

IN THE SUPREME COURT OF FLORIDA

ETHERIA V. JACKSON,

Appellant,

CASE NO.: SC21-754

LT. NO.: 1985-CF-12620

v.

DEATH PENALTY CASE

STATE OF FLORIDA,

Appellee. /

ON APPEAL FROM THE CIRCUIT COURT  
OF THE FOURTH JUDICIAL CIRCUIT,  
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF THE APPELLEE

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## **PRELIMINARY STATEMENT**

Appellant Etheria V. Jackson is hereinafter referred to as “Jackson” or “Appellant.” The State of Florida is referred to as “State” or “Appellee.” Appellant’s Initial Brief is referred to as “IB.” Florida Rule of Criminal Procedure 3.851 is referred to as “Rule 3.851.”

Citations to records on appeal cited herein are designated as follows: The 2021 successive postconviction record on appeal (SC21-754) is referred to as “2021 SPCR”; supplemental record on appeal (SC21-754) is referred to as “2021 SPCR-Supp”; 2017 successive postconviction record on appeal (SC17-703) is referred to as “2017 SPCR”; 1990 initial postconviction record on appeal is referred to as PCR; and the direct appeal record (SC60-69197) is referred to as “DAR.” All record citations will include volume number (if applicable) and page number(s).

## **STATEMENT OF THE CASE, FACTS AND PROCEDURAL HISTORY**

This is an appeal from the trial court’s denial of Appellant’s successive postconviction motion, claiming relief based on this Court’s decision in *State v. Poole*, 297 So. 3d 487 (Fla. 2020), *cert.*

*denied, Poole v. Florida*, 141 S.Ct. 1051 (2021). 2021 SPCR at 6-25. Appellant is in the custody of the State of Florida and under a sentence of death.

### **Trial and Direct Appeal**

Jackson was convicted of first-degree murder and sentenced to death for the 1985 murder of a 64-year-old Jacksonville, Florida, businessman. The facts established at trial were set forth by this Court in the direct appeal:

Wendell and Linton Moody operated a retail furniture business in Jacksonville, Florida. To facilitate the collection of monthly installment payments, Linton obtained cash from the bank every month and then cashed customers' government checks, deducting their installment bills from the respective checks. On November 29, 1985, Linton cashed a check at the bank for \$4,000. On December 2, Linton worked in the furniture store from 10:30 a.m. until early afternoon. The following day Linton failed to report for work and his brother filed a missing person report. On December 5, Officer Raymond Godbee discovered Linton's body rolled up in a carpet in the back of Linton's 1983 Chevrolet station wagon. Several pieces of evidence were discovered with the body, including the victim's brown briefcase and a calling card box. On the same day, Linda Riley, appellant's live-in girlfriend and the mother of one of appellant's children, reported Linton's murder to the police department. According to Linda Riley's trial testimony, she purchased a washing machine from Linton Moody on the installment plan. On December 3, 1985, Linton came to her home to collect the monthly payment. On this particular occasion, Riley's two children

and the appellant were also present. Riley stated that after Linton cashed the check, he gave her a receipt. At this point, the appellant, Jackson, grabbed Moody and put a knife to his neck. Riley testified that appellant then forced Moody to the floor and directed her to remove his wallet and keys. As the sixty-four-year-old Moody begged for mercy, he was bound, gagged, and then choked with a belt until he was unconscious. After Moody regained consciousness, Jackson beat him in the face with a cast on his forearm and then straddled his body and repeatedly stabbed him in the chest. Jackson and Linda Riley then disposed of the body by rolling it up in a carpet and stuffing it in the back of the victim's car. The car was driven by Jackson to another location and abandoned, where it was later discovered by police. Riley also testified that after Jackson left with the body, he returned forty-five minutes later with two men, summoned Riley into the kitchen, and asked her to inject cocaine into his arm.

One of the two men who returned with Jackson also testified at the trial and stated he was driving with a friend when they were flagged down by a man with a cast on his forearm, later identified as Jackson. He stated Jackson asked if they knew where to find cocaine, and offered to purchase a tank of gas for the witness's car, stating, "I'll fill your tank, I have money all over, I just hit a sweet lick." According to the witness, Jackson later pulled stacks of folded twenty-and fifty-dollar bills from his pockets. After they purchased drugs, the witness said they returned to Jackson's house where his girlfriend injected him with cocaine.

An autopsy established that the victim had numerous bruises on the head, face, and neck, a shallow slash wound on the neck, a rug-burn on the left elbow, and bruised kneecaps. The victim also sustained seven stab wounds in the upper left chest area, causing massive internal bleeding and death. There was no blood on the

lower extremities, indicating the victim was prone when the injuries were inflicted. The bruises on the neck were consistent with strangulation by either a forearm or cast, or possibly a broad belt.

In an interview with detectives on December 9, Jackson said Riley committed the murder and claimed he was not present when it occurred. He further stated on this occasion that an affair between Riley and the victim while he was in prison had prompted the killing. Jackson's mother testified that Jackson visited with her on December 8 and related three different versions of the murder, at least two of which placed Jackson at the scene of the crime.

The investigating detectives obtained a search warrant for Jackson's cast. In accordance with the warrant, they took Jackson into custody and brought him to Jacksonville's University Hospital to examine his cast for blood traces. One of the detectives testified that during this time Jackson made statements to the detective, admitting that the detective had him "like a hawk" and stating, "I had the opportunity." The detective testified that when he replied that Jackson still had the opportunity to tell the truth, Jackson responded, according to the detective, "Not really, I have to go with what I told you, I can't change my story now." The examination of the cast failed to produce any blood trace evidence. The state did present, however, expert testimony matching appellant's fingerprints with prints found on the victim's calling card box.

*Jackson v. State*, 530 So. 2d 269, 270-71 (Fla. 1988).<sup>1</sup>

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<sup>1</sup>/ Jackson was not charged with robbery or any other contemporaneous felony.

The State presented four penalty phase witnesses to establish aggravating circumstances, including Jackson's prior violent felony conviction for armed robbery. DAR Vol. XVIII at 1244-91. Certified copies of Jackson's judgment and sentence for armed robbery and escape, as well as records documenting his commitment and parole (Duval County Criminal Case Nos. 79-7229 and 82-8621, respectively), were entered into evidence. *Id.* at 1245-74.

The defense presented several mitigation witnesses, including family members and Jackson's former attorney who represented him in the armed robbery case. DAR Vol. XVIII at 1291-1368. The attorney testified that Jackson pled guilty to the robbery charge and agreed to be a state witness against his co-defendant in that case. Other mitigation evidence from his family included:

Jackson was talented, intelligent, and a good student; . . . was respectful and helpful to members of the family; . . . helped care for his older sister, who had polio, and his father, who suffered from arthritis and a heart condition. Favorable testimony was also given by Vanessa Jackson, the mother of two of appellant's children. Appellant's mother testified that appellant had substantially changed in the month before Moody's murder and that she assumed he was under the influence of drugs. Jackson testified in his own behalf, advising the jury that he wanted to live, that he loved his parents and children, and,

if given a chance to live, he would try to be a positive influence on his children's lives, as he always had been.

