RECEIVED 01/15/2016 06:16 PM FLORIDA SUPREME COURT

No. SC16-56
Lower Tribunal No. 221983CF000012CFAXMX

IN THE

Supreme Court of Florida

CARY MICHAEL LAMBRIX,

Petitioner,

v.

JULIE L. JONES, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

**BRIEF OF AMICUS CURIAE,
THE CAPITAL HABEAS UNIT OF THE
OFFICE OF THE FEDERAL PUBLIC DEFENDER
FOR THE NORTHERN DISTRICT OF FLORIDA,
IN SUPPORT OF PETITIONER LAMBRIX
AND CONSOLIDATED MOTION FOR LEAVE TO FILE**

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MOTION FOR LEAVE TO FILE UNDER RULE 9.370

The Capital Habeas Unit (CHU) of the Office of the Federal Public Defender for the Northern District of Florida, as amicus curiae, respectfully moves for leave to file the accompanying brief in support of Petitioner Cary Michael Lambrix, whose execution is scheduled for February 11, 2016.

The Statement of Interest describes the interest of the CHU and its belief that the arguments presented in the amicus curiae brief will be helpful to the Court.

Counsel for Petitioner has agreed to the filing of the accompanying brief. Counsel for Respondent, representing the State, objects to the filing of the brief.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Capital Habeas Unit (CHU) of the Office of the Federal Public Defender for the Northern District of Florida was established with the concurrence of the Chief Judge of the United States Court of Appeals for the Eleventh Circuit (the Honorable Ed Carnes), the Chief Judge of the United States District Court for the Northern District of Florida (the Honorable M. Casey Rogers), and the Administrative Office of the United States Courts. The Capital Habeas Unit was established because of significant problems relating to the provision of meaningful defense services in a number of capital cases in Florida, a pattern that raised concerns for the Bench and Bar. As the Eleventh Circuit commented:

> Establishing a CHU in one of [Florida's] . . . federal districts would have several benefits. Not only could it provide direct representation to capital inmates in some federal habeas proceedings, . . . but it could also provide critical assistance and training to private registry counsel who handle state capital cases in Florida's collateral proceedings.

Lugo v. Secretary, 750 F.3d 1198, 1215 (11th Cir. 2014). The office advises, assists, and trains counsel in capital cases. The office also represents a number of Florida death-sentenced individuals in federal habeas cases, and this Court's resolution may well have a life-and-death impact on our clients.

As the institutional federal capital defender office of Florida, our office, as a friend of the Court, hopes that the Court will find helpful our perspective on the retroactivity of the recent federal constitutional decision in *Hurst v. Florida,* No.

14-7505, 2016 WL 112683 (U.S. Jan. 12, 2016), as well as on some of the general "harmless error" questions that the Court will confront in light of *Hurst*.

SUMMARY OF ARGUMENT

Hurst raises highly consequential questions. Those questions include complex issues of retroactivity and harmless error analysis. This amicus curiae brief primarily addresses retroactivity and comments on harmless error, explaining that *Hurst* should be applied to cases on collateral review under the *Witt* test, and that *Hurst* claims may not be easily—if at all—subject to harmless error review.

Above all, amicus submits that *Hurst* retroactivity and harmless error analysis—life or death matters for many—should not be resolved by this Court in the first instance, mid-way through Petitioner's state habeas proceeding, and under the constraints of an active death warrant. It is urged that this Court, consistent with its practice in similar cases, enter a stay of execution and permit Petitioner to litigate his *Hurst* claim initially in the trial court. At a minimum, it is urged that a stay of execution be granted and that Petitioner be permitted to file an amended petition in this Court so that he can make arguments based on the actual *Hurst* decision, as opposed to the preliminary and speculative arguments in his pre-*Hurst* petition.

ARGUMENT

"Florida's capital sentencing scheme violates the Sixth Amendment . . . ." *Hurst*, 2016 WL 112683, at *5. The *Hurst* Court invalidated as unconstitutional Fla.

