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IN THE SUPREME COURT OF FLORIDA

Case No. SC18-245

STATE OF FLORIDA,

Appellant/Cross-Appellee,

v.

MARK ANTHONY POOLE,

Appellee/Cross-Appellant.

On Appeal From The Tenth Judicial Circuit,
In And For Polk County, State of Florida

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STATEMENT OF THE ISSUES

I. On Mark Anthony Poole's cross-appeal, whether under *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), Poole is entitled to a new trial on the ground that defense counsel's concession of guilt over Poole's objection violated the Sixth Amendment to the U.S. Constitution.

II. On the State of Florida's appeal, whether the trial court correctly vacated the sentence of death imposed in the absence of the unanimous jury findings required by *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) (per curiam).

INTRODUCTION

This case, which arises out of Appellee/Cross-Appellant Mark Anthony Poole's postconviction proceeding, concerns two fundamental constitutional violations—each of which is governed by controlling precedent.

Although Appellant/Cross-Appellee State of Florida challenges the trial court's vacatur of Poole's death sentence, this Court must first decide whether Poole's underlying capital conviction is valid. It is not. *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), leaves no doubt that where, as here, a defense counsel concedes guilt over the express objection of his client, the defense counsel has committed a structural Sixth Amendment error that necessitates a new trial. That straightforward conclusion, which affects Poole's convictions on all counts, obviates the need to reach the State's appeal.

If this Court leaves Poole's capital conviction intact, however, it should affirm the trial court's vacatur of Poole's death sentence under *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) (per curiam) ("*Hurst III*"). The State does not dispute that Poole's death sentence, like the vacated death sentences of nearly 150 other defendants, contravenes *Hurst III* because a unanimous jury never made the requisite findings under Florida law to impose that punishment. Instead, the State takes the position that this Court should overrule *Hurst III*—insofar as that precedent requires a jury to find that aggravating circumstances outweigh mitigating circumstances—as

inconsistent with the U.S. Supreme Court's interpretation of the Sixth Amendment in *Hurst v. Florida*, 136 S. Ct. 616 (2016) ("*Hurst II*"). The State has been unable to persuade the U.S. Supreme Court to take up that question, and this Court has refused the State's previous bids to overturn *Hurst III* as well. This case warrants similar treatment. Notwithstanding its hand-waving at *stare decisis* principles, the State does not come close to meeting the standard required to overrule *Hurst III*, given its recency and the serious injustice that would follow reversal. At any rate, the State's argument fails on its merits: the State ignores the freestanding state-law underpinnings of the jury-findings requirement and takes a pinched view of *Hurst II* and *Hurst III* that disregards the distinctive features of Florida's capital sentencing statute. Accordingly, at minimum, Poole is entitled to vacatur of his death sentence.

STATEMENT OF THE CASE

A. Trial And Direct Appeals

1. Poole was charged with the first-degree murder of Noah Scott, attempted first-degree murder and sexual battery of Loretta White, burglary, and robbery. At trial, the State sought to prove that Poole entered Scott and White's mobile home, raped and struck White with a tire iron while also striking Scott, and stole video games that he later sold. *Poole v. State*, 997 So. 2d 382, 387-389 (Fla. 2008) (per curiam) ("*Poole I*"). Poole's defense counsel, Howard Dimmig, conceded during closing argument that Poole committed the non-homicide offenses (*i.e.*, burglary,

sexual battery, and robbery), but denied that Poole committed the homicide offenses (*i.e.*, first-degree murder and attempted first-degree murder). *Id.* at 390. The jury returned a guilty verdict on all counts. *Id.* at 388.

Following a penalty-phase proceeding, a jury by a vote of 12-0 recommended a death sentence for the murder of Scott. *Poole I*, 997 So. 2d at 388. The trial court found two statutory aggravators, as well as three statutory mitigators and numerous nonstatutory mitigators. *Id.* at 388-389. Finding that the mitigating circumstances did not outweigh the aggravating circumstances, the trial court sentenced Poole to death on the first-degree murder count and to consecutive life sentences on the other counts. *Id.* at 389.

On direct appeal, Poole pressed several improprieties in the State's presentation of its case and challenged the constitutionality of Florida's capital sentencing statute. *Poole I*, 997 So. 2d at 389. Despite finding that the State had violated Poole's rights in varying respects, this Court rejected most of Poole's claims and affirmed his convictions. *Id.* at 389-391, 394-397. Because the State's improper cross-examination of witnesses at the penalty phase could not be deemed harmless, however, this Court "vacate[d] [Poole's] sentence of death and remand[ed] the case to the trial court to conduct a new penalty phase proceeding." *Id.* at 391-394, 397.

2. On remand, the jury recommended a death sentence of 11-1 on the first-degree murder count. *Poole v. State*, 151 So. 3d 402, 408 (Fla. 2014) (per curiam)

("*Poole II*"). The trial court found four aggravating circumstances: (1) the contemporaneous conviction for the attempted murder of White; (2) that the capital felony occurred during the commission of a burglary, robbery, and sexual battery; (3) that the capital felony was committed for financial gain; and (4) that the capital felony was committed in a heinous, atrocious, or cruel manner. *Id.* It also found two statutory mental mitigating circumstances and 11 nonstatutory mitigating circumstances. *Id.* Finding that the aggravating circumstances outweighed the mitigating circumstances, the trial court sentenced Poole to death in August 2011. *Id.*

This Court affirmed the sentence of death. *Poole II*, 151 So. 3d at 419. In doing so, the Court again rejected Poole's challenge to the constitutionality of the Florida capital sentencing statute. *Id.*

B. Postconviction Proceedings

In April 2016, Poole timely filed a postconviction motion, raising two claims that are relevant here: (1) that defense counsel Dimmig violated the Sixth Amendment (among other constitutional provisions) in acknowledging that Poole committed the charged burglary, sexual assault, and robbery, ROA Vol. III, at 414-418; and (2) that the death sentence was unconstitutional under the U.S. Supreme Court's recently issued decision in *Hurst II* and this Court's remand decision in

Hurst III, *id.* at 465-471; *see* ROA Vol. IV, at 634-638 (amending motion following *Hurst III*).

1. The trial court issued an interim order vacating Poole's death sentence under *Hurst III*, which held that a unanimous jury must make all the findings necessary to impose the death penalty under Florida law. ROA Vol. VI, at 1064. Reviewing this Court's post-*Hurst III* precedent, the trial court determined that, "because the jury recommendation in this case was not unanimous, it cannot find beyond a reasonable doubt that the *Hurst* error did not contribute to Mr. Poole's sentence of death." *Id.* at 1065-1066.

2. The trial court then held an evidentiary hearing on the guilt-phase postconviction claims. Pertinent here, Dimmig recounted his understanding that, despite Poole's repeated and explicit instruction not to concede guilt, an attorney had discretion to override such an objection under *Florida v. Nixon*, 543 U.S. 175 (2004). ROA Vol. VII, at 1303-1304, 1318-1321, 1325-1326. Dimmig exercised that (supposed) discretion on the belief that Poole was best served by accepting responsibility for the non-homicide charges, thereby preserving credibility in defending against the homicide charges. *See id.* at 1295-1298.

After examining Dimmig's testimony at length, the trial court denied Poole's claim. ROA Vol. IX, at 1720-1732. According to the court, "Dimmig made a tactical decision" in order "to maintain credibility with the jury," "thought the *Nixon*

case gave him the authority to concede [g]uilt on the non-homicide cases," and "reasonably thought that by doing so he gave Mr. Poole the best chance of not being convicted of first degree murder." *Id.* at 1732.

Poole filed a motion for rehearing, calling the trial court's attention to the (overlooked) argument in Poole's post-hearing brief that, even under *Nixon*, "an admission of guilt against the express wishes of one's client can never be objectively reasonable." ROA Vol. IX, at 1766-1769; *see also* ROA Vol. VIII-IX, at 1587-1602, 1679-1682 (post-hearing briefs). As further support for that claim, Poole submitted several *amicus curiae* briefs filed in *McCoy v. Louisiana*, a pending U.S. Supreme Court case raising the same issue. ROA Vol. IX-X, at 1773-1913.

The State did not file a response, and the trial court denied rehearing "[b]ased on [its] review of the Motion, the file and the applicable law." ROA Vol. X, at 1925.

3. In February 2018, the State appealed the vacatur of Poole's death sentence, ROA Vol. X, at 1919, and Poole cross-appealed the trial court's order denying his guilt-phase claims, *id.* at 1934.

Three months later, in May 2018, the U.S. Supreme Court issued its decision in *McCoy*, 138 S. Ct. 1500, holding that the Sixth Amendment bars a defense counsel from conceding guilt over a client's objection.

SUMMARY OF ARGUMENT

I. This Court should vacate Poole's convictions on all counts under the U.S. Supreme Court's recent decision in *McCoy*, which governs review of Poole's (then-pending and still non-final) guilt-phase postconviction claim. Here, as in *McCoy*, defense counsel informed the jury—over the defendant's intransigent and unambiguous objection—that the defendant was guilty. And here, as in *McCoy*, that concession constituted a structural Sixth Amendment error that must be rectified by a new trial, irrespective of prejudice.

Poole's new trial must encompass not only the non-homicide offenses to which his defense counsel admitted guilt, but also the homicide offenses. That is the only result consistent with the settled understanding that a structural error pervades the entire trial, as well as the State's submission to the jury that the acknowledgment of guilt was pertinent to all of the charged crimes—in particular, felony murder.

