

DOCKET NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2020

ANTHONY JOHN PONTICELLI,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

MARTIN J. McCLAIN
Florida Bar No. 0754773
Law Office of Martin J. McClain
141 N.E. 30th Street
Wilton Manors, FL 33334
Telephone: (305) 984-8344
FAX: (954) 564-5412
martymcclain@comcast.net

COUNSEL FOR PETITIONER

QUESTIONS PRESENTED--CAPITAL CASE

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. Ponticelli'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. Ponticelli's detriment?

3. Whether *McKinney v. Arizona* governs the retroactivity of *Hurst v. Florida* and *Hurst v. State* as to Florida's capital sentencing statute which is markedly different than Arizona's statute?

4. Whether the Eighth Amendment requires a unanimous jury verdict on the elements required for a capital defendant to be sentenced to death?

NOTICE OF RELATED CASES

Per Supreme Court Rule 14.1(b)(iii), the following cases relate to this petition:

Underlying Trial:

Circuit Court of Marion County, Florida
State of Florida v. Anthony Ponticelli, Case No. 87-2719 CF
Judgement Entered August 12, 1988

Appellate Proceedings:

Florida Supreme Court (Case No. 60-73,064)
Ponticelli v. State, 593 So. 2d 483 (Fla. 1991)
Conviction and Sentence Affirmed: October 10, 1991

Petition for Writ of Certiorari:

United States Supreme Court
Ponticelli v. Florida, 506 U.S. 802 (1992)
Vacated Judgement and Remanded: October 5, 1992

Proceedings on Remand to the Florida Supreme Court:

Florida Supreme Court (Case No. 60-73,064)
Ponticelli v. State, 618 So. 2d 154 (Fla. 1993)
Death Sentence Affirmed: March 4, 1993

Initial Postconviction Proceedings:

Circuit Court of Marion County, Florida
State of Florida v. Anthony Ponticelli, Case No. 87-2719 CF
Judgement Entered November 1, 2002 (denying motion)

Appellate Proceedings:

Florida Supreme Court (Case No. SC03-17)
Ponticelli v. State, 941 So. 2d 1073 (Fla. 2006)
Affirmed: August 31, 2006

Successive Postconviction Proceedings:

Circuit Court of Marion County, Florida
State of Florida v. Anthony Ponticelli, Case No. 87-2719 CF
Judgement Entered November 1, 2003 (denying motion)

Appellate Proceedings:

Florida Supreme Court (Case No. SC03-1655)
Ponticelli v. State, 879 So. 2d 623 (Fla. 2004)
Affirmed: June 9, 2004

Second Successive Postconviction Proceedings:

Circuit Court of Marion County, Florida
State of Florida v. Anthony Ponticelli, Case No. 87-2719 CF
Judgement Entered March 16, 2009 (denying motion)

Appellate Proceedings:

Florida Supreme Court (Case No. SC09-992)
Ponticelli v. State, 49 So. 3d 236 (Fla. 2010)
Affirmed: November 10, 2010

Third Successive Postconviction Proceedings:
Circuit Court of Marion County, Florida
State of Florida v. Anthony Ponticelli, Case No. 87-2719 CF
Judgement Entered April 1, 2011 (denying motion)

Appellate Proceedings:
Florida Supreme Court (Case No. SC11-877)
Ponticelli v. State, 90 So. 3d 823 (Fla. 2012)
Affirmed: April 26, 2012

Appellate Proceedings:
Eleventh Circuit Court of Appeals (Case No. 11-11966)
Ponticelli v. Sec'y, Dept. of Corrs., 690 F.3d 1271 (11th
Cir. 2012)
Affirmed: August 16, 2012

Fourth Successive Postconviction Proceedings:
Circuit Court of Marion County, Florida
State of Florida v. Anthony Ponticelli, Case No. 87-2719 CF
Judgement Entered May 9, 2017 (denying motion)

Appellate Proceedings:
Florida Supreme Court (Case No. SC19-607)
Ponticelli v. State, 297 So. 3d 1292 (Fla. 2020)
Affirmed: April 16, 2020

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IN THE
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ANTHONY JOHN PONTICELLI,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Anthony John Ponticelli respectfully petitions this Court for a writ of certiorari to review the decision of the Florida Supreme Court.

