
In the Supreme Court of Florida

CASE NO. SC17-653

ARAMIS AYALA,
AS STATE ATTORNEY FOR THE NINTH JUDICIAL CIRCUIT,

Petitioner,

v.

GOVERNOR RICHARD L. SCOTT,

Respondent.

**BRIEF OF *AMICUS CURIAE* THE FLORIDA HOUSE OF
REPRESENTATIVES IN SUPPORT OF
RESPONDENT GOVERNOR SCOTT**

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Florida House of Representatives is one of two chambers of the Legislature, in which the Florida Constitution vests all legislative power of the State. The Legislature, through various statutes, has set Florida’s policy regarding death as a punishment for capital murder and how that punishment may be imposed. *See, e.g.*, §§ 775.082, 782.04, 921.141, Fla. Stat. (2016); Ch. 2017-1, Laws of Fla.; Ch. 2016-13, Laws of Fla. The petitioner has stated publicly that she refuses to follow the Legislature’s capital sentencing scheme because she disagrees with the Legislature’s policy choices, which she also claims are ineffective and invalid. The House has an interest in ensuring that state officers follow legislative policies and that the public maintains confidence in the rule of law.

SUMMARY OF ARGUMENT

The Legislature—and no other—sets Florida’s public policy regarding death as punishment for capital murder. The jury—and no other—decides, as part of a legislatively set capital sentencing scheme, whether death will be authorized as a punishment in any particular case following a capital murder conviction. The former speaks for the people as a collection of their elected representatives. The latter speaks as an “objective index,” a “microcosm,” and the “conscience” of the community in which the crime occurred.

A state attorney, although an elected constitutional officer, does not have the authority to act on behalf of the people generally, or her community specifically, to change legislative policy or make decisions as to the ultimate question of life or death as a punishment. Prosecutorial discretion, in turn, is not so broad that it allows the petitioner to categorically set aside legislative policy on the death penalty in favor of her personal views on its efficacy or fairness. Despite the petitioner's suggestions otherwise, a state attorney must pursue death as a punishment in each case where she believes, upon a good faith assessment of the evidence, that she can prove beyond a reasonable doubt at least one aggravating factor during the penalty phase of a capital murder trial.

The state attorney, then, has no statutory charge within the capital sentencing scheme to act as a separate pretrial filter for which cases should be death cases. She cannot, on behalf of her community, decide whether death is an *appropriate* punishment in any particular case, much less all cases. What the petitioner has done is nothing short of a dereliction of her duties under the law. Indeed, it is an abuse of her office. The Governor certainly had the authority to suspend the petitioner from office completely for this gross affront to the faithful enforcement of the law. That the Governor chose not to go that far and instead reassigned the petitioner in a limited number of cases—as he also had the authority to do in the alternative—should be beyond judicial reproach.

ARGUMENT

I. THE LEGISLATURE—AND NO OTHER—SETS FLORIDA’S PUBLIC POLICY REGARDING DEATH AS A PUNISHMENT.

The Florida Constitution vests *all* legislative power of the State in the Legislature. *See* Art. III, § 1, Fla. Const. That is, “the legislature’s exclusive power encompasses questions of fundamental policy and the articulation of reasonably definite standards to be used in implementing those policies.” *Fla. House of Representatives v. Crist*, 999 So. 2d 601, 611 (Fla. 2008) (internal quotation and citation omitted). Absent a constitutional limitation on its power, the Legislature’s “discretion reasonably exercised is the *sole* brake on the enactment of legislation.” *Chiles v. Phelps*, 714 So. 2d 453, 458 (Fla. 1998) (internal quotation and citation omitted) (emphasis supplied).