II. If Poole's capital conviction withstands *McCoy*, this Court should decline the State's request to overrule *Hurst III*, insofar as that case reads *Hurst II* and the Sixth Amendment to require in capital sentencing that a Florida *jury* find that aggravating circumstances outweigh mitigating circumstances, and affirm the vacatur of Poole's death sentence.

As a threshold matter, the State gives short shrift to the presumption of *stare decisis* and fails to appreciate the serious injustice of leaving Poole's death sentence

undisturbed, when nearly 150 defendants have been granted *Hurst III* relief. The State also ignores the fact that Florida law independently requires that a jury weigh aggravating and mitigating circumstances.

With respect to federal law, the State is incorrect that "weighing" is not a factual finding that must be made by a jury. The Sixth Amendment insists that a jury make any determination that exposes a defendant to greater punishment than authorized by a guilty verdict, and Florida's capital sentencing statute expressly provides that a death sentence can be imposed *only* if there is a penalty-phase finding of fact that aggravating circumstances outweigh mitigating circumstances. *Hurst II* recognized as much in holding that the advisory verdict could not satisfy the Sixth Amendment because the trial court alone performed the "weighing" function. None of the State's authorities from other jurisdictions considers, let alone forecloses, the possibility that *Florida's* "weighing" step must be performed by a jury. Moreover, the State's explications of whether jury sentencing is constitutionally mandated and whether the Eighth Amendment imposes a unanimity requirement at the penalty phase of capital cases likewise do not support the State's position on "weighing."

Precedent squarely forecloses the State's (fallback) harmless error argument. Where *Hurst III* applies and a violation occurred, this Court has refused to find that violation harmless in *every* case involving a non-unanimous jury recommendation,

regardless of the strength of the State's aggravation evidence. Because Poole's jury split 11-1, this Court should reach the same result here.

STANDARD OF REVIEW

Where a trial court denies postconviction claims "after an evidentiary hearing, [this Court] defer[s] to the postconviction court's factual findings as long as they are supported by competent, substantial evidence in the record and review[s] the postconviction court's legal conclusions de novo." *Patrick v. State*, 246 So. 3d 253, 260 (Fla. 2018) (per curiam) (citation and internal quotation marks omitted). Whether a death sentence must be vacated under *Hurst III* is a legal question reviewed de novo. *Reynolds v. State*, 251 So. 3d 811, 814 (Fla. 2018) (per curiam) ("*Reynolds I*").

ARGUMENT

I. POOLE'S CONVICTIONS MUST BE VACATED UNDER *McCOY*

Without reaching the State's appeal concerning vacatur of Poole's death sentence, this Court should vacate Poole's convictions as an antecedent matter. Under *McCoy*, 138 S. Ct. 1500, Poole's defense counsel committed a structural Sixth Amendment violation in admitting guilt—contrary to Poole's wishes.

A. Defense Counsel Violated The Sixth Amendment And Committed A Structural Error By Admitting Guilt Over Poole's Objection

1. McCoy *precludes defense counsel from overriding a defendant's directive to pursue acquittal.*

In *McCoy*, the State of Louisiana charged McCoy with murdering three members of his family. 138 S. Ct. at 1506. Despite McCoy's express instruction not to concede guilt, his defense counsel told the jury that McCoy was the killer—in the hope that the jury would spare McCoy the death penalty. *Id.* at 1506-1507.

The U.S. Supreme Court deemed that concession constitutionally impermissible. "The Sixth Amendment," the Court explained, "guarantees to each criminal defendant 'the Assistance of Counsel for his defence.'" 138 S. Ct. at 1507. Although "most defendants choose to be represented by counsel," that "choice is not all or nothing: To gain assistance, a defendant need not surrender control entirely to counsel. For the Sixth Amendment, in 'grant[ing] to the accused personally the right to make his defense,' 'speaks of the "assistance" of counsel, and an assistant, however expert, is still an assistant.'" *Id.* at 1508 (alteration in original) (citation omitted). Indeed, the Court had previously recognized that because "[s]ome decisions *** are reserved for the client—notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal"—they are excluded from defense counsel's "province" of "[t]rial management." *Id.*

Adding to that list of reserved client decisions, the Court held that defendants must retain "[a]utonomy to decide that the objective of the defense is to assert innocence." 138 S. Ct. at 1508. Such decisions "are not strategic choices about how best to *achieve* a client's objectives; they are choices about what the client's objectives in fact *are*." *Id.* Thus, even when a "[c]ounsel may reasonably assess a concession of guilt as best suited to avoiding the death penalty," "[w]hen a client expressly asserts that the objective of '*his* defence' is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt." *Id.* at 1508-1509 (quoting amend. VI, U.S. CONST.).

The Court further explained that *Florida v. Nixon*, 543 U.S. 175, did not command a contrary result. In that case, there was no Sixth Amendment violation because "Nixon 'was generally unresponsive' during discussions of trial strategy, and 'never verbally approved or protested' counsel's proposed approach" to offer an "admission of *** guilt." *McCoy*, 138 S. Ct. at 1509 (quoting 543 U.S. at 181, 185). McCoy, by contrast, repeatedly protested his defense counsel's invitation to return a guilty verdict. *Id.*

With regard to remedy, the Court declared that a "[v]iolation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called 'structural'; when present, such an error is not subject to harmless-error review." 138 S. Ct. at 1511. That is because an admission of guilt "blocks the

defendant's right to make the fundamental choices about his own defense. And the effects of the admission would be immeasurable, because a jury would almost certainly be swayed by a lawyer's concession of his client's guilt." *Id.* For those reasons, McCoy was "accorded a new trial without any need first to show prejudice." *Id.*

2. McCoy *applies squarely to Poole's case.*

McCoy conclusively resolves Poole's claim that, despite a directive to maintain innocence, his defense counsel (Howard Dimmig) unconstitutionally admitted guilt to the non-homicide offenses (*i.e.*, burglary, sexual battery, and robbery). The postconviction record could not be clearer on three central points.

First, Poole told Dimmig *not* to concede guilt a half-dozen times:

> Q. Did Mr. Poole consent to you conceding these charges?
>
> A. To the best of my recollection, he did not.
>
> Q. Was he adamant that you not concede the charges?
>
> A. He was consistent in that position. We were able to discuss it, but he was consistent in his position that he did not want it conceded.
>
> Q: How many times approximately would you say you discussed the strategy with Mr. Poole?
>
> A: Again, I don't have an absolute memory. I would estimate at least five or six times, including during the course of the trial.

ROA Vol. VII, at 1303-1304; *see also id.* at 1311-1312 (Dimmig agreeing that Poole "never consented to [the] concession at all" to "acknowledg[e] guilt"); *id.* at 1325-

1326 (Dimmig recounting that Poole expressed a preference against Dimmig's strategy "on multiple occasions"). Poole never wavered from that position:

> Q. *** At any time did Mr. Poole abandon his objection to you conceding guilt to the non-homicide offenses.
>
> A. Not that I recall.

ROA Vol. VIII, at 1548. Thus, Poole lodged an "intransigent and unambiguous objection" with his counsel. *McCoy*, 138 S. Ct. at 1507.

Second, Dimmig refused to heed Poole's directive and twice told the jury during closing argument what he had "hinted" at from the outset of the case: that Poole was guilty of the non-homicide offenses.

> Mr. Poole acknowledges that he went in the trailer, 4-L, and committed a crime therein. That's a burglary. Mr. Poole acknowledges that he had sexual contact with Loretta White against her will, and that's a sexual battery. And Mr. Poole acknowledges that he had possession of those [stolen video] games and he went down the road and sold them, and that's a robbery.

ROA Vol. VI, at 1141-1142; *see id.* at 1170 ("[R]emember, he did the burglary, he did the sexual battery, he did the robbery. *** And when you convict Mr. Poole of burglary, sexual battery, and robbery, he will be before this judge for the administration of justice."). That had the effect of "putting words into [Poole's]

mouth" without his permission. ROA Vol. VII, at 1311 (Dimmig agreeing that Poole never even acknowledged committing those offenses).[1]

Third, it was not lost on Dimmig, the State, and the trial court that the "acknowledgement of guilt" raised constitutional concerns. ROA Vol. VII, at 1316. During a subsequent bench conference, the State represented that it had queried Dimmig about his "understanding of the role of the attorney versus the role of the defendant," and that it wished to "make [that conversation] part of the record, for whatever—wherever that might go, either in appeal or in post-conviction." *Id.* at 1316-1317. Dimmig explained that the conversation "deal[t] with *** [whether] [he] had the authority to concede guilt," and that he "did believe that [he] had that authority"—indeed, "sole[] *** discretion"—based on *Nixon*. *Id.* at 1318-1321. Dimmig exercised that discretion on the theory that, by maintaining credibility with

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[1] In its brief (at 11-13), the State appears to suggest that Poole tacitly agreed to the concession of guilt when, moments before delivering his closing argument, Dimmig advised Poole in open court of that intention. The State quotes Dimmig's testimony that Poole was non-responsive, but leaves out Dimmig's statement doubting "that there was even an opportunity" to respond. ROA Vol. VIII, at 1481; *see id.* at 1545-1547 ("I do not recall *** there being time for a response. I just looked at him and said I'm go[ing] to do it."; "[I]t would have been split seconds. I would have looked over and said I'm going to do it and stood up and walked to the podium."; "I was not there long enough for him to—to give him time to respond, yes."). At any rate, given Poole's prior insistence that guilt not be conceded and Dimmig's statements that Poole never abandoned the objection, Poole's non-responsiveness at that particular moment could not possibly be read as a change in position.

the jury as to the non-homicide offenses, he could avoid a conviction on the homicide offenses. *See id.* at 1295-1298 (Dimmig providing overview of strategy). At the same time, Dimmig appreciated that if "this strategy were to fail and Mr. Poole were convicted of first degree murder and proceeded to the penalty phase," the defense "team as a whole" would "clearly" be "less credible." *Id.* at 1305; *see id.* at 1346 (Dimmig agreeing that he "was considering the second phase of the case" when he "made the decision to *** admit to the non-homicide offenses"); ROA Vol. VIII, at 1479 (Dimmig stating that he "thought about [the penalty phase]" in deploying strategy).

