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.

_____/

MOTION TO SUPPLEMENT THE REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS AND TO SUPPLEMENT THE RENEWED MOTION FOR STAY OF EXECUTION

COMES NOW the Appellant/Petitioner, **CARY MICHAEL LAMBRIX**, by and through counsel, and herein files this motion to supplement his reply to the response to his petition for writ of habeas corpus and supplement his renewed application for a stay of execution. As grounds therefore, Mr. Lambrix states:

1. On January 22, 2016, Mr. Lambrix filed his reply to the State's response to his petition for writ of habeas corpus, and on January 25, 2016, Mr. Lambrix filed

his renewed motion for stay of execution. Mr. Lambrix seeks to supplement those pleadings with the information contained here that has become available since those pleadings were submitted.

2. Since the filing of the habeas reply on Friday, January 22nd, and the renewed motion for a stay of execution, Mr. Lambrix's counsel has learned of significant court rulings referencing *Hurst v. Florida*. Counsel has discovered that in the case of *State v. Dykes*, Case No. 15-1972 CFANO (6th Jud. Cir. Pinellas County), Judge Andrews entered an order on January 22, 2016, stating "that pursuant to *Hurst v. Florida*, – S.Ct. –, No. 14-7505, 2016 WL 112683 (Jan. 12, 2016) this court concludes that there currently exists no death penalty in the State of Florida in that there is no procedure in place." *See* Attachment A. Accordingly, Judge Andrews ruled in a case set for trial that there would be no attempt to death qualify a jury and that the State's notice of intent to seek a death sentence was struck.

3. Judge Andrews' ruling that "there currently exists no death penalty in the State of Florida" gives rise to an argument that counsel has not previously formulated in his previous pleadings regarding *Hurst v. Florida*. Mr. Lambrix stands convicted of first degree murder. Following the decision in *Hurst v. Florida*, a defendant convicted of first degree murder alone is not eligible for a sentence of death. The death penalty for the capital felony defined under Florida law as first degree murder has been rendered unconstitutional by virtue of the decision in *Hurst*.

In order to be eligible for a death sentence, a defendant must be found guilty of the elements of first degree murder plus an additional element or elements statutorily defined as the presence of those facts necessary for the imposition of a death sentence:

> As described above and by the Florida Supreme Court**, the Florida sentencing statute does not make a defendant eligible for death until "findings by the court that such person shall be punished by death."** Fla. Stat. § 775.082(1) (emphasis added). The trial court alone **must find "the facts . . . [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances."** § 921.141(3).

Hurst v. Florida, 2016 WL 112683 at *3 (2016) (emphasis added)

4. Upon the conviction of first degree murder alone, the only sentence permitted by virtue of the decision in *Hurst v. Florida* was or is life imprisonment. All that Mr. Lambrix stands convicted of was two counts of first degree murder. He was not convicted of first degree murder along with a finding of the additional element or elements by a unanimous jury informed that its finding of the additional element or elements specifically identified in *Hurst* was binding on the court.

5. Mr. Lambrix's circumstances are best illustrated by a hypothetical. Assume that he had been convicted of manslaughter because the jury had only been instructed on the crime of manslaughter and had not been instructed as to the elements of first degree murder. Assume that the sentencing judge then imposed a

life sentence on Mr. Lambrix saying that he found that Mr. Lambrix had a premeditated intent to kill and did kill the victim. *See State v. Montgomery*, 39 So. 3d 252 (Fla. 2010). Because the sentencing judge had concluded that the facts necessary for first degree murder were present, he announced that the sentence for first degree murder should be imposed, i.e. life imprisonment without the possibility of parole. For whatever reason, Mr. Lambrix did not appeal. Then twenty years later, he realized that his sentence was illegal and filed a Rule 3.800 motion which can be filed at any time to correct an illegal sentence. *See Carter v. State*, 786 So. 2d 1173, 1178 (Fla. 2001). If at the Rule 3.800 proceeding the State conceded that the sentence was illegal, would the State then be able to argue that the error was harmless because it had evidence that demonstrated that the murder was committed with premeditated intent, and that the life without parole sentence should be undisturbed? According to *Hopping v. State*, 708 So. 2d 263, 265 (Fla. 1998), the answer to the question would seem to be no as it would violate double jeopardy.[1]

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[1] In *Hopping*, this Court adopted the reasoning of the dissenting judge from the First DCA decision under review:

