Filing # 109815914 E-Filed 07/06/2020 02:11:36 PM

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IN THE SUPREME COURT OF FLORIDA
CASE NO. SC20-287
Lower Court Case No. 88-1357CF

RICHARD BARRY RANDOLPH
Appellant,

v.

STATE OF FLORIDA
Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT, IN AND FOR PUTNAM COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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REPLY TO ANSWER BRIEF'S STATEMENT OF THE CASE AND FACTS

Appellee's Statement of the Case and Facts is not a complete recitation of Mr. Randolph's case and its procedural history. Mr. Randolph stands by the Procedural History and Sentencing Facts which he provided in his Initial Brief as it provides a more complete picture of the unreliability of his death sentence.

ARGUMENT IN REPLY

In his Initial Brief [hereinafter IB] filed with this Court, Mr. Randolph presented three arguments. Argument I addressed the substantive nature of Ch. 2017-1, Laws of Florida, as set forth by the statutory construction in *Hurst v. State*, 202 So.3d 40 (Fla. 2016), and explained that the Due Process Clause of the Fourteenth Amendment dictates that this substantive law existed and governed at the time of Mr. Randolph's crime and sentencing. Argument II clarified that the Due Process Clause of the Fourteenth Amendment forbids applying *State v. Poole*, __ So. 3d __, 2020 WL 3116598 (Fla. Jan. 23 2020)[1] retroactively to Mr. Randolph's

[1] *State v. Poole* is not yet final. *See* Sup. Ct. R. 13.1 and 13.3. Finality attaches when the time to file a petition for a writ of certiorari expires or alternatively if a petition is filed then finality attaches when the United States Supreme Court denies the petition. Moreover, due to COVID-19, the United States Supreme Court entered Order: 589 U.S. on March 19, 2020, extending the time in which to file a writ of certiorari from 90 days to 150 days. Accordingly, *State v. Poole* will not be final until at least August 30, 2020, assuming no Motions for Extensions of Time are filed. Thus, *State v. Poole* as applied to Mr. Randolph's case only bolster's Argument III—that Florida inflicts the death penalty in an arbitrary manner in violation of the Eighth and Fourteenth Amendments.

detriment. Argument III concerned the unreliability of Mr. Randolph's death sentence in light of his procedural history, the evolving standards of decency, and this Court's arbitrary actions in and following *State v. Poole* which have exposed the true nature of Florida's unpredictable and erratic capital sentencing scheme.

ARGUMENT I

In addressing Argument I, Appellee refuses to acknowledge the state law distinctions between Arizona and Florida and instead regurgitates what occurred in the aftermath of *Ring v. Arizona*, 536 U.S. 584 (2002).[2] However, as this Court made clear when Mr. Randolph litigated his *Ring* claim over seventeen years ago, Arizona's capital sentencing scheme—is and always has been—distinct from Florida's.

In response to the merits of Mr. Randolph's substantive due process argument, Appellee acknowledges that a retroactivity analysis is unnecessary when a rule of law is not new. Answer Brief at 17 [hereinafter AB]. Appellee then states that the

[2] Even if Ch. 2017-1, Laws of Florida, is procedural in nature, Appellee's contention that United States Supreme Court jurisprudence has never retroactively applied rules of criminal procedure—is blatantly inaccurate and ignores the very case relied upon by this Court in *Witt v. State*, 387 So. 2d 922 (1980). AB at 12. *See Stovall v. Denno*, 388 U.S. 293, 298 (1967) ("We have also retroactively applied rules of criminal procedure fashioned to correct serious flaws in the factfinding process at trial. See, for example, Jackson v. Denno, 378 U.S. 368.").

"class of death eligible defendants"[3] did not change following the enactment of Ch. 2017-1, Laws of Florida. AB at 15. Nor did Florida's substantive statute defining first-degree murder. *Id*. Relying on the substantive statute defining first-degree murder, Appellee asserts that Mr. Randolph's jury properly convicted him of a capital felony during the guilt phase of his trial because Fla. Stat. § 782.04 defines the "crime of first-degree murder… as a capital felony—this is regardless of whether the death penalty is ultimately imposed." AB at 16. *Contra Donaldson v. Sack,* 265 So. 2d 499, 502 (1972) (construing the meaning of a capital offense as a crime for which the punishment of death is *actually* inflicted). Not only does *Hurst v. Florida*, 136 S. Ct. 616 (2016) invalidate Appellee's erroneous statement, it also establishes that a conviction of first-degree murder at the guilt phase in and of itself cannot support a sentence of death under Florida law. *Hurst v. Florida*, 136 S. Ct. at 620 (expressly recognizing that "[u]nder state law, the maximum sentence a capital felon may receive on the basis of the conviction alone is life imprisonment. § 775.082 (1).").