*Jackson*, 530 So. 2d at 271. Against advice of counsel, Jackson testified on his own behalf. *Id.*; DAR Vol. XVIII at 1369-74.

The trial court instructed the penalty phase jury of their "duty to follow the law"; the five aggravating circumstances and two mitigating factors it may consider; and its responsibility to weigh the aggravation against the mitigation in order to arrive at an advisory sentence. DAR Vol. XIX at 1472-75. Following its deliberation, the jury recommended that Jackson be sentenced to death by a seven to five vote. *Jackson*, 530 So. 2d at 271.

In imposing a death sentence, the trial judge found five aggravating factors: (1) Jackson committed the murder while under sentence of imprisonment as he was on parole at the time of the killing; (2) he was previously convicted of a felony involving the use or threat of violence (armed robbery); (3) he committed the murder for financial gain; (4) the murder was especially atrocious or cruel; and (5) the murder was committed in a cold, calculated, and premeditated manner (CCP). The trial judge also concluded, "no

statutory or nonstatutory mitigating circumstances exist.” *Jackson*, 530 So. 2d at 272.

On direct appeal, this Court struck the CCP aggravator, but noted that its “elimination . . . would not have resulted in a life sentence.” *Id.* at 273-74. Jackson’s conviction and death sentence became final on January 23, 1989, when the United States Supreme Court denied certiorari review. *Jackson v. Florida*, 488 U.S. 1050 (1989) (No. 88-5801).

### **State Postconviction and Federal Habeas Litigation**

Appellant’s state postconviction litigation has spanned more than thirty years, beginning in 1990 with his initial state postconviction motion to vacate his sentence and petition for habeas corpus to this Court. *Jackson v. Dugger*, 633 So. 2d 1051 (Fla. 1993).<sup>2</sup> The circuit court denied the postconviction motion without an evidentiary hearing, as “legally insufficient on its face” and because the claims were procedurally barred. PCR, Vol. I at 193-94;

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<sup>2/</sup> Appellant’s first state Petition for Writ of Habeas Corpus alleged in part, he was denied the right to an individualized and reliable sentencing proceeding. The petition was denied. *Jackson*, 633 So. 2d at 1055 n.2. These claims were dismissed as meritless. *Id.*

*Jackson*, 633 So. 2d at 1053. The trial court further found, “[t]he Motion in fact does little but rehash evidentiary and procedural issues which were put to rest by direct appeal. The argument as to ineffective assistance of counsel is on its face legally insufficient to the point of being spurious.” *Id.* This Court affirmed summary denial of all postconviction claims, finding them either meritless or procedurally barred and a mandate was issued on March 15, 1994.<sup>3</sup> *Jackson*, 633 So. 2d at 1055.

On June 23, 2005, the trial court summarily denied Appellant’s successive postconviction motion under Florida Rule of Criminal Procedure 3.851, which challenged his conviction and death sentence as unconstitutional in light of *Ring v. Arizona*, 536 U.S. 584 (2002). The State argued summary denial was proper and the

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<sup>3</sup>/ Appellant filed a second state Petition for Writ of Habeas Corpus in 1992, which was denied by this Court. *Jackson v. Singletary*, 613 So. 2d 5 (Fla. 1993).

Jackson’s 1994 twice amended federal habeas petition raised 26 claims, including that his conviction and sentence were unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002). Nine of the 26 claims were dismissed in whole or in part and 17 were denied on the merits. The application for a certificate of appealability to the Eleventh Circuit Court of Appeals was denied. See *Jackson v. Crosby*, 375 F.3d 1291 (11th Cir. 2004); Case No. 3:94-v-492-J-20, United States District Court, Middle District of Florida (Docs. 38, 55, 71, 73, 78).

successive post-conviction motion was procedurally barred as it was filed more than one year after his conviction and sentence became final and did not fall within an exception, as set forth in Rule 3.851(d). Jackson was not entitled to relief because *Ring* had no retroactive application to his case, which had been final 13 years before *Ring* was decided. The State additionally argued that the *Ring* claim failed because Jackson had previously been convicted of a prior violent felony and was under a sentence of imprisonment at the time of the murder. Without opinion, this Court affirmed summary denial of the successive postconviction motion. *Jackson v. State*, 952 So. 2d 1190 (Fla. 2006).

Jackson's January 10, 2017, successive state postconviction motion claimed his death sentence violated the Sixth, Eighth and Fourteenth Amendments, entitling him to resentencing. 2017 SPCR, 1-43. He argued retroactive application of both *Hurst v. Florida*, 136 S.Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), under the fundamental fairness doctrine and federal law.<sup>4</sup> *Jackson v. State*,

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<sup>4</sup>/ *Hurst v. Florida* held that Florida's capital sentencing scheme was unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002) (holding, "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to

237 So. 3d 905, 906 (Fla. 2018); 2017 SPCR at 10-13. The motion was summarily denied as untimely under Rule 3.851(d)(1) and (d)(2)(B). The motion did not fall within an exception, as *Hurst v. Florida* and *Hurst v. State* did not apply retroactively.<sup>5</sup> See 2017 SPCR at 48-52. The trial court observed, “the *Asay/Mosley/Gaskin* triad” created a categorical bar against retroactive application of *Hurst v. Florida* and *Hurst v. State* to capital cases which became final before *Ring v. Arizona*, 536 U.S. 584 (2002), was decided.<sup>6</sup> *Id.* at 51-52. Jackson’s motion was filed several years after his conviction and sentence became final in 1989, 13 years prior to *Ring*. Following the parties’ responses to this Court’s Order to Show Cause, denial of Jackson’s 2017 successive postconviction motion was affirmed because *Hurst* did not apply retroactively to his death sentence. *Jackson*, 237 So. 3d at 906.

Jackson filed a petition for writ of certiorari to the United States

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impose a sentence of death”). *Hurst*, 136 S.Ct. at 619.

<sup>5/</sup> A postconviction motion is untimely if “the fundamental constitutional right asserted was not established within the [one-year] period . . . and has been held to apply retroactively.” Fla. R. Crim. P. 3.851(d)(1) and (d)(2)(B).

<sup>6/</sup> *Asay v. State*, 210 So. 3d 1 (Fla. 2016); *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016); and *Gaskin v. State*, 218 So. 3d 399 (Fla. 2017).

Supreme Court, seeking review of this Court's decisions that 1) *Hurst v. State* error was harmless, rather than structural; 2) *Hurst v. State* did not apply retroactively to his case; and 3) Florida's standard penalty phase jury instructions, referring to the jury's recommendation as "advisory," does not violate *Caldwell v. Mississippi*, 472 U.S. 320 (1985). The petition was denied on October 1, 2018. *Jackson v. Florida*, 139 S.Ct. 193 (2018).

