Filing # 103632647 E-Filed 02/20/2020 01:44:31 PM

RECEIVED, 02/20/2020 01:46:31 PM, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant/Cross-Appellee,

v.

CASE NO. SC18-245
L.T. No. CF01-7078A-XX
DEATH PENALTY CASE

MARK ANTHONY POOLE,

Appellee/Cross-Appellant.
_____/

STATE'S RESPONSE TO APPELLEE/CROSS-APPELLANT'S MOTION FOR REHEARING AND CLARIFICATION

COMES NOW Appellant/Cross-Appellee, the State of Florida, by and through the undersigned Assistant Attorney General, and pursuant to Florida Rule of Appellate Procedure 9.330(a)(3), hereby responds to Appellee/Cross-Appellant's Motion for Rehearing and Clarification and submits as follows:

A. This Court's decision to vacate the lower court's decision to grant a new penalty phase based upon *Hurst v. State*, is well supported by the law and facts of this case.

Poole does not challenge this Court's decision overturning this Court's Hurst v. State decision which expanded the required findings that must be made by the jury beyond those that make a defendant eligible for the death penalty--the finding of an aggravating circumstance.[1] Nonetheless, Poole maintains that

[1] Poole's failure to challenge this Court's rejection of weighing and selection as required Hurst/Ring findings is well taken. This Court's decision is not subject to fair debate and is supported by

although the jury did necessarily find the contemporaneous felony aggravators, it must also find the heinous, atrocious and cruel aggravator that was argued to the jury and found by the trial court before Poole could be sentenced to death.[2] Poole misapprehends Florida law. Poole's eligibility for a death sentence is established by the existence of a single aggravator. "As we have explained, under longstanding Florida law, it is the finding of an aggravating circumstance that exposes the defendant to a death

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an almost unbroken wall of precedent. See, e.g., Castillo v. State, 135 Nev. 126, 129-30, 442 P.3d 558, 560-61 (2019) (rejecting weighing as a required factual finding, holding "[l]ike Apprendi and Ring, Hurst clearly limits its reach to facts that expose a defendant to a higher sentence."); State v. Mason, 153 Ohio St. 3d 476, 483, 108 N.E.3d 56, 64, cert. denied, 139 S. Ct. 456 (2018) ("Nearly every court that has considered the issue has held that the Sixth Amendment is applicable to only the fact-bound eligibility decision concerning an offender's guilt of the principle offense and any aggravating circumstances" and that "weighing is not a factfinding process subject to the Sixth Amendment.") (string citation omitted); Underwood v. Royal, 894 F.3d 1154, 1184-86 (10th Cir. 2018) (holding that the Court's decision in Hurst v. Florida was limited to aggravating circumstances and did not extend to mitigating circumstances or weighing).

[2] Poole cryptically asserts that the jury finding of guilt beyond a reasonable doubt was insufficient because the jury did not understand its significance for the penalty phase. However, the jury did understand it must make those guilt phase findings beyond a reasonable doubt. That is all that is required. See Jenkins v. Hutton, 137 S. Ct. 1769, 1772 (2017) (Since the jury had found the existence of two aggravating circumstances during the guilt phase by convicting Hutton of aggravated murder "[e]ach of those findings 'rendered Hutton eligible for the death penalty.'").

sentence." State v. Poole, 45 Fla. L. Weekly S41, *11 (Fla. Jan. 23, 2020). Once a single aggravator is found, the defendant is death eligible – and the existence of additional aggravators and their weight is not a Sixth Amendment concern. See Ex parte Bohannon, 222 So. 3d 525, 534 (Ala. 2016), cert. denied, 137 S. Ct. 831 (2017) ("Nothing in Apprendi, Ring, or Hurst suggests that, once the jury finds the existence of the aggravating circumstance that establishes the range of punishment to include death, the jury cannot make a recommendation for the judge to consider in determining the appropriate sentence or that the judge cannot evaluate the jury's sentencing recommendation to determine the appropriate sentence within the statutory range."). Thus, the fact the judge relied upon the heinous, atrocious and cruel aggravator in sentencing Poole to death does not render his sentence subject to Sixth Amendment challenge.

Poole next invites this Court to make the same mistake it made in Hurst v. State by arguing the Eighth Amendment mandates a unanimous jury recommendation.[3] This Court acknowledged it "erred

[3] States can certainly make different value judgments regarding the degree of jury consensus required on a sentencing recommendation to the judge. It can certainly be argued that those jurisdictions mandating a unanimous jury recommendation are in fact empowering a single juror and his or her opinion to override the clear consensus on the appropriate penalty.

in Hurst v. State when we held that the Eighth Amendment requires a unanimous jury recommendation of death." This Court cited relevant Supreme Court precedent and concluded it was bound by the Conformity Clause in reaching its decision:

> The Supreme Court rejected that exact argument in *Spaziano*. *See Spaziano*, 468 U.S. at 465, 104 S. Ct. 3154; *see also Harris v. Alabama*, 513 U.S. 504, 515, 115 S. Ct. 1031, 130 L.Ed.2d 1004 (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.

