IN THE SUPREME COURT OF FLORIDA
CASE NO. SC20-287
Lower Court Case No. 88-1357CF

RICHARD BARRY RANDOLPH
Appellant,

v.

STATE OF FLORIDA
Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT, IN AND FOR PUTNAM COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Randolph's second amended successive motion for postconviction relief pursuant to Fla. R. Crim. P. 3.851.

The following symbols will be used to designate references to the record in this appeal:

"(R. _)" - record on direct appeal (SC74-083);

"(__ Tr. p. __") - postconviction record on appeal of the "Howard Pearl" hearings (SC81-950);[1]

"(PCR. __)" – postconviction record on appeal on initial 3.850 motion (SC93-675);

"(PCRS. __)" – supplemental record to initial 3.850 motion (SC93-675);

"(PCR3. __)" – record on instant appeal.[2]

All other citations will be self-explanatory or will be otherwise explained.

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[1] This Court granted Mr. Randolph's motion to consolidate the record of the proceedings from Case No. 81,960 into his appeal in Case No. 93,675. However, due to COVID-19, counsel is unable to obtain portions of the record on appeal, and thus, counsel will cite to the "Howard Pearl" testimony done December 15-18, 1992, by date of the transcript and transcript page, unless otherwise indicated.

[2] Mr. Randolph's record on appeal in Case No. SC11-725 will not be referenced in the instant appeal.

REQUEST FOR ORAL ARGUMENT

Mr. Randolph has been sentenced to death. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Randolph, through counsel, accordingly urges that the Court permit oral argument.

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INTRODUCTION

Following the nationwide rebuke of the death penalty in *Furman v. Georgia*, 408 U.S. 238 (1972), the Florida Legislature quickly enacted a revised statute in an effort to reinstate the death penalty. While other State's responded to *Furman* by changing their capital punishment schemes to allow the trial judge to make the ultimate life-or-death decision or alternatively enacted mandatory statutes which outlined specific crimes for which the death penalty was required, Florida created a bifurcated trial system. *Donaldson v. Sack*, 265 So. 2d 499, 504 (1972).[3] The Florida Legislature responded to *Furman* by maintaining a broad definition of "first-degree murder," *see* § 782.04, Fla. Stat. and revising § 921.141, Fla. Stat. "to segregate the determination of guilt or innocence from the determination of the recommendation of mercy." *Lee v. State*, 294 So. 2d 305, 307 (Fla. 1974). In requiring the finding of additional facts during a separate sentencing proceeding, the requisite narrowing function demanded by the Eighth Amendment is met. Consequently, a defendant can only be eligible for the death penalty if the additional findings were made by a jury at the sentencing phase of the bifurcated trial.

Florida's capital sentencing scheme survived an Eighth Amendment challenge in *Proffitt v. Florida*, 428 U.S. 242 (1976). In upholding the death penalty

[3] ("BIFURCATED TRIAL: Fla. Stat. s 921.141(2)(a), as amended by s 1, Ch. 72-72, effective 10-1-72, applies to criminal offenses which may be punished by death and requires separate trials on the issues of innocent v. guilt and life v. death…").

scheme, the U.S. Supreme Court compared Florida's statute to Georgia's, and concluded the constitution does not require jury sentencing.[4] *See also*, *Spaziano v. Florida*, 468 U.S. 447 (1984).[5]

In *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000), the U.S. Supreme Court held that a defendant has a right "to a jury determination that [he] is guilty of **every element** of every crime with which he is charged, beyond a reasonable doubt." The Court also noted that "due process and associated jury protections extend, to some degree, 'to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence.'" *Apprendi,* 530 U.S at 484. The Court then

[4] In contrast to Florida's scheme, Georgia's capital sentencing scheme required the jury "to find at least one valid statutory aggravating circumstance and to identify it in writing… [this] adequately protected against the wanton and freakish imposition of the death penalty." *Zant v. Stephens*, 462 U.S. 862, 867 (1983).

[5] Contrary to this Court's recent interpretation of *Spaziano*, the Petitioner there never raised a Sixth Amendment argument regarding jury sentencing, in fact, this specific issue was addressed in *Hildwin v. Florida*, 490 U.S. 638 (1989). In *Hildwin*, the Petitioner argued that under this Court's interpretation of Florida law, the provisions of § 921.141, Fla. Stat. are elements which are part of the substantive offense of capital murder that must be found by a jury beyond a reasonable doubt before a death sentence may be imposed. In 1989, the U.S. Supreme Court rejected the Due Process and Sixth Amendment arguments by concluding, "the existence of an aggravating factor here is not an element of the offense but instead is a 'sentencing factor.'" *Hildwin, 490 U.S. at 640.* Despite Hildwin's **unanimous jury recommendation**, this holding was overruled by *Hurst v. Florida*, 136 S. Ct. 616, 624 (2016) ("time and subsequent cases have washed away the logic of *Spaziano* and *Hildwin*.").

applied this analysis to Arizona's death penalty scheme, which had not provided any role for the jury in determining death eligibility.

In *Ring v. Arizona*, 536 U.S. 584 (2002), the U.S. Supreme Court concluded that because the Arizona Legislature responded to *Furman* by creating statutory aggravating factors, which functioned to increase a defendant's authorized punishment, no matter how the State labeled it, those findings had to be found by a jury beyond a reasonable doubt. Justice Scalia noted his primary concern was "the accelerating propensity of both state and federal legislatures to adopt **'sentencing factors' determined by judges**… cause[s] me to believe that our people's traditional belief in the right of trial by jury is in perilous decline. **That decline is bound to be confirmed, and indeed accelerated, by the spectacle of a man's going to his death because a judge found that an aggravating factor existed.** We cannot preserve our veneration for the protection of the jury in criminal cases if we render ourselves callous to the need for that protection by regularly imposing the death penalty without it." *Ring*, 536 at 611-12 (Scalia, J., concurring) (emphasis added).

In 2016, the U.S. Supreme Court declared Florida's death penalty scheme equally unconstitutional, noting that the "[t]he trial court *alone* must 'find the **facts**… [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'§

921.141(3).” *Hurst v. Florida*, 136 S. Ct. 616, 622 (2016) (emphasis added). As a result, in *Hurst v. State*, 202 So.3d 40, 53 (2016), the then majority, Chief Justice Labarga, and Justices Pariente, Lewis, and Quince, thoroughly reviewed U.S. Supreme Court precedent, Florida’s precedent and history, as well as the statutes as they had existed since 1973 and concluded:

> These necessary facts include, of course, each aggravating factor that the jury finds to have been proven beyond a reasonable doubt. However, the imposition of a death sentence in Florida has in the past required, and continues to require, additional factfinding that now must be conducted by the jury. As the Supreme Court long ago recognized in *Parker v. Dugger*, 498 U.S. 308, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991) under Florida law, “The death penalty may be imposed only where *sufficient aggravating circumstances* exist that *outweigh* mitigating circumstances.” *Id*. at 313, 111 S. Ct. 731 (emphasis added) (quoting § 921.141(3), Fla. Stat. (1985)).

The Court made clear that in addition to the Sixth Amendment as interpreted by the Supreme Court in *Hurst v. Florida*- its decision in *Hurst v. State* was also grounded in the parallel right to trial by jury provided in Art. 1, § 22, Fla. Const. The Court explained the Eighth Amendment’s “evolving standards of decency” further supported its conclusion that a twelve-member jury’s final recommendation for death must be unanimous.[6] In holding Ch. 2016-13, Laws of Fla. (2016),

[6] The Court noted the foundational precept is the “principle that death is different.” *Hurst,* 202 So. 3d at 60. But more importantly, the Court emphasized Florida’s outlier status as one of only three states which still permit the imposition of death without unanimity. Thus, the Court expressly intended to ensure the “future validity and long-term viability of the death penalty in Florida” in accordance with federal law. *Id*. at 61-62.

unconstitutional in *Perry v. State*, 210 So. 3d 630 (2016),[7] the Court reiterated the importance of unanimity in the final verdict.[8] The State subsequently appealed *Hurst v. State*'s statutory construction to the U.S. Supreme Court on February 13, 2017. Thereafter, the Florida Legislature confirmed the Court's statutory construction as set forth in *Hurst v. State* with the enactment of Ch. 2017-1, Laws of Fla. (2017). The U.S. Supreme Court denied the State's petition May 22, 2017.

On January 23, 2020, a newly composed five-Justice Court decided to recede from *Hurst v. State* in *State v. Poole*, __So. 3d.__, 2020 WL 370302 (Fla. Jan. 23, 2020). In rejecting its own precedent, the statutory construction of § 921.141, Fla. Stat. set forth in *Hurst v. State*, the unanimity requirement, as well as reinstating a vacated death sentence where *Hurst* relief has been granted, this Court has demonstrated the arbitrary nature of Florida's capital sentencing scheme. *Poole* in and of itself reveals that Florida's legal system permits the arbitrary infliction of death while ignoring the Eighth Amendment's twin objectives of "measured

[7] Receded from on other grounds by *Rogers v. State*, 285 So. 3d 872 (Fla. 2019) (per curiam) (pending certiorari review, *Rogers v. Florida*, Docket No. 19-8473).

[8] The Court also noted that the revised statute now expressly states that a defendant is **ineligible** for a death sentence unless the jury unanimously finds at least one aggravating factor, "[o]f course, this change is consistent with preexisting case law. *See, e.g.*, *Steele*, 921 So. 2d at 543." *Perry*, 210 So. 3d at 637; *Contra State v. Steele*, 921 So. 2d 538, 545 (Fla. 2005), "Nothing in the statute… requires a jury to agree on *which* aggravating circumstances exist."

consistent application and **fairness to the accused**." *Eddings v. Oklahoma*, 455 U.S. 104, 111 (1982) (emphasis added).

Mr. Randolph has been on death row for thirty-one (31) years. His case is emblematic of the arbitrariness that *Furman* warned of. As will be established below by Mr. Randolph's tortured procedural history, his death sentence is far from reliable. Following Mr. Randolph's direct appeal, where this Court rejected his claims related to capital sentencing as "meritless" rather than providing an individualized justification for imposing the most severe sentence on Mr. Randolph in comparison to other defendants found guilty of murder, Mr. Randolph's case then spent thirteen (13) years bouncing back and forth between the circuit court and this Court.

Two days after Mr. Randolph filed his initial Rule 3.850 motion, this Court declared that Mr. Randolph's case be consolidated with eight (8) other capital defendants who also raised conflict of interest claims regarding trial counsel, Howard Pearl. At the 1992 consolidated evidentiary hearing it was revealed for the first time that both Mr. Randolph's trial counsel and the judge who sentenced him to death, Judge Perry, served as special deputy sheriffs. Despite this testimony, the circuit court denied all relief. On appeal, this Court determined the consolidated hearing was a violation of Due Process and remanded Mr. Randolph's case for an individualized evidentiary hearing.

In 1997, the State Attorney's Office appeared at the evidentiary hearing with new records, which had never been produced. The records revealed improper *ex parte* communications between the Judge's law clerk and the State Attorney's Office. Following the 1997 hearing, the circuit court denied all claims related to trial counsel, but granted a hearing on the *ex parte* issue. At the 1998 hearing, unrebutted testimony from the Judge's law clerk confirmed that the State Attorney assisted her in drafting the Judgement and Sentence, at Judge Perry's direction. The circuit court again denied relief.

At oral argument, this Court became concerned by the circuit court's denial of relief as the court had denied Mr. Randolph the necessary tools to fully investigate his claim. In addition, this Court was concerned by the appearance of impropriety. Thus, Mr. Randolph's case was yet again remanded for a third evidentiary hearing. This hearing was meant to determine whether his death sentence had been imposed by a neutral and detached judiciary, independent of the State Attorney's Office. Once again, the circuit court denied Mr. Randolph the ability to fully investigate and present his claim. Not only did the court fail to provide requisite notice, the court's order did not even address the relevant proffered testimony—testimony which confirmed Judge Perry had a practice of asking State Attorney's to draft his Judgement and Sentence. While this Court reprimanded Judge Perry's behavior in

civil cases, this Court rubber stamped the circuit court's order denying Mr. Randolph relief.

Moreover, unlike the majority of capital defendants in Florida, Mr. Randolph perfectly preserved the issue that was validated by *Hurst v. Florida*. Not only did Mr. Randolph's trial counsel file *Ring*-like motions in 1989, he also objected to jury instructions during trial and argued that Florida's capital sentencing scheme violated the Sixth, Eighth, and Fourteenth Amendments. Despite adverse rulings, Mr. Randolph continued to preserve this issue on direct appeal and in collateral proceedings. And while Mr. Randolph stands in the same procedural posture as the defendant in *James v. State*, 615 So.2d 668 (Fla. 1993), Mr. Randolph has not received the same treatment.

The facts provided below are relevant to claim presented herein as they further illuminate the arbitrary and capricious nature of Florida's capital sentencing scheme. It can hardly be said that Mr. Randolph's death sentence is compatible with the reliability envisioned by *Furman* and mandated by the Eighth and Fourteenth Amendments to the U.S. Constitution.

PROCEDURAL HISTORY AND SENTENCING FACTS[9]

[9] In this brief, Mr. Randolph will not set forth the extensive facts of the case as they were detailed in this Court's direct appeal opinion. *Randolph v. State*, 562 So. 2d 331 (Fla. 1990). Mr. Randolph does, however, provide a factual summary of the facts adduced at trial and in postconviction which are relevant to the instant appeal.

