Supreme Court of Florida

WEDNESDAY, JANUARY 4, 2017

CASE NO.: SC16-547
Lower Tribunal No(s).:
5D16-516; 492013CF000612XXXAXX

LARRY DARNELL PERRY	vs.	STATE OF FLORIDA
Petitioner		Respondent

In Perry v. State, we invalidated the revised section 941.141 ("the Act") as a whole because the 10-2 recommendation rendered the Act unconstitutional under the requirements of Hurst. No. SC16-547, 41 Fla. L. Weekly S449, S453, 2016 WL 6036982 (Fla. Oct. 14, 2016). As we stated, "While most of the Act can be construed constitutionally under our holding in Hurst, the Act's 10-2 recommendation requirement renders the Act unconstitutional." Id. Thus, the Act "cannot be applied to pending prosecutions." Id.

Respondent's Motion for Clarification is hereby denied.

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

POLSTON, J., dissenting.

This Court should clarify its conflicting decision in this case, which has created confusion and paralysis across the state regarding the death penalty and capital trials, including concerns about a defendant's constitutional right to a speedy trial. See Evans v. State, SC16-1946; Rosario v. State, SC16-2133.

In the beginning of its analysis in Perry, the majority of this Court summarized its conclusion as follows:

> 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.

Perry v. State, 41 Fla. L. Weekly S449, at *3 (Fla. Oct. 14, 2016). Based upon this detailed description of its holding, Floridians would logically assume that the majority of this Court held that the Act can be applied to pending prosecutions. Indeed, the majority specifically stated that "most of the provisions of the Act can be constitutionally construed and could otherwise be validly applied to pending prosecutions." Only two votes pursuant to the Act would be unconstitutional as applied: 10-2 and 11-1. In other words, the Act can be validly applied to pending prosecutions and that application would not be unconstitutional pursuant to Hurst if the death recommendation was unanimous. Obviously, the application of the Act would not be unconstitutional if it resulted in a life sentence.

However, when concluding its opinion, the majority contradicted itself regarding whether the Act can be applied to pending prosecutions at all:

> The Act, however, is unconstitutional because it requires that only ten jurors recommend death as opposed to the constitutionally required unanimous, twelve-member jury. Accordingly, it cannot be applied to pending prosecutions.

Id. 41 Fla. L. Weekly S449, at *8 (emphasis added).

Apparently, with its order in this case (combined with its opinions in Evans v. State, SC16-1946, and Rosario v. State, SC16-2133), the majority is choosing its second statement that the Act cannot be applied to pending prosecutions rather than its first that it can be applied constitutionally to the extent that the death recommendation is unanimous. This choice is incomprehensible given that the majority has already held that a Hurst error under the prior statute, which had fewer jury finding requirements than the Act involved here, is harmless beyond a reasonable doubt if the jury unanimously recommended the death sentence. See Davis v. State, No. SC11-1122, 2016 WL 6649941, at *29 (Fla. Nov. 10, 2016) (concluding that the Hurst error was harmless and explaining that "we can conclude that the jury unanimously made the requisite factual findings to impose death before it issued the unanimous recommendations").

To be clear, I still do not believe the Act is unconstitutional under Hurst v. Florida. See Perry, 41 Fla. L. Weekly S449, *9 (Canady, J., dissenting); see also Smith v. Alabama, 580 U.S. ___, No. 16A569, (Dec. 8, 2016) (order denying application for stay of execution of death sentence that was an override of the jury's life recommendation). However, I would grant the State's motion for clarification. The majority should explain that the Act can be constitutionally applied under its Hurst decisions with a unanimous jury recommendation for death. I respectfully dissent.

CANADY, J., concurs.

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