No. _____

IN THE

Supreme Court of the United States

ROBIN LEE ARCHER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the Florida Supreme Court

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PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the Florida Supreme Court's statutory construction in *Hurst v. State* constitutes substantive law, and if so, whether the Due Process Clause of the Fourteenth Amendment requires that this substantive law govern the law in existence at the time of Mr. Archer's alleged offense?

2. Whether the Due Process Clause of the Fourteenth Amendment permits *State v. Poole* to retroactively change Florida's substantive law to Mr. Archer's detriment?

3. Whether the Florida Supreme Court's recession from *Hurst v. State* in *Poole* violates the Eighth Amendment as it relates to the jury's role of finding statutorily required facts beyond a reasonable doubt?

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Florida v. Robin Lee Archer, Case No. 1991-CF-606A
Judgment Entered: September 20, 1991

Direct Appeal: Florida Supreme Court, Case No. SC60-7871
Archer v. State, 613 So.2d 446 (Fla. 1993)
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Judgment Entered: April 23, 2020 (affirming)

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Robin Lee Archer, is a condemned prisoner in the State of Florida. Petitioner respectfully requests that this Honorable Court issue a writ of certiorari to review the decision of the Florida Supreme Court.

DECISION BELOW

The Florida Supreme Court's decision appears as *Archer v. State*, 293 So. 3d 455 (Fla. 2020), and is Attachment A to this petition. The circuit court's order, which is not reported, is Attachment B to this petition.

JURISDICTION

The Florida Supreme Court entered its opinion on April 23, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a), with Petitioner having asserted in the state court below and asserting in this Court that the State of Florida has deprived him of rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment provides, in relevant part:

> Excessive bail shall not be required . . . nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides, in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE[1]

I. Introduction

Citing *Ring v. Arizona*, 536 U.S. 584 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court in *Hurst v. Florida*, 136 S. Ct. 616 (2016), concluded that Florida's capital sentencing scheme was unconstitutional. Sections 921.141(2) and (3) of the Florida Statutes provided that before a defendant who has been convicted of a capital felony could be sentenced to death, the sentencing judge had to find as a matter of fact that sufficient aggravating circumstances existed to justify a death sentence and that the aggravating circumstances were not outweighed by the mitigating circumstances. *Hurst v. Florida*, 136 S. Ct. at 620–21. In *Hurst v. Florida*, this Court explained that under Florida's statutes:

> "A person who has been convicted of a capital felony shall be punished by death" only if an additional sentencing proceeding "results in findings by the court that such person shall be punished by death." *Ibid*. "[O]therwise such person shall be punished by life imprisonment and shall be ineligible for parole." *Ibid*.

This Court noted that Florida law, "require[d] a judge to find these facts." *Id*. Accordingly, this Court ruled Florida's capital sentencing scheme violated the Sixth Amendment because it provided for a judge, not a jury, to make the factual findings that were necessary to increase the range of punishment to include death as a sentence. *Id*

[1] Citations to the record below are as follows: AT – record on direct appeal; AR – direct appeal transcripts from second penalty phase; ARR – direct appeal record from second penalty phase.

On remand, the Florida Supreme Court in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), read the plain language of *Hurst v. Florida* and concluded that because statutorily defined facts were necessary to increase the range of punishment to include death as a sentence, proof of those facts was necessary "to essentially convict a defendant of capital murder." *Hurst v. State*, 202 So. 3d at 53. As a result, those facts were essentially elements of a higher degree of murder. *Hurst v. State*, 202 So. 3d at 54 ("we hold that in addition to unanimously finding the existence of any aggravating factor, the jury must also unanimously find that the aggravating factors are sufficient for the imposition of death and unanimously find that the aggravating factors outweigh the mitigation before a sentence of death may be considered by the judge."). As such, those facts had to be proven like all other elements of a criminal offense had to be found by a unanimous jury to have been proven beyond a reasonable doubt. *Id*. at 57 ("the findings necessary for imposition of a death sentence are 'elements' that must be found by a jury, and Florida law has long required that jury verdicts must be unanimous.").

