IN THE SUPREME COURT OF FLORIDA

CARY MICHAEL LAMBRIX,

Appellant/Petitioner,

v.

STATE OF FLORIDA/
JULIE L. JONES, ETC.

Appellee/Respondents.
_____/

CASE NOS. SC16-8/SC16-56
L.T. No. 83-12-CF

DEATH WARRANT SIGNED
EXECUTION SCHEDULED FOR
FEBRUARY 11, 2016 AT 6:00 PM

ON APPEAL FROM THE CIRCUIT COURT
OF THE TWENTIETH JUDICIAL CIRCUIT,
IN AND FOR GLADES COUNTY, FLORIDA

# RESPONSE BRIEF TO AMICUS CURIAE

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## SUMMARY OF THE ARGUMENT

Hurst v. Florida is not retroactive and has no application to this post-conviction case.[1] In addition, the jury necessarily found Lambrix eligible for a death sentence by their guilt phase findings that Lambrix had committed another murder.

## ARGUMENT

### ISSUE I

**HURST V. FLORIDA HAS NO APPLICATION THIS CASE BECAUSE IT WAS FINAL ON DIRECT REVIEW WHEN HURST WAS DECIDED AND IN ANY CASE, THERE IS NO ERROR WHERE THE JURY NECESSARILY FOUND THAT LAMBRIX WAS ELIGIBLE FOR THE DEATH PENALTY BY ITS GUILT PHASE FINDINGS.**

In their briefs, Amicus Curiae assert that Hurst v. Florida, ___ S. Ct. ___, 2016 WL 112683 (January 12, 2016) entitles Lambrix to a life sentence or a resentencing. Neither contention has any merit.

### A. *Hurst* does not entitle Lambrix to a life sentence.

Amicus for the Florida Association of Defense Lawyers posit an interesting, but plainly meritless argument that Hurst entitles Lambrix to a life sentence. However, Hurst did not determine capital punishment to be unconstitutional; Hurst

[1] In its order of January 21, 2016 this Court invited a State response to the Amicus' briefs filed in support of Petitioner Lambrix. This brief is filed in accordance with this Court's order.

only invalidated Florida's procedures for implementation, finding that it could result in a Sixth Amendment violation if the judge makes factual findings which are not supported by a jury verdict. Therefore, Section 775.082(2), Fla. Stat. does not apply, by its own terms. That section provides that life sentences without parole are mandated "[i]n the event the death penalty in a capital felony is held to be unconstitutional," and was enacted following Furman v. Georgia, 408 U.S. 238 (1972), in order to fully protect society in the event that capital punishment as a whole for capital felonies were to be deemed unconstitutional. This provision for example applied in Coker v. Georgia, 433 U.S. 584 (1977), where the United States Supreme Court held that capital punishment was not available for the capital felony of raping an adult woman.

This Court's decision in Donaldson v. Sack, 265 So. 2d 499 (Fla. 1972), has no application to this case. Donaldson is not a case of statutory construction, but one of jurisdiction. Based on our state constitution in 1972, which vested jurisdiction of capital cases in circuit courts rather than the criminal courts of record, Donaldson held that circuit courts no longer maintained jurisdiction over capital cases since there was no longer a valid capital sentencing statute to apply. Donaldson observed the new statute (§ 775.082(2)) was conditioned on the invalidation of the death penalty, but clarifies, "[t]his provision is not before us for

review and we touch on it only because of its materiality in considering the entire matter."

The focus and primary impact of the Donaldson decision was on those cases which were pending for prosecution at the time Furman was released. Donaldson does not purport to resolve issues with regard to pipeline cases pending before the Court on appeal, or to cases that were already final at the time Furman was decided. This Court's determination to remand all pending death penalty cases for imposition of life sentences in light of Furman is discussed in Anderson v. State, 267 So. 2d 8 (Fla. 1972), a case which explains that, following Furman, the Attorney General filed a motion requesting that this Court relinquish jurisdiction to the respective circuit courts for resentencing to life, taking the position that the death sentences that were imposed were illegal sentences. There is no legal reasoning or analysis to explain why commutation of 40 sentences was required, but it is interesting to observe that this was before the time that either this Court or the United States Supreme Court had determined the appropriate rules for retroactivity, such as Teague v. Lane, 489 U.S. 288 (1989), and Witt v. State, 387 So. 2d 922 (1980).

