APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI

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Supreme Court of Florida

No. SC18-245

STATE OF FLORIDA,
Appellant/Cross-Appellee,

vs.

MARK ANTHONY POOLE,
Appellee/Cross-Appellant.

January 23, 2020

PER CURIAM.

The State of Florida appeals from a postconviction order setting aside Mark Anthony Poole's 2011 death sentence for the 2001 murder of Noah Scott. The sentence became final in 2015. *Poole v. State (Poole II)*, 151 So. 3d 402 (Fla. 2014), *cert. denied*, 135 S. Ct. 2052 (2015).[1] The trial court set aside the sentence and ordered a new penalty phase proceeding after finding the sentence to have been imposed in violation of the United States and Florida Constitutions as interpreted and applied in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). Arguing that Poole suffered no

[1] We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const.; *State v. Fourth Dist. Court of Appeal*, 697 So. 2d 70, 71 (Fla. 1997).

constitutional deprivation in his sentencing proceeding, the State requests that we reexamine and partially recede from *Hurst v. State*.

Poole filed a cross-appeal, arguing that his trial counsel's concession of guilt on related non-homicide offenses violated his Sixth Amendment right to counsel and constituted structural error requiring reversal of his convictions and a new guilt phase trial.

We address the cross-appeal first because relief on Poole's guilt phase postconviction claim would moot the sentencing issue. The trial court rejected the guilt phase claim, and we affirm the trial court as to this issue because Poole did not preserve the issue for review on appeal. As for the sentencing issue, we agree with the State that we must recede from *Hurst v. State* except to the extent that it held that a jury must unanimously find the existence of a statutory aggravating circumstance beyond a reasonable doubt. Accordingly, we reverse the portion of the trial court's order setting aside Poole's sentence.

BACKGROUND

The opinion on direct appeal set out the following facts:

> Mark Anthony Poole was convicted of the first-degree murder of Noah Scott, attempted first-degree murder of Loretta White, armed burglary, sexual battery of Loretta White, and armed robbery. Poole was convicted based on the following facts presented at trial. On the evening of October 12, 2001, after playing some video games in the

bedroom of their mobile home, Noah Scott and Loretta White went to bed sometime between 11:30 p.m. and 12 a.m. Later during the night, White woke up with a pillow over her face and Poole sitting on top of her. Poole began to rape and sexually assault her as she begged Poole not to hurt her because she was pregnant. As White struggled and resisted, Poole repeatedly struck her with a tire iron. She put her hand up to protect her head, and one of her fingers and part of another finger were severed by the tire iron. While repeatedly striking White, Poole asked her where the money was. During this attack on White, Scott attempted to stop Poole, but was also repeatedly struck with the tire iron. As Scott struggled to defend White, Poole continued to strike Scott in the head until Scott died of blunt force head trauma. At some point after the attack, Poole left the bedroom and White was able to get off the bed and put on clothes but she passed out before leaving the bedroom. Poole came back in the bedroom and touched her vaginal area and said "thank you." White was in and out of consciousness for the rest of the night. She was next aware of the time around 8 a.m. and 8:30 a.m. when her alarm went off.

When her alarm went off, White retrieved her cell phone and called 911.

Shortly thereafter, police officers were dispatched to the home. They found Scott unconscious in the bedroom and White severely injured in the hallway by the bedroom. White suffered a concussion and multiple face and head wounds and was missing part of her fingers. Scott was pronounced dead at the scene. Evidence at the crime scene and in the surrounding area linked Poole to the crimes. Several witnesses told police officers that they saw Poole or a man matching Poole's description near the victims' trailer on the night of the crimes. Stanley Carter stated that when he went to the trailer park around 11:30 that night, he noticed a black male walking towards the victims' trailer. Carter's observations were consistent with that of Dawn Brisendine, who knew Poole and saw him walking towards the victims' trailer around 11:30 p.m. Pamela Johnson, Poole's live-in girlfriend, testified that on that evening, Poole left his house sometime in the evening and did not return until 4:50 a.m.

Poole was also identified as the person selling video game systems owned by Scott and stolen during the crime. Ventura Rico, who lived in the same trailer park as the victims, testified that on that night, while he was home with his cousin's girlfriend, Melissa

Nixon, a black male came to his trailer and offered to sell him some video game systems. Rico agreed to buy them for $50, at which point the black male handed him a plastic trash bag. During this exchange, Nixon got a good look at the man and later identified Poole when the police showed her several photographs. Nixon testified that the next morning, when her son was going through the trash bag, he noticed that one of the systems had blood on it.

Pamela Johnson also testified that on the same morning, she found a game controller at the doorstep of Poole's house, she handed it to Poole, and Poole put it in his nightstand. She indicated that she had never seen that game controller before that morning and did not know what it would be used for because neither she nor Poole owned any video game systems. During the search of Poole's residence, the police retrieved this controller. In addition, the police retrieved a blue Tommy Hilfiger polo shirt and a pair of Poole's Van shoes, shoes Poole said he had been wearing on the night of the crimes. A DNA analysis confirmed that the blood found on the Sega Genesis box, Super Nintendo, Sega Dreamcast box and controller matched the DNA profile of Scott. Also, a stain found on the left sleeve of Poole's blue polo shirt matched White's blood type.

> The testing of a vaginal swab also confirmed that the semen in White was that of Poole. A footwear examination revealed that one of the two footwear impressions found on a notebook in the victims' trailer matched Poole's left Van shoe. The tire iron used in the crimes was found underneath a motor home located near the victims' trailer. A DNA analysis determined that the blood found on this tire iron matched Scott's DNA profile.

Poole v. State (Poole), 997 So. 2d 382, 387-88 (Fla. 2008) (footnote omitted).

The trial began on April 21, 2005, and the jury returned a verdict six days later finding Poole guilty of all charges, namely first-degree murder of Noah Scott, attempted first-degree murder of Loretta White, armed burglary, sexual battery of Loretta White, and armed robbery. The penalty phase began on May 2, 2005. The jury recommended death by a vote of twelve to zero two days later, which allowed the trial court to consider a death sentence under section 921.141, Florida Statutes (2005). On August 25, 2005, the trial court sentenced Poole to death.

On direct appeal Poole raised a number of challenges to his convictions and death sentence, including that his death sentence violated the dictates of *Ring v. Arizona*, 536 U.S. 584 (2002), because Florida's statutory sentencing scheme did not require the jury to unanimously find all of the aggravators necessary to impose a death sentence. *Poole*, 997 So. 2d at 396. This Court rejected that argument, holding

that Florida's capital sentencing scheme was not unconstitutional pursuant to *Ring*. *Id*. Alternatively, we held that Poole's case fell outside the scope of *Ring* because the jury had unanimously found that Poole committed other violent felonies during the murder—specifically attempted first-degree murder, sexual battery, armed burglary, and armed robbery. *Id*. Those convictions unanimously found by Poole's jury formed the basis of one of the statutory aggravators found by the trial court—that Poole had prior violent felony convictions. *Id*. Thus, this case fell "outside the scope of Ring." *Id*. However, this Court determined that Poole was entitled to a new penalty phase proceeding because the prosecutor improperly introduced inadmissible nonstatutory aggravation by cross-examining witnesses about unproven prior arrests and the unproven content of a tattoo on Poole's body. *Id*. at 393-94. We vacated Poole's sentence of death and remanded for a new penalty phase. *Id*. at 394.

On June 29, 2011, following a new penalty phase, the jury recommended death by a vote of 11 to 1. *Poole II*, 151 So. 3d at 408. The trial court found four aggravating circumstances: (1) the contemporaneous conviction for the attempted murder of Loretta White (very great weight); (2) the capital felony occurred during the commission of burglary, robbery, and sexual battery (great weight); (3) the capital felony was committed for financial gain (merged with robbery but not burglary or sexual battery) (less than moderate weight); and (4) the capital felony was committed in a heinous, atrocious, or cruel (HAC) manner (very great weight). *Id*. Again, three of these four aggravators were found unanimously by the jury

because the jury found Poole guilty of the other charged crimes on which these aggravators are based.

The trial court found two statutory mitigating circumstances: (1) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance (moderate to great weight); and (2) the defendant's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired (great weight). It found eleven nonstatutory mitigating circumstances:

> (1) borderline intelligence (little weight); (2) defendant dropped out of school (very little weight); (3) loss of father figure had emotional effect and led to his drug abuse (very little weight); (4) defendant sought help for drug problem (very little weight); (5) defendant had an alcohol problem at time of crime (very little weight); (6) drug abuse problem at time of crime (very little weight); (7) defendant has a relationship with son (very little weight); (8) strong work ethic (very little weight); (9) defendant is a religious person (very little weight); (10) dedicated uncle (very little weight); and (11) defendant needs treatment for mental disorder unrelated to substance abuse (very little weight). The trial court determined that the proposed mitigator that the defendant has severe chronic

> alcohol and cocaine problem for which he needs treatment was not proven.

Id.

The trial court concluded that the aggravating factors far outweighed the mitigating circumstances; specifically, the HAC aggravator alone outweighed all mitigating circumstances. *Id*. Accordingly, the trial court sentenced Poole to death on August 19, 2011, and we upheld the trial court's resentencing on June 26, 2014. *Id*. at 419.

On April 8, 2016, Poole filed his initial postconviction motion, raising two issues pertinent to this appeal: (1) counsel was ineffective for conceding that Poole committed the nonhomicide offenses; and (2) Poole is entitled to resentencing because the jury did not make the findings required by *Hurst v. State*.

The trial court entered an interim order vacating Poole's death sentence pursuant to *Hurst v. State*, finding the error was not harmless because the jury's recommendation of death was not unanimous. Following an evidentiary hearing, the trial court denied Poole's claim that counsel was ineffective for conceding guilt on the nonhomicide offenses. The trial court granted the State's request for a stay of its order requiring a new penalty phase, pending this appeal.

GUILT PHASE CLAIM

Poole argues that he is entitled to a new trial because, over his express objections, defense counsel conceded Poole's guilt on the non-homicide offenses. Poole bases this claim on *McCoy v. Louisiana*, 138 S.

Ct. 1500 (2018).[2] The State argues that Poole failed to preserve the specific legal argument that he raises on appeal and thus this issue was waived. We agree.

"In order to preserve an issue for appeal, the issue 'must be presented to the lower court and the *specific legal argument* or grounds to be argued on appeal must be part of that presentation.'" *Bryant v. State*, 901 So. 2d 810, 822 (Fla. 2005) (emphasis added) (quoting *Archer v. State*, 613 So. 2d 446, 448 (Fla. 1993)). Raising a claim for the first time during closing arguments is insufficient to preserve a postconviction claim. *Deparvine v. State*, 146 So. 3d 1071, 1103 (Fla. 2014). Rather, the specific legal argument must be raised in the postconviction motion. *Wickham v. State*, 124 So. 3d 841, 853 (Fla. 2013). Applying these principles here, we conclude that Poole did not preserve this claim for appellate review.

In his postconviction motion, Poole argued that counsel's concession of guilt on the nonhomicide offenses violated Poole's rights to remain silent and to the attorney-client privilege under the Fifth and Sixth Amendments. Poole emphasized the specific wording of counsel's concession, noting that counsel told the jury that Poole "acknowledges" that he committed burglary, sexual battery, and robbery. Poole contrasted "acknowledging" that a defendant

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[2] In *McCoy*, the Supreme Court reviewed a state supreme court decision affirming the petitioner's murder conviction on direct appeal. *See McCoy*, 138 S. Ct. at 1507. The Supreme Court decided McCoy on direct appeal. Because we have concluded that Poole did not preserve his guilt phase claim for appellate review, we need not address how *McCoy*'s holding applies in the postconviction context. *See Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017).

committed a crime with simply conceding that a charge has been proven by the state. In the former case, according to Poole's motion, "the attorney-client privilege is violated, and the right to remain silent is waived, opening the door to rebuttal evidence and argument."

The argument that Poole now raises on appeal did not appear until written closing argument. Only then did Poole assert that counsel's concession of guilt without Poole's consent violated Poole's constitutional rights. Poole's written closing argument presented this argument as one of "two errors," each of which "individually would constitute grounds for vacating Mr. Poole's conviction." (The other error, of course, was the one he asserted in his postconviction motion—the alleged violation of Poole's rights to remain silent and to the attorney client privilege.) Poole presented each argument under a separate heading in his closing argument memorandum and said that the second argument (his original argument) provided "additional grounds for vacating Mr. Poole's conviction."

Poole's postconviction motion did not present the specific legal argument that he now presses on appeal. Raising the argument in his post-hearing, written closing argument memorandum was insufficient. Therefore, we hold that Poole did not preserve his guilt phase argument for our review on appeal.

SENTENCING PHASE CLAIM

We now turn to the State's argument that Poole suffered no constitutional deprivation in his sentencing proceeding and that we should partially recede from *Hurst v. State*.

I. Statutory and Legal Background

A. Florida's Capital Sentencing Law

Poole was sentenced to death under the familiar statutory framework that governed Florida's capital sentencing proceedings from 1973 until 2016. Florida adopted that framework in response to the Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972). "A fair statement of the consensus expressed by the Court in *Furman* is that 'where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.'" *Zant v. Stephens*, 462 U.S. 862, 874 (1983) (quoting *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (plurality opinion)). The Supreme Court has fleshed out this principle by requiring states to narrow the class of death-eligible murders and by mandating individualized sentencing that considers offender-specific mitigating circumstances.

Florida's capital sentencing procedures begin with an evidentiary hearing at which the judge and jury hear evidence relevant to the nature of the crime and the character of the defendant, including statutory aggravating and mitigating circumstances. § 921.141(1), Fla. Stat. (2011).[3] Next the jury deliberates and renders an "advisory sentence" to the court. § 921.141(2), Fla. Stat. Finally, "[n]otwithstanding the recommendation of a majority

[3] For simplicity, unless otherwise indicated, throughout our discussion we refer in the present tense to Florida's capital sentencing law as it existed in 2011, when Poole was resentenced.

of the jury, the court, after weighing the aggravating and mitigating circumstances," must enter a sentence of life imprisonment or death. § 921.141(3), Fla. Stat. If the court imposes a sentence of death, it is required to issue written findings "upon which the sentence of death is based as to the facts: (a) [t]hat sufficient aggravating circumstances exist as enumerated in subsection (5); and (b) [t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." *Id*.

Soon after the legislature adopted this capital sentencing framework, this Court in *State v. Dixon*, 283 So. 2d 1 (Fla. 1973), considered whether the new law passed muster under *Furman*. The Court concluded that it did, because the statutory scheme "controlled and channeled" discretion "until the sentencing process becomes a matter of reasoned judgment." *Id*. at 10.

B. From *Proffitt* to *Walton*

In several cases that are directly relevant to the issues before us now, the Supreme Court itself considered and rejected Sixth and Eighth Amendment challenges to Florida's post-*Furman* capital sentencing law. In *Proffitt v. Florida*, 428 U.S. 242 (1976), the Court took up the question whether Florida's capital sentencing system complied with the Eighth Amendment. The Court noted that, in Florida, the "jury's verdict is determined by majority vote. It is only advisory; the actual sentence is determined by the trial judge." *Id*. at 248-49. No matter, the Court concluded, because the Court's decisions had "never suggested that jury sentencing is constitutionally required." *Id*. at 252. The Court's ultimate holding in

Proffitt was that "[o]n its face the Florida system . . . satisfies the constitutional deficiencies identified in *Furman*." *Id.* at 253.

Next, in *Spaziano v. Florida*, 468 U.S. 447, 457 (1984), the Supreme Court considered whether Florida's capital sentencing system violated the Sixth or Eighth Amendment by allowing the trial judge to override a jury's recommendation of life. *Id.* at 457. As to the Sixth Amendment, the Court observed that, "despite its unique aspects, a capital sentencing proceeding involves the same fundamental issue involved in any other sentencing proceeding—a determination of the appropriate punishment to be imposed on an individual." *Id.* at 459. And "[t]he Sixth Amendment never has been thought to guarantee a right to a jury determination of that issue." *Id.* The Court also found no Eighth Amendment violation in the possibility of a jury override: "We are not persuaded that placing the responsibility on a trial judge to impose the sentence in a capital case is so fundamentally at odds with contemporary standards of fairness and decency that Florida must be required to alter its scheme and give final authority to the jury to make the life-or-death decision." *Id.* at 465. The Court concluded that "there is no constitutional imperative that a jury have the responsibility of deciding whether the death penalty should be imposed." *Id.*

Finally, in *Hildwin v. Florida*, 490 U.S. 638, 639 (1989), the Supreme Court considered a claim that "the Florida capital sentencing scheme violates the Sixth Amendment because it permits the imposition of death without a specific finding by the jury that sufficient aggravating circumstances exist to qualify

the defendant for capital punishment." The Court rejected the claim, reasoning that "the existence of an aggravating factor here is not an element of the offense but instead is 'a sentencing factor that comes into play only after the defendant has been found guilty.'" *Id.* at 640 (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 86 (1986)). Based on that premise, the Court held that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Id.* at 640-41.

A final, non-Florida case bears explaining before we turn to the cases that led directly to *Hurst v. State*. Decided one year after *Spaziano, Walton v. Arizona*, 497 U.S. 639 (1990), involved a challenge to Arizona's capital sentencing law, which required the trial court to find and weigh aggravating and mitigating circumstances before imposing a death sentence. The Arizona law under review did not include any role for the jury in the capital sentencing process. The petitioner in *Walton* argued that "every finding of fact underlying the sentencing decision must be made by a jury, not by a judge" and that therefore "the Arizona scheme would be constitutional only if a jury decides what aggravating and mitigating circumstances are present in a given case and the trial judge then imposes sentence based on those findings." *Id.* at 647. The Court rejected that claim, relying largely on *Hildwin* and the Court's other decisions upholding Florida's capital sentencing system.

The argument that Florida's advisory jury verdict materially distinguished the two states' systems did not persuade the Court. Instead, the Court emphasized that Florida's capital jury does not make specific factual findings about aggravators and

mitigators and that the jury's recommendation is not binding on the trial judge. *Id*. at 647-48. The Court reasoned that "[a] Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." *Id*. at 648. The Court also rejected the argument that, in Arizona, aggravating factors were "elements of the offense." *Id*. The Court ultimately held that "the Arizona capital sentencing scheme does not violate the Sixth Amendment." *Id*. at 649.

C. *Apprendi* and *Ring*

The Court's retreat from the rationale underlying the Sixth Amendment holdings of *Spaziano*, *Hildwin*, and *Walton*—specifically, that aggravators are sentencing factors rather than de facto elements of the crime of capital murder— began with the seminal case of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Apprendi had pleaded guilty to illegal possession of a firearm, an offense that carried a maximum punishment of ten years' imprisonment. Later, in a separate sentencing proceeding, the trial court found by a preponderance of the evidence that Apprendi had also violated a New Jersey hate crime sentencing statute. That judicial finding resulted in Apprendi being sentenced to a term of imprisonment two years above the statutory maximum for the base firearm offense. The Supreme Court described the question presented in *Apprendi* as whether the Fourteenth Amendment's Due Process Clause "requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt." *Id*. at 469.

The Court's analysis proceeded from the foundational principle that the Fifth Amendment (due process) and the Sixth Amendment (jury trial) combine to "entitle a criminal defendant to a 'jury determination . . . of every element of the crime with which he is charged, beyond a reasonable doubt.'" *Id.* at 477 (quoting *United States v. Gaudin*, 515 U.S. 506, 510 (1995)). From that principle the Court derived the more specific rule that is the central holding of *Apprendi*: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." *Id.* at 490 (Stevens, J., concurring) (alteration in original) (quoting *Jones v. United States*, 526 U.S. 227, 252-53 (1999)). The only exception to this rule is "the fact of a prior conviction." *Id.*

Most pertinent to our case here, the Court in *Apprendi* rejected New Jersey's argument that the factual finding supporting Apprendi's hate crime sentencing enhancement was a mere "sentencing factor," rather than a fact that constitutes an element of the offense. *Id.* at 494. The Court stated: "Despite what appears to us the clear 'elemental' nature of the factor here, the relevant inquiry is one not of form but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict[.]" *Id.*

In the penultimate paragraph of its opinion, the Court anticipated and rejected the argument that "the principles guiding" its decision "render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital

crime, to find specific aggravating factors before imposing a sentence of death." *Id.* at 496. The Court deemed the capital cases "not controlling" because, according to the Court, the offenses of conviction in those cases already subjected the defendant to a sentence of death; the aggravating factor findings merely informed the judge's choice of life or death. *Id.* This reasoning turned out to be short-lived.

Two years later, *Ring v. Arizona*, 536 U.S. 584 (2002), gave the Supreme Court the opportunity to apply its *Apprendi* rule in the capital sentencing context. As we explained earlier, capital sentencing hearings under Arizona law were conducted by the trial court alone, and the court made all required findings. *Id.* at 592. As in Florida, Arizona law provided that a death sentence could not be imposed unless at least one aggravating factor was found to exist beyond a reasonable doubt. *Id.* at 597. The Court framed the question presented as "whether that aggravating factor may be found by the judge, as Arizona law specifies, or whether the Sixth Amendment's jury trial guarantee . . . requires that the aggravating factor determination be entrusted to the jury." *Id.*

The Court acknowledged its earlier decision in *Walton* upholding Arizona's capital sentencing scheme against a similar Sixth Amendment challenge. The Court recognized that *Walton* had characterized Arizona's required aggravating factors as "sentencing considerations" rather than "elements of the offense." *Id.* at 598. But the Court explained that *Apprendi* had since clarified that the Sixth Amendment inquiry must focus on effect rather than form: "If a State makes an increase in a defendant's authorized

punishment contingent on a finding of fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." *Id*. at 602.

With that baseline established, the Court revisited whether, as the *Walton* decision had assumed, a first-degree murder conviction in Arizona necessarily included all the jury findings necessary to expose the defendant to a death sentence. The Court looked to an Arizona Supreme Court decision holding that the answer is no—"Defendant's death sentence required the judge's factual findings." *Id*. at 603 (quoting *State v. Ring*, 25 P.3d 1139, 1151 (Ariz. 2001)). "Recognizing that the Arizona court's construction of the State's own law is authoritative," the Court concluded that "*Walton*, in relevant part, cannot survive the reasoning of *Apprendi*." *Id*. The Court ended its opinion:

> [W]e overrule *Walton* to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. Because Arizona's enumerated aggravating factors operate as "the functional equivalent of an element of a greater offense," the Sixth Amendment requires that they be found by a jury.

Id. at 609 (citations omitted) (quoting *Apprendi*, 534 U.S. at 494 n.19).

Justice Breyer declined to join the Court's opinion. He concurred in the judgment, however, on the ground that he "believe[d] that jury sentencing in capital cases

is mandated by the Eighth Amendment." *Id.* at 614 (Breyer, J., concurring in the judgment).

D. *Hurst v. Florida*

It was not until *Hurst v. Florida*, 136 S. Ct. 616 (2016), that the Supreme Court addressed the significance of *Ring* for the constitutionality of Florida's capital sentencing procedure. Although it ultimately chose to address only the Sixth Amendment in its decision, the Supreme Court granted certiorari on the question "[w]hether Florida's death sentencing scheme violates the Sixth Amendment or the Eighth Amendment in light of this Court's decision in *Ring v. Arizona*." *Hurst v. Florida*, 575 U.S. 902, 902 (2015).

In his briefing to the Supreme Court, Hurst made a Sixth Amendment argument and an Eighth Amendment argument. His Sixth Amendment argument was that "Florida's capital sentencing scheme violates the Sixth Amendment under *Ring v. Arizona* . . . because it assigns to the judge alone the power to render a defendant eligible for the death penalty by finding aggravating circumstances." Reply Brief for Petitioner at 2, *Hurst v. Florida*, 136 S. Ct. 616 (2016) (No. 14-7505), 2015 WL 5138584 at * 2. Hurst's Eighth Amendment argument was that "Florida's capital sentencing scheme also violates the Eighth Amendment because it assigns to the judge the power to impose the death penalty." Reply Brief for Petitioner at 5.

