IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant,

v.

MARK ANTHONY POOLE,

Appellee.
_____/

CASE NO. SC18-245
L.T. No. CF01-7078A-XX
DEATH PENALTY CASE

ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT,
IN AND FOR POLK COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT/CROSS-APPELLEE

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PRELIMINARY STATEMENT

References to the record on appeal from the direct appeal following resentencing (Case No. SC11-1846) will be designated as "RS" followed by the applicable volume and page numbers. Citations to the instant record in this post-conviction appeal (SC18-245) will be designated as "R." with the applicable page number.

STATEMENT OF THE CASE AND FACTS

A. Trial and Resentencing

On direct appeal, this Court provided the following summary of facts:

> Mark Anthony Poole was convicted of the first-degree murder of Noah Scott, attempted first-degree murder of [L.W.], armed burglary, sexual battery of [L.W.], and armed robbery. Poole was convicted based on the following facts presented at trial. On the evening of October 12, 2001, after playing some video games in the bedroom of their mobile home, Noah Scott and [L.W.] went to bed sometime between 11:30 p.m. and 12 a.m. Later during the night, [L.W.] woke up with a pillow over her face and Poole sitting on top of her. Poole began to rape and sexually assault her as she begged Poole not to hurt her because she was pregnant. As [L.W.] struggled and resisted, Poole repeatedly struck her with a tire iron. She put her hand up to protect her head, and one of her fingers and part of another finger were severed by the tire iron. While repeatedly striking [L.W.], Poole asked her where the money was. During this attack on [L.W.], Scott attempted to stop Poole, but was also repeatedly struck with the tire iron. As Scott struggled to defend [L.W.], Poole continued to strike Scott in the head until Scott died of blunt force head trauma. At some point after the attack, Poole left the bedroom and [L.W.] was able to get off the bed and put on clothes but she passed out before leaving the bedroom. Poole came back in the bedroom and touched her vaginal area and said "thank you." [L.W.] was in and out of consciousness for the rest of the night. She was next aware of the time around 8 a.m. and 8:30 a.m. when her alarm went off.
>
> When her alarm went off, [L.W.] retrieved her cell phone and called 911. Shortly thereafter, police officers were dispatched to the home. They found Scott unconscious in the bedroom and [L.W.] severely injured in the hallway by the bedroom. [L.W.] suffered a concussion and multiple face and head wounds and was

missing part of her fingers. Scott was pronounced dead at the scene. Evidence at the crime scene and in the surrounding area linked Poole to the crimes. Several witnesses told police officers that they saw Poole or a man matching Poole's description near the victims' trailer on the night of the crimes. Stanley Carter stated that when he went to the trailer park around 11:30 that night, he noticed a black male walking towards the victims' trailer. Carter's observations were consistent with that of Dawn Brisendine, who knew Poole and saw him walking towards the victims' trailer around 11:30 p.m. Pamela Johnson, Poole's live-in girlfriend, testified that on that evening, Poole left his house sometime in the evening and did not return until 4:50 a.m.

Poole was also identified as the person selling video game systems owned by Scott and stolen during the crime.[FN1] Ventura Rico, who lived in the same trailer park as the victims, testified that on that night, while he was home with his cousin's girlfriend, Melissa Nixon, a black male came to his trailer and offered to sell him some video game systems. Rico agreed to buy them for $50, at which point the black male handed him a plastic trash bag. During this exchange, Nixon got a good look at the man and later identified Poole when the police showed her several photographs. Nixon testified that the next morning, when her son was going through the trash bag, he noticed that one of the systems had blood on it.

> FN1. [L.W.] testified that Scott owned a Sega Genesis, Sega Dreamcast, and Super Nintendo.

Pamela Johnson also testified that on the same morning, she found a game controller at the doorstep of Poole's house, she handed it to Poole, and Poole put it in his nightstand. She indicated that she had never seen that game controller before that morning and did not know what it would be used for because neither she nor Poole owned any video game systems. During the search of Poole's residence, the police retrieved this controller. In addition, the police retrieved a blue Tommy Hilfiger polo shirt and a pair

> of Poole's Van shoes, shoes Poole said he had been wearing on the night of the crimes. A DNA analysis confirmed that the blood found on the Sega Genesis box, Super Nintendo, Sega Dreamcast box and controller matched the DNA profile of Scott. Also, a stain found on the left sleeve of Poole's blue polo shirt matched [L.W.]'s blood type. The testing of a vaginal swab also confirmed that the semen in [L.W.] was that of Poole. A footwear examination revealed that one of the two footwear impressions found on a notebook in the victims' trailer matched Poole's left Van shoe. The tire iron used in the crimes was found underneath a motor home located near the victims' trailer. A DNA analysis determined that the blood found on this tire iron matched Scott's DNA profile.
>
> Based on this evidence, the jury returned a verdict finding Poole guilty on all charges, including first-degree murder. Following the penalty phase, the jury recommended death by a vote of twelve to zero. The trial court followed the jury's recommendation and sentenced Poole to death.

Poole v. State, 997 So. 2d 382, 387-88 (Fla. 2008).

This Court affirmed Poole's conviction, but vacated his sentence of death and remanded to the trial court to conduct a new penalty phase. Poole, 997 So. 2d at 397. The new penalty phase commenced on June 20, 2011. On June 28, 2011 the jury recommended by a vote of eleven to one (11-1) that the defendant be sentenced to death for the murder of Noah Scott. A Spencer hearing was held on July 29, 2011, wherein the Court heard additional argument for mitigation and legal arguments. The Court again sentenced Poole to death on August 19, 2011. (RS 5/716-29).

The trial court found in aggravation the following: 1) prior violent felony convictions [attempted first degree murder and sexual battery with great force, very great weight]; 2) contemporaneous violent felonies [armed burglary, armed robbery, and sexual battery [great weight], 3) financial gain [less than moderate weight], and 4) the murder was heinous, atrocious and cruel [very great weight]. (RS 5/719-23).

In mitigation, the court found the crimes were committed while Poole was under influence extreme mental or emotional disturbance (moderate to great weight) and, that his capacity to appreciate or conduct/conform his conduct to the requirements of the law was substantially impaired (great weight). (RS 5/727).

The court also found the following non-statutory mitigating circumstances: borderline intelligence (little weight); defendant dropped out of school (very little weight); loss of father figure had emotional effect and led to his drug abuse (very little weight); defendant sought help for drug problem (very little weight); alcohol problem at time of crime (very little weight); drug abuse problem at time of crime (very little weight); defendant has a relationship with son (very little weight); strong work ethic (very little weight); defendant is a religious person (very little weight); dedicated uncle (very little weight); defendant needs treatment for mental disorder

unrelated to substance abuse (very little weight); defendant has severe chronic alcohol and cocaine problem for which he needs treatment (not proven). (RS 5/723-26).

The court sentenced Poole to death finding that the aggravating circumstances "far outweigh the mitigating circumstances" and that the "heinous, atrocious, and cruel aggravator alone outweighs all the mitigating circumstances in this case." (RS 5/729). On appeal, this Court affirmed the sentence recommended by the jury and imposed by the trial court. Poole v. State, 151 So. 3d 402 (Fla. 2014), cert. denied, 135 S. Ct. 2052 (2015).