At any rate, there are several cogent reasons for this Court to reject the blanket approach of commuting all capital sentences currently pending before this

Court on direct appeal such as followed the Furman decision. Furman was a decision that invalidated all death penalty statutes in the country, with the United States Supreme Court offering nine separate opinions that left many courts "not yet certain what rule of law, if any, was announced." Donaldson, 265 So. 2d at 506 (Roberts, C.J., concurring specially). The Court held that the death penalty, as imposed for murder and for rape, constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. The various separate opinions provided little guidance on what procedures might be necessary in order to satisfy the constitutional issues, and whether a constitutional scheme would be possible. The situation following Furman simply has no application to the limited procedural ruling issued by the Supreme Court in Hurst.

Amicus for the Florida Association of Criminal Defense Lawyers argue that effectively every death sentenced prisoner should have their sentence reduced to life. (Amicus Brief of FACDL at 3-5). Neither the federal nor Florida constitutions authorize this Court to take such action. And, such a decision ignores the considerable interests of the citizens of this State and, in particular, the victims' family members upon whom the emotional toll of such an action cannot be measured. Just next week this Court will hear argument on several capital cases,

including Lambrix, involving a brutal double homicide under an active death warrant. It will also hear argument in the Michael King case, SC14-1949, where King took a young married mother of two young children from her home in broad daylight, leaving her two children behind, brutally raping her and in her prolonged ordeal she managed to obtain King's phone and call for help. Her frantic 911 call begging for help will forever be remembered by those who have heard it. Sadly, King murdered Denise by shooting her at close range and buried her body in the hope of evading responsibility for her murder. Another case this Court will hear is Dontae Morris, Case No. SC14-1317, who coldly murdered two police officers in order to avoid going back to prison. This is just a representative sample of the hundreds of murderers on Florida's death row. Most of these cases are notorious in their own right, but, each also represents a deeply personal tragedy for both the victims and the victims' family members. Florida law provides for and justice clearly demands that some murderers forfeit their own lives for having committed such crimes. Appellant's invitation for this Court to simply commute all death sentences is not a serious legal or moral proposition.

**B. *Hurst* is not retroactive and therefore remand to the trial court to consider a motion based upon *Hurst* would be futile.**

Amicus counsel for the Capital Habeas of Office of the Federal Public Defender for the Northern District of Florida unit argues that Hurst is retroactive.

However, Hurst has no application to Lambrix who was tried, convicted, and sentenced in accordance with Florida and federal law at the time of his trial. Amicus largely ignores the great wealth of precedent directly on point which establishes that Ring, and thereby Hurst, simply announced a new procedural rule that will not have retroactive application.

In Hurst, the Court held that Florida's capital sentencing structure violated Ring v. Arizona, 536 U.S. 584 (2002), because it required a judge to conduct the fact-finding necessary to enhance a defendant's sentence. Hurst, 2016 WL 112683, *5–6. In arriving at its decision, the Court looked directly to Florida's sentencing statute, finding that it does not "make a defendant eligible for death until 'findings *by the court* that such a person shall be punished by death.'" Id. at *6 (citing Fla. Stat. § 775.082(1) (emphasis in opinion). Also, under Spaziano v. State, 433 So. 2d 508, 512 (Fla. 1983), the jury's role in sentencing a defendant to capital punishment was viewed as advisory. Spaziano, 433 So. 2d at 512. Thus, the Supreme Court held Florida's capital sentencing structure, "which required the judge alone to find the existence of an aggravating circumstance", violated its decision in Ring, and overruled the prior decisions of Spaziano v. State of Florida, and Hildwin v. Florida, 490 U.S. 638 (1989). Hurst, 2016 WL 112683, *6–9.

