IN THE SUPREME COURT OF FLORIDA

CARY MICHAEL LAMBRIX,

Appellant,

Case Nos. SC16-8 & SC16-56

v.

STATE OF FLORIDA,

Appellee.

_____/

MOTION FOR A TWO DAY EXTENSION OF TIME

COMES NOW, the Defendant, **CARY MICHAEL LAMBRIX**, by and through his undersigned attorney, and requests a two day extension of time to file the reply to the State's response to the state habeas petition and to file the reply brief. In support thereof, Mr. Lambrix states:

The day after counsel had filed the initial brief in Case No. 16-8, and the petition in Case No. 16-56, the United States Supreme Court issued its decision in *Hurst v. Florida* on January 12, 2016. In *Hurst*, the United States Supreme Court by a vote of 8-1 concluded that Florida's capital sentencing statute was unconstitutional: "We hold this sentencing scheme unconstitutional. The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." 2016 WL 112683

at *3. The decision in *Hurst* was a tectonic shift in the law. The declaration that Florida's capital sentencing statute is unconstitutional can only be described as a development of fundamental significance or a jurisprudential upheaval. *See Hughes v. State*, 901 So. 2d 837, 848 (Fla. 2005) (Lewis, J., concurring in result only) ("Based on language in both *Apprendi* and *Ring*, these decisions initially appeared to implicate constitutional interests of the highest order and seemed to go to the very heart of the Sixth Amendment.").

This Court certainly recognized the enormity of the decision in *Hurst v. Florida* when within hours of the *Hurst* decision this Court *sua sponte* issued an Amended Briefing Order requiring the Respondent to include in its response to the habeas petition "the applicability *of Hurst v. Florida*, No. 14-7505, 2016 WL 112683 (Jan. 12, 2016) to each of Petitioner's first-degree murder convictions and sentences of death.[1] Specifically, the Respondent shall address retroactivity of *Hurst*, the effect of *Hurst* in light of the aggravating factors found by the trial court and whether any error in Lambrix's case is harmless." The Amended Order directed Petitioner to submit his reply on January 20, 2016 to address these same issues. Appellee/Respondent filed on Friday, January 15, 2016.

[1] On January 14, 2016, this Court again recognized the enormity of the decision in *Hurst* and granted Rodney Tyrone Lowe's, Case No.: SC12-263, motion for supplemental briefing ordering that he file his supplemental brief on or before February 15, 2016. Mr. Lowe has been granted a full month in which to brief the issues. Mr. Lambrix must do the same in eight days.

Mr. Lambrix, who submitted his habeas petition and initial brief to this Court the day before the 8-1 decision in *Hurst v. Florida* issued and thus did not have notice of the decision and/or an opportunity to address the jurisprudential upheaval that is *Hurst v. Florida* in either his habeas petition or initial brief, will have his very first opportunity to present his claims for relief based upon the decision in a reply due to be filed in this Court a mere eight days after *Hurst v. Florida* was published. And in the reply, Mr. Lambrix has been ordered to address a laundry list of issues that indisputably arise in the wake of *Hurst*. But of course, the list of issues identified by this Court *sua sponte* does not include issues that Mr. Lambrix's collateral counsel may identifying as also arising in the wake of *Hurst* which also warrant briefing and presentation to this Court.

Clearly since *Hurst v. Florida* just issued, now a mere six days ago, Mr. Lambrix's case will be one of first impression for consideration of *Hurst* and the jurisprudential upheaval it has created. So from the issuance of *Hurst*, this Court has afforded Mr. Lambrix eight days to read the decision, assess its implications, investigate the impact on how it affects a capital penalty phase proceeding, review the record in Mr. Lambrix's case in light of the decision, determine what non-record evidence exists as to how the decision would have changed trial counsel's strategic approach to Mr. Lambrix's capital trial, analyze the response filed by the State on January 15th, conduct legal research into all the issues that this Court *sua sponte*

ordered the parties to address, conduct legal research regarding other pertinent issues that this Court did not specifically identify in its order, and prepare and file written pleadings presenting Mr. Lambrix's claims premised upon *Hurst* while addressing the list of issues that this Court specifically identified in its Amended Order. This is not the normal procedure set forth in Rule 3.851 for a capital defendant to present his claims from a new decision by the United States Supreme Court. Normally, the capital defendant has one year to prepare and file a Rule 3.851 motion premised upon new United States Supreme Court law.

In his preliminary efforts on behalf of Mr. Lambrix, counsel has already found an issue not identified in the Amended Order, i.e. whether Mr. Lambrix's claims pursuant to *Hurst* are cognizable in a habeas petition, or must they be presented in a Rule 3.851 motion. When *Hitchcock v. Dugger*, 481 U.S. 393 (1987), issued, this Court ultimately determined that *Hitchcock* claims required consideration of non-record evidence necessary in evaluating the impact of *Hitchcock* on specific penalty phase proceedings. *Hall v. State*, 541 So. 2d 1125, 1126 (Fla. 1989) (Florida's pre-*Hitchcock* law "precluded Hall's counsel from investigating, developing, and presenting possible nonstatutory mitigating circumstance"); *Meeks v. Dugger*, 576 So. 2d 713, 716 (Fla. 1991) ("according to the affidavits filed with this motion, Meeks' counsel did not seek to develop nonstatutory mitigating evidence because he was constrained by the then-prevailing statutory construction"). Accordingly, this

Court concluded that *Hitchcock* claims were required to be presented in Rule 3.850 motions. *Hall v. State*, 540 So. 2d at 1128 ("We hold, therefore, that *Hitchcock* claims should be presented to the trial court in a rule 3.850 motion for postconviction relief and that, after the filing of this opinion, such claims will not be cognizable in habeas corpus proceedings."); *Meeks v. Dugger*, 576 So. 2d at 716 ("*Hitchcock* claims should now be raised by motion for postconviction relief. However, Meeks' petition for habeas corpus was filed before our decision in *Hall*. Therefore, we remand this case to the trial court for an evidentiary hearing directed to the *Hitchcock* allegations of this petition as if they had been filed pursuant to Florida Rule of Criminal Procedure 3.850.").