Jackson's January 25, 2021, successive state postconviction motion at issue before this Court, claimed his death sentence is unconstitutional and violative of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. 2021 SPCR at 1-25. He argued, "he did not have a jury trial on the facts that made him eligible for a death sentence as required by *Poole*." 2021 SPCR at 8. The 2021 motion parallels his 2017 Rule 3.851 postconviction motion in that Jackson claims that *State v. Poole*, 297 So. 3d 487 (Fla. 2020), should be retroactive to his case, instead of claiming relief based on non-existent retroactivity of the *Hurst* decisions. *Id.*<sup>7</sup>

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<sup>7</sup>/ As discussed in more detail, *infra*, the *Poole* Court "reexamine[d] and partially recede[d]" from *Hurst v. State*. *Poole*, 297 So. 3d at 491.

The State answered that the successive motion was procedurally barred in light of his 2017 postconviction motion, based on the *Hurst* cases. 2021 SPCR at 54, et seq. The motion was also untimely under Rule 3.851(d)(1) and did not fall within an exception to the one-year time requirement, because *Poole* was not retroactive to his case. The procedural and time bars notwithstanding, the successive postconviction motion was meritless because of the four valid aggravating factors found, two recidivist aggravators (prior violent felony and under sentence of imprisonment) satisfied the Sixth Amendment and *Poole*, and in accordance the United States Supreme Court's *McKinney v. Arizona*, \_\_\_ U.S. \_\_\_, 140 S.Ct. 702 (2020), decision. *McKinney* provides that in accordance with *Ring* and *Hurst*, "a jury must find *the aggravating circumstance* that makes the defendant death eligible." *Id.* at 707 (emphasis added); 2021 SPCR at 54.

The trial court summarily denied Appellant's postconviction claim as untimely under Rule 3.851(d)(2)(B) because *Poole* is not retroactive to his conviction and death sentence. 2021 SPCR at 74-78. The court found that Jackson did not "address [Rule 3.851's]

requirement that the newly-established fundamental constitutional right must have been held to apply retroactively.” *Id.* at 77. The trial court further observed, Jackson “urges retroactive application of *Poole*,” having made no arguments that he did not make in his 2017 successive motion for “retroactive application of *Hurst*.” *Id.*

The trial court referred back to Judge Russell Healey’s 2017 order denying Jackson’s “belated *Hurst* claims,” utilizing a significant portion of its *Asay/Mosley/Gaskin* analysis. *Id.* at 77-78, 81-85. The trial court also noted that this Court affirmed the 2017 order denying relief in accordance with *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017). *Id.* at 78; *Jackson*, 237 So. 3d at 906. Regarding *Poole*, the trial court specifically noted, “of the three jury findings required under *Hurst*, only one survived *Poole*. *Poole*’s ‘clarification’ of *Hurst* did not expand *Hurst* and did not establish a fundamental constitutional right, but curtailed constitutional rights previously recognized under *Hurst*.” 2021 SPCR at 78. Jackson appeals this order.

## **STANDARD OF REVIEW**

This summary denial of Appellant’s successive state postconviction motion raises a pure question of law, subject to *de novo* appellate review. See *Anderson v. State*, 291 So. 3d 531, 533 (Fla. 2020). A trial court cannot err as a matter of law, if it follows controlling Florida Supreme Court precedent, as the postconviction court did in this case. See *Mann v. State*, 112 So. 3d 1158, 1162 (Fla. 2013) (explaining, because the claims “raised purely legal claims that have been previously rejected by this Court, the circuit court properly summarily denied relief”). The trial court denied the postconviction motion as untimely under Rule 3.851 because no Florida court held *State v. Poole* was retroactive. Therefore, there necessarily was no legal error under the *de novo* standard of review.

## **SUMMARY OF ARGUMENT**

**ISSUE I:** Appellant’s 2021 successive postconviction motion claimed his death sentence was unconstitutional, based on *State v. Poole*, 297 So. 3d 487 (Fla. 2020), because he was denied proper jury findings to render him eligible for the death penalty. This Court receded from

*Hurst v. State*, “except to the extent it requires a jury unanimously to find the existence of a statutory aggravating circumstance beyond a reasonable doubt” to recommend a death sentence. *Poole*, 297 So. 3d at 507. *Poole* retained this key requirement which ensures the validity of Appellant’s death sentence.

The trial court properly ruled the successive motion was untimely under Rule 3.851 because Jackson failed to file it within one-year of when his conviction and sentence became final, in 1989. Nor did Jackson meet an exception to the one-year requirement where *Poole* served as a re-examination of its understanding of *Hurst v. Florida* and clarification of its *Hurst v. State* decision. *Poole* did not recognize a new substantive constitutional right, calling for retroactivity, which is an exemption to the Rule 3.851 one-year limitation.

In this appeal, Jackson fails to show how the trial court improperly denied the postconviction motion and urges this Court to consider retroactive application of *Poole*. Despite recognizing that *Poole* is not retroactive, Jackson offers no valid argument for this Court to disregard its decision in *Asay v. State*, 210 So. 3d 1 (Fla.

2016) (holding, defendants whose conviction and death sentence became final prior to *Ring*, are not entitled to retroactive relief), and those decisions which have followed.

Further, Appellant's arguments are virtually indistinguishable from those made in support of his 2017 postconviction motion regarding *Hurst v. State* retroactivity, denied as untimely by the trial court and subsequently rejected by this Court. *Jackson*, 237 So. 3d 905. He re-litigates and restates that retroactivity of *Ring*-like claims is warranted under the fundamental fairness doctrine and well-settled state and federal jurisprudence in capital cases. Therefore, in addition to being untimely, any claim in support of *Poole*'s retroactivity should be procedurally barred in accordance with the law of the case doctrine.

As to *Jackson*'s substantive argument that if *Poole* applied retroactively, his death sentence would be unconstitutional under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. IB at 6-7. This Issue fails on both procedural grounds and on the merits.

**ISSUE II:** Jackson attacks his death sentence as unconstitutional under the Sixth Amendment and claims in error, he “stands convicted of first-degree murder and sentenced to death without a unanimous finding by the jury, much less a finding beyond a reasonable doubt by the jury, of the existence of at least one aggravating circumstance.” IB at 25. This argument is meritless and squarely refuted by the record below. Jackson’s death sentence is predicated on both a prior violent felony and under the sentence of imprisonment aggravators, proven in his penalty phase. Moreover, Jackson benefitted from a properly instructed jury, which is presumed to have found requisite aggravating circumstances, proven beyond a reasonable doubt, and which outweighed mitigation.

