CAPITAL CASE

No. 20-7732

IN THE

Supreme Court of the United States

TINA LASONYA BROWN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

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REPLY BRIEF FOR PETITIONER

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Most of the arguments in Respondent's Brief are directed at avoiding a grant of certiorari even if Petitioner Tina Brown's federal constitutional challenges to her death sentence are legally well founded. Most of these avoidance arguments, in turn, were anticipated and refuted in Ms. Brown's cert. petition. All of them are ill taken.

1. "Petitioner asks this Court to address whether the Sixth Amendment prohibits an appellate court from conducting harmless error analysis in a case involving an alleged error under *Hurst v. Florida*." (BIO, p. 4; *see also* pp. 8 – 9, 10 – 11, 16 – 17.) Wrong. This is not Petitioner's contention. Of course an appellate court can find such error harmless if its harmless-error analysis is consistent with the Constitution. But not if it is not. *Clemons v. Mississippi*, 494 U.S. 738 (1990); *Parker v. Dugger*, 498 U.S. 308 (1991). What Petitioner actually "asks this Court to address" is the *way* in which the Florida Supreme Court ("FSC") found the error[1] harmless. The FSC did so by invoking the logic of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) – which Ms. Brown's petition asks this Court to reconsider[2] – and by

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[1] Not the "alleged error." It is not disputable that Ms. Brown's death sentence was imposed under the procedure held unconstitutional in *Hurst v. Florida*, 577 U.S. 92 (2016).

[2] The BIO is wrong again in asserting that the "correctness of the finding of harmlessness is a factual determination with no implications beyond the parties involved in this case. . . ." (BIO, p. 4 – 5.) It is "factual" only in the sense that the FSC found that the facts bring the case within the logic of *Almendarez-Torres*. And that finding carbon-copies *State v. Poole*, 297 So.3d 487 (Fla. 2020), a precedent that governs the cases of all condemned inmates situated like Ms. Brown and Mr. Poole.

The BIO alternatively argues that "[e]ven if this Court disagrees with the Supreme Court of Florida's assessment of the kidnapping evidence, any Sixth Amendment sentencing error remains harmless as the evidence of HAC was still overwhelming." (BIO, p. 9.) But the FSC did not rely at all upon the HAC aggravator in rejecting Ms. Brown's Sixth Amendment claim. It relied solely on the kidnap-murder *Almendarez-Torres*-based theory that rested in turn upon the FSC's *post hoc* construction of what a rational jury "would have found." (*See* Petition, pp. 11 – 12.)

flouting the holdings of *Caldwell v. Mississippi*, 472 U.S. 320 (1985), and *Stromberg v. California*, 283 U.S. 359, 367 – 368 (1931), and its progeny. (*See* Petition for Certiorari ("Petition"), pp. 16 –18 and p. 15, n.30.)

2. The BIO argues that "[i]n raising her *Caldwell* sub-claim . . . Petitioner fails to demonstrate that the jury instructions 'improperly described the role assigned to the jury by local law.'" (BIO, p. 16.) It goes on for three pages to document (a) that the jury instructions given at Ms. Brown's trial described the jury's sentencing role as merely rendering an advisory recommendation, and (b) that this description was correct *at the time of the trial in 2012*. Ms. Brown has never contended otherwise. It is the application, eight and one-half years later, of the *Poole* ruling that a guilt-phase finding of kidnap-murder would *suffice without more to sustain a death sentence* that renders the instructions altogether wrong, converting a guilt-stage finding which the jury was told would merely set the stage for a penalty trial and sentencing recommendation,[3] into a *per se* death warrant. (Petition, pp. 16 – 17, 19 – 20.)

3. The BIO argues that this Court should disregard the state-law holding in *Mosley v. State*, 209 So.3d 1248 (Fla. 2016), that *Hurst* applies retroactively to the temporal cohort which includes Ms. Brown, and should displace that holding with an independent nonretroactivity holding. (BIO, pp. 4 – 5, 8, 15 – 16.) *But see Danforth v. Minnesota*, 552 U.S. 264 (2008).

4. The BIO argues that most of the claims raised by Ms. Brown's Questions Presented were not raised "in her Initial Brief before the Supreme

[3] Petitioner says "would suffice" rather than "will suffice" because the jury in Ms. Brown's case never made any such finding. (*See* Petition, pp. 10 – 12, 14 – 18.)

