IN THE SUPREME COURT OF FLORIDA

TINA LASONYA BROWN,

Appellant/Petitioner,

v.

CASE Nos. SC19-704, SC19-1419
L.T. No. 172010CF001608XXXAXX

STATE OF FLORIDA,

DEATH PENALTY CASES

Appellee.

MARK S. INCH,

Respondent
_____/

STATE'S RESPONSE TO MOTION FOR REHEARING

I. CLAIMS RAISED IN POSTCONVICTION APPEAL

In case number SC19-704, Appellant appealed the denial of her initial postconviction motion and raised several claims of error.

Ineffective Assistance of Counsel Claims

First, Appellant argued that trial counsel provided ineffective assistance during jury selection, the guilt phase, and the penalty phase of her capital trial; additionally, Appellant argued cumulative error as to those claims only. *See Brown v. State*, Case No. SC19-704, 2020 WL 5048548 *5 (Fla. Aug. 27, 2020). Rejecting Appellant's claims of error, this Court affirmed "the circuit court's denials of relief with respect to each of the individual claims [of ineffective

assistance of counsel] and with respect to Brown's cumulative error claim." *Id*. at *18.

Newly Discovered Evidence Claim

Second, Appellant challenged the denial of her claim of newly discovered evidence. *See Brown*, 2020 WL 5048548 at *18. This Court rejected Appellant's claim of error and affirmed "the circuit court's denial of relief." *Id*.

***Hurst* Claim**

Third, Appellant challenged the denial of her *Hurst*[1] claim. *See Brown*, 2020 WL 5048548 at *24. Affirming the circuit court's denial of this claim, this Court agreed "with the circuit court that the error is harmless beyond a reasonable doubt." *Id*.

Rehearing Claims

In the motion for rehearing, Appellant claims that this Court overlooked points of law or fact regarding each of the claims outlined above – except for the claim of ineffective assistance of counsel during jury selection.

[1] *Hurst v. Florida*, 136 S.Ct. 616 (2016); *see also Hurst v. State*, 202 So.3d 40 (Fla. 2016), receded from by *State v. Poole*, 297 So.3d 487, 491 (Fla. 2020), reh'g denied, clarification granted, No. SC18-245, 2020 WL 3116598 (Fla. Apr. 2, 2020).

II. CLAIMS RAISED IN STATE HABEAS PETITION

In case number SC19-1419, Appellant filed a petition for writ of habeas corpus alleging ineffective assistance of appellate counsel "on direct appeal for failing to raise claims of fundamental error based on several statements made by the prosecutor during the State's rebuttal closing argument at trial that Brown now contends amount to prosecutorial misconduct." *Brown v. State*, No. SC19-1419, 2020 WL 5048548, at *24 (Fla. Aug. 27, 2020).

In the motion for rehearing, Appellant does not claim that this Court overlooked any points of law or fact regarding the petition. Therefore, the State does not address the habeas petition in this response.

III. CLAIMS RAISED IN MOTION FOR REHEARING

In his Motion for Rehearing and Clarification, Appellant raises the following, five claims: (1) this Court's affirmance of the circuit court's denial of the claim of ineffective assistance of counsel for the guilt phase "violates the Fifth, Sixth, Eighth, and Fourteenth Amendments"; (2) this Court's affirmance of the circuit court's denial of the claim of newly discovered evidence "violates the Fifth, Sixth, Eighth, and Fourteenth Amendments"; (3) this Court's affirmance of the circuit court's denial of the claim of ineffective assistance of counsel for the penalty phase "violates the Fifth, Sixth, Eighth, and Fourteenth Amendments"; (4) this Court's affirmance of the circuit court's denial of the claim of cumulative error

"violates the Fifth, Sixth, Eighth, and Fourteenth Amendments"; and, (5) this Court's affirmance of the circuit court's denial of the *Hurst* claim "violates the Sixth, Eighth, and Fourteenth Amendments." *See* Motion for Rehearing, pp. 1, 7, 11, 12, and 15.

IV. REHEARING

Under Florida Rule of Appellate Procedure 9.330, a motion for rehearing "shall state with particularity the points of law or fact that, in the opinion of the movant, the court has overlooked or misapprehended in its order or decision." Fla. R. App. P. 9.330(a)(2)(A).

A motion for rehearing "shall not reargue the merits of the Court's order." *Jacobs v. Wainwright*, 450 So.2d 200, 201 (Fla. 1984). Additionally, a motion for rehearing should be clear and concise. *See Dep't of Revenue v. Leadership Hous., Inc.*, 322 So.2d 7, 9 (Fla. 1975) (quoting *Tex. Co. v. Davidson*, 80 So. 558, 559 (Fla. 1918)) ("The proper function of a [motion] for rehearing is to present to the court in clear and concise terms some point that it overlooked or failed to consider; only this and nothing more.").

Put simply, an appellant or petitioner cannot use a motion for rehearing as a means to continue his or her attempts at advocacy. *See Goter v. Brown*, 682 So.2d 155, 158 (Fla. 4th DCA 1996):

> Motions for rehearing are strictly limited to calling our attention - *without argument* - to something we have obviously overlooked or

> misapprehended. The motion for rehearing is not a vehicle for counsel or the party to continue its attempts at advocacy. It should be demonstrative only - i.e. merely point to the overlooked or misunderstood fact or circumstance. If we want additional argument, we know how to say so. (emphasis in original)

Given these constraints, the length of the motion for rehearing is often inversely proportional to its merit; for if the Court truly overlooked an important point of law or fact, then an appellant should not need pages upon pages to highlight that point with particularity. *Cf. Boardwalk at Daytona Dev., LLC v. Paspalakis*, 212 So.3d 1063 (Fla. 5th DCA. 2017):

> Appellees' "motion does what [Florida Rule of Appellate Procedure] 9.330(a) proscribes; it re-argues the merits of the case." *Lawyers Title Ins. Corp. v. Reitzes*, 631 So.2d 1100, 1100 (Fla. 4th DCA 1993) (citations omitted). "It appears that counsel are utilizing the motion for rehearing and/or clarification as a last resort to persuade this court to change its mind or to express their displeasure with this court's conclusion." *Id*. at 1101. "This is not the purpose of [r]ule 9.330. It should be noted that the filing of [r]ule 9.330 motions should be done under very limited circumstances, it is the exception to the norm." *Id*. (footnote omitted). "Motions for rehearing are strictly limited to calling an appellate court's attention—without argument—to something the court has overlooked or misapprehended.

Cf. also State ex rel. Jaytex Realty Co. v. Green, 105 So.2d 817, 818–19 (Fla. 1st DCA 1958):

> Certainly it is not the function of a petition for rehearing to furnish a medium through which counsel may advise the court that they disagree with its conclusion, to reargue matters already discussed in briefs and oral argument and necessarily considered by the court, or to request the court to change its mind as to a matter which has already received the careful attention of the judges, or to further delay the termination of litigation.

Cf. also Ayala v. Gonzalez, 984 So.2d 523, 526 (Fla. 5th DCA 2008):

> [W]e do not view the privilege to seek a rehearing pursuant to rule 9.330, Florida Rules of Appellate Procedure, as an open invitation for an unhappy litigant or attorney to reargue the same points previously presented, or to discuss the bottomless depth of the displeasure that one might feel toward this judicial body as a result of having unsuccessfully sought appellate relief.

Finally, a motion for rehearing cannot raise new issues or new arguments. *See* Fla. R. App. P. 9.330(a)(2)(A) ("The motion shall not present issues not previously raised in the proceeding."); *see also Rolling v. State*, 215 So.3d 70 (Fla. 3d DCA 2016) ("A new issue raised for the first time in a motion for rehearing is improper under Rule 9.330, and this Court will not entertain this new argument on rehearing."); *Cleveland v. State*, 887 So.2d 362, 364 (Fla. 5th DCA 2004) ("Here, the State impermissibly attempts to raise a new argument in its notice of supplemental authority and petition for rehearing. This court need not entertain new argument or consider additional authority cited in support thereof.").

