay and uncertainty of tort litigation." *Martinez v. Scanlan, 582 So. 2d 1167, 1172 (Fla. 1991)*.

The statute prevents every injured worker from challenging the reasonableness of the fee award in his or her individual case—an issue of serious constitutional concern given the critical importance, as a key feature of the workers' compensation statutory scheme, of a reasonable attorney's fee for the successful claimant. Accordingly, we answer [**10] the rephrased certified question in the affirmative, quash the First District's decision upholding the patently unreasonable $1.53 hourly fee award, and direct that this case be remanded to the JCC for entry of a reasonable attorney's fee.

I. FACTS AND PROCEDURAL HISTORY

In 2009, Marvin Castellanos, then forty-six years old, suffered an injury during the course of his employment as a press break operator for Next Door Company, a manufacturer of metal doors and door frames located in Miami, Florida. Castellanos requested medical treatment, and Next Door authorized him to seek treatment at the Physician's Health Center in Hialeah, Florida, the health insurance clinic designated for medical diagnoses by Next Door's workers' compensation insurance carrier, Amerisure Insurance Company. At the clinic, Castellanos was diagnosed with multiple contusions to his head, neck, and right shoulder. A doctor requested authorization of medically necessary treatment, including x-rays, medications, and physical therapy.

Next Door, as the employer, and Amerisure, as Next Door's insurance carrier (collectively, the "E/C"), failed to authorize its own doctor's recommendations, and Castellanos subsequently [**11] filed a petition for benefits, seeking a compensability determination for temporary total or partial disability benefits, along with costs and attorney's fees. The E/C filed a response to the petition, denying the claim based on *sections 440.09(4)* (intentional acts) and *440.105(4)(b)9.* (fraud), Florida Statutes (2009), ultimately asserting that Castellanos was responsible for his own injuries.

The parties subsequently filed a stipulation, in which the E/C raised twelve defenses. A final hearing was then held before the JCC, in which numerous depositions, exhibits, and live testimony were submitted for consideration.

In its Final Compensation Order, the JCC determined that Castellanos was entitled to be compensated by the E/C for his injuries and was therefore entitled to recover attorney's fees and costs from the E/C. The JCC explicitly found that Castellanos' attorney was successful in securing compensability and defeating all of the E/C's defenses, and retained jurisdiction to determine the amount of the attorney's fee award.

Based on the JCC's finding of compensability, Castellanos filed a motion for attorney's fees, seeking an hourly fee of $350 for the services of his attorney. *Section 440.34*, however, strictly [**12] constrains an award of attorney's fees to the claimant's [*436] attorney, requiring the fee to be calculated in conformance with the amount of benefits obtained.

Specifically, *subsection (3) of section 440.34* was amended in 2009 to remove the longstanding requirement that the fee be "reasonable" and instead to provide, except for disputed medical-only claims, that the fee equal the amount provided for in *subsection (1)*, which sets forth the following sliding scale fee schedule:

> A fee, gratuity, or other consideration may not be paid for a claimant in connection with any proceedings arising under this chapter, unless approved by the judge of compensation claims or court having jurisdiction over such proceedings. *Any attorney's fee approved by a judge of compensation claims for benefits secured on behalf of a claimant must equal to 20 percent of the first $5,000 of the amount of the benefits secured, 15 percent of the next $5,000 of the amount of the benefits secured, 10 percent of the remaining amount of the benefits secured to be provided during the first 10 years after the date the claim is filed, and 5 percent of the benefits secured after 10 years. The judge of compensation claims shall not approve a compensation order, a joint [**13] stipulation for lump-sum settlement, a stipulation or agreement between a claimant and his or her attorney, or any other agreement related to benefits under this chapter which provides for an attorney's fee in excess of the amount permitted by this section.* The judge of compensation claims is not required to approve any retainer agreement between the claimant and his or her attorney. The retainer agreement as to fees and costs may not be for compensation in excess of the amount allowed under this subsection or *subsection (7)*.

§ 440.34(1), Fla. Stat. (emphasis added). Application of the fee schedule in this case resulted in a statutory fee of $1.53 per hour.

In support of his motion for attorney's fees, which argued that an award limited to the statutory fee would be unreasonable and manifestly unjust, Castellanos presented expert testimony from attorneys James Fee and Brian Sutter. Fee testified that there is "no way on this planet" that Castellanos could have prevailed in obtaining benefits "without the skilled and tenacious representation" of an attorney, based on "the onslaught of defenses that were asserted." He agreed that the 107.2 hours claimed by Castellanos' attorney were reasonable and necessary and an "exceedingly [**14] efficient use of time" given that "this was a very difficult case."

Sutter testified that it is "absolutely illusory to think" that a claimant could present his case without counsel "because of all the dangers and pitfalls" of the workers' compensation law. He further stated that fees under $2.00 an hour, such as the statutory fee in this case, are "absurd" and "manifestly unjust," and "would provide an extreme chilling effect" that would "prevent any attorney from handling a similar case in the future."

Attorney Jeff Appell testified as an expert witness on behalf of the E/C. When asked what percentage of workers' compensation cases showed claimants to be successful in prosecuting their claims without an attorney, Appell responded that, although he regularly reviewed JCC orders, "I can't say that I've seen one that's been entirely successful," and, "as far as litigating a complicated case throughout, I honestly haven't seen it." He agreed that a statutory fee as low as the one in this case was "an unreasonably low hourly rate" and "an absurd result."

[*437] After hearing the testimony and considering the evidence and the law, the JCC issued an order awarding fees, finding that Castellanos "ultimately [**15] prevailed in obtaining a finding of compensability, a necessary precursor to obtaining benefits." According to the JCC, in order to obtain this result, Castellanos "had to overcome between 13 and 16 different defenses raised by the E/C throughout the course of litigation." The JCC further found that it was "highly unlikely that [Castellanos] could have succeeded and obtained the favorable result he did without the assistance of capable counsel."

Constrained to the statutory fee schedule, however, the JCC found that Castellanos was limited to an attorney's fee of $164.54, based on the application of the conclusive fee schedule to the actual value of benefits secured of $822.70. Nevertheless, in its order, the JCC "fully accept[ed] the notion that 'Lawyers can't work for $1.30 an hour,'" and stated that Castellanos' attorney "is an exceptionally skilled, highly respected practitioner who has been awarded as much as $350 to $400 an hour for his success in workers' compensation cases." The JCC, in addition, found that "[t]here is no question . . . that the 107.2 hours expended by his firm . . . were reasonable and necessary," and that these hours constituted an "exceedingly efficient use of time," which [**16] was "wholly consistent with the 115.20 defense hours documented" by counsel for the E/C.

But as an executive branch official, the JCC had no authority to address Castellanos' claim that *section 440.34*, and the resulting $1.53 hourly fee, was unconstitutional. *See Ariston v. Allied Bldg. Crafts, 825 So. 2d 435, 438 (Fla. 1st DCA 2002)* ("A JCC clearly does not have jurisdiction to declare a state statute unconstitutional or violative of federal law."). Castellanos thus appealed the JCC's order to the First District, raising the constitutional claim.

The First District affirmed the JCC's decision to award "only $164.54 for 107.2 hours of legal work reasonably necessary to secure the claimant's workers' compensation benefits," holding that "the statute required this result" and that the court was "bound by precedent to uphold the award, however inadequate it may be as a practical matter." Castellanos, 124 So. 3d at 393. In so doing, the First District recognized that there were important constitutional issues presented by this case that warranted this Court to determine the constitutionality of the current attorney's fee statute. Id. at 394. We granted review and now hold that the statute is unconstitutional under both the state and federal constitutions as a violation of due process.

II. ANALYSIS

Our review of [**17] the constitutionality of section 440.34 is de novo. See Graham v. Haridopolos, 108 So. 3d 597, 603 (Fla. 2013). We begin our analysis by tracing the history of awarding attorney's fees to the claimant under our state's workers' compensation law, culminating in the Legislature's 2009 elimination of the requirement that the fee be "reasonable." Then, we consider whether the statute, as amended in 2009, creates an unconstitutional, irrebuttable presumption in violation of due process of law. Finally, concluding that the statute is unconstitutional, we address the remedy.

A. History of Awarding Attorney's Fees to the Claimant Under Florida's Workers' Compensation Law

In 1935, the Legislature adopted the workers' compensation law to provide "simple, expeditious" relief to the injured worker. Lee Eng'g & Constr. Co. v. Fellows, [*438] 209 So. 2d 454, 456 (Fla. 1968). As an integral part of that goal from 1941 until 2009, the Legislature provided for an award of a reasonable attorney's fee to an injured worker who was successful in obtaining workers' compensation benefits.

In the eighty years since the enactment of the workers' compensation law, however, the statutory scheme has become increasingly complex. And although the Legislature has now eliminated any requirement that attorney's fees awarded to an injured worker prevailing [**18] in his or her claim for benefits must be "reasonable," the Legislature's expressed intent for the workers' compensation law has remained unchanged:

> ***HN2*** It is the intent of the Legislature that the Workers' Compensation Law be interpreted so as to assure the *quick and efficient delivery of disability and medical benefits* to an injured worker and to facilitate the worker's return to gainful reemployment at a reasonable cost to the employer. . . . The workers' compensation system in Florida is based on a *mutual renunciation of common-law rights and defenses* by employers and employees alike. . . . It is the intent of the Legislature to *ensure the prompt delivery of benefits* to the injured worker.

§ 440.015, Fla. Stat. (emphasis added).

In Murray, 994 So. 2d at 1057, which was the last time this Court addressed the attorney's fee provision, we summarized the statutory history of awarding attorney's fees to the claimant, explaining that the Legislature initially adopted this provision to ensure that the injured worker, rather than his or her attorney, would actually receive the bulk of the compensation award. We stated:

> The theory underlying the Act was that a claimant did not need an attorney and could alone navigate the procedures to obtain [**19] the benefits to which he or she was entitled under the law. Thus, originally, when a claimant hired an attorney, the claimant's attorney fee was the obligation of the claimant. The Legislature, however, was concerned that the bulk of the compensation benefit go to the claimant, not his attorney. Accordingly, to protect a claimant's compensation award, the Legislature, from the original adoption of the Act, gave the JCC or relevant administrative body, however denominated at the time, approval oversight of the amount a claimant paid to his attorney. *See* ch. 17481, § 34, Laws of Fla. (1935).

Id. (citation omitted).

In 1941, as it became clear that an injured worker needed the assistance of an attorney to navigate the workers' compensation system, the Legislature significantly revised the workers' compensation law to "mandate[] that in some instances, the employer/carrier should pay for the claimant to have an attorney." *Id.* At that time, the Legislature provided as follows:

> If the employer or carrier shall file a notice of controversy as provided in Section 20 of this Act, or shall decline to pay a claim on or before the 21st day after they have notice of same, or shall otherwise resist unsuccessfully [**20] the payment of compensation, and the injured person shall have employed an attorney at law in the successful

> prosecution of his claim, *there shall, in addition to the award for compensation, be awarded [a] reasonable attorney's fee*, to be approved by the Commission which may be paid direct to the attorney for the claimant in a lump sum. If any proceedings are had for review of any claim, award or compensation order before any Court, the Court may allow or increase the attorney's fees, in its discretion, which fees shall be in addition to the compensation [*439] paid the claimant, and shall be paid as the Court may direct.

Ch. 20672, § 11(a), Laws of Fla. (1941) (emphasis added).

"As the First District noted regarding a subsequent version of this provision, 'The legislative determination that a fee is payable by the employer/carrier in the circumstances enumerated in [this subsection] reflects a public policy decision that claimants are entitled to and are in need of counsel under those conditions.'" *Murray, 994 So. 2d at 1058* (quoting *Pilon v. Okeelanta Corp., 574 So. 2d 1200, 1201 (Fla. 1st DCA 1991)*). Indeed, the First District has stated that, especially in a "lengthy and expensive contest" with an E/C, a claimant proceeding "without the aid of competent counsel" would be as "helpless as [**21] a turtle on its back." *Davis v. Keeto, Inc., 463 So. 2d 368, 371 (Fla. 1st DCA 1985)* (quoting *Neylon v. Ford Motor Co., 27 N.J. Super. 511, 99 A.2d 664, 665 (N.J. Super. Ct. App. Div. 1953)*).

This Court, in *Ohio Casualty Group*, noted that the award of a "reasonable attorney's fee" was

> enacted to enable an injured employee who has not received an equitable compensation award to *engage competent legal assistance* and, in addition, to *penalize a recalcitrant employer*. If the services of an attorney become necessary, and the carrier is ordered to pay compensation, attorney's fees must be assessed against the carrier so that the benefits awarded the employee will constitute a net recovery. Thus, in adding attorney's fees to the injured worker's compensation award, [the provision] *discourages the carrier from unnecessarily resisting claims* in an attempt to force a settlement upon an injured worker. In addition, if the worker has a meritorious case, *an attorney will be inclined to represent him, realizing that a reasonable fee will be paid for his labor* and not deducted from perhaps a modest benefit due the claimant. Conversely, if the attorney believes the claim is frivolous, he would be inclined to decline representation.

350 So. 2d at 470 (emphasis added) (citations omitted).

This Court has long recognized the factors to be considered in determining the reasonableness [**22] of an attorney's fee award under the statute. In *Florida Silica Sand Co. v. Parker, 118 So. 2d 2, 4 (Fla. 1960)*, this Court concluded that Canon 12 of the Canons of Professional Ethics, the predecessor to *rule 4-1.5 of the Rules Regulating The Florida Bar*—the ethical rule governing attorneys' fees—was a "safe guide in fixing the amount of [E/C-paid] fees" awarded to the claimant. This Court noted that the Florida Industrial Commission had promulgated a minimum schedule of fees to be used as a guide by the JCC and found that "[s]uch a schedule is helpful but is not conclusive." *Id. at 5*. "Innumerable economic factors," this Court stated, "enter into the fixing of reasonable fees in one section of the State and in one community which might not be present in others." *Id.*

In addition to the minimum schedule, this Court explained that "it appears to us that supplemental evidence should be presented." *Id.* This Court specifically noted the principle that, "especially in this type of matter[,] fees should be carefully considered so that on the one hand they will not be so low as to lack attraction for capable and experienced lawyers to represent workmen's compensation claimants" while, "[o]n the other hand, they should not be so high as to reflect adversely on the profession or in actuality to enter disproportionately [**23] into the cost of maintaining the workmen's compensation program." *Id. at 4*.

Then, in *Lee Engineering*, this Court rejected the strict application of a contingent [*440] percentage of the benefit award based on a schedule of minimum fees, holding that a "schedule of fees . . . was helpful but unreliable" and remanding for the determination of a reasonable attorney's fee. *209 So. 2d at 458-59*. According to this Court, a statutory fee schedule is "less sensitive to the changing needs of the program," and, "in the absence of a stipulation or other evidence, is not an appropriate method for fixing a fee in Workmen's Compensation cases." *Id. At 458*. Reaffirming *Florida Silica Sand*, this Court concluded that the factors set forth in Canon 12 of the Canons of Professional Ethics, the predecessor to *rule 4-1.5*, must be considered to determine whether an attorney's fee is reasonable and stated that findings by the JCC to support the award are required. *Id. at 458-59*.

Ironically, the Lee Engineering decision was a response

to what this Court perceived as "excessive" attorney's fees. *Id. at 457*. In 1977, responding to this Court's decision in *Lee Engineering*, the Legislature significantly revised *section 440.34* to add discretionary factors the JCC must consider when increasing [**24] or decreasing the fee, but also added a statutory formula to be used as the starting point for determining a reasonable attorney's fee award for a successful claimant:

> (1) If the employer or carrier shall file notice of controversy as provided in s. 440.20, or shall decline to pay a claim on or before the 21st day after they have notice of same, or shall otherwise resist unsuccessfully the payment of compensation, and the *claimant*
>
> injured person shall have employed an attorney at law in the successful prosecution of the claim, there shall, in addition to the award for compensation, be awarded a reasonable attorney's fee *of 25 percent of the first $5,000 of the amount of the benefits secured, 20 percent of the next $5,000 of the amount of the benefits secured, and 15 percent of the remaining amount of the benefits secured*, to be approved by the judge of industrial claims, which *fee* may be paid direct to the attorney for the claimant in a lump sum. *However, the judge of industrial claims shall consider the following factors in each case and may increase or decrease the attorney's fee if in his judgment the circumstances of the particular case warrant such action*:
>
> *(a) The time and labor [**25] required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.*
>
> *(b) The likelihood, if apparent to the claimant, that the acceptance of the particular employment will preclude employment of the lawyer by others or cause antagonisms with other clients.*
>
> *(c) The fee customarily charged in the locality for similar legal services.*
>
> *(d) The amount involved in the controversy and the benefits resulting to the claimant.*
>
> *(e) The time limitation imposed by the claimant or the circumstances.*
>
> *(f) The nature and length of the professional relationship with the claimant.*
>
> *(g) The experience, reputation, and ability of the lawyer or lawyers performing the services.*
>
> *(h) The contingency or certainty of a fee.*

Ch. 77-290, *§ 9*, at 1293-94, Laws of Fla. (statutory additions underlined; statutory deletions struck-through).

"Thus, to determine a reasonable fee, the JCC applied the formula and then increased or decreased the amount after consideration of the factors in order to determine a reasonable fee." *Murray, 994 [*441] So. 2d at 1059*. As the First District noted, the sliding fee schedule "embodies a legislative intent to standardize fees." *Fiesta Fashions, Inc. v. Capin, 450 So. 2d 1128, 1129 (Fla. 1st DCA 1984)*.

Two years after codifying the *Lee Engineering [**26]* factors, the Legislature again significantly amended the statute, in 1979, to limit entitlement to "a reasonable attorney's fee from a carrier or employer" to three conditions:

> (a) Against whom he successfully asserts a claim for medical benefits only, *if the claimant has not filed or is not entitled to file at such time* which does not include a claim for disability, permanent impairment,
>
> or wage-loss, *or death* benefits, *arising out of the same accident*; or
>
> (b) In cases where the deputy commissioner *issues*
>
> concludes by the issuance of an order *finding* that a carrier has acted in bad faith with regard to handling an injured worker's claim and the injured worker has suffered economic loss. For the purposes of this paragraph, "bad faith" means conduct by the carrier in the handling of a claim which amounts to fraud, malice, oppression, or willful, wanton or reckless disregard *of* for the rights of the claimant. Any determination of bad faith shall be made by the deputy commissioner through a separate fact-finding proceeding; or
>
> (c) In a proceeding where a carrier or employer denies that an injury occurred for which compensation benefits are payable, and the claimant prevails on the issue [**27] of *compensability* coverage.

Ch. 79-312, § 15, at 1657, Laws of Fla. (statutory

additions underlined; statutory deletions struck-through).

The Legislature also revised section 440.34(4) to provide a penalty to restrict payment for services only to fees approved by the JCC:

> *Any person: (a) [w]ho receives any fees or other consideration or any gratuity on account of services so rendered, unless such consideration or gratuity is approved by the deputy commissioner, the commission, or court; or (b) [w]ho makes it a business to solicit employment for a lawyer or for himself or herself in respect of any claim or award for compensation, is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.*

Ch. 79-312, § 15, at 1658, Laws of Fla. (statutory additions underlined). Then, in 1980, the Legislature revised section 440.34(2) to include language intended to limit the amount of the attorney's fee award: "In awarding a reasonable attorney's fee, the deputy commissioner shall consider only those benefits to the claimant the attorney is responsible for securing." Ch. 80-236, § 14, Laws of Fla.

In 1993, the Legislature again revised the statute, this time to reduce the percentage amounts for attorney's [**28] fees in the sliding schedule:

> [A]ny attorney's fee approved by a judge of compensation claims *for services rendered to a claimant must*
>
> shall be equal to *20*
>
> 25 percent of the first $5,000 of the amount of the benefits secured, *15*
>
> 20 percent of the next $5,000 of the amount of the benefits secured, *10*
>
> and 15 percent of the remaining amount of the benefits secured *to be provided during the first 10 years after the date the claim is filed, and 5 percent of the benefits secured after 10 years.*

Ch. 93-415, § 34, at 154 Laws of Fla. (statutory additions underlined; statutory deletions struck-through).

A decade later, setting the stage for the current statute, the Legislature in 2003 implemented other changes to the workers' compensation law following the 2003 [*442] Governor's Commission on Workers' Compensation Reform. Among the many changes made in that legislation to the entire workers' compensation law, the Legislature deleted reference in the attorney's fee provision to consideration of the reasonable fee factors; required the fee to be based on the benefits secured; and restricted the JCC's authority to approve fee awards based only on a statutory formula, while also providing for an alternative fee of [**29] a maximum of $1,500 if the claimant successfully asserted a claim solely for medical benefits. Ch. 2003-412, § 6, Laws of Fla.

In Murray, 994 So. 2d 1051, this Court was asked to consider the constitutionality of the 2003 amendments to the attorney's fee statute, which deleted the *Lee Engineering* factors to be used in determining whether the fee award was reasonable. *Murray* involved a claimant who hired an attorney and prevailed after the employer and its insurance carrier denied workers' compensation benefits. Id. at 1053-54. The JCC then calculated the claimant's award of attorney's fees in accordance with the statutory formula, finding that although the claimant's counsel expended eighty hours of reasonable and necessary time on the case, the ultimate fee award was governed by the statutory formula set forth in section 440.34(1). Id. at 1054. Thus, the JCC awarded attorney's fees in the amount of $684.84. Id. at 1055.

Noting that this equated to an hourly rate of only $8.11 because of the low monetary value of the benefits obtained, the JCC commented:

> Given that this was a very complex case, with difficult issues, very contingent, required a highly skilled practitioner and that [the claimant's] attorney enjoys an outstanding reputation as a highly skilled and experienced [**30] workers' compensation practitioner, an attorney fee of $8.11 per hour would on its face . . . hardly appear to be "reasonable." It would appear to be "manifestly unfair."

Id. at 1055-56 (quoting Murray v. Mariners Health, OJCC Case No. 04-000323DFT, 2006 Fla. Wrk. Comp. LEXIS 61, *5 (Fla. Div. of Admin. Hearings Compensation Order filed Jan. 17, 2006)). Evidence in *Murray* also showed that the E/C paid its attorney $16,050-135 hours at $125 an hour—in the unsuccessful effort to resist paying benefits. Id. at 1055.

After the First District affirmed the $8.11 hourly fee award for the claimant's attorney, this Court held that the statute was ambiguous—section 440.34(3) stated that the claimant was entitled to a "reasonable attorney fee," while section 440.34(1) stated that any attorney's

fee approved by the JCC "must equal" the statutory formula. Id. at 1057. "It is obvious," this Court stated, "that applying the formula in all cases will not result in the determination of reasonable attorney fees in all cases." *Id.* To the contrary, applying the formula will in some circumstances "result in inadequate fees," while in other circumstances, "applying the formula will result in excessive fees." *Id.*

Recognizing the principle of statutory construction that it will construe statutes in a manner [**31] that avoids a holding of unconstitutionality, this Court declined to consider the constitutional challenge. Id. at 1053. Instead, this Court resolved the statutory ambiguity in favor of section 440.34(3), holding that the claimant was entitled to recover a reasonable attorney's fee; that a reasonable attorney's fee for a claimant was to be determined using the factors set forth in rule 4-1.5 of the Rules Regulating The Florida Bar, rather than using the statutory formula; and that reasonable attorney's fees for claimants, when not otherwise defined in the workers' compensation statute, are to be determined [*443] using the factors set forth in rule 4-1.5. Id. at 1061-62.

Following *Murray*, the Legislature in 2009 removed any ambiguity as to its intent. Deleting the word "reasonable" in relation to attorney's fees, the Legislature provided that a claimant is entitled to recover only "*an*

a reasonable attorney's fee *in an amount equal to the amount provided for in* subsection (1) *or* subsection (7) from a carrier or employer." Ch. 2009-94, § 1, Laws of Fla. (statutory additions underlined; statutory deletions struck-through). Subsection (1) requires the fee to be calculated in strict conformance with the fee schedule, and subsection (7) applies solely to the $1500 flat fee for "disputed medical-only claims."

The Legislature has, thus, eliminated any consideration [**32] of reasonableness and removed any discretion from the JCC, or the judiciary on review, to alter the fee award in cases where the sliding scale based on benefits obtained results in either a clearly inadequate or a clearly excessive fee. Confronted again with a constitutional challenge to the statute, we must now determine whether the complete elimination of any ability of either the JCC or the reviewing court to deviate from the statutory formula, even when the amount of the fee is determined to be unreasonable, is unconstitutional. We hold that it is.

B. Violation of Due Process

Section 440.34 provides a fee schedule that must be followed in every case by the JCC in calculating and awarding attorney's fees, based on the amount of benefits recovered by the claimant. The statute does not allow for any consideration of whether the fee is reasonable or any way for the JCC or the judiciary on review to alter the fee, even if the resulting fee is grossly inadequate—or grossly excessive—in comparison to the amount of time reasonably and necessarily expended to obtain the benefits.

Stated another way, the statute establishes a conclusive irrebuttable presumption that the formula will produce an adequate fee [**33] in every case. This is clearly not true, and the inability of any injured worker to challenge the reasonableness of the fee award in his or her individual case is a facial constitutional due process issue.

In considering the constitutionality of the statute, we do not view the absolute limitation from the point of view of the attorney's rights, because the attorney always has the option to refuse representation, especially in complex lowvalue claims. Rather, we view the conclusive irrebuttable presumption in the context of the complete frustration of the entire workers' compensation scheme designed to provide workers with "full medical care and wage-loss payments for total or partial disability regardless of fault and without the delay and uncertainty of tort litigation." Martinez v. Scanlan, 582 So. 2d 1167, 1172 (Fla. 1991). We accordingly reject the argument that Castellanos, as the claimant rather than the attorney, lacks standing to raise the constitutional violation.

As the First District has explained, the injured worker, rather than the attorney, is the "true party in interest." Pilon, 574 So. 2d at 1201. A "barrier to review a decision to award a fee," the First District stated in *Pilon*, "could ultimately result in a net loss of attorneys willing to represent [**34] workers' compensation claimants." *Id.* This in turn would result "in a chilling effect on claimants' ability to challenge employer/carrier decisions to deny claims for benefits and disrupt the equilibrium of the parties' rights intended by the legislature in enacting section 440.34." *Id.*

Because Castellanos has standing to challenge the constitutionality of the statute, [*444] we turn to the merits of his argument. ***HN3*** This Court has set forth the following three-part test for determining the

constitutionality of a conclusive statutory presumption, such as the fee schedule provided in section 440.34: (1) whether the concern of the Legislature was "reasonably aroused by the possibility of an abuse which it legitimately desired to avoid"; (2) whether there was a "reasonable basis for a conclusion that the statute would protect against its occurrence"; and (3) whether "the expense and other difficulties of individual determinations justify the inherent imprecision of a conclusive presumption." Recchi, 692 So. 2d at 154 (citing Markham v. Fogg, 458 So. 2d 1122, 1125 (Fla. 1984)).

In *Recchi*, this Court fully adopted the reasoning of the First District, which concluded that a statute violated the constitutional right to due process where it provided no opportunity for an employee working in a drug-free [**35] workplace program to rebut the presumption that the intoxication or influence of drugs contributed to his or her injury. *Id.* "According to the district court of appeal, the irrebuttable presumption failed the three-pronged test because the expense and other difficulties of individual determinations did not justify the inherent imprecision of the conclusive presumption." *Id.* (citing Hall v. Recchi Am. Inc., 671 So. 2d 197, 201 (Fla. 1st DCA 1996)).

The same, and more, can be said of the conclusive presumption in section 440.34. We address each prong of the due process test to explain why.

1. Whether the Concern of the Legislature was Reasonably Aroused by the Possibility of an Abuse Which it Legitimately Desired to Avoid

As to the first prong, one of the Legislature's asserted justifications for the fee schedule is to standardize fees. *See* Alderman v. Fla. Plastering, 805 So. 2d 1097, 1100 (Fla. 1st DCA 2002) ("Section 440.34(1), Florida Statutes[,] reflects a legislative intent to standardize attorney's fee awards in workers' compensation cases."). The conclusive presumption certainly does that, although it does so in a manner that lacks any relationship to the amount of time and effort actually expended by the attorney. As the First District has recognized, ***HN4*** a fee schedule has typically been considered merely a starting point in determining an appropriate fee award. [**36] *See, e.g.,* Fumigation Dep't v. Pearson, 559 So. 2d 587, 590 (Fla. 1st DCA 1989) ("For purposes of determining an attorney's fee award under section 440.34(1), Florida Statutes, a starting point in the analysis is the amount of benefits obtained for the claimant by his attorney."); Martin Marietta Corp. v. Glumb, 523 So. 2d 1190, 1195 (Fla. 1st DCA 1988) ("Although the amount of benefits obtained is a significant factor, it is not determinative of the maximum amount that can be awarded as a fee.").

To the extent the Legislature was also concerned about the excessiveness of attorney's fee awards, however, this is not a reasonable basis for the unyielding formulaic fee schedule. Other factors, such as ***HN5*** Rule Regulating The Florida Bar 4-1.5, already prevent against excessive fees. That Rule provides a number of factors to be considered as a guide to determining a reasonable fee, including, among many others, "the time and labor required, the novelty, complexity, and difficulty of the questions involved, and the skill requisite to perform the legal service properly." R. Reg. Fla. Bar 4-1.5(b)(1)(A). In fact, since *Lee Engineering*, this Court has made clear that it does not condone excessive fee awards.

The effect of the limitation on the fee amounts paid to claimants' attorneys is [*445] revealed in the mandatory annual reporting of all attorney's fees to the Office of the Judges of Compensation Claims, as required by section 440.345, Florida Statutes. The report demonstrates [**37] the one-sided nature of the fees paid, with claimants' attorneys consistently receiving a lower percentage of the total fees than defense attorneys and the gap only increasing over the past decade:

Go to table1

State of Fla. Div. of Admin. Hearings, *2012-2013 Annual Report of the Office of the Judges of Compensation Claims* at 31. Further, claimants' attorneys are prohibited by statute from negotiating a different fee with the claimant, and the JCC is precluded from approving a different fee—even if the negotiated rate would actually produce a more reasonable fee than the statutory fee schedule. *See* § 440.34(1), Fla. Stat. ("The judge of compensation claims shall not approve a compensation order, a joint stipulation for lump-sum settlement, a stipulation or agreement between a claimant and his or her attorney, or any other agreement related to benefits under this chapter which provides for an attorney's fee in excess of the amount permitted [**38] by this section."). In fact, it is a *crime* for an attorney to accept any fee not approved by the JCC, which is of course constrained to award a fee only pursuant to the statutory fee schedule. *See* § 440.105(3)(c), Fla. Stat. (***HN6*** "It is unlawful for any attorney or other person, in his or her individual capacity or in his or her capacity as a public or

private employee, or for any firm, corporation, partnership, or association to receive any fee or other consideration or any gratuity from a person on account of services rendered for a person in connection with any proceedings arising under this chapter, unless such fee, consideration, or gratuity is approved by a judge of compensation claims or by the Deputy Chief Judge of Compensation Claims.").[4]

2. Whether There was a Reasonable Basis for a Conclusion That the Statute Would Protect Against its Occurrence

Even assuming, however, that the first prong of the due process test is satisfied [*446] because the Legislature desired to avoid excessive fees, there is no reasonable basis to assume that the conclusive fee schedule actually serves this function—as required by the second prong of the test. Excessive fees can still result under the fee schedule, just as inadequate ones can—for instance, in a simple and straightforward case where the claimant obtains a substantial amount of benefits. *See Murray, 994 So. 2d at 1057*. The fee schedule does nothing to adjust fees downward when the recovery is high, even if the time required to obtain significant benefits was relatively minor and the resulting fee is actually excessive.

As this Court stated in *Murray*:

> In some cases such as the present case, the amount of benefits is small, but the legal issues are complex and time consuming, and require skill, knowledge, and experience to recover the small but [**40] payable benefits. In other cases, the amount of benefits is substantial, but the legal issues are simple and direct, and do not require exceptional skill, knowledge, and experience. In the former case, a mandatory, rigid application of the formula results in an inadequate fee; in the latter, such application of the formula results in an excessive fee.

Id. at 1057 n.4.

The First District has also observed that a customary fee based on an hourly rate is likely to be more significant in a case in which the value of the attorney's services greatly exceeds the financial benefit obtained on behalf of the client. *See Alderman, 805 So. 2d at 1100*. For example, the work necessary to establish a connection between chemical exposure and respiratory illness might not bear a reasonable relationship to the benefit obtained, and to apply the statutory formula in such a case might result in a fee that is inadequate and unfair. *See Glumb, 523 So. 2d at 1195*. In other words, the elimination of any authority for the JCC or the judiciary on review to alter the fee award completely frustrates the purpose of the workers' compensation scheme.

3. Whether the Expense and Other Difficulties of Individual Determinations Justify the Inherent Imprecision of a Conclusive Presumption [**41]

But even if none of that were true, the third prong of the test for evaluating a conclusive presumption—that the feasibility of individual assessments of what constitutes a reasonable fee in a given case must justify the inherent imprecision of the conclusive presumption—certainly weighs heavily against the constitutionality of the fee schedule. Indeed, the JCC in this case actually made these individual determinations, but the inherent imprecision of the conclusive presumption prevented both the JCC and the First District from doing anything about the unreasonableness of the resulting fee.

Courts have, in fact, long operated under the view that the fee schedule was merely a starting point, and judges of compensation claims have determined, awarded, and approved attorney's fees without undue expense or difficulty to avoid unfairness and arbitrariness since the reasonable attorney's fee provision was adopted in 1941. Under prior versions of the statutory scheme, the JCC considered legislatively enumerated factors, and, after the deletion of these factors, continued to consider whether the fee was reasonable and not excessive. *See, e.g., S. Bell Tel. & Tel. Co. v. Rollins, 390 So. 2d 93, 95 (Fla. 1st DCA 1980); E. Coast Tire Co. v. Denmark, 381 So. 2d 336, 339-40 (Fla. 1st DCA 1980)*. This type of review to control abuse, limit [**42] excessive fees, and award reasonable fees provides no

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[4] We note that the First District Court of Appeal recently concluded in an as-applied constitutional challenge to *sections 440.105* and *440.34* that the restrictions in those sections are unconstitutional violations of a claimant's right to free speech, free association, petition, and right to form contracts, and held "that the criminal penalties of *section 440.105(3)(c), Florida Statutes*, are unenforceable against an attorney representing a workers' compensation client seeking to obtain benefits under chapter 440, as limited by other [**39] provisions." *Miles v. City of Edgewater Police Dep't, No. 1D15-0165, 190 So. 3d 171, 2016 Fla. App. LEXIS 5990, *29 (Fla. 1st DCA Apr. 20, 2016)*. The issue of the constitutionality of that provision is not before us.

basis for concern about abuse.

