No. SC16-8 & SC16-56
Lower Tribunal No. 83-12-CF

IN THE SUPREME COURT OF FLORIDA

CARY MICHAEL LAMBRIX,

Petitioner,

vs.

STATE OF FLORIDA and the SECRETARY of the FLORIDA DEPARTMENT OF CORRECTIONS,

Respondents.

EMERGENCY MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER AND CONSOLIDATED BRIEF

Robert A. Young
FBN 144826
General Counsel
Assistant Public Defender
Office of the Public Defender
Tenth Judicial Circuit
P. O. Box 9000—Drawer PD
Bartow, FL 33831
RYoung@pd10.org

Counsel for FPDA, Amicus Curiae

Florida Public Defender Association's Emergency Motion to File Amicus Curiae Brief in Support of Petitioner

Pursuant to Florida Rule of Appellate Procedure 9.370(a), the Florida Public Defender Association moves this Court for leave to participate as Amicus Curiae in support of Petitioner's quest for a reasonable briefing schedule consistent with the complexity of the issues presented and the substantial effect those issues will have on the administration of justice in cases throughout Florida. Counsel for Petitioner has consented to this Motion. Counsel for the State opposes it. Counsel for Amicus, Capital Habeas Unit of the Office of the Federal Public Defender for the Northern District of Florida has consented to Amicus joining its Amicus Brief.

Table of Contents

Table of Authorities

Other Authorities

Introduction

Whether *Hurst v. Florida*, 14-7505, 2016 WL 112683 (2016) dec'd. Jan. 12, 2016, is to be accorded retroactive effect by this Court is a life-or-death question for scores, if not hundreds, of Movants' clients who are in various stages of the trial and appellate process. Movants also will show that the question of whether a death sentence imposed under the unconstitutional statute can nevertheless be upheld as "harmless error" is first and foremost a legal question. Only after that is resolved can the fact-driven question of whether, in each individual case, it can be shown beyond a reasonable doubt that the total absence of a jury verdict based on jury fact-finding did not contribute to the imposition of the death penalty. Even a cursory perusal of *Hurst* reveals that it raises highly consequential questions concerning the administration of Florida's death penalty.

The issues arising in the context of each individual post conviction case should first be presented to the appropriate lower courts and decided in a deliberate and thoughtful manner that will encourage respect for the judicial branch rather than convey the appearance that the third branch of government is rushing to judgment.

These issues should NOT be decided after an opportunity of only three and one-half working days to marshal the arguments, and present them on a schedule that was arbitrarily imposed upon the judicial branch by the executive. Moreover, these issues should NOT be decided upon the argument of only one substantially affected

party in a context that will undoubtedly have a preclusive effect of the rights of all other death-sentenced individuals whose unique arguments will never thereafter be heard.

Statement of Amicus' interest

The Florida Public Defender Association ("FPDA") consists of 19 elected Public Defenders in Florida, who supervise and direct more than one thousand assistant public defenders, including many senior trial attorneys that are lead counsel in pending cases in which the State is seeking the death penalty, together with assistant public defenders who are appellate counsel in direct appeals involving *Hurst* issues, or assistant public defenders who have unsuccessfully raised *Hurst* (formerly, *Ring)* issues in appeals for clients. The FPDA is fundamentally committed to, and its members are statutorily and ethically charged with, providing effective representation to indigent criminal defendants in the trial courts and, for five legislatively-designated circuits, in direct appeals in death cases. Additionally, one Public Defender represents certain death-sentenced individuals in their pending Executive Clemency cases.

The FPDA is able and willing to assist this Court (as opposed to the parties) in the consideration of these difficult issues. *See generally, Ciba-Geigy Ltd., v. Fish Peddler,* 683 So.2d 522, 523 (Fla. 4th DCA 1996). The FPDA has often been

accorded amicus status in the courts of Florida on issues affecting the proper administration of justice. *See, e. g., Office of State Attorney v. Polites,* 904 So.2d 527 (Fla. 3d DCA 2005); *Bottoson v. Moore,* 833 So.2d 693 (Fla. 2002); *Pullen v. State,* 802 So.2d 1113 (Fla. 2001); *State v. Public Defender, Eleventh Judicial Circuit,* 115 So.3d 261 (2013) and many others.

