IN THE SUPREME COURT OF FLORIDA

CASE NO.:

SC03-1730 JAMES L. HALL,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.
_____/

APPELLANT'S INITIAL BRIEF ON THE MERITS

On review from a question certified as one of great public importance from the First District Court of Appeal in Case No. 1D02-181

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PREFACE

This is an appeal originating from the Circuit Court of the First Judicial Circuit in and for Escambia County, Florida, the Honorable Jan Shackelford presiding. James L. Hall was the defendant in the trial court and will be referred to as "defendant" in this brief. The State of Florida was the plaintiff in the trial court and will be referred to as "State" in this brief. The defendant is appealing the First District Court of Appeal's decision to affirm his conviction and sentence.

STATEMENT OF THE CASE AND FACTS

The factual history of this case is put forth in the First District's decision in this case, Hall v. State, 28 Fla. L. Weekly D2024 (Fla. 1st DCA 2003). The instant appeal involves the defendant's second trial. The defendant was first tried in 1993 and found guilty of first degree felony murder and armed robbery. The appellant was sentenced to life in prison with no possibility of parole for 25 years and sentenced to 10 consecutive years for the robbery.

Subsequently, the defendant filed a motion for postconviction relief based on newly discovered evidence which resulted in a new trial being ordered. Prior to the new trial, the defense argued that it was entitled to a 12-person jury because the defendant was on trial for the capital offense of first degree murder. The defense refused to waive this right.

The State argued that the defendant did not have a right to a 12-person jury because double jeopardy barred a death sentence at the retrial. The trial court ruled that the case would be tried with a six person jury. The six person jury found the defendant guilty of first degree murder and armed robbery.

The First District corrected a discrepancy between the trial court's orally pronounced sentence and the written judgment on the murder count. The defendant

was sentenced to life with no possibility of parole for 25 years on the murder count. The defendant was sentenced to 10 consecutive years for the robbery count.

In a two to one decision, the First District affirmed the defendant's conviction. In so doing, the court certified a question to be one of great public importance:

> WHETHER A 12-PERSON JURY IS REQUIRED IN A FIRST DEGREE MURDER CASE WHERE THE DEATH PENALTY MAY NOT BE IMPOSED AS A MATTER OF LAW ?

The defendant's initial brief on the merits follows.

SUMMARY OF ARGUMENT

This court's decision in Griffith controls the resolution of this case. Griffith holds that a criminal defendant charged with first degree murder has a statutory right to trial by a twelve person jury. The fact that there is no possibility of a sentence of death is irrelevant. The legislature has used its authority to extend special protections to those accused of first degree murder. The legislature's intent in this regard is unambiguous.

ARGUMENT: A 12-PERSON JURY IS REQUIRED IN FIRST DEGREE MURDER CASES REGARDLESS OF WHETHER THE DEATH PENALTY MAY BE IMPOSED

The defendant would respectfully incorporate by reference the dissenting judge's opinion in the instant case as his own. The defendant would add the following:

STATUTORY CONSTRUCTION

The defendant argued below that he was entitled to a 12-person jury for the crime he was accused of committing in 1991. Florida Statute Section 913.10 (1991) states that, "[t]wleve persons shall constitute a jury to try all capital cases."

(Emphasis added). See also Fla.R.Crim.P. 3.270. The word "all" is indicative of the legislature's intent to have a 12-person jury in all capital cases, regardless of whether the death penalty is imposed.

If the legislature only wanted a 12-person jury in capital cases where the death penalty was a possible result it would have said so. The legislature's intent is unambiguous. Even if it was ambiguous, it is a fundamental element of statutory construction that any ambiguity shall be resolved in favor of the criminal defendant.

THE DEFINITION OF A CAPITAL OFFENSE

First degree murder is codified at Fla. Stat. § 782.04(1)(a)(1). First degree murder "constitutes a capital felony." Fla. Stat. § 775.082. This case is a capital case and it is even identified as such in the trial court's judgment [R. 193, 196]. The fact that the death penalty is not a possible penalty does not make first degree murder a non-capital offense. There is no magical transformation. See Alfonso v. State, 528 So.2d 383, 384 (Fla. 3d DCA 1988); Ortagus v. State, 500 So.2d 1367, 1371 (Fla. 1st DCA 1987).

