IN THE SUPREME COURT OF FLORIDA
CASE NOS. SC16-8 & SC16-56

CARY MICHAEL LAMBRIX,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____

CARY MICHAEL LAMBRIX,

Petitioner,

v.

JULIE L. JONES, etc.

Respondents.
_____/

RENEWED MOTION FOR STAY OF EXECUTION

COMES NOW the Appellant/Petitioner, **CARY MICHAEL LAMBRIX**, by and through undersigned counsel, herein respectfully requests this Court to enter a stay of his execution currently scheduled for February 11, 2016. In support of this motion, he states:

1. On November 30, 2015, Governor Scott signed a death warrant and

scheduled Mr. Lambrix's execution for February 11, 2016.

2. On December 1, 2015, this Court entered a scheduling order setting forth the dates by which any additional collateral litigation would be filed and resolved in the circuit court. The scheduling order also set the date by which Mr. Lambrix's initial brief was to be filed in any appeal that was pursued from the circuit court's denial of collateral relief.

3. Pursuant to this Court's scheduling order, Mr. Lambrix was directed to file his initial brief in this Court by noon on January 11, 2016. Mr. Lambrix complied with this Court's scheduling order and the initial brief was filed with this Court at 11:51 a.m. on January 11, 2016. Mr. Lambrix also filed a petition for a writ of habeas corpus in this Court at 11:53 a.m. on January 11, 2016. An application for a stay of execution accompanied Mr. Lambrix's initial brief. It referenced the pendency of *Hurst v. Florida*, Case No. 14-7505, in the United States Supreme Court, and urged this Court to stay Mr. Lambrix's execution on the basis of the decision's potential impact on one of Mr. Lambrix's claims in his state habeas. The entirety of Mr. Lambrix's discussion of the pendency of *Hurst* appeared in one paragraph of the stay application that was a total of twelve lines in length. *See* Application for Stay of Execution at 4-5, *Lambrix. v. State*, Case No. SC16-8 (Fla. Jan. 11, 2016). Of course, at that point, there was not much more that could be said, because *Hurst* was still

pending before the United States Supreme Court, awaiting a decision.

4. On January 12, 2016, the day after Mr. Lambrix's initial brief and habeas petition were filed with this Court, the United States Supreme Court issued its 8-1 decision in *Hurst* declaring Florida's capital "sentencing scheme unconstitutional." *Hurst v. Florida,* Case No. 14-7505, 2016 WL 112683 *3 (U.S. January 12, 2016). Until the issuance of the *Hurst* opinion on January 12, Mr. Lambrix was unaware of what the United States Supreme Court would rule in *Hurst* and/or the basis for its ruling.

5. Within hours of the issuance of *Hurst v. Florida*, this Court issued an order directing the parties to address the decision's significance as to Mr. Lambrix. The next day, January 13, 2016, Mr. Lambrix filed a Renewed Motion for a Stay of Execution and an Untruncated Briefing Schedule, *Lambrix. v. State*, Case Nos. SC16-8, SC16-56 (Fla. Jan. 13, 2016). In this motion, Mr. Lambrix did ask for a stay of execution, but the focus of the motion concerned the adequacy of the time that this Court had afforded the parties to submit pleadings addressing *Hurst v. Florida* in its January 12 order. On January 15, 2016, this Court entered an order denying Mr. Lambrix's Renewed Motion for a Stay of Execution and an Untruncated Briefing Schedule.

6. Since the entry of this Court's January 15 order denying a stay and an

untruncated briefing schedule, there have been a number of developments that warrant revisiting Mr. Lambrix's motion for a stay of execution. First, late on January 15, 2016, the Capital Habeas Unit of the Office of the Federal Defender for the Northern District submitted an amicus brief in support of Mr. Lambrix. Next on January 19, 2016, Mr. Lambrix filed a motion asking for a two day extension of time to submit his pleading addressing *Hurst v. Florida*. The same day that the motion was filed, this Court granted the request for a two-day extension of time. Also on January 19, 2016, this Court issued orders in all the capital appeals scheduled for oral argument the first week of February 2016, directing the parties to submit supplemental briefs regarding the impact of *Hurst v. Florida* on each case. Then on January 21, 2016, the American Civil Liberties Union filed an amicus in support of Mr. Lambrix. On January 22, 2016, Mr. Lambrix submitted his pleadings addressing the effect of *Hurst v. Florida* regarding the validity of his sentences of death. Also on January 22, 2016, the Florida Association of Criminal Defense Lawyers filed an amicus in support of Mr. Lambrix.