B. Post-Conviction

i) Course of Proceedings and Relevant Rulings

Following resentencing, pursuant to Fla. R. Crim. P. 3.851, Poole filed his initial Motion to Vacate Judgment of Conviction and Sentence on April 8, 2016. (R. 400-98). The State filed its Response June 6, 2016 (R. 502-75) and a case management conference was held September 15, 2016. Following the case management conference, the trial court issued an Order granting an evidentiary hearing on portions of Claims 1 and 2, and Claim 4 of Poole's post-conviction motion. The court deferred ruling on whether Claim 3, the Hurst claims should be included in the evidentiary hearing pending a ruling by this Court on that

subject. (R. 612).

On January 25, 2017, Poole filed a Motion to Amend Motion to Vacate Judgments of Conviction and Sentence of Death, seeking to amend Claim 3 based upon Hurst v. Florida, 136 S. Ct. 616 (2016) and Hurst v. State, 202 So. 3d 40 (Fla. 2016) and related cases decided after Poole's 3.851 motion was filed. (R. 634-63). Following a response by the State (R.665-682), the court granted the motion to amend (R. 683-84) and held a second case management conference on March 10, 2017. (R. 1012-47). (Following the hearing, the trial court, on March 29, 2017, entered an Interim Order on Motion to Vacate Judgment of Conviction and Sentence, vacating Poole's sentence of death and granting him a new penalty phase trial on Amended Claim Three. (R. 1062-67). In reversing Poole's death sentence for a new penalty phase, the court provided the following analysis:

> The Defendant's Amended Claim 3 is based upon the ruling by the United States Supreme Court in Hurst v. Florida, 136 S.Ct. 616 (2016), and the ruling by the Florida Supreme Court in Hurst v. State, 202 So.3d 40 (Fla. 2016). In Hurst v. Florida the United States Supreme Court found that Florida's Capital sentencing scheme was unconstitutional because the judge, not the jury, made the necessary findings of fact to impose a death sentence. On page 44 of Hurst v. State, the Florida Supreme Court stated,
>
> > As we will explain, we hold that the Supreme Court's decision in Hurst v. Florida requires that all the critical findings necessary before the trial court may

> consider imposing a sentence of death must be found unanimously by the jury. We reach this holding based on the mandate of Hurst v. Florida and on Florida's constitutional right to jury trial, considered in conjunction with our precedent concerning the requirement of jury unanimity as to the elements of a criminal offense. In capital cases in Florida, these specific finding required to be made by the jury include the existence of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances. We also hold, based on Florida's requirement for unanimity in jury verdicts, and under the Eighth Amendment to the United States Constitution, that in order for the trial court to impose a sentence of death, the jury's recommended sentence of death must be unanimous.

The Florida Supreme Court held in Mosley v. State, 2016 WL 7406506, 41 Fla L. Weekly S629 (Fla. December 22, 2016), that the Hurst rulings apply to all defendants whose sentences were not final at the time the United States Supreme Court issued its opinion in Ring v. Arizona, 536 U.S. 584 (2002). Ring was issued on June 24, 2002. See also Hojan v. State, 2017 WL 410215 (Fla. January 31, 2017).

The Defendant was tried and found guilty of the First Degree Murder, Attempted First-Degree Murder, Armed Burglary, Sexual Battery, and Armed Robbery. On August 25, 2005, the Trial Court sentenced Mr. Poole to death for the First Degree Murder of Noah Scott. The Florida Supreme Court affirmed his convictions but remanded the case for a new penalty phase. See Poole v. State, 997 So.2d 382 (Fla. 2008). On June 28, 2011, a jury by the vote of 11 to 1 recommended a sentence of death. The Trial Court imposed a sentence of death on August 19, 2011. The Defendant's sentence of death was affirmed on appeal by the Florida Supreme Court on

June 26, 2014. Rehearing Denied Nov. 20, 2014, in Poole v. State, 151 So.3d 402 (Fla. 2014).

Based on the above, the Court finds that Hurst does apply retroactively to Mr. Poole. However, it is also necessary to consider if the Hurst error was harmless error. The State of Florida takes the position that the Hurst error in this case was harmless.

In Durousseau v. State, 2017 WL 411331 at *6 (Fla. January 31, 2017), the Florida Supreme Court opined, "[t]herefore, in the context of a Hurst v. Florida error, the burden is on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to Hurst's death sentence in this case." The Florida Supreme Court has found that Hurst error was harmless error in cases where the jury's recommendation for death was unanimous. See Davis v. State, 2016 WL 6649941 (November 10, 2016) and Hall v. State, 2017 WL 526509 (Fla. February 9, 2017). However, in the cases that involve non-unanimous jury recommendations, the Florida Supreme Court has remanded the cases for a new penalty phase. In Williams v. State, 2017 WL 224529 (Fla. January 19, 2017), (jury recommendation 9 to 3), the Florida Supreme Court found that there was no way to determine if the jury unanimously concluded that sufficient aggravation existed to warrant a death sentence. In Durousseau v. State, 2017 WL 411331 (Fla. January 31, 2017), (jury recommendation 10 to 2), the Court noted that there was no way to conclude if the two jurors that voted to recommend a life sentence found that the aggravation outweighed the mitigation. In Dubose v. State, 2017 WL 526506 at*12 (Fla. February 9, 2017), the Florida Supreme Court stated, "[w]e have also determined that in cases where the jury makes a non-unanimous recommendation of death, the Hurst error is not harmless." Additionally, in Johnson v. State, 205 So.3d 1285 (Fla. 2016), (jury recommendation 11 to 1 for each of the three (3) murder convictions) The Florida Supreme Court held:

> We are unable to conclude "beyond a reasonable doubt [that] there is no possibility that the *Hurst v. Florida* error in this case contributed to the sentence."
>
> The Court finds that because the jury recommendation in this case was not unanimous, it cannot find beyond a reasonable doubt that the Hurst error did not contribute to Mr. Poole's sentence of death. Because it is the determination of the Court that the Defendant is entitled to a new penalty phase trial based on Hurst, as argued in Claim 3 of his Motion, the Court is not going to independently rule on each of the subclaims in Claim 3 of his Motion.

(R. 1064-66).

The Interim Order granted an evidentiary hearing on Poole's remaining guilt phase claims only. Those claims generally consisted of the following: 1) counsel's failure to object to improper comments by the State during closing arguments; 2) counsel was ineffective for failing to withdraw due to a conflict of interest; 3) trial counsel's failure to challenge a juror during voir dire; and 4) counsel's failure to object to hearsay. The evidentiary hearing was held on July 10, 2017. (R. 1284-1564). Following the evidentiary hearing, the post-conviction court entered an order on January 9, 2018 denying Poole's guilt phase claims. (R. 1691-1764).

The State filed a notice of appeal of the order granting a new penalty phase on February 8, 2018. (R. 1917). Poole filed a

notice of cross-appeal of the guilt phase claims on February 15, 2018. (R. 1934-36).

ii) Evidentiary Hearing Facts

Only one witness was called to testify during the evidentiary hearing, lead trial counsel Howard Dimmig. At the time this case was tried in 2005, Howard Dimmig either was, or was soon to be the Administrative Division Director in the Public Defender's Office. (R. 1460). Dimmig had tried capital cases as far back as the 1980's. (R. 1461). Over the course of his career Dimmig has handled some 20 to 25 capital cases. Six to eight of those went to trial and two resulted in death sentences. (R. 1295). He was appointed to represent Poole in 2001. He had the benefit of second chair counsel Julia Williamson with another attorney, Steve Fisher, assisting with developing mental health mitigation. (R. 1296-97).