Stat. §§ 921.141(2) and (3), which provide that a defendant who has been convicted of a capital felony may be sentenced to death only after (1) a penalty phase jury renders an advisory verdict, without specifying the factual basis for its recommendation, and (2) notwithstanding the recommendation of a majority of the jury, the court decides whether sufficient aggravating circumstances exist and that they are not outweighed by the mitigating circumstances. *See id.* at *3.

The *Hurst* ruling emanates from *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002). In *Apprendi*, the Supreme Court held that the Sixth Amendment, in conjunction with the Due Process Clause, requires 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 the jury. *Apprendi*, 530 U.S. at 494. In *Ring*, the Court applied *Apprendi* in the capital punishment context, ruling that Arizona's capital sentencing scheme was unconstitutional because it required judges to independently find at least one aggravating circumstance before imposing a death sentence. *Ring*, 536 U.S. at 604.

In *Hurst*, the Supreme Court held that "[t]he analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's." *Hurst*, 2016 WL 112683, at *5. That is because "Florida does not require the jury to make critical findings necessary to impose the death penalty," but rather, "requires a judge to find these facts." *Id.* Accordingly, the Court ruled that Florida's capital sentencing

scheme violated the Sixth Amendment. *Id.* at 6. The Court did not address whether its decision was retroactive to cases on collateral review, and indicated that any harmless error determinations will ordinarily be left to the state courts. *Id.* at 8.

I. *Hurst* Claims Should Be First Brought In Florida's Trial Courts

The appropriate place to resolve the difficult retroactivity and harmless error questions raised by *Hurst* in the first instance is not mid-way through a state habeas corpus proceeding under the time constraints of an active death warrant. When Petitioner initiated these proceedings, *Hurst* had not yet been decided, meaning that his initial arguments were necessarily speculative and preliminary. Now that *Hurst* has issued, Petitioner Lambrix should be permitted, consistent with this Court's practice, to return to the trial court to litigate his *Hurst* claims on the basis of the actual decision in *Hurst*. In similar situations in the past, this Court has permitted litigation based on recently-issued Supreme Court decisions to first occur in the trial court and later to be appealed. *See, e.g.*, *Hall v. State*, 941 So. 2d 1125, 1128 (1989) (explaining that because "[a]ppellate courts are reviewing, not fact-finding courts," claims under the Supreme Court's recent decision in *Hitchcock v. Dugger*, 481 U.S. 393 (1987), "should be presented to the trial court in a rule 3.850 motion for postconviction relief . . . ."); *Meeks v. Dugger*, 576 So. 2d 713 (Fla. 1991); *Falcon v. State*, 162 So. 3d 954 (Fla. 2015) (permitting life-sentenced juvenile offenders

two years to petition the trial court for relief under the Supreme Court's recent decision in *Miller v. Alabama*, 132 S. Ct. 2455 (2012)).

At a minimum, Petitioner Lambrix should be permitted to re-file an amended petition with the benefit of the *Hurst* opinion. His present petition, based on what he surmised the Supreme Court *could* say in *Hurst*, is by its very nature insufficient and not appropriate for adjudication under the actual *Hurst* opinion.

II. *Hurst* Is Retroactive Under The *Witt* Test

A. The *Witt* Test

This Court recently reaffirmed the continuing validity of Florida's long-applied retroactivity test, established in *Witt v. State*, 387 So. 2d 922 (Fla. 1980), for determining whether new decisions of the United States Supreme Court that are favorable to criminal defendants are to be applied to cases on collateral review in Florida's state courts. *See Falcon*, 162 So. 3d at 954 (holding that *Miller v. Alabama* is retroactive). This Court applies decisions retroactively provided that they (1) emanate from the United States Supreme Court, (2) are constitutional in nature, and (3) constitute "a development of fundamental significance." *Id.* at 960.