Both *Hurst* and *Ring* stem from *Apprendi v. New Jersey*, 530 U.S. 466 (2000), where the United States Supreme Court analyzed New Jersey's statutory mechanism

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[3] Given that a capital defendant is now only "eligible" for a death sentence when a unanimous jury returns a verdict in favor of death, or alternatively unanimously identifies and agrees upon the existence of a particular aggravator, the class of "death eligible" defendants arguably did change.

for determining the appropriate punishment for the unlawful possession of a firearm. Because the statutory scheme involved four independent statutes which operated together to authorize an increase in Apprendi's punishment, the court held the statutory scheme violated the Sixth and Fourteenth Amendments. The court determined that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490.

Florida's capital sentencing scheme likewise involves the interplay of statutes. Under Florida law, a first-degree murder conviction is automatically subject to a life sentence without parole, *see* Fla. Stats. §§ 782.04 and 775.082 (1) (Fla. Stat. § 782.04 provides that first-degree murder is "punishable as provided in s. 775.082."). Fla. Stat. § 775.082 in turn references Fla. Stat. § 921.141 which includes the additional facts that must be found in order to support elevating the conviction to include a sentence of death. *See also*, *Ring v. Arizona*, 536 U.S. at 586 ("The Arizona first-degree murder statute authorizes a maximum penalty of death only in a formal sense, for it explicitly cross-references the statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty.") (internal citations omitted).[4]

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[4] Unlike Florida's statutes, Arizona's first-degree murder statute only cross-referenced Ariz. Rev. Stat. § 13-703, which provided that a judge, rather than jury, must determine whether at least one statutory aggravating circumstance exists. And

At the time of Mr. Randolph's sentencing, Fla. Stat. § 775.082 (1) provided:

> (1) A person who has been **convicted of a capital felony shall be punished by life imprisonment** and shall be required to serve no less than 25 years before becoming eligible for parole **unless** the proceeding held to determine sentence according to the procedures **set forth in s. 921.141** results in findings by the court that such person shall be punished by death.

(emphasis added). And when Mr. Randolph was sentenced to death, Fla. Stat. § 921.141 (3) provided:

> (3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH -
>
> Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence is based as to the facts:
>
> (a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and
>
> (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.
>
> In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. **If the court does not make the findings requiring the death sentence, the court shall impose a sentence of life imprisonment in accordance with S. 775.082.**

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upon that singular finding, a convicted murderer became "eligible" for a death sentence. Thus "weighing" and "sufficiency" were not necessary to determine death eligibility under Arizona law.

(emphasis added). Florida's capital sentencing scheme, like the statutory scheme at issue in *Apprendi*, exposes a defendant to enhanced punishment—death rather than life imprisonment—when a murder is committed "under certain circumstances but not others." 530 U.S. at 484. And under Ch. 2017-1, Florida's statute still requires that the jury make a finding as to whether aggravators exist and whether the aggravator or aggravators are "sufficient" and requires consideration of the mitigating circumstances. Because the sufficiency of the aggravators exists under Florida's statute, it is a factor and thus the Sixth Amendment requires a jury finding.

As the facts of *Hurst v. Florida* itself reveal, Timothy Hurst, was similarly indicted under both a premeditated and/or felony murder theory based on a contemporaneous robbery.[5] 136 S.Ct. at 619-20. And Mr. Hurst's jury, like Mr. Randolph's, did not specify which underlying theory supported the first-degree murder conviction. Furthermore, like Mr. Randolph's jury, Mr. Hurst's jury made no findings as to which, if any, aggravation was established beyond a reasonable doubt to support elevating his sentence beyond the statutory maximum of a life

[5] Comparably, the defendant in *Ring* was also indicted for premeditated and/or felony murder based on a contemporaneous armed robbery and/or burglary in 1994. While the jury deadlocked on premeditation, the jury convicted Ring of the armed robbery thereby exposing him to a potential sentence of death. Unlike in *Ring*, however, the jury at issue here, questioned whether they had to unanimously agree to either theory, *see* IB at 11-12, and then failed to reach a unanimous recommendation in favor of death. Ring, who appealed to the United States Supreme Court following his direct appeal, was resentenced to life in 2007.

sentence. *Hurst v. Florida*, 136 S. Ct. 616 at 622, citing and abrogating *State v. Steele*, 921 So. 2d 538, 546 (Fla. 2005) ("[T]he trial court alone must make detailed findings about the existence and weight of aggravating circumstances; it has no jury findings on which to rely.").[6]

