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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.

MOTION FOR REHEARING AND CLARIFICATION

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MOTION FOR REHEARING AND CLARIFICATION

COMES NOW the Appellee/Cross-Appellant, Mark Anthony Poole, by and through the undersigned attorneys, and moves for rehearing and clarification of this Court's January 23, 2020 opinion pursuant to Florida Rule of Appellate Procedure 9.330, and states as follows:

I. THE COURT OVERLOOKED THAT THE CORRECT REMEDY UNDER ITS DECISION IS TO REMAND FOR A PROPER WEIGHING OF THE AGGRAVATING AND MITIGATING CIRCUMSTANCES

Assuming this Court adheres to its decision in this case to recede partially from *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) ("*Hurst III*"), *but see* Part II, *infra*, it cannot reinstate Poole's death sentence outright. Rather, even under the rule that the jury needs to make only the finding of aggravating circumstances in § 921.141(3)(a), FLA. STAT. (2010), the appropriate remedy here would be to remand for the trial court to reweigh the aggravating factors and mitigating circumstances, taking into account *only* those aggravating circumstances that were actually found by a unanimous jury. *See* Poole Initial Br. 44 n.10 (arguing that "certain aggravators cannot be based on the mere fact of a prior conviction" and that there is no "certainty whether the trial court would have imposed a death sentence based on a different set of aggravators").

Before sentencing Poole to death, the trial court found four aggravating circumstances: (1) "the contemporaneous conviction for the attempted murder of

Loretta White"; (2) "the capital felony occurred during the commission of burglary, robbery, and sexual battery"; (3) "the capital felony was committed for financial gain (merged with robbery but not burglary or sexual battery)"; and (4) "the capital felony was committed in a heinous, atrocious, or cruel (HAC) manner." Op. 6. The first three aggravators were deemed to have been "found unanimously by the jury because the jury found Poole guilty of the other charged crimes on which these aggravators were based." *Id.* *But see* Poole Answer Br. 44 n.10 (raising questionable continuing validity of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)).

The HAC aggravator, by contrast, was not found by a unanimous jury at any point. In fact, the jury's non-unanimous, 11-1 recommendation of death at the penalty phase must be read as the jury failing to find the HAC aggravator. *See* Poole Answer Br. 45-47. Nonetheless, the HAC aggravator played a critical role in the trial court's weighing finding: in finding that the aggravating circumstances "far outweighed the mitigating circumstances," the trial court "specifically" noted that, in its view, "the HAC aggravator alone outweighed all mitigating circumstances." Op. 7; *see also Jackson v. State*, 213 So. 3d 754, 788 (Fla. 2017) ("HAC has been recognized as one of the most weighty aggravating circumstances."). Florida law applicable to Poole's sentencing in 2011, the Court's opinion in this case, and a wealth of other authority foreclose the trial court's reliance on the HAC aggravator.

For the trial court to have sentenced Poole to death, it was required to make two interrelated findings:

> [I]f 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.

§ 921.141(3), FLA. STAT. (2010). By the statute's plain terms, "*the* aggravating circumstances" weighed against the "mitigating circumstances" in step "(b)" must be limited to the same "aggravating circumstances" found in step "(a)." *Id.* (emphasis added). Under basic statutory interpretation principles that stretch back more than a century, "[t]he definite article 'the,' used here relates to *** particular" aggravating circumstances, *i.e.*, those that are the subject of the finding in section 921.141(3)(a). *Jacksonville Terminal Co. v. Blanshard*, 82 So. 300, 301 (Fla. 1919); *accord Nielsen v. Preap*, 139 S. Ct. 954, 965 (2019) ("'[T]he' is 'a function word *** indicat[ing] that a following noun or noun equivalent is definite or has been previously specified by context.'") (second alteration and ellipsis in original) (quoting MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1294 (11th ed. 2005)).

Indeed, this Court has consistently interpreted section 921.141(3) in precisely that manner—including in this very case. In *State v. Dixon*, this Court explained that "[w]hen one or more of the aggravating circumstances is found, death is

presumed to be the proper sentence unless *it or they* are overridden by one or more of the mitigating circumstances." 283 So. 2d 1, 9 (Fla. 1973) (emphasis added); *see also* Op. 27 (quoting same); *Zommer v. State*, 31 So. 3d, 733, 754 (Fla. 2010) (quoting same). The words "it or they" plainly refer to those "aggravating circumstances" that are "found"—now, by a jury. It would make no sense if a trial court could simply introduce *other* aggravators in the weighing mix. Presumably, that is why even the State writes that "[t]he weighing determination *** asks the sentencing body to balance *facts that have already been found* (aggravating and mitigating circumstances) in order to reach a conclusion or judgment." State Reply Br. 11 (emphasis added). In this instance, the HAC aggravator was never "found" by a unanimous jury, as this Court's interpretation of section 921.141(3) demands.