Trial

Mr. Randolph was indicted on September 1, 1988, and charged with the offenses of first-degree murder (either through "a premeditated design…or to perpetuate a robbery and/or sexual battery"), armed robbery, sexual battery, and theft charges. (R. 11-12). The court appointed the Putnam County Public Defender Howard Pearl[10] to represent Mr. Randolph. (R. 8). After a brief three-day hearing, Mr. Randolph was convicted as charged on February 23, 1989. (R. 583-84).

Prior to trial, on October 10, 1988, trial counsel requested the appointment of Dr. Krop as a confidential mental health expert to assess competency, sanity, and statutory and non-statutory mitigation. (R. 21). The Honorable Judge Perry granted the request. (R. 22). Dr. Krop's evaluation revealed "a history of physical abuse and neglect" as well as a recommendation to obtain additional information from Mr. Randolph's parents regarding his background and childhood. (PCR. 900-01). As a result, on November 30, 1988, Pearl requested a continuance citing the incomplete status of the mental health evaluations, forensic evaluations, investigation, discovery, and depositions. (R. 30). After granting this motion, the court also granted Pearl's request for the appointment of a neurologist, Dr. B. J. Wilder. (R. 42-43). Dr. Wilder's report revealed that Mr. Randolph's 1979 closed head injury

[10] In 1979, Howard Pearl was given the responsibility of representing all defendants accused of capital crimes assigned to the Public Defender's Office of the Seventh Circuit. (PCR. 2810).

rendered him unconscious for one hour, that he had a childhood psychiatric referral, drug use, and high blood pressure. (PCR. 905).

Ahead of trial, Pearl was consumed by the re-trial of Johnny Robinson[11] in St. Augustine, Florida. (R. 712; 786; 1873). Consequently, on February 16, attorney Henderson from the Public Defender's Office filed motions on Mr. Randolph's behalf. In addition to presenting a proposed preliminary jury instruction regarding potential *Caldwell*[12] issues (R.127-28), he filed a "Motion For Use of Special Verdict Form For the Unanimous Jury Determination of Statutory Aggravating Circumstances." (R. 125-26). The motion argued: 1) the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution and Article 1, Sections 9, 16, and 22 of the Florida Constitution (1976) require unanimous jury determination of all essential elements of the offense for which he is to be punished; 2) the statutory aggravating circumstances set forth in § 921.141(5), Fla. Stat. are substantive elements; and 3) it is the jury's function to make the specific factual findings to determine death eligibility.

Before trial, on February 20, 1989, Henderson argued the four motions on Mr. Randolph's behalf: to prohibit reference to the advisory role of the jury; request for

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[11] *See Robinson v. State*, 707 So. 2d 688 (Fla. 1998) (affirming denial of postconviction relief but noting trial counsel Pearl's performance was "probably deficient," for failing to investigate mitigation when urged to do so by Dr. Krop).

[12] 472 U.S. 320 (1985).

special penalty phase verdict forms; request for individual and sequestered voir dire; and a motion declaring HAC and CCP unconstitutional for failing to adequately narrow the class of persons eligible for the death penalty in accordance with the Eighth Amendment. (R. 105-32). The court denied all motions and directed the prosecutor, ASA Alexander, to draft the order. (R. 775-93). Mr. Randolph's guilt phase began shortly thereafter.

During the guilt phase portion of Mr. Randolph's trial, Pearl made a motion to compel the State to elect between the two felonies alleged in support of the felony murder charge. (R. 1391-1392). The court denied the motion. (R. 1392). The jury retired for deliberations at 12:12 p.m. on February 23, 1989. (R. 1617). In the course of deliberations, at 2:08 p.m., the jury submitted a question to the bailiff. (R. 582). The question concerned whether the jury had to reach unanimous consent regarding the first-degree murder charge, *i.e.* whether they had to "unanimously agree that it was based on premeditation, felony murder based on robbery and/or sexual battery, or simply murder in the first-degree." (R. 528, 1621-22). Pearl requested the jury be instructed that they are required to unanimously agree to either premeditated murder or felony murder, and that if they could not agree then they would be unable to reach a verdict. (R. 1622-23). The court denied the request and over trial counsel's objection instructed the jury to "simply follow the verdict forms in announcing a unanimous verdict as to each count of the indictment." (R. 1623-24). Following this

instruction at approximately 2:30 p.m., the jury once again retired, and returned at 2:50 p.m., finding Mr. Randolph guilty of all counts, as charged. (R. 583-91, 1625-26).

The guilt phase concluded on February 23, 1989, and the penalty phase portion of Mr. Randolph's trial occurred on February 24, 1989. During the penalty phase both the State and defense presented evidence. The State presented the testimony of the medical examiner and post-autopsy photographs of the victim,[13] over the objection of trial counsel, (R. 1674-85), and trial counsel presented one witness, Dr. Krop.

Dr. Krop testified to the physical and mental abuse Mr. Randolph suffered at the hands of his adoptive parents. (R. 1733). His mother was emotionally unstable while his father was physically abusive, tying Mr. Randolph up and beating him all over his body with a broomstick and a belt. (R. 1733). He also testified about Mr. Randolph's emotional deficiencies as well as the atypical personality disorder he suffers from which Dr. Krop believed contributed to the offense. (R. 1726; 1731-32). Dr. Krop also testified about Mr. Randolph's time in the military and how Mr. Randolph began abusing marijuana and cocaine prior to his honorable discharge. (R.

[13] Following the medical examiner's testimony, the court indicated it would not allow the photographs to go back to the jury room or to be exhibits as the witness did not testify as the court expected and thus the court felt that the photos were overly prejudicial. (R. 1687-97). However, the court also denied the defense motion to strike the photos. (R. 1696).

1734). Mr. Randolph began using crack cocaine in 1984. (R. 1734). Dr. Krop opined that Mr. Randolph's abnormal personality was greatly influenced by his drug addiction at the time of the offense. (R. 1737; 1740; 1742). He testified that Mr. Randolph regretted what happened and was ashamed and felt remorse for what he had done. (R. 1741). Dr. Krop concluded that Mr. Randolph's criminal behavior was influenced by his drug addiction. (R. 1742). The State did not present any evidence to negate the statutory mitigating circumstance of no prior criminal history regarding Mr. Randolph. (R. 1645-1760; 1788-89).

At the penalty phase charge conference, trial counsel objected to the jury being instructed on the aggravating circumstance of "avoid arrest," contending that there was no evidence to support that aggravator. (R. 1766-68). The court overruled the objection. (R. 1768). When the State sought to change the aggravating factor concerning during the course of a felony from "during the course of a robbery/and or sexual battery," as had been charged in the indictment, to simply "during the course of a sexual battery," Pearl objected. (R. 1768-72). Pearl argued: "[w]e have no way of knowing from the verdict what the jury convicted the defendant of. They may have easily found that he was guilty of felony murder because of the sexual battery, or of the robbery, but not necessarily of both. And without this, it does not rise to the dignity of proof beyond a reasonable doubt." (R. 1769). Pearl alleged the State was manipulating the aggravating circumstances in order to obtain both

"during the course of a felony" aggravator and the "for pecuniary gain" aggravator, without violating the prohibition against the improper doubling of two aggravators which are based on the same aspect of the offense. (R. 1770-72). The court overruled the objection. (R. 1772). Pearl then objected to the jury being instructed on the aggravator that the murder was HAC, challenging the aggravator as unconstitutionally vague, (R. 1777-78), but this too was denied. (R. 1781). Thereafter, Pearl renewed his earlier motion requesting that the jury have a special verdict form to identify the aggravating circumstances it had found, and it was again denied. (R. 1797-98).

Mr. Randolph's jury was ultimately instructed on four aggravating factors: 1) the murder was committed during the commission of a sexual battery; 2) the murder was committed for the purpose of avoiding arrest; 3) the murder was committed for pecuniary gain; and 4) HAC. (R. 1842). In terms of mitigation instructions, the court instructed the jury on the statutory mitigating circumstances of: 1) no prior criminal history; 2) the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance; and 3) the age of the defendant at the time of the crime. (R. 1843).

After a brief 1-hour deliberation, the jury returned and recommended a sentence of death by a vote of eight (8) to four (4) for the killing of Minnie Ruth McCollum. (R. 1850).

After the conclusion of the penalty phase on February 24, 1989, trial counsel filed a motion for a new trial alleging that both verdicts (innocence/guilt and penalty phase) are contrary to the law and the weight of the evidence. (R. 600-604). Amongst his claims, in "paragraph 5," Pearl alleged that "the statutory scheme by which an advisory verdict is decided by a majority, rather than unanimously, fails to genuinely limit the class of persons eligible for the death penalty, and thereby deprives the proceedings of requisite certainty, making the determination of the advisory verdict a lottery." (R. 600).

On March 7, 1989, the court was set to hear arguments on the motion for a new trial, but prior to the hearing, Pearl had prepared a letter detailing mitigating aspects which he believed the court should consider prior to sentencing Mr. Randolph. The letter was entered into evidence as Defense Exhibit #1 and detailed Mr. Randolph's crack addition, remorse, and described his intent to steal money to support his drug addiction and to leave the store without detection. (R. 606-07).

At the outset of the March 7, 1989 hearing, the court noted, "[p]argraph 5 is an interesting paragraph to me. Something I had not heard before." (R. 1861). As a result, trial counsel began his argument by focusing on *Furman v. Georgia*, and *Proffitt v. Florida.* Pearl explained that since the issuance of *State v. Dixon*,[14] many additions have been made to Florida's statutory scheme as set forth in § 921.141,

[14] 283 So.2d 1 (Fla. 1973).

Fla. Stat. which have effectively altered the balance to increase the odds in favor of death. (R. 1863-62). In response, the State alleged that there was simply no evidence that the jury decided "their penalty… by a lot." (R. 1872). In rebuttal, Pearl maintained that Florida's capital sentencing scheme amounted to a "lottery." (R. 1876). Following closing arguments, the court denied relief and directed ASA Alexander to draft the order. (R. 1882; R. 610-11).

On March 27, 1989, Pearl gave probation his input. (PCR. 983). Probation finished preparing its pre-sentence investigation (PSI) report on Mr. Randolph on March 30, 1989. (PCR. 948-63).[15] The PSI report was approved by the Probation Supervisor on April 3, 1989, two days before Mr. Randolph's sentencing hearing. (PCR. 957). The PSI indicates that at the time of the offense, Mr. Randolph had been a street person and homeless for several weeks, and had even been found sleeping inside a dumpster. (PCR. 950). The report also noted Mr. Randolph's extreme remorse, shame, and the sorrow that he felt for the victim's family. (PCR. 950).

Furthermore, the PSI detailed Mr. Randolph's history of drug abuse and addiction. According to the PSI, Mr. Randolph received psychiatric treatment as a child and began drinking at the age of 16. (PCR. 954-55). His adoptive mother was classified as an alcoholic, which resulted in physical abuse at home. (PCR. 955). Mr.

[15] The PSI report exists in the direct appeal record, however due to COVID-19, counsel is without access and will reference the PSI as it appears in the postconviction appeal.

Randolph's drug abuse increased after entering the U.S. Army. (PCR. 955). By the summer of 1985, Mr. Randolph had become addicted to crack cocaine. (PCR. 955). And on the night prior to the offense, [16] Mr. Randolph spent approximately $300.00 on crack. (PCR. 950). In the report, Mr. Randolph described his crack cocaine usage as "pathetic" noting that he had spent all of his money on crack. (PCR. 955). Both Mr. Randolph and his father felt that this crime would not have been committed if Mr. Randolph was drug free. (PCR. 950, 955).

The PSI also described Mr. Randolph's education. (PCR. 953). Mr. Randolph graduated high school in 1980 and was ranked 77 in a class of 82 students, with an average GPA of 1.07. (PCR. 953, 994). Most importantly, the PSI revealed that Mr. Randolph's prior criminal history consisted of only misdemeanor convictions, two of which were the product of the domestic abuse suffered by Mr. Randolph at the hands of his alcoholic, emotionally unstable, mother, Pearl Randolph. (R. 621-22; PCR. 955). While this information was not made available to the jury before they reached their eight (8) to four (4) recommendation, trial counsel urged Judge Perry to review the PSI and to consider Mr. Randolph's statement of extreme remorse.

At the April 5, 1989, sentencing hearing, Pearl reiterated Mr. Randolph's admitted remorse, the PSI, his March 7, 1989 letter, and Mr. Randolph's potential

[16] The PSI indicates the offense was committed between 5:30 and 6:00 a.m. (PCR. 964).

for rehabilitation. (R. 1889-90). ASA Tanner presented the State's argument, and despite acknowledging Mr. Randolph's youth (26 years old), Tanner argued that the court had no choice but to impose death. (R. 1892). Immediately thereafter, without recess, Judge Perry began reading the Judgement and Sentence, sentencing Mr. Randolph to death on the murder charge alone. (R. 1895-1905). Judge Perry then signed the written Judgment and Sentence and directed that it be filed for the record. (R. 1906; 641-52).

