IN THE SUPREME COURT OF FLORIDA

CARY MICHAEL LAMBRIX,

Appellant/Petitioner,

v.

STATE OF FLORIDA/
JULIE L. JONES, ETC.

Appellee/Respondents.
_____/

CASE NOS. SC16-8 & SC16-56
L.T. No. 83-12-CF

DEATH WARRANT SIGNED
EXECUTION STAYED

STATE'S RESPONSE TO PETITIONER'S SECOND MOTION TO SUPPLEMENT THE REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, the State of Florida, by and through the undersigned attorneys, and files its Response to Petitioner's Second Motion to Supplement the Reply to Response to Petition for Writ of Habeas Corpus and respectfully submits the following:

Lambrix asserts that the State did not address in its habeas response the possibility of partial retroactivity. (Supplemental Argument at 3). However, the State made it very clear that Hurst v. Florida, 136 S. Ct. 616 (2016) should only be applied to cases that were not final on direct review at the time Hurst was decided. That is the typical course for any new constitutional rule of procedure announced by the Supreme Court. See Schriro v. Summerlin, 542 U.S. 348, 352 (2004) (recognizing that new rules of procedure "generally do not apply retroactively."). Given that Ring v. Arizona, 536 U.S. 584 (2002) is not retroactive, then it follows that Hurst cannot be

retroactive as it is not only an expansion of Ring to Florida, but in deciding Hurst, the Supreme Court overruled its decades old precedent finding Florida's capital sentencing constitutional.[1] Hurst, at 623-24. Like Ring, Hurst is a new procedural rule, not dictated by Ring as prior Supreme Court precedent had to be overruled in deciding Hurst. As provided in Whorton v. Bockting, 549 U.S. 406, 416 (2007), Crawford v. Washington, 541 U.S. 36 (2004) was a new rule because it was not "dictated" by prior precedent, but instead, overruled Ohio v. Roberts, 448 U.S. 56, 66 (1980). It also follows that the announcement of a new rule, where prior precedent is overruled, necessarily runs from the date of the new case. Notably, even the right to a jury trial itself was not held retroactive. See DeStefano v. Woods, 392 U.S. 631 (1968) (per curiam). Consequently, it logically follows that a new procedural ruling applying that right, such as Hurst, will not have retroactive application.[2]

The partial retroactivity analysis offered by Lambrix is

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[1] Spaziano v. Florida, 468 U.S. 447 (1984) and Hildwin v. Florida, 490 U.S. 638 (1989).

[2] Notably, this Court has found none of the evolutionary series of cases beginning with Apprendi, retroactive. See State v. Johnson, 122 So. 3d 856, 865-66 (Fla. 2013) (holding that Blakely, like Apprendi and Ring, is not retroactive). See also Foster v. Quarterman, 466 F.3d 359, 369-70 (5th Cir. 2006) (noting that neither Ring, Apprendi, or Blakely apply retroactively).

neither supported by precedent nor warranted. In its habeas response, the State cited Butterworth v. United States, 775 F.3d 459, 467-68 (1st Cir. 2015), cert. denied, 135 S. Ct. 1517 (2015), that rejected an argument that simply reading the tea leaves from the first in a line of constitutional rulings from the Supreme Court is sufficient to warrant the first case being the starting point for the retroactivity analysis --- in this case, Apprendi v. New Jersey, 530 U.S. 466 (2000). Such hindsight miasma would make the retroactivity determination a hollow and meaningless exercise in attempting to find the "first domino" to fall. See Butterworth, 775 F.3d at 467-68 ("Judicial interpretation of the Constitution, by its nature, builds on itself. The exercise of seeking out the first domino to fall, in hindsight, would make the retroactivity determination of any given new rule interminable."); Jeanty v. Warden, FCI-Miami, 757 F.3d 1283, 1285 (11th Cir. 2014) (observing "if Apprendi's rule is not retroactive on collateral review, then neither is a decision applying its rule") (citing In re Anderson, 396 F.3d 1336, 1340 (11th Cir. 2005)). As argued in both the State habeas response and the State's response to the Amicus briefs, both this Court and the State reasonably relied upon Hildwin and Spaziano specifically upholding Florida's hybrid statute; a reasonable decision in light of the significant differences between Florida's and Arizona's statutes. Since certiorari

review was only granted by the Supreme Court in a Florida case a dozen years after Ring was decided, that also supports the notion that such reliance was both reasonable and in good faith.