The cases cited in opposition are readily distinguishable. Although the United [*447] States Supreme Court held that the unreasonably low fee provisions at issue in those cases passed constitutional muster despite the existence of a fee schedule, the judiciary still had discretionary authority to raise or lower the final fee according to articulated standards—unlike the conclusive presumption established by *section 440.34*.

For example, the Longshore and Harbor Workers' Compensation Act (LHWCA), the federal statutory workers' compensation scheme, which provides benefits to maritime workers, prohibits an attorney from receiving a fee unless approved by the appropriate agency or court. This provision has been upheld by the United States Supreme Court. *See U.S. Dep't of Labor v. Triplett, 494 U.S. 715, 721-26, 110 S. Ct. 1428, 108 L. Ed. 2d 701 (1990)* (upholding the LHWCA provision, as incorporated into the *Black Lung Benefits Act of 1972*, against *Fifth Amendment* Due Process challenge).

Unlike the conclusive fee schedule in *section 440.34*, however, the Code of Federal Regulations creates factors to guide the adjudicator in awarding a fee "reasonably commensurate with the necessary work done." *Triplett, 494 U.S. at 718*. In other words, the fee provision in the LHWCA does not [**43] establish a conclusive irrebuttable presumption without consideration of whether the fee is "reasonable," but actually allows for the award of a "reasonable attorney's fee"—the precise constitutional problem with *section 440.34*.

In addition, in the federal cases cited in *Triplett*, the fees were intentionally set low due to the simple and non-adversarial nature of the services required—a far cry from the complex nature of Florida's current workers' compensation system. Indeed, Florida's workers' compensation law has become increasingly complex over the years. As a result of the complexity of the statutory scheme, the JCC specifically concluded in this case that it was "highly unlikely that [Castellanos] could have succeeded and obtained the favorable results he did without the assistance of capable counsel."

The stated goal of the workers' compensation system remains to this date the "quick and efficient delivery of disability and medical benefits to an injured worker" so as "to facilitate the worker's return to gainful reemployment at a reasonable cost to the employer." *§ 440.015, Fla. Stat.* This case, and many others like it, demonstrate that despite the stated goal, oftentimes the worker experiences delay and resistance [**44] either by the employer or the carrier.[5] Without the likelihood of an adequate attorney's fee award, there is little disincentive for a carrier to deny benefits or to raise multiple defenses, as was done here. This is the exact opposite of the original goal of the attorney's fee provision, as this Court recognized long ago. *See Ohio Cas. Grp., 350 So. 2d at 470* ("[I]n adding attorney's [*448] fees to the injured worker's compensation award, *Section 440.34, Florida Statutes* (1975), discourages the carrier from unnecessarily resisting claims in an attempt to force a settlement upon an injured worker.").

While the E/C's attorney is adequately compensated for the hours reasonably expended to unsuccessfully defend the claim, as here, the claimant's attorney's fee may be reduced to an absurdly low amount, such as the $1.53 hourly rate awarded to the attorney for Castellanos. In effect, the elimination of any requirement that the fee be "reasonable" completely eviscerates the purpose of the attorney's fee provision and fails to provide any penalty to the E/C for wrongfully denying or delaying benefits in contravention to the stated purpose of the statutory scheme.

And although there is a "mutual renunciation of common-law rights and defenses by employers and employees alike," *§ 440.015, Fla. Stat.*, the employer under the workers' compensation law has the prerogative to raise a whole host of defenses to denying benefits, while the employee is at the mercy of the E/C in being required to see the doctors that are chosen by the E/C. As this case shows, to navigate the current

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[5] Several related cases arising out of the First District, which are currently pending in this Court, illustrate that this is not an isolated case. In each of these cases, there was either an outright denial of benefits or multiple defenses raised by the E/C, and in each case, the attorney for the E/C expended a number of hours equal to or exceeding the hours expended by the claimant's attorney.

For example, in *Diaz v. Palmetto General Hospital, No. SC14-1916, 191 So. 3d 882, 2016 Fla. LEXIS 887 (Fla. Apr. 28, 2016)*, the statutory fee award was $13.28 per hour for 120 hours of work deemed to be necessarily and reasonably expended by the attorney for the claimant. The E/C's attorney spent 175 hours litigating [**45] the case, which was found to be a reasonable amount of time given its complex nature. Just as in this case, the JCC in *Diaz* found that the injured worker would not have recovered benefits without the aid and assistance of an attorney.

workers' [**46] compensation system, after a denial by the E/C of benefits, would be an impossibility without the assistance of an attorney. The JCC explicitly found as much in this case.

Virtually since its inception, the right of a claimant to obtain a reasonable prevailing party attorney's fee has been central to the workers' compensation law. While the incentive for an attorney to represent a claimant in a relatively high-value case is readily apparent, the exact opposite is true in a low-value complex case, such as this one.

But the conclusive fee schedule prevents all injured workers—whether they have small-value or high-value claims—from presenting evidence to prove that the fee is inadequate in any given case. Without the ability of the attorney to present, and the JCC to determine, the reasonableness of the fee award and to deviate where necessary, the risk is too great that the fee award will be entirely arbitrary, unjust, and grossly inadequate. We therefore conclude that the statute violates the state and federal constitutional guarantees of due process.[6]

C. Statutory Revival

Having concluded that the statute is unconstitutional, we must consider the remedy until the Legislature acts to cure the constitutional infirmity. ***HN7*** "Florida law has long held that, when the legislature approves unconstitutional statutory language and simultaneously repeals its predecessor, then the judicial act of striking the new statutory language automatically revives the predecessor unless it, too, would be unconstitutional." *B.H. v. State, 645 So. 2d 987, 995 (Fla. 1994)*.

Accordingly, ***HN8*** our holding that the conclusive fee schedule in *section 440.34* is unconstitutional operates to revive the statute's immediate predecessor. This is the statute addressed by this Court in *Murray*, where we construed the statute to provide for a "reasonable" award of attorney's fees.

With *Murray* as a guide, a JCC must allow for a claimant to present evidence to show that application of the statutory fee schedule will result in an unreasonable [*449] fee. We emphasize, however, that the fee schedule remains the starting point, and that the revival of the predecessor statute does not mean that claimants' attorneys will receive a windfall. [**48] Only where the claimant can demonstrate, based on the standard this Court articulated long ago in *Lee Engineering*, that the fee schedule results in an unreasonable fee—such as in a case like this—will the claimant's attorney be entitled to a fee that deviates from the fee schedule.

III. CONCLUSION

The right of an injured worker to recover a reasonable prevailing party attorney's fee has been a key feature of the state's workers' compensation law since 1941. Through the 2009 enactment of a mandatory fee schedule, however, the Legislature has created an irrebuttable presumption that every fee calculated in accordance with the fee schedule will be reasonable to compensate the attorney for his or her services. The $1.53 hourly rate in this case clearly demonstrates that not to be true.

We conclude that the mandatory fee schedule is unconstitutional as a violation of due process under both the Florida and United States Constitutions. Accordingly, we answer the rephrased certified question in the affirmative, quash the First District's decision upholding the patently unreasonable fee award, and direct that this case be remanded to the JCC for entry of a reasonable attorney's fee.

It is so ordered. [**49]

LABARGA, C.J., and QUINCE, and PERRY, JJ., concur.

LEWIS, J., concurs with an opinion.

CANADY, J., dissents with an opinion, in which POLSTON, J., concurs.

POLSTON, J., dissents with an opinion.

Concur by: LEWIS

Concur

LEWIS, J., concurring.

Over years of operation, construction, writing and rewriting, the Florida workers' compensation system has become increasingly complex and difficult to navigate

[6] Although Castellanos has also raised a strong argument based on the state constitutional right of access to courts in *article I, section 21, of the Florida Constitution*, because we conclude [**47] that the due process challenge is dispositive, we do not address the many other constitutional challenges to the statute.

without the assistance of one having specialized training. It is fair to say that the system once designed and intended to fairly distribute and allocate risk and economic burdens with reduced conflict and confrontation has rapidly expanded into an arena of such conflict and confusion that legal counsel is not only helpful, but it is now essential for the protection of workers. This need for representation has been well recognized as Florida's workers' compensation system has moved from the once quick and efficient delivery of necessary medical treatment and wages into the current maze of reduced benefits and a contentious process for the recovery of those benefits.

Now the workers' compensation program has emasculated the attorney fee provision to the extent that a mandatory fee schedule creates an irrebuttable [**50] presumption with regard to attorney fees that eliminates any consideration of whether the attorney fee is adequate for workers to actually obtain competent counsel in these cases. Thus, circumstances such as this case result in providing counsel attorney fees in an amount of $1.53 per hour, which is clearly unreasonable and insufficient to afford workers the ability to secure competent counsel, and the irrebuttable or conclusive presumption with regard to attorney fees violates the three-pronged analysis applicable to determine constitutionality here. This irrebuttable or conclusive presumption violates the constitutional right to due process. *See* Recchi America Inc. v. Hall, 692 So. 2d 153 (Fla. 1997); Markham v. Fogg, 458 So. 2d 1122 (Fla. 1984).

[*450] Additionally, where workers face the exclusive remedy under Florida's workers' compensation statutes, but are then denied the ability to secure competent counsel due to the totally unreasonable attorney fees provision, the legislation operates to unconstitutionally deny Florida workers access to our courts. As stated in Kluger v. White, 281 So. 2d 1, 4 (Fla. 1973):

> [W]here a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right [**51] has become a part of the common law of the State pursuant to Fla. Stat. § 2.01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries . . . .

Dissent by: CANADY; POLSTON

Dissent

CANADY, J., dissenting.

The fee schedule in section 440.34, Florida Statutes, embodies a policy determination by the Legislature that there should be a reasonable relationship between the value of the benefits obtained in litigating a workers' compensation claim and the amount of attorney's fees the employer or carrier is required to pay to the claimant. This policy violates none of the constitutional provisions on which the petitioner relies. Accordingly, I dissent from the majority's invalidation of this statutory provision.

In reaching the conclusion that the statute violates due process, the majority fails to directly address the actual policy of the statute. Instead, the majority assumes—without any reasoned explanation—that due process requires a particular definition of "reasonableness" in the award of statutory attorney's fees. The definition assumed by the majority categorically precludes the legislative policy requiring a reasonable relationship [**52] between the amount of a fee award and the amount of the recovery obtained by the efforts of the attorney. Certainly, this legislative policy may be subject to criticism. But there is no basis in our precedents or federal law for declaring it unconstitutional.

Although the Legislature long ago made provision for the award of attorney's fees to workers' compensation claimants, we have never held that—as the majority asserts—"a reasonable attorney's fee [is] the linchpin to the constitutionality of the workers' compensation law." Majority op. at 6. And we have never held that it is unreasonable to require that an award of attorney's fees be commensurate with the benefits obtained. The policy adopted by the Legislature in section 440.34 may be subject to criticism, but it unquestionably has a rational basis.

This case illustrates the rationale for the legislative policy requiring that a fee award be commensurate with the recovery obtained. Here, the value of the claim was $822.70, and the claimant sought attorney's fees in the amount of $36,817.50—a fee nearly 45 times the amount of the recovery. Of course, an argument can be made that an award of fees in an amount so disproportionate to the recovery [**53] is necessary and appropriate to allow the effective litigation of a complex

low-value claim. And a counter argument can be made that such disproportionate fee awards impose an unwarranted social cost. But the question for this Court is not which side of this policy debate has the best argument, but whether the policy adopted by the Legislature violates some constitutional requirement.

Our precedents and federal law provide no authority to support the proposition that due process—or any other constitutional requirement relied on by the petitioner—requires that statutory fee awards [*451] fully compensate for the effective litigation of all claims. Under the American Rule, parties must ordinarily bear the expense of obtaining their own legal representation. Inevitably, under the American Rule, obtaining the assistance of an attorney for the litigation of low-value claims—whether simple or complex—often is not feasible. Given the undisputed constitutionality of the American Rule, there is no impediment to a legislative policy requiring that the amount of statutory fee awards be reasonably related to the amount of the recovery obtained. *See* Florida Patient's Comp. Fund v. Rowe, 472 So. 2d 1145, 1149 (Fla. 1985) ("We find that an award of attorney fees to the prevailing [**54] party is 'a matter of substantive law properly under the aegis of the legislature,' in accordance with the long-standing American Rule adopted by this Court.")

The majority's reliance on the "three-part test for determining the constitutionality of a conclusive statutory presumption," majority op. at 26, to invalidate the statute is unjustified because the majority misunderstands the test and misapplies it in the context presented by this case. The majority's decision ignores the background of the three-part test. When that background is considered, it becomes abundantly clear that the majority has misapplied the test in this case.

The three-part test was first referred to by this Court in Gallie v. Wainwright, 362 So. 2d 936, 943-45 (Fla. 1978), where we rejected a claim that statutory and rule provisions limiting the availability of bond pending appeal by criminal defendants established an irrebuttable presumption that transgressed the requirements of due process. The three-part test referred to in *Gallie* was derived from Weinberger v. Salfi, 422 U.S. 749, 752-53, 95 S. Ct. 2457, 45 L. Ed. 2d 522 (1975), which reversed a lower court's decision "invalidating [9-month] duration-of-relationship Social Security eligibility requirements for surviving wives and stepchildren of deceased wage earners." The lower court had held [**55] the statutory requirements invalid on the ground that they constituted an irrebuttable presumption that violated due process.

In *Salfi*, the three parts of the test utilized by the majority here were simply elements considered by the Court in determining whether the challenged statutory provisions comported with "standards of legislative reasonableness." 422 U.S. at 776-77. *Salfi* relied on "[t]he standard for testing the validity of Congress' Social Security classification" set forth in Flemming v. Nestor, 363 U.S. 603, 611, 80 S. Ct. 1367, 4 L. Ed. 2d 1435 (1960): "'Particularly when we deal with a withholding of a noncontractual benefit under a social welfare program such as (Social Security), we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification.'" Salfi 422 U.S. at 768. *Salfi* also cited Richardson v. Belcher, 404 U.S. 78, 84, 92 S. Ct. 254, 30 L. Ed. 2d 231 (1971), which, in rejecting a due process challenge to a provision of the Social Security Act, said: "'If the goals sought are legitimate, and the classification adopted is rationally related to the achievement of those goals, then the action of Congress is not so arbitrary as to violate the Due Process Clause of the Fifth Amendment.'" Salfi, 422 U.S. at 768-69.

Accordingly, the *Salfi* Court's reasoning was—unlike the majority's reasoning here—highly deferential [**56] to the legislative judgment underlying the challenged statutory provision:

> Under those standards [of legislative reasonableness], the question raised is not whether a statutory provision precisely [*452] filters out those, and only those, who are in the factual position which generated the congressional concern reflected in the statute. Such a rule would ban all prophylactic provisions . . . . Nor is the question whether the provision filters out a substantial part of the class which caused congressional concern, or whether it filters out more members of the class than nonmembers. The question is [1] whether Congress, its concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, [2] could rationally have concluded both that a particular limitation or qualification would protect against its occurrence, and [3] that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule. We conclude that the duration-of-relationship test meets this constitutional standard.

Salfi, 422 U.S. at 777.

The particular elements of the rational basis analysis in *Salfi* were based on the particular justification advanced by the [**57] Social Security Administration for the duration-of-relationship requirement—that is, as a "general precaution against the payment of benefits where the marriage was undertaken to secure benefit rights." *422 U.S. at 780*. The Court concluded that this concern was undoubtedly "legitimate," that it was "undoubtedly true that the duration-of-relationship requirement operates to lessen the likelihood of abuse through sham relationships entered in contemplation of imminent death" and that "Congress could rationally have concluded that any imprecision from which [the requirement] might suffer was justified by its ease and certainty of operation." *Id.*

It is readily apparent that the framework of the three-part analysis does not fit the context presented by the case on review here. *Section 440.34* does not embody a prophylactic requirement akin to the eligibility requirement in *Salfi*. *Section 440.34* thus does not present any question of "inherent imprecision." *Id. at 777*. By definition, the rule of proportionality embodied in the statute precisely and comprehensively protects against fee awards disproportionate to the recovery obtained. The award of such disproportionate fees is the very evil that the Legislature sought to eliminate. In its application [**58] of the inapposite three-part test, the majority simply ignores this fundamental point. Beyond that, the majority applies the elements of the test in a manner totally contrary to the manner in which *Salfi* applied them and totally at odds with the general rule "that the *Due Process Clause* can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification." *Id. at 768* (citing *Nestor, 363 U.S. at 611*).

It should not be ignored that *Salfi* reversed the lower court's application of the irrebuttable presumption doctrine and took pains to distinguish and limit earlier cases that had relied on that doctrine to invalidate legislation. *422 U.S. at 771-72*. In doing so, the Court expressed its strong concern that an expansive application of the irrebuttable presumption doctrine—like the application by the lower court—would turn that doctrine "into a virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the *Fifth* and *Fourteenth Amendments* to the Constitution." *Id. at 772*. Underlying this concern is the reality that any legislative classification can be characterized as an irrebuttable presumption. The majority here has applied [*453] a test extracted from *Salfi* in [**59] a manner that flies in the face of the central concern expressed by the Court in *Salfi* justifying its reversal of the lower court. The line of reasoning adopted by the majority unquestionably has the potential to become a "virtual engine of destruction for countless legislative judgments" previously understood to be constitutional.

Although some of our prior cases have relied on the three-part test derived from *Salfi*, we have never applied that test to find a statutory provision unconstitutional in circumstances that have any similarity to the circumstances presented here. In *Recchi America Inc. v. Hall*, which is briefly discussed by the majority, the underlying legislative policy—as expressly stated in the statute—was that no workers' compensation would be payable for an injury occasioned primarily by the employee's intoxication. With that legislative policy in view, we upheld the invalidation of a statutory irrebuttable presumption that an employee's injury was caused primarily by intoxication if the employee was working in a workplace with a drug-free workplace program and tested positive for alcohol or drugs at the time of injury. We concluded that "the conclusive presumption created [**60] a high potential for inaccuracy" and emphasized that the injured worker in the case "was injured when a coworker tripped and jabbed a long steel apparatus into the back of his head." *Recchi, 692 So. 2d at 154-55*.

Leaving aside the question of whether our analysis in *Recchi* is consistent with *Salfi*—which we did not mention—*Recchi* is readily distinguishable from the case now on review. Here, there is no expressly stated legislative policy regarding attorney's fees that might be implemented through a process of individualized determinations analogous to the expressly stated legislative policy regarding causation that was addressed in *Recchi*. No process of individualized factual determinations could better serve the legislative purpose of establishing proportionality between fee awards and recoveries obtained than does the statutory fee schedule.

Finally, I agree with Justice Polston that the majority "turns this Court's well-established precedent regarding facial challenges on its head[.]" Dissenting op. at 53 (Polston, J.)

I would answer the rephrased certified question in the negative and approve the decision of the First District.

POLSTON, J., concurs.

POLSTON, J., dissenting.

There is no conclusive presumption. The [**61] majority has rewritten the statute to avoid the standard governing facial challenges. I respectfully dissent.

In 2008, this Court issued an opinion interpreting the attorney's fees provision of Florida's workers' compensation law as amended in 2003 to include a reasonableness requirement. *See* Murray v. Mariner Health, 994 So. 2d 1051 (Fla. 2008) (interpreting section 440.34, Florida Statutes (2003)). This Court in *Murray* determined that the plain language of the statute was ambiguous regarding reasonableness because subsection (1) did not include the term reasonable when providing for a mandatory fee schedule but subsection (3) did employ the term. Id. at 1061. Such ambiguity necessitated a judicial interpretation utilizing the rules of statutory construction. *Id.* In response to this Court's decision in Murray, the Legislature amended the statute to eliminate any ambiguity, which the Legislature is constitutionally authorized to do. Specifically, in 2009, the Legislature eliminated all references to reasonableness, rendering moot this Court's 2008 interpretation of the provision as including a reasonableness requirement. [*454] *See* ch. 2009-94, § 1, Laws of Fla. However, with today's decision, the majority reinstates its prior 2008 holding by turning facial constitutional review completely on its head and rewriting [**62] the 2009 statute.

To be clear, I am not saying that a constitutional challenge to section 440.34, Florida Statutes (2009), could never succeed. In fact, I would not foreclose the possibility of a successful as-applied constitutional challenge to the attorney's fees provision based upon access to courts, depending upon the particular facts of the case involved. However, as acknowledged during oral argument, the petitioner did not raise any as-applied challenge to the statute in this Court, even given what would certainly seem to be the rather egregious facts of his case. Instead, the petitioner raised a facial challenge that lacks any merit under our precedent.

In a facial challenge, this Court has emphasized that "our review is limited." Abdool v. Bondi, 141 So. 3d 529, 538 (Fla. 2014). Specifically, "we consider only the text of the statute." *Id.* "For a statute to be held facially unconstitutional, the challenger must demonstrate that no set of circumstances exists in which the statute can be constitutionally applied." *Id.; see also* Cashatt v. State, 873 So. 2d 430, 434 (Fla. 1st DCA 2004) ("A facial challenge to a statute is more difficult than an 'as applied' challenge, because the challenger must establish that no set of circumstances exists under which the statute would be valid."); *cf.* Accelerated Benefits Corp. v. Dep't of Ins., 813 So. 2d 117, 120 (Fla. 1st DCA 2002) ("In considering an 'as applied' [**63] challenge, the court is to consider the facts of the case at hand."). Moreover, "when we review the constitutionality of a statute, we accord legislative acts a presumption of constitutionality and construe the challenged legislation to effect a constitutional outcome when possible." Abdool, 141 So. 3d at 538 (citing Fla. Dep't of Revenue v. Howard, 916 So. 2d 640, 642 (Fla. 2005)). "As a result, [an] Act will not be invalidated as facially unconstitutional simply because it could operate unconstitutionally under some [] circumstances." *Id.*

Applying this well-established precedent, the facial challenge at issue here fails, even assuming that adequate and reasonable attorney's fees are constitutionally required. There are some workers' compensation cases where "the amount of benefits is substantial, but the legal issues are simple and direct, and do not require exceptional skill, knowledge, and experience." Murray, 994 So. 2d at 1057 n.4. In these high pay-off, low-effort cases, the statutory fee schedule could provide reasonable compensation for a prevailing claimant's attorney. After all, section 440.34(1), Florida Statutes (2009), provides that the attorney's fee must equal 20 percent of the first $5,000 in benefits, 15 percent of the next $5,000, 10 percent of the remaining during the first 10 years of the claim, and 5 percent after [**64] 10 years. Therefore, because there are a set of circumstances under which the attorney's fees provision could be constitutionally applied, the provision is facially constitutional under our precedent. *See* Fla. Dep't of Revenue v. City of Gainesville, 918 So. 2d 250, 265 (Fla. 2005) ("[I]n a facial constitutional challenge, we determine only whether there is any set of circumstances under which the challenged enactment might be upheld.").

The majority reaches a contrary holding, not by applying our precedent regarding facial challenges, but by ignoring it altogether and never even citing the well-established standard. The majority just declares that the attorney's fees provision in Florida's workers' compensation law includes an irrebuttable presumption of reasonableness, [*455] and then it holds that this presumption is a violation of procedural due process under both the United States and Florida constitutions. But the 2009 provision does not mention reasonableness at all and, therefore, does not include any such presumption, irrebuttable or otherwise. *Cf.*

Recchi America Inc. v. Hall, 692 So. 2d 153 (Fla. 1997) (declaring an irrebuttable presumption invalid as a violation of due process where the statute plainly and *expressly included* a presumption that an accident was primarily caused by the worker's intoxication if that [**65] worker's urine test revealed the presence of alcohol or drugs). *Section 440.34* as plainly written prescribes a mandatory schedule for prevailing party attorney's fees. It never states that those attorney's fees have to be or should be considered reasonable. In fact, it was specifically amended post-*Murray* to eliminate the term reasonable, which eliminates the ability of this Court to say that the statute includes anything about reasonableness. And because the statute does not include any presumption of reasonableness (let alone a conclusive presumption), the majority's analysis of the constitutionality of that non-existent presumption is erroneous.

The majority's decision turns this Court's well-established precedent regarding facial challenges on its head and accomplishes by the backdoor what it could not do by the front door. The majority is really deciding that reasonable attorney's fees are constitutionally required. But by rewriting the 2009 statute to include a conclusive presumption, the majority avoids the fact that the *state* and *federal due process clauses* do not require Florida's workers' compensation scheme to include reasonable prevailing party attorney's fees. The majority also invalidates a statute that [**66] might sometimes, but not all the time, be applied in a manner that denies reasonable attorney's fees. However, this Court's precedent regarding facial challenges requires that such a statute be upheld. *See State v. Ecker, 311 So. 2d 104, 110 (Fla. 1975)* ("While the statute might be unconstitutionally applied in certain situations, this is no ground for finding the statute itself [facially] unconstitutional.").

Accordingly, I respectfully dissent.

Table1 (*Return to related document text*)

Fiscal Year	Aggregate Fees	Claimant %	Defense %
02-03	$430,705,423	48.91%	51.09%
03-04	$446,472,919	48.23%	51.77%
04-05	$475,215,605	44.43%	55.57%
05-06	$507,781,830	41.04%	58.96%
06-07	$478,640,476	39.95%	60.05%
07-08	$459,202,630	41.09%	58.91%
08-09	$459,324,903	39.55%	60.45%
09-10	$456,566,882	38.77%	61.23%
10-11	$428,036,787	36.70%	63.30%
11-12	$416,870,962	36.67%	63.33%
12-13	$418,775,099	36.27%	63.73%

Table1 (*Return to related document text*)

End of Document

Westphal v. City of St. Petersburg

Supreme Court of Florida

June 9, 2016, Decided

No. SC13-1930, No. SC13-1976

Reporter
194 So. 3d 311 *; 2016 Fla. LEXIS 1197 **; 166 Lab. Cas. (CCH) P61,716; 41 Fla. L. Weekly S 261; 2016 WL 3191086

BRADLEY WESTPHAL, Petitioner, vs. CITY OF ST. PETERSBURG, etc., et al., Respondents.CITY OF ST. PETERSBURG, etc., Petitioner, vs. BRADLEY WESTPHAL, Respondent.

Subsequent History: As Corrected July 7, 2016.

Prior History: [**1] Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance. First District - Case No. 1D12-3563.

Westphal v. City of St. Petersburg, 122 So. 3d 440, 2013 Fla. App. LEXIS 15084 (Fla. Dist. Ct. App. 1st Dist., 2013)

Core Terms

benefits, workers' compensation, temporary total disability, maximum, courts, total disability, injured worker, permanent total disability, gap, disability benefits, disability, eligible, Statutes, reasonable alternative, permanent impairment, en banc, expiration, permanent, reaches, redress, rewrite, provides, injuries, statutory scheme, abolish, medical care, claimants, severely, temporary benefits, tort litigation

Case Summary

Overview

HOLDINGS: [1]-*Section 440.15(2)(a), Fla. Stat.*, which cut off disability benefits after 104 weeks to a worker who was totally disabled and incapable of working but who had not yet reached maximum medical improvement, was unconstitutional under *Art. I, § 21, Fla. Const.*, as a denial of the right of access to courts because it deprived an injured worker of disability benefits for an indefinite amount of time, thereby creating a system of redress that no longer functioned as a reasonable alternative to tort litigation; [2]-Because the statute was plainly written, it did not permit the court to resort to rules of statutory construction, even to avoid an unconstitutional result; [3]-The proper remedy was the revival of the pre-1994 statute that provided for a limitation of 260 weeks of temporary total disability benefits.

Outcome

Decision quashed and case remanded.

LexisNexis® Headnotes

Workers' Compensation & SSDI > Benefit Determinations > Temporary Total Disabilities

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

HN1 *Section 440.15(2)(a), Fla. Stat.* (2009)—part of the state's workers' compensation law—which cuts off disability benefits after 104 weeks to a worker who is totally disabled and incapable of working but who has not yet reached maximum medical improvement is unconstitutional under *Art. I, § 21, Fla. Const.*, as a denial of the right of access to courts, because it deprives an injured worker of disability benefits under these circumstances for an indefinite amount of time—thereby creating a system of redress that no longer functions as a reasonable alternative to tort litigation.

Governments > Legislation > Interpretation

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation

HN2 The judiciary is without power to rewrite a plainly written statute, even if it is to avoid an unconstitutional result. When the subject statute in no way suggests a saving construction, the court will not abandon judicial restraint and effectively rewrite the enactment.

Workers' Compensation & SSDI > Benefit Determinations > Temporary Total Disabilities

Governments > Legislation > Interpretation

HN3 *Section 440.15(2)(a), Fla. Stat.*, of the workers' compensation law is plainly written and therefore does not permit the court to resort to rules of statutory construction. Instead, the court must give the statute its plain and obvious meaning, which provides that once the employee reaches the maximum number of weeks allowed (104 weeks), or the employee reaches the date of maximum medical improvement, whichever occurs earlier, temporary disability benefits shall cease and the injured worker's permanent impairment shall be determined. *§ 440.15(2)(a), Fla. Stat.* The statute does not provide that the worker is at that time legally entitled to permanent total disability benefits, nor does it provide that the worker is automatically deemed to be at maximum medical improvement based on the cessation of temporary total disability benefits.

Workers' Compensation & SSDI > Benefit Determinations > Temporary Total Disabilities

HN4 The stated legislative intent of the workers' compensation law is to assure the quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the worker's return to gainful reemployment at a reasonable cost to the employer. *§ 440.015, Fla. Stat.* (2009). *Section 440.15(2)(a)*, however, operates in the opposite manner. The statute cuts off a severely injured worker from disability benefits at a critical time, when the worker cannot return to work and is totally disabled but the worker's doctors—chosen by the employer—deem that the worker may still continue to medically improve. As applied to these circumstances, the workers' compensation law undoubtedly fails to provide full medical care and wage-loss payments for total or partial disability regardless of fault. Instead, for injured workers who are not yet legally entitled to assert a claim for permanent total disability benefits at the conclusion of 104 weeks of temporary total disability benefits, the workers' compensation law lacks adequate and sufficient safeguards and cannot be said to continue functioning as a system of compensation without contest that stands as a reasonable alternative to tort litigation.

Business & Corporate Compliance > Workers' Compensation > Workers' Compensation & SSDI

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

HN5 The constitutional yardstick for determining whether an access-to-courts violation occurred under *Art. I, § 21, Fla. Const.* as a result of changes made to the workers' compensation statutory scheme is whether the scheme continues to provide adequate, sufficient, and even preferable safeguards for an employee who is injured on the job.

Workers' Compensation & SSDI > Benefit Determinations > Temporary Total Disabilities

HN6 *Section 440.15(2)(a), Fla. Stat.* (2009) as written by the legislature is unconstitutional. However, this unconstitutional limitation on temporary total disability benefits does not render the entire workers' compensation system invalid. Rather, under the remedy of statutory revival, the limitation in the workers' compensation law preceding the 1994 amendments to *§ 440.15(2)(a)* is revived, which provides for temporary total disability benefits not to exceed 260 weeks—five years of eligibility rather than only two years, a limitation the Florida Supreme Court previously held passes constitutional muster.

Governments > Legislation > Interpretation

Civil Procedure > Appeals > Standards of Review > De Novo Review

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > Inferences & Presumptions

HN7 Although review of statutory interpretation is de novo, statutes come clothed with a presumption of constitutionality and must be construed whenever possible to effect a constitutional outcome.

Governments > Legislation > Interpretation

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation

HN8 Although the court must, whenever possible, construe statutes to effect a constitutional outcome, it may not salvage a plainly written statute by rewriting it. Courts may not go so far in their narrowing constructions so as to effectively rewrite legislative enactments. Even if potentially unwise and unfair, it is not the prerogative of the courts to rewrite a statute to

overcome its shortcomings. A court's function is to interpret statutes as they are written and give effect to each word in the statute. Courts may not vary the intent of the legislature with respect to the meaning of the statute in order to render the statute constitutional.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

Constitutional Law > State Constitutional Operation

HN9 *Art. I, § 21, Fla. Const.*, part of Florida's state constitutional "Declaration of Rights" since 1968, guarantees every person access to the courts and ensures the administration of justice without denial or delay: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." *Art. I, § 21, Fla. Const.* This important state constitutional right has been construed liberally in order to guarantee broad accessibility to the courts for resolving disputes.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

HN10 Where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the state pursuant to *§ 2.01, Fla. Stat.*, the legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the state to redress for injuries, unless the legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

Business & Corporate Compliance > Workers' Compensation > Workers' Compensation & SSDI

HN11 The fact that workers' compensation was created prior to 1968 as a non-judicial statutory scheme of no fault benefits intended to provide full medical care and wage-loss payments does not mean that changes to the workers' compensation law to reduce or eliminate benefits are immune from a constitutional attack based on access to courts. Workmen's compensation abolished the right to sue one's employer in tort for a job-related injury, but provided adequate, sufficient, and even preferable safeguards for an employee who is injured on the job, thus satisfying one of the exceptions to the rule against abolition of the right to redress for an injury. In other words, workers' compensation constitutes a reasonable alternative to tort litigation—and therefore does not violate the access to courts provision—so long as it provides adequate and sufficient safeguards for the injured employee.

Business & Corporate Compliance > Workers' Compensation > Workers' Compensation & SSDI

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

HN12 In order to be upheld as constitutional under the access-to-courts provision, the workers' compensation law must continue to provide a reasonable alternative to tort litigation.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

Business & Corporate Compliance > Workers' Compensation > Workers' Compensation & SSDI

HN13 Although the Florida Supreme Court has rejected constitutional challenges to the workers' compensation law in the past, its precedent clearly establishes that when confronted with a constitutional challenge based on access to courts, the court must determine whether the law remains a reasonable alternative to tort litigation.

Workers' Compensation & SSDI > Benefit Determinations > Temporary Total Disabilities

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

HN14 The 104-week limitation on temporary total disability benefits, as applied to a worker who falls into the statutory gap at the conclusion of those benefits, does not provide a "reasonable alternative" to tort litigation. Under the current statute, such workers are denied their constitutional right of access to the courts. Under the plain language of the statute, many hardworking Floridians who become injured in the course of employment are denied the benefits necessary to pay their bills and survive on a day-to-day basis. The inequitable impact of this statute is patent because it provides permanent total disability benefits to the disabled worker who reaches maximum medical improvement quickly, but arbitrarily and indefinitely terminates benefits to other disabled workers—i.e., until the employee proves that he or she is permanently and totally disabled once maximum medical improvement is attained, even where there is no dispute that the

employee is totally disabled at the time the temporary benefits expire, and even if maximum medical improvement will occur in the future.

