

In the Supreme Court of Florida

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. SC20-_____
ORIGINAL PROCEEDING

LOWER COURT CASE NO.: 16-2005-CF-10263-CXXX
Duval County Circuit Court

MICHAEL JAMES JACKSON,

Respondent.

_____ /

EMERGENCY MOTION TO STAY
RESENTENCING PROCEEDINGS IN THE TRIAL COURT

Pursuant to Florida Rule of Appellate Procedure 9.310(f), the State moves this Honorable Court to stay the resentencing proceedings in the trial court. On February 20, 2020, the State of Florida filed an All Writs petition in this Court seeking a stay of the proceedings in this case pending the outcome of the appeal of the order in *State v. Thomas Ford McCoy, Jr.*, Case No. 2009-CF-000257A (Walton Cty Circuit Court). In *McCoy*, the trial court entered a written order reinstating the death penalty in light of this Court's recent decision in *State v. Poole*, ___ So.3d ___, 45 Fla. L. Weekly S40, 2020 WL 370302 (Fla. Jan. 23, 2020).¹

¹ The defense filed a motion for rehearing in *McCoy* and the State filed a response to the rehearing. A hearing on that motion is scheduled for Thursday, March 5, 2020. The written order reinstating the death penalty in *McCoy* was entered on February 12, 2020, so the appeal of that order is likely to be filed by March 13, 2020.

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The new penalty phase in this case, however, is scheduled to begin this Monday, February 24, 2020. The State requested a stay in the trial court but the trial court denied the request.

The resentencing would moot the State's petition entirely. Furthermore, the State has no remedy at all after the penalty phase is completed because, due to double jeopardy principles, the State cannot appeal a new sentence once imposed. For these reasons, the State seeks a stay of the resentencing in the trial court in this case.

Standard of review

The trial court's decision on the stay is reviewed under the abuse of discretion standard. *Sunbeam Television Corp.*, 117 So.3d at 772 (citing *Parker v. Estate of Bealer*, 890 So.2d 508, 512 (Fla. 4th DCA 2005)).

Stays pending appeal

To prevail on a motion to stay the trial court proceedings pending an appeal, a party must establish: 1) a likelihood of success on the merits, and 2) a likelihood of harm absent the entry of a stay. *Sunbeam Television Corp. v. Clear Channel Metroplex, Inc.*, 117 So.3d 772 (Fla. 3d DCA 2012). The State can establish both.

Regarding the first prong of a likelihood of success on the merits, under this Court's caselaw, a trial court has the inherent authority to reconsider its prior order granting a new penalty phase based on the now-repudiated decision in *Hurst v. State*, 202 So.3d 40 (Fla. 2016), and reconsider that ruling in light of this Court's recent decision in *State v. Poole*. See *Silvestrone v. Edell*, 721 So.2d 1173, 1175 (Fla. 1998) (recognizing inherent authority of trial judges to reconsider interlocutory orders); *Savoie v. State*, 422 So.2d 308, 312 (Fla. 1982) (noting the

inherent power of the trial court to reconsider, while the court has jurisdiction of the case and upon appropriate motion or objection by either counsel, a ruling previously made on a motion to suppress); *but cf. Simmons v. State*, 274 So.3d 468 (Fla. 1st DCA 2019).²

Regarding the second prong of a likelihood of harm absent a stay, due to double jeopardy, the State has no appellate remedy. If the penalty phase jury's vote is not unanimous, resulting in a life sentence at the new penalty phase, or if the trial court overrides the jury unanimous death recommendation, and imposes a life sentence at the new resentencing, the State cannot appeal. *Williams v. State*, 595 So.2d 936 (Fla. 1992) (holding that the Double Jeopardy Clause prohibits a new penalty phase where the judge had imposed a life sentence at the first penalty phase citing *Brown v. State*, 521 So.2d 110 (Fla. 1988)); *State v. Ballard*, 956 So.2d 470, 475 (Fla. 2d DCA 2007) (Villanti, J., concurring) (noting a judge's decision to override a jury's recommendation of death is not appealable); *cf. Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003). There is no remedy on appeal because there can be no appeal.

Additionally, there is the harm from the time and expense involved in conducting an unnecessary new penalty phase. It would be an enormous waste of both the bench and bars' time, in addition to the time of the citizens who are called for jury duty, as well as taxpayers' money, to conduct an unnecessary penalty phase. And the victim's family will have to endure another penalty phase and the additional years of delay starting over again will cause. As Justice Harding observed, Sixth Amendment right-to-a-jury trial challenges could result in "repeats of penalty phase trials, in turn leading to repeats of postconviction proceedings, and then new federal habeas proceedings." *King v. Moore*, 831 So.2d

² Obviously, this Court's caselaw controls over a district court's decision.

143, 148 (Fla. 2002) (Harding, J., concurring). Justice Harding noted all the persons involved “will have to relive horrid experiences” to reestablish the factual bases or to reestablish victim impact evidence in these cases, “many which are undeniably heinous.” *King*, 831 So.2d at 148 (Harding, J., concurring). Indeed, this Court in *State v. Poole* based the decision to recede from *Hurst v. State*, in part, on the victims’ and society’s interest in holding defendants “to account” and noted “the substantial resources” spent litigating and adjudicating capital cases. *State v. Poole*, 2020 WL 370302 at *15. But those exact interests are undermined if the trial court in this case insists on conducting a new penalty phase. Conducting new penalty phase would continue the deleterious effect on the administration of the death penalty in Florida caused by the *Hurst v. State* decision. The harm to the State is both obvious and irreparable.

Accordingly, this Court should order the trial court to stay the resentencing proceedings scheduled for Monday, February 24, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing EMERGENCY MOTION TO STAY RESENTENCING PROCEEDINGS IN THE TRIAL COURT has been furnished by e-portal to The Honorable Michael R. Weatherby, Duval County Courthouse, 501 W Adams St Ste 6193, Jacksonville, FL 32202-4628; phone: (904) 255-1020; email: MICHAELW@coj.net and Arigano@coj.net; Tania Z. Alavi, Esq., of Alavi & Pozzuto, P.A., 108 N Magnolia Ave Ste 600, Ocala, FL 34475-6648; phone: (352) 732-9191; email: talavi@theaplawgroup.com; Terrence M. Lenamon, Esq., of Lenamon Law, 245 SE 1st St Ste 404, Miami, FL 33131-1913; phone: (305) 373-9911; email: terry@lenamonlaw.com; Alan Mizrahi, Assistant State Attorney, Office of the State Attorney for the Fourth Judicial Circuit, 311 W Monroe St, Jacksonville, FL 32202-4242; phone: (904) 255-2500; email: amizrahi@coj.net; and Garrett Hill, Assistant State Attorney, Office of the State Attorney for the Fourth Judicial Circuit, 311 W Monroe St, Jacksonville, FL 32202-4242; phone: (904) 255-2500; email: garretth@coj.net and SAO4DuvalCriminal@coj.net this 20th day of February, 2020.

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