IN THE FLORIDA SUPREME COURT

TINA LASONYA BROWN,
Appellant,

No. SC19-704

vs.

STATE OF FLORIDA,
Appellee.

and

TINA LASONYA BROWN,
Petitioner,

No. SC19-1419

vs.

MARK S. INCH, etc.,
Respondent.

_____/

MOTION FOR REHEARING

Appellant, TINA LASONYA BROWN, pursuant to Fla. R. App. P. 9.330, respectfully moves this Court to reconsider its decision of August 27, 2020, denying Brown's appeal and petition for writ of habeas corpus. As grounds for this request, Brown argues the following points of law or fact that the Court has overlooked and/or misapprehended:

I. This Court's Finding that there was no Prejudice under *Strickland*, despite Multiple Instances of Deficient Conduct by Trial Counsel Violates the Fifth, Sixth, Eighth and Fourteenth Amendments

Because trial counsel was found deficient in more than one instance, this Court addressed the prejudice cumulatively. (Opinion at 44-47). This Court found that all of trial counsel's deficiencies centered around the failure to discredit Lee and her version of events – failing to impeach Lee with her prior conviction; and failing to call Woods and Darren Lee as witnesses. (Opinion at 44-45).

In reasoning that "[t]he likelihood that the jury placed high value on Lee's testimony is suspect, at best, because the jury knew that, despite describing herself as a victim and minimizing her role in the victim's murder, Lee had pleaded guilty to the victim's second-degree murder in exchange for testifying against Brown", the Court overlooks the evidence that was actually presented at trial concerning Lee and assumes that the jury knew that she was minimizing her role in the murder. She was never actually impeached at trial with evidence tending to show that she was minimizing her role in the murder. Evidence of that was simply not before the jury.

The only evidence by which to doubt Lee's testimony was the fact that she pleaded to second-degree murder. However, the State argued in closing that this was warranted because Lee was less culpable. In making this argument, the State bolstered Lee's credibility with regard to her version of the events.

The jury never heard that, in addition to pleading guilty for her participation in this case, Lee had also previously been convicted of two felonies and two crimes

of dishonesty. In phrasing these convictions as "two petit thefts and two felony failures to appear", this Court seems to overlook their importance. (Opinion at 19).

Although Lee ultimately pleaded guilty to felony failures to appear, the underlying crimes were violent felonies. This Court misunderstands Brown's argument as to this issue. Brown's argument is not that impeaching Lee with her prior convictions would have "opened the door" to further inquiry about the underlying details of those convictions. (Opinion at 20).

At the evidentiary hearing, there was an exchange during which Brown asked trial counsel about his failure to impeach Lee with her prior convictions. (PC. 2753-55). It was trial counsel who insisted that jurors would hear that Lee was convicted of a felony failure to appear, which would not have made any difference in his view. (PC. 2753-55). He refused to concede that jurors would only hear that Lee was convicted of two felonies and two crimes of dishonesty, not details of the actual crimes. (PC. 2753-55).

It is well-settled Florida law, that a party may attack the credibility of any witness by evidence that the witness has been convicted of a felony or a crime involving dishonesty or a false statement. *Cummings v. State*, 412 So.2d 436, 438 (Fla. 4th DCA 1982). If the witness admits the number of his convictions, the prosecution may not ask further questions regarding prior convictions, and in particular the prosecution may not question the witness as to the nature of the crimes.

On the other hand, if the witness denies a conviction, the prosecution can impeach him by introducing a certified record of that conviction, which will necessarily reveal the nature of the crime. *Id*.

Brown's argument was merely that jurors would only hear that Lee was convicted of two felonies and two crimes of dishonesty *unless* Lee somehow "opened the door", for example, by refusing to acknowledge her prior convictions or the accurate number of convictions. If such a circumstance of "opening the door" had occurred, trial counsel could have admitted certified copies of these convictions, which would have included the information filed in the cases, as well as the arrest forms containing the original charges. (PC. 3812-66).