CLAIM #1 INEFFECTIVE ASSISTANCE - GUILT PHASE

Appellant Repeats Previous Argument

Instead of pointing this Court's attention to a point of law or fact that the Court overlooked or misapprehended, Appellant reargues her guilt phase ineffective assistance of counsel claim – positing as before that impeaching Heather Lee's testimony with her prior convictions would have challenged the

credibility of her testimony regarding who actually lit the victim on fire. Compare Initial Brief, p.72 ("There is no reason that trial counsel could not have also impeached [Lee] with her prior convictions to challenge her credibility. Counsel had no reasonable strategic reason for failing to impeach Ms. Lee with her prior convictions.") with Motion, pp. 6-7 ("It was trial counsel's defense to challenge [Lee's] credibility with her truthfulness about what happened. His failure to attack here truthfulness and credibility by using prior convictions…"); compare also Initial Brief, p.70 ("Heather Lee was the *only* eyewitness who testified at trial as to what occurred in the wooded area between herself, Ms. Brown, Ms. Miller, and the victim.") (emphasis in original) with Motion, p.7 ("The only person who was actually in the wooded area that night and testified at trial was Lee.").

Unacknowledged in the motion for rehearing, this Court considered Appellant's argument and rejected it – finding that the impeachment evidence was not significant enough to change the outcome of the trial. *See Brown*, 2020 WL 5048548 at *17:

> All of trial counsel's deficiencies center around the failure to discredit Lee and her version of events. The 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. Nevertheless, it is true that but for trial counsel's deficiencies, the jury could have relied on Heather Lee's prior convictions and testimony from Terrance Woods and Darren Lee to further discount Lee's testimony and conclude that her role in the crime was more substantial

> than she admitted during the guilt phase. However, there is no reasonable probability that but for trial counsel's deficiencies, individually or cumulatively, the outcome would have been different.

By essentially repeating her previous argument, Appellant fails to establish any basis for relief. *See Jacobs*, 450 So.2d at 201; *see also Dep't of Revenue v. Leadership Hous., Inc.*, 322 So.2d at 9; *Boardwalk at Daytona Dev., LLC v. Paspalakis*, 212 So.3d at 1063; *State ex rel. Jaytex Realty Co. v. Green*, 105 So.2d at 818–19; *Ayala v. Gonzalez*, 984 So.2d at 526; *Goter v. Brown*, 682 So.2d at 158.

Erroneous Factual Assertions

Despite the failure to establish any basis for relief, Appellant makes two factual assertions that the State addresses below. First, Appellant claims that "there was simply no evidence to support the idea that Brown *intended* to kill the victim." Motion, p.5 (emphasis in original). Second, Appellant claims that "*there was no testimony*, other than from Lee, that Brown was the person who set the victim on fire…" Motion, p.6 (emphasis added).

Intent to Kill

Unacknowledged in the motion for rehearing, this Court concluded that Appellant acted with an intent to kill; and, this Court identified several pieces of evidence that support such a conclusion. *See Brown v. State*, 143 So.3d 392, 403 (Fla. 2014) ("On the day of the murder, Brown lured Zimmerman into her home under false pretenses with the express intent to kill her."); *see also id*. at 403, citing

Lynch v. State, 841 So.2d 362, 368 (Fla. 2003) ("These facts specifically and directly demonstrate that Brown's decision to murder Zimmerman was the product of cool and calm reflection and was not an act prompted by emotional frenzy, panic, or a fit of rage."); *Brown*, 2020 WL 5048548 at *17:

> Regarding the guilt phase, the evidence of Brown's involvement and culpability in the victim's murder under both theories of premeditated and felony murder is *overwhelming*. For example, the victim named "Tina [Brown], Heather [Lee], and Britnee [Miller]" as her attackers and told a paramedic that "they poured gas on her and set her on fire." Although the paramedic acknowledged on cross-examination by trial counsel that the victim "didn't actually breakdown what each one of these people did to her," the victim's statement that "they" did it, at a minimum, indicates that in her experience her attackers were acting in concert. Moreover, M.A. testified that Brown was the primary aggressor based on her observations at the trailer where the attack began. According to M.A., Brown attacked the victim with a stun gun, held the victim's hands behind her back, forced the victim into the trunk, and screamed at the victim about calling Crime Stoppers. Consistent with M.A.'s testimony, Brown's DNA was on the stun gun, Brown's trailer and vehicle were used in the crime, and Brown drove the victim to the area where she was lit on fire. Additionally, both Brown and her daughter, Miller, made incriminating statements: Miller told M.A. that they were going to kill the victim right before the attack began, and, within days of the crime, while the victim was still alive in the hospital, Brown told Pamela Valley that she wanted the victim "finish[ed] off." Accordingly, there is no reasonable probability of a different verdict.

(emphasis added); *see also Id*. at *23:

> When the victim first emerged from scene of the burning, she named two people as the perpetrators—Tina Brown and "Heather"—and said that they dragged her out of the house, "tased" her, beat her in the head with a crowbar, and then set her on fire. She repeated those two names several times and told where those individuals lived. Similarly, the victim told a paramedic that "Tina, Heather, and Britnee" poured

> gasoline on her and set her on fire. The victim did not distinguish among the perpetrators in terms of who did what, which suggests that in her experience, they were all acting in concert.
>
> M.A., on the other hand, testified that from her observations at the trailer, Brown was the primary aggressor, although Lee also participated by putting a sock in the victim's mouth. Brown is the one whose trailer and vehicle were used in the crime, and she is the one M.A. heard screaming at the victim about calling Crime Stoppers. She is the one who, according to M.A., operated the stun gun, held the victim's hands behind her back, and forced the victim into the trunk. Consistent with M.A.'s testimony, Brown's DNA was on the stun gun.
>
> In addition to M.A.'s testimony and the forensic evidence, there were incriminating statements by Brown and her daughter. Just before the crime started, Brown's daughter, Miller, told M.A. that they were going to kill the victim. And Pamela Valley testified, albeit not without impeachment, that, days after the crime was complete, Brown wanted the victim "finish[ed] off." Further, in any retrial, Brown's new jury would hear compelling evidence against her that her original jury did not: Brown admitted at the Spencer hearing that she "was one of the ones who participated in taking [Zimmerman's] life" and commented that "[Zimmerman] didn't deserve it at all."

Thus, despite Appellant's assertion to the contrary, a reasonable jury could view the information outlined by this Court as evidence clearly showing Appellant's intent to kill the victim.

Other testimony

Although the victim did not testify in court, the paramedic who treated her did. *See Brown*, 2020 WL 5048548 at *17 ("[T]he victim named 'Tina [Brown], Heather [Lee], and Britnee [Miller]' as her attackers and told a paramedic that

'they poured gas on her and set her on fire.' Although the paramedic acknowledged on cross-examination by trial counsel…").

Thus, contrary to Appellant's erroneous assertion that "there was no testimony, other than from Lee, that Brown was the person who set the victim on fire," the jury heard, through the testimony of the paramedic, the victim's dying declaration in which she identified Appellant as one of her attackers.

CLAIM #2 NEWLY DISCOVERED EVIDENCE

Appellant Repeats Previous Argument

Instead of pointing this Court's attention to a point of law or fact that the Court overlooked or misapprehended, Appellant reargues her newly discovered evidence claim – positing as before that the newly discovered evidence would show that Appellant was a minor participant but Heather Lee was a major participant, thereby resulting in a life sentence for Appellant. Compare Initial Brief, p.106 ("Had jurors heard that Ms. Lee was actually the one who was the instigator, the aggressor, and who killed the victim in one of the worst ways possible, it is likely they would have recommended a life sentence rather than death for Ms. Brown.") with Motion, p.11 ("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… would probably result in a lesser sentence…").

Unacknowledged in the motion for rehearing, this Court considered Appellant's argument and rejected it – finding it too speculative to satisfy the second prong of the *Jones* test[2] for newly discovered evidence. *Se Brown*, 2020 WL 5048548 at *24:

> Considering the attention given to the facts that Brown was the one who lit the victim on fire and was the main aggressor—both as points supporting the death penalty and as an explanation for the different treatment of Lee—we believe the additional impeachment of Lee *might* result in a lesser sentence at a retrial. However, it cannot be said that it *would probably* result in a lesser sentence. (emphases in original)

By essentially repeating her previous argument, Appellant fails to establish any basis for relief. *See Jacobs*, 450 So.2d at 201; *see also Dep't of Revenue v. Leadership Hous., Inc.*, 322 So.2d at 9; *Boardwalk at Daytona Dev., LLC v. Paspalakis*, 212 So.3d at 1063; *State ex rel. Jaytex Realty Co. v. Green*, 105 So.2d at 818–19; *Ayala v. Gonzalez*, 984 So.2d at 526; *Goter v. Brown*, 682 So.2d at 158.

