IN THE SUPREME COURT OF FLORIDA

CASE NO. SC18-1999

DEATH WARRANT SIGNED

JOSE ANTONIO JIMENEZ,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S RESPONSE TO PETITIONER'S WRIT OF HABEAS CORPUS

LISA-MARIE LERNER
Assistant Attorney General
Florida Bar No. 698271

MELISSA ROCA SHAW
Assistant Attorney General
Florida Bar No. 99628

Office of the Attorney General
1515 No. Flagler Drive, Ninth Floor
West Palm Beach, Florida 33401
Telephone: (561) 837-5000
COUNSEL FOR APPELLEE

ARGUMENT

The instant Petition falls short of raising an appropriate state habeas claim, where Jimenez is essentially arguing that he should retroactively receive a life sentence based on a voter referendum that has not been implemented yet and cannot be applied to Jimenez's case. Most recently, Jimenez raised the identical argument through *Hurst v. State*, 202 So.3d 40, 60 (Fla. 2016), arguing that *Hurst* and chapter 2017-1 should apply retroactively to his case even though this case was final long before the issuance of *Ring v. Arizona, 120 S.Ct 2348 (2002)* and Jimenez's jury unanimously recommended death. This Court, on June 28, 2018, rejected the instant claims in *Jimenez v. State*, 247 So.3d 395 (Fla. 2018).[1]

Under this Court's established precedent, habeas petitions are reserved to challenge the effectiveness of appellate counsel. *See Davis v. State*, 789 So. 2d 978, 981 (Fla. 2001) (reiterating that state habeas corpus proceedings are the vehicle to advance claims of ineffective assistance of appellate counsel). A state habeas petition is **not grounds to argue claims that either could have been or should have been raised earlier**. *See Lambrix v. State*, 217 So. 3d 977, 989 (Fla. 2017) ("Lambrix cannot use a successive petition for writ of habeas corpus to raise

[1]Since the claim Jimenez raises here has been litigated between the State and Jimenez previously and has been resolved against Jimenez, it is also barred by the doctrine of *res judicata*. *See In re Senate Joint Resolution of Legislative Apportionment 2-B*, 89 So. 3d 872, 883-884 (Fla. 2012) and *Topps v. State*, 865 So. 2d 1253, 1255 (Fla. 2004) (discussing application of *res judicata* to claims previously litigated on the merits).

claims that he raised in a prior proceeding."); *Breedlove v. Singletary*, 595 So. 2d 8, 10 (Fla. 1992) ("Habeas corpus is not a second appeal and cannot be used to litigate or relitigate issues which could have been, should have been, or were raised on direct appeal.") (citing *Porter v. Dugger*, 559 So. 2d 201 (Fla. 1990); *Clark v. Dugger*, 559 So. 2d 192 (Fla. 1990).

While Jimenez may creatively suggest he was unable to raise this argument concerning a non-implemented future constitutional provision any earlier than November 6, 2018, the assertion that an amendment to a criminal statute **must** be applied retroactively is not new or novel to Jimenez or this Court. As this Court has admonished defendants, habeas corpus does not present a proper forum to simply quibble with prior rulings of this Court. *Diaz v. State*, 132 So. 3d 93, 123 (Fla. 2013) ("Habeas proceedings simply do not afford an opportunity to relitigate such claims.); *Rodriguez v. State*, 39 So. 3d 275, 295 (Fla. 2010) ("As to the last claim, that this Court performed an improper harmless error analysis on direct appeal, this claim is an improper attempt to relitigate a claim we have already rejected.") (citation omitted); *Lambrix v. State*, 227 So. 3d 112, 113 (Fla. 2017), cert. denied sub nom. *Lambrix v. Florida*, 138 S. Ct. 312 (2017); ("To the extent Lambrix now raises additional claims to relief based on the rights announced in *Hurst* and *Perry* -including arguments based on the Eighth Amendment to the United States Constitution, denial of due process and equal protection based on the

arbitrariness of this Court's retroactivity decisions in *Asay V* and *Mosley v. State*, 209 So.3d 1248 (Fla. 2016), and a substantive right based on the legislative passage of chapter 2017–1, Laws of Florida, prospectively requiring unanimous verdicts—we reject these arguments based on our recent opinions in *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017), and *Asay v. State* (Asay VI), 224 So.3d 695 (Fla. 2017)).

The State observes that Jimenez has filed multiple habeas petitions in this Court. That alone is reason enough to dismiss this Petition. *See Johnson v. Singletary*, 647 So. 2d 106, 109 (Fla. 1994) ("Successive habeas corpus petitions seeking the same relief are not permitted...."). The petition is an abuse of procedure that inappropriately seeks duplicative review of a decision of this Court that has been final for years and does little more than quarrel with this Court's prior opinions. The purpose of the writ of habeas corpus is not to provide a device for the re-litigation of long-decided claims, and Jimenez's attempt to employ the writ in that fashion is an abuse of procedure.

To this point, Jimenez argues that the passing of Amendment 11 on November 6, 2018 requires that he be given a life sentence or at least a new penalty phase trial. He contends that because part of that ballot measure addressing the Savings Clause contained in Section 9 of Article X of the Florida constitution was approved to be changed by the voters, the penalty for first degree murder is

now life given the 2017 change in the statute governing the prosecution of capital murders. Jimenez misreads the change in the law and is incorrect that it affects him in any way. Importantly, the changes in the constitution brought about with the passage of Amendment 11 will not go into effect until January 8, 2019. Consequently, this issue is not ripe and cannot apply to Jimenez since his execution is set for December 13, 2018. This Court should deny the petition on this ground alone.