7. On January 22, 2016, in *State v. Johnson*, Case No. F11-01796-B, the State filed the attached Response & Objections to Defendant's Motion for Imposition of Sentence on January [25], 2016 (hereinafter "*Johnson* response") in the Eleventh Judicial Circuit in and for Miami-Dade County. *See* Attachment. The State's position in the *Johnson* response is telling and demonstrates quite clearly why this Court

should stay Mr. Lambrix's execution.

8. First, Florida law is quite clear regarding this Court's authority to stay an execution. It has long been recognized that Florida courts have the authority to enter stays of execution when considering a collateral challenge that "containe[s] enough facts to show, on its face, that [the defendant] might be entitled to relief." *State v. State ex rel. Russell*, 467 So. 2d 698 (Fla. 1985); *see also State v. Green*, 466 So. 2d 218 (Fla. 1985); *State v. Beach*, 466 So. 2d 218 (Fla. 1985). "A stay of execution pending the disposition of a successive motion for postconviction relief is warranted only when there are 'substantial grounds upon which relief might be granted.'" *Chavez v. State*, 132 So. 3d 826, 832 (Fla. 2014). Relying upon Florida law regarding its authority to stay an execution, this Court on February 17, 2015, entered a stay of execution in *Correll v. State*, Case No. SC15-147. In an opinion concurring in the issuance of the stay of execution, Chief Justice Labarga relied upon *Chavez v. State* to conclude that there was "a significant possibility of relief on the merits" of Mr. Correll's lethal injection challenge. *See* Order granting stay at 3, *Correll v. State*, Case No. SC15-147 (Fla. Feb. 17, 2015) (Labarga, C.J., concurring, joined by Pariente, J., and Perry, J.).

9. Thus, this Court's authority to issue a stay of execution turns on whether the pleadings before the Court demonstrate "a significant possibility of relief on the merits." It is not necessary to conclusively establish the right to relief, but just that "a

significant possibility of relief on the merits" has been shown. If so, this Court has the authority to enter a stay of execution in order to ensure full and meaningful consideration of the claim for relief which carries a significant possibility of relief.

10. While Mr. Lambrix believes that the habeas reply that he filed on January 22 and the three supporting amicus briefs demonstrate more than "a significant possibility of relief"—as does this Court's orders directing supplemental briefing regarding *Hurst v. Florida* in all the capital cases scheduled for oral argument the first week of February—it is the *Johnson* response filed by the State on January 22 that demonstrates that it is not just Mr. Lambrix and the supporting amici that recognize the significance of *Hurst v. Florida*, and the uncertainty that it has engendered.

11. In *State v. Johnson*, relying on *Hurst v. Florida*, the defendant has asked that the judge (in a case in which a jury has returned a death recommendation, but a judge sentencing has yet to occur) impose a life sentence at a hearing scheduled for January 25, 2016. The basis for the defendant's request was the holding in *Hurst* finding Florida's capital sentencing scheme unconstitutional. Arguing that "the Death Penalty [was] unenforceable and void," the defendant has asserted that the judge has no recourse but to impose a life sentence (*See* Attachment at 2).

12. In its *Johnson* response, the State argues that Johnson's sentencing should be stayed until after the next legislative session: "Several reasons exist for why

this Court should not impose sentence at the current time and should await further action by the Florida Legislature during the current session which is scheduled to end on March 11, 2016, and which may result in enacted legislation with respect to the death sentence even prior to that time" (*See* Attachment at 1). Certainly if a capital sentencing proceeding should be delayed in order to see what the Florida Legislature does in response to the 8-1 decision in *Hurst v. Florida*, then Mr. Lambrix's execution should also be delayed until after a legislative response to *Hurst* has been crafted.

