CAPITAL CASE

No. _____

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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PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

ONE: Petitioner Tina Brown sought state postconviction relief from a 2012 death sentence imposed under the procedure subsequently held unconstitutional in *Hurst v. Florida*. The Florida Supreme Court denied relief, holding (a) that it is constitutionally permissible to execute a death sentence based on a guilt-stage jury finding of an element of first-degree murder which tracks any aggravating factor required in order to make the first-degree murder death-eligible, and (b) that such a finding needs not be actually made by a jury but can be imputed by an appellate court to a guilt-phase jury verdict which must "have logically concluded" that the element was found, and (c) that such a logical conclusion could be drawn even though the case was submitted to the jury under alternative theories of guilt, only one of which required such a finding. Does this procedure violate the Sixth, Eighth or Fourteenth Amendments? (This question includes the subquestions (1) whether *Almendarez-Torres v. United States* remains good law in the wake of *Hurst* and *Caldwell v. Mississippi* and, if so, (2) whether *Mathis v. United States* or *Stromberg v. California* precludes the Florida Supreme Court's finding-by-imputation procedure.)

TWO: Does the Eighth or the Fourteenth Amendment tolerate a death sentence imposed through a process which denies the jury any responsible role in the selection-stage capital-sentencing decision? (This question includes the subquestions (1) whether these amendments require that the ultimate choice between life and death be made by a unanimous jury, or (2) if not, whether that choice must at least be made by a plurality of a jury, or (3) if not, whether a jury must at least be given some meaningful input into the life-or-death selection-stage decision.)

THREE: The procedure described in Question Presented ONE was announced by the Florida Supreme Court in an opinion which overruled that Court's earlier (2016) implementation of *Hurst v. Florida* and revalidated death sentences which the 2016 ruling had held impermissible. Does this volte-face violate the guarantees of Article I, § 10 or the Fourteenth Amendment's due process prohibition of *ex post facto* liability?

PARTIES TO THE PROCEEDINGS

Petitioner, Tina LaSonya Brown, a death-sentenced Florida prisoner, was the appellant in the Florida Supreme Court.

Respondent, the State of Florida, was the appellee below.

There are no other parties to the proceeding.

LIST OF RELATED PROCEEDINGS

Florida Supreme Court

Brown v. State, Nos. SC19-704 & SC19-1419 (opinion and judgment issued August 27, 2020; order denying rehearing issued November 12, 2020; mandate issued November 30, 2020). [Reported as *Brown v. State*, 304 So.3d 243 (Fla. August 27, 2020)].

United States District Court for the Northern District of Florida

Brown v. Sec'y, Fla. Dep't. of Corr., No. 3:16-cv-99-RH (N.D. Fla.) (proceedings stayed). Unreported.

Circuit Court of the First Judicial Circuit of Florida, in and for Escambia County

State v. Brown, 172010CF001608XXXAXX (judgment entered April 5, 2019). Unreported. [*State v. Brown,* 2019 WL 11234115 (Fla. 1st Cir. Ct. April 5, 2019)].

Supreme Court of the United States

Brown v. Florida, No. 14–6646: certiorari denied. [Reported as *Brown v. Florida*, 574 U.S. 1034 (December 1, 2014)].

Florida Supreme Court

Brown v. State, SC17-2166 Petition for Writ of Prohibition and Motion for Stay of Proceedings, denied December 19, 2017. Unreported. [*Brown v. State*, 2017 WL 6493249 (Fla. December 19, 2017)].

Florida Supreme Court

Brown v. State, SC16–358 Petition Seeking Review of Nonfinal Order in Death Penalty Postconviction Proceeding denied without prejudice, June 24, 2016. Unreported. [*Brown v. State*, 2016 WL 3474843 (Fla. June 24, 2016)].

Florida Supreme Court

Brown v. State, SC16–397 Petition for Writ of Prohibition denied June 24, 2016. Unreported. [*Brown v. State*, 2016 WL 3459727 (Fla. June 24, 2016)].

Florida Supreme Court

Brown v. State, SC12-2159 (opinion and judgment issued May 15, 2014; order denying rehearing issued July 8, 2014; mandate issued July 24, 2014).
[Reported as *Brown v. State*, 143 So.3d 392 (Fla. May 15, 2014)].

Circuit Court of the First Judicial Circuit of Florida, in and for, Escambia County

State v. Brown, 172010CF001608XXXAXX (Fla. 1st Cir. Ct. judgment entered September 28, 2012). Unreported. [*State v. Brown*, 2012 WL 13214557 (Fla. 1st Cir. Ct. September 28, 2012)].

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OPINIONS BELOW

The opinion of the Florida Supreme Court is reported as *Brown v. State*, 304 So.3d 243 (Fla. 2020), and is attached in the Appendix as Exhibit 1. That court's order denying rehearing appears in 2020 WL 6609420 (Fla. 2020) and as Exhibit 2 in the Appendix.

The order of the Circuit Court in and for Escambia County, Florida, in Case No.172010CF001608XXXAXX, denying Ms. Brown's Third Amended Motion to Vacate Judgments of Conviction and Sentence is unreported and is attached in the Appendix as Exhibit 3.

JURISDICTION

The judgment of the Florida Supreme Court was entered on August 27, 2020, and rehearing was denied on November 12, 2020. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides, in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

The Eighth Amendment provides:

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

The Fourteenth Amendment provides, in relevant part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

Article I, § 10 of the Constitution provides, in relevant part:

> "No State shall . . . pass any . . . ex post facto Law . . . ."

STATEMENT OF THE CASE[1]

A. Crime, Trial, Sentence, and Direct Appeal

On April 27, 2010, Petitioner Tina Brown was indicted for the kidnapping and first-degree murder of Audreanna Zimmerman, committed in March of 2010. (R.1 - 2.) The prosecution subsequently dismissed the kidnapping charge (T. 9) and the case went to trial on the murder charge alone. Guilt-stage and penalty-stage proceedings were conducted under the Florida procedure later held unconstitutional in *Hurst v. Florida*.[2]

The prosecution's evidence established a crime out of nightmare. As described by the Florida Supreme Court on direct appeal:

> "In March 2010, Tina Brown, Brown's sixteen-year-old daughter Britnee Miller, Heather Lee, and Audreanna Zimmerman lived in neighboring trailers in an Escambia County mobile home park. The four women were initially good friends, but their relationships – particularly between Miller, Brown, and Zimmerman – were volatile and often escalated to violence. . . .
>
> "On March 24, 2010, Brown invited Zimmerman to her home under the guise of rekindling their friendship. Before Zimmerman arrived, Brown, Miller, Lee, and Miller's thirteen-year-old friend, were inside the trailer. Brown and Lee were in the kitchen, where Lee instructed Brown on the proper use of a stun gun. Miller then pulled her friend aside and told her, 'we're fixing to kill Audreanna [Zimmerman].' Shortly after 9 p.m., Zimmerman entered the trailer. Brown waited several minutes and then used the stun gun on Zimmerman multiple times. When Zimmerman lost muscular control and fell to the floor, Brown continued to use the stun gun on Zimmerman, who was screaming and crying for help. Eventually, Brown pulled Zimmerman across the trailer into the

[1] The abbreviation "T." will be used to refer to Petitioner's trial, and "R." will be used to refer to the record on appeal as compiled for Petitioner's direct appeal, *Brown v. State*, 143 So.3d 392 (Fla. 2014). The abbreviation "PCR." will be used to refer to the postconviction record on appeal as compiled for Petitioner's state postconviction proceeding in *Brown v. State*, Nos. SC19-704 & SC19-1419, 304 So.3d 243 (Fla. 2020), 2020 WL 5048548 (Fla. Aug. 27, 2020).