Appellee likewise fails to appreciate the significance of the case law which was overruled by *Hurst v. Florida* and its applicability to the facts of Mr. Randolph's case. While Appellee acknowledges *Hildwin v. Florida*, 490 U.S. 638 (1989) and *Spaziano v. Florida*, 468 U.S. 477 (1984), Appellee fails to recognize the remaining cases which were abrogated by *Hurst. v. Florida*, *see e.g.*, *State v. Steele*, 921 So. 2d 538 (Fla. 2005), *Bottoson v. Moore*, 833 So. 2d 694 (Fla. 2002), and most relevant to the issues presented here, *Blackwelder v. State*, 851 So. 2d 650 (2003). The decision to abrogate *Blackwelder* is perplexing given that Blackwelder, who was

[6] On remand, in *Hurst v. State*, this Court identified the elements necessary to "essentially convict a defendant of capital murder" from the plain language of the statute as it had existed since 1973. *Hurst v. State*, 202 So. 3d 40, 53. After determining that a non-unanimous recommendation based on non-existent jury findings was insufficient to justify a sentence of death, this Court remanded for a new penalty phase consistent with the constitutional construction of Fla. Stat. § 921.141. At the third retrial of his penalty phase, yet again, the jury did not return a unanimous verdict of death. Hurst now serves a life sentence for a conviction pre-dating *Ring* itself. And while this Court has since receded from the interpretation in *Hurst v. State*, Mr. Randolph respectfully suggests that in determining a contemporaneous conviction at the guilt phase serves as automatic eligibility for a death sentence, this Court has effectively expanded, rather than narrowed, the pool of "death eligible" defendants. In essence, by solely focusing on what the Sixth Amendment requires, this Court has effectively eliminated the constitutionally required Eighth Amendment narrowing function.

executed in 2004, never petitioned the court following this Court's denial of his direct appeal nor was his case mentioned by any party in their *Hurst* briefing.

In *Blackwelder*, the defendant alleged his death sentence, which was based on a unanimous jury recommendation, was invalid because the judge requested sentencing memorandums from *both* parties, yet the sentencing order reflected a verbatim copy of the State's sentencing memorandum. As a result, Blackwelder asserted the trial court improperly delegated its independent sentencing authority to the prosecutor in violation of Fla. Stat. § 921.141 (3). This Court rejected Blackwelder's claim, that the state attorney, and not the judge, did the sentencing analysis, finding that the "sentencing order demonstrates that the trial judge independently weighed the aggravating and mitigating circumstances. The sentencing order found three mitigating circumstances, while the State's memorandum argued that no mitigation applied." *Blackwelder v. State*, 851 So. 2d at 653.[7]

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[7] Blackwelder also argued Florida's capital sentencing scheme is unconstitutional because it did not require aggravating circumstances charged in the indictment, did not require specific unanimous jury determinations of aggravating circumstances, and did not require a unanimous verdict to return a recommendation of death. This Court rejected those claims citing *Doorbal v. State*, 837 So. 2d 940, 963 (Fla. 2003) (stating that prior violent felony aggravator based on contemporaneous crimes charged by indictment and on which defendant was found guilty by unanimous jury satisfies mandates of both the U.S. and Florida Constitutions); *but see*, *Doorbal v. Jones*, 227 So. 3d 110 (Fla. 2017) (granting *Hurst* relief for two 1995 murders due to non-unanimous jury recommendations); *contra Owen v. State*, __ So. 3d __, 2020 WL 3456746 (Fla. June 25, 2020) at *8 (holding

In Mr. Randolph's case, public records establish the prosecutor—ASA Alexander—engaged in *ex parte* communications with Judge Perry's judicial assistant, Ms. Koller, and assisted her with drafting the sentencing order. IB at 31-41. Additional documents also revealed the prosecutor drafted and inserted extra aggravating language into the sentencing order, without the presence or knowledge of defense counsel, or even the judicial assistant herself. *Id*. Furthermore, the record reflects this was common practice for Judge Perry in death penalty cases, *see e.g*., *Colina v. State*, 570 So. 2d 929 (Fla. 1990); *Jones v. State*, 845 So. 2d 55 (Fla. 2003). While this Court publicly reprimanded Judge Perry's nearly identical improper *ex parte* communications and due process violations in *civil* cases, this Court declined to do so in cases involving life and death. *See In re Perry*, 586 So. 2d 1054 (Fla. 1991). In light of *Blackwelder*'s abrogation and a record full of insidious due process violations, it can hardly be said that Mr. Randolph's death sentence is the product of either the independent judgment of the trial judge or of a uniform and reliable death penalty scheme.[8]

"in the course of a burglary" aggravator was established by jury's verdict at the guilt phase).

