IN THE

SUPREME COURT OF FLORIDA

CARY MICHAEL LAMBRIX, Petitioner, v. JULIE L. JONES, Respondent.	Case No. SC 16-56

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION AND AMERICAN CIVIL LIBERTIES UNION OF FLORIDA IN SUPPORT OF PETITIONER CARY MICHAEL LAMBRIX

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PRELIMINARY STATEMENT

This brief is being filed by the American Civil Liberties Union Capital Punishment Project (ACLU-CPP) and the American Civil Liberties Union of Florida (ACLU-FL), in support of the Petitioner, CARY MICHAEL LAMBRIX.

The ACLU is a nationwide nonpartisan organization of nearly 500,000 members dedicated to protecting the fundamental liberties and basic civil rights guaranteed by the state and federal Constitutions, while the ACLU's Capital Punishment Project focuses on upholding those rights in the context of death-penalty cases. The ACLU of Florida is the ACLU's state affiliate and has approximately 15,000 members in the State of Florida equally dedicated to the principles of liberty and equality embodied in the United States Constitution and the Florida Constitution.

Both the ACLU-CPP and the ACLU-FL have long been committed to protecting the constitutional rights of persons facing the death penalty. Both have filed amicus curiae briefs in the United States Supreme Court in recent death penalty cases. *See*, *e.g.*, *Hurst v. Florida*, __ U.S.__, No. 14-7505, 2016 WL 112683 (Jan. 12, 2016); *Holland v. Florida*, 560 U.S. 631 (2010); *Lawrence v. Florida*, 549 U.S. 327 (2007). Jointly, both currently represent a Florida death-row prisoner on direct appeal.

SUMMARY OF ARGUMENT

"Florida's capital sentencing scheme violates the Sixth Amendment . . . ." *Hurst v. Florida*, __ U.S.__, No. 14-7505, 2016 WL 112683 (Jan. 12, 2016). As authoritatively interpreted in *Hurst*, the Sixth Amendment to the United States Constitution "requires a jury, not a judge, to find each fact necessary to impose a sentence of death." *Id.* at *3. The Florida death-penalty statute – as applied by the Florida courts, as interpreted by the U.S. Supreme Court when evaluating its constitutionality, and as applied in this Court's jury instructions – is distinct from that of other states, including Arizona. It specifies the facts to be proven before a prisoner may be eligible for a death sentence. Specifically, it requires "'[t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'" *Id.* at 6 (quoting § 921.141 (3), Fl. St.). Because, as in *Hurst*, no jury found "each fact necessary" to impose Lambrix's death sentence, it must be vacated, and his scheduled execution may not go forward.

Lambrix is scheduled for execution on February 11, 2016, while Hurst was decided days ago on January 12th. In the context of an expedited briefing schedule for a writ Lambrix's attorneys filed on the eve of *Hurst*, the Court ordered on the day *Hurst* was decided that the

> Respondent shall address the applicability of *Hurst v. Florida*, No. 14-7505, 2016 WL 112683 (Jan. 12, 2016), to each of Petitioner's first-degree murder convictions and sentences of death. Specifically, the Respondent shall address the retroactivity of Hurst, the effect of Hurst in light of the aggravating factors found by the trial court in Lambrix's case, and whether any error in Lambrix's case is harmless.

Order (Jan. 12, 2016). The Court directed Lambrix's attorneys to then address the same issues in a reply to be filed by January 20, 2016.

This brief is limited to addressing the "effect of Hurst in light of the aggravating factors found by the trial court in Lambrix's case." Amici endorse and adopt the views of Lambrix's attorneys and other amici with respect to the questions of retroactivity and harmlessness. The question this brief will address is of crucial importance of course to Lambrix, but also to every other prisoner sentenced to death under a scheme the U.S. Supreme Court has now declared fails to uphold the Sixth Amendment's jury right. *Hurst*, 2016 WL 112683, at *6.