Governments > Legislation > Expiration, Repeal & Suspension

Governments > Legislation > Extension & Revival

HN15 Florida law has long held that when the legislature approves unconstitutional statutory language and simultaneously repeals its predecessor, then the judicial act of striking the new statutory language automatically revives the predecessor unless it, too, would be unconstitutional.

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William Harris Rogner, Winter Park, Florida, for Amici Curiae Associated Industries of Florida, Associated Builders and Contractors of Florida, The Florida Chamber of Commerce, The Florida Insurance Council, The Property Casualty Insurers Association of America, The Florida Justice Reform Institute, Publix Super Markets, United Parcel Service, The Florida Roofing, Sheet Metal and Air Conditioning Contractors Association, The Florida Retail Federation, The American Insurance Association, The National Federation of Independent Business, The Florida United [**3] Businesses Association, Inc., and The Florida Association of Self Insureds.

Judges: PARIENTE, J. LABARGA, C.J., and QUINCE, and PERRY, JJ., concur. LEWIS, J., concurs in result with an opinion. CANADY, J., dissents with an opinion, in which POLSTON, J., concurs.

Opinion by: PARIENTE

Opinion

[*313] PARIENTE, J.

In this case, we consider the constitutionality of ***HN1*** *section 440.15(2)(a), Florida Statutes* (2009)—part of the state's workers' compensation law—which cuts off disability benefits after 104 weeks to a worker who is totally disabled and incapable of working but who has not yet reached maximum medical improvement. We conclude that this portion of the worker's compensation statute is unconstitutional under *article I, section 21, of the Florida Constitution*, as a denial of the right of access to courts, because it deprives an injured worker of disability benefits under these circumstances for an indefinite amount of time—thereby creating a system of redress that no longer functions as a reasonable alternative to tort litigation.

In *Westphal v. City of St. Petersburg/City of St. Petersburg Risk Management, 122 So. 3d 440, 442 (Fla. 1st DCA 2013)*, an en banc majority of the First District Court of Appeal valiantly attempted to save the

statute from unconstitutionality by interpreting section 440.15(2)(a) so that the severely injured worker who can no longer receive temporary total disability benefits, but who is not yet eligible for permanent [**4] total disability benefits, would not be cut off from compensation after 104 weeks.[1] ***HN2*** The judiciary, however, is without [*314] power to rewrite a plainly written statute, even if it is to avoid an unconstitutional result. *See* Brown v. State, 358 So. 2d 16, 20 (Fla. 1978) ("When the subject statute in no way suggests a saving construction, we will not abandon judicial restraint and effectively rewrite the enactment."). We accordingly quash the First District's decision.

Consistent with the views of both the petitioner, Bradley Westphal, and the principal respondent, the City of St. Petersburg, we conclude that ***HN3*** section 440.15(2)(a) of the workers' compensation law is plainly written and therefore does not permit this Court to resort to rules of statutory construction. *See* Knowles v. Beverly Enterprises-Florida, Inc., 898 So. 2d 1, 5 (Fla. 2004). Instead, we must give the statute its plain and obvious meaning, which provides that "[o]nce the employee reaches the maximum number of weeks allowed [104 weeks], or the employee reaches the date of maximum medical improvement, whichever occurs earlier, temporary disability benefits shall cease and the injured worker's permanent impairment shall be determined." § 440.15(2)(a), Fla. Stat. The statute does not—as the First District erroneously concluded—provide that the worker is at that time legally entitled to permanent total disability benefits, nor does it provide that the worker is automatically deemed to be at maximum medical improvement based on the cessation of temporary total disability benefits. *See* Westphal, 122 So. 3d at 444.

Applying the statute's plain meaning, we conclude that the 104-week limitation on temporary [**6] total disability benefits results in a statutory gap in benefits, in violation of the constitutional right of access to courts. ***HN4*** The stated legislative intent of the workers' compensation law is to "assure the quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the worker's return to gainful reemployment at a reasonable cost to the employer." § 440.015, Fla. Stat. (2009). Section 440.15(2)(a), however, operates in the opposite manner. The statute cuts off a severely injured worker from disability benefits at a critical time, when the worker cannot return to work and is totally disabled but the worker's doctors—chosen by the employer—deem that the worker may still continue to medically improve.

As applied to these circumstances, the workers' compensation law undoubtedly fails to provide "full medical care and wage-loss payments for total or partial disability regardless of fault." Martinez v. Scanlan, 582 So. 2d 1167, 1171-72 (Fla. 1991). Instead, for injured workers like Westphal who are not yet legally entitled to assert a claim for permanent total disability benefits at the conclusion of 104 weeks of temporary total disability benefits, the workers' compensation law lacks adequate and sufficient safeguards and cannot be said to [**7] continue functioning as a "system of compensation without contest" that stands as a reasonable alternative to [*315] tort litigation. Mullarkey v. Fla. Feed Mills, Inc., 268 So. 2d 363, 366 (Fla. 1972). Contrary to Justice Canady's dissenting opinion, the seminal case on the meaning of the Florida Constitution's access to courts provision, Kluger v. White, 281 So. 2d 1 (Fla. 1973), specifically discussed the test for determining the constitutionality of the workers' compensation statutory scheme under the access to courts provision, article I, section 21, of the Florida Constitution. ***HN5*** The constitutional yardstick, which we applied in *Martinez* and *Mullarkey* for determining whether an access-to-courts violation occurred as a result of changes made to the workers' compensation statutory scheme, is whether the scheme continues to provide "adequate, sufficient, and even preferable safeguards for an employee who is injured on the job." Kluger, 281 So. 2d at 4.

Accordingly, ***HN6*** we hold that the statute as written by the Legislature is unconstitutional. However, we

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[1] In its decision, the First District ruled upon the following question, which it certified to be of great public importance:

> IS A WORKER WHO IS TOTALLY DISABLED AS A RESULT OF A WORKPLACE ACCIDENT, BUT STILL IMPROVING FROM A MEDICAL STANDPOINT AT THE TIME TEMPORARY TOTAL DISABILITY BENEFITS EXPIRE, DEEMED TO BE AT MAXIMUM MEDICAL IMPROVEMENT BY OPERATION OF LAW AND THEREFORE ELIGIBLE TO ASSERT A CLAIM FOR PERMANENT AND TOTAL DISABILITY BENEFITS?

Westphal, 122 So. 3d at 448. We have jurisdiction. *See* art. V, § 3(b)(4), Fla. Const. Because of our conclusion that the First District's interpretation of the statute cannot withstand scrutiny, and our holding that the statute is unconstitutional, we do not specifically answer the certified question. As our analysis in this opinion explains, to the extent the certified question simply asks [**5] whether the workers' compensation law constitutionally permits the statutory "gap" at issue, we answer that question in the negative.

conclude that this unconstitutional limitation on temporary total disability benefits does not render the entire workers' compensation system invalid.[2] Rather, we employ the remedy of statutory revival and direct that the limitation in the workers' compensation law preceding the 1994 amendments to section 440.15(2)(a) is revived, which provides [**8] for temporary total disability benefits not to exceed 260 weeks—five years of eligibility rather than only two years, a limitation we previously held "passes constitutional muster." Martinez, 582 So. 2d at 1172.

I. FACTS AND PROCEDURAL HISTORY

In December 2009, Bradley Westphal, then a fifty-three-year-old firefighter in St. Petersburg, Florida, suffered a severe lower back injury caused by lifting heavy furniture in the course of fighting a fire. As a result of the lower back injury, Westphal experienced extreme pain and loss of feeling in his left leg below the knee and required multiple surgical procedures, including an eventual spinal fusion.

Shortly after his workplace injury, Westphal began receiving benefits pursuant to the workers' compensation law set forth in chapter 440, Florida Statutes (2009). Specifically, the City of St. Petersburg began to provide both indemnity benefits, in the form of temporary total disability benefits pursuant to section 440.15(2), Florida Statutes, [*316] and medical benefits.

Under section 440.15(2)(a), entitlement to temporary total disability benefits ends when a totally disabled injured [**10] worker reaches the date of maximum medical improvement or after 104 weeks, whichever occurs earlier. § 440.15(2)(a), Fla. Stat. The "date of maximum medical improvement" is defined in section 440.02(10), Florida Statutes (2009), as "the date after which further recovery from, or lasting improvement to, an injury or disease can no longer reasonably be anticipated, based upon reasonable medical probability." Westphal did not reach maximum medical improvement prior to the expiration of the 104-week limitation on temporary total disability benefits.

At the expiration of temporary total disability benefits, Westphal was still incapable of working or obtaining employment, based on the advice of his doctors and the vocational experts that examined him. In an attempt to replace his pre-injury wages of approximately $1,500 per week that he was losing because of his injuries, Westphal filed a petition for benefits, claiming either further temporary disability or permanent total disability pursuant to section 440.15(1), Florida Statutes (2009).

A. Judge of Compensation Claims Decision

The Judge of Compensation Claims (JCC) held a hearing on Westphal's petition and subsequently denied the claim for permanent total disability benefits based on its interpretation of City of Pensacola Firefighters v. Oswald, 710 So. 2d 95 (Fla. 1st DCA 1998), and Matrix Employee Leasing, Inc. v. Hadley, 78 So. 3d 621 (Fla. 1st DCA 2011). In *Oswald*, the First [**11] District held that to receive permanent total disability benefits, "an employee whose temporary benefits have run out-or are expected to do so imminently—must be able to show not only total disability upon the cessation of temporary benefits but also that total disability will be 'existing after the date of maximum medical improvement.'" 710 So. 2d at 98, *abrogated by* Westphal, 122 So. 3d at 448 (quoting § 440.02(19), Fla. Stat. (Supp. 1994)). The First District also observed that the statutory scheme could create a statutory gap-a period of time when totally disabled individuals would no longer be eligible for temporary total disability benefits and could not receive any disability benefits until, possibly, finally being declared eligible for permanent total disability benefits. Id. at 97-98. In *Hadley*, the First District again

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[2] To the extent Justice Lewis's concurring in result opinion suggests as a remedy that chapter 440 should be "invalidated where defective," the remedy of invalidating other sections in chapter 440 beyond section 440.15(2)(a) is not properly before us. In his briefing on this matter to the Court, Westphal requested reversal of the en banc decision of the First District Court of Appeal to "either reinstate the panel decision"—which revived the pre-1994 statute that provided for the administration of 260 weeks of temporary total disability benefits—or hold "that the 104 weeks limitation on temporary disability" is "unconstitutional as applied to the facts of this case and do so prospectively." Petitioner's Initial Brief at 47. Because we hold that the statute is unconstitutional as applied to Westphal and others similarly situated, we have granted Westphal's requested relief of reversing the en banc decision of the First District Court of Appeal and will not consider an argument of the unconstitutionality of the entire workers' [**9] compensation law when the parties have not raised such an expansive remedy. Although the remedy of invalidating the entire workers' compensation law was suggested at some length by the Florida Workers' Advocates in an amicus curiae brief filed in support of Westphal, we do not consider arguments raised by amici curiae that were not raised by the parties. *See* Riechmann v. State, 966 So. 2d 298, 304 n.8 (Fla. 2007); **Dade Cty. v. E. Air Lines, Inc., 212 So. 2d 7, 8 (Fla. 1968)**; Michels v. Orange Cty. Fire Rescue, 819 So. 2d 158, 159-60 (Fla. 1st DCA 2002).

acknowledged the concern of a statutory gap in benefits, but reaffirmed *Oswald* nonetheless. *See* Hadley, 78 So. 3d at 624-25, *receded from by* Westphal, 122 So. 3d at 442.

Based on this line of case law, the JCC denied Westphal's claim. In its final order, the JCC found that Westphal had not reached maximum medical improvement and that it was "too speculative to determine whether he will remain totally disabled after the date of [maximum medical improvement] has been reached from a physical [**12] standpoint." Thus, Westphal fell into the statutory gap—still totally disabled at the cessation of temporary total disability benefits, but not yet entitled to permanent total disability benefits because he could not prove that he would still be totally disabled when he reached maximum medical improvement. He was, in essence, completely cut off from disability benefits for an indefinite amount of time, unless and until he could claim entitlement to permanent total disability benefits at some future date and, even then, without any ability to recover disability benefits for his time in the statutory gap.

B. First District Panel Decision

Westphal appealed to the First District, contending that the JCC erred in determining [*317] that he was not entitled to permanent total disability benefits. He further argued that the 104-week statutory limitation on temporary total disability benefits, as applied to him, was an unconstitutional denial of access to courts. A panel of the First District agreed with the constitutional claim, holding that the 104-week limitation on temporary total disability benefits was unconstitutional as applied to the facts of this case.

Specifically, relying on Kluger, 281 So. 2d 1, the First [**13] District panel concluded that the 104-week limitation on temporary total disability benefits was an inadequate remedy as compared to the 350 weeks available when voters adopted the access to courts provision in the 1968 Florida Constitution. The First District panel also observed that the 104-week limitation on temporary total disability benefits was the lowest in the United States. The First District panel applied its decision prospectively and instructed the JCC to grant Westphal additional temporary total disability benefits, not to exceed 260 weeks, as would have been provided under the relevant statutory provisions in effect before the 1994 amendment of section 440.15(2)(a), limiting eligibility for temporary total disability benefits to a maximum of 104 weeks.

C. First District En Banc Decision

Subsequent to the panel decision, the First District granted motions for rehearing en banc filed by the City and the State. The First District then issued an en banc decision withdrawing the panel opinion that had declared the statute unconstitutional. Setting forth a new interpretation of the statute to avoid a holding of unconstitutionality, the First District's en banc decision receded from Hadley, 78 So. 3d 621, and abrogated [**14] Oswald, 710 So. 2d 95.

In addressing the issue of Westphal's entitlement to disability benefits, the en banc majority determined that the First District's construction of the statute fifteen years earlier in *Oswald*, and then again two years earlier in *Hadley*, was incorrect. Specifically, the First District noted that the statute requires a medical evaluation either when an injured worker reaches maximum medical improvement or six weeks before the expiration of the 104-week period of eligibility for temporary total disability benefits, whichever occurs earlier, and that the doctor must assign an impairment rating as part of this evaluation. Westphal, 122 So. 3d at 444. The First District construed the use of the phrase "permanent impairment" in section 440.15(2)(a) to signify that the worker has attained maximum medical improvement. Id. at 445-46. Accordingly, the First District held that "a worker who is totally disabled as a result of a workplace accident and remains totally disabled by the end of his or her eligibility for temporary total disability benefits is deemed to be at maximum medical improvement by operation of law and is therefore eligible to assert a claim for permanent and total disability benefits." Id. at 442.

As a result of this new interpretation of the statute, [**15] which eliminated the statutory gap, the First District found it unnecessary to consider whether its prior, now discredited interpretation of the statute in *Hadley*—recognizing the gap—rendered the statute unconstitutional as a denial of the right of access to courts. Id. at 447. The First District then certified the question it passed upon as one of great public importance. Id. at 448. We granted review[3] and now quash the First District's [*318] en banc decision and hold the statute unconstitutional as applied, in

[3] Both Westphal and the City invoked this Court's discretionary jurisdiction. We consolidated the petitions but retained the two different case numbers. During briefing, we treated Westphal as the petitioner and the City as the respondent, and we accordingly employ those same designations here.

accordance with the prior panel opinion.

II. ANALYSIS

Both Westphal as the petitioner and the City as the principal respondent argue before this Court that the First District's previous construction of the statute in *Hadley* and *Oswald* was correct, and that the new interpretation advanced by the en banc majority in *Westphal* amounts to a violation of separation of powers, due process, and the principle of stare decisis. [**16] The State, which is also a respondent, agrees that the previous interpretation of the First District in *Hadley* and *Oswald* is correct, but argues that the First District's new construction of section 440.15(2)(a) is a reasonable alternative interpretation if this Court is inclined to declare the 104-week limitation on temporary total disability benefits to be invalid as a denial of access to courts. Westphal, however, argues that there is no judicial fix and that the 104-week limitation in section 440.15(2)(a), as applied to him and others similarly situated, is an unconstitutional denial of access to courts.

We thus begin our analysis by interpreting section 440.15 to determine if the First District's en banc opinion—eliminating the statutory gap—provides a permissible statutory construction, or if the First District's prior opinions in *Hadley* and *Oswald*—recognizing the statutory gap created by the Legislature—provided the correct interpretation. After concluding that the First District's en banc opinion is an impermissible judicial rewrite of the Legislature's plainly written statute, we are forced to confront the constitutional issue of whether the statute, as applied to Westphal and other similarly situated severely injured workers, [**17] is unconstitutional. Concluding that the statute, as applied, violates the access to courts provision of the Florida Constitution, we conclude by considering the appropriate remedy.

A. *Section 440.15, Florida Statutes*

Section 440.15, Florida Statutes (2009), governs the payment of disability benefits to injured workers. As of the 1968 adoption of the Florida Constitution, permanent total disability benefits were determined "in accordance with the facts," and the term "maximum medical improvement" was not included in the workers' compensation law. § 440.15(1), Fla. Stat. (1967). Nevertheless, the phrase "maximum medical improvement" was part of this Court's lexicon because it assisted in determining the permanence of the injury. Indeed, in 1969, this Court noted that "[t]he date of maximum medical improvement marks the end of temporary disability and the beginning of permanent disability." Corral v. McCrory Corp., 228 So. 2d 900, 903 (Fla. 1969). At that time, section 440.15(2) provided for the payment of temporary total disability benefits for a duration not to exceed 350 weeks. § 440.15(2), Fla. Stat. (1967).

In 1979, the Legislature added the term "date of maximum medical improvement" to the statute, defining it consistently with this Court's prior 1969 construction in *Corral* and requiring that the date be "based upon reasonable medical probability." § 440.02(22), Fla. Stat. (1979). That statutory [**18] definition has remained unchanged to this day.

In 1990, the Legislature reduced the duration of temporary total disability benefits from 350 weeks to 260 weeks. [*319] § 440.15(2), Fla. Stat. (1990). Then, just four years later, and as part of an extensive statutory overhaul, the Legislature further reduced the duration of temporary total disability benefits from 260 weeks to 104 weeks. § 440.15(2)(a), Fla. Stat. (1994).

Accordingly, in 2009, at the time of the events giving rise to this case, section 440.15(1) provided in part:

> (a) In case of total disability adjudged to be permanent, 66 2/3 percent of the average weekly wages shall be paid to the employee during the continuance of such total disability. No compensation shall be payable under this section if the employee is engaged in, or is physically capable of engaging in, at least sedentary employment.
>
> (b) In the following cases, an injured employee is presumed to be permanently and totally disabled unless the employer or carrier establishes that the employee is physically capable of engaging in at least sedentary employment within a 50-mile radius of the employee's residence:
>
> . . . .
>
> In all other cases, in order to obtain permanent total disability benefits, the employee must establish that he or she is [**19] not able to engage in at least sedentary employment, within a 50-mile radius of the employee's residence, due to his or her physical limitation. . . . Only claimants with catastrophic injuries or claimants who are incapable of engaging in employment, as described in this paragraph, are

> eligible for permanent total benefits. In no other case may permanent total disability be awarded.

Under the plain language of this provision, permanent total disability benefits are expressly limited to "claimants with catastrophic injuries or claimants who are incapable of engaging in employment." § 440.15(1)(b), Fla. Stat. (2009). "In no other case may permanent total disability be awarded." *Id.*

Section 440.15(2)(a), which governs temporary total disability benefits, provided in part as follows:

> Subject to subsection (7), in case of disability total in character but temporary in quality, 66 2/3 percent of the average weekly wages shall be paid to the employee during the continuance thereof, not to exceed 104 weeks except as provided in this subsection, s. 440.12(1), and s. 440.14(3).[4] Once the employee reaches the maximum number of weeks allowed, or the employee reaches the date of maximum medical improvement, whichever occurs earlier, temporary disability benefits [**20] shall cease and the injured worker's permanent impairment shall be determined.

Under the plain language of this provision, temporary total disability benefits are payable for no more than 104 weeks, after which the worker's permanent impairment rating must be determined. "The permanent impairment rating is used to pay 'impairment income benefits,'" as distinguished from permanent total disability benefits, "commencing on 'the day after the employee reaches [maximum medical improvement] or after the expiration of temporary benefits, whichever occurs earlier,' [*320] and continuing for a period determined by the employee's percentage of impairment." Hadley, 78 So. 3d at 624 (quoting § 440.15(3)(g), Fla. Stat.).

As the First District recognized in *Hadley*, "[t]he statutory scheme [**21] in section 440.15 works seamlessly when the injured employee reaches [maximum medical improvement] prior to the expiration of the 104 weeks of temporary disability benefits." *Id.* But where "the employee is not at [maximum medical improvement] at the expiration of the 104 weeks, there is the potential for a 'gap' in disability benefits because [temporary total disability] benefits cease by operation of law after 104 weeks and entitlement to [permanent total disability] benefits is generally not ripe until the employee reaches [maximum medical improvement]." *Id.*

Analyzing these statutory provisions, and in an apparent effort to avoid the statutory gap, the First District in *Westphal* ultimately concluded that the Legislature's use of the term "permanent impairment" in section 440.15(2)(a) signifies that the disabled worker has attained maximum medical improvement by operation of law. *See* Westphal, 122 So. 3d at 445. The First District therefore held that "a worker who is totally disabled as a result of a workplace accident and remains totally disabled by the end of his or her eligibility for temporary total disability benefits is deemed to be at maximum medical improvement by operation of law and is therefore eligible to assert a claim for permanent [**22] and total disability benefits." Id. at 442.

HN7 Although this Court's review of the First District's statutory interpretation is de novo, "statutes come clothed with a presumption of constitutionality and must be construed whenever possible to effect a constitutional outcome." Crist v. Fla. Ass'n of Crim. Def. Lawyers, Inc., 978 So. 2d 134, 139 (Fla. 2008). While we are confident that the First District en banc majority was attempting to save the statute's constitutionality by interpreting it so as to avoid a draconian result for severely injured workers, the clear language of the statute simply does not allow us to agree with the First District's interpretation.

Rather, the previous interpretation provided by the First District in *Oswald*, and adhered to in *Hadley*, is consistent with the Legislature's plainly stated intent, which nowhere indicates that the Legislature sought to equate the expiration of temporary total disability benefits with maximum medical improvement. As stated in *Oswald*, under the plain language of the statute, "an employee whose temporary benefits have run out—or are expected to do so imminently—must be able to show not only total disability upon the cessation of temporary benefits but also that total disability will be existing after the date of maximum [**23] medical improvement" in order to be eligible to receive permanent total disability benefits. 710 So. 2d at 98 (internal citation omitted).

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[4] Section 440.12(1), Florida Statutes (2009), provides: "No compensation shall be allowed for the first 7 days of the disability, except benefits provided for in s. 440.13. However, if the injury results in disability of more than 21 days, compensation shall be allowed from the commencement of the disability." Section 440.14(3), Florida Statutes (2009), provides in part: "The department shall establish by rule a form which shall contain a simplified checklist of those items which may be included as 'wage' for determining the average weekly wage."

Specifically, section 440.15(2)(a) requires an injured worker's "permanent impairment,"[5] as opposed to permanent total disability, to be determined. In addition, section 440.15(3), which pertains to "permanent impairment benefits," is the only section that discusses an "evaluation" for permanent impairment of the employee, with entitlement to such benefits to commence the day after the employee reaches [*321] maximum medical improvement or his or her temporary total disability benefits expire. Permanent impairment benefits are distinct from, and not a substitute for, total disability benefits. Thus, the plain language of the statute provides for permanent impairment to be determined for purposes of impairment benefits as opposed to permanent total disability benefits.

It is clear from the statute that the Legislature intended to limit the duration of temporary total disability [**24] benefits to a maximum of 104 weeks. It is further clear that the Legislature intended to limit the class of individuals who are entitled to permanent total disability benefits to those with catastrophic injuries and those who are able to demonstrate a permanent inability to engage in even sedentary employment within a fifty-mile radius of their home. In other words, these provisions "create a gap in disability benefits for those injured workers who are totally disabled upon the expiration of temporary disability benefits but fail to prove prospectively that total disability will exist after the date of [maximum medical improvement]." Hadley, 78 So. 3d at 626 (quoting Crum v. Richmond, 46 So. 3d 633, 637 n.3 (Fla. 1st DCA 2010)).

HN8 Although this Court must, whenever possible, construe statutes to effect a constitutional outcome, we may not salvage a plainly written statute by rewriting it. See Sult v. State, 906 So. 2d 1013, 1019 (Fla. 2005) ("Courts may not go so far in their narrowing constructions so as to effectively rewrite legislative enactments."). The gap in benefits caused by the Legislature's decision to reduce the duration of entitlement to temporary total disability benefits may be an unintentional, unanticipated, and unfortunate result. But even if potentially unwise and unfair, it is not the prerogative [**25] of the courts to rewrite a statute to overcome its shortcomings. See Clines v. State, 912 So. 2d 550, 558 (Fla. 2005) ("A court's function is to interpret statutes as they are written and give effect to each word in the statute." (quoting Fla. Dep't of Revenue v. Fla. Mun. Power Agency, 789 So. 2d 320, 324 (Fla. 2001))); Metro. Dade Cty. v. Bridges, 402 So. 2d 411, 414 (Fla. 1981), *receded from on other grounds by* Makemson v. Martin Cty., 491 So. 2d 1109 (Fla. 1986) (explaining that "courts may not vary the intent of the legislature with respect to the meaning of the statute in order to render the statute constitutional").

Because we hold that the statute is clear in creating a statutory gap in benefits, and thus not susceptible to the rules of statutory construction, we turn to Westphal's constitutional challenge—that the statute as plainly written results in a denial of access to courts.

B. Denial of Access to Courts

HN9 Article I, section 21, of the Florida Constitution, part of our state constitutional "Declaration of Rights" since 1968, guarantees every person access to the courts and ensures the administration of justice without denial or delay: "The courts shall be open to every person for redress of any injury, and *justice shall be administered without sale, denial or delay*." Art. I, § 21, Fla. Const. (emphasis added). This important state constitutional right has been construed liberally in order to "guarantee broad accessibility to the courts for resolving disputes." Psychiatric Assoc. v. Siegel, 610 So. 2d 419, 424 (Fla. 1992), *receded from on other [**26] grounds by* Agency for Health Care Admin. v. Associated Indus. of Fla., Inc., 678 So. 2d 1239 (Fla. 1996).

In *Kluger*, this Court explained the meaning of the access to courts provision and the necessary showing for demonstrating a constitutional violation based on access to courts:

> [*322] ***HN10*** [W]here a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla. Stat. § 2.01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity

[5] As defined in section 440.02(22), Florida Statutes (2009), "permanent impairment" means "any anatomic or functional abnormality or loss determined as a percentage of the body as a whole, existing after the date of maximum medical improvement, which results from the injury."

can be shown.

281 So. 2d at 4.

Prior to 1968, when the access to courts provision was adopted, the Legislature had already abolished the common-law tort remedy for injured workers and enacted a workers' compensation law "as administrative legislation to be simple, expeditious, and inexpensive so that the injured employee, his family, or society generally, would be relieved of the economic stress resulting [**27] from work-connected injuries, and place the burden on the industry which caused the injury." Lee Engineering & Constr. Co. v. Fellows, 209 So. 2d 454, 456 (Fla. 1968). The workers' compensation law "abolishes the right to sue one's employer and substitutes the right to receive benefits under the compensation scheme." Sasso v. Ram Prop. Mgmt., 452 So. 2d 932, 933 (Fla. 1984).

Nevertheless, ***HN11*** the fact that workers' compensation was created prior to 1968 as a non-judicial statutory scheme of no fault benefits intended to provide full medical care and wage-loss payments does not mean that changes to the workers' compensation law to reduce or eliminate benefits are immune from a constitutional attack based on access to courts. In fact, this Court in *Kluger* specifically discussed the alternative remedy of workers' compensation, explaining that "[w]orkmen's compensation abolished the right to sue one's employer in tort for a job-related injury, *but provided adequate, sufficient, and even preferable safeguards for an employee who is injured on the job*, thus satisfying one of the exceptions to the rule against abolition of the right to redress for an injury." Kluger, 281 So. 2d at 4 (emphasis added). In other words, as *Kluger* held, workers' compensation constitutes a "reasonable alternative" to tort litigation—and therefore does not [**28] violate the access to courts provision—so long as it provides adequate and sufficient safeguards for the injured employee. *Id.*

This Court has applied the *Kluger* analysis in subsequent cases that have raised constitutional challenges to the workers' compensation law based on access to courts. Citing to *Kluger*, this Court in *Martinez* explained that ***HN12*** in order to be upheld as constitutional, the workers' compensation law must continue to provide a "reasonable [*323] alternative to tort litigation." Martinez, 582 So. 2d at 1171-72; *see also* Mahoney v. Sears, Roebuck & Co., 440 So. 2d 1285, 1286 (Fla. 1983) ("Workers' compensation, therefore, still stands as a reasonable litigation alternative.").

In *Martinez*, this Court noted that it "previously has rejected claims that workers' compensation laws violate access to courts by failing to provide a reasonable alternative to common-law tort remedies." Martinez, 582 So. 2d at 1171 (citing Kluger, 281 So. 2d at 4). Although the 1990 amendment addressed by the Court in *Martinez* "undoubtedly reduce[d] benefits to eligible workers," by reducing the administration of temporary total disability benefits from 350 weeks to 260 weeks, this Court concluded at that time that "the workers' compensation law *remains a reasonable alternative* to tort litigation." Id. at 1171-72 (emphasis added). But this conclusion was premised on the [**29] holding that the workers' compensation scheme as a whole continued to provide "injured workers with full medical care and wage-loss payments for total or partial disability regardless of fault and without the delay and uncertainty of tort litigation." Id. at 1172. That is, under the *Kluger* analysis, the law at the time of *Martinez*, which provided for 260 weeks for temporary total disability, continued to provide adequate and sufficient safeguards for injured employees.

Therefore, ***HN13*** although this Court has rejected constitutional challenges to the workers' compensation law in the past, our precedent clearly establishes that, when confronted with a constitutional challenge based on access to courts, we must determine whether the law "remains a reasonable alternative to tort litigation." Acton v. Fort Lauderdale Hosp., 440 So. 2d 1282, 1284 (Fla. 1983). However, because the workers' compensation law had already been adopted in 1968, the question in this case is whether the workers' compensation law with regard to the 104-week limitation remains a "system of compensation without contest," Mullarkey, 268 So. 2d at 366, that provides "*full medical care and wage-loss payments for total or partial disability* regardless of fault," Martinez, 582 So. 2d at 1172 (emphasis added).

The 104-week limitation on temporary total disability [**30] benefits and the statutory gap must therefore be viewed through the analytical paradigm of *Kluger*, asking whether the workers' compensation law continues to provide adequate and sufficient safeguards for the injured worker and thus constitutes a constitutional, reasonable alternative to tort litigation. Kluger, 281 So. 2d at 4. The "reasonable alternative" test is then the linchpin and measuring stick, and this Court has undoubtedly upheld as constitutional many limitations on workers' compensation benefits as benefits have progressively been reduced over the years and the statutory scheme changed to the

detriment of the injured worker.

But, there must eventually come a "tipping point," where the diminution of benefits becomes so significant as to constitute a *denial* of benefits—thus creating a constitutional violation. We accordingly must review what has occurred to the workers' compensation system since the 1968 adoption of the access to courts provision, as it relates to providing "full medical care and wage-loss payments for total or partial disability regardless of fault," Martinez, 582 So. 2d at 1172, in order to determine whether we have now reached that constitutional "tipping point."

As applied to Westphal, the current workers' [**31] compensation statutory scheme does not just reduce the amount of benefits he would receive, which was the issue we addressed in *Martinez*, but in fact completely cuts off his ability to receive any disability benefits at all. It does so even though there is no dispute that Westphal remained a severely injured and disabled firefighter under active treatment by doctors the City selected for him. As stated in the First District's original panel opinion:

> Under this law, the City—not Westphal—had the right to select and, if appropriate, de-select, the doctors who would treat his work-related injuries. Through this statutory system of recovery, the City had the right to meet and confer with their selected doctors without Westphal's involvement, and obtain otherwise-confidential medical information—whether or not Westphal consented to such communications. And the City had the right to make decisions as [*324] to whether it would authorize the medical treatment recommended by the doctors of its choosing. For his part, Westphal, removed from his otherwise inherent right to select his medical providers and make unfettered decisions about his medical care, was required to follow the recommendations of [**32] the doctors authorized by his employer. Should he fail to do so, he risked losing entitlement to his workers' compensation benefits, his only legal remedy.
>
> As part of his medical care, Westphal required multiple surgical procedures, culminating in a five-level fusion of the lumbar spine. Under chapter 440, Westphal was then required to refrain from working *and go without disability pay or wages*—and *wait.* Westphal had to wait until the [City's] authorized doctors opined that he had reached maximum medical improvement, with no guarantee that such a day would ever come. But, even once he fully recovered, Westphal could not, under normal circumstances, recover disability benefits for the indeterminate waiting period.

Westphal v. City of St. Petersburg, No. 1D12-3563, 2013 Fla. App. LEXIS 3203, *9-10 (Fla. 1st DCA Feb. 28, 2013) (footnote omitted) (emphasis added), *opinion withdrawn and superseded on rehearing en banc by* Westphal, 122 So. 3d 440. In other words, even though doctors chosen by the City had performed multiple surgical procedures culminating in a five-level spinal fusion, because those same doctors did not render an opinion that Westphal had reached maximum medical improvement—that is, that he had reached the end of his medical [**33] recovery and would improve no further—Westphal was not yet eligible for permanent total disability benefits. And there was no way to know when those doctors would determine that he had reached maximum medical improvement, leaving Westphal without disability benefits for an indefinite amount of time while he was still totally disabled and incapable of working.

In comparing the rights of a worker such as Westphal injured on the job today with those of a worker injured in 1968, the extent of the changes in the workers' compensation system is dramatic. A worker injured in 1968 was entitled to receive temporary total disability benefits for up to 350 weeks. *See* § 440.15(2), Fla. Stat. (1967). In 1990, the Legislature reduced the availability of temporary total disability benefits from 350 to 260 weeks—a 25.7% reduction of two years. *See* ch. 90-201, § 20, Laws of Fla. Then, in 1993, the Legislature again reduced the availability of temporary total disability benefits, this time from 260 weeks to 104 weeks—a 60% reduction. *See* ch. 93-415, § 20, Laws of Fla. This means that an injured worker such as Westphal is now eligible to receive only 104 weeks of temporary total disability benefits—a massive 70% reduction when compared [**34] to the temporary total disability benefits available in 1968.