Judge Perry imposed death after finding the four aggravating circumstances upon which the jury had been instructed. (R. 641-43). In finding the "in the course of a sexual battery aggravator," the court wrote, "**in this Court's mind** [the injuries] are consistent with that of a brutal and violent rape,"[17] (R. 642) despite the medical examiner's testimony that the injuries to the victim did not appear to be of the type

[17] As will be discussed later in Mr. Randolph's procedural history, the majority of the language supporting "the in the course of a sexual battery" aggravator was drafted by then ASA Alexander according to State Attorney records produced November 26, 1997. The 1997 record production revealed a draft copy of the Judgement and Sentence which differed from the Judge's law clerk's saved draft. The State Attorney's draft contained the following additional language, after the "*helpless on the convenience store floor*" and before the "*non-motile sperm*":

> "The Defendant's version of the sexual battery **in this Court's opinion** runs contrary to the evidence introduced at trial. Autopsy photos that this Court admitted into evidence **but did not allow the jury to view,** in order to insure the Defendant a fair trial, show massive bruising and trauma between the upper thighs and the general vaginal area which, **in this Court's mind**, are consistent with that of a brutal and violent rape. The Defendant's version of the rape is incredible and most unbelievable. Non-motile sperm…" (PCR. 4239-4259).

caused by a forceful sexual battery. (R. 1695-96). In support of the "avoid arrest aggravator," the court wrote that because the victim knew the defendant, and could identify him to law enforcement, then the avoid arrest aggravator had also been proven beyond a reasonable doubt. (R. 642). In justifying the pecuniary gain aggravator, the court wrote "the facts adduced at trial show conclusively that the Defendant was interrupted by the victim when in the process of attempting to steal money and/or lottery tickets from the Handy Way Store." (R. 643).

The court rejected two statutory mitigating factors upon which the jury was instructed: 1) no significant history of criminal activity based upon the information contained in the PSI report (which had not been made available for the jury and **revealed no prior felony convictions**) and rejected 2) the extreme mental or emotional disturbance mitigating factor. (R. 644). The sentencing order did not address the statutory mitigating factor of the defendant's youth which trial counsel had argued before the jury. Instead, the order states: the "Defendant has not proven or argued any other statutory mitigating circumstances." (R. 645). The court gave "very little weight" (if any) to four non-statutory mitigating circumstances: 1) the defendant was a crack cocaine addict;[18] 2) the defendant was adopted and never

[18] Given that the sentencing order considered this mitigating circumstance as a "self-serving assertion," it does not appear the trial court gave it any weight. (R. 645).

bonded with his mother;[19] 3) the defendant possesses an atypical personality disorder;[20] and 4) he expressed remorse and shame for his conduct. (R. 645-46). The court ultimately concluded that "any of the aggravating factors found to exist would outweigh all mitigating factors; statutory and non-statutory." (R. 645-46).[21]

Direct Appeal

In 1989, Mr. Randolph was represented by James Gibson in his direct appeal. *Randolph v. State*, 562 So. 2d 331 (Fla. 1990). Mr. Gibson raised eleven arguments in the Initial Brief, however, only the relevant claims will be discussed herein.

On direct appeal, Mr. Randolph again challenged the trial court's denial of his motion for special verdict forms during the penalty phase, noting, "[d]efense counsel specifically requested that the trial court require the jury to make written findings of the aggravating factors which it found. The court denied this request." Initial Brief at 52. Appellate counsel also cited to the dissenting opinion in *Burch v. State* in

[19] It's unclear what weight, if any, the court gave to this factor as the order states the defendant's "mother has a history of mental health problems. Regardless… he was loved by both parents. Thus, this factor even if proven does rise to a mitigating circumstance which would… outweigh the aggravating circumstances found to exist." (R. 646).

[20] The court found this factor proven by a preponderance of the evidence but considered it too "weak" to rise to the level to outweigh any statutory aggravation. (R. 646).

[21] This language is particularly relevant to the unreliability of Mr. Randolph's death sentence in light of the public records withheld by the State Attorney's Office until November 26, 1997.

support of his claim. Initial Brief at 51; *Burch v. State*, 522 So. 2d 810, 815 (Fla. 1988) (Shaw, Ehrlich, and Grimes, JJ., dissenting) (emphasis added) (internal citations omitted).

> [O]ur decision to vacate the death sentence rests entirely on the advisory recommendation of the jury which has rendered no factual findings on which to base our review. This treatment of an advisory recommendation as virtually determinative cannot be reconciled with e.g., Combs and our death penalty statute. Moreover, the situation of largely unfettered jury discretion is disturbingly similar to that which led the Furman court to hold that the death penalty was being arbitrary and capriciously imposed by a jury with no method of rationally distinguishing between those instances where death was the appropriate penalty and those where it was not. **Absent factual findings in the advisory recommendation, any distinctions we might draw between cases where the jury recommends (sic) death and those where it recommends life, must, of necessity, be based on pure speculation. This is not a rational system of imposing the death penalty as Furman requires.**

Between trial and direct appeal, however, the U.S. Supreme Court rendered its decision in *Hildwin v. Florida*, 490 U.S. 638 (1989).[22] Mr. Randolph recognized that this ruling constituted a determination "that the Sixth Amendment does not require the jury to specify the presence of statutory aggravating circumstances." Initial Brief at 52. Nonetheless, Mr. Randolph argued that because of the refusal to require a written jury determination of the aggravating circumstances, "when the

[22] As a result of *Spaziano*, *Hildwin* held: "it follows that it does not forbid the judge to make the written findings that authorize imposition of a death sentence **when the jury unanimously recommends a death sentence.** *Hildwin*, 490 U.S. at 640 (emphasis added).

jury recommends death this Court simply presumes that death is the appropriate penalty."[23] Initial Brief at 53.

Mr. Randolph argued that this resulted in the arbitrary and capricious review of death sentences, "based on the absence of any structured means by which to review in every case in which the death penalty is imposed the factual findings made by the jury to support its recommendation." Initial Brief at 54. Accordingly, "this Court does not provide a principled way to distinguish [cases] in which the death penalty was imposed, from the many cases in which it is not." *Id*.

In sum, Mr. Randolph alleged that the capital sentencing process as applied in Florida, which did not include written findings by a jury, violated the Eighth and Fourteenth Amendments to the U.S. Constitution as well as article I, section 22 of the Florida Constitution.[24]

This Court affirmed Mr. Randolph's conviction and sentences. *Randolph v. State*, 562 So. 2d 331 (Fla. 1990), *cert. denied*, *Randolph v. Florida*, 498 U.S. 992 (1990). In denying relief, the Court disregarded Mr. Randolph's arguments regarding the improper aggravation found by the trial court as "meritless and

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[23] *See Quince v. State*, 414 So.2d 185, 188 (Fla. 1982) ("[S]ince **death is deemed the proper penalty**, concerns that a general sentence interferes with the rehabilitative process are moot.") (emphasis added).

[24] Art. I, § 22, Fla. Const. states: "The right of trial by jury shall be secure to all and remain inviolate."

warranting no discussion." *Randolph v. State*, 562 So. 2d at 339. This Court also denied Mr. Randolph's allegation that this Court's appellate review results in the arbitrary and capricious imposition of the death penalty in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution in a footnote, citing *Hildwin v. Florida,* a Sixth Amendment case.

On May 18, 1990, Mr. Randolph filed Motion for Rehearing arguing that "[t]he Court failed to recognize that the argument presented herein was an Eighth Amendment claim, which was not addressed in the *Hildwin* case. *Hildwin* not being dispositive of the issue, the appellant asks this Court to reexamine the issue as it was presented here in the Eighth Amendment context." The Court denied rehearing on July 9, 1990, and issued a mandate on August 15, 1990.

Initial 3.850 Motion and the "Howard Pearl issue"

Mr. Randolph timely filed a motion for postconviction relief pursuant to Rule 3.850, on April 6, 1992.[25] On April 8, 1992, Chief Justice Shaw entered an order requesting the Chief Judge of the Seventh Judicial Circuit to consolidate all cases in

[25] Due to the delay in receiving his public records production, which had not been completed prior to the deadline set forth by Fla. R. Crim. P. 3.852, Mr. Randolph filed an amended Rule 3.850 motion on June 6, 1992. A second amended Rule 3.850 motion was filed following the December 18, 1992, testimony of Judge Perry, where he revealed for the first time that he had been a special deputy sheriff during Mr. Randolph's capital trial. (PCR. 6337-58).

which capital postconviction defendants had raised "Howard Pearl" claims.[26] *See generally Teffeteller v. Dugger*, 676 So. 2d 369 (Fla. 1996). The consolidated case was assigned to Senior Judge B.J. Driver for evidentiary development.

Prior to the evidentiary hearing, Mr. Randolph's investigator sought documentation from the Pinellas County Sheriff's Office regarding whether Judge Driver himself had ever been a special deputy. The investigator was informed by the Internal Affairs Department that Judge Driver had not been a special deputy. On November 18, 1992, Mr. Randolph filed the defense witness list which included all then known special deputies. Afterwards, Mr. Randolph received public records as a result of a subpoena served on the Pinellas County Sheriff's Office. The records obtained from the sheriff's office established that Judge B. Driver served as a special deputy sheriff with their office from 1958-1988.

1992 Evidentiary Hearing

At the start of the evidentiary hearing held on December 15, 1992, Mr. Randolph filed a motion to disqualify Judge Driver. Mr. Randolph alleged that it

[26] Public Defender Pearl represented Mr. Randolph and at least eight other death row inmates at their respective trials, all of which resulted in death sentences. Following the trials, it was discovered that Pearl was a special deputy sheriff in Marion County and an honorary deputy sheriff in Lake and Volusia Counties while representing them and while serving in the Capital Division of the Public Defender's Office. Pearl continued as a special deputy sheriff until May 1, 1989, when he resigned due to the matter coming to light in *Harich v. State*, 573 So. 2d 303 (Fla. 1990) (executed April 24, 1991). Thus, nine defendants raised conflict of interest claims in postconviction proceedings.

would be a denial of his due process rights if Judge Driver presided over the case given that the issue remanded by this Court was "Howard Pearl's status as a special deputy." Mr. Randolph also filed an Emergency Petition to Prohibit and/or Stay the Proceedings before Judge Driver. The Court denied the motion. *Randolph v. Driver*, 614 So. 2d 503 (Fla. 1992).

At the consolidated evidentiary hearing conducted December 15-18, 1992, Howard Pearl testified that he applied for a special deputy sheriff position with the Marion County Sheriff's Department on August 8, 1970, to enable him to carry a firearm throughout the State of Florida.[27] (12/15 Tr., p. 161; 171). Pearl's certificate of appointment by which he represented himself to the public indicated that he was a regular deputy sheriff.[28] (12/15 Tr., p. 44-46; *Herring* Exh. 8). Sheriff Moreland[29] conceded that Pearl's ability to carry a firearm was provided by § 790.051, Fla. Stat. which only provided an exemption from licensing and penal provisions for firearms for law enforcement officers while acting within the scope of their official duties. (12/15 Tr., p. 55-59). Sheriff Moreland also testified that special deputy status was

[27] It should be noted that in 1987, the Legislature amended § 790.06, Fla. Stat., to allow ordinary citizens the ability to obtain statewide concealed firearm permits.

[28] Sheriff Moreland confirmed, that at the time, Florida statutes did not authorize "honorary" deputy sheriffs to carry a firearm. (12/15 Tr. p. 46).

[29] Sheriff Don Moreland reappointed Pearl in 1981 and 1985. (12/15 Tr., p. 161).

granted for "political reasons." (12/15 Tr., p. 134).[30] Pearl resigned in 1989 only after his supervisor insisted he do so because of the conflict of interest raised by Roy Harich and other defendants. (12/15 Tr., p. 163).

Pearl also testified that an appointment as a special deputy in any county in the Seventh Judicial Circuit would have been a conflict of interest because he "would have felt that my relationship with law enforcement would have been distorted." (12/18 Tr., p. 32). Yet, Pearl never told any of his clients about his status, as "it had nothing to do with anything I was doing for them." (12/15 Tr., p. 202). However, the Marion County Sheriff's Department had mutual aid agreements to assist the sheriffs of other counties if the need arose (12/15 Tr., p. 117-119) and at the time Pearl represented Mr. Randolph, such an agreement existed between Marion County and Putnam County. (12/15 Tr., p. 119). Pearl did not dispute that the duties of a law enforcement officer and a defense attorney are mutually inconsistent. (12/15 Tr., p. 211).

Judge Perry who presided over Mr. Randolph's trial also testified at the evidentiary hearing. Judge Perry recalled that Mr. Randolph's trial occurred in early 1989. (12/18 Tr., p. 64). He testified that he was not aware of Pearl's appointment

[30] The State similarly characterized special deputy status as "a widespread quaint practice of political patronage" *See* State's Response to Motion to Relinquish Jurisdiction in the case of *Roy Swafford*, Case No. 80-182, (Dec. 21, 1992)

as a special deputy at that time. (12/18 Tr., p. 64).[31] He also testified that if he had known, he would not have felt the need to inform Mr. Randolph. (12/18 Tr., p. 67).

Judge Perry was asked whether he was familiar with the label "special deputy sheriff," and he responded, "it means different things to different folks in different places." (12/18 Tr., p. 75). Judge Perry was then questioned as to whether he had ever been a special deputy to which he replied, "I think so." (12/18 Tr., p. 75). In response to whether he had ever been a special deputy in Putnam County, Judge Perry testified, "I don't really think so… I may well have been. But I certainly was not active." (12/18 Tr., p. 76). As a result of this disclosure as well as this Court's public reprimand of Judge Perry, for amongst other things, engaging in improper *ex parte* communications, Mr. Randolph filed an amended Rule 3.850 motion on February 23, 1993. *See In re Perry*, 586 So. 2d 1054 (Fla. 1991).[32]

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[31] Pearl, however, testified that Judge Perry was aware of his special deputy status at the time of Mr. Randolph's trial. (12/18 Tr., p. 31); (PCR. 3177). In fact, Pearl testified that Judge Perry knew he carried firearms into court and had previously asked him not to do so. (12/18 Tr., p. 32). Moreover, Judge Perry presided over the Joel Wright evidentiary hearing held in October of 1988 where Mr. Wright specifically filed a conflict of interest claim regarding Pearl's special deputy status. Judge Perry summarily denied the claim in 1988, before Mr. Randolph's 1989 trial.