Hurst like *Hitchcock* has enormous implications for how trial counsel would approach a capital trial, and in particular the penalty phase proceeding. By changing who decides the facts necessary for death eligibility and by treating those facts as elements of the offense of capital murder, the decision in *Hurst* also changes the strategies that trial counsel in Florida would employ in a capital trial. Counsel must investigate by speaking with trial attorneys regarding how *Hurst* would change how the penalty phase was conducted. This kind of investigation requires time as it did in the post *Hitchcock* cases. It also requires evidentiary development. For example on its face, *Hurst* holds that a jury's decision as to the facts necessary under Florida statutes for rendering death eligible must be conclusive, not advisory. Certainly, this

would cause trial counsel to object to any instructions informing a jury that its penalty phase decision is advisory. Trial counsel would undoubtedly go further in this regard and emphasize to the jury its responsibility for a death sentence. *See Caldwell v. Mississippi*, 472 U.S. 320 (1985). Certainly, there are trial attorneys available to testify to this; but under the time parameters set by this Court, counsel does not have time to develop this except in the most rudimentary fashion.

Similarly, this Court's Amended Order overlooks the implication of *Hurst* on juror unanimity. This is matter which must be assessed and warrants non-record evidence regarding how trial counsel's strategies would change if the jury was required to return a unanimous verdict. Mr. Lambrix's counsel needs to be investigating this aspect of the *Hurst* decision and the non-record evidence that is available to support his arguments.

Also not referenced in this Court's Amended Order is what is, or are, the facts that the statute requires to render a Florida capital defendant death eligible. Certainly, the *Hurst* decision observes that Florida's statute sets forth the facts necessary for death eligibility in a much different fashion that did Arizona law. *Hurst*, 2016 WL 112683 at 6, specifically set forth the additional statutorily defined facts required to be found to render the defendant death eligible are:

> **...[t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.** § 921.141(3).

This is unlike Arizona law that provided that the finding of one aggravating factor rendered the defendant death eligible.[2] This issue not only needs to be briefed, but also investigated. Non-record evidence needs to be developed and presented regarding how this aspect of *Hurst* would have impact Mr. Lambrix's penalty phase proceeding.

Counsel is diligently working on Mr. Lambrix's reply. While under Rule 3.851 Mr. Lambrix should be entitled to more time to present his *Hurst* claims, his counsel is endeavoring to comply with this Court's order. Accordingly in order to

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[2] The Arizona Supreme Court in *Ring v. State*, 25 P.3d 1139, 1151 (Ariz. 2001), explained what factual determination Arizona law required before a death sentence was authorized:

> And even then [after a sentencing hearing before the trial judge] a death sentence may not legally be imposed by the trial judge unless at least one aggravating factor is found to exist beyond a reasonable doubt. *State v. Gretzler*, 135 Ariz. 42, 54, 659 P.2d 1, 13 (1983); *see also* A.R.S. § 13–703.E ("the court ... **shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated**"). Thus, when the state seeks the death penalty, a separate evidentiary hearing, without a jury, must be held; the death sentence becomes possible only after the trial judge makes **a factual finding that at least one aggravating factor is present**.

(Emphasis added). Unlike the Arizona law at issue in *Ring*, Florida law only permits the imposition of a death sentence upon a factual determination **"...[t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances."** § 921.141(3).

complete what will be a rudimentary reply, counsel beseeches this Court for at least a two day extension of time to submit the reply. This would not interfere with this Court's oral argument setting for February 2, as there would still a ten day period between the filing of the reply and the oral argument before this Court.

Counsel herein requests an extension of time until Noon on Friday, January 22, 2016 to file the Court-ordered reply currently due to be filed by Noon on Wednesday, January 20, 2016.

Given that today is the Rev. Dr. Martin Luther King's birthday National Holiday, counsel is unable to contact opposing counsel to obtain their position on the instant motion. Given opposing counsel's prior opposition to the previously filed stay motions, counsel must assume that the State will oppose this motion. This motion is not being filed for purposes of delay, but instead for the purpose of providing this Court with a reasoned and complete reply brief and state habeas reply.

WHEREFORE, Mr. Lambrix requests a two day extension of time, until Noon on Friday January 22, 2016, to file his replies to the State's Answer Brief and the State's Response to Petitioner's Writ of Habeas Corpus with expanded briefing on all *Hurst* related matters.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been provided to: Scott A. Browne, Assistant Attorney General, Office of the Attorney General, 3507 East Frontage Road, Ste. 200, Tampa, FL 33607-7013, *Scott.Browne@myfloridalegal.com*; Capital Appeals Intake Box, *capapp@myfloridalegal.com*; via email service at *warrant@flcourts.org* this 18th day of January 2016.

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