Even if this Court were to consider this future deletion to section 9 of Article X to be relevant to Jimenez in some way, the deletion alone does not instantaneously make the 2017 change in the amended statute retroactive to Jimenez's case. The changes in the constitution on this issue are as follows:

> **Section 9 of Article X**
>
> Repeal of Criminal Statutes. - Repeal ~~or amendment~~ of a criminal statute shall not affect prosecution ~~or punishment~~ for any crime ~~previously~~ committed before such repeal.

Accordingly, the change allows the Florida Legislature the discretion to make retroactive revisions to criminal punishments.[2] The amendment does not mandate that any change be retroactive; it is the Legislature's authority and prerogative to

[2] Jimenez's discussion on any possible intent of the voters in passing the amendment is rank speculation. It does not matter why a citizen voted in a particular way; it is the outcome and the specific language change to the constitution which controls. Again, any change does not become effective until 2019.

determine which changes in punishment will be retroactive. Jimenez contends that Chapter 2017-1, which revised §921.141, makes the maximum sentence for first degree murder life and must be retroactive to him under the new constitutional amendment which does away with the part of the savings clause regarding changes in punishment. He is essentially relying on the common law rule of abatement which allows a defendant the benefit of a change in the law or punishment enacted after the commission of the crime in a pending prosecution. His case, however, is not pending prosecution but has been final for decades. Furthermore, Chapter 2017-1 does not alter or reduce the punishment for first-degree murder since it remains the same.

Jimenez goes on to say that he must be given a life sentence because no jury found the additional "elements" required to convict him of capital murder. This is simply a mischaracterization of the law and the effect of the unanimous jury recommendation for death. This Court has specifically held that first degree murder is a capital crime by its very definition and the *Hurst* findings are not elements of the capital felony, in direct contradiction of Jimenez's stance.

> In sum, a conviction for first-degree murder, a capital felony, solely consists of the jury having unanimously found the elements set forth in the substantive first-degree murder statute and the relevant jury instruction. The conviction for first-degree murder must occur before and independently of the penalty-phase findings required by *Hurst* and its related legislative enactments. The Florida Statutes clearly establish the elements of first-degree murder required for a conviction, and upon conviction, the required findings in order to sentence a

> defendant to the death penalty. There is no, as Foster asserts, greater offense of "capital first-degree murder." Foster's guilt-phase jury considered all of the elements necessary to convict him of first-degree murder, a capital felony.

Foster v. State, No. SC18-860, 2018 WL 6379348, at *4 (Fla. Dec. 6, 2018).

Neither the Legislature nor this Court have held that the new statute can be applied retroactively to a defendant whose case was final before *Ring* and whose jury unanimously recommended death. *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017); *Asay v. State*, 224 So. 3d 695 (Fla. 2017); *Lambrix v. State*, 227 So. 3d 112, 113 (Fla. 2017); *Hannon v. State*, 228 So. 3d 505 (Fla. 2017). Moreover, nothing in the text of the revised statute or legislative history of Chapter 2017-1 evinces a legislative intent to abrogate all prior death sentences. Indeed, the Senate Staff Analysis of S.B. 280 refers to this Court's decision in *Asay* regarding retroactivity of Chapter 2017-1. *See* Senate Staff Analysis dated Feb. 21, 2017, at 6-7.[3]

As such, the legislature certainly did not hint at any desire to expand *Hurst* to all capital cases though the implementation of Chapter 2017-1. Further, Chapter 2017-1 was not meant to apply as a substantive right as it merely codified the

[3] The Senate Staff Analysis states:

> It is the date of the *Ring* opinion (2002) that has become the Florida Supreme Court's bright line for deciding *Hurst*'s retroactivity. If a sentence became final prior to the *Ring* decision, the defendant is not entitled to *Hurst* relief. If, however, the sentence became final on or after the date of the *Ring* opinion, *Hurst* applies.

Id. at 6-7.

language of *Hurst*. Jimenez's contrary proposition that the deletion of the portion of the Savings Clause requires him to receive a life sentence due to the revision of Chapter 2017-1 goes directly against the express proclamation of this Court and the Florida legislature. Accordingly, this Court should deny the petition.

CONCLUSION

WHEREFORE, the State respectfully requests that this Honorable Court deny all relief based on the merits.

Respectfully submitted,
PAMELA JO BONDI
ATTORNEY GENERAL

/s/ Lisa-Marie Lerner
LISA-MARIE LERNER
Assistant Attorney General
Florida Bar No. 698271
Office of the Attorney General
1515 No. Flagler Drive, Ninth Floor
West Palm Beach, Florida 33401
Telephone: (561) 268-5203
lisa-marie.lerner@myfloridalegal.com
capapp@myfloridalegal.com

/s/ Melissa Roca Shaw
Assistant Attorney General
Florida Bar No. 99628
Office of the Attorney General
1 SE Third Ave.
Suite 900
Miami, Florida 33131
Melissa.shaw@myfloridalegal.com
capapp@myfloridalegal.com

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of December, 2018, I electronically filed the foregoing with the Clerk of the Court by using the e-portal filing system which will send a notice of electronic filing to the following: Martin J. McClain, Esquire, McClain and McDermott, P.A., 141 N.E. 30th Street, Wilton Manors, Florida 33334-1064, martymcclain@comcast.net, Abbe Rifkin, Assistant State Attorney, at AbbeRifkin@MiamiSAO.com, and Fariba Komeily, Assistant State Attorney, at FaribaKomeily@MiamiSAO.com.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 14-point Times New Roman type, a font that is not spaced proportionately on December 7, 2018.

/s/ Lisa-Marie Lerner
COUNSEL, STATE OF FLORIDA