Beyond the plain text of section 921.141(3), the U.S. Supreme Court's line of cases beginning with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), compels the same conclusion. *See, e.g.*, *Ring v. Arizona*, 536 U.S. 584, 597 (2002) (concluding that "Sixth Amendment's jury trial guarantee *** requires that the aggravating factor determination be entrusted to the jury"); *Blakely v. Washington*, 542 U.S. 296, 306 (2004) ("[T]he judge's authority to sentence derives wholly from the jury's verdict."). Even in *Hurst v. Florida*, while specifically discussing the Florida statute at issue here, the Court explained that the Sixth Amendment "required Florida to

base [a] death sentence on a jury's verdict, not a judge's factfinding." 136 S. Ct. 616, 624 (2016) ("*Hurst II*").

Reinstating Poole's death sentence cannot be squared with the foregoing principles. The Sixth Amendment requires the jury, not the trial court, to find which aggravating circumstances satisfy section 921.141(3)(a). Those aggravating circumstances alone serve as the predicate for the weighing finding that must be made under section 921.141(3)(b). Here, however, the trial court not only considered a non-unanimous HAC aggravator, but also gave it seemingly dispositive weight. Accordingly, the correct remedy is for this Court to remand for the trial court to conduct a reweighing of the aggravating and mitigating circumstances, excluding the HAC aggravator that was never found unanimously by a jury.

II. THIS COURT'S EIGHTH AMENDMENT ANALYSIS CONTRAVENES BINDING PRECEDENT

Independent of the remedy question, this Court should grant rehearing regarding its conclusion that the Eighth Amendment does not require a unanimous jury recommendation of death before a trial court may impose that sentence.

In its opinion here, this Court rested its Eighth Amendment analysis on *Spaziano v. Florida*, 468 U.S. 447 (1984):

> Finally, we further erred in *Hurst v. State* when we held that the Eighth Amendment requires a unanimous jury recommendation of death. The Supreme Court rejected that exact argument in *Spaziano*. *See Spaziano*, 468 U.S. at 465; *see also Harris v. Alabama*, 513 U.S. 504, 515 (1995) ("The Constitution permits the trial judge, acting alone, to impose a capital

> sentence."). We are bound by Supreme Court precedents that construe the United States Constitution.

Op. 32. That one-paragraph analysis failed to grapple with two key Eighth Amendment questions: whether the sentence is consistent with evolving standards of decency and whether the sentence is constitutionally reliable.

1. As the U.S. Supreme Court has made clear time and again, the touchstone for what constitutes cruel and unusual punishment under the Eighth Amendment is the "evolving standards of decency" test. *E.g.*, *Moore v. Texas*, 137 S. Ct. 1039, 1048 (2017) ("To enforce the Constitution's protection of human dignity, we loo[k] to the evolving standards of decency that mark the progress of a maturing society[.]") (first alteration in original) (internal quotation marks omitted); *Roper v. Simmons*, 543 U.S. 551, 561 (2005) ("[W]e have established the propriety and affirmed the necessity of referring to 'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual."). Evaluating "evolving standards of decency" is imperative given the understanding that "[t]he Eighth Amendment is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Hall v. Florida*, 572 U.S. 701, 708 (2014) (quoting *Weems v. United States*, 217 U.S. 349, 378 (1910)).

Current standards of decency show that jury unanimity is required to impose a sentence of death. This Court adopted that conclusion more than three years ago.

See Hurst III, 202 So. 3d at 60-61 (noting that "Florida is one of only three [states] that does not require a unanimous jury recommendation for death," and holding that "[b]y requiring unanimity in a recommendation of death in order for death to be considered and imposed, Florida will achieve the important goal of bringing its capital sentencing laws into harmony with the direction of society reflected in all these states and with federal law"). Since then, the notion that unanimity can be dispensed with when the prospect of death looms has only become more unpalatable: today, only "Alabama *** still permits a judge to impose the death penalty based upon a jury's non-unanimous recommendation for death." DEATH PENALTY INFORMATION CENTER, THE DEATH PENALTY IN 2019: YEAR END REPORT 21 (2019).[1] That statement remains true even in the wake of the opinion in this case. *See* § 921.141(2), FLA. STAT. (2016).

The Court's opinion here nowhere mentions the "evolving standards of decency" test and instead relies on *Spaziano*. *Spaziano* does not short-circuit the "evolving standards of decency" inquiry. For one thing, *Spaziano* focused on whether the jury itself must perform the sentencing in a death case. 468 U.S. at 463-464. That is consistent with *Hurst III*, under which the ultimate sentencing decision still rests with the judge, within the constitutional confines of the jury's findings. *See* Poole Initial Br. 42. For another thing, *Spaziano* found support in the Court's

[1] https://files.deathpenaltyinfo.org/reports/year-end/YearEndReport2019.pdf.

decisions upholding the Florida death penalty statute, 468 U.S. at 464—a fact that is no longer true in light of *Hurst II*.

