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.
_____/

APPELLANT'S MOTION TO RELINQUISH JURISDICTION

COMES NOW the Appellant/Petitioner, **CARY MICHAEL LAMBRIX**, by and through his undersigned counsel and herein requests that this Court relinquish jurisdiction to the circuit court so that it may entertain the Rule 3.851 motion that accompanies this motion as an appendix. In support of his motion, Mr. Lambrix states:

1. Mr. Lambrix is a death-sentenced inmate. Presently pending before this Court is Lambrix's appeal from the denial of a successive motion to vacate, and his petition for a writ of habeas corpus. Both were filed in January of 2016 after the Governor issued a death warrant scheduled Mr. Lambrix's execution. This Court heard oral argument on February 2, 2016, and later that day issued a stay of execution.

2. The focus of the pleadings filed in January of 2016 and at the February 2 oral argument was the meaning of *Hurst v. Florida*, 136 S. Ct. 616 (2016), and whether it was retroactive. Subsequently on October 14, 2016, this Court issued *Hurst v. State*, 202 So. 3d 40

(Fla. 2016), and explained the meaning of *Hurst v. Florida* and its impact on Florida law. In *Hurst v. State*, this Court went beyond the Sixth Amendment basis of the decision in *Hurst v. Florida* and found that under the Florida Constitution and the Eighth Amendment, the factual determinations required to authorize a death sentence as well as the death recommendation itself had to be made by a unanimous jury. Thus, the jury unanimity requirement of *Hurst v. State* is based not on *Hurst v. Florida* and the Sixth Amendment, but upon the Florida Constitution and the Eighth Amendment. Thus, the decision in *Hurst v. State* establishes new Florida law that was not part of *Hurst v. Florida*, and gives rise to constitutional claims that were not available on the basis of *Hurst v. Florida* alone.[1]

3. Then on December 22, 2016, this Court issued its opinions in *Mosley v. State*, 2016 WL 7406506 (Fla. Dec. 22, 2016), and *Asay v. State*, 2016 WL 7406538 (Fla. Dec. 22, 2016), and addressed Florida's standards for determining the retroactivity of *Hurst v. Florida* and whether Asay and Mosley were entitled to the retroactive benefit of *Hurst v. Florida*. In *Mosley*, this Court appears to also address the retroactivity of *Hurst v. State*, while it appears that this Court in *Asay* did not address the retroactivity of *Hurst v. State*. Because *Hurst v. State* rests upon the Florida Constitution and the Eighth Amendment to reach a holding that was not within the scope of *Hurst v. Florida*, the retroactivity analysis for *Hurst v. State* involves different considerations than those at issue when the retroactivity analysis is simply concerned *Hurst v. Florida*. In fact under *Montgomery v. Louisiana*, an entirely different retroactivity analysis may be required the new law rests on the Eighth Amendment's evolving standards of decency, as is the case with *Hurst v. State*.

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[1]This Court explained in *Hurst v. State* that a Florida penalty phase jury has the right to "grant mercy in a capital case" even if "it finds aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating circumstances." *Id.* at 58. Indeed, each juror in a Florida capital case has the "right to recommend a sentence of life even if [he or she] finds aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating circumstances." *Id.* 57-58 (citation omitted). Accordingly, a single juror voting to recommend a life sentence precludes the imposition of a death sentence.

4. But beyond that, the decisions in *Mosley* and *Asay* have created issues that previously did not exist as a majority of the justices of this Court recognized in the various separate concurring and dissenting opinions written in *Mosley* and *Asay*. The binary approach to retroactivity which was the basis of *Witt v. State*, 387 So. 2d 922 (Fla. 1980), seems implicitly to have been discarded. Justice Polston joined Justice Canady's dissent in *Mosley* that asserted that the majority had left "the *Witt* framework in tatters." *Mosley*, 2016 WL 7406506 at *32. Justices Pariente and Perry dissented in *Asay* because the majority had not applied *Hurst v. Florida* retroactively to Asay under *Witt* while it was applied retroactively to Mosley. *Asay*, 2016 WL 7406538 at *23, *27 (Pariente, J., concurring in part and dissenting in part) (Perry, J., dissenting). And Justice Lewis in a specially concurring opinion agreed with Justice Perry that "there is no salient difference between June 23 and June 24, 2002—the days before and after the case name *Ring* arrived. *See* Perry, J., dissenting op. at ——. However, that is where the majority opinion draws its determinative, albeit arbitrary, line." *Asay v. State*, 2016 WL 7406538 at *22 (Lewis, J., concurring in result).

5. In addition, the Court in *Mosley* recognized that besides employing the *Witt* analysis to argue for the retroactive application of new case law, parties can argue that in their individual circumstances, fundamental fairness warrants the retroactive application of new case law. This combined with the implicit abandonment of the binary approach to retroactivity that was previously the foundation of *Witt* has completely changed Florida's retroactivity law in ways that Lambrix could not have anticipated, but must be afforded an opportunity to address. *See Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014) ("The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution.").