Procedural background

In its recent scheduling order (entered January 15, 2016), this Court required that, "During oral argument, both parties shall be prepared to address the applicability of Hurst v. Florida, No. 14-7505, 2016 WL 112683 (Jan 12, 2016) to each of Appellant/Petitioner's first-degree murder convictions and sentences of death, **including whether Hurst is retroactive, the effect of Hurst given the aggravating factors in Lambrix's case, and whether any error is harmless.**" [Emphasis added.] This Court set a briefing schedule for all of these issues that according to the most recent Order ends at 12:00 p.m. on Friday, January 22, 2016. Thus, from start (Jan. 15) to finish (noon on Jan. 22) these parties have been accorded only six and one-half calendar days (three and one-half working days) to understand and brief all of the *Hurst* issues -- **issues that will presumably have a preclusive effect on literally hundreds of current and former trial and appellate clients.**

Issues to be addressed

As clearly explained in the Amicus Brief filed by the Capital Habeas Unit ("CHU") in which the Movant joins: "*Hurst* raises highly consequential questions. * * * 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**."** CHU Amicus Brief, p. 2. Movants are ill-equipped to argue the specific merits of Mr. Lambrix's case, especially on a briefing schedule radically time-constrained by the executive, but Movants will show that the issues are of major significance not only to Lambrix and to all other death-sentenced individuals, but also to all those who respect the judicial branch for its deliberative and balanced resolution of conflict.

Argument

It is by now beyond argument that "death is different." *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (reversing a Florida death sentence for sentencing errors including a "secret" Pre-sentence Investigation). As Justice Stevens explained, "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Id.* Movant submits that this Court's decision regarding the several

substantial issues presented, after only a few days consideration cannot be or appear to be based on reason.

Clearly, in *Hurst,* the United States Supreme Court applied *Ring*[1] so as to declare Florida's capital sentencing statute unconstitutional. Bemoaning just such a potential event, former Justice Wells forcefully explained the gravity of the situation in his special concurring opinion (denying relief) in *King v. Moore*, 831 So.2d 143, 148 (Fla 2002):

> Extending *Ring* so as to render Florida's capital sentencing statute unconstitutional as applied to either King or Bottoson would have a catastrophic effect on the administration of justice in Florida and would seriously undermine our citizens' faith in Florida's judicial system. If Florida's capital sentencing statute is held unconstitutional based upon a change in the law applicable to these cases, all of the individuals on Florida's death row will have a new basis for challenging the validity of their sentences on issues which have previously been examined and ruled upon. These challenges could possibly result in entitlements to entire repeats of penalty phase trials, in turn leading to repeats of postconviction proceedings, and then new federal habeas proceedings.

Ring was decided in 2002, and *Hurst* recognizes that the analysis the *Ring* court applied to Arizona's capital sentencing scheme applies equally to Florida's. Indeed, by early 2006, all seven members of this Court expressed their awareness of the constitutional problems (including the lack of jury findings and the absence of a unanimity requirement), and recommended legislative action to remedy the defects. *State v. Steele*, 921 So.2d 538 (Fla. 2006)(opinion as revised on denial of rehearing

[1] *Ring v. Arizona*, 536 U.S. 584 (2002).

dated February 2, 2006). The Florida legislature's non-response was deafening. Since *Steele*, 172[2] individuals have been sentenced to death in Florida. Now some would rush to accomplish a "quick fix" to this state's death penalty scheme, and the pressure of active death warrants in two cases threatens this Court's ability to resolve all of the Hurst-related issues in a deliberate manner, as they apply to each individual who has been sentenced to death under the unconstitutional statute.