**ISSUE III:** Jackson attacks his death sentence as unconstitutional under the Eighth Amendment as “arbitrary and capricious” and claims in error, that his maximum sentence should have been life imprisonment. IB at 34-35. In support, he again reiterates the unsubstantiated claim that he was deprived of a jury’s unanimous determination of at least one aggravating circumstance required by

*Poole*, thereby rendering him ineligible for the death penalty, citing in part to *Spaziano v. Florida*, 468 U.S. 447 (1984), and its Eighth Amendment considerations. *Id.* at 35-36. However, Jackson appears to fail to understand that *Hurst v. Florida* overruled *Spaziano*. Hence, based on the underlying record establishing his death sentence eligibility, in conjunction with state and federal laws, Jackson's arguments are meritless and should be rejected.

**ISSUE IV:** Jackson's final iteration of the "*Poole* claim" and that he was constitutionally deprived of a jury properly founding at least one aggravating circumstance to render him eligible for the death penalty, is based on the Due Process Clause of the Fourteenth Amendment. IB at 38. Just as with Issues II and III, no constitutional violation occurred, Jackson's death sentence was safeguarded by jury findings and this argument should be rejected.

## ARGUMENT

### **ISSUE I: THE TRIAL COURT PROPERLY DENIED APPELLANT'S SUCCESSIVE POSTCONVICTION MOTION AS UNTIMELY AND PROCEDURALLY BARRED BECAUSE STATE V. POOLE IS NOT RETROACTIVE UNDER STATE OR FEDERAL LAW.**

Appellant claims, despite being a pre-*Ring* case, he is entitled to resentencing because the penalty phase jury's death sentence recommendation was not unanimous. He further argues that *Poole* should be retroactively applied to his case under both state and federal laws. IB at 6-24. The circuit court correctly denied Appellant's 2021 successive postconviction motion as untimely under Rules 3.851(d)(1) and (d)(2)(B). The trial court's opinion thoroughly discussed Jackson's failure to establish Rule 3.851's fundamental constitutional right retroactivity exception to the one-year time limitation. 2021 SPCR at 74-79.

Jackson readily accepts that *Poole* has not been found to be retroactive, but nonetheless asks this Court to "consider" it, under the fundamental fairness doctrine and federal law. IB at 7. *Poole*, as an interpretation of *Hurst v. State*, is not and should not be deemed retroactive in contravention of well-established precedent. Therefore,

Jackson's death sentence is constitutional and his 2021 successive postconviction motion remains properly denied.

Jackson has repackaged the same unsuccessful Sixth, Eighth and Fourteenth Amendment arguments made in his 2017 successive postconviction motion and appeal for retroactive application of the *Hurst v. Florida* and *Hurst v. State* decisions to pre-*Ring*. In 2017, he argued the fundamental fairness doctrine required retroactive application under state law and that *Hurst v. State* established a substantive constitutional rule, requiring retroactive application under federal law. See 2017 SPCR at 1-43. *Jackson*, 237 So. 3d 905 (SC17-703).<sup>8</sup> All arguments were rejected.

Four years later, Jackson presents the same issues and arguments employed for retroactivity of the cases which underlie *Poole*. Therefore, Jackson's 2021 claims are procedurally barred by the law of the case doctrine, which limits reconsideration of questions of law, presented and considered in a former appeal. See *Fla. Dept. of Transp. v. Juliano*, 801 So. 2d 101, 106 (Fla. 2001); see also *Marek*

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<sup>8</sup>/ Appellee refers this Court to Jackson's Initial Brief in SC17-703, as well as his reply to this Court's Order to Show Cause why the order denying his successive postconviction motion based on *Hurst* retroactivity.

*v. State*, 8 So. 3d 1123, 1129 (Fla. 2009) (holding argument on appeal from denial of successive postconviction motion is procedurally barred because it was previously litigated); *State v. Okafor*, 306 So. 3d 930, 934 (Fla. 2020). The law of the case doctrine serves to prevent unnecessary re-litigation of the same issues and applies in postconviction proceedings. *McManus v. State*, 177 So. 3d 1046, 1047 (Fla. 1st DCA 2015), citing *State v. McBride*, 848 So. 2d 287, 290-91 (Fla. 2003). Because *Poole* clarified *Hurst v. State*, based on this Court's interpretation of *Hurst v. Florida*, the fundamental claims and arguments now brought have been litigated and warrant rejection.

**A. The fundamental fairness doctrine does not support *Poole's* retroactivity.**

Appellant submits that *Poole* should be retroactively applied to his case, based on fundamental fairness and the preservation rationale aspect of *James v. State*, 615 So. 2d 668 (Fla. 1993), as well the *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016) (discussing *James's* fundamental fairness rationale). IB at 7, 12-18. He also refers to Justice Lewis' preservation approach to retroactivity in his concurring opinions in *Hitchcock*, 226 So. 3d at 218 (Lewis, J.,

concurring) (advocating that defendants who “properly preserved” a right-to-jury-findings challenge prior to *Ring* should be entitled to *Hurst* relief based on the “preservation approach” of *James*), *cert. denied*, *Hitchcock v. Florida*, 138 S.Ct. 513 (2017); *Asay*, 210 So. 3d at 30 (Lewis, J., concurring); *see also Gaskin v. State*, 218 So. 3d 399, 402-03 (Fla. 2017) (Pariante, J., dissenting) (advocating a *James* exception to *Mosley* for those defendants who “asserted, presented, and preserved” a right-to-jury-findings challenge before *Ring*). IB at 12-16.

First, *James* was an unwarranted deviation from the established state test for retroactivity of *Witt v. State*, 387 So. 2d 922 (Fla. 1980). *James*, 615 So. 2d at 671 (Grimes, J., dissenting) (explaining that *Espinosa v. Florida*, 505 U.S. 1079 (1992), was not retroactive under *Witt* and observing that the “public can have no confidence in the law if court proceedings which have become final are subject to being reopened each time an appellate court makes a new ruling”); *Mosley*, 209 So. 3d at 1291 (Canady, J., dissenting) (advocating the abrogation of *James* altogether because it is irreconcilable with *Witt* as it gave “no consideration to the framework

for retroactivity established in *Witt*). Thereafter, this Court has consistently rejected the fundamental fairness retroactivity standard based on preservation of *Ring*-like claims.

In *Freeman v. State*, 300 So. 3d 591 (Fla. 2020), this Court denied retroactive *Hurst* relief under a fundamental fairness analysis to a capital defendant whose death sentence became final prior to *Ring*. *Id.* at 593-94, citing *Robinson v. State*, 260 So. 3d 1011, 1015 (Fla. 2018) (rejecting “fundamental fairness” retroactivity standard, based on preservation of a *Ring*-like claim) and *Foster v. State*, 258 So. 3d 1248, 1252-53 (Fla. 2018) (rejecting claims from pre-*Ring* defendants arguing that a “nonunanimous death sentence violates the Eighth Amendment”). *Cf. Phillips v. State*, 299 So. 3d 1013, 1022 (Fla. 2020) (holding *Hall v. Florida*, 572 U.S. 701 (2014), not retroactive under *Witt*, where *Hall* “involved a mere application and evolutionary refinement” of *Atkins v. Virginia*, 536 U.S. 304 (2002), analysis).

