

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 21-754

ETHERIA VERDELL JACKSON

Appellant

v.

STATE OF FLORIDA,

Appellee.

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

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Mr. Jackson was tried by a jury and found guilty of one count of first-degree murder for the death of Linton Moody on June 20, 1986. Mr. Jackson was not charged, indicted, or found guilty of any other concurrent felony. Applying the Florida sentencing scheme in existence in 1986,¹ the jury recommended that Mr. Jackson be sentenced to death by a bare majority vote of seven to five. The jury made no specific findings as to the existence of any aggravating or mitigating circumstances in the case. TR. IV:704; R. 27.²

The trial court sentenced Mr. Jackson to death on August 8, 1986, finding five aggravating circumstances³ and no mitigating factors. TR. IV:733. The Florida Supreme Court affirmed Mr. Jackson's conviction and sentence on direct appeal. *Jackson v. State*, 530 So. 2d 2 69 (Fla. 1988).⁴

¹ See Fla. Stat. § 775.082(1) (1986) and Fla. Stat. § 921.141 (1986).

² Citations to the trial record are designated as "TR." and followed by the appropriate volume and page numbers (TR. volume:page). Citations to the specific record on appeal are designated a "R." and followed only by a page number (R. page).

³ The aggravating circumstances found by the trial court were: (1) Mr. Jackson was on parole; (2) he was previously convicted of a felony involving violence; (3) the crime was committed for financial gain; (4) the crime was wicked, evil, atrocious; and (5) the crime was committed in a cold calculated and premeditated manner.

⁴ The Court found, however, that the trial court erred in improperly considering the cold, calculated, and premeditated aggravating factor in the

Mr. Jackson then filed a petition for certiorari before the United States Supreme Court, which was denied on January 23, 1989. *Jackson v. Florida*, 109 S. Ct. 882 (1989).

On April 16, 1990, Mr. Jackson filed his first petition for habeas corpus in the Florida Supreme Court. About five months later,⁵ Mr. Jackson filed a motion for post-conviction relief under Rule 3.850 of the Florida Rules of Criminal Procedure. Without requiring a response by the State and without holding an evidentiary hearing, the trial court summarily denied Mr. Jackson's 3.850 motion on March 25, 1991. Mr. Jackson appealed.

Mr. Jackson also filed a second petition for habeas corpus relief, which was denied by the Court on January 4, 1993. *Jackson v. Singletary*, 613 So. 2d 5 (Fla. 1993). On September 9, 1993, the Florida Supreme Court affirmed the denial of post-conviction relief and denied Mr. Jackson's pending first State habeas petition. *Jackson v. Dugger*, 633 So. 2d 1051 (Fla. 1993). Mr. Jackson requested a rehearing, which was denied.

On May 18, 1994, Mr. Jackson filed a petition for federal habeas relief, which he moved to amend twice. During the pendency of Mr. Jackson's federal habeas petition, *Apprendi v. New Jersey*, 530 U.S. 466 (2000) was

case, but found the trial court's error harmless. *Jackson v. State*, 530 So. 2d 269 (Fla. 1988).

⁵ On September 5, 1990.

decided, and Mr. Jackson immediately brought the case to the attention of the federal court in a supplemental brief.⁶ See *Jackson v. Moore*, Case No. 3:94-cv-00492-HES-PDB, Dkt. 41 (Jan. 31, 2001). The district court denied Mr. Jackson habeas petition on December 15, 2003. The denial of Mr. Jackson's federal habeas petition was later upheld by the Eleventh Circuit Court of Appeals. *Jackson v. Crosby*, 375 F.3d 1291 (11th Cir. 2004).

On July 8, 2003, also during the pendency of Mr. Jackson's federal habeas petition, Mr. Jackson filed a successive motion for post-conviction relief, alleging that his conviction and sentence was unconstitutional pursuant to *Ring v. Arizona*, 536 U.S. 584 (2002). The trial court denied the motion on June 23, 2005. Mr. Jackson filed an appeal before the Florida Supreme Court, which the Court summarily denied on November 14, 2006. *Jackson v. State*, 952 So. 2d 1190 (Fla. 2006).

On January 10, 2017, Mr. Jackson, filed a successive 3.851 motion⁷ based on the change in Florida law following *Hurst v. Florida*, 577 U.S. 92 (2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).⁸ The successive motion was summarily denied. Mr. Jackson appealed the denial of his

⁶ This was the first opportunity to do so.

⁷ Rule 3.851 of the Florida Rules of Criminal Procedure was adopted in 1993.

⁸ Previously, Mr. Jackson filed a successive 3.851 motion regarding lethal injection and a 3.853 motion for DNA testing, both of which were denied.

successive motion for post-conviction relief. The Florida Supreme Court denied the appeal on January 24, 2018. *Jackson v. State*, 237 So. 3d 905 (Fla. 2018). The opinion denying Mr. Jackson’s relief was among the first of eighty (80) virtually identical opinions that were released by the Florida Supreme Court in the span of a few weeks. Because there was no individual analysis conducted in Mr. Jackson’s case, Mr. Jackson filed a request for rehearing and a petition for certiorari with the United States Supreme Court. Both were denied without substantive analysis. *Jackson v. State*, SC17-703, 2018 WL 1081357, at *1 (Fla. Feb. 27, 2018); *Jackson v. Florida*, 139 S. Ct. 193 (2018).

In light of the Florida Supreme Court’s decisions in *State v. Poole*, 297 So. 3d 487 (Fla. 2020), Mr. Jackson filed his current Successive Motion to Vacate his Sentence (“Motion”) with the trial court on January 25, 2021.⁹ On March 26, 2021, the trial court issued an order dismissing Mr. Jackson’s Motion finding that it “fail[ed] to meet the time limitation exceptions set forth in subdivisions (d)(2)(A), (d)(2)(B), or (d)(2)(C)” of Rule 3.851(e)(2) of the Florida Rules of Criminal Procedure. R. 78. A motion for rehearing was filed

⁹ On March 3, 2021, the trial court held a case management conference and heard legal arguments on the Motion. During the conference, Defense counsel raised an oral motion for the court to allow Appellant to interview the jurors in his case. The trial court denied the oral motion.

with the trial court on April 12, 2021. The trial court denied it on April 14, 2021. R. 91. This timely appeal followed.