Notwithstanding that record evidence, the trial court (albeit without the benefit of *McCoy*) rejected Poole's postconviction claim on the ground that "Dimmig thought the *Nixon* case gave him the authority to concede [g]uilt on the non-homicide cases, and he reasonably thought that by doing so he gave Mr. Poole the best chance of not being convicted of first degree murder." ROA Vol. IX, at 1732. Of course, *McCoy* holds that, regardless of whether Dimmig's strategy was sound, once Poole "object[ed] to [Dimmig's] proposed strategy, a concession of guilt should have been off the table." 138 S. Ct. at 1512; *see id.* at 1509 ("If, after consultations with English concerning the management of the defense, McCoy disagreed with English's proposal to concede McCoy committed three murders, it was not open to English to override McCoy's objection."). Accordingly, on this

record there can be no dispute that Dimmig violated Poole's Sixth Amendment right in admitting guilt.

3. The structural error requires invalidation of Poole's convictions on all counts.

Dimmig committed a structural error that can result only in the invalidation of Poole's convictions. *See McCoy*, 138 S. Ct. at 1510-1511; *see also Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (stating that structural error "will always invalidate the conviction"). As in *McCoy*, "the violation of [Poole's] protected autonomy right was complete when" Dimmig "usurp[ed] control of an issue within [Poole's] sole prerogative." 138 S. Ct. at 1511. Poole "must therefore be accorded a new trial without any need first to show prejudice." *Id.*

To be clear, a new trial is necessary for not only the non-homicide counts, but for the homicide counts as well. The very nature of a structural error is that it "pervades the *entire* trial," *Kaley v. United States*, 571 U.S. 320, 336 (2014) (emphasis added) (citation and quotation marks omitted), and "undermine[s] the fairness of a criminal proceeding *as a whole*," *United States v. Davila*, 569 U.S. 597, 611 (2013) (emphasis added). In the face of a structural error, "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991) (citation and quotation marks omitted). Thus, it is unsurprising that courts have vacated convictions on "all counts" after finding a

structural error. *United States v. Noushfar*, 78 F.3d 1442, 1446, 1448 (9th Cir. 1996) ("We reverse all convictions.").

Moreover, it would be illogical to consider the non-homicide and homicide counts in isolation. Beyond the fact that the "effects of the admission [of guilt]" on the jury are "immeasurable," *McCoy*, 138 S. Ct. at 1511, "a concession on one count might increase the chances of conviction on others," *United States v. Gomes*, 177 F.3d 76, 83 (1st Cir. 1999). That is "especially" true "in a case *** where the charges are interrelated and evidence relevant to one count may have influenced the jury as to others," *United States v. Roy*, 761 F.3d 1285, 1297 (11th Cir. 2014) (finding structural error), *vacated on other grounds*, 855 F.3d 1133, 1142 (11th Cir. 2017) (en banc) (finding error to be non-structural). In that scenario, "the convictions as to all counts are tainted" by the structural error. *Id.* at 1296.

To see that the non-homicide and homicide counts in this case are inextricably intertwined, such that the structural error tainted all counts, this Court need look no further than the State's own words. In its rebuttal closing argument, the State wasted no time linking the capital offense to the conceded crimes—in particular, the sexual battery (a felony)—precisely because that link could be used to convict Poole of felony murder:

> The very first thing that Mr. Dimmig addressed that was substantive was he said Mr. Poole acknowledges or acknowledged that he committed the sexual battery, he committed the robbery, and he committed the burglary.

> ***
>
> [I]f you want to accept this version of the facts, you have to somehow believe that there is another person out there that went in and attacked these people. *** But I couldn't figure out whether Mr. Poole was supposed to have been there before this mystery person or after this mystery person. But whichever it was, Ms. White must not have been there, because *the guy that was raping Ms. White—Mr. Poole—was beating Noah Scott over the head with a tire iron while he was doing it*. And that's *felony murder*.

ROA Vol. VI, at 1173-1174 (emphasis added); *see id.* at 1176; *see also* pp. 15-16, *supra* (Dimmig recognizing impact of strategy on penalty phase).

Given that the State pursued a theory of the case wherein Dimmig's admission of guilt on the non-homicide charges was tantamount to a concession of guilt on all charges, it would blink reality to conclude that the admission had no effect on the jury's decision to return a murder conviction. Accordingly, there is both a firm legal and compelling factual basis for this Court to vacate Poole's convictions on all counts.

B. *McCoy* Governs Poole's Postconviction Claim

Although *McCoy* issued after the trial court denied Poole's postconviction claim, it governs this Court's review on appeal under *Castano v. State*, 119 So. 3d 1208 (Fla. 2012) (per curiam). There, Castano timely filed a postconviction motion asserting, contrary to prevailing law at the time, that defense counsel should have informed her that a guilty plea would have collateral deportation consequences. While Castano's "postconviction proceeding was pending," the U.S. Supreme Court

held that a defense counsel is obligated to provide such advice under the Sixth Amendment. *Id.* at 1208 (citing *Padilla v. Kentucky*, 559 U.S. 356 (2010)). This Court quashed the Fifth District Court of Appeal's refusal to apply *Padilla*. *Id.*

In a concurring opinion, Justice Pariente explained that "where the defendant timely raised the same postconviction claim as the defendant in *Padilla* and the resolution of her claim was still pending at the time *Padilla* was decided," then "it is in effect a 'pipeline' case for purposes of whether *Padilla* applies." *Castano*, 119 So. 3d at 1210. In other words, the Fifth District Court of Appeal should have applied the longstanding rule that courts should decide pending cases in accordance with the law in effect at the time of the appeal, rather than the law in effect at the time of the order on appeal. *Id.*; *see also Wheeler v. State*, 344 So. 2d 244, 245 (Fla. 1977) (per curiam) ("The decisional law in effect at the time an appeal is decided governs the issues raised on appeal, even where there has been a change of law since the time of trial.").

This case is on all fours with *Castano*. Poole timely filed a postconviction motion arguing that Dimmig's decision to concede guilt violated the U.S. Constitution. ROA Vol. III, at 414-418; *see also* ROA Vol. VIII-IX, at 1587-1602, 1679-1682 (post-hearing briefs). Poole even cited the briefing in *McCoy* and urged the trial court to "stay *** proceedings pending the forthcoming opinion of the United States Supreme Court." ROA Vol. IX, at 1766-1769 (motion for

reconsideration). The trial court nevertheless denied Poole's claim, reasoning that Dimmig had made a reasonable tactical decision countenanced by *Nixon*. Soon after, with Poole's postconviction proceeding still pending, the U.S. Supreme Court decided *McCoy*—authority that would have resolved Poole's claim in his favor. "[I]t would be inequitable and illogical to hold that only one of two similarly situated defendants—[McCoy] and not [Poole]—should receive the benefit of the United States Supreme Court's decision." *Castano*, 119 So. 3d at 1211 (Pariente, J., concurring). Thus, *McCoy* governs here.[2]

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[2] In view of *Castano*, this Court can leave for another day whether *McCoy* should be given retroactive effect. But it is worth noting that *McCoy* would satisfy this Court's retroactivity standard. *McCoy* "(a) emanates from *** the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance." *Witt v. State*, 387 So. 2d 922, 931 (Fla. 1980) (per curiam). Like *Gideon v. Wainwright*, 372 U.S. 335 (1963), which this Court deemed a "prime example" of a fundamentally significant development that "remed[ied] the basic constitutional injustice of prior felony trials without counsel," *Witt*, 387 S. 2d at 927, 929, *McCoy* remedied the "fundamental unfairness" of a defense counsel overriding an objection to admitting guilt, contravening the "fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty," and essentially depriving a defendant of the assistance of counsel. 138 S. Ct. at 1511 (citation and quotation marks omitted). Moreover, because it is "now know[n]" that *Nixon* did not authorize defense counsel to decide whether to pursue innocence, "it is undeniable that [*McCoy*] changed the [Sixth Amendment] calculus." *Mosley v. State*, 209 So. 3d 1248, 1280-1281 (Fla. 2016) (per curiam). Finally, retroactive application of *McCoy* would not "burden the judicial machinery *** fiscally and intellectually, beyond any tolerable limit," *Witt*, 387 So. 2d at 929-930, as a defense counsel is more likely to "part ways" than to concede guilt over a client's express objections, *McCoy*, 138 S. Ct. at 1512, 1514-1515 (Alito, J., dissenting) (positing that fact pattern was "rare" and "unlikely to recur").

