

IN THE SUPREME COURT OF FLORIDA

JOHNNY MACK SKETO CALHOUN,

Appellant,

v.

CASE NO. SC18-340
DEATH PENALTY CASE

STATE OF FLORIDA,

Appellee.

_____ /

MOTION TO RECALL MANDATE

Appellee, State of Florida, moves this Court pursuant to Florida Rules of Appellate Procedure 9.340 and 9.300, and Florida Statute § 43.44, to recall the mandate that was issued on February 28, 2020, in this case, and as grounds therefore states:

1. This Court entered a decision affirming the trial court's order on November 21, 2019, and the mandate issued on February 28, 2020.
2. Pursuant to Florida Rule of Appellate Procedure 9.340 and Florida Statute § 43.44, this Court may, within 120 days of it being issued, direct the clerk to recall the mandate to require, reconsider, revise, reform, or modify its own opinions for the purpose of making them accord with law and justice. Because this motion is well within that 120-day window, Appellee requests this Court

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recall the mandate and remand the case to the lower court to address the pending Motion to Reinstate the Death Sentence.

3. In the trial court prior to this appeal, Calhoun filed a motion for postconviction relief alleging several guilt-phase and penalty-phase claims, one of which was a claim to vacate his death sentence pursuant to this Court's opinion in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), and his non-unanimous jury verdict for death. The trial court granted *Hurst* relief, granting Calhoun a new penalty phase, but rejected his other claims for relief.
4. Calhoun appealed to this Court, and as the Court's precedent had been decided uniformly against the State in non-unanimous death cases, at that time the State did not file a cross-appeal on the *Hurst* issue. This Court ultimately affirmed the trial court's order, and as noted above, the mandate related to that opinion issued on February 28, 2020.
5. Prior to the mandate being issued, this Court issued its opinion in *State v. Poole*, 2020 WL 370302 (Fla. Jan. 23, 2020) (SC18-245), largely receding from its holdings in *Hurst*. In *Poole*, this Court overruled the *Hurst* case "except to the extent it requires a jury unanimously to find the existence of a statutory aggravating circumstance beyond a reasonable doubt." *Id.* at *15.

6. Recalling this mandate to allow for the case to be remanded to address the Motion to Reinstate the Death Sentence would allow this Court to revise its decision so it can accord with law and justice, as required by Fla. Stat. § 43.44.
7. It would be an enormous waste of both the bench and bar's time, in addition to the time of the citizens who are called for jury duty, as well as taxpayers' money, to require new penalty phases based on a decision that this Court in *State v. Poole* acknowledged "got it wrong." *State v. Poole*, 2020 WL 370302 at *14. The *Poole* Court explained that *Hurst v. State* was incorrectly decided on a myriad of levels including mischaracterizing weighing as a fact and ignoring the Florida Constitution's conformity clause regarding the Eighth Amendment when it held that all the jury's additional findings and final recommendation had to be made unanimously. *Id.* at *11-*13; *id.* at *8 (noting the United States Supreme Court's decision in *Hurst v. Florida* "did not address Hurst's Eighth Amendment argument").
8. In light of the number and magnitude of the legal errors in *Hurst v. State*, this Court should not require the prosecutors and citizens of Florida to have to go through the empty formality and enormous waste of resources of new penalty phases based on that erroneous decision. New penalty phases in capital cases are quite time consuming in the trial court and will result in dozens of appeals in this Court as well. The victim's family also must endure yet another penalty

phase and the additional years of delay starting over again will cause. Moreover, new penalty phases are dangerous. One egregious example of this is Michael Hernandez whose death sentence was vacated based on *Hurst v. State* and who consequently was released into the general population of the prison where he murdered again. *Hernandez v. Jones*, 217 So. 3d 1032 (Fla. 2017). And transporting inmates is dangerous, especially in inmate murder resentencings where many of the witnesses are inmates too. *Van Poyck v. State*, 116 So. 3d 347, 349 (Fla. 2013) (noting the victim was a correctional officer who was transporting an inmate to the doctor's office, who was murdered by the defendant during an escape attempt). These numerous new penalty phases required by the now-repudiated *Hurst v. State* decision will consume massive amounts of prosecutorial resources that are better spent in prosecuting other cases. To prevent this massive waste that serves no purpose, a belated cross-appeal should be permitted.

9. In *State v. Poole*, this Court explained that *Hurst v. State* was not entitled to stare decisis protection because the erroneous *Hurst v. State* decision “serves no one well and only undermines the integrity and credibility of the court.” *State v. Poole*, 2020 WL 370302 at *14 (citation omitted). And instead of being a “narrow and predictable ruling that should have had limited practical effect on the administration of the death penalty in our state,” *Hurst v. State*

had the opposite result. *Id.* But not allowing the State to cross-appeal would result, in the end, in mandating Florida courts follow the repudiated *Hurst v. State* decision and continue the deleterious effect on the administration of the death penalty in Florida caused by that decision. In the interest of justice, as well as to give full effect to the *State v. Poole* decision, a belated cross-appeal should be permitted. The interests of justice and judicial economy support allowing a cross-appeal.

10. In this case, under *State v. Poole*, there was no violation of the right-to-a-jury-trial. In this case, the court found three aggravators, including that the capital felony was committed while the defendant was engaged in the commission of a kidnapping, which was based on the jury's contemporaneous unanimous conviction of Calhoun for kidnapping. The jury specifically found the felony murder aggravator in convicting him of kidnapping during the guilt phase. Here, as in *State v. Poole*, the jury made the required finding of one aggravator by convicting Calhoun of this felony. *State v. Poole*, 2020 WL 370302 at *15 (noting that in addition to the capital murder, the jury convicted Poole of attempted first-degree murder, sexual battery, armed burglary, and armed robbery and under "a correct understanding of *Hurst v. Florida*, this satisfied the requirement that a jury unanimously find a statutory aggravating circumstance beyond a reasonable doubt").

11. Since this Court issued its opinion in this case, the Supreme Court has expressly recognized that *Hurst v. Florida* was limited to the finding of an aggravating circumstance that renders a defendant eligible for the death penalty. Notably, the Court also held that *Hurst v. Florida*, like *Ring* before it, is not retroactive. See *McKinney v. Arizona*, 140 S.Ct. 702 (2020).

CONCLUSION

Accordingly, this Court should permit the belated cross-appeal and supplemental briefing on the *Hurst v. State* issue in light of this Court's new decision in *State v. Poole*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 9th day of March, 2020, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Stacy Biggart, at stacy.biggart@ccrc-north.org, and Elizabeth Spiaggi, at Elizabeth.salerno@ccrc-north.org, attorneys for Appellant.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this response is 14-point Times New Roman, in compliance with Fla. R. App. P. 9.100(l).

Respectfully submitted,

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