Dimmig's theory of defending Poole's case was to characterize the crimes as two separate episodes, the murder and the non-capital felonies. His goal was to prevent conviction on the capital felony and then there would be no penalty phase. (R. 1463). Dimmig acknowledged that on the non-capital felonies, the State presented a fairly overwhelming amount of evidence. (R. 1467). "And so I thought that the evidence concerning the homicide was significantly weaker than the evidence concerning

the other offenses and that in order to maintain credibility with the jury on the homicide charge it was appropriate not to challenge the other charges." (R. 1304). In closing argument, he planned to use the word "acknowledges" rather than "admits." (R. 1306).

Dimmig was questioned regarding his general strategy for handling objections to comments during closing argument. Dimmig recognized the need to balance the need to preserve the record with the impact such objections might have on the jury. (R. 1464). Dimmig also testified that closing argument comments are occurring quickly and he did not have a script. And, during the argument he had the opportunity to watch the jury. (R. 1466-67). In an effort not to alienate the jury, Dimmig tried to object strategically to only those comments that hurt his case. (R. 1468). He did not want to object every single time he could because that could turn the jury off. (R. 1497). How the jury would react to his objections and the likely rulings on those objections "certainly played a role in my decision as to whether or not to object." (R. 1355).

Dimmig did not concede guilt in opening statement and put the State to its burden of proof. (R. 1477). In his own closing, Dimmig conceded guilt to the non-capital felonies. This strategy

was agreed upon by both Dimmig and co-counsel Ms. Williamson.[1] (R. 1476). After the State rested its case, Dimmig's suspicions proved correct - the State had presented a very strong case against Poole. (R. 1470). The State had established Poole's DNA inside of sexual battery victim [L.W.] and that Poole had sold video games with murder victim Noah Scott's blood on them. (R. 1478). In light of the evidence, Dimmig testified that he "strongly believed that the best strategy in Mr. Poole's case was to concede guilt on the non-capital offenses." (R. 1335).

Dimmig "believed the holding of Nixon[2] was that I did not have to have the explicit consent of Mr. Poole to present the theory of the defense that I did." (R. 1345). Since Nixon was decided shortly before Poole's trial, Dimmig acknowledged that the case law following Nixon was not fully developed. (R. 1472). Dimmig read Nixon as authorizing a concession type strategy even without the defendant's express consent: "It was my call." (R. 1475).

If he had the strategy to deny everything, Dimmig testified that he ran the risk of losing credibility with the jury. (R. 1478). Dimmig thought he could present a viable defense on the

[1] Dimmig believed that Williamson was qualified to act as first chair in a capital case at the time this case was tried in 2005. (R. 1477).

[2] Florida v. Nixon, 543 U.S. 175 (2004).

capital murder. (R. 1479). Dimmig discussed a potential concession strategy with Poole prior to trial. (R. 1481). However, Poole was consistent in not wanting to pursue a concession strategy. (R. 1481). "But by the time we got to closing arguments I informed him that I believed that to be the only strategy to go forward and that I was going to do it." (R. 1480). When that was explained prior to closing, Dimmig testified that Poole was non-responsive. Dimmig testified:

> He did not respond, is my recollection. I just emphatically said to him, "Here's what I'm going to do." I said, "I tried to hold off. It's what's left. Here's what I'm going to do" and I do not recall -- we were in open court at that time, and I do not recall -- you know, certainly he did not get up, yell, scream, rant and rave. He was a very appropriate individual in court.

(R. 1480). After explaining to Poole the strategy left to him, Poole did not say do not do it: "No, not that I recall." (R. 1481). Dimmig did acknowledge that they were in open court and Poole may have had only "split seconds" to respond." However, Dimmig testified: "I can't say why he didn't respond." (R. 1546). However, he had "very little time to do it." (R. 1547).

In 2005, having reviewed the Nixon case, Dimmig believed that he did not need Poole's consent to concede guilt for the non-capital offenses. ". . .I believe that the holding of Nixon was that it was my decision as a trial lawyer in a capital case

to decide whether or not to concede guilt of non-death penalty eligible offenses." (R. 1474). His primary focus was to maintain some credibility on the first phase, arguing that the homicide occurred hours after Poole committed the non-capital crimes. He believed that if the jury did not accept that theory as it related to the homicide, that other attorneys on the defense team would "maintain a degree of credibility with the jury as it relates to the penalty phase." (R. 1347).

With regard to objecting to comments relating to Poole's arrest in Orlando, Dimmig did not think those comments by Mr. Aguero were prejudicial to the defense. The defendant did not admit to anything and cooperated with authorities. (R. 1466).

As for comments by the State in rebuttal closing, Dimmig acknowledged that in admitting guilt of those non-capital felonies in his own closing it was inviting a response from the State. (R. 1484). As far as acknowledging guilt, that was obvious the jury could have seen for themselves, that Dimmig was doing it, not Mr. Poole. (R. 1484). The last comment by the prosecutor in rebuttal, Dimmig thought went too far and he objected. (R. 1485). Dimmig objected and requested a mistrial for Aguero's comment that he could come forward and tell Detective Grice. (R. 1486). Dimmig acknowledged that this claim was raised on appeal and that no relief was granted by the

Florida Supreme Court. (R. 1486).

One of the things Dimmig argued in his own closing was that the authorities rushed to judgment and there was an inadequate investigation. (R. 1487). Dimmig was aware of case law standing for the proposition that if a witness is equally available to both sides, no adverse inferences should be drawn by the failure of the other party to call the witness. (R. 1493). In his own closing, Dimmig argued more could have been done or tested and the State essentially said it was available to both sides. (R. 1494). Considering his own argument, Dimmig did not contest the prosecutor's reference that items were also available to the defense for testing. Moreover, Dimmig was not contesting that Poole had been in the victim's residence. (R. 1495). In addition, Dimmig was concerned that "objecting a great deal to issues that we were acknowledging anyway would reflect badly on the —- well, it would cause the jurors to reflect badly about the Defense." (R. 1369).

As for comments allegedly denigrating the defense, Dimmig admitted the Disneyland or fantasy comments made by the prosecutor got past him. (R. 1497). But, in his own closing, Dimmig sked the jury to keep their emotions in check. (TR. 1498). The prosecutor, Mr. Aguero, was very passionate in closing and Dimmig expected that from him based upon his

experience with him from previous trials. (R. 1498). Dimmig thought that Aguero was a bit over the top on his comments but with what Dimmig understood at the time, did not believe those comments vitiated the entire defense case. (R. 1500).

As to comments about the jury's common sense, Dimmig thought Aguero's comments were insulting the jury's intelligence. He did not want to object to those comments. (R. 1501). As a general rule, turning off the jury is not a good idea in a criminal case. (R. 1501). In addition, Dimmig recognized that jury instructions actually advise the jury to use common sense. (R. 1501). As for characterizing the defense case as a wild story, Dimmig acknowledged the State was entitled to argue the lack of evidence supporting his theory. (R. 1506). Watching the jury, Dimmig testified that he would have objected if he felt the comment hurt the defense. (R. 1507). In addition, Dimmig testified that he did not believe Aguero's comment "boggles the imagination" denigrated the defense. (R. 1508). Dimmig acknowledged that wide latitude is permitted to counsel in closing argument. (R. 1508).