13. The *Johnson* response further underscores the significant issues and far-reaching effects that arise in the wake of *Hurst v. Florida* and require a full airing before this Court. This Court should stay Mr. Lambrix's execution in order to permit a full understanding of the decision in *Hurst* and the impact of its declaration that Florida's capital sentencing scheme is unconstitutional.

14. The State in the *Johnson* response highlights that an important question in the wake of *Hurst* is legislative intent (*See* Attachment at 4-5). Mr. Lambrix maintains that since the statute requires a finding that sufficient aggravating circumstances exist to justify the imposition of a death sentence, the legislative intent is clear. A defendant is not eligible to receive a death sentence until a finding has been made that sufficient aggravating circumstances exist. That means that the existence of sufficient aggravating circumstances is a functional element of capital first degree

murder under Florida's legislatively adopted statutes.[1] Certainly, what constitute elements of a statutorily defined crime is substantive law, not procedural. Because of the clearly stated legislative intent, it is clear that Mr. Lambrix was never convicted of capital first degree murder, i.e. first degree murder plus a finding of the sufficient aggravators exist element.

15. Interestingly, the State in the *Johnson* response seems to be hoping that the Legislature will circumvent or overturn Florida Statutes § 775.082:

> Thus, the question comes back to what the Florida Legislature intends in light of *Hurst*'s holding that the current procedures for imposing the death penalty are unconstitutional. It is clear that the Florida Legislature intends to keep open the option of the imposition of the death sentence rather than automatically imposing a sentence of life without further consideration of the possible sentence of death.

[1] Inexplicably, later in the *Johnson* response, the State asserts that the "statutory provisions which have been declared unconstitutional . . . are *procedural* in nature" (*See* Attachment at 9). Yet, quite clearly, the United States Supreme Court indicated that the facts that the legislature have required to be established before a death sentence can be imposed are elements of the offense of capital first degree murder. *Hurst* ruled that because the substantively defined facts, i.e. elements of capital first degree murder, are not subject to a jury trial in Florida, the capital sentencing scheme violated the Sixth Amendment. At issue with *Hurst* is Florida's substantive law, what fact or facts must be established to render a defendant death eligible. Nowhere in the *Johnson* response is there any recognition that the statute requires the existence of sufficient aggravating circumstances, which is substantive law—the element for Sixth Amendment purposes that must be found beyond a reasonable doubt by a unanimous jury. The Florida Legislature is not free to retroactively change substantive law or redefine what fact must be found to render a defendant death eligible.

(Attachment at 5). The State offers no citation in support of its claim to know the Legislature's intention. But, the State makes clear that it does not want to even acknowledge what is known about the legislative intent of § 775.082. It argues that *Furman v. Georgia* held the death penalty itself to be unconstitutional, completely ignoring the fact that it was capital sentencing statutes like Florida's that *Furman* held unconstitutional. *See Donaldson v. Sack*, 265 So. 2d 499, 502 (Fla. 1972) ("We are unable in the face of existing authorities and logic to find support for the continuance of 'capital offense' as heretofore applied. Accordingly, it must fall with the **U.S. Supreme Court's holding against the death penalty as provided under present legislation**." (emphasis added)). Despite *Donaldson*, the State argues that § 775.082 only applies "where the death penalty itself was held unconstitutional" (Attachment at 5). Yet, in *Furman v. Georgia*, 408 U.S. 238 (1972), it was capital sentencing scheme's like Florida's that were declared unconstitutional under the Eighth Amendment, not the death penalty itself. Indeed, Florida's Legislature enacted a new capital sentencing scheme within months of the *Furman* decision, and that new capital sentencing scheme has now been declared unconstitutional in *Hurst v. Florida* under the Sixth Amendment.[2]

[2] Looking at *Hurst v. Florida* in light of *Furman v. Georgia* makes it all the more apparent that the State's assertion that *Hurst* is procedural cannot be correct (*See*