Most certainly the phrasing "two *felonies* and two crimes of *dishonesty*" is more compelling than this Court's phrasing which minimizes these convictions as they relate to Lee's credibility. In fact, jurors are routinely instructed that, in weighing the evidence, they should consider whether the witness had been convicted of a felony or a misdemeanor involving dishonesty or a false statement. *See* Fla. Std. Jury Instr. (Crim.) 3.9.

This Court further held that "impeaching Lee with her prior convictions and calling Woods and Darren Lee to impeach Lee's testimony and implicate her as the ringleader during the guilt phase would not eliminate the overwhelming evidence of Brown's involvement and culpability in the victim's murder from sources other than

Lee." (Opinion at 46). This Court points to the DNA evidence found on the taser, as well as testimony by M.A. that Brown was the aggressor at the trailer and that Brown's daughter told M.A. that they were going to kill the victim before the attack began. (Opinion at 46).

This Court overlooks the fact that Brown did not deny using the taser on the victim or being an aggressor while at the trailer; that M.A. was not present in the wooded area and did not see what happened after they left the trailer with the victim; that Brown's daughter's statement about killing the victim was made while Brown was in the other room and there is no evidence that she was aware of this plan; and that the *only* testimony at trial as to who set the victim on fire came from Lee.

While there may have been evidence that Brown attacked the victim and was an aggressor at the trailer, there was simply no evidence to support the idea that Brown *intended* to kill the victim. However, when considering the testimony presented at the evidentiary hearing, we now *know* that it was Lee who had every intention of killing the victim.

Just because Brown may have been an aggressor while at the trailer does not mean that she was the person who poured gas on the victim and set her on fire, or as the State argued at trial – the person most culpable in the death of the victim and the person deserving of a death sentence.

This Court relies upon statements made by Valley that Brown asked her to "finish off" the victim while she was in the hospital. (Opinion at 46). This Court overlooks the fact that Valley was attempting to get money from Crime Stoppers based on this information, and that she initially did not tell police about the phone call from Brown asking her to "finish off" the victim, calling into question her credibility as a witness.

Furthermore, this Court points to testimony from the mental health expert at the penalty phase who testified that Brown did not deny being an aggressor or being involved and had been "very frank about her role". (Opinion at 47). However, this Court overlooks the fact that this mental health expert never said that Brown told her that she was the one who poured gas on the victim and set her on fire. While Brown does not deny her involvement that night, there was no testimony, other than from Lee, that Brown was the person who set the victim on fire and therefore, the most culpable and deserving of the death penalty.

Trial counsel's deficiencies when considered cumulatively, amount to the prejudice required by *Strickland*. The only evidence about what occurred in the wooded area when the victim was set on fire comes from Lee. It was trial counsel's defense to challenge her credibility and her truthfulness about what happened. His failure to attack her truthfulness and credibility by utilizing her prior convictions, and his failure to present Woods and Darren Lee, who would have directly refuted

her testimony about what happened to the victim, would have cast significant doubt on Brown's credibility. Since this was a "penalty phase case" as stated by trial counsel, his deficiencies cost Brown critical arguments that could have been made as to her culpability for the murder and likewise, arguments for a life sentence. The testimony by witnesses other than Lee, as pointed to by this Court – M.A., Valley, and the mental health expert – are not nearly as powerful as Lee's testimony claiming that Brown was the person who set the victim on fire. The only person who was actually in the wooded area that night and testified at trial was Lee. This Court overlooks that Lee's purported eyewitness testimony was likely given *more* weight by jurors, despite the fact that she pleaded to second-degree murder, because the State argued to jurors in closing that Lee was less culpable and that is why she was allowed to plead to second-degree murder.

II. This Court's Finding that Newly Discovered Evidence Does Not Warrant Relief Because It Does Not Meet the Second Prong of *Jones* Violates the Fifth, Sixth, Eighth and Fourteenth Amendments

Although this Court found that the newly discovered evidence with respect to the testimony of Swindle and Edmonson satisfied the first prong of *Jones,* it declined to find that this evidence met the second prong of *Jones*. (Opinion at 52-53; 55).