The Supreme Court recently reaffirmed that the Sixth Amendment right

underlying Ring and Apprendi v. New Jersey, 530 U.S. 466 (2000), did not apply to factual findings made in selecting a sentence for a defendant after the defendant has been found eligible to receive a sentence within a particular range. Alleyne v. United States, 133 S. Ct. 2151, 2161 n.2 (2013)("Juries must find any facts that increase either the statutory maximum or minimum because the Sixth Amendment applies where a finding of fact both alters the legally prescribed range and does so in a way that aggravates the penalty. Importantly, this is distinct from factfinding used to guide judicial discretion in selecting a punishment 'within limits fixed by law.' Williams v. New York, 337 U.S. 241, 246, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949). While such findings of fact may lead judges to select sentences that are more severe than the ones they would have selected without those facts, the Sixth Amendment does not govern that element of sentencing."); see also United States v. O'Brien, 560 U.S. 218, 224 (2010)(recognizing that Apprendi does not apply to sentencing factors that merely guide sentencing discretion without increasing the applicable range of punishment to which a defendant is eligible).

Moreover, in Kansas v. Carr, 2016 WL 228342, at *8 (Jan. 20, 2016), the Court discussed the distinct determinations of eligibility and selection under Kansas's capital sentencing scheme. In doing so, the Court stated that an eligibility determination was limited to findings related to aggravating circumstances and that

determinations regarding whether mitigating circumstances existed and the weighing process were selection determinations. In fact, the Court stated that such determinations were not factual findings at all. Id. Instead, the Court termed the determinations regarding the existence of mitigating circumstances as "judgment call[s]" and weighing determinations "question[s] of mercy." Id.

When a constitutional rule is announced, its requirements apply to defendants whose convictions or sentences are pending on direct review or not otherwise final. Griffith v. Kentucky, 479 U.S. 314, 323 (1987). However, once a criminal conviction has been upheld on appeal, the application of a new rule of constitutional criminal procedure is limited. The Supreme Court has held that new rules of criminal procedure will apply retroactively only if they fit within one of two narrow exceptions.[2] Schriro v. Summerlin, 542 U.S. 348, 351 (2004).

Amicus from the Capital Habeas Unit and the ACLU appear to argue that Hurst created a new substantive rule**,** not a new procedural rule, or, that it created

[2] Those exceptions are: (1) a substantive rule that "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe or if it prohibits a certain category of punishment for a class of defendants because of their status or offense"; and (2) a procedural rule which constitutes a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. Teague v. Lane, 498 U.S. 288, 310–13 (1989); Penry v. Lynaugh, 492 U.S. 302 (1989) (abrogated on other grounds by Atkins v. Virginia, 536 U.S. 304 (2002); Butler v. McKellar, 494 U.S. 407 (1990); Saffle v. Parks, 494 U.S. 484 (1990)).

some new fundamental or structural error that is not subject to a harmless error analysis. Neither contention has any merit.

In Schriro v. Summerlin, the Supreme Court directly addressed whether its decision in Ring v. Arizona was retroactive. Summerlin, 542 U.S. at 349. The Court held the decision in Ring was **procedural** and non-retroactive. Id. at 353. This was because Ring only "altered the range of permissible methods for determining whether a defendant's conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment." Id. The Court concluded its opinion stating: "The right to jury trial is fundamental to our system of criminal procedure, and States are bound to enforce the Sixth Amendment's guarantees as we interpret them. But it does not follow that, when a criminal defendant has had a full trial and one round of appeals in which the State faithfully applied the Constitution as we understood it at the time, he may nevertheless continue to litigate his claims indefinitely in hopes that we will one day have a change of heart. Ring announced a new procedural rule that does not apply retroactively to cases already final on direct review." Summerlin, 542 U.S. at 358. See Whorton v. Bockting, 549 U.S. 406, 416 (2007)(holding Crawford v. Washington, 541 U.S. 36 (2004) was not retroactive under Teague and relying extensively on the analysis of Summerlin).

Ring did not create a new constitutional right. That right was created by the Sixth Amendment guaranteeing the right to a jury trial.[3] If Ring was not retroactive, then Hurst cannot be retroactive as Hurst is merely an application of Ring to Florida. In fact, the decision in Hurst is based on an entire line of jurisprudence which courts have almost universally held to not have retroactive application. See DeStefano v. Woods, 392 U.S. 631 (1968) (*per curiam*) (holding the Court's decision in Duncan v. Louisiana, which guaranteed the right to a jury trial to the States was not retroactive); McCoy v. United States, 266 F.3d 1245, 1255, 1259 (11th Cir. 2001) (holding Apprendi not retroactive under Teague, and acknowledging that every federal circuit to consider the issue reached the same conclusion); Varela v. United States, 400 F.3d 864, 866–67 (11th Cir. 2005) (explaining that Supreme Court decisions, such as Ring, Blakely, and Booker, applying Apprendi's "prototypical procedural rule" in various contexts are not retroactive); Crayton v. United States, 799 F.3d 623, 624-25 (7th Cir. 2015), cert. denied, 136 S. Ct. 424 (2015) (holding that Alleyne v. United States, 570 U.S. ___, ___, 133 S. Ct. 2151, 2156 (2013), which extended Apprendi from maximum to