16. In any event, a Sixth Amendment-compliant verdict, in conformity with Florida law demanding jury unanimity, has never been returned to find Mr. Lambrix guilty of capital first degree murder, i.e. first degree murder plus a finding of the additional statutorily defined facts necessary to render him death eligible. As was explained in Hurst, "[t]he State cannot now treat the **advisory** recommendation by the jury as the necessary factual finding that *Ring* requires." *Hurst v. Florida*, No. 14-7505, 2016 WL 112683 at *6 (U.S. Jan. 12, 2016) (emphasis added).

WHEREFORE, for the reasons discussed in this motion, Appellant respectfully requests that this Court stay his execution in light of the significant possibility of relief on his *Hurst* claims.

I HEREBY CERTIFY that a true copy of the foregoing motion has been served by electronic mail on Scott Browne, Assistant Attorney General, at his primary email addresses, scott.browne@myfloridalegal.com and capapp@myfloridalegal.com, on this 25th day of January, 2016.

Attachment at 9). It is hard to imagine a case that was more about procedure than *Furman v. Georgia*. Even the State acknowledges this in the course of its *Johnson* response, then seems to forget. When referencing *Dobbert v. Florida*, 432 U.S. 282 (1977), the State notes that under *Furman*, "[t]he procedures utilized in Florida's then-existing capital sentencing statute had been held unconstitutional in June 1972, and a revised sentencing statute was enacted in late 1972" (Attachment at 4). *Hurst*, on the other hand, is about substantive law—the legislatively defined facts which must be found to render a defendant death eligible.

Respectfully submitted,

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ATTACHMENT

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR MIAMI-DADE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

CASE NO. F11-01796 B

vs.

CHARLES W. JOHNSON,

Defendant.
_____/

RESPONSE & OBJECTIONS TO DEFENDANT'S MOTION FOR IMPOSITION OF SENTENCE ON JANUARY, 2016

The State of Florida, by and through undersigned counsel, hereby files this Response and Objections to the Defendant's Motion For Imposition Of Sentence On January 25, 2016 (hereinafter Motion) and states that the Motion be denied as stated herein as follows:

Several reasons exist for why this Court should not impose sentence at the current time and should await further action by the Florida Legislature during the current session which is scheduled to end on March 11, 2016, and which may result in enacted legislation with respect to the death sentence even prior to that time. Apart from the substantive and procedural reasons precluding the rush to sentencing set forth below, the inadequate and untimely notice of sentencing which

curtail the constitutional rights of the victim's next of kin prevent the relief requested in the Motion.

The Defendant on Thursday, January 22, 2016, at 5:45 pm, filed the instant Motion, based upon having preserved *Hurst v. Florida*, 2016 WL 112683 (2016) which is stated to have made "the Death Penalty unenforceable and void", and which allegedly authorizes this court to sentence the defendant to a life sentence. The Defendant requests that this court impose the sentence of life on Monday, January 25, 2016, at 9:00 a.m., in accordance with his Notice Of Hearing, dated at the same time as his Motion, on Thursday, January 22, 2016, at 5:45 p.m. The Defendant is not entitled to the relief requested as set forth below.

1. First, *Hurst* itself does not contemplate the immediate reduction of any death sentences to life. Indeed, instead of reducing Hurst's sentence of death to life as requested herein, the Court *remanded for a determination of Harmless Error*. *Hurst* left it to the state courts to determine whether the constitutional error in applying Florida's death penalty statute with respect to findings by the sentencing court were harmless error. The Supreme Court in *Hurst* did *not* reach the State's argument that any sentencing error was harmless because that was a matter for the state courts to determine themselves: "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." *Hurst*, at 2016 WL 112683 *8.