[2] *Hurst v. Florida*, 577 U.S. 92 (2016).

bathroom. Zimmerman continued to scream and cry for help, so Miller struck Zimmerman in the face and Lee stuffed a sock into Zimmerman's mouth. Zimmerman was then forcibly escorted outside and forced into the trunk of Brown's vehicle. Brown, Miller, and Lee then entered the vehicle and drove away.

"The women drove to a clearing in the woods about a mile and a half from the trailer park. Brown exited the car and pulled Zimmerman out of the trunk. Zimmerman attempted to flee, but stumbled in the darkness and was caught by Brown and Miller. The two women wrestled Zimmerman to the ground and simultaneously attacked her. Brown used the stun gun again on Zimmerman as Miller beat her with a crowbar. Brown and Miller then switched weapons and continued to torture and beat Zimmerman. Miller eventually dropped the stun gun and repeatedly punched Zimmerman. Brown returned to the car, retrieved a can of gasoline from the trunk, and walked back toward the beaten and prone, but still conscious, Zimmerman. Brown poured gasoline on Zimmerman, retrieved a lighter from her pocket, set Zimmerman on fire, and stood nearby to watch the screaming Zimmerman burn. Lee testified that she was standing beside Miller, who exuberantly jumped up and down and screamed, "Burn, bitch! Burn!" After a few minutes, the three women returned to the car and drove away. During the ride home, Miller said, "Mom, you've got to turn around. I left my shoes and the taser." Brown, however, refused to return to the location of the event.

"Due to the extensive nature of Zimmerman's burns, . . .[an] EMT testified that he could not initially identify whether she was wearing clothing. The EMT noticed that Zimmerman's skin was falling off her body, and he believed that over ninety percent of her body was burned. She had severe head trauma, and her jaw was either broken or severely dislocated. . . .

"Zimmerman was stabilized at a local hospital and then transferred to the Burn Center at the University of South Alabama Hospital in Mobile, Alabama, where she died sixteen days later."[3]

The jury found Ms. Brown guilty as charged (R. 632 - 633; T. 742) and recommended death by a vote of 12 to 0 (R. 648; T. 1126 - 1127). The trial judge then

[3] *Brown v. State*, 143 So.3d 392, 395 - 396 (Fla. 2014).

made independent findings of circumstances in aggravation and mitigation;[4] he "concluded that the aggravating circumstances outweighed the mitigating circumstances and noted that this case, 'particularly because of the heinous, atrocious, [or] cruel nature of the murder of Audreanna Zimmerman, falls into the class of murders for which the death penalty is reserved'"[5]; and he elected to impose a death sentence (R.897 - 909).

On direct appeal to the Florida Supreme Court, Ms. Brown contended, *inter alia*, that the Florida capital-sentencing procedure through which she was sentenced to die violated the Sixth Amendment as construed in *Ring v. Arizona*.[6] The Florida

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[4] Two months after the jury's penalty recommendation was received, the trial judge conducted a sentencing hearing (R.897 - 909) pursuant to *Spencer v. State*, 615 So.2d 688 (Fla. 1993). He found the following aggravating factors: (1) the crime was committed during a kidnapping; (2) it was especially heinous, atrocious, or cruel (HAC); and (3) it was cold, calculated, and premeditated (CCP). He found one statutory mitigator – no prior criminal history. He also found twenty-seven non-statutory mitigators: Ms. Brown (1) was the child of a teenage mother (minimal weight); (2) was neglected by both parents (some weight); (3) lost her childhood due to parental neglect (some weight); (4) was abandoned by her mother (some weight); (5) had a history of family violence (some weight); (6) was exposed to drugs during her adolescence (some weight); (7) suffered developmental damage due to her parents' use of and dependence on drugs (some weight); (8) was subjected to sexual violence inflicted by her father; (some weight); (9) was betrayed by a trusted family member (i.e., her grandmother) (some weight); (10) experienced corruptive community influences and exposure to a criminal lifestyle (some weight); (11) experienced chaotic moves and transitions (little weight); (12) was a victim of domestic violence during her adult life (some weight); (13) witnessed a violent homicide and served as a State witness in a murder trial (little weight); (14) lost her family (her parental rights were terminated for her two sons, and she has no relationship with her mother or father) (little weight); (15) suffered repeated trauma throughout her life (little weight); (16) suffered from drug addiction (little weight); (17) suffered from the long term effects of chronic cocaine use on her brain (some weight); (18) was a productive citizen during periods of sobriety (little weight); (19) was living in poverty at the time of the crime (minimal weight); (20) behaved well in jail (little weight); (21) conducted a bible study program (little weight); (22) exhibited good courtroom behavior (little weight); (23) has no possibility of parole (little weight); (24) showed remorse (some weight); (25) received a different sentence than that of her co-defendants (some weight); (26) had no history of prior criminal violence (moderate weight); and (27) was using cocaine on the day of the crime (moderate weight). *State v. Brown*, Circuit Court in and for Escambia County, Florida, Case No. 1710CF001608-A, Sentencing Order, September 28, 2012. *See Brown v. State*, 143 So.3d 392, 401 (Fla. 2014).

[5] *Brown v. State*, 143 So.3d 392, 401 - 402 (Fla. 2014).

[6] 536 U.S. 584 (2002).

Supreme Court affirmed her conviction and sentence on May 15, 2014 (*Brown v. State*, 143 So.3d 392), and this Court denied certiorari on December 1, 2014 (*Brown v. Florida*, 574 U.S. 1034).

B. The Present Postconviction Proceeding

Following earlier postconviction proceedings not currently relevant, Ms. Brown filed the present Rule 3.851 motion – her Third Amended Motion to Vacate Judgments of Conviction and Sentence – on May 1, 2017. (PCR. 1597 - 1862). Among other claims, she argued that her death sentence violated the federal Sixth Amendment by force of *Hurst v. Florida*.[7] On April 5, 2019 the circuit court issued a final order denying all claims. (PCR. 5204 - 5313.)

Ms. Brown appealed the circuit court's ruling to the Florida Supreme Court and simultaneously filed in that court a petition for writ of habeas corpus[8]. The Florida Supreme Court issued an opinion denying relief on August 27, 2020 (*Brown v. State*, 304 So.3d 243) and denied rehearing on November 12, 2020 (*Brown v. State*, 2020 WL 6609420).

[7] 577 U.S. 92 (2016).

[8] The writ proceeding is not currently relevant.

HOW THE FEDERAL QUESTIONS PRESENTED WERE RAISED AND PASSED ON BY THE COURTS BELOW

A. *Hurst*'s wake in Florida: From *Hurst* to *Poole*

On January 12, 2016, in *Hurst v. Florida*, 577 U.S. 92, this Court invalidated Florida's capital-sentencing procedure which had been in effect (with minor, presently irrelevant changes) since December 8, 1972. On remand, the Florida Supreme Court ordered that Timothy Hurst be given a new sentencing trial. *Hurst v. State*, 202 So.3d 40 (Fla. 2016).[9] It took the occasion for a fresh look at the State's statutory death-determining scheme in the light of Florida's own constitution and historic practices, and it undertook to correct two deficiencies that this Court had not found it necessary to reach.