The Court had little trouble concluding that "the analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's." *Hurst v. Florida*, 136 S. Ct. at 621-22. Pointing to section 921.141(3), Florida Statutes (2010), the Court noted

that Florida law required the judge, not the jury, to find the "facts" necessary to impose the death penalty. *Id*. at 622. The Court said it was "immaterial" that Florida's system, unlike Arizona's, incorporated an advisory jury verdict. *Id*. The Court rejected the State's argument that "when Hurst's sentencing jury recommended a death sentence, it 'necessarily included a finding of an aggravating circumstance.'" *Id*. (quoting the State's brief). What mattered was that "the Florida sentencing statute does not make a defendant eligible for death until 'findings *by the court* that such person shall be punished by death.'" *Id*. (quoting § 775.082(1), Fla. Stat. (2010)).

The Court ultimately held that "Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional." *Id*. at 624. And, paralleling the language it used in Ring to overrule *Walton*, the Court overruled *Spaziano* and *Hildwin* "to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for the imposition of the death penalty." *Id*.

As we noted earlier, the Court's opinion did not address Hurst's Eighth Amendment argument. In fact, notwithstanding its earlier order, the Court described itself as having granted certiorari to resolve only "whether Florida's capital sentencing scheme violates the Sixth Amendment in light of *Ring*." *Id*. at 621. In a solo concurrence, Justice Breyer did address the Eighth Amendment claim. Citing his own concurring opinion in *Ring*, he concluded that "the Eighth Amendment requires that a jury, not a judge, make the decision to sentence a defendant to death."

Id. at 624 (Breyer, J., concurring in the judgement) (quoting *Ring*, 536 U.S. at 614).

E. *Hurst v. State*

When Hurst's case returned to this Court on remand from the Supreme Court, it would have been reasonable to expect that the application of *Hurst v. Florida* would be straightforward. Hurst had asked the Supreme Court to find that Florida's capital sentencing statute violated the Sixth Amendment "because it assigns to the judge alone the power to render a defendant eligible for the death penalty by finding aggravating circumstances." Reply Brief for Petitioner at 2, *Hurst v. Florida*, 136 S. Ct. 616 (2016) (No. 14-7505), 2015 WL 5138584 at *2. In a relatively brief opinion that did not expand on Ring, the Supreme Court agreed. As Justice Canady correctly observed in his *Hurst v. State* dissent, "*Hurst v. Florida* simply applies the reasoning of *Ring* and *Apprendi* to Florida's death penalty statute and concludes that the jury's advisory role under Florida law does not satisfy the requirements of the Sixth Amendment." 202 So. 3d at 79 (Canady, J., dissenting). Years before, while it awaited definitive guidance from the Supreme Court, this Court had already addressed what it would mean "if *Ring* did apply in Florida": "we read [*Ring*] as requiring only that the jury make the finding of 'an element of a greater offense.' That finding would be that at least one aggravator exists . . . ." *State v. Steele*, 921 So. 2d 538, 546 (Fla. 2005) (citation omitted) (quoting *Ring*, 536 U.S. at 609).

Nonetheless, this Court on remand concluded that *Hurst v. Florida* had far greater implications for

Florida's capital sentencing law. The new rule announced in *Hurst v. State* was as follows:

> [B]efore the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating factors, and unanimously recommend a sentence of death.

202 So. 3d at 57.

The Court based its holding on several sources of law. The Court looked to *Apprendi*, *Ring*, and *Hurst* for the principle that the Sixth Amendment requires the jury to find "every fact . . . necessary for the imposition of the death penalty" and for the conclusion that each of these facts constitutes an "element." *Id.* at 53. Expanding on the Supreme Court's concept of "facts," the Court looked to the Florida statutes to identify "those critical findings that underlie the imposition of a death sentence." *Id.* at 51. The Court looked to article I, section 22 of the Florida Constitution[4] for the principle that jury verdicts must be unanimous on all the elements of criminal offenses—including the new capital sentencing "elements" that the Court had purported to identify. *See id.* at 55. And finally, "in addition to the

[4] Article I, section 22 provides in pertinent part: "The right of trial by jury shall be secure to all and remain inviolate."

requirements of unanimity that flow from the Sixth Amendment and from Florida's right to trial by jury," the Court concluded that "juror unanimity in any recommended verdict resulting in a death sentence is required under the Eighth Amendment." *Id*. at 59.

II. Analysis

The State asks us to recede from *Hurst v. State* "to the extent its holding requires anything more than the jury to find an aggravating circumstance—what *Hurst v. Florida* requires." We now explain how this Court erred in *Hurst v. State* and why we have concluded that we must partially recede from our decision in that case.

A. The Correct Understanding of *Hurst v. Florida*

It helps first to consider *Hurst v. Florida* in light of the principles underlying the Supreme Court's capital punishment cases. Those cases "address two different aspects of the capital decisionmaking process: the eligibility decision and the selection decision." *Tuilaepa v. California*, 512 U.S. 967, 971 (1994). As to the eligibility decision, the Court has required that the death penalty be reserved for only a subset of those who commit murder. "To render a defendant eligible for the death penalty in a homicide case, [the Supreme Court has] indicated that the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase." *Id*. at 971-72. "[A]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe

sentence on the defendant compared to others found guilty of murder." *Zant*, 462 U.S. at 877.

By contrast, the selection decision involves determining "whether a defendant eligible for the death penalty should in fact receive that sentence." *Tuilaepa*, 512 U.S. at 972. The Supreme Court's cases require that the selection decision be an individualized determination that assesses the defendant's culpability, taking into account "relevant mitigating evidence of the character and record of the defendant and the circumstances of the crime." *Id.*

Hurst v. Florida is about eligibility, not selection. We know this from the face of the Court's opinion: "Florida concedes that *Ring* required a jury to find every fact necessary to render Hurst *eligible* for the death penalty." *Hurst v. Florida*, 136 S. Ct. at 622 (emphasis added). We know it from the opinion's exclusive focus on aggravating circumstances, the central object of the Court's death eligibility jurisprudence. We know it because Hurst's counsel conceded it at oral argument. Transcript of Oral Argument at 12, *Hurst v. Florida*, 136 S. Ct. 616 (2016) (No. 14-7505). And most fundamentally, we know it from the *Apprendi*-based principle that animates the Court's decision: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Apprendi*, 530 U.S. at 490 (alteration in original) (quoting *Jones*, 526 U.S. at 252 (Stevens, J., concurring)).

Justice Scalia explained "the import of *Apprendi* in the context of capital-sentencing proceedings" this way:

> [F]or purposes of the Sixth Amendment's jury-trial guarantee, the underlying offense of "murder" is a distinct, lesser included offense of "murder plus one or more aggravating circumstances." Whereas the former exposes a defendant to a maximum penalty of life imprisonment, the latter increases the maximum permissible sentence to death.

Sattazahn v. Pennsylvania, 537 U.S. 101, 111 (2003).

This of course describes Florida's capital sentencing law. As the Supreme Court itself noted in *Hurst v. Florida*, section 775.082(1), Florida Statutes, states that the punishment for a capital felony is life imprisonment unless "the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death." The required trial court findings are set forth in section 921.141(3), Florida Statutes, which is titled "Findings in Support of Sentence of Death." When the Supreme Court referred to "the critical findings necessary to impose the death penalty," it referred to those findings as "facts" and cited section 921.141(3). *Hurst v. Florida*, 136 S. Ct. at 622. Tellingly, the Court did not cite section 921.141(2), which sets out the process for the jury to render an advisory verdict.

Section 921.141(3) requires two findings. One is an eligibility finding, the other a selection finding. The eligibility finding is in section 921.141(3)(a): "[t]hat sufficient aggravating circumstances exist as enumerated in subsection (5)." The selection finding is in section 921.141(3)(b): "[t]hat there are

insufficient mitigating circumstances to outweigh the aggravating circumstances."

We know that section 921.141(3)(a) is the eligibility finding because that is what our Court said repeatedly and consistently for many decades prior to *Hurst v. State*. In our first case interpreting Florida's post-*Furman* capital sentencing law, we said: "When 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 provided in Fla. Stat. s. 921.141(7)." *State v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973). Beginning with that holding, it has always been understood that, for purposes of complying with section 921.141(3)(a), "sufficient aggravating circumstances" means "one or more." *See Miller v. State*, 42 So. 3d 204, 219 (Fla. 2010) ("sufficient aggravating circumstances" means "one or more such circumstances"); *Zommer v. State*, 31 So. 3d 733, 754 (Fla. 2010) (same); *see also Douglas v. State*, 878 So. 2d 1246, 1265 (Fla. 2004) (Pariente, J., concurring as to conviction and concurring in result only as to sentence) ("A defendant convicted of first-degree murder cannot qualify for a death sentence unless at least one statutory aggravating factor is found to exist.").

Poole's suggestion that "sufficient" implies a qualitative assessment of the aggravator—as opposed simply to finding that an aggravator exists—is unpersuasive and contrary to this decades-old precedent. Likewise, our Court was wrong in *Hurst v. State* when it held that the existence of an aggravator and the sufficiency of an aggravator are two separate findings, each of which the jury must find unanimously. Under longstanding Florida law, there

is only one eligibility finding required: the existence of one or more statutory aggravating circumstances.

B. The Errors of *Hurst v. State*

This Court clearly erred in *Hurst v. State* by requiring that the jury make any finding beyond the section 921.141(3)(a) eligibility finding of one or more statutory aggravating circumstances. Neither *Hurst v. Florida*, nor the Sixth or Eighth Amendment, nor the Florida Constitution mandates that the jury make the section 941.121(3)(b) selection finding or that the jury recommend a sentence of death.

1. Sixth and Eighth Amendment Errors

Weighing Under Section 941.121(3)(b). Again, the *Apprendi* rule drives the Sixth Amendment inquiry: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Apprendi*, 530 U.S. at 490 (alteration in original) (quoting *Jones*, 526 U.S. at 252 (Stevens, J., concurring)). Only such "facts" are "elements" that must be found by a jury. The section 921.141(3)(b) selection finding—"that there are insufficient mitigating circumstances to outweigh the aggravating circumstances"—fails both aspects of the *Apprendi* test.

The section 921.141(3)(b) selection finding is not a "fact." As the Supreme Court observed in a case decided shortly after *Hurst v. Florida*, "the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy." *Kansas v. Carr*, 136 S. Ct. 633, 642 (2016). That stands in stark contrast to the "aggravating-

factor determination," which is "a purely factual determination." *Id.* A subjective determination like the one that section 921.141(3)(b) calls for cannot be analogized to an element of a crime; it does not lend itself to being objectively verifiable. Instead, it is a "discretionary judgment call that neither the state nor the federal constitution entrusts exclusively to the jury." *State v. Wood*, 580 S.W.3d 566, 585 (Mo. 2019); *see also Hurst v. State*, 202 So. 3d at 82 (Canady, J., dissenting) (weighing of mitigators and aggravators is a determination that "require[s] subjective judgment").

We acknowledge that section 921.141(3)(b) requires a judicial finding "as to the fact[]" that the mitigators do not outweigh the aggravators. But the legislature's use of a particular label is not what drives the Sixth Amendment inquiry. *See Apprendi*, 530 U.S. at 494. In substance, what section 921.141(3)(b) requires "is not a finding of fact, but a moral judgment." *United States v. Gabrion*, 719 F.3d 511, 533 (6th Cir. 2013) (describing balancing provision in federal death penalty statute).

In any event, even if we were to consider the section 921.141(3)(b) selection finding to be a fact, it still would not implicate the Sixth Amendment. The selection finding does not "expose" the defendant to the death penalty by increasing the legally authorized range of punishment. As we have explained, under longstanding Florida law, it is the finding of an aggravating circumstance that exposes the defendant to a death sentence. The role of the section 921.141(3)(b) selection finding is to give the defendant an opportunity for mercy if it is justified by the

relevant mitigating circumstances and by the facts surrounding his crime.

This passage from the Supreme Court's decision in *Alleyne v. United States*, 570 U.S. 99 (2013), illuminates this point:

> Juries must find any facts that increase either the statutory maximum or minimum because the Sixth Amendment applies where a finding of fact both alters the legally prescribed range *and* does so in a way that aggravates the penalty. Importantly, this is distinct from factfinding used to guide judicial discretion in selecting a punishment "within limits fixed by law." While such findings of fact may lead judges to select sentences that are more severe than the ones they would have selected without those facts, the Sixth Amendment does not govern that element of sentencing.

Id. at 113 n.2 (quoting *Williams v. New York*, 337 U.S. 241, 246 (1949)). And *Alleyne* merely echoes what the Supreme Court said in *Apprendi*: "We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute." *Apprendi*, 530 U.S. at 481.

In sum, because the section 921.141(3)(b) selection finding is not a "fact" that exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict, it is not an element. And because it is

not an element, it need not be submitted to a jury. *See Hurst v. Florida*, 136 S. Ct. at 621 (defining "element").

Unanimous Jury Recommendation. The *Hurst v. State* requirement of a unanimous jury recommendation similarly finds no support in *Apprendi*, *Ring*, or *Hurst v. Florida.* As we have explained, the Supreme Court in *Spaziano* upheld the constitutionality under the Sixth Amendment of a Florida judge imposing a death sentence even in the face of a jury recommendation of life—a jury override. It necessarily follows that the Sixth Amendment, as interpreted in *Spaziano*, does not require any jury recommendation of death, much less a unanimous one. And as we have also explained, the Court in *Hurst v. Florida* overruled *Spaziano* only to the extent it allows a judge, rather than a jury, to find a necessary aggravating circumstance. *See Hurst v. Florida*, 136 S. Ct. at 624.

Even without *Spaziano*, the *Apprendi* line of cases cannot be read to require a unanimous jury recommendation of death. Those cases are about what "facts"—those that are the equivalent of elements of a crime—the Sixth Amendment requires to be found by a jury. Sentencing recommendations are neither elements nor facts. As Justice Scalia said, the judgment in *Ring*—and by extension the judgment in *Hurst v. Florida*—"has nothing to do with jury sentencing." *Ring*, 536 U.S. at 612 (Scalia, J., concurring).

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.

2. State Law Errors

For many decades, this Court considered Florida's post-*Furman* sentencing procedures to be facially consistent with our state constitution. Even after *Ring*, in cases where the aggravator consisted of a prior violent felony, we rejected claims that Florida's capital sentencing scheme violated the right to a jury trial under our state constitution. *See, e.g., Doorbal v. State*, 837 So. 2d 940, 963 (Fla. 2003).

We departed from those precedents in *Hurst v. State*, when we decided that article I, section 22 of the Florida Constitution requires a unanimous jury recommendation of a sentence of death and unanimous jury findings as to all the aggravating factors that were proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating factors. We based that holding on our determination that each of these findings is the equivalent of an element of an offense and on the longstanding principle of Florida law that all elements must be found unanimously by the jury.

Here we already have explained that our holding in *Hurst v. State* was based on a mistaken view of what constitutes an element. Under the principles established in *Apprendi, Ring,* and *Hurst v. Florida*, only one of the findings we identified in *Hurst v.*

State—the finding of the existence of an aggravating circumstance—qualifies as an element, including for purposes of our state constitution. There is no basis in state or federal law for treating as elements the additional unanimous jury findings and recommendation that we mandated in *Hurst v. State*. As to state law, subsequent to our decision in *Hurst v. State*, we already have receded from the holding that the additional *Hurst v. State* findings are elements. We held:

> To the extent that in *Perry v. State*, 210 So. 3d 630, 633 (Fla. 2016), we suggested that *Hurst v. State* held that the sufficiency and weight of the aggravating factors and the final recommendation of death are elements that must be determined by the jury beyond a reasonable doubt, we mischaracterized *Hurst v. State*, which did not require that these determinations be made beyond a reasonable doubt. Since *Perry*, in *In re Standard Criminal Jury Instructions in Capital Cases* and *Foster* [*v. State*, 258 So. 3d 1248 (Fla. 2018)], we have implicitly receded from its mischaracterization of *Hurst v. State*. We now do so explicitly. Thus, these determinations are not subject to the beyond a reasonable doubt standard of proof, and the trial court did not err in instructing the jury.

Rogers v. State, 44 Fla. L. Weekly S208, S212 (Fla. Sept. 5, 2019).

Last, lest there be any doubt, we hold that our state constitution's prohibition on cruel and unusual punishment, article I, section 17,[5] does not require a unanimous jury recommendation—or any jury recommendation—before a death sentence can be imposed. The text of our constitution requires us to construe the state cruel and unusual punishment provision in conformity with decisions of the Supreme Court interpreting the Eighth Amendment. Binding Supreme Court precedent in *Spaziano* holds that the Eighth Amendment does not require a jury's favorable recommendation before a death penalty can be imposed. *See Spaziano*, 468 U.S. at 464-65. Therefore, the same is true of article I, section 17.

C. Stare Decisis

While this Court has consistently acknowledged the importance of *stare decisis*, it has been willing to correct its mistakes. In a recent discussion of *stare decisis*, we said:

> *Stare decisis* provides stability to the law and to the society governed by that law. Yet *stare decisis* does not command blind allegiance to precedent. "Perpetuating

[5] Article I, section 17 provides in pertinent part: "Excessive fines, cruel and unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden. The death penalty is an authorized punishment for capital crimes designated by the legislature. The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution."

> an error in legal thinking under the guise of stare decisis serves no one well and only undermines the integrity and credibility of the court."

Shepard v. State, 259 So. 3d 701, 707 (Fla. 2018) (quoting *State v. Gray*, 654 So. 2d 552, 554 (Fla. 1995)). Similarly, we have stated that "[t]he doctrine of stare decisis bends . . . where there has been an error in legal analysis." *Puryear v. State*, 810 So. 2d 901, 905 (Fla. 2002). And elsewhere we have said that we will abandon a decision that is "unsound in principle." *Robertson v. State*, 143 So. 3d 907, 910 (Fla. 2014) (quoting *Brown v. Nagelhout*, 84 So. 3d 304, 309 (Fla. 2012)).

It is no small matter for one Court to conclude that a predecessor Court has clearly erred. The later Court must approach precedent presuming that the earlier Court faithfully and competently carried out its duty. A conclusion that the earlier Court erred must be based on a searching inquiry, conducted with minds open to the possibility of reasonable differences of opinion. "[T]here is room for honest disagreement, even as we endeavor to find the correct answer." *Gamble v. United States*, 139 S. Ct. 1960, 1986 (2019) (Thomas, J., concurring).

In this case we cannot escape the conclusion that, to the extent it went beyond what a correct interpretation of *Hurst v. Florida* required, our Court in *Hurst v. State* got it wrong. We say that based on our thorough review of *Hurst v. Florida*, of the Supreme Court's Sixth and Eighth Amendment precedents, and of our own state's laws, constitution, and judicial precedents. Without legal justification,

this Court used *Hurst v. Florida*—a narrow and predictable ruling that should have had limited practical effect on the administration of the death penalty in our state as an occasion to disregard decades of settled Supreme Court and Florida precedent. Under these circumstances, it would be unreasonable for us *not* to recede from *Hurst v. State*'s erroneous holdings.

Invoking *North Florida Women's Health & Counseling Services, Inc. v. State*, 866 So. 2d 612 (Fla. 2003), Poole urges us to stand by our decision in *Hurst v. State*. Our opinion in *North Florida Women's Health* said that, before deciding to overrule a prior opinion, "we traditionally have asked several questions, including the following": whether the decision has proved unworkable; whether the decision could be reversed "without serious injustice to those who have relied on it and without serious disruption in the stability of the law;" and whether there have been drastic changes in the factual premises underlying the decision. *Id.* at 637. Though we do not doubt that this list of considerations could have been culled from our pre-*North Florida Women's Health* precedents, we note that the Court there offered no citation to support its compilation.

In the years since our decision in *North Florida Women's Health*, we have not treated that case as having set forth a *stare decisis* test that we must follow in every case. On the contrary, we have repeatedly receded from erroneous precedents without citing *North Florida Women's Health* or asking all the questions it poses. *See, e.g.*, *Shepard*, 259 So. 3d at 707; *State v. Sturdivant*, 94 So. 3d 434, 440 (Fla. 2012); *Westgate Miami Beach, Ltd. v. Newport Operating*

Corp., 55 So. 3d 567, 574 (Fla. 2010); *Allstate Indem. Co. v. Ruiz*, 899 So. 2d 1121, 1131 (Fla. 2005).

More fundamentally, we are wary of any invocation of multi-factor *stare decisis* tests or frameworks like the one set out in *North Florida Women's Health*. They are malleable and do not lend themselves to objective, consistent, and predictable application. They can distract us from the merits of a legal question and encourage us to think more like a legislature than a court. And they can lead us to decide cases on the basis of guesses about the consequences of our decisions, which in turn can make those decisions less principled. Multi-factor tests or frameworks like the one in *North Florida Women's Health* often serve as little more than a toolbox of excuses to justify a court's unwillingness to examine a precedent's correctness on the merits.

We believe that the proper approach to *stare decisis* is much more straightforward. In a case where we are bound by a higher legal authority—whether it be a constitutional provision, a statute, or a decision of the Supreme Court—our job is to apply that law correctly to the case before us. When we are convinced that a precedent clearly conflicts with the law we are sworn to uphold, precedent normally must yield.

We say normally because "*stare decisis* means sticking to some wrong decisions." *Kimble v. Marvel Entertainment, LLC*, 135 S. Ct. 2401, 2409 (2015). "Indeed, *stare decisis* has consequence only to the extent it sustains incorrect decisions; correct judgments have no need for that principle to prop them up." *Id*. But once we have chosen to reassess a precedent and have come to the conclusion that it is

clearly erroneous, the proper question becomes whether there is a valid reason *why not* to recede from that precedent.

The critical consideration ordinarily will be reliance. It is generally accepted that reliance interests are "at their acme in cases involving property and contract rights." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). And reliance interests are lowest in cases—like this one—"involving procedural and evidentiary rules." *Id.*; *see also Alleyne*, 570 U.S. at 119 (Sotomayor, J., concurring) ("[W]hen procedural rules are at issue that do not govern primary conduct and do not implicate the reliance interests of private parties, the force of *stare decisis* is reduced.").

Here any reliance considerations cut against Poole. No one, including Poole, altered his behavior in expectation of the new procedural rules announced in *Hurst v. State*. To the extent that reliance interests factor here at all, they lean heavily in favor of the victims of Poole's crimes and of society's interest in holding Poole to account and in the substantial resources that have been spent litigating and adjudicating Poole's case.

We acknowledge that the Legislature has changed our state's capital sentencing law in response to *Hurst v. State*. Our decision today is not a comment on the merits of those changes or on whether they should be retained. We simply have restored discretion that *Hurst v. State* wrongly took from the political branches.

Having thoroughly considered the State's and Poole's arguments in light of the applicable law, we recede from *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.

CONCLUSION

The jury in Poole's case unanimously found that, during the course of the first-degree murder of Noah Scott, Poole committed the crimes of attempted first-degree murder of White, sexual battery of White, armed burglary, and armed robbery. Under this Court's longstanding precedent interpreting *Ring v. Arizona* 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. *See Poole II*, 151 So. 3d at 419. In light of our decision to recede from *Hurst v. State* except to the extent it requires a jury unanimously to find the existence of a statutory aggravating circumstance, we reverse the portion of the trial court's order vacating Poole's death sentence. We affirm the trial court's denial of Poole's guilt phase claim. And we remand to the trial court with instructions that Poole's sentence be reinstated and for proceedings consistent with this opinion.

It is so ordered.

CANADY, C.J., and POLSTON, LAWSON, and MUÑIZ, JJ., concur.

LAWSON, J., concurs specially with an opinion. LABARGA, J., dissents with an opinion.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

LAWSON, J., concurring specially.