It is uncontroverted that decreasing substantially the period of payments from 350 weeks to 104 weeks, standing alone, results in a dramatic reduction from almost seven years of disability benefits down to two years. Whereas almost seven years or even five years post-accident should be a reasonable period for an injured worker to achieve maximum medical improvement, clearly two years is not for the most severely injured of workers, like Westphal, who might be in need of multiple surgical interventions.

Currently, at the conclusion of the 104-week limit, temporary total disability benefits cease, regardless of the condition of the injured worker. Therefore, rather than receive "full medical care and wage-loss payments" for a continuing disability, [*325] as the workers' compensation law was intended, an injured worker's full medical care and wage-loss payments are eliminated after 104 weeks if the worker falls into the statutory gap. This is true even if the worker remains incapable of working for an indefinite period of time, based on the advice of the employer-selected doctors.

Recognizing the constitutional implications of such [**35] a statutory scheme, Judge Van Nortwick, in his dissent in *Hadley*, cogently noted:

> [I]n the case of a totally disabled claimant whose rights to temporary disability benefits has expired, but who is prohibited from receiving permanent disability benefits, the elimination of disability benefits may reach a point where the claimant's cause of action has been effectively eliminated. In such a case, the courts might well find that the benefits under the Workers' Compensation Law are no longer a reasonable alternative to a tort remedy and that, as a result, workers have been denied access to courts.

78 So. 3d at 634 (Van Nortwick, J., dissenting). We have now reached that point at which "the claimant's cause of action has been effectively eliminated"—the constitutional "tipping point" of which Judge Van Nortwick forewarned.

We conclude that ***HN14*** the 104-week limitation on temporary total disability benefits, as applied to a worker like Westphal, who falls into the statutory gap at the conclusion of those benefits, does not provide a "reasonable alternative" to tort litigation. Under the current statute, workers such as Westphal are denied their constitutional right of access to the courts. We agree with the point our [**36] colleague, Justice Lewis, makes in his concurring in result opinion that:

> Under the plain language of the statute, many hardworking Floridians who become injured in the course of employment are denied the benefits necessary to pay their bills and survive on a day-to-day basis. The inequitable impact of this statute is patent because it provides permanent total disability benefits to the disabled worker who reaches maximum medical improvement quickly, but arbitrarily and indefinitely terminates benefits to other disabled workers—i.e., until the employee proves that he or she is permanently and totally disabled once maximum medical improvement is attained, *even where there is no dispute that the employee is totally disabled at the time the temporary benefits expire, and even if maximum medical improvement will occur in the future.*

Concurring in result op. of Lewis, J., at 39-40 (footnote omitted) (emphasis in original).

Sadly, Westphal's case is not an isolated one. As observed by Judge Thomas in the First District's panel opinion:

> When an employee sustains serious injuries that require prolonged or complicated medical treatment, *it is not unusual for that claimant to exhaust entitlement to 104 weeks of temporary [**37] disability benefits before reaching maximum medical improvement (the status of full medical recovery)—paradoxically leaving only seriously injured individuals without compensation for disability while under medical instructions to refrain from work that cannot be ignored lest a defense of medical non-compliance be raised.* Although this result is anathema to the stated purposes of chapter 440, providing injured workers with prompt medical and indemnity benefits, this court has held on numerous occasions that an award of permanent total disability benefits is premature until an injured worker reaches the stage of full medical recovery.

[*326] *Westphal, No. 1D12-3563, 2013 Fla. App. LEXIS 3203 at *24* (footnote omitted) (emphasis added).

Although Westphal has not argued at length that this Court should declare the entire workers' compensation law unconstitutional, the statutory gap cannot be viewed in isolation from the remainder of the statutory scheme. Over the years, there has been continuous diminution of benefits and other changes in the law. For example, during the same period of time in which the Legislature reduced the provision of disability benefits, the Legislature also gave employers and insurance carriers the virtually [**38] unfettered right to select treating physicians in workers' compensation cases. *See § 440.13(2)(f), Fla. Stat.* (2009); *see also Butler v. Bay Center/Chubb Ins. Co., 947 So. 2d 570, 572-73 (Fla. 1st DCA 2006)*. Further, the right of the employee and the employer to "opt out" of the workers' compensation law, and preserve their tort remedies, was repealed. *See §§ 440.015, 440.03, Fla. Stat.* (2009). Other changes have included a heightened standard that the compensable

injury be the "major contributing cause" of a worker's disability and need for treatment, and a requirement that the injured worker pay a medical copayment after reaching maximum medical improvement. *See* §§ 440.09(1), 440.13(13)(c), Fla. Stat. (2009).

The current law also allows for apportionment of all medical costs based on a preexisting condition. *See* § 440.15(5), Fla. Stat. (2009). As Judge Webster has observed, allowing for the apportionment of medical costs means that "injured workers will be less likely to seek medical treatment, making it more likely that they will be unable to return to the workplace." Staffmark v. Merrell, 43 So. 3d 792, 798 (Fla. 1st DCA 2010) (Webster, J., concurring). This change, Judge Webster commented, significantly reduces the benefits to which many injured workers are entitled, thereby leading to a reasonable conclusion that "the right to benefits has become largely illusory." *Id.*

Although this Court in Martinez, 582 So. 2d at 1171-72, upheld the 1990 version of the workers' [**39] compensation law on constitutional grounds, we wholeheartedly agree with Judge Thomas's conclusion that the current version of the law presents a materially different situation:

> We are now presented with a different iteration of the Workers' Compensation Law from that addressed in *Martinez*—one which today provides an injured worker with limited medical care, no disability benefits beyond the 104-week period, and no wage-loss payments, full or otherwise. And, the lack of disability compensation occurs only because the severely injured worker *has not* reached maximum medical improvement as to the very injury for which redress is guaranteed under the Florida constitution.
>
> The natural consequence of such a system of legal redress is potential economic ruination of the injured worker, with all the terrible consequences that this portends for the worker and his or her family. A system of redress for injury that requires the injured worker to legally forego any and all common law right of recovery for full damages for an injury, and surrender himself or herself to a system which, whether by design or permissive incremental alteration, subjects the worker to the known conditions of personal ruination [**40] to collect his or her remedy, is not merely unfair, but is fundamentally and manifestly unjust. We therefore conclude that the 104-week limitation on temporary total disability benefits violates Florida's constitutional guarantee that justice will be administered without denial or delay.

[*327] Westphal, No. 1D12-3563, 2013 Fla. App. LEXIS 3203 at *25-26 (footnote omitted).

Thus, under the access to courts analysis articulated in *Kluger*, the only way to avoid a holding of unconstitutionality under these circumstances would be to demonstrate an overwhelming public necessity to justify the Legislature's elimination of temporary total disability benefits after 104 weeks for our most injured workers. *See* Kluger, 281 So. 2d at 4. We conclude that this showing has not been made. The statute is unconstitutional as applied.

Accordingly, the question becomes one of remedy. ***HN15*** "Florida law has long held that, when the legislature approves unconstitutional statutory language and simultaneously repeals its predecessor, then the judicial act of striking the new statutory language automatically revives the predecessor unless it, too, would be unconstitutional." B.H. v. State, 645 So. 2d 987, 995 (Fla. 1994). We therefore conclude that the proper remedy is the revival of the pre-1994 statute that provided for a [**41] limitation of 260 weeks of temporary total disability benefits. *See* § 440.15(2)(a), Fla. Stat. (1991). The provision of 260 weeks of temporary total disability benefits amounts to two and a half times more benefits—five years of eligibility for benefits rather than only two—and thus avoids the constitutional infirmity created by the current statutory gap as applied to Westphal.

In this regard, we respectfully disagree with the assertion in Justice Lewis's concurring in result opinion that this remedy is insufficient because it still allows for the possibility of a statutory gap, and would therefore unconstitutionally deprive claimants of access to courts. Concurring in result op. of Lewis, J., at 35. In fact, as we have indicated throughout this opinion, we previously held that the pre-1994 statute's limitation of 260 weeks "passes constitutional muster" because it "remains a reasonable alternative to tort litigation," where a worker "is not without a remedy." Martinez, 582 So. 2d at 1171-72. Although the length of time available for the administration of temporary total disability benefits to a worker before the worker reaches maximum medical improvement does involve line drawing, the difference between a period of only two years (104 weeks) and five years [**42] (260 weeks) is significant as it relates to the time it takes a worker to attain maximum medical

improvement.

III. CONCLUSION

For all the reasons explained in this opinion, we hold section 440.15(2)(a), Florida Statutes (2009), unconstitutional as applied to Westphal and all others similarly situated, as a denial of access to courts under article I, section 21, of the Florida Constitution. The statute deprives a severely injured worker of disability benefits at a critical time, when the worker cannot return to work and is totally disabled, but the worker's doctors—chosen by the employer—determine that the worker has not reached maximum medical improvement.

Such a significant diminution in the availability of benefits for severely injured workers, particularly when considered in conjunction with the totality of changes to the workers' compensation law from 1968, when the access to courts provision was added to our Constitution, to the present, is unconstitutional under our precedent. Accordingly, we quash the First District's en banc decision in *Westphal* and remand this case to the First District for further proceedings consistent with this opinion.

It is so ordered.

LABARGA, C.J., and QUINCE, and PERRY, JJ., concur.

LEWIS, J., concurs in result with an opinion.

CANADY, J., dissents [**43] with an opinion, in which POLSTON, J., concurs.

Concur by: LEWIS

Concur

[*328] LEWIS, J., concurring in result.

I agree with the conclusion reached by the majority that section 440.15(2)(a) is unconstitutional as applied to Bradley Westphal. Valiant judicial attempts to salvage the statute notwithstanding, the statutory gap that resulted from the limitations in section 440.15(2)(a) is a plain denial of the right of access to courts guaranteed by the Constitution of this State to Floridians who, after 104 weeks, may still be totally disabled due to injuries received in the course of their employment.

However, at this point in time, I conclude that the remedy relied upon by the majority is insufficient. Statutory revival of the 1994 limitation, which provides for the administration of temporary total disability for 260 weeks, may provide relief for those individuals who remain totally disabled but have not been deemed permanently disabled at the end of 104 weeks. However, this remedy simply moves the goalposts without eliminating the unconstitutional statutory gap that will still persist for those who remain totally—but not permanently—disabled after 260 weeks. Therefore, I do not believe that this is a situation in which statutory revival is appropriate. [**44] *Cf.* B.H. v. State, 645 So. 2d 987, 995 (Fla. 1994) ("[T]he judicial act of striking the new statutory language automatically revives the predecessor *unless it, too, would be unconstitutional.*" (emphasis added)). In my opinion, the only appropriate remedy would be to require the Legislature to provide a comprehensive, *constitutional* Workers' Compensation scheme, rather than rely on the courts to rewrite existing law or revive prior law. I believe that the remedy provided today fails to fully address the problems with the Workers' Compensation scheme because it will still leave some injured Florida workers without access to benefits to which they are entitled. Thus, the majority decision leaves Florida workers in an only marginally better position than they were in prior to this matter by failing to address and remove the inadequate alternative remedy, thereby leaving the Workers' Compensation scheme unconstitutional and in need of major reform. As I see it, such a system is fundamentally unconstitutional and in need of legislative—not judicial—reform.

Over time, the Florida judiciary has repeatedly rewritten provisions of the Workers' Compensation law to avoid a declaration of unconstitutionality. No fair-minded individual who reads [**45] these decisions can reasonably conclude that they involve simple statutory interpretation. *See, e.g.*, Newton v. McCotter Motors, Inc., 475 So. 2d 230, 231-32 (Fla. 1985) (Ehrlich, J., dissenting) (disagreeing with the holding that section 440.16(1), which provides that for a death to be compensable under the Workers' Compensation law, it "must result within one year of the accident or must follow continuous disability and must result from the accident within five years of the accident," *see* id. at 230, and does not violate access to courts for deaths that occur more than five years after the accident; noting that "[b]enefits paid during the life of the worker . . . cannot, and never were intended by the legislature to, substitute as a reasonable alternative for a cause of action for wrongful death"); Rhaney v. Dobbs House, Inc., 415 So. 2d 1277, 1279 (Fla. 1st DCA 1982)

(upholding statutory provision that the American Medical Association Guides to the Evaluation of Permanent Impairment shall be used to determine permanent impairment until a permanent schedule is adopted; noting that "[a]lthough the provisions of § 440.15(3)(a)3. are not unconstitutional [*329] per se, they could be unconstitutional in their application if this section were interpreted to mean that there could be no permanent impairment unless a medical doctor testified from the AMA Guides as to a certain percentage [**46] of permanent impairment set forth therein. However, the section should not be interpreted in that fashion.").[6] I have a full appreciation for the judicial attempts to save the Workers' Compensation statute from total disaster. Florida needs a valid Workers' Compensation program, but the charade is over. Enough is enough, and Florida workers deserve better.

The judicial rewriting of a problematic statute is no more evident than in the present case where section 440.15 has been rewritten not once, but twice. *See* Westphal, 122 So. 3d at 444 (avoiding a constitutional challenge by holding that under section 440.15(2)(a), "an injured worker who is still totally disabled at the end of his or her eligibility for temporary disability benefits is deemed to be [**47] at maximum medical improvement as a matter of law, even if the worker may get well enough someday to return to work"); City of Pensacola Firefighters v. Oswald, 710 So. 2d 95, 98 (Fla. 1st DCA 1998) (bridging the unconstitutional gap by holding that to be eligible for permanent total disability benefits, "an employee whose temporary benefits have run out—or are expected to do so imminently—must be able to show not only total disability upon the cessation of temporary benefits but also that total disability will be 'existing after the date of maximum medical improvement'"); *see also* Matrix Emp. Leasing, Inc. v. Hadley, 78 So. 3d 621, 632 (Fla. 1st DCA 2011) (Van Nortwick, J., dissenting) ("[B]oth the approach adopted in *Oswald* (and reaffirmed by the majority opinion) and the approach expressed in the dissent are judicial 'patches' crafted to attempt to avoid a material 'gap' in disability benefits for injured workers who remain totally disabled on the expiration of temporary disability benefits. In my view, our concern with this potential 'gap' is not simply a humanitarian concern for particular claimants, but is based on our interest in avoiding a potential constitutional issue."). Although both rewrites of section 440.15 may have been good faith attempts to protect injured workers, neither cures the underlying invalidity of the statute.[7] One need only [**48] consider the multiple opinions in this case to understand the essential problem.

The truth of the matter is that section 440.15 is hopelessly broken and cannot be constitutionally salvaged. The judicial branch must terminate the practice of rewriting the statute. Under the plain language of the statute, many hardworking Floridians who become injured in the course of employment are denied the benefits necessary to pay their bills and survive on a day-to-day basis.[8] The inequitable [*330] impact of this statute is patent because it provides permanent total disability benefits to the disabled worker who reaches maximum medical improvement quickly, but arbitrarily and indefinitely terminates benefits to other disabled workers—i.e., until the employee proves that he or she is permanently and totally disabled once maximum medical improvement is attained, *even where there is no dispute that the employee is totally disabled at the time the temporary benefits expire, and even if maximum [**49] medical improvement will occur in the future*. Where totally disabled workers can be routinely denied benefits for an indefinite period of time, and have no alternative remedy to seek compensation for their injuries, something is drastically, fundamentally, and constitutionally wrong with the statutory scheme. *See* Kluger v. White, 281 So. 2d 1, 4 (Fla. 1973) ("[W]here a right of access to the courts for redress for a particular injury has been

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[6] This Court has also held that the invalidation of a comprehensive revision to the Workers' Compensation law for a single-subject violation should operate prospectively to avoid "the substantial impact on the entire workers' compensation system if we were to hold [the chapter law] void ab initio." Martinez v. Scanlan, 582 So. 2d 1167, 1176 (Fla. 1991). *But see* id. at 1177 (Barkett, J., concurring in part and dissenting in part) ("I do not believe it is the function of the judiciary to suspend constitutional principles to accommodate administrative convenience.").

[7] Further, it is not the role of the judiciary to rewrite a problematic statute. *See* Brown v. State, 358 So. 2d 16, 20 (Fla. 1978) ("When the subject statute in no way suggests a saving construction, we will not abandon judicial restraint and effectively rewrite the enactment.").

[8] Moreover, there is no way to determine how many of these injured and disabled workers actually exist. Many may choose to suffer in silence rather than fight a system that is so obviously and drastically skewed against them. Thus, the number of disabled workers who are entitled to permanent total disability benefits—but cannot receive them because they have not yet reached maximum medical improvement—may be larger [**50] than anyone knows.

provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to *Fla. Stat. § 2.01, F.S.A.*, the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries.").

The reality is that Workers' Compensation benefits have been steadily chipped away and reduced by the Legislature to such an extent that intelligent, able jurists have now concluded enough is enough and declared the entire statutory scheme unconstitutional. *See Cortes v. Velda Farms*, No. 11-13661-CA-25, 2014 WL 6685226 at *10 (11th Cir. Ct. Aug. 13, 2014) ("As a matter of law, Chapter 440, effective October 1, 2003[,] is facially unconstitutional as long as it contains *§ 440.11* as an exclusive replacement remedy."), *overruled for mootness and lack of standing by State v. Fla. Workers' Advocates, 167 So. 3d 500 (Fla. 3d DCA 2015)*. Although the majority opinion does not take this step, it too has recognized that Workers' Compensation benefits have been steadily eroded. Majority op. at 29. I submit that the time has come for this Court to uphold its sacred and constitutional duty and simply apply the words of the Legislature. In lieu of continuing to uphold the Workers' Compensation law with rewrites, judicial patches, and flawed analyses, Chapter 440 should be invalidated where defective and the Legislature required to provide a valid, comprehensive program.

Florida families presume that when they report to work every day and perform their duties with dedication and diligence, a valid Workers' Compensation program will be in place should [**51] they ever become injured on the job and be precluded from seeking access to our courts. Indeed, the Workers' Compensation law was, at least initially, created to deliver adequate, fair, and prompt disability benefits to injured workers and balance workers' rights with business interests. However, *section 440.15*—both under its plain meaning, and as interpreted by the majority today—denies that critical safety net to the most seriously injured by hinging the award of permanent total disability benefits upon the attainment of maximum medical improvement, which cannot occur until a future date, but eliminates benefits until that future date arrives. I cannot vote to uphold this statute, or the interpretation of this statute, that denies such fundamental rights to the hardworking citizens of this [*331] State. It is time that both business interests and workers receive a valid, balanced program that can operate as Florida moves into its economic future.

Accordingly, I concur in result.

Dissent by: CANADY

Dissent

CANADY, J., dissenting.

I agree with the majority that Westphal should prevail on his argument—with which the City and the State agree—that the district court erred in concluding that he should be "deemed to be at maximum [**52] medical improvement, regardless of any potential for improvement[,]" *Westphal v. City of St. Petersburg/City of St. Petersburg Risk Management, 122 So. 3d 440, 446 (Fla. 1st DCA 2013)*, upon the expiration of his eligibility for temporary total disability benefits. Majority op. at 3-4. As the majority explains, the district court's interpretation effectively rewrites the statute. I therefore would answer the certified question in the negative. But I would reject Westphal's argument that the statutory limitation on the period of eligibility for temporary total disability benefits violates the right of access to courts provided for in *article I, section 21 of the Florida Constitution.*

In the foundational case of *Kluger v. White, 281 So. 2d 1, 4 (Fla. 1973)* (Emphasis added), we set forth the test for determining whether an access-to-courts violation has occurred:

> [W]here a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the [1968] Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to *[section 2.01, Florida Statutes]*, the Legislature is without power to *abolish such a right* without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the [**53] abolishment of such right, and no alternative method of meeting such public necessity can be shown.

The threshold question in evaluating an access-to-courts claim therefore is whether the Legislature has abolished a right of redress that was in existence when the access to courts provision was incorporated into the 1968 Constitution.

Here, the challenged statutory provision restructures an existing right of redress. It does not abolish that right. The State argues persuasively that "today's workers' compensation system allowed Westphal substantially greater temporary total disability benefits than any 1968 statutory right provided" and that "[t]he amendment limiting temporary total disability benefits to 104 weeks, therefore, did not 'abolish' any pre-existing right." State's Answer Brief at 14. Westphal does not dispute the State's assertion that the aggregate compensation paid to him for temporary total disability benefits substantially exceeded the aggregate compensation for such benefits that would have been available under the pre-1968 law, even when the pre-1968 benefits are adjusted for inflation. Instead, he contends that "[t]his case is about weeks, not about dollars." Petitioner's Reply [**54] Brief at 9. But the decision to substantially increase weekly compensation for temporary total disability and to reduce the number of weeks that such benefits are paid is a trade-off that is a matter of policy within the province of the Legislature. The Legislature—rather than this Court—has the institutional competence and authority to make such policy judgments.

We have long recognized that the Legislature should be afforded latitude in the [*332] structuring of remedies both outside the worker's compensation context, *see, e.g.*, *White v. Clayton, 323 So. 2d 573 (Fla. 1975)*, and within the worker's compensation context, *see, e.g.*, *Acton v. Fort Lauderdale Hosp., 440 So. 2d 1282 (Fla. 1983)*. We should do likewise here and reject Westphal's access-to-courts challenge.[9]

POLSTON, J., concurs.

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[9] I am inclined to agree with Judges Benton and Thomas that competent, substantial evidence does not support the determination by the Judge of Compensation Claims that Westphal did not establish that he would meet the requirements for permanent total disability when he reached maximum medical improvement. *See Westphal, 122 So. 3d at 450* (Benton, J., concurring in result); *id. at 459-64* (Thomas, J., concurring in result only, and dissenting in part). But Westphal has not presented any argument to us on this point.

Jones v. Food Lion, Inc.

Court of Appeal of Florida, First District

November 9, 2016, Opinion Filed

CASE NO. 1D15-3488

Reporter
2016 Fla. App. LEXIS 16710 *; 202 So. 3d 964; 41 Fla. L. Weekly Fed. D 2490

VINCENT JONES, Appellant, v. FOOD LION, INC., AND RISK MANAGEMENT SERVICES, Appellees.

Subsequent History: As Corrected November 9, 2016.

Prior History: [*1] An appeal from an order of the Judge of Compensation Claims. Ralph J. Humphries, Judge. Date of Accident: October 10, 2011.

Core Terms

Claimant, benefits, temporary, total disability, disability benefits, partial disability, eligibility, maximum, permanent total disability

Case Summary

Overview

HOLDINGS: [1]-The JCC's conclusion that the claimant's total disability claim was premature was correct although not for the reason given by the JCC; based on the reasoning and directive of the Florida Supreme Court in Westphal II, under *§ 440.15(4)(c), Fla. Stat.* (1991), the claimant was in fact entitled to temporary partial disability benefits and remained eligible until the expiration of 260 weeks, but having not reached maximum medical improvement, he was not entitled to pursue a claim for permanent total disability benefits.

Outcome

Ruling affirmed.

LexisNexis® Headnotes

Workers' Compensation & SSDI > Benefit Determinations > Permanent Total Disabilities

Workers' Compensation & SSDI > Administrative Proceedings > Awards > Termination

HN1 In Westphal v. City of St. Petersburg (Westphal II), the Florida Supreme Court held *§ 440.15(2)(a), Florida Statutes* (2009), unconstitutional as applied to Westphal and all others similarly situated, as a denial of the right of access to courts guaranteed by *Art. I, § 21, Fla. Const.* The supreme court reasoned that by cutting off disability benefits after 104 weeks to a worker who is totally disabled and incapable of working but who has not yet reached maximum medical improvement deprives an injured worker of disability benefits under these circumstances for an indefinite amount of time — thereby creating a system of redress that no longer functions as a reasonable alternative to tort litigation.

Workers' Compensation & SSDI > Administrative Proceedings > Awards > Termination

HN2 For purposes of workers' compensation benefits, being medically released for some level of employment (e.g., light-duty) is not the equivalent of working.

Workers' Compensation & SSDI > Administrative Proceedings > Awards > Termination

Workers' Compensation & SSDI > Benefit Determinations > Temporary Partial Disabilities

Workers' Compensation & SSDI > Benefit Determinations > Temporary Total Disabilities

HN3 The Florida Supreme Court's use of the phrase "temporary disability benefits" in Westphal v. City of St. Petersburg (Westphal II), implies that the reasoning of Westphal II also encompasses any "gap" created by

application of the 104-week cap on temporary total and partial disability benefits.

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review

Civil Procedure > Appeals

HN4 If a trial court reaches the right result, but for the wrong reasons, it will be upheld if there is any basis to support the judgment in the record.

Counsel: Bill McCabe, Longwood, for Appellant.

Janelle G. Koren of Sponsler, Bishop, Koren & Hammer, P.A., Tampa, for Appellees.

Opinion

PER CURIAM.

In this workers' compensation appeal, Claimant argues the Judge of Compensation Claims (JCC) erred in finding that his claim for permanent total disability benefits was not ripe for adjudication because Claimant had not reached overall maximum medical improvement according to his authorized healthcare providers. Claimant argued below that his claim was nonetheless ripe given this Court's reasoning in *Westphal v. City of St. Petersburg (Westphal I), 122 So. 3d 440 (Fla. 1st DCA 2013)* (en banc). In *Westphal I*, this Court held:

> [A] worker who is totally disabled as a result of a workplace accident and remains totally disabled by the end of his or her eligibility for temporary total disability is deemed to be at maximum medical improvement by operation of law and is therefore eligible to assert a claim for permanent total disability benefits.

Id. at 442.

The parties agreed at the time of the June 8, 2015, hearing that Claimant had not reached maximum medical improvement per his healthcare providers, that he was at that time temporarily [*2] partially disabled, and that he otherwise would be eligible for temporary partial disability benefits but for the expiration of the 104-week eligibility limitation found in *paragraph 440.15(4)(e), Florida Statutes (2011)*. The JCC declined to extend this Court's reasoning in *Westphal I* to the facts of the case before him, concluding that the *Westphal I* opinion addressed only the circumstance wherein a claimant was temporarily totally disabled at the end of the 104 weeks of eligibility. This appeal followed.

On June 9, 2016, the Florida Supreme Court released ***HN1*** *Westphal v. City of St. Petersburg (Westphal II), 194 So. 3d 311, 327 (Fla. 2016)*, in which the court held *paragraph 440.15(2)(a), Florida Statutes (2009)*, unconstitutional as applied to Westphal and all others similarly situated, as a denial of the right of access to courts guaranteed by *article I, section 21, of the Florida Constitution.* The supreme court reasoned:

> cut[ting] off disability benefits after 104 weeks to a worker who is totally disabled and incapable of working but who had not yet reached maximum medical improvement . . . deprives an injured worker of disability benefits under these circumstances for an indefinite amount of time — thereby creating a system of redress that no longer functions as a reasonable alternative to tort litigation.

Id. at 313. The supreme court [*3] concluded there was no demonstration of "an overwhelming public necessity to justify the Legislature's elimination of temporary total disability benefits after 104 weeks." *Id. at 327*.

Claimant argues here that the supreme court's reasoning in *Westphal II* applies equally to those claimants, like him, who are temporarily partially disabled when the 104-week eligibility period expires under *paragraph 440.15(4)(e)*. Based on the reasoning and directive of the supreme court in *Westphal II*, we necessarily agree. ***HN2*** Being medically released for some level of employment (e.g., light-duty) is not the equivalent of working. *See Wyeth/Pharma Field Sales v. Toscano, 40 So. 3d 795, 800 (Fla. 1st DCA 2010)* ("Simply being able to work and search for work, however, is not the economic equivalent of an earning capacity."). Whether totally disabled or partially disabled at the end of 104 weeks, a claimant whose temporary indemnity is cut off by *paragraph 440.15(2)(a)* or *(4)(e)* would be deprived of disability benefits for an indefinite amount of time.

In *Westphal II*, the supreme court held:

> It is further clear that the Legislature intended to limit the class of individuals who are entitled to permanent total disability to those with catastrophic injuries and those who are able to demonstrate [*4] a permanent inability to engage in even sedentary employment within a fifty-mile radius of their home.

> In other words, these provisions "create a gap in disability benefits for those injured workers who are totally disabled upon the expiration of ***temporary disability benefits*** but fail to prove prospectively that total disability will exist after the date of [maximum medical improvement]." [*Matrix Employee Leasing, Inc. v.] Hadley*, 78 So. 3d [621,] 626 [(Fla. 1st DCA 2011)] (quoting *Crum v. Richmond, 46 So. 3d 633, 637 n.3 (Fla. 1st DCA 2010)*). (emphasis added).

Id. at 321 (emphasis added). We conclude that ***HN3*** the supreme court's use of the phrase "temporary disability benefits" implies that the reasoning of *Westphal II* also encompasses any "gap" created by application of the 104-week cap on temporary total and partial disability benefits. Similar to Westphal, a claimant who was receiving temporary partial disability benefits and who reached the 104-week cap would suffer a reduction in benefits, but under the 2009 statutory scheme, would then be cut off from his or her "ability to receive any disability benefits at all." *Id. at 323*.

Accordingly, as the supreme court concluded in *Westphal II*, the appropriate "remedy is the revival of the pre-1994 statute that provided for a limitation of 260 weeks of temporary total [*5] disability benefits." *Westphal II, 194 So. 3d at 327*. Applying that reasoning here leads to the conclusion that, as of the time of the hearing below, Claimant in fact was entitled to temporary partial disability benefits and remained eligible until the expiration of 260 weeks. *See § 440.15(4)(c), Fla. Stat.* (1991).* Having not reached maximum medical improvement, he was not entitled to pursue a claim for permanent total disability benefits. *See Hernandez v. Geo Grp., Inc., 46 So. 3d 1123, 1125 (Fla. 1st DCA 2010)* (affirming JCC's denial of permanent total disability benefits as premature for time period prior to date of maximum medical improvement).

Accordingly, we affirm the JCC's conclusion in result only. *See James W. Windham Builders, Inc. v. Overloop, 951 So. 2d 40, 43 (Fla. 1st DCA 2007)* (***HN4*** "If a trial court reaches the right result, but for the wrong reasons, it will be upheld if there is any basis to support the judgment in the record. *Dade County Sch. Bd. v. Radio Station WQBA, 731 So. 2d 638, 644 (Fla. 1999)*."). Here, the JCC's conclusion that Claimant's permanent total disability claim was premature is correct, not for the reason given by the JCC, but based on the reasoning and application of *Westphal II*, as just explained. *See Fla. Patient's Comp. Fund v. Von Stetina, 474 So. 2d 783, 788 (Fla. 1985)* ("An appellate court is generally required to apply the law in affect at [*6] the time of its decision."). Consequently, the JCC's ruling is AFFIRMED.

MAKAR, JAY, and M.K. THOMAS, JJ., CONCUR.

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* In reaching this conclusion, however, we make no judgment as to whether the remainder of *subsection 440.15(4), Florida Statutes (1991)*, has been revived.

Miles v. City of Edgewater Police Dep't/Preferred Governmental Claims Solutions

Court of Appeal of Florida, First District

April 20, 2016, Opinion Filed

CASE NO. 1D15-0165

Reporter
190 So. 3d 171 *; 2016 Fla. App. LEXIS 5990 **; 41 Fla. L. Weekly D 985; 2016 WL 1578434

MARTHA MILES, Appellant, v. CITY OF EDGEWATER POLICE DEPARTMENT/PREFERRED GOVERNMENTAL CLAIMS SOLUTIONS and STATE OF FLORIDA, Appellees.

Subsequent History: Rehearing denied by *Miles v. City of Edgewater Police Dep't, 2016 Fla. App. LEXIS 8441 (Fla. Dist. Ct. App. 1st Dist., May 13, 2016)*

Prior History: [**1] An appeal from an order of the Judge of Compensation Claims. Mark A. Massey, Judge. Dates of Accident: August 3, 2011, and November 29, 2011.

Core Terms

Claimant, benefits, statutes, rights, workers' compensation, attorney's fees, regulation, restrictions, attorneys, exposure, retainer agreement, approve, police power, costs, public harm, depletion, petitions, waive, right to contract, injured worker, prevailed, redress, amount of benefits, freedom of speech, provisions, sections, exposed, hire, governmental interest, legal representation

Case Summary

Overview

HOLDINGS: [1]-To the extent *§§ 440.105* and *440.34, Fla. Stat.* prohibited a workers' compensation claimant or his union from paying attorney's fees out of their own funds for purposes of litigating a workers' compensation claim, these statutes violated a claimant's *First Amendment* rights to free speech, free association, and petition, and no attorney accepting fees in this situation could be prosecuted under *§ 440.105(3)(c)*; [2]-These provisions also represented unconstitutional violations of a claimant's right to form contracts and were not permissible police power restrictions on those rights; [3]-The proper remedy was to allow an injured worker and an attorney to enter into a fee agreement approved by the Judge of Compensation Claims, notwithstanding the statutory restrictions.

Outcome

Reversed and remanded for further proceedings.

LexisNexis® Headnotes

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Assembly

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Free Press

HN1 See *U.S. Const. amend. I*.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech

Constitutional Law > Bill of Rights > State Application

HN2 Freedom of speech is among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a state.

Constitutional Law > ... > Fundamental

Freedoms > Freedom of Speech > Scope

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation

HN3 An as-applied challenge is an argument that a law which is constitutional on its face is nonetheless unconstitutional as applied to a particular case or party, because of its discriminatory effects; in contrast, a facial challenge asserts that a statute always operates unconstitutionally. In a *First Amendment* challenge, content-based speech restrictions will not survive strict scrutiny unless the government can show that the regulation promotes a compelling government interest and that it chooses the least restrictive means to further the articulated interest.

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review

Workers' Compensation & SSDI > Administrative Proceedings > Claims > Jurisdiction

HN4 In Florida workers' compensation proceedings, constitutional challenges of any sort need not be preserved for appellate review, because Judges of Compensation Claims lack jurisdiction to determine constitutionality. Workers' compensation judges do not have the power to determine the constitutionality of a portion of the Workers' Compensation Act, and such issues may be raised for the first time on appeal, without having been preserved below.

Governments > Legislation

HN5 The applicable legal test by which to review the legislation itself depends upon the particular claim.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN6 Because *First Amendment* rights are fundamental, the court applies strict scrutiny to a statute regarding its effect on *First Amendment* rights. To survive strict scrutiny, a law (a) must be necessary to promote a compelling governmental interest and (b) must be narrowly tailored to advance that interest, and (c) accomplishes its goal through the use of the least intrusive means. The applicable standard of "review," even where there is no constitutional ruling to review, is de novo.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Association

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech

Civil Procedure > Attorneys

HN7 Included in the *First Amendment's* fundamental guarantee of freedom of speech, association, and to petition for redress of grievances, is the right to hire and consult an attorney. The rights to assemble peaceably and to petition for a redress for grievances are among the most precious of the liberties safeguarded by the Bill of Rights. These rights, moreover, are intimately connected both in origin and in purpose, with the other *First Amendment* rights of free speech and free press, that, although not identical, are inseparable.