[2] *See Jones v. State,* 709 So.2d 512, 521 (Fla. 1998), citing *Jones v. State*, 591 So.2d at 911, 915(Fla. 1991) ("Second, the newly discovered evidence must be of such nature that it *would probably* produce an acquittal on retrial.") (emphasis added).

Facts Could Support More Than One Death Sentence

Despite the failure to establish any basis for relief, Appellant makes a suggestion that the State addresses below, namely: only one person involved in the murder could receive the death penalty; and if the jury viewed Heather Lee as the main aggressor, then Lee would receive that death sentence instead of Appellant. *See* Motion, p.8 ("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.").

As the State noted during oral argument, the facts of the case would support a death sentence for each of the main defendants (Appellant, her daughter, and Heather Lee). As the evidence clearly shows, the victim was lured into Appellant's trailer, "tased", beaten, bludgeoned with a crowbar, tortured, driven to a remote location in Appellant's car, beaten again, doused with gasoline, and lit on fire. *See Brown* 143 So.3d at 396-97; *see also Brown*, 2020 WL 5048548 at *17, *23.

Without question, Appellant's involvement was sufficiently substantial and the murder was sufficiently heinous, atrocious, and cruel for Appellant to receive a death sentence – regardless of whether she was the one who actually doused the victim with gasoline and ignited the cigarette lighter. *See Brown*, 2020 WL 5048548 at *24:

> Although there would be a more substantial question as to whether Brown actually lit the fire and acted as the primary aggressor, especially once the testimony of Darren Lee and Terrance Woods was added, all the evidence that the murder itself was heinous, atrocious, or cruel—a weighty aggravating factor—would still stand, and the new evidence would not carry any significant probability of showing Brown to have been a minor participant.

See also Henyard v. State, 992 So.2d at 126 ("The record affirmatively supports the State's position that regardless of whether Smalls or Henyard pulled the trigger, Henyard's substantial culpability as outlined by the trial court in great detail and as reflected in our opinion affirming his death sentence establishes the death penalty as a proportionate sentence for his actions.").

And as this Court noted on direct appeal, Appellant's daughter was a minor at the time of the murder and Heather Lee was convicted of second degree murder; therefore, both remained ineligible to receive a death sentence – not because the facts would not support one but because the law does not. *See Brown*, 143 So.3d at 406–07:

> Here, however, neither Miller nor Lee received the death penalty because they were not eligible for that sentence. Miller, who was a minor at the time of the offense, was constitutionally prohibited from receiving the death penalty pursuant to *Roper v. Simmons*, 543 U.S. 551 (2005). Lee was also ineligible for the death penalty because she pled guilty to second-degree murder.

CLAIM #3 INEFFECTIVE ASSISTANCE - PENALTY PHASE

Appellant Repeats Previous Argument

Instead of pointing this Court's attention to a point of law or fact that the Court overlooked or misapprehended, Appellant reargues her penalty phase ineffective assistance of counsel claim – positing as before that the testimony of Dr. Sultan established the two mental health mitigating circumstances, which would support a life sentence. Compare Initial Brief, p.53 ("Dr. Sultan found the two statutory mitigators: Ms. Brown was experiencing extreme mental disturbance at the time of the offense, and 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..") with Motion, p.12 ("…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 requires of the law…").

Unacknowledged in the motion for rehearing, this Court considered Appellant's argument and rejected it – finding that "more favorable [expert] opinions" based upon already established evidence of childhood trauma does not

establish ineffective assistance of counsel. *See Brown*, 2020 WL 5048548 at *16-17:

> Dr. Bailey testified during the penalty phase to the "stressors" that would have affected Brown at the time of the crime, including "repeated traumas, addictions, abusive relationships, exposure to violence, a lot of sexual victimization, both in childhood being prostituted and adulthood[,] [and a] lot of community negative influence and crime, and [she explained that] all of those things c[a]me together." Dr. Bailey also testified that Brown's childhood experiences would have affected her into adulthood, that trauma affects brain development, and that "[t]he bottom line is trauma is cumulative"…
>
> That 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.

Admittedly, Dr. Sultan may have provided additional terminology during the postconviction hearing – testifying that the Adverse Childhood Experience (ACE) factors present during Appellant's formative years strongly suggest trauma with long-lasting effects. *See* IB, p.47. And, this Court has recognized the significance of the ACE factors on the development of children. *See e.g. Tisdale v. State*, 257 So.3d 357, 363, n.8 (Fla. 2018), as corrected (Nov. 29, 2018) ("There is an 'enormous body of research' on ACEs and their effect on children into their adult lives.").

As the following table illustrates, however, trial counsel elicited evidence during the penalty phase that supports all ten of the ACE factors:

ACE Factor	Language from direct appeal opinion
Emotional abuse	"Willie, Jr., testified that Melinda drank every day, and when she drank she became verbally abusive."
Physical abuse	"Willie, Jr., testified that their father would physically abuse them when he was high."
Incarceration of a household member	"Willie, Sr., was eventually investigated by the FBI, arrested, and served a year in prison for his involvement in the organization."
Emotional neglect	"Often Brown and Willie, Jr., were either left at home alone or taken to the homes of different family members for extended stays… Brown was forced into a parenting role for her brother at a very early age." "When Brown attempted to discuss the abuse with her paternal grandmother, the grandmother grew enraged with Brown for accusing her son of sexually abusing his child, kicked Brown out of the house, and told her never to return."
Physical neglect	"Brown's mother was later charged with child abandonment…"
Divorce or separated parents	"Brown's mother moved out, and Brown's parents divorced shortly thereafter."
Domestic violence	"Shortly before Brown's twelfth birthday, Willie, Sr., beat her mother."

Exposure to substance abuse	"Willie, Sr., who frequently used and sold drugs from his home, retained custody of Brown and Willie, Jr." "Brown and Willie, Jr., would wander the streets in an area known for gangs and violence while Willie, Sr., and Melinda used drugs and alcohol."
Depression or mental illness[3] of a family member	"Willie, Sr., and Melinda would often lock themselves in the bedroom with drugs and alcohol for hours without leaving."
Sexual abuse	"After her mother moved out, Brown's father began sexually abusing Brown." "Melinda introduced Brown to drugs and forced Brown to engage in sexual intercourse with men for money."

Furthermore, Dr. Bailey opined during the penalty phase that Appellant's repeated childhood traumas "negatively impacted" Appellant's development with the repercussions extending well into adulthood. *See Brown*, 143 So.3d at 400:

> Based on her evaluation, Dr. Bailey concluded Brown suffered from repeated traumas, addictions, physically and sexually abusive relationships, negative community influences, and exposures to violence both in her childhood and adult life. Dr. Bailey testified that Brown's parents were neglectful and provided an inadequate and unhealthy foundation, which negatively impacted Brown's

[3] *See* https://www.nimh.nih.gov/health/topics/substance-use-and-mental-health/index.shtml ("Did you know that addiction to drugs or alcohol is a mental illness? Substance use disorder changes normal desires and priorities. It changes normal behaviors and interferes with the ability to work, go to school, and to have good relationships with friends and family.").

> development. Dr. Bailey concluded that the repercussions from the repeated traumas in Brown's childhood extended for decades into her adolescence and adulthood.

Thus, for all intents and purposes, the penalty phase jury heard the facts (all 10 ACE factors) and opinion (lifelong, negative impacts of childhood trauma) offered by Dr. Sultan during the postconviction evidentiary hearing.

By essentially repeating her previous arguments, Appellant fails to establish any basis for relief. *See Jacobs*, 450 So.2d at 201; *see also Dep't of Revenue v. Leadership Hous., Inc.*, 322 So.2d at 9; *Boardwalk at Daytona Dev., LLC v. Paspalakis*, 212 So.3d at 1063; *State ex rel. Jaytex Realty Co. v. Green*, 105 So.2d at 818–19; *Ayala v. Gonzalez*, 984 So.2d at 526; *Goter v. Brown*, 682 So.2d at 158.