Similarly, the comment by the prosecutor referring to are you going to believe the evidence or what the defense is telling you did not improperly denigrate the defense. (R. 1509). One of the things Dimmig had to consider is whether or not an objection

to an arguably objectionable comment might actually draw attention to, or reinforce the remark by objecting. (R. 1509).

After he made his burden/shifting objection, Dimmig testified: "It was clear to me that the jury, or at least some members of the jury were growing frustrated with some of the lawyers' moves during the case. So that is something I took into consideration in deciding whether or not to object from that point forward." (R. 1510). He was watching the jury and how they reacted to Mr. Aguero and his own argument as well as when the judge made a ruling or pronouncement. (R. 1510).

As for a potential conflict of interest with Poole, Dimmig testified that none of the individuals previously represented by the Public Defender's Office had been personally represented by him. (R. 1511). An independent counsel was represented to look into the potential conflict of interest. (R. 1512). The judge declined to remove the Public Defender's Office from Poole's case. (R. 1512). With regard to Lewis and Campbell, Dimmig testified that the fact they had previously been represented by the PD's Office did not impair his ability to represent Poole in any way. (R. 1513). Dimmig testified that he presented Campbell as a possible perpetrator of the second incident [murder] as part of his theory of defense. (R. 1514). He thought that one of those two individuals had been released from prison somewhere in

the vicinity of midnight and based upon his release he could have arrived back at the trailer park within the time frame of the murder. (R. 1407). When asked why he did not depose Campbell or Lewis, Dimmig explained that there was a risk the State would have discovered information to invalidate the timeline that would exclude them as possible perpetrators. (R. 1514). Additional investigation might have placed those two individuals out of circulation at the time of the murder and Dimmig might learn something that would impair his "ethical ability" to pursue the defense he did. (R. 1515).

Ultimately, when this case was remanded for a new penalty phase, Dimmig filed a motion to withdraw in 2011. That motion was not based upon a conflict of interest but because an adversarial relationship had developed with Mr. Poole. (R. 1516-17).

On jury selection and his failure to challenge juror Wilson, Dimmig did not believe that Wilson's responses to his questions or the court's gave rise to reasonable grounds for a cause challenge. Dimmig testified that ultimately, juror Wilson agreed that he would weigh all of the evidence and if after the close of evidence he had a reasonable doubt, he would vote innocent. (R. 1522). Dimmig had the ability to observe juror Wilson and see how he was reacting in talking to him and took

all those factors into consideration in believing that Wilson would hold the State to its burden in this case. (R. 1522).

As for the claim he was ineffective for failing to make hearsay objections, Dimmig was aware of the Crawford case which was relatively new at the time this case was tried.[3] (R. 1525). There was testimony regarding a series of games that Poole had taken and sold to Ventura Rico. There was DNA evidence on those games connected to victim Noah Scott and blood identified by Robin Ragsdale from the FDLE. (R. 242). Dimmig did not have any question about the fact there was blood on those games and that fact would be admitted into evidence. (TR. 1525). Mr. Rico and Ms. Nixon testified to seeing blood on those games. Ms. Arlt, a crime scene technician, took photos of those games. (R. 1526). Dimmig testified that he had no legitimate grounds to contest the fact that there was blood on those games. (R. 1527). Dimmig explained that he did not want to aggressively challenge things that "were going to be coming into evidence on counts that I anticipated we would likely end up having to concede." (R. 1527).

As for the allegedly hearsay location, being adjacent to the residence in which Poole was staying, at least one witness at trial provided that address. And, Pamela Johnson testified

[3] Crawford v. Washington, 541 U.S. 36 (2004).

and identified a specific address. (R. 1528). Mr. Rico also testified and identified where he lived. The information Ms. Arlt testified to was already before the jury or would come from actual witnesses. So, Dimmig testified that there was no harm to the defense from failing to object to such testimony. (R. 1529).

Similarly, Karen Gaugh's testimony regarding what her boyfriend's daughter stated, that a black man came to the house and disposed of a video game system with blood on it, was relevant to show how the police got involved and who they went to next. That caused the police to go to Mr. Rico's house. And, the fact these games were recovered and had blood on them was not something the defense was disputing. (R. 1531).

Further, the fact a shoeprint analyst testified about a supervisor reviewing her findings, Dimmig acknowledged he did not object to this testimony. However, Dimmig believed that had he objected the prosecutor may simply have produced the other analysts. Then, Dimmig acknowledged he would have two analysts testifying to this point, a point the defense was not seriously contesting. (R. 1533). Dimmig thought it would be better to fight about things that matter and maintain credibility with the jury. (R. 1533).

With regard to Melissa Nixon, she testified her son was looking through the bag with games the defendant had sold them

and said blood was on them and he threw it down. (R. 1534). She told her son not to touch it and put it back in the bag. (R. 1534). Dimmig lodged no objection because the fact there was blood on it had already come out through more than one previous witness. (R. 1534-35). The statement may also have qualified as an excited utterance. (R. 1535). Again, Mr. Rico also saw blood on those games and there was no question that it was victim Noah Scott's blood on them. (R. 1536). Dimmig had no legitimate basis to dispute that fact. (R. 1536). Dr. Ragsdale identified the DNA from Noah Scott's blood on those games. (R. 1540).

As for Rico's identification, Dimmig acknowledged that a statement of identification by a testifying witness is a hearsay exception. (R. 1537). Dimmig acknowledged that both Detective Grice and Rico testified at trial about the photo pack. (R. 1538).

SUMMARY OF THE ARGUMENT

Although the State acknowledges the important role of *stare decisis* to our system of justice, time and the force of subsequent precedent suggest that it is time to reevaluate this Court's expansive interpretation of Hurst v. Florida. The State is seeking reversal of part of this Court's decision in Hurst v. State, 202 So. 3d 40, 57 (Fla. 2016), cert. denied, 137 S. Ct. 2161 (2017), which expanded upon the Supreme Court's holding in Hurst v. Florida to require the weighing of aggravating and mitigating circumstances as an essential finding before a sentence of death may be imposed in Florida. Neither the Florida nor Federal Constitutions require the additional findings this Court required in light of the Supreme Court's decision in Hurst.

ARGUMENT

THIS COURT SHOULD REVERSE THE DECISION OF THE POST-CONVICTION COURT BELOW GRANTING A NEW PENALTY PHASE BECAUSE POOLE BECAME DEATH ELIGIBLE BY VIRTUE OF THE JURY FINDING HIM GUILTY OF CONTEMPORANEOUS VIOLENT FELONIES. THIS COURT'S INCLUSION OF THE WEIGHING PROCESS AS A "FACT" THAT MUST BE FOUND BY THE JURY BEFORE A DEFENDANT BECOMES ELIGIIBLE FOR A DEATH SENTENCE SHOULD BE REEVALUATED IN LIGHT OF THE NEAR UNIVERSAL REJECTION OF THAT REQUIREMENT BY COURTS APPLYING AND INTERPRETING HURST V. FLORIDA.

The State is seeking reconsideration and reversal of part of this Court's decision in Hurst v. State, 202 So. 3d 40, 57 (Fla. 2016), cert. denied, 137 S. Ct. 2161 (2017), which expanded upon the Supreme Court's holding in Hurst v. Florida to require the weighing of aggravating and mitigating circumstances as an essential finding before a sentence of death may be imposed in Florida. Neither the Florida nor Federal constitutions require the additional findings this Court required in light of the Supreme Court's decision in Hurst. The decision of the post-conviction court below, granting a new penalty phase, should be reversed.