[32] Judge Perry stipulated to his improper *ex parte* communications and misconduct in at least four separate civil cases. *See Teeft v. Lunda Cheese Corp. of Florida*, 577 So. 2d 1004 (Fla. 5th Dist. 1991) (overruling Judge Perry's verdict in a non-jury trial due to his *ex parte* communications which denied the defendant his right to due process and a fair and impartial tribunal). But before agreeing to stipulate to the allegations, Judge Perry filed a motion to recuse members of the Judicial Qualifications Commission (JQC) because he feared he would "not receive a fair

In his order denying relief on the "Howard Pearl issue," Judge Driver agreed with the State's position, that this Court had already denied the conflict of issue as presented in *Harich v. State*.[33] Judge Driver, like Judge Foxman, found that "Pearl's status as an honorary/special deputy sheriff was no secret. It was known to the judges of the court…likewise known to the assistant state attorneys whom he litigated against, as well as law enforcement officer[s]." (PCR.81,950 at 6597). Since "knowledge of Pearl's… status was readily available by simple discovery at the time each of the defendants was tried," the defendants could have sought different representation at the time of trial. (PCR.81,950 at 6598).[34] Thus, Judge Driver

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hearing." Judge Perry's affidavit noted, **"*the very basis of due process is to have a matter heard before an impartial person or panel*."** *See* Appendix 1. On June 10, 1991, Judge Perry, under oath, accepted the consequences of his actions, but noted, "my only mitigation for it is I thought that the judicial process was being besmirched by perjury, which no judge can tolerate and I acted too zealously to guard the process." This Court subsequently allowed Judge Perry to return to the bench.

[33] The State's memorandum of law specifically noted that this Court "agreed with the fact-findings made by Judge Foxman in rejecting the conflict of interest claim… Harich was ultimately executed April 24, 1991." (PCR. 6410-14).

[34] In *Jone*s *v. State*, 612 So. 2d 1370, 1373 (Fla. 1992), however, this Court held that a criminal defendant does not have a constitutional right to obtain different court-appointed counsel. Jones sought to have Pearl dismissed from representing him at his re-sentencing as Pearl had represented him during the original trial and Jones had since become aware of Pearl's special deputy status. This Court upheld Judge Perry's refusal to dismiss Pearl finding that it was "within the court's discretion." *See also, Jone*s *v. State*, 612 So. 2d 1370 at 1367 (Barkett C.J. dissenting) ("The trial court denied both Jones' and Pearl's motions with virtually no inquiry into the allegations…the trial judge… only expressed his confidence that Pearl would serve as an effective advocate…I cannot find that [Judge Perry] adequately addressed the

concluded that none of the nine (9) defendants represented by Pearl and sentenced to death had viable conflict of interest claims. (PCR.81,950 at 6593-6600). Mr. Randolph appealed this ruling on June 29, 1993.

In *Teffeteller v. Dugger*, 676 So. 2d 369 (Fla. 1996), this Court vacated Judge Driver's order and ruled that the consolidation of the Howard Pearl cases had violated the Due Process Clause. With other claims still pending in the circuit court, the Court vacated the order and held that Mr. Randolph was entitled to another evidentiary hearing on his postconviction claims.

1997 Evidentiary hearing

The evidentiary hearing on Mr. Randolph's initial Rule 3.850 motion (including the Howard Pearl issue) as well as a hearing on his Motion to Compel public records was conducted July 22-24, 1997, before the Honorable Judge Mathis. Prior to the start of the hearing, the State was unwilling to stipulate to the admissibility of the prior record from the "Howard Pearl" hearing. Once former Sheriff Moreland testified, the State agreed to stipulate to the admissibility of the evidence from the prior hearing. (PCR. 2997; 2986-3016).

At the evidentiary hearing, Mr. Randolph asked the State to jointly file a continuance motion as he wanted to investigate the voluminous records produced at

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defendant's allegations of ineffectiveness as is required by *Hardwick*) (internal citations omitted).

the evidentiary hearing. (PCR. 3153-54). The State refused (PCR. 3141-59) and the hearing continued. During the course of the hearing, the circuit court granted Mr. Randolph leave to depose the custodian of the Palatka State Attorney's Office regarding the newly produced public records. (PCR. 3131).

At the September 11, 1997 deposition, ASA John Stevenson produced a banker's box of documents containing an estimated 2,200 pages. Included in the box was a receipt charging CCRC for the 797 pages of documents disclosed during initial production in 1992. (PCR. 3760). As a result, Mr. Randolph requested a copy of the entire box of documents. The documents were received by Mr. Randolph's counsel on November 26, 1997. *See* PCR. 4239-4258. At a hearing held on December 4, 1997, the court granted Mr. Randolph sixty (60) days to file an amended Rule 3.850 motion.

On January 26, 1998, Mr. Randolph filed an amendment based on the discovery of a draft judgment and sentence and handwritten notes located within the State Attorney's files which did not exist in trial counsel's file nor match the final judgement and sentence signed and filed by Judge Perry. (PCR. 4239-4259). Thus, Mr. Randolph alleged that the requisite procedures as set forth in § 921.141, Fla. Stat. were not followed as the trial court improperly delegated his constitutional duty to independently (of the State) weigh the aggravating and mitigating circumstances to the State Attorney's Office. Mr. Randolph also alleged that beyond the Eighth and

Fourteenth Amendment concerns of an individualized and reliable sentencing proceeding, the issue also implicated the fundamental constitutional requirement of a neutral and detached judiciary.

On February 23, 1998, Judge Mathis issued an order granting an evidentiary hearing on the basis of Mr. Randolph's January amendment, but denied relief on all other claims in the Rule 3.850 motion, including Mr. Randolph's claim of ineffective assistance of counsel arising from Pearl's failure to investigate and present available mitigation evidence.[35] (PCR. 4586-4615).

On April 15, 1998, Mr. Randolph filed a Motion to Disqualify the State Attorney's Office and have his case reassigned to a prosecutor outside the Seventh Judicial Circuit due to the fact that several necessary witnesses who participated in his prosecution remained employed by the State Attorney's Office. (PCR. 4640-44). The court denied the motion. (PCR. 4648-49). Mr. Randolph also filed a Motion to Permit Discovery pursuant to *State v. Lewis*[36] requesting permission to depose ASA

[35] As noted earlier, Dr. Krop evaluated Mr. Randolph and recommended that Pearl obtain additional information regarding his background, *i.e*., family interviews, school records, *etc*. Pearl, however, never obtained any of those records or interviews because his approach to the penalty phase investigation was to leave it to Dr. Krop to: 1) be the judge of what was relevant and 2) conduct any investigation required. (PCR. 3181, 3193).

[36] 656 So. 2d 1248 (Fla. 1994).

Tanner, ASA Daly, and former ASA Alexander[37] regarding the *ex parte* issue. Mr. Randolph requested a hearing on this motion, but it too was denied. (PCR. 4648-49).

1998 Evidentiary Hearing

On April 24, 1998, an evidentiary hearing was conducted on the basis of Mr. Randolph's allegation that Judge Perry had failed to independently weigh aggravating and mitigating circumstances by either expressly relying upon findings prepared by the state attorney or by engaging in improper *ex parte* communications with the state attorney as to the findings included in the judgement and sentence. At the hearing, the State stipulated that the draft judgment and sentence came from the State Attorney's file. (PCR. 5313; Ex. 1). Not only did the draft contain notations, such as "insert marks," (PCR. 4681), the draft language differed from the final judgement and sentence entered by Judge Perry on April 5, 1989.[38] *Compare* R. 641-47 *with* PCR. 4681-88, Ex. 1, Judgement and Sentence (State's file) *and* PCR. 4689-95, Ex. C (Ms. Koller's copy).

At the evidentiary hearing, Mr. Randolph presented Judge Perry's former law clerk (now assistant State Attorney), Ms. Pamela Koller, who's unrebutted testimony

[37] ASA Alexander had since become Judge Alexander in the Seventh Judicial Circuit.

[38] Mr. Randolph's concerns were further supported by this Court's public reprimand of Judge Perry for engaging in improper *ex parte* communications. *In re Perry,* 586 So. 2d 1054 (Fla. 1991).

confirmed that she remembered ASA Alexander "being in her office" and "assist[ing] with some language." (PCR. 5324). Specifically, he assisted with the language regarding the weighing of aggravation against mitigation: "[i]n fact any of the aggravating factors found to exist would outweigh all mitigating factors; statutory and non-statutory." (PCR. 5331). According to Ms. Koller, this was done because Judge Perry was concerned by recent case law and "wanted to ensure that his order would not be reversed on appeal." (PCR. 5323).

Ms. Koller testified she could not recall when this assistance occurred, but remembered that once Judge Perry heard the evidence at trial (February 20-23), "he never intended to do anything else."[39] (PCR. 5353-54). However, in addition to that specific insertion, ASA Alexander also drafted the majority of the language for the "in the course of a sexual battery aggravator." (PCR. 5330, Ex. 1, *see also*, n.5). Ms. Koller testified that she retained a copy of the original draft judgement which she had personally written and her draft did not contain the additional language located in the "in the course of a sexual battery" aggravator. (PCR. 5328, 5330, *see also* Ex. C, PCR. 4689-95). As a result, Mr. Randolph alleged that his death sentence is the product of an unreliable and unconstitutional sentencing proceeding as the improper communication casts serious doubt as to whether the trial judge performed his

[39] It should be noted that the letter detailing mitigating circumstances was presented by Pearl at the March 7, 1989, hearing and the PSI indicating a lack of a prior criminal history was not completed until two days prior to sentencing.

constitutionally required duty independently. Given the timing of the PSI report and the State Attorney draft, it also raised the question as to whether Judge Perry gave any effect to Mr. Randolph's character or record rather than just the circumstances of the offense as mandated by the Eighth Amendment.

On May 14, 1998, Judge Mathis issued an order denying relief. (PCR. 5182-84). Despite finding the communication between the State Attorney's Office and the judge's law clerk without the presence of defense counsel "improper," the court deemed the improper contact "purely ministerial in nature." (PCR. 5183-84). However, Judge Mathis' order never made any findings as to how the draft judgement and sentence made its way into the State Attorney's file, and not into trial counsels file.

On August 13, 1998, Mr. Randolph appealed to this Court. Amongst his claims, Mr. Randolph alleged that he had been denied a neutral and detached judge in violation of the Due Process Clause. Mr. Randolph also alleged that Judge Perry impermissibly delegated his independent duty to the State and unlawfully predetermined that he would sentence him death. In addition, Mr. Randolph presented the "Howard Pearl" issue, alleging that trial counsel's undisclosed status as a special deputy denied his right to conflict-free counsel. Mr. Randolph alleged that Judge Perry was likewise obligated to disclose his status as a special deputy, and

his failure to do so evinced bias and violated Mr. Randolph's right to due process and a fair trial.

During oral argument, this Court questioned the State about the existence of the draft order in the State Attorney's file. In response, the State alleged that Mr. Randolph "never proved how the draft order got into the prosecutors file." This prompted the Court to ask why the circuit court had denied Mr. Randolph's motion to depose the State Attorney's. The State replied because, "it was a fishing expedition." This Court once again inquired as to how the State received the draft, and again the State replied, "Mr. Randolph never proved it." This Court then asked about Judge Perry's special deputy sheriff status. In response to whether there was any evidence in the record that Judge Perry had been a special deputy sheriff in Putnam County, the State replied, "I'm not sure that there was…they don't tell us what evidence they have to prove this claim." *See* Transcript of Oral Argument Case No. SC93-675.

Following oral argument, on December 22, 2000, this Court relinquished jurisdiction for additional development of evidence of "appellant's claim regarding improper *ex parte* communications between the state and the judiciary during appellant's trial."[40] (PCRS. 977). On January 24, 2001, Mr. Randolph filed a Motion

[40] Specifically, this Court ordered the circuit court to grant Mr. Randolph leave to depose the State Attorney's involved in his prosecution which Judge Mathis had previously denied.

to Permit Discovery to depose additional State Attorneys who had already testified in other evidentiary hearings regarding Judge Perry's practice of asking State Attorney's to draft sentencing orders.[41] (PCRS. 985-89). Mr. Randolph sought to depose State Attorney's Robert McLeod and Richard Whitson who testified at the Randall Scott Jones evidentiary hearing. At the Jones hearing, ASA McLeod was asked about Judge Perry's "standard practice and procedure" in having state attorney's draft his judgments and sentences in death cases. (PCRS. 1228). ASA McLeod testified that he was asked to do it by Judge Perry "in the Colina[42] case and in the Jones[43] case… those were the only two death penalty murder cases that I prosecuted before Judge Perry." (PCRS. 1228).

On January 26, 2001, Mr. Randolph filed another Motion to Disqualify State Attorney's Office of the Seventh Judicial Circuit. Mr. Randolph once again argued that "improper *ex parte* communications are a two-way street. As such, it is Mr.

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[41] Mr. Randolph sought these additional depositions to obtain material evidence as Judge Perry had passed away and therefore could not be deposed.

[42] *Colina v. State*, 570 So. 2d 929 (Fla. 1990) (remanded for a new sentencing proceeding because Judge Perry excluded statements offered by the defense and allowed the state to present evidence of non-statutory aggravating circumstances).