[3] The right to a jury trial was extended to the States in Duncan v. Louisiana, 391 U.S. 145 (1968). But, in DeStefano v. Woods, 392 U.S. 631 (1968) (*per curiam*), the Court declined to apply the holding of Duncan retroactively. Apprendi merely extended the right to a jury trial to the sentencing phase, when the State sought to increase the maximum possible punishment. Apprendi, 530 U.S. at 494.

minimum sentences, did not, like Apprendi or Ring, apply retroactively); State v. Johnson, 122 So. 3d 856, 865-66 (Fla. 2013) (holding Blakely not retroactive in Florida).

Because the United States Supreme Court expressly found that Ring was not retroactive, Hurst, which applied Ring to invalidate Florida's statute, is also not retroactive. Significantly, this Court has already decided that Ring does not apply retroactively in Florida. In Johnson v. State, 904 So. 2d 400, 412 (Fla. 2005), this Court comprehensively applied the Witt factors to determine that Ring was not subject to retroactive application. This Court concluded:

> We conclude that the three Witt factors, separately and together, weigh against the retroactive application of *Ring* in Florida. To apply *Ring* retroactively "would, we are convinced, destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state ... beyond any tolerable limit." *Witt*, 387 So. 2d at 929-30. Our analysis reveals that *Ring*, although an important development in criminal procedure, is not a "jurisprudential upheaval" of "sufficient magnitude to necessitate retroactive application." *Id*. at 929. We therefore hold that *Ring* does not apply retroactively in Florida and affirm the denial of Johnson's request for collateral relief under *Ring*.

This Court specifically noted the severe and unsettling impact that retroactive application would have on our justice system [with nearly 400 death

sentenced prisoners]. Johnson, 904 So. 2d at 411-12.[4] Amicus' invitation for this Court to revisit this decision is unpersuasive. There is no question that retroactive application will be greatly disruptive to our justice system as there are nearly 400 death sentenced murderers in Florida. Such disruption is completely unnecessary and unjustified by any compelling notions of fairness or justice. Courts have uniformly rejected claims that Ring should be applied retroactively.[5] See State v.

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[4] This Court's decision in State v. Johnson, 122 So. 3d at 865-66, similarly holding that one of Apprendi's many permutations was not retroactive is also instructive. In finding Blakely was not retroactive, this Court stated, in part:

> Retroactive application of the rule announced in *Blakely* would require review of the records of numerous cases, first to determine whether *Blakely* error occurred, then whether such error was preserved, and finally, whether the error was harmless. In those cases where a claim for postconviction relief survives such review, juries would likely have to be empaneled to hear evidence and determine sentence enhancements. All told, this would be a time-consuming undertaking that would significantly strain our scarce court resources. Even if the retroactive application extended only to cases finalized in the interval between the issuance of *Apprendi* and *Blakely*, the disruption would be significant. Accordingly, this factor also weighs against applying *Blakely* retroactively.

[5]The only apparent outlier is Missouri. In a decision issued before the Supreme Court issued its opinion on retroactivity in Summerlin the Missouri Supreme Court applied Ring retroactively to those few cases where the jury had deadlocked on a verdict and therefore the judge made all the requisite findings and sentenced the defendant to death. In doing so, the court noted that it would have minimal impact in Missouri as the court had identified only **five** such cases. State v. Whitfield, 107 S.W.3d 253, 268-69 (Mo. 2003). C.f. State ex rel. Taylor v. Steele, 341 S.W.3d 634, 652 (Mo. 2011) (noting that subsequently the Supreme Court and federal courts subsequently held Ring not retroactive "[a]nd in light of Whitfield's limited