CLAIM #4 CUMULATIVE ERROR

Appellant Raises New Argument

Instead of pointing this Court's attention to a point of law or fact that the Court overlooked or misapprehended, Appellant raises an argument that she did not present in her initial brief – that the prejudice analysis for her claim of cumulative error involving ineffective assistance of counsel should include the information provided in support of her newly discovered evidence claim. Compare Initial Brief, p.117 ("Repeated instances of ineffective assistance of counsel significantly tainted Ms. Brown's guilt and penalty phases. The errors as claimed in this brief are hereby specifically incorporated into this claim and include:

ineffective assistance of counsel at the guilt and penalty phases; and all others listed and presented at the evidentiary hearing.") with Motion, pp. 12-13 ("This Court failed to consider those errors in conjunction with the newly discovered evidence, other than to a brief mention of this evidence.").

Any generalized reference to "all [other arguments] listed and presented at the evidentiary hearing" fails to raise the newly discovered evidence claim as a specific, additional basis for cumulative error. *See generally Brown v. State*, 2020 WL 5048548, at *9, citing *Thompson v. State*, 759 So.2d 650, 667 n.12 (Fla. 2000) ("However, Brown's argument regarding Doyle's prior convictions was not included in her postconviction motion and is therefore procedurally barred."); *see also Doorbal v. State*, 983 So.2d 464, 492 (Fla. 2008), *citing Perez v. State*, 919 So.2d 347, 359 (Fla. 2005) ("For an issue to be preserved for appeal, it must be presented to the lower court, and the specific legal argument or ground to be argued on appeal must be part of that presentation.").

By raising an argument not presented in the initial brief, Appellant fails to establish any basis for relief. *See Rolling*, 215 So.3d 70; *see also Cleveland*, 887 So.2d at 364.

CLAIM #5 *POOLE*

Appellant Raises New Argument

Instead of pointing this Court's attention to a point of law or fact that the Court overlooked or misapprehended, Appellant raises an argument that she did not present in her initial brief – that this Court's decision in *State v. Poole*, 297 So.3d 497 (Fla. 2020) violates the U.S. Constitution. Compare Initial Brief, p.117 (In a case involving a *Hurst* claim, a *per se* harmless error finding based on a unanimous jury recommendation "does not allow for meaningful consideration of the actual record.") with Motion, p.15 ("This Court's Application of *Poole v. State* [sic] to Defeat Brown's Claims under *Hurst v. Florida* and *Hurst v. State* Violates the… U.S. Constitution.").

In making this argument, Appellant fails to acknowledge that this Court gave her exactly what she asked for in her initial brief: an evidence-based test for harmless error in cases involving *Hurst* claims. *See Brown*, 2020 WL 5048548 at *24 ("[W]e 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."). The fact that this Court applied the evidence-based harmless error test suggested by Appellant but reached a conclusion adverse to Appellant's

interests is not grounds for rehearing. *See generally State ex rel. Jaytex Realty Co. v. Green*, 105 So.2d at 818–19.

Additional Arguments

Despite the foregoing, Appellant makes several arguments that the State addresses below. First, Appellant argues that this Court relied on the *Almendarez-Torres*[4] exception in order to find harmless any *Hurst* error in her case. *See* Motion, pp. 15-18. Second, Appellant argues that, due to the evolving of decency that mark the progress of a maturing society, the Eighth Amendment requires jury sentencing. *See* Motion, pp. 19-21. Third, Appellant argues that her death sentence violates the Equal Protection Clause. *See* Motion, pp. 22-23. And fourth, Appellant argues that her death sentence violates the Ex Post Facto Clause. *See* Motion, pp. 23-25.

Almendarez-Torres

Appellant complains that this Court improperly relied on the *Almendarez-Torres* exception to find a "suppositious" contemporaneous felony conviction for kidnapping – even though the State *nolle prossed* that charge. *See* Motion, pp. 17-18; *see also Brown*, 2020 WL 5048548 at *3, n.1 ("Brown was also indicted for kidnapping, but for reasons not explained in the record, the State entered a nolle prosequi as to the kidnapping charge as trial began.").

[4] *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

In making this argument, Appellant correctly notes that the *Almendarez-Torres* exception applies to prior convictions, not contemporaneous convictions. *See* Motion, p.17; *see also Ring v. Arizona*, 536 U.S. 584, 597 n.4 (2002) ("No aggravating circumstance related to past convictions in his case; Ring therefore does not challenge *Almendarez–Torres*… which held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence.").

Nonetheless, Appellant does not acknowledge that under either scenario, no Sixth Amendment error occurs. With a prior conviction, no Sixth Amendment error occurs because the caselaw contains a "narrow exception" to the general rule that a jury must find any fact that increases the maximum sentence. *See Alleyne v. United States*, 570 U.S. 99, 111 n.1 (2013), citing *Almendarez-Torres* (prior convictions are "a narrow exception" to the Sixth Amendment requirement that defendants have a right to have a jury find facts which expose a defendant to a greater punishment).

With a contemporaneous conviction, however, no Sixth Amendment error occurs because the jury verdict during the guilt phase satisfies the fact-finding requirement for the penalty phase. *See generally Frances v. State*, 970 So.2d 806, 822–23 (Fla. 2007):

> In the instant case, the trial court found the aggravating circumstances of a prior violent felony conviction, based on Frances'

> contemporaneous convictions for the murder of the two victims, and the murder was committed during a robbery. In the guilt phase, a unanimous jury found Frances guilty beyond a reasonable doubt of two counts of premeditated murder and one count of robbery, thereby satisfying the mandates of the United States and Florida Constitutions.

Within the context of *Almendarez-Torres*, some might not see any meaningful distinction between a prior conviction and contemporaneous one. In both scenarios, jury fact-finding supports an increase in the maximum sentence – just at different times. With a contemporaneous conviction, any Sixth Amendment requirement in the penalty phase was satisfied by the jury verdict in the guilt phase; similarly with a prior conviction, any Sixth Amendment requirement in the present case was satisfied by the verdict in the prior case (because the defendant either admitted to the facts or because the jury verdict itself provides the necessary fact-finding). *See generally Jones v. United States*, 526 U.S. 227, 249 (1999) ("[U]nlike virtually any other consideration used to enlarge the possible penalty for an offense, and certainly unlike the factor before us in this case, a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees.").

Under this view, and as to the fact of prior conviction only, the previous jury essentially serves as a substitute for the present one. *See e.g. Lott v. State*, No. SC19-1356 *2-3 (Fla. Sept. 17, 2020):

> [B]ecause a unanimous jury finding in Lott's case establishes the existence of at least one statutory aggravating circumstance beyond a

> reasonable doubt, there is no *Hurst* error. Among the aggravators in Lott's case, the trial court found that Lott "had a previous conviction for a violent felony." That aggravating circumstance was "based on three prior armed robbery convictions and one prior attempted escape conviction," all of which were unanimously found by a jury.) (citations omitted).

Regardless of any distinction between prior convictions and contemporaneous ones, Appellant fails to recognize that *Almendarez-Torres* does not stand for the proposition that, although a Sixth Amendment error did occur, any such error was nonetheless harmless. Unacknowledged by Appellant, the *Almendarez-Torres* exception means that no Sixth Amendment error ever occurred. *See Lott*, No. SC19-1356 *2 ("[T]here is no *Hurst* error.").

Thus, in Appellant's case, this Court did not rely on the *Almendarez-Torres* exception to find a "suppositious felony" conviction that rendered any *Hurst* error harmless. In other words, this Court did not look to a prior or contemporaneous felony conviction in order to show that no Sixth Amendment error occurred. Instead, this Court properly applied an evidence-based harmless error test and concluded that, because of the "uncontroverted evidence that the capital felony was committed while Brown was engaged, or was an accomplice, in the commission of a kidnapping," any Sixth Amendment error that did occur was nevertheless harmless. *Brown*, 2020 WL 5048548 at *24.

