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IN THE SUPREME COURT OF FLORIDA

TERRY ANTONIO SMITH

Appellant, **CASE NO.: SC18-1763**

vs.

STATE OF FLORIDA,
Appellee.
_____/

APPELLANT'S MOTION TO STRIKE APPELLEE'S MOTION TO PERMIT CROSS-APPEAL AND SUPPLEMENTAL BRIEFING

COMES NOW Appellant, TERRY ANTONIO SMITH, by and through undersigned counsel and files this motion to strike Appellee's motion to permit cross-appeal and supplemental briefing in light of Poole v. State, 2020 WL 370302 (Fla. January 23, 2020) filed on March 5, 2020, and states:

1. On March 4, 2011, Mr. Smith was found guilty of the first-degree murders of Desmond Robinson, Kennethia Keenan, and Bertham Gibson and one count of armed robbery. (R. 4:735-42). Following his penalty phase, the jury recommended death for the murder of Mr. Gibson by a vote of 8 to 4, death for the murder of Ms. Keenan by a vote of 10 to 2 and life for the murder of Desmond Robinson. (R. 5:878-80).

2. Mr. Smith's judgments and sentences were affirmed by this Court on January 16, 2014. Smith v. State, 139 So. 3d 839 (Fla. 2013). One issue raised by

Mr. Smith pre-trial and on direct appeal was that Florida's capital sentencing scheme was unconstitutional under Ring v. Arizona, 536 U. S. 584 (2002). That claim was denied by the trial court and the denial was affirmed on appeal.

3. Thereafter, on November 20, 2015, Mr. Smith, through undersigned counsel, filed his initial motion for postconviction relief under Rule 3.851, Fla. R. Cr. P. One claim raised was the unconstitutionality of Florida's capital sentencing scheme under Ring. (Claim 10, initial postconviction motion, PCR 331).

4. Mr. Smith filed an amended postconviction motion on January 25, 2017 asking for a new penalty phase for Mr. Smith pursuant to this Court's decisions in Hurst v. State, 202 So. 3d 40 (Fla. 2016) and Mosley v. State, 209 So. 3d 1248 (Fla. 2016). (PCR. 606-624).

5. On June 7, 2017, in its response to Mr. Smith's amended motion for a new penalty phase under Hurst v. State and Mosley v. State, the State acknowledged that Mr. Smith was entitled to a new penalty phase. (PCR. 647).

6. Again, at the case management hearing held on August 22, 2017, the State conceded that Mr. Smith was entitled to a new penalty phase under Hurst v. State, 202 So. 3d 40 (Fla. 2016). (PCR. 2215).

7. The circuit court determined that all claims related to penalty phase issues were rendered moot by the award of a new penalty phase under Hurst v.

State. (PCR. 770). Accordingly, no evidence on penalty phase issues was presented at the evidentiary hearing held on December 5, 6 and 8, 2017.

8. The circuit court denied all of Mr. Smith's guilt phase claims and Mr. Smith filed his timely notice of appeal on October 18, 2018. At no time did the State move for a rehearing to reconsider whether Hurst relief should have been granted, nor did it file a notice of cross-appeal challenging the award of a new penalty phase.

9. All briefs were filed in this cause according to this Court's briefing schedule, with Mr. Smith's reply brief filed on October 3, 2019.

10. On January 23, 2020, this Court decided State v. Poole, 2020 WL 370302 (Fla. 2020). In Poole, this Court reversed Hurst v. State to the extent that it required unanimous jury findings that aggravating circumstances outweighed mitigation and that the appropriate sentence should be death.

11. Oral argument was held in this cause on February 5, 2020.

12. The State's motion for a belated cross-appeal and for supplemental briefing is unauthorized, improper, and untimely. Rule 3.851(f)(8), Fla. R. Cr. P, grants any party the right to appeal the circuit court's "final order" granting or denying relief within thirty days of rendition of the order. The State did not appeal the circuit's order granting Hurst relief, and, in fact, it conceded that Mr. Smith was entitled to a new penalty phase numerous times. The time for filing an appeal

expired on October 20, 2018, 502 days before the State filed its untimely motion for cross-appeal and supplemental briefing on March 4, 2020.

13. As a result, the circuit's order vacating Mr. Smith's death sentence and granting him a new penalty phase became final on October 20, 2018.