CITATION TO OPINION BELOW

The Florida Supreme Court's decision appears as *Ponticelli v. State*, 297 So. 3d 1292 (Fla. 2020), and is Attachment A to this petition. The order denying rehearing is Attachment B to this petition.

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Florida Supreme Court on the basis of 28 U.S.C. Section 1257. The Florida Supreme Court entered its opinion on April 16, 2020. Rehearing was denied on July 2, 2020.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides:

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

The Eighth Amendment to the Constitution of the United States provides in relevant part:

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

The Fourteenth Amendment to the Constitution of the United States 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

PROCEDURAL HISTORY

Mr. Ponticelli was indicted on January 4, 1988, with two counts of first-degree murder and one count of armed robbery (R. 1375-6). Mr. Ponticelli pled not guilty (R. 1385).

Mr. Ponticelli's capital jury trial commenced on August 9, 1988. After the State rested, the trial court granted the defense's motion for judgment of acquittal as to the armed robbery count (R. 941). Guilty verdicts were returned on both counts of first degree murder on August 12, 1988.

The penalty phase began on August 18, 1988. That same day, the jury recommended a death sentence by a vote of nine to three for each of the murders (R. 1371-2). A sentencing hearing was

held on September 6, 1988, at which time Mr. Ponticelli was sentenced to death for the two counts of first degree murder (R. 1849-51).

On direct appeal, the Florida Supreme Court affirmed Mr. Ponticelli's convictions and sentences. *Ponticelli v. State*, 593 So. 2d 483 (Fla. 1991).

After filing a writ of certiorari, this Court vacated the judgment and remanded for further consideration in light of *Espinosa v. Florida*, 505 U.S. 1079 (1992). *Ponticelli v. Florida*, 506 U.S. 802 (1992).

The Florida Supreme Court found Mr. Ponticelli's challenge to his jury instructions procedurally barred. *Ponticelli v. State*, 618 So. 2d 154 (Fla. 1993).

A motion to vacate sentence pursuant to Rule 3.850 was filed on April 11, 1995 (Supp. PC-R. 1-60). On July 10, 2000, an evidentiary hearing commenced. Following the hearing, the lower court entered an order denying all relief on November 1, 2002 (Supp. PC-R. 1736-60).

Mr. Ponticelli appealed to the Florida Supreme Court. Simultaneously, with his appeal, Mr. Ponticelli filed a petition for writ of habeas corpus. The Florida Supreme Court denied all relief on August 31, 2006. *Ponticelli v. State*, 941 So. 2d 1073 (Fla. 2006).

While Mr. Ponticelli's case was on appeal before the Florida Supreme Court, Mr. Ponticelli filed a successive Rule 3.851 motion, based on this Court's ruling in *Ring v. Arizona*. The

circuit court denied relief, as did the Florida Supreme Court. *Ponticelli v. State*, 879 So. 2d 623 (Fla. 2004).

In May, 2007, Mr. Ponticelli filed another successive Rule 3.851 motion based on recently disclosed documents he obtained from the Office of the State Attorney and the Department of Corrections (PC-R2. 10-48).

In late 2007, Mr. Ponticelli instituted federal habeas corpus proceedings before the Federal District Court for the Middle District of Florida.

A state court evidentiary hearing was held before the circuit court on October 1, 2008, on Mr. Ponticelli's successive Rule 3.851 motion.

On March 16, 2009, the circuit court entered an order denying Mr. Ponticelli's amended successive Rule 3.851 motion (PC-R2. 879-889).

Mr. Ponticelli appealed to the Florida Supreme Court (PC-R2. 949-50). On November 10, 2010, the Florida Supreme Court entered an order affirming the circuit court's denial of relief. *Ponticelli v. State*, 49 So. 3d 236 (Fla. 2010).

Shortly before the Florida Supreme Court had entered its order on Mr. Ponticelli's first successive Rule 3.851 motion, he filed a second successive Rule 3.851 motion based upon *Porter v. McCollum*, 558 U.S. 30 (2009) (PC-R3. 1-34). On April 1, 2011, the circuit court denied Mr. Ponticelli's motion.

Mr. Ponticelli appealed to the Florida Supreme Court. The Florida Supreme Court denied all relief on May 31, 2012.