Lambrix acknowledges "strong and compelling reasons" for this Court to conclude that Hurst must be found retroactive to June 24, 2002, the date Ring v. Arizona was released. (Supplemental Argument at 4). He then goes on to contend that the retroactivity starting point should extend all the way back to Apprendi.[3] While the State clearly disagrees with both of those propositions, in that Hurst announced a new procedural rule that is not retroactive, even counsel's novel looking glass scenario would not suffice to entitle Lambrix to relief. Lambrix's case was final in 1986, long before even Apprendi had been decided. Lambrix v. State, 494 So. 2d 1143, 1148 (Fla. 1986). Thus, his attempt to carve out partial retroactivity would not have any impact upon this case.

Lambrix mentions that this Court's decision in Witt v. State, 387 So. 2d 922 (Fla. 1980) articulated an overriding principle of "fairness." (Supplemental Argument at 10). However, fairness in the context of retroactive application is not the one way street Lambrix believes it is. In fact, fairness in the

[3] Such an exercise could theoretically go back to Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (extending the right to a jury trial to the states) or ultimately, even the Magna Carta. Not surprisingly, Lambrix offers no authority for such legal gymnastics.

Witt analysis in this case strongly weighs against retroactive application. Lambrix was tried, sentenced and convicted in accordance with Florida and federal law at the time of his trial in 1983. It would simply be unfair to disturb his long final and just sentences for committing two brutal murders based upon procedural evolutionary developments occurring thirty years later. In Johnson v. State, 904 So. 2d 400, 411-12 (Fla. 2005), this Court stated:

> Resentencing hearings necessitated by retroactive application of *Ring* would be problematic. For prosecutors and defense attorneys to reassemble witnesses and evidence literally decades after an earlier conviction would be extremely difficult. We fear that any new penalty phase proceedings would actually be less complete and therefore less (not more) accurate than the proceedings they would replace. As we explained in *State v. Glenn*, 558 So. 2d 4 (Fla. 1990), where we declined to apply retroactively the double jeopardy ruling of *Carawan v. State*, 515 So. 2d 161 (Fla. 1987):
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> > Granting collateral relief ... would have a strong impact upon the administration of justice. Courts would be forced to reexamine previously final and fully adjudicated cases. Moreover, courts would be faced in many cases with the problem of making difficult and time-consuming factual determinations based on stale records. We believe that a court's time and energy would be better spent in handling its current caseload....
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> *Glenn*, 558 So. 2d at 8; *see also Reed v. State*, 837 So. 2d 366, 370 (Fla. 2002) (refusing to apply a new rule retroactively to child abuse cases because it "would require courts to revisit numerous final convictions and to extensively review stale records"); *Williams*, 421 So. 2d at 515 (refusing to apply a new rule retroactively because it would entail hearings with "evidence possibly long since destroyed, misplaced, or

> deteriorated" and witnesses who "may not be available or [whose] memory might be dimmed"); *Towery*, 64 P.3d at 835 (recognizing that "[c]onducting new sentencing hearings [for Arizona's 90 death row prisoners], many requiring witnesses no longer available, would impose a substantial and unjustified burden on Arizona's administration of justice").
>
> To apply *Ring* retroactively in Florida would undermine the perceived and actual finality of criminal judgments and would consume immense judicial resources without any corresponding benefit to the accuracy or reliability of penalty phase proceedings.

Lambrix offers nothing remotely compelling for this Court to depart from its precedent in Johnson, specifically applying the Witt factors to conclude that Ring has no retroactive application in Florida. See Brown v. Nagelhout, 84 So. 3d 304, 309 (Fla. 2012) (noting that in Florida the "'presumption in favor of *stare decisis* is strong []'" and that it "'provides stability to the law and to the society governed by that law.'") (quoting N. Fla. Women's Health & Counseling Servs., Inc. v. State, 866 So. 2d 612, 637-38 (Fla. 2003) and Rotemi Realty, Inc. v. Act Realty Co., 911 So. 2d 1181, 1188 (Fla. 2005)). Courts, including this one, have consistently rejected the notion that judicial, rather than jury fact finding necessary to increase either the statutory minimum or maximum, seriously undermines the integrity or fairness of the proceeding. See e.g. Summerlin, 542 U.S. at 356 ("When so many presumably reasonable minds continue to disagree over whether juries are better factfinders at all, we cannot confidently say that judicial

