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

CARY MICHAEL LAMBRIX,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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CARY MICHAEL LAMBRIX,

Petitioner,

v.

JULIE L. JONES, etc.

Respondents.
_____/

SECOND MOTION TO SUPPLEMENT THE REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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. As grounds therefore, Mr. Lambrix states:

1. On January 22, 2016, Mr. Lambrix filed his reply to the State's January

15 response to his petition for writ of habeas corpus. On January 27, 2016, Mr. Lambrix filed a motion to supplement his reply to the State's response to his petition for writ of habeas corpus. On January 28, 2016, this Court granted the motion and ordered the pleadings to be supplemented with the motion and its attachments. On February 2, 2016, this Court heard oral arguments from the parties as to Mr. Lambrix's claims regarding *Hurst v. Florida*, 136 S. Ct. 616 (2016).[1] Later on February 2, 2016, this Court issued a stay of Mr. Lambrix's execution.

2. During the oral argument, this Court asked numerous questions regarding the issue of *Hurst's* retroactivity under *Witt v. State*, 387 So. 2d 922 (Fla. 1980). The ensuing discussion included whether *Hurst* could or should be retroactive to the date on which *Ring v. Arizona*, 536 U.S. 584 (2002), issued, which is June 24, 2002. Implicit in this discussion was the companion question of whether retroactivity could or should be limited to that date—June 24, 2002.

[1] Hurst was convicted of a 1998 homicide at a March 2000 trial which took place before either the issuance of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), or *Ring v. Arizona*, 536 U.S. 584 (2002). Hurst was sentenced to death. In his direct appeal to this Court, Hurst challenged his death sentence on the basis of *Apprendi*. This Court denied Hurst's *Apprendi* claim on the merits in an opinion that issued on April 18, 2002, two months before the issuance of *Ring*. *Hurst v. State*, 819 So. 2d 689, 702-03 (Fla. 2002). Hurst's certiorari petition was denied by the United States Supreme Court several months after the issuance of *Ring*. *Hurst v. Florida*, 537 U.S. 977 (2002). Subsequently, Hurst's death sentence was vacated in 2009 by this Court in a Rule 3.851 appeal, and a resentencing was conducted in 2012.

3. The question of partial retroactivity was neither addressed nor asserted by the State in its response to the habeas petition filed on January 15, 2016. As a result, it was not a matter addressed by Mr. Lambrix in his reply to the response nor in his supplement to the reply.[2]

4. Given that partial retroactivity of *Hurst* did not arise in Mr. Lambrix's case prior to the February 2 oral argument, Mr. Lambrix files the motion to supplement his habeas reply in order to provide this Court with briefing on this matter and so that Mr. Lambrix is afforded his right to fully and meaningfully be heard regarding whether *Hurst* should be deemed partially retroactive, the implications of such partial retroactivity as to Mr. Lambrix, and the constitutional claims that could arise from arbitrarily limiting the retroactivity of *Hurst* to a particular date.

5. As Mr. Lambrix's counsel indicated during the February 2 oral argument, this Court should not resolve the impact of *Hurst v. Florida* and its retroactive application on an ad hoc basis. Mr. Lambrix urges this Court to fully consider the plethora of issues and implications arising from *Hurst*. The question of *Hurst's* retroactivity, whether partial or full, is one of these matters that warrants full briefing and full consideration by this Court.

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[2] This pleading is intended to respond to issues raised for the first time during oral arguments and is not intended in any way to supplant or abandon arguments made in Mr. Lambrix's prior pleadings before this Court.

6. Mr. Lambrix absolutely concedes that there are strong and compelling reasons for this Court to conclude that *Hurst* must be found retroactive to June 24, 2002—the date that *Ring v. Arizona* issued. Indeed, this Court in *Witt v. State* wrote:

> The doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring **fairness and uniformity in individual adjudications**. Thus, society recognizes that a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief **is necessary** to **avoid individual instances of obvious injustice**. **Considerations of fairness and uniformity** make it very "difficult to justify depriving a person of his liberty or his life, **under process no longer considered acceptable** and **no longer applied to indistinguishable cases**."