Towery, 204 Ariz. 386, 393-94, 64 P.3d 828, 835-36 (2003) ("Conducting new sentencing hearings, many requiring witnesses no longer available, would impose a substantial and unjustified burden on Arizona's administration of justice" and would be inconstant with the Court's duty to protect victim's rights under the Arizona Constitution); Rhoades v. State, 149 Idaho 130, 139-40, 233 P.3d 61, 70-71 (2010) (holding that Ring is not retroactive after conducting its own independent Teague analysis and observing, as the Supreme Court did in Summerlin, that there is debate as to whether juries or judges are the better fact-finders and that it could not say "confidently" that judicial factfinding "seriously diminishes accuracy."); Colwell v. State, 118 Nev. 807, 821-22, 59 P.3d 463, 473 (2002), cert. denied, 540 U.S. 981 (2003) **(**applying Teague to find that Ring announced a new procedural rule that would not be subject to retroactive application).[6]

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retroactively holding, this Court is not compelled to go further than the United States Supreme Court to provide Sixth Amendment jury sentencing to Taylor.").

[6] In Colwell, 59 P.3d 463, 473 the Nevada Supreme Court explained:

> . .[W]e believe it is clear that *Ring* is based simply on the Sixth Amendment right to a jury trial, not on a perceived need to enhance accuracy in capital sentencings, and does not throw into doubt the accuracy of death sentences handed down by three-judge panels in this state. We conclude therefore that the likelihood of an accurate sentence was not seriously diminished simply because a three-judge panel, rather than a jury, found the aggravating circumstances that

There is simply no compelling justification for revisiting this Court's decision in Johnson. Assuming, any new Witt analysis would be appropriate, all of the same factors apply with equal force to hold that Hurst is not retroactive. Such an application would be greatly deleterious to finality and unsettle the reasonable expectations for justice by Florida's citizens and, in particular, countless numbers of victims' family members.[7]

There can be no credible argument that Florida failed to apply Ring in bad faith. The State certainly relied in good faith upon prior decisions of this Court and prior decisions of the Supreme Court which had upheld Florida's capital sentencing statute. See e.g. Rigterink v. State, 66 So. 3d 866, 895-96 (Fla. 2011) (noting that "[i]n over fifty cases since Ring's release, this Court has rejected

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> supported Colwell's death sentence. We conclude that retroactive application of *Ring* on collateral review is not warranted.

[7] As noted by the Supreme Court Calderon v. Thompson, 523 U.S. 538, 556 (1998) the concept of finality is of vital importance to our system of justice. The Court stated, in part:

> Only with an assurance of real finality can the State execute its moral judgment in a case. Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out. *See generally Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). To unsettle these expectations is to inflict a profound injury to the "powerful and legitimate interest in punishing the guilty," *Herrera v. Collins*, 506 U.S. 390, 421, 113 S.Ct. 853, 871, 122 L.Ed.2d 203 (1993) (O'CONNOR, J., concurring), an interest shared by the State and the victims of crime alike.

similar Ring claims."). Indeed, since Ring was decided, more than a decade passed without the Supreme Court accepting a case challenging Florida's capital sentencing statute in light of Ring, until Hurst. While the Supreme Court ultimately extended Ring to invalidate Florida's capital sentencing procedure, there were significant differences between the Arizona and Florida statutes that rendered such an extension far less than certain or inevitable. See Hurst at 9-10 (Alito, Justice, dissenting) (observing that unlike Arizona, "[u]nder the Florida system, the jury plays a critically important role and that the Court's "decision in Ring did not decide whether this procedure violate[d] the Sixth Amendment . . ."). In Butterworth v. United States, 775 F.3d 459, 467-68 (1st Cir. 2015), cert. denied, 135 S. Ct. 1517 (2015), the First Circuit Court of Appeals rejected a defendant's attempt to justify retroactive application of Alleyne [holding that facts justifying minimum mandatory sentence must be found by a jury] based upon Apprendi hindsight:

> This twist on Butterworth's argument is unpersuasive. We are unaware of any instance in which the Supreme Court (or any federal court) decided that a particular procedural protection is not retroactively applicable under the watershed exception, and then changed its mind years later due to the law's intervening evolution. It is not difficult to imagine why that is so: Judicial interpretation of the Constitution, by its nature, builds on itself. The exercise of seeking out the first domino to fall, in hindsight, would make the retroactivity determination of any given new rule interminable. So the fact that *Apprendi* was cited by subsequent cases extending the jury trial