The Florida Supreme Court, in *State v. Poole*, No. SC18-245, 2020 WL 3116597 (Fla. Jan. 23, 2020), receded from its conclusion in *Hurst v. State* that the sufficiency of the aggravating circumstances and whether they outweighed any mitigating circumstances were facts that had to be found proven before a death sentence could be imposed. In *Poole*, the Florida Supreme Court announced that it had been "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." In *Poole*, the court ignored the statutory language and ignored this Court's express language in *Hurst v. Florida.* *Id.* at *11. Instead, *Poole* focused on the holding in *Ring v. Arizona* which addressed the constitutionality of the Arizona statute that differed significantly from Florida's. Under Arizona's statute, the only finding necessary to subject a defendant convicted of first degree murder to a death sentence was the existence of a single aggravating circumstance. *Poole* concluded that because in *Ring* the Sixth Amendment only attached to the finding of one aggravating circumstance, the additional findings mandated by Florida's statute were not subject to the Sixth Amendment right to a jury trial. *Id.* at *10–11; *see Hurst v. State*, 202 So. 3d at 83 (Canady, J., dissenting).

Thus, the Florida Supreme Court in 2016 construed Florida's capital sentence and concluded that the statutorily required findings necessary for the imposition of a death sentence were elements of a higher degree of murder. Then in 2019, that same court held that the statutorily required findings necessary for the imposition of a death sentence were not elements of a higher degree of murder.

Relying on *Poole*, the Florida Supreme Court rejected Petitioner's challenge to his death sentence on the basis of the statutory construction set forth in *Hurst v. State*. *Archer v. State*, 293 So. 3d 455, 456-57 (Fla. 2020) ("there is no *Hurst* violation in Archer's sentence, as his guilt-phase jury found him guilty of the facts that establish the basis for one of the aggravating factors on which the sentencing court relied to determine that he is eligible for the death penalty. *See Poole*, 292 So.3d at 697 (receding 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" and finding no *Hurst* violation where the jury found the defendant guilty of a contemporaneous robbery, among other qualifying offenses).

II. Procedural History

A. Prior proceedings

A jury convicted Mr. Archer of murder and related crimes in the circuit court for Escambia County, Florida in 1991. The same jury, by the narrowest possible margin, seven to five, recommended a sentence of death. The court imposed death. On appeal, the Florida Supreme Court affirmed Mr. Archer's convictions, but remanded his case for a new penalty phase. The court found Mr. Archer did not know the manner in which the murder would be carried out, so he was not vicariously subject to the heinous, atrocious, or cruel (HAC) aggravator. The court determined this was not harmless error. *Archer v. State*, 613 So. 2d 446 (Fla. 1993).

In 1993, Mr. Archer's resentencing jury, again by the narrowest possible margin, seven to five, returned another death recommendation. The circuit court imposed death, finding two aggravators: 1) the homicide occurred while Mr. Archer was engaged in, or an accomplice to, a robbery; and 2) the homicide was committed in a cold, calculated and premeditated (CCP) manner. Also, the court determined the aggravators outweighed the mitigating circumstances, which included Mr. Archer having no significant history of prior criminal activity.

On appeal, a sharply divided Florida Supreme Court affirmed Mr. Archer's sentence of death. The court unanimously found that the CCP instruction was

constitutionally inadequate. However, the court split 4-3 in finding the constitutional error was harmless. *Archer v. State*, 673 So. 2d 17 (Fla. 1996).

Mr. Archer filed a motion for postconviction relief. The circuit court held an evidentiary hearing and then denied the motion. Mr. Archer unsuccessfully appealed to the Florida Supreme Court. *Archer v. State*, 934 So. 2d 1187 (Fla. 2006).

Mr. Archer sought habeas relief in federal court. The United States District Court for the Northern District of Florida, Pensacola Division, denied his Petition for Writ of Habeas Corpus on March 3, 2009. ECF No. 24, 3:06-cv-00312. On May 8, 2008, the district court refused to issue a certificate of appealability. On October 17, 2008, the Eleventh Circuit Court of Appeals denied Mr. Archer's Application for Certificate of Appealability. ECF No. 51, 3:06-cv-00312. Mr. Archer sought certiorari review in this Court. However, his Petition for a Writ of Certiorari was denied on October 16, 2009. *Archer v. McNeil*, 558 U.S. 836 (2009).