I fully concur in the majority opinion and write separately to address the dissent's contentions: (1) that "national consensus," dissenting op. at 53, is relevant to our consideration of any legal issue decided today; (2) that today's decision "returns Florida to its status as an absolute outlier among the jurisdictions in this country that utilize the death penalty," *id.* at 51; (3) that "settled [Florida] law compelled this Court's conclusion in *Hurst v. State* [202 So. 3d 40 (Fla. 2016)] that the unanimity requirement applied not only to the jury's duty to determine whether to convict the defendant, but upon conviction, to the jury's duty to determine whether the defendant should receive the death penalty," dissenting op. at 53-54; and (4) that our decision "removes an important safeguard for ensuring that the death penalty is only applied to the most aggravated and least mitigated of murders," *id.* at 51-52.

I. National consensus is irrelevant to our legal analysis.

It is axiomatic that we are bound by decisions of the United States Supreme Court when construing provisions of the United States Constitution. *Carnival Corp. v. Carlisle*, 953 So. 2d 461, 465 (Fla. 2007) ("[S]tate courts are bound by the decisions of the United States Supreme Court construing federal law." (quoting *Chesapeake & O. Ry. Co. v. Martin*, 283 U.S. 209, 220-21 (1931))). While political decisions by the various states are regularly considered in Eighth Amendment analysis to gauge "evolving standards of decency," *see, e.g., Spaziano v. Florida*, 468 U.S. 447, 463-64 n. 9 (1984) (considering the statutory

approaches of a number of jurisdictions to capital sentencing), *overruled in part by Hurst v. Florida*, 136 S. Ct. 616 (2016), a consideration when determining what constitutes cruel and unusual punishment, the Supreme Court has held that the Eighth Amendment does not require a jury determination on the ultimate question of whether to impose a death sentence. *Id*. at 465. In conducting its Eighth Amendment analysis of this issue in *Spaziano v. Florida*, the Supreme Court acknowledged that a significant majority of jurisdictions entrusted the sentencing decision to a jury in the death penalty context, *id*. at 463, making Florida one of only three jurisdictions that permitted a judge to impose a death sentence in the absence of a jury's unanimous determination that a death sentence should be imposed. *Id*. Despite Florida's minority position, the Supreme Court found no Eighth Amendment violation, reasoning:

> The fact that a majority of jurisdictions have adopted a different practice, however, does not establish that contemporary standards of decency are offended by the jury override. The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws. "Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment" is violated by a challenged practice. *See Enmund v. Florida*, 458 U.S. 782, 797 (1982); *Coker v. Georgia*,

> 433 U.S. 584, 597 (1977) (plurality opinion). In light of the facts that the Sixth Amendment does not require jury sentencing, that the demands of fairness and reliability in capital cases do not require it, and that neither the nature of, nor the purpose behind, the death penalty requires jury sentencing, we cannot conclude that placing responsibility on the trial judge to impose the sentence in a capital case is unconstitutional.

Id. at 464. Because the Supreme Court has already considered arguments based upon "national consensus" in its analysis of this precise issue, *id*., and because we are bound by this precedent, *Carlisle*, 953 So. 2d at 465, we cannot conduct an original Eighth Amendment analysis, consider national consensus, and reach a different result than that of the Supreme Court on this same legal issue. *Id*.

Moreover, because the Supreme Court in *Spaziano* expressly held that the Eighth Amendment does not require jury sentencing in capital cases, the Florida Constitution expressly prohibits us from reaching a different result under the Florida Constitution. *See* art. I, § 17, Fla. Const. ("The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution.").

For these reasons, "national consensus" is irrelevant to *our analysis* of the legal issues presented in this appeal, and its consideration is therefore properly absent from the majority's legal analysis.

II. Our decision today does not make Florida an "outlier."

The majority today decides constitutional questions, not political ones. Those constitutional questions are properly decided through legal reasoning, not policy analysis. It is true that Congress has made a policy decision requiring a unanimous jury recommendation before death can be imposed as a sentence under federal law. 18 U.S.C. § 3593(e) (2019). It is also true, as already discussed, that an overwhelming majority of states still authorizing death as a sentence have made the same legislative policy choice. *See Spaziano*, 468 U.S. at 463; *see also* Michael L. Radelet & G. Ben Cohen, *The Decline of the Judicial Override*, 15 Ann. Rev. L. & Soc. Sci. 539, 548-49 (2019). As for Florida law, today's decision does not alter section 921.141, Florida Statutes (2019), which still requires a unanimous jury recommendation before death can be imposed. If the Florida Legislature considers changing section 921.141 to eliminate the requirement for a unanimous jury recommendation before a sentence of death can be imposed, the fact that this legislative change would make Florida an "outlier" will surely be considered in the ensuing political debate. As for the constitutional questions addressed in the majority opinion, our decision should be judged solely on the quality, clarity, and force of its legal analysis—not on speculation regarding possible future policy choices that are constitutionally entrusted to the political branch. *See*

art. II, § 3, Fla. Const. ("The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.").

III. Settled Florida law did not compel "this Court's conclusion in *Hurst v. State* that the unanimity requirement applied not only to the jury's duty to determine whether to convict the defendant, but upon conviction, to the jury's duty to determine whether the defendant should receive the death penalty."

Prior to this Court's decision in *Hurst v. State*, this Court had repeatedly and consistently held that Florida's constitution was not violated by imposition of a death sentence without unanimous jury determinations during the sentencing proceeding, *see* majority op. at 32, including in Poole's case. *Poole v. State*, 151 So. 3d 402, 419 (2014). This was the "settled [Florida] law" on the issue until *Hurst v. State*. The dissent's contrary claim, that "settled [Florida] law" compelled a contrary conclusion in *Hurst v. State*, is inaccurate. The "settled law" cited by the dissent is precedent existing "[f]or well more than a century . . . requir[ing] that a jury unanimously vote to convict a defendant of a criminal offense." Dissenting op. at 53. If Florida's century-plus-old unanimous-verdict requirement so obviously and necessarily applied to capital sentencing proceedings that it compelled the conclusion reached for the first time in *Hurst v. State*, why was this argument soundly and repeatedly

rejected by the entirety of Florida's judiciary until 2016, when *Hurst v. State* was decided?

Fundamentally, the dissent's argument, and the *Hurst v. State* holding, are premised on a mischaracterization of the jury's ultimate sentencing recommendation, and the penultimate considerations leading up to that recommendation under section 921.141, as factual determinations that constitute elements of the charged crime. This mischaracterization was neither grounded in reason nor supported by analysis. Rather, the *Hurst v. State* majority simply declared that the jury's sentencing determinations were "also elements [of the crime of capital murder] that must be found unanimously by the jury." 202 So. 3d at 54.

The erroneous declaration that the jury sentencing determinations were "elements" of the crime of capital murder—the sole basis stated for the *Hurst v. State* majority's conclusion that Florida's Constitution required jury unanimity on those determinations, *id.*—was initially corrected in *Foster v. State*, 258 So. 3d 1248, 1252 (Fla. 2018) (clarifying that "the *Hurst* [*v. State*] penalty phase findings are not elements of the capital felony of first-degree murder"), an opinion joined by four members of the original *Hurst v. State* majority. More recently, in *Rogers v. State*, 44 Fla. L. Weekly S208 (Fla. Sept. 5, 2019), we explained:

> To the extent that in *Perry v. State*, 210 So. 3d 630, 633 (Fla. 2016), we suggested that *Hurst v. State* held that the sufficiency and weight of the aggravating factors and the final

> recommendation of death are elements that must be determined by the jury beyond a reasonable doubt, we mischaracterized *Hurst v. State*, which did not require that these determinations be made beyond a reasonable doubt. Since *Perry*, in *In re Standard Criminal Jury Instructions in Capital Cases* and *Foster*, we have implicitly receded from its mischaracterization of *Hurst v. State*. We now do so explicitly.

Id. at S212.

Hurst v. State's implied characterization of the jury's capital sentencing determinations as factual findings qualitatively indistinguishable from those made by a jury when weighing evidence and rendering a guilt-phase verdict is also incorrect. In reality, the recommendation is an individualized, conscience-based exercise of discretion. This should be obvious when considering that a juror could judge a crime to be highly aggravated and hardly mitigated but still recommend a life sentence based upon some consideration personal to that individual juror. It should also be obvious from the post-*Hurst v. State* penalty-phase jury instructions authorized by this Court, which explain that "different [sentencing] factors or circumstances may be given different weight or values by different jurors"; that "each individual juror must decide what weight is to be given to a particular factor or circumstance"; and that "[r]egardless of the results of each juror's individual weighing process—even if [a juror] find[s] that the sufficient aggravators outweigh the mitigators—the

law neither compels nor requires [that juror] to determine that the defendant should be sentenced to death." *In re Standard Criminal Jury Instructions in Capital Cases*, 244 So. 3d 172, 191 (Fla. 2018).

While the penultimate "weighing" questions are phrased as fact-like determinations (and are certainly more fact-like than the recommendation), they are clearly designed as an analytical tool to guide individual jurors in making their individual recommendations—not as facts to be determined by the jury as a whole. Again, this is obvious from the instructions themselves, which do not even require mitigation findings and tell jurors that the weight given to all factors, as well as whether a fact is considered mitigating at all, are individual determinations.

Because the ultimate jury recommendation and penultimate weighing questions are neither "facts" historically entrusted to jurors under the Florida Constitution, nor "elements" of a crime, *Foster*, 258 So. 3d at 1252, the *Hurst v. State* majority demonstratively erred in stating that article I, section 22 of the Florida Constitution supports or compels jury unanimity on anything other than the existence of an aggravating circumstance. Settled Florida law was to the contrary.

IV. Today's decision does not eliminate a safeguard needed to ensure that the death penalty is only applied to the most aggravated and least mitigated of murders.

The Eighth Amendment's protection against cruel and unusual punishment requires safeguards to assure that a death sentence is not imposed unless

careful consideration is first given to the "particular acts by which the crime was committed . . . [and] the character and propensities of the offender," *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (quoting *Pennsylvania ex.rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937)), to appropriately narrow the class of cases in which the sentence can be imposed. *Id.* The procedures set forth in section 921.141 were enacted to comply with the Eighth Amendment in this regard by requiring the State to prove at least one statutorily defined "aggravating circumstance" before the death penalty can be considered, § 921.141(2)(b)1., (6), and by providing for the comprehensive consideration of mitigating circumstances. § 921.141(2)(b)2., (3)(a)2., (3)(b), (7). Additionally, before a death sentence can be imposed, the sentencing judge must enter a written order reflecting findings that "there are sufficient aggravating factors to warrant the death penalty . . . [and that] the aggravating factors outweigh the mitigating circumstances reasonably established by the evidence." § 921.141(4). Appellate review assures that these standards are met in every case. § 921.141(5) ("The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida and disposition rendered within 2 years after the filing of a notice of appeal. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules adopted by the Supreme Court."); *see also Pulley v. Harris*, 465 U.S. 37, 45-46 (1984) (discussing the importance of "meaningful appellate review" in this context). Reviewing Florida's death penalty procedure, the Supreme Court has determined that a unanimous jury sentencing recommendation is not required to comply with the

Eighth Amendment's demand that discretion to impose the death penalty be appropriately directed and limited. *Spaziano*, 468 U.S. at 464 ("[T]he demands of fairness and reliability in capital cases do not require [jury sentencing]."). Review of this Court's 2014 opinion affirming Poole's sentence of death illustrates why Florida's system meets Eighth Amendment demands of "fairness and reliability" without requiring a unanimous jury recommendation.

Loretta White and Noah Scott had gone to bed together in their mobile home. *Poole*, 151 So. 3d at 406. White was startled awake to find a stranger, Poole, attempting to rape her. *Id*. Scott repeatedly tried to stop the rape and, each time, Poole hit Scott in the face with a tire iron—beating Scott to death. *Id*. Poole ignored White's cries for mercy, which were emphasized by the plea that she was pregnant; he also beat her with the tire iron, severing some of her fingers as she tried to defend herself against the attack. *Id.* After raping, beating, and sexually assaulting White, Poole left her unconscious in the trailer. *Id*.

This murder was obviously highly aggravated by Poole's contemporaneous crimes. The trial judge appropriately found that these aggravators were sufficient to warrant the death penalty under Florida law and that the aggravators outweighed all mitigation so that a death sentence was appropriate. *Id*. at 419 (concluding that the trial court "properly" weighed "the aggravators against the mitigators" and affirming Poole's sentence of death). Even with the jury's 11-1 death recommendation, this Court appropriately and without hesitation (or dissent on this issue) determined that Florida's sentencing procedure had reliably guided and limited the

sentencing decision in this case, as required by the Eighth Amendment. *Id.*

Conclusion

The constitutionality of Poole's sentence was already decided by this Court in 2014. *Id. Hurst v. State* required the trial court to reevaluate the constitutionality of Poole's death sentence—and deciding this appeal required this Court to address the State's argument that *Hurst v. State* was incorrectly decided. For the reasons explained in the majority opinion, and above, it is clear that Poole suffered no constitutional deprivation in the imposition of his sentence and that we cannot reach a correct legal result in this appeal without receding in part from *Hurst v. State*. I fully agree with the majority's determination that we should partially recede from *Hurst v. State* because the State and those whose interests are represented by the State in this case, including the victims and their families, relied heavily on the significant body of precedent upholding as constitutional the relevant statutory procedures invalidated in *Hurst v. State, cf. Johnson v. State*, 904 So. 2d 400, 410 (Fla. 2005) (explaining that "Florida's reliance on its capital sentencing has been entirely in good faith" in light of the legal precedent upholding its constitutionality); because the State and society's interests in the finality of Poole's sentence are equally strong, *see In re Baxter Int'l, Inc.*, 678 F.3d 1357, 1367 (Fed. Cir. 2012) (Newman, J., dissenting) ("Finality is fundamental to the Rule of Law." (citing *S. Pac. R.R. v. United States*, 168 U.S. 1, 18 (1897))); and, because Poole's reliance interest on the erroneous *Hurst v. State* precedent is nonexistent. Majority op. at 38.

LABARGA, J., dissenting.

Today, a majority of this Court recedes from the requirement that Florida juries unanimously recommend that a defendant be sentenced to death. In doing so, the majority returns Florida to its status as an absolute outlier among the jurisdictions in this country that utilize the death penalty. The majority gives the green light to return to a practice that is not only inconsistent with laws of all but one of the twenty-nine states that retain the death penalty, but inconsistent with the law governing the federal death penalty. Further, the majority removes an important safeguard for ensuring that the death penalty is only applied to the most aggravated and least mitigated of murders. In the strongest possible terms, I dissent.

The requirement that a jury unanimously recommend a sentence of death comports with the overwhelming majority of states that have the death penalty. At the time that *Hurst v. Florida* was decided, of the thirty-one states that legalized the capital punishment, only three states—Florida, Alabama, and Delaware—did not require that a unanimous jury recommend the death penalty. Since that time, the Delaware Supreme Court declared the state's capital sentencing statute unconstitutional, *see Rauf v. Delaware*, 145 A.3d 430 (Del. 2016), and we held in *Hurst v. State* that unanimity was required in Florida. These developments left Alabama as the sole death penalty state not requiring unanimity—until today.

Not only does requiring a unanimous recommendation of a sentence of death comport with the overwhelming majority of death penalty states, it

also comports with federal law governing the imposition of the federal death penalty. Title 18 U.S.C. § 3593(e) (2012) provides that after weighing the aggravating and mitigating factors and determining that a sentence of death is justified, "the jury *by unanimous vote*, or if there is no jury, the court, *shall recommend whether the defendant should be sentenced to death*, to life imprisonment without possibility of release or some other lesser sentence." (Emphasis added.) As we explained in *Hurst v. State*:

> The vast majority of capital sentencing laws enacted in this country provide the clearest and most reliable evidence that contemporary values demand a defendant not be put to death except upon the unanimous consent of the jurors who have deliberated upon all the evidence of aggravating factors and mitigating circumstances. By 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.

202 So. 3d at 61. By receding from the unanimity requirement, we retreat from the national consensus and take a huge step backward in Florida's death penalty jurisprudence.

The historical treatment of unanimity in Florida underscores our conclusion in *Hurst v. State* that Florida's right to trial by jury, contained in article I,

section 22, of the Florida Constitution, requires that a jury unanimously recommend a sentence of death. For well more than a century, Florida law has required that a jury unanimously vote to convict a defendant of a criminal offense. *See Ayers v. State*, 57 So. 349, 350 (Fla. 1911) ("Of course, a verdict must be concurred in by the unanimous vote of the entire jury . . . ."); *On Motion to Call Circuit Judge to Bench*, 8 Fla. 459, 482 (Fla. 1859) ("The common law wisely requires the verdict of a petit jury to be unanimous . . . ."). This settled law compelled this Court's conclusion in *Hurst v. State* that the unanimity requirement applied not only to the jury's duty to determine whether to convict the defendant, but upon conviction, to the jury's duty to determine whether the defendant should receive the death penalty. We said: "This recommendation is tantamount to the jury's verdict in the sentencing phase of trial; and historically, and under explicit Florida law, jury verdicts are required to be unanimous." *Hurst*, 202 So. 2d at 54. Given Florida's long history of requiring unanimous jury verdicts, it defies reason to require unanimous juries for the conviction of a capital offense but to then reduce the jury's collective obligation when determining whether the defendant's life should be taken as punishment for that offense.

As Justice Brennan explained: "[S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit

the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed." William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977). Our determination that Florida's right to trial by jury requires unanimity fell squarely within our role as "the arbiters of the meaning and extent of the safeguards provided under Florida's Constitution." *Busby v. State*, 894 So. 2d 88, 102 (Fla. 2004). "[W]e have the duty to *independently* examine and determine questions of state law so long as we do not run afoul of federal constitutional protections or the provisions of the Florida Constitution that require us to apply federal law in state-law contexts." *State v. Kelly*, 999 So. 2d 1029, 1043 (Fla. 2008).

In deciding *Hurst v. State*, this Court was ever mindful that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (citing *Furman v. Georgia*, 408 U.S. 238 (1972)). Requiring "that a jury must unanimously recommend death in order to make a death sentence possible serves that narrowing function required by the Eighth Amendment . . . and expresses the values of the community as they currently relate to imposition of death as a penalty." *Hurst*, 202 So. 3d at 60.

The imperative for a just application of the death penalty is not a pie-in-the-sky concept. "The unusual severity of death is manifested most clearly in its

finality and enormity. Death, in these respects, is in a class by itself." *Furman*, 408 U.S. at 289 (Brennan, J., concurring). Florida holds the shameful national title as the state with the most death row exonerations. Since 1973, twenty-nine death row inmates have been exonerated, and those exonerations have continued to this very year. Death Penalty Information Center, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/florida (last visited December 23, 2019). Given this history, there is every reason to maintain reasonable safeguards for ensuring that the death penalty is fairly administered.

I strongly object to the characterization of this Court's decision in *Hurst v. State* as one where this Court "wrongly took [discretion] from the political branches." Majority op. at 39. As the court of last resort in Florida's third and co-equal branch of government—whose responsibility it is to interpret the law—that is what this Court did in *Hurst v. State*. The constitutionality of a provision of Florida's death penalty law is uniquely this Court's to interpret.

Death is indeed different. When the government metes out the ultimate sanction, it must do so narrowly and in response to the most aggravated and least mitigated of murders. Florida's former bare majority requirement permitted a jury, with little more than a preponderance of the jurors, to recommend that a person be put to death. This Court correctly decided that in Florida, the state and federal

constitutions require much more and, until today, for a "brief and shining moment," it did just that.[6]

Sadly, this Court has retreated from the overwhelming majority of jurisdictions in the United States that require a unanimous jury recommendation of death. In so doing, this Court has taken a giant step backward and removed a significant safeguard for the just application of the death penalty in Florida.

Although in 2017, in response to our decision in *Hurst v. State*, the Legislature revised section 921.141(2), Florida Statutes, to require a unanimous recommendation by the jury, nothing in the majority's decision today requires the Legislature to abandon the unanimity requirement. As the majority pointed out in its decision: "Our decision today is not a comment on the merits of those changes or on whether they should be retained." Majority op. at 39.

For these reasons, I dissent.

An Appeal from the Circuit Court in and for Polk County,
Jalal A. Harb, Judge - Case No. 532001CF007078A0XXXX

Ashley Moody, Attorney General, Tallahassee, Florida, and Scott A. Browne, Chief Assistant Attorney General, Tampa, Florida,

for Appellant/Cross-Appellee

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[6] Alan J. Lerner & Frederick Loewe, *Camelot*, act II, scene 7 (1960)

Eric Pinkard, Capital Collateral Regional Counsel, and James L. Driscoll Jr., David Dixon Hendry, and Rachel P. Roebuck, Assistant Capital Collateral Regional Counsel, Middle Region, Temple Terrace, Florida; and Mark J. MacDougall and Z.W. Julius Chen, Washington, District of Columbia, and Parvin Daphne Moyne of Akin Gump Strauss Hauer & Feld LLP, New York, New York,

for Appellee/Cross-Appellant

**IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, FLORIDA**

STATE OF FLORIDA,
Plaintiff,
v. **CASE NO: CF01-007078A-XX**
SECTION: F9

MARK ANTHONY POOLE,
Defendant.
_____/

INTERIM ORDER ON MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE

This cause came on for a for a [sic] Second Case Management Conference on March 10, 2017, pursuant to Rule 3.851, Fla. R. Crim. P. Upon review of the "Defendant's Amended Claim 3 To Motion To Vacate Judgment Of Conviction And Sentence, "filed on January 25, 2017, the "State's Response To Amended Rule 3.851 Motion For Post-Conviction Relief," filed on February 20, 2017, the Defendant's "Notice of Supplemental Authority," filed on March 3, 2017, the Defendant's "Refiled Notice of Supplemental Authority," filed on March 6, 2017, the court file; applicable law; and hearing argument from counsel at the Second Case Management Conference on March 10, 2017, the Court finds as follows:

Claim 3 of the "Defendant's Amended Claim 3 To Motion To Vacate Judgment Of Conviction And Sentence," reads:

CLAIM 3

IN LIGHT OF *HURST V. FLORIDA, HURST V. STATE, RING*, AND *APPRENDI*, MR. POOLE'S DEATH SENTENCE VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND ARTICLE I, SECTIONS 15, 16, AND 22 OF THE FLORIDA CONSTTUTION [sic].

> 3-1: MR. POOLE'S DEATH SENTENCE SHOULD BE VACATED BECAUSE IT IS UNCONSTITUTIONAL BASED ON *HURST V. FLORIDA* AND *HURST V. STATE*, PRIOR PRECEDENT AND SUBSEQUENT DEVELOPMENTS BECAUSE MR. POOLE WAS DENIED HIS RIGHT TO A JURY TRIAL ON THE FACTS THAT LED TO HIS DEATH SENTENCE.
>
> 3-2: THIS COURT SHOULD VACATE MR. POOLE'S DEATH SENTENCE BECAUSE, IN LIGHT OF *HURST V. FLORIDA* AND *HURST V. STATE*, AND SUBSEQUENT CASES, MR. POOLE'S DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT BECAUSE HIS DEATH SENTENCE WAS CONTRARY TO EVOLVING STANDARDS OF

> DECENCY AND IS ARBITRARY AND CAPRICIOUS.
>
> 3-3: THIS COURT SHOULD VACATE MR. POOLE'S DEATH SENTENCE BECAUSE THE FACT-FINDING THAT SUBJECTED MR. POOLE TO THE DEATH WAS NOT PROVEN BEYOND A REASONABLE DOUBT.
>
> 3-4: IN LIGHT OF *HURST V. FLORIDA* AND *HURST V. STATE*, MR. POOLE'S DEATH SENTENCE SHOULD BE VACATED BECAUSE IT WAS OBTAINED IN VIOLATION OF THE FLORIDA CONSTITUTION.
>
> 3-5: *HURST V. FLORIDA* AND *HURST V STATE* APPLY RETROACTIVELY IN MR. POOLE'S CASE.
>
> 3-6: THE *HURST V. FLORIDA* AND *HURST V. STATE* ERROR IN MR. POOLE'S CASE WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

The Court entered an "Order On Case Management Conference", on September 21, 2016, which stated in part:

> The Court finds that it would be appropriate to have an evidentiary hearing on subclaims 1-1.1, 1-1.2, 1-1.3, of subclaim 1-1 of Claim 1; subclaims 1-2.1, 1-2.2 of subclaim 1-2 of Claim 1, and subclaims 1-3, 1-4, and 1-5 of Claim1 [sic]; subclaims 2-1.1, 2-1.2. and 2-1.3 of subclaim 2-1 of Claim 2; subclaims 2-2

> and 2-3 of Claim 2; and Claim 4 of the Defendant's "Motion To Vacate Judgment of Conviction And Sentence." Subclaims 3-1, 3-2, 3-3, 3-4, and 3-5 of Claim 3 concern the impact of Hurst v. Florida, 136 S.Ct. 616 (2016). The Court defers making a ruling at this time on whether Claim 3 and these subclaims should be part of the evidentiary hearing pending a ruling by the Florida Supreme Court on this subject.