While seemingly axiomatic, this basic proposition bears repeating in light of the petitioner’s recent comments and arguments in this Court. Despite her protests to the contrary, she possesses no policymaking authority and no authority to second-guess or block the enforcement of legislative directives and state policy. That is, only the *Legislature’s* reasonable discretion—and not a state attorney’s—is a brake on policy. The Legislature’s ultimate prerogative to set the public policy of this State cannot be overstated, and this Court’s jurisprudence firmly reflects this principle: “It has also been accurately stated that courts of this state are without power to construe an unambiguous statute in a way which would extend,

modify, or limit, its express terms or its reasonable and obvious implications. *To do so would be an abrogation of legislative power.*” *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984) (internal quotation and citation omitted) (emphasis supplied).

This Court has stressed that “it is not its function to substitute its judgment for that of the Legislature *as to the wisdom or policy of a particular statute.*” *S. Alliance for Clean Energy v. Graham*, 113 So. 3d 742, 745 (Fla. 2013) (internal quotations and citation omitted) (emphasis supplied); *see also Kelly v. State*, 795 So. 2d 135, 137 (Fla. 5th DCA 2001); *Griffin v. Stonewall Ins. Co.*, 346 So. 2d 97, 98 (Fla. 3d DCA 1977). Indeed, according to this Court, “courts have no right to ignore or set aside a public policy established by the legislature or the people.” *Local No. 234 of United Ass’n of Journeymen & Apprentices of Plumbing & Pipefitting Indus. of U.S. & Canada v. Henley & Beckwith, Inc.*, 66 So. 2d 818, 821 (Fla. 1953). Like the courts, then, the petitioner has “no right to ignore or set aside a public policy” set by the Legislature. Nonetheless, while claiming to be quasi-judicial, the petitioner asks this Court to approve an arrogation of authority that this Court itself has eschewed.

The Legislature’s policy regarding death as punishment for capital murder is clear. A person convicted of capital murder “*shall be punished by death* if the proceeding held to determine sentence according to the *procedure set forth in s. 921.141* results in a determination that such person shall be punished by death,

otherwise such person shall be punished by life imprisonment” without parole. § 775.082(1)(a), Fla. Stat. (2016) (emphasis supplied).¹ Section 921.141, in turn, *requires* that there be “a separate sentencing proceeding [before a jury] to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082” upon conviction for capital murder. § 921.141(1), Fla. Stat. (2016) (emphasis supplied); *see* § 782.04(1)(b), Fla. Stat. (2016).

A conviction for capital murder, then, *must* result in a separate penalty phase. During that phase, the *jury* determines whether death is authorized, the *jury* recommends whether the punishment should be death for that conviction, and—only if the jury unanimously has authorized and recommended death—the trial judge independently considers whether death or life imprisonment shall be the sentence imposed. *See* §§ 775.082(1), 921.141, Fla. Stat. (2016); Ch. 2017-1, §§ 1-2, at 1, Laws of Fla.; Ch. 2016-13, §§ 1, 3, at 1, 3, Laws of Fla. Put another way, someone “convicted of a capital felony *shall* be punished by death” *if* death is determined to be the punishment as part of a proceeding held pursuant to section 921.141, Florida Statutes. Otherwise, and *only* “otherwise,” the “person shall be punished by life imprisonment.” § 775.082(1)(a), Fla. Stat.

¹ Murder in the first degree is a capital felony. *See* § 782.04(1)(a), Fla. Stat. (2016). And for all such first degree murder cases, “the procedure set forth in s. 921.141 shall be followed *in order to determine sentence of death or life imprisonment.*” § 782.04(1)(b), Fla. Stat. (emphasis supplied).

This legislative policy—longstanding,² and recently revised and renewed to comport with this Court’s recent holdings³—is beyond the question of any state officer as to its propriety, efficacy, or harshness. As will be discussed in the next section, the policy of this State, reflected in legislative enactments, reserves to the *jury*—speaking for the community and reflecting that community’s values—the threshold decision whether death should be an authorized punishment for a capital murder conviction. A state attorney, by contrast, has no authority to abrogate the Legislature’s death penalty policy within her circuit.

II. THE LEGISLATURE’S CAPITAL SENTENCING SCHEME LEAVES NO DISCRETION TO THE STATE ATTORNEY TO ASSESS WHETHER DEATH SHOULD BE AN AUTHORIZED PUNISHMENT IN A CAPITAL MURDER CASE.