Appellant’s reliance on *Mosley* to further his retroactivity claim is thin. *See* IB at 13-14. As noted by Chief Justice Canady in his concurrence in *Brown v. State*, 304 So. 3d 243, 280-81 (Fla. 2020)

(Canady, C.J., concurring), “[t]he new rule articulated in *Hurst v. Florida*—which simply requires that the jury find an aggravator—is an evolutionary refinement in the law that does not cast doubt on the veracity or integrity of penalty phase proceedings resulting in death sentences that are now final” and that the new rule therefore should not be given retroactive effect. Ultimately, Appellant offers no persuasive argument to circumvent this Court’s treatment of retroactivity in light of fundamental fairness.

**B. *Poole* is not retroactive under federal law.**

Finally, Appellant’s argument that *Poole* should apply retroactively under federal law is unsupported. IB at 19-24. He contends *Poole* “announced a substantive rule accompanied by a procedural component” and created a new class of defendants eligible to be sentenced to death. IB at 23. Therefore, Jackson argues, this Court should find it retroactive under the United States Supreme Court’s retroactivity analysis in *Teague v. Lane*, 489 U.S. 288 (1989), and *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016) (holding “that when a new substantive rule of [federal] constitutional law controls the outcome of a case, the Constitution requires state collateral

review courts to give retroactive effect to that rule” under the first prong of *Teague*’s retroactivity analysis). IB at 20-23. Jackson is not entitled to *Poole* retroactivity under federal law.

The United States Supreme Court has held that a new criminal procedure rule applies retroactively to cases which have become final, only if it is substantive and not procedural. A substantive rule which either “narrow[s] the scope of a criminal statute by interpreting its terms” or involves “constitutional determinations . . . [which] necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him.” *Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004) (citations and quotations omitted).

Stating the obvious, *Poole* re-examined and clarified the capital sentencing requirements announced in *Hurst v. State* and represents a modification of the same, albeit a significant one. Borrowing the language of the *Phillips* Court, *Poole* constituted the “application and evolutionary refinement” of *Hurst v. Florida*. This Court did not *fundamentally* change, expand or add to the requirements needed to sentence a defendant to death in accord with the United States

Constitution. In as much as the Appellant raises a Sixth Amendment claim, his argument for *Poole* retroactivity is inextricably based on *Ring/Hurst v. Florida*, and *Poole* is a congruent and reasonable extension of that well-settled jurisprudence.

The United States Supreme Court has unequivocally and consistently held, “*Ring* and *Hurst* do not apply retroactively on collateral review.” *McKinney*, 140 S.Ct. at 708, citing *Summerlin*, 542 U.S. at 358 (holding, *Ring*, which extended the application of *Apprendi* to increasing a defendant’s sentence from life imprisonment to death, is not retroactive on collateral review). *Cf. State v. Jackson*, 306 So. 3d 936, 938 n.1 (Fla. 2020). Like *McKinney*, Appellant’s “hurdle is that [his] case became final on direct review in [1989], long before *Ring* and *Hurst*.” *McKinney*, 140 S.Ct. at 708.

Recently, the Court decided *Edwards v. Vannoy*, 141 S.Ct. 1547 (2021), which held, even a “new procedural rule” will not apply retroactively, unless “it constitutes a ‘watershed’ rule of criminal procedure.” *Id.* at 1555, citing *Teague*, 489 U.S. at 311.<sup>9</sup> The

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<sup>9/</sup> While this case may not be the appropriate vehicle, this Court’s retroactivity decision giving any retroactive effect to *Hurst*, should be reexamined and reversed in light of subsequent case law from the Supreme Court on the non-

*Edwards* Court further observed, “in the 32 years since *Teague*, as we will explain, the Court has *never* found that any new procedural rule actually satisfies that purported exception.” *Id.* The Court concluded by stating,

we recognize that the Court’s many retroactivity precedents taken together raise a legitimate question: If landmark and historic criminal procedure decisions—including *Mapp*, *Miranda*, *Duncan*, *Crawford*, *Batson*, and now *Ramos*—do not apply retroactively on federal collateral review, how can any additional new rules of criminal procedure apply retroactively on federal collateral review? At this point, some 32 years after *Teague*, we think the only candid answer is that none can—that is, no new rules of criminal procedure can satisfy the watershed exception.

*Id.* at 1559 (internal citations omitted).<sup>10</sup>

*Poole* did not create a new substantive rule, much less the elusive “watershed” exception required for *Teague* retroactivity

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retroactivity of *Hurst*, and its decision in *Edwards*, eliminating the watershed exception of *Teague* for new procedural rules.

<sup>10</sup>/ *Cf. Phillips*, 299 So. 3d at 1022 (holding *Hall*, 572 U.S. 701, is not retroactive under *Witt*’s retroactivity analysis where it “involved a mere application and evolutionary refinement” of *Atkins*, 536 U.S. 304, and whether federal law requires retroactive application under *Teague*, which provides that state courts must give retroactive effect to new substantive rules of federal constitutional law, citing *Montgomery*, 136 S.Ct. at 728-29 (holding “when a new substantive rule of [federal] constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule” under *Teague*’s retroactivity analysis)).

analysis. On the contrary, it represented this Court's re-examination and clarification of its understanding of *Hurst v. Florida* and *Hurst v. State*. *Poole* was procedural in accordance with the United States Supreme Court in *Summerlin*.

*Hurst v. Florida* was procedural in nature, did not create substantive or watershed rule of criminal procedure and therefore, not retroactive. It was interpreted and applied by *Hurst v. State* and subsequently refined by *Poole*. Therefore, it logically and explicably follows that *Poole* can be neither substantive, nor retroactive.

**ISSUE II: APPELLANT WAS ELIGIBLE FOR THE DEATH PENALTY BASED ON A PRIOR VIOLENT FELONY AGGRAVATING FACTOR, RENDERING HIS DEATH SENTENCE CONSTITUTIONAL UNDER THE SIXTH AMENDMENT.**

Jackson asserts his death sentence violates the Sixth Amendment under *Poole*, because no jury unanimously found any "elements" that made him eligible for the death penalty. IB at 25. His arguments are meritless in multiple respects. First, and as addressed in Issue I, *Poole's* unanimity requirement does not apply to Jackson and is not retroactive. Second, and in accordance with Florida and federal laws, a prior violent aggravator was proven at trial

and rendered Jackson eligible to be sentenced to death. Hence, his death sentence passes constitutional muster.