> Thus, **as Judge Benton concisely reasoned**, the sentence should not be unreachable under a rule expressly intended to correct illegal sentences:
>
> > The court today decides that appellant's claim that his sentence was unconstitutionally lengthened, after he had begun serving it cannot be considered under a rule that provides: "A court may at any time correct an

6. In Mr. Lambrix's case, the only possible punishment authorized by the guilty verdicts alone was life imprisonment without the possibility of parole for twenty-five (25) years.[2] There is no doubt as to this conclusion because in this case, the indictment charged only first degree murder, and Mr. Lambrix was convicted of only first degree murder. Thus, as of the time that the jury returned a unanimous verdict of guilt for first degree murder, there were no actual factual findings as to whether sufficient aggravating circumstances existed to justify the imposition of a death sentence. Under these circumstances, and pursuant to the statutory scheme in place at the time, Mr. Lambrix was required to be sentenced to life unless and until

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> illegal sentence imposed by it...." The opinion in *Davis v. State*, 661 So. 2d 1193 (Fla. 1995), should not, in my opinion, be read so narrowly. **A sentence that has been unconstitutionally enhanced is "an illegal sentence ... [in] that [it] exceeds the maximum period set forth by law for a particular offense without regard to the guidelines."**
>
> *Hopping v. State*, 674 So. 2d 905, 906 (Fla. 1st DCA 1996) (Benton, J., dissenting) (citations omitted). **We agree with Judge Benton's reasoning** and conclude that our holding today does no violence to the rationale of *Davis*.

Hopping v. State, 708 So. 2d at 265 (emphasis added).

[2] As *Hurst* now makes clear, any fact which increases the punishment authorized by a guilty verdict—no matter how it is labeled—constitutes an element of the death-eligible offense, i.e. capital first degree murder, and must be found by a jury beyond a reasonable doubt.

there was a determination by the sentencing judge that sufficient aggravating circumstances existed which justified a death sentence.

7. The question in *Hurst* was not whether the Sixth Amendment requires a jury to determine whether the facts necessary to establish the elements of a criminal offense have been proved beyond a reasonable doubt. That has been a given since the Bill of Rights was adopted. The important question resolved by *Hurst* was what facts are elements under Florida law that must be established to render a capital defendant eligible for a death sentence.

> As described above and by the Florida Supreme Court, **the Florida sentencing statute does not make a defendant eligible for death until "findings by the court that such person shall be punished by death."** Fla. Stat. § 775.082(1) (emphasis added). The trial court alone **must find "the facts . . . [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances."** § 921.141(3).

Hurst v. Florida, 2016 WL 112683 at *3 (2016) (emphasis added).[3]

8. Thus after *Hurst* we now know that the elements of capital first degree murder under Florida include those facts set forth in the statute that must be found before the judge may impose a sentence of death. Defining crimes and their elements

[3] In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), Justice Thomas wrote in his concurrence that courts have "long had to consider which facts are elements," but that once that question is answered, "it is then a simple matter to apply that answer to whatever constitutional right may be at issue in a case—here, *Winship* and the right to trial by jury." *Id*. at 501.

is a matter of substantive law that under separation of power principles is a legislative function. *Hurst* has illuminated the fact that under Florida's substantive law, Mr. Lambrix was not and is not death eligible on the basis of the jury's verdict finding him guilty of first degree murder. Under *Fiore v. White,* 531 U.S. 225 (2001), *Hurst's* mere clarification of the plain language of the statute dates back to the statute's enactment:

> "Because we were uncertain whether the Pennsylvania Supreme Court's decision ... represented a change in the law," we certified a question to the Pennsylvania Supreme Court. *Id*., at 228, 121 S. Ct. 712. This question asked whether the Pennsylvania Supreme Court's interpretation of the statute "'state[d] the correct interpretation of the law of Pennsylvania at the date Fiore's conviction became final.'" *Ibid.*
>
> When the Pennsylvania Supreme Court replied that the ruling "'merely clarified the plain language of the statute,'" *ibid*., the question on which we originally granted certiorari disappeared. Pennsylvania's answer revealed the "simple, inevitable conclusion" that Fiore's conviction violated due process. *Id*., at 229, 121 S. Ct. 712. It has long been established by this Court that "the Due Process Clause ... forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt." *Id*., at 228 229, 121 S. Ct. 712.

Bunkley v. Florida, 538 U.S. 835, 839-40 (2003).