Evolving Standards of Decency

Unacknowledged by Appellant, the United States Supreme Court recently rejected an argument that the Eighth Amendment requires jury sentencing. *See McKinney v. Arizona*, 140 S.Ct. 702, 707 (2020) ("[I]n a capital sentencing proceeding just as in an ordinary sentencing proceeding, a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range.").

Furthermore, due to the Conformity Clause, this Court remains bound by *McKinney* and cannot provide any additional cruel and unusual protections under the Florida Constitution. *See* art. I, § 17, Fla. Const.:

> The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution.

See also Bowles v. State, 276 So.3d 791, 796 (Fla. 2019), citing *Correll v. State*, 184 So.3d 478, 489 (Fla. 2015):

> In his habeas petition, Bowles claims that, given national trends in the death penalty, his execution would constitute cruel and unusual punishment. However, as we have explained, "this Court is bound by the conformity clause of the Florida Constitution to construe the state prohibition against cruel and unusual punishment consistently with pronouncements by the United States Supreme Court."

Equal Protection

Appellant argues that *Poole* resulted in a "fragmentation of the cohort of equally deserving death-sentenced defendants, some of whom are not dispatched to die while others have been spared for no other reason than the different handling of their postconviction proceedings…" Motion, p.23; *see generally State v. Silvia*, 235 So.3d 349, 352 (Fla. 2018) (Lewis, J., dissenting) ("This new denial approach results in equal protection and due process violations, constitutes cruel and unusual punishment, and the arbitrary and capricious operation of the death penalty.").

Although Appellant describes this fragmentation as "invidiously discriminatory," Appellant nonetheless fails to identify any purposeful discrimination in her case. *See McGirth v. State*, 209 So.3d 1146, 1154, n.9 (Fla. 2017), receded from on other grounds by *Hooks v. State*, 286 So.3d 163, 164 (Fla. 2019), quoting *Freeman v. State*, 761 So.2d 1055, 1068 (Fla. 2000):

> [I]n *McCleskey v. Kemp*, 481 U.S. 279 (1987), the Supreme Court held that studies showing disproportionate impact of death sentences on black defendants as compared to white defendants were not sufficient to find the state's administration of the death penalty violated a black defendant's right to equal protection. However, the Court went on to say, "[T]o prevail under the Equal Protection Clause, McCleskey must prove that the decisionmakers in his case acted with discriminatory purpose." *Id*. at 292.

See generally Freeman, 761 So.2d at 1068 ("The claim being made here is distinguishable from cases which have alleged a discriminatory impact proves there was a discriminatory purpose.").

For example, Appellant does not allege any purposeful discrimination on the basis of race. *See e.g. Glock v. Moore*, 776 So.2d 243, 252 (Fla. 2001), quoting *Washington v. Davis*, 426 U.S. 229, 239 (1976) ("The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating *on the basis of race*.").

Nor does she allege any purposeful discrimination on the basis of gender. *See e.g. Abshire v. State*, 642 So.2d 542, 544 (Fla. 1994) ("[T]he Equal Protection Clause of the federal constitution prohibits gender-based peremptory challenges.").

Additionally, Appellant does not demonstrate that, by virtue of her death sentence, she belongs to a suspect class that warrants heightened review. *See generally Jackson v. State*, 213 So.3d 754, 770 (Fla. 2017), citing *Crump v. State*, 654 So.2d 545, 547 (Fla. 1995), *Gov't of Virgin Islands v. Hodge*, 359 F.3d 312, 326 (3d Cir. 2004) ("Although 'death is different,' criminal defendants are not generally considered a suspect class, not even those sentenced to death.").

Nor does Appellant establish the lack of any rational basis for the purported discrepancy in death penalty cases following this Court's decision in *Poole*. *See generally Abdool v. Bondi*, 141 So.3d 529, 545–46 (Fla. 2014) (citations omitted):

> The Equal Protection Clause of the United States Constitution protects classes and individuals from being treated arbitrarily without a legitimate justification. *Clements v. Fashing*, 457 U.S. 957, 963 (1982). However, the Equal Protection Clause allows States considerable leeway to enact legislation that may appear to affect similarly situated people differently. *Id*. Unless a classification

> warrants heightened review because it jeopardizes the exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification be rationally related to a legitimate state interest. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). The party that alleges that a statute violates equal protection bears the burden to demonstrate that there is no rational basis for the classification. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001).

But see Allen v. Butterworth, 756 So.2d 52, 54 (Fla. 2000) ("[T]he successive motion standard applies only to capital prisoners in violation of the principles of equal protection.").

For all intents and purposes, Appellant's argument remains indistinguishable from the Equal Protections claims based on the *Asay*/*Mosely* retroactivity split[5] that this Court has repeatedly denied. *See e.g. Jimenez v. Jones*, 261 So.3d 502, 504 (Fla. 2018):

> Jimenez argues that failure to apply chapters 2016-13 and 2017-1 to his case is arbitrary, in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment, when his case is compared to the cases of other defendants who have been granted new penalty-phase proceedings for crimes that occurred before the 1992 murder for which Jimenez has been sentenced to death. He raised these arguments in response to this Court's order to show cause in case number SC17-2272 as well. We rejected them when we held that *Hurst* does not apply retroactively to Jimenez's sentence of death. [*Jimenez v. State*, 247 So.3d 395, 396 (Fla. 2018)]. We also rejected

[5] *See Asay v. State*, 210 So.3d 1, 22 (Fla. 2016) (*Hurst* not retroactive to cases in which the death sentence became final before the issuance of *Ring v. Arizona*, 536 U.S. 584 (2002)); *see also Mosley v. State*, 209 So.3d 1248, 1274 (Fla. 2016) (*Hurst* retroactive to cases in which the death sentence became final after the issuance of *Ring*.); *but see Brown*, 2020 WL 5048548 at *26 ("After *Poole*, *Mosley* is the ghost of a precedent.").

> these arguments when they were raised in *Lambrix v. State*, 227 So.3d 112, 113 (Fla. 2017) (rejecting claims that this Court's decisions concerning the retroactivity of *Hurst* violate the rights to due process and equal protection due to arbitrariness).

Ex Post Facto

In presenting her *ex post facto* argument, Appellant fails to establish that the Ex Post Facto Clause applies to judicial decisions. *See generally Rogers v. Tennessee*, 532 U.S. 451, 456 (2001), quoting *Marks v. United States*, 430 U.S. 188, 191 (1977) ("As the text of the [Ex Post Facto] Clause makes clear, it 'is a limitation upon the powers of the Legislature, and does not of its own force apply to the Judicial Branch of government.'").

Additionally, Appellant fails to demonstrate how the Ex Post Facto Clause applies to a case in which the sentence has never changed. *See generally Victorino v. State*, 241 So.3d 48, 50 (Fla. 2018), citing *Lynce v. Mathis,* 519 U.S. 433, 441 (1997) ("For a criminal law to be ex post facto it must be retrospective, that is, it must apply to events that occurred before its enactment; and it must alter the definition of criminal conduct or *increase the penalty* by which a crime is punishable.") (emphasis added); *see also Rogers*, 532 U.S. at 456, quoting *Calder v. Bull*, 3 Dall. 386, 390, 1 L.Ed. 648 (1798):

> The most well-known and oft-repeated explanation of the scope of the Clause's protection was given by Justice Chase, who long ago identified, in dictum, four types of laws to which the Clause extends:

> "1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action.2d. Every law that aggravates a crime, or makes it greater than it was, when committed.3d. *Every law that changes the punishment, and inflicts a greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender."

(emphasis added). From the moment it was announced, Appellant's sentence has always been death. This Court's decision in *Poole* did nothing to alter that reality.

Arguably, Appellant's case is not even a *Poole* case because the jury recommendation in her case was unanimous. Compare *Brown*, 143 So.3d at 400 ("[T]he jury recommended a death sentence by a unanimous vote.") with *Poole*, 297 So.3d at 494 ("The trial court entered an interim order vacating Poole's death sentence pursuant to *Hurst v. State*, finding the error was not harmless because the jury's recommendation of death was not unanimous.").

Therefore, any Sixth Amendment error would still be harmless under this Court's pre-*Poole* precedent. *See e.g. Davis v. State*, 207 So.3d 142, 174 (Fla. 2016) ("With regard to Davis's sentences, we emphasize the *unanimous* jury recommendations of death. These recommendations allow us to conclude beyond a reasonable doubt that a rational jury would have unanimously found that there

were sufficient aggravators to outweigh the mitigating factors.") (emphasis in original).

