No. 20-250

In The
Supreme Court of the United States

MARK ANTHONY POOLE,

Petitioner,

v.

STATE OF FLORIDA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

CONSTITUTION & STATUTES:

OTHER AUTHORITY:

The State cannot explain away this Court's Sixth Amendment holding in *Hurst v. Florida* (*Hurst I*), 136 S. Ct. 616 (2016), which identifies "weighing" as a factual finding necessary to impose the death penalty under Florida's pre-2016 capital-sentencing scheme. Nor can the State stretch this Court's Eighth Amendment jurisprudence to defeat a clear national consensus against death sentences that are unsupported by unanimous jury recommendations—and that in many cases (like this one) rest solely on guilt-phase jury verdicts rendered without any appreciation for capital-sentencing ramifications. Poole (and others) should be afforded the same constitutional protections that prompted vacatur of approximately 150 death sentences under *Hurst v. State* (*Hurst II*), 202 So. 3d 40 (Fla. 2016) (per curiam). Accordingly, this Court should grant review (or summarily reverse).

I. THE STATE CANNOT AVOID *HURST I*

The State's insistence that the Sixth Amendment does not reach Florida's statutory weighing finding flows from its misreading of *Hurst I*. None of the State's arguments justifies its refusal to take this Court at its word.

1. *Hurst I* holds unequivocally that a Florida defendant could not be sentenced to death absent a "finding" as to "the fact[] *** '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'" 136 S. Ct. at 622 (second alteration in original) (quoting FLA. STAT. § 921.141(3)(b) (2010)); *see* Pet. 15-17, 21. That holding is anything but "stitch[ed] together," "manufacture[d]," or merely "descriptive." BIO 16-17.

The State suggests that *Hurst I* never connects the Florida capital-sentencing weighing requirement to "the general principle that '[t]he Sixth Amendment requires a jury, not a judge, to find each *fact* necessary to impose a sentence of death.'" BIO 17 (alteration in original). But the Court's discussion of the weighing requirement begins with that very principle: "Florida concedes that *Ring* required a jury to find every fact necessary to render Hurst eligible for the death penalty." 136 S. Ct. at 622.

As this Court explained, the State could not insulate Florida's capital-sentencing scheme from *Ring* on the ground "that when Hurst's sentencing jury recommended a death sentence, it 'necessarily included a finding of an aggravating circumstance.'" 136 S. Ct. at 622. That is because Florida law required two findings—one being weighing—without which a defendant shall be ineligible for the death penalty and must receive a life sentence:

> As described above and by the Florida Supreme Court, 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." Fla. Stat. § 775.082(1) (emphasis added). The trial court *alone* must find "the facts *** [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." § 921.141(3)[.]

Id. (alterations except last and ellipsis in original). Returning to the general Sixth Amendment principle, the Court concluded by rejecting the State's

"treat[ment] [of] the advisory recommendation by the jury as the necessary factual finding that *Ring* requires"—*i.e.*, necessary to impose a death sentence. *Id.*

Accordingly, *Hurst I* "by its terms" and "[o]n its face" *does* "say that, under the Sixth Amendment, [the weighing] finding must be made by a jury." BIO 3, 17. Although the State would dismiss the Court's quotation of section 921.141(3)(b) as a stray reference that can be read out of the decision, even the Florida Supreme Court accepted that "[w]hen th[is] *** 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)," which "requires two findings." Pet. App. 26a-27a (quoting 136 S. Ct. at 622); *see* Pet. 10-11, 20-21.

The State cannot overcome that clear holding by parsing (BIO 14-15) the *Hurst I* briefs and oral argument. In the end, this Court's decision uses section 921.141(3)(b) to dispatch the State's argument under *Ring*.

Nor can the State rely (BIO 15-16) on the part of *Hurst I* that overrules *Spaziano v. Florida*, 468 U.S. 447 (1984), and *Hildwin v. Florida*, 490 U.S. 638 (1989) (per curiam), "to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty." 136 S. Ct. at 624. Those cases did not pass judgment on the weighing finding, which explains why the State points repeatedly to *Spaziano*'s summary of the trial court's sentencing findings. BIO 16. Indeed, in reaffirming *Spaziano*, *Hildwin* states that "[t]his case presents

[the Court] *once again* with the question whether the Sixth Amendment requires a jury to specify the *aggravating factors* that permit the imposition of capital punishment in Florida," 490 U.S. at 638 (emphases added), and makes no mention of weighing.