Adhering to the principle held in *Hurst*, this Court would have to consider the question of whether the error related to the jury's sentencing recommendation in the instant case are harmless – i.e., whether this Court can nevertheless impose a sentence of death, notwithstanding such errors, based upon the factual findings that the jury clearly made – e.g., five (5) counts of violent felonies which unlike *Hurst* were unanimously found by the jury not to mention overwhelming evidence of other aggravating factors.[1]

2. Second, a deferral of the sentencing pending the outcome of the current legislative session would avoid the need to make such harmless error assessments as it would enable this Court to conduct a new sentencing proceeding in accordance with whatever new sentencing scheme the Legislature enacts. The deferral would be for a modest time, as the current session will end on March 11, 2016, and the relevant statutory amendments may well be enacted even earlier than that.

There will be no impediment to the imposition of a sentence of death in accordance with any remedial legislation enacted by the Florida Legislature. The United States Supreme Court addressed a similar issue in *Dobbert v. Florida*, 432 U.S. 282 (1977). Dobbert had committed first-degree murders in late 1971 and

[1] Unlike the instant case, in *Hurst* there was "no prior violent felony aggravator in this case, nor did this jury convict Hurst of a contemporaneous felony such as robbery." *Hurst v. State*, 147 So. 3d 435, 446 (Fla. 2014)

early 1972. The procedures utilized in Florida's then-existing capital sentencing statute had been held unconstitutional in June 1972, and a revised capital sentencing statute was enacted in late 1972 after the commission of the murders in that case.

Not only were *ex post facto* challenges to the application of the revised statute to Dobbert rejected by the United States Supreme Court, but, the Court emphasized the "operative fact" of the existence of the prior death penalty statute at the time of the offenses served to warn Dobbert of the penalty that could be imposed. 432 U.S. at 298. The existence of a statutory sentence of death at the time of the commission of the offense served as an indication of the controlling legislative intent – i.e., that the legislature would want the sentencing court to be able to entertain a revised statutory scheme in order to implement its obvious intent that the sentence of death should be considered as a viable option in the case. The clearest way in which this can be done is to await the remedial legislation that is likely to be enacted in the next several weeks.

The foregoing point is further consistent with the United States Supreme Court's analysis in *United States v. Booker*, 543 U.S. 220 (2005). After declaring the United States Sentencing Guidelines unconstitutional, the Supreme Court addressed the remedy to impose. Under such circumstances, the Supreme Court emphasized that the remedial issue was one of legislative intent: "We answer the

remedial question by looking to legislative intent. . . . We determine what 'Congress would have intended in light of the Court's constitutional holding. 543 U.S. at 246.

3. Thus, the question comes back to what the Florida Legislature intends in light of *Hurst*'s holding that the current procedures for imposing the death penalty are unconstitutional. It is clear that the Florida Legislature intends to keep open the option of the imposition of the death sentence rather than automatically imposing a sentence of life without further consideration of the possible sentence of death.

In s. 775.082, Florida Statutes, after authorizing the imposition of the death sentence for a capital felony, the Legislature contemplated what should be done in the event that the death penalty was held to be unconstitutional by either the Florida or United States Supreme Court. Only in the circumstance *where the death penalty itself was held unconstitutional* did the Legislature decree that individuals who were convicted of a capital felony should then simply be sentenced to life. For the situation where either of the Supreme Courts decreed that the procedures for implementing the sentence of death were unconstitutional, but did not hold the death penalty itself unconstitutional, the Legislature did not mandate the similar limitation of the maximum sentence to life. Rather, the Legislature left the door

open to other possibilities which would still authorize the imposition of the death sentence when warranted under appropriate procedures.

"It is of course, a general principle of statutory construction that the mention of one thing implies the exclusion of another." *Thayer v. State*, 335 So. 2d 815, 817 (Fla. 1976). This rule of statutory construction is clearly applicable here, as the Legislature expressly contemplated one scenario where the entirety of the death penalty was declared unconstitutional and mandated the remedy of the lesser sentence of life, while not mentioning, let alone mandating, such a remedy for the lesser scenario where the death penalty itself remains constitutional while its current procedures do not.