At the Case Management Conference on March 10, 2017, the defense and the State agreed that Amended Claim 3 of the Defendant's Motion involved legal matters that could be ruled upon by the Court without the necessity of an evidentiary hearing. The Parties asked the Court to rule on the Defendant's Amended Claim 3 in an Interim Order.

The Defendant's Amended Claim 3 is based upon the ruling by the United States Supreme Court in Hurst v. Florida, 136 S.Ct. 616 (2016), and the ruling by the Florida Supreme Court in Hurst v. State. 202 So.3d 40 (Fla. 2016). In Hurst v. Florida, the United States Supreme Court found that Florida's Capital sentencing scheme was unconstitutional because the judge, not the jury, made the necessary findings of fact to impose a death sentence. On page 44 of Hurst v. State, the Florida Supreme Court stated,

> As we will explain, we hold that the Supreme Court's decision in *Hurst v. Florida* requires that all the critical findings necessary before the trial court may consider imposing a sentence of

> death must be found unanimously by the jury. We reach this holding based on the mandate of *Hurst v. Florida* and on Florida's constitutional right to jury trial, considered in conjunction with our precedent concerning the requirement of jury unanimity as to the elements of a criminal offense. In capital cases in Florida, these specific finding [sic] required to be made by the jury include the existence of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances. We also hold, based on Florida's requirement for unanimity in jury verdicts, and under the Eighth Amendment to the United States Constitution, that in order for the trial court to impose a sentence of death, the jury's recommended sentence of death must be unanimous.

The Florida Supreme Court held in Mosley v. State, 2016 WL 7406506, 41 Fla. L. Weekly S629 (Fla. December 22, 2016), that the Hurst rulings apply to all defendants whose sentences were not final at the time the United States Supreme Court issued its opinion in Ring v. Arizona, 536 U.S. 584 (2002). Ring was issued on June 24, 2002. See also Hojan v. State, 2017 WL 410215 (Fla. January 31, 2017).

The Defendant was tried and found guilty of the First Degree Murder, Attempted First-Degree

Murder, Armed Burglary, Sexual Battery, and Armed Robbery. On August 25, 2005, the Trial Court sentenced Mr. Poole to death for the First Degree Murder of Noah Scott. The Florida Supreme Court affirmed his convictions but remanded the case for a new penalty phase. See Poole v. State, 997 So.2d 382 (Fla. 2008). On June 28, 2011, a jury by the vote of 11 to 1 recommended a sentence of death. The Trial Court imposed a sentence of death on August 19, 2011. The Defendant's sentence of death was affirmed on appeal by the Florida Supreme Court on June 26, 2014. Rehearing Denied Nov. 20, 2014, in Poole v. State, 151 So.3d 402 (Fla. 2014).

Based on the above, the Court finds that Hurst does apply retroactively to Mr. Poole. However, it is also necessary to consider if the Hurst error was harmless error. The State of Florida takes the position that the Hurst error in this case was harmless.

In Durrousseu v. State, 2017 WL 411331 at *6 (Fla. January 31, 2017), the Florida Supreme Court opined, "[t]herefore, in the context of a Hurst v. Florida error, the burden is on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to Hurst's death sentence in this case." The Florida Supreme Court has found that Hurst error was harmless error in cases where the jury's recommendation for death was unanimous. See Davis v. State, 2016 WL 6649941 (November 10, 2016) and Hall v. State, 2017 WL 526509 (Fla. February 9, 2017). However, in the cases that involve non-unanimous jury recommendations, the Florida Supreme Court has remanded the cases for a new penalty phase. In

Williams v. State, 2017 WL 224529 (Fla. January 19, 2017), (jury recommendation 9 to 3), the Florida Supreme Court found that there was no way to determine if the jury unanimously concluded that sufficient aggravation existed to warrant a death sentence. In Durrousseu v. State, 2017 WL 411331 (Fla. January 31, 2017), (jury recommendation 10 to 2), the Court noted that there was no way to conclude if the two jurors that voted to recommend a life sentence found that the aggravation outweighed the mitigation. In Dubose v. State, 2017 WL 526506 at *12 (Fla. February 9, 2017), the Florida Supreme Court stated, "[w]e have also determined that in cases where the jury makes a non-unanimous recommendation of death, the Hurst error is not harmless." Additionally, in *Johnson v. State*, 205 So.3d 1285 (Fla. 2016), (jury recommendation 11 to 1 for each of the three (3) murder convictions). The Florida Supreme Court held:

> We are unable to conclude "beyond a reasonable doubt [that] there is no possibility that the *Hurst v. Florida* error in this case contributed to the sentence."

The Court finds that because the jury recommendation in this case was not unanimous, it cannot find beyond a reasonable doubt that the Hurst error did not contribute to Mr. Poole's sentence of death. Because it is the determination of the Court that the Defendant is entitled to a new penalty phase trial based on Hurst as argued in Claim 3 of his Motion, the Court is not going to independently rule on each of the subclaims in Claim 3 of his Motion.

Based on the above, it is **ORDERED AND ADJUDGED**;

1. Claim 3 of the "Defendant's Amended Claim 3 To Motion To Vacate Judgment of Conviction And Sentence," is **GRANTED** to the extent that he is entitled to a new penalty phase trial.

2. A Status Hearing is set for April 6, 2017 at 2:30 p.m. in Courtroom 9C.

3. An Evidentiary Hearing is set for July 10 - July 14, 2017, at 8:30 a.m. in Courtroom 9C on subclaims 1-1.1, 1-1.2, 1-1.3, of subclaim 1-1 of Claim 1; subclaims 1-2.1, 1-2.2 of subclaim 1-2 of Claim 1, and subclaims 1-3, 1-4, and 1-5 of Claim 1, which are Guilt Phase Claims in the Defendant's "Motion To Vacate Judgment of Conviction And Sentence."

4. The Evidentiary hearing set for July 10 – July 14, 2017, will include Claim 4 to the extent it involves Guilt Phase Claims.

5. The Evidentiary hearing set for July 10 – July 14, 2017, will not include subclaims 2-1.1, 2-1.2. and 2-1.3 of subclaim 2-1 of Claim 2 and subclaims 2-2 and 2-3 of Claim 2; which are Penalty Phase Claims, not based on Hurst issues, from the Defendant's "Motion To Vacate Judgement of Conviction And Sentence."

DONE AND ORDERED in Bartow, Polk County, Florida this day 29th of March 2017.

s/ Jalal A. Harb
JALAL A. HARB
Circuit Court Judge

cc:

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I CERTIFY the foregoing is a true copy of the original as it appears on file in the office of the Clerk of the Circuit Court of Polk County, Florida, and that I have furnished copies of this order and its attachments to the above-listed on this 31 day of March, 2017.

CLERK OF THE CIRCUIT COURT

By: s/
Deputy Clerk

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT IN AND FOR POLK COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,
v. **CASE NO: CF01-007078A-XX**
SECTION: F9

MARK ANTHONY POOLE,
Defendant.
/

ORDER ON DEFENDANT'S MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE

THIS MATTER is before the Court upon Defendant's "Motion To Vacate Judgment Of Conviction And Sentence," filed on April 8, 2016; the "State's Response To Rule 3.851 Motion For Post-Conviction Relief," filed on June 6, 2016; the Court's Order On Case Management Conference," filed on September 22, 2016; the "Defendant's Motion To Amend Motion To Vacate Judgments of Conviction And Sentence of Death," filed on January 25, 2017; the "Defendant's Amended Claim 3 To Motion To Vacate Judgment of Conviction And Sentence," filed on January 25, 2017; the "State's Response To Amended Rule 3.851 Motion For Post-Conviction Relief," filed on February 20, 2017; the Defendant's "Notice of Supplemental Authority," filed on March 3, 2017; the

Defendant's "Refiled Notice of Supplemental Authority," filed on March 6, 2017; the Court's Interim Order On Motion To Vacate Judgment Of Conviction And Sentence," filed on March 31, 2017; an Evidentiary Hearing held on July 10, 2017; the Court's "Order On July 10, 2017 Evidentiary Hearing And Order Regarding Submission Of Written Closing Arguments," filed on July 19, 2017; the "Defendant's Written Closing Argument Following Evidentiary Hearing On Guilt Phase Claims, filed on October 25, 2017; the "State's Written Closing Argument Following Post-Conviction Evidentiary Hearing," filed on November 6, 2017; and the "Defendant's Response To State's Written Closing Argument Following Post-Conviction Evidentiary Hearing," filed on November 16, 2017. The Court having reviewed the postconviction Motion and Amended Postconviction Motion filed by the Defendant, the State's Responses; having heard the testimony and reviewed the evidence presented at the evidentiary hearing on July 10, 2017; having reviewed the written Closing Arguments from all parties (including the Defendant's Response); having reviewed the case file, and the applicable case and statutory law; and being otherwise fully advised in the premises, finds as follows:

STATEMENT OF PROCEDURAL HISTORY

On November 1, 2001, the Defendant, Mark Poole, (hereinafter referred to as Mr. Poole), was charged by Indictment with Count 1- First Degree Murder for the murder of Noah Scott. He was also charged in the Indictment with Count 2 - Attempted First Degree/ Attempted Felony Murder, Count 3- Armed Burglary, Count 4 - Sexual Battery –Great Force, and Count 5 - Armed Robbery. On April 25, 2005, the jury found Mr.

Poole guilty of first degree murder with a weapon, attempted first degree murder with a weapon, armed burglary with intent to commit an assault or battery with a weapon, sexual battery with great force, and armed robbery with a deadly weapon.

On May 4, 2005, the jury recommended by a vote of twelve (12) to zero (0), that the Court sentence Mr. Poole to death. A Spencer hearing was held on July 22, 2005.

The Trial Court agreed with the death recommendation of the jury and sentenced Mr. Poole to death on August 25, 2005, for the murder of Noah Scott. A summary of the Aggravating Circumstances and Mitigators considered by the Trial Court are described in this Order below under **STATEMENT OF THE CASE FACTS**. On August 25, 2005, the Trial Court also sentenced the Defendant to a term of life imprisonment for the attempted first degree murder of Loretta White, to life imprisonment for armed burglary with intent to commit an assault or battery with a weapon, to life imprisonment for sexual battery with great force, and to life imprisonment for armed robbery with a deadly weapon.

On December 11, 2008, on direct appeal, the Supreme Court of Florida affirmed the convictions but vacated the sentence of death and remanded the case to the Trial Court to conduct a new penalty phase proceeding. See Poole v. State, 997 So.2d 382 (Fla. 2008). A new penalty phase proceeding commenced on June 20, 2011.

On June 28, 2011, a jury recommended by a vote of eleven (11) to one (1) that the Court sentence the Defendant to death for the murder of Noah Scott. A

Spencer hearing was held on July 29, 2011. The Trial Court agreed with the death recommendation of the jury and sentenced the Defendant to death on August 19, 2011.

The Trial Court found that the following Aggravating Circumstances were established for the murder of Noah Scott: (1) the Defendant was contemporaneously convicted of another capital felony or a felony involving the use or threat of violence to the person, (great weight) ; (2) the capital felony was committed while the defendant was engaged in the commission of, or attempt to commit, or in flight after committing or attempting to commit the crimes of armed burglary, sexual battery with great force, and armed robbery, (great weight); (3) the capital felony was committed for financial gain, (moderate weight); and (4) the capital felony was especially heinous, atrocious or cruel HAC, (great weight).

The Court found that the following two statutory mitigators were established: (1) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance (moderate to great weight); and (2) the capacity of the defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired (great weight).

The Court found that the following eleven non-statutory mitigating circumstances were established: (1) the defendant has borderline intelligence, (little weight); (2) the defendant dropped out of school, either in the ninth or tenth grade, (very little weight); (3) the defendant lost his best friend, father figure, and employer, which had an emotional effect on the

defendant and led to his drug abuse, (very little weight); (4) the defendant sought help for his drug problem in the past, (very little weight); (5) the defendant had an alcohol abuse problem at the time of the crime, (very little weight); (6) the defendant had a drug abuse problem at the time of the crime, (very little weight); (7) the defendant has and can continue a relationship with his son, (very little weight); (8) the defendant has a strong work ethic, (very little weight); (9) the defendant is a religious person, (very little weight); (10) the defendant is a dedicated uncle to his nephews, (very little weight); and (11) the defendant needs specialized treatment for a mental disorder unrelated to substance abuse, (very little weight). The Court also found that a proposed mitigating circumstance, (the defendant has a severe, chronic alcohol and cocaine addiction, for which he is in need of treatment), was not proven. The Trial Court found that the aggravating circumstances far outweighed the mitigating circumstances for the murder of Noah Scott. The Trial Court also added, "Additionally, the Court is of the opinion that the heinous, atrocious, and cruel aggravator alone outweighs all mitigating circumstances in this case."

On June 26, 2014, on direct appeal, the Supreme Court of Florida affirmed the Trial Court's sentence of death. Rehearing was denied on November 20, 2014. Mr. Poole filed his "Motion To Vacate Judgment Of Conviction And Sentence," on April 8, 2016; and "Defendant's Amended Claim 3 To Motion To Vacate Judgment of Conviction And Sentence," was filed on January 25, 2017. On March 31, 2017, the Court rendered an "Interim Order On Motion To Vacate Judgment Of Conviction And Sentence."

STATEMENT OF THE CASE FACTS

The underlying facts of the case are set forth in Poole v. State, 151 So.3d 402, 406 -408, (Fla. 2014), and are presented below:

> On the evening of October 12, 2001, after playing some video games in the bedroom of their mobile home, Noah Scott and Loretta White went to bed sometime between 11:30 p.m. and 12 a.m. Later during the night, White woke up with a pillow over her face and Poole sitting on top of her. Poole began to rape and sexually assault her as she begged Poole not to hurt her because she was pregnant. As White struggled and resisted, Poole repeatedly struck her with a tire iron. She put her hand up to protect her head, and one of her fingers and part of another finger were severed by the tire iron. While repeatedly striking White, Poole asked her where the money was. During this attack on White, Scott attempted to stop Poole, but was also repeatedly struck with the tire iron. As Scott struggled to defend White, Poole continued to strike Scott in the head until Scott died of blunt force head trauma. At some point after the attack, Poole left the bedroom and White was able to get off the bed and put on clothes but she passed out before leaving the bedroom. Poole came back in the bedroom and touched her vaginal area and said "thank you." White was in and

out of consciousness for the rest of the night. She was next aware of the time around 8 a.m. and 8:30 a.m. when her alarm went off.

When her alarm went off, White retrieved her cell phone and called 911. Shortly thereafter, police officers were dispatched to the home. They found Scott unconscious in the bedroom and White severely injured in the hallway by the bedroom. White suffered a concussion and multiple face and head wounds and was missing part of her fingers. Scott was pronounced dead at the scene. Evidence at the crime scene and in the surrounding area linked Poole to the crimes. Several witnesses told police officers that they saw Poole or a man matching Poole's description near the victims' trailer on the night of the crimes. Stanley Carter stated that when he went to the trailer park around 11:30 that night, he noticed a black male walking towards the victims' trailer. Carter's observations were consistent with that of Dawn Brisendine, who knew Poole and saw him walking towards the victims' trailer around 11:30 p.m. Pamela Johnson, Poole's live-in girlfriend, testified that on that evening, Poole left his house sometime in the evening and did not return until 4:50 a.m.

Poole was also identified as the person selling video game systems owned by Scott and stolen during the crime. Ventura Rico, who lived in the same trailer park as the victims, testified that on that night, while he was home with his cousin's girlfriend, Melissa Nixon, a black male came to his trailer and offered to sell him some video game systems. Rico agreed to buy them for $50, at which point the black male handed him a plastic trash bag. During this exchange, Nixon got a good look at the man and later identified Poole when the police showed her several photographs. Nixon testified that the next morning, when her son was going through the trash bag, he noticed that one of the systems had blood on it.

Pamela Johnson also testified that on the same morning, she found a game controller at the doorstep of Poole's house, she handed it to Poole, and Poole put it in his nightstand. She indicated that she had never seen that game controller before that morning and did not know what it would be used for because neither she nor Poole owned any video game systems. During the search of Poole's residence, the police retrieved *407 this controller. In addition, the police retrieved a blue Tommy Hilfiger polo shirt and a pair of Poole's Van shoes, shoes Poole said he had been wearing on

the night of the crimes. A DNA analysis confirmed that the blood found on the Sega Genesis box, Super Nintendo, Sega Dreamcast box and controller matched the DNA profile of Scott. Also, a stain found on the left sleeve of Poole's blue polo shirt matched White's blood type. The testing of a vaginal swab also confirmed that the semen in White was that of Poole. A footwear examination revealed that one of the two footwear impressions found on a notebook in the victims' trailer matched Poole's left Van shoe. The tire iron used in the crimes was found underneath a motor home located near the victims' trailer. A DNA analysis determined that the blood found on this tire iron matched Scott's DNA profile.

Based on this evidence, the jury returned a verdict finding Poole guilty on all charges, including first-degree murder. Following the penalty phase, the jury recommended death by a vote of twelve to zero. The trial court followed the jury's recommendation and sentenced Poole to death. The trial court found two statutory aggravating circumstances: (1) the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person, and (2) the murder was especially heinous, atrocious, or cruel. The court also found three statutory

mitigators and numerous nonstatutory mitigators. The statutory mitigators were: (1) the crime for which Poole was to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance (moderate weight); (2) Poole's capacity to conform his conduct to the requirements of law was substantially impaired (moderate weight); and (3) Poole had no significant history of prior criminal activity (little weight). The nonstatutory mitigators were: (1) Poole is of borderline intelligence (some weight); (2) Poole received a head injury, which created dementia (little weight); (3) Poole's age at the time of the crime linked with mental deficiency and lack of serious criminal history (moderate weight); (4) Poole dropped out of school due to his low intelligence and learning disabilities (little weight); (5) Poole lost Mr. Bryant, his "best friend, father figure, employer," and that had an emotional effect on Poole and led to his drug use (some weight); (6) Poole sought help for his drug problem in the past (little weight); (7) Poole had an alcohol abuse problem at the time of the crime (little weight); (8) Poole had a drug abuse problem at the time of the crime (little weight); (9) Poole does not have antisocial personality disorder nor is he psychopathic (some weight); (10) Poole has and can continue a relationship with his son (minimum weight); (11) Poole has

a strong work ethic (little weight); (12) Poole has a close relationship with his family (moderate weight); (13) Poole is a religious person (little weight); and (14) the murder and rape were impulsive excessive acts, not premeditated acts (little weight). The trial court determined that these mitigating factors did not outweigh the aggravating circumstances and, as a result, the trial court sentenced Poole to death on the count of first-degree murder. The trial court also sentenced Poole to consecutive life sentences for the attempted first-degree murder of Loretta White, armed burglary, sexual battery of Loretta White, and armed robbery.

[On direct] appeal, Poole raise[d] four issues: (1) whether the trial court abused its discretion in denying Poole's motion for mistrial when the prosecutor repeatedly commented during closing argument on Poole's failure to testify at trial and on his silence after his arrest; (2) whether the prosecutor violated Poole's right to a fair penalty phase proceeding by cross-examining defense witnesses about the unproven prior arrests, the unproven content of a tattoo, and the lack of remorse; (3) whether the prosecutor violated Poole's right to a fair penalty phase proceeding by misleading the jurors about their responsibilities in recommending a sentence; and (4)

whether Florida's death penalty statute violates the Sixth Amendment right to trial by jury.

Id. at 387-89 (footnote omitted). Based on the cumulative effect of the errors made during the penalty phase of the trial, this Court vacated Poole's death sentence and remanded the case for a new penalty phase. *Id*. at 394.

Resentencing

On remand, following the new penalty phase, the jury recommended death by a vote of eleven to one. Following a *Spencer*[2] [sic] hearing, the trial court followed the jury's recommendation and sentenced Poole to death. The trial court found four aggravating circumstances: (1) the contemporaneous conviction for the attempted murder of Loretta White (very great weight); (2) capital felony occurred during the commission of burglary, robbery and sexual battery (great weight); (3) capital felony was committed for financial gain (merged with robbery, but not merged with burglary or sexual battery) (less than moderate weight); and (4) the capital felony was committed in a heinous, atrocious or cruel manner (HAC) (very great weight).

The trial court found two statutory mental mitigating circumstances: (1) the capital felony was committed while

the defendant was under the influence of extreme mental or emotional disturbance (moderate to great weight); and (2) defendant's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired (great weight).

The trial court also found eleven nonstatutory mitigating circumstances, according them little or very little weight: (1) borderline intelligence (little weight); (2) defendant dropped out of school (very little weight); (3) loss of father figure had emotional effect and led to his drug abuse (very little weight); (4) defendant sought help for drug problem (very little weight); (5) defendant had an alcohol problem at time of crime (very little weight); (6) drug abuse problem at time of crime (very little weight); (7) defendant has a relationship with son (very little weight); (8) strong work ethic (very little weight); (9) defendant is a religious person (very little weight); (10) dedicated uncle (very little weight); and (11) defendant needs treatment for mental disorder unrelated to substance abuse (very little weight). The trial court determined that the proposed mitigator that the defendant has severe chronic alcohol and cocaine problem for which he needs treatment was not proven.

> The trial court sentenced Poole to death, finding that the aggravating circumstances "far outweigh the mitigating circumstances" and that the "heinous, atrocious, or cruel aggravator alone outweighs all the mitigating circumstances in this case."

POSTCONVICTION MOTIONS

The Defendant filed his "Motion To Vacate Judgment Of Conviction And Sentence," on April 8, 2016. The "State's Response To Rule 3.851 Motion For Post-Conviction Relief' was filed on June 6, 2016. On January 25, 2017, the Defendant filed "Defendant's Amended Claim 3 To Motion To Vacate Judgment of Conviction And Sentence." The State filed the "State's Response To Amended Rule 3.851 Motion For Post-Conviction Relief," on February 20, 2017.

CASE MANAGEMENT CONFERENCES

A Case Management Conference was held on September 15, 2016, pursuant to Rule 3.851, Fla. R. Crim. P. In the "Order On Case Management Conference" the Court stated, "The Court finds that it would be appropriate to have an evidentiary hearing on subclaims 1-1.1, 1-1.2, 1-1.3, of subclaim 1-1 of Claim 1; subclaims 1-2.1, 1-2.2 of subclaim 1-2 of Claim1 [sic], and subclaims 1-3, 1-4, and 1-5 of Claim1 [sic]; subclaims 2-1.1, 2-1.2. and 2-1.3 of subclaim 2-1 of Claim 2; subclaims 2-2 and 2-3 of Claim 2; and Claim 4 of the Defendant's "Motion To Vacate Judgment of Conviction And Sentence." In the "Order On Case Management Conference," the Court also stated, "Subclaims 3-1, 3-2, 3-3, 3-4, and 3-5 of Claim 3 concern the impact of Hurst v. Florida. 136 S.Ct. 616

(2016). The Court defers making a ruling at this time on whether Claim 3 and these subclaims should be part of the evidentiary hearing pending a ruling by the Florida Supreme Court on this subject."

