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Death Row Case May Reveal Life After Hurst

Noreen Marcus, Daily Business Review

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The U.S. Supreme Court pumped hope into Florida's death row when it voided the state's capital sentencing scheme.

That hope will prove illusory for many if not all the inmates unless the courts decide Hurst v. Florida applies retroactively.

For now all the major players in the death-or-life game want something. Defense attorneys want time to craft arguments for resentencing or, better yet, retrial. Prosecutors want guidance from the Legislature.

And conservative legislators must be seeking divine intervention to write a death penalty statute that's legal yet keeps the execution machinery going. Florida has about 400 condemned prisoners, the second-highest number after California's 746—and far more than Texas's 265, according to the Death Penalty Information Center.

What the Florida Supreme Court wants may become apparent Tuesday when the justices hear oral argument in the case of Cary Lambrix, 55. He was convicted of a 1983 double murder at his trailer home in LaBelle near Fort Myers.

The case is familiar to the court after eight stops there, the latest appeal filed in 2010. Lambrix's lawyers will argue for a stay of his scheduled Feb. 11 execution. After the Jan. 12 Hurst decision the court refused to postpone the execution but asked both sides for briefs on its applicability.

Six justices will hear the argument. Justice Peggy Quince, a former state prosecutor who helped Attorney General Bob Butterworth fight to uphold Lambrix's death sentence, is recused.

Criminal defense lawyer Bruce Fleisher predicts if the state high court doesn't grant the requested relief, the U.S. Supreme Court will.

"The message is very simple: Our death penalty statute has been declared unconstitutional. You must enter a stay," said Fleisher, a Miami solo practitioner with two clients on death row. Lambrix isn't one of them.

Parsing Hurst

The U.S. Supreme Court allowed substantial room for judicial and legislative maneuvering in its 8-1 Hurst ruling. The court said nothing about the opinion's retroactive effect; it gave Florida no explicit direction about what would constitute an acceptable sentencing protocol.

"We liked the decision, but the Supreme Court only eliminated the judge from the sentencing process by saying it should be the jury that sentences, not the judge," Fleisher said.

The court said the Florida statute that empowers the trial judge to weigh aggravating and mitigating factors after a jury's advisory sentence violates the Sixth Amendment. Majority opinion writer Justice Sonia Sotomayor relied on the court's 2002 decision in Ring v. Arizona, which struck Arizona's capital sentencing scheme because a judge rather than a jury determined the facts necessary to impose the death sentence.

As in Hurst, the Supreme Court didn't address retroactivity in Ring. But two years later in Schriro v. Summerlin, a five-justice majority declared Ring doesn't apply to older cases, dooming about 100 condemned prisoners in five states, the Death Penalty Information Center reported.

"So many aspects of the death penalty are arbitrary," DPIC executive director Richard Dieter said at the time. "In this case, the court is saying that constitutional rights can be deprived and you can be executed depending simply on the date you filed your appeal. In such a critical matter, this seems grossly unfair."

The Florida capital defense bar takes heart from a post-Hurst decision on retroactivity. In Montgomery v. Louisiana decided Jan. 25, the Supreme Court said the 2012 rule of Miller v. Alabama is retroactive in cases on state collateral review. Miller prohibits mandatory life sentences without the possibility of parole for juveniles.

Perhaps more relevant than what the court decided in Montgomery is the authority it assumed to do the deciding. The justices asserted they had jurisdiction to rule on whether the Louisiana high court was correct when it refused to give retroactive effect to their Miller decision.

So it's not a stretch to say that if the justices of the Florida Supreme Court decide against applying Hurst retroactively and the U.S. Supreme Court disagrees, it will have no compunction about correcting them.

Practicalities

Last week, the Senate Criminal Justice Committee began the arduous task of revising the death penalty statute. Much of the testimony from academics and government lawyers addressed whether the new law should require jury unanimity for death sentences. The House takes it up Tuesday.

Fleisher and other defense lawyers favor this approach and say it would moot future constitutional challenges to the law. They have an influential ally in Raoul Cantero, a former state justice now with White & Case in Miami.

"Regardless of whether one supports or opposes capital punishment, justice would be well-served if the Legislature were to require unanimous penalty phase juries," he wrote in a recent article for Fort Myers News Press.com.

Prosecutors support a 9-3 jury recommendation for death and unanimity on aggravating factors. Fleisher said the model for this system is Mississippi.

The lawyers engaged in the ongoing dialogue about life after Hurst know that judges and especially legislators focus on fallout. With hundreds of cases potentially in play, it's impossible to ignore the impact on the court system.

Lawyers for the state made this point in a brief to the Florida Supreme Court arguing against remanding the Lambrix case to the trial court to consider a Hurst-based claim. They quoted from a 2003 Supreme Court of Arizona ruling, State v. Towery.

"Conducting new sentencing hearings, many requiring witnesses no longer available, would impose a substantial and unjustified burden on Arizona's administration of justice," wrote Scott Browne and Suzanne Bechard of the state attorney general's office.

The same will hold true for Florida's death row inmates, said defense lawyer Bruce Lehr of Lehr Levi & Mendez in Miami. "I think most of them will get life sentences by default."

CARY MICHAEL LAMBRIX, APPELLANT, V. STATE OF FLORIDA, APPELLEE

Case no.: SC16-8

Oral argument: Feb. 2, 2016

Case type: Death penalty

Court: Florida Supreme Court

Arguing for petitioner: William M. Hennis, III, Capital Collateral Regional Counsel's office, Fort Lauderdale

Arguing for respondent: Scott A. Browne, Florida Attorney General's Office, Tampa

Panel: En banc; Justice Peggy A. Quince recused

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