Although undersigned amici endeavor to take on this important question, it cannot be overemphasized that time on this briefing schedule is insufficient to do so adequately. This brief therefore (and also due to space limitations) touches on only a few of the many arguments that may be raised to show the unconstitutionality of Lambrix's death sentence. Further, amici respectfully suggest that, after repeatedly holding over decades that Florida's death-sentencing procedures pose no Sixth Amendment problem, the Court should not rush over

days and weeks under the pressure of an imminent execution to decide the import of a U.S. Supreme Court decision that has decided the opposite and obliterated the previous landscape. Amici respectfully request that Lambrix and other prisoners facing execution be afforded sufficient time to research and brief the implications of *Hurst*, and that this Court take adequate time, aided by the State's briefing, to make a reasoned decision that will stand the test of time. Undersigned amici could be a much better "friend to the Court" in the context of a reasoned and deliberative process where the priority is honoring the Sixth Amendment jurisprudence *Hurst* has now provided, rather than a rush to complete proceedings on time for an execution.

ARGUMENT

Because no jury has found all of the facts required to make Lambrix eligible for a death sentence under Florida law, his Sixth Amendment jury right has been violated.

"Florida's capital sentencing scheme violates the Sixth Amendment . . . ." *Hurst*, 2016 WL 112683, at *5. The State used this unconstitutional scheme to obtain the death sentence of Cary Michael Lambrix. As with Timothy Ring and Timothy Hurst, "the maximum punishment" Lambrix "could have received without any judge-made findings was life in prison without parole[,] and "a judge increased [his] authorized punishment based on [his] own factfinding." *Hurst*, 2016 WL

112683, at *6 (citing *Ring v. Arizona*, 536 U.S. 584 (2002)). As shown below, because the sentencing judge, and no jury, made the operative findings "'[t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances,'" *id.* (quoting § 921.141(3), Fl. St.), Lambrix's death sentence violates the Sixth Amendment.

1. The sentencing judge, and not the jury, made the requisite fact findings rendering Lambrix eligible for the death penalty.

The trial judge sentenced Lambrix to death on each of two murder counts. As recounted by this Court on direct appeal, the *judge* found the following aggravators "(1) the capital felonies were committed by a person under sentence of imprisonment, section 921.141(5)(a), Florida Statutes (1983); (2) the defendant was previously convicted of another capital felony, section 921.141(5)(b); (3) the capital felony was committed for pecuniary gain, section 921.141(5)(f); (4) the capital felonies were especially heinous, atrocious or cruel, section 921.141(5)(h); and (5) the capital felonies were homicides and committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification, section 921.141(5)(i)." *Lambrix v. State*, 494 So. 2d 1143, 1148 (1986). This Court found the pecuniary gain aggravating circumstance applied with respect to only one of the victims. *Id.*

But the sentencing judge found not only the existence of each of these

aggravating circumstances, he specifically found that "there are *sufficient* aggravating circumstances to impose the death penalty, and there are insufficient mitigating circumstances to support a sentence of life imprisonment." Sentencing Order, at 1 (emphasis added).

Supporting that conclusion, beyond the mere existence of these aggravators, the trial judge described the particular facts he believed established the aggravators. Thus, the judge found that Lambrix had escaped from "Lakeland Community Correctional Center where he was serving two years in Florida State Prison System[,]" that the prior capital felony convictions were the two "counts returned jointly by the jury in the instant case," that testimony "showed the defendant went through the pockets of the male deceased, and also, stole his automobile[,]" that the "facts speak for themselves" to establish the crime was especially heinous and atrocious, and that Lambrix had "enticed" one victim "out to himself and beat him to death with a tire iron" and then enticed out the second victim "and strangled her to death," after which he "went back into the trailer, washed up and ate a plate of spaghetti." Sentencing Order, at 1-2.

Florida procedure meanwhile relegated Lambrix's jury to the same advisory role the Court in *Hurst* found insufficient under the Sixth Amendment. His jury was instructed:

As you have been told, the final decision as to what punishment shall

> be imposed is the *responsibility of the judge*. However, it is your duty to follow the law that will now be given you by the court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist. Your *advisory* sentence should be based upon the evidence that you have heard while trying the guilt or innocence of the Defendant and evidence that has been presented to you in these proceedings.

R. 2665 (emphasis added). *See also* R. 2665 (repeating that the jury's findings are advisory).[1] The jury's recommendations following this instruction were non-binding, non-unanimous, and contained no special verdict identifying any single aggravating factor the jury found beyond a reasonable doubt. R. 1347-48.