First, informed by *Hurst v. Florida* that "the Sixth Amendment right to a trial by jury mandates that under Florida's capital sentencing scheme, the jury . . . must be the finder of every fact, and thus every element, necessary for the imposition of the death penalty,"[10] the court considered what exactly those facts are:

> "These necessary facts include, of course, each aggravating factor that the jury finds to have been proven beyond a reasonable doubt. However, the imposition of a death sentence in Florida has in the past required, and continues to require, additional factfinding that now must be conducted by the jury. . . . [U]nder Florida law, 'The death penalty may be imposed only where *sufficient aggravating circumstances* exist that *outweigh* mitigating circumstances.' . . . 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

[9] *Hurst v. State* was decided by the Florida Supreme Court on October 14, 2016.

[10] 202 So.3d at 53.

> doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances." [11]

Second, because "Florida has a longstanding history requiring unanimous jury verdicts as to the elements of a crime,"[12] the court concluded 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."[13]

> "Accordingly, we reiterate our holding that before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death."[14]

> "In requiring jury unanimity in these findings and in its final recommendation if death is to be imposed, we are cognizant of significant benefits that will further the administration of justice. . . . '[B]oth the defendant and society can place special confidence in a unanimous verdict.'[15]

> "We also note that the requirement of unanimity in capital jury findings will help to ensure the heightened level of protection necessary for a defendant who stands to lose his life as a penalty."[16]

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[11] *Id*. (Florida Supreme Court's emphasis).

[12] *Id*. at 57. The history is detailed in *id*. at 55 - 57.

[13] *Id*. at 54 (Florida Supreme Court's emphasis).

[15] *Id*. at 58.

[16] *Id*. at 59.

The Florida Legislature subsequently incorporated these *Hurst v. State* requirements into the State's capital-sentencing statutes. As amended effective March 13, 2017, Fla. Stat. § 921.141 provides that a capital sentence may be imposed only after a unanimous jury has found at least one aggravating circumstance and has unanimously recommended a death sentence based upon findings that there exist sufficient aggravating circumstances to warrant death and to outweigh any mitigating circumstances found.

The Florida Supreme Court then addressed the question of the retroactive application of the new federal and state constitutional rules to the State's approximately 380 condemned inmates. *Hurst v. Florida* had followed *Ring v. Arizona*[17] (decided on June 24, 2002) in subjecting the capital-sentencing process to the Sixth Amendment requirement of *Apprendi v. New Jersey*[18] that all facts necessary for criminal sentencing enhancement must be found by a jury. Applying state retroactivity doctrines, the Florida Supreme Court held in *Mosley v. State*[19] that inmates whose death sentences were not yet final on June 24, 2002 were entitled to resentencing under *Hurst v. Florida* and *Hurst v. State.* It held in *Asay v. State*[20] that inmates whose death sentences became final before June 24, 2002 were not entitled to resentencing.

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[17] 536 U.S. 584 (2002).

[18] 530 U.S. 466 (2000).

[19] 209 So.3d 1248 (Fla. 2016).

[20] 210 So.3d 1 (Fla. 2016).

On January 23, 2020, a substantially reconstituted Florida Supreme Court overruled *Hurst v. State* in *State v. Poole*, 297 So.3d 487.[21] It held that a death sentence could be imposed whenever a capital jury found any one or more statutorily enumerated aggravating circumstances, either at the guilt-trial stage or at the penalty-trial stage.

> "Under the principles established in *Apprendi*, *Ring*, and *Hurst v. Florida*, only one of the findings we identified in *Hurst v. State* – the finding of the existence of an aggravating circumstance – qualifies as an element, including for purposes of our state constitution. There is no basis in state or federal law for treating as elements the additional unanimous jury findings and recommendation that we mandated in *Hurst v. State*."[22]

Id. at 505. At the penalty-trial stage, the jury is to return an advisory verdict as to sentence, but the ultimate life-or-death decision is left to the trial judge.[23] This means

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[21] "[T]his Court erred in *Hurst v. State* and . . . we have concluded that we must partially recede from our decision in that case." 297 So.3d at 503. "This Court clearly erred in *Hurst v. State* by requiring that the jury make any finding beyond the section 921.141(3)(a) eligibility finding of one or more statutory aggravating circumstances." 297 So.3d at 501. "The *Hurst v. State* requirement of a unanimous jury recommendation similarly finds no support in *Apprendi*, *Ring*, or *Hurst v. Florida*." 297 So.3d at 504. "Finally, we further erred in *Hurst v. State* when we held that the Eighth Amendment requires a unanimous jury recommendation of death." *Id*.

[22] "Last, lest there be any doubt, we hold that our state constitution's prohibition on cruel and unusual punishment, article I, section 17, does not require a unanimous jury recommendation – or any jury recommendation – before a death sentence can be imposed. The text of our constitution requires us to construe the state cruel and unusual punishment provision in conformity with decisions of the Supreme Court interpreting the Eighth Amendment. Binding Supreme Court precedent in *Spaziano* holds that the Eighth Amendment does not require a jury's favorable recommendation before a death penalty can be imposed. *See Spaziano*, 468 U.S. at 464 - 465. Therefore, the same is true of article I, section 17." 297 So.3d at 505.

[23] "Florida's capital sentencing procedures begin with an evidentiary hearing at which the judge and jury hear evidence relevant to the nature of the crime and the character of the defendant, including statutory aggravating and mitigating circumstances. § 921.141(1), Fla. Stat. (2011). Next the jury deliberates and renders an "advisory sentence" to the court. § 921.141(2), Fla. Stat. Finally, "[n]otwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances," must enter a sentence of life imprisonment or death. §921.141(3), Fla. Stat. If the court imposes a sentence of death, it is required to issue written findings "upon which the sentence of death is based as to the facts: (a) [t]hat sufficient aggravating

that in the case of any condemned inmate seeking *Hurst*-based relief from a death sentence imposed before *Poole*, such relief becomes automatically barred if a jury at the guilt stage had made any factual finding which coincided with one of the statutory aggravators:

> "The jury in Poole's case unanimously found that, during the course of the first-degree murder of Noah Scott, Poole committed the crimes of attempted first-degree murder of White, sexual battery of White, armed burglary, and armed robbery. Under this Court's longstanding precedent interpreting *Ring v. Arizona* and under a correct understanding of *Hurst v. Florida*, this satisfied the requirement that a jury unanimously find a statutory aggravating circumstance beyond a reasonable doubt. . . . In light of our decision to recede from *Hurst v. State* except to the extent it requires a jury unanimously to find the existence of a statutory aggravating circumstance, we reverse the portion of the trial court's order vacating Poole's death sentence."

Poole v. State, 297 So.3d at 508.

B. *Poole* is applied to Ms. Brown

Petitioner Tina Brown is under sentence of death for a murder committed in 2010. Her sentence was imposed in 2012 and falls into the *Mosley* cohort. The case now before this Court arises from a third amended motion to vacate that sentence under Florida's postconviction Criminal Procedure Rule 3.851. The motion was filed in the state circuit court in May of 2017 and denied there in April of 2019. It invoked *Hurst v. Florida*, *Hurst v. State*, and *Mosley* in seeking a new sentencing hearing to correct the constitutional deficiencies of Ms. Brown's 2012 penalty trial, which (everyone must agree) was conducted under the Florida's pre-*Hurst* death-sentencing

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circumstances exist as enumerated in subsection (5); and (b) [t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." 297 So.3d at 495 - 496 (footnote omitted).

procedure. The postconviction court of first instance denied relief on the theory that the *Hurst* error was harmless in light of the jury's 12-0 recommendation of death.[24] Ms. Brown appealed and filed her brief in the Florida Supreme Court in 2019 relying on the Sixth and Fourteenth Amendments as explicated in *Hurst v. Florida* and *Caldwell v. Mississippi*, 472 U.S. 320 328 - 330 (1985), to challenge the notion that a 12-0 rec renders *Hurst* error harmless.[25]

With the stage set for an adjudication of the viability of that notion,[26] the Florida Supreme Court switched the playbill. Its August 27, 2020 decision in Ms.