State v. Poole, 45 Fla. L. Weekly S41, *12 (Fla. Jan. 23, 2020).

As this Court recognized, no case from the Supreme Court has mandated jury sentencing in a capital case. Moreover, such a holding would require reading a mandate into the Constitution that is simply not there. The Florida and U.S. Constitutions provide for a right to trial by jury, not to sentencing by jury. Indeed, the Sixth Amendment applies to all criminal cases, not just capital cases. If it is a Sixth Amendment Right, all criminal defendants would enjoy the right to have a jury sentencing determination. However, judges, not juries sentence criminal defendants, not only in Florida, but throughout this country.

Poole next argues that since Florida was an outlier by allowing death sentences on less than a unanimous recommendation its sentencing scheme violated the Eight Amendment. However, the

Eighth Amendment requires states to "give narrow and precise definition to the aggravating factors that can result in a capital sentence" in order to limit the death penalty to a "narrow category of the most serious crimes" and to defendants who are "more deserving of execution." Roper v. Simmons, 543 U.S. 551, 568 (2005) (citing Atkins v. Virginia, 536 U.S. 304, 319 (2002)). The Supreme Court has never held that the Eighth Amendment requires the jury's final recommendation in a capital case to be unanimous. See, e.g., Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972). Florida was not required to adopt a unanimous jury recommendation requirement simply because a majority of other states have done so. As this Court recognized, this same distinction was considered and rejected when the Supreme Court issued its opinion in Spaziano v. Florida, 468 U.S. 447, 464 (1984) (The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of states.). The Supreme Court's ruling in Hurst did not overrule Spaziano's Eighth Amendment holding — that "there is no constitutional imperative that a jury have the responsibility of deciding whether the death penalty should be imposed." Id. at 465. Accordingly, "[a]ny argument that the Constitution requires that a jury impose the sentence of death . . . has been soundly rejected by prior

decisions of this Court." Clemons v. Mississippi, 494 U.S. 738, 745 (1990). And because the Eighth Amendment does not require that death sentences be imposed by a jury, it certainly does not require them to be imposed unanimously by a jury. See Spaziano, 468 U.S. at 465; Proffitt v. Florida, 428 U.S. 242, 252 (1976) (plurality opinion) (explaining that, although "jury sentencing in a capital case can perform an important societal function," this Court "has never suggested that jury sentencing is constitutionally required" in such cases); id. at 260-61 (White, J., concurring in the judgment). The motion for rehearing should be denied.

B. Poole's rehearing should be granted only to the extent it seeks remand to the trial court to consider Poole's remaining penalty phase claims.

The State agrees that a limited remand to the trial court is appropriate for it to consider Claim 2 of Poole's motion for post-conviction relief, which raised claims surrounding counsel's effectiveness during the penalty phase of Poole's trial. Since the lower court granted Poole a new penalty phase on the Hurst v. State claims, the court did not address these claims in its post-conviction order. (R. 1760-1761).

WHEREFORE, the State of Florida respectfully requests that this Court deny Poole's motion for rehearing except to the limited extent it seeks remand for the lower court to consider Poole's penalty phase ineffective assistance of counsel claims.

Respectfully submitted,

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ATTORNEY GENERAL
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of February, 2020, I electronically filed the foregoing with the Clerk of the Florida Supreme Court by using the e-portal filing system which will send a notice of electronic filing to the following: David D. Hendry, James L. Driscoll, Jr. and Rachel P. Roebuck, Assistants CCRC-M, Law Office of the Capital Collateral Regional Counsel - Middle Region, 12973 North Telecom Parkway, Temple Terrace, Florida 33637-0907, **hendry@ccmr.state.fl.us**, **driscoll@ccmr.state.fl.us**, **roebuck@ccmr.state.fl.us** and **support@ccmr.state.fl.us**; Parvin D. Moyne, Akin Gump Strauss Hauer & Feld LLP, One Bryant Park, 44th Floor, New York, NY 10036-6745, **pmoyne@akingump.com**, and Z.W. Julius Chen and Mark J. MacDougall, Akin Gump Strauss Hauer & Feld LLP, 2001 K Street, N.W., Washington, D.C. 20006, **chenj@akingump.com** and **mmacdougall@akingump.com**.

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