Constitutional Law > ... > Fundamental Freedoms > Judicial & Legislative Restraints > Time, Place & Manner Restrictions

HN8 Time, place and manner laws must (a) be content-neutral, (b) be narrowly tailored to serve a significant (rather than "compelling") governmental interest, and (c) leave open alternative channels of communication.

Constitutional Law > ... > Fundamental Freedoms > Judicial & Legislative Restraints > Time, Place & Manner Restrictions

HN9 The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech

Workers' Compensation & SSDI > Administrative Proceedings > Costs & Attorney Fees

Legal Ethics > Client Relations > Attorney Fees > Fee Agreements

HN10 To the extent *§§ 440.105(3)(c)* and *440.34, Fla. Stat.* prohibit a workers' compensation claimant (or a claimant's union) from paying attorney's fees out of their own funds for purposes of litigating a workers' compensation claim, these statutes are unconstitutional, because they impermissibly infringe on a claimant's

rights to free speech and to seek redress of grievances. Additionally, any fee agreement must nonetheless, like all fees for Florida attorneys, comport with the factors set forth in Lee Engineering & Construction Co. v. Fellows, and codified in *R. Regulating Fla. Bar 4-1.5(b)*. Consequently, no attorney accepting fees in this situation may be prosecuted under *§ 440.105(3)(c)*.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Business & Corporate Compliance > ... > Formation of Contracts > Contracts Law > Formation of Contracts

HN11 The right to make contracts of any kind, so long as no fraud or deception is practiced and the contracts are legal in all respects, is an element of civil liberty possessed by all persons who are sui juris. It is both a liberty and property right and is within the protection of the guaranties against the taking of liberty or property without due process of law. The right to contract is one of the most sacrosanct rights guaranteed by our fundamental law.

Governments > Police Powers

Business & Corporate Compliance > ... > Formation of Contracts > Contracts Law > Formation of Contracts

Constitutional Law > Bill of Rights > Fundamental Rights

HN12 Like the *First Amendment* rights to freedom of speech, assembly, and petition, the right to contract for legal services is a fundamental right, implicating strict scrutiny. Although strict scrutiny applies, because the right to contract is a property right, the relevant exception to strict scrutiny review is whether the restrictions on the right to contract represent a reasonable restraint under the State's police power, the right being the general rule and its restraint the exception to be exercised when necessary to secure the comfort, health, welfare, safety and prosperity of the people.

Governments > Police Powers

HN13 There is no settled formula for determining when the valid exercise of police power stops and an impermissible encroachment on private property rights begins. The Florida Supreme Court, however, listed some factors: (1) whether the regulation confers a public benefit or prevents a public harm; (2) whether the regulation promotes the health, safety, welfare, or morals of the public; and (3) whether the regulation is arbitrarily and capriciously applied.

Governments > Police Powers

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

HN14 If a regulation creates a public benefit it is more likely an exercise of eminent domain, whereas if a public harm is prevented it is more likely an exercise of the police power.

Constitutional Law > Bill of Rights

HN15 Florida case law has long recognized that an individual can waive his or her personal constitutional rights.

Workers' Compensation & SSDI > Administrative Proceedings > Costs & Attorney Fees

Legal Ethics > Client Relations > Attorney Fees > Excessive Fees

HN16 Logically, if a person can waive constitutional rights, a person can also waive statutory rights such as those in *§ 440.34, Fla. Stat.* For example, the Florida Supreme Court has approved a Florida Bar rule that allowed medical malpractice plaintiffs to waive the constitutional caps on attorney's fees, subject to certain conditions. Notably, those conditions did not require judicial review of such waivers; whereas in the workers' compensation context, the Judge of Compensation Claims (JCC) must approve as reasonable the fee a claimant agrees to pay her attorney. Likewise, there is no reason why a workers' compensation claimant should not be able to waive a limitation on claimant attorney's fees and agree to pay her attorney with her own (or someone else's) funds, subject to a JCC's finding that the fee is reasonable.

Workers' Compensation & SSDI > Administrative Proceedings > Costs & Attorney Fees

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Association

Governments > Police Powers

HN17 The restrictions in *§§ 440.105* and *440.34, Fla. Stat.* when applied to a claimant's ability to retain counsel under a contract that calls for the payment of a reasonable fee by a claimant (or someone on his or her behalf), are unconstitutional violations of a claimant's

rights to free speech, free association, and petition — and are not permissible time, place, or manner restrictions on those rights. Likewise, those provisions also represent unconstitutional violations of a claimant's right to form contracts — and are not permissible police power restrictions on those rights. Thus, the criminal penalties of *§ 440.105(3)(c), Fla. Stat*, are unenforceable against an attorney representing a workers' compensation client seeking to obtain benefits under ch. 440, Fla. Stat., as limited by other provisions. The statutory restrictions are unconstitutional, and the proper remedy is to allow an injured worker and an attorney to enter into a fee agreement approved by the Judge of Compensation Claims, notwithstanding the statutory restrictions.

Counsel: Michael J. Winer of the Law Offices of Michael J. Winer, P.A., Tampa, and Geoffrey Bichler of Bichler, Kelley, Oliver & Longo, PLLC, Maitland, for Appellant.

Kimberly A. Hill of Kimberly A. Hill, P.L., Fort Lauderdale, for Amici Curiae Fraternal Order of Police, Police Benevolent Association, International Union of Police Associations, and Florida Association of State Troopers, in support of Appellant.

George A. Helm, III, Lake Mary, and William H. Rogner, Winter Park, for Appellees City of Edgewater Police Department/Preferred Governmental Claims Solutions.

Pamela Jo Bondi, Attorney General, Rachel Nordby, Deputy Solicitor General, Office of the Attorney General, Tallahassee, for Intervenor State of Florida.

Judges: THOMAS, J. ROBERTS, C.J., and WOLF, J., CONCUR.

Opinion by: THOMAS

Opinion

[*174] THOMAS, J.

In this workers' compensation appeal, Claimant, a law enforcement officer, appeals two orders of the Judge of Compensation Claims (JCC): the first order denied Claimant's motion to approve two attorney's fee retainer agreements — one agreement provided for payment of a $1,500 retainer [**2] by Claimant's union, the Fraternal Order of Police Lodge 40 (FOP), and a second agreement provided that Claimant would pay her attorney an hourly fee once the $1,500 is exhausted — and the other order on appeal determined that Claimant failed to establish she sustained a compensable injury. Claimant challenges the constitutionality of *sections 440.105* and *440.34, Florida Statutes*, which limit attorney's fees as applied to her. She argues these provisions infringe on her *First Amendment* rights protected under the United States Constitution.

We hold that the challenged provisions violate Claimant's *First Amendment* guarantees of free speech, freedom of association, and right to petition for redress. For the reasons that follow, we reverse the appealed orders, and remand for a new hearing on the motion for approval of the retainer agreements and on Claimant's petitions for benefits.

Factual and Procedural Background

Through counsel, Claimant filed two petitions for benefits. The first petition alleged she was exposed over time to chemicals related to methamphetamine production, which resulted in her becoming disabled on August 3, 2011. The second petition alleged she was exposed to an intense smell that prevented her from conducting any further investigation [**3] regarding a shoplifting case. The Employer/Carrier (E/C) filed Notices of Denial regarding both petitions, disputing occupational causation of Claimant's condition. Claimant voluntarily dismissed those petitions, and her attorney withdrew as counsel of record.

Thereafter, two retainer agreements were signed in this matter — one between Bichler, Kelley, Oliver & Longo, PLLC (the Firm) and the Fraternal Order of [*175] Police (FOP), and one between the Firm and Claimant. The agreement with the FOP provided that the FOP would pay the Firm a flat fee of $1,500 to represent Claimant. In the retainer agreement signed by Claimant, she stated she understood the $1,500 fee paid by the FOP would not be "sufficient compensation" if the Firm expended more than 15 hours representing her; accordingly, Claimant agreed to pay her attorney an hourly fee for all attorney time expended beyond 15 hours. Claimant acknowledged in the agreement that the Workers' Compensation Law prohibits such a fee arrangement, and specifically waived those statutory prohibitions. Claimant further acknowledged that the Firm advised her of the extremely difficult legal burden she must carry in order to prevail, and stated she was [**4] entering into this agreement with the understanding she may not prevail.

In July 2013, Claimant's attorney filed two more petitions, each alleging a chemical exposure during an

investigation, and in each instance seeking compensability of the exposure along with an award of attorney's fees and costs. The E/C filed a response, again asserting that these claims were the same that had previously been denied, and again disputing occupational causation of Claimant's condition.

In January 2014, Claimant's attorney filed a "Motion to Approve Attorney's Fee," seeking approval of both retainer agreements. Claimant's attorney alleged that because of the extensive litigation necessary to pursue an exposure claim, "it would not be economically feasible for the undersigned to continue on a purely contingent basis with fee restrictions as contained in Florida Statute § 440.34." The attorney certified that if the JCC denied the retainer fee, the Firm may have no choice but to withdraw.

An evidentiary hearing on the motion took place in July 2014. At the hearing, Claimant's attorney referenced the time-intensive nature of pursuing an exposure claim under the Workers' Compensation Law, asserting, "It is economically not feasible [**5] for our firm to continue to represent [Claimant] without being paid for it." Based on the fee restrictions contained in chapter 440 and the contingent nature of the fee, Claimant's attorney argued that "it is unreasonable to ask an attorney to basically work for free." The E/C represented that it was taking no position on the issue, because the fee request did not involve an E/C-paid fee.

After hearing argument, the JCC announced he was denying both retainer agreements as being contrary to the Workers' Compensation Law as it currently exists. In his written order, the JCC noted that the argument advanced was

> not limited to the assertion that a guideline fee would be inadequate to compensate her attorney in the event she prevailed on the claim, which is the issue in Castellanos [v. Next Door Co., 124 So. 3d 392 (Fla. 1st DCA 2013)] and was also the issue in the Emma Murray [v. Mariner Health, 994 So. 2d 1051 (Fla. 2008)] decision. Rather, claimant argues that the *contingent nature of the fee*, in and of itself, is what leads to the alleged economic infeasibility. This is a new and different argument altogether. To argue that a guideline fee would be inadequate to compensate an attorney in the event the attorney prevailed on the claim is one thing; to argue that the attorney should [**6] be paid up front for time spent, without having secured any benefits . . . is an entirely different proposition, and I can find no persuasive authority or reason to support it. . . .
>
> It is not the province of a JCC to decide whether the law is fair or reasonable. [*176] Rather, it is the job of the JCC to apply the law as it exists. I find that the law as it currently exists does not allow for non-contingent, claimant-paid hourly fees for prosecution of a claim on the merits.

Thereafter, Claimant's attorney filed a motion to withdraw and to impress a lien based on hours expended. Claimant's attorney explained that the agreement extended to prosecution of claims on behalf of Claimant only if the contractual agreement was approved by the JCC. Further, "[t]he clear understanding between the Claimant and the undersigned counsel was that, should the contract for representation not be approved, then the undersigned counsel would have no choice but to withdraw as counsel of record." Claimant's attorney explained that a conflict of interest now arose, because Claimant wished to pursue the claims, but her counsel's continued representation of Claimant would create a financial hardship for her counsel, "as [**7] well as an undue burden on her ability to practice law and to zealously represent her other clients if she were to be forced to remain as counsel of record on these claims." Finally, Claimant's attorney advised that Claimant had been served with this motion to withdraw "and has indicated she does not object to same." The JCC granted the motion to withdraw and impress lien, finding that "claimant and claimant's counsel are in a position of conflict."

The merits hearing went forward, with Claimant appearing *pro se*. Claimant renewed her request that the JCC approve the retainer agreements which would allow her, and the FOP on her behalf, to retain the Firm to represent her. The JCC again advised that the Workers' Compensation Law does not permit payment of non-contingent hourly attorney's fees. Claimant's prior attorney, who was present as an observer, asked that the JCC take judicial notice of affidavits Claimant had obtained from attorneys in which they asserted they did not have time to take this case on a contingency basis. The E/C objected on grounds the affidavits were not the sort of documents that would qualify for judicial notice and were not relevant to the merits of Claimant's [**8] exposure claims. The JCC excluded the affidavits, agreeing they related to the attorney's fee question that was the subject of an earlier hearing and should have been submitted at that time.

Next, Claimant argued for entitlement to medical benefits, including ongoing care, for her two dates of accident. The E/C responded that it was Claimant's burden, as she was a law enforcement officer, to prove by a preponderance of the evidence that she was exposed to a specific level of a specific substance and that the exposure actually caused her injury. *See § 112.1815(2)(a)1., Fla. Stat.* (2011) (providing that first responders must prove exposure to toxic substance by preponderance of evidence). The E/C maintained there was no evidence of a specific exposure and no medical evidence linking any exposure to Claimant's condition.

Claimant was sworn in and testified regarding what occurred on the two dates of accident. She testified that she became ill after each incident and lost time from work, but was eventually released to return to work. She testified that she received some medical treatment after the second exposure. On cross-examination, she testified she had been diagnosed with Chronic Obstructive Pulmonary Disease prior [**9] to the first date of accident and had seen her personal physician on three separate visits regarding this condition. Claimant agreed it was possible that at the time of the events she was a cigarette smoker, as she had stopped and started smoking [*177] many times. The E/C did not offer any exhibits or testimony from any witness.

In closing argument, Claimant asserted that losing a significant amount of work and requiring medical treatment for a short time after each event "would lead anyone to believe that there was something that occurred that was out of the ordinary from the individual normal health responses." The E/C noted that this case would have been difficult to prove, even with counsel. Because Claimant offered no evidence necessary to meet her burden of proof, the E/C asked that the JCC enter an order denying and dismissing her petitions for benefits with prejudice.

In his order, the JCC denied and dismissed both petitions, concluding:

> In this case, claimant offered no evidence as to what the specific substance or substances were to which she was exposed. Further, she offered no evidence as to the levels to which she was exposed. Finally, she offered no evidence that the exposure [**10] she suffered can cause the injury or disease she complains of. Without such evidence, claimant cannot carry and has not carried her required burden of proof.

Claimant filed a motion for rehearing or motion to vacate the final compensation order, arguing, in relevant part, that the JCC erred in not allowing her to submit the affidavits she had secured from attorneys who declined to represent her. Claimant argued that this was new information and evidence which "related to the futility of trying to hire alternative counsel given the nature of her case. The evidence relates directly to constitutional concerns of Equal Protection, Due Process of Law, and *First Amendment* freedoms which are fundamental rights under both the State and Federal Constitutions." Claimant argued that she had the right "to build a record related to constitutional issues." The JCC denied the motion both on grounds it was untimely and on its merits. Notwithstanding that denial, the JCC allowed Claimant to supplement the record and accepted the affidavits as proffered exhibits, noting that even if he accepted them as evidence, his ruling would not change.

Legal Background

Paragraph 440.105(3)(c), Florida Statutes (2011), provides that [**11] an attorney receiving a fee for services rendered in connection with proceedings under chapter 440 commits a first-degree misdemeanor, unless the fee is approved by a JCC. *Subsection 440.34(1), Florida Statutes* (2011), provides the JCC with the following limits on his or her ability to approve an attorney's fee:

> A fee, gratuity, or other consideration may not be paid for a claimant in connection with any proceedings arising under this chapter, unless approved by the [JCC] or court having jurisdiction over such proceedings. Any attorney's fee approved by a [JCC] for benefits secured on behalf of a claimant must equal to 20 percent of the first $5,000 of the amount of the benefits secured, 15 percent of the next $5,000 of the amount of the benefits secured, 10 percent of the remaining amount of the benefits secured to be provided during the first 10 years after the date the claim is filed, and 5 percent of the benefits secured after 10 years. The [JCC] shall not approve a compensation order, a joint stipulation for lump-sum settlement, a stipulation or agreement between a [*178] claimant and his or her attorney, or any other agreement related to benefits under this chapter which provides for [**12] an attorney's fee in excess of the amount permitted by this section. The [JCC] is not required to approve any retainer agreement between the claimant and his or her attorney. The retainer agreement as to fees and costs may not be

> for compensation in excess of the amount allowed under this subsection or subsection (7).

Subsection 440.34(2) instructs the JCC to "consider only those benefits secured by the attorney" when awarding a fee. Thus, the relevant statutes impose a criminal penalty on any attorney who accepts a fee for providing legal representation to a workers' compensation claimant who may not successfully obtain benefits under chapter 440.

The First Amendment of the United States Constitution provides, in relevant part, that **HN1** "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." **HN2** Freedom of speech is "among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a state." Thornhill v. Ala., 310 U.S. 88, 95, 60 S. Ct. 736, 84 L. Ed. 1093 (1940).

Standard of Review

HN3 An as-applied challenge, as raised here, is an argument that a law which is constitutional on its face is nonetheless unconstitutional as applied to a particular [**13] case or party, because of its discriminatory effects; in contrast, a facial challenge asserts that a statute always operates unconstitutionally. In a First Amendment challenge, "content-based speech restrictions will not survive strict scrutiny unless the government can show that the regulation promotes a compelling government interest and that it chooses the least restrictive means to further the articulated interest." Cashatt v. State, 873 So. 2d 430, 434 (Fla. 1st DCA 2004) (citing Sable Commc'ns of Calif., Inc. v. Fed. Commc'ns Comm'n, 492 U.S. 115, 109 S. Ct. 2829, 106 L. Ed. 2d 93 (1989)). **HN4** In Florida workers' compensation proceedings, constitutional challenges of any sort need not be preserved for appellate review, because JCCs lack jurisdiction to determine constitutionality. *See* B & B Steel Erectors v. Burnsed, 591 So. 2d 644, 647 (Fla. 1st DCA 1991) ("[W]e note that workers' compensation judges do not have the power to determine the constitutionality of a portion of the Workers' Compensation Act, and that such issues may be raised for the first time on appeal, without having been preserved below.").

Furthermore, **HN5** the applicable legal test by which to review the legislation itself depends upon the particular claim. **HN6** Because First Amendment rights are fundamental, "we apply strict scrutiny to section 440.34, regarding its effect on these First Amendment rights when taken in conjunction with section 440.105(3)(c)." Jacobson v. Se. Pers. Leasing, Inc., 113 So. 3d 1042, 1048 (Fla. 1st DCA 2013). "To survive strict scrutiny, a law '[a] must be necessary to promote a compelling [**14] governmental interest and [b] must be narrowly tailored to advance that interest,' and '[c] accomplishes its goal through the use of the least intrusive means.'" *Id.* (quoting State v. J.P., 907 So. 2d 1101, 1110 (Fla. 2004)). The applicable standard of "review," even though there is no constitutional ruling to review, is *de novo*. *See* Medina v. Gulf Coast Linen Servs., 825 So. 2d 1018, 1020 (Fla. 1st DCA 2002).

Analysis

Freedom of Speech

HN7 Included in the First Amendment's fundamental guarantee of freedom of speech, association, and to petition for redress of grievances, is the right to hire and consult an attorney. In United Mine [*179] Workers of America, District 12 v. Illinois State Bar Association, 389 U.S. 217, 88 S. Ct. 353, 19 L. Ed. 2d 426 (1967), the Court held that "the freedom of speech, assembly, and petition guaranteed by the First and Fourteenth Amendments" gave the union "the right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights." *Id.* at 221-22. The Court based this conclusion on "the premise that the rights to assemble peaceably and to petition for a redress for grievances are among the most precious of the liberties safeguarded by the Bill of Rights. These rights, moreover, are intimately connected both in origin and in purpose, with the other First Amendment rights of free speech and free press," that, although not identical, are inseparable. *Id.* at 222. Here, Claimant argues that the fee statutes violate her right to free speech, because the evidence established that no [**15] attorney would take her case if counsel's compensation was limited to a "guideline" fee, regardless of whether that fee was paid by the E/C or by Claimant.

In *Jacobson*, this court addressed a similar challenge to the fee statutes challenged here, and explained that it viewed the "speech at issue here [was] Claimant's own words — given voice through his attorney — spoken or written before the court in his defense during litigation." 113 So. 3d at 1049. The claimant in *Jacobson* was faced with a claim for litigation costs by the E/C and wished to hire an attorney. The court held that the fee

statutes — insofar as they limited claimant-paid fees due under contract (as opposed to fees paid by an E/C to a claimant's attorney) — violated the claimant's *First Amendment* rights, because they completely denied his right to hire an attorney given that no benefits could ever be secured as a result of the cost hearing, even upon a successful defense against the E/C's motion to tax costs. *Id. at 1048-49*. Because *section 440.105(3)(c), Florida Statutes*, makes it a crime for an attorney to accept a fee that is not approved by a JCC, and *section 440.34, Florida Statutes*, prohibits a JCC from approving a fee that is not tied to the amount of benefits secured, the two statutes operated as an unconstitutional [**16] infringement on the claimant's right to hire an attorney.

Addressing the governmental interests advanced as the basis for these statutes, the *Jacobson* court pointed to "the regulation of attorney's fees in general . . . ; lowering the overall cost of the workers' compensation system . . . ; and protecting injured workers who are of relatively limited financial means . . . ." *Id. at 1049*. The court found that the general interest in regulating fees in the context of prior case law related "specifically to the state's interest in protecting the amount of benefits secured by an injured worker under chapter 440 from depletion to pay a lawyer's bills," and that it was "not evident from case law that these fee regulations represent a general interest in 'regulating attorney's fees.'"[1] *Id.*

The *Jacobson* court also held that the State's interest in lowering the cost of workers' compensation premiums was "not implicated in the instant case because it is Claimant, not the E/C, who would pay the fee implicated by the legal work at issue here — defending against the E/C's motion to tax costs. Thus, premiums charged by insurers would be unaffected." *Id.* Finally, the court held that [**17] the interest in "protecting the body of workers' compensation [*180] benefits from depletion" was not implicated, because "there can be no depletion of benefits where there are no benefits. A successful defense against an E/C's motion to tax costs does not constitute 'benefits secured.'" *Id.*

Here, by contrast, Claimant was seeking to obtain workers' compensation benefits, and she properly requested the JCC approve retainer agreements, under which Claimant and her union would pay an attorney out of their own funds to pursue those benefits. Despite this difference, the analysis that led to the holding in *Jacobson* still applies here, as we discuss below.

We start with the premise that "[laypersons] cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries." *Bhd. of R.R. Trainmen v. Va. ex rel. Va. State Bar, 377 U.S. 1, 7, 84 S. Ct. 1113, 12 L. Ed. 2d 89, 94 Ohio Law Abs. 33 (1964)*. Here, although the JCC specifically found the attorney affidavits would not have changed his ruling on the fee retainer issue, his ruling was that he did not have jurisdiction over the constitutional arguments, and the JCC could not declare the statutory provision unconstitutional. *See Burnsed, 591 So. 2d at 647* (noting workers' compensation judges do not have authority to determine constitutionality of [**18] statutory provisions). In our view, the affidavits of the six attorneys support Claimant's argument that she could not secure their representation, as it is not economically feasible for an attorney to undertake representation in a case as complex as an exposure claim, knowing that a fee would be payable only if the claim was successful. In other words, no reasonable attorney would accept the risk of investing their labor into representing Claimant where the likelihood of receiving any compensation was uncertain.

The State cites *United States Department of Labor v. Triplett, 494 U.S. 715, 717-18, 110 S. Ct. 1428, 108 L. Ed. 2d 701 (1990)*, to bring into question the sufficiency of Claimant's record. In *Triplett*, the assessment of the three attorneys relied upon by Mr. Triplett, as described in the opinion, were all commenting in the third person: "'fewer qualified attorneys are accepting black lung claims,' and that more claimants are proceeding *pro se*. . . . 'few attorneys are willing to represent black lung claimants.' . . . 'many of his colleagues had '. . . stated unequivocally that they would not take black lung cases. . . .'" *494 U.S. at 723*. Here, in contrast, the six affidavits spoke in the first person: All six attorneys averred they would not be able to take *this* case on a contingency basis under [**19] the current statutory scheme, where a fee is paid only if the prosecution of the claim is successful. The evidence is direct, unlike the evidence rejected in *Triplett, 494 U.S. at 723-24*, and the evidence persuasively supports Claimant's argument that *sections 440.105* and *440.34* thwart her *First Amendment* rights, which can be adequately exercised only by obtaining legal representation.

[1] The cases cited were *Samaha v. State, 389 So. 2d 639, 640 (Fla. 1980)*; *Lundy v. Four Seasons Ocean Grand Palm Beach, 932 So. 2d 506, 510 (Fla. 1st DCA 2006)*; and *Khoury v. Carvel Homes South, Inc., 403 So. 2d 1043, 1045 (Fla. 1st DCA 1981)*.

Thus, because Claimant, a layperson, required legal counsel to pursue her claim for benefits, and without counsel she was in all likelihood destined to fail in that pursuit, there were no benefits to deplete, as in *Jacobson*. Therefore, the interest in regulating attorney's fees under the guise of protecting the amount of benefits secured by an injured worker against unreasonable attorney's fee payments, or of protecting the body of workers' compensation benefits from depletion, was not and could not be implicated if securing *any* benefits was effectively prevented by Claimant's inability to secure counsel. As the court in *Jacobson* observed, "there can be no depletion [*181] of benefits where there are no benefits." *113 So. 3d at 1049*.

Furthermore, even to the extent that Claimant may have prevailed, and was only entitled to an E/C-paid fee based on the guidelines which would not cover the amount [**20] she paid out of pocket, Claimant would still be left in a better position with counsel, as without counsel she likely would obtain no benefits at all (and been exposed to a potential claim for costs as well). As noted in the concurring opinion to *In re Amendment to the Rules Regulating the Florida Bar — Rule 4-1.5(f)(4)(B) of the Rules of Professional Conduct, 939 So. 2d 1032, 1041 (Fla. 2006)*, "[t]here are many reasons why a client would choose a particular lawyer at a rate which would be higher than that charged by other lawyers." Likewise, there may be many reasons why a claimant in a workers' compensation case may choose to pay more in attorney's fees than she otherwise would under the guidelines, including increasing her likelihood of obtaining any benefits at all. The equation is simple: Some compensation is superior to no compensation.

Furthermore, again as in *Jacobson*, an attorney's fee paid by Claimant and her union would have no impact on workers' compensation premiums, because Claimant and her union are the ones paying the fee, not the E/C. If Claimant prevailed, the E/C still could not be required to pay more in fees that the Legislature allows under *section 440.34, Florida Statutes*, regardless of Claimant obtaining legal counsel not authorized under *chapter 400*, as Claimant would pay the excess [**21] fee.

Nor are we persuaded that the exception to strict scrutiny review for laws that permissibly restrict the time, place, or manner of the exercise of the applicable rights has been satisfied. As we noted in *Jacobson*, "such ***HN8*** [time, place and manner] laws must (a) be content-neutral, (b) be narrowly tailored to serve a significant (rather than "compelling") governmental interest, and (c) leave open alternative channels of communication." *113 So. 3d at 1049* (citing *Clark v. Cmty. for Creative Non—Violence, 468 U.S. 288, 293, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984)*).

Applying this test here, *sections 440.105(3)(c)* and *440.34* fail, because

> [t]here is no significant governmental interest being served, because there is no "benefit secured" associated with the fees at issue in this case and, thus, no need to protect such from depletion. Moreover, the legislation is not content-neutral. ***HN9*** "The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward [v. Rock Against Racism, 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989)]*. The fee restrictions at issue here are not content-neutral, both because they are limited to work done on workers' compensation issues as opposed to other areas of law, and [**22] because they are imposed only on claimants arguing [entitlement to benefits], rather than on both parties' arguments . . . .

Id. at 1050.

Thus, we conclude that, ***HN10*** to the extent these statutes prohibit a workers' compensation claimant (or a claimant's union) from paying attorney's fees out of their own funds for purposes of litigating a workers' compensation claim, these statutes are unconstitutional, because they impermissibly infringe on a claimant's rights to free speech and to seek redress of grievances. Additionally, any fee agreement "must nonetheless, like all fees for Florida attorneys, comport with the factors [*182] set forth in *Lee Engineering & Construction Co. v. Fellows, 209 So. 2d 454, 458 (Fla.1968)*, and codified in the Rules Regulating the Florida Bar at *rule 4-1.5(b)*." *Jacobson, 113 So. 3d at 1052*. Consequently, we hold that no attorney accepting fees in this situation may be prosecuted under *section 440.105(3)(c), Florida Statutes*.

Freedom to Contract

The *Jacobson* court also held that the statutes under review violated the claimant's right to contract for legal services. *Id. at 1050*. ***HN11*** "The right to make contracts of any kind, so long as no fraud or deception is

practiced and the contracts are legal in all respects, is an element of civil liberty possessed by all persons who are sui juris. It is both a liberty and property right and is within the protection [**23] of the guaranties against the taking of liberty or property without due process of law." *State ex rel. Fulton v. Ives, 123 Fla. 401, 167 So. 394, 398-99 (Fla. 1936)* (citations omitted). "The right to contract is one of the most sacrosanct rights guaranteed by our fundamental law." *Lawnwood Med. Ctr. v. Seeger, 959 So. 2d 1222, 1224 (Fla. 1st DCA 2007)*.

HN12 "Like the *First Amendment* rights to freedom of speech, assembly, and petition, the right to contract for legal services is a fundamental right, implicating strict scrutiny." *Jacobson, 113 So. 3d at 1050*. Although strict scrutiny applies, because the right to contract is a property right, the relevant exception to strict scrutiny review is whether the restrictions on the right to contract represent a "reasonable restraint" under the State's police power, "the right being 'the general rule' and its restraint 'the exception to be exercised when necessary to secure the comfort, health, welfare, safety and prosperity of the people.'" *Id. at 1050-51* (quoting *Golden v. McCarty, 337 So. 2d 388, 390 (Fla. 1976)*).

The *Jacobson* court determined that the statutory limitations on attorney's fees were not a permissible exercise of that police power in the context of a legal defense against a motion to tax costs, because the fee provisions precluded entirely the claimant's ability to obtain legal representation. *Id. at 1051*. The *Jacobson* court distinguished the determination in *Lundy v. Four Seasons Ocean Grand Palm Beach, 932 So. 2d 506 (Fla. 1st DCA 2006)*, that *section 440.34* "'does not offend the right [**24] to freely contract,'" on grounds that *Lundy* addressed E/C-paid fees as opposed to claimant-paid fees. *Id. at 1052* (quoting *Lundy, 932 So. 2d at 510*).

Here, although, Claimant is seeking benefits (unlike the claimant in *Jacobson*), she argues that her right to contract is no less violated by the strict adherence to the fee schedule than it was under the circumstances in *Jacobson*, where the issue was not an E/C-paid fee, but a claimant-paid fee, because the challenged statutes prevented Claimant from retaining and paying an attorney with her own funds (or those of her union) in an amount not based on the mandated statutory fee schedule. The issue, therefore, is whether *sections 440.105* and *440.34* are constitutionally permissible restrictions on claimant-paid fees based on the State's police power.

HN13 "There is no settled formula for determining when the valid exercise of police power stops and an impermissible encroachment on private property rights begins." *Graham v. Estuary Props., Inc., 399 So. 2d 1374, 1380 (Fla. 1981)* (reviewing decision to deny approval for development of wetlands). As we noted in *Jacobson*, however, the Florida Supreme Court listed some factors in *Graham* which have been considered in past appeals, and the *Jacobson* [*183] court found that the following of those factors were relevant in addressing [**25] the fees statutes at issue here: (1) whether the regulation confers a public benefit or prevents a public harm; (2) whether the regulation promotes the health, safety, welfare, or morals of the public; and (3) whether the regulation is arbitrarily and capriciously applied. *Jacobson, 113 So. 3d at 1051*.

Regarding factor (1), the supreme court observed, ***HN14*** "If the regulation creates a public benefit it is more likely an exercise of eminent domain, whereas if a public harm is prevented it is more likely an exercise of the police power." *Graham, 399 So. 2d at 1381*. The fee regulations here are intended to prevent public harm, and are therefore at least purportedly an exercise of the State's police power. *See generally City of El Paso v. Simmons, 379 U.S. 497, 508, 85 S. Ct. 577, 13 L. Ed. 2d 446 (1965)* (noting, in reviewing statute governing forfeiture of public land sale contracts for nonpayment of interest, that Legislature has "wide discretion" in determining what is necessary to protect general welfare of people in association with police power).

For the same basic reasons addressed above holding that these statutes do not advance the State's interest in regulating attorney's fees to protect the amount of benefits a claimant is awarded, the statutes do not *actually* prevent a public harm. To the contrary, as Claimant established, [**26] the statutes actually operated to discourage attorneys from representing her, thus potentially placing the burden for any allegedly compensable injury or condition, which might normally be borne by the E/C, on the public as a whole, if Claimant is forced to access governmental benefits. Thus, the statutes cannot be reasonably read to prevent a public harm.

Likewise, the statutes' restrictions on a claimant's ability to contract for legal representation to obtain benefits no longer promote the health, safety, welfare, or morals of the public when, as demonstrated here, an injured worker is unable to secure benefits to which she could potentially otherwise be entitled under law, because of the statutory restrictions on attorney compensation.

Finally, application of the statutes to this scenario is arbitrary and capricious, because only the attorney's fees paid to claimants' attorneys are regulated, and E/Cs are free to contract for legal services without limitation. *See id.* (holding application of statutes to scenario in which only claimant is restricted from paying for legal services in an action for costs is arbitrary and capricious).

We recognize that the Legislature could intend to [**27] prevent the public harm caused when injured workers might quixotically seek benefits the worker is highly unlikely to obtain. In addition, the Legislature could rationally seek to disincentivize meritless litigation which disrupts the workplace and causes unnecessary hostility between employers and employees. But in a free society which attempts to allow individuals the intellectual prerogative to personally weigh the benefits and risk of exercising their statutory right to obtain redress for their injury, we hold that the rational intent to minimize workplace litigation cannot ultimately trump the benefits the public obtains by allowing an injured worker, or one who personally thinks she is injured, to seek redress under law. Thus, the public harm to be prevented — undue depletion of workers' financial resources and undue disruption of the workplace — does not prevail against the individual's right to contract for legal representation.

Because the record establishes that Claimant demonstrated that, as applied to her, the restrictions on her right to contract for legal work in workers' compensation cases do not adequately prevent public [*184] harm, no longer promote the health, safety, welfare, [**28] and morals of the public, and are being arbitrarily and capriciously applied, sections 440.105 and 440.34 are not a valid exercise of the State's police power, and thus are unconstitutional violations of the right to contract.