A. The State Acknowledges the Important Role of *Stare Decisis*

The state initially acknowledges the important role of *stare decisis* to our system of justice. 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)). As the United States Supreme Court has stated, the doctrine "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." Payne v. Tennessee, 501 U.S. 808, 827 (1991). See also Hilton v. S.C. Pub. Railways Com'n, 502 U.S. 197, 202 (1991) ("Adherence to precedent promotes stability, predictability, and respect for judicial authority.") (citations omitted). However, as the Supreme Court acknowledged in United States v. Scott, 437 U.S. 82, 101 (1978), *stare decisis* principles do not preclude a court from recognizing the force of subsequent events, better reasoning, and experience in assessing the role of precedent. The Court observed:

> We recognize the force of the doctrine of *stare decisis*, but we are conscious as well of the admonition of Mr. Justice Brandeis:
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> > "[I]n cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the

> process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-408, 52 S.Ct. 443, 448, 76 L.Ed. 815 (1932) (dissenting opinion).

Stare decisis concerns should be somewhat alleviated in this case because prior to Hurst, this Court understood that a prior conviction or contemporaneous conviction took the case out of the purview of Ring v. Arizona, 536 U.S. 584 (2002). This Court had consistently held that such a conviction or jury finding satisfied the Sixth Amendment fact finding requirement of Ring. 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 citations omitted); Frances v. State, 970 So. 2d 806, 822 (Fla. 2007) (noting that this Court had rejected constitutional challenges to Florida's capital statutory scheme in over fifty cases since Ring's release and further stating that Ring did not alter the "express exemption" in Apprendi "that prior convictions are exempt from the Sixth Amendment requirements announced in [Apprendi and Ring]"); Rigterink v. State, 66 So. 3d 866, 896 (Fla. 2011)

("This Court has repeatedly relied on the presence of the prior violent felony aggravating circumstance in denying Ring claims.") (citations omitted). This Court's decision in Hurst v. State, which included for the first time the weighing process as a necessary or predicate "fact" under Hurst/Ring, was itself a departure from this Court's settled precedent. As will be discussed more fully below, those additional findings were not required by the Supreme Court in Hurst.

Properly understood as a straightforward application of Apprendi v. New Jersey, 530 U.S. 466 (2000) and Ring, Hurst would have had minimal disruptive impact upon Florida's capital sentencing procedures and afforded relief to very few convicted and death sentenced murderers. See Ring, 536 U.S. at 612 (Scalia, J., concurring) ("[T]oday's judgment has nothing to do with jury sentencing. What today's decision says is that the jury must find the existence of the *fact* that an aggravating factor existed.") (emphasis in original). However, following remand in Hurst, this Court effectively overruled its prior precedent, expanding the Supreme Court's holding to include not just the fact that an aggravating circumstance existed, but weighing and selection of the defendants' sentence. It is this Court's expansion of Hurst to include the weighing and selection of the defendant's sentence that resulted in the reversal of a

large number of death sentences. And, it is that aspect of this Court's decision in Hurst that the State seeks to reverse here.

Subsequent developments in the case law, both from the Supreme Court and other courts applying and interpreting Hurst, have now shown that this Court's ruling in Hurst should be reconsidered in part, to reflect the actual holding of the Supreme Court in Hurst. Consequently, the State respectfully asks this Court to acknowledge that the reasoning behind that decision was legally and factually unsound and must be overturned.

B. This Court's Decision on Remand in Hurst v. State Exceeded What the Supreme Court Required in Hurst v. Florida

In Apprendi v. New Jersey, 530 U.S. 466, 494 (2000), the U.S Supreme Court held that, pursuant to the Sixth Amendment, any fact that "expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict" is an "element" that must be submitted to a jury. Two years after Apprendi, the Supreme Court extended the rule to Arizona's capital sentencing scheme and held that it was a violation of the Sixth Amendment for the trial judge, sitting alone, to find the existence of an aggravating circumstance thereby making a defendant eligible for an enhanced sentence of death. Ring v. Arizona, 536 U.S. 584 (2002).

In Hurst v. Florida, 136 S. Ct. 616 (2016), the Court extended its Ring holding to Florida's capital sentencing scheme and found Florida's statute unconstitutional on Sixth Amendment grounds. In applying Ring's holding to Florida, the Hurst Court expressly overruled its prior decisions in Spaziano v. Florida, 468 U.S. 447 (1984), and Hildwin v. Florida, 490 U.S. 638 (1989), "*to the extent* they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for the imposition of the death penalty." Hurst, 136 S. Ct. 623-24 (emphasis added). The Court noted that the portions of Spaziano and Hildwin which concluded that the "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury," could not survive the reasoning announced in Apprendi and Ring. Id. Accordingly, the Court concluded that Florida's sentencing scheme violated the Sixth Amendment because the judge, rather than the jury, had to find the existence of an aggravating circumstance. Id. at 624.

The Hurst decision reaffirmed the Supreme Court's Ring holding that the jury must find each "fact" necessary to impose a sentence of death. Hurst, 136 S. Ct. at 619. Pursuant to the Court's Sixth Amendment jurisprudence, once the state establishes the existence of an aggravating circumstance, the

defendant becomes eligible for an enhanced sentence of death and the jury need not make any additional "factual" findings. See Sattazahn v. Pennsylvania, 537 U.S. 101, 111 (2003) ("That is to say, for purposes of the Sixth Amendment's jury-trial guarantee, the underlying offense of 'murder' is a distinct, lesser included offense of 'murder plus one or more aggravating circumstances': Whereas the former exposes a defendant to a maximum penalty of life imprisonment, the latter increases the maximum permissible sentence to death. Accordingly, we held that the Sixth Amendment requires that a jury, and not a judge, find the existence of any aggravating circumstances, and that they be found, not by a mere preponderance of the evidence, but beyond a reasonable doubt.") (citing Ring v. Arizona, 536 U.S. 584, 608-09 (2002)).

The Supreme Court's Hurst decision did not address the process of weighing the aggravating and mitigating circumstances or suggest that the jury must conduct the weighing process to satisfy the Sixth Amendment. However, on remand this Court in Hurst v. State, 202 So. 3d 40, 57 (Fla. 2016), cert. denied, 137 S. Ct. 2161 (2017), greatly expanded the Supreme Court's ruling, requiring that "before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven

beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death." This Court's expansion of the holding in Hurst v. Florida was not required or even suggested by the Supreme Court's decision in Hurst. The Supreme Court's ruling in Hurst v. Florida was a narrow one: "Florida's sentencing scheme, which required the judge alone to **find the existence of an aggravating circumstance**, is . . . unconstitutional." Hurst v. Florida, 136 S. Ct. at 624 (emphasis added). Hurst, 136 S. Ct. at 662 ("As with Ring, a judge increased Hurst's authorized punishment based on her own factfinding. In light of Ring, we hold that Hurst's sentence violates the Sixth Amendment."). This Court's expansion of the holding in Hurst v. Florida was not required or even suggested by the Supreme Court's holding in Hurst. Hurst v. Florida, *like* Ring *before it, merely* requires the jury to find one aggravating circumstance exists, not that every aggravating circumstance must be found to exist before rendering a defendant eligible for the death penalty. Likewise, Hurst v. Florida did not establish a new Sixth Amendment right to have a jury determine whether mitigating circumstances exist and determine whether mitigation is sufficiently substantial to warrant leniency.