This Court repeatedly has affirmed sentences of death, as recently as 2015. *See Carr v. State*, 156 So. 3d 1052, 1072 (2015); *see also id.* at 1071 (determining that sentence of death was proportional “when compared to other cases where sentences of death have been affirmed”) (internal brackets, quotation, and citation omitted); *cf. Hurst v. State*, 147 So. 3d 435, 447, 449 (Fla. 2014), (rejecting constitutional challenge to Florida’s capital sentencing scheme), *rev’d*, 136 S. Ct. 616 (2016).

² *See* Ch. 72-724, Laws of Fla.

³ *See* Ch. 2017-1, Laws of Fla.; Ch. 2016-13, Laws of Fla.

Even on remand following the U.S. Supreme Court’s decision in *Hurst* last year, this Court did not invalidate the sentence of death as a penalty under Florida law. *Hurst v. State*, 202 So. 3d 40, 44 (Fla. 2016) (noting that U.S. Supreme Court “did not invalidate death as a penalty” and “the death penalty still remains the ultimate punishment in Florida”). Rather, this Court emphasized the central role a jury must play in the process for death to persist as a constitutional punishment for capital murder. This Court observed: “[T]he Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power.” *Hurst*, 202 So. 3d at 50 (quoting *Blakely v. Washington*, 542 U.S. 296, 308 (2004)). And it “conclude[d] that the Sixth Amendment right to a trial by jury mandates that under Florida’s capital sentencing scheme, the *jury*—not the judge—must be the finder of every fact, and thus every element, necessary for the imposition of the death penalty.” *Hurst*, 202 So. 3d at 53 (emphasis supplied).

That means that “before a sentence of death may be considered by the trial court in Florida, the *jury* must find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances.” *Id.* (emphasis supplied); *see also id.* at 57. Each of these jury determinations, and the jury’s separate and subsequent recommendation of a sentence of death, must be unanimous—*before* the trial judge may consider whether to impose a sentence of

death. *See id.* at 54, 57, 59, 60. Focusing again on the jury’s central role in this process, this Court emphasized that “we do not intend to diminish or impair the jury’s right to recommend a sentence of life even if it finds aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating circumstances.” *Id.* at 57-58. “Once these critical findings are made unanimously by the jury, each juror may then exercise reasoned judgment in his or her vote as to a recommended sentence.” *Id.* at 58 (internal quotation and citation omitted).

This Court left no ambiguity as to why a “jury must unanimously recommend death in order to make a death sentence possible”—unanimity ensures that the *jury*’s recommendation “expresses the *values of the community* as they currently relate to imposition of death as a penalty.” *Hurst*, 202 So. 3d at 60 (emphasis supplied). The unanimous *jury* is “a significant and reliable objective index of contemporary values,” and preserves its role as “a veritable microcosm of the community.” *Id.* (internal quotation and citation omitted). “A jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death.” *Id.* at 61 (internal brackets, quotation, and citation omitted).

Noting that the Legislature already had to “immediately attempt to craft a new sentencing law” governing the penalty phase to comport with the U.S. Supreme Court’s first *Hurst* decision, this Court assured the Legislature that “[r]equiring a unanimous jury recommendation before death may be imposed” is critical to “ensuring that Florida will continue to have a constitutional and viable death penalty law” and “will dispel most, if not all, doubts about the future validity and long-term viability of the death penalty in Florida.” *Id.* at 62.

This decision was issued in October 2016, less than a month before the general election. The timing is significant. The petitioner starts her brief with the observation that she was elected by the voters of Orange and Osceola Counties on November 8, 2016, after making certain campaign promises. Pet. at 3-4 & nn. 2-6. But in that same election, all 160 members of the Florida Legislature also were elected. See <http://dos.elections.myflorida.com/candidates/CanList.asp> (“Candidate Listing for 2016 General Election”). Of course, “fundamental and primary policy decisions [shall] be made by members of the legislature who are elected to perform those tasks.” *S. Alliance for Clean Energy*, 113 So. 3d at 748 (internal quotation and citation omitted).