Therefore, just as the Supreme Court described the Florida procedure in *Hurst*, it was Lambrix's trial judge and not his jury who made "'findings . . . that [Lambrix] shall be punished by death.'" *Hurst*, 2016 WL 112683, at *6 (quoting §

[1] Notably, the trial judge found an aggravating circumstance – the prior capital felony – the jury was not even asked to consider, and which the prosecutor asked the jury to disregard. The court did not charge the jury to consider whether the "defendant was previously convicted of another capital felony, section 921.141(5)(b)." *Lambrix*, 494 So. 2d at 1148. Over defense objection, R. 2701, 2703, the court made that particular finding all by itself. Sentencing Order at 1. The court asked the jury to consider a different question – whether "the crime for which the Defendant is to be sentenced was committed while he was engaged in the commission of a robbery." R. 2663. Before the jury, the prosecutor abandoned the previous capital conviction aggravator the court later found. R. 2645 ("And the Defendant was previously convicted of another capital offense for the felony involving violence to some other person. We are not claiming that. You are not to consider that."). The jury's sentencing recommendation does not identify the aggravating circumstances it found. R. 1347-48.

775.082 (1), Fl. Stat.). And it was the trial court judge "alone" who found "'the facts . . . [t]hat sufficient aggravating circumstances exist' and "'[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'" *Hurst*, 2016 WL 112683, at *6 (quoting § 921.141(3), Fl. Stat.).[2] The Sixth Amendment reserves these findings for the jury. *Id.* These proceedings thus violated Lambrix's jury right.

2. Florida law does not make a defendant death-eligible through the bare establishment of a single aggravating circumstance.

The State argues that no Sixth Amendment violation occurred "because of the existence of the contemporaneous murder conviction supporting each of [Lambrix's] two death sentences." Resp. Br. at 16. *See generally Ring v. Arizona*,

[2] *See also In re Standard Jury Instructions in Criminal Cases-Report No. 2005-2*, 22 So. 3d 17, 26 (Fla. 2009) ("There is no question about the trial court's duty to make findings independent from those made by the jury.") (quoting order in death penalty case from "one of our most experienced trial judges in death penalty cases, and the judge who teaches the States judges the death penalty course mandated by the Rules of Judicial Administration."); *Blackwelder v. State*, 851 So. 2d 650, 653 (Fla. 2003) ("[W]e remind judges of their duty to independently weigh aggravating and mitigating circumstances. A sentencing order should reflect the trial judge's independent judgment about the existence of aggravating and mitigating factors and the weight each should receive."); *Carr v. State*, 156 So. 3d 1052, 1068 (Fla. 2015) ("[T]he detailed findings in the trial court's sentencing order plainly show that the trial court . . . reached an independent judgment regarding the appropriate sentence.").

536 U.S. 584, 600 & 597 n.4 (2002) (noting exception of prior conviction from the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2001), and noting in footnote that petitioner did not challenge this exception to the rule). According to the State, because of the mere existence of this single aggravator, the jury's failure to make the requisite findings outlined in § 921.141(3), and cited by *Hurst*, is completely irrelevant. Resp. Br. at 16-17. This is not the law.

a. The statutory requirement of "sufficient aggravators" for death eligibility.

The State's argument fails because application of *Ring*'s exception for prior convictions here in no way fulfills the missing requisite jury findings under the Florida statutory procedure. To be sure, the Sixth Amendment, under extant precedents, does not currently require the capital jury to find a prior conviction.[3] Further, a prior violent felony conviction is one aggravating circumstance in the Florida statute, § 921.141(5)(b), and indeed one found by the sentencing judge here. But it simply does not follow that the State's excusal from proving this aggravating circumstance to the jury means that Lambrix's jury found, as the Sixth Amendment requires, "the facts necessary to sentence [him] to death." *Hurst*, 2016 WL 112683, at *5; *see also id.* (requiring "a jury [to] find the facts behind [the]

[3] *But see Shepard v. United States*, 544 U.S. 13, 27-28 (2005) (Thomas, J. concurring) (noting such precedent has "been eroded by this Court's subsequent Sixth Amendment jurisprudence, and that the Court should consider its continuing viability in a future case).

punishment"); *id.* at 6 (referring to "necessary factual finding that *Ring* requires"); *id.* at 6 (identifying the Florida facts to be found as "'the facts . . . [t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances'") (quoting § 921.141 (3)). As *Hurst* teaches, the non-unanimous recommendation of Lambrix's jury surely did not constitute such findings.