One of this Court's retroactivity rulings necessitated by its decision on remand in Hurst questioned why there was a more than decade delay in the Supreme Court accepting review of a Florida case based upon an alleged conflict with Ring. In Mosley v. State, 209 So. 3d 1248, 1276-83 (Fla. 2016), this Court granted Hurst retroactivity under a Witt v. State, 387 So. 2d 922, 926 (Fla. 1980) analysis back to the date of the Supreme Court's decision in Ring. In moving the line of retroactive application back to Ring, this Court reasoned that since Florida's death penalty sentencing scheme should have been recognized as unconstitutional upon the issuance of the decision in Ring, defendants should not be penalized for the time that it took for this determination to be made official in Hurst. However, the gap between the Supreme Court's rulings in Ring and Hurst may be fairly explained by the fact that this Court properly recognized that a prior violent felony or contemporaneous felony conviction took the case out of the purview of Ring. 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 citations omitted). Hurst

v. Florida presented the Supreme Court with a rare "pure" Ring case, that is a case where there was no aggravator supported either by a contemporaneous felony conviction or prior violent felony. Accordingly, the Supreme Court's opinion in Hurst should have been read by this Court following remand as a straight forward application of Ring under the facts presented. See Ex parte State, 223 So. 3d 954, 963 (Ala. Crim. App. 2016) ("The Court in Hurst did nothing more than apply its previous holdings in Apprendi and Ring to Florida's capital-sentencing scheme. The Court did not announce a new rule of constitutional law, nor did it expand its holdings in Apprendi and Ring."). However, a majority of this Court interpreted Hurst to include weighing and selection of the defendant's sentence, thereby causing an unnecessarily devastating and costly impact to the State's capital sentencing system.

Indeed, there is now a compelling amount of precedent both from the Supreme Court and lower courts that reject the notion that weighing in relation to a sentence is even a "fact" that must be found by the jury. The Supreme Court clarified in Kansas v. Carr, what is, and what is not, a "fact" in the capital sentencing context. 136 S. Ct. 633, 642 (2016). The existence of an aggravating factor is "a purely factual determination." Id. "Whether mitigation exists, however, is largely a judgment call

(or perhaps a value call); what one juror might consider mitigating another might not."[4] Id. However, the Court observed that "weighing is not an end; it is merely a means to reaching a decision." Kansas v. Marsh, 548 U.S. 163, 179 (2006). In any event, "the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy—the quality of which, as we know, is not strained." Carr, 136 S. Ct. at 642. Thus, "[i]t would mean nothing . . . to tell the jury that the defendants must deserve mercy beyond a reasonable doubt; or must more-likely-than-not deserve it."[5] Id.

[4] Unlike aggravating circumstances, potential mitigating factors include a virtually limitless panoply of circumstances, some of which may be, or may not be viewed by jurors as actually mitigating. See e.g. Morton v. State, 789 So. 2d 324, 330 (Fla. 2001) (presenting the defendant's antisocial personality disorder as a mitigating circumstance). Of course, while successfully arguing on direct appeal that the trial court failed to find and weigh his antisocial personality disorder as mitigation, Morton subsequently faulted defense counsel in post-conviction for presenting such evidence. See Morton v. Sec'y, Florida Dept. of Corr., 684 F.3d 1157, 1168 (11th Cir. 2012) (holding "[t]hat a diagnosis of antisocial personality disorder has negative characteristics or presents a double-edged sword renders it uniquely a matter of trial strategy that a defense lawyer may, or may not, decide to present as mitigating evidence.").

[5] Mitigating circumstances simply are not elements of the crime of capital murder. The prosecution does not prove mitigating circumstances; the defense does. And mitigating circumstances are not proven beyond a reasonable doubt by the defense under Florida law. Rather, mitigating circumstances are only required to be proven by the "greater weight of the evidence." Coday v. State, 946 So. 2d 988, 1001 (Fla. 2006) (citing Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990)). This Court failed to

Accordingly, a jury must find the existence of an aggravating factor, Hurst, 136 S. Ct. at 623-24, but a judge may determine that "the mitigating circumstances were insufficient to outweigh such aggravating circumstances," and that "a sentence of death should be imposed," Spaziano, 468 U.S. at 451-52.

Subsequently, in Jenkins v. Hutton, 137 S. Ct. 1769, 1771 (2017), the Supreme Court observed that the jury had found the existence of two aggravating circumstances during the guilt phase by convicting Hutton of aggravated murder and that "each of those findings rendered Hutton eligible for the death penalty". Under the Supreme Court's reasoning in Hutton and Marsh, there was no Hurst/Ring error in this case because the weighing decision is not a fact-based eligibility determination.

Lower courts too have almost uniformly held that a judge may perform the "weighing" of factors to arrive at an appropriate sentence without violating the Sixth Amendment. As the Sixth Circuit Court of Appeals in United States v. Gabrion,

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directly address the nature of mitigating circumstances in its Hurst opinion, but it did treat the weighing as a factual finding that must be made by the jury. But before a jury can make "factual findings" regarding the weighing of aggravating circumstances against the mitigating circumstances, the jury must make the antecedent factual findings regarding mitigating circumstances. Even if this Court views mitigating circumstances as only partially factual and partially a judgment call, then weighing is not actually a factual finding either because a large component of what the jury is weighing — the mitigating circumstances — are not factual in nature.

719 F.3d 511, 532-33 (6th Cir. 2013), explained in addressing a challenge to the federal death penalty statute:

> *Apprendi* findings are binary-whether a particular fact existed or not. Section 3593(e), in contrast, requires the jury to "consider" whether one type of "factor" "sufficiently outweigh[s]" another so as to "justify" a particular sentence. Those terms-consider, justify, outweigh-reflect a process of assigning weights to competing interests, and then determining, based upon some criterion, which of those interests predominates. The result is one of judgment, of shades of gray; like saying that Beethoven was a better composer than Brahms. Here, the judgment is moral-for the root of "justify" is "just." What § 3593(e) requires, therefore, is not a finding of fact, but a moral judgment.

See State v. Mason, ___ N.E.3d ___, 2018 WL 1872180, *5-6 (Ohio, April 18, 2018) ("Nearly every court that has considered the issue has held that the Sixth Amendment is applicable to only the fact-bound eligibility decision concerning an offender's guilt of the principle offense and any aggravating circumstances" and that "weighing is not a factfinding process subject to the Sixth Amendment.") (string citation omitted); Underwood v. Royal, 894 F.3d 1154, 1184-86 (10th Cir. 2018) (holding that the Court's decision in Hurst v. Florida was limited to aggravating circumstances and did not extend to mitigating circumstances or weighing); United States v. Sampson, 486 F.3d 13, 32 (1st Cir. 2007) ("As other courts have recognized, the requisite weighing constitutes a process, not a

fact to be found."); United States v. Purkey, 428 F.3d 738, 750 (8th Cir. 2005) (characterizing the weighing process as "the lens through which the jury must focus the facts that it has found" to reach its individualized determination); Waldrop v. Comm'r, Alabama Dept. of Corr., 711 Fed. Appx. 900, 923 (11th Cir. 2017) (unpublished) (rejecting Hurst claim and explaining "Alabama requires the existence of only one aggravating circumstance in order for a defendant to be death-eligible, and in Mr. Waldrop's case the jury found the existence of a qualifying aggravator beyond a reasonable doubt when it returned its guilty verdict.") (citation omitted); State v. Gales, 658 N.W.2d 604, 628-29 (Neb. 2003) ("[W]e do not read either Apprendi or Ring to require that the determination of mitigating circumstances, the balancing function, or proportionality review to be undertaken by a jury").

