

**IN THE SUPREME COURT OF FLORIDA
CASE NO. SC22-378
DEATH PENALTY CASE**

MARKEITH DEMANGZLO LOYD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

REPY BRIEF OF CROSS-APPELLANT/APPELLEE

**ON APPEAL FROM THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA**

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ARGUMENT

THE TRIAL COURT ERRED IN DENYING THE STATE'S PROPOSED STANDARD JURY INSTRUCTIONS 7.10 AND 7.11 AND VERDICT FORM 3.12(E) WHICH ARE IN CONFLICT WITH THIS COURT'S DECISION IN POOLE AND FLORIDA STATUTE 921.141.

Loyd claims that the State, in its Cross-Appeal, seeks no remedy other than general affirmance. This is erroneously predicated on the argument that the term “unanimously” in the preliminary penalty-phase instructions, the final penalty-phase instructions, and the verdict form in both interrogatories B and D was omitted.

This Court held in *Hurst v. State*, 202 So.3d 40 (Fla. 2016) that, in addition to unanimously finding the existence of at least one aggravator as required by *Hurst v. Florida*, 577 U.S. 92 (2016), a jury must also “unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death.” *Hurst v. State*, 202 So.3d at 58. This Court receded from *Hurst v. State* and clarified that *Hurst v. Florida* only requires that “a jury must unanimously find the existence of a statutory aggravating circumstance beyond a reasonable doubt.” This Court clarified that any aggravator is

sufficient to impose death; therefore, no additional sufficiency determination is required. *State v. Poole*, 297 So.3d 487, 508 (Fla. 2020). With that in mind, the State objected to the use of that language in the penalty phase instructions and verdict form.

As to the preliminary penalty-phase instructions, the standard instruction called for the following language:

You are instructed that this evidence is presented in order for you to determine, as you will be instructed, (1) whether each aggravating factor is proven beyond a reasonable doubt; (2) whether the aggravating factors found to exist beyond a reasonable doubt are sufficient to justify the imposition of the death penalty; (3) whether mitigating circumstances are proven by the greater weight of the evidence; (4) whether the aggravating factors outweigh the mitigating circumstances; and (5) whether the defendant should be sentenced to life imprisonment without the possibility of parole or death. At the conclusion of the evidence and after argument of counsel, you will be instructed on the law that will guide your deliberations.

Fla. Std. Jury Instr. (Crim.) 7.10.

It's clear that the jury has to unanimously find each aggravating factor and to unanimously recommend death under the statute. However, the other findings are not required nor do they have to be unanimous. The State's proposed jury instructions deleted (2) whether the aggravating factors found to exist beyond a reasonable doubt are sufficient to justify the imposition of the death penalty; (3)

whether mitigating circumstances are proven by the greater weight of the evidence; and (4) whether the aggravating factors outweigh the mitigating circumstances. While the trial court removed “unanimously”, the “sufficiency” and “weighing” language was kept in.

As to the preliminary penalty-phase instructions, the standard instruction also called for the following language:

Before moving on to the mitigating circumstances, you must determine that the aggravating factors are sufficient to impose a sentence of death. If you do not unanimously agree that the aggravating factors are sufficient to impose death, do not move on to consider the mitigating circumstances.

Fla. Std. Jury Instr. (Crim.) 7.10.

Hence, the State objected to the entire paragraph and stated that the language was already included in the first paragraph in the numbered portion describing the process. (R 6767). The trial court originally agreed and removed this paragraph because of *Poole* and noted it was taken out of the proposed new instruction. (R 6766; 6770; 6773). Nevertheless, in trying to make as few changes as possible, the trial court ultimately left the paragraph in, simply

removing the word “unanimously” contrary to the State’s proposed instructions and the language in *Poole*.

Likewise, the final penalty-phase instructions, contained the following, inaccurate language which is indicated by italics:

Once each juror has weighed the proven factors, he or she must determine the appropriate punishment for the defendant. The jury’s decision regarding the appropriate sentence must be unanimous if death is to be imposed. To repeat what I have said, *if your verdict is that the defendant should be sentenced to death, your finding that each aggravating factor exists must be unanimous, your finding that the aggravating factors are sufficient to impose death must be unanimous, your finding that the aggravating factor[s] found to exist outweigh the established mitigating circumstances must be unanimous, and your decision to impose a sentence of death must be unanimous.*

Fla. Std. Jury Instr. (Crim.) 7.11. The court once again only omitted the term “unanimously” but kept the incorrect language regarding sufficiency. (R 4489; T 7429-30).