SUMMARY OF ARGUMENTS

Mr. Jackson argues that in light of the interpretation of *Hurst v. Florida* in *State v. Poole*, 297 So. 3d 487 (Fla. 2020), his death sentence is unconstitutional because the jury did not make the necessary findings, unanimously and beyond a reasonable doubt, to determine that Mr. Jackson was eligible for the death penalty as required under the Sixth Amendment to the United States Constitution. Further, Mr. Jackson argues that because he was not eligible for the death penalty his sentence exceeds the statutory maximum for a first-degree murder. Consequently, Mr. Jackson's sentence is illegal and arbitrary and a violation of the Eighth and Fourteenth amendments of the United States Constitution and corresponding state provisions.

As a threshold issue, however, Mr. Jackson argues that *Poole* is applicable to his case based on the fundamental fairness doctrine—a doctrine recognized by the Florida Supreme Court in other cases—because he properly and timely raised and preserved his challenges to the constitutionality of Florida's capital statutory scheme, which as discussed in *Hurst v. Florida* and clarified in *Poole*, fell short of the Sixth Amendment

requirement that the jury, not the judge, find all elements necessary to make a defendant death-eligible.

STANDARD OF REVIEW

The claims presented in this appeal are legal in nature. Pure questions of law are subject to de novo review. *Hurst v. State*, 18 So. 3d 975, 997 (Fla. 2009).

ARGUMENTS

- I. **The Sixth Amendment right that the jury, not the judge, find all elements necessary to make a defendant death-eligible, as stated in *Poole*, is retroactively applicable to Mr. Jackson's case under the fundamental fairness doctrine and under federal law.**

At the core of Mr. Jackson's Motion, now under appeal, is the argument that if *Poole* were to be applied to his case, Mr. Jackson's death sentence would be found unconstitutional under the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and corresponding state provisions. The trial court dismissed Mr. Jackson's motion without deciding the merits of its constitutional challenges, on the basis that Mr. Jackson's motion failed to meet any of the exceptions to the one-year deadline to file a Rule 3.851 motion after a sentence becomes final. Particularly, the circuit court found that the exception established in Rule 3.851(d)(2)(B) of the

Florida Rules of Criminal Procedure¹⁰ was not applicable to Mr. Jackson's case because "[*Poole*] has not been held by an appellate court to have retroactive application." R. 78.

Mr. Jackson does not dispute that "an appellate court" has not found *Poole* to apply retroactively. However, Mr. Jackson argues that it is appropriate for the Florida Supreme Court to consider at this point the retroactive application of *State v. Poole* to Mr. Jackson's case under the fundamental fairness doctrine and under federal legal principles.

A. *Poole*'s constitutional legal principles should apply to Mr. Jackson's case under the fundamental fairness doctrine because he preserved his challenges to the limited role of the jury in his case throughout the entire proceedings.

The Sixth Amendment requirement that the jury, not the judge, must find all aggravators necessary to make a defendant death-eligible, as stated in *Poole*, is applicable to Mr. Jackson's case under the fundamental fairness doctrine. To better understand Mr. Jackson's argument, this brief will first describe the legal landscape surrounding Mr. Jackson's case at the time he

¹⁰ The rule states: "No motion shall be filed or considered pursuant to this rule if filed beyond the time limitation provided in subdivision (d)(1) [1 year after the judgment and sentence become final] unless it alleges that . . . the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively." Fla. R. Crim. P. 3.851(d)(2)(B).

was convicted and sentenced to death, will address the development of the fundamental fairness doctrine in Florida, and then will describe the steps taken by Mr. Jackson's to abide himself of this doctrine.

1. Legal background applicable to Mr. Jackson's claims

Mr. Jackson was sentenced to death under Florida's sentencing scheme utilized in 1986. Fla. Stat. § 775.082(1) (1986) and Fla. Stat. § 921.141 (1986). This scheme was adopted in Florida in response to the Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972). See *Poole*, 297 So. 3d at 495. Post-*Furman*, it was clearly understood that the maximum sentence a capital felon could receive based on a conviction alone was life imprisonment. Fla. Stat. § 775.082(1). It was also understood that in order to impose a death sentence, additional sentencing proceedings were required. Specifically, the sentencing judge was required to conduct an evidentiary hearing before a jury and the jury was required to render an "advisory sentence" of death. Fla. Stat. § 921.141(1) and (2). Florida did not require, however, a unanimous jury recommendation, nor a unanimous finding by the jury that any aggravating circumstance was proved, and it did not require a special verdict reflecting the jury's vote on the aggravating circumstances. See *State v. Steele*, 921 So. 2d 538, 550 (Fla. 2005).

After the jury rendered its advisory sentence, the judge was then required to weigh the aggravating and mitigating circumstances of the case and “[n]otwithstanding the recommendation of a majority of the jury,” decide whether life imprisonment or death was the appropriate sentence. Fla. Stat. § 921.141(3). If death was imposed, the judge was further required to enter a sentencing order setting forth the findings upon which he based his decision. Fla. Stat. § 921.141(3). At this stage, the jury had no real role as the sentencing order needed only to “reflect the trial judge’s independent judgment about the existence of aggravating factors and mitigating factors.” *Blackwelder v. State*, 851 So. 2d 650, 653 (Fla. 2003).

In 2002, the Supreme Court of the United States decided *Ring*, finding unconstitutional an Arizona capital sentencing scheme that like Florida’s permitted a judge, rather than the jury, to find the facts necessary to sentence a defendant to death. *Ring*, 536 U.S. at 609 (“[b]ecause Arizona’s enumerated aggravating factors operate as the functional equivalent of an element of a greater offense . . . the Sixth Amendment requires that they be found by a jury.”) (Citations and quotations omitted). The Court based its holding on *Apprendi v. New Jersey*, an earlier decision holding that “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.” 530 U.S. at 490.

In 2016, the Supreme Court of the United States considered the constitutionality of the Florida death penalty statutory framework in light of *Ring* in *Hurst v. Florida*. The Court concluded that the Sixth Amendment right to a jury trial “requires a jury, not a judge, to find each fact necessary to impose a sentence of death” and that a “jury’s mere recommendation [of death was] not enough[.]” *Hurst*, 577 U.S. at 94. Consequently, this Court struck down Florida’s capital-sentencing procedures as contrary to those requirements. *See id.* at 102–03.

The Florida Supreme Court then interpreted the holding of the Supreme Court’s decision in *Hurst v. Florida* in *Hurst v. State*. In *Hurst v. State*, the Court concluded that a defendant was eligible for a death sentence only when a jury independently and unanimously found beyond a reasonable doubt: (1) the existence of aggravating circumstances; (2) that those aggravating circumstances together were “sufficient” to justify the imposition of the death penalty; and (3) those aggravating circumstances together outweigh the mitigation in the case. 202 So. 3d at 53–59. The Court’s holding, however, was short-lived.