Waiver

HN15 Florida case law has long recognized that an individual can waive his or her personal constitutional rights. *In re Shambow's Estate v. Shambow, 153 Fla. 762, 15 So. 2d 837, 837 (Fla. 1943)* ("It is fundamental that constitutional rights which are personal may be waived."). Courts have also recognized the ability to waive various protective rights, including the right to present mitigating evidence in the penalty phase of a first-degree murder trial, *see Spann v. State, 857 So. 2d 845, 853 (Fla. 2003)*; the right to require a warrant before authorities can search one's property, *see Lockwood v. State, 470 So. 2d 822 (Fla. 1985)*; the right to remain silent, *see Bailey v. State, 31 So. 3d 809, 812 (Fla. 1st DCA 2009)*; and the right to a jury or speedy trial, *see Torres v. State, 43 So. 3d 831 (Fla. 1st DCA 2010)*, and *State v. Burgess, 153 So. 3d 286 (Fla. 2d DCA 2014)*.

HN16 Logically, then, if a person can waive constitutional rights, a person can also waive statutory rights such as those in *section 440.34, Florida Statutes*. For example, in *In re Amendment to the Rules Regulating the Florida Bar — Rule 4-1.5(f)(4)(B) of the Rules of Professional Conduct*, the Florida Supreme Court approved a Florida Bar rule that allowed medical malpractice plaintiffs to waive the constitutional caps on attorney's fees, subject to certain conditions. *939 So. 2d at 1038-39*. Notably, those conditions [**29] did not require judicial review of such waivers; whereas in the workers' compensation context, the JCC must approve as reasonable the fee a claimant agrees to pay her attorney. Likewise, here, we see no reason why a workers' compensation claimant should not be able to waive a limitation on claimant attorney's fees and agree to pay her attorney with her own (or someone else's) funds, subject to a JCC's finding that the fee is reasonable.

Conclusion

In conclusion, **HN17** the restrictions in *sections 440.105* and *440.34*, when applied to a claimant's ability to retain counsel under a contract that calls for the payment of a reasonable fee by a claimant (or someone on his or her behalf), are unconstitutional violations of a claimant's rights to free speech, free association, and petition — and are not permissible time, place, or manner restrictions on those rights. Likewise, those provisions also represent unconstitutional violations of a claimant's right to form contracts — and are not permissible police power restrictions on those rights. Thus, we hold that the criminal penalties of *section 440.105(3)(c), Florida Statutes*, are unenforceable against an attorney representing a workers' compensation client seeking to obtain benefits under chapter 440, as limited [**30] by other provisions discussed above.

We conclude that the statutory restrictions are unconstitutional, and that the proper remedy is to allow an injured worker and an attorney to enter into a fee agreement approved by the JCC, notwithstanding the statutory restrictions. Accordingly, we reverse the orders of the JCC, and remand for a new hearing on the motion to approve the retainer agreements and on the petitions

for benefits.

REVERSED and REMANDED for further proceedings consistent with this opinion.

ROBERTS, C.J., and WOLF, J., CONCUR.

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Stahl v. Hialeah Hosp.

Supreme Court of Florida

April 28, 2016, Decided

No. SC15-725

Reporter
191 So. 3d 883 *; 2016 Fla. LEXIS 889 **; 41 Fla. L. Weekly S 197

DANIEL STAHL, Petitioner, vs. HIALEAH HOSPITAL, et al., Respondents.

Prior History: [**1] Application for Review of the Decision of the District Court of Appeal - Statutory Validity. First District - Case No. 1D14-3077.

Stahl v. Hialeah Hosp., 160 So. 3d 519, 2015 Fla. App. LEXIS 4294 (Fla. Dist. Ct. App. 1st Dist., 2015)

Counsel: Mark Lawrence Zientz of the Law Office of Mark L. Zientz, P.A., Miami, Florida, for Petitioner.

Kenneth Bradley Bell of Gunster, Yoakley & Stewart, P.A., Tallahassee, Florida; and Kimberly Anne Johnson of Kelley Kronenberg, P.A., Tallahassee, Florida, for Respondents.

Gerald Arthur Rosenthal of Rosenthal, Levy, Simon & Ryles, West Palm Beach, Florida, for Amicus Curiae Workers' Injury Law & Advocacy Group.

Richard Anthony Sicking and Mark Anthony Touby of Touby, Chait & Sicking, P.L., Coral Gables, Florida, for Amicus Curiae Florida Professional Firefighters, Inc.

Kimberly Ann Hill of Kimberly A. Hill, P.L., Fort Lauderdale, Florida, for Amicus Curiae Voices, Inc.

William J. McCabe, Longwood, Florida, for Amicus Curiae Florida Workers' Advocates.

Louis Paul Pfeffer, Jupiter, Florida, for Amicus Curiae National Employment Lawyers Association, Florida Chapter.

Michael Jason Winer of the Law Office of Michael J. Winer, P.A., Tampa, Florida, for Amicus Curiae Florida Justice Association.

Geoffrey Bichler of Bichler, Kelley, Oliver & Longo, PLLC, Maitland, Florida, for [**2] Amici Curiae Police Benevolent Association, Fraternal Order of Police, International Union of Police Associations, AFL-CIO, and Florida Association of State Troopers.

Rayford Huxford Taylor of Gilson Athans P.C., Atlanta, Georgia, for Amici Curiae Florida Insurance Council, American Insurance Association, National Association of Mutual Insurance Companies, and Property Casualty Insurers Association of America.

James Newton McConnaughhay and David Anthony McCranie of McConnaughhay, Coonrod, Pope, Weaver, Stern & Thomas P.A., Tallahassee, Florida, for Amici Curiae Associated Industries of Florida, Florida Roofing, Sheet Metal and Air Conditioning Contractors Association, The Florida Retail Federation, The National Federation of Independent Business, The Florida United Businesses Association, Inc., and the Florida League of Cities.

William Harris Rogner, Winter Park, Florida, for Amici Curiae The Florida Association of Insurance Agents and American Association of Independent Claims Professionals.

Katherine Eastmoore Giddings and Diane G. DeWolf of Akerman LLP, Tallahassee, Florida; Roy Carroll Young of Young, van Assenderp & Qualls, P.A., Tallahassee, Florida; and William Wells Large, Florida [**3] Justice Reform Institute, Tallahassee, Florida, for Amici Curiae Florida Justice Reform Institute and Florida Chamber of Commerce.

Pamela Jo Bondi, Attorney General, Allen C. Winsor,

Solicitor General, Jordan E. Pratt, Deputy Solicitor General, and Rachel Erin Nordby, Deputy Solicitor General, Tallahassee, Florida, for Amicus Curiae State of Florida.

Judges: LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, POLSTON, and PERRY, JJ., concur.

Opinion

[*884] PER CURIAM.

We initially accepted jurisdiction pursuant to *article V, section 3(b)(3), of the Florida Constitution*, to review the decision in *Stahl v. Hialeah Hospital, 160 So. 3d 519 (Fla. 1st DCA 2015)*, in which the First District Court of Appeal declared certain provisions of *chapter 440, Florida Statutes*, to be valid. After further consideration and hearing oral argument in this case, we have determined that we should exercise our discretion and discharge jurisdiction. Accordingly, we dismiss review.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, POLSTON, and PERRY, JJ., concur.

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Condominium Terminations

Condominium Terminations

THE TROPICANA CONDOMINIUM ASSOCIATION, INC.

V.

TROPICAL CONDOMINIUM, LLC, ET AL.

__ SO.3D __, (3RD DCA 2016)

Declaration of Condominium...

- It is a contract of covenants "running with the land."
- It is authorized by statute—a "creature of statute."
- It creates the "condominium parcel" that is owned...
- Consisting of "units" exclusively owned and jointly owned "common elements" that cannot be separated from the units nor separately conveyed.

Interests in the Property...

- Individual owners of the units...,
- Joint ownership of the common elements of the property...and
- Lenders with mortgages on the property.


gettyimages
Steve Starr
128383930

Natural Disasters...

- Following Hurricane Andrew—718.117 (7)...
- When the
  - Identity of directors is in doubt,
  - Right of directors to hold office is in doubt, or
  - If a director(s) is deceased, unable, or refuses to act...
- Any owner may petition for a receiver to conclude the affairs of the association.

Impossible to Operate or Replace...

Impossible to Operate or Replace...

- When the cost to reconstruct or repair exceeds the market value after completion, or
- When reconstruction is not possible under current land use laws and regulation,
- Plan of termination, per 718.117 (2) may be approved by the lesser of:
  - The voting percentage to amend the declaration or
  - The voting percentage to terminate.

"Greenmail"...

Protecting the Owners from "Greenmail"...?

- Approval by a "super" majority pursuant to 718.117 (3)
  - Written approval by 80% of the ownership
  - Less than 10% objecting
- Market value paid to individual owners, and
- When all conditions met, termination occurs.

Partial Terminations...

- Approval of a plan of partial termination by a "super" majority pursuant to 718.117 (3)
  - Written approval by 80% of the ownership
  - Less than 10% objecting
- Completed units remain, and...
  - Vacate property relieved from the covenants
  - Remaining unit owners relieved from the maintenance burden

Rental Conversions...

Consumer Protections...718.117 (3) and (16)

- Identity of Bulk Owners
- Right to Board Membership for Minority Owners
- Homestead property minimum market value at original purchase price.
- Right to challenge procedure and valuations in Arbitration

The Tropicana Decision...

- Declaration of condominium is a contract;
- Its covenants run with the land;
- Attempts to make the law retroactive can be an impairment of the contract; and
- "..the retroactive application of 718.117 is impermissible..."

"..the retroactive application of 718.117 is impermissible..."

- No options to solve the dilemmas created by...
  - Natural disasters;
  - Conflicting land use regulations;
  - Phantom Units; and
  - Consumer Abuses.
- For approximately 1.2 million Floridians, the only remedy is to obtain written consents from all owners and all lenders in the community; and
- For Florida local governments, there is virtually no remedy to address damaged or abandoned properties.

Neutral
As of: December 27, 2016 12:03 PM EST

Tropicana Condo. Ass'n v. Tropical Condo., LLC

Court of Appeal of Florida, Third District

November 16, 2016, Opinion Filed

No. 3D15-2583

Reporter
2016 Fla. App. LEXIS 17090 *; 41 Fla. L. Weekly D 2580

The Tropicana Condominium Association, Inc., Appellant, vs. Tropical Condominium, LLC, etc., et al., Appellees.

Notice: NOT FINAL UNTIL DISPOSITION OF TIMELY FILED MOTION FOR REHEARING.

Prior History: [*1] An Appeal from the Circuit Court for Miami-Dade County, Rosa I. Rodriguez, Judge. Lower Tribunal No. 15-389.

Tropicana Condo. Ass'n v. Tropical Condo. LLC, 2015 Fla. App. LEXIS 16101 (Fla. Dist. Ct. App. 3d Dist., Oct. 9, 2015)

Core Terms

condominium, Declaration, unit owner, termination, amendments, Association's, trial court, contractual, impairment, ownership, unanimous, restraint on alienation, retroactive application, Mortgages, retroactively, restrictions

Case Summary

Overview

HOLDINGS: [1]-The trial court properly determined that the condominium association failed to amend its Declaration of Condominium properly by accepting amendments to *§ 718.117, Fla. Stat.* (2013), of the Condominium Act, that were not approved unanimously. Since the amendment would have worked a severe, permanent, and immediate change in those unit owners' safeguards against condominium termination that were built into the Declaration, retroactive application of the Declaration was impermissible; [2]-The trial court erred by declaring that the association's amendment to § 13.10 of the Declaration creating an ownership restriction was an unreasonable restraint on alienation because the majority of unit owners approved the restriction.

Outcome
Judgment affirmed in part, reversed in part, and remanded.

LexisNexis® Headnotes

Real Property Law > Common Interest Communities > Condominiums > Termination

HN1 The 2007 Florida Legislature amended *§ 718.117, Fla. Stat.* (2013), to facilitate the termination of condominiums. In particular, the amendment provided that a condominium could be terminated upon an approval vote of 80 percent of unit owners, so long as not more than 10 percent of the unit owners opposed the termination. *§ 718.117(3), Fla. Stat.* (2013). This amendment also provided that this section applies to all condominiums in this state in existence on or after July 1, 2007. *§ 718.117(1), Fla. Stat.* (2013).

Real Property Law > Common Interest Communities > Condominiums

HN2 Absent the language, "as amended from time to time, " in a Declaration of Condominium, any changes made by the Legislature to the Condominium Act subsequent to the effective date of the Declaration do not become a part of the Declaration automatically.

Real Property Law > Common Interest Communities > Condominiums

HN3 Absent Kaufman language, an amendment to the Condominium Act will not have retroactive application to a condominium's Declaration if it impairs contractual obligations.

Real Property Law > Common Interest Communities > Condominiums

HN4 The Florida Supreme Court adopted a three-prong balancing test to determine whether a statutory change in the Condominium Act can be applied retroactively without running afoul of Florida's Constitution. The third prong asks whether the law effects a temporary alteration of the contractual relationship of those within its coverage, or whether it works a severe, permanent, and immediate change in those relationships irrevocably and retroactively. The other two prongs are: (1) whether the law was enacted to deal with a broad, generalized economic, or social problem; and (2) whether the law operates in an area which was already subject to state regulation at the time the parties' contractual obligations were originally undertaken, or whether it invaded an area never before subject to regulation by the state.

Real Property Law > Common Interest Communities > Condominiums > Condominium Associations

HN5 The Condominium Act allows a Declaration of Condominium to establish restrictions on the transfer of units. *§ 718.104(5), Fla. Stat.* (2013). Courts have acknowledged that condominium associations may impose restrictions on unit owners' ability to transfer their units, either by lease or sale. Due to the uniqueness of condominium living, condominium associations have a degree of control over the ownership of units and, concomitantly, individual owners tolerate a degree of intrusion into their property ownership. While a restriction on alienation of a condominium might be permissible, it still must be reasonable. Properly enacted condominium Declaration restrictions are presumed valid, and the challenger of such restrictions has the burden to establish arbitrariness, unreasonableness, or violation of law.

Counsel: Heller Waldman, P.L., and Glen H. Waldman and Jason Gordon, for appellant.

Shubin & Bass, P.A., and John K. Shubin, Juan J. Farach and Katherine R. Maxwell, for appellees.

Judges: Before SUAREZ, C.J., and FERNANDEZ and SCALES, JJ.

Opinion by: SCALES

Opinion

SCALES, J.

Appellant, the defendant below, The Tropicana Condominium Association, Inc. (the "Association") appeals an order of the Miami-Dade County Circuit Court granting summary judgment to Appellee, the plaintiff below, Tropical Condominium, LLC ("Tropical"). We affirm in part and reverse in part.

I. Facts

HN1 The 2007 Florida Legislature amended *section 718.117* of the Condominium Act to facilitate the termination of condominiums. In particular, the amendment provided that a condominium could be terminated upon an approval vote of eighty percent of unit owners, so long as not more than ten percent of the unit owners opposed the termination. *§ 718.117(3), Fla. Stat.* (2013). This amendment also provided that "[t]his section applies to all condominiums in this state in existence on or after July 1, 2007." *§ 718.117(1), Fla. Stat.* (2013).

For economic benefits to accrue to its unit owners, the Association sought to take advantage of [*2] amended *section 718.117* and to terminate the condominium status of the forty-eight unit Tropicana Condominium, located in Sunny Isles Beach, Florida. This condominium, established in 1983, was governed by a Declaration of Condominium that lacked "*Kaufman*"[1] language, meaning that, when referencing Florida's Condominium Act, the Declaration did not contain the words "as amended from time to time." ***HN2*** Absent this language in a Declaration, any changes made by the Legislature to the Condominium Act subsequent to the effective date of the Declaration do not become a part of the Declaration automatically.

In 2012, the Association's board submitted to the unit owners a series of amendments to the Declaration. Among these amendments was one that responded inadequately to the 2007 amendment to *section 718.117*: it reduced from one hundred percent to sixty-five percent the vote required to consent to a termination of condominium. A second attempt occurred in March of 2013, which changed the consent threshold

[1] *Kaufman v. Shere, 347 So. 2d 627 (Fla. 3d DCA 1977).*

to eighty percent of unit owners, a percentage that aligned with section 718.117(3). Neither these first nor second Declaration amendments included the condition set forth in section 718.117(3), allowing for an eighty percent approval of unit owners so long [*3] as not more than ten percent did not object to termination.

A majority of Tropicana unit owners approved the Association's amendments. Section 14.5 of the Declaration, however, requires the *unanimous* approval of unit owners to alter the Declaration's termination provision.[2] The Association had not pursued a simultaneous amendment of section 14.5's requirement of a unanimous vote.

The Association submitted additional amendments to the unit owners during this 2012-13 time period.[3] Among those was a restriction on unit ownership that limited unit owners from obtaining any kind of real estate interest in more than two units in the Tropicana Condominium. A majority of unit owners also voted to approve this [*4] amendment.

Tropical is composed of five unit owners who appear to oppose condominium termination (and who represent more than ten percent of unit owners who may object and halt a termination effort). The Association alleges that the Tropical owners are associated with the developer of an adjacent condominium tower, who does not favor a re-development of the Tropicana Condominium. In January of 2015, Tropical filed a complaint for declaratory relief, seeking a declaration that the Association's amendments are invalid because: (1) the amendments relating to condominium termination were not approved by the required unanimous vote; and (2) the prohibition on having an ownership interest in more than two units represented an unreasonable restraint on alienation.

On August 31, 2015, the trial court granted summary judgment on all counts in favor of Tropical. After first finding that the Association failed to comply with its own Declaration's [*5] requirement of unanimous consent of unit owners in order to terminate condominium status, the trial court then found that the Legislature's 2007 amendments to section 718.117 could not be retroactively applied without causing a constitutional impairment of contract. The trial court also determined that the Association's attempt to prevent a unit owner from having an ownership interest in more than two units constituted an unreasonable restraint on alienation. Accordingly, on September 10, 2015, the trial court entered final judgment on Tropical's complaint for declaratory relief. The Association's appeal ensued.

II. Analysis[4]

A. The Retroactive Application of Section 718.117

We agree with the trial court that the Association failed to amend its Declaration properly by accepting amendments that were not approved unanimously. On appeal, the Association argues that its effort to amend its Declaration was unnecessary and without import because the Florida Legislature's intent was that its 2007 amendment to section 718.117 had retroactive application to Tropicana, notwithstanding an absence [*6] of Kaufman language in its Declaration. The issue on appeal thus becomes whether a retroactive application of the statute exists to override the procedural defect of the Declaration amendments; and, if so, whether such retroactive application is constitutional.

HN3 Absent *Kaufman* language, an amendment to the Condominium Act will not have retroactive application to a condominium's Declaration if it impairs contractual obligations. Cohn v. Grand Condo. Ass'n, Inc., 62 So. 3d 1120, 1121-22 (Fla. 2011) (holding that an amendment to section 718.404(2) of the Florida Statutes, which altered voting rights for mixed-use condominium boards, constituted an impairment of contract under Article 1, section 10 of the Florida

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[2] Section 14.5 of the Declaration provides: "This §14 cannot be amended without the consent of all Unit Owners and of all record owners of institutional Mortgages upon the Units." The termination provision is in section 14.1 of the Declaration, which provides: "The Condominium may be terminated at any time by the written consent of all of the Owners of Units in the Condominium and all Institutional Mortgages holding Mortgages on Condominium Parcels." The record reflects that the Association did not obtain approvals of mortgage holders of units.

[3] The Association submitted and a majority of voters approved an amendment to the Declaration's right of first refusal provision. The trial court found this amendment to be void. On appeal, the Association concedes its invalidity, and so we do not address it here.

[4] The trial court's summary final declaratory judgment is based on pure questions of law. Therefore, our review of both issues on appeal is de novo. Courvoisier Courts, LLC v. Courvoisier Courts Condo. Ass'n, Inc., 105 So. 3d 579 (Fla. 3d DCA 2012).

Constitution). Tropicana's Declaration, established in 1983,[5] sought to protect unit owners from any undesired effort to terminate condominium status. As a result, the condominium unit owners had a vested right in this contractual provision; indeed, the Declaration bestows this veto right on every unit owner. To what extent will impairment of this right be tolerated?

The question of tolerating impairment was examined in Pomponio v. Claridge of Pompano Condo., Inc., 378 So. 2d 774, 780 (Fla. 1979) ("To determine how much impairment is tolerable, we must weigh the degree to which a party's contract rights are statutorily impaired against both the source of authority under which the state purports to alter the contractual relationship and the evil which it seeks to remedy."). In *Pomponio*, **HN4** the Florida Supreme Court adopted a three-prong balancing test to determine whether a statutory change in the Condominium Act can be applied retroactively without running afoul of Florida's Constitution. Id. at 779. The third prong is relevant in this case: "Does the law effect a temporary alteration of the contractual relationship of those within its coverage, or does it work a severe, permanent, and immediate change in those relationships irrevocably and retroactively?" *Id.*[6]

The Association argues that the third *Pomponio* prong is satisfied because the 2007 amendment to section 718.117 effects only "a temporary alteration of the contractual relationship." *Id.* The Association argues that section 718.117 should be retroactively applied because it expands the contractual right of condominium unit owners to terminate their condominiums; and further, the 2007 amendment increases options and creates a more equitable situation because of the difficulty of achieving unanimous consent. This argument, however, loses focus on whether the 2007 amendment *impairs* contractual rights.

The trial court correctly determined that, irrespective of Tropical's motives, the 2007 amendment, if retroactively applied, would eviscerate the Tropical owners' contractually bestowed veto rights. According to *Pomponio*'s third prong, the amendment would "work a severe, permanent, and immediate change" in those unit owners' safeguards against condominium termination that are built into the Declaration. *Id.*

Therefore, we affirm the trial court's ruling that the retroactive application of section 718.117 is impermissible, and that the Association's amendment to section 14.1 of the Declaration is invalid.

*B. The Restraint on Alienation [*9]*

On October 17, 2012, prior to the individual Tropical owners' acquisitions of their five units, the Association amended the Declaration to add a new section 13.10[7] in order to limit a unit owner from owning more than two Tropicana Condominium units at any given time. The trial court determined that this provision constituted an unreasonable restraint on alienation.

HN5 The Condominium Act allows a Declaration to establish restrictions on the transfer of units. § 718.104(5), Fla. Stat. (2013). Courts have acknowledged that condominium associations may impose restrictions on unit owners' ability to transfer their units, either by lease or sale. Woodside Vill. Condo. Ass'n, Inc. v. Jahren, 806 So. 2d 452 (Fla. 2002); White Egret Condo., Inc. v. Franklin, 379 So. 2d 346 (Fla. 1979). Due to the uniqueness of condominium living, condominium associations have a degree of control over the ownership of units and, concomitantly, individual owners tolerate a degree of intrusion into their property ownership. Hidden Harbour Estates, Inc. v. Norman, 309 So. 2d 180 (Fla. 4th DCA 1975). While a restriction on alienation of a condominium might be permissible, it still must be reasonable. Id. at 182; Seagate Condo. Ass'n, Inc. v. Duffy, 330 So. 2d 484, 486 (Fla. 4th DCA 1976) ("The test which our courts have adopted and applied with respect to restraints on alienation and use [*10] is reasonableness."). Properly enacted condominium Declaration restrictions are presumed valid, and the challenger of such restrictions has the burden to establish arbitrariness, unreasonableness or violation of law. Woodside Vill.

[5] It bears noting that, in 1983, the drafters of Tropicana's Declaration had the benefit of our 1977 Kaufman decision and could have chosen to qualify the Declaration to include any subsequent revisions to Florida's Condominium Act enacted by the Florida Legislature. The drafters [*7] chose not to include such Kaufman language.

[6] The other two prongs are: (1) "Was the law enacted to deal with a broad, generalized economic or social problem?" and (2) "Does the law operate in an area which was already subject to state regulation at the time the parties' contractual obligations were originally undertaken, or does it invade an area never before subject to regulation [*8] by the state?" Pomponio, 378 So. 2d at 779.

[7] This amendment was approved by a majority of the Tropicana unit owners. Section 14.5's requirement of unanimous consent applies only to amendments to section 14 of the Declaration.

Condo. Ass'n, Inc., 806 So. 2d at 457.

We disagree with the trial court's determination that Tropical met its burden of establishing that the ownership restriction is unreasonable. The record reflects that the majority of unit owners approved the restriction after a fellow owner, who owned six units in the building, allowed all six units to go into foreclosure. Given the relatively small size of Tropicana — forty-eight units — multiple foreclosures caused by a single owner's financial circumstances, could have a significant, detrimental financial impact on the Association.[8]

An additional and important consideration in our evaluation of the Association's limit of not more than two units per owner is whether such a restriction impedes the improvement or marketability of a property. *Aguarian Found., Inc. v. Sholom House, Inc., 448 So. 2d 1166, 1168 (Fla. 3d DCA 1984)* (citing *Iglehart v. Phillips, 383 So. 2d 610 (Fla. 1980)*).

Again, given the relatively small size of the Tropicana Condominium, in an area of Sunny Isles Beach that in recent decades has seen abundant development of large condominium buildings, the restriction will have a negligible effect on marketability. Tropicana unit owners are free to sell their units to the public at large (subject to the ordinary condominium association approval process), and are excluded only from selling to a tiny, almost inappreciable class of persons who already own two Tropicana units.

For these reasons, we reverse the trial court's ruling that section 13.10 of the Declaration unreasonably restrains alienation of Tropicana units and remand to the trial court for entry of an amended judgment consistent herewith.

III. Conclusion

For the reasons stated above, we affirm the trial court's invalidation of the Association's amendment [*12] to section 14.1 of the Declaration. We reverse the trial court's ruling that declared the Association's amendment to section 13.10 of the Declaration an unreasonable restraint on alienation.

Affirmed in part, reversed in part. Remanded with instructions.

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[8] Tropical argues that the two-unit ownership restriction unreasonably restricts alienability because it would impede a single lender from underwriting mortgage loans for more than two Tropicana condominium units. The definition of "Unit Owner" in section 2 of the Declaration provides: "Unit Owner . . . means the owner of a Condominium Parcel (including the Developer when applicable)." Despite the broadness of this definition, in light of the Association's [*11] intent in adding section 13.10 to its Declaration, we conclude that, for the purposes of section 13.10, a unit owner does not include a foreclosing mortgage holder.

Candidate Fees

Neutral
As of: December 27, 2016 11:59 AM EST

Wright v. City of Miami Gardens

Supreme Court of Florida

September 15, 2016, Decided

No. SC16-1518

Reporter
2016 Fla. LEXIS 2044 *; 41 Fla. L. Weekly S 387

JAMES BARRY WRIGHT, Petitioner, vs. CITY OF MIAMI GARDENS, etc., et al., Respondents.

Prior History: [*1] Third District - Case No. 3D16-1804. (Miami-Dade County).

Wright v. City of Miami Gardens, 2016 Fla. App. LEXIS 12424 (Fla. Dist. Ct. App. 3d Dist., Aug. 17, 2016)

Core Terms

candidate, qualifying, election, campaign, disqualify, cashier's check, funds, unambiguous, Statutes, courts, ballot, election process, public office, circumstances, irrational, invalid, trial court, en banc, disqualification, nonpartisan, provides, notice, statutory interpretation, constitutional right, qualification, regulating, facially, banking, checks, papers

Case Summary

Overview

HOLDINGS: [1]-Because *§ 99.061(7)(a)1., Fla. Stat.* was clear and unambiguous, petitioner was disqualified as a candidate for election under the statute when his check for the qualifying fee was returned, even though the return was exclusively due to a banking error, and when petitioner was not informed of the bank error until after the qualifying period had ended; [2]-The statute was invalid under *Art. I, § 1, Fla. Const.*, because it erected a barrier that was an unnecessary restraint on one's right to seek elective office, and therefore the version in existence prior to the 2011 amendment would be revived by operation of law and petitioner would be allowed to pay the qualification fee and to be placed on the ballot notwithstanding that the qualification period had ended.

Outcome

Decision below quashed and case remanded.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Governments > Legislation > Interpretation

HN1 Statutory interpretation is a pure question of law that is reviewed de novo.

Governments > Legislation > Interpretation

Governments > State & Territorial Governments > Elections

Governments > Local Governments > Elections

HN2 When the Florida Election Code is at issue, the court primarily relies on the same rules of statutory reading and construction that it applies to other statutes. Legislative intent is the polestar that guides the court's analysis.

Governments > Legislation > Interpretation

HN3 Florida case law contains a plethora of rules and extrinsic aids to guide courts in their efforts to discern legislative intent from ambiguously worded statutes. However, when the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.

Governments > Legislation > Interpretation

HN4 Courts of Florida are without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power.

Governments > Legislation > Interpretation

HN5 A literal interpretation of the language of a statute need not be given when to do so would lead to an unreasonable or ridiculous conclusion. Such a departure from the letter of the statute, however, is sanctioned by the courts only when there are cogent reasons for believing that the letter of the law does not accurately disclose the legislative intent.

Governments > Legislation > Interpretation

Governments > Local Governments > Elections

Governments > State & Territorial Governments > Elections

HN6 Literal and total compliance with statutory language which reaches hypersensitive levels and which strains the quality of justice is not required to fairly and substantially meet the statutory requirements to qualify as a candidate for public office.

Governments > State & Territorial Governments > Elections

Governments > Local Governments > Elections

HN7 The following language in *§ 99.061(7)(a)*1., Fla. Stat is abundantly clear and unambiguous: If a candidate's check is returned by the bank for any reason, the filing officer shall immediately notify the candidate and the candidate shall have until the end of qualifying to pay the fee with a cashier's check purchased from funds of the campaign account. Failure to pay the fee as provided shall disqualify the candidate.

Governments > Legislation > Interpretation

HN8 The court presumes that the legislature acts purposefully when it removes language from one statute, but leaves identical language in a different statute. When the legislature has used a term in one section of the statute but omits it in another section of the same statute, the court will not imply it where it has been excluded.

Governments > Legislation > Interpretation

HN9 The court presumes that the legislature is aware of judicial construction of its statutes.

Governments > Legislation > Interpretation

Constitutional Law > Separation of Powers

HN10 As a coequal branch of government with the utmost respect for the separation of powers, the Florida Supreme Court can neither legislate nor question the wisdom of the legislature. First, it is the function of the court to interpret the law, not to legislate. Second, courts are not concerned with the mere wisdom of the policy of the legislation. The judiciary will not nullify legislative acts merely on grounds of the policy and wisdom of such act, no matter how unwise or unpolitic they might be, so long as there is no plain violation of the Constitution.

Constitutional Law > Elections, Terms & Voting

HN11 Under *Art. VI, § 1, Fla. Const.*, the legislature is directed to enact laws regulating the election process. The constitutional directive, however, is not plenary: legislative acts that impose unreasonable or unnecessary restraints on the elective process are prohibited.

Constitutional Law > Elections, Terms & Voting

HN12 Although the legislature is charged with the authority and responsibility of regulating the election process so as to protect the political rights of the people and the integrity of the political process, these regulations must be reasonable and necessary restraints on the elective process and not inconsistent with the constitution of this state. In order to assure orderly and effective elections, the state may impose reasonable controls. The law places restraints upon all of its citizens in the exercise of their rights and liberties under a republican form of government. Such restraints have been found to be necessary in the development of our democratic processes to preserve the very liberties which we exercise. Similar restraints may lawfully be imposed upon individual candidates for public office.

Constitutional Law > Elections, Terms & Voting

HN13 The declaration of rights expressly states that all political power is inherent in the people. *Art. I, § 1, Fla. Const.* The right of the people to select their own officers is their sovereign right, and the rule is against imposing unnecessary and unreasonable disqualifications to run.

Constitutional Law > Elections, Terms & Voting

HN14 Unreasonable or unnecessary restraints on the elective process are prohibited.

Constitutional Law > Elections, Terms & Voting

HN15 Fundamental to our system of government is the principle that the right to be a candidate for public office is a valuable one and no one should be denied this right unless the Constitution or an applicable valid law expressly declares him to be ineligible.

Governments > Local Governments > Elections

Governments > State & Territorial Governments > Elections

HN16 Discouragement of candidacy for public office should be frowned upon in the absence of express statutory disqualification. The people should have available opportunity to select their public officer from a multiple choice of candidates. Widening the field of candidates is the rule, not the exception, in Florida.

Governments > State & Territorial Governments > Elections

HN17 To determine the reasonableness of the restraint or condition placed on the right to seek public office, the nature of the right asserted by the individual must be considered in conjunction with the extent that it is necessary to restrict the assertion of the right in the interest of the public.

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > Inferences & Presumptions

HN18 A law comes to the court with a presumption of validity—an extremely strong presumption in statutes regulating the conduct of elections. To overcome the presumption, the invalidity must appear beyond reasonable doubt, for it must be assumed the legislature intended to enact a valid law.

Governments > State & Territorial Governments > Elections

Governments > Local Governments > Elections

Constitutional Law > Elections, Terms & Voting

HN19 *Section 99.061(7)(a)1., Fla. Stat.* (2016) is arbitrary and without a rational basis. For those prospective candidates who tender properly executed checks that ultimately clear because they have done all they were required to, the statute poses no problem. However, the statute effectively forecloses the candidacy of all otherwise qualified candidates who have done all they were required to do but have had their checks returned, not due to insufficient funds or some other matter within their control, but due to sheer bad luck resulting from a bank error totally beyond their control. This bright line, by turning on luck rather than conduct, is irrational and violates a candidate's constitutional right to run for public office. There is no relief valve for circumstances such as these.

Governments > Local Governments > Elections

Governments > State & Territorial Governments > Elections

HN20 The Florida Supreme Court severs the portion of ch. 2011-40, § 14, Laws of Fla., that amends *§ 99.061(7)(a)1., Fla. Stat.* Thus, the version of *§ 99.061(7)(a)*1. in existence prior to the 2011 amendments is revived by operation of law.

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation

HN21 The Florida Supreme Court's precedent in Holley specifically recognizes the court's duty to invalidate a statute when an unambiguous statute violates a clear mandate of the Constitution: To the extent that such an act violates expressly or clearly implied mandates of the Constitution, the act must fall, not merely because the courts so decree, but because of the dominant force of the Constitution, an authority superior to both the legislature and the judiciary.

Governments > Courts

HN22 The Florida Supreme Court's first and foremost duty is to enforce the Constitution and to protect all the rights of all Floridians thereunder.

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Abigail Price-Williams, Miami-Dade County Attorney, and Oren Rosenthal and Michael Benny Valdes, Miami-Dade Assistant County Attorneys, Miami, Florida, for Respondent Christina White.

Juan-Carlos Planas of KYMP, LLP, Miami, Florida; and Sonja Knighton Dickens, Miami Gardens, Florida, for Respondents City of Miami Gardens and Ronetta Taylor.