In light of this solid wall of precedent rejecting the notion that the weighing and selection of a defendant's sentence are required by the Sixth Amendment, the State submits it is time for this Court's Hurst decision to be revisited and reversed. The expansive findings required by this Court following remand in Hurst v. State, see, e.g., McGirth v. State, 209 So. 3d 1146, 1164 (Fla. 2017), can no longer be justified. To explain this expansion, this Court reasoned that the jury

"recommendation is tantamount to the jury's verdict in the sentencing phase of trial" and under Florida law, jury verdicts are required to be unanimous. Id. at 54. Additionally, this Court held that unanimity "serves th[e] narrowing function required by the Eighth Amendment" to ensure that death is not "arbitrarily imposed, but . . . reserved only for defendants convicted of the most aggravated and least mitigated murders." Id. at 60 (citing Gregg v. Georgia, 428 U.S. 153, 199 (1976); McClesky v. Kemp, 481 U.S. 279, 303 (1987)).

It appears that this Court's decision intermingled State and federal constitutional concerns to arrive at its desired destination—a unanimous jury recommendation.[6] However, the right to a jury trial under the Sixth Amendment and its corresponding provision in the Florida constitution has been limited to just that, the trial, not sentencing. See Ring, 536 U.S. at 612 (Scalia, J., concurring) ("[T]oday's judgment has nothing to do with jury sentencing. What today's decision says is that the

[6] It would seem that the decision as to whether or not to require a unanimous jury recommendation, no matter how well intentioned by this Court, was a matter reserved for the state legislature. See Perry v. State, 210 So. 3d 630, 641 (Fla. 2016) (Canady, J., dissenting) ("The Legislature's work in enacting the new statute reflects careful attention to the holding of Hurst v. Florida, which does not require jury sentencing. In rejecting the new statute, the majority has 'fundamentally misapprehend[ed] and misuse[d] Hurst v. Florida[]'") (citing and quoting from the dissent in Hurst, 202 So. 3d at 77).

jury must find the existence of the fact that an aggravating factor existed.") (emphasis in original); Harris v. Alabama, 513 U.S. 504, 515 (1995) (holding that the Constitution does not prohibit the trial judge from "impos[ing] a capital sentence"). No case from the Supreme Court has mandated jury sentencing in a capital case, and such a holding would require reading a mandate into the Constitution that is simply not there. The Florida and U.S. Constitutions provide for a right to trial by jury, not to sentencing by jury. Indeed, the Sixth Amendment applies to all criminal cases, not just capital cases. If it is a Sixth Amendment Right, all criminal defendants would enjoy the right to have a jury sentencing determination. However, judges, not juries sentence criminal defendants, not only in Florida, but throughout this country.

Perhaps recognizing that neither the Florida or United States Constitutions have ever interpreted the Sixth Amendment to require jury sentencing, this Court invoked the Eighth Amendment to require unanimous jury findings in the penalty phase. See Hurst, 202 So. 3d at 61 ("Florida's capital sentencing law will comport with these Eighth Amendment principles in order to more surely protect the rights of defendants guaranteed by the Florida and United States Constitutions.") (emphasis added). However, this Court was

without authority under our constitution to interpret the Eighth Amendment in a manner that conflicts with Supreme Court precedent.[7] Correll v. State, 184 So. 3d 478, 489 (Fla. 2015) ("[T]his Court is bound by the conformity clause of the Florida Constitution to construe the state prohibition against cruel and unusual punishment consistently with pronouncements by the United States Supreme Court.").

The Eighth Amendment requires states to "give narrow and precise definition to the aggravating factors that can result in a capital sentence" in order to limit the death penalty to a "narrow category of the most serious crimes" and to defendants who are "more deserving of execution." Roper v. Simmons, 543 U.S. 551, 568 (2005) (citing Atkins v. Virginia, 536 U.S. 304, 319 (2002)). The Supreme Court has never held that the Eighth Amendment requires the jury's final recommendation in a capital case to be unanimous. See, e.g., Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972). Florida was not required to adopt a unanimous jury recommendation requirement simply because a majority of other states have done

[7] Article I, section 17 of the Florida Constitution contains the following provision: "The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution."

so. This same distinction was considered and rejected when the Supreme Court rejected this claim in Spaziano v. Florida, 468 U.S. 447, 464 (1984) (The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of states.). The Supreme Court's ruling in Hurst did not overrule Spaziano's Eighth Amendment holding—that "there is no constitutional imperative that a jury have the responsibility of deciding whether the death penalty should be imposed." Id. at 465. Accordingly, "[a]ny argument that the Constitution requires that a jury impose the sentence of death . . . has been soundly rejected by prior decisions of this Court." Clemons v. Mississippi, 494 U.S. 738, 745 (1990). And because the Eighth Amendment does not require that death sentences be imposed by a jury, it certainly does not require them to be imposed unanimously by a jury. See Spaziano, 468 U.S. at 465; Proffitt v. Florida, 428 U.S. 242, 252 (1976) (plurality opinion) (explaining that, although "jury sentencing in a capital case can perform an important societal function," this Court "has never suggested that jury sentencing is constitutionally required" in such cases); id. at 260–61 (White, J., concurring in the judgment).

This Court's invocation of the Eighth Amendment to justify its holding in Hurst, is contrary to the Supreme Court's Eighth

Amendment precedent, and therefore cannot be reconciled with the conformity clause. Consequently, this Court's decision in Hurst v. State should be reversed to the extent its holding requires anything more than the jury to find an aggravating circumstance -- what Hurst v. Florida requires.[8]

C. Poole's Death Sentence Was Not Unconstitutionally Obtained

In applying the Hurst/Ring/Apprendi cases and well accepted precedent applying those cases to the facts of this case, it is clear that there was no underlying constitutional error. The judgment of the post-conviction court granting a new penalty phase should be reversed.

The trial court found in aggravation the following: 1) prior violent felony convictions [attempted first degree murder and sexual battery with great force] [very great weight]; 2) contemporaneous violent felonies [armed burglary, armed robbery, and sexual battery] [great weight]; 3) financial gain [less than moderate weight]; and 4) the murder was heinous, atrocious and cruel [very great weight]. (RS 5/719-23).

[8] Following Hurst, the Florida Legislature amended the death penalty statute to include the findings required by Hurst and to require a 10-2 recommendation. See § 921.141, Fla. Stat. (effective Oct. 1, 2016). This Court found that statute unconstitutional in Perry v. State, 210 So. 3d 630 (Fla. 2016), because it authorized a death recommendation by a less than unanimous recommendation.