[43] *Compare Jones v. State*, 845 So. 2d 55, 65 (Fla. 2003) *with Randolph v. State*, 853 So. 2d 1051, 1059 (Fla. 2003). Both cases involve allegations of improper *ex parte* communications between Judge Perry's law clerk, Ms. Koller, and the State. Judge Mathis found that Ms. Koller **did** engage in improper *ex parte* contact whereas Judge Nichols concluded that she **did not** in *Jones*. This Court upheld the circuit court's findings in both cases.

Randolph's assertion that the State Attorney's Office, like Judge Perry, is a real party in interest which must defend itself against a charge of impropriety." (PCRS. 990-96). Mr. Randolph argued that ASA Tanner, former ASA Alexander, and ASA Daly are necessary witnesses in the matter, who are still employed by the office,[44] thus it would be appropriate to disqualify the entire State Attorney's Office of the Seventh Judicial Circuit. On February 14, 2001, Judge Mathis denied Mr. Randolph's discovery motion, finding that the testimony would be "speculative and not relevant to these proceedings." (PCRS. 1007). Judge Mathis also denied Mr. Randolph's motion to disqualify the State Attorney's Office again, finding "insufficient evidence to merit disqualification." (PCRS. 1008).

On March 2, 2001, Mr. Randolph filed a Motion to Disqualify Judge and Supporting Memorandum of Law. (PCRS. 1009-29). In the motion, Mr. Randolph sought to have the entire judicial circuit disqualified as the former prosecutor alleged to have assisted in drafting the order, Judge Alexander, now sat in the same judicial circuit as Judge Mathis. Thus, Judge Mathis would be required to preside over a hearing exploring the past misconduct of his colleague. Mr. Randolph feared he would not receive a fair or impartial hearing. Mr. Randolph also filed an additional Motion to Permit Discovery, noting that none of the parties deposed in February provided any information as to how the draft sentencing order made its way to the

[44] With the exception of Judge Alexander.

State Attorney file. (PCRS. 1030-34). Lastly, Mr. Randolph filed a Motion to Continue the March 21, 2001, evidentiary hearing, citing incomplete discovery and investigation into his claim. (PCRS. 1035-39).

On March 8, 2001, the State filed its Response to the Defendants Motion to Disqualify Judge and Supporting Memorandum of Law alleging that Mr. Randolph was procedurally barred from filing the motion. (PCRS. 1040-47).

At the March 21, 2001, "evidentiary hearing," ASA Daly and Mr. Randolph's counsel appeared. Mr. Randolph's then counsel, Mr. Jackson, asked to address the court regarding the three motions that had been filed on Mr. Randolph's behalf which had not yet been addressed or ruled upon. (PCRS. 1211-12). The court responded that he had already ruled on the motions on February 9. (PCRS. 1212). Mr. Jackson responded that he had not received the order, but more importantly, the motion to disqualify the entire judicial circuit had been filed on March 2. (PCRS. 1212). The court responded that he had also filed an order denying that motion. (PCRS. 1212). Both Mr. Jackson and ASA Daly responded that they had not received the order. (PCRS. 1213). After a brief pause, the court stated: "I'm going to deny the motion to disqualify. I do not find it to be legally sufficient." (PCRS. 1213).

As a result, Mr. Jackson argued that the ruling put the defense in an awkward position as it did not provide the defense any time to take a writ to this Court. (PCRS.

1213). Mr. Jackson stated that since he did not receive the court's rulings on the three prior motions, he was unaware of what the March 21, 2001, hearing would consist of. (PCRS. 1214). The State replied that counsel was put on notice and is attempting to "delay these proceedings." (PCRS. 1216).

After back and forth argument between the State and defense counsel, Judge Mathis stated he had gone through his file again and had "found the orders." (PCRS. 1217). The court indicated that he signed the motion denying disqualification as well as the second motion permitting discovery on March 6, 2001. (PCRS. 1217). Mr. Jackson replied that it must be a clerical error as the State did not file their reply to Mr. Randolph's motion to disqualify the judicial circuit until March 7, 2001 (PCRS. 1218); *see also*, PCRS. 1040-47. Mr. Jackson then stated that had he received those orders he would have subpoenaed those individuals and would have started those additional depositions. (PCRS. 1218). Mr. Jackson reminded the court that this Court granted 120 days to hear the claim. The court responded that he had no other time available to hear Mr. Randolph's case. (PCRS. 1219). The court then stated he would not continue the hearing but would consider the transcripts of the other depositions "prior to" ruling on the issue. (PCRS. 1219). The court then asked for witnesses, which neither side had come prepared with, and stated, "so neither of you have any evidence concerning the question of whether or not there was improper *ex parte* communication between the State and the judiciary." (PCRS. 1220).

At this point, Mr. Jackson asked to read the transcript from the Randall Scott Jones evidentiary hearing into the record and asked the court to accept the testimony. (PCRS. 1221). ASA Daly objected to the admissibility of the transcript, calling it "hearsay." (PCRS. 1223). Mr. Jackson replied that those State Attorneys had already been subject to cross examination and Judge Perry's death prevented deposing him. (PCRS. 1224). Mr. Jackson also reminded the court that Mr. Randolph moved for these depositions back in 1997 but was denied. (PCRS. 1225). The court then allowed Mr. Jackson to proffer the relevant portions of the *State of Florida v. Randall Scott Jones* evidentiary hearing. (PCRS. 1225). Mr. Jackson read the portion of ASA McLeod's testimony where he admitted to drafting the judgements and sentences for two capital defendants, Colina and Jones, at the direction of Judge Perry. (PCRS. 1228).

At the conclusion of the hearing, the State and Mr. Randolph litigated how the court would treat the three additional discovery dispositions which had not yet been completed but had been authorized, "that apparently y'all didn't get the order on." (PCRS. 1231). The court stated he would "consider [them] as evidence. And if there's further evidentiary hearing needed after that, if the Supreme Court grants you additional time, I'll hear it." (PCRS. 1231).

On May 16, 2001, the court filed a Status Report with this Court. In the report, Judge Mathis wrote, "it is the result of the evidentiary hearing, no evidence

whatsoever, was presented to support the Appellant's claim of improper *ex parte* communications between the trial court/sentencing judge, and the Office of the State Attorney, and no further information has been brought forth to the Court in the form of deposition testimony as authorized by this Court. The Court therefore reports to the Supreme Court that as a result of the evidentiary hearing and proceedings subsequent thereto, that no evidence has been presented which would in any way support the appellant's claim of such improper *ex parte* communication." (PCRS. 1055-56). The three additional depositions were taken on July 6, 2001.

On August 21, 2001, after the completion of the relinquishment proceedings, the record on appeal was supplemented. Mr. Randolph also filed a petition for writ of habeas corpus on December 17, 2001. This Court issued its opinion denying both on April 24, 2003. In the opinion, the Court condemned the improper contact, noting, "we do not approve of the improper *ex parte* contact between Judge Perry's law clerk and the prosecutor," but still denied relief. *Randolph v. State*, 853 So. 2d 1051, 1059 (Fla. 2003). Rehearing was denied on August 20, 2003, and the mandate issued on September 29, 2003.

On June 18, 2003, Mr. Randolph filed an additional habeas petition with this Court premised upon *Ring v. Arizona*. Mr. Randolph argued that: (1) *Ring* requires specific factual findings by the jury to determine death eligibility; (2) aggravating factors constitute elements of an offense (3) his jury was not instructed that these

elements must be proven beyond a reasonable doubt; and (4) *Ring* and the Sixth Amendment are violated when a jury decides death eligibility and recommends death by a mere majority. This claim was denied in an unpublished opinion on November 21, 2003. *Randolph v. Crosby*, 861 So. 2d 430 (Fla. 2003).

Successive Rule 3.851 Motions

On November 29, 2010, Mr. Randolph filed a successive Rule 3.851 motion alleging that this Court failed to properly analyze prejudice based on clearly established federal law as set forth in *Porter v. McCollum*[45] and *Strickland v. Washington*.[46] On March 7, 2011, the circuit court denied the motion and Mr. Randolph appealed to this Court. On April 26, 2012, this Court affirmed the denial in an unpublished opinion. (PCR3. 14).

The second successive Rule 3.851 motion at issue herein was filed on January 10, 2017. (PCR3. 43-86). Mr. Randolph raised three separate claims challenging his death sentence. Claim I alleged his death sentence violates the Sixth Amendment under *Hurst v. Florida*, and *Hurst v. State*, and that fundamental fairness as announced in *James v. State* dictates relief. Claim II rested on the Eighth Amendment, the Florida Constitution, and this Court's ruling in *Hurst v. State*, that before a death sentenced can be authorized a jury must have returned a unanimous

[45] 558 U.S. 30 (2009).

[46] 466 U.S. 668 (1984).

recommendation in favor of death. Claim III relied upon *Perry v. State* and the enactment of the revised statute which would govern at a resentencing and would require the jury to unanimously find the statutorily required facts necessary to impose a death sentence. Thus, Mr. Randolph asserted that a cumulative consideration of his previously presented and rejected *Brady*[47] and *Strickland* claims under a constitutional framework would probably result in a life sentence thereby rendering Mr. Randolph's sentence of death unreliable under the Eighth Amendment.

Mr. Randolph amended his motion with one additional claim on May 12, 2017. (PCR3. 119-37). Claim IV alleged the Due Process Clause of the Fourteenth Amendment requires the retroactive application of Ch. 2017-1, Laws of Fla. (2017), because that law established a substantive rule that has been extended to other capital defendants with convictions and sentences pre-dating Mr. Randolph's. He also argued that depriving him of the benefit of Ch. 2017-1 violates the Eighth Amendment.

A case management conference was conducted on September 22, 2017, before the Honorable Clyde Wolfe. (PCR3. 307-32). Due to Judge Wolfe's illness and passing the case remained dormant until the matter was reassigned to the Honorable Raul Zambrano. (PCR3. 302). Judge Zambrano granted Mr. Randolph leave to file

[47] *Brady v. Maryland*, 373 U.S. 83 (1963).

a supplement to the amended Rule 3.851 motion on February 28, 2019. (PCR3. 336-50). The amendment contained one additional claim for relief. Claim V alleged that Mr. Randolph's sentence violates the Due Process Clause and the Eighth and Fourteenth Amendments because death is only authorized under Florida law if the jury finds the necessary elements required to convict of the greater offense of capital murder, *i.e.* first-degree murder plus the additional facts necessary to authorize a sentence of death. A second case management hearing was conducted before another judge, the Honorable Howard McGillin, on September 12, 2019. (PCR3. 532-53).

The circuit court entered an order denying Mr. Randolph's 3.851 motion on December 31, 2019. (PCR3. 460-70). Mr. Randolph filed a motion for rehearing on January 14, 2020. (PCR3. 471-86). It was denied on January 21, 2020. (PCR3. 487). Mr. Randolph timely filed a notice of appeal, and the present appeal follows.

STANDARD OF REVIEW

This appeal arises from the denial of a successive postconviction motion. A summary denial of a 3.851 motion is a pure question of law and is subject to de novo review by this Court. *See e.g. Rose v. State*, 985 So. 2d 500, 505 (Fla. 2008).

SUMMARY OF THE ARGUMENT

The Due Process Clause of the Fourteenth Amendment requires that Mr. Randolph be given the benefit of *Hurst v. State* because it is this Court's statutory construction set forth in *Hurst v. State* that governs as to what facts must be found

by a unanimous jury before a death sentence may be imposed on Mr. Randolph. Given the statutory construction which governs Mr. Randolph's case, Mr. Randolph was deprived of his Sixth Amendment right to jury trial as explained in *Hurst v. Florida*.

This Court's statutory construction in *Hurst v. State* constitutes substantive law, and due process requires that this law govern the law that existed back in 1989 when Mr. Randolph was arrested for first-degree murder. Due process also does not permit *State v. Poole* to retroactively change Florida's substantive criminal law to Mr. Randolph's detriment. Moreover, *State v. Poole*, and the subsequent actions taken by this Court, not only undermine the integrity of the judicial process, it also solidifies Mr. Randolph's claim that Florida's capital sentencing scheme operates in a "wanton and freakish" manner in violation of the Eighth and Fourteenth Amendments.

INTRODUCTION

Prior to *Furman v. Georgia*, Florida law provided for a single-phase trial where the jury would make the ultimate life-or-death determination by expressly identifying mercy in the verdict form. *Adams v. State*, 48 So. 219, 224 (Fla. 1908) ("Section 3910 of the General Statutes of 1906 provides: 'Twelve men shall constitute a jury to try all capital cases… A 'capital case' is a case in which a person is tried for a capital crime. A 'capital crime' is one in which the punishment of death

is inflicted."). In the aftermath of *Furman*, this Court reviewed § 775.081(1), Fla. Stat. (1972), which defined "capital offenses" as fitting within three circumstances under Florida law: first-degree murder, rape, and kidnapping, and concluded that the removal of the death penalty did not destroy the statute in its entirety. *Donaldson v. Sack*, 265 So. 2d at 502.

Despite this holding, the Florida Legislature revised and expanded the definition of "capital offenses" to mean first-degree murder either through premeditation or in the course of a felony. The new statute also laid out how to determine whether a first-degree murder qualified as egregious enough to warrant the death penalty. *See* § 782.04, Fla. Stat. "capital felony, punishable as provided in s. 775.082." Section 775.082 in turn, referred to a separate proceeding—§ 921.141, Fla. Stat., where additional evidence would be presented to determine whether the defendant was eligible for a sentence of death. Thus, the Legislature created a bifurcated trial system requiring the weighing of aggravating circumstances against mitigating circumstances to determine whether a first-degree murder constitutes a felony so horrific as to be punishable by death. While other states maintained single phase trials but required aggravation charged in the indictment along with express jury findings, or created bifurcated systems which also required express jury

findings,[48] Florida removed the jury's traditional role in providing the accused with a safeguard against arbitrary government action. Instead, under the new law, the jury was tasked with the illusory role of making "eligibility" and "selection" recommendations at the second stage of the trial, while the judiciary was entrusted with the ultimate power of determining whether the accused should live or die.