This court even goes so far as to say that when combined with all other evidence that would come in at a new trial, "Lee would have even less credibility than she had at Brown's original trial, and *it would be more difficult for the State to*

rely on the position it took at trial that Brown was the one with motive and the one who poured gasoline on the victim and lit her on fire, while Lee's involvement was comparatively minimal." (Opinion at 59) (emphasis added). Brown couldn't agree more. It would be difficult for the State to maintain its position that Brown was the one who actually killed the victim by setting her on fire, and therefore, the one who was deserving of a death sentence. This would have resulted in a life sentence for Brown because she was indeed less culpable than Lee.

Despite such strong language regarding the weakened case against Brown, this Court again circles back to the evidence from witnesses other than Lee who testified to Brown's involvement. (Opinion at 60). However, there are issues with each piece of evidence relied upon by this Court, and this evidence does not refute Brown's argument that she was not the individual who poured gas on the victim and set her on fire – or as the State argued, the individual who was most culpable and deserved a death sentence.

This Court first notes that the victim named Brown and Lee as her attackers. However, she did not distinguish who did what, as acknowledged by this Court. (Opinion at 60). Rather this Court reasoned that by naming both Brown and Lee, and not distinguishing who did what, "suggests that in [the victim's] experience, they were all acting in concert." (Opinion at 60). Such speculation by this Court cannot be sufficient to refute Brown's argument that she was less culpable in the murder.

Next, this Court points to testimony by M.A. as to her observations at the trailer. (Opinion at 60). This Court failed to consider the fact that Brown does not dispute having attacked the victim in the trailer, but M.A. was not in the wooded area when the victim was set on fire. This court overlooks the fact that M.A. also testified that it was Lee who was instructing Brown on how to use the taser before the victim came over to the trailer, giving credence to Brown's arguments at trial that Lee was the instigator. Likewise, Brown's DNA on the taser was not challenged, as she did not dispute that she used the taser on the victim.

As to M.A.'s statements that Brown's daughter said they were going to kill the victim, this Court should not attribute any meaning from this statement as it pertains to Brown. (Opinion at 60). Brown did not make this statement. Brown was not present when this statement was made. Just because it was Brown's daughter who made the statement, doesn't mean that it should be imputed to Brown. There is simply no evidence that Brown *knew* that they were about to kill the victim.

Finally, this Court relies upon testimony by Valley that Brown wanted Valley to "finish off" the victim. (Opinion at 60). While this Court acknowledges that Valley was impeached at trial, it overlooks the fact that she initially did not tell police about this supposed statement by Brown. She was not impeached on this issue at trial. This was the most harmful testimony by Valley.

This Court notes that in a retrial, the jury would hear Brown's statements from her *Spencer* hearing that she participated in taking the victim's life and that the victim did not deserve it. (Opinion at 60). These statements are not contrary to Brown's position. She was remorseful for the part she played in the death of the victim. That, in no way, is a confession that she was the one who poured gas on the victim and set her on fire.

In reaching its conclusion that this newly discovered evidence fails the second prong of *Jones* as to sentencing, this Court recognized that "testimony by Swindle and Edmonson, along with corroborating evidence, would impeach Lee on a major point the State relied on in support of the death penalty: that Brown was the 'main aggressor' and the one who lit the fire." (Opinion at 61). Critically, this Court acknowledged "Lee's testimony was the only evidence that unambiguously singled out Brown as the person who lit the victim on fire, but not the only evidence that she was a, if not the, primary aggressor, at least at the trailer." (Opinion at 62). This is also not contrary to Brown's arguments, as she does not dispute her participation at the trailer.