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[24] *State v. Brown*, Circuit Court in and for Escambia County, Florida, Case No.2010-CF-1608A, Order Denying Defendant's Third Amended Motion to Vacate Judgments of Conviction and Sentence, April 5, 2019, pages 107 - 110. The court wrote that: "Additionally, the facts in this case – the victim was repeatedly tased, bludgeoned with a crowbar, and set on fire, and yet still lived long enough to tell persons who committed the crime – are so egregious that it supports the finding that any *Hurst* error in this case was harmless." *Id.* at 109 - 110.

[25] Initial Brief of Appellant, *Brown v. State*, Case No. SC19-704, August 21, 2019, at pages 118 - 125.

[26] As this Court well knows, the Florida Supreme Court has sometimes found that a 12-0 jury rec sufficed to require the denial of retroactive *Hurst* relief. But that has not been the invariable rule (*see*, *e.g.*, *Philmore v. State*, 234 So.3d 567 (2018) (treating the 12-0 rec as merely one of three factors to be considered in harmless-error analysis), and the opinion below does not rely in any part on the 12-0 theory, perhaps because that theory has been severely criticized by Justices of this Court. *See, e.g.*, *Middleton v. Florida*, 138 S.Ct. 829 (2018) (Justice Sotomayor, joined by Justice Ginsburg and with whom Justice Breyer agreed, dissenting from the denial of certiorari); *Reynolds v. Florida*, 139 S.Ct. 27, 29 (2018) (statement of Justice Breyer), 32 - 36 (Justice Sotomayor, dissenting from the denial of certiorari); *Anderson v. Florida*, 140 S.Ct. 291 (2019) (Justice Sotomayor, dissenting from the denial of certiorari). Similarly, in *Boyd v. State*, 291 So.3d 900, 901 (2020), and *Lott v. State,* 303 So.3d 165 (Fla. 2020), the Florida Supreme Court relied exclusively upon *Poole*'s recession from *Hurst* to deny relief in 12-0 cases without reliance on the jury's unanimous death rec (*see Lott v. State*, 695 So.2d 1239, 1241 (Fla. 1997); *Boyd v. State*, 910 So.2d 167, 176 (Fla. 2005)). This stands in sharp contrast to the Florida Supreme Court's continuing reliance on the non-retroactivity rule of *Asay* to reject *Hurst*-based claims in post-*Poole* cases where it might have relied on *Poole*. *See*, *e.g.*, *Wright v. State*, No. SC19-2123, January 7, 2021; *Randolph v. State*, No. SC20-287, February 4, 2021. Consequently, it is now unclear both whether the pre-*Poole* 12-0 cases do or do not establish a categorical basis for finding *Hurst* error harmless and whether or not the rule of those cases might continue to be applied in post-*Poole* collateral proceedings. But these questions should have no bearing on the merit of the present cert. petition in any event. This Court reviews lower court decisions on the basis of the rationale which the lower court offers as the ground of its decision; it does not consider whether there are some lurking alternative grounds on which the lower court might have reached the same decision but did not. This is why it frequently reverses a lower-court decision and remands with an explicit statement that the lower court is free to consider other grounds that might support its adhering to its previous result.

Brown's case forbore any retroactivity analysis and rejected her *Hurst*-based claims solely on authority of the supervening decision in *Poole*. *See Brown v. State*, 304 So.3d 243. Applying *Poole*'s new rule that any jury guilt-stage finding of facts that were coincidental with a statutory aggravator precludes *Hurst*-based relief, it ruled as follows:

> "After the circuit court denied relief, we 'recede[d] 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.' *State v. Poole* . . . . Although the required jury finding does not exist in Brown's case, we agree with the circuit court that the error is harmless beyond a reasonable doubt.
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> "At trial, the State argued that Brown was guilty of first-degree murder under both premeditated and felony murder theories and presented uncontroverted evidence that the capital felony was committed while Brown was engaged, or was an accomplice, in the commission of a kidnapping. Any jury that found, based on the State's presentation, that Brown was guilty of first-degree murder could not have logically concluded that Brown was not also guilty of kidnapping, whether as the primary aggressor or an accomplice. Accordingly, we hold that, under the circumstances of this case, there is no reasonable doubt that a 'rational jury,' properly instructed, would have found beyond a reasonable doubt the existence of the statutory aggravating circumstance that the capital murder was committed while Brown was engaged in the commission of a kidnapping. . . . Because the existence of a single statutory aggravating circumstance would render Brown eligible for imposition of the death penalty, *see Poole*, . . . it is unnecessary to address any of the other statutory aggravators found by the trial court to conclude that the sentencing error in Brown's case is harmless. Accordingly, we affirm the circuit court's denial."
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> 304 So.3d at 277 - 278.

E.g., Bearden v. Georgia, 461 U.S. 660 (1983); *Roe v. Flores-Ortega*, 528 U.S. 470, 478 - 481 (2000); *Padilla v. Kentucky,* 559 U.S. 356 (2010); *Bosse v. Oklahoma*, 137 S.Ct. 1 (2015) (per curiam); *Byrd v. United States*, 138 S.Ct. 1518 (2018); *Maslenjak v. United States,* 137 S.Ct. 1918 (2017); *Tharpe v. Sellers*, 138 S.Ct. 545 (2018) (per curiam).

Ms. Brown's motion for rehearing then raised all of the federal constitutional objections to this ruling which are presented in the current petition for certiorari, fleshing them out in essentially the same terms as the following REASONS section.[27]

REASONS FOR GRANTING THE WRIT

A. Certiorari should be granted to determine whether the Sixth and Fourteenth Amendments can tolerate Florida's post-*Poole* practice of upholding a death sentence unsupported by any responsible jury finding of the facts necessary to make a defendant's crime death-eligible

Hurst v. Florida, 577 U.S. 92 (2016), invalidated Florida's longstanding capital-sentencing procedure because that procedure did "not require the jury to make the critical findings necessary to impose the death penalty." *Id*. at 622. As we have noted above, the 2016 Florida Supreme Court in *Hurst v. State* correctly read *Hurst v. Florida* as holding that "the Sixth Amendment right to a trial by jury mandates that under Florida's capital sentencing scheme, the jury . . . must be the finder of every fact, and thus every element, necessary for the imposition of the death penalty." 202 So.3d at 53. In receding from *Hurst v. State*, the 2020 Florida Supreme Court in *Poole* held retroactively that a death sentence could be upheld whenever a capital jury had found any one or more statutorily enumerated aggravating circumstances, either at the guilt-trial stage or at the penalty-trial stage. And in Ms. Brown's case that holding was extended to encompass an aggravating circumstance never actually found by a jury at any stage but supplied constructively by appellate exegesis of what "a 'rational jury,' properly instructed, would have found."

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[27] Motion for Rehearing, *Brown v. State*, Case No. SC19-704, September 11, 2020, at pages 15 - 25.

The only way to square this holding with *Hurst v. Florida* is to assume that *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), survives *Hurst* and qualifies *Hurst*'s Sixth Amendment command. For two reasons, it does not; and for one additional reason the application of *Almendarez-Torres* to Ms. Brown's case constitutes a peculiarly egregious Sixth Amendment violation.