This court's holding in State v. Griffith, 561 So.2d 528 (Fla. 1990), controls the question at issue. Griffith made clear that the legislature decides which cases receive twelve-person juries. As argued above, the legislature's intent is clear. This

court's unequivocal mandate is also clear: "A defendant charged with first-degree murder . . . has a statutory right to trial by a twelve-person jury . . . [because] the legislature has the [constitutional power to . . . prescribe the number of jurors (not less than six). Id. at 529.

This court went on to state that, "[t]he prosecutor cannot, by electing not to seek the death penalty, change classification of an offense from capital to noncapital and unilaterally determine whether a defendant is entitled to trial by a twelve-person jury. *A court cannot do this either*." Id. (Emphasis supplied).

Any appellate court decision to the contrary ignores the fact that the legislature has the power to define crimes and set punishments. See Rusaw v. State, 451 So.2d 469 (Fla. 1984). First degree murder is a crime that is of a special concern to the legislature and it has exercised its authority to attach different statutory protections to those accused of this crime. These protections were not afforded to the defendant. As a result, the defendant's convictions are invalid.[1]

The majority cites Donaldson v. Sack, 265 So.2d 499 (Fla. 1972), and State v. Hogan, 451 So.2d 844 (Fla. 1984), to support its position. First, it should be

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[1] Normally, the 12-person jury protection would not be applied to a robbery charge. However, the defendant should have his robbery conviction overturned as well because it was the predicate for the first degree felony murder conviction.

noted that these opinions were issued before Griffith and are therefore outdated. Griffith is the controlling case. Regardless, these two decisions were concerned with the procedures to be used when the death penalty has been deemed unconstitutional. The present case has no such concerns. The capital structure in the state of Florida was intact in the case at bar. Accordingly, all of the legislature's definitions regarding the capital scheme are also intact.

The majority attempted to distinguish Griffith by stating that Griffith involved the issue of whether there was a knowing and intelligent waiver by the defense, and that this issue is not present here. While this is true, it is not a reason to ignore Griffith because it is a distinction without a difference. The fact is that the rule of law espoused by Griffith applies on all fours to the instant case. The fact that it is undisputed that the defendant herein did not waive his right to a 12-person jury does not make Griffith's ruling on the consequences of such a decision irrelevant. The reasoning used to resolve each question is the same. Griffith controls this case and it should have been adhered to by the majority.

CONTRARY DECISION BY THE FIFTH DISTRICT

A case decided after the First District's decision in the case at bar is also applicable because it implicitly conflicts with the decision at issue herein. In Smith

v. State, 2003 WL 22103329 (Fla. 5th DCA, September 12, 2003), the defendant was informed before trial that the State would not be seeking the death penalty. The defendant was then convicted of first degree murder.

The Fifth District ultimately held that Smith's Rule 3.850 motion was properly denied because he could not show prejudice from the trial attorney's failure to ask for a 12-person jury. However, what is significant is that the Fifth District implicitly held that he was entitled to a 12 person jury had he asked for it. The Court cited section 913.10 and Rule 3.270 and did not hold that he was not entitled to a 12-person jury because he was not exposed to the death penalty.

CONCLUSION

For all the foregoing arguments and authorities set forth herein, the appellant JAMES L. HALL, respectfully requests this Honorable Court to reverse both of his convictions and remand for trial to a twelve-person jury.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by First Class U.S. Mail to: The Office of the Attorney General, Criminal Appeals Division, Attn: Robert R. Wheeler, Esq., PL-01, The Capitol, Tallahassee, Florida 32399-1050 on this 6th day of October 2003.

_____

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with Times New Roman 14-point font in compliance with Fla.R.App.P. 9.210(a)(2) on this 6th day of October 2003.

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Appellate Attorney for Hall