6. By virtue of *Mosley* and *Asay* as a majority of this Court's justices recognized, unacceptable arbitrariness has been injected into Florida's capital sentencing process. The difference between who gets the benefit of *Hurst v. Florida* and/or *Hurst v. State* and a

resentencing, and who doesn't and gets executed will be an arbitrary. *See Asay*, 2016 WL 7406538 at *22 (Lewis, J., concurring in result) ("As Justice Perry noted in his dissent, there is no salient difference between June 23 and June 24, 2002—the days before and after the case name *Ring* arrived. *See* Perry, J., dissenting op. at 58. However, that is where the majority opinion **draws its determinative, albeit arbitrary, line**. As a result, Florida will treat similarly situated defendants differently—here, the difference between life and death—for potentially the simple reason of one defendant's docket delay.") (emphasis added); *Id*. at *26 (Pariente, J., concurring in part, dissenting in part) ("The majority's conclusion results in an unintended **arbitrariness** as to who receives relief depending on when the defendant was sentenced or, in some cases, resentenced.") (emphasis added); *Id*. at 26 (Perry, J., dissenting) ("In my opinion, the line drawn by the majority is **arbitrary and cannot withstand scrutiny under the Eighth Amendment** because it creates an arbitrary application of law to two groups of similarly situated persons.") (emphasis added); *Mosley*, 2016 WL 7406506 at *32 (Canady, J., concurring in part, dissenting in part) ("the supposed rule of 'fundamental unfairness' articulated in *James* is deeply problematic—if not entirely incoherent—when judged by its own terms. If counsel accepted our decisions at face value and relied on the United States Supreme Court's repeated rejection of *Ring* claims, the client loses under *James*. But if counsel raised claims that had been consistently rejected, the client wins. **This hardly comports with the notion of fundamental fairness**.") (emphasis added); *Id*. at *32 (Canady, J., concurring in part, dissenting in part) ("Based on an indefensible misreading of *Hurst v. Florida* and **a retroactivity analysis that leaves the *Witt* framework in tatters**, the majority **unjustifiably plunges the administration of the death penalty in Florida into turmoil that will undoubtedly extend for years**. I strongly dissent from this badly flawed decision."). Justice Polston concurred in Justice Canady's dissent in *Mosley*.

7. This arbitrariness creates an Eighth Amendment issue under *Furman v. Georgia*, 408 U.S. 238 (1972), which did not exist before *Mosley* and *Asay* issued. Lambrix could not have

pled a claim based upon this arbitrariness before *Mosley* and *Asay* issued.

8. Lambrix could not have previously pled a claim based on *Hurst v. State* that because his jury did not unanimously recommend a death sentence for either means that his death sentences stand in violation of the Eighth Amendment and the Florida Constitution. Under *Hurst v. State*, Lambrix's death sentences violate the Eighth Amendment's evolving standards of decency to execute a capital defendant when one or more of his jurors voted in favor of life sentences. Since two jurors voted in favor of a life sentence as to Bryant and four jurors voted in favor of a life sentence as to Moore, Lambrix's death sentences now constitute cruel and unusual punishment under the governing Eighth Amendment standards and Florida Constitution.

9. Lambrix could not have argued before *Hurst v. State* issued that at a resentencing the jury would have to unanimously recommend death before a death sentence could be imposed and that the previously rejected newly discovered evidence claims must be revisited in light of the new law that would govern at a resentencing. Lambrix is quite certain that in a penalty phase proceeding conducted in conformity with *Hurst v. State*, it is likely that he would receive a life sentence because under the standard for evaluating newly discovered evidence claims, most recently set forth by this Court in *Swafford v. State*, 125 So. 3d 760 (Fla. 2013), and *Hildwin v. State*, 141 So. 3d 1178 (Fla. 2014), he would carry his burden and establish his entitlement to Rule 3.851 relief. When the qualifying newly discovered evidence already found by this Court to exist is evaluated under *Swafford* and *Hildwin* and all of the evidence that would be admissible at a resentencing is evaluated under the law that will govern at a resentencing, it is likely that at one or more jurors would vote in favor of life sentences and thus preclude the imposition of death sentences.

10. In order the address the issues and present his claims arising from this Court's decisions in *Hurst v. State*, *Mosley v. State*, and *Asay v. State,* Lambrix has prepared the accompanying successive motion to vacate. This is his first, and perhaps only, only opportunity to show that the Constitution prohibits his execution under these recent decisions from this

Court. *See Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014) ("The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution."). The claims arising by virtue of *Hurst v. State*, *Mosley v. State*, and *Asay v. State* simply did not exist before.

11. This Court has held that in these circumstances with an appeal in this Court, the circuit court lacks jurisdiction. *State v. Meneses*, 392 So. 2d 905, 907 (Fla. 1981). Accordingly, a capital appellant with new claims to present in a Rule 3.851 proceeding should file a motion to relinquish jurisdiction with this Court and ask that the circuit court be authorized to consider his new Rule 3.851 motion. *Tompkins v. State*, 894 So. 2d 857, 859-60 (Fla. 2005).

12. In the accompanying successive motion to vacate, Lambrix has set forth his claims and arguments arising from this Court's recent decisions in detail as an examination of the motion will show. The claims and arguments are substantial, and Mr. Lambrix must be given a fair opportunity to demonstrate that his execution is now prohibited in light of this Court's most recent rulings in *Hurst v. State*, *Mosley v. State*, and *Asay v. State*. This Court should relinquish jurisdiction to the circuit court so that these claims and arguments may be heard by the circuit court.

WHEREFORE Mr. Lambrix, by and through undersigned counsel for the reasons discussed herein, respectfully requests that this Court relinquish jurisdiction to the circuit court so that it may consider Mr. Lambrix's Rule 3.851 motion which accompanies this motion as an appendix.

I HEREBY CERTIFY that a true and correct copy of the foregoing motion has been furnished by electronic service to all counsel of record on this 2nd day of February, 2017.

Respectfully submitted,

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