(1) We begin with this third reason. Exactly like Timothy Hurst, Tina Brown now stands slated for execution on the sole ground of a death-eligibility decision based on a factual finding made only by judges, not jurors. The jury in Ms. Brown's case never convicted her of any felony other than the first-degree murder of Audreanna Zimmerman. Although indicted for kidnapping, Ms. Brown was never tried on that charge. The suppositious felony conviction through which the Florida Supreme Court brought Ms. Brown within *Poole*'s ambit is a creature of its own making, inferred factually from appellate what-a-jury-would-have-found reasoning.

And that reasoning itself is wrong. If the prosecution's first-degree murder charge had been submitted to the guilt-stage jury solely on a kidnap-murder theory, then it might be true that a guilty verdict by a rational jury would support an inference that the jury found a kidnapping beyond a reasonable doubt. But as the Florida Supreme Court itself concedes, "the State argued that Brown was guilty of first-degree murder under both premeditated and felony murder theories",[28] and the

[28] *Brown v. State*, 304 So.3d at 278. The indictment cast the first-degree charge in the alternative. (*See* T. 39.) The prosecution argued both theories independently in its closing to the jury. (T. 680 - 683.) "So what that means for you as the jurors is that either one or all of you may be convinced beyond a reasonable doubt that this was a premeditated murder or one or all of you may be convinced beyond a reasonable doubt that it was a felony murder. It doesn't matter. As long as all of you agree that it was first degree murder – murder, either felony or premeditated, you can convict Tina Brown. There's

guilt-stage instructions told the jurors that they could return a first-degree murder verdict based on either theory alone.[29] This is quite simply the classic case in which every precedent of this Court forbids an appellate court to attribute to a jury's verdict one of the two alternative findings upon which the jurors had been told that they could rest a criminal conviction.[30]

In any event, the Florida Supreme Court's *post hoc* fact-construction is plainly at odds with the Sixth Amendment restrictions placed upon judicial fact-finding by *Mathis v. United States*, 136 S.Ct. 2243 (2016), and *Shepard v. United States*, 544 U.S. 13 (2005) (plurality opinion).

> "This Court has held that only a jury, and not a judge, may find facts that increase a maximum penalty, except for the simple fact of a prior conviction. See *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). . . . That means a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense. . . . He is prohibited from conducting such an inquiry himself; and so too he is barred from making a disputed determination about 'what the defendant and state judge must have understood as the factual

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no place on the verdict form that makes you explain your answer or take a vote saying who voted for premeditated or who voted for felony. It doesn't matter as long as you all agree it's first degree murder. (T. 685 - 686.)

[29] *See* T. 719 - 721.

[30] "The verdict against the appellant was a general one. It did not specify the ground upon which it rested. As there were three purposes set forth in the statute, and the jury was instructed that their verdict might be given with respect to any one of them, independently considered, it is impossible to say under which clause of the statute the conviction was obtained. If any one of these clauses, which the state court has held to be separable, was invalid, it cannot be determined upon this record that the appellant was not convicted under that clause." *Stromberg v. California*, 283 U.S. 359, 367 - 368 (1931). *See also*, *e.g.*, *Williams v. North Carolina*, 317 U.S. 287, 291 - 292 (1942) ("[W]e cannot determine on this record that petitioners were not convicted on the other theory on which the case was tried and submitted . . . . That is to say, the verdict of the jury for all we know may have been rendered on that ground alone, since it did not specify the basis on which it rested. . . . To say that a general verdict of guilty should be upheld though we cannot know that it did not rest on the invalid constitutional ground on which the case was submitted to the jury, would be to countenance a procedure which would cause a serious impairment of constitutional rights."); *Yates v. United States*, 354 U.S. 298, 312 (1957); *Mills v. Maryland*, 486 U.S. 367, 376 (1988); *Black v. United States*, 561 U.S. 465, 470 (2010).

> basis of the prior plea' or 'what the jury in a prior trial must have accepted as the theory of the crime.' . . . He can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of."

(*Mathis*, 136 S.Ct. at 2252.)[31]

To uphold a death sentence on the basis of a judicially imputed jury finding also flies in the teeth of *Caldwell v. Mississippi.* The record of these proceedings makes unmistakably clear that Ms. Brown's jury never made a decisive determination of the factual predicate upon which the Florida Supreme Court has now retrospectively rested her death-eligibility. Prior to jury selection, the judge instructed the potential jurors that the consequence of a first-degree murder verdict would be simply that "the jury will then reconvene for the purpose of rendering an advisory recommendation as to which sentence death or life imprisonment should be

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[31] *See also Shepard*, 544 U.S. at 25 - 26:

> "[T]he sentencing judge considering the ACCA enhancement would (on the Government's view) make a disputed finding of fact about what the defendant and state judge must have understood as the factual basis of the prior plea, and the dispute raises the concern underlying *Jones v. United States*[, 526 U.S. 227 (1999)], and *Apprendi*; the Sixth and Fourteenth Amendments guarantee a jury standing between a defendant and the power of the State, and they guarantee a jury's finding of any disputed fact essential to increase the ceiling of a potential sentence. While the disputed fact here can be described as a fact about a prior conviction, it is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to *Jones* and *Apprendi,* to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute. The rule of reading statutes to avoid serious risks of unconstitutionality . . . therefore counsels us to limit the scope of judicial factfinding on the disputed generic character of a prior plea, just as *Taylor* constrained judicial findings about the generic implication of a jury's verdict."

And see id. at 28 (Justice Thomas, concurring):

> "In my view, broadening the evidence judges may consider when finding facts under *Taylor* [*v. United States*, 495 U.S. 575 (1990)] – by permitting sentencing courts to look beyond charging papers, jury instructions, and plea agreements to an assortment of other documents such as complaint applications and police reports – would not give rise to constitutional doubt, as the plurality believes. . . . It would give rise to constitutional error . . . ."

imposed."[32] The jurors were not told that the Florida Supreme Court would later treat their guilt-stage verdict as a self-sufficient basis for consigning Tina Brown to death. The judge's guilt-stage instructions told the jury nothing more about the potential sentencing consequences of a guilty verdict. At the penalty stage, the jury was instructed that:

> "The punishment for this crime is either death or life imprisonment without the possibility of parole. The final decision as to which punishment shall be imposed rests with the judge of this court, which in this case is me. However, the law requires that you, the jury, render to me an advisory sentence as to which punishment should be imposed upon the defendant."[33]

Sheltered by these instructions, the prosecutor was allowed to tell the jurors:

> "Ultimately . . . , you're going to render an advisory recommendation to the Judge whether Tina Brown should be sentenced to death or life imprisonment.
>
> "This Honorable Judge will ultimately decide which punishment to impose, but he must give your recommendation great weight."[34]

So "[i]f you vote and recommend the death penalty for Tina Brown, her death would not be on your hands." (T.1070.)[35]

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[32] T. 77 - 78. "At that hearing, . . . [b]oth the State and the defendant will have an opportunity to present arguments for and against the death penalty." *Id.*

[33] T. 751 (opening penalty-stage instructions, Penalty Stage Instruction 7.11.) *See also* T.1111 (final penalty-stage instructions, Penalty Stage Instruction 7.11) ("As you have been told, the final decision as to which punishment shall be imposed is the responsibility of the judge. In this case, as the trial judge, that responsibility will fall on me. However, the law requires you to render an advisory sentence as to which punishment should be imposed – life imprisonment without the possibility of parole or the death penalty. ¶ Although the recommendation of the jury as to the penalty is advisory in nature and is not binding, the jury recommendation must be given great weight and deference by the Court in determining which sentence to impose.")

[34] T. 112.