The first law those recently elected members of the Legislature passed—in the first week of its session, no less—was Senate Bill 280, a re-validation of the State’s policy on the punishment of death for capital felonies set out in section

775.082(1) of the Florida Statutes. *See* Ch. 2017-1, § 3, at 2, Laws of Fla. The vote was not even close—Senate Bill 280 passed the Senate unanimously,⁴ and the House by a vote of 112 to 3.⁵

The Legislature had just amended the capital sentencing scheme a year earlier to address the U.S. Supreme Court’s then-recent holding in *Hurst v. Florida*, 136 S. Ct. 616, 619 (2016), that the “Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death.” *See* ch. 2016-13, Laws of Fla. (2016); *see also Perry v. State*, 210 So. 3d 630, 635-38 (Fla. 2016) (discussing Legislature’s 2016 changes to “Florida’s capital sentencing scheme” to address *Hurst* decision). As amended in 2016, section 921.141 required that, following an evidentiary hearing on aggravating and mitigating factors, *the jury determine* whether the state attorney had proven beyond a reasonable doubt that there was at least one of the aggravating factors listed later in that section. Ch. 2016-13, § 3, at 3-4, Laws of Fla. Also, the *jury* had to identify each aggravating factor it unanimously found to exist. Ch. 2016-13, § 3, at 4, Laws of Fla. If the *jury found* at least one aggravating factor to have been proven beyond a reasonable doubt, a capital defendant would be “eligible for a sentence of death.” *Id.* Then, it would be the *jury* that had to deliberate on whether to

⁴ *Fla. S. Jour.* 173 (Reg. Sess. March 9, 2017).

⁵ *Fla. H.R. Jour.* 343 (Reg. Sess. March 10, 2017).

recommend that a defendant should be sentenced to death or life imprisonment, but only after determining whether sufficient aggravating factors existed and weighing the aggravating factors and mitigating circumstances. *See id.*

By adding the additional requirement that a jury sentencing recommendation of death be unanimous, the 2017 change made by Senate Bill 280 addressed the only remaining concern this Court expressed about Florida's capital sentencing scheme set out in section 921.141, Florida Statutes. *See* Ch. 2017-1, §§ 1, 2, at 1, Laws of Fla. (further amending §§ 921.141(2)(c), 921.142(3)(c), Fla. Stat. (2016)). In doing so, the Legislature seconded this Court's intent to "ensur[e] that Florida will continue to have a constitutional and viable death penalty law" and "dispel most, if not all, doubts about the future validity and long-term viability of the death penalty in Florida." *Hurst*, 202 So. 3d at 62.

None of these changes or re-enactments to Florida's death penalty policy charges the *state attorney* with the role of determining whether a capital defendant should be sentenced to death or life imprisonment. *Cf.* § 775.082(1)(a), Fla. Stat. (2016) (requiring punishment of death for person convicted of capital felony if such a determination is made pursuant to "the procedure set forth in s. 921.141"). The "procedure set forth in s. 921.141" charges first the jury, then the judge, with the role of determining "whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082." *See* ch. 2016-13, § 3, at 3-5, Laws of

Fla.; § 921.141(1), Fla. Stat. (2016). Again, Florida law, enacted by the Legislature and approved by this Court, places with the *jury*, as the barometer and arbiter of community values, the authority to decide whether death is appropriate in a particular capital murder case. There is no place reserved for the state attorney to exercise *her* discretion and insinuate herself into the process to express her view on death as a punishment for first degree murders committed in her circuit.