Ultimately, even if the Ex Post Facto Clause were to apply to the judicial branch, this Court's decision in *Poole* could not create an Ex Post Facto violation in Appellant's case. Put simply, the two cases are just too different.

V. *POOLE* WAS CORRECTLY DECIDED

In the event this Court considers Appellant's claim that *Poole* was wrongly decided, the State provides the following analysis.

TUILAEPA V. CALIFORNIA

Summary

Addressing an Eighth Amendment claim, the United States Supreme Court held that the consideration of "relevant mitigating evidence of the character and record of the defendant and the circumstances of the crime" is part of the individualized sentencing determination that takes place during the selection phase. *Tuilaepa v. California*, 512 U.S. 967, 972-73 (1994).

While "the character and record of the defendant and the circumstances of the crime" certainly includes mitigating circumstances, "the circumstances of the crime" can also include aggravating factors. *See Tuilaepa*, 512 U.S. at 976 ("[O]ur capital jurisprudence has established that the sentencer should consider the circumstances of the crime in deciding whether to impose the death penalty.").

Thus, *Tuilaepa* strongly suggests that the jury considers the relative weight of aggravating factors and mitigating circumstances during the selection phase of the capital sentencing process.

Eligibility Phase and Selection Phase

In reaching its decision, the Court identified two distinct phases for the capital sentencing process: (1) on objective eligibility phase; and, (2) a subjective selection phase. *See Tuilaepa*, 512 U.S. at 971 ("Our capital punishment cases under the Eighth Amendment address two different aspects of the capital decision-making process: the eligibility decision and the selection decision.").

Eligibility Phase is Objective

The eligibility phase is objective because it involves a rational decision regarding the existence, *vel non*, of facts that the prosecution must prove beyond a reasonable doubt. *See generally Tuilaepa*, 512 U.S. at 973, quoting *Arave v. Creech*, 507 U.S. 463, 471 (1993) ("Eligibility factors almost of necessity require an answer to a question with a factual nexus to the crime or the defendant so as to 'make *rationally* reviewable the process for imposing a sentence of death.'") (emphasis added); *see also Zant v. Stephens*, 462 U.S. 862, 863 (1983) ("The narrowing function of statutory aggravating circumstances was properly achieved in this case by the two valid aggravating circumstances upheld by the Georgia Supreme Court, because these two findings adequately differentiate this case in an

objective, evenhanded, and substantively *rational* way from the many Georgia murder cases in which the death penalty may not be imposed.") (emphases added).

In order for the death penalty to be an available option during the selection phase, the trier of fact first must find at least one aggravating factor during the eligibility phase. *See Tuilaepa*, 512 U.S. at 971-72 ("To render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase."); *accord Sattazahn v. Pennslyvania*, 537 U.S. 101, 111 (2003):

> [F]or purposes of the Sixth Amendment's jury-trial guarantee, the underlying offense of "murder" is a distinct, lesser included offense of "murder plus one or more aggravating circumstances": Whereas the former exposes a defendant to a maximum penalty of life imprisonment, the latter increases the maximum permissible sentence to death.

If the jury finds the existence of at least one aggravating factor, then the eligibility phase ends and the selection phase begins. *See California v. Ramos*, 463 U.S. 992, 1008 (1983):

> Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, as did respondent's jury in determining the truth of the alleged special circumstance, the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment. In this sense, the jury's choice between life and death must be individualized.

See also id. at n.21, quoting *Zant v. Stephens*, 462 U.S. at 900 (Rehnquist, J., concurring in the judgment) ("[S]entencing decisions rest on a far-reaching inquiry into countless facts and circumstances and not on the type of proof of particular elements that returning a conviction does.").

Selection Phase is Subjective

In order for a defendant to receive the death penalty at the conclusion of the selection phase, the sentencer must make an "individualized determination," with that determination based upon a consideration of "relevant mitigating evidence of the character and record of the defendant and the circumstances of the crime." *Tuilaepa*, 512 U.S. at 973, quoting *Zant v. Stephens*, 462 U.S. at 879.

Because it involves an individualized determination whether the death penalty is appropriate in a particular case, the selection phase is subjective as to relative weight given the aggravating factors and mitigating circumstances.[6] *See generally Tuilaepa*, 512 U.S. at 973 ("The selection decision, on the other hand,

[6] In concurring opinion from an earlier decision, Justice Rehnquist expressed his belief that the jury's consideration of mitigating circumstances during the selection phase does not involve any factfinding regarding the existence of any elements (i.e. aggravating factors) – presumably because any such decision would have already taken place during the eligibility phase. *See Zant v. Stephens*, 462 U.S. at 900 (Rehnquist, J., concurring in the judgment), citing *Lockett v. Ohio*, 438 U.S. 586, 602–605 (1978) ("In considering [mitigating] evidence, the jury does not attempt to decide whether particular elements have been proved, but instead makes a unique, individualized judgment regarding the punishment that a particular person deserves.").

requires individualized sentencing and must be expansive enough to accommodate relevant mitigating evidence so as to assure an assessment of the defendant's culpability."); *see also Caldwell v. Mississippi*, 472 U.S. 320, 340, n.7 (1985), quoting *Zant v. Stephens*, 462 U.S. at 900 (REHNQUIST, J., concurring in judgment) ("[I]n one crucial sphere of a system of capital punishment, the capital sentencer comes very near to being 'solely responsible for [the defendant's] sentence,' and that is when it makes the often highly subjective, 'unique, individualized judgment regarding the punishment that a particular person deserves.'").

HURST V. FLORIDA

Summary

Addressing the Sixth Amendment, the United States Supreme Court held that Florida's capital sentencing process violated the Constitution because it impermissibly required the judge, rather than the jury, to make the factual findings necessary to render a defendant eligible for the death penalty. *See Hurst*, 136 S.Ct. at 619 ("The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death."); *see also id.* at 622 ("Florida does not require the jury to make the critical findings necessary to impose the death penalty. Rather, Florida requires a judge to find these facts… [Therefore,]we hold that Hurst's sentence violates the Sixth Amendment"); *id*. at 624 ("Florida's sentencing

scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional.").

For all intents and purposes, "*Hurst v. Florida* simply applies the reasoning of *Ring* and *Apprendi* to Florida's death penalty statute and concludes that the jury's advisory role under Florida law does not satisfy the requirements of the Sixth Amendment." *Hurst v. State*, 202 So.3d 79 (Fla. 2016) (Canady, J., dissenting).

Unnecessary Confusion

In reaching its decision in *Hurst v. Florida*, the Court did not address the Eighth Amendment; nor did the Court recognize any distinctions between the eligibility phase and the selection phase. Nonetheless, *Hurst v. Florida* does include language that could be misinterpreted as signaling a break with *Tuilaepa* – that under Florida's capital sentencing scheme, the weighing of aggravating factors and mitigating circumstances takes place during the eligibility phase, not the selection phase. *See Hurst*, 136 S. Ct. at 622:

> [T]he Florida sentencing statute does not make a defendant eligible for death until "findings by the court that such person shall be punished by death." The trial court *alone* must find 'the facts ... [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." (emphasis in original).

But see Poole, 297 So.3d at 503:

> We acknowledge that section 921.141(3)(b) requires a judicial finding "as to the fact[ ]" that the mitigators do not outweigh the aggravators. But the legislature's use of a particular label is not what drives the

> Sixth Amendment inquiry. In substance, what section 921.141(3)(b) requires "is not a finding of fact, but a moral judgment." (citations omitted)

By specifically quoting statutory provisions regarding the sufficiency of the aggravating factors as well as the relative weight given to the aggravating factors and mitigating circumstances, *Hurst v. Florida* led some to misinterpret the Court's holding and conclude that: (1) the weighing of aggravating factors and mitigating circumstances involves factfinding; and, (2) a jury finding of at least one aggravating factor was not enough to make a defendant eligible to receive a death sentence in Florida. *See e.g. Hurst v. State*, 202 So.3d at 57:

> *Hurst v. Florida* mandates that all the findings necessary for imposition of a death sentence are "elements" that must be found by a jury, and Florida law has long required that jury verdicts must be unanimous. Accordingly, we reiterate our holding that before the trial judge may consider imposing 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.