On January 23, 2020, the Florida Supreme Court issued *Poole*. In *Poole*, the State urged this Court to recede from *Hurst v. State* “to the extent its holding requires anything more than the jury to find an aggravating circumstance.” *Poole*, 297 So. 3d at 501. Agreeing with the State, the Court noted that contrary to the holding in *Hurst v. State*, only the existence of an aggravating circumstance qualifies as an element of the offense capable of increasing the penalty for first degree murder from life in prison to death. See *Poole*, 297 So. 3d at 505. Consequently, going forward, a jury unanimously finding a single statutory aggravator beyond a reasonable doubt was sufficient to make a defendant death-eligible under the Court’s “longstanding precedent interpreting *Ring v. Arizona*” *Id.* at 508.¹¹

Against this background, Mr. Jackson argues that without a clear unanimous finding by the jury, during his guilt or sentencing phase, of the

¹¹ The Court further noted that *Hurst v Florida* overruled *Spaziano v. Florida*, 468 U.S. 447 (1984) 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 the imposition of the death penalty.” *Poole*, 297 So. 3d at 498–500. *Spaziano* stood for the proposition that the Sixth Amendment never has been thought to guarantee a right to a jury determination as to the appropriate punishment to be imposed on an individual. 468 U.S. at 459. *Hildwin* stood for the proposition that “the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.” 490 U.S. at 640–41.

elements that made him eligible for the death penalty, he is entitled to a resentencing.

2. The fundamental fairness doctrine in Florida

The fundamental fairness doctrine was first recognized by the Florida Supreme Court in *James v. State*, 615 So. 2d 668 (Fla. 1993). In *James*, the defendant argued, at different stages of his case, that the standard jury instruction on the heinous, atrocious, and cruel (“HAC”) aggravator given to his jury was unconstitutionally vague. See *id.* at 669. The Florida Supreme Court rejected his argument. Years later, in *Espinosa v. Florida*, 505 U.S. 1079 (1992), the United States Supreme Court held Florida’s HAC jury instructions unconstitutional. Based on *Espinosa*, the court in *James* found that since Mr. James objected to the then-standard instruction at trial, asked for an expanded jury instruction, and argued on appeal against the constitutionality of the instruction his jury received, it would be unfair to deprive him of the *Espinosa* ruling. *James*, 615 So. 2d at 669. The Court then granted Mr. James a resentencing. *Id.*

In essence, this Court held in *James* that a criminal defendant who has raised a constitutional claim, which is rejected at a specific point in time, but it is later found legally sound, can abide himself of its preserved claim to obtain relief. See *id.* at 669.

James is not the only case in which the Florida Supreme Court has recognized the existence and possible application of the fundamental fairness doctrine within the context of the retroactive application of new criminal rules to criminal defendant.

In *Mosley v. State*, 209 So.3d 1248 (Fla. 2016), a case in which the Florida Supreme Court discussed the retroactive application of *Hurst v. State* to death sentences that were final after *Ring* issued, this Court recognized that after the United States Supreme Court decides a case that changes this Court's jurisprudence, certain decisions involving the death penalty may be applied retroactively based on the "fundamental fairness doctrine." *Id.* at 1274-75.

In *Mosley*, the Court concluded that fundamental fairness required the retroactive application of *Hurst v. State* to Mr. Mosley. *Id.* at 1275. The Court reasoned that it would be fundamentally unfair to prohibit Mr. Mosley from seeking post-conviction relief under *Hurst* because—he had accurately anticipated the fatal defects in Florida's capital sentencing scheme even before they were recognized in the *Hurst* decisions; he had raised his *Ring* claim at the first opportunity available; and his claims had been rejected at every turn. *Id.* In other words, the Court reasoned that, because Mr. Mosley had raised the exact claim that was validated by the

United States Supreme Court under *Hurst*, it would not be fair to deprive him of the *Hurst*'s ruling. *See id.*

The Court further stated that the issue presented in *Hurst* was more important than the issue resolved in *James* because under *Hurst v. Florida*, the fundamental right to trial by jury under both the United States and Florida Constitutions was implicated, and Florida's death penalty sentencing procedure has been held unconstitutional, thereby making “the machinery of post-conviction relief . . . necessary to avoid individual instances of obvious injustice.” *Id.* at 925. The *Mosley* Court then emphasized that ensuring fundamental fairness in assessing retroactivity outweighed any State’s interest in finality of death sentences. *See id.* (“In this instance . . . the interests of finality must yield to fundamental fairness.”). Based in *James* and *Mosley*, therefore, a new constitutional doctrine may and should be applied retroactively if a defendant properly preserved the issue. *See also Hitchcock v. State*, 226 So. 3d 216, 218 (Fla. 2017) (Lewis, J., dissenting) (stating that in deciding the retroactive application of *Hurst v. State* the Court “need not tumble down the dizzying rabbit hole” of whether “a new constitutional doctrine should be ‘retroactively’ or ‘prospectively apply,’” when a defendant properly “presented and preserved the substance of the issue.”).

3. Preservation of Mr. Jackson's claims

Mr. Jackson argues that like *James* and *Mosley*, where the preservation of their claims was essential to obtain relief later in time, he can obtain relief under *Poole* because he raised and preserved a constitutional challenge to the Florida's sentencing statute on the same bases that *Poole* and its predecessors, *Apprendi*, *Ring*, and *Hurst*, were later decided.¹² Specifically, during his trial, postconviction proceedings, and later his federal habeas petition, Mr. Jackson raised challenges to the ability of the judge, rather than the jury, to find the aggravators that made him death eligible, practice that was later found contrary to the Sixth

¹² In reaching its decision to dismiss Mr. Jackson's Motion, the circuit court cited to the previous ruling denying Mr. Jackson's successive motion under *Hurst*. R. 77. In support of the denial of Mr. Jackson's *Hurst* motion, the trial court cited, among other cases, *Gaskin v. State*, 218 So. 3d 399 (Fla. 2017). According to the circuit court, in *Gaskin*, "the Florida Supreme Court made clear that the fundamental fairness retroactivity analysis only applies to post-*Ring* cases." R. 84. *Gaskin*, however, does not stand for that proposition. In fact, the decision does not address the fundamental fairness doctrine at any point. It simply concluded that *Hurst* is not retroactive to pre-*Ring* cases based on *Asay v. State*, 210 So.3d 1 (Fla. 2016). See *Gaskin*, 218 So. 3d at 401. Although in *Asay* the Florida Supreme Court did not use the fundamental fairness doctrine in analyzing the retroactivity of *Hurst*, contrary to what this Court did in *Mosley*, such omission cannot be construed as a categorical rule stating that the fundamental fairness doctrine does not apply to pre-*Ring* cases. Mr. Jackson submits that this Court is not precluded from applying the fundamental fairness doctrine to his case.