2. *McKinney v. Arizona*, 140 S. Ct. 702 (2020), cannot save the decision below. According to the State, "*McKinney* confirms" that "*Hurst* did not 'strik[e] down' Florida's pre-2016 scheme on the ground that it tasked the trial court with determining whether mitigators outweigh aggravators." BIO 20 (alteration in original). But it is difficult to see how *McKinney* did so when all agree that only *Hurst I* "assessed Florida's pre-2016 statutory scheme." BIO 19.

It is no answer that "*McKinney* interprets *Hurst*." BIO 19. Notably, the State does not deny that *McKinney* could not have *sub silentio* overruled *Hurst I*. *See Thryv, Inc. v. Click-To-Call Techs., LP*, 140 S. Ct. 1367, 1376 n.8 (2020) ("We do not so lightly treat our determinations as dicta and our decisions as overruling others *sub silentio*."). Those precedents can easily be read together: *McKinney* observes that *Hurst I*, while deeming the weighing step a specific death-eligibility finding in Florida's statutory scheme, does "not require" it to be so as a categorical matter in every scheme. 140 S. Ct. at 707-708; *see* Pet. 24. Yet rather than reconcile *McKinney* with *Hurst I*, the State "assumes [*Hurst I*] did not mean what it said." BIO 19-20. Such reasoning underscores that the dispositive question in this case is what *Hurst I* holds about *Florida's* capital-sentencing scheme, not what *McKinney* might mean for other schemes.

The State's expansion of *McKinney* beyond its self-described "narrow" framing, 140 S. Ct. at 706, is equally unavailing. Regardless of whether *Hurst I* stops short of "prohibit[ing] appellate reweighing of aggravating and mitigating circumstances," BIO 20-21, what matters here is that *Hurst I* holds that a *Florida* trial court could not impose a death sentence absent a weighing finding by the jury.

3. Clarifying that *Hurst I* means what it said for Florida law would not require any "expansion of the *Apprendi* doctrine," much less a wholesale change in capital-sentencing precepts. BIO 21-22. That is the lesson of *Rauf v. Delaware*, which determined that a jury must make the weighing finding because, as in Florida, Delaware law "plainly require[d]" the "specific finding" on weighing "be made before a death sentence can be issued." 145 A.3d 430, 464 (Del. 2016) (Strine, C.J., joined by Holland and Seitz, JJ.). That result followed directly from *Apprendi*, not any broad pronouncement on weighing attributable to *Hurst I*.

The State warns (BIO 21) that if Poole prevails, federal sentencing considerations used outside the death-penalty context would need to be found by a jury. That comparison, which glosses over the specifics of the statutory schemes, is inapt. Unlike in Florida, where a convicted capital defendant was not "eligible for death until 'findings *by the court* that such person shall be punished by death'" were made, *Hurst I*, 136 S. Ct. at 622, in the federal system a non-capital defendant's conviction permits a district court to impose the sentence "prescribed by statute," *Apprendi v. New Jersey*, 530 U.S. 466, 481-483 (2000).

The State also cautions that strict lines must be preserved between purely factual determinations and "weighing and other normative judgments." BIO 21-23. But the State offers no response to the "artificial" and "elusive" nature of that line-drawing exercise, as demonstrated by the (supposedly) "objectively verifiable" finding that a murder was "*especially* heinous, atrocious, and cruel" beyond a reasonable doubt. Pet. 22-23. Likewise, the State conspicuously mounts no defense of the Florida Supreme Court's use of "eligibility" and "selection" labels—in contravention of *Apprendi*'s admonition that "[l]abels do not afford an acceptable answer," 530 U.S. at 494 (alteration in original)—to head off the Sixth Amendment. Pet. 25-26.

At bottom, none of the State's alarmist claims—least of all, its bewildering suggestion (BIO 22-23) that reversal here would "threaten to deter valuable reforms and thwart the administration of criminal justice"—can alter the reality that Florida's capital-sentencing scheme made weighing a factual finding necessary to imposition of a death sentence. No more is required to trigger the Sixth Amendment's jury-finding rule, as *Hurst I* already held.

II. THE STATE MISREADS THIS COURT'S EIGHTH AMENDMENT JURISPRUDENCE

The State's defense of the Florida Supreme Court's Eighth Amendment ruling does not obviate the need for this Court's review.