Mr. Archer filed two additional postconviction motions in the state circuit court, each of which were denied by the circuit court and the denials were affirmed on appeal. *See Archer v. State*, No. SC11-2234 (Fla. Mar. 7, 2013); *Archer v. State*, 151 So. 3d 1223 (Fla. 2014).

On November 22, 2016, Mr. Archer filed a state habeas petition in the Florida Supreme Court, asserting that his death sentence violated the Sixth and Eighth Amendments pursuant to *Hurst v. Florida.* He argued that *Hurst v. Florida* was a constitutional ruling that warranted retroactive application under the state law set forth in *Witt v. State*, 387 So. 2d 922 (Fla. 1980). In an unpublished opinion, the

Florida Supreme Court denied the petition because it had concluded that *Hurst v. Florida* only applied retroactively to capital defendants whose cases were not final in 2002 when this Court decided *Ring v. Arizona*, 536 U.S. 584 (2002). *Archer v. Jones*, 2017 WL 1034409 (Fla. 2017). Mr. Archer sought rehearing, which was denied on January 22, 2018.

B. Current proceedings

After Mr. Archer filed his state habeas petition and before the Florida Supreme Court denied the petition, it had rendered *Asay v. State*, 210 So. 3d 1 (Fla. 2016), and *Mosely v. State*, 209 So. 3d 1248 (Fla. 2016). In those decisions, the Florida Supreme Court held that *Hurst v. Florida* was retroactive to June 24, 2002, the day that this Court issued *Ring v. Arizona*. This development led Mr. Archer to file a successive postconviction motion in the circuit court.

Mr. Archer's proceedings in the circuit court were stayed pending the outcome of his state habeas petition. After his habeas petition was denied, Mr. Archer was permitted to amend his successive postconviction motion on October 31, 2018. In Claim II of his amended motion, Mr. Archer asserted that the portion of the Florida Supreme Court's ruling in *Hurst v. State*—which construed Fla. Stat. § 921.141—was substantive criminal law that should govern his case.

On February 13, 2019, the circuit court summarily denied Mr. Archer's motion. On April 23, 2020, the Florida Supreme Court issued an order affirming the circuit court's denial. *Archer v. State*, 293 So. 3d 455 (Fla. 2020). The Florida Supreme Court, relying on its decision in *Poole*—which receded from *Hurst v. State*—found no "*Hurst*

violation[, because] . . . his guilt-phase jury found him guilty of the facts that establish the basis for one of the aggravating factors on which the sentencing court relied to determine that he is eligible for the death penalty." *Id*. at 457 (citation omitted). From this ruling, Mr. Archer seeks certiorari.

III. Relevant Facts

The circuit court, during the guilt/innocence phase of Mr. Archer's 1991 trial, specifically instructed the jury that it was not making a decision on punishment. Instead, the court instructed the jury that the judge's "job [was] to determine what the proper sentence would be if the defendant is guilty," that the jury's only function regarding punishment was to "advise the Judge as to what sentence would be properly imposed," and that the judge would give great weight to its recommendation. (AT 426–27). During the penalty phase instructions, the judge told the jury that "[a] final decision as to what punishment shall be imposed rests solely with the . . . court." The judge continued by telling the jury that its decision was merely a recommendation or advisory only. (AT 449–50, 477–78, 480–82, 515–16, 518–21). Likewise, the prosecutor told the jury that its decision as to punishment was only advisory, or a recommendation only. (AT 451, 467–68).

By a vote of seven in favor and five opposed—the narrowest possible margin—the jury returned a verdict recommending a death sentence be imposed. (T 484). The jury did not make statutorily required findings of fact. *See* § 921.141(3) (2012) ("(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and (b) That there are insufficient mitigating circumstances to outweigh the aggravating

circumstances."). Those findings were made by the judge when he imposed a death sentence.

On direct appeal, the Florida Supreme Court vacated the death sentence and remanded for a resentencing. *Archer v. State*, 613 So. 2d 446 (Fla. 1993). At Mr. Archer's 1993 resentencing proceeding, all of the parties either referred to the jury's duty as advisory, or told the jury that its duty—with regard to punishment—was merely advisory. (AR 9, 25–26, 61, 166, 169, 171, 494–95, 497–98, 502–05). Additionally, the court instructed the resentencing jury that its duty with regard to punishment was advisory only. (AR 494–95, 497–98; ARR 84–89). Again, the resentencing jury, by a vote of seven in favor and five opposed, recommended a death sentence. (AR 502). And again, the jury did not make statutorily required findings of fact. Rather, those findings were made by the judge when he imposed a death sentence.