factfinding seriously diminishes accuracy."); Johnson, 904 So. 2d at 410 ("The purpose of the new rule in Ring is to conform criminal procedure to the Sixth Amendment's jury trial guarantee, and not to enhance the fairness or efficiency of death penalty procedures."); Colwell v. State, 118 Nev. 807, 821-22, 59 P.3d 463, 473 (Nev. 2002), cert. denied, 540 U.S. 981 (2003) ("We conclude therefore that the likelihood of an accurate sentence was not seriously diminished simply because a three-judge panel, rather than a jury, found the aggravating circumstances that supported Colwell's death sentence."); Rhoades v. State, 149 Idaho 130, 139-40, 233 P.3d 61, 70-71 (Id. 2010), cert. denied, 562 U.S. 1258 (2011) (holding that Ring is not retroactive after conducting its own independent Teague analysis and observing, as the Supreme Court did in Summerlin, that there is debate as to whether juries or judges are the better fact-finders and that it could not say "confidently" that judicial factfinding "seriously diminishes accuracy."); State v. Towery, 204 Ariz. 386, 392, 64 P.3d 828, 834 (Az.), cert. dismissed, 539 U.S. 986 (2003) ("We have no reason to believe that impartial juries will reach more accurate conclusions regarding the presence of aggravating circumstances than did an impartial judge.") (citations omitted). The uniformity of that precedent strongly militates against rejection of this Court's

well reasoned decision in Johnson.[4]

Against this weight of precedent Lambrix offers a line of cases that has little in common with the procedural error at

[4] While this precedent generally employs a Teague analysis, this distinction does not render such precedent meaningless. As this Court explained in Hughes v. State, 901 So. 2d 837, 847-48 (Fla. 2005) (footnote omitted; emphasis supplied):

> While the standards of *Teague* are different from those of *Witt*, they are based on many of the same concerns. *Compare Teague*, 489 U.S. at 309, 109 S.Ct. 1060 (noting that "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system"), with *Witt*, 387 So. 2d at 925 (noting that "[t]he importance of finality in any justice system, including the criminal justice system, cannot be understated.").[fn12] Therefore, although we should conduct our own analysis under the *Witt* standard (and have done so) we should not blind ourselves to how other courts interpret *Apprendi*. **We consider it relevant, though not dispositive, that no court anywhere in the country, whether state or federal, has held *Apprendi* to apply retroactively**. Regardless of the standard used, we find it persuasive that courts unanimously consider *Apprendi* to be a rule of procedure that simply changes who decides certain sentencing issues. Moreover, we have not, as the dissent suggests, relied only on cases that have analyzed retroactivity under *Teague*. As we explained earlier, the Supreme Court used the same standard we adopted in *Witt* in holding that the right to a jury trial itself is not so fundamental as to require retroactive application. *See DeStefano*, 392 U.S. at 633-34, 88 S.Ct. 2093. If, using the same analysis as we did in *Witt*, the right to jury trial itself is not retroactive, we fail to see how a subset of that right-a jury determination of facts relevant to sentencing-can be retroactive.

issue in this case. The Lockett[5] and Hitchcock[6] errors were addressed by this Court as a type of fundamental error, without apparently conducting a formal retroactivity analysis.[7] See Harvard v. State, 486 So. 2d 537, 540 (Fla. 1986) (Booth, Justice, dissenting). Regardless, such an error is more likely to undermine confidence in the outcome of a penalty phase than any Hurst error. In those cases the jury was essentially instructed that they were prohibited from considering non-statutory mitigation. See e.g. Riley v. Wainwright, 517 So. 2d 656, 659 (Fla. 1987) ("Despite the existence of significant nonstatutory mitigating evidence, it is apparent that the judge believed that he was limited to consideration of the mitigating circumstances set out in the statute and instructed the jury accordingly."). In contrast, a Hurst error does not prohibit the jury from considering or weighing any mitigation offered by the defendant.

There is a significant consensus that a Ring error does not fundamentally undermine the fairness or integrity of capital sentencing proceedings. Notably, the Supreme Court came to the non-retroactivity conclusion following Ring even though the

[5] Lockett v. Ohio, 438 U.S. 586 (1978).