Although this Court found that this newly discovered impeachment evidence against Lee *might* result in a lesser sentence at a retrial, it found that "it cannot be said that it *would probably* result in a lesser sentence." (Opinion at 62). This Court seems to be relying on the heinous, atrocious, or cruel aggravator that "would still

stand, and the new evidence would not carry any significant probability of showing Brown to have been a minor participant." (Opinion at 62-63). That reasoning by this Court overlooks the fact that while the HAC aggravator might still stand, there is a reasonable probability that jurors would not attribute that weighty aggravator to Brown if they heard this evidence and believed that she was less culpable, and that it was Lee who was actually responsible for the victim's death. This Court also overlooks that there is also a reasonable probability that jurors would indeed find that Brown was a minor participant in the murder of the victim, insofar as it was Lee who actually poured gas on the victim and set her on fire. Thus, this newly discovered evidence combined with all of the other evidence admissible at a retrial would probably result in a lesser sentence as required by the second prong of *Jones*.

III. This Court's Finding that Trial Counsel was not Deficient for Failing to Present Additional Mental Health Experts Violates the Fifth, Sixth, Eighth and Fourteenth Amendments

This Court concluded "[t]hat new experts retained for postconviction would render more favorable opinions based on essentially the same information presented during the penalty phase does not render trial counsel deficient for relying on the opinions of Dr. Bailey." (Opinion at 44). This Court overlooks that it is not a matter of more favorable opinions, but rather statutory mental health mitigating factors that jurors should have been able to consider. Dr. Bailey did not provide any testimony as to the relevant statutory mental health mitigators during Brown's penalty-phase

proceedings. However, the State's expert, Dr. Bingham, testified specifically that Brown was not under the influence of extreme mental or emotional disturbance at the time of the incident; was not acting under extreme duress at the time of the incident; was not acting under the substantial domination of another person at the time of the incident; and her capacity to appreciate the criminality of her conduct or her capacity to conform to the requirements of the law were substantially impaired. (T. 1013-18).

This Court overlooks that Dr. Sultan, a licensed forensic clinical psychologist, testified at the evidentiary hearing that Brown was experiencing extreme mental disturbance at the time of the offense, and that she was substantially impaired in her ability to appreciate the criminality of her conduct and to conform her conduct to the requirements to the law at the time of the offense. (PC.2932). Testimony as to these two statutory mental health mitigators as they applied to Brown, would have undermined the State's expert, who did not have a doctorate in psychology, but rather had a doctorate in education, yet testified that no statutory mitigators were present in this case. (T.1001).

IV. This Court has Overlooked that Cumulative Error Deprived Brown of a Fundamentally Fair Trial Violates the Fifth, Sixth, Eighth and Fourteenth Amendments

Although this Court conducted an analysis of the cumulative prejudice based on the deficient performance of trial counsel at the guilt phase of Brown's trial, this

Court failed to consider those errors in conjunction with the newly discovered evidence, other than to a brief mention of this evidence. (Opinion at 44-47; 62). As trial counsel testified at the evidentiary hearing, this was necessarily a penalty-phase case, and counsel's arguments hinged on the culpability of Brown. This Court has overlooked the substantial prejudice when cumulatively considering this evidence: (1) Lee's convictions for two felonies and two crimes of dishonesty; (2) Darren Lee's testimony that Lee said that she was going to kill the victim and then confessed to pouring the gas and setting the victim on fire; (3) Woods' testimony that Lee said that she was going to kill the victim and then confessed to pouring the gas and setting the victim on fire; (4) Wendy Moye's testimony that Lee confessed to setting the victim on fire while they were both incarcerated at the Escambia County Jail prior to trial; (5) the newly discovered evidence of Swindle that Lee confessed to setting the victim on fire because the victim was sleeping with her husband; (6) the newly discovered evidence of Edmonson that Lee confessed she killed the victim and would do it again because the people involved (the victim and Brown) were both sleeping with her husband; (7) the evidence of two mental health statutory mitigators from Dr. Sultan that Brown was experiencing extreme mental disturbance at the time of the offense, and that she was substantially impaired in her ability to appreciate the criminality of her conduct and to conform her conduct to the requirements to the law at the time of the offense; and (8) the compelling evidence of Brown's lifetime of