14. Pursuant to Fla. R. Crim. P. 3.851(f)(8), the State had 30 days from the rendition of the final order granting Mr. Smith a new penalty phase to appeal that order. Fla. Stat. §59.081(2) (2018) provides that the "[f]ailure [of a party] to invoke the jurisdiction of any such court within the time prescribed by the rules shall divest such court of jurisdiction to review such cause." See also Dibble v. Dibble, 377 So. 2d 1001, 1003 (Fla. 3d DCA 1979); Donin v. Goss, 69 So. 2d 316, 318 (Fla. 1954) ("However, a principle so well settled that no citation of authority is required is that jurisdiction cannot be conferred upon this court by consent. Unless an appeal is taken within the prescribed time, this Court has no jurisdiction whatever."). Accord, State v. Jackson, 276 So. 3d 488-89 (Fla. 1st DCA 2019) (time for State to seek review of order granting resentencing was 30 days after the orders were entered); Simmons v. State, 274 So. 2d 468, 470 (Fla. 1st DCA 2019) (holding that the order granting resentencing became final when neither party moved for rehearing or appealed the order and thus the postconviction court lacked authority to rescind the original resentencing order); and German v. State, 284 So.

3d 572-73 (Fla. 4th DCA 2019) (resentencing order became final and non-appealable when neither party moved for rehearing or appealed); et al.

15. Moreover, "[C]ontemporaneous objection and procedural default rules apply not only to defendants, but also to the State." Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993). The State did not appeal Mr. Smith's Hurst relief and conceded the issue numerous times as set forth above. The State's failure to appeal the postconviction court's final order granting Mr. Smith a new penalty phase acts as a waiver and the State is procedurally barred from raising the issue now.

16. The State reliance upon Poole is misplaced because Poole is distinguishable. In Poole, the State appealed the trial court's order granting Poole a new penalty phase under Hurst v. State. In Mr. Smith's case, the State conceded Mr. Smith's right to a new penalty phase and did not appeal the postconviction court's decision.

17. The State's reliance on Rule 9.142 (3), Fla. R. Cr. P, and belated appeal cases is also misplaced. That rule specifically permits "petitioners", not the state, leave to file belated appeals in Rule 3.851 cases where defense counsel failed to do so. Moreover, Rule 9.142 places an absolute limit of one year for a petitioner to file a belated notice of appeal from the date the notice was due, unless the petitioner was unaware that his counsel neglected to file the notice of appeal, "was misadvised as to his right to an appeal, or was prevented from timely filing a notice

of appeal due to circumstances beyond the petitioner's control; and . . . (ii) could not have ascertained such facts by the exercise of due diligence." Fla. R. Cr. P. 9.142 (3)(A)-(B). Here, the State filed its belated cross-appeal 502 days late.

18. Finally, the State argues that "this Court should not require prosecutors and citizens of Florida to go through the empty formality and enormous waste of resources of new penalty phases" as those proceedings are contrary to the decision in Poole. The State forgets if Mr. Smith's death sentence were to be reinstated, he would be entitled to an evidentiary hearing on penalty phase issues that were rendered moot by the grant of Hurst relief. An evidentiary hearing on penalty phase issues would require expert testimony from both the State and the defense, along with countless other witnesses. All of this is costly and time consuming as well, so any argument that reinstating the Defendant's death sentence is more efficient is disingenuous as it overlooks the costs associated with the evidentiary hearing that will become necessary.

WHEREFORE Mr. Smith respectfully requests this court strike the State's untimely motion for cross-appeal.

Respectfully submitted, this 12th day of March, 2020.

ROBERT S. FRIEDMAN
Capital Collateral Regional Counsel

/s/ Karin L. Moore
KARIN L. MOORE

Assistant Capital Collateral Regional
Counsel North
Florida Bar Number 351652
1004 DeSoto Park Drive
Tallahassee, FL 32301
(850) 487-0922
Karin.Moore@ccrc-north.org

/s/ Elizabeth Spiaggi
Elizabeth Spiaggi
Assistant Capital Collateral Regional
Counsel North
Florida Bar Number 1002602
1004 DeSoto Park Drive
Tallahassee, FL 32301
(850) 487-0922
Karin.Moore@ccrc-north.org

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Appellant has been furnished via electronic service to Lisa Hopkins, Assistant Attorney General (lisa.hopkins@myfloridalegal.com and capapp@myfloridalegal.com), on this 9th day of March, 2020.

/s/ Karin Moore
Karin Moore
Assistant CCRC-North
Florida Bar No. 351652
1004 DeSoto Park Drive
Tallahassee, Florida 32301
(850) 487-0922
Karin.Moore@ccrc-north.org

Elizabeth Spiaggi
Assistant CCRC-North
Florida Bar No. 1002602
Elizabeth.Spiaggi@ccrc-north.org

COUNSEL FOR APPELLANT