Ponticelli v. State, 90 So. 3d 823 (Fla. 2012).

In May, 2011, the federal district court denied Mr. Ponticelli's petition for writ of habeas corpus. Mr. Ponticelli appealed to the Eleventh Circuit Court of Appeals. On August 16, 2012, the Court affirmed the district court's order. *Ponticelli v. Sec'y, Dept. of Corrs.*, 690 F.3d 1271 (11th Cir. 2012).

On December 14, 2016, Mr. Ponticelli filed a successive Rule 3.851 motion based upon *Hurst v. Florida*, 136 S.Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). On May, 9, 2017, the circuit court denied Mr. Ponticelli's motion. Mr. Ponticelli timely filed a motion for rehearing. On April 12, 2019, the circuit court denied the motion.

On appeal, the Florida Supreme Court entered an order directing Mr. Ponticelli "to show cause ... why the trial court's order should not be affirmed in light of this Court's decision in *Hitchcock v. State*, 226 So.3d 216 (Fla.), *cert. denied*, 138 S.Ct. 513 (2017)." On April 16, 2020, the Florida Supreme Court denied relief. *Ponticelli v. State*, 297 So. 3d 1292 (Fla. 2020).

FACTS RELEVANT TO QUESTIONS PRESENTED

Mr. Ponticelli was charged with two counts of first degree murder and one count of robbery with a deadly weapon. *Ponticelli v. State*, 593 So. 2d 483, 486 (Fla. 1992). The indictment, which was read to the jury panel by the trial judge, failed to define the applicable aggravating circumstances under Florida Statute 921.141, pursuant to which the state sought to convict and execute Mr. Ponticelli (R. 12-13).

The trial court entered a judgment of acquittal on the robbery count at the close of the state's case-in-chief. *Ponticelli*, 593 So. 2d at 486. However, the jury found Mr. Ponticelli guilty on both counts of first-degree murder.

From the outset, the jurors were told individually that their responsibility was merely to make a recommendation and advise the Court as to the appropriate sentence of life or death (R. 1365-70). In fact, each prospective juror and all of the ultimate jurors repeatedly heard that they were responsible for providing a recommendation, only, and that the judge was the sentencer (*Id.*).

The jury was also advised that it was its duty to render to the Court an advisory sentence and that the final decision was with the judge (R. 1365-70). Thereafter, an advisory verdict was returned stating whereby the jury "recommended" to the court by a vote of 9-3 that Mr. Ponticelli be sentenced to death for each shooting. *Ponticelli*, 593 So. 2d at 486.

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.

THE STATE COURT'S RULING

In denying relief on Mr. Ponticelli's claim, the Florida Supreme Court stated:

The United States Supreme Court's precedent and our precedent foreclose relief as to Ponticelli's claims. See *McKinney v. Arizona*, 140 S.Ct. 702, 707-08 (2020) (holding that, under *Hurst v. Florida*, "a jury must find the aggravating circumstance that makes the defendant death eligible," but that a jury "is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range," and that *Hurst v. Florida* "do[es] not apply retroactively on collateral review"); see also *Poole*, 41 Fla. L. Weekly at S48 ("reced[ing] 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" as required by *Hurst v. Florida*); *Hitchcock v. State*, 226 So. 3d 216, 217 (Fla. 2017) (holding that *Hurst v. Florida* as interpreted in *Hurst v. State* is not retroactive to defendants similarly situated to Ponticelli).

Ponticelli v. State, 297 So. 3d 1292, 1293 (Fla. 2020).

REASONS FOR GRANTING THE WRIT

- I. **THE FLORIDA SUPREME COURT ERRONEOUSLY APPLIED *POOLE v. STATE* AND *McKINNEY v. ARIZONA*, TO MR. PONTICELLI'S CLAIM THAT THE STATUTORY CONSTRUCTION IN *HURST v. STATE*, IDENTIFIED THE ELEMENTS OF CAPITAL MURDER AT THE TIME OF HIS SENTENCING IN 1988.**

In *Hurst v. State*, the Florida Supreme Court construed Florida Statute § 921.141, and held:

under Florida law, "The death penalty may be imposed only where sufficient aggravating circumstances exist that outweigh mitigating circumstances." Id. at 313, 111 S.Ct. 731 (emphasis added) (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.