Certainly Justice Wells' dire prophecy has come to pass, and it is now clear that the effect of *Hurst* will be as wide-spread and "catastrophic" (from his perspective) as he predicted. The lesson to be learned from this history is that such a cataclysmic change in Florida law cannot be adequately briefed in such a miniscule time and cannot be thoughtfully decided by this Court in the time arbitrarily chosen by the governor. This Court's scheduling Order has identified two of the major issues.

The retroactivity issue. The retroactivity question raised by this Court's January 15th Order necessarily involves an analysis pursuant to *Witt v. State*, 387 So.2d 922 (1980). Of course, *Witt* requires a determination of whether the change wrought by *Hurst* is a "development of fundamental significance." (Justice Wells certainly seemed to think so). To fully answer that question, this Court's opinion in *Falcon v. State*, 162 So.3d 954, 961 (Fla. 2015) teaches that to determine which

[2] Florida Department of Corrections, Death Row Roster, available at: http://www.dc.state.fl.us/activeinmates/deathrowroster.asp, last viewed, Jan 22, 2016.

"changes in the law are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test" in two United States Supreme Court cases.[3] *Quoting, Witt* at 926. In addition to test's first two prongs, which involve the new rule's purpose and the extent of our reliance on the old rule, the test requires the courts to determine "the effect on the administration of justice of a retroactive application of the new rule." *Id.* During his time on this Court, Justice Wells had a ring-side seat to the operation of Florida's death-penalty scheme; therefore, his prophetic observations cannot be ignored. Only an ostrich could believe that *Hurst* is not a development that is of fundamental significance for the administration of justice in Florida. Clearly, the application of all of the prongs of the tests requires more careful analysis than Florida's chief executive's timetable will permit.

Harmless error analysis. The parameters of any "harmless error" inquiry must be set by this Court only after full briefing and mature reflection. It is movant's position that any death sentence imposed under the unconstitutional statute is not susceptible to a meaningful "harmless error" analysis for similar reasons to those explained by Justice Scalia, writing for a unanimous court in *Sullivan v. Louisiana,* 508 U.S. 275 (1993). Secondarily, the fact that a defendant may have committed contemporaneous crimes or prior violent felonies does not authorize a harmless error finding under the reasoning of *Hurst*.

[3] *Stoval v. Denno,* 388 U.S. 293 (1967) and *Linkletter v. Walker,* 381 U.S. 618 (1965).

The starting place is the recognition that the Florida Legislature has designed a death-penalty scheme that is reserved only for homicides which are BOTH among the most aggravated AND the least mitigated. *Crook v. State,* 908 So.2d 350, 357 (Fla. 2005), *citing Kramer v. State*, 619 So.2d274, 278 (Fla. 1993) and *Almeida v. State,* 748 So.2d 922 (Fla. 1999). *State v. Dixon*, 283 So.2d 1, 7 (Fla. 1973) ("Death is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation. It is proper, therefore, that the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes.") "In order to ensure (the death penalty's) continued viability under our state and federal constitutions the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes." *Jones v. State,* 705 So.2d 1364, 1366 (Fla. 1998), quoted in *Urbin v. State*, 714 So2d. 411, 416 (Fla. 1998). *See also, Lawrence v. State,* 846 So.2d 440, 453 (Fla. 2003).

Thus, it is axiomatic that a single aggravator can rarely cause a defendant to fall into the category of eligible for death, because the homicide is not among the "most aggravated". *See, e.g., Nibert v. State,* 574 So.2d 1059 (Fla.1990), *Songer v. State*, 544 So.2d 1010, 1011 (Fla. 1989), *Rogers v. State*, 948 So.2d 655, 670 (Fla. 2006), *Yacob v. State,* 136 So.3d 539, 550 (Fla. 2014).

Florida is a "weighing state." *Parker v. Dugger*, 498 U.S. 308, 318 (1991), *Sochor v. Florida*, 504 U.S. 527, 532 (1992), *Johnson v. Singletary*, 991 F.2d 663,

666 (11th Cir. 1993), *Kearse v. State*, 662 So.2d 677, 686 (Fla. 1995), and *Hardwick v. Crosby*, 320 F.3d 1127, 1165 (11th Cir. 2003).