REASONS FOR GRANTING THE WRIT

I. THE FLORIDA SUPREME COURT'S ACTION IN CONSTRUING ITS DEATH PENALTY STATUTE IN *HURST V. STATE* TO SET FORTH ELEMENTS OF CAPITAL MURDER IN 2016 ONLY TO RETROACTIVELY RECEDE FROM THAT STATUTORY CONSTRUCTION IN 2020 RAISES IMPORTANT CONSTITUTIONAL ISSUES THAT WARRANT RESOLUTION BY THIS COURT.

In the proceedings below, Mr. Archer asserted that the Florida Supreme Court in *Hurst v. State* construed § 921.141, Florida Statutes, and that the resulting construction of the statute constitutes substantive law which governs his case.[2] Mr.

[2] While Mr. Archer raised this issue as Claim II before the state circuit court, it was presented as Argument I before the Florida Supreme Court.

Archer invoked both the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment.

In addressing this issue, the Florida Supreme Court made reference to a procedural bar, stating, "Even if this claim is not procedurally barred, it is without merit, as we explained in *Rogers v. State*, 285 So. 3d 872, 885-86 (Fla. 2019)." *Archer v. State*, 293 So. 3d 455, 457 (Fla. 2020). However, given the ambiguity of the Florida Supreme Court's statement, Mr. Archer's federal claim can be given full consideration on its merits by this Court. *See Harris v. Reed*, 489 U.S. 255 (1989) ("[A] procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar.") (internal citation omitted).

A. The Florida Supreme Court's decision in *Hurst v. State* constitutes substantive law applicable at the time of Mr. Archer's offense.

Considering that the Florida Supreme Court's construction of § 921.141 in *Hurst v. State* constitutes substantive law, due process demands that the law provided thereby was the law in 1991, when the State arrested and charged Mr. Archer with first degree murder. In *Hurst v. Florida*, this Court first observed that "Florida required the judge to hold a separate hearing and **determine whether sufficient aggravating circumstances existed to justify imposing the death penalty**." 136 S. Ct. at 619 (emphasis added). This Court further described what facts had to be found under Florida's statutory scheme before a death sentence could be authorized. Quoting Florida law, this Court stated,

> [T]he 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). The trial court *alone* must find "**the facts . . . [t]hat sufficient aggravating circumstances exist**" and "[t]hat there are sufficient mitigating circumstances to outweigh the aggravating circumstances." § 921.141(3); see *Steele,* 921 So. 2d, at 546.

Hurst v. Florida, 136 S. Ct. at 622 (emphasis in italics in original) (all other emphasis added). Because Florida's statute provided for a judge to find the requisite facts, it stood in violation of the Sixth Amendment pursuant to *Ring*, 536 U.S. 584.

In *Hurst v. State*, the Florida Supreme Court, pursuant to *Hurst v. Florida*, sought to construe the version of Fla. Stat. § 921.141 that was in effect before 2016. *Hurst v. State*, 202 So. 3d 40; *see also* Fla. Stat. § 921.141 (2012). The Florida Supreme Court identified the requisite facts the State needed to demonstrate in order to increase the range of punishment available on a first degree murder conviction to include a death sentence. *Id.* at 53. The court explained,

> [The imposition of . . . death . . . in Florida has in the past **required, and continues to require, additional factfinding** that now must be **conducted by the jury**. As the Supreme Court long ago recognized in *Parker v. Dugger*, 498 U.S. 308[, 313] . . . (1991), under Florida law, "**The death penalty may be imposed only where** *sufficient aggravating circumstances* **exist that** *outweigh* **mitigating circumstances**. . . ." (quoting § 921.141(3), Fla. Stat. (1985)). Thus, **before a sentence of death may be considered by the trial court in Florida, the jury must find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances**.