Witt v. State, 387 So. 2d at 925 (emphasis added). Thus, the *Witt* standard for retroactive application is a yardstick for determining when "[c]onsiderations of fairness and uniformity" trump "[t]he doctrine of finality." *See Thompson v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987) ("We find that the United States Supreme Court's consideration of Florida's capital sentencing statute in its *Hitchcock* opinion represents a sufficient change in the law that potentially affects a class of petitioners, including Thompson, to defeat the claim of a procedural default.").[3]

[3] In *Thompson*, this Court noted that

> Thompson's sentencing occurred in September of 1978. The United States Supreme Court, in June of 1978, had released

7. The United States Supreme Court issued *Ring v. Arizona* on June 24, 2002. After certiorari review had been accepted in *Ring*, but before the decision issued, the United States Supreme Court stayed Amos King's execution due to the pendency of *Ring* on January 18, 2002. *See King v. State* & *King v. Moore*, Case Nos. SC02-01 & SC-2-01.[4] The United States Supreme Court also stayed Linroy Bottoson's

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> *Lockett v. Ohio*, 438 U.S. 586, 98 S .Ct. 2954, 57 L.Ed.2d 973 (1978), which held unconstitutional Ohio's capital sentencing statute limiting mitigating circumstances to those enumerated in the statute itself. In December of that year, three months after Thompson's sentencing, this Court directly addressed the issue in *Songer v. State*, 365 So.2d 696 (Fla.1978), cert. denied, 441 U.S. 956, 99 S. Ct. 2185, 60 L. Ed. 2d 1060 (1979), construing our statute as allowing nonstatutory mitigating circumstances to be considered by both the jury and the judge in the sentencing proceeding.

Thompson v. Dugger, 515 So. 2d at 175. This Court then concluded: "we have no alternative but to conclude Mr. Thompson's death sentence was imposed in violation of *Lockett*, and in violation of the United States Supreme Court's *Hitchcock* decision." *Id*. *Accord Downs v. Dugger*, 514 So. 2d 1069 (Fla. 1987) (*Hitchcock* rejected this Court's misreading of *Lockett*, and thus *Downs'* penalty phase was conducted in violation of *Lockett*); *Delap v. Dugger*, 513 So. 2d 659, 660 (Fla. 1987) ("Because *Hitchcock* represents a substantial change in the law occurring since we first affirmed Delap's sentence, we are constrained to readdress his *Lockett* claim on its merits.").

[4] This Court's opinion in *King v. State*, 808 So. 2d 1237, 145-46 (Fla. 2002), *cert denied*, 536 U.S. 962 (June 28, 2002), addressed King's *Apprendi v. New Jersey*, 530 U.S. 466 (2000), issue on the merits and provided:

> King's sixth contention, that *Apprendi* applies to Florida's capital sentencing statute and the maximum sentence under the statute is death, has been decided adversely to King's

execution due to the pendency of *Ring* on February 4, 2002. *See Bottoson v. State* & *Bottoson v. Moore*, Case Nos. SC02-58 & SC02-128.[5] After the decision in *Ring v.*

> position. *See Mills v. Moore*, 786 So. 2d 532, 537-38 (Fla.2001), *cert. denied*, 532 U.S. 1015, 121 S.Ct. 1752, 149 L.Ed.2d 673 (2001); see also *Brown v. Moore*, 800 So.2d 223 (Fla. 2001) (rejecting claims that aggravating circumstances are required to be charged in indictment, submitted to jury during guilt phase, and found by unanimous jury verdict); *Mann v. Moore*, 794 So.2d 595, 599 (Fla. 2001) (same). We are aware that the United States Supreme Court very recently granted certiorari in *State v. Ring*, 200 Ariz. 267, 25 P.3d 1139 (2001), *cert. granted*, 534 U.S. 1103, 122 S. Ct. 865, 151 L. Ed. 2d 738 (2002); however, we decline to grant a stay of execution following our precedent on this issue, on which the Supreme Court has denied certiorari. Thus, King is not entitled to relief on this issue.

[5] This Court's opinion in *Bottoson v. State*, 813 So. 2d 31 (Fla. 2002), *cert. denied*, 536 U.S. 962 (June 28, 2002), addressed the *Apprendi v. New Jersey* issue on the merits and provided:

> In Bottoson's third and final habeas claim, he alleges that the U.S. Supreme Court's holding in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), applies to Florida's capital sentencing statute. We have consistently rejected similar claims and have decided this issue adversely to Bottoson's position. *See King v. State*, 808 So. 2d 1237 (Fla. 2002), stay granted, 534 U.S. 1118, 122 S .Ct. 932, 151 L. Ed. 2d 894 (2002); *Mills v. Moore*, 786 So. 2d 532, 536-537 (Fla. 2001), *cert. denied*, 532 U.S. 1015, 121 S.Ct. 1752, 149 L. Ed. 2d 673 (2001); see also *Brown v. Moore*, 800 So. 2d 223 (Fla. 2001) (rejecting claims that aggravating circumstances are required to be charged in indictment, submitted to jury