Following the enactment of the new statute, the Court interpreted the legislative intent in *State v. Dixon*. The Court noted the "most important safeguard" of the statute, "is the propounding of aggravating and mitigating circumstances which must be determinative of the sentence imposed." *State v. Dixon*, 283 So. 2d at 8. The Court went on to hold, "**[t]he aggravating circumstances of Fla. Stat. s 921.141(6), F.S.A., actually define those crimes-when read in conjunction with**

[48] *Contra State v. Mason*, 108 N.E.3d 56, 62, 66 (Ohio 2018) (upholding Ohio's death penalty scheme because "an Ohio… jury decides whether the offender is guilty beyond a reasonable doubt of aggravated murder and—unlike the juries in *Ring* and *Hurst*—the aggravating-circumstance specifications for which the offender was indicted. R.C. 2929.03(B). Then the jury—again unlike in *Ring* and *Hurst*—must 'unanimously find[ ], by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors." R.C. 2929.03(D)(2) …the Florida scheme violated the Sixth Amendment because it did not require the jury…to find that Hurst was guilty of committing a specific aggravating circumstance. Ohio law, in contrast, requires a jury to find the defendant guilty of at least one aggravating circumstance, R.C. 2929.03(B), before the matter proceeds to the penalty phase.") (internal citations omitted).

Fla. Stat. ss 782.04(1) and 794.01(1), F.S.A.- to which the death penalty is applicable in the absence of mitigating circumstances." *Id*. at 9 (emphasis added).[49]

For decades after *State v. Dixon*, this Court construed the "provisions of Section 921.141" as "matters of substantive law insofar as they define those capital felonies which the legislature finds deserving of the death penalty." *Vaught v. State*, 410 So. 2d 147, 149 (Fla. 1982). In *Morgan v. State*, 415 So. 2d 6, 11 (Fla. 1982), this Court explicitly rejected the appellant's argument that § 921.141, Fla. Stat. was unconstitutional because "the statute seeks to regulate matters of criminal trial practice and procedure, which are exclusively the province of this Court." The Court held:

> **…the aggravating and mitigating circumstances enumerated in section 921.141 are substantive law.** (citations omitted). "The aggravating circumstances of Fla. Stat. **§ 921.141, (6)**, F.S.A., [sic] actually define those crimes when read in conjunction with Fla. Stat. §§ 782.04 (1) and 794.01(1), F.S.A. to which the death penalty is applicable in the absence of mitigating circumstances. As such, they must be proved beyond a reasonable doubt before being considered by judge or jury." **To the extent that section 921.141 pertains to procedural matters such as the bifurcated nature of the trial in capital cases**, it has been incorporated by reference in Florida Rule of Criminal Procedure 3.780, promulgated by this Court, and is therefore properly adopted. (internal citations omitted).

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[49] *See also*, *State v. Dixon*, 283 So. 2d at 26 (Ervin J., dissenting) (observing that the new statutes have effectively caused the law to become more arbitrary, "[u]nder the old system, a majority of the twelve member jury, in the exercise of their discretion, determined the nature of the punishment. Under the new law, to the exercise of that discretion is added the opportunity for the arbitrary, completely unfettered, and final exercise of discretion by the judge. Clearly, the new law provides for even more discretion than the quantum thereof condemned in *Furman*.").

Id. (emphasis added).

The Petitioner in *Hildwin v. Florida* relied upon this precedent in arguing the provisions of § 921.141, Fla. Stat. are elements which are part of the substantive offense of capital murder, *i.e.* first-degree murder plus the findings added by the Legislature in response to *Furman*.[50] In 1989, the U.S. Supreme Court rejected the Sixth and Fourteenth Amendment arguments because the court did not yet consider "aggravating factors" as anything but "sentencing factors." *Hildwin*, 490 U.S. at 640. Moreover, the Court found no error in judicial sentencing in light of Hildwin's unanimous jury recommendation. *Id.* While *Hildwin* and *Spaziano* have since been overruled, this Court fails to recognize the significance.

In *Spaziano v. Florida*, the U.S. Supreme Court clarified what was and what was not at issue: "Petitioner does not urge that capital sentencing is so much like a trial on guilt or innocence that it is controlled by the… right to trial guaranteed by the Sixth Amendment… nor does Petitioner urge that… the death penalty requires the benefit of a jury." 468 U.S. at 457. In fact, Spaziano's primary argument was "that the laws and practice in most of the States indicate a nearly unanimous recognition that juries, not judges are better equipped to make reliable capital-

[50] *Compare Ring*, 536 U.S at 587 ("If a Legislature responded to such a decision by adding the element the Court held constitutionally required, surely the Sixth Amendment guarantee would apply to that element.").

sentencing decisions." *Id*. at 461. In overruling *Spaziano*, it appears the U.S. Supreme Court now agrees that juries are better equipped to make "reliable sentencing decisions."

While this Court insists that its recent and not yet final decision in *State v. Poole*, to recede from the statutory construction set forth in *Hurst v. State*, rests upon a proper reading of Florida precedent and history, in reality, the majority of *Poole* relies upon U.S. Supreme Court precedents interpreting the constitutionally of other state specific capital sentencing schemes. By ignoring the state law component, this Court reveals that it still misreads *Ring* and conflates Sixth and Eighth Amendment principles.

THE EIGHT AMENDMENT

In *Stringer v. Black*, 503 U.S. 222 (1992), the U.S. Supreme Court was called upon to contrast how capital sentencing schemes used aggravating circumstances. According to the Supreme Court:

> In Lowenfield [v. Phelps, 484 U.S. 231 (1988)], the petitioner argued that his death sentence was invalid because the aggravating factor found by the jury duplicated the elements it already had found in determining there was a first-degree homicide. We rejected the argument that, as a consequence, the Louisiana sentencing procedures had failed to narrow the class of death-eligible defendants in a predictable manner. We observed that "[t]he use of 'aggravating circumstances' is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion. We see no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase." [citation]. **We went on to compare the Louisiana scheme with the Texas**

> **scheme, under which the required narrowing occurs at the guilt phase** [citation]. **We also contrasted the Louisiana scheme with the Georgia and Florida schemes.** [citation].
>
> The State's premise that the Mississippi sentencing scheme is comparable to Louisiana's is in error. The Mississippi Supreme Court itself has stated in no uncertain terms that, with the exception of one distinction not relevant here,[51] its sentencing system operates in the same manner as the Florida system; and Florida, of course, is subject to the rule forbidding automatic affirmance by the state appellate court in an invalid aggravating factor is relied upon. In considering a Godfrey claim based on the same factor at issue here, the Mississippi Supreme Court considered decision of the Florida Supreme Court to be the most appropriate source of Guidance.

Stringer, 503 U.S. at 233-34 (emphasis added).

In fact, in *Lowenfield*, 484 U.S. at 242, the Louisiana statute defined first-degree murder as fitting within one of five circumstances in contrast to Florida's provision that first-degree murder is either premeditated or felony-murder. The U.S. Supreme Court in *Lowenfield* found that the Louisiana capital scheme operated similarly to the Texas scheme that provided for death eligibility to be determined at the guilt phase of the trial:

> It seems clear to us from this discussion that the narrowing function required for a regime of capital punishment may be provided in either of these two ways**: The legislature may itself narrow the definition**

[51] The distinction is relevant here. In Mississippi, a sentence of death could not be imposed unless the jury "**unanimously find[s] in writing**: … b) that sufficient aggravating circumstances exist…; and c) that there are insufficient mitigating circumstances… to outweigh the aggravating circumstances." Miss. Code Ann. § 99-19-101(3) (1988). In addition, "if the jury does not make the findings requiring the death sentence, the court shall impose a sentence of life imprisonment." *Stringer*, 503, U.S. at 233-34. (emphasis added).

> **of capital offenses, as Texas and Louisiana have done, so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase.** See also Zant [v. Stephens, 462 U.S. 862, 876 n. 13 (1983)] discussing Jurek and concluding: "[I]n Texas, aggravating and mitigating circumstances were not considered at the same stage of the criminal prosecution."

Lowenfield, 484 U.S. 245-47 (emphasis added).

In Florida, however, the Legislature clearly decided that the aggravating circumstances and their sufficiency would be determined during the penalty phase in order to perform the Eighth Amendment narrowing function in conformity with *Zant v. Stephens*:

> To avoid arbitrary and capricious punishment, this aggravating circumstance, "must genuinely narrow the class of persons eligible for the death penalty and must reasonable justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862 (1983) (footnote omitted). Since premeditation is already an element of capital murder in Florida, section 921.141 (5) (I) must have a different meaning; otherwise, it would apply to every premeditated murder.

Porter v. State, 564 So. 2d 1060, 1064 (1990).

As a result, *Hurst v. State* correctly concluded that the elements identified in § 921.141, Fla. Stat. are necessary under the Eighth Amendment requirement that death eligibility be narrowed beyond the traditional definition of first-degree murder. *Zant*, 462 U.S. at 878 ("[S]tatutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class

of persons eligible for the death penalty."). Regardless of how this Court now labels these statutorily required factual findings, *i.e.*, "eligibility decisions" vs "selection decisions," under the operation of Florida's statutory scheme, it is clear the jury was precluded from making either determination during the guilt phase.

THE SIXTH AMENDMENT

In *Ring v. Arizona*, the U.S. Supreme Court reviewed Arizona's statute and found that "in Arizona, a 'death sentence may not be legally imposed … unless at least one aggravating factor is found to exist beyond a reasonable doubt." *Ring*, 538 U.S. at 597. Because the only fact necessary to authorize the imposition of death under Arizona law was the existence of one aggravating circumstance, the court concluded the Sixth Amendment applied to that finding. Mr. Ring's death sentence was overturned because his judge, not his jury, was charged with determining whether the State had proven an aggravating circumstance beyond a reasonable doubt. *Id*. at 602. ("**If a State makes an increase** in a defendant's authorized punishment contingent on a finding of fact, **no matter how the State labels it**- it must be found by a jury beyond a reasonable doubt.") (emphasis added).[52] As Justice Scalia made clear, States like Florida could continue "leav[ing] the ultimate life-or-

[52] The Arizona statute at issue in *Ring* and the Florida statute at issue in *Hurst* diverge as to the facts needed to render a defendant convicted of first-degree murder subject to a death sentence. The construction of the Florida statute in *Hurst v. State* changed Florida's substantive law; while in Arizona, *Ring* did not produce a change in Arizona's substantive law.

death decision to the judge" provided that a jury find the existence of an aggravator at sentencing, or alternatively, "by putting the aggravating-factor determination (where it logically belongs anyway) in the guilt phase." *Ring*, 538 U.S. at 612-613 (Scalia, J., concurring).

When Florida capital defendants raised *Ring* claims on the basis that § 921.141, Fla. Stat. instructed the jury to make factual findings, but deprived the jury of the ability to express those findings, this Court determined that Arizona's statute was markedly different than Florida's. *See King v. Moore*, 831 So. 2d 143 (Fla. 2002); *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002). Yet now, the Court in *Poole* utilizes Justice Scalia's analysis of Arizona law, that "today's decision has nothing to do with sentencing," as support for receding from *Hurst v. State*'s statutory construction of Florida law. *Ring*, 538 U.S. at 612 (Scalia, J., concurring).

This Court's rationale in *Poole*, not only disregards the state law component, it also disregards U.S. Supreme Court precedent. In relying on *Tuilaepa v. California*, 512 U.S. 967 (1994),[53] this Court misconstrues the import of the case. A comparison of Florida's statute reveals California law required the jury to express their "death eligibility" findings in their guilt phase verdicts. While this Court claims

[53] "In California, to sentence a defendant to death for first-degree murder the trier of fact must find the defendant guilty and also find one or more of 19 special circumstances listed in Cal. Penal Code Ann. §190.2. The case then proceeds to the penalty phase, where the trier of fact must consider a number of specified factors in deciding whether to sentence the defendant to death." *Tuilaepa*, 512 U.S. 967 at 969.

the aggravating factors under Florida law similarly circumscribe the class of persons eligible for the death penalty, *Poole* itself reveals the opposite result. In *Tuilaepa v. California*, the court held that, "**an aggravating circumstance may not apply to every defendant convicted of murder**; it must apply only to a subclass of defendants convicted of murder." *Tuilaepa*, 512 U.S. 967 at 972 (emphasis added). Clearly, Florida's statutory scheme is distinguishable.

In *Poole,* no written jury findings exist let alone expressly identify any "eligibility" determination to distinguish his case from any other first-degree murder with contemporaneous convictions, yet this Court upheld the death sentence. *Contra State v. Ring,* 65 P.3d 915, 941 (Ariz. 2003) ("We hold that the pecuniary gain and multiple homicide aggravators usually are not implicit in a jury's [guilt phase] verdict… we cannot conclude that jury finding of pecuniary gain inheres in its robbery or burglary verdict."); *see also, Hurst v. Florida,* 136 S.Ct. at 622. Under the interpretation set forth in *Poole* any felony murder is automatically eligible for the death penalty based solely upon the jury's guilt phase verdict. Such an interpretation, however, runs afoul of the Eighth Amendment. *See Caldwell v. Mississippi*, 472 U.S. at 328-30 (Because the jury was not forewarned that their finding of contemporaneous convictions during the guilt phase would constitute automatic death eligibility, the jury could not possibility appreciate its "awesome responsibility.").

