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IN THE SUPREME COURT OF FLORIDA

TERRY SMITH,

Appellant,

CASE NO. SC18-1763

vs.

STATE OF FLORIDA,

Appellee.

_____/

MOTION TO PERMIT CROSS-APPEAL AND SUPPLEMENTAL BRIEFING

The State moves this Court to permit a belated cross-appeal in this pending case and supplemental briefing on the trial court's granting of a new penalty phase. The postconviction court in this case vacated the death sentence based on Hurst v. Florida, 136 S.Ct. 616 (2016) (Hurst v. Florida), and Hurst v. State, 202 So. 3d 40 (Fla. 2016) (Hurst v. State). But, on January 23, 2020, this Court receded from the decision in Hurst v. State "except to the extent it requires a jury unanimously to find the existence of a statutory aggravating circumstance beyond a reasonable doubt." State v. Poole, 2020 WL 370302, *15 (Fla. Jan. 23, 2020) (SC18-245). This Court has the discretion to permit belated cross-appeals and should do so in light of this Court's new decision in State v. Poole and the total waste of resources any new penalty phase would represent.

Belated cross-appeals

Allowing the State to file a belated cross-appeal is merely procedural reciprocity. Defendants are routinely permitted to file belated appeals in both capital and non-capital criminal cases. Indeed, the rules of appellate procedure were amended to allow untimely appeals by criminal defendants. Fla. R. App. P. 9.142(b)(3) (providing for belated appeal in capital cases); Fla. R. App. P. 9.141(c) (providing for belated appeal in criminal cases with a four-year time limit); Franqui v. State, 81 So. 3d 414 (Fla. 2012) (granting a belated appeal in a capital successive postconviction case where the notice was untimely); Rumph v. State, 746 So. 2d 1249, 1250 (Fla. 1st DCA 1999) (granting a petition for belated appeal; noting that a belated appeal is not dependent solely upon a showing that trial counsel was ineffective and explaining that although an error by counsel may give rise to a right to a belated appeal, a belated appeal may also be granted based on other exceptional circumstances as well). And, here, the State is not seeking an independent new appeal unlike the situation of those belated appeal cases filed by defendants. Rather, the State is only seeking to cross-appeal in an existing appeal. Permitting a cross-appeal would create only one additional issue in an existing appeal, not an entirely new appeal. The State, like the defense, should be permitted to file belated appeals.

On March 5th, 2020, the State filed a belated notice of cross-appeal in the trial court. The rule of court governing appeals by the State, Florida Rule of Appellate Procedure 9.140(c)(3), provides that "the state's notice of cross-appeal shall be filed within 15 days of service of defendant's notice or service of an order on a motion pursuant to Florida Rule of Criminal Procedure 3.800(b)(2)." But, the State notice of cross-appeal being untimely does not prevent a cross-appeal. The filing of a timely notice of appeal is jurisdictional, but the filing of a timely notice of cross-appeal is not.

Cross-appeals are not jurisdictional

In Lopez v. State, 638 So. 2d 931 (Fla. 1994), this Court held that the filing of a notice of cross-appeal is not jurisdictional. Lopez was charged with murder as well as other crimes. Id. at 931. He filed a motion to suppress which was granted in part. Id. The State took an interlocutory appeal. Id. at 931-32. Lopez sought to cross-appeal the other part of his motion to suppress, which the trial court had denied, but the district court dismissed the cross-appeal concluding that they lacked jurisdiction. Id. at 932. This Court, relying on its prior decision in State v. McKinney, 212 So. 2d 761 (Fla. 1968), held that "the filing of a notice of cross-appeal is not jurisdictional." Id. This Court reasoned that there was "nothing in the current rules which can be read to prohibit cross-appeals from interlocutory

orders in criminal cases." Id. at 932-33. This Court noted that rule 9.140(f) of the appellate rules stated that in "the interest of justice, the court may grant any relief to which any party is entitled." Id. at 933.[1] This Court explained that "the interest of justice as well as judicial economy favor the resolution of all related issues" when the State appeals from an order that partially grants and partially denies a motion for suppression. Id. This Court observed that regardless of any specific authority for such a cross-appeal, the cross-appeal was proper "so long as it concerns a related issue and is taken from the same order from which the State's appeal is taken." Id. This Court held that when the State files an appeal from a nonfinal order in a criminal case, the defendant may file a "cross-appeal on any related issue which was resolved in the same order from which the State is appealing." Id.[2] Cross-appeals are not jurisdictional.