trauma and abuse, her drug addiction that resulted from this abuse; and how those things affected her emotional and cognitive development. This Court has overlooked that the cumulative effect of all of this compelling evidence outweighs any evidence presented by the State that Lee was less culpable, or that Brown was an aggressor at the trailer, or that Brown's DNA was on the taser, or that Valley claims that Brown asked her to "finish off" the victim. This Court overlooks that the evidence supporting that Brown was less culpable in this murder, and therefore, not deserving of a death sentence, is much stronger than the evidence presented by the State to the contrary. This Court failed to consider that had jurors heard all of this compelling evidence supporting Brown's defense that she was less culpable, they *would probably* have recommended a life sentence. This Court has previously upheld the reasonableness of the jury vote for life based on a co-defendant's relative culpability.[1]

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[1] *See e.g., San Martin v. State*, 717 So. 2d 462, 472 (Fla. 1998)(holding that the jury could have reasonably relied upon the fact that although San Martin was an active participant in the robbery of the bank, he was not armed and fired no shots at the victim, in recommending a life sentence for San Martin); *Barfield v. State*, 402 So.2d 377, 382 (Fla.1981)(finding that jury override was improper because there was a reasonable basis for the jury's recommendation of life imprisonment where defendant was a middleman in a contract murder and did not participate in the actual killing); *Cooper v. State*, 581 So. 2d 49, 51 (Fla. 1991)(holding that conflicting evidence on the identity of the actual killer can form the basis for a recommendation of life imprisonment); *Marta-Rodriguez v. State*, 699 So. 2d 1010, 1013 (Fla. 1997) (finding that there is mitigating evidence in the record upon which the jury reasonably could have relied in recommending life, including testimony that his codefendant initiated and instigated the plan); and *Barrett v. State*, 649 So. 2d 219,

V. This Court's Application of *Poole v. State* to Defeat Brown's Claims under *Hurst v. Florida* and *Hurst v. State* Violates the Sixth, Eighth and Fourteenth Amendments and Article I, § 10 of the United States Constitution

Brown's pre-decision briefs in this appeal were filed in 2019, before this Court handed down *Poole v. State*, 297 So.3d 487, on January 23, 2020. The Court's recourse to *Poole* to undermine her *Hurst*-based claims comes as a surprise. This motion for rehearing is her first opportunity to explain why that recourse is indefensible and falls afoul of her federal rights to jury trial, due process, and equal protection of the law, and her federal immunity from *ex post facto* punishment.

(A) *Poole*'s application to Brown violates the Sixth Amendment and due process

Hurst v. Florida, 136 S. Ct. 616 (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. On remand, this Court in *Hurst v. State*, 202 So.3d 40 (Fla. 2016), correctly read the U.S. Supreme Court's decision 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

223 (Fla. 1994)(holding that there was a reasonable basis on which the jury could have concluded that life imprisonment was the appropriate sentence because the jury could have reasonably concluded that Barrett was not the person who actually committed the murders).

the death penalty." *Id*. at 53. In receding from *Hurst v. State*, *Poole* held retroactively that a death sentence could be imposed 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. In the *Poole* case itself, this requirement was met (the Court said) because the jury "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." 297 So.3d at 508.

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 Brown's case constitutes a peculiarly egregious Sixth Amendment violation.

(1) *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 survive *Ring v. Arizona,* 536 U.S. 584 (2002), and *Hurst v. Florida*. Well before *Poole*, a majority of the U.S. Supreme Court 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 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).").

(2) *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.

(3) But applying *Almendarez-Torres* to Brown's situation is a still worse aberration. The jury in Brown's case never convicted her of any felony other than the first-degree murder for which she stands sentenced to die. Although indicted for kidnapping, she was not tried on that charge. The suppositious felony through which this Court has sought to bring Brown within *Poole*'s ambit is a creature of its own

making, inferred factually from what "a 'rational jury,' properly instructed, would have found beyond a reasonable doubt" in returning a first-degree murder verdict. Slip opinion, page 64. This kind of judicial 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, 2252 (2016), and *Shepard v. United States*, 544 U.S. 13, 25 (2005) (plurality opinion). And it defies rationality and denies Brown due process because the indictment, prosecutor's closing argument and jury instructions all permitted the jury to convict her of first-degree murder on either of the alternative theories of premeditation or felony-murder. *Cole v. Arkansas*, 333 U.S. 196 (1948); *Presnell v. Georgia*, 439 U.S. 14 (1978) (per curiam)).