Id. (Emphasis in italics in original) (all other emphasis added). The Florida Supreme Court's citation to *Parker v. Dugger*, 498 U.S. 308 (1991), demonstrates that the additional factfinding was the law in Florida in 1991.

Importantly, the Florida Supreme Court explained that because the statutorily defined facts were necessary to increase the range of punishment to include death, proof of those facts was necessary "to essentially convict a defendant of capital murder." *Hurst v. State*, 202 So. 3d at 53. The facts were, in essence, elements of a higher degree of murder that the State had to prove beyond a reasonable doubt. The Florida Supreme Court noted,

> *Hurst v. Florida* mandates that all the findings necessary for imposition of a death sentence are "elements" that must be found by a jury, and Florida law has long required that jury verdicts must be unanimous. Accordingly, we reiterate our holding that before the trial judge may consider imposing . . . 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 [aggravators] are sufficient to impose death, unanimously find that the [aggravators] outweigh the mitigating circumstances, and unanimously recommend a sentence of death. We equally emphasize that by so holding, we do not intend to diminish or impair the jury's right to recommend a sentence of life even if it finds [aggravators] were proven, were sufficient to impose death, and that they outweigh the [mitigators].

Id. at 57–58.

The statutory construction addressed in *Hurst v. State* constitutes Florida's substantive law. *Hurst v. State* identified what statutorily identified facts were essentially elements of the greater offense and had to be found by a jury before a death sentence could be imposed. So, when a court construes a statute and identifies the elements of a statutorily defined criminal offense, the ruling constitutes substantive law and dates to the statute's enactment. *See Bousley v. United States*, 523 U.S. 614, 625 (1998) (Stevens, J., concurring in part and dissenting in part) ("This case does not raise any question concerning the possible retroactive application of a

new rule of law, cf. *Teague* . . . because our decision in *Bailey v. United States*, 516 U.S. 137 . . . (1995), did not change the law. It merely explained what § 924(c) had meant ever since the statute was enacted."); *see also Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 312-13 (1994) ("A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.").

The Fourteenth Amendment requires that this substantive law govern the law that existed at the time of the offense. The Florida Supreme Court's statutory construction of Fla. Stat. § 921.141 in *Hurst v. State* constitutes substantive criminal law. The court construed the meaning of the statute back to, at least, the date of the criminal offense. In Mr. Archer's case, that date would be January 26, 1991. *See* Savings Clause of the Florida Constitution, Art. X, § 9 ("Repeal of a criminal statute shall not affect prosecution for any crime committed before such repeal."). So—as substantive law—*Hurst v. State* was not subject to the retroactivity analysis of either *Witt*, 387 So. 2d 922, or *Teague v. Lane*, 489 U.S. 288 (1989).

After *Hurst v. State*, the Florida Legislature made changes to § 921.141. But nowhere did the Legislature express disagreement with the Florida Supreme Court's determination that the aggravating factors had to be found sufficient as a matter of fact before a death sentence could be authorized as an appropriate punishment. This demonstrates that the Florida Legislature believed that the Florida Supreme Court correctly construed § 921.141 in *Hurst v. State*. *See Fla. Dep't of Children and Families v. F.L.*, 880 So. 2d 602, 609 (Fla. 2004) ("The Legislature is presumed to

know the judicial constructions of a law when amending that law, and . . . is presumed to have adopted prior judicial constructions . . . unless a contrary intention is expressed.").

The Florida Supreme Court's ruling in *Hurst v. State* construed the capital statute, which had been in effect since before 1991. It likewise construed the requirement that before death could be imposed, a jury first had to find that the State sufficiently established the statutorily identified facts. Undoubtedly, there was reasonable basis for the Florida Supreme Court's construction of Fla. Stat. § 921.141 in *Hurst v. State*, and its conclusion that whether the aggravators were sufficient constituted a question of fact. 202 So. 3d at 68; *see also Jackson v. State*, 213 So. 3d 754, 783 (Fla. 2017) ("Those facts that permit the authorization of a death sentence are a matter of state law."). Moreover, the Florida Supreme Court has the final word upon the governing construction of a Florida statute