Arizona issued, the United States Supreme Court denied both King and Bottoson's certiorari petitions on June 28, 2002. Both King and Bottoson then filed habeas petitions with this Court and requested stays of execution on July 5, 2002. In light of *Ring v. Arizona*, this Court issued published orders granting stays of execution on July 8, 2002, and set a briefing and oral argument schedule. *Bottoson v. Moore*, 824 So. 2d 115 (Fla. 2002); *King v. Moore*, 824 So. 2d 127 (Fla. 2002).[6]

> during guilt phase, and found by unanimous jury verdict); *Mann v. Moore*, 794 So.2d 595, 599 (Fla. 2001). Thus, we conclude that Bottoson is not entitled to relief on this claim.
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> Although we recognize that the United States Supreme Court recently granted certiorari review in *State v. Ring*, 200 Ariz. 267, 25 P.3d 1139 (2001), *cert. granted*, 534 U.S. 1103, 122 S. Ct. 865, 151 L. Ed. 2d 738 (2002), we decline to grant a stay of execution or other relief, in accordance with our precedent on this issue in *King*.

[6] Justice Wells dissented from the stay order asserting that the U.S. Supreme Court's denial of certiorari review on June 28, 2002, in both *Bottoson* and *King* and the lifting of the stays of execution granted during the pendency of *Ring* meant: "The termination of the stays of execution by the Supreme Court can only mean that *Ring* does not apply to the Florida capital sentencing statute." *Bottoson*, 824 So. 2d at 124. Justice Wells continued "The Supreme Court in *Ring* overruled neither *Hildwin* [*v. Florida*, 490 U.S. 638 (1989),] nor multiple decisions in which the Supreme Court rejected the very same constitutional challenges to Florida's capital sentencing statute made now by Bottoson." *Bottoson*, 824 So. 2d at 124. Justice Wells noted: "there has been no receding from or rejection by the Supreme Court of its decisions in Spaziano v. Florida, 468 U.S. 447, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984) (rejecting Fifth, Sixth, Eighth, and Fourteenth Amendment challenges)". *Bottoson*, 824 So. 2d at 125. Justice Wells concluded with the following:

8. Subsequently on October 24, 2002, this Court issued its opinions re-addressing the merits of both Bottoson and King's *Apprendi* claims in light of *Ring v. Arizona*. *See Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002); *King v. Moore*, 831 So. 2d 143 (Fla. 2002). This Court again denied the *Apprendi* claims (re-raised on the basis of *Ring v. Arizona*) on the merits, stating in the identically worded language of the majority opinions in both cases:

> There is simply no reason for this Court to stay this execution in order to study or further consider *Ring*. These cases of the Supreme Court of the United States, dealing directly with the Florida capital sentencing statute-not *Ring*, which deals with the Arizona capital sentencing statute-continue to be what this Court and lower Florida courts are to follow.
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> I am very concerned about the confusion which will certainly result for Florida's trial judges from this Court's stay of execution. These trial judges have to try cases and adjudicate postconviction motions this week. This Court's entering of this stay of execution will clearly leave the impression that *Ring* has an effect at present on Florida's capital sentencing statute. Because the Supreme Court has repeatedly upheld Florida's statute and because Ring did not overrule any of these decisions, that impression is clearly incorrect. There are twenty-five years of precedent from the Supreme Court repeatedly upholding the constitutionality of Florida's capital sentencing statute, and nothing in *Ring* affected those decisions.

King v. State, 824 So. 2d at 132 (footnotes omitted).

> Significantly, the United States Supreme Court has repeatedly reviewed and upheld Florida's capital sentencing statute over the past quarter of a century and although King contends that there now are areas of "irreconcilable conflict" in that precedent, the Court in *Ring* did not address this issue.

King v. Moore, 831 So. 2d at 144 (footnote omitted); *Bottoson v. Moore*, 833 So. 2d at 695 (footnote omitted).[7] In the omitted footnote, this Court relied upon *Hildwin v. Florida* and *Spaziano v. Florida*. *See id*.