Section 921.141 (3) (a) requires a finding that "sufficient aggravating circumstances exist." Having analyzed Florida law to evaluate its constitutionality, *Hurst* says nothing different. Nowhere does *Hurst* say that a single aggravating circumstance in Florida satisfies the Eighth Amendment eligibility requirement. Nor does Section 921.141 state anywhere that a single aggravating circumstance makes a defendant eligible for the death penalty. Nor, contrary to the State's argument, do this Court's precedents support this argument. Resp. Br. at 17 (citing *Ault v. State*, 53 So. 3d 175, 205 (Fla. 2010); *Zommer v. State*, 31 So. 3d 733, 752-54 (Fla. 2010); *State v. Steele*, 921 So. 2d 538, 540 (Fla. 2005)).

Neither *Ault* nor *Steele* states that a defendant becomes death eligible once a single aggravating factor is proven. They instead, each state that before a *jury* may recommend a death sentence a majority of it "must find that the State has proven, beyond a reasonable doubt, the existence of at least one aggravating circumstance . . . ." *Steele*, 921 So. 2d at 540 (emphasis added); *Ault*, 53 So. 3d at 205 (citing

Steele for nearly identical language). Post-*Hurst*, it is clear that the jury takes no Sixth Amendment relevant part in the sentencing process. In any case, even to the extent these statements in *Ault* and *Steele* may be read to speak to death eligibility, *Hurst* now makes clear that they misread *Ring*. *Ring* discusses the existence of an aggravating factor only because it is addressing the jury right in terms of *Arizona* law's specific death-eligibility requirement. *Ring*, 536 U.S. at 594. *Florida* law, as shown in this brief, is much different. Here, the question of death eligibility goes well beyond this minimal inquiry.

As for *Zommer*, it admittedly comes closer to answering the question by rejecting – in dicta – the appellant's argument that § 921.141 (3)'s requirement of "sufficient aggravating circumstances" must mean more than a single aggravating circumstance. But *Zommer* does not resolve the question for three reasons. First, the Court in *Zommer* made this pronouncement in dicta, after first rejecting the appellant's argument as unpreserved. 31 So. 3d at 752 ("Given the absence from the record of any motion or argument that presented the claims raised here to the trial court, we conclude that this issue has not been preserved for review."). The Court only then went on to address the issue presented. When a statement does not directly control the outcome, it is dicta and "without force as precedent." *State ex rel. Biscayne Kennel Club v. Bd. of Bus. Regulation of Dep't of Bus. Regulation*, 276 So. 2d 823, 826 (Fla. 1973). In this post-*Hurst* world, where previous

assumptions have been upset, the Court should not bind itself to pre-*Hurst* dicta.[4] Second, *Zommer's* dicta cites to *State v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973) ("When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by . . . mitigating circumstances . . . ."). This statement in *Dixon* goes against the text of Section 921.141 (3) (requiring "sufficient aggravating circumstances" and the weighing of mitigating and aggravating circumstances), and has been revealed to be constitutionally infirm and impermissible as a jury instruction.[5]

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[4] For similar reasons, the Court should not accept the State's invitation to look to pre-*Hurst* decisions to resolve whether the existence of a prior conviction or contemporaneous felony precludes a finding of *Hurst* error on the grounds here argued. Resp. Br. at 17 (citing *Ellerbee v. State*, 87 So. 3d 730, 747 (Fla. 2012)). Based on the text of the decision, *Ellerbee* does not appear to have addressed the arguments raised in this brief. Moreover, the decision is predicated on the observation, quoted by the State here, that the 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." *Ellerbee*, 87 So. 3d at 747. That decision, however, cites only to prior decisions, which each made such observations in *dicta* only after the controlling holding that *Ring* has no application at all to the Florida statute. *See Baker v. State*, 71 So. 3d 802, 824 (Fla. 2011); *Douglas v. State*, 878 So. 2d 1246, 1263–64 (Fla. 2004); *Caballero v. State*, 851 So. 2d 655, 663–64 (Fla. 2003); *Doorbal v. State*, 837 So. 2d 940, 963 (Fla. 2003).