> guarantee and heightened burden of proof to mandatory state sentencing guidelines, *Blakely v. Washington*, 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), federal sentencing guidelines, *Booker*, 543 U.S. at 244–45, 125 S.Ct. 738, and the death penalty, *Ring v. Arizona*, 536 U.S. 584, 589, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), does not a watershed moment make of *Apprendi* itself. Put differently, when a non-retroactive new constitutional rule is later cited in cases that create more new rules, that first new rule does not then automatically qualify as retroactive under *Teague*. We note, too, that the most relevant guidance the Supreme Court has provided on retroactivity points squarely against the conclusion Butterworth wants us to reach. In *Schriro v. Summerlin*, 542 U.S. 348, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004), the Court declined to make retroactive a new rule prohibiting judges from determining the presence or absence of factors implicating the death penalty, finding "it implausible that judicial factfinding so seriously diminishe[s] accuracy as to produce an impermissibly large risk of injustice." *Id.* at 355-56, 124 S.Ct. 2519.6 (alteration in original) (internal quotation marks omitted). *Schriro* only cuts *Alleyne*'s potential retroactivity approximately in half, since it did not implicate the burden of proof. But *Schriro* takes us in the opposite direction of a retreat from Sepulveda which, just like the question facing us here, implicated both the beyond a reasonable doubt and jury trial protections.

There is no reason for this Court to depart from its prior determination that Ring does not apply retroactively to cases that are final on direct appeal.[8] Such a decision would represent a clear break from this Court's precedent which has not found decisions from the United States Supreme Court providing new

[8] See also Washington v. State, 907 So. 2d 512, 516 (Fla. 2005) (Lewis, Justice, concurring) ("The interpretations of the concepts discussed in *Apprendi* and *Ring* by the United States Supreme Court drive my consideration that *Ring* cannot be classified as being of fundamental significance or of significant magnitude to cause retroactive application.").

developments in constitutional law retroactive. See e.g. Chandler v. Crosby, 916 So. 2d 728, 731 (Fla. 2005) (holding that all three factors in the "Witt analysis weigh against the retroactive application of Crawford[]" and noting that the "new rule does not present a more compelling objective that outweighs the importance of finality.") (citing State v. Glenn, 558 So. 2d 4, 7 (Fla. 1990)); Hughes v. State, 901 So. 2d 837, 838 (Fla. 2005) (holding Apprendi v. New Jersey, is not retroactive); State v. Statewright, 300 So. 2d 674 (Fla. 1974) (declining to retroactively apply Miranda v. Arizona, 384 U.S. 436 (1966).

Capital Habeas Amicus' reliance upon this Court's decision in Falcon v. State, 162 So. 3d 954, 961 (Fla. 2015) is misplaced. In Falcon this Court found that the Supreme Court's decision in Miller announced a new substantive bar to mandatory life sentences without the possibility of parole for all juveniles. This Court had little difficulty determining that such a decision effectively places beyond the power of the State the power to punish certain offenders. Subsequently, the Supreme Court decided that Miller announced a new substantive rule that was retroactive. The fact the ruling was described as substantive, not procedural, was critical to the retroactivity analysis. The Court explained:

> Substantive rules, then, set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose. It follows that when a State enforces a proscription or penalty barred by the Constitution, the resulting conviction or sentence is,

> by definition, unlawful. Procedural rules, in contrast, are designed to enhance the accuracy of a conviction or sentence by regulating "the manner of determining the defendant's culpability." Schriro, 542 U.S., at 353; Teague, supra, at 313. Those rules "merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." Schriro, supra, at 352. Even where procedural error has infected a trial, the resulting conviction or sentence may still be accurate; and, by extension, the defendant's continued confinement may still be lawful. For this reason, a trial conducted under a procedure found to be unconstitutional in a later case does not, as a general matter, have the automatic consequence of invalidating a defendant's conviction or sentence.19 The same possibility of a valid result does not exist where a substantive rule has eliminated a State's power to proscribe the defendant's conduct or impose a given punishment. "[E]ven the use of impeccable factfinding procedures could not legitimate a verdict" where "the conduct being penalized is constitutionally immune from punishment." United States v. United States Coin & Currency, 401 U.S. 715, 724, 91 S.Ct. 1041, 28 L.Ed.2d 434 (1971). Nor could the use of flawless sentencing procedures legitimate a punishment where the Constitution immunizes the defendant from the sentence imposed. "No circumstances call more for the invocation of a rule of complete retroactivity." Ibid.