[35] Defense counsel similarly emphasized that the jury's sentencing role was merely advisory. (T.215; 217; 224; 1101; 1103; 1104.) During penalty-stage closing, he argued that "what you're about to do is

All in all, the Florida Supreme Court's extension of *Almendarez-Torres* into conflict with *Mathis* and *Shepard*, together with its disregard for *Caldwell*, leave Ms. Brown's death sentence with no foundation that could withstand this Court's Sixth and Fourteenth Amendment review.

(2) But Ms. Brown's case also presents an apt vehicle for the Court to reconsider the Sixth Amendment viability of *Almendarez-Torres* itself if the Court chooses to do so. There are strong reasons why it should.

Almendarez-Torres was a case about the construction of a federal statute and legislative intent. It did discuss the Constitution in connection with a "constitutional doubt" argument, but that discussion was primarily devoted to the Indictment Clause of the Fifth Amendment. The opinion's single paragraph bearing on Sixth Amendment caselaw comes in by way of analogy (s*ee* 523 U.S. at 547), and the analogy is to three Sixth Amendment cases that have since been overruled: *Walton v. Arizona*, 497 U.S. 639 (1990); *Hildwin v. Florida*, 490 U.S. 638 (1989) (per curiam); and *Spaziano v. Florida*, 468 U.S. 447 (1984). None of these cases survives *Ring v. Arizona,* 536 U.S. 584 (2002), and *Hurst v. Florida.* Well before *Poole*, a majority of this Court's Justices had announced that *Almendarez-Torres* was no longer good Sixth Amendment law, if it ever had been. *See Shepard v. United States*, 544 U.S. 13, 27 - 28 (2005) (Thomas, J., concurring in part and concurring in the judgment) ("*Almendarez-Torres* . . . has been eroded by this Court's subsequent Sixth

render … an advisory sentence or a recommendation. And the reason it's called that is that you don't actually impose the final sentence on Tina Brown. Only the Judge can do that." (T.1107.)

Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided. *See* 523 U.S., at 248 - 249 . . . (SCALIA, J., joined by STEVENS, SOUTER, and GINSBURG, JJ., dissenting); *Apprendi, supra,* at 520 - 521. . . (THOMAS, J., concurring).").

(3) *Almendarez-Torres* had to do with *prior* convictions, not *contemporaneous* convictions. *Almendarez-Torres* is a case about recidivism: it aims to spare the government from the need to retry and re-prove old criminal charges that have been reduced to judgment. Its application to contemporaneous convictions in *Poole* is an aberration. When all of the facts bearing upon a capital defendant's eligibility for death are litigated in a single case with no prior case to revisit, it is not too much for the Sixth Amendment to demand that the jury in this single case make a responsible determination of the existence *vel non* of those facts.

The operative word in that proposition is "responsible." *See Caldwell*. Ms. Brown's jury and other juries in Florida capital cases tried before *Hurst v. Florida* had no inkling that their guilt-stage verdict would suffice without more to make the defendant death-eligible. See pages 15 - 17 *supra.* This Court has established that the key to *Caldwell*'s applicability is whether instructions that diminish the jury's responsibility for the fatal consequences of its verdict are accurate or inaccurate under local law.[36] Here, *Poole* has made them retroactively inaccurate. The guilt-

[36] *See, e.g., Romano v. Oklahoma*, 512 U.S. 1, 9 (1994): "[W]e have since read *Caldwell* as 'relevant only to certain types of comment – those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision.' . . . . Thus, '[t]o establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law.'"

stage verdict of Ms. Brown's jury (and other juries in her temporal cohort) which the jury was led to believe would do no more than initiate a second, sentencing stage of the trial have now – a decade later – been converted by *Poole* into an automatic, stand-alone basis for death-eligibility. This has got to be all wrong under *Hurst v. Florida* and *Caldwell*.

B. Certiorari should be granted to consider whether Florida's post-*Poole* scheme for dealing with cases in which pre-*Hurst* trials produced a death sentence violates the Eighth and Fourteenth Amendments

By the terms of the Florida Supreme Court's decision below, Ms. Brown will go to her death without ever having had a responsible jury determination that death is a fitting punishment for her. The same is true of all other unresolved[37] *Mosley*-cohort cases in which any factual element submitted to a jury as a possible theory of first-degree murder mirrors a statutory aggravating circumstance – which, as a practical matter, means virtually all first-degree felony-murder cases.[38] This raises the

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[37] In cases in which a final order vacating a death sentence was entered by a trial court pursuant to the *Hurst* precedents and was not appealed by the State within the statutorily prescribed appeal deadline, the death sentence cannot be reinstated under *Poole* (*State v. Jackson*, 2020 WL 6948842 (Fla. 2020); and in cases in which a final judgment vacating a death sentence was entered by the Florida Supreme Court itself pursuant to the *Hurst* precedents and the State failed to seek timely rehearing, the death sentence cannot be reinstated under *Poole* (*State v. Okafor*, 2020 WL 6948840 (Fla. 2020)). The reason why Ms. Brown and similarly situated condemned inmates lose out in the *Hurst*-relief lottery is that post-*Hurst* proceedings in their cases were delayed by various litigation fortuities (local docket congestion; unavailability of defense counsel; COVID-19 problems) so that they failed to get a formal order vacating their pre-*Hurst* death sentences as early as the 100-odd condemned inmates covered by *Jackson* and *Okafor*. Their plight makes a mockery of the Eighth Amendment principle "insist[ing] upon general rules that ensure consistency in determining who receives a death sentence" (*Kennedy v. Louisiana*, 554 U.S. 407, 436 (2008)) – the rule that "if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty" (*Godfrey v. Georgia*, 446 U.S. 420, 428 (1980)).

[38] Fla. Stat. Ann. § 782.04 provides that the unlawful killing of a human being is first-degree murder:

fundamental question whether the Cruel and Unusual Punishments Clause of the federal Eighth Amendment or the Due Process Clause of the Fourteenth Amendment requires meaningful jury input into life-or-death sentencing judgments. The *Poole* Court explicitly rejected an Eighth Amendment objection to its recession from *Hurst v. State* on the ground that the Florida Constitution's conformity clause obliged it to

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1. When perpetrated from a premeditated design to effect the death of the person killed or any human being;
2. When committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any:
a. Trafficking offense prohibited by s. 893.135(1),
b. Arson,
c. Sexual battery,
d. Robbery,
e. Burglary,
f. Kidnapping,
g. Escape,
h. Aggravated child abuse,
i. Aggravated abuse of an elderly person or disabled adult,
j. Aircraft piracy,
k. Unlawful throwing, placing, or discharging of a destructive device or bomb,
l. Carjacking,
m. Home-invasion robbery,
n. Aggravated stalking,
o. Murder of another human being,
p. Resisting an officer with violence to his or her person,
q. Aggravated fleeing or eluding with serious bodily injury or death,
r. Felony that is an act of terrorism or is in furtherance of an act of terrorism, including a felony under s. 775.30, s. 775.32, s. 775.33, s. 775.34, or s. 775.35, or
s. Human trafficking; or
which resulted in specified drug-distribution offenses by a person 18 or older.

Fla. Stat. Ann. § 921.141(6) lists 16 aggravating circumstances, any one of which renders a first-degree murder convict death-eligible. These include:

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

follow this Court's Cruel-and-Unusual-Punishment precedents, and that those precedents – specifically, *Spaziano v. Florida*, 468 U.S. 447 (1984) – foreclosed any Eighth Amendment right to jury trial in capital sentencing.[39] The question whether this reading of the Eighth Amendment remains tenable in the light of today's nationwide capital-sentencing practice and of *Spaziano*'s obsolescence[40] is thus squarely presented by the *Brown* court's reliance on *Poole*.