[8] A comparison of *Blackwelder* to the facts of this case underscores the arbitrary nature of Florida's death penalty system. Blackwelder pled guilty to premeditated murder of a fellow inmate, admitted his intent was to kill, had a prior violent record, and had the same level of aggravation yet more mitigation than Mr. Randolph. Perhaps the disparity can be attributed to the fact that Blackwelder had multiple mitigation witnesses testify on his behalf, whereas only one witness, Dr.

Appellee's argument also conflates the Sixth Amendment fact-finding function with the Eighth Amendment narrowing function. In doing so, Appellee appears to suggest that every defendant indicted for "first-degree murder" with an accompanying felony, is automatically "death eligible," following the guilt phase in light of the "in the course of a felony" aggravator. This interpretation, however, disregards case law as well as Florida's status as a weighing state with a bifurcated trial system for capital felonies. *Jennings v. McDonough*, 490 F.3d 1230, 1249 n.14 (11th Cir. 2007) ("A weighing state is one in which the **legislative narrowing of death-eligible defendants and the individual sentencing determination are collapsed into a single step** and based on an evaluation of the same sentencing factors. In order to ensure that the process satisfies the constitutionally mandated narrowing function, all aggravators must be defined by statute and must identify 'distinct and particular aggravating features.'") (internal citations omitted) (emphasis added). Thus, despite Appellee's contention, and this Court's recent case law, it is evident that the requisite narrowing which determines death eligibility is

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Krop, testified on behalf of Mr. Randolph. More importantly, Blackwelder's jury received a full portrayal of him and his background, while Mr. Randolph's non-unanimous jury was never informed that he had no prior violent history. And while Judge Perry had access to the PSI, he still rejected the statutory mitigating circumstance of "no significant criminal history." Blackwelder, who described Florida's prison system as "modern-day slavery," waived all postconviction appeals and was executed May 26, 2004. Lise Fisher, *Blackwelder Executed By Lethal Injection*, The Gainesville Sun, (May 27, 2004) https://www.gainesville.com/article/LK/20040527/News/604160087/GS.

performed at the penalty phase. If not, logically, there would be no need for a "penalty phase" to present evidence in support of either aggravation or mitigation. *Donaldson v. Sack*, 265 So. 2d. at 504. ("Fla.Stat. s 921.141(2)(a), as amended by s 1, Ch. 72-72, effective 10-1-72, applies to criminal offenses which may be punished by death and requires separate trials on the issues of innocent v. guilt and life v. death.").

Ch. 2017-1, Laws of Florida, did not alter the definition of first-degree murder; instead, it precisely defined the facts necessary to elevate the first-degree murder conviction to include a sentence of death. *State v. Dixon*, 283 So. 2d 1, 7 (1973) ("With the issue of guilt or innocence disposed of, the jury can then view the question of penalty as a separate and distinct issue. **The fact that the defendant has committed the crime no longer determines automatically that he must die in the absence of a mercy recommendation. They must consider from the facts presented to them-facts in addition to those necessary to prove the commission of the crime**…") (emphasis added); *State v. Garcia*, 229 So.2d 236, 238 (Fla.1969) ("The rules adopted by the Supreme Court are limited to matters of procedure… [] As related to criminal law and procedure, substantive law is that which declares what acts are crimes and prescribes the punishment therefor…"). Ch. 2017-1 is substantive law. It is not merely a procedural rule. If it were, it would violate the separation of powers doctrine for it to be enacted by the legislature.

Appellee's reliance on Fla. R. Crim. Pro. 3.112(b) is equally unpersuasive. AB at 16. In relying on a rule of criminal procedure to bolster the definition of "a capital trial," and equating it with "any first-degree murder case in which the State has not formally waived the death penalty on the record," Appellee only reinforces Argument III of Mr. Randolph's IB. Undoubtedly, a capital sentencing scheme in which a death sentence depends on the unrestricted action of a local state prosecutor and their subjective interpretation of "capital murder" as opposed to an objective substantive definition in the law, cannot pass constitutional muster. Surely Appellee is not seeking to emphasize the disparity in capital sentences which result from overzealous prosecutors in particular regions of the state.[9] Of course, certain areas have played a greater role in determining whether a death sentence shall be sought,