II. THE TRIAL COURT CORRECTLY VACATED POOLE'S DEATH SENTENCE UNDER *HURST III*

The State's appeal, which this Court would reach only if the homicide conviction were to survive *McCoy*, challenges the trial court's vacatur of Poole's death sentence. The State does not dispute that the trial court imposed that sentence in the absence of the unanimous jury findings required by *Hurst III—i.e.*, "the existence of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances." 202 So. 3d at 44. Nor does the State dispute that Poole's 11-1 jury recommendation failed to satisfy *Hurst III*'s further requirement "that in order for the trial court to impose a sentence of death, the jury's recommended sentence of death must be unanimous." *Id.*[3]

Instead, the State launches a frontal assault on *Hurst III* itself, arguing that this Court should overrule that barely two-year-old precedent to the extent it "require[s] the weighing of aggravating and mitigating circumstances as an essential finding before a sentence of death may be imposed in Florida." Br. 23. The U.S. Supreme Court declined to review that exact question when the State petitioned for

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[3] *Hurst III* applies retroactively to Poole because his death sentence was imposed after the U.S. Supreme Court issued *Ring v. Arizona*, 536 U.S. 584, 589 (2002). *See Mosley*, 209 So. 3d at 1283 (applying *Hurst III* to all convictions that became final after *Ring*).

a writ of certiorari. *See Florida v. Hurst*, 137 S. Ct. 2161 (2017) (mem.). And this Court has rebuffed the State's subsequent attempts to scale back *Hurst III* as well. *See, e.g.*, *Jackson v. State*, 213 So. 3d 754, 783 (Fla. 2017) (per curiam) (noting that "Jackson and the State dispute the scope of [*Hurst III*]," and "agree[ing] with Jackson that a jury must find that sufficient aggravating circumstances exist and that these aggravating circumstances outweigh any mitigating circumstances"); *Taylor v. Jones*, 228 So. 3d 71 (Fla. 2017) (per curiam) (vacating death sentence); Answer to Successive Pet. for Writ of Habeas Corpus at 11-14, *Taylor*, 228 So. 3d 71 (No. SC17-1145), 2017 WL 3114165, at *11-*14 (arguing that *Hurst III* "is incorrectly decided"). The State's (latest) attempt to achieve that result should suffer the same fate.

A. The State's Arguments For Overruling *Hurst III* Lack Merit

None of the State's arguments for overruling *Hurst III* supports that exceptional result.

1. The State gives short shrift to stare decisis.

"[A] decision to depart from the principles of stare decisis cannot be taken lightly." *Robertson v. State*, 143 So. 3d 907, 910 (Fla. 2014) (per curiam). To the contrary, "[t]he presumption in favor of *stare decisis* is strong, and where the decision in issue was a watershed judgment resolving a deeply divisive societal controversy, the presumption in favor of *stare decisis* is at its zenith." *North Fla.*

Women's Health & Counseling Servs., Inc. v. State, 866 So. 2d 612, 637-638 (Fla. 2003). *Hurst III* is unquestionably such a watershed case. *See Mosley*, 209 So. 3d at 1281 ("From *Hurst* [*III*], it is undeniable that *Hurst* [*II*] changed the calculus of the constitutionality of capital sentencing in this State.").

The *stare decisis* analysis is anything but freewheeling. Traditionally, "[b]efore overruling a prior decision of this Court, *** several questions, including the following," are posed:

> (1) Has the prior decision proved unworkable due to reliance on an impractical legal "fiction"? (2) Can the rule of law announced in the decision be reversed without serious injustice to those who have relied on it and without serious disruption in the stability of the law? And (3) have the factual premises underlying the decision changed so drastically as to leave the decision's central holding utterly without legal justification?

North Fla. Women's Health, 866 So. 2d at 637. At bottom, there must be either a "significant change in circumstances since the adoption of the legal rule" or an "error in legal analysis" of sufficient "gravity," such that the prior decision is "unsound in principle" or "unworkable in practice." *Robertson*, 143 So. 3d at 910 (citation and quotation marks omitted).

Rather than engage in that analysis, the State suggests that "[*s*]*tare decisis* concerns should be somewhat alleviated" because it seeks a return to the pre-*Hurst III* status quo, notes that *Hurst III* has "resulted in the reversal of a large number of death sentences," and looks to case law from other jurisdictions. Br. 25-27. None

of those points establishes that *Hurst III* has been overtaken by a "significant change in circumstances" or is "unsound in principle" or "unworkable in practice." *Robertson*, 143 So. 3d at 910 (citation and quotation marks omitted); *see also* pp. 36-37, *infra* (distinguishing *Hurst III* from other case law).

If anything, Florida law has evolved in a way that undercuts the State's claim that *Hurst III* needs to be overruled. In the wake of the U.S. Supreme Court's January 2016 decision in *Hurst II*, but *before* this Court's October 2016 remand decision in *Hurst III*, the Florida legislature in March 2016 made several *statutory* changes to Florida's capital sentencing scheme. The amended statute: (i) "requires the jury to determine whether at least one aggravating factor has been proven beyond a reasonable doubt, and *** to find the aggravating factors unanimously and to specify which aggravating factors have been found unanimously"; (ii) "expressly indicates that a death sentence cannot be considered unless at least one aggravating factor has been proven beyond a reasonable doubt"; (iii) "requir[es] the jury to make a sentencing recommendation based on the weighing of whether sufficient aggravating factors exist *** [and] whether those aggravating factors outweigh the mitigating circumstances found to exist"; and (iv) allowed the jury to "recommend a death sentence so long as at least ten jurors agree that the defendant should be sentenced to death." *Perry v. State*, 210 So. 3d 630, 636-638 (Fla. 2016) (per curiam)

(citations omitted); *see* Ch. 2016-13, § 3, at 3-4, Laws of Fla.[4] Those attributes of the Florida capital sentencing scheme, which echo those set forth in *Hurst III*, will persist even if *Hurst III* is overruled.

In addition, given that nearly 150 capital defendants have already seen their death sentences vacated under *Hurst III* for lack of the requisite unanimous jury findings, *see Florida Death-Penalty Appeals Decided in Light of Hurst*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/Hurst_Cases_Reviewed (last updated Nov. 9, 2018); pp. 45-46, *infra*, and others will be entitled as a statutory matter to the benefit of the new sentencing framework going forward, it makes little sense to withhold the same protections from Poole. To embrace that disparate result in a matter of life and death—particularly when Poole has challenged the constitutionality of his death sentence for over a decade, *see Poole II*, 151 So. 3d at 419; *Poole I*, 997 So. 2d at 396—would work a "serious injustice." *North Fla. Women's Health*, 866 So. 2d at 637; *cf. Mosley*, 209 So. 3d at 1275 ("[B]ecause Mosley raised a *Ring* claim at his first opportunity and was then rejected at every turn, we conclude that fundamental fairness requires the retroactive application of *Hurst* [*III*], which defined the effect of *Hurst* [*II*], to Mosley.").

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[4] After this Court struck down the (final) provision allowing a nonunanimous jury to recommend death, *see Perry*, 210 So. 3d at 639-640, the Florida legislature amended the statute to require unanimity, Ch. 2017-1, § 1, at 1, Laws of Fla.

2. *The State ignores* Hurst III*'s independent Florida law underpinnings.*

On the merits, the State frames its argument in terms of whether *Hurst III*'s requirement that a jury make the findings mandated by Florida law is "required or even suggested by the [U.S.] Supreme Court's decision in *Hurst [II]*." But that framing elides the fact that *Hurst III*'s holding is independently grounded in Florida law: "We reach this holding based on the mandate of [*Hurst II*] *and* on Florida's constitutional right to jury trial, considered in conjunction with our precedent concerning the requirement of jury unanimity as to the elements of a criminal offense." *Hurst III*, 202 So. 3d at 44 (emphasis added); *see id.* at 54 ("This holding is founded upon the Florida Constitution and Florida's long history of requiring jury unanimity in finding all the elements of the offense to be proven; and it gives effect to our precedent that the final decision in the weighing process must be supported by sufficient competent evidence in the record.") (citations and internal quotation marks omitted); *see also id.* at 57 ("[T]his Court, as the ultimate arbiter of the meaning and extent of the safeguards and fundamental rights provided by the Florida Constitution, may interpret those rights as providing greater protections than those in the United States Constitution.") (citation and quotation marks omitted). In particular, this Court pointed to the 1838 Florida Constitution's "right to trial by jury in criminal cases," found now in article I, section 22 of the current Constitution. *Id.* at 54-55.

This Court also explained that, "[i]n capital cases, Florida's early laws *** indicate that jurors controlled which defendants would receive death" by virtue of the fact that "the penalty for defendants convicted of murder was death by hanging." *Hurst III*, 202 So. 3d at 55. Consequently, "the jury's factual findings on the elements of the crime also necessarily served as the elements necessary for imposition of a sentence of death." *Id.* By 1872, "Florida law *** expressly provided a mechanism by which the jury could grant mercy in a capital case and assure a life sentence," and "[t]hus, historically, it was the finding by the jury of all the elements necessary for conviction of murder that subjected the defendant to the ultimate penalty, unless mercy was expressed in the verdict of the jury as allowed by law." *Id.* at 55-56 & n.11.