[5] *Jackson v. Dugger*, 837 F.2d 1469, 1473 (11th Cir. 1988) ("Such a presumption, if employed at the level of the sentencer, vitiates the individualized sentencing determination required by the Eighth Amendment."). In her concurring opinion in *Zommer*, 31 So. 3d at 756, Justice Pariente cited subsequent cases, discussed below in this brief, clarifying *Dixon* and holding "that a jury is not compelled to recommend death when the aggravating factors outweigh the mitigating factor." *Id.*

Third, and even more to the point, the question is not one of the *number* of aggravating factors, as apparently argued in *Zommer*, but of their *sufficiency* to warrant a death sentence.[6] In practice, in both the opinions of this Court and sentencing orders of the trial courts, *a death sentence in Florida is always predicated not simply on the bare finding of an aggravating circumstance, but on sufficiency* of the single aggravator or plural aggravators. *See Bevel v. State*, 983 So. 2d 505, 524 (Fla. 2008) ("[A]lthough the trial court found only one aggravating circumstance, the facts upon which the aggravator is based are critical to our analysis."); *Williams v. State*, 967 So. 2d 735, 761 (Fla. 2007) (noting where four aggravators had been found by trial court, it is "clear from the trial court's order that it found sufficient aggravators existed to justify a death sentence even though it did not make this precise statement in its order"), *as revised on denial of reh'g* (2007); *Daugherty v. State*, 419 So. 2d 1067, 1069 (Fla. 1982) (recounting trial court finding "sufficient aggravating circumstances"); *Moody v. State*, 418 So. 2d

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at 756 & n.10 (Pariente, J., concurring).

[6] Rather than a question of numbers, eligibility for a death sentence is tied into the facts the Court identified as required in *Hurst* – aggravation and mitigation. *Hurst*, 2016 WL 112683, at *6. This Court thus has held that "death is not indicated in a single-aggravator case where there is substantial mitigation." *Almeida v. State*, 748 So. 2d 922, 933 (Fla. 1999) (quoting *Jones v. State*, 705 So. 2d 1364, 1367 (Fla. 1998)). However, where the mitigation is not substantial and a prior murder is involved, this Court has affirmed the death penalty even in a single-aggravator case. *See, e.g.*, *Ferrell v. State*, 680 So. 2d 390, 391 (Fla. 1996); *see also Duncan v. State*, 619 So. 2d 279, 284 (Fla.1993).

989, 994 (Fla. 1982) (quoting extensive and detailed sentencing findings regarding several aggravating factors which the sentencing court called at the outset "sufficient Aggravating Circumstances"); *Harvard v. State*, 375 So. 2d 833, 835 (Fla. 1977) ("The jury and the judge both found the aggravating circumstances sufficient to warrant death. We agree."); *Elledge v. State*, 346 So. 2d 998, 1001 (Fla. 1977) (quoting sentencing court's finding of "sufficient aggravating circumstances existing to justify the sentence of death"); *Swan v. State*, 322 So. 2d 485, 489 (Fla. 1975) ("Having considered the total record, we are of the opinion that there were insufficient aggravating circumstances to justify the imposition of the death penalty.").

Indeed, the meaning of the word "sufficient" in the Florida statute, and its ability to adequately guide the sentencer, was debated the very first time the U.S. Supreme Court examined Florida's capital sentencing proceedings. *See Proffitt v. Florida*, 428 U.S. 242, 257-58 (1976). There, the petitioner argued that it was "not possible to make a rational determination whether there are 'sufficient' aggravating circumstances that are not outweighed by the mitigating circumstances, since the state law assigns no specific weight to any of the various circumstances to be considered." The Court recognized that answering these questions may be hard, but found they nevertheless satisfied the Eighth Amendment requirements of guided discretion. *Id.* At no point did the Court consider whether the phrase "sufficient

aggravating circumstances" meant something much simpler – merely that a single aggravating circumstance had been proven.

This Court and the sentencing court's decisions have thus long given effect to the term "sufficient" in the sentencing requirement of sufficient aggravating circumstances. § 921.141 (3), Fl. Stat. Even the U.S. Supreme Court has given effect to the word, finding it adequate to guide sentencers. To permit the lesser showing the State proposes before a defendant could become eligible for a death sentence – merely that some aggravating circumstance was proven in accord with current Sixth Amendment requirements – is to ignore this important history.