Unfortunately, this misinterpretation created unnecessary confusion. *See generally Hurst*, 202 So.3d at 81 (Canady, J., dissenting):

> The majority's misinterpretation of *Hurst v. Florida* is rooted in its misunderstanding of the Court's Sixth Amendment jurisprudence concerning "facts" that must be found by a jury. The majority confuses the "facts" that must be proved by the government to a jury in order for a defendant to pass the threshold of eligibility for a death sentence with the other determinations that may lead to the imposition of a death sentence.

KANSAS V. CARR

Summary

Approximately one week after deciding *Hurst v. Florida*, the United States Supreme Court addressed the Eighth Amendment and held that the Constitution does not require States to inform juries that mitigating circumstances need not be established with proof beyond a reasonable doubt. *See Kansas v. Carr*, 136 S.Ct. 633, 642 (2016).

Eligibility Phase v. Selection Phase

In reaching its decision, the Court addressed the distinction between the eligibility phase and the selection phase – echoing language from the Court's earlier decision in *Tuilaepa*. *See Carr*, 136 S.Ct. at 642 ("[W]e doubt whether it is even possible to apply a standard of proof to the mitigating-factor determination (the so-called 'selection phase' of a capital-sentencing proceeding). It is possible to do so for the aggravating-factor determination (the so-called 'eligibility phase'), because that is a purely factual determination.").

The Court described the eligibility phase as a determination whether the aggravating factors do or do not exist. *See Carr*, 136 S.Ct. at 642 ("The facts justifying death set forth in the Kansas statute either did nor did not exist – and one can require the finding that they did exist to be made beyond a reasonable doubt."); *see also United States v. Gabrion*, 719 F.3d 511, 532 (6th Cir. 2013) ("*Apprendi*

[*v. New Jersey*, 530 U.S. 466 (2000)] findings are binary—whether a particular fact existed or not.").

In contrast, the Court described the sentencing phase as a "judgment call" regarding the existence of any mitigating circumstances. *Carr*, 136 S.Ct. at 642 ("Whether mitigation exists, however, is largely a judgment call (or perhaps a value call); what one juror might consider mitigating another might not.").

Most importantly, the Court described the weighing of aggravating factors and mitigating circumstances in the selection phase as "mostly a question of mercy." *Id*. ("And of course the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy – the quality of which, as we know, is not strained."); *see also Gabrion*, 719 F.3d at 533 (describing balancing provision in federal death penalty statute as "not a finding of fact, but a moral judgment").

Thus, contrary to *Hurst v. Florida* (which was decided one week prior) but consistent with *Tuilaepa*, *Carr* strongly suggests that the weighing of aggravating factors and mitigating circumstances takes place during the selection phase.

MCKINNEY V. ARIZONA

Summary

In a case decided earlier this year, the United States Supreme Court addressed an Eighth Amendment claim based upon an *Eddings* error[7]. *See McKinney v. Arizona*, 140 S.Ct. 702 (2020). According to the defendant, the sentencer in his capital trial failed to consider the mitigating impact of his post-traumatic stress disorder. *See id*. at 706.

In addition to claiming an *Eddings* error, the defendant argued that a State appellate court could no longer correct that error by conducting a *Clemmons* reweighing[8] of the aggravating factors and mitigating circumstances (which now included the PTSD). *See McKinney*, 140 S.Ct. at 706.

Ultimately, the Court held that a state appellate court may still conduct a *Clemons* reweighing of aggravating and mitigating circumstances in order to resolve an *Eddings* claim. *See McKinney*, 140 S.Ct. at 709.

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[7] *See Eddings v. Oklahoma*, 455 U.S. 104, 113–14 (1982) ("Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence.") (emphasis in original).

[8] *See Clemons v. Mississippi*, 494 U.S. 738, 748 (1990) (Eighth Amendment permits an appellate court to reweigh aggravating and mitigating circumstances in an attempt to salvage the death sentence imposed by a jury.).

Eligibility Phase v. Selection Phase

In reaching its decision in *McKinney*, the Court appeared to follow the distinction draw in *Tuileapa* and *Carr* regarding the two phases of the capital sentencing process. With regard to the eligibility phase, the Court clearly stated that the finding of at least one aggravating factor is all that is required under the Constitution for establishing a defendant's eligibility for the death penalty. *See McKinney*, 140 S.Ct. at 705–06, citing *Tuilaepa*, 512 U.S. 967; *Zant v. Stephens*, 462 U.S. 862; *Gregg v. Georgia*, 428 U.S. 153 (1976) ("Under this Court's precedents, a defendant convicted of murder is eligible for a death sentence if at least one aggravating circumstance is found.").

With regard to the selection phase, the Court confirmed the continued validity of *Clemons*, which permits appellate courts to reweigh aggravating factors and mitigating circumstances. *See McKinney*, 140 S.Ct. at 707:

> In deciding whether a particular defendant warrants a death sentence in light of the mix of aggravating and mitigating circumstances, there is no meaningful difference for purposes of appellate reweighing between subtracting an aggravator from one side of the scale and adding a mitigator to the other side. Both involve weighing, and the Court's decision in *Clemons* ruled that appellate tribunals may perform a "reweighing of the aggravating and mitigating evidence." In short, a *Clemons* reweighing is a permissible remedy for an *Eddings* error.

Additionally, the Court unequivocally rejected the defendant's argument that, in the wake of *Hurst v. Florida*, "appellate courts may no longer reweigh

aggravating and mitigating circumstances in determining whether to uphold a death sentence." *McKinney*, 140 S.Ct. at 707.

Furthermore, the Court squarely rejected any argument that the Constitution requires a jury to weigh aggravating factors and mitigating circumstances. *See McKinney*, 140 S.Ct. at 707 ("[I]n a capital sentencing proceeding just as in an ordinary sentencing proceeding, a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range.").

Loose Language of *Hurst v. Florida* Corralled

Addressing *Hurst v. Florida*, the Court limited the holding of that decision to the Sixth Amendment requirement that a jury find the aggravating circumstance necessary to make a defendant eligible for the death penalty. *See McKinney*, 140 S.Ct. at 707 ("Under *Ring* [*v. Arizona*, 536 U.S. 584 (2002)] and *Hurst*, a jury must find the aggravating circumstance that makes the defendant death eligible.").

Thus, consistent with *Tuilaepa* and *Carr*, *McKinney* appears to correct any imprecise language in *Hurst v. Florida* that inappropriately suggested the jury's weighing of aggravating factors and mitigating circumstances takes place during the eligibility phase of Florida' capital sentencing process.

FLORIDA LAW

Eligibility Phase

Under Florida law, a capital defendant is eligible to receive the death penalty once the jury unanimously finds at least one aggravating factor beyond a reasonable doubt. *See* Fla. Stat. § 921.141(2)(b)2; *see also Poole*, 297 So.3d at 502–03.

Selection Phase

The finding of at least one aggravating factor concludes the jury's role in the sentence eligibility phase – but not its role in the overall sentencing process. If the jury unanimously finds at least one aggravating factor beyond a reasonable doubt, then the jury then proceeds to the sentence selection phase where it must evaluate the sufficiency of the aggravating factors as well as the weight of the aggravating factors and mitigating circumstances. *See Poole*, 297 So.3d at 502.

In performing its role during the sentencing selection phase, the jury must consider: "[w]hether sufficient aggravating factors exist"; and, "[w]hether aggravating factors exist which outweigh the mitigating circumstances found to exist." Fla. Stat. § 921.141(2)(b)2.a-b.

After considering whether sufficient aggravating factors exist and whether the aggravating factors outweigh the mitigating circumstances, the jury must recommend to the trial court "whether the defendant shall be sentenced to life

imprisonment without the possibility of parole or to death." Fla. Stat. § 921.141(2)(b)2.

If the jury recommends death, then the trial court may impose either a death sentence or a sentence of life imprisonment without the possibility of parole. Fla. Stat. § 921.141(3)(a)2. If, however, the jury recommends a sentence of life without the possibility of parole, then the trial court can only impose a life sentence. Fla. Stat. § 921.141(3)(a)1.