Appellant presents a fragmented argument regarding *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), regarding the validity of his prior jury conviction for armed robbery, as a recidivist aggravating circumstance “involving the use or threat of violence,” in accordance with Section 921.141(6)(b). IB at 30. Jackson’s argument that *Almendarez-Torres* is no longer “applicable” and the prior violent felony exception is not applicable to his case, is simply inaccurate. *See Id.* *Almendarez-Torres* is still valid, even in the wake of *Apprendi*, *Hurst* and *Poole*.

He informs this Court that the prior violent felony aggravator must be more than the fact of a prior conviction. *Id.* at 30-31. With this statement, the State agrees. However, Appellant ignores the “surrounding facts and circumstances” of that prior conviction, which he deemed necessary, citing *Bevel v. State*, 983 So. 2d 505, 518 (Fla. 2008). IB at 31. The facts and circumstances of Jackson’s prior armed robbery conviction necessarily involved the threat of

violence and rendered him eligible for the death penalty. *See also Freeman*, 300 So. 3d at 594 n.6 (observing, even though *Hurst* is not retroactive to pre-*Ring* convictions, *Poole* precludes relief, on the merits as “[u]nanimous juries found Freeman guilty of prior violent felonies, rendering [him] eligible for the death penalty” and “[the] death sentence does not violate the Sixth Amendment”).

Jackson’s argument is flawed to the extent that the proven prior violent felony presented to the jury “does not prevent the application of . . . *Ring*, *Hurst v. Florida* and *Poole*” to his case IB at 29. The argument, predicated on the Sixth Amendment’s right-to-a-jury determination, fails on the merits. He was eligible for the death penalty by virtue of his prior conviction and sentence for armed robbery, by a separate jury. The direct appeal record is clear that the State presented ample testimonial and documentary evidence to Jackson’s penalty phase jury to prove it, thus safeguarding the constitutionality of his death sentence. Further, the prior violent felony aggravator is considered, qualitatively, one of the weightiest in Florida’s capital sentencing scheme. *See Craven v. State*, 310 So. 3d

891, 908 (Fla. 2020); *Bolin v. State*, 117 So. 3d 728, 742 (Fla. 2013). This all but forecloses his argument and renders it meritless.

Additionally, the second recidivist aggravator proven, under a sentence of imprisonment, ensured Jackson's eligibility for the death penalty. See *Smith v. State*, 310 So. 3d 366, 374 (Fla. 2020) (rejecting a Sixth Amendment *Hurst* claim in the wake of *Poole* and *McKinney* and explaining the "existence of previous violent felonies was an aggravating circumstance that rendered Smith eligible for the death penalty and satisfied the mandates of the United States and Florida Constitutions"). Both recidivist aggravators are exempt from *Hurst*.

The Florida Supreme Court still follows the logic in *Almendarez-Torres*. See generally *King v. State*, 211 So. 3d 866 (Fla. 2017); *Jackson v. State*, 213 So. 3d 754 (Fla. 2017); and *Williams v. State*, 226 So. 3d 758 (Fla. 2017). In several recent cases involving prior violent felony aggravators, this Court consistently concluded there was no Sixth Amendment violation in the wake of *Poole* or *McKinney*. See *Owen v. State*, 304 So. 3d 239, 242 (Fla. 2020) (explaining that the prior violent felony aggravator "would preclude a finding of *Hurst v. Florida* error" in the wake of *Poole*); *Lott v. State*, 303 So. 3d 165,

166 (Fla. 2020) (rejecting a Sixth Amendment claim in the wake of *Poole* and *McKinney*, due to the presence of a prior violent felony aggravator); *Freeman*, 300 So. 3d at 594 n.6 (rejecting a Sixth Amendment claim in the wake of *Poole* and *McKinney*, due to the presence of a prior violent felony aggravator).

Instead of recognizing recent state and federal jurisprudence regarding capital sentencing, Jackson incorrectly asserts that *Almendarez-Torres* and its narrow exception to the Sixth Amendment regarding a prior violent felony conviction, “is not controlling” and does not apply to his case IB at 29, nn.17, 31. On the contrary, the Eleventh Circuit recently announced, *Almendarez-Torres* “remains good law.” *United States v. Dudley*, \_\_\_ F.4th \_\_\_, 2021 WL 3086186, \*7 (11th Cir. July 22, 2021); see also *United States v. Smith*, 775 F.3d 1262, 1266 (11th Cir. 2014) (stating, “we are bound to follow *Almendarez-Torres* unless and until the Supreme Court itself overrules that decision”) (citation omitted).

This Court too, “reaffirmed that it will follow the Supreme Court’s precedent creating ‘one narrow exception to the Sixth Amendment requirement that a jury must find any fact that increases

the maximum sentence: the fact of a prior conviction, as established in *Almendarez-Torres*.” *Williams*, 226 So. 3d at 774 (Canady, J., concurring in part and dissenting in part and further stating, “because Williams had twice previously been convicted of violent felonies . . . it was not even necessary for the jury to make a unanimous finding regarding the existence of an aggravating circumstance”), citing *Jackson*, 213 So. 3d at 781, 787 (observing, “a jury is not required to make factual findings that the defendant has a prior conviction” and “unless and until the United States Supreme Court expressly overrules *Almendarez-Torres*, that decision remains a valid, if narrow, exception to *Apprendi* and *Ring*”). Moreover, as stated by Justice Alito, “convictions have consequences” and given a valid conviction, a criminal defendant may be constitutionally deprived of his liberty. *United States v. Haymond*, 139 S.Ct. 2369, 2399 (2019) (Alito, J., dissenting and quoting *Meachum v. Fano*, 427 U.S. 215, 224 (1976)).

Jackson relies on *Franklin v. State*, 209 So. 3d 1241 (Fla. 2016), and *Johnson v. State*, 205 So. 3d 1285 (Fla. 2016), for his contention the trial court’s “finding of an aggravating factor . . . even a finding of

a prior conviction, is unable to make a defendant death-eligible.” IB at 31. Reliance on these cases in support of Jackson’s specific arguments, is flawed.

The one key distinction between *Franklin* and *Johnson* compared to Jackson’s case, is that both were *post-Ring* cases with non-unanimous jury death sentence recommendations and remanded for resentencing. See *Franklin*, 209 So. 3d at 1248; and *Johnson*, 205 So. 3d at 1288. It was under this Court’s harmless error analysis for *Hurst* relief, that the fact of prior violent felony aggravating circumstances did not preserve the death sentences.