9. In addition to the order in *State v. Dykes* and the issues that it has suggested to counsel, counsel has also discovered that in the case of *State v. Toledo*, Case No. 2013-102888 CFDL (7th Jud. Cir. Volusia County), Judge Zambrano

entered an order on January 15, 2016, indicating that *Hurst v. Florida* "establishes that the procedures used in the imposition of the death penalty are improper." *See* Attachment B. Judge Zambrano elaborated:

> Unfortunately, the *Hurst* opinion left a number of issues undetermined. For example, the opinion failed to address any requirements of unanimity of votes in the finding of aggravators, standards to be used in making a determination of mitigators, and the requirement (or lack thereof) of unanimity of votes in sentencing and the finding of aggravators. More importantly, the opinion failed to inculcate Florida on the issue of retroactive application of this law.
>
> It would be a gross understatement to say that the *Hurst* opinion has a direct impact on Mr. Toledo's case. The impact is profound in the sense that at the outset, there is no mechanism in place now to "death qualify" a jury. So even at the earliest of these proceedings, this court (and the lawyers) would be forced to extrapolate and speculate on the meaning of *Hurst* and how it can (or cannot) be incorporated into the existing or new statutes. * * * The defense has all along urged this court to take a 'wait and see' approach early on when it was known that the U.S. Supreme Court had granted certiorari in *Hurst*. This court denied those requests because up to January 11, 2016 – **the law was clear. All that changed with the *Hurst* opinion**.
>
> **When human life hangs in the balance – a rush to judgment is unwise**.

Attachment B at 2-3 (emphasis added). Accordingly, Judge Zambrano granted the State's motion to continue the January 19, 2016, trial. Here, a human life hangs in the balance and as Judge Zambrano indicated, "a rush to judgment is unwise" under

the circumstances detailed herein and "would only result in the trivialization of the value of human life". *See* Attachment B at 3.

WHEREFORE, the Appellant/Petitioner respectfully urges this Court to grant a stay of execution, and/or remand for an evidentiary hearing, and/or vacate his sentences of death, and/or such other relief this Court deems warranted.

Respectfully submitted,

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Capital Collateral Regional
Counsel - South
Fla. Bar No. 311545

Respectfully submitted,

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COUNSEL FOR MR. LAMBRIX

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 27th day of January 2016.

/s/ William M. Hennis, III
WILLIAM M. HENNIS, III
Florida Bar No. 0066850
Litigation Director CCRC-South

ATTACHMENT A

Abare

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR PINELLAS COUNTY

STATE OF FLORIDA

V. CASE NO.: 15-1972CFANO

STEVEN CECIL DYKES
PID: 12107390
defendant

_____/

ORDER STRIKING STATE'S INTENT TO SEEK DEATH PENALTY

THIS CAUSE coming on to be heard pursuant to the Court's own Motion to Strike State's Intent to Seek Death Penalty, it is hereby,

ORDERED AND ADJUDGED that pursuant to *Hurst v. Florida* ---S.Ct. ---, No. 14-7505, 2016 WL 112683 (Jan. 12, 2016) this court concludes that there currently exists no death penalty in the State of Florida in that there is no procedure in place. This case is set for trial on February 29, 2016. Because there is no procedure in place the court will not attempt to death qualify the jury and the State's Notice of Intent to Seek Death is hereby struck.

DONE AND ORDERED in Chambers, Clearwater, Pinellas County, Florida this 22 day of January, 2016.

FILED 01/25/16 M0821

ORIGINAL SIGNED

JAN 22 2016

MICHAEL F. ANDREWS
Circuit Judge

MICHAEL F. ANDREWS
CIRCUIT JUDGE

cc: State Attorney
Public Defender

ATTACHMENT B

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA
Plaintiff,

CASE NO.: 2013 102888 CFDL

vs.

DIVISION: 08 Judge Raul A. Zambrano

LUIS ALBERTO TOLEDO
Defendant.
_____/

ORDER GRANTING STATE'S MOTION TO CONTINUE

ORDER DENYING DEFENDANT'S MOTION TO STRIKE NOTICE OF INTENT TO SEEK THE DEATH PENALTY

THIS CAUSE came before this court upon two separate motions. The State's Motion to Continue the trial, and the defendant's Motion to Strike [the State's] Notice of Intent to Seek the Death Penalty. After a careful review of the motion, the supporting case law, and the argument of counsel, the court finds as follows:

The defendant, LUIS ALBERTO TOLEDO has been charged by way of an Indictment with two counts of First Degree Murder, one count of Second Degree Murder, and one count of Tampering with Physical Evidence. The State is seeking to impose the death penalty upon Mr. Toledo if he is convicted of the first degree murder charges. The trial was scheduled to begin with jury selection on January 19, 2016.