This Court's *Witt* test is distinct from, and not impacted by, the federal retroactivity test established in *Teague v. Lane*, 489 U.S. 288, 307 (1989). *See Falcon*, 162 So. 3d at 955-56 (recognizing that determining retroactivity under *Witt* and *Teague* requires separate inquiries); *see also Witt*, 387 So. 2d at 928 ("We start

by noting that we are not obligated to construe our rule concerning post-conviction relief in the same manner as its federal counterpart . . . . [T]he concept of federalism clearly dictates that we retain the authority to determine which 'changes of law' will be cognizable under this state's post-conviction relief machinery."). After all, the federal retroactivity test was designed with "[c]omity interests and respect for state autonomy" in mind. *Schriro v. Summerlin*, 542 U.S. 348, 364 (2004). The federal test was never intended to prohibit a state from granting broader retrospective relief when reviewing its own state convictions. *Danforth v. Minnesota*, 552 U.S. 264, 280-81 (2008). States may grant more expansive retroactive effect to new rules than is required by federal law, *id.* at 277, 282, and Florida traditionally has done so. The critical question, therefore, is whether *Hurst* meets Florida's *Witt* test.

B. Applying *Witt* to *Hurst*

Here, it is not debatable that *Hurst* satisfies the first two *Witt* retroactivity factors because (1) it is a decision of the United States Supreme Court, and (2) its holding—that the Sixth Amendment forbids a capital sentencing scheme that requires judges, as opposed to juries, to conduct the fact-findings that subject a defendant to a death sentence. *See Witt*, 387 So. 2d at 931; *see also Falcon*, 162 So. 2d at 960 (finding that Supreme Court decision that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders is clearly constitutional in nature.") (internal quotation omitted).

The determinative question therefore is whether the third factor is established, i.e., whether *Hurst* "constitutes a development of fundamental significance." *See Witt*, 387 So. 2d at 931. The factor is established.

In determining whether a Supreme Court decision "constitutes a development of fundamental significance," this Court has explained that, "[a]lthough specific determinations regarding the significance of various legal developments must be made on a case-by-case basis, history shows that most major constitutional changes are likely to fall within two broad categories." *Witt*, 387 So. 3d at 929. The first category of fundamentally significant decisions includes "those changes in law 'which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties.'" *Falcon*, 162 So. 3d at 961 (quoting *Witt*, 387 So. 2d at 929). The second category includes "'those changes of law which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of the United States Supreme Court's decisions in *Stovall v. Denno*, 388 U.S. 293 (1967), and *Linkletter v. Walker*, 381 U.S. 618 (1965).'" *Falcon*, 162 So. 3d at 961 (quoting *Witt*, 387 So. 2d at 929) (internal brackets omitted). "The three-fold analysis under *Stovall* and *Linkletter* includes an analysis of '(a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule.'" *Id.* (quoting *Witt*, 387 So. 2d at 926). While *Stovall* and *Linkletter* pre-date the comity-

based *Teague* retroactivity test now used by federal courts, this Court has indicated as recently as 2015 that Florida approves the *Stovall* and *Linkletter* factors, and that it is these factors that guide its analysis under *Witt* of whether a new Supreme Court rule "constitutes a development of fundamental significance." *See Falcon*, 162 So. 3d at 961. This is appropriate given Florida's right to give retroactive effect to a broader range of new Supreme Court rules than would be mandated for federal courts under the comity-based *Teague* approach.