Hurst v. State, 202 So. 3d 40, 53 (Fla. 2016). Because the sufficiency of the aggravating circumstances was a statutorily identified fact that had to be found before a death sentence could be imposed, the Florida Supreme Court concluded that the sufficiency of the aggravating circumstances was an element that had to be found unanimously by the jury:

We also conclude that, just as elements of a crime must be found unanimously by a Florida jury, **all these findings necessary for the jury to essentially convict a defendant of capital murder** – thus allowing imposition of the death penalty – **are also elements** that must be found unanimously by the jury. Thus, 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.

Id. at 53-54 (emphasis added).

In addition to the express language in the majority opinion holding that the sufficiency of the aggravating circumstances was an element of capital murder, Justice Canady's dissenting opinion stated his disagreement with the majority's holding that the sufficiency of the aggravating circumstances was an element:

"Elements" are "facts" that the State must prove to the jury. *Ring* made clear and *Hurst v. Florida* reaffirmed that in death cases, the necessary elements include the existence of an aggravating circumstance. But the other determinations made in a death penalty proceeding – whether the aggravation is sufficient to justify a death sentence; whether mitigating circumstances (which are established by the defendant) outweigh the aggravation; whether a death sentence is the appropriate penalty—are not elements to be proven by the State.

Hurst v. State, 202 So. 3d at 81-82 (Canady, J. dissenting).

The disagreement between the majority and the dissent in *Hurst v. State* was over whether the finding that the aggravating circumstances were sufficient was an element of the greater offense of capital murder. This disagreement at its core was a matter of statutory construction. The statute at issue was § 921.141¹, which, at the time of Mr. Ponticelli's sentencing, provided:

(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 for in writing its findings upon which the sentence 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, the court shall impose sentence of life imprisonment in accordance with S. 775.082.**

Fla. Stat. § 921.141(3) (emphasis added).

In *Stringer v. Black*, 503 U.S. 222 (1992), this Court was called upon to contrast how capital sentencing schemes used aggravating circumstances. This Court explained:

¹For simplicity, unless otherwise indicated, Mr. Ponticelli refers in the present tense to Florida's capital sentencing law as it existed in 1988, when he was sentenced to death.

In Lowenfield v. Phelps, 484 U.S. 231 (1988)], the petitioner argued that his death sentence was invalid because the aggravating factor found by the jury duplicated the elements it already had found in determining there was a first-degree homicide. We rejected the argument that, as a consequence, the Louisiana sentencing procedures had failed to narrow the class of death-eligible defendants in a predictable manner. We observed that "[t]he use of 'aggravating circumstances' is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion. We see no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase." [Citation]. **We went on to compare the Louisiana scheme with the Texas scheme, under which the required narrowing occurs at the guilt phase. [Citation]. We also contrasted the Louisiana scheme with the Georgia and Florida schemes. [Citation].**

The State's premise that the Mississippi sentencing scheme is comparable to Louisiana's is in error. The Mississippi Supreme Court itself has stated in no uncertain terms that, with the exception of one distinction not relevant here, its sentencing system operates in the same manner as the Florida system; and Florida, of course, is subject to the rule forbidding automatic affirmance by the state appellate court in an invalid aggravating factor is relied upon. In considering a Godfrey claim based on the same factor at issue here, the Mississippi Supreme Court considered decisions of the Florida Supreme Court to be the most appropriate source of guidance.

Stringer, 503 U.S. at 233-34 (emphasis added).

In fact in *Lowenfield v. Phelps*, 484 U.S. 231, 242 (1988), the Louisiana statute defined first degree murder as fitting within one of five circumstances in contrast to Florida's provision that first degree murder is either premeditated or felony-murder. This Court in *Lowenfield* found that the Louisiana capital scheme operated similarly to the Texas scheme that provided for death eligibility to be determined at the guilt phase of the trial:

It seems clear to us from this discussion that the narrowing function required for a regime of capital punishment may be provided in either of these two ways: **The legislature may itself narrow the definition of capital offenses, as Texas and Louisiana have done, so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase.** See also Zant v. Stephens, 462 U.S. 862, 876 n.13 (1983)] discussing Jurek and concluding: "[I]n Texas, aggravating and mitigating circumstances were not considered at the same stage of the criminal prosecution."

