IN THE SUPREME COURT OF FLORIDA

CARY MICHAEL LAMBRIX,

Appellant/Petitioner,

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

v.

JULIE L. JONES, ETC.

Appellee/Respondents.
_____/

APPELLEE'S OBJECTION TO APPELLANT'S MOTION FOR ADDITIONAL BRIEFING ON APPLICATION OF THE NEW CAPITAL SENTENCING STATUTE

COMES NOW, the State of Florida, by and through the undersigned attorneys, and files its objection to Appellant's Motion for supplemental briefing on the new capital sentencing statute, and states:

1) At some point, a case on appeal must be considered submitted to the Court for a decision. Appellant/Petitioner has now submitted multiple pleadings following his initial brief and habeas petition. This Court has already granted Appellant leave to file two supplemental arguments.[1] However, at this point, Appellant is simply delaying submission of this case. The appellate rules do not permit an Appellant/Petitioner to file supplemental briefs following the close of briefing and oral argument. Leave to file yet another supplemental pleading should

[1] See Orders dated January 28, 2016 and February 8, 2016. However, on February 16, 2016, this Court issued an order denying Appellant's motion to file a supplemental brief addressing the issue of harmless error.

be denied. See e.g. United States v. Williams, 136 F.3d 547, 554 (8th Cir. 1998) ("At some point briefing and argument must end and the appeal must be decided. Williams passed this point long ago."); Archdiocese of Milwaukee v. Underwriters at Lloyd's, London, 955 F. Supp. 1066, 1070 (E.D. Wis. 1997) ("The rule does not provide for briefs in response to replies, such as the defendant's surreply brief which responds to an 'additional issue' in the plaintiff's reply brief. If the defendant's brief is permitted, the plaintiffs may wish to file a reply to defendant's surreply. However, at some point, briefing must end.").

2) Notably, this Court recently denied an identical request for supplemental briefing on the application of the new capital sentencing procedures in a case with a similar procedural posture in Asay v. State, SC16-223 (March 29, 2016).

3) While there are certainly pipeline direct appeal cases before this Court which will undoubtedly present questions surrounding the application of Florida's new capital sentencing procedures, this is not one of those cases. This case was final years before Hurst v. Florida, ___ U.S. ___, 136 S. Ct. 616 (2016) or even Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000), were decided. Lambrix will not get past the threshold question of retroactivity. Horn v. Banks, 536 U.S.

266, 122 S. Ct. 2147 (2002) (explaining that retroactivity is a threshold that must be addressed first when raised by the State, citing Caspari v. Bohlen, 510 U.S. 383, 114 S. Ct. 948 (1994)). Since Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428 (2002) itself is not retroactive, a decision expanding Ring to hold Florida's statute unconstitutional would not satisfy the stringent requirements needed to disrupt finality. Schriro v. Summerlin, 542 U.S. 348, 124 S. Ct. 2519 (2004); see also Johnson v. State, 904 So. 2d 400, 410 (Fla. 2005) (applying the Witt factors to hold that Ring would not be applied retroactively in Florida); Peede v. State, 955 So. 2d 480, 498 (Fla. 2007) ("Peede's death sentence became final long before Ring was decided in 2002; therefore, Peede cannot rely on Ring to find his death sentence unconstitutional.") (citations omitted); 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"). The threshold issue in this case is retroactivity, not the effect of the new statute.

4) The issue of the appropriate remedy and therefore the effect of the new statute would only arise if this Court: 1) found Hurst to be retroactive back before Ring and even Apprendi were decided, despite this Court's precedent to the contrary; 2)

found that the jury explicitly finding the previously-convicted-of-a-capital-felony aggravator in the guilt phase by convicting Lambrix of both murders was not sufficient to satisfy Hurst, despite this Court's precedent to the contrary[2]; and then 3) found that the error was not harmless, would the issue of the remedy arise under the new statute.

5) In the event Lambrix could overcome the rather significant hurdles to obtaining relief under the factual and procedural posture of this case, Dobbert v. Florida, 432 U.S. 282, 97 S. Ct. 2290 (1977), establishes that there would be no constitutional impediment to applying the new statutory procedures. See also Hameen v. State of Delaware, 212 F.3d 226

[2] Hurst would have no application under the facts of this case. Appellant, unlike Hurst, was convicted of qualifying contemporaneous felony convictions for a capital offense [death sentences supported by contemporaneous murders of victims Moore and Bryant]. These qualifying convictions, found by the jury and the trial court, supported the aggravator of conviction of another capital felony or of a felony involving use or threat of violence to the person. Therefore a unanimous jury found Appellant eligible for the death penalty at the guilt phase of his trial, precluding the finding of any Hurst based error. See Ellerbee v. State, 87 So. 3d 730, 747 (Fla. 2012) ("This Court has consistently held that a defendant is not entitled to relief under Ring if he is convicted of murder committed during the commission of a felony, or otherwise where the jury of necessity has unanimously made the findings of fact that support an aggravator.") (string cites omitted). Notably, since Hurst was decided the Supreme Court has denied certiorari review of several Florida cases, including one which challenged this Court's application of the prior violent felony exception to Ring based claims. See e.g. Hobart v. Florida, ___ S. Ct. ___, 2016 WL 1078981 (March 21, 2016); Smith v. Florida, 136 S. Ct. 980 (Jan. 25, 2016).

(3d Cir. 2000) (finding no ex post facto violation in applying a new statute when Delaware changed its statute following Ring based upon the holding in Dobbert).

6) At some point, briefing on a case should be concluded and the case submitted for disposition. This case has long since reached that point. Appellant's counsel should not now be given a third opportunity to raise new Hurst arguments via supplemental briefing.

WHEREFORE, the State respectfully requests that Appellant's motion for supplemental briefing on application of the new capital sentencing statute be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of April, 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 and Jessica Houston, Staff Attorney, Office of the Capital Collateral Regional Counsel - South, One East Broward Boulevard, Suite 444, Fort Lauderdale, Florida 33301 at **hennisw@ccsr.state.fl.us** and **houstonj@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. 9.100(*l*).

s/ Scott A. Browne
COUNSEL FOR APPELLANT