To the extent that the defendant relies on s. 775.082(2) for the claim that the death penalty has been declared unconstitutional and that s. 775.082(2) therefore mandates the imposition of the sentence of life, most emphatically, *Hurst* did not declare the death penalty unconstitutional. *Hurst* declared only that the statutory procedures in place were unconstitutional in certain respects. Indeed, the fact that the *Hurst* Court remanded for the conduct of harmless error clearly manifests that the death penalty itself has not been held unconstitutional.

This conclusion is further supported by the Supreme Court's decision in *Schriro v. Summerlin*, 542 U.S. 348 (2005). In that decision, the Court held that the Court's prior decision in *Ring v. Arizona*, 536 U.S. 584 (2002), was

procedural in nature, not substantive. *Ring,* like *Hurst,* had held that a sentencing judge, sitting without a jury, could not find the existence of an aggravating circumstance necessary for the imposition of the sentence of death. *Ring* was therefore procedural and did not render the death penalty itself unconstitutional. As *Ring* is based on *Apprendi v. New Jersey*, and *Hurst* is based on both *Ring* and *Apprendi*, it necessarily follows that *Hurst* merely goes to the procedures of the sentencing statute, not the validity of the death sentence *itself*. Any reliance by the defendant on s. 775.082(2) is therefore erroneous, and, as further set forth above, the appropriate rule of statutory construction compels the conclusion that that statutory provision reflects the legislative intent to defer to options that would retain the sentence of death as a viable alternative.

4. Another important reason for not imposing a life sentence at the current time relates to the victim impact statutes and the constitutional rights of victims. The less than one (1) business day notice to inform the next of kin for sentencing as demanded in the instant case, especially when the defense knows that the next of kin herein reside out of State, in Georgia, is unreasonable and curtails the victim's next of kin constitutional rights. The instant case is akin to *Santoni v. State*, 143 So. 3d 1097 (Fla. 3d DCA 2014). In *Santoni* the defendant sought to compel the trial court to accept a plea to second-degree murder while the grand jury was still considering an indictment for first-degree murder. The defendant sought to

compel the acceptance of the plea in order to secure a guarantee that the death sentence for first-degree murder, if the grand jury indictment ensued, could not be imposed in the case. The trial court refused to accept the plea proffered by the defendant, and the Third District denied a mandamus petition which sought to compel the trial court to accept the plea to second-degree murder. Part of the Third District's analysis related to the constitutional rights of the victim's next-of-kin:

> Moreover, Florida's constitution protects the right of homicide victim's next of kin to attend crucial stages of criminal proceedings to the extent the right does not interfere with the constitutional rights of the accused. Art. I, s. 16(b), Fla. Const. The trial court's responsibility to ensure that the victim's rights are properly accommodated also cuts against the claim that a defendant may unilaterally dictate the timing of a plea hearing.

So, too, in the instant case, at an absolute minimum, this Court must accommodate the constitutional rights of the victim's next of kin by providing reasonable and adequate notice prior to the ultimate sentencing proceeding. Rule 3.060, Florida Rules of Criminal Procedure, expressly provides that a written motion and notice of hearing "shall be served on the adverse party a reasonable time before the time specified for the hearing." Motions and notices of hearing which are filed on the eve of hearing dates are viewed by appellate courts with disfavor. See, e.g., *Blazekovich v. State*, 390 So. 2d 480 (Fla. 4th DCA 1980); *State v. Ready*, 862 So.2d 941 (Fla. 2d DCA 2004). In the context of a victim's next-of-kin's right to appear and have input, such reasonable notice clearly requires more

than the one business day mandated by the Defendant. Indeed, even when law enforcement officers—who are far more accessible than civilian next of kin-- are being subpoenaed to appear as witnesses and service is being made upon designated employees at the place of employment, such employees are not even required to accept such service if it provides less than five (5) days notice. Section 48.031(4)(a), Florida Statutes. Given the foregoing, and the required fairness that Florida statutes mandate for a victim's next of kin, the defendant's effort to rush a sentencing hearing is contrary to all relevant statutory provisions.