9. In *Hurst v. Florida*, the United States Supreme Court specifically addressed this Court's opinion in *Bottoson v. Moore* and concluded that this Court's reliance on *Hildwin* and *Spaziano* to conclude that *Ring* and *Apprendi* had no application to Florida's capital sentencing scheme was error:

> *Spaziano* and *Hildwin* summarized earlier precedent to conclude that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Hildwin*, 490 U.S., at 640–641, 109 S.Ct. 2055. **Their conclusion was wrong, and irreconcilable with Apprendi**. Indeed, today is not the

[7] In neither *Bottoson v. Moore* nor *King v. Moore* did this Court refuse to address the merits of the claims premised on *Ring v. Arizona* on the basis that the claims were procedurally barred or on the basis that *Ring* was not retroactive. Bottoson was convicted of a 1979 homicide. His death sentence was affirmed on direct appeal in 1983. *Bottoson v. State*, 443 So. 2d 962 (Fla. 1983). King was convicted of a 1976 homicide. His conviction and sentence of death were affirmed in 1980. *King v. State*, 390 So. 2d 315 (Fla. 1980). Subsequently, a resentencing was ordered. He was again sentenced to death, and this Court affirmed in 1987. *King v. State*, 514 So. 2d 354 (Fla. 1987).

> first time we have recognized as much. In *Ring*, we held that another pre-*Apprendi* decision—*Walton*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511—could not "survive the reasoning of *Apprendi*." 536 U.S., at 603, 122 S.Ct. 2428. *Walton*, for its part, was a mere application of *Hildwin's* holding to Arizona's capital sentencing scheme. 497 U.S., at 648, 110 S.Ct. 3047.
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> * * *
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> **Time and subsequent cases have washed away the logic of *Spaziano* and *Hildwin***. The decisions are overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty.

Hurst v. Florida, 136 S. Ct. at 623-24 (emphasis added).

10. Since the United States Supreme Court specifically addressed and disapproved of this Court's decision in *Bottoson v. Moore* and its conclusion that *Ring* did not have any applicability to Florida's capital sentence scheme, the fairness principles of *Witt v. State* warrant treating *Hurst v. Florida* as retroactive to the issuance of *Ring*. Had *Bottoson* and *King* been properly decided and it been recognized that *Ring* had rendered Florida's capital sentencing scheme unconstitutional, certainly every capital defendant whose death sentence was not final on June 24, 2002, would have received the benefit of *Ring*. Simple fairness—the overriding principle of *Witt*—demands that those who should have received the benefit of *Ring* must receive the

benefit of *Hurst*.[8] *See Thompson v. Dugger*, 515 So. 2d 173 (Fla. 1987); *Downs v. Dugger*, 514 So. 2d 1069 (Fla. 1987); *Delap v. Dugger*, 513 So. 2d 659 (Fla. 1987).

11. However, limiting the benefit of *Hurst* only to those whose death sentences became final after *Ring* issued ignores the fact that *Hurst* held that *Hildwin* and *Spaziano* were "irreconcilable with *Apprendi*." *Hurst v. Florida*, 136 S. Ct. at 623. *Apprendi v. New Jersey* issued on June 26, 2000. Indeed, Bottoson and King both presented this Court with challenges to their death sentences on the basis of *Apprendi*. In January of 2002, this Court denied their *Apprendi* claims on the merits. *See King v. State*, 808 So. 2d 1237, 145-46 (Fla. 2002), *cert denied*, 536 U.S. 962 (2002); *Bottoson v. State*, 813 So. 2d 31 (Fla. 2002), *cert. denied*, 536 U.S. 962 (2002). This Court gave merits review to Bottoson's *Apprendi* challenge to his death sentence that was final in 1983. This Court gave merits review to King's *Apprendi* challenge to his death sentence that was final in 1987. This Court did not apply any procedural bars to the

[8] *Hurst* held that the logic of *Hildwin* and *Spaziano* had been washed away by the time of this Court's decisions in *Bottoson* and *King*. In those two case, this Court relied upon the United States Supreme Court's failure to state in *Ring v. Arizona* that not only was *Walton v. Arizona* overruled, but so too were *Hildwin v. Florida* and *Spaziano v. Florida*. Neither this Court's failure to recognize that the logic of *Hildwin* and *Spaziano* had been washed away nor the United States Supreme Court's failure in *Ring* to expressly state that *Hildwin* and *Spaziano* were overruled can properly be attributed to any capital defendant. It would simply be unfair within the meaning of *Witt* to deprive capital defendants whose death sentences became final after *Ring* issued on June 24, 2002, the benefit of *Hurst v. Florida*.