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[9] *See* Daniel Ducassi, *Harvard Report Rips Four Florida Counties for High Number of People Sent to Death Row*, Politico (Aug. 23, 2016), https://www.politico.com/states/florida/story/2016/08/harvard-law-report-finds-duval-co-is-a-death-penalty-outlier-clergy-to-call-for-hiatus-104903 (noting outlier counties shared a history of overzealous prosecutions, inadequate defense lawyering, and a pattern of racial bias and exclusion); Frank R. Baumgartner, *Racial Bias Plagues Florida's Death Penalty*, The Gainesville Sun (Jan. 26, 2016), https://www.gainesville.com/opinion/20160126/frank-baumgartner-racial-bias-plagues-floridas-death-penalty (noting 71% of executions carried out against black inmates were for homicides of white victims and that in over 40 years and 30,000 homicides in Florida, no white person had ever been executed for killing a black person).

but that is precisely why the elements identified in *Hurst v. State* are necessary to ensure uniformity throughout the entire state.[10]

When this Court construed Fla. Stat. § 921.141, it identified elements "necessary to essentially convict a defendant of capital murder." *Hurst v. State*, 202 So. 3d at 53-54. And most importantly, the Florida Legislature—the branch charged with enacting all laws—did not dispute that construction as evinced by the enactment of Ch. 2017-1. Appellee, however, contends that because there is "no express statement that the legislature intended that chapter 2017-1 be applied retroactively," this cannot be rebutted. AB at 18. Appellee's statement implies that the Florida Legislature, in drafting the laws of this State, is unaware of constitutional provisions affecting criminal laws, such as, the Saving Clause[11] in Florida's Constitution at the

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[10] *See* Robert J. Smith, *America's Deadliest Prosecutors*, Slate (May 14, 2015), https://slate.com/news-and-politics/2015/05/americas-deadliest-prosecutors-death-penalty-sentences-in-louisiana-florida-oklahoma.html (noting that one quarter of Florida's death sentences stem from State Attorney Angela Corey even though Duval County holds only 5% of the state's population).

[11] In 2009, New Mexico repealed its death penalty statute with three remaining on death row. The three capital defendants subsequently challenged their sentences as unconstitutional. New Mexico's Constitution also contained a Savings Clause provision. In addition, like Florida, the New Mexico Supreme Court utilized comparative proportionality review in determining whether a sentence of death was justified. In *Fry v. Lopez*, 2019-NMSC-013, 447 P.3d 1086 (2019), the court realized that in only comparing first-degree murders which resulted in death sentences, the court was excluding numerous equally heinous murders which had resulted in life sentences. Thus, by expanding the pool of cases to include factually similar murders, regardless of whether death was ultimately imposed, the court was able to conclude

time of enactment.[12] *Washington v. Dowling,* 92 Fla. 601, 109 So. 588 (1926) (defining criminal statutes as acts dealing with crime or its punishment); *Castle v. State*, 330 So. 2d 10 (Fla. 1976) (construing Art. X § 9 Fla. Const. as barring criminal defendants from benefiting from changes in the statute that controlled the original prosecution and sentence); *Love v. State*, 286 So. 3d 177, 185 (Fla. 2019) (holding amendment at issue is not substantive law as it "neither 'declares what acts are crimes' nor 'prescribes the punishment therefor.'").

Accordingly, rules such as Fla. R. Crim. Pro. 3.112(b) are procedural in nature, just as are rules which provide the steps by which to waive the right to a jury trial. However, when the right to a jury trial has not been waived, the jury is required to determine each fact which exposes the defendant to a sentence beyond the statutory maximum under Fla. Stat. § 775.082 (1). Thus, while Fla. Stat. § 784.02 defines the substantive offense of first-degree murder, Fla. Stat. § 921.141 in turn

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that the remaining death sentences were, in fact, disproportionate and thus unconstitutional under the Eighth Amendment.

[12] *See* Florida Senate Committee on Criminal Justice, Issue Brief 2011-212, Oct. 2010, Constitutional Prohibitions Affecting Criminal Laws, at 3, https://www.flsenate.gov/UserContent/Session/2011/Publications/InterimReports/pdf/2011-212cj.pdf ("A retroactive change that does not disadvantage an offender is not an ex post facto violation **but may be a savings clause violation if it affects prosecution or punishment for a crime previously committed.** An example of such a change is the retroactive reduction of a criminal penalty.") (emphasis added)

defines which facts must be found by a unanimous jury in order to elevate the sentence beyond the statutory maximum.