It would also ignore the plain words of the legislature, in violation of the fundamental rules of statutory construction. "It should never be presumed that the legislature intended to enact purposeless and therefore useless, legislation. Legislators are not children who build block playhouses for the purpose, and with the gleeful anticipation, of knocking them down." *Sharer v. Hotel Corp. of America*, 144 So. 2d 813, 817 (Fla. 1962). The reading the State proposes impermissibly "render[s] part of [the] statute meaningless." *Unruh v. State*, 669 So. 2d 242, 245 (Fla. 1996). That seems particularly problematic given that the U.S. Supreme Court's approval of the Florida sentencing statute assumed something much different about the term "sufficient."

Finally, the State's attempts at a quick and tidy renovation of this

longstanding statute are not warranted by the finding in *Hurst* that the statute is constitutionally lacking. *See State v. Wershow*, 343 So. 2d 605, 607 (Fla. 1977) ("Under our constitutional system, courts cannot legislate. Article II, Section 3, Florida Constitution."); *Locklin v. Pridgeon*, 30 So. 2d 102, 104 (Fla. 1947) (quoting *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 518-22 (1926)) ("The court cannot, in order to bring a statute within the fundamental law, amend it by construction. A statute which requires the doing of an act so indefinitely described that men must guess at its meaning violates due process of law."). *See also Cuda v. State*, 639 So. 2d 22, 23 (Fla. 1994) (quashing lower appeals court's declaration that Florida criminal statute was constitutional because lower court cured statute's constitutional vagueness problem by relying on case law to furnish a definition for one vague term (illegal) and severing another vague term (improper) from the criminal statute).

It would be a strange system, indeed, if the trial court sentencing Lambrix to death was, after all, incorrect in thinking (consistent with the above history and the statutory text) that he was making the constitutionally necessary fact findings to make Lambrix eligible for a death sentence. *See* Sentencing Order at 2 (finding "there are sufficient aggravating circumstances to impose the death penalty, and there are insufficient mitigating circumstances to support a sentence of life imprisonment"). The State's argument that a "single aggravating circumstance,"

rather than "sufficient aggravating circumstances," can make a person eligible for a death sentence is atextual, ahistorical, and would require an impermissible trespass on the province of the legislature. It should be rejected.

b. The requirement of "insufficient mitigating circumstances to outweigh the aggravating circumstances."

Most of the arguments set forth above apply with equal force here. Simply stated, the statutory requirement of a finding that there are "insufficient mitigating circumstances to outweigh the aggravating circumstances," § 921.141 (3)(b), was a factual finding the jury was required to make before Lambrix could be sentenced to death. *Hurst*, 2016 WL 112683, at *6 (quoting this language as a requirement before Hurst could be sentenced to death). The existence of insufficient mitigating circumstances is thus a "fact on which the legislature conditions an increase in the[] maximum punishment" that "the Sixth Amendment requires be found by a jury." *Ring*, 536 U.S. at 589; *see State v. Ring*, 204 Ariz. 534, 565 (Ariz. 2003) (holding, on remand from U.S. Supreme Court, that the Sixth Amendment requires a jury determination on whether the mitigating factors, when compared with the aggravators, call for leniency).

The same is true at the practical level, in the courts that have applied the existing sentencing scheme. The very structure of the legislature's existing sentencing scheme is to bring into the question of death eligibility the weighing of

aggravating and mitigating circumstances. *See Bevel*, 983 So. 2d at 523 ("This Court has previously stated that 'death is not indicated in a single-aggravator case where there is substantial mitigation.'") (quoting *Almeida*, 748 So. 2d at 933 (quoting *Jones*, 705 So. 2d at 1367)); *Proffitt v. State*, 510 So. 2d 896, 898 (Fla. 1987) (noting mitigation presented and that "the trial judge expressly found that Proffitt's lack of any significant history of prior criminal activity or violent behavior were mitigating circumstances," and finding that in the course of a felony aggravating circumstance did not justify the imposition of a death sentence, because "[t]o hold, as argued by the state, that these circumstances justify the death penalty would mean that every murder during the course of a burglary justifies the imposition of the death penalty").

Furthermore, as shown above, accepting the State's invitation to read the operative language out of the statute as irrelevant or unnecessary would violate the province of the legislature and Article II, Section 3, Florida Constitution. Because Lambrix's jury *did not* make the requisite finding of Section 921.141 (3)(b), his death sentence, like Hurst's, violates the Sixth Amendment.