In capital murder cases, the state attorney's discretion is sandwiched between and cabined by the authority of the grand jury, at the initiation of the case, and of the petit jury, at the trial and penalty phases of the case. The Florida Constitution gives the state attorney the authority and discretion to initiate every felony and misdemeanor via a sworn information, *save for* a capital felony. Only the *grand jury*, an adjunct of the circuit court,⁶ has the authority and discretion to initiate a capital felony case. *See* Art. I, § 15, Fla. Const. Even though the state attorney has the duty to assist the grand jury,⁷ the grand jury is independent and operates as a check on prosecutorial discretion. *See Miller v. State*, 28 So. 208,

⁶ *See State ex rel. Martin v. Michell*, 188 So. 2d 684, 685 (Fla. 4th DCA 1966) (“A grand jury has a specially valued place in our system of jurisprudence. It is a common law institution which has no independent existence but is a part of and an adjunct to the court.”); *see also* § 905.01(3), Fla. Stat. (2016).

⁷ *See* § 27.03, Fla. Stat. (2016) (“Whenever required by the grand jury, the state attorney shall attend them for the purpose of examining witnesses in their presence, or of giving legal advice in any matter before them; and he or she shall prepare bills of indictment.”).

210 (Fla. 1900) (noting that state attorney’s involvement in grand jury vote threatens “free and unbiased judgment of the jury on the merits of the case” and the body’s “freedom and independence”); *cf.* Fla. R. Crim. P. 3.140, 1968 comm. notes (“A grand jury should be considered as a guardian of the public peace against all criminal activity. . . .[I]t is well to retain the grand jury’s check on prosecutors in this area [of charging non-capital felonies by information] of otherwise practically unrestricted discretion.”). At the other end of the process, the petit jury limits the state attorney’s discretion as to punishment. After conviction of a capital felony, this Court’s precedent and Florida policy require that the petit jury unanimously must find the facts necessary to support a sentence of death *and* unanimously must recommend a sentence of death.

Between return of an indictment in a capital murder case and the penalty phase after a conviction, there is the state attorney. The state attorney’s duty, of course, is to prosecute the case. *See* § 27.02(1), Fla. Stat. (2016); *see also State ex rel. Martin v. Mitchell*, 188 So. 2d 684, 687 (Fla. 4th DCA 1966) (noting constitutional and statutory duty of state attorney “to prosecute in the circuit court any and all violations of the criminal laws of which that court has jurisdiction either upon his own information or upon indictment by the grand jury”).

It is not for the state attorney to review the case at the front end and make an independent assessment of whether death is “appropriate.” The Legislature has not

given the state attorney that task, reserving it instead to the petit jury. The Legislature, however, did assign the state attorney the task of assessing at the outset whether she has evidence to prove beyond a reasonable doubt any aggravating factors at the penalty phase. The Legislature added, as part of its 2016 amendments to the State's capital sentencing scheme, a requirement that the state attorney notify the defendant, within 45 days after arraignment, of her intent "to seek the death penalty" and list in that notice "the aggravating factors the state intends to prove and has reason to believe it can prove beyond a reasonable doubt." Ch. 2016-13, § 2, at 3, Laws of Fla. (emphasis supplied).⁸

This notice requirement did not exist in Florida law prior to the 2016 statutory addition. *See Hitchcock v. State*, 413 So. 2d 741, 746 (Fla. 1982) ("Thus, there is no reason to require the state to notify defendants of the aggravating factors that the state intends to prove."); *cf. Amendments to Florida Rule of Criminal Procedure 3.220 Discovery (3.202 Expert Testimony of Mental Mitigation During Penalty Phase of Capital Trial)*, 674 So. 2d 83, 84 (Fla. 1995) (adopting rule requirement in Florida Rule of Criminal Procedure 3.202 that the prosecutor give "written notice of its intent to seek the death penalty," but only for the purpose of expert discovery pertaining to mental mitigation; including statement in the rule that "[f]ailure to give timely written notice under this

⁸ The Legislature re-enacted this provision as a policy of the State, too. *See* Ch. 2017-1, § 4, at 2, Laws of Fla.

subdivision does not preclude the state from seeking the death penalty”). The Legislature’s 2016 changes also added a reference to this new notice requirement to section 921.141(1) of the Florida Statutes, such that the separate death penalty proceeding may only include evidence of aggravating factors set out in the notice. *See* Ch. 2016-13, § 3, at 3, Laws of Fla.