This Court, in applying *Hurst v. State*'s statutory construction to capital defendants such as Mr. Card, who's homicide occurred in 1981 and who's conviction became final in 1984, determined that that statutory construction existed and governed as to convictions pre-dating Mr. Randolph's. *Card v. Jones*, 219 So. 3d 47, 48 (Fla. 2017) (vacating death sentence as the jury's 11-1 recommendation could not establish the jury found the requisite elements beyond a reasonable doubt to support a capital murder conviction); *Card v. State*, 453 So. 2d 17, 18 (Fla. 1984); *see also*, *Johnson v. State*, 205 So. 3d 1285 (Fla. 2016) (vacating three death sentences imposed by a non-unanimous jury for three 1981 capital murder convictions and remanding for a new penalty phase under Ch. 2017-1). Consequently, this construction must apply with equal force to Mr. Randolph.[13]

ARGUMENT II

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[13] It bears repeating that following *Ring*, the Arizona Supreme Court did not create an arbitrary line to separate capital defendants with newer convictions from those with older convictions, nor did the court clarify the meaning of a statute that had been in existence since 1973. As *McKinney v. Arizona*, 140 S. Ct. 702 (2020), explained, under Arizona law, the date of the conviction, as opposed to the date the sentence became final, controls how the appropriate punishment will be determined. McKinney was convicted of two counts of first-degree murder in 1992. The trial court made the necessary findings under Arizona law to sentence him to death in 1993. Thus, consistent with Arizona law and their decision to only apply *Ring* to cases pending direct review, McKinney was not entitled to benefit from *Ring*. *Contra Mosley v. State*, 209 So. 3d 1248 (Fla. 2016) (applying *Hurst* cases retroactively to capital defendants on collateral review).

In response to Mr. Randolph's argument regarding the inapplicability of *State v. Poole* to his case, Appellee contends that that the United States Constitution is only concerned with the finding of an "eligibility factor." AB. At 21-22. And as result of Mr. Randolph's contemporaneous convictions at his guilt phase, his death sentence satisfies Sixth and Eighth Amendment concerns.[14] However, as explained above, Appellee's interpretation is incompatible with *Hurst v. Florida* itself.

Additionally, this Court's decision in *State v. Poole*, amounts to an *ex post facto* change in the law which cannot be applied to Mr. Randolph's detriment. *Bouie v. City of Columbia*, 378 U.S. 347 (1964). "[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, § 10, of the Constitution forbids. . . . If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the

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[14] Given the State's previous attempt challenging *Hurst v. State* as contravening "Sixth and Eighth Amendment jurisprudence" failed, it is apparent the United States Supreme Court either found no flaws with this Court's holding or found no substantial legal issues worth addressing. *See State of Florida v. Hurst*, Case No. 16-988, Petition for Writ of Certiorari, Feb. 13, 2017. Moreover, in light of the legislature enacting Ch. 2017-1 in accordance with the statutory construction set forth in *Hurst v. State*, it is all the more evident that this Court ignored the separation of powers and usurped the legislative function in issuing *State v. Poole*. *See State v. Graydon*, 506 So. 2d 393 (Fla. 1987) (holding that where the legislature has defined a crime in specific terms, courts are without authority to define it differently); *State v. Jackson*, 526 So. 2d 58, 59 (Fla. 1988) ("Criminal statutes are to be construed strictly and in favor of the accused.").

same result by judicial construction." *Id*. at 353-354. *See also 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. Both 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).[15]

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.

Appellee's reliance on *McKinney v. Arizona*, 140 S. Ct. 702 (2020), is equally unconvincing. In *Mckinney v. Arizona*, the United States Supreme Court reviewed the Arizona death penalty statute—a statute that this Court repeatedly explained had

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[15] There is another as well: "The counsel for Missouri closed his argument in this case by presenting a striking picture of the struggle for ascendency in that State during the recent Rebellion between the friends and the enemies of the Union, and of the fierce passions which that struggle aroused. It was in the midst of the struggle that the present constitution was framed, although it was not adopted by the people until the war had closed. It would have been strange, therefore, had it not exhibited in its provisions some traces of the excitement amidst which the convention held its deliberations." It was against the excited action of the States, under such influences as these, that the framers of the Federal Constitution intended to guard. In *Fletcher v. Peck* [10 U.S. 87, 137-138], Mr. Chief Justice Marshall, speaking of such action, uses this language: 'Whatever respect might have been felt for the State sovereignties, it is not to be disguised that the framers of the Constitution viewed with some apprehension the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the States are obviously founded in this sentiment; and the Constitution of the United States contains what may be deemed a bill of rights for the people of each State.'"

no impact on Florida's capital sentencing scheme. *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002). Furthermore, the specific questions presented to and considered by the United States Supreme Court were:

1. Whether the Arizona Supreme Court was required to apply current law when weighing mitigating and aggravating evidence to determine whether a death sentence is warranted.
2. Whether the correction of error under *Eddings v. Oklahoma*, 455 U.S. 104 (1982), requires resentencing.