Apprendi challenges, nor did this Court find that it was precluded from considering the *Apprendi* challenges to death sentences under *Witt v. State*. In both cases, this Court relied upon its decision in *Mills v. Moore*, 786 So. 2d 532 (Fla. 2001).[9]

12. In *Mills v. Moore*, this Court considered an *Apprendi* challenge to a death sentence that resulted from a judicial override of a jury's life recommendation. The crime had occurred in 1979. The conviction was returned in late 1979, and then the jury recommended a sentence of life imprisonment. The judge overrode the life recommendation and imposed a death sentence in early 1980. *See Mills v. State*, 476 So. 2d 172 (Fla. 1985). In early 2001, Mills filed a habeas petition in this Court in which he argued that "Florida's death penalty override scheme, under which [he] was sentenced to death, violates the principle espoused in the recent decision by the United States Supreme Court in *Apprendi v. New Jersey*." *Mills v. Moore*, 786 So. 2d at 536. This Court noted that "Mills argues that [775.082(1), Fla. Stat.] makes life imprisonment the maximum penalty available. Mills argues that the statute allowing

[9] The decision in *Mills v. Moore* was a 4-3 decision affirming the death sentence. However, as to the *Apprendi* claim, the dissenters joined the majority opinion. *Mills v. Moore*, 786 So. 2d at 545 (Pariente, J., dissenting) ("I agree with the majority, however, that the United States Supreme Court majority opinion in *Apprendi v. New Jersey*, . . . , by its express terms did not apply to capital sentencing and thus does not provide a basis for granting Mills relief. **Nonetheless, I point out that a jury recommendation of life might, under a logical extension of the reasoning in *Apprendi*, preclude a trial court from overriding a jury's life recommendation**.") (emphasis added).

the judge to override the jury's recommendation makes it clear that the maximum possible penalty is life imprisonment unless and until the judge holds a separate hearing and finds that the defendant is death eligible." This Court rejected Mills' *Apprendi* claim on the merits, saying:

> Mills is actually attacking the validity of the bifurcated guilt and sentencing phases of a capital trial. That issue was litigated and decided in *Proffitt v. Florida*, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976), and *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990). The *Apprendi* majority clearly did not revisit these rulings.

Mills v. Moore, 786 So. 2d at 538.[10]

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[10] In its opinion, this Court noted: "Mills argues that *Apprendi* overruled *Walton* [*v. Arizona*] and relies upon the five-to-four split in the Court." This Court in rejecting Mills' *Apprendi* claim specifically relied upon the continued vitality of *Walton*. But then in *Ring v. Arizona*, *Walton* was specifically overruled. In the wake of *Ring*, Justice Pariente noted in her concurrence in the stay of execution issued to Bottoson on July 8, 2002, that *Ring* had explicitly overruled *Walton*. Justice Pariente then wrote:

> However, I cannot accept the dissent's view that "[t]he termination of the stays of execution by the Supreme Court can only mean that *Ring* does not apply to the Florida capital sentencing statute." Dissenting op. at 124. That is what we thought after *Apprendi* when in case after case, the United States Supreme Court denied petitions for certiorari in cases that had stated that *Apprendi* did not apply to capital sentencing. *See Mills*, 786 So.2d at 537 ("The Supreme Court's denial of certiorari indicates that the Court meant what it said when it held that *Apprendi* was not intended to affect capital sentencing schemes."). **Clearly, we were wrong in *Mills*** that the multiple instances where

13. Mills was not the only capital defendant to raise an *Apprendi* challenge before this Court. In *Mann v. Moore*, 794 So. 2d 595, 599 (Fla. 2001), this Court citing to *Mills v. Moore* also rejected Mann's *Apprendi* claim on the merits: "Thus, Mann's Apprendi arguments are without merit." In *Brown v. Moore*, 800 So. 2d 223, 225 (Fla. 2001), when faced with another *Apprendi* challenge to Florida's capital sentencing scheme, this Court wrote:

> We have previously rejected identical arguments. *See Mills v. Moore*, 786 So .2d 532, 536-38 (Fla.), *cert. denied*, 532 U.S. 1015, 121 S. Ct. 1752, 149 L. Ed. 2d 673 (2001); *Mann*, 794 So. 2d at 600. For the same reasons explained in those opinions, we reject Brown's arguments.