Here, *Hurst* is well-within the second category of fundamentally significant decisions described in *Witt*. With respect to the first *Stovall* and *Linkletter* consideration, the primary purpose of *Hurst* is to protect capital defendants' inaliable Sixth Amendment right to have any fact that exposes them to a death sentence, a punishment which is not authorized by their conviction alone, be found by a jury. As to the second *Stovall* and *Linkletter* consideration, although Florida relied on the now-invalidated capital sentencing scheme in penalty phase proceedings, the number of affected cases is finite, easily determinable, and certainly *as manageable, if not more manageable, than the cases at issue in Falcon.*

The first two *Stovall* and *Linkletter* considerations indicate that *Hurst*'s "purpose would be advanced by making the rule retroactive," *Linkletter*, 381 U.S. at 637, by ensuring that all capital defendants' Sixth Amendment rights are protected, regardless of whether their sentences became final after *Hurst*'s publication. In that

respect, *Hurst* is different from *Linkletter* itself, where the issue was whether the purpose of the exclusionary rule announced in *Mapp v. Ohio*, 367 U.S. 643 (1961)—deterring police from committing Fourth Amendment violations—would be advanced if applied retroactively. *Id.* at 636-37. The *Linkletter* Court held that *Mapp*'s purpose would not be advanced by retroactive application because the police could no longer be deterred from activity that had already occurred, and judicial chaos would result from "the wholesale release of guilty victims." *Id.* at 637.

In contrast, retroactive application of *Hurst* would not be futile or produce undesirable results. *Hurst*'s purpose is to ensure that death sentences are reached as the result of a constitutional proceeding, a purpose that would be advanced by extending the protection to all capital prisoners. And unlike retroactive application of the exclusionary rule, applying *Hurst*'s Sixth Amendment imperative is in accord with the core idea that "death is a different kind of punishment from any other that may be imposed in this country," and "[i]t is of vital importance . . . that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977).

Put simply, death sentences imposed with a judge's, but not a jury's findings on the defendant's eligibility for capital punishment are unconstitutional. The question should not be how many executions based upon such unconstitutional

sentences will Florida tolerate before *Hurst* is given effect. This Court's history of adherence to principles of fundamental fairness opposes such a miserly approach.

With respect to the remaining *Stovall* and *Linkletter* consideration, retroactive application of *Hurst* would not have any injurious effect on the administration of justice, but rather would promote "the integrity of the judicial process." *Id.* In *Linkletter*, the Court found that retroactive application of *Mapp* would "tax the administration of justice to the utmost" because it would require applying the exclusionary rule to innumerable cases and pieces of evidence. Here, by contrast, the retroactive application of *Hurst* would be finite in scope, limited to a specific number of current Florida death row inmates. The most that would be required would be a new sentencing placing the authority in the jury's hands to find the elements necessary for the court to decide whether to impose a sentence of death. The convictions of those inmates are not affected at all.

This Court has recognized in the retroactivity context that "[c]onsiderations of fairness and uniformity make it very 'difficult to justifying depriving a person of his liberty or his life under a process no longer considered acceptable and no longer applied to indistinguishable cases.'" *Falcon*, 162 So. 3d at 962 (quoting *Witt*, 387 So. 2d at 929). Retroactive application of *Hurst* is the only just result.

C. This Court's Retroactivity Decisions in Similar Contexts

This Court has determined that decisions similar to *Hurst* have constituted "development[s] of fundamental significance" that warranted retroactive application under the *Witt* test.

Hurst is a Sixth Amendment decision. In *Witt* itself, this Court recognized the retroactivity of the Sixth Amendment ruling in *Gideon v. Wainwright*, 372 U.S. 335 (1963), which first announced that each state must provide counsel to every indigent defendant charged with a felony at all critical stages of the proceeding. *See Witt*, 387 So. 2d at 927. This Court's retroactive application of *Gideon* asked whether an individual had a lawyer during a criminal proceeding. Surely as significant, *Hurst* asks *who* made the critical factual findings authorizing a death sentence. The question of who decides whether a death sentence can be imposed—whether a judge, in contravention of the Sixth Amendment, or a jury, in comportment with the Sixth Amendment—is fundamentally significant within the meaning of *Witt*.