This Court could answer that question in the negative on any of three broader or narrower grounds based upon the "standards of decency [that] have [now] evolved . . . as expressed in legislative enactments and state practice" (*Roper v. Simmons*, 543

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[39] See note 22 *supra*. In post-*Poole* opinions relying on *Poole* to reject Sixth and Eighth Amendment claims, the Florida Supreme Court has also taken comfort from *McKinney v. Arizona,* 140 S.Ct. 702, 707 (2020), which it reads as 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.'" *Reed v. State*, 297 So.3d 1291, 1292 (Fla. 2020). *See also Lott v. State,* 303 So.3d 165, 166 (Fla. 2020); *Franqui v. State*, 301 So.3d 152, 155-156 (Fla. 2020). But McKinney made no Eighth Amendment claim remotely resembling Ms. Brown's. The only Eighth Amendment arguments which McKinney advanced in this Court had to do with the Arizona Supreme Court's reweighing procedure. *See* Petition for a Writ of Certiorari in No. 18-1109 at pages 4 and 5: "The Arizona Supreme Court's decision to apply the law as it stood in 1996 when weighing the mitigating and aggravating evidence in McKinney's death penalty case in 2018 violated McKinney's Sixth, Eighth, and Fourteenth Amendment rights . . ." (page 4) and "[T]he Arizona Supreme Court violated this Court's decision in *Eddings*, and McKinney's Sixth, Eighth, and Fourteenth Amendment rights, by declining to remand McKinney's case for resentencing in the trial court" (page 5). The Court's rejection of these claims took McKinney at his word: "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. Rather, according to McKinney, a jury must resentence him." 140 S.Ct. at 706. The Florida Supreme Court's persistent reading of this Court's decisions as categorically foreclosing any claim that the Eighth Amendment requires jury participation in the selection stage of a State's death-sentencing process makes a grant of certiorari on Ms. Brown's Eighth Amendment contentions all the more appropriate.

[40] *See Hurst v. Florida*, 577 U.S. at 101 - 102.

U.S. 551, 563 (2005)), upon this Court's own judgments[41] regarding the crucial role of the jury in criminal cases, and upon "the consequences that follow from saying what we know to be true" (*Ramos v. Louisiana*, 140 S.Ct. 1390, 1395 (2020)).

(1) The Eighth Amendment requires that the ultimate decision to impose a sentence of death rather than life must be made by a unanimous jury.

Capital-sentencing procedures which 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 (*see Woodson v. North Carolina*, 428 U.S. 280 (1976), *Roberts v. Louisiana*, 428 U.S. 325, 332 - 333 (1976)), as do capital-sentencing procedures which are inconsistent with the consensus of contemporary practice in the nation (*Beck v. Alabama*, 447 U.S. 625, 635 (1980)). Under both of these paired principles, the Eighth Amendment today requires a unanimous jury determination in favor of a death sentence before a State may enforce that sentence.

The overwhelming consensus of American jurisdictions which authorize capital punishment is that a death sentence should not be inflicted without a unanimous jury decision that death is the appropriate punishment for each individual defendant in consideration of his or her crime, character, circumstances, and history. Only Alabama, Florida, Montana and Nebraska now cling to the

[41] "Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty" under particular circumstances. *Enmund v. Florida*, 458 U.S. 782, 797 (1982).

contrary position[42] – and Florida does so only retroactively as a result of the atavistic *Poole* ruling, which is at odds with the Florida Legislature's own judgment, rendered in 2017, that a death sentence without unanimous jury approval is intolerable.

The Eighth Amendment stands to guarantee that the death penalty is reliably inflicted only upon the most morally culpable subset of those persons who commit the most serious homicides. *See, e.g., Roper v. Simmons,* 543 U.S. 551, 568, (2005); *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980). The essentially non-existent capital-sentencing role that *Poole* assigns to the jury is inconsistent with "the unique nature of the death penalty and the heightened reliability demanded by the Eighth Amendment in the determination whether the death penalty is appropriate in a particular case." *Sumner v. Shuman*, 483 U.S. 66, 72 (1987). Only a unanimous jury verdict can supply the requisite assurance of reliability.[43] The application of *Poole* to confirm Ms. Brown's death sentence deprives her of that assurance.

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[42] See pages 25 - 26 *infra* and Exhibits 4 and 5 in the Appendix.

[43] A large body of empirical evidence demonstrates the reasons why unanimous juries better express the reasoned moral judgment of the community than non-unanimous juries. A unanimity requirement produces more thoroughgoing and deliberately reasoned decision-making. REID HASTIE *et al.,* INSIDE THE JURY 115, 164 - 165 (Harvard U. Press 1983); Shari Seidman Diamond et al., *Revisiting the Unanimity Requirement: The Behavior of the Nonunanimous Civil Jury*, 100 NW. U. L. REV. 201 (2006); Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622, 669 (2001); Valerie P. Hans, *The Power of Twelve: The Impact of Jury Size and Unanimity on Civil Jury Decision Making,* 4 DEL. L. REV. 1, 24 - 25 (2001). It assures that jurors who enjoy a majority position at the outset of deliberations and demographically will be obliged to hear the opinions of minority jurors. Valerie P. Hans, *Deliberation and Dissent: 12 Angry Men Versus the Empirical Reality of Juries*, 82 CHI.-KENT L. REV. 579, 587 (2007); Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1264 (2000). For example, "majority rule may make it less likely that women's voices will ever be heard." *Id*. at 1300. And so with racial minorities. *See* Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1599 (2018). It lessens the likelihood of erroneous findings. HASTIE, *supra*, at 62, 81; Dennis J. Devine et al., *Deliberation Quality: A Preliminary Examination in Criminal Juries,* 4 J. EMPIRICAL LEGAL STUD. 273, 300 (2007); Taylor-Thompson, *supra*, at 1272. And although the ultimate life-or-death decision is less constrained by fact-finding and legal guidance than is a guilt-phase verdict, it is neither fact-free nor – in jurisdictions like Florida where statutory law provides lists of aggravating and mitigating

(2) Alternatively, even if the Eighth Amendment did not require jury unanimity in death sentencing, it would at least require a jury to make the ultimate decision to impose a death sentence.

At a minimum, the Eighth Amendment requires – as Justices Stevens and Breyer have explained – that a jury make the ultimate decision to impose a death sentence, whether unanimously or non-unanimously. *See, e.g., Harris v. Alabama,* 513 U.S. 504, 515 - 526 (1995) (Justice Stevens, dissenting); *Ring*, 536 U.S. at 613 - 618 (Justice Breyer, concurring). Among the 29 American jurisdictions which retained the death penalty at the time of the Florida Supreme Court's decision in Ms. Brown's case, only three failed to recognize that such a requirement reflects the vital role of the jury in ensuring a "reasoned moral response" (*Penry v. Johnson*, 532 U.S. 782, 797 (2001)) to the balance of aggravation and mitigation: – Montana and Nebraska by statute and Florida in disregard of statute. This lopsided division of legislative judgments regarding the necessity for a jury determination that death is the appropriate sentence for each individual defendant convicted of a capital crime is among the most extreme disproportions found in cases in which this Court has relied upon a national legislative consensus to support the conclusion that a State's sentencing practice is at odds with evolving standards of decency.[44]

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circumstances and a weighing formula – rule-free.