This Court's reliance on *Kansas v. Carr*, 136 S. Ct. 663 (2016) is also misplaced.[54] In alleging *Kansas v. Carr*, stands for the proposition that the U.S. Supreme Court has ruled the Sixth Amendment does not require a jury determination as to the "sufficiency of aggravation," this Court fails to consider the question presented: "whether the Eighth Amendment requires capital sentencing courts to instruct a jury that mitigating circumstances need not be proved beyond a reasonable doubt." *Kansas v. Carr*, 136 S. Ct. at 635. Not only is this holding irrelevant to how Florida's capital sentencing scheme operates, *Ring* itself reveals that Kansas' statute, unlike Florida's, satisfies Sixth Amendment concerns.[55] In fact, in *Kansas v. Marsh*, 548 U.S. 163 (2006), the U.S. Supreme Court upheld Kansas' weighing statute, noting: "so long as a State's method of allocating the burdens of proof **does not lessen the State's burden to prove every element of the offense charged**… a defendant's constitutional rights are not violated." *Kansas*, 548 U.S. 163 at 170-71

[54] The reliance on *State v. Wood*, 580 S.W.3d 566, 588 (Mo. 2019), is equally unpersuasive in light of the Supreme Court of Missouri's interpretation of its own state law: "Missouri's sentencing procedure is fundamentally different from the Florida statute the Supreme Court invalided in *Hurst*." *See also, Ring*, 536 U.S. 584 n.6, noting that Missouri's statute is unlike Arizona's as it commits "the sentencing decision to the jury."

[55] *Ring* itself notes that the majority of States responded to Eighth Amendment jurisprudence by entrusting juries to determine "the presence of aggravating circumstances in capital cases." *Ring*, 536 U.S. 584, n.6. While the U.S. Supreme Court included a list of 29 state statutes which contained the Sixth Amendment findings which Arizona lacked, such as Kansas, Ohio, Georgia, California, and Texas, Florida did not make the list. *Id.*

(emphasis added). The Kansas statute at issue required "jury unanimity" before a death sentence could be recommended and imposed. *See* K.S.A. § 21-6617. Such a requirement has never existed under Florida law, until *Hurst v. State*.

In *Hurst v. State*, the Court was called upon to construe the meaning of § 921.141, Fla. Stat. as it had existed since 1973. In its analysis, the Court "look[ed] to the operation and effect of the law as [it had been] applied and enforced by the state." *Mullaney v. Wilbur*, 421 U.S. 684, 699 (1975). The Court then identified the facts that had to be shown in order to increase the range of punishment authorized on a first-degree murder conviction upwards to include a death sentence. *See Hurst v. State*, 202 So. 3d at 53. Not only did the Court rely on Florida precedent, it also relied on U.S. Supreme Court precedent interpreting Florida law:

> As the Supreme Court long ago recognized, in *Parker v. Dugger*, 498 U.S. 308, 111 S.Ct. 731. 112 L.Ed 81 812 (1991), under Florida law, "The death penalty may be imposed only where sufficient aggravating circumstances exist that outweigh the mitigating circumstances." *Id*. at 313,111 S.Ct. 731 (emphasis added) (quoting § 921.141(3), Fla. Stat. (1985)).

Id. at 53. *See also, Jackson v. State*, 213 So. 3d 754, 784-85 (Fla. 2017) (quoting *Barclay v. Florida*, 463 U.S. 939, 954 n.12, (1983) (noting that the language in section 921.141 pertaining to "sufficient aggravating circumstances" suggests that the finding of one aggravating circumstance alone does not necessarily support the imposition of a death sentence.). After harmonizing and interpreting the statutes under state law, the Court concluded:

> 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. at 53.

In contrast to Arizona's capital sentencing statute discussed in *Ring*, Florida's statute did not permit the imposition of a death sentence unless the sentencing judge set forth in written findings of fact that "sufficient circumstances exist" to justify a death sentence. *See* § 921.141, Fla. Stat. The statute uses the word "facts" to describe the question of the sufficiency of the aggravating circumstances and the question of whether the mitigating circumstances were insufficient to outweigh the aggravating circumstances. *Id*. As a result, a death sentence "comes into play only as a result of," *United States v. Haymond*, 139 S.Ct. 2369, 2381 (2019), those two additional determinations. Undoubtedly, the majority in *Hurst v. State* had a reasonable basis for its statutory construction of § 921.141, Fla. Stat.

Once the Court determined that a finding that the aggravating circumstances were sufficient was a finding of fact necessary to render the defendant subject to a death sentence, the Court found the question of fact was subject to the Sixth Amendment right to trial by jury. *Hurst v. State*, 202 So. 3d at 63. The Court then referenced the Florida Constitution and the longstanding history of requiring unanimity in jury verdicts, *see* Art. 1, § 22, Fla. Const., as support for the proposition

that as a matter of statutory construction, this State's law should be interpreted in light of the fundamental principle that the basic right to trial by jury is treasured and valued in this State. *Hurst v. State*, 202 So. 3d at 57. Thus, the Court concluded that each factual finding requires unanimity. Further support stems from Florida's prior capital sentencing scheme which had left the ultimate life-or-death determination in the hands of the jury.

The Court also found support for unanimity in the Eighth Amendment. Given *Spaziano*'s Eighth Amendment reversal, the Court considered the "evolving standards of decency" which reflect the "direction of society." *Hurst v. State*, 202 So. 3d at 61. After realizing Florida's outlier status as one of only two[56] states to permit a death sentence without unanimity, the Court held the Eighth Amendment also demands unanimity. Thus, the majority in *Hurst v. State* intended to restore the jury's traditional role in criminal convictions as envisioned by the Framers. *See Ring*, 536 U.S. at 612 (Scalia J., concurring) (judge sentencing "would undermine our people's traditional… veneration for the protection of the jury in criminal cases.").[57]

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[56] *See Rauf v. State*, 145 A. 3d 430 (Del. 2016) (declaring Delaware's weighing capital sentencing scheme unconstitutional in light of *Hurst v. Florida*. Despite providing for an "eligibility phase" prior to the "sentencing phase," the court concluded the statute was still unconstitutional because it did not require jury findings as to **each element prescribed under state law.**)

[57] It should be noted that the issue of unanimity was specifically left open in *Ring*, 526 U.S at 584 n.4 ("Ring's claim is tightly delineated…nor does he argue that the Sixth Amendment required the jury to make the ultimate determination whether to

The Court further reiterated the importance of unanimity in *Perry v. State*, and in response, the Florida Legislature enacted Ch. 2017-1, Laws of Fla. (2017), thus confirming the Court's statutory construction set forth in *Hurst v. State*. Since the Court's statutory construction was based on the plain language of the statute, under well-established case law, it must date back to the enactment of the statute to avoid running afoul of the Due Process Clause to the Fourteenth Amendment. *In re Winship*, 397 U.S. 357, 364 (1970); *See also, Fiore v. White*, 531 U.S. 225 (2001); *Bunkley v. Florida*, 538 U.S. 835 (2003) (per curiam). Stated differently, taken together with the Sixth Amendment right to jury trial, the Due Process Clause requirement of proof beyond a reasonable doubt "indisputably entitle[s] a defendant to 'a **jury determination** that [he] is guilty of every element of the crime with which he is charged beyond a reasonable doubt.'" *Apprendi*, 530 U.S. at 467-77 (quoting *United States v. Gaudin*, 515 U.S. 506, 510 (1995) (emphasis added).

ARGUMENT I: The statutory construction in *Hurst v. State* constitutes substantive law, and the Due Process Clause of the Fourteenth Amendment requires that this substantive law govern the law that existed at the time of Mr. Randolph's crime.

A judicial decision construing substantive criminal law or identifying the elements of a criminal offense is substantive law. It is not a procedural rule. The

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impose the death penalty… He does not question the Arizona Supreme Court's authority to reweigh the aggravating and mitigating circumstances."). Nonetheless, Arizona amended its statute to require unanimity.

analyses used to determine when a new procedural rule of constitutional law is to be applied retroactively do not apply to the judicial decisions construing statutes setting forth substantive criminal law. *Bousley v. United States*, 523 U.S. 614, 620 (1998) (Because *Teague v. Lane,* 489 U.S. 288 (1989) "by its terms applies only to procedural rules, we think it is inapplicable to the situation in which this Court decides the meaning of a criminal statute enacted by Congress.").

While members of this Court disagreed with the majority's holding in *Hurst v. State*, the statutory construction contained therein constitutes Florida's substantive criminal law. It identified what statutorily identified facts were essentially elements of a greater offense that had to be found by a jury before a death sentence could be an authorized punishment.

When a court construes a statute and identifies the elements of a statutorily defined criminal offense, the ruling constitutes substantive law and dates to the statute's enactment. *Bousley v. United States,* 523 U.S. at 625 (Stevens, J. concurring). "A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction… Thus, it is not accurate to say that the … court's decision … 'changed' the law that previously prevailed." *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 312-13 n.12 (1994). Of course, what fact or facts must be found in order to increase the range of punishment to include a more severe sentence is a matter of a

state's substantive criminal law. Establishing Florida's substantive criminal law is a legislative function:

> "Enacting laws—and especially criminal laws—is quintessentially a legislative function." *Fla. House of Representatives v. Crist*, 999 So.2d 601, 615 (Fla.2008). "[T]he Legislature generally has broad authority to determine any requirement for intent or knowledge in the definition of a crime." *State v. Giorgetti*, 868 So.2d 512, 515 (Fla.2004). We thus have recognized that generally "[i]t is within the power of the Legislature to declare an act a crime regardless of the intent or knowledge of the violation thereof." *Coleman v. State ex rel. Jackson*, 140 Fla. 772, 193 So. 84, 86 (1939).

State v. Adkins, 96 So. 3d 412, 417 (Fla. 2012).

Identifying the facts necessary to increase an authorized sentence is likewise regarded as a legislative function. *State v. Benitez*, 395 So. 2d 514, 518 (Fla. 1981) (". . . the legislature, and not the judiciary, determines maximum and minimum penalties for violations of the law."). § 921.002(1), Fla. Stat. *i.e.*, The Criminal Punishment Code states:

> The provision of criminal penalties and of limitations upon the application of such penalties is a matter of predominantly substantive law and, as such, is a matter properly addressed by the Legislature. The Legislature, in the exercise of its authority and responsibility to establish sentencing criteria, to provide for the imposition of criminal penalties, and to make the best use of state prisons so that violent criminal offenders are appropriately incarcerated, has determined that it is in the best interest of the state to develop, implement, and revise a sentencing policy.
>
> Naturally, construing the statutory language that the Legislature provided is a

judicial function. A judicial decision that engages in statutory construction of a criminal statute identifying the facts that are necessary to increase the range of punishment constitutes substantive criminal law. The Legislature is presumed to have agreed with this Court's statutory construction when it does not express voiced disagreement:

> The Legislature is presumed to know the judicial constructions of a law when amending that law, and the Legislature is presumed to have adopted prior judicial constructions of a law unless a contrary intention is expressed.

Florida Dep't Of Children And Families v. F.L., 880 So. 2d 602, 609 (Fla. 2004).

When it was issued, the statutory construction aspect of *Hurst v. State* constituted Florida's substantive criminal law. It construed the meaning of the statute back to at least the date of the criminal offense given that at the time of *Hurst v. State*, Art. X, § 9 Fla. Const. (2017) provided: "Repeal of criminal statutes. –Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed." And this Court previously explained that "the purpose of the 'Savings Clause' is to require the statute in effect at the time of the crime to govern the sentence an offender receives for the commission of that crime." *Horsley v. State*, 160 So. 3d 393, 406 (Fla. 2015). As substantive criminal law, *Hurst v. State* is not subject to the retroactivity analysis of either *Witt v. State*, 378 So. 2d 922 (Fla. 1980) or *Teague*.

After *Hurst v. State* issued, the Florida Legislature did make changes to § 921.141, Fla. Stat. which corresponded with the holding of *Hurst v. State*—that the aggravating circumstances had to be found sufficient as a matter of fact before a death sentence could be authorized. Moreover, the Legislature did not alter the statute following the issuance of *Poole*. Accordingly, this demonstrates the Legislature's agreement with the statutory construction set forth in *Hurst v. State*. *See Florida Dep't Of Children And Families v. F.L.*, 880 So. 2d at 609.

Under the Due Process Clause of the Fourteenth Amendment, the statutory construction set forth in *Hurst v. State* must be found to have been the governing law at the time of Mr. Randolph's conviction in 1989. *Hicks v. Oklahoma*, 447 U.S. 343, 345 (1980) ("It is argued that all that is involved in this case is the denial of a procedural right of exclusively state concern. Where, however, a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, [citation] and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State." (internal citations omitted).

ARGUMENT II: The Due Process Clause of the Fourteenth Amendment does not permit *State v. Poole* to retroactively change Florida's substantive law to Mr. Randolph's detriment.

This Court, in *State v. Poole,* receded from the conclusion that the sufficiency of the aggravating circumstances is a fact that had to be found before a death sentence was authorized. In *Poole*, this Court in essence adopted Justice Canady's dissent from *Hurst v. State*. While Mr. Randolph believes that the dissent in *Hurst v. State* and the *Poole* decision rest on a fundamental misreading of *Ring* and *Hurst v. Florida* what really matters is the simple fact that the Due Process Clause of the Fourteenth Amendment does not permit *Poole* to retroactively change Florida's substantive criminal law to Mr. Randolph's detriment. *Vitek v. Jones*, 445 U.S. 480, 488-89 (1980) ("Once a State has granted prisoners a liberty interest, we held that due process protections are necessary 'to insure that the state-created right is not arbitrarily abrogated.'") (internal citations omitted).