Under *Fiore v. White*, 531 U.S. 225, 228–29 (2001), the statutory construction in *Hurst v. State*—based on the plain language of the statute—dated back to the enactment of the statute. The Fourteenth Amendment forbids the State to convict a defendant of a crime without first proving the elements of that crime beyond a reasonable doubt. *See also, e.g., Bunkley v. Florida*, 538 U.S. 835, 842 (2003) (courts should not only strive to determine whether a law has changed, but when it changed, or came to be enacted). Therefore, pursuant to the Fourteenth Amendment, the statutory construction set forth in *Hurst v. State* must have been the governing law at the time the offense occurred in the instant case, January 26, 1991. *See, e.g., Fiore*,

531 U.S. 225 (A state court's construction of the state's statutory law is binding even on the Supreme Court of the United States).

B. In *State v. Poole*, the Florida Supreme Court retroactively rejected its construction of the statute set out in *Hurst v. State*, and thereby retroactively changed Florida's substantive criminal law.

In *State v. Poole*, 2020 WL 3116597, the Florida Supreme Court revisited its 2016 decision in *Hurst v. State*. In *Poole*, the court announced it was receding from *Hurst v. State*, stating "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." *Poole* rejected the reading of § 921.141 that was set forth in *Hurst v. State*.

Normally, due process precludes a court from unexpectedly changing a criminal statute's construction and applying the change retroactively, something that state legislatures cannot do by virtue of the Ex Post Facto Clause. *Bouie v. City of Columbia*, 378 U.S. 347, 362 (1964). For example, due process prohibits the retroactive application of judicial interpretations of criminal statutes that are "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Rogers v. Tennessee*, 532 U.S. 451 461 (2001) (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964)). By changing the construction of the statute, as the Florida Supreme Court did in *Poole*, and by applying that change to Mr. Archer, as it did in the decision below, the Florida Supreme Court arguably violated the Due Process Clause of the Fourteenth Amendment.

Certainly, *Poole* was unexpected. *Poole* is also indefensible, because the statutory construction set forth in *Hurst v. State* has been applied to a number of cases where the crime was committed pre-*Ring*, the corresponding death sentences were vacated, and unanimous juries returned binding life sentences. For example, a Florida state court applied *Hurst v. State* statutory construction to William Melvin White's case, which was a homicide committed in 1978. The circuit court for Orange County, Florida, vacated White's death sentence on the basis of *Hurst v. State*. *Florida v. White*, 1978-CF-1840-C-O (Circuit Court of Orange Cty., Fla. Sept. 19, 2017); *see White v. State*, 817 So. 2d 799 (Fla. 2002) (per curiam); *White v. State*, 729 So. 2d 909 (Fla. 1999) (per curiam); and *White v. State*, 415 So. 2d 719 (Fla. 1982) (per curiam).[3] After the circuit court vacated White's death sentence, the State did not pursue another death sentence. Instead, the court imposed a life sentence.

Poole is likewise indefensible because the Florida Legislature demonstrated its agreement with the statutory construction of § 921.141, as set forth in *Hurst v. State*. Indeed, the Legislature did not challenge the decision as contrary to its intent when the statute was amended during the 2017 legislative session. Pursuant to separation

[3] *See also Card v. Jones*, 219 So.3d 47 (Fla. 2017) (The Florida Supreme Court applied *Hurst v. State*'s statutory construction to Card's case, which was a homicide committed in 1981, and vacated his sentence of death). By virtue of the Florida Constitution's Savings Clause, the ruling in *Card* means that the statutory construction adopted in *Hurst v. State* was Florida's substantive criminal law at the time of the offense therein, June 1981. *See Horsley v. State*, 160 So. 3d 393, 406 (Fla. 2015) (The Florida Supreme Court determined that "the purpose of the 'Savings Clause' is to require the statute in effect at the time of the crime to govern the sentence an offender receives. . .").

of powers as stated in the Florida Constitution, the Legislature surely has the authority to complain when the Florida Supreme Court construes a statute contrary to legislative intent. The Florida Legislature did not indicate that *Hurst v. State* had construed Fla. Stat. § 921.141 in a manner inconsistent with, or contrary to, its legislative intent during its 2018 or 2019 legislative session.[4]