Amendment right to a jury trial in *Hurts* and *Poole*. See *Hitchcock*, 226 So. 3d at 218 (Lewis, J., concurring) (stating that “[p]reservation of the issue is perhaps the most basic tenet of appellate review . . . and [the Florida Supreme Court] should be particularly cognizant of preservation issues for capital defendants.”) (Internal citations omitted).

For example, during pretrial, Mr. Jackson challenged the statute because “the jury [was] not required to list specific aggravating circumstances [it had] found beyond a reasonable doubt” and “[t]his permit[ed] the trial judge when imposing the sentence to consider and find aggravating circumstances that the jury did not.” TR I:64-65; R. 50-51. He also argued, among other things, that the sentencing statute was unconstitutional because “the jury recommendation need not be unanimous thereby depriving the defendant of the right to due process and to a unanimous verdict in violation of Article I, sections 9, 16, and 22 of the Florida Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.” TR. I:63; R. 49. At the time this pre-trial motion was filed, *Apprendi* and *Ring* had not yet been decided.

Mr. Jackson also took care to bring *Apprendi* and *Ring* to the attention of the federal court dealing with his federal habeas petition and to file a successive post-conviction motion arguing the unconstitutionality of his

death sentence under *Ring*, at the first possible opportunity. Specifically, Mr. Jackson argued that “the principles of *Ring* and *Apprendi* require a re-evaluation of the rationale for allowing an indictment alleging only first-degree premeditated murder to be sufficient to allow a general verdict for premeditated or felony murder”, and urged the Court that “settled law rejecting retroactive application of *Ring* to capital sentencing be re-examined and corrected to offer relief to all capital defendants sentenced under Florida’s capital sentencing scheme.” *Etheria Jackson, Appellant, v. State of Florida, Appellee.*, 2005 WL 3670664 at *6 (Dec. 28, 2005). Mr. Jackson’s Motion, however, was summarily denied without a hearing.

The procedural history of this case shows that Mr. Jackson properly preserved the substance of his Sixth Amendment constitutional challenge to the role of the jury during the trial and post-trial processes. *Ring*, *Hurst*, and *Poole* later recognized the principles of law underlying Mr. Jackson’s reiterated claims. Mr. Jackson was denied relief at that time, and he has been denied relief ever since. Because as in *James* and *Mosley*, Mr. Jackson properly raised his claim and the issue at stake is of fundamental importance to the determination of life and death, Mr. Jackson submits that it would be unfair to prevent him from benefiting from the holding of the Court in *Poole*.

4. The application of the fundamental fairness doctrine to Mr. Jackson's case does not contradict the administration of justice goals.

Finally, although the application of the fundamental fairness doctrine as a retroactive principle has been criticized by this Court on the basis that *James* cannot be reconciled with the balancing process between fairness and finality required by *Witt v. State*, 387 So.2d 922 (Fla. 1980), see *Mosley*, 209 So. 3d at 1291 (Cannady, J., dissenting), Mr. Jackson submits that the application of *Poole* based on the fundamental fairness doctrine to his case, in fact, balances such goals.

Notably, the retroactive application of constitutional rights to all death penalty defendants is the only way to recognize decades worth of death penalty jurisprudence stating that death, as a punishment, is “unique in its severity and irrevocability.” See *Gregg v. Georgia*, 428 U.S. 153, 187–88 (1976). Further, the retroactive application of *Poole* would have minimal effects on the administration of justice. Specifically, the retroactive application of *Poole* would only benefit those inmates who have not already received *Hurst* relief and who had preserved a constitutional challenge to the role of the jury during the eligibility process in a timely manner. This is necessarily a very small group of defendants, who can be identified by reviewing the record in their cases. The balance of the justice system's

goals—understood as the balance between the justice system’s goals of fairness and finality—therefore, favors the application of *Poole* to Mr. Jackson’s case.¹³

B. *Poole*’s constitutional legal principles should apply to Mr. Jackson’s under federal law principles.

This Court has previously analyzed the retroactive application of certain state rules of criminal procedure using federal retroactive principles

¹³ Mr. Jackson submits that even under state retroactive principles, *Poole* should be applicable to his case. According to *Witt*, for a change of law to be applied retroactively, it must: (1) originate in the Florida Supreme Court or the United States Supreme Court; (2) be constitutional in nature; and (3) represent a development of fundamental significance. *Id.* at 931. In *Asay v. State*, 210 So. 3d 1 (Fla. 2016), this Court found that *Hurst v. State*—and consequently *Poole* since it steps in *Hurst v. State* shoes—satisfy the first two requirements but not the last. See *Asay*, 210 So. at 17. The last prong “requires courts to analyze three factors: (a) the purpose to be served by the rule, (b) the extent of reliance on the prior rule, and (c) the effect that retroactive application of the new rule would have on the administration of justice.” *Id.* at 16–17. The *Asay* court concluded that the last two factors weighed heavily against the retroactive application of *Hurst*, with “reliance on the prior rule” being the “most important factor” in reaching this conclusion. See *id.* at 18, 20, 22. However, considering that in less than a year, this Court receded from decisions that for decades served as a basis for its opinions, as well as from younger decisions of equal importance, see e.g., *Bush v. State*, 295 So. 3d 179 (Fla. 2020); *Lawrence v. State*, 308 So. 3d 544 (Fla. 2020); *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020); *Poole*, 297 So. 3d at 513, reliance on a prior rule, cannot longer be the most important factor in deciding whether to apply a rule retroactively, at least within the death penalty context. Mr. Jackson submits that the most important factor in determining whether to apply *Poole* retroactively to his case, therefore, is its effects on the administration of justice. As stated above, this factor favors the application of *Poole* to Mr. Jackson’s case. Consequently, *Poole* could also be applied to Mr. Jackson’s case under state law principles.

despite the existence of state retroactivity principles. See *Phillips*, 299 So. 3d at 1022 (*sua sponte* addressing the retroactive application of *Hall v. State*, 109 So. 3d 704, 708 (2012) under *Teague v. Lane*, 489 U.S. 288 (1989)). Further, in cases where it is argued that a constitutional rule is substantive rather than procedural, the Supremacy Clause of the United States Constitution requires state post-conviction courts to apply such rules retroactively even where a state supreme court has a separate retroactivity doctrine. See *Montgomery v. Louisiana*, 136 S. Ct. 718, 73-32 (2016) (“Where state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge.”).