In delineating as an eligibility finding the insufficient weight of any mitigating circumstances, the legislature (responding to the concerns of *Furman v. Georgia*, 408 U.S. 238 (1972) and anticipating the Court's future decisions), was honoring the Eighth Amendment command that imposition of the death penalty

"must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution." *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008). While a finding on the existence of an aggravating circumstance adequately protects the "most serious crimes" half of the equation, a finding of insufficient mitigating circumstances helps to ensure that the judge does not impose the death penalty "in spite of factors which may call for a less severe penalty." *Lockett v. Ohio*, 438 U.S. 586, 605 (1978).

Findings on the existence and weight of the aggravating circumstances not only serve similar functions, they also often entail a very similar kind of fact-finding. A finding, for example, that the defendant's severe mental illness is sufficiently weighty, *see, e.g., Green v. State*, 975 So. 2d 1081, 1088 (Fla. 2008), is close in kind to one of the most commonly found aggravating circumstances: that the defendant committed the murder in an "especially heinous, cruel, or depraved manner." *Schriro v. Summerlin*, 542 U.S. 348, 361 (Breyer, J., dissenting) (noting that the heinous-cruel-depraved aggravator, which is "[t]he leading single aggravator charged in Arizona," is "not simply the finding of brute facts, but also the making of death-related, community-based value judgments"); *Sireci v. Moore*, 825 So. 2d 882, 887 (Fla. 2002) (listing the heinous, atrocious and cruel aggravator as one of "the most weighty in Florida's sentencing calculus").

Indeed, the weighing determination is in some regards more tightly connected to the traditional elements of an offense than the finding of an aggravating circumstance or even a sentencing enhancement in a non-capital case. *See Jones v. United States*, 526 U.S. 227, 272 (1999) (Kennedy, J., dissenting) ("*Walton* [*v. Arizona*, 497 U.S. 639 (1990),] would appear to have been a better candidate for the Court's new approach than is the instant case … [T]he question was the aggravated character of the defendant's conduct, not, as here, a result that followed after the criminal conduct had been completed.").

Thus, the finding of insufficient weight of mitigation, no less than the finding on the existence of sufficient aggravating circumstances, "operate[s] as the functional equivalent of an element of a greater offense." *Ring*, 536 U.S. at 609; *see also id.* at 610 (Scalia, J., concurring) ("whether the statute calls them elements of the offense, sentencing factors, or Mary Jane … all facts essential to imposition of the level of punishment that the defendant receives … must be found by the jury beyond a reasonable doubt").

Tellingly, in light of all this in *Ring*'s wake, not only did the Arizona Supreme Court interpret the weighing required by its statute to constitute an eligibility fact the jury must find under the Sixth Amendment, but so did several other states. *See Johnson v. State*, 59 P. 3d 450, 460 (Nev. 2002); *Woldt v. People*, 64 P.3d 256, 265 (Colo. 2003); *State v. Whitfield*, 107 S.W.3d 253, 261 (Mo. 2003)

(same); *State v. Rizzo*, 266 Conn. 171, 242 (2003); *Olsen v. State*, 67 P.3d 536, 571-74 (Wyo. 2003) (same). *Ring*'s reasoning also provoked seven additional states legislatures to require *jurors* to determine the comparative weightiness of the aggravating and mitigating circumstances.[7]

It is clear then that the weighing the legislature requires under Section 921.141 (3) (b) is factfinding the Sixth Amendment reserves for the jury. 2016 WL