Montgomery v. Louisiana, 14-280, 2016 WL 280758, at *8 (U.S. 2016). Since both this Court and the Supreme Court has held that Ring announced a new procedural rule, not a substantive rule, Falcon has no application to this case.

In conclusion, since both the Supreme Court and this Court have held that Ring v. Arizona does not apply retroactively, Hurst should not applied retroactively in Florida. See Jeanty v. Warden, FCI–Miami, 757 F.3d 1283, 1285 (11th Cir. 2014)(observing "if *Apprendi*'s rule is not retroactive on collateral review, then neither is a decision applying its rule")(citing *In re Anderson*, 396

F.3d 1336, 1340 (11th Cir. 2005)). Appellant is not entitled to relief.

**C. Any *Hurst* error is clearly subject to harmless error analysis**

Amicus for Lambrix take the position that any Hurst type error is structural and not subject to harmless error review. That position is quite curious given the fact the Supreme Court remanded Hurst back to this Court so that it could assess harmlessness. The Court stated:

> Finally, we do not reach the State's assertion that any error was harmless. See *Neder v. United States*, 527 U.S. 1, 18-19 (1999) (holding that the failure to submit an uncontested element of an offense to a jury may be harmless). This Court normally leaves it to state courts to consider whether an error is harmless, and we see no reason to depart from that pattern here. See Ring, 536 U.S. at 609 n.7."

Hurst v. Florida, in section D on page 10. It seems clear that any error, contrary to Amicus position, is subject to harmless error review.

Putting aside the notion of harmlessness, in this case the jury convicted Lambrix of two murders. Hurst was in a distinctly different position from Lambrix. Hurst was convicted of first-degree murder, and did not have a prior criminal history or a contemporaneous felony conviction with the murder. Hurst v. State, 147 So. 3d 435, 440–41 (Fla. 2014). Accordingly, Hurst presented the United States Supreme Court with a 'pure' claim under Ring v. Arizona, 536 U.S. 584 (2002), where the jury neither gave a unanimous recommendation nor were any of

established aggravating circumstances identifiable as having come from a jury verdict. Hurst, 147 So. 3d at 445–47.

Hurst does not hold there is a constitutional right to any jury sentencing. In Florida, a defendant is eligible for a capital sentence if at least one aggravating factor applied to the case. See Ault v. State, 53 So. 3d 175, 205 (Fla. 2010); Zommer v. State, 31 So. 3d 733, 752-54 (Fla. 2010); State v. Steele, 921 So. 2d 538, 540 (Fla. 2005). In Lambrix's case, a unanimous jury convicted him of two murders [victims Moore and Bryant], and based on these convictions, he was indisputably eligible for his death sentences. Thus, his eligibility for a death sentence is supported by unanimous jury findings unlike Hurst.[9]

This Court has consistently rejected Ring claims where the defendant is convicted of a qualfying contemporaneous felony. As explained in Ellerbee v. State, 87 So. 3d 730, 747 (Fla. 2012):

Here, the jury found Ellerbee "Guilty of First Degree Murder as

[9] The five aggravating circumstances found by the trial judge are: (1) the capital felonies were committed by a person under sentence of imprisonment, section 921.141(5)(a), Florida Statutes (1983); (2) the defendant was previously convicted of another capital felony, section 921.141(5)(b); (3) the capital felony was committed for pecuniary gain, section 921.141(5)(f); (4) the capital felonies were especially heinous, atrocious or cruel, section 921.141(5)(h); and (5) the capital felonies were homicides and committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification, section 921.141(5)(i). Lambrix, 494 So. 2d at 1148. The pecuniary gain aggravator only applied to the death sentence of victim Moore.

> charged in the indictment," and guilty of the contemporaneous burglary, "as charged in the indictment," and that "[i]n the course of the burglary," Ellerbee committed a battery while armed with a firearm. These findings, made by the jury, meet the requirements of the aggravators in section 921.141(5)(d) & (f).