Here, Mr. Jackson submits that federal law principles require this Court to apply *Poole’s* interpretation of *Hurst v. Florida* to his case because the right to a unanimous jury determination, beyond a reasonable doubt, that a defendant is eligible for death is a substantive constitutional rule.

The United States Supreme Court in *Teague* recognized two categories of rules that are not subject to the general bar against retroactivity. 489 U.S. at 311-12. First, “a new rule should be applied retroactively if it places “certain kinds of primary, private individual conduct beyond the power

of the criminal law-making authority to proscribe.” *Id.* at 311. Second, “a new rule should be applied retroactively if it requires the observance of “those procedures that . . . are ‘implicit in the concept of ordered liberty[.]’” *Id.* (internal citations omitted). The first category can be better described as substantive rules of constitutional law. See *Montgomery*, 136 S. Ct. at 728 (internal citations omitted). Substantive rules are those (1) forbidding criminal punishment of certain primary conduct, and (2) rules prohibiting a certain category of punishment for a class of defendants because their status or offense. *Id.*

Poole should be applied retroactively to Mr. Jackson’s case because it “prohibits the imposition of capital punishment on a particular class of persons.” *E.g.*, *Saffle v. Parks*, 494 U.S. 484, 494–95 (1990). The analysis related to the retroactive application of *Poole* to Mr. Jackson’s case is not different from the retroactivity analysis use in *Montgomery* to apply the holding in *Miller v. Alabama*, 567 U.S. 460 (2012) to Mr. Montgomery. In *Montgomery*, a Louisiana defendant brought a state post-conviction proceeding seeking retroactive application of *Miller* to his case. *Miller* held that the imposition of mandatory sentences of life without parole on juveniles violates the Eighth Amendment. *Miller*, however, did not foreclose a sentencer’s ability to impose life without parole on all juveniles, but required

a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence. *Montgomery*, 136 S. Ct. at 734. The Louisiana Supreme Court denied *Miller* relief on state retroactivity grounds. *Id.* at 727. Mr. Montgomery then filed a petition for a writ of certiorari arguing that *Miller* stated a substantive rule of criminal procedure, which should be applicable to his case under *Teague*. Louisiana, on the other hand, argued, among other things, that *Miller* was procedural because *Miller* did not categorically bar a penalty for a class of offenders or type of crime. Rather, "it mandated only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Id.* at 734 (citing *Miller*, 567 U.S. at 483).

Despite Louisiana's arguments, the United States Supreme Court reversed the lower court decision, holding that *Miller* announced a substantive constitutional rule, and the state court was obligated to apply it retroactively. *Id.* at 732-34. In reaching its decisions, the Supreme Court noted that the holding in *Miller* was no less substantive than the holdings in *Roper* and *Graham* prohibiting the imposition of a death sentence to minors because after *Miller*, only juvenile "whose crimes reflect irreparable corruption" could receive a life without parole sentence. *Id.* at 734.

The Court further acknowledges that by requiring a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence, *Miller's* holding had a procedural component. *Id.* at 734-35 (citations omitted). The Court explained that “there are instances in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within the category of persons whom the law may no longer punish.” *Id.* at 735 (citations omitted). However, the existence of that procedural requirement does not transform the substantive rules into a procedural one. *Id.* The existence of a procedural requirement in *Miller*, therefore, did not prevent its holding for constituting a substantive rule that should be applied retroactively under *Teague*.

Like in *Miller*, *Poole* announced a substantive rule accompanied by a procedural component. In clarifying that a defendant who is convicted of a first-degree murder is only eligible for the death penalty if an aggravator is found unanimously and beyond a reasonable doubt by the jury, *Poole* not merely addresses a procedural requirement, but also clarified who is eligible for the death penalty in Florida. In other words, *Poole* prohibits the application of a certain category of punishment—the death penalty—to a class of defendants because of the nature of their offense—defendants

convicted of first-degree murder without aggravators. *Poole*, therefore, should be applied retroactively because the absence of a jury determination as to the existence of an aggravator, “necessar[ily] carr[ies] a significant risk that a defendant faces a punishment that the law cannot impose upon him.” *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004) (quoting *Bousley v. United States*, 523 U.S. 614, 620 (1998)). As a result, *Poole* announced a substantive rule of constitutional law.¹⁴

II. Mr. Jackson’s death sentence is unconstitutional under the Sixth Amendment of the United States Constitution because he

¹⁴ The logic supporting *Poole*’s retroactivity is not undermined by *Summerlin*. In *Summerlin*, the United States Supreme Court held that *Ring*’s holding that the Sixth Amendment requires that aggravating circumstances be found by a jury, rather than a judge, announced a procedural rule, rather than a substantial one because it has nothing to do with the range of conduct a State may criminalize. 542 U.S. at 353–55. Rather, “*Ring* altered the range of permissible methods for determining whether a defendant’s conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment.” *Id.* However, as discussed above, *Poole* does not only address the procedural way in which a defendant is found eligible for death. Moreover, *Poole*, unlike *Ring*, addressed the standard by which the jury must make the eligibility decision—proof-beyond-a-reasonable-doubt, and the Supreme Court has always regarded such decisions as substantive. See, e.g., *Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972) (explaining that “the major purpose of the constitutional standard of proof beyond a reasonable doubt announced in [*In re Winship*, 397 U.S. 358 (1970)] was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function, and *Winship* is thus to be given complete retroactive effect.”); see also *Guardado v. Jones*, Case No. 4:15-CV-256-RH, 2016 WL 3039840, at *2 (N.D. Fla. May 27, 2016) (stating that *Summerlin* different from *Hurst* did not address the requirement for proof beyond a reasonable doubt).

did not have a jury trial on the facts that made him eligible for a death sentence.

Mr. Jackson was never eligible for a death sentence under *Poole's* standards. *Poole* curtailed some constitutional rights previously recognized under *Hurst v. State* to criminal defendants. However, by curtailing certain rights to which criminal defendants were entitled, it reaffirmed the need for an explicit jury finding as to the existence of at least one aggravator unanimously and beyond a reasonable doubt before making a defendant eligible for the death penalty.