[6] Hitchcock v. Dugger, 481 U.S. 393 (1987).

[7] Although curiously, such errors were often found harmless. See Hall v. Dugger, 531 So. 2d 76, 77 (Fla. 1988); Booker v. Dugger, 520 So. 2d 246, 248 (Fla. 1988) (finding Hitchcock errors harmless).

Arizona statute at issue, unlike Florida, had no jury participation in the finding of an aggravating circumstance or the actual sentencing determination itself. Summerlin, 542 U.S. 348, 358.

Finally, Lambrix curiously mentions the judicial override cases of Marshall v. Crosby, 911 So. 2d 1129, 1135 (Fla. 2005), Zeigler v. State, 580 So. 2d 127, 129 (Fla. 1991) and Zakrzewski v. State, 717 So. 2d 488, 491 (Fla. 1998) in support of his argument. However, those cases are not before this Court. While the State agrees that the retroactivity analysis [unlike harmlessness or even the existence of such error itself under the particular facts of a case] does not rest on any one individual case, Lambrix's reference to override cases should not factor into this Court's analysis.[8] Neither this Court nor

[8] In any case, the three override cases Lambrix mentions do not have a Hurst error in that jury findings, or the defendant's guilty plea rendered each defendant eligible for the death penalty. In Zeigler v. State, 580 So. 2d 127, 129 (Fla. 1991), the defendant had been convicted of four murders and qualified for the prior violent felony aggravator --- taking that case out of the purview of Hurst. Similarly, in Marshall v. Crosby, 911 So. 2d 1129, 1135 (Fla. 2005), this Court found that "one of Marshall's aggravating circumstances was that he had been previously convicted of nine violent felonies. Therefore, even if Hurst were to call Florida's jury override procedures into question, Marshall's nine prior violent felonies are an aggravating circumstance that takes his sentence outside the scope of Ring's requirements." Zakrzewski v. State, 717 So. 2d 488, 491 (Fla. 1998) involved guilty pleas to contemporaneous murders and two jury recommendations of death. Thus, applying Hurst retroactively to those cases would simply inject delay and waste judicial resources without any corresponding benefit to

the Supreme Court has ever declared judicial overrides to be unconstitutional. An advisory opinion on those three cases mentioned by Lambrix is neither necessary nor warranted.

In conclusion, application of new constitutional rules of procedure are normally limited to those cases that are not yet final on direct review. Hurst clearly does not fall into the category of a very exceptional constitutional ruling that mandates retroactive application under either Teague or Witt. To be sure, with more than forty cases that are not yet final on direct review, the "pipeline" cases will require expenditure of significant judicial resources to determine the existence of, and potential harmlessness of any Hurst error.[9] Those considerable costs are part of the settled course for application of any new constitutional procedural rule. However, respect for finality in our justice system and its concern for fairness to the State, the victims' family members, and judicial economy mandate that those costs not extend beyond those cases

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either the accuracy or fundamental fairness of those defendants' death sentences.

[9] While those cases in the pipeline requiring actual resentencing may be small in number --- due to qualifying contemporaneous felony convictions or the presence of prior violent felonies, and harmless error, the emotional toll on victims and financial cost to the State of conducting such new penalty phases will likely be significant.

that are not yet final.[10] Hurst is not retroactive.

WHEREFORE, the State respectfully requests that this Court deny Lambrix's State Habeas Petition.

Respectfully submitted,

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[10] The legal concept of finality includes several interests, including retribution, deterrence, the quality of judging, and the considerable interests of crime victims. Calderon v. Thompson, 523 U.S. 538, 555-556 (1998).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of February, 2016, a true and correct copy of the foregoing has been furnished electronically to the Clerk of the Florida Supreme Court at **warrant@flcourts.org**; and to William M. Hennis, III, Litigation Director, Martin J. McClain, Special Assistant CCRC-South, Jessica Houston, Staff Attorney CCRC-South and M. Chance Meyer, Staff Attorney CCRC-South, Office of the Capital Collateral Regional Counsel - South, One East Broward Boulevard, Suite 444, Fort Lauderdale, Florida 33301 (**hennisw@ccsr.state.fl.us**, **martymcclain@earthlink.net**, **houstonj@ccsr.state.fl.us** and **meyerm@ccsr.state.fl.us**).

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this response is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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