In a "weighing state" like Florida, the trier of fact must weigh the aggravating factors against all the mitigating evidence to determine if the defendant is eligible for death. In a non-weighing state, the finding of one or more aggravating factors automatically makes the defendant eligible for death. As *Woldt v. People*, 64 Pa.3d 256, 263 (Colo. 2003) clearly explains, Florida's death penalty scheme as a "weighing state":

> U.S. Supreme Court constitutional jurisprudence divides death penalty decision-making into two stages, eligibility and selection. During the eligibility stage, a state must narrow the class of murderers on whom the trier of fact may impose death. *See, e.g., Dunlap*, 975 P.2d at 735. Generally, states employ one of two methods to determine which defendants are eligible for the death penalty, weighing and non-weighing. Under the United States Constitution, both methods must begin with the trier of fact convicting the defendant of murder.
>
> Determination of eligibility is the first stage. During this stage, both methods require a finding of at least one aggravating circumstance during either the guilt or the penalty phase. *Id.* Once the trier of fact has completed the first stage, the process differs in weighing and non-weighing states. In a weighing state, the trier of fact must weigh the aggravating factors against all the mitigating evidence to determine if the defendant is eligible for death. *Id.* In a non-weighing state, the finding of one or more aggravating factors automatically makes the defendant eligible for death. *Id.* A standard of beyond a reasonable doubt applies to eligibility fact-finding. *Id.* at 739.
>
> Selection of penalty is the second stage. During this stage, the trier of fact determines whether an eligible defendant should actually receive a death sentence. *Id.* at 735–36. Under both the weighing and ***264**non-weighing systems, the selection determination requires the admission of all relevant evidence. *Id.* at 736. In a weighing state, the trier of fact may select the death penalty or a life sentence based on all relevant information about the

> individual defendant. *Id.* at 735. In a non-weighing state, no special significance is given to statutory aggravators or mitigators; all evidence is considered when deciding whether to impose the death penalty. *Id.* at 736. [Citations omitted]

Moreover, as *Hurst* teaches, "any fact that "expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict" in an "element" that must be submitted to a jury." p. *5 *quoting Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000). Under Florida law, the jury must not only find the existence of enumerated aggravators beyond a reasonable doubt, but it must also find that the proven aggravators (plural) are "sufficient" to justify a death sentence. §921.141(2)(a)

Conclusion

According to the Department of Corrections website,[4] nearly 150 individuals on death row are there for crimes that occurred after April 12, 2002, the date when *Ring* was announced. The simple message of this Brief is that such a cataclysmic change to the jurisprudence of Florida deserves more discussion and careful deliberation than the current schedule – truncated by active death warrants – allows. Accordingly, respect for our judicial institutions and for the deliberative traditions of this Court requires adequate opportunities for these parties and for all other parties

[4] See note 2.

affected by *Hurst* to develop their positions on the complex issues presented, and to convincingly articulate them to this Court.

Certificate of Compliance

I HEREBY CERTIFY that this Amicus Brief was prepared with 14 point Times New Roman as required by Fla. R. App. P. 9.210(a)(2).

Certificate of Service

I HEREBY CERTIFY that the original of this Amicus Brief was e-filed with the Court' capital e-mail system and that the following counsel of record were served by e-mail: Office of the Attorney General at Scott.Browne@myfloridalegal.com, cappapp@myfloridalegal.com, Office of the Federal Public Defender, billy_nolas@fd.org and warrant@flcourts.org on January 25, 2016.

HOWARD L. "REX" DIMMIG, II,
PUBLIC DEFENDER

_/s/ Robert A. Young_____
Robert A. Young, FBN 144826
General Counsel
Attorney for Petitioner
(863) 534-4258 voice
(863) 534-4355 fax
Post Office Box 9000-PD
Bartow, FL 33831-9000
appealfilings@pd10.state.fl.us
RYoung@PD10.state.fl.us
TLocke@pd10.state.fl.us