A Second Case Management Conference was held on March 10, 2017. At this Second Case Management Conference, the State and the Defense agreed that Amended Claim 3 of the Defendant's Motion involved legal matters that could be ruled on by the with [sic] Court without the necessity of an evidentiary hearing. On March 31, 2017, the Court rendered an "Interim Order On Motion To Vacate Judgment of Conviction and Sentence." In that "Interim Order," the Court held that "Claim 3 of the "Defendant's Amended Claim 3 to Motion To Vacate Judgment Of Conviction And Sentence," is **GRANTED** to the extent that he is entitled to a new penalty phase trial." The Court further stated that, "Because it is the determination of the Court that the Defendant is entitled ot [sic] a new penalty phase trial based on Hurst, as argued in Claim 3 of his Motion, the Court is not going to independently rule on each of the subclaims in Claim 3 of his Motion." In addition, the Court's "Interim Order," stated,

> 3. "An Evidentiary Hearing is set for July 10 – July 14, 2017, at 8:30 a.m. in Courtroom 9C on subclaims 1-1.1, 1-1.2, 1-1.3, of subsclaim [sic] 1-1 of Claim 1; subclaims 1-2.1, 1-2.2 of subclaim 1-2 of Claim 1, and subclaims 1-3, 1-4, and 1-5 of Claim 1, which are Guilt Phase Claims in the Defendant's "Motion To Vacate Judgment of Conviction And Sentence."

4. The Evidentiary hearing set for July 10 - July 14, 2017, will include Claim 4 to the extent it involves Guilt Phase Claims.

5. The Evidentiary hearing set for July 10 - July 14, 2017, will not include subclaims 2-1.1, 2-1.2, and 2-1.3 of subclaim 2-1 of Claim 2 and subclaims 2-2 and 2-3 of Claim 2; which are Penalty Phase Claims, not based on Hurst issues, from the Defendant's "Motion To Vacate Judgment of Conviction and Sentence".

EVIDENTIARY HEARING - WITNESSES

An evidentiary hearing was held in this matter on July 10, 2017. The Honorable Howard Dimmig, Public Defender for the Tenth Judicial Circuit, was called as a witness by the Defendant. Mr. Dimmig was the only witness that testified at the evidentiary hearing. He was an Assistant Public Defender and a co-counsel for the Defendant at his jury trial in 2005.

ANALYSIS OF DEFENDANT'S CLAIMS

Strickland Standard:

The United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), set forth the standard for determining ineffective assistance of counsel. To establish ineffective assistance of counsel, a Defendant must prove two elements. First, the Defendant must show that counsel's performance was deficient. The defendant must show that counsel's representation fell below an objective standard of reasonableness. "The proper measure of attorney performance remains

simply reasonableness under prevailing professional norms." Strickland. 466 U.S. at 688. Second, the Defendant must show that counsel's deficient performance prejudiced the defense. This occurs when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. "Unless a Defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." Strickland, 466 U.S. at 687. The Strickland standard requires establishment of both prongs. Where a Defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong. See Waterhouse v. State, 792 So. 2d 1176 (Fla. 2001).

In Douglas v. State. 141 So.3d 107, 117 (Fla. 2012), the Florida Supreme Court discussed Penalty Phase prejudice and stated,

> Penalty phase prejudice under the *Strickland* standard is measured by whether the error of trial counsel undermines the Court's confidence in the sentence of death when viewed in the context of the penalty phase evidence and the mitigators and aggravators found by the Trial Court... That standard does not "require a defendant to show 'that counsel's deficient conduct more likely than not altered the outcome of his penalty proceeding, but rather that he establish a probability sufficient to

> undermine confidence in [that] outcome.' *Porter v. McCollum*, ---U.S.---, 130 S. CT 447, 455-56, 175 L.Ed 2d 398 (2009) (alteration in original) (quoting *Strickland*, 466 U. S. at 693-94, 104 S. Ct. 2052), "To assess that probability, (the Court) consider(s) 'the totality of the available mitigation evidence ... and reweighs it against the evidence in aggravation.'" Id at 453-54 (quoting *Williams v. Taylor*, 529 U.S. 362, 397-98, 120 S.Ct. 1495, 146 L.Ed 2d 389 (2000).

3.851 CLAIMS

The Defendant has four Claims for relief which have numerous subclaims. These Claims and subclaims are set forth in his "Motion To Vacate Judgment Of Conviction And Sentence" and "Defendant's Amended Claim 3 To Motion To Vacate Judgment of Conviction And Sentence." The Defendant's Four Claims and subclaims are discussed below.

CLAIM 1

MARK POOLE WAS DEPRIVED OF HIS RIGHT TO A RELIABLE ADVERSARIAL TESTING DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF HIS FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND HIS

CORRESPONDING RIGHTS UNDER THE DECLARATION OF RIGHTS OF THE FLORIDA CONSTITUTION.

1-1: TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO IMPROPER COMMENTS BY THE STATE DURING CLOSING ARGUMENTS THUS DENYING MR POOLE HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

1-1.1: Improper Comment on Mr. Poole's Right to Remain Silent.

The Defendant alleges, "Trial counsel was ineffective for failing to object to several improper comments by the prosecutor on Mr. Poole's right to remain silent. These comments prejudiced Mr. Poole, as there likely would have been a different outcome in their absence, and this Court should grant Mr. Poole relief." In his Motion, the Defendant notes four comments made by the prosecutor that he considers to be comments on his right to remain silent:

(1) "Mr. Poole doesn't make any admissions and he doesn't resist. Of course, he's confronted with a tremendous amount of force. Detective Navarro

himself was not some skinny little guy." (ROA, Vol. XXI, P. 2774). In his Motion, the Defendant notes that trial counsel did not object or move for a mistrial, and the issue was not raised on direct appeal.

In their written closing argument, the State alleges that this comment by the prosecutor was simply his recounting of facts admitted during trial, and he was not making a direct comment on the Defendant's right to remain silent. The State argues that Detective Grice's testimony recounted that when law enforcement first made contact with Mr. Poole he was brought to the station and he talked with police at the station. (V20/2637). The State further asserts that Mr. Poole consented to a search of his residence, provided law enforcement with a DNA sample, and was then released. (V20/2640-41).

Additionally, the State alleges that the prosecutor was not indicating that Mr. Poole refused to cooperate with police or had invoked his right to remain silent. At the evidentiary hearing, Mr. Dimmig was asked about this comment by the prosecutor and testified that he did not feel that the comment was injurious to the defense. Mr. Dimmig testified, "I wanted the jury to know that he did not resist in any way." (EH, V2/186).

With regard to this first statement, the Court agrees with the State that the prosecutor's comment was not a comment on the right to remain silent. The prosecutor was recounting evidence that had been presented to the jury regarding Mr. Poole's initial contact with law enforcement. Mr. Dimmig testified that he wanted the jury to know that the Defendant was fully cooperative, and Mr. Dimmig reasonably

thought that the prosecutor's statement did not hurt the defense theory of the case or presentation of evidence. (EH, V2/185-186). "Whether to object is a matter of trial tactics which are left to the discretion of the attorney so long as his performance is within the range of what is expected of reasonably competent counsel." See Muhammad v. State, 426 So. 2d 533, 538 (Fla. 1982).

The Court finds that Counsel did not perform deficiently in not objecting to the State's comments in this first statement. In addition, the State presented a strong case against Mr. Poole. Even if counsel's failure to make an objection to this comment from the prosecutor could be considered to be deficient, it is not reasonable to think such a deficiency rendered the result of the Defendant's trial unfair or unreliable. Subclaim 1-1.1(1) of the Defendant's Motion is denied.

(2) "Well, there is no evidence in this case that at any time, either in this trial or anywhere else, Mr. Poole ever acknowledged that he did anything." (ROA, Vol. XXI, P. 2835). The Defendant notes in his Motion, "Trial counsel deficiently failed to object, the issue was raised on direct appeal and was found to be an invited response to the defendant's closing statement in *Poole v. State*, 997 So.2d at 390." The Court will further discuss (2) along with (3) below.

(3) "If Mr. Poole burglarized this house, and said, well, he talked – Mr. Poole talked to the police. And Mr. Poole – so that there's this other guy that was involved. Well, there's no evidence. Keep in mind what's evidence and what's argument. [The Defense] is arguing all these things, but there is absolutely no evidence that Mr. Poole ever said, hey, somebody else

was there before me and these people's heads were bashed in. There is no evidence of that." (ROA, Vol. XXII, P. 2840). In his Motion, the Defendant notes, "Trial counsel deficiently failed to object, the issue was raised on direct appeal and was found to be an invited response to the defendant's closing statement in *Poole v. State*, 997 So.2d at 390."

As noted by the Defendant in his Motion, the Supreme Court of Florida discussed comments (2) and (3) in Poole v. State, 997 So.2d 382, 389-390 (Fla. 2008). The Florida Supreme Court opined;

> The prosecutor began by stating that the defense's argument came from "Fantasy Land." A few sentences later, the prosecutor stated, "Well, there is no evidence in this case that at any time, either in this trial or anywhere else, Mr. Poole ever acknowledged that he did anything." A few paragraphs later, the prosecutor continued:
>
> Mr. Poole talked to the police. And Mr. Poole-so that there's this other guy that was involved. Well, there's no evidence. Keep in mind what's evidence and what's argument. Mr. Dimmig is arguing all these things, but there is absolutely no evidence that Mr. Poole ever said, hey, somebody else was there before me and these people's heads were bashed in. There is no evidence of that.
>
> And there's no evidence that Mr. Poole ever said, well, I went in there and raped her and left her and then somebody else

> came in and beat their heads in. There's no evidence of that either. That's argument. But when you look at what the testimony is and what the physical evidence is and what the photographs are, there is no evidence to support that theory.

The Florida Supreme Court goes on to note that these two comments were not followed by an objection from counsel.

> We have consistently held that "the failure to raise a contemporaneous objection when improper closing argument comments are made waives any claim concerning such comments for appellate review." *Card v. State*, 803 So.2d 613, 622 (Fla.2001). However, we have carved out an exception to the contemporaneous objection rule when the unobjected-to comments rise to the level of fundamental error, that is, an error that "reaches down into the validity of the trial itself to the extent that a verdict of guilty or jury recommendation of death could not have been obtained without the assistance of the alleged error." *Id.* at 622. Neither of the two comments rises to the level of fundamental error because both comments were invited responses to the defense's closing argument. During his closing argument, defense counsel stated that Poole acknowledged that he committed the crimes of sexual battery,

> robbery, and burglary but denied that he was the person who inflicted the injuries on White and Scott. In response, the prosecutor was arguing that there was no evidence in the case to support the argument that Poole acknowledged that he committed those crimes or to support the argument that someone else inflicted the injuries on the victims. Because the prosecutor's comments were invited responses, the comments cannot be deemed improper. See *Walls v. State*, 926 So.2d 1156. 1166 (Fla.2006); see also *Dufour v. State*, 495 So.2d 154, 160-61 (Fla.1986). Therefore, these comments do not warrant reversal.

As noted above the Florida Supreme Court considered whether the two comments constituted fundamental error and concluded that both comments were invited responses based upon the closing argument of the defense and could not be deemed improper. In Rogers v. State, 957 So. 2d 538, 550 (Fla. 2007), the Florida Supreme Court stated "This Court has held that counsel's failure to object to improper comments cannot prejudice the outcome if the comments were raised on direct appeal and do not rise to the level of fundamental error. See *Chandler v. State*, 848 So.2d 1031, 1045-46 (Fla.2003)."

Even if counsel was considered deficient in not objecting to comments (2) and (3) there is no reasonable probability, given the strength of the State's case, that, but for counsel's deficiency the result of the proceeding would have been different.

(4) "And if Mr. Poole wants to tell the state and Detective Grice that somebody helped him commit this crime, then let him come forward because - -" The Defendant notes that trial counsel objected to this comment and asked for a mistrial. He further notes that the motion for mistrial was denied by the trial court, and the Supreme Court of Florida on direct appeal found that the comment was an improper comment but not fundamental error in Poole v. State, 997 So.2d at 391.

The Florida Supreme Court had a lot to say about the fourth comment raised by the Defendant which was objected to by defense counsel at the trial:

> The final comment-"And if Mr. Poole wants to tell the state and Detective Grice that somebody helped him commit this crime, then let him come forward because...."-was objected to. Moreover, we find that this comment was an improper comment on Poole's failure to testify. Under article I, section 9 of the Florida Constitution, a defendant has the constitutional right to decline to testify against himself in a criminal proceeding. Therefore, "any comment on, or which is fairly susceptible of being interpreted as referring to, a defendant's failure to testify is error and is strongly discouraged." *Rodriguez v. State*, 753 So.2d 29, 37 (Fla.2000) (quoting *State v. Marshall*, 476 So.2d 150, 153 (Fla.1985)). In the instant case, the prosecutor's comment impermissibly suggested a burden on Poole to prove his innocence

> by stating that he had to come forward and testify. Although this was an erroneous comment on Poole's silence, we find that the trial court did not abuse its discretion in denying the motion for mistrial because in light of the evidence linking Poole to the crimes, the error was not "so prejudicial as to vitiate the entire trial." *Dessaure v. State*, 891 So.2d 455, 464-65 (Fla.2004). The evidence presented demonstrates that Poole was seen heading towards the victims' trailer on the night of the crime; Poole sold video games like those taken from the victims' residence immediately after the attack; the semen found in White matched Poole; Poole's shoeprint matched a shoeprint left inside the victims' trailer; and a stain found on Poole's shirt matched White's DNA Profile. Accordingly, relief is not warranted on this claim.

The Court agrees with the Florida Supreme Court that the comment is fairly susceptible to being interpreted as referring to a comment on Mr. Poole's right to silence. Like the Florida Supreme Court, the Court agrees that the error was not so prejudicial that the entire trial was vitiated. As indicated by the Florida Supreme Court, there was strong evidence presented, which linked Mr. Poole to the crimes.

On pages 10 -12 of its closing argument, the State presents a compelling discussion of the strong evidence against the Defendant:

This was simply not a close case. The State presented absolutely overwhelming evidence of Poole's guilt. Poole was identified heading in the direction of the victim's trailer immediately prior to the attack. Poole sold video games like those taken from the victims (some stained with the victim's blood) immediately after the murder and attempted murder. One video game was left on the porch of Johnson's (Poole's on again, off again girlfriend) trailer where Poole had been living at the time the victims were robbed.

In addition to eyewitness testimony connecting Poole with the charged offenses, the State presented compelling and uncontradicted physical evidence to link Poole to the crimes. This evidence included DNA found on Poole's shirt matching or consistent with victim [L.W.]'s DNA, and DNA from the rape kit, matching Poole's genetic profile. From the vaginal swab, FDLE analysis Robin Ragsdale found a mixture, with the male contributor matching Poole's profile at 8 loci.

….

Three of the games or game controllers linked to Poole after the offenses had blood on them matching victim Scott's DNA profile. In addition, a tire iron

> found in the vicinity of the victims' trailer had blood stains on it which were consistent with victim Scott's DNA profile. A footprint consistent with Poole's was found next to the bed where the attacks occurred.

Based on the Court's discussion above with regard to the four comments listed by the Defendant in his Motion, subclaim 1-1.1 is denied.

1-1.2: Improper Comments Which Shifted the Burden of Proof to Mr. Poole.

The Defendant alleges, "Trial counsel was ineffective for failing to object to several improper comments by the prosecutor which shifted the burden of proof to Mr. Poole. These comments prejudiced Mr. Poole, as there likely would have been a different outcome in their absence, and this Court should grant Poole relief."

The Defendant identifies three comments below, where he alleges the State improperly shifted the burden of proof to the Defendant. The Defendant asserts with respect to all three comments that his counsel deficiently failed to object to each comment or move for a mistrial, therefore this issue was not raised on direct appeal.

(1). "Well, had there not been all of this other evidence, had there been evidence that Mr. Poole was elsewhere or had his shoe impression not been found on the book, then maybe that could just be a coincidence." (ROA, Vol. XXI, P. 2761). Comment (1) was made during the State's Initial Closing argument.

The Court agrees with the State's closing argument that that [sic] the prosecutor's comment was a fair comment on the evidence. In its closing argument, the State alleges that the prosecutor was simply stating that no evidence showed that Mr. Poole was somewhere else. Instead, the evidence placed Mr. Poole at the scene of the murder, rape, and robbery.

(2). "There's been plenty of time for Mr. Poole to request that any test in the world be done to any piece of evidence that the state put in in this trial. So it's not that it's only available to the state. If there was something that the defense thought they could test or do something with to prove that somebody else was in there, they had every opportunity to do that." (ROA, Vol. XXII, P. 2841). The Court will discuss (2) along with (3) below.

(3) "You've heard no evidence that some request was made of the state to get this bed sheet and have it examined by a defense expert. You haven't heard any evidence about that. That bed sheet was available, just as available to the defense as it was to the state." (ROA, Vol. XXII, P. 2847).

Comments (2) and (3) took place during the State's Rebuttal argument. On page 15 of its written closing arguments the State argues:

> This was a fair reply to defense counsel's closing wherein he stated that '[t]here could have been and there should have been so much more." (V21/2816). In his own closing, defense counsel criticized the investigators for not testing or examining other items, including unidentified fingerprints

> (V21/2815-16), conduct additional fingerprint analysis of the tire iron, additional footwear analysis on a pillowcase (V21/2817), or conduct DNA analysis of two hairs found at the scene of the murders. (V21/2818-19).

The Court agrees with the State that this was a fair comment on the closing arguments of the defense, and it was permissible for the State to argue that the defense was not prohibited from doing its own testing on such items. In United States v. Long, 300 Fed. Appx. 804, 816 (11th Cir. 2008), the Eleventh Circuit Court of Appeal discussed comments made by a prosecutor after the defense questioned the prosecution's failure to call a particular witness. The Eleventh Circuit opined:

> We must consider allegedly improper prosecutorial comments in context when evaluating their propriety. *See* *United States v. Bright*, 630 F.2d 804, 825 (5th Cir. 1980). "[W]hile a prosecutor may not comment about the absence of witnesses or otherwise attempt to shift the burden of proof, it is not improper for a prosecutor to note that the defendant has the same subpoena powers as the government, particularly when done in response to a defendant's argument about the prosecutor's failure to call a specific witness." *United States v. Hernandez*, 145 F.3d 1433, 1439 (11th Cir.1998) (quotation marks and citation omitted). It also "is not error to comment

on the failure of the *defense*, as opposed to the *defendant*, to counter or explain the evidence." *United States v. Griggs*, 735 F.2d 1318, 1321 (11th Cir.1984) (per curiam) (quotation marks and citation omitted).

The record reflects that in his closing statement, defense counsel asked the jury to consider why the government failed to call Agent Kiper as a witness:

> Well, who is the lead Agent in this case? It was Agent Richard K[i]per. Why didn't he testify? He was the lead agent in this case. He was the person with all the information about everything going on, but why wasn't he called? ... That's something you can consider in deciding whether or not the Government has met their burden.

The prosecutor's comments, which were made in direct response to this argument, "referred ... to the quality (or lack thereof) of the defense's evidence and the defense's failure to rebut the necessary inferences created by the government's case." *United States v. Exarhos*, 135 F.3d 723, 728 (11th Cir.1998). Moreover, even if the prosecutor's comments were prejudicial, they were rendered harmless by the court's instruction to the jury regarding

> the burden of proof. *See* Simon, 964 F.2d at 1087. Accordingly, we conclude that the prosecutor's comments were not improper.

In its closing argument the State cites United States v. Simon, 964 F.2d 1082, 1087 (11th Cir. 1992). In that case, the Eleventh Circuit opined, "This court has held that the prejudice from the comments of a prosecutor which may result in a shifting of the burden of proof can be cured by a court's instruction regarding the burden of proof. *See Duncan v. Stynchcombe*, 704 F.2d 1213, 1216 (11th Cir.1983); *see also United States v. Casamayor*, 837 F.2d 1509 (11th Cir.1988), *cert. denied*, 488 U.S. 1017, 109 S.Ct. 813, 102 L.Ed.2d 803 (1989); *United States v. Johnson*, 713 F.2d 633, 651 (11th Cir. 1983), *cert. denied*, 465 U.S. 1081, 104 S.Ct. 1447, 79 L.Ed.2d 766 (1984)."

The Court agrees with the State that the comments made by the Prosecutor did not shift the burden of proof and were responsive to the arguments of the defense. Should it be considered that the arguments caused confusion in the minds of the jury regarding burden of proof, the Court finds that any such confusion was cleared up by the Court's jury instructions which emphasized to the jury what the State had to prove for them to find the Defendant guilty of the crimes he was charged with. In addition, the Court does not find any reasonable basis to conclude that any deficiency by counsel in not objecting to these comments undermines confidence in the outcome of the trial. Subclaim 1-1.2 of the Defendant's Motion is denied.

1-1.3: Improper Comments Which Denigrated Mr. Poole's Theory of Defense.

The Defendant alleges, "Trial counsel was ineffective for failing to object to several improper comments by the prosecutor which denigrated Mr. Poole's theory of defense. These comments prejudiced Mr. Poole, as there likely would have been a different outcome in their absence, and this court should grant Mr. Poole relief."

In his Motion, the Defendant sets forth seven instances, during the State's rebuttal closing argument, where he alleges the prosecutor made comments denigrating the defense's theory of defense:

(1) "I did check around at the lunch hour, and as far as I could tell, I was in still (sic) Polk County and this was still Bartow, and this was still the courthouse, and I still came back to 9-A. I think this is 9-A. And I don't think it's Disney, and I don't think it's Fantasy Land. That's still up the road. But that's where the argument came from for the defense, either there of somewhere in one of those video games that goes in one of those machines." (ROA, Vol. XXI, P. 2835). At the evidentiary hearing, Mr. Dimmig acknowledged that he did not know why he did not object at the time, and his understanding or denigration was now more refined. (EH, V1/91).

(2) "Well, folks, if you could believe a story like that, I don't know how we got you on this jury, because you don't have any common sense." (ROA, Vol. XXII, P. 2836). At the evidentiary hearing, Mr. Dimmig testified that he regarded the comments as a statement that denigrated the intelligence of the jury.

He admitted that he did not recall having thought that the statement denigrated the defense at the time, but again he admitted that his understanding of the concept of denigration was more refined at this point in his career. (EH, V1/92-94) On cross-examimation [sic], Mr. Dimmig agreed that judges routinely tell jurors to use their common sense. (EH, V2/218-219).

(3) "You could go back there and think about things like that, but that's just stupid [sic] It didn't happen that way." (ROA, Vol. XXII, P. 2838-2839). At the evidentiary hearing, Mr. Dimmig said that at the time of the trial he did not recognize these comments as denigrating the defense. He was asked why he did not object and he answered, "I thought that the insult to the - -I, I didn't recognize that it was denigrating the defense, and 2, I thought insulting the jury was a negative thing for the Prosecution to be doing." (EH, VI/96).

(4) "I used a list of coincidences to explain circumstantial evidence, without having any idea that the most bizarre coincidence was going to be brought up by the defense, which is that there's somehow this other person. Now, talk about a coincidence that boggles the imagination... No, that didn't happen unless you are in Mickey Mouse Land." (ROA, Vol. XXII, P. 2839). At the evidentiary hearing Mr. Dimmig testified that at the time of the trial he did not believe the comments in (4) denigrated the theory of defense and that is why he did not object to it. (EH, Vl/96-97). On cross-examination, Mr. Dimmig stated, "That particular comment about, you know, no reason to believe there was a second person there directly contradicted the testimony of (L.W.) who said in her 911 call and then when the police responded that she

was aware of two people being in the trailer at the time, 3:30 in the morning, somewhere roughly right around there. So my view was the State Attorney - - the Prosecutor was saying to the jury, don't believe our eyewitness to the offense. (EH, V2/219-220). Mr. Dimmig was also asked about the phrase "boggles the imagination," and he testified that "[i]t was just a different way of saying that the evidence does not support it. (EH, V2/225).