See McKinney v. Arizona, Case No. 18-1109, Initial Brief, August 21, 2019.

In fact, the United States Court made clear in its opinion: "The issue in this case is narrow. McKinney contends that after the Ninth Circuit identified an *Eddings* error, the Arizona Supreme Court could not itself reweigh the aggravating and mitigating circumstances." *McKinney*, 140 S. Ct. at 706.

A simple comparison of Arizona's former capital sentencing scheme to Florida's reveals *McKinney* has no bearing on Florida law, particularly in light of the fact that this Court does not independently "reweigh" the trial court's consideration of aggravating and mitigating circumstances. *Compare Sochor v. Florida*, 504 U.S. 527, 542 (1992) (Rehnquist, C.J., White, J., Thomas, J., concurring in part and dissenting in part) ("As the majority observes, the Supreme Court in Florida does not in practice independently reweigh the aggravating and mitigating evidence…"); *Hudson v. State*, 538 So.2d 829, 831 (Fla. 1989) ("It is not within this Court's province to reweigh or reevaluate the evidence presented as to

aggravating or mitigating circumstances.") *with State v. Brookover*, 124 Ariz. 38, 42 601 P.2d 1322, 1326 (1979) ("**Both the trial court and this court** then must 'weigh' the mitigating circumstances against the aggravating circumstances to determine if leniency is required.") (emphasis added). While Appellee is correct that "*Ring* and *Hurst* did not require jury weighing of aggravating and mitigating circumstances," the Florida statute at issue does.[16] AB at 23.

ARGUMENT III

In his IB, Mr. Randolph cited to this Court's ruling in *State v. Poole* and this Court's subsequent actions as a basis for his argument that the Florida capital sentencing scheme is arbitrary. However, since the issuance of that opinion, this Court issued *Owen v. State*, __ So. 3d __, 2020 WL 3456746 (Fla. June 25, 2020). Mr. Randolph respectfully argues that this Court's ruling in *Owen* strengthens Mr. Randolph's claim—that the effect of this Court's rulings in *Poole* and *Owen* create an unacceptable level of arbitrariness, based on little more than timing in determining which murder defendants ultimately receive the death penalty. This level of arbitrariness violates the Eighth and Fourteenth Amendments.[17]

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[16] Mr. Randolph refers in the present tense to Florida's capital sentencing law as it existed in 1989, when he was sentenced to death.

[17] In holding that a jury's guilt phase verdict containing contemporaneous felony convictions automatically establishes certain aggravating factors, this Court not only contravenes the prior Court's precedent, it disregards the import of *Hurst v. Florida* and creates yet another arbitrary line in Florida's death penalty

"[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." *Furman v. Georgia*, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring); s*ee also id*. at 313 (White, J., concurring) ("[T]he death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not"). The death penalty may not be "inflicted in an arbitrary and capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.); *see also Godfrey v. Georgia*, 446 U.S. 420, 428 (1980).

As noted above, other Florida inmates with crimes and convictions pre-dating Mr. Randolph's have received the benefit of Ch. 2017-1. There is no non-arbitrary, rational basis that justifies this Court denying Mr. Randolph the same benefit. This Court's removal of the Eighth Amendment right to a unanimous jury determination simply because of a change in the make-up of this Court also violates Mr. Randolph's right to equal protection of the law under the Fourteenth Amendment to

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jurisprudence. *Compare Reed v State*, _ So. 3d _ 2020 WL 1295054 (Mar. 19, 2020) (holding contemporaneous guilt phase convictions of sexual battery and robbery automatically established two statutory aggravating circumstances) *with Ellerbee v State*, 232 So. 3d 909 (Fla. 2017) (holding contemporaneous burglary conviction at guilt phase could not establish the "in the course of a burglary" aggravator beyond a reasonable doubt to support a death sentence). Mr. Ellerbee has since been re-sentenced to life imprisonment.

the United States Constitution. *See Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); *In re Baker*, 267 So. 2d 331, 334-35 (Fla. 1972) ("We have already granted this requested relief to 27 members of the class of persons under sentence of death. There appears to be no reason why the remaining members of the class need be treated differently. To do so would create a class statutorily denied parole, while facing life terms in prison. The uniqueness of this position would foster litigation attacking both the facial validity of the Statute (C. 72-118) and its selective application to an indistinguishable few-a seeming denial of equal protection.").