When *Furman v. Georgia*, 408 U.S. 238 (1972), upended Florida's mandatory capital sentencing scheme, the Florida legislature responded by "requir[ing] the jury to consider evidence of aggravating factors concerning the circumstances of the crime, as well as evidence of mitigating circumstances that a jury may find renders the death penalty inappropriate for an individual defendant in a specific case." *Hurst III*, 202 So. 3d at 56; *see also id.* at 51-53 (conducting "close review of Florida's sentencing statute" and "identify[ing] those critical findings that underlie imposition of a death sentence"). Although the legislature gave "Florida judge[s]" the "ultimate[]" responsibility over the sentencing decision, there was no question that

"[t]hese findings are necessary because, *** [g]iven that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases." *Id.* at 56 (citation and internal quotation marks omitted). Because those same "findings occupy a position on par with elements of a greater offense," this Court in *Hurst III* "conclude[d] that all these findings necessary for the imposition of a sentence of death must be made by the jury." *Id.* at 57.

The State adopts the position that *Hurst III* cannot be squared with "[]either the Florida []or Federal constitutions." Br. 23. In reality, however, the State focuses exclusively on the latter. Indeed, article I, section 22 of the Florida Constitution appears nowhere in the State's brief, even though this Court has stated on several occasions that a death sentence lacking the requisite jury findings is "imposed in violation of *** article I, section 22, of the Florida Constitution, as this Court fully explained in *Hurst* [*III*]." *Andres v. State*, --- So. 3d ---, 43 Fla. L. Weekly S389, 2018 WL 4496567, at *14 (Fla. 2018) (per curiam).[5] The State's plea to overrule

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[5] *See, e.g.*, *Perry*, 210 So. 3d at 639 (recounting that *Hurst III* was based on "Florida's right to a jury trial provided under article I, section 22 of the Florida Constitution"); *Mosley*, 209 So. 3d at 1274 (conducting "retroactivity analysis based on *** our opinion in *Hurst* [*III*], interpreting the meaning of *Hurst* [*II*] as applied to Florida's capital sentencing scheme and considering Florida's independent right to trial by jury in article I, section 22, of the Florida Constitution"); *Simmons v. State*, 207 So. 3d 860, 867 (Fla. 2016) (per curiam) (holding that jury findings on aggravation and mitigation "do[] not meet *** the requirements of Florida's right to

Hurst III thus fails to grapple with the full breadth of this Court's holding and should be rejected for that reason alone.

3. Hurst III *correctly holds that a jury must make each of the requisite findings in the Florida capital sentencing scheme.*

The State is wrong in any event that, as a matter of Sixth Amendment law, *Hurst III* conflicts with *Hurst II*. In the Florida capital sentencing scheme struck down in *Hurst II*, several critical findings—including the fact that aggravating circumstances outweigh mitigating circumstances—were necessary to imposition of the death penalty.

a. As this Court detailed at length in *Hurst III*, the U.S. Supreme Court decided *Hurst II* "[a]gainst [a] backdrop of [its] decisions implementing the guarantees of the Sixth Amendment in *Apprendi*, *Ring*, and *Blakely*." 202 So. 3d at 50. Starting with *Apprendi v. New Jersey*, the Court set forth the foundational rule "that the Sixth Amendment does not permit a defendant in a noncapital case, without additional jury findings, to be exposed to a penalty exceeding the maximum he would receive if the punishment was based only on the facts reflected in the jury's guilty verdict." *Id.* at 48 (citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000)). The Court then extended that holding to the death penalty context in *Ring v. Arizona*,

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jury trial under article I, section 22, of the Florida Constitution, as we explained in *Hurst* [*III*]").

holding that "[c]apital defendants, no less than noncapital defendants, *** are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment"—"even if the State characterizes the additional findings made by the judge as 'sentencing factor[s].'" *Id.* (second alteration in original) (quoting *Ring*, 536 U.S. at 589). Finally, in *Blakely v. Washington*, the Court reaffirmed that *Apprendi* "ensur[es] that the judge's authority to sentence derives *wholly* from the jury's verdict" and that "every defendant has the right to insist that the prosecutor prove to a jury *all facts legally essential to the punishment*." *Id.* at 50 (some emphasis added and omitted) (quoting *Blakely v. Washington*, 542 U.S. 296, 313 (2004)).

Hurst II applied those rules to Florida's capital sentencing scheme. "The Court reiterated, as it had in *Apprendi*, 'that any fact that "expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict" is an "element" that must be submitted to [the] jury.'" *Hurst III*, 202 So. 3d at 51 (alterations in original) (quoting *Hurst II*, 136 S. Ct. at 621). In evaluating and ultimately striking down Florida's capital sentencing scheme under that principle, the Court recognized "that, pursuant to section 775.082(1), Florida Statutes (2012), the maximum sentence a capital felon may receive on the basis of the conviction alone is life imprisonment." *Id.* (citing 136 S. Ct. at 620). To go beyond life imprisonment, the Florida "statute made clear that a person convicted of a capital

felony shall be punished by death only if a separate sentencing proceeding 'results in *findings* by the court that such person shall be punished by death.'" *Id.* (emphasis added) (quoting 136 S. Ct. at 620).

Those "findings," the Court then explained, had been "described *** by the Florida Supreme Court" and in "the Florida sentencing statute": "The 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.'" *Hurst II*, 136 S. Ct. at 622 (alterations and second ellipsis in original) (emphasis omitted) (quoting § 921.141(3), FLA. STAT. (2010)); *see id.* ("'[T]he trial court alone must make detailed findings about the existence and weight of aggravating circumstances[.]'") (first alteration in original) (quoting *State v. Steele*, 921 So. 2d 538, 546 (Fla. 2005)).

On remand, this Court conducted a "close review of Florida's sentencing statutes *** to identify"—in line with *Apprendi*, *Ring*, *Blakely*, and *Hurst II*—"those critical findings that underlie imposition of a death sentence." *Hurst III*, 202 So. 3d at 51.[6] It began by noting that section 775.082 states that "[a] person who has been convicted of a capital felony shall be punished by death if the proceeding held to

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[6] Citations are to the versions of the statutes, set forth in the statutory addendum, struck down in *Hurst II* and *Hurst III*. Poole was sentenced under that statutory scheme.

determine sentence according to the procedure set forth in § 921.141 *results in findings by the court that such person shall be punished by death*." *Id.* at 52 (quoting § 775.082(1), FLA. STAT.). Section 921.141, in turn, provided that a Florida trial court imposing a sentence of death "shall set forth in writing its *findings* upon which the sentence of death is based as to the *facts*: (a) That *sufficient aggravating circumstances* exist *** , and (b) *That there are insufficient mitigating circumstances to outweigh the aggravating circumstances*." *Id.* (first and second emphasis added) (quoting § 921.141(3), FLA. STAT.); *see also* § 921.141(3), FLA. STAT. ("In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written *findings of fact* based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings.") (emphasis added).

The Florida capital sentencing statute did not permit the imposition of the death penalty in the absence of those factual findings. *See Hurst III*, 202 So. 3d at 53 ("[U]nder Florida law, 'The death penalty may be imposed only where *sufficient aggravating circumstances* exist that *outweigh* mitigating circumstances.'") (quoting *Parker v. Dugger*, 498 U.S. 308 (1991)). Indeed, section 921.141(3) was explicit that "[i]f the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with § 775.082." § 921.141(3),

FLA. STAT. It follows that in Florida, per *Hurst II* and the Sixth Amendment, the weighing of aggravating and mitigating circumstances was a finding that a *jury* must render. *See* 136 S. Ct. at 622 ("As with Timothy Ring, the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole. As with *Ring*, a judge increased Hurst's authorized punishment based on her own factfinding. In light of *Ring*, we hold that Hurst's sentence violates the Sixth Amendment."). Thus, in holding that "before a sentence of death may be considered by the trial court in Florida, the jury must find," *inter alia*, "that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances," *Hurst III*, 202 So. 3d at 53, this Court followed *Hurst II* to the letter.

b. Resisting that conclusion, the State characterizes (Br. 29-32) *Hurst III* as "greatly expand[ing]" *Hurst II*. That gloss on those cases does not withstand scrutiny. For reasons just explained, *Hurst III* does nothing more than apply to the Florida capital sentencing statute *Hurst II*'s "dictate that '[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death.'" *Hurst III*, 202 So. 3d at 51 (quoting *Hurst II*, 136 S. Ct. at 619).

According to the State, *Hurst II* "did not address the process of weighing the aggravating and mitigating circumstances or suggest that the jury must conduct the

weighing process to satisfy the Sixth Amendment." Br. 29. But that simply ignores the following passage:

> As described above and by the Florida Supreme Court, the Florida sentencing statute does not make a defendant eligible for death until "findings *by the court* that such person shall be punished by death." Fla. Stat. § 775.082(1) (emphasis added). The 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); *see Steele*, 921 So. 2d, at 546. "[T]he jury's function under the Florida death penalty statute is advisory only." *Spaziano v. State*, 433 So. 2d 508, 512 (Fla. 1983). The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires.

136 S. Ct. at 622 (alterations and ellipsis in original). If the "necessary factual finding that *Ring* requires" does not include the weighing of aggravating and mitigating circumstances, it would have made no difference to the Court's analysis that the "trial court *alone*" made that particular factual finding. *Id.* (citation and quotation marks omitted).