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[1] The current version of rule 9.140(i) provides that in "the interest of justice, the court may grant any relief to which any party is entitled."

[2] Florida's district courts often permit the State to cross-appeal at any time provided there is no prejudice to the defendant. In Walker v. State, 457 So. 2d 1136 (Fla. 1st DCA 1984), the First District held that a notice of cross-appeal by the State in a criminal case is procedural rather than jurisdictional. The First District explained that jurisdiction is acquired by the appellate court upon the timely filing of the notice of appeal. Id. at 1137 (citing Hollywood v. Clark, 15 So. 2d 175 (1943)). And then the First District explained that, because an appellate court gains jurisdiction over the entire cause at the time the notice of appeal is filed, the failure to timely file a notice of cross-appeal does not affect the jurisdiction of the appellate court. The First District relied on the Third District case of Brickell Bay Club

The interests of justice and judicial economy

Here, as in Lopez, the State, in the "interest of justice as well as judicial economy" should be permitted to file a belated cross-appeal. It would be an enormous waste of both the bench and bars' 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

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Condo. Ass'n, Inc. v. Forte, 379 So. 2d 1334, 1335 (Fla. 3d DCA 1980), in which the Third District denied a motion to dismiss an untimely cross-appeal. The Third District explained that a notice of cross-appeal is "properly regarded as no more than a subsequent procedural step in the appellate process" and is not jurisdictional. Id. The First District explained that when defendant will not suffer any prejudice or will not be deprived of adequate notice, the court may, in its sound discretion, allow the State to file an untimely notice of cross-appeal. Walker, 457 So. 2d at 1137. Because there was no prejudice to the defendant, the First District denied the defense's motion to strike the State's cross-appeal in Walker. The First District has also allowed the State to file a belated cross-appeal recently as well. Copeland v. State, 240 So. 3d 58 (Fla. 1st DCA 2018) (No. 1D16-5621) (noting the State's cross-appeal and remanding for resentencing without the 25-year review). Smith will suffer no procedural prejudice from the State's cross-appeal. If this Court permits supplemental briefing, opposing counsel, of course, would be entitled to file a supplemental answer brief addressing the State v. Poole issue.

unanimously. State v. Poole, 2020 WL 370302 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").

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.

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.

State v. Poole and this case

In this case, under State v. Poole, there was no violation of the right-to-a-jury trial. In this case, the trial court found three aggravators including the felony murder aggravator and the on-felony-probation aggravator. But Smith's jury specifically found the felony murder aggravator by convicting him of armed

robbery during the guilt phase. Here, as in State v. Poole, the jury made the required finding of one aggravator by convicting Smith of these felonies. 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").

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).

Additionally, in this case the on-felony-probation aggravator is present. The on-felony-probation aggravator is a recidivist aggravator, and, like all recidivist aggravators, it is exempt from Hurst v. Florida under the exception established in Almendarez-Torres v. United States, 523 U.S. 224 (1998). The judge alone in a capital case may find any recidivist aggravators because a prior jury already convicted the defendant of that prior crime. The penalty phase jury is not required to "refind" recidivist

aggravators. Smith was eligible for the death penalty before the penalty phase even started based on the recidivist on-felony-probation aggravator.

So, the right to a jury trial was satisfied in this case under this Court's recent decision in State v. Poole. Smith should not be entitled to a new sentencing hearing based on a decision that was wrong from its inception and was based on flawed legal analysis. And Hurst v. State is not entitled to any deference from any court.

A cross-appeal would not involve substantial appellate resources. Allowing the cross-appeal would only involve permitting limited additional briefing regarding one issue. And this Court could limit any supplemental briefing to ten or twenty pages. This Court often sua sponte orders supplemental briefing based on new caselaw. The State's request for supplemental briefing is in line with this Court's normal practice regarding supplemental briefing based on a new case. For these reasons, this Court should permit a belated cross-appeal.

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 5th 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: Karen Moore, at Karen.Moore@ccrc-north.org, and Elizabeth Salerno, at Elizabeth.salerno@ccrc-north.org, attorneys for Appellant.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of the type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

/s/ Lisa A. Hopkins
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