1. a. Resisting the conclusion that the Eighth Amendment requires a unanimous jury recommendation of death, the State relies heavily on *Spaziano*. BIO 26-29. But *Spaziano* did not address

unanimity. As the State's explication of that case confirms, *Spaziano* held only that the Constitution does not mandate "jury sentencing," BIO 29—a limitation that *Hurst II* respects, Pet. 29.

The State takes issue (BIO 29-30) with the distinction between jury sentencing and jury recommendations, positing that if a judge is charged with the ultimate responsibility of imposing the sentence then the jury recommendation lacks significance. That does not follow. "[A] capital sentencing jury representative of a criminal defendant's community assures a diffused impartiality in the jury's task of express[ing] the conscience of the community on the ultimate question of life or death." *McCleskey v. Kemp*, 481 U.S. 279, 310 (1987) (second alteration in original) (citation and internal quotation marks omitted).

No inconsistency arises from tasking a trial court to apply independent sentencing judgment, while also requiring the jury to perform a gatekeeping role. Although the State asserts that it would be anomalous to hold that a trial court can consider death only upon a jury's unanimous recommendation, but can always consider life, the Eighth Amendment is concerned with the cruel and unusual "inflict[ion]" of the death penalty, U.S. CONST. amend. VIII, not its avoidance. The reason a trial court remains "free" (BIO 30) to depart from a jury recommendation of death is that mercy is always an option in capital sentencing. Pet. 31. Demanding that the jury and the trial court both serve as safeguards to the imposition of a death sentence is not only sensible, but also advances the constitutional directive "that the death penalty [be] reserved only for the most culpable defendants

committing the most serious offenses." *Miller v. Alabama*, 567 U.S. 460, 476 (2012).

b. Even assuming *Spaziano* speaks to the constitutionality of nonunanimous jury recommendations, this Court would have good cause to revisit that precedent in view of "the evolving standards of decency that mark the progress of a maturing society." *Moore v. Texas*, 137 S. Ct. 1039, 1048 (2017). *Spaziano*'s survey of the death-penalty landscape in 1984 cannot withstand the marked shifts in norms the State ignores. BIO 27-29.

"The beginning point is a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question." *Roper v. Simmons*, 543 U.S. 551, 564 (2005). In that regard, "Alabama is the only state that permits a judge to impose the death penalty based upon a jury's nonunanimous recommendation of death," Michael L. Radelet & G. Ben Cohen, *The Decline of the Judicial Override,* 15 ANN. REV. L. & SOC. SCI. 539, 549 (2019), not to mention that several states in the past 36 years are deemed to have eschewed that practice by "abandon[ing] the death penalty altogether," *Roper*, 543 U.S. at 574. That current Florida law requires a unanimous jury recommendation of death makes Poole's death sentence more "obsolete," *Moore*, 137 S. Ct. at 1048, not less, BIO 28.

The State's focus (BIO 27) on (outdated) court decisions declining to require a unanimous jury recommendation of death reinforces the steady march in the opposite direction. Arizona and Idaho now require a jury to decide "unanimously whether death

is the appropriate sentence," ARIZ. REV. STAT. § 13-752(H); *see* IDAHO CODE § 19-2515(3)(b) ("The jury shall not direct imposition of a sentence of death unless it *** unanimously determines that the penalty of death should be imposed."). Connecticut has since abolished the death penalty. *State v. Santiago*, 122 A.3d 1, 9-13 (Conn. 2015).

2. The decision below is made all the more indefensible by the effective elimination of the penalty-phase jury's role in many capital cases, including Poole's. Pet. 30-34. The Florida Supreme Court upheld Poole's death sentence despite a nonunanimous jury recommendation because the guilt-phase jury's verdict "satisfied the requirement that a jury unanimously find a statutory aggravating circumstance beyond a reasonable doubt." Pet. App. 39a. But the guilt-phase jury could not have appreciated "the capital-sentencing ramifications of its decision," BIO 31, as required by the Eighth Amendment. *See Caldwell v. Mississippi*, 472 U.S. 320 (1985). In fact, the State does not dispute that, consistent with Florida law, the jury was instructed that the guilt and penalty phases would be separate affairs. Pet. 33-34.

Instead, the State submits that no *Caldwell* violation occurred because, tracking the instruction given to the guilt-phase jury, "a sentencing-phase jury did convene for the purpose of considering punishment." BIO 31-32 (internal quotation marks omitted). That misses the point. Because the sentencing-phase jury's (nonunanimous) recommendation was not used to support the death sentence, its empanelment or understanding of capital-sentencing ramifications is irrelevant.