Hurst is a death penalty decision. This Court found retroactive the Supreme Court's decision in *Hitchcock v. Dugger*, 481 U.S. 393 (1987), which held that in death penalty cases, trial courts are prohibited from instructing juries to consider only statutorily enumerated mitigating circumstances. *Hitchcock* followed the Supreme Court's prior decision in *Lockett v. Ohio*, 438 U.S. 586 (1978), which held that the Eighth Amendment prohibits the sentencer from refusing to consider or

being precluded from considering any relevant mitigating evidence. Before *Hitchcock*, this Court interpreted *Lockett* to require that a capital defendant merely have had the opportunity to present any mitigation evidence, not to require an instruction that the jury must consider non-statutory mitigation. *See, e.g.*, *Downs v. Dugger*, 514 So. 2d 1069, 1070 (Fla. 1987); *Thompson v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987). Shortly after the Supreme Court issued *Hitchcock*, a death-sentenced individual with an active death warrant argued to this Court that he was entitled to benefit from *Hitchcock* retroactively because his jury did not receive a proper instruction. Applying the analysis adopted in *Witt*, this Court agreed and ruled that *Hitchcock* constituted a fundamental change in the law that must be retroactively applied. *Riley v. Wainwright*, 517 So. 2d 656, 660 (1987). The Court thereafter continued to apply *Hitchcock* retroactively. *See, e.g.*, *Hall*, 941 So. at 1125; *Meeks*, 576 So. 2d at 713. Surely as significant is *Hurst*, which deals with who makes the findings determinative of death eligibility: jury or judge.

Hurst is about aggravation findings. This Court has found retroactive the Supreme Court's decision in *Espinosa v. Florida*, 505 U.S. 1079 (1992), which held that Florida's "heinous, atrocious or cruel" aggravating circumstances was, without a clarifying instruction, impermissibly vague under the Eighth Amendment and the Court's prior decision in *Maynard v. Cartwright*, 486 U.S. 356 (1988). Before *Espinosa*, this Court interpreted *Maynard*'s vagueness analysis of a similar

Oklahoma aggravating factor to be inapplicable to Florida's aggravating factor. Following the contrary decision in *Espinosa*, this Court applied the *Witt* test and determined that *Espinosa* was retroactive, permitting the revisiting of previously rejected challenges to the "heinous, atrocious or cruel" aggravating circumstance. *James v. State*, 615 So. 2d 688, 669 (Fla. 1993); *see also Jackson v. State*, 648 So. 2d 85, 90 (Fla. 1994). Again, *Hurst* is no less significant.

In sum, under the *Witt* test, *Hurst* is no less fundamentally significant than *Hitchcock*, which addressed a jury instruction on the scope of mitigating evidence that could be considered during a penalty phase. *Hurst* is also no less fundamentally significant than *Espinosa*, which concerned a limiting instruction required for the consideration of one statutory aggravator. Indeed, *Hurst*'s reach is much broader than either *Hitchcock*'s or *Espinosa*'s. *Hurst* changes the nature of the penalty proceeding by shifting the authority to the jury to engage in fact-finding as to death eligibility. Not only does such a fundamental shift implicate the differences between judge and jury decision-making, but it also impacts the strategy and manner by which capital defense lawyers approach the penalty phase. Prior to *Hurst*, the focus of the penalty proceeding was on the scope and presentation of mitigating evidence to the jury. Under *Hurst*, the focus shifts towards combating aggravation.

D. The Supreme Court's Decision in *Summerlin*

Any State arguments focused on the Supreme Court's decision in *Summerlin*, would be misplaced. *Summerlin* has no impact on this Court's retroactivity analysis. In *Summerlin*, the Supreme Court ruled that *Ring* would not be applied retroactively under the stringent *Teague* retroactivity standard applied by federal courts in a habeas corpus case. Those special federal standards were developed with "[c]omity interests and respect for state autonomy" in mind. *Summerlin*, 542 U.S. at 364. Such considerations are inapplicable when a state decides whether to apply a new Supreme Court decision to its own collateral review docket, particularly when, as in Petitioner's case, the relevant Supreme Court decision addressed that same state's procedures. This Court, as recently as last year, continues to apply Florida's retroactivity standard, as set down in *Witt*. Under *Witt*, this Court is empowered to apply *Hurst* retroactively in Florida and in accord with its tradition of respect for the rights of capital defendants. Amicus urges that the Court do so.