(5) "Sir don't come in here with some wild story and tell the jury that they should be able to – or have to deliberate for hours to figure out a case that's an open and shut as this." (ROA, Vol. XXII, P. 2841). Mr. Dimmig testified at the evidentiary hearing that he did not think this comment denigrated the defense. (EH, V1/97).

(6) "And this is a motive, according to the defense, for somebody to go and commit this horrible crime? I think that also boggles the imagination." (ROA, Vol. XXII, P. 2844). Mr. Dimmig testified at the evidentiary hearing that he did not think this comment denigrated the defense. (EH, VI/97).

(7) "Basically, the defense is this: Are you ladies and gentlemen of the jury going to believe what you saw and heard in this courtroom, or are you going to believe what I'm telling you?" (ROA, Vol. XXII, P. 2847). Mr. Dimmig testified at the evidentiary hearing that he did not think this comment denigrated the defense. (EH, V1/97-98).

Mr. Dimmig was asked if at the time of trial, taking all of these statements together, he had grounds to seek a mistrial. Mr. Dimmig answered, "No, I did not think I had basis for a mistrial at the

time of trial." (EH, V1/98). He was asked why he did not think he had grounds for a mistrial. He answered, "I did not believe that there had been sufficient denigration of the defense. The only denigration of the defense that I recognized was the early comments about Disney World or - -" (EH, V1/99). On cross-examination, Mr. Dimmig agreed that the prosecutor Mr. Aguero was a passionate person, and he expected him to be animated during the closing. (EH, V2/215). Assistant State Attorney Victoria Avalon asked him about the way Mr. Aguero was presenting the case.

> ASA Avalon : And did you feel that the way Mr. Aguero may have been presenting his case by this point might have been coming off a little over the top and perhaps even unreasonable?
>
> Mr. Dimmig: Yes. I mean, I thought he was over the top on how he discounted the evidence supporting our alternative theory.
>
> ASA Avalon: Once again, the old adage about when your opponent makes a mistake you let him. Right?
>
> Mr. Dimmig: Yes. Not sure that's exactly what, you know was going on here.
>
> ASA Avalon: Let me put it in slightly different terms. Did you feel at the time, taking in context while you were sitting there watching the jury react to Mr. Aguero, did you feel that his comments

> were so prejudicial as to wholly vitiate the entire trial?
>
> Mr. Brown: Judge, I'll object. That calls for a legal conclusion.
>
> Ms. Avalon: I'm asking what - - what he thought.
>
> Judge Harb: Overruled.
>
> Mr. Dimmig: With the understanding that I had at the time about denigrating the defense case, no, I did not think it completely vitiated the case.

(EH, V2/217).

> Mr. Dimmig agreed in his testimony that he could have objected to the way Mr. Aquero was arguing the case. He testified that he did not remember what was going through his head at the time, but it was his usual practice to take into consideration all factors in deciding whether or not to object.

(EH, V2/221).

> Mr. Dimmig agreed during his testimony that you run the risk of turning the jury off if you object every single time you can object to a statement by the prosecution. (EH, V2/214 - 215). It is clear from listening to the testimony of Mr. Dimmig that his decision not to object to the majority of the closing comments identified above were based on his tactical decision that the comments in some respects showed the State overreaching and insulting the jury, his belief that he did not want to turn off the jury

> with frequent objections, and his decision that a comment was within the wide latitude allowed the parties in closing arguments. The Court does not find that counsel's performance fell below an objective standard of reasonableness in not objecting to the comments (2) through (7) above.

With regard to comment (1), the testimony of Mr. Dimmig's testimony indicates this comment got by him. (EH, V2/214). Referring to Disney and Fantasy land could certainly be seen as disparaging the defense's theory of defense. However, if counsel's performance fell below an objective standard of reasonableness in not objecting to comment (1), there is no reasonable basis to believe that the result of the proceedings could have turned out differently but for such a deficiency in not objecting to comment (1), based on the strong case presented by the State. Even should it be considered that counsel showed some deficiency in not objecting to all the comments (l)-(7), there is no reasonable basis to conclude that the result of the proceedings could have turned out differently but for such a deficiency. Subclaim 1-1.3 of the Defendant's Motion is denied.

Subclaims 1-1.1, 1-1.2 and 1-1.3, having been denied, the Court denies Subclaim 1-1 of the Defendant's Motion.

> **1-2: TRIAL COUNSEL WAS INEFFECTIVE FOR STATING DURING CLOSING ARGUMENTS THAT MR. POOLE "ACKNOWLEDGES" HISGUILT [sic] FOR SEXUAL BATTERY,**

BURGLARY, AND ROBBERY, THUS DENYING MR. POOLE HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION., AND UNDER SECTION 90.502, FLORIDA STATUTES.

The Defendant alleges, "During the closing statement, Mr. Poole's trial counsel stated: 'Mr. Poole acknowledges that he went in the trailer, 4-L, and committed a crime therein. That's a burglary. Mr. Poole acknowledges that he had sexual contact with (L.W.) against her will, and that's a sexual battery. And Mr. Poole acknowledges that he had possession of those games and he went down the road and sold them, and that's a robbery.' (ROA, Vol. XXI, P. 2795)". In his Motion, the Defendant asserts "This statement was not supported by the evidence submitted at trial, and violated Mr. Poole's right to remain silent and the attorney-client privilege."

1-2.1: Violation of the Right to Remain Silent.

The Defendant alleges, "Trial counsel was ineffective for violating Mr. Poole's right to remain silent by testifying during closing arguments that Mr. Poole acknowledged his guilt to the non-homicide offenses. This violation prejudiced Mr. Poole, as there likely would have been a different outcome in its

absence, and this Court should grant Mr. Poole relief." The Defendant notes that the trial court held a colloquy with Mr. Poole regarding whether or not he wanted to testify. Mr. Poole agreed during the colloquy that he had decided in consultation with his attorney not to testify. (ROA, Vol. XI Pgs. 2725-2726).

The Court does not find that counsel violated the Defendant's Right to Remain Silent in his statements that Mr. Poole acknowledges his guilt for sexual battery, burglary and robbery. Defense Counsel was clearly making a reasonable tactical decision in light of the strong evidence the State had with regard to the non-homicide crimes to maintain some credibility with the jury with regard to challenging the actual murder charge. This tactical decision is discussed in significant detail with regard to subsclaim [sic] 1-2.2 below. Subclaim 1-2.1 is denied.

1-2.2: Violation of the Attorney-Client Privilege.

The Defendant alleges, "Trial counsel was ineffective for violating the attorney-client privilege by testifying during closing arguments that Mr. Poole acknowledged his guilt to the non-homicide offenses. This violation prejudiced Mr. Poole, as there likely would have been a different outcome in its absence, and this Court should grant Mr. Poole relief."

The Defendant argues that "By telling the jury, 'Mr. Poole acknowledges' committing armed burglary, armed robbery, and rape, trial counsel clearly violated the attorney-client privilege by disclosing confidential communications that were made during the course of representation."

At the evidentiary hearing, the following exchange took place between Postconviction Counsel, Mr. Brown, and Mr. Dimmig regarding Mr. Dimmig's Closing at the trial:

> Mr. Brown: But let me direct your attention to Volume XXI and page 2795. That will be towards the back of your binder.
>
> Mr. Dimmig: I have it.
>
> Mr. Brown: All right. Just a moment, please. All right. We're going to begin by looking - - starting at Line 2. I'll just read a portion of your – this comes from your closing argument in the trial. And at Line 2 you state, "And now - - "now that all of the evidence is in I can tell you that we're here for two trials; a trial for first degree murder and a trial for first degree" - - "and a trial for attempted first degree murder.
>
> "Mr. Poole acknowledges that he went into Trailer 4L and committed a crime thererin [sic]. That's a burglary. Mr. Poole acknowledges that he had sexual contact with (L.W.) against her will and that's a sexual battery. And Mr. Poole acknowledges that he had possession of those games and he went down the road and sold and [sic] them that's a robbery."
>
> You don't have any reason to doubt that that's an accurate transcript of your statement. Correct?

Mr. Dimmig: I have no reason to doubt it's [sic] accuracy.

Mr. Brown: All right. Do you remember making that statement?

Mr. Dimmig: I cannot say that I recall word-for-word. I can recall that that was the thrust of how I was going to begin the opening or the closing arguments. So yes I believe it's what I said.

Mr. Brown: All right. I'm going to ask you a lot about that statement, but let me get a little bit of background information with regards to it.

Did you know that Mr. Poole was going to be facing multiple life sentences if convicted of the robbery, sexual battery and burglary charges?

Mr. Dimmig: Yes, I did.

Mr. Brown: What sentence did you expect that he would received [sic] if convicted of those charges?

Mr. Dimmig: I believed he would receive the maximum sentence.

Mr. Brown: Did you discuss with Mr. Poole at any time conceding those charges?

Mr. Dimmig: I did.

Mr. Brown: Did he consent to that strategy?

Mr. Dimmig: I just want to clarify, because there have been some discrepancies or differences between the State Attorney's Office and then the Office of the Public Defender concerning waiver of attorney/client privilege. And I just want to make sure on the record that attorney/client privilege is waived for any questions you may ask me.

Mr. Brown: You're asking if I'm waiving the - -

Mr. Dimmig: Yes.

Mr. Brown: - - attorney/client privilege? The Defense's position would be that by filing an ineffective assistance of counsel claim against you that the attorney/client privilege is waived for these proceedings.

Mr. Dimmig: Okay. Could you repeat the question for me, then?

Mr. Brown: Did Mr. Poole consent to you conceding these charges?

Mr. Dimmig: To the best of my recollection, he did not.

Mr. Brown: Was he adamant that you not concede the charges?

Mr. Dimmig: He was consistent in that position. We were able to discuss it, but he was consistent in his position that he did not want it conceded.

Mr. Brown: How many times approximately would you say you discussed the strategy with Mr. Poole?

Mr. Dimmig: Again, I don't have an absolute memory. I would estimate at least five or six times, including during the course of the trial.

Mr. Brown: Why did you believe that admitting to the lesser charges or rather the non-homicide charges was the best strategy in the case?

Mr. Dimmig: Two reasons. One, I believed that the evidence of the burglary, robbery and sexual battery and Mr. Poole's involvement in it was overwhelming. And secondly, because I believed that the evidence of his involvement in the homicide was shaky at best.

There were - - there was testimony from the surviving victim, a (L.W.) that created significant time discrepancies. There were issues brought up by the medical examiner which raised significant time discrepancies. There was also testimony from (L.W.) about more than one perpetrator being in the house.

And so I thought that the evidence concerning the homicide was significantly weaker than the evidence concerning the other offenses and that in

> order to maintain credibility with the jury on the homicide charge it was appropriate not to challenge the other charges.
>
> Mr. Brown: And so was this part of the overall strategy of trying to avoid a conviction for first degree murder?
>
> Mr. Dimmig: Yes, it was.

(EH. Vl/18-22).

> ….
>
> Mr. Brown: Let's talk now about the word "acknowledges." We – we read the statement or I read the statement already for you., [sic] but on three different occasions you stated that Mr. Poole acknowledges committing different offenses. Did you in turn - - intend to use the phrase "Mr. Poole acknowledges"?
>
> Mr. Dimmig: If I can, let me sort of lead into that response. The short answer is yes, I did. I struggled - - and my memory is such that major things that happened this long ago I don't remember specifics of. Things that have, quite frankly, haunted me for 12 years I remember quite clearly.
>
> I remember sitting at the table in my breakfast room writing notes about my closing argument and struggling over what or exactly how I should phrase this. And I settled on "acknowledges." I did

not want to use the word "admits." I wanted to use the word "acknowledges." Where I missed, if you will, what - - what I should have said, what I had intended to say in closing argument was that Mr. Poole acknowledges that the evidence establishes that he committed these offenses. So the choice of the work [sic] "acknowledges" was quite intentional. The total phrase that is here is not what I intended to say.

Mr. Brown: All right. So just because this is an important issue let me just make sure that we're crystal clear. So you did intend to use the phrase "Mr. Poole acknowledges," but you intended to that - - for that craze - - for that phrase to include Mr. Poole acknowledges that the State has proven, or something to that effect?

Mr. Dimmig: Words to that effect, that the State has proven or the evidence establishes. Something to that effect.

Mr. Brown: Was it ever your intention to give the jury the impression that Mr. Poole was making a statement to the jury?

Mr. Dimmig: No. That's what I was hoping to avoid by using the word "acknowledges." That's part of what I was wrestling with, that in preparing my closing notes that I missed when I added on the additional part.

(EH, Vl/23-24).

….

Mr. Brown: Why was it important to state during your closing argument that Mr. Poole was acknowledging that he committed those offenses?

Mr. Dimmig: It was a couple of things. One, to maintain degree of credibility that, you know, what we're doing was putting the State to its burden of proof and not, you know, admitting, but rather acknowledging what they had met that particular burden of proof.

So it was to try and indicate that Mr. Poole had not attempted to deceive the jury or anything, but was - - simply was putting the State - - holding the State to its burden. And second, it was to not get into anything about any statements that Mr. Poole may or may not have made to me in preparation of the case, not to get into anything that he has stated about the case.

Mr. Brown: All right. And that's what I want to focus on. Why was that important?

Mr. Dimmig: Well, you didn't want to open the door to the State Attorney getting into any -- anything about any statement he may or may not have made.

Mr. Brown: Okay. And why is it important to not open door to statements that Mr. Poole might have made?

Mr. Dimmig: It would be potentially evidence that had not been received during the course of the trial. It could be comments on right to remain silent.

Mr. Brown: Did you believe when you made that statement that you had made a mistake?

Mr. Dimmig: I did not recognize at that exact moment in time. As soon as the State Attorney began his closing argument I glanced at the notes that I had and realized the mistake I had made.

(EH, Vl/25-26).

….

Mr. Brown: Did Mr. Poole ever acknowledge to you that he committed those offenses?

Mr. Dimmig: To the best of my recollection, he did not.

Mr. Brown: All right. So would you say that you were putting words into his mouth when you made that statement to the jury?

Mr. Dimmig: In the way that I put the statement to the jury, yes.

Mr. Brown: All right. So we'll clear that up a little bit. It wasn't your intention to put words into Mr. Poole's mouth.

Mr. Dimmig: Correct.

(EH, VI/28).

….

Mr. Brown: Did you talk to Mr. Poole about whether he was going to testify?

Mr. Dimmig: Yes.

Mr. Brown: What kind of discussions did you have with him about that?

Mr. Dimmig: I don't remember the specific conversations we had about it. There would have been the general sort of discussion about that that would mean from a practice point of view, that the State Attorney would have the opportunity to cross-examine him, areas that I believe the State would probably go into on cross-examination, and then, a more general discussion of the advantages or disadvantages to him of testifying.

And then it was - - was and is my practice that I advise my client of my opinion as to whether or not they should testify. And so I would have advised Mr. Poole that in my opinion it was in his best interest not to testify.

Mr. Brown: All right. Was part of the discussion about whether to testify or

> not, did that include advising him that by testifying that he would be waiving his right to remain silent?
>
> Mr. Dimmig: Yes.
>
> (EH, VI/29).
>
> ….
>
> Mr. Brown: Okay. Did the Court ultimately conduct a colloquy of Mr. Poole about whether he wished to exercise his right to remain silent.
>
> Mr. Dimmig: I believe they did, or he did. Judge did.
>
> Mr. Brown: Did Mr. Poole advise the Court unequivocally that he wished to exercise his right to remain silent?
>
> Mr. Dimmig: I don't have a specific recollection. I know that - - I do recall that there was not an issue that was created, so my assumption is that he indicated that he did not wish to testify.
>
> (EH, VI/30).

Mr. Brown asked Mr. Dimmig how he would describe the gravity of the realization that he had opened the door to the State in his closing argument and he responded that, "I considered it quite serious." Mr. Brown asked Mr. Dimmig about Florida v. Nixon, 543 U.S. 175 (2004), and Mr. Dimmig testified what he was familiar with that case at the time of the trial. (EH, Vl/31-32). Mr. Brown directed Mr. Dimmg's [sic] attention to ROA, Volume XXI, page 2831 of the trial

transcript where a brief exchange that took place between the attorneys and the Trial Judge.

> Mr. Brown: All right. And we're going to start at - - at Line 9. And this is a relatively brief exchange so I'll go through the exchange and then ask you some questions about it.
>
> All right. So on Line 9 Mr. Aguero – oh, wait. No. I'm sorry. Not Line 9. Line 20. "We have one" - - this is Mr. Aguero speaking, and Mr. Aguero was the State Attorney in this case; the lead State Attorney?
>
> Mr. Dimmig: Correct.
>
> Mr. Brown: Okay.
>
> [Mr. Aguero talking] "We have one matter that we would like to put on the record. Mr. Dimmig, in his closing, admitted guilt to certain of the offenses. The caselaw in that area has evolved over the last few years and I've had a discussion with Mr. Dimmig about his decision that he made in that regard and his understanding of the role of the attorney versus the role of the defendant, such that we're all aware that, as the Court did with Mr. Poole, that the right to testify or not testify has been held for years to be a constitutional right of the defendant, not a decision that an attorney can make, but rather one that has to be personally made by the

> defendant. And that's the reason that the standard inquiry that the Court went through was done.
>
> "Mr. Dimmig's interpretation of the law and his rationale behind the admission of guilt is a little different with regard to his closing. And so I'd like to make a part of the record, for whatever -- wherever that might go, either in appeal or in post-conviction."
>
> (EH, Vl/33-34).
>
> ….

Mr. Brown asked Mr. Dimmig if he had a conversation with Mr. Aquero about the acknowledgment issue in between his closing argument and the State's rebuttal, and Mr. Dimmig agreed that they did. Mr. Dimmig went on to say, "I do not recall Mr. Aguero and I discussing the client's absolute right to decide whether or not to testify. I remember our conversation only dealing with his asking me, you know, did I think I had the authority to concede guilt. And I pointed out that I did believe that I had that authority and I mentioned the Nixon case at the time of that conversation." (EH, VI/35).

> ….
>
> Mr. Brown: All right. I'll - - let me just continue now with the - - with the record.
>
> And so the Court said, "Okay. Mr. Dimmig, do you wish to respond on the record?"

> And you stated, " I would simply say , Your Honor, that it is my interpretation of the case law, and I do not have the cite, but there is a United States Supreme Court case, Nixon, that was decided."
>
> ....
>
> I believe within the last year that my interp. - - well, that's not a good way to word that. All right. So - - and I do not have the cite, but there is a United States Supreme Court case, Nixon, that was decided, I believe, within the last year that my interpretation of the particular case, as I reviewed it in preparation for this trial - - for trial in this case is that a capital - - in a capital murder cases the decision as to whether or not to admit guilt of something other than the capital murder itself lies solely within the discretion of trial counsel, and I made that decision." (EH, V1/36-37).

Mr. Brown asked Mr. Dimmig if "[t]hat was a accurate statement of your understanding of the holding of Nixon that you had at the time that you cited it in Mr. Poole's case?" Mr. Dimmig responded "Correct." (EH, VI/37).

At the evidentiary hearing, Mr. Brown pointed out several differences between the Nixon case and Mr. Poole's case, including the fact that Mr. Nixon's counsel conceded his client's guilt to first degree murder whereas Mr. Poole was admitting to lesser crimes; Mr. Nixon was very disruptive as opposed to the demeanor of Mr. Poole; Mr. Nixon was

unresponsive with regard to conceding guilt while Mr. Poole opposed the tactic; Mr. Nixon's counsel conceded guilt from the very beginning while Mr. Dimmig did not concede Mr. Poole's guilt until closing arguments. (EH, Vl/52-64).

With regard to conceding during the closing argument Mr. Dimmig testified, "I thought there was a distinction between conceding before the evidence is in, so that at least the question could be raised as to whether or not defense counsel put the State to its burden as opposed to what I did, which was not to concede in opening, hold the State to its burden of proof and concede only after the evidence was in." (EH, VI/58). Mr. Dimmig was asked if the holding in Nixon included the fact that the defendant was unresponsive, and he responded, "I don't know any other way of saying it is, I did not focus on the unresponsive part. I believed the holding to authorize me to do what I did." (EH, VI/62).

Although not specifically discussed by the parties with regard to the decision by Mr. Dimmig to concede the guilt of Mr. Poole, Mr. Dimmig was asked at the evidentiary hearing about the composition of the defense team and the theory of defense.

At the evidentiary hearing Mr. Dimmig: testified that Julia Jester, now Julia Williamson, and Steven Fisher also represented Mr. Poole on behalf of the Public Defender's Office. He testified that he handled the Guilt Phase and was not involved in the Penalty Phase. Ms. Jester was the Second Chair on the case and primarily responsible for the Penalty Phase, Mr. Fisher was almost exclusively involved with Mental

Health experts for Penalty Phase purposes. (EH, Vl/14- 15).

The following discussion took place at the evidentiary hearing between Mr. Poole's postconviction counsel, Mr. Brown, and Mr. Dimmig regarding why the trial defense team was composed the way it was and the Defense's theory of the case:

> Mr. Dimmig: There was inconsistency in the theory of the first phase and second phases of the case. And as lead counsel it was my opinion that it was in the best interest of Mr. Poole that I not be involved in the second phase in case I had lost credibility with the jury during the first phase of the case. So I tried to limit the role of Ms. Williamson and Mr. Fisher in the first phase and let them handle the second phase.
>
> Mr. Brown: So did you believe that you would have a credibility issue going forward if Mr. Poole was found guilty of first degree murder?
>
> Mr. Dimmig: Yes.
>
> Mr. Brown: And that is the main reason that the defense team was composed the way that it was?
>
> Mr. Dimmig: Correct.
>
> Mr. Brown: What was the Defense's theory of the case?
>
> Mr. Dimmig: Our theory of the case was that there were two independent

> criminal episodes that occurred. One in which there was a burglary, a robbery and a sexual battery, and that several hours later a perpetrator from that incident returned to the scene and committed the homicide.
>
> Mr. Brown: And so was your goal to avoid a conviction of first degree murder?
>
> Mr. Dimmig: Yes.
>
> Mr. Brown: And was that the overall strategy or was that strategy related simply to the guilt phase?
>
> Mr. Dimmg [sic]: (No response.)
>
> Mr. Brown: Let me rephrase that question if you need me to. You already said that you divided the defense team because you believed there would be a credibility problem if - - if there was a conviction for first degree murder. Correct?
>
> Mr. Dimmig: Yes.
>
> Mr. Brown: All right. So when you made the decision to divide the defense team that way did you decide at that time that trying to avoid a conviction for first degree murder was the best way to try to save Mr. Poole's life?
>
> Mr. Dimmig: Yes.

(EH, V1, 14-15).

As can be seen by Mr. Dimmig's testimony above. The focus of the Defense was to avoid a conviction for first degree murder. Mr. Dimmig made a tactical decision to divide the defense team between the two phases of the trial to maintain credibility with the jury. He made the State meet its burden with respect to proving the non-capital crimes prior to conceding to them in his closing argument. Mr. Dimmig thought the Nixon case gave him the authority to concede Guilt on the non-homicide cases, and he reasonably thought that by doing so he gave Mr. Poole the best chance of not being convicted of first degree murder. The Court does not find that counsel's performance fell below an objective standard of reasonableness. Additionally, the Court finds no reasonable basis to conclude that any deficiency by counsel with regard to this claim undermines confidence in the result of the proceedings. Subclaim 1-2.2 of the Defendant's Motion is denied.

Subclaims 1-2.1 and 1-2.2 having been denied, the Court denies Subclaim 1-2 of the Defendant's Motion.