Conversely, because the guilt-phase jury's verdict was used to support the death sentence, it matters a great deal that the jury was led to believe conviction would not preordain the punishment. That is the definition of "improperly describ[ing] the role assigned to the jury." BIO 31 (quoting *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994)).

The Florida Supreme Court should not be given a free pass because it declined to resolve the obvious tension between the decision below and *Caldwell*. In merits briefing before the Florida Supreme Court, Poole preserved a challenge to the use of his contemporaneous convictions as the requisite aggravating-circumstance finding, and noted that papering over the nonunanimous jury recommendation as harmless risked "minimiz[ing] *** the jury's sense of responsibility." Poole Answer Br. 44 n.10, 48-49 (quoting *Caldwell*, 472 U.S. at 341). When the Florida Supreme Court receded from *Hurst II* in such a manner as to create a square *Caldwell* problem, Poole responded in kind by seeking rehearing. BIO 30.

In any event, the State is wrong to characterize the *Caldwell* issue as a distinct "claim." BIO 26. That line of precedent is available to Poole—and this Court—to explain the unworkability of the decision below and the need for this Court's intervention.

III. THE IMPORTANCE OF THE QUESTIONS PRESENTED IS BEYOND CAVIL

Despite a years-long campaign (culminating in this case) to overturn *Hurst II*, the State now proclaims that the questions presented are unworthy of this Court's review. That position is baseless.

The State's effort to downplay the importance of this case, by suggesting that no death-penalty defendant in Florida would benefit from reversal, not only discounts the reinstatement of Poole's death sentence but defies reality. In particular, the State surmises that the Florida Supreme Court will repudiate (or has already repudiated) *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), and therefore will no longer apply *Hurst* retroactively to death sentences that became final after *Ring*. Tellingly, however, the State's sole support for declaring *Mosley* "discredited precedent" is a single-Justice concurrence predicated entirely on the (flawed) reasoning of the decision below. BIO 33-35 ("[T]he decision below 'dismantled the foundation for the majority's analysis in *Mosley*[.]'") (quoting *Brown v. State*, 304 So. 3d 243, 281 (Fla. 2020) (Canady, C.J., concurring in result)). The State fails to mention, moreover, that the majority in that same case expressly "decline[d] to revisit" *Mosley*. *Brown*, 304 So. 3d at 277 n.16.

To be sure, the Florida Supreme Court recently rebuffed the State's brazen attempts to apply the decision below to "inmates for whom the grant of *Hurst* relief has already become final." BIO 34. But that hardly means "granting review in this case will not impact pending or future capital proceedings in Florida." BIO 33. Although the State faults Poole for not identifying additional defendants who remain eligible for *Hurst* relief (BIO 34-35), presumably the State is aware of pending death-penalty cases in which it defeated a *Hurst* claim based on the "decision to recede from *** requirements imposed by *Hurst [II]*." *Owen v. State*, 304 So. 3d 239, 241-242 (Fla. 2020) (per curiam) (denying relief in post-*Ring* sentence

supported by nonunanimous jury recommendation), *reh'g denied*, No. SC18-810, 2020 WL 6495233 (Fla. Nov. 5, 2020).

At any rate, the fact that numerous defendants have already been granted *Hurst* relief, and have been or will be resentenced under Florida's current law, weighs in favor of granting review, not against it. Pet. 35 & n.5. In striking down Florida's pre-2016 capital-sentencing procedure, this Court determined that the precedents "uph[olding] that procedure against Sixth and Eighth Amendment challenges" (BIO 35) were "not sacrosanct." *Hurst I*, 136 S. Ct. at 623-624. So, too, did the Florida Supreme Court in making *Hurst* retroactive and vacating approximately 150 death sentences that became final after *Ring*, even if rendered in "good faith." *Mosley*, 209 So. 3d at 1278-1281.

There is no reason—prudential or equitable—to condone disparate treatment of identically situated defendants, especially when it comes to life and death. To the contrary, arbitrarily depriving Poole (and others) of the benefit of *Hurst I* and *II*'s sea-change in Florida death-penalty law—based on the happenstance that only one of the members of the *Hurst II* majority remains on the Florida Supreme Court, Pet. 12-13 & n.3—would be the height of inequity.

* * *

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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