E. This Court's Decision in *Johnson*

This Court's decision in *Johnson v. State*, 904 So. 2d 400 (Fla. 2005), is also not a barrier to this Court's *Witt* analysis of *Hurst*. *Johnson* is no longer good law.

In *Johnson*, the Court considered the retroactivity of *Ring* in circumstances entirely different from those presented by *Hurst*. The *Johnson* Court ruled that *Ring*—which arose from a challenge to Arizona's death penalty statute—was not

retroactive under Florida law because *Ring* had no applicability to Florida's capital sentencing scheme. *Johnson* outlined earlier decisions espousing that *Ring* did not apply in Florida:

> We first analyzed *Ring*'s effect on Florida law in two plurality opinions, *Bottoson v. Moore*, 833 So. 2d 693 (Fla.), *cert. denied*, 537 U.S. 1070, 123 S.Ct. 662, 154 L.Ed.2d 564 (2002), and *King v. Moore*, 831 So. 2d 143 (Fla.), *cert. denied*, 537 U.S. 1067, 123 S.Ct. 657, 154 L.Ed.2d 556 (2002). Both opinions noted that the United States Supreme Court repeatedly has upheld Florida's capital sentencing scheme. *Bottoson*, 833 So. 2d at 695; *King*, 831 So. 2d at 143.

Johnson, 904 So. 2d at 406. However, contrary to *Johnson*, the Supreme Court not only made clear in *Hurst* that *Ring*'s holding was applicable to Florida's capital sentencing scheme, but also directly addressed the underlying ideas that led to *Johnson* and ruled that they were violative of the Sixth Amendment.

In light of *Hurst*, the retroactivity perspective of *Johnson* no longer carries any weight, not only because *Johnson* espoused a view of *Ring* that has now been repudiated by the Supreme Court, but also because there is no longer any need to analogize the law at issue in *Ring* to Florida's law; *Hurst* addressed Florida's law directly. Moreover, *Johnson* cited this Court's previous decisions in *Bottoson* and *King* for the proposition that Florida's capital sentencing scheme had been approved by the Supreme Court despite *Ring*. *Bottoson* and *King* relied on the Supreme Court's decisions in *Hildwin v. Florida*, 490 U.S. 638 (1989), and *Spaziano v.*

Florida, 468 U.S. 447 (1984). *Hurst* **explicitly overruled** *Hildwin* and *Spaziano*, leaving *Johnson* no remaining legs to stand on. *See Hurst*, 2016 WL 112683, at *7-8 ("We now expressly overrule *Spaziano* and *Hildwin* in relevant part . . . . Time and subsequent cases have washed away the[ir] logic . . .").

F. *Hurst* Should Be Applied Retroactively

Based on the foregoing, *Hurst* should be applied retroactively under this Court's *Witt* test. The appropriate remedy, as this Court explained in *Falcon*, is to permit capital defendants in Florida, even those whose convictions have become final, an opportunity to file Rule 3.851 petitions in light of *Hurst*. Possibly following the Legislature's enactment of a new death penalty statute, which the Legislature has already begun to draft, Florida courts presented with *Hurst* petitions should conduct resentencing proceedings in conformance with the new legislation. *See Falcon*, 162 So. 3d at 963 ("[W]e conclude that trial courts should apply chapter 2014-220, Laws of Florida, and conduct a resentencing proceeding in conformance with that legislation, when presented with a timely rule 3.850 motion for postconviction relief from any juvenile offender whose sentence is unconstitutional under *Miller*."). This Court may impose a time limitation on the filing of *Hurst* petitions, as it has in other instances. *See id.* at 954 ("[A]ny affected juvenile offender shall have two years from the time the mandate issues in this case to file a motion for postconviction relief in the trial court seeking to correct his or her sentence pursuant to *Miller*.").