(B) *Poole*'s application to Brown violates the Eighth Amendment

By the terms of this Court's August 27 decision, Brown will go to her death without ever having had a jury determination that death is a fitting punishment for her. This violates the Cruel and Unusual Punishments Clause of the federal Eighth Amendment.

(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, 332-33 (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 verdict to impose it. Only Florida and Alabama now cling to the contrary position – and Florida does so only 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 on 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. *See* the Brief of Law Professors and Social Scientists as *Amici Curiae* in Support of Petitioner in No. 18-5924, *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), 2019 WL 2549461 (U.S.) (Appellate Brief). The application of *Poole* to confirm Brown's death sentence deprives her of that assurance.

(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). No American jurisdiction in 2020 fails to recognize that such a requirement reflects the vital role of the jury in reflecting a "reasoned moral response" (*Penry v. Johnson*, 532 U.S. 782, 797 (2001)) to the balance of aggravation and mitigation – excepting, again, Alabama by statute and Florida in disregard of statute. "Because 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 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). 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, this Court has abruptly converted those jurors' guilt-phase verdict into a death warrant. The Eighth Amendment cannot possibly countenance this legerdemain.

(C) *Poole*'s application to Brown violates the the Equal Protection Clause and the Eighth Amendment's prohibition of capricious infliction of death sentences.

It is hornbook Eighth Amendment law 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). This principle "insist[s] upon general rules that ensure consistency in determining who receives a death sentence." *Kennedy v. Louisiana*, 554 U.S. 407, 436 (2008). The Eighth Amendment's concern against capriciousness in capital cases refines the older, settled precept that equal protection of the laws is denied "[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense and . . . [subjects] one and not the other" to a uniquely harsh form of punishment. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942); *and see Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

As of the date of this Court's decision in Brown's case, 145 Florida inmates have had their death sentences vacated under *Hurst v. State*, and in at least 37 of these cases a final judgment resentencing the inmate to life imprisonment has been entered. What non-arbitrary, rational basis could justify consigning Brown to death

and not these other similarly situated defendants? Court calendars that vary throughout the state? The proclivities of prosecutors and judges to move cases quickly or slowly? The inability of this or that circuit court to provide qualified counsel promptly? A death penalty "cannot be predicated on mere 'caprice' or on 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process.'" *Johnson v. Mississippi*, 486 U.S. 578, 585 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 884–885, 887, n.24 (1983)).

The *Poole* decision and its application to Brown produce an unexplained, unreasoned fragmentation of the cohort of equally deserving death-sentenced defendants, some of whom are now dispatched to die while others have been spared for no other reason than the different handling of their postconviction proceedings by Florida prosecutors and circuit judges. This remarkable lottery is "invidiously discriminatory." *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957). *See Humphrey v. Cady*, 405 U.S. 504, 512 (1972); *Goss v. Lopez*, 419 U.S. 565, 576 (1975); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 442 (1982) (opinion of Justice Blackmun, with whom Justices Brennan, Marshall, and O'Connor join).

(D) *Poole*'s application to 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 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. Article I, § 10 and the Fourteenth Amendment preclude this Court from sending Brown to her death under *Poole*'s retroactive recession from *Hurst v. State*.

WHEREFORE, Brown respectfully requests this Court to rehear this case, withdraw its August 27, 2020, opinion, and issue a revised opinion granting Brown's appeal and petition for writ of habeas corpus.

I HEREBY CERTIFY that a copy of this motion for rehearing has been served via electronic service to all counsel of record on this 11th day of September, 2020.

Respectfully submitted,

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