APPELLANT'S ARGUMENT

Summary

Appellant essentially argues that, in Florida, the eligibility phase is not over until the maximum sentencing range has been established by the jury's sentencing recommendation to the trial court; therefore, any jury determinations that precede the recommendation are the functional equivalents of elements that must be found beyond a reasonable doubt.

Under this view of Florida's capital sentencing process, the selection phase does not start until the trial court commences the *Spencer*[9] hearing – a proceeding in which the trial court independently weighs the aggravating factors and mitigating circumstances following a jury recommendation of death. *See generally Mosley v. State*, 209 So. 3d 1248, 1284 (Fla. 2016) ("The court held a *Spencer*

[9] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

hearing and, after independently weighing the aggravating factors and mitigating circumstances, agreed with the jury's recommendation.").

Appellant's Four-Step Eligibility Argument

Specifically, Appellant argues that, under Florida's capital sentencing scheme, a defendant convicted of first-degree murder is not eligible to receive a death sentence unless the jury: (1) unanimously finds beyond a reasonable doubt the existence of at least one aggravating factor; (2) unanimously finds beyond a reasonable doubt that any established aggravating factors are sufficient to justify the death penalty; (3) unanimously finds beyond a reasonable doubt that the aggravating factors outweigh the mitigating circumstances; and, (4) unanimously recommends death. *See* Initial Brief, pp. 119 ("On remand in *Hurst* [*v. State*], this Court held that the Eighth Amendment requires unanimous jury factfinding as to each of the required elements above, and also a unanimous death recommendation by the jury."); *see also Hurst v. State*, 202 So.3d at 57.

According to Appellant, all four steps outlined above take place during the eligibility phase of Florida's capital sentencing process; and, each step in the process is a condition precedent for the next step – up and until the final recommendation. Because each step in the process is dependent on the one before it, Appellant points to the jury's last step as the final step in the eligibility phase.

Highlighting that a trial court in Florida cannot impose a death sentence unless all four steps are satisfied, Appellant argues that the jury's consideration of the aggravating factors and mitigating circumstances necessarily takes place during the eligibility phase, not the selection phase. According to Appellant, the sufficiency of the aggravating factors and weighing of aggravating factors against the mitigating circumstances must be the functional equivalents of elements because a trial court cannot impose a death sentence unless, after carefully considering those factors, a jury recommends one. In other words, the considerations that factor into the jury's recommendation must be the functional equivalent of elements because, without that recommendation, the maximum sentence remains life imprisonment.

According to Appellant, the jury's role in determining sentence eligibility extends beyond its purely factfinding role and continues into the subjective consideration of aggravating factors and mitigating circumstances. In other words, Appellant argues that the eligibility process is not complete simply because the jury unanimously finds an aggravating factor beyond a reasonable doubt. Rather, completion can only occur if the jury similarly finds beyond a reasonable doubt that the aggravating factors are sufficient and that the aggravating factors outweigh the mitigating circumstances. Thus, Appellant argues that the jury's

recommendation – not the finding of any aggravating factor – determines the maximum sentence allowable by law.

Jury Considers Aggravators and Mitigators During the Eligibility Phase but the Trial Court Considers Them in the Selection Phase?

Under Appellant's interpretation of Florida's capital sentencing statute, the jury's consideration of the aggravating factors and mitigating circumstances takes place during the eligibility phase, whereas the trial court's consideration of those same factors takes place during the selection phase. According to Appellant, the former is an eligibility determination that increases the maximum sentence, but the latter is a call for leniency to forego that maximum sentence.

POOLE

Summary

Relatively recently, this Court addressed an interpretation of Florida's capital sentencing statute similar to the one suggested by Appellant. *See generally Poole*, 297 So.3d at 500. Consistent with *McKinney*, this Court held that a capital defendant becomes death-eligible once a jury unanimously finds at least one aggravating factor beyond a reasonable doubt. *Compare id.* at 502-03 with *McKinney*, 140 S. Ct. at 705-06; *see also Owen v. State*, No. SC18-810, 2020 WL 3456746, at *3, n.2 (Fla. June 25, 2020).

Eligibility Phase v. Selection Phase

In reaching its decision, this Court highlighted the distinction draw by *Tuilaepa* between the eligibility phase and the selection phase of the capital sentencing process. *See Poole*, 297 So.3d at 501. Then, this Court identified which provisions of Florida's capital sentencing statute fall into which phases of that process. *See id.* at 502:

> Section 921.141(3) requires two findings. One is an eligibility finding, the other a selection finding. The eligibility finding is in section 921.141(3)(a): "[t]hat sufficient aggravating circumstances exist as enumerated in subsection (5)." The selection finding is in section 921.141(3)(b): "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances."

Consistent with *Tuilaepa* and *Carr*, this Court described the eligibility phase as objective and the selection phase as subjective. *See Poole*, 297 So.3d at 503 ("A subjective determination like the one that section 921.141(3)(b) calls for cannot be analogized to an element of a crime; it does not lend itself to being objectively verifiable.").

Furthermore, this Court described the selection phase as "an opportunity for mercy." *See id.* ("The role of the section 921.141(3)(b) selection finding is to give the defendant an opportunity for mercy if it is justified by the relevant mitigating circumstances and by the facts surrounding his crime.").

This Court clearly stated that the eligibility phase concludes once the jury determines whether the State established at least one aggravating factor beyond a

reasonable doubt. *See Poole*, 297 So.3d at 502-03 ("Under longstanding Florida law, there is only one eligibility finding required: the existence of one or more statutory aggravating circumstances.").

Any subsequent consideration of aggravating factors and mitigating circumstances simply involves the exercise of sentencing discretion – something shared by judge and jury in Florida – within the sentencing range prescribed by statute and established by the jury's factfinding during the eligibility phase. *See Poole*, 297 So.3d at 503 ("[E]ven if we were to consider the section 921.141(3)(b) selection finding to be a fact, it still would not implicate the Sixth Amendment. The selection finding does not 'expose' the defendant to the death penalty by increasing the legally authorized range of punishment."); *see also Apprendi v. New Jersey*, 530 U.S. 466, 481 (2000) ("We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion-taking into consideration various factors relating both to offense and offender-in imposing a judgment within the range prescribed by statute."); *Alleyne v. United States*, 570 U.S. 99, 116 (2013):

> In holding that facts that increase mandatory minimum sentences must be submitted to the jury, we take care to note what our holding does not entail. Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment.

Id. at 113, n.2:

> Juries must find any facts that increase either the statutory maximum or minimum because the Sixth Amendment applies where a finding of fact both alters the legally prescribed range and does so in a way that aggravates the penalty. Importantly, this is distinct from factfinding used to guide judicial discretion in selecting a punishment "within limits fixed by law." While such findings of fact may lead judges to select sentences that are more severe than the ones they would have selected without those facts, the Sixth Amendment does not govern that element of sentencing. (citations omitted)

OWEN

After its decision in *Poole*, this Court acknowledged *McKinney* and correctly viewed that decision as support for its conclusion that, in Florida, a capital defendant becomes eligible to receive a death sentence once the jury unanimously finds beyond a reasonable doubt at least one aggravating factor. *See Owen v. State*, No. SC18-810, 2020 WL 3456746, at *3, n.2 (Fla. June 25, 2020).

VI. CONCLUSION

In her motion for rehearing, Appellant fails to establish any basis for relief. Instead of directing this Court's attention to points of law or fact overlooked or misapprehended in its decision, Appellant repeats her arguments and/or raises new arguments not presented in the Initial Brief.

ASHLEY MOODY
ATTORNEY GENERAL

/s/*Michael T. Kennett*
MICHAEL T. KENNETT
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 177008
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
(850) 414-3595 (tel)
(850) 487-0997 (fax)
Michael.Kennett@myfloridalegal.com
capapp@myfloridalegal.com
COUNSEL FOR
APPELLEE/RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via the eportal to Dawn B. Macready, Assistant CCRC-North, and to Stacy R. Biggart, Assistant CCRC-North, Counsel for Appellant, this 23rd day of September, 2020.

/s/*Michael T. Kennett*
MICHAEL T. KENNETT