Lowenfield, 484 U.S. 245-47 (emphasis added).

The Florida Legislature had decided that it was during the penalty phase that the factual determinations were to be made as to the aggravating circumstances and their sufficiency, as well carrying out the Eighth Amendment narrowing function in conformity with *Zant v. Stephens*:

To avoid arbitrary and capricious punishment, this 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 v. Stephens, 462 U.S. 862 (1983) (footnote omitted). Since premeditation is already an element of capital murder in Florida, section 921.141 (5)(I) must have a different meaning; otherwise, it would apply to every premeditated murder.

Porter v. State, 564 So. 2d 1060, 1064 (1990).

The majority in *Hurst v. State* concluded that the factual determination of that "sufficient aggravating circumstances existed" is the finding of those additional facts that are necessary under the Eighth Amendment requirement that death eligibility be narrowed beyond the traditional definition of first degree murder. *Zant*, 462 U.S. at 878 ("[S]tatutory

aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty"). Clearly in Florida, the narrowing of the death eligible occurs in the sentencing phase. That factual determination--that "sufficient aggravating circumstances exist"--has not been made during the guilt phase of a capital trial.

Fla. Stat. § 921.141, requires both the jury and the trial judge to make at least two factual determinations before a death sentence may be imposed. They (1) must find the existence of at least one aggravating circumstance, AND (2) must find that "sufficient aggravating circumstances exist" to justify imposition of death. Fla. Stat. § 921.141(3), (emphasis added). If the judge does not make these findings, "the court **shall** impose a sentence of life imprisonment in accordance with [§]775.082." *Id.* (emphasis added). Fla. Stat. § 775.082 provides that a person convicted of first-degree murder must be sentenced to life imprisonment "unless the proceedings held to determine sentence according to the procedure set forth in § 921.141 result in finding by the court that such person shall be punished by death." The Florida Supreme Court has long held that §§ 775.082 and 921.141 do not allow imposition of a death sentence upon a jury's verdict of guilt, but only upon the finding of sufficient aggravating circumstances. *Dixon v. State*, 283 So. 2d 1, 7 (Fla. 1973).

The majority in *Hurst v. State* read the plain language of

Florida's death penalty statute as mandating a factual determination that there existed sufficient aggravating circumstances to justify a death sentence. Indeed, the statute described the sufficiency of the aggravating circumstances as a "fact" and required the entry of factual findings regarding the sufficiency of the aggravators.²

In *State v. Poole*, the Florida Supreme Court announced it was receding from *Hurst v. State*. 297 So. 3d 487, 502-03 (Fla. 2020) ("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."). The Florida Supreme Court in *Poole* rejected the *Hurst* majority's reading of § 921.141 and adopted the position taken by Justice Canady's dissent. *Poole* rejected the construction of § 921.141 that had been adopted in *Hurst v. State*. However, the decision in *Poole* cannot be given retroactive effect because to do so would violated the Due Process Clause.

When the Florida Supreme Court in *Hurst v. State* construed § 921.141, the Savings Clause of the Florida Constitution (Article X, Section 9) required the law on the date of the criminal offense to govern as to the prosecution and sentencing of a criminal defendant. Thus, the construction of § 921.141 in *Hurst v. State* reflected the meaning of the statute on November 27, 1987, the date of the homicides at issue there. The Florida

²And Justice Canady, joined by Justice Polston, dissented from the majority's conclusion that the sufficiency of the aggravators was an element of capital murder.

Supreme Court's decision on January 23, 2020, in *Poole* to recede from statutory construction set forth in *Hurst v. State* cannot be applied retroactively. This Court has held that:

We think it clear that the South Carolina Supreme Court, in applying its new construction of the statute to affirm these convictions, has deprived petitioners of rights guaranteed to them by the Due Process Clause. If South Carolina had applied to this case its new statute prohibiting the act of remaining on the premises of another after being asked to leave, the constitutional proscription of ex post facto laws would clearly invalidate the convictions. The Due Process Clause compels the same result here, where the State has sought to achieve precisely the same effect by judicial construction of the statute.

Bouie v. City of Columbia, 378 U.S. 347, 362 (1964). In *Bouie*, the Court also stated:

When a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law 'in its primary sense of an opportunity to be heard and to defend (his) substantive right.' *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 678, 50 S.Ct. 451, 453, 74 L.Ed. 1107.