In Ex parte Waldrop, 859 So. 2d 1181, 1188 (Ala. 2002), the Alabama Supreme Court employed a similar analysis to find the guilt phase finding of a murder in the course of a specified felony sufficient to satisfy Ring. The court stated:

> Because the jury convicted Waldrop of two counts of murder during a robbery in the first degree, a violation of Ala.Code 1975, § 13A–5–40(a)(2), the statutory aggravating circumstance of committing a capital offense while engaged in the commission of a robbery, Ala.Code 1975, § 13A–5–49(4), was "proven beyond a reasonable doubt." Ala.Code 1975, § 13A–5–45(e); Ala.Code 1975, § 13A–5–50. Only one aggravating circumstance must exist in order to impose a sentence of death. Ala.Code 1975, § 13A–5–45(f). Thus, in Waldrop's case, the jury, and not the trial judge, determined the existence of the "aggravating circumstance necessary for imposition of the death penalty." *Ring*, 536 U.S. at 609, 122 S.Ct. at 2443. Therefore, the findings reflected in the jury's verdict alone exposed Waldrop to a range of punishment that had as its maximum the death penalty. This is all *Ring* and *Apprendi* require.

See also Zebroski v. State, 822 A.2d 1038, 1051 (Del.)[10], cert. denied, 540 U.S. 933 (2003) (finding Ring satisfied because the jury convicted the defendant of an enumerated felony murder under Delaware's statute and concluding that "once a

[10] Negative treatment on other grounds, Neal v. State, 80 A.3d 935, 951 (Del. 2013)

jury finds unanimously and beyond a reasonable doubt, the existence of at least one statutory aggravating circumstance, the defendant becomes death eligible and Ring's constitutional requirement of jury fact-finding is satisfied.")(citing Brice v. State, 815 A.2d 314, 318 (Del. 2003)).

Lambrix was unquestionably eligible for the death penalty based upon the jury's factual finding.[11] The trial judge was able to utilize this aggravator, necessarily found by the jury, in sentencing Lambrix.[12]

The Supreme Court itself has recognized the critical distinction of an enhanced sentence supported by a prior conviction. See Almendarez-Torres v. United States, 523 U.S. 224 (1998) (permitting judge to impose higher sentence based on prior conviction); Ring, 536 U.S. at 598 n.4 (noting Ring does not challenge Almendarez-Torres, "which held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence"); Alleyne

[11] Any argument that a jury had to find each and every aggravator is without merit. Once the jury found one aggravator, Lambrix became eligible for the higher range penalty---death. In Alleyne v. United States, 133 S. Ct. 2151, 2162-63 (2013) the Court explained that "[t]he essential point is that the aggravating fact produced a higher range, which, in turn, conclusively indicates that the fact is an element of a distinct and aggravated crime." As noted, in Florida, only one aggravating factor is necessary to support the higher range penalty--death. Finding additional aggravators does not expose the defendant to any higher or additional penalty.

[12] § 921.141(5)(b) ("The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person").

v. United States, 133 S. Ct. 2151, 2160 n.1 (2013) (affirming Almendarez-Torres provides valid exception for prior convictions). Consequently, this Court's well established precedent that any Ring claim is harmless in the face of contemporaneous qualifying felony convictions was not disturbed by Hurst.

In sum, none of the arguments presented by the Amicus in this case suggest that Lambrix or any other Defendant in a similar procedural posture are entitled to relief in light of Hurst.

## CONCLUSION

WHEREFORE, the State respectfully requests that this Honorable Court AFFIRM the denial of post-conviction relief.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of January, 2016, I electronically filed the foregoing with the Clerk of the Florida Supreme Court by using the e-portal filing system which will send a notice of electronic filing to the following: Maria C. Perinetti (**perinetti@ccmr.state.fl.us)** and Raheela Ahmed (**ahmed@ccmr.state.fl.us)**, Assistants CCRC, Law Office of the Capital Collateral Regional Counsel - Middle Region, 12973 N. Telecom Parkway, Temple Terrace, Florida 33637-0907, to Sonya Rudenstine at srudenstine@yahoo.com and Karen M. Gottlieb at karen.m.gottlieb@gmail.com; to N. Adam Tebrugge at atebrugge@aclufl.org and Nancy G. Abudu at nabudu@aclu.org and to Billy Nolas at billy_nolas@fd.org.

## CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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