One week before the beginning of this case, the United States Supreme Court struck down Florida's death penalty scheme by finding it unconstitutional in the case of *Hurst v. Florida,* ____ U.S. ____ (2016). The *Hurst* opinion addresses a number of issues that the Supreme Court has found to be fatal flaws to Florida's death penalty scheme. Among them are: (1) the jury's role in making factual findings of aggravators and mitigators, and (2) the jury's role vs. the judge's role in imposing the death penalty.

The Supreme Court's findings with the death penalty scheme are limited in content. To be clear, the Supreme Court's holding did not abolish the death penalty in Florida, and did not impact the guilt phase in a first degree murder case. However, the holding clearly establishes that the procedures used in the imposition of the death penalty are improper.[1] Those procedures are derived from section 921.141, of the Florida Statutes.

Section 921.141, Florida Statutes has a provision within it whereby this court could empanel two separate juries in this case. One jury would address the issues relating to guilt, and the second one to address the issues of penalty. This court finds that this mechanism is a viable option at this time. However, from a practical standpoint of view, this procedure would require that the case be tried twice and neither the court, nor the parties feel this would be a good alternative at this time.

Unfortunately, the *Hurst* opinion left a number of issues undetermined. For example, the opinion failed to address any requirements of unanimity of votes in the finding of aggravators, standards to be used in making a determination of mitigators, and the requirement (or lack thereof) of unanimity of votes in sentencing and the finding of aggravators. More importantly, the opinion failed to inculcate Florida on the issue of retroactive application of this law.

It would be a gross understatement to say that the *Hurst* opinion has a direct impact on Mr. Toledo's case. The impact is profound in the sense that at the outset, there is no mechanism in place now to "death qualify" a jury. So even at the earliest of these proceedings, this court (and the lawyers) would be forced to extrapolate and speculate on the meanings of *Hurst* and how it can (or cannot) be incorporated into the existing or new

[1] Through deductive reasoning, the defense contends that there is no death penalty in Florida as of right now. The State takes a counter approach to it citing the probability of the legislature fixing the statute. This court does not address this issue at this time since it is not ripe for determination.

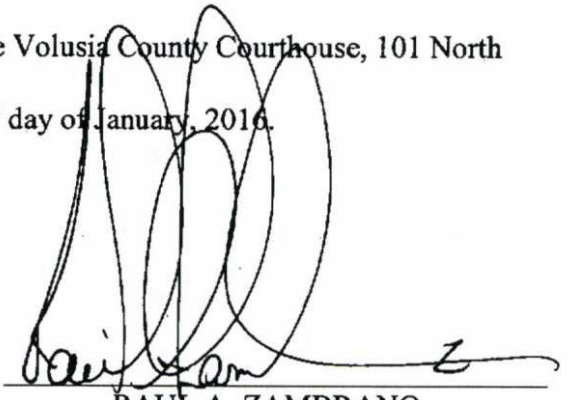
statutes. To compound matters, there is a strong likelihood now that the Florida Legislature and/or the Florida Supreme Court will be weighing in on this matter while this case would be underway. There is a high danger now that the rules would be changing in the middle of the trial if this court were to go forward with it as scheduled. Furthermore, the subsequent changes to the law will impact the antecedent events in the trial – such as jury selection. This court is particularly sensitive to the history of this case. The defense has all along urged this court to take a 'wait and see' approach early on when it was known that the U.S. Supreme Court had granted certiorari in *Hurst.* This court denied those requests because up to January 11, 2016 – the law was clear. All that changed with the *Hurst* opinion.

When human life hangs in the balance – a rush to judgment is unwise. With each passing hour, the law will become more and more discernible. The better approach at this time is to use discretion, caution and prudency. To do anything else would only result in the trivialization of the value of human life. It is therefore

ORDERED AND ADJUDGED that the State's Motion to Continue is Granted. It is further

ORDERED AND ADJUDGED that the defendant's Motion to Strike the Notice of Intent to Seek the Death Penalty is Denied without prejudice. The court finds that the motion is (a) premature and (b) *Hurst* did not invalidate death as a penalty in Florida. The motion may be re-raised again at the appropriate time.

DONE AND ORDERED in Chambers at the Volusia County Courthouse, 101 North Alabama Avenue, DeLand, Florida, this 15th day of January, 2016.



RAUL A. ZAMBRANO
CIRCUIT JUDGE

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