To be sure, *Hurst II* also states that "'Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is *** unconstitutional.'" Br. 30 (ellipsis in original) (emphasis omitted) (quoting 136 S. Ct. at 624). But *Hurst II* cannot be confined to that single sentence. In holding that aspect of Florida's capital sentencing scheme to contravene the Sixth Amendment, the Court did not bless (either directly or indirectly) the practice of having a trial court make the other findings necessary to impose a death sentence under Florida

law. Quite the opposite, the *Hurst II* excerpt in the preceding paragraph makes clear that the "trial court *alone*" could *not* continue to make those findings.[7]

c. Apart from *Hurst II*, the State proffers (Br. 32-36) that there is a "compelling amount of precedent" specifying that "weighing in relation to a sentence" is not a fact that must be found by a jury.

That precedent—which the State erroneously labels (Br. 36) a "solid wall" by omitting contrary decisions, *see Rauf v. State*, 145 A.3d 430, 434 (Del. 2016) (per curiam); *State v. Whitfield*, 107 S.W.3d 253, 256-262 (Mo. 2003) (en banc); *Woldt v. People*, 64 P.3d 256, 266-267 (Colo. 2003) (en banc)—is inapposite. Those cases

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[7] For the same reasons, the State incorrectly surmises (Br. 31-32) that, because *Ring* and *Hurst II* both concerned defendants with no prior or contemporaneous felonies that would qualify as aggravators, those cases simply determined that it was unconstitutional for a court alone to find the fact of aggravating circumstances—and nothing more. The legal principle set forth in *Ring* applies to *all* predicate findings for imposition of the death penalty. And *Hurst II* expressly casts the exclusion of the jury from Florida law's "weighing" process as a deficiency under *Ring*.

Furthermore, the absence of prior/contemporaneous felonies does not "explain[]" a "gap between the Supreme Court's ruling in *Ring* and *Hurst [II]*." Br. 31. *Hurst II* was hardly the first Florida case to present such facts and land before the U.S. Supreme Court. *See, e.g.*, *Hurst v. State*, 147 So. 3d 435, 446 (Fla. 2014) (per curiam) (citing "similarly situated cases," including those the U.S. Supreme Court declined to review, in which this Court "ha[s] rejected the *Ring* claim"). More to the point, this Court adhered to its pre-*Ring* decisions not because of any prior/contemporaneous felony conviction distinction, but because (i) the U.S. Supreme Court had previously upheld Florida's sentencing procedures and did not overrule that precedent in *Ring*, and (ii) there were differences (ultimately deemed immaterial in *Hurst II*) between the Florida and Arizona schemes. *Id.* at 446-447.

largely concern the Federal Death Penalty Act, which folds the weighing of aggravating and mitigating factors into the sentencing decision itself by asking the jury merely to "consider" that information. 18 U.S.C. § 3593(e); *see, e.g.*, *United States v. Gabrion*, 719 F.3d 511, 531-533 (6th Cir. 2013). Others involve sentencing statutes that differ materially from Florida's. *See, e.g.*, *State v. Belton*, 74 N.E.3d 319, 336-337 (Ohio 2016) ("Ohio's capital-sentencing scheme is unlike the laws at issue in *Ring* and *Hurst* [*II*]. *** Because [in Ohio] the determination of guilt of an aggravating circumstance renders the defendant eligible for a capital sentence, it is not possible to make a factual finding during the sentencing phase that will expose a defendant to greater punishment."); *State v. Gales*, 658 N.W.2d 604, 627 (Neb. 2003) ("In contrast [to *Apprendi* and *Ring*], *** the balancing of aggravating circumstances against mitigating circumstances *** [is] part of the 'selection decision' in capital sentencing, which, under the current and prior statutes, occurs only after eligibility has been determined."). *None* evaluates whether Florida's allowance of a death sentence only upon predicate "*findings* *** as to the *fact*[]" that aggravating circumstances outweigh mitigating circumstances, § 921.141(3), FLA. STAT. (emphasis added), implicates the Sixth Amendment.

Accordingly, whether other jurisdictions have found no Sixth Amendment impediment to a court-only weighing of aggravating and mitigating circumstances does not resolve whether a Florida jury in a Florida state court must make the

"weighing" factual finding required by Florida law. In the end, as this Court has underscored more than once, "identify[ing] th[]e critical findings that underlie imposition of a death sentence *** is a matter of state law." *Hurst III*, 202 So. 3d at 51; *see Jackson*, 213 So. 3d at 783 ("Those facts that permit authorization of a death sentence are a matter of state law."); *see also Spaziano v. Florida*, 468 U.S. 447, 464 (1984) ("As the Court several times has made clear, we are unwilling to say that there is any one right way for a State to set up its capital sentencing scheme."). *Hurst II* is not to the contrary. *See* 136 S. Ct. at 619, 622 (discussing what "*Florida law* required *** to justify imposing the death penalty" and explaining that "the *Florida sentencing statute* does not make a defendant eligible for death until" certain findings of fact are made) (emphasis added); *see also Ring*, 536 U.S. at 589 (requiring "jury determination of any fact *on which the legislature conditions* an increase in [defendants'] maximum punishment") (emphasis added).[8]

To the extent the State submits that other U.S. Supreme Court precedent has already foreclosed the possibility that "weighing" could be a finding subject to *Apprendi* and its progeny, its cited cases do not come close to establishing that

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[8] Of course, a state could not structure its capital sentencing scheme in a manner that conflicts with the federal constitutional floor set by the U.S. Supreme Court. *See, e.g.*, *Tuilaepa v. California*, 512 U.S. 967, 971-972 (1994) ("To render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase.").

proposition. In *Sattazahn v. Pennsylvania*, the Court's statement that the presence of an aggravating circumstance "increases the maximum permissible sentence to death" was a description of its holding in *Ring*, which concerned an Arizona law that allowed imposition of a death sentence without findings beyond aggravation. 537 U.S. 101, 111 (2003). That language cannot be extrapolated into a categorical rule that "once the state establishes the existence of an aggravating circumstance, the defendant becomes eligible for an enhanced sentence of death and the jury need not make any additional 'factual' findings." State Br. 28-29. The same is true for *Jenkins v. Hutton* (Br. 34), where the only finding necessary to make the defendant eligible for the death penalty under Ohio law was the presence of an aggravating circumstance. *See* 137 S. Ct. 1769, 1772 (2017) (citing *Hutton v. Mitchell*, 839 F.3d 486, 511 (6th Cir. 2016) (Rogers, J., dissenting)); *see also Belton*, 74 N.E.3d at 336-337.

Nor does it matter that "weighing" is a mechanism for considering mercy in capital sentencing, *Kansas v. Marsh*, 548 U.S. 163, 177, 179 (2006), or that when "[a]pproaching the question in the abstract, and without reference to *** capital-sentencing case law," the existence of mitigation may be described as a judgment call, *Kansas v. Carr*, 136 S. Ct. 633, 642 (2016). *Contra* State Br. 32-33. Such factors, however labeled, fall equally within the ambit of the *Apprendi* line if the death penalty remains unavailable in their absence. *See Apprendi*, 530 U.S. at 494

("[T]he relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict."); *Ring*, 536 U.S. at 589 ("This prescription governs, *Apprendi* determined, even if the State characterizes the additional findings made by the judge as 'sentencing factor[s].'") (alteration in original). To borrow Justice Scalia's words, "the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt." *Ring*, 536 U.S. at 610 (Scalia, J., concurring). So long as Florida law required a factual finding as to how the "weighing" comes out, and the death penalty could not have been imposed without that finding, the Sixth Amendment insists that a jury supplied it.

d. Notably, even assuming *arguendo* that "weighing" is not a factual finding subject to the Sixth Amendment, vacatur of Poole's death sentence would still be necessary in light of other *Hurst III* errors that the State does not confront. For instance, the State offers no treatment of whether the *sufficiency* of aggravating circumstances is a factual finding. That was no oversight: The opening line of the State's argument (which tracks its summary of argument and dovetails with the remainder of its brief) indicates that "[t]he State is seeking reconsideration and reversal of *part of* this Court's decision in [*Hurst III*]," and points only to the

recognition of "the weighing of aggravating and mitigating circumstances as an essential finding before a sentence of death may be imposed in Florida." Br. 22-23 (emphasis added).

Here, the jury's 11-1 recommendation did not provide "unanimity as to all aggravating factors to be considered," "unanimity that sufficient aggravating factors exist for the imposition of the death penalty," or "unanimity in the final jury recommendation for death." *Perry*, 210 So. 3d at 633. Because the death penalty cannot be imposed in the absence of those findings, any of those deficiencies alone is sufficient to uphold the trial court's vacatur of Poole's death sentence. *See, e.g.*, *Jackson*, 213 So. 3d at 784-785 (emphasizing that jury must make "findings of '*sufficient*' aggravating circumstances" and finding error because "at least one juror apparently concluded *** that sufficient aggravating circumstances did not exist").

4. The State's attacks on jury sentencing and the unanimity requirement are misguided.

Lastly, the State faults this Court for using the unanimity requirement "[t]o explain" the (alleged) "expansion" of *Hurst II*. Br. 36-41. In truth, the State's arguments are not directed at whether a jury, as opposed to a judge, must make the predicate factual findings for imposition of a death sentence mandated by Florida law. But they fail even on their own terms.