This new notice requirement—considered together with the new requirement that the jury unanimously determine whether the state attorney has proven beyond a reasonable doubt that at least one statutorily enumerated and properly noticed aggravating factor exists—illustrates that the state attorney’s assessment of whether a case should proceed as a death case is limited to the determination, “within 45 days after arraignment,” whether she “has reason to believe” that at least one aggravating factor can be proved beyond a reasonable doubt at the penalty phase. Of course, if the state attorney, in his or her prosecutorial discretion, concludes that no aggravating factors could be proved to that certainty, there would be no reason to waste judicial and attorney resources in preparation for a penalty phase that could result only in life imprisonment in any event.

In direct contradiction of this Court’s holding about the jury’s role in the capital sentencing scheme and of the Legislature’s revised policy in response to that holding, the petitioner announced her sweeping rejection of Florida’s entire capital sentencing scheme based on her own assessment of the death penalty as

policy in Florida. Essentially, the petitioner decided she could override both this Court's and the Legislature's carefully crafted choices on the matter. She offered a sweeping, jaw-dropping assessment of Florida's death penalty policy:

- In addressing how she would “be handling death penalty cases going forward . . . I’ve thoroughly reviewed the newly passed statute and relevant legal decisions relating to Florida’s death penalty. . . [W]hile I currently do have discretion to pursue death sentences, *I have determined* that doing so is not in the best interest of this community or the best interest of justice. *After careful review and consideration of the new statute under my administration I will not be seeking death penalty in the cases handled in my office.*” App. D-2 – D-3 (emphasis supplied).
- In rejecting the death penalty as a punishment that she would pursue in any case, she gave five failings behind the policy approved by this Court and the Legislature. According to the petitioner, the “death penalty has no public safety benefit”; it “does not increase safety for law enforcement officers”; it generally is not a deterrent” because it is “used too rarely”; it gives “false promises . . .[to] families” but “no closure”; and it “costs millions of dollars that far outweigh the cost of life in prison sentences.” App. D-4 – D-7.

Her approach certainly is not case-based or evidence based, contrary to what is required of her: “What I did is I absolutely started with the point of are we going to pursue death penalty? . . . *Do we agree with this policy as being consistent, as being evidence-based?* And I arrived at the decision that it is *not proper for this office* to seek justice and actually *enforce this particular one.*” App. D-11 (emphasis supplied). She continued: “*I am required to consider policy, not an individual case.* . . . It is my responsibility to make a *determination of*

whether or not this is justice for this community, not individual cases.” App. D-12 – D-13 (emphasis supplied).

The petitioner fundamentally and completely misses the mark regarding her role as a prosecutor vis-à-vis the Legislature’s sentencing choices—indeed, choices made in response to this Court’s holdings. To be sure, “[c]riminal sentences are a product of *legislative* decision.” *Hall v. State*, 823 So. 2d 757, 763 (Fla. 2002) (emphasis supplied). “Criminal sentencing policy is a matter of substantive law that is within the province of the legislature.” *State v. Ayers*, 901 So. 2d 942, 946 (Fla. 2d DCA 2005). “Whatever views may be entertained regarding severity of punishment, *whether one believes in its efficacy or its futility*, these are peculiarly questions of legislative policy.” *Gore v. U. S.*, 357 U.S. 386, 393 (1958) (internal citation omitted) (emphasis supplied), *quoted in Hall*, 823 So. 2d at 763. According to this Court, “the length of the sentence actually imposed is generally said to be a matter of legislative prerogative. *Although the penalty is harsh, we accept the Legislature’s judgment about the gravity of the crime.*” *Adaway v. State*, 902 So. 2d 746, 750 (Fla. 2005) (internal quotations and citations omitted) (emphasis supplied); *cf. Hurst*, 202 So. 3d at 61 (“[T]he clearest and most reliable objective evidence of contemporary values [regarding capital sentencing] is the legislation enacted by the country’s legislatures.”).