Judges: LEWIS, J. LABARGA, C.J., and PARIENTE,

QUINCE, and PERRY, JJ., concur. CANADY, J., concurs in result only with an opinion. POLSTON, J., dissents with an opinion.

Opinion by: LEWIS

Opinion

Application for Review of the Decision of the District Court of Appeal — Certified Great Public Importance

LEWIS, J.

This case is before the Court on a certified question of great public importance for review of the decision of the Third District Court of Appeal in *Wright v. City of Miami Gardens, No. 3D16-1804, 2016 Fla. App. LEXIS 12424, 41 Fla. L. Weekly D1907, 2016 WL 4376766 (Fla. 3d DCA Aug. 17, 2016)*.

In February 2016, James Barry Wright properly opened a campaign account with Wells Fargo Bank [*2] to run in the August 30, 2016, election for the office of Mayor in the City of Miami Gardens (the City). The qualifying period for this particular election commenced at 9 a.m. on May 26, 2016, and terminated at 4 p.m. on June 2, 2016.

On June 1, 2016, one day before the qualifying period ended, Wright tendered to Ronetta Taylor, the City Clerk of the City of Miami Gardens, a check issued on the Wells Fargo Bank campaign account in the amount of $620.00, which was the specifically required qualifying fee amount. The City Clerk accepted the check and issued Wright a receipt. It is undisputed that Wright's properly opened and properly maintained campaign account had ample funds to pay the qualification fee at all relevant times. Although the check was one of the first checks written by Wright after the opening of his campaign account, and therefore might be considered a starter check or "temporary" check, it bore his name, his campaign name, his campaign mailing address, and his campaign account number. Further, it is also undisputed that Wells Fargo had properly and successfully previously processed and honored six similarly formatted "temporary" checks in connection with Wright's other [*3] campaign expenses. Finally, it is undisputed that Wright met all other requirements to qualify as a candidate for the office of the Mayor of the City.

However, on June 16, 2016—more than two weeks later—the City Clerk was notified by the City's Finance Department that Wright's check had been returned to the City by its bank "because the account number on the check could not be located."[1] Indeed, the check that was returned was stamped with the following: "UN LOCATE ACCT." Beneath that reflected "Do Not Re-deposit." To the left of the check was the following: "6/8/2016 . . . This is a LEGAL COPY of your check. You can use it the same way you would use the original check. RETURN REASON—UNABLE TO LOCATE ACCOUNT."

Wright was not informed of the situation until four days later, on June 20, 2016. While the City Clerk initially informed Wright that he could still pay the filing fee (and the $45.00 returned check fee that Wells Fargo had charged the City) with a cashier's check to remain qualified, Wright later [*4] received an e-mail informing him that he had been totally disqualified. Nevertheless, Wright attempted, without success, to rectify the problem by actually tendering a cashier's check for the filing fee, as well as a separate check to pay the returned check fee.

When Wright requested an explanation as to why he could not rectify the situation which he had not created, the City Clerk referred Wright to *section 99.061(7)(a)1. of the Florida Statutes* which provides:

> (7)(a) In order for a candidate to be qualified, the following items must be received by the filing officer by the end of the qualifying period:
>
> 1. A properly executed check drawn upon the candidate's campaign account payable to the person or entity as prescribed by the filing officer in an amount not less than the fee required by *s. 99.092*, unless the candidate obtained the required number of signatures on petitions pursuant to *s. 99.095*. The filing fee for a special district candidate is not required to be drawn upon the candidate's campaign account. *If a candidate's check is returned by the bank for any reason, the filing officer shall immediately notify the candidate and the candidate shall have until the end of qualifying to pay the fee with a cashier's check purchased [*5] from funds of the campaign account. Failure to pay the fee as provided in this subparagraph shall disqualify the candidate.*

§ 99.061(7)(a)1., Fla. Stat. (2016) (emphasis added).

[1] An e-mail in the record indicates that the City Clerk initially believed the check was returned for insufficient funds, but a subsequent e-mail indicated that such a belief was incorrect.

The City Clerk further referred Wright to the decision of the First District Court of Appeal in *Levey v. Detzner* which had held that the clear and unambiguous language of section 99.061(7)(a)1. required disqualification under very similar circumstances:

> The statute at issue is clear and unambiguous. Although we agree with the trial court that this result is harsh, it is mandated by the clear language of the statute. If a candidate's qualifying check is returned *for any reason*, the candidate must pay the qualifying fee by cashier's check before the end of the qualifying period. Levey's check was returned, the reason for that occurring is immaterial, and she failed to cure the deficiency within the time allotted by the statute. This circumstance "shall disqualify the candidate." Courts are not at liberty to extend, modify, or limit the express and unambiguous terms of a statute. *See* Hill v. Davis, 70 So. 3d 572, 575 (Fla. 2011); *see also* State v. Chubbuck, 141 So. 3d 1163 (Fla. 2014).
>
> The result in this case is buttressed by the fact that under an earlier version of section 99.061, if a candidate's qualifying check was returned, the candidate was allowed 48 hours [*6] after being notified of that fact by the filing officer to pay the fee by cashier's check, "the end of qualifying notwithstanding." *See* § 99.061(7)(a)1., Fla. Stat. (2010). The operative language of the current statute, which eliminated the possibility of a post-qualifying cure period for candidates for federal, state, county, and district offices, was adopted by the Legislature in a 2011 amendment. *See* Ch. [20]11-40, § 14, at 22, Laws of Fla. It is not within a court's power to rewrite the statute or ignore this amendment, and any remedy Levey or others aggrieved by the amendment may have lies with the Legislature, not the courts.
>
> AFFIRMED.

146 So. 3d 1224, 1226 (Fla. 1st DCA 2014), *rehearing en banc denied*, Sept. 22, 2014, *review denied*, 153 So. 3d 906 (Fla. 2014) (footnote omitted).

On June 30, 2016, Wright sought judicial redress by filing the instant action. Wright sought declaratory and mandamus relief against the City, the City Clerk, and the Miami-Dade County Supervisor of Elections.[2] On July 27, 2016, the trial court conducted a hearing on Wright's amended motion for temporary injunction and emergency writ of mandamus. In both counts, Wright sought to require the defendants to recognize Wright as a properly and validly qualified candidate for the office of Mayor [*7] in the August 30 election. In the alternative, Wright sought to require the defendants to reschedule the pertinent election to the general election taking place on November 9, 2016.

During the hearing on Wright's motion, the Supervisor of Elections announced that it had no objections to moving the election to the November general election if Wright were entitled to relief on the merits. On the other hand, the City of Miami Gardens objected to consideration of this relief on the basis that it would add unnecessary expenses, create a hardship, potentially result in a separate December run-off election with low voter turnout, and affect its ability to ensure a fair election. Specifically, the City noted that Wright would be able to raise funds that other candidates would not be able to because he had not been a candidate.

Ultimately, the trial court denied both of Wright's motions on the merits. The trial court concluded that Wright was not entitled to any relief because section 99.061(7)(a)1., Florida Statutes, explicitly [*8] required the City Clerk to disqualify Wright. The trial court further explained that it was bound by the decision of the First District Court of Appeal in Levey, 146 So. 3d 1224, which it considered to be directly on point, absent any relevant precedent from the Third District Court of Appeal.

Wright sought review of the trial court's order in the Third District Court of Appeal. Relying on largely the same reasoning as the trial court and the First District in *Levey*, the Third District affirmed:

> Appellees argue, and we agree, that the plain and unambiguous provisions of the controlling statute require affirmance. When a candidate's qualification fee has been returned by the bank for any reason, the statute rather plainly provides a mechanism for a candidate to pay the qualifying fee only within the qualifying period. We recognize the statute produces a harsh result in this case. When an unambiguous statute plainly requires a particular result, though, courts are powerless to fashion a different result under the auspices of fairness. Corfan Banco Asuncion Paraguay v. Ocean Bank,

[2] Originally, Wright did not include the Miami-Dade County Supervisor of Elections as a party, and the trial court granted a motion to dismiss without prejudice so that Wright could amend his pleadings accordingly.

715 So. 2d 967, 970 (Fla. 3d DCA 1998).

> In denying Wright's emergency motion, the trial court cited, and was bound to follow, Levey[, 146 So. 3d 1224]. As in this case, in *Levey*, the candidate's qualifying fee check was returned because of [*9] a bank mistake, i.e., for reasons totally outside of the candidate's control. 146 So. 3d at 1225. Relying on the clear and unambiguous language of the controlling statute, the *Levey* court held that the statute's use of the term "returned by the bank for any reason" rendered irrelevant any consideration of whether the candidate bore responsibility for the check being returned. Id. at 1226.
>
> We agree with the *Levey* court's rationale, and the statutory analysis contained therein. Despite our tremendous distaste for the result, we are compelled by the plain language of the relevant statute to affirm the trial court's denial of Wright's emergency motion.

Wright, 2016 Fla. App. LEXIS 12424 at *5-6, 41 Fla. L. Weekly at D1908, 2016 WL 4376766 at *2.

However, the Third District also noted that "this issue's recurrence has moved the matter from the 'mere anecdotal' column to the 'likely to recur' column" and, therefore, certified the following question to be of great public importance:

> Does section 99.061(7)(a)1. require a candidate's disqualification when the candidate's qualifying fee check is returned by the bank after the expiration of the qualifying period due to a banking error over which the candidate has no control?

Id. We have jurisdiction. *See* art. V, § 3(b)(4), Fla. Const. Further, we accepted jurisdiction and granted [*10] a motion to expedite review. Due to the late timing, while this case was pending in this Court, the August 30 mayoral election was conducted, but voters were presented with a ballot that did not contain the name James Barry Wright.

This review follows.

ANALYSIS

I. Certified Question

The certified question is one of ***HN1*** statutory interpretation, which is a pure question of law that we review de novo. ***HN2*** When the Florida Election Code is at issue, we primarily rely on the same rules of statutory reading and construction that we apply to other statutes. Legislative intent is the polestar that guides our analysis. *See* Knowles v. Beverly Enters.-Fla., Inc., 898 So. 2d 1, 5 (Fla. 2004).

> ***HN3*** Florida case law contains a plethora of rules and extrinsic aids to guide courts in their efforts to discern legislative intent from ambiguously worded statutes. However,
>
> > [w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.
>
> A.R. Douglass, Inc. v. McRainey, 102 Fla. 1141, 137 So. 157, 159 (Fla. 1931). *See also* Carson v. Miller, 370 So. 2d 10 (Fla. 1979); Ross v. Gore, 48 So. 2d 412 (Fla. 1950). It has also been accurately stated that ***HN4*** courts of this state are
>
> > without power to construe an unambiguous statute in a way which would extend, modify, or [*11] *limit*, its express terms or its *reasonable and obvious implications*. To do so would be an abrogation of legislative power.
>
> American Bankers Life Assurance Company of Florida v. Williams, 212 So. 2d 777, 778 (Fla. 1st DCA 1968) (emphasis added). It is also true that ***HN5*** a literal interpretation of the language of a statute need not be given when to do so would lead to an unreasonable or ridiculous conclusion. Johnson v. Presbyterian Homes of Synod of Florida, Inc., 239 So. 2d 256 (Fla. 1970). Such a departure from the letter of the statute, however, "is sanctioned by the courts only when there are cogent reasons for believing that the letter [of the law] does not accurately disclose the [legislative] intent." State ex rel. Hanbury v. Tunnicliffe, 98 Fla. 731, 124 So. 279, 281 (1929).

Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984). In the specific context of candidate qualification, this Court has further explained that:

> ***HN6*** Literal and 'total compliance' with statutory language which reaches hypersensitive levels and which strains the quality of justice is not required to

> fairly and substantially meet the statutory requirements to qualify as a candidate for public office.

State ex rel. Siegendorf v. Stone, 266 So. 2d 345, 346 (Fla. 1972).

Although we are primarily concerned with *subparagraph (7)(a)1.*, *section 99.061(7)* provides in full:

> (7)(a) In order for a candidate to be qualified, the following items must be received by the filing officer by the end of the qualifying period:
>
> 1. A properly executed check drawn upon the candidate's campaign account payable to the person or entity [*12] as prescribed by the filing officer in an amount not less than the fee required by *s. 99.092*, unless the candidate obtained the required number of signatures on petitions pursuant to *s. 99.095*. The filing fee for a special district candidate is not required to be drawn upon the candidate's campaign account. *If a candidate's check is returned by the bank for any reason, the filing officer shall immediately notify the candidate and the candidate shall have until the end of qualifying to pay the fee with a cashier's check purchased from funds of the campaign account. Failure to pay the fee as provided in this subparagraph shall disqualify the candidate.*
>
> 2. The candidate's oath required by *s. 99.021*, which must contain the name of the candidate as it is to appear on the ballot; the office sought, including the district or group number if applicable; and the signature of the candidate, which must be verified under oath or affirmation pursuant to *s. 92.525(1)(a)*.
>
> 3. If the office sought is partisan, the written statement of political party affiliation required by *s. 99.021(1)(b)*.
>
> 4. The completed form for the appointment of campaign treasurer and designation of campaign depository, as required [*13] by *s. 106.021*.
>
> 5. The full and public disclosure or statement of financial interests required by *subsection (5)*. A public officer who has filed the full and public disclosure or statement of financial interests with the Commission on Ethics or the supervisor of elections prior to qualifying for office may file a copy of that disclosure at the time of qualifying.
>
> (b) If the filing officer receives qualifying papers during the qualifying period prescribed in this section which do not include all items as required by *paragraph (a)* prior to the last day of qualifying, the filing officer shall make a reasonable effort to notify the candidate of the missing or incomplete items and shall inform the candidate that all required items must be received by the close of qualifying. A candidate's name as it is to appear on the ballot may not be changed after the end of qualifying.
>
> (c) The filing officer performs a ministerial function in reviewing qualifying papers. In determining whether a candidate is qualified, the filing officer shall review the qualifying papers to determine whether all items required by *paragraph (a)* have been properly filed and whether each item is complete on its face, including whether items that must be verified [*14] have been properly verified pursuant to *s. 92.525(1)(a)*. The filing officer may not determine whether the contents of the qualifying papers are accurate.

§ 99.061(7), Fla. Stat. (emphasis added).

Like all the other courts that have considered this language, we believe that ***HN7*** the statute's following language is abundantly clear and unambiguous:

> If a candidate's check is returned by the bank for any reason, the filing officer shall immediately notify the candidate and the candidate shall have until the end of qualifying to pay the fee with a cashier's check purchased from funds of the campaign account. Failure to pay the fee as provided in this subparagraph shall disqualify the candidate.

§ 99.061(7)(a)1., Fla. Stat.

Because this language is clear and unambiguous, there is no basis or authority to apply rules of construction. *See Holly, 450 So. 2d at 219*. In this case, Wright's check was returned, and although it was not due to any fault of Wright's and was exclusively due to a banking error, the statute on its face applies because it applies to returns "by the bank for any reason." Finally, although Wright was not informed of this bank error until after qualifying had ended, he only had "until the end of qualifying to pay the fee with a cashier's check purchased [*15] from funds of the campaign account."

Even if we were to take issue with the draconian and irrational policy of requiring payment before notice, as was the case with the facts before us, the next sentence in the statute ends further inquiry. In no uncertain terms, the statute provides: "Failure to pay the fee as provided in this subparagraph shall disqualify the candidate." Quite clearly, *subparagraph 7(a)1.* does not provide any method of paying the fee after the end of qualifying. Therefore, because the fee was not paid before the end of qualifying, under the plain language of the statute the filing officer had no choice but to disqualify Wright.[3]

The fact that the filing officer received "[a] properly executed check drawn upon the candidate's campaign account payable to the person or entity as prescribed by the filing officer in an amount not less than the fee required" is of no moment because the statute quite clearly considers a returned check as indicating that the fee has not [*16] been paid. There could be no other explanation as to why upon a returned check, the candidate has a second opportunity "to pay the fee," albeit before "the end of qualifying."

We further agree with the district courts that have reviewed this statute in application that this law yields a most distasteful and harsh result when a candidate who did everything right is disqualified due to a banking error beyond the candidate's control. Some of the district court judges and Wright have contended that this demonstrates an absurd result that could not have been intended by the Legislature. We acknowledge that the "absurd result" doctrine is alluring on these facts, but there is no ambiguity upon which to apply that rule of construction. We are convinced that the Legislature did intend the law to effect a true bright line, and therefore, we cannot resort to a rule of construction based on "absurdity." Unlike in other cases where the absurd result doctrine has been applied to an ambiguous statute, here the Legislature specifically removed the language from the prior statute that would have avoided the result of disqualification. Specifically, the Legislature removed language that would have allowed [*17] payment of the fee within 48 hours upon notice of a returned check, "the end of qualifying notwithstanding," and added that the candidate had "until" the end of qualifying:

> 99.61 Method of qualifying for nomination or election to federal, state, county, or district office.—
>
> . . .
>
> (7)(a) In order for a candidate to be qualified, the following items must be received by the filing officer by the end of the qualifying period:
>
> 1. A properly executed check drawn upon the candidate's campaign account *payable to the person or entity as prescribed by the filing officer* in an amount not less than the fee required by *s. 99.092*, *unless the candidate obtained the required number of signatures on petitions*
>
> or, in lieu thereof, as applicable, the copy of the notice of obtaining ballot position pursuant to *s. 99.095*. The filing fee for a special district candidate is not required to be drawn upon the candidate's campaign account. If a candidate's check is returned by the bank for any reason, the filing officer shall immediately notify the candidate and the candidate shall *have until* , the end of qualifying
>
> notwithstanding, have 48 hours from the time such notification is received, excluding Saturdays, [*18] Sundays, and legal holidays, to pay the fee with a cashier's check purchased from funds of the campaign account. Failure to pay the fee as provided in this subparagraph shall disqualify the candidate.

Ch. 2011-40, § 14, Laws of Fla. (2011) (words stricken are deletions; words *underlined* are additions).

Moreover, the other parts of the statute adopt the same bright-line approach requiring all aspects of qualifying within the candidate's control to be completed within the qualifying period. Furthering the cohesion of this bright line, in the very same Act, the Legislature removed all discretion from the filing officer by adding new *subparagraph 99.061(7)(c)*:

> (c) *The filing officer performs a ministerial function in reviewing qualifying papers.* In determining whether a candidate is qualified, the filing officer shall review the qualifying papers to determine whether all items required by *paragraph (a)* have been properly filed and whether each item is complete on its face, including whether items that must be verified have been properly verified pursuant to *s. 92.525(1)(a)*. *The filing officer may not determine whether the contents of the qualifying*

[3] We also note that our precedent concerning the doctrine known as substantial compliance has no place in our analysis because the statute at issue is not ambiguous and directly addresses the facts presented.

papers are accurate.

Ch. 2011-40, § 14, Laws of Fla. (2011) (emphasis [*19] added).

Furthermore, the result appears to be the product of specific intent when we note that the Legislature did not amend the identical provision that governs non-partisan elections. To this date, in nonpartisan elections,

> If a candidate's check is returned by the bank for any reason, the filing officer shall immediately notify the candidate and the candidate shall, the end of qualifying notwithstanding, have 48 hours from the time such notification is received, excluding Saturdays, Sundays, and legal holidays, to pay the fee with a cashier's check purchased from funds of the campaign account. Failure to pay the fee as provided in this subparagraph shall disqualify the candidate.

§ 105.031(5)(a)1., Fla. Stat. (2016); *see also* Ch. 2011-40, § 51, Laws of Fla. (2011) (amending *section 105.031*, but not removing this provision).[4] ***HN8*** We presume that the Legislature acts purposefully when it removes language from one statute, but leaves identical language in a different statute. *See, e.g., Beach v. Great W. Bank, 692 So. 2d 146, 152 (Fla. 1997); Leisure Resorts, Inc. v. Frank J. Rooney, Inc., 654 So. 2d 911, 914 (Fla. 1995)* ("When the [L]egislature has used a term, as it has here, in one section of the statute but omits it in another section of the same statute, we will not imply it where it has been excluded.").

Finally, in his *Levey* dissent, Judge Makar opined that the Legislature could not have intended this result when it could very well happen to its own members. *See Levey, 146 So. 3d at 1232* (Makar, J., dissenting from the denial of rehearing en banc). This is a thought-provoking and compelling statement. Tellingly however, in the two years following the decision in *Levey*, the law remains the same. ***HN9*** This Court presumes that the Legislature is aware of judicial construction of its statutes. *See Dickinson v. Davis, 224 So. 2d 262, 264 (Fla. 1969)* (noting "[t]he Legislature is presumed to know existing law when a statute is enacted, and, also in re-enacting a statute the Legislature is presumed to be aware of constructions placed upon it by the Court.") (internal citation omitted). This suggests further that the bright line was intentional rather than an unfortunate oversight.

Therefore, because the language at issue is clear and unambiguous we are compelled to answer the certified [*21] question in the affirmative. Were we to construe the statute as allowing the payment of the fee with a cashier's check after the end of qualifying, we would literally be legislating by reinserting the language "notwithstanding the end of qualifying" after the Legislature in its wisdom removed it. This is certainly beyond our power because ***HN10*** as a coequal branch of government with the utmost respect for the separation of powers, we can neither legislate nor question the wisdom of the Legislature. *See Holley v. Adams, 238 So. 2d 401, 404-05 (Fla. 1970)* ("First, it is the function of the Court to interpret the law, not to legislate. Second, courts are not concerned with the mere wisdom of the policy of the legislation . . . The judiciary will not nullify legislative acts merely on grounds of the policy and wisdom of such act, no matter how unwise or unpolitic they might be, so long as there is no plain violation of the Constitution."). Answering the certified question in the affirmative does not end our review in this case, however, "because of the dominant force of the Constitution, an authority superior to both the Legislature and the Judiciary." *See id. at 405*.

Wright asserted his constitutional rights in his complaint, alleging that the City Clerk [*22] "further provided [Wright] with a copy of the case *Levy v. Detzner* . . . upon which the City bases its untenable position to deny [Wright] his *constitutional right to run for public office*." In addition, in his initial brief before this Court, Wright stated, "Thus, Mr. Wright implores this Court to reach a different result from the First District, and adopt the compelling dissents of Judges Benton and Makar." Init. Br. of Petitioner at 21. Before the Third District, Wright concluded his briefs by quoting and adopting Judge Makar's conclusion and reference to a case strictly concerning the constitutionality of an election qualification requirement:

> "Disqualifying a candidate who did everything right is both unreasonable and unnecessary." *Levey v. Detzner, 146 So. 3d [at 1234]* (Makar, J., dissenting) (quoting *Treiman v. Malmquist, 342 So. 2d 972 (Fla. 1977)*).

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[4] We note that the Charter of the City of Miami Gardens designates the mayoral [*20] election as one that is nonpartisan—"Nonpartisan Elections. All elections for the Council and Mayor shall be conducted on a nonpartisan basis. The ballot shall not show the party designation of any candidate." However, none of the parties has asserted that *chapter 105 of the Florida Statutes*, governing nonpartisan elections, applies.

Given the fundamental importance of free and fair elections to our republican form of government, the recurrence of these "banking errors" and their ensuing harsh consequences, as well as the strong potential that other prospective candidates have similarly been turned away, but simply declined to keep fighting, we consider this issue to be one of fundamental importance.

Our Florida [*23] Constitution opens by succinctly reaffirming a truism that is the heart of our government: "All political power is inherent in the people." *Art. 1, § 1 Fla. Const.* This Court has long considered free and fair elections vital to ensuring that such political power is not usurped from the people.

Our Constitution further provides that "Registration and elections shall . . . be regulated by law." *Art. VI, § 1, Fla. Const.* This Court has explained that: ***HN11*** "Under this provision, the Legislature is directed to enact laws regulating the election process. . . . The constitutional directive, however, is not plenary: legislative acts that impose '[u]nreasonable or unnecessary restraints on the elective process are prohibited.'" *AFL-CIO v. Hood, 885 So. 2d 373, 375-76 (Fla. 2004)* (quoting *Treiman, 342 So. 2d at 975*). In *Treiman*, this Court examined the contours of this constitutional limitation in detail:

> ***HN12*** Although the Legislature is charged with the authority and responsibility of regulating the election process so as to protect the political rights of the people and the integrity of the political process, these regulations must be reasonable and necessary restraints on the elective process and not inconsistent with the constitution of this state. In order to assure orderly and effective elections, the state may impose reasonable controls. [*24] In *Bodner v. Gray, 129 So. 2d 419 (Fla. 1961)*, this court explained:
>
> > 'The law places restraints upon all of its citizens in the exercise of their rights and liberties under a republican form of government. Such restraints have been found to be necessary in the development of our democratic processes to preserve the very liberties which we exercise. Similar restraints may lawfully be imposed upon individual candidates for public office.'
>
> ***HN13*** The declaration of rights expressly states that 'all political power is inherent in the people.' [*Art. I, § 1, Fla. Const.*] The right of the people to select their own officers is their sovereign right, and the rule is against imposing unnecessary and unreasonable disqualifications to run. *cf. Ervin v. Collins, 85 So. 2d 852 (Fla. 1956)*, wherein this court declared that:
>
> > 'The lexicon of democracy condemns all attempts to restrict one's right to run for office. The Supreme Court of the United States has approved the support of fundamental questions of law with sound democratic precepts.'
>
> ***HN14*** Unreasonable or unnecessary restraints on the elective process are prohibited. *Pasco v. Heggen, 314 So. 2d 1 (Fla. 1975)*.
>
> ***HN15*** Fundamental to our system of government is the principle that the right to be a candidate for public office is a valuable one and no one should be denied this right unless the Constitution or an applicable [*25] valid law expressly declares him to be ineligible. *cf. Vieira v. Slaughter, et al., 318 So. 2d 490 (Fla. 1st DCA 1975)*. This court, in *Hurt v. Naples, 299 So. 2d 17 (Fla. 1974)*, emphasized:
>
> > ***HN16*** 'Discouragement of candidacy for public office should be frowned upon in the absence of express statutory disqualification. The people should have available opportunity to select their public officer from a multiple choice of candidates. Widening the field of candidates is the rule, not the exception, in Florida.'
>
> ***HN17*** To determine reasonableness of the restraint or condition placed on the right to seek public office, the nature of the right asserted by the individual must be considered in conjunction with the extent that it is necessary to restrict the assertion of the right in the interest of the public. *Jones v. Board of Control, 131 So. 2d 713 (Fla. 1961)*.
>
> *Treiman, 342 So. 2d at 975-76*.

Because the disqualification involved here is due to a law expressly disqualifying Wright, our only inquiry is whether the law is a valid law. In performing this inquiry, however, we must remember that ***HN18*** the law in question "comes to us with a presumption of validity—an extremely strong presumption in statutes regulating the conduct of elections." *Bodner, 129 So. 2d at 421*. "To overcome the presumption, the invalidity must appear beyond reasonable doubt, for it must be assumed the [L]egislature intended to enact a valid law." *License Acquisitions, LLC v. Debary Real Estate*

Holdings, LLC, 155 So. 3d 1137, 1143 (Fla. 2014) (internal quotation [*26] marks omitted).

Nevertheless, as Judge Makar and Wright have similarly concluded, we are convinced beyond a reasonable doubt that disqualifying a candidate who did everything right due to an error of a third party bank that was totally beyond the control of the candidate is both unreasonable and unnecessary, as well as plainly irrational.

We have previously undertaken such an analysis on a few occasions. In *Treiman*, we held unconstitutional a judicial candidate oath requirement that the candidate was registered to vote in the last preceding general election. Treiman, 342 So. 2d at 976. This Court noted the arbitrary divide caused by the requirement:

> For those persons who were possessed of all of the qualifications of electors prior to the closing of the registration books preceding the last general election and who actually registered to vote in this state in that election, the statute poses no problem. However, it effectively forecloses the candidacy of all of those otherwise qualified persons who, because of age, illness, residence or other reason, failed or were unable to register to vote in a time period somewhere in the past.

Id. We struck down that requirement as unconstitutional:

> We find that Section 105.031(4)(a) does not serve [*27] any reasonable or legitimate state interest. It does not in any way protect the integrity of the election process or purity of the ballot; it does not serve to keep the ballot within manageable limits, *cf.* Lubin v. Panish, 415 U.S. 709, 94 S. Ct. 1315, 39 L. Ed. 2d 702 (1974), Bullock v. Carter, 405 U.S. 134, 92 S. Ct. 849, 31 L. Ed. 2d 92 (1972), Pasco v. Heggen, [314 So. 2d 1]; nor does it serve to assure orderly and effective elections; it does not serve to maintain party loyalty and perpetuate the party system, *cf.* Crowells v. Petersen, 118 So. 2d 539 (Fla. 1960). The barrier it erects is an unnecessary restraint on one's right to seek elective office. Noteworthy is the fact that this restriction applies solely to candidates for judicial office. No such similar restraint is placed on candidates for any other political office.
>
> For the foregoing reasons, we find Section 105.031(4)(a) unconstitutional.

Id.

Like the arbitrary divide in Treiman, **HN19** the statute at issue here is arbitrary and without a rational basis. For those prospective candidates who tender properly executed checks that ultimately clear because they have done all they were required to, the statute poses no problem. However, the statute effectively forecloses the candidacy of all otherwise qualified candidates who have done all they were required to do but have had their checks returned, not due to insufficient funds or some other matter within their control, [*28] but due to sheer bad luck resulting from a bank error totally beyond their control. This bright line, by turning on luck rather than conduct, is irrational and violates Wright's constitutional right to run for public office. There is no relief valve for circumstances such as these.

Moreover, a quick glance at the Florida Statutes regulating banks and checks reveals that notice that a check has been returned before the end of qualifying is essentially impossible if both the payor bank and collecting bank use all the time they are minimally entitled to under Florida law. The qualifying period for all elections by statute is only 96 hours or 4 days long. *See* §§ 99.061(1)-(3), Fla. Stat.[5] Likewise, a collecting bank and payor bank combined are minimally entitled to at least four business days to effect notice of dishonor. *See* § 674.104(1)(j), Fla. Stat. (2016) ("In this chapter, unless the context otherwise requires, the term: (j) 'Midnight deadline' with respect to a bank is midnight on its next banking day following the banking day on which it receives the relevant item or notice or from which the time for taking action commences to run, whichever is later."); § 674.1081(2), Fla. Stat. (2016) ("An item or deposit of money received on any day after a cutoff hour so [*29] fixed or after the close of the banking day may be treated as being received at the opening of the next banking day."); § 674.1071, Fla. Stat. (2016) ("A branch or separate office of a bank is a separate bank for the purpose of computing the time within which, and determining the place at or to which, action may be taken or notices or orders must be given under this chapter and under chapter 673."); § 674.1091(2), Fla. Stat. (2016) ("Delay by a collecting bank or payor bank beyond time limits prescribed or permitted by this code or by instructions is excused if: (a) The delay is caused by interruption of communication or computer facilities, suspension of payments by another bank, war, emergency conditions, failure of equipment, or other circumstances beyond the control of the bank; and (b)

[5] As noted above, the qualifying period in this particular nonpartisan municipal race was five business days.

The bank exercises such diligence as the circumstances require."); *see generally* § 674.202, Fla. Stat. (2016) (entitled "Responsibility for collection or return; when action timely.").

Indeed, the facts of this case demonstrate that this is more reality than theory. Here, eight days expired—twice the length of the statutory qualifying period—for Wright's check [*30] to be returned erroneously for the bank's failure to locate an account number despite the fact that his check bore his name, address, and account number. Had luck been on Wright's side, a bank official likely would have taken a proper closer look at the check and found the account, avoiding the situation presented today. However, solely because luck was not on Wright's side, he is abruptly disqualified without an opportunity to cure the error, and the citizens of Miami Gardens are deprived of an otherwise qualified candidate. Again, this is irrational. Where offering a cure would not adversely impact an election or the election process, the arbitrary disqualification is the antithesis of our democracy and the election of its officers.

In a similar manner, the bright-line rule imposed by the amendment to section 99.061(7)(a)1. is neither reasonable nor necessary to serving any legitimate state interest we have previously considered in election cases. First, rather than protect the integrity of the election process or purity of the ballot, it only sets a trap that operates in this case to thwart that objective. If this law were to stand, the various cautionary hypotheticals raised by Judge Makar concerning [*31] political shenanigans become true possibilities going forward:

> Finally, a troubling and unintended consequence of disqualifying otherwise qualified candidates on the type of banking error in this case is the potential for political shenanigans. What if political operatives wrongfully induce a banking official to put a hold on a gubernatorial candidate's check causing its return after qualifying's end? Ditto as to checks from a political party? Or if a bank official or employee undertakes a pre-textual check fraud investigation that renders a candidate's qualifying account without funds temporarily? Must the Department turn a blind eye and rotely disqualify candidates in these situations? Asking the question answers it: the Department should not.

Levey, 146 So. 3d at 1233 (Makar, J., dissenting from the denial of rehearing en banc). Moreover, in situations in which there are only two candidates, the threat of political shenanigans against the integrity of the political process is even more pronounced because disqualification of one results in the other candidate winning by default. Indeed, although there are no allegations that political shenanigans were at issue in *Levey*, the statute in that case deprived the [*32] people of an election and all of the benefits that flow from elections:

> As it currently stands, the 68,218 registered voters in House District 113 get the short end of the stick. There will be no robust candidate debates, no campaigning on important legislative issues affecting their futures, and no choice between candidates with alternative visions for their district; instead, they have a qualified candidate unnecessarily pushed to the sidelines and another qualified candidate who wins by default without running the race.

Id. at 1234 (Makar, J., dissenting from the denial of rehearing en banc). Thus, rather than protecting the integrity of the political process, this amendment has injected doubt where there was none—under the previous law, such possibilities for political shenanigans were foreclosed by the candidate's right to tender a cashier's check "notwithstanding the end of qualifying."

Second, we glean from the affidavit of the Miami-Dade Supervisor of Elections and her able briefs in this matter that one might advance the notion that this law serves the interest of assuring orderly and effective elections. However, the fact that the Legislature retained the ability to pay with a cashier's [*33] check within 48 hours notwithstanding the end of qualifying with regard to nonpartisan elections belies such an assertion. Further, in this very case, the Clerk initially offered to accept Wright's payment by cashier's check. Indeed, the prior statute was in effect since 1995 without any problems we have found or that have been brought to our attention. Likewise, similar provisions affording even more time to pay with a cashier's check were quietly in place for decades. Moreover, this draconian measure cannot be said to be necessary when the Legislature alternatively could have moved the statutory qualifying period to an earlier time, as it does in other elections, to assure orderly and effective elections.