First, the State puts stock in the notion that *both* the Sixth Amendment and the Florida constitutional right to a jury trial have been "limited to *** trial, not

sentencing." Br. 37. That is wrong on several levels. For starters, the State relies exclusively on Sixth Amendment authorities, which do not purport to interpret or define the scope of article I, section 22 of the Florida Constitution (which, again, the State does not even cite, *see* p. 29, *supra*). In addition, the Sixth Amendment plainly *does* apply to sentencing matters when a defendant is exposed to increased punishment based solely on a judge's findings. *See Ring*, 536 U.S. at 609 ("The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death. We hold that the Sixth Amendment applies to both.").

Further still, the State's concern that *Hurst III* has resulted in "jury sentencing" lacks any foundation. *See* State Br. 26 (citing Justice Scalia's statement in *Ring* concurrence that "[t]oday's judgment has nothing to do with jury sentencing") (citation and quotation marks omitted). In *Hurst III*, this Court carefully explained that its decision does not "eliminate the right of the trial court, even upon receiving a unanimous recommendation for death, to impose a sentence of life." 202 So. 3d at 58. Thus, to complete the quotation from *Ring* that the State invokes, it remains the case after *Hurst III* that—assuming the necessary findings were made by a jury—Florida law "leave[s] the ultimate life-or-death decision to the judge." *Ring*, 536 U.S. at 612 (Scalia, J., concurring).

Second, the State expends much effort arguing (Br. 38-41) that because the Eighth Amendment does not require a *unanimous* jury recommendation of death in a capital case, this Court could not require the same under article I, section 17 of the Florida Constitution. That argument likewise suffers from several defects. The Florida-law basis for the unanimity requirement was article I, section 22, not article I, section 17. *See Perry*, 210 So. 3d at 633 n.4 (noting that while *Hurst III* imposed unanimity requirement as matter of federal constitutional law, the Court's "basic reasoning rests on Florida's independent constitutional right to trial by jury") (citing art. I, § 22, FLA. CONST.). Several of the State's authorities do not pertain to the Eighth Amendment and/or discuss a jury-sentencing requirement that (as just explained in the preceding paragraph) *Hurst III* did not adopt. *See Clemons v. Mississippi*, 494 U.S. 738, 745 (1990) (discussing Sixth Amendment in portion cited by State and stating that jury is not required to impose sentence); *Spaziano*, 468 U.S. at 457-465 (discussing jury sentencing); *Apodaca v. Oregon*, 406 U.S. 404 (1972) (plurality opinion) (Sixth Amendment); *Proffitt v. Florida*, 428 U.S. 242, 252 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (discussing jury sentencing); *Johnson v. Louisiana*, 406 U.S. 356 (1972) (equal protection, due process, and Fourth Amendment).[9]

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[9] Even if Florida did employ jury sentencing, whether the Eighth Amendment permits "a scheme that required the judge to make the ultimate decision to impose

More fundamentally, the State cites zero cases for the proposition that the U.S. Supreme Court has rejected an Eighth Amendment unanimity requirement for capital sentencing. Hence, there is no "conflict[]" (Br. 39) between *Hurst III* and U.S. Supreme Court precedent that would trigger article I, section 17's conformity clause.

B. The State Cannot Demonstrate Harmless Error

Anticipating that this Court may decline to retreat from *Hurst III*, the State contends that the violation of Poole's federal and Florida constitutional rights is harmless error. The State fails to satisfy that stringent standard.[10]

The State "bears an extremely heavy burden" of "prov[ing] beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary

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the death penalty, and in which the jury was repeatedly instructed that its recommended verdict would be advisory," continues to be a contested matter notwithstanding *Spaziano* and *Proffitt*. *Reynolds v. Florida*, --- S. Ct. ---, No. 18-5181, 2018 WL 5913358, at *2 (2018) ("*Reynolds II*") (Breyer, J., statement respecting denial of certiorari).

[10] Conversely, the State argues (Br. 41-43) that, under its view of *Hurst II*, Poole's convictions for attempted first-degree murder and the non-homicide offenses would satisfy the (uncontested) requirement that the jury find aggravating circumstances unanimously. Poole maintains that the "continued validity" of that rule, derived from *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), is "questionable," *Jackson*, 213 So. 3d at 787, and should be revisited by the U.S. Supreme Court. But even still, some or all of the trial court's aggravation findings may fall under *McCoy*, certain aggravators cannot be based on the mere fact of a prior conviction, and the State cannot predict with the requisite certainty whether the trial court would have imposed a death sentence based on a different set of aggravators.

for imposition of the death penalty did not contribute to [Poole's] death sentence in this case." *Hurst III*, 202 So. 3d at 68. As the State "acknowledges *** , this Court has only found *Hurst* error harmless where the jury recommendation has been unanimous." Br. 44. Where the jurors have not agreed—whether on a vote of 7-5, 11-1, or in between—this Court has repeatedly and *uniformly* rejected the State's harmless error arguments.[11] That is because, even where aggravating factors were

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[11] *See, e.g.*, *State v. Smith*, 251 So. 3d 807, 810 (Fla. 2018) (per curiam) (10-2); *Patrick*, 246 So. 3d at 265 (7-5); *Guzman v. State*, 238 So. 3d 146, 157-158 (Fla. 2018) (per curiam) (11-1); *Kirkman v. State*, 233 So. 3d 456, 472 (Fla. 2018) (per curiam) (10-2); *Morris v. State*, 233 So. 3d 438, 451 (Fla. 2018) (per curiam) (10-2); *Lebron v. State*, 232 So. 3d 942, 957 (Fla. 2017) (per curiam) (9-3); *Ellerbee v. State*, 232 So. 3d 909, 915, 933 (Fla. 2017) (per curiam) (11-1); *Taylor*, 228 So. 3d at 72 (10-2); *Brookins v. State*, 228 So. 3d 31, 40 (Fla. 2017) (per curiam) (10-2); *Doorbal v. Jones*, 227 So. 3d 110, 111 (Fla. 2017) (per curiam) (8-4); *Glover v. State*, 226 So. 3d 795, 812 (Fla. 2017) (per curiam) (10-2); *Williams v. State*, 226 So. 3d 758, 760, 773 (Fla. 2017) (per curiam) (10-2); *Bailey v. Jones*, 225 So. 3d 776, 777 (Fla. 2017) (per curiam) (11-1); *Okafor v. State*, 225 So. 3d 768, 775 (Fla. 2017) (per curiam) (11-1); *Serrano v. State*, 225 So. 3d 737, 759 (Fla. 2017) (per curiam) (9-3); *Pasha v. State*, 225 So. 3d 688, 698, 717 (Fla. 2017) (per curiam) (11-1); *Gregory v. State*, 224 So. 3d 719, 738 (Fla. 2017) (per curiam) (7-5); *Jeffries v. State*, 222 So. 3d 538, 550-551 (Fla. 2017) (per curiam) (10-2); *Peterson v. State*, 221 So. 3d 571, 585 (Fla. 2017) (per curiam) (7-5); *Bargo v. State*, 221 So. 3d 562, 568, 570 (Fla. 2017) (per curiam) (10-2); *Cole v. State*, 221 So. 3d 534, 540, 545 (Fla. 2017) (per curiam) (9-3); *Sexton v. State*, 221 So. 3d 547, 553, 559 (Fla. 2017) (per curiam) (10-2); *Bevel v. State*, 221 So. 3d 1168, 1177 (Fla. 2017) (per curiam) (8-4); *Braddy v. State*, 219 So. 3d 803, 814, 826-827 (Fla. 2017) (per curiam) (11-1); *Hall v. State*, 219 So. 3d 783, 789 (Fla. 2017) (per curiam) (8-4); *Card v. Jones*, 219 So. 3d 47, 48 (Fla. 2017) (per curiam) (11-1); *Hertz v. Jones*, 218 So. 3d 428, 432 (Fla. 2017) (per curiam) (10-2); *Caylor v. State*, 218 So. 3d 416, 425 (Fla. 2017) (per curiam) (8-4); *Davis v. State*, 217 So. 3d 1006, 1020 (Fla. 2017) (per curiam) (9-3 and 10-2); *Snelgrove v. State*, 217 So. 3d 992, 997, 1004 (Fla. 2017) (per curiam) (8-4); *Hampton v. State*, 219 So. 3d 760, 782 (Fla. 2017) (per curiam) (9-3);

found by a unanimous jury at the guilt phase, there would be "no way of knowing" if those "aggravating circumstances were 'sufficient' to qualify [the defendant] for the death penalty"; "no way of knowing if the jury found any of the other aggravating circumstances unanimously, or if any aggravators that were unanimously found were also unanimously found to be sufficient to qualify [the defendant] for the death penalty"; and "any attempt to determine what findings were made by the jurors who voted for life and jurors who voted for death would amount to speculation and cannot