To date, Mr. Jackson 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. Mr. Jackson was tried by a jury and found guilty of one count of first-degree murder. The jury recommended a sentence of death by a vote of seven to five, a bare majority. TR. IV:704; R. 27. Mr. Jackson's jury verdict did not identify what aggravating circumstances, if any, were found by the jury in his case.¹⁵ *Id.* Rather, the trial court alone made the findings as to the aggravating and mitigating circumstances applicable to

¹⁵ Mr. Jackson filed a proposed penalty phase verdict form, which required the jury to indicate the specific aggravating circumstances found by a majority and beyond a reasonable doubt. TR IV:663-64. The trial court denied Mr. Jackson's request.

his case. In other words, the trial court alone determined Mr. Jackson's eligibility for the death penalty in contravention to the requirements of the Sixth Amendment as announced in *Hurst v. Florida* and *Poole*. Because a defendant convicted of first-degree murder cannot qualify for a death sentence unless at least one statutory aggravating factor is found by a unanimous jury, Mr. Jackson's death sentence is unconstitutional under the Sixth Amendment.

A. No contemporaneous felony aggravators were found at the guilt-phase.

In *Poole*, the Court upheld Mr. Poole's conviction because the jury had unanimously found that, during the murder, Mr. Poole committed various felonies against his victim, including the crimes of attempted first-degree murder, sexual battery, armed burglary, and armed robbery. *Poole*, 297 So. 3d at 508. The Court concluded that under the correct understanding of *Hurst v. Florida*, Mr. Poole's *contemporaneous convictions* satisfied the requirement that a jury unanimously finds at least one statutory aggravating circumstance beyond a reasonable doubt. *See id.*

Contrary to Mr. Poole's case, no contemporaneous conviction that could serve as a felony aggravator exists in Mr. Jackson's case. Although Mr. Jackson's jury was *incorrectly* instructed on both premeditated and felony murder theories during the guilt phase of his trial, see TR. 1:8, and led

to believe by the State that Mr. Jackson could have been guilty of first-degree murder under the felony-murder theory based on robbery, see TR. XVII: 1107-08; R. 38-39, Mr. Jackson was never indicted or convicted for robbery or any underlying felony. See R. 29, 41.

Notably, the state only charged premeditated murder pursuant to section 782.04(1)(a)(1), the premeditated murder statute. The felony murder statute, 782.04(1)(a)(2), was not expressly named in the indictment, and the indictment provided no facts to support that the death occurred during the commission or the attempted commission of a robbery. R. 41.

In post-conviction, Mr. Jackson challenged the propriety of his indictment because the elements of felony murder were never part of it. Additionally, Mr. Jackson argued that the trial court erred when it failed to provide a specific verdict distinguishing premeditated and felony murder and stating whether a conviction was found unanimously. See *Etheria Jackson*, 2005 WL 3670664 at *8-26. Mr. Jackson's claims were summarily denied. Although this Court has "rejected the argument that aggravating circumstances must be alleged in the indictment," *Lott v. State*, 303 So. 3d 165, 166 (Fla. 2020) (citing cases), and that a special verdict reflecting the jury's vote on the theory of the crime is necessary to uphold a conviction, see *Parker v. State*, 641 So. 2d 369, 375 (Fla. 1994). Mr. Jackson submits that

without such procedures a guilty verdict which addresses only a general conviction for first-degree can never provide the basis to make a defendant death-eligible, since it would be unclear whether the jury found unanimously and beyond a reasonable doubt the existence of an aggravator.

Further, even if the State was not required to include the elements of the felony murder in the indictment, or to list an aggravator, it is important to notice that Mr. Jackson was not prosecuted for a crime other than murder.¹⁶ Furthermore, Mr. Jackson requested a verdict form permitting the jury to specify whether it elected between premeditated or felony murder as the theory underlying Mr. Jackson's first-degree murder conviction. TR. IV:645; R. 34. The court rejected the form and used one which only permitted a verdict of first-degree murder or the lesser offense, thereby depriving the jury of the opportunity to specify upon which theory of first-degree murder it based its verdict. TR. IV:646; R. 36.

Thus, based on the indictment, prosecution, and verdict in this case, we must conclude that the jury could have only found Mr. Jackson guilty of first-degree murder based on a premeditated murder theory. By itself, a

¹⁶ During closing arguments at the guilt phase, the State argued that if the jury were to find that the victim died in the course of a robbery, that Mr. Jackson would be guilty of first-degree murder under the felony-murder theory. TR. XVII: 1107-08. Such argument was inappropriate as the State decided not to prosecute Mr. Jackson on robbery charges.

premeditated murder does not provide an aggravator capable of enhancing the penalty for first degree murder from life in prison to death. See Fla. Stat. § 921.141 (creating the separate and unique crime of aggravated homicide). Consequently, during the guilt phase of Mr. Jackson’s trial, the Jury found no *contemporaneous conviction* that could have served as a felony aggravator that made Mr. Jackson eligible for the death penalty.

B. The aggravating factors found during the sentencing phase by the judge do not impede the application of *Poole* to Mr. Jackson’s case.

The finding of aggravating circumstances by the judge during the sentencing phase, including a prior violent felony, does not prevent the application of the principles of law established in *Ring*, *Hurst v. Florida*, and *Poole* to Mr. Jackson’s case. Based on *Almendarez-Torres v. United States*, 523 U.S. 224, 230 (1998),¹⁷ the Supreme Court in *Apprendi* recognized a

¹⁷ In *Almendarez-Torres*, the United States Supreme Court dealt with the issue of whether prior convictions not charged in an indictment could be used as penalty enhancers. The Court concluded that under principles of recidivism, the prior convictions were sentencing factors capable of enhancing the penalty. As recognized in *Apprendi*, however, *Almendarez-Torres* did not “involve a question concerning the right to a jury trial or the standard of proof that would apply to a contested issue of fact.” See *Apprendi*, 530 U.S. at 488. As a result, the *Almendarez-Torres* “prior conviction” exception is not controlling in cases involving Sixth Amendment constitutional challenges to the role of the jury in finding beyond a reasonable doubt “any fact that increases the penalty for a crime beyond the prescribed statutory maximum.” See *Apprendi*, 530 U.S. at 489-90.

narrow “prior conviction” exception to the rule that “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 489-90. The *Apprendi* exception has been used to deny *Ring* relief in some cases. See *Duest v. State*, 855 So. 2d 33, 49 (Fla. 2003). Following the issuing of *Almendarez-Torres*, however, justices from the Supreme Court have criticized their own decision and have stated unequivocally that the prior conviction exception has been eroded and should not be applicable in the context of a Sixth Amendment right to a jury trial. See *Shepard v. United States*, 544 U.S. 13, 27-28 (2005) (Thomas, J., concurring in part and concurring in the judgment) (stating “*Almendarez-Torres* . . . has been eroded by this Court’s subsequent Sixth Amendment Jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided.”).