Court of Florida." (BIO, p. 6, n.2.) It apparently concedes that every claim within the QPs was raised in Ms. Brown's motion for rehearing (*id*. p. 7) but says that "[u]nder state rules . . . a motion for rehearing cannot raise issues or arguments that were not raised in the initial brief" (*id*.). This evasive maneuver conveniently ignores the facts that (a) all of the issues raised by Ms. Brown's QPs arise from the FSC's *Poole* decision; (b) *Poole* had not been decided when Ms. Brown's initial brief was filed; (c) the FSC sprung *Poole* on Ms. Brown after her initial brief was filed; and (d) her rehearing motion was the first opportunity she had to raise the issues. (*See* Petition, pp. 10 – 13.) *See e.g.*, *Saunders v. Shaw*, 244 U.S. 317, 320 (1917); *Cole v. Arkansas*, 333 U.S. 196, 200 (1948).

5. The BIO attributes a "*Schad* claim" to Ms. Brown. (BIO, pp. 4, 19 – 21.) Ms. Brown has never made the "*Schad* claim" that is Respondent's whipping boy, or anything remotely resembling it. *Schad v. Arizona*, 501 U.S. 624 (1991), holds that a first-degree murder charge can be *submitted* to a jury under alternative theories – premeditation and felony murder – and that a first-degree murder conviction can be upheld without 12 jurors agreeing upon one of the two theories as opposed to the other. That is not what the FSC got wrong in Ms. Brown's case. What the FSC got wrong is that it treated a jury verdict which was submitted on alternative theories as *establishing, factually, that the jury made a finding of guilt based on one of the two theories rather than the other*. That treatment of the verdict flies squarely in the teeth

of *Stromberg* and at least a half-dozen similar rulings of this Court. (*See* Petition, p. 15, n.30.) It is precisely because *Schad* **does** allow the jury to cumulate 12 votes from jurors who do not agree about which of two alternative submissions is factually established beyond a reasonable doubt that the FSC violated the Sixth Amendment by reading into Ms. Brown's conviction a factual finding of kidnap-murder which the jury's instructions did not require it to make in order to convict.

The BIO does not seriously contest that Ms. Brown's Eighth Amendment and *Bouie/Marks*[4] issues are properly before the Court. (*See* BIO, p. i, Questions Presented Two and Three, and pp. 22 – 23, 24 – 26.)[5] It argues those issues cursorily on the merits.[6] Ms. Brown would welcome the opportunity afforded by a grant of certiorari to fully brief and argue the merits of her case.[7]

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[4] *Bouie v. City of Columbia*, 378 U.S. 347 (1964); *Marks v. United States*, 430 U.S. 188 (1977).

[5] Respondent's only contention in avoidance of these issues is found in the BIO's footnote 2. This contention is discussed in paragraph 4 *supra*.

[6] Notably, the BIO, like the FSC, grossly overreads this Court's decision in *McKinney v. Arizona,* 140 S. Ct. 702 (2020). (Compare BIO, p. 22, with Petition, p. 22, n.39.) The persistent distortion of *McKinney* is itself a matter warranting certiorari review.

[7] This is not to say that full briefing and argument would be required in order to support reversal of the decision below upon the ground that the FSC's reliance on a conjectural construction of what a jury "would have found" (304 So.3d at 278) to satisfy the requirement of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Hurst v. Florida*, that "any fact that 'expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict' is an 'element' that must be submitted to a jury" (*Hurst*, 577 U.S. at 97) goes far beyond the bounds of judicial fact-finding permissible under *Mathis v. United States*, 136 S. Ct. 2243, 2252 (2016), and *Shepard v. United States*, 544 U.S. 13, 25 – 26 (2005) (plurality opinion). *See* Petition, pp. 14 – 16. That excess is of the kind and degree that this Court has sometimes found to warrant summary reversal. *See, e.g.*, *Espinosa v. Florida*, 505 U.S. 1079 (1992); *Presnell v. Georgia*, 439 U.S. 14 (1978).

CONCLUSION

Ms. Brown respectfully requests that certiorari be granted.

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