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[7] *See, e.g., State v. Lovelace*, 90 P.3d 298, 301 (Idaho 2004) ("Subsequent to the *Ring* decision, the legislature revised Idaho's capital sentencing statutes, requiring that a jury find and consider the effect of aggravating and mitigating circumstances in order to decide whether a defendant should receive a death sentence"). *See also* Ohio Rev. Code 2929.03(D) ("jury [must] unanimously find[], by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors"); Ark. Stat. § 5-4-603 (Arkansas) ("jury [must] unanimously return[] written findings that. . ., aggravating circumstances outweigh beyond a reasonable doubt all mitigating circumstances found to exist . . . . Aggravating circumstances justify a sentence of death beyond a reasonable doubt"); Tenn. Code Ann. 39-13-204 (g) (.1) (B) ("If the jury unanimously determines that a statutory aggravating circumstance [exists], but that such circumstance or circumstances have not been proven by the state to outweigh any mitigating circumstances beyond a reasonable doubt, the jury shall … sentence the defendant [to] life"); Utah Code Ann. 76-3-207 (5) (b) ("death penalty shall only be imposed if . . . the jury is persuaded beyond a reasonable doubt that total aggravation outweighs total mitigation"); RCW 10.95.060 (Washington) ("jury must be convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency"); K.S.A. § 21-4624 (2006) (Kansas) (death penalty not imposed unless "by unanimous vote, the jury finds beyond a reasonable doubt . . . that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist . . ."). *See also Isom v. Indiana*, No. 15-544 (petition available at http://www.scotusblog.com/wp-content/uploads/2015/11/Isom-v.-Indiana-Cert-Petition.pdf) (seeking certiorari to answer whether the "determination that aggravating circumstances outweigh mitigating circumstances must be made by a unanimous jury, beyond a reasonable doubt").

112683, at *6 (quoting the statutes weighing language and identifying it as among the facts that must be found before prisoner could be sentenced to death). Because Lambrix's judge and not his jury performed this factfinding, his death sentence violates the Sixth Amendment.

3. **Florida law differentiates between the eligibility requirements, which carry Sixth Amendment implications, and the final decision on sentencing**.

The State points out that "*Hurst* does not hold there is a constitutional right to any jury sentencing." Resp. Br. at 17. But sentencing is a matter distinct from the eligibility factfinding discussed above.

The eligibility process is discrete. If the aggravating factors are insufficient, or if there are sufficient mitigating circumstances to outweigh the aggravating circumstances, the process is over: the defendant is ineligible for a death sentence.

The sentencing decision follows. Thus, even if the aggravating circumstances are sufficient, and the mitigating circumstances do not outweigh the aggravating circumstances, a death sentence is not required. *See Steele*, 921 So. 2d at 543 ("[T]o obtain a life sentence the defendant need not prove any mitigating circumstances at all."); *Cox v. State*, 819 So. 2d 705, 717 (Fla. 2002) ("[W]e have declared many times that 'a jury is neither compelled nor required to recommend death where aggravating factors outweigh mitigating factors.'") (quoting *Henyard v. State*, 689 So. 2d 239, 249–50 (Fla. 1996))). The Court's model instruction, in

turn, follows the Court's precedents. *See* Jury Instruction 7.11 ("Regardless of your findings in this respect, however, you are neither compelled nor required to recommend a sentence of death.").

For the judge, too, a death sentence is never required. *Cf. Coleman v. State*, 64 So. 3d 1210, 1224 (Fla. 2011) (whatever the jury's recommendation, this Court's precedent "does not demand that the judge agree with the jury's conclusion"). Since the jury is working the exact same process as the sentencing judge must later undertake, the above authority (permitting a jury to recommend life even when aggravation outweighs mitigation) must apply with equal force to the trial judge making the ultimate sentencing decision. *See, e.g., Dixon*, 283 So. 2d at 8 ("The third step added to the process of prosecution for capital crimes is that the trial judge actually determines the sentence to be imposed-guided by, but not bound by, the findings of the jury. To a layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants. Thus the inflamed emotions of jurors can no longer sentence a man to die; the sentence is viewed in the light of judicial experience."). *Cf. Gregg v. Georgia*, 428 U.S. 153, 222 (1976) (White, J., concurring) (describing Georgia procedure as "permitting the jury to dispense mercy on the basis of factors

too intangible to write into a statute").

That ultimate decision is, quite simply, a separate and later one from the Sixth-Amendment factfinding that occurs with the eligibility inquiries.

CONCLUSION

A correct, and constitutionally-faithful, application of *Hurst* in Florida requires analysis of the *facts* required to be proven for death eligibility under Florida law. Because Lambrix's jury did not find them, his death sentence violates the Sixth Amendment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that a true and correct copy of the foregoing has been furnished to Scott A. Browne, counsel for respondent, and to counsel for Petitioner Lambrix, through the Florida Electronic Portal, this the 21st day of January, 2016.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this computer-generated amicus curiae brief is in compliance with Florida Rules of Appellate Procedure 9.210 and 9.370.

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