Id. at 354.

In *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 681-82 (1930), this Court held:

Undoubtedly, the state court had the power to construe the statute dealing with the state tax commission; and to re-examine and overrule the *Laclede* Case. Neither of these matters raises a federal question; neither is subject to our review. But, while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its Legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.

(Footnote omitted).

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). Certainly, *Poole* was unexpected. It is also indefensible in that the statutory construction set forth in *Hurst v. State* was applied to Hurst’s crime, which was committed May 2, 1998. As a result, his death sentence was vacated and his jury returned a binding life recommendation. The *Hurst* statutory construction was applied in the case of William Melvin White when the circuit court vacated his death sentence on the basis of *Hurst v. State*. See *White v. State*, 817 So. 2d 799 (Fla. 2002); *White v. State*, 729 So. 2d 909 (Fla. 1999); *White v. State*, 415 So. 2d 719 (1982). White’s homicide was committed in 1978. After White’s death sentence was vacated, the State did not pursue another death sentence. As a result, a life sentence was imposed. Moreover, this Court in 1991 indicated that under Florida law a death sentence could only be imposed “where sufficient aggravating circumstances exist”. *Parker v. Dugger*, 498 U.S. 308 (1991).

Poole is also indefensible because the Florida Legislature has demonstrated its agreement with the statutory construction set forth in *Hurst v. State*. The legislature did not dispute the holding of *Hurst v. State*, and chose not to change the statute after *Poole* issued. This means that the Florida Supreme Court in

Hurst v. State correctly read the statute in *Hurst v. State* and captured the legislative intent.

However, in Mr. Ponticelli's case, the Florida Supreme Court constitutionally erred when it held *Poole* retroactive contrary to *Bouie v. City of Columbia* and *Rogers v. Tennessee*.

Furthermore, the Florida Supreme Court's erroneously applied this Court's decision in *McKinney v. Arizona* to Mr. Ponticelli's case. This Court granted certiorari to *McKinney* "[b]ecause of the importance of the case to capital sentencing in Arizona."

McKinney v. Arizona, 140 S.Ct. 702, 706 (2020). Furthermore, the specific questions presented to and considered by this Court were:

1. Whether the Arizona Supreme Court was required to apply current law when weighing mitigating and aggravating evidence to determine whether a death sentence is warranted.

2. Whether the correction of error under *Eddings v. Oklahoma*, 455 U.S. 104 (1982), requires resentencing.

See *McKinney v. Arizona*, Case No. 18-1109, Initial Brief, August 21, 2019. In fact, this Court made clear in its opinion: "The issue in this case is narrow. McKinney contends that after the Ninth Circuit identified an *Eddings* error, the Arizona Supreme Court could not itself reweigh the aggravating and mitigating circumstances." *McKinney*, 140 S.Ct. at 706. The Florida Supreme Court misapprehended the application of *McKinney* to the constitutional errors in Mr. Ponticelli's capital proceedings.

It is important to note that the Arizona statute is markedly different than Florida's statute. The Arizona statute at issue in

Ring v. Arizona and found to govern *McKinney* did not require a finding that sufficient aggravating circumstances existed to justify a death sentence.

Nowhere in *McKinney* did this Court address the Florida death sentencing scheme or the critical Eighth Amendment issues presented by Mr. Ponticelli in his postconviction appeal, including that Mr. Ponticelli's Eighth Amendment right to a unanimous jury finding of each element necessary to make him eligible for a death sentence under Florida's former capital sentencing was violated and without which his death sentences are simply unreliable, or that the current consensus reflecting the evolving standards of decency preclude the execution of a defendant without a jury's unanimous death recommendation, or that the Florida Supreme Court's ruling that *Hurst v. State* does not apply to Mr. Ponticelli is arbitrary and capricious.³

This Court's opinion, which was limited to Arizona and the specific questions before it, simply cannot be dispositive of Mr. Ponticelli's claims or correct the Fifth, Sixth and Eighth Amendment violations that occurred at his capital sentencing proceedings and led to the unreliable death sentences he currently faces.