Even if the *Almendarez-Torres* exception were applicable within the context of the Sixth Amendment, the exception falls short of the requirements set forth in Section 921.141(6)(b) of the Florida Statutes. In order to establish the prior conviction aggravator, the Florida Statute requires that the prior conviction be one “of . . . a felony involving the use or threat of violence to the person.” Fla. Stat. 921.141(6)(b). Since the Florida statute requires

more than “the simple fact of a prior conviction” to establish the existence of an aggravator, *Mathis v. United States*, 136 S. Ct. 2243, 2243 (2016), the *Almendarez-Torres* exception cannot be automatically applied. See *Bevel v. State*, 983 So. 2d 505, 518 (Fla. 2008) (stating that the determination of “whether a crime constitutes a prior violent felony,” depends on the surrounding facts and circumstances of the case).

More importantly, the Florida Supreme Court has rejected, within the context of *Hurst* harmless error analysis, the contention that “prior convictions for other violent felonies insulate [a defendant’s] death sentence from *Ring* and *Hurst v. Florida*.” *Franklin v. State*, 209 So. 3d 1241, 1248 (Fla. 2016); see also *Johnson v. State*, 205 So. 3d 1285, 1289 (Fla. 2016) (“We reject the State’s contention that Johnson’s contemporaneous convictions for other violent felonies insulate Johnson’s death sentences from *Ring* and *Hurst v. Florida*.”). These cases stand for the general proposition that because the existence of an aggravating factor increases the penalty for first-degree murder from life in prison to death, the jury, not the judge, should make such findings. See *Franklin*, 209 So. 3d at 1248; *Johnson*, 205 So. 3d at 1289. Consequently, any finding of an aggravating factor by the judge, even a finding of a prior conviction, is unable to make a defendant death-eligible.

C. The existence of a jury’s advisory sentence of death does not cure the constitutional violations in this case.

In *Hurst v. Florida*, the Court cautioned against using what was an advisory recommendation to conclude that the findings necessary to authorize the imposition of a death sentence had been made by the jury: “[T]he jury’s function under the Florida death penalty statute is advisory only.” *Spaziano v. State*, 433 So. 2d 508, 512 (Fla.1983). The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* and *Poole* require. See *Hurst*, 577 U.S. 92 at 99.

Mr. Jackson’s jury recommended a sentence of death by a bare majority vote of seven to five. The jury, however, made no specific finding as to its reason to recommend such a sentence. Mr. Jackson asked the trial court to provide the jury with a special verdict form that would have permitted the jury to clarify its findings. The trial court denied his request. 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. In other words, there is no way of knowing if Mr. Jackson was properly found to be death-eligible. Consequently, the limited role of the jury during Mr. Jackson’s penalty phase cannot be considered harmless. See *Zack v. State*, 753 So.2d 9, 20 (Fla. 2000) (“Where the error concerns sentencing, the error

is harmless only if there is no reasonable possibility that the error contributed to the sentence.”).

Further, assuming *arguendo* that the jury relied on an aggravator to issue its recommendation, it is impossible to determine if the aggravator was a valid one. See *Gaskin v. State*, 218 So. 3d 399, 404 (Fla. 2017) (Pariente, J., concurring in part and dissenting in part) (stating that the advisory role of the jury was not harmless because, among other things, “the jury may have relied on invalid aggravating factors to reach its mere eight to four recommendation for death” by weighting a vacated sentence of felony murder). Here, there is a serious risk that Mr. Jackson’s jury improperly relied on an erroneous understanding that a concurrent felony of robbery existed in this case. Notably, during closing arguments at the guilt phase, the State argued that if the jury were to find that the victim died in the course of a robbery, that Mr. Jackson would be guilty of first-degree murder under the felony-murder theory. TR XVII: 1107-08; R. 38-39. Such argument was inappropriate as the State decided not to prosecute Mr. Jackson on robbery charges. Considering such unknowns, the jury’s advisory verdict in this case is insufficient to establish beyond a reasonable doubt that Mr. Jackson was eligible for the death penalty and that his sentence was constitutionally valid.

III. Mr. Jackson's death sentence is arbitrary under the Eighth Amendment because it exceeds the permitted maximum statutory sentence.

The imposition of the death sentence to Mr. Jackson without a proper finding that he was eligible for the death penalty is arbitrary under the Eighth Amendment to the United States Constitution and Florida constitution.¹⁸ It is a well-established Eighth Amendment principle that 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.). This principle “insist[s] upon general rules that ensure consistency in determining who receives a death sentence.” *Kennedy v. Louisiana*, 554 U.S. 407, 436 (2008). The states, therefore, do not have unfettered discretion to treat condemned prisoners differently in terms of punishment. See *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (stating that equal protection is denied “[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense and . . . [subjects] one and not the other” to a harsh form of punishment.”).

¹⁸ The Eighth Amendment provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. Cons. amend. VIII. The Fourteenth Amendment applies those restrictions to the states. *Roper v. Simmons*, 543 U.S. 551, 560 (2005).

Poole clarifies that for a criminal defendant to be eligible for the death penalty, the jury must unanimously find at least one aggravating factor. See *Poole*, 297 So. 3d at 508. The purpose of requiring the existence of an aggravator, in addition to other elements of the offense, is to “narrow the class of persons eligible for the death penalty” and to “justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.” *Zant v. Stephens*, 462 U.S. 862, 877 (1983). In Mr. Jackson’s case, no aggravating circumstance was found unanimously by the jury. Without such a finding, Mr. Jackson’s maximum penalty is life in prison. Fla. Stat. § 775.082(1). Consequently, the trial court’s imposition of the death penalty to Mr. Jackson is arbitrary under the Eighth Amendment because it exceeds the permitted maximum statutory sentence.¹⁹

This conclusion is not controverted by the holding in *Poole*, stating that Florida’s capital statutory scheme comports with the Eighth Amendment and

¹⁹ Mr. Jackson’s sentence is also deemed illegal under Rule 3.800 of the Florida Rules of Civil Procedure. For purposes of this Rule, an “illegal sentence” is one that fails to comport with statutory limitations, and the failure is revealed on the face of the record without the need for an evidentiary hearing. An example of a sentence that fails to comport with statutory limitations is one in excess of the statutory maximum. Mr. Jackson was convicted of first-degree murder without a jury finding of aggravating circumstances. Under the Florida capital sentencing scheme, Mr. Jackson was subject to a maximum penalty of life in prison, not to the death penalty. Therefore, his death sentence is illegal. See Fla. R. Crim. P. 3.800(a).

the State constitution in light of *Spaziano v. Florida*, 468 U.S. 447 (1984). See *Poole*, 297 So. 3d 487, 504-05. In *Tuilaepa v. California*, 512 U.S. 967 (1994), the Supreme Court stated that its “capital punishment cases under the Eighth Amendment address two different aspects of the capital decision[—]making process: the eligibility decision and the selection decision.” *Id.* at 971–72. The Court further explained:

To be eligible for the death penalty, the defendant must be convicted of a crime for which the death penalty is a proportionate punishment. To render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one “aggravating circumstance” (or its equivalent) at either the guilt or penalty phase.