As to the verdict form, the standard form authorized by this Court contains the following language:

3.12(e) JURY VERDICT FORM—DEATH PENALTY

We the jury find as follows as to (Defendant) in this case:

A. Aggravating Factors as to Count ___:

We the jury unanimously find that the State has established beyond a reasonable doubt the existence of (aggravating factor).

YES _____

NO _____

Repeat this step for each statutory aggravating factor submitted to the jury.

If you answer YES to at least one of the aggravating factors listed, please proceed to Section B. If you answered NO to every aggravating factor listed, do not proceed to Section B; (Defendant) is not eligible for the death sentence and will be sentenced to life in prison without the possibility of parole.

B. Sufficiency of the Aggravating Factors as to Count _____:

Reviewing the aggravating factors that we unanimously found to be established beyond a reasonable doubt (Section A), we the jury unanimously find the aggravating factors are sufficient to warrant a possible sentence of death.

YES _____

NO _____

If you answer YES to Section B, please proceed to Section C. If you answer NO to Section B, do not proceed to Section C; (Defendant) will be sentenced to life in prison without the possibility of parole.

C. Mitigating Circumstances:

One or more individual jurors find that one or more mitigating circumstances was established by the greater weight of the evidence.

YES _____

NO _____

Please proceed to Section D, regardless of your findings in Section C.

D. Eligibility for the Death Penalty for Count ____.

We the jury unanimously find that the aggravating factors that were proven beyond a reasonable doubt (Section A) outweigh the mitigating circumstances established (Section C above) as to Count ____.

YES _____

NO _____

If you answered YES to Section D, please proceed to Section E. If you answered NO to Section D, do not proceed; (Defendant) will be sentenced to life in prison without the possibility of parole.

E. Jury Verdict as to Death Penalty

Having unanimously found that at least one aggravating factor has been established beyond a reasonable doubt (Section A), that the aggravating [factor] [factors] [is] [are] sufficient to warrant a sentence of death (Section B), and the aggravating [factor] [factors] outweigh the mitigating circumstances (Section D), we the jury unanimously find that (Defendant) should be sentenced to death.

YES _____

NO _____

Although the verdict form used below omitted the term “unanimously” in both interrogatories B and D, the State had asked to strike B, C and D and leave A and E, to be consistent with *Poole* and the statute. (R 5706).

The motions filed by the State asked that the verdict form and the penalty phase jury instructions omit the language that *Poole* said was unnecessary. However, while the trial court, removed the word "unanimously" as requested by the State, it still used much of the standard language in contradiction to the State’s proposed instructions which eliminated the sufficiency and weighing requirements from *Hurst v. State*. The State argues that the language identified in both the *Preliminary Instructions* and the *Final Instructions* as well as the Verdict Form, is contrary to the explicit holding in *Poole*, is not a correct statement of the law, and should not have been given.

The trial judge's error is harmless only if the death penalty is affirmed by this Honorable Court.

CONCLUSION

The State respectfully requests this Honorable Court find that the trial court should have granted the State's motion updating the Preliminary and Final Instructions to conform with the Court's decision in *Poole*.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing REPLY BRIEF OF CROSS-APPELLANT/APPELLEE has been furnished via e-portal to: **Nancy Ryan**, Assistant Public Defender, Email: ryan.nancy@pd7.org, coppello.renee@pd7.org,

appellate.efile@pd7.org; **Robert Jackson Pearce, III**, Assistant
Public Defender Email: pearce.robert@pd7.org, 444 Seabreeze Blvd.,
Suite 210, Daytona Beach, FL 32118 on this 6th day of March, 2023.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this
response is 14-point Bookman Old Style, and word count is 1,709 in
compliance with Fla. R. App. P. 9.210 and 9.045.

s/DORIS MEACHAM
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