Poole arguably cannot be applied retroactively under due process pursuant to *Bouie* and *Rogers*. Surely, due process does not permit *Poole* to erase *Hurst v. State* out of existence. It cannot undo the construction of § 921.141 that *Hurst v. State* employed, because such statutory construction was and remains the binding substantive law as to offenses committed prior to January 23, 2020. In *Poole*, decided just three and a half years after *Hurst v. State*, the Florida Supreme Court chose to dramatically change the construction of the statute to make it easier for the State to obtain death sentences. This change operated to the detriment of defendants and was entirely unexpected. Due process should mandate that *Poole* is not applicable to offenses committed after January 23, 2020. *See Bouie*, 378 U.S. at 362 ("We think it clear that the South Carolina Supreme Court, in applying its new construction of the statute . . . has deprived petitioners of [due process]. If South Carolina had applied to this case its new statute prohibiting the act [in question], the constitutional proscription of ex post facto laws would clearly invalidate the convictions. [Due

[4] And, after the Florida Supreme Court issued *Poole*, the Legislature left Fla. Stat. § 921.141 intact, as adopted, to accommodate the Sixth Amendment ruling in *Hurst v. State*. The Florida Legislature's reaction to *Hurst v. State,* and *Poole,* shows that the Florida Supreme Court in *Hurst v. State* correctly read the statute and captured the legislative intent in its construction thereof.

process] compels the same result here, where the State has sought to achieve precisely the same effect by judicial construction of the statute.").

Since the homicide at issue in Mr. Archer's case occurred long before January 23, 2020, *Poole* arguably is not applicable. Due process principles should not allow *Poole* to retroactively replace *Hurst v. State* as substantive law since it operates to Mr. Archer's detriment. *Poole* should merely replace *Hurst v. State* going forward in time from January 23, 2020.

At least thirty-three inmates in Florida have been resentenced to life imprisonment under *Hurst*. Six new non-*Hurst* related defendants have been sentenced to life under the current death penalty statute left undisturbed by *Poole*. There is no meaningful difference between Mr. Archer's case and those cases in which the courts granted *Hurst* relief and imposed life sentences, save the arbitrariness of a date. Death "cannot be predicated on mere 'caprice' or on 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process.'" *Johnson v. Mississippi*, 486 U.S. 578, 584–85 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 884-885, 887 n. 24 (1983)). The Florida Supreme Court's zig zag in its construction of § 921.141(3) should be examined by this Court to determine whether Mr. Archer's due process rights were violated.

At the very least, an important constitutional question that only this Court can resolve arises from the Florida Supreme Court's reliance on *State v. Poole* as retroactively changing its construction of a criminal statute to eliminate elements

that the State must prove beyond a reasonable doubt to the satisfaction of a unanimous jury before a death sentence is a permissible punishment.

II. THIS COURT SHOULD ADDRESS WHETHER THE EIGHTH AMENDMENT REQUIRES A JURY TO MAKE THE DECISION WHETHER TO IMPOSE A DEATH SENTENCE.

The Eighth Amendment ensures that the death penalty is reliably imposed on only the most morally culpable subset of those persons who commit the most serious homicides. *Roper v. Simmons*, 543 U.S. 551, 568 (2005); *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980). Yet, by assigning a non-existent capital sentencing role to the jury, as *Poole* does, this is inconsistent with "the unique nature of the death penalty and the heightened reliability demanded by the Eighth Amendment in the determination of whether the death penalty is appropriate in a particular case." *Sumner v. Shuman*, 483 U.S. 66, 72 (1987).

Only Alabama, and now, again, Florida, cling to contrary positions, which are at odds with both contemporary standards of decency and the overwhelming consensus of American jurisdictions. Nearly every other jurisdiction has concluded that jury unanimity reflects the vital role of the jury as the conscience of the community, and recognizes that such a requirement is deeply rooted in common law and must be required in capital cases.

