IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16-2013-CF-5781 AXXX

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD SMITH

STATE'S RESPONSE TO DEFENDANT'S MOTION TO STRIKE NOTICE OF INTENT TO SEEK THE DEATH PENALTY AND BAR THE STATE FROM SEEKING THE DEATH PENALTY BASED ON U.S. SUPREME COURT'S DECISION IN *HURST V. FLORIDA*

COMES NOW, the State, by and through the undersigned Assistant State Attorney, and files this response in opposition to the Defendant's motion to strike notice of intent to seek the death penalty and to bar the State from seeking the death penalty as follows:

1. In his motion, Smith acknowledges that he has been put on notice that the State will seek the death penalty in his case. Smith claims, however, that as a result of the United States Supreme Court's decision in Hurst v. Florida, the only possible penalty for first degree murder in Florida, now, is life without the possibility of parole. Smith's motion is due to be denied for two reasons.

2. First, a trial court is not at liberty to strike the State's notice of intent to seek the death penalty prior to trial. State v. Bloom, 497 So.2d 2 (Fla. 1986)(a

circuit judge lacks authority to decide pre-trial whether the death penalty will be imposed in a first-degree murder case.). This is so because the decision to seek the death penalty is solely within the purview of the prosecutor. [1]

3. Rather than striking the State's notice of intent to seek the death penalty, the appropriate time to determine whether the defendant may be lawfully sentenced to death is during the separate proceedings on the issue of penalty conducted pursuant to Section 921.141(1), Florida Statutes. [2] In accord with the Florida Supreme Court's decision in Bloom, Smith's motion should be denied.

4. Second, this Court should deny Smith's motion because his motion rests on the assumption that Florida's death penalty sentencing statute has been declared unconstitutional in its entirety. It has not.

5. Instead, in Hurst, the Court determined that Florida's capital sentencing statute, Section 921.141, is unconstitutional because it permits a trial judge to make death eligibility findings of fact, specifically the existence of statutory aggravators set forth in Section 921.141(5), that were not found by the jury. [3]

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[1] There is a narrow exception to this rule not applicable in this case. State v. Donner, 500 So.2d 532 (Fla. 1987) (prosecutorial discretion can be curbed when it is based on impermissible motives such as race, religion, or a desire to prevent the exercise of the defendant's constitutional rights).

[2] Logically, this determination could not even be made until after the jury makes the requisite findings of fact and recommendation. Only then, could the Court, under the current statute, determine whether imposition of a death sentence would be lawful.

[3] Nothing in Hurst altered the exception set forth in Ring that a prior conviction for a violent felony is a fact that need not be found by the jury. Moreover, while Hurst spoke generally in terms of facts that need to be found by the jury, it is clear these facts are limited to the aggravating factors proven by the State to exist and do not include the selection factors set forth in Section 921.141(2), Florida Statutes. Kansas v. Carr, 136 S.Ct. 633 (2016)(noting that aggravating factors are "purely factual determination(s)" and observing, in contrast, that whether mitigation exists is "largely a judgment call (or perhaps a valuecall)" and that "of course, the ultimate question whether mitigating

6. In reality, Hurst is all about the procedure Florida uses to sentence a defendant to death and not about the substance of the statute. Importantly, Hurst did not abolish the death penalty in Florida nor did it declare the death penalty unconstitutional.

7. Accordingly, should Smith go to trial before the Legislature amends Section 921.141 to make it Hurst compliant, the trial judge may remedy any procedural infirmity in the statute by way of an appropriate jury instruction and verdict form whereby the jury makes findings of fact as to the aggravators and the trial judge limits its aggravation findings to the aggravators found to exist by the jury. [4] Nothing in the statute precludes this court from crafting such a remedy.

8. Leaving the remedy to the trial court in the face of an unconstitutional application of an otherwise valid statute has been done recently, albeit in another context. In Miller v. Alabama, 132 S.Ct. 2455 (2012), the United States Supreme Court ruled that, for juvenile offenders, a mandatory life sentence without the possibility of parole was unconstitutional. [5] At the time Miller was decided, the only statutorily permissible punishment for juvenile offenders

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circumstances outweigh aggravating circumstances is mostly a question of mercy—the quality of which, as we know, is not strained."

[4] The State will be prepared to propose Hurst compliant jury instructions and a verdict form.

[5] The State uses the term "juvenile offenders" or "juvenile" in this response to mean a defendant who was under the age of 18 at the time he committed the murder.

convicted of first degree murder in Florida was mandatory life without the possibility of parole or death. *Section 775.082(1), Florida Statutes (2011).*

9. Not until July 1, 2014 did the Florida Legislature address Miller by amending Section 775.082, Florida Statutes and enacting Sections 921.1401 and 921.1402, Florida Statutes. [6]

10. In the two year interval between the time Miller was decided and the Legislature acted to address the decision in Miller, the question of how to constitutionally apply Section 775.082(1), Florida Statutes to juvenile murderers was left to Florida's courts. In turn, some appeals courts, including the First District Court of Appeal, left the task of crafting a constitutional sentence and sentencing procedure to the trial courts, subject, of course, to appellate review. *See* Washington v. State, 103 So.3d 917, 920 (Fla. 1st DCA 2012)(reversing and remanding Washington's mandatory life sentence in light of Miller but leaving the potential range of sentencing options to the trial court). [7] *See also* Ortiz v. State, 119 So.3d 494, 496 (Fla. 1st DCA 2013)(Makar J. concurring)(noting that the First District Court of Appeal has determined that it is appropriate for the

[6] These three statutes set forth procedures by which a juvenile could be sentenced to life, a term of years equal to life or a term of years short of a life sentence, as well as a review process whereby, with the exception of prior violent offenders, juvenile killers could get their sentence reduced after a period of time.

[7] The Fourth District Court of Appeal was of the same view as the First District Court of Appeal while two other courts of appeal believed that the previous statute, calling for a sentence of life with the possibility of parole after 25 years, provided a lawful sentence. See Orange v. State, 149 So.3d 74 (Fla. 4th DCA 2014) *disapproved on other grounds by* Lawton v. State, 2015 WL 156572540 (Fla. 2015).

trial courts to get the first crack at determining a lawful sentence for juvenile murderers in light of Miller). [8]

11. Implicit in both Washington and Ortiz, is the First District Court of Appeal's determination that a trial court has the inherent authority to craft procedures designed to cure constitutional defects in a statute even before the Legislature steps in to repair it.

12. Because Florida's death penalty statute has only been declared unconstitutional on narrow grounds and because the trial court has the ability to remedy any constitutional infirmity within the parameters of the current statute, Smith is not entitled to the relief he seeks and his motion should be denied.

[8] Eventually, the Florida Supreme Court determined that juvenile offenders, whose sentences were found to be unconstitutional under Miller, would be subject to the juvenile sentencing statute enacted by the legislature effective July 1, 2014 even though the statute, on its face, limited its applicability to offenses committed on or after the effective date of the statute. See Horsley v. State, 160 So.3d 393 (Fla. 2015).

BASED ON THE FOREGOING, the State respectfully requests this Court deny Smith's motion to strike notice of intent to seek the death penalty as well as his request to bar the State from seeking death in this case.

Respectfully submitted,

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CERIFICATE OF SERVICE

I certify that a copy of the foregoing response has been furnished to counsel for the defendant by E-service this 2ND day of February 2016.

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