It is particularly odd, then, that the petitioner, who claims to be “a quasi-judicial officer,” Pet. 15, would seek from the judiciary—which repeatedly has disavowed the ability to second-guess the Legislature’s sentencing choices—ratification of her *own* refusal to enforce the Legislature’s sentencing policy based on her *own* disagreements. The petitioner’s claim that her “absolute” prosecutorial discretion permits her to pursue, or not to pursue, the death penalty in individual cases or in any cases at all is simply meritless.

The petitioner’s multiple pronouncements set out above conclusively establish that she did not exercise this required, case-by-case, evidence-intensive analysis to determine whether she could prove even just *one* aggravating factor beyond a reasonable doubt in any of the reassignment cases now at issue here. Under the law, if she believed she could prove even that one aggravating factor beyond a reasonable doubt, she had a duty to notify the defendant of this and treat the case as a death case. Instead, the petitioner contends that she had to “examine whether it [was] fair, just, and prudent to seek . . . death.” Pet. 8. But this is not the law. Her decision not to seek death in any of her first degree murder cases—without any assessment in each case on whether she could prove an aggravating factor—was a dereliction of duty.⁹

⁹ Indeed, that the petitioner would not pursue death as a punishment in the Loyd case starkly illustrates how she is neglecting her duty to assess the aggravating factors for each case. As alleged in the grand jury’s indictment, Pet.

The State deserves better. “[A] state attorney in this State is not merely a prosecuting officer in the Circuit in which he is [elected]; he is also an officer of the State in the general matter of the enforcement of the criminal law.... It is the State, and not the County, that pays his salary and official expense.” *Hall v. State*, 187 So. 392, 398 (Fla. 1939); *see also* Ch. 2016-66, § 4, at 144-159, Laws of Fla. (line items 798-918) (appropriating salaries and expenses for all 20 of the state attorney offices); *id.*, § 8, at 417 (setting state attorney salaries). And when a state officer like the petitioner refuses or is unable to follow the State’s policies as set by the Legislature, the Legislature fairly can expect that either the Governor, *see* § 27.14, Fla. Stat., or a chief circuit judge, *see* § 27.16, Fla. Stat., will find someone who will. At a minimum, the petitioner has engaged in a neglect of duty, and suspension by the Governor pursuant to Article IV, section 7, of the Florida Constitution is warranted. The Governor was generous when he stopped short of that and instead took a more deferential approach by only removing her from certain cases pursuant to section 27.14 of the Florida Statutes.

Notably, a prospective juror in a death case may be excused for cause when the juror’s views would “prevent or substantially impair the performance of his

App. H, and described in detail in the Governor’s response, one of Loyd’s murder victims was a law enforcement officer engaged in the performance of her official duties, which is one of the statutorily enumerated aggravating factors. *See* § 921.141(6)(j), Fla. Stat. (2016). It strains credulity for her to claim she could not prove this aggravating factor at the penalty phase.

duties as a juror in accordance with his instructions and his oath.” *Hurst*, 202 So. 3d at 62 (internal quotation and citation omitted); *see also id.* (noting that a juror may be dismissed if he or she is uncertain about the ability to “set aside biases or misgivings concerning the death penalty”). It is not a stretch, then, to say the Governor acted entirely reasonably when he determined that the interests of justice demanded the reassignment of the petitioner in the capital murder cases charged by the grand jury in her circuit. He certainly acted well within the authority provided to him both by the Constitution and the Legislature.

CONCLUSION

The Governor acted lawfully to correct the petitioner’s failure to abide by her duties, and the petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this third day of May, 2017, a true copy of the foregoing motion was filed electronically with the Clerk through the Florida Courts eFiling Portal, which shall serve a copy via email to counsel on the attached service list, constituting compliance with the service requirements of Florida Rule of Judicial Administration 2.516(b) and Florida Rule of Appellate Procedure 9.420(c).

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief was generated by computer using Microsoft Word with Times New Roman 14-point font, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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