It is clear that none of the other interests previously considered by this Court could possibly justify the amendment to section 99.061(7)(a)1. The amendment does not serve to keep the ballot within manageable limits, nor does it serve to maintain party loyalty and perpetuate the party system; it does not serve to protect

a candidate's right to privacy.

Therefore, we conclude that this law unconstitutionally erects a barrier that is an unnecessary restraint on one's right to seek elective office. This [*34] unnecessary and irrational barrier, which has already in the case of *Levey* completely deprived the citizens of an election, can no longer stand. Unreasonable and unnecessary restrictions on the elective process are a threat to our republican form of government. At their worst, they cloak tyranny in the garb of Democracy. *See* Thomas Paine, *Dissertation on the First Principles of Government* (1795) ("The right of voting for representatives is the primary right by which other rights are protected. To take away this right is to reduce a man to slavery, for slavery consists in being subject to the will of another, and he that has not a vote in the election of representatives is in this case.").

HN20 We therefore sever the portion of section 14 of chapter 2011-40, Laws of Florida, that amends *section 99.061(7)(a)1. of the Florida Statutes*. *See* Ch. 2011-40, § 79, Laws of Fla. (2011) ("If any provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable."). Thus, the version of *section 99.061(7)(a)*1. in existence prior to the 2011 amendments is revived [*35] by operation of law. *See Henderson v. Antonacci, 62 So. 2d 5, 7 (Fla. 1952)*.[6]

We are mindful of the impacts and burdens our decision today may have on the Legislature, the Supervisor of Elections, the other candidates, and the City of Miami Gardens. Indeed, as some of the relief requested here is at equity, these are central considerations.

However, ***HN22*** as a Court, our first and foremost duty is to enforce our Constitution and to protect all the rights of all Floridians thereunder. In this case, an irrational, as well as unreasonable and unnecessary restriction on the elective process has tainted the entire Miami Gardens election for the office of Mayor by keeping the name of a candidate off the ballot, and therefore, beyond the reach of all the voters.[7] This is irremediable without a new election.

CONCLUSION

We therefore quash the decision below. As the previous statute is now the law, Wright "shall, the end of qualifying notwithstanding, have 48 hours from the time such notification is received, excluding Saturdays, Sundays, and legal holidays, to pay the fee with a cashier's check purchased [*37] from funds of the campaign account." *§ 99.061(7)(a)1., Fla. Stat.* (2010). This Court's mandate shall serve as Wright's notification. We remand for further proceedings not inconsistent with this opinion, including the invalidation of the August 30 election upon Wright's qualification.

Upon qualification, Wright's name shall be placed on the November ballot. If the parties are unable to accomplish that task, then the City will be forced into a special election for the position of Mayor of the City. *See Francois v. Brinkmann, 147 So. 3d 613, 616 (Fla. 4th DCA 2014), aff'd, 184 So. 3d 504 (Fla. 2016)* (invalidating open primary election where unconstitutional law foreclosed write-in candidate from qualifying); *Matthews v. Steinberg, 153 So. 3d 295 (Fla. 1st DCA 2014), aff'd, SC14-2202, 2016 Fla. LEXIS 1300, 2016 WL 3419207 (Fla. June 22, 2016)* (authorizing invalidation and new election under same circumstances as *Francois, 147 So. 3d 613*).

No motion for rehearing will be entertained.

LABARGA, C.J., and PARIENTE, QUINCE, and PERRY, JJ., concur.

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[6] Contrary to Justice Canady's concur in result only opinion, as we stated above, Wright did raise in his complaint the issue of the constitutionality of the statute by specifically claiming that his constitutional rights were violated. Wright has consistently asserted that the statute is unreasonable, irrational, and unnecessary, as has Judge Makar. *See generally* ***Levey, 146 So. 3d at 1227*** (Makar, J., dissenting from the denial of rehearing en banc). As discussed at length above, arbitrariness, unreasonableness, unnecessariness, and irrationality all characterize the constitutional inquiry for election regulations. *See Treiman, 342 So. 2d at 975-76*. Consequently, Wright's constitutional right to run for public office was not only raised, but has been the focus of the litigation surrounding the statute. In addition, ***HN21*** our precedent in *Holley, 238 So. 2d at 403*, specifically recognizes this Court's duty to invalidate a statute when an unambiguous statute violates a clear mandate of the Constitution: "To the extent . . . that such an act violates expressly or clearly implied mandates of the Constitution, the act must fall, not merely because the courts so decree, but because of the dominant force of the Constitution, an authority superior to [*36] both the Legislature and the Judiciary." *Id. at 405* (citing *Amos v. Matthews, 99 Fla. 1, 99 Fla. 65, 126 So. 308 (Fla. 1930)*).

[7] We note that the voters could not have even written in Wright's name in this election because no write-in candidates were qualified.

CANADY, J., concurs in result only with an opinion.

POLSTON, J., dissents with an opinion.

Concur by: CANADY

Concur

CANADY, J., concurring in result only.

I agree with the result reached by the majority—allowing Wright's candidacy to go forward—but I strongly disagree with the unprecedented route taken by the majority to reach that result.

Based on the arguments presented by Wright, I would decide this case as a matter of statutory [*38] interpretation along the lines advanced by Judge Makar in his dissent from the denial of rehearing en banc in *Levey v. Detzner, 146 So. 3d 1224 (Fla. 1st DCA 2014)*. As Judge Makar cogently explains, the critical sentence in *section 99.061(7)(a)* addresses only circumstances in which a check is returned before "the end of qualifying." *Id. at 1231-32* (Makar, J., dissenting from the denial of rehearing en banc). I therefore disagree with the statutory interpretation adopted by the majority. But I agree with quashing the Third District decision and allowing Wright's candidacy to go forward.

Regarding the majority's holding that the version of *section 99.061(7)(a)* enacted in 2011 is unconstitutional, there is one big problem: the Petitioner has presented no argument challenging the constitutionality of the statute.[8] It is not within the province of an appellate court to overturn the ruling of a lower court on a ground that has not been urged by the party challenging the lower court's decision. Anytime that a court does so, the basic structure of the appellate process—which depends on the presentation of issues and the marshaling of arguments by the parties—is seriously undermined. The damage is compounded when a court sua sponte—without the benefit of any argument by the parties—declares a statute [*39] unconstitutional. In such cases, injury is done not only to the appellate process but also to the separation of powers. "It is a well established principle that the courts will not declare an act of the legislature unconstitutional unless its constitutionality is challenged directly by one who demonstrates that he is, or assuredly will be, affected adversely by it. . . . Courts should not voluntarily pass upon constitutional questions which are not raised by the pleadings." *Henderson v. Antonacci, 62 So. 2d 5, 8 (Fla. 1952)*; *see also State v. Turner, 224 So. 2d 290, 291 (Fla. 1969)* ("This Court has, on a number of occasions, held that it is not only unnecessary, but improper for a Court to pass upon the constitutionality of an act, the constitutionality of which is not challenged; that Courts are not to consider a question of constitutionality which has not been raised by the pleadings. . . ."). Today's decision needlessly transgresses this principle.

Under our system of government, one of the most serious and consequential judgments that any court can render is a judgment that the Legislature has violated the Constitution in enacting a particular law. Here, the majority renders such a judgment without anyone

[8] The majority asserts that the constitutionality of the statute is properly at issue here because Wright "specifically claim[ed] that his constitutional rights were violated" and "has consistently asserted that the statute is unreasonable, irrational, and unnecessary." Majority op. at 27. The majority's position is without any support. Wright [*40] has never sought a determination that the statute is unconstitutional. Indeed, he has never so much as suggested that the statute is constitutionally infirm. His position has consistently been that the City's position regarding application of the statute is incorrect. He has taken the position not that the statute is infirm but that the City's interpretation of the statute is unreasonable. Wright did make a reference in his complaint to the City's "untenable position to deny [Plaintiff] his constitutional right to run for public office." Majority op. at 17 (quoting Petitioner's "Amended Complaint for Declaratory and Injunctive Relief, and Emergency Writ of Mandamus" at ¶ 51) (majority emphasis omitted). That is part of Wright's attack on the City's interpretation of the statute. It is by no means a challenge to the constitutionality of the statute. The majority can provide no quotations or citations to support its assertions. The vacuity of the majority's assertions on this point is highlighted by its reliance on Judge Makar's dissent from the denial of rehearing en banc in *Levey*. The majority says that Judge Makar has asserted that the "the statute is unreasonable, irrational, and [*41] unnecessary." Majority op. at 27 (citing ***Levey, 146 So. 3d at 1227***). As anyone who reads Judge Makar's dissent will soon discover, the majority's characterization of his position is totally incorrect. Judge Makar's position is that the statutory interpretation adopted by the majority here is "unreasonable and unnecessary"—not that the statute is unconstitutional. ***Levey, 146 So. 3d at 1234***. Similarly, the majority's citation of *Holley v. Adams, 238 So. 2d 401 (Fla. 1970)*, provides no support for the majority's consideration of an issue that has not been properly presented. Majority op. at 27. The *Holley* Court addressed the constitutional issue there because "Holley attacked the constitutionality" of the particular statute that was at issue. *Holley, 238 So. 2d at 404*.

suggesting—much less arguing—that such a judgment is required by the Constitution. No matter how wise and learned a court may be, the court should not strike down as unconstitutional a law adopted by the Legislature without the benefit of considering any arguments on the issue of [*42] constitutionality. As a coordinate branch of government, the Legislature is certainly entitled to have some argument in favor of constitutionality considered by a court before that court rules that a statute is unconstitutional. *See* Fla. R. Civ. P. 1.071(b) (providing that a party "drawing into question the constitutionality of a state statute" is required to serve notice on "the Attorney General or the state attorney of the judicial circuit in which the action is pending").

The potential for unanticipated and untoward consequences is manifest when the court fails to hear and consider such arguments. The majority's decision in this case provides a perfect example. Here, the majority declares the statute facially unconstitutional—rather than unconstitutional as applied—and resurrects an earlier version of the statute under which a candidate who submits a check that is properly returned by the bank for non-sufficient funds will nonetheless be given an opportunity to cure the defect. It is unfathomable that such a result could be required by the Constitution, but that result is mandated by today's ill-considered decision.

Dissent by: POLSTON

Dissent

POLSTON, J., dissenting.

Section 99.061(7)(a)1., Florida Statutes (2016) (emphasis added), clearly and unambiguously provides [*43] that "[i]f a candidate's check is returned by the bank *for any reason*, the filing officer shall immediately notify the candidate and the candidate shall have until the end of the qualifying to pay the fee with a cashier's check purchased from funds of the campaign account." The same statute explains that the "[f]ailure to pay the fee as provided in this subparagraph shall disqualify the candidate." *Id.* As explained in the majority opinion, pursuant to the plain language of this subsection, Mr. Wright is disqualified as a candidate because his check was returned by the bank and he did not pay the qualifying fee with a cashier's check by the end of the qualifying period.

While this result is harsh, particularly considering that Mr. Wright did all he could possibly have done to comply with the statutory requirements, this Court does not have the constitutional authority to rewrite statutes lawfully enacted by our state's legislature by just asserting that a statute that it does not wish to enforce is unnecessary, unreasonable, and arbitrary. I agree with Justice Canady's rejection of the majority's decision to declare the statute unconstitutional. As Justice Canady explains, the petitioner here did [*44] not raise a constitutional challenge to the statute in this Court. By addressing and deciding the case based on a facial constitutional claim that was not raised or briefed by the parties, the majority becomes an advocate rather than a neutral decision maker.

Even if the petitioner had raised a facial challenge to the statute, the challenge would fail under this Court's precedent. Because section 99.061(7)(a)1. serves the legitimate government purpose of ensuring that candidates for office lawfully pay the required qualifying fee with campaign funds, it passes the rational basis test and is, therefore, constitutional. *See* Fla. High School Activities Ass'n v. Thomas, 434 So. 2d 306, 308 (Fla. 1983) ("Under a 'rational basis' standard of review a court should inquire only whether it is conceivable that the regulatory classification bears some rational relationship to a legitimate state purpose.").

The majority holds that the statute is facially unconstitutional due to the circumstances involved in this case while acknowledging that "[f]or those prospective candidates who tender properly executed checks that ultimately clear because they have done all they were required to, the statute poses no problem." Majority op. at 21. This turns facial constitutional review on its head. As this Court [*45] has explained, "[f]or a statute to be held facially unconstitutional, the challenger must demonstrate that no set of circumstances exists in which the statute can be constitutionally applied." Abdool v. Bondi, 141 So. 3d 529, 538 (Fla. 2014); *cf.* Accelerated Benefits Corp. v. Dep't of Ins., 813 So. 2d 117, 120 (Fla. 1st DCA 2002) ("In considering an 'as applied' challenge, the court is to consider the facts of the case at hand."). Contrary to the majority's decision today, this Court's precedent emphasizes that an "[a]ct will not be invalidated as facially unconstitutional simply because it could operate unconstitutionally under some [] circumstances." Abdool, 141 So. 3d at 538.

I would not foreclose the possibility of a successful as-applied constitutional challenge to this statute. However, as stated above, the petitioner did not raise any constitutional challenge to the statute in this Court, as-

applied or otherwise.

I respectfully dissent.

End of Document

Levey v. Detzner

Court of Appeal of Florida, First District

September 22, 2014, Opinion Filed

CASE NO. 1D14-3854

Reporter
146 So. 3d 1224 *; 2014 Fla. App. LEXIS 14777 **; 39 Fla. L. Weekly D 2030

LAURA RIVERO LEVEY, Appellant, v. KEN DETZNER, Secretary of State, State of Florida; PENELOPE TOWNSLEY, Supervisor of Elections, Miami-Dade County, Florida; and DAVID RICHARDSON, Appellees.

Subsequent History: Released for Publication October 8, 2014.

Prior History: [**1] An appeal from the Circuit Court for Leon County. Charles A. Francis, Judge.

Levey v. Detzner, 146 So. 3d 1224, 2014 Fla. App. LEXIS 13717 (Fla. Dist. Ct. App. 1st Dist., Sept. 3, 2014)

Core Terms

qualifying, candidate, disqualify, sentence, checks, election, campaign, en banc, notify, certified check, requirements, funds, cure, fail to pay, deposit, qualification, registered, days, qualified candidate, cashier's check, post-qualifying, situations, happened, statutes, harsh

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J. Andrew Atkinson, General Counsel, and Ashley E. Davis, Assistant General Counsel, Florida Department of State, for Appellee Florida Secretary of State Kenneth W. Detzner.

R.A. Cuevas, Jr., Miami-Dade County Attorney; Oren Rosenthal and Michael B. Valdes, Assistant County Attorneys, Miami, for Appellee Penelope Townsley.

Mark Herron, Robert J. Telfer, III, and J. Brennan Donnelly of Messer Caparello, P.A., Tallahassee, for Appellee David Richardson.

Judges: LEWIS, C.J., WOLF, ROBERTS, CLARK, WETHERELL, ROWE, MARSTILLER, RAY, and OSTERHAUS, JJ., concur. BENTON, VAN NORTWICK, and PADOVANO, JJ., dissent. MAKAR, J., dissents in an opinion in which THOMAS, J., joins. SWANSON, J., dissents with opinion.

Opinion

[*1227] ORDER ON MOTION FOR REHEARING EN BANC

A judge of this court requested that this cause be considered en banc in accordance with *Florida Rule of Appellate Procedure 9.331(d)*. All judges in regular active service have voted on this request. Less than a majority of those judges voted in favor of rehearing en banc. Accordingly, the request for rehearing en banc is denied.

Dissent by: MAKAR; SWANSON

Dissent

MAKAR, J., dissenting from [**2] the denial of rehearing en banc.

Presented with two interpretations of an election statute, one that puts a compliant candidate on the ballot and one that does not, our court has chosen the latter course, an en banc vote failing by two votes. Our supreme court has said, however, that election statutes should not be read in overly-rigid ways that deprive the people of their constitutionally-recognized political power to vote for candidates of their choosing. Under

these circumstances, en banc review is warranted due to the exceptional importance of the question presented. Rule 9.331(a), Fla. R. App. P. (2014).

I.

Laura Rivero Levey would like to represent the people of House District 113, located in Miami-Dade County, which has a total of 68,218 registered voters.[1] The [*1228] qualifying period for the 2014 election cycle began at noon on Monday, June 16, 2014, and was set to end at noon on Friday, June 20, 2014. On the second day of that week, Levey timely filed all necessary paperwork to run as a Republican candidate against the incumbent Democrat, who likewise timely filed the required paperwork. Both also timely filed checks in the proper amounts for their qualifying fees, which were drawn upon their respective campaign [**3] accounts and made payable to the Florida Department of State (the Department as shorthand).

Based on their submitted paperwork, both Levey and her Democratic compatriot were certified as "qualified" because each had complied with relevant statutory requirements, including the subparagraph at issue in this case, which states:

> (7)(a) *In order for a candidate to be qualified*, the following items must be received by the filing officer by the end of the qualifying period:
>
> 1. *A properly executed check drawn upon the candidate's campaign account payable to the person or entity as prescribed by the filing officer in an amount not less than the fee required by s. 99.092*, unless the candidate obtained the required number of signatures on petitions pursuant to s. 99.095. The filing fee for a special district candidate is not required to be drawn upon the [**4] candidate's campaign account. *If a candidate's check is returned by the bank for any reason, the filing officer shall immediately notify the candidate and the candidate shall have until the end of qualifying to pay the fee with a cashier's check purchased from funds of the campaign account.* ***Failure to pay the fee as provided in this subparagraph shall disqualify the candidate.***
>
> . . .

§ 99.061(7)(a)1, Fla. Stat. (2014) (various emphases added). Each of the differently highlighted portions are discussed in turn below.

Turning first to the italicized-only portions of the statute, it states that a candidate is deemed "qualified" if she provides the Department by the end of the qualifying period with a check that meets statutory requirements (properly executed, drawn on campaign account, payable to proper person or entity, and so on). No dispute exists that Levey did so; she was thereby deemed "qualified" and the Division of Elections officially informed her so. Likewise, as to her opponent.

What happened in the post-qualifying period, however, triggered the present controversy and spawned the statutory construction dispute at issue. Under section 99.061(7)(a)1, a candidate who is deemed otherwise "qualified" can be *disqualified* based on [**5] the last sentence in the subparagraph (italicized and bolded above), which provides that the "[f]ailure to pay the fee as provided in this subparagraph shall disqualify the candidate." Which leads to the banking snafu at center stage in this matter.

Levey's check from SunTrust was drawn upon her campaign account as the statute requires (other payment methods, such as a certified check, PayPal®, or the like, are impermissible) and was filed timely with the Department. Once filed, qualifying fee checks embark on a circuitous route. The Department deposits checks into an account at Bank of America, which then undertakes efforts to collect the funds. Notice that a check is dishonored goes to the Florida Department of Financial Services (DFS), not to the Department; the reason is that funds deposited in the state treasury become treasury funds under the control of DFS.

A check's odyssey through this labyrinth may span a number of days. As a result, qualifying fee checks may not clear *before* [*1229] the end of qualifying and may require some effort by banking institutions and election officials to determine whether payment is forthcoming. Such was the case with Levey's check.

The Department deposited Levey's [**6] SunTrust check in its Bank of America account on Wednesday, June

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[1] *See* Fla. Dep't of State, Div. of Elec., *2014 Primary Election, Active Registered Voters by House District, available at* http://election.dos.state.fl.us/voter-registration/statistics/pdf/2014/pri2014_CountyPartyHouseDist.pdf (data as of July 28, 2014). Of that number, 27,902 are registered as Democrats, 16,881 are registered as Republicans, 1,545 are registered with other miscellaneous parties, and the remaining 21,890 are nonparty affiliated. *Id.*

18th. Soon thereafter, Bank of America presented the check for payment, but was told that SunTrust had placed a hold on it, apparently because someone in its fraud department decided to investigate the validity of a check from the Republican Party of Florida that had been deposited in Levey's account (the party check had cleared on June 16, 2014).[2] After a second attempt to deposit the check and being told a hold remained on Friday, June 20th, Bank of America returned Levey's check to DFS on Saturday, June 21st, (after the qualifying deadline), denoting it as "uncollected funds." To this point, with qualifying now over, neither the Department of State, the Division, nor Levey had been notified that any problem existed; and as we'll see later, Levey could not avail herself of the certified check cure in *section 99.061(7)(a)1* (underlined in the statute above).

The weekend having passed, the next business day, Monday, June 23rd, DFS prepared a debit memorandum notifying [**7] the Department that Levey's check had been returned. DFS sent the memorandum via interoffice mail, the Department not receiving it until two days later on June 25th. According to the Bureau Chief of Election Records, debit memoranda are delivered by interoffice mail, not electronically.

Two days later, on Friday, June 27th, the Division—apparently unaware of the looming kerfuffle over Levey's qualifying check—certified her as qualified as a candidate for House District 113. Levey's certification was on the last day of the statutory deadline for doing so. *See § 99.061(6), Fla. Stat.* (2014) ("The Department of State shall certify to the supervisor of elections, within 7 days after the closing date for qualifying, the names of all duly qualified candidates for nomination or election who have qualified with the Department of State.").

Another weekend passed. On Monday, June 30th, the Division first became aware of the situation. In response, it called Levey the next day, July 1st, to notify her that her check had not cleared and that she was going to be disqualified.

Understandably distraught, Levey responded on Thursday, July 3rd, with a letter from a senior vice president of SunTrust explaining that the snafu [**8] related to Levey's qualifying check was entirely due to bank error and no fault of Levey; a cashier's check from SunTrust drawn from funds in Levey's account was tendered as well.

Almost a week later on Wednesday, July 9th, Levey—having heard nothing from the Department—filed suit seeking a declaration that she was a qualified candidate; she also sought an order directing the Secretary to add her to the list of qualified candidates and directing the Supervisor of Elections to add her name to the ballot for the November 2014 general election.

Two days later, the Department advised Levey that—despite having initially been deemed qualified by the Division—she was now disqualified because her check was deemed dishonored; her cashier's check was later returned to her.

After discovery and an August 8th hearing on the parties' motions for summary [*1230] judgment, the trial court ruled against Levey on August 18th. In doing so, it found that "[t]here was nothing [Levey] could have done differently that would have changed what happened during the week of qualifying." Nonetheless, it stated:

> 3. The application of the law in this case results in a harsh decision, but the Court is bound by precedent that says when [**9] the Legislature speaks clearly to a particular item, the Court is not to guess at what it means. Specifically, the Legislature in Section 14, Chapter 2011-40, Laws of Florida, amended *Section 99.061 (7)(a)7 [sic], Florida Statutes*, to eliminate or preclude the relief sought by [Levey] in this case.
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> 4. Although a check, properly made and drawn on the campaign account, was delivered during the qualifying period, it was returned. The result was the qualifying fee in this case was not paid *before the end of the qualifying deadline as required by statute*.

(Emphasis added). Levey appealed and a divided panel of this court affirmed.

II.

Two alternative statutory interpretation paths are in play. The first relies upon a plain reading of the statutory language to reach a sensible and workable result that, happily, effectuates the political power of the citizenry. *See Art. 1, § 1, Fla. Const.* ("All political power is inherent in the people."). This reading also conforms to principles of strict statutory construction, and advances

[2] The bank investigator's stated reason for why the check drew scrutiny was that the "$2,000 deposit was a very large deposit into a brand new account" that had no "customer history."

the judicial philosophy in candidate qualification cases that statutes should be construed to enable the people to exercise their right to vote for their favored candidates. *State ex rel. Siegendorf v. Stone, 266 So. 2d 345, 346 (Fla. 1972)* ("Literal and 'total compliance' with statutory [**10] language which reaches hypersensitive levels and which strains the quality of justice is not required to fairly and substantially meet the statutory requirements to qualify as a candidate for public office.").

In candidate qualification cases, this court has recognized the "general philosophy of our Supreme Court was stated in [*Siegendorf*], wherein that Court held a technical flaw in a candidate's qualifying papers should not prevent his candidacy[.]" *Bayne v. Glisson, 300 So. 2d 79, 82 (Fla. 1st DCA 1974)*. Thus, rather than disenfranchise candidates and voters, "[i]t is better in such factual situations to let the people decide the ultimate qualifications of candidates unless they appear clearly contrary to law." *Siegendorf, 266 So. 2d at 347*; *see also Hurt v. Naples, 299 S. 2d 17 (Fla. 1974)* ("Widening the field of candidates is the rule, not the exception, in Florida."); *see generally Validity and effect of statutes exacting filing fees from candidates for public office, § 7[b]* ("What constitutes payment—Timeliness of payment or filing receipt"), 89 A.L.R.2d 864 ("The most frequently occurring problem in connection with the meaning of filing fee statutes is whether the fee, admittedly due, has been paid within the time prescribed by the law, and in answering it the tendency of the courts has been to construe the provisions liberally [**11] in favor of the candidate.").

This philosophical norm in mind, we turn to the statute. No dispute exists that Levey fully complied with everything she was required to do. She submitted all the requisite items, including a valid check in the proper amount in a timely manner.[3] The statute proclaims that "[i]n order for a candidate to be qualified" specified "items [*1231] must be received by the filing officer by the end of the qualifying period" including a "properly executed check drawn upon the candidate's campaign account payable to the person or entity as prescribed by the filing officer in an amount not less than the fee required by s. 99.092 . . . ." *§ 99.061(7)(a)1, Fla. Stat.* A plain reading of this statutory language supports the conclusion that because Levey fully complied with these requirements, she met the requirements to be qualified; indeed, she was deemed qualified.

That, of course, does not end the story. Simply submitting a compliant check in a timely manner does not ensure one's ultimate qualification for the ballot. Despite [**12] being initially deemed qualified, a candidate in Levey's position is subject to possible disqualification for actually failing to pay the fee. The last sentence of statute says so: "Failure to pay the fee as provided in this subparagraph shall disqualify the candidate." *Id.* What constitutes a "failure to pay" and what effort the Department must take to ensure payment are undefined; no rule or policy exists. Further, nothing in the statute says a candidate's check must clear the bank prior to the end of qualifying; nor does it place any post-qualifying time limit on when it must do so. The statute only states that the "failure to pay the fee" results in disqualification, which leaves unanswered the parameters of the authority and discretion the Department may exercise in these situations.

At this point it is worth noting two things. First, nothing in statutory language supports the trial court's conclusion that a qualifying fee must be paid "before the end of the qualifying deadline as required by statute." To the contrary, the statute is silent on when payment is to be effectuated. Indeed, the statute as written—and applied by the Department—only requires the submission of a check that [**13] meets the requirements (set out in the first sentence of *subparagraph 7(a)(1)* before the end of qualifying; payment can and must occur sometime thereafter. As discovery shows, and reason dictates, for checks submitted late in the qualifying process, the payment of qualifying fee checks can and does occur after qualifying is over.

Second, because payment issues necessarily must be resolved even after qualifying is over, the Department has an affirmative duty to do so. Nothing in the statute (nor in any rule) prohibits the Department from exercising authority and discretion as to payment issues during the post-qualifying period. *See § 99.061(10), Fla. Stat.* ("The Department of State may prescribe by rule requirements for filing papers to qualify as a candidate under this section."). While neither the statute nor a rule specifies how the Department is to process payment for timely-received qualifying fee checks, it is obvious that it must do so. Discovery in this case shows that the Department engaged in appropriate investigation and notification activities that pose no meaningful administrative burdens.

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[3] Her situation is unlike cases where a candidate fails to file her qualification papers or filing fees timely, *see, e.g., State ex rel. Taylor v. Gray, 157 Fla. 229, 25 So. 2d 492 (Fla. 1946)* (failure to pay "qualifying fee within the time required by law").

Most importantly, the context in which the Department operates—i.e., qualifying candidates for public office—suggests [**14] that standards or practices that cause admittedly "harsh" results, such as the case at hand, should be avoided. The supreme court's philosophy in this class of cases, one that allows room for substantial compliance, governs. *See* Browning v. Young, 993 So. 2d 64, 67 (Fla. 1st DCA 2008) (applying substantial compliance doctrine in holding that error in candidate's financial disclosure form did not disqualify her from public office). Problems may arise (such as the erroneous hold on Levey's check in this case that temporarily and wrongfully delayed payment) that can be resolved [*1232] quickly as the bank's confession of error did as to Levey's check. The Legislature has given no indication that it wants the Department to disqualify fully compliant candidates based on easily correctable bank errors arising after qualifying has ended. While the State has an interest in the orderly administration of the candidate qualification process, the balance decidedly shifts in favor of putting candidates on the ballot under the circumstances presented.

Indeed, it is hard to believe that legislators intended that a fully compliant candidate, such as Levey, be disqualified due to an error beyond her control—when they could easily find themselves in the same position. [**15] None of the intervening snafus and delays within the banking system were attributable to Levey, as the trial court specifically held: "[t]here was nothing [she] could have done differently that would have changed what happened during the week of qualifying."[4]

A second and competing construction of section 99.061(7)(a)1, Florida Statues, relies heavily on a sentence (underlined in subparagraph above) [**16] that has no application in this case. It states:

> If a candidate's check is returned by the bank for any reason, the filing officer shall immediately notify the candidate and the candidate shall have until the end of qualifying to pay the fee with a cashier's check purchased from funds of the campaign account.

Under plain language principles, this sentence is best understood as creating a limited remedy that allows a candidate to file a certified[5] check as a cure *before qualifying is over*, provided the Department notified the candidate that her check had been returned. It is a remedial sentence, not a punitive one. The remedy serves no purpose if notification is not given until after qualifying is over; a candidate cannot submit a certified check before the "end of qualifying" if she wasn't notified until after the qualifying period has ended. Levey was not notified by the Department about any potential problems with the check until *after qualifying was over*: indeed, the Department did not even know of the problem until ten days after qualifying had ended. Beyond having no application in this case, Levey had no need to cure anything; her check was valid when written and remains valid today. [**17]

The alternative construction of this sentence extrapolates its provisions onto the *post*-qualifying period. This makes little sense because the sentence creates a remedy, a certified check, which can be filed only *before* "the end of qualifying." Nothing in this sentence speaks to returns of checks or other check-related problems arising after the end of qualifying; instead, it has a limited, focused purpose to remedy returned check problems that arise prior to the end of qualifying.

[*1233] Similarly, nothing shows a legislative intent that the phrase "returned for any reason" applies other than in the period *before* the end of qualifying. The alternative construction of the statute, however, applies this phrase to check-related problems that arise after the end of qualifying, which—rather than a strict construction of the sentence—amounts to an expansion of it. In context, it makes sense that the Department should [**18] "immediately" notify candidates whose checks are "returned for any reason" so that they can file certified checks as a cure before the end of qualifying. Doing so allows for a potentially efficient

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[4] The trial court's finding notwithstanding, the suggestion that Levey may have had some fault in what happened is not borne out by the record. At most, SunTrust claimed it sent an email to Levey about a hold on the check; Levey denied receiving an email and no evidence of the actual email exists (only an unhelpful "screen shot" from an all but abandoned software program). But whatever missteps occurred were by the bank, which accepted full responsibility for its errors. For this reason, no *material* disputed facts exist making summary judgment proper. Even if the candidate had received an email from the bank about a hold (not a "return" of the check, which is different), the fact remains that the *Department* did not know about and failed to provide notification of a potential problem until after the end of qualifying.

[5] Under Department policy, a certified check cannot be submitted initially; it can only be submitted as a remedy for a "returned check" under this sentence. Which explains why the Department declined to accept the certified check Levey submitted after the end of the qualifying period.

mechanism to cure returned check problems arising before qualifying ends. But this case is not one of the situations to which the sentence applies. And the application of this phrase to post-qualifying determinations of whether a candidate should be disqualified for the "[f]ailure to pay the fee" imposes a harsh penalty the Legislature has not authorized.

In addition, the alternative approach relies on the italicized portion of the payment/disqualification sentence as having special significance ("Failure to pay the fee *as provided in this subparagraph* shall disqualify the candidate."). If the Legislature intended this italicized language to mean that all qualifying checks (whether they be the initial checks submitted or certified cure checks under the remedial sentence) must clear and yield payment *before* the end of qualifying, it woefully failed. While the italicized language might support the conclusion that a certified check is the requisite method of curing returned check problems discovered [**19] prior to the end of qualifying, it is a major leap to conclude that candidates are disqualified if their timely-filed checks do not clear and provide payment until after the end of qualifying.

What's more, the 2011 amendment to the cure sentence in section 99.061(7)(a)1 yields little support for the alternative reading of the statute.

> If a candidate's check is returned by the bank for any reason, the filing officer shall immediately notify the candidate and the candidate shall *have until* , the end of qualifying notwithstanding, have 48 hours from the time such notification is received, excluding Saturdays, Sundays, and legal holidays, to pay the fee with a cashier's check purchased from funds of the campaign account.

Chapter 2011-40, Laws of Fla. § 14. While the Legislature tightened the timeframe for paying fees with certified checks returned prior to the end of qualifying, it created uncertainty as to what happens when check problems arise after the end of qualifying. The language of the revised statute simply does not address the matter directly. And if the Legislature intended the harsh, if not draconian, result in this case, it could have easily (re)written the statute to say so.

Finally, a troubling and [**20] unintended consequence of disqualifying otherwise qualified candidates on the type of banking error in this case is the potential for political shenanigans. What if political operatives wrongfully induce a banking official to put a hold on a gubernatorial candidate's check causing its return after qualifying's end? Ditto as to checks from a political party? Or if a bank official or employee undertakes a pre-textual check fraud investigation that renders a candidate's qualifying account without funds temporarily? Must the Department turn a blind eye and rotely disqualify candidates in these situations? Asking the question answers it: the Department should not.

III.

In conclusion, the natural and literal construction of section 99.061(7)(a)1, one that allows for the Department's acceptance [*1234] of payment on checks that are erroneously held by a bank, makes the most sense. In contrast, extrapolating statutory provisions that apply only in the pre-qualifying period to situations that arise in the post-qualifying period creates a harsh and unreasonable result the Legislature could not have intended. Disqualifying a candidate who did everything right is both unreasonable and unnecessary. Treiman v. Malmquist, 342 So. 2d 972, 975 (Fla. 1977) ("The right of the people [**21] to select their own officers is their sovereign right, and the rule is against imposing unnecessary and unreasonable disqualifications to run."). As it currently stands, the 68,218 registered voters in House District 113 get the short end of the stick. There will be no robust candidate debates, no campaigning on important legislative issues affecting their futures, and no choice between candidates with alternative visions for their district; instead, they have a qualified candidate unnecessarily pushed to the sidelines and another qualified candidate who wins by default without running the race. These circumstances, and the exceptional importance of the legal question presented, warrant en banc review.

SWANSON, J., dissenting on denial of en banc.

I concur with Judge Makar that en banc review is warranted in this case. The issues presented are of great public importance and the final opinion will serve as broadly impacting precedent.

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