At a minimum, this Court should grant stays of execution to *Hurst* petitioners under active death warrants, such as Petitioner Lambrix, pending a more complete presentation. *See, e.g.*, *Thompson v. Dugger*, 515 So. 2d 173 (Fla. 1987) (granting stay of execution to determine whether *Hitchcock* was retroactive under *Witt*); *Riley*, 517 So. 2d at 660 (same); *Jackson v. Dugger*, 547 So. 2d 1197 (Fla. 1989) (granting stay of execution to determine whether *Booth v. Maryland*, 482 U.S. 496 (1987), was retroactive under *Witt*). The question of *Hurst*'s retroactivity—a matter of life and death—is too consequential to decide mid-way through an appellate proceeding filed pre-*Hurst* and under the time constraints of an active death warrant.

III. *Hurst* Claims Present Harmless Error Analysis Problems Not Suited for Expedited Resolution by This Appellate Court in the First Instance

The *Hurst* Court declined to reach the State's argument that the Sixth Amendment error arising from the jury's diminished fact-finding role at the penalty phase was harmless. *Hurst*, 2016 WL 112683, at *8 ("[W]e do not reach the State's assertion that any error was harmless."). The Supreme Court observed that it "normally leaves it to state courts to consider whether an error is harmless." *Id.* (citing *Neder v. United States*, 527 U.S. 1, 25 (1999) (explaining that it is ordinarily left to lower courts to pass on harmlessness in the first instance). This Court is therefore the appropriate forum to resolve whether *Hurst* claims are subject to harmless error review and, if so, the standards by which such analysis should be conducted. However, this Court should not decide those highly-consequential issues

mid-way through the instant proceeding. Rather, the complexity of conducting proper harmless error analysis in the context of *Hurst* claims is appropriately resolved by trial courts in the first instance, and appealed to this Court with the opportunity for full, untruncated briefing and oral argument.

There is a serious question as to whether *Hurst* claims are subject to harmless error analysis at all, or whether they present claims of "structural" error that defy specific harmlessness review. *See Arizona v. Fulminante*, 499 U.S. 279, 307-09 (1991) (distinguishing between "structural defects in the constitution of the trial mechanism," which are not subject to harmless error review, and trial errors that occur "during the presentation of the case to the jury, which may be quantitatively assessed in the context of other evidence presented."). In determining whether *Hurst* errors are structural or instead subject to harmless error review, this Court must decide whether the Sixth Amendment error identified in *Hurst*—stripping the capital jury of its constitutional fact-finding role at the penalty phase—represents a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Id.* at 310. Measured against that standard, *Hurst* errors are likely to be found structural because they "infect the entire trial process." *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993). In other words, *Hurst* errors "deprive defendants of basic protections without which a [capital] trial cannot reliably serve

its function as a vehicle for determination" or whether the elements necessary for a death sentence exist. *See Neder*, 527 U.S. 1 at 8.

The structural nature of *Hurst* claims is further underscored by what Justice Scalia, writing for the Court, called the "illogic of harmless-error review" in the context of the Sixth Amendment constitutional error at issue in *Hurst*. *See Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993). Because *Hurst* made clear that Florida's statute did not allow for a jury verdict on the necessary elements for a death sentence that was compatible with the Sixth Amendment, "the entire premise of [harmless error] review is simply absent." *Id.* at 280. Harmless error analysis would require this Court to determine in the first instance "not whether, in a trial that occurred without the error, a [jury fact-finding of sufficient aggravating circumstances] would surely have been rendered, but whether the [death sentence] actually rendered in [original] trial was surely unattributable to the error." *Id.* There being no jury findings on the requisite aggravating circumstances, it is not possible to review whether such findings would have occurred absent the *Hurst* error. In such cases:

> There is no object, so to speak, upon which harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury *would surely have found* petitioner guilty [of the aggravating circumstances] beyond a reasonable doubt—not that the jury's actual finding of guilty [of the aggravators] beyond a reasonable doubt *would surely not have been different* absent the constitutional error. That is not enough. The Sixth Amendment requires more than appellate speculation

> about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal . . . .

Id. For this Court "to hypothesize a [jury's finding of aggravating circumstances] that was never in fact rendered—no matter how inescapable the findings to support the verdict might be—would violate the jury-trial guarantee." *Id.* at 280.

The serious issues raised by the question of whether *Hurst* claims are subject to harmless error analysis at all underscores the practical problems the Court confronts at this juncture. A determination of whether an individual petitioner would have been sentenced to death, notwithstanding the Sixth Amendment infirmity baked into Florida's capital sentencing scheme that *Hurst* invalidated, would require courts to hypothesize whether—in an imaginary proceeding consistent with the *Hurst* and the Sixth Amendment—the jury would have nonetheless found sufficient aggravating circumstances for a death sentence. The jury having never made findings as to aggravating circumstances, there is no way to determine whether it would *still* have made those findings absent the Sixth Amendment error.

Moreover, the Florida Legislature has not yet enacted any statute in response to *Hurst* that courts can measure against the records of individual cases to conduct harmless error review. Today, this Court would be simply guessing what the Legislature will enact and then using that estimation to measure against the record of individual cases for harmlessness.

A further practical problem for harmless error analysis in *Hurst* cases is that penalty phase presentations do not occur in a vacuum. In a hypothetical proceeding where the jury's Sixth Amendment fact-finding role is respected as paramount, defense counsel's entire approach to the presentation of evidence will be different, given the inherent differences between judges and juries as fact-finders. *See Summerlin*, 542 U.S. at 356 (recognizing the differences between judge and jury fact finding). Appellate courts are ill-equipped to determine how much if any impact the relative fact-finding roles of the judge and jury impacted defense counsel's presentation of the penalty case. As this Court has recognized in the context of *Hitchcock* retroactivity, such determinations should be made in trial courts following evidentiary hearings. *See, e.g.*, *Meeks*, 576 So. 2d at 716; *Hall*, 541 So.2d at 1125.

This Court must ultimately determine whether *Hurst* errors are structural or subject to harmless error review, and if the Court determines that such errors are subject to harmless error review, it must come to terms with various fact patterns relating to how such review should be conducted. The Court should not decide such serious and consequential matters in the first instance, mid-way through Petitioner's current proceeding, and under the constraints of an active death warrant. As explained above, the appropriate course is to permit capital petitioners in Florida an opportunity to file Rule 3.851 petitions in light of *Hurst*. The trial courts can rule

on the harmless error issue as to each case in the first instance, and the decisions can then be appealed to this Court.

CONCLUSION

Hurst raises significant and highly-consequential questions involving retroactivity and harmless error analysis. Amicus respectfully submits that *Hurst* should be applied to cases on collateral review under the *Witt* test, and that harmless error analysis of *Hurst* claims would be either inapplicable or extremely problematic. Because of the importance of these issues, this Court should not decide them in the first instance, mid-way through Petitioner's habeas corpus proceeding, and under the constraints of an active death warrant. It is urged that this Court, consistent with its practice in similar prior cases, enter a stay of execution and permit Petitioner to litigate his *Hurst* claim initially in the trial court. At a minimum, it is urged that a stay of execution be granted and Petitioner be permitted to re-file his petition so that he can make arguments based on the actual *Hurst* decision, as opposed to the speculative and preliminary arguments in his pre-*Hurst* filings.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by email to the Office of the Attorney General at *Scott.Browne*@myfloridalegal.com, *capapp@myfloridalegal.com*, and *warrant@flcourts.org*, on January 15, 2016.

/s/ Billy H. Nolas
Billy H. Nolas

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this computer-generated amicus curiae brief is in compliance with Florida Rules of Appellate Procedure 9.210 and 9.370.

/s/ Billy H. Nolas
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