More fundamentally, that the standards of decency in 1984 supported a different result does not tie this Court's hands today. *See Roper*, 543 U.S. at 564 (concluding that current standards of decency did not permit sentencing a juvenile to death, even though the Court had found the opposite 16 years earlier); *Atkins v. Virginia*, 536 U.S. 304, 314 (2002) (explaining that "[m]uch ha[d] changed since" Court had decided 13 years earlier that then-existing standards of decency permitted executing persons with mental disabilities). Just as "[a] claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the 'Bloody Assizes' or when the Bill of Rights was adopted, but rather by those that currently prevail," *Atkins*, 536 U.S. at 311, Poole's claim that a nonunanimous jury recommendation of death is unconstitutional must be judged by the standards of today, not those prevailing when *Spaziano* was decided in 1984.

2. Scrapping the requirement that the jury render a unanimous recommendation in favor of death before a trial court may impose such a sentence also raises another (unanswered) Eighth Amendment problem: without that constitutional safeguard, a jury in many cases will unwittingly open the door to a trial court's imposition of a death sentence without appreciating the consequences of its actions.

For a death sentence to be constitutionally permissible under the Eighth Amendment, it must meet a heightened standard of reliability. *See, e.g.*, *Caldwell v. Mississippi*, 472 U.S. 320, 328-330 (1985); *Beck v. Alabama*, 447 U.S. 625, 638 (1980). This standard is met only when the sentence "rest[s] *** on a determination made by a sentencer" who is fully aware of its "power to determine the appropriateness of death" and appreciates this "awesome responsibility." *Caldwell*, 472 U.S. at 328-330. Such awareness ensures "that jurors confronted with the *** responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision." *Id.* at 329-330. And it lessens the "unacceptable risk," *id.* at 343 (O'Connor, J., concurring in part), that "the death penalty is *** meted out arbitrarily or capriciously," *California v. Ramos*, 463 U.S 992, 999 (1983). Poole's death sentence does not meet the Eighth Amendment's reliability standards.

According to the opinion here, because a "jury in Poole's case unanimously found that, during the course of" committing a capital offense, he also committed other crimes that could serve as aggravating circumstances, the Sixth Amendment "requirement that a jury unanimously find a statutory aggravating circumstance beyond a reasonable doubt" was satisfied. Op. 39. But what this Court did not address was the fact that a jury found that Poole committed those crimes during the *guilt* phase of his trial—not the *penalty* phase. Op. 4.

That distinction matters under the Eighth Amendment. Under Florida's death penalty statute, "the trial and sentencing phases are bifurcated." *Walsh v. State*, 418 So. 2d 1000, 1003 (Fla. 1982). If the jury finds the defendant guilty of a capital offense, "[t]he case then proceed[s] into the penalty phase." *Buford v. State*, 403 So. 2d 943, 946 (Fla. 1981). Only at that point, in an entirely "separate sentencing proceeding," is death considered. § 921.141(1), FLA. STAT. The jury that found that Poole committed the above crimes at the guilt phase was unable to "treat their power to determine the appropriateness of death as an 'awesome responsibility'" because they were not deciding the appropriateness of death. *Caldwell*, 472 U.S. at 330; *cf. Cannady v. State*, 427 So. 2d 723, 729-730 (Fla. 1983) ("There is no basis in support of [the] premise that a jury recommendation of a sentence is the same as a jury verdict as to guilt or innocence. Florida's death penalty law completely separates these two functions by establishing a bifurcated trial system."). Yet unbeknownst to that jury, its guilty verdict now doubles as the trigger for Poole to be subjected to the death penalty. That is precisely what the Eighth Amendment protects against: a jury that does not "act with due regard for the consequences of [its] decision." *Caldwell*, 472 U.S. at 330.

III. CLARIFICATION IS NECESSARY CONCERNING POOLE'S UNRESOLVED PENALTY-PHASE POST-CONVICTION MOTION CLAIMS

In the event the Court declines the relief requested above on rehearing, Poole seeks clarification that the trial court should adjudicate his unresolved penalty-phase, post-conviction motion claims, including ineffective-assistance-of-counsel for failure to obtain and present the results of a PET scan. Because the trial court granted the motion to vacate sentence under *Hurst III* (*i.e.*, Claim 3), it declined to consider two sets of penalty-phase claims (*i.e.*, Claims 2 and 4) at the evidentiary hearing or to make a determination at the time it issued the order appealed to this Court. *See* ROA Vol. VI, at 1066-1067; ROA Vol. IX, at 1758-1763. To avoid any confusion stemming from this Court's remand "instruction[] that Poole's sentence be reinstated," Poole submits that this Court should make explicit that the further "proceedings consistent with [its] opinion" include resolution of the unresolved penalty-phase, post-conviction motion claims. Op. 40.

CONCLUSION

This Court should grant rehearing of its January 23, 2020 opinion. If the Court declines to grant rehearing, it should clarify its instructions on remand.

Respectfully submitted,

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February 7, 2020

CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2020, 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 Rule 9.210(a)(2).

/s/ Z.W. Julius Chen
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