When this Court in *Hurst v. State* construed § 921.141, Fla. Stat., the Savings Clause of the Florida Constitution (Art. X, § 9, Fla. Const. (2017)) required the law on the date of the criminal offense to govern as to the prosecution and sentencing of a criminal defendant. Thus, the construction of the § 921.141, Fla. Stat. in *Hurst v. State* reflected the meaning dating back to the date of the homicide at issue here. Accordingly, this Court's January 23, 2020 decision in *Poole*, cannot be applied retroactively. The U.S. Supreme Court has held that:

> We think it clear that the South Carolina Supreme Court, in applying its new construction of the statute to affirm these convictions, has deprived petitioners of rights guaranteed to them by the Due Process Clause. If South Carolina had applied to this case its new statute prohibiting the act of remaining on the premises of another after being asked to leave, the constitutional proscription of ex post facto laws would clearly invalidate the convictions. The Due Process Clause compels the same result here, where the State has sought to achieve precisely the same effect by judicial construction of the statute.

Bouie v. City of Columbia, 378 U.S. 347, 362 (1964). In *Bouie*, the Supreme Court also stated:

> When a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law 'in its primary sense of an opportunity to be heard and to defend (his) substantive right.' *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 678, 50 S.Ct. 451, 453, 74 L.Ed. 1107.

Id. at 354.

Due process prohibits the retroactive application of judicial interpretations of criminal statutes that are "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Rogers v. Tennessee*, 532 U.S. 451, 461 (2001) (citing *Bouie*, 378 U.S. at 354). Certainly, *Poole* was unexpected. It is also indefensible in that the statutory construction set forth in *Hurst v. State* has been applied to a number of cases where the crime was committed pre-*Ring*, its corresponding death sentence was vacated, and a unanimous jury returned a binding life recommendation. The *Hurst v. State* statutory construction was applied in the case of William Melvin White, whose homicide was committed in 1978, when the

circuit court vacated his death sentence on the basis of *Hurst v. State*. *State of Florida v. William Melvin White*, No. 1978-CF-001840-C-O (Fla. 9th Cir. Ct. Sept. 19, 2017); *See also White v. State*, 817 So. 2d 799 (Fla. 2002) (per curiam); *White v. State*, 729 So. 2d 909 (Fla. 1999) (per curiam); *White v. State*, 415 So. 2d 719 (1982) (per curiam). After Mr. White's death sentence was vacated, the State did not pursue another death sentence, and as a result, a life sentence was imposed. Moreover, the U.S. Supreme Court in 1991 indicated that under Florida law a death sentence could only be imposed "where sufficient aggravating circumstances exist" as to a crime committed in 1982. *Parker*, 498 U.S. 308.

Poole is also indefensible because the Florida Legislature has demonstrated its agreement with the statutory construction set forth in *Hurst v. State*. This is in sharp contrast to the Legislature's reaction to this Court's decision in *Delgado v. State*, 776 So. 2d 233 (Fla. 2000) (per curiam), in which this Court construed Florida's burglary statute. In *Delgado*, this Court "held that the phrase 'remaining in' found in Florida's burglary statute, section 810.02(1), Florida Statutes (1989), applied 'only in situations where the remaining in was done surreptitiously.'" *State v. Ruiz*, 863 So. 2d 1205, 1207 (Fla. 2003). In the next legislative session after *Delgado*, the Legislature amended the burglary statute and included language stating that *Delgado* "was decided contrary to legislative intent." *Id*.

Following *Hurst v. State*, the Legislature did not challenge the decision as contrary to legislative intent when the statute was amended in the 2017 legislative session. Nor did the Legislature indicate that *Hurst v. State* had misconstrued legislative intent in the 2018 or 2019 legislative sessions. Instead when the makeup of this Court changed, it decided to ignore the Legislature's reaction to *Hurst v. State* and instead issue a repudiation in *Poole*. This amounted to an effort to re-write the statute which under Florida's Constitution is a legislative function. It seemingly violated Florida's separation of powers provision. But given this Court's usurpation of the legislative power, the limit on the legislative power must still attach to the usurped power. When the Legislature passed legislation amending the burglary statute with a repudiation in *Delgado,* this Court held that the amendment could not apply retroactively and could only be applied prospectively. *Ruiz*, 863 So. 2d at 1209-10.

Furthermore, after *Poole* issued the Legislature left the provisions intact that had been adopted to accommodate the Sixth Amendment ruling in *Hurst v. State*. It still remains that the jury must unanimously find that the aggravating circumstances are sufficient and find that the aggravating circumstances outweigh the mitigating circumstances before the judge is authorized to impose a death sentence. The Florida Legislature's reaction to *Hurst v. State* and *Poole* shows that this Court in *Hurst v. State* correctly read the statute and captured the legislative intent. Further, due

process precludes *Poole* from applying to crimes committed prior to January 23, 2020.

ARGUMENT III: Mr. Randolph's death sentence is unreliable and *State v. Poole* confirms the State of Florida inflicts capital punishment in an arbitrary manner in violation of the Eighth and Fourteenth Amendments.

Mr. Randolph's unreliable sentencing proceeding (as well as his unreliable collateral proceedings), demonstrate the arbitrary nature of Florida's capital sentencing scheme. *Poole*'s about-face holding and the subsequent actions taken by this Court only further undermine the reliability of Florida's legal system as well as public confidence in the judiciary.

Reliability is the linchpin of capital punishment jurisprudence. *See Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). As the U.S. Supreme Court recognized, "[c]apital sentencing must of course satisfy the dictates of the Due Process Clause [citation], and we have recognized that when state law creates for a defendant a liberty interest in having a jury make particular findings, speculative appellate findings will not suffice to protect that entitlement for due process purposes." *Clemons v. Mississippi*, 494 U.S. 738, 746 (1990) (citation omitted). The Fourteenth Amendment guarantees a trial that results in the "impartial ascertainment of the facts." *Chambers v. Mississippi*, 410 U.S. 284, 296 (1973). In Mr. Randolph's case, it cannot be said beyond a reasonable doubt, that he received the benefit of an impartial trial, let alone an impartial judiciary in light of the improper *ex parte*

contact, which this Court condemned.[58] Nor can it be said that his jury found any specific aggravating circumstance, let alone determined its sufficiency, in light of his eight (8) to four (4) recommendation. *Steele,* 921 So. 2d at 545 ("Nothing in the statute… requires a jury to agree on *which* aggravating circumstances exist."). Thus, it can hardly be said that Mr. Randolph's case has been afforded the greater degree of scrutiny that is required under the Eighth Amendment.

As *Poole* makes evident, its rationale stems from *Hurst v. State*'s two-member dissent. *Hurst v. State,* 202 So.3d at 77 (Canady J., dissenting). And while the new majority claims *stare decisis* supports receding from established precedent in this instance, the Court fails to "ensure that the law will not [] change erratically" as a result of the "proclivities of individuals." *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986). Instead, once again, this Court disregards Eighth Amendment jurisprudence to achieve its desired result. "The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution. Florida's law contravenes

[58] While this Court did not condemn Judge Perry's conduct in Mr. Randolph's case, this Court found Due Process violations by Judge Perry's improper *ex parte* contact in at least four separate civil case. *See In re Perry*, 586 So. 2d 1054 (Fla. 1991). Moreover, while this Court did not find Howard Pearl's conflicted representation prejudicial on behalf of at least 10 capital defendants, this Court did find that such conflicts are prohibited as it relates to civil defendants. *See* Timothy Chinaris & Elizabeth Tarbeth, *Professional Responsibility*, 24 Nova L. Rev. 199, 212 (1999).

our Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world." *Hall v. Florida*, 572 U.S. 701, 724 (2014).

As *Hurst v. State* explained, requiring "that a jury must unanimously recommend death… serves the narrowing function required by the Eighth Amendment … and expresses the values of the community as they currently relate to imposition of death as a penalty." 202 So. 3d at 60. Unanimity was meant not only to ensure consistent application, but to counter Florida's high rate of exonerations of capital defendants. *Id*. at 73. *Poole* and this Court's other recent opinions, not only attempt to remove Eighth Amendment safeguards, they also seek to render the statutorily required "appellate review" added in response to *Furman* v. *Georgia,* meaningless.

In *Yacob v. State*, 136 So. 3d 539, 547 (Fla. 2014), this Court explained proportionality review is necessary under Florida law to maintain a "high degree of certainty in procedural fairness as well as substantive proportionality… to insure that the death penalty is administered evenhandedly." (internal citations omitted); *See also, Yacob v. State*, 136 So. 3d at 557 (Labarga, J., concurring) ("Not insignificantly… [it] aids our analysis not only because it promotes consistency in sentencing, but also because it is, in part, by this examination that we can discover the 'evolving standards of decency that mark the progress of a maturing society.'"). As a simple comparison of *Poole* to Timothy Hurst reveals, a death sentence in

Florida, in actuality, depends not on reason but on the whim, passion, and emotion of the current judiciary.

The aftermath of *Poole* further demonstrates that Florida's capital sentencing scheme neither promotes consistency nor ensures fairness. In reinstating a vacated death sentence based on a non-unanimous recommendation at the State's request, with no procedural authority in place, this Court has demonstrated the procedures under Florida law are inflected in an "arbitrary and capricious manner." *See Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.); *see also, id*. at 175 (internal citations omitted) ("Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.").

Poole's death sentence became final in 2014 following a 11-1 jury recommendation. *Poole*, 2020 WL 370302 at 3. As a result of this Court's established precedent in *Hurst v. State* and *Mosley v. State*,[59] the postconviction court granted *Hurst* relief because of the non-unanimous jury recommendation which

[59] 209 So. 3d 1248 (Fla. 2016).

lacked any factual findings. *See Johnson v. State*, 205 So.3d 1285, 1291 (Fla. 2016) ("On this record, with a nonunanimous jury recommendation and a substantial volume of mitigation evidence, we simply cannot conclude, 'beyond a reasonable doubt, that no rational trier of fact would determine that the mitigating circumstances were sufficiently substantial to call for leniency.' *State v. Ring*, 204 Ariz. 534, 65 P.3d 915, 946 (2003)."); *Simmons v. State*, 207 So. 3d 860, 867 (Fla. 2016) ("We decline to speculate as to the reasons why four jurors voted for life in this case.").

After the circuit court entered an order vacating the death sentence pursuant to this Court's then precedent, the State filed a cross-appeal requesting this Court recede from *Hurst v. State*. This Court granted the request and reversed the order vacating Poole's death sentence. *Poole*, 2020 WL 370302 at *15. On the same day, *Kocaker v. State*, __So. 3d.__, 2020 WL 370363 (Fla. Jan. 23, 2020), issued. Unlike in *Poole*, the State conceded Kocaker was entitled to *Hurst* relief and filed no cross-appeal. Thus, this Court affirmed the circuit court's order granting *Hurst* relief. Interestingly, both cases fall within the post-*Ring* category created by *Mosley v. State*, and both defendants received 11-1 jury recommendations. Consequently, the only discernable reason for the disparate treatment of similarly situated defendants is the State's action; in *Poole* the State filed a cross-appeal whereas in *Kocaker* the State conceded *Hurst* relief. However, within seven days of *Poole*'s holding, the State filed a Motion for Rehearing in *Kocaker*. The State brazenly asked this Court

to either reinstate the death sentence or alternatively remand for consideration of other penalty phase issues.

On April 1, 2020, this Court granted the State's request and stayed the proceedings in *Kocaker* pending the disposition of *State v. Jackson*, Case No. SC20-257 and *State v. Okafor*, Case No. SC20-323. Both *Jackson* and *Okafor* had their death sentences vacated and resentencing procedures were set to begin. But, as a result of *Poole*, the State filed Emergency All Writs Petitions to preclude the re-sentencing procedures from beginning. Not only is this flawed unilateral procedure unconstitutional and unsupported by Florida law, it also reveals bias by this Court. By disregarding the prior full Court's precedent granting capital defendants the right to a life sentence unless a jury returns a unanimous verdict containing factual findings, this Court places the reliance interests of the State, over the interests of Florida citizens. *Compare Mosley*, 209 So. 3d 1248 at 1288 ("But the majority here does not acknowledge the State's strong interest in finality.") (Canady, J. dissenting) *with Ramos v. Louisiana*, 140 S. Ct. 1390, 1408 (2020) ("In its valiant search for reliance interests, the dissent somehow misses maybe the most important one: the reliance interests of the American people. Taken at its word, the dissent would have us discard a Sixth Amendment right in perpetuity rather than ask two States to retry a slice of their prior criminal cases. Whether that slices turns out to be large or small,

it cannot outweigh the interest we all share in the preservation of our constitutionally promised liberties.").

CONCLUSION AND RELIEF SOUGHT

Mr. Randolph respectfully urges this Court to allow full briefing on the issues from the trial court's denial. In the alternative, Mr. Randolph requests that this Court vacate his death sentence and remand to the circuit court for the imposition of a life sentence or a new jury trial and penalty phase that comports with the requirements of the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been electronically served on Doris Meacham, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, Florida, 32188, at her primary email address, doris.meacham@myfloridalegal.com on May 26, 2020.

/s/ Rachel L. Day
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CERTIFICATE OF FONT

I hereby certify that a true and correct copy of the foregoing was generated in Times New Roman 14-point font in compliance with Fla. R. App. P. 9.210(a)(2).

/s/ Rachel L. Day
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