There is no doubt the jury found all but one of the aggravators in this case based upon Poole's contemporaneous convictions. See e.g. Jackson v. State, 213 So. 3d 754, 788 (Fla. 2017) ("the jury in this case was not required to find the existence of the aggravating circumstance that Jackson committed the murder during the course of sexual battery because he had already been convicted of sexual battery at the time he was sentenced.") These aggravators are necessarily supported by a unanimous jury verdict, and, under this Court's previous understanding of Ring and Apprendi, rendered Poole eligible for a death sentence in this case. See Miller v. State, 42 So. 3d 204, 218–19 (Fla. 2010) (Ring is not violated where Miller's aggravating factors were established by prior violent felonies and contemporaneous felonies). As discussed above, Hurst v. Florida was a straight forward application of Ring to Florida. Consequently, the Sixth Amendment was satisfied because the jury's unanimous verdict in the guilt phase established Poole's eligibility for a death sentence. See Ex parte Bohannon, 222 So. 3d 525, 534 (Ala. 2016), cert. denied, 137 S. Ct. 831 (2017) ("Nothing in Apprendi, Ring, or Hurst suggests that, once the jury finds the existence of the aggravating circumstance that establishes the range of punishment to include death, the jury cannot make a recommendation for the judge to consider in

determining the appropriate sentence or that the judge cannot evaluate the jury's sentencing recommendation to determine the appropriate sentence within the statutory range.").

Assuming for a moment that all aggravators need to be found by the jury – not just sufficient aggravators to make the defendant death eligible -- the remaining aggravator was uncontestable on the weight of the evidence. Any rational juror would have found that the murder of Noah Scott was heinous, atrocious and cruel. This Court recognized the strength of the evidence supporting the HAC aggravator on direct appeal, noting that any erroneous comments by the prosecutor regarding HAC did not prejudice the Defendant in light of the strong evidence supporting this aggravator:

> In light of defense counsel's failure to object to this comment at trial, the next inquiry is whether this misstatement amounts to fundamental error. As observed by the trial court's sentencing order, this Court has "consistently upheld HAC in beating deaths," particularly where the victim is conscious for at least a part of the attack and is aware of impending death. *See Williams v. State*, 37 So. 3d 187, 198–99 (Fla. 2010); *Bogle v. State*, 655 So. 2d 1103, 1109 (Fla. 1995). **Based on [L.W.]'s testimony regarding the suffering experienced by Scott before he was rendered unconscious, there is no reasonable doubt that the HAC aggravator would have been found despite the prosecutor's improper instruction to consider what happened to [L.W.] at the point where it is not clear whether Scott was conscious to hear or see what took place.** Additionally, this misstatement was not repeated by the trial court when it instructed the jury on HAC immediately prior to deliberations. Thus,

> the prosecutor's direction does not constitute fundamental error.

Poole, 151 So. 3d at 417-18 (emphasis added). Noah Scott died a painful death attempting to fend off Poole's attack upon his fiancée. Any rational juror would have found the murder of victim Scott heinous, atrocious, and cruel. Again, there was no constitutional error in either the findings supported by contemporaneous felonies or the finding of the HAC aggravator. The post-conviction court's decision below should be reversed.

Finally, assuming this Court declines to overrule its expansive interpretation of Hurst, the State maintains that any error in this case should be deemed harmless. Being bound by this Court's precedent, the lower court in this case only looked to the non-unanimous jury recommendation to conclude that the Hurst error was harmful. The State respectfully submits that the lower court, and this Court, have misapplied the harmless-error test regarding what a "rational jury" "would have unanimously found." See Pagan v. State, 235 So. 3d 317, 319 (Fla. 2018) (Lawson, J., dissenting) (finding *per se* reversible error in all non-unanimous cases is not the "proper harmless analysis").

The State acknowledges that to date, this Court has only found Hurst error harmless where the jury recommendation has been unanimous. See e.g. Hojan v. State, 212 So. 3d 982, 1000

(Fla. 2017) ("Given the jury vote of nine to three to recommend a sentence of death, it is impossible for this Court to conclude that the Hurst error in this case was harmless beyond a reasonable doubt."); Hertz v. Jones, 218 So. 3d 428, 432 (Fla. 2017) (where this Court explained that "any attempt to determine what findings were made by the jurors who voted for life and the jurors who voted for death would amount to speculation and cannot rise to the level of proof beyond a reasonable doubt."). However, under these specific facts, the State submits that a rational jury would have unanimously found the aggravating factors if it had been instructed to, and it would have unanimously found that the aggravating factors outweighed the mitigation.

This was simply not a close case as evidenced by the jury's near unanimous 11-1 death recommendation. Indeed, since the instructions at the time of trial placed no consequence on a less than majority life recommendation, the jury need not even continue its deliberation after the first vote. All jurors, including the one that did not vote for a death sentence, would be aware that the recommendation on that vote would be death. Obviously, it is quite a different dynamic entirely to instruct the jury that a death sentence requires a unanimous vote. Had the jury been properly instructed in light of Hurst v. Florida,

that a unanimous recommendation was required, additional deliberation would occur. In that case, a rational juror would have altered or changed his or her vote to coincide with the clearly expressed majority view.[9]

Poole was sentenced to death because he broke into a sleeping young couple's home, armed with a tire iron, and, in a heinous, atrocious and cruel manner, murdered a young man, Noah Scott, who attempted to fend Poole off to protect his pregnant fiancée. The accompanying crimes of violence which comprise the prior violent felony aggravator in this case are also particularly weighty. Poole mercilessly raped and attempted to murder L.W. who was begging him not to hurt her and her unborn

[9] Long ago, the Supreme Court recognized the dynamics of jury deliberation and the propriety of additional instructions in the face of potential deadlock. In Allen v. United States, 164 U.S. 492, 501-02 (1896), the Court stated:

> While, undoubtedly, the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury room. The very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves. It certainly cannot be the law that each juror should not listen with deference to the arguments, and with a distrust of his own judgment, if he finds a large majority of the jury taking a different view of the case from what he does himself. It cannot be that each juror should go to the jury room with a blind determination that the verdict shall represent his opinion of the case at that moment, or that he should close his ears to the arguments of men who are equally honest and intelligent as himself. There was no error in these instructions.

child. Poole left L.W. for dead after repeatedly hitting her in the head with a tire iron. His blows left her permanently disfigured [shearing off part of a finger and fingertip] and she would have died as a result of Poole's attack, had she not been pregnant.

A detailed review of the evidence of aggravation and mitigation yields the undeniable conclusion that a rational, properly-instructed jury would, without a doubt, unanimously find the aggravation sufficient for death and unanimously find that the aggravating factors outweigh the mitigation. The trial court sentenced Poole to death finding that the aggravating circumstances "far outweigh the mitigating circumstances" and that the "heinous, atrocious, and cruel aggravator alone outweighs all the mitigating circumstances in this case." (RS 5/729). In light of the strong aggravation presented, there is no reason to believe that a rational juror, properly instructed, would have made the assessment differently than the trial court below.[10] The error was harmless in this case. The trial court's ruling should be reversed.

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[10] In mitigation, the court found the crimes were committed while Poole was under the influence of extreme mental or emotional disturbance (moderate to great weight) and, that his capacity to appreciate the criminality of his conduct/conform his conduct to the requirements of the law was substantially impaired (great weight). (RS 5/727). The trial court also found a number of non-statutory mitigators.

CONCLUSION

In conclusion, Appellant/Cross-Appellee, the State of Florida, respectfully requests that this Honorable Court reverse the decision of the court below granting the Poole a new penalty phase.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 13th day of August 2018, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: David D. Hendry, James L. Driscoll, Jr. and Gregory W. Brown, Assistants CCRC, Law Office of Capital Collateral Regional Counsel - Middle Region, 12973 North Telecom Parkway, Temple Terrace, Florida 33637-0907 (**hendry@ccmr.state.fl.us**, **driscoll@ccmr.state.fl.us**, **brown@ccmr.state.fl.us** and **support@ccmr.state.fl.us**).

CERTIFICATE OF FONT COMPLIANCE

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

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