[44] *Compare Beck v. Alabama*, 447 U.S. 625 (1980) (only Alabama employed the practice at issue), and *Coker v. Georgia*, 433 U.S. 584 (1977) (only three States employed the practice at issue), *with Kennedy v. Louisiana*, 554 U.S. 407 (2008) (six States employed the practice at issue, some under more restrictive conditions than Louisiana's); and *Enmund v. Florida*, 458 U.S. 782 (1982) (eight States employed the practice at issue); and *Hall v. Florida*, 572 U.S. 701 (2014) (somewhere between four and nine States employed the practice at issue; the Court regarded the direction and consistency of evolving practice significant and also noted that the 19 States that had abolished or suspended capital punishment altogether were also to be considered among the bellwethers); and *Atkins v. Virginia*, 536

The Legislatures of twenty-seven of America's 29 death-penalty jurisdictions can't be wrong in insisting that juries must make an individualized capital-sentencing decision after considering crime-specific and defendant-specific circumstances in aggravation and mitigation. Some jurisdictions provide formulas for jurors to use in weighing aggravation against mitigation; others ask the jury – instead or in addition to employing a balancing formula – to vote yes or no on the ultimate issue of life or death.[45] But all understand that "[b]ecause juries are better suited than judges to 'express the conscience of the community on the ultimate question of life or death,' the Constitution demands that jurors make, and take responsibility for, the ultimate decision to impose a death sentence." *Reynolds v. Florida*, 139 S.Ct. 27, 28 - 29 (2018) (Justice Breyer, statement respecting the denial of certiorari).

(3) Alternatively, at a minimum the Eighth Amendment requires that a jury have meaningful input into the capital-sentencing decision.

Poole cannot be squared with the Eighth Amendment because, even if jury unanimity in capital sentencing is not a federal constitutional requirement, and even if a jury need not make the ultimate decision to impose the death penalty, it is

U.S. 304 (2002) (18 States employed the practice at issue; 20 had abandoned it; the Court regarded the direction and consistency of evolving practice significant); and *Roper v. Simmons*, 543 U.S. 551 (2005) (18 States employed the practice at issue; 20 death-penalty States had abandoned it; the Court noted that the 12 States that had abolished capital punishment altogether were also to be considered among the bellwethers).

[45] Exhibit 4 in the Appendix *infra* summarizes the relevant procedures of the 29 jurisdictions other than Florida that authorized capital punishment at the time of the decision below. Exhibit 5 identifies the sources of the data in Exhibit 4.

manifestly required under the Eighth Amendment that a jury have some meaningful input into a capital-sentencing decision. Meaningful jury input in death sentencing is required to ensure that each individual decision to impose capital punishment comports with prevailing moral standards. *Woodson*, 428 U.S. at 302 - 305.

The Eighth Amendment requires that "'the sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime'" (*Abdul-Kabir v. Quarterman*, 550 U.S. 233, 252 (2007) (internal citations omitted)), and "'justice . . . requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender'" (*Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982)).

Whether the nature of the crime and the nature and background of a defendant render her death-worthy requires a decision made by a jury which feels the weight of its importance. *Caldwell v. Mississippi*, 472 U.S. 320, 328 - 30 (1985). Ms. Brown's jurors were led to believe that their only task was to decide her guilt or innocence, and that the final sentencing decision rested solely with the judge. Now, decades later, the Florida Supreme Court has abruptly converted the jury's guilt-stage verdict into a death warrant.[46] The Eighth Amendment cannot possibly countenance this legerdemain.

[46] It is true, of course, that Ms. Brown's jury did render a unanimous advisory recommendation of death. But – even putting aside *Caldwell* problems (see pages 16 - 18 *supra*) – that recommendation is not the basis upon which Ms. Brown is now slated to be killed. Her 2012 death sentence following that recommendation was invalidated by *Hurst v. Florida*; its resurrection under *Poole* depends entirely on the Florida Supreme Court's attribution of an aggravation finding to the jury's *guilt-stage* verdict. See pages 11 - 12 *supra.*

C. Certiorari should be granted to consider whether *Poole*'s application to Ms. Brown constitutes a federal *ex post facto* and due process violation

Article I, § 10 of the federal Constitution prohibits state *ex post facto* laws. *See*, *e.g.*, *Weaver v. Graham*, 450 U.S. 24 (1981); *Lindsey v. Washington*, 301 U.S. 397 (1937). Federal Due Process erects the same prohibition against state judicial action. *Bouie v. City of Columbia*, 378 U.S. 347 (1964); *and see Marks v. United States*, 430 U.S. 188 (1977).

Bouie notes the thematic connection between the prohibition of *ex post facto* liability and the doctrine of vagueness, citing Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533, 541 (1951), and Amsterdam, *Note*, 109 U. PA. L. REV. 67, 73 - 74, n. 34. It is true that one of the traditional concerns of both the *ex post facto* clause and the void-for-vagueness precept – the danger of punishing an individual for acts which s/he had no notice would be criminal – is inapplicable here. But that is not the only concern of either doctrine. *See Miller v. Florida*, 482 U.S. 423, 429 - 430 (1987); *Peugh v. United States*, 569 U.S. 530, 544 (2013). Both doctrines also stand to protect against malleable legal rules which "inject[ ] into the governmental wheel so much free play that in the practical course of its operation it is likely to function erratically – responsive to whim or discrimination . . . ." Amsterdam, *supra*, at 90. It is a commonplace of *ex post facto* history that the prohibition was a response to punishments exacted in England when one warring faction succeeded another and proceeded to despoil the losers. *See Calder v. Bull*, 3 U.S. 386 (1798) (opinion of Justice Chase). Protection against retroactive punishment resulting from regime

change[47] was very much in the mind of the Framers when they included two *ex post facto* clauses in the federal Constitution. *See Cummings v. Missouri*, 71 U.S. 277, 322 (1866).

"So much importance did the convention attach to . . . [the precept that "no state shall pass any *ex post facto* law], that it is found twice in the constitution, – first as a restraint upon the power of the general government, and afterwards as a limitation upon the legislative power of the states." *Kring v. Missouri*, 107 U.S. 221, 227 (1883). In *Calder*, "Justice Chase explained that the reason the *Ex Post Facto* Clauses were included in the Constitution was to assure that federal and state legislatures were restrained from enacting arbitrary or vindictive legislation." *Miller v. Florida*, 482 U.S. 423, 429 (1987). No lesser restraint is imposed upon state judicial action by the *ex post facto* component of federal Due Process. The question whether Article I, § 10 and the Fourteenth Amendment permit Florida to consign Ms. Brown to death under *Poole*'s retroactive recession from *Hurst v. State* warrants this Court's review on certiorari.

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[47] In addition to *Poole*, *see Phillips v. State*, 299 So.3d 1013 (Fla. 2020), overruling *Walls v. State*, 213 So.3d 340 (Fla. 2016), which had held *Hall v. Florida*, 572 U.S. 701 (2014), retroactive; *Lawrence v. State*, 308 So.3d 544 (Fla. 2020), overruling Y*acob v. State*, 136 So.3d 539 (Fla. 2014), *Rogers v. State*, 285 So.3d 872, 891 (Fla. 2019), and cognate cases which had held that the Florida Supreme Court is obliged to conduct proportionality review of death sentences to assure uniformity in capital sentencing; *Bush v. State*, 295 So.3d 179 (Fla. 2020), overruling *Jaramillo v. State*, 417 So.2d 257 (Fla. 1982), and cognate cases which had held that "[a] special standard of review of the sufficiency of the evidence applies where a conviction is wholly based on circumstantial evidence" (*id*. at 257).

CONCLUSION

Petitioner, Tina LaSonya Brown, requests that certiorari be granted.

Respectfully submitted,

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