Notably absent from Appellant’s successive motion and initial brief, is any acknowledgment of the United States Supreme Court’s *McKinney* decision or this Court’s opinions noting *Poole*’s consistency with it.<sup>11</sup> Although the aggravating circumstances included a contemporaneous felony, *McKinney*’s pivotal ruling as it relates to Jackson’s case, is that “[u]nder *Ring* and *Hurst [v. Florida]*, a jury must find the aggravating circumstance that makes the defendant

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<sup>11</sup>/This Court has repeatedly held that *Poole* is consistent with *McKinney*. See *Ponticelli v. State*, 297 So. 3d 1292, 1293 (Fla. 2020).

death eligible.” *McKinney*, 140 S.Ct. at 707. The majority opinion quoted Justice Scalia’s concurrence in *Ring*, joined by Justice Thomas explaining, “[w]hat today’s decision says is that the jury must find the existence of the *fact* that an aggravating factor existed.” *Id.* at 708 (emphasis in original) (citation omitted).

Finally, Jackson’s repeated representations that the judge and not the penalty phase jury, made requisite aggravation or mitigation findings to warrant a death sentence. Appellee points out to the Court, these statements are inaccurate and refuted by the record.

It is axiomatic that absent evidence to the contrary, juries are presumed to follow the trial court’s instructions as explained to them in good faith. *See Weeks v. Angelone*, 528 U.S. 225, 234 (2000) (citing *Richardson v. Marsh*, 481 U.S. 200 (1987)); *Lowe v. State*, 259 So. 3d 23, 52 (Fla. 2018), citing *Hurst v. State*, 202 So. 3d at 63 (“In a capital case, the gravity of the proceeding and the concomitant juror responsibility weigh even more heavily, and it can be presumed that the penalty phase jurors will take special care to understand and follow the law.”); *see also United States v. Colston*, 4 F.4th 1179, 2021 WL 2934698 (11th Cir. July 13, 2021); *cf. Blackwell v. Sec’y, Dept. of*

*Corr.*, No. 3:12-cv-518-J-32JBT, 2015 WL 5599828, \*10 (M.D. Fla. Sept. 22, 2015), citing *Hallford v. Culliver*, 459 F.3d 1193, 1204 (11th Cir. 2006) (per curiam) (finding trial court’s instructions “plainly and correctly conveyed to the jury” the acts the jury might consider in rendering its recommended sentence). Conversely, this Court has made clear, “that a jury is presumed not to have weighed properly instructed aggravators that subsequently are found not to exist.” *Jones v. Moore*, 794 So. 2d 579, 590 (Fla. 2001), citing *Foster v. State*, 679 So. 2d 747, 754 (Fla. 1996).

The record establishes the presumption afforded to Jackson’s penalty phase jury, in part through the trial court’s instructions:

it is your duty to follow the law that will now be given to you [and] render to the Court an advisory sentence based upon your determination as to *whether sufficient aggravating circumstances exist to justify the imposition of the death penalty, and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.*

Your advisory sentence should be *based upon the evidence that you have heard . . .*

DAR Vol. XIX at 1472-73 (emphasis added). The jury was instructed on five aggravating circumstances to be considered. *Id.* at 1473-74.

The trial court specifically instructed, “each aggravating

circumstance must be established beyond a reasonable doubt before it may be considered” and they must determine “whether mitigating circumstances exist that outweigh the aggravating circumstances.” *Id.* at 1475. The jury was given two mitigating factors to consider, which “need not be proved beyond a reasonable doubt and may be found merely if you are reasonably convinced.” *Id.*<sup>12</sup>

Jackson argues, “without the benefit of a special verdict form, there is no way of knowing if the jury found at least one aggravating circumstance, or if such an aggravating circumstance was found unanimously and beyond a reasonable doubt.” IB at 32. This supposition does not support a Sixth Amendment violation. The trial judge addressed the fact that the penalty verdict form did not record the aggravating circumstances found and the sentencing recommendation may be “reached by a single ballot.” The jury was instructed, it should not “act hastily or without due regard to the gravity of the proceedings [and] carefully weigh, sift, and consider the evidence . . . realizing that human life is at stake, and bring to bear

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<sup>12</sup>/Both State and defense counsel reinforced the trial court’s instructions. See DAR Vol. XIX at 1434-35, 1440, 1449, 1453, and 1458.

your best judgment in reaching your advisory sentence.” DAR Vol. XIX at 1476.<sup>13</sup>

For purposes of his appeal, Jackson does not show this Court that the jury disregarded or ignored the trial court’s instructions or its duties under the law. Instead, Jackson merely repeats various forms of a mantra that he “stands convicted of first-degree murder and sentenced to death without a unanimous finding by the jury, of the existence of at least one aggravating circumstance.” IB at 25.

Jackson states, even if the jury relied on an aggravator to recommend a death sentence, “it is impossible to determine if the aggravator was a valid one, citing Justice Pariente’s concurring/dissenting opinion in *Gaskin*. IB at 33. He compounds the rhetoric by asserting “there is a serious risk” that his penalty phase jury improperly relied on a concurrent felony. *Id.*<sup>14</sup> The record,

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<sup>13</sup>/The Florida Supreme Court has “specifically held that it is a departure from the essential requirements of law to use a special verdict form detailing the jury’s determination on the aggravating circumstances.” *Coday v. State*, 946 So. 2d 988, 1005 (Fla. 2006). *See also Patten v. State*, 598 So. 2d 60, 62 (Fla. 1992) (holding no requirement mandating the use of a special verdict form in death penalty cases and sentencing jury is not required to report detailed decisions regarding aggravating or mitigating circumstances found).

<sup>14</sup>/Jackson includes a lengthy discussion that the contemporaneous felony aspect of *Poole* is somehow germane to this appeal. *See* IB 26-29. The fact

in conjunction with well-settled case law, belies the unsupported conjecture. Jackson's penalty phase jury was well-instructed on five aggravating circumstances, to be considered and to be found beyond a reasonable doubt. The jury was presented with both testimonial and documentary evidence of his prior conviction for armed robbery by prior jury. Because the jury is presumed to have performed its duties as instructed, this aspect of the argument is meritless.

Taking Jackson's Sixth Amendment argument to its logical conclusion and even applying *Poole* retroactively, his death sentence would not be altered, nor is its constitutionality affected. Under *McKinney*, Jackson's armed robbery conviction and sentence, there is no *Hurst* or constitutional error. *See also Poole*, 297 So. 3d at 508.

### **ISSUE III: APPELLANT'S DEATH SENTENCE IS NOT ARBITRARY UNDER THE EIGHTH AMENDMENT.**

Appellant claims his death sentence exceeds the statutory maximum, is arbitrary and violates the Eighth Amendment. IB at

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that no contemporaneous felony exists in this case has no bearing whatsoever, to the fact that *Poole* is not retroactive to his case and the death sentence imposed in accordance with Florida and federal laws. Due to its irrelevance, the State does not address it further.

35. In support, Jackson repeats the arguments made in Issues I and II, that he was not eligible for the death penalty because “no aggravating circumstance was found unanimously by the jury.” *Id.*<sup>15</sup> His discussion of *Spaziano v. Florida*, 468 U.S. 447 (1984), its Eighth Amendment considerations and this Court’s historical analysis in *Poole* seems misplaced and fails to advance his argument. See IB at 35-36.