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Banks v. State, 219 So. 3d 19, 32-33 (Fla. 2017) (per curiam) (10-2); *Abdool v. State*, 220 So. 3d 1106, 1116 (Fla. 2017) (per curiam) (10-2); *Altersberger v. State*, 216 So. 3d 621, 629 (Fla. 2017) (per curiam) (9-3); *Newberry v. State*, 214 So. 3d 562, 568 (Fla. 2017) (per curiam) (8-4); *Robards v. State*, 214 So. 3d 568, 576 (Fla. 2017) (per curiam) (7-5); *McMillian v. State*, 214 So. 3d 1274, 1289 (Fla. 2017) (per curiam) (10-2); *Orme v. State*, 214 So. 3d 1269, 1274 (Fla. 2017) (per curiam) (11-1); *Bradley v. State*, 214 So. 3d 648, 652, 657 (Fla. 2017) (per curiam) (10-2); *Heyne v. State*, 214 So. 3d 640, 648 (Fla. 2017) (per curiam) (10-2); *Guzman v. State*, 214 So. 3d 625, 631, 640 (Fla. 2017) (per curiam) (7-5); *White v. State*, 214 So. 3d 541, 549-550 (Fla. 2017) (per curiam) (8-4); *Baker v. State*, 214 So. 3d 530, 536 (Fla. 2017) (per curiam) (9-3); *Deviney v. State*, 213 So. 3d 794, 799-800 (Fla. 2017) (per curiam) (8-4); *Hodges v. State*, 213 So. 3d 863, 868, 881 (Fla. 2017) (per curiam) (10-2); *Smith v. State*, 213 So. 3d 722, 744 (Fla. 2017) (per curiam) (10-2 and 9-3); *Anderson v. State*, 220 So. 3d 1133, 1140, 1150 (Fla. 2017) (per curiam) (8-4); *Ault v. State*, 213 So. 3d 670, 680 (Fla. 2017) (per curiam) (9-3 and 10-2); *Dubose v. State*, 210 So. 3d 641, 644-645, 657 (Fla. 2017) (per curiam) (8-4); *Durousseau v. State*, 218 So. 3d 405, 414-415 (Fla. 2017) (per curiam) (10-2); *Calloway v. State*, 210 So. 3d 1160, 1200 (Fla. 2017) (per curiam) (7-5); *McGirth v. State*, 209 So. 3d 1146, 1164 (Fla. 2017) (per curiam) (11-1); *Armstrong v. State*, 211 So. 3d 864, 865 (Fla. 2017) (per curiam) (9-3); *Williams v. State*, 209 So. 3d 543, 567 (Fla. 2017) (per curiam) (9-3); *Kopsho v. State*, 209 So. 3d 568, 570 (Fla. 2017) (per curiam) (10-2); *Mosley*, 209 So. 3d at 1284 (8-4); *Franklin v. State*, 209 So. 3d 1241, 1245, 1248 (Fla. 2016) (per curiam) (9-3); *Simmons*, 207 So. 3d at 867 (8-4); *Johnson v. State*, 205 So. 3d 1285, 1288, 1290-1291 (Fla. 2016) (per curiam) (11-1).

rise to the level of proof beyond a reasonable doubt." *Hertz*, 218 So. 3d at 432 (footnote omitted) (10-2 recommendation where aggravators included conviction of a felony involving threat of violence, burglary, robbery, and murder in a heinous, atrocious, or cruel manner).[12] That wealth of authority leaves no room for a first-of-its-kind finding of harmless error in this case.

The State's disagreement is grounded in what it holds up as "strong evidence" that the murder was committed in a heinous, atrocious, or cruel manner, and in its "detailed review of the evidence of aggravation and mitigation." Br. 43-47. But focusing on the strength of the evidence is precisely the harmless error analysis that

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[12] *See also Andres*, 43 Fla. L. Weekly S389, 2018 WL 4496567, at *14 (holding that 9-3 recommendation is not harmless because "[t]his Court cannot determine whether the[] [dissenting] jurors did not find that sufficient aggravating factors were proven to impose a sentence of death, that the aggravation did not outweigh the mitigation, or, for some other reason, determined that death was not an appropriate sentence"); *Pagan v. State*, 235 So. 3d 317, 318 (Fla. 2018) (per curiam) (holding that 7-5 recommendation is not harmless because "we cannot determine whether the jury would have unanimously found that the aggravation outweighed the mitigation"); *Jackson*, 213 So. 3d at 787-789 ("[It] is impossible for us to conclude that the jury would have found the existence of this aggravating circumstance beyond a reasonable doubt from its simple nonunanimous [11-1] recommendation to sentence Jackson to death."); *Hojan v. State*, 212 So. 3d 982, 1000 (Fla. 2017) (per curiam) (holding in 9-3 recommendation case—with aggravators of contemporaneous attempted murder, financial gain, and murder in a heinous, atrocious, or cruel manner—that it would be "impossible *** to conclude that the *Hurst* [*III*] error in this case was harmless beyond a reasonable doubt"); *Hurst III*, 202 So. 3d at 69 ("We decline to speculate as to why seven jurors in this case recommended death and why five jurors were persuaded that death was not the appropriate penalty. To do so would be contrary to our clear precedent governing harmless error review.").

this Court has eschewed. In *Hurst III*, this Court voiced its "full[] aware[ness] of the brutal actions that resulted in the murder," and even offered its view that "[t]he evidence of the circumstances surrounding this murder can be considered overwhelming and essentially uncontroverted." 202 So. 3d at 68-69. Yet the Court refused to find harmless error, cautioning:

> The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence.

Id. at 68 (citation and quotation marks omitted). Those statements apply with particular force to the heinous, atrocious, or cruel aggravator because "an erroneous finding of [heinous, atrocious, or cruel] is often harmful because of the associated weight of this aggravating circumstance." *Jackson*, 213 So. 3d at 788.

The State's overarching contention that "[t]his was simply not a close case as evidenced by the jury's near-unanimous 11-1 death recommendation," and its supposition that the lone juror holdout "would have altered or changed his or her vote" if unanimity had been required, are equally unavailing. Br. 45-47. There is a serious question whether a *unanimous* jury recommendation is enough to insulate a *Hurst III* error against vacatur when the jurors knew the final sentencing decision rested with the trial judge. *Caldwell v. Mississippi*, 472 U.S. 320, 341 (1985) ("This Court has always premised its capital punishment decisions on the assumption that

a capital sentencing jury recognizes the gravity of its task," and thus found unconstitutional the "minimiz[ation] [of] the jury's sense of responsibility for determining the appropriateness of death."); *see also Reynolds II*, 2018 WL 5913358, at *4-*9 (Sotomayor, J., dissenting from denial of certiorari).

Regardless of how that question may ultimately be resolved, the harmless error analysis in this case travels a well-trodden path that leads to a new penalty-phase proceeding. It is settled that a "nonunanimous advisory recommendation cannot be overlooked in [the] harmless error analysis," and "[t]he fact that a single juror" votes against a death sentence "is itself evidence of reasonable doubt that a different result might have occurred but for the *Hurst* [*II*] error." *Jackson*, 213 So. 3d at 787; *see Reynolds I*, 251 So. 3d at 815 ("We have been abundantly clear that there is a critical distinction between unanimous and nonunanimous jury recommendations as they pertain to *Hurst* [*III*] error."). Accordingly, the State cannot discharge its heavy burden by suggesting that 11-1 is close enough for harmless error.

CONCLUSION

This Court should vacate Poole's convictions on all counts under *McCoy*. In the event the Court reaches the State's appeal, it should affirm the trial court's vacatur of Poole's death sentence.

Respectfully submitted,

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STATUTORY ADDENDUM

§ 775.082(1), FLA. STAT. (2011).....A1

§ 921.141, FLA. STAT. (2010) A2

Florida Statutes

Title XLVI. Crimes (Chapters 775-899)

Chapter 775. General Penalties; Registration of Criminals

§ 775.082. Penalties; applicability of sentencing structures; mandatory minimum sentences for certain reoffenders previously released from prison

Effective: July 1, 2011 to July 30, 2014

(1) A person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in § 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole.

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Florida Statutes

Title XLVII. Criminal Procedure and Corrections (Chapters 900-999)

Chapter 921. Sentence

§ 921.141. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence

Effective: October 1, 2010 to March 6, 2016

(1) Separate proceedings on issue of penalty.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by § 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or the defendant's counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) Findings in support of sentence of death.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with § 775.082.

(4) Review of judgment and sentence.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida and disposition rendered within 2 years after the filing of a notice of appeal. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any: robbery; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary; kidnapping; aircraft piracy; or unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(*i*) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(j) The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties.

(k) The victim of the capital felony was an elected or appointed public official engaged in the performance of his or her official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity.

(*l*) The victim of the capital felony was a person less than 12 years of age.

(m) The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.

(n) The capital felony was committed by a criminal gang member, as defined in § 874.03.

(*o*) The capital felony was committed by a person designated as a sexual predator pursuant to § 775.21 or a person previously designated as a sexual predator who had the sexual predator designation removed.

(p) The capital felony was committed by a person subject to an injunction issued pursuant to § 741.30 or § 784.046, or a foreign protection order accorded full faith and credit pursuant to § 741.315, and was committed against the petitioner who obtained the injunction or protection order or any spouse, child, sibling, or parent of the petitioner.

(6) Mitigating circumstances.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

(h) The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.

(7) Victim impact evidence.—Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence to the jury. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by

the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

(8) Applicability.—This section does not apply to a person convicted or adjudicated guilty of a capital drug trafficking felony under § 893.135.

CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2018, a true and correct copy of the foregoing has been furnished via electronic service to all counsel of record on this day.

/s/ Z.W. Julius Chen
Z.W. Julius Chen

CERTIFICATE OF COMPLIANCE

This brief has been prepared using Microsoft Word and 14-point Times New Roman type style, and thus complies with the typeface and type-style requirements of Rule 9.100(1).

/s/ Z.W. Julius Chen
Z.W. Julius Chen