1-3: TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO WITHDRAW FROM MR. POOLE'S CASE DUE TO AN ACTUAL CONFLICT OF INTEREST DUE TO THE FORMER REPRESENTATION OF STATE WITNESSES TREVOR CAMPBELL AND ALBERT LEWIS IN VIOLATION OF THE SIXTH AMENDMENT OF THE UNITED STATE [sic] CONSITUTION [sic] AND

CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

The Defendant alleges, "Trial counsel in this case labored under an actual conflict of interest, and this conflict adversely affected trial counsel's representation of Mr. Poole. Based upon this actual conflict of interest which adversely affected trial counsel's representation of Mr. Poole, Mr. Poole must be granted a new trial."

In his Motion the Defendant argues, "In the present case, a hearing was held before the Honorable Susan Roberts on July 21, 2004. During that hearing, trial counsel advised the court that his office, the Public Defender for the 10th Judicial Circuit, had previously represented a series of state witnesses: Dawn Campbell, Charles Michael Butler, Denise Harris Wood, Rufus Knighton, Albert Lewis, Melvadine Miller, Venture Rico, Gary Seafort, and Gary Lynn Burton. ROA, Vol. V, Pgs. 754-55. Trial Counsel further advised that he had discussed this issue with Mr. Poole in his opinion this former representation did not constitute a conflict of interest. The trial court then conducted a colloquy of Mr. Poole to determine whether he had discussed the issue with his attorneys and wished to remain represented by the public defender's office. Mr. Poole advised the court that he had discussed the matter with his attorneys, but that he was not comfortable with the public defender's office continuing to represent him. At this point, the trial court recessed the proceedings and appointed independent counsel to advise Mr. Poole specifically as to the conflict of interest issue." (ROA, Vol. V, Pgs. 755-763)."

At the Evidentiary Hearing, the following discussion took place between Mr. Brown and Mr. Dimmig concerning the issue of a conflict of interest and the hiring of conflict free counsel to represent Mr. Poole regarding a possible conflict of interest.

> Mr. Brown: Okay. Had you discussed with Mr. Poole at this point the potential for a conflict of interest existing?
>
> Mr. Dimmig: I don't specifically recall if I had or not. I believe that I did, but I can't say that I specifically recall it.
>
> Mr. Brown: Okay. Had you discussed with him specific - - or do you remember specifically whether you discussed with him the fact that your office had represented those other individuals?
>
> Mr. Dimmig: Again, I don't have a specific recollection of it, but I believe that I did.
>
> Mr. Brown: Okay. Did you - - do you recall at any point Mr. Poole raising concerns with you over your continued representation?
>
> Mr. Dimmg [sic]: I do remember that at some point, and I don't remember if it was before or after this hearing, that there was conversation with Mr. Poole about some concerns.
>
> Mr. Brown: And was [sic] his concerns specifically - - do you recall if his concerns were specifically related to

Albert Lewis and Trevor Campbell and their representation?

Mr. Dimmig: Yes.

Mr. Brown: Okay.

Mr. Dimmig: It was.

(EH, Vl/116-117).

….

Mr. Brown: Did you personally represent Trevor Campbell or Albert Lewis?

Mr. Dimmig: No.

Mr. Brown: Were you representing any individuals charged with lower level drug offenses at the time?

Mr. Dimmig: Not at that time, I was not.

Mr. Brown: Okay. Do you recall whether or not a subsequent hearing was scheduled and Mr. Point - - Mr. Poole was appointed conflict-free counsel?

Mr. Diming: Yes, I do recall that.

Mr. Brown: Do you remember who was appointed to represent him?

Mr. Dimmig:

Mr. Larry Shearer.

Mr. Brown: Is that someone that had been familiar to you at that point?

Mr. Dimmig: Yes, I had dealt with Mr. Shearer since I moved to Polk County in 1978.

Mr. Brown: Okay. What discussions - - after Mr. Shearer was appointed to represent Mr. Poole on the conflict issue what conversation did you have with Mr. Shearer?

Mr. Dimmig: Almost none. I considered that something that was between Mr. Shearer and Mr. Poole and did not want to interject myself into it. I believe that I shared the evidence of when we go appointed or would have caused to be shared with Mr. Shearer when we were appointed and what our involvement in the cases was, but I did not – I do not recall any direct conversation with Mr. Shearer about the merits of the - - wither [sic] of the cases or my opinion as to why there was not a conflict.

Mr. Brown: Did you make your files related to Mr. Poole available to Mr. Shearer?

Mr. Dimmig: I don't recall.

Mr. Brown: Do you not recall doing it or you don't recall one way or the other?

Mr. Dimmig: I don't recall one way or the other.

Mr. Brown: Okay. Do you recall if you made your files regarding Trevor

Campbell and Albert Lewis available to Mr. Shearer?

Mr. Dimmig: The files themselves. I do not recall.

Mr. Brown: Is – would it have been your normal practice to provide client files to an outside attorney?

Mr. Dimmig: No, it would not be our common practice. Now, since Mr. Shearer was appointed as conflict - - conflict –free counsel to advise Mr. Poole I would not have considered him as outside counsel. He was one of Mr. Poole's attorneys at that point. So our general rule would have been different as it relates to Mr. Shearer than it relates - - well, at Mr. Shearer looking at Mr. Poole's file as opposed to his looking at the other individuals.

Mr. Brown: But as it - - as it relates to him reviewing Trevor Campbell and Albert Lewis' files would it have been your practice to make those files available to someone that didn't work for the Public Defender's Office.

Mr. Dimmig: No, it would not have been our practice.

Mr. Brown: And why not?

Mr. Dimmig: We would consider that a breach of attorney/client confidentiality and we would not turn the files over without a waiver from the client.

Mr. Brown: Do you recall if you sought or obtained a waiver from Albert Lewis or Trevor Campbell?

Mr. Dimmig: I do not believe that we did.

Mr. Brown: Okay. Do you recall a hearing - - do you recall the hearing where Mr. Shearer appeared on Mr. Poole's behalf to discuss the conflict issue?

Mr. Dimmig: Yes.

Mr. Brown: What do you recall taking place at that hearing?

Mr. Dimmig: The only part of that hearing that I really recall is Mr. Shearer advising the Court that it was his opinion that there was a conflict of interest.

Mr. Brown: Okay. Do you recall whether or not Mr. Shearer asked for an ex parte hearing?

Mr. Dimmg: Yes, he did.

Mr. Brown: And do you recall if the Court Granted an ex parte hearing?

Mr. Dimmig: My recollection is that the Court did not grant an ex parte hearing.

Mr. Brown: Do you recall whether Mr. Poole was maintaining that he believed that there was a conflict of interest?

(EH, V1/118- 122)

….

Mr. Dimmig: I believe that he was.

Mr. Brown: He was?

Mr. Dimmig: Still objecting to the Public Defender remaining as his attorney.

Mr. Brown: Now, in terms of Mr. Poole's objection, was there any ill will between the two of you at the time?

Mr. Dimmig: I certainly did not perceive any, no.

Mr. Brown: Okay. So was it your belief that this issue was related solely to the conflict issue and not indicative of other issues in the lawyer/client relationship?

Mr. Dimmig: Correct.

Mr. Brown: Ultimately did your office remain counsel for Mr. Poole?

Mr. Dimmg: Yes.

Mr. Brown: And you personally remained lead counsel for Mr. Poole?

Mr. Dimmig: Yes, I did.

Mr. Brown: As far as conversations that you had had - - conversations you had with Mr. Poole at - - up to this point and up to the point of trial, was he maintaining that someone else committed the murder?

Mr. Dimmig: Yes.

> Mr. Brown: How did the prior incident at the trailer park fit in with your theory of defense in the case?
>
> Mr. Dimmig: It was all part of the explanation of why these two individuals may have been targeted and it fit into the timeline. One of the two individuals, and I cannot recall which one right now, I believe it was Mr. Lewis, perhaps, was released from custody the night of this particular homicide, and it fit a timeline of the burglary, sexual battery and robbery occurring somewhere in the vicinity of midnight. And based upon when that individual was released from custody he could have arrived back at the trailer park within that time frame.
>
> Mr. Brown: Okay. At the time of the trial would you say that the prior incident at the trailer park was a [sic] important part of your theory of defense?
>
> Mr. Dimmig: Yes.

(EH, Vl/123-124).

At the Evidentiary Hearing, Mr. Dimmig was asked by Mr. Brown if the prosecution had an objection to him bringing up the prior incident involving Albert Lewis and Trevor Campbell at the time of his opening statement. Mr. Dimmig agreed that there was an objection to him doing this. (EH, Vl/124-125).

> Mr. Brown: And now, I want to just address or direct you to 1859, and at Line

> 23. "Your Honor," – this is you speaking."
>
> "Your Honor, I would ask that we go ahead and do that right now because I cannot made a competent and effective opening statement without presenting this defense theory of the case."
>
> Does that accurately reflect or would have able - - been able to present your theory of defense without presenting the Albert Lewis, Trevor Campbell incident to the jury?
>
> Mr. Dimmig: I do not believe I would have been able to present an effective opening statement.
>
> Mr. Brown: So it - - so was that integrated into your theory of defense?
>
> Mr. Dimmig: Yes.
>
> Mr. Brown: Okay. Would you characterize Albert Lewis and Trevor Campbell as alternative suspects within your theory of defense?
>
> Mr. Dimmig: Yes.

(EH, Vl/125-126)

Mr. Brown and Mr. Dimmig had the following discussion regarding Dawn Campbell, a witness that he called at the trial.

> Mr. Brown: Okay. What was the purpose of presenting her testimony?

Mr. Diming: Helping establish the timeline.

Mr. Brown: Which timeline?

Mr. Dimmig: Well, it - - the prior arrest and then the release of Gary Burton from the county jail at the time of the homicide.

Mr. Brown: The release of Gary Burton or the release of Trevor Campbell.

Mr. Dimmg: I'm sorry. As I said earlier, my memory – Gary Burton – names don't stick with me very well. I know that certain individuals went down to retrieve someone after they were released from the jail.

Mr. Brown: Okay.

Mr. Dimmig: And looking at it now, it was Gary Burton who was asked to go down and pick up Trevor.

Mr. Brown: Okay, Do you did exam – or did examine Ms. Campbell abou [sic] the prior drug raid. Correct?

Mr. Dimmig: Yes.

Mr. Brown: And you did examine her about when Trevor Campbell was released from jail?

Mr. Dimmig: Yes.

Mr. Brown: Did you examine her with regard to where Trevor Campbell was at the time of the murder?

Mr. Dimmg: I believe I did, yes.

Mr. Brown: And what was the purpose of that?

Mr. Dimmig: To establish that she could not verify where he was at all times.

Mr. Brown: Okay. So outside of the questioning her about the prior incident at the mobile home and the whereabouts of Albert Lewis and Trevor Campbell was there any other purpose to her testimony?

Mr. Dimmg: Not that I can recall, no.

Mr. Brown: All right. In preparation for trial did you personally ever attempt to speak to Trevor Campbell or Albert Lewis?

Mr. Dimmig: No.

Mr. Brown: Do you know if anyone at your office ever attempted to speak to them about the Poole case.

Mr. Dimmg: I do not believe anyone did.

(EH, Vl/125-129).

….

Mr. Brown: Had you decided to investigate, depose or subpoena for trial testimony Albert Lewis and Trevor Campbell, and had you learned anything relevant to Mr. Poole's case would you have withdrawn in that situation?"

(EH, VI/132)

….

Mr. Dimmig: Let me give you a fairly lengthy answer if I - - in capital cases we followed a slightly different procedure then we did in non-capital cases as it relates to withdrawal.

In a capital case we would look carefully at whether or not the information that we acquired from a former client was acquired in any way because of the attorney/client relationship. If it did not we would stay on the capital case. So the answer to your question would be, we might have had to withdraw depending upon what those individuals said either during the investigation or deposition or testimony at trial.

Mr. Brown: Okay. But you don't know what they would have said because you didn't ask them any questions.

Mr. Dimmig: Correct.

Mr. Brown: Why didn't you investigate, depose or subpoena any of them for trial?

Mr. Dimmig: We could make our defense case without needing to present them in my opinion.

Mr. Brown: That's what you believed at the time?

Mr. Dimmig: Yes. I believed that we could paint the picture and present the alternative theory that the homicide

> occurred later in the morning than the burglary, robbery, sexual battery, and that it was one or more of those individuals that was engaged - - or let me put it this way. At least it was not Mr. Poole who was engaged in that second criminal episode later in the morning.
>
> (EH, Vl/133-134).
>
> ….
>
> Mr. Brown: But how would interviewing them or deposing them have prevented you from making that same case?
>
> Mr. Dimmig: Because if we had developed evidence that clearly established that they were not I could not perpetuate a fraud upon the Court and present the theory that they were involved.
>
> (EH, Vl/134-135).

The following discussion took place between Mr. Brown and Mr. Dimmig concerning another event that took place at the trailer park where the murder occurred:

> Mr. Brown: Did you at some point become - - some point before trial become aware of another incident that occurred at the same trailer park as the murder a few days before the murder?
>
> Mr. Dimmig: Yes.
>
> Mr. Brown: All right. What do you remember about the other incident?

Mr. Dimmig: It was an incident involving narcotics. There were two individuals who were taken into custody and there were questions concerning whether or not this case - - this homicide was retaliation for that incident - - for the reporting of that incident.

Mr. Brown: All right. You said there were questions. Do you remember why there were questions about whether it was retaliation?

Mr. Dimmig: No, I don't remember specifically or how that first came to my attention - -

Mr. Brown: Okay.

Mr. Dimmig: - - and why I initially thought it.

Mr. Brown: Do you remember learning at some point that the murder victim in this case had told his mother that people in the trailer park thought that he had called the police?

Mr. Brown: Okay. Is that what you were referencing when you said questions?

Mr. Dimmig: Well, yes, that is what I - - but like I say, I don't remember if I first heard that or if I heard something else first and then that later, but yes, that is what I was referencing when I said that there were questions about a retaliation.

Mr. Brown: All right. And you said that there were two people arrested at that previous incident. Were those two people Trevor Campbell and Albert Lewis?

Mr. Dimmig: That's my recollection, yes.

Mr. Brown: And do you recall whether or not a Dawn Campbell was also arrested during the incident?

Mr. Dimmig: The name does not sound familiar. I do remember that there was a third person arrested.

Mr. Brown: Okay.

Mr. Dimmig: I think I remember that, yeah.

Mr. Brown: All right. Now did you at some point before trial become aware that your office was representing or had represented Trevor Campbell and Albert Lewis on charges related to that incident?

Mr. Dimmig: Yes.

Mr. Brown: Did you become aware of that fact while your office was representing those individuals or after their - - the representation had ceased?

Mr. Dimmig: I believe I became aware of [sic] while we were still representing them.

Mr. Brown: Okay.

Mr. Dimmig: I think. I'm not 100 percent certain.

Mr. Brown: Do you remember how you became aware of the fact that you were representing those individuals?

Mr. Dimmig: It is routine practice within the homicide division of the Public Defender's Office that any name that comes up in association with a case we run a records check on them and check to see if we've ever represented that individual. I believe that's how we identified that they were clients of the Public Defender's Office.

Mr. Brown: Let me ask you a little bit more about that. Does your office had any sort of - - or did your office at the time have any sort of procedure for how to deal with representing potential witnesses when you represented a capital defendant?

Mr. Dimmig: Yes, we did.

Mr. Brown: And what was that?

Mr. Dimmig: As a general rule of thumb, if we represented a critical witness or a significant witness in a cap - - if we currently or ever in the past had represented a significant witness in a capital case we would move to withdraw from the capital client.

Mr. Brown: Okay. And what a about a situation where you currently represent

a capital defendant and you learn that you've been appointed to cases involving potential witnesses in the capital defendant's case?

Mr. Dimmig: We – if our appointment to the witnesses occurs after we're already representing the capital defendant there was a policy in place to attempt to catch those at the time of first appearance and move to withdraw in the non-capital clients. Technology being different than it is now we did not always catch them at first appearance. So there was a procedure in place where we could ask newly appointed clients if they were co-defendants or if they were witnesses in other cases. And if they disclosed to us that they were we would move to withdraw from their cases at that time.

Mr. Brown: Was priority given to attempting to keep the capital cases - -

Mr. Dimmig: Yes.

Mr. Brown: - - where a conflict had not yet become ripe?

Mr. Dimmig: Yes.

Mr. Brown: Any why were - - why - - what was the purpose of those procedures?

Mr. Dimmig: The procedure to keep - - primarily to keep the capital case or - -

> Mr. Brown: No. More generally the procedure to try to recognize witnesses in capital cases before trial and withdraw from their cases.
>
> Mr. Dimmig: To avoid ethical conflicts of interest.

(EH, Vl/108-113)

> ….
>
> Mr. Brown: Okay. Do you know in this case whether you withdrew from anyone's case?
>
> Mr. Dimmig: My - - while I have no concrete recollection, my belief is that we did withdraw from the other two individuals.
>
> Mr. Brown: Okay.
>
> Mr. Dimmig: We kept Mr. Poole obviously.

(EH, V1/113).

The State alleges in its closing that the potential conflict alleged by the Defendant appears in the record on appeal and could have been raised, if at all, on direct appeal. The State asserts that the claim is procedurally barred as a matter that could have, and, should have been raised on direct appeal. The Court believes the State's argument has merit, but it also finds that the testimony from the evidentiary hearing makes it clear that the Defendant's claim has no merit.

The testimony of Mr. Dimmig presented above clearly demonstrates that they investigated and found

no conflict of interest that would interfere with their representation of Mr. Poole. Furthermore, the evidence presented leads this Court to conclude that Mr. Poole's defense team reasonably believed that it was able to provide him with competent and diligent representation. Rule 4-1.7 of the Florida Rules of Professional Conduct. A special counsel, Larry Shearer, was appointed by Judge Roberts to look into the matter. Judge Roberts found that the Public Defender's Office should continue to represent the Defendant, and that ruling was later affirmed by Judge Durrance. (EH, V2/229). Mr Dimmig: clearly made a reasonable tactical decision not to depose Cambell [sic] or Lewis, out of concern that there was a risk that information could be developed that would invalidate the timeline and excluded them as possible perpetrators of the homicide. The Court finds that the Defendant has not shown any deficiency by counsel with regard to Claim 1-3 of his Motion. Additionally, the Court finds that the Defendant had not presented evidence that would support a conclusion that the results of the proceedings might have been different but for some deficiency by counsel with regard to a claim of conflict of interest. Claim 1-3 of the Defendant's Motion is denied.

1-4: TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE JUROR WILSON FOR CAUSE, AFTER JUROR WILSON INDICATED THAT HE WOULD NOT HOLD THE STATE TO THE BURDEN OF PROOF AND WOULD NOT PRESUME MR. POOLE INNOCENT UNLESS

PROVEN GUILTY, THEREBY VIOLATING MR. POOLE'S RIGHT TO TRIAL BY AN IMPARTIAL JURY UNDER THE SIXTH AND FOURTEENTH AMENDEMENTS [sic] TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

The Defendant alleges, "Trial counsel was ineffective for failing to strike Juror Wilson from the jury panel in violation of Mr. Poole's Sixth Amendment right to trial by jury. Mr. Poole was prejudiced by trial counsel's deficient performance, and this Court should grant relief."

In his Motion, the Defendant includes multiple exchanges that took place between Mr. Dimmig and Mr. Wilson during voir dire, and he has emphasized some of the language:

> **Mr. Dimmig**: So he is presumed innocent and to overcome that, Mr. Wilson, where does the burden of proof lie?
>
> **Prospective Juror Wilson**: I believe it belongs with both sides
>
> [...]
>
> **Mr. Dimmig**: If he starts presumed innocent, he is an innocent man. And if the state does not convince you to the exclusion of and beyond all reasonable

doubt that he is guilty, they don't carry their burden of proof, what must he still be?

Prospective Juror Pearce: Innocent.

[...]

Mr. Dimmig: Okay. Mr. Wilson, how about you, mentally you can say that's the way things work, right?

Prospective Juror Wilson: Like I said, I have never done this, so I can't really tell you. But I would assume it goes in my mind right, my gut, if my gut said it was wrong, but I don't know. I have never been here, you know.

Mr. Dimmig: Okay, Well, let me ask you this. Does that made [sic] sense to you, if you start with the presumption of innocence, you told us you accept that and you believe that in your head you think that's right, if you start with the presumption of innocence, right?

Prospective Juror Wilson: Yeah.

Mr. Dimmig: And in your head you understand the burden of proof lies with state?

Prospective Juror Wilson: Correct.

Mr. Dimmig: So if you see how those two come together?

Prospective Juror Wilson: (nods head.)

Mr. Dimmig: If we start with the presumption of innocence and the state doesn't prove beyond a reasonable doubt and to the exclusion of all reasonable doubt, where you're left is innocence? I mean mentally does that make sense to you?

Prospective Juror Wilson: Yeah, it looks good that way. But then, you know, I have not gotten there yet.

Mr. Dimmig: I'm not talking about where you're going to be at the end.

Prospective Juror Wilson: Oh.

Mr. Dimmig: I'm just talking about concepts.

Prospective Juror Wilson: Yeah. The concepts - I mean every concept is great. There is [sic] always laws. There is always good points, bad points. But I can't say, I have not been there yet.

ROA, Volume XV, Pgs. 1607-1610.

Mr. Dimmig: That burden lies with the state. They have to go to get all the way there, and the way you judge whether or not they get all the way there is by looking at everything, the direction, the physical evidence and the cross-examination. And in some cases, the defense case, if you the defense [sic] calls witnesses. You look at all of it. But what you're deciding is, did the state ever get

there, not did the defense prove innocence. Does that make sense? […]

Mr. Dimmig: Okay. Mr. Wilson, how do you feel about that?

Prospective Juror Wilson: Well, if I weigh everything and I feel he is guilty, then he is guilty. But if he is innocent, then he will be let free.

Mr. Dimmig: And what if you just don't know?

Prospective Juror Wilson: I think that somehow my God will let me know in my mind or in my gut, or wherever it comes from, but I will know you know before the end of this trial. **But I think that there won't be a doubt one way or the other.**

ROA, Volume XV, Pgs. 1613-1618 (emphasis added).

Mr. Dimmig: [...] And let's see, you have heard a circumstantial case. And when it is all done, you say I can put these circumstances together this way. A perfectly reasonable way of putting them together and that means they're guilty. But I can also put them together this way. I can look at it differently, but the same exact facts and that means he didn't do it, that means he is innocent. Which way do you go?

[...]

Prospective Juror Wilson: Whichever – if he is proven more innocent, that's the way I would go. But if he is proven guilty, then he is guilty.

Mr. Dimmig: Okay. So you're going to weigh them if I'm understanding.

Prospective Juror Wilson: (Nods head.)

Mr. Dimmig: This explanation is more reasonable to me that [sic] this one, so I'm going with this one. Is that what you're saying?

Prospective Juror Wilson: Yes.

Mr. Dimmig: How does that tie in with the presumption of innocence?

Prospective Juror Wilson: Well, innocence is middle ground to me. And I guess I deal with facts. And the more facts that I get and information that I get, the more weight it would carry whether it was good or bad. I think I have a good sense, you know, judging whether something is good or bad. I don't know any other way of putting it, but I guess I use my common sense.

ROA, Volume XV, Pgs. 1622-1623.

[...]

Mr. Dimmig: Okay. Mr. Wilson, I believe, and correct me if I'm wrong here, said that he would sort of weigh them. He would take the construction that

indicates guilt and the construction which indicates innocence and whichever one he thought was more likely, is that right?

Prospective Juror Wilson: Right.

ROA, Volume XV, Pg. 1631.

[...]

Mr. Dimmig: But if you start with the presumption of innocence and the burden is on the State or Florida to prove to the exclusion of and beyond all reasonable doubt that the defendant is the one who did it, if there is a reasonable construction of circumstances that says he is innocent, what have you got there?

Prospective Juror Wilson: He is innocent.

[…]

Mr. Dimmig: Mr. Wilson.

Prospective Juror Wilson: Yes, sir.

Mr. Dimmig: Okay. Now, we have come to a point different from what you first indicated. I think haven't we?