Capital sentencing procedures that are inconsistent with the "evolving standards of decency that mark the progress of a maturing society," *Atkins v. Virginia*, 536 U.S. 304, 312 (2002), violate the Eighth Amendment, *Woodson v. North Carolina*, 428 U.S. 280 (1976), *Roberts v. Louisiana*, 428 U.S. 325 (1976), as do capital

sentencing schemes that are inconsistent with the consensus of contemporary practice in the nation. *Beck v. Alabama*, 447 U.S. 625, 635 (1980). These considerations demonstrate that the Eighth Amendment's evolving standards should now require a unanimous jury determination in favor of death before a state may impose such a sentence. *See* Fla. Stat. § 921.141(2) (The Florida Legislature adopted unanimity herein, and said statute is still in effect even after *Poole*); *see also Ramos*, 140 S. Ct. at 1397 (Sixth Amendment right to jury trial, by way of the Fourteenth Amendment, requires a unanimous verdict to convict a defendant of a serious offense).

At the very least, the Eighth Amendment should require that a jury make the ultimate decision to impose a death sentence, whether unanimously or not. *See, e.g., Harris v. Alabama*, 513 U.S. 504, 515–26 (1995) (Stevens, J., dissenting); *Ring*, 536 U.S. at 615–18 (Breyer, J., concurring). Those considerations are even more important today. *See, e.g., Reynolds v. Florida*, 139 S. Ct. 27, 28–29 (2018) (Breyer, J., statement respecting denial of certiorari) (In light of the Florida Supreme Court's refusal to apply *Hurst v. State* retroactively to capital defendants whose sentences were final before the decision in *Ring*, the death penalty as administered in Florida (at the time of *Reynolds*) raises Eighth Amendment issues, especially regarding Florida's disinclination to have a jury make the ultimate decision to sentence a defendant to death). *Poole* further exacerbates the situation as it relates to this Eighth Amendment protection.

Poole's recession from *Hurst v. State* has, again, made Florida "an absolute outlier among the jurisdictions in this country that utilize the death penalty[,]" because it no longer requires jury unanimity in recommending a sentence of death. *Poole*, *id.* at *20 (Labarga, J., dissenting). Justice Labarga further noted that jury unanimity in recommending the death penalty "comports with the overwhelming majority of states that have the death penalty[,]" and with federal law, and that Florida, with the majority's decision in *Poole*, "retreat[ed] from the national consensus and [took] a huge step backward. . . ." *Id.* at *21. The majority's opinion "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" death should be imposed in such a case. *Id.*

Meaningful jury input should be required to ensure that each individual decision to impose death comports with prevailing moral standards. *See Woodson*, 428 U.S. at 302-305 (this Court found North Carolina's mandatory death penalty statute was unconstitutional because it replaced jury input, which rendered unreliable the determination that death was an appropriate sentence). This Court should grant review in order to address whether the Eighth Amendment's evolving standards now require a jury to make the decision as to whether a death sentence is to be imposed.

III. THIS COURT SHOULD GRANT REVIEW TO DETEMINE WHETHER THE FLORIDA SUPREME COURT'S DECISION IN *STATE V. POOLE* HAS RESULTED IN THE ARBITRARY ADMINISTRATION OF THE DEATH PENALTY IN THE STATE OF FLORIDA.

"[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." *Furman v. Georgia*, 408 U.S. 238, 309–10 (1972) (Stewart, J., concurring); *see also Id.* at 313 (White, J., concurring) ("[T]he death penalty is exacted with great infrequency even for the most atrocious of crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."). That is, the death penalty may not be "inflicted in an arbitrary and capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976); and *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (same). "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." *Poole*, *id.* at *22 (Labarga, J., dissenting).

At least thirty-three inmates in Florida have been resentenced to life imprisonment under *Hurst*. Six new non-*Hurst* related defendants have been sentenced to life under the current death penalty statute left undisturbed by *Poole*. There would seem to be no meaningful difference between Mr. Archer's case and those cases in which the courts granted *Hurst* relief and imposed life sentences, save the arbitrariness of a date. Death "cannot be predicated on mere 'caprice' or on 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process.'" *Johnson v. Mississippi*, 486 U.S. 578, 584–85 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 884-885, 887 n. 24 (1983)).

This Court should grant review in order to determine whether the Florida Supreme Court's zig zag in its construction of § 921.141(3) violated the Eighth Amendment.

CONCLUSION

This Court should grant a writ of certiorari to review the decision below.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first-class postage prepaid, to Janine Robinson, Assistant Attorney General, Office of the Attorney General, PL-01, the Capitol, Tallahassee, FL 32399-1050, on this 13th day of October, 2020.

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