5. Lastly, this Court has other options. The statutory provisions which have been declared unconstitutional, as noted above, are *procedural* in nature. Rule 3.720, Florida Rules of Criminal Procedure, addresses the general manner in which trial courts should conduct sentencing hearings, and it enables the court, among other things, to "entertain submissions and evidence by the parties that are relevant to the sentence." In essence, in the absence of any more specific governing set of procedural rules for the manner in which the penalty phase of a capital case shall be conducted, Rule 3.720 effectively authorizes any trial court to provide its own reasonable procedures, consistent with Supreme Court constitutional requirements. If this Court is not prepared to wait for the implementation of legislative revisions, it may develop its own procedures for this case, which comport with *Hurst,* and then proceed in accordance with such procedures, which are inherently authorized

by Rule 3.720. *See also* Rule 3.590(b), Florida Rules of Criminal Procedure (authorizing new penalty phase proceedings). Florida appellate courts have also expressly recognized the power and discretion that trial courts have when necessary rules of procedure have not been effectuated.[2]

The State notes that this will take substantial time and effort on the part of the parties and court, and will undoubtedly be more complex and time-consuming than awaiting the legislative remedial action, but, given that it is procedural in nature, it would be appropriate to do so. And, given the existence of such an

[2] In *State v. Ford*, 626 So. 2d 1338, 1340 (Fla. 1993), the Supreme Court held "that absent appropriate authority a trial court in a criminal case may employ a procedure if necessary to further an important public policy interest." Similarly, in *Hernandez v. State*, 597 So. 2d 408, 409 (Fla. 3d DCA 1992), the Third District, addressing the right to have children testify by closed-circuit television, in the absence of any controlling rule of procedure, held: "Although no authority expressly authorizes the procedure used here, . . ., the Florida Supreme Court stated that the trial court's use of a procedure not specifically authorized by statute or rule of court does not automatically entitle a defendant to a new trial." Finding that the procedure utilized, although not expressed in any rule of procedure or statute, comported with constitutional requirements, the Third District approved its use and affirmed the conviction and sentence. Similarly, in *Harrell v. State*, 689 So. 2d 400, 405 (Fla. 3d DCA 1997), the Third District addressed procedures developed by the trial court with respect to the use of testimony by satellite transmission during a trial, when there was no governing rule of procedure or statute. "Thus, a trial court in a criminal case may employ new procedures without precedent if the procedure furthers an important public policy interest." The Third District's decision was approved by the Florida Supreme Court. *Harrell v. State*, 709 So. 2d 1364 (Fla. 1998). To the same effect, see *Galbut v. Garfinkl*, 340 So. 2d 470, 472- 473 (Fla. 1970), recognizing the "well established proposition" that "in the absence of a controlling statute or overriding rule of procedure trial courts have a broad discretion in conducting the trial of a cause." (emphasis added).

authorized possibility, no matter how complex it may be, there is no justification for simply foreclosing the consideration of a sentence of death at this time.

Once again, given the options, the State urges this Court to take the eminently more reasonable option of awaiting legislative developments, as those will likely minimize the possibility for reversal on appeal if the sentence of death does ensue. It is clear, however, that this Court cannot just impose a life sentence without conducting a new penalty phase in accordance with constitutional requirements.

In short, compelling reasons exist to conclude that the relevant legislative intent would be one that would not foreclose the imposition of a sentence of death. The clearest way that that can be done is by awaiting remedial legislation, which could then be applied. Any delays in awaiting such developments will be modest, as the legislative session is scheduled to end on March 11, 2016. Deferring action at the current time will further serve the legitimate interests and constitutional rights of the victim's next of kin.

Wherefore, the State of Florida respectfully requests that the Defendant's

Motion For Imposition Of Sentence On January 25, 2016 be DENIED.

Respectfully submitted,

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State Attorney

_/s/_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to defendant's Motion for Imposition of Sentence was furnished by email on this 22nd day of January, 2016, to BRUCE H. FLEISHER, Esq., at bruce@brucefleisherlaw.com., and MICHAEL BLOOM, Esq., at michaelbloom44@gmail.com.

/s/_____
FARIBA N. KOMEILY