Prospective Juror Wilson: Yes. You have shown me a little bit different way of looking at it. And I mean, if that's the way it is, then it would have to be there wouldn't be any really judging, because the facts would prove out that he would be innocent.

[...]

Mr. Dimmig: For purposes of discussion, we will put that down here (indicating) where we have to get is up here, proof to the exclusion of and beyond all reasonable doubt. If you don't have proof that to the exclusion of and beyond a reasonable doubt, if you end up here in here somewhere (indicating). What is this in here? This is when you're putting on the evidence right?

[...]

Mr. Dimmig: You know, you start with the presumption of innocence. And some pieces of evidence comes in and you say, well, that's a look little bad, that looks a little worse, but you haven't gotten all the way up here yet to proof beyond and to the exclusion of all reasonable doubt. What is all of this in here in legal terms?

Prospective Juror Pearce: It is doubt.

Mr. Dimmig: What kind of doubt is it?

Prospective Juror Pearce: It is reasonable doubt.

[...]

Mr. Dimmig: Mr. Wilson, how about you, do you understand it?

Prospective Juror Wilson: I'm not going to say gut anymore. I don't think, I believe it is a good way of looking at it.

> And once again, I will strive – I have not come to this point and I can't tell you one hundred percent that I would think that way or with my gut, but I would, I mean, love to believe that I would weigh everything that comes in. And if there is reasonable doubt, then I have to vote innocent.
>
> ROA, Volume XV, Pg. 1633-34.

At the evidentiary hearing, the defense asked Mr. Dimmig if he thought his questioning had corrected the misconception that Mr. Wilson had regarding the burden of proof. Mr. Dimmig responded, "Yes. I thought that he understood what the burden of proof was, that his difficulty was in trying - - he was in - - my perception was that the was interpreting the questions as saying right then during voir dire did he have a reasonable doubt or didn't he have a reasonable doubt. He was trying to project forward in the case instead of addressing the issue at - - relevant to the time we were doing the voir dire." (EH, VI/145).

Mr. Dimmig was asked about why he did not do a cause challenge regarding keeping Mr. Wilson on the jury. He responded, "I did not think his responses rose to the level where a challenge for cause would be granted. So I believe his understanding was adequate to get past a cause challenge and then it became a balancing question of him versus the other jurors that were available." (EH, V1/149 - 150).

The Court does not find that counsel's performance fell below an objective standard of reasonableness with regard to not challenging Juror Wilson For Cause. He actively questioned Mr. Wilson

regarding his ability to properly consider the burden of proof and the presumption of innocence, and he made a reasoned decision that any attempt to exclude Mr. Wilson for cause would have been rejected by the Court on the basis that Mr. Wilson's answers indicated that he would follow the law. Additionally, the Court does not find that the Defendant can show any prejudice. To establish prejudice in this matter, the Defendant would have to show that an actually biased juror served on the jury. See Carratelli v. State. 961 So. 2d 312 (Fla. 2007). The Defendant did not present any evidence showing any actual bias by juror Wilson. The State's case against the Defendant was a strong one, and there is no reasonable showing that the results of the proceedings might have been different but for some deficiency of counsel with regard to Juror Wilson. Subclaim 1-4 of the Defendant's Motion is denied.

1-5: TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT AND MOVE FOR MISTRIAL ON MULTIPLE OCCASIONS WHEN PREJUDICIAL HEARSAY TESTIMONY AND OTHER INADMISSIBLE TESTIMONY AND EVIDENCE WAS ELICITED BY THE STATE, ANDTHIS [sic] HEARSAY EVIDENCE VIOLATED MR. POOLE'S SIXTH AMENDMENT CONFRONTATION RIGHT UNDER *CRAWFORD*.

The Defendant alleges, "Trial counsel failed on multiple occasions to object to improper hearsay evidence. This deficient performance prejudiced Mr. Poole, and this Court should grant Mr. Poole relief."

The First instance raised by the Defendant involves some testimony from Ms. Arlt., [sic] a crime scene technician for the Lakeland Police Department. In his Motion, the Defendant alleges, "[t]he State's theory of the case included an assertion that three video game systems were stolen during the crime, that these video games had the victims' blood on them, and that Mr. Poole sold the video games to Ventura Rico in the presence of Melissa Nixon." The following testimony came from Ms. Arlt when she was asked where the video game systems were seized from:

> **Ms. Arlt**: These items were seized from – an officer collect the from the residents of the Twelve Oaks Moblie [sic] Home Park across the street from Mr. Poole's home.
>
> **Mr. Aguero**: Why were you taking pictures of them at this point.
>
> **Ms. Arit [sic]**: They had blood on them, and that was obvious to the people that phoned in that they had these games for evidence.
>
> ROA, Vol. XVII, Pg. 2107.

The Defendant alleges in his Motion, "This exchange contained multiple instances of inadmissible prejudicial hearsay. Without calling the people who actually witnessed these events, the State elicited where the video game systems were recovered, that his

location was across the street from the Mr. Poole's residence, that someone had phoned in that they had this evidence, and that the video games were obviously covered in blood."

At the evidentiary hearing, Mr. Dimmig was asked about a series of video games that Mr. Poole was alleged to have taken from the crime scene and sold to Ventura Rico. Mr. Dimmig agreed that there was DNA evidence on the video games that was identified by Dr. Robyn Ragsdale of FDLE. Mr. Dimmig said he did not believe there was any question that there was blood on the video games and it would be coming into evidence. Mr. Dimmig acknowledged that his recollection was that Ms. Arlt had been a crime scene technician for a long time and had taken the photos herself. He agreed that he was aware of her qualifications. He agreed that she probably could have been qualified as an expert at recognizing blood on the evidence. The following exchange took place between the Prosecutor, Victoria Avalon, Esq., and Mr. Dimming about the matter:

> Ms. Avalon – And did you particularly want Mr. Aguero to exhaustively qualify Ms. Arlt as being an expert witness as to the identification of a substance similar or looking like blood?
>
> Mr. Dimmig: No, I didn't. I didn't want to very aggressively challenge things that I believed were going to be coming into evidence on counts that I anticipated we would likely end up having to concede.

(EH, V2/244).

Ms. Avalon and Mr. Dimmig also discussed the fact that Ms. Arlt mentioned that the video games were collected from a house adjacent to Mr. Poole's house. Mr. Dimmig acknowledged that he thought at least one witness gave the address of Mr. Poole's house, and he was shown a portion of the trial transcript on page 2526 where Pamela Johnson gave the Defendant's address as 3328 North Florida Avenue. Mr. Dimmig also agreed that Mr. Rico described where he lived. Mr. Dimmig agreed that the information provided by Ms. Arlt came in later from other witnesses and there was no harm from his perspective. (EH, V2/246).

The Second instance identified by the Defendant in his Motion came during the testimony of State Witness Karen Gaugh, who was called to testify that her boyfriend's daughter told her that, "One of her friends said that this black man came to her house with a video system with blood on it." (ROA, Vol. XIX, Pg. 2334). The Defendant asserts in his Motion, "[a]t this point, the jury had now heard testimony from two separate witnesses about a "black guy" selling bloody video games "across the street from Mr. Poole's home," without having heard from a single witness who actually had any personal knowledge of the events." In the State's closing argument, the State alleges that the statement of Ms. Gaugh "was relevant to show how the police got involved and who they went to next. That caused the police to go to Mr. Rico's house. The fact these games were recovered and had blood on them was not something the defense was disputing. (TR. 248)."

The third instance raised by the Defendant in his Motion, concerns testimony from Mary Beth Byrie,

who was tendered as an expert witness by the State in the field of footware examination. She testified that a shoe impression on a vinyl notebook at the crime scene was a conclusive match to a shoe that was recovered from the home of the Defendant. She further testified, "Whenever an identification is made, we have to have another independent analyst review the work and confirm or not confirm the identification. In this case the other analyst did confirm the identification." (ROA, Vol. XX, Pg. 2512).

The following discussion took place at the evidentiary hearing regarding a confrontation clause objection under Crawford:

> Ms. Avalon: Okay. Now, let's say that you actually raised a confrontation clause objection to this or whatever under Crawford. You potentially could have. Correct?
>
> Mr. Dimmig: I believe I could have, yes.
>
> Ms. Avalon: And could then Mr. Aguero have produced the supervising analyst?
>
> Mr. Dimmig: Assuming she was still available, yes, he could have.
>
> Ms. Avalon: And then you've got two analysts testifying to these results. Do you particularly want that?
>
> Mr. Dimmig: No.
>
> Ms. Avalon: Beating that point into the ground?
>
> Mr. Dimmig: Well, again, this was not a point we were seriously contesting.

> Ms. Avalon: Right. It's one of those things - - Let me ask you this. Do you - - do you want to fight about things just to fight about them?
>
> Mr. Dimmig: No.
>
> Ms. Avalon: You try to save the fight for what matters.
>
> Mr. Dimmg: I think that's critical to maintain credibility with the jury.
>
> Ms. Avalon: And you were considering that as things were rolling in front of you. Right?
>
> Mr. Dimmig: Yes.
>
> Ms. Avalon: Including this point. Right?
>
> Mr. Dimmig: Yes.

(EH. V2/249-250).

The Fourth instance raised by the Defendant involves testimony given by Melissa Nixon. The Defendant notes that the parties stipulated that a video tape of the deposition of Ms. Nixon could be played to the jury. Ms. Nixon identified Mr. Poole from a photopack as the person she witnessed sell video game systems to her friend Ventura Rico. Ms. Nixon also testified," My son was look through the bag to see which one he wanted. But then he found one, he said blood was on it, and he threw it on the ground." (ROA Vol. XX, Pg. 2597).

The Fifth and Sixth instances identified by the Defendant concerned hearsay that came out during trial testimony from Detective Bradley Grice, who was

the lead Detective in the case. The Defendant alleges the defense had presented a theory of defense that revolved around Trevor Campbell and/or Albert Lewis committing the crime. The Defendant alleges, " During his direct examination, the prosecutor asked Detective Grice, "Did you find out where Mr. Lewis was up until about 3:00 or 4:00 in the morning on October 13th of 2001?" (ROA, Vol. XX, Pg. 2649). The Defendant asserts, "This question clearly called for a hearsay response, which Detective Grice provided, stating that Mr. Lewis had been in the Polk County Jail. This was clearly hearsay evidence even though the actual hearsay statement was not repeated, because the statement gave an inescapable inference that a non-testifying witness had provided Detective Grice information which negated Mr. Poole's theory of defense." The State asserts that the Detective's statements were not testimonial in nature and relayed easily verified background facts. The State further notes that Mr. Dimmig during cross-examination of Detective Grice also elicited that Campbell was released from jail on Friday night October 12, and Gary Burton was the person that was asked to pick him up in Bartow. (V19/2382).

The State also alleges, "[i]n addition, in cross-examining victim (L.W.), defense counsel asked (L.W.) if detectives had told her that Lewis has only been released from jail at 4:00 in the morning." (V19/2447). Counsel was not ineffective for failing to lodge an objection where Poole has not cast any doubt on when Lewis was actually released from jail." Mr. Dimmig was also aware that the State could have called the custodian of the jail as a witness to introduce the information if it was necessary.

The next instance concerned a photopack that had been administered to Ventura Rico. The prosecutor asked Detective Grice about the photopack and he indicated that Mr. Rico had selected two photographs that looked like this person that sold him the video games, and that one of those photos was Mr. Poole. The Defendant argues that the statement by Mr. Rico did not fall into the exception for the hearsay rule involving identification. The State points out that Mr. Rico was called as a witness by the State and defense counsel cross-examined him about his out of court identification of Poole. Mr. Rico acknowledged that he was shown 15 pictures and picked out two of them. See ROA, V18/2228. Because Mr. Rico testified at trial and was subject to cross-examination there is no confrontation clause violation.

The Defendant has not shown that counsel's performance fell below an objective standard of reasonableness in not objecting to the hearsay instances he sets forth in his Motion. Defense counsel was aware that other witnesses would be providing the same information, had no dispute with the information elicited, or thought it appropriate not to give even more emphasis to the information by having the State call another witness to support it. Additionally, the Court finds no reasonable basis to conclude that the outcome of the proceedings might have been different but for some deficiency of counsel with regard to the hearsay incidents set forth in Subclaim 1-5 of the Defendant's Motion. Subclaim 1-5 of the Defendant's Motion is denied.

The Court having denied subclaims 1-1, 1-2, 1-3, 1-4, and 1-5, denies Claim 1 of the Defendant's Motion. Given the strong evidence presented by the State,

there is no reasonable basis to conclude that the result of the proceedings could have turned out differently but for any deficiency with regard to any or all of the subclaims under Claim 1. Claim 1 of the Defendants Motion is denied.

CLAIM 2

MARK POOLE WAS DEPRIVED OF HIS RIGHT TO A RELIABLE ADVERSARIAL TESTING DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF MARK POOLE'S FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITEDSTATES [sic] CONSTITUTION AND HIS CORRESPONDING RIGHTS UNDER THE DECLARATION OF RIGHTS OF THE FLORIDA CONSTITUTION AND UNDER FLORIDA COMMON LAW.

2-1: TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO FULLY INVESTIGATE AND PRESENT A COMPLETE MITIGATION CASE.

The Defendant alleges, "Trial counsel was ineffective for failing to fully investigate and present mitigating evidence. This deficient performance prejudiced Mr. Poole, and he should be granted a new sentencing hearing."

2-1.1: Failure To Fully Investigate and Present Evidence of Mr. Poole's Upbringing and Familial History.

The Defendant alleges, "Trial counsel's was deficient in failing to fully investigate Mr. Poole's upbringing and familial history. This deficient performance prejudiced Mr. Poole and he should be granted relief."

2-1.2: Trial Counsel Was Ineffective for Failing to Present Testimony of a Neuropsychologist, or Other Qualified Expert, Regarding Mr. Poole's Documented Brain Damage And Dementia.

The Defendant alleges, "Trial counsel's was deficient in failing to present the testimony of a neuropsychologist to the jury. This deficient performance prejudiced Mr. Poole as he would have likely been given a life sentence if this crucial mitigating evidence had been presented to the jury."

2-1.3: Trial Counsel was Ineffective for Failing to Have a PET Scan of Mr. Poole Conducted, and for Failing to Present the Results of the PET Scan to Show the Highly Mitigating Fact That Mr. Poole Suffered From Brain Damage Which Seriously Disabled His Ability to

Conform His Behavior To The Requirements of Law.

The Defendant alleges, "In addition to being ineffective for failing to call a neuropsychologist to testify before the sentencing jury regarding Mr. Poole's brain damage and dementia, trial counsel was additionally ineffective for failing to have a PET brain scan conducted, and to present the results of such a scan to the sentencing jury. Trial counsel had a duty to investigate and present a complete mitigation case."

2-2: TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT AND MOVE FOR MISTRIAL WHEN THE PROSECUTOR COMMITTED PROSECUTORIAL MISCONDUCT AND MISTATED [sic] THE LAW ON SEVERAL OCCASIONS DURING HIS PENALTY PHASE CLOSING ARGUMENT.

The Defendant alleges, "The prosecutor in this case made several statements during his penalty phase closing argument that constituted prosecutorial misconduct and misstated the law regarding aggravating circumstances and the death penalty in Florida. Trial counsel failed to object to all but one of these statements. These failures, individually and collectively, constituted deficient performance by trial counsel, and prejudiced Mr. Poole in this case."

2-3: TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO AND MOVE TO

EXCLUDE IMPROPER VICTIM IMPACT TESTIMONY.

The Defendant alleges, "Trial counsel in this case was ineffective for not only failing to object to improper victim impact evidence, but to actually stipulating as to its admissibility."

Claim 2 was not considered at the evidentiary hearing, because the Court had already determined that Claim 3 would be **GRANTED** to the extent that the Defendant was entitled to a new penalty phase trial in the Court's "Interim Order On Motion To Vacate Judgment Of Conviction And Sentence," filed on March 31, 2017. The Court makes no determination at this time regarding Claim 2 and the subclaims raised in Claim 2.

CLAIM 3

IN LIGHT OF *HURST V. FLORIDA, HURST V. STATE, RING, AND APPRENDI*, MR. POOLE'S DEATH SENTENCE VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDEMENTS [SIC] OF THE UNITED STATES CONSTITUTION, THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND ARTICLE I, SECTIONS 15, 16, AND 22 OF THE FLORIDA CONSTITUTION.

3-1: MR. POOLE'S DEATH SENTENCE SHOULD BE VACATED BECAUSE IT IS

UNCONSTITUTIONAL BASED ON *HURST V. FLORIDA AND HURST V STATE*, PRIOR PRECEDENT AND SUBSEQUENT DEVELOPMENTS BECAUSE MR. POOLE WAS DENIED HIS RIGHT TO A JURY TRIAL ON THE FACTS THAT LED TO HIS DEATH SENTENCE.

3-2: THIS COURT SHOULD VACATE MR. POOLE'S DEATH SENTENCE BECAUSE, IN LIGHT OF *HURST V. FLORIDA AND HURST V. STATE*, AND SUBSEQUENT CASES, MR. POOLE'S DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT BECAUSE HIS DEATH SENTENCE WAS CONTRARY TO EVOLVING STANDARDS OF DECENCY AND IS ARBITRARY AND CAPRICIOUS.

3-3: THIS COURT SHOULD VACATE MR. POOLE'S DEATH SENTENCE BECAUSE THE FACT-FINDING THAT SUBJECTED MR. POOLE TO THE DEATH [sic] WAS NOT PROVEN BEYOND A REASONABLE DOUBT.

3-4: IN LIGHT OF *HURST V. FLORIDA AND HURST V. STATE*, MR. POOLE'S DEATH SENTENCE SHOULD BE VACATED BECAUSE IT WAS OBTAINED IN VIOLATION OF THE FLORIDA CONSTITUTION.

3-5: *HURST V. FLORIDA AND HURST V. STATE* APPLY RETROACTIVELY IN MR. POOLE'S CASE.

3-6: THE *HURST V. FLORIDA AND HURST V. STATE* ERROR IN MR. POOLE'S CASE WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

In the Court's "Interim Order On Motion to Vacate Judgment of Conviction And Sentence," filed on March 31, 2017, the Court ruled," Claim 3 of the 'Defendant's Amended Claim 3 to Vacate Judgment of Conviction and Sentence is **GRANTED** to the extent that he is entitled to a new penalty phase trial. The Court adopts by reference this ruling in the "Interim Order On Motion to Vacate Judgment of Conviction And Sentence."

CLAIM 4

CUMULATIVE ERROR

The Defendant alleges, "[i]f not individually, the sum total of all of the aforementioned constitutional errors warrants relief in this case." The Court considered this claim with regard to the various errors alleged by the Defendant with regard to the Guilt

Phase of the Trial. The Court did not find that counsel's performance fell below an objective standard of reasonableness with regard to Claim 1 and any of the subclaims made by the Defendant with regard to Claim 1 of his Motion. Any deficiency by counsel with regard to any of the claims and subsclaims [sic] asserted by the Defendant when combined could not reasonably be viewed as affecting the fairness and reliability of the proceedings and the outcome of the trial. Claim 4 of the Defendant's Amended Motion is denied with respect to the Guilt phase claims. The Court makes no determination at this time regarding cumulative error and penalty phase claims raised by the Defendant.

Therefore, it is **ORDERED AND ADJUDGED** that the Defendant's Motion To Vacate Judgment and Sentence is **DENIED** with respect to his Claims that he is entitled to a new guilt phase trial. It is further, **ORDERED AND ADJUDGED** that the Defendant's Motion To Vacate Judgment and Sentence is **GRANTED** to the extent that he is entitled to a new penalty phase trial based on Claim 3 of his Motion To Vacate Judgment and Sentence. The Defendant has thirty (30) days to appeal this Order to the Florida Supreme Court.

DONE AND ORDERED in Bartow, Polk County, Florida this 9th day of January, 2018.

s/ Jalal A. Harb
JALAL A. HARB,
Circuit Judge

cc:
Mark Poole, #H12548 Gregory Brown, Esq.

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I CERTIFY the foregoing is a true copy of the original as it appears on file in the office of the Clerk of the Circuit Court of Polk County, Florida, and that I have furnished copies of this order and its attachments to the above-listed on this 10 day of January 2018.

CLERK OF THE CIRCUIT COURT

By: s/
Deputy Clerk

Supreme Court of Florida

THURSDAY, APRIL 2, 2020

CASE NO.: SC18-245
Lower Tribunal No(s).:
532001CF007078A0XXXX

STATE OF FLORIDA	vs.	MARK ANTHONY POOLE
Appellant/Cross-Appellee		Appellee/Cross-Appellant

On February 7, 2020, Poole filed a Motion for Rehearing and Clarification. We deny rehearing but grant clarification of this Court's instructions on remand. Remand for "proceedings consistent with this opinion" may include resolution of Poole's remaining penalty-phase claims that were raised in his postconviction motion but not addressed on the merits by the trial court in its order.

CANADY, C.J., and POLSTON, LAWSON, and MUÑIZ, JJ., concur.
LABARGA, J., concurs in part and dissents in part with an opinion.

LABARGA, J., concurring in part and dissenting in part.

I concur in the majority's decision to clarify that on remand, Poole is entitled to the resolution of penalty phase claims raised in his postconviction motion that were not decided given this Court's decision in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016),

receded from in part by State v. Poole, 45 Fla. L. Weekly S41 (Fla. Jan. 23, 2020).

However, I remain firmly committed to my dissent in *Poole*, and to my position that the opinion was wrongly decided. I would grant rehearing, and I dissent to the majority's decision to deny rehearing in this case.

s/_____
John A. Tomasino
Clerk, Supreme Court

so
Served:

JAMES L. DRISCOLL JR.
PARVIN D. MOYNE
Z.W. JULIUS CHEN
MARK J. MACDOUGALL
RACHEL P. ROEBUCK
SCOTT A. BROWNE
DAVID DIXON HENDRY
HON. STACY M. BUTTERFIELD, CLERK
HON. JALAL A. HARB, JUDGE
VICTORIA AVALON

United States Constitution

Amendment VI. Jury trials for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

United States Constitution

Amendment VIII. Excessive Bail, Fines, Punishments

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Florida Statutes

Title XLVI. Crimes (Chapters 775-899)

Chapter 775. General Penalties; Registration of Criminals

§ 775.082. Penalties; applicability of sentencing structures; mandatory minimum sentences for certain reoffenders previously released from prison

Effective: July 1, 2011 to July 30, 2014

(1) A person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in § 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole.

***

Florida Statutes

Title XLVII. Criminal Procedure and Corrections (Chapters 900-999)

Chapter 921. Sentence

§ 921.141. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence

Effective: October 1, 2010 to March 6, 2016

(1) Separate proceedings on issue of penalty.— Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by § 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or

mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or the defendant's counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
>
> (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
>
> (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) Findings in support of sentence of death.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life

imprisonment or death, but if 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.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with § 775.082.

(4) Review of judgment and sentence.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida and disposition rendered within 2 years after the filing of a notice of appeal. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any: robbery; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary; kidnapping; aircraft piracy; or unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(*i*) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(j) The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties.

(k) The victim of the capital felony was an elected or appointed public official engaged in the performance of his or her official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity.

(*l*) The victim of the capital felony was a person less than 12 years of age.

(m) The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.

(n) The capital felony was committed by a criminal gang member, as defined in § 874.03.

(*o*) The capital felony was committed by a person designated as a sexual predator pursuant to § 775.21 or a person previously designated as a sexual predator who had the sexual predator designation removed.

(p) The capital felony was committed by a person subject to an injunction issued pursuant to § 741.30 or § 784.046, or a foreign protection order accorded full faith and credit pursuant to § 741.315, and was committed against the petitioner who obtained the injunction or protection order or any spouse, child, sibling, or parent of the petitioner.

(6) Mitigating circumstances.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

(h) The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.

(7) Victim impact evidence.—Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence to the jury. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

(8) Applicability.—This section does not apply to a person convicted or adjudicated guilty of a capital drug trafficking felony under § 893.135.