Given that the only change between the rulings in *State v. Poole* and *Hurst v. State* is the membership of this Court, Mr. Randolph respectfully suggests that by receding from *Hurst v. State*, this Court "could not pretend to be reexamining the prior law with any justification beyond a present doctrinal disposition to come out differently from the Court" in *Hurst v. State*. *Planned Parenthood v. Casey*, 505 U.S. 833, 864 (1992); *see also id*., citing and quoting *Mitchell v. W. T. Grant Co*., 416 U. S. 600, 636 (1974) (Stewart, J., dissenting) ("A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve."); *North Florida Women's*

Healthy & Counseling Services, Inc. v. State, 866 So. 2d 612, 638 (Fla. 2003) ("We cannot forsake the doctrine of *stare decisis* and recede from our own controlling precedent when the only change in this area has been the membership of the Court.").

"Adherence to precedent is necessary to 'avoid an arbitrary discretion in the courts.' The Federalist No. 78, p. 529 (J. Cooke. Ed. 1961) (A. Hamilton). The constraint of precedent distinguishes the judicial 'method and philosophy from those of the political and legislative process.' Jackson, Decisional Law and Stare Decisis, 30 A. B. A. J. 334 (1944). . . . *Stare decisis* instructs us to treat like cases alike." *June Medical Services L. L. C. v. Russo*, ---S.Ct--- 2020 WL 3492640 at *22, 29 (June 29, 2020) (Roberts, C.J., concurring in judgement). Accordingly, this Court's reasoning for abandoning prior precedent must fail upon review. *Compare Bottoson v. Moore*, 833 So. 2d at 698 (Denying *Ring*'s applicability to Florida because "Florida's citizens and Florida's judiciary have relied in good faith upon these decisions of the United States Supreme Court. *Cf. Morange v. Sate Marine Lines, Inc.*, 398 U.S. 375, 401, 90 S. Ct. 1772 26 L.Ed.2d 399 (1970) (stating that a basic reason for stare decisis is maintaining public faith in the judiciary).") *with Poole*, 2020 WL3116598 at *15 ("The critical consideration ordinarily will be reliance. It is generally accepted that reliance interests are 'at their acme in cases involving property and contract rights.' And reliance interests are lowest in cases—like this one…") (internal citation omitted).

The unevenness that has been created by this Court flouts the fundamental fairness interests enshrined in the Eighth Amendment's concerns about punishment and the Fourteenth Amendment's concept of Due Process. *See Carmell v. Texas*, 529 U.S. 513, 533 (2000) (holding "there is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life."). "Once a State has granted prisoners a liberty interest, [the United States Supreme Court has] held that due process protections are necessary 'to insure that the state-created right is not arbitrarily abrogated.'" *Vitek v. Jones*, 445 U.S. 480, 488-89 (1980). Who gets the benefit of a substantive right and who does not must not offend the Due Process Clause. *State v. Robinson*, 873 So. 2d 1205, 1209 (Fla. 2004) ("It is the Due Process Clause that protects the individual against the arbitrary and unreasonable exercise of governmental power.").

In order to ensure the impartial administration of justice, this Court cannot treat the Fourteenth Amendment's guard against the deprivation of human life without the due process of law as inconsequential when compared against liberties such as property and contract rights. The scales of justice cannot tolerate a system which is tipped in favor of the government, nor can it tolerate a system which strips defendants of basic, orderly protections of settled law. In denying the applicability of the Eighth Amendment's evolving standards of decency, this Court not only runs

afoul of federal constitutional protections, it effectively fails to live up to its role as a neutral arbiter independent of the State. *Trop v. Dulles*, 356 U.S. 86, 103 (1958) ("We are oath-bound to defend the Constitution… **The Judiciary has the duty of implementing the constitutional safeguards that protect individual rights**" against government action.) (emphasis added).

CONCLUSION

In light of the foregoing argument, Mr. Randolph is entitled to Rule 3.851 relief or, at the very least, a new penalty phase consistent with the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been electronically served on Doris Meacham, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, Florida, 32188, at her primary email address, doris.meacham@myfloridalegal.com on July 6, 2020.

/s/ Rachel L. Day
RACHEL L. DAY
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CERTIFICATE OF FONT

I hereby certify that a true and correct copy of the foregoing was generated in Times New Roman 14-point font in compliance with Fla. R. App. P. 9.210(d).

/s/ Rachel L. Day
RACHEL L. DAY
Assistant CCRC-South