We have imposed a separate requirement for the selection decision, where the sentencer determines whether a defendant eligible for the death penalty should in fact receive that sentence. “What is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime.”

Id. at 971–73 (internal citations omitted). *Spaziano* addresses the application of the Eighth Amendment within the specific context of the selection requirement, not the eligibility requirement, as argued here by Mr. Jackson.

In *Spaziano*, the Supreme Court considered whether Florida’s capital sentencing system violated the Sixth or Eighth Amendments by allowing the

trial judge to override a jury's recommendation of life. 468 U.S. at 457. As to the Eighth Amendment, the Court concluded that Florida's capital sentencing statute was constitutional because "there is no constitutional imperative that a jury have the responsibility of deciding whether the death penalty should be imposed." *Id.* (emphasis added). The Court reasoned, "[w]e are not persuaded that placing the responsibility on a trial judge [to impose the death penalty] in a capital case is so fundamentally at odds with contemporary standards of fairness and decency that Florida must be required to alter its scheme and give final authority to the jury to make the life-or-death decision." *Id.* at 465. In other words, the Court concluded that it was constitutional for a judge to make the final decision to impose a death sentence.

The question of whether a judge's final decision to impose the death sentence is constitutional under the Eighth Amendment is, however, different from the question of whether a judge's decision to find a defendant eligible for death is constitutional under the same Amendment. Contrary to the eligibility decision, which requires only an inquiry into whether an aggravating circumstance has been found in the case, the final decision to impose a death sentence necessarily requires the weighing of the aggravating and mitigating circumstances in the case. See Fla. Stat. § 921.141(3) (2010).

The weighting of aggravating and mitigating circumstances is a task that belongs to the selection process. See *Poole*, 297 So. 3d at 502 (“Section 921.141(3) requires two findings. One is an eligibility finding, the other a selection finding. . . . The selection finding is in section 921.141(3)(b): ‘[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.’”). In other words, *Spaziano* addresses the application of the Eighth Amendment within the specific context of the selection process, only. Because Mr. Jackson’s Eighth Amendment claim is concerned with the lack of jury participation during the eligibility process, *Spaziano*’s Eighth Amendment holding is not applicable to his claim.

IV. Mr. Jackson’s death sentence is unconstitutional under the Fourteenth Amendment of the United States Constitution because not all of the critical elements of his offense were submitted to the jury.

The Fourteenth Amendment states in pertinent part: “nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protections of the laws.” U.S. Const. Amend. XIV. Under the due process clause of the Fourteenth Amendment, states are forbidden from convicting “a person of a crime without proving the elements of that crime beyond a reasonable doubt.” *Fiore v. White*, 531 U.S. 225, 228-29 (2001). Before *Ring*, aggravators were considered sentencing factors not required to be found by

the jury beyond reasonable doubt. See *Hildwin v. Florida*, 490 U.S. 638, 639 (1989) (“the existence of an aggravating factor here is not an element of the offense but instead is ‘a sentencing factor that comes into play only after the defendant has been found guilty.’”); Fla. Stat. § 921.141(2) and (3) (1985) (simply establishing that death is authorized if mitigating circumstances do not outweigh aggravating circumstances). After *Ring*, as further developed in *Hurst v. Florida* and *Poole*, aggravating circumstances are considered elements of the crime that must be established by the jury beyond a reasonable doubt. *Poole*, 297 So. 3d at 505. The natural consequence flowing from this change in the law is that where a trial court fails to submit to the jury the critical elements necessary to impose the death penalty, i.e., the existence of an aggravator, a defendant’s due process rights are unequivocally violated. See *Apprendi*, 530 at 476-77 (stating that the Due Process Clause requirement of proof beyond a reasonable doubt, “indisputably entitles a criminal defendant to a jury determination that [he] is guilty of every element of the crime with which he is charged beyond a reasonable doubt.” (Internal citations and quotations omitted)).

As discussed above, the judge in Mr. Jackson’s case made the findings necessary to subject him to the death penalty, including the finding that at least one applicable aggravator existed in his case. The jury had no

input in this process. In light of *Poole*'s holding stating that only the existence of an aggravating circumstance qualifies as an element of the offense capable of increasing the penalty for first-degree murder from life in prison to death, see *Poole*, 297 So. 3d at 505; and the lack of a unanimous jury determination of the existence of a statutory aggravator beyond a reasonable doubt, Mr. Jackson's death sentence is unconstitutional under the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

In light of the interpretation of *Hurst v. Florida* in *Poole*, which should be applicable to Mr. Jackson's case under the fundamental fairness doctrine, Mr. Jackson's death sentence is unconstitutional because it was made without a unanimous jury finding, and beyond a reasonable doubt, of the essential elements that made Mr. Jackson's death-eligible; therefore, in violation of the Sixth and Fourteenth Amendments of the United States Constitution.

Mr. Jackson's death sentence is also in violation of the prohibition against arbitrary punishment under the Eighth Amendment of the United State Constitution, and corresponding Florida constitutional provision, because it exceeds the statutory maximum applicable to a crime of first-degree murder in which no aggravating factor was found by the jury. As a

result, Mr. Jackson death sentence should be vacated, and his case remanded for a new sentencing proceeding.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief has been electronically filed with the Clerk of the Florida Supreme Court, and electronically served upon Assistant Attorney General Janine Robinson (Janine.Robinson@myfloridalegal.com, capapp@myfloridalegal.com), and the Honorable Tatiana Salvador, Circuit Judge (tsalvador@coj.net), on July 20th, 2021.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing was generated in Arial 14-point font and otherwise formatted in compliance with Florida Rules of Appellate Procedure 9.045 and 9.210.

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