Jackson appears to focus on his claim made throughout, that the trial court determined whether aggravating circumstances existed and not his penalty phase jury. IB at 37. He further distinguishes between a “selection finding” in accordance with section 921.141(3)(b), Fla. Stat. and the death sentence eligibility determination. *Id.* In either event, *Spaziano* is inapplicable because it was overruled by *Hurst v. Florida*.

In *Hurst v. Florida*, the United States Supreme Court determined Florida’s capital sentencing scheme violated the Sixth

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<sup>15</sup>/Appellant also mistakenly argues that his sentence is “illegal under Rule 3.800 of the Florida Rules of Civil [sic] Procedure.” IB at 35 n.19. Although he referenced sub-section (a), the more specific provisions of Florida Rule of Criminal Procedure 3.800(b) and (c), expressly state, neither is applicable to cases in which a death sentence has been imposed.

Amendment in light of *Ring*, where it required the judge alone, to find the existence of an aggravating circumstance. *Hurst*, 136 S.Ct. at 624. In so doing, the Court also overruled *Spaziano* and *Hildwin v. Florida*, 490 U.S. 638 (1989), “to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury’s factfinding, that is necessary for imposition of the death penalty.” *Id.* On remand in *Hurst v. State*, this Court expanded *Hurst v. Florida* and announced the new sentencing rule that,

[B]efore 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 factors, and unanimously recommend a sentence of death.

*Hurst*, 202 So. 3d at 57.

The *Poole* Court observed that it “erred in *Hurst v. State* when we held that the Eighth Amendment requires a unanimous jury recommendation of death. The Supreme Court rejected that exact argument in *Spaziano*.” *Poole*, 297 So. 3d at 504. The *Poole* Court further observed,

even 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. As we have explained, under longstanding Florida law, it is the finding of an aggravating circumstance that exposes the defendant to a death sentence. 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.

*Id.* at 503.

Once again, *Poole* merely clarified this Court’s erroneous interpretation in *Hurst v. State*, to the extent that a jury is only required to unanimously find at least one aggravating circumstance beyond a reasonable doubt. Moreover, this Court “has consistently held that where a defendant has been convicted of a prior violent felony, the requirement in *Ring* is satisfied.” *Martin v. State*, 151 So. 3d 1184, 1196-97 (Fla. 2014), citing *Merck v. State*, 975 So. 2d 1054, 1067 (Fla. 2007) (stating, “[t]his Court has held that the requirement that the jury make all of the findings necessary to enhance a defendant’s sentence is satisfied where one of the aggravators is the prior violent felony aggravator”). *See also Freeman*, 300 So. 3d at 594, citing *Foster v. State*, 258 So. 3d 1248, 1252-53 (Fla. 2018)

(rejecting claims from pre-*Ring* defendants arguing that “nonunanimous death sentence violate[d] the Eighth Amendment”); see also *Randolph v. State*, \_\_\_ So. 3d \_\_\_, 2021 WL 386576, \*1 (Fla. Feb. 4, 2021) (holding pre-*Ring* defendant’s “argument that his death sentence was insufficiently reliable to satisfy the Eighth Amendment is similarly unavailing,” citing *Lambrix v. State*, 227 So. 3d 112, 113 (Fla. 2017)).

As Appellee discussed in Issue II, the penalty phase jury was properly instructed as to the aggravating circumstances which may be considered and of their duty to find if any existed, it must have been proven beyond a reasonable doubt. This included consideration of the State’s evidence of the prior violent felony aggravator. The jury was also advised of the mitigating factors and their duty under the law to weigh aggravation against mitigation, in order to recommend a death sentence. Therefore, because of the presumption that his jury in fact acted in accordance with the law and instruction, which he has failed to disprove, no Eighth Amendment violation occurred.

**ISSUE IV: APPELLANT'S DEATH SENTENCE IS  
CONSTITUTIONAL UNDER THE FOURTEENTH AMENDMENT.**

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Lastly, Appellant presents a bare-bones argument that he was denied due process under the Fourteenth Amendment because “not all of the critical elements of his offence were submitted to the jury” and the judge alone made the requisite findings rendering him eligible for the death penalty. IB at 38-39. This is yet another restatement of a meritless argument, which has been a consistent theme in Jackson’s appeal, gauged under the Fourteenth Amendment instead of the Sixth or Eighth Amendment.

Appellant misapplies *Fiore v. White*, 531 U.S. 225, 229 (2001), where the Court reversed the conviction and sentence because the defendant’s conduct was not in fact prohibited by the state criminal statute. Such are not the circumstances in his case, where Jackson was properly convicted of first-degree murder, beyond a reasonable doubt and affirmed on appeal. *Jackson*, 530 So. 2d at 271.

Nonetheless, he again argues that the trial court alone made the requisite penalty phase findings, instead of the jury. IB at 39. Merely presenting and framing this issue through the Fourteenth Amendment due process lens does not cure its lack of merit. Nor

does it change the underlying facts supported by the record that refute Jackson's claim that the jury had no input in sentencing.

The State has shown the record before this Court objectively demonstrates Jackson's penalty phase jury performed its constitutional duty. Based on uncontroverted documentary and testimonial evidence of Jackson's prior conviction for armed robbery, found by a jury beyond a reasonable doubt and that he committed the murder while under a sentence of imprisonment, he was eligible for the death penalty. With that, Jackson was not deprived of due process protections and this claim is meritless.

### **CONCLUSION**

Appellant has not shown that the trial court's denial of his 2021 successive postconviction motion as untimely under Rule 3.851 was improper. Nor has he shown *Poole* should be held retroactive under the fundamental fairness doctrine of federal law as it did not create a new constitutional rule, but merely clarified this Court's *Hurst v. Florida* holding. Moreover, Appellant has not presented this Court with any argument requiring any reconsideration of its precedent.

Even accepting his arguments, Jackson is not entitled to relief on the merits and his death sentence comports with constitutional protections. The record refutes his repeated claims that the judge alone determined the aggravating circumstances rendering him eligible for the death penalty. And, Jackson was eligible for the death penalty based on his prior felony conviction and under the sentence of imprisonment aggravating circumstances. Therefore, Appellee, the State of Florida, respectfully urges this Court to affirm the circuit court's denial of Appellant's successive postconviction motion.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the Answer Brief of the Appellee has been furnished to Counsel for Appellant, Etheria Verdell Jackson, Assistant Capital Collateral Regional Counsel Natalia C. Reyna-Pimiento, Julissa R. Fontán and Heather Forgét, via the Florida Courts E-Filing Portal, this 18<sup>th</sup> day of August, 2021.

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**CERTIFICATE OF FONT COMPLIANCE**

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Bookman Old Style, in compliance with Rule 9.100, Florida Rules of Appellate Procedure.

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