As it did in *Mills*, this Court reviewed the *Apprendi* challenges on the merits without referencing *Witt v. State* while considering the validity of Mann's death sentence (which was final in 1992) and Brown's death sentence (which was final in 1990).[11]

> the United States Supreme Court denied certiorari after *Apprendi* meant that the Supreme Court did not intend *Apprendi* to apply to capital sentencing.

Bottoson v. Moore, 824 So. 2d at 118 (Pariente, J., concurring).

[11] In this Court's 2002 opinion denying Hurst's first direct appeal, this Court while rejecting Hurst's *Apprendi* claim wrote:

> Subsequent to the filing of Hurst's initial brief, this Court decided this issue and has rejected the argument that the *Apprendi* case applies to Florida's capital sentencing scheme. *See Mills v. Moore*, 786 So.2d 532 (Fla.), *cert.*

14. The United States Supreme Court in *Hurst* specifically concluded that *Spaziano v. Florida* and *Hildwin v. Florida* were irreconcilable with *Apprendi*:

> *Spaziano* and *Hildwin* summarized earlier precedent to conclude that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Hildwin*, 490 U.S., at 640–641, 109 S. Ct. 2055. **Their conclusion was wrong, and irreconcilable with *Apprendi***.

136 S. Ct. at 623 (emphasis added). Thus, this Court's rejection of *Apprendi* claims on the merits in *Mills*, *Mann*, and *Brown* was error under the principles enunciated in *Apprendi*, a decision that issued on June 26, 2000. Indeed, this Court rested its decision rejecting Mills' *Apprendi* challenge to his death sentence, which resulted from an override, on *Walton v. Arizona*, a decision that was expressly found to be contrary to *Apprendi* in *Ring v. Arizona*.

15. Since the United States Supreme Court specifically found that *Hildwin* and *Spaziano* were irreconcilable with *Apprendi* and yet this Court rejected *Apprendi*

> *denied*, 532 U.S. 1015, 121 S.Ct. 1752, 149 L.Ed.2d 673 (2001); *Mann v. Moore*, 794 So.2d 595 (Fla.2001). In his reply brief, Hurst requests that this Court revisit the *Mills* decision and find that *Apprendi* does apply to capital sentencing schemes. Having considered the cases Hurst cited and his additional arguments, this Court finds no reason to revisit the *Mills* decision, and thus we reject Hurst's final claim.

Hurst v. State, 819 So. 2d 689, 703 (Fla. 2002).

claims on the merits in *Mills*, *Mann*, and *Brown*, the fairness principles of *Witt v. State* warrant treating *Hurst v. Florida* as retroactive to the issuance of *Apprendi*. Had *Mills*, *Mann*, and *Brown* been properly decided and recognized that *Apprendi* had rendered Florida's capital sentencing scheme unconstitutional, certainly every capital defendant whose death sentence was not final on June 26, 2000, would have received the benefit of *Ring*. Simple fairness, the overriding principle of *Witt*, demands that those who should have received the benefit of *Apprendi* must receive the benefit of *Hurst*. *See Thompson v. Dugger*, 515 So. 2d 173 (Fla. 1987); *Downs v. Dugger*, 514 So. 2d 1069 (Fla. 1987); *Delap v. Dugger*, 513 So. 2d 659 (Fla. 1987).

16. *Witt v. State* is not just premised upon principles of fairness; it also rests on the concept of uniformity. **"Considerations of fairness and uniformity** make it very 'difficult to justify depriving a person of his liberty or his life, **under process no longer considered acceptable** and **no longer applied to indistinguishable cases**.'" *Witt v. State*, 387 So. 2d at 925 (emphasis added).

17. In *Meeks v. Dugger*, 576 So. 2d 713 (Fla. 1991), this Court was presented with a *Hitchcock/Lockett* claim in a case in which the death sentence became final in 1976, two years before *Lockett* issued. Even though Meeks' death sentence was final two years before *Lockett* issued, this Court gave Meeks the benefit of *Hitchcock*:

> We have previously recognized that the recent *Hitchcock* decision represents a sufficient change in the law to defeat a

> claim that the issue is procedurally barred. *See, e.g., Thompson v. Dugger*, 515 So. 2d 173 (Fla. 1987), *cert. denied*, 485 U.S. 960, 108 S. Ct. 1224, 99 L. Ed. 2d 424 (1988); *Demps v. Dugger*, 514 So. 2d 1092 (Fla. 1987); *Delap v. Dugger*, 513 So.2d 659 (Fla.1987).