While *McKinney* has no relevance to the issue Mr. Ponticelli

³The Florida Supreme Court failed to recognize that as reflected in *McKinney*, the Arizona Supreme Court has determined that the finality date for retroactivity purposes is the date on which the conviction became final. This is markedly different from the Florida Supreme Court's view that a case is only final when the sentence imposed is final.

presented to the Florida Supreme Court, this Court's decision in *Ramos v. Louisiana*, 140 S.Ct. 1390 (2020), which was decided on April 20, 2020, does. In *Ramos*, this Court addressed the Oregon and Louisiana laws permitting non-unanimous verdicts in criminal cases. This Court held that the Sixth Amendment compels that a defendant be convicted of a criminal charge in state court only when a unanimous jury finds each element of the offence with which he or she has been charged is proven beyond a reasonable doubt. The impact of *Ramos* on the Florida Supreme Court's decision in *Poole* is indisputable. A unanimous guilty verdict is definitely more reliable than a non-unanimous guilty verdict. See *Schriro v. Summerlin*, 542 U.S. 348, 356 (2004) ("When so many presumably reasonable minds continue to disagree over whether juries are better factfinders at all, we cannot confidently say that judicial factfinding seriously diminishes accuracy.").

Finally, the circumstances surrounding Mr. Ponticelli's sentences of death establish that his constitutional rights were violated. Mr. Ponticelli was indicted on January 4, 1988, with two counts of first-degree murder in the deaths of Nicholas and Ralph Grandinetti and one count of armed robbery (R. 1375-6). Mr. Ponticelli pled not guilty to the charges (R. 1385).

The Grandinetti brothers were local drug dealers who fueled twenty year old Anthony Ponticelli's severe cocaine addiction. The Grandinettis actually sought out Mr. Ponticelli and his friends to supply them cocaine and crack, even when they knew that the addicts could not pay for the drugs (see R. 966-968). On

Thanksgiving weekend, in 1987, the Grandinetti brothers pressured Mr. Ponticelli to pay them what he owed for drugs. John Turner testified at trial that Mr. Ponticelli had told him that: "[the Grandinetti brothers] roughed him up, threw him in the back of the car" (R. 645). Shortly thereafter, with a gun that Mr. Ponticelli had borrowed for protection, he shot Nicholas and Ralph Grandinetti.

After the State rested, the trial court granted the defense's motion for judgment of acquittal as to the armed robbery count (R. 941). However, during the penalty phase, despite the court's finding, the jury was instructed that it could consider the pecuniary gain aggravator as to both victims. And, in sentencing Mr. Ponticelli to death, the trial judge found that the murders were committed for pecuniary gain and they were cold, calculated and premeditated (CCP). As to Nicholas Grandinetti, the trial judge also found that the murder was heinous, atrocious and cruel (HAC) (R. 1343). However, this Court later determined that the HAC aggravator considered by Mr. Ponticelli's jury and found by the trial court was unconstitutionally vague. See *Ponticelli v. Florida*, 506 U.S. 802 (1992). Following the penalty phase, the jury recommended sentences of death by a 9-3 vote for each of the murders (R. 1371-2).

It is clear based on the Florida statute and caselaw and jury instructions that the jury never made the requisite finding that Mr. Ponticelli was eligible for a death sentence, even under

the Florida Supreme Court's analysis in *Poole*. See *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (holding that Fifth and Sixth Amendment to the United States Constitution "entitle a defendant to a 'jury determination ... of every element of the crime with which he is charged, beyond a reasonable doubt.'"); *Ring v. Arizona*, 536 U.S. 584, 602 (2002) ("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."). It cannot be said that the jury found any aggravator unanimously or beyond a reasonable doubt. Mr. Ponticelli's death sentences violate the Fifth, Sixth and Eighth Amendments to the United States Constitution.

CONCLUSION

Petitioner, Anthony Ponticelli, requests that certiorari review be granted.

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 Patrick Bobek, Assistant Attorney General, Office of the Attorney General, The Capitol, PL-01, Tallahassee, FL 32301, on November 27, 2020.

/s/ Martin J. McClain
MARTIN J. MCCLAIN
Fla. Bar No. 0754773
Law Office of Martin J. McClain
141 N.E. 30th Street
Wilton Manors, FL 33334
Telephone: (305) 984-8344
martymcclain@earthlink.net

COUNSEL FOR PETITIONER