Meeks, 576 So. 2d at 715. In a special concurrence, Justice Kogan wrote: "I believe that both this Court and the trial court must directly confront the root cause of the problem we face today: This Court's own inconsistent pronouncements on the admissibility of mitigating evidence during trials conducted in the 1970s." *Meeks*, 576 So 2d at 717. He then explained:

> In the 1970s, because of our own erroneous interpretation of federal case law, this Court directly barred capital defendants from presenting any mitigating evidence other than that described in the narrow list contained at that time in section 921.141(7), Florida Statutes (1975). *E.g., Cooper v. State*, 336 So. 2d 1133, 1139 & 1139 n.7 (Fla. 1976), *cert. denied*, 431 U.S. 925, 97 S. Ct. 2200, 53 L. Ed. 2d 239 (1977).
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> In 1978, the United States Supreme Court declared such a practice invalid in *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978). Only weeks later, this Court disingenuously stated that *Cooper* and other cases never had restricted defendants solely to the statutory list. In *Songer v. State*, 365 So. 2d 696, 700 (Fla. 1978) (on rehearing), *cert. denied*, 441 U.S. 956, 99 S. Ct. 2185, 60 L. Ed. 2d 1060 (1979), we retroactively amended *Cooper* with a few sentences arguing that our precedents "indicate unequivocally that the list of mitigating factors is not exhaustive." *Id*.

Meeks, 576 So.2d at 717.[12] Within this context, Justice Kogan concluded that the underlying principles of *Witt*'s retroactivity analysis warranted giving Meeks the benefit of *Hitchcock*: "Cooper and *Songer*, read together with an honest and objective mind, reveal a serious injustice that now must be corrected." *Meeks*, 576 So.2d at 718.

18. Accepting that the *Witt* fairness principles require *Hurst* to relate back to the issuance of *Ring v. Arizona* and/or *Apprendi v. New Jersey*, this Court must then confront whether "[c]onsiderations of fairness and uniformity" can justify denying the benefit of *Hurst* to those whose death sentences were final before June 24, 2002, or June 26, 2000. For example, what about the death sentences imposed on Matthew Marshall and William Thomas Zeigler?[13]

19. Marshall and Zeigler are the **only** individuals on Florida's death row solely on the basis of a judicial override of a jury's life recommendation. In *Marshall*

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[12] Justice Kogan continued: "Only two years later, in *Songer*, we did exactly what we said we could not do: We judicially expanded the list to conform to *Lockett*." *Meeks*, 576 So. 2d at 717. "This act alone was highly suspect. As we frequently have stated, **a statute cannot be rendered constitutional if this can be accomplished only 'by a bald judicial amendment similar to a legislative enactment.'** *Brown v. State*, 358 So.2d 16, 20 (Fla. 1978) (quoting *State v. Mayhew*, 288 So. 2d 243, 252 (Fla. 1973) (Ervin, J., dissenting)). A bald judicial amendment is precisely what *Songer* achieved." *Meeks*, 576 So. 2d at 717 n.5 (Kogan, J., specially concurring) (emphasis added).

[13] These specific cases are referenced here as relevant to this Court's consideration of the retroactivity of Mr. Lambrix's case, and indeed all cases, because that consideration must necessarily be global, contemplating all Florida death sentences, and cannot be limited to the four corners of any one case, or the impact on any one defendant.

v. State, 604 So. 2d 799 (Fla. 1992), this Court affirmed the death sentence by a 4-3 margin. The majority wrote:

> The jury found Marshall guilty of first-degree murder and recommended a sentence of life imprisonment. The judge rejected the jury's recommendation and imposed a sentence of death, finding in aggravation: (1) that the murder was committed by a person under sentence of imprisonment; (2) that the defendant was previously convicted of violent felonies; (3) that the murder was committed while the defendant was engaged in the commission of or an attempt to commit a burglary; and (4) that the murder was especially heinous, atrocious, and cruel.

Marshall, 604 So. 2d at 802. Subsequently, this Court affirmed the denial Marshall's Rule 3.851 claim based on *Ring* and *Apprendi* in *Marshall v. State*, 911 So. 2d 1129, 1134 (Fla. 2005) ("Although we have not addressed *Ring's* application in the context of a jury override verdict, our previous conclusions with regard to *Ring* claims preclude Marshall from being granted relief on his claim.").[14]

20. When this Court reviewed Zeigler's case on the direct appeal of his death sentence following a resentencing for *Hitckcock* error, this Court observed:

[14] Justice Lewis wrote in his concurrence: "I reiterate my concern that a trial judge's override of a jury's life recommendation stands in apparent "irreconcilable conflict" with the holding of *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)." *Marshall v. Crosby*, 911 So. 2d at 1138. However, Justice Lewis concluded that because in the years following *Ring*'s issuance, *Spaziano* had been left intact: "I must agree that *Ring* is inapplicable in this post-conviction case." *Marshall v. Crosby*, 911 So. 2d at 1140.

> We also affirmed *Zeigler's* death sentence in that case. Subsequently, however, we vacated the death sentence due to *Hitchcock*[] error. *Zeigler v. Dugger*, 524 So.2d 419 (Fla.1988). We ordered that the new sentencing proceeding be held **before only a judge because the jury had recommended life imprisonment.** *Id.* The judge again imposed the death penalty.

Zeigler v. State, 580 So. 2d 127, 128 (Fla. 1991) (emphasis added). Indeed, there was no jury involved in Mr. Zeigler's resentencing at all, because a jury had already declined to find insufficient aggravation to sentence Mr. Zeigler to death.

21. How can "[c]onsiderations of fairness and uniformity" justify denying Marshall and Zeigler the benefit of *Hurst* simply because the judicial override of the jury's life recommendations in their cases were affirmed by this Court on July 16, 1992 and April 11, 1991? Can this Court leave Marshall and Zeigler's death sentences intact after the decision in *Hurst v. Florida*?[15]

22. What about Edward Zakrzewski? After he pled guilty to killing his wife and two children, his penalty phase jury returned one 6-6 life recommendation, and two 7-5 death recommendations. His sentencing judge overrode the life recommendation and imposed three death sentences that this Court affirmed on direct

[15] As Mr. Lambrix argued in his prior pleadings, *Hurst* held that "[a] jury's mere recommendation is not enough." *Hurst v. Florida*, 136 S. Ct. at 619. This raises, in addition to the Sixth Amendment issue, an Eighth Amendment issue under *Caldwell*, which also must be part of this Court's evaluation of the impact of *Hurst* on Florida death sentences.

appeal by a narrow margin. *Zakrzewski v. State*, 717 So. 2d 488 (Fla. 1998). Subsequently, this Court rejected Zakrzewski's *Apprendi/Ring* challenge to his three death sentences on the merits. *Zakrzewski v. State*, 866 So. 2d 688, 697 (Fla. 2003) ("Thus, the prior violent felony or capital felony conviction aggravator exempts this case from the requirement of jury findings on any fact necessary to render a defendant eligible for the death penalty."). This Court's rejection of Zakrzewski's *Apprendi/Ring* claim was premised upon this Court's misunderstanding of what facts *Apprendi* and *Ring* require the jury to find in order for a death sentence to be imposed. How can "[c]onsiderations of fairness and uniformity" justify denying Zakrzewski the benefit of *Hurst* simply because the judicial override of the jury's life recommendation in his case was affirmed by this Court on June 11, 1998. Can this Court leave Zakrzewski's death sentence intact after the decision in *Hurst v. Florida*? Is there some guiding principle that can justify denying Zakrzewski the benefit of *Hurst*? If not, then this Court will arbitrarily be drawing lines that violate the bedrock principles of *Furman v. Georgia*, 408 U.S. 238 (1972).

23. Indeed, there is no principled way to grant partial retroactivity under *Witt v. State*. "Considerations of fairness and uniformity" require that *Hurst v. Florida* be fully retroactive, and that Mr. Lambrix receive the benefit of that decision.

WHEREFORE, the Appellant/Petitioner respectfully urges this Court to

remand for an evidentiary hearing, and/or vacate his sentences of death, and/or such other relief this Court deems warranted.

IT IS HEREBY CERTIFIED that a true copy of the foregoing motion to supplement the reply to the response to the petition for writ of habeas corpus and supplement the renewed motion for stay of execution has been furnished by electronic mail to Scott Browne, Assistant Attorney General at his primary